

I N D E X

Description Vol#-Page#

PART 1 - PRELIMINARY PROCEDURES

Charge Sheet	1-1
Convening Order	1-5
Court Martial Appointment Order	1-6
Judge Advocate Appointment Order	1-8
Judge Advocate Appointment Order	1-10
Composition of the court	1-12
Arraignment	1-14, 1-121, 1-135, 2-187

PART II - EVIDENCE

Defending Officer - Admissions	2-191
Prosecutor - Admissions	2-195

WITNESS FOR THE PROSECUTION

1. Lieutenant(N) Hart	
Examination-in-chief	2-322

FIRST TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1. Lieutenant(N) Hart	
Examination-in-chief	2-336
Cross-examination	2-339
Re-examination	2-340

MAIN TRIAL

WITNESS FOR THE PROSECUTION

1. Lieutenant (N) Hart

Examination-in-chief	2-356, 3-381
Cross-examination	3-382
Re-examination	3-419

SECOND TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1. Lieutenant-Commander Craven

Examination-in-chief	3-421
Cross-examination	3-423

WITNESS FOR THE DEFENCE

1. Lieutenant-Commander Marsaw

Examination-in-chief	3-429
Cross-examination	3-449

MAIN TRIAL

WITNESSES FOR THE PROSECUTION

2. Lieutenant-Commander Craven

Examination-in-chief	3-493
Cross-examination	3-510, 3-515, 3-538
Re-examination	3-556

3. Leading Seaman Pilon

Examination-in-chief	3-561
Cross-examination	3-568
Re-examination	3-577

4. Leading Seaman Kohli

	Examination-in-chief	4-579
	Cross-examination	4-590
	Re-examination	4-602
5.	Lieutenant(N) Marr	
	Examination-in-chief	4-604

THIRD TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1.	Lieutenant(N) Marr	
	Examination-in-chief	4-620
	Cross-examination	4-621
	Re-examination	4-624

MAIN TRIAL

WITNESSES FOR THE PROSECUTION

5.	Lieutenant(N) Marr	
	Examination-in-chief	4-627
	Cross-examination	4-634
	Re-examination	4-652
6.	Lieutenant-Commander Davidson	
	Examination-in-chief	4-655, 4-686
	Cross-examination	4-716
	Re-examination	4-742
7.	Lieutenant(N) Pokotylo	
	Examination-in-chief	4-745
	Cross-examination	5-761
	Re-examination	5-593
8.	Lieutenant(N) Cassivi	

Examination-in-chief 5-796

FOURTH TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1. Lieutenant(N) Cassivi

Examination-in-chief 5-803
Cross-examination 5-804

MAIN TRIAL

WITNESSES FOR THE PROSECUTION

8. Lieutenant(N) Cassivi

Examination-in-chief 5-809
Cross-examination 5-810
Re-examination 5-824

9. Lieutenant-Commander Dickinson

Examination-in-chief 5-826
Cross-examination 5-831
Re-examination 5-836

10. Lieutenant(N) Higginson

Examination-in-chief 5-838
Cross-examination 5-847, 879
Re-examination 5-880

11. Lieutenant(N) Byrne

Examination-in-chief 5-885
Cross-examination 5-899
Re-examination 5-924
Questioned by court 5-927
Defending Officer through court 5-928

12. Lieutenant(N) Watt

	Examination-in-chief	5-930
	Cross-examination	5-941
	Re-examination	5-954
13.	Master Seaman Madgett	
	Examination-in-chief	6-956
	Cross-examination	6-969
	Re-examination	6-979
14.	Mr LeClaire	
	Examination-in-chief	6-983
	Cross-examination	6-990
	Re-examination	6-999
15.	Warrant Officer Shea	
	Examination-in-chief	6-1001
	Cross-examination	6-1011
	Re-examination	6-1030
16.	Chief Petty Officer, 1st Class Tovey	
	Examination-in-chief	6-1032
	Cross-examination	6-1038
	Re-examination	6-1046

FIFTH TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1.	Petty Officer, 1st Class Stone	
	Examination-in-chief	6-1053
	Cross-examination	6-1054
	Re-examination	6-1059

MAIN TRIAL

WITNESSES FOR THE PROSECUTION

17.	Petty Officer, 1st Class Stone	
	Examination-in-chief	6-1078
	Cross-examination	6-1080
	Re-examination	6-1085
18.	Leading Seaman Avant	
	Examination-in-chief	6-1087
	Cross-examination	6-1094
	Re-examination	6-1101
19.	Petty Officer, 2nd Class Conrad	
	Examination-in-chief	6-1103
	Cross-examination	6-1115
	Re-examination	6-1142
20.	Mr Harris	
	Examination-in-chief	7-1147
	Cross-examination	7-1151
	Re-examination	7-1159
21.	Petty Officer, 2nd Class Parsons	
	Examination-in-chief	7-1161
	Cross-examination	7-1164
	Re-examination	7-1168
22.	Lieutenant(N) Pitman	
	Examination-in-chief	7-1170
	Cross-examination	7-1174
	Re-examination	7-1184
23.	Leading Seaman Bidinost	
	Examination-in-chief	7-1186
	Cross-examination	7-1192

	Re-examination	7-1203
24.	Petty Officer, 2nd Class Brown	
	Examination-in-chief	7-1205
	Cross-examination	7-1209
25.	Master Corporal Schubert	
	Examination-in-chief	7-1217
	Cross-examination	7-1219
26.	Leading Seaman Bourassa	
	Examination-in-chief	7-1224

SIXTH TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1.	Leading Seaman Bourassa	
	Examination-in-chief	7-1227
	Cross-examination	7-1229

WITNESS FOR THE DEFENCE

1.	Lieutenant-Commander Marsaw	
	Examination-in-chief	7-1240
	Cross-examination	7-1243

MAIN TRIAL

WITNESSES FOR THE PROSECUTION

26.	Leading Seaman Bourasa	
	Examination-in-chief	7-1277
	Cross-examination	7-1279
	Re-examination	7-1288

27.	Master Seaman Szucs	
	Examination-in-chief	7-1290
	Cross-examination	7-1293
	Re-examination	7-1298
28.	Master Seaman Smyth	
	Examination-in-chief	7-1301
	Cross-examination	7-1304
	Re-examination	7-1308
29.	Lieutenant (N) Elford	
	Examination-in-chief	7-1309
	Cross-examination	7-1319
	Re-examination	7-1337
	Questioned by court	7-1340
30.	Lieutenant-Commander Kavanagh	
	Examination-in-chief	8-1342
31.	Lieutenant-Commander Virgin	
	Examination-in-chief	8-1352
	Cross-examination	8-1360
	Re-examination	8-1381
32.	Lieutenant (N) Soper	
	Examination-in-chief	8-1386
	Cross-examination	8-1394
	Re-examination	8-1408
33.	Leading Seaman Cumberland	
	Examination-in-chief	8-1413
	Cross-examination	8-1418
	Re-examination	8-1421
34.	Lieutenant-Commander Dussault	

	Examination-in-chief	8-1423
	Cross-examination	8-1435
	Re-examination	8-1449
35.	Captain Whynott	
	Examination-in-chief	8-1451

SEVENTH TRIAL WITHIN A TRIAL

WITNESSES FOR THE PROSECUTION

1.	Petty Officer, 2nd Class Lalancette	
	Examination-in-chief	8-1456
	Cross-examination	8-1459
	Re-examination	8-1460

MAIN TRIAL

WITNESSES FOR THE PROSECUTION

36.	Petty Officer, 2nd Class Lalancette	
	Examination-in-chief	8-1468
	Cross-examination	8-1471
	Re-examination	8-1478
37.	Chief Petty Officer, 1st Class Brown	
	Examination-in-chief	8-1481
38.	Lieutenant-Commander Hickey	
	Examination-in-chief	8-1499
39.	Sergeant Wiley	
	Examination-in-chief	8-1508
40.	Petty Officer, 2nd Class Breese	

	Examination-in-chief	8-1513
	Cross-examination	8-1516
	Re-examination	8-1518
41.	Lieutenant (N) Wamback	
	Examination-in-chief	8-1519
	Cross-examination	8-1526
	Re-examination	8-1531
42.	Lieutenant-Commander Woodburn	
	Examination-in-chief	8-1533, 9-1542
43.	Captain(N) Webster	
	Examination-in-chief	9-1545
	Cross-examination	9-1548
	Re-examination	9-1553
	Defending Officer - Admissions	9-1555

WITNESSES FOR THE DEFENCE

1.	Lieutenant-Commander Truscott	
	Examination-in-chief	9-1560
	Cross-examination	9-1579
	Re-examination	9-1590
2.	Lieutenant (N) Tingle	
	Examination-in-chief	9-1594
	Cross-examination	9-1602
	Re-examination	9-1608
3.	Leading Seaman Cox	
	Examination-in-chief	9-1610
	Cross-examination	9-1614
	Re-examination	9-1617

4.	Chief Petty Officer, 1st Class Smith	
	Examination-in-chief	9-1620
	Cross-examination	9-1632
	Re-examination	9-1635
5.	Chief Petty Officer, 2nd Class Lavoie	
	Examination-in-chief	9-1653
	Cross-examination	9-1660
6.	Chief Petty Officer, 2nd Class Kramble	
	Examination-in-chief	9-1666
	Cross-examination	9-1672
	Re-examination	9-1687
7.	Commander Scherber	
	Examination-in-chief	9-1689

EIGHTH TRIAL WITHIN A TRIAL

WITNESS FOR THE PROSECUTION

1.	Commander Scherber	
	Examination-in-chief	9-1708
	Cross-examination	9-1713
	Re-examination	9-1717

MAIN TRIAL

WITNESS FOR THE DEFENCE

7.	Commander Scherber	
	Cross-examination	10-1731
	Prosecutor - Admissions	10-1755

WITNESSES FOR THE DEFENCE

8. Petty Officer, 2nd Class Hallonquist

Examination-in-chief	10-1757
Cross-examination	10-1763
Re-examination	10-1764

9. Mr Calnan

Examination-in-chief	10-1768
Cross-examination	10-1772
Re-examination	10-1775

10. Lieutenant-Commander Marsaw

Examination-in-chief	10-1799, 10-1805
Guiding the view	10-1800

NINTH TRIAL WITHIN A TRIAL

WITNESS FOR THE DEFENCE

1. Lieutenant-Commander Marsaw

Examination-in-chief	10-1826
Cross-examination	10-1828

MAIN TRIAL

WITNESS FOR THE DEFENCE

10. Lieutenant-Commander Marsaw

Examination-in-chief	10-1850, 10-1887
Cross-examination	11-1915

Defending Officer - Admissions	11-1985
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PART III - EXHIBITS

"A"	Charge Sheet (See page 1-15)	1-1
"B"	Convening Order (See page 1-15)	1-5
"C"	Court Martial Appointment Order (See page 1-16)	1-6
"D"	Judge Advocate Appointment Order (See page 1-16)	1-8
"E"	Agreed Statement of Facts (See page 1-127)	1-9
"F"	Judge Advocate Appointment Order (See page 2-187)	1-10
"VD1"	The Synopsis (See page 1-24)	12-2225
"VD2"	Letter dated 28 September 1994 (See page 1-25)	12-2253
"VD4-1"	Letter dated 16 June 1995 (See page 2-193)	12-2254
"VD4-2"	Letter dated 5 July 1995 (See page 2-193)	12-2258
"VD4-3"	Letter dated 6 July 1995 (See page 2-194)	12-2261
"VD4-4"	Newspaper article (See page 2-194)	12-2263
"VD4-5"	Unedited draft of the newspaper article (See page 2-194)	12-2265
"VD4-6"	Document entitled "Notes" (See page 2-194)	12-2269
"VD5-1"	Summons to a witness (See page 2-229)	12-2271
"G"	Pamphlet, "Welcome Aboard	

	HMCS OJIBWA" (See page 2-320)	12-2275
"H"	Diagram, plan of the flats as fitted (See page 2-320)	12-2280
"I"	Diagram, partial main flat plan (See page 2-321)	12-2281
"J"	Diagram, HMCS OJIBWA Wardroom (See page 2-321)	12-2282
"K"	Cigar tube (See page 2-358)	12-2283
"VD11-1"	LCdr Craven's statement typewritten (See page 3-422)	12-2284
"VD11-2"	LCdr Craven's statement handwritten (See page 3-429)	12-2289
"L"	Enlargement of Exhibit "H" (See page 3-564)	12-2300
"M"	Memorandum dated 26 June 1992 (See page 4-585)	12-2301
"N"	Letter dated 30 June 1992 (See page 4-588)	12-2302
"O"	Divisional organization chart (See page 4-692)	12-2303
"P"	Memorandum dated 17 November 1992 (See page 4-755)	12-2304
"Q"	OJIBWA sailing schedule (See page 5-760)	13-2306
"R"	OJIBWA annual historical report 1992 (See page 5-761)	13-2329
"S"	OJIBWA annual historical report 1993 (See page 5-761)	13-2332

"T"	Memorandum dated 12 February 1993 (See page 5-939)	13-2336
"U"	Memorandum dated 1 June 1993 (See page 5-953)	13-2338
"V"	Photograph of radar room door (See page 6-964)	13-2340
"W"	Photograph of radio room door (See page 6-964)	13-2340
"X"	Diagram, communication mast (See page 6-1112)	13-2341
"VD19-1"	Crown memo on similar fact evidence (See page 7-1273)	13-2342
"Y"	SOCT report dated 1 August 1990 (See page 8-1426)	13-2356
"Z"	SOCT report dated 2 November 1990 (See page 8-1427)	13-2357
"AA"	SOCT report dated 8 February 1991 (See page 8-1427)	13-2358
"BB"	Letter dated 9 February 1993 (See page 8-1428)	13-2359
"CC"	Letter dated 26 October 1993 (See page 8-1428)	13-2362
"DD"	Business card (See page 8-1434)	13-2366
"EE"	Curriculum Vitae of CPO1 Brown (See page 8-1491)	13-2367
"FF"	CFAO record of changes (See page 8-1510)	13-2371

"GG"	Memorandum dated 5 December 1991 (See page 8-1523)	13-2372
"HH"	Assessment for submarine command (See page 8-1525)	13-2373
"II"	Guide to divisional system (See page 9-1557)	13-2375
"JJ"	Mainguy report (See page 9-1558)	13-2539
"KK"	Annual work up report dated 4 november 1991 (See page 9-1625)	13-2597
"LL"	Annual work up report dated 25 March 1993 (See page 9-1625)	14-2617
"MM"	Personnel evaluation report signed 10 June 1993 (See page 9-1694)	14-2641
"NN"	Personnel evaluation report signed 12 October 1993 (See page 9-1694)	14-2647
"VD24-1"	Media query (See page 10-1724)	14-2653
"OO"	Newspaper article (See page 10-1755)	14-2657
"PP"	Proposed itinerary for submarine visit (See page 10-1791)	14-2659
"VD26-1"	Message dated 12030Z DEC 91 - became "QQ" (See page 10-1821)	-
"VD26-2"	Message dated 241915Z NOV 91 - became "RR" (See page 10-1821)	-
"VD26-3"	Message dated 281401 FEB 92 - became "SS" (See page 10-1822)	-
"VD26-4"	Report SOJ 1610-1 dated 4 October 1991 -	-

	became "UU" (See page 10-1823)	-
"VD26-5"	Report SOJ 1601-1 dated 2 July 1991 - became "VV" (See page 10-1822)	-
"VD26-6"	Report SOJ 1601-1 dated 6 January 1992 - became "WW" (See page 10-1824)	-
"VD26-7"	Report SOJ 1601-1 dated 5 April 1992 - became "XX" (See page 10-1824)	-
"VD26-8"	Report SOJ 1601-1 dated 4 July 1992 - became "YY" (See page 10-1824)	-
"VD26-9"	Report SOJ 1630-1 dated 6 January 1993 - became "ZZ" (See page 10-1824)	-
"VD26-10"	Report SOJ 1630-1 dated 8 April 1993 - became "AAA" (See page 10-1824)	-
"VD26-11"	Report SOJ 1630-1 dated 8 July 1993 - became "BBB" (See page 10-1824)	-
"VD26-12"	Report SOJ 1630-1 dated 4 October 1993 - became "CCC" (See page 10-1824)	-
"VD26-13"	Captain's Instructions to Officers - became "TT" (See page 10-1825)	-
"QQ"	Message dated 120305Z DEC 91 (See page 10-1846)	14-2661
"RR"	Message dated 242915 NOV 91 (See page 10-1846)	14-2662
"SS"	Message dated 281401 FEB 92 (See page 10-1846)	14-2663
"TT"	Captain's Instructions to Officers (See page 10-1847)	14-2664
"UU"	Report SOJ 1610-1 dated	

	16 October 1991 (See page 10-1847)	14-2712
"VV"	Report SOJ 1610-1 dated 2 July 1991 (See page 10-1847)	14-2714
"WW"	Report SOJ 1610-1 dated 6 January 1992 (See page 10-1847)	14-2716
"XX"	Report SOJ 1610-1 dated 5 April 1992 (See page 10-1847)	14-2719
"YY"	Report SOJ 1610-1 dated 4 July 1992 (See page 10-1847)	14-2721
"ZZ"	Report SOJ 1630-1 dated 6 January 1993 (See page 10-1848)	14-2723
"AAA"	Report SOJ 1630-1 dated 8 April 1993 (See page 10-1848)	14-2726
"BBB"	Report SOJ 1630-1 dated 8 July 1993 (See page 10-1848)	14-2728
"CCC"	Report SOJ 1630-1 dated 4 October 1993 (See page 10-1848)	14-2730
"DDD"	The 1992 OJIBWA log book (See page 10-1849)	14-2732
"EEE"	The 1993 OJIBWA log book (See page 10-1849)	14-2745
"FFF"	Summary of hours spent at sea (See page 10-1849)	14-2761
"GGG"	The quiz (See page 10-1909)	14-2762
"HHH"	Report SOJ 1610-1 dated 31 March 1991 (See page 11-1968)	14-2765
"III"	Personnel evaluation report for May 1991 to April 1992	

	(See page 11-1985)	14-2767
"VD28-1"	Crown memo on the nature of the objective test (See page 11-1988)	14-2773
"VD28-2"	Crown memo on abuse/ill-treatment of subordinates (See page 11-1988)	14-2778
"VD28-3"	Crown memo on proving conduct to the prejudice of good order and discipline (See page 11-1988)	14-2783
"VD28-4"	Crown memo on cruel/disgraceful conduct (See page 11-1988)	14-2793
"JJJ"	Findings of the court (See page 12-2183)	14-2798
"KKK"	Statements as to particulars of the accused (See page 12-2184)	14-2802
"LLL"	Member's personnel record résumé (See page 12-2184)	14-2803
"MMM"	Pay record (See page 12-2184)	14-2804
"NNN"	Personnel evaluation report for January 1990 to April 1991 (See page 12-2186)	14-2805
"OOO"	Personnel evaluation report for August 1989 to April 1990 (See page 12-2186)	14-2811
"PPP"	Personnel evaluation report for April 1988 to March 1989 (See page 12-2186)	15-2817
"QQQ"	Personnel evaluation report for August to December 1987 (See page 12-2187)	15-2823

xx

"RRR"	Personnel evaluation report for March 1986 to March 1987 (See page 12-2187)	15-2829
"SSS"	Personnel evaluation report for May to December 1987 (See page 12-2187)	15-2835
"TTT"	Personnel evaluation report for June 1984 to May 1985 (See page 12-2187)	15-2841
"UUU"	Personnel evaluation report for January to June 1984 (See page 12-2187)	15-2847
"VVV"	Personnel evaluation report for July 1983 to February 1984 (See page 12-2187)	15-2853
"WWW"	Course reports (See page 12-2187)	15-2859
"XXX"	Letter dated 1 January 1981 (See page 12-2188)	15-2869
"YYY"	Letter dated 24 January 1983 (See page 12-2188)	15-2870
"ZZZ"	Letter dated 6 April 1989 (See page 12-2188)	15-2871
"AAAA"	Message dated 24247Z FEB 91 (See page 12-2188)	15-2872
"BBBB"	Message dated 021425Z DEC 91 (See page 12-2188)	15-2873
"CCCC"	Message dated 131640Z DEC 91 (See page 12-2188)	15-2874
"DDDD"	Message dated 221715Z JUL 92 (See page 12-2188)	15-2875
"EEEE"	Demi-official letter dated	

	29 April 1993 (See page 12-2189)	15-2876
"FFFF"	Demi-official letter dated 12 May 1993 (See page 12-2189)	15-2877
"GGGG"	Letter dated 16 September 1993 (See page 12-2189)	15-2878
"HHHH"	Demi-official letter dated 8 October 1993 (See page 12-2189)	15-2879
"IIII"	Letter dated 30 November 1993 (See page 12-2189)	15-2880
"JJJJ"	Assessments (See page 12-2189)	15-2885
"KKKK"	Sentence (See page 12-2220)	15-2887

PART IV - ADDRESSES, APPLICATIONS, CERTIFICATIONS,
 DECISIONS, FINDINGS, OBJECTIONS, MITIGATION, MOTIONS,
 PLEAS, SENTENCE

FIRST PLEA IN BAR OF TRIAL

Defending Officer - Admissibility of evidence	1-17
Prosecutor - Rebuttal	1-18
Defending Officer - Reply	1-22
Judge Advocate - Ruling	1-23
Defending Officer - Plea in bar of trial	1-25
Prosecutor - Rebuttal	1-34
Defending Officer - Reply	1-42
Judge Advocate - Decision	1-45

SECOND PLEA IN BAR OF TRIAL

Assistant Defending Officer - Plea in bar of trial	1-49
Assistant Prosecutor - Rebuttal	1-59
Assistant Defending Officer - Reply	1-74

Assistant Prosecutor - Exclusion of evidence	1-82
Assistant Defending Officer - Rebuttal	1-83
Judge Advocate - Decision	1-85

THIRD PLEA IN BAR OF TRIAL

Prosecutor - Admissibility of evidence	1-89
Assistant Defending Officer - Rebuttal	1-93
Judge Advocate - Ruling	1-95
Assistant Defending Officer - Plea in bar of trial	1-95
Prosecutor - Rebuttal	1-102
Assistant Defending Officer - Reply	1-117
Judge Advocate - Decision	1-119

MAIN TRIAL

Prosecutor - Motion of objection	1-126
Defending Officer - Rebuttal	1-131
Judge Advocate - Address on motion	1-132
President - Decision	1-134
Defending Officer - Application for adjournment	1-138
Prosecutor - Rebuttal	1-139
Defending Officer - Reply	1-140
President - Ruling	1-141
Defending Officer - Objection to counsel	1-143
Assistant Prosecutor - Rebuttal	1-146
Defending Officer - Reply	1-147
Judge Advocate - Decision	1-147
Defending Officer - Motion of recusal	1-150
Assistant Prosecutor - Rebuttal	1-153
Defending Officer - Reply	1-171
Judge Advocate - Decision	1-177
Prosecutor - Objection to defence motions	2-198
Defending Officer - Rebuttal	2-210
Judge Advocate - Decision	2-223

Defending Officer - Application for disclosure	2-230
Assistant Prosecutor - Rebuttal	2-249
Intervener - Argument	2-265
Defending Officer - Reply	2-269
Judge Advocate - Decision	2-272
Judge Advocate - Opening address	2-295
Prosecutor - Opening address	2-301
Defending Officer - Opening address	2-316

FIRST TRIAL WITHIN A TRIAL

Defending Officer - Address	2-340
Prosecutor - Address	2-344
Judge Advocate - Decision	2-346

MAIN TRIAL

Defending Officer - Exclusion of evidence	2-363
Prosecutor - Rebuttal	2-366
Defending Officer - Reply	2-373
Judge Advocate - Decision	2-377

SECOND TRIAL WITHIN A TRIAL

Prosecutor - Address	3-478
Defending Officer - Address	3-480
Prosecutor - Reply	3-488
Judge Advocate - Decision	3-489

THIRD TRIAL WITHIN A TRIAL

Prosecutor - Address	4-625
Defending Officer - Address	4-626
Judge Advocate - Decision	4-626

MAIN TRIAL

Defending Officer - Exclusion of evidence	4-661
Prosecutor - Rebuttal	4-667
Defending Officer - Reply	4-671
Judge Advocate - Decision	4-672

FOURTH TRIAL WITHIN A TRIAL

Prosecutor - Address	5-805
Defending Officer - Address	5-806
Judge Advocate - Decision	5-808

FIFTH TRIAL WITHIN A TRIAL

Prosecution - Address	6-1060
Defence - Address	6-1069
Judge Advocate - Decision	6-1075

SIXTH TRIAL WITHIN A TRIAL

Prosecution - Address	7-1256
Defence - Address	7-1265
Prosecution - Reply	7-1273
Judge Advocate - Decision	7-1274

SEVENTH TRIAL WITHIN A TRIAL

Assistant prosecutor - Address	8-1461
Defending Officer - Address	8-1465
Judge Advocate - Decision	8-1466

MAIN TRIAL

Defending Officer - Admissibility of evidence	9-1638
Prosecutor - Rebuttal	9-1641
Defending Officer - Reply	9-1646
Judge Advocate - Ruling	9-1649

EIGHTH TRIAL WITHIN A TRIAL

Prosecutor - Address	9-1722
Defending Officer - Address	9-1724
Prosecutor - Reply	9-1727
Judge Advocate - Decision	9-1728

MAIN TRIAL

Defending Officer - Request to take a view	10-1791
--	---------

XXV

Assistant Prosecutor - Rebuttal	10-1793
Defending Officer - Reply	10-1794
Judge Advocate - Address in respect of view	10-1794
President - Decision	10-1796

NINTH TRIAL WITHIN A TRIAL

Assistant Prosecutor - Address	10-1835
Defending Officer - Address	10-1841
Assistant Prosecutor - Reply	10-1843
Judge Advocate - Decision	10-1844

MAIN TRIAL

Prosecutor - Exclusion of evidence	10-1879
Defending Officer - Rebuttal	10-1881
Prosecutor - Reply	10-1882
Judge Advocate - Ruling	10-1884
Prosecutor - Closing address	11-2034
Defending Officer - Closing address	11-2073
Judge Advocate - Summation	12-2100, 12-2176
President - Finding	12-2183
Prosecutor - Address as to punishment	12-2190
Defending Officer - Address as to punishment	12-2202
Judge Advocate - Address in respect of sentence	12-2205
President - Sentence	12-2220
Certification by president	12-2221
Certification by judge advocates	12-2222
Certification by court reporters	12-2223

12

Composition of court

MINUTES OF PROCEEDINGS
OF A GENERAL COURT MARTIAL

for the trial of Lieutenant-Commander D.C. MARSAW, CD, Canadian Forces Maritime Warfare Centre, Canadian Forces Base Halifax, Regular Force, held at 6080 Young Street, Suite 505, Halifax, on the 6th, 7th, 8th days of December 1994, 21st day of February 1995, 12th, 13th, 14th, 26th, 27th, 28th, 29th days of September 1995, 2nd, 3rd, 4th, 5th, 6th, 11th, 12th, 13th, 16th, 17th, 18th, 20th, 23rd, 24th, 25th, 26th, 27th, 28th, 31st days of October 1995, 1st and 2nd day of November 1995 by order of J.A. MacInnis, Major-General, CMM, CD, Land Force Atlantic Area dated the 21st of October 1994.

PRESIDENT

Captain(N) B.R. Brown, CD, National Defence Headquarters, Chief of Staff J3.

MEMBERS

Lieutenant-Colonel B.W. Hope, CD, National Defence Headquarters, Director General Procurement and Supply Resource Management, Director Procurement and Supply Aerospace.

Commander L.D. Sweeney, CD, Her Majesty's Canadian Ship HALIFAX, Halifax.

Lieutenant-Commander J.S. McLachlan, CD, Her Majesty's Canadian Ship HURON, Victoria.

Major R.J. Leblanc, CD, 14 Dental Unit Detachment Cold Lake.

JUDGE ADVOCATES

Composition of court

Colonel G.L. Brais, CD, Chief Military Trial Judge.

Lieutenant-Colonel A. Ménard, CD, Deputy Chief Military Trial Judge.

PROSECUTOR

Major D.K. Abbott, Deputy Judge Advocate Halifax.

ASSISTANT PROSECUTORS

Lieutenant-Colonel K.W. Watkin, CD, Judge Advocate Halifax.

Captain P.K. Gleeson, CD, Assistant Deputy Judge Advocate Halifax.

DEFENDING OFFICER

Lieutenant-Colonel J.E.D. Couture, CD, Director of Law - Defence.

ASSISTANT DEFENDING OFFICER

Major L. Mackay, CD, Deputy Judge Advocate St-Hubert.

INTERVENER

Mr Robert Grant of the law firm Stewart McKalvey Sterling Scales, Halifax.

ASSISTANT INTERVENER

Ms Nancy Rubin of the law firm Stewart McKalvey Sterling Scales, Halifax.

COURT REPORTERS

14

Composition of court

Chief Petty Officer, 2nd Class P.D.
Gauthier, CD, Office of the Chief Military Trial Judge.

Warrant Officer M.C. Roy, CD, Office of the
Chief Military Trial Judge.

Master Warrant Officer G. Marsolais, CD,
Office of the Chief Military Trial Judge.

Mr Bob Martin, CD, Office of the Chief
Military Trial Judge.

Warrant Officer R.K. Gaudet, CD, Office of
the Chief Military Trial Judge.

THE PUBLIC IS PRESENT.

AT 1000 HOURS, THE TRIAL COMMENCES.

THE ACCUSED IS BROUGHT BEFORE THE COURT.

JUDGE ADVOCATE: This court has before it a
charge sheet referring to Lieutenant-
Commander Marsaw, Dean Carey, Canadian Forces Maritime
Warfare Centre, Canadian Forces Base Halifax, Regular
Force. Have you received a copy of this document?

ACCUSED: Yes, sir.

JUDGE ADVOCATE: Are those your correct
particulars?

ACCUSED: Yes, sir.

JUDGE ADVOCATE: This court also has before
it a convening order which reads as follows:

THE JUDGE ADVOCATE READS THE CONVENING ORDER.

JUDGE ADVOCATE: Have you received a copy of
this document?

ACCUSED: Yes, sir.

15

Judge Advocate

Arraignment

JUDGE ADVOCATE: This court has before it an appointment order which reads as follows:

THE JUDGE ADVOCATE READS THE APPOINTMENT ORDER.

JUDGE ADVOCATE: You have received a copy of this appointment order of members?

ACCUSED: Yes, sir.

JUDGE ADVOCATE: Okay. This court has also before it an appointment order for a judge advocate, it reads:

THE JUDGE ADVOCATE READS THE APPOINTMENT ORDER.

JUDGE ADVOCATE: You've received a copy of that document?

ACCUSED: Yes, sir.

JUDGE ADVOCATE: I am that Colonel Brais mentioned in that last document that I just read. Mr Prosecutor, do you object to the judge advocate?

PROSECUTOR: No, I do not, sir.

JUDGE ADVOCATE: Mr Defending Officer, do you object to the judge advocate?

DEFENDING OFFICER: No, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. I will then take the oath. Do we have an interpreter in this trial?

PROSECUTOR: No, we do not, Mr Judge Advocate.

JUDGE ADVOCATE: So, all rise, please.

THE JUDGE ADVOCATE TAKES THE OATH.

16

Judge Advocate

Arraignment

THE COURT REPORTER, CHIEF PETTY OFFICER, 2ND CLASS P.D. GAUTHIER, IS DULY SWORN.

JUDGE ADVOCATE: Be seated. The charge sheet will be marked Exhibit "A".

THE CHARGE SHEET IS MARKED EXHIBIT "A".

JUDGE ADVOCATE: And since it has four pages, I'll staple them together to make sure we don't lose anything here. The convening order will be marked Exhibit "B".

THE CONVENING ORDER IS MARKED EXHIBIT "B".

JUDGE ADVOCATE: The appointment order will be marked Exhibit "C".

THE APPOINTMENT ORDER OF MEMBERS IS MARKED EXHIBIT "C".**Error! Bookmark not defined.**

JUDGE ADVOCATE: And the appointment order of the judge advocate will be Exhibit "D".

THE APPOINTMENT ORDER OF THE JUDGE ADVOCATE IS MARKED EXHIBIT "D".

JUDGE ADVOCATE: Would you read the charge sheet, Mr Prosecutor?

THE PROSECUTOR READS THE CHARGE SHEET.

JUDGE ADVOCATE: You may break off and sit with your defending officer. Mr Defending Officer, I direct your attention to QR&O article 112.05 under paragraph (5)(b), do you apply for an adjournment on the grounds that you are unable to properly prepare your defence because the particulars of the charges are inadequate or are not set out with sufficient clarity?

DEFENDING OFFICER: No, I do not.

17

Judge Advocate

Arraignment

JUDGE ADVOCATE: Turning to paragraph (5)(c), do you have a plea in bar of trial pursuant to QR&O article 112.24?

DEFENDING OFFICER: Yes, I do, Mr Judge Advocate.

JUDGE ADVOCATE: How many pleas?

DEFENDING OFFICER: I have a total of three and I propose to present the first one, obtain your ruling and then take them one at the time.

JUDGE ADVOCATE: One at the time, Okay. Because we will be doing that, Mr Prosecutor, Mr Defending Officer, in respect of those facts and matters contained in Military Rule of Evidence 15, that is to say required judicial notice, do you wish to make any representation regarding either the competence or the propriety of the court taking judicial notice of those facts and matters?

PROSECUTOR: No comments, Mr Judge Advocate.

DEFENDING OFFICER: No representation.

JUDGE ADVOCATE: Then the court takes judicial notice of those facts and matters contained in Military Rule of Evidence 15.

So first, the first of the pleas that you've mentioned.

PLEA IN BAR OF TRIAL

DEFENDING OFFICER: Mr Judge Advocate, the first plea of the defence relates to all charges appearing on Exhibit "A", and essentially on the grounds that this court has been illegally convened for the reason I will state further, but in essence, the synopsis which is a document required to be produced under Queen's Orders and Regulations article 109.02 does

18

1st voir dire

Defending Officer

Admissibility of evidence

contain information that should not appear in the synopsis and the convening authority having gained access to that information, that is in our view improperly put before him, has contravened and that has constituted a fatal flaw to the convening of the court. That is in essence the argument. Of course, I can argue further right now, if you wish.

JUDGE ADVOCATE: But first, do you wish to call evidence on this?

DEFENDING OFFICER: The only evidence I wish the court to consider is the synopsis. Of course, this is the very basis of the defence argument that is, it indeed, the synopsis that contain that information that is so prejudicial and according to our position has affected the legality of the convening of the court and although I well appreciate that a synopsis is not admissible before a court for the purpose of the merit, for example, it is my position though that the synopsis can be admitted before you as judge advocate for the purpose of the **voir dire** alone, for that purpose only, and that I propose to introduce the synopsis.

I understand my learned friend has some comments on that and maybe you want to hear him before making any decision on the synopsis.

JUDGE ADVOCATE: Well, in fact now you are asking me to take the synopsis into evidence on the **voir dire** in the motion.

DEFENDING OFFICER: I am and I have a copy right here that is available.

JUDGE ADVOCATE: Let's deal with this issue first. Any representations?

PROSECUTOR: Yes, Mr Judge Advocate. My representation, I would like to refer you to two cases. The General Court Martial decision in **Lalonde** as well as the Court Martial Appeal Court decision of **Lunn**.

19

Plea in bar of trial

Prosecutor

Rebuttal

JUDGE ADVOCATE: **Lunn?**

PROSECUTOR: **Lunn**, L-U-N-N.

JUDGE ADVOCATE: Yes. I gather you're objecting to the synopsis being seen by myself?

PROSECUTOR: Yes, I'm objecting to the synopsis being seen by the judge advocate and its admission as evidence in this plea in bar on the basis of relevance. It is the position of the prosecution that the admission of this document is not relevant for the motion that's currently before you.

Defence counsel is arguing that the court martial is improperly convened pursuant to QR&O 109 because there is something inside the synopsis which fatally flaws the entire process and it is the position of the prosecution that even if there were information in the synopsis that did fall within the definition of 109.02(2)(b)(i) and (ii), that information in and of itself is not determinative of the issue of whether the court was improperly convened and, importantly, it is not even relevant to the issue in light of the wording of 109.02 and also in light of the wording of 109.02(5), as well as the decisions of the Court Martial Appeal Court in **Lunn** and also the decision in the General Court Martial of **Lalonde**.

So for all these distinct and different legal bases, I will be arguing that the introduction of the synopsis is clearly not relevant for you to determine the issue of whether the court has been improperly convened given the wording in the QR&O and those court decisions. In making this motion, of whether or not the synopsis should be considered, I respectfully submit for your consideration Note D to QR&O 109.02 which states as follows:

**"The synopsis is not admissible
..."**

Prosecutor

Rebuttal

JUDGE ADVOCATE: Yes.

PROSECUTOR: Okay, so I=m at 109.02 Note D.

JUDGE ADVOCATE: I=m there too, Note D.

PROSECUTOR:

"The synopsis is not admissible in proceedings before a court martial and may not be seen by the judge advocate or by the president or any other member of the court. Where it is learned that the judge advocate or the president or any other member of a court martial has seen the synopsis, a finding of guilty made by that court martial could on that ground alone be quashed under section 208 of the National Defence Act."

Apparently, that Note was in place on the 15th of June 1992. I=m not sure what the case law origins are for that Note. However, it does reveal some dangers when a judge advocate is confronted with the possibility of admitting the synopsis into evidence. The whole purpose, I would submit, of bringing the synopsis into evidence through the defence motion is so that you will be asked to make some decision about whether or not information contained in it can include facts which are prejudicial but not relevant to the charges, whether or not the facts contained in the synopsis refer to opinion of character.

The defence by this motion and by asking you to consider the synopsis is not only asking the synopsis to go before you but it=s also asking you to make pre-trial rulings on evidence that will come out later on at trial without ever hearing the benefit from either counsel as to what is relevant and what is not.

21

Plea in bar of trial

Prosecutor

Rebuttal

At this point you haven't even heard arguments on how ill-treatment, disgraceful conduct, for example, is going to be defined, and also without hearing evidentiary foundation for evidence such as similar facts which may through defence arguments be considered opinion evidence but through prosecution arguments be considered a similar fact.

So the moment the synopsis goes before you the red flag does go up, given the wording of Note D, and it goes up simply because the synopsis is before you but probably, more importantly, because of what defence counsel will ask you to consider when reviewing the synopsis. They are asking you to make findings that there is information inside the synopsis that falls within 109.02(2)(b)(i) and (ii). And in the argument, as I understand it from defence counsel, it will be because there is information of this sort, in it, that results in the convening process is fundamentally flawed.

In arguing relevance, assuming simply for the sake of example that there is in fact such information in the synopsis that falls within (b)(i) and (ii), it is the definite position of the prosecution ... the prosecution says that all the information that is in the synopsis is proper and is accurate. But assuming for the sake of argument that there is that type of information in the synopsis, does that mean the whole process is fatally flawed?

JUDGE ADVOCATE: Well, that's what he is asking me to decide.

PROSECUTOR: That's the question. If you look at the wording that just precedes subsection (b) in 109.02, it says: "**A synopsis should ...**", it doesn't say a synopsis must, or has to include information of that sort. Combine that with looking at 109.02 subsection (5), which is important for the argument on relevancy, it says:

Prosecutor

Rebuttal

"Notwithstanding that a synopsis has not been prepared in accordance with paragraph (2), it shall not, for that reason alone, affect the legality of the decision by a convening authority to convene a court martial in respect of the charge."

So assuming for the sake of argument that there is something in there that falls within (b)(i) and (ii) of subsection (2), is that relevant based on the construction of 109 subsection (2) which simply says a synopsis should rather than must and also the wording in subsection (5)? The answer then they gave is so what if it contains that type of information. So what if it contains that type of information. How is that possibly relevant to the convening process as a whole?

JUDGE ADVOCATE: Excuse me. One moment, Major Abbott. I understand what you are saying and I am hearing you and I presume that this is going to be your position or your response to the application by the defence, general response on the meaning of 109.02(2) and (5) and the Notes, maybe. At this point though, really I think the question is: Should I look at the synopsis or not? I don't like to go into arguments now that don't really pertain to the question now which is, and I think, solely whether I should look at the synopsis or not in order to determine ... Then if once I decided as an example to look at it, then the argument I suppose would be made or even evidence called to try to show that 109.02 has been infringed and the infringement is such that it is fatal to the case of the prosecution, okay.

So I think I understand that you object to (1) to me looking in the synopsis on the basis that, one, that would be it's not relevant to this motion because whatever is contained in there first is a matter of opinion for the ... basically the master of the facts, is what I think to understand from you; and

23

Plea in bar of trial

Defending Officer

Reply

secondly, because of Note D to 109.02, this is I, as a judge advocate, I shouldn't be looking at the synopsis, okay. So that's what I'm going to rule upon first, okay.

DEFENDING OFFICER: Do you want to hear me on this, Mr Judge Advocate?

JUDGE ADVOCATE: Yes, sure.

DEFENDING OFFICER: First of all, as to the relevancy, I mean, I do not contend that the synopsis speaks for the facts. There will be witnesses called in due course. Nonetheless, the synopsis is very relevant in the convening process. I'm not talking about the future of this trial. I'm talking about the past and what has led us here today, and very clearly the convening authority has or should have in any event, according to regulation, should have consulted the synopsis and that's what I'm referring to, not the future.

Second, I would like to submit that Note D is only that, a note. It is a note inserted under the QR&O under the authority of the Minister. It is not binding upon you and you have the liberty and the prerogative of looking at the synopsis, especially in this context of a General Court Martial where the members won't see it in the context of a **voir dire** where you can have a look at it to determine the merit of the argument presented. This is based as well on the right to the defence to present full defence and one cannot invoke a mere note in the QR&O to impeach this right of the defence to present a full defence and obtain ruling on a matter of law that is in my view appropriately put before the court.

Finally, I would refer to the **Lalonde** case as my learned friend has done. In that case, and I know you were the judge advocate in that case, you have accepted to look at a military police report which is also very clearly inadmissible at a trial. Nonethe-

Judge Advocate

Ruling

less, you had determined in the **Lalonde** case in which case a similar, I would say a similar application had been presented to you, you had determined that looking at this police report was necessary to determine ... make a determination on the plea at bar and I suggest to you that the synopsis today is just very relevant. It is essential for you to look at it and make determination on the argument presented by the defence.

JUDGE ADVOCATE: Okay, I=ll take a few minutes and consider the admissibility of the synopsis on this **voir dire**.

AT 1034 HOURS, 6 DECEMBER 1994, THE COURT CLOSES TO DETERMINE ADMISSIBILITY OF SYNOPSIS.

AT 1100 HOURS, 6 DECEMBER 1994, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: Thank you. Be seated please. On the very narrow issue of the admissibility of the synopsis as evidence in this plea in bar of trial I find that the synopsis is admissible for the purpose of determining whether the defence=s plea in bar of trial is founded and the jurisdiction of the court is flawed **ab initio**.

Where the parts of the synopsis fall within the definition of opinion as to the character of the accused or facts prejudicial to the accused which do not bear directly on the charges as indicated in QR&O article 109.02 subparagraph (2) and whether such a thing would flaw the jurisdiction of the court will be decided later on in this **voir dire**. As to Note D and the way it reads I have to refer to QR&O article 1.095 on the effect of Notes which provides that Notes are for the guidance of officer and non-commissioned members. They shall not be construed as having the force and effect of law but should not be deviated from without good reason.

Judge Advocate

Ruling

I find that there is ample reason to deviate from Note D to QR&O article 109.02 at this point. Firstly, I wish to assure the parties that the synopsis will not be seen by the court as the court in any event is not allowed to see documents taken as exhibits in **voir dire**s unless they become exhibits in the main trial later on. Secondly, notwithstanding the 15 June 1992 as the last date of issue of Note D under QR&O 109.02, I believe its application is and should be limited to the president and members of a court martial as they are the master of the facts and as the seeing of the synopsis by them could indeed result in an irreversible damage to the case.

However, as was done in the General Court Martial of Colonel Lalonde where the judge advocate, myself in that instance, had to consider the contents of the police report giving rise to the charges as the judge advocate who deals exclusively with questions of law and questions of mixed law and facts, the accused may not suffer any prejudice by the judge advocate considering the synopsis and indeed in this case the accused is asking me to do so, nor can the prosecution from the fact that I look at the synopsis of evidence which the prosecution has given to the accused as part of the disclosure process of what evidence his case was based upon.

I therefore rule as I did earlier, but I want to repeat, that I can look at the contents of the synopsis at the request of the defence if the defence deems that I ought to do so in order to adjudicate on their first plea in bar of trial.]

DEFENDING OFFICER: Thank you, Mr Judge Advocate, I understand that you having so ruled on relevancy that my learned friend will not object to the production of the document without for example me having to call the maker.

PROSECUTOR: That is correct, Mr Judge Advocate, we will not be opposing its introduction.

26

Plea in bar of trial

Judge Advocate

Ruling

JUDGE ADVOCATE: Okay. So this will be marked Exhibit "VD1" on this **voir dire**.

THE SYNOPSIS IS MARKED EXHIBIT "VD1".

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: Mr Judge Advocate, that=s all the evidence the defence intended to call and unless my friend has evidence on his own ...

JUDGE ADVOCATE: Do you have evidence, Major Abbott?

PROSECUTOR: I guess I do, Mr Judge Advocate, it would be the response to the synopsis given by the accused pursuant to QR&O 109.03. I understand my friend will not be putting me to strict proof of proving the making of the document.

DEFENDING OFFICER: I have, Mr Judge Advocate, a copy of the said document and I have no ...

JUDGE ADVOCATE: Let=s look at 109.03 for a moment. Okay, so you want to put that in, and you have no objection?

DEFENDING OFFICER: That=s correct.

JUDGE ADVOCATE: Okay. Bring it in. So we=ll mark this "VD2".

LETTER DATED 28 SEPTEMBER 1994 IS MARKED EXHIBIT "VD2".

JUDGE ADVOCATE: Okay. That=s the evidence that you wish to call?

PROSECUTOR: Yes, it is. Thank you, Mr Judge Advocate.

JUDGE ADVOCATE: Are you ready to address me?

27

Plea in bar of trial

Defending Officer

Plea in bar of trial

DEFENDING OFFICER: I am, Mr Judge Advocate.

JUDGE ADVOCATE: Go ahead.

DEFENDING OFFICER: I will go very briefly over the scheme produced or established in Queen=s Regulations and Orders, QR&O, Vol II, in particular Chapter 109. I know you are very familiar with the said chapter and in a nutshell this is the chapter that provides for application for disposal of charges by higher authority. One scenario contemplated in that chapter, obviously, is the convening of a court martial. My remarks, of course, will address mainly that issue because the scenario of a summary trial by a superior commander in my view finds no application in this particular context.

In essence, when a commanding officer decides to apply to higher authority for disposition of a case he shall see that a synopsis is prepared. That synopsis will be eventually served on the accused. The accused will be afforded the opportunity to make or not a statement regarding the facts disclosed in the synopsis with the understanding that this statement is, if made of course, is not admissible and is only to be placed in front of the convening authority.

Then, and I believe it is the first ... I will come back to 109.02 about the synopsis, then the commanding officer in accordance with 109.04 shall forward his application in the form of a letter to be accompanied by the synopsis, the charge sheet, a statement, if any, of the accused as I referred to earlier, conduct sheet, if any, and a couple other documents that do not have any relevance in this motion. Clearly, it has been intended that an application must contain all of those documents. The terminology or the wording of 109.04 is a clear "shall" which is quite well known as meaning a must, and it must be done, a compulsion.

28

Plea in bar of trial

Defending Officer

Plea in bar of trial

Then this document, or these series of documents with the letter, is referred to the higher authority who has various options. If it's one that cannot convene a court martial, for example, that authority will pass it up, if it is recommended that the court martial be convened ... etc. It is quite clear in my opinion that it had been intended that those documents and those documents alone be produced to higher authority for those higher authorities to make a determination as to the disposition of the case.

And I will rely, of course, throughout my submission on the Court Martial Appeal Court decision in **Bouchard** which I will make available to you, Mr Judge Advocate, at a later time before you to consider this argument where it has been stated by the Court Martial Appeal Court that compliance with Chapter 109 is essential to grant authority to the court.

The Court Martial Appeal Court stated in that particular case that the referral of a member of the Forces to a court martial was such an important matter that indeed such referral had to take place in strict compliance with Chapter 109. I am not suggesting that **Bouchard** has application to this case beyond that because in **Bouchard**, as you may know, the endorsement of the charge sheet was absent and that was the flaw that the Court Martial Appeal Court noted, and of course, that has no relevance to this case but their comment though about the strict compliance with the regulation because of the very serious matter of referring a member to a court martial is in my opinion very relevant to this plea.

Chapter 109.02 ...

JUDGE ADVOCATE: Article 109.02, not Chapter 109.02.

DEFENDING OFFICER: You're correct. I'm sorry. Article 109.02 states in part that:

"(2) A synopsis should:

29

Plea in bar of trial

Defending Officer

Plea in bar of trial

(a) include a ... summary of the circumstances relating to the charge, together with the names of the persons who will be called as witnesses in relation to those circumstances;"

Article 109.02(2)(b) states:

"... not include any reference, direct or indirect, to

... opinion as to the character of the accused, or

... facts prejudicial to the accused, other than facts that bear directly on the charge, or

... board of inquiry ..."

which has no relevancy in this particular case.

It is the defence submission that despite the word "should", as my learned friend has commented on earlier on, I take the view, I aver that despite the word "should" in this English version that in actual fact and according to the scheme of those regulations this "should" should be read as a must or a shall. In stating that I rely on two bases essentially, one, the French text of the same article 109.02 which states, 109.02(2), "**Un sommaire ... doit**", which is a must, shall, contain such and such, and 109.02(2)(b) "**ne doit faire aucune mention ...**", must not or shall not make any reference, then followed by the word direct or indirect.

30

Plea in bar of trial

Defending Officer

Plea in bar of trial

The position of the defence here, and I think it's been well recognized in law, that both French and English text have equal value, equal footing legally, and that whenever there is a contradiction or a discrepancy between two versions of a text that it be an actual act or a regulation as it is in this case, the adjudicator must look at the scheme provided for by the legislator or the regulation maker. I suggest to you in this case that this scheme by itself on its own and without even any reference to the French text which uses a shall, the mere presence or the words, directly or indirectly, if it had been intended that it was after all permissible to refer to opinion and bad character evidence, why would the words directly or indirectly appear.

I submit to you that the very presence of the word "should make no mention, directly or indirectly", express a very clear concern by the regulation maker that no such reference shall be made, and the French text, of course, very much so supports that position by using the words "**ne doit pas ... ne doit faire aucune mention**", which is shall not make any reference to.

Having so concluded, Mr Judge Advocate, it is the defence position that since such information that would be of a prejudicial value not related to the charges or that would speak as to the character of the accused, if they are present in the synopsis they are there in clear contravention of article 109.02. And then as we know as the synopsis is further passed on to the accused, he has a chance to make a statement, and further passed on to the ultimate convening authority eventually to be considered if that document, the synopsis, is done in contravention to Chapter 109, more specifically 109.02, it does affect and create and result in our view in a fatal flaw because then the convening authority in making its decision, its appreciation as to the way to dispose of the matter is now relying on information that should not be in front of him.

31

Plea in bar of trial

Defending Officer

Plea in bar of trial

And as you know very well, the convening authority in being in receipt of such an application has the option for example to send it back down for summary trial or eventually possibly even dismiss the charges or send it up for court martial. Those are very important decisions to be made by the convening authority and clearly they have to be made on the basis of the proper documentation provided for in Chapter 109 and not on a documentation that clearly contravenes.

The prosecution may very well claim that ... and I will come back as to some of the aspects of the synopsis in a moment ... but the prosecution may very well claim that yes, suppose there was something that should not have been in the synopsis, it was open to the accused to make a statement and might suggest that it was for him to possibly rectify the situation. If the prosecution is to take such a position I have the following comments. On one hand, the accused is never under any compulsion to make any statement, that it be to the military police, other authorities or as expressly indicated in article 109.03 to authorities in the process of disposing of the charges.

Therefore, I don't think it can be reasonably argued that it was within the power of the accused, if you wish, to resolve those problems that had been created by the author of the synopsis. He is under no compulsion to make any statement. Even if the accused had perceived some flaws in the synopsis, it is my submission that there is no duty on him to tell prosecuting authorities, as the case is, how to run their case if you wish. He cannot be held accountable for the doings of those who are about to prosecute him as a potential result.

I believe this is very consistent with our very system ... basic system of law, whereby the accused always benefits of the presumption of innocence, he has got the right to remain silent and so on and so forth and I would suggest to you that trying to make the accused accountable for information improperly

32

Plea in bar of trial

Defending Officer

Plea in bar of trial

placed in the synopsis would be totally inappropriate. The synopsis, a 27 page document, 27, I suggest to you that even if the accused had wanted to make a statement, if one for a moment accepted that it was open to the accused to make a statement to try to rectify the record, if you wish, it would have been a near impossible task.

I do not intend to get into all the details of the synopsis, how could I try to summarize a quarter inch thick document containing 27 pages. I will only draw your attention ... and those are only but a few, very few examples, of some information that I do consider either highly prejudicial and not relating to the charges or opinion as to character or for that matter many other elements in there that appear to be ... and I know I'm not asking you for a ruling in advance on admissibility, but that appear to be inadmissible evidence and I suggest to you that to ask a convening authority to make such an important decision as he has to make on the basis of such information is so wrong as to basically totally affecting the jurisdiction of the court, the very decision the convening authority has made.

One example, at page 26, paragraph 33, I will not read it publicly. It is within the **voir dire**. You have the document. It is only one example where the person, this particular witness there at paragraph 33 of the synopsis, page 26, is not listed in any annexes, is reporting a situation that is totally irrelevant to any of the charges because the name of that person is not listed in the annexes.

JUDGE ADVOCATE: Just to make sure that I follow you, the witness that appears at paragraph 33 is not listed in Annexes A or B?

DEFENDING OFFICER: That=s correct.

JUDGE ADVOCATE: So to make sure that I follow you. Okay.

33

Plea in bar of trial

Defending Officer

Plea in bar of trial

DEFENDING OFFICER: And of course that goes to the relevancy of course of that information being there. My submission is that it=s totally irrelevant because it=s not even a charge in relation to those alleged events by that witness. I=ll give you another example. Paragraph 5 of the synopsis at pages 3 and 4, the bottom of page 3, and I would invite you to the second paragraph of page 4, and the 5th paragraph of page 4.

JUDGE ADVOCATE: Which one? The fifth or the one below that?

DEFENDING OFFICER: One, two, three, four, five.

JUDGE ADVOCATE: So we=re in witness number 5.

DEFENDING OFFICER: That=s right, at page 4.

JUDGE ADVOCATE: Okay, we go to page 4.

DEFENDING OFFICER: And then within page 4 paragraphs 2 and 5, still in that witness.

JUDGE ADVOCATE: Two, five, okay, got you.

DEFENDING OFFICER: And as I said those are just examples, but those two paragraphs among other things and I will invite you later to read the whole thing ... are clearly irrelevant, inadmissible and that=s the sort of information that was presented to the convening authority. And I, again, re-emphasize, I=m not asking for rulings on admissibility of evidence. That comes in the future. We=ll take that as it comes and I=m sure that I will be ready to make objection at that time if there is any proposed evidence that I find is not admissible. The purpose of my comments here are to demonstrate that back when the convening authority had made that decision, that so

34

Plea in bar of trial

Defending Officer

Plea in bar of trial

important decision, he made it on the basis on that sort of information that I=m referring to.

Another example, and that will be the last ... excuse me, I have a problem with the number here. Witness number 7 which starts at page 5, more particularly at page 6, and I say more particularly because again there is ... para 2 of page 6, basically relates an incident which may have amounted to the commission of an offence but by a third party and nowhere is there anything in there, that particular paragraph 2 that I=m referring to, that ties those actions to Lieutenant-Commander Marsaw, totally irrelevant, prejudicial, it has no place in that synopsis and I say that with all respect to the maker of the document. I find this document is absolutely filled with information that amounts to opinions, facts that are prejudicial but yet not relating to charges, facts and opinions that in my opinion would not be admissible in a court of law, speculation on the part of witnesses.

And I invite you, Mr Judge Advocate, and I urge you to read all 27 pages of that synopsis. I submit to you that you should agree. You will find that information that I=m referring to be speculation on the part of a witness ... I cannot give you the exact reference. I=m sure it will strike you when you see it ... that "I did not see Lieutenant-Commander Marsaw do something but it must be him who did it because he was close." You will see that as related by one of the witnesses, mere speculation. I submit to you that this whole document of 27 pages is filled with this and whilst I appreciate that you have in the **Lalonde** case made comments about the use of a synopsis, use of other information that the convening authority may consult which of course has no application in this case.

As you will recall in the **Lalonde** case it was the defence position that the prejudicial information was contained in the military police report and that it still affected the legality. In this case the prejudi-

35

Plea in bar of trial

Prosecutor

Rebuttal

cial information is contained in the very synopsis which must be prepared in accordance with Chapter 109, article 109.02 especially. So, and despite, Mr Judge Advocate, the comments that you may have made as to the use of a synopsis in the **Lalonde** case, I suggest to you that the content of this particular synopsis is so outrageous as to rendering the decision ... eventual decision of the convening authority illegal, flawed, for non-compliance with Chapter 109.

My proposition to you, Mr Judge Advocate, is that as you have ruled in **Lalonde**, even if one contended that the synopsis may be used in such and such a manner and possibly that the requirement of not having opinions and all that, especially designed, and I believe it was your position in **Lalonde**, the requirement of not having prejudicial information or opinion in the synopsis was mainly to serve the purpose of a potential summary trial. I believe that was your position then. I suggest to you, Mr Judge Advocate, and with all respect, that even adopting that position, this synopsis here, and I again urge you to read it carefully. This synopsis is so outrageous as to have constituted a fatal flaw in the convening process. No convening authority could be expected to act reasonably or make a reasonable decision on the basis of such of synopsis. And that=s the distinction I try to make or present to you here today between **Lalonde** and this case is that despite the **Lalonde** decision there must be a line, a cut off line somewhere and I think that the line has been well exceeded by this synopsis.

For those reasons, I would submit to you the court has been illegally convened and this court, or you Mr Judge Advocate, should terminate proceedings on these matters.

PROSECUTOR: Before I begin, Mr Judge Advocate, with your permission I would like to give you and my friend, written submissions of the argument I will be making. I give them to you for your assistance. Perhaps that will be helpful.

36

Plea in bar of trial

Prosecutor

Rebuttal

JUDGE ADVOCATE: Comments?

DEFENDING OFFICER: I believe I heard my learned friend saying that he wanted to submit to me a written submission.

PROSECUTOR: They are simply written submissions of what I will be arguing and for that reason I would like to present it to the court.

DEFENDING OFFICER: I have no objection to that.

JUDGE ADVOCATE: Why don=t you show them to the defence?

DEFENDING OFFICER: I have no objection. I will consult it and see whatever it means for me in terms of rebuttal. I will have only one question so that I can follow my learned friend there. Does he intend to just go along in that order presented there or is that the only arguments to be made or will there be additional stuff that I should pay attention to? That=s what I trying to determine here.

PROSECUTOR: I=ll be basically going along paragraph by paragraph making the points that are contained in the written argument. There won=t be new legal argument that haven=t been incorporated to the written text. As I go along what I=ll try to do as best as I can to incorporate some of the arguments that my friend just made. But apart from that it will be basically sticking to the written text and making different comments as we go along in regard to it.

JUDGE ADVOCATE: Go ahead.

PROSECUTOR: Mr Judge Advocate, the thrust of the defence argument is that the synopsis relating to the accused contains information found within article 109.02(2)(i) and (ii), and because there is information that falls within the ambit of that provision, the

37

Plea in bar of trial

Prosecutor

Rebuttal

entire convening process if fundamentally flawed. It is the position of the prosecution that there is absolutely no legal basis whatsoever to support that argument. There is no legal basis that says just because there is information that may be a type found within those subsections of that article that the entire convening process is flawed.

First of all and for the record, Mr Judge Advocate, it's the position of the prosecution that the information in the synopsis does not fall within the description of that information cited in 109.02(2)(b)(i) and (ii). All the information in the synopsis is relevant to the charges that have been laid. It does not contain opinion of the accused's character. The information in the synopsis does relate to the accused's leadership style, the actions of the accused, the words spoken by the accused, the inaction of the accused as well, but does not relate to the character of the accused.

It is his leadership style, his conduct and his words that are on trial. He is charged with disgraceful conduct, ill-treatment of members of his crew, conduct to the prejudice of good order and discipline.

By the very nature of those charges there will be evidence laid concerning his leadership style, his conduct, his actions, his inactions to certain situations as well as the words that he spoke. So while there is information in the synopsis about his behaviour, his language, etc., that he uses, that doesn't mean that the evidence relates to his character.

The bulk of the evidence that is contained in the ... that the defence counsel has cited that they claim does fall within the cited paragraph of 109 sub (2) from the prosecution position is evidence which helps define the Canadian Forces standards as it relates to the conduct to the prejudice of good order and discipline. There is evidence there which can be admitted as similar fact evidence. There is evidence which again refers to leadership style but not charac-

38

Plea in bar of trial

Prosecutor

Rebuttal

ter. There is evidence in there which relates to his verbal abuse and public rebuking and to refer to QR&O 19.13 whether that style of leadership is absolutely necessary for the preservation of discipline ...

JUDGE ADVOCATE: What was the last article you quoted?

PROSECUTOR: 19.13.

JUDGE ADVOCATE: Yes.

PROSECUTOR: Concerning rebuking subordinates in the presence of others. There is also evidence in the synopsis which demonstrates the prejudicial effect of his conduct on good order and discipline. There is also evidence there which goes to the accused=s intent. There is also evidence which goes to his knowledge. To accept defence counsel=s arguments that the information only goes to character evidence and that it is not relevant is really asking you to make those decisions and rulings on evidence before you=ve heard any argument from either counsel and what the test is for ill-treatment, for disgraceful conduct and for the conduct of good order and discipline, all charges that he faces, two of which are not really before a court, have not been given a lot of judicial consideration.

So how do we know what the tests are? How do you know what our arguments are for those tests at this point in time, and consequently how would you know what is and isn=t relevant? Further you don=t have before you evidentiary foundation required to admit similar fact evidence but some of the evidence cited by my friend claims that it=s character evidence rather than similar fact evidence. The defence is really asking you to prematurely rule on the admissibility of evidence.

Another point relating to the construction of QR&O 109.02(2), the emphasis on the word "should" rather than "must". I have listened to my friend=s

39

Plea in bar of trial

Prosecutor

Rebuttal

argument. I certainly don't have any difficulties with his legal argument about the construction of statutes when there is a French and an English translation. I, myself, don't speak French so I can't follow all of his argument but I certainly leave it up to you who are completely fluent in both languages and I will leave that point for the court to consider. Does 109.02(2) which uses the word "should" mean that there can't absolutely never be any evidence in the synopsis that might reflect on character or facts prejudicial not relevant? Our position right now is that that's not the case but I'll leave it in your hands, Mr Judge Advocate.

For the sake of argument, assuming that there are bits of information in the synopsis which do fall within subsection (b)(i) and (ii), that necessarily does not flaw the construction of the synopsis in light of the word "should" but also in light of article 109.02(5) which reads:

"Notwithstanding that a synopsis has not been prepared in accordance with paragraph (2), it shall not, for that reason alone, affect the legality of the decision by a convening authority to convene a court martial in respect of the charge."

So if a synopsis is not drafted in accordance with subsection (2) it does not fatally flaw the convening process in light of subparagraph (5). This is a point my friend has failed to address. I note that the words in 109.02(5) use "**for that reason alone**", there therefore must be some other evidence apart from that contained in the synopsis which allows defence counsel to argue that the whole process has been flawed. It's another distinct point. Defence counsel, as we see in the exhibit that was introduced as evidence, the response to the synopsis, both civil and military defence

40

Plea in bar of trial

Prosecutor

Rebuttal

counsel advised the accused not to respond to the synopsis. In the response to the synopsis it says:

"... I personally wish to provide you with a detailed argument which could assist you in determining the most suitable disposition of those charges. I am, however, advised most strongly by both civil and military counsel that to do so would not be appropriate with regard to the possibility of having to defend myself at some point in the future."

So it appears that defence counsel has strongly advised their client not to say anything about the synopsis although they were fully aware at the time before it was given to the convening authority of its contents. Having advised him not to say anything they cannot now be allowed to be passing up that opportunity and then now rely on their inaction and then retroactively enter the convening process by springing from the bushes now arguing that the whole system is fatally flawed.

I appreciate my friend's comments that his client has the right to remain silent but if the synopsis was so outrageous and so fatally flawed, why did the accused's counsel then make the articulate argument to the convening authority that he has just done now. He fully knew the contents of the synopsis. He understands the process that is about to be carried out. He chooses to remain silent only to now argue that the synopsis is now in front of the convening authority improperly and the whole system is flawed.

One of the application of defence counsel argument is that if there is any information at all in the synopsis which may go to character or which may not be relevant but prejudicial to facts other than those that bear directly on the charge the whole system is automatically flawed. And again I stress not only is there absolutely no legal basis for that argument but there is no evidence to support his proposition in the

41

Plea in bar of trial

Prosecutor

Rebuttal

first place. It=s my respectful submission that defence counsel has misconceived not only the legal nature of the decision that has been made by the convening authority and convened a court martial but he has also misconceived the legal nature of the role of the convening authority as well.

In the Court Martial Appeal Court decision 8th of December 1993 of **R. v. Lunn**, it=s noted at page 7 that:

"Persons making decisions relative to the laying and prosecution of charges must act according to the law but the law does not require their independence or impartiality.

What is required of them is that they not act in a manner that may be seen, by a reasonable and informed person, as drawing the administration of justice into disrepute."

The Court Martial Appeal Court in that decision equated the role of the convening authority with that of the Attorney-General. This is confirmed when they have relied on the reference of **R. v. Balderstone** (1983) 8 C.C.C., (3d) Manitoba Court of Appeal. In **Balderstone**, the Attorney-General was referred to as the Chief Accusatorial Officer whose role did not require impartiality and independence. The thrust of the defence argument is somehow the convening authority has to be pure, has to be completely neutral and completely impartial. The case law says otherwise. He has been equated with the role of the Attorney-General.

The QR&O provisions allow him, if he sees fit, under 109.05 subparagraph (1)(a) ... 109.05(1)(a) to seek further information than that contained in the synopsis in such a manner as he sees fit.

42

Plea in bar of trial

Prosecutor

Rebuttal

So the convening authority, who is similar to the role of the Attorney-General, who does not have any duty to remain independent and impartial can, not only look at the synopsis but he can look at any other information that seems fit. And in article 111.05 Note B states that:

"If the convening authority considers that information not contained in the synopsis is necessary before deciding whether to convene a court martial, the convening authority may seek further information."

So clearly the convening authority legally can look at other information not contained in the synopsis. He can refer to a variety of sources which I guess could include military police reports and that takes us to the recent General Court Martial of **Lalonde**, where defence counsel did make a plea but because prior to deciding to convene a court or not, the convening authority had looked at a military police report that they argued did contain the information that was prejudicial but not relevant to the charges and also contained opinion of the character. The issue in that case was whether or not that fatally flawed the entire convening process.

Based on the reasoning of **Lalonde** as well as QR&O 109.02(5), it is the position of the prosecution that regardless of what is in the synopsis is not determinative of the issue of whether the convening process has been fatally flawed or not. The test and the purpose of the exercise is not to pick out a needle in a hay stack that may or may not be character evidence or may not be relevant to the facts in issue. The test cited and adopted in the **Lalonde** decision is whether or not a reasonable informed person could perceive the consideration of the synopsis by a convening authority has drawn the administration of justice into disrepute, and that's the test.

43

Plea in bar of trial

Prosecutor

Rebuttal

As in **Lalonde** it cannot be shown in this case that the convening authority was unable to discharge his duties and judicial process with the quiet and impartial objectivity and free from any extraneous pressure as contemplated in the decision of Court Martial Appeal Court decision of **Nye**. There is absolutely no evidence that the administration of justice has been drawn into disrepute and there is absolutely no evidence that the convening authority was ever unable to discharge his duties with the quiet and impartial objectivity that=s legally required.

The information my friend has cited for your consideration in the synopsis I would submit falls squarely within the Rules of Evidence in admissibility. With regard to the witness at paragraph 5 of the synopsis, why can he ... in that comment as to whether he was or wasn=t intoxicated? He is talking about himself. He is not talking about everybody else. With regard to the second paragraph of witness number 5 on page 4, a reference to the synopsis will show that this individual cited in that paragraph was having similar treatment done to him as the victim, was outlined in charges one and two at the same time, at the same place, by the same people. Clearly, that=s relevant.

The information in the last paragraph for witness number 5 talks about experiences when there are other commanding officers. The court needs to know what standard of conduct is acceptable in certain situations and to determine whether or not it=s prejudicial to the good order and discipline. Paragraph 33 or witness number 33, is clearly a witness to a number of bits of information that are relevant to the charges. He was a witness and, in fact, a few similar fact evidence can also be argued to be a victim as well.

Paragraph 7 or witness number 7, second paragraph down on page 6, does this go to knowledge and intent of the accused? The accused=s intent is charged with ill-treating of his crew, his evidence showing

44

Plea in bar of trial

Prosecutor

Rebuttal

condemnation of the same type of treatment done by others, evidence of knowledge and intent. The prosecution would submit so.

So in conclusion, Mr Judge Advocate, 109.02(5) clearly states that the construction of the synopsis is not fatal to the convening process. The decisions of **Lalonde** and supported by **Lunn** clearly defined what the role of the convening authority is. It doesn't have to be independent and impartial. And the real test in determining whether or not the convening process is fatally flawed is whether or not a reasonable person would consider that the administration of justice has been brought into disrepute. And as in **Lalonde** whether there is absolutely no evidence to support that allegation, there is none here as well. Thank you.

JUDGE ADVOCATE: Before you sit down, I want to ask you a question. Is it your position that the synopsis contains evidence that supports all the charges on Exhibit "A"?

PROSECUTOR: Yes.

JUDGE ADVOCATE: Thank you. Would you answer the same question?

DEFENDING OFFICER: ...

JUDGE ADVOCATE: It may contain more but does it contain at least enough evidence to support the charges?

DEFENDING OFFICER: I believe so.

JUDGE ADVOCATE: Okay. Do you have any reply?

DEFENDING OFFICER: Yes, and I will try to be brief. Regarding the prosecution's address that basically the defence has ambushed this whole process, I'll

Defending Officer

Reply

only submit that for the same reason the accused has the right to remain silent, I think it's unfair and inappropriate to say that the defending officer for example has got to go and help prosecutorial authorities to bring the matter up in a proper fashion. I think that it would be a clear conflict of interest situation. So it surely cannot be said that accused nor defence counsel had a duty to come up and say, "Hmm, Mr Prosecutor or Mr Possible Prosecutor or Mr Advisor, are you sure that you're doing this right?"

I don't think it can be said that such a duty exists on the part of either the accused or his counsel.

My learned friend has referred to 109.02(5) to the effect that:

"Notwithstanding that a synopsis has not been prepared in accordance with paragraph (2), it shall not, for that reason alone, affect the legality of the decision ... "

This clearly has to refer to forms more than actual content, or even if one was prepared to adopt that yes maybe if there is a minor degression or breach of for example the rule against opinion or character, one might say, "Well, this being minor and for that reason alone it would not affect." But when we are facing a situation like the present one here where the synopsis is outrageously filled with information that falls within (2)(b) of that same article I would say that this could not hold.

I would suggest that such a regulation providing that legality of decision is not affected by a mere breach to this article cannot be held and enforced against an accused when the actual breach was of such a serious nature as it is in this case. I suggest to you that one cannot by mere regulation take away rights that exist in favour of the accused and to the extent this subparagraph (5) of that article would purport to

Defending Officer

Reply

do that I would say that this paragraph should be disregarded altogether.

The prosecution has referred in his submission as he had earlier on mentioned about a ruling, that I'm asking about a ruling on your part in advance. Simply, I reiterate that it is not the case. I'm asking you to look back and see what was there when the convening authority made the decision. Of course, with your legal background you will look at the synopsis and you will appreciate it for what it is and that's when of course you'll have to make the next decision as to whether this was so bad as to result in a fatal flaw.

My learned friend has referred to **Lunn** and **Balderstone**. The defence does not suggest that there was a lack of independence and impartiality in this affair. The convening authority, I agree with the decision in **Lunn**, it says, "Well, the law does not require the convening authority to be independent and impartial." That is for the tribunal, I suppose, and they have commented on that. My argument has nothing to do with impartiality and independence. It's got to do with reasonableness of a decision on the basis of such flawed information that is so clearly a) in contravention to article 109.02; and, (2) so grossly prejudicial as to preventing such a reasonable decision despite the good faith of the decision maker.

My last comment, Mr Judge Advocate, will be to urge you again to read the 27 pages of it. I will not ... I could have given you many, many more examples. For sake of economy of time and I would say as well that I would not necessarily be comfortable to repeat some of this information here now. That's why I won't do it. But I urge you to read it carefully and come to the conclusion, that's what I invite you, that on the basis of such information and despite your previous decision in **Lalonde**, the reasonableness of this decision and the administration into disrepute is present and I ask you to rule in favour of the defence.

47

Plea in bar of trial

Defending Officer

Reply

JUDGE ADVOCATE: One last question, I guess, to either one of you which can confirm, the application under 109.04 by the commanding officer, Colonel Eady, the application ... I'm looking at 109.04(3)(b):

"The commanding officer shall, where applicable, include in a letter applying for disposal by higher authority:

...

(b) a recommendation as to whether the accused should be tried by a superior commander or by court martial;"

Now, Chapter 110 on **SUMMARY TRIALS BY SUPERIOR COMMANDERS** indicates that pursuant to section 164(1) of the **National Defence Act** a superior commander has jurisdiction to in his discretion try summarily an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant. Now in view of the rank of the accused, lieutenant-commander, he would have been a superior commander within his rights to try Lieutenant-Commander Marsaw summarily if he had wanted to.

Now my question is that, under 109.04, and that=s in view of the comment by the defence at the very beginning of your motion. There were two scenarios in 109.02 whether the synopsis was to be used in view of a court martial or to be used at a summary trial, my question then is, in his letter, did Colonel Eady ask for a court martial or did he recommend for a summary trial?

PROSECUTOR: Surely after that, Mr Judge Advocate, another commanding officer took the place of Lieutenant-Commander Marsaw ...

48

Plea in bar of trial

Defending Officer

Reply

JUDGE ADVOCATE: Well, who ever was the commanding officer who replied, the convening authority.

PROSECUTOR: There was a recommendation that charges be dealt with by court martial.

JUDGE ADVOCATE: Okay. Do you agree with that? That=s part of the record, I suppose.

DEFENDING OFFICER: Yes, I don=t recall having seen that document but I=ll take my learned friend=s word for it.

JUDGE ADVOCATE: Okay. Thank you very much. The court is closed to consider the plea in bar of trial. It=s noon. I won=t be back before probably 2 o=clock.

AT 1208 HOURS, 6 DECEMBER 1994, THE COURT CLOSES TO DETERMINE DECISION.

AT 1428 HOURS, 6 DECEMBER 1994, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: Thank you. Be seated please. The defence pleads in bar of trial that the court has no jurisdiction to try the accused because the process outlined in Chapter 109 was not followed by the commanding officer and the convening authority. Mainly, he argues that the rule in QR&O article 109.02 was not followed and that the synopsis that was forwarded to higher authority under article 109.04 was part of the application package for a court martial. The court martial contained the material which was either or both opinions as to the character of the accused and facts prejudicial to the accused but not bearing directly on a charge against him.

Chapter 109 provides that when a person is charged the commanding officer must apply for the disposal of charges to higher authority unless the

Judge Advocate

Decision

charge was dismissed, a finding was pronounced or the individual was tried summarily under Chapter 108. I understand that neither of these apply to the accused in this case.

The synopsis was therefore prepared and together with the charge sheet and the other documents listed in article 109.04, the synopsis was forwarded to the higher authority with the commanding officer's letter of application recommending a trial by court martial. In other words, there was no question here that the synopsis would ever be used in lieu of calling the witnesses as is possible with the agreement of the accused at a summary trial before a superior commander pursuant to article 109.03 paragraph (5).

In accordance with 109.02 subparagraph (2) such a synopsis should not have contained opinions as to the character of the accused or facts prejudicial to the accused other than the facts that would bear directly on the charge or charges. The defence suggests that the French version differs from the English version in that the prohibition contained in the French version is stronger than the English version and that the most favourable version ought to be used for the benefit of the accused. On that last point while the court takes no exception to the fact that the most favourable version ought to be used when two versions in each official language are at variance, a word like the word "doit" which essentially means shall ought not be looked at in a vacuum and without considering the purpose of the regulation.

In view of paragraph (5) of 109.02 which provides that a synopsis that is not prepared in accordance with paragraph (2) shall not affect the legality of the decision to convene a court martial, it appears reasonable to conclude that the author of the regulation could not have intended that "should" that is used in the English version be construed as meaning "shall", and that any mistake in the synopsis be fatal to the process under (2) and not be under (5).

Judge Advocate

Decision

Incidentally, Mr Defending Officer, I recommend the reading of the latest version of article 109.02 which came into effect less than a week or so ago which in French now refers to the word "devrait" instead of the word "doit". Although, admittedly, such new regulation was not in force at the time the synopsis, which is marked "VD1", was prepared, in my view, however, it is a serious indication as to how the regulation ought to be interpreted.

Be that as it may, and that=s why I guess it took me so long, as requested by the defence, I took the time to read the synopsis from beginning to end with a view to determining whether there were items in there that could be described as being direct or indirect references to opinions as to the character of the accused or to facts that did not bear directly on the charges. By way of examples, speculations as the defence described the evidence of Lieutenant Marr could be considered as circumstantial evidence, evidence of an incidence of abuse of language which is not the object of a charge could be considered as similar fact evidence.

Without this constituting any form of ruling on the admissibility of evidence which as indicated by the prosecution, I as judge advocate, have yet to listen to that evidence and to the representations that will undoubtedly be made by the two parties on their admissibility, I found nothing in the synopsis which could fall exclusively within what is described in 109.02 paragraph (2) subparagraph (b), sub subparagraph (i) and (ii) and therefore be clearly and absolutely inadmissible evidence before the court during the trial. Character evidence, similar fact evidence, **res gestae** evidence, confession evidence, statement against interests are all manners of introducing evidence at a court martial under our Military Rules of Evidence.

Again, I want it to be abundantly clear that I do not rule on the admissibility of anything con-

Judge Advocate

Decision

tained in the synopsis at this time because things that are in the synopsis could very well after argument find themselves ruled inadmissible, but I am merely stating that I was unable to find in the synopsis which went to the convening authority anything which on the face of it would be outright inadmissible because of a lack of relevancy for example and therefore should not have found its way into "VD1".

I have re-read my ruling in the **Lalonde** case and the decision of the CMAC in the case of **Lunn** and although I am not required at this time, in view of my preceding remarks, I feel compelled nevertheless to state for the record and even where I was wrong in determining that the synopsis did not contain objectionable material I would nevertheless have found that no prejudice would have been suffered by the accused by the fact that the convening authority would have been made aware of that material. Indeed, it has been confirmed that there was enough material in the synopsis to support each and everyone of the charges bearing on Exhibit "A", the administration of justice would not be brought into disrepute by the fact that the commanding officer or the convening authority considered evidence in the synopsis or other extraneous sources such as boards of inquiry, summary investigations, or police investigation reports in making decisions to charge and to convene the court martial. In fact, such military authorities would be remiss in their duties in the disciplinary process if they did not consider all that was available to come to a reasonable and informed decision as required.

The plea in bar of trial of the accused is denied.

PLEA IN BAR OF TRIAL IS TERMINATED

Now you indicated that you had, and you=ve certainly given myself notice that you had, a second plea in bar of trial.

DEFENDING OFFICER: Yes, Mr Judge Advocate.

JUDGE ADVOCATE: Would you be so kind as to make your representations.

PLEA IN BAR OF TRIAL

DEFENDING OFFICER: Absolutely. The second plea in bar is directed at charges one and two on Exhibit "A" for lack of jurisdiction of this court to try those two offences and Major Mackay will address you further on this matter.

JUDGE ADVOCATE: Okay. So it=s in respect of charges one and two. Do you have evidence to call?

ASSISTANT DEFENDING OFFICER: I don=t have any evidence to call, Mr Judge Advocate.

JUDGE ADVOCATE: Do you have any evidence to call, Mr Prosecutor, or would you rather wait until we know a little bit?

ASSISTANT PROSECUTOR: I think we would prefer to wait, Mr Judge Advocate.

JUDGE ADVOCATE: Yes, maybe we should hear first what is the substance of the plea is and then we=ll see.

ASSISTANT DEFENDING OFFICER: Well, the substance of the plea, Mr Judge Advocate, is the court would have no jurisdiction under QR&O 112.24 because the argument is based on section 70 of the **National Defence Act** which prohibits the ... or bars the jurisdiction of the court on several offences and one found in section 70 is sexual assault. It is our submission that the Act described in the particulars, most certainly in charge number one, is not ... I=m not alleging that it is, I=m just saying it discloses an act in the nature of sexual assault and therefore this court would not have jurisdiction because of section 70.

53

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

JUDGE ADVOCATE: Okay, and you don=t have any evidence to call?

ASSISTANT DEFENDING OFFICER: No, Mr Judge Advocate, it will be strictly done on the evidence before the court right now.

JUDGE ADVOCATE: Okay. Do you have any evidence to call, Mr Prosecutor?

ASSISTANT PROSECUTOR: No, Mr Judge Advocate.

JUDGE ADVOCATE: Okay. May I hear you?

ASSISTANT DEFENDING OFFICER: Just a moment, please. I=m just getting a hard copy of the charge sheet. I will, primarily in the first part, deal strictly with charge one and in the later part address specific comments with respect of charge two.

Charge one reads under section 93 of the **National Defence Act**, with a statement of the offence being, "BEHAVED IN A DISGRACEFUL MANNER". The disgraceful behaviour is described in the particulars and is said to be:

"... did insert a cigar tube between the buttocks of ... Lieutenant(N) Kelk, ..."

I would like now to turn to section 70 of the **National Defence Act** which reads:

"A service tribunal shall not try any person charged with any of the following offences committed in Canada:

- (a) murder;
- (b) manslaughter;

54

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

- (c) **sexual assault;**
- (d) **sexual assault committed with a weapon or with threats to a third party or causing bodily harm;**
- (e) **aggravated sexual assault; or**
- (f) **an offence under sections 280 to 283 of the *Criminal Code*.",**

which mainly deal with abduction.

In this section, one of the salient points is the use of the word "shall". Under the interpretation section that we have in QR&O 106, it says that "may" shall be construed as being permissive and "shall" as being imperative. Section 11 of the **Interpretation Act** states the same thing. Therefore, when the word "shall" is used there is no discretionary power to be exercised. Also this section, section 70, makes use of the words "charged with". Now in some of the cases I've had the chance to review the prosecution argued in reply to a plea in bar that the accused is not charged with sexual assault as is the case here because the charge is in fact behaved in a disgraceful manner.

I will certainly have to disagree with such a position because it would be tantamount to saying that notwithstanding the prohibition in section 70 the tribunal would have jurisdiction just as long as it is called something else. This at the very least, I suggest, would be unethical. I'm not suggesting that it was done purposely but I'm suggesting that just thinking that we could call it something else and proceed would be unethical. So therefore in my submission there is a contrary or an intent in the legislature that would be contrary to that interpretation, and I would suggest that to find the legislative intent

55

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

behind section 70 we must first look at the French text of section 70 which states:

"Les tribunaux militaires n=ont pas compétence pour juger l=une des infractions suivantes commises au Canada: ...",

and the offences are listed. There is no reference in the French text of the accused being charged with. It simply states: **"Les tribunaux militaires n=ont pas compétence ..."**, military tribunals do not have jurisdiction over the offences.

Therefore, the prohibition in section 70, it is my submission, applies to the offence not what the individual is charged with. I have here some material that I have presented to the prosecution and I will submit to you, which is case law and certain section of Acts that I will be referring to throughout the course of my argument. I would refer you in that package towards the end, first chapter O-3.01 of the **Revised Statutes of Canada** (1985), an Act respecting the status and use of the official languages of Canada. I would like to refer you first to section 6 which states:

"All Acts of Parliament shall be enacted, printed and published in both official languages."

And further on to section 13:

"Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement, or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted,

56

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative."

So therefore there appears to be a possibility for different interpretations of section 70 of the **National Defence Act**. Another section of an Act that I gave you in the package is part of Chapter I-21 of the **Interpretation Act**. My intent there was to refer you first to section 10:

"The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."

And a little further down, section 12:

"Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

So therefore the interpretation to be given, the correct interpretation of the legislative enactment must be consistent with the purpose. As I said earlier the interpretation to the effect that a service tribunal would have jurisdiction to proceed just if we call it something else would be unethical and I submit would be contrary to the purpose. The correct interpretation, the one consistent with the purpose of the instrument, is that a service tribunal does not have jurisdiction over an offence of the nature of sexual assault.

57

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

As evidenced by the facts before the court even if the same facts were capable of supporting a finding that another offence of a different nature was also committed in the process, the prosecution may very well argue, Mr Judge Advocate, that there are in fact such offences and I do not disagree with this principle but it must be further restricted and scrutinized.

This very principle in fact was recognized by the Supreme Court in **Généreux** when the Supreme Court was discussing the necessity of a military judicial system. One example given there was that of two ordinary citizens one striking the other which amounts to assault. But when the court applied the same act, the striking, to the military context because of the military structure and chain of command, said that such an act may warrant a more severe punishment because it attacks the need for discipline which must be treated differently. But the reserved side of this principle is, is it always necessary? Now to try to answer this last question I intent to do a short analysis of the various offences that one can find under the Code of Service Discipline, and by all means I don=t intent this to be exhaustive but just necessary to understand the argument and the point I=m trying to make.

We can basically divide offences under the Military Code of Service Discipline into three general categories. The one which I would call the strictly military offences which are those offences enacted for the sole purpose of providing the military structure with the necessary tools to enforce discipline. And a good example of a strictly military offence is AWOL, absent without leave. It exists in the Code of Service Discipline. It doesn=t exist outside. And these offences, strictly military offences, do fall under certain limitations as all the other sections, one being under section 69, the three year limitation period and the other being under section 60 for the persons who fall subject to the Code of Service Discipline, under different circumstances, different persons will not fall under the Code of Service Discipline.

58

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

The second category I would call hybrid offences for a lack of a better term, and can be further divided, the same category, this way. The first, the civilian offences, incorporated by reference by way of section 130. These are the offences for instance of the **Criminal Code** that we imported to our own law, that we make our own law but are not the object of a specific offence under the Code of Service Discipline. The second kind of hybrid offences would be offences which exist in civilian criminal law but which are the object of a specific offence under the Code of Service Discipline. An example there, theft, theft exists in the **Criminal Code** but theft exists also in the Code of Service Discipline under section 114 which provides additional definitions.

But these offences, the hybrid offences, are also subject to a further restriction which is a judge made restriction, the military nexus, which adds on to the first time limitation, the second, a person subject to the Code and now we're dealing with military nexus. The court will have to decide whether it has jurisdiction because there is sufficient connection. The fact that the accused is a member of the Forces is not said to be sufficient for the court to have jurisdiction. There must be more than that and there is ample case law on this.

And the third sub-category of hybrid offences are offences which exist in civilian criminal law and are incorporated by reference but which could also take a different form under a specific offence, a different form of a specific offence under the Code of Service Discipline which is assault, basically is an example. Assault is striking a person or applying force without that person's consent but applied to the military it could take a different form. The act of assault could be ill-treatment of a subordinate or could be contemptuous behaviour or offering violence to a superior. But again these are all subject to military nexus.

59

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

And finally, the third category, are offences over which the military tribunals have no jurisdiction notwithstanding the fact that the act could give rise to a different offence under the Code of Service Discipline. Those offences, even if they have a clear military nexus have been shielded from the jurisdiction of the military disciplinary system, I submit, so as to ensure that the Act will be dealt with for what it is and not what the military authorities think it is.

This third category, I further submit, was purposely enacted, section 70, by the legislator in order to avoid the confusion which would arise from the military authorities being blinded by the need for discipline and going to the point where an act which could be part or form an hybrid defence could be considered more serious than what the law says it is. The point I'm trying to make here is if we don't shield that, what could happen is that murder could be called disgraceful conduct. But can the military authorities truly say that disgraceful conduct is more serious than murder, that disgraceful conduct is more serious than sexual assault or even abduction?

This, in fact, the practice of calling it or making it something that it is not could inherently lead to a fundamentally unfair trial since the accused so being charged would be deprived of available defences which impose of much higher burden of proof on the prosecution. For instance, murder and manslaughter, they are very technical but admitted defences for murder which require a proof of a specific intent. But if you charge murder under manslaughter or even disgraceful conduct, you prove the commission of the act. You don't even go to intent. But the murder, the death of somebody to the hand of another repulses naturally and will lead to the conclusion that it is disgraceful. We are still missing the higher standard of proof.

It is the defence's submission that the offence alleged in the charge or charge one falls in

60

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

the third category and that the particulars as drafted "... did insert a cigar tube between the buttocks of ..." reveal an offence in the nature of sexual assault.

A further indication of this legislative intent can be found in section 73 or rather the QR&O enacted in support of section 73 which is article 103.26. And that section which deals like I said with ... that article which deals with section 93, we have a Note:

"Offences involving indecency or unnatural conduct might be charged under this section but, as a general rule, should be charged under section 130 of the National Defence Act ..."

That is to say, the service offence should be the offence prescribed in the **Criminal Code**. As you mentioned earlier, in the earlier plea in bar, under article 1.095 the effects of notes. The notes are meant to be guidance to officers and non-commissioned members and have no force of law but they should not be deviated from without good reason. And, again, if I refer to 103.26 the note deals with indecency. There are definitions of what indecency is. There is even an offence under section 173 of the **Criminal Code**. But the act must be called for what it is in order for the court to have jurisdiction.

The question, therefore, Mr Judge Advocate, necessarily is, is the act alleged in charge one of the charge sheet which includes the particulars pursuant to QR&O 106.12 one in the nature of sexual assault? I put a lot of emphasis on the words "in the nature of", because as I am sure you know at this stage in the proceedings you're not to decide whether the accused did or did not commit a sexual assault. That will come to trial. The determination you are asked to make today is simply whether on the evidence before you

61

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

which is the charge sheet, the alleged act which is drafted there is one in the nature of sexual assault, and I submit that does not require a proof beyond a reasonable doubt.

I now address like I mentioned at the beginning a few comments about charge number two. First, I would like to submit that the comments I've just made in respect of charge one all apply to charge number two. Charge number two as drafted which in fact is alternate to the first charge and the first being an alternate to the second, there are no references to the act, just a charge under section 130:

"AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY ASSAULT, CONTRARY TO SECTION 266 OF THE CRIMINAL CODE".

And in the particulars it just says "... did commit an assault ...". But my submission is that the particulars contained in charge two refer to the same act as we find in the particulars of charge one and because there is no difference between the two and there is no evidence of a different act having been committed, charge number two cannot be said to be a lesser included offence to charge number one.

I would like to refer you to 106.015 of the QR&Os:

"MEANING OF 'ALTERNATIVE CHARGE=

Charges may be laid in the alternative where the allegations in the particulars are considered capable of supporting a finding of guilty

(a) of one of several offences, or

62

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

(b) of a particular offence but, failing proof of one or more elements of that offence, another offence ..."

I also direct your attention to Note A.

Note A:

"An alternative charge should not be used except in the following circumstances: ..."

The first circumstance is:

"... where an essential element of an offence is in doubt, but the remaining elements constitute conduct to the prejudice of good order and discipline ..."

The alternate charge here is not prejudice to the good order and discipline, is a charge under 130 for assault under the **Criminal Code**. The second one:

"... where a service offence is inherently a more serious form of conduct to the prejudice of good order and discipline ..."

As I mentioned earlier, under section 70 the interpretation which is consistent with the purpose is to prevent that the offences listed in section 70 be called something else under a service offence as in this case because it is more serious or deemed to be more serious. I don't see how disgraceful conduct can be said to be more serious than sexual assault. And finally:

63

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

"... where there is a doubt as to whether, in law, the particulars constitute one offence or another."

The only particulars we have refer to the insertion of the tube which I would submit raise a very graphic image as to the nature of the act. And if the prosecution was in fact able to adduce evidence of a commission of an act but with no reference to any sexual aspect, maybe it could be said to be a lesser included offence of assault, but we don't have that. The only evidence before the court is in the charge sheet. We have the same date. We have the same place and we have the same victim. I don't see anything in those particulars that could lead to believe that the act took place in different circumstances than what it is alleged in the first charge.

So basically my submission with respect to charge two, in absence of any further evidence, is that we're dealing with the same act but under a different statement of offence. Now, in the package I have submitted to you I would just like to refer to three cases basically. The first is that of the court martial of Warrant Officer Tamblyn. In that court martial the accused was charged with section 85, ill-treated a person who by reason of rank was subordinate to him, alternate to the second and the second alternate to the first, section 119, conduct to the prejudice to the good order and discipline, and basically the act alleged was "did perform cunnilingus." The court found that it was in fact a sexual offence and under section 70 it could not have jurisdiction even though he was charged with section 85 and section 119.

That decision was followed in the court martial of Master Corporal Aubut. Yes. Again, here the charges were that section 85 again, "**S=est conduit d=une façon méprisante à l=endroit d=un officier**" and section 129, "**Comportement préjudicial au bon ordre et à la discipline**". In that decision, the court couldn't

Assistant Prosecutor

Rebuttal

differentiate the facts from **Tamblyn** concluded that the act was in the nature of a sexual offence and terminated the proceedings.

And finally, the last case I submitted is that of **Chase** from the Supreme Court which was reported at (1987) 37 C.C.C., Canadian Criminal Cases, (3d) at page 97, which is basically a case in which there was an attempt to further define what constitutes sexual assault. We can find several references in that case giving (a) that the offence of sexual assault is one of general intent and that the test to be applied in determining whether the act constitutes sexual assault is an objective one in light of all the circumstances.

It also says that the intent of the accused is but one of the factors to be considered and one of the most prominent factor is whether there is a violation of the sexual integrity of the victim. It also says that the act to be considered sexual is not necessarily restricted to genitals and it is not restricted to male female contact. It applies equally to contacts between either two males or two females.

Based on that decision and based on the evidence that you have before you, the description of the act in charge one which I submit is the same act in charge two, the act we have is one in the nature of sexual assault and therefore the court would lack jurisdiction under section 70. I have finished, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR: Mr Judge Advocate, before beginning I have a number of cases and authorities that I will be referring to throughout the argument and if I could just read those into the record and provide you with copies.

JUDGE ADVOCATE: Yes.

Assistant Prosecutor

Rebuttal

ASSISTANT PROSECUTOR: First of all, an excerpt from the text book Driedger on the Construction of Statutes, (3d). We're providing you with pages 220 and 221. An extract of a transcript of the Disciplinary Court Martial of Warrant Degroot. That's D-E-G-R-O-O-T, held in Regina, Saskatchewan on the 7th and 8th days of May 1991. I have a copy of the Supreme Court of Canada decision in **Chase**, although you may already have it, Mr Judge Advocate, and again that is found at ... it's a 1987 decision at 37 C.C.C., (3d) page 97. The case of **Regina and C.J.**, a Newfoundland Court of Appeal case, (1990) found at 58 C.C.C. (3d) page 167. The case of **Regina and S.M.**, a court of Quebec case, (1989) found at 73 C.R., (3d) at page 60. The case of **Regina and V.T.**, a Supreme Court of Canada ...

JUDGE ADVOCATE: And?

ASSISTANT PROSECUTOR: **And V.T.**, victor, tango, Mr Judge Advocate, found at 71 C.C.C., (3d) page 32. The Supreme Court of Canada decision in **Regina and Power**, (1994) found at 89 C.C.C., (3d), page 1, and finally, Mr Judge Advocate, an extract from the transcript of the Disciplinary Court Martial of an Able Seaman Hamilton, held in Esquimalt, British Columbia, on the 16th day of May 1983. Copies of these have all been provided to my friend, Mr Judge Advocate.

Mr Judge Advocate, the defence has in effect argued that section 70(c) of the **National Defence Act** precludes this court's jurisdiction over charges numbers one and two as set out in Exhibit "A", the charge sheet. It's the prosecution's position that these charges are properly before the court on the basis of the following three arguments. First of all, the accused has not been charged with sexual assault and therefore section 70 of the **National Defence Act** has not been triggered. Secondly, the evidence before the court does not allow the court to reach any conclusion with respect to the nature or character of the alleged

Assistant Prosecutor

Rebuttal

acts. And finally, the Crown has a general discretion to determine what, if any charges, should be laid and the court will only interfere in the exercise of this discretion in the clearest of circumstances.

Mr Judge Advocate, section 70 of the **National Defence Act** states:

"A service tribunal shall not try any person charged with any of the following offences committed in Canada: ..."

And then goes on to (c) where it states "**sexual assault**". Now, Mr Judge Advocate, you'll note in looking at section 70 that it in no way suggests that a person shall not be tried with an offence that is in the nature of the sexual assault. It refers strictly to sexual assault and the commission of that offence. The wording in section 70 is such that in effect the accused must be charged with the offence and when the accused is charged with the offence a service tribunal does not have jurisdiction.

Now my friend has suggested that the wording of section 70 is somewhat different in French than it is in English and he has suggested that as a result of that the meaning is not the same and the court need not apply the rigorous task of being charged but need only look at the nature of the act and if it is somehow sexual that is enough to exclude the jurisdiction of the court.

The prosecution would refer you to the extract from **Driedger Statutes** and specifically to page 220 of that where the author discusses the meaning or the shared meaning rule. In effect, Mr Judge Advocate, if I could read you a short extract from that, it states the following:

Assistant Prosecutor

Rebuttal

"The basic rule governing the interpretation of bilingual legislation is known as the shared or common meaning rule. Where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless this meaning is for some reason unacceptable.

Because the versions of bilingual legislation express the same law, they ought to say the same thing; if they do not, an effort must be made to reconcile them. The best way to reconcile conflicting versions is to identify and adopt a meaning that is shared by both. This point was made by the British Columbia Court of Appeal in *R. v. O'Donnell*:"

Then he quotes shortly from that case and states:

" The words in both versions, of necessity, must be construed with the same meaning. So, if one version is clear and unambiguous and the other version has the same meaning as well as others, it follows that, when construing, the common meaning must be accepted."

Mr Judge Advocate, it is the prosecution's position that the common meaning between the French and English version of section 70 of the **National Defence Act** is that an individual charged with the offence shall not be tried by military tribunal. The French

Assistant Prosecutor

Rebuttal

version is somewhat less restrictive, however, it allows that interpretation. The English version does not allow any other interpretation other than where the charge has in fact been laid as a sexual assault.

Now, Mr Judge Advocate, if you would review Exhibit "A", you will note that the accused in this case has not been charged with a sexual assault. Charge number one charges the accused with having behaved in a disgraceful manner contrary to section 93 of the **National Defence Act**, and charge number two alleges the accused committed an assault contrary to section 130 of the **National Defence Act**.

As a result, Mr Judge Advocate, on the face of the charge sheet there is no charge of sexual assault. As a result, section 70 of the **National Defence Act** has not been triggered. In the Disciplinary Court Martial of Warrant Degroot, which I believe you're somewhat familiar with, a similar argument was raised by the defence in that case. The case involved two charges under section 129 of the **National Defence Act** and one charge of assault contrary to section 130 of the **National Defence Act**. The plea in bar relates to the assault charge. Evidence called during the plea indicated that the accused had poked the complainant in the ribs and lifted her up and he had been involved in some brief wrestling with her. In rejecting the plea the judge advocate stated the following at page 38 of the extract that you've been provided with, commencing at line 31, and it was stated:

"The particulars of the charge three as they appear on Exhibit 'A' the charge sheet refer to a common assault or assault simpliciter under section 266 of the *Criminal Code of Canada* and not a sexual assault under section 271. On that basis alone this court has jurisdiction over the accused."

Assistant Prosecutor

Rebuttal

The charge sheet in this case refers not to sexual assault but to common assault and conduct or behaving in a disgraceful manner. Mr Judge Advocate, on that basis alone the prosecution submits that this court does have jurisdiction.

Now, Mr Judge Advocate, the defence has suggested that the court has an obligation to do more than merely look at the charge as it is laid on the charge sheet and they suggested that in fact the court must review the particulars to determine if what has been charged is actually a sexual assault or in the words of my friend in the nature a sexual assault. The defence has further stated that because the particulars in charge number one refer to the insertion of a cigar tube between the buttocks of an officer that this charge on its face alleges sexual assault.

Mr Judge Advocate, the offence of sexual assault is set out in section 271 of the **Criminal Code** and as you're aware 271 does not define the offence. The offence is in fact defined in the case law and specifically in the case of **Regina v. Chase**, where the Supreme Court of Canada dealt with the issue. In **Chase**, Mr Justice McIntyre speaking on behalf of a unanimous court states at page 103 that the test to be used in determining whether or not a sexual assault has occurred is as follows:

The test to be applied in determining whether the impugned conduct as the requisite sexual nature is an objective one: >Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?=@

As a result of the test as set out in **Chase** then the context or circumstances of the act become

Assistant Prosecutor

Rebuttal

highly relevant in determining whether or not any given situation a sexual assault has or has not occurred. Mr Justice McIntyre therefore goes on at page 103 to identify a number of factors none of which he indicates are in and of themselves determinative of the issue but all of which he indicates are relevant and these factors are as follows:

- the part of the body touched;
- the nature of the contact;
- the situation in which the contact occurred;
- the words and gestures accompanying the act;
- threats and/or use of force;
- the intent or purpose of the assaulter; and
- finally, whether or not the act was carried out for purposes of sexual gratification.

The court in this case has no evidence before it as to the circumstances in which the alleged act occurred and, Mr Judge Advocate, I would ask you to contrast that with the situation in the two court martial cases the defence has referred to in support of this plea. Now I'll start with the **Tamblyn** decision or the **Tamblyn** case. In **Tamblyn** the charge sheet as indicated by defence counsel described what could only ... or set out or allege what could only be described as a sexual act as part of the particulars of the offence. The case had in fact been referred to the Crown prosecutor because the allegations against Warrant Officer Tamblyn were considered to constitute a sexual assault by military authorities at the time that it was reported to them; and thirdly, there was before

Assistant Prosecutor

Rebuttal

the court a detailed agreed statement of facts that clearly established the sexual nature of the alleged acts.

It is submitted that review of the transcript will show that most, if not all of the relevant factors set out in the **Chase** decision, were present. The complainant was a female and the accused ... the male accused contacted her genital area and her genital area was certainly involved in the allegation set out in the charge sheet. The offence occurred in private, in a private office with the door closed and locked and the act was clearly initiated for the purposes of sexual gratification as set out in the agreed statement of facts.

In the **Aubut** decision, the complainant was called as a witness on the plea in bar of trial. As a result of that the court had evidence before it that at the time the alleged contact occurred with the victim the victim was asleep, she was approached by the accused and the accused spoke words to the effect that he just wanted to touch her and then he touched her right breast. The evidence of the complainant in this particular situation was uncontested.

Again, it is submitted that most if not all the relevant factors allowed the court, in the **Aubut** case, to objectively find that a sexual assault had occurred. The allegations again involved a male touching a female breast without the female's consent while she was in bed and, presumably, they were alone since the charge sheet indicates that they were in the duty room. The accused spoke words just prior to touching the victim to establish both his intention and purpose and which supported to the conclusion that the act had been committed for purposes of sexual gratification.

Again, the criteria set out in **Chase** were objectively satisfied, it is submitted, in the **Aubut** decision. I sort of stand to be corrected in this area but defence counsel indicated that in the **Aubut** deci-

Assistant Prosecutor

Rebuttal

sion there was not a finding of sexual assault but the court in fact found that the act was in the nature of a sexual assault. That=s certainly not my impression in looking at the decision in **Aubut**.

Now, Mr Judge Advocate, given the decisions in **Tamblyn** and **Aubut** I would ask you to contrast them with what you have before you in this particular circumstance. You have particulars on a charge sheet which allege that a cigar tube was placed between a victim=s buttocks. The particulars allege that the offence occurred on board HMCS OJIBWA, a Canadian warship in effect, but we have no other evidence as to whether or not the act occurred in public or in private. We just know it occurred on OJIBWA. We have no evidence as to whether or not any words or gestures accompanied the act. We don=t know if any threats were made or force was used. We don=t know of the intent or purpose of the accused, although it is clearly the Crown=s position that this was not done for any sexual purpose. And we have no evidence before us to establish whether or not the act was carried out for purposes of sexual gratification although, again, it is the Crown=s position that this was not the case.

In short then there is no evidence that will allow the court to assess all of the circumstances to determine whether or not the alleged act as set out in the particulars amounts to a sexual assault as defined by the Supreme Court of Canada in **Chase**. The defence appears to be of the view that because the buttocks of the alleged victim were involved this in and of itself is enough to establish a sexual assault. The prosecution submits that the mere fact of the certain portion of the body was touched or involved does not in and of itself support a conclusion that a sexual assault has occurred.

To reach such a conclusion would be inconsistent with the **Chase** decision, and this is clearly demonstrated by two cases, one out of Newfoundland and one out of Quebec. The Newfoundland case is **R. v. C.J.**

Assistant Prosecutor

Rebuttal

in which it had been alleged that the accused had fondled the breast and genital area of his stepdaughter. The accused, while not denying that the alleged acts had occurred, argued that they occurred in the context of tickling and play wresting, an activity which was described as skylarking in the decision.

These activities occurred in the presence of the mother and had been engaged in since the complainant's early childhood. The complainant was, I believe, 16 years of age at the time of the alleged acts that were charged. The Newfoundland Court of Appeal upheld the acquittal of the accused on the basis that in the circumstances the motivation of the accused was highly relevant and that in effect the acts complained of were not sexual assault but rather incidental to the long practice skylarking. Thus the court considered all of the circumstances and did not focus or reach a decision based solely on the facts ... or solely on the question on the part of the body that was involved in the touching.

A similar result was reached in the Quebec case of **R. v. S.M.**, in which it was held that the mother did not commit a sexual assault by kissing the genital area of a four year old daughter. Again, in light of all the circumstances, excluding ... or not excluding but even though the genital area was involved in the contact the court objectively found there was no sexual assault.

The prosecution therefore submits that there is insufficient evidence before the court that will allow it to find that the act alleged in charge numbers one and two is a sexual assault. The test as set out in **Chase** simply cannot be satisfied on the basis of the evidence before the court and the prosecution would go further and indicate that there is not even enough evidence for you to determine that the act described in charge numbers one and two, specifically charge number one, is even of a sexual nature. Again, the **Chase** test simply cannot be satisfied in this case.

Assistant Prosecutor

Rebuttal

Now, Mr Judge Advocate, should you be of the opinion that a sexual assault may have occurred here the prosecution would submit that a particular factual situation may result in the foundation for more than one charge and in order to deal with this situation the Crown is in fact given the discretion which in effect allows it to determine whether or not charges will be laid in a particular circumstance and if so what charge is most appropriate.

The prosecutorial discretion is exercised by the Attorney-General and in turn the Crown prosecutor in a civilian criminal system and it is submitted by the commanding officer and possibly the convening authority in the military justice system. The principle of prosecutorial discretion in the criminal justice system was canvassed and affirmed by Madam Justice L=Heureux-Dubé speaking on behalf of the unanimous Supreme Court of Canada in the case of **R. v. V.T.**

This case involved a charge under the **Young Offender Act** and the issue was whether or not a youth court had the jurisdiction to dismiss a charge because of its minor nature even though the Crown in exercising its discretion had chosen to proceed with it. Madam Justice L=Heureux-Dubé discusses in detail the question of prosecutorial discretion at pages 38 through 43 of the case and at page 38 she states the following:

AThere is no doubt that the Crown acting through the Attorney-General, and in turn through his or her prosecutors, has a wide amount of discretion in the carriage of criminal cases. Our own court has recognized the principle numerous times and I would cite, as an example, the words of Fauteux C.J.C. in *Smythe v. The Queen* ...@

75

Plea in bar of trial

Assistant Prosecutor

Rebuttal

And it then goes on to give a cite and the quote is as follows:

A>Obviously the manner in which the Attorney-General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable, but that again is foreign to the determination of the question now under consideration. Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power. The following statements made in *R. v. Court of the Sessions of the Peace ...* by Montgomery, J., with the concurrence of Tremblay, C.J.Q., and Pratte, J., are to the point and I adopt them.

I cannot conceive of a system of enforcing the law where someone in authority is not called upon to decide whether or not a person should be prosecuted for an 'alleged offence'. Inevitably there will be cases where one man is prosecuted while another man, perhaps equally guilty, goes free. A single act, or series of acts, may render a person liable to prosecution in more than one charge, and someone must decide what charges are to be laid.=@

Assistant Prosecutor

Rebuttal

And, Mr Judge Advocate, I would like then to refer you to page 40 in another short quote about three quarters of the way down the page. It is stated:

A It is important to understand the rationale for this judicial deference to the prosecutor=s discretion. In this regard, the reasons of Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*, are instructive:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.@

Madam Justice L=Heureux-Dubé then goes on to state that this prosecutorial discretion is not absolute. A court will ... but a court will only interfere with the exercise of the discretion in the clearest of cases where there has been a violation of the principles of fundamental justice or an abuse of a court process. Mr Judge Advocate, the prosecution would submit that if this restriction on prosecutorial discretion that will prevent the abuses that were suggested by my friend in his argument, for example, where someone commits a murder and is in fact charged with disgraceful conduct. In other words, if the gravamen

Assistant Prosecutor

Rebuttal

of the offence is such that it is clearly excluded under section 70 of the **National Defence Act** and there is evidence before the court to establish that, then the prosecution would submit the court in accordance with the decision of the Supreme Court of Canada could exercise its discretion and refuse to hear the case. But again, that only exists in the clearest of cases.

The Supreme Court of Canada recently dealt with the question of discretion again in the case of **R. v. Power**. In the **Power** case, again it=s Madam Justice L=Heureux-Dubé that=s speaking, and in this case she is speaking for the majority of the court and deals with the question of discretion at pages 13 though 20 of the decision. And she deals in a little more detail in this particular decision with the reluctance of the courts to interfere with prosecutorial discretion. She states the following at page 15, and this is the last paragraph or the second last paragraph on page 15 is where it begins:

A That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case-law. They have been so as a matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review.

**In R. V. Balderstone ...
Monnin C.J.M. wrote, at p. 539:**

The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial offi-

Assistant Prosecutor

Rebuttal

cers lay information or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General -- barring flagrant impropriety -- he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.@

Now, Mr Judge Advocate, the defence has not suggested nor have they provided any evidence to support an argument that there has been a violation of the principles of fundamental justice or an abuse of the court=s process. Nor has the prosecution, it is submitted, acted in any manner that can be characterized as unethical in this particular situation. The prosecution reviewed the evidence that it has and made a **bona fide** decision based on the evidence to lay the charge that it felt could be substantiated with the evidence that it had before it. And there was no decision to lay a charge in an effort to avoid section 70 of the **National Defence Act**.

The CO in making that decision made that decision on the basis of the evidence he had. He did not make it on the basis of any statutory restriction on the powers of any military tribunal. I would have submitted that the defence is putting forth an argument that if successful would have the effect of eliminating the discretion of a CO and or a convening authority in any case where there is even a remote possibility that

Assistant Prosecutor

Rebuttal

the facts could support a charge of sexual assault and this was put forward by the defence in their argument, ASuch situations have to be referred downtown.@

Not only would such a task if adopted eliminates prosecutorial discretion, something which the Supreme Court of Canada has stated should not be done for both constitutional and policy reasons, it will unfairly impact upon the accuseds themselves, in that an accused will be forced as a matter of law to face a sexual assault charge even where the CO is of the opinion that such a charge is not warranted or supported by the evidence that he has.

The prosecution submits that the test being put forth by the defence is not correct. Rather the court must recognize and allow the exercise of prosecutorial discretion. This was done in the Disciplinary Court Martial of Able Seaman Hamilton. Again, Mr Judge Advocate, I believe you=re somewhat familiar with this particular decision. In this case the accused was charged with two offences under what was then section 119 of the **National Defence Act**. One charge involved placing the hand on the leg of a female member and the other involved caressing the buttocks of a female member in a Mess.

The defence argued that the court had no jurisdiction because the charges and the fact alleged a sexual assault. The defence called no evidence but argued the plea strictly on the basis of the wording in the charge sheet. In rejecting the motion the judge advocate stated the following at page 14 of the extract that you have before you and this commences at line 12 of page 14:

Assuming for one moment that the evidence to be heard at this trial could prove sexual assault by the accused, it does not necessarily follow, however, that such evidence could only support charges of sex-

Assistant Prosecutor

Rebuttal

ual assault. The conduct of the accused could well support other charges such as section 119 NDA, for example. In other words, it is a common practice or a common fact that the same set of circumstances give rise to more than one charge and it is in the discretion of the commanding officer to choose his way of proceeding against the accused. In this case the CO has elected to proceed under 119 for Conduct to the Prejudice of Good Order and Discipline.@

And in this case, Mr Judge Advocate, the CO has chosen to proceed under section 93 and section 130 of the **National Defence Act**. The bottom line then, Mr Judge Advocate, is that the defence itself has stated to the court that they are not arguing the particulars amount to a sexual assault. The defence only suggest that the particulars suggest conduct in the nature of a sexual assault. If defence doesn't even put forth an argument that the particulars meet the test as set out in **Chase** for a sexual assault or to constitute a sexual assault, how can the defence then ask you to find that you have no jurisdiction to hear this particular matter on the basis of section 70 of the **National Defence Act**.

It is submitted that this court has jurisdiction to try the offences set out in Exhibit AA@, charges number one and two. The accused is not being charged or tried for a sexual assault, he is being charged for offences which the Crown and the commanding officer upon reviewing all the evidence felt could and should be laid. Furthermore, the failure of the defence to call any evidence other than the charge sheet makes it impossible for the court to make any determination as to the circumstances surrounding the alleged act so that the court can determine whether or not the

Assistant Defending Officer

Reply

test in **Chase** has been met. The fact that the victim's buttock was involved does not in and of itself satisfy the **Chase** test as set out by the Supreme Court of Canada.

And finally, Mr Judge Advocate, the prosecution submits that to determine that the allegations contained in charges one and two amount to a sexual assault would be an interference with prosecutorial discretion something that should only be done, it is submitted, in the most clearest of cases. And this it is submitted is not one of those clear cases.

JUDGE ADVOCATE: Thank you.

ASSISTANT DEFENDING OFFICER: Very few short argument, Mr Judge Advocate.

This first argument, the prosecution alleges finally that the accused was not charged with and read only the two statements of the offence. Under QR&O 106.12 relating to charges it is specifically stated:

"Each charge in a charge sheet shall:

**(a) allege one offence only;
and**

**(b) be divided into two parts
as follows:**

**(i) a statement of the
offence ...",**

with which the accused is charged, and

**(ii) a statement of the
particulars of the act,
omission, conduct, disor-**

Assistant Defending Officer

Reply

**der or neglect constitut-
ing the offence.@**

So the two parts are inextricably attached one to the other when we're talking about "charged with", we must also include the particulars. In addition, there was a mention that there was no other evidence before this court. Well, I would submit that presently, as we stand, the synopsis is in evidence before the court and is evidence of the statements and witnesses the prosecution intends to present in support of the offences alleged.

With respect to the prosecutorial discretion, my submission is that to be an interference with the prosecutorial discretion there must first be a discretion. And our submission since the beginning has been that section 70 has in fact taken away that discretion and I further argued if you remember under QR&O article 103.26 although a note but which states if we are dealing of an act of indecency or unnatural that the charge should be laid under the section 130 of the **National Defence Act** i.e., the **Criminal Code** offence.

And finally, I don't agree that the decision of the Supreme Court in **Power** would be applicable in support of the prosecutorial discretion argument. If I do remember in **Power** the case dealt with the admissibility of a breathalyser certificate. At trial, the judge had ruled that the certificate was inadmissible and from that point on the prosecution did not call any further evidence and, therefore, the accused had been found innocent. The Crown appealed that decision and the Court of Appeal ruled that in fact the judge erred and should have admitted the certificate but did not grant a new trial on the basis that there was other evidence that could have been adduced by the prosecution and in deciding not to do so there was no reason to grant a new trial, and the Supreme Court reversed that in saying that if they decided at that point to stop their case it was their discretion to do so. But

Assistant Defending Officer

Reply

the discretion is on how you conduct the trial. It does not refer to the discretion to lay a charge.

I don=t agree with the argument that we can choose because if we don=t, nothing is going to happen. The discretion that has been given here is it=s taken away from the military hands and the discretion will be the discretion of the prosecutor downtown. He will decide whether or not to proceed with a charge of sexual assault based on the evidence that is present. These are all my comments on the reply.

JUDGE ADVOCATE: Before you sit down, now in your original argument on this motion when I listened to you, you alleged that the evidence before the court was the charge sheet. There is no evidence in this **voir dire** of a synopsis. The **voir dire** that we held before is finished as far as I=m concerned. We=re in the second **voir dire**.

ASSISTANT DEFENDING OFFICER: It was my mistake then, Mr Judge Advocate. I was under the impression that we were still under the same.

JUDGE ADVOCATE: Yes, but it=s a different motion. You, yourself, have stated that there was no evidence before me other than the charge sheet. You=ve said that. I have that in my note right here.

ASSISTANT DEFENDING OFFICER: Yes, I understand and it may have been my mistake.

JUDGE ADVOCATE: Now, in your reply, you want me to consider the contents of the synopsis. Is that what you want me to do?

ASSISTANT DEFENDING OFFICER: Well, yes, it=s if in fact we are in a separate **voir dire**, separate proceeding, then I would still invite you in rebuttal to the prosecutor=s reply to go back and visit the synopsis.

JUDGE ADVOCATE: Yes. I'll have to give a chance to the prosecution to address that very point and that point only.

ASSISTANT PROSECUTOR: The point of whether or not the synopsis is in, Mr Judge Advocate?

JUDGE ADVOCATE: Yes.

ASSISTANT PROSECUTOR: Mr Judge Advocate, the defence clearly stated ...

JUDGE ADVOCATE: And also, excuse me, and also, I know they stated that but I mean right now they are asking the court to use the synopsis once again. So I mean, I think it=s clear that in his first address or the first portion of his arguments before your reply he did not refer to that. Okay, so that=s clear. Now, he refers to it in reply and says it=s an oversight. He thought it was before the court because he thought we were still in the same **voir dire**. There may be some confusion now. So I don=t like you to simply say, "Well, he didn=t say that first, it=s too bad." That=s too easy an answer. But I want to hear from you if you have any representation, maybe you do not have any, okay. What I want to hear from you is whether you object to the synopsis being used by me in the resolution of this plea in bar of trial and why. Maybe you have no argument. Then if you don=t, just say you don=t have any argument and sit down. That=s no problem.

ASSISTANT PROSECUTOR: Mr Judge Advocate, I do object to the synopsis being used in this **voir dire**. I object for two reasons. First of all, the notice provided to the prosecution by the defence as required by QR&O article 112.41 states when it gives notice of the second plea in bar of trial ...

JUDGE ADVOCATE: Let me get that, because I=ve got a copy of this document too. I'll find it

somewhere here. Absolutely, yes paragraph 2 alluded to this plea in bar of trial.

ASSISTANT PROSECUTOR: That=s correct,
Mr Judge Advocate.

JUDGE ADVOCATE: Okay.

ASSISTANT PROSECUTOR: And on the fourth line of paragraph 2 it states after the comma:

"The court has no jurisdiction to proceed with the trial as the offence alleged by these charges on the face of the information appearant on the charge sheet is in the nature of sexual assault."

The notice provided clearly indicated that the argument was to be based on the information on the charge sheet, something which as you=ve already indicated was affirmed at the start of the argument on this particular plea.

Secondly, Mr Judge Advocate, I=ve tailored my argument in reply on the basis that the only evidence before the court is the charge sheet. Should you decide despite our objection to consider the synopsis then I would request an opportunity to deal with that in argument.

JUDGE ADVOCATE: So there are two issues at least to resolve here. One is there is a notice that was given to the court and to the opposing party, the prosecution, by the defence under QR&O article 112.04 and the notice pursuant to paragraph (a) shall include sufficient detail of the nature of the application or objection and the relief sought and (b) any supporting witnesses that it proposes to call. So I understand that (b) could include the synopsis or the evidence. So the first question to resolve is whether the note as given to the prosecution in the court was sufficient and if it were not sufficient then deal with what is in

paragraph (3) of 112.04 at where notice is to be given in accordance with paragraph (1), as an example, that is not sufficient, that the judge advocate appointed to officiate at a court martial may still permit the application or objection where reasonable cause for failure to give notice, as in this case, reasonable cause for failing to give suitable notice, and in accordance with paragraph (1) is shown in this case by the defence. Well, the first thing to be resolved is this issue.

Now, once this issue is resolved, the second issue is, assuming that we can proceed, what is the relief that can be provided to the prosecution. I suppose the relief would be an opportunity to the prosecution to reopen his argument and provide additional comments in relation to this and although at this stage there is no evidence of malice on the part of the defence in failing to raise the issue of the synopsis prior to their reply, still I think it would probably be fair to give the prosecution an opportunity to re-tailor his arguments and further address the court on the issue of now the use of the synopsis, resolving the second plea in bar of trial.

DEFENDING OFFICER: May I address the court in this respect, Mr Judge Advocate?

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: I was listening to your comments. The position of the defence of course is we did not obviously ... did not intend to mislead the prosecution nor the judge advocate, yourself, in that respect. I believe you will agree with me it is for the court to satisfy itself that it has jurisdiction and since the matter has been raised ...

JUDGE ADVOCATE: You mean the court, not myself?

DEFENDING OFFICER: The court ... the judge advocate.

JUDGE ADVOCATE: Then I think we should be very clear in what you're saying.

DEFENDING OFFICER: The judge advocate in as much as ...

JUDGE ADVOCATE: It is my responsibility to ensure and not the court's responsibility to ensure that we have jurisdiction.

DEFENDING OFFICER: Exactly, yes.

JUDGE ADVOCATE: So I think you should use judge advocate rather than court.

DEFENDING OFFICER: So it is your responsibility then as judge advocate to ensure that the court that will later on arrive, has jurisdiction over the charge. An objection has been raised on the part of the defence that there is no jurisdiction. I would say that in the line of the CMAC decision in **Ryan**, whether or not the defence may have proven the absence of jurisdiction when the matter has been raised, the court, the judge advocate in this case, has the duty to ensure that actually the court has jurisdiction. And you may recall in the case of **Ryan** the defence had raised a nexus argument, did not bring sufficient evidence to satisfy the judge advocate. As it was, about the nexus, the judge advocate said on the basis of what I see I'm not prepared to grant your application. He says later on if it appears there is no nexus it will be time to do it.

Later on, of course, the accused pleaded guilty and the issue was not resolved and the Court Martial Appeal Court then stated that as soon as the argument had been raised it was the duty of the judge advocate to ensure that it did in fact have jurisdiction. And I would submit to you that in this case I

believe the same responsibility exists on you because of the very nature of the charges, one and two, and the information that you have in front of you and it is unfortunate that there was this misunderstanding about the synopsis being part of this **voir dire** or not but nonetheless you have read it, Mr Judge Advocate, and you know what=s in it and you know ... or I=m sure that you will if you haven=t already, formed an opinion as to how this affects the jurisdiction of the court.

Therefore it cannot be said that because of a mere misunderstanding that the synopsis is not there and is to be ignored and I, at the same time, I fully agree with you that the prosecution should be given a chance to respond or even call evidence if that is necessary in order to satisfy yourself re jurisdiction.

JUDGE ADVOCATE: Thank you very much for your comment. So I think that what I=m going to do now is take a short adjournment and ... Yes?

PROSECUTOR: I wonder if I could just raise ... We weren=t clear in listening to your comments earlier on, Mr Judge Advocate, if one of the issues that will be reopen is also the admissibility of the synopsis because we will be opposing the admissibility of the synopsis as evidence for this matter as well.

JUDGE ADVOCATE: Okay, so what I=ll do then is I=ll give you an opportunity to prepare comments in view of what the defence has raised there in reply. It=s four o=clock. Let=s adjourn for half an hour, okay, and at 4:30 I will listen to any supplementary comments you may have on the propriety of using the synopsis, on the propriety of basing a decision on this plea in bar of trial on the contents of the synopsis and if by any chance I decided to do so then maybe additional remarks you may have as to the meaning of the synopsis so that you have an opportunity to say make one final argument. Then there will be an additional reply in view of what the prosecution will have said in that regard. I think this adjournment should

provide you with enough time to say that to satisfy that now you have had sufficient warning from the defence in relation to 112.04, okay, and that should give you enough time to address me.

We'll resume at 4:30, okay. I will listen to your remarks, both of you. And then in all likelihood I will simply close the court to consider the plea in bar of trial and will not return until tomorrow sometime, okay. So half an hour.

ADJOURNMENT: At 1600 hours, 6 December 1994, the court adjourns.

REASSEMBLY: At 1630 hours, 6 December 1994, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Thank you. Be seated.
Mr Prosecutor, are you ready?

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate. As indicated before the break we do oppose to the admission of the synopsis as evidence on this particular plea in bar of trial. The prosecution submits that the synopsis is not evidence and is not proven facts before this court and in fact that was acknowledged by defence counsel this morning in the original plea where they stated, "The synopsis does not speak for facts. Witnesses will be called" or word to that effect.

That is in effect our position as well. The synopsis does not establish proven facts before the court. Mr Judge Advocate, if you look at similar pleas in bar in this area you'll find that where evidence has been called it has always been introduced either through an agreed statement of facts put in on the consent of the prosecution or by the calling of live witnesses. It is the prosecution's position that that's in effect what the defence will be required to do in this particular circumstance.

90

Plea in bar of trial

Assistant Prosecutor

Exclusion of evidence

By introducing the synopsis as facts in evidence, you will be placed in a position where you will clearly be having to make decision with respect to the relevance of evidence, the weight to be given, circumstantial evidence and you=ll have to resolve conflicting information contained in the synopsis. In effect, Mr Judge Advocate, what you=ll have to do is assess the credibility of possible witnesses without being given the opportunity to observe their demeanour or their conduct in the witness=s chair. As a result we don=t feel the synopsis should be taken as evidence.

JUDGE ADVOCATE: So last few remarks before I close.

DEFENDING OFFICER: My comments will be brief. The prosecutor states that I said this morning that the synopsis was not fact and that witness will be called. Of course, that was in the limited purpose of the fear of the prosecution that you would have to ... you would be ruling in advance in the admissibility of evidence and it is in that context that I made that statement. As to what the synopsis does, it tells you and me ... and us what the prosecution proposes to call as evidence. That=s clear from the terms of article 109.02 that has been discussed quite abundantly so far. If that synopsis tells you that the evidence that the prosecution proposes to call will tend to demonstrate an offence that is of a sexual nature as suggested, it is for you, if you do reach this conclusion, to step in and make the ruling that the court should not entertain those charges for lack of jurisdiction.

This does not involve usurping the role of the court. It does not involve assessing credibility, weighing evidence, admissibility and so on and so forth. All it does involve is on the basis of what the prosecution proposes to call, is it your view, Mr Judge Advocate, that this charge can properly be put or placed before the court? And having said that I leave you with this task that is basically yours.

91

Plea in bar of trial

Defending Officer

Rebuttal

JUDGE ADVOCATE: Okay, thank you very much. So as I indicated earlier, it's a quarter to five. I will have a lot to read because you've given me a lot to read and I will now close the court to consider the motion but I will definitely not give you a decision before tomorrow morning sometime. Yes?

ASSISTANT PROSECUTOR: I just wanted ... You're going to consider the motion on the basis of the synopsis, Mr Judge Advocate, or ...?

JUDGE ADVOCATE: Oh no. I'll decide that.

ASSISTANT PROSECUTOR: I see, okay. I'm sorry.

JUDGE ADVOCATE: I'll decide that and I'll tell you if I decide to consider it then I'll tell you what I did with it in granting or not granting the motion and if I decide not to consider it I'll tell you also that I did not consider and I will tell you whether I grant or not grant the motion.

ASSISTANT PROSECUTOR: Mr Judge Advocate, if you are going to consider the synopsis we would just like an opportunity to respond to it and argue it as discussed earlier. We would like to make argument with respect to the contents of the synopsis if it's going to be considered as evidence.

JUDGE ADVOCATE: I can't see what you could say that would change what's on that document which I have read before. I don't think we're at the stage of interpreting evidence or giving it any weight or assessing the credibility of these witnesses or not. I think we're just at the stage of, as indicated by the defence, whether we're dealing with sexual assault or not. No, I don't think it would serve any purpose. I think that I have heard enough for me to decide what the synopsis is worth and what it does on this motion if I decide to consider its contents.

ASSISTANT PROSECUTOR: Well, again, Mr Judge Advocate, we would certainly like to address the test that=s set out in **Chase** and the factors that are set out there and relate those to the contents of the synopsis.

JUDGE ADVOCATE: I=m fully aware of **Chase** and if I decide to consider the contents of the synopsis I will look at it in relation to the test that is being expressed in **Chase**. That will be certainly sufficient.

ASSISTANT PROSECUTOR: Thank you, Mr Judge Advocate.

JUDGE ADVOCATE: So the court is now closed to consider the motion. Thank you.

AT 1645 HOURS, 6 DECEMBER 1994, THE COURT CLOSES TO RENDER DECISION.

AT 1003 HOURS, 7 DECEMBER 1994, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: Thank you. Be seated. Good morning. The defence pleads in bar of trial that the court has no jurisdiction to try the accused in respect of charges one and two on the basis of section 70 of the **National Defence Act** which prohibits service tribunals from trying a person charged with sexual assault committed in Canada.

The defence submits that the offences of behaving in a disgraceful manner and the alternative of common assault which are based on the same alleged conduct by the accused are on the face of it assault of a sexual nature and as such are not within the jurisdiction of this General Court Martial. In support of its plea the defence relies on the wording of the charges themselves and on the content of the synopsis which was prepared for the purpose of this trial. At

Judge Advocate

Decision

the outset it is necessary for the court to determine if it can use the said synopsis.

In reply to the defence argument, that the court can rely on the synopsis to find evidence on the particulars of charges one and two, that the court is faced with acts in nature of sexual assault, the prosecution submits that the court cannot rely on the synopsis as it does not constitute admissible evidence. Indeed, the contents of the synopsis have not been the object of examination and cross-examination and cannot be considered a reliable source from which the court can determine what evidence will be admitted at trial, the credibility of the witnesses mentioned therein or its probative value.

As is the accepted procedure in courts martial when the defence wishes to plead in bar of trial and evidence must be laid in support of that plea, the court is provided with that evidence through witnesses, documentary evidence, admissions or agreed statements of facts but not by way of a synopsis which was prepared under and for the purposes of Chapter 109 of the QR&Os. The use of the synopsis earlier in this trial was for the limited purpose of verifying its contents with regard to the rule on the subject and not to determine their probative value or reliability. The use now proposed by the defence would be improper. I have therefore not relied on the synopsis as evidence in this plea in bar of trial and my decision is based solely on the wording of the charges and the arguments of counsel.

In support of its plea the defence submits that the first charge refers to an act in the nature of sexual assault inasmuch as the insertion of a cigar tube between the buttocks of another person cannot be viewed as anything else when considering the definition of sexual assault contained in the **Criminal Code** and confirmed by the Supreme Court of Canada decision of **R. v. Chase** which was cited by both parties. In their opinion the particulars of charge one paint a very

Judge Advocate

Decision

graphic image as to the nature of the act. Assuming that the prosecution would be able at trial to lead evidence which would meet the definition of sexual assault as it appears in the **Chase** decision and the **Criminal Code** it is indeed possible that these charges later reveal a sexual assault proper.

The defence argues that given the wording of the French version of section 70 the prohibition found in that section applies notwithstanding that the accused was not charged to a sexual assault under section 130 NDA incorporating section 271 of the **Criminal Code of Canada**. I find that the wording of the versions amount to the same thing, assuming that tribunals of criminal jurisdiction, civilian or military, only try persons who are charged with offences. The English version words "any person charged" are implied in the French version, otherwise the interpretation could mean that there could be a trial of one of the charges without an accused. So I do not find merit in that argument.

The defence suggests that the effect of section 70 of the **National Defence Act** is to prevent the Canadian Forces from lowering the higher standard of proof in respect of a number of serious offences whereas specific intent need to be proved in order to secure a conviction against an accused. For example, the prosecution should not be permitted to lower its burden by charging a murder as an offence of behaving in a disgraceful manner which by comparison to a murder it=s a general intent offence. I fail to see the applicability of such a proposition to this case as sexual assault and behaving a disgraceful manner appear to have identical standards of proof.

The defence then suggests that a further indication that this court should not be proceeding with these charges can be found in the note under QR&O article 103.26 which although it does not have the force of law recommends that offences involving indecency or unnatural conduct be charged under section 130

Judge Advocate

Decision

of the **National Defence Act** thereby triggering the application of section 70 of the **National Defence Act**.

In addition to the **Chase** decision by way of precedence the defence refers to the two court martial decisions in the cases of **Warrant Officer Tamblyn** and **Master Corporal Aubut** where it was determined that actual sexual assaults had been charged under another section of the **National Defence Act** in contravention of section 70 or section 60 as it was in the **Tamblyn** case.

I have reviewed these two cases and have observed that contrary to the situation here today either by way of an agreed statement of facts in particular which refer to cunnilingus performed on a female private soldier in the **Tamblyn** case or by way of the evidence of the victim in the **Aubut** case the court was able to determine then that sexual assaults had been committed and charged in contravention of section 60 or section 70 of the **National Defence Act** and had granted the pleas in bar of trial. As it is in this case the court is unable to determine on the basis of the particulars of charges one and two that a sexual assault was committed. Although admittedly physical contact with the buttocks can be the basis of a sexual assault, the insertion of a cigar tube between the buttocks of another individual in the absence of other evidence is not sufficient to determine that a sexual assault has taken place.

The prosecution submits that the accused is not charged with sexual assault, that there was no evidence upon which any conclusion could be drawn as to the nature of the alleged act and that in any event the prosecution has the discretion to charge the accused with those particular offences even though where this was a case of sexual assault. Given the lack of evidence, it has been impossible to apply most of the cases cited by the prosecution. In the cases of **Degroot, R. v. C.J., R. v. S.M.**, it was possible to determine that the acts of the accused were not in the nature of sexual assaults. In the cases of **Tamblyn**

Judge Advocate

Decision

and **Aubut** it was possible to determine that they were sexual assaults.

There is only the case of **Hamilton** which bears some remote similarity with the present case. In the **Hamilton** case no evidence in any form was tendered by the defence and it was not possible for the court to determine whether it was faced with sexual assaults or not. The court is in the same position here. That is why also the argument that the prosecution has on the issue of prosecutorial discretion is considered to be premature at this time.

In his reply to the prosecution's argument, the defence refers the court to the Court Martial Appeal Court decision in the case of **Ryan** which appears at page 563 of 4 CMAR. The principle expressed therein is that once the issue of jurisdiction is raised by the defence the prosecution has the burden to prove that the court has jurisdiction. The court is satisfied that the issue was properly raised and argued by the defence and was also properly argued and responded to by the prosecution, and that for the reason cited above the court has jurisdiction over charges one and two.

So having said that, it is not possible at this stage of the proceedings to determine whether the court is faced with sexual assault disguised under another provision of the **National Defence Act** and whether that was done for the purpose of circumventing the provisions of section 70 of the **NDA** or whether prosecutorial discretion leads to that. So the plea in bar of trial of the accused is denied.

PLEA IN BAR OF TRIAL IS TERMINATED

So, Mr Defending Officer, you had indicated in your notice that you had yet a third and last, I understand, plea in bar of trial?

PLEA IN BAR OF TRIAL

97

3rd voir dire

Prosecutor

Admissibility of evidence

ASSISTANT DEFENDING OFFICER: Yes, I do, Mr Judge Advocate. The third plea in bar of trial is also under 112.24 of QR&O for lack of jurisdiction. The position of the defence on this one is that the charges found on the charge sheet, charges three, four and seven as drafted allege each the commission of several offences which violates the right of the accused to make full answer and defence and therefore, as drafted, it would be improper for the court to proceed with these charges. It's an issue basically of multiplicity.

JUDGE ADVOCATE: Will you call evidence on that?

ASSISTANT DEFENDING OFFICER: No, we will not be calling any evidence on this.

JUDGE ADVOCATE: Will the prosecution call evidence?

PROSECUTOR: Yes, Mr Judge Advocate, the prosecution will seek the introduction of the synopsis previously introduced in another plea in bar as evidence as well as correspondence outlining the disclosure that has been given to the defence counsel to date.

JUDGE ADVOCATE: I would like to hear arguments on the admissibility of the synopsis in this plea in bar of trial, first. In view of the two rulings I have made yesterday and this morning on this issue of synopsis, it will be interesting to know which way you are going to suggest that the court take the synopsis in evidence at this time.

PROSECUTOR: Thank you, Mr Judge Advocate, I would like to refer to two cases, **R. v. R.I.C.**, which is (1986) 32 C.C.C., (3d) page 399, an Ontario Court of Appeal Court decision as well as the case of **R. v. German**, which is (1988) 51 C.C.C. (3d) page 175 of the Saskatchewan Court of Appeal. I've already

98

3rd voir dire

Prosecutor

Admissibility of evidence

provided my friend with copies of these cases. I would like to provide you with them at this time as well.

JUDGE ADVOCATE: Was there a disagreement that the synopsis be used for the purpose of this motion?

ASSISTANT DEFENDING OFFICER: For the synopsis, Mr Judge Advocate, we don=t intend to object to the synopsis being submitted in evidence. We may object to the presentation of the disclosure, the list of disclosure material as we don=t see it relevant to the issue.

JUDGE ADVOCATE: Let=s not talk about the list of disclosure. We=re talking about the synopsis.

ASSISTANT DEFENDING OFFICER: With the synopsis, we have no objection.

JUDGE ADVOCATE: In fact, does it serve your purpose?

ASSISTANT DEFENDING OFFICER: Well, it serves the purpose in that our interpretation of these charges as I mentioned represent multiplicity and we haven=t seen anything in the synopsis that would show anything to the contrary.

JUDGE ADVOCATE: So, indeed, the answer is it serves your purposes.

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: It=s going to make it that much easier maybe for me to decide. Anyway, let me hear you.

PROSECUTOR: Mr Judge Advocate, the two cases I=ve just referred to both deal with the information of charges being challenged either on the grounds of sufficiency, multiplicity, or whether or not they fall within the ambit of being a single transaction. Both

Prosecutor

Admissibility of evidence

courts in resolving the issue applied what is called the golden rule, "Does the accused know the case that he has to face? Can he make full answer and defence?", which is from what I understand in reading and hearing the defence third motion, that=s exactly what they are arguing that they cannot make full answer and defence for reasons that they allege are multiplicitous charges.

In unravelling that issue the courts, in both those cases, stand for the proposition that the court and the trial judge can look behind the wording of the charges themselves to see what information has been disclosed to the accused in order to determine whether the accused can in fact and does in fact know the case he has to meet or whether there is something fatal in the wording of the information that can be corrected through a disclosure. In **R.I.C.**, defence argued that the particulars in that charge were not sufficient and didn=t know the case that it had to meet. The court rejected that argument and noted that it had been given access to the Crown brief and that Crown counsel had volunteered information as to the nature of the sexual assault that was charged. So the judge in looking behind, looking at the disclosure material which I would argue would include the synopsis as well as other material clearly said that the transaction that=s alleged in the charge could be identifiable and the defence didn=t know therefore the case it had to meet.

In the **German** case, again, there were particulars of a sexual assault between specified dates stretching over a two year period. The defence argued that it didn=t know the case it had to meet and the judge noted at the bottom of page 176 that the Crown did make full disclosure of its case providing the respondent with an opportunity to view videotapes of the victim=s statements about the sexual assault. The record also revealed that the Crown had made full disclosure of the testimony to be adduced from other witnesses.

100

Plea in bar of trial

Prosecutor

Admissibility of evidence

So in order to counteract the argument that will be raised by defence counsel that they do not know the case they have to meet that they cannot make full answer and defence, we're seeking the introduction of the synopsis as evidence and also a list of disclosures materials, not the disclosure material itself, it's simply a list of what we disclosed to them as evidence so you, as judge, know what information has been provided to them that will allow you to come to a decision as to whether or not they do in fact know the case they have to meet. I understand your decision with regard to the synopsis in particular to the last case. The disclosure material by the judge in these cases was not weighed, it would not determine whether or not it was actually factual. The disclosure material was not placed before the judge to determine whether or not the contents of the material were truthful.

The disclosure material was simply placed before the judge so that he saw what the Crown had presented to the accused. In determining whether or not the accused knew where the Crown was going, it was still up to the Crown to prove later on at subsequent proceedings whether or not they can actually prove what they have disclosed and what they allege in the charges. So I'm asking for the synopsis to be introduced, not as truth of its contents, but merely as evidence to show that the defence has been informed by the Crown what the allegations are and where the evidentiary underpinnings for those allegations lie. Thank you.

JUDGE ADVOCATE: Thank you. So on that issue of synopsis itself?

ASSISTANT DEFENDING OFFICER: Yes, on the issue of synopsis itself, the two cases that the prosecution has referred you to are cases that refer to the sufficiency of particulars or information. The issue that we raise here is not the issue of sufficiency. It's the issue that each charge refers or alleges the commission of several offences.

101

Plea in bar of trial

Prosecutor

Admissibility of evidence

JUDGE ADVOCATE: I appreciate that, Major Mackay, but I think that, what I understand the prosecution is saying is that in response, in the **German** and **R.I.C.**, which I haven't read yet, cases, the judge referred to the information, the list of disclosures and the Crown brief. Presumably there could be some similarity between what the Crown brief was and what the synopsis is, because down in civilian court they don't have synopses like we do. I think that what the Crown was saying is the use of these documents and the use of the synopsis. In other words, it's yet again a second ... maybe admissible ... and that's why I want to hear you say, admissible use of the synopsis. Not as he argues to determine whether what's in there is factual or the truth or what's in there but simply whether it was there or not. In other words, consider it as hearsay if you want, here is the statement if you want, but look at it as to whether it indicates that there is evidence on the point and presumably later on if I agree and if we all agree, mind you I will rule, if we all agree that I can look at the synopsis, then arguments will be made as to whether there is evidence of multiplicity or not which is what you're arguing, isn't it?

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: So on this issue of synopsis you indicated earlier you basically had no objection. Do I take it that that's still the case?

ASSISTANT DEFENDING OFFICER: As I mentioned earlier, on that strict basis I will not object because it's our position that it doesn't go against.

JUDGE ADVOCATE: In view of the comments by the prosecutor and you know your agreement and what I understand as the purpose of the synopsis I will, and that's a second time in this trial that we use the synopsis for a purpose which is certainly not ... was not envisaged in Chapter 109, but which appears legiti-

102

Plea in bar of trial

Assistant Defending Officer

Rebuttal

mate. So we'll use it, okay. So now that's the evidence you wanted to present.

PROSECUTOR: I have a letter that was given to previous defence counsel outlining the disclosure material given from the Crown to the accused and that will be the second document that I would seek to being introduced as evidence for this motion.

ASSISTANT DEFENDING OFFICER: As I mentioned as we started off, we have no objection to the synopsis but the letter itself, if we're dealing simply with an issue of sufficiency to show multiplicity, I don't see the relevance of this document coming in. We're not dealing with sufficiency of information being given to the defence, just multiplicity issue. Does on its face the charge sheet or the charge as drafted reveal more than one offence?

PROSECUTOR: The prosecution would be taking the position that the defence is misconceiving the legal distinctions between multiplicity and single transaction and what they are actually arguing ...

JUDGE ADVOCATE: But we'll see that later. What I want your comments on now is the list of disclosures. Maybe they confuse multiplicity and you know that's another issue, I think. I think that what I would like to hear now is, should I be taking that list of disclosures in evidence or not?

PROSECUTOR: The arguments that I made with why the synopsis should go in as evidence, I would submit, equally apply to why a list of the disclosure material should go in as well. It gives the judge further information as to exactly what the accused has available to him to understand the case the Crown is seeking against him. There is information in the synopsis but there is also other evidentiary basis independent of the synopsis that have been provided in disclosures.

So in many regards the synopsis is just one item in a longer list of disclosures and if the synopsis can be relevant for the purposes of this particular motion then we would argue that a list of the other items that have been disclosed as well would be equally as relevant and helpful to the judge.

JUDGE ADVOCATE: That list is not simply a repeat of what's in the synopsis, I presume?

PROSECUTOR: No, in fact it would be a list of just numbering items. It wouldn't be the actual disclosure document. It's simply an inventory of what documents and items have been given to the defence at this point in time. There is probably well over 100 different items, interview notes, videotapes of specific interviews, military police reports, other information that has been gathered in the investigation of this case.

JUDGE ADVOCATE: I don't really understand why you want it in and why you're objecting. It seems to me that this is a non-issue. If it's a list of items, what does it do to clarify the issue raised by the defence in their plea in bar of trial? And secondly, if it doesn't, why do you object? If it's irrelevant, why do you object? I don't understand. Let me take a look at the document. I'll take a look at the document. I guess this is probably the safest way and if I don't think it is admissible I'll just give it back and I won't even think about it a second time.

I don't see how this could be of any assistance in the plea in bar of trial that the defence has alluded to and not made yet. Whether I note that there were, you know, 2000 pages of notes given to the accused doesn't help me much in knowing what was in the notes. You know what I mean. I think that we're losing our time here. We're spinning wheels for nothing.

Judge Advocate

Ruling

Okay. So the synopsis is, with the agreement of both parties, is before the court. That=s it in terms of evidence. Major Abbott?

PROSECUTOR: That=s it, Mr Judge Advocate.

JUDGE ADVOCATE: So, could we hear your comments?

ASSISTANT DEFENDING OFFICER: Before I proceed I would like to give you some documents to which I will be referring. I=ve already provided copies to the prosecution. The first is a decision, a Standing Court Martial of 1981, the court martial of Private **Thompson**. The second is the case of the Ontario Court of Appeal, **Regina v. Zamal**, Z-A-M-A-L, in the Canadian Criminal Cases (1964) Volume 1, page 12. The third is a short Supreme Court case, **Neville**, N-E-V-I-L-L-E, **v. the Queen**, from the Canadian Criminal cases (1981) 62 C.C.C. (2d) page 1. The fourth is **R. v. Deutsch**, again, (1983) 5 C.C.C. (3d) page 41.

As I mentioned earlier, the motion is to the effect that the charges, charges three, four and seven as drafted each allege the commission of more than one offence and as such would place the accused in a difficult position, the position namely to exercise his right to full answer and defence. If we look at the charges, charge number three in the charge sheet under section 95 of the **National Defence Act**:

**"ILL-TREATED PERSONS WHO BY REASON
 OF RANK WERE SUBORDINATE TO HIM
 ..."**

And the particulars first make reference to a period of time between 5 February 1992 and 4 October 1993 covering therefore a period approximately of a year and a half, and the particulars further go on saying that the ill-treatment was in a form of verbal abuse of members of his crew cited in

105

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

Annex A. Annex A is a list of 11 names, alleged victims. And finally, these particulars make reference to nine words for a combination of words that would have been the verbal abuse. So therefore what the accused is facing now is a single count alleging that over a year and a half or around the year and a half nine words or combination of words would have been abusive towards 11 people. The possibilities are great. It=s a question of has a word been said to one person? The same word to 11 persons? A combination of words to a combination of persons in a year and a half period? I know that the prosecution will go with the single transaction theory and our position is that in this case the single transaction doesn=t apply and I intend to explain why later on.

The fourth charge is under section 129:

**"CONDUCT TO THE PREJUDICE OF GOOD
ORDER AND DISCIPLINE ..."**

In that third charge the same period is alleged, 18 months or thereabout. The verbal abuse, although there is no reference to any specific words which would have constituted the verbal abuse but makes reference to Annex B, Annex B if I=m not mistaken, consists of 19 names. So we have basically the same situation.

And finally, the seventh charge which is under section, again section 129 of the **National Defence Act:**

**"CONDUCT TO THE PREJUDICE OF GOOD
ORDER AND DISCIPLINE ..."**

The period of time indicated here in the particulars is between October 1992 and October 1993 covering a year. It concerns personal harassment towards one alleged victim but by making derogatory anti-francophone comments in the plural form. Though therefore the situation again alleges that comments

106

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

were made to this time one victim ... alleged victim over a year period.

First of all I would like to refer you to QR&O article 106.12 concerning charge sheets:

"106.12 Each charge in a charge sheet shall:

... allege one offence only; and

(b) be divided into two parts ..."

As I mentioned earlier and as has been mentioned by the prosecutor earlier, their intention is to plead the single transaction theory and that we do not make the difference between the single transaction and multiplicity. The two are connected and, as I said, it is our position that the single transaction does not apply and multiplicity does apply. I would like to refer you to section 581 of the **Criminal Code** and this is to explain by way of comparison, the reason why it is our position that the single transaction ...

JUDGE ADVOCATE: 581 you said?

ASSISTANT DEFENDING OFFICER: 581. In that section it is said:

"Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified."

First of all, in this section we're dealing with the word "indictment", a specific document under the procedures of the **Criminal Code**. We, in our system, do not have indictments. We do not deal with indictable offences and summary conviction offences.

107

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

We have charge reports and charge sheets. This article makes specific reference to the transaction. It is an apparently recognized principle for the purposes and ends of the **Criminal Code**. But since we're dealing with a charge sheet which under 106.12 specifies that each charge shall refer to only one offence, it is our position that the single transaction rule does not necessarily automatically apply.

On this basis, I would like now to refer to some of the cases that I have put before you. The first one is, I would like to refer you is **R. v. Neville**, the Supreme Court case which is a short decision.

JUDGE ADVOCATE: You said **Neville**. It's in the back of the package you gave me. **Neville**, got it. You also gave me the case of **Deutsch**.

ASSISTANT DEFENDING OFFICER: Yes, there is **Deutsch**.

JUDGE ADVOCATE: Okay.

ASSISTANT DEFENDING OFFICER: In this case the accused, if I'm not mistaken was under one count charged with two separate offences. So we dealt basically with multiplicity or duplicity and in that case the Supreme Court said that it was impossible to divide them because under the **Provincial Summary Convictions Act** which led to the charges, there were no provisions preventing the laying of two counts of two offences under one count.

Our section in the QR&Os prevents that and it is specific that there shall be only one offence referred in each count. In the second case, **R. v. Zamal**, this case basically was a case of multiple rape or gang rape. The victim had been raped by five individuals and they were all charged under the one count. Of course, defence sought the separation of the counts and

108

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

where the demand was turned down by the Ontario Court of Appeal, in this case, as a base for its decision the court looked at the circumstances. The rape took place in the same apartment, in the same bed and one after the other, and the court found that because of the so closed proximity in time it was or constituted a single transaction and therefore admissible under the single transaction rule and did not divide into five counts of rape.

And finally, in **Deutsch, Deutsch** was a case where the charge, the count was that the individual attempted to procure different women over a period of several months for the purposes of illicit sexual intercourse. And again in this case, however, the Ontario Court of Appeal didn't see proximity into the various offences and the counts were divided and as it says there each attempt at procuring a women not being connected with the other should be made the object of one count. The question therefore between single transaction theory and multiplicity would apply to be one of connexity. Is there sufficient connection in time, in facts, in the place and in the circumstances to be satisfied that this or all of these transactions amounted to a single transaction?

An example I would give in military environment would be for instance on a parade or exercise of parade where the person conducting the exercise if not satisfied with the conduct of the group would by way of an order let people stand at attention for three hours under the sun. There is connexity in time, connexity in place, connexity in motive and in circumstances. Although there are 36 victims I would say even in our circumstances would amount to a single transaction. But if the same person is unsatisfied of the behaviour or deportment of a single individual, different individual at different time under different exercises and each time gives the same or a similar order there would be a tantamount to ill-treatment, would that by itself constitute single transaction?

109

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

The main difference between proceedings under section 591 of the **Criminal Code** and proceedings in 106.12 the charge sheet can be found at section 590 of the **Criminal Code**. Section 590 states:

"A count is not objectionable by reason only that

(b) it is double or multifarious."

So under 581 the indictment as it says there can make reference to a transaction and under 590 is not objectionable by reason only that it is multifarious. The **Criminal Code** provides for that. Our procedures do not. The charge sheet, each charge shall refer to only one offence, and the reason is in the remedy. Under 590 paragraph (3):

"The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided."

Under the **Criminal Code** the court has the power to divide. Under our rules, under 112.59 this court would not have the power to divide. The powers there are to amend if there is a technical defect or if there is a mistake in the charge sheet. But multiplicity is not a technical defect. It is a defect that goes to the substance of the offence and is therefore fatal to the charge. This has been discussed already in the Standing Court Martial case I have put before you, that of Private Thompson. It was a Standing Court Martial, the president being Lieutenant-Colonel Tait and the plea in bar was with respect of the first and fifth charges as drafted. The first charge was section 120 of the **National Defence Act** now 130:

110

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

"AN OFFENCE PUNISHABLE UNDER SECTION 120 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY TRAFFICKING IN A SUBSTANCE HELD OUT BY HIM TO BE A NARCOTIC, CONTRARY TO SECTION 4(1) OF THE NARCOTIC CONTROL ACT."

But in the particulars it was said:

"In that he ... unlawfully sold quantities ..."

plural form,

"... of a substance held out by him to be ..."

And the same appeared in the fifth charge and in his conclusion the president there found that the use of the plural quantities at ... it=s the second last page:

"PRESIDENT: The court finds that charges one and five on the charge sheet do in effect allege more than one offence in using the term 'quantities'. I am also of the opinion that this is a type of error that cannot be amended by the section in QR&O. So I therefore allow the plea in bar on the two charges and terminate proceedings insofar as charges one and five are concerned."

In looking in the particulars and the charges as drafted in charges three, four and seven, a period especially for three and four, a period of a year and half is covered. Under (3) we have 11 different alleged victims, nine words or combination of words

111

Plea in bar of trial

Assistant Defending Officer

Plea in bar of trial

potentially amounting to abuse. What you would have to consider, Mr Judge Advocate, are the circumstances, the place, the time, the motives or all that would surround the speaking of one word to one individual. And of course, as I explained, if you find sufficient connexity, it could very well fall under the single transaction rule. But under these circumstances I don't see how, based on the case law, it would connect.

These are separate, different, alleged offences and this court does not have the power to divide, even for the seventh charge in which there is but one alleged victim. There is still a period of one year but since the synopsis is before you I would attract your attention to witnesses 14 and 16.

It would show, based on that, that it is in fact comments and not a comment and is not a typographical error. Several offences are referred to or alleged and that would be fatal to the charge. And finally I would just like to refer you again to **Thompson**, these defects, the multiplicity are fatal to the charge and since there is no power to divide the proceedings, it is the defence's position, should be terminated on charges three, four and seven. These are all my representations.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: Before I begin, Mr Judge Advocate, I would like to start with just doing some house-keeping or organizing case law and other material I will be presenting to the court as well as to my friends. The main source that I will be referring to, and I have already given that to my friend, we will present to you as well, is a copy of Chapter 9 of **Criminal Pleadings and Practices in Canada In Canada**, (2d) (1994) edited by E.G. Ewaschuk. I'll simply refer from now on as that document being Ewaschuk. The next case would be **R. v. City of Sault Ste. Marie**, 40 C.C.C. (2d) Supreme Court of Canada starting at page 353. The next case is **R. v. Cote**, (1977) from the Supreme Court of Canada at 33 C.C.C. (2d) page 353. I

112

Plea in bar of trial

Prosecutor

Rebuttal

have the full text of a Court Martial decision that has already been referred to during these proceedings, Warrant Officer **Tamblyn, R. v. Ostrove**, (1967) Manitoba Queen=s Bench found in Volume I (1968) C.C.C. at page 117, and a copy of the relevant portions of the proceedings of a Disciplinary Court Martial for the trial of Warrant **Reid** held in October 1990 and presided by Colonel Boutet at the time he was the Chief Military Trial Judge.

In addition to those materials, Mr Judge Advocate, I also have two other packages of cases, one package is copies of those cases cited in Ewaschuk under his reference at paragraph 3020 ...

JUDGE ADVOCATE: 3020?

PROSECUTOR: Yes, paragraph 9:3020 which deals with multiple incidents and the single transaction rule and a second package of cases found, that are cited in Ewaschuk at paragraph 9:3040 which deals with multiple victims and similar transaction rule. I have already given this material to my friend. In addition to that I also have my arguments in writing. I would like to present you and my friend both with a copy of my arguments in writing. The purpose of doing that is I, in my oral presentation, will be referring hopefully very briefly to the subheadings and key points of my arguments. It will allow the elaboration to simply be contained in the written submission and let that stand on its own.

In fairness to my friend, he hasn=t seen a copy of these written submissions and it was finalized several minutes ago. He hasn=t had time to digest them.

JUDGE ADVOCATE: Well, he will be listening to you and after that, if he needs time, we=ll give him sometime to digest them and reply.

113

Plea in bar of trial

Prosecutor

Rebuttal

PROSECUTOR: I'll begin, Mr Judge Advocate, by saying that if the particulars in a charge or even if the statement in a charge refers to a series of multiple incidents of a similar nature or a course of conduct, that does not mean in law that the charge is multiplicitous. It is a key and an important point that I will be elaborating on throughout my presentation. As you're aware, Mr Judge Advocate, there is a number of requirements that have to exist in law for a charge to be valid. It has to disclose an offence. It has to be of sufficient particularity. It can only refer to a single transaction. It cannot contain more than one offence in a single charge. There is a variety of other legal principles that we can cite. The key purpose for the point of my presentation is simply to state that these are all distinct ... legally distinct and separate requirements for a charge to be valid.

A charge can only refer to a single transaction and it cannot contain more than one offence within a single charge. It's important to note that the single transaction requirement and the duplicity or the multiplicitous requirement are legally distinct and separate requirements. I stress that at this point because Ewaschuk in the material I have presented to you notes that there has been widespread confusion by advocates who seemed to confuse the single transaction rule or seemed to confuse a charge that is actually a single transaction for incorrectly calling it something which is multiplicitous. There is confusion and it is widespread. A single transaction charge refers to the factual transaction as identified in the particulars to the charge sheet.

A multiplicitous charge deals with several legal charges. So the single transaction is dealing with facts. Multiplicitous is dealing with the plurality of different offences. A duplicitous charge is a charge which contains two offences in a single charge and a multiplicitous charge is a charge which contains more than two offences in a single charge. A charge

114

Plea in bar of trial

Prosecutor

Rebuttal

can become multiplicitous or duplicitous in two general ways. Sometimes a charge may actually refer to two separate sections in the Code of Service Discipline or the **Criminal Code of Canada**. For example, somebody is charged with both theft and fraud under a single count. There are two distinct sections that are found in the **Canadian Criminal Code** and it cannot be charged under a single count. On the other hand, in the Code of Service Discipline as well as the **Criminal Code of Canada** there are descriptions of offences which include more than one offence, an example that I guess could be found under section 111 of the **National Defence Act** which deals with improper driving, reference is made to the **National Defence Act**, section 111. You'll see that there is various types of offences under that subheading. People have been charged in our courts with driving dangerously or driving in manners that are wilfully neglectful and the courts, the military courts have said that that discloses two separate offences and for that reason it's duplicitous.

Again, I stress there is an important distinction between a charge which suggests a fact situation of a continual transaction of similar activity and a charge which expresses two distinct legal offences such as theft and fraud. I see as one of the important cornerstones in my friend's argument is that there is a distinction in the **Criminal Code** between section 591 of the **Criminal Code** and QR&O 106.12. And his comments are to the effect that the single transaction rule cannot apply in light of QR&O 106.12. He then went on later on to state in his presentation that if the judge advocate did find a connexity, you could find a single transaction but then the suggestion I guess is that because of 106.12 which is different in wording than the **Criminal Code** section 591, even if you did find a single transaction on the particulars of the charges that are in question they couldn't be valid because 106.12 doesn't allow you to apply the single transaction rule.

115

Plea in bar of trial

Prosecutor

Rebuttal

I have a strong disagreement with my friend on that point. It's the position of the prosecution that 106.12 does in fact incorporate the single transaction rule and if the prosecution can demonstrate that the facts relate to a single transaction the charges are valid. Later on I will be referring to the Disciplinary Court Martial decision of **Reid** where the former Chief Military Trial Judge expressly finds that QR&O 106.12 does incorporate the single transaction rule. So there is a fundamental disagreement between the position taken by defence counsel and that taken in the Disciplinary Court Martial decision of **Reid**.

When we're speaking of a single transaction we're speaking of something which is a similar continuous activity involving a similar course of conduct. We're not talking about isolated, distinct incidents that are similar. This is an important distinction. In law it is found that there is a distinction between isolated, separated events which are similar in nature as opposed to a course of conduct of similar incidents and similar activity throughout a passage of time. If the facts only reveal isolated, distinct incidents which are similar in nature such as the **Deutsch** case, that wouldn't fall within the similar transaction rule.

On the other hand, if the particular suggests transaction over several ... if they suggest a transaction which is similar and continual in nature involving a number of incidents, it would fall within the single transaction rule. It's important to stress that a single transaction by its very nature does by definition include a variety of instance over a passage of time and, importantly, a single transaction by its very nature can and often does include a variety of victims.

So although a charge may refer to a process which includes a number of incidents and a number of victims over a time, the charge can still be valid because it falls within the ambit of being a single transaction.

If I can refer quickly to some of the cases that I have given you under paragraph 3020 of **Ewaschuk**.

116

Plea in bar of trial

Prosecutor

Rebuttal

I can just quickly read through. A couple of them there is no need. You're free to read the line if you wish then to do so. I've got **Marino and Yipp**, the court upheld the charge which referred to the selling of a drug although the evidence revealed that both morphine and cocaine were distributed at the time that was held to be sufficient. In **Laroche** the court found that if the prosecution sees fit to particularize the specific mode of conversion as a single transaction as opposed to individual charges for individual incidents it's within their discretion. That dealt with a case of conversion. In **Michaud** the Crown was faced with an individual who repeatedly had obstructed the railway lines endangering lives through a series of continuous acts and the court noted that the Crown may elect to treat the several acts of obstruction continually for several weeks as cumulative acts forming one offence in law. In the case of **Minchin** which relates to the theft over a period of time of a variety of small amounts at different times during a specified period, the court upheld a single charge as opposed to individual incidents related to each a specific, the taking of each a particular sum. In the case of **Bruck**, this is applicable, both because it relates to multiple incidents as well as to multiple victims. The individual was charged with intent to defraud by false pretences and obtain from various people in the Province of Quebec and the United States of America various sums of money. The court noted that although it related to different people at different times, the act, the gravamen of the offence can be considered a single transaction.

Looking at other cases that deal with multiple victims, **Ewaschuk** cites the case of **Piquette** which is under paragraph 3040. Here the court held that there is a consistent line of cases stating that an indictment is valid even if it refers to multiple facts, States and persons as long as they all constitute a single operation. The accused was properly charged with continuing offences of theft perpetrated against different victims over a period of more than a

117

Plea in bar of trial

Prosecutor

Rebuttal

year. Although not cited in Ewaschuk I have given you a copy of a case, **Kisinger**, 6 C.C.C.(2d) page 212, a decision from the Alberta Court of Appeal which dealt with a case involving fraud over a three year period and alleging numerous victims. They found that that complied with the single transaction rule as there was a general scheme of operation which constituted one continuing offence. The other cases that I provided you with essentially establish the same point. Although there are multiple victims and multiple instances, if the Crown does allege that they happened as a continual, similar course of conduct that would allow the charge to fall within the single transaction rule.

And the principles that I have cited concerning multiple instances and multiple victims have been adopted by our court in the Disciplinary Court Martial decision of **Reid** where the judge advocate in that case at page 95 to 98 adopted the principles that I have cited in Ewaschuk. With regard to QR&O 106.12 he noted that it did not preclude the charging of an accused with a continuing offence or a count that related to a number of occurrences related to a similar activity or a similar course of conduct. And that=s at page 98 of **Reid**. So clearly, the judge advocate in that case found that 106.12 did allow for a single transaction rule and he further referred to QR&O 103.46 Note G. At page 98 and 99, the judge advocate cited that article as a clear indication that the single transaction rule did apply in military system of justice.

So contrary to the defence=s arguments it does appear that the single transaction rule does have a life in this court. When the Crown is faced with a fact situation that establishes a continual course of similar conduct throughout a period of time the Crown has a choice or the charging authority has a choice as to which way it will go. If there is evidence that demonstrates a similar course of conduct throughout a period of time which may involve multiple incidents and/or multiple victims, the charging authority has a

118

Plea in bar of trial

Prosecutor

Rebuttal

discretion. It=s their choice. They can charge an individual charge for each particular incident and each particular victim or they can charge one single charge as a single transaction. The facts of this particular case are such that the charging authority did have that discretion, to go with individual count or single count.

Before I get into the particulars of the charges it=s important to generally look at what=s being alleged. There is conduct to the prejudice of good order and discipline and there is ill-treatment and then there is conduct to the prejudice of good order and discipline based on personal harassment. The words "conduct, ill-treatment, personal harassment" all suggests a continuum of more than one act by their very nature. In my written submission I extract the Oxford Concise Dictionary definition for conduct, behaviour and ill-treatment, and you=ll see that they all can include more than an individual act or gesture. It can include a series of acts or gestures. In the Court Martial Appeal Court decision of **Tamblyn**, the judge advocate in that case did give some definition to what ill-treatment meant dealing with the first plea in bar and he found that ill-treatment could include acts or actions, so it=s not just a particular act, but that it could also include physical or non-physical treatment, and treatment by its very nature suggests a continuum of behaviour or conduct. The word "harassment" found in paragraph 4 of CFAO 19-39 notes that harassment may involve a continuing series of incidents.

So it would be the prosecution=s submission that the gravamen of the charges by their very nature, by their definition would suggest more than a single, isolated individual act. Conducting yourself to the prejudice of good order and discipline or ill-treating, people can involve more than one victim at the time. It can involve more than one incident. It can take place over of period of time. The key is to try to identify what the subject matter or to use the Supreme Court of Canada: "What is the focal point of the

119

Plea in bar of trial

Prosecutor

Rebuttal

charge?" The focal point of these charges is conduct to the prejudice of good order and discipline through verbal abuse. It is ill-treatment through verbal abuse and it=s conduct to the prejudice of good order and discipline through personal harassment. That=s the gravamen or the focal point of the charge. Everything else in the particulars is peripheral.

I would like to turn to the Supreme Court of Canada decision in **Sault Ste. Marie**, in particular at page 361. In that case the accused was accused of, that they did discharge or caused to be discharged or permitted to be discharged or deposited materials in a manner which might impair the quality of water contrary to section 32(1) of the **Ontario Water Act**. So the accused was arguing that the charge is multiplicitous.

What are we alleged to have done, discharged, or caused to be discharged, or permitted to be discharged, or deposited materials? The court, however, found that the wording of the particulars was not duplicitous or multiplicitous. At page 361 the court said, and I=m reading at the very bottom, halfway down the last paragraph:

"Section 32(1) of the Ontario Water Resources Act is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was 'polluting', and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge.

120

Plea in bar of trial

Prosecutor

Rebuttal

Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section."

It is the submission of the prosecution that the charges three, four and seven - take charge three for example, could have simply stated, "In that he, between 5 February 1992 and 4 October 1993 on board HMCS OBJIWA, while commanding officer, verbally abused members of his crew in the presence of other members of the crew", and that would have been sufficient. The Crown has gone further in giving particulars it wasn't legally required to do. It's expanded the periphery to demonstrate that we're dealing with a single transaction.

In the Warrant Officer **Reid** case, the individual was charged with a number of counts under section 125 of the **National Defence Act**, which the statement of the offence refers to making a false entry in a document required for official purposes. The prosecution charged Warrant Officer Reid with a variety of 125's but wrote in the statement that he was making false entries in documents required for official purposes and defence argues that only a single entry and a single document can be the basis for a count under 125. If you include more than one the offence is multiplicitous.

The judge advocate rejected that argument and said at QR&O 1.05, which refers the words in QR&O that are worded in the singular can include the plural, and in following the decision of **Sault Ste. Marie** in the passages that I have cited, asked to whether or not the particulars suggested a similar activity or involved in a similar course of conduct. And at page 97 and 98 he found that each charge dealt with one subject matter borrowing the language from the **Sault Ste. Marie** decision. Although there were plural, more than one entry, more than one document, which were never specified in

121

Plea in bar of trial

Prosecutor

Rebuttal

the particulars, it simply said making entries in documents, never specified anything beyond that, the judge advocate said it dealt with one subject matter. The gravamen was the same. It was the making of false entries. It wasn't the making of false entries and striking people. It wasn't the making of false entries and impaired driving. It only dealt with one type of offence although what was being accused was a single transaction, multiple instances of the same type of offence over a period of time.

In determining whether three, four and seven are in fact ... charges three, four and seven are multiplicitous or whether they fall within the single transaction rule it is important to note for example charge three which deals with ill-treatment does not include that he verbally abused and kicked his crew. It simply deals with verbal abuse, and we go further and particularize exactly how that was done. Charge four which deals with the conduct to the prejudice of good order and discipline doesn't allege verbal abuse and personal harassment. It only alleges verbal abuse. There is only one offence, one subject matter. Charge seven deals with personal harassment based on linguistic grounds, not personal harassment in striking and kicking or other types of verbal abuse. It deals again with one type of subject matter throughout a continuum of time.

In all cases, the Crown is not alleging that sometime over a year and a half the accused spoke nine words to a possible pool of 11 people. The Crown is alleging that the accused used words as cited in the particulars, for example in charge three, over a continual period of time as defined in the particulars. It wasn't an isolated case. Unlike the **Deutsch** case, it wasn't three different individuals over three different months. First of all, the class of the victims are the same. They are all members of the crew. In **Deutsch**, the victims were distinct and unknown to each other. But what's accused in the particulars is a repetitive, consistent, similar course of conduct

122

Plea in bar of trial

Prosecutor

Rebuttal

throughout the entire period specified in the charges.

It=s not putting the defence out into the haystack trying to find the nine needles over a year and a half period. The Crown is alleging that this was a continual course of conduct.

The same would apply for the fourth charge, continual course of conduct and the same would apply for the seventh charge. It wasn=t a particular statement made sometime between October '92 and October '93.

It was a series of derogatory anti-francophone comments that occurred throughout the period specified in the charge sheet.

I would like to quickly refer to the synopsis because that does show that the defence does know the case the Crown is alleging against them. When you look at the synopsis and read it witness by witness, you will see evidence or references to when that particular individual was on board the HMCS OBJIWA, what was said and done to them personally by the accused, what they observed the accused do to other members of the crew in their presence. You also see comments concerning the frequency of when and how this was done and there is nothing in the synopsis to suggest that the Crown is in pursuit of these nine illusive words given to a pool of possibly 11 people. It=s a continual, repetitive course of conduct. For example, witness number two, last paragraph at the bottom of page one states the date when he was present on the OBJIWA:

"During his time, members of the Control Room, in particular junior officers, were often publicly yelled at by LCdr Marsaw in the presence of subordinates. Often this would include yelling and screaming with personal verbal attacks in which LCdr Marsaw called persons the following name: 'idiot=', 'stupid=', 'fucking idiot=', 'fucking stupid=', 'incompetent=', 'lazy=', and words to ..."

123

Plea in bar of trial

Prosecutor

Rebuttal

that effect. He then continues and talks about what type of other people would be subjected to this abuse and on what frequency, people who occupied the position of helmsman or people who were in the sound room. If you read as it relates to other witnesses, you'll see similar types of testimony, reference to when they were on board the ship, what was said to them, what they observed and comments on the frequency. So the defence knows exactly what they are facing. This isn't a case of trying to find nine words that were mumbled sometime within a year and a half.

The fact that the defence sat down with a chart and made lines across the top, one for each alleged victim, and then lines on the other side of all the words cited in the particulars of charge three, for example, they would find out quite graphically, exactly what we're alleging. It's there in black and white.

It's important to touch upon and stress the underpinnings for the multiplicity rule. Without understanding the underpinnings of the multiplicity rule the logic in the development of the decision such as the one in **Sault Ste. Marie** can't be fully grasped. The duplicity and multiplicity rules were created and came into existence at a time where there was no written transcripts of court proceedings. So individuals were often fearful that they may be acquitted in one hearing then be charged for the same offence at a later point in time but not have any proof that they were ever tried. The pleas of **autrefois convict and acquit** would have to be triggered. However, with the introduction of transcripts and recording or court proceedings you see a historical demise in the multiplicity rule when you look at the jurisprudence.

In Warrant Officer **Reid's** case, the judge advocate expressly refers to this historical development to understand what really is the current modern issue and what really is the test and what is at stake. At page 96 and 97 he makes reference to the historical decline of the multiplicity rule and he now notes that

124

Plea in bar of trial

Prosecutor

Rebuttal

military courts do indeed take written transcripts of court proceedings so the danger that one might have been exposed to previously with the multiplicitous charge may no longer be valid or present.

Importantly, he makes a comment with regard to QR&O 101.056 into unravelling his question of whether he is looking at a multiplicitous charge or a single transaction charge. I just want to highlight that to you because it is a passage that was overlooked in defence counsel=s arguments and it is interesting to see how the judge advocate incorporates it in his analysis. Applying **Sault Ste. Marie**, the judge advocate in **Reid** notes that once upon a time when no transcripts existed there was a real danger with a multiplicitous charge, or that possibility. However, in cases where one is now confronted with a single transaction charge the courts should be fearful of getting into petty technicalities and formalism in dividing up a charge for a count, and he notes that that age has passed, the age of petty formalities has passed and he rejected the defence=s argument that the charges must be re-laid so that each individual act of a fraudulent nature must consume a separate and distinct count.

It=s important to consider what the logic is to the defence argument if we follow it through. Charge three as has been noted refers to 11 individuals, I believe, and charge four refers to I believe 19 individuals. So automatically if the defence argument is accepted, what they are really asking the court to do is to send the charges back to the convening authority and if the convening authority chooses, they=ll be back before another court with a minimum of 30 new charges that the judge advocate and the members of the court will have to work their way through as opposed to two. And if you follow the logic of the defence argument as it may relate to charge seven that each particular verbal comment of a derogatory, anti-francophone nature might have to be a separate charge because we used the word "comments" plural, he argues that=s multiplicitous. That would mean that every

125

Plea in bar of trial

Prosecutor

Rebuttal

single individual comment made by the accused to a particular individual would have to form the basis of a separate and distinct charge.

So we've divided for charges three and four from two counts now to a possible 30 counts or charges and then we've got to further divide that for each individual every time they were personally verbally abused in the way alleged by the Crown. It doesn't take long to look through the synopsis and figure out that a number of these people were verbally abused or allegedly verbally abused in a repetitive continual basis. Let's assume for the sake of argument they have each been verbally abused or allegedly verbally abused four times, 30 people times 4, we are now at a trial facing 120 charges, possibly. As the judge advocate said in **Reid** the age of petty formalities and technicalities has passed.

If the judge advocate in this case does find that the particulars do refer to a single transaction it is submitted that the only remaining issue really is does the accused know the case against him? And the law is such that the onus is on the defence to prove that they cannot make a full answer and defence and that they do not know the case against them. It's important to note that in these proceedings, there has been absolutely no motion or demand for particulars. It is submitted by the Crown the reason why that is so is because the synopsis is detailed, because the disclosure material is exhaustive.

We would submit that the defence in this case knows exactly what the particulars are against them, what exactly the allegations are against them and what the factual underpinnings for those allegations are. And the defence hasn't met the onus that's on them to demonstrate to the court why they cannot make a full answer and defence. There has been absolutely no evidence called. If it is found that these charges do refer to a single transaction the only remedy the defence has really is a motion for particulars and the

126

Plea in bar of trial

Prosecutor

Rebuttal

Crown is submitting that we've gone far out of our way, we've increased the periphery in the drafting of the particulars far beyond what we were legally required to have to do and that the particulars are sufficient.

In closing I would like to make five final points. First of all is to go back to the ... use the term that **Ewaschuk** uses, "widespread confusion". It is the position of the prosecution that defence has confused the distinction between the single transaction rule and a multiplicitous charge. Charge three, charge four and charge seven do not reveal upon their reading more than one type of offence. What they do reveal is a single subject matter which is particularized in a way to demonstrate a single transaction, and a similar course of conduct and activity over a period of time.

In cases where the facts are such that the Crown would have the ... or the prosecutorial or the charging authority would have the discretion to charge individual counts, 30, 120, however many, or one single count, the discretion is theirs. An important point to note with regard to the Crown's discretion is that any attempt by the defence to sever the single transaction and argue it should be the subject of separate charges 30 or 120 or whatever, is first of all to breach prosecutorial or the charging authority's discretion but more importantly there is a subtle point here, they are depriving the Crown of making an argument that it isn't the rebuking of a single individual which is prejudicial to the good order and discipline but the Crown would therefore, if the charges were severed, be denied the opportunity to argue what the cumulative effect is, of verbally abusing so many members of the crew in the presence of others because we would have to demonstrate to the court beyond a reasonable doubt that for every single particular individual there was a prejudicial effect related to that individual rebuking that was prejudicial to good order and discipline. By severing the counts you would deprive the Crown of making the argument and demonstrating beyond a reasonable doubt that the rebuking of the individuals

127

Plea in bar of trial

Prosecutor

Rebuttal

as a whole, the cumulative effect was prejudicial to the good order and discipline or alternatively with the fourth charge ill-treatment.

To accept the defence=s argument really is to revert back to an age of petty formalism and to dismember charges three, four and seven in a way which is neither required by law or by common sense. On that note I would like to turn quickly and conclude with the case of **R. v. Ostrove**, at page 123, halfway down the second paragraph at page 123 it states:

"The criminal Court is after all as much the shield to the community as it is the guarantor of the liberty of the subject, a matter which tends sometimes to be forgotten; and in striving as it must to preserve the balance between the two, the Court must be vigilant not to allow the true nature of the proceeding to be defeated by a too finely-tuned ear of precision."

On page 125, in the second full paragraph down after the quotation which starts **"The same ..."**, and in **Ostrove** they were dealing with a fraud case, the argument was that each separate individual act of fraud should be a separate charge. The court said:

"The same might be said of the mechanics of fraud which is the case before me. Here again, the dismemberment of a coherent unity of facts with a view to their individual presentation in a severalty of counts is required neither by common sense nor by the express terms of the Code ..."

128

Plea in bar of trial

Assistant Defending Officer Reply

And I would say that that argument and that finding is equally applicable to this case. Thank you.

JUDGE ADVOCATE: Reply?

ASSISTANT DEFENDING OFFICER: I intend to make just very few short comments, Mr Judge Advocate.

With respect to the reply of the prosecution, that there is sufficient evidence, there was sufficient evidence given to the defence to know what he was accused of or what he is facing. I would refer to the court martial in the **Reid** case at page 86, that is but one part. At page 96 at line 20 when the former Chief Military Trial Judge referred to **Ewaschuk**, quoted:

"And at page 9-15:

'The basis for the rule against duplicity or multiplicity is that an accused must know with precision with what he is charged ...="

which is what the prosecution raised but he also goes on ...

"'... and of what he is acquitted or convicted so as not to prevent him from pleading *autrefois acquit* or *autrefois convict* at a future time.="

So it=s a two part. You must know what you face but you must also know what you have been acquitted or found guilty of. In this case, charge three would be ill-treatment by verbal abuse and if we go to trial and there is a verdict of guilty, all we would know is that the court would pronounce guilty. But what exactly did the court find in the conduct to say that it amounted to ill-treatment by verbal abuse? Was

129

Plea in bar of trial

Assistant Defending Officer Reply

it one of the persons on Annex A? Was it part of them?

All of them? Was it one word? All of the words? He will have been found guilty but no way of knowing of what. And I wouldn't say surely that not knowing what you've been found guilty of would be petty formalism.

And as to the issue of confusion between the single transaction and the multiplicity I would refer you again to the cases of **Zamal** and **Deutsch**. In **Deutsch** he was attempting to procure women, different women for a time-period for the purposes of illicit sexual intercourse. The single transaction is living off the proceeds of prostitution. But yet, the court divided the counts because there was no connexity. In **Zamal**, on the other hand, the single purpose was rape by five different men but so closely connected in time that the counts were not divided. And also I would raise issue with other cases that are cited, **Sault Ste. Marie** as to what applied and when and how. But we must also look at the scheme under which these courts are operating.

If a court operates with a section that does not preclude the transaction backed up by a section that allows or gives the power to the court to divide, that is one thing, but this being a statutory court limited to the powers granted by the enabling Statute if we have on the one hand sections and regulations that say each count shall not refer to more than one offence but there is no power to divide, we should go with what we have.

These are my comments, Mr Judge Advocate.

JUDGE ADVOCATE: Yes.

PROSECUTOR: I realize it's discretionary as to whether I can respond or not but my friend has raised one new argument concerning the inability to make a full answer and defence that I haven't heard before and I would like the opportunity to address just that specific point.

130

Plea in bar of trial

Assistant Defending Officer

Reply

JUDGE ADVOCATE: What was that?

PROSECUTOR: There was a comment with reference to full answer and defence that in the way that the charges are drafted now, the accused if convicted would never really know what people in Annex A or Annex B he is alleged to have verbally abused and that would somehow prejudice him for further appeals or trials that he may be subjected to.

JUDGE ADVOCATE: I think that that was part of the decision of **Reid** that you cited and if you have read that decision then you must have seen what appears at line 22 to line 29 on page 96 and you should have addressed it before. So permission denied. So the court is closed to consider the plea in bar of trial.

AT 1140 HOURS, 7 DECEMBER 1994, THE COURT CLOSSES TO DETERMINE DECISION.

AT 1500 HOURS, 7 DECEMBER 1994, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: Thank you. Be seated. On this, his third plea in bar of trial, the defending officer contends that he will not be able to make full answer and defence in respect of charges three, four and seven because all three charges are multiplicitous or multifarious. In the case of charges three and four, the particulars refer to more than one offence involving more than one individual over a period of time of approximately 18 months. In the case of charge seven the particulars of the offence refer to more than one incident of derogatory comments over a 12 month period.

The defence admits that the sufficiency of the evidence disclosed is not an issue, that in spite of that the accused is not only unable to make full answer and defence because of the number of events and people involved in each of these three charges but in the event of a finding of guilty by the court the accused would be unable to determine which individual

Judge Advocate

Decision

portion or portions of each charge he would have been found guilty of or not guilty of.

The defence cites a number of cases in support of its submission such as the case of **Zamal, Deutsch, Neville** and **Thompson**. In my view **Zamal** stands for the proposition that more than one accused can be joined in one count before a court and is an example of one transaction. Here we're dealing with one accused.

The judges in the cases of **Deutsch** and **Thompson** concluded that they were faced with multifarious counts which offended then section 510 of the **Criminal Code of Canada** and QR&O article 106.12 respectively.

The good judges did not provide us with the basis of their reasoning, however, and, their conclusions are of little assistance. In the **Neville** case as offered in support to the proposition that since our military regulations do not permit the severance of multifarious counts, the court does not have the power to order such severance. The defence pleads that the court should terminate its proceedings in respect of these three charges.

In his reply the prosecution refers to Chapter 9 titled "The Form And Content by Mr Justice Eugene Ewaschuk" in his book "Criminal Pleadings and Practice in Canada", and namely articles 9-3020 and 9-3040 on the issue of single transactions and the case law in support of their proposition therein. Amongst other cases he also refers to a ruling made by my predecessor, then Chief Military Trial Judge Boutet, in the case of Warrant Officer **Reid** of October 1990 and to the Supreme Court of Canada decision in the case of **R. v. City of Sault Ste. Marie**.

He submits that charges three, four and seven refer to single transactions which according to Mr Justice Ewaschuk in the cases cited may validly encompass a number of occurrences and/or incidents and involve a number of different victims where these occurrences or incidents relate to a similar activity

Judge Advocate

Decision

or course of conduct. I accept this submission as being an accurate reflection of the state of the law and of the jurisprudence from the Supreme Court of Canada down to the level of trial courts in Canada today.

At the instance of the prosecution and with the consent of the defence I have once again considered the contents of the synopsis prepared in relation to this case. I am satisfied that on the basis of it and even though the evidence that is alluded to therein has yet to be tested as to its admissibility and probative value, it has been possible to conclude that the offences contained in the three charges were based on single transactions notwithstanding the long period of time over which they are alleged to have occurred, the number of victims involved in charges three and four and the numerous instances of verbal abuse or personal harassment alleged in all three charges.

I have also reviewed the decision of Colonel Boutet in the **Reid** case. I agree with his position that the provisions of QR&O article 106.12 do not preclude the charging of an accused with a continuing or continual offence, a single transaction which involves numerous incidents and numerous victims over a long period of time. I also agree that Note G to QR&O article 103.46 contemplates the very scenario which is facing us today within the system of military justice.

As to the argument raised by the defence about **autrefois acquit** and **autrefois convict** I will refer the defence to the comments of Mr Justice Dixon in the **City of Sault Ste. Marie** case where he rules that the problem of raising a defence of **autrefois acquit** is illusory because as is the case in the military under section 66 of the **National Defence Act** the prosecution would in any event be precluded from charging the accused again in respect of any of these charges. So the plea in bar of trial of the accused is denied.

133

Judge Advocate

Arraignment

PLEA IN BAR OF TRIAL IS TERMINATED

So these were the three pleas in bar of trial that you had notified the court of.

DEFENDING OFFICER: Hmm hmm.

JUDGE ADVOCATE: I gather this completes the pleas in bar of trial.

DEFENDING OFFICER: For the time being, yes.

JUDGE ADVOCATE: Okay. And we are now at paragraph (5)(d) ... 112.05(5)(d) of Queen=s Regulations and Orders, do you apply to be tried separately in respect of any charge or charges on the ground that you will be embarrassed in your defence?

DEFENDING OFFICER: No, we don=t.

JUDGE ADVOCATE: Thank you. Any application under QR&O article 112.05(5)(e), Mr Prosecutor?

PROSECUTOR: No, Mr Judge Advocate.

JUDGE ADVOCATE: Mr Defending Officer?

DEFENDING OFFICER: No, I don=t.

JUDGE ADVOCATE: So, at this point in time it=s for me to request the court to assemble. In view of the notice that I had received from defence a week or so ago, I had asked that the court not come to Halifax until today. They will be available and I=ve already warned them to be present in this area here on this floor by 0900 hours tomorrow morning at which time I will be giving to them the customary pre-trial briefing. I would like all counsel and the accused and the court staff to be present during this pre-trial briefing at 0900. So the court is adjourned until 10 o=clock tomorrow morning.

Judge Advocate

Arraignment

ADJOURNMENT: At 1505 hours, 7 December
 1994, the court adjourns.

REASSEMBLY: At 1000 hours, 7 December
 1994, the court reassembles
 and the accused is before it.

JUDGE ADVOCATE: Thank you. Be seated. Good morning, Mr President and Members of the court. The president of the court is Captain(N) B.R. Brown who is seated to my left, Lieutenant-Colonel or rather Commander G.R. Nield who is seated to his left, Lieutenant-Colonel B.W. Hope, who is seated to my right, then Major J.L.J. Cloutier seated at the end and Lieutenant-Commander J.S. McLachlan who is at this end and there are the alternates, Commander L.D. Sweeney and Major R.J. Leblanc.

Mr President, I draw your attention to QR&O 112.03 which reads in part as follows:

"112.03 - INQUIRY AS TO DISQUALIFICATION OF MEMBERS

Before the trial commences, the president shall ascertain whether any member of the court is disqualified to sit, having regard to article 111.20 (*Ineligibility to Serve on General Court Martial*) ..."

QR&O 111.20 reads as follows:

Section 170 of the *National Defence Act* provides:

'170. None of the following persons shall sit as a member of a General Court Martial:

135

Judge Advocate

Arraignment

(a) the officer who convened
the court martial;

(a.1) the officer who ap-
pointed the members of the
court martial;

(b) the prosecutor;

(c) a witness for the prose-
cution;

(d) the commanding officer of
the accused person;

(e) a provost officer;

...

(g) an officer below the rank
of captain; or

(h) any person who, prior to
the court martial, partici-
pated in any investigation
respecting the matters on
which a charge against the
accused person is founded."

Mr President, have you complied with the
provisions of those articles?

PRESIDENT: Yes, I have.

JUDGE ADVOCATE: Do we have any difficulties
from your side with any members of the court?

PRESIDENT: No, there is none.

136

JUDGE ADVOCATE: We don=t. Then, Mr Prosecutor, do you object to this court martial being conducted as it is assembled here today?

PROSECUTOR: Mr Judge Advocate, I do have one objection with regard to one member of the court.

JUDGE ADVOCATE: Okay. Just one moment. Under QR&O article 112.14 it is indeed the privilege which includes section 187 of the **National Defence Act**, it is the privilege of the prosecution or the defence to object to the president or to a member. I think you=ve indicated it was a member not the president?

PROSECUTOR: A member.

JUDGE ADVOCATE: A member. Then the procedure that is prescribed in regulations which is QR&O 112.14 is to be followed, and I read paragraph (2):

"Where the accused or prosecutor objects to the judge advocate, president or any other member of the court ...",

and we are now talking of a member of the court,

"... witnesses may be called:

(a) in support of the objection by the party making the objection,

**(b) in rebuttal of the objection by the other party, and
(c) by the court, if it desires to hear any further evidence."**

Then addresses may be made to the court by the party who is making the objection and then by the other party and then there is an address to the court by the judge advocate with respect to the objection and then once this is done you retire to determine whether you accept the objection to the concerned member. It is stated in paragraph (8) that:

"The decision in respect of an objection concerning the president or another member shall be made by the court on the basis of a majority vote.

(9) A member of the court in respect of whom an objection is made shall not vote upon the objection.

(10) In the case of an equality of votes, the president shall have a second or casting vote in respect of an objection to any of the other members, and the senior member shall have a second or casting vote in respect an objection to the president."

But that is not applicable here according to what has been just said by the prosecutor.

"(11) When the court has determined the objection, it shall re-open and the president shall announce the court=s decision.

...

(13) Where an objection is allowed in respect of a member ...

138

Prosecutor

Motion of objection

(a) the president shall designate an alternate to replace the member; and

(b) and if there is no alternate to replace the member, the court shall adjourn until sufficient replacements are appointed pursuant to article 111.051."

And then we follow the same procedure in respect of that new member if the objection is granted. So, Mr Prosecutor, let=s hear your evidence.

PROSECUTOR: Thank you, Mr Judge Advocate. I have a duty as an officer of the court to ensure that not only justice is done by it=s also seen to be done, and if there is a matter that comes within my knowledge, even if it reflects on the perception of justice being done I have a duty to bring that evidence before the court.

In light of this, I feel obliged that I do have to bring to the court=s attention for their consideration a historical connection between myself and Commander Nield. In many ways, Commander Nield and myself, I guess, presently are trapped by history. We both had to assemble before this court today, although we do have a historical connection based on both of us being involved in prior litigation on different sides of the interest, I guess, and for that reason, I have talked to my friend, Mr Defending Officer, we=ve drafted agreed statement of facts that I would like to become a record of the court that will provide the evidentiary basis for my motion. It reads:

"AGREED STATEMENT OF FACTS

In March 1990 the Security Intelligence Review Committee (SIRC) held a two day inves-

139

Prosecutor

Motion of objection

tigation to inquire into a complain made by
Commander Nield pursuant to section 42 of the
Canadian Security Intelligence Service Act.

Commander Nield

It was argued by Commander Nield that

The Canadian Forces argued that the

The Canadian Forces was represented by two
legal officers one of which was myself, who
is now in the role of prosecuting officer in
this General Court Martial.

The Security Intelligence Review Commit-
tee investigation is adversarial in nature
and is similar to a civilian criminal trial.

Witnesses including Commander Nield were
called, examined and cross-examined.

It is important to note that Commander
Nield was

And the agreed statement of facts is in
writing. I would like to present that and enter it as
an exhibit.

JUDGE ADVOCATE: With your agreement?

DEFENDING OFFICER: No objection.

140

Prosecutor

Motion of objection

JUDGE ADVOCATE: We'll mark this as ... I guess we'll mark it as an exhibit in this trial. Exhibit "E".

AGREED STATEMENT OF FACTS IS MARKED EXHIBIT "E".

JUDGE ADVOCATE: Okay. So these were ...

PROSECUTOR: That will conclude my evidence.

JUDGE ADVOCATE: That is your evidence. Any evidence you wish to call?

DEFENDING OFFICER: I have no evidence to call, Mr Judge Advocate.

JUDGE ADVOCATE: Okay. Now your remarks, argument?

PROSECUTOR: As I mentioned before, Mr Judge Advocate, it is important to ensure that not only is justice done but it is seen to be done. It is important to ensure that a fair trial does occur and also important that everybody who leaves the process, leaves with the appearance that a fair trial has indeed been conducted. The charges that are revealed in the charge sheet do involve very serious matters and ultimately this court will have to deliver a decision ... a verdict.

In ensuring that justice is seen to be done it's important that the court acknowledges any perceptions of bias that may be before it. It is the prosecution's submission, based on the agreed statement of facts, that there could very well be a perception of bias or an apprehension, a reasonable apprehension of bias could be raised due to Commander Nield's prior involvement in litigation in which I was a member of the opposing counsel, an adverse interest to that issue that was being litigated.

141

Prosecutor

Motion of objection

For this reason and based on the agreed statement of facts, it's the prosecution's position that a reasonable apprehension of bias could be found to exist and that it would not be fair to place Commander Nield in a situation where he would have to continue becoming a member of the court. It's important to stress, I believe, I feel this is a very important point, that the reasonable apprehension of bias does not include any arguments that Commander Nield or any other member of this court actually is biased. It simply deals with perceptions.

Given our historical relationship, there could be a perception held by some regardless of any outcome that this court ultimately reaches with verdict because of the historical relationship between myself and Commander Nield that there was some bias involved. For anybody to walk away with that perception, I would contend, would be unfair but nonetheless it still is a possibility. And it's that perception of that possibility that forms the basis of this motion.

In raising the concern, I think it's also extremely important for the prosecution to state that not for a single instance or for a single moment does this motion call into question Commander Nield

I do not do that nor does this motion. We're simply dealing with perception based on historical facts where the prosecution and one of the member of the court were involved in litigation of an adverse nature and as opposing parties.

I believe it's unfair for Commander Nield to be put in this position, if he is allowed to continue, or forced to continue, it's unfair for the prosecution, also the accused, the whole court process as a whole. In referring to a reasonable apprehension of bias, I would just like to bring to your attention, Mr Judge Advocate, three cases, one is **Blanchette v. CIS Ltd** which is a Supreme Court of Canada decision from 1973, found at 36 D.L.R. (3d) page 561. A Disciplinary Court

142

Prosecutor

Motion of objection

Martial decision from October '91 involving Lieutenant Sapera and I also will be providing you with a copy to a similar motion in the case of **R. v. Private Brown**, the first trial, which I believe was October 1993.

In the case of **Blanchette**, an issue arose where the trying judge involving litigation dealing with a victim who was insured by a particular insurance company had ... it became known that that judge had previously advocated on behalf of his family members. The simple fact that the judge had previously advocated on behalf of his family members created a reasonable apprehension of bias as to whether he could properly try a case involving that insurance company that was currently before him.

So, again, we're dealing with apprehension rather than actual bias. In the Court Martial decision of Lieutenant Sapera, it was found that one of the key witnesses in the trial had professionally known one of the members on the court. They were both members of the same regiment and a reasonable apprehension of bias was found to occur. In that situation, the member was allowed to stand down.

In the General Court Martial of **R. v. Private Brown**, Private Brown was affiliated with the PPCLI and I believe the member of the court was also a member of the same regimental affiliation. There is absolutely no evidence that Private Brown and that member had known each other or interacted socially, but again dealing simply with perceptions, that was sufficient to have the member stand down because they were both members of the same regimental affiliation.

And again, for this motion, we're simply dealing with the reasonable apprehension of bias, the perception of bias. Right now, I believe this court has an opportunity to decide this motion and in an abundance of caution, perhaps in fairness to the prosecution as well as Commander Nield in the whole process, I would submit that Commander Nield not be required to

143

Prosecutor

Motion of objection

continue sitting. This type of situation, I would submit, is reflected in some of the cases I've just cited, isn't uncommon and that's why the procedure allows for alternates to exist. People are trapped by historical facts. People do encounter each other in courtrooms in circumstances not of their own making but with historical connections and for that reason alternates are part of the procedure.

I'd submit that this is a perfect opportunity in which to use one of the alternates. It's also a good opportunity, I believe, for the court to begin its work on what is a serious matter on firm footing rather than on a foundation which may be perceived to be flawed. The court can avoid a perception of bias and thereby avoid having its decision in the future questioned based on this historical connection rather than simply having its decision looked retrospectively later on by simply looking at the merits of the case. Thank you.

JUDGE ADVOCATE: Mr Defending Officer?

DEFENDING OFFICER: Only a few comments, Mr Judge Advocate, Mr President.

I will only point out that the president has stated that there was no disqualification or no reason for any of the members= inability to sit. The president has confirmed that members are able to sit and that's it. As to the argument of my learned friend I will just leave it to the members of the court to decide.

JUDGE ADVOCATE: In other words, you don't object to the representations made by the prosecution?

DEFENDING OFFICER: I do no object. I do not condone. My stand is merely that all members are not prevented by law to sit and I'll just leave the rest to the discretion of the court as to the course of action they see best.

144

Defending Officer

Rebuttal

JUDGE ADVOCATE: Thank you. Mr President and Members of the court, what I'm going to do is take a few minutes to go and look at what has been represented by the prosecutor as well as the agreed statement of facts which I will be providing you once I finish giving you my address and I will tell you in my address what it is that you're required to do, more precisely even that I alluded to at the beginning of this and then you'll be able to go out, deliberate and decide whether you grant the objection or not. So give me until 11 o'clock. It's twenty-five to eleven. So if you could adjourn the court to 11:00.

PRESIDENT: The court is adjourned until 1100 hours.

ADJOURNMENT: At 1036 hours, 8 December 1994, the court adjourns.

REASSEMBLY: At 1151 hours, 8 December 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Thank you. Be seated. Pursuant to section 187 of the **National Defence Act** and QR&O article 112.14, the prosecution objects to the trial being conducted by one of the members, namely Commander Nield. In support of its objection an agreed statement of facts has been read and is now marked as Exhibit "E". The court can consider that the facts contained in this exhibit are facts that have been conclusively proven and can rely on them to determine the issue.

The prosecutor, Major Abbott, submits that because he and Commander Nield are historically connected in a situation of adversarial litigation as illustrated in Exhibit "E", there is a real danger that a reasonable and informed person would apprehend that the member may be biased in respect of the trial of this accused. The defence agrees with the statement of facts and does not object to the representations of the

145

Judge Advocate

Address on motion

prosecutor. Indeed, they have no opinion on the issue and leave it to the discretion of the court.

Lieutenant-Commander Marsaw has the right to be tried by an independent and impartial tribunal and this includes not only an independent and impartial tribunal in fact, but also one which is perceived to be independent and impartial. Although it is the first time in my memory that such a situation arises in respect of a member and one of counsel at trial, I believe that there is not such a great difference between this and the situations that were referred to by the prosecution where there is an historical connection between one witness and one member of the court or where one member of the court may have been previously connected with one of the parties to the trial.

I believe it is important to note here that none of the representations of the prosecution allude to an actual bias on the part of Commander Nield but rather to the apprehension of such bias on the part of a reasonable and informed person who would have been made aware of the historical connection as at least members of the public present in this courtroom today may potentially perceive.

What you have to determine here is whether this apprehension of bias exists and whether it could prevent justice not only from being done but from being seen to be done. Before you close the court to determine the issue and with the knowledge and agreement of both counsel, the issue of the availability of an alternate member, if an alternate member was called to replace Commander Nield later in the year of 1995, and maybe the issue of the sufficiency of members to form this General Court Martial must not, and I repeat, it must not have any bearing on the objection that you now have to decide.

In other words an issue of when this court will sit must not affect you in the decision that you are about to make. It is now time for you to close to

146

Judge Advocate

Address on motion

consider the issue. Remember that pursuant to QR&O article 112.14, Commander Nield does not get to vote on this objection and in fact should not be present nor the alternate members in the deliberation room when you retire. When you start your deliberations, discuss the matter generally, allow each member to formulate his opinion and then vote starting with the junior member.

Mr President, you may initiate the discussion but you should not endeavour to sway the opinions of the remaining three members. If you need further advice on the law after you started your deliberation like in any other matter, you will have to reopen the court and seek my advice in open court. When you have reached your decision you will return to the courtroom and announce your decision in the following manner: "The court allows the objection to Commander Nield", and indicate to the Commander that he is dismissed and may remain as a member of the public or return to his duties or "The objection to Commander Nield is denied."

Any comments by counsel in my remarks to the court?

PROSECUTOR: No comments, sir.

DEFENDING OFFICER: No comments.

JUDGE ADVOCATE: Any questions by the court?

COURT: No, sir.

JUDGE ADVOCATE: So, Mr President, if you would now just close the court to deliberate on the objection.

PRESIDENT: The court is closed to consider the motion.

AT 1156 HOURS, 8 DECEMBER 1994, THE COURT CLOSES TO DETERMINE OBJECTION.

AT 1211 HOURS, 8 DECEMBER 1994, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

147

President

Decision

PRESIDENT: The court allows the application of the prosecution respecting Commander Nield. Commander Nield, you are dismissed from your duties as a member of the court. You are welcome to remain as a member of the public or to return to your regular duties.

JUDGE ADVOCATE: If you'd just step down.

COMMANDER NIELD STEPS DOWN AS A MEMBER OF THE COURT.

PRESIDENT: Commander Sweeney, as the first designated alternate, you will replace Commander Nield as a member of the court.

COMMANDER SWEENEY TAKES HIS SEAT AS A MEMBER OF THE COURT.

JUDGE ADVOCATE: Now, Mr Defending Officer, before I ask ... Is there any other objection to members of this court as they are constituted now? Any objection based on 112.14?

DEFENDING OFFICER: Not from me.

PROSECUTOR: No, Mr Judge Advocate.

JUDGE ADVOCATE: Now, Mr President, I'm aware because this issue was raised before, that there is a problem with proceeding with the trial after today. So, Mr Defending Officer, will you give us a brief indication of what this is all about?

DEFENDING OFFICER: Yes, when the court is properly constituted and sworn in I will be asking for an adjournment on the basis that I didn't have sufficient time to prepare, and I can inform the court that I will be seeking ... it won't be a matter of days, it will be more a matter of months like looking into the month of maybe February at the earliest, March, somewhere there.

148

Judge Advocate

Arraignment

JUDGE ADVOCATE: And Mr President, I think also you had indicated that there maybe a member of the court ... yet, again, another member of the court may have difficulties after the 1st of January.

PRESIDENT: That=s correct.

JUDGE ADVOCATE: That was, I believe, Major Cloutier.

PRESIDENT: Major Cloutier certainly will not be available in the new year as a member of the court.

JUDGE ADVOCATE: So with the agreement of parties, rather than know that we=re going to face a difficulty and it will be impossible or difficult for Major Cloutier, since he is proposing to I gather after the 1st of January why do we not simply with your agreement ask the other alternate member to step up and replace Major Cloutier?

PROSECUTOR: You have my agreement, Mr Judge Advocate.

DEFENDING OFFICER: And mine.

JUDGE ADVOCATE: Then maybe Major Cloutier.

PRESIDENT: Major Cloutier, you=re dismissed from your duties as a member of this court. You=re welcome to remain as a member of the public or you may return to your regular duties. And we will pronounce the second designated alternate, Major Leblanc.

MAJOR CLOUTIER STEPS DOWN AS A MEMBER OF THE COURT.

MAJOR LEBLANC TAKES HIS SEAT AS A MEMBER OF THE COURT.

JUDGE ADVOCATE: So, formally, now I would like to ask Lieutenant-Commander Marsaw if he object to being tried by this court martial as it is now assembled?

149

Judge Advocate

Arraignment

DEFENDING OFFICER: No, we have no objection.

JUDGE ADVOCATE: Okay, then we will take the oath.

THE PRESIDENT AND MEMBERS ARE DULY SWORN.

JUDGE ADVOCATE: Be seated, please. Before proceeding, Mr President, I would invite your attention to the subject of QR&O article 112.06. Your duty as the court is to assess fairly the evidence which will be placed before you and to determine from that evidence, according to established principles of law, whether the accused is guilty or not guilty of the charges laid against him. QR&O 112.06 provides that the judge advocate shall hear and determine all questions of law or mixed law and fact either in the absence of or in the presence of the court.

As an example, I may be called upon to rule as to whether evidence tendered for admission may be properly received by the court. In some of these situations you may be asked to retire while I hear evidence and argument and make my ruling upon the issue. I also ask you not to attach any importance to the fact that either counsel objects to certain evidence being admitted. It is absolutely imperative in order that justice be done that our rules of evidence be properly applied as your verdict depends upon evidence properly received in those proceedings.

I should point out that any rulings I may make with regards to evidence relate solely to the question of admissibility. It is for you as the court to assess what weight or probative value should be given to any evidence admitted as a result of my rulings. So, Mr President, Members of the court, I would now like to introduce you to counsel in these proceedings. The prosecutors are Major Abbott and Captain Gleeson.

150

Judge Advocate

Arraignment

PROSECUTOR: Sir.

ASSISTANT PROSECUTOR: Sir.

JUDGE ADVOCATE: The defending officers are Lieutenant-Colonel Couture and Major Mackay.

DEFENDING OFFICER: Sir.

ASSISTANT DEFENDING OFFICER: Sir.

JUDGE ADVOCATE: Lieutenant-Commander Marsaw, stand up, please. It's been a long time since the charge sheet was read. Is it required that it be read again?

ACCUSED: No, sir.

JUDGE ADVOCATE: I will ask you to plead to the charges that are on Exhibit "A", there is a copy here, Mr President, and when I ask you, simply answer guilty or not guilty.

How do you plead in respect of charge number one?

ACCUSED: Not guilty.

JUDGE ADVOCATE: How do you plead in respect of charge number two?

ACCUSED: Not guilty.

JUDGE ADVOCATE: How do you plead in respect of charge number three?

ACCUSED: Not guilty.

JUDGE ADVOCATE: How do you plead in respect of charge number four?

ACCUSED: Not guilty.

151

Judge Advocate

Arraignment

JUDGE ADVOCATE: How do you plead in respect of charge number five?

ACCUSED: Not guilty.

JUDGE ADVOCATE: How do you plead in respect of charge number six?

ACCUSED: Not guilty.

JUDGE ADVOCATE: And how do you plead in respect of charge number seven?

ACCUSED: Not guilty.

JUDGE ADVOCATE: Thank you. You may be seated. Mr Defending Officer, I direct you now to article 112.05 paragraph (6) ... you can remove your head-dress ... do you apply for an adjournment on the ground that you had insufficiency time to prepare your defence?

DEFENDING OFFICER: Yes, I do, Mr President, Mr Judge Advocate. As stated that is the ground of my request. Maybe I should inform the court as to the circumstances in which I have become involved in this case and maybe explain why I am not prepared to proceed today.

I became Lieutenant-Commander Marsaw=s counsel only fairly recently toward the end of October and I met for the first time with Commander Marsaw then. It was not until early November that I received disclosure and in saying that I am not blaming the prosecutor. It=s that disclosure had been made to another counsel, so ... and since I was new on the case it=s then I got the disclosure. In November, it was 1 November ... 4 November, it was confirmed that I would have Major Mackay to assist me. So, he too came in fairly late in the picture, if I may say, and for the whole month of November I was tied up in another

152

Defending Officer

Application for adjournment

General Court Martial in Trenton which ended only on 1 December which is last week. I flew here after only one day back in Ottawa, and I flew here on the Sunday to be present here.

I can assure the court that Major Mackay and I have done our best to at least be here and attempt to proceed as much as we could but we did not have the opportunity to prepare the merit of the case. I can also inform you, and I believe the prosecutor will agree, that the disclosure material is very extensive. It=s boxes of material. It=s apparently in excess of 20 or 30 tapes of interviews of witnesses and it will be extremely demanding in terms of time to prepare, view and assess the whole situation. For those reasons I anticipate that I could not reasonably proceed before the later part of February, at the earliest.

I can assure the court that Major Mackay and I will do our very best to be prepared for then, of course, subject to availability of other personnel involved. At this time, because we have had such little time to even discover what the evidence is all about, it is very difficult for me to give a certainty that we would be able to proceed through the whole trial including defence as the case might be but I would surely undertake to be ready to proceed with at least the prosecution=s case, let=s say anytime late February from the 20th on or thereabouts. I will gladly answer any questions you might have, Mr President, as to other details that you may find relevant to this request of mine.

JUDGE ADVOCATE: Comments?

PROSECUTOR: My friend asked me to allude I think to the disclosure. I can say the disclosure material given to my friend is extensive. It will take some time to digest. The disclosure was first given on the 16th of August of this year to Lieutenant-Commander Marsaw=s initial defence counsel. He subsequently changed counsel. Now, my friend has taken over the

153

Prosecutor

Rebuttal

role giving little time to digest the disclosure material. For the record, I can say the prosecution is ready to proceed with the trial today. However, defence will need time to prepare, make February as a starting point, the 21st is acceptable to the prosecution. We have a number of witnesses to call in terms of juggling sailing schedules, for example, of all the witnesses, we would be in some difficulty if this trial was not finished by early April, however. Those would be my comments. Thank you.

DEFENDING OFFICER: With your leave, Mr Judge Advocate, and President. The prosecutor has alluded to a problem which sort of basically leaves me in the unknown because I don=t know enough of the material. One of the problems I was alluding to was the availability of witnesses and of course whether I will discover, for example, witnesses that might be required by the defence, I will discover only later. And that is indeed very much a factor because most of the personnel are sailors and in that respect that=s why I made this point about being uncertain of being capable to proceed to the full trial. But I surely do undertake to be ready to proceed with the prosecution=s case.

JUDGE ADVOCATE: I believe that 21 February 1995 until the beginning of April is a period of some five weeks. I would imagine that if the defence was ready we could anticipate that the trial would be finished in that period, if you were ready. We=re not looking at more than five weeks total, excluding adjournments for the time being. It=s an approximation.

DEFENDING OFFICER: Yes, an approximation, five ...

JUDGE ADVOCATE: It should be finished in less than five weeks.

DEFENDING OFFICER: I would say minimum four, six possibly. It=s four to six weeks as an approxima-

154

Defending Officer

Reply

tion and of course I will know better when we reassemble.

JUDGE ADVOCATE: Mr President, I will just remark here that in view of the representations of counsel I think, and because as you can see from the regulation itself, it is envisaged that the defence has to have sufficient time to prepare. I mean there is no choice. That's a right in order to make full answer and defence to have the time to prepare. Now, I appreciate that counsel now have said that the end of February like, and I'm thinking of Tuesday the 21st of February until April, they'll probably be in a period where they can proceed. I have no problem with that period either, personally, like my court schedule is okay for that, I can assure you of that.

Now, the other thing that you have to determine is the availability of all five of you. I would ask you to close the court and to look at this. I think you should look at all of your personal schedule.

Make sure you have, you know, as up-to-date as possible schedule of what there is planned for you in the coming weeks, oh, well not in the coming weeks, but those weeks in February and March and if you find that you can do it then, my recommendation would be that you come back and grant an adjournment as requested by the defence to Tuesday morning the 21st of February at 0900 hours. Monday I think is required for people to get here and for the last minute adjustments so that we can, if the defence is fully ready, then we can proceed with all possible speed. So, Mr President, if you could close the court and go and discuss that and come back with a decision.

PRESIDENT: The court is closed until further notice.

AT 1229 HOURS, 8 DECEMBER 1994, THE COURT CLOSSES TO DETERMINE DECISION.

155

President

Ruling

AT 1246 HOURS, 8 DECEMBER 1994, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

PRESIDENT: It turns out that with the dates being requested there is a potential conflict for one of the members of the court, Commander Sweeney, who is the commanding officer of HMCS HALIFAX. His availability is fairly assured until the 24th of March when the ship comes out of a short work period. But after that it's assumed he will be proceeding to sea to conduct trials prior to an operational deployment that begins in April. Therefore, there is a potential that he would not be available for the full period of the court should it run the four to six weeks that is anticipated.

JUDGE ADVOCATE: So the court would be able to sit on the 21st but on the 24th we would have a problem?

PRESIDENT: That's correct.

JUDGE ADVOCATE: And then we would need to adjourn?

PRESIDENT: We would need to adjourn until such time as all the members could resume.

JUDGE ADVOCATE: All the members could resume.

PRESIDENT: In the event that we're seeking an adjournment here, is it doable to swear in another member at a later date?

JUDGE ADVOCATE: No, no.

PRESIDENT: No.

JUDGE ADVOCATE: The board, the panel, if you want, of the court is sworn in. Those are the five judges and if one judge became incapacitated or unavailable it would result in the dissolution of the

156

President

Ruling

court martial. But other adjournments at that time are possible and we will ... I guess we will face that bridge when we come to it. So is the 21st then an acceptable date?

PRESIDENT: Yes, the court would agree to the granting of an adjournment until the 21st of February at 0900.

JUDGE ADVOCATE: And then with all haste, maybe we might be finished by the 24th of March. We never know. We=ll see.

DEFENDING OFFICER: Yes, I wanted to clarify whether it was the 24th of February or 24th of March.

PRESIDENT: The 24th of March.

DEFENDING OFFICER: Okay.

PRESIDENT: Commander Sweeney is not available after that or he may not be available after that.

JUDGE ADVOCATE: So let=s adjourn to the 21st of February. So you just pronounce it, sir.

PRESIDENT: The court is adjourned until the 21st of February at 0900 hours.

ADJOURNMENT: At 1246 hours, 8 December 1994, the court adjourns.

REASSEMBLY: At 0900 hours, 21 February 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Thank you. Be seated.

JUDGE ADVOCATE: Good morning, Mr President, Members of our court. I mean good morning to all parties as well. So when we adjourned the court last December it was at the request of the defending offi-

157

Defending Officer

Objection to counsel

cer, the accused, in that they were not ready to proceed with their defence. So now that we are back in court, Mr Prosecutor, are you ready to proceed?

PROSECUTOR: Yes, we are, Mr Judge Advocate.

JUDGE ADVOCATE: Very well, at this point I gather there are matters that the defence wishes to raise?

DEFENDING OFFICER: That is correct. Some matters that have intervened since the last time and that was not presented before you, Mr Judge Advocate, then because the matter was unknown, and that results in an application in law that I would suggest should be heard in the absence of the court. I apologize for that but it=s ...

JUDGE ADVOCATE: Mr President, Members of the Court, if you could please retire.

THE PRESIDENT AND THE MEMBERS RETIRE.

JUDGE ADVOCATE: Mr Defending Officer?

DEFENDING OFFICER: Thank you, Mr Judge Advocate. The matter I would like to address is one of pure law which results from a recent decision, fairly recent, a decision of the Court Martial Appeal Court in the case of a **Corporal J. Barsalou and Her Majesty The Queen**, and that=s a decision dated 12 October '94 and I will explain to you more. It is the contention of the defence that this decision is such that it would call, and I will argue in a moment and will give you the gist here, that it would call for you, Mr Judge Advocate, to disqualify yourself from this case, from hearing this case, from acting as judge advocate on this case on the basis that you have seen the synopsis.

Before I proceed to do that, however, with your leave, the prosecution informed me yesterday that Lieutenant-Colonel Watkin intended to handle this

158

Defending Officer

Objection to counsel

particular argument in law this morning. Whilst I do not object to Lieutenant-Colonel Watkin **per se** as an individual, what I would like to raise is an objection as him intervening as a prosecutor in this case. I do submit to you that it is not desirable from one party or another to keep adding new counsel unless, for example, one is incapacitated or cannot act. Major Kirby Abbott is here and looked pretty healthy this morning so is Captain Gleeson, and I do not see the purpose of adding yet a co-counsel.

I would like to direct your attention, Mr Judge Advocate, to the provisions of QR&O 111.51 which deals with the transmission of documents to the accused. In particular 111.51(1)(f):

"As soon as practicable after receipt of the documents referred to ... 11.50 ... 111.50 ...",

should I say which are the documents confirming that a court martial has indeed been convened,

"... but ..."

and I believe it=s important

"... but no later than 24 hours before the commencement of the accused=s trial, the commanding officer ..."

causes the accused to be served with a number of documents that are listed including at subparagraph (f):

"(f) a written notification as to whether the prosecutor is a person having legal qualifications."

I will admit and I believe my learned friend will not object to that, that the accused has indeed been served in November prior to the commencement of

159

Defending Officer

Objection to counsel

his trial with notice to the effect that the prosecutor would be Major D.K. Abbott and through another notice also dated 29 November '94, the accused was further put a notice that the assisting prosecutor for his trial would be a Captain P.K. Gleeson.

The trial has now obviously commenced. It has commenced on 6 December, as I recall, and I suggest to you that at this stage of the procedure and given the circumstances and given compelling reasons for which another counsel should be allowed and with all due respect to Lieutenant-Colonel Watkin he should not be allowed to intervene in this trial. Those are my submissions on this aspect and I will be ready to address the court on the actual ...

JUDGE ADVOCATE: Should we deal with this right away or should we wait until you're finished and then I'll deal with that one before?

DEFENDING OFFICER: ...

JUDGE ADVOCATE: Well, it will have to be dealt with before there is a response on the other side. I suppose so.

DEFENDING OFFICER: Exactly.

JUDGE ADVOCATE: So it would be preferable to deal with this issue right away.

DEFENDING OFFICER: I would suggest, yes.

JUDGE ADVOCATE: So those are your comments on the acceptability of Lieutenant-Colonel Watkin to respond for the prosecution?

DEFENDING OFFICER: They are.

JUDGE ADVOCATE: Any comments?

ASSISTANT PROSECUTOR(LIEUTENANT-COLONEL WATKIN): Well, I must start out by saying I'm flat-

160

Assistant Prosecutor

Rebuttal

tered that he is so concerned I might be addressing the court. I do note that Lieutenant-Colonel Couture has not indicated in anyway it goes to the jurisdiction of the court but he relies on pre-convening documents as to somehow that might.

Clearly, the requirement of the regulations have been complied with. The defence has been put on notice that the prosecution would be conducted by legally trained officers in particular Major Abbott and Captain Gleeson. That presumably then fore-allows the accused to know that he should have equally qualified counsel, which he does, and that, therefore, he has been put on notice, obviously reacted to that notice and we're here in court today. There is absolutely no prohibition against another lawyer coming in and arguing the case for the prosecution. There is nothing that would even suggest in the regulations that if the prosecutor can't continue that somehow the court should dissolve.

Obviously, if a prosecutor cannot continue then another prosecutor can come in. The purpose of the regulation is clear and the regulation has been complied with. In terms of notice, my friend was put on notice yesterday that I would be arguing this motion. No objection certainly was raised at that time. It's a bit of a surprise, a real surprise, to find that is raised this morning, and quite simply, it's the - I guess the other key point in this is the defence has not indicated in anyway whatsoever how the accused is prejudiced by my arguing the motion, in anyway, in terms of his objection. It does not go to jurisdiction. There is nothing I would argue to even rule on other than the fact that - there is no even a requirement the prosecutor must be legally trained. That's my response, Mr Judge Advocate.

JUDGE ADVOCATE: Yes, but from what the defending officer has said and your response now that the defence knows that you have legal qualifications?

161

Defending Officer

Reply

ASSISTANT PROSECUTOR (LIEUTENANT-COLONEL WATKIN): I don=t think that was ever in doubt, Mr Judge Advocate.

JUDGE ADVOCATE: That was never in doubt. It was never argued that Lieutenant-Colonel Watkin has legal qualifications. He is a person who could have been here as the original prosecutor.

DEFENDING OFFICER: He could. Incidentally, and to maybe reflect a little more correctly, although I didn=t speak to Lieutenant-Colonel Watkin yesterday, I did indicate first a bit of a surprise and then a concern about this addition of counsel. I may not have formally said, "I will object", but I don=t believe I did consent. In any event, that has a little to do. I did not consent.

JUDGE ADVOCATE: I don=t know if you=re in a position to consent or not consent. That too would have to be in the regulations as to whether the accused can consent to a particular prosecutor.

DEFENDING OFFICER: Yes, and clearly I do know that Lieutenant-Colonel Watkin is a qualified lawyer. He is a member of the Judge Advocate General=s office, et cetera. I will go as far as saying and not contesting at all, of course, that I was informed yesterday. Nonetheless, it is an event that didn=t take place prior to the commencement of trial and barring any compelling reason why he would have to intervene instead of one of the originally scheduled counsel, it shouldn=t be allowed.

JUDGE ADVOCATE: I=ll take a few minutes to think about this one.

AT 0912 HOURS, 21 FEBRUARY 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 0942 HOURS, 21 FEBRUARY 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

162

Judge Advocate

Decision

JUDGE ADVOCATE: Thank you. Be seated, please. The defence objects to the addition of yet another prosecutor to this case in the person of Lieutenant-Colonel Watkin. No argument is put forward that this addition will result in the prejudice to the accused in the presentation of his defence and the defending officer relies strictly on the provisions of QR&O article 111.51(f) which stipulates that a written notification of the legal qualifications of a prosecutor must be given in writing to the accused at least 24 hours before the commencement of the trial. I will read 111.51 paragraph (1) and subparagraph (f):

"As soon as practicable after receipt of the documents referred to in article 111.50 (*Forwarding of Documents by Convening Authority*) but no later than 24 hours before the commencement of the accused's trial, the commanding officer of the unit where the accused is present shall ensure that there is handed to the accused:

...

(f) a written notification as to whether the prosecutor is a person having legal qualifications."

The prosecutor replies that a notice of such addition of prosecutor was given to the accused more than 24 hours ago.

The issue then is whether the absence of a written notice prior to the commencement of the trial, which as the defence points out and I agree with the defence, was indeed 6 December 1994 when the accused is brought before the judge advocate is sufficient? So the question to be determined is whether this is suffi-

163

Judge Advocate

Decision

cient to prevent Lieutenant-Colonel Watkin to become co-prosecutor at this stage of the trial.

In order to resolve this issue and in an attempt to determine the meaning and value of the words "but no later than 24 hours before the commencement of the accused=s trial", I have done a little comparison exercise and I looked at QR&O article 111.645. This article is entitled "**RIGHT TO CALL PROSECUTION WITNESSES**", and it reads as follows:

"(1) Subject to paragraph (2), the prosecutor shall not be bound to call every witness against the accused whose evidence is contained in the synopsis or a witness whose evidence is not contained in the synopsis even though the prosecutor has notified the accused of the intent to call such a witness.

(2) A prosecutor who does not intend to call a witness mentioned in paragraph (1) shall:

(a) give the accused reasonable notice before trial of that intention;"

In that case (2) of 111.645, a notice that the prosecution will not be calling a witness whose name appears on the synopsis must be given before trial and if such notice is given then the accused loses his right to compel the prosecutor to offer the said witness for cross-examination.

There is in my view a difference in the meaning of the words "before trial" as they are used in these two articles of QR&O. In 111.645, that=s the one entitled "**RIGHT TO CALL PROSECUTION WITNESS**", a notice given during the trial could result in a prejudice to

164

Judge Advocate

Decision

the accused in the presentation of his defence. In 111.51, and it is not suggested by the defence that there was any prejudice, it is difficult to conceive a potential prejudice for the accused by the addition of a prosecutor. In any event, if the prosecutor of record was to become permanently incapacitated during the trial, the possibility must remain open to replace him in mid-course.

So the words "before trial" may not therefore in my view and need not be interpreted so strictly in respect of 111.51 as they would be in respect of 111.645, particularly in this case where no evidence has been heard yet. We're still at the preliminary stage of the trial and because there is no evidence that the accused would suffer any prejudice from the addition of Lieutenant-Colonel Watkin to the prosecution at this state. So the objection to Lieutenant-Colonel Watkin is denied.

So we can now continue with the application by the defence that I, as judge advocate, disqualify myself from sitting on this trial. Carry on.

DEFENDING OFFICER: That's correct. Thank you, Mr Judge Advocate.

JUDGE ADVOCATE: Carry on. So you can therefore reply when the time comes.

DEFENDING OFFICER: My learned friend has a copy of the only case I will rely on, and I give you one. This is the case of as I stated before **Barsalou**.

In this case, Mr Judge Advocate, as you will recall and at the request of the defence you did, I believe it was on the 6th or 7th of December as we started the trial, actually it was the 6th, it was the very first application that was presented, you did look at the synopsis to determine whether the synopsis was drafted in such a way that did not comply with the provision of Chapter ... article 109.02 and whether such digression from the provisions of 109.02 would be of a nature to

Defending Officer

Motion of recusal

affect the whole jurisdiction of the court. You eventually denied that application.

After my return to Ottawa - I must add as you will recall too, that the prosecution objected to you looking at the synopsis on the basis that, well, it says that, I don=t know if they relied on exactly the actual rule of evidence or a note under Chapter 109.02, that you couldn=t see the synopsis. You ruled that you would see the synopsis but later on denied the application. An interesting point to note, and I had the opportunity to discuss that with my learned friend, I was not aware of the decision in **Barsalou** and it turned out that I became aware of it upon my return to Ottawa. My assistant received his copy as well on 12 December, I believe.

My learned friend was not aware of it because I know he would have made a point of using the case in objecting to the synopsis being seen and apparently, Mr Judge Advocate, you didn=t know, and I say "apparently" because it=s not for me to say, but I do believe that had you been aware of the case I=m sure you would have either incorporated it in your decision or at a minimum I believe invite comments of counsel on that decision and from your total silence on that case, I infer, I suggest reasonably, that you were not aware of the case. Now that we are all aware of the case, the problem presents itself in the following fashion and I refer you to page 4, the very last paragraph of page 4 of the **Barsalou** decision:

**"Neither a synopsis or statement
 ...",**

the statement referred to there, is the statement that an accused is afforded the opportunity to make under Chapter 109

"... are admissible at trial.

166

Defending Officer

Motion of recusal

Incidentally and although the CMAC did not state the exact rule, the synopsis is not admissible under Rule 55(a) of the rules ... the Military Rules of Evidence and the statement clearly under QR&O 109.02(4)(e). So having made that statement the Court Martial Appeal Court continues on by stating and this is the crux of my argument which at the end of the day is quite simple, short:

"If it were learned that the President or Judge Advocate or any member of a court martial had seen a synopsis, any conviction appealed would be quashed."

Incidentally and before I carry on with my argument, I would like to point out to you, Mr Judge Advocate, that that decision of **Barsalou** was delivered by the Chief Justice then Justice Mahoney and concurred and it was a unanimous decision concurred in by Justices Hart and Brooke.

So this little paragraph there clearly indicates to me, Mr President, that you have ... I mean we cannot presume of the outcome of the trial, but the court martial says if it was learned that anyone, that the judge advocate, president or members of a court have seen, any conviction appeal would be quashed. It is quite clear that the Court Martial Appeal Court has stated that a synopsis cannot be seen by a judge advocate and have the judge advocate carry on with his duty in the case.

Now, as I stated earlier, I was not aware and of course had I been aware, had my learned friend and yourself been aware, it would have been a totally different story, possibly. Your decision might very well have been different than what it was. But now that you have made that decision and indeed seen the synopsis I believe that you are bound by this decision. The prosecution will probably suggest that this paragraph that I refer to now is a mere **obiter dictum**.

167

Defending Officer

Motion of recusal

With respect I disagree and respectfully submit to you that it was not a by-the-by comment or **en passant**. This comment is made in the very context of the CMAC looking at sufficiency of notice in this particular case regarding the introduction of intercepted communication. And in reviewing the sufficiency of the notice they did review the military system stating among other things at page 4 the first full paragraph or the second if we ... after the first two lines, making a review of how the system works under the Code of Service Discipline.

A synopsis is prepared, served on the accused affording him an opportunity to make a statement, et cetera, and then the synopsis is served again as they do come in there and in this very context of studying the sufficiency of the notice they review this system. Then they say, "Okay, now that=s what the military justice system requires", and they continue on. So neither the synopsis or the statement are admissible and they put it extremely clear that they are inadmissible to the point where, should ... if it was learned.

So, therefore, it cannot be said and the terminology is quite clear, simple and unequivocal, in my opinion. It is also of interest to note that for example had the Court Martial Appeal Court wanted to limit the extent of their comment for example to the members of the court or possible the president they could have for example said "If it were learned that the president or any member of a court martial had seen a synopsis", et cetera. The inclusion of the word "judge advocate" contemplates only and clearly the scenarios of DCMs, Disciplinary Court Martial and GCMs, General Court Martial.

So clearly they had intended that even the judge advocate in those scenarios be not aware of the synopsis. At page 5 of the same decision, at the very top of the paragraph they continue in their analysis and they talk about the synopsis and as the court had considered "Maybe we should ourselves have a look at

168

Assistant Prosecutor

Rebuttal

the synopsis", and the appellant, a corporal as he then was, Barsalou, objected to the respondent to being allowed to perfect the record at that stage and the respondent was adamant that the confidentiality of the synopsis is essential to the integrity of the court martial system and they did not require the production not necessarily based on those arguments, they carried on after that and discussing that there was from the record sufficient evidence to conclude that it had been properly ... the defence had been properly notified.

So for all these reasons and with all due respect I suggest to you, Mr Judge Advocate, in light of this decision that you do withdraw because this decision is one of the CMAC which is binding and cannot reasonably be distinguished from the circumstances of this case. Those are my remarks for now, Mr Judge Advocate, subject to my right of reply.

JUDGE ADVOCATE: ...

ASSISTANT PROSECUTOR (LIEUTENANT-COLONEL WATKIN): Thank you, Mr Judge Advocate. Perhaps there is two preliminary matters. First, in casting back I note the last time I appeared in front of you as a counsel was in 1982 in this courtroom. I would like to think that neither of us have aged. But anyway it is a pleasure again to be back in court. The second is nothing magical of course is attached to the fact that the AJAG has come in to do this motion. We're a busy office. There are apparently many last minute motions and as a result we've tried to spread our resources a bit and I anticipate it's unlikely you'll see me very much during the rest of the trial.

What I would like to do though is to provide you with some cases that I'll be relying on. I've already given copies of these cases to the defence.

JUDGE ADVOCATE: Thank you.

169

Assistant Prosecutor

Rebuttal

ASSISTANT PROSECUTOR (LIEUTENANT-COLONEL WATKIN): I must admit that on the ... at my first blush reading the portion of the **Barsalou** case that my friend just brought to the attention of the court I was ... a view upon my task was a bit of a daunting task. However, after having looked at the law and considered the true meaning of the words I found that to be less so and I hope to convince the court of that position.

I would like to set for the record that this office was not provided a copy of **Barsalou** prior to the last session in December of '94 even though the judgement occurred in October of '94, the **Barsalou** judgement. Hopefully, the process has been put in place by means of the fax machine to ensure that doesn't happen again. But I would submit that it would not have made a difference in any event in terms of us being here arguing this position. It was the position of the defence that they felt it was necessary to have the synopsis before the court and I would like to certainly correct from the prosecution's point of view, and of course the record will confirm this, but I'm certainly advised that it was ... that the prosecution brought to your attention Note "D" but did not actually object but was concerned that there was this note in QR&O and that the court ruled accordingly that the synopsis could be used for the purposes of the pre-trial hearing.

I'd argue that if you had taken the view that the court cannot look at the synopsis that it would have been open to the defence to argue under Section 7 and 11(d) of the **Charter** that they were being denied full answer and defence. The result being that you would have I argue been compelled to look at the synopsis and we'd be here today arguing whether you could continue or not in terms of the trial proceeding. So in any event we are here arguing over your continued involvement. But that question of your looking at the synopsis during the judicial proceeding is important with respect to the plain wording about the Note to QR&O 109.02 and the wording with respect to the synopsis ... sorry, the statement of the accused in 109.03

170

Assistant Prosecutor

Rebuttal

and I would argue the plain wording that there is in the actual **Barsalou** decision.

With respect to the Note to QR&O 109.02, of course, there is two concepts which are covered in the first sentence. The first is that the synopsis is not admissible in proceedings before the court martial and may not be seen by the judge advocate or by the president or other member of the court, two different ideas, admissible and seen. And when I look at 109.03 subparagraph (3) (b):

"(3) Any written statement made by the accused under paragraph (1) shall

...

(b) not be admissible as evidence at any trial."

And that of course is a regulation and we have this question of what=s the effect of a Note? What=s the effect of a regulation? But turning it to the wording of the **Barsalou** decision it=s set out in two separate sentences and it=s really a juxtaposition of the regulation and the Note altogether and the Court Martial Appeal Court has said:

"Neither a synopsis or statement are admissible at trial. If it were learned that the President or Judge Advocate or any member of a court martial had seen a synopsis, any conviction appealed would be quashed."

Now, if they had seen the synopsis the question of admissibility at trial, there would be no need for that first wording because it would never get to the trial in terms of being admissible. And I certainly on the plain reading of the words it=s quite

171

Assistant Prosecutor

Rebuttal

open and consistent with our law that if there is an extrajudicial viewing of a synopsis that that would preclude the members, the president or the judge advocate from continuing with the trial. It's also consistent with our procedures that the defence could argue against that, challenge the judge advocate if he knew that the judge advocate had actually seen the synopsis.

If it came out later on that the judge advocate had seen the synopsis, then presumably, that would be a ground for appeal. But that's different, I would argue, than the question of looking at the judicial in court view of a synopsis where the learned judge advocate has an opportunity to rule on the synopsis for its purpose that it's put before the court and the weight, if any, to be given to the synopsis.

So that's certainly on the plain reading. And then when you go on to read **Barsalou**, what they are talking about, it was never at the record, it was never in the judicial proceeding and that's when you get into the battle between the prosecution and the defence in the court. I mean no one wanted to look at the thing.

It wasn't part of the record. And that's what the rest of the wording is about. I would argue that position is consistent with our existing regulations and as I will attempt to show in a moment it's consistent with the state of the law in terms of judges looking at what might be otherwise inadmissible evidence and I will also submit to the court that there is a duty to do so.

Okay, I note and I believe it is significant that the defence is not arguing that it's not a question of bias or a question of a reasonable apprehension of bias, and indeed on these facts I do not believe they could do so and they have chosen not to. They are saying because you have seen a document, a summary of evidence entitled "SYNOPSIS", in the course of these proceedings in terms of dealing with pre-trial motions that somehow that bars you from sitting as a judge. And it's significant to note that the synopsis contains ... this isn't a question of whether the evidence

172

Assistant Prosecutor

Rebuttal

itself was admissible or inadmissible. Of course, the position of the prosecution is everything in the synopsis is admissible. It may or may not at the end of the day as the trial unfold. But it's not that the words in the synopsis themselves are at this stage inadmissible evidence. They are just the information that went to the convening authority and that is the very issue for which the defence relied on back in December.

The prosecution is concerned that you may feel compelled out of respect to the Court Martial Appeal Court as was mentioned by my friend, that it was a unanimous decision of Chief Justice Mahoney and the other two judges concurred in the plain wording which we have discussed. Of course, one simple option is to look at it as I have suggested in terms of that's what was meant by the wording and we're simply following the **obiter dictum** that is in that judgement and that contrary to what my friend has indicated, and I will be making a bit more of a submission on **obiter dictum**, the issue that was before the Court Martial Appeal Court was not the propriety of looking at a synopsis in terms of, is the judge then disqualified or the judge advocate if he does? It was simply, is the synopsis a sufficient notice? And in fact, they all studiously avoided the question of looking at the synopsis because of course no one looked at the synopsis in that case.

The other thing I would like to indicate to the court that while this judgement is unanimous, written by the Chief Justice, there is another judgement of the Court Martial Appeal Court unanimous written by the Chief Justice, the **Lunn** decision which appears to be inconsistent and I will deal with that in a second, but first addressing **Barsalou** on its own, okay. It's the position of the prosecution that out of respect for the Court Martial Appeal Court you cannot take the position or should not take the position that this **obiter dicta** is binding in such a way that you must excuse yourself, because it's the prosecution's position that for reasons of law, for reasons of logic, and for reasons of the administration of justice it

173

Assistant Prosecutor

Rebuttal

would be disrespectful to the court to take that position.

I've already indicated that it's the position of the prosecution that this is **obiter dicta** and I've included an excerpt from the **Canadian Law Dictionary** a definition of **Obiter dictum** which is clearly:

"A statement made or a decision rendered in a court opinion that is not essential for the disposition of the case."

And I believe as I have indicated, the question of whether a judge advocate had viewed the synopsis and must then excuse himself is not ... was not the issue before that court. In fact, no one had seen the synopsis other than the defence and the key issue was whether the defence had raised an objection at trial on insufficient notice. That was the issue that was before that court.

So it is **obiter dicta**, it is the submission of the prosecution. That being said I would also indicate that in looking at what is **obiter dicta** the question is, is **obiter dicta** binding, or are the words of this decision binding on you, Mr Judge Advocate? And it is the position of the prosecution that they aren't. The classic definition of the effect of **obiter dicta** is set out in the **Pollock** decision which is a decision of the Federal Court Trial Division (1981), at page 713 they refer to a learned text and I quote and the text is:

"Rédaction et interprétations des lois",

and I quote from a translation,

"The ratio decidendi may be contrasted with the obiter dictum."

174

Assistant Prosecutor

Rebuttal

The latter is what a judge says in passing, or an interpretation suggested by the judge without making a definite ruling. It is not binding. Anything not regarded as essential to the decision rendered is viewed as an *obiter dictum*."

Now, the question of the status of **obiter** was - and there appears to be a trend in my reading of the law, is that there is ... **obiter dicta** from the Supreme Court of Canada is treated differently than **obiter dicta** from other courts which is understanding in the sense that they of course are the courts of last resort and their words should bear a particular importance. That being said the case that relies on that is **Sellars v. The Queen** and I state that as a ball proposition because that=s the way it=s found in Ewaschuk. But when you look at the case of **Sellars v. The Queen** (1980) at 348, the court there, the Supreme Court, refers to the **Ottawa v. Nepean Township** case of the Ontario Court of Appeal where they talk about **obiter**:

"What was there said may be *obiter* but it was the considered opinion of the Supreme Court ..., and we should respect it and follow it, even if we are not strictly bound by it."

So it isn=t that you are bound by it. It is a question of whether it is persuasive or not. And that of course is the Supreme Court of Canada and certainly I have not been able to find any case law that would argue that in any other court at any other level, there is this idea of you are bound by what=s in the decision just on the bold wording that=s in the decision. And similarly, I would invite the court to look at the **Pollock** decision again where Mr Justice Dubé was confronted with a decision of the Federal

175

Assistant Prosecutor

Rebuttal

Court of Appeal and was confronted with **obiter dicta** from the Supreme Court of Canada. They had appeared to go in the other direction and he relied on the classic view of **obiter** from the **Davidson v. McRobb** decision at 713:

"My Lords, I apprehend that the dicta of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shown to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case."

And finally, I'm not going to spend too much time on **obiter**, the more recent decision, and it's just to highlight sort of, it's the two-edge swords in terms of not only is it lower courts and there are questions of whether they are bound by **obiter** statements of higher courts but it works both ways. And there I refer to the **R.J.S.** case which was just rendered on the 2nd of February 1995 at page 82, Mr Justice ...

JUDGE ADVOCATE: Let me get there. It's in that ...

ASSISTANT PROSECUTOR(LIEUTENANT-COLONEL WATKIN): Sorry, I haven't provided a copy of that. I was only going to refer to one page, sir, I can provide you this case. It's a bit of a brick.

JUDGE ADVOCATE: Well, maybe for interesting reading. So it's the case of **R.J.S.**

ASSISTANT PROSECUTOR(LIEUTENANT-COLONEL WATKIN): **R.J.S.**, which really dealt with the question on self-incrimination and the issue of derivative evidence. But in rejecting a lower court's view on

176

Assistant Prosecutor

Rebuttal

things, Mr Justice Iacobucci, in fact two lower court=s view, said:

"The laws of relevancy would preclude the random examination of individuals within a criminal trial. It also follows that I disapprove of obiter suggestions which might lead to contrary results:",

and he refers to two cases, **Welton and The Queen**, Ontario High Court, and **Zurlo**, a Quebec Court of Appeal ... sorry, and a 3rd case **Praisoody, supra**. I only bring that up to indicate that as a higher court all he had to say was I disapprove. But out of respect he said, "I really disapprove because it=s just **obiter**." So it=s a two-edged sword.

The reasons for feeling bound by what might be **obiter** comes from, I submit, the doctrine of **stare decisis** which is the importance of precedence and the importance of stability in court decision. However, there are equally important reasons for not being bound by **obiter** and those are in the common law system. The development of law is obviously a living tree and is dependent upon the resolution of different facts on a continual basis. The too literal adherence to words can bring about results which were never intended or even contemplated by the superior court. And that=s particularly important, I submit, an important issue in this case. And thirdly, strict following of **obiter** cuts off the appellate tribunal from new law and new issues. If precedence is pushed to doctrinaire or literal limits then the law becomes inflexible and illogical and of course that=s the reason why judges, since the time they have been judges, have been distinguishing cases.

Let=s look at the question of logic and that is, what is a synopsis? Under QR&O 109.02, it is a

177

Assistant Prosecutor

Rebuttal

summary of evidence, one can argue a summary of information. The regulation says it should not include character, it should not include irrelevant prejudicial facts. It's very narrowly ... I recall, and it's already been indicated in terms of the earlier proceedings, the **Lunn** case, where more than just the synopsis went to the convening authority and far more prejudicial information went to the convening authority and it was submitted before the learned judge advocate in that case which of course was yourself in the pre-trial hearing.

So it isn't that it's prejudicial, that it shouldn't be put before you. It isn't that it isn't relevant to the case that is put before yourself as the judge advocate. There is nothing magical about the information that's in there other than the fact that it has synopsis at the top. The same information could have been found in a police report, hardly in most cases less, and it was part of the pre-trial ... it's part of the pre-trial procedure. Clearly, a synopsis is not a preliminary hearing and I would submit there is nothing magical about it.

The defence says you should excuse yourself because you've seen at their request a summary of evidence. The prosecution, as I've already indicated it is the position of the prosecution, it's all admissible subject to the cut and thrust of the trial and if the proper foundation is laid then presumably that information will get before the court proper. And clearly, under our regulations as we are doing now, there is a provision where you as the learned judge advocate would be involved in a number of different types of pre-trial hearings including arguably and I don't submit for a second it will happen in this case at all but in any case there might be things like admissions by an accused that they have committed an offence, certainly far more damaging than some other evidence that might be in a synopsis, or a particular case you might be asked to rule about particularly a jury trial, photographs that might be insightful in

178

Assistant Prosecutor

Rebuttal

terms of being too prejudicial to an accused and you of course would see that and not the members of the court, far more damaging than what might be in a synopsis.

So, again, it=s not the magic that you might see would otherwise, would be inadmissible evidence and so I asked myself, what is so unique about the synopsis? And I come to the conclusion that there isn=t anything and that=s the submission of the prosecution.

There is nothing magical about it. I turn now to the Canadian criminal process, because I believe it=s important to contrast our system with the civilian system just to see where we stand in terms of the way civilian courts have headed with this very issue.

I invite the court to look at **R. v. Huard**. It=s a 1962 decision of the British Columbia Supreme Court, and basically what happened in that case is one magistrate started a trial and saw evidence which by Statute was inadmissible. They had an adjournment and when they appeared again in front of the court a different magistrate was there, and the question was put why? And because the argument was that just because the magistrate had seen inadmissible evidence prohibited by Statute, that that magistrate could not continue. And the British Columbia Supreme Court said no way. And I quote from the decision of Mr Justice Lord:

" In my opinion, there is nothing in the facts disclosed in this case to allow another justice to act in the place of the magistrate who commenced the trial. I cannot regard the reception of this evidence as leading to any inability on the part of the learned magistrate to continue the trial."

"Inability" is described in the New Oxford Dictionary as being the condition of being unable, want of ability, physical, moral ... mental or moral, lack

179

Assistant Prosecutor

Rebuttal

of power, capacity or means. None of these things have been shown to exist. Now, I would like to indicate that they are talking about the commencement of the trial and the admissibility of evidence in 1962, but as I'll show, now, the law has expanded that principle. But the question wasn't looking at the by-law, not allowed to see inadmissible evidence, the question was, it's a capacity question. We expect the judges to see inadmissible evidence and you don't excuse yourself for that reason. That brings me to the case of **R. v. Doel, Gill and Randev**. And in that case Mr Justice Kerans, that's the 1979 decision 51 C.C.C.(2d) at page 40, Mr Justice Karens of the Alberta Court Queen's Bench and in particular at page 47, he gives a comment that where you have a pre-trial hearing and a trial, it would be preferable if you had different judges. But then he puts it in context.

He says if it's a judge sitting alone and he makes an acknowledgement to the type of jury trial where he says that's not an issue, and that comes from English common law tradition where they didn't have judges sitting alone. What they were dealing with on the pre-trial motion was the question of a severance of charges and Mr Justice Karens said back in 1979 that if you're going to have a procedural matter you deal with that because you may have to see depositions, exhibits that sort of things, and then if you're going to have a trial you have a new judge. That's the preference, not a requirement at law, but that's the preference.

So we move on to **R. v. Curtis**, which is a 1991 decision, Mr Justice Ewaschuk, and there the question was in the intervening time, section 645(5) of the **Criminal Code** is enacted, which deals with this issue that Mr Justice Karens referred to and allows for the judge to hear things before trial and during trial. And what is said in the **Curtis** decision by Mr Justice Ewaschuk at page 159 is in my view when a judge makes evidentiary rulings pursuant to section 645(5) of the **Criminal Code**, he or she acts as the trial judge and consequently is necessarily seized with the trial.

180

Assistant Prosecutor

Rebuttal

So if you hear it pre-trial, you're there for the duration. Now, there they are dealing with evidentiary matters not procedural. And so to get the full picture we have to move on to a recent decision of the Supreme Court of Canada which is **The Queen v. Litchfield** which finally brings us to a complete understanding on how, what happens in the civilian justice system with respect of judges hearing inadmissible evidence and their requirement that they are seized with the trial, and in that case, it's at page 113, Mr Justice Iacobucci indicated that whether you're dealing with procedures or whether you're dealing with pre-trial procedural motions and it was a joinder in severance of counts question much like the old guilt case was. If you've dealing with pre-trial motions, severance or admissibility of evidence, you're seized with the trial, and I quote from the decision:

"Moreover, as a matter of practice and policy, it is obviously preferable that the trial judge hear applications to divide and sever counts so that such orders are not immunized from review. Otherwise, procedure begins to govern substance."

This is about halfway down the page between "c" and "d".

"Indeed, it makes sense that the trial judge consider applications to divide and sever counts since an order for division or severance of counts will dictate the course of the trial itself. Courts have recognized that it is preferable that trial judges make division and severance orders:"

181

Assistant Prosecutor

Rebuttal

And they refer to the **Watson** and all the cases. Then Mr Justice Iacobucci goes on to say:

"Not only are trial judges better situated to assess the impact of the requested severance on the conduct of the trial, but limiting severance orders to trial judges avoids the duplication of efforts to become familiar enough with the case to determine whether or not a severance order is in the interests of justice. It seems desirable, therefore, that in the future only trial judges can make orders for division or severance of counts ... to avoid injustices such as occurred in this case."

So the Supreme Court of Canada has come from the point of saying ... or the law has developed to the point of saying, pre-trial you started, pre-trial, you continue on in trial you're seized. Combine that with the **Huard** case, it says just because you see inadmissible evidence that doesn't mean the judge can excuse himself. I would submit that at law our learned judge advocates and yourself, sir, are required to continue with this case.

In some respect this issue is not much different than the **Lalonde** case where you had MP reports which contained more prejudicial information than the actual synopsis going to the convening authority and you, of course, yourself, sir, in that case were asked to review the Military Police Reports, albeit not the synopsis. Now, of course, Lieutenant-Colonel Couture is required and does on every occasions forcefully put forward the defence of the accused he is representing and certainly in this case he is doing so.

182

Assistant Prosecutor

Rebuttal

I just submit that in passing I would not be dissatisfied if I had the same judge advocate in this case rule that something less prejudicial that he had seen in the synopsis somehow barred him from continuing on in the trial. I just bring that out for two points. One, to indicate the artificiality of the word "synopsis". It really is trying to put that strict reading on the **obiter** in the **Barsalou** case as an artificial concept. And, of course, the decision here can have a much broader effect on the administration of justice which is what I'll turn to next.

Clearly, in **Litchfield** and as indicated in the last portion of the passage which I read to you, the Supreme Court of Canada is looking for a less complicated trial process. We don't want a duplication of effort. We don't want to have two judges for every trial that comes up. It's a question of the administration of justice and certainly in a military context as a result of the **Généreux** decision which clearly indicated that the military justice system is meant to be a speedier and more efficient process, certainly the avoidance of duplication of effort and the streamlining of trial process must be an even more important concept with respect to military justice.

One judge does all the hearings in the civilian court, that is both the law and the preferred practice, and I would submit that there is certainly no reason or no law that would indicate that one judge, yourself, should not be doing this, Mr Judge Advocate. Certainly, our judge advocates are no less capable of separating the wheat from the shaft in terms of pre-trial hearing, in terms of **voir dire**s than are their civilian counterparts. If **Barsalou** is followed too literally, as suggested by the defence, then we could have a two-step or even a three-step process in the administration of military courts martial. Pre-trial and perhaps the synopsis might be brought out at the trial stage and that is where I would like to head next in terms of my submissions.

183

Assistant Prosecutor

Rebuttal

Now, certainly in this case the fact situation was such that none of us knew of **Barsalou** before or at the time of the last sitting. However, the next time there is a trial on, not this trial but another trial, it wouldn't be impossible for a defence counsel to decide that they are going to raise a synopsis issue at the pre-trial in terms of, as I have already mentioned, the question of full answer and defence in terms of the convening of the court, the in-judicial viewing of a synopsis as opposed to the extrajudicial viewing of a synopsis and not be displeased with the result that the judge who is assigned to the court will no longer be sitting.

That, of course, raises the spectra of judge shopping and deciding that whoever judge you get you'd bring up this motion. And I look also during the trial proper itself and look at the motion of particulars and I'm certainly advised by the defence that we may see a motion for particulars in this case, and I would like to ask the court or invite the court to look at two cases. One is **R. v. R.I.C.**, which is the Ontario Court of Appeal (1986) 32 C.C.C.(3d) at page 403 in which among the things that the court relied on, to ensure that the accused had sufficient particulars, was an opportunity to see the Crown's brief which of course is a synopsis of the evidence which the Crown is going to put before the court. And similarly, in **R. v. Harrison and Alonso**, which is 1982, 67 C.C.C. (2d) at page 415, it is an indication there that part of the reason that the accused was not successful on the particulars motion was they had a chance to see the transcript from the preliminary inquiry. But we don't have a preliminary inquiry but of course what we do do, is provide the synopsis of the evidence.

So it would not, in light of this case law, be unreasonable in a particulars motion for the prosecution to ask the new trial judge, if you decide to excuse yourself or decide you must excuse yourself, is to look at the synopsis. So we would need a third trial judge. And then, of course, as if you want to

184

Assistant Prosecutor

Rebuttal

take it too literal, we want to carry this down in the ordinary course of a trial, then as we continue on motions for disclosure, it=s open for the defence to argue they haven=t had adequate disclosure. Of course, in any case one of the documents which discloses the evidence for the prosecution is the synopsis. That=s its whole purpose, is in part to let the accused know the case they are going to have to meet.

In fact, there is no requirement under our law for police reports. It isn=t inconceivable that there be no written investigation that there be only a synopsis under military law. So it=s not unreasonable for the prosecution to want to disclose, and this could happen at any point during the trial, want to ensure that when the defence argues they haven=t had adequate disclosure, the prosecution says, "Mr Judge Advocate, I would ask you to look at the synopsis, look what we told them." And the result being that that judge advocate, if you take the literal interpretation, would have to excuse himself from the trial.

So now we=re on to our 4th judge and we still aren=t done yet, which brings me to the **Lunn** decision which I mentioned earlier of course, a decision of the Court Martial Appeal Court written by Chief Justice Mahoney, unanimous for the court, and the question there of course, or one of the questions on appeal was not the synopsis directly but the question of the accused=s statement and as what I understand in the facts is, the prosecution prepared its list of witnesses, served on the accused, the accused chose to make a statement in which the accused provided more information of which it appears the prosecution was not aware, the prosecution took that information and from that served a new synopsis on the accused. The question which arose at trial was, was that proper for the prosecution to do that? And it=s of course the derivative evidence. The accused took part in the procedure. As a result of that taking part in the procedure it wasn=t used against him in the **Lunn** trial.

185

Assistant Prosecutor

Rebuttal

Now, the Court Martial Appeal Court ruled that that wasn't proper and didn't allow, on its appeal, allow consideration of the extra witnesses ... or sorry ... approved the decision of the judge advocate with respect to the extra witnesses that were on the "second synopsis". Now, that was a very broad look at the derivative evidence rule and luckily one would argue in terms of simplicity, the prosecution and defence were able to agree that everything that was in the second synopsis derived from the accused's statement. But that won't always be the case and that's clear, particularly now as a result of **The Queen v. R.J.S.**, the new derivative evidence rule that's come out from the Supreme Court of Canada which if I can paraphrase says basically, just because the accused said something doesn't mean everything he talked about is automatically excluded in terms of derivative evidence. If the prosecution could have found out that information any ways then the prosecution can still lead the evidence at trial notwithstanding the statement of the accused.

So it's one ... it's a more sophisticated look at the issue that one had and so now the issue becomes ... could become in the case a battle between the prosecution and the defence if they can't agree as to what's truly derivative evidence and what isn't and the only way to resolve that at trial is to show it to the judge advocate and have him rule whether that statement, which I note from the regulations, is not admissible in evidence truly resulted in derivative evidence either at trial or from the synopsis. So, clearly, the Supreme Court or the Court Martial Appeal Court in the **Lunn** decision was opening the door and said, "What is in the synopsis, is important", and carrying that on to a case where you wouldn't have an agreement between the prosecution and the defence and applying the **R.J.S.** case. I submit the judge advocate would have to look at the synopsis to determine what was truly derivative evidence or not. And if we follow the literal wording in **Barsalou**, as soon as he looked at that he would have to excuse himself from the trial.

186

Assistant Prosecutor

Rebuttal

In summary, Mr Judge Advocate, the words in the **Barsalou** case, it is the submission of the prosecution, are clearly **obiter**. There is a common sense reading to the words, those **obiter** words, which is consistent with military law as it exists in terms of non-judicial viewing of the synopsis on the part of the judge advocate, while not ... well during the course not admitting the synopsis into evidence, but allowing for the unaddressed view in the **obiter**, allowing for the judge advocate to look at the synopsis for the purposes of the trial, whether it=s pre-trial or during the course of trial motions, the inside-the-judicial-viewing of the synopsis. That interpretation of the words in CMAC is consistent with the law. It=s consistent with the role and function of trial judges and it shows absolutely no disrespect for the Court Martial Appeal Court. The only time we start to get ourselves into the realm of disrespect for the Court Martial Appeal Court is when we try to take, I would submit, too strict an interpretation of the words that there are in **Barsalou**, and there we end up with, I would submit, an illogical result, something which conceivably is less prejudicial which a judge advocate in the course of a trial can see eminently more prejudicial evidence against an accused and rule on its admissibility or not admissibility, that somehow this less prejudicial document because it has the word "synopsis" on it becomes a magical document, that as a class, causes a judge advocate to excuse himself. I would submit it is illogical.

And finally, the administration of justice itself, the potential becomes as our courts become and if we look at **Litchfield**, questions of process become intertwined with questions of evidence and we have procedural motions coming partway through the trial, the end of the trial, the beginning of the trial, evidentiary motions before trial and during trial, as all this becomes intertwined, to set up an artificial rule over something entitled "the synopsis" could conceivably result in two or three or four judge advo-

187

Assistant Prosecutor

Rebuttal

cates having to be assigned to a case. That certainly can't have been the intention of the Court Martial Appeal Court.

So I would submit, Mr Judge Advocate, you were right in December when you addressed all the issues and determined that you could look at the information, that you can take an approach which is consistent with the wording of the Court Martial Appeal Court and consistent with the law, both military and civilian, that the law requires you to continue because you are seized with the trial and the fact that you have seen what might be at some point become inadmissible evidence does not allow you to excuse yourself and, to take that decision now would be just as right now as it was in December. And those are the submissions of the prosecution, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Reply?

DEFENDING OFFICER: Yes, Mr Judge Advocate. The essence here is I of course strongly disagree with my learned friend that the passage I read to you this morning of **Barsalou** is an **obiter dictum** as defined, and my friend has relied on that, "a passing incidental statement not essential for the disposition of the case." I suggest to you that a close reading of **Barsalou** clearly indicates that this reasoning forms parts of an overall reasoning addressing the matter of disclosure.

My learned friend on one hand talks about the synopsis being artificial and then a minute after talks about its importance. My learned friend talked about disclosure. Disclosure has, as far as I'm concerned, nothing to do with the issue that the CMAC has raised in **Barsalou** on the statement regarding the synopsis. My learned friend relies on civilian cases and I think that is important to know that there is a big difference, although there are many points in common there are very fundamental important differences between the so called civilian criminal justice system and the

188

Defending Officer

Reply

military justice system, as of course acknowledged several time by both, the Supreme Courts and the Court of Appeal ... and CMAC, Court Martial Appeal Court, and again, in **Barsalou**, they did it. They said, "Eh, that=s different. There is no preliminary hearing and that=s the way their system works", and so on and so forth. And that=s what led them right into that statement about the synopsis.

For example the **Huard** case, **R. v. Huard**, the BC case, 1960, something that with all respect is not of great help to this court. It talks about then section 698 as to whether a judge could stay or not stay. It has nothing to do with this here. It=s like in terms of capability or unable to continue the trial and when does one take jurisdiction. That=s the sort of matter. My learned friend has also cited about three other cases dealing with when a judge must stay, when he is seized, when he is committed to stay. We=re dealing here with just the opposite. We=re dealing with when a judge must not stay and that=s what the Court Martial Appeal Court has talked about. They haven=t discussed when one is seized of a trial or anything of that nature. All those cases, I submit respectfully for that reasons that they deal with when a judge must stay which is not what we=re dealing with here. We=re dealing with a clear instruction in my opinion of the CMAC as to when the judge must withdraw. And two, all those comparisons do not hold, having given the differences between the civilian and the military system with which I=m sure you are more than familiar.

My learned friend talks about the judge determining questions of law all the time either on admissibility or procedural and he says, "Well, what=s so different about this?" I do not want to attempt to explain for the CMAC more or what they wanted to say I=m sure that in the future we will hear more, but I can venture one explanation here which I believe is reasonable. If we look at 55(a) and (b), they read

189

Defending Officer

Reply

basically: **"A synopsis not admissible ..."**. Okay, I shall read it because it=s important:

"Except as specified in this article, and notwithstanding ...,"

so many others,

"... the following documents shall not be admitted in evidence at a court martial:

(a) a synopsis prepared pursuant to QR&O 109.02;

(b) a report of a civil or military investigation relating to the alleged offence;"

Then, interestingly, there is three other category of documents or facts that are listed as not admissible but they all contain an "except", except provided here and except provided there, that sort of terminology, if we look, for example, at 55(e):

"... the record of a previous conviction of the accused by a judicial or disciplinary tribunal except when such evidence is admissible under ..."

this or that.

So those three, the last three subparagraphs of 55 declare certain type of evidence, documents, none admissible unless they are under specified reasons. The first two contain no unless, no exception. And to me that is the big difference between a synopsis and a military police report and a statement of an accused because the law says that the statement of an accused shall not be admissible unless a judge has determined

190

Defending Officer

Reply

its admissibility, et cetera, et cetera. A document is not admissible unless the maker or custodian et cetera, produces the document.

So there are many qualifiers. When you look at the synopsis and a police report there are none. I had believed, in good faith, in asking to have those documents introduced and you, Mr Judge Advocate, had determined that it was appropriate in the circumstances. We did not have the benefit of the guidance of the CMAC at that time. Now, we do have it. To me, it is not an **obiter**, it is quite right on point.

Another aspect, my learned friend has commented as to how a ruling on your part to withdraw from this case, that would throw off the wheels that would bring this system of ours to a halt because a defending officer could do some judge shopping and could trade judges, maybe with a bit of luck, three, four, five times. Why not?, as he was stating. It is quite clear to me that judges like you, Mr Judge Advocate, having recognized the importance and the extent of the **Barsalou** decision would simply not look at the synopsis. So, we're not derailing anything. We're in danger of derailing this case now, apparently due to an honest mistake that none of us had the privilege or the benefit of reading that decision before 6 December. But I don't think it is reasonable to believe that judge advocate will get caught, one, two, three, four times. It is mere speculation.

As well, I must say that, and it is well known to you and I suggest that's something that you can consider in your reflections, amendments to regulations have been made in the past. Regulations have been amended time and time after again following Supreme Court of Canada decisions, Court Martial Appeal Court decisions. Let's think of **Ingebrighton**. Let's think of **Généreux**. Let's think of many others. This is not the end of the world. This imposition is not the end of the world for two reasons. One, because it is simply consistent with the law as it exists and I

191

Defending Officer

Reply

refer you back to my argument on 55. I refer you also to the Note, Note D, and I invite you to read it. It says and I'll read part:

"Where it is learned ..."

That=s the Note D under article 109.02:

"Where it is learned that the judge advocate or the president or any other member of a court martial has seen the synopsis, a finding of guilty made by that court martial on that ground alone be quashed under ..."

may be quashed ... Where is the word?

"... could on that ground, ..."

sorry,

"... be quashed."

Don=t you find, Mr Judge Advocate, a striking resemblance between those words and Note D and those words in the CMAC except that the CMAC has gone one step further. They didn=t use the word "could be quashed" for that reason alone. They said "would be squashed." It is to me quite clear that it is not coincidental that the CMAC has used the terminology they have in **Barsalou** because they were engaged in the process of reviewing the very matter of our military system, its particularities, the writing of the synopsis, and then you find this wording in **Barsalou** which is quite identical to the Note D except it is made even stronger. And I think that=s very indicative that it was not an **obiter** and they knew exactly what they meant.

192

Defending Officer

Reply

Very early in his argument, my friend has made a commendable attempt to distinguish between what is being admissible and/or seen. I am not sure if I fully understood. Like he seemed to draw a difference between what may be admissible and seen and how it may affect the matter of the synopsis. I suggest to you that the admissibility, I may have disposed of that argument by reading 55(a) and comparing it to (c), (d), (e), and, the seen, well, you have seen it, Mr President(sic), so, and not only have you seen it, you have admitted it. It is obviously not before the president and members of the court but you have both read it and admitted it in a **voir dire**. I forget now how exactly it was marked but it would have been presumably "VD1" or something.

JUDGE ADVOCATE: It was.

DEFENDING OFFICER: So, I suggest to you that in those circumstances, no such distinction can be drawn as to the admissibility and then then the seeing.

The prosecution has suggested that if you were to do that that would prevent, possibly, the defence to maybe seek remedies. Well, that may be or maybe the remedies will have to be sought differently.

I obviously for one and as you know very well, twice, I did present such argument before you in both, **Lalonde** and this present case, it is not again for me to say, "Well, okay, the CMAC must have contemplated either this or that." There are always way and counsel like judges, and even more so I would say, have to adjust all the time to a changing law.

So I mean there is nothing really all that exciting about the decision. It is another decision of the CMAC which, in my humble submission, would call for you to withdraw because we all were caught by surprise, if you wish, and if it is determined by competent authorities, the **NDA** happened to be reviewed as we speak, well, there are requirements for amendments to either the **NDA** or other regulations, well, so be it. I

193

Defending Officer

Reply

mean, there is no real detrimental effect here and there will always be ways to ensure the rights of the accused are respected, one way or the other.

It is now in my view clear that asking a judge advocate to see a synopsis will not be the way. There will be different ways, different avenues, but I don't have to satisfy you as to what that might be. I think I only rely on the **Barsalou** decision.

Finally, Mr Judge Advocate, should you decide not to withdraw, I understand the prosecution is ready to proceed, presumably we would proceed, and then the defence would disclose his defence. That would be a dry run for the prosecution going after to the CMAC who, if my interpretation is right, would quash conviction. So we would have put the trial, if of course the accused was convicted, would quash the conviction. So we're putting the accused through one, two trials. How many trials? Now, if he is acquitted, **Barsalou** will have limited application, presumably, except that prosecution might appeal. He is still caught. If he is convicted on anything and you have no say on that, Mr Judge Advocate, as you know, the members are masters of the fact, I think it is not reasonable to have to go through those proceedings especially in light of the most clear decision of **Barsalou** in that respect. Those are my comments.

JUDGE ADVOCATE: Before I close the court to consider this application, I would like to put on the record the fact that at the pre-trial meeting, parties advised the court that this court that this trial was likely to last in excess of four weeks. Am I correct in stating that for the record?

PROSECUTOR: Yes, Mr Judge Advocate.

DEFENDING OFFICER: That is correct, in excess of ...

194

Defending Officer

Reply

JUDGE ADVOCATE: The court is now closed to consider the application and I should not return here before 2 o'clock.

AT 1103 HOURS, 21 FEBRUARY 95, THE COURT CLOSES TO CONSIDER THE APPLICATION.

AT 1440 HOURS, 21 FEBRUARY 95, THE COURT REOPENS AND THE ACCUSED IS BEFORE THE COURT.

JUDGE ADVOCATE: On 6 December 1994, the trial of the accused Lieutenant-Commander D.C. Marsaw was beginning before this General Court Martial. At the outset, the accused was asked if he had any objection to the proposed judge advocate. Since he and, for that matter, the prosecution had no objection, I took the oath as judge advocate. We then proceeded to hear various pleas in bar of trial and applications by the defence and by the prosecution.

In the first plea in bar of trial to be heard, the accused submitted that the court had no jurisdiction to try the accused because the court had been convened in contravention of the regulations on the convening of courts martial, namely, that, in contravention of QR&O article 109.02, the synopsis provided to the convening authority had contained improper material which was either or both opinions as to the character of the accused and facts prejudicial to the accused but not bearing directly on the charges against him.

In order to prove its contention, the defence asked that the synopsis be taken as evidence on the motion and reviewed by the judge advocate. Over the objection of the prosecutor who relied on Note D to QR&O article 109.02, I determined that I had no choice but to review and consider the contents of the synopsis if I wanted to properly decide whether there was objectionable material in the synopsis.

In respect of the objection of the prosecution at the time, it appears useful here to refer to

195

Judge Advocate

Decision

some of my comments on the admissibility of the synopsis for the purpose of that plea in bar of trial. As I then said, firstly, the contents of Note D did not have the force and effect of law, as QR&O article 1.095 provides; secondly, the parties had my assurance that the court, i.e., the president and the members would never be allowed to see the synopsis which had been marked as item "VD" on the **voir dire**; and thirdly, that note D should be interpreted not to be applicable to the judge advocate at trial.

Military Rule of Evidence 55 was not raised by the prosecutor in objection to the proposed use of the synopsis but had he done so, I would in all likelihood have ruled that in my view it ought not be applied strictly to the judge advocate because admission in a **voir dire** for the purpose of a plea in bar of trial is different from admission of evidence at trial. As you know, the plea in bar of trial was denied and to this date the court has not seen the synopsis.

Now, this morning, after a lengthy adjournment and in a rather unexpected move, the defence is now asking this Judge Advocate to disqualify himself and not continue with this trial on the ground that in seeing and considering the contents of the said synopsis, I did so in breach of the direction given by the Court Martial Appeal Court in the case of **R. v. Barsalou** dated 12 October 1994. At page 4 of the reasons for judgment which were concurred in by the two other members of the bench, Chief Justice P.M. Mahoney, as he then was, states:

"Neither a synopsis or statement are admissible at trial. If it were learned that the President or Judge Advocate or any member of a court martial had seen a synopsis, any conviction appealed would be quashed."

Judge Advocate

Decision

The defence submits that these words of the Court Martial Appeal Court which are clear and unequivocal are binding on this court and that I must disqualify myself for the reasons explained earlier.

The prosecution submits that the pronouncement of the Court Martial Appeal Court is no more than an **obiter dictum** or statement in passing by the Court Martial Appeal Court and is not binding on this court, and in support of that proposition, he refers to the case of **Pollock v. The Queen**, where at page 713, Justice Dubé states:

"The doctrine of *stare decisis* is well known. As expounded by L.P Pigeon in his *Rédaction et interprétation des lois*, it applies only to *ratio decidendi*, and not to an *obiter dictum*."

He submits also that the synopsis is similar to a number of other pieces of evidence which are considered during pre-trial hearings and at trial by the judge advocate and are later ruled inadmissible. In his view the simple fact of seeing the synopsis cannot be enough for the judge advocate to excuse himself.

In support of his view, he cites a number of decisions which generally stand for the proposition that when a judge is seized with a case, the fact that the judge sees or hears clearly inadmissible evidence does not automatically result in a disqualification. I read all of these cases with interest and note that none, regrettably, touched directly on the point of a summary of the whole evidence being seen by any of the judges presiding in these cases or as it is called in civilian courts on the preliminary inquiry.

I believe that a comparison of the preliminary inquiry hearing and the synopsis that we use in the

Judge Advocate

Decision

military courts is in order here. As Chief Justice Mahoney states earlier on, at page 4 of the **Barsalou** decision:

"The Code of Service Discipline makes no provision for preliminary hearings. Many offences are tried in a summary fashion by commanding officers. Such a trial is not a court martial. When a CO decides that a charge ought to be tried by court martial, he must so recommend to a superior commander and must, under QR&O Chapter 109, cause a 'synopsis' to be prepared. The synopsis is required to contain a summary of the circumstances giving rise to the charge and the names of the witnesses who will be called in relation thereto. The synopsis along with a copy of the charge sheet and notice of the CO's intention to refer is required to be delivered to the accused, who is afforded an opportunity to make a statement. The statement may result in the CO changing his mind. If not, the synopsis and statement, if any, is required to be included in the material sent to the superior commander and, under Chapter 111, if a convening order is made, they are among the materials required to be delivered with that order to the accused, or counsel for the accused, 'as soon as practicable'. Thus, an accused is required to be served with the synopsis twice, once before and

**once after the decision to try the
charge by court martial is made."**

It is clear in my view that the Court Martial Appeal Court believes that in our court martial system, the synopsis serves a purpose similar to that of the preliminary inquiry in our civilian courts of criminal jurisdiction. As it is provided in QR&O article 109.05, upon reception of the charge sheet, the synopsis and the statement of the accused, if any, the convening authority is, amongst other things, entitled to dismiss the charges, return the charges to the commanding officer for trial by the commanding officer or to convene a court martial.

I find that such a system is not so different from that in force in our civilian criminal courts where the judge who presides a preliminary inquiry, decides whether an accused will be committed to trial or not. In other words, his synopsis, the synopsis of the civilian judge holding a preliminary inquiry, will be in the form of *viva voce* or documentary evidence for example, but not in a written summary like our synopsis where there must be enough evidence to convict the accused. It is interesting to note that under QR&O article 109.03(5) in a trial before a superior commander, the said synopsis could be read in lieu of calling the witnesses listed therein. It must therefore be quite complete in terms of summarizing the evidence.

I cannot therefore agree with the submission by the prosecutor that the synopsis is no more than all those pieces of evidence that as a judge advocate or a judge alone in a Standing Court Martial I have to consider and at times rule inadmissible. As it is the practice in our courts and in other courts of criminal jurisdiction in Canada, a judge who has ruled an incriminating statement, a confession, or photographs, or any other evidence of a crime inadmissible is not by that fact alone unable to continue with the trial. In the case of a synopsis it appears however to be a different matter, certainly since the **Barsalou** decision

199

Judge Advocate

Decision

of 12 October 1994. I certainly thought differently on 6 December 1994 when I decided to look at the synopsis in this case, as did the prosecutor and the defending officer. This court decision, this Court Martial Appeal Court decision had not then been distributed to all the parties interested. There is a clear distinction between being shown a confession in a **voir dire** when ruling on its admissibility as one piece of evidence and being shown a summary of the whole of the prosecution's case against the accused.

So the question now is, "Has the rule changed because of the **Barsalou** decision of our CMAC or Court Martial Appeal Court?" No one will argue that if the words of the court at page 4 which I have stated earlier are part of the *stare decisis*, I have no choice but to disqualify myself because quite innocently as the decision, as I said a moment ago, of 12 October '94 had not reached my desk by the 6th of December 1994, I have considered the document, the mere seeing of which is likely to result in a quashing of any conviction against the accused on appeal to the same Court Martial Appeal Court. If, on the other hand, the pronouncement of the Court Martial Appeal Court is a comment in passing, then it is for me to determine if that or those comments in passing are strong enough to persuade me to abide by them and disqualify myself.

I have read the **Barsalou** decision with great care and I have come to the conclusion that the consideration of the nature and potential use of the synopsis were not done in an **obiter** fashion as suggested by the prosecution. The issue before the Court Martial Appeal Court was one of whether sufficient notice was given to the accused of the prosecution's intention to use intercepted private communication in evidence. Of its own motion, the Court Martial Appeal Court raised the possibility of putting the synopsis on the record of the appeal. Both parties objected to this course of action for different reasons and the CMAC decided not to require the production of the synopsis. In refusing to use the synopsis as direct evidence against

200

Judge Advocate

Decision

the accused, the CMAC accepted that the synopsis could not be allowed to perfect the record of the respondent and that its confidentiality was essential to the integrity of the court martial system. However, later on page 5 of the decision, the court states:

"If the requirements respecting the synopsis were complied with in this case, the intention to rely on the intercepted communications and the names of the witnesses to be called to identify, analyse and interpret them would necessarily have been disclosed well in advance of trial.

In my view, one of the military Defending Officers here would certainly have objected had they not been complied with and ...",

those are the important words,

" ... I therefore infer that they were."

In inferring, in making that inference that the synopsis must have contained the intention of the prosecution to rely on the intercepted communication, the court was obviously considering the contents of the synopsis though by inference as being sufficient notification in respect of the private communication. In doing so, I do not believe that it was considering the use of the synopsis and commenting on it in an **obiter**, but rather it was looking at the synopsis as an essential part of the decision to deny the appeal on that point.

I believe therefore that when the court decided not to require its production the court was determining the potential use of the synopsis at the appeal level and at the trial level, and it was not doing so in passing. I find further support for that

201

Judge Advocate

Decision

proposition in the fact that as correctly stated by the defence in reply, that they have espoused the language used in Note D to QR&O 109.02. If that Note did not have the force and effect of law as QR&O 1.095 says or stipulates, it sure does now. I find that the message is clear and that no member of a court martial including the judge advocate who admittedly in a General Court Martial or a Disciplinary Court Martial, for that matter, is not the trier of facts is allowed to see the synopsis and to use it for any purpose at all without having to disqualify himself.

So by virtue of the rule of **stare decisis**, I am therefore bound by the decision of the Court Martial Appeal Court and having seen and considered the synopsis which was marked as an exhibit in the **voir dire**, I must disqualify myself from sitting any further as judge advocate in this court martial.

Even where my interpretation of the **Barsalou** decision was incorrect and the comments of the Court Martial Appeal Court were truly **obiter**, I still believe that the most prudent course to be adopted in this case would in any event be to disqualify myself. As the parties confirmed, this trial is expected to last in excess of four weeks. A large cost in terms of witnesses attendance and expenditures will necessarily be incurred. I believe it would not be wise to put this accused through such a trial knowing that the pronouncement of a Court Martial Appeal Court could come back to haunt us.

At this stage of the trial, no evidence has been heard by the president or the members of the court. In accordance with the provisions of paragraph (2) and (3) of QR&O article 112.64, and I will read those,

"Where a judge advocate who has been appointed is for any cause unable to attend, the president shall adjourn the court and report

the circumstances to the convening authority."

And paragraph (3),

"Upon receipt of the report referred to in paragraph (2), the convening authority may authorize the court to stand adjourned until the judge advocate is able to attend or, if the judge advocate is unable to attend or if the convening authority considers delay to be inexpedient, the convening authority may:

(a) request the Chief Military Trial Judge to appoint another judge advocate and, after the Chief Military Trial Judge has appointed another judge advocate, direct the trial to proceed, or

(b) dissolve the court."

And also in accordance with the provisions of section 669.1 of the **Criminal Code of Canada**, and I'll read those as well:

"669.1(1) Where any judge, court or provincial court judge by whom or which the plea of the accused or defendant to an offence was taken has not commenced to hear evidence, any judge, court or provincial court judge having jurisdiction to try the accused or defendant has jurisdiction for the purpose of the hearing and adjudication."

203

Judge Advocate

Decision

So in accordance with these two regulations I just read, the replacement of the judge advocate in this case can be effected rather painlessly if the convening authority wishes to proceed with the trial. The court martial need not be dissolved according to the regulations and a new judge advocate may be appointed.

In conclusion and in response to the comments of the prosecution as to the doomsday like consequences of a decision to disqualify myself, let me state for the record that I do not share those grim views. I believe that military judges will now be most reluctant to review the contents of synopses or statements of the accused if they read the **Barsalou** decision like I read it.

Where it will be necessary to look at evidence that is contained in the synopsis or ought not be contained therein, other ways will have to be found, obviously by the defence, to provide that evidence to the judge without placing the whole document before the court. An example of a way to do so could be to call the officer detailed to prepare the synopsis on the stand, although as the practice goes, it may become a problem where the prosecutor who is called to testify is also the writer of the synopsis.

I also believe that issues of disclosures if dealt with at the right time, that is to say, before the accused is asked to plead to the charges will avoid having to replace the judge advocate. Once the audition of the evidence has started, it may not be possible. Lastly, I do not believe that defending officers would deliberately attempt to put the judge advocate in an embarrassing position for the purpose of judge shopping.

I do not believe that the comments of Mr Justice Iacobucci of the Supreme Court of Canada on

204

the procedure beginning to govern substance is applicable to my decision to disqualify myself. I do not believe that such a prudent course of action would bring the administration of justice into disrepute. To the contrary, in view of the strength of the **Barsalou** decision, it would appear irresponsible to attempt to continue with such a lengthy trial to the detriment of both the accused and the system of military justice when a corrective course of action may be so easily adopted.

Would you recall the court, please.

THE PRESIDENT AND THE MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Mr President and Members of the Court, this morning you were asked to leave the court while I heard an application that required my decision in your absence. This application was for the disqualification of myself as judge advocate in this trial and after due consideration of all the remarks, the comments and the case law submitted to me by both parties I have ruled that I had to disqualify myself from further hearing this case.

So, Mr President, in accordance with 112.64 of QR&Os your duty at this point will be to adjourn the court and report the circumstances of what I just told you to the convening authority. I will read paragraph (2) of 112.64:

**"Where a judge advocate who has
been appointed is for any cause
unable to attend ..."**

and disqualification is a cause that makes me unable to attend,

**"... the president shall adjourn
the court and report the circum-**

205

stances to the convening authority."

So, Mr President, would you please adjourn the court.

PRESIDENT: The court is adjourned until further notice.

ADJOURNMENT: At 1507 hours, 21 February 1994, the court adjourns.

187

Judge Advocate

Arraignment

REASSEMBLY: At 1005 hours, 12 September 1995, the court reassembles and the accused is before it.

THE PRESIDENT AND MEMBERS ARE NOT PRESENT.

JUDGE ADVOCATE: Lieutenant-Commander Marsaw, would you stand up please.

This court has before it an appointment order for a judge advocate indicating that Lieutenant-Colonel Ménard is appointed as judge advocate for this general court martial. Have you received a copy of this document?

ACCUSED: Yes, I have, sir.

JUDGE ADVOCATE: I am Lieutenant-Colonel Ménard named in this document. Do you object to me as judge advocate in this case?

ACCUSED: No, I do not.

JUDGE ADVOCATE: Does the prosecution have any objection to the judge advocate in this case?

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: Thank you.

You may be seated.

I will mark this document as Exhibit "F".

THE JUDGE ADVOCATE APPOINTMENT ORDER FOR LIEUTENANT-COLONEL MÉNARD IS MARKED EXHIBIT "F".

JUDGE ADVOCATE: I will now take the oath. Please rise.

THE JUDGE ADVOCATE, LIEUTENANT-COLONEL MÉNARD, TAKES THE OATH.

188

Judge Advocate

Arraignment

THE COURT REPORTER, WARRANT OFFICER M.C. ROY, TAKES THE OATH.

JUDGE ADVOCATE: Thank you. You may be seated.

This court has received a notice of intention from the defending officer to make two applications before this court this morning. I understand that the prosecution has something to say on this matter.

PROSECUTOR: Yes, we do, Mr Judge Advocate. The position of the prosecution is that the defence has no legal basis to make either of these motions and with your permission we would like to argue why before the court. Thank you.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, were you aware of this position taken by the prosecution?

DEFENDING OFFICER: Yes, I was and I am. And I have discussed with my learned friend and we have agreed to certain admissions that could be made to assist the court in this decision and in some further motions. And we will in just a moment make those admissions with your leave and produce some documents.

However before we do that I would like to point out to your attention, Mr Judge Advocate, that there is, in this courtroom at present a potential witness, Mr Dunlop, who is sitting in the courtroom. And although it is a preliminary motion and it is a not the trial, or evidence **per se**, I would feel much more comfortable and I think it would be prudent if Mr Dunlop was not in the courtroom until such a time we need to call him.

JUDGE ADVOCATE: What are the views of the prosecution on this matter?

189

PROSECUTOR: Mr Dunlop certainly will not be a witness for the prosecution on this motion or any other motion. I know that he has counsel here in the courtroom today. I am not sure what purpose is served by having him leave the courtroom but having his counsel stay here. Clearly anything that goes on in this courtroom can be transmitted from his counsel to him and I am not sure if having Mr Dunlop leave the courtroom serves any practical purpose at all.

JUDGE ADVOCATE: The purpose of this application made by the prosecution is to try to convince the court that the defence has no legal basis to make such an application. So how do you submit that the presence of a potential witness for the defence causes any problem at this particular time? Will you be referring to evidence or ...?

DEFENDING OFFICER: Well, we will be making a number of admissions. We will be introducing documents before the court that relate directly to the matter upon which Mr Dunlop might be called to testify on at a later stage depending on a number of decisions that still have to be made. So I cannot tell you with the greatest certainty, "Here the very immediate danger" but I just feel that it would be more prudent because we will be alluding obviously to the very fact that he might have to testify on later. And documents will be produced as well. That and reference will be made to those documents. So I would suggest it would be more prudent. I certainly don't want either this court or my learned friend to blame me later for having had a witness testifying whilst he has been in attendance and that might create dangers. That is all I am saying.

JUDGE ADVOCATE: Major Abbott, do you wish to add anything?

PROSECUTOR: I think my friend - from what he says, reading between the lines - feels that perhaps Mr Dunlop may be a witness for another motion but not a witness for this particular motion. And if that is the

190

case I see no reason why he should be excused from the court while I argue on points of law in my motion.

JUDGE ADVOCATE: Is it the case, Lieutenant-Colonel Couture? Will this witness be a witness in another application or within the present one that is going to be made by the prosecution?

DEFENDING OFFICER: As you will recall the notice we served to the prosecution and yourself refers for a motion for disclosure and probably - I don't have a copy in front of me - refers to Mr Dunlop by name as being the individual from whom the information will be sought. So this is my first motion.

JUDGE ADVOCATE: Yes. But this is not the first one I am going to hear.

DEFENDING OFFICER: No, he is not going to testify on the argument that my learned friend is about to make. But what I am saying to you is that the admissions we are about to make to give you more information about this very argument of my learned friend includes material that will be the object of the motion **per se**.

JUDGE ADVOCATE: OK, thank you. I am not going to grant this request at this time. I think that the witness, Mr Dunlop, who is going to be heard on the first application made by the defence, as the defence just mentioned, will not be called in this first application made by the prosecution. So for this reason at this time I am not going to order the witness to withdraw from the courtroom. Although if we feel, or if there is evidence during this application that may force the court to decide the contrary later on please don't hesitate to raise the matter again, Lieutenant-Colonel Couture, and we will take a decision when we cross that bridge. Thank you.

Before you proceed with your admissions, because you mentioned that you will have some admis-

191

sions to make, I would like to ask the prosecutor and the defending officer in respect of those facts and matters contained in Military Rule of Evidence 15, that is to say, required judicial notice. Do you wish to make representations regarding either the competence or the propriety of the court taking judicial notice of those facts and matters?

PROSECUTOR: No representations, Mr Judge Advocate.

DEFENDING OFFICER: The same.

JUDGE ADVOCATE: Thank you. So the court takes judicial notice of those facts and matters contained in Military Rule of Evidence 15.

You may proceed with your application.

DEFENDING OFFICER: I would like to read, and in fact - if I can get out of here - I will give you a copy of them.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Those are admissions of the accused and they pertain to the motion that we are about to hear.

The accused was charged in July 1994. At the time he was represented by Mr David Bright. Given Mr Bright calendar he was not available for a trial until early 1995. A court date was set in December 1994 so that preliminary matters could be dealt with and pleas entered. A date for pleas was required before 21 December '94 as charges 1 and 2 involved litigation which would have occurred beyond the prescribed three-year limitation period if pleas were entered beyond the 21 December '94.

In February '95 the defence informed the prosecution prior to a court sitting and the trial

192

Defending Officer

Admissions

recommencing that it had three motions it wished to make: A "**Barsalou**" motion, arguing that the Judge Advocate Brais could no longer preside over the trial as he had reviewed the synopsis while deciding two previous preliminary motions; a motion for particulars; and another motion which defence counsel chose not to disclose at that time for strategic and practical reasons.

If I may come back on the second motion. It should not read motions for particulars, it was a motion on the basis on multiplicity rather than particulars.

PROSECUTOR: That was December.

DEFENDING OFFICER: Sorry, you are right. OK, I apologize. You will understand better in a moment. I got myself confused. It was indeed a notice that a motion for particulars would be presented. I apologize for that. And a third motion, as I said, was not disclosed at that time. The defence counsel informed the prosecution that he would disclose the nature of the motion immediately after a decision of the then judge advocate that he did not have to withdraw from the case. The judge advocate decision was that he had to withdraw from the case.

On 15 August '95, the defence counsel informed the prosecution that the not yet disclosed motion would be a motion to have Mr Malcom Dunlop, a reporter for the Halifax Chronicle-Herald Newspaper, disclose his sources and relevant material used in writing an article in December 1993 alleging improper conduct by Lieutenant-Commander Marsaw while in command of HMCS OJIBWA.

Lieutenant-Commander Marsaw made some inquiries as to the identity of the sources in December '93 and some more after charges were laid against him. Lieutenant-Commander Marsaw did not find out who the sources were nor does he know at present.

193

Defending Officer

Admissions

As a consequence of the adjournment in this trial, the military commitments and responsibilities of a number of witnesses and their respective units have been affected. Witnesses with operational roles on operational units were taken out of units to meet the previous gear up for February '94 trial. As a consequence of this current sitting arrangements have been made to fly witnesses from their units which are deployed at various locations on a number of missions including Chili, Saudi Arabia, Singapore, England, United States, Germany, West Coast, Bahamas. Other members will miss operational tasking completely. The operational schedule of one submarine has been significantly revised because of this court martial recommencing on 26 of September 1995.

This court martial was convened in compliance with all appropriate regulations contained in QR&O particularly at Chapter 108 and 109. The prosecution intends to call 43 witnesses. Mr Dunlop is not a witness the prosecution intends to call.

And if I may, with your leave and with consent of my learned friend, I will introduce a number of documents to this court.

JUDGE ADVOCATE: Major Abbott, do you accept these admissions as forming part of your case?

PROSECUTOR: Yes, we do, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. So the admissions are so accepted by the court.

DEFENDING OFFICER: The first document I would like to produce is a letter dated 16 June 1995 addressed to the Halifax Chronicle-Herald, a letter signed by myself, Lieutenant-Colonel Couture.

JUDGE ADVOCATE: Any objections from the prosecution?

194

PROSECUTOR: No objections.

DEFENDING OFFICER: And the document contains a fax cover sheet.

JUDGE ADVOCATE: So this document is marked "VD4-1" and it contains four pages.

THE LETTER DATED 16 JUNE 1995 IS MARKED EXHIBIT "VD4-1".

DEFENDING OFFICER: The second document is a letter again addressed to the Halifax Chronicle-Herald, dated 5 July '95, signed by myself, Lieutenant-Colonel Couture, with two fax cover sheets.

JUDGE ADVOCATE: Any objection?

PROSECUTOR: No objection.

JUDGE ADVOCATE: "VD4-2".

THE LETTER DATED 5 JULY 1995 IS MARKED EXHIBIT "VD4-2".

DEFENDING OFFICER: The third document is a one-page letter dated 6 July 1995 addressed to D. Couture, Lieutenant-Colonel, and signed by Jane Purves, managing editor of the Halifax Chronicle-Herald, with fax cover sheets.

JUDGE ADVOCATE: If there is any objection, just let me know.

PROSECUTOR: No objection to this or any other document, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. "VD4-3", two pages.

THE LETTER DATED 6 JULY 1995 IS MARKED EXHIBIT "VD4-3".

195

DEFENDING OFFICER: My next document is a two-page document reproducing an article entitled "Sub's Captain Under Scrutiny" published in the Chronicle-Herald on 16 December 1993.

JUDGE ADVOCATE: "VD4-4".

THE NEWSPAPER ARTICLE IS MARKED EXHIBIT "VD4-4".

DEFENDING OFFICER: The next document is a four-page document which starts with the words "<dunlop .. 15 DEC."

JUDGE ADVOCATE: "VD4-5".

THE UNEDITED DRAFT OF THE NEWSPAPER ARTICLE IS MARKED EXHIBIT "VD4-5".

DEFENDING OFFICER: The next document is a two-page document entitled "Notes".

JUDGE ADVOCATE: "VD4-6".

THE DOCUMENT ENTITLED "NOTES" IS MARKED EXHIBIT "VD4-6".

DEFENDING OFFICER: On the last document, Mr Judge Advocate, it is to be noted and it is with the agreement of the prosecution that this document was given to the military police by Mr Malcom Dunlop. And I might add as well, I know that my learned friend is about to make some admissions, that the previous document, the four-page document, is referred to in the admission of my learned friend as the unedited draft of the article that was given to Lieutenant-Commander Jeff Agnew by Mr Dunlop. So to assist the court, it helps you making the proper connection between the documents and the admissions my learned friend is about to make.

JUDGE ADVOCATE: Who is Lieutenant-Commander Agnew?

196

Prosecutor

Admissions

DEFENDING OFFICER: He is the Public Affairs Officer. It forms part of the admissions that my learned friend is about to make. It is just to assist you in making the connection. So what is referred to as the unedited draft is the four-page document you have.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: That is it. I have no further documents.

JUDGE ADVOCATE: Does the prosecution intend to call any evidence on this application?

PROSECUTOR: We have some admissions as well, Mr Judge Advocate, and I did a copy of those.

JUDGE ADVOCATE: Very well. Thank you.

PROSECUTOR: Pursuant to Military Rule of Evidence 8(d) and for the purpose of dispensing with proof thereof the prosecution admits the following facts:

1. On 16 December 1993 the Chronicle-Herald (Halifax) published an article entitled, "Sub's Captain Under Scrutiny".
2. The above article written by staff reporter, Malcom Dunlop, refers to information he received from "four veteran submariners" who spoke only on condition their names not be released. The same article also refers to other OJIBWA crew members who would have discussed the morale on board the submarine with the reporter.

Prosecutor

Admissions

3. The allegations in the above article pertain to Lieutenant-Commander Marsaw, the accused in the present proceedings.
4. Prior to publication of this article, Mr Malcolm Dunlop contacted Lieutenant-Commander Jeff Agnew, public affairs officer with MARLANT and provided him with a copy of the unedited draft of the proposed article.
5. On 15 December 1993 and as a result of Mr Dunlop's draft article the commander Maritime Forces Atlantic tasked the base commander CFB Halifax to initiate a military police investigation into the allegations that were published the next day.
6. In the ensuing investigation military police investigators interviewed approximately 153 people including Mr Dunlop.
7. Prosecuting authorities (i.e., commanding officer, the convening authority and prosecutors) and military police investigators are not aware to this date of the identity of the individuals who spoke to Mr Dunlop. However the prosecution has been informed that those individuals who had spoken to Mr Dunlop were later interviewed by the military police investigators. The prosecutors have informed the defence counsel accordingly.
8. These proceedings are directly related to Mr Dunlop's article and the military police investigation ordered on 15 December 1993.
9. On 20 December 1993 Master Corporal Rice who was in charge of the investigation

198

Prosecutor

Admissions

in this matter met with and received from Mr Dunlop a one-page document entitled "Notes", document to be produced by the defence with the consent of the prosecution, which document has been produced.

And finally,

10. On 9 December 1994 when this court first assembled it was understood by the prosecution that the case would not proceed at that time except for a few preliminary matters and entering pleas so as to interrupt the prescribed time limitations in respect of charges 1 and 2.

JUDGE ADVOCATE: Thank you. Does the defence accept these admissions as forming part of its case?

DEFENDING OFFICER: Yes, I do, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. The admissions are accepted by the court.

PROSECUTOR: That concludes our evidence, Mr Judge Advocate. With your permission I would like to begin my argument.

JUDGE ADVOCATE: So you don't wish to call any witnesses on this application?

PROSECUTOR: No, sir.

JUDGE ADVOCATE: Does the defence intend to call any witnesses in this application?

DEFENDING OFFICER: No, I do not.

JUDGE ADVOCATE: Thank you. You may address the court.

199

Prosecutor

Admissions

PROSECUTOR: Thank you, Mr Judge Advocate. To begin with just some housekeeping I would like to present to you cases that we will rely upon. As well I have, and I have given to my friend, written notes that form the body of my oral submission to you today.

I would like to begin by starting with the review of some of the key facts. This is a proceeding that has gone on for a long time. The accused was charged initially two Julys ago. The court has sat in December '94, February '95 and now September '95. I think my friend demonstrated the confusion that all of us have with this case from time to time when he was making his admissions by wondering out loud whether it was a motion for particulars or multiplicitous motion that was made at a certain point in time. Clearly procedures have become complicated because they have taken part at different times, involving different motions.

After reviewing the key facts there will be the argument of the prosecution that the defence does not have a legal basis at this point in time, at this point in the proceedings, to raise any one of the motions that it submits. Now firstly this is because of the wording of QR&O 112.05 which sets out in mandatory wording the procedure that is to follow. As a second but distinct legal basis based upon the common law there is a positive legal duty placed upon defence counsel when making motions for particulars and also making motions related to disclosure of third party information that it will be done at the earliest opportunity. And it will be the argument of the prosecution that they have not only had an earlier opportunity but they have had several earlier opportunities to make their motion and have chosen in part, as stated in the admission for strategic reasons, not to raise them before but to raise them now. So based on the wording of QR&O 112.05, and as a distinct basis, the common law, it is the position of the prosecution, the defence doesn't have a legal basis now to make their motions.

200

Prosecutor

Objection to defence motions

To take a spin off the quote that I will be referring to later on from one of the cases, Mr Judge Advocate, last minute motions are only available when there are last minute surprises. And both of the motions that the defence seeks to deal with today, deal with matters that were well within their knowledge a long time ago and they were given opportunities to raise them back then. They are now out of time.

In terms of reviewing the key facts, the accused as noted was charged in July 1994. At the time he was represented by a civilian counsel, Mr Bright, who had informed the court that ... or informed the court I guess through admissions made today, Mr Bright's calendar was not available until early 1995. So a court date was set in December 1994 for the purpose of dealing with preliminary motions and having pleas entered as charges 1 and 2 were coming up against the three-year time limitation period. So although the accused was charged in July, a trial could not proceed with because Mr Bright's calendar was full until early 1995.

Preliminary motions were heard in December 1994 and pleas were entered. Prior, and I believe in October, prior to the December sitting, Lieutenant-Commander Marsaw no longer retained Mr Bright and retained his present counsel. In December, represented by Lieutenant-Colonel Couture, the judge advocate expressly asked defence counsel whether they wished to make motions for particulars. And in the December hearing the defence counsel expressly said that it did not wish to make any such motions. In legal language it declined the opportunity.

Defence counsel then made three preliminary motions including an argument that charges 3, 4 and 7 were multiplicitous and that each charge referred to too many incidents and defence counsel argued, it is a matter on the record, that each one of the incidents which constitutes the evidence for charges 3, 4 and 7

201

Prosecutor

Objection to defence motions

should be broken up into separate charges. So each instance of verbal abuse under charge 7 should be made a separate charge. Each incident of ill treatment by referring to certain derogatory terms in charge 3 should be made a separate charge. Each instance of verbal abuse alleged in charge 4 should be made a separate charge. So although now they are arguing that they don't have enough particulars to successfully defend themselves, back then on the record they were arguing that there were too many particulars, too much information; a complete contradiction of their current position.

In December '94, the judge advocate at the time ruled that all three of their pleas, including the motion of multiplicity, was unsuccessful. The accused plead at that time and immediately after defence counsel requested an adjournment. The court was then rescheduled for trial to commence on 21 February '95.

JUDGE ADVOCATE: You said that the accused plead at that time?

PROSECUTOR: Yes, sir.

So the preliminary motions are over, the pleas have been entered. We are now set to go for trial on the 21st of February 1995. Prior to court actually sitting, the defence counsel informed the prosecution that it was going to raise three preliminary motions. The first motion was a **Barsalou** motion arguing that because the Judge Advocate Brais had looked at the synopsis in determining and making a decision on the December preliminary motion, he could no longer continue as trial judge. A second motion that they informed us they would make in February prior to sitting, would be a motion for particulars. And a third motion would be a motion which it would not disclose to us. So we called it a surprise motion. And the reason they would not disclose it to us was for a number of reasons including strategic reasons.

202

Prosecutor

Objection to defence motions

But clearly going into the February sittings, defence counsel knew it had three motions it wished to make. Defence counsel chose to make those motions and extremely important significant to note that then the defence counsel chose the order in which they would make those motions. There is absolutely nothing prohibiting them from making the motion for particulars first, the surprise motion second and then the **Barsalou** motion third. That would have made sense because then you could still continue with the same judge you had and if he did have to take himself off the case, well you would have dealt with your preliminary motions at that point in time. But the defence chose to make a **Barsalou** motion first. They had an opportunity again, at least to attempt to make the particulars motion, but chose to decline that opportunity. And the same with the surprise motion that they wished to retain for strategic reasons.

After the February sitting Judge Advocate Brais took himself off the case. He only heard one motion, the **Barsalou** motion. And the prosecution repeatedly asked defence counsel what was the content of the surprise motion. The defence counsel declined to answer that question until 15th of August 1995. Although they had known about their surprise motion prior to the sitting on 21st of February 1995, defence counsel only informed the prosecution about the contents of the surprise motion which is now the Dunlop disclosure motion on the 15th of August 1995.

That brings us to today I guess. In September now we are sitting the 12th of September. The defence now wants to raise two motions that it had opportunities to raise before that do not deal with the jurisdiction of this court. As a consequence of the adjournments and as noted in the admissions the military commitments and responsibilities of a number of the witness members have been adversely affected, units have been affected by the delays. Witnesses in some operational roles have been taken out of those operational roles completely. The sailing schedule of a

203

Prosecutor

Objection to defence motions

submarine in the First Canadian Submarine Squadron has been significantly revised. Witnesses gearing up to the February trial were flown into Halifax from all different locations. And now they are ready again to come to court in September on the 26 to begin the trial and they will be flying out of their operational taskings in a variety of diverse geographical locations. The delays have had an impact on the operations of some of the witness members as well as their units.

We intend to call 43 witnesses and Malcolm Dunlop will not be a witness for the prosecution. We have no need to rely upon his evidence. He has never been a basis for the prosecution case.

So in arguing now that the defence has no legal basis to raise these non jurisdictional motions, the prosecution relies upon the wording of 112.05(1) and 112.04. It is the argument of the prosecution that to allow them to now make their motions causes prejudice to the prosecution. Should the motions be granted, the effect of it, at least with regards to the particulars motion, will be now to ask the prosecution to gear up, prepare, advance a case completely different from the one that it has been waiting to present since July '94. And additionally it can adversely affect the prosecution if there are further delays in regards to the Dunlop motion if it deteriorates into a contempt proceeding which will bowl the 26 of September start date possibly right out the window.

Under the wording of QR&O 112.05(1) it states:

"... , the procedure at a court martial shall be in the order set out in this article."

QR&O Article 1.06(a)notes:

204

Prosecutor

Objection to defence motions

"(a) 'may' shall be construed as being permissive and 'shall' as being imperative; ..."

You will find the same wording in Section 11 of the **Interpretation Act**. The Oxford Concise Dictionary defines "imperative" as obligatory.

So based on the wording of 112.05(1) it is the argument of the prosecution that the procedure stated out in that scheme under 112.05 must occur in the order in which they are designated. Under 112.05(5) there are provisions after the judge advocate and court interpreter take the oath and after the prosecution has read the charge sheet that the accused may apply for adjournment because the particulars of the charge are inadequate. That opportunity was given to the defence in December and the defence expressly declined that opportunity at that point in time. It had no problems with the particulars being inadequate. On the contrary they argued that there were too many particulars and too many incidents contained in charges 3, 4 and 7.

As stated in the admission, the accused was concerned about the identity of the sources when the article first came out in December '94. He was also concerned and also made inquiries again about the sources when he was charged in July and August 1995. The need to know the identity of the sources was in the accused's mind as far back as December '93. Twelve months before any plea was required to be entered and 12 months before the defence had their first opportunity to raise this Dunlop disclosure issue.

Three pleas as I noted were made in December, or three motions were unsuccessfully made in December, pleas were entered, an adjournment was requested, and then we come to February as I have noted before, they inform the prosecution before sitting they would make the **Barsalou** motion, now a motion for particulars and then an undisclosed motion that they could not reveal for strategic reasons. So they have at least the

205

Prosecutor

Objection to defence motions

ability to argue why they should make a particulars motion. The prosecution would have argued they were out of time, but at least in February, at the February sitting they had another opportunity to raise this particulars motion and they had another opportunity to raise the Dunlop disclosure motion in February. They chose the order in which they would make the motions and they chose to make the **Barsalou** motion first. The consequence of that is that the judge had to take himself off the case and another opportunity to make the motions was lost.

It is the prosecution argument that not only allowing the motions to be made violates 112.05(1) at this point in time but it also and importantly undermines the purpose behind 112.04. There is a reason why 112.04 was in place, to regulate, to make the court efficient and effective and economical. It is to deal with preliminary motions in a preliminary way. The effect of allowing defence counsel to now make their motions, we would submit not only violates the mandatory wording of 112.05(1), but also guts the spirit and the purpose of 112.04.

So that in effect by allowing defence counsel to now make these motions at this point in time in these proceedings completely overrides the scheme of 112.04. It means that preliminary motions never need to be made in a preliminary way. They can be made at any time in the trial. And this has an effect in legal terms for the prosecution because it undermines the need for an effective and efficient speedy administration of justice, something which was identified in the Supreme Court of Canada's decision in **Généreux**.

In reviewing the cases that we know about through the court martial system there have been approximately 30 cases in which a motion for particulars has been made. Only four of these motions have ever been successful and we have been informed by the JAG researchers at the library in Ottawa that none of the preliminary motions or none of the motions for particu-

206

Prosecutor

Objection to defence motions

lars have ever been made after a plea has been entered.

So the first prong of our argument is simply that the motions are out of time given the wording of 112.05 and the spirit of 112.04. It is our submission that the court is bound by the mandatory wording of that scheme. There is no legal basis that allows them now to make motions that they previously declined opportunities to make.

Alternatively there is legal basis based on the common law that requires the defence to make motions for disclosure and make motions for particulars at the earliest opportunities. And with regard to the motions for particulars if you look at **Criminal Code** Section 587, the wording is a bit more ambiguous than what we find under 112.05(1). They don't use the mandatory language but nonetheless there still has been a body of case law that has arisen from interpreting that section that requires defence counsel to make motions at the earliest opportunity for particulars. Salhany, and there is a copy of it in the materials that I have submitted to you, at paragraph 6.970, of his 6th edition of Canadian Criminal Procedures notes that:

"An application for particulars should be made at the earliest opportunity and not later than the taking of the plea by the court."

The cite that is the basis for this is a case of **R. v. Haney**, a copy of which you have. Another basis to support this proposition can be found in **R. v. Pope** which notes:

"... that applications for particulars should be made before ..."

pleas are entered. A copy of that you have and key paragraphs cited in my written submission.

207

Prosecutor

Objection to defence motions

In the decision of **Regina and R.I.C.** copy of which you have, the Ontario Court of Appeal notes that in determining issues of making motions to quash and to request further particulars, the fact that the accused chose not to make it prior to making the plea is considered a key factor.

To my knowledge the defence doesn't have any case law or authority that they can point to that shows that motions for particulars can be made after the pleas are entered. I haven't been provided with any.

In addition to the case law which stresses that a motion for particulars must be made before a plea is entered there is also a body of case law which is suggested in that passage from Salhany that these types of motions must be made at the earliest opportunity. And again I note that the accused was charged in July '94. He had an opportunity to respond to the synopsis. He was given opportunities to make various preliminary motions and expressly declined an opportunity to make motions for particulars at that time. That was his opportunity.

In dealing with the third party disclosure motion I am focusing again on the passage in **Généreux** that deals with the importance of having an efficient and an effective and a speedy system of military justice. It is submitted by the prosecution that that need to have a speedy, efficient, effective system of military justice far outweighs the right of defence counsel to use the court process to hunt for peripherally relevant information in the hands of third parties.

There has got to be a point where the court says it is time to get on with the trial. There is a need to have an efficient and effective speedy system of justice. There may be lots of things floating around the world that may be peripherally relevant to you. Lots of conversations between people who may or

208

Prosecutor

Objection to defence motions

may not be witnesses with third parties. That in and of itself isn't a basis to stop the military system of justice from being efficient, speedy or effective.

It is important to note that defence counsel and the accused are brought in the court to meet the case that they are facing against the Crown, not the case they are facing against Malcolm Dunlop or the case that they are facing against the Mail Star or the Chronicle-Herald. Defence counsel know the evidence they are up against. They know the prosecution's allegations against them. They know the witness list. All the evidence that the defence has to meet they already know about. They may not have all the evidence they have to meet against the case against Malcolm Dunlop or the Mail Star or the Chronicle-Herald but they have come to court facing allegations based on evidence and witnesses by the Crown which are identifiable.

In dealing with the case **R. v. H. (J.S.)** a copy of which you have dealing with Crown disclosure issues and when motions for disclosure have to occur by defence counsel, the court noted at 575 that the duty falls:

"... upon the accused promptly to secure judicial review of the Charter breach. ... he *must* exercise his right to judicial review promptly in order to help prepare full answer and defence, which, as noted in *Stinchcombe*, is the purpose of the right. We conclude that the right and the duty of the accused is to exercise his right promptly."

So even in dealing with request for disclosure material that is within the ambit of the Crown there is a legal duty on the defence to make a prompt

209

Prosecutor

Objection to defence motions

request and to seize the first opportunity. That court continued at page 576 and said:

"Indeed, one might fairly say that the delay by the accused for nine months before raising his right to prompt and full disclosure raises a serious question whether he had any real desire to exercise the right."

In another case of which you have a copy and the extract of the quote is contained in my written submissions, **McAnespie**, the Crown failed to disclose the victim impact statement to the defence prior to a sexual assault trial but only disclosed it to the defence at sentencing.

At page 191 the Supreme Court of Canada noted that:

"Counsel for the respondent failed to bring this to the attention of the trial judge at the earliest opportunity as required. ..."

In this case, counsel did not seek to bring the matter to the attention of the trial judge but made a tactical decision not to have the information disclosed in the sentencing proceedings."

These cases dealing with disclosure request by defence to information within the ambit or the scope of the Crown are of limited use, at the same time they are of very important use. They are of limited use because these cases and the case law that comes from it deal with what we do in situations when the Crown has possession of knowledge the defence seeks. This is not the case in this matter. The Crown does not have any knowledge of the information defence counsel is seek-

210

Prosecutor

Objection to defence motions

ing. It is held within a third party, the newspaper and Malcom Dunlop.

It is of important use however because even when the court is considering what to do in situations where the information is within the hands of the Crown and probably more relevant, the stuff that is in the hand of the third party, the courts have still placed a positive legal duty upon defence counsel to act promptly.

And I would argue that if that duty exists upon the defence to act promptly in regards to information held by the Crown it must clearly and perhaps even more so apply to the defence in situations when they know there is material held by third parties which would be more a peripheral and less relevant than information held by the Crown.

And again defence counsel knew about this motion before February sitting, chose not to disclose it to the prosecution for strategic reasons. The courts have already noted with regards to motions they refused to make for tactical reasons when it is in the hands of the Crown. They are out of time. I would argue the same thing would apply in this case.

Again the defence and the accused know the case they have to meet. They don't come to court trying to meet the case against them alleged by the Chronicle-Herald. They are coming to court to meet the case against them alleged by the prosecution. They have the evidence. They know the identity of all the witnesses. And all the evidence that the Crown relies upon can be attributed back to identifiable witnesses.

To allow defence counsel to now get into this after they have had an opportunity to do so in December and also possible opportunities to do so in February raises a spectre of further delay just given the nature of the motions they propose to make. They now wish to

211

Prosecutor

Objection to defence motions

make a motion arguing that charges 3 and 4 do not contain enough particulars although they had previously argued that they contained too many, they are now contradicting themselves and arguing that they contain not enough.

So what do we do with this motion if we get into it? There is the prosecution. They have a legal right to bring evidence before the judge to look behind the face of the charges to determine whether or not the defence has adequate knowledge of the case against them. Are we back into a **Barsalou** situation again on the eve of the third attempt to get this trial on the go? Do we have to present the evidence that we have disclosed to defence counsel to a second judge, ask him to look behind the record, rule whether the particulars are adequate or not? Then take himself off the case, then appoint a third judge, then delay the start of the trial yet a third time?

In dealing with the third party disclosure information will there be enough time to deal with this motion before the 26th of September? Is the information they seek even relevant? Will Mr Dunlop's lawyer have standing when Mr Dunlop discloses sources? Will there be contempt proceedings? If so will it be under Section 118 or 302 of the **NDA**? If it is under 118 that requires a certificate signed by the president who isn't here. If it is 302, it has got to go downtown to a civilian court. Which civilian court? How will it get there? Who will prosecute it?

Both motions contain a Pandora's box that will have the effect or raise the real possibility of further delay in these proceedings. There is no basis in law under 112.05 or the common law for the defence to now raise motions it knew about and had the opportunity to raise before. To allow them to do so now raises the real possibility of further delaying the process which has already been delayed too often and completely undermines the purpose of an efficient,

212

speedy and effective system of military justice as defined by the Supreme Court of Canada. Thank you.

JUDGE ADVOCATE: Thank you.

Before proceeding with the defence arguments we will take a 10-minute recess.

ADJOURNMENT: At 1100 hours, 12 September 1995, the court adjourns.

REASSEMBLY: At 1115 hours, 12 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Just before you proceed with your arguments, Lieutenant-Colonel Couture, could you inform the court as to when the accused entered his pleas?

DEFENDING OFFICER: On 9 December 1994.

JUDGE ADVOCATE: 9 December.

DEFENDING OFFICER: It might have been the 10th.

JUDGE ADVOCATE: So in December of what year? '94?

PROSECUTOR: It would have been December '94, sir. I believe the proceedings started on the 9th of December. We had three days of preliminary motions and then the pleas were entered, approximately the 12th.

DEFENDING OFFICER: Yes, somewhere in there.

JUDGE ADVOCATE: Thank you.

213

Defending Officer

Rebuttal

DEFENDING OFFICER: I will give you now a number of cases to which I will be referring there. My learned friend has a copy of those cases.

The prosecution has made a number of representations as to why the defence shouldn't be allowed to proceed in the matter in contention. The prosecution has failed to allude or refer to two very basic and fundamental principles of law, one which is the presumption of innocence of the accused, and two, the right of an accused to make full answer and defence.

Toward the end of his address the prosecutor was talking about the complexity of matters, the delays. I suggest to you that the complexity of any proceedings that may be required to ensure a fair trial, a trial during which the accused is allowed to make full answer and defence, is not a factor to be considered by the court. If it is very complex, so be it. That is the price of justice and the rights of the accused must not be ignored for mere reason of possible complexity.

My learned friend was talking about, are we going to enter another **Barsalou**? Well the accused, Lieutenant-Commander Marsaw, did not write the decision in **Barsalou**. The Court Martial Appeal Court did. The accused did not read the synopsis that lead to the judge advocate eventually withdrawing himself. That is not his doing. Those are matters of law and the accused must not bear responsibility for that.

It is in the admission and you will remember, Mr Judge Advocate, that it was the prosecution that insisted to a date in December so that the time limitation would not take charge if you wish or care of the first two charges on the charge sheet.

At that point then the prosecution did not contest and did not argue it today either, it was understood and agreed that I, as counsel, had just become seized of this case. It was put on the record

Defending Officer

Rebuttal

that I had spent ... when we asked for an adjournment which was eventually granted to February it was put on the record and the prosecution agreed that I had spent the whole month of November in Trenton where I was working on another general court martial, that I had become the counsel for Lieutenant-Commander Marsaw in October just prior to my proceeding to Trenton for a general court martial. It was mentioned all of this on the occasion of the request for adjournment that Major Mackay who assists me in this case also had come late in the picture, as I use the expression, that was in November.

None of this was contested by the prosecution in December when we made the request for an adjournment. It was also and remains conceded that the disclosure was very extensive and that counsel for the defence had not had an opportunity to look at it, or so brief anyway that it was not meaningful. It is in the admissions that the investigators in this case interviewed 153 witnesses. There were in excess of 130 hours of interview tapes that needed to be listened to and studied by the defence. And all of that and all this rush to get going in December only because the prosecution wanted to save the prescription on charges 1 and 2. And they knew that - it forms part of the admission - they knew that the defence was not ready and could not possibly be ready.

The prosecution has referred you to **R.I.C.** **R.I.C.** aside from saying what the prosecutor mentioned to you also mentions that disclosure can be considered and is a factor that courts may consider when facing a motion for particulars. And it is the position of the Ontario Appeal Court in **R.I.C.** that in determining the sufficiency of particulars they will look at the disclosure and if they feel that the disclosure is of a nature to direct the mind of the accused to the specific events that will suffice and that will form part of the factors to be considered.

215

Defending Officer

Rebuttal

How could we make a motion for particulars specially keeping this decision in mind when we had had no opportunity to look at the disclosure? What we did ...

JUDGE ADVOCATE: So what you are saying here if I understand you well is that there is a relation between your two applications. And in order to present your motion to particulars you have first to present your motion for disclosure, is that what you are saying?

DEFENDING OFFICER: No, I am not saying that.

JUDGE ADVOCATE: OK. Sorry.

DEFENDING OFFICER: All I am saying is, I am explaining why we were not in a position, in December '94 to make a motion for particulars. And truly enough we did present up to three motions but all of those were motions that were very apparent on the face of the charge sheet, multiplicity, a matter of jurisdiction of the court regarding charges 1 and 2, those were quite obvious on the face of the charge sheet and did not require extensive knowledge of the disclosure material.

JUDGE ADVOCATE: And you are saying that the motion for particulars doesn't appear at the face of the charge sheet, is it that?

DEFENDING OFFICER: The motion for particulars appears as well but disclosure is also relevant. So if I find that on the face of the charge sheet the particulars are lacking it may be ... and courts have ruled as it was the case in **R.I.C.** that disclosure may assist the accused and is a factor that the court will consider. We have now looked at the material ...

JUDGE ADVOCATE: Are you referring to third party disclosure?

216

Defending Officer

Rebuttal

DEFENDING OFFICER: No. I am talking about disclosure ...

JUDGE ADVOCATE: In general.

DEFENDING OFFICER: ... in general, OK. And it is the essence of **R.I.C.** as you will, I am sure, see as you read it and you are probably aware of it already. We studied disclosure and after study of disclosure we were not better informed as to exact, the nature of charges 3 and 4 because these will be the charges I would intend to ask for particulars.

Now, the court of course having granted an adjournment until February, in February effectively we were back here. And by then we had studied. And there was the **Barsalou** decision as you may recall that intervened. In fact the judge advocate read the synopsis in this very court probably on the 9th or 10th or 11th and that decision of **Barsalou** was not known to either counsel here or the judge advocate. You will recall that the terms and the expression of **Barsalou** were quite clear when the Court Martial Appeal Court said - and that was Mr Justice Mahoney rendering the decision - that should it be known that the president, a member or judge advocate has seen the synopsis, any conviction appealed will be quashed.

JUDGE ADVOCATE: I read **Barsalou** and I am familiar with it. But getting back to the point of your application that you made at the time for multiplicity and the question that was put to you by the judge advocate to the effect that, did you have an application at that time to the effect that the particulars of the charge were insufficient or not set out with sufficient clarity. What did you answer at that question?

DEFENDING OFFICER: I answered no.

JUDGE ADVOCATE: You answered no. You did not reserve your right to make one later, did you?

217

Defending Officer

Rebuttal

DEFENDING OFFICER: No, I did not.

JUDGE ADVOCATE: So why is that so?

DEFENDING OFFICER: Suppose that ... OK, if it was wrong for counsel, for me, not to reserve my rights, must the accused be penalized for that? Even if it was wrong on my part not to reserve the right and I will ...

JUDGE ADVOCATE: I am not saying that, I am just asking you the question.

DEFENDING OFFICER: Must the accused be penalized for that? And we will see in a moment when I review some of the cases that some courts have made comments on that.

My learned friend says that there exists no law or no basis in law for me to put this motion forward now. I would agree that normally those motions for particulars are made before entering a plea. That is very true and I will not even attempt to contest that. But except in this case it was different. It was a matter of counsel not being prepared at the time. That is just as simple as that really.

I also would like to direct your attention to QR&O ...

JUDGE ADVOCATE: I have a hard time to understand that, Lieutenant-Colonel Couture. What you are telling me is that you agree with your friend to the effect such a motion is normally done before a plea is entered and what you are telling the court now is that the reason for not having done it before a plea was entered is that because ... you were not prepared at the time. Why did you not inform the court that you were not prepared and that you were reserving your rights because of that specific reason? Why did you not raise it?

218

Defending Officer

Rebuttal

DEFENDING OFFICER: I did raise ...

JUDGE ADVOCATE: You were ready and you were prepared to make the other applications that you made?

DEFENDING OFFICER: Uh-huh.

JUDGE ADVOCATE: And one of them referring to multiplicity was closely related to this one that you intend to make and what you are telling me is that you were not prepared at the time to make it, is it that?

DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: And you never informed the judge about that ... or your friend?

DEFENDING OFFICER: I did not, no.

JUDGE ADVOCATE: OK.

DEFENDING OFFICER: And as I say if I was wrong in doing that it will be for you to decide whether the accused should be penalized for that. Because there is, I suggest to you, authority right in the QR&Os about the procedures and I refer you to 101.06 and 101.07. And 101.06 deals with effects of irregularities in procedures:

"(1) A finding made or a sentence passed by a service tribunal shall not be invalid by reason only of deviation from the procedure prescribed in QR&O, ..."

And cases not provided for at 101.07, if it is not provided for there is no regulation saying that it can't be done after a plea. But you must, it is said, it is suggested, that the course of action best suited to make justice be followed. And I suggest that it is the situation we are in.

219

Defending Officer

Rebuttal

My learned friend talks about the imperative "shall" that we read at 112 about the procedure. I suggest to you that in the past courts have not hesitated to deviate sometime from the procedure as set out in 112.05 if it was felt that it was necessary or best suited for a proper administration of justice. One example of that, for example, was in the **Mathieu** where you sat as the judge advocate and allowed the defence to make an opening statement immediately after the prosecution which is slightly different from the procedure set out in the QR&O. So I suggest to you that there is a possibility to allow this motion to be presented.

I was talking about **Barsalou** a moment ago and I think it is of interest to note that in the admissions that were made, the defence had informed prior to the sitting of 21 February of its intention to have a motion for particulars brought forward but as well as another motion which it was undertaken to be disclosed to the prosecution immediately after the **Barsalou** argument if the judge did not desist himself or withdraw. I suggest to you that it was very logical that if there was a chance that the judge as a result of the **Barsalou** argument might withdraw from the case, it was only reasonable to hold on the other two motions pending his decision on that motion. In this particular instance the judge felt appropriate to withdraw and of course the proceedings were interrupted at that time. Had the judge remained in his office as the judge advocate the motion would have been presented then, both a motion for particulars and a motion disclosure.

JUDGE ADVOCATE: And why was it logical to do so?

DEFENDING OFFICER: Because if the judge advocate is about to withdraw why continue to seize him of matters if he is going to withdraw, if he feels that he must withdraw from the case for basically appearances of justice because that was his concern as he

220

Defending Officer

Rebuttal

rendered his decision. He was not to stay as a judge advocate in light of the **Barsalou** decision and the risk that all proceedings could be overturned later on and for appearances of justice having regard to the **Barsalou** decision. So it was my view, nothing else, that it was more appropriate to see how the judge advocate would handle the **Barsalou** argument and then take it from there. Because it appears more logical than bring more motions or possibly call evidence in **voir dire** or all of that to have only the judge withdraw after. And in my mind, and that is my submission, it is more logical to see what the judge intended to do first and then carry on after.

I want to come back on the argument that the prosecution advanced that the defence has been the cause of the delays and that goes against the **Généreux** who talks about speedy trial or the need for a parallel system, the military justice system. You have evidence in front of you, in fact you have the charge sheet which refers to incidents in 1991. The accused was charged in July '94 and it is before this court; you have this information. You have in front of you information that the prosecution would not proceed in December. The fact that many witnesses are being disturbed from their operational tasking and so and so forth, I suggest to you is not a factor that must again prevent the accused from presenting full answer and defence. It is not uncommon for courts in a navy environment to be more difficult to schedule or procure witnesses of course because of the sailing schedule of ships and various tasking. So those arguments, Mr Judge Advocate, must simply be held against the accused. And I suggest to you that the defence is not responsible for the delays that have occurred in this trial. And as I put it to you before if, for example, counsel did wrong in not reserving a right on that issue, does that mean that the accused must be penalized?

Another aspect, Mr Judge Advocate, and you have in front of you evidence that upon viewing will show that the request for disclosure - and I know we

221

Defending Officer

Rebuttal

will argue it further at a later time I hope pending your decision - but already in front of you, Mr Judge Advocate, and I invite you to pay close attention to this evidence about documents that were introduced, article in the paper of Mr Dunlop ... and look at the charge sheet and the allegations in the charge sheet and the article in the paper, the unedited draft that was submitted to Lieutenant-Commander Agnew, the notes produced by Mr Dunlop to the military policemen. You will see the **connexity**, you will see the relevancy - and I know we will discuss more hopefully later on that - but you will see on its face that the request for such disclosure is very reasonable. The information sought we suggest - and we will argue furthermore hopefully - is very relevant and is of a nature to enable the accused to prepare full answer and defence and present such full answer and defence.

On that note I would like to refer you, Mr Judge Advocate, to **Stinchcombe** at page 336 where it is indicated that:

"The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted."

That is what we are talking about here, Mr Judge Advocate. At page 340 of the same decision which talks ... I appreciate that here of course I am not saying that the prosecution has failed to disclose but they are not aware of the information that I am seeking. And I suggest to you again on the reasonableness of the request if we look at the test suggested:

"... that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full

222

Defending Officer

Rebuttal

answer and defence, unless the non-disclosure is justified by the law of privilege."

I suggest to you that - and that is a bridge that we will have to cross later again - but I suggest to you that this goes directly to the reasonableness of this request and that the accused must not be prevented from having an opportunity to so seek and obtain the information.

In the case of **Regina v. L.A.T.** which should be the second case in front of you - it was a case of sexual assault - a statement was made by a complainant to a third party and it is said there ... and that will relate to my learned friend's address when he was saying "We are not calling Mr Dunlop". That is fine but this case clearly states that information that cannot be put in evidence by the Crown but that can be used by the defence in cross-examination or otherwise should be disclosed to defence counsel. So it is not really important whether or not the prosecution intends to call Mr Dunlop. The point of the matter is if Mr Dunlop has information that is of assistance and it meets the criteria of relevancy and I suggest to you merely **prima facie** at this point in time that the accused must be allowed to present such a request. And this statement is made in particular after page 94 of that decision.

The same decision at page 95 contains an interesting comment. The paragraph before last at page 95:

"In the present, case whether or not one agrees with the tactical decision of defence counsel not to avail himself of the offer to conduct further cross-examination of the complainant and experts, it cannot be said with certainty that the appellant was not prejudiced.

223

Defending Officer

Rebuttal

The critical opportunity to attach the credibility of the complainant C.T. was considerably, and arguably, irredeemably reduced."

And the court in that decision did allow the appeal and ordered a new trial. This as well, Mr President, goes to the concept of obtaining evidence or seeking disclosure at the first reasonable opportunity. I suggest to you and this is again discussed in the next case, the case of **Anutooshkin**, a decision of the British Columbia Court of Appeal where it is stated at page 63 ...

JUDGE ADVOCATE: Just referring to the last case for a moment, **R. v. L.A.T.**, the information that the defence was seeking, was it in possession of the Crown?

DEFENDING OFFICER: I will just verify that. Yes, it was and it was actually a case of late disclosure in that case. The defence had become aware of that information and as far as I understand the information was provided to him by the Crown.

JUDGE ADVOCATE: So it is totally different from the case we have right now if I understand well.

DEFENDING OFFICER: It is different, yes. Because I have acknowledged already that I am not alleging that the Crown has not disclosed but the principle of full answer and defence stated in **Stinchcombe** still applies. And if the accused is to be prevented of providing full answer and defence I don't think it matters much where the information is. I believe the object is to ensure that the accused be given the opportunity to present full answer and defence.

In the case I was just starting to discuss it is indicated at page 63 and it is a quote from a **Stinchcombe**:

224

Defending Officer

Rebuttal

"Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply ..."

Again I use this as a parallel. I mean it is similar.

"... to comply to its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and, thus, avoid a new trial."

That is the underlying principle again in favour of making timely requests for disclosure and that is what in my opinion courts refer to when they talk about first reasonable opportunity, that is, at a time that will allow the judge to take whatever action is necessary, order whatever remedy that is necessary to avoid the prejudice to the accused. So the first reasonable opportunity must be understood in that context and it does not only and always refer to mere timing but it is in that context.

The defence in the present case has sought the information and you have evidence in front of you, wrote two letters to Mr Dunlop seeking the information, the first letter I have received no response, the second sought a response to the first one and it was the reply too by Miss Purves. As the information was not forthcoming that is when of course counsel have decided that this matter should be brought to your attention, Mr Judge Advocate, so that the information could be disclosed at your direction. And again I hope that is something that we will have to discuss later and more completely.

And incidently it is also my position that although we are arguing now both motions that the defence intends to present, it is my position that there is a difference between the two and if this court should decide, for example that the motion for particulars cannot be received at this time on the basis of whatever argument it does not necessarily follow - and I am not saying that you should reach such a conclusion - but it is suggested that there is a very clear difference and important difference between these two motions. And again it is by way of similarity; it is well known that the duty of disclosure is a continuing one and it cannot be said that the relevancy of disclosure stops at any time. Because if counsel become aware of information in the middle of the trial or toward the end of the trial - in one of the cases cited the information had come up at the very end and was not raised at the sentencing point - but the issue of disclosure is always live. It is always in movement. And when knowledge is acquired of some information, this is when it must be addressed. And I suggest to you that our request now is very timely and in doing it now we will avoid situations where at the very end of the trial we could be subjected to recalling witnesses and so on and so forth. In having disclosure right now the defence will be in a position to carry on with the trial and present full answer and defence.

As you asked the logic of presenting **Barsalou** first, I tried to explain that I thought that it was reasonable that such a matter that could affect the outcome of the trial should be brought forward immediately. And I think it is only appropriate, and rather than wasting the judge advocate time, I think as matter of courtesy if not as an ethical consideration I think it was appropriate to proceed that way. And again even if you, Mr Judge Advocate, take a different position on that, I suggest that this move on the part of counsel must not turn to the prejudice of the accused as it was mentioned incidently in that **L.A.T.** case that I just referred you to.

226

So for this reason, Mr Judge Advocate, it is my contention that there exists authority in QR&Os for you to allow particulars to be sought at this time. The reason it wasn't done before is not attributable to negligence or any form of malice or anything of that nature. It was not contested; it is still not contested that in December '94 counsel representing the accused were not aware of the disclosure or had not had a meaningful opportunity to look at the disclosure material which was extensive.

And on the issue of disclosure I believe there is in front of you enough information to appreciate the seriousness, the reasonableness of that request, that the request is timely and that to ensure full answer and defence for the accused you should allow the motion to be heard and of course dispose of it in accordance with applicable law.

Thank you.

JUDGE ADVOCATE: Thank you. The court will now close to consider this application made by the prosecution. In view of the time of the day I may already inform you that I will not be in a position to make my decision or ... read my decision before 9 o'clock tomorrow morning.

AT 1200 HOURS, 12 SEPTEMBER 1995, THE COURT CLOSSES TO DETERMINE THE APPLICATION MADE BY THE PROSECUTION.

AT 0900 HOURS, 13 SEPTEMBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: The accused, through his defending officer, wishes to make two preliminary applications to this court and gave this court a notice to that effect by fax on August 16, 1995. A copy of the said notice was also provided to the prosecution. The notice reads as follows:

"IN THE MATTER OF the General Court Martial
of
LIEUTENANT COMMANDER MARSAW
Dean Carey, Canadian Forces Maritime Warfare
Centre, Canadian Forces Base Halifax, con-
vened for December 6th 1994.

TAKE NOTICE that, pursuant to Queen=s Regula-
tions and Orders art. 112.04(1), the defence
intends to make the following motions and/or
pleas in bar of trial on September 12th 1995,
or as soon thereafter as practicable as the
Court will permit:

1. The defence will make a motion for the disclosure of information held by a third party requesting that M. Malcolm Dunlop, Reporter with the Chronicle-Herald be compelled by the Court to reveal the identity of his sources as well as turning over to the defence any notes, records or recordings of interviews made with such sources regarding events or incidents for which the accused is presently before the Court;
2. The defence will further make a motion for particulars pursuant to article 112.22(1) of the Queen=s Regulations and Orders, with regards to charges 3 & 4, to the effect that the particulars fail to identify with relative certainty specific events and times where the accused would have used some or all of the alleged abusive words against some or all of the alleged victims and are therefore set out in such a fashion that the accused cannot properly prepare a defence.

The defence intends to call one to three witnesses in support of its arguments on the first motion and does not intend to call any witnesses for the second motion.

The defence estimates that it will take approximately 4 hours to present these applications or objections."

The prosecution objects to the presentation of those two applications for reasons that can be summarized as follows. According to the prosecution, the accused has no procedural right to now make non jurisdictional motions after the plea has been taken. To allow the defence to do so at this time would be contrary to QR&O 112.05(1) and 112.04 and would cause prejudice to the prosecution. Should the motions be granted the court would be asking the prosecution to prove a different case with different particulars than it has prepared for and possibly further delay the trial should Mr Dunlop refuse to disclose sources and the matter deteriorate into "contempt" proceedings. The prosecution argues that, in December 1995, the accused was given the opportunity to make a variety of motions contemplated in 112.05 and that he expressly declined, when asked by the Judge Advocate, an opportunity to make a motion for particulars pursuant to QR&O Article 112.22. The prosecution submits that allowing preliminary motions to be made outside the scheme of QR&O 112.05(1) and 112.04 undermines the necessity for a speedy administration of military justice as identified in the Supreme Court of Canada decision of **R. v. Généreux**. Alternatively, the prosecution admits that should it be decided that the mandatory wording of QR&O 112.05(1) not be binding and that non jurisdictional motions can be raised after a plea has been entered, the defence is still prohibited from raising these issues because it has failed to raise them at the first available opportunity.

The evidence before this court on this application consists of admissions made by both parties, exhibits produced as "VD4-1" to "VD4-6" inclusively and matters of which this court has taken judicial notice under Military Rule of Evidence 15.

The facts can be summarized as follows. The accused was charged in July 1994. At the time he was represented by Mr David Bright, a civilian attorney. Given Mr Bright's calendar he was not available for a trial until early 1995. A court date was set in December 1994 so that preliminary matters could be dealt with and pleas entered. At the December hearing the judge advocate expressly asked the defence whether they wished to make a motion for particulars. The defence expressly declined this opportunity. Defence then made three preliminary motions including an argument that charges 3, 4 and 7 were multiplicitous and that each charge contained too many incidents thus preventing a full answer and defence. In the December 1994 session, after making three unsuccessful pleas in bar of trial and after declining an offer to make a motion for particulars, the accused pleaded not guilty. Defence counsel then made a request for adjournment and the trial was scheduled for February 21, 1995. In February 1995, the Defence informed the prosecution, prior to the court sitting and the trial recommencing, that it had three motions it wished to make:

1. A motion arguing that the judge advocate could no longer preside over the trial as he had reviewed the synopsis while deciding two of the above noted preliminary motions.
2. A motion for particulars; and
3. Another motion which it would not disclose for strategic reasons.

In February, the defence chose to proceed with the so-called **Barsalou** application and decided not

to raise the two other applications. Upon the Judge Advocate Brais removing himself, the case was adjourned until September 1995. After the February 1995 sitting the prosecutor repeatedly asked the defence what the surprise motion was and the defence did not reveal its contents until August 15, 1995.

QR&O Article 112.05(1) states in part:

"..., the procedure at a court martial shall be in the order set out in this article".

QR&O Article 1.06(a) states that:

...

"(a) 'may' shall be construed as being permissive and 'shall' as being imperative; ..."

QR&O Article 112.05(5) states in part that:

"...

(b) the accused may apply for an adjournment on the ground of being unable to properly prepare a defence because the particulars of a charge are inadequate or are not set out with sufficient clarity (...);

(c) the accused may object to the trial being proceeded with (...);"

The defending officer admitted in its presentation that motions for particulars are normally made before a plea is entered. He also admitted having been offered the opportunity to make a motion for particulars and that he expressly declined such possibility.

231

Judge Advocate

Decision

When asked why he declined at the time and wants to make one today, he said that he was not really prepared at the time to make such an application and that the accused should not be penalized for his errors.

It is my decision that a motion for particulars as referred to in QR&O Article 112.05 (5)(b) is a preliminary application and as such must be made before the time the accused enters a plea. In the present case the defence was offered the opportunity to make one and declined to do so. I do not accept the argument that it is because the defence was not prepared that it declined to make one. If that was the case, it should have raised the issue to the presiding judge advocate. It should also be noted that the defence made a motion for multiplicity at the time. I have difficulty to understand why the defence was prepared for that motion and not for the other, the two referring to similar law concepts. For all the above reasons, the prosecution=s objection to this motion for particulars is granted.

As to the prosecution=s objection to the motion for third party disclosure, the higher courts and in particular the Supreme Court of Canada in the case of **Stinchcombe** have decided that the defence has a positive legal duty to raise disclosure at the earliest opportunity. It is in evidence that the defence has intended to make this application since at least February 1995 and that it has decided to wait until August 15 for strategic reasons, despite repeated requests from the prosecution. Although I am inclined to think that the defence has consciously chosen not to raise the issue at the earliest moment I am of the view that although such a motion for disclosure should and could have been made before in this case, such a motion is not considered as a preliminary application which shall absolutely be made before an accused enters a plea to the charges before the court. I therefore deny the prosecution=s objection on this matter and I am ready to hear the defence application on the matter of third party disclosure.

232

Judge Advocate

Decision

Now, Mr Defending Officer, how do you suggest or submit we proceed from this point?

Would you like an adjournment to give you sufficient time to consider your respective positions?

DEFENDING OFFICER: Yes, if I might. I have discussed with the prosecution and we thought it might be in order to confer a moment and Mr Grant is here as well so it might be appropriate that we discuss the matter and maybe over a 30-minute adjournment.

JUDGE ADVOCATE: Very well. So this court is adjourned for 30 minutes. In the meantime I would like to meet with counsel in chambers.

ADJOURNMENT: At 0915 hours, 13 September 1995, the court adjourns.

REASSEMBLY: At 1000 hours, 13 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Is the defence ready to proceed with its application?

DEFENDING OFFICER: Yes, Mr Judge Advocate. However before I proceed to do so I understand that Mr Grant, counsel for Mr Dunlop, would like to request a standing before this court at this time. So maybe if the court wants to address this matter first then I will be ready to proceed after.

JUDGE ADVOCATE: Very well. Do you have any objection to this request for standing?

DEFENDING OFFICER: No, I do not.

JUDGE ADVOCATE: What about the prosecution?

233

ASSISTANT PROSECUTOR: No, we have no objection. In fact we fully support the request, Mr Judge Advocate.

JUDGE ADVOCATE: Mr Grant?

INTERVENER: Thank you, Mr Judge Advocate. For the record my name is Robert Grant. Associated with me is Nancy Rubin. And we would seek on behalf of our client, Malcolm Dunlop, standing in connection with this application.

JUDGE ADVOCATE: Very well. So standing is hereby granted to Mr Robert Grant to represent Mr Malcolm Dunlop.

DEFENDING OFFICER: I would like, and I believe it is with the consent of the prosecution, that the evidence submitted in the argument yesterday, all admissions, as well as all documents that were tendered in yesterday's proceeding be incorporated for the purpose of this argument today.

JUDGE ADVOCATE: Any objection from the prosecution?

ASSISTANT PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: So documents marked "VD4-1" to "VD4-6" inclusive plus admissions made by both parties yesterday now become evidence in this fifth **voir dire**.

DEFENDING OFFICER: I would also like to introduce one additional document, and it is with consent of the prosecution and I understand of Mr Grant as well, of a four-page document comprising of an affidavit of service and a summons to a witness.

JUDGE ADVOCATE: Any objection from the other parties?

ASSISTANT PROSECUTOR: No objection.

INTERVENER: None, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

This four-page document becomes "VD5-1".

THE SUMMONS TO A WITNESS IS MARKED EXHIBIT "VD5-1".

JUDGE ADVOCATE: Just before you proceed, as we are sitting in another **voir dire** I will ask all parties in respect of those facts and matters contained in Military Rule of Evidence 15, that is to say, required judicial notice, do you wish to make any representations regarding either the competence or the propriety of the court taking judicial notice of those facts and matters?

DEFENDING OFFICER: No, I do not.

ASSISTANT PROSECUTOR: No, sir.

JUDGE ADVOCATE: Mr Grant?

INTERVENER: No, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

So the court takes judicial notice of those facts and matters contained in Military Rule of Evidence 15.

Go ahead.

DEFENDING OFFICER: Mr President, as indicated, this is an application for disclosure, disclosure of information in the hands of a third party, namely Mr Dunlop, who has in his possession, we believe in any event, information, documents which are directly connected to the proceedings against Lieutenant-Commander Marsaw before this court. At this point I do not propose to call any further evidence than what you

235

Defending Officer

Application for disclosure

have and I do this on the understanding that any attempt to do so would resolve in a privilege being claimed on the part of the witness, a privilege as to a right not to disclose and that has to bring me in some of the law with respect to that. And it will be in my view as well relevant to the whole issue as to whether should disclosure be made or not.

I know, and my learned friend has provided me with a copy of material to that effect, that the prosecution and possibly Mr Grant will rely on the authorities of **O'Connor**, a decision of the BC Appeal Court dealing with procedure to be followed in cases where disclosure of information from third party is sought. My position, and I would like to address that to start with, is that this is not the proper test to be applied.

Do you have the decision of **O'Connor** already?

JUDGE ADVOCATE: It is here in the library if you want it.

DEFENDING OFFICER: Because I have only the one copy that the prosecution gave me. I will make reference to it at this point.

ASSISTANT PROSECUTOR: We will provide a copy of that to you, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: The position of the defence is that in such a matter of disclosure as the present one, the **O'Connor** test is not the right one. **O'Connor** basically pertains to medical records and if it can be said that it pertains to documents other than medical records then nonetheless it is in my submission quite clear that it deals with information that is protected by legislation. It deals with information that benefit a privilege status if you wish. And in the case of **O'Connor** which addresses the medical only as clearly stated at page 259, it dealt a lot with

236

Defending Officer

Application for disclosure

privacy, right to privacy, protection of privacy, protection of information that has been given, for example, in the case of medical treatment, to a doctor by a person with expectation that it would not be released.

I suppose to an extent one could claim that **O'Connor** may cover cases such as solicitor/client privilege which is a clear one and possibly others. However in this particular case, Mr Judge Advocate, we are not dealing with information that is in the possession of a third party and this is protected. It is in the possession of a third party, yes. But it is not information that benefits any status by law, any privilege by law. Therefore the much stringent standard and test invoked in **O'Connor** I respectfully submit do not find its application in the present circumstances.

Instead, and I would like to give you a copy of actually two cases. I put these two together because in the **Moysa** decision there, it is one decision but I have provided the court with the three levels of decision which goes up to the Supreme Court of Canada. And I believe this is obviously extremely important because it is the very crux of the matter. This is in our submission the standard that must be applied in looking at the present request.

The test is, if I may give you a little bit of background on **Moysa** which is the first case I provided, at page 1575:

"The issue in this case is the right of the appellant, ..."

JUDGE ADVOCATE: Just a second, 1575?

DEFENDING OFFICER: That is correct, of the Supreme Court of Canada decision which is probably the very last.

JUDGE ADVOCATE: OK.

237

Defending Officer

Application for disclosure

DEFENDING OFFICER:

"..., a journalist, to refuse to answer relevant questions in the proceeding before the Alberta Labour Relations Board. The refusal was grounded in part on an alleged right to protect sources of information on the basis of a qualified privilege either at common law or under s. 2(b) ..."

JUDGE ADVOCATE: Where are you reading from?

DEFENDING OFFICER: At page 1575, the very first paragraph just next to Sopinka.

JUDGE ADVOCATE: "The issue in this case"?

DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: OK.

DEFENDING OFFICER: Now immediately thereafter, and I will save you ... I will only summarize, but immediately thereafter you have the factual background.

"In 1985," etc., and in essence a journalist had spoken to a number of employees of a store regarding a union matter. Shortly after a publication of an article six employees were fired by the Company Hudson Bay and the matter was brought in front of the Labour Relations Board and the matter of the person she had spoken to and information and what had transpired from that was addressed and that is where the journalist refused to answer the questions.

Now in terms of test, and I do believe and it is our submission, the Supreme Court has looked at two tests. The first test which is often referred to as

238

Defending Officer

Application for disclosure

the Wigmore test is indicated at page 1576 of this Supreme Court of Canada decision and is four criteria:

"(1) The communications must originate in a *confidence* that it will not be disclosed.

(2) This element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*

(4) The *injury* that would inure to relation to disclosure of communication must be *greater than the benefit* thereby gained from the correct disposal of the litigation."

This is the so-called Wigmore test and of course I must say at this point that in criminal proceeding one could reasonably claim that a more even careful examination must be made or a more liberal must be made in considering this test which has been set out in the context that I have described to you. I must add at this point the portions I just read of is at 1576 of the Supreme Court of Canada decision and I must add that it has been adopted as such by the Supreme Court of Canada at page 1578 of the same decision. It is the middle paragraph that starts with the word "the appellant" and the last sentence which reads:

"Even if such a qualified testimonial privilege exists in Canada this appeal must be dismissed as the appellant here does not fall

239

Defending Officer

Application for disclosure

within any of the possible tests which have been proposed as establishing the conditions necessary to justify a refusal to testify."

Wigmore being the first test which I have just addressed. And the second test being the 2(b) argument under the Charter. That second test on 2(b) is discussed at page 1577, second paragraph where it says:

"The Labour Board was of the opinion that Powell J. had identified two criteria that need to be demonstrated before the government could compel a journalist to testify. The perceived evidence must be crucial to whomever seeks it and the evidence must also be relevant. The Board felt that this was the appropriate test under s. 2(b) of the Charter."

Again this test, as the test under common law as set out by Wigmore, has been adopted by the Supreme Court in the same passage I just read at page 1578. And at the end, at 1582 the judge was concluding:

"In these circumstances I am of the opinion that the Board did not err in law in ordering the appellant to answer the questions posed. This doesn't mean that I necessarily agree that a journalist is entitled to a qualified privilege when asked to testify about sources ..."

And it carries on, having adopted the two standards.

When we deal with what is crucial, and of course we deal as well with relevancy, I will suggest

240

Defending Officer

Application for disclosure

to you, Mr Judge Advocate, the definitions of relevancy discussed in McWilliams at pages 3-4 and 3-5 of the Canadian Criminal Evidence, McWilliams 3rd edition - and I will make copy available to you as needed. And the concept of relevance of course is very broad and they have attempted definition there, the one of which at page 3-5:

"'relevant' as meaning that 'any two facts to which [the word] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with the other facts proves or renders probable the past, present or future existence or non-existence of the other.' ... Relevancy is also defined simply as whatever is logically probative or whatever accords with common sense."

JUDGE ADVOCATE: Do you have copies of what you are reading?

DEFENDING OFFICER: Yes. I will provide it to you. I don't have the copy made now but I will make available to you.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: Also at page 3-4 of McWilliams:

"... in considering whether evidence is admissible the first question is 'What are the issues?'

In addition to facts *in issue* there are facts *relevant to the issue* in the sense that they prove or render

241

Defending Officer

Application for disclosure

probable the past, present or future existence, or non-existence of any fact in issue: ..."

Also on this point of relevancy and of course tied up to the matter of full answer and defence I would like to refer this court to an extract quoted again in McWilliams at page 8-80.3 where Madam Justice Wilson was stating:

"What rights then does an accused have under s.7 of the Charter with respect to the admission of previous testimony? It is, in my view, basic to our system of justice that the accused have had a full opportunity to cross-examine the witness when the previous testimony was taken if a transcript of such testimony is to be introduced as evidence in a criminal trial for the purpose of convicting the accused.

This is in accord with the traditional view that it is the opportunity to cross-examination and not the fact of cross-examination which is crucial if the accused is to be treated fairly. As Professor Delisle has noted: ...'If the opposing party has had an opportunity to fully cross-examine he ought not to be justified in any later complaint if he did not fully exercise that right.'"

I suggest to you that this portion reported in McWilliams is also relevant in the conduct obviously of full answer and defence.

242

Defending Officer

Application for disclosure

I have given to you, Mr Judge Advocate, the decision of **The Citizen v. Coates**, a 1986 decision of the Nova Scotia Supreme Court and I will not go over all the facts, but again in that decision it was recognized that there is no such a thing as a privilege, that journalist do not benefit a privilege. That is the conclusion and they have adopted as well there the Wigmore test. So it is very consistent with the decision in **Moysa**.

Now, having submitted that the journalist does not benefit of any privilege granted by common law or by the Charter, then I submit to you that the standard to be used ought to be different than the one described in **O'Connor** because **O'Connor** deals with privilege, privileged information, information that is protected by law. I suggest to you that then if we do not deal with privileged information, that it would be medical, solicitor/client privilege, or for that matter in given circumstances police informants subject to some exception, I suggest to you that then we merely revert back to those criteria that have been addressed in the two cases I cited and those that have been addressed in **Stinchcombe** as well in terms of - I do appreciate that **Stinchcombe** deals a great deal with the duty of the Crown, etc., and I do agree as well that the Crow cannot disclose what it doesn't have - nonetheless the fact that the Crown doesn't have certain information doesn't mean that that information is not opened to be had by the defence. Obviously in such a case the defence must direct his attention to another party to obtain the information but the information if it is relevant and if it does not benefit any privilege status under law, either common law, Charter, or otherwise, should be disclosed to the defence in the same vein and under the same general guidance as provided in **Stinchcombe**, albeit from a source different than the prosecution but nonetheless under the same guidance as given in **Stinchcombe**.

And in that respect, and I have given to you **Stinchcombe** yesterday. I will not go over again all

243

Defending Officer

Application for disclosure

the arguments about the full answer and defence as discussed there. In **Stinchcombe** though the standard is set at page 340 that the judge must consider ... at page 340, that is the second full paragraph of the page:

"The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."

And it is to that extent, Mr Judge Advocate, that I suggest to you that this is the real test. Understood that the prosecution doesn't have the information and I am not seeking it from them. But the principle, the guidance regarding disclosure in **Stinchcombe** are applicable with that exception that it is the prosecution that has it. Mr Dunlop, in our view, has the information, has information that falls within the ambit of both **Moysa, Coates** and of course **Stinchcombe**.

I would like to review briefly the matter of evidence that is in front of you right now: You have all the admissions that were made yesterday and incorporated today. The close link that exists between the article inquiries of Mr Dunlop, the contact he has had with military authorities, the ordering of an investigation on 15 December '93, the number of people that were interviewed, the fact that the prosecution nor the military police for that matter, nobody else knows who those people are. You have a copy of the article, and I would like to direct your attention to some extracts thereof. The very first paragraph:

244

Defending Officer

Application for disclosure

"Sailors and officers of a Canadian submarine have told The Chronicle-Herald of assaults, verbal and mental abuse and unsafe diving conditions at sea ..."

All matters which appear to relate directly to the charge sheet in front of you. Assault, you look at charges 1 and 2, and charges 5 and 6. Verbal abuse, you may look at charge number 4. Mental abuse, we look at charge number 3: ill treated. Then later in the same article, paragraph 10 to the right hand side of the page:

"Four veteran submariners, who spoke only on condition their names not be released, said the captain's command, which lasted nearly three years, was hellish. Two submariners from Ojibwa have described in detail a reign of fear aboard the 30-year old O-class sub while two others confirmed the events occurred."

It goes on later to state that:

"Others among the 100 or so who served ... [said] they would speak but only to naval authorities."

nonetheless the next paragraph say:

"They said morale was low in the tight-knit squadron ..."

This, I suggest to you, along with the admissions that are in front of you already create sufficient level of relevancy to entitle the defence to be informed of further information.

245

Defending Officer

Application for disclosure

You have the document entitled "Notes" - and whilst I don't want to read it all, it is fairly lengthy - if we look at paragraph 1 of those notes most directly link to charges 1 and 2.

"VD4" I believe, is it?

JUDGE ADVOCATE: There are notes in "VD4-6" and notes in "VD4-5".

DEFENDING OFFICER: It is -6, Mr Judge Advocate, I apologize for that.

JUDGE ADVOCATE: It starts with a date of 20 December '93 on the right hand top corner?

DEFENDING OFFICER: That is right. Then it says, "Notes para 1 December '91, January '92"

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: OK. That is the paragraph I was ...

JUDGE ADVOCATE: "VD4-6"

DEFENDING OFFICER: Yes.

If we look at paragraph 4 which again, of the same document, deals with verbal and mental abuse directly link to charges 3 and 4 to say the least. And then if you look at "VD4-5", which is the four-page document, you have again a great deal of information on various occurrences that can be easily tied up to especially charges number 3 and 4, 3 in particular where reference is made to people being called "stupid" or "liar" or all those other expressions.

Now what has the defence done to try to secure this further information from Mr Dunlop? It has written to him one letter in June, on 16 June '95, produced as "VD4-1" and requesting exactly the information. Then the next document, "VD4-2", is a second

246

Defending Officer

Application for disclosure

letter requesting that please the information be provided as no reply had been received. And the very next document is "VD4-3" which is the answer from the paper stating that they do consider this information privileged and will not release it voluntarily.

It is submitted to you, Mr President, that this body of evidence clearly indicates the need and the importance, the crucial aspect, as alluded to in some of the test, I suggest to you that the privilege does not exist, the privilege that may be claimed by the potential witness does not exist. The relevancy has been in my opinion demonstrated by the documentary evidence in front of you.

And it is submitted that the defence is entitled to have that complete information. Mr Judge Advocate, this request is not unlike, for example, if an individual had made two or three statements to the police regarding events that he would have witnessed. Could it be said that the defence is entitled to have all three documents disclosed because they pertain to the same events. What I am saying here is that we have individual that have spoken to Mr Dunlop, regarding to our contention the very matter that are about to be heard before this court. They have spoken to him and then it is confirmed by way of admission that they have spoken to the military police as well.

What I suggest to you is that what they said to Mr Dunlop is just as relevant as what they said to the military police, and the defence is entitled to see and be provided with that information, especially having regard to the fact that Mr Dunlop has been so closely involved with the military authorities as this matter was about to turn into a military police investigation. And I invite your attention to the admissions again that were made.

The information that is in front of you now and the information that has been passed to Mr Dunlop by at least four confidential sources and others that

247

Defending Officer

Application for disclosure

have spoken to him is not removed from these proceedings. It pertains directly to these proceedings in as much as and as admitted the investigation was furthered and as a result of Mr Dunlop draft article. He had contacted Lieutenant-Commander Jeff Agnew - Mr Dunlop that is - a public affairs officer with the Canadian Forces. So it is not as if the defence is asking for information that was way removed in time prior or after an incident or an investigation but it is directly linked to the military police investigation and later obviously the charges. And since it has been confirmed that especially those same sources and people who have spoken to Mr Dunlop have also spoken to the military police we claim it is very relevant and that the defence is entitled to it.

I suggest to you it may be the contention of the prosecution that the defence is only on a fishing expedition. I will admit that much. I will admit that I cannot say with a great degree of certainty what exact information Mr Dunlop owns. And I will admit to that. But at the same time I can assure you, and it is my submission that this is not a fishing expedition at all because already in front of you by way of documentary evidence and admissions you already have plenty of evidence in front of you to indicate that Mr Dunlop by mere virtue of the article he has written and the other document he has produced, is indeed in possession of documents that are relevant. Therefore it must not be just classified as a fishing expedition. And the fact that I cannot tell you exactly what he has must not be construed as being a fishing expedition. If I knew exactly what he has, or if I knew exactly what I want to know, obviously we would not be here in court today. But on the basis of what I do know, which is the same as you basically, produced as evidence, I know that Mr Dunlop is in possession of further information that is required so that the accused can have full answer and defence.

Those are my representations.

248

Defending Officer

Application for disclosure

JUDGE ADVOCATE: Before sitting down, I would like to know a few things from you. First of all what is the information that you are seeking? Can we say that it refers to the matters elaborated in "VD5-1", the summons to a witness?

DEFENDING OFFICER: That is correct. It is fully detailed, "VD5", summons to a witness, lays out exactly the charges as it should.

JUDGE ADVOCATE: So you are referring to notes, recordings made relating to interviews or conversation ... I am just reading from paragraph a on page 3.

DEFENDING OFFICER: Two of 3 probably.

JUDGE ADVOCATE: Because there is an affidavit of service which is the first page.

DEFENDING OFFICER: I am sorry.

JUDGE ADVOCATE: It is 2 of 3, yes. "Any notes/recordings made relating to interviews or conversations you had", and you are referring to the witness I guess, "you had ... witnesses/informants leading to the publication of your article in the Chronicle-Herald on 16 December 1993 entitled *Sub's captain under scrutiny;*" and you go on, paragraph b, c and d. So you refer to notes and recordings made during interviews. Oh! there is a paragraph e also on 3/3, the other page.

Now, my next question is for what purpose do you want this evidence to come in. What do you want to do with that evidence at the trial?

DEFENDING OFFICER: So I can use it for the defence of the accused.

JUDGE ADVOCATE: Yes, but be more precise please.

249

Defending Officer

Application for disclosure

DEFENDING OFFICER: Well, as you know, Mr Judge Advocate, there are three purposes in a cross-examination. One is to weaken the position of the witness as it came across the examination. Two, is ...

JUDGE ADVOCATE: I stop you there. Do you know if one of those people to whom the witness talked to will be a witness in these proceedings?

DEFENDING OFFICER: No, I don't.

JUDGE ADVOCATE: OK. Go on.

DEFENDING OFFICER: That is another thing that I am very interested in knowing too because if they are not, who knows? I mean I might be able to call those as witnesses or if they are called I can use the information ... I cannot tell you with a great deal of certainty the use I will make of the information. It can be threefold as I was about to say. If those individuals are called as a witness, in cross-examination I may try to weaken their position, bring some relevant facts that may not have been brought or simply attack their credibility.

Now the fact that I am going to use that information possibly in cross-examination it doesn't mean that it only goes to credibility or anything like that. If it has to go to credibility we might be talking about previous inconsistent statement, or any other procedure of that nature. It may be that the witness talks about information today, that he had spoken of differently before, that might be on the very issue. For example, the witness says, "The captain struck me, punched me in the face". He says that in court. If that same individual has said to Mr Dunlop that he punched me but it was accidental and heapologizedd or something like that I think that such a statement is very relevant to the issue and that goes beyond the mere matter of credibility. That is one possible use.

250

Defending Officer

Application for disclosure

And I refer to the Wilson in the Supreme Court of **Potvin** from McWilliams, the right to fully cross-examine suppose that we have the information. And my understanding of the law is that the purpose of early disclosure is to allow full answer and defence by permitting and giving an opportunity to the accused to inform himself of all the facts that are relevant or those that at one time may not appear relevant but become relevant so that he can make his representation, make proper cross-examination. That is the purpose of ... I intend to make of that information.

And in that regard I would like to refer you to **Stinchcombe** and I will give you the exact page in a moment. **Stinchcombe** at page 345 and the last paragraph of that page. Again of course here they talk about possession or information in possession of the Crown. I am not saying that is the case here. But again by way of analogy.

"I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses."

So whether they, those people I am seeking information on, are or not proposed, but I won't know until I know their name. But it seems that according to this it doesn't matter whether they are called or not.

"Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all informa-

251

Defending Officer

Application for disclosure

tion in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report"

that is the Marshall Commission alluded to before.

"If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use ..."

and it says some use

"... then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor."

of course in the case where they would have the information.

"Moreover, I do not understand the Commission's statement that '[t]heir statement are not evidence'."

Judge Sopinka correctly continues on:

"That is true of all witness statement. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called viva voce."

252

Defending Officer

Application for disclosure

That is my answer to your question.

JUDGE ADVOCATE: Thank you. Now you didn't say anything about the onus. According to you whose party has the onus of establishing the relevancy of these matters? Which position do you take on that?

DEFENDING OFFICER: I will take position that the defence has to demonstrate a certain relevancy. **Stinchcombe** addresses this matter but again it relates to the prosecutor. I guess if the prosecutor had the information - and I think that might be of use to understand the test - if the prosecution had the information and had chosen not to disclose it, it would have been for the prosecution to establish the why of the non-disclosure, almost as if there is almost a presumption that they would have to satisfy the judge that they have withheld for a good reason.

JUDGE ADVOCATE: Yes, which is not the case here.

DEFENDING OFFICER: No.

JUDGE ADVOCATE: So.

DEFENDING OFFICER: That is one thing on which we agree.

JUDGE ADVOCATE: So you are saying that you have the burden to demonstrate a certain relevancy. You seem to agree on that.

DEFENDING OFFICER: That is right. And I would rely on the standard in **Stinchcombe** that I relied on earlier on as to the reasonable usefulness and whether or not absent that information the defence right to full answer and defence would be impaired. So I suppose that since it is my motion and it is one that is directed at information the prosecution does not possess, I would conceive that I have a minimal or a

253

Defending Officer

Application for disclosure

minimum requirement of showing some relevancy obviously. But clearly different from ... I would ask that the judge advocate be liberal in his interpretation and his research of relevancy. And I know this matter of relevancy as a matter of fact is discussed by Justice Wilson in the case **O'Connor**, what is relevant, what is not relevant. **O'Connor** deals mainly with medical records. There is a big review of the rape shield law, there is what is relevant in sexual assault. They say what was relevant 10 years ago is not relevant now. And Justice Wilson discusses the concept of relevancy. And you will find that useful I know that the prosecutor will produce to you that decision.

JUDGE ADVOCATE: So I should adopt **O'Connor** to define what relevancy is all about but I should not adopt **O'Connor** to define what the test is all about, is it what you are saying?

DEFENDING OFFICER: No, it is not.

JUDGE ADVOCATE: No. I hope so. So I don't understand what you say. Would you repeat?

DEFENDING OFFICER: Yes. I am saying that as you will read Wilson you may find of interest some comments from Justice Wilson on relevancy. Like it is theoretical comments that she makes.

JUDGE ADVOCATE: In **O'Connor**?

DEFENDING OFFICER: In **O'Connor**. But I am not saying I am adopting **O'Connor**. I am saying that she makes ...

JUDGE ADVOCATE: What are you adopting on relevancy? Tell me please. What are you adopting? What should I consult to determine the relevancy on this application according to you? That is what I want to know from you. Where do you hang your hat?

254

Defending Officer

Application for disclosure

DEFENDING OFFICER: Well, I have referred to McWilliams if it can be of any help.

JUDGE ADVOCATE: You didn't read anything from McWilliams on burden, on onus of proof, or unless I am mistaken you read McWilliams on the definition of relevancy, is it not so?

DEFENDING OFFICER: That is right.

JUDGE ADVOCATE: Now I am questioning on onus. I am asking you on onus.

DEFENDING OFFICER: I would say that it is not beyond a reasonable doubt. I think that we might agree on that. I would say that at best, at best, and the most stringent test that could be applied would be balance of probability but more likely - and I still rely on **Stinchcombe** - for reasonable expectation of being useful.

JUDGE ADVOCATE: In other words you don't know. That is what you are telling me. I mean, "At best it could be this. Surely it is not that but it is more likely this." I mean you are not taking that from anywhere.

DEFENDING OFFICER: No. If it is not useful to you I apologize.

JUDGE ADVOCATE: I just wanted to know if you want me to adopt a specific position that had previously been adopted by a court on this specific matter as far as onus is concerned. That was the gist of my question.

DEFENDING OFFICER: I know. But I disagree with **O'Connor**.

JUDGE ADVOCATE: Yes. That is what I understood first. But that is not what I understood at the end.

255

DEFENDING OFFICER: And they set a standard there that I wouldn't be welcome to use since I disagree with it. I have referred you to **Moysa**. Unfortunately they don't discuss the onus and the relevancy. So I have no further comment to make. All I will ask you is that if you feel comfortable in using **O'Connor** as guidance, I would say that in this instance, because the nature of the information sought is totally different, I would say that a less stringent onus than that discussed in **O'Connor** would be in order.

JUDGE ADVOCATE: Thank you.

May I suggest that we take a short break before asking the other parties to address the court? Fifteen minutes.

ADJOURNMENT: At 1105 hours, 13 September 1995, the court adjourns.

REASSEMBLY: At 1120 hours, 13 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Is the prosecution ready to proceed?

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate. Before I begin I have a folder for you which contains a written memo on the issue and the authorities I will be referring to in my argument.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR: Copies have been given to both the defence and Mr Grant.

JUDGE ADVOCATE: And just before I forget, don't forget, Lieutenant-Colonel Couture, to give me the copies that you promised me before.

256

Assistant Prosecutor

Rebuttal

DEFENDING OFFICER: Absolutely.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR: I also have a list of authorities to give to the court reporter. When there is a cite it might make it a little easier for the transcript.

To start off, Mr Judge Advocate, I guess we summarize the defence position and it is our understanding that the defence is seeking disclosure of documentation that is allegedly in the possession of Mr Dunlop. Now defence counsel in their submission readily admitted that they believe this material is there. They don't have actual knowledge that he has any of the documentation that is set out in the subpoena or the summons which is "VD5-1".

And set out in the admissions, Mr Dunlop is a reporter for the Chronicle-Herald. He wrote a story that was published on December 16, 1993 with respect to HMCS OJIBWA. Mr Dunlop himself being a reporter is not a submariner and the defence has not suggested that he has any personal knowledge of the matters that are before the court. And in fact any knowledge that Mr Dunlop would have would be nothing more than hearsay.

Further more the existence of the articles themselves and the material that you have been provided in "VD4-1" through "4-6" in no way suggest that there is any written material in existence or tape recordings, etc. It refers to conversation with four unnamed or unidentified sources. Now presumably, and I think it was confirmed by the defence, this material is being sought in order to determine if it contains any statements by any witnesses in this matter that will be called by the Crown. And presumably those statements are being sought so that they can be used in cross-examination if there are any inconsistencies between what was said to Mr Dunlop and what is contained in the

257

Assistant Prosecutor

Rebuttal

disclosure material or what the witness says on the stand.

The sole purpose of this material is credibility. It is being sought to attack the credibility of the witnesses. And again there is nothing to suggest that there is anything in the material or even that the material exists that would allow the defence to do that.

The defence can't state whether or not the sources in fact are witnesses in the proceeding. They can't advise the court as to whether or not statements if any are complete or accurate or even if they are reliable, let alone consistent. And finally they can't establish whether or not this material if it exists even attributes any comments or any notes to an individual witness.

And finally any information that Mr Dunlop may have forms absolutely no part of the Crown's case. The Crown isn't aware of this information. None of it was used in the reviewing process with respect to laying charge by charging authorities and none of it has been incorporated into anything the prosecution will call in its case against the accused.

Having taken a look at that, it is also important to set out that the Crown has in fact provided full disclosure to the defence. The Crown case, as I already stated, is in no way based on Mr Dunlop story and the Crown does not have this information. All the evidence from which the charges themselves are based was gathered by military authorities and fully disclosed. All potential witnesses interviewed during the investigation have been identified. The defence has been provided with video tapes of those interviews with the military police. They have also been provided with any written statements that were provided.

So what was said to Mr Dunlop is not as relevant to the accused making full answer and defence

258

Assistant Prosecutor

Rebuttal

as was suggested by the defence. What was said to the military police clearly is relevant. And what was determined in the investigation clearly is relevant because it is that information that resulted in charges being laid. What was said to Mr Dunlop did nothing more than trigger an investigation. The investigating authorities when they ordered the investigation and the military police when they conducted the investigation did not have access to any of that material.

As a result, the prosecution submission is that the defence has been and is fully aware of the case it has to meet. But despite this the defence is arguing that it has a right to material outside the custody and control of the Crown in order to make full answer and defence to the charges against the accused.

The case law is quite clear and I refer you to **R. v. Johnston** - and you have got a copy of that, at page 246, with respect to the Crown's obligation in third party disclosure issues - and Mr Justice Finlayson in that case simply states:

"There is no duty on the Crown to disclose evidence that it does not possess."

And that is at page 246 of that decision and it is also noted in my written memo at paragraph 8 I believe. Again the Alberta Court of Appeal also address this issue of third party disclosure in the case of **R. v. Gingras** and at page 58 in that decision is stated:

"As we read the *Stinchcombe* decision, it forces the prosecutor to disclose to defence counsel relevant matters which the investigation of the crime has disclosed ..."

and the important portion of that extract is

Assistant Prosecutor

Rebuttal

"... and which are within the control of the prosecutor."

This material clearly is not within the control of the prosecution. As a result of **Stinchcombe, Johnston and Gingras** it is submitted that the Crown has no obligation to disclose material in possession of third party and I think the defence counsel certainly agrees with that position.

Now the **Stinchcombe**, the defence counsel has argued that it is useful because it talks about relevant material and relevancy is applicable to third party disclosure. And the aspect of **Stinchcombe** that deal with relevance are certainly not in dispute from the Crown's perspective. But the Crown position is simply that the material being sought by the defence in this motion is not in any way relevant to the case.

Again there is no evidence as to the circumstances in which this alleged material was gathered or prepared. There is nothing to suggest how accurate if at all. There is nothing to suggest whether it is a reliable record of what was said, if anything by the witnesses. In short there is nothing before the court to show any of these issues.

And finally there is nothing in the material before you, in "VD4-1" to "4-6", to suggest that even if the material exists that there is anything in it that is inconsistent. The statements in the news report, in the draft news report, in the notes are all perfectly consistent with the allegations contained in charges 1 through 7 and in the disclosure material it is submitted. So again it is not a question where there is some glittering inconsistency that may be of some relevance. In fact what is being sought is merely hearsay and it does not in any way constitute evidence that would be relevant in this proceeding.

260

Assistant Prosecutor

Rebuttal

The defence counsel referred to a passage at page 345 of the **Stinchcombe** decision that talk about the requirement that all relevant information be produced. It is important to note that again he is talking about relevant information in the possession of the Crown. It is also important to note that where that information is the possession of the Crown it could have been used or will be used in presenting the Crown's case and therefore required by the accused to make full answer and defence. So I distinguish that, the passage there specifically is discussing documentation evidence held by the Crown which again makes it relevant if the accused is facing the case that is being put forth by the Crown.

The definition in Wigmore on relevance, the prosecution would submit simply arises out of a general discussion on the whole question of relevancy and does not address this whole issue of relevancy in third party disclosure. And the prosecution submission is that the definition of relevancy with respect to third party disclosure are more appropriately obtained from the case law which I will discuss in a few minutes. Therefore little if any consideration should be given to that, those general comments in McWilliams.

However McWilliams does talk about relevancy and common sense. And we just leave that with the court and suggest that common sense dictates at some point; an accused right to full answer and defence has to be looked at in the light of the prosecution continuing with the prosecution. And third party discussion with witnesses can occur anywhere in any circumstances with anybody and that if an accused has a right to disclosure of all that information then presumably a prosecution might never proceed. And again I will deal with that in light of the **Gingras** decision later on.

And finally the issue from McWilliams on full answer and defence that was quoted at, I believe it was paragraph 8-80.3, specifically talks about previous testimony. That is evidence as given presumably under

Assistant Prosecutor

Rebuttal

oath. There is a reliable record of what was said and it is accurately recorded for use in a later proceeding. Again certainly not the situation that we have here if any record even exist of any conversations with Mr Dunlop.

Therefore strictly on this basis, just looking at **Stinchcombe** in relevancy, the prosecution's position is the motion should be dismissed. However if the court feels it needs to go beyond that, and consider the whole issue of third party disclosure, the prosecution submits that there are two cases that are essentially relevant to the issue and should be considered by the court.

The first is the case of **R. v. Chaplin**, a Supreme Court of Canada decision, and it dealt with disclosure of information relating to wiretap evidence or authorizations that had been granted in other investigations relating to an accused. The Crown had refused to disclose the information and Mr Justice Sopinka speaking on behalf of the unanimous court at page 741 of that decision states that in effect there are two situations where a disclosure issue may arise after the Crown has indicated it is satisfied with its obligations:

- "(1) the defence contends that material that has been identified and is in existence ought to have been [disclosed]; ...
- (2) the defence contends that that material whose existence is in dispute ought to have been produced."

This case again deals with material if it existed that would be in the Crown's possession. So

262

Assistant Prosecutor

Rebuttal

again it has to be distinguished on that basis. But it does provide some indication of what the test should be in any event.

With respect to the first circumstance where the Crown acknowledges the existence of the material the burden is on the Crown to justify non-disclosure. They have to justify why this existing material wasn't provided to the defence. In the second case it is the defence who must establish a basis upon which the judge can conclude that further material does exist and that the material is relevant. So again the relevancy issue is central.

The case then goes on to define relevance at page 743 by stating:

"Relevance means that there is a reasonable possibility of [the material] being useful to the accused in making full answer and defence."

And it is our submission that the second situation is what is before the court today, in other words material that the Crown doesn't know exist. And the burden is on the accused and the court must be convinced that there is some relevancy with respect to material before an order for disclosure should be considered.

The most important case in the Crown submission is **O'Connor**. And **O'Connor** is a two-part decision of the British Columbia Court of Appeal which dealt with a sexual assault case in which the Crown appealed the decision at trial to stay proceedings against the accused. One of the issues in the case was an order that all complainants authorized therapists and medical professionals to release medical records to the Crown and that the Crown in turn disclose that material to the defence.

263

Assistant Prosecutor

Rebuttal

The court in **O'Connor** discussed the whole issue of disclosure and set out the test to be used at page 148 of what I will call **O'Connor** No. 1 which is the decision that is found at 89 C.C.C. (3d) 109. It is a rather lengthy passage but I think it is important so I will read it to the court. It is found at page 148 as I say and it is the last paragraph on that page. And the court states after going through an analysis of the **Stinchcombe** decision:

"A number of conclusions can be drawn from this review of the general principles laid down in *Stinchcombe*. The first is that the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right. What this means is that while the Crown has an obligation to disclose, and the accused has a right to all that which the Crown is obligated to disclose, a simple breach of the accused's right to such disclosure does not, in and of itself, constitute a violation of the Charter such as to entitle a remedy under s. 24(1). This flows from the fact that the non-disclosure of the information which ought to have been disclosed because it was relevant, in the sense there was a *reasonable possibility* it could assist the accused in making full answer and defence, will not amount to a violation of the accused's s. 7 right not to be deprived of liberty except in accordance with the principles of funda-

Assistant Prosecutor

Rebuttal

mental justice unless the accused establishes that the non-disclosure *has probably* prejudiced or had an adverse effect on his or her ability to make full answer and defence.

It is the distinction between the 'reasonable possibility' of impairment of the right to make full answer and defence and the 'probable' impairment of that right which marks the difference between a mere breach of the right to relevant disclosure on the one hand and a constitutionally material non-disclosure on the other."

So in effect the **O'Connor** test in **O'Connor 1**, it is essentially stating that where disclosure either has not or cannot be made, the accused must satisfy the first branch of the test and establish whether or not there is a reasonable possibility that the material being sought could be of assistance. However that in itself does not provide the accused with the right to an order for disclosure even a right to a remedy. The second branch must then be satisfied and the court must be satisfied that failure to provide the material will probably prejudice or have an adverse effect on the accused ability to make full answer and defence. And again the burden is on the accused to establish that.

And it is the Crown's submission that this is the test which is further refined in **O'Connor 2** that the court should be utilizing in determining whether or not this motion should be granted. Now in **O'Connor 2** the court expressly deals with, and that is the whole purpose of the decision in **O'Connor 2**, with the law and procedures to be applied in an application for pre-trial production of medical records not in the possession of the Crown. Now obviously we are not dealing

265

Assistant Prosecutor

Rebuttal

with medical records in this case. But the Crown submits the real issue dealt with in **O'Connor** 2 is the balancing of privacy interest with the right of an accused to make full answer and defence. And that is in effect the very issue that this court will be dealing with, especially if we get into stage 2, what we propose is the appropriate test, balancing the privacy interest with the right of the accused to make full answer and defence.

Now, defence counsel has suggested that **O'Connor** is not relevant because it deals with medical records and it should be restricted to that and may be extended to other areas where there is some identified legal privilege. It is submitted that such an interpretation places much too narrow a restriction on the **O'Connor** and again the fact that the case deals with medical records is purely because that was the issue before the court, but the court specifically discussed at the whole aspect of balancing legal and societal interest, it talks about privacy interest, etc. And I would refer you to page 261 of that decision and it is at the bottom of 261 where the court states that:

"While a liberal interpretation of the word 'relevant' is to be encouraged, it is not to be encouraged without due regard for other legitimate legal and societal interests, ..."

And it goes on to say:

"... including the privacy interests of complainants in sexual assault cases."

And we would argue including the media right to maintain confidentiality with respect to informants; again a privacy interest.

266

Assistant Prosecutor

Rebuttal

So it is our position that there is at least a privacy interest to be protected where information is received in confidence by the press. Now the **Moysa** case referred to earlier deals with the whole issue of the media and privacy interest but in the context of a qualified privilege. And it is interesting that the Supreme Court of Canada does not state in **Moysa** that there is no such thing as a qualified privilege for the press. It simply states that it was not necessary to decide the issue for that particular case. So presumably that argument is still available.

But it is the Crown's submission you don't even have to go that far. There is a privacy interest that is recognized by section 2(b) of the Charter in our submission and that is enough to bring us within the scope of **O'Connor** and to use the test and the procedure set out therein to determine what should be done with this material.

Again the Wigmore test also talks about relevant information, so relevancy continues be a central aspect regardless of which test is applied and it is just simply the definition of relevancy that must be dealt with and again where privacy are concerned it is our submission that the case law is the appropriate place to go for that and **O'Connor** is the appropriate case to look at.

Now in **O'Connor** at pages 250 and 260 the court begins by citing the passage from Madam Justice L'Heureux-Dubé in the case of **R. v. Osolin** where she recognizes the inherent dangers in using statements which are clearly hearsay and where there is no way to confirm their reliability. As I say that quote is found at the bottom of page 259 and it goes on to 260 but the relevant portion is in the first full paragraph of 260. And then at 261 the court sets out the two-stage process that is to be used to determine whether or not, in this case, medical records of a witness should be disclosed. And again it is very similar to the test set out in **O'Connor** 1.

267

Assistant Prosecutor

Rebuttal

The first stage requires that the accused establish that the information contained in the records is likely to be relevant either to an issue in the proceeding or the competency of a witness to testify. Again the burden is on the accused to establish that. Should the accused satisfy that test then the documents will be provided to the court and the court will review the documents to determine which of them are material to defence using the test that without them the accused ability to make full answer and defence would be adversely affected. And that is the second stage and we will deal with that in more detail presumably if you accept the process and we get to the second stage.

But again it is the Crown's position that this is the correct process and that is what we should follow. Now at page 265 of the **O'Connor** decision the court sets out a number of grounds where medical records will not be determined by the court to be relevant. And again it is our submission that this equally applicable in this case. And the court states at 265 the paragraph beginning with "The submission" stating:

"The submission that medical records should be produced because they may be relevant to the credibility of a complainant is patently inadequate to justify their production, in the absence of evidence indicating that there is likely to be something in those records relevant to the credibility of the complainant with respect to a particular issue in the case. Invoking credibility 'at large' is not sufficient to justify such an interference with the privacy interests of a complainant."

And then at page 266 the court states:

268

Assistant Prosecutor

Rebuttal

"Further, production of medical records is not to be compelled simply because the defence hopes that they might disclose a prior inconsistent statement of a complainant. Without more, such a submission amounts to no more than a request to go fishing in these very private documents in the hope that something useful might be discovered, but without any basis being posited for believing that such evidence might be found. In this regard, see R. v. Gingras ..."

Then the court goes on again further down on 266 and on 267 and states that:

"... the onus is on the person applying for the production of such records to show that those documents are likely to be relevant. If the submission amounts to no more than a bare statement that the documents might impact on credibility or corroboration, or might reveal a prior inconsistent statement, then that onus will not have been met."

And obviously it is the Crown's position that that is precisely what has been argued by defence counsel. There might be material in there, it might provide a prior inconsistent statement, it might be useful to deal with the credibility of the witnesses, etc., etc. And **O'Connor** specifically excludes that type of argument from being utilized to satisfy the first stage of the test.

269

Assistant Prosecutor

Rebuttal

Now with respect to fishing expeditions the **O'Connor** case refers to **Gingras**. And in **Gingras** defence counsel applied to another superior court for a subpoena to be served on a person in charge of records of a penitentiary. The affidavit in support of the application for subpoena indicated that counsel plead that the institutional file on an inmate contained information that would be material to the accused defence. The subpoena was granted and subsequently quashed by trial judge. On appeal the court dealt with the adequacy of the affidavit in support of the subpoena found that it contained nothing but mere hearsay in conclusion and that the defence counsel through its argument really had no more information other than what was in the affidavit and was simply hoping that there might be relevant files in the material they were looking for. And at page 57 of the **Gingras** decision the court states:

"It appears to us that this is a pure fishing expedition and goes far beyond what would be permitted in a civil case, let alone a criminal case, and does not begin to fall within what is called in s. 698 of the Criminal Code."

And 698 deals with the requirement that evidence be relevant before it will be admissible.

Again it is our position that this is merely a fishing expedition. The defence has not placed any foundation before the court to suggest that there is anything inconsistent in any material that might exist. And it is not being sought, it is submitted, not because it is probably relevant to any issue in the case, but it is being sought simply because it might disclose some prior inconsistency. And again **Gingras** addresses that issue and **O'Connor** addresses that issue. In **Gingras** it is called a fishing expedition and in

270

Assistant Prosecutor

Rebuttal

O'Connor it is called not satisfying the first stage of the test.

However, even if the court disagrees and finds that this is more than a fishing expedition, that there might be something that is there that may be beyond the criteria set out in **Gingras** and in **O'Connor**, the best case scenario for the defence is that the material disclosed would be the statements of four submariners possibly only two if you look at the article it says "Two spoke and two simply confirmed". So two or four submariners which might be available to the defence to use on cross-examination if any of these people are in fact witnesses in the proceedings. At the worst the material may be nothing more than incoherent collection of facts and statements that aren't attributable to anybody that basically can't be suggested to be in any way accurate of a previous conversation etc.

But even if we assume the best case scenario exists again the test in **O'Connor** 2 makes it clear that credibility at large is not enough to justify satisfaction of the first stage of the test and the material simply is not relevant to the case. Thus even looking at things in their best light, on the basis of **O'Connor** and simply on the basis of relevancy, I would argue, the motion again should be dismissed.

So I guess in summary with respect to **O'Connor** it is our position that **O'Connor** 2 is applicable where any privacy interest conflicts with the right of an accused to make full answer and defence. I further argue that the interest of the press in maintaining confidentiality is important within society as a protection of confidentiality of medical records and this is evidenced by the express exclusion of freedom of the press in section 2(b) of Charter and that in effect the defence simply hasn't satisfied or met the burden that is imposed upon it to require disclosure of this material.

271

Assistant Prosecutor

Rebuttal

Two other brief issues I would like to touch on. One was addressed briefly in the first **voir dire** yesterday and that is the whole issue of the a speedy trial. I think the court should consider in reaching a decision on this matter that the court must consider the unique elements and needs of the military justice system. And again **Genereux** clearly sets out in a decision of the Supreme Court of Canada that military discipline must be dealt with speedily. And should the court order disclosure of material the basis for which is mere speculation, it is submitted, that it may contain a prior inconsistent statement then this trial would be further delayed particularly if the decision of this court is reviewed as a result of an application by Mr Dunlop or if this court is required to refer the matter to a civil court should the material simply not be provided as ordered. So in either of those situations there is going to be a further delay in proceeding with the case.

And I think again **Gingras** is relevant to this issue and **Gingras** recognizes that at some point the right to disclosure must give way to the conduct of the trial. In **Gingras** the court rejected an overly broad interpretation of **Stinchcombe** stating that the required disclosure of documents simply because they are in the possession of the federal or provincial Crown would be unreasonable.

In this case we are even further away from that. We are talking about documents that are in the possession of a third party over which the Crown has absolutely no control. But the court states at page 59 of the decision that:

"If that line of briefing were correct, then in order to meet the test set out in Stinchcombe, some months before trial every Crown prosecutor would have to inquire of every department of the provincial

Assistant Prosecutor

Rebuttal

government and every department of the federal government. He would have to ask whether they had in their possession any records touching each prosecution upcoming. It would be impossible to carry out what one per cent of that task. It would take many years to bring every case to trial if that were required."

And again I think a similar argument exists here. And it comes back to the whole issue raised in the defence argument about the witnesses speaking with other people and making statements outside the court regarding charges that the accused might be facing. Again if the accused is entitled to this information then presumably he is entitled to information that arise out of any conversation any witness may have had prior to, during or after the investigation. And to impose that burden, it is submitted, is unreasonable.

The final issue that I would like to address is the whole issue of Charter violations. And the defence has suggested that a failure of Mr Dunlop to provide the material being sought would violate the accused's right to make full answer and defence under section 7 of the Charter. Section 32 of the Charter sets out to whom the Charter is applicable. And essentially it states that it is applicable to the federal parliament and government and it is applicable to provincial legislatures and government. It is not applicable to private citizens. And Mr Dunlop, it is submitted, is a private citizen. It is not possible for Mr Dunlop by failing to provide material in his possession to violate the Charter right of the accused. He is not subject to the Charter. And I provided a brief extract from Professor Hogg text on Canadian Charter Law which essentially states that the Charter only applies where there has been governmental action of some kind and this action by the Parliament or

273

Assistant Prosecutor

Rebuttal

Government of Canada or by the legislature or government of a province it affects an individual.

So in conclusion then it is the Crown position that the defence has all of the information that is relevant to it making full answer and defence. Full disclosure has been provided by the Crown. That the information held by Mr Dunlop if any is simply not relevant to the accused making full answer and defence and the only possible purpose it could be put to is to attack credibility or to impeach a witness on a prior inconsistent statement; and again not admissible under the **O'Connor** test.

If the defence is suggesting otherwise that the material might be for some other purpose, the identification of witnesses, etc. it just isn't consistent with the material. If the defence is intending to call witnesses that will indicate that the accused did certain terrible acts to them those witnesses presumably are of no use to the accused. So the only purpose is credibility and an inconsistent statement.

And finally I guess if the court finds that in fact stage 1 of the test has been satisfied, then again **O'Connor** is applicable and it is a matter of then determining by reviewing the material whether it is in fact relevant based on the test that it would probably impair the accused's right to make full answer and defence. And again we are arguing not privilege but privacy interest with respect to matter. And although the argument may exist, and arguably does exist as a result of the **Moysa** that a qualified privilege is possible with respect to the press, we are not relying on that issue. We are relying strictly on the fact that there is a privacy interest.

Of course if the court wants to go so far as to find a qualified privilege then that clearly puts us within any kind of test that is set out in the case law.

274

Intervener

Argument

Those are my comments to that, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you very much. Now it is 12:00 noon.

Mr Grant would you prefer to address after lunch or do it now?

INTERVENER: Mr Judge Advocate, I think I prefer to do it now subject to your wishes. My remarks will be very brief and it may just expedite proceedings if you have heard my submissions.

JUDGE ADVOCATE: Very well. I am ready to hear you right now.

INTERVENER: Mr Judge Advocate, I think the first thing I should do is adopt the submissions made by the prosecution and endorse them as if they were my own. I have very to add by way of their comment.

The issue before you, with respect, is the question of potential relevancy in material of the documentary evidence being sought by the defence. And I would agree with the submissions made by the prosecution that with respect to the **O'Connor** case that case cannot be distinguished from the present case on the basis of evidence being sought being protected by some sort of privilege in the **O'Connor** case and no such privilege attaching in the present case.

I would submit that if you read the decision in the **O'Connor** case carefully it is clear that there is no statutory protection afforded to the disclosure of the medical records. There is no common law privilege attached or referred to by the court with respect to a doctor/patient communications. The decision proceeds on the basis that what is to be protected is a privacy interest of the complainant.

275

Intervener

Argument

Now, if it were necessary, I would submit it is not, but if it were necessary for this court to make a finding as to whether there is privilege attached to a journalist notes or other documents sought by the defence, I would submit that it would be necessary to adjourn the consideration and allow the intervener the opportunity to lead evidence to support a claim for privilege with respect to those documents.

As the prosecution has indicated, in the **Moysa** case the Supreme Court of Canada clearly left open the question of whether there was a qualified privilege to be attached to journalist confidential communications with a source. That case has to be read, I would submit, in conjunction with some subsequent cases by the Supreme Court of Canada and I can provide the court copies of those I have here. But I don't really wish to refer in detail to the dicta contained in those cases. But they are cases dealing with the ability to issue search warrants against journalists.

And the recent **Dagenais** case which deals head on with how the court is to go about balancing Charter privileges afforded to the media and the freedom of the press with the Charter rights of individuals to make fair answer to charges laid against them.

So in our submission the **O'Connor** case applies, it can't be distinguished from the case at bar on the basis of privilege or lack of privilege attaching to journalist notes. If the court wishes to make a decision on that basis that we would urge that we be afforded the opportunity to lead evidence with respect to that privilege.

Turning to the key question, the question of relevance and materiality we would submit that the defence hasn't met any basic threshold test to the relevance of information which our client may possess.

His sources have all been interviewed by the military police. This is not a case of a lost witness or a

276

Intervener

Argument

witness that can't be identified. The category of witnesses is a closed category. It is the crew members that were on board the submarine. That was known to the prosecution. That is known to the defence. And all those individuals can be interviewed.

The relevancy of naming the sources for the articles has not been demonstrated in any way. We know that naming the source would cause the journalist to breach his undertaking of confidentiality. It may be a breach of Charter rights with respect to freedom of the press. It is certainly going to interfere with the privacy interest of the sources. Disclosing their names may open it up for ostracism or stigmatization in the military. It may place them in jeopardy with respect to breach of the Code of Service Discipline. There has been nothing indicated as to how the disclosure of their names would in any way be of assistance to the defence.

Mr Dunlop is not a witness to the offence that are in issue in this court martial. He is not a first hand witness to the events that lead to the charges. His only information is hearsay. It is in an informal form of hearsay. It may even be double hearsay. He may be reporting on what his source told him someone else told the source. We are not dealing with a situation in as the defence suggested to someone giving a signed statement to the police. There is not a single degree of formality in that sort of statement as there would be in talking to the police.

In the **O'Connor** case the court quoted at page 260 from Madam Justice L'Heureux-Dubé and the **Osolin** case about some of the difficulties associated with medical records and we would submit to the court that those difficulties apply with even greater force to statements made to a journalist. That quotation is at the top of page 260:

"Moreover, medical records concerning statements made in the course

277

Intervener

Argument

of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial."

And then later on reference is made of course to evidence having been made pursuant to an oath.

The submission by the defence, with respect, could if accepted in this case apply equally to a requirement for disclosure or a requirement for wives and girlfriends of potential witnesses to come into court to give evidence as to possibility of prior inconsistent statement with respect to matters to which they are going to testify. And that type of argument could be extended peripherally to all range of potential witnesses entirely outside of what would be generally thought of as acceptable in a court of law.

Finally, Mr Judge Advocate, I would stress the point that there has been no identification on the part of the defence of any perceived inconsistency in the statements attributed to the sources and either the articles or the draft articles with any sort of statement which is referred to in the Crown disclosure. There is no apprehension at this time at least as presented to the court of any inconsistency which would lead the court to form a reasonable opinion that it is probable and possible that a prior inconsistent statement of such relevancy and materiality as would be useful to the defence would be disclosed if the motion sought by the defence were successful.

Thank you. Those are my submissions.

JUDGE ADVOCATE: Thank you.

278

Defending Officer

Reply

DEFENDING OFFICER: Mr Judge Advocate, I intended to put in a very brief response to these arguments and I would expect to be - I know I misguided you a little bit earlier on on the time - but I would expect to be no more than five or 10 minutes and if that could be done now that would leave you with all the submissions and you would be ready to start your deliberation.

JUDGE ADVOCATE: Any objection from the other parties?

PROSECUTOR: We have no objection, Mr Judge Advocate.

JUDGE ADVOCATE: Very well, go ahead.

DEFENDING OFFICER: The prosecution was alluding to the fact that we don't know whether it is accurate information that has been reported, that it is hearsay and so on and so forth. In that respect I would like to refer you again to the **Moysa** case where at the Alberta Court Queen's Bench, so that was the first level of the three decisions I gave you, where Lord Denning at page 142 is reported to say:

"How is anyone to know that this story was not a pure invention, if journalist will not tell the tribunal its source? Even if it was not invention, how is anyone to know it was not the gossip of some idler seeking to impress? It may be mere rumour unless the journalist knows he got it from a trustworthy source. And if he has got it from a trustworthy source (as I take it on the statement he has, which I fully accept), then however much he may desire to keep it secret, he

279

Defending Officer

Reply

must remember that he has been directed by the tribunal to disclose it as a matter of public duty and that is justification enough."

Now both the prosecution and the intervener have made reference to the fact there was no evidence whatsoever that could support the relevancy aspect of this request. I respectfully beg to defer and suggest that for one the "VD4-3" which is the response from the Calgary Herald ... the Halifax Herald, I am sorry, states:

"It is our position that all interviews, notes, tapes, etc. regarding this or any other story are confidential. Consequently we will not voluntarily provide the materiel you are looking for."

This clearly establishes the existence of the material. Furthermore the prosecution was alluding again to the absence, "We don't even know if they exist". Well I suggest to you that this establishes the existence of the article and other documents provided to you. It surely leaves it open for this court to conclude that the material does in fact exist and the very content of the documents introduced clearly suggest relevancy of the information held by Mr Dunlop in particular the document "VD4-6" again as I refer to it.

The close involvement of Mr Dunlop at the early initiation, it is not like calling a girlfriend or spouse to fish for information. In this case and according to the information, Mr Dunlop was closely involved in dealing with the military authorities which eventually resulted in an investigation being ordered. He is giving information to the military police with some tips as to how to go further and get more informa-

280

Defending Officer

Reply

tion and concludes by saying "Cheers, good luck and good hunting".

This is not the mere story of somebody on something that is removed from these proceedings but it is an active participation of an individual who is in possession of information and I suggest that it is absolutely and totally different from **O'Connor** where very clearly - and I will not read it but I will refer you to page 59 - reference is made to Madame Justice L'Heureux-Dubé from the **Osolin** Supreme Court decision.

That will demonstrate to you clearly what is meant in **O'Connor** by interest and privacy. And at page 262 as well the court in **O'Connor** takes a second look at the factor of privacy.

So for all those reasons I reiterate my position that the standard of **O'Connor** does not apply and that the defence has provided enough information for this court to derive a relevancy out of information sought.

JUDGE ADVOCATE: Thank you.

The court will now close to consider this application made by the defence. For the information of everybody in this court, I don't precisely know when I will be in a position to render my decision on this matter. But what about if I give all parties concerned, let us say, a two-hour notice of my intention to render my decision, would that be convenient and enough to everybody?

INTERVENER: Yes, thank you.

PROSECUTOR: Yes, Mr Judge Advocate.

DEFENDING OFFICER: That is starting this afternoon?

JUDGE ADVOCATE: It will not be today for sure.

281

Defending Officer

Reply

DEFENDING OFFICER: It will not be today.

JUDGE ADVOCATE: Maybe tomorrow but you will have a minimum of two-hour notice.

AT 1215 HOURS, 13 SEPTEMBER 1995, THE COURT CLOSSES TO DETERMINE THE APPLICATION MADE BY THE DEFENCE.

AT 1600 HOURS, 13 SEPTEMBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: The defence is seeking disclosure of information allegedly in the possession of Mr Malcolm Dunlop, a reporter for the Chronicle-Herald and Mail Star. The nature of such information is contained in Exhibit "VD5-1", a subpoena **duces tecum** served to the Witness Dunlop on September 6, 1995. In the said document, the evidence sought is described as follows:

"...to testify as to what you know concerning the charges made against the accused, and have with you then and there any documents in your possession or under your control relating to the charges and more particularly:

- a. **any notes/recordings made relating to interviews or conversations you had with witnesses/informants leading to the publication of your article in the Chronicle-Herald on 16 December 1993 entitled *Sub=s captain under scrutiny*;**
- b. **any notes/recordings made relating to interviews or**

conversations you had with witnesses/informants used for the drafting of two documents which you handed over to the Military Police Investigators on 21 December 1993, under the cover of Confidential Informant OA;

- c. any notes/recordings made relating to interviews or conversations you had with witnesses/informants used for the drafting of a list of questions entitled *QUESTIONS RE HMCS OJIBWA (during command of LCdr Dean Marsaw Dec. 90-Oct 93)*, a copy of which you faxed to LCdr Jeff Agnew, Public Affairs Officer, on 7 December 1993;
- d. any notes/recordings made relating to interviews or conversations you had with witnesses/informants used for the writing of an unedited draft of an article entitled [*dunlop-15 DEC. Navy orders investigation into conduct of captain, officers of submarine*]/1 a copy of which you provided to LCdr Jeff

**Agnew, Public Affairs
Officer; and**

- e. **any notes/recordings made relating to interviews or conversations you had with witnesses/informants after the publication of your article entitled *Sub=s captain under scrutiny.*"**

The defence argues that the information sought is necessary for the accused to make full answer and defence as it would be used in cross examination among other things for the purpose of attacking the credibility of witnesses. The defence admits that it cannot say with certainty what information is in possession of Mr Dunlop. When asked what specific purpose any of the information obtained would serve the defence, the defence answers that although it cannot tell the court which use it will make of it, any information obtained would be used in cross-examination if they are inconsistent for the purpose of attacking credibility.

The evidence before this court consists of Exhibits "VD4-1" to "VD4-6" and admissions which parties have made in the previous **voir dire** and have accepted to incorporate in the present **voir dire**, Exhibit "VD5-1" and matters of which this court has taken judicial notice under Military Rule of Evidence 15.

At the beginning of this application and with the consent of the defence and prosecution, standing was granted to Mr Robert Grant, an attorney representing Mr Malcolm Dunlop.

It is agreed by all parties present before the court that the information sought by the defence is not in possession of the prosecution and that the

prosecution has provided full disclosure of its case to the defence. It is also agreed that prosecuting authorities (i.e., commanding officer, convening authority and prosecutors) and military police investigators are not aware to this date of the identity of the individuals who spoke to Mr Dunlop. However, the prosecution has been informed that those individuals who had spoken to Mr Dunlop were later interviewed by the military police investigators and that the prosecution has informed the defence accordingly. The military police investigators interviewed approximately 153 people, including Mr Dunlop which is not a witness the prosecution intends to call. Also, the prosecution submits and the defence does not take issue of the following. All of the evidence upon which the charges were based was gathered by military authorities and this has all been fully disclosed to the defence. All potential witnesses interviewed during the investigation have been identified to the defence and the defence has been provided with video tapes of all military police interviews and written statements when provided by the witnesses.

The first matter for this court to determine, as the jurisdiction of this court to hear the application is not in issue, is the test to be applied in such an application for third party disclosure. The defence objects to the proposition made by the prosecution and the intervening party that the test proposed in **O=Connor** should be used and argues that the general principle expressed in **Stinchcombe** should be applied. Such principle is to the effect that "the trial judge, on a review, should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege".

The starting point on disclosure is the Supreme Court of Canada's decision in **R. v. Stinchcombe** (1991), 8 C.R. (4th) 277, a Supreme Court of Canada

decision, and it is necessary to recognize the limits and scope of that decision. **Stinchcombe** was not a case of third party disclosure. It was a case of Crown disclosure. However, the underlying principles in that case shape the limits of disclosure. The Crown's duty to disclose flows from the right of the accused to make full answer and defence. Mr Justice Sopinka wrote, at page 285:

"This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s.7 of the *Canadian Charter Of Rights And Freedoms* as one of the principles of fundamental justice. (...) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted."

The Supreme Court of Canada made it clear that counsel for the Crown is under a general duty to disclose all relevant information. For the purposes of disclosure, relevancy was given a generous meaning, as Crown counsel were told to err on the side of inclusion.

In a subsequent decision, **R. v. Egger** (1993), 82 C.C.C. (3d) 193 at page 204, a Supreme Court of Canada decision, Mr Justice Sopinka expanded relevancy to include what might be termed "tactical relevancy".

"One measure of the relevance of information in the Crown=s hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed: This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence ... such as, for example, whether to call evidence."

The case of **R. v. Hutter** (1993), 86 C.C.C. (3d) 81, Ontario Court of Appeal, is an example of tactical relevancy. The appellant was convicted of five charges of sexual assault and one charge of indecent assault. Prior to trial defence counsel informed the Crown that it was his intention to lead character evidence on behalf of the accused. Defence counsel wrote to the Crown:

"... that he could not decide whether to put Mr. Hutter=s character in issue without 'first receiving from you a list of witnesses as well as a copy of their statements you intend to rely upon and call on the issue of Mr. Hutter=s character. ...'"

Without such a disclosure the defence claimed that they were unable to prepare a full and complete defence. The Crown obtained statements of witnesses to rebut evidence of Mr Hutter=s good character. The defence was advised that the Crown had this evidence, but no details were given. The Crown took the position

287

Judge Advocate

Decision

that this rebuttal evidence need not be disclosed and the trial judge agreed. In the circumstances the defence chose not to call any character evidence.

The Ontario Court of Appeal relied upon **Egger, supra**, to conclude that:

"The information in the hands of the Crown with respect to the character of the appellant could 'reasonably be used by the accused in advancing a defence in making a decision which could affect the conduct of the defence such as, for example, whether to call evidence'".

The Crown=s rebuttal evidence was provided on the appeal and the court was satisfied that had the defence called character evidence the rebuttal evidence in the possession of the Crown would have been devastating. Accordingly, the withheld information would not have affected the outcome and the appeal was dismissed.

Now, what of information that is not in the possession of the Crown? In the United States, the prevailing view is that:

"Clearly the government cannot be required to produce that which it does not control and it never possessed or inspected."

Morgan v. Salamack (1984) 735 F.2d 354 at 358, United States Court of Appeal, 2nd circuit.

The issue arose in **R. v. Gingras** (1992), 71 C.C.C. (3d) 53, Alberta Court of Appeal. An important Crown witness in the accused=s trial on a charge of murder was a prisoner in a penitentiary in another province. The defence applied to the Court of Queen=s

Bench for a subpoena **duces tecum** to be served on the penitentiary seeking the institutional and medical file on the prisoner. The Crown succeeded in quashing the subpoena at trial. The accused was convicted of first degree murder. On appeal the accused cited error in the quashing of the subpoena. The Alberta Court of Appeal found that this ground was without merit. In so doing the Court of Appeal observed, at page 59:

"This was an ordinary criminal prosecution run by a regular prosecutor in Alberta=s Department of the Attorney-General. The files in question were held by a federal civil servant in another province. If the *Stinchcombe* decision, ..., supported production of these files, then it would presumably support production of files from the Income Tax Department, the telephone company, a bank, or a private hospital.

...

That being so, it was almost impossible to know how a prosecutor or anyone else could before trial apply a *Stinchcombe* duty of disclosure to such matters not even in the hands of the police or the prosecutor. For example, must the Crown before calling each witness check with the Credit Bureau, the Income Tax Department, and C.P.I.C. to see if he has any convictions or other discreditable matters in his past? Must the prosecutor try to get medicare records to see if the

witness has ever consulted a psychiatrist? We say no."

The Supreme Court, in **R. v. Chaplin**, (1995) 1 S.C.R. 727, also says no. Mr Justice Sopinka, for the full court, wrote:

"This Court has clearly established that the Crown is under a general duty to disclose all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged: ..."

Stinchcombe has been seized upon to ground claims for a broader right to discovery. Essentially courts are being asked to move the law from disclosure by the Crown to the right of an accused to pre-trial discovery. The argument proceeds on the basis that an accused, in order to make full answer and defence, requires disclosure of all relevant information from all sources.

The leading case on third party disclosure is **R. v. O=Connor** (1994), 30 C.R. (4th) 55, British Columbia Court of Appeal. The accused, Father O=Connor, is charged with two counts of rape and two counts of indecent assault dating back 25 years to the period between 1964 and 1967. The incidents allegedly took place at a residential school when the accused, a priest at the time, was the principal of the school. The defence has contested the charges in a most rigorous manner. Five motions to stay the proceedings were brought in the trial court. Mr Justice Thackray, the trial judge, finally accepted the defence=s last motion for a stay, which was brought during the trial and was precipitated by continued non-disclosure by the Crown counsel. Problems with disclosure began, however, well before trial. In fact, the root of the disclosure problem in **O=Connor** can be traced to an earlier cham-

bers motion where the following orders were made,
R. v. O'Connor, No.1 (1994) 29 C.R. (4th) 40 at 48:

"1) Crown to produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists whom [sic] have treated any of the complainants with respect to allegations of sexual assault or sexual abuse;

2) The complainants authorize all therapists, counsellors, psychologists and psychiatrist whom [sic] have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith;

3) The complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph=s Mission School and that the Crown provide those records to counsel for the accused forthwith;

4) The complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph=s Mission School as either students or employees."

In my view, these orders went far beyond Crown disclosure. To comply with certain of the orders the Crown was obliged to go out and seek the information. In other instances the information clearly was in the possession of third parties and the complainants were ordered to authorize disclosure. Moreover, neither the complainants nor the affected third parties were given notice of the application. Eventually the orders were reluctantly complied by the Crown and the third parties.

Where does the court get the authority to make such sweeping order that affects the rights of third parties? In **O=Connor** the British Columbia Court of Appeal gave the no jurisdiction argument short shrift and concluded:

"... there is no impediment, jurisdictional or otherwise, to a judge other than the trial judge making pre-trial disclosure orders when the necessity arises."

Page 63.

It seems that the primary argument lies under the **Canadian Charter of Rights and Freedoms**. First, the applicant must prove that his constitutional right to make full answer and defence has been breached. Second, that the ordering of disclosure by third parties is the "appropriate and just" remedy under s. 24(1).

In **R. v. Sterling** (1993), 84 C.C.C. (3d) 65, Saskatchewan Court of Appeal, an application was made by the defence not for the production of documents but for the production of the Crown witnesses to be examined on oath by counsel for the accused. The accused were charged in the "Martensville case" involving allegations of sexual assault on children. The Crown had proceeded by way of direct indictment. The de-

fence, therefore, was deprived of an opportunity to question the Crown witnesses during the course of a preliminary inquiry. The application for examination of the witnesses was based upon section 7 of the Charter, the right to make full answer and defence, with the remedy flowing from section 24(1) of the Charter. The presiding chambers judge of the Court of Queen's Bench assumed jurisdiction under section 24(1), heard the application and ordered key Crown witnesses, excluding children, to appear for examination by the defence.

The Saskatchewan Court of Appeal set aside the orders. Bayda C.J.S. concluded:

"... that the orders had been improperly made and could not be left to stand".

In **R. v. Olscamp**, No. 1, (1994) 30 C.R. (4th) 106, Ontario General Division, where the Crown indicated an intention to call a psychologist and a psychometrist in support of the complainant's testimony in a sexual assault trial and where the defence responded by seeking an order compelling the complainant and her mother to be examined by a psychiatrist or psychologist on his choosing, Madame Justice Charron found that she had jurisdiction to hear the application under section 24(1). She then went on to consider whether the accused's Charter rights had been infringed. After canvassing the arguments in a thorough review, she stated her conclusion as follows, page 116:

"The accused's constitutional rights are not without limits. Other societal concerns can serve to define their parameters. In my view, his constitutional right to make full answer and defence does not extend to the right to obtain an independent examination of the

complainant or of her mother (...)
His inability to obtain an independent assessment does not result in an apprehended violation of his rights under s. 7 of the *Charter*. Furthermore, it does not result in the apprehension of an unfair trial. In fact, granting the order would be more likely to affect the overall fairness of the proceedings."

Professor Lee Stuesser in his document entitled, "Reconciling Disclosure and Privilege", published at 30 C.R. (4th) 67, made a thorough study of the case law on the matter of third party disclosure. On the specific matter of the procedure to be followed for third party disclosure and after having reviewed the latest case law on this matter, he made the following comment when referring to the British Columbia Court of Appeal decision in *R. v. O'Connor*. He said the following:

"The two-step process adopted by the court in *O'Connor* [is a helpful starting point]. Step 1 involves convincing the judge to look at the information in dispute. The applicant is called upon to articulate the 'likely' relevancy of the disputed information. Only once this threshold of articulate relevancy is met will the judge review the material. ...

[Since] the step 1 analysis concerns a search for relevancy it is absolutely critical that the trial judge and counsel have a firm understanding of what relevancy

means. The Supreme Court of Canada in *R. v. Morris* (1983), 7 C.C.C. (3d) 97 (S.C.C.) defined relevancy in terms of logical probative value, nothing more, nothing less. The factoring in of other interests and the weighing of the potential probative value of the evidence versus its potential prejudicial effect is a question of admissibility."

And Professor Stuesser concludes by saying:

"[In light of the foregoing a suggested] rewording of the two-step process outlined in *O'Connor* is as follows:

Step 1: The applicant must satisfy the court that the records sought to be disclosed contain information likely relevant to an issue at trial. If the applicant meets this test, then the documents must be disclosed to the court.

Step 2: The court will then review the documents. Disclosure will be made of only those documents that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper

**administration of justice
or by harm to the privi-
leged relation".**

This court adopts the suggested two-step process proposed by Professor Stuesser and is of the view that such a process is applicable in the present case and not only in sexual assaults cases or in cases where the disclosure of medical records is in issue.

Having concluded that the applicant must first satisfy the court that the records sought to be disclosed contain information likely relevant to an issue at trial, we will now apply it to the present case.

As I said before, the defence argues that the information sought is necessary for the accused to make full answer and defence to the charges before the court. The defence does not know - he said he believes - if Mr. Dunlop possesses the information sought and cannot articulate the relevancy of the information sought in more specific terms than saying that it can be useful in his cross-examination of witnesses.

In its discussion of relevancy the British Columbia Court of Appeal specifically addressed the situation in **O=Connor** where medical records were being sought in the context of a sexual assault trial. Such cases raise special concerns about confidentiality and require extra care in determining relevancy. The court listed a number of irrelevant grounds often raised to support disclosure:

**"Invoking credibility 'at large' is
..."**

**"... patently inadequate to justify
..."**

disclosure.

"Similarly, a simple submission that the documents should be produced because they may relate to 'recent complaint' is an inadequate foundation for an order of disclosure. ...

...

Further, production of medical records is not to be compelled simply because the defence hopes that they might disclose a prior inconsistent statement of a complainant. ...

Nor, in our view, is it sufficient simply to say that because a witness received counselling or psychiatric assistance as a consequence of an alleged sexual assault that the records must, therefore, be relevant. ...

Further, we would reject any suggestion that psychiatric and counselling records are relevant on the supposition that the very fact that witnesses obtained therapy, whether related to an allegation of sexual assault or otherwise, justifies the conclusion that their evidence may be unreliable.

In light of these comments, the argument advanced by the defence in **O=Connor** to support the original disclosure is inadequate. The defence had argued:

"My lord, the importance of psychiatric and psychological counselling records with respect to accused person=s ability to help defend themselves is evident -- self-evident. It is for the purpose of testing the credibility of the complaints, determining issues such as recent complaint, corroboration, contradictory statements, et cetera."

As expressed by Professor Stuesser:

"Defence counsel must be able to articulate the relevancy of the information in more specific terms. They bear the burden, unlike in a *Stinchcombe* application where the Crown must show that the information is clearly irrelevant. The threshold of proof -- 'likely relevancy' -- may be a low one, however, it is not meaningless. Mere speculation or conjecture will not be enough. In the words of Mr. Justice Cory in *R. v. Osolin* [(1993) 86 C.C.C. (3d) 481 at 524, a Supreme Court of Canada decision] 'There must be a sound basis in relevance for their admission.'".

As expressed in *Gingras*:

"... the onus is on the person applying for the production of information to show that such information is likely to be relevant. If the submission amounts to no more than a bare statement that the

[information] might impact on credibility or corroboration, or might reveal a prior inconsistent statement, then that onus will not have been met."

In **R. v. Archer** (1989) 47 C.C.C. (3d) 567 and **R. v. Coon** (1991) 74 C.C.C. 146, the courts have stated that the defence must show that the line of questioning would lead to a substantive defence and not a fishing expedition.

Having reviewed all the evidence before this court I do not find any relevancy in the evidence sought. The defence has not shown any line of questioning that would lead to a substantive defence and is unable to articulate the relevancy of the information sought in specific terms. I do not find any sound basis in relevance for its admission.

All information in the prosecution's possession has been disclosed to the defence, all of the individuals who spoke to Mr Dunlop were interviewed by the military police investigators and the prosecution has informed the defence counsel accordingly. The defence has not placed any foundation before the court to suggest that there is anything inconsistent contained in whatever material might be in possession of Mr Malcolm Dunlop. I can see nothing to establish that the material sought is probably relevant to an issue in this case but I am rather of the view that it is sought simply in the hope that it might disclose a proper inconsistent statement. This is precisely the situation that the court in **Gingras** characterized as a fishing expedition.

For all the above reasons, this application for disclosure is denied.

Now unless there are other matters you want me to deal with I will adjourn this case to September 26th.

299

PROSECUTOR: No other matter, sir.

DEFENDING OFFICER: No other matters.

JUDGE ADVOCATE: Thank you. This court is adjourned until ...

ASSISTANT INTERVENER: Mr Judge Advocate, excuse me, is Mr Dunlop free to go now? This decision, does it satisfy the subpoena?

JUDGE ADVOCATE: Yes, he is free to go.

ASSISTANT INTERVENER: Thank you.

JUDGE ADVOCATE: This court is adjourned until 1000 hours Tuesday, September 26, 1995.

ADJOURNMENT: At 1634 hours, 14 September 1995, the court adjourns.

REASSEMBLY: At 1010 hours, 26 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Thank you. Before we be seated, would you please remove your headdress and I would like the two court reporters to take their oath.

THE COURT REPORTER, MR R. MARTIN, TAKES THE OATH.

THE COURT REPORTER, MASTER WARRANT OFFICER G. MARSOLAIS, TAKES THE OATH.

JUDGE ADVOCATE: Thank you, you may be seated.

Now I understand that before asking the members of the court to join us, that the defending officer has a matter to raise to the court.

DEFENDING OFFICER: Yes I do, Mr Judge Advocate. We are in, I take it, a form of **voir dire**. I will not call any evidence and it might be appropriate to ensure that there is no publication of the matter I wish to discuss at this present time, because if these are matters that may deal with evidence and jurisdiction and I don't think it could be appropriate that it be published because of course, depending on your decision, we will ... this may not become to the knowledge of the members of the court, etc. So you may if you feel it is appropriate so order that those matters be not published.

JUDGE ADVOCATE: What are the views of the prosecution on this matter?

PROSECUTOR: We are in agreement, Mr Judge Advocate. Many of the reporters here indeed are used to cover civilian criminal trials perhaps may not be familiar with the military form. It may be useful just to state that matters that falls within a **voir dire** are not subject to publication in the media.

JUDGE ADVOCATE: Very well. So this court orders that no information regarding any portion of the trial at which the members of the court are not present shall be published in any newspaper or broadcast before the members retire to consider their verdict. Any other matter you wish to raise?

DEFENDING OFFICER: Yes, this having been done, the next matter I want to raise is somewhat unusual and I would say directly attributable to the fact that you are now sitting as the judge advocate. Of course you know that Colonel Brais had started this trial and you have now stepped in.

The purpose, it is not a motion, it is a matter of continuity if I might say and with your leave I would like to give you a copy of a decision rendered by Colonel Brais, the judge advocate, in this case in December of 1994 when this court first assembled. I have a copy here that I have provided to my colleague.

301

JUDGE ADVOCATE: Would you like this document to be marked as an exhibit?

DEFENDING OFFICER: If you feel so inclined, Mr Judge Advocate, my point is mainly to inform you. There is a decision there in December, and that's why I want to give you a little background and you'll have the decision in front of you. In December 1994, the defence objected to ... presented a plea in bar of trial to the effect that this court, this General Court Martial, didn't have jurisdiction in respect of charges one and two on the Charge Sheet for the reason that that charge number one which is labelled, "Disgraceful conduct" or "behaving in a disgraceful manner" and two which is alternate to number one which is framed as a common assault. These two offences related to allegedly an offence which could be of a nature of sexual offence, a sexual assault. Having regard to the prescription of section 70 of the **National Defence Act**, the court martial does not have jurisdiction to hear charges such as sexual assault and a few others, murder, etc. when committed in Canada.

The then judge advocate listened to the argument. There was no evidence called. At page 81 for one you will find that the essence as summarized by the JA of the nature of the position adopted by the defence and you will find that there was no evidence being called. At the end, at page 83, the three last lines:

"As it is in this case the court is unable to determine on the basis of the particulars of the charge one and two that a sexual assault was committed."

And then he goes on:

302

"Although admittedly physical contact with the buttocks can be the basis of a sexual assault, the insertion of a cigar tube between the buttocks of another individual in the absence of other evidence is not sufficient to determine that a sexual assault has taken place."

And he continues at the bottom of page 84, the very last paragraph:

"So having said that, it is not possible at this stage of the proceedings to determine whether ..."

etc.

The purpose of me bringing this to your attention this morning is that when the defence made that motion, and I know you don't sit here as an appeal court very obviously but it's because of the change, of course, in judge advocate, it was felt by the defence when that application was presented in December 1994 that this danger or this possibility of those offences disclosing one of a sexual assault nature, it was our fear that it could happen. That was on the basis of the Charge Sheet itself and on the basis of the synopsis. As stated earlier, at that time we had little if any opportunity to get acquainted with the very voluminous disclosure. Now that we have, we still and even more so believe that there is an imminent danger or possibility, let's say, that evidence to be called might disclose an offence of a sexual nature.

Our position in this, the position of the defence **vis-à-vis** charges one and two, is that it didn't take place or if it did, the accused was not involved at all. Nonetheless, it presents a danger that if the evidence comes out and you, for example, as master of the law in this trial determine that there is

303

indeed a possibility, a risk, a danger that the evidence could support a charge of sexual assault that may affect the jurisdiction of the court then that might create a danger - because we are in the context of a general court martial - it might create a danger of prejudicial evidence of being heard by the members of the court, the president and members, whilst later on it might be determined that in fact the court had no jurisdiction. And that could possibly, and I cannot argue much more than that at this point, but it could possibly result in a mistrial...

So this is why I want to make this warning to the court and I can inform the court - although I do not intend to argue all the law - I want to inform the court that those fears or apprehension from the defence are based on a body of law cases that I will only refer to without arguing them. One of course being the C.M.A.C. decision in **Ryan** where it is stipulated that a court martial being a court of statutory jurisdiction when the jurisdiction of the court has been properly challenged has got to ensure that it has proper jurisdiction, etc.

That two, there are a number of cases that were cited before and that, I think may be useful at this point, again without arguing them fully, **Regina v. Chase** of the Supreme Court of Canada level which defines what a sexual assault is. And then we have a few decisions of Courts Martial, one for example in 1983, **Aubut** in Valcartier, the judge being Colonel Brais at that time where again a similar argument was presented and successfully so. Individual charged under section 85 of the **NDA**, facts disclose that this really amounts to sexual amount, the court decided not to proceed. **Tamblyn**, a decision of 1985 by then Colonel Boutet.

So those authorities provide some basis for the defence to be a little apprehensive about the possibilities existing. I do know that there are other authorities that exist that might take a different

304

view. I know of, for example, a Supreme Court of Canada decision in **Wigglesworth**, a decision of 1987. A decision of **Wigman v. The Queen**, 1987 as well and a decision of **Van Rassel**, 1990, Supreme Court as well. Whilst appreciating those are there it is and it would be our position that they can be distinguished and that there exist a body of law to support our position or at least our apprehension.

So that's all I have to say for now. We take the position that as responsible for the law in this case, now that you have an idea of that possibility of that sort of evidence coming that it would be open to you and you will have sufficient warning to intervene should you determine that there is a danger as I expressed it. Those were my comments, Mr Judge Advocate.

JUDGE ADVOCATE: Very well, but just to make things very clear, you do not wish to make any application regarding lack of jurisdiction of this court at this time?

DEFENDING OFFICER: No, I do not because I do not propose for one to call evidence and in that and if it is of any assistance to you, and I will give to my learned friend a copy of the decision of **Ryan** I said I had relied on. I said I didn't want to argue it now, nonetheless, I would like to refer you at page 569 ... well the whole decision of **Ryan** and I believe you are very familiar with it. It deals with the responsibility of the court. Let's say at page 567. I will just take, for example, the last three lines of the mid-paragraph of page 567:

**"As long as these circumstances
were unknown, the jurisdiction of
the Court could not be presumed."**

That was a case where not much or not at all evidence had been called and the judge had deferred his decision. He says, "At this time I do not grant the application that was dealing with nexus. I do not

305

grant the application because I don't have the evidence, etc." The court here, C.M.A.C., said, "Well, it was properly raised." I won't read the whole thing but this forms basically the basis of the argument. The court had to ascertain its jurisdiction.

And as to our position as to who should do what, prosecution, defence or otherwise, I would refer you at page 569, Mr Justice Marceau in fact is not dissenting but he has written his decision. It's interesting to note that he starts at page 568 by stating, "Well, I agree with Mr Justice Pratte but I've had some hesitation so I thought it would be worthwhile for guidance to share my hesitation, why I hesitated and etc." But at the end he joined in Mr Justice Pratte and the majority as it turned out to be decision.

And at page 569 of the same decision, the fifth line of that last big paragraph, he says:

"However, after further reflection, I have come to the view that to require a member of the Forces to demonstrate lack of any military nexus in an offence he is accused of in order to challenge the authority of the Court Martial before which he is brought would put in jeopardy his right to stand silent, a principle so fundamental to the criminal law that it ought not to be breached on the basis of a presumption no more clearly established by Parliament. It seems to me much more in accordance with the principles involved that, when the offence with which the member is charged has, on its face, nothing to do with the service ..."

306

Of course, this case dealt with nexus,

"... the Court Martial whose authority is challenged should not proceed until evidence is brought of circumstances capable of establishing the military nexus required to give it jurisdiction."

Of course, that case dealt with nexus. The present case deals with section 70 of the **National Defence Act** which also, of course, deals with jurisdiction.

So at this point, to answer more directly your question, I am not making a motion, I am not calling evidence at this point but the purpose was to warn - especially because you were new on the bench, if I may say - you of this background so that you are alert to the problem that we claim is real.

JUDGE ADVOCATE: Very well, thank you very much. Mr Prosecutor, do you wish to say something?

PROSECUTOR: Briefly, Mr Judge Advocate. My friend noted that he has reviewed the evidence that the Crown is about to call and as a consequence refers to the danger that might unfold once the witnesses are brought into the courtroom. I also note that he is apprehensive about this happening. I note in nowhere during his comments has he referred to any evidence nor has he made any suggestion that the convening authority, the commanding officer or the prosecution has used the legal discretion that those individuals have in any improper way. I would submit that if defence counsel feels there is a danger, he does have apprehension that the court may not have jurisdiction to entertain the first two charges that they make a motion now and to deal with the issue once and for all.

Clearly, if they are aware that the evidence sets to the extent that they feel a danger does arise,

307

I think they have an obligation to deal with the motion now before the court unfolds. If they don't and they choose not to, that's a decision that all confident counsel have to make and they live with the consequences. So the position of the prosecution would be, if there is a danger, let's deal with it now through a defence motion. If defence chooses not to make the motion, that's their discretion and their right, thank you.

JUDGE ADVOCATE: Thank you. Any other point you wish to raise? You don't want a decision on this matter I guess? You already said you didn't wish to make any application so it is solved.

DEFENDING OFFICER: Exactly, only to ... if I may say one word in response to the prosecution. It is for the reason I alluded to on the authority of **Ryan** in the last page I've quoted to you at 469 that we choose this approach and that's it. I have no other matters to raise at this point.

JUDGE ADVOCATE: Thank you. Mr Prosecutor, do you wish to raise any other matters at this time before we ask the president and members to join us?

PROSECUTOR: Only, I guess, to request an order if there are any possible defence witnesses in the room or witnesses that the defence intends to call that they not be privy to the proceedings but stay out of the courtroom.

DEFENDING OFFICER: I would make a similar request in respect of those of the prosecution.

JUDGE ADVOCATE: Very well. So if there are any witnesses, any person in this room that knows that ... who will be called as a witness in this procedure I would invite that person or these persons to withdraw from the courtroom.

308

Judge Advocate

Opening address

Mr Officer of the Court, would you please invite the president and members to join us.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Good morning, Mr President and Members. So, Mr President and Members of the Court, before calling on the prosecutor to proceed with his case, I would now address a few words to you, hopefully to guide you in the discharge of your duties during this trial.

You will recall, Mr President, that when the former judge advocate spoke to you about QR&O 112.06, he informed you that your duty as the Court is to assess fairly the evidence which will be placed before you to determine from that evidence, according to established principles of law, whether the accused is guilty or not guilty of the charges against him. Again, the court is the sole judge of the facts and my function as judge advocate, is to determine questions of law or mixed law and fact and to inform you on the law that is applicable, indicating the fashion in which it should be applied in each case. The court shall follow my instructions upon the law.

At the end of the trial you will be required to sign a certificate stating that you have followed all the principles of law that I will have mentioned during the trial.

You will find a further explanation of your general responsibilities and of mine, in articles 112.54, minus para 3, and 112.55 of the QR&O and I would advise you to review them at your earliest opportunity. I also mention at this time that when comments are made referring to articles of the QR&O, sections of the **National Defence Act** or articles of the Military Rules of Evidence, you should take note of them so that you can refer to them at your convenience. When you read the articles of QR&O you will notice that there may be notes appended thereto. QR&O 1.095 provides

309

Judge Advocate

Opening address

that these notes shall not be construed as if they have the force and effect of law, but they should not be deviated from without good reason.

I strongly recommend at this time that each member take as complete notes as possible of the evidence which is to be produced before you. You can then refer to those notes at the end of the trial when you close to determine your findings because you will not have a transcript of the evidence available to you at that time.

No matter what the charge before the Court, it must be remembered that every accused person is presumed to be innocent until the contrary is proven. Before you find an accused guilty of any offence, the evidence presented must establish that such an accused committed the offence, and every essential ingredient of the offences must be established beyond a reasonable doubt. I will deal further with the degree of proof necessary when I address you after the evidence has been presented.

The evidence in these proceedings in all likelihood will consist of sworn testimony of witnesses as well as various physical objects or documents, which may be filed as exhibits and taken with you for your inspection during the course of your deliberations.

In addition to such sworn testimony and exhibits, our rules of evidence permit the prosecutor or the defending officer to admit certain matters of fact so as to dispense with the necessity of formal proof thereof. When such admissions of fact are made, agreed upon by counsel and accepted by you, you will treat those facts as having been conclusively proven. Any other statement made by counsel during the course of the trial concerning the facts of the case, must not be regarded as evidence of those facts.

In order for you to make a finding from the evidence introduced in this trial, it will be necessary

Judge Advocate

Opening address

for you to consider how much, if any, of the evidence of the witnesses you are prepared to believe. In other words, you will be required to assess the credibility or truthfulness of witnesses and this is one of your very important functions. In considering the evidence of any witness, you may accept some, all or none of what the witness has said, and you are not obliged to accept it simply because there has been no denial of all or part of that evidence.

When considering whether to believe a witness's evidence in whole or in part, or not at all, study carefully the following: firstly, the conduct, demeanour and attitude of the witnesses as they testify, bearing in mind that in most cases, some nervousness is to be expected in view of the lack of familiarity with the court and its procedures; secondly, the witness's apparent opportunity to observe or hear the facts to which he testified, and his powers of observation and recollection, not only at the time of the events but also at the time the witness gave evidence; thirdly, the witness's ability to express himself, that is, to understand the questions asked, and to formulate intelligible answers in response; and, finally, the witness's apparent interest or lack of interest in the results of these proceedings, is the witness biased or prejudiced for or against the prosecution or the accused? Bear in mind each of these considerations as you carefully study and listen attentively to each witness who is called to give evidence before you at this trial. As I said, you may believe or disbelieve a witness in whole or in part, but I should add, and this is important - if you reject any portion of a witness's evidence as being unworthy of belief, the remainder of his evidence should only be accepted as being credible after being subjected to a most careful scrutiny.

During the course of this trial there is likely to be what is known as direct and what is known as circumstantial evidence and facts may be proven by both types of evidence. Direct evidence consists of the testimony of a witness, who with any of his physi-

311

Judge Advocate

Opening address

cal senses, perceived the fact in question. However, you are not required to rely only upon direct evidence. A fact may be established by circumstantial evidence, as well.

To prove a fact by circumstantial evidence involves inferring the fact in issue from the evidence before you and not from speculation or conjecture.

Both direct and circumstantial evidence are equally admissible in a court of law, but there is a risk with circumstantial evidence that does not arise in the case of direct evidence. In the case of direct evidence, the only uncertainties are as to the truthfulness and accuracy of the witness. The witness might be deliberately lying or honestly mistaken. Where the evidence is circumstantial, there is also the uncertainty as to whether the correct inference has been drawn from the proven facts. Circumstantial evidence should be scrutinized carefully with this in mind.

Let me give you an illustration. You look out the window upon getting out of bed in the morning and you see that the street in front of your house is wet. You neither saw nor heard rain during the night, but yet you might infer from the wet street that rain had fallen. However, if you live in an area in which the streets are washed during the night by trucks spraying water from tanks, it would be dangerous to infer from the wet street alone, that rain had fallen. Such an inference might not be correct. But, if in addition to the wet street, you observed that your lawn was wet and you had not been watering it - and/or that there was water dripping from the leaves of trees in your garden or from your eaves; and/or that your flower-beds were soft and muddy, you might feel certain, although still by inference, that rain had fallen during the night. In that case the occurrence of rain during the night would probably be the only reasonable inference to be drawn from the facts you had observed.

312

Judge Advocate

Opening address

Circumstantial evidence is a reasonable inference drawn from proven facts. Where there are many independent facts which support the inference, circumstantial evidence may be as persuasive as the testimony of witnesses giving direct evidence.

A charge sets out the facts upon which the prosecution relies, as establishing that the accused committed the offence with which he is charged. The particulars of a charge, expressly or impliedly, allege what are called essential ingredients of the offence stated in the statement of the offence, and these essential ingredients, together with the question of identity of the accused as the person who committed the act, are the facts with which the court is primarily concerned. And these facts are known as facts in issue.

During the trial, the court may take into consideration only those facts which are established by evidence given during the course of the trial, whether by way of oral testimony or by the production of documents or objects, or by admissions accepted by the court. To this rule there is only one exception and that is that the court is required to take judicial notice of certain facts or matters and may take judicial notice of certain other facts or matters, although no reference has been made to them in court. This simply means the acceptance by the court of the truth of a fact or matter without requiring the introduction of evidence to prove its truth. I would invite your attention, at your convenience, to rules 14 to 19 of the Military Rules of Evidence which pertain to facts or matters of which judicial notice must or may be taken. These rules are exhaustive. That is, the court must not take judicial notice of any facts or matters not specified in those rules. Military Rule of Evidence 15 provides those circumstances where the court is required to take judicial notice and Military Rules of Evidence 16 and 17 provide for the court to take judicial notice as a discretionary matter or upon request. If the court proposes to take judicial notice

313

Judge Advocate

Opening address

under Military Rules of Evidence 15, 16 or 17, the court must comply with the provisions of Military Rule of Evidence 18 and both prosecution and defence must be given the opportunity to make representations regarding the competence and the propriety of the court taking judicial notice. I may have more to say on the subject of judicial notice as the occasion may arise or when I address you after the evidence has been presented.

It goes without saying, that you must put completely from your mind anything concerning the case you may have heard or may hear during the course of the trial outside of the courtroom.

I would instruct you, specifically, not to discuss this trial outside the courtroom with anyone who is not a member of this court. I must also caution you, before proceeding, that you must not, at any stage of the proceedings, prejudge the guilt of the accused.

It is upon the evidence as a whole that the court must determine whether the accused is guilty or not guilty, and it is of course, immaterial in determining this question, that a court martial has been convened.

Those are all the preliminary remarks I intend to make at this time, Mr President, however it may be appropriate at this time to inquire of both the prosecutor and the defending officer if, in respect only of those facts and matters contained in Military Rule of Evidence 15, that is to say required judicial notice, they wish to make any representations regarding either the competence or the propriety of the court taking judicial notice of those facts and matters. Mr Prosecutor?

PROSECUTOR: No comment, sir.

JUDGE ADVOCATE: Mr Defending Officer?

DEFENDING OFFICER: No comments.

314

Judge Advocate

Opening address

JUDGE ADVOCATE: So it is my decision that the court may take judicial notice of those facts and matters contained in Military Rule of Evidence 15.

PRESIDENT: The court takes judicial notice of those facts and matters contained in Military Rule of Evidence 15.

JUDGE ADVOCATE: Thank you, Mr President. Now before I ask the prosecutor to call his case, I have been informed that the prosecutor wishes to make an opening address which will be followed by another opening address but this time from the defence.

Just a few words on that specific matter, the lawyer representing the prosecution ... as I said I will call upon the lawyer representing the prosecution to make his opening statement to you. He will tell you what he expects the evidence to show and what he expects the various prosecution witnesses will say. The purpose of this opening statement is to make it easier for you to follow the evidence as the witnesses testify. It is important that you understand that the opening statement of prosecution counsel is not evidence because it is not given under oath from the witness box. And the same rule applies to the defence opening statement.

Mr Prosecutor, are you ready to make your opening statement?

PROSECUTOR: Yes I am, Mr Judge Advocate, thank you.

Mr President, Mr Judge Advocate, Members of the Court, my name is Major Kirby Abbott. I am assisted and will be throughout this trial by Captain Pat Gleeson.

Before I begin I would like to just touch on some housekeeping matters. I'll be referring to the Charge Sheet, Mr Judge Advocate, and with your permis-

315

Prosecutor

Opening address

sion I would like to provide the members of the court with copies of the Charge Sheet so they can read along with me as I go, discussing charge to charge.

JUDGE ADVOCATE: I think it's already done. We'll check that immediately. You have a photocopy of the Charge Sheet in your book. They do.

PROSECUTOR: Thank you. My opening statement will be approximately 30 to 35 minutes in length. And I intend to give you an overview of what will be a very lengthy trial. At the outset, it's important to note that it is not our job or our duty as prosecutors to tell you that the accused is guilty. Rather it is our job as prosecutors to call witnesses which will provide evidence for you to consider whether assessing the guilt or the innocence of the accused in relation to the charges that he now faces.

The learned judge advocate is the expert in the law. It is he that will guide you on areas that touch upon legal issues. He will also guide you on the application of the law as it relates to the evidence that the prosecution calls through witnesses. Importantly the accused is presumed innocent beyond a reasonable doubt and remains so unless the evidence proves otherwise and you make a finding otherwise. As the judge advocate has stated, it is extremely important to note that everything that I'm saying in this opening address is not evidence. It is merely a road map or a skeleton outlining to you where I anticipate the evidence will go. So it's an anticipation of evidence that will be led but not evidence itself.

The accused, as you can see from referring to the Charge Sheet, faces seven different charges. While they relate to a very wide range of activity, in essence the allegations and the evidence focus on one general point. The evidence in this case will focus on how the commanding officer of the HMCS OJIBWA treated members of his crew from December 1991 until October 1993.

316

Prosecutor

Opening address

The prosecution will propose and anticipates to lead evidence that while commanding officer, in the words of the witnesses, the accused belittled, humiliated, degraded and insulted the members of the crew, particularly a number of members who have worked in the control room of the submarine through different means; verbal treatment on a routine basis while at sea; through personally insulting adjectives; through yelling and screaming at them; comments of a sarcastic tone and nature which were directed at them, their professionalism or their work.

The prosecution expects to lead evidence through witnesses that as a consequence of this type of verbal treatment the control room was filled with a tense atmosphere of fear and uncertainty which caused many of the members in the control room not to want to work in the control room, weaken their confidence, weaken their morale, weaken the divisional system and causing to compound their errors and their mistakes.

Before I actually delve into the anticipated evidence of each charge, I would like to set the scene a bit, give you some background of a submarine squadron, the nature of a submarine, the career and the training progression of submariners. So you have a context through which to understand the evidence as it unfolds.

The accused became commanding officer of the HMCS OJIBWA in December 1990 and he remained so until October 1993. The charges concern the latter half of his command and generally speaking fall within three years from when he plead to the charges at this trial when it began in December of 1994.

Turning to the First Canadian Submarine Squadron, the HMCS OJIBWA is one of three submarines that fall within that squadron. At anyone time generally speaking two of the submarines are operational and one of the submarines is in refit. In a ball park figures the First Canadian Submarine Squadron employs

317

Prosecutor

Opening address

200 to 250 submariners with 40 to 45 of them being officers.

In terms of the training and the career path of submariners and in particular officers, it's important to note that in getting the Dolphins and becoming a qualified submariner it usually takes somewhere between six to eight months to qualify. So an officer at the rank of sub-lieutenant will come on board, be under training and aspire to obtain their Dolphins. They're refer to as Part 3s and as I said hold the rank of sub-lieutenant. In order to be boarded or formally examined by an examination board in order to qualify, they must get a recommend from their commanding officer who conducts the pre-board on the boat.

After qualifying before the board, they now have their Dolphins and they start to advance in their profession, and, if they're able, they are selected later on for an Executive Officer or an Attack Coordinator's course in Australia. Upon completing that course they're then qualified to become an executive officer of a Canadian submarine at sea. Unlike surface vessels, executive officers are not command qualified.

After they have their XO appointment, they continue to develop in their career. Just before obtaining their status of XO or possibly after they are selected for SOCT which is Submarine Officer Continuation Training which is a pre-requisite to go on the command course. Until recently it was referred "Perisher" run by the Royal Navy. As of last year, the Canadian Forces now conducts its own command course, the Submarine Command Officer Qualification course. Usually a submariner will do a number of SOCTs before they recommend it and assess ready to go on the command course.

The key people at this career point in developing the officers career are the commanding officer who is conducting or operating the boat in which the SOCT is performed on, the squadron commander who also

318

Prosecutor

Opening address

gives an assessment and that individual's commanding officer of whatever boat he is attached with. Once the individual gets a recommendation from SOCT and from his commanding officer, he is then sent on the command course. As I noted before, until recently it was a "Perisher" course and now it's the submarine commanding officer's course. I think I misspoke earlier on calling it something else than submarine commanding officer's course. In 1994, prior to any candidates taking the SMCOC, the accused was the officer in charge of the Canadian Submarine Commanding Officers course.

Upon successfully passing perisher or the command course, the individual generally speaking will now be at the rank of lieutenant-commander in command of a submarine. In order to get Dolphins and subsequently go onto SOCT and then go on to be command qualified, the captain of the submarine and the commander of the First Canadian Submarine Squadron are the two most important individuals in that submariners career universe. It is those individuals that give him the recommendation and the assessment to carry on in his career, without them he goes no further.

In the facts of this case which deal with officers of the OJIBWA, Lieutenant-Commander Marsaw was one of the most, if not the most important person in their career advancement. He was a gatekeeper for the Part 3s to obtain their Dolphins. He was a gatekeeper for the SOCT candidates who were assessed on the OJIBWA. And he was also designated in 1994 as the future instructor for the Canadian Command Officers Course.

The squadron commander earlier on in this chronology was Captain[N] Plante and he was the commanding officer of the First Canadian Submarine Squadron until April 1992. He was subsequently replaced by Commander Scherber who then became SM1 or the commander of the First Canadian Submarine Squadron.

319

Prosecutor

Opening address

Turning now to the OJIBWA. The OJIBWA, in ball park figures, holds a crew of 70 submariners including the captain, the XO, four qualified officers and two Part 3s for possibly two more qualified officers. The condition are Spartan. There is no privacy. While dived, officers in the control room stand watch of six on and six off with secondary duties on top of that. Most of the witnesses when asked will tell you that they would average at anyone time at most four hours sleep. Some witnesses will tell you that in their minds you submerge and dive for days if not weeks on end and there is little distinction between day and night, on Monday and Tuesday, six on and six off. The days tend to blend into each other particularly if you're away at sea for 180 days a year.

The lighting conditions in the control room are either black lighting, red lighting or white depending on whether it is day, or night, or dusk, or dawn when you look through the periscope. Quarters are cramped, personal storage space is absolutely minimal and bunks are shared quite often, six on six off.

In 1992 the OJIBWA was away for approximately 180 days with 30 days of port visits. From January to October 1993 the OJIBWA was approximately away a 140 days.

The wardroom, which by definition does not include the captain, does include the XO and all officers. The executive officer, in the beginning of our chronology, up until 1992 was Lieutenant[N] Virgin, now Lieutenant-Commander Virgin. Subsequently he was replaced by Lieutenant[N] now Lieutenant-Commander Dussault who was the XO from August 1992 until October 1993. In addition to the XO the wardroom as I mentioned consisted of officers that were qualified but it also consisted of officers that were still under training, the Part 3s. Not all could sleep in the wardroom and some of the Part 3s slept in the fore ends, the Torpedo room. The accused would eat his meals in the wardroom, but would often watch movies in the wardroom

320

Prosecutor

Opening address

as well, sit and smoke or pass the time or play games in the wardroom. He would sleep in his cabin which is not part of the wardroom, physically separated, visit the heads and spend the remainder of the time in the control room. So the control room, the wardroom, the cabin, the heads basically define the geographical parameters of the captain or the accused's movements.

In the control room when dived, the OJIBWA was led by an officer of the watch, two officers - one qualified and the other either qualified or under training - and junior and senior ranks or rates would work in the sound room using sonar, the radar room using radars, the radio room, what is referred to is the CDC, the Command Display Console. This would all be on one side of the control room of the submarine.

On the other side of the control room is where the driving function of the sub occurs. The boat would be manned by 1st and 2nd panel watch keepers, usually engineers, of senior and junior rate, a helmsman who would switch jobs on a rotational basis. Usually it would be at the petty officer rank, with persons who were operating the CDC or Command Display Console. Three officers would rotate between the trim seat who in conjunction with the helmsman actually drove the boat. They would also move between that place, the helms seat, the aft periscope and the plot table. The number of positions in the control room would increase during attack stations and when the sub was on surface the number of people in the control room would decline.

All persons who do have Dolphins, regardless of their rank who do work in the control room, are qualified professionals who have been properly trained in the performance of their duties. It is the system that says they have been qualified as such. It's the system that has placed them on the OJIBWA. It's not the accused who independently determines whether or not the member qualifies or not to hold his rank, his qualification or his position.

321

Prosecutor

Opening address

I could turn to the charges at this point that deals first of all with charges relying to verbal abuse ill-treatment. The prosecution alleges that the accused verbally ill-treated, insulted, belittled, degraded and humiliated some of the members of his crew. These allegations concern the third, fourth and seventh charges involving ill-treatment and prejudice to good order and discipline.

The prosecution anticipates that evidence will show that when an individual made an error, no matter how large or small, or was simply not performing the job up to the expected standards of the accused, they were, not always, but often personally and publicly verbally addressed by the accused. Praise was rare. Criticism was often, often done in public before an individual's peers and subordinates, sometimes in the captain's cabin. Less often errors were identified in a firm, controlled and helpful voice. A demonstration of how to correct the error occurred with less frequency than an adverse verbal response by the accused.

As I stated earlier the prosecution expects to lead evidence that the accused, while commanding officer, in the OJIBWA did in fact insult, degrade, belittle the members of his crew through the verbal treatment he gave. On a routine basis, the prosecution anticipates to lead that the accused would be personally insulting through the use of adjectives, he would be yelling and screaming at them and making comments of a sarcastic tone and nature that was directed to them, their work or their professionalism.

First, let's deal with the yelling and screaming. Individual witnesses will tell you often that they were yelled and screamed at in an uncontrolled voice with anger. In doing so the accused was often critical at their performance, their duties and their responsibility. Seldom would he identify an error and show an individual how to correct it although

322

Prosecutor

Opening address

he did it on occasion. Individuals were often told in no uncertain terms that they had made a mistake but then were left to their own resources to learn how to correct the mistake or do it properly. It's a difficult position if you're a Part 3.

Two of the radar men will tell you about sitting in the radar room during the work ups in 1993. The door to the radar room was kicked completely off its hinges, crashed on to them, splattering them on the deck. The senior radar men crashed to the deck knocking over his junior at the same time looking up into the entrance of the doorway seeing the accused yelling at him, "Would you gentlemen fucking join us."

In terms of sarcasm, at other times individuals were approached in the control room in a controlled voice but one which was sarcastic or insulting in tone. The accused would say to them, "Do I have to do your job too. Why don't you stand up and kick yourself in the cunt", or referred to qualified officers as Part 3s.

In terms of personally insulting words. At times, though less frequent than the general bollocking, the accused screaming and yelling would be even more personal and pointed. At times the accused in the control room referred to ... use a variety of terms. If you can refer to the particulars in charge three you'll see some of those terms. Now there is a variety of terms there or words to that effect. There were other words as well, the most common one would be "idiot", being referred to as an idiot as well.

Lieutenant[N] Soper, we anticipate, will state that the accused referred to him and fellow officers through a variety of names including, "idiot, stupid, fucking idiot, fucking stupid, incompetent", and words to that effect. Master Seaman Cumberland will recall that the accused referred to the officers as "fucking idiots, assholes, slow and useless". Lieutenant[N] Elford will state that he has been re-

323

Prosecutor

Opening address

ferred to as a "fucking idiot, an idiot and a fucking asshole". Lieutenant[N] Byrne will state that he has been referred to by the accused as "stupid, slow and as a liar". Lieutenant[N] Higginson will state that he has been referred to by the accused as "stupid, a fucking idiot and an asshole". Lieutenant[N] Pitman will state that he and fellow officers have been referred to by the accused with a variety of words including "idiot, mother fucker, cunt, fucking asshole and stupid fucking cunt".

Leading Seaman Pilon will state that he has heard Lieutenant-Commander Marsaw yell at persons in the control room using terms such as "stupid fucker, asshole and incompetent". Lieutenant[N] Watt will state that he can recall being referred to as "an idiot, a lazy shit or a lazy fuck" by the accused. Ordinary Seaman Kohli will state that he recalls being referred to by the accused as "stupid". Petty Officer Conrad will state that he can recall the accused referring to officers as "incompetent" and he himself has been referred to as a "liar". Warrant Officer Shea will state that at times he was referred to by the accused as an "idiot or as a piece of shit".

Formally Lieutenant[N], now Mr Leclaire will say that he recalls being yelled at by the accused who referred to him and his officers as "incompetent". Master Seaman Madgett, as I have mentioned before, recalls being knocked onto the floor by the radar room door as it was kicked in on him by the accused who yelled, "Are you gentlemen going to fucking join us?" Leading Seaman Madgett also recalls the accused stating to Madgett's superior, Lieutenant[N] Higginson, "If we were closer to home I'd fire you."

Leading Seaman Bidinost will also recall the same incident that Madgett refers to about the radar room door. Leading Seaman Smyth recalls an incident where the accused kicked in the door to the radar room and started yelling at him. Petty Officer Parsons will state that he recalls an incident in which the accused

324

Prosecutor

Opening address

kicked in the radar room door and yelled at Leading Seaman Smyth, "Didn't you hear my last pipe? I should kick you in the fucking nuts." Lieutenant[N] Cassivi, who is francophone, will recall Lieutenant-Commander Marsaw making anti-francophone comments. Lieutenant[N] Watt will state that after a set of drills being done over and over again, the accused apologized to the junior and senior rates for the fact that his officers were "worthless jerks". On other occasion Lieutenant[N] Watt recalls the accused referring to the officers for the watch as a "fucking piece of shit".

Importantly, the prosecution is not basing its allegations or relying on any evidence where the accused is simply yelling or screaming out his orders. This is not a case of a commanding officer yelling and screaming out orders. It's not a case about a commanding officer who in a moment of frustration or extreme stress blurts out words he may later regret or apologize for. This is a case, as, it is anticipated the evidence will show, of a commanding officer who screams and yells, criticizes publicly, verbally confronts and insults and degrades sometimes in sarcastic tones members of his control room.

As well, it's important to note that this is not a trial about the accused tactical ability or skill. As the prosecution evidence will show, a number of witnesses held the accused's tactical ability in high regard. A number of witnesses will tell you that the submarine was very operationally efficient. This evidence from the prosecution as it anticipates to call will not focus on the accused's tactical ability but rather the manner in which he verbally treated members of his crew while obtaining that high tactical standard.

Importantly, there will be some witnesses that will state that the accused did not react to members in the various ways alleged on a daily basis. Some will give evidence that the accused was inconsistent and that the verbal treatment came in waves. The

325

Prosecutor

Opening address

evidence will show that there were entire watches where the accused would not make an outburst in the control room or the wardroom. The overall evidence, however, will demonstrate that at least one member was insulted or verbally abused on a daily, or near daily, basis while the submarine was at sea. As a general exception the evidence will also show that the accused behaved differently when certain riders were important on board, the Command Chief or SMI, the Squadron Commander.

The witnesses will give evidence of how they and others were verbally treated by the accused. They will tell you the words used, the tone, the volume and the frequency of those types of words. The witnesses will not tell you the time, date and place that each incident would have occurred. In a sub, six on, six off, sometimes four hours of sleep, not knowing the exact days or whether it's day or night, the witnesses will tell you that it is difficult to recall events by specific date or place. The witnesses will state they or their fellow submariners were bollocked on a daily or near daily frequency. The witnesses will squarely tell you that they, personally or through observation, saw the accused berate, belittle, yell or insult others in the manner and the tone as I described you above.

Dealing with the seventh charge alleging anti-francophone comments. Lieutenant[N] Dussault, the XO, will state that not only would he be subjected although with lesser frequency than other officers to the verbal treatment described, but also he would be the subject of particular comments given his linguistic ancestry.

Lieutenant[N] Cassivi was the only officer who was a member of the OJIBWA during the relevant time.

As a consequence of this verbal treatment, most senior and junior rates will tell you that their superiors appeared visibly afraid or frightened of the accused. They noted that their demeanour and their

326

Prosecutor

Opening address

physical appearance would change when the accused entered the control room. The officers, generally speaking, will tell you that the atmosphere in the control room was tense and that it was filled with fear. Voices became whispers. Warnings went out that the captain had entered in the control room. And for some of these officers, the fear was the fear of uncertainty of whether you would be the next person picked on. Errors were made. People feared making mistakes. Mistakes were compounded. At times the information was fabricated or not reported to avoid the accused's response. Some witnesses will tell you they felt humiliated at times. Others will tell you that they felt angry and frustrated at times. Some of the members will tell you that they did not want to work in the control room.

Most basic things like sleeping and eating were even affected. Many officers would not eat meals, or skip some meals, or eat them outside of the wardroom as the accused spent much of his time there. Others whose bunks were in the wardroom did not sleep in there on occasion because the accused would be there. Many witnesses thought seriously about leaving the submarine service. Some actively looked for other opportunities and some actually did leave because in whole or part of their experiences on the OJIBWA. The morale was low and most members of the wardroom were openly, at times verbally dissatisfied with the treatment they received from their captain. The divisional system was weakened.

With regard with charges five and six. The kicking was not limited to the radar room door. Lieutenant[N] Higginson was a navigating officer and the officer of the watch and also a recipient of various forms of verbal treatment from the accused. At times he, too, was yelled and screamed at. He has been referred to by the accused in the presence of his peers and subordinates as "stupid", "a fucking idiot" and an "asshole". The accused has stated to Lieutenant[N] Higginson in the presence of subordinates in the con-

327

Prosecutor

Opening address

trol room that it is, "too late to get rid of you now", after the accused was informed that he was unable to dive the sub during a trip from Bermuda to Baltimore. Another witness will recall the accused stating to Lieutenant[N] Higginson, "If we were closer to home I'd fire you" or "If I could find a nav I'd fly you off right now."

Once during a wardroom meeting the accused asked the wardroom how come the crew was not working together as a team, what was wrong and what to be improved? Lieutenant[N] Higginson was the only one who took the challenge. He commented that there was too much yelling and screaming going on. The meeting was concluded. The accused did not agree and Lieutenant[N] Higginson was brought in to the captain's cabin for a talk.

During the counter drugs trip which you'll see in the fall of 1992 the accused was on the forward periscope and Lieutenant[N] Higginson was at the plot table. The plot table was right next to the forward periscope. There was a curtain between them because the accused wanted the boat's location to be kept secret from the crew given the nature of the mission. With the curtain hanging between Lieutenant[N] Higginson and the forward periscope, Lieutenant[N] Higginson will state that he recalls a hard kick above the ankle area. Given the curtain, however, he did not see who kicked him.

Sergeant Shea, now Warrant Officer Shea, was on the CDC looking at Lieutenant-Commander Marsaw on the forward periscope awaiting further instructions from the accused. Lieutenant[N] Pokotylo was on the aft periscope. Both Shea and Pokotylo will tell you they saw the accused kick Lieutenant[N] Higginson or the individual behind the curtain. Petty Officer Conrad was near the entrance of the passage way to the control room, only feet away from the accused, when he heard the accused say, "That will teach you to get the

328

Prosecutor

Opening address

fuck out of the way." Warrant Officer Shea recalls the words, "That will teach you for getting in the way."

The control room is a cramped, small space. When an individual is on the forward periscope and another individual is at the plot table, it is possible for the bodies to bump or to touch. The witnesses will state that the most common point of contact is between the buttocks of the individual at the plot table and the buttocks of the person on the forward periscope as he swings around. If a person is in a crouched position on the periscope it's also possible that maybe shoulders may touch as well. The witnesses will also tell you that it is possible for an individual in the forward periscope to have his feet entangled with the individual who is at the plot table.

Lieutenant[N] Shea and Pokotylo will describe for you how the accused would and did move his feet around the periscope on that particular incident. They will contrast to you how he moved his feet on the periscope before the kick and at the time of the kick.

It is anticipated that the evidence will show that the accused's foot motion at the time of the kick was distinct and different from the foot movements that he would usually have on going around the periscope.

I'm referring to charges one and two now. Lieutenant Kelk as mentioned in the charges on the particulars was an exchanged officer from the Royal Navy. In the early hours of 20 December 1991 after a mess dinner, Lieutenant Kelk passed out after too much drink in the wardroom of the OJIBWA. The wardroom is a small space. After most of the post dinner guests had left the wardroom of the OJIBWA, Lieutenant Kelk who was also a member of the OJIBWA and a supply officer not from the boat, passed out on the settees in the wardroom.

The accused was present as was Lieutenant-Commander Craven, Lieutenant[N] Hart, Lieutenant[N], now Lieutenant-Commander Dickinson and Lieutenant[N]

329

Prosecutor

Opening address

Elford at the time was a Part 3. Lieutenant[N] Marr, who was the officer of the day, was in and out of the wardroom in those early morning hours frequently leaving the wardroom to check a hydraulics problem and also to do rounds of the boat. The time of rounds would take him up to 30 or 40 minutes. The accused, Craven, Hart, Dickinson and Elford and the two sleeping individuals remained in the wardroom. Marr came and went throughout the morning. When he returned at one point he saw Kelk passed out lying on the settee, his shirt half off, his pants down to his knees, as well as undergarments with various markings written on him such as the one Lieutenant[N] Marr observed done by the accused, the drawing of a French flag on Lieutenant Kelk's hip.

Lieutenant[N] Marr will tell you that when he came back he saw a cigar tube in the cleft between the top of Lieutenant Kelk's buttocks and his trousers which were not undone but simply pulled revealing the cleft of his buttocks. At this point the partiers remained on board and continued their drinking for approximately an hour, according to Lieutenant[N] Marr. Lieutenant[N] Marr did not witness that entire hour as he came and went doing his rounds. Upon returning after a set of rounds he observed Kelk in basically the same position he saw him before with the cigar tube in the cleft, the top of his buttocks.

The witnesses Elford, Craven, Dickinson and Hart will all tell essentially the same story. Their evidence will be different in terms of exactly who sat where, what time exactly they arrived, the name of the ship they were on before they got to the OJIBWA, whether Muir or Kelk was marked first. There are differences in the evidence from the prosecution witnesses on those types of points. However, those witnesses, Craven, Hart, Elford and Dickinson are all consistent on one point, after Kelk's shirt was raised, after his pants were lowered, sometime after various things were written and marked on his body the accused

330

Prosecutor

Opening address

picked up a cigar tube and inserted it between ...
placed it between the buttocks of Lieutenant Kelk.

Leading Seaman Pilon was the duty roundsman on the OJIBWA that morning as well. He will tell you that the officer of the day showed him the wardroom after all the partiers left. He witnessed the aftermath of the wardroom with glasses spilled, cans on the floor. He'll state that he looked at Lieutenant Kelk who was disrobed and marked upon and had what he recalls a cigar inserted between his buttocks. Leading Seaman Pilon was not present for any of the occurrences in the wardroom prior to that moment.

Later in the morning to begin a new shift Sub-Lieutenant Kohli came into the wardroom for his duties and saw Lieutenant Kelk marked upon and disrobed with his pants down. He observed a cigar tube and a condom unrolled in the garbage can.

The prosecution will be calling approximately 44 witnesses. It's difficult to predict how long this trial will actually take to unfold this. The length of a trial is never determined by one single individual. The prosecution hopes to have its case presented in three weeks at the rate of four witnesses a day. In saying that I don't want to leave you with any implication, however, that if we do go beyond that time that that's of any fault to be implied to my friend on the other side. As I said, the pace of a trial is never determined by one individual.

Apart from the mess dinner witnesses involving the first two charges, we hope to give you an even mix of officers, senior rates and junior rates who will describe what they observed, heard and saw and how they felt in the control room of the OJIBWA. Generally speaking, it is hoped to call mess dinner witnesses first, the witnesses alleging the kicking after that and the witnesses alleging verbal abuse after the kicking witnesses. This will be followed by the calling of former and present submarine commanders to

331

understand how they have performed their job as commander of submarines in the past.

That's the general plan of how the prosecution intends to call the witnesses. Some of the witnesses will be called out of order. Lieutenant-Commander Dickinson and Elford who were witnesses to the mess dinner, allegations while on operations, they will be brought in later on to give their testimony. So though we hope to go with the mess dinner allegations, kicking and the verbal abuse, there will be witnesses who were scattered a bit out of the sequence or out of order.

Trials are generally slow and they are tedious matters unlike television that are usually sorts of high drama, they're slow and they're tedious. So I thank you at this time for all your patience and your attentiveness, thank you.

JUDGE ADVOCATE: Thank you, Major Abbott. Now Lieutenant-Colonel Couture, do you wish to make your opening address at this time or later on in the trial?

DEFENDING OFFICER: I would wish to do it now with your leave, Mr President, Mr Judge Advocate.

JUDGE ADVOCATE: Please proceed.

DEFENDING OFFICER: The Charge Sheet that you have in front of you, Mr President and Members, seems, to say the least, to draw a very unkind picture of Lieutenant-Commander Marsaw. So did Mr Prosecutor who referred to berating, belittled, yelled, insulted a great number of times during his address. You must however remember that those particulars in the Charge Sheet, the comments from my learned friend of the prosecution remain allegations only until they are proven before this court, until they are proven as has or will indicate the judge advocate, beyond a reasonable doubt.

332

Defending Officer

Opening address

The burden of proof beyond a reasonable doubt rest entirely with the prosecution and what you have just heard are proposals, anticipated evidence. As to the burden of the accused, there is none. The accused does not have to meet any particular standard. For that matter myself and I should ... I neglected maybe to introduce myself. I'm Lieutenant-Colonel Denis Couture and I'm representing Lieutenant-Commander Marsaw. My assistant who will be sitting to the left of Lieutenant-Commander Marsaw is Major Louis Mackay. He is attending some administrative matter at present and he will be assisting me throughout the trial.

So having said that, I was to say that the defence who could sit silent throughout the whole duration of the trial and for you, you would be left with the same decision to be made to the same high standard, has the prosecution proven each and every essential ingredient of those offences? The judge advocate will talk to you more about that later on. Have those elements been proven beyond a reasonable doubt?

Having said that, I can assure you that the defence will not sit in this case ... sit silent. We will be putting questions to witnesses produced by the prosecution. That is what is referred to as cross-examination.

This leads me into this old say that there is no ownership in witnesses and that answers given to this court by witnesses in answers to the questions of the defence amount, subject to your appreciation of its weight, as well as evidence just as those answers given to the prosecution. It is quite clear from the remarks of the prosecutor that the bulk of the evidence to be called will consist of witnesses. As indicated to you by the judge advocate earlier in his opening remarks, you will have to perform this always important task of assessing the credibility of the witnesses and the weight to be given to their evidence.

333

Defending Officer

Opening address

We submit to you that this task, this assessment of the evidence becomes even more critical in this particular case because of the time elapsed between the alleged offence on the Charge Sheet and the date of this trial. Looking at the Charge Sheet, you will realize or you have already realized that we are going back to: for one, an incident that took place in December, allegedly - should I say - allegedly took place in December 1991 and then we are talking about other incidents that took place in the early months of '92 and up to October '93 which is even the closest date included in the Charge Sheet to the date of this trial is about two years ago. The furthest we're talking three years or more.

It will be our position, Mr President and Members, that the evidence to be called is generally unreliable. In some cases, because intoxication of some witnesses which of course we will submit would affect perception, ability to remember. In other cases, it will be poor recollection of events that day back and that cannot be pinned down by the witnesses with any degree of accuracy. In some other cases, because of straightforward bias against the accused.

It will become clear, and my learned friend has already referred you to some figures although that's not evidence yet but it should become clear fairly soon and it's a point that will not be disputed that the OJIBWA spent a lot of time at sea during the concerned period. Because for a great part of that time it was the only submarine fit to sail, one being in refit, my learned colleague has alluded to that, another one having mechanical problems.

It will also become clear that Lieutenant-Commander Marsaw is indeed a perfectionist and consequently a demanding captain. I should have said a very demanding captain. That under his command, OJIBWA performed at a very high standard, a situation that was recognized by Lieutenant-Commander Marsaw's superior who assessed his performance throughout as outstanding.

334

Defending Officer

Opening address

You will hear about leadership, leadership style, officer like qualities, morale.

I suggest to you, Mr President and Members, that this is not a board of inquiry, a study or a comparative study on those fundamental issues of leadership style, officer like qualities and other very interesting topics in today's Canadian Navy. This is a disciplinary matter where the standard of proof is much higher. If the authorities of this command had wanted a study on leadership, they would have commissioned one. I invite you not to be necessarily distracted by some issues that are not directly related.

The words yelling, screaming, raising his voice, etc., will be heard. You will have, however, to determine whether those acts or words, demeanour to the extent they are proven amount to the commission of an offence or whether they are a necessity in the running of a submarine in a day-to-day tense and dangerous situation. Is it conceivable that one has to raise its voice to operate the submarine? This will be explored.

It will be our position that Lieutenant-Commander Marsaw did, on occasion, rebut some member of his crew but that there was a requirement to do so. It will be our position that Lieutenant-Commander Marsaw never chastise anyone for the mere say of chastising or inflicting personal injury in terms of ill-treatment, mental, or otherwise, or physical. This will be our position throughout this trial and I thank you for your attention, thank you.

JUDGE ADVOCATE: Thank you. We're now at the time where I would ask the prosecution to call it's first witness, but it's a quarter to twelve so I wonder if it would not be better to adjourn for lunch at this time and come back at 1300 hours to start with the first witness. It's your call, Mr President.

PRESIDENT: I wish to adjourn until 1300.

335

JUDGE ADVOCATE: The court is adjourned until 1300 hours.

ADJOURNMENT: At 1145 hours, 26 September 1995, the court adjourns.

REASSEMBLY: At 1300 hours, 26 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Is the prosecution ready to call its first witness?

PROSECUTOR: We are, Mr Judge Advocate. Before I do call my first witness I wonder if I might introduce some exhibits and documents by consent first and get the housekeeping out of the way?

JUDGE ADVOCATE: Very well.

PROSECUTOR: The first document on consent of my friend is a pamphlet called: Welcome Aboard the OJIBWA, and copies are available for the members of the court and yourself as well.

JUDGE ADVOCATE: Thank you. This document is marked Exhibit "G".

PAMPHLET, WELCOME ABOARD HMCS OJIBWA, IS MARKED EXHIBIT "G".

JUDGE ADVOCATE: Copies?

PROSECUTOR: Copies. The next document will be entitled: HMCS OJIBWA, Plan of the Flats as fitted.

JUDGE ADVOCATE: No objection?

DEFENDING OFFICER: No.

JUDGE ADVOCATE: Exhibit "H".

336

DIAGRAM, HMCS OJIBWA - PLAN OF THE FLATS AS FITTED, IS MARKED EXHIBIT "H".

PROSECUTOR: And I have copies as well, Mr Judge Advocate. These are reduced in size but it's the same information. You should also note, Mr Judge Advocate, we have a hard-backed copy of it as well. It will be used as a visual aide by some of the witnesses.

The next document is a drafting called: Partial Main Flat Plan, HMCS OJIBWA.

JUDGE ADVOCATE: If there is any objection, Lieutenant-Colonel Couture, just please let me know.

DEFENDING OFFICER: Absolutely, Mr Judge Advocate.

JUDGE ADVOCATE: Exhibit "I".

DIAGRAM, PARTIAL MAIN FLAT PLAN - HMCS OJIBWA, IS MARKED EXHIBIT "I".

PROSECUTOR: Again, Mr Judge Advocate and Members of the Court, this is on hard-backing as well for visual aide. Another diagram of HMCS OJIBWA Ward-room.

JUDGE ADVOCATE: Exhibit "J".

DIAGRAM, HMCS OJIBWA WARDROOM, IS MARKED EXHIBIT "J".

PROSECUTOR: And again, Mr Judge Advocate and Members of the Court, the same exhibit on hard-backing as a visual aide.

May I consult with my friend just for a second, Mr Judge Advocate?

JUDGE ADVOCATE: Certainly.

PROSECUTOR: Thank you, Mr Judge Advocate. That concludes the documentary evidence at this point

337

in time. I would like to call my first witness if I
may, Lieutenant[N] Hart.

338

Lieutenant(N) Hart

Examination-in-chief

FIRST WITNESS) Lieutenant(N) D. J. HART,
FOR THE) is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Could you give your full name to the court and spell your last name, please? A. Douglas James Hart. H-A-R-T.

Q. And in what year did you join the Canadian Forces? A. 1980.

Q. What=s your current position? A. I=m a watchkeeper in the Maritime Operations Centre.

Q. What year did you become a submariner?
A. In 1989.

Q. And which boats have you been posted to in the past? A. Only the OJIBWA.

Q. And do you recall the commanding officers you=ve served with on the OJIBWA? A. Yes. It would have been Lieutenant-Commander MacDonald, Lieutenant-Commander Davidson and Lieutenant-Commander Bush.

Q. Did you attend a mess dinner in December of 1991? A. Yes, I did.

Q. And could you tell the court where you attended that mess dinner? A. It would have been in the Submarine Squadron.

Q. And where is that located? A. In CFB Halifax.

Q. Can you tell the court the exact date you attended that mess dinner? A. I believe it was December 19th.

339

Lieutenant(N) Hart

Examination-in-chief

Q. What time would you have arrived at the Sub Squadron that evening? A. It would have been approximately 1900.

Q. And do you recall what time you left for home later after the activities were finished? A. At approximately four-thirty a cab was called in, and four-forty-five approximately the cab would have picked me up.

Q. And that would have been the next morning? A. That=s correct.

Q. Just with regard to general location, can you retrace for the court the different locations you went to that evening, starting at where the mess dinner was located and the other places that you went after that? A. From the Submarine Squadron I went to one of the steamers, the in fact steamer I can=t remember. I had a beer on board it and then I proceeded to the OJIBWA.

Q. And after the OJIBWA where did you go?
A. I went home.

Q. Approximately what time do you recall arriving on board the OJIBWA, after the mess dinner?
A. It would have been approximately one o=clock.

Q. Did you go on board with anyone?
A. Yes, it would have been Lieutenant-Commander Craven.

Q. And upon your arrival, how many people were present when you first arrived at the Wardroom?
A. It would have been anywhere from 12 to 15. It was pretty crowded in the Wardroom.

Q. By the time that you left at four-thirty in the morning, how many people would have been present in the Wardroom? A. Maybe eight.

340

Lieutenant(N) Hart

Examination-in-chief

Q. Were seats available in the Wardroom when you first arrived there? A. No. There was standing room only.

Q. How about later on? A. Later on there was. Yes.

Q. Upon your first arrival at the Wardroom, can you recall who was in the Wardroom? A. To the best of my recollection: Lieutenant-Commander Marsaw, Lieutenant-Commander Bush, Lieutenant-Commander Craven who arrived with me, Lieutenant[N] Marr who was the officer of the day, Lieutenant Kelk, Lieutenant[N] Muir, Lieutenant[N] Wamback, Lieutenant[N] Pelletier, Lieutenant[N] Dickinson and Sub-Lieutenant Elford. There were others but I can't remember everybody who was there.

Q. Okay. Upon your arrival at the Wardroom, what were your personal observations of Lieutenant Kelk? A. He was drinking and socializing like everybody else there.

Q. Did he remain that way throughout the evening? A. No, he didn't. At one point he passed out.

PROSECUTOR: If I may, Mr Judge Advocate, I'd like to approach the witness with one of the exhibits?

JUDGE ADVOCATE: Certainly.

PROSECUTOR: I'll just show the witness a copy of Exhibit "J" and ask if he can identify where Kelk was at the point that he had passed out.

WITNESS: He would have been sitting on the settee in this area here.

PROSECUTOR:

341

Lieutenant(N) Hart

Examination-in-chief

Q. That would be referred to in the diagram as settee number one. Can you describe the events that occurred in the Wardroom from the point in time where you noticed that Kelk had passed out? A. Some markers were produced and Kelk=s face and neck were marked on and his shirt was either opened up and pulled up and his torso was marked, his pants were pulled down and his legs were also marked.

Q. Okay, when you say his pants were pulled down, how far down were they pulled? A. It would have been between his knees and his ankles.

Q. Do you recall who was doing the marking?
A. No, I don=t.

Q. After he was marked on, what happened next? A. Okay, at some point after he was marked on, Lieutenant-Commander Marsaw picked up a Tueros cigar tube from the table and reached over, lifted Kelk=s legs up and inserted the cigar tube into his anus. The cigar tube ...

Q. Okay, if I could just stop you at that point. You said a Tueros cigar tube, could you describe the tube? A. Yeah, about five or six inches long, it=s silver and blue.

DEFENDING OFFICER: Mr Judge Advocate, at this point I=d like to raise a question or an objection regarding the matter I discussed earlier in the absence of the court this morning concerning the possible nature of the act that the witness has just described.

JUDGE ADVOCATE: And you want to do that in the absence of the court?

DEFENDING OFFICER: Yes. That will probably be very brief, but it would probably be better if it was done in the absence of the court.

JUDGE ADVOCATE: Very well. Mr President and Members of the Court, I would ask you to withdraw from

342

Lieutenant(N) Hart

Examination-in-chief

the courtroom until you are recalled by the officer of the court.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR: Perhaps it might be appropriate if the witness is excused at this point, Mr Judge Advocate.

JUDGE ADVOCATE: Lieutenant[N] Hart, would you please withdraw from the courtroom.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Go ahead.

DEFENDING OFFICER: Okay. Mr Judge Advocate, at this point ... and I would like to get back to my comments of earlier this morning. When the witness, as this one just did, provides evidence ... and I do appreciate of course that credibility is not yet ... has not been challenged. Nonetheless, when the witness refers to such an act, as he did, of inserting a cigar tube in one=s anus, I would suggest to you that this may very well amount to an act of a sexual assault nature. And again, without discussing the weight or credibility, if by itself this act can amount to that, I would suggest that it may be dangerous to carry on on this subject without making sure that the act is not of a sexual nature or one ... to make sure that this court has jurisdiction to hear this sort of act that has allegedly been done, whether it is called behaved in a disgraceful manner or whether it is called otherwise. If the act is one of a sexual nature, it may very well be that the court doesn=t have jurisdiction. And again, I am more seeking guidance from this court inasmuch as would it be more prudent to hear possibly some more evidence or what else?

343

9th voir dire

JUDGE ADVOCATE: Well, so far, what we have heard is exactly what is in the particulars. So I suspect, and I may only suspect because I haven't read the previous transcript where the other judge was presiding, I suspect that you already raised that matter of lack of jurisdiction at the very beginning of this trial under this very first charge on the Charge Sheet. Is that the case?

DEFENDING OFFICER: Yes, I have.

JUDGE ADVOCATE: Okay. So your only concern at this time is that the court may hear more evidence ... or not more because they haven't heard any before, but that more evidence on this particular aspect may be brought before the court through this witness if we go on with the examination-in-chief in the main trial?

DEFENDING OFFICER: That's correct. And with all respect, Mr Judge Advocate, the Charge Sheet, as I read it, refers to "inserts cigar tube between the buttocks" which, of course, can be I suppose read or interpreted in various fashions, and I suggest that what more we have discovered now that goes beyond the face of the record, the face of the Charge Sheet, is that the cigar tube, according to the witness, would have been inserted in the anus. And I anticipate that the witness will carry on further in this line and will be further descriptive of what anyway he recalls having seen. And that's why I stood up at this point.

JUDGE ADVOCATE: And are you suggesting that I should hear this whole evidence in a **voir dire** before we get back to the main trial with this witness? Is it what you are suggesting?

DEFENDING OFFICER: Essentially. It might be a prudent ...

JUDGE ADVOCATE: I mean, are you suggesting anything else?

344

DEFENDING OFFICER: It is a prudent course of action, I suggest, to enter a **voir dire**, subject of course to my learned friend's comments and, of course, your decision. But again, that is further to my concerns of this morning. I think it is a dangerous area and it might be prudent especially regarding the fact that we're sitting in a General Court Martial that it be done that way.

JUDGE ADVOCATE: Very well.

Mr Prosecutor, what are your views on that?

PROSECUTOR: I think, Mr Judge Advocate, my friend either has a motion or he doesn't have a motion. He can't stand up now for the third time and try to bounce it in your court without any guidance at all as to how this matter should be resolved. If he keeps on raising it to your attention or the previous judge advocate's attention without making a motion it doesn't assist the court in any way. By bouncing it to your attention - how do you resolve it? You can't call the witnesses. It's not my motion. Why should I have to call the evidence out? Why is it done in a **voir dire**? If it is done in a **voir dire**, you will need all the witnesses here to look at the surrounding circumstances in which the act took place. As my friend's aware, two of the witnesses are on operational duties right now. One will be flown in from Cape Canaveral or somewhere in Florida on the 5th of October, the other one is in the Persian Gulf on a ship that won't reach a port until the 29th of October. My friend has already known about this. If we're going to deal with the **voir dire** and we're going to have to call the witnesses in, I guess we could stand everything down right now.

JUDGE ADVOCATE: And we won't do that. We will proceed with this trial - I can assure you.

Now, I understood your warning of this morning, Lieutenant-Colonel Couture, but what I'm not too sure at this time of your intentions. Is that ...

345

What do you exactly want the court to do at this time?

I mean, you are afraid that some evidence that should not be heard by the court be heard by the court, and you wish the court to hear this evidence before and decide on the matter. But I don't want you to make the same application every time there is a witness that comes into this courtroom. I hope you understand me on that.

DEFENDING OFFICER: That's why I'm raising it now.

JUDGE ADVOCATE: Okay, but if you raise it now, I mean ... there are two ways of doing it. As your friend mentioned, one of those ways would be that I hear the evidence given by this witness and I decide on its admissibility. The other manner would be that you object to its admissibility and you do that within a particular motion, which is a motion attacking the jurisdiction of the court. And I would like ... where do you stand on that? Because if it is what you intend to do, we'll proceed differently. Perhaps you should inform me at this point, when you raised that motion at the very beginning, was any evidence heard?

DEFENDING OFFICER: No. There was no evidence heard.

JUDGE ADVOCATE: Just on the face of the Charge Sheet?

DEFENDING OFFICER: That's right.

JUDGE ADVOCATE: Okay. Go ahead.

DEFENDING OFFICER: And the concern I'm expressing, for example, I cannot formulate a valid objection for example to the irrelevancy of the question because as it is presented ... I'm not saying that it is not admissible because clearly as it is presented it appears to be admissible, very clearly so indeed to charges one and two. So I don't have a valid objection

346

to formulate on the question. The witness claims he observed the events and they are, I will admit, should they be believed, quite relevant to charges one and two. The problem is, is that evidence and what more is coming from this witness, is that evidence going to lead you to believe or form a decision that the act described is one of a sexual assault nature, in which case it might be ruled that the court doesn't have jurisdiction to hear that by virtue of section 70 of the **National Defence Act**. Should such a ruling be made either at the end of this witness or, for example, if it took so long as ten witnesses in front of this court before such a ruling be made, the court would have heard mounds of evidence which would appear and tend to be prejudicial to the accused on the matter which, at the end, is not of their jurisdiction.

JUDGE ADVOCATE: Yes, but how do you suggest we proceed then - we hear all of them before?

DEFENDING OFFICER: I suggest that possibly this witness could finish his testimony in direct-examination to see how much more he will say.

JUDGE ADVOCATE: Without testifying first in a **voir dire**?

DEFENDING OFFICER: No, no, in a **voir dire**.

JUDGE ADVOCATE: In a **voir dire**, okay.

DEFENDING OFFICER: That's correct. And then we will take it from there. I don't know how much my learned friend wants to call in terms of ... he refers to some witnesses not being available. I do believe, my own assessment of the evidence and the witnesses that are available to the prosecution now ... I do understand that the prosecution is ready at this point to call up to four witnesses and that would leave approximately two ... and that would leave so many anyway. I suggest to you that if you needed to hear up to four witnesses, there are four witnesses available

347

now. And maybe that would allow you to make a determination on this matter.

JUDGE ADVOCATE: I follow you. I have no problem with that. My problem is the procedure because if it is a motion that you make the procedure will be different. This witness will become your witness. So are you making one or are we in the dark? I mean, is it a fishing expedition to the effect that you don't know what this witness will come and say, and it's only after that that you will decide if you have an application or not to make? Is it that the scenario? Or do you already know in advance? Because I suspect that you have interviewed this witness before and you have a good idea of what he will say. If such is the case, do you have an application to make? Because, do you understand that the procedures will be different? That's what I trying to clarify at this point.

DEFENDING OFFICER: Uh, huh. Of course I do know what the witness is going to say, and it is not a fishing expedition. So it's not a fantasy of myself to go into a **voir dire**.

JUDGE ADVOCATE: So that's what I thought.

DEFENDING OFFICER: As to am I making a motion ... and maybe that's where my view digresses from possibly at least my learned friend and even possibly yours. As stated this morning, I rely on the case law of **Ryan** and it is our position that if, as stated in **Ryan**, if a matter of jurisdiction is properly raised ... and Colonel Brais in our application in December 1994 had considered it ... it's not binding on you of course ... had considered then that it had been properly raised but he didn't have evidence so he carried on. Today, I submit to you, that we are properly raising a matter of jurisdiction and then that it would be incumbent on the court to ascertain its jurisdiction. In terms of procedure now, if it was your desire to ascertain your jurisdiction on this matter, who should you call upon to establish that jurisdic-

348

tion, that that jurisdiction exists? Should you be calling upon the prosecution who is bringing the case forward? Or should it be upon the accused to essentially disprove the presence of jurisdiction? And in that regard I rely again on **Ryan** which, where I read that it would be for the prosecution to establish, satisfy the court that the court has jurisdiction over the offence alleged, and more particularly at page 469, I believe it was to which I referred you this morning, the comments from Mr Justice Marseau, I believe it was, to the effect that it would not be fair to force an accused to disprove the existence of jurisdiction.

JUDGE ADVOCATE: Yes, I follow you on that and I follow the parallel that you make with the **Ryan** decision. But as you properly said, **Ryan** was dealing with a nexus, I mean the Court Martial Appeal Court was dealing with a nexus, military nexus. So although at the same time it deals with jurisdiction, what I mean by that is that of course nexus affects jurisdiction. The same way here if it were a sexual assault, it would affect jurisdiction. But my problem here is that that matter of a "disguised" sexual assault, as far as the first and second charges are concerned, has already been dealt with. It's been decided that they are not sexual assault charges by the former judge advocate, and that because of that, that this court had jurisdiction. If, in order to be more catholic than the Pope, you want that I hear this whole evidence ... I mean, I'm referring only to this witness, Lieutenant[N] Hart's evidence, into a **voir dire** - I'm ready to do it.

I won't consider it as an application at this time, and I'm ready to go through it and satisfy myself that we're not getting into any type of trouble if this same evidence is heard by the full court afterwards. But it would only be for that purpose. You know, what I'm afraid you will come with is that I don't want to be placed in the position where I will have to make another decision on the same matter that was made by the former judge advocate. And I don't want to do that because that matter had been dealt with.

349

DEFENDING OFFICER: If I may, Mr Judge Advocate. I gave to you this morning a copy of the decision of Colonel Brais in the matter, and as you may recall ... I forget the exact number of the page, but it was the very last paragraph of the page before last, the learned judge advocate was stating that in the absence of evidence he was not prepared at this stage.

And that was the purpose of this so-called warning of mine this morning to appraise you of that. I interpreted, and still interpret, this passage of Colonel Brais' decision to mean that he was prepared, should the need arise as in the course of the evidence, to intervene as need it be. Having stated, he said: Okay, you made an objection to jurisdiction, I don't have evidence in front of me. At this stage I cannot ... and that was my interpretation that he had left the door open should ... that's my interpretation of course, those words are not found in the decision, but I read it to say: Should it be that later in the course of the trial evidence comes out that indicates that it is - we will deal with it then. That's what I read, properly or not, in this decision. And in my mind, if Colonel Brais was there, of course he would know of his previous decision and that's why I wanted to bring it to your attention.

JUDGE ADVOCATE: I clearly understand what you're doing now. I mean ... You really want me to go through this evidence, hear it all at least as far as what this witness has to say, and then make the same type of decision that Colonel Brais did before. It's exactly the same point. I mean ... But this time you want to go through the evidence instead of doing it on the face of the Charge Sheet?

DEFENDING OFFICER: Essentially.

JUDGE ADVOCATE: And you expect a decision from me at the end of this **voir dire** as to the admissibility of this evidence to the effect that - does this court have jurisdiction or not to hear this matter in

350

view now of the evidence that is presented to the court.

Mr Prosecutor?

PROSECUTOR: The first thing, Mr Judge Advocate, I would have to respectfully oppose that suggested procedure. Unless we deal with all the so-called cigar-tube witnesses, or people that Lieutenant-Commander Marsaw has spoken to that weren't in the room at that time, you will not have all the evidence before you to make that decision. If you do not have all the evidence before you to make this decision finally one way or the other, then the opportunity will always arise for the jack-in-the-box to pop up again and this court having to deal with the issue again as another witness comes and another witness testifies.

This whole proceeding has been subjected to numerous adjournments, motions, delays. I was quite hopeful that once I got to the point that I could make my opening and call my first witness, we'd have smooth sailing. It's evident that we will not. And as a consequence of that I have no confidence that by simply calling one witness ... I'm not even sure who would lead and who would cross or who would ask questions, that this matter can be dealt with conclusively for the remainder of this trial. Even if you did decide to listen simply to Hart, I would like to call evidence as well, to put other witnesses before this court so you have a better understanding for the surrounding circumstances which you would need to have anyway, in the decision of **Chase** for the definition of sexual assault, as well as witnesses who weren't in the Wardroom but did speak to Lieutenant-Commander Marsaw who made statements to them concerning his intent that evening or the lack thereof. So I don't think we can get this matter fixed quickly by simply calling Hart and having a ruling on it.

In addition to all that, let's assume that the evidence does support a **prima facie** case of sexual assault. Where is the evidence that the discretion of

351

the prosecution, the commanding officer and the convening authority has been improperly used? Even if we spend the next three days calling witnesses, it may be for nothing if the evidence also shows that there were a variety of other charges that could have been laid based upon those facts: disgraceful conduct, assault and other forms of 129. So perhaps it might be best to see if there is, in fact, any evidence of commanding officer, convening authority or prosecutorial impropriety in the exercise of the discretion. If there isn't, then I think the case law says that the matter is a non-issue. Maybe it does reveal a sexual assault and maybe it doesn't, but it clearly is evidence which supports the laying of the charge for disgraceful conduct.

So I would like to be helpful, at the same time I'd like to do so in a way that puts this issue in the grave once and for all, I guess. Thank you.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, if I may and if it may be of assistance, I know I have had several occasions to express myself. If it can be of any assistance to you, I understand some of the concerns of the prosecution and I can assure you that it is not our intent to attempt to even unduly delay these proceedings. At the same time, because of the nature of the decision rendered by Colonel Brais with those famous words, especially "at this stage", I felt and I still feel and that's why I'm doing it, compelled to bring it to your attention so that ... I don't want to prejudge your decision, I don't want to use you as an appeal court it is clear, I don't want to delay the prosecution's case. I simply do not want any instances who might review this matter to conclude that after the decision, not having for example informed you or intervened to try to avoid a situation that might result possibly ... and again I say very possibly in a mistrial, that the accused has consented or so on and so forth. So all I'm doing here is I'm playing with let's

352

say an abundance of caution so that it can not be said that the defence has contributed or waived any of its rights. And it is, I know, for you at the end of the day to decide.

JUDGE ADVOCATE: I clearly understand that. But I mean, will you raise the same concern every time a witness will come in this courtroom and testify on this matter?

DEFENDING OFFICER: No. I think I have raised it fairly clearly enough now that I will, of course as always, go with your ruling. And if you determine that you're satisfied, you don't have the same concern as I do have, that's fine. And then we will carry on and that's it. I will not raise it because it is our position that this witness gives a pretty complete story, like again without any consideration to weight, but he gives a pretty good story of what took place there, and so many other witnesses will corroborate possibly certain aspects of it and so on and so forth. So I suggest that this witness is particularly important and if, after this witness, you say: Well I have no problem with this, well it will be difficult for me to claim that we have problems with others because others may not even be as explicate as he is.

JUDGE ADVOCATE: Very well. I am ready to make my decision. I will hear the evidence of this witness in a **voir dire**. We will hear what he has to say and if I have any decision to take after this testimony I'll do it. Please call back the witness, Lieutenant[N] Hart.

He's still your witness, Mr Prosecutor.

TRIAL WITHIN A TRIAL

353

Trial within a trial

Lieutenant(N) Hart

Examination-in-chief

FIRST WITNESS) Lieutenant(N) D. J. HART.
 FOR THE)
 PROSECUTION)

JUDGE ADVOCATE: Welcome back. You may be seated. This court is now sitting in a **voir dire**, that means that we are sitting in a trial within a trial to decide a matter of admissibility. So you will testify under the same oath that you have taken previously.

WITNESS: Yes, sir.

DEFENDING OFFICER: Mr Judge Advocate, I would have no objection that we incorporate into the **voir dire** the previous portion if my learned friend wants, or if he wants to start from the beginning - whatever.

PROSECUTOR: I'm all in favour of making this go as quickly as possible.

JUDGE ADVOCATE: Very well. So we will incorporate in this **voir dire** everything that has been already said by the witness in the main trial.

PROSECUTOR: Okay. I'll just start out by leading a bit, I don't think my friend is going to object, so that we come back to the point where we were when we left off.

EXAMINED BY PROSECUTOR

Q. As confusing as it might be, Lieutenant[N] Hart, you're now back here still under the same oath. Before you left you were testifying to the fact that you observed, I believe, Lieutenant-Commander Marsaw pick up a Tueros cigar tube off the table and you had described how he had inserted it into the anus of Kelk. I wonder if you can just describe the scenario starting from the point where Lieutenant-Commander Marsaw picks up the cigar tube? A. Okay. Can I point at the diagram?

354

Trial within a trial

Lieutenant(N) Hart

Examination-in-chief

Q. Certainly. And you had previously testified that Kelk was passed out on number one settee?

A. The settee here. Lieutenant-Commander Marsaw would have been sitting on the settee here.

Q. That would be settee number three?

A. Settee number three. He would have taken the tube off the table, reached over, lifted Kelk's legs up and then inserted the tube into his anus when he was lying on the settee number one.

Q. Okay. After he did that, what happened next? A. Kelk rolled over and the cigar tube came out, and Marsaw reached forward, lifted Kelk's legs again and reinserted the cigar tube.

Q. Can you describe how he inserted the cigar tube the second time? A. Much in the same manner as the first time.

Q. Okay. A. Lifted his legs and pushed it in.

Q. How far away were you from Kelk at this point? A. I would have been sitting up in the area towards the forward part of settee number two, up around the desk. So it would have been approximately eight feet.

Q. Was there anything between you and Kelk, anything between your view? A. Nothing to obstruct my view. No.

Q. At the moment that the cigar tube was inserted, who was present in the Wardroom? A. In the Wardroom at that time, I can't once again recall everybody that was there, but to the best of my recollection: Lieutenant-Commander Craven, Sub-Lieutenant Elford, Lieutenant[N] Dickinson, Lieutenant[N] Muir, Sub-Lieutenant Elford, myself. That's to the best of my recollection who I can recall was there.

355

Trial within a trial

Lieutenant(N) Hart

Examination-in-chief

Q. Would you look around the courtroom and see if you see Lieutenant-Commander Marsaw today?

A. Yes, I do.

Q. Can you identify him by pointing towards him or indicating where he is sitting? A. Yes. He's between the two army officers, right over here.

JUDGE ADVOCATE: The witness indicates the accused.

PROSECUTOR:

Q. I believe you had previously mentioned that earlier on in the evening a number of other individuals were present? A. Yes.

Q. Do you recall if Commander Bush was present in the room at that time? A. I don't believe he was. I think he had left for home at that time or before the incident.

Q. Upon viewing Lieutenant-Commander Marsaw insert the cigar tube, what was your personal reaction?

A. I was a little shocked and put off by it.

Q. Why? A. Well, I had never seen anything like that before and I thought it had crossed the line.

Q. Okay. What was your understanding of Lieutenant-Commander Marsaw's position at that time?

A. I don't understand the question.

Q. What appointment did he hold? A. Well he was the commanding officer of the submarine.

Q. Was there any discussions occurring prior to the insertion of the cigar tube by Lieutenant-Commander Marsaw or anyone else? A. Not that I'm aware of.

356

Trial within a trial

Lieutenant(N) Hart

Examination-in-chief

PROSECUTOR: Again, Mr Judge Advocate, I'm at a difficult point in questioning this witness through direct-examination, given the purpose of this **voir dire**, and I'm wondering if I can get a little latitude?

JUDGE ADVOCATE: Well from what I understand from the defence, they wish the court, I mean the judge advocate, to hear a description of the acts that were allegedly performed by the accused.

That's mainly what you're looking for, Lieutenant-Colonel Couture?

DEFENDING OFFICER: Uh, huh. And we've heard them.

JUDGE ADVOCATE: And we've heard it.

PROSECUTOR: We can stop there, I suppose, and make our submissions.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: Subject to maybe one question on my part?

JUDGE ADVOCATE: Very well. Go ahead.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Lieutenant[N] Hart, you stated that the tube was inserted in Lieutenant Kelk's anus, did you?

A. Yes, I did.

Q. How much of it was inserted there?

A. The exact amount I can't say. I'd say at least three-quarters of it.

Q. At least three-quarters of it. And could you describe for the court or tell the court the approximate length of one of those tubes? A. Five to six inches, about the size of the length of a pen.

357

Trial within a trial

Lieutenant(N) Hart

Cross-examination

PROSECUTOR: Perhaps I could have some re-direct?

JUDGE ADVOCATE: My pen?

WITNESS: Yes, and it would be a little fatter than your pen.

JUDGE ADVOCATE: Thank you.

Re-direct?

RE-EXAMINED BY PROSECUTOR

Q. Okay, when you said it was, I believe it was, I'm not sure how many inches did you believe it was inserted? A. Approximately three-quarters of the length of the tube, it was about four and a half inches.

Q. So do you mean to say that four and a half inches actually penetrated or that was the length of tubing that was between the buttocks? A. That was approximately the length of the tubing that was between the buttocks.

PROSECUTOR: Okay. Thank you.

JUDGE ADVOCATE: Thank you. You may withdraw from the courtroom.

WITNESS WITHDRAWS

JUDGE ADVOCATE: Mr Couture, do you wish to address on that? Do you have any objections as to the admissibility of this evidence?

DEFENDING OFFICER: No. I mean the admissibility ... the evidence is admissible in relation to charges one and two. I will concede that much. The question now that arises is whether that evidence

358

Trial within a trial

Lieutenant(N) Hart

Re-examination

discloses or is capable of disclosing, having considered the weight, is capable of disclosing an offence of a sexual nature. And if it is so, then the question arises whether that matter ... or if this particular court martial should I say, has jurisdiction to hear any evidence regarding the first two charges which would, as I said, tend to demonstrate an act of a sexual nature, sexual assault, having regard to the provision of section 70 of the **National Defence Act**.

This morning ... we will not go through all the cases, but this morning I did refer you to the case of **Aubut** and I can make those cases available to you should you so desire.

JUDGE ADVOCATE: Before you go there, what difference do you see at this stage with the decision that Judge Brais had to render?

DEFENDING OFFICER: The difference is that Judge Brais rendered the decision in the absence of any evidence whatsoever. He, in fact, as it is stated in his decision, he did not look at the synopsis, he even had looked at the synopsis for another purpose, but he erased all that from his mind and for the purpose of that motion did not consider any information that was contained in the synopsis. So he rendered his decision on the basis of argument and the face of the record, i.e., the Charge Sheet.

JUDGE ADVOCATE: I understand that. But what I mean by that is what more do you have in this testimony, as far as evidence is concerned, than Judge Brais had to make his decision?

DEFENDING OFFICER: I would say the testimony of Lieutenant[N] Hart which indicates that a cigar tube was indeed placed or inserted in the anus of the alleged victim to a degree that varies approximately, I'm not sure, three-quarters of it was out, I believe, or one-quarter of it in of the six inches ... anywhere between three-quarters of an inch and an inch and a

359

Trial within a trial

Defending Officer

Address

half, presumably would have penetrated the anus of the individual. That Justice Brais, or Judge Brais, didn't have. That can, in our submission, very well be seen as constituting a ... to use the expression in **Chase**, a violation of one's sexual ...

PROSECUTOR: Integrity.

DEFENDING OFFICER: Integrity is the word. And for that reason this is much more than Judge Brais had and if the sexual integrity has been violated, as indicated in the case of **Chase**, it is not necessary that ... there is no need to have a sexual desire on the part of the author of the act and that all the criteria given in **Chase** as a matter of fact are only factors, as far as I read in the decision of **Chase**, no formal definition of sexual assault has been given but they have given guidance. And I suggest that within that guidance the violation of one's sexual integrity is an important factor. Of course they also state that we must look at all other circumstances. And in the particular case of **Chase**, of course as you know, the accused had only touched the breast of the complainant, then had gone to touch her more private part which she prevented him from doing. And in that particular case there were words as well that were pronounced. So in **Chase** they decided that the words and the touching of the breasts in those instances combined to make it a sexual assault, not to mean or to say that words will always be necessary so that a case of sexual assault can be made, nor the intent of a sexual ... of indulging in sexual matters from the part of the accused be required either.

So for all those factors, I suggest to you that that's what we have more or that's what you have more than Mr Judge Brais had in December 1994.

Did you want to hear more?

JUDGE ADVOCATE: You say when it's finished or not.

360

Trial within a trial

Defending Officer

Address

DEFENDING OFFICER: Okay, I'll talk about prosecutorial discretion then. My learned friend has indicated earlier that in this little debate that we had called no evidence of bad faith or something, bad faith, indifference, abuse of process, that sort of thing. I suggest to you that it is not necessary, it is not a factor that is relevant in the present consideration. And in stating that I'd like to refer you to some of the cases I mentioned this morning, and again I will try to make those available to you. I know there is, for example, the decision of the CMAC in **Lunn** where we talk about for example prosecutorial discretion, independence, impartiality and all that. And in this particular case the CMAC refers to the case of **Balderstone**, and I will provide copies if you so require. **Balderstone**, where the prosecutorial discretion was discussed by the Manitoba Appeal Court and a motion to quash an indictment was rejected at first level and went to the Manitoba Appeal Court. Essentially the court said: Well, there's nothing wrong. There's no evidence and counsel for the applicant conceded there was no bad faith, etcetera. And after a rather complete review of the law the court decides that - no, not only was there anything wrong on the part of the prosecution to do what they did, but the authority exists right in the **Criminal Code**, they have authority to prefer indictment. This is a very important factor.

Another case, and I will procure you with the full text as required, **Wigglesworth**, was a matter of an RCMP officer who was tried by his disciplinary committee and then was also charged downtown. Now it must be kept in mind that there is a difference, I believe, between the procedure of the RCMP which, I believe at this point tends to be more of an administrative nature, and those of the court martial where an accused is liable, depending on the nature of the case, to imprisonment for a long time, up to 14 years in certain cases and so on and so forth. Therefore, the fact that a court accepts that two jurisdictions do not necessarily conflict, it is not in our view determinant in this

361

Trial within a trial

Defending Officer

Address

case, especially in light of course of the fact that section 70 does provide.

The case of **Balderstone**, I was referring to earlier, the court ... and that was an interesting extract, at page 535 of that case, the court talking about prosecutorial discretion states:

"Once again the matter will have to be disposed of by the highest tribunal in the land. To grant the thousands of individual judges in this country the right to stay proceedings duly instituted by the Crown in the proper exercise of its accusatorial function, is a matter of too much importance to be done without specific pronouncement and guidelines from the highest tribunal of the land or from Parliament by legislative pronouncement."

What I suggest to you, Mr Judge Advocate, is that in this, in our case, in the case of the **National Defence Act**, we have had a Parliament legislative pronouncement. The Canadian Parliament has chosen by way of section 70 of the **National Defence Act** to take away from the military jurisdiction over certain types of offences, such as murder, manslaughter, sexual assault and possibly a couple more, whilst committed in Canada. In that respect, then Colonel Boutet in the case of **Tamblyn**, which I alluded to this morning, and again I can make the case available to you, was stating it is not for me to decide whether this is correct or not, it is a provision that exists and I am bound by law that if I see that it is this act which was charged, I believe under section 85, is one that amounts to sexual assault, whether I agree with the propriety of removing this from the military, I have no choice but to grant the application. And that's essentially our position. This argument and this debate does have little to do

362

Trial within a trial

Prosecutor

Address

with for that matter my own views on the subject. Whether it's right or right [sic], whether the military should have the powers to do this or that, but I do believe though that this guidance from the Canadian legislative Parliament referred to in **Balderstone**, has been given to the Canadian Forces in the **National Defence Act**, and I suggest that to that extent it is binding and that other cases that relate to prosecutorial discretion must be distinguished from this for basically those reasons I just alluded to. In one case the Crown, the downtown prosecutor, as we refer to him sometimes, has ... of course, there is a body of law to say that he has prosecutorial discretion, he has common law discretion authority, he has **Criminal Code** authority given to him. What do we have in the **National Defence Act** that is the same? Little. And too, to the contrary, we have section 70 that tends to limit jurisdiction which to an extent limits discretion that may be exercised by the prosecution. Those are my comments.

JUDGE ADVOCATE: Thank you.

Mr Prosecutor?

PROSECUTOR: The prosecution doesn't have any issue at all with the defence making this motion if they truly believe that if we prove the facts beyond any reasonable doubt that Lieutenant-Commander Marsaw would not have performed disgraceful conduct but would have sexually assaulted Lieutenant Kelk and therefore the court doesn't have jurisdiction to continue hearing the matter - that's fine. We don't have any difficulty with them making that motion at all, if that's what they want to do. The only comment we would have from the prosecution side of the house is that if we are going to deal with this motion - let's deal with it fully. Let's hear all the evidence from all the relevant witnesses that both sides want to call and let's make full legal argument on that point. Right now my friend is referring to cases. We don't have them. We can dust off our files that we used last December to

363

Trial within a trial

Prosecutor

Address

argue this same point again and refresh ourselves with the case law, call any evidence we choose and then make our presentation. So the difficulty we have at this point in time is you don't have all the evidence before you.

At this point probably the most significant piece of evidence is not what came from Lieutenant[N] Hart but the Charge Sheet. Based on the wording of section 70 of the **NDA**, we don't have jurisdiction to deal with offences where people have been charged with sexual assault. The Charge Sheet doesn't show a charge of sexual assault at all, the court has jurisdiction - let's continue. If you have doubts otherwise, then let's have a full hearing of this before we go any further down the road. Thank you.

JUDGE ADVOCATE: Thank you.

Mr Defending Officer, you gave me this morning Judge Brais' decision, I guess?

DEFENDING OFFICER: Yes, I did, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. Then I should have it in my chambers. Do you have your other cases here that you want me to ...

DEFENDING OFFICER: If I may take just 30 seconds after you have left the courtroom and I will send it through the court reporter.

JUDGE ADVOCATE: Very well. So the court is closed to consider its decision on this matter.

AT 1410 HOURS, 26 SEPTEMBER 1995, THE COURT CLOSES TO DETERMINE RULING.

AT 1520 HOURS, 26 SEPTEMBER 1995, THE COURT RE-OPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: You may be seated.

The purpose of this **voir dire** is to determine if this court has jurisdiction to hear charges number one and two before this court. The defence, who has already plead in bar of trial before another judge advocate at the beginning of this trial that this court had no jurisdiction to hear these two charges because they represented a "disguised sexual offence" now argues that this same matter should be revisited by this judge advocate because the evidence is now different from the evidence presented to the former judge advocate.

The evidence before this court in this **voir dire** is contained in the testimony of Lieutenant[N] Hart who described the acts allegedly done by the accused to Lieutenant Kelk on December 20th, 1991.

Section 70 of the **National Defence Act** provides in part as follows:

"A service tribunal shall not try any person charged with any of the following offences committed in Canada:

(c) sexual assault"

Very clearly, then, a General Court Martial cannot try a person charged with sexual assault committed in Canada.

Without deciding if the act allegedly committed by Lieutenant-Commander Marsaw constitutes or not a sexual assault on the person of Lieutenant Kelk, it is important to precise that a single action can be the foundation for more than one charge. As stated by Madame Justice Wilson in **R. v. Wigglesworth**, (1987) 2 S.C.R. 541 at page 566, and I quote:

Judge Advocate

Decision

"A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public ... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example, a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the State; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the State for his crime; to the victim for the damage he caused, and to the police force for discipline."

There is no doubt that the Canadian Forces through the accused's commanding officer, the convening authority and in turn through the prosecutor have a wide amount of discretion in the carriage of offences against the Code of Service Discipline as in the case of civilians, the Crown, through the Attorney General, and in turn through his or her prosecutors, has a wide amount of discretion in the carriage of criminal cases.

As stated by Madam Justice L'Heureux-Dubé, in **R. v. T. (V.)**, 71 C.C.C. 32 at page 38 and 39, and I quote:

Judge Advocate

Decision

"Obviously, the manner in which the Attorney-General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable, but that again is foreign to the determination of the question now under consideration. Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power. The following statements made in *R. v. Court of the Sessions of the Peace et al., Ex p. Lafleur*, [1967] 3 C.C.C. 244 at p. 248, by Montgomery, J., with the concurrence of Tremblay, C.J.Q., and Pratte, J., are to the point and I adopt them.

'I cannot conceive a system of enforcing the law where someone in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence. Inevitably, there will be cases where one man is prosecuted while another man, perhaps equally guilty, goes free. A single act, or series of acts, may render a person liable to prosecution in more than one charge, and someone must decide what charges are to be laid.'

And further at page 39, and I quote:

Judge Advocate

Decision

"The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice.

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on."

In the case at bar, the prosecution has decided in its discretion, to lay charges against the Code of Service Discipline for disgraceful behaviour and assault. Those offences are less serious offences than sexual assault offences. There is no evidence of injustice for the accused and there is no evidence that the prosecution used its discretion in order to circumvent the provisions of section 70 of the **National Defence Act**.

There might be many reasons why the prosecution decided to proceed under the Code of Service Discipline rather than to refer the case to civil authorities and it is not to this court to interfere with this decision.

For all these reasons, this court is satisfied that the prosecution acted in good faith and within its discretion when it was decided to charge Lieutenant-Commander Marsaw under the provisions of the Code of Service Discipline. Charges number one and two before this court are within the jurisdiction of this

368

Trial within a trial

Judge Advocate

Decision

court and it is this court's ruling that the trial must proceed on the charges laid on Exhibit "A".

This application is therefore denied.

TRIAL WITHIN A TRIAL IS TERMINATED

JUDGE ADVOCATE: Unless there is any other application to be heard by me at this time I propose to adjourn the proceedings until nine o'clock tomorrow morning.

DEFENDING OFFICER: There's no application on my part.

PROSECUTOR: None, sir.

JUDGE ADVOCATE: Very well. This court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1530 hours, 26 September 1995, the court adjourns.

REASSEMBLY: At 0922 hours, 28 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott, should we call the members back to the courtroom?

DEFENDING OFFICER: Mr Judge Advocate, before we do, I would like to appraise the court of a situation. I have discussed with my learned friend this morning and informed him that I had some transcripts of interviews that have been conducted with witnesses in the course of the investigation. My learned friend would like to review those and I will admit that I informed him of this fact only this morning. He is about to seek an adjournment of he will tell you how long so that he and the witness have a chance to look at the transcript.

369

To make you understand better, those transcripts are produced from videotaped interviews, so the purpose of this adjournment that my learned colleague is about to ask for is to have the witness to confirm the accuracy and in such a case, of course, that would be likely of saving a lot of time for the rest of the trial as if there was any debate about the transcript we would have to have recourse to the video tape all the time in the course of the trial. So there are so many transcripts that will be so provided to the prosecution and in order to speed up the process, there will be apparently an agreement on the gist and the accuracy of the statement which will later on as the trial unfolds refrain from having to go back to video tapes all the time, if the matter arises in terms of refreshing memory or otherwise.

JUDGE ADVOCATE: Very well. Major Abbott?

PROSECUTOR: I think what my friend said is accurate, like going this route we should in a long term save the court much time although it will cause a short term immediate delay. What I propose it that my friend undertakes to provide me with all the transcripts that he has in his possession as well as the other ones he might produce as this trial unfolds. I will give them to the witnesses immediately upon receiving them, noting that some of the witnesses aren't in the Halifax area. So I undertake to get them ... the transcript to them as soon as possible, have them review it for accuracy. If there is any inconsistencies between the transcript and the video tapes, I'll confirm formally with Lieutenant-Colonel Couture and we'll try to agree on an accurate transcript.

This in a long run will save the court time during the trial. In a short term, however, I understand the first two witnesses, they do indeed have transcripts. I propose that the court stands down at least until one o'clock this afternoon so both witnesses could have a chance to review the transcript in relation to the video tape to determine whether or not

370

it is accurate. Once that has been done and then we can then proceed by recalling Lieutenant[N] Hart followed by Lieutenant-Commander Craven. I would say I propose a stand down at least until one. It may take longer for Lieutenant[N] Hart to review his transcript depending on the length of the interview and the quality of the transcript, thank you.

JUDGE ADVOCATE: Very well, in these circumstances and if it is for the sake of saving lots of time throughout this trial, this court will agree with the request made by parties and will adjourn the proceedings until 1300 hours.

PROSECUTOR: I wonder if, Mr Judge Advocate, Lieutenant[N] Hart could be brought back in the room and perhaps since he is under oath, maybe if you could explain to him on the record the purpose for the stand down and the request to have him review the transcript that he will subsequently ...

JUDGE ADVOCATE: Do counsel have any objection that the witness that is actually on the stand has the possibility to review the transcript of his interview also?

DEFENDING OFFICER: No, I do not. This is the purpose of this. It's to save time. So, I'm quite prepared to consent to that. You may instruct, if you feel appropriate, the witness that he is entitled to retire and view the transcript and video.

JUDGE ADVOCATE: You agree that he can do it at this time before proceeding on with the examination-in-chief and the cross-examination?

DEFENDING OFFICER: That's correct, sir.

JUDGE ADVOCATE: Would you call the witness back, please.

371

Lieutenant(N) Hart

FIRST WITNESS) Lieutenant(N) Hart.
FOR THE)
PROSECUTION)

JUDGE ADVOCATE: Lieutenant[N] Hart, there has been an agreement among counsel to the effect that you will be allowed to - you and other witnesses but I am referring to you right now - you will be allowed to review a transcript of an interview you have given previously for the purpose of determining accuracy of that transcript. So counsel will take the necessary steps to provide you with the necessary instruments to review the transcript and compare it with the interview. I would ask you to do so and for that purpose I have granted an adjournment until 1300 hours this afternoon. If it is not sufficient counsel will request a longer period of time to do it. Is that OK?

WITNESS: Yes, sir.

JUDGE ADVOCATE: Thank you. The court is adjourned until 1300 hours.

ADJOURNMENT: At 0930 hours, 27 September 1995, the court adjourns.

REASSEMBLY: At 1305 hours, 27 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Good afternoon, I understand that one of the counsel has a request to make?

DEFENDING OFFICER: Who ever makes it, Mr Judge Advocate. The prosecutor has informed me that the witness Hart has reviewed the transcript and apparently there would be some discrepancies that he is still dressing. This will take a little while to do. It is suggested that it might be in order to resume with certainty of then being able to proceed tomorrow morning. I have no disagreement with that and he will surely confirm his position to you. I believe that it

372

would be in order to do that because it will set the tone obviously for a faster pace after that. All transcripts have been produced and if we have the witness going through this exercise out of court it will make the proceedings in court much more faster than expected.

JUDGE ADVOCATE: But are you doing the same thing with the other transcripts? Are you taking steps actually to the effect that other witnesses will start reviewing the transcripts?

DEFENDING OFFICER: Steps, as far as I know, Mr Judge Advocate, have been taken by the prosecutor and I'm sure he will be in position to confirm that.

JUDGE ADVOCATE: Very well. Major Abbott.

PROSECUTOR: Mr Judge Advocate, the witnesses, Lieutenant[N] Hart and Lieutenant-Commander Craven, do have a copy of their transcripts. Hart has just finished reviewing his. There is a number of discrepancies although he has identified them on the transcript. Craven has reviewed it quickly and again found numerous discrepancies. Both witnesses are making their changes in pencil on the transcript. They'll then be sent over the defence counsel to see if they are in agreement or consensus with the amended transcript. If they are then we can proceed calling the witnesses.

Practically speaking I don't think the earlier start time that we see would be 0930 tomorrow morning. At the same time there is another six transcripts which are on their way of going to five other witnesses as one of the transcripts belongs to a witness which is in the Persian Gulf and it won't be able to get to him for quite some time. We're doing all we can at this point and time to make sure that the transcripts are in the hands of all other witnesses and they're reviewing them as of today. Hopefully, there won't be anymore delays.

373

JUDGE ADVOCATE: So you expect to be in a position to proceed tomorrow morning at 0930?

PROSECUTOR: I expect to be, yes.

JUDGE ADVOCATE: Very well, this court is adjourned until 0930 tomorrow morning.

ADJOURNMENT: At 1308 hours, 27 September 1995, the court adjourns.

REASSEMBLY: At 0930 hours, 28 September 1995, the court reassembles and the accused is before it.

PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Good morning, Mr President and Members. According to my information we should be able to receive the testimony of Lieutenant[N] Hart. Would you call the witness back to his chair please.

s.19(1)

Lieutenant(N) Hart

Examination-in-chief

FIRST WITNESS) Lieutenant(N) Hart.
FOR THE)
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Lieutenant[N] Hart, it has been a while since you were testifying before the entire panel. I am just going to walk us back to where we were before. In your introduction I noted that you had become a submariner in 1989? A. That is correct.

Q. And you had had three commanding officers previously, MacDonald, Bush and Davidson? A. That is correct.

Q. In December of '91 what was your position? A. In December of '91 I was the squadron operations officer.

Q. And did you attend a mess dinner in December '91? A. That is correct.

Q. You said before that you believed it was on the 19th of December '91. Is that based on your own personal observations? A. That is based on the military police telling me that is the date it was. Subsequently I have looked up on an old calendar and it was Thursday night, December the 19th. And I believe that was the night the mess dinner was held.

Q. I believe, retracing your location through the mess dinner, you attended the mess dinner at the Chiefs' and POs' Mess, then went to the wardroom at the squadron, then went to a steamer and then went to the wardroom of the OJIBWA? A. That is correct.

Q. And upon arriving there, there would have been a number of individuals present in the wardroom including a Lieutenant Kelk? A. That is correct.

Lieutenant (N) Hart

Examination-in-chief

Q. And can you describe the condition of Kelk when you first entered the wardroom? A. He was drinking, socializing.

Q. Did his condition change throughout the evening? A. Yes, it did.

Q. How did it change? A. He became inebriated and passed out.

Q. Referring to Exhibit "J", can you identify for the court where you were when Lieutenant Kelk passed out? A. I would have been in this area, on the settee here, settee number 1, somewhere between the end here and the middle, somewhere in that area.

Q. Settee number 1 on Exhibit "J". Can you describe the events as they unfolded step by step in the wardroom from the moment that Lieutenant Kelk passed out? A. Yes. Markers were produced. His neck and face were marked in tattoo type markings. His shirt was either opened or pulled up. His torso was marked. His pants were pulled down and his legs were marked.

Q. How far down were his pants pulled?
A. Between his knees and his ankles.

Q. And after his pants were pulled down and his legs were marked what happened next to Lieutenant Kelk? A. Some either masking tape or gun tape was produced and he was hog-tied. I neglected to say that the first time around, when I first testified due to nervousness and I just didn't mention it.

Q. When you say "hog-tied" can you describe what parts of his body were tied and how he was tied?
A. His wrists and ankles were tied or taped.

Q. This is while he was lying on the settee?
A. That is correct.

Lieutenant (N) Hart

Examination-in-chief

Q. After he was marked upon and tied, what happened next to Lieutenant Kelk? A. At some point after that Lieutenant-Commander Marsaw picked up a Tueros cigar tube, leaned forward, lifted Kelk's legs up and inserted the cigar tube in his anus.

Q. And after what happened? A. Kelk rolled over, or fell over and the cigar tube came out and Lieutenant-Commander Marsaw picked it up and reinserted it into his anus.

Q. When you say "he picked it up and reinserted it" can you describe how that was done? A. It would have been in much the same manner as the first time. He would have picked it off the deck and lifted Kelk's legs again and reinserted the cigar tube.

Q. Can you describe the tube that was inserted? A. Approximately five to six inches long and the size of a cigar tube.

Q. What colour? A. It would have been silver and blue.

Q. Do you recall the brand? A. Tueros.

Q. Had you ever seen a Tueros cigar tube prior to that evening? A. Yes, I had.

Q. I wonder if you can look at this tube and describe it in relation to what you would have seen that evening? A. That is a Tueros cigar tube. It would have been similar to that.

PROSECUTOR: I would like to introduce this as exhibit, Mr Judge Advocate.

JUDGE ADVOCATE: Any objection?

DEFENDING OFFICER: No.

Lieutenant(N) Hart

Examination-in-chief

THE CIGAR TUBE IS MARKED EXHIBIT "K".

PROSECUTOR: That would be Exhibit?

JUDGE ADVOCATE: "K".

PROSECUTOR:

Q. How far away approximately were you from Lieutenant Kelk at the moment that the cigar tube was inserted? A. I would say approximately 8 feet. Looking at the diagram I would have been on the forward side of settee 2 or standing up in that area.

Q. Perhaps you can point to your location? A. Up in this area here.

Q. That would have been close to the seat that is on the right hand side of settee number 2 on Exhibit "J"? A. That is correct.

Q. Was there anything between your view of Kelk and yourself at the moment the cigar tube was inserted by Lieutenant-Commander Marsaw? A. Nothing really blocked my view, no.

Q. At the moment that the cigar tube was inserted into Lieutenant Kelk, can you tell the court who would have been present in the wardroom at that time? A. I can't really say who was present in the wardroom at that time beside Lieutenant Kelk and myself, Lieutenant-Commander Marsaw. Like I said there was other people there but they were going in and out of the wardroom throughout the evening or the early morning.

Q. Do you know Lieutenant[N] Marr? A. Yes, I do.

Q. Do you know what he was doing that evening? A. He would have been the officer of the day aboard the OJIBWA.

Lieutenant (N) Hart

Examination-in-chief

Q. Did he remain in the wardroom throughout that evening? A. No, he didn't. He was in and out of the wardroom throughout the evening.

Q. Can you look around the courtroom to see if you see Lieutenant-Commander Marsaw. If you do, can you identify him please? A. Yes, I do. He is sitting between the two army officers right here.

JUDGE ADVOCATE: The witness indicates the accused.

PROSECUTOR:

Q. How confident in making the statement that it was Lieutenant-Commander Marsaw that inserted ...

DEFENDING OFFICER: Mr President, I would object to this. He has described what he saw. The level of confidence he may have in that would be for the court to appreciate.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: The witness has stated in response to certain questions, he has qualified them, telling you that he can remember certain people being here at the same time. He would qualify it saying he can't recall other people being here. Obviously there is some things he recalls with more accuracy than others and I am simply asking the question to confirm his confidence on his previous assertion of whether it was Marsaw or not who inserted the tube.

JUDGE ADVOCATE: I would permit the question. Objection denied.

WITNESS: Can you repeat the question please?

PROSECUTOR:

Lieutenant(N) Hart

Examination-in-chief

Q. How confident or certain are you that it was Lieutenant-Commander Marsaw who inserted the cigar tube? A. A hundred per cent confident.

Q. What was your personal reaction upon witnessing the insertion of the cigar tube? A. I was put off by it. I had never seen anything like that before and I thought it was fairly disgusting.

Q. Were there any words spoken by Lieutenant-Commander Marsaw at the time the cigar tube was inserted? A. Not that I can say, no.

Q. Was there any discussion of inserting the cigar tube prior to the act occurring by anybody in the room? A. Not that I can say, no.

Q. As a Squadron Ops O, have you had occasion to observe Lieutenant-Commander Marsaw in non-drinking situations? A. Yes, I have.

Q. Have you, on those situations, observed him speak and walk? A. Yes, I have.

Q. Can you comment on his state of sobriety that evening in the wardroom? A. No, I really can't.

Q. What about your state of sobriety that evening? A. I had been drinking but I would say that I was very lucid. I had consumed approximately one drink an hour from the time I was at the mess dinner.

Q. And how many hours would you have been in the sub squadron area at that point in time? A. From the time I arrived at the submarine squadron to the time I arrived home was 10 hours.

Q. And approximately how many drinks would you have consumed throughout that entire period? A. It would have been approximately eight to ten.

Lieutenant(N) Hart

Examination-in-chief

Q. And what time did you arrive home?

A. At approximately five o'clock in the morning.

Q. Did you go to work the next day?

A. Yes, I did.

Q. What time did you arrive for work?

A. It would have been between 7:30 and 7:45.

Q. How did you perform your job that day?

A. As per usual.

Q. Hung over? A. Definitely not.

Q. Upon viewing this incident, did you report the incident to anybody the next day? A. No, I didn't.

Q. Why did you not report it? A. I did not feel it was my place to report it.

Q. Why not? A. Lieutenant-Commander Marsaw was the commanding officer of the OJIBWA. The incident took place aboard the OJIBWA to one of the OJIBWA wardroom officers. I felt that if it was to be reported by anybody it would be reported by submarine personnel.

PROSECUTOR: At this point, Mr Judge Advocate, consulting with my friend, I think I am at a point in my questioning where my friend may want to make a statement or take a position. And I think we jointly agree that it may be advisable to do so in the absence of the court.

JUDGE ADVOCATE: Very well, Mr President and Members, I would ask you to withdraw from the court.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: You may be seated.

10th voir dire

PROSECUTOR: Now, Mr Judge Advocate, I will be referring to anticipated future evidence as well and it might be appropriate to have Lieutenant[N] Hart leave as well.

JUDGE ADVOCATE: Very well.

Lieutenant[N] Hart, would you please withdraw from the courtroom.

WITNESS WITHDRAWS.

This court is now sitting in a **voir dire**.

PROSECUTOR: Mr Judge Advocate, I intended on asking Lieutenant[N] Hart some very quick questions about his experience as a submariner, identify again who he had as commanding officers when he was sailing on a submarine and ask him whether or not he had occasion to observe his commanding officers, Bush, Davidson and MacDonald, lead in the control room, ask him some questions on how they would act in the control room, have him refer to the particulars in charge 3, ask him whether or not any of his commanding officers have ever referred to members of the crew in the control room using those types of words. I understand my friend objects to this line of questioning and perhaps I should sit down at this point and let him make his objection. Then I can fully respond to it.

JUDGE ADVOCATE: Lieutenant-Colonel Couture?

DEFENDING OFFICER: I do indeed object to that line of questioning. What my learned friend has indicated reflects accurately, as I understand it, the evidence that he wants to adduce. And my understanding of the evidence that would come out and answers from the witness would be neither Bush or MacDonald or other COs under which he has served. He had three, MacDonald, Davidson and Bush. He would say, "Well, these guys didn't yell. These guys wouldn't use foul language. These guys wouldn't do this, wouldn't do that."

Defending Officer

Exclusion of evidence

And this is to what I object. The prosecution puts forward a theory that they want to establish some form of standard, particularly as it relates to charges 3 and 4. I suggest to you that while it is proper for the prosecution to want to lead evidence about a standard that this is not the proper way of doing it. How did Bush run his boat, how Davidson ran his boat, we submit is not relevant to these proceedings and I will come back and explain more about this.

Accepting such an evidence would bring in not an objective standard but rather evidence as to how one officer, let us take Bush, during a certain time - we don't know the nature of the operation. Was he, for example, on a public relation, a nice little cruise in the Pacific, which would throw a complete twist of course on matters? Did he have an experienced crew? Did he have a competent crew? And so on and so forth.

So trying to take one style of running his boat and try to apply it to the accused in that fashion is not proper. If there is a standard to be proven, I suggest to you this court has already taken judicial notice of a number of regulations. For one QR&O 19.13 "REBUKE IN PRESENCE OF JUNIOR" does set a standard. For one, QR&O 4.02 which deals with general responsibilities of officers to acquaint themselves with, observe and enforce orders, subpara (c):

**"promote the welfare, efficiency
and good discipline of all subordi-
nates;"**

I suggest to you that there is a lot of regulations, a CO's of the responsibilities for example at 4.20, is responsible for the safety of his unit.

I am also aware that my learned friend at a later stage of these proceedings will ask this court to take judicial notice of a number of documents such as

Defending Officer

Exclusion of evidence

Canadian Submarine Standing Orders, Guide to Divisional System, officer like qualities, a publication of Canadian Forces on leadership, etc. I suggest to you that this is where the standard should be found.

Let us give the court the parameters of the expected conduct of an officer within the framework of Canadian Forces regulations and specific naval orders or instructions and then let them take the facts of this case and apply them to those objective parameters that are set in regulations and orders. That is all in my view that has to be done. We could call so many COs, then it becomes an extremely fine line.

I mean one style might be different than another and how relevant is it to these proceedings as to determining whether Lieutenant-Commander Marsaw is guilty of those offences. A captain can do a good job on his ship and run it differently than another. I would like to give you an example.

Suppose a lawyer is charged with negligence in the handling of a case. And suppose he is charged in, let us say, criminal proceeding - although it is unlikely but for the sake of this example - what would be the best way to determine the negligence of the lawyer? Would it be to call the client of the lawyer to say to the court, "Your Honour, I have been represented by four lawyers in the past and they did not do that"?

I submit to you that would be totally irrelevant, circumstances being totally different, it is not a proper way of placing it. We all know that 10 lawyers can look at a case, appreciate it and conduct it in different manner. Does that mean that one or the other is improper to the point of amounting to an offence?

I would suggest to you that in that example the proper way of establishing the negligence or absence thereof of a lawyer would be to look at the Code

Defending Officer

Exclusion of evidence

of Professional Ethics. That would be one source. I can even see calling expert evidence although the field might be a little difficult to set, but I could foresee the possibility by expert evidence, for example, to say whatever. In this particular case an expert for example could be called and say "Rebuking superior in presence of junior arbitrarily is contrary to good order and discipline."

I suppose one might say that. But for, in this case, Lieutenant[N] Hart to say "Captain so and so in the past was like this, was like that." So what? It is just not relevant to these proceedings because they are two different matters and we don't know the circumstances, factors such as experience of the captain. I mean Lieutenant[N] Hart is not going to tell us about that; the experience of the crew, the number of trainees on board, the competence of the crew, the duration or the length of time they spent at sea, as many factors, the type of operation they conducted.

And I suggest to you and I will go further by stating that should you admit, Mr Judge Advocate, this evidence as being admissible hence relevant it would open the door to the defence, I would assume in all fairness to start calling evidence from all kinds of other people to say, "Well did really Bush run his boat that way?" Like, it almost becomes a contest of popularity there. We will call hundreds of people to say, "This guy ran the ship that way." And he can call a hundred people to say, "This guy ran the ship that way." What does it have to do with Lieutenant-Commander Marsaw and the present charge sheet?

The standard must be one that is set in an objective standard that exists, that can be in my view - and it is not for me to tell the prosecution how to run their case and that is not what I am doing here - but I express the view that there are regulations, orders that I know the prosecution will introduce that will set an objective standard and then let the court

Defending Officer

Exclusion of evidence

do its work by taking the facts of this matter and apply them to an objective standard.

Those are my comments.

JUDGE ADVOCATE: Thank you. Prosecution?

PROSECUTOR: If my friend's comments are adopted by you, Mr Judge Advocate, in essence what he is saying is that the only way that I can prove a 129 is to show that there has been a breach of an order or some sort of Canadian Forces publication. And clearly the case law on 129 says other ways. There is a variety of ways to prove a 129. Only one of the ways is for me to call evidence of the CFAOs, QR&Os, leadership manuals and to show that some sort of order has been breached.

My friend has told you in his presentation that that is the only way that I should be allowed to prove a 129. Quite simply put, the case law says otherwise. I have a variety of ways that I can prove a 129. He raises a number of concerns, "If these witnesses are allowed to be called we don't know the nature of the operations, we don't know how competent the crew was, or they were, we don't know how experienced they were."

Quite frankly he can get all that out on cross-examination. By me calling that witness doesn't prevent him from finding out that type of evidence that he says can't be presented before the court. Ask Hart how much experience he has. Ask Hart whether this was Bush's first run at the boat or a second one. Ask Hart whether they were doing encounter drugs op or whether they were floating around the South Atlantic sunning themselves. It is an easy enough question to ask. There is no danger that that sort of evidence can't be called. It can simply be called by cross-examination.

My friend also mentioned, it is alternatively I guess, I could call some sort of an expert. I think

Prosecutor

Rebuttal

the case law recently on 129 show that you can't call an expert and ask them whether or not a 129 has been proven or not. The Court Martial Appeal Court has ruled on that. My friend then throws the spectre and the threat that should you admit this type of evidence, he will be forced to go out and call a body of submariners who will tell you that everything my witnesses said was wrong and that Bush really did things this way or that way. That is fine. That is his job. He is entitled to do that he wants.

I would submit to you right now that the Crown anticipates that the evidence will show that there is a single transaction of verbal abuse on the OJIBWA from the time specified in the charge sheet and that the defence will not be able to prove at any time in the history of Canadian submarines and more relevantly during the '90s that there is a single transaction of verbal abuse conducted by any other Canadian officer commanding a submarine. So if he thinks the evidence is out there then I suggest he go out and call it. I don't think he will find it but that is a subject for debate. Those are my quick opening comments in relation to his response.

We have prepared a memo on the case law involving 129s that I would like to present to you and my friend. I will be referring to it in the balance of my presentation. We have got some cases we can give you at an adjournment. Essentially this is a memo, Mr Judge Advocate, that we prepared outlining in general terms how 129 can be proved.

I note at page 1 that there is a variety of ways in which the case law has demonstrated that 129s can be proven. We have cited them on the first two pages as a, b, c, d, e, and f. And as we state in paragraph 2 with recent developments the case law really seems to suggest that method a, c, d and f are the four different ways the Crown can prove a 129.

Prosecutor

Rebuttal

We can prove that an act or an omission contravenes an order through method a or we can establish through method c the existence and nature of a standard of conduct demonstrating that the accused breached that standard and that would require proving the following four elements: that there was an objective standard conduct required of the accused; that the accused knew or ought to have known of the existence and nature of the standard of conduct required of him; the conduct complained of breached the standard of conduct required of the accused; and finally and fourthly that the breach by the accused of the standard of conduct required did or may have resulted in injury to good order and discipline.

Then there is two other methods that the case law allows us to prove a 129. Method d, actually call evidence that shows that there was actual conduct, not may have, but actually was prejudicial to good order and discipline. And f - a rare case I would submit, probably never exist, but theoretically it is there - simply by having the defence admit it and I guess it would be in the form of a guilty plea.

In particular, method b is the one we are focusing on I think with this submission. The test relating to that is found on pages 6 and 7 of the memorandum and a bit on page 8 as well. Charge 4 is what we are concerned with right now with this evidence. Like my friend said - I believe he referred to charge 3 and charge 4 - this evidence is called for charge 4. The particulars in charge 4, I note, with regard to place, time and date, that the commanding officer verbally abused persons cited in annex B.

Using the Concise Oxford Dictionary, "abuse" has been defined in different ways, and ways which include "to insult verbally" and to use "insulting language". So under charge 4 we have to show that the accused verbally insults or uses insulting language toward members of the crew and that this breaches an objective standard of conduct.

Prosecutor

Rebuttal

The prosecution intends to prove that Canadian Forces naval submarine officers while in position of command do not, as a matter of leadership style or technique, verbally insult or use insulting language towards the members of their crew. Indeed the prosecution intends to prove that these Canadian Forces naval submarine officers conduct themselves in a very professional manner and a very high professional standard. But in order to demonstrate what the standard is to the court, what is the standard of conduct required of a submarine commanding officer while at sea, the Crown is legally entitled to call evidence to prove what the standard is. And this is clearly stated in the tests as enunciated in method b and as outlined in pages 6, 7 and 8 of our memorandum.

The former Chief Military Trial Judge in **Russell** at page 6, the court, at the bottom of page 6 I am reading from the end of the second line down, says that:

"... then alternatively you may be satisfied that the conduct of the accused was prejudicial to good order and discipline if you find that the prosecution has established beyond a reasonable doubt the following four matters. One, that there was an objective standard of conduct required of the accused in the circumstances."

This is one of the things that the cases in **Russell** as well as other cases cited at pages 6, 7 and 8, **Butt, McIntyre, Martin, Mackenzie, Guenette** and **Brand**, all say the Crown has to prove. The Crown has to go out and find evidence so that they can demonstrate and persuade the court that there is an objective standard.

Prosecutor

Rebuttal

And most importantly not only do they have to prove that there is an objective standard but they have to show the existence and the nature of that objective standard. And that can be seen, for example, in the cases of **Brand** and **Martin**. So the Crown is entitled to call evidence which allows them to argue to the court what the nature and existence of an objective standard of conduct is.

The defence counsel may disagree with their evidence and say that that doesn't prove anything but that is a matter of weight and debate. It is not a matter of admissibility. The Crown has a right to call evidence because that evidence is relevant to helping the court prove what an objective standard is. We intend to do this by calling witnesses and also introducing different types of documentary publications.

The **Mackenzie** case, for example, which is cited in my memo is an example of where witnesses are called and they give lay evidence that is used by the Crown to argue what the standard is; **Butt, MacIntyre** and **Russell** as well. Some of these cases have a mix of expert witnesses and lay witnesses. But the prosecution draws from both types of witnesses information which allows them to argue that an objective standard of conduct exists and furthermore to show the existence and the nature of that standard.

In terms of our case we intend to call a variety of different types of witnesses, people like Lieutenant[N] Hart who were submariners but not members of the accused's crew. And generally speaking ask them a few quick questions of, "What their experience has been like? How have they been led in the past? What leadership style has their former commanding officers used in the control room? Had they ever been verbally insulted?" That is where we are going with the questioning. To prove that no other Canadian Forces submarine commanding officer as a matter of leadership style verbally insulted or degraded members of his crew while at sea.

Prosecutor

Rebuttal

And this is done simply by asking them to give their personal observation and not an opinion of whether they thought Bush was a good CO or a bad CO. We are not asking that. "Did you ever observe him use these words? How would, based on your personal observations, Lieutenant-Commander Bush respond if you were off two feet while on the helm seat?" Questions like that. And of course the evidence can be tested on cross-examination.

We intend to call another group of witnesses as well, actual submariners who have been led by Lieutenant-Commander Marsaw as well as other COs. "How would Marsaw react in this situation? What would he do when he entered the control room? What words would he use? Did he use them to you? Did you ever personally observe him use these words to other people? How did you respond when that happened? Give us examples. Can you contrast what you observe of Lieutenant-Commander Marsaw with how Lieutenant-Commander Davidson would lead when in the control room? Can you contrast that with how Lieutenant-Commander Bush would do that when he was in the control room?"

Slowly as this case unfold witness by witness there will be an emerging body of evidence that shows that Lieutenant-Commander Marsaw's leadership style is in one group and leadership style of all the other commanding officers that the witnesses have sailed for is in a different crew. The point of contrast is that Lieutenant-Commander Marsaw, the Crown alleges, degraded, humiliated and belittled members of his crew and no other Canadian Forces submarine officer did. And we can prove that through calling evidence such as this.

We also intend to call witnesses who are former or current submarine commanding officers. "How do you lead people in your crew? Do you use words like this? What do you do when somebody is not working up to the standard. Do you take them in your cabin? Do you

Prosecutor

Rebuttal

deal with them on the spot? Have you ever been in any life threatening situations? How have you responded on those occasions?"

So between those three types of witnesses the body of evidence continues to grow. This evidence is very very relevant as any member of the Canadian Forces can pick up QR&Os or a leadership manual which is what the members of the court can do. But they need the assistance to find out what it is like and how do you lead inside a submarine.

My evidence is relevant to rebut the defence's opening statement. The defence's opening statement state to the court that they would hear evidence about different leadership styles. And he also said that the accused on occasion because of the tense and dangerous nature of what he was doing, would have to sometimes rebuke people. We will call evidence that shows that other commanding officers were in dangerous intense situations but they handled them safely and professionally but never belittled or humiliated anybody.

So, Mr Judge Advocate, the Crown does have a legal right, it is submitted, to call witnesses of any type which give evidence which may be relevant to showing what the standard of conduct is. The Crown intends to show that Canadian Forces submarine commanding officers do not verbally abuse or insult members of their crew as part of their leadership style. And indeed that the actions, conducts, words of the accused are distinct and different from that of other commanding officers.

And finally just as a note, when you look at cases of, for example, criminal negligence, the court can define a standard themselves. The Crown is not required to call evidence proving what the objective standard is in case of criminal negligence. The case law is clear on that. The court can infer what a reasonable person would have done. But the Crown also

Prosecutor

Rebuttal

has a right to call evidence that allows them to argue what a reasonable person would have done in the circumstances.

So the Crown right now in this position is in the same position we would be if we were in a criminal negligence type case. We are not required to but we have every right in the world to bring in evidence which is relevant to the issue of what a reasonable person would have done. Whether we are persuasive and successful in the end is a matter of weight but not admissibility. Thank you.

JUDGE ADVOCATE: Before you sit down, there are, according to my experience, three different ways to lay a 129. One of the ways is to allege a breach of a regulation, order or instruction. The second way is not to allege any breach of a regulation, order or instruction. The third way is to allege that there is a breach of the regulation, order or instruction given in the evidence but not alleged in the charge. Of course the first one does not apply, "breach of a regulation, order or instruction alleged" it is not alleged in the charge. So which one of the other two ways of proving it do you intend to do?

PROSECUTOR: The Crown intends to prove it both ways. We would argue that we have a right to argue it either way. The case law is clear I believe. And even in the decision that we cited in **Russell** that the judge advocate states that a 129 can be proven either way. And then he goes on to say, "If the Crown has proven that the order has been breached that is sufficient. Alternatively if you are not convinced that the order has been breached it can be proven if the following four components are proven beyond a reasonable doubt."

So we intend to prove a 129 in this case by proving both breaches of orders as well as by establishing a standard of conduct and demonstrating that the nature and existence of that standard as well as

Defending Officer

Reply

the fact that it has been breached by the accused, that prejudice may have arisen and that the accused knew or ought to have known what the standard was.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, with you leave I will reply to my friend.

JUDGE ADVOCATE: Go ahead.

DEFENDING OFFICER: In first formulating my objection I expressed some fear that should the prosecution be allowed to proceed that way that we would end up of doing the trial of whole fleet. In fact the prosecutor has indicated that is what he intends to do in his response. He said, "We would prove that the Canadian Navy behaves in a professional manner and there is only this one captain, the accused, who has behaved differently."

I resubmit this is totally irrelevant. We are not here to make the trial of the submarine squadron or the Canadian Navy or part thereof. We are here for the trial of Lieutenant-Commander Marsaw who is charged with those charges that appear there.

My learned friend has referred to my opening address where I said words to the effect, "You will hear of leadership".

JUDGE ADVOCATE: In your opening address you said something to the effect that the words that may have been used or might have been used by the accused could be necessary words for conducting a submarine. So I am interested to hear what you have to say now about that.

DEFENDING OFFICER: Yes. I will. But when I talked about, "You will hear about leadership, officer like qualities, morale" I did not take a position there. I said, "You will hear". I didn't say, "It will be our position". When the defence has indicated

Defending Officer

Reply

its position it has prefaced its remark by saying "It will be our position." When I said, "You will hear of officer like qualities" I mean I knew what my friend was about to adduce for evidence. Morale, officer like qualities, leadership, I knew that he was going to introduce CFP 131(2) or anyway seek to introduce it. I didn't say, "It is my position".

As to the part that you invited me to comment on, which was, may have rebuked or indeed rebuked some members? But there was a requirement to do so. Sure. And I think it is very relevant. Evidence will be brought before this court, for example, by Lieutenant X that he did something and Lieutenant-Commander Marsaw corrected him, raised his voice and said, "No, that is wrong". That is a mere example here.

Now in that context it is obviously clearly opened to the defence to establish whether there was a necessity, and there are exceptions in law that are provided for in regulations. Rebuke of junior in presence of others is not normally permissible unless it is required for the purpose of good order and discipline. There is an exception on that. So of course it is relevant. But how does the fact that Bush did or did not rebuke anyone becomes relevant to this trial?

My learned friend talks about, and he has cited cases with which I agree. Let us take page 6 of his brief and the case at paragraph 22 Master Corporal **Butt** and if we go to line 6 of paragraph 22 it says, "The ex-commandant gave evidence of the standard of conduct expected of an instructor. The prosecution also relied on the evidence of other instructors who testified as to the obligations of instructors and recruits."

They didn't call the ex-commandant to say Instructor X instructed that way, Instructor Y instructed that way. They called the ex-commandant to set a standard of conduct expected of an instructor. They didn't call former recruits to say, "When I was a

Defending Officer

Reply

recruit in 1983 Instructor Y treated me that way." Or call another recruit to say, "When I was a recruit in '84 Instructor Z treated me that way." It is not what they did. They did call quite apparently a body of expert evidence that set up a standard but they didn't do a trial of the school for the sake of one accused.

Similarly, Mr Judge Advocate ...

JUDGE ADVOCATE: Just to clarify on that point, are you saying that the prosecution must call expert evidence to prove a standard?

DEFENDING OFFICER: No. No, I am not. I am commenting here on where it was done that way and I stated that if in establishing a case - and I say "if" because I know that in some cases it may not be necessary - but if it was necessary to call evidence to establish a standard, you see the fact of what may amount to conduct to prejudice of good order and discipline it has been, I believe, now established that you probably don't need an expert to do that because the court is capable of doing it too. All right. On the basis of what standard? That is where the question is.

If we look at the same document I just referred you to, the document submitted by the prosecution, the case of **Russell** it appears to be, at page 6 para 23, the middle paragraph, that was then Colonel Boutet, he talks about the four elements. And of course we are quite obviously at that point in final address of the judge advocate, and he instructs the court how to discharge their duty in relation to a 129 and he says:

"One, that there was an objective standard of conduct Two, that the accused knew or ought to have known ..."

Calling Davidson is not going to help proving that the accused knew or ought to have known. Calling

Defending Officer

Reply

Davidson or Bush is not going to help determining whether or not the accused behaved in a manner that would be contrary to the standard. So sure I do agree with the body of case law submitted by my learned friend except that in my opinion, in my view, he does not support his position regarding the type of evidence that he wants to call.

Otherwise ... and he says the defence can cross-examine. Sure we can cross-examine. But it appears that the rules of evidence are such that only relevant evidence may be admitted at trial for the purpose of limiting the debate. Sure we can exercise the right to cross-examine but if any and all evidence and if we embark in the trial of the whole Canadian fleet, I mean we will never get out of this trial and too it wouldn't be right under any circumstances to put such a burden on the defence to say, "You have been convened here for the trial of Lieutenant-Commander Marsaw", and then ending up to make the trial of the whole fleet. It just would not do anything to prove any objective standard. This is why it cannot be accepted.

If he wants to call Commander Bush as an expert witness, for example, and ask him about some guiding principles on command, I could see - and I mean subject to how the evidence would come out and of course excising our right to cross-examine - I might see some relevance to that. But calling one, ten, twenty sailors and say, "How did Bush ...?" I mean maybe Bush never raise his voice towards Hart because Hart happened to have a good trip. He didn't make any mistakes. He didn't need to be rebuked or something.

Like we are embarking in totally subjective information, incomplete information that would lead us into making the trial of the whole fleet and that is not what we are here for. Let us look for an objective standard and that can be done and those cases here support that position of mine, I submit.

Defending Officer

Reply

Those are my comments.

JUDGE ADVOCATE: Thank you.

The court will now close to consider the objection made by the defence.

AT 1030 HOURS, 28 SEPTEMBER 1995, THE COURT CLOSSES TO CONSIDER THE OBJECTION MADE BY THE DEFENCE.

AT 1400 HOURS, 28 SEPTEMBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: You may be seated.

The object of this **voir dire** is to determine how the prosecution can prove a charge under section 129 of the **National Defence Act**, as charges number four and seven are laid, and more particularly, as we refer to charge number four, to determine if the prosecution can do so by calling submariners who have worked under the command of other commanding officers to testify as to how other commanding officers led their crew in order to establish an objective standard of conduct required of the accused.

The defence objects to this line of questioning arguing that although there is a requirement for the prosecution to establish an objective standard of conduct, the prosecution cannot establish it the way it intends to but should rather ask the court to take judicial notice of certain regulations and/or calling ex-commanding officers as witnesses. The defence submits that asking submariners how they were led by other submarine=s commanding officers would result in doing the trial of the whole fleet which is not relevant to the charges before the court.

Charge number four reads as follows:

**"CONDUCT TO THE PREJUDICE OF GOOD
ORDER AND DISCIPLINE**

Judge Advocate

Decision

Particulars: In that he between 5 February 1992 and 4 October 1993 on board HMCS OJIBWA, while commanding officer, verbally abused persons cited in Annex 'B' in the presence of other members of the crew."

In order for the prosecution to prove such a charge it must prove either a breach of an order or a breach of an objective standard of conduct of which the accused was aware. Under the first method, which is to prove a breach of an order, the prosecution must prove the following essential ingredients:

1. the identity of the accused as the offender;
2. the date and place of commission of the offence as alleged in the charge sheet;
3. the conduct of the accused;
4. the prejudice to good order and discipline resulting from the act; and
5. the blameworthy state of mind of the accused at the time of the alleged act.

In order to establish the prejudice to good order and discipline the prosecution must establish, under this first method, the nature and existence of a specific order, the accused's knowledge of the order and that his conduct amounted to a contravention of the order.

Under the second method, which consists of establishing a breach of an objective standard of conduct of which the accused was aware, the prosecution, in order to prove the fourth element of prejudice to good order and discipline resulting from the act of the accused, must establish that:

Judge Advocate

Decision

1. there was a standard of conduct required of the accused. This standard of conduct must be an objective standard of conduct required of all persons subject to the Code of Service Discipline similarly situated to the accused and against which his conduct can be measured;
2. the accused knew or ought to have known of the standard of conduct required of him;
3. the act of the accused breached the standard of conduct required of him; and
4. the breach by the accused of the standard of conduct required of him resulted in an injury to good order and discipline.

Now, how can the prosecution establish the objective standard of conduct required of the accused?

It can do so by asking the court to take judicial notice of specific matters or publications and it can also do so by calling witnesses.

As to the type of witnesses that can be offered to establish the objective standard, I agree with the case law indicating that it should be done by ordinary witnesses as opposed to expert witnesses. In order to oppose a standard of conduct to the accused the prosecution must establish that the latter be expected to both be aware of it and understand it.

The defence argues that it is not any type of ordinary witnesses that can be called to establish the standard of conduct. As an example, it says that the same way a client would not be the appropriate witness to establish the standard of conduct that must be required of his counsel, a submariner who has served

Judge Advocate

Decision

under the command of other submarine=s commanding officers is not the appropriate witness to establish the standard of conduct of a submarine=s commanding officer. According to the defence, it is by calling ex-submarine=s commanding officers that the prosecution should be allowed to establish such standard.

I do not share the defence=s views in this regard. If the prosecution wishes to establish the proper standard of conduct of a submarine=s commanding officer serving in the First Canadian Submarine Squadron, it can do so by calling either subordinates who have served under the command of other submarine=s commanding officers or by calling other submarine's commanding officers being either actual COs or ex-COs.

Both types of witnesses can establish what type of language is used by commanding officers of the First Canadian Submarine Squadron. The difference between the two types of testimonies is one of weight rather than one of relevancy.

I find the type of evidence sought by the prosecution to be relevant to the present case as it serves to establish the standard of conduct required of the accused. I must also add that the defence, in its opening address to the court, opened the way to such line of questioning. The defence said words to the effect that the evidence will show that the accused is a perfectionist and a very demanding Captain and that as such, the words he might have spoken when addressing his crew might have been necessary in the circumstances. These comments made by the defence represent one additional element to establish the relevancy of the evidence sought by the prosecution.

For all the above reasons, the defence objection is denied.

Officer of the Court, would you please call the witness back to the stand and after that invite the members to come back to the courtroom.

WITNESS RETURNS TO THE COURTROOM.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

REASSEMBLY: At 1005 hours, 12 September.....187
REASSEMBLY: At 1010 hours, 26 September.....287
REASSEMBLY: At 1300 hours, 26 September.....320
REASSEMBLY: At 0922 hours, 28 September.....350
REASSEMBLY: At 0930 hours, 28 September.....355
AT 1400 HOURS, 28 SEPTEMBER 1995, THE COURT REOPENS AND
377

s.19(1)

381

Lieutenant(N) Hart

Examination-in-chief

FIRST WITNESS) Lieutenant(N) D. J. HART.
FOR THE)
PROSECUTION)

JUDGE ADVOCATE: You may be seated.

In your absence, Mr President and Members of the Court, I had to decide on the admissibility of a certain type of evidence and you will now hear this evidence in open court.

EXAMINED BY PROSECUTOR

Q. Lieutenant[N] Hart, can you again recall the commanding officers that you have sailed with while you were a submariner? A. Lieutenant-Commander MacDonald, Lieutenant-Commander Bush and Lieutenant-Commander Davidson. I also sailed for approximately two weeks with Lieutenant-Commander Truscott when he stood in for Lieutenant-Commander Davidson when his

Q. Okay, and what boat would this have been on? A. HMCS OJIBWA.

Q. Okay. And what period of time did you sail on the OJIBWA? A. From 1988 until 1990.

Q. Lieutenant[N] Hart, I'm showing you an exhibit, it's the actual Charge Sheet, and I'd like you to look at the particulars, look at the words stated in the third charge. Read them to yourself, please. While working in the Control Room as a submariner under any of these commanding officers, have you ever had occasion to hear those commanding officers use the words cited in the particulars of the third charge when referring to individuals in the Control Room? A. Never.

Q. How would Commanders MacDonald, Davidson and Bush react to individuals who had made an error in the Control Room or who had not worked up to the ex-

382

Lieutenant(N) Hart

Cross-examination

pected standard of performance? A. It would vary. Usually it was a glare. There was no yelling. There might have been yelling to get the team moving when there was something coming up, but if someone screwed up there was never any abuse of yelling at them.

PROSECUTOR: Thank you. Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Do you know Lieutenant[N] Waller?

A. Yes, I do.

Q. Was she present on board the sub?

A. She may have been. I can't recall.

Q. Do you know Lieutenant[N] Pelletier?

A. Yes, I do.

Q. Was he present on board? A. I'm pretty sure he was. I believe I said he was.

Q. Lieutenant[N], now Lieutenant-Commander, Kavanagh? A. Yes, I know him.

Q. Was he present? A. I can't recall.

Q. How often have you seen women on board submarines? A. A few times.

Q. And would you say though that it's rather uncommon? A. Not uncommon. It's not something that happens frequently, but not uncommon.

Q. So if Lieutenant[N] Waller had been there, would you remember it? A. I've already stated I do not recall her being there.

383

Lieutenant(N) Hart

Cross-examination

Q. Would you say that submariners have a bit of a reputation - work hard, play hard, like they can get wild? Would you say that? A. Absolutely.

Q. Would you say that there are things though that submariners wouldn't dare do in the presence of their Captain? A. I don't understand the question, sir.

Q. Well, when submariners are having fun, would you say that they feel completely at liberty to do whatever they want whether the Captain is there or not? A. I believe they carry on whether the Captain is there or not. Yes, sir.

Q. And they would do very silly things although the Captain was there? A. Yes, sir.

Q. All the time? A. I would say frequently. Yes.

Q. Are there matters, for example you were referring this morning to you thought that Lieutenant-Commander Marsaw had crossed the line, and you said something along that line? A. That's correct. Yes.

Q. Would you, as a junior officer, like to cross the line on silliness when your Captain is present? A. No, sir. I don't like crossing the line anytime.

Q. Okay. And especially not when the Captain of the ship is present, wouldn't you agree? A. As I said, sir, I would not cross the line anything.

Q. How about in the presence of the Captain? Would that act as a re-enforcer not to cross the line? A. No, it wouldn't.

384

Lieutenant(N) Hart

Cross-examination

Q. It would not. You said you went on board a steamer. Is that correct? A. That's correct, sir.

Q. What's the name of the steamer? A. I can't recall, sir. It was either MARGAREE or it might have been NIPIGON. I can't remember.

Q. Uh, huh. Do you recall being interviewed by the military police on 12 January 1994? A. Yes, I do, sir.

Q. If I suggested to you that at that time in the course of that interview, you did not indicate to the MPs that you had been on board a steamer, is that correct? A. That's correct.

Q. Because you did not remember presumably?
A. That's correct, sir.

Q. How is it that you remember today?
A. After I was interviewed by the military police, of course I was not aware of what they were going to be questioning me concerning and I went home and I reflected on it that evening in many long hours and some things did come back to me.

Q. Uh, huh. So you didn't know what they were about to interview you about? A. I had an idea, sir. I was not exactly sure.

Q. If I suggest to you that the line of questioning and the very general question that was put to you was "Do you recall any incident that took place at a mess dinner on 19 December 1991?" Do you remember that question being put to you? A. Yes, I do, sir.

Q. Isn't that right ... okay, let's talk about that for a moment. The mess dinner started at about seven o'clock? A. That's correct.

Q. And you stated this morning that you went home at five o'clock in the morning? A. I arrived

385

Lieutenant(N) Hart

Cross-examination

home at five o'clock, approximately five o'clock in the morning. That's correct.

Q. So the so-called mess dinner, what you would have referred to when one mentioned mess dinner, goes from seven o'clock to five in the morning, so that's some ten hours. Is that correct? A. That's correct, sir.

Q. Isn't that true that the first answer you gave to the MPs was straight regarding the cigar tube incident? A. I don't understand the question.

Q. They asked you "Was there any incident during the mess dinner?", so over a ten-hour period they asked you was there any incident and you said "Yes, cigar tube". Is that true? A. That would be true. Yes.

Q. So you didn't know why you were there but yet over a ten-hour period the first thing that came to mind was the cigar tube? A. That's correct.

Q. Why? A. Because over that ten-hour period it's the only thing that I could possibly think of that they would want to question me on.

Q. Now you said that when you arrived there would have been 12 or 15 people on board OJIBWA, on board the Wardroom? A. That's approximately correct. Yes.

Q. What time was it when you arrived?
A. The exact time once again I'm not sure, it was somewhere after, I think, between one o'clock and two o'clock in the morning.

Q. Between one and two. And how long after would you say this cigar incident took place? A. I would say probably within an hour and a half to two hours. Like I said, I wasn't looking at my watch all

386

Lieutenant(N) Hart

Cross-examination

evening. So exact timings I can't really give you, except for the fact when I arrived and when I got home.

Q. Could it have been as early as within the hour rather than one and a half to two? A. It could have been. Yes.

Q. What time did the mess dinner actually start that night? A. Inside the Wardroom?

Q. Yes? A. Seven-thirty, quarter-to-eight, something like that, I believe.

Q. What time did you get off the table?
A. Probably somewhere around 2300.

Q. And you had wine during the meal?
A. That's correct. Yes.

Q. You had cocktails before, or sherry or something? A. Well, I had maybe half a sherry. I'm so I don't believe I finished it.

Q. What was the meal that night? Chicken? Beef? A. I couldn't tell you, sir.

Q. Couldn't tell you. Who was the guest speaker? A. I believe it was Commodore Moore.

Q. Okay. And at eleven, what did you do after leaving the table? A. The table was set up in the Chiefs and POs mess, so we retired to the Wardroom in the squadron.

Q. Uh, huh. Who were you with? A. A number of people. I believe most people who where at the dinner retired to the Wardroom.

Q. Was Lieutenant-Commander Craven there?
A. I believe so. Yes. In fact, he would have been there because I left with him to go to the steamer.

387

Lieutenant(N) Hart

Cross-examination

Q. Okay. And did you get to the OJIBWA with him? A. That's correct, sir.

Q. You did. Did you speak at all to Lieutenant-Commander Craven about this whole incident?

A. At what time, sir.

Q. At any time? A. Yes, I have.

Q. So to help recollect some of the events, is that correct? A. No, sir.

Q. So what was it for then? A. We were just discussing it.

Q. Uh, huh. Might it be that some of the information you may have given may be affecting your testimony today? A. No, sir.

Q. So what you remember now you remember from your own? A. Yes, sir.

Q. And you are very clear about that, that that is what took place? A. Yes, sir.

Q. Is that right that when you first met with the military police on 12 January 1994, you asked them if you could tape this interview? A. That's correct. I did.

Q. Why was that? A. Oh, just to make sure that if anything I had said wasn't what I had said, I would have a copy of the interview.

Q. And then the MPs would not let you tape. Is that correct? A. That's correct.

Q. But you were informed that if ever you said anything that would incriminate yourself, your rights would be read to you and that would take care of

388

Lieutenant(N) Hart

Cross-examination

all kinds of mechanisms, right to counsel and etcetera?

A. That's correct.

Q. And is that right that, upon being told that, that satisfied you and you said "Well that being the case, okay, I feel better about this". Is that right ... or words to that effect? A. It wasn't that, it was the fact that I would be given, I believe, also a written transcript of my own testimony after the interview was over. But I also believe that when they told me that, I told them that I didn't think that I had done anything that evening that I would possibly need any counsel for.

Q. Uh, huh. Okay. So arrival on board ship, very approximate, could be anywhere between ... how long did you stay at the Wardroom after the mess dinner? A. It would have been until approximately midnight.

Q. And you drank ... well, how many beers, or was it beer you were drinking? A. It would have been beer. I had had a beer.

Q. "A"? A. "A", a single beer.

Q. A single beer. How was the mess dinner, was it quiet or rowdy? A. It was fairly quiet.

Q. Do you remember an incident during the mess dinner? A. I don't understand that question, sir.

Q. An incident? A. During the mess dinner?

Q. Yeah? A. No, sir.

Q. Nothing that caught your attention?
A. No, sir.

Q. You don't remember an officer throwing up at the table? A. Not really, sir. I thought that happened at the previous mess dinner.

389

Lieutenant(N) Hart

Cross-examination

Q. Uh, huh. Is that right that when a question was put to you about your attendance at the mess dinner, as to whether you had attended a mess dinner on 19 December 1991, your answer was "I would have to say - yes"? A. That's correct.

PROSECUTOR: Mr Judge Advocate, if I could just object at this point. There's a particular way and procedure involved in questioning witnesses on the statements they made. In fairness to the witness, I believe the question should be asked, if they say anything which is contradictory to a previous statement they've made, they're given the opportunity to review that previous statement and then have the question posed to them again. And although I've let my friend go before, I think at this point onward I'm going to insist that the procedure be followed. Thank you.

JUDGE ADVOCATE: What do you have to say on that, Lieutenant-Colonel Couture?

DEFENDING OFFICER: I'm asking questions to the witness and he is answering them.

JUDGE ADVOCATE: You are, but you're not following the procedure. Please do. Otherwise it would confuse the witness. So if he has made a previous statement to the same effect ...

DEFENDING OFFICER: Which he has.

JUDGE ADVOCATE: ... then the question that you're asking, please show him the document, the tape or the transcript or whatever.

DEFENDING OFFICER: Oh, I can do that. I did not because I didn't think it appeared, up to that point, that the witness was quite comfortable in answering the question. If that's the way you want it to be ...

390

Lieutenant(N) Hart

Cross-examination

JUDGE ADVOCATE: But that's the way the rules are all about. Your objection is sustained.

DEFENDING OFFICER:

Q. I'll show you a document. Could you look at this document and tell the court whether you recognize that document and if so why and what it is?

A. Yes. This is the transcript that I reviewed and corrected yesterday.

Q. Okay. You corrected it, so do I take it that you are satisfied that this transcript reflects accurately the conversation that took place between you and the MPs on 12 January 1994? A. Yes, it does.

DEFENDING OFFICER: For your information and possible use I will give, Mr Judge Advocate, a copy of the document in case I use it.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER:

Q. How well do you know Lieutenant Kelk?

A. I know him casually.

Q. So would you go out often with him, for example, or anything like that? A. Would I ...?

Q. Would you go out? Out drinking? Out to social functions often, or anything like that? A. No.

Q. This morning you stated that Lieutenant Kelk was so I take that you never observed that yourself. That's something that you have heard from others? A. Just stories. Yes, sir. And I've seen him a couple of times when I was out in an extremely inebriated state where the next day at work it was reported that - yes,

s.19(1)

391

Lieutenant(N) Hart

Cross-examination

Q. So his _____ is not your knowledge but rather stories that you have heard?
A. That's correct. Yes.

Q. Approximately how people were in the Wardroom when allegedly ... when you state, sorry, when you state that Lieutenant-Commander Marsaw put the tube in Lieutenant Kelk's rectum or anus? A. I'd say approximately 10, maybe 12. The exact numbers at that time I can't really tell you.

Q. I show you this diagram which is a reproduction of Exhibit "J". This morning you stated that Lieutenant Kelk was ... that's the door, is it?
A. No, the door is up at the top here.

Q. Oh, I got it upside down. A. No, now it's upside down.

Q. Oh well, I had it right then. Okay, the door is again ...? A. Up here.

Q. Okay. Alright. So you said this morning that Lieutenant Kelk was here to the closer portion close to the door on settee one? A. No, I said he was between the middle and the end in here ... somewhere in there.

Q. In the ...? A. Number one settee there.

Q. That's right. But closer to the door than further to the door. Is that correct? A. Well, I said he was between the door and the middle of the settee.

Q. How tall is Lieutenant Kelk? A. Oh, I'm not sure ...

Q. Uh, huh. A. I believe, I'm just guessing here.

Q. And, as I recall, you stated that you were somewhere in this area? A. That is correct.

392

Lieutenant(N) Hart

Cross-examination

Q. How many people can sit on a settee like this, like one of those where they're marked one, two, three? A. Oh, anywhere from one to five.

Q. Uh, huh. A. Maybe four ... four or five. It depends how crowded you want to be.

Q. Uh, huh. So if there were up to 11 people, wouldn't you say it would be very unlikely that no one would be in your way to see what's going on at the far end of the Wardroom? A. No.

Q. It wouldn't be unlikely? A. No.

Q. Now this morning you said that he was lying down on his left side? A. That's correct.

Q. His head forward and feet aft?
A. That's correct.

Q. Would you agree with me that in that position his rear end would be facing the bulkhead behind the settee? A. Well, facing the bulkhead or facing the little bulkhead that's aft of the settee. It would have been facing down in that area. Yes.

Q. Okay, let's have a look again at this reproduction of Exhibit "J". Head is down there?
A. Correct.

Q. Feet down here? A. No, not feet. His feet would have been dangling over the side, because he would have been in a sitting position when he passed out.

Q. I was showing feet down here? A. ...

JUDGE ADVOCATE: Lieutenant-Colonel Couture, for the transcript, when you say "down here" and "down there" and "here" and "there", it doesn't mean anything.

393

Lieutenant(N) Hart

Cross-examination

DEFENDING OFFICER: Okay.

Q. Feet aft. Correct? A. No. I would say the feet were more towards the floor or the deck. He was sitting up when he passed out, he passed out to his side with his head going forward, leaving his feet dangling over the end of the settee on the deck.

Q. And his rear end was where? A. Well, his rear end would have either been facing down this way or ... yeah, it would have been more down toward this bulkhead here.

JUDGE ADVOCATE: Again, facing "here" and "there" ...

DEFENDING OFFICER: Okay.

WITNESS: The same thing, his rear end would have been facing more towards the after part of the submarine.

DEFENDING OFFICER:

Q. Okay. And close to the bulkhead alongside the door? A. Correct.

Q. Would you agree with me that if his rear end is facing the bulkhead behind the settee and close to the bulkhead by the door, it would be pretty hard to reach his rear to insert anything in it? A. Unless someone lifted the legs up - yes, it would be.

Q. Uh, huh. And would you agree that that cannot be done from the side, like for example, by the bulkhead by the door but rather one would have to stand basically in front of the settee to do that? A. Well if his buttock is resting against this bulkhead there it might be, but it wasn't resting against the bulkhead. He would have been anywhere from, I don't know, up to a foot away from that bulkhead.

394

Lieutenant(N) Hart

Cross-examination

Q. Even if his rear end is a foot away from the bulkhead by the door, don't you agree that it would be difficult, considering the presence of the bulkhead, to reach? A. No.

Q. You don't agree? A. No. Because I saw it happen so, I mean, I know it can be done.

Q. You saw it happen. And he lifted one of his legs? A. No, he lifted both legs. The legs were taped together.

Q. Wasn't it your testimony that he lifted the leg so that he could insert the tube? A. I believe I had stated he lifted the legs so he could insert the tube. Yes, sir.

Q. What use is it to lift both legs? What assistance is that going to be to insert the tube if you lift both legs? A. If you lift both legs, you would be exposing the buttocks.

Q. Did he do that alone? A. As far as I can recollect - yes, he did, sir.

Q. So I gather then he would take both legs with one hand, lift them up and insert the cigar with the other hand? A. That's correct. Yes.

Q. And you saw that very clearly? A. Yes, I did.

Q. And his pants were where at that time? A. It would have been between his knees and ankles.

Q. How heavy is Lieutenant Kelk? A. Maybe at the most. I'm just guesstimating here, like his height - I'm not really sure.

Q. And he was passed out? A. That correct.

395

Lieutenant(N) Hart

Cross-examination

Q. He might be heavier than ? A. He might. He might be lighter than .

Q. Uh, huh. You said that he was hog-tied, didn't you? A. That's correct. Yes.

Q. What do you mean by that? A. His ankles and wrists were taped together.

Q. Ankles and wrists were tied together?
A. Yes, were taped together.

Q. Taped together? A. Yes.

Q. So both wrists tied to both ankles?
A. It would have been something like this.

JUDGE ADVOCATE: Would you please describe in words what you just did.

WITNESS: Okay. His wrists and ankles would have been taped down with his wrists taped somewhere in around between his ankles and his shins, and it was either with gun-tape or masking tape, which kind of tape I can't remember.

Q. Would you agree with me that if one attempted to lift the legs, basically he would have to literally lift almost the whole body to expose the buttocks? A. No.

Q. No? The legs were ... you used an expression "dangling down" or something? A. Yes. He would have been on his side with his legs and wrists tied ... I can't really do it on here, but with them dangling over the side. Yes, sir.

Q. Wouldn't you say that the best way to expose the buttocks would have been to roll him over?
A. I can't say which would be the best way, sir.

396

Lieutenant(N) Hart

Cross-examination

Q. According to the description? A. I'm just stating the way that I recall it happening.

Q. Uh, huh. Could you be mistaken on the exact way it happened? A. I don't believe so. No.

Q. Do you know who took his pants down?
A. No, sir.

Q. Why not? A. I can't recall.

Q. Could you look at the transcript that you have there, at page 24, third paragraph, and just read it to yourself. It starts with "Like I said ..." Is that correct ... "Like I said ..." it starts with that?
A. Yes.

Q. Now, my question to you is, didn't you tell the MPs that you don't know who took the pants down because you were away, you were too far away, you were at being across the Wardroom? A. No, sir. The size of the Wardroom is pretty well small. From the point where Kelk was sitting to where I was sitting was maybe eight to ten feet.

Q. That's what you stated this morning that you were about eight to ten feet ... A. That's correct.

Q. ... when this incident with the cigar tube occurred. Now when asked who pulled the pants down, you stated that ... you explained that you were far, on the far side, when this was happening and you suggest that because of that you couldn't see. Isn't that right? A. No, I don't believe it says that the reason was that I couldn't see. It was that I can't remember it.

Q. "And then I was on the far side of the Wardroom", so you either don't remember or you explain why you didn't see it. You don't need to refer to being on the far side of the Wardroom if you don't

397

Lieutenant(N) Hart

Cross-examination

remember, do you? A. I suppose I probably didn't, but I was just trying to be as candid as possible when these questions were being asked and that's how it came out.

Q. So you don't deny having said that "I was on the far side of the Wardroom when this was happening"? A. No, that's absolutely correct, it's on the videotape and it's in the transcript.

Q. Okay. There was a fair amount of writing being done on people. You can put the transcript back down there. If we need it again I will invite you to take it. There were writings done on people, on Kelk, is that correct? A. That's correct, sir.

Q. Who did it? A. I can't remember that either.

Q. Who was present ... are you sure even of the number of people that were present when the tube was inserted? A. The exact number? No, sir.

Q. It could be as low as four or five?
A. No, it was more than that.

Q. More than that? A. Yes, sir. Maybe as low as eight or nine.

Q. As low as eight or nine, but not exceeding ten, let's say? A. Not exceeding 10 or 12. No, sir.

Q. When his pants were taken down, was he passed out already or was he standing? A. He would have been passed out by then.

Q. Was he - not would he have been? Was he?
A. To the best of my recollection, he was. Yes, sir.

Q. Was he still wearing his jacket? He was wearing a mess-kit, I understand? A. That's correct.

s.19(1)

398

Lieutenant(N) Hart

Cross-examination

I can't recall if he had his jacket on or if he had removed it.

Q. Would you agree with me that it is, for most people anyway, standard practice to wear suspenders with the mess-kit? A. Yes.

Q. How did they take, whomever took his pants down, did that with his jacket on? A. That's a good point. He must have had his jacket off.

Q. So you don't recall that though? A. No, I don't. I mean, some people take their jackets off after the mess dinner. I, myself, the

Q. So you don't recall who took the pants down? A. That's correct, sir.

Q. You don't recall who made the markings? A. No, sir.

Q. I suppose that's a common occurrence on board a submarine to do markings on people like this? A. That's the first time I had seen it happen on the submarines. I've seen it happen on a surface ship before.

Q. So wouldn't that catch your attention in the same way as the placing of a cigar in the rectum would catch your attention? A. Not really, sir. No.

Q. No. Now wasn't there writing made on his torso? A. Yes, sir. Tattoo-type markings.

Q. And you don't recall whether the shirt was unbuttoned and opened up or whether it was pulled up? A. That's correct.

Q. And, obviously, you would not recall who did that either? A. No, I don't.

399

Lieutenant(N) Hart

Cross-examination

Q. Can you even try? Was it one or more than one person who would have done that? A. I can't comment on it, sir. I cannot remember.

Q. Is it that alcohol had taken its toll on you or what? A. No, sir. I would think it's more the time from the incident when it happened. It's been almost four years now.

Q. You didn't recall either in '94 when you were interviewed by the police? A. No, sir.

Q. I suggest to you that you were not as sober and you indicated this morning? A. Is that a question, sir?

Q. Yes, I'm suggesting. Would I be right or wrong in suggesting that? A. I would suggest that you are wrong in suggesting that.

Q. Okay. You know Lieutenant-Commander Craven? A. Yes, I do.

Q. And was he sober too? A. I would say that he was probably fairly sober. I know that later in the evening when the cab got to my house, Lieutenant-Commander Craven suggested that we go into my place for a night cap, and I told him that I didn't think it would be a wise decision and that they should proceed home.

Q. Uh, huh. Yeah, not such a good idea to go at people's home at five o'clock to have a drink? A. No, sir.

Q. Would you agree? A. Yes, sir.

Q. And not an idea that many sober people would have? A. I can't make comment on that, sir. I mean,

400

Lieutenant(N) Hart

Cross-examination

Q. Do you know Lieutenant[N] Elford? A. I knew him as Sub-Lieutenant Elford - Yes, sir.

Q. Yeah. How about ... he was there I understand, was he? A. Yes, sir.

Q. I suggest to you that he was fairly drunk. What would you say to that? A. I can't really comment. But if your stating he was, I couldn't dispute it.

Q. So you cannot recall his state of sobriety or intoxication? A. Not really. No, sir.

Q. How about ... was it Lieutenant[N] or Lieutenant-Commander Dickinson? A. Yes, sir, it would have been Lieutenant[N] Dickinson at the time.

Q. At the time. And could you comment on his state of his sobriety or drunkenness? A. Once again, sir - No. No, I really couldn't.

Q. Would you say that if ... let's say Dickinson, for example, was very drunk. Is that something that you would notice? A. No. No. I mean I don't know Lieutenant[N] Dickinson that well.

Q. How about Elford? A. Elford? I've seen Lieutenant[N] Elford or Sub-Lieutenant ... Lieutenant[N] Elford, I guess, intoxicated. But once again, I don't know him that well.

Q. Would you agree with me that it's not necessarily required to know the person ... like, do you know what to look for when you determine if a person is intoxicated or not? A. Yes, sir: slurred speech ...

Q. Loud voice? A. Red eyes, loud voice, unsteady in their walking.

401

Lieutenant(N) Hart

Cross-examination

Q. Okay. So were any of those individuals I just referred to displaying any of those symptoms, as far as you know? A. I can't make comment on it, sir. I can't remember.

Q. Now I believe there might have been another individual there who eventually passed out. Is that correct? A. That's correct.

Q. Who was that? A. It would have been Lieutenant[N] Muir.

JUDGE ADVOCATE: Lieutenant[N] who ...?

WITNESS: Muir, the supply officer for the Submarine Squadron.

DEFENDING OFFICER:

Q. And I understand that he too had some writing and taping done to him? A. That's correct, sir.

Q. Who did the taping? A. I don't know, sir. I don't know who did the marking either.

Q. Were any pieces of his kit taken off, shirt ripped off, opened, lifted? A. Yes, sir.

Q. Who did that? A. I can't recall, sir.

Q. I'd like to refer you to page 18 of that transcript that you have there, third paragraph that starts with "I can't remember"? A. Yes, sir.

Q. One, two, three ... four lines down, you talk about Muir where there is markers on his face, shirt let open. Isn't that right that you said to the MPs that "we", "W-E", we opened his shirt? Did you say that? A. Yes, I did, sir.

Q. So it would appear that you know who opened the shirt? A. No, sir. As I said, there's a

402

Lieutenant(N) Hart

Cross-examination

number of contradictions in this document here that I picked up, and I wasn't under oath at the time, I'm under oath now, and I'm telling you to the best of my ability - I can't remember.

Q. Is that right that you reviewed this transcript yesterday? A. Yes, it is, sir.

Q. Is that right that you were invited to make corrections? A. Yes, it is, sir. No, I was invited to make corrections that were said on the difference from what was on the tape and what was in the transcript.

Q. Uh, huh. So, you were invited to verify the accuracy of the transcript compared to the tape that you took an opportunity to review in this very courtroom? A. That's correct. Yes, sir.

Q. And you did not correct the word "we"?
A. No, sir.

Q. I understand that to mean that "we" opened the shirt is what you said? A. No, sir. My directions were to make sure that the transcript accurately portrayed what was on the tape. "We" was on the tape.

Q. So, and who said "we" on the tape?
A. That would have been myself.

Q. So "we" opened the shirt, didn't "we"?
A. No. I just said that there are several contradictions in this document, and at that time I was not under oath, I am under oath now and I'm saying that that statement is incorrect.

Q. You lied to the police. You were not under oath - you lied to the police and you said "we opened the shirt"? A. No, sir. At the beginning of this document I believe I say "to the best of my recollection".

403

Lieutenant(N) Hart

Cross-examination

Q. Why would you say that you opened the shirt? A. Well, sir, I was being as candid as possible and "we" came out.

Q. Isn't that suggesting that maybe it came out because that's what actually happened, being candid, that's what happened, that's what you did say, didn't you? A. That's what I did say. Yes, sir.

Q. And that's what happened? A. No, sir.

Q. So you're saying today that it did not? A. No. I'm saying it happened, just it wasn't "we".

Q. But you did say "we"? A. I did say "we". Yes, sir.

Q. Let's go back to the tube. I refer you to page 17 of the transcript, just toward the last ...

PROSECUTOR: Again, Mr Judge Advocate, my friend is straying again from the procedure of asking questions, getting an answer which is inconsistent and then refer the witness to the document. I'm simply asking that the question be asked, an answer be given, if there's an inconsistency, then at that point if there's reference made to the question that was asked in the transcript, an opportunity to review the answer and then pose the question to the witness.

JUDGE ADVOCATE: Lieutenant-Colonel Couture?

DEFENDING OFFICER: That's what I was doing a little while ago, asking questions without showing that and I was not showing it because he was answering the question and that's where my learned friend objected. From that point on I gave the transcript, and now I'm doing what I was invited to do a few minutes ago.

JUDGE ADVOCATE: Not exactly. Do you know what the rule says?

404

Lieutenant(N) Hart

Cross-examination

DEFENDING OFFICER: It depends which, Mr Judge Advocate. There are two rules that I would consider.

JUDGE ADVOCATE: So which one do you consider now?

DEFENDING OFFICER: I was considering Rule 92.

JUDGE ADVOCATE: Refreshing the memory of the witness?

DEFENDING OFFICER: That's correct.

JUDGE ADVOCATE: Okay. So I would ask you to ask your question first and then if the witness has any problem recollecting the matter, then follow Rule 92.

DEFENDING OFFICER: Thank you.

Q. Did you state to the MPs that the tube came shooting out? A. I believe those were the words I used. Yes. It wasn't really shooting out, it fell out.

Q. Shooting out and falling out, isn't there a difference? A. It could be. I mean, he might have had gas and it might have come shooting out, but I mean it came out.

Q. Did it come shooting out or did it come out? A. It came out.

Q. But you said to the MPs that it came "shooting out"? A. Once again, a poor choice of words on my part.

Q. Who left the Wardroom with you in the early hours of the morning? A. It would have been Lieutenant-Commander Craven, Sub-Lieutenant Elford,

405

Lieutenant(N) Hart

Cross-examination

Lieutenant[N] Dickinson, I can't really remember if Lieutenant[N] Higginson came with us or not, or he lived in the same area but I can't recall.

Q. Do you recall Lieutenant[N] Higginson being even present? A. No, I don't. That's why I'm not really sure on that point.

Q. Do you know Lieutenant-Commander Craven well? A. I was an acquaintance of his for approximately two years and I've been a good friend of his for approximately ten.

Q. Is that right that at one point of your career
A. That's correct, sir. Yes. Well, in accordance with the CF military doctors I would have been classified that.

Q. So what you mean by that is :
A. No, I mean by that that

Q. Uh, huh. And that night at the mess dinner, you spent basically the whole night at the Wardroom watching people getting pissed and you didn't drink? A. No, I've never stated that. I believe ...

Q. Okay you didn't drink much? A. I didn't drink heavily. I had approximately one drink an hour, so it would have been between eight and ten drinks I had over the evening.

Q. And it did not affect at all either your perception or recollection? A. Well, it may actually have affected it - yes.

Q. You stated this morning that you thought Marsaw, when he did that, had crossed the line. Is that correct? A. That's correct.

406

Lieutenant(N) Hart

Cross-examination

Q. I suggest to you that you did say that to the MPs four times during the interview. Is that correct? A. Without counting them, I'll take your word for it that I said it four times. Yes, sir.

Q. Is that reasonable, like is that possible? Do you recall that? A. I recall stating it. The exact number ...

Q. Several times? A. Several times. Yes, sir.

Q. Are you familiar with QR&O 4.02? A. No, sir.

Q. General responsibilities of officers?
A. No, sir. If you could refresh me?

Q. I will.

"An officer shall: become acquainted with, observe and enforce ... the National Defence Act, ... QR&Os ..."

and all kinds of other regulations. You're familiar with that? A. I'd say not very well familiar with it, but - yes.

Q. You know it is the responsibility of officers to do those things, don't you? A. Yes.

Q. You tend to observe regulations and what not? A. Yes, sir.

Q. And you have a duty as well to have them enforced when required? A. Yes, sir.

Q. And the same article has also another duty with which you may be familiar. To:

407

Lieutenant(N) Hart

Cross-examination

"report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline when the officer cannot deal adequately with the matter".

That rings a bell - this? A. Yes, sir.

Q. If you thought so vehemently that Lieutenant-Commander Marsaw had crossed the line, why didn't you report it? A. I was negligent in my duty.

Q. Or was it that there was nothing to be reported really? A. No, sir. The way I looked at it at the time was that Lieutenant Kelk or one of the OJIBWA Wardroom members should have reported it.

Q. How Kelk could report something ... I mean, when he was passed out? A. In the morning when he woke up, sir.

Q. How would he know that this took place? Unless you can tell this court that he showed some reaction when all this took place? Did he resist? A. No, sir.

Q. Did he speak, did he shout, did he do something? A. No. He might have grunted a few times.

Q. So he displayed no real indication of fighting it off or showing any reaction of some kind? A. No, sir.

Q. So you could not really expect him to even be aware of any such occurrence? A. Not until the next morning. No, sir.

Q. And then you anticipated that it would be reported by somebody else. So whilst there was no investigation forthcoming on this, did you then think

408

Lieutenant(N) Hart

Cross-examination

of reporting it? A. No, sir. I thought it would be a dead issue.

Q. Would you have thought that if there had been an investigation in the matter, you should have been contacted, in your mind? A. Yes, sir.

Q. And not being contacted, that would be a clear indication that there was no investigation? A. Yes, sir. If there would have been an investigation I probably would have been aware of it.

Q. Yes. And yet, knowing that this matter had gone unreported, you chose not to report it? A. That's correct, sir.

Q. You've read an article in the Halifax Chronicle-Herald? A. Yes, sir.

Q. Published on 16 December 1993? A. Say the date again, sir?

Q. 16 December 1993? A. Yes, sir.

Q. And that pertained to some allegation concerning the commanding officer of the OJIBWA? A. That's correct, sir.

Q. Did you tell Lieutenant-Commander Byrne that you knew weeks in advance that this article was about to be published? A. I don't know Lieutenant-Commander Byrne, sir.

Q. Lieutenant[N] Byrne? A. Yes, sir. Lieutenant[N] Byrne I do know.

Q. I apologize. A. But, no, I never had any conversation with him about that.

Q. So you're saying that you never told Lieutenant[N] Bird ... Byrne, I'm sorry. How do you spell Byrne. Let's clarify that and make sure we're

409

Lieutenant(N) Hart

Cross-examination

talking about the same person - the Byrne that you know? A. I believe it's B-Y-R-N-E, his first name is Martin.

Q. That's the one. I just was mistaken about the rank. So you did not tell Lieutenant[N] Byrne that you knew around five-six weeks in advance that Mr Dunlop was coming out with this article?
A. No, sir.

Q. And I believe you said to the MPs that you were ... and you in fact repeated that this morning, you were quite put off by this incident?
A. That's correct, sir.

Q. And I believe it is your testimony that you cannot say how much of the cigar was showing or not showing, having been inserted? A. No, that would have been part of the transcript, sir. I believe in my testimony I said it would have been approximately three-quarters of the way inserted.

Q. Okay. So you say that today, but that's not what you said to the MPs at the time? A. That's correct, sir.

Q. In '94 you couldn't say how much, but in '95 now you can say how much? A. That's correct, sir. Exactly how much, I said I still can't say, but I believe it's around three-quarters of the way.

Q. And it's merely because you have given it some thought? A. Yes, sir. Quite a bit of thought actually.

Q. Have you given thought as to the ship you went on board? A. Not really that much, sir.

Q. If I suggested to you that Lieutenant-Commander Craven went on board MARGAREE? A. Is that a question, sir?

410

Lieutenant (N) Hart

Cross-examination

Q. I suggest to you ... is that possible?
A. That's quite possible. I believe I said earlier that it might have been the MARGAREE or the NIPIGON.

Q. Or FRASER? A. Or the FRASER, one of the old steamers. Yes, sir.

Q. So you gave thought to some matters but not to some others. Is that what you're saying?
A. That's correct, sir.

Q. In giving thought to some matters, you've come up with some more details and then there's other matters you chose not to give thought to? A. Yes, sir. I felt that some matters were more critical than others.

Q. And the "we" pulled the jacket, you gave thought to that, I suppose? A. No, sir. In fact, I didn't really notice that until yesterday when reviewing the tape. Although I had a copy of the tape provided to me and I watched it probably at least half-a-dozen times prior to that.

Q. So it's not for lack of familiarity with the transcript that you cannot recall a number of things? A. Say that again, sir?

Q. It is not for lack of familiarity, with the contents of your interview with the police, that you cannot recall things? A. No, sir. I believe when you see it written out and you're going through it word by word what was on the tape, you know, some things become more evident than others.

Q. I will ask you again to give thought to a matter that might be of some interest here, as to how long after you got on board this incident took place?
A. Sir, I've thought about that long and hard, and I wasn't checking my watch throughout the evening. Everything, all the timings I'm giving except for the time when I arrived and the approximate time when we

411

Lieutenant (N) Hart

Cross-examination

actually went in to sit down for the dinner and the time I arrived home, those are the only times that I'm fairly certain about.

Q. Aside from your friend let's say, Lieutenant-Commander Craven, and Elford and Dickinson, how about the state of drunkenness or sobriety of the rest of the crowd? A. I can't comment on that, sir. I know that alcohol was being consumed, I believe it was mostly beer, there were some scotch bottles, rum bottles, out on the table, but the state of sobriety of everybody there - once again, I wasn't checking up on people.

Q. I understand there were cigars being smoked there? A. Yes, sir. Tueros cigars, they were handed out at the mess dinner.

Q. And I mean just a few people smoking cigars in the Wardroom, it would create quite a smoke screen, wouldn't it? A. Yes, sir. It would have been fairly smoky.

Q. But nothing though of any consequence to affect your perception of the events? You still can see very well? A. Yes, sir.

Q. I believe this morning you said that you saw the CO picking up a Tueros cigar tube on the table? A. That's correct.

Q. That's another matter you've just given thought to, is it? I suggest to you that you did not say that to the MPs? A. That would be correct. I did not say that to the MPs.

Q. So that's a matter that you have considered again and you came up with this this morning? A. No, sir. Not just this morning, it's something I believe I spoke with Major Abbott about in preparation for the case.

412

Lieutenant(N) Hart

Cross-examination

Q. Is that correct that a day or two after your interviews with the MPs, you called them to say: "Oh, gentlemen, I forgot to mention I've been on a steam ships before going to OJIBWA"? A. That's correct. Yes, I did.

Q. But you didn't pass out any other information to them? You gave consideration to matters but those matters you did not inform the MPs of, like the fact that the tube was on the table? A. That would be correct, sir. Yes.

Q. Do you know what time the CO left, the CO I'm talking about here, Lieutenant-Commander Marsaw? What time did he leave OJIBWA? A. I'm not sure, sir. I believe he left before I did.

Q. So would you give it some thought and see if you can help the court as to what time he left? A. No, sir.

Q. Do you know, maybe, what time he arrived? Or I'll put my question in a different way. Was he there when you arrived? A. Yes, he was.

Q. Are you sure? A. I'm pretty sure he was, sir. Yes.

Q. Uh, huh. Do you remember Commander Jay Plante being there? A. Well, it's a possibility he was there as well, sir. Yes.

Q. And was he there when Lieutenant-Commander Marsaw did the thing? A. Which thing, sir.

Q. The cigar tube? A. I can't recall. I don't believe he was, sir.

Q. That wouldn't be a nice thing to do in front of the Commander? A. That would have been Captain[N], sir.

413

Lieutenant(N) Hart

Cross-examination

Q. Captain[N]? That's right. I apologize, I mixed up another rank here. I do apologize, Captain (Navy) Plante? A. Yes, sir.

Q. And there was ... how about Commander Bush? A. At the time that was Lieutenant-Commander Bush, and I don't believe he was there at the time either, sir. I think he had either gone home or he was in the heads.

Q. Was he present at anytime that you were there? A. Lieutenant-Commander Bush? Yes, sir. That's to the best of my recollection - Yes, he was.

Q. And was he there when the incident took place? A. I don't believe so.

Q. Or do you know or you don't recall or you don't believe so? A. I don't believe so.

Q. So who would have been there if there were up to 12 people? Who was there then? A. I said the only ones that I can put my hand on the Bible and say that I know absolutely that they were in the Ward-room when the incident took place, were myself, Lieutenant[N] Muir, Lieutenant-Commander Marsaw and Lieutenant Kelk.

Q. Okay. Now Muir was about, on the verge or had already passed out. True? A. I believe he was still functioning.

Q. And Kelk passed out before Muir?
A. That's correct.

Q. So Kelk did not do any painting on Muir?
A. That's correct.

Q. And Muir ... did he do any on Kelk?
A. I don't believe so.

414

Lieutenant(N) Hart

Cross-examination

Q. Okay, now that leaves you, Craven, Elford ... that leaves you, Craven and Elford? A. Dickinson.

Q. Dickinson? A. Right, that I said I can recall, and there were other people there that I cannot recall.

Q. So maybe you were not so mistaken when you said "we" pulled off the shirt? A. I was incorrect in stating that. I believe I had said I would not ever do that to anyone else because I sure as hell would not want them to do it to me.

Q. Do you recall telling the MPs, when you were describing the incident ... and I will put that in the context a little bit ... that Kelk was passed out, hog-tied on the jetty ... sorry, on the settee, and that the CO came in? A. Yes, I said I do recall reading it right here that it said came in, but he was in.

Q. You did say that? A. Yes, I did.

Q. So you did say that the CO came in, like very casually, lifted the leg and put the cigar? That's what you said to the MPs? A. Yes, I did say "came in", but he was ... I mean, he would have been in and out, he would have been going to the heads during the evening and then coming back into the Wardroom.

Q. Uh, huh. How about Lieutenant[N] ... somebody I had forgot, a Lieutenant[N] Marr, was he there? A. Lieutenant[N] Marr? I can't say that he was there. He was on board the submarine, but where on board the submarine, I don't know. He could have been doing rounds, he might have been sitting in one of the other messes, he might have been in the Wardroom. Yes.

Q. You don't recall very much of this evening, do you? A. Well, sir, the one incident I do recall, because I think I will remember it until the day I die, is the cigar tube incident.

415

Lieutenant(N) Hart

Cross-examination

Q. Yeah, that was so serious that you did not bother reporting it. A. I didn't follow that statement or question, sir?

Q. Toward the end of your testimony in direct-examination, you said that Bush ... and I don't want to misuse ranks again ... what is he now? A. He's Commander Bush now, sir.

Q. Commander? Okay, let's call him Commander. He was Lieutenant-Commander at the time of the mess dinner? A. Yes, sir.

Q. Bush never raised his voice? A. That, to the best of my recollection, sir, I don't recall Lieutenant-Commander Bush, when he was commanding officer, raising his voice in a derogatory manner towards any of the crew.

Q. That's as far as you can remember? A. That's correct, sir.

Q. How long did you serve under him? A. Oh, from the time he was the commanding officer, the exact dates ... I think he was there for a little over a year - maybe 15 months.

Q. Never raised a voice? A. Not that I can recall, directly in a derogatory manner towards any of the crew. No, sir. He raised his voice when he wanted to get things moving. Yes, sir.

Q. Yes, and isn't that right that most Captains do raise their voices when they want to get things done? A. They certainly do.

Q. And especially in a submarine, close section, when there's all kinds of screaming and information being passed, that COs regularly raise their voice to keep control over matters? A. Yes, sir. It's more of a barking because they're snapping out orders fast and furiously usually.

416

Lieutenant(N) Hart

Cross-examination

Q. Uh, huh. And you looked at the Charge Sheet and I believe the word, the four-letter word F-U-C-K, is used in there? A. Yes, sir.

Q. Are you telling the court today you never heard a Captain using that word before when you served in the submarine? A. Not under the heat of battle. No, sir.

Q. You never heard a Captain using that word? A. No, sir.

Q. What kind of words might they use to express displeasure? A. "Get it together", something along that line.

Q. How about "For fuck sake"? A. I can't personally recall any of them ever saying that. No, sir.

Q. I suppose that service was prior to '91. Is that correct? A. Say again, sir?

Q. Your service on the submarine was prior to 1991? A. Yes, sir. It was from August of '88 until of July 16th of '90.

Q. So would it be fair to say that if you have a problem recollecting events in '91, the problem would be more so aggravated if it took place prior to '91? A. Well, possibly. Yes, sir. They are things that I'm sure I don't recall prior to '91.

Q. Including any Captain using the word "fuck"? You don't recall that? A. No, I definitely know that some of them have said it, but I cannot recall them saying it in the Control Room in the heat of action.

Q. Ah, so you do recall some using it then after all? A. Yes, sir.

417

Lieutenant (N) Hart

Cross-examination

Q. And the crew? Other officers? That would be a word that is seldomly used or do you recall it being used once in awhile? A. It gets used. Yes, sir.

Q. Frequently? A. I wouldn't say frequently - No. But I mean I don't know what you mean by frequently.

Q. Often? A. Once again, "often" it's a very wide spectrum.

Q. Would you agree that the use of words like those would very much depend on the crew? I mean some crews will swear more than others and some less than others? A. I'd say it's more of an individual trait than anything else.

Q. That's right. So if a crew is composed of individuals who tend to swear - so there will be lots of swearing basically? A. Yes, sir. I would agree with that.

Q. And if a Captain is having a good trip with his crew he will tend to be rather docile and quiet, and everything will be working tickety-boo. Is that correct? A. Yes.

Q. So the level of response you get from the Captain really depends on the actual circumstances the Captain is in at a given time? A. Once again, I would think it would depend on the individual.

Q. And would you say that if one makes a ... if a Captain detects many errors on his crew that he would be more prone to correct, to raise his voice, etcetera? A. Yes, I would say that.

Q. It's not unheard of, of Captains who've raised their voice ... A. Could you ...

418

Lieutenant(N) Hart

Cross-examination

Q. Sorry? A. Could you repeat that again, sir, I didn't catch the second word?

Q. It is not unheard of for a Captain to raise his voice to apply immediate correction ...?
A. No, sir.

Q. ... in the running of a submarine?
A. No, sir.

Q. In fact it is expected, isn't it?
A. Well, depending on who was making the mistake. At some points, you know, different people would be expected to make the correction.

Q. Uh, huh. But the Captain is ultimately responsible for the ship or the boat, I mean, he is expected to do something. Would you agree?
A. Depending on the situation - Yes.

Q. Exactly. And what he'll do depends on the situation. Would you agree with that? That's what you just said? A. Yes.

Q. What do you know of the situation under which Lieutenant-Commander Marsaw has been between '91 and '93 A. Very little, sir. I never served with Lieutenant-Commander Marsaw.

Q. Okay. So whatever comments you make about what may be said and when you talk about situations, would have nothing to do with the Captain of the ship, Lieutenant-Commander Marsaw, because you don't know what he was doing and how he was doing it?
A. That's correct.

DEFENDING OFFICER: If I may have a moment, Mr Judge Advocate, to consult my notes?

JUDGE ADVOCATE: Certainly.

419

Lieutenant(N) Hart

Cross-examination

DEFENDING OFFICER: I'll have only a couple of your questions, with your leave. I just have to locate something here.

Q. What happened to the tube? A. I don't know, sir.

Q. We know that it went in once, shouted out ... shooting out, came shooting out, was replaced. And then what? A. I don't know. I believe it's still in.

Q. And how long after did you stay on board?
A. I don't think it was very long after that that I think pretty well everyone cleared out of the Wardroom.

Q. Okay. If you arrived on board at 0100 ...
A. Approximately.

Q. ... and it happened about within an hour of your arrival ...
A. I said that was possible when I said the timings, you know. I can't say.

Q. Okay, let's work this out on the basis of the answers you've given to the court already. You arrive at about one, and this would happen within an hour to an hour and a half of your arrival. A. I believe you said that, sir, and I said that's possible.

Q. And you concurred? A. No, I said it's possible.

Q. Okay, let's tell the court. Don't be bothered by me. Tell the court what time you think it happened? A. Somewhere prior to four-thirty, between one o'clock and four-thirty, I'm not exactly sure of the time.

Q. I think you said to the court earlier on, and under no suggestion of mine, that you figure it happened within an hour and a half to two hours of your arrival? A. That's quite possible, sir.

420

Lieutenant(N) Hart

Cross-examination

Q. Okay, so that brings us to three.

A. Well, like I said, those were approximate timings.

I was not checking my watch, I cannot give you an exact definite time except for an approximation for the whole evening.

Q. And I suggest to you that ... I bet it takes something like 30 minutes to get home? A. No, sir.

Q. No? A. It takes from the Rainbow Gate to my door, with no traffic, I think it's approximately 12 minutes.

Q. Twelve minutes. You got home at about five o'clock, so you left the Wardroom at four-thirty or thereabouts. A. That's right.

Q. The cigar tube was inserted at one ... three o'clock. So the cigar tube stayed there for an hour and a half, I guess? A. It's quite possible. Yes, sir.

Q. But you're not quite sure that it was actually there or not? A. No, sir. It might have come out, you know, again. I can't recall. I believe it was still in.

Q. Did you see it or like are you guessing here? A. I'm just guessing, sir.

Q. So you don't know what happened to the cigar? A. I don't know what happened. I mean, it might have gone in all the way and ... I'm not sure.

Q. Okay. This matter of being put off by it ... put off, that's the word you used? A. Yes, sir. Put off, disgusted.

Q. Disgusted? A. Yeah.

421

Lieutenant(N) Hart

Cross-examination

Q. And having crossed the line? A. Yes, sir.

Q. Like to the point that: I want out of here, I'm not staying in this place? A. Obviously not, sir. I mean, eventually I left. I believe it was ... I can't tell if it was five minutes it happened or an hour after it happened, I can't say.

Q. And now you observed that very well. What did you observe of other people when that took place? Was there such a general consent of disgust or what? A. I can't really recall. I think it was that the mood of the Wardroom changed.

Q. But you cannot pinpoint Craven's reaction for example? A. No, sir.

Q. You cannot recall Craven laughing or crying? A. No, sir.

Q. Muir was passed out, I believe? A. Or very close to it. Yes, sir.

Q. Yes. And it was after he passed out that you opened his shirt ... or, I apologize, somebody opened his shirt? A. Or pulled it up. Like I can't recall whether it was opened or pulled up.

Q. Okay. I want to focus on the time you left. The way you've put it there's a very clear suggestion that this act was so disgusting that you would have left very shortly thereafter? A. I said I don't recall what time I left. It might have been ten minutes or it might have been an hour after it happened. It might have been, you know, an hour and a half after it happened. I can't really say on the timing.

Q. You never consulted your watch, for example, because you were working the next day, so it might be an appropriate time to go home, or something

422

Lieutenant(N) Hart

Cross-examination

like that? A. No, sir. I believe I looked at the watch when we called the cab and it was somewhere around four-thirty. It was a Casino cab, I'm sure if we had their records checked - they could confirm that.

But it was called at approximately four-thirty, we waited out at the Rainbow Gate until approximately a quarter-to, and I arrived home at right around five o'clock.

Q. Those facts are pretty clear? A. Yes, sir.

Q. Much more than those inside the Wardroom, aren't they? A. Yes, sir. Because I checked my watch when they happened.

Q. But you didn't check you watch when that extraordinary event and disgusting event took place? A. No, sir. I didn't.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. Lieutenant-Colonel Couture has asked you some questions about whether you've ever observed commanding officers swearing the "F" word. Have you ever observed a commanding officer refer to a subordinate as a "F-U-C-K"? A. No, I haven't.

Q. You were asked the question of whether it was your understanding that QR&O article 4.02: to obey, enforce and report a breach of the Code of Service Discipline, applied you. What is your understanding about whether or not that article: to obey, enforce and report Code of Service Discipline breaches applies to commanding officers? A. Could you repeat that question, sir?

423

Lieutenant(N) Hart

Re-examination

Q. Does article 4 apply to commanding officers? A. I don't know if it does or not, sir.

PROSECUTOR: Okay. Thank you.

JUDGE ADVOCATE: Questions from the court?

No questions. Thank you very much.

WITNESS WITHDRAWS

JUDGE ADVOCATE: The court is adjourned for ten minutes.

ADJOURNMENT: At 1535 hours, 28 September 1995, the court adjourns.

REASSEMBLY: At 1557 hours, 28 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

Major Abbott?

PROSECUTOR: Mr Judge Advocate, my next witness will be raising evidence that my friend has a concern over that will require a **voir dire**, a legitimate concern. The **voir dire** will take probably about an hour or an hour and a half, that will be followed by about 30-40 minutes of direct-examination and from what I understand a lengthy cross-examination. You've been working all day, straight through lunch, so I mean, you are in the members' hands, I guess, as to whether you want me to call this witness now or do so tomorrow morning.

JUDGE ADVOCATE: Well, Mr President, I had my share of **voir dires** for today. So I suggest that the best way to proceed perhaps would be to adjourn until nine o'clock tomorrow morning at which time I will hear this application in a **voir dire**, and I won't ask you to be here for that time. So according to the information

424

11th voir dire

that we have just received from the prosecution, I would say that your presence will not be required before 10:30, and let's say that if you have not heard anything from the Officer of the Court by ten o'clock - you will be on a 30-minute notice. Is that agreeable to you?

PRESIDENT: That's fine. Yes.

DEFENDING OFFICER: Very well. So the court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1600 hours, 28 September 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 29 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Good morning. So this court is now sitting in a **voir dire**.

TRIAL WITHIN A TRIAL

JUDGE ADVOCATE: Major Abbott.

PROSECUTOR: Thank you, Mr Judge Advocate. I would like to call Lieutenant-Commander Craven, please.

425

Trial within a trial

Lieutenant-Commander Craven

Examination-in-chief

FIRST WITNESS) Lieutenant-Commander M.L.
FOR THE) Craven, is duly sworn.
PROSECUTOR)

EXAMINED BY PROSECUTOR

Q. Good morning, could you please give your full name to the court and spelling your last name, please? A. Yes, my name is Michael Laird Craven, C-R-A-V-E-N.

Q. What is your current position? A. I am the Deputy Combat Officer on HMCS REGINA.

Q. Did you have occasion to attend a mess dinner on December 19, 1991, at the Sub Squadron at CFB Halifax? A. Yes, I did.

Q. On that evening or early hours of 20 December 1991 did you have occasion to attend the wardroom in the HMCS OJIBWA? A. Yes, I did.

Q. I refer you to the Charge Sheet. I'm asking you to read it to yourself, the first two charges. Have you ever had occasion to discuss with Lieutenant-Commander Marsaw details relating to those first two charges? A. Yes, I have.

Q. And when would that have occurred? A. That would have occurred at Lieutenant-Commander Marsaw's home in July of 1994.

Q. Do you recall if whether Lieutenant-Commander Marsaw had been charged with these charges at the time that you had spoken with him? A. Yes, he had been charged.

Q. Do you recall how many days after that the charges had been laid that you did discuss these matters with him at his home? A. It was either the day he was charged or the day immediately following.

426

Trial within a trial

Lieutenant-Commander Craven

Examination-in-chief

Q. Did you have occasion to discuss at that time with Lieutenant-Commander Marsaw the conduct as you observed in the wardroom of the OJIBWA on the 20 December 1991? A. Yes, I did.

Q. Could you relate to the court the contents of that conversation, please? A. Yes, I can. Lieutenant-Commander Marsaw had read the statement that I had provided him.

Q. OK, can I just stop you there for a second. I would like you to look at this statement and ask whether that is the statement you've provided Lieutenant-Commander Marsaw at that time? A. Yes, that is the statement I provided Lieutenant-Commander Marsaw at his home.

PROSECUTOR: Mr Judge Advocate, I already gave my friend a copy. I would like to introduce this statement as an exhibit in this **voir dire**.

JUDGE ADVOCATE: Very well. So this document is marked "VD11-1".

LIEUTENANT-COMMANDER CRAVEN'S STATEMENT TYPEWRITTEN IS MARKED "VD11-1".

PROSECUTOR:

Q. After giving Lieutenant-Commander Marsaw the statement what did he do next? A. He read the statement through once in its entirety. After he had done that we talked about the statement.

Q. OK, I wonder if you could read the highlighted portion at page five of the statement to the court please? A. "Shortly after arrival on board an indelible black felt tip pen was produced. This object was used to decorate Lt(RN) Kelk's head with markings.

Subsequently, his shirt was undone, trousers and shorts lowered to his ankles, and torso and legs further had on felt tip pen markings. On completion of these antics Lt Kelk was rolled on his side. At this

427

Trial within a trial

Lieutenant-Commander Craven

Examination-in-chief

point, LCdr Marsaw, sitting beside the unconscious RN officer, inserted a TUERO cigar tube between Lt Kelk's exposed buttocks. Shortly thereafter, LCdr Marsaw exited the Wardroom and proceeded to his cabin, not to be seen for the remainder of the evening. This extraordinary incident became widespread knowledge within the First Canadian Submarine Squadron Wardroom in the following weeks."

Q. Thank you. You said after Lieutenant-Commander Marsaw read the statement that you discussed with him matters relating to the 20th of December 1991 in the wardroom of the HMCS OJIBWA? A. That is correct.

Q. Could you relive that conversation for the court, please? A. Yes, I can. Lieutenant-Commander Marsaw said to me, "So you actually saw this? You actually remember this?", and I said yes I did. And he responded, "Well, I don't remember any of that." I said, "Well, I do and if I am called as a witness I'm going to have to tell the truth." He responded by saying, "Well, in that case you realize that I'm going to have to prove you're wrong." I said, "Yes, I do realize that." And he subsequently went on to say, "You realize that I'm going to have to attack your credibility?" I said, "Yes, I understand that too but I will still be obliged to tell the truth."

Q. Is that an exact quote of the conversation? A. That is perhaps not an exact quote but words to that effect were exchanged.

PROSECUTOR: Thank you, I have no further questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

s.19(1)

428

Trial within a trial

Lieutenant-Commander Craven

Cross-examination

Q. How certain are you about the time of this conversation? A. The time with respect to the day, sir, or the time of day?

Q. Time ... let's start with the day?
A. I'm reasonably certain that it was either the day Lieutenant-Commander Marsaw was charged or the day after.

Q. About the time of the day? A. It was approximately five o'clock in the afternoon, just before supper time.

DEFENDING OFFICER: May I see the exhibit, Mr Judge Advocate.

Q. This is a document marked Exhibit "VD11-1". This document "VD11-1", that's the one that was just introduced? A. Yes.

Q. How certain are you that this is the actual document that you showed to Lieutenant-Commander Marsaw? A. This document is not the document I've showed him but an exact facsimile of it.

Q. OK, now if I suggest to you that the document that you showed him was not typed but rather handwritten? A. No, that's not correct. The document I gave Lieutenant-Commander Marsaw was typed.

Q. So it is your testimony that the document you showed was not a photocopy of the handwritten statement you gave to the military police? A. Yes, that is correct.

Q. How long did you stay there? A. Close to an hour.

Q. And where did that conversation take place? A. It took place in Lieutenant-Commander Marsaw's recreation room in the basement of his house on in Dartmouth.

429

Trial within a trial

Lieutenant-Commander Craven

Cross-examination

Q. That was in July 1994? A. Yes.

Q. About 15 months ago or whatever?
A. Whatever, yes.

Q. It's close to 15 months anyway? A. Yes.

Q. Did you make notes at that time of that conversation? A. I did not make notes of that conversation at that time, no.

Q. So would you say that those words you just related do not necessarily amount to what exactly Lieutenant-Commander Marsaw told you? A. No, I would not say that. They do amount more or less to what Lieutenant-Commander Marsaw told me.

Q. But these are not the exact words he might have used? A. No, of course not. Those are not the exact words that he used.

Q. Do you recall stating, in the course of the same conversation, stating to Lieutenant-Commander Marsaw that you were pretty drunk that night? A. I do not recall stating that I was pretty drunk that night, no.

Q. Is it possible that you might have?
A. No, I don't think so.

Q. Were you in fact pretty drunk that night?
A. No, I was not pretty drunk that night.

Q. Drunk? A. I was mildly inebriated at the time I left the submarine at about 4:30 that morning.

Q. Was there anybody else present when that conversation took place at Lieutenant-Commander Marsaw's home? A. There was no one else present in the recreation room in the basement of the house, no. There were two other people present in the house.

Q. When you said ... you reported the words and correct me if I'm wrong, "I don't remember any of this", you reported those words? A. I reported that Lieutenant-Commander Marsaw said in respect to the discussion about the cigar tube incident, "I don't remember any of that."

Q. "Any of that", rather than "this"?
A. Yes, "that".

Q. Is it possible that he would have said, "That did not happen. I don't remember that happening"? A. It's possible I suppose, yes.

DEFENDING OFFICER: Thank you, I have no further questions.

JUDGE ADVOCATE: Re-examination?

PROSECUTOR: No re-examination.

JUDGE ADVOCATE: Thank you very much, you may withdraw.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Do you have any other evidence to call in this **voir dire**?

PROSECUTOR: I do not, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Lieutenant-Colonel Couture, do you wish to call evidence in the **voir dire**?

DEFENDING OFFICER: I'm still debating on that actually. I was about to make a request in order to assist me in the making of a decision. I know I have a few alternatives. Since the prosecutor has not indicated yet on the ground on what basis this may be admissible ... I'm not asking the prosecutor to argue now but maybe if in a few sentences he indicated his

position so I can better appreciate and determine whether I would call evidence or not.

JUDGE ADVOCATE: Mr Prosecutor, do you have any objection to inform us about the gist of your application?

PROSECUTOR: No, I don't. If it helps the process out I don't mind. What my position is, it is my understanding that the defence does not contest the voluntariness issue of the **voir dire**, rather the issue that they contest is one of relevancy. Consequently, I believe the comments as alleged made by Lieutenant-Commander Marsaw through the witness Craven are relevant for a number of different legal reasons. First of all it goes to the issue of intent, an essential ingredient that the prosecution must prove.

Lieutenant-Commander Marsaw, according to some Craven statement, indicates that he may not have had a memory of what happened that night, possibly that as a consequence of alcohol. That goes directly to issues of intent or lack thereof. To the same extent, it also may have relevance should Lieutenant-Commander Marsaw take the stand and testify otherwise that he has a very clear memory of that evening for example because he was PMC of the mess dinner and he drank water all night. So the statement is relevant on that issue of intent as well.

It's also relevant for the issue of credibility. Should Lieutenant-Commander Marsaw take the stand and as the defence counsel has already stated repeatedly, "This is a case that deals with significant issue of credibility", so credibility is a live issue in this case. Consequently, the statement is relevant. Should Lieutenant-Commander Marsaw take the stand and say a statement otherwise than the one alleged to him by Craven, I would also submit that his statement to Craven is inconsistent with the statement that he has made to other people at other times, statement which I will attempt at future **voir dires** in this trial to have

introduced as well. Again, it's relevant therefore for credibility.

Thirdly, apart from intent and credibility, it negates possible defences including at least one live defence we know that it exists, as it has been raised three times now, that the court has no jurisdiction to hear the first two charges because they amount to sexual assault. One of the ingredients in sexual assault is specific intent. Clearly, if Lieutenant-Commander Marsaw's statement is admitted as evidence, this is evidence that the Crown can use to argue that specific intent did not exist, therefore, that sexual assault charge is not possible. Again, that goes to a live jurisdictional issue which the defence has said they can raise at any time throughout the trial as jurisdiction is always a matter for the court to deal with.

Fourthly, courts have always said that evidence should be allowed which relates to consciousness of guilt and that is to be considered by the jury in relation to issues surrounding **mens rea**. But part of the statement of Lieutenant-Commander Marsaw does not say, "I guess I'll have to reflect on what you said since I have no recollection of that night. Perhaps you're right, perhaps I'll have to re-evaluate things, perhaps I'll have to take responsibility for the acts that I can't remember." He says, "I'm going to have to attack your credibility." That clearly falls within the ambit of evidence that could be considered consciousness of guilt. An accused who is confronted with incriminating facts, responding in a way that he has to attack the evidence he faces or flea from it.

So, I would say at this point in terms of relevance, the statement is relevant for issues of intent, credibility, in getting possible jurisdiction of defences as well as consciousness of guilt.

JUDGE ADVOCATE: Thank you.

433

Trial within a trial

DEFENDING OFFICER: Thank you very much. I
would like to call Lieutenant-Commander Marsaw.

s.19(1)

434

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

FIRST WITNESS) Lieutenant-Commander D.C.
FOR THE) Marsaw, is duly sworn.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. Lieutenant-Commander Marsaw, you are the accused in these proceedings? A. Yes, sir.

Q. You just heard the testimony of Lieutenant-Commander Craven with respect to a statement or a conversation that took place between you and him in July 1994. This will be the focus of this examination. A. Could I see the exhibit, please?

Q. I show you a document that has been marked "VD11-1". Could you look at this document? You've heard the testimony of Lieutenant-Commander Craven, does this document look like the document you saw that night, if you did indeed see it? A. No, sir. The document I was shown was handwritten, a photocopy of a handwritten statement.

Q. I show a document to you. Would you please look at this document. Could you tell the court whether you recognize this document and if so what if any relation it has with that conversation we're talking about? A. With the exception of the annotation on the top right hand corner which is typed in, this is at first glance identical to the document I was shown. I haven't read through of course.

DEFENDING OFFICER: Mr Judge Advocate, I would like to introduce this document as exhibit in this **voir dire**.

JUDGE ADVOCATE: No objection?

PROSECUTOR: No objection.

JUDGE ADVOCATE: So, it will become "VD11-2".

435

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

LIEUTENANT-COMMANDER CRAVEN'S STATEMENT HANDWRITTEN IS
MARKED EXHIBIT "VD11-2".

DEFENDING OFFICER:

Q. Now, can you confirm to the court ...
first of all, did such meeting take place between you
and Lieutenant-Commander Craven? A. Yes, it did.

Q. And it is at the occasion of that meeting
that you saw the document or a document like the one we
just introduced? A. That's correct, sir.

Q. Could you tell the court exactly when
that meeting took place? A. Yes, sir, it was the 18th
of July. The day before I was charged with these
offences at ...

JUDGE ADVOCATE: The day before you were
charged, you said?

WITNESS: The day before, sir, yes, at ap-
proximately 2100.

DEFENDING OFFICER:

Q. Where did it take place? A. In the
family room of my home.

Q. I understand that indeed the statement we
just produced was showed to you? A. That's correct,
sir.

Q. Could you inform the court whether or not
you read it? A. Yes, I read it.

Q. Prior to reading the statement was there
any special conversations between you and Lieutenant-
Commander Craven? A. No, sir, normal greeting when he
came to my home. I asked him if he wanted a coffee to

436

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

which he declined. We then went downstairs in my family room. He showed me the statement and I read it.

Q. Having read the statement, could you inform the court as to what if any conversation took place? A. I read it and I said to Lieutenant-Commander Craven, I thanked him for being honest with me.

I think he understood the context of that and that I was very conscious that a lot of people were speaking behind my back. He was one who actually came forward and at least told me honestly what he was saying.

Q. What else did you say? A. Other than normal departure salutations that's all I said.

Q. So you just heard Lieutenant-Commander Craven referring to that conversation as to you saying, "I don't remember any of that." He says, "I do." Then you telling him you'll have to challenge his credibility or challenge him, all that conversation. Could you comment to the court whether if it actually took place?

A. It did not take place.

Q. So your position is, having thanked him for being honest with you, that was the extent of it? A. He made comments to me. That's the extent of what I've said to him.

Q. What comments did he make to you? A. For accuracy, may I check my diary, sir?

Q. When did you make this diary? A. After reading the statement ... sorry, when did I make the diary?

Q. Yes. A. Immediately after he left my home did I ... I made an entry in my diary.

DEFENDING OFFICER: Mr Judge Advocate.

JUDGE ADVOCATE: Mr Prosecutor?

437

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

PROSECUTOR: I've never seen the diary before. I certainly want a chance to review the diary and I want a copy of the diary.

WITNESS: It's marked "Protected by Solicitor/Client" because there is stuff between you and I. I don't need to look at it. If that's required I can approximate what I recorded in.

DEFENDING OFFICER:

Q. So, to the best of your recollection what was the comment that Lieutenant-Commander Craven made?

A. Just before we left the family room he said to me that he had shown that very same statement he had shown me to Lieutenant-Commander Pete Kavanagh. Then as we were more properly departing the room and going up the stairs he turned and said to me that he was very drunk the night when he left the submarine.

PROSECUTOR: I'm going to object to that question, Mr Judge Advocate, on grounds that it's hearsay. If it's introduced to prove the truth of the contents I'm objecting to it.

DEFENDING OFFICER: No, it is not introduced to prove the content of the statement but rather that a statement of that nature was made whilst the witness Craven has stated that he made no such statement. It goes like directly to the issue of what conversation took place? I have asked Lieutenant-Commander Craven ... as a matter of fact the prosecution asked Lieutenant-Commander Craven to detail the conversation. In cross-examination I said, "Did you state that? Did you discuss that?" And I asked him about further conversation that took place and he stated that no such conversation has taken place. I'm only adducing the full context of the conversation.

JUDGE ADVOCATE: Major Abbott?

438

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

PROSECUTOR: If it's being introduced for the truth of its contents, I object to it.

JUDGE ADVOCATE: It's not.

PROSECUTOR: If it's not then that's fine.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER:

Q. How certain are you of those events of that night? A. ...

PROSECUTOR: I would object to it. He is out boosting at this point.

DEFENDING OFFICER: I do believe that my learned friend ... I objected to a similar question of my learned friend in the main trial when he asked to Lieutenant[N] Hart, "How certain are you that you have seen that?" I objected and you ruled in the prosecution's favour.

PROSECUTOR: Now it's because Lieutenant[N] Hart commented prior to the making of the statement, that he had recollections that were clear at some moments in the wardroom and he had recollections that weren't so clear such as who was in and who was out in the wardroom at that point. The purpose of the question at that point was to determine for the court whether his comments about Lieutenant-Commander Marsaw inserting the cigar tube felt within his sure category or his not so sure category. In this case, that issue hasn't arisen in Lieutenant-Commander Marsaw's testimony. It's a question which is simply asked to boost the oath of Lieutenant-Commander Marsaw.

JUDGE ADVOCATE: The objection is denied. You may answer.

439

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

WITNESS: Would you repeat the question please, sir?

DEFENDING OFFICER:

Q. Yes, could you tell the court to what extent you are positive or certain of the accuracy of the detail you just provided? A. I'm absolutely certain. I recorded what he said to me at exactly 2130, the evening of the 18 July '94. It is particularly indelible upon my mind because it was one of the rare circumstances under which a person was actually forthright with me during that time period.

DEFENDING OFFICER: Thank you, I have no further questions.

JUDGE ADVOCATE: Cross-examination?

PROSECUTOR: I do have a cross-examination, Mr Judge Advocate. I'm in a situation I've never been in before. I would like to challenge the credibility of Lieutenant-Commander Marsaw's statement and do so by referring to other statements he has made to other people. I believe I would have to have those statements dealt with within a **voir dire** to determine whether or not they have been given voluntarily or in accordance with the **Charter of Rights** before I can put the statements to the witness. I'm not sure if I'm asking for a **voir dire** within a **voir dire** at this point.

JUDGE ADVOCATE: It looks like that.

PROSECUTOR: Or several **voir dires** within a **voir dire**.

JUDGE ADVOCATE: It really looks like that. We're talking about how many statements of how many witnesses?

Lieutenant-Commander Marsaw

PROSECUTOR: I would have to check my record. Definitively Lieutenant-Commander Kavanagh would have a couple of statements. Possibly Lieutenant-Commander Scherber would have a statement, Lieutenant-Commander Dussault, possibly Captain Whynott. I don't mind being ... that can be open with the court. The accused of course has every right to be present throughout all of this. I can tell you what sort of things I would anticipate trying to bring out in these **voir dire**s and how I would use them in terms of credibility, if you would like.

JUDGE ADVOCATE: Go ahead.

PROSECUTOR: It's the contention of the Crown that Lieutenant-Commander Marsaw has challenged, and threatened, and intimidated a number of witnesses after he was charged. At the same time in doing so that some of them has made similar statements that Craven alleges that he has made to them as well. For example, he had a meeting with Lieutenant-Commander Kavanagh before and after Kavanagh had talked to the military police for his interview stating to Kavanagh that he had no recollection of that night or the mess dinner. There was also a conversation he has with Kavanagh after Lieutenant-Commander Marsaw had confronted with Lieutenant-Commander Dussault in the wardroom giving him threats where Lieutenant-Commander Marsaw allegedly tells Lieutenant-Commander Kavanagh that his lawyer has told him to be confrontational.

Indeed with Lieutenant-Commander Dussault, Dussault will say that Lieutenant-Commander Marsaw approached him in the wardroom and said that he was going to take Lieutenant-Commander Dussault and his family down with him and this was witnessed by Captain Whynott.

So the picture that Lieutenant-Commander Marsaw paints right now is a person who thanks somebody for being forthright in coming to him simply and silently receives a statement made by Lieutenant-Com-

441

Trial within a trial

Lieutenant-Commander Marsaw

mander Craven. He thanks him and everybody goes on their way. And there is absolutely no hints or discussion according to Lieutenant-Commander Marsaw that he made any implicit threat to Craven about challenging his credibility or that he ever said that he had no recollection that night. For the purposes of challenging his credibility about what he says happened in his family room that night, I would like to cross-examine him using those statements. And to be honest, I'm not completely certain on the law in this area about whether or not the statements that I attempt to use to challenge his credibility on this point have to be patched through a **voir dire** first and before I can use them and that's the issue I'm into right now, thank you.

JUDGE ADVOCATE: And those witnesses who made those statements, are they available to you at this time?

PROSECUTOR: Lieutenant-Commander Dussault, I believe, is in town. I believe Lieutenant-Commander Kavanagh is in town. Whynott could be flown here. Other witnesses, I'll have to check on them.

JUDGE ADVOCATE: Thank you. What are your views on that, Lieutenant-Colonel Couture?

DEFENDING OFFICER: I do not share my colleague's view. I believe that the issue here is rather limited. The purpose of this **voir dire** is to determine whether a statement was made that evening and if so the nature of the statement, the content of the statement.

Myself in cross-examining Lieutenant-Commander Craven, I limited myself to basically the event of the evening.

I must say that if I had wanted or I could have attempted to widen the debate and go through a whole slew of questions from the evening of the alleged incident to the time that conversation took place. I chose obviously not to do so because I do believe that the debate is rather limited. Did the statement take place or not?

Lieutenant-Commander Marsaw

First of all, I can inform you right now that I am aware of some of the allegations that the prosecution is making now and they are also disputed. I submit to you that a conversation Lieutenant-Commander Marsaw may have had with, let's take, Dussault for example as mentioned, how relevant is it to the debate we have here today? Supposing that such conversation took place, and our position of course would be again different, how does that affect the very issue that is in front of you?

JUDGE ADVOCATE: The problem I have is that I think it does affect for the reason that it may affect the credibility of your witness. The problem I have right now is that you said the issue is and I quite agree on that, I mean those two are two issues before the court. The first issue is that I have to determine if a statement was made by the accused. Secondly, I have to determine the nature of that statement. But, here comes the third issue which is in order to decide that because of the fact that one witness says white and the other witness says black I may have to assess the credibility of those people and that's where I see this third issue coming. What are your views on that?

DEFENDING OFFICER: It's hard to deny that credibility always remains an issue so be it, yes, I cannot really object to that. My concern now - I can assure the court, we have no fear of being challenged incidently - my concern now is the time in the process involved in this.

JUDGE ADVOCATE: I have the same concerns.

DEFENDING OFFICER: But nonetheless it must be understood that the accused has the right to defend himself. We approached this as casually and simply as possible and you can see that it is most legitimate for the accused to express his position especially when the discrepancy is so flagrant.

443

Trial within a trial

Lieutenant-Commander Marsaw

Now as a suggestion to the court and to my learned friend - it's hard to express, it's like asking the court for half a decision - I was thinking if we could get maybe ... maybe get a debate on the narrow issue if those words had been pronounced as reported by the witnesses Craven. Would they be admissible and under what?

JUDGE ADVOCATE: Have a debate on the narrow issue of if those words were pronounced?

DEFENDING OFFICER: If those words as related by Craven had been said?

JUDGE ADVOCATE: Again, I have to assess credibility to decide that.

DEFENDING OFFICER: No, but what I'm saying is if I was very much in doubt as to ... even under what rule or under what principle of law those statements may be admissible. That's why I have difficulty determining my position in this part for instance because quite simply put, hearsay is not admissible unless it falls within some of the exception. It doesn't fall under 42 of the MRE.

JUDGE ADVOCATE: You're talking about the statements made by the other witnesses?

DEFENDING OFFICER: I'm talking about the statement the accused would allegedly have made to Craven.

JUDGE ADVOCATE: OK.

DEFENDING OFFICER: They do not fall under 42. They do not fall under 27, 28, 29 or 30 of the MREs. So what are they and how can they be admitted?

JUDGE ADVOCATE: After 42, what other MREs?

DEFENDING OFFICER: Twenty-seven.

444

Trial within a trial

Lieutenant-Commander Marsaw

JUDGE ADVOCATE: OK, **rea gestae**

DEFENDING OFFICER: That's right, obviously they are not that.

JUDGE ADVOCATE: And you mentioned other rules.

DEFENDING OFFICER: They are not admissible under 28. They are not admissible under 29 and they are not admissible, in our submission, under 30 which are spontaneous words in emergency situation.

JUDGE ADVOCATE: What about 60?

DEFENDING OFFICER: Maybe I forgot one. I will review it. I tried to look at them all.

JUDGE ADVOCATE: I just raised it by memory but I will refer to my rules.

DEFENDING OFFICER: OK, yes I see your point. I say, not it is not admissible under 60 either which covers other types of hearsay that might be admissible.

JUDGE ADVOCATE: And why?

DEFENDING OFFICER: Because I haven't found a rule in my submission. I haven't found a rule.

JUDGE ADVOCATE: Why is it not admissible under 60?

DEFENDING OFFICER: Sixty reads ... well, I'm looking at 60(a). I suppose that's what you have in mind?

JUDGE ADVOCATE: OK, (a), yes.

DEFENDING OFFICER: So I understand 60 to mean if there is a situation of hearsay. Twenty-six

445

Trial within a trial

Lieutenant-Commander Marsaw

says hearsay not admissible. Then our rules provide for so many exception amongst others, those I have referred to. Sixty provide further exception that maybe ... if some exceptions to hearsay that are not covered in the MRE exist and would be admissible down-town, they would be admissible in ours.

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: I question the existence, like if we were like a civil court in Ottawa right now I would be formulating the same objection, because under what principle of law, recognized by a civil court, would this be admissible?

JUDGE ADVOCATE: What about the common law rule that any conversation that the accused has with another person is admissible?

DEFENDING OFFICER: With all respect, it cannot be any, it has to be ...

JUDGE ADVOCATE: I'm just trying to summarize it because I don't have it before me and unfortunately ...

DEFENDING OFFICER: Understood, Mr Judge Advocate.

JUDGE ADVOCATE: I don't want to quote the rule.

DEFENDING OFFICER: No, no, that's all right. What I'm stating, Mr Judge Advocate, is that it has to be relevant to start with. This is again a most fundamental rule that governs both military and civilian trials. Otherwise, should no consideration be given to relevancy of the evidence, it would be impossible to get through any rather complex or even simple trials because it would take such proportions that it would be impossible to eventually see the end of it.

446

Trial within a trial

Lieutenant-Commander Marsaw

What is the relevancy of a statement? Just assuming for a moment that the statement was made as Craven described it. Supposing for a moment although we have contested it obviously ...

JUDGE ADVOCATE: I don't want ... I know I'm cutting you and I'm sorry about that but I mean, are you arguing to the whole issue ... I'm not too sure on what you're arguing right now. Are you arguing to the problem that your friend has?

DEFENDING OFFICER: That's right, yes. I'm trying to propose to the court and my learned friend to what extent if before getting into a long and complex process of challenging the credibility of Lieutenant-Commander Marsaw that if you were to look at the statement, and if on its face it's not relevant, why should we waste a week?

JUDGE ADVOCATE: So when you said that you were proposing to ask for half a decision ...

DEFENDING OFFICER: Decision ... that's what I had in mind.

JUDGE ADVOCATE: That would be on that specific matter of relevancy.

DEFENDING OFFICER: That's right. In conducting, or proceeding, or taking the position we have adopted this morning, that's what we have tried to do. We have tried to limit the debate. We don't want to unduly limit the debate but clearly I could have challenged Lieutenant-Commander Craven much more than I did. But we chose to attempt to limit the debate because our original position was that those statements cannot be admitted because they do not fall under any exception to the hearsay rule.

JUDGE ADVOCATE: When you said, "Those statements", which statements?

447

Trial within a trial

Lieutenant-Commander Marsaw

DEFENDING OFFICER: Those statements as reported by Craven. It has always been and it was my position that they were not admissible because they do not fall under any exception to the hearsay rule and I will argue later if need be. They do not amount to consciousness of guilt. They do not amount to ... they amount to very little. They are not just relevant. They do not meet the test required for consciousness of guilt. I have several cases here. The consciousness of guilt is something that goes far beyond the evidence proposed here. It has to be ... in most cases they are lies relating to consciousness of guilt, lies or fleeing a scene, or doing a number of acts that are after the alleged commission of the offence out of which an inference of guilt may be inferred in certain variousness of these circumstances and so on and so forth.

Let's talk about the, "I do not remember", how can an inference of guilt be drawn out of that? In fact my learned friend has indicated already ...

JUDGE ADVOCATE: No, perhaps it's not that but when it is alleged that he may have said ...

DEFENDING OFFICER: "I don't remember."

JUDGE ADVOCATE: Let me refer to the words, "I'm going to tell you wrong. I'm going to attack your credibility." After Craven would have said that, "If I am called as a witness I'm going to tell the truth or I must tell the truth."

DEFENDING OFFICER: As to those words what's more legitimate? The person is about to be charged. He hasn't been charged admittedly according to his evidence this morning. According to the witness Craven he has been charged already.

JUDGE ADVOCATE: Again, that's something that is not clear in my mind that we'll have to check because when we refer to the fact that, had the witness been charged or not? There may be confusion here. He

448

Trial within a trial

Lieutenant-Commander Marsaw

had not been served the copy of the Charge Sheet because it is dated 19 July, but according to the regulations, he might have been served with a copy of the charge report. So that's one of the questions I intended to ask later on, on that specific point. Let's say it's not too clear at this time.

DEFENDING OFFICER: Yes, and I'm saying it isn't all that critical either, personally. Whether he was actually charged, I mean, we will go as far as admitting that he knew he was about to be, so it really doesn't matter whether he was actually or not. But the fact of the matter, the important fact though is what more natural for a person who is about to stand trial or he is about to be charged to express his desire to fight the charge. If something, it is more exculpatory. The most reasonable interpretation that can be drawn out of that sentence tends to be more of a exculpatory nature. There is nothing ... it cannot be said that there is anything wrong for one to represent to another his desire to defend his rights or to use his rights to defend himself against pending charges or coming charges.

Had he threatened the witness, well that might be a different story, but there is no evidence there whatsoever that he might have threatened Craven. Craven relates this conversation like very casual tone and so on and so forth. I'm sure that if there had been any threats or voice raising and all that the prosecution would have made a duty of raising it. So from a relevance point of view and from inference that can be drawn, "I will have to attack your credibility", is only an expression of somebody who intend to defend himself.

So, our position is that those are not admissible and if there was a way of determining the hypothetical admissibility of that, that might save a lot of time. I would add ...

449

Trial within a trial

Lieutenant-Commander Marsaw

JUDGE ADVOCATE: Yes, but you touched only one aspect. That's much more complicated than that because you touched one of the four issues that your friend has raised.

DEFENDING OFFICER: That's right and I was about to talk about some ...

JUDGE ADVOCATE: I'm not really asking you to plead on four of them at this time but all I'm saying is that it may be very difficult to give half a decision as you're asking when we consider all those matters raised by the prosecution.

DEFENDING OFFICER: I wanted to add as you intervened that in fact some of the comments of the prosecution tend to demonstrate that relevancy is not really what they're after. They say that it goes to credibility.

JUDGE ADVOCATE: Well, it's not the way I understand it. They say it is relevant because it deals with credibility, consciousness of guilt and so on, that's the way I see it. That's a way to demonstrate ... those are four ways, they suggest, to demonstrate relevancy. It goes to intent, credibility, matter of specific intent when we relate to sexual assaults and consciousness of guilt.

DEFENDING OFFICER: Yes, well I would call that four ways to support admissibility and not relevancy. I mean, relevancy deals with relevancy to the charge, what is relevant to proving the charge. Credibility issues may become admissible. That's maybe just a manner of confusion in the wording here but that's how I see it. The prosecution must adduce evidence that is relevant to the charge and I submit to you that on this factor alone the proposed evidence is not relevant to the charge to be extended, it doesn't tend to demonstrate the commission of the offence. That's what I mean by relevancy.

Lieutenant-Commander Marsaw

Now having put relevancy aside, then we look at, might something be admissible as it relates to credibility? I suggest to you that yes, it may be but ... I'll give you the example of a statement to the military police by way of analogy. If an accused makes a statement to the military police, inculpatory statement ... no, let's say that it is not inculpatory to better suit the example. By way of example only here at this point, if an accused makes a statement to the military police the prosecution - the statement is not let's say inculpatory, clearly inculpatory - the prosecution wants to have a ruling on the admissibility or on the voluntariness of the statement, they would in their case call the evidence, have a ruling as to whether the statement was made freely and voluntarily and they will keep it in their back pocket, if I may say so, because that's the only way they could later use it for cross-examination of the accused. The reason they're doing that it's because the statement is not admissible in their case because it is not relevant.

JUDGE ADVOCATE: It's for future purposes.

DEFENDING OFFICER: Exactly. I'm stating to you here that in this case voluntariness is not an issue. If they want later to test the credibility of the witness they can do it.

JUDGE ADVOCATE: If they want to test the credibility of the accused they can do it when ...

DEFENDING OFFICER: The credibility of the accused testifying in the main trial, if he did, they could do it later.

JUDGE ADVOCATE: In rebuttal you mean?

DEFENDING OFFICER: They could do it in rebuttal and they could do it in rebuttal ...

JUDGE ADVOCATE: But are you suggesting that they can only ... that they can at that time ask the

Lieutenant-Commander Marsaw

court to rule on the admissibility of a certain amount of statements to attack the credibility of ... can they do that in rebuttal, is it what you say?

DEFENDING OFFICER: What I'm saying, Mr Judge Advocate, is that to the extent where voluntariness is not involved, at least for that portion they need not to because all the individuals that the prosecution has referred to as potential people that could contradict and all that, none of them are persons in authority. None of them present any scenarios where a formal **voir dire** might need to be held to determine voluntariness.

JUDGE ADVOCATE: I'm maybe mistaken. I was under the impression that there was a point of voluntariness to determine with the statements made by those witnesses. I thought that it's what I understood from the prosecution's argument, that we would have to hold a **voir dire** within a **voir dire** to determine voluntariness of several statements being made by other witnesses to, I don't know, the military police I guess, that's what I heard. So I'm a bit confused at this point.

DEFENDING OFFICER: I believe my understanding - and maybe Major Abbott can confirm - my understanding of the evidence and his remarks is such that no, there is no such a thing. All the individuals he mentioned are - I'm not saying that the MPs are abnormal - but they are normal people. They are not ... military police, they are not persons in authority. They are persons, period. I have had disclosure and those extracts of conversation, or action, or whatsoever that could be brought up by the prosecution in relation to those witnesses do not involve the concept of voluntariness. The defence position will only be, should we get there at one stage or another of the trial, our position will be, well either it took place or didn't take place and so on and so forth or maybe the relevancy as well but voluntariness is not the issue.

452

Trial within a trial

Lieutenant-Commander Marsaw

JUDGE ADVOCATE: May I suggest that we take a break at this time. The court is adjourned for half an hour and I would like to meet counsel in my chambers.

ADJOURNMENT: At 1102 hours, 29 September 1995, the court adjourns.

REASSEMBLY: At 1125 hours, 29 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: I understand that you have a request to make to the court at this time?

DEFENDING OFFICER: Yes, I discussed with my learned friend this situation we're in now. I made certain representations to you before this adjournment. I think my learned friend as well as I might benefit of an adjournment so that we can consider the situation. It is not necessarily easy at this point. We want to further investigate and consider our respective position and then make summation to the court as to how it is going to be approached. I have some views but I sure would like, in light of the information the prosecution has given me, I would like to consider further options and then make more complete representations to the court.

JUDGE ADVOCATE: And do you wish an adjournment?

DEFENDING OFFICER: Didn't I say that?

JUDGE ADVOCATE: I don't think so.

DEFENDING OFFICER: Well, I argued for it but then I've neglected to request it, until 1300 hours if it was possible?

JUDGE ADVOCATE: Is that agreeable to the prosecution?

453

Trial within a trial

Lieutenant-Commander Marsaw

PROSECUTOR: Yes it is, Mr Judge Advocate, and prior granting the adjournment I wonder if you could remind the witness that he is under oath and the implications of being under oath at this time, thank you.

JUDGE ADVOCATE: So, Lieutenant-Commander Marsaw, you're under oath and pending cross-examination I would ask you not to discuss your testimony with anybody. This court is ...

DEFENDING OFFICER: Mr Judge Advocate, with anybody I take that does not include counsel?

JUDGE ADVOCATE: What are your views on that, Mr Prosecutor?

PROSECUTOR: I'm a Nova Scotia barrister. Our rules say that when a witness is sworn in neither counsel can discuss matters with the witnesses that are under oath. I believe it varies perhaps.

DEFENDING OFFICER: I'm not too ... I must say I haven't looked at the book lately.

JUDGE ADVOCATE: Another issue.

DEFENDING OFFICER: I'm not ... on that I understand that rule, of course, especially as it applies to other witnesses but it cannot be binding on the accused because then that would literally deprive the accused of his right to counsel. I mean, if I cannot talk to him, I mean, he may want to seek advice. I may need input of him in considering my position, it would not, to me, stand to sense that if I cannot talk to him he is for all intended purposes denied of his right to counsel just at the time he needs it the most.

PROSECUTOR: I think there might be a way around it. Perhaps simply and very merely the witness cannot discuss his testimony.

454

Trial within a trial

Lieutenant-Commander Marsaw

JUDGE ADVOCATE: I thought it's what I said.

PROSECUTOR: In terms of giving instructions to counsel that's something completely different.

DEFENDING OFFICER: The prosecution has informed me and has made representations, several of them on the record about bringing issues and bringing evidence, I need obviously to discuss those with my client and to an extent it can be said that it pertains to his testimony because he hasn't been cross-examined yet. I got to appraise myself of a number of facts. I think there should be no limitations whatsoever as to what I may discuss with the accused just the same as we don't ask the accused to withdraw from the courtroom when we debated this.

PROSECUTOR: I want to be fair to my friend. If he wants to talk to his client about his testimony although he is under oath I'm not going to raise it as an issue.

JUDGE ADVOCATE: So you have no objection that the witness talks to counsel.

PROSECUTOR: Talks to counsel but not others.

JUDGE ADVOCATE: You heard that, Lieutenant-Commander Marsaw?

WITNESS: I understand, sir.

JUDGE ADVOCATE: Very well. This court is adjourned until 1300 hours.

ADJOURNMENT: At 1140 hours, 29 September 1995, the court adjourns.

REASSEMBLY: At 1300 hours, 29 September 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: Thank you, Mr Judge Advocate. During the break my friend and I have been able to save the court at least some time. I will not be requesting a **voir dire** taking in the statement allegedly made by Lieutenant-Commander Marsaw to a person in authority. So there will be no need for me to make a request to have a **voir dire** within a **voir dire**. That will save a full day at least. Consequently I will be prepared and ready to cross-examine Lieutenant-Commander Marsaw at 9 o'clock Monday morning. I would like to take an adjournment at this time so I can use the afternoon for administrative purposes, rounding up potential witnesses that may be ... I may make a motion to call in rebuttal should that be needed on Monday afternoon. Thank you.

JUDGE ADVOCATE: Any objection from the defence?

DEFENDING OFFICER: No, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. In these circumstances this court is adjourned until 9 o'clock Monday morning.

ADJOURNMENT: At 1305 hours, 29 September 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 2 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott, are you ready to proceed with your cross-examination of the witness?

PROSECUTOR: Yes, I am, Mr Judge Advocate.

CROSS-EXAMINED BY PROSECUTOR

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Lieutenant-Commander Marsaw, were you informed by Lieutenant-Colonel Eady, your former commanding officer, during a 15 July 1994 phone call, that you would be charged? A. Is that a Friday, sir? Is that a Friday, the 15th of July?

Q. The 15th of July is a Friday? A. Yes, I was.

Q. And you were actually formerly charged the 19th July 1994? A. That is correct, sir.

Q. Were you upset over being charged?
A. Yes, I was upset for the entire period I suppose. So that was more upsetting.

Q. Sure. Because that entire period, the investigation, the charging period, was an emotional and a stressful time for you? A. Yes, sir.

Q. And that it probably became a stressful and an emotional time for you as far back as December '93 when the story broke in the paper? A. In fact, even slightly before that when I started hearing that the reporter was investigating.

Q. During that period did you tell people that you were taking prescribed drugs to combat the stress? A. I told some people that; yes, sir

Q. So during the period of the investigation, the charging process, it is a stressful time and you were taking prescribed drugs to calm your emotional state? A. Yes, that is true.

Q. During this time would it be fair to say that your wife could also observe that you were upset and you were under stress? A. That is true.

Q. Do you know if she knows Mrs Craven, Lieutenant-Commander Craven's wife? A. I know they

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

have met. I do not think they are close friends. I know they have associated.

Q. Do you know if she phoned Mrs Craven some time between the 16th and the 18th of July stating that you were upset and asked if Mike Craven could come over and visit you? A. I do not know that. I would find that hard to believe.

Q. You can't say whether it is possible that Craven enters your house that July night under the impression that you have been charged, can you? A. I don't know how he would get that impression.

Q. Colonel Eady phones four days before saying you are about to be charged. That information gets passed through the broken telephone. He arrives at your doorstep under the impression that you are already charged. You don't know what is in his mind so you can't say whether he is under that impression or not, can you? A. Oh no I can't comment on what impressions he might be under.

Q. When he does visit you, in your family room, that July night, he presents to you what you claim is a written statement that you read in his presence? A. Yes, sir.

Q. I wonder if you could read for the court this whole entire highlighted area please? A. ...

JUDGE ADVOCATE: What are you referring to?

PROSECUTOR: Excuse me, Mr Judge Advocate.

JUDGE ADVOCATE: "VD11-2"?

PROSECUTOR: "VD11-2", sir.

JUDGE ADVOCATE: What page?

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

PROSECUTOR: Reading at the bottom of page 9 underneath the diagram.

WITNESS: "Shortly after our arrival on board an indelible black felt tip pen was produced. This object was used to decorate Lt(RN) Kelk's head with markings. Subsequently his shirt was undone, trousers and shorts lowered to his ankles, and his torso and legs were further adorned with felt pen markings. On completion of these antics Lt(RN) Kelk was rolled on his side. At this point LCdr Marsaw, sitting beside the unconscious RN officer, inserted a TUERO cigar tube between Lt(RN) Kelk's exposed buttocks. Shortly thereafter, LCdr Marsaw exited the Wardroom, and proceeded to his cabin, not to be seen for the remainder of the evening. This extraordinary incident became widespread knowledge within the Submarine Squadron Wardroom in following weeks."

Q. Thank you. Is it your testimony that you read this entire statement including the portion you have just read to the court, thanked Lieutenant-Commander Craven for being honest and forthright with you, gave him the general salutations upon departure and that is the only words you said to him that evening?

A. As I testified earlier we discussed the other comments that he made that he had made and I also asked him if he was sure that it was MARGAREE that he had visited because I thought it was FRASER. And he said, "No it was MARGAREE". But yes, that is what transpired.

Q. That was the only words you can recall you ever spoke to him that night, discussing the MARGAREE, the FRASER, thanking him for being honest and forthright and then giving him the general salutations upon departure? A. And then the comments he made to me regarding his drunkenness and showing his statement to Captain ...

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. I am asking you what you said to him?

A. Oh. I am not sure if I mentioned that I offered him a coffee when he arrived which he declined.

Q. So it is your testimony and you would deny ever telling Lieutenant-Commander Craven upon reading the statement that you have no recollection or don't recall that? A. I deny that, yes.

Q. You also deny that you made any statement to Lieutenant-Commander Craven that you would have to discredit him or attack his credibility or words to that effect? A. That is correct, sir.

Q. Do you have a recollection of being in the OJIBWA Wardroom on the night of December 20th 1993? A. The early morning of it?

Q. Yes? A. Yes, sir.

Q. Were you drinking that night? A. Yes, I was.

Q. What did you drink on the evening of the 19th of December and also the early hours of 20 December '91? A. ...

DEFENDING OFFICER: I will object at this point, Mr Judge Advocate. I believe this line of questioning is way too broad having regard to the purpose of this **voir dire**. The purpose of this **voir dire** is to determine the admissibility of a statement that allegedly was made by the accused to Lieutenant-Commander Craven on/around 19 July or so of 1994. And it is our position, and we believe supported by law, that in a **voir dire** the issue must be limited to the purpose of the **voir dire**.

Embarking a **voir dire** for that specific purpose I just enunciated does not in our view open the door to the prosecution to go through zillion of events that really are not related to this issue. In that

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

respect whilst some law may suggest that an accused, for example, may ask about the truth or untruth of a statement, for example, he has made to the police in a **voir dire**, that may be true because if the accused has made a statement regarding the alleged events and whatnot, that is true that he may be put those questions.

But we are far from discussing this issue here. The issue here is quite limited to a July incident and although it is opened to the prosecution to test in general terms the credibility of the witness, it cannot in our view extend and it cannot be used as the prosecutor to open up a debate that has nothing to do with the purpose of the **voir dire**. In that respect I would like to refer this court to the case of **Regina v. Gauthier**, a Supreme Court of Canada case of 1975, where in particular at page 22, Mr Justice Pigeon was rendering the decision. If I may, first at page 20, in the first full paragraph:

"It should first be noted that the Court of Appeal correctly held that, on a *voir dire*, the trial Judge did not have to decide whether the statement that the prosecution sought to introduce in evidence had actually been made, and whether it was true. In a trial by jury, ..."

this is for the jury to decide that.

He continues on in this paragraph to determine of course the purpose of a **voir dire**. Then he carries on at page 22, in the last paragraph on that page. Mr Justice Pigeon states:

"In my opinion it is important to consider, as Turgeon, J.A., did, that when the accused testifies on

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

a voir dire the prosecution is restricted in its cross-examination of the accused. As Kaufman, J.A., states in his book *Admissibility of confessions*, 2nd ed. (1974), p. 30, 'this should be limited to testing credibility and to the matter in issue'."

Mr Justice Pigeon carries on at page 23 making a further analysis and of course in this case it must be remembered that in this particular case, the case of **Gauthier**, the trial judge had heard a **voir dire** regarding the admissibility of some statements of the accused and later on, although the prosecution did not introduce those statements, the trial judge who found some defence or some factors that were playing in favour of the accused in the **voir dire** decided to consider that evidence in the main trial without the evidence having been called. And that is basically what Mr Justice Pigeon is discussing at pages 22 and 23.

But his statement and the most telling and significant statement of Mr Justice Pigeon, as I read it, is at page 22 when he accepts the principle that cross-examination of the accused in a **voir dire** must be limited. The rest of the argument he puts in at pages 23 and 24 deals with propriety of considering evidence that hasn't been properly called in the main trial, that is, evidence that came from a **voir dire**. So Justice Pigeon recognizes the principle of the limitation in cross-examination. He states that and then that forms part of his argument later on.

So for those reasons I would suggest, Mr Judge Advocate, that that line of questioning, especially that of the evening of the 19th of December 1991 is irrelevant to this **voir dire** and I would ask you, Mr Judge Advocate, to sustain this objection and

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

ask the prosecution to refrain from broadening unnecessarily or unduly the cross-examination.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: It is interesting that my friend objects when I ask the question about the accused state of sobriety when he himself asked Lieutenant-Commander Craven that very question. It apparently is in issue when he is allowed to question Craven but it is no longer in issue for my friend when I question the accused about his state of sobriety.

Of course state of sobriety that night is in issue as it relates to credibility. Before I carry on with that point though, Mr Judge Advocate, my friend mentions two passages in the case of **Gauthier** that he has provided, the first one at page 20. He quotes and says that the statement that the prosecution sought to introduce in evidence had actually been made and whether it was true. So he is saying that, based on this case, the judge does not have to decide whether or not the actual statement has been made. He simply determines whether it is relevant and whether it should go in and be admissible in the trial as a whole.

This is a contradiction from the position my friend took last Friday. After I questioned Lieutenant-Commander Craven he asked through the court whether I could tell the court what the purposes of having Craven's statement introduced were. "Why did the prosecution want the statement introduced?" I imagine a number of issues: intent, credibility, and it negates possible jurisdictional defences relating to intent and also consciousness of guilt. My friend then called the accused and before that he said that there were two issues here: One, whether the statement was actually made and two, relevancy.

So on Friday he is saying that one of the purposes of calling the accused to the stand is to argue the issue of whether the statement was in fact

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

made. Now on Monday he is citing case law to say that that isn't one of the reasons why you have a **voir dire**. So it is a contradiction to his argument.

I think on Friday maybe he put the accused on the stand thinking that one of the things a **voir dire** does decide is whether or not a statement was actually made or not. And maybe that is why the accused has found himself on the stand.

I agree with him, one of the purposes of a **voir dire** is not to determine whether or not a statement was actually made. That is for the jury to decide or the members of the court to decide. The purpose of a **voir dire** however is as my friend state on page 22, to deal with issues that he cites in his quote, of credibility and to the matter in issue, so relevancy.

So issues relating, questions can be asked that deal with issues of credibility and that deal with issues of relevancy. In my line of cross-examination I have to get and probe statements that Lieutenant-Commander Marsaw has made on direct. I have to probe and test his credibility. At the same time through cross-examination I can use that as a vehicle to show why Craven's statement is relevant based other statements the accused has made. I will argue that what he told Craven that night is not any different than what he has told a number of other people on other occasions. In order to do that though I have to demonstrate the overall relevancy of his conduct as it relates to Craven's statement and at the same time challenge his credibility on making certain assertions.

So by asking his state of sobriety that night it is nothing more than my friend has already asked. It goes directly to the issue of credibility which is always a live issue before a **voir dire** when an accused is called.

JUDGE ADVOCATE: Thank you. So the ruling of this court is to the effect ... you wish to add something?

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

DEFENDING OFFICER: Just one quick word about the ... my learned friend alluded to the fact that I did ask one question of Lieutenant-Commander Craven and I did indeed. But I should add that I asked the one question whether he was in fact drunk that night and I left it at that because I didn't want to pursue it further for the reason I am objecting now today. I suppose I could have asked lots and lots of questions of Lieutenant-Commander Craven. I asked that one. Whether it was right or not, I am not sure but I surely stopped there and did not carry on. Because I could have, for all intents and purposes, I could have carried on a long cross-examination of Lieutenant-Commander Craven surrounding the events of the 19 December. But I thought that it was not really relevant to the issue in this **voir dire** and I refrained from doing it. And I suggest that for the same reason, on matter of relevancy, and although I recognize that the prosecution may be entitled to test credibility of the witness, it has got to be done within reason and within certain parameters.

JUDGE ADVOCATE: Thank you. My ruling is to the effect that the objection from the defence is denied. First of all because of the fact that the matter of the state of sobriety of the accused was first raised by the defence in examination-in-chief and secondly that the question put by the prosecution goes to test the credibility of the witness. You may proceed.

PROSECUTOR:

Q. Lieutenant-Commander Marsaw, can you outline, taking yourself through the events of 19 December as well as 20 December 1993, outline what you had to drink, when you had to drink it? A. Yes, sir. The mess dinner was ordered at 1930 for 2000. At 1930 in the Squadron Wardroom I had a glass of sherry. And then at or shortly before 2000 we went to the dining room which was in the Chief and Petty Officer's

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Mess. During dinner I had two glasses of wine. After dinner we passed the port twice, I believe. We then adjourned back into the Squadron Wardroom where I had a beer with the guest of honour. And then we departed shortly thereafter. We then went down on board the OJIBWA and I had two more tins of beer.

Q. That is your total consumption for the 19th and 20th of December 1993? A. Yes, sir.

Q. Do you have a clear recollection of everything that happened on the 19th December and the 20th of December '93? A. No, not everything. I clearly recollect some things and other things, no. After that length of time it is sort of ...

Q. What time did you in fact depart the OJIBWA on the morning of the 20th of December '93? A. I slept on board that night in my cabin.

Q. What time would you have retired? A. Approximately 2 o'clock. But I must confess that is a vague timing.

Q. Do you have any recollection at all of Lieutenant Kelk getting marked on or being disrobed? A. No, I don't.

Q. Any recollection of Lieutenant Kelk having a cigar tube placed between his buttocks? A. No, I don't.

Q. Do you have any recollection of Lieutenant Kelk at all on the 20th of December '93? A. I seem to recall him being there. But I wasn't talking to him so I don't have a specific memory of a conversation with him or anything like that that evening.

Q. Is Bob Bush one of your friends? A. I use that word advisedly right now.

Q. At the time? A. At the time, yes.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Did he stay on board of the OJIBWA that night? A. No. He visited but then left.

Q. Did you leave and go home with Commander Bush at approximately 3:30 in the morning? A. No, I didn't.

Q. What things don't you have a recollection of that night? A. I am sorry, can you ...

Q. You told me that you had recollections of some things and you don't of others. So presumably you know what things you don't recall? A. I don't recall anything that occurred that was untoward. Well that is not quite so. At the very beginning of dinner, in fact just before sitting down, two officers came in slightly late. One of them I was rather distressed about because he, in fact, was going to be sitting to the right of the guest of honour and I was about to motion for another officer to come in and fill that chair through the duty steward. But just before I made that motion the officer did show up rather inebriated. I permitted him to go and take his seat and the officer with him was also inebriated. This concerned me because I had been giving quite clear instructions as to how the mess dinner was going to be conducted and that there was to be no repetition of the previous years events. I recall that when my broth was served, as first course, that there was a Brussels sprout ...

Q. OK. Sir, I asked you questions of what things don't you recall. Obviously you must have discussed this with other people and relive the evening and said, "I don't remember this, I don't remember that." You, in your own testimony just told me that there are some things you don't recall. What sort of things don't you recall? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I don't think it is a fair question. I mean if the witness doesn't recall certain events he cannot tell

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

which he doesn't recall. I mean it doesn't appear to be a fair question. He certainly can be asked what he recalls and that he can say. But I mean what he cannot recall, how can he describe what he cannot recall.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: Well, it is a mysterious question, I agree. But it is only prompted because the accused under oath has just told us that he recalls some things and doesn't recall other things. So that prompts me to ask the question, "What don't you recall? Why do you think there are some things you don't recall?"

JUDGE ADVOCATE: I don't think that the witness can answer a question like that.

PROSECUTOR: We will be more specific.

Q. You have heard Lieutenant[N] Hart's testimony? A. Yes, I have.

Q. He has testified that you have inserted the tube between the buttocks of Kelk. Do you deny that ever happened or do you simply say you don't recall it happening? A. Oh I deny it ever happening, yes.

Q. Do you deny that Kelk was disrobed and marked upon in your presence? A. Yes, I do.

Q. But you do assert that you have a clear recollection of the 20th of December '93? A. Somewhat clear due to the length of time, yes.

DEFENDING OFFICER: Mr Judge Advocate, we keep indulging. I know you have ruled that the prosecution was allowed to test the credibility but I must state again and in all respect of course of your previous ruling but it appears that it has got to be limited at some point. I mean we are going ...

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

PROSECUTOR: Maybe I can help my friend. I am finished, I am leaving the wardroom of the OJIBWA right now. I am going on to other things, so I can probably save everyone a motion.

DEFENDING OFFICER: That being the case ...

JUDGE ADVOCATE: Thank you.

PROSECUTOR:

Q. How long have you known Mike Craven?

A. I first met him on the West Coast when we were both in venture doing our classification training which I think would have been '82.

Q. At one time were you close friends?

A. Reasonably close, we were shipmates.

Q. So you did runs ashore together, and you would work together and ...? A. Yes.

Q. Did your bonds of friendship slowly loosened over time for a variety of reasons? A. Yes, they did.

Q. Including an incident at the press room in 1985? A. No.

DEFENDING OFFICER: Mr Judge Advocate, I will object again. I am sorry. But I believe that the prosecution is coming up with some evidence of in-depth. Again I question relevancy, evidence that if I understand well the direction he is going, might amount to bad character evidence, might amount ...

PROSECUTOR: Maybe I can save my friend again. If he is going to object to a particular question I am a going to ask may be he should wait for it. He obviously doesn't have any idea of where I am going because he hasn't listened to my next question.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

JUDGE ADVOCATE: So far all your objections or most of them, Lieutenant-Colonel Couture, are premature. Again it is denied. Go ahead.

PROSECUTOR: Thank you.

Q. During that July night when you were meeting with Craven in your family room, you thanked him for being honest with you? A. Yes, sir.

Q. Then you believed that he told you honestly what he was saying? A. I believed that at that time, yes.

Q. And that that meeting was one of the rare circumstances in which a person actually was forthright with you during that entire period? A. That is what I believed at the time.

Q. You mentioned on direct examination I believe that Craven's acts in your family room on that July night were different than the acts of others who you referred to as speaking behind your back? A. I am sorry. You said Craven's acts?

Q. Craven's acts, his visit to you in your family room, talking to you, showing the statement, that conduct was different and distinct from the acts of others which you referred to on direct testimony as speaking behind your back? A. It was rare. It was not the only example of that. But it was rare.

Q. What do you mean by speaking behind your back? A. Saying things out of my presence that would not be said in my presence to put it simply. I don't know if that is that.

Q. Would people who have said adverse things to your interests but not to your face fall within that definition of people who speak behind your back? A. Casually I would believe so, yes.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Speaking behind your back in your terms, would that sort of be a disparaging label that would connote sort of a lack of moral courage? A. Not necessarily. I can imagine several reasons why a person would do that. And I think each one would have to be looked at individually before you apply such a vitriolic term toward it as lack moral courage.

Q. Who do you think has spoken behind your back? A. ...

DEFENDING OFFICER: Mr Judge Advocate, again a bit like the "what you cannot recall" "Who do you think spoke behind your back?" he cannot know since they spoke behind his back. And he defines "speaking behind his back" meaning "people who would say things outside of my presence or that they wouldn't say when I am present". So how can he answer who spoke behind his back since obviously he wouldn't be there to know who spoke behind his back. Again I believe it is an unfair question.

PROSECUTOR: I guess we have to find out, don't we. The accused has said under oath that and this is a quote, that he refers to some other undefined group of people who speak behind his back.

JUDGE ADVOCATE: But how can he tell you who did that?

PROSECUTOR: We might find out.

JUDGE ADVOCATE: Without giving hearsay evidence?

PROSECUTOR: We can probe to see whether the accused is saying things under oath based on personal observation or whether he is saying things under oath not based on personal observation. Maybe we will find out he is talking about people that were videotaped through the MP interviews that he has now watched.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

JUDGE ADVOCATE: I don't know but you are in cross-examination; ask him. But the way your question is asked right now it cannot be answered in any other way than giving hearsay evidence. So the objection is sustained.

PROSECUTOR:

Q. You have an opportunity to review videotapes of persons who were interviewed by the military police? A. Yes, I have, sir.

Q. Would some of those people fall within the category of people who spoke behind your back? A. I would feel that way about some of them, yes.

Q. And for those people you would adopt that term for them and that term would connote a lack of moral courage? A. I would say again I would have to look at each circumstance and within the context of that circumstance, how well they knew me, how they behaved to me in front of me, what their motives might be. There are a lot of factors I would have to take into account before I would be eager to apply that sort of character assessment.

Q. But that would include some of the people that you did watch on videotape? A. I believe it would include some of them, yes.

Q. As far as you are concerned would the witnesses and persons interviewed by the military police during the investigation fall within categories of either being friends or enemies? A. That is far too simple an explanation, sir.

Q. Would some of them fall within those categories? A. I have had cause to redefine in own mind those terms over the past couple of years, and I would not voluntarily use either the word "friends" or "enemies" as a glib catch all categorization.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. But a category nonetheless that you would use? A. I would use it in certain contexts at different times, some times thoughtfully, some times less than thoughtfully.

Q. Did you have a blackboard in your office at any time during the investigation with the word "friends" and the word "enemies" and ticks under each heading as you categorized people involved in the investigation? A. I had a blackboard in my office with the words "friends" on one side underlined, "enemies" on the other side and underlined. And I had one tick under "friends" and a number of ticks under "enemies" and I put that there as a joke for my office mate.

Q. So you did have a blackboard marked with "friends" and "enemies" with ticks under each side and that related to the investigation whether it was in humour or not? A. Yes.

Q. During the investigation and the charging period, did you embark on a process to determine who your friends and your enemies were? A. As in any other time in my life I suppose I questioned who - again I am reluctant to use those terms "friends" and "enemies" because now you are asking a serious question - but I was intensely curious as to who would be supportive of me and my family and who would be contra-supportive I suppose.

Q. And you were intensely curious about this? A. Well intensely is a word of ... implying degree. I was curious about it.

Q. I am just using your words. You just stated under oath you were intensely curious? A. Again as a word of degree, yes if you like, I will say that.

Q. Did you approach persons of unknown status in a friendly manner hoping to win them over and

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

then threaten people who you decided were your enemies?

A. No, I did not.

Q. Did you phone Lieutenant[N] Marr on or about the 2nd of January 1994? A. If you use the word "about" in a rather broad sense, yes.

Q. Did you also phone him on two other occasions on or about the 20th of January '94 and sometime between the 20th of March and the 5th of April '94? A. That is possible. I don't remember the exact dates. I phoned him three times.

Q. Lieutenant[N] Marr used to be your NAVO on the OJIBWA until June '92? A. I don't remember the date he departed. He was my navigating officer.

Q. And then he was posted to England?
A. That is correct.

Q. Approximately June '92? A. Yes, that would make sense.

Q. Did you ever phone Lieutenant[N] Marr in England on his birthday or wish him Merry Christmas?
A. No, I didn't.

Q. Did you ever phone him when he first went over to make sure he was coping well and he was doing fine? A. No, I didn't.

Q. Prior to December '93 you really didn't care too much about Lieutenant[N] Marr and what he was doing in England, did you? A. That is not true.

Q. You never phoned him, did you? A. No, I didn't

Q. You only phoned him after this investigation starts? A. That is correct.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. You really weren't too interested in Lieutenant[N] Marr even when he was on the OJIBWA, were you? A. That is definitely not true.

Q. He was your officer of your watch and your navigation officer and on the last day on board of the OJIBWA he came up to you to say goodbye and you responded in a sarcastic tone that England would be a challenge to him or words to that effect, didn't you? A. No, that is not true.

Q. If Lieutenant[N] Marr says that that is his memory of his goodbye, would his memory be flawed? A. Yes, it would.

Q. On the 2nd January '94 when you did phone Lieutenant[N] Marr, was your stated purpose to congratulate him on his XO appointment? A. No. That was a polite introduction to what I wanted to ask him about.

Q. Did you also during that conversation ask whether he was going to get a perisher recommend? A. No. That is a funny thing to ask.

Q. It is. Who was overseeing the Canadian perisher course at that time? A. In January '94?

Q. In January of '94? A. I was ... there was still some doubt about it but I was the chief nominee.

Q. And "perisher" is the word that is used for the command course? A. Yes. Actually by that point it appeared that it would not be me because I had been selected for staff college and the staff college days would preclude my teaching the perisher.

Q. But at that point in time you were the person identified for the Canadian perisher course? A. Most people thought that, but by that time I knew it would not be the case because I had met my career

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

manager in December and he said that I was going to staff college.

Q. But most people would have thought that?

A. Most people thought that. They hadn't heard the revision to the plan.

Q. Did you discuss the mess dinner at all with Lieutenant[N] Marr during that telephone call?

A. Yes, I did.

Q. Did you ever state to Lieutenant[N] Marr "I have no recollection of that night"? A. No, I did not.

Q. So if Lieutenant[N] Marr states that you said you had no recollection of that night his memory would be flawed? A. That is correct.

Q. As you said you weren't really phoning him to congratulate him on his XO appointment, were you? A. No. I thought it was a polite way to introduce the conversation, to start it.

Q. The dominant purpose of your phone call was to determine whether Marr was going to be a friend or an enemy to you, wasn't it? A. No, that is not true.

Q. And you deny making any reference at all to a perisher recommend? A. Yes.

Q. Who is Lieutenant-Commander Dussault?

A. Currently the commanding officer of OJIBWA.

Q. Who was he before that appointment?

A. Before that appointment he did the Canadian Submarine Command Course. Before that appointment he was executive officer of ONONDAGA and before that appointment he was executive officer of the OJIBWA under my command.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. So he was your former XO? A. That is correct.

Q. By the 5th of August '94 had you read the synopsis that was attached to your charge sheet?
A. Yes, I had.

Q. So you knew by the 5th of August '94 that Lieutenant-Commander Dussault was a witness, didn't you? A. That is correct.

Q. On the 5th of August 1994 at the CFB Halifax Wardroom did you threaten Lieutenant-Commander Dussault? A. I didn't threaten him, no.

Q. OK. Did you call him a liar or a coward?
A. I called him a coward.

Q. Did you yell at him that you would take him and his family down with you? A. No, I did not.

Q. If Lieutenant-Commander Dussault states that that is what you said to him, would his memory be flawed as well? A. Yes, it would be.

Q. Lieutenant-Commander Kavanagh states that on that occasion you referred to Lieutenant-Commander Dussault as a liar, would his memory be flawed?
A. Yes, it would.

Q. If Captain Whynot from Cold Lake states that a threat was made to Lieutenant-Commander Dussault, would his memory be flawed as well? A. Yes, it would.

Q. So everybody's memory: Craven, Marr, Dussault, Kavanagh, Whynot, their memories are flawed and yours isn't, is that correct? A. I am not saying my memory is not flawed, sir. What I am saying is in response to your specific questions, I have a reasonably good memory of those events and I am able to answer what I have said.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. After this incident with Dussault in the Base Wardroom, did you tell Lieutenant-Commander Kavanagh that you were doing what you were doing because your lawyer had told you to be confrontational or spark a reaction? A. Definitely not.

Q. So if Kavanagh says that that is what you told him, his memory of that incident would be flawed as well? A. That is correct.

Q. This confrontation with Dussault even if we accept your story of calling him a liar, is that part of your process of attempt ...? A. My story, sir, was calling him a coward.

Q. A coward, is that part of your process of weeding out the friends from the enemies? A. No, sir.

Q. Going to the wardroom, bumping into potential witnesses, sorting out friends from enemies? A. No, sir.

Q. Was Lieutenant[N] Elford a Part 3 on the OJIBWA when you were in command? A. Yes, he was.

Q. You are aware that Lieutenant[N] Elford is a prosecution witness in these proceedings? A. I am now, yes.

Q. He was unsuccessful in qualifying for his dolphins and eventually went to surface vessels? A. That is correct.

Q. Did you ever ask Lieutenant[N] Elford in the Base Wardroom words to the effect that "What are you trying to demise me and my family"? A. I have never the word "demise" as a verb.

Q. Did you ever approach Lieutenant[N] Elford in the Base Wardroom and discuss his role in the

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

investigation against you? A. When he asked to speak to me, yes.

Q. I am going to read to you the following exchange and I wonder if you can listen carefully and tell whether or not that exchange occurred. Marsaw to Elford: "Did you go to the press?" Elford: "No, sir." Marsaw: "Do you hate me?" Elford: "I don't hate you. I was just asked to go to the MPs and I did so truthfully." Marsaw: "Why are you trying to demise me and my family?" Elford: "I am not. Everything I said is the truth. If that causes you demise I suggest you deal with it." Marsaw: "I always thought you were a nice guy. I guess you are a cunt." Did that exchange ever occur at the CFB Halifax Wardroom? A. No, it did not.

Q. Did you have a conversation with Elford or words to that effect? A. No, not words to that effect.

Q. So if Lieutenant[N] Elford states that you did then his memory would be flawed of that incident? A. Perhaps I can qualify all of these summary questions you have asked me, "is such and such a person's memory flawed?", I can't say their memory is flawed. What I can say is that I have not said these things. And whether it is their memory or their motive I cannot comment.

Q. So something is flawed with regard to those particular incidents that I have been referring to? A. Yes, sir.

Q. And it is a flaw that is held by the other witnesses that I have mentioned, not yourself? A. That is correct.

Q. Were you trying to put a guilt trip on Lieutenant[N] Elford by suggesting he was hurting your family? A. No, I was not.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Once you got his response and found the guilt trip wasn't working did you then shift him into the enemy category and started to verbally insult him at the wardroom? A. I don't recall verbally insulting him ever.

Q. Would you agree that if you call somebody a cunt that is an insult? A. In some context it is a term of endearment.

Q. Was it at the wardroom if somebody ... if you were ... approached Lieutenant[N] Elford and called him a cunt in the wardroom, would that be a term of endearment? A. In that context I would doubt it.

Q. That would be an insult, wouldn't it?
A. I would think so.

Q. Do you respond to prosecution witnesses such as Lieutenant[N] Elford by verbally insulting them, defend yourself against charges and allegations that you verbally insulted members of your crew? A. I am sorry. Would you ask me again?

Q. Do you respond to prosecution witnesses called in support of charges of verbal abuse by verbally abusing them or insulting them? A. Is that my response to them?

Q. I am asking you whether you verbally abused witnesses who are called in support of charges that allege that you verbally abused members of your crew? A. I cannot recall any incidents of doing that. I can recall using coarse language at times, but not as insults or abuse to individuals.

Q. Is it proper to insult somebody in the wardroom? A. I suppose I can imagine circumstances where I have seen it, not leapt out of my chair thinking it was improper. As a general rule I suppose, no it is not proper.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Have you confronted prosecution witnesses Tovey, Cassivi, Byrne and Watt in the Sub Squadron Wardroom about things they had said to the military police? A. I would think the word "confronted" strong, but I have talked to them, yes, in the Submarine Squadron Wardroom.

Q. When was Bo Reid's RPC? A. 29 July '94.

Q. By that time you would have had an opportunity to review your synopsis? A. Yes, I had.

Q. Did you confront Chief Petty Officer, 1st Class Tovey in an intimidating manner and say, "I have seen your video, I am not impressed."? A. No, that is not what I have said.

Q. So if Chief Tovey says that is his recollection, then his memory of that incident would be flawed? A. Either his memory or motive.

Q. If he says that is his memory of that incident, would his memory be flawed? A. I can't answer that directly without saying that if he says that is his memory, I still must question his motive.

Q. We will get to motives later on I guess. Did you approach Lieutenant[N] Watt in the presence of his commanding officer and allege that he was quote: saying all sorts of bad things against you and accused everyone of jumping on a bandwagon to get you? A. No, I did not.

Q. And again if that is his recollection of the meeting in the Squadron Wardroom his memory would be flawed? A. Or it is a misrepresentation, yes.

Q. Did you confront Lieutenant[N] Byrne by saying quote: what you said was damning and then turned to Lieutenant Cassivi and say and what you said was very damning? A. No, I did not.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. So again their memories would be flawed if they say that is their recollection of the incident as well? A. Would you like me to just say yes re advert to memory when I ... rather than say or motive at the same time?

Q. You answer the question any way you want?
A. Memory or motive, I am not sure.

Q. Let us talk about motives, then. Is it your belief that a number of prosecution witness have jumped on some sort of bandwagon against you? A. In the sense of the colloquial use of the word, yes.

Q. That is sort of a conspiracy amongst these submariners who jumped on a bandwagon against you? A. I am reluctant to use the word "conspiracy" but I can't off the top of my head think of a better one.

Q. Then could you explain how Captain Whynot, an air traffic controller on course from Cold Lake, having a beer at the wardroom could have ended up on this bandwagon when he alleges that you have made ... or someone made a threat to Lieutenant-Commander Dussault? A. Possibly through talking with someone else.

Q. So somebody else would have talked to him and convinced him to jump on the bandwagon of sorts?
A. I am just surmising, you know I was not ... I don't know Captain Whynot.

Q. Would all the people that are on this supposed bandwagon fall within the enemy category?
A. Again I ...

Q. Do you perceive them as your enemies?
A. In the broadest sense of the word it ...

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. They are on the bandwagon. They are your enemies because they are saying things that are adverse to you behind your back? A. Not all of them.

Q. Did you quit wearing your dolphins on your summer dress? A. Yes, I did.

Q. And that was because you perceived that the sub squadron had turned its back on you or jumped on a bandwagon? A. No, that is not true.

Q. Why did you quit wearing your dolphins?
A. There is a couple of reasons. One is that I feel ashamed at being a submariner given the reaction that the submarine community has had to this entire process as well as several other things that have been going on over the past few years in submarines. The other, I don't like to have a constant reminder, even out of the corner of my eye, that I once belonged to this fraternity.

Q. Is that because the fraternity has disowned you or at least you have perceived that they have? A. Not so much that they have disowned me as that they have, I believe, made a mockery of the principles that I thought we all believed in.

Q. They have. You haven't? A. I haven't, no.

Q. So why are you wearing your dolphins today? A. It is my understanding that this is a very formal occasion and I, although I didn't check to see if I am absolutely required to do so by the Canadian Forces regulations, thought it would be easier than taking a sewn badge off my uniform and then finding out I had to sew it on for court.

Q. But if you are ashamed of the service and what it represents why wear it? A. I thought I just explained that, sir.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. I mean you have had it off all summer?

A. On my summer dress. It is just a simple badge on your summer dress.

Q. Are you wearing it now to create an appearance of professionalism for the judge advocate and the members of the court? A. No. I am wearing it because I believe it may well be required to be worn by Canadian Forces regulations.

Q. But it is not required on your summer dress? A. On my summer dress there is a certain amount of more latitude I can get away with.

Q. Where is that written down? A. It is not. But I would not expect to be challenged other than in court on my dress providing it is neat and tidy.

Q. So the dress regulations is interpreted by you meaning you don't wear them in the summer but you wear before the judge and the members of the court, would that be correct? A. I would rather say that by not wearing my dolphins on my summer dress I feel I am less likely to cause either formal offence or cause any kind of a fuss. If I did not wear an article of uniform in court that I might otherwise be expected to wear, it might cause a fuss and I wouldn't wish to do that under these circumstances.

Q. So you don't mind causing a fuss in front of others but you don't want to cause a fuss in front of the court? A. No. I just said that I didn't think that by not wearing them on my summer uniform that it would cause a fuss.

Q. Was taking down your dolphins on your summer dress your protest against the perceived treatment you were receiving from the sub community or the sub squadron? A. No, it wasn't a protest.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Do you feel the sub squadron, generally speaking, is on a bandwagon? A. I wouldn't say that generally speaking, no.

Q. A good part of it? A. Again if you wish to use the term "bandwagon" in its most colloquial sense and a good part of it I can't define but a certain part of it, I would agree.

Q. So is this how you react when you filter the information you receive, you label people as friends or enemies and take off your dolphins? Is this part of this process of information input during the investigation and the charging process for you? A. I believe that I tried not to label people friends or enemies. I think that is what I said.

Q. You just happened to stick it on your blackboard? A. That was joke intended for my office mate.

Q. Was it a joke for Lieutenant[N] Elford or Lieutenant[N] Dussault? A. I am sorry. What was it before the joke?

Q. The encounters you had with them in the wardroom? A. Well, the encounters you have described did not occur as you stated.

Q. Has it ever entered your mind that some of the people you may have labelled as enemies when watching that videotape are nothing more than honest officers answering questions as truthfully as they could? A. Yes, certainly that has entered my mind.

Q. But some of these people nonetheless get labelled as enemies? A. I am trying to answer once again regarding the use of the word "enemies". I try not to label people as friends or enemies any longer. I don't know how to put it more clearly.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. I am going to read to you my notes taken from listening to the tape during your direct examination on Friday. I want you to listen carefully. After that is done I am going to ask you whether you agree that those questions were asked of you and that is how you have answered them. This is coming in with a question from Lieutenant-Colonel Couture after you thanked Craven for being honest about what he was saying to you. Question: "What else did you say?" Answer: "Other than normal departure salutations that is all I said. He made comments to me. That is the extent of what I said to him." Question: "What comment did he make to you?" Answer: "For accuracy may I check my diary, sir?" Question: "When did you make your diary?" Answer: "Immediately after he left my home." I then object saying I have never seen that diary and want a chance to review it. You then respond: "It is marked protected by solicitor/client because there is stuff in it between you and I." Then you say: "I don't need to look at it if that is what is required. I can approximate what I recorded." Question: "OK, to the best of your recollection what was the comment that Lieutenant-Commander Craven made?" Answer: "Just before we left the family room he said to me that he had shown the very same statement to Lieutenant-Commander Pete Kavanagh and that as we were departing going up the stairs he said to me that he was very drunk that night when he left the submarine." I object that it is going to the proof of the contents. I am overruled. Question: "How certain are you of those events that night?" I object on the base of oath boosting. The question is then allowed. Question: "Could you tell the court to what extent you are positive or certain of the accuracy of the details you just provided?" Answer: "I am absolutely certain." Do you recall those questions being asked of you and those being your answers? A. Yes, sir.

Q. So first of all in order to answer the question you need the assistance of your diary for accuracy. Then you say you don't need the diary, you can approximate what the contents of the conversation

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

were. Then when asked how certain you are you respond under oath by saying you are absolutely certain. Is this whole two-minute exchange in court under oath before this judge an example of how you twist and turn and colour information for your purposes? A. No, sir.

Q. First you were going to approximate something and then you take an oath that you are absolutely certain about it? A. I don't understand the question, sir.

Q. You were asked a question to recall a conversation. You say you need the assistance of your diary. You then don't have the assistance of your diary but tell the court under oath you can approximate it. You then give the contents of the conversation. Then when asked how certain of it you are, you say that you are absolutely certain? A. Yes. That is a reasonable response when having put it out of my mouth, I think it is almost word for word what I wrote in my diary.

Q. Is this whole process of denying the comments by Marr, Craven, Kavanagh and then going from approximate to telling the judge under oath that you are absolutely certain, a process for you of distorting adverse information and putting particular colour on that information which is useful to you for your own self serving purposes? A. No, sir; it is not.

Q. Is that what you are doing with your testimony discussing what Craven did or didn't say to you that July night? A. No, absolutely not.

Q. And it is your testimony with regard to the incidents that I have raised with you that the memory of Marr, Elford, Kavanagh and Craven, Watt, Whynott, Dussault, Byrne, Cassivi and Tovey, their memories or their motives might be flawed? A. Yes, absolutely.

PROSECUTOR: Thank you.

Trial within a trial

JUDGE ADVOCATE: Thank you. Re-examination?

DEFENDING OFFICER: No re-examination.

JUDGE ADVOCATE: Thank you.

Thank you very much. You may resume to your seat.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Are you, gentlemen, ready to argue on the matter or ...?

DEFENDING OFFICER: I think at this point, Mr Judge Advocate, that was my witness that was called and ...

JUDGE ADVOCATE: Yes. First I should ask you if you have any other witnesses.

DEFENDING OFFICER: That is right.

JUDGE ADVOCATE: I am sorry.

DEFENDING OFFICER: I want to inform you that I have no further evidence to call and I close my case in this **voir dire**.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: As to argument maybe we could have maybe a 15-minute adjournment and then address the court.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I would appreciate an adjournment simply for the reason of determining whether or not I would like to make a motion and call rebuttal evidence, Mr Judge Advocate.

Trial within a trial

Prosecutor

Address

JUDGE ADVOCATE: And is 15 minutes sufficient time to decide this matter?

PROSECUTOR: It think it will, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. This court is adjourned until 20 after 10.

ADJOURNMENT: At 1000 hours, 2 October 1995, the court adjourns.

REASSEMBLY: At 1130 hours, 2 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott, before we adjourned you mentioned that you needed some time to consider if you were to make an application for rebuttal evidence or not. What have you decided?

PROSECUTOR: Thank you, Mr Judge Advocate. The prosecution will not be calling any rebuttal evidence.

JUDGE ADVOCATE: Thank you. And are you ready to address the court?

PROSECUTOR: I am, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: Mr Judge Advocate, I would submit to you that the issue, this whole issue in this **voir dire** is not whether a conversation alleged by Craven did in fact occur but as long as there is some evidence of a conversation and that threshold is met by Craven's evidence in this **voir dire**, the sole issue in this **voir dire** is whether the conversation is relevant to any issue arising at trial. I would therefore submit that there is no issue to resolve, issues of

Trial within a trial

Prosecutor

Address

whether the statement was made and also issues of credibility.

I would submit that this whole issue is whether the statement by Marsaw to Craven to the effect that Marsaw had no recollection of any of that and that he would have to discredit Craven or challenge his credibility is relevant to a variety of issues at trial, either because the evidence on its own or importantly in conjunction with other evidence that may be called is relevant for the following four issues.

It goes to the issue of intent. It goes to the issue of credibility. It negates a possible jurisdictional defence which has already been raised at three different moments in this trial concerning sexual assault in the first two charges. And it also goes to evidence of consciousness of guilt.

I say, Mr Judge Advocate, that the evidence is relevant either on its own or in conjunction with other evidence. There is no requirement that the evidence sought to be introduced through a **voir dire** in and of itself completely resolve any of these four points or issues. It is admissible as long as it is some evidence that can be used in conjunction with other evidence to help the prosecution deal with the issues of intent, credibility, defences and consciousness of guilt.

I have argued my position on Friday and to expedite matters would simply wish that my comments on Friday are incorporated into my present remarks. I would submit that the conversation of Craven is admissible for any one of the four issues. As a consequence there is no requirement on your part to identify whether the conversation is or isn't relative to all the four heads or issues that I have raised. It is sufficient for admissibility should you find it is admissible on any one of those four points.

Trial within a trial

Defending Officer

Address

It is relative to the issue of intent because clearly Lieutenant-Commander Marsaw has just reviewed a statement where Commander Craven expressly identifies him as the one who inserts the cigar tube. He responds that he doesn't have any recollection of any of that or words to that effect. Whether that goes to the statement as a whole or that particular incriminating entry is a matter for counsel to debate in front of the members of the court. But clearly it is evidence that is useful to the prosecution to argue issues of intent.

Second of all it is also relative to the issue of credibility. Should Lieutenant-Commander Marsaw state that he is clearly in recollection of everything that happened that night then this is evidence that can challenge that assertion by him before the members of the court and is useful for the Crown to have at its side to attack his credibility with. The other accompanying comment "I will have to discredit you" or words to that effect are clearly central to issues of credibility as well as consciousness of guilt.

Additionally and finally the defence has raised on a number of occasions that the court does not have jurisdiction or may not have jurisdiction to deal with the first two charges because it is a sexual assault in disguise. A sexual assault requires the proof of specific intent. Any evidence the Crown has that shows that Lieutenant-Commander Marsaw does not have a recollection of what he did on the 20th of December '94 goes directly to rebutting that defence.

So in summation, Mr Judge Advocate, we propose that Craven's testimony is admissible for any one of the four reasons we have just raised. It is not necessary to evaluate all four grounds as long as one fits then admissibility is permitted.

Thank you.

JUDGE ADVOCATE: Thank you.

Trial within a trial

Defending Officer

Address

Lieutenant-Colonel Couture?

DEFENDING OFFICER: Mr Judge Advocate, the prosecution contends that the statement is admissible on those various grounds. First of all I pretended and represented on Friday that there was some determination whether or not the statement was made. The threshold for that determination may be fairly low and I will leave to you to determine whether there is in fact evidence to be submitted to the members of the court or as referred to in civilian cases by analogy to the jury.

And that is the gist of basically the decision in **Gauthier** I referred to you earlier on that it is not, obviously and clearly, for the judge to determine the weight of the evidence and it says even that it was made but to determine whether there is evidence to be put before And will leave that to you and I must confess that the threshold and the standard there is fairly low but I will leave it to you to determine.

Are those statements, assuming they were made, are they relevant to the charges before the court? The prosecution contends that it goes to the intent. Recollection and intent in my opinion, in my view, are two different concepts. And whether one may have said that he does not recollect has nothing to do with the intent. And by way of example I would use - and of course I am not talking about this being applicable to this case but by way of example - sometimes in cases of drunkenness people will say, "Well I don't recall." The fact that one does not recall doesn't mean it wasn't done. Like the absence of recollection is not probative at all to the issue of intent.

The words that, "I will have to challenge your credibility" are certainly not probative to any of the issue pertaining to the commission of the offence.

Consciousness of guilt, yes, this is a concept that exists in law but before statement from which con-

Trial within a trial

Defending Officer

Address

consciousness of guilt can be derived are put before the court they must on their face relate again to the charges. And the most classical case ... and I will have to make a copy; my mistake, I thought copies had been made; I will provide you with some cases shortly after this adjournment on consciousness of guilt.

It is our position that consciousness of guilt involve ... often it could be of course flight, a person fleeing a scene, is one example or they may be statements, lies, for example, made in the course of an investigation. They have to be established of course as lies. For example the case of **Regina v. Cole**, Ontario Court of Appeal reported at 53 C.C.C (2d) in this case there were a number of lies made by the accused during the investigation. He was saying that he was not at the party, that his name was not Tracy. That is the party during which a murder had taken place. He didn't even know where that place was. And so on and so forth.

Clearly those would go directly to the issue of the offence if he is trying to build a false alibi, etc. It can be derived eventually that in some cases - and you will see for yourself as you read the cases - the standard is ... before the court can be advised of a statement from which they can derive consciousness of guilt they must meet lots of standard which are explained in that case of **Cole**. Similarly, in **Minhas** another murder case, again an Ontario Court of Appeal, reported at 29 C.C.C. (3d) deals with the same issue. **Ruddick** a case reported at 57 C.C.C. (2d) deals with the same issue and these cases show to you what may or may not be consciousness of guilt.

I suggest that the statement before you the words, "I do not recall any of that" I believe are the exact words and, "I will have to discredit or attack your credibility" in my view have nothing to do with either intent or the actual commission of the offence. They may have to do with credibility, and in that respect I would like to provide you ... maybe one way

Trial within a trial

Defending Officer

Address

of approaching this is to look at what is relevant and, for example, what is collateral and I would like to submit to you some authorities that discuss those matters.

Now the main topic here is collateral facts and it deals as well with rebuttal, right to call rebuttal, etc. Of course we are not here discussing rebuttal. Nonetheless you will find in those authorities that I am about to give you that courts have, of course in determining whether a rebuttal may or may not be allowed, they have had to ask themselves whether the evidence that one proposes to rebut is either purely collateral or whether it is relevant. If it is relevant to the charge, authorities consistently agree, and the Supreme Court leads of course on that, that rebuttal can be called. If it is purely collateral it cannot be done.

Now this might be of use, Mr Judge Advocate, in providing some guidance as to what has been deemed to be relevant and what has been deemed not to be relevant to an issue. The first document I just produced is an article by Carol A. Brewer that was produced at a course of the National Criminal Law Program at University of British Columbia. It is for the sake of an overview on the question and I will quote you some distinct authority. I think it is important to understand the purpose of this rule on so called collateral issue and at page 1 paragraph 3 of this document reference is made to a case of **Yaeck** and it reads:

"To be admissible evidence must be 'sufficiently relevant'. The risks addressed by the collateral fact rule are confusion of the issues, misleading the jury, trial economy and unfairness to witness. The rule recognizes that judicial resources are limited and that it is neither efficient nor possible to

Trial within a trial

Defending Officer

Address

**investigate fully every matter that
arises at trial."**

That is the general rule. At page 2 refer-
ence is made to the test:

**"[The] test, whether the matter is
collateral or not is this: if the
answer of a witness is a matter
which would be allowed on your part
to prove in evidence - if it have
such connection with the issue,
that you would be allowed to give
it in evidence - then it is a mat-
ter on which you may contradict
him."**

Again that is relevancy. At page 3 reference
is made - and I will give you the actual complete cases
of **Krause** and **Aalders** - what the Supreme Court of
Canada has articulated as being collateral or not. In
Krause:

**"Where something new emerges in
cross-examination, ... and where
the matter is concerned with the
merits of the case, (i.e., it con-
cerns an issue essential for deter-
mination of the case) then ..."**

the party may call rebuttal.

**"Where, however, the new matter is
collateral, that is, not determina-
tive of an issue arising in the
pleadings or indictment or not
relevant to matters which must be
proved for the determination of the
case, no rebuttal will be allowed."**

Trial within a trial

Defending Officer

Address

And this of course was again considered in **Aalders** and I will talk to you about that more in a moment. At page 8 of the same document, and I won't read it but the first two paragraphs of page 8 are examples on cases where matters have been determined as being collateral, i.e., not relevant.

And at pages 9 and 10 you have more quotes and analysis of the **Krause** and **Aalders** case that are obviously the leading cases in the field. I would now like to produce for your information the case of **Krause**. Again I do not intend to go through everything. For your information a review of the facts is made at pages 388 and 389. And that was Mr Justice McIntyre. At page 391 Justice McIntyre in the second paragraph that starts "With the plaintiff" discuss some of the issues again as to when rebuttal may or may not be called. It goes like this:

"The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matters or the defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated."

Again this is a little irrelevant because we are not dealing with rebuttal. But then he goes on:

"But rebuttal will not be permitted regarding matters which merely confirms or reinforce earlier evidence ..."

of the Crown. And I skip a little bit.

"It will be permitted only when it is necessary to insure that at the

Trial within a trial

Defending Officer

Address

end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other."

Later on he carries on in mid of the next paragraph.

"Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with in its case-in-chief (*i.e.*, there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case, (*i.e.*, it concerns an issue essential for the determination of the case) ..."

I skip one sentence:

"Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed."

In this particular case the Crown wanted to contradict an accused who made comments about a policeman who used to rough him up and so on and so forth. And the court at page 394 clearly indicated at line 8 and following:

"It may be suggested, however, that the evidence given by the accused at trial made the police version of the conversation relevant. This, however, is a conclusion I cannot

Trial within a trial

Defending Officer

Address

reach. The evidence of the appellant reflected on the integrity of the police -- though not on that of any police witness who gave evidence as part of the Crown's case-in-chief -- but it did not touch upon the question of guilt or innocence."

I skip one sentence.

"The fact that evidence is introduced by defence-in-chief does not make it a proper subject for rebuttal evidence unless it is otherwise relevant to a matter other than credibility:"

JUDGE ADVOCATE: But you always refer to rebuttal evidence. We don't have any rebuttal evidence. So get to the point, please.

DEFENDING OFFICER: I know. And I have prefaced my comments by saying that these cases deal mainly with rebuttal but the example given in those cases, I submit to you, are of assistance in ... we submit assisting you in determining whether those words are relevant. Those cases indicate or give guidance as to what has been considered relevant to an issue. And I suggest to you that those words that are here do not fall within that category of words considered by courts.

This is the **Aalders** decision which is the most recent and leading case. In this particular case the accused was charged with breaking entry and murder. And the question arose when the accused testified and sort of recounted the story he had previously told that he was in there to steal. Then he recounted it as "Yes, I was there to steal" The question became whether this lie alone only went to credibility or

Trial within a trial

Defending Officer

Address

whether it went to the actual element of the offences.
 And in this case the court having reviewed among other things the situation in **Krause** determined that those words because they pertain to the commission of the robbery which was linked in fact to the commission of the murder went beyond ... the Crown was not seeking to merely contradict an inconsistency but rather that those words went directly to the issue of the murder. And that is why the court decided that it was of course relevant and rebuttal was open.

And I would like to refer you to page 501. You will have the opportunity to read the case at your leisure. But at page 501 it is of interest to note, 501 and 502 in general, para 1 of 501:

"The appellant relied upon two authorities to support his position. The first of these was Krause, supra. As I had indicated, the admission of the reply evidence in this case does not offend any of the principle put forward in Krause."

Simply to indicate that **Aalders** and **Krause** are in harmony basically. And at page 502 Mr Justice Cory, like mid paragraph of the top paragraph:

"The sole purpose of the rebuttal evidence was to discredit the appellant's testimony by attacking his credibility on a purely collateral issue. It was therefore improper and inadmissible."

That was in **Krause**. Once again that case is very different and readily distinguishable from the one at bar where the rebuttal evidence dealt with an essential issue that was integral to the Crown's case. And again I reiterate that those are produced to you,

Trial within a trial

Prosecutor

Reply

obviously not because there is any discussion here about rebuttal but in a way to assist the court in determining what may be relevant in given circumstances.

I suggest to you the word, "I don't recall any of that" or "I will have to challenge your credibility" have nothing to do with the issue to be proven with the various elements to be proven by the prosecution and to put that before the court might only raise confusion and serve essentially no purpose.

So those are my representations as to why those words should not be admitted into evidence.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: Mr Judge Advocate, I haven't receive any of the copies of the cases that my friend is referring to prior to him making his argument. So I wonder if I could make four quick points and leave it at that.

First of all, I think it is very important to stress that evidence can be considered relevant if, on its own, it goes directly to proving an issue or if in conjunction with other evidence which may arise at trial he can go directly to an issue. And my friend had made a comment that before a statement is admissible it must on their face relate to the charges. It doesn't have to on its own, on its own face, relate to the charges. It can be considered relevant if in conjunction with other evidence it relates to a charge or an issue dealing with the charges. It doesn't have to deal with the charges as a whole. It could deal with issues related to the charges, credibility, for example.

The second part, he has thrown out some cases I haven't seen, **Cole, Minhas, Ruddick**. These all seem to deal with consciousness of guilt cases that consider lies or flight. There is another reason why you can

Trial within a trial

Judge Advocate

Decision

call consciousness of guilt because that evidence on its own or in conjunction with other evidence, other pattern of conduct, can be used by the prosecution to argue that threats, subtle or overt, had been made to witnesses. And that is evidence of consciousness of guilt. Though my friend talks about consciousness of guilt as it relates to lies or flight there is also the other subheading of threats.

Anything that can be used by the prosecution as evidence that allows them to impeach the credibility of an accused is relevant. Contradictory statements by the accused, bizarre responses when confronted with incriminating evidence from a witness, is all evidence or all utterances which can be used against the accused to impeach his credibility at a later time in trial.

Lieutenant-Commander Marsaw just reads a statement where somebody says he saw him put a cigar tube between somebody's buttocks and his response is, "You know I am going to have to challenge your credibility." I would submit that is very powerful evidence that can be used to impeach his credibility should he decide to take the stand at the trial. It is a bizarre thing to say.

Fourthly my friend raises different cases, **Krause** and **Aalders**. I haven't read them. I would submit that they simply refer to a different issue completely of rebuttal evidence. If the issues raised in those case are live issues then I would like the opportunity to respond to those cases. But if there is no need to respond I don't think there is any point in taking up the court's time dealing with issues of rebuttal evidence. Thank you.

JUDGE ADVOCATE: Thank you. The court will now close to consider this matter.

AT 1200 HOURS, 2 OCTOBER 1995, THE COURT CLOSES TO CONSIDER THE RELEVANCY OF EVIDENCE.

Trial within a trial

Judge Advocate

Decision

AT 1415 HOURS, 2 OCTOBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: The prosecution seeks the admissibility of a statement allegedly made by the accused to Lieutenant-Commander Craven on 18 July 1994. The defence objects to the admissibility of such evidence on the ground that it is not relevant.

The evidence before the court in this **voir dire** consists of the testimonies of Lieutenant-Commander Craven and the accused, Lieutenant-Commander Marsaw.

Lieutenant-Commander Craven testified to the effect that while at the accused's residence on 18 July 1994, he showed him a copy of exhibit "VD 11-1" which is a statement he had previously made to the Military Police concerning the incidents that took place on board HMCS OJIBWA on December 20th, 1991. He said that the accused read the statement once and that a conversation then followed. Lieutenant-Commander Craven said that the accused asked him "if he actually remembered that" to which Craven answered "yes". Craven said that the accused then said "I don't remember any of that". Craven then said: "If I am called as a witness I must tell the truth" and the accused would have said: "I am going to tell you wrong. I am going to attack your credibility".

As to Lieutenant-Commander Marsaw, he testified to the effect that although he met with Lieutenant-Commander Craven on that same day in question, he never said anything to that effect.

As stated by the Supreme Court of Canada in the case of **Park v. The Queen**, 1981 59 C.C.C. 385, and I quote:

"whenever the Crown seeks to adduce evidence of a statement made by an accused there must, by definition,

Trial within a trial

Judge Advocate

Decision

be some evidence that the statement was made. Whether or not the officer is to be believed, and the weight to be given to the statement, is a matter for the trier of fact. The fact that the officer=s testimony as to the contents of the statement is contradicted by the accused cannot affect its admissibility. Where there are conflicting versions of what was said by the accused the jury will decide which is to be believed."

As in this case there are conflicting versions of what was said by the accused to Lieutenant-Commander Craven during that conversation at the accused=s residence, it is a matter for the members of the court to determine. Suffice to say, at this time, that I am satisfied that there is some evidence that the statement was made.

The prosecution argues that the statement is admissible in evidence because it is relevant on four specific grounds: First, that it goes to prove intent. Second, that it can be used to impeach the accused=s credibility. Third, it negates a possible defence to the effect that charge number one constitutes a sexual assault and that therefore this court has no jurisdiction over it. And finally, that such statement may be used to establish consciousness of guilt. The prosecution submits that the evidence is either relevant on its own or in conjunction with other evidence.

I will start with the matter of credibility.

I am satisfied that if the members of the court were to conclude that such a statement was made by the accused, such statement could be used by them to determine the accused=s credibility if the accused were to testify in his own case. If, for example, the accused were to say that he recollects the cigar tube

Trial within a trial

Judge Advocate

Decision

incident which took place on board HMCS OJIBWA on December 20th 1991, such statement would be relevant to impeach his credibility.

Having decided that the evidence sought by the prosecution is admissible because of its relevancy on at least one of the grounds raised by the prosecution, there is no need for this court to address on the three other grounds. The evidence is therefore admissible in the main trial.

Now is there any other matters on which you would like me to pronounce before we call the members back?

TRIAL WITHIN A TRIAL IS TERMINATED

PROSECUTOR: No, there isn't, Mr Judge Advocate. Thank you.

JUDGE ADVOCATE: Mr Couture?

DEFENDING OFFICER: No, not from my part.

JUDGE ADVOCATE: So from what I understand, one of the members is still not back to Halifax and should be back here sometime late this afternoon. So in view of that this court is then adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1420 hours, 2 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 3 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Good morning and welcome back, Mr President and Members of the Court. In your absence I decided on the admissibility of some evidence which I hope you will hear sometime today.

Major Abbott, are you ready to call your next witness?

PROSECUTOR: Yes, Mr Judge Advocate. I would like to call Lieutenant-Commander Craven, please.

s.19(1)

Lieutenant-Commander Craven

Examination-in-chief

SECOND WITNESS) Lieutenant-Commander M.L.
FOR THE) Craven, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning, would you give your full names spelling your last name, please? A. Yes, my name is Michael Laird Craven. My last name is spelled C-R-A-V-E-N.

Q. And what is your current position?
A. I'm the Deputy Combat Officer in HMCS REGINA.

Q. What year did you join the Canadian Forces? A. I joined the Canadian Forces in 1981.

Q. And I see you have your Dolphins. What year were you awarded your Dolphins? A. In 1986.

Q. Approximately what time frame were you a member of the sub community? A. I served in a submarine community from the spring of 1985 until I commenced ORO training in June of 1994.

Q. And during your time as a submariner, which commanding officers have you sailed for? A. I sailed under five commanding officers. They included Captain Jay Plante, Lieutenant-Commander Drew Macdonald, Commander Robert Bush, Lieutenant-Commander Bob Davidson and Lieutenant-Commander Randy Truscott.

Q. Where were you on the evening of 19 December 1991? A. I was in the Headquarters of First Canadian Submarine Squadron attending a mess dinner.

Q. How do you know that that was the date that you were actually there? A. I have personally checked back calendars of mine to ascertain that date.

Lieutenant-Commander Craven

Examination-in-chief

Q. What time did you leave to go for home after the mess dinner activities concluded?

A. Approximately 4:30 in the morning of the 20th of December.

Q. And where is the subs squadron located?

A. On C Jetty and HMC Dockyard.

Q. That would be CFB Halifax, Nova Scotia?

A. That is correct.

Q. With regard to your general location, could you retrace your steps from where you went, from point to point, beginning with the mess dinner to the points before you left to go for home the next morning?

A. Yes, I can. On completion of the mess dinner, which was held in the Chiefs' and Petty Officers' Mess in the Submarine Squadron, we proceeded into the Squadron Wardroom in the same building. From there I proceeded to a destroyer berthed at the end of NC Jetty. From there I proceeded to the HMCS OJIBWA and from the HMCS OJIBWA I proceeded home.

Q. Approximately what time would you say that you arrived in the wardroom of the OJIBWA? A. I suspected it was some time between midnight and half past midnight.

Q. Did you go on board the OJIBWA with anyone else? A. Yes, I did.

Q. Who? A. Three other officers, Lieutenant[N] Douglas Hart, Sub-Lieutenant Rob Elford and Lieutenant[N] Chris Dickinson accompanied me aboard the OJIBWA.

Q. Approximately how many people were present when you first arrived in the wardroom of the OJIBWA? A. There were a large number of people present. I can't say exactly how many. I suspect at least 16, likely more.

Lieutenant-Commander Craven

Examination-in-chief

Q. Did all these people remain in the OJIBWA wardroom throughout the evening until you departed?

A. No, they did not.

Q. Were seats available when you first arrived in the wardroom of the OJIBWA? A. I'm sorry?

Q. Seats, sitting, was that available when you first arrived? A. No, there were not enough seats for everyone.

Q. Who do you recall actually being there upon your arrival? A. There were eight people who I am absolutely or certain on board the submarine at the time of my arrival. They included the three officers I previously mentioned with myself, Lieutenant[N] Hart, Lieutenant[N] Dickinson, Sub-Lieutenant Elford, Lieutenant-Commander Marsaw, the captain of the OJIBWA, the officer of the day, Lieutenant[N] Ken Marr, two other officers, Lieutenant Steven Kelk, the Royal Navy, and Lieutenant[N] Gordon Muir who was the supply officer of the submarine squadron.

Q. Apart from those eight, do you have any recollection of other individuals possibly being there?

A. Yes, I do. I'm reasonably certain of the attendance of at least four other officers. Those officers would be Lieutenant[N] Wamback, Lieutenant[N] Higginson, Lieutenant[N] Soper and Lieutenant[N] Pelletier. In addition to those four officers, I am somewhat confident that Lieutenant-Commander Peter Kavanagh, Sub-Lieutenant Helen Waller and Lieutenant-Commander Robert Bush were aboard the submarine.

Q. Based on your observations can you describe the condition of Lieutenant Kelk during the early hours of 20 December '91? A. Yes, Lieutenant Kelk was passed out.

Q. Did he remain so throughout your time on the OJIBWA Wardroom that day? A. At the time I left

Lieutenant-Commander Craven

Examination-in-chief

he was still passed out. He did not recover at any time during that period.

Q. With reference to Exhibit "J" I wonder if you can identify where Kelk had passed out at?

A. Yes, I can. He was in this vicinity, right here, position one.

Q. OK, so that would be bed settee number one, Exhibit "J". About the location of Lieutenant[N] Muir? A. Lieutenant[N] Muir was sitting on bed settee number three just by the wardroom door in this vicinity right here.

DEFENDING OFFICER: Excuse me, could you indicate it again, please?

WITNESS: Yes, here, sir.

JUDGE ADVOCATE: Would you describe in words what you point on the chart. Say it in words for the transcript, please.

WITNESS: I'm pointing at the end of bed settee number three by the entrance to the wardroom, that's where Lieutenant[N] Muir was sitting.

PROSECUTOR:

Q. That would be close to the last letter "E" in the word "settee" on settee number three of Exhibit "J"? A. Yes, that is correct.

Q. And your location? A. I was at various locations during the evening. Initially, I had to stand in the doorway. I could not get in the wardroom. After that I was sitting between Lieutenant-Commander Marsaw and Lieutenant Kelk, approximately where the word "bed" is in the bed settee number one. Later that evening, I was sitting by where it says desk cupboard on the seat locker. As the seat locker are shown in here, that's not exactly the way the wardroom was set

Lieutenant-Commander Craven

Examination-in-chief

up. In fact there was two seat lockers over in the vicinity of the desk cupboard area, I seem to recall in this vicinity.

Q. Now it would be two seat lockers in the vicinity of the desk area on Exhibit "J". I understand the seat lockers are movable. These could be picked up and moved around the floor space. A. They are portable. As well I was, at one stage during the evening, sitting on bed settee number two in approximately position number two marked on the diagram.

Q. Can you describe the events as they unfolded in the wardroom with regard to Lieutenant Kelk? A. Yes, I can. Lieutenant Kelk was marked with a marker, a magic marker, as we would commonly describe. At the time I arrived on board, as I've indicated, he was unconscious, passed out. His jacket was either loosen or already off. The marking began with his face, his forehead. His shirt was subsequently loosen. His upper body was marked. His trousers and shorts were at one stage lowered and his torso and upper leg areas were marked as well.

Q. Do you recall who did the marking? A. I do not recall specifically who did the marking, no.

Q. Do you recall what was marked upon Kelk? A. I have no recollection of anything specifically being marked on him.

Q. You mentioned some individuals, Wamback, Pelletier, Waller and Kavanagh. Were they present at the time this marking occurred? A. The only eight people who I can say for certain were present at the time that the marking took place were the first eight I indicated that I was absolutely certain of at the time of my arrival and at the time of my departure. I'm uncertain if any of the others were actually on board.

Q. At the time that the marking is going on, can you state whether Commander Bush was or wasn't

Lieutenant-Commander Craven

Examination-in-chief

present? A. I'm certain that Commander Bush was not aboard the submarine at that time.

Q. Why do you say that? A. I say that because I recall quite distinctively at the time of the marking ... pardon me, at the time of the cigar tube incident, with the exception of the commanding officer of the OJIBWA, I, as a lieutenant-commander and the executive officer of the HMCS ONONDAGA, was the senior officer present on board.

Q. Do you recall being interviewed by the military police on the 14 January '94? A. Yes, I do.

Q. Do you recall being asked questions about whether Commander Bush was or wasn't present at that time? A. Yes, I do recall being asked those questions.

Q. What was your answer to the military police at that time? A. My answer at that time was that I was somewhat uncertain as to whether or not he was on board.

Q. What parts of Kelk were marked upon at this time? A. At which time?

Q. At the time that the marking begins? A. At the time that the marking began, he was unmarked. At the time it concluded his head was marked, certain parts of his upper body, his chest had been marked, his torso, the upper parts of his legs, I believe, had all been marked.

Q. How was he dressed at the point in time when the marking finished? A. He has on his mess kit shirt which is open. He still has his trousers, his shorts which are lowered, shoes and sox are on.

Q. Shorts and trousers are lowered, how lowered? A. They were a reasonable way down. I

Lieutenant-Commander Craven

Examination-in-chief

believe in my statement I said they were down perhaps as far as his ankles.

Q. Did you do any of the marking? A. I did not do any of the marking.

Q. After the marking is finished can you describe what happened next? A. Yes, Lieutenant-Commander Marsaw secured a TUERO cigar tube either from the table ... the table as shown on the diagram is incorrect. The top square part I don't believe was there. I believe it was the round underneath. This piece is removable for cocktail parties. He took the TUERO cigar tube ... several people in the wardroom that night had been smoking cigars ...

Q. And he took the cigar tube from where? A. In the vicinity of the table here.

Q. And after he did that, what happened next? A. He subsequently returned to the spot where he was sitting on bed settee number one. He turned to the RN officer who by now was still lying in position one marked on bed settee number one. He took his left hand, put it on the upper buttock of Lieutenant Kelk, raised the buttock and inserted the cigar tube between the unconscious officer's buttocks.

Q. Did you observe Lieutenant-Commander Marsaw's reaction to this? A. Yes, I did.

Q. What was it? A. He smiled at first. I would describe the look on his face subsequent to that as being somewhat sheepish.

Q. Where were you at the time that the cigar tube was inserted? A. At the time the cigar tube was actually inserted, to the best of my recollection, I was either on the seat locker in the vicinity of the desk cupboard, in this vicinity right here about the corner of that locker would be. It's possible that I was on bed settee two in that position.

Lieutenant-Commander Craven

Examination-in-chief

Q. Either where the "2" is in bed settee number two or near the seat that's on Exhibit "J" just in front of the desk? A. Correct.

Q. And Lieutenant-Commander Marsaw would be situated where at the time the cigar tube was inserted? A. He would be situated approximately where the word "bed" is in the bed settee one.

Q. And Kelk would be near the number one on bed settee number one? A. Yes, he would be exactly in that location.

Q. Can you say which end of the cigar tube was inserted? A. I can't say with any degree of certainty which end of the cigar tube was inserted.

Q. Can you say whether you could see the cigar tube protruding from the buttocks of Kelk? A. Yes, the cigar tube could be seen protruding from the buttocks of Lieutenant Kelk.

Q. Were there any words spoken by Marsaw at the time that the cigar tube was inserted? A. There were no words that I can recall spoken by Lieutenant-Commander Marsaw.

Q. Was there any discussion of doing this by anybody in the wardroom prior to the act occurring? A. No, there was not.

Q. At the exact moment the cigar tube was inserted between the buttocks of Kelk, who was present in the wardroom at that time? A. As I've said earlier, certainly the seven of the eight people I previously mentioned, myself, Sub-Lieutenant Elford, Lieutenant[N] Hart, Lieutenant[N] Dickinson, Lieutenant-Commander Marsaw, Lieutenant Kelk and Lieutenant[N] Muir. I'm not certain as to the instant of insertion whether or not Lieutenant[N] Marr was in

Lieutenant-Commander Craven

Examination-in-chief

the wardroom. Those are the people who I can state absolutely were in the space.

Q. Could you describe the atmosphere in the wardroom at the moment the tube was inserted? A. At the moment the tube was inserted the atmosphere ... people had been joking, talking, conversations were taking place, some laughter were going on about what had happened to Lieutenant Kelk in terms of his being marked up. At the moment the cigar tube was actually inserted, that became the focus of attention within the wardroom. Some people were laughing. It was however a defining moment. The atmosphere changed. I either seemed to recall someone saying, "Oh, that's gross." The nature of the laughter was somewhat different. It was the type of laughter you hear when a joke is told that doesn't go over right.

Q. Would you look around the courtroom and see if you see Lieutenant-Commander Marsaw present today? If you do, identify him, please? A. Yes, Lieutenant-Commander Marsaw is sitting between the two officers in the Army uniforms to my immediate right.

JUDGE ADVOCATE: The witness indicates the accused.

PROSECUTOR:

Q. Was there anything in your view between yourself and Kelk at the moment the cigar tube was inserted? A. You're asking me if my view was obstructed?

Q. Sure? A. No, my view was not obstructed. I saw the cigar tube.

Q. How sure are you that it was Lieutenant-Commander Marsaw that had inserted the tube? A. I'm absolutely certain that it is Lieutenant-Commander Marsaw that has inserted the cigar tube.

Lieutenant-Commander Craven

Examination-in-chief

Q. Do you know if anybody removed the cigar tube? A. No, I cannot recall if anybody did.

Q. After the cigar tube is inserted, what does Lieutenant-Commander Marsaw do next? A. He, as I said, smiled, a rather sheepish look then came over his face. Very shortly after that he left the wardroom and did not return.

Q. Lieutenant[N] Muir, what was his fate that evening or morning? A. Lieutenant[N] Muir, at the time of my arrival, was virtually unconscious. He was fighting the good fight. He was still upright, his head was nodding. Eventually he passed out in the upright position. After the cigar tube incident, after Lieutenant-Commander Marsaw had left, Lieutenant[N] Muir befell much the same fate as Lieutenant Kelk had to a certain extent. His head was marked with markers. At one point some masking tape was wrapped around his spectacles. He was a de-spectacled officer and his ankles were taped as well.

Q. Who participated in that? A. I cannot recall specifically who participated in that.

Q. Can you comment based on your own personal observations of Lieutenant-Commander Marsaw state of sobriety at the moment the cigar tube is inserted? A. I cannot make an exact assessment as to Lieutenant-Commander Marsaw's sobriety. He did not appear to me to be suffering from the effects of intoxication. His speech was not slurred. His physical motions were in no way impaired. He did not look dishevelled. Certainly he was in no condition, even beginning to approach the two officers, Muir and Kelk, who were in the wardroom.

Q. How long have you known Lieutenant-Commander Marsaw? A. I have known Lieutenant-Commander Marsaw since 1982.

Lieutenant-Commander Craven

Examination-in-chief

Q. Have you had occasions in the past to observe him in an intoxicated state? A. Yes, I have.

Q. How about your state of sobriety at that point in time? A. At which point in time?

Q. At the point that the cigar tube is inserted between the buttocks? A. I was in possession of my faculties at that particular time. I had been drinking.

Q. At that point in time, can you retrace your steps and tell the court how much you had to drink, and what you drank, and when you drank it? A. Yes, I feel I can with a reasonable accuracy. At the mess dinner, towards the end of the mess dinner I had a glass of Porto. On board the ship at the end of the Jetty, end of C Jetty, I had two beers. On proceeding aboard OJIBWA I had been offered another beer. So my assessment at the time of the cigar tube incident I had probably four drinks.

Q. Again, what did you drink at the mess dinner? A. At the mess dinner I had one glass of Porto and water and that was it.

Q. What's your personal reactions to observing the insertion of the cigar tube? A. I was extremely surprised.

Q. Why was that? A. More because ... for two reasons I suppose. First, because of the individual who did it. Second of all, because it was an act that I had never seen before at mess dinners or indeed any shipboard function that involve drinking or partying.

Q. OK, with regard to the first reason, "Because of the individual who did it", what do you mean by that? A. I have never seen a commanding officer of one of HMC ships or submarines commit an act of that type.

Lieutenant-Commander Craven

Examination-in-chief

Q. Did you report the act the next morning?

A. No, I did not report the act the next morning.

Q. Why not? A. There were a variety of reasons. The first reason was with respect to my consideration that it might be inappropriate for me to report the act. I was a guess on board. I was the XO on another submarine. I was reluctant to involve myself in events that had happened on another submarine in the squadron. The second reason had to do with concern that I had with respect to how the incident would be viewed. I was not necessarily convinced that if I was doing a report that a cigar tube had been inserted between the buttocks of another officer, that some people might not think that was just funny, type of horseplay, you could expect at a mess dinner. The third reason and I suppose the reason that ultimately dissuade me of not reporting the incident was that I had a concern about how it might affect my own progression within the submarine community at that particular point in time.

Q. What do you mean by that? Can you elaborate on that? A. I can elaborate. At the time that Lieutenant-Commander Marsaw took command of the HMCS OJIBWA in December of 1990, he gave a speech to the wardroom officers about his perspective on command. Amongst the many things that were contained in that speech ...

DEFENDING OFFICER: Mr Judge Advocate, it appears that we are going into some hearsay here. I would object to that of course.

PROSECUTOR: I don't think we're breaking any hearsay rules, Mr Judge Advocate. We're talking about words of the accused. Also not for the truth of its contents of course but to show how Lieutenant-Commander Craven may have acted or may not have acted in a certain ways as a consequence of hearing those words. So it is truly an exception to the hearsay rule on two grounds.

Lieutenant-Commander Craven

Examination-in-chief

JUDGE ADVOCATE: Do you wish to add something?

DEFENDING OFFICER: It is the accused ... I'm not sure what the witness is about to report but ... I don't know, if it is not presented for the proof of its content, I suppose, it is open to you to allow the question.

JUDGE ADVOCATE: The objection is denied. You may answer the question.

WITNESS: Yes. We were all present at this brief that Lieutenant-Commander Marsaw was giving on his perspective on command of OJIBWA. At that time amongst the many things he told his officers, one thing sticks in my mind, that was he intended to command as long as he possibly could. One of the ways he intended to do that was to be the commanding officer for as many Submarine Officer Continuation Training periods as he could. One way he could stay in command was to make sure that as few officers as possible got through that course. He said it with an element of jest of course, but subsequent to that, there was an SOCT on the spring of 1991 where an officer who had expected to go to Perisher did not go. He was replaced with another officer.

PROSECUTOR:

Q. What was his name? A. The officer who expected to go to Perisher was Lieutenant-Commander Larkin. The officer who took his place was Lieutenant-Commander Woodburn. This of course was not Lieutenant-Commander Marsaw's decision. It had been the squadron commander's decision, but in subsequent discussion with Lieutenant-Commander Larkin he had indicated ...

Q. OK, at that point I think we are into hearsay so we can't get into that. Whose boat did

Lieutenant-Commander Craven

Examination-in-chief

Larkin do the SOCT on? A. Lieutenant-Commander Marsaw's boat.

Q. At this point in your career where were you situated? A. I was the XO of HMCS ONONDAGA.

Q. And what would be the next step in your career progression after being an XO? A. The next step would be a recommendation for the Perisher course, attendance on the Perisher and conditional on successfully passing that, submarine commander.

Q. And what would be a prerequisite to getting that recommendation for Perisher? A. The prerequisite for that recommendation would be attendance on Submarine Officer Continuation Training periods and a subsequent recommendation from the captain and the Squadron Commander.

Q. Which boats were being used in 1992 for the SOCTs? A. I can't recall specifically which boats were used in 1992, either OJIBWA or ONONDAGA.

Q. So these three factors are factors why you did not make a report? A. Yes, they are.

Q. Did you ever have occasion to discuss with Lieutenant-Commander Marsaw the activities in the wardroom on the 20th of December 1991? A. Yes, I did.

Q. When would this have occurred? A. At Lieutenant-Commander Marsaw's house in July of 1994.

Q. Can you briefly tell the court your understanding of the circumstances surrounding that day? A. Yes, it was either the day or the day after Lieutenant-Commander Marsaw had been charged.

Q. You went to his house? A. Yes, I went to his house.

Lieutenant-Commander Craven

Examination-in-chief

Q. And can you relive the conversation that you had with Lieutenant-Commander Marsaw for the court, please? A. Yes, I can. At Lieutenant-Commander Marsaw's house I give Lieutenant-Commander Marsaw a copy of the statement that I have provided the military police.

Q. Was this statement typed or in handwriting? A. I believe it was typed.

Q. And after you gave him a copy of this what happened next? A. He spent a period of time reading it, reading it thoroughly. On completion of reading it ...

Q. OK, if I could just stop you there. I wonder ... if I can show you the document. I'll ask you if it is a copy of the statement that you would have given Lieutenant-Commander Marsaw to read that evening? A. Yes.

Q. I wonder if you could read for the court the highlighted section on the first paragraph of the fifth page, please? A. "Shortly after our arrival on board an indelible black felt-tip pen was produced. This object was used to decorate Lt(RN) Kelk's head with markings. Subsequently, his shirt was undone, trousers and shorts lowered to his ankles, and torso and legs further adorned with felt-tip pen markings. On completion of these antics, Lt(RN) Kelk was rolled on his side. At this point LCdr Marsaw, sitting beside the unconscious RN officer, inserted a TUERO cigar tube between Lt Kelk's exposed buttocks. Shortly thereafter, LCdr Marsaw exited the Wardroom and proceeded to his cabin, not to be seen for the remainder of the evening. This extraordinary incident became widespread knowledge within the First Canadian Submarine Squadron Wardroom in following weeks."

Q. Thank you. Did you give the military police a similar statement? A. Yes, I did.

Lieutenant-Commander Craven

Examination-in-chief

Q. Was it in the same format as the one that you give Lieutenant-Commander Marsaw that evening?

A. No, it was not ... no, it wasn't.

Q. What format was the one you gave the military police? A. It was handwritten and it had been substantially marked with lines and things that the military police had instructed me to mark out blank spaces.

Q. After Lieutenant-Commander Marsaw read the statement including the portion you just read, what happened next? A. He then started at the beginning at the statement and he asked me a variety of questions which I did my best to answer.

Q. OK, could you relive that discussion? A. In general terms, yes, I can. Lieutenant-Commander Marsaw first started by asking me if I was still friends with the newspaper reporter, Malcolm Dunlop. I indicated that yes, I was. We discussed at length whether or not I knew who the sources were, who had reported the event. I indicated that I didn't know, that I had some suspicions. We discussed a few names between the two of us who we thought it might be without really coming to any positive conclusion.

Q. Did you discuss the mess dinner incident at all with him that evening? A. Yes, we did.

Q. Can you relive that part of the discussion? A. Yes. Lieutenant-Commander Marsaw indicated to me that he certainly didn't remember that, referring to the cigar tube incident.

Q. What was your response when he said that? A. I indicated to him that it had happened and that as such, if I was called as a witness, I would be obliged to tell the truth to relate that that incident had occurred.

Lieutenant-Commander Craven

Examination-in-chief

Q. What was his response? A. His response in essence was to ask me if I appreciated that it would be up to him to disprove that that had happened and that in the process of doing that he would of course have to challenge my credibility. I indicated that I understood that but nonetheless I would have to relate the circumstances of that particular evening.

Q. I would like to shift to questions now away from the mess dinner and talk about your experience as a submariner. How many years were you a submariner? A. Nine years in total.

Q. I believe you identified that you had sailed with the following commanding officers, Plante, Macdonald, Bush, Davidson and Truscott? A. I have sailed with four other commanding officers but only attached for short periods of time for courses and things. Yes, those were my five captains in the time I've served in submarines, OJIBWA and ONONDAGA.

Q. I would like to show you the wording of the charge three, the particulars of ...

DEFENDING OFFICER: Mr Judge Advocate, I would object to this procedure of my learned friend by showing the document like this. It is our view that it amounts to a leading question. If he wants the witness to answer a question regarding how he was led or whatever he can do that without necessarily having to show the witness the document which is the Charge Sheet that he intends to show him which in my view amounts to a leading question.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I think this is the most efficient way to get to the heart of the matter. Given how slow these proceedings have unfolded so far, anything we can do to speed things up and get to the heart of the matter, I think we should consider.

Lieutenant-Commander Craven

Examination-in-chief

JUDGE ADVOCATE: I understand but you have an objection.

PROSECUTOR: I can show him that or I can simply ask a question. "Have you ever had occasion to observe commanding officers that you sailed with refer to subordinates in a control room with the following words?" It accomplishes the same thing and it is not a leading question. It's not eliciting the answer, it's simply asking a question and he's free to give whatever answer he wants.

DEFENDING OFFICER: That's my very position. That type of question that the prosecution has just formulated is one that is leading and showing the document is just as leading as the question my learned friend just formulated.

JUDGE ADVOCATE: So the objection is sustained. Find another way to ask your question.

PROSECUTOR:

Q. How would Commanding Officers Macdonald, Davidson, Bush reacted to an individual who has made an error or were not working up to standards? A. Typically, they would respond by first pointing out the individual that they were unhappy with what was being done, unhappy with the performance that was being carried out. They would in various words tell the individual to correct it, to get it right. In the case where the ship or the submarine safety would be involved, it might even involve raising their voices to that particular individual. An example would be, "Ship control officer of the watch, we're not on depth. Get on depth. Are you pumping? The submarine is heavy." A raised tone of voice to draw attention to what they were concerned with. In cases beyond that, I have certainly, even myself in instances where my performance was deficient in the control room, been invited into the captain's cabin for a personal interview and told what the shortcoming was, what I was expected to

Lieutenant-Commander Craven

Examination-in-chief

do about it and to make sure it didn't happen again. In very occasional instances, I can only say that I saw this once or perhaps twice in my entire time at sea in submarines, people would be relieved on watch in the control room, asked to leave the control room and a replacement secured for that particular position. But as I say, that would be an extraordinary circumstance.

Q. Have you ever had occasion to observe any of these commanding officers use personally insulting adjectives towards subordinates in the control room?

A. I have heard one of those commanding officers use a personally insulting adjective.

Q. What was that? A. The word was "stupid".

Q. When was that said? A. That was said in the summer of 1985 in HMCS ONONDAGA.

Q. Could you describe the circumstances?
A. Yes, the executive officer of the submarine, Lieutenant-Commander Langlois, had directed that a Part 3 officer's books be wrapped in plastic and thrown in the port bottle well because he'd left him sculling in the wardroom. He had been warned several times. That was done. The Part 3 officer became very upset, an argument ensued. At that point Lieutenant-Commander Plante came into the wardroom and told the Part 3 officer, Lieutenant[N] Mabbett, to stop being so stupid, that he didn't buck up, he, Lieutenant-Commander Plante would sort him out.

Q. That was in the wardroom rather than in the control room? A. That was in the wardroom.

Q. How many years have you been a submariner? A. From 1985 to 1994.

Q. Can you think of any other example based on your experience over that time? A. I can think of no other examples under any of the five captains I've

Lieutenant-Commander Craven

Cross-examination

served with where words were used to personally humiliate an individual in the control room.

PROSECUTOR: I have no further questions, thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. At some point you alluded to a Mr Dunlop as to whether you were a friend of his. To that could you inform the court whether or not you are actually friend with Mr Malcolm Dunlop? A. I am a friend of Mr Malcolm Dunlop.

Q. And you've known him since when? A. Nineteen seventy-four.

Q. And is that correct to say that Mr Malcolm Dunlop is a staff writer at the Chronicle-Herald here in Halifax? A. Not anymore, no.

Q. Not anymore? A. No.

Q. Since when has he changed position? A. I don't know when he changed position but he ...

Q. Is he still employed with the Chronicle-Herald? A. Yes, he is.

Q. He is still employed with the Chronicle-Herald. Is that the same Malcolm Dunlop who published an article on 16 December 1993 on some allegations on board submarine? A. That is the same Malcolm Dunlop.

DEFENDING OFFICER: At this point in time, Mr Judge Advocate, I intend to introduce a document and I believe my learned friend has some concern about that so maybe if we have a brief ... it would be a rather

brief **voir dire** in the absence of the court to determine the admissibility.

PROSECUTOR: I certainly don't mind stating what my objection is. I'm ready to argue it out in the presence of the members of the court. I know for them to come in and out, in and out all the time is frustrating. I'll leave it up to you, Mr Judge Advocate, but I'm quite prepared to make my argument right now even if it either stands or falls.

JUDGE ADVOCATE: Go ahead.

PROSECUTOR: Mr Judge Advocate, we're getting to an area of question and perhaps it might be appropriate for the witness to leave.

JUDGE ADVOCATE: Lieutenant-Commander Craven, would you please withdraw from the courtroom until the time you're called back, thank you.

WITNESS: Yes, sir.

WITNESS RETIRES.

PROSECUTOR: We're gaining to an area of an article written by Mr Malcolm Dunlop. That brings into questions of whole variety of other underlying questions and it's going to be appropriate, I think, at some point in time for the court to determine how far it is willing to get in to this area. When do we go pass the balance of being relevant and when are we inside it?

My position to make the issue clear is that anything to do with the creation of that article or the publication of that article is not relevant to whether Lieutenant-Commander Marsaw is guilty or innocent of the charges that he faces. I think when we begin to make inquiries about the Dunlop article we are entering on a very slippery slope and that will take us into all places that are far removed from the issues that are

central to this courtroom. I don't plan on standing up and down and jumping every time we get into the Dunlop argument making an objection that it's irrelevant. I simply make one right here and now for the court to decide, happy to go either way, but I think matters concerning the construction of the Dunlop article and its publication are completely and totally irrelevant to deciding whether or not Lieutenant-Commander Marsaw is guilty or innocent of the charges that he faces. If we're going to get into that whole area then I think we would add an extra dimension to this trial bringing in all sorts of issues and subterranean issues as well.

So I'll leave it at that and respecting any decision you make on the point.

JUDGE ADVOCATE: Thank you. Lieutenant-Colonel Couture, what do you wish to obtain with this line of questioning?

DEFENDING OFFICER: My position would be to introduce a copy of the article not to prove the content, of course, of the article but rather to prove its publication. We intend and it will become quite obvious throughout evidence that this article has been sort of a focus point in the whole investigation that led to this court martial. Most if not all witnesses have read that article and most witnesses have referred to an extent or another to it in the course of the investigation. I suggest to you too that it might serve as to possibly establish bias on the part of some witnesses and other possible defence to be raised by the defence.

It is not to prove the content of the article but rather prove its publication. As the trial unfold we will keep referring witnesses to that because witnesses have throughout the investigation referred to this article as this witness has as you will find out in a moment as many witnesses have.

JUDGE ADVOCATE: So you wish to attack the credibility of certain witnesses with that matter?

DEFENDING OFFICER: Yes, that's what it is and we suggest evidence capable of demonstrating some motive or some bias on the part of some witnesses.

PROSECUTOR: I would simply add that if he wants to introduce it for the truth of its contents, we have no objection. I don't see how presenting the article to witnesses attacks their credibility in any way. I mean their credibility can be attacked on what their perceptions were and what their personal observations were. Most people in Halifax probably read the article. I'm not sure on how that goes to the credibility of anybody. It opens up a can of worms and it takes the trial off the tracks.

JUDGE ADVOCATE: I don't see it at this point either. I don't see what you can obtain. I tried to follow you on that and I don't see what you can obtain from the introduction of this document and this line of examination or cross-examination. I'm ready to let you go for a while but I already warned you that I will not give you all latitudes to do another trial within this trial by using this method of proceeding. If you want to use it to impeach the credibility of some witnesses, and again I don't know how you will do it, but perhaps you will show it to the court, I'm ready to let you proceed on that as you said but it's not a **carte blanche** that I'm giving you. I'll let you proceed with that and if there are other objections on this matter by your friend, well I will consider them at that time.

DEFENDING OFFICER: I will, I might and I will try to do so or proceed without necessarily having to introduce it. I might be able to achieve the result without necessarily introducing the document.

PROSECUTOR: I wonder if I can make another comment, Mr Judge Advocate. The problem with even peripherally getting into this whole area is that the

impression or the implicit nature of the question may very well leave the court with the impression that somehow this person was involved with the construction of this article. The only way to defend that then is to fairly and squarely put before the witnesses that question. And then we're into the whole issue of who is involved in constructing the article.

JUDGE ADVOCATE: Well, we will see. I mean, at this point I don't know anything about that except the article that I have previously seen. So as I said proceed with it and we'll see how it goes.

DEFENDING OFFICER: Please recall the witness.

JUDGE ADVOCATE: Please.

s.19(1)

Lieutenant-Commander Craven

Cross-examination

SECOND WITNESS) Lieutenant-Commander
FOR THE) M.L. Craven.
PROSECUTION)

CROSS-EXAMINED BY DEFENDING OFFICER

Q. So, Lieutenant-Commander Craven, is that correct to say that in 1993 Mr Dunlop was a staff reporter with the Chronicle-Herald here in Halifax?
A. Yes, that is correct.

Q. And that shortly before, on or about 20 November 1993, you had either dinner or paid a visit to Mr Dunlop at his home? A. That is correct.

Q. And at that time some matters were discussed about allegations of improprieties on board a submarine? A. That is correct.

Q. Lieutenant[N] Doug Hart, I understand is a good friend of yours? A. Yes, he is.

Q. Like a close friend of yours? A. Yes, he is.

Q. I take that on the 14 January 1994 you were interviewed by the military police? A. Yes, I was.

Q. Concerning matters that are being discussed here today in court? A. That is correct.

Q. I understand that approximately five days ago, you had an opportunity to review a transcript of that interview with the military police? A. That is correct, I did.

Q. And I understand that you compared this transcript that had been produced to you and compared it to the video tape of the actual interview that took place? A. Yes, that is correct.

Lieutenant-Commander Craven

Cross-examination

Q. And that in the course of that process you made a number of amendments to the transcript either reflecting spelling mistakes or parts that were either too low that you were unable to pick up and you have amended the transcript to reflect those changes?

A. Yes, that is correct.

Q. I take too that the transcript as it is now, after your amendments, reflects your statement to the police, the various matters you discussed with them? A. Not entirely, I've reviewed the tape at least four times since and found another half dozen discrepancies but they're not large.

Q. So details would be very minor. Number of the mistakes you picked were misspelling and then some words? A. Some parts in the transcript were previously said too low and the words couldn't be made out. I have not been able to make them no, but generally speaking they are, I would use the word, insignificant, yes.

Q. OK, and I take that when you spoke to the MPs you told them the truth? A. I told them the truth to the best of my ability given the fact that I was answering questions for which I had no time to prepare.

Q. Lieutenant-Commander Craven, I show you a document here. Could you have a look at this and confirm to the court whether it is in fact the transcript we just discussed? A. Yes, that is the transcript that we just discussed.

DEFENDING OFFICER: Could you just put it aside for now.

I'll give you a copy, Mr Judge Advocate. You can keep it aside for now. If needed we will refer to it.

Lieutenant-Commander Craven

Cross-examination

Q. When were you first contacted by the military police regarding this upcoming interview that you were to attend? A. The 14 January 1994?

Q. Yes? A. I can't really say. It wasn't that long before that particular date, I don't think.

Q. Could you guesstimate? Was it on the 13 that you were notified that you were to meet them or was it on the 12, approximately? A. No, I couldn't guesstimate at all.

Q. You could not guesstimate at all when you got the call from the MPs to meet with them? A. No.

Q. But that would have happened in 1994? A. Perhaps.

Q. So it might even be in 1993 that they contacted you, is that what you're saying? A. It might have been late '93, yes.

Q. So you have absolutely no indication or you cannot tell the court whether it was even in '93 or in '94 that you were contacted? A. I can tell the court that it would have either been in December of '93 or January of '94, but I can't in no way narrow down on a particular date, no.

Q. But yet you can narrow time of events that took place in 1991? A. Yes.

Q. I take that at the occasion of this interview you did provide a written statement to the military police, is that correct? A. Yes, that is correct.

Q. Could you please look at this document and tell me whether it is indeed the statement you produced to the military police? A. Yes, that is the statement I produced for the military police.

Lieutenant-Commander Craven

Cross-examination

DEFENDING OFFICER: You can put it on the side too just in case we need it. My next question will call for a little bit of hearsay but I submit that it's not intended to prove the content but rather what the witness knew.

Q. My question is as follow, what did you understand or what did the MPs tell you regarding this interview? How much details did they give you as to the purpose of the interview that you were about to have? A. I'm not sure I understand your question.

Q. The MPs called you. I think we have agreed on that. They want to meet you to interview you on a specific matter, I assume? A. Yes.

Q. Hopefully rightly, that they told you what it was about? A. Hm, hmm.

Q. Now how detailed were they? What was your understanding of what you were about to be interviewed on? A. It was my understanding that I was about to be interviewed concerning the allegations against Lieutenant-Commander Marsaw.

Q. Allegations, that's all, like no more specifics? A. There were perhaps other specifics, I cannot recall them.

Q. Those allegations, was it mentioned for example that they were allegations as they appeared in the Chronicle-Herald on the 16 December? A. Perhaps there were, I cannot recall precisely.

Q. The written statement I just showed you and that you have acknowledged as being the one you produced for the MPs? A. Yes.

Q. Is that correct that that statement was prepared prior to your arrival at the MP station? A. That is correct.

Lieutenant-Commander Craven

Cross-examination

Q. So upon being asked to see the MPs for an interview, you wrote that? A. That is correct, I wrote that the night before the interview.

Q. I take this document is dated 14 January 1994? A. Yes.

Q. Which is the date of the interview? A. Yes, it is. That is correct.

Q. In actual fact though you did not write that statement on the 14 January '94, it was already done when you got there? A. No, that is incorrect. I didn't finish this statement until well into the early hours of the morning of the 14th of January.

Q. When did you start writing it? A. I suspect at about nine o'clock in the evening before, on the 13th.

Q. You didn't work on it on the 12th or anything? A. No, I did not.

Q. You wrote that on the 13th. A. No, I wrote that on the 13th.

Q. Do you remember in certain terms the article that was published in 1993, on 16 December? A. I do remember in certain terms that article in the event that I found I couldn't remember. I cut the article out and kept a copy of it.

Q. Have you read it recently? A. Not recently.

Q. Is that correct to say that this article did not talk about a cigar tube incident? A. I don't believe the article on the 16th of December 1993 talked about the cigar tube incident, no.

Q. OK, and you don't believe either that the MPs told you about the cigar tube either. They kept it

Lieutenant-Commander Craven

Cross-examination

in general terms? A. That is correct, it was kept in general terms.

Q. OK, I direct you to your statement at page ... first page of your statement. A. Yes.

Q. Is that correct that you state that, "This statement is a personal written record of information and/or observations that I feel may be relevant with respect to allegations concerning activities in HMCS OJIBWA", is that correct that you said that? A. That is entirely correct.

Q. Now if we go at page two of the same statement, is that correct that you enunciate the content of your conversation in rough terms, albeit, but you enunciate the content of your conversation with Mr Dunlop? A. I enunciate what he conveyed to me that evening, that is correct.

Q. You stated a number of additional details? A. Yes.

Q. Is that true that the cigar tube incident ... the so-called cigar tube incident is not mentioned there either? A. It is entirely true that it's not mentioned there either.

Q. If I direct you at page seven of your statement. Is that true that from that page on for three pages or so that you discussed the cigar tube incident? A. That is entirely correct.

Q. My question to you is, how did you know that the MPs were interested in this if they hadn't told you if you hadn't discuss with Mr Dunlop? Why did you relate this incident? You talked about other things in your statement but why would this incident come to mind? A. I, of course, had no idea that the MPs would be interested in the cigar tube statement. What I did know was that it was my obligation to be as helpful and as truthful to the military police as I

Lieutenant-Commander Craven

Cross-examination

possibly could be. I was also well aware of the fact that there were many other people who were aware of the cigar tube incident and that if it hadn't already come out by the time I spoke, and I was not the first person interviewed by the military police, that it certainly likely would. In essence I include that because I was not attempting to hide anything.

Q. Now, that is on 16 January '94 that you decide that you have to be forthcoming about the cigar tube incident? A. No, that's on the 14th of January 1994.

Q. I apologize, I did not intend to mislead you. It is on 14 January 1994 or basically on the 13 when you wrote your statement that you decided to be forthright about this incident? A. It's when I decided to tell the military police, that is correct.

Q. Why did you decide to do that then while you had for three years held on the story without reporting it to anyone? A. Because I was being questioned by the military police. I had never been questioned by the military police in the three years before that.

Q. Is that correct that you were somewhat nervous as well about meeting with the military police? A. That's safe to say, yes, I was nervous.

Q. Upon entering there you asked them whether this interview was video-taped? A. Yes, I did ask them that.

Q. And you asked them whether you would have access to a transcript of that? A. Yes, I did ask them that question as well.

Q. And you asked whether you were under compulsion of making a statement? A. Yes, that is correct as well.

Lieutenant-Commander Craven

Cross-examination

Q. Now you said that it was the first time that you were being spoken by the military police. I show you here a copy of QR&O article 4.02. Could you have a quick look at this, please? A. Yes, certainly.

Q. You can read the whole article, it's not very long. In fact you just can keep it should you need to refer to it. I have one copy here. So would you say that, as an officer, you and officers in general, have general duties and responsibilities? A. I would agree, yes, that all officers of course have general duties and responsibilities.

Q. And one of those includes being acquainted with, observing and enforcing National Defence regulations and so on and so forth? A. Of course, yes.

Q. And that another, among many of course, it's not an exhaustive list, but another responsibility is to report to proper authority any infringement of the pertinent statute, regulation, rules, orders, etc, instructions of the Canadian Forces? A. Yes, entirely so.

Q. And you understand that to mean that if you, as an officer, become aware of a breach to the Code of Service Discipline you have a duty to report it, is that correct? A. That is correct.

Q. You understand that. So why didn't you report that incident immediately after ... upon it occurrence? A. I think I have already stated my reasons for not reporting that incident.

Q. Might it be that you wanted to protect somebody? A. No, I don't think so.

Q. If I suggest to you that Lieutenant-Commander Marsaw was not responsible for SOCT, would you agree with that? A. Yes, I would agree with that to a certain extent.

Lieutenant-Commander Craven

Cross-examination

Q. So when you state that you were concerned about your career because you might have to sail under Marsaw for SOCT, actually Marsaw did not have the final say whatsoever on SOCT? A. He did not have the final say but he was certainly very influential.

Q. Is that correct to say that when you go on SOCT you go for a period at sea, for example you might go for a week or two weeks? A. That is very true, a week or two weeks, usually two weeks.

Q. And the SOCT staff from the school accompanies you on board? A. No, that's not correct.

Q. At times they do? A. I don't think on any occasion that I ever did an SOCT that staff from the school accompanied me.

Q. Aren't they the one who assess you?
A. No, they are not.

Q. OK, is there authorities from the squadron there to observe you? A. There was only one authority who was ever there from the squadron to observe.

Q. There is one authority? A. Yes.

Q. And is that correct that this is the authority who makes the assessment? A. That is correct.

Q. And in turn reports to the SOCT people?
A. No, he is the SOCT person.

Q. OK, so he is the SOCT person? A. That is correct.

Q. A representative from the squadron, sub squadron? A. That is correct.

Lieutenant-Commander Craven

Cross-examination

Q. Is that correct to say that that person is the squadron commander? A. That would be correct to say that that person is the squadron commander, yes.

Q. And he is the one who makes the assessment? A. He makes the assessment but of course he bases his assessment on what he sees and inputs from the submarine commanding officer. The squadron commander cannot be up 24 hours a day to observe the students.

Q. And it might be ... it might sound obvious but I take that the squadron commander is superior in rank and appointment to the captain of the ship? A. Yes, of course, he is superior in rank and appointment to the captain of the ship.

Q. And he is the one who at the end of the day, to use the expression, signs your sheet as having successfully completed SOCT? A. Yes, that is correct.

Q. Now, another reason you stated for not reporting the incident was that, you were a guess and that was not your boat. But you also stated, you were the senior officer present? A. Yes, I stated both those things. I didn't state I was the senior officer present. Next of the commanding officer of the OJIBWA I was the senior officer present.

Q. That's right, but at the time of the alleged incident you would have been next to Lieutenant-Commander Marsaw? A. That is correct.

Q. The senior officer present, is that correct? A. That is correct.

Q. Because you have stated that you don't believe that Bush was there, Lieutenant-Commander Bush as he was? A. Yes.

Q. So you were senior next to Lieutenant-Commander Marsaw? A. Correct.

Lieutenant-Commander Craven

Cross-examination

Q. Don't you feel that as senior officer present you had a responsibility? A. I was not the senior officer present.

Q. Aside from the alleged offender, you were? A. Aside from the alleged offender, I considered that I had some responsibility, yes.

Q. And one of those responsibility includes to report the matter to authorities? A. It would have included reporting the matter to the authorities based on my assessment to what I thought of the matter.

Q. Isn't that right, and it is your testimony this morning, that the ultimate reason you did not report was that you were afraid of that might affect your progression? A. Yes.

Q. However, though you have admitted a moment ago that Lieutenant-Commander Marsaw was not the ultimate authority in producing such an assessment of your SOCT? A. He was not the ultimate authority but he, at that stage, was a highly influential officer in the submarine squadron and I had reason to believe that his influence had in fact affected the selection of other officers.

Q. Are you stating this morning that your personal interest goes before the interest of the service and your responsibilities as an officer? A. Of course I'm not saying that. I don't think there is any officer who would say that.

Q. But that ... isn't that what you said amount to ultimately ... the ultimate reason why you did not report was that you were looking after your career. That's what it is you said, isn't it? A. I'm saying that ultimately I considered a number of factors and after having considered all those factors I decided that I was going to not report the incident.

Lieutenant-Commander Craven

Cross-examination

Q. You alluded to the fact that you went on board a ship I believe, is that correct? A. That is correct.

Q. What was the name of the ship in question? A. In my statement I have indicated that the ship was HMCS MARGAREE.

Q. And by the way you state this now do I take that it may not have been HMCS MARGAREE? A. I have good reason now to believe that in fact it was HMCS FRASER.

Q. And in your statement to the military police on 14 January 1994 you stated with great deal of certainty that you had been on board MARGAREE, isn't that correct? A. Yes, that is correct.

Q. There was no doubt in your mind that you had been ... A. At that point, no, there was no doubt in my mind.

Q. Would you agree, and I'm sure you're more familiar than I am, that upon getting on board a ship it is readily available and easy to identify what ship you're on board of? A. Yes, it is.

Q. Kisby ring and special decoration in the wardroom and so on and so forth? A. That is correct.

Q. And I understand that the FRASER has got a stuffed elk, is it or a elk head? A. It's a deer head.

Q. Deer head, is it. Would you agree with me that this is a very distinctive feature of that particular ship? A. Most certainly it is, yes.

Q. And despite all of that you were absolutely certain in '94 that it was on board MARGAREE that you had been? A. Yes, that's correct, I was.

Lieutenant-Commander Craven

Cross-examination

Q. As it turned out, MARGAREE was not in the jetty? A. That is correct.

Q. The FRASER was? A. That is correct.

Q. And that's the ship you were on board of. And you were there with Elford, Hart and Dickinson?
A. Elford, Hart and Dickinson, yes.

Q. Is that possible that you had more to drink on board FRASER that what you stated this morning? A. No, I think not.

Q. So according to your testimony, if I understand right ... in fact you may not have said that. I will make sure not to mislead you. Let's clarify this. What time did you leave the Chiefs' and Petty Officers' Mess after the mess dinner? A. I can't put an exact time on it but I think we arrived on board MARGAREE at perhaps 2230.

Q. On board, you mean, FRASER? A. Or on board the FRASER.

Q. Or what you thought was the MARGAREE.
A. On board the ship at the end of NC Jetty.

Q. And so you did spent ... I understand that you got on board OJIBWA or you left MARGAREE, which ever, shortly after midnight? A. Yes, I think probably about half past midnight.

Q. So in the space of two to two and a half hours, you say that you had two beers on board the FRASER? A. Yes, that's what I said.

Q. And you said there were other officers present as well that whose names you don't recall, is that correct? A. At one point I had thought that there were more than the four of us who had gone there. I thought there might be some other officers but once again in my own mind ...

Lieutenant-Commander Craven

Cross-examination

Q. It doesn't appear to be the case?

A. I'm certain that the four of us were there and the officer of the day of that particular ship.

Q. And other officers of the mess dinner that you first thought had joined you on board of what you thought then being MARGAREE were not there either.

So that was the four of you? A. There were certainly the four of us. There may have been others, I'm uncertain.

Q. But you wouldn't remember their names?

A. No, I would not.

Q. Would you say that the sub community is a fairly tight net community? It's fairly small and that most people know each other? A. No, I wouldn't necessarily say that. One can very quickly lose track of the trainees who are in other submarines.

Q. What is the total strength of the submarine squadron? Isn't that in the area of 250 people?

A. In the days when I knew the numbers, I think we used to say it was about 258, boats and squadron staff included.

Q. So how many officers? That would be of course a smaller amount, the number? A. It would vary but it could total up to at any given time as many as 30 to 40 officers.

Q. And as a rule you would know most of them like ... A. No, that's not true. As a rule I would not know perhaps a third of them, maybe more.

Q. In what condition was Lieutenant[N] Hart that night, I'm talking about in degree of sobriety or intoxication? A. I cannot state with any accuracy exactly what the degree of his sobriety was. Of course Lieutenant[N] Hart had been drinking. I did not observe that he in any way seemed to be suffering from

Lieutenant-Commander Craven

Cross-examination

impairment of speech, impairment of physical motion, anything like that.

Q. How was Elford that night? A. I assess Elford to be in the same condition as Hart.

Q. And Hart as you? A. I beg your pardon?

Q. Was Hart in the same condition as you were? A. Was Hart in the same condition as I was? In terms of his speech, his physical motions, yes.

Q. So is that correct that you indicated during your interview to the MPs that all three actually, Hart, Dickinson and Elford were in the same position you were in terms of their sobriety? A. In terms of my assessment of their sobriety ...

PROSECUTOR: Objection, Mr Judge Advocate. My objection is with the way the question is phrased. In MRE 100 there is a proper way to put inconsistent statements to the witness. It's there to ensure fairness. That if there is an inconsistency, the statement is brought to the attention of the witness. He is asked if he recollects being asked a particular question. He is given time to look at that. He either adopts it or he doesn't.

JUDGE ADVOCATE: Lieutenant-Colonel Couture?

DEFENDING OFFICER: I formulated the question, Mr President, and I don't think I was ... I didn't think anyway that I was in the field of Rule 100. I asked the witness the question. If he does answer then that's fine, there is no problem. If he does not, than I would propose to go on the Rule 92, show the document to him, reformulate my question. If he does answer, fine, and then if he does not answer then we can look into Rule 100. But I think that it's a various ... about a three stage process.

Lieutenant-Commander Craven

Cross-examination

JUDGE ADVOCATE: I'll let you go for now. I'm sure you're aware of that rule.

DEFENDING OFFICER: Yes, thank you.

Q. To avoid any further debate here, could you please open the copy of the transcript you have at page 24. And at page 24, there is a big first paragraph of the paragraph number one. Go to three which starts with the word "Certainly"? A. Yes, it says, "Certainly ..."

Q. OK, don't read it. Just read it for yourself at this point in time. Read that answer of yours and I'll ask you my question. Do you recall stating to the military police that you would remember if Elford was drunk, like you would remember that? A. That I would remember if he was drunk?

Q. Yes. A. Yes, I think perhaps I do remember saying that.

Q. Did you actually say that? A. Well, I can't recall whether the military policeman, Master Corporal Rice might have said to me, "Would you have remembered if he was drunk?", and I might have said yes. Or whether I said, "I certainly would have remembered if he was drunk."

Q. Now I refer you directly to this paragraph three of that page 24. I see that there is no amendments there. Are those the words that you stated to the military police. "Certainly, if he had been really intoxicated I would have remembered it"? A. Yes, I think they are.

Q. So you did state that? A. Hm, hmm.

Q. And you stand by that, that if Elford had been intoxicated you would have remembered and you would remember today? A. Yes.

Lieutenant-Commander Craven

Cross-examination

Q. And is it your testimony in court today that Elford was in the same condition as you were like in terms of being intoxicated? A. No, I'm not saying he was in the same condition as I was. I'm saying by all physical appearances he didn't seem to me to be drunk.

Q. How certain are you about the timings that you have related to this court this morning like roughly 20, 2230 to now MARGAREE ... now FRASER, sorry, shortly after midnight to OJIBWA? A. I'm reasonably certain of those timings. Of course, I was not checking my watch at every junctures during the evening. Some times I know for certain because people reminded me of things.

Q. Would you agree that shortly ... what do you mean by shortly? Like it would not exceed any later than 1230 or it would be more closer to 12? What do you mean by shortly after midnight? A. It depends on the context in which it was used. It could mean up to 1230. It could mean two minutes after 12.

Q. In the context that you used it ... I understand you used that expression with the MPs, you used that expression this morning? A. Yes.

Q. In the context you are using it, what do you mean? Try to be more precise as to what "shortly" is. Is it more likely 10 after 12 or is it ... can it go as late as 1230? A. It could go as late as 1230.

Q. Then I take that the alleged cigar tube incident, according to you, would have taken place approximately within 30 minutes of your arrival on board, is that correct? A. Yes, I feel it probably did.

Q. So that means that the alleged cigar tube incident would have taken place anywhere between quarter to one and one o'clock, depending on the exact meaning of "shortly after midnight", is that correct?

Lieutenant-Commander Craven

Cross-examination

A. The cigar tube incident took place sometime after the point we arrived on board and I suspect about one o'clock in the morning, yes.

Q. One o'clock in the morning. I believe you used the expression this morning that it was an extraordinary event and it was gross and the atmosphere changed? A. I didn't say it was gross. I said that I heard others to use that expression. I did say, "It was an extraordinary event."

Q. You called it yourself, "an extraordinary event"? A. Yes, I did.

Q. You were shocked, you said that as well? A. Surprised and shocked, yes.

Q. And the atmosphere changed? A. Yes.

Q. Nonetheless, you stayed there drinking for another three and a half hours, so you could not have been that shocked I suppose? A. I stayed on board another three and a half hours, that's correct.

Q. So, this extraordinary event was not after all, all that shocking. I mean, if it was so shocking and so gross would you really have stayed on board with Kelk with the cigar tube in his rectum for three and a half hours? A. I wouldn't stay on board if the captain had stayed in the space but he left immediately. Yes, it was shocking and it was extraordinary.

Q. What's the relationship between the captain leaving and you staying on board, is there any? A. Yes, I think there is.

Q. What is it? A. The relationship is, the captain is the one who had done the extraordinary shocking act.

Lieutenant-Commander Craven

Cross-examination

Q. Wouldn't have decency call for somebody to remove that thing if it was so gross and then so shocking? A. Would decency have called for it to be removed?

Q. Yes? A. I suppose, it depends on one's definition of decency.

Q. What's your definition of decency?
A. My definition of decency is that I wasn't going to touch the cigar tube.

Q. Although it was outrageous and shocking?
A. I didn't use the word "outrageous".

Q. Shocking, shocking it was? A. I used the word "shocking", yes.

Q. And despite all shocking it was you wouldn't touch it? A. What was shocking was who did it.

Q. How would you briefly define loyalty in the context of the military? A. Loyalty is the support that you provide to those above you and below you in the execution of their duties.

Q. So it does go up and down? A. It goes both ways.

Q. And you owe loyalty and assistance to your superiors as well, of course, as your peers and your subordinates? A. That is correct.

Q. Wouldn't any sense of loyalty or even some sense of being human call for assisting this lieutenant who had this cigar stuck you know where?
A. I didn't feel any sense of loyalty to an officer who had drank so much. He had passed out in his ward-room before half past midnight, no.

Lieutenant-Commander Craven

Cross-examination

Q. So basically he deserved it and so you're stuck with it? A. No, I did not say "he deserved it and you're stuck with it". I'm saying that I did not feel a strong sense of loyalty towards an officer who had passed out in his own wardroom who had subsequently been marked with a magic marker. His captain apparently condoning that action.

Q. You're the senior officer on board and that's fine? A. No, I'm not the senior officer on board.

Q. After the captain has left? A. I am the senior officer on board after the captain has left, that's correct.

Q. Now you say that the atmosphere changed. Can you be more precise as to in what direction it changed? A. No, I can't. It was very subjective. At the time the cigar tube was inserted, at the time Lieutenant-Commander Marsaw sat there, there was a definite change in the atmosphere in the wardroom. Prior to that, as I said, people had been laughing, talking, having a good time. Suddenly, that this event committed by the captain became the sole focus of attention in the wardroom.

DEFENDING OFFICER: Mr Judge Advocate, I will finish a little bit this line of questioning and maybe it would be an order to adjourn to give the court reporter a little break possibly. I can tell you that I'll be a little while yet but I would like to finish this line of questioning here first.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER:

Q. You said that the atmosphere changed and you said before people were having fun and all that. So I take that by a change in atmosphere that means that people were not having fun anymore, is that cor-

Lieutenant-Commander Craven

Cross-examination

rect? A. No, I wouldn't say that. I don't think it's a question of fun being the appropriate word at all.

Q. OK, what was the change then? A. Well, the change was, after that point people had been enjoying themselves, partying in the wardroom of the OJIBWA. Suddenly, a cigar tube is inserted between the buttocks of the RN officer. That becomes the focal point of everyone's attention in the wardroom.

Q. So is the change then that people from thereon stop enjoying themselves? A. No, it's not that they stopped enjoying themselves. It's that becomes the centre of attention and people had different reactions to that particular incident.

Q. But that, how gross according to some ... I know you didn't use the word "gross" or shocking ... of shocking that may have been and the impact it had on the whole wardroom yet was not sufficient to prevent some unknown people who undressed Muir and start playing tricks on him as well? A. I don't recall that I said Muir was undressed.

Q. OK, he was marked, wasn't he? A. He was marked, yes.

Q. He was taped in his face and his spectacles were taped and so on and so forth? A. His spectacles were taped and his legs were taped.

Q. Would you say that it's a humour that is of a rather questionable nature? A. I would say that it's a humour that I have seen in ships and submarines before at mess dinners.

Q. But yet, this extraordinary event that had taken place seconds before did not sober up the crowd there and they continued indulging in that sort of silliness? A. I don't recall that I said it happened seconds before.

Lieutenant-Commander Craven

Cross-examination

Q. OK, when was Muir then marked? You said shortly after the captain left, then they did this on Muir, is that what you said? A. I think I said that shortly after that Muir was subsequently ...

Q. I do apologize, I should not have used the word "seconds". I guess, "minutes" would have been more appropriate, minutes before or minutes after? A. Perhaps several minutes.

DEFENDING OFFICER: Maybe at this time, Mr Judge Advocate, and maybe to give an opportunity to the court reporter to rest a few minutes, a 10-minute adjournment might be in order? I have not completed my cross.

PROSECUTOR: I'm in agreement, however, if you could stay behind just for a second, Mr Judge Advocate, after the members leave?

JUDGE ADVOCATE: Sorry, say that again?

PROSECUTOR: I have no objection to the adjournment, but I wonder if you could stay behind after the members leave. I would like to raise a point.

JUDGE ADVOCATE: Very well. It's hard to say how long at this time, Mr President, because I don't know how long I will stay here after your departure.

THE PRESIDENT AND MEMBERS RETIRE.

PROSECUTOR: I wonder if Lieutenant-Commander Craven could withdraw.

JUDGE ADVOCATE: Would you please withdraw from the courtroom.

WITNESS RETIRES.

PROSECUTOR: I'll try to be brief. I've got a concern with the way that MRE 100 and 92 have been played out in cross-examination. I've raised it a couple of times with Lieutenant[N] Hart in his testimony. You supported the objection then. Now with Craven, the same style cross-examination creeps in once in a while and you've been willing to let it go. It was then let go and Lieutenant-Colonel Couture was able to lead the witness through statements he made to the military police by having the transcript right on his lap without giving the witness a chance to ... he asked the question without reference to it. He leads it right in to a point. That will, as you see as the trial unfold, become a major point that he will be able to use to attack the credibility between Craven as it relates the story Elford tells.

It's my understanding that witnesses are to be asked a question, they give an answer that is inconsistent with it, then we're into Rule 100. At that point in time the witness is then asked whether he recollects giving the statement. He is given an opportunity to see the question asked and the answer he gives at that point. He is then asked whether he wants to adopt it or not. If he doesn't adopt it, well, then on rebuttal evidence they can bring in the MPs and they can say that Craven did in fact make out that statement although he denies making it at that point.

MRE 92, never ever comes in to play unless the witness says that he is unable to recall a fact or has forgotten. The problem I have with the way cross unfolds at some points with Craven will be compounded especially when we're dealing with witnesses of much lower rank later on during the trial who are basically trussed with a question, "You said this to the MPs, didn't you?" Without ever being asked an opportunity of ... "What was the condition of Elford?" Give their answer. If it's contradictory then have a fair opportunity to see if their prior statement is one that they will adopt or not.

So, I guess, that's why I have been insisting on following the procedures of MRE 100. I don't think 92 has any application at all so far in Craven's testimony. I will be insisting that it get followed more so as the cross-examination unfolds. So, that is just a point I want to raise, a heads up that I might be a bit more insisting on later on, sir, thank you.

JUDGE ADVOCATE: Very well, thank you.

DEFENDING OFFICER: I would like an opportunity here since we're not in an adjournment. I believe it is perfectly permissible for a cross-examining party to put a question, "Didn't you tell the MPs?", or, "Didn't you tell Private Smith?" That is proper to ask such a question. If the witness says, "No, I don't quite remember", or if he does not answer the question in sure enough terms then it is open to the cross-examining party, referring to Rule 92, to show a document, direct the witness to look for himself at a given portion as I have done with Lieutenant-Commander Craven when I referred him to page 24, para three. I said, "Read that for yourself. Now I will reformulate my question." Upon reformulating my question he did not recall exactly - that's only one example here - he gave an answer that was somewhat different. Then I pressed him a little more and I said, "Well, didn't you say that?", and he adopted it and that's it.

So I suggest to you in that stage we went basically through ... at that point we went basically through the two stages. In the first time, I asked the question. He didn't come out very clearly at all or he wasn't sure. He saw the text. He answered again more or less clearly and then I pushed him to the text which he had in front of him and he said, "Yes, that's what I told the MPs." I think it's absolutely proper. The witness has already admitted that this transcript that he has in front of him and that he uses from time to time reflects what took place there. I don't think it would be appropriate for me to ... I cannot always and I do not intend to always contradict the witness on the

former statement. That, I mean, you do only if there is a contradiction. So when we ask a question and he doesn't recall, we are entitled to refresh his memory and in the process after that, if he gave a clear contradiction, then we go to Rule 100 and do it.

I think my procedure or the procedure I have followed or my way of cross-examining this witness has been totally in accordance with the rules. Those are my representations.

JUDGE ADVOCATE: Very well. Well, I guess that the best way to deal with that, Major Abbott, is that when you feel that you have an objection concerning the way the defence is proceeding in a very specific matter, well, just object and I will deal with the matter at that time. As we all know, there may be all sorts of situations involved and rules are there to be complied with. So whenever you have an objection, raise it and I will deal with it.

PROSECUTOR: Thank you, sir.

JUDGE ADVOCATE: Now, the 10 minutes will start from now. The court is adjourned for 10 minutes.

ADJOURNMENT: At 1040 hours, 3 October 1995, the court adjourns.

REASSEMBLY: At 1055 hours, 3 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Would you invite the members to come back, please.

THE PRESIDENT AND MEMBERS RETURN IN THE COURTROOM.

JUDGE ADVOCATE: Recall the witness back on the stand, please.

s.19(1)

Lieutenant-Commander Craven

Cross-examination

SECOND WITNESS) Lieutenant-Commander M.L.
FOR THE) Craven.
PROSECUTION)

CROSS-EXAMINED BY DEFENDING OFFICER

Q. I show you a enlarged copy of Exhibit "J". Would you agree with me that the night of the incident that you were talking about there was a bar in this area which is forward and in front basically of the bed settee one? A. There was a little shelf that used to slide out in this vicinity in the OJIBWA.

Q. And you have testified earlier that Lieutenant Kelk was on the bed settee number one closer to the bulk head forward? A. Yes.

Q. And you would have been near the seat or the desk here? A. Yes, that's correct.

Q. Would you agree with me that the presence of that so-called bar would be of a nature to obstruct your view especially if Kelk is right there? A. No, not necessarily.

Q. To the forward on the settee? A. No.

Q. It would not? A. I would not agree with that.

Q. First of all, can you tell with certainty where you were when the incident took place? A. With reasonable certainty I can say I was there, in this vicinity here.

Q. On the seat ... A. That seat is not positioned the right way.

Q. OK, now that we have the officer of the court holding this, I'm taking advantage of it now.

Lieutenant-Commander Craven

Cross-examination

What degree of certainty do you have about the table not being square that night? A. I have a reasonable degree of certainty that the table top had been removed and that the round table that exists underneath for cocktail party was in position.

Q. Earlier in your testimony you have placed Lieutenant[N] Muir on the settee number three near the bulk head close to the door, is that correct? A. That is correct.

Q. At the time of the placing of the tube, where was Lieutenant[N] Hart? A. I have no idea where Lieutenant[N] Hart was.

Q. Where was Lieutenant[N] Elford? A. I'm uncertain as to Lieutenant[N] Elford's location.

Q. Where was Lieutenant[N] Dickinson?
A. I'm uncertain as to where his location was.

Q. Where was Lieutenant[N] Marr? A. I don't know if Lieutenant[N] Marr was even in the space at the time the cigar tube was inserted. If he was, he was in the doorway but I'm not certain if he was even in the space. He was the officer of the day and he would have been roving about the submarine.

Q. Would you say that there was a thick screen of cigar smoke when you entered the wardroom?
A. There was certainly a lot of cigar smoke in the air, yes.

Q. And the lighting was red I supposed as it is customary at night? A. Yes.

Q. Could you inform the court whether those lighting conditions and the presence of smoke could have impeded your perception of the facts? A. No, it did not impede my perception of the facts.

Q. Now, as this extraordinary event took place, could you tell the court what if any degree of

Lieutenant-Commander Craven

Cross-examination

force was used by Lieutenant-Commander Marsaw to insert the cigar tube? A. Yes, I can do that. Not much force was used.

Q. Would you use the expression like it was not a protracted effort? A. Yes, I certainly would use that expression. In fact I believe I did use that expression.

Q. So it was ... I show you here an Exhibit which is marked "K". Could you comment to the court whether you have seen anything like that or what that means to you, if anything at all? A. Yes, I've seen these many times. These are the standard cigars that are carried in submarine wardrooms. And this is a cigar tube, actually like this one, that was inserted by Lieutenant-Commander Marsaw between Lieutenant Kelk's buttocks.

Q. What would you estimate the length of this tube to be? A. I suppose that's about five and a half inches, six inches maybe.

Q. Would you say that ... how much of the tube was showing after it had been inserted? A. I believe I've stated to the military police that at least half of the tube was visible to the observer.

Q. And the other half invisible? A. Half or less than half was invisible.

Q. When you say that it was done in a non-protracted manner, do I understand that to mean that it was done sort of very casually, no effort whatsoever, one shot at it, bingo, in it is? A. I do not think the word "done casually" ... for this the phrase, "done casually", is appropriate. It was done deliberately.

Q. Yes, but with no apparent effort for sure? A. Lieutenant-Commander Marsaw did not have to struggle to insert the cigar tube between the officer's buttocks, no.

Lieutenant-Commander Craven

Cross-examination

Q. And he never missed target or anything. It was a one time affair. It was right in and half had now disappeared? A. Lieutenant-Commander Marsaw prides himself of never missing his targets.

Q. So according to you he did not that night either and it was that simple? A. It was that simple.

Q. You stated, I believe, the name of Higginson, Lieutenant[N] Higginson? A. Yes, I did state his name.

Q. And there was some uncertainty as to whether he was present or not? A. I stated that Lieutenant[N] Higginson was in the second group of four officers of whom I'm reasonably certain who was present when we've arrived.

Q. Is that possible that Lieutenant[N] Higginson could have shared a cab with you and Elford and Hart in the early hours when you left? A. No, I don't think so.

Q. As a matter of fact talking about leaving, is that correct that you left in a cab with Lieutenant[N] Elford and Lieutenant[N] Hart and yourself. So the three of you shared the cab? A. That is correct, we did.

Q. Is that correct that on the way you proposed or attempted to get invited at Lieutenant[N] Hart's place for a night capper? A. I recall as we left there had been some discussion in the cab that we might adjourn to one of our homes for an additional drink and to listen some more music, yes.

Q. At five o'clock in the morning, how reasonable is it to want to go for one more drink in your view? A. How reasonable is it to want to go for one more drink? It depends on the state of mind of the

Lieutenant-Commander Craven

Cross-examination

individuals who have been drinking. It seemed like an eminently reasonable thing to do at that time.

Q. Would you say that the more one has been drinking, the more reasonable this idea would appear?
A. Oh, yes, certainly I would agree with that.

Q. I take that you are relatively certain about the time you got home, five or shortly thereafter?
A. I am absolutely certain about the time I got home.

Q. And one factor that influences that is that your wife hasn't let you forgotten about that?
A. That's correct. In fact those are my exact words, yes.

Q. And I take that you were not sober either when you arrived?
A. I was, as I believe I have stated before, mildly inebriated.

Q. You testified this morning that Lieutenant-Commander Marsaw was not prompted to do this act?
A. Yes, I did testify that.

Q. So just out of the blue, I mean there is no conversation that you can report anyway. There is no conversation, is there?
A. The act was unsolicited, unprompted. There was no conversation.

Q. And it's one o'clock in the morning. Marsaw looks relatively sober and picks up a cigar tube, never miss his target and bang, that's it?
A. If you wish to use those words, yes.

Q. Now, let's talk about Kelk for a moment. That's our RN naval officer?
A. That's correct.

Q. His pants were taken down. Well actually, I don't want to mislead you here. Correct me if I'm wrong. First of all there was some writing on his face, is that correct?
A. His face, his head, like

Lieutenant-Commander Craven

Cross-examination

his forehead. We had an officer with a receding hair-line. They started up on the top of his head. Yes, I believe that's correct.

Q. Then his shirt was either unbuttoned and opened up, or pulled off, or something in such a manner that it would expose his torso? A. I don't believe his shirt was ever pulled off. It was unbuttoned down the front.

Q. And then more marking on his torso and his body? A. Yes.

Q. Who did that? A. I don't know.

Q. You didn't, did you? A. I did not do the marking, no.

Q. Although it is not unconceivable that you could have done it because it is something that you have seen done before? A. I consider it unconceivable that I did it. It is something I have seen before.

Q. Now, if I understand your testimony well, at the time of these happenings, opening the shirt, pants down ... pants down, that came after the shirt I take? A. Yes, I think so.

Q. Do you recall whether Kelk was wearing suspenders or otherwise? A. I'm sure he probably would have been. It was a mess kit and most officers wear suspenders with a mess kit.

Q. And you're not too sure whether his jacket had been removed or whether he was still wearing it? A. I'm not entirely certain, no.

Q. At the time ... who did pull the pants down? A. I don't know.

Q. Where was he when the pants were pulled down? A. He was in the same position on ...

Lieutenant-Commander Craven

Cross-examination

Q. OK, if it's of any use, let's have a look at Exhibit "J". On bed settee number one in approximately the position of the number "1" on that settee.

Q. As shown on the diagram, is that what you mean? A. Yes, as shown on the diagram.

Q. And he is passed out? A. Yes, he is.

Q. Do I understand he is in some sort of a foetal position or something like that? A. At the time the cigar tube was inserted he was in a foetal position, that's correct.

Q. And before that when the pants were pulled, how did that happen? I understand you don't recall who did it but how did he or they do it? A. I can't describe exactly how his pants were removed.

Q. Would removing his pants have required a somewhat of a protracted effort? A. Yes, one could assume that it would.

Q. And although it needed such an effort you cannot recall that but then you can recall that event that did not require protracted effort? A. Oh, yes, I can.

Q. I understand at the time of these happenings, which I now refer to as being the marking, the shirt and the pants down, that Lieutenant-Commander Marsaw would have been present? A. Yes.

Q. But he did not pull the pants down?
A. I don't believe Lieutenant-Commander Marsaw pulled the officer's trousers down, no.

Q. You were present and you did not pull the pants down? A. That is correct.

Lieutenant-Commander Craven

Cross-examination

Q. Dickinson was there but did not pull the pants down? A. I don't think so, no.

Q. Elford was there but did not pull the pants down? A. I don't think so, no.

Q. Kelk was passed out and did not pull his own pants down? A. No, he certainly did not take his own trousers down.

Q. Muir was semi-unconscious on the verge of completely passing out? A. In fact he may well have passed out by that time but yes, that's an accurate description of Lieutenant[N] Muir's condition.

Q. So Muir did not pull Kelk's pants down because he was not in a shape to do it himself? A. That's correct.

Q. And Marr was probably not in the wardroom at that time? A. I cannot say where Lieutenant[N] Marr was at that time.

Q. So that's the list of people that were present and nobody did it? A. No, I disagree with you, sir. That's the list of people that I can absolutely with certainty remember being aboard the submarine at that time.

Q. OK, your next list of reasonable ... that you can establish with reasonable certainty include Lieutenant-Commander Bush, now he was gone? A. I think Lieutenant-Commander Bush was in my third list. As I previously stated I recall at the time that at the cigar tube was inserted he was gone.

Q. Do you recall Captain Jay Plante being present? A. No, I do not.

Q. Wamback is on your list of possible? A. Yes, he is.

Lieutenant-Commander Craven

Cross-examination

Q. Is he the one that pulled the pants down?

A. I can't recall.

Q. Waller? A. Who?

Q. Lieutenant[N] Waller, she was then Sub-Lieutenant? A. Sub-Lieutenant Waller, certainly she was present at the time I arrived, yes, I think.

Q. And was she present at the time of the incident? A. I can't recall.

Q. Higginson, you had at some point on your list of possible? A. Yes, I did.

Q. So, is he still on your list today of possible? A. I think he is on my list of the second group of four who I'm reasonably certain were there when we arrived.

Q. Would he have been present at the time of the incident? A. It's possible that he was, yes.

Q. Now, so we don't know at the end of the day who pulled the pants down and who did the marking? A. In the essence, I cannot state who did that, sir, no.

Q. Would you be able to tell whether it was one or more than one person? A. Oh, there was more than one person involved, I'm sure of that.

Q. Because it's not easy to move Kelk around in his passed out status or condition, would you agree? A. As I recall there wasn't much moving around with Lieutenant Kelk. He stayed in about the same position all night.

Q. And at the time you left at 4:30 in the morning, some three and a half hours, he still had the cigar in his rectum and he was still passed out, and he hadn't moved, and he hadn't done a thing? A. I can't

Lieutenant-Commander Craven

Cross-examination

say with certainty that he still had the cigar in his rectum. He was still on about the same position on that settee.

Q. Kelk, do you remember any taping made on him? A. No, I do not.

Q. Do you remember his ankles, for example, being taped together? A. No, I cannot recall that his ankles were taped together.

Q. So if there had been such a thing you would not remember who would have done it obviously, is that correct? You wouldn't know who might have done anything like that? A. If his ankles had been taped together, you're saying I would have remembered?

Q. No, you wouldn't ... would you? A. I don't know, it's quite hypothetical.

Q. OK, so basically with respect to Kelk, he was only marked on, half undressed and then there was this cigar thing? A. Yes, that is correct.

Q. No tape on him? A. I don't believe so, no.

Q. So whenever we talk about tape, we talk only about Lieutenant[N] Muir and we'll talk about that in a moment, is that correct? A. Yes.

Q. There cannot be confusion between Kelk and Muir, only Muir was taped? A. In my recollection Lieutenant[N] Muir was taped, yes.

Q. Now, could you tell the court whether ... how many times the tube was inserted that you saw? A. Yes, I can. I believe the tube was inserted once.

Q. Is that correct that it may have been suggested to you that the tube was inserted twice? A. It has been suggested to me that the tube was

Lieutenant-Commander Craven

Cross-examination

inserted twice. Indeed I've read it in the newspaper that the tube was inserted twice but that is not my recollection.

Q. What newspaper is that? I'm sorry, I'm not sure of what newspaper ... A. There was a newspaper article recently, either the Globe and Mail or the Chronicle-Herald.

Q. Oh, recently? A. Yes.

Q. We're not talking about the 16 December '93 article here? A. No, the cigar tube was not mentioned in that article.

Q. So you don't recall basically the tube falling off, or shooting out, or anything of that nature and being replaced? A. No, I do not recall that.

Q. You don't recall Lieutenant Kelk having his legs taped together? A. No, I do not recall him having his legs taped together.

Q. You do not recall anyone pulling Kelk's leg up in order to insert the tube? A. I recall Lieutenant-Commander Marsaw lifting Lieutenant Kelk's upper buttock to insert the cigar tube. I don't believe his leg was ever lifted.

Q. That last statement you just made and which I believe you alluded to in direct examination as well, do you recall stating that detail to the military police? A. I think I may have stated that to the military police, yes.

Q. If I suggested to you that you did not mention that additional detail to the military police in January of '94, what would be your reaction to that?
A. My reaction would be to request that I'd be allowed to look at the transcript to see exactly what I had to say.

Lieutenant-Commander Craven

Cross-examination

Q. Sure, why don't you please look at page 27. Just look at that page for yourself. Did you at that ... does that still change your answer when you're reading this page? A. No, it does not.

Q. So, did you or did not tell the military police about that? A. About what?

Q. About moving the buttock? A. I can't be certain, as I say I think I did.

PROSECUTOR: Perhaps the witness could look at page 61 as well, Mr Judge Advocate.

DEFENDING OFFICER: Yes, I'm rounding up the various references there.

WITNESS: Yes, page 61, at the bottom of the page.

DEFENDING OFFICER:

Q. Now would you agree that your statement to the military police at the time was that he might have or may have touched his buttock? A. The exact words I used are, "He may have touched the upper buttock, just sort of gone like that."

Q. Yes, so you used then the word "may have" like which, would you agree, characterizes a certain level of uncertainty? A. The words "may have" do characterize a certain level of uncertainty.

Q. Which you did not use in court this morning? A. That is correct.

Q. Now, let's talk about Muir. He was taped, is that correct? A. His ankles were taped and his spectacles were taped, yes.

Lieutenant-Commander Craven

Cross-examination

Q. And can you recall who did that? A. No, I cannot.

Q. But you can state that it was shortly after the cigar tube incident? A. It was sometime after the cigar tube incident. Certainly after Lieutenant-Commander Marsaw had left the wardroom.

Q. And you did not do it and you cannot recall who did it? A. I did not do it. I cannot recall who did it, no.

Q. And I would suggest that by that time as the night goes on, the crowd tends to thin up rather than increasing, is that correct? A. That's correct, the crowd has thinned from its initial number at the time I had entered the wardroom.

Q. Now you referred to a conversation that took place in '94 with Lieutenant-Commander Marsaw at his home, is that correct? A. Yes, in July of 1994 at his home.

Q. Would you say that the tone of conversation was rather friendly? A. I wouldn't use the term "friendly". It was civil.

Q. Was he shouting at you, "I'll discredit you", or whatever words you mentioned. "I'll attack your credibility", or words to that effect? A. No, he was not shouting at me at all. He was speaking in a very civil tone of voice.

Q. And that lasted a few minutes, I take. Like I know you testified that he read the statement, but having read the statement I take that the conversation went sort of casually and was rather short after that? A. I wouldn't say it was a short conversation. I think we spoke for about 30 minutes.

Q. And those are the only exact words that you remember from the 30-minute conversation?
A. Which words would those be, sir?

Lieutenant-Commander Craven

Cross-examination

Q. Those that you reported regarding, "I don't remember any of that", that you attributed to Lieutenant-Commander Marsaw and those of yours, "Yes, I was there. I saw it and if I have to testify, I will have to tell the truth." Are those the only precise words you can remember? A. Those are the general words that I remember for exchange. They, of course, are not the exact words. I cannot recall the exact words.

Q. So, "I don't remember any of that", could have been, "I don't remember any of that happening", for example? A. I believe it was more like, "I certainly don't remember any of that."

Q. And about the credibility or discredit thing, how did that go exactly? A. It began with Lieutenant-Commander Marsaw essentially telling me that I of course realise that he would have to disapprove that the cigar tube had happened. In the process of doing so that he would have to challenge my credibility.

Q. Did you feel threatened by that? A. I didn't feel threatened so much as resigned to the fact that I knew that was what was going to have to happen.

Q. So we should not hold you to those very words though that you have mentioned in court today as they do not reflect the verbatim of what was discussed, is that correct? A. They reflect the general trust of what was said. They are not the exact words.

Q. How many times have you been approached by military police officers in the context of an investigation and a police interview, in the recent years, I would say? A. In the recent years?

Q. Like say from '90 on? A. Just the once.

Lieutenant-Commander Craven

Cross-examination

Q. The once, referring to this case?

A. Yes.

Q. So that would be a rather unusual occurrence, would you agree? A. To be approached by the military police for an investigation?

Q. Yes, because it's not something that happens to you every day? A. Something that I think it has only happened to me once since 1990.

Q. And would you think that the nature of the information they gave you at the time would have sort of stuck to your mind? A. The nature of the information that they gave me?

Q. Yes, regarding the nature of the ... the purpose of the investigation? A. No, I'm not sure that it would have stuck in my mind, not the exact words. Of course, I did know what the purpose of the investigation was.

Q. You had many conversations with Lieutenant-Commander Marsaw throughout the years? A. Throughout the years?

Q. The years, yes? A. Yes, certainly from the time I met him.

Q. But you didn't have many conversation with military policemen concerning investigation, is that correct? A. Not too many, no.

Q. But you cannot recall the conversation with the MPs in December/January '94, but yet you can recall clearly that conversation with Marsaw? A. I cannot recall exactly the words that the MPs said to me when they indicated they wished to talk to me. I can remember the general trust of what they said to me which was that they were conducting an investigation on allegations that had been made against Lieutenant-

Lieutenant-Commander Craven

Cross-examination

Commander Marsaw and they were seeking my assistance in their investigation.

Q. You mentioned a number of COs under which you have served? A. Yes.

Q. Plante, Macdonald, Bush, Davidson and Truscott? A. Yes.

Q. And later in your testimony though you mentioned that you had not served full time under all of these, do I understand you right? A. No, that's not correct. I had served full time, that is to say, I had been posted to those submarines when those officers were in command. I subsequently indicated that in my time in the submarine service I have served under four additional commanding officers for various short periods of time including Lieutenant-Commander Marsaw during SOCT periods at sea.

Q. And you said that regarding that it was only under extraordinary circumstances that people would be relieved from their duty? A. It was an infrequent occurrence which in my experience was only employed as a last resort when it became apparent that an individual was incapable of executing his assigned duties in the control room.

Q. Would you agree with me that the frequency or infrequency of that type of action would depend on a lot of factors? A. Oh, of course it would depend on a lot of factors.

Q. Would you agree with me that the competence, the experience, the training of the crew would be determinant as to how many mistakes are being made and so on and so forth? A. Indeed, all those factors would be central determinants.

Q. And that would Lieutenant-Commander Marsaw, as he was the CO of ... the captain of the OJIBWA in '91/'93 roughly, is that correct? A. I

Lieutenant-Commander Craven

Cross-examination

believe he was captain of OJIBWA from December 1990 to October of 1993.

Q. So you didn't sail with him during that period of time? A. Only during SOCT periods, Submarine Officer Continuation Training.

Q. Which was when? A. The last SOCT that I believe I sailed with Lieutenant-Commander Marsaw, was early in 1993.

Q. And I take that you successfully completed your SOCT? A. My SOCT was successfully completed, yes.

Q. And eventually you were recommended for Perisher, ECT? A. Eventually I was recommended for Perisher, that is correct.

Q. Would you say that Lieutenant-Commander Marsaw treated you fairly when you were on board his submarine at that time? A. I certainly would say Lieutenant-Commander Marsaw treated me fairly when I was aboard his submarine.

Q. Did he abuse you in any way? A. Lieutenant-Commander Marsaw never abused me in any way.

Q. Did he degrade you? A. Lieutenant-Commander Marsaw never degraded me in any way.

Q. And that was over how many weeks of sailing with him? A. Two weeks.

Q. Two weeks altogether? A. It may ... no, two weeks, yes, 10 days perhaps.

Q. And would you agree that if a planes man is not keeping the boat on depth it might represent considerable danger to the sub? A. In some circumstances it could represent considerable danger to the submarine.

Lieutenant-Commander Craven

Cross-examination

Q. And if such a circumstance existed he would have to be removed. I mean, either he does the job or you don't want to endanger the boat, is that correct? A. It depends on the captain and the approach. Certainly in the initial instance the captain would rebuke generally speaking the ship control officer of the watch, not the planesman because it is the ship control officer of the watch's responsibility to supervise the planesman. In the second instance, the captain might sternly rebuke the planesman. And in the final analysis there is always, of course, the option of removing the planesman from the helm and I have seen that done in submarines before, yes.

Q. I believe you have heard this and I want to confirm that, that it is not uncommon for a captain of a ship to have to raise his voice especially in closed station. Let's say not when sailing for pleasure but in closed station, would you say that there is a lot of noise in the control room and that, I mean, it's almost a necessity at times so that the captain can pass information on? A. Absolutely not, in fact one of the things that submarine officers when in the control room are instructed to ensure that the level of noise in the control room is kept to a minimum consistent with that required for the captain to do his job, particularly in instances where the periscope is up when no one else is supposed to be making any noise whatsoever.

Q. But wouldn't you agree though that often at closed station there must be an exchange of information between, for example, navigator, planesman, trim officer and then so on and so forth, the attack officer or the weapon officer and so on and so forth? A. Yes.

Q. Would you agree there is a fair amount of information being passed and exchanged? A. Yes.

Q. Of course, within the limit you have described you try to keep it down but there is in fact

Lieutenant-Commander Craven

Cross-examination

lots of information being passed? A. There is a large volume of information that has to be exchanged in a control room of a submarine, that is correct.

Q. In those closed station, the level of stress and intensity is always very high? A. There is always a certain level of stress and intensity in the control room. It is the duty of the attack coordinator, the XO, to make sure that the level of intensity remains high but that the level of the volume in the control room remains low. That is the ideal circumstance.

Q. In all those years, have you heard the word, the four letter word, "fuck", being used by crew members or captains on board submarine? A. At any time on board submarines?

Q. Yes? A. Yes, I've heard that four letter word used aboard submarines.

Q. And that wouldn't be an uncommon occurrence, would you agree with that? A. Aboard submarine I've heard the word "fuck" used many times, yes.

Q. Including by some, or most, or many captains? A. No, not by some, or most, or many captains.

Q. By all? A. No, not by all.

Q. So did you hear ... did you ever hear Jay Plante using the word "fuck"? A. Not that I can recall, no.

Q. Macdonald? A. No, I think with reasonable certainty I can say I never heard Lieutenant-Commander Macdonald used the word "fuck".

Q. Not even the odd, "for fuck sake" or something like that? A. No, I don't recall that he ever used that word.

Lieutenant-Commander Craven

Cross-examination

Q. And Davidson never used the word either?

A. I can't recall Lieutenant-Commander Davidson ever used that word.

Q. And Lieutenant-Commander Truscott?

A. Yes, Lieutenant-Commander Truscott has used that word.

Q. So it is not in any event an extraordinary event that would take place on board the boat?

A. It's a word that I have not used, heard used in a control room of a submarine during operations when drawing shortcomings to the attention of people in that room.

DEFENDING OFFICER: If I may have a minute, Mr Judge Advocate, Mr President.

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. Do you recall ... would you say that Lieutenant-Commander Marsaw is widely disliked? A. I would say that Lieutenant-Commander Marsaw is certainly disliked by some.

Q. And because he was a demanding captain, would you say? A. I don't know if he was disliked because he was a demanding captain. He was indeed a demanding captain.

Q. And do you recall telling the military police actually those very words that he was widely disliked? A. I may have said to the military police the he was widely disliked, yes.

Q. For more certainty, could you look at page 68 of the transcript. Just look at it for yourself. Approximately one third of the big paragraph,

Lieutenant-Commander Craven

Re-examination

actually line six of that last big paragraph there.

A. Yes.

Q. So having look at that portion of the transcript, could you now ... I will rephrase or put my question to you, did you tell the MPs that Marsaw was widely disliked? A. Yes, I did use the term. I said, "That fellow is widely disliked."

DEFENDING OFFICER: Thank you, I have no further questions.

JUDGE ADVOCATE: Thank you, re-examination?

RE-EXAMINED BY PROSECUTOR

Q. Defence counsel asked you some questions concerning a conversation you had with Malcolm Dunlop prior to the 16 December '93 article being published. Do you recall what day you met Malcolm Dunlop? A. I'm sorry?

Q. Do you recall what day you met Malcolm Dunlop? Was it a Friday, a Saturday? A. When I first met him or when I met him for ...

Q. For this conversation? A. You are talking about the conversation I had with Lieutenant-Commander Marsaw?

Q. No, with Malcolm Dunlop? A. Yes, I believe that was approximately the 20th of November 1993, a Saturday evening.

Q. A Saturday evening. Did you go to work the following Monday? A. Yes, I did.

Q. Could you tell the court what you did on that Monday at work? A. Yes, I went in to see my boss, Commander Garry Bowen, at that time he was N34 in the MARCOM Organization. I told him what had transpired the Saturday evening before and I also told him

Lieutenant-Commander Craven

Re-examination

that I felt somewhat uncomfortable with it. I asked for his views on what my next step should be. Lieutenant-Commander Bowen and I subsequently discussed the issue. He directed me to see Lieutenant-Colonel Adams, MARCOMHQ Public Affairs Officer. Subsequently, that afternoon I did see Lieutenant-Colonel Adams. Lieutenant-Colonel Adams assured me that the MARLANT Public Affairs Officer, a Lieutenant-Commander Jeff Agnew, was aware of what was going on. As far as he was aware, this is Lieutenant-Colonel Adams was aware, the military police were involved or were going to be involved and that no doubt I would be contacted in due course but in the meantime not to worry about it.

Q. The defence counsel had raised a QR&O article number four to you. I wonder if you can review that for a second? A. Yes.

Q. Would you read to yourself article 4.02(e)? A. Yes, I have read it.

Q. Who would Lieutenant-Commander Marsaw's immediate superior be in December of '93? A. Captain Jay Plante.

Q. Have you had opportunity to observe the informal relationship between Captain Plante and Lieutenant-Commander Marsaw? A. I may be mistaken, December '93 it might have been Commander Frank Scherber in December of '93.

Q. Have you had an occasion to observe their relationship, the informal relationship between Captain Plante and Lieutenant-Commander Marsaw? A. Yes, I have.

Q. How would you describe their relationship? A. Close.

Q. There were questions concerning whether you were on the MARGAREE or the FRASER that night. You commented that you told the MPs it was the

Lieutenant-Commander Craven

Re-examination

MARGAREE, you've now discussed the FRASER as a possibility? A. Yes, I have.

Q. Why did you discuss the FRASER as a possibility now? A. Because Lieutenant-Commander Marsaw, at the meeting at his house, was quite adamant that it was the FRASER and not the MARGAREE and he indicated that he would be willing to prove the point by checking the ships' logs.

Q. Defence counsel has asked you questions about defining loyalty. Do you recall those questions? A. Yes, I do.

Q. Did loyalty play a part in your consideration of article 4.02(e), the duty to report to authorities? A. I cannot recall at the time that the word "loyalty" went through my mind. I suspected that emotions related to loyalty were likely going through my mind, yes.

Q. In what way? A. In the way that I had a certain amount of loyalty to the commanding officer of HMCS OJIBWA and his own submarine, that I thought it would perhaps be inappropriate for me as a guess to then go outside that submarine and report on something I had seen at what was essentially a social occasion.

Q. Who did you go home with by cab on the morning of 20 December '93? A. Lieutenant[N] Hart, Lieutenant[N] Dickinson, Sub-Lieutenant Elford.

Q. OK, so Dickinson was also in the cab as well? A. Yes, he was.

Q. You stated that you stayed out for two weeks in an SOCT with Lieutenant-Commander Marsaw as commanding officer of that boat? A. Yes, I have.

Q. At that time he hasn't degraded or abused you in any way? A. No, he has not.

Lieutenant-Commander Craven

Re-examination

Q. Can you tell the court whether there were any riders on board that boat of a superior rank to Lieutenant-Commander Marsaw when you were sailing with him for two weeks? A. Yes, the squadron commander was aboard.

Q. You discussed observing people being rebuked in the control room as well as being relieved of their duties in the control room. During those occasions did you observe the person who was doing the rebuking use any personally insulting adjectives?

A. ...

DEFENDING OFFICER: Mr Judge Advocate, that is fairly leading and it calls of course for lots of interpretation as to what is insulting and so on and so forth. I think the question should be rephrased. My learned friend is in re-examination. He is still, as far as I understand the rule, not allowed to lead. I think that that question should be better rephrased because that way it's ...

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I simply state that it's not a leading question. It doesn't suggest an answer. I'm simply asking what he observed in those occasions.

JUDGE ADVOCATE: Why don't you ask him?

PROSECUTOR:

Q. During those occasions where you observed the individuals being rebuked or relieved of their duties in the control room, did you have occasion to observe the person who was in charge use personally insulting adjectives towards those individuals?

A. No.

Q. You stated to the defence counsel that you have heard commanding officers and people in authority use words such as "fuck" and "fuck sakes".

Lieutenant-Commander Craven

Re-examination

Have you ever had occasion to observe this commanding officer referred to his subordinate as a "fuck"?

A. No.

PROSECUTOR: Thank you, those are my questions.

JUDGE ADVOCATE: Thank you. Any questions from the court?

PRESIDENT: No questions.

JUDGE ADVOCATE: No questions, thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Major Abbott, what are your intentions at this time.

PROSECUTOR: I got to confess, I'm torn. I've got an opportunity to call a second witness although as soon as he gets on it will be the lunch break. At the same time we're about to break all speed records so far for this trial and if I have an opportunity to call a second witness I might want to start it now. I'm in your hands as well as Mr President's hands. We can do this witness now or do it after the lunch break.

JUDGE ADVOCATE: Let's carry on.

PROSECUTOR: Thank you. I would like to call Leading Seaman Pilon, please.

s.19(1)

Leading Seaman Pilon

Examination-in-chief

THIRD WITNESS) : Leading Seaman L.R. Pilon,
FOR THE) is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Could you give your full name to the court please and spell your last name? A. Joseph Lucien Richard Pilon, P-I-L-O-N.

Q. What is your current position?
A. Assistant Mess Manager for the Warrants' and Sergeants' Mess at CFB Gagetown.

Q. And did you join the Canadian Forces in 1981? A. Yes, sir.

Q. Since that time have you had an opportunity to serve on the PRESERVER as well as the ALGONQUIN? A. Yes, sir.

Q. Did you become a submariner in 1991?
A. Yes, sir.

Q. You have been a member of the OKANAGAN when the OKANAGAN was in refit? A. Yes, sir.

Q. And you were a member of the OJIBWA from approximately November 1991 until August '94? A. Yes, sir.

Q. During that period you sailed with the OJIBWA but you missed on the trips that we referred to as a counter drugs trip? A. Yes, sir.

Q. Do you recall what you were doing on the evening of the 19 December 1991 in the early hours of the 20 December 1991? A. I was on duty on board the HMCS OJIBWA.

Q. What was your duty during that night and early hours? A. Roundsman, sir.

Leading Seaman Pilon

Examination-in-chief

Q. As a roundsman who would be your immediate superior? A. The officer of the day, sir.

Q. That evening of the 19th of December '91 and the 20th of December '91, do you recall the name of who your officer of the day was? A. No, sir.

Q. Did you ever have an opportunity to enter the wardroom on the early hours of 20 December 1991? A. Yes, sir.

Q. Can you tell us, based on your own personal observations, what you saw when you did enter the wardroom? A. I was asked by the officer of the day to come into the wardroom and I saw Lieutenant Kelk and Lieutenant[N] Muir passed out on the settees.

Q. Maybe I'll just stop you there because we've got a chart ...

DEFENDING OFFICER: If I may, I simply missed the name of the second ...

JUDGE ADVOCATE: Yes, what was the second name you said?

WITNESS: Lieutenant[N] Muir.

PROSECUTOR:

Q. I wonder if you can identify where the entrance of the wardroom is for the members of the court? A. The entrance of the wardroom is right here.

Q. OK, that would be in between the bed settee number three and number one. Can you identify where Lieutenant Kelk was positioned? A. Lieutenant Kelk was in bed settee number one and Lieutenant[N] Muir in bed settee number three.

Leading Seaman Pilon

Examination-in-chief

Q. And you said you had entered the wardroom on the request of the officer of the day? A. Yes, sir.

Q. When you entered the wardroom would you describe the condition of Lieutenant Kelk?

A. Lieutenant Kelk was passed out, faced down on the settee. He was ... his buttocks standing up and he had a cigar kind of squashed into his buttocks.

Q. What was the lighting conditions like at the time that you observed this? A. A bright lighting.

Q. How far away would you have been from Lieutenant Kelk at the time that you observed him?

A. Approximately two to three feet.

Q. Do you know if the officer of the day was present when you observed this? A. Yes, he was.

Q. Can you describe the state of dress of Lieutenant Kelk at the time you observed him?

A. Lieutenant Kelk, his shirt was off and his pants down to his ankles.

Q. And again could you describe what you saw of Lieutenant Kelk? A. He had the cigar inserted in his buttocks and the cigar looked like a cauliflower or something like that.

Q. I want to show you a cigar. I wonder if you could tell me in relation to the one you saw that night compared to this cigar? A. It would have been a little more wider like cauliflower wise.

Q. So you say the cigar was cauliflowered or squashed in his ... it was wider at the end? A. Yes.

Q. You don't know how far down the cigar went between the buttocks of Kelk? A. The only thing I could see was about an inch to an inch and a half sticking out. I can't say how deep.

Leading Seaman Pilon

Examination-in-chief

Q. Do you know whether there was a cigar tube between the buttocks and the cigar? A. No.

Q. How long were you in the wardroom?
A. Approximately two to three minutes.

Q. I would like you to now shift over and have you discuss some of your experiences on the OJIBWA.

PROSECUTOR: Before I do that, however, I believe I can introduce a document with the consent of my friend. It's another chart on the layout of the OJIBWA. Do you agree that this is with the consent of my friend?

DEFENDING OFFICER: Yes, it is.

PROSECUTOR: Mr Judge Advocate, I would like to introduce a diagram which is simply a blow up a of the control room as found at Exhibit "H".

JUDGE ADVOCATE: Exhibit "L".

AN ENLARGEMENT OF EXHIBIT "H" IS MARKED EXHIBIT "L".

PROSECUTOR: I have copies for you and the Members of the Court, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

PROSECUTOR:

Q. I understand, Leading Seaman Pilon, as you stated before, you were a member of the OJIBWA from November '91 until August '94? A. Yes, sir.

Q. Lieutenant-Commander Marsaw was your commanding officer during that period? A. Yes, sir.

Leading Seaman Pilon

Examination-in-chief

Q. What was your position on board the OJIBWA at that time? A. CO's steward, sir.

Q. What was the name for your work area? A. The wardroom pantry, sir.

Q. With regard to this exhibit which I believe is Exhibit "L", I wonder if you could identify for the members of the court where the wardroom pantry is? A. The wardroom pantry happen to be just by the control room which is in here, when you're looking that way, about 15 feet away from the control room.

Q. So that would be at top right hand corner of Exhibit "L" across the passage way from the wardroom and it's identified by "Sink, Grill Boiler, Water Cooler". That's the passage way. That would be your general work area? A. Yes sir.

Q. And where would your sleeping area be? A. Right across from the wardroom pantry, the "3 Fixed Berths".

Q. How far approximately from the passage way or the pantry would the control room be? A. Approximately 10 to 15 feet, sir.

Q. Did you ever have occasion to work in the control room? A. Yes, sir.

Q. Why would you be working there? A. For pay assistance during the close-up, sir.

Q. For what assistance? A. Close-up pay assistant for underwater photograph or combat ...

Q. Is this the individual that moves around the forward periscope with whoever is on the forward periscope? A. Yes, sir.

Q. Usually the captain? A. Yes, sir.

Leading Seaman Pilon

Examination-in-chief

Q. Where would most of your duties be performed? A. Mostly by the wardroom pantry, sir.

Q. Can you hear people from the control room when you're in the pantry? A. Yes, sir.

Q. How would you describe the atmosphere in the control room when Lieutenant-Commander Marsaw was present? A. Tense.

Q. Why would you describe it that way? A. Screaming in the wardroom and yelling and all that, sir.

Q. What sorts of words would you hear being yelled? A. "Mother fucker, asshole, incompetent, stupid."

Q. And whose voice would be yelling these? A. Lieutenant-Commander Marsaw, sir.

Q. How would you describe the volume or the tone of his voice at those times when those words were said? A. Loud and harsh, sir.

Q. When you were in the control room working near the periscope did you have occasion to observe those words said by Lieutenant-Commander Marsaw? A. Yes, sir.

Q. Did he ever say those words to you? A. No, sir.

Q. How frequently would he say those types of words while the submarine was dived at sea? A. It depends on the situation, sir. It could be three times in a six hour watch or six to seven times a day, depending.

Q. What was your own personal reaction to hearing those sorts of things? A. It kind of put

Leading Seaman Pilon

Examination-in-chief

myself down to shame. I couldn't expect like not be able to satisfy the requirements to work.

Q. How would you describe the morale aboard the OJIBWA amongst the junior rates? A. Variable, sir.

Q. Generally speaking, where would meals be eaten by officers? A. In the wardroom, sir.

Q. And would all the officers be able to eat in one sitting? A. No, sir.

Q. Why not? A. Six people per table, so there would be two sittings, sir.

Q. Would all the officers eat all of their meals in the wardroom all the time? A. No, sir.

Q. If they didn't eat in the wardroom where have you observed them eating? A. In the forward torpedo room down the AMS ACS or in the wardroom pantry.

Q. Would there be seats available in the wardroom at the time that they would eat their meals in these areas? A. Yes, sir.

PROSECUTOR: I would like to refer, Mr Judge Advocate, to Exhibit "H".

Q. It's a fairly large diagram, Leading Seaman Pilon. I wonder if you could first of all identify where the wardroom is located? A. OK, the wardroom is located just by the "No.2 Oil Fuel Tank" on the outside here.

Q. Where would the officers sometimes eat their meals? A. In the forward torpedo room in front here or in the lower flat down the AMS ACS.

Leading Seaman Pilon

Examination-in-chief

Q. That would be on the lower deck? A. On the lower deck, yes, sir.

PROSECUTOR: Thank you. Those are all my questions, thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

DEFENDING OFFICER: I will take up to 30 or 40 minutes, Mr President, for your information.

JUDGE ADVOCATE: We will adjourn then until 1300 hours.

ADJOURNMENT: At 1205 hours, 3 October 1995, the court adjourns.

REASSEMBLY: At 1300 hours, 3 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Leading Seaman Pilon, just to confirm, I may have missed the date of your enrolment in the Canadian Forces? A. The 14th of March 1981.

Q. And you got your dolphins in 1991?
A. In '92, sir.

Q. In '92. Were you actually on board OJIBWA in '91? A. Yes, sir.

Q. But you didn't have your ...? A. I was not qualified yet.

Leading Seaman Pilon

Cross-examination

Q. Do you know Leading Seaman or Master Seaman Robertson? A. Yes, sir.

Q. I understand you replaced him on board OJIBWA? A. Yes, sir.

Q. And the date of November '91 is quite clear as to the actual date you started your service on OJIBWA? A. Posting date; yes, sir.

Q. Posting date. Did you actually start on board OJIBWA at that time? A. Yes, sir.

Q. OK. You related that on 19 September you were duty on board? A. Yes, sir.

Q. And you were roundsman? A. Yes, sir.

Q. What would have been the hours like of your shift? A. From 12:00 to 4 o'clock in the morning, sir.

Q. So 12:00 that is midnight, 0000 to 0400, that is correct? A. Yes, sir.

Q. And that would be like basically the morning of 20 December? A. Yes, sir.

Q. You don't recall who the officer of the day was? A. No, sir.

Q. You stated you went to the wardroom at his invitation, whomever that was, the officer of the day? A. Outside at his request. Yes, sir.

Q. What time was that? A. Approximately 3:00, 3:30 in the morning, sir.

Q. And at that time I gather there were only the two officers in question. You mentioned Kelk and Muir? A. Yes, sir.

Leading Seaman Pilon

Cross-examination

Q. The party was over? A. Yes, sir.

Q. Kelk was passed out, you said. Do you make any difference between somebody who is passed out and somebody who is sleeping? Or why did you use the expression "passed out"? A. Well, in the evening they had a mess dinner and all that into the sub squadron and all that and from there on they came on board and had a few more drinks and all this.

Q. So actually it is a conclusion that you have drawn that he was passed out? A. Yes, sir.

Q. You did not see him passing out or drinking or anything. You saw him and you draw the inference that he was passed out, that is correct? A. Yes, sir.

Q. Which may or may not be correct?
A. Yes, sir.

Q. Face down, butts up, basically? A. Yes, sir.

Q. On the settee? A. Yes, sir.

Q. Butts up, I suppose, I guess he was on his knees? A. Yes, sir.

Q. So that if I picture this well, his knees were up, his butt was up, his torso was down and his head was somewhere at the end of his torso, I suppose. Could you explain to the court like - because you saw it, I am just imagining it here - as to how in that position, how you perceived it in terms of keeping his balance up there? A. Well he was against the back of the settee, sir.

Q. On the bulkhead? A. On the bulkhead, yes.

Leading Seaman Pilon

Cross-examination

Q. He was leaning a bit toward the bulkhead then? A. Yes, sir.

Q. And I take that if his legs were sort of spread out like on his knee, I take you didn't see any tape around his ankles? A. No, sir.

Q. And I take that his ass was bare? A. Yes, sir.

Q. And that he could not, for example, to your recollection, have been covered with a sleeping bag? A. No, sir.

Q. And yet a cigar which took somewhat the look of a cauliflower is the expression you used? A. Yes, sir.

Q. I am not sure how much you said about Muir. We may not have discussed Muir very much. But Muir was on a different settee? Lieutenant[N] Muir? A. Lieutenant[N] Muir, yes.

Q. He was on a different settee? A. On a different settee; yes, sir.

Q. What was his appearance like? Was he dressed? Was he undressed? Was he ...? A. He had his shirt unbuttoned, opened, pants down and writing all over him.

Q. Pants down, did you say to his ankles or to his knees? A. To his ankles.

Q. To actually his ankles? A. Yes, sir.

Q. Tape on him? A. Can't recall, sir.

Q. You can't recall any tape. I take your tour of duty finished at 4:00. That is what you testified on. So obviously those observations you just

Leading Seaman Pilon

Cross-examination

described would have had to take place before 4 o'clock. That is true? A. Yes, sir.

Q. Anywhere between 3:15 and 3:45 would you say? A. Probably, sir.

Q. You were the CO's steward? A. Yes, sir.

Q. And I believe you explained, and correct me if I am wrong, that during close station you act as PA? A. PA.

Q. And if I understand that well that means that basically you stand in front of the CO, the captain, who normally operate in those situations the attack periscope, is that correct? A. Yes, sir.

Q. And you are there to respond to whatever need or wishes he may have regarding the conduct of the operation, is that correct? A. To read the range in degrees of the periscope.

Q. And most of the time, if not all the time, only the CO, the captain of the boat, operates the attack periscope? A. Most of the time.

Q. And officers of the watch would use the after periscope or the ..., is that correct? A. Yes, sir.

Q. Of course if during a close up station you are not acting as PA, your position then you would be somewhere out near your working area by the pantry as you described this morning? A. Yes, sir.

Q. You stated this morning that this would be approximately 10 to 15 feet away from the control room? A. Yes, sir.

Q. If I suggested to you that it is more like 20 feet, would that be a reasonable assumption? A. Probably, sir.

Leading Seaman Pilon

Cross-examination

Q. Uh-huh. Have you served on other submarines, other than OJIBWA? A. No, sir.

Q. You haven't. Would you agree that during close station there is a fair amount of information relayed, conveyed between various players? A. Yes, sir.

Q. And they have to, I mean, pass the information, so often in a loud voice to make sure the captain gets all the information in? A. Yes, sir.

Q. And that at times, again of course depending on circumstances, the captain would shout commands or seek further information. Is that something that you would observe in the control room? A. Yes, sir.

Q. And would you agree that in that environment and in that context and again depending on circumstances, that the captain would have to shout to be sure that he is heard in a bit of a commotion there? A. Yes, sir.

Q. And Lieutenant-Commander Marsaw did that I take? A. Yes, sir.

Q. I take you were doing your job all right? A. Yes, sir.

Q. You enjoyed your tour on board OJIBWA? A. So so, sir.

Q. So so. You did prepare good food and you, I mean, you managed your job well? A. Yes, sir.

Q. Did Lieutenant-Commander Marsaw ever just called you names for the pleasure or the sake of it? A. No, sir.

Q. As far as you can tell, and if you cannot answer the question just say so, but would you say that

Leading Seaman Pilon

Cross-examination

Lieutenant-Commander Marsaw by his gestures and chat with you appreciated your work? A. Yes, sir.

Q. And there are some officers on board with whom you didn't get along as well? A. Yes, sir.

Q. But you got along very well with the CO?
A. Yes, sir.

Q. Now you were on board this boat for close to, November '91 to the time you left actually?
A. Yes, sir.

Q. Do you recall when you left? A. August '94, sir, I left.

Q. You left? A. Yes.

Q. Do you recall when Lieutenant-Commander Marsaw left? A. No, sir.

Q. '93, is that reasonable? A. Probably, sir.

Q. Yes. So during all that time he never degraded you or insulted you and you got along well with him? A. No, sir.

Q. Hey? During that time he never degraded you or called you names for the sake of it. You had a good rapport with him? A. Yes, sir.

Q. The number of people involved in close station in the control room, would you agree that it goes like somewhere like eight to ten people in the rather confined space of the control room? A. It could be more, sir. I am not quite sure.

Q. And it could be more. The wardroom, the Officers' Wardroom, you referred to the fact that it would take two sittings to feed all the officers?
A. Yes, sir.

Leading Seaman Pilon

Cross-examination

Q. Is that correct that during that period of time, in addition to the regular officers of the boat, there were a number of SOCTs or/and officers under training, level 3 or part 3 officers? A. Yes, sir.

Q. There were. And is that correct that it did increase the number of officers above the normal staffing of the wardroom? A. Once in a while.

Q. It did once in a while. So even under the best circumstances you can never feed all officers at once, in one sitting in the wardroom? A. Yes, sir.

Q. And of course less so when you are over-staffed or when there are trainees on board? A. Yes, sir.

Q. You did state this morning that sometimes officers would eat in the torpedo room? A. Yes, sir.

Q. You don't know why, do you? A. Some of the officers told me they were ...

Q. Without repeating what they told you, according to your own knowledge, you don't have a clear observation or a clear knowledge of why they would eat in the torpedo room sometime? A. No, sir.

Q. You stated that morale was low at some point, is that correct? A. Yes, sir.

Q. If I suggest to you that actually in 1991 to '92 what one would call your first year on board, that the morale was pretty good? A. I cannot recall, sir.

Q. You cannot recall that. If I stated to you that in '92 there was a refit period and then the morale was a little low? A. Yes, sir.

Q. You do recall that? A. Yes, sir.

Leading Seaman Pilon

Cross-examination

Q. And that after the refit then the boat got very busy, very long working hours, had to work over Christmas and New Year's to prepare the boat to sail? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. It is. And would that be correct too that in that particular period of time, after the refit, the boat would have spent up to - and I say "up to" and it is approximate - up to 257 days at sea? A. Probably, sir.

Q. So anyhow a lot of time at sea? A. Yes, sir.

Q. And lots of long hours to prepare the boat? A. Yes, sir.

Q. You said that sometime the captain called somebody, whatever, people, "mother fucker" "ass-hole" "incompetent". Could you tell this court exactly when that took place? A. On very tense situation like diving and something was going wrong or whatsoever with the trim or whatsoever or depending on the situation, I wasn't there, but that is when those things would be coming out.

Q. But you said "would call" I believe those are the words that you used this morning, "he would call" people that way? A. Yes, sir.

Q. What I want to know is, who did he actually call, not "would" as a general statement, but I would like you to give some specifics to the court. I want an event, a date, a year or something? A. I can't recall any, sir.

Q. You can't recall any specific events? A. No, sir.

Leading Seaman Pilon

Cross-examination

Q. Do you know who he called that way?

A. No, sir.

Q. In fact did you hear other people use similar language on board? A. No, sir.

Q. How about Lieutenant[N] LeClaire?

A. No, sir.

Q. You never heard Lieutenant[N] LeClaire use such words on board? A. No, sir.

Q. Have you ever heard the word "fuck" mentioned on board aside from the captain? A. Yes, sir.

Q. You have. "Incompetent"? A. No, sir.

Q. You never heard the word "incompetent" mentioned on board aside from the captain? A. No, sir.

Q. Did he ever call you an incompetent?

A. No, sir.

Q. "Ass-hole". Have you ever heard somebody on board using that word aside from the captain?

A. Yes, sir.

Q. You have. Who might that be? A. I could say a three-quarter of the crew, sir.

Q. Sorry? A. A three-quarter of the crew use it.

Q. Uh-huh. Officers? A. Yes, sir.

Q. Would you agree that keeping depth with the boat is quite important? A. Yes, sir.

Q. And that if it is not done that could very much endanger both the boat and the crew?

A. Yes, sir.

Leading Seaman Pilon

Cross-examination

Q. And did you see people being relieved from the trim? A. Yes, sir.

Q. And the helmsman as well if there were problems? A. Yes, sir.

Q. I take they were not like literally booted out? A. Hard to say, sir.

Q. Did you see people, anyone being booted out? A. No, sir.

Q. Did you see anyone being manu militari or physically, like with force, removed? A. No, sir.

Q. Is that right that there was such an expression as somebody being kicked out of the control room but that is an expression and that does not refer to the actual physical gesture of kicking out?

A. Would you repeat the question again, sir.

Q. Sometime, is that right that people would say "I have been kicked out of the control room"?

A. Yes.

Q. Is that right that this is an expression only? Like that doesn't mean that they have been literally physically kicked out but that means they were relieved? A. Yes, sir.

Q. This is true. Is that right that you never saw Lieutenant-Commander Marsaw physically - I hate using the word "abuse" - but physically kicking, punching or otherwise his staff? A. Yes, sir.

Q. It is true that you never saw him doing that? A. I never saw him, no.

Q. I take that from '93 to '94 you sailed the OJIBWA with a different captain? A. No, sir.

Leading Seaman Pilon

Re-examination

Q. Are you suggesting that Lieutenant-Commander Marsaw was your captain throughout your posting on board OJIBWA? A. Yes, sir.

Q. And you were posted out in August of '94?
A. Yes, sir.

DEFENDING OFFICER: May I have a second please?

I have no further question, thank you.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. Prior to entering the wardroom of the OJIBWA at around 3:30 in the morning, had you had any opportunity at all to enter the wardroom on the 20th of December before that moment? A. No, sir.

Q. Can you tell the court based on your personal observations whether anybody in there had been taped or had tape removed from them? A. No, sir.

Q. Have you ever had occasion to observe any other officers or commanding officers refer to subordinates as "mother fuckers"? A. No, sir.

PROSECUTOR: Thank you. Those are my questions.

JUDGE ADVOCATE: Questions from the court?
No questions.

Thank you.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The next witness?

Leading Seaman Pilon

Re-examination

ASSISTANT PROSECUTOR: The next witness is
Leading Seaman Kohli, Mr Judge Advocate.

Leading Seaman Pilon

Re-examination

REASSEMBLY: At 0900 hours, 29 September.....420
REASSEMBLY: At 1300 hours, 29 September.....448
AT 1415 HOURS, 2 OCTOBER 1995, THE COURT REOPENS AND489
REASSEMBLY: At 0900 hours, 3 October 1995,.....492
REASSEMBLY: At 1300 hours, 3 October 1995,.....567

580

Leading Seaman Kohli

Examination-in-chief

Q. What date were you posted to OJIBWA?

A. October 1991, sir.

Q. And what was your job on board? A. I was qualifying as a submariner officer, sir.

Q. Do you recall what other officers were on OJIBWA at the time you joined her? A. Yes, sir. The captain was Lieutenant-Commander Marsaw. The executive officer was Lieutenant[N] Virgin. Lieutenant[N] Marr was a NAVO at the time. Lieutenant[N] LeClaire was the EO. Lieutenant[N] Wamback was the Ops officer, Lieutenant Steve Kelk, Royal Navy, was the sonar officer. The other qualifiers was Lieutenant[N] Duff, Sub-Lieutenant Elford, Sub-Lieutenant Pitman; Lieutenant[N] Reid was on board at the time.

Q. So you joined in October of 1991?

A. Yes, sir.

Q. And when did you leave OJIBWA? A. June

of '92, sir.

Q. Did you attend a sub squadron mess dinner

late in 1991? A. Yes, I did, sir.

Q. How many sub squadron mess dinners have

you attended? A. Two I believe.

Q. And the dinner in late 1991, was

Lieutenant-Commander Marsaw present at that dinner?

A. Yes, he was.

Q. What time did you leave the dinner that

night? A. Eleven, eleven-thirty, sir.

Q. And where did you go when you left?

A. I went home, sir.

Q. Is there any reason why you left at that

particular time? A. Yes, sir. I was duty the next day on board OJIBWA.

581

Leading Seaman Kohli

Examination-in-chief

Q. And did you report for duty the next day?

A. Yes, I did, sir.

Q. And approximately at what time did you report? A. Between 7:00 and 7:30.

Q. Where did you go once you arrived on board OJIBWA? A. When I arrived on board OJIBWA I proceeded down to the wardroom to let the officer of the day know that I was there to relieve him and then conducted a set of rounds.

Q. Did you actually enter the wardroom at that time? A. I stuck my head in. I may have said a couple of words to him.

Q. And then you did your rounds? A. Yes, sir.

Q. What did you do after your rounds? A. I went back to the wardroom.

Q. And did you enter the wardroom at this time? A. Yes, I did, sir.

Q. Who was in the wardroom? A. The off going officer of the watch or officer of the day was there, Lieutenant[N] Marr, Lieutenant Kelk, and Lieutenant[N] Muir from the squadron was there as well.

Q. I just would like to refer you to Exhibit "J". I am wondering if you could point out on this diagram where Lieutenant[N] Muir was located? A. Lieutenant[N] Muir was on this settee. His head was down here. His feet were towards the door.

Q. So you are referring to settee number 3? A. Yes, sir, I am.

Q. And his head was towards the number 3? A. Yes, sir.

582

Leading Seaman Kohli

Examination-in-chief

Q. And his feet were towards the door of the wardroom then? A. That is correct.

Q. And where was Lieutenant Kelk located?
A. Lieutenant Kelk was on bed settee number 1. His head was facing forward. His feet were aft towards the door.

Q. So again his feet were towards the number 1? A. No. His head was towards the number 1.

Q. His head towards the number 1, OK. And where was ... Was there somebody else in the wardroom?
A. Lieutenant[N] Marr.

Q. And where was Lieutenant[N] Marr?
A. Lieutenant[N] Marr was over here on the seat or on the edge of the settee.

Q. Can you describe how Lieutenant Kelk was positioned on the settee? A. Lieutenant Kelk?

Q. Yes? A. He was lying down. He had a blanket thrown over him at one point.

Q. Did he have a blanket on when you arrived? A. No, he did not.

Q. So can you described how he was dressed?
A. His shirt was undone and it was all untucked. He had writing on his face and abdomen. The same as Lieutenant[N] Muir.

Q. Do you recall what the writing was on Lieutenant Kelk? A. On Lieutenant Kelk it said "Margaret Hatwood ate here".

Q. And where was that written? A. That was written on his abdomen.

Q. What about Lieutenant[N] Muir, can you describe how he was dressed? A. Lieutenant[N] Muir

583

Leading Seaman Kohli

Examination-in-chief

had his trousers around his ankles. He had a coat thrown over him. He was not wearing underwear at the time. And he had the remnants of his mess dress on.

Q. Again anything else unusual about him?

A. He had writing on him as well. He had "Helen gives good beak" written across his face.

Q. Anything else unusual about

Lieutenant[N] Muir? A. No. Other than the fact that his glasses were on the table. They still had some tape on them.

Q. What was the position of

Lieutenant Kelk's pants? A. Around his ankles.

Q. Did you notice anything else in the

wardroom at that particular time? A. Yes. In the gash can underneath the table there was a cigar tube, a Tueros cigar tube with a condom.

Q. And what prompted you to look in the gash

can? A. A conversation I had with Lieutenant[N] Marr.

Q. Leading Seaman Kohli, you completed your

basic MARS training before going to OJIBWA? A. Yes, sir.

Q. And then served under Lieutenant-Com-

mander Marsaw as your commanding officer? A. Yes, I did, sir.

Q. How would you describe Lieutenant-Com-

mander Marsaw's leadership style? A. I found it very abrasive, sir. He was very forceful. He wanted things done his way and there was no other way you would be doing it.

Q. Where did you work when you were on watch

at sea? A. Mostly in the control room.

Q. Could you describe the atmosphere in the

control room when Lieutenant-Commander Marsaw was

584

Leading Seaman Kohli

Examination-in-chief

present? A. It was very oppressive. People were looking over their back to see where something was going to come from next. It wasn't comfortable, very tense.

Q. And why was the atmosphere like that?

A. Because of the captain, sir. He liked to know what was going on and if he didn't like something that was going on he made it very clear that he didn't like it.

Q. And how would he make it very clear that he didn't like it? A. He would state so. He would often use profanity or sarcasm.

Q. How would Lieutenant-Commander Marsaw respond to a perceived error in the control room?

A. He might start shouting. He might say, "Get on fucking depth" or "What are you? Stupid?"

Q. Have you ever personally been addressed by Lieutenant-Commander Marsaw in that way? A. Yes, I have, sir.

Q. And again where would situations like this occur only? Where would Lieutenant-Commander Marsaw act in this manner? A. In the control room.

Q. Would other people be present? A. Yes.

Q. In addition to yourself, have you ever observed other people being treated in this way by Lieutenant-Commander Marsaw? A. Yes, I have, sir.

Q. Do you recall who? A. Other officers in the control room.

Q. Was there any particular position in the control room that was more likely to attract Lieutenant-Commander Marsaw's attention? A. Ship control officer of the watch. That was the officer supervising the helmsman and the panel and at the plot table.

585

Leading Seaman Kohli

Examination-in-chief

Q. What about the atmosphere in the wardroom when Lieutenant-Commander Marsaw was present? A. Some times it was fairly comfortable. Other times it was strained.

Q. Can you give any examples of when the atmosphere in the wardroom might be strained? A. Things weren't going well on board. Then everyone would be subdued and not really want to talk too much.

Q. Did Lieutenant-Commander Marsaw ever use personally insulting adjective towards you? A. I was called stupid once.

Q. Were subordinates present on the occasion you are thinking of? A. I am not exactly sure, sir.

Q. Where did this incident occur? A. In the control room.

Q. When Lieutenant-Commander Marsaw would react in the way you described, how would you feel? A. Small. I felt like I was stupid.

Q. Leading Seaman Kohli, I would like to show you a memorandum. Before I do that I believe my friend has seen this but ... I am wondering if you could first of all tell me what that is? A. This is the memorandum to cease training that I wrote.

Q. Whose signature is on the bottom of that? A. It is mine.

ASSISTANT PROSECUTOR: At this time, Mr Judge Advocate, I would ask that this be admitted as the next exhibit, subject to any comments my friend may have.

ASSISTANT DEFENDING OFFICER: At this point, Mr President, the defence ... I don't know what the relevant use they want to make that in their case at

s.19(1)

586

Leading Seaman Kohli

Examination-in-chief

this point in time but since it is a document that we had intended to use in cross-examination, we don't object to the document.

JUDGE ADVOCATE: Very well. "M".

THE MEMORANDUM SIGNED BY LEADING SEAMAN KOHLI IS MARKED EXHIBIT "M".

ASSISTANT PROSECUTOR:

Q. Leading Seaman Kohli, I am showing Exhibit "M". I am wondering if you could read that for us? A. Yes, sir. "REQUEST TO CEASE TRAINING I have been in OJIBWA since Oct 91, employed as a Submarine Officer under training. During the past 8 months I have become aware

Q. Does that memo reflect how you actually felt with respect to your service on board OJIBWA?
A. Yes, sir.

587

Leading Seaman Kohli

Examination-in-chief

Q. I note at paragraph 4 of the letter you make a statement to the effect that "I feel it would improve" referring to your performance "in the atmosphere of a surface ship"? A. Yes, sir.

Q. What did you mean when you made that statement? A. I felt that the environment was not particularly conducive to learning on board the submarine. So I felt that if I went to a surface ship I would have a better chance to learn and get on with my job.

Q. What was the stress level like on board OJIBWA in your experience? A. High.

Q. What would you attribute that to? A. Mostly to the leadership of the captain. He was very perfectionist, demanded a lot from the crew and when he didn't get it he was often threatening.

Q. What about morale aboard OJIBWA? What was that like? A. It was very low.

Q. And again what would you attribute that to? A. Again to the behaviour of the captain. The crew wasn't getting a lot of breaks.

Q. What was your own personal morale like on board? A. It was very low.

Q. How would you feel prior to going on watch while you were on board OJIBWA? A. I would dread going on watch on OJIBWA.

Q. And why was that? A. Because I wasn't perceiving it as an opportunity to learn something. I was just perceiving it as an opportunity to fail at something else again.

Q. What was your personal reaction to Lieutenant-Commander Marsaw's leadership style? A. I found it did not motivate me. I had to motivate myself

588

Leading Seaman Kohli

Examination-in-chief

through my own want to complete my training. I didn't get a lot of incentive from Lieutenant-Commander Marsaw.

Q. Did it affect the way you performed your duties? A. Yes, it did, sir.

Q. In what way? A. It was a vicious circle. The harder I tried, the poorer I did. So I just corkscrewed down.

Q. Did you ever discuss these feelings with other members of the crew? A. No. Not specifically.

Q. Based on what you observed, how did other members of the wardroom react to Lieutenant-Commander Marsaw's style? A. The wardroom was not acting as a team. Officers weren't looking out for other officers. So if someone made a mistake there was no one there to help him out with it right away.

Q. Why weren't they working as a team? A. Because everyone was more worried about themselves rather than everyone else.

Q. Did your experience on board OJIBWA, and in particular the atmosphere on board, have any effect on you personally? A.

Q. And then in June of '92 you left OJIBWA? A. Yes, I did, sir.

Q. And Exhibit "M" was your request to leave the submarine? A. Yes, it was.

Q. I would like to show you another letter. I am just wondering, do you recognize that letter? A. Yes, sir, I do.

589

Leading Seaman Kohli

Examination-in-chief

Q. And whose signature is on that letter?

A. Lieutenant-Commander Marsaw's, sir.

Q. And what does that deal with? A. This deals with the reasons I was cease trained from OJIBWA.

Q. Have you seen it before? A. Yes, sir, I have.

ASSISTANT PROSECUTOR: At this time, Mr Judge Advocate, with the consent of my friend, I would ask that this be entered as an exhibit and if he is not prepared to consent then perhaps we could just mark it for identification purposes.

ASSISTANT DEFENDING OFFICER: No. I just take the same position as with the previous letter.

JUDGE ADVOCATE: Very well. Exhibit "N".

LETTER SIGNED BY LIEUTENANT-COMMANDER MARSAW ON 30 JUNE 1992 IS MARKED EXHIBIT "N".

ASSISTANT PROSECUTOR:

Q. Leading Seaman Kohli, could you read paragraph 4 of Exhibit "N"? A. Yes, sir. "Pending acceptance of reference B as doctrine, it is recommended that SLt Kohli's attached posting to OJIBWA at reference C be ceased and that a Training Review Board consider his case for continued service in the CF. SLt Kohli is a sincere and well intentioned young officer, however,

Q. Thank you. So essentially a training review board was recommended for you? A. Yes, sir.

Q. When you left OJIBWA in June of '92, is that the recommendation you understood the commanding officer would be making? A. No, it is not, sir.

590

Leading Seaman Kohli

Examination-in-chief

Q. What did you understand the recommendation would be? A. I understood the recommendation would be that he would recommend that I continue my training with a surface ship, sir.

Q. And where did you get that understanding from? A. I had a conference with the captain on OJIBWA before I left Groton, Connecticut.

Q. And your continued training on a surface ship would be in what role? A. As a MARS officer, sir.

Q. You say you had a conversation with the captain. Do you recall what he said to you? A. Yes, sir. He said "I think you deserve another chance on surface ship". Essentially it was a goodbye meeting.

Q. Did Lieutenant-Commander Marsaw subsequently advise you that he would be making a different recommendation? A. No, he did not, sir.

Q. So when did you first become aware of his recommendation contained in Exhibit "M"? A. Some months after I had been at the submarine squadron I was shown a copy of the letter.

Q. Was the training review board convened for you? A. Yes, it was, sir.

Q. Did you discuss the conditions on board OJIBWA with the training review board? A. No, I didn't, sir.

Q. And why didn't you do that? A. I felt that anything derogatory I had to say about the OJIBWA would be just viewed as sour grapes.

Q. Why is that? A. I had just failed my submarine training, so I was in no position to criticize the boat.

591

Leading Seaman Kohli

Cross-examination

Q. How would you describe how you and other officers on board OJIBWA were treated by Lieutenant-Commander Marsaw? A. Fairly poorly, sir.

Q. How did you feel about the sailing or going to sea on board OJIBWA? A. I did not look forward to going to sea with OJIBWA.

Q. If given the opportunity would you volunteer to sail with Lieutenant-Commander Marsaw again? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I think "if given the opportunity" that is sort of hypothetical, isn't?

ASSISTANT PROSECUTOR: Again, Mr Judge Advocate, the Crown would submit that it goes to the witness's perception after he left the boat, his state of mind and how he perceived his time on board which is relevant to a 129 charge and to the effect on good order and discipline.

JUDGE ADVOCATE: I will allow the question.

ASSISTANT PROSECUTOR:

Q. Again, Leading Seaman Kohli, would you volunteer to sail with Lieutenant-Commander Marsaw again? A. No, I would not.

ASSISTANT PROSECUTOR: Thank you. Those are my questions.

JUDGE ADVOCATE: Cross-examination?

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. With regards to the morning after the incident of 19th December, the morning you showed up for duty, December 20th, 1991, you said you put your

592

Leading Seaman Kohli

Cross-examination

head into the wardroom then you went to do your rounds and came back to the wardroom? A. Yes, sir.

Q. What time approximately was it when you came back to the wardroom? A. Probably 10 minutes to 8 o'clock, sir.

Q. Ten to eight. Who was present at the time in the wardroom? A. There was Lieutenant[N] Muir, Lieutenant Kelk, Lieutenant[N] Marr, and myself.

Q. Anybody else? A. Not that I remember; no, sir.

Q. Any other officers on duty that day that would have been there? A. Not that I recall, sir.

Q. In what kind of state was the wardroom at the time? A. It was after a party, sir. But it had been cleaned up by Lieutenant[N] Marr.

Q. It had been cleaned up? A. Yes, sir.

Q. And the garbage pail you mentioned, was it full, half-full? A. About half-full, sir. There was some papers in it.

Q. And what else was in there? A. The cigar tube and an unrolled condom.

Q. Just the one cigar tube? A. Yes, sir.

Q. And a condom? A. Yes, sir.

Q. Did you see anything else? A. No, sir.

Q. No. What about tape? A. There was some tape on Lieutenant[N] Muir's glasses. I think there was some tape still on his trousers. I don't recall if there was any tape in the gash can, sir.

593

Leading Seaman Kohli

Cross-examination

Q. Were you there when they woke up?

A. Yes, sir, I was.

Q. Did any of them question how come they were in that state? A. No, sir. Lieutenant[N] Muir woke up. I had advised him to go wash his face off. And while he was doing that his wife called and he left shortly afterwards.

Q. And what about Lieutenant Kelk?

A. Lieutenant Kelk got up a little later but he was somewhat groggy. He asked no questions, sir.

Q. And what was used to cover Lieutenant Kelk? Was it a blanket? A. A sleeping bag, sir.

Q. A sleeping bag. Who put it on there?

A. Lieutenant[N] Marr, I believe.

Q. What kind of markers were used to mark up these two individuals? A. Felt tip markers, sir; I believe black and red.

Q. Felt tip. How can you be sure it was felt tip? A. It wasn't ball point, sir.

Q. Were there any lying around the wardroom?

A. Not that I recall, sir.

Q. Would that be the kind of markers used to mark charts, for example? A. No, sir.

Q. No. What kind do you use to mark the charts? A. The only thing you would use to mark the charts, sir, would be a purple ink if you are making a correction or use a pencil, sir.

Q. And about the markings on Lieutenant Kelk and Muir? A. Yes, sir.

Q. You mentioned phrases? A. Yes, sir.

594

Leading Seaman Kohli

Cross-examination

Q. Was there a phrase on each that you remember or the two on the same individual? A. No. There was several markings on each but I only remember one phrase from each, sir.

Q. Any designs? A. Not that I remember, sir.

Q. Just the one marking or were there anything else that you ...? A. There was more markings, but I remember they were there but I do not recall what they were.

Q. Have you seen something like a flag design? A. Not that I recall, sir.

Q. Any other specific mark that would come to mind? A. No, sir.

Q. And about Lieutenant[N] Muir, if I am not mistaken you said his pants were down. What about his shorts? A. His shorts were either down with his trousers or they were completely gone.

Q. Couldn't you see them or ...? A. I don't recall, sir.

Q. Don't you remember telling the investigators they were either torn or gone? A. Yes, sir. That is correct.

Q. If they were torn you probably saw them? A. Probably I did, sir.

Q. And the pants down around the ankles of Lieutenant[N] Muir, were they just loose or taped? A. I believe they had tape on them, sir.

Q. Tape on them. Was it left over tape or taped real tight so his legs will be taped together? A. It would be left over tape, sir.

595

Leading Seaman Kohli

Cross-examination

Q. Left over tape. In your direct examination you made a mention of Lieutenant-Commander Marsaw, a remark to the effect that he was pushing to be at sea or something like that, wanting time out or volunteering to go out. Do you recall that? A. I don't ...

Q. Not those specific words but in terms of after ... I am trying to recall here. I am going to go back to my notes? A. ...

ASSISTANT DEFENDING OFFICER: I am sorry, Mr Judge Advocate, I am just trying to get the exact quote here. So I can move to another area and catch back on it later when I get the exact quote.

Q. You said you didn't look forward to going on watch? A. No, I didn't, sir.

Q. Is that comment directly made towards Lieutenant-Commander Marsaw or other officers of the watch as well? A. I don't understand, sir.

Q. Did you fear going on watch because of Lieutenant-Commander Marsaw would be there or because you feared as well the officer of the watch that would have been present? A. At one time, both, sir.

Q. Both. Who would be the officer of the watch or if anybody in particular? A. When I was working with Lieutenant Kelk I did not enjoy working with him.

Q. During that same time did you, when you were in the control room doing whatever you were doing there, did you get ragged on by anybody else than Lieutenant-Commander Marsaw? A. No, sir; with the exception of Lieutenant Kelk.

Q. With the exception of Kelk. What about Lieutenant[N] Marr? A. Lieutenant[N] Marr I found to be a good officer of the watch, sir. His comments towards me were more constructive than anything else.

596

Leading Seaman Kohli

Cross-examination

Q. What about Lieutenant[N] LeClaire?

A. Lieutenant[N] LeClaire?

Q. Do you recall being ragged on by him?

A. Yes, I do, sir.

Q. And what words would he use on you when he did that? A. He might say, "Common let us get going".

Q. Nothing harsher than that? A. He took a poke at me once.

Q. He called you stupid or idiot? A. He called me stupid.

Q. He called you stupid? A. Yes.

Q. And your statement earlier about feeling stupid when you were on watch, was that in relation to how people talked to you or in relation to the mistakes that you would make? A. A combination of both, sir.

Q. A combination of both. So you recognize that some of the mistakes you feel you made made you feel stupid? A. Yes, sir.

Q. What kind of mistakes were they?

A. Drills that perhaps I should have known a little better. I wasn't doing them smoothly. I required some prompting. Overall performance, sir.

Q. And what did those drills relate to?

A. Snorting, sir; snorkelling.

Q. And actually being in control of the snort?

A. Yes, sir.

Q. And what would happen if you miss on the snort?

A. I never did, sir. There was always someone else to help back me up, sir.

597

Leading Seaman Kohli

Cross-examination

Q. What happens if you miss on the snort, for example, that being the example that is given to the court right now. If something was wrong? A. If something was wrong, sir? You would have to stop the snort.

Q. And were you ever on the trim seat?
A. Yes, sir, I was.

Q. How did you feel when you were in that position? A. I did not feel particularly confident, sir.

Q. Is it hard to do? A. Sometimes it was, sir, depending on what was going on around you.

Q. And how important is it? A. It is fairly important.

Q. And if you are not successful on keeping the boat on depth doing the snort would that affect the snort? A. Yes, it would, sir.

Q. What else could it affect? A. In a wartime situation it could affect the safety of the boat.

Q. And in peacetime? A. In peacetime, it could be just embarrassing, sir.

Q. It wouldn't affect the safety of the boat in peacetime? A. No, sir.

Q. If you are in shallow waters and you are off depth? A. Sir?

Q. If you are navigating in shallow waters and you are off depth that wouldn't affect the safety if you were off depth? A. It depends how far off depth you had to go, sir.

598

Leading Seaman Kohli

Cross-examination

Q. And you think it would be important to make a correction only if it is a situation of emergency? A. No, sir. The important thing would be to learn how to maintain the trim of the boat so that when an emergency did come you would be prepared to deal with it.

Q. So it would be necessary to do it all the time? A. Yes, sir.

Q. And not be satisfied since this is not an emergency or operational situation we can go off depth as we see fit, right? A. No, sir. There are limits.

Q. There are limits. And you have to keep trying and going at it? A. That is right, sir.

Q. So basically there would be no occasion where the captain or the commanding officer should come into the control room and find the submarine off depth? A. Normally no, sir.

Q. You made a comment "feeling threatened for your career". Do you recall that? A. During testimony or previous ...

Q. During testimony? A. I don't recall, sir.

Q. Did you ever feel that your career was threatened? A. Yes, sir. Before my career review board.

Q. Going back to the career review board, the training review board, now in your letter you state in paragraph 4, the one that they had you read. "Although my performance has been lacklustre, I feel it would improve in the atmosphere of a surface ship." Then you went on to the further discussion that you had prior to leaving OJIBWA with the commanding officer with your understanding that he would recommend you for a surface ship? A. Yes, sir.

599

Leading Seaman Kohli

Cross-examination

Q. Does he have any control over that?

A. No, sir. He can make a recommendation. And from what I have seen the commanding officer's recommendation holds a lot water, sir.

Q. In terms of your performance on training for the time that you were on OJIBWA who was your training officer? A. Lieutenant[N] Virgin, sir.

Q. And what his position would be?

A. Executive Officer.

Q. So basically the XO is in charge of training of officers? A. Yes, sir.

Q. And you said you were given the opportunity to see the letter of Lieutenant-Commander Marsaw that was sent to the Command for your cessation of training. Is that correct? A. Yes, sir.

Q. Were you or were you not satisfied with his recommendation for a training review board? A. I had no choice, sir, but to be satisfied with it.

Q. What do you mean? A. There was nothing I was going to do that was going to change it. So I just accepted it.

Q. So if you are not satisfied or feel you have been ill-treated do you recognize the fact that in the service we have a system called a redress of grievance? A. Yes, I do, sir.

Q. Did you think it was an injustice that was done to you that he recommended you for a training review board? A. Not so much an injustice, sir. But he could have told me that he was going to change his recommendation before hand.

Q. But that recommendation actually, isn't true that all it does is recommend that you cease training in submarines? A. Yes, sir.

600

Leading Seaman Kohli

Cross-examination

Q. It doesn't recommend that you cease training as a MARS officer? A. I think it implied it, sir.

Q. It implied it? A. Yes, sir.

Q. Could you take the letter please. Do you still have the copy? A. No, I don't, sir.

Q. Paragraph number 4 is the one you read?
A. Yes, sir, it is.

Q. And the last sentence says, "SLt Kohli is a sincere and well intentioned young officer, however, he does not have the ability to be a submariner"?
A. Yes, sir.

Q. It doesn't say that you don't have the ability to be a MARS officer, does it? A. No, sir. But the sentence before that says "... that a Training Review Board consider his case for continued service in the CF". I think that implies that he doesn't think that I should be a MARS officer.

Q. Yet again you don't know if he had the choice or not to recommend you to the training review board? A. No, sir.

Q. Were you on board OJIBWA on a trip coming back to Halifax around the Easter period? A. Yes, sir, I was.

Q. In 1992, would that be accurate?
A. Yes, sir.

Q. And you actually did not get back on time for that trip, did you? A. No, we did not, sir. We arrived several days late.

Q. Several days later? A. From our original arrival point.

601

Leading Seaman Kohli

Cross-examination

Q. And do you know why that happened?

A. Yes, sir, I do.

Q. And could you tell the court why you think it happened? A. Yes, sir. We dove after we left Dublin, sir, then continued on and the weather closed in on us. We started to fall behind in our box. The box is the planned submarine movements. And we fell behind far enough that the captain was concerned we may not be able to maintain our position in the box at all. So he sent in a request or a due plan to arrive I believe it was on the Monday vice the Thursday or the Friday, sir.

Q. And didn't you use that in your interview with the investigators as an example of his wanting to stay out not having concern for the families of the sailors? A. I don't know if it was indicative of his wanting to stay out. But the fact that the weather cleared up and we could have made it in much quicker was an example that he didn't want to change his mind again.

Q. How can you say that you could have made it in much quicker? What is the procedure once you have changed your box? A. He could change it again, sir.

Q. Is he the authority to change it? A. He can request it. We were on the surface. We weren't dove.

Q. How easy is it to change, do you know? A. Send a message.

Q. And what effect would that have? A. It could have had the effect that we could have made Halifax much sooner than we actually did, sir.

Q. And with respect to the rest of the traffic? A. The rest of the traffic, sir?

602

Leading Seaman Kohli

Cross-examination

Q. Well, you did say you put in a request. So obviously the person who you put the request to directs more than one submarine at a time? A. It would be our national submarine operating authority. They only have three submarines really to deal with especially when you are not concerned with dived water, sir.

Q. And how sure are you that it is only our authority that governs that? A. Fairly sure.

Q. You think it is normal for a commanding officer to want his boat to be ready for the mission? A. Yes, sir, I think it is normal.

Q. And if the commanding officer or the captain gets orders to be ready is it a matter of his concern for the sailors or the members of his crew or a matter of concern of obeying the orders? A. I think it is a matter of both, sir.

Q. And during that period of time, one submarine ... my understanding is that one was in refit. What about the other one? A. The other one was having a towed array incorporated into it. It is a operational sonar fit.

Q. So basically yours was the only one that was operational at the time? A. Yes, sir.

Q. How much more difficult does it make it for the captain then? A. I imagine it would make it more difficult, sir.

Q. But still people would be willing to blame him for morale? A. Yes, sir. The captain is responsible for the morale on his ship.

Q. The morning of December 20th you said you were on duty. Were you the officer of the day that day? A. Yes, I was, sir.

603

Leading Seaman Kohli

Cross-examination

Q. If I showed you the log book of the submarine, would you be able to identify your signature and tell the court whether or not you were on duty?

A. Yes, sir.

ASSISTANT DEFENDING OFFICER: Just a moment. There seems to be a little problem with dates, sir.

Q. I will show you just the one day. My understanding is that you start at 0800 in the morning, correct? A. Yes, sir.

Q. At 0800 there was a turn over on the 20th? A. Yes, sir.

Q. And would that be your signature?
A. No, sir. That is not my signature because that would be the off going officer of the watch signature.

Q. Then your signature would be the next?
A. The next day.

Q. So on the next day when you turned over with your follower? A. And that is not my signature.

Q. That is not your signature. So you would not have been officer of the day? A. No, I would not have been officer of the day.

ASSISTANT DEFENDING OFFICER: If I could just review my notes for two seconds. Just one last question.

Q. In respect to his style of command, you said that his style was forceful when it was his way?
A. Yes, sir.

Q. How many ways of command can you have in a control room at any one given time? A. How many ways of command at one time? Just one way of command, sir.

604

Leading Seaman Kohli

Cross-examination

Q. And that would be the captain's way, right? A. Whoever the captain was, sir, yes.

ASSISTANT DEFENDING OFFICER: These are all my questions, sir.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY THE ASSISTANT PROSECUTOR

Q. Leading Seaman Kohli, who was Lieutenant[N] LeClaire's CO at the time he would have called you stupid in the control room? A. Lieutenant-Commander Marsaw.

Q. Did Lieutenant-Commander Marsaw ever take any action as a result of that? A. Not that I am aware of; no, sir.

Q. With respect to difficulty on the helm or the trim seat did Lieutenant-Commander Marsaw ever take you aside and instruct you on how to carry those procedures properly? A. No, sir.

Q. That any time you were on either the helm or the trim seat was the submarine at least in your opinion in any immediate danger? A. No, sir.

Q. On your return back on the Easter weekend in '92 I believe it was, do you know if a request was made to change your box after the weather cleared? A. No, sir.

Q. You don't know or no request was made? A. As far as I am aware, no request was made, sir.

Q. And on the 20th of December '91 you indicated you reported for duty on the OJIBWA? A. Yes, sir.

Q. Do you know what day of the week that was? A. No, sir, I don't recall.

605

Leading Seaman Kohli

Re-examination

Q. If it were a week day would you have duties to perform on board OJIBWA? A. Regular duties, sir?

Q. Yes? A. Yes, sir, I would.

ASSISTANT PROSECUTOR: Thank you. Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Questions from the court? No questions.

Thank you.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness will be Lieutenant[N] Marr.

DEFENDING OFFICER: Mr Judge Advocate, I wonder if we could have a brief adjournment before we start the next witness so I can change file and take care of some personal administration?

JUDGE ADVOCATE: How long?

DEFENDING OFFICER: Ten minutes. Ten or fifteen at the pleasure of the court.

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1415 hours, 3 October 1995, the court adjourns.

REASSEMBLY: At 1435 hours, 3 October 1995, the court reassembles and the accused is before it.

PROSECUTOR: The next witness will be Lieutenant[N] Marr.

606



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607

Lieutenant(N) Marr

Examination-in-chief

|FIFTH WITNESS) Lieutenant(N) K.M. Marr
FOR THE) is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you state your full name for the court and spell your last name please? A. Kenneth MacArthur Marr; M-A-R-R.

Q. What is your current position? A. I am the XO of HMCS ONONDAGA.

Q. What year did you enter the Canadian Forces? A. In 1982.

Q. And approximately when were you awarded your dolphins? A. In 1988.

Q. Which Canadian submarines have you sailed on? A. I have sailed in OKANAGAN, OJIBWA and I am presently in ONONDAGA.

Q. Have you sailed on the submarines of other countries as well? A. I have. I have served in HMS UPHOLDER, HMAS OVENS, HMS ONYX and HMS TRENCHANT.

Q. Did you have a posting with the Royal Navy? A. I did, sir. With HMS UPHOLDER.

Q. And approximately what time period would that have occurred in? A. It was from August of '92 until August of '94.

Q. Prior to August of '92, what unit were you with? A. I was with HMCS OJIBWA.

Q. And who was your commanding officer?
A. Lieutenant-Commander Marsaw.

608

Lieutenant(N) Marr

Examination-in-chief

Q. What position did you hold under Lieutenant-Commander Marsaw? A. I was his navigator, sir.

Q. Were you also one of the two watch leaders? A. I was indeed.

Q. Can you tell the court where you were on the evening of 19 December 1991? A. Yes, sir. I was officer of the day in OJIBWA.

Q. And where was the OJIBWA located? A. It was on Jetty C in the dockyard in Halifax.

Q. That would be CFB Halifax? A. That is correct, sir.

Q. How do you know that it was the 19th of December you were on duty? A. Sir, it is written down on my file of fax, sir.

Q. And again what were you doing that evening? A. I was on duty as officer of the day.

Q. What period of time to what period of time was your shift? A. It would have been from approximately 8:00 in the morning until 8 o'clock the following morning, sir.

Q. That would be 8 o'clock the on 20th of December 1991? A. That is correct, sir.

Q. As officer of the day what were your duties as best as you can recall during that shift? A. Primarily safety and security of the submarine and personnel on board. On that particular day there was some diving operations and that evening there was the mess dinner.

Q. How long as an officer of the day would it, generally speaking, take you to do your rounds on the 19th/20th of December? A. On that evening it

609

Lieutenant (N) Marr

Examination-in-chief

would take me approximately 45 minutes to conduct a set of rounds.

Q. I would like to show you an exhibit and ask if you can just basically retrace your steps as you do a set of rounds on the OJIBWA. I am referring to Exhibit "H". I will hold it up and wonder if you can illustrate where you would start your rounds and where you would go? A. May I stand?

JUDGE ADVOCATE: Certainly.

WITNESS: I would come up through the accommodation space hatch and I usually start my rounds on the casing or the upper deck. I come all the way aft. While I am onto the upper deck I am checking the security of the lines if they are made up properly, if there is anything in the water around the submarine. As I go aft I check the after draught marks too on both sides. The important thing while I am up there too is to stand and listen for a few minutes to hear of possibly indication of air coming out of tanks or anything at all. Check the state of ceremonial if it is by the day as check the state of all the hatches in any of the fittings up on the casing. As I begin to come forward, again I am looking for any indication on both sides of the submarine to check and see if there is any air at all, anything out of the ordinary. As I come forward up to the fin - of course this isn't indicated in this particular drawing - I look on both sides at the ceremonial and both sides of the submarine. I have a good look at the masts if there are any masts raised and if they are raised for what particular reason. As I come to the forward part of the fin, this is still of course up on the casing, we have a whole series of safety and security equipment up there, everything from axes to man over board reels. Make sure the man over board reel is free for running, that the Kisby is there, that none of the equipment has been taken away. I then continue forward all the way up to the forward part casing. Again I am checking lines, we have four lines that we use in submarines just to secure us along the

610

Lieutenant(N) Marr

Examination-in-chief

side. Check the state of all the hatches, we have escape hatches too and there is a messenger buoyant, there was a messenger buoyant, the 639 buoyant. Coming forward again I look on both sides on the draught marks. Sometimes, especially at night time, it is difficult to read those marks just because of the light. So generally I would go ashore, walk along the jetty to read those marks just to double check. Most importantly while I am up there I am checking the draught marks to make sure the submarine isn't sinking or taking on some type of water. Check the state of the fore plane, check the state of the soft patches while I am up there. If the soft patches are off then I can check and see the state of the anchor and make sure they are secured. I would come back. I would then go down the accommodation space hatch. This is quite a busy drawing.

PROSECUTOR:

Q. It is. A. Excuse me. Then I would then go forward into the fore torpedo room and generally start my rounds forward. I begin to work my way aft, to the after ends of the submarine. Up in the fore ends the first thing I do is stand - there is a platform if you will before you leap down onto a walkway, if you will - the important thing whenever I go into each compartment is to stand, look and listen for anything at all, any odd noises, any odd smells, anything at all that is out of the ordinary. I then proceed all the way forward just up between the torpedo tubes. I would check each torpedo tubes and in turn check the rear door. There is a mechanism where I could check that the tube was properly vented and drained, there was no water. If there is any that might indicate that there was water leaking into the torpedo tube which would affect the overall trim of the submarine. Back then we had the things called the AIVs

611

Lieutenant(N) Marr

Examination-in-chief

automatic on board vents and HESSs; they have been removed from submarines now. But there was a series of lights and indications that indicated to me what condition they were in and of course I had to have, if you will, a green board. I would also check there was indications ... if there was mechanical indication of forward between the tubes to up here that would indicate the state of the bulkhead which I would expect of course to be, expect all that stuff to be shut. Beginning to walk after I would have a look up into the escape tower to see the state of the escape tower. Also sailing at night time there may be members of the duty watch sleeping up there because the bunks would be rigged. There is a lot of cartons up there to make sure that it is nice and dark inside where they are sleeping, so make sure there is nothing out of the ordinary in there, have a look underneath all the bunks for any fluid that might be leaking down. There is quite a bit of hydraulic equipment up there forward, up in the forward torpedo room, and there is a series of hydraulic blocks up on the port side aft that would be checked too for any leakage as well too. There was hydraulic system and that runs down ... on the whole boat runs down the port side. Also there is a space down below here called Q recess which is a grotty, a very small confined little space. I would look down again if there is indication of anything coming in there out of the ordinary, any odd smell down there too. Also as you come up onto the pedestal you can look down onto the hydraulic block on the port side and on the starboard side. There is a mainland valves. There is also storage down there too. That has to be checked too to make sure that there is nothing wrong there, nothing out of the ordinary as well too. Again just before I leave the forward torpedo room I do a good listen, a good sniff, have a look around before I depart, come through bulkhead 34 into the accommodation space. The accommodation space in the three submarines differs slightly. OJIBWA's is different from ONONDAGA's, it is different from OKANAGAN's. The primary thing with the accommodation space, again looking and listening the majority ... some members of my duty

612

Lieutenant(N) Marr

Examination-in-chief

watch would be sleeping up there or they may be watching television, check out that whole area if there is nothing out of the ordinary. Check the back, the other side of the bulkhead and then begin to work my way forward, looking and listening for anything at all. Excuse me, back in the forward torpedo room there was also a fore trim loading hatch which is above me that I have to check as well to ensure and check it is secured and I can do that simply by sighting it. Coming through to the accommodation space, working my way, there is a coxswain's stores which is a ... the hatch has to be left stood up and look down again there is tanks on either side of that so it is possible there is something leaking in. So look down there and also there is a lot of food down there, generally that would be secured but depending on what is going on it might not be. So if it isn't then I will look. I have also keys to that if I want to look down there as well too. Coming through into through bulkhead 49 and then to the wardroom again as I pass through there is a HP air block above my head too that I would check the state of all the valves, make sure that the master is opened. Walking my way, again there is bunks here too, have a quick peak through the curtains. Coming through there is a little of S turn as you pass the wardroom, I have a quick peak in the wardroom. I come aft check that the captain's cabin was secured and normally it would be locked and secured. And then coming into the control room up here - let me refresh my memory with the layout of the OJIBWA - Again have a look at the state of the fire control system. Again behind the fire control system there is another hydraulic block where things that could be possible to have leakage. There is also a void space down on either side there with air bottle groups and again it is something that has been checked and that there is a bilge if you will that can be pumped. I have a look into the sound room, all the sonar set should be covered up. Looking in the fire control system, the safety fire keys they should be out and secured in the officer of the day's thing, but I would generally just look at those in my first set of rounds. Walking past the fire control again, stop in

613

Lieutenant(N) Marr

Examination-in-chief

the middle of the control room have a good look and listen. There is an awful lot, of course everything happens in the control room, so there is a lot, the ventilation is little noisier in there too. There is a lot to listen to and to see as well in there too. So again I would stop in the middle of the floor and have a good look. Have a look up the conning tower, there will be cabling and wiring such as telephone lines, cable lines, the ashore power lines that would breach to make sure that nothing else is breaching because in emergency one thing that I need to be able to do is to shut that hatch; shut the conning tower either the lower or upper lid. Then I would look at the OMC, generally have a good look to see that the inclination indicator is upright and I should tell it with what I saw, on the upper as well too and the reason. Sometimes they would stick so they would need a little bit of a punch. Again look at the whole left side of the control room, there is all sorts of stuff there from indication of tank contents to the state of the hydraulic pumps, which ones are on, which ones are standby. Again I have three gauges that will tell me all sorts of information from what and when the alarms are going to go off, what the pressure is at that moment, is the pressure dropping and that gives me an indication if there is a snag. Sometimes it would give me an indication of a snag in the system. And also there is a thing called a CDM there which is a distribution manifold for HP air. That has a specific line up in harbour and I would check that to make that the line up was correct. Again look up over to see the pressure on all the gauges. Looking over on the starboard side, check that the chart table is secured, like I say the charts are contained in there, radars are in there too. Look in the radar office, all I need to check there is that it is locked and it has remained locked as there is no particular reason it should be opened unless there is anyone doing any work in there. Beginning to walk back into the heads, look in the heads, make sure there is nothing out of the ordinary there, that the WT office has been secured. Coming back look at the galley, make sure all the power is off, that it is

614

Lieutenant(N) Marr

Examination-in-chief

clean, there is nothing lying around, there is no hazards in there whatsoever. I would then proceed down into the AMS which is below the control room, if you will. Again that is a good puzzle. There is an awful lot of equipment from hydraulic pumps, trim pumps, air conditioning units, that sort of thing, a lot of controls for some of the heavier electrical ... all the starter boxes for some of the heavier electrical equipment. Again that is a place to just stand and listen for some time. Work my way all the way forward in the AMS which is back - in OJIBWA back then we had the old McTaggart Scott hydraulic pumps. There was a lot of stuff to look at there, such as ... there was cocks and that sort of stuff that were small. These could easily be kicked, and an incident happened before to me. I didn't want that to happen again. Moving up through the AMS were the trim, the trim pump, come out and look at the AC units, the starter units, make sure if the fans were up or the heaters were up, the heater control that they were in fact correct and there was no arcing and sparking down there. Come up back up into the main flats, if you will, have a look in the crews wash place, to see if it was clean, there was nothing, there was no rags lying around because that is generally where the engineers would clean up after the day and sometimes they would leave stuff lying around. Continuing aft into the engine room, sometimes I would go down into - below the plates there is an area known as the ... the colloquial name was the snake pit - and depending on what rig I was in then I would go down there or just have a peak down there, also controls for the things called the oil heaters were down there. It was important to keep the DOT temperature, or the oil temperatures up because that was part of ready for sea. There is also as we came through bulkhead 77 into engine room there was a six-valve chest which controls the ballast system ... or which is controlling the movement of water throughout the main line which is for ballasting the internal tanks. That should be secured. There is also a panel on the starboard side as you came through bulkhead 77 which indicated the state of the group exhaust valves, indication of ... a lot of

615

Lieutenant(N) Marr

Examination-in-chief

hole openings would have indications there. Check that what I have been turned over, what was my last set of rounds was actually correct. Continuing aft I go between the ... main diesels, go between the generators. Again we are getting back to the after part of the engine room, stop, look and listen, smell.

Have a look at the state of the after services pumps which are responsible for cooling and that again provides cooling water to all ACUs. Moving, have a look down into an area known as the bear pit which is aft part of the generators, see if there is anything down there. Coming into the motor room again stop, look, listen and smell. A lot of electrical equipment in there. So your sense of smell sometimes might be ... if something was burning or something. I go down into the lower motor room, which is a bit of a confined area, have a quick look around, nothing out of the ordinary there again, no fire hazards, nothing at all.

Come back up onto the flats, have a look in the, what was known as the chief elects cage, which is an area where things were stored. There was a lot of heavy electrical equipment around there too. Coming back into the main part where the main power switchboard or where the two watch keepers would place themselves while at sea, have a look to see if there was any VP errors, if there was any CP errors, there is indications in there that would give me that. The state of the fans, the temperature in there too and also that if we were on shore ... for instance if we were on the box then that would again give an indication what we were discharging. On shore power then there should be no discharge at all. Coming forward to a thing called an LP battery as well too and have a look at that to make sure there was no discharge or charge into the LP battery and that would be an indication as well too. Beginning to move aft towards bulkhead 103, towards bulkhead 103 there is an EMR or electrical maintenance space that was usually unlocked and I could have a look in there to make sure nothing untoward in there. And there was a space below, just aft of the ... sorry just forward of bulkhead 103 that was ... have a look as well too. Coming through the

616

Lieutenant (N) Marr

Examination-in-chief

bulkhead into 103 or into the after end should I say again stop, look, listen, best way through. There was a hatch right basically at my feet, went down into the glance space, ideal space for there to be a flood or for water to seep in slowly. So actually I would climb on the ladder in there and have a look through, again a bit of a confined space. Come back up have a look in the inner mess. Walk aft, there is engineering storage, generally they were secured, but there were sight holes where I could look down into it, it is a very tiny space. Have a look to see if there was anything untoward down there. Walk all my way aft, look at the portable, look at all the bunks, see if there is anyone in there and all the way back to the very back of the very aft of the ... in the after ends where are those steering equipments or steering gear and gear for the after planes too, an ideal place for leaks as well too. That would complete my rounds. I would then walk forward and that would be my rounds.

Q. Again that would take approximately 45 minutes or so? A. Approximately, yes.

Q. Were there any other particular things you had to look for while doing your rounds that night of December 19th? A. On that particular evening, sir, I recall there was ... I had been handed over some form of a leak, its exact nature I don't recall. But I do believe it was hydraulic in nature and it was definitely down in the AMS and that required not constant attention but regular attention by the officer of the day and other members of the duty watch.

Q. And at a minimum how often would you have to do a set of rounds like that? A. I am required to do a set of rounds once every four hours. However with the leak or the problem I did them more often.

Q. You mentioned the mess dinner that night as well. Did guests arrive on board that evening?
A. That is correct, sir; yes. Lieutenant-Commander

617

Lieutenant(N) Marr

Examination-in-chief

Marsaw informed me during the day that he intended to bring guests down before and after the mess dinner.

Q. Did that in fact happen? A. That is correct, sir, it did.

Q. What time did the first round of guests arrive? A. This is after the mess dinner, sir?

Q. Before and after? A. I don't recall before the mess dinner. After the mess dinner the second... the first set ... the guests would have arrive sometime between midnight and midnight forty-five.

Q. And approximately how many people were in the wardroom of the OJIBWA shortly after midnight? A. Approximately 10, sir.

Q. Ten. Were there ever occasions to have more than 10 or was 10 the maximum number? A. Not that I recall, sir.

Q. Did you have occasion to enter the wardroom at all on the OJIBWA the early hours of 20 December '91? A. Yes, sir, I did.

Q. And were you in there throughout that period? A. I was, throughout with the exception of using the heads or doing rounds, sir.

Q. So you would be there some times, other times you would be doing the rounds that you just described? A. That is correct, sir.

Q. And that would take approximately 45 minutes? A. That is correct, sir.

Q. Do you know Lieutenant Kelk? A. I do, sir.

618

Lieutenant(N) Marr

Examination-in-chief

Q. How do you know him? A. He and I served in OJIBWA. He was the operations officer.

Q. Was he the other watch leader as well while you were watch leader? A. That is correct, sir. Yes, he was.

Q. Did you have an occasion to see him during the early hours of the 20th December '91?
A. Yes, sir. He was on board.

Q. In the wardroom? A. Yes, sir.

Q. And what can you state about his condition upon first viewing him? A. He was drunk and after some time being on board he passed out.

Q. How much longer after you first saw him, did you then see him passed out? A. Approximately half an hour, sir.

Q. So ballparking the time, about what time would Kelk have passed out? A. Between midnight forty-five and 0115, sir.

Q. Can you recall - reference to an exhibit outlining the wardroom of the OJIBWA, this is Exhibit "J" that I am showing you - where Kelk had passed out?
A. Yes, sir. Here.

Q. That would be bed settee number 1 on Exhibit "J"? A. ...

DEFENDING OFFICER: I didn't see the area on the bed settee.

WITNESS: About here, sir.

PROSECUTOR: In between the word "bed" and the word "settee".

WITNESS: Approximately in that area, sir.

619

Lieutenant(N) Marr

Examination-in-chief

PROSECUTOR:

Q. How long is this bed settee approximately? A. It is long enough for a chap my size to lie down on.

Q. Can you discuss the incidents as they unfolded as you observed them in relation to Kelk that morning? A. Yes, sir. As I say all the guests had arrived at approximately between midnight and midnight forty-five. Shortly thereafter Lieutenant Kelk passed out. He was lying on his side in the foetal position with his back to the settee, if you will, or the bulk-head. The mood at that time was good natured and jovial. As soon as the guests came on board the bar was opened and there was beer brought out. And the stereo was switched on at a moderate level. At some point, approximately 20 to 30 minutes later I noted - it was time for a set of rounds - I also noted that one of the guests and I believe it was Lieutenant[N] Kavanagh had gone to use the heads and had not returned. I went to check on him. He was in fact in the heads. He was OK. I coaxed him back to the wardroom. As I passed the wardroom to proceed on my rounds I noted that Lieutenant[N] Muir who was the squadron supply officer at the time had passed out or was asleep sitting up near the edge of the wardroom. Then I proceeded on my rounds. When I returned I noted that someone had taken some green tape, green gun tape that is, and had taped Lieutenant[N] Muir's legs, not together but just taped them.

Q. At that point what was Kelk's state of dress? A. He was, for all intents and purposes, fully clothed. However the position in which he was lying, the side of his right hip was exposed because his shirt had come loose from the trousers. So his right hip and the lower part of his side of his back had become exposed.

620

Lieutenant(N) Marr

Examination-in-chief

Q. And can you describe next the events as they unfolded with regard to Kelk? A. After some time Lieutenant-Commander Marsaw who was sitting near Lieutenant Kelk's head shifted positions to the other side of Lieutenant Kelk. He had mass procured some markers and began drawing on Lieutenant Kelk's side, or side of his hip, should I say.

Q. And again with regard to Exhibit "J" can you identify where Lieutenant-Commander Marsaw was situated? A. Yes. Here.

Q. He would be on bed settee number 1 as well? A. Yes, that is right.

Q. Sharing the same settee as Kelk. And you stated that you observed Lieutenant-Commander Marsaw writing on Kelk with markers? A. That is correct, sir.

Q. Do you recall what he wrote on Kelk at this time? A. He proceeded to draw a facsimile of the French national flag using a blue and a red pen, and proceeded to write things like "I love France", on it.

Q. What is the nationality of Lieutenant Kelk? A. Lieutenant Kelk is British, sir.

Q. And what part of his anatomy was being written on by Lieutenant-Commander Marsaw at this time? A. It would be the side of his lower back.

Q. After you observed this, what happened next with regard to Lieutenant Kelk? A. I then shortly after proceeded on to use the heads myself. Upon my return I noted that his shirt had been either moved or had pulled its way up and Lieutenant-Commander Marsaw was continuing to write on his back and on his side. And there was also something written on his forehead too. I also noted too that his trousers - I wouldn't say they had been pulled, they may have just

621

Lieutenant(N) Marr

Examination-in-chief

worked they way down - were now in such a way that the crack of his buttocks was exposed.

Q. Do you know how, from personal observations, his pants got down to that location? A. No, sir, I do not.

Q. And was there any other individuals that you observed at this point in time or up to it writing on Kelk apart from Lieutenant-Commander Marsaw? A. Not that I recall, sir.

Q. So again I interrupted you. You were discussing that Kelk's pants had gone down? A. Yes. I also noted that there was a cigar tube was nestling if you will between the waistband of the trousers and the small of his back. After about another half an hour I proceeded on another set of rounds so to check, including the AMS. I would have been gone approximately 45 minutes.

Q. Prior to leaving can you comment on Lieutenant[N] Muir's condition before you left to do that set of rounds? A. Lieutenant[N] Muir was still passed out. There was still some gun tape on his legs and there was a Burberry, his shirt may have been undone slightly and there was a Burberry covering from his waist down to his shoes.

Q. Was he in that condition at the same time that you observe Lieutenant-Commander Marsaw writing on Lieutenant Kelk? A. As best as I can recall, yes.

Q. Then you stated you go off and do the set of rounds you have previously described? A. That is correct, sir.

Q. How long would you have left the wardroom of the OJIBWA at that time? A. I would have been gone approximately forty-five minutes.

622

Lieutenant(N) Marr

Examination-in-chief

Q. Do you have any idea based on your personal observations what did or did not happen in the wardroom during those next 45 minutes? A. No, sir; I do not.

Q. Upon reentering the wardroom, can you describe the condition of Lieutenant Kelk? A. Lieutenant Kelk, his shirt was now up around ... just underneath his shoulders and there was still writing on his back obviously and then on the side of his back and on his head and still some on his forehead and the cigar tube was still sitting between the waistband of his trousers and the small of his back and he was still passed out.

Q. Was Lieutenant-Commander Marsaw in the room at that time? A. Yes, sir; he was.

Q. What did you observe happen upon your re-arrival back into the wardroom? A. Upon my re-arrival back in the wardroom I noted that someone had taken some green gun tape and had taped some around Lieutenant[N] Muir's head leaving his nostrils and his mouth still exposed. Also the music was a bit louder. That is all I recall, sir.

Q. Do you recall anybody else apart from Muir, Kelk and Marsaw being in the wardroom at that time? A. I recall Lieutenant-Commander Craven still being there and Lieutenant-Commander Bush still being there, sir.

Q. Do you know Lieutenant[N] Hart, Dickinson and Elford? A. I know them, sir, yes.

Q. Do you know if they were present? A. Not that I can recall, sir.

Q. And what was the position of Kelk's pants at that point? A. They were still in such a position to reveal the crack of his buttocks, sir.

623

Lieutenant(N) Marr

Examination-in-chief

Q. And did you observe the cigar tube that you had previously seen at that time? A. I did, sir. It was still ... or appeared still to be in the same position.

Q. What did you observe after this?
A. There was ... the drinking continued, the smoking continued, the music, the whole shot and at approximately 5:00 to 5:30 everyone either left individually or went as a group, how they went I don't recall.

Q. What about Kelk and Muir? A. They were both still passed out.

Q. Do you know who the duty roundsman was that night or morning? A. No, sir, I don't.

Q. Do you know if the duty roundsman ever entered the wardroom? A. Not that I recall, sir; no.

Q. Did you ever discussed what happened in the wardroom with the duty roundsman that evening?
A. Not that I recall, sir; no.

Q. Discuss it with any officers coming on shift early next morning, Lieutenant[N] Soper, Lieutenant[N] Kohli? A. Not that I recall, sir; no.

Q. How would you describe Lieutenant-Commander Marsaw's state of sobriety on the 20th of December '91? A. He was capable of operating a lighter and smoking a cigarette without burning himself or anyone else. He was capable of operating the pull top on a beer can and drinking beer and he was capable of writing and talking coherently.

Q. Did you ever have occasion to discuss the evening or the morning of 20 December '91 with Lieutenant-Commander Marsaw? A. It was mentioned in a phone call after I left the country, sir.

624

12th voir dire

Q. And what date did that phone call occur?

A. That occurred, sir, on the 2nd of January 1994.

Q. At this time I would like to ask you to tell the court the details of that telephone conversation you did have with Lieutenant-Commander Marsaw?

A. ...

DEFENDING OFFICER: Mr Judge Advocate, at this point, as the witness prepares to obviously relate a conversation, I would think it would be in order to ascertain the admissibility of the proposed evidence.

JUDGE ADVOCATE: Very well.

Mr President and Members of the Court, I would ask you to withdraw from the courtroom.

THE PRESIDENT AND MEMBERS OF THE COURT RETIRE.

JUDGE ADVOCATE: You may be seated. This court is now sitting in a **voir dire**.

TRIAL WITHIN A TRIAL

PROSECUTOR: Feel free to have a glass of water, Lieutenant[N] Marr.

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625

Trial within a trial

Lieutenant(N) Marr

Examination-in-chief

FIRST WITNESS) Lieutenant(N) K.M.
FOR THE) Marr.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Lieutenant[N] Marr, you mentioned you had had an opportunity to discuss some aspect of the mess dinner with Lieutenant-Commander Marsaw during a telephone call on the 2nd of January 1994. Prior to that phone call when was the last time you ever spoke to Lieutenant-Commander Marsaw? A. It was the morning of my departure from HMCS OJIBWA in June of 1992.

Q. Had you had any opportunity to discuss anything with him between June of '92, after your departure and before the 2nd of January 1994? A. No, sir.

Q. I wonder if you can relive that conversation you had with Lieutenant-Commander Marsaw over the telephone for the court please starting from the moment when you pick up the phone and he is on the other end? A. I picked up the phone and answered that it was the officer of the day of HMS UPHOLDER. He said, "Hello, it is Dean Marsaw here". I think I replied, "Ho". He reported that he had called to congratulate me on becoming or being drafted as First Lieutenant of HMS UPHOLDER and he hoped that I get a perisher recommend out of this. There was a bit of a pregnant pause and then he asked me, did I know there was an investigation of some description ongoing that concerned him, I replied, "Yes." Again there was a pregnant pause. He asked me if I knew any of the details of the investigation. I said I knew essentially where the investigation was going but not the details. I said that, did he know that I had been officer of the day on that particular evening. He replied that, no ... he put some surprise and replied, no, he thought it was

626

Trial within a trial

Lieutenant(N) Marr

Cross-examination

Lieutenant[N] Soper. He then said to me, did I see him do anything bad on that particular evening.

Q. Which particular evening are you talking about? A. The evening of the mess dinner. I had heard about the cigar tube incident and assumed that is what he meant. So I replied, "No." He sounded very relieved and said, "Well thank god because I don't recall anything about that evening." There was uncomfortable silence and the conversation steered away from that.

PROSECUTOR: Thank you, Lieutenant[N] Marr. Those are my questions for the purpose of this **voir dire**.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Did you make notes of that conversation?
A. No, sir, I didn't.

Q. So I take that those are not the exact words that were spoken by Lieutenant-Commander Marsaw?
A. Those are the words, sir, as best as I can recall them, sir.

Q. When you talk about "pregnant pause" what do you mean by that? A. I mean an uncomfortable silence, sir.

Q. Do you recall speaking to the military police about this investigation? A. I do, sir.

Q. And if I suggested to you you indicated to them that Lieutenant-Commander Marsaw had not asked any pointed questions, does that make sense? A. He didn't ask any pointed questions about the investigation, sir.

627

Trial within a trial

Lieutenant (N) Marr

Cross-examination

Q. When he called you? A. When he called me; yes, sir.

Q. But here though you referred to the investigation. So you said he asked you if you knew about the investigation? A. That is correct, sir; yes.

Q. How did you know? Obviously you did know? A. I did, sir; yes. Lieutenant-Commander Virgin had called me prior to Lieutenant-Commander Marsaw's phone call, sir.

Q. So you had found out from an officer in the sub squadron here in Canada that there was such an investigation? A. That is correct, sir.

Q. Because you had been posted in England since ...? A. Actually since July of '92.

Q. July of '92 you were in England, never step foot back again here in Halifax? A. That is correct, sir.

Q. And in '94, early January '94 you got a call from Lieutenant-Commander Marsaw? A. That is correct, sir.

Q. And you were aware of the investigation?
A. Yes, sir, I was.

Q. What was his tone on the phone?
A. Initially it was jovial, good natured and when he asked me had I seen anything bad and I replied "No" he sounded very relieved.

Q. Had you been interviewed by the military police at that time? A. No, sir, I hadn't.

Q. You had not. Did he say anything to you like of a nature as to what you should tell the mili-

628

Trial within a trial

Lieutenant(N) Marr

Cross-examination

tary police or anything of that nature? A. No, sir. It wasn't until the second telephone call that he asked me if the military police had interviewed me.

Q. Yes. And you did tell the military police that you didn't see Lieutenant-Commander Marsaw doing anything wrong, is that correct? A. Yes, sir.

Q. The words that "Thank God, I don't recall anything of that evening" are those the very words he pronounced? A. Yes, sir. That particular phrase sticks on my mind.

Q. Although the way you described him he didn't appear all that drunk that evening? A. That is correct, sir.

Q. And in your opinion, would you state that he wasn't drunk according to the description you have made of him, that he actually was not drunk that evening? A. No, sir. I would not say he was not drunk but he was coherent.

Q. Let us say that he was not sober but he was not grossly intoxicated? A. That is correct, sir.

Q. That is correct. You said the beginning of the conversation was cordial. Did it change? A. It did as soon as we got onto the subject of the investigation, sir; yes. And the time frame was very short indeed.

Q. The time frame of the conversation, that is? A. It was very short, yes.

Q. What change took place? A. As soon as we began to talk about the investigation, sir.

Q. Yes, but what actual change? A. He went from being jovial to relieved.

629

Trial within a trial

Lieutenant(N) Marr

Cross-examination

Q. Which doesn't go against the grain of being jovial either? A. I am sorry, sir, I don't understand.

Q. One can be relieved and yet remain jovial, would you agree with that? A. There was a marked change, sir.

Q. He didn't become aggressive? A. Most certainly not, sir.

Q. And is it customary for people in the Navy to extend congratulation on promotion, appointments and sort of that nature? A. Yes, sir.

DEFENDING OFFICER: That will be my cross-examination for the purpose of this **voir dire**.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You mentioned Lieutenant-Commander Marsaw made a second phone call? A. That is correct, sir.

Q. How many times did he phone you in England about the investigation? A. He called me a total of three times, sir.

Q. As a consequence of him repeatedly phoning you, did you do anything? A. I did, sir. After the second call, sir, I called my Canadian superior, Captain[N] Davie who was the CDLS Naval Adviser and advised him about the phone calls. Captain[N] Davie stated that he was aware of an investigation and that he would contact the submarine squadron commander to see if something could be done, sir.

Q. Why would you phone Captain[N] Davie?
A. I was very uncomfortable about the phone calls. I was aware of the investigation and although not aware

630

Trial within a trial

Lieutenant(N) Marr

Re-examination

of much legal things, knew that it would be an exceptionally good idea to talk to him about it.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, if I may, before the witness is excused anyway for now in the **voir dire**, I would like confirmation that this indeed completes what the prosecution intends to adduce.

JUDGE ADVOCATE: You mean from this witness?

DEFENDING OFFICER: That is right.

JUDGE ADVOCATE: I mean he has terminated his re-examination.

DEFENDING OFFICER: Reference has been made to other calls. I just want to be sure that before we argue this that this is the extent of the evidence.

JUDGE ADVOCATE: First of all, have you finished with this witness?

PROSECUTOR: I have, sir.

JUDGE ADVOCATE: Thank you. So Lieutenant, you may withdraw from the courtroom.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Now, the second question. Do you wish to call other evidence in this **voir dire**?

PROSECUTOR: No, sir.

JUDGE ADVOCATE: Thank you.

631

Trial within a trial

Prosecutor

Address

Lieutenant-Colonel Couture, do you wish to call evidence in the **voir dire**?

DEFENDING OFFICER: In light of your previous ruling as to the level of evidence I elect not to call evidence.

JUDGE ADVOCATE: Thank you. Are you ready to argue Major Abbott?

PROSECUTOR: I am, Mr Judge Advocate.

I believe this statement is very relevant to the trial. It goes to the issues of intent and credibility and, possibility in conjunction with other evidence I would call, the issue of consciousness and guilt. With regard to both intent and credibility however we have the statement allegedly made by the accused to a subordinate that he has no recollection of the night of the mess dinner. This is relevant for the same reasons the Craven's statement was relevant.

And as we know in the other **voir dire**s the accused has stated that he has a very clear recollection of that night. He said that under oath. Should he take the stand and give the same story again then this statement he allegedly gave to Marr would be very useful in attacking his credibility.

Thank you.

JUDGE ADVOCATE: Thank you. Mr Defending Officer.

DEFENDING OFFICER: My objection basically stems of ... for the same reason - and I say that most respectfully, not that I want you to believe that I am reassessing your first decision. There was a dual purpose in this, the defence had to ascertain the exact nature of the comments, and with all respect I would submit that it is lacking in terms of relevancy as to the commission of the offence and I would suggest and I

632

Trial within a trial

Defending Officer

Address

would submit that if any part of those quotes from the witness are introduced that of course all of them should be, should you decide that they are relevant to the issue. I have no further comments.

JUDGE ADVOCATE: Thank you. So your objection is denied for the same reasons I expressed when I denied your objection on the statements made by Lieutenant-Commander Craven.

TRIAL WITHIN A TRIAL IS TERMINATED

So before going back to the main trial we will take a short break, 10 minutes.

ADJOURNMENT: At 1525 hours, 3 October 1995, the court adjourns.

REASSEMBLY: At 1535 hours, 3 October 1995, the court reassembles and the accused is before it.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Mr President and Members of the Court, in your absence I ruled that some evidence was admissible and you will now hear it in the main trial.

633

Lieutenant(N) Marr

Examination-in-chief

FIFTH WITNESS) Lieutenant(N) K.M. Marr.
FOR THE)
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Lieutenant[N] Marr, I believe before the members left I had asked you whether you had ever discussed the night of the mess dinner with Lieutenant-Commander Marsaw and you mentioned you had a phone call with him on 2nd of January '94? A. That is correct, sir.

Q. Where were you on the 2nd of January '94?
A. I was officer of the day in HMS UPHOLDER in the HMMB Dockyard in Plymouth in England.

Q. Can you relive that conversation for the members of the court beginning from the moment that you picked up the telephone and discovered Lieutenant-Commander Marsaw was on the other end? A. I picked up the phone and he identified himself as, "Hello, this is Dean Marsaw" and I replied "Oh" I was rather surprised. He reported that he called up to congratulate me on becoming First Lieutenant of UPHOLDER, on being appointed as First Lieutenant, and hope that I would get a perisher recommend out of it. There was a pregnant pause or uncomfortable silence. He then asked me if I was aware of an investigation that was ongoing or had just started in Canada. I reported that I had. Again there was a pause. He asked me if I knew the details of the investigation. I replied that I didn't know the details but I knew some of the things the investigation was focusing on. He then said he didn't realize that I had been officer of the day on the evening of the mess dinner. He had thought it was Lieutenant[N] Soper. I reported that I had. He then asked me if I saw anything bad that evening. I assumed he was referring to the cigar tube. I reported that I had not. He then sounded very relieved and said, "Well that is good

634

Lieutenant(N) Marr

Examination-in-chief

because I do not recall anything that happened that evening." The conversation then steered away from that topic.

Q. So he stated that he didn't have any ... he didn't recall anything of that night? A. That is correct, sir.

Q. I would like to switch now and ask you some questions about your experience as the NAVO and a watch leader on the OJIBWA. I again note that you were the officer of the watch and also the navigator under Lieutenant-Commander Marsaw's command? A. That is correct, sir.

Q. How would you describe Lieutenant-Commander Marsaw's leadership style? A. I would describe it as leadership by intimidation.

Q. How would you describe the atmosphere in the control room when he was present? A. It was tense and uncomfortable.

Q. Why do you use the adjective "intimidation"? A. Because his methods and the way his orders were delivered was a ramification that often were of an intimidating manner.

Q. Did you feel intimidated? A. I did, sir.

Q. In what ways would Lieutenant-Commander Marsaw be intimidating towards you? A. He would raise his voice for indiscretions. He used to breathe rather heavily and almost snort through his nose.

Q. How would he do that and where would you be situated in relation to him when he would do that sort of thing? A. In close proximity.

Q. What sort of words would he use towards you when he raised his voice? A. He would use swear

635

Lieutenant(N) Marr

Examination-in-chief

words such as "fuck" and "bastard". He would occasionally use the terms "incompetence" and "incompetent" and "idiot".

Q. What were those words directed to or who were they directed to, "idiot" and "incompetent"?

A. Usually to me and sometimes to other members of the watch.

Q. How frequently would he refer to you with the words "idiot" or "incompetent"? A. About once every couple of watches.

Q. How many watches would you do in the run of a 24-hour period? A. Two six-hour watches, sir.

Q. So on an average once every two watches that would then once on average every day? A. Once every day I have been certainly, sir.

Q. Would this occur in the control room? A. Sometimes in the control room or sometimes in his cabin.

Q. Would your subordinates be present in the control room when he would refer to you in those ways of "idiot" and "incompetent"? A. Yes, sir, they were.

Q. Based on your personal observations can you describe the reaction of your subordinates in the control room upon Lieutenant-Commander Marsaw's presence? A. As soon as Lieutenant-Commander Marsaw entered the control room the watch noticeably stiffened up. Any jovial conversation or banter that was occurring at the time would cease immediately and any further conversation would be done by whisper. There was an air of tension in the control room.

Q. Why would they be done in whispers? A. Afraid of the captain overhearing something that may be incorrect.

636

Lieutenant(N) Marr

Examination-in-chief

Q. How did you feel as an officer of the watch when Lieutenant-Commander Marsaw entered the control room? A. I myself would stiffen up and I was concerned not only of my primary function as the safety of the submarine but also trying to look out for things that might be out of place that either myself or a member of my watch had done so as not to incur a dressing down.

Q. Did his leadership style influence the way you performed your work? A. It did, sir. For instance his style at times was to come into the control room and either switch various pieces of equipment off or change the settings on various pieces of equipment ...

Q. Such as ... what types of equipment? A. The underwater telephone which is situated ... or was situated in OJIBWA on the starboard side aft of the control room there is ...

Q. Sorry what is the purpose of an underwater telephone? A. That telephone is our primary means of communication between ... you can use it to talk to surface ships equipped with sonar equipment or with other submarines. It is almost, if you will, like underwater telephone, communications device. Also when it is not being used, it is, if you will, a very very good sensor because you have raw acoustic noise, if you will, entering through transducers and straight into the aloud speaker into the control room.

Q. As a safety measure, is that usually left on then? A. Certainly, sir, it is. It is an important safety measure.

Q. So this would be turned off at times? A. Not necessarily turned off, sir, but there is a switch on there which controls gain and sometimes that would be turned right down.

637

Lieutenant (N) Marr

Examination-in-chief

Q. How else might his leadership style influence the way you performed your work? A. There were times, that is with all naval units at sea, you are required to have a DR and AP.

Q. What is a DR and an AP? A. "DR" is a dead reckoning position which is taken from a fix which from the fix will show, based on your course and speed where the ship is going ... or where the submarine is going to be at a given time. And an AP is the same except that it takes into account any set or current that may exist. That has to be current and also has to show the future of where the unit is going to be. It is generally based on the fixing interval, how often we're fixing, from a fix you will have ... if we're fixing once every half-hour, you will have an AP and a DR that extends an hour from the fix time. So there always has to be one that is current and one that shows where the submarine is going to be at a given time. That also has to be on the chart. It is an absolute must of safety. There were times, for instance if I was taking my turn on the after periscope and when I am on after periscope my primary function is to look through it, I can't take my eyes off it, I can only hear what is going on in the control room and I have to rely on my watch officers and members of the watch to report to me. However I was aware that at times that certain part 3 officers that I have at the plotting the fix and forgetting to plot the DR and the AP which is easily controllable if I or my other experienced watch officer is around but sometimes ... we weren't in this case. There was an occasion I recall when the captain entered the control room. I had known that one of those officers who had a habit of failing to put the DR and AP, hadn't put one on. He immediately put one on that wasn't necessarily correct but very close to the truth. So when the captain looked at the chart he was satisfied that it was correct and as soon as he departed the control room the error if any was immediately fixed.

638

Lieutenant (N) Marr

Examination-in-chief

Q. Why would you bother faking an AP or a DR if you didn't know what it was? A. Because if there wasn't a current one or an up to date one on the chart then there would end up being a lot of yelling in the control room from the captain.

Q. Is there other ways in which his leadership style influenced the way you did your job?

A. There was an occasion during the European trip in early of '92 when myself and the other watch leader, Lieutenant Kelk, were invited into the wardroom by the captain for a discussion on our watch leader technique.

The XO was invited to take the control of the submarine whilst this conversation was going on. He had informed us that our own particular leadership technique, if you will in the control room whilst on watch, wasn't what he expected and he wished us to yell more and use our voice, be a bit more aggressive from a vocal point of view in the control room. We were invited to do so. And that was essentially what he asked us to do.

Q. Is that your style? A. No, sir, it is not.

Q. Is that the one you use now as XO?
A. No, sir, it is not.

Q. Did you ever had other occasion to observe Lieutenant Kelk in the control room when Marsaw was present and contrast that to when he wasn't?

A. Yes, sir. When I first joined the OJIBWA I was the second officer of the watch under Lieutenant Kelk. Lieutenant Kelk is by his nature a nervous person to begin with however whenever the captain entered the control room, if I can use an analogy, a cat on a hot tin roof. He immediately stiffened up and became very tense and very jittery. Whereas when the captain wasn't in the control room he was a lot calmer and more in control.

639

Lieutenant(N) Marr

Examination-in-chief

Q. What about Kelk's vocal presence?

A. Lieutenant Kelk would raise his voice a lot when the captain was in the control room.

Q. Did the lieutenant-commander's leadership style help you make less mistakes when you were officer of the watch? A. No, sir. I made more mistakes as an officer of the watch.

Q. Why? A. Because of the threat of, I will use the term, "a bollocking" was ever present.

Q. And this at times would include being referred to as an idiot or incompetent? A. Yes, sir.

Q. Can you comment on your own personal confidence level upon leaving the OJIBWA in June of '92? A. Yes, sir. When I departed OJIBWA in June of '92 my confidence level was extremely low level. I think the lowest that it has ever been. And my interest in submarines was again at very low level. I think what was keeping me going was the fact that I was getting married and being that I was going off to the United Kingdom on an exchange posting which I was looking forward to that.

Q. Do you recall saying goodbye to Lieutenant-Commander Marsaw on the OJIBWA before you left? A. I do, sir. It was early in the morning, before 6 o'clock. I was going to be departing the submarine via boat transfer with SOCT students which were other officers. There had been a delay in the boat transfer and I was waiting around with the intention of saying goodbye to the captain prior to going up the ladder going to the casing for the boat transfer. I then received word that they were waiting for the passengers to transfer and in this case I was one of them and we were required up on the casing. I went to look for the captain. He was in the flats by the wardroom pantry making himself a cup of coffee. I said, "Sir, I am leaving. It has been a pleasure." And he looked at me. I think he didn't realize that I

640

Lieutenant(N) Marr

Examination-in-chief

was departing that day. And he informed me that ... he said that England would be an awful challenge for me.

Q. What was the tone of his voice when he said that? A. I felt there was a hint of sarcasm in his voice.

Q. Did you see Lieutenant-Commander Marsaw again before you left for England? A. I did, sir, on one occasion. When I departed OJIBWA it was understood that they would be at sea, deployed. They would not return until I had left for England which was a month past this event. The submarine returned early and after I got married there was a series of administrative work I had done at the squadron with respect to my wife and I was in civilian clothes. I was walking back down Jetty C. He was walking towards me in uniform. I said hello to him. He sort of look at me, didn't say anything, continued on walking.

Q. And since those last two encounters where he didn't say hello to you and he suggested England would be a challenge for you, did he ever phone you at any time when you were in England between when you left Canada and the 2nd of January '94? A. No, sir, he did not.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. How many months did you serve under Lieutenant-Commander Marsaw? A. Thirteen months, sir.

Q. You explained what a round was all about on board the boat. You stated that it takes 45 minutes. If I suggested to you that it can take less time than that, like 20 or 30 minutes or would 45 be a

641

Lieutenant (N) Marr

Cross-examination

longer time? A. It would depend on how thorough you were, sir.

Q. But it can be done relatively thoroughly or I mean with sense in 20 minutes depending on how one applies itself to it? A. It could be done incorrectly in about 20, 25 minutes, sir, yes. To do it properly one would need a minimum of 30 minutes.

Q. What was the problem you had? You referred to hydraulic problem and all that. What was it relating to? A. I don't recall precisely but I believe it was a problem with one of the pumps, sir. Maybe a cock or a relief or something.

Q. It wouldn't have had to do with water or power, is that correct? A. Not that I recall, sir; no.

Q. Is that correct that when you are in a jetty like this you are on shore power? A. Yes, sir.

Q. So lots of the mechanism on board the boat wouldn't be in use? A. That is correct, sir.

Q. So you cannot recall what the problem was? A. Except to say that I believe it was hydraulics and it was centred around the AMS, ACS, sir.

Q. Isn't the SOP at night like this and in home port if you identify something like this you have it identified and it is then corrected the next day by the appropriate crew? A. Yes, sir; it should.

Q. I take there was no great emergency that ... I mean if it had been anything of any urgent or dangerous nature you would recall what it is?
A. Absolutely, sir.

Q. So therefore whatever the problem may have been was not one of a great magnitude? A. I disagree with that, sir. It was a nagging problem and

642

Lieutenant(N) Marr

Cross-examination

I had had an occasion a couple of months previous where whilst on the lift in Dartmouth a roundsman had accidentally kicked a cock on one of the hydraulic pumps open and the hydraulic system had slowly flattened and drained itself into the bilge creating a fire hazard and that wasn't a problem of great magnitude but that required my constant attention too.

Q. It is your testimony today that if anything went wrong or anything wrong was done the night of the 19 December 1991, it was done by Lieutenant-Commander Marsaw? A. That is to my recollection, sir.

Q. You didn't see anyone putting tapes on. You didn't see anyone but Lieutenant-Commander Marsaw doing some writing on people? A. Sir, I didn't see anyone but Lieutenant-Commander Marsaw doing any writing. As for the tape I don't recall who was involved in that, sir.

Q. So you don't recall who taped people. You are sober yourself I take? A. That is right, sir; yes.

Q. It appears that every time something happens you are conveniently not around? A. Yes, sir.

Q. Can you comment on that? A. No, sir, I can't.

Q. You don't recall Lieutenant[N] Elford being there? A. No, sir, I don't.

Q. You don't recall Lieutenant[N] Hart being there? A. No, sir, I don't.

Q. You don't recall Lieutenant[N] Dickinson being there? A. No, sir, I don't.

Q. You vaguely or maybe recall Lieutenant Craven being there? A. I do recall Lieutenant-Commander Craven being there, sir.

643

Lieutenant (N) Marr

Cross-examination

Q. What time did he leave? A. Who is that, sir?

Q. Craven? A. I do not recall, sir.

Q. What time did Lieutenant-Commander Marsaw leave the wardroom? A. I don't recall. I would suggest ... I think it was early in the morning about 5ish.

Q. If I suggested to you that Lieutenant-Commander Marsaw might have left as early as 1:00, 1:30 in the morning, what would you say to that? A. I would say it was incorrect, sir, because I recall him being there on my return from my second set of rounds.

Q. So anybody else claiming that Lieutenant-Commander Marsaw was gone at 1:30 or 2 o'clock even would be in the error? A. That is correct, sir.

Q. You were sober. Try to put your mind back to it and tell us what time Lieutenant-Commander Marsaw left? A. As best as I can recall, sir, about 5:00 in the morning.

Q. What did you do when you finished your shift in the morning? Did you go home to sleep or something or what? A. No, sir. I believe I continued with some work in the squadron and I was also preparing to go on leave, sir.

Q. If I suggested to you that Lieutenant-Commander Marsaw was on sub ... in the squadron and sub as his functions required it all day on Friday the 20th, would that ring a bell? A. I don't recall, sir, no.

Q. You don't recall that. Do you recall the state of intoxication of Lieutenant-Commander Craven? A. No, sir, I don't.

644

Lieutenant(N) Marr

Cross-examination

Q. You said that Lieutenant-Commander Bush was there? A. Yes, sir.

Q. Do you recall his state of intoxication or sobriety? A. Not precisely, sir; no.

Q. How many times approximately did you go out for rounds? A. I departed twice for rounds, sir, and once to use the heads, sir.

Q. So when you used the heads it would have been very brief I suppose like ... nothing compared to doing a 45-minute round? A. Sir, I honestly can't remember what I did in the heads.

Q. So one time would have been at? The first round would have been at what time? A. Approximately between 1:30 ... 1:50, 1:30 through to 2:00, 2:15.

Q. And the second round would have been at? A. Approximately 3:30 through to 4:15, 4:30, sir.

Q. You stated that you normally do those rounds every four hours, or so? A. That is correct, sir.

Q. You also added that of course that night because of your hydraulic problem you did it more often. Would it not have been the more logical thing to do just to go and check at the hydraulic problem rather than doing a complete tour of the sub? A. It would have been, sir. However I wasn't particularly comfortable in the control room ... in the wardroom, sir.

Q. Why? A. Quite frankly because the captain was there, sir.

Q. And what was he doing that bothered you that much? A. Just his general state, sir.

645

Lieutenant(N) Marr

Cross-examination

Q. So you don't like him very much, do you?

A. That is not true, sir. Just as captain I wasn't comfortable in his presence, sir.

Q. So you tried to stay away as long as possible? A. I departed when I thought it was appropriate, sir, and when I felt uncomfortable.

Q. So that you wouldn't see wrong things happening, that sort of thing? A. I didn't anticipate any wrong thing, sir.

Q. How about this French flag, how sure are you of that? A. I am sure of it, sir.

Q. So if so many witnesses indicated that there was no such a flag you would still maintain your story that there was a drawing of a flag? A. Yes, sir.

Q. If I ask you exactly who was in the wardroom after completing your first round? A. The people that I can put my hand on my heart and say were there, sir, was Captain[N] Plante, Lieutenant-Commander Marsaw, Lieutenant Kelk, Lieutenant-Commander Bush, Lieutenant-Commander Craven, and that is all I can remember, sir. Lieutenant[N] Muir, excuse me.

Q. Sorry? A. Lieutenant[N] Muir, sir.

Q. Oh, Muir. And you would say that Kelk would have passed out as early as ... like within 30 minutes of his arrival on board. It would have been at approximately 12:30? A. I am not exactly sure when everyone arrived but a half an hour after he arrived approximately; yes, sir.

Q. What time was it when you saw Lieutenant-Commander Marsaw doing some painting of a flag on Kelk?

A. It was after the first set of rounds, sir, so about 2:45, 3 o'clock in the morning, sir.

646

Lieutenant(N) Marr

Cross-examination

Q. Is that correct that you invited Leading Seaman Pilon to come and look at the "mess" in the wardroom? A. I don't recall, sir, no.

Q. You don't recall that at all. Like you don't recall seeing Pilon at all in the wardroom that night? A. No, sir.

Q. Do you know who Pilon is? A. I do, sir.

Q. Do you recall whether he was working that night? A. No, sir, I don't.

Q. You don't recall that. Did you wake up Muir and Kelk at about 7 o'clock in the morning? A. I attempted to, sir; yes.

Q. Successfully so? A. No, sir.

Q. Nonetheless by 7:30 they were gone?
A. I think they were gone, sir; yes.

Q. You think or you know? Are you testifying that they were gone or they might have been? A. I am testifying they might have been gone, sir.

Q. Do you recall writing a statement, a written statement to the military police about this whole incident? A. I did, sir; yes.

Q. And if I am correct that would have been on 9 February 1994? A. Yes, sir.

Q. Still two and a half years after. I show you copy of this document here. Could you tell the court whether you recognize that document? A. Yes, sir, I do.

Q. Would you please have a look at this document and tell the court whether you recognize that document? A. I do, sir; yes.

647

Lieutenant(N) Marr

Cross-examination

Q. Is it indeed the statement you made to the military police? A. That is correct, sir; it is.

Q. I would refer you please at the last sentence of page 3 and I would ask you just to read it to yourself starting with the words "at around" the last three lines up to the page 4 for the first two lines that are showing there? A. Yes, sir.

Q. Having done so I will put my question to you again. Did you actually shook them up and wake them up at 7 o'clock in the morning, that is Muir and Kelk? A. I did, sir.

Q. Is that correct that within 30 minutes at about 7:30 you came back to the wardroom and they had left? A. No, sir. I can only be ... I am not sure that that statement is correct, sir.

Q. So what you are saying today is that you did in fact state to the military police that they had left at 7:30? A. ...

PROSECUTOR: I object, Mr Judge Advocate. I would like you to look at the statement and you will see that there is nowhere in the statement he says categorically that they did leave.

DEFENDING OFFICER: I will simply rephrase ...

PROSECUTOR: I am back to rule 100.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, you know the rule, please comply with the rule. I don't have the statement before me so I can only wait for objections.

DEFENDING OFFICER:

648

Lieutenant(N) Marr

Cross-examination

Q. That document that I showed you is that indeed your statement that you made to the military police? A. It is, sir; yes.

Q. You are saying in court today that you didn't ... are you saying that you did not state to the military police that they had gone, not they left but they had gone by 7:30? A. I stated that they would have gone and that is to the best of my recollection, sir.

Q. So that is what you stated to the military police, "they would have gone"? A. They would have gone; yes, sir.

Q. "They would have been gone from the submarine by 7:30", is that correct? A. That is correct, sir. However I can't be sure.

Q. And today are you stating that they were not gone by 7:30? A. No, sir. I am stating I can't be sure if they were gone by 7:30.

Q. Can you describe the state of drunkenness or sobriety of any of the people that were in the wardroom that night? A. Sir, I can only state that the guests who came on board were in varying states of drunkenness. I cannot pinpoint precisely the exact state of each individual.

Q. Did you have a chance to observe Lieutenant-Commander Marsaw and have a chance to form an opinion on his own state? A. Based on recollection; yes, sir.

Q. Would you say that he was coherent?
A. Yes, sir.

Q. And he was not stumbling or in danger of passing out as you have seen others do? A. No, sir; he was not in danger of passing out.

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649

Lieutenant(N) Marr

Cross-examination

Q. So although he may not have been, like, completely sober he was by no means falling drunk or otherwise? A. That is correct, sir.

Q. And he was coherent? A. That is correct, sir.

Q. Is that correct that you put a sleeping bag on Kelk? A. I did, sir.

Q. Kelk is a good friend of yours? A. He is, sir.

Q. How tall is he approximately? A.

Q. How tall are you? A.

Q. You removed the tape that was on Muir's face? A. That is correct, sir.

Q. Although you don't know who put it there? A. That is correct, sir.

Q. How long would you say altogether you spent in the wardroom that night? A. Cumulative, sir, approximately three and a half, four hours.

Q. It is your claim that any wrong doing in that wardroom that you were in a position to observe were those of Lieutenant-Commander Marsaw? A. What do you mean by wrongdoing, sir?

Q. Wrongdoing. Anything that would have caught your attention, anything that you can recall? A. I don't recall him doing any wrongdoing as such.

Q. But let us be more specific. The taping you didn't see, the putting the pants down you didn't see? A. No, sir.

650

Lieutenant(N) Marr

Cross-examination

Q. Putting the shirts up or open, you didn't see? A. I saw the shirts being pushed up; yes, sir.

Q. By whom? A. Lieutenant-Commander Marsaw, sir.

Q. You saw that too. And what else did you see? A. The using of the markers.

Q. By Lieutenant-Commander Marsaw? A. That is correct, sir.

Q. Who turned up the music? A. I don't recall, sir.

Q. As a matter of fact you testified in direct examination that at one time ... you stated that you don't know how long you were in the heads. You went to the heads at some point? A. At some point, sir, yes; between the first set of rounds and the second set, yes.

Q. And you don't know how long you absented yourself at that time? A. I am sorry, sir, I can't remember if it was a quick one or ...

Q. It might have been two minutes, five minutes, 10 minutes? A. It might have been, sir; yes.

Q. Then you stated that when you left Lieutenant-Commander Marsaw was drawing the French flag and actually when you came back he was still at it? A. He was drawing the French flag but not necessarily still at the French flag. He was writing still. He was still marking; yes, sir.

Q. He was still using the marker? A. Yes, sir.

Q. Then you left and as soon as you left ... when you came back more items of clothing had disappeared from the individuals? A. It hadn't disap-

651

Lieutenant (N) Marr

Cross-examination

peared, sir. The shirt had just been pushed up, that is all.

Q. Trousers had been pulled down eventually, haven't they? A. I never saw the trousers being pulled down, sir; no.

Q. But let us say they were not in the same position when you came back as they were when you left? A. They didn't appear to be; yes, sir.

Q. You stated that at around 0500, 0530, everybody was gone? A. To the best of my recollection, yes.

Q. Could you venture any guess as to who was last to leave? A. I am afraid I can't, sir; no.

Q. But we know that Kelk and Muir are still passed out? A. That is correct, sir; yes.

Q. That conversation you have alluded to with Lieutenant-Commander Marsaw, I take took place on 2 January '94? A. That is correct, sir.

Q. Which would have been seven days prior to the statement you signed to the police? A. No, sir. It was a month and seven days actually.

Q. A month, yes; 2 January to 9 February, that would do that, yes. I apologize for the error. So it would have been a month prior to your interview with the military police. Would you agree with me that when you spoke to the police there was lots of people basically according to what you are saying today that you did not remember being present? A. That is correct, sir.

Q. And there was a lots of, many in a way, uncertainties and "do not recall" that you stated to the military police? A. Yes, sir.

652

Lieutenant(N) Marr

Cross-examination

Q. And that conversation though of 2 January with Lieutenant-Commander Marsaw you recall well?

A. As well as I can, sir.

Q. So it is not by any means the very words that he used that particular day, are they? A. No. As I stated that was to the best of my recollection.

Q. And I gather that the tone of the conversation was - I don't know if I should use jovial, friendly or otherwise - how would you qualify it?

A. I would say it started off jovial; sure, sir.

Q. And is that correct to say that at no time did he ... he didn't threatened you of any sort?

A. No, sir.

Q. He did not invite you to make a statement to ... given statement to the military police or anything like that? A. No, sir.

Q. He did not interfere with whatever you might have had to do in the course of this investigation? A. No, sir.

Q. When you say that he sounded relieved, how did you make that determination? How does one sound when he sounds relieved? A. Excel of breath, a suddenly excited tone in his voice, that I do recall.

Q. You have been on a few more submarines since your service under Lieutenant-Commander Marsaw?

A. Yes, sir.

Q. Wouldn't you say that life on board submarine is generally uncomfortable and a little tense as a rule? A. No, sir. I disagree with that statement.

Q. Would you say that maybe then that there might be some tension existing particularly at close station? A. It doesn't have to exist, sir; no.

653

Lieutenant (N) Marr

Cross-examination

Q. No. Would you say that sometime subs do perform or are called upon conducting some missions that are both difficult, technically difficult to accomplish, possibly dangerous and all that? A. Yes, sir.

Q. Wouln't you agree that when operating under such circumstances it does create tension? A. It may do so, sir; but if a submarine is properly worked up and they practice as many a time, although there will be a bit of nervousness, the air of tension shouldn't be at any great degree.

Q. Did OJIBWA achieve good results under the command of Lieutenant-Commander Marsaw? A. I believe it did, sir.

Q. You believe. You served on it for 13 months, you should know a little more? A. Well, we passed work up; so that is a good result, sir.

Q. How about target shooting and all that? A. Yes, sir. We achieved good results in our firings.

Q. Firing like ... would that be a good result like a hundred per cent? A. I don't recall the exact result, sir, but it was good.

Q. A hundred per cent is fairly good, wouldn't you say? A. If that was the result, sir; yes.

Q. But you don't recall the result? A. No, sir, but it was high.

Q. You made reference to turning some switch off and then you went on to explain that this was critical to safety and so on and so forth. Are you saying that Lieutenant-Commander Marsaw was deliberately endangering the safety of the ship and its crew?

A. I would suggest that by reducing the gain on the underwater telephone, if it wasn't pick up right away by the watch, then that is a cause for concern, sir; yes.

654

Lieutenant (N) Marr

Cross-examination

Q. And how would you know anyway that he did that? A. By continuous control room rounds, sir.

Q. Did you see him doing it? A. No, sir, I didn't.

Q. Oh, you didn't see Lieutenant-Commander Marsaw turning off controls? A. I saw him turn off some controls, not specifically underwater telephone, sir.

Q. So what you said then we must not consider too much because you didn't see that happening? A. Sir.

Q. Now, fixing the plot or plotting the fix, which of the two is right? A. Plotting the fix, sir.

Q. That is right. Plotting the fix and you said that an officer, a part 3 officer, who hadn't done his homework upon being visited by the CO, the captain, just threw some lines on there to make it look as if everything was nice and tickety-boo, is that correct? A. I don't recall if that was a part 3, although they were notorious, they ...

Q. You did state in your testimony a part 3? A. OK, sir.

Q. So is it a part 3 or not? A. Yes, sir, it was a part 3.

Q. What is the name of the individual if you can recall? A. I don't recall a specific name.

Q. Would you say that would be some trick or reaction that might very much endanger the boat? A. It would depend on our proximity to danger, sir.

Q. Would you agree that a captain cannot rely on officers treating such important matters as

655

Lieutenant (N) Marr

Cross-examination

those lightly and putting it together to keep him happy? A. I would agree with that statement.

Q. Isn't that right that during that year you served, there was a lot of rather young officers and then not so young but that were not all that experienced either? A. I would agree with that statement, sir; yes.

Q. Would you agree that Lieutenant-Commander Marsaw had a lot of work to do with those officers because everybody was not up to par? A. He did, sir; yes.

Q. And that if one is not comfortable with himself with his level of competence and his level of training, yes he would be nervous because he just cannot perform to a required standard? A. You are talking about the individual officers, sir?

Q. The individual officers, yes? A. He would be, sir; yes.

Q. Being on board and locked on a submarine, wouldn't you expect your captain to make sure that the sub is running safely and it is not going to either crush in the bottom and hit some rocks or get up and hit some surface boat or anything of that nature? A. Yes, sir, I would.

Q. And would you conceive that this requires a lot of attention and rigour into SOPs on the boat? A. Yes, sir; I agree with that.

Q. Would you consider it normal that a captain expect that from his crew? A. He would, sir; yes.

Q. Would you expect the captain to possibly at time loose it if it is just not done repeatedly? A. I would, sir, but not to the level that Lieutenant-Commander Marsaw did.

656

Lieutenant (N) Marr

Cross-examination

Q. Let us talk about the level to which he did it. Can you give me a very specific instance where he has acted in such a manner that you were totally scared and he degraded you? A. Yes, sir. There was an instance involving crypto material. I was the CB officer which entailed the custody of crypto. It was during the European trip in 1992. To give you a bit of background, an Op order would come out for a big NATO exercise, part of it details what crypto has to be carried. It is my job to ensure that the correct crypto was on board. Prior to the trip I had checked that the correct crypto was on board, not only with the Op order but also with the Canadian Forces Distributing Authority and the MARCOM sponsor for the exercise. However when we got out onto the exercise there was an occasion in the middle of the night where the captain wished to communicate with an exercise unit. The particular crypto that that exercise unit requested, we did not carry, however it was for the exercise but not for ... some of these weren't required to carry it. He became very crossed and accused me of being incompetent and was at that time to charge me.

Q. And was he justified as far as you know?

A. No, sir, I don't think so because I checked and double checked and the information that was contained in the Op order was correct. We had the crypto that the Op order required. We had the crypto that CFDA had given us and had checked was correct and I had checked the crypto list with the MARCOM sponsor, our exercise sponsor.

Q. And when was that exactly? A. It would have been approximately March of '92, sir.

Q. So maybe the CO made a mistake that time?

A. In that case I think he did, sir; yes.

Q. Would you say that the other way around was much more common? A. I am sorry, sir.

657

Lieutenant(N) Marr

Cross-examination

Q. Would you say that the other way around, the crew making mistake vice the captain making mistake was much more common? A. Yes, sir.

Q. Would you say that ... you related that he invited you and Kelk to talk to you, and you used the words invited you to be more aggressive, what do you mean by that? A. To be more verbally aggressive, sir. To yell more in the control room, to throw a weight from a verbal point of view. He felt that was the way to conduct business in the control room.

Q. Did he invite you to be abusive? A. No, sir.

Q. Did he invite you to yell and scream at people for no reason, for no purpose? A. He didn't specifically say that, no.

Q. No. So that is your opinion I mean as to what aggressive means. Might it be that if you tend to be too soft spoken that doesn't work too well in the commotion of a control room? A. It works for me, sir.

Q. At all times? A. Most times, sir. I do raise my voice but it is when something needs to be done.

Q. What I am seeing here is that there is very much of leeway on the interpretation of being aggressive? A. I appreciate that, sir; yes.

Q. And there is also different style of people? A. There are many different style, sir; yes.

Q. Style of command? A. Yes, sir.

Q. And I gather that when you left for England in 1992 you met Lieutenant-Commander Marsaw. And it is your testimony this afternoon to say as you were departing that it has been a pleasure to work

658

Lieutenant(N) Marr

Cross-examination

under him? A. I stated that it had been a pleasure, sir.

Q. So obviously you lied to him, it hasn't been a pleasure at all, has it? A. Well I wasn't going to say that, sir; no.

Q. No. Did you ever complain to Lieutenant-Commander Marsaw about some of his leadership attributes or style that made you nervous or something? A. No, sir, I didn't.

Q. You didn't. Did you complain to the XO? A. I mentioned it to the XO; yes, sir.

Q. Who was the XO at the time? A. Lieutenant-Commander Virgin, sir.

Q. Lieutenant-Commander Virgin, that is the one who called you in England to inform you of the investigation ongoing against Lieutenant-Commander Marsaw? A. The same one, sir; yes.

Q. The same one. And what did Virgin do to your knowledge? A. I am sorry, sir.

Q. What did Virgin do to your knowledge in response to your complain? A. I am not sure, sir.

Q. You are not sure? A. I don't know.

Q. Would you agree with me that the XO is responsible for the discipline on board and morale of the troops, ultimately responsible to the captain, but in the structure the XO is responsible for that? A. He is, sir; yes.

Q. Personnel matters. So if you have any difficulty that it would be with the captain or senior rates or junior rates or peers or whatnot, ultimately you can go to the XO? A. That is correct, sir.

659

Lieutenant(N) Marr

Cross-examination

Q. And for people of various ranks of course they might have to follow a chain of command depending on rank, junior rate to senior rate to department head and so on and so forth? A. That is correct, sir.

Q. So you didn't formulate any complain whatsoever at the time? A. No, sir.

Q. And the boat achieved very good results? A. That is correct, sir.

Q. Do I take that to mean that people did eventually shape up and cut the number of mistakes? A. Eventually they did, sir; yes.

Q. And I suppose that when the number of mistakes was cut the amount of yelling may have proportionally reduced too? A. No, sir, it didn't.

Q. It didn't. At that point the captain is facing a crew that is doing a superb job and he is just yelling, screaming at them, degrading them for the sake of it, because he is unable? A. It would appear that way, sir; yes.

Q. That is what your testimony is today? A. Yes, sir.

Q. Everything was fine and he did it just to hurt you? A. Sir, the mistakes that the crew made were minor in nature. And mistakes or no mistakes the crew would have performed well any way.

Q. Minor. Didn't I ask you a question about inconsequential problem or not too serious problem and you gave me an example of one minor problem that turned out to be a great hazard for fire? A. It did ... had the potential, sir; yes.

Q. Now that is what you told me a few minutes ago. Now you talk about minor mistakes as if it is all right, it is minor? A. They were generally minor in nature; yes, sir.

660

Lieutenant(N) Marr

Cross-examination

Q. So of no consequences and could not have resulted in any great danger to the boat or the crew?

A. Somewhere, some of them can build up, sir.

Q. Is a perisher in England or a posting in England on an English submarine, for example, would you qualify that as challenging? A. Challenging in that you are dealing with ...

Q. Professionally challenging? A. Yes, it is professionally challenging; yes, sir.

Q. So you agree that that is challenging, like going to England, you are getting a challenging job? A. Any job is challenging, sir.

Q. But if it comes from Lieutenant-Commander Marsaw it is now ... it is a matter of sarcasm? A. It was the tone he used, sir; yes.

DEFENDING OFFICER: I have no further questions. Thank you.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. The defence counsel has referred you to a written statement you gave the military police when they visited you in England. How many times did Lieutenant-Commander Marsaw phone you before you wrote that statement? A. Twice, sir.

Q. How many times did Lieutenant-Commander Marsaw phone you altogether when you were in England? A. Three times, sir.

Q. How far after the time you gave that MP statement did Lieutenant-Commander Marsaw phone you the third time? A. It is approximately seven weeks, sir.

661

Lieutenant(N) Marr

Re-examination

Q. During all three telephone calls, did you discuss subject matter which was related to the investigation? A. The second two phone calls the...

Q. Without getting into the contents of the conversation, just simply yes or no if you can?
A. Yes.

Q. Do you believe the OJIBWA was operationally efficient? A. I do, sir.

Q. Is it possible for a submarine to be operationally efficient if the entire wardroom and control room is incompetent? A. No, sir.

Q. Do you therefore agree with defence counsel's suggestions that the wardroom and the control room were incompetent? A. No, sir.

Q. You mentioned an incident where Lieutenant-Commander Marsaw threatened to charge you and referred to you as being incompetent. Did he actually use the word "charge"? A. Yes, sir.

Q. Did he ever discuss that with you again about whether charges were pending or weren't pending?
A. There were occasions ... excuse me. There was once when we got back alongside in May when he mentioned that he was still considering it. And then just prior to me departing the submarine, to leave the submarine, he informed me that he decided not to continue on with it because he wanted me to go to England with a clean slate.

Q. So that was hanging over your head until you left the OJIBWA? A. That is correct, sir.

Q. And during that period of time you were referred to as an idiot or incompetent on average once a day? A. ...

DEFENDING OFFICER: That is ...

662

Lieutenant (N) Marr

Re-examination

JUDGE ADVOCATE: Do you have an objection?

DEFENDING OFFICER: The prosecutor is in re-examination. He has been leading. It is getting late but still the rules apply even late in the day and I would require that the leading be minimized at this point.

JUDGE ADVOCATE: Sustained. You are leading, Major Abbott.

PROSECUTOR: Thank you, sir.

That is my questions. Thank you.

JUDGE ADVOCATE: Thank you. Questions from the court? No questions.

Thank you, Lieutenant.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Should we call it a day?

PROSECUTOR: I think it has been a good day. Hopefully we will have another one like this tomorrow, sir.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: So do I.

JUDGE ADVOCATE: Sorry?

DEFENDING OFFICER: So do I.

JUDGE ADVOCATE: The court is adjourned until 9 o'clock tomorrow morning.

ADJOURNMENT: At 1640 hours, 3 October 1995, the court adjourns.

REASSEMBLY: At 0910 hours, 4 October 1995,
the court reassembles and the
accused is before it.

JUDGE ADVOCATE: You may be seated.

Major Abbott, are you ready to call your next
witness?

PROSECUTOR: Yes, I am, Mr Judge Advocate. I
would like to call Lieutenant-Commander Davidson.

s.19(1)

Lieutenant-Commander Davidson Examination-in-chief

SIXTH WITNESS) Lieutenant-Commander
FOR THE) R. A. DAVIDSON, is duly affirmed.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning, Lieutenant-Commander Davidson. I understand you're under the weather a bit, so anytime you need a break, please ask, the judge advocate and I'm sure will have one granted. Can you give your full name to the court and spell your last name please? A. Robert Andrew Davidson, D-A-V-I-D-S-O-N.

Q. And what's your current position? A. I'm Deputy Chief of Staff/Submarines for MARLANT, Maritime Forces Atlantic.

Q. What year did you join the Canadian Forces? A. I joined the Forces in 1977.

Q. I understand that was as a Reservist in the rank of ordinary seaman? A. That's correct.

Q. And you became a sub-lieutenant in the Reserves in 1979? A. That's correct.

Q. Joined the Regular Force in 1982? A. 1982, yes.

Q. And was awarded your "Dolphins" in 1983? A. Yes.

Q. At that time you were a member of the OJIBWA? A. Yes.

Q. You then did a three-year exchange posting with the Royal Navy Submarine Service from 1984 to 1987? A. Yes.

Q. And in 1987 you came back to Canada and was the XO of the OJIBWA? A. Yes.

Lieutenant-Commander Davidson

Examination-in-chief

Q. And then in 1988 you were the XO on the ONONDAGA? A. Yes.

Q. In 1989 you successfully completed the "Perisher" Course? A. Yes.

Q. And from August of 1989 until December of 1990 you commanded the OJIBWA? A. Yes.

Q. So you would have been the commanding officer prior to Lieutenant-Commander Marsaw taking over command of the OJIBWA? A. Yes, I was.

Q. In 1991 you were the Squadron Warfare Officer for the First Canadian Submarine Squadron? A. Yes.

Q. And went to Staff College through 1991-92? A. Yes.

Q. Did a short stint at NDHQ in 1992? A. Yes.

Q. And from 1993 to 1995 you did a second exchange posting with the Royal Australian Navy? A. Yes, I did.

Q. Working with their Submarine Service as well? A. Yes.

Q. And currently in your current position as of early 1995? A. Yes, that's correct.

Q. Throughout your career you've had the following Canadian submarine commanders as leaders: Nicolson, Webster, and then Anderson who I believe is Royal Navy? A. Royal Australian Navy.

Q. Royal Australian. Dereks? A. Dierks.

Lieutenant-Commander Davidson

Examination-in-chief

Q. Dierks? A. Belongs to the Royal Australian Navy, but he was commanding a Canadian submarine.

Q. Okay, and also Bush? A. That's correct.

Q. I'd like to ask you first of all, a number of questions concerning the organization of the First Canadian Submarine Squadron, followed by questions dealing with the career progression of submariner officers, the organization of the OJIBWA and some basic questions concerning how a submarine operates and does its job with reference to identifying certain positions? A. ...

DEFENDING OFFICER: Mr Judge Advocate, at this point and given this presentation or brief of what the prosecution anticipates the witness to testify on, I note that the prosecution has not, although they have discussed the background of Lieutenant-Commander Davidson, they have not made an application to have him qualified. And I understand that they do not intend to make such a request. And maybe I would like to make some representation to the judge advocate on the propriety of whether he can testify on those matters, given the circumstances of the case and the charges at bar.

JUDGE ADVOCATE: Thank you.

Mr President and Members of the Court, would you please withdraw from the courtroom.

THE PRESIDENT AND MEMBERS RETIRE.

PROSECUTOR: Perhaps we can spare Lieutenant-Commander Davidson's health and maybe he can be excused while we argue that, sir.

JUDGE ADVOCATE: Very well. Lieutenant-Commander Davidson, would you please withdraw from the courtroom while I have to decide on a certain matter.

Lieutenant-Commander Davidson

WITNESS: Yes.

WITNESS RETIRES.

JUDGE ADVOCATE: Thank you. First of all, I would ask you, Major Abbott, to tell me exactly ... well, give me the gist of what you want to ask of this witness.

PROSECUTOR: Certainly, sir. I'd first start out by asking him general questions based on his observations of the organization of the First Canadian Submarine Squadron. He's been a commanding officer in one of the units, he's also worked in staff positions inside the squadron, so he does have personal experience. A ballpark figure as to how many submariners work within the First Canadian Submarine Squadron; describe the organization of the squadron; is there a headquarters; who's the commander of it; how many units come within the squadron; what units, based on his observations, existed between '91 and '95; which boats were operational and which boats weren't; who were the commanding officers of the boats that were operational during that time; ask him whether or not there is a divisional system in the submarine service; how is it organized according to divisional heads, for example, based on his experience in the OJIBWA, how many divisions did he have in it; did he have divisions for operations, combat systems, engineering; how was the divisional system organized; and generally to outline the career and training progression of the submariner officer. He himself has gone through it so it's personal observation again. You start off as a Part 3, you do SOTC, you go ashore, you do a "D" Level Course, come back as a qualified submariner, work your way from a position to an OpsO, then to an XO appointment, at the same time you're on SOCT courses that are required to obtain a recommend for "Perisher"; go on Perisher, just as he has, through his own personal observations. Not only has he gone through this system, but as a commanding officer he's personally observed subordi-

nates go through the system. He's done SOCTs, he's had Part 3s get their "Dolphins" under him, he's sent them off to "Perisher" courses. Identify what role the commanding officer plays at these different points in the career progression; does the CO give assessments at the SOCT level for first officer of the watch tickets; for the Attach Coordinator's Course; for SOCT; for the "Perisher" course. Then get into the issue of how a submarine operates by identifying locations on a sub. Show us with reference to a diagram where the fore ends are; where the torpedo space is; where's the Wardroom; the engine room; the motor room. All this is personal observation again. He, in fact, has commanded the OJIBWA, he probably knows the boat inside out. He can identify on the chart where all these different types of positions are. You focus in on the Control Room. How is the Control Room organized? Well on the left hand side we have this type of function being done, on the right hand side this type of work gets done. He can identify the physical locations with reference to a chart, based on personal observation of things, like the helm seat; the trim seat; first and second panel watch keepers; CDC; things like that. Identify the main working areas outside the Control Room; the motor room; the engine room. Again personal observation. How does the submarine manoeuvre; how does it surface and dive; how does it change depths; how do you keep on depth; what do we mean by trimming; what do you mean by planing; what do we mean by snorting? As a submariner officer and commanding officer, he would have performed personally all these roles at some point in time. He can tell you: I sit in the helm seat and I move the stick up and down and this is what happens on the dials, and the depth gauge shows this or that. What's the configuration of the Control Room when dived; how many extra people are brought in during attack team situations; how many people are in the Control Room when the sub is surfaced; what type of watches can be served while the sub dives - six on and six off. So those types of questions. Just to give a general walk through the squadron, the training, the boat and the job that a boat does.

Then ask him questions, as I have already asked of every other witness: Based on your personal observations, have you ever seen any CO use personally insulting adjectives? If so, what, when and where? Have you, yourself, ever used personally insulting adjectives towards subordinates in the Control Room? If so, when, where and what? How do you deal with situations where individuals have made errors in the Control Room in the past, situations dealing with whether he has ever, based on personal observations, had occasions where it was absolutely necessary to rebuke subordinates in the presence of others? Has he ever had personal experiences where the sub has been in immediate danger? If so, how often? Describe the circumstances. How did he or his COs respond in those situations? Who was in his Wardroom at the time he left in December '90? Can the CO take a boat out by himself, literally just one man on the boat and go out, sail it, engage targets and come back? Describe the level of morale on the OJIBWA at the time that he handed command over to Marsaw? Was he concerned, as a CO with morale? Was the OJIBWA operationally effective at the time that he left?

I'd submit that all these questions have been asked in one form or another, either by the prosecution or defence. By defence, I would give as an example the cross-examination of Marr. You know, is it stressful, and the sub is always in immediate danger, and this can have an affect and that can have an affect, and morale is the job of the XO. All those sorts of questions have already been asked either by me or by defence counsel. And in all the cases so far there's never been an objection that the person had to be qualified as an expert in order to give his opinion. Marr explaining his rounds, for example, was similar. Hopefully it will be a bit more colourful than the way Marr did it, but it's essentially the same thing.

At this point, that's what I intend to seek from the witness. I am not prepared however to get

into a legal argument as to why I believe Davidson, based on case law, does not have to be qualified as an expert. I wasn't prepared to do that this morning. If you require that of me, if we get to that stuff in the enquiry, then I'd probably have to ask for some time and I haven't put my mind at all to thinking of how I would go about qualifying him and in what sort of area I would have to do so in.

JUDGE ADVOCATE: But I think it is exactly what the objection is on right now.

Is it not what you're telling me, that you will submit that the witness should be qualified?

DEFENDING OFFICER: Uh, huh. The thing is, I guess, the prosecution has suggested that he did not understand my position that I would object. If that's the case, I explained to him I had stated that position, I thought I had left the message clearly enough that I would adopt this position. Apparently he had some doubt in his mind as to whether it will actually be my position. And that's what he seems to indicate to the court now.

JUDGE ADVOCATE: So would you prefer that we grant him an adjournment and let him provide authorities as to ... or should we hear your objection first, because you have an objection to make, but you understand after that that your friend is not ready to answer?

DEFENDING OFFICER: I would be willing to do that. And then when my friend has replied, I will have my rebuttal and we'll close it.

JUDGE ADVOCATE: Very well. Go ahead.

DEFENDING OFFICER: Okay, and in fact that will be useful for the prosecutor to hear my argument so he will know exactly what to address his mind to.

Defending Officer

Exclusion of evidence

I looked at the Rules of Evidence and tried to determine on what basis this type of evidence would be admissible. If we look, for example, at Rule 7 - Relevancy, relevancy to the charge. So clearly, Lieutenant-Commander Davidson was not on board OJIBWA at the time of the accused's command and that's what we are concerned with. Therefore, he cannot testify directly as to the actions, for example, of the accused in a given situation, etcetera. So from that narrow point of view it would appear that it wouldn't be relevant there.

On the other hand, this type of evidence I believe can be made relevant to help the court understanding the functioning of a submarine and understand the evidence that will be coming forth. And I will concede that much that - yes, I can see that this evidence may be made relevant. But then I would suggest to you that it would have to be under Rules that pertain to expert witnesses. If one looks at Rule 81, it reads ... and I think I'll read the whole rule because I think it's quite important and right to the point:

"A witness is an expert witness and is qualified to give testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience or training

(b) the witness has the requisite knowledge, skill, experience or training; and

(c) ..."

and very important,

Defending Officer

Exclusion of evidence

**"... the expert testimony of
the witness would substan-
tially assist the court."**

It is our submission that it is only under this rule that the prosecution can establish the relevance of the evidence he proposes to call. The purpose clearly appears to be to assist the court in the knowledge, in matters relating to submarines, so that they better understand and appreciate the evidence that would be forthcoming.

My learned friend has talked about some of the witnesses that have testified already, and I've been asked some questions about the operation. I would distinguish, if we take for example Lieutenant[N] Marr, he has explained to the court what he did during his tour. I suggest to you that it was ... I understood that evidence to be more of the nature to explain various actions he took, for example, like to say: Well, I wasn't in the Wardroom because I was out doing this, doing that, doing this, doing that. That was the night of the mess dinner, at the time the alleged offence was being committed, to which he had been partially a witness. That's fine. If we talk about Lieutenant[N] Marr and maybe some of the questions asked even by the defence in cross-examination, he has for example discussed and even made suggestions that, for example, the Captain might have endangered the safety of the ship. I put a question to him, which of course may have required up to a point some special knowledge, but he is and he has already testified in his testimony that he had his "Dolphins", he was a qualified submariner. Now the difference, I suggest to you, between Marr and Davidson is that Marr was actually on board, he did serve under Lieutenant-Commander Marsaw and some, I would say, some of the opinion he has given would have been admissible under Rule 64. Although I was not challenged at the time, some of those opinions would have been admissible under Rule 64 probably. And, I mean, and that's it.

Defending Officer

Exclusion of evidence

As for Davidson, he was not on board, he did not serve under Lieutenant-Commander Marsaw and he will talk to the court about the functioning of a submarine. It is my position that the mere fact that the prosecution proposes to call that evidence is a clear indication that the court does need this assistance which must be given by an expert. If it was such that the court, without special knowledge, skill, experience or training ... if it was such that the court without those special qualifications was able to understand and fully appreciate the evidence, there would be no need to call Lieutenant-Commander Davidson. It is because the subject matter requires a special training that the prosecution wants to share with the court that they're calling Lieutenant-Commander Davidson. And that's why we take the position that this must be done by an expert witness.

I will have an opportunity when my learned friend takes his adjournment to look up a case of the CMAC, which name escapes me, but I can give you the facts now. In a drug case ... now the prosecution keeps repeating that all those things are observations of Davidson. In the drug cases, for example, there was a time where a prosecution would call a constable, like a police officer, who had worked on so many investigations and so on and so forth. He would come in court and sometime testify as to the jargon used in the street regarding drugs.

JUDGE ADVOCATE: Ferguson?

DEFENDING OFFICER: It may be.

JUDGE ADVOCATE: Or Grath ...

DEFENDING OFFICER: It was a decision, as I recall, of then Lieutenant-Colonel Boulanger who had allowed a police officer to testify on the price of drugs, the cost of drugs, the jargon, but he was not testifying on the price of drugs as it related to the particular charge in front of the court. He was talk-

Defending Officer

Exclusion of evidence

ing in general terms. And the CMAC determined that because his testimony did not pertain to the very charge his evidence was not acceptable as an ordinary witness, although it could have been done by an expert witness, it was not admissible. Now had the constable been personally involved himself in that investigation and on the very fact discussed, then he probably could have given an opinion as to what he saw, a fact that was directly relevant to the charge. But he couldn't come as an outsider without being qualified and discuss those matters without being qualified.

We take the position ... and we don't know to what extent the defence will use that right, but there are, I believe, two principles involved here. One is evidence can only be admitted in accordance with the Rules of Evidence, and we claim that it has to be the only way - by expert evidence in this case. And two, it has a very direct consequence on the defence as to the type of question that can be put to the witness. If the prosecution wants to have the witness produce only as an ordinary witness, at the end of the day they deprive the defence of the line of cross-examination that might involve hypothetical questions and other questions of that nature. And for that matter, according to the outline of the prosecutor, I take for example his example of: "Can one man take a sub to sea?" It sounds to me like a hypothetical question, and that's the type of question that probably could not be admitted if asked from an ordinary witness.

So for those reasons, we submit that the evidence proposed, as proposed by the prosecution, cannot be given by Lieutenant-Commander Davidson unless he is qualified as an expert, and that evidence should not be admissible and cannot be admitted under other rules but that one, that's the rule on experts and particularly Rule 81 is about the only rule that can make that evidence relevant to this case.

JUDGE ADVOCATE: Thank you.

Major Abbott, do you still wish an adjournment to answer your friend?

PROSECUTOR: If I could have a second to consult my colleague, Mr Judge Advocate?

JUDGE ADVOCATE: Certainly.

PROSECUTOR: One of my big concerns right now, Mr Judge Advocate, is to keep the pace of the trial going, since we took a week to get it to where we had four witnesses yesterday. If I go through my questions, is it possible to identify which ones require an opinion, and if there's only two or three I will cut them out of my examination and we'll get on with the trial.

JUDGE ADVOCATE: That's your decision. I mean, I'm not going to take it for you.

PROSECUTOR: If I knew precisely out of the long list of questions I stated to you and my friend, if he could identify which ones he thinks requires an opinion. He mentioned one - I'll gladly take the question out about "Can a boat go to sea by one person" and we'll do Davidson right now as a witness if that's his only concern. If his concern is that now we won't qualify him as an expert and we deprive him the opportunity of cross-examining an expert, he can obviously qualify Davidson, if he needs be, on cross-examination.

JUDGE ADVOCATE: Would you guys would like to have an adjournment to consult each other? Perhaps you can reach a compromise of some sort?

DEFENDING OFFICER: It might prove to be useful, however I must warn you, Mr Judge Advocate, that I'm prepared to be as cooperative as can be but I'm not sure if we can reach an agreement on some specific questions because the gist of my argument is that the whole of the testimony cannot be made relevant ... it's our position anyway, it cannot be made rele-

vant without going through 81. Because if we take the running of a submarine, a submarine, it has nothing to do with OJIBWA '91, '92, '93. So how can it be relevant to the charge? And it can only, in my view, be made relevant via 81. So is it one or two questions? I do agree with my learned friend too that I could have him qualified eventually. That still doesn't solve the problem of the admissibility of his evidence without the witness being qualified.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: If we could get five minutes then, Mr Judge Advocate, I'd appreciate it.

JUDGE ADVOCATE: Only five minutes would be sufficient to solve your problems?

PROSECUTOR: I think so. And is it possible to skip this witness on the witness order, and call a second witness, and deal with this matter later on?

JUDGE ADVOCATE: The witness has already been called in the main trial.

What are your views on this matter, Lieutenant-Colonel Couture?

DEFENDING OFFICER: Well, he's been called. We had anticipated in the schedule of the day that he would be called first and then other witnesses after. He's on the stand already. I would rather dispose of this matter now, frankly.

JUDGE ADVOCATE: Yes, I think it is advisable to dispose of this matter now.

The court is adjourned for five minutes.

ADJOURNMENT: At 0940 hours, 4 October 1995, the court adjourns.

REASSEMBLY: At 1002 hours, 4 October 1995,
the court reassembles and the
accused is before it.

JUDGE ADVOCATE: You may be seated.

The first thing I want to raise is that,
Major Abbott, you asked for a five-minute adjournment.
I asked you if it was a sufficient time for you to
prepare and you said "yes" and you took 20 minutes. So
I would like to know why?

PROSECUTOR: I'm trying to re-live what we
did in 20 minutes. I met with Colonel Couture, we came
to an agreement as to areas the witness could be quali-
fied in should that be necessary. Colonel Couture had
to consult and get the instructions from his client
first to do that. I then informed him that I would
still take the position that qualifying Lieutenant-
Commander Davidson as an expert wasn't required and
that would be my position, that would be the position I
would argue when we got back into the court. If I'm
overruled, then we were agreeing on areas that he could
get qualified into. Following that, Colonel Couture
was interested in tracking down a CMAC case. There was
difficulty finding that book in our library because of
the way, I guess, the library was organized. At the
same time I went to our cabinet and pulled out our file
on expert law surrounding expert opinion evidence and
brought it into the courtroom.

JUDGE ADVOCATE: It's just that in the fu-
ture, I mean, when you want a longer period of time -
just ask for it and I will give it to you.

PROSECUTOR: Okay, my apology, sir.

JUDGE ADVOCATE: So?

PROSECUTOR: Mr Judge Advocate, it's the
prosecution's position that Lieutenant-Commander

Prosecutor

Rebuttal

Davidson does not have to be qualified as an expert because he will not be giving any opinions. He will simply be asked a number of questions based on his personal observations that do not fall within the opinion evidence rules. Being asked, given what he was gone through in his life, working inside the submarine squadron, now being Deputy Chief of Staff for Submarines, being a commanding officer of one of the units inside the submarine squadron can, in fact, based on personal observations, answer questions such as: What is the rank of the First Canadian Submarine Squadron Commander? What units exist within the squadron? What units were operational and what units were in refit between '91 and '95? How many members were on his submarine? Who commanded the units that were operational? What is the chain of command for a submariner on board an operational unit going from his level all the way up to the commander of the First Canadian Submarine Squadron? What is the most senior rank held on board a submarine of the other ranks? Did a divisional system exist on board his submarine when he was in the OJIBWA? Have him introduce a chart that outlines the divisional and departmental heads in the divisional system. Outline the chain of command if an individual of the rank of sub-lieutenant wished to place a grievance within his submarine. Outline what courses existed between 1991 and 1995 for a submariner officer. Again, he was the commanding officer of a boat during that period, and he was also a student of some of these courses in his career. Identify what role the commanding officer plays with regard to each one of these courses. The CO writes formal assessments for this particular course, he doesn't for that particular course. Again, that's personal observation. How many Part 3's did he have when he was CO of the OJIBWA? What was the pass rate? How many persons each year are eligible to take the Attack Coordinator's Course and the Command Course, based on his personal observations? Based upon his personal knowledge, has there ever been an individual recommended for Command Course and then has been poorly assessed at SOCT and not put on the Command Course? Again, that's personal

Prosecutor

Rebuttal

observations, he recommend Lieutenant-Commander Larkin to go on the Perisher Course. Later on Larkin wasn't put on that course, given a subsequent SOCT. Identify the parts of a submarine, just as Lieutenant[N] Marr has done yesterday, but in a different way. That's personal observation, he knows where the galley is, he knows where the torpedo room is, he knows where the wardroom is because he has been on that boat. Identify the following positions: helm seat, trim seat, first/second panel watch, sound room, radio room. Again, based on personal observations. Main working areas outside of the Control Room. He knows where the engine room is, where the motor room is. What is meant by the term: trimming, planing and snorting? We've heard all those concepts used repeatedly so far in this case. What part of the boat is used to change depths? He can identify where the ballasts are. What is meant by keeping on depth? Identify the positions of first officer of the watch, second officer of the watch, helmsman, sonarman, radarman, ship control officer of the watch, etcetera. Again, that's based on personal observations, these are positions that occur in the Control Room, this is the rank level that usually does that job, this is what the job entails in one sentence or so. Are extra people required when the Control Room is closed up for attack? Based on his personal observations - yes, I bring in two more people, they have the dedicated position, the fire control; one guy is on the LOP, the XO is the attack coordinator, there is HQ1 set up in the wardroom. This is all personal observation. How many members of his wardroom had operational roles in the Control Room? A hundred percent, based on personal observation. What percentage of other ranks worked in the Control Room? Again, personal observation. Contrast how the Control Room is configured when it was dived compared to when it was on the surface?

So that's his walk through the squadron, the submarine, the training and career progression of submariners. Then I get into his personal experience a bit, ask him about the longest sail he has ever been on ... a 50-plus day sail. Ask him whether or not with

Prosecutor

Rebuttal

his commanding officers, if he has ever observed them use personal derogatory adjectives ... the same question I have asked a number of witnesses without objection in the past. Has he ever used personal derogatory adjectives to individuals in the Control Room? If he was going to criticize an individual, how has he done it in the past? Does he take them to the cabin? Does he do it in the Control Room? How would his other commanding officers react if a subordinate had made an error in the Control Room or not worked up to the expected standards? Has he ever personally observed a situation where he felt it was absolutely necessary for the preservation of discipline to personally insult the subordinate in the presence of his juniors? Get him to talk about some life threatening situations he has been in. Ask him whether or not, based on his personal observations, the submarine is in immediate danger all the time, if so, when? How many times has he been in immediate danger as a submariner? How is the submarine schedule coordinated? Again, that's his job right now, he coordinates the schedules for submarines. If the submarine wanted to change its schedule on the Easter long weekend, what would be involved in getting that done? We have to get a message, we see if there is a jetty open, and we send back a message saying this or that. Who was in his wardroom at the time he left command of the OJIBWA? Did he feel his crew was competent? And again, questions of competency, experience and things are all questions that have been asked on cross-examination of a number of witnesses. Would an inexperienced crew cause more stress in the Control Room and cause the commanding officer to do this or that? That's been given without opinion evidence. I don't think it is opinion evidence when I ask him: Can he jump on a boat tomorrow and take it out to sea by himself and engage a target? I can't do the helm and I can't do the trim and I can't do the fire control solution and I can't look through the periscope all at the same time. There is a way I can get around that question if it is indeed an opinion question. Describe the morale in the OJIBWA at the time he left? Did he consider morale something that was a part of his job,

Prosecutor

Rebuttal

as commanding officer of the OJIBWA? Was the OJIBWA operational and effective at the time he left? That's again a question that was asked of witnesses without requiring them to give opinion.

I submit that none of these questions require opinion evidence. There may be one or two. If that's the case, then we meet them as I go along in my questioning. And if it's decided that that would elicit opinion evidence, then I will just skip it and move on to the next question. But to require him to be qualified for maybe one, possibly two, potential questions that might get into opinion evidence, I don't think it is required and it unduly slows down the trial. I've got three or four other commanding officers, I've got the former Canadian Forces Command Chief Warrant Officer testifying, probably the most experienced submariner in the Canadian Forces. I've got Captain[N] Webster whom I intend to qualify and I've got an individual who is a "Perisher" teacher, a commanding officer I believe with two nuclear submarines in Britain whom I'm also qualifying as an expert. If I've got to qualify people, like Davidson, I think I'm into about eight experts when I only intend to qualify at the very most three. Thank you.

JUDGE ADVOCATE: So, Lieutenant-Colonel Couture, now that you know more, that you know in detail what the prosecution intends to do, do you express the same views on this matter?

DEFENDING OFFICER: Yes, I do.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: And I have the **Ferguson** case for you. You were right when you ...

JUDGE ADVOCATE: It was **Ferguson**?

DEFENDING OFFICER: Yes. And I will not, with your leave and if you would confirm that I made my position fairly clear earlier on, I will simply reiter-

Defending Officer

Reply

ate that and simply add the following in the **Ferguson** case ... and I have given a copy to my colleagues there. At page 500, which is the second page there, of the CMAC decision, a justice and then Chief Justice Mahoney, in the middle of the paragraph after the words "... *Military Rules of Evidence*", Mr Justice Mahoney says:

"The facts 'observed or experienced' by a non-expert witness as contemplated by the rule ..."

and he was referring to 64(1) here,

"... must be facts within the *res gestae* of the offence charged. The rule does not contemplate the admission of opinion evidence by a non-expert based on what he has experienced or observed in circumstances entirely unrelated to the offence."

And then he goes on to dispose of the appeal.

Quite clearly, most or a lot of the testimony or proposed testimony of Lieutenant-Commander Davidson will call for opinions. It is how he sees it. "This is how I see a submarine being run". He will describe those things. But if they are not opinions, how are they relevant? How are they relevant if ... that's what I fail to understand. How can his description of a submarine or his view or his description as to how a submarine is operated ... which at the end amounts almost to conclusions basically, how can that be relevant? And then, if it is to be admitted as I suggest by way of relevancy being made by way of information of a nature to assist the court under 81, that has to be done by an expert.

Judge Advocate

Decision

The prosecution has expressed concern that if, for example, Davidson needs to be qualified as an expert to testify on those matters, that will increase the number of experts that he will need to qualify throughout the trial. I respectfully disagree with that in the sense that ... and as I understand the evidence that is forthcoming, many other witnesses will have been on board, were on board, at the time of the alleged offences, and I would suggest that then they would be in a position to qualify as required and to the extent it is required within the ambit of Rule 64.

As to others that my learned friend has referred to, the teacher on "Perisher" in England and all that, well, that may be properly an expert. But qualifying Davidson as an expert, in my view, surely wouldn't send a trend to have to qualify every single witness that would come to testify after. This is our position. Thank you.

JUDGE ADVOCATE: Very well. The court is closed to consider the objection made by the defence.

AT 1018 HOURS, 4 OCTOBER 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 1110 HOURS, 4 OCTOBER 1995, THE COURT RE-OPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: You may be seated.

The prosecution wishes to call Lieutenant-Commander Davidson to testify as an ordinary witness on several matters, namely, the organization of the First Canadian Submarine Squadron, the career progression and training of a submariner, the role of a commanding officer in such progression, the operation of a submarine, etcetera.

The defence objects to such line of questioning without the witness being first qualified as an expert under Military Rule of Evidence 81. It submits that the evidence sought by the prosecution could only

Judge Advocate

Decision

be made relevant if it falls within the content of MRE 81. In support of his argument, the defence refers to the CMAC decision of **Collins Grant Ferguson v. Her Majesty the Queen**, 4 C.M.A.C. 499.

As decided by the Court Martial Appeal Court in the above decision:

"the facts 'observed or experienced' by a non-expert witness as contemplated by the rule must be facts within the *res gestae* of the offence charged. The rule does not contemplate the admission of opinion evidence by a non-expert based on what he has experienced or observed in the circumstances entirely unrelated to the offence."

I will start with saying that I am bound by the rule of **stare decisis**. A large portion of the evidence sought by the prosecution can be qualified as opinion evidence. This is the case for example of evidence related to the career progression of a submariner, the type of actions and decisions that a commanding officer should take in certain circumstances, the operation of a submarine. As most of the evidence sought from this witness is based on what he has experienced or observed in circumstances entirely unrelated to the offences before the court, such evidence cannot be brought by an ordinary witness.

It is therefore my decision that should the prosecution wish to offer such evidence as described in this **voir dire**, it should do so through an expert witness.

Mr Officer of the Court, would you please invite the witness back to the stand and the Members of the Court back to the courtroom.

14th voir dire

PROSECUTOR: I still have a sub-issue to deal with first concerning Military Rule of Evidence 62(2), Mr Judge Advocate?

JUDGE ADVOCATE: Very well.

PROSECUTOR: Before I call an individual and have him qualified as an expert I will have to ...

JUDGE ADVOCATE: You wish to call more than three experts?

PROSECUTOR: I guess I may very well have to, Mr Judge Advocate. Right now we're getting some case law printed off that should assist us in the interpretation of Military Rule of Evidence 62(2). It may be, given that body of case law, that I may not have to make a motion pursuant to 62(2). I'd like to get an adjournment of five minutes ... and I promise five minutes, to get that case, bring it into court, try to persuade you that although I intend on qualifying as many as seven people, counting Lieutenant-Commander Davidson, as experts I will not require your leave pursuant to 62(2). Should you decide otherwise and find that I do have to get the leave of the court if I am going to call more than three persons as experts I will then have to make a motion at that point prior to calling Lieutenant-Commander Davidson and having him to be attempted to be qualified as an expert.

JUDGE ADVOCATE: Do you wish to call these witnesses on the same topic, the same field of expertise?

PROSECUTOR: Well, essentially, Lieutenant-Commander Davidson was commanding officer of the OJIBWA prior to Lieutenant-Commander Marsaw's command. I will also be calling a Lieutenant-Commander Kavanagh who is the current commanding officer of the HMCS ONONDAGA. I will call Lieutenant-Commander Hickey who, at the time that Lieutenant-Commander Marsaw was charged, was the CO of the OKANAGAN, and also call Lieutenant-Commander

Woodburn who, at the time Lieutenant-Commander Marsaw was charged, was the CO of the ONONDAGA. They will essentially be asked similar questions I guess that Lieutenant-Commander Davidson would be asked ... not to the same extent but I can clearly see those types of issues arising either on direct or cross-examination. And as a consequence, they may very well be qualified or attempted to be qualified in the same areas I will be seeking Davidson to be qualified in.

Then we've got another kettle of fish, former Command Chief[CPO1] Brown, who is a submariner of great experience, I will possibly be seeking opinion evidence from. Captain[N] Webster, who has commanded surface vessels as well as submarines, will certainly be called as an expert. And Commander Charlton of the Royal Navy, who was the Perisher instructor for Commander [sic] Marsaw, will also be called quite clearly as an expert. Their areas of expertise will be related to the areas I seek to have Davidson qualified in, but be much more specific and more focused dealing essentially with aspects of leadership, discipline, operational effectiveness ... and in Charlton's case, standards required to complete training to be qualified for submarine command.

So there is a body of case law based on the Canada Evidence Act, that has an interpretation of when I fall and don't fall within the ambit of the expert witness rule, that I would like to use to be able to argue that I don't need your leave under 62(2) because some of these people: Kavanagh, Hickey, Woodburn, might be in other areas and Brown, Webster and Charlton would be in other one.

JUDGE ADVOCATE: Very well, so you wish an adjournment?

PROSECUTOR: Five minutes and I will be back.

JUDGE ADVOCATE: The court is adjourned for five minutes.

ADJOURNMENT: At 1120 hours, 4 October 1995,
the court adjourns.

REASSEMBLY: At 1125 hours, 4 October 1995,
the court reassembles and the
accused is before it.

JUDGE ADVOCATE: Yes, Major Abbott?

PROSECUTOR: Thank you, Mr Judge Advocate.
The **Canada Evidence Act**, Section 7, states that:

"Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding."

There's a similarly worded rule, as you're aware of, in Military Rule of Evidence 62(2) that put a limit on three experts may be examined by any party without leave from the judge advocate.

There's a body of case law that has interpreted Section 7 of the **Canada Evidence Act**, the case of **R. V. Higgins**, 1979, 28 N.B.R., 2nd Edition, 20, New Brunswick Court of Appeal; and also a decision **Noyes**, N-O-Y-E-S, 1991, B.C. Court of Justice, and a Court of Appeal. It's 69 pages long and it's still coming through the QuickLaw printer so I don't have it in front of me. The thrust of the case law is that Section 7 has been interpreted to apply only to each area of expertise testified to. So the prosecution for

example could call more than five experts without leave from the presiding judge because they would be called in areas that were different.

I'm not sure to what extent that would apply to Military Rule of Evidence 62(2). I'm making a request that that body of case law would apply to interpreting 62(2). If it does, then I don't believe I would require leave from the court. I would have Davidson who would have to be qualified; then there would be Kavanagh, Hickey and Woodburn which of course would be qualified in the same area, for a total of four. I would have to choose which person I wouldn't get qualified. One of those three I would have to cut loose, I guess. Either not call them at all during the trial or call them but not call them as experts.

With regard to Command Chief[CP01] Brown and Captain[N] Webster ... I should say at this point, I'm seeking to have Davidson introduced ... and I can give you a copy of this ... as an expert in the organization of the First Canadian Submarine Squadron, the training and career progression of submarine officers, the operation of OBERON Class submarines, and the leadership of an OBERON submarine crew. That's what I'm seeking to have Davidson qualified in, and probably similarly so two of the three other commanding officers: Kavanagh, Hickey and Woodburn.

With former Command Chief[CP01] Brown and Captain[N] Webster, I would be seeking to have them qualified, without nailing myself to this, but in this general area of the leadership, discipline and operational effectiveness of the submarine crew. I would argue that that's distinct from what I am seeking Davidson to be qualified in, therefore, we would not have to request leave pursuant to 62(2), given the case law that interprets Section 7 of the **Canada Evidence Act**. Commander Charlton would be qualified and giving opinion evidence on standards required to complete training to be qualified for a submarine command. Should you decide that Chief[CP01] Brown and

Captain[N] Webster's testimony is in the same area of expertise as what I seek from Davidson, then I would have to, pursuant to 62(2), make a request before I call Davidson and seek to have him qualified as an expert, make a request to you to have leave to call more than three experts. Should you decide that the areas of expertise between Brown and Webster is sufficiently distinct from that sought by Davidson and two of the other three commanding officers, then I don't believe I will have to make a request.

So I guess at this point I am asking for a threshold ruling from you as to whether those different areas of expertise are in fact distinct. If they are, I may not have to make the request under 62(2). If you find that they are sufficiently similar that I am within the ambit of 62(2), then I will have to make a further motion before you to call more than three experts. Thank you.

JUDGE ADVOCATE: Lieutenant-Colonel Couture? Have you seen the fields of expertise?

DEFENDING OFFICER: We discussed it briefly. I made note of that of Lieutenant-Commander Davidson. I didn't make all the notes regarding the others, but listening to Major Abbott however, I found that they could be pretty close. And that's all. I mean, it's a bit speculative. And I guess it is my position at this time that it might be a little premature to attempt to dispose of the problem.

I will agree with the prosecution ... and although I have not made a total review of the law on this aspect, like fairly recently, but I tend to agree that the body of cases goes to the effect that the limitation on the number of experts pertain to the same subject. I would tend to agree on that. Now the question that remains to be decided or will, I would suggest, will have to be decided is whether those fields are so closely related as to amounting to the same. I can see, for example, possibly Charlton ap-

peared to be clearly distant from what I heard my friend stating. But quite clearly when we deal with Davidson, Hickey, Kavanagh, Woodburn, Brown, Webster, it seems all very intermingled. To what extent will the prosecutor be able to satisfied you, the judge advocate, that they are different - I don't know. I am not, myself, at this very moment in a position to say that because of their so close proximity.

So, having said that, I would take the position that it is probably premature to attempt to make any decision at this point in time without knowing further. And if it may be of any assistance to the court as to what my position will be, what I anticipate my position to be, is if indeed the prosecution qualifies so many witnesses ... let's say up to three for example, at this point on a given field - so be it. And then after that ... I mean he can do that without any permission on your part. After that, however, my position will be, and will depend of course on the evidence that they will attempt to adduce, will be that if their evidence, or the further proposed evidence by experts, is too much of the same of the first three, then I might object at this time by stating that it goes against the rule my learned friend has referred to. If they can be distinguished, I mean, I do not ... I'm not here to make undue interference, but if they are too linked together, then we will have to argue how many should be called, what is the necessity ... but those will be questions that will have to be addressed at the time.

I do believe that the rule of law that pertains to the limitation of experts on one topic is to prevent a parade, an endless parade, of experts on the same subject that would drag on forever and at the end would have added very little. So it's to limit the parties. A point has to be made and it appears that the legislators as well as tribunals have decided that as a rule a point, a point, is capable of being made through three experts or five experts under the **Criminal Code**. So that is my position.

JUDGE ADVOCATE: Thank you.

Do you wish to add something, Major Abbott?

PROSECUTOR: I just simply ... I don't think the motion is premature. I think you're bound, as you noted before, Mr Judge Advocate, 62(2) states that:

"Unless leave is granted by the judge advocate before ..." before "... any experts have been called by a party, not more than three experts may be examined by that party."

So I've got to make my pitch now. If Davidson takes the stand and gets qualified as an expert, I'm out of time procedurally to make that request given the wording of 62(2).

JUDGE ADVOCATE: But I will need more information if I go along with your argument that I should make my decision at this time. First of all, I would need the field of expertise in which you wish to qualify these different groups of experts in writing. Do you have that?

PROSECUTOR: I have it for Davidson, but I can type it up for each particular witness.

DEFENDING OFFICER: Mr Judge Advocate, if I may intervene and if this may help save time possibly, I forget about the exact rule but like it is open to you to take the course of action that is best suited to serve justice. And I can inform the court now that if the prosecution didn't make its application now, I would not object to them making it at a later time. That way it might prevent wasting some time now in attempting to provide you with enough information which can be quite demanding and you will make a decision on very scarce facts actually. And then, and I say that

with the most respect, but if it turns up later that the evidence comes out a little different than presented today by the prosecution, and I'm not insinuating that he would mislead you in any way, but should it come a little different, just a little different, might make the difference on the correctness of your ruling today. And then it would appear at that time you would be bound by the decision you have made today. I find it a very difficult situation and I am prepared, if it is to assist the court and the prosecution for that matter, to undertake not to force or make an objection to the prosecution making its request ... let's say that they have heard three on a given field, now they're prepared to call the fourth one, I will not ... I undertake that, I will not stand up and say you did not seek permission under 62(2) before any expert has been called therefore you're out of time. I undertake now not to make any objection of that nature and the prosecution, having heard their first three, will be at liberty to tell you more if they do indeed propose to call the fourth one or whatever, or to satisfy you that the fourth, fifth and sixth are different than the first three, and as needed to seek your permission. So if it is of any assistance to you, Mr Judge Advocate, this is the position I adopt.

JUDGE ADVOCATE: Thank you.

Major Abbott, are you satisfied with this offer made by the defence?

PROSECUTOR: The problem I have with it ... I appreciate the offer from my friend, he's trying to be very helpful, is that I may find myself using three witnesses as experts before I get to Chief[CP01] Brown, Captain[N] Webster and Commander Charlton who, if I could ever call three experts at this trial, they would be my first three picks. So if we get to a point in the proceedings where I've used up three experts on Woodburn, Kavanagh and Davidson, for example, then we argue out this whole motion about whether I can call more. I've compromised my case if I get a ruling from you that says I'm out of luck, I can't call anymore.

So from our point of view it's a request, I guess, that would have to be done up front so if, in fact, I can't call more than three I've got to make a decision at this point as to who I'm going to call and who I'm not going to call.

I wonder if it's helpful simply to state that I will be calling Kavanagh, Hickey, Woodburn and Davidson, as well as Brown, Webster and Charlton, will all be giving opinion evidence concerning leadership. And at this point you can tell me whether my request to have more than three people qualified as experts in that is or isn't granted? If it isn't granted, then I've got to decide ...

JUDGE ADVOCATE: So you already know that you will be calling more than three witnesses on the same area of expertise. Is it what you're saying?

PROSECUTOR: For the sake of assumption, for this motion - yes. If you come back and tell me that I can only call three experts in the area of leadership ...

JUDGE ADVOCATE: And perhaps I should ask why would you do so? Why do you intend to call more than three witnesses in the same area of expertise?

PROSECUTOR: Well, I would argue that I've already called ... I mean, I'm calling Davidson today to ask him what are his personal ... has he ever personally observed commanding officers use personally insulting adjectives to subordinates in his Control Room. I do not believe that that requires expert opinion. It's been asked of Hart, and you were even faced with an objection from defence counsel as to whether I could ask a similar question to Craven. I've asked Craven and I've asked Marr. That's what I was seeking with Davidson, but based on your ruling I'm now told that I have to qualify him as an expert to give that opinion.

JUDGE ADVOCATE: For opinion evidence. That doesn't mean I gave examples in my ruling. That doesn't mean that you have to qualify the witness to ask everything that you wanted to ask him. That's not what I said.

PROSECUTOR: That was my impression. I'm sorry.

JUDGE ADVOCATE: I gave an example.

PROSECUTOR: And as a consequence of that, then I would have to get them all qualified in leadership because I'm going to ask or seek or hope to ask them all what their observations are of whether they've had any commanding officers that have used personally insulting adjectives, and whether they have in their own experience done that as well.

JUDGE ADVOCATE: Well there is not too much I can do at this time. I don't have much before me. I mean, first of all, I will need, if you wish to proceed with this, I will need the field of expertise in which you wish to qualify each of these witnesses, and then I will need to know how many witnesses you wish to call in each of these fields of experience. And then if you wish a ruling at this time, I mean and if I have all the information, I will make one. If you don't accept the offer made by your friend ... I mean, and if you want a ruling, I'll make one. But at this time I don't have sufficient information.

PROSECUTOR: Okay, so I'll have to ask for an adjournment, Mr Judge Advocate, to give you that information.

JUDGE ADVOCATE: How long?

PROSECUTOR: It's quarter-to-twelve, can we come back at 1300?

JUDGE ADVOCATE: I have no problem with this.

Lieutenant-Colonel Couture, any objection?

DEFENDING OFFICER: No, I do not object.

JUDGE ADVOCATE: The court is adjourned until 1300 hours.

ADJOURNMENT: At 1145 hours, 4 October 1995, the court adjourns.

REASSEMBLY: At 1315 hours, 4 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott.

PROSECUTOR: Thank you, Mr Judge Advocate. I=ve given my friend a copy and I believe made a copy available for you as well of the names of individuals and the proposed areas that I=ll seek to have them qualified in.

I would seek to qualify Lieutenant-Commander Davidson as an expert for purposes of giving opinion evidence in the following areas: the organization of the First Canadian Submarine Squadron; the training and career progression of submariner officers; and the operation of OBERON Class submarines. I also propose later on to qualify former Command Chief Brown and Naval Captain Webster in the area of leadership of an OBERON submarine crew and acts which could be prejudicial to good order and discipline, and also the operation of OBERON Class submarines. Finally, I would seek later in the trial to qualify Royal Navy Commander Charlton in the area of the standards required to complete training to be qualified for a submarine command.

Given this, Mr Judge Advocate, I have four possible individuals who may be required to be qualified as experts. Military Rule of Evidence 62(2)

refers to a procedure where I must request leave from the court should I be calling more than three experts.

The case law that I had previously referred to before interpreting the **Canada Evidence Act**, section 7, the case of **R. v. Higgins**, has defined that rule to mean numbers of experts giving testimony in a similar or the same area of expertise. I would request that that interpretation be applied to 62(2) as well. If it is, I don't believe I will be required to ask for leave to call up to four individuals as expert because at the very most only three people would be qualified as experts in the same area during this trial. Thank you.

JUDGE ADVOCATE: Thank you. Lieutenant-Colonel Couture?

DEFENDING OFFICER: Well, Mr Judge Advocate, the prosecution has advised me of its intent and, of course if there is no request at this time, I have of course nothing to really reply on. I will only warn you, Mr Judge Advocate, that ... and the prosecution will govern themselves accordingly, I'm sure, that there will be some areas where the line will be fine between certain topics and I shall endeavour to be vigilant and make sure that the prosecution does not enter into certain fields that would be so-called reserved to experts. And should that come about ... well, we'll have to take it as it comes.

JUDGE ADVOCATE: Very well. Thank you. As requested by the prosecution, it is also my interpretation of Military Rule of Evidence 62(2) that it refers or should refer to each area of expertise. In other words, that when the rule refers to a maximum of three expert witnesses it should mean three expert witnesses testifying in each area of expertise.

Very well. So, Mr Officer of the Court, would you please invite the witness back to the chair and the Members of the Court.

THE WITNESS RETURNS TO THE COURTROOM.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

s.19(1)

Lieutenant-Commander Davidson Examination-in-chief

SIXTH WITNESS) Lieutenant-Commander R.A.
FOR THE) Davidson.
PROSECUTION)

JUDGE ADVOCATE: We're now back in the main trial, Mr President, and we'll hear the witness.

PROSECUTOR: Mr Judge Advocate, as I mentioned prior to the members of the court leaving, I would be asking Lieutenant-Commander Davidson questions concerning the organization of the First Canadian Submarine Squadron; the training and career progression of a submariner officer; questions on how a OBERON Class submarine operates. And as a consequence of that, understand that I will now wish leave to seek to have him qualified as an expert in the following areas: the organization of the First Canadian Submarine Squadron; the training and career progression of submariner officers; and the operation of OBERON Class submarines. In order to do this I would request your permission to ask Lieutenant-Commander Davidson questions concerning his background to provide the court with evidence that they can consider whether or not he would be qualified as an expert.

JUDGE ADVOCATE: Go ahead.

EXAMINED BY PROSECUTOR

Q. Lieutenant-Commander Davidson, prior to the members of the court leaving, just to run through quickly your résumé. You entered the Canadian Forces as an ordinary seaman reservist in 1977; you became a sub-lieutenant in 1979; and joined the Canadian Forces Regular Force in 1982? A. Yes.

Q. You were awarded your Dolphins in 1983?
A. Yes.

Q. And served on the OJIBWA at that time?
A. That's correct.

Lieutenant-Commander Davidson

Examination-in-chief

Q. And you were on a three-year exchange posting with the Royal Navy from 1984 until 1987?

A. Yes.

Q. When you were with the Royal Navy during '84 to '87, what were your tasks? A. I was the sonar officer of HMS WALRUS, and in the final six months I was the course training officer for the Basics Submarine course for the Royal Navy.

Q. In 1987 you were the executive officer of the OJIBWA? A. Yes.

Q. And in 1988 you were the executive officer of the ONONDAGA? A. Yes.

Q. In 1989 you successfully completed the Perisher course? A. Yes.

Q. And subsequently from August of 1989 to December of 1990, you became the commanding officer of the OJIBWA? A. Yes.

Q. In December of '90, you handed off command to Lieutenant-Commander Marsaw? A. That's correct.

Q. In 1991 you worked in the First Canadian Submarine Squadron as the warfare officer? A. Yes.

Q. And during that time you were also, for periods of it, acting commanding officer of the First Canadian Submarine Squadron Headquarters? A. That's correct.

Q. 1991 to 1992, you attended Staff College; 1992 you worked at NDHQ? A. Yes.

Q. In which directorate? A. In the now Director of Naval Requirements.

Lieutenant-Commander Davidson

Examination-in-chief

Q. From 1993 until 1995 you had a second exchange posting, but this time with the Royal Australian Navy? A. That's correct.

Q. And what did you do with the Royal Australian Navy? A. I was the OIC of the Submarine and Sea Training Group.

Q. OK. And currently, as of early 1995, you're Deputy COS Submarines for MARLANT? A. That's correct.

Q. In terms of the organization of the First Canadian Submarine Squadron, you mentioned that you were the acting commanding officer of the First Canadian Submarine Squadron Headquarters for a period of approximately six months? A. Yes.

Q. What duties were you involved with at that time, as acting CO of the Headquarters? A. There were two duties. Basically, one was the Squadron Warfare Officer and the other was CO of the Headquarters. The CO of the Headquarters function was primarily as the senior administrator for the functions going on inside the headquarters.

Q. Would that include working with the units, the other units that fall within the First Canadian Submarine Squadron as a whole? A. Yes.

Q. In your current position as DCOS for Subs, is an understanding of the organization of the First Canadian Submarine Squadron required for you to be in your present job? A. Yes.

Q. In terms of the training and career progression of submariner officers, I understand you, yourself, have gone through your Part 3 training; your SOCT training; an AC Course - Attack Commanders Course? A. Yes.

Lieutenant-Commander Davidson

Examination-in-chief

Q. You've gone through SOCT training?

A. Yes.

Q. And you've been awarded your command appointment through the Perisher course? A. That's correct.

Q. So you, yourself, have progressed through the training and career progression from sub-lieutenant to an officer who has been entrusted with command of a Canadian submarine? A. Yes.

Q. At the same time, by being a commanding officer of the OJIBWA, have you played a role in the training of Part 3s? A. Yes, I have.

Q. Have you made assessments and issued First Officer of the Watch certificates? A. Yes.

Q. Have you participated in any Perisher training of any sort? A. Yes, I have.

Q. In what capacity? A. I was the CO of a submarine that had the Perisher students on board for a period of one week.

Q. Would you also give assessments concerning subordinates' ability to go on and take command courses or obtain command positions? A. Yes.

Q. In terms of the operation of OBERON Class submarines you, yourself, have been an officer and sailed on which Canadian submarines? A. The Canadian submarines OJIBWA and ONONDAGA.

Q. Have you ever sailed on any other OBERON Class submarines? A. I sailed in HMS WALRUS, which is not an OBERON Class but very similar, a PORPOISE Class, the predecessor. And I sailed in three RAN OBERON Class submarines.

Lieutenant-Commander Davidson

Examination-in-chief

Q. As part of your duties with the Royal Navy, would that require an understanding of how OBERON Class submarines operate? A. Yes.

Q. And with the Royal Australian Navy in sea training, would that also require an understanding of the operation of OBERON Class submarines? A. Yes.

PROSECUTOR: Mr Judge Advocate, at this time I have no further questions for the witness. Thank you.

JUDGE ADVOCATE: Thank you. Mr Defending Officer, do you wish to cross-examine on the qualifications?

DEFENDING OFFICER: No, I do not and I have no objection.

JUDGE ADVOCATE: Thank you. So this court is satisfied that the witness has the requisite knowledge, skill, experience or training to be qualified in the field sought by the prosecution.

So, Lieutenant-Commander Davidson, you will now testify as an expert witness in the field of the organization of the First Canadian Submarine Squadron; the training and career progression of submariner officers; and the operation of OBERON Class submarines.

PROSECUTOR:

Q. Lieutenant-Commander Davidson, in ballpark figures, can you tell the court how many submariners work within the First Canadian Submarine Squadron? A. About 250.

Q. OK. And out of the 250, how many would be officers? A. About 40.

Q. Can you describe the organization of the First Canadian Submarine Squadron, or as it's known

Lieutenant-Commander Davidson

Examination-in-chief

SM1, as it existed approximately from 1990 to 1995?

A. The submarine squadron is headed up by the squadron commander. He has essentially four units under his command: the headquarters and the three submarines OJIBWA, ONONDAGA and OKANAGAN.

Q. OK. In 1990, what was the rank of SM1?

A. In 1990, SM1 was a captain.

Q. And what's the current rank of SM1?

A. Commander.

Q. All right. What year, approximately, did the shift occur between four-rings to three-rings for commanding the First Canadian Submarine Squadron?

A. In 1992.

Q. Do you know why that change occurred?

A. The change occurred primarily as a trade off in billets. The billet of squadron commander had been either captain or commander for a period of time.

Q. Would all three boats be operational from 1991 to '95? A. No. One of the boats ... most of the time one of the boats is in refit. There are times when all three are running.

Q. Do you recall which boats were in refit and which boats were operational during the periods of '91 to '95? A. In 1991, ONONDAGA came out of refit. In 1991, OKANAGAN went into refit and came out of refit in '94, at the beginning of 1994. And OJIBWA went into refit in '93.

Q. In ballpark figures, how many members are there on each submarine? A. The complement for OJIBWA is 62 and normally there would be additional personnel on board for training; and the complement for OKANAGAN and ONONDAGA ... Correction, OJIBWA is 65; ONONDAGA and OKANAGAN are 62.

Lieutenant-Commander Davidson

Examination-in-chief

Q. That would be the normal complement?

A. That's the normal complement. They normally have additional personnel on board for training.

Q. Is that common to have additional personnel on board for training? A. Yes.

Q. Can you recall the names of the people that commanded the three boats during the periods that they were operational from 1991 to '95? A. During the period that OJIBWA was operational, it was commanded by Lieutenant-Commander Marsaw from '91 to '93. ONONDAGA came out of refit with Lieutenant-Commander Truscott in command, he was replaced in '92 by Lieutenant-Commander Woodburn, and he was subsequently replaced last year by Lieutenant-Commander Kavanagh. OKANAGAN came out of refit with Lieutenant-Commander Hickey and has subsequently had Lieutenant-Commander Mosher take command at the beginning of this year.

Q. I wonder if you could identify this chart for me, please? A. This is a divisional organization for a submarine.

Q. Based on the minimal manning levels for the OJIBWA? A. Yes.

Q. Is it an accurate representation?
A. Yes.

PROSECUTOR: Mr Judge Advocate, at this time I would like to seek to introduce this Division Organization of HMCS submarines as an exhibit, please.

JUDGE ADVOCATE: Thank you. Exhibit "O".

DIVISIONAL ORGANIZATION CHART IS MARKED EXHIBIT "O".

PROSECUTOR: Here are some copies of it.

JUDGE ADVOCATE: Thank you.

Lieutenant-Commander Davidson

Examination-in-chief

PROSECUTOR:

Q. Can you, with reference to this chart, briefly outline the general chains of command for a submariner on board an operational unit? A. The individual submariners at the lower ranks are responsive to a petty officer for the division, the divisional petty officer; and normally a divisional chief petty officer and depending upon the division; and then a divisional officer. The individual divisional officers are responsible to their heads of departments for their work; and lastly this diagram shows the heads of departments; and then ultimately the executive officer as the senior head of department would be administratively in charge from a divisional perspective; and then the commanding officer.

Q. OK. What departments exist on board a submarine? A. There's essentially the executive department: admin, personnel, medical and the cox'n; a supply department consisting of the cooks and steward; an operational department consisting of the sonar personnel, above water sensors, radio; the combat systems department consisting of the combat systems engineering maintenance personnel; and the marine systems department consisting of the engineering personnel, as primarily heavy machinery and the electrical personnel.

Q. Does the divisional system exist on a submarine as it does on a surface vessel? A. Yes, it does.

Q. If a sub-lieutenant or lieutenant on a submarine wished to make a redress of grievance, could you outline the chain in which they would submit that grievance? A. Initially, a sub-lieutenant would raise a grievance with his head of department, it would then be taken up with the executive officer, and then the commanding officer.

Q. If the individual had a grievance against the commanding officer, would the routing change?

Lieutenant-Commander Davidson

Examination-in-chief

A. The routing doesn't essentially change, however, if the individual felt that he wasn't being adequately addressed, he would have the possibility in the squadron of seeing the squadron commander.

Q. Would the squadron commander be the immediate superior to a commanding officer of a submarine? A. Yes, he would.

Q. And for 1991, who was the squadron commander by name? A. Captain Jay Plante.

Q. And who is his successor? A. Commander Scherber.

Q. Dealing now with the training and career progression of the submariner, can you outline in general terms the general courses and qualifications an officer submariner would go through from the point of being a sub-lieutenant all the way up to and including obtaining command of a Canadian submarine? A. A junior officer would be selected for the Submarine Course, the SOTC, which is about 80 or 90 days in duration. On completion of that course, which is generally referred to as his Part 1, he will go to sea, at which point he would do an OJT package of requirements which would normally take anywhere from six to nine months, some individual have been known to take longer. On completion of that, for a MARE officer, he would be attempting to get his head of department qualification, whereas the MARS officers would be attempting to get their first officer of the watch qualification. On completion of the OJT package, the individual does a board chaired by the squadron commander of the squadron and that's the point at which he's awarded his Dolphins.

Q. How is it determined when that person is ready to be boarded or to do his board? A. An individual is recommended for the board by the submarine, by the commanding officer.

Lieutenant-Commander Davidson

Examination-in-chief

Q. By the commanding officer. So the individual would require the recommendation from the commanding officer before he'd ever see a qualification board? A. Yes.

Q. After the individual is boarded and successfully obtains his Dolphins, what would his next career progression step be? A. When he has his Dolphins, he would ideally stay on board for a period of time for consolidation in the case of a MARS officer in order to obtain his first officer of the watch qualification. He may be sent ashore at that time to progress in other training and perhaps D-level coursing or a shore job of some sort.

Q. When you say D-level coursing, what do you mean by that? A. D-level course, either a Destroyer Navigating Officer's Course or in rare instances there are Underwater Warfare Director that an individual can take. Then they would go back and do a full tour as a navigator or similar level position. That's normally followed by a tour as an operations officer. Sometime during the tour as an operations officer or just prior to an executive officer position, they would be selected to attend an Attack Coordinator's Course.

Q. Generally speaking, would the Ops O position be the stepping stone towards XO appointments? A. Yes.

Q. And Attack Coordinator's Course, is that sometimes referred to the XO Course? A. It can be referred to as an XO Course.

Q. Where is the course held? A. The course that's generally used is the Kwanata, held in the RAN down at HMAS WATSON in Sydney, Australia.

Q. Who determines who goes on the AC course? A. The course loading is done at the squadron level on the recommendations of commanding officers.

Lieutenant-Commander Davidson

Examination-in-chief

Q. And you had mentioned before SOCT, what is SOCT? A. Submarine Officers Continuation Training. It is a form of continuation training where assets are provided and a submarine is provided at sea to progress individual officers training. They get an opportunity to conduct a task against surface ship, to do inshore operations. It is basically an advanced level of continuation training with assets being provided to ... assisting with professional development.

Q. Is the purpose of the SOCT to determine whether an individual is ready go on to take the command course? A. The purpose of the SOCT partly is to determine those individuals that are suited to command. And it is also to progress their training for follow on position to Ops O and XO.

Q. Would an individual have to go the AC course before he would ever do SOCT? A. No. SOCT students can be at the navigator and Ops O level.

Q. So a person can be on SOCT before his XO appointment but also after his XO appointment as well? A. Yes.

Q. What would be the next course an individual might go on after successful completion of the AC course and SOCT? A. Well after a period of time as an Executive Officer - I believe the normally accepted standard is about a year - an individual would, if recommended for Perisher, be selected for that course.

Q. Who would determine whether the individual is ready to go on Perisher or not? A. That is determined by both the commanding officer and SM1, the SM1 commander.

Q. Do you know the name of the last Canadian submarine officer who went on the British Perisher

Lieutenant-Commander Davidson

Examination-in-chief

course? A. That would be Lieutenant-Commander Kavanagh.

Q. And I understand he was the last of the individuals we sent over to England. We have now started up our own Canadian Submarine Command Officers Qualification Course? A. Yes, we have. It is called the SMCOT.

Q. And do you know the name of the candidates that have successfully passed that to date? A. There has been one candidate that has successfully completed that course and that was Lieutenant-Commander Dussault.

Q. When you were commanding officer of the OJIBWA, did you have Part 3s in your wardroom? A. Yes, I did.

Q. How long were you the commander of the OJIBWA, how many months? A. Sixteen months.

Q. How many Part 3s did you have in your wardroom? A. Six.

Q. Would that be common? A. Over that period, yes.

Q. Out of the six, how many were successful on obtaining their Dolphins? A. Six.

Q. Based on your observations, what is the general pass rate for Part 3s? A. About 70 or 80 per cent.

Q. And again just to review, for SOTC the commanding officer would be the individual that makes a recommendation that the individual is ready to be boarded? A. Yes.

Q. And the commanding officer is the individual that would award the first officer of the watch

Lieutenant-Commander Davidson

Examination-in-chief

ticket for a Part 3? A. Not for Part 3 for some of the Dolphins.

Q. And the CO would have a role to play in making recommendations as to who goes on the Attack Coordinator's course? A. Yes.

Q. Although that decision would ultimately be made by SM1? A. That is correct.

Q. What role does the CO of the boat have, the CO of the boat in which the SOCT training is undertaken on it, does he have any formal or informal role in assessing SOCT candidates? A. During an SOCT the observation of the students and the running of the course - it is not formerly a course - but the running of the training is done by the commanding officer and the commanding officer would have input into the assessment that is prepared primarily by SM1.

Q. And the teacher of the Canadian SMCOT what role does he have to play? A. The teacher of the SMCOT decides whether the individual is competent to go to sea. So he makes that initial assessment based on shore days. And then he has a slice of the one quarter course into the assessment at sea.

Q. At any one year within the squadron how many people between '91 and '95 would be eligible to go on the AC course? A. Normally two to three people per year for the AC course.

Q. And how many people would be eligible to be selected for the command course at any one year? A. Again about one or two perhaps three in a good year.

Q. That is just because there is only a small handful of people at that point in their career progression in any one year? A. That is correct.

Q. Based upon your personal knowledge has anybody ever been recommended to go on the command

Lieutenant-Commander Davidson Examination-in-chief

course but then poorly assessed at SOCT and never put on the command course? A. Yes.

Q. Who is that individual? A. Lieutenant-Commander Larkin.

Q. Do you know who the commanding officer of the boat was in which the SOCT occurred? A. I believe it was Lieutenant-Commander Marsaw.

Q. Do you have any personal observation of that? A. I had no personal observation of the SOCT, of course not.

Q. Had you made a recommendation for Lieutenant-Commander Larkin to go on the command course? A. Yes, I had.

Q. What was his position in relation to yours? A. ...

DEFENDING OFFICER: Mr Judge Advocate, at this point, I am not sure ... I haven't seen Lieutenant-Commander Larkin's name on any of the annexes attached to the charge sheet. The witness is dealing with matter obviously that he hasn't observed according to his own admission and I would question the relevancy of this.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I have no problem addressing the objection. I will be referring to anticipated evidence to be called in the future. However to show how it is relevant, I am in your hands as to whether we can do that in the presence or absence of the members of the court as well as the witness.

JUDGE ADVOCATE: You may proceed.

PROSECUTOR: It will become relevant later on during the trial, Mr Judge Advocate, that the career

Lieutenant-Commander Davidson

Examination-in-chief

progression or lack thereof of Lieutenant-Commander Larkin, was a defining moment in the minds of a number of potential ... actually witnesses that will be called at this trial to explain why they did or didn't do certain things in regard to the treatment they received from Lieutenant-Commander Marsaw. Simply put you had an individual who was progressing well in his career. Everybody anticipated he would go on command course. He was recommended for a command course, ended up doing an SOCT on Marsaw's boat. Commander Craven has already made reference to the statement he is mean and aggressive "Maybe I'll fail the first SOCT candidate." That in fact was done. That was the perception that was held by many and explains the acts that we will learn subsequently out from Lieutenant[N] Wamback and in particular Lieutenant-Commander Dussault to explain their actions and they were allegedly treated in particular ways by Lieutenant-Commander Marsaw. The Larkin experience was a defining moment in understanding the career progression of a number of submarine officers and therefore is directly relevant to the issues my friend has already raised such as questions, why didn't you complain? And who did you complain to?

JUDGE ADVOCATE: Very well. You may proceed.

PROSECUTOR:

Q. Did you make recommendation for Lieutenant-Commander Larkin to carry on with command training on the command course? A. Yes, I did.

PROSECUTOR: This time I wonder if we can get the podium out. We will do a review of different parts of the boat identifying certain areas of the boat to the court. I will be referring to Exhibit "H".

Q. There will be a number of points in the boat that other witnesses will be referring to and I would like to identify the following positions on the exhibit. Now the fore ends and torpedo room? A. May I stand?

Lieutenant-Commander Davidson

Examination-in-chief

Q. Please? A. This is the fore ends there.

Q. And this for the purpose of identifying on the record, this will be number 2 bulkhead? A. I don't see the bulkhead number on here.

Q. So it will be number 2 main tank, where it reads number 2 main tank. Is there living space in the fore ends? A. There is traditionally living space there. It is a magazine but it has been used for living space for the use of ... bunks are strung in there.

Q. Was it ever used when you were a commanding officer of the OJIBWA as living space? A. Yes.

Q. For who? A. Normally it is used by the Part 3s and the fore ends watch keepers.

Q. Can you identify where the junior and senior rates mess is? A. The junior rates are here. The senior rates are here.

Q. If you can just identify that with the pointer off to the side so all the members of the court can see. And that would be near number 3 in your ...
A. Junior rates mess and the senior rates mess here.

Q. So the engine room and the motor room?
A. This is the engine room here and the motor room in this vicinity.

Q. For the purposes of the transcript can you identify when you point to an area the heading that would be at the top of the diagram just for references?

A. The heading at the top says number 5 through the free front space here, 5 main tank through to 3 flats space here is the area outside of the engine room and the motor room.

Lieutenant-Commander Davidson

Examination-in-chief

Q. Where was the heads located? A. The heads were located here in the control room.

Q. And the galley? A. The galley is opposite.

Q. So that would be after the control room?
A. After the control room.

Q. And the pantry for the wardroom? A. The wardroom pantry is in the passageway outside of the wardroom which is here.

Q. And that is just below number 2 oil fuel tank ...
A. Just under ... below number 2 oil fuel tank.

Q. The auxiliary machine space? A. The auxiliary machinery space is the deck below the control room. So it is down underneath this area here which is from ... on number 3 and 4 main tanks stand below here.

Q. So it would be on a different deck than the control room is on? A. A different deck, it is a half deck. So it is not full standing room.

Q. The control room? A. The control room extends from here.

Q. Which would be number 2 oil fuel tank?
A. Number 2 oil fuel tank back to here, number 3 oil fuel tank.

Q. How would one get to the bridge from the control room? A. You get to the bridge from the control room by a ladder which is in the fore part of the control room just forward of the attack periscope. It is a ladder that is rigged when the submarine is on the surface and is de-rigged when the submarine is dived.

Lieutenant-Commander Davidson

Examination-in-chief

Q. How many planes exist on the OJIBWA?

A. There are planes forward and aft. The forward planes are just out of the casing area in this vicinity. And the after planes are underneath the hand guards.

Q. What is the purpose of a plane?

A. Planes are used to control depth.

Q. That will be it for this exhibit. I would like to use another exhibit. Look at the layout of the control room. This will be Exhibit "I". Can you identify where the helm seat is? A. The helm seat is at the one man control.

Q. And identify where the trim seat is?

A. The trim seat, the trimming officer sits just back of the operator here from the OMC.

Q. The first and second panel? A. The first panel watch keeper is in this area by the main buoyant panels. And the second panel watch keeper does all the activities after that down through the passage way.

Q. Is the control room divided on one half, certain functions are done, on the other half ...

A. It is essentially functionally divided in that primarily the left hand side is your control, maintaining the attitude of the submarine, on the right hand side is the tactical and navigation aspects.

Q. The command display console, CDC, where is that located? A. The CDC, command display console, is here.

Q. And the sound room? A. The sound room is here.

Q. The radio room? A. The radio room is aft and opposite the heads.

Lieutenant-Commander Davidson

Examination-in-chief

Q. The radar room? A. The radar office is here, the doorway is just after the search periscope.

Q. The navigation or plot table? A. The chart table is here on the starboard side of the submarine in the vicinity of the two periscopes.

Q. There are only two periscopes in the control room? A. Yes.

Q. What is the difference between the forward periscope and the aft periscope? A. The forward periscope is called the attack periscope. It is referred to as attack periscope because it has a much smaller cross-sectional size at the top the periscope and so it is better for you to close in to other units, it is much harder to detect. It is monocular. The search periscope is further aft, has a much larger cross section, a much larger radar cross section, and it is binocular and it is used for a better visual searching.

Q. Is there a seat that is attached to the aft periscope? A. There is a seat there. There is a round ... what is referred as a roundabout and it is a small pedal driven seat that cause the periscope to go around so that you don't have to physically move it yourself all the time.

Q. But the forward periscope you actually have to hold it and physically move it around?
A. That is correct.

Q. With the aft periscope you can sit on a seat and through a foot pedal ... A. You can engage the roundabout using a small detent and drive it around.

Q. So that will be it for the chart, thank you. What would be other main areas where work would be done in a submarine apart from the control room?
A. There are watch keepers in the engine room, three

Lieutenant-Commander Davidson

Examination-in-chief

or four depending upon the class of the submarine. On the OJIBWA there would be four watch keepers. There would be two watch keepers in the motor room area, one of them is a roundsman. And there are watch keepers individuals in the forward and after ends where there are personnel and where the two single ejectors are.

Q. I would like to ask you some questions on how a sub actually goes about servicing and diving and manoeuvring. How does a sub basically surface and dive? What is involved with doing that? A. The process of surfacing and diving is based upon ballast and expelling the water out the ballast tanks to increase your buoyancy from the period that we are on the surface and of course you fill those tanks by opening the main vents on the top of those tanks so that the boat becomes negatively buoyant, neutrally buoyant, so that you can dive it and maintain that neutral buoyancy through the compensating systems.

Q. So through a process of filling certain tanks with water and filling other tanks with air the sub can surface or ... A. It can maintain, or either be on the surface, or dived condition. And the actual depth keeping is then done through propulsion and trimming and use of the planes.

Q. What factors impact on keeping the sub on a certain depth either at the surface or under the water? A. Well internally the trimming officer and his ability to maintain the neutral buoyancy of the submarine, the speed at which the submarine is being propelled will affect the quality of the planes and the ability that they will have to affect depth. And of course the planes man's and his ability to anticipate and then manoeuvre of the planes to stay on depth. Externally primary factors are sea and swell and high changes in density.

Q. Changes in density of the water?
A. That is correct.

Lieutenant-Commander Davidson

Examination-in-chief

Q. So the water temperature, fresh water or salt water will affect ... are being external factor on whether depth is kept or not? A. Yes.

Q. Is it easy to keep a sub on depth within an inch or two? A. I would say it is almost impossible to keep a submarine on depth within an inch or two. The best planes man on each submarine will be normally designated as the man for action planes man. And he is normally capable of keeping a submarine within about 6 inches on depth provided there are no unusual external factors.

Q. Do you recall whether your sub standing orders required you to be notified if you were off depth of more than 10 feet? A. Yes, they did. I also asked for 5 feet when we were at periscope depth.

Q. Five feet at periscope depth, 10 feet while dived? A. Yes, or deeper.

Q. So if the boat was off depth within those ranges there was no need to call you. If they were beyond that you would have to be consulted? A. That is generally correct. But they would also have to call me if they were having difficulty maintaining depth. So if they were consistently four and a half and 5 feet off depth I would expect them to call me.

Q. How would a sub change direction apart from going up and down? A. Well the helmsman also controls the rudder which changes course.

Q. What do you refer to as trimming?
A. Trimming is adjusting the water inside the submarine. There are two ways of doing that. There is the trim system which moves water between the forward part of the submarine and the after part of the submarine and vice versa and also controls some of the tanks, external tanks that can be used. And the main line system is used for bringing water in or taking water out of the submarine for the overall neutral points.

Lieutenant-Commander Davidson

Examination-in-chief

Q. And does trimming reflect the angle or degree that the ... A. Trimming will affect the angle that the helmsman is required to maintain to stay on depth.

Q. What about planing, what is that process?
A. Planing is the actual control of the submarine both in course and depth and it is using the yoke system and a wheel much like an aircraft. When pulling back it causes the submarine to assume an up angle, when pushing down would cause the submarine to take a down angle.

Q. In terms of snorting, what is snorting?
A. Snorting is running the diesel engines when you are dived by sucking air for the engine down through the induction system and then blowing out the exhaust through the exhaust system.

Q. So the submarine as a whole is under water but it is taking on air because it is close to the surface? A. It is close to the surface and the induction mast is actually out of the water.

Q. Why would a sub have to snort? A. A submarine needs to snort to maintain the battery at a suitable level for operations, to keep charging up the battery when the battery is being used.

Q. Can you identify what the general role is of the first officer of the watch in the control room?
A. The officer of the watch, the first officer of the watch in the control room has charge of the submarine and so his role is to control the submarine both in attitude and in depth keeping and where it is going as well as maintaining a tactical picture of the surroundings and calling the captain and keeping him informed if necessary.

Q. The second officer of the watches, what are their roles? A. The second officer of the watches

Lieutenant-Commander Davidson

Examination-in-chief

support the first officer of the watch by doing any number of functions from operating the fire control consoles, putting fixes on the chart or doing the trimming job or maintaining looks on the periscope.

Q. And the helmsman, what is his job?

A. The helmsman job is to maintain course and depth.

Q. First and second panel watch keepers, what do they do? A. The first panel watch keeper is the senior of the two and it is his function to man the buoyant panels and the main vents which are the key elements in the system for surfacing and diving. Actually he has to stay within basically an arm's reach of those system all the time. The second panel watch keeper's job is to carry all of the other functions that might be required in the control room such as operating valves, doing a snorting drill, raising or lowering periscopes and those types of things.

Q. Are they engineers by trade? A. Yes, normally.

Q. And what rank would the first and second panel watch keepers be? A. The first panel watch keeper can be a leading seaman, often a master seaman, also petty officers. The second ...

Q. Sorry. How about helmsman? A. The helmsman is normally a petty officer of the watch level individual as well, so he can be master seaman, he could be a leading seaman, in some cases they are petty officers.

Q. I interrupted you. You were about to discuss the rank I think for the second panel? A. The second panel is junior to the first panel, works for the first panel and is normally at the leading seaman or able seaman level, possibly ordinary seaman.

Q. Sonar men, what rank are they? A. Sonar men cover all of the ranks up to petty officers.

Lieutenant-Commander Davidson

Examination-in-chief

Q. How many sonar men would usually be in the control room when dived? A. There are normally three sonar men inside.

Q. How many radio men are in the control room at any one time? A. One, normally inside the radio office most of that time.

Q. What rank level would he be? A. He can be an able seaman, a leading seaman or master seaman.

Q. About the radar men, how many are there and at what rank level? A. There may be one or two individuals in that space and again it can vary in terms of which individuals are filling the billets. It could be a master seaman or a petty officer 2nd class or more likely a leading seaman or even an able seaman.

Q. CDC operator, command console display?
A. CDC operators and the petty officer of the watch is essentially rotation, they're again the same rank level as the helmsman.

Q. Do they often rotate jobs between the helmsman and the CDC? A. Yes.

Q. Ship control officer of the watch?
A. The ship control officer of the watch is the second officer of the watch that is designated basically for trimming, for ship control. So his primary function is the trimming, operating the telegraphs, and supervising the helmsman and the first and second panel watch keepers.

Q. So generally speaking when a sub is dived you would have an officer of the watch, two second officer of the watches, a helmsman, the first panel and the second panel watch keeper, three sonar men, a radio man, a radar man, a CDC operator who would rotate with the helmsman and a spare and the ship control officer of the watch? A. There may also be an individual on

Lieutenant-Commander Davidson

Examination-in-chief

the fire control again normally from the petty officer of the watch rotation. In addition there may be - it is not necessary that there would be three officers, normally in Canadian submarines there are three but it can be done by two and in some cases at higher states of readiness there could be four or more officers in the control room.

Q. How many extra people, what extra roles would come into play if the control room was organizing an attack team for an attack? A. The attack team is basically the "A" team if you will for conducting an attack. So the XO comes out and assumes the attack coordinator's function and you put the specialist on each of the individual position.

Q. So each position would have a dedicated person looking after it? A. Yes. Normally someone who has specifically trained for that job in command team training and most of the evolutions that have been done at that higher level of readiness.

Q. So in addition to the people that were just mentioned that would usually be there when the sub is dived you would have the XO as the attack coordinator, the AC? A. Yes.

Q. Two people at fire control? A. Yes.

Q. Somebody working the LOP, the local operations plot? A. There would be a dedicated officer on the LOP and he would have an assistant.

Q. And would there also be another officer possibly that assist simply in the forwarding of information between the sound room ... A. There is a PSC, a principal sensor coordinator, who operates or assists in the management of information on the CDC and in the supervision of the sound room.

Lieutenant-Commander Davidson

Examination-in-chief

Q. And also a periscope assistant? A. A periscope assistant who would assist the captain with the operation of the periscope.

Q. And would there be sometimes what you refer to HQ1 in the wardroom? A. Yes.

Q. What is HQ1? A. HQ1 is the damage control organization to respond to any emergencies or defects or problems while you are closed up.

Q. They would be positioned in the wardroom next to the control room? A. Yes.

Q. And who would be in the wardroom as part of HQ1? A. Normally one of the engineers, usually the MSE and a collection of individuals to support him, specialists, electrical specialists ...

Q. So electricians, stokers? A. Yes.

Q. Electronics people? A. And somebody for communications.

Q. When the submarine is on the surface how does the control room organization change? A. On the surface there are essentially two states of readiness to dive. One is in a passage when you are not expecting to dive at short notice and one is where you may be required to dive at short notice. In the passage state there are very few people required in the control room. The officer of the watch is on the bridge for the lookout. There is a petty officer of the watch in the control room; he does the navigation and supervises. There is a helmsman, an individual panel watch keeper, and a roundsman or a runner basically.

Q. What percentage of the wardroom have roles in the control room on the OJIBWA? A. All of the wardroom have roles in the control room dived.

Lieutenant-Commander Davidson

Examination-in-chief

Q. Ballpark percentage ... what percentage of other ranks have roles in the control room?

A. About 60 per cent other ranks of a ship's company have roles in the control room.

Q. What are the typical ship rotations the OJIBWA or any of the other subs would have while dived?

A. The submarines can operate two systems. One is a one in three shift rotation which is three hours on and six hours off. Or one in two shift rotation which is six hours on, six hours off. And the commanding officer decides that based upon the level of readiness he wants.

Q. What is the longest sail that you have ever been on as a submariner? A. Something over 50 days.

Q. Do you recall when that was? A. In the spring of 1984.

Q. Do you recall the exact dates? A. I don't recall the exact dates, no.

Q. Do you recall the months? A. I only recall that it was in the spring. I couldn't say the exact ... I believe March was the essential part.

Q. What were you doing on the 6th of March? A. I have no idea.

Q. Who did you talk to? A. I don't remember.

Q. Do you know if it was a Monday or a Tuesday? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I am not sure what this line of questioning is leading us to. And I would object at least on the relevancy for sure.

Lieutenant-Commander Davidson

Examination-in-chief

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: What I am getting at right now is his experience as a submariner when they are away at long period of time. The defence has cross-examined the witnesses basically asking questions that challenge their memory to recall, where were they? Who was this said to? When did it happen? My argument that I will show throughout the evidence is that when you are on a submarine, you are away for 60 days at a time, life becomes a bit of a blur. That doesn't mean there is anything wrong with the memory or the credibility of the witnesses. Simply that is the nature of life on a sub. You are up for six hours. You are sleeping for four. You are back up. After a while you don't know if it is a Monday or a Tuesday or night or day. That is the existence and the experience of being a submariner. It doesn't mean you have got a faulty memory. That is the purpose of my question.

DEFENDING OFFICER: I would maintain ever more so my objection. It is absolutely what is referred to as credibility boasting. If witnesses want to explain their testimony, their failure of memory, whatever the case may be, they can do that. But I suggest and I find totally inappropriate and inadmissible according to the rules of evidence that such evidence be adduced.

JUDGE ADVOCATE: And also where does it fit in the qualification of the witness to answer such a question?

PROSECUTOR: I don't think I am asking for his expert opinion at this point. I am simply asking for his own observations if he can recall what he was doing on the 6th of March '84 during his 50-day sail.

JUDGE ADVOCATE: I don't find that question to be relevant. So the objection is sustained.

PROSECUTOR:

Lieutenant-Commander Davidson

Examination-in-chief

Q. Can you recall the commanding officers that you have sailed on while serving on Canadian submarines? A. Yes.

Q. Who were they? A. My first commanding officer was now Commander Nicolson. My second commanding officer was then Lieutenant-Commander Webster. And my third Canadian commanding officer was now Commander Bush.

Q. You have also had Anderson and Derricks?
A. Anderson and Derricks, that is correct.

Q. And what service were they with?
A. They were both Australian officers. Anderson was commanding the Royal Navy submarine I was on. And Derricks had command of the Canadian submarine I was on.

Q. Based upon your observations of these commanding officers, have you ever heard any of these commanding officers refer to individual subordinates in the presence of others in the control room with personally derogatory adjectives? A. I can only recall one incident.

Q. And how many years have you been a submariner? A. I have been serving in submarines since 1982.

Q. As commanding officer of the OJIBWA, have you ever referred to individuals in the presence of others with personally insulting adjectives? A. No, I have not.

Q. How would you deal with the situation as commanding officer of the OJIBWA when an individual had made an error or wasn't working up to your expected standards? A. If an individual makes an error in the control room that requires my immediate attention, I would correct the error all the way, directly. If an

Lieutenant-Commander Davidson Examination-in-chief

individual is not meeting up to my expected standards, generally I would counsel him in my cabin.

Q. Why would you do it in the cabin?

A. Because there is an issue of individual credibility and to, in other words, dress him down for his standard of performance in public would be inappropriate.

Q. I would like you to read QR&O article 19.13 please? A. ...

JUDGE ADVOCATE: Nineteen what?

PROSECUTOR: Nineteen point thirteen.

WITNESS: Aloud or ...

PROSECUTOR:

Q. Aloud please? A. "REBUKE IN PRESENCE OF JUNIOR. No officer or non-commissioned member shall rebuke any person in the presence or hearing of anyone junior to that person in rank, unless a public rebuke is absolutely necessary for the preservation of discipline."

Q. How many occasions can you think of as a submariner where it was absolutely necessary for the preservation of discipline to use personal derogatory adjectives towards a subordinate in the presence of his juniors? A. None.

Q. Have you ever been in any life threatening dangerous situations as a submariner? A. Yes.

Q. How many occasions do you recall? A. I can recall two specific incidents where individuals were at risk.

Q. But not the sub as whole? A. Not the submarine as a whole.

Lieutenant-Commander Davidson

Examination-in-chief

Q. Can you describe those situations?

A. There was an incident in the North Atlantic when my submarine was on the surface and the weather had deteriorated markedly over a short period of time. The submarine took a freak wave and rolled excessively which caused the tower, which was in a reverse condition as the tower which gave access to the bridge to fill up with water. I had three personnel on the bridge. The communications to the bridge failed. The submarine had, as I said, rolled excessively causing a table in the forward mess to break free. The electrolyte in the battery had spilled onto the top of the battery causing a full 400 volts earths of the battery and there were heavy electrolyte fumes in the submarine. And lights had to be shut down to resolve the earthly problem.

Q. And the second example? A. The second example was an incident again when I was in command when an individual under my command had suffered a concussion and he subsequently had convulsions and the issue was an effort to get him med evac.

Q. Can you think of any other situations where other members of your crew or the sub as a whole was in immediate danger? A. No other incidents when I was in command. I can think of an incident while I was the first officer of the watch when a contact got unnecessarily ... or too close to the submarine. And I was forced to take the submarine deep in emergency to get underneath it.

Q. Apart from those three examples over what 9 years? A. Yes.

Q. Can you think of any other times?

A. There was another heavy storm, coming back from England, when we had personnel on the bridge where an individual once washed over the side but he still held on by his harness. We were subsequently forced to evacuate the bridge. There have been a number of instances perhaps when submarines had been taken deep

Lieutenant-Commander Davidson

Examination-in-chief

because a vessel being too close. But those weren't necessarily incidents of immediate danger.

Q. Based upon your personal observations, is a submarine while dived always in immediate danger?

A. No.

Q. What would your response be to any suggestion of anyone that a submarine is always in immediate danger? A. I would say that was incorrect.

Q. In your current job, you are responsible for the schedules of submarine operations? A. Yes.

Q. What would be involved if a submarine want to change its arrival date? Let us say it was coming back for Easter, it hit bad weather. He thought he was going to be slowed down but the weather broke. What would that submarine have to do if it wanted to come back on its original time to make it to home port before the Easter weekend? A. For accountability submarines travel on sub notes which is a means of keeping track of where they are at any one time and it is normally ... the vehicle is a moving haven in which they have to remain as they transit across the Atlantic. If a commanding officer wishes to change his arrival time because he has managed to get ahead in the moving haven and wants to advance his time or because he has fallen back in the moving haven because of weather or whatever and wants to delay his time, he would send off a message to the Sub Ops, submarine operating authority, where they sum up change request.

Q. Do you recall who was in your wardroom when you left command of the OJIBWA in December '90?

A. I can certainly recall the key players. The executive officer was Lieutenant-Commander Larkin, the Operations Officer was Lieutenant-Commander Craven, the engineer was Halle, Lieutenant[N] Halle then at the time, the combat systems engineer was Lieutenant[N] Kent, the navigator I believe was Lieutenant[N] Wamback

Lieutenant-Commander Davidson

Examination-in-chief

and there were a number of other junior officers in other positions.

Q. What would your response be to any suggestion that that wardroom was incompetent? A. My idea was that that wardroom was a professional wardroom, an average wardroom for any circumstances that I have been in in my time.

Q. Can you describe the morale on the OJIBWA at the time that you handed the command over to Lieutenant-Commander Marsaw? A. When I left the submarine the morale, I would characterize it as being excellent.

Q. As a commanding officer are you concerned with morale? A. Absolutely.

Q. What would your response be to a suggestion that morale is really something that the XO deals with and not the captain? A. Morale is certainly an issue for which the XO bears responsibility. But ultimately the commanding officer is responsible for ensuring that his crews maintain a high degree of morale.

Q. Was the OJIBWA operationally effective at the time you handed it over to Lieutenant-Commander Marsaw? A. Yes, it was. We just finished winning the Combat Readiness Trophy.

Q. The Combat Readiness Trophy? A. Yes.

Q. That is provided by the squadron?
A. That is provided by the squadron. It is the best or the most combat ready submarine in the squadron.

Q. Who accepted that award on behalf of the OJIBWA? A. That was accepted by Lieutenant-Commander Marsaw at a parade just after he had taken command.

Lieutenant-Commander Davidson

Cross-examination

PROSECUTOR: Thank you. No further questions.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: I wonder, Mr President and Mr Judge Advocate, if it would be appropriate to take 10 minutes recess before I proceed to the cross-examination.

JUDGE ADVOCATE: The court is adjourned for 10 minutes.

ADJOURNMENT: At 1420 hours, 4 October 1995, the court adjourns.

REASSEMBLY: At 1430 hours, 4 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Whenever you are ready.

DEFENDING OFFICER: Thank you.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Lieutenant-Commander Davidson, I show you Exhibit "O" that was just introduced through you a few minutes ago. As I recall in explaining this document you referred a number of times to the word "department" "departmental" "department" a number of times, is that right? A. Yes, sir.

Q. So this chart, would you agree with me is more a departmental organization chart than a divisional organization chart? A. The departmental organization and the divisional system are in many respects much the same in terms of the way personnel issues are handled.

Q. But there is a difference actually though between the two? A. There is a difference between?

Lieutenant-Commander Davidson

Cross-examination

Q. Departmental and divisional organization?

A. Yes.

Q. Now on this exhibit that you have in your hand, we see that the XO, the executive officer - and for the benefit of the court, I will show - stands to the left of the exhibit under a solid line, under the commanding officer, is that correct? A. It does, yes.

Q. Would you agree with me that the XO is responsible for all administration, personnel and training matters on board? A. Yes, he is.

Q. Of course under the direct authority of the captain of the sub? A. Yes.

Q. So I don't want to look too picky here but actually this chart that you have there would more accurately reflect the actual situation if the XO was to appear immediately under the commanding officer, would you say so? A. Yes. He essentially appears in two locations. What I did say was that for administrative handling as a divisional system he is the senior department head and all the department heads report to him.

Q. And would you agree that everyone basically on board ship respond to the XO except for three officers that may in certain aspects be responsible directly to the captain on operation matters?

A. There are individuals that can be responsible directly to the captain, yes. But for administrative work all personnel report to the XO, yes.

Q. And the three officers would be the operation officer, combat system officer, and marine system officer who for matters of operations would respond directly to the captain, is that correct?

A. No. Not exactly. The navigating officer has a direct responsibility to the captain for navigational issues.

Lieutenant-Commander Davidson

Cross-examination

Q. That is right. And the ... A. And the combat systems engineering officer and the engineering officer have direct ...

Q. OK, sorry. I used operation meaning their respective part of the operation. So the statement is correct though. These three have direct access to him. Therefore when you spoke about redress of grievance, any member of the crew, let's take a junior rate to make the example as clear as possible, the junior rate would pass on his complain to his immediate supervisor who in turn would pass it to his next supervisor and so on and so forth ultimately reaching the XO who would staff it possibly and pass it to the captain of the boat, is that correct? A. Yes.

Q. Now you have given lots of explanation regarding the control room and so on and so forth. We haven't heard much of the cox'n yet. Could you explain to the court - and I know Mr President and some other members would be very familiar with the role of the cox'n - but yet for the benefit of the court in general, could you explain what the role of a cox'n is on board? What is his rank and what is his function on board a submarine? A. The cox'n is normally a chief petty officer 2nd class on a submarine. Occasionally it has been a petty officer 1st class. His function is, as the senior non-commissioned member, to supervise the general running of the ship's daily routine. He also has responsibilities towards the maintenance of morale, food services, et cetera, which he oversees and he also has a direct access generally to the captain.

Q. With respect to specially morale, discipline, would you agree that the cox'n is the liaison between the XO to whom he reports directly and the captain, and the junior rates and seniors rates, is that correct? A. For the morale outside the wardroom, yes.

Lieutenant-Commander Davidson

Cross-examination

Q. And would you agree that it is very much his duty, for example, if some things are not working properly on board ship, if the XO or the captain, for that matter, or any officers I suppose, was to be too demanding or pushing the crew too hard, would you agree that it would be the cox'n who would stand up and try to approach the officers, the captain eventually to try to sort the problem out? A. He may do so, yes.

Q. And would you say that it would be common practice for a junior rate or a senior rate for that matter, if you had complaints about any aspect or whether he ... suppose he has a complaint that although falls short of writing a redress of grievance, he has a complaint about treatment on board or life in general, would you say that it would be normal practice to go and see the cox'n as the person who is there to help him? A. Particularly in a submarine with a small crew the cox'n gets around and speaks to people quite regularly. So it may follow that route or it may follow the more traditional divisional route.

Q. And it may even be that the cox'n although the individual has not complained to the cox'n because as you stated it is a small boat, the cox'n perceives a problem and would take upon himself, that would be part of his responsibilities to find out and work with the crew or the individual to see what is the matter, would you say that? A. Yes.

Q. So it would be appropriate to say that the cox'n is the real gauge, I mean if anyone on board knows of the morale of the crew non-commissioned, the cox'n would be your best gauge because by definition that is his job to know and to be aware? A. He could be. He may not always be.

Q. As a rule though you would expect ...
A. As a rule he should be, yes.

Q. And you as a captain, I mean if you have some uncertainties about some matters pertaining to

Lieutenant-Commander Davidson

Cross-examination

your senior rates, junior rates, you would expect your cox'n to be able to help you because he would know?

A. Yes.

Q. He is closer to them than you are?

A. Yes.

Q. Now, in your testimony regarding training, I missed something so I will need your help. I remember you talking about SOCT Part 1 which you said was 90 days and I guess it is ground training, isn't?

A. It is training ashore, yes.

Q. Ashore, yes. Part 2, you stated six to nine months, sometime longer and that is at sea. That is sort of OJT at sea, is that correct? A. It is mostly at sea. There are elements that are done in harbour but on board the submarine. So it is all on the submarine.

Q. All in the sub. Now earlier in this trial and possibly even during your testimony we have heard of Part 3 and that is where I am a little confused as to where the Part 3 falls in there?

A. Part 3 is a British term which we have used for a number of years. When we initially started doing submarine training it was referred to as Part 1, Part 2 and Part 3. And the Part 2 was - and I am looking at my memory for NCMs - but it was a ashore phase also that was tailored to the trade. So Part 1 was the general training and Part 2 was tailored to the trade and then Part 3 was the OJT. So Part 3 has traditionally, because of that, been referred to by submariners as being the sea phase. Sorry for the confusion.

Q. So in the actual program that we now know that would have been in effect in '90, '91, '92, '93?

A. In '91, '92, '93, there were the two phases, the shore phase and the sea phase.

Lieutenant-Commander Davidson

Cross-examination

Q. So the Part 3 did not exist any more?

A. We don't really talk about it in terms of Part 1 and Part 2.

Q. Although people might still have been referring to it as Part 3? A. Yes.

Q. Thank you. And for ... we talked about - just again to make sure I got this right - board for approval of qualifications, that is a board that confirms or proves qualifications as submariners like the Dolphins, is that correct? A. That is a board that awards the Dolphins for the officers. The sailors follow a different route.

Q. And that is the board that decides as you stated on recommendation of the captain? A. Yes.

Q. And I suppose that if somebody really is having a hard time qualifying, I mean he cannot stay there for ever, then the captain rather than making a recommendation to the board for approval, he would make a recommendation to the squadron for cease training or shifting his career anyway because it doesn't appear that he will make it as a submariner? A. Yes. If an individual looks like he is not going to make it, then an appropriate recommendation would be made by the commanding officer.

Q. And then either the squadron commander or another type of board may dispose of the matter? A. Yes.

Q. On the recommendation of the CO? A. Yes.

Q. So the CO in that respect is sort of supervising the training and directing traffic, if you wish, he is not the ultimate authority in terms of ...

A. He is not the ultimate authority for passing individuals but he is essentially the ultimate authority for failing them in terms of if they are not recom-

Lieutenant-Commander Davidson

Cross-examination

mended, and we are talking of officers here, then they would not go to a board, so they would not be assessed at a later level.

Q. But they would have to go elsewhere. That is what I was suggesting earlier. Like they cannot stay there for ever. So if it is clear that he cannot be recommended for the board for approval the CO has got to do something else. He cannot keep him on board for ever? A. That is correct.

Q. He will do a recommendation and then other authorities who may disagree with him may take a different course of action, is that correct? A. Yes.

Q. And one of the courses of action would be, for example, I am a captain for a moment and I make a recommendation that this individual in my view is not going to make it. I pass that up to my squadron commander. The squadron commander looks at this and say, "Hey, Couture, I know this officer well, we will give him another chance. We will send him on another boat and we will give him another three month trial", is that correct? A. That can happen, yes.

Q. That scenario is possible? A. Yes.

Q. Specially if the squadron commander doesn't have much trust in Couture, he might very well do that and say, "Here you go." So Lieutenant-Commander Kavanagh is the last Canadian CO of a submarine who attended the English Perisher, the British Perisher, is that correct? A. Yes.

Q. And the Perisher, I don't know if you stated that before, I believe you did, the Perisher is the sort of nickname or short name for the submarine command course, is that correct? A. Yes, the British submarine course.

Q. The British submarine course. And Lieutenant-Commander Dussault is the first Canadian

Lieutenant-Commander Davidson

Cross-examination

captain of a sub to have attended the Canadian Perisher. Do we refer to it as the Canadian Perisher?

A. Some do, yes, colloquially.

Q. And that Lieutenant-Commander Dussault when did he qualify under this new system? A. He qualified that in November I believe or December of last year.

Q. Larkin, I gather had served under you as XO? A. Yes.

Q. And there was some ... your testimony was to the effect that to one point he was supposed to go on Perisher? A. Yes.

Q. And then he didn't go? A. That is correct.

Q. Where did you go after your tour in 1990, when you finished your tour as captain of OJIBWA? A. I went to the submarine squadron headquarters.

Q. Do you know that he didn't go to the course, from your personal knowledge? A. I didn't personally view him but I know from what he told me.

Q. So actually you don't know why he didn't go on Perisher? A. I was not part of the final assessment, no.

Q. OK. Now you talked about that in your orders, you required that you would be called if the depth of the submarine is ... if it is not kept within your order plus/minus 5 to 10 feet, is that correct? A. Yes, or if they were having difficulty maintaining depth.

Q. That is right? A. Yes.

Q. Now would you agree with me that this pertains to notifying you, like you are in your cabin

Lieutenant-Commander Davidson

Cross-examination

or something or resting, they have to notify you if such an occurrence occur. Nonetheless, for example, if you are snorting, you would not tolerate that your boat be 10 feet off depth or not even 5, would you? A. I would not tolerate losing the snort. I would expect that the crew would be able to maintain the snort in most conditions.

Q. That's right. And if you are off 10 feet chances are that it would jeopardize your snorting?
A. Ten feet would certainly, yes.

Q. And 5 might? A. It might, yes.

Q. Aside from jeopardizing the snort operation, it would, a deviance of 5 to 10 feet aside from the snorting aspect, you would become easily detectable, I suppose you could be detected by air planes, ships and what not because it would have so much of your boat showing? A. If the submarine starts to go off depth such that they are exposing themselves then I would expect them to stop the snort at that time and that if they were not snorting to adjust the mast such that they were not exposing themselves.

Q. So 5 to 10 feet might be a tolerable level at times like in very special circumstances as it might be totally unacceptable in others, would you agree? A. The 10 foot is for deep. So the restriction there of 5 feet is what we are talking for being shallow at periscope depth. And so that is the normal tolerance, yes.

Q. And you would not tolerate though such deviance in depth when you are not snorting if you are working on the periscope attack. You surely don't want your periscope to show all the way up to the sky?
A. No, that is ... Yes.

Q. So the 5 to 10-foot rule applies only when you are deep and then when you are involved in the conduct of a specific operations then you would require

Lieutenant-Commander Davidson

Cross-examination

more? A. In specific operations where I required better depth keeping would be circumstances where quite likely while I was in the control room or taking a greater interest. So I would have already been called and it would be a higher level of readiness. I am just talking about the normal routine operation of a submarine.

Q. That is what I am trying to clarify here. The 5 to 10 foot rule applies only when it is time to, if I may use the expression, to go and fetch the captain? A. Yes.

Q. That's what it says. Now when you are in the control room you expect much more accuracy than that on your depth? A. I expect accuracy in the depth according to the circumstances, yes.

Q. You said you worked under Commander - I am not sure what he is now - is he Commander Nicolson now? A. Yes.

Q. Once Lieutenant-Commander Nicolson. Would you agree with me that then Lieutenant-Commander Nicolson had a tendency to scream and yell a lot? A. He had a tendency to use a high voice, yes, sharp in the control room.

Q. And it wouldn't be necessarily uncommon for him to use the four-letter word? A. He cursed, yes.

Q. Yes. And you worked under now Captain Webster, how would you compare his style to Nicolson? A. Hardly ever shouted.

Q. And Bush how would you compare him to the other two? A. Hardly ever shouted.

Q. But different though? A. Each commanding officer has a slightly different style, yes.

Lieutenant-Commander Davidson

Cross-examination

Q. I will show you a document here. I show you a document, could you inform the court whether you recognize that document? A. Yes, I do.

Q. And if so why and what it is? A. It is the covering letter or letter of promulgation for my standing orders.

Q. And could you quickly go through the document just to confirm that you are satisfied that the whole document is there complete and what not. I will ask you a few questions on those? A. It looks the same.

Q. So you are roughly satisfied that this is your order. We were just talking about leadership now, would you agree that leadership style may vary quite a bit? A. It may, yes.

Q. Would you agree that it is part of your orders that you do not intend to delve into the principles of the best approach to leadership. "What has worked for me may not work for you". So you recognize that ... A. I recognize those words, yes.

Q. ... style of leadership vary? A. ...

PROSECUTOR: I am just wondering if I could get what page is ...

DEFENDING OFFICER: It is on page 3.

PROSECUTOR: Page 3, thank you.

DEFENDING OFFICER: Sorry about that.

Q. And that you, as a ... page 3 para 3 d., now, you as a commanding officer, you always insist on the highest standard possible or you tell your officers, "You will always insist on the highest standard possible and ensure that your men understand exactly

Lieutenant-Commander Davidson

Cross-examination

what you require ..." etc. So you insist on highest standard, is that correct? A. Yes.

Q. And you would expect that of any good professional captain? A. Yes.

Q. It is also true that, I believe you would agree with me and it forms part of your orders - at page four, for the benefit of my colleague, item 107 - you will agree that the aim of the submarine is to be operationally and technically ready for any operation at any time? A. Yes.

Q. And you will agree that this, I mean in good as in bad times, I mean this is a demanding work and sometime it would result in inconveniences, long working hours, etc? A. Yes.

Q. With relation to officers under training - page eight for my learned friend at para 5 - it is understood that you may assign trainees whatever duty you feel "will assist them in their qualification"? A. Yes.

Q. And you are the ultimate authority for that. That with respect to the officer duty watch system you personally approve senior NCMs and unqualified officers to stand duties as OOD as recommended by the executive officer, correct? A. Yes.

Q. And this reflects of course your ultimate authority as well as it reflects the XO's responsibility for both training and personnel? A. Yes.

Q. With respect to operation, you will agree - and it is at page 10 for my learned friend item 201 - that, "The overriding responsibility of all members of the Ship's Company is to maintain the highest possible state of operational readiness."? A. Yes.

Q. You have explained to the court how the trim works, controlling the weight and what not, so that you can keep depth and all that. Regarding the

Lieutenant-Commander Davidson

Cross-examination

importance of the trim - at page 15 for my learned friend - that "Trimming is a continual process. There is no reason why ..." you are saying, "... I should arrive in the the control room and find the submarine out of trim"? A. Yes.

Q. So that you expect proper depth?

A. That is not what that says. I expect proper trim.

Q. Proper trim relates to depth as well?

A. It does relate to depth, yes. But I wouldn't always expect the submarine would be exactly on depth every time I came into the control room.

Q. But you ... A. I would expect it to be close to depth, yes.

Q. You should not find the submarine out of trim? A. Yes.

Q. What does that mean? A. What I am saying there "out of trim" is that the submarine should be neutrally buoyant, the correct forward and aft weight so that the submarine is maintaining the proper angle for the conditions and the proper depth. But that doesn't necessarily imply that it has to be exactly on depth which is what you are alluding.

Q. Subject of course to your previous testimony that in some circumstances greatest accuracy is required and expected? A. Greater accuracy is, yes, some times.

Q. Would you also agree - at page 27 - that the practice of different drills, practice exercise is always very important? And you state, "Exercise your Emergency Party thoroughly and with as much realism and practical content as possible. Give advance planning and thought to exercises. Only one drill is REQUIRED; that does not mean you cannot do more, especially if the first is poorly done"? A. Yes.

Lieutenant-Commander Davidson

Cross-examination

Q. Is that correct that you put the stress here on the importance of, I mean to be in good possession of the basic drills and practice them all the time and especially if you have been weak and you didn't do that great the first time. Keep doing it. You must have perfect control, is that correct? A. Yes.

Q. One quick question about the attack periscope, otherwise called the forward periscope?
A. Yes.

Q. That is correct that only ... it is mainly for the use of the captain and it is to be used by other officers only with the specific permission of the captain, is that correct? A. It depends upon the commanding officer.

Q. And your own position was that it would be with your permission? A. Yes.

Q. And according to your experience in submarines and all that, would you agree that most captains proceed generally the same way? A. Yes.

Q. And I come back here briefly again to training, page 46. You state, "I shall take a personal interest in the officer's qualification at all levels. When an officer has had an item signed off, he is to be prepared to discuss that item in detail or perform that practical factor to my satisfaction at any time." So would you agree that this is a statement that when the trainee has ... when you say "signed off" I suppose means that he has been ticked off as having completed a PO, presumably a performance objective? A. Yes.

Q. So when he has been ticked off as having completed that, that's it? A. I would expect him to be confident to do that at any time, yes.

Q. And you expect him to not only be confident of doing it, but to do it and do it right?
A. Yes.

Lieutenant-Commander Davidson

Cross-examination

Q. Another item we touched upon briefly earlier on was the role of the XO on board and his role for administration and again from your orders, page 48, "Officers are to make themselves available onboard as required by the Executive Officer to carry out such duties as may he may require" So I understand from this that you informed the XO of your operational tasking, for example, you say, "XO, we are sailing to Bermuda tomorrow." You expect the XO to make sure that personnel is on board and so on and so forth? A. They have to be on board for sailing, yes.

Q. Yes. But what I am saying is that it is the XO's responsibility to look after the personnel, to make sure that people are present and so on and so forth? A. He includes in his report on departure who is on board or who may be absent. I would expect him to tell me if there are people absent, yes.

Q. And in your particular case the executive officer was to arrange a leave plan and he signed the leave passes for non-commissioned members. You signed the leave passes for officers? A. Yes.

Q. Do all the CO operate the same way? Are there cases where the XO would be given the authority to sign all leave passes or do you know? A. I would consider it unlikely that the XO would have authority to sign all leave passes. But I don't know exactly what all COs routines are.

Q. And although you would sign them I take it that it would be through the XO. So the XO would really look, like make a plot, a plan, and submit it to you and you approve? A. Yes.

Q. Are you familiar with the Canadian Submarine Weapons Certification Program? A. Yes.

Q. Have you been through it yourself?
A. Yes.

Lieutenant-Commander Davidson

Cross-examination

Q. Is it to your knowledge that Lieutenant-Commander Marsaw did go through that program as well?
A. I believe so, yes.

Q. And is it to your knowledge the result he obtained? A. No.

Q. It is not. Have you ... so you were never informed of any result he may have achieved?
A. I don't recall whether he did it before I left the squadron or not.

Q. Do you recall your own result when you made it? A. Do you mean in terms of hits and miss ...

Q. The percentage. Like sometimes you get a score of I don't know 70 per cent, 50 per cent, 100 per cent, in percentage. Do you recall at all? A. I don't recall the exact percentage, no.

Q. I believe you talked about some kind of organization, I may not have picked the complete name, submarine movement authority or something like that?
A. Submarine operating authority.

Q. Now these are the people who are responsible to assign you a haven box? A. A moving haven, yes.

Q. Which is basically a moving box?
A. Correct.

Q. Often maybe what 20, 100 miles or whatever? A. There are a number of different sizes used depending upon where you are in the world.

Q. Those authorities would ... they are a bit like air traffic controller essentially?
A. Essentially, yes.

Q. They control traffic in the ocean of submarines, only those? A. Yes.

Lieutenant-Commander Davidson

Cross-examination

Q. But that would cover the Russian submarines if there were any or American and Brit and Canadian submarine in the ocean? A. It covers allied submarine movements.

Q. Allies, OK. A. Yes. What we are talking about here is a NATO organization.

Q. It is not limited to Canadian, that is what I'm saying? A. No, it is not.

Q. So would you agree with me that changing a box like this may or may not always be simple. Like it takes into consideration factors that go well beyond your own situation? A. It is a simple process but it may or may not always be possible depending upon whether they are other movements that would hinder what you want to do.

Q. And you as a captain, would you agree that you wouldn't like to go to those authorities every four hours or something like that and say, "Oh gee, this happened, I want to change my box." It is something that a captain doesn't tend to do, to go there every four hours, six hours, or even 24 hours to change his box constantly? A. There is no reason why he can't. I have seen commanding officers do that.

Q. Have you done it yourself? A. I have not done it but I have been on board when commanding officers have had occasions to change the box regularly.

Q. And in some cases it is possible, in others it isn't? A. Sometimes it is not possible, yes.

Q. And if it is not possible then you have just got to live with it. For example the scenario would be if you are working on box A and you want to change it to B, for example, because your speed is

Lieutenant-Commander Davidson

Cross-examination

greater. Because when you are in the box that means you cannot exceed that box, so you cannot lag or go faster, you must remain inside? A. You must remain inside it, yes.

Q. If you are going very fast you are in danger of breaking the front part of the box, so you want your box advanced to allow you a more free movement? A. Yes.

Q. If they say no then you just have to pace yourself and remain within your box? A. You may be forced to, but if your ultimate aim, for example, were to advance your arrival time somewhere, you may not get exactly what you asked for but there may be another solution, changing box size or adjusting the tracks to improve on your current arrival time but maybe not give you exactly what you asked for.

Q. Are you aware of some local regulations here in Maritime Command that existed and may still exist to the effect that it is not ... it is either forbidden or not desirable that ships get to home port during weekends? Are you aware of anything like that? A. We have had from time to time restrictions in terms of overtime for tugs and those kinds of things. But I have arrived out of hours or on weekends myself without tugs. So it is possible to do it.

Q. And at times from time to time though limitation may be imposed on a captain coming either with a surface ship or a submarine as to whether he can come in? A. I think there are general rules that people follow for normal running but there are always exception for breaking rules and quite frequently ships will adjust ETAs when they are for instance coming back from a long deployment.

Q. You were talking about the danger, if a submarine while dived is always in immediate danger and you said, no. I suppose it is a question of perspective. Would you agree that driving a car represent

Lieutenant-Commander Davidson

Cross-examination

dangers? A. There are risks associated with driving a car, yes.

Q. Similarly diving a sub there are inherent danger and risks obviously? A. Like flying an air plane.

Q. That's correct. Now would you agree that the mechanism, the complexity and then what not of a sub, which is, I believe we can agree, much greater than that of a car, would increase the risk, like if there is a failure, if there is an error, it might take less of an error to be disastrous on board a submarine than on board a car? A. In an assessment of the operation of a submarine and when you produce your operating procedures you take a look at the risks that may occur and you produce procedures to counter those.

Q. Now, for example, let us take the example of a plane jam, would you say that that is serious? A. A plane jam can be serious, yes.

Q. A plane jam might result in a hard to dive which means that the boat goes down, is that correct? A. Yes.

Q. The angle of the plane is such that you cannot control the boat and it just goes down? A. Yes.

Q. And in such circumstances if the angle of the boat is such you run a good risk that the engine in the aft might just get loose and just pretty well ruin ... A. In an absolutely extreme circumstance it might, yes.

Q. And then if you are in shallow water, you run the risk of just hitting the bottom and possibly killing everybody on board? A. No, you shouldn't run the risk of hitting the bottom because your navigational plan and the way you approach the problem is to

Lieutenant-Commander Davidson

Cross-examination

avoid exactly that circumstance. So you shouldn't be running that risk.

Q. Yes, but I am saying in a scenario though of plane jam drill, if the drill is not applied you will not run of course ... you will not get into that problem. My point was though if the appropriate drill is not applied timely and effectively that is the risk that you run, isn't that true? A. That's why we practice.

Q. That's right. But those risks I mentioned, are they real, absent from proper application of the drill? A. I am not sure I understand the question.

Q. The risk of having the engines running you over because of the angle. I understand the engines are not solid, like they are sort of on a cushion or something? A. Yes.

Q. And it would be very conceivable for the engine, given the angle of the sub going down, that those engines just could fly down and probably kill a few people on the way? A. I can only see that circumstance happening if the whole organization of the submarine failed to do its job. In that circumstance if you completely failed to follow any procedures and deal with the emergency as it was developing in the angle then yes, in the ultimate circumstance, if all failed, you could have that happened, yes.

Q. And the risk of ... again that is what I'm basing my question on, that if proper action is not taken immediately, those are the risks. And the other risk is that you hit the bottom? A. Yes.

Q. That is bad news too. Would you say that silence on board submarine is quite vital? A. It is vital to avoid counter detection.

Lieutenant-Commander Davidson

Cross-examination

Q. Yes. And would you agree that ... of course I want to expand on silence a bit. Would you agree that airborne noise does not transmit, like for example, voices. We can speak in a submarine and that do not run the risk of detection. However if I kick the bulkhead or something or if I drop a can of something in the sub because it is related to structure that will emit sounds that may be detected? A. Sounds that are transmitted directly into the hull are more likely to go out in a further distance. But equally a stereo operating to a louder volume is a form of airborne noise that could actually go outside but that is in extreme circumstances, yes. Essentially it is noises transmitted through the hull that are of concern.

Q. Yes. That would have to be very very extreme for a stereo to be so loud as to affect the structure and then ... A. It is an extreme case.

Q. Yes. But then just about in the structure borne noise would be detected, like I drop my glass? A. That could be detected, yes.

Q. The attack periscope, would you agree that if your particular mission so requires and you want to do a 360 degree look, which some time you do, you agree with that? A. Yes.

Q. Would you agree that the standard on Perisher calls for that to be done in 20 to 25 seconds? A. Yes.

Q. Of course again the idea there is that you cannot just take your time and to avoid risk of detection again, is that correct? A. Yes. But of course you serve no purpose if you don't complete the look as well. You have to be able to see on all points of the bearing as you go around.

Q. And what you are expected to do on Perisher is to be able to perform that task in approxi-

Lieutenant-Commander Davidson

Cross-examination

mately in 20, 25 seconds. That is the standard they like to set? A. You should be able to do that, yes.

Q. Yes. And of course you are going around with the periscope? A. Yes.

Q. We are not talking about the after periscope where you are sitting and the use is completely different, is that correct? A. You are man handling it, yes.

Q. And then depending on the depth of the sub you may be standing upon the periscope like this, or you might be crouching down to take you view depending on the depth? A. Yes. You will adjust the height of the mast out of the water in accordance with what your depth to minimize the exposure.

Q. So you don't always do your 360 in ideal conditions like straight up, and just at eye level and happily. Like some time you are in difficult position and still you have got to move around? A. Yes.

Q. Are there, to your knowledge, any regulations concerning or practices whatever, regarding bottoming of a ... like when you are bottomed? A. A submarine can bottom in a recognized accepted bottoming area, yes.

Q. Uh-huh. And any limit on time or anything like that? Any rules on that is it just ... A. There are no real limits on the duration of the bottoming. Your limiting factor is going to be the battery and your operation taskings.

Q. And would you agree that when you bottom a submarine it has to be such that the propellers are ... will normally be higher than the forward? A. Yes. You don't want the propellers to touch first.

Lieutenant-Commander Davidson

Cross-examination

Q. So could it be said that in all bottoming the forward will be lower than the aft? A. That is the aim, yes.

Q. And could you inform the court whether this affects for example the functioning of certain system on board, for example the heads? A. Yes. It will affect the heads in terms of, they drain ... basically to drain the heads you need a bow up angle. Otherwise the sewage would collect to the front. There are other factors as well when you are sitting on the bottom in terms of not running water through the submarine circulating it because you will have disturbed the bottom, etc. So there are system limitations.

Q. So then would you agree that it wouldn't be uncommon and you probably have done it yourself, that when you are bottomed, nose down if I may say, you may have to shut, depending for how long you are there and all that, you may have to shut down the heads for that period? A. If they get full you would have to, absolutely.

Q. And because you just cannot keep them clean and all that? A. You can't flush them, yes.

Q. You can't flush them because you would have to flush them upwards? A. Uphill, right.

Q. That doesn't work too well? A. Right.

Q. Would you consider that it is the responsibility of qualified submariners on board to assist trainees in their development? A. It is the responsibility of anybody on board with Dolphins to assist trainees in getting their Dolphins.

Q. And if for example your officers did not provide your expected level of assistance to the trainees, what would you do? A. I would address the problem, I would speak to the officers.

Lieutenant-Commander Davidson

Cross-examination

Q. How would you address the problem exactly? A. Are we talking an individual or are we talking a collective problem?

Q. Let's say a couple of your qualified officers are not pulling their weight? A. If it was just a couple of them, then I would ask them into my cabin and speak to them and counsel them on their responsibilities.

Q. I would like to give you a situation here and I will ask you a question. First of all you may want to explain to the court what is the expression "a worked up submarine". What means "worked up"? A. A worked up submarine is a submarine that has completed a full work up and has been run through most if not all of the kinds of operations they would expect to perform and practice them and been criticized on them and brought up to a high standard.

Q. So you have got an up to par submarine there with its crew that is ready to operate? A. Yes.

Q. A situation on a worked up submarine at river routine, "river routine" is a ... A. Is a routine, a surplus routine as you are approaching the coastal area.

Q. A state of readiness in other words?
A. A state of readiness, yes.

Q. Entering Halifax harbour, prior to proceeding to the bridge you personally observe the fixing officer deliberately fudging a fix, what would you do?
A. I would speak to him about it.

Q. Is that something you would consider serious? A. Yes.

Q. Like very serious? A. Yes, it is a serious thing; fudging fixes is not acceptable procedure.

Lieutenant-Commander Davidson

Cross-examination

Q. And it would affect ... first of all it is not right for an officer. Like it doesn't show much of an officer like qualities to fudge a fix, to cheat for one, and two, it would possibly endanger the boat as well? A. If there was ... I mean you need to have confidence that the fixing is being done correctly. Otherwise, yes you could loose confidence in the navigation of the submarine.

Q. Would you go as far as replacing that officer and say, "Well, Smith take over" and have a chat with your fudger? A. If that officer had shown a pattern of doing that before then I might replace him, yes, on the plot.

Q. If you again, on a worked up submarine, in open sea, you are dived, you are conducting a plane jam exercise and you discover that none of your officers know how to execute the drill, including the XO, what would you do? A. I have been in a circumstance ... let me say that even a fully worked up submarine, if they are a crew and they are alongside for an extended of time may loose the edge in terms of practice and ability and so it should be standard practice to run them all through a plane jam drill as part of bringing them back up to speed when they go to sea. Now are we talking about a circumstance where we are doing that or are we talking about circumstance where we have done that and two weeks later they can't do it?

Q. No, no. We are talking here, you're at sea and say well we have been home for a while, let's refresh our drill here? A. Yes.

Q. As you do it you realize that it's lacking, what do you do then? A. I would run all the officers through a drill.

Q. And is that correct that the best way to do that would be to surface the ship and have them

Lieutenant-Commander Davidson

Cross-examination

practice there? A. No, you are better to practice while you are dived.

Q. Would you let that practice go without you being present if you have doubt about the ...

A. No I wouldn't do it without my presence. I would always be in the control room during plane jam practices.

Q. And if you want to do it for a while in your presence and you wanted the officers to continue practising in your absence then you might want to surface the ship so not to run any risk of disaster when you are practising dived? A. Again I don't see a lot of value in continuing to practice on the surface.

You need to feel the submarine moving. So you are better off doing it dived. So I would choose to continue to practice while dived and I would remain in the control room.

Q. Again in the same scenario of a worked up submarine in coastal water dived, you enter the control room and you find there is no current fix, the DR - that stands for dead reckoned position - and AP - estimated position? A. Yes.

Q. Or pool of errors on the chart. Could you explain to the court what a pool of errors is?

A. A pool of errors is a constructed diagram, if you will, on a transparent paper that you create so that by capturing all of the potential navigational errors you are confident that the submarine is going to be inside of it. So basically instead of having a fixed position as being where you think the submarine is, you take into accounts all of the potential errors that you may be misestimating, the tidal effect or that the fix may have been actually plotted slightly incorrectly or that the error, the general errors and all the rest of it, and you build up what basically looks like an ellipse which is your area of confidence that the submarine is inside that. And any time a submarine is dived it should have a pool of errors after a period of time. I

Lieutenant-Commander Davidson

Cross-examination

mean if you are getting regular fixing you would create a pool of errors unnecessarily. But certainly on going deep you have to create a pool of errors immediately.

Q. And then your pool of errors basically is, like in my worst scenario, given some errors, I know I am about there? A. I know I am inside that ellipse, yes.

Q. So you realize that you have no current fix, no DR, no AP, or pool of errors on the chart, so what do you do? A. I would address the officers that were there and say get a fix, DR and ... I mean I would tell them to get on with it.

Q. And you would address those comments to your officer of the watch? A. I would address those comments ... in a dived circumstance I would address it to all of the officers because all of the officers are responsible for it.

Q. And I suppose depending how tired you are and what not, your sense of humour about such a lack might be very limited? A. I might be upset by it if it had been a continuous issue, I mean if they had failed to do it on numerous occasions.

Q. And would you agree that it is very crucial to have those? A. It is, yes, absolutely.

Q. And it is at the same time very basic, isn't? A. Yes.

Q. It is a basic principle of navigation?
A. It is a basic principle. I might add though particularly in my time of sea training that there are enumerable times when I have gone into the control room and found exactly that circumstance.

Q. Again in a worked up submarine, let's say a surveillance mission where being undetected is of prime importance and you have to raise your attack

Lieutenant-Commander Davidson

Cross-examination

periscope for observation or possibly filming, some time you do film, is that correct? A. Yes.

Q. Yes. You have to raise your periscope for observing or filming quite often because of the special circumstances and your planesman or your trim officer cannot keep the boat at the depth you need, could you see yourself replacing that officer and get the job done, or would you just simply go to the trim officer and say, "Well, that is the third time I try to check" or what not or would you rather say, "OK, I need to finish this job, you take the trim, I finish the job", etc. Is that a reasonable scenario? A. You are saying, would I replace the individuals if they couldn't keep me on depth?

Q. Yes? A. I would replace them if it was through their inability rather than external factors and I may do it because of getting tired. I mean if you leave an actual planesman on the planes for an hour, by the end of the hour no matter how good the guy is, he is going to start getting off depth. So it is a standard routine to replace them after a period of time anyway.

Q. So there is no big magic about replacing somebody. It is not something ... replacing somebody from the trim, the planes, it is nothing unheard of? A. I would have put the best person for the job on the seat in the first place.

Q. But it is nothing unheard of? A. It not unheard of to replace people because they are getting tired or having difficulties doing the job.

Q. Or would you agree that the planesman might be just like a hockey player or a football player, having a good day, having a bad day? Even your good planesman may have a bad day, would you agree with that? A. Oh, yes. He can be sick or something, yes.

Lieutenant-Commander Davidson

Cross-examination

Q. Yes, or just doesn't have it that day and he just doesn't perform at his usual standard. Those things are possible? A. There is usually a reason for that.

DEFENDING OFFICER: If I may have a minute, please.

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, I have no further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

PROSECUTOR: I have some questions. I wonder if the witness might want a break first.

I know you were concerned about loosing your voice before you started today. You are probably going to loose it by the time it is over?

WITNESS: I'm all right.

RE-EXAMINED BY PROSECUTOR

Q. The defence asked you whether or not a cox'n was the real gauge of what was happening onto the sub and you answered, "He could be or should be". What factors might affect the cox'n not being the real gauge? A. Sometimes the problem may be in the engineer department, for example, and if there is not a good rapport between the Chief ERA and the cox'n then the cox'n may not in fact be aware of the problem. So that is an example where he may not be the best gauge for a problem.

Q. Would the strength of the cox'n's personality or lack thereof be a factor? A. Yes, it would.

Q. There was a question concerning Commander Nicolson tendency to use a high voice. And you stated

Lieutenant-Commander Davidson

Re-examination

that he had cursed or used swear words on occasions. Did you ever observe Commander Nicolson personally derogatory adjectives when he raised his voice? A. I don't recall him using personal derogatory adjectives.

Q. In walking through your standing orders, there was discussions about exercising emergency drills, expecting a certain type of trim and making sure that the sub was operationally and technically ready. If these things weren't occurring on the sub did that cause you to use personal derogatory adjectives towards members of you crew? A. No.

Q. I wonder if you could read the cover page of your standing orders paragraph 3, for the court, please? A. The whole paragraph?

Q. Yes, please. A. "The inherent nature of a submariners' duties demands a high level of professionalism. To a great extent, this professionalism is gained through observation, experience and teamwork. These orders reflect the framework around which my Command will be structured and are based on the observations and experiences I have developed while serving in submarines."

Q. Does a professional submariner use personal derogatory adjectives towards subordinates in his control room? A. In my view, no.

Q. Silence on a boat is vital particularly if there is noise that impacts on the hull. Could throwing a telephone against the bulkhead compromise the sub's location? A. Yes.

Q. Could screaming and yelling and throwing everything off the plot table, including a large metal ruler onto the deck comprise the sub's location? A. Yes.

Q. You were given a hypothetical concerning a river routine and found an individual fudging a fix.

Lieutenant-Commander Davidson

Re-examination

You stated you would speak to him about it. During that type of conversation would you use personal insulting adjectives to the individual? A. No.

Q. You were also given a hypothetical concerning plane jam exercises and discovered that none of your officers knew how to do plane jam drills. In that scenario would you refer to your officer corps as worthless jerks in the presence of other rates?

A. No, I would not.

Q. You were given a hypothetical concerning a situation in where there was no DR, no AP, no pool of errors done. If you found that scenario would you threaten to fire the navigator in front of his subordinates? A. No, I would not.

DEFENDING OFFICER: Mr Judge Advocate, I know we, as I mention yesterday about at the same time, it is getting late but the rules apply equally late in the day. My learned friend is in re-examination and he has been very leading. So I would formulate an objection on that basis. I let a few go but eventually I had to stand up.

JUDGE ADVOCATE: Thank you. You are leading, Major Abbott. Sustained.

PROSECUTOR: Sir, those are my questions, thank you.

JUDGE ADVOCATE: Thank you. Any questions from the court? No questions. Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: How do you expect your next witness ...

PROSECUTOR: I expect I will be a half an hour with my next witness, sir.

JUDGE ADVOCATE: And on your part?

DEFENDING OFFICER: Major Mackay is going to conduct the cross-examination of the next witness and he, depending the direction it takes, it might take up to an hour, slightly less, depending on the witness.

JUDGE ADVOCATE: The court is adjourned for 10 minutes.

ADJOURNMENT: At 1545 hours, 4 October 1995, the court adjourns.

REASSEMBLY: At 1600 hours, 4 October 1995, the court reassembles and the accused is before it.

PROSECUTOR: The next witness will be Lieutenant[N] Pokotylo.

s.19(1)

Lieutenant(N) Pokotylo

Examination-in-chief

SEVENTH WITNESS) Lieutenant(N) D.H.
FOR THE) Pokotylo, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Could you give your full name to the court and spell your last name, please? A. My full name is Danny Harry Pokotylo. It is spelled P-O-K-O-T-Y-L-O.

Q. Did you join the Canadian Forces Reserves in 1992? A. Yes, sir.

Q. And the Regular Force in 1993? A. Yes, sir.

Q. What year did you join the sub service? A. In 1986, sir.

Q. And were you awarded your Dolphins in 1986? A. 1987, sir.

Q. Did you serve on OKANAGAN approximately from December '86 until May '88? A. Yes, sir.

Q. And would that be under the command of Lieutenant-Commander Macdonald? A. Yes, sir.

Q. And I understand you were on exchange posting with the Royal Navy from September '88 until July '90? A. Yes, sir.

Q. And that was on board the HMS ONYX? A. Yes, sir.

Q. And you had occasion to sail as well as a HMS OPOSSUM in October '88? A. Yes, sir.

Q. From 1990 until 1992 you worked with sub sea training here in Halifax? A. Yes, sir.

Lieutenant(N) Pokotylo

Examination-in-chief

Q. And you were the Ops O on the HMCS OJIBWA from August '92 until April '93? A. Yes, sir.

Q. And that would be under whose command?
A. Lieutenant-Commander Marsaw, sir.

Q. During your time as Ops O under Lieutenant-Commander Marsaw's command did you serve with the following officers: Lieutenant[N] LeClaire, Dussault? A. Yes, sir.

Q. Higginson? A. Yes, sir.

Q. Byrne? A. Yes, sir.

Q. Jacques? A. Yes, sir.

Q. Pitman? A. Yes, sir.

Q. Soper? A. Yes, sir.

Q. Kelk? A. Yes, sir.

Q. Watt? A. Yes, sir.

Q. And Duff? A. Yes, sir.

Q. Have you ever had occasion to witness physical violence on board the HMCS OJIBWA? A. Yes, sir.

Q. In very general terms can you describe for the court what you did observe? A. I saw the commanding officer, Lieutenant-Commander Marsaw, kick another officer.

Q. And approximately when did this occur?
A. It would have occurred between August and October of 1992, sir.

Lieutenant(N) Pokotylo

Examination-in-chief

Q. That was during the counter drugs trip?

A. Yes, sir.

Q. You said, "I observe Lieutenant-Commander Marsaw kick another officer", do you know who got kicked? A. No, sir. I believe though it was one of three people. It would have been either Lieutenant[N] Higginson, Lieutenant[N] Pitman or Lieutenant[N] Byrne.

Q. During the counter drugs trip, do you recall if the curtain around the plot table was up or down, generally speaking? A. Generally speaking, sir, it was down.

Q. And why was the curtain down around the plot table during the counter drugs trip? A. It was down to keep, navigational information or our position, that information away from the members of the crew, sir.

Q. I would like to refer to a chart exhibit, it would be Exhibit "I". If you could identify for the court where Lieutenant-Commander Marsaw was approximately, at what location he was at, when the kick that you observed occurred? A. He was at the forward periscope, sir.

Q. So it would be labelled on this exhibit, Exhibit "I" as the attack periscope? A. The attack periscope, yes, sir.

Q. And where was the officer who was kicked?

A. He was positioned at the forward end of the chart table.

Q. And where were you at the time that you observed this? A. I was sitting at the search periscope roundabout.

Q. I understand the rear or the aft periscope has a chair that an individual can sit on?

A. Yes, sir.

Lieutenant(N) Pokotylo

Examination-in-chief

Q. You were sitting on that chair? A. Yes, sir.

Q. How far away were you from Lieutenant-Commander Marsaw at the time you observed this kick?
A. Approximately 6 feet, sir.

Q. Were there any objects or persons in your view between yourself and Lieutenant-Commander Marsaw?
A. No, sir.

Q. Can you verbally describe step by step what you observed? A. I saw Lieutenant-Commander Marsaw at the attack periscope. He was doing a look on the attack periscope. He proceeded around the periscope once in a counterclockwise direction. He was shuffling his feet on the deck. On his way past the chart table his buttocks hit the buttocks of the officer at the chart table and he forced his way by that officer and continued around on his look. On his second ... as he again approached the forward position he stopped, he planted his left leg, lifted his right and in a thrusting motion kick the officer on the plot in the back of the leg, sir.

Q. What the position was Lieutenant-Commander Marsaw when he was at the periscope? Was he standing, crouching? A. He was not fully erect, sir. He was in a semi-crouch.

Q. And he was moving in a counterclockwise direction? A. Yes, sir.

Q. And on the first go around there was a bump? A. Yes, sir.

Q. And it is on the second go around that the kick occurs? A. Yes, sir. Once he kicked the individual he said, "Keep this area clear."

Lieutenant(N) Pokotylo

Examination-in-chief

Q. Could you describe the difference between his foot movement the first time he went around and contrast it by describing the foot movement the second time he went around? A. One the first time that he went around the periscope, his feet were planted on the deck and he was shuffling his feet around as he did his look in the periscope. On the second pass when he was pointing ... when he was looking ahead, he stopped, he planted his left leg, lifted his right up and thrust at the back of the leg of the officer on the plot.

Q. Do you recall what footwear Lieutenant-Commander Marsaw was wearing at the time? A. He was wearing tropical sandals, sir.

PROSECUTOR: With the permission of the Judge Advocate and Mr President, I would like Lieutenant[N] Pokotylo, if he could, to demonstrate for you the foot movement going around the periscope the first time and contrast that with the foot movement going around the periscope at the second time.

JUDGE ADVOCATE: Any objection from the defence?

ASSISTANT PROSECUTOR: No objection, Mr Judge Advocate.

JUDGE ADVOCATE: Go ahead.

WITNESS: He was at the periscope and he was in roughly this sort of stance. He went around the periscope the first time. At about this position he was rubbing a buttocks and pushed his way through, plod by the other officer. He came around the second time. When he was facing forward, he stopped and thrust in that manner and he said "Keep this area clear", and carried on with his look, sir.

PROSECUTOR: Mr Judge Advocate, I wonder if the record can reflect that Lieutenant[N] Pokotylo on

Lieutenant(N) Pokotylo

Examination-in-chief

the second around raised his right leg off the ground angled it towards the right and thrust it down.

JUDGE ADVOCATE: Very well.

PROSECUTOR: I also wonder, Mr Judge Advocate, Mr President, if Lieutenant[N] Pokotylo could demonstrate the degree of force that was used in the kick by kicking the chair.

JUDGE ADVOCATE: Go ahead.

WITNESS: It was like this.

PROSECUTOR: I wonder if the record could reflect that the chair moved approximately 12 inches to the right.

JUDGE ADVOCATE: OK.

PROSECUTOR:

Q. Have you ever had occasion before or after that incident to see a person on the forward periscope bump into a person at the plot table?

A. Yes, sir.

Q. And based upon your personal observations, what is the most common point of contact between those two bodies? A. Generally speaking, sir, the buttocks area and the back of the boots at times.

Q. You have observed people have their feet entangle? A. Yes, sir.

Q. Could you contrast what you observed on that kicking occasion to past observations where you witnessed people's feet getting entangled? A. Lieutenant-Commander Marsaw did not have his feet tangled with the individual at the plot table. He stopped before he came into contact the other person's feet and kicked, sir. But there was no effort ... they were too

Lieutenant(N) Pokotylo

Examination-in-chief

far apart to be tangled at that point and ... Essentially they were too far apart to have their feet tangled up together, sir.

Q. I would like to ask you some questions about your other experiences on the OJIBWA. You were, apart from Ops O, also watch leader? A. Yes, sir.

Q. How would you describe the atmosphere in the control room when Lieutenant-Commander Marsaw was present? A. It was very tense, sir.

Q. You have been on board in the control room of Royal Navy subs? A. Yes, sir.

Q. That was during the cold war? A. Yes, sir.

Q. Can you contrast the atmosphere in the control room in those types of operations compared to the atmosphere in the control room under Lieutenant-Commander Marsaw? A. On board the ONYX, sir, there was always a sense of ... people were always tensed. There was always a sense of fear that if you made a mistake or something ... if you made a mistake that you were about to be yelled at and dressed down.

Q. Is this on the OJIBWA or the ...
A. That is on the OJIBWA, yes, sir. On my other submarine in the UK on patrol, there was also a tense atmosphere on board but this was very much related to the type of mission we were conducting. We didn't ... we never feared the repercussions from command if something went wrong.

Q. How would you describe Lieutenant-Commander Marsaw's leadership style? A. He lead through fear, sir. He was very bullying.

Q. How might Lieutenant-Commander Marsaw react if a person made a perceived error or wasn't performing up to expectations? A. He could come up

Lieutenant(N) Pokotylo

Examination-in-chief

behind you and breathe very heavily basically indicating his presence behind you. He would also on occasion, or more ... he would also quite frequently yell, raise his voice and yell at you.

Q. In terms of your own personal experience has he ever spoken to you in the control room when he was unhappy? A. Yes, sir.

Q. Can you give the court an example of what he might have said on that occasion? A. The one incident that really stands out in my mind, he called me behind the curtain one night and told me if I didn't get my watch sorted out blood would be spilled.

Q. How did you take that? A. I took that as a threat, sir.

Q. Was this before or after you observed the kicking incident? A. I can't recall, sir.

Q. Generally speaking though, how was Lieutenant-Commander Marsaw towards you? A. Generally speaking, sir, if he had occasion to dress me down, he would call me into his cabin and dress me down, not in front of the remainder of my watch, sir.

Q. Is that how he would treat other officers? A. No, sir.

Q. How might he approach them? A. If a mistake was made he very often come into the control room and yell at them. And then at times there was one officer, Lieutenant[N] Jantzi, whom he referred to as a donkey in the control room. Generally if you made a mistake he would come in and raise his voice and use profanities.

Q. How would Lieutenant-Commander Marsaw behave in situations where riders were present in the control room? A. In those occasions he was very much different. He was quite civil towards us. He didn't

Lieutenant(N) Pokotylo

Examination-in-chief

use profanities, however, he did have occasions where he would raise his voice but not to the same level or degree but ... well, profanities were dropped when riders were on board, sir.

Q. Do you know Petty Officer 2nd Class Brown? A. Yes, sir.

Q. Who is he? A. He joined the submarine as the UC1 while I was the operations officer. He was the senior sonar man on board.

Q. How was he treated, based on your observations, by Lieutenant-Commander Marsaw? A. He was treated very poorly, sir. When he joined the submarine I was taken aside by the captain and told that this individual at best receive an adverse PER.

Q. How long had Brown been on board at that point when Lieutenant-Commander ... A. He just had his posting message, sir.

Q. Did you have occasions to observe Lieutenant-Commander Marsaw and Petty Officer 2nd Class Brown in the control room? A. Yes, sir.

Q. And how would Brown on occasion be treated by Lieutenant-Commander Marsaw? A. He would be dressed down in front of his subordinates in the sonar room, sir. He was treated very, in my opinion, very poorly by Lieutenant-Commander Marsaw.

Q. How would, based on your observation, others react to Lieutenant-Commander Marsaw entering the control room and making some of the verbal comments that he would make? A. When you were on watch, he would come into the control room and you could sense and you could see people stiffen up at their different positions. When he came into the control room people tensed up so much that mistakes, I believe, followed naturally.

Lieutenant(N) Pokotylo

Examination-in-chief

Q. Did you make mistakes on occasions?

A. Yes, sir. Quite often what we would do, and what was done on board, was, you would put solutions on fire control, update the fire control position, put solutions onto the CUP and put navigational information in the chart that wasn't entirely correct, but it was simply put on to indicate that information, that you were doing your job.

Q. Why would you do that though? A. So you wouldn't be yelled at. Quite often, especially for me, on the fire control and on the plot, you would have long range contacts that the information you put on was basically, at best, a very much of a guess at what a contact might be doing. You might not have a bearing movement at all on a contact that you had put a solution on the UCP just to indicate that you looked at it even though it was rubbish basically. You pulled something out of your hat. So if that information wasn't there you were questioned as to why this information wasn't on there and your ability to do your job was questioned.

Q. Did Lieutenant-Commander Marsaw instruct you on how to lead in the control room? A. Yes, sir.

Q. And what were his instructions?

A. There was one occasion where things ... a lot of information ... people were passing in reports basically to no one and the watch was starting to disintegrate. I yelled, I raised my voice and said, "Right, I am the officer of the watch in this control room. If you have reports to make, you make them to me you don't make them to anybody else. Information comes to me, I make the final decision." And I yelled while I did that. After that the captain called me into his cabin and said, "That was good". He wanted to see me raise my voice and yell more often.

Q. Did you ever receive any other praise from Lieutenant-Commander Marsaw? A. There is one occasion during work up, sir. We were doing a steer

Lieutenant(N) Pokotylo

Examination-in-chief

... it was a battle problem basically. I was on the ship control and we were steering in ... playing an air emergency. We were doing that for quite some time, maybe an hour, less than an hour. But throughout this serial or this evolution, the CO of Sea Training Group was telling me to do different things ... well towards the end of it he was telling me to do different things, putting an oil tank, blowing ... trimming the submarine in different manners that I was doing while I believed that we were maintaining a proper depth, the proper depth under the circumstances. Finally after being told numerous time to take some sort of action, I was about to follow what the CO of the Sea Training said and put a different tank on line and the captain said, "No, don't do that, carry on". At the end of that serial the captain said to me, "That was one of the better ship control evolutions I had seen." Then we went to the wardroom for the debrief afterwards. The CO of Sea Training singled me out as ... or singled the ship control officer as having absolutely no concept on controlling a submarine in any advanced serial. However when I did do that the captain did single me out and say that was one of the better ship control evolutions ...

Q. So when you were criticized in the wardroom, was the captain present? A. Yes he was, sir.

Q. Did he interject? A. No, sir.

Q. Do you feel you worked up to your full potential? A. No, sir.

Q. Why not? A. I didn't enjoy my time on board. I didn't feel I worked up to my potential. I was afraid to try different and new things. I was afraid to take decisions because I thought these decisions would only land me in trouble, sir.

Q. How did you ultimately deal with your experience on the OJIBWA? A. I requested to leave the submarine, sir.

Lieutenant(N) Pokotylo

Examination-in-chief

Q. When in fact did you leave the OJIBWA?

A. I left the OJIBWA, I believe it was in April of 1993, sir.

Q. Can you briefly describe the circumstances surrounding your leaving the OJIBWA and the request that you made? A. When we returned from the counter narcotics trip, I put in a memorandum to the captain requesting to leave the submarine service. He received that memorandum and had me up to his cabin. He said that he was surprised that I was requesting to leave. But he said the memorandum I initially submitted wasn't sufficient to justify my reasons for leaving. He asked me to draft another one which I did.

Q. I would like to have you look at this particular memorandum and identify it, please?

A. That was the memorandum I drafted to the CO requesting my return to general service.

Q. Is this the one that was drafted with the new amendments after the initial comments on the first draft? A. Yes, sir.

PROSECUTOR: I would like to introduce this as an exhibit, Mr Judge Advocate.

JUDGE ADVOCATE: No objection?

ASSISTANT DEFENDING OFFICER: No objection, Mr Judge Advocate.

JUDGE ADVOCATE: Exhibit "P".

THE MEMORANDUM BY LIEUTENANT(N) POKOTYLO IS MARKED EXHIBIT "P".

PROSECUTOR:

Q. The exhibit, your memorandum, list a number of reasons why you are seeking to go to general

Lieutenant(N) Pokotylo

Examination-in-chief

service. You discuss at paragraph 3 the relatively harsh lifestyle, increasingly large number of officers now serving of board, lack of privacy, hygiene facilities. Were there other reasons why you sought to return to general service apart from the ones that are stated in your memo? A. Yes, sir. I no longer wished to served on the OJIBWA.

Q. And why was that? A. I did not wish to serve with this commanding officer any longer. At the time I felt that I was being ... I felt almost hopeless. I was feeling under pressure and I was not enjoying myself and wished to leave.

Q. Why didn't you include those reasons in your memo? A. I didn't believe it would help my case for leaving the submarine service, sir.

Q. Why not? A. I didn't believe that you could or that it was appropriate to mention a relationship with the CO in a memorandum asking to leave, sir.

Q. Was your request granted? A. Yes, sir.

Q. Was it initially granted? A. No, sir. The commanding officer supported my requested and forwarded it to the CO of SM1 who was Commander Scherber at the time. He had me in for an interview and after a lengthy discussion he agreed that I should leave the submarine service. I believe this is maybe on a Wednesday that the conversation happened. On Friday, I believe it was a Friday, I received an attached posting message off the OJIBWA. When I initially put in my request I ...

Q. How did you feel at that time? A. I was very happy, sir. I was surprised that it would be that easy.

Q. What happened after Friday? A. I took a duty from one of the other officers on board on the Monday and while I was on duty I had a call from the

Lieutenant(N) Pokotylo

Examination-in-chief

secretary of the squadron. The squadron commander was asking me to come back to the squadron commander's office, what I did. He basically said there was no one available to relieve me, that my attached posting message was to be cancelled and that I return to the OJIBWA.

Q. Your initial request was on 17 November '92? A. Yes, sir.

Q. And you didn't leave, I don't believe until April? A. April.

Q. Can you contrast the observed leadership style of Lieutenant-Commander Marsaw with that that you have observed of Lieutenant-Commander Macdonald, the other Canadian CO you sailed with? A. Lieutenant-Commander Marsaw lead through fear and intimidation on board. Lieutenant-Commander Macdonald did not use the same sort of intimidation tactics that Lieutenant-Commander Marsaw did. He didn't come up behind you, breathe heavily. He didn't dress you down in the control room for every little mistake. He would very often ... and again I was junior, when I did make a mistake I did get yelled at in the control room. Afterwards he took me aside and explain what my error was and how I could correct it and it was forgotten after that. I didn't feel that every mistake was compiling upon itself and the captain was basically using it against me. It was very much more of a training in a training atmosphere. So it wasn't nearly as oppressive on board the OKANAGAN as it was on the OJIBWA.

Q. And again how was your treatment by Marsaw towards you personally compared to how he would treat others? A. Towards me personally, he never that I can recall, dress me down in front of my watch, in front of my subordinates. He tried as much as possible to take me aside and let me know the mistakes I was making. We had a couple of interviews in which he did express his concern that the way I was conducting my

Lieutenant(N) Pokotylo

Examination-in-chief

job and I assured him that I would try harder to improve my performance. But I never felt that I could climb out from under a rock.

Q. Would he give others, generally speaking, on your watch the same courtesy of the cabin? A. No. The others on my watch would be dressed down in front of everybody in the control room.

Q. Would you wish to sail with Lieutenant-Commander Marsaw again? A. No, sir.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Major Mackay, any idea how long you are going to be in your cross-examination?

ASSISTANT PROSECUTOR: Well, that is my problem, Mr Judge Advocate, because there are several areas that weren't covered by the witness, that were covered in his previous interview. It's my feeling that in the process of cross-examination in this case is we don't have a transcript. I will have to go back to the tape. In my understanding we have to decide as to matters of procedure how we are going to go about doing that.

JUDGE ADVOCATE: So you don't have it on transcript.

ASSISTANT PROSECUTOR: We don't have this particular witness on transcript.

PROSECUTOR: I am wondering if that problem even arises. If the issues he wants to cross-examine on haven't come up on direct, following MRE 100, you pose the question. Only when you hit a contradiction do we even have to worry about the video tape.

JUDGE ADVOCATE: Certainly. I mean we can cross that bridge whenever the time comes to do it. You don't have to use the tape at this time?

ASSISTANT PROSECUTOR: No, not at this present time but ...

JUDGE ADVOCATE: But you expect that it's a possibility. You may have to refer to the tape. So to make a long story short, it may be long.

ASSISTANT PROSECUTOR: Yes.

JUDGE ADVOCATE: That's what I was afraid of. Would doing your cross-examination at 9 o'clock tomorrow morning be acceptable to you?

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate.

JUDGE ADVOCATE: No objection, Mr Prosecutor?

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: Thank you. The court is adjourned until 9 o'clock tomorrow morning.

ADJOURNMENT: At 1630 hours, 4 October 1995,
the court adjourns.

REASSEMBLY: At 0910 hours, 4 October 1995,.....654
REASSEMBLY: At 1315 hours, 4 October 1995,.....683

|

760

REASSEMBLY: At 0930 hours, 5 October 1995,
the court reassembles and the
accused is before it.

JUDGE ADVOCATE: Thank you. You may be
seated. We were now at the cross-examination.

ASSISTANT DEFENDING OFFICER: I'm ready to
proceed, Mr Judge Advocate. Good morning, Mr President
and members. Before I proceed though, I would just
have a matter of housekeeping, I would like to
introduce three documents that one of them would be
helpful in cross-examination of Lieutenant[N] Pokotylo.
So if I may, the first document is called a Sailing
Schedule, and what it is is a calendar, if you wish,
month by month, starting in December '91 going to
October of '93. And this document is actually based on
information that was gathered from the ship's logs and
historical reports, which is the second document. The
second document, the Historical Report, is basically a
narrative of the events that are scheduled in the
Sailing Schedule.

JUDGE ADVOCATE: Any objection from the
prosecution?

PROSECUTOR: No. These documents are going
in by consent on both sides, this document as well as
the other two, Mr Judge Advocate.

JUDGE ADVOCATE: Very well.

ASSISTANT DEFENDING OFFICER: The first
document is the Sailing Schedule, and I have copies for
yourself and the members.

JUDGE ADVOCATE: Exhibit "Q".

OJIBWA SAILING SCHEDULE IS MARKED EXHIBIT "Q".

JUDGE ADVOCATE: Put it on the table, please.

761

Lieutenant(N) Pokotylo

Cross-examination

ASSISTANT DEFENDING OFFICER: And as I mentioned previously, the second document is a document entitled: Annual Historical Report 1992 - HMCS OJIBWA UIC 1308, dated 25 February '93, a short narrative of the events described in the Sailing Schedule for 1992.

JUDGE ADVOCATE: Exhibit "R".

ANNUAL HISTORICAL REPORT 1992 - HMCS OJIBWA IS MARKED EXHIBIT "R".

ASSISTANT DEFENDING OFFICER: And the last one, the same, entitled as well Annual Historical Report, this one 1993 - HMCS OJIBWA UIC 1308, dated 30th of March 1994.

JUDGE ADVOCATE: Exhibit "S".

ANNUAL HISTORICAL REPORT 1993 - HMCS OJIBWA IS MARKED EXHIBIT "S".

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Lieutenant[N] Pokotylo, yesterday you were questioned on direct-examination by the prosecution with reference to an incident that you would have witnessed concerning a kick? A. Yes, sir.

Q. Do you recall that? A. Yes, sir.

Q. I would like for you to give a little bit more description of the environment. What was at the moment of the kick, or shortly before, during and shortly after, what was the intensity in the Wardroom?

A. In the Control Room, sir?

Q. In the Control Room - yes? A. In the Control Room, as I recall, we were doing closer to shore operations. We were making our approach towards Inshore Ops and we just loaded the after-periscope, so I was sitting at the after-periscope, the Captain raised the forward-periscope. And to the best of my

762

Lieutenant(N) Pokotylo

Cross-examination

recollection he had just finished a fix and he was doing ... I think he was doing a look or something on the periscope right after that. But we were approaching shore.

Q. Was it a tense moment? A. It was escalating. Yes, sir.

Q. And when you described the area between the forward-periscope and the plot table, could you describe how wide this area is? A. Oh, maybe three feet, two to three feet.

Q. Barely space for two persons? A. There is not much space. No, sir.

Q. And you were asked by the prosecutor to actually do a physical demonstration of what you witnessed, the kick? A. Yes, sir.

Q. Do you recall showing the kick using your right leg? A. Yes, sir.

Q. Is that your recollection of the incident? A. Yes, sir.

Q. Do you recall an interview you gave to the investigators concerning the matters ... A. Yes, sir.

Q. ... that are before the court today on 21 February '94? A. I do, sir.

Q. Do you recall having been asked by the investigator to physically demonstrate? A. Yes, sir.

Q. Do you recall ... A. He asked me to show him where he was kicked, so I showed where the kick took place.

Q. Yes? A. And in what motion the kick motion was given.

763

Lieutenant(N) Pokotylo

Cross-examination

Q. And do you recall, in demonstrating that motion, placing the investigator, Master Seaman Rice, to your left? A. I used my left foot as well, sir. Yes, sir.

Q. And using your left foot? A. Yes, sir.

Q. And yesterday you used the right one? A. Yes, sir. He did not ask me at that point to demonstrate exactly how the kick took place. All I did was to show him what sort of motion and where the kick actually appeared on the individual who was kicked.

Q. And in your demonstration ... A. Yesterday I was asked to describe exactly what took place, rather than the motion and the area of kick.

Q. Okay. And the motion that you described yesterday would indicate that Lieutenant-Commander Marsaw at the time would be going counter-clockwise? A. Yes, sir.

Q. Whereas the one when you used the left foot would demonstrate that he was going clockwise? A. I wasn't demonstrating how he went around the periscope, sir. I was simply demonstrating, in that interview, the motion of the kick and where the kick took place.

Q. Uh, huh. And then you said that at the moment or shortly after the kick, you reported the words of Lieutenant-Commander Marsaw "Keep this area clear"? A. Yes, sir.

Q. Do you recall during the same interview being asked if Lieutenant-Commander Marsaw said anything after the kick? A. I don't recall, sir.

Q. And you wouldn't recall your answer to that question? A. No, sir.

764

Lieutenant(N) Pokotylo

Cross-examination

ASSISTANT DEFENDING OFFICER: At this point, Mr Judge Advocate, I would ask that we go to the taped interview to refresh the witness' memory.

JUDGE ADVOCATE: Well, we'll do this in the absence of the Members of the Court. Again, Mr President, I would ask you to withdraw from the courtroom, please.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: You may be seated. This court is now sitting in a **voir dire**.

ASSISTANT DEFENDING OFFICER: The tape is on top of the machine - yes, and it is positioned at the very start of the interview of 21 January 1994.

Before we proceed, Mr Judge Advocate, I would have a few questions to have the witness identify.

JUDGE ADVOCATE: Very well.

ASSISTANT DEFENDING OFFICER:

Q. Were you advised when that interview took place that the interview was being taped? A. Yes, sir.

Q. Were you provided with a copy of the tape? A. Yes, sir.

Q. Have you had the opportunity to review that tape? A. Yes, sir.

Q. And are you satisfied that that tape actually reflects the conversation ... A. Yes, it does.

Q. ... that took place between yourself and the investigators? A. Yes, sir.

765

15th voir dire

Lieutenant(N) Pokotylo

Cross-examination

Q. So it's a clear reflection of what you said at that moment? A. Yes, sir.

ASSISTANT DEFENDING OFFICER: Would you bring the tape, please to ... you have the timer at the bottom ... 09-15-32. The timer is on the bottom of the picture.

JUDGE ADVOCATE: What's the date please? The date again, you mentioned it before?

ASSISTANT DEFENDING OFFICER: 21 January 1994.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: February?

ASSISTANT DEFENDING OFFICER: Oh, I'm sorry. February.

JUDGE ADVOCATE: February.

VIEWING OF VIDEO TAPE.

WITNESS: I didn't hear what I said there.

ASSISTANT DEFENDING OFFICER:

Q. You didn't hear. Do you want to hear it again? A. I'd like to hear it again. Yes, sir.

JUDGE ADVOCATE: Is there a mute on this?

VIEWING OF VIDEO TAPE.

ASSISTANT DEFENDING OFFICER:

Q. "Did he say anything?", was that the question? A. I think it was the question.

766

Lieutenant (N) Pokotylo

Cross-examination

Q. And what was your answer? A. I said:
"He may have, I don't know".

Q. No. You said: "I don't think so. He may
have" was the second question. A. Okay.

Q. Do you agree with that? A. Yes, sir.
That's what I said. Yes. Yes, sir.

Q. So that would be different from the
answer you gave yesterday saying "Did he say any-
thing?", "Keep this area clear"? A. That was before
he kicked him in that tape. I said yesterday that he
said "Keep this area clear" after he kicked him, sir.

ASSISTANT DEFENDING OFFICER: Okay.

JUDGE ADVOCATE: I'm just not too sure, but
correct me if I'm wrong. Again, I'm not too sure of
what I heard. I think he said: "Did he say anything
before ..."

ASSISTANT DEFENDING OFFICER: We can listen
to be sure.

JUDGE ADVOCATE: Before something ... I don't
know before what, before kicking probably.

ASSISTANT DEFENDING OFFICER: That's just
what he said.

PROSECUTOR: That's what he said.

JUDGE ADVOCATE: So it's not the question
that was put to the witness yesterday?

PROSECUTOR: No.

JUDGE ADVOCATE: Okay.

ASSISTANT DEFENDING OFFICER: Could you leave
it there please. With your permission, Mr Judge Advo-

767

Lieutenant(N) Pokotylo

Cross-examination

cate, I have several questions which may relate to the tape, so in the **voir dire** we could carry on with the cross-examination, deal with all the questions that deal with the tape and ask the members to come back afterward?

JUDGE ADVOCATE: Very well.

ASSISTANT DEFENDING OFFICER:

Q. In your demonstration yesterday, you demonstrated that he went around once and as he squeezed or ... your words were "he forced his way by the plot table", he would have touched? A. Yes, sir. He came into contact when he went by the first time.

Q. The first time. And coming the first time around would have kicked. Do you again, in the course of that interview, remember being asked if Lieutenant-Commander Marsaw had touched with the individual at the plot table before? A. Again, I can't recall from the interview, sir.

ASSISTANT DEFENDING OFFICER: Okay. We can go ... it's just about at the same area, at 09-15-36, which was the second question just following the question about ... You're right on the spot now, but we may miss the first part or the question. 09-15-36, because you have to listen closely.

VIEWING VIDEO TAPE.

ASSISTANT DEFENDING OFFICER: "Did he bump him before he kicked him?" Could we go back again?

JUDGE ADVOCATE: It's a very poor quality of tape.

ASSISTANT DEFENDING OFFICER: My interpretation, Mr Judge Advocate, to the question, the second one right after ... the question about "Did he ask ..." and right after we have to pay attention

768

Lieutenant(N) Pokotylo

Cross-examination

closely because he goes directly into the second question: "Did he bump into him?" 09-15-36, or a little before that to get the question, because the questions are fired one-two.

VIEWING OF VIDEO TAPE.

ASSISTANT DEFENDING OFFICER:

Q. So did you hear the second question? A.
Yes, sir.

Q. "Did he bump into him before he kicked him?" A. Yes, sir.

Q. And what was your answer? A. At that time I said: "He may have, I don't know", I don't recall basically.

Q. And if we can go back last time on the answer, because the words I have is: "He may have, I don't know. I didn't notice anything that took place beforehand"? A. Right.

Q. Do you agree with that? A. That's what I said. Yes, sir.

Q. That's what you said? A. Yes, sir.

Q. Okay. So there's no need to go back. Do you recall ... and that was not a question put to you but a comment you made during that interview concerning the kick, which was right after you made the physical demonstration on the tape, that you had only caught a glimpse of it? A. Yes, sir.

Q. Do you recall making that statement?
A. I do recall that.

Q. Okay. Would you agree that the demonstration that you made yesterday, if he goes once around as to force his way by the plot table, finish

769

Lieutenant(N) Pokotylo

Cross-examination

his turn and do the kick, how long would that take?

A. Sir?

Q. The demonstration, the actual physical demonstration you did before the court yesterday, what you were trying to describe, that event took how long?

A. That event would have taken, for two times, about 30 second I would say.

Q. So there's a difference between catching a glimpse and describing an event that you've observed for 30 seconds? A. Yes, sir.

Q. And again, it was not a question but a comment when you had tried to qualify what you had witnessed in talking about taking notice of it. Do you recall telling the investigators that you took notice of it and these are your words, and I have written them down from the tape: "took notice of it but it was not something that you would have jumped and say 'Hey, that is not correct'"? A. That's correct, sir. On that submarine I wouldn't have jumped up and said that was not correct.

Q. Further on in your examination, direct-examination, you were asked to describe the atmosphere in the Control Room. And your response was that people would tense up? A. Yes, sir.

Q. And that mistakes, that would lead to mistakes? A. Yes, sir.

Q. Do you recall during the course of your interview, again without a question, still commenting on the life on OJIBWA, making the statement "Mistakes were made, stupid mistakes, lots of mistakes by officers, you would fear the day, the CO would have had us, it was a group thing"? A. Yes, sir.

Q. Okay. And again, carrying on, I'm skipping parts here because I just want to catch the parts I want to relate to which connect to the tape. Later

770

Lieutenant(N) Pokotylo

Cross-examination

on you were asked of your reasons for leaving the submarine, that you had put in a request. Do you recall that? A. Yes, sir.

Q. And that you mentioned that you had other reasons that were not put in your request because ... and you added that you did not want to serve under Lieutenant-Commander Marsaw any longer? A. Yes, sir.

Q. Do you recall that? A. Yes, sir.

Q. Feeling of hopelessness and not enjoying yourself? A. Yes, sir.

Q. Okay. Let me get to my notes here. Do you recall discussing your reasons for leaving the submarine with the investigators on 21 February '94? A. Yes, sir.

Q. You do. Do you remember describing some of the reasons? A. Yes, sir.

Q. Hard lifestyle, do you remember that? A. Yes, sir.

Q. That you had many other choices? A. Yes, sir.

Q. That it was a personal choice? A. Yes, sir.

Q. That your time on OJIBWA made the decision easier? A. Yes, sir.

Q. And that you were contemplating it for awhile? A. Yes, sir.

Q. Okay. And as well, do you recall stating in your interview that you would not have volunteered to work for Lieutenant-Commander Marsaw? A. I do. Yes, sir.

771

Lieutenant(N) Pokotylo

Cross-examination

Q. And that you would not go the extra distance for him? A. No, sir.

Q. Do you recall? A. I recall saying that. Yes, sir.

Q. You recall saying that. Okay. Do you also recall stating that you had discussed or had discussions with one being Lieutenant-Commander Hickey in October '92? A. I do, sir.

Q. And stating you also had the opportunity to discuss your decision or your request with then Commander Scherber? A. I had an interview with Commander Scherber. Yes, sir.

Q. An interview with Commander Scherber. You had a second interview, did you, on 31 March 1994? A. Yes, sir.

Q. And do you recall during the course of that second interview making the statements ... or let me go to the exact notes here ... Sorry, second interview, telling that you were bitter about submarines because of where you were now in terms of your profession, your progression? A. Yes, sir.

Q. You recall making that. Okay. And going back to the first interview, do you recall being asked by the investigator "What was Lieutenant-Commander Marsaw's temper like"? A. I do recall being asked that question.

Q. Okay. And do you recall what your answer was? A. I couldn't phrase my response. No, sir.

Q. No? If I suggest to you that your response was that he was aggressive in his job to meet the objective? A. Yes, sir.

Q. That would be accurate? A. It is accurate, sir.

772

Lieutenant(N) Pokotylo

Cross-examination

Q. That some days he would laugh, others he would be moody, angry, upset? A. Yes, sir. I think before that I said he was inconsistent.

Q. Yes, you said that but it was at the very beginning of the interview. A. Okay.

Q. And do you recall ... A. I do recall saying that. Yes, sir.

Q. ... the inconsistency as well, or that part about being inconsistent. And just before making that comment that he was not consistent, do you recall telling the investigators that Lieutenant-Commander Marsaw knows the submarines and tactics and has no rival? A. I do recall that. Yes, sir.

ASSISTANT DEFENDING OFFICER: I'm getting to the end, Mr Judge Advocate.

Q. Do you recall ... well, relating a discussion that occurred in the Wardroom with the XO that was initiated by Lieutenant[N] Higginson? A. It wasn't in the Wardroom, it was in Sub Squadron up in the OJIBWA office.

Q. And it was in front of the XO? A. Yes, sir.

Q. Do you remember the reasons you stated for that, or the complaints? A. I remember some of them. It was Lieutenant[N] Higginson more than me that raised the issue.

Q. But you attended? A. Oh, yes, sir.

Q. Okay. Who else was there? A. Some of the more senior members of the Wardroom, as far as I recall.

773

Lieutenant(N) Pokotylo

Cross-examination

Q. And would it be accurate that one of the complaints or issues that were raised was the questioning by Lieutenant-Commander Marsaw during the meals?

A. Yes, sir.

Q. The fact that the Wardroom was not reserved for the CO and the XO? A. Yes, sir.

Q. And that people felt that they were made to be unwelcomed in the Wardroom? A. Yes, sir.

Q. And what is your recollection as to what came out of it? A. I don't think it ever got resolved. I think I've said that he may have taken it to the CO - he may not have, I don't know.

Q. Do you recall when you stated that, like I said, the first time is at the very start of your interview ... Sorry, a little bit later on, and then you go on to the second part, you go back on the subject. Do you recall stating that the XO replied "Grow up"? A. Yes, sir.

Q. That was basically ... A. Yes, sir.

Q. Your understanding of his reply was "Grow up"? A. Yes, sir.

ASSISTANT DEFENDING OFFICER: Those would be all the questions I would have referring to the tape.

JUDGE ADVOCATE: Very well. So would you suggest that we call the members back?

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: Mr Officer of the Court, would you please invite the president and the members back to the courtroom.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

774

Lieutenant(N) Pokotylo

Cross-examination

JUDGE ADVOCATE: You may be seated.

ASSISTANT DEFENDING OFFICER

Q. Now Lieutenant[N] Pokotylo, just before we went into the **voir dire** I had asked you about your description using the right and left foot, and then went into the interview that you gave to the investigators on 21 February 1994? A. Yes, sir.

Q. Do you recall being asked by the investigator, Master Seaman Rice, if Lieutenant-Commander Marsaw had bumped into the person that was at the plot table? A. Yes, sir.

Q. As he went around? A. Yes, sir.

Q. What was your answer? A. I said "He may have ..." No, I said "I don't think so" basically.

Q. I can go back. Would it be more exact to say that your answer was "He may have. I don't know. I didn't notice anything that took place beforehand"? A. Yes, sir. That would be what I said.

Q. And shortly after making the physical demonstration to the investigator, do you recall making the statement that you only caught a glimpse of it? A. Yes, sir.

Q. Now, the events that you physically described before this court yesterday, the number of times that Lieutenant-Commander Marsaw went around from the start to the kick, how long would that take? A. Approximately 30 seconds, sir.

Q. And would you say there is a bit of a discrepancy between 30 seconds and only catching just a glimpse of it? A. I was also watching other dials, that was part of my responsibility as well, sir.

775

Lieutenant(N) Pokotylo

Cross-examination

Q. How can you describe an entire event of 30 seconds if you're watching elsewhere? Are you compiling it from past memory ... A. Yes, sir.

Q. ... of how usually the Captain goes around? A. No, sir. No, sir. I've had much more time to reflect on what took place since that interview, sir.

Q. So what you didn't remember then, now you remember? A. Yes, sir.

Q. And would you also say that there is a larger discrepancy when you say that you don't know because you didn't notice anything that took place beforehand, before the kick? A. Yes, sir.

Q. So if you say you didn't take notice of anything that took place beforehand, he was referring to Lieutenant-Commander Marsaw bumping into, which was the question that was put to you, how can you come before the court and say that he had to force his way through and he would have touched the individual? A. Because I've had much more time to reflect on what took place since that interview, sir.

Q. Is that what you witnessed or an habitual memory that you have because area is so tight that there is hardly any times that the Captain can go around without touching anyone? A. I believe what I said yesterday took place.

Q. Do you recall making a statement, a particular statement, as to what made you take notice of the kick? I can refer you to the words? A. I think it was malicious.

Q. Yes? A. The maliciousness of it.

Q. Didn't you also say that you took notice of it but it was not something that would make you jump up and say "Hey, that's not correct"? A. On that

776

Lieutenant(N) Pokotylo

Cross-examination

submarine, sir, I would not have jumped up and taken the Captain to task on something like that.

Q. Why not? A. Since that time I've had the opportunity to go to the surface fleet and ... and "grow up" and experience a lot more of what the service is all about, and I can say unequivocally now that that was wrong. I wouldn't stand up for something like that if I saw it today compare to when I saw it three years ago.

Q. And that would have happened during the period of between August and October '92? A. Yes, sir.

Q. And if I'm not mistaken, yesterday you said that you joined the Reserves in '82 and the Regular Force in '83? A. Yes, sir.

Q. So how much time would you have had at that point in experience, in the Forces I mean, as an officer? A. Approximately 10 years.

Q. Approximately 10 years. And what was your position during that trip? A. I was the Operations Officer.

Q. And that would put you, in the chain of command, number three from the top? A. Yes, sir.

Q. There would be the Captain, there'd be the XO and you, as OpsO, would be number three in the chain of command? A. Yes, sir.

Q. And you say it was a malicious kick?
A. Yes, sir.

Q. But you wouldn't challenge the Captain on it? A. Not at that time. No, sir.

Q. How long has it been since you had the opportunity to look at QR&O article 4.02? A. When I

777

Lieutenant(N) Pokotylo

Cross-examination

was studying for the command exam would have been the last time, sir.

Q. I show you a copy here of QR&O article 4.02, which deals with duties and responsibilities of officers. 4.02:

"An officer shall:

... become acquainted with, observe and enforce

... the *National Defence Act,*

... the *Official Secrets Act,*

... QR&Os, and

... all other regulations, rules, orders and instructions that pertain to the performance of the officer's duties ..."

And I refer you directly to subparagraph (e):

"Report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline when the officer cannot deal adequately with the matter."

A. Yes, sir.

Q. Now which is it: you can't deal adequately with it; or you don't know the regulation; or you just don't want to challenge the Captain? A. At the time I did not want to challenge the Captain, sir.

778

Lieutenant(N) Pokotylo

Cross-examination

Q. Going against your own duty? A. Yes, sir. In reading this - yes, sir.

Q. You can put the sheet down. Now is it because he was malicious you didn't want to challenge him or, like you mentioned earlier, it was not something that would make you jump up and say "Hey, that's not correct"? A. In a submarine, in that submarine, you did not challenge the Captain. Was it self-preservation? Yes, sir, it was self-preservation.

Q. You did not challenge the Captain. So why would it be self-preservation if you're only accomplishing your duty? A. In the submarine service, sir, at the time there was a general perception that Captains are untouchable.

Q. According to who? A. It's almost an unwritten rule. It's perception.

Q. So the unwritten rule overrides the written rule? A. Yes, sir. In my mind at that time. Yes, sir.

Q. And who else's mind? You mentioned that it was the unwritten rule of the squadron? A. All junior officers, sir, in general.

Q. Junior officers, for self-preservation? A. Yes, sir.

Q. What are the fundamental three qualities required of any members of the Forces? A. Duty, truth ...

Q. Honesty, loyalty and integrity? A. Yes, sir.

Q. You witnessed one of your fellow officers, as you mentioned, be given a malicious kick by the Captain. Where's your loyalty? A. If I saw that today, sir, I would make a complaint. I would lodge a formal complaint against the Captain.

779

Lieutenant(N) Pokotylo

Cross-examination

Q. So your loyalty then was not towards the Forces and report as your duty tells you it is to do, you won't have loyalty towards your fellow officer, you're just acting on your self-preservation. So you put your own loyalty in front? A. I was afraid. Yes, sir. I was afraid on that submarine.

Q. Afraid of what? A. Afraid of any repercussion that may happen to me if I took action against my CO. COs are ... the general feeling was COs are almost irreplaceable, lieutenants are.

Q. And you wouldn't bring that up with authorities at the squadron? A. No, sir.

Q. Because it is your statement that they would protect Lieutenant-Commander Marsaw? A. That was my feeling. Yes, sir.

Q. And who would that include at the time? A. The squadron commander.

Q. Who was? A. Commander Scherber.

Q. Who is above him in the chain? A. At the time it would have been CANFLEET.

Q. Okay. You also referred to a bad moment you had on watch and you were called into the Captain's cabin, where he would have made the statement to you that "blood will be spilled"? A. That wasn't in the cabin, sir, that was in the Control Room.

Q. In the Control Room? A. On the chart table.

Q. And you said you took that as a threat? A. Yes, sir.

Q. Is that your interpretation, going in your line of self-preservation? A. Yes, sir. He

780

Lieutenant(N) Pokotylo

Cross-examination

threatened. As far as I was concerned I was threatened.

Q. What other possible interpretation of that statement would there be? A. In my mind, sir? No other interpretation of that.

Q. You were the watch leader then? A. Yes, sir.

Q. Things weren't going right? A. No, sir.

Q. Is it possible that the statement he made is that if you keep going this way you're looking for an accident to happen? A. No, sir.

Q. No, sir? Further on, you described the deportment of Lieutenant-Commander Marsaw as being different, more civil, when you had riders on board. Is that correct? A. For the most part. Yes, sir.

Q. And you were there from August of '92 until April of '93? A. Yes, sir.

Q. Do you recall the date you got on board in August? A. No, sir.

Q. Or just generally in the month?
A. Early August.

Q. And in April when you left? A. I think it was early April ...

Q. Early April? A. ... or mid April.

Q. Okay. I refer you here to a document, and we will walk through that, which is Exhibit "Q", the Sailing Schedule. Just be careful because the last page seems to be loose. Start at August '92. So you joined just ... you see on the date, August 12, the Wednesday. It says "At Sea. DRUG OP". How many days before that did you join? A. I joined, I think it would have been probably the 3rd, roughly in the area

781

Lieutenant(N) Pokotylo

Cross-examination

of the 3rd. I was on board a couple of days, and for the ISE.

Q. So basically the 4th and the 5th, you're just alongside? A. Yes, sir.

Q. The 6th you start the ISE, you're at the bouy? A. Yes, sir.

Q. And do the ISE for three days. Do you remember Sea Training being on board at that time? A. Yes, sir.

Q. When you just started? A. I believe they were. Yes, sir.

Q. So you have riders, Sea Training is there? A. Yes.

Q. The 10th you come back, you're alongside, nothing happens - you're not at sea in the Control Room with Lieutenant-Commander Marsaw. The 11th you start, you go at sea, ISE, no riders there? A. That's right.

Q. Then you start the "At Sea - DRUG OP" on the 12th. Did you have riders for that period? A. I believe we did. Yes, sir.

Q. How many, do you recall approximately? A. Four maybe. Three or four.

Q. Okay. And that operation carries on through September and ends October 10th. Is that correct, according to the schedule? A. Yes, sir.

Q. Okay. Then two days alongside, the 13th you go to "De-ammunition", the rest of the week until the 18th you're alongside, nothing happened, you're not at sea with Lieutenant-Commander Marsaw in the Control Room? A. That's correct.

782

Lieutenant(N) Pokotylo

Cross-examination

Q. And after that you go into a work period and the boat is lifted on the Dartmouth Slips, and that carries through November, December, into early January. So you're not in the Control Room there with Lieutenant-Commander Marsaw. On the 5th of January you go into a self-maintenance period? A. Yes, sir.

Q. From the 5th to the 12th, so still not in the Control Room, not sailing anywhere, Halifax, the 13th, you're alongside, the same. The 14th you go out, ammunition. 15th, one day ISE, no riders. Do you recall it? A. Vaguely. Yes, sir.

Q. So, okay. A. The 15th - definitely ammunition, I don't know if we were at sea on the 16th or not.

Q. Okay, so no riders. Come back, alongside one day, still not in the Control Room. 18th you go out, ammunition. 19th you go into one day of sea trials. On the 19th, when you do the sea trials, do you recall the log calibration team being on board? A. I don't recall, sir.

Q. Just before the workups? A. No, I don't recall.

Q. You don't recall. Okay. 20th, one day alongside. 21st you start the annual workups. Who was on board for the annual workups? A. Sea Training.

Q. Sea Training. And they stayed there throughout FLEET EX? A. Right.

Q. Until you come back on February 10th. So this time again you have riders. You come back alongside, no riders and not in the Control Room with Lieutenant-Commander Marsaw when you're alongside. 18th starts a period at sea, ISE. Do you recall if there was an SOCT done at that time? A. Yes, sir.

Q. With then Lieutenant[N] Kavanagh and Lieutenant[N] Pitman? A. Yeah, I think so. Yes, sir.

783

Lieutenant(N) Pokotylo

Cross-examination

Q. So you have riders for that period until the end of the month and into the first day of March. Four days alongside, not in the Control Room, just being tied up. The 6th you start a Fisheries Patrol which lasted until the 11th. So we have riders then on the Fisheries Patrol? A. There was, Fisheries Patrol. Yes, sir.

Q. And then you come back, you're alongside for the rest of the month? A. I was gone around some place around that period.

Q. You were gone sometime around that period? A. Yes.

Q. So basically we were able to identify about three days during the entire period from August to end of March during which you did not have riders. The rest of the time you had riders? A. True. The riders weren't always in the Control Room though, especially during the FISHPAT, riders weren't in the Control Room. Quite often the rider was asleep, and that was a period where basically ... unless the Fisheries observer was in the Control Room.

Q. What about the period starting August ending the 10th, the DRUG OP, there would always be one of them in the radar room at the time? A. There were a couple of Forces members. Yes, sir.

Q. They would be in the radar room, which is adjacent? A. Yes, sir.

Q. They were there at that time. When you do Sea Training, are these people there only to assess the Captain and look at him, or do they look at the entire ... A. They look at the entire crew.

Q. The entire crew. So it would be during the entire part of the operation notwithstanding the watches? A. That's right, sir.

784

Lieutenant(N) Pokotylo

Cross-examination

Q. Because people go on and go off, and they would replace themselves ... so they'd still be there.

A. Yes, sir. Sea Training especially, there are people everywhere.

Q. So by saying that they weren't there all the time in the Control Room, is that he would go into a ranting and raving phase when they would just walk off and then just cool down when they would walk back in? A. Well, during the drug period, the CF members, the junior CF members, I almost didn't consider as being riders in the true sense of the word. When the RCMP officer was in the Control Room, his actions were quite different.

Q. Okay. You can put the document down. And going back to your interview of 21 February '94, earlier in your direct-examination yesterday you were asked what the atmosphere would be like when Lieutenant-Commander Marsaw came into the Control Room?

A. It was tense. Yes, sir.

Q. Tense. And you made reference to mistakes being made? A. Yes, sir.

Q. Do you recall in your interview of 21 Feb '94, making a statement to the investigators, and I quote your words, that "when mistakes were made, stupid mistakes, lots of mistakes by officers, you would fear the day" Do you recall making that statement?

A. Yes, sir.

Q. And then that the CO would have had you, it was a group thing. Do you recall making that?

A. Yes, sir.

Q. Okay. Wouldn't you expect that from the commanding officer when he shows up on the Control Room and the officer of the watch doesn't have a grip on his watch? A. Not for the Captain to come in and say "What the fuck is going on in here? Are you all a

785

Lieutenant(N) Pokotylo

Cross-examination

bunch of fucking Part 3's? If you can't sort this out, I'll find somebody who can".

Q. And you saw that as a threat? A. Yes, sir. Which in the long way ... which in a sense ... well, actually it hurts people's confidence. People's confidence just kept getting stomped upon.

Q. Would you have your confidence hurt rather than your body hurt if something happens because the watch can't keep a grip on the submarine? A. We were safe, sir.

Q. You were safe? A. In fact, I can recall one interview with Lieutenant-Commander Marsaw in which he did say "Yes, you are safe. You're a safe officer of the watch".

Q. Then, to accentuate that, you referred to an example of the fire control console? A. Yes, sir.

Q. It was yesterday in your direct-examination that you put information on the fire control console so that if he would walk in he would not yell because he would figure that you were not doing anything? A. I qualified that as well by saying that long range contacts, contacts which may have been there for two or three days, which you could get, that wouldn't show any bearing, you'd put something down because you have to assess. You have no information on which to make a proper assessment with.

Q. What were the Captain's Standing Orders?
A. I can't recall.

Q. With respect to contacts to be analysed?
A. I can't recall, sir. I think it was all contacts are to be.

Q. All contacts are to be analysed?
A. Yes, sir.

786

Lieutenant(N) Pokotylo

Cross-examination

Q. And when you first get a contact, isn't it exact to say that you just get the contact, the first information you would put down would be the bearing of the contact? A. Yeah. Yes, sir.

Q. And then with no more information, the second information you would put down was that you would assume the range of the day on the sonar because the range can vary from day to day depending on the conditions? A. Yes, sir.

Q. So the basic drill was: Put the bearing down, assume the range on the range of the day of the sonar ... A. And assume the most dangerous course and a closing speed.

Q. And assume the most dangerous course - was that he was coming towards you? A. That's right. So you'd sit and you'd watch the fire control, continue to calculate to be at periscope depth, you'd have a range in the fire control of 5000 yards, if you can't see anything through the periscope - bump him back out again.

Q. But you would add information to that whether or not you had received the information from the other sensors. Is that what you were telling yesterday, that you'd build up so as for him not to yell at you, telling you - you weren't doing your job? A. Yeah, you'd put a solution on it. Yes, sir.

Q. Would that practice to keep him from yelling at you, would that also as an officer of the watch, have you witnessed any practices of putting down a fake DR and EP on the charts? A. I've never put a fake DR, ever.

Q. Have you seen it? A. I've never seen a fake DR, and I've never put a fake DR on the chart.

Q. Another period that was covered right after that was that you were told you called in after a

787

Lieutenant(N) Pokotylo

Cross-examination

particular period where you would have exercised control in your watch, you would have been called in by Lieutenant-Commander Marsaw to tell you that he appreciated that and he wanted you to use your voice more?

A. He wanted me to yell more, sir.

Q. To yell more? A. Yes, sir.

Q. And is that your interpretation of what he told you? A. Absolutely, sir.

Q. Or did he tell you that to make a point that, in fact, this time you showed control in the Wardroom, that you had everything in hand and he appreciated that? A. He appreciated me yelling, sir.

Q. And you were, in fact during that episode you were more assertive, weren't you? A. If yelling is more assertive. Yes, sir.

Q. And then a part about being praised, that during a drill he praised you on your seamanship, is that ... or control? A. Ship control.

Q. Ship control. And then in the debrief that followed you were criticized by the assessor and he didn't step in. Do you recall saying that yesterday? A. Yes, sir.

Q. And you said you were in fact praised for what you had done at the time? A. Yes, sir.

Q. That would have been during the annual workup period, wouldn't it? A. Yes, sir.

Q. In January of '93? A. Yes, sir.

Q. When Sea Training was on board? A. Yes, sir.

Q. Do you recall what the drill was? A. I don't recall. No, sir. I can recall roughly.

788

Lieutenant(N) Pokotylo

Cross-examination

Q. Was the drill about fire in the AMS and VP failure? A. It may have been.

Q. VP being? A. One of your main power sources.

Q. Variable power? A. Variable power.

Q. And AMS is? A. Auxiliary machinery space.

Q. Okay. What happens when you loose the variable power? What does that connect to? Do you loose the hydraulic pumps, for instance? A. If you do loose hydraulic pumps, you go to after-planes air emergency.

Q. Air emergency meaning you switch from hydraulic to air ... A. To air. Yes, sir.

Q. ... to still keep control over the planes? A. Yes, sir.

Q. Okay. And that of course renders the boat more difficult to control, handle? A. Yes, sir.

Q. Because you're using the auxiliary system as opposed to the direct? A. Yes, sir. Especially in this case where the planesman was on for a considerable length of time.

Q. Uh, huh. And you replace ... I'm sorry, I didn't get that last ... A. If the planesman or the helmsman is on for a significant length of time, he wasn't replaced during the drill.

Q. Okay, but he was replaced at one point? Do you recall that? It was Leading Seaman Hunt? A. It was Leading Seaman Hunt. He may have been replaced near the end, but I don't ... he was on for quite awhile.

789

Lieutenant(N) Pokotylo

Cross-examination

Q. Quite awhile, and do you recall who was on the trim seat? A. I was in the trim seat. I came in ...

Q. You were on the trim seat, so you took control? A. Yes, sir.

Q. And it was fairly difficult? A. We were going along fine for a good portion of the drill, and I think as he started getting tired we started having a little bit of ... a little bit of problems.

Q. Okay. Do you recall ordering to trim 50 gallons from the aft to forward, to trim the boat off? A. I don't.

Q. You don't, but when you have difficulties would you try trimming the boat? A. You try to correct the action, correct the problem. Yes, sir.

Q. Do you recall Lieutenant-Commander Marsaw overriding that order, saying "Do not trim 50 gallons", and telling you to listen to what HQ2 was passing on because they were about to open V2, the main power source? A. I don't recall that. No, sir.

Q. Do you recall ... then there's a certain amount of time, then the emergency is finished, and the order is that to restore the planing surfaces? A. That's standard. You'd revert to primary steering.

Q. Do you recall Lieutenant-Commander Marsaw asking you if you had planes and steering? A. I don't recall, sir.

Q. You don't recall. So you wouldn't recall also him telling you that the order ... to order it right now because it wasn't needed any more to go without planing surfaces, seeing it was over? A. I don't remember that. No, sir.

790

Lieutenant(N) Pokotylo

Cross-examination

Q. And towards the end of your direct-examination yesterday, you were shown the document which was your request to leave submarines? A. Yes, sir.

Q. But you also mentioned that there were other reasons that were not put in your request? A. Yes, sir.

Q. And one of them being you not wanting to serve with Lieutenant-Commander Marsaw any longer? A. Yes, sir.

Q. Feeling of hopelessness, not enjoying yourself. Do you recall that as well? A. Yes, sir.

Q. And that these reasons were not included because you felt it would be inappropriate? A. It wasn't worth my putting them in. No, sir.

Q. It wasn't worth your putting them in. What was your attitude when you joined the submarine in August '92? A. My attitude? I wanted to do well. I just came off the SO Course, the OPSO Course, I topped the course, and I wanted to do well.

Q. During your investigation of 21 February '94, do you recall stating some of the reasons why you had put in your request to the investigators? Hard lifestyle. Do you recall mentioning that to the investigators? A. Yes, sir.

Q. That you had many other choices? A. Many other things I was interested in. Yes, sir.

Q. Interested in. And it was a personal choice? A. Yes, sir.

Q. And that your time in OJIBWA only made the decision easier? A. Yes, sir.

Q. But you had been contemplating it for awhile? A. Yes, sir.

791

Lieutenant(N) Pokotylo

Cross-examination

Q. Do you recall saying that? Do you recall also stating that you also had discussions in October '92, when you put in your request, with Lieutenant-Commander Hickey? A. Yes, sir.

Q. And you had an interview when you put in your request with Commander Scherber? A. Yes, sir.

Q. Did you stray from these reasons? Did you mention to any of these two individuals the other reasons that you would not put into your request? A. I may have told Lieutenant-Commander Hickey. I can't say for certain, but I didn't with Commander Scherber.

Q. You didn't raise the issue with Lieutenant-Commander Scherber? A. He asked me what the problem was in that submarine. And I said "There is no problem, I'd like to leave".

Q. You said "There is no problem, I would like to leave"? A. Yes, sir.

Q. And do you also recall stating to the investigators during your first interview that when you got there you had already lost your will? You had made up your mind about leaving submarines? A. That's not entirely true.

Q. And do you also recall telling the investigators that you were not a volunteer to work under Lieutenant-Commander Marsaw, that you would not go the extra distance for him? A. I recall when I got my posting message to the OJIBWA, I was extremely concerned about it when I was in Sea Training. And when I sat down and talked to some of the chiefs, they said "Just try. Go down and give it a shot". Because we all knew of the reputation of OJIBWA and I was a little intimidated by that.

792

Lieutenant(N) Pokotylo

Cross-examination

Q. Uh, huh. And in your interview, how did you qualify the lieutenant-commander's ability as a submarine ... in terms of technique? A. I respected his ... I didn't think he had a rival in terms of how he handled the submarine and the tactics that he knew and employed.

Q. And would you say that that could create a problem when somebody is not well motivated to be on a submarine and is confronted with a Captain who is? A. Yes, sir.

Q. It does create a problem, doesn't it? A. Yes, sir.

Q. Just a second. How was the Lieutenant-Commander's, on your perspective, Lieutenant-Commander Marsaw's approach to his work? A. He was absolutely consumed by it.

Q. And to the mission, the objective? A. And to the objective.

Q. Did you ever see him laugh? A. Oh, yes, sir.

Q. And other times he wouldn't be in that good a humour? A. No, sir.

Q. He would be upset? A. Yes, sir.

Q. By the environment? A. By the environment. I've seen him laughing because he would be laughing at other people as well, you know, and that sort of thing. But not always at the expense of other people.

Q. Now you had a second interview on 21 March '94? A. Yes, sir.

Q. Do you recall making the statement that you were bitter about submarines because of where you

793

Lieutenant(N) Pokotylo

Cross-examination

are now in your position and your progression? Do you recall making that statement? A. Yes, sir.

Q. Do you feel that being in the submarine has been an impediment to your career progression?
A. No. No, it taught me a lot of valuable lessons, it taught me how to be a very good officer of the watch on a ship. What I was bitter about, and it was a choice I had to make myself personally, but I feel I had to take a three or four-year step back in my career, in my career progression. And I was bitter about how it ended.

Q. Uh, huh. A. And it's certainly not how I wanted it to end.

Q. Do you recall ever attending a discussion that took place between junior officers, and you were there, and the XO? A. Yes, sir.

Q. What were some of the pre-occupations that were voiced? A. Some of the problems that we had as Wardroom members, we were concerned that the Captain and the XO basically monopolized the Wardroom.

Q. In what terms? A. Well, they were always playing games in the Wardroom on the Wardroom table. You'd come off watch and you'd sit down on the settee and you couldn't really do ... or you didn't have much space on the table to do anything else because they were playing scrabble or they were playing cards, so we had to go to other places.

Q. What about questions? A. And questioning Part 3's during meals.

Q. And what feeling did you have when you walked out of that meeting? What was the general response, not the actual words but how did you feel about the response that you got from that meeting?
A. I was entirely satisfied.

794

Lieutenant(N) Pokotylo

Cross-examination

Q. Yeah. A. I didn't think anything would be done about it.

Q. Did that give you the feeling that these aches and pains weren't being taken seriously or not deemed to be serious enough to do anything about it? A. Well, I would think if the majority, the vast majority, of the Wardroom had certain concerns about how the Wardroom was being run, and these concerns were basically ignored, that ... I personally wasn't surprised by it. I didn't think anything would be done in the first place.

Q. But there was a general sentiment of discontent because of those aches and pains? A. Very much so. Yes, sir.

Q. How many people usually live in a Wardroom? A. Oh, God.

Q. In terms of how many bunks do you have in there? A. I think seven. I don't know. I 'm not sure anymore.

Q. How many officers did you have during your time on board of OJIBWA? A. More than seven.

Q. More than seven. And for bunk space, they would be bunked somewhere else on the submarine? A. Yes, sir.

Q. But for the usual eating and ... A. Entertainment.

Q. Off duty entertaining, there'd be the one Wardroom. How many trainees did you have during ... if I suggest to you anywhere between three and five? A. That would be it approximately. Yes.

Q. What about the riders? A. One rider, on that trip, had Wardroom status.

795

Lieutenant(N) Pokotylo

Cross-examination

Q. Which who was? A. An RCMP officer.

Q. And what about Sea Training? A. One officer of Wardroom status.

Q. So we have your regular numbers of qualified officers ... A. They weren't all in the Wardroom at the same time or on board at the same time, they came in and out.

Q. But that makes life difficult because there's not only the seven living in the Wardroom?
A. That's true. Yes, sir.

Q. You have to share with an additional seven to eight people? A. Yes, sir.

Q. And when you want to go in and hit the bunk, would these people have no place else to go but the Wardroom, because it's the officers' Wardroom?
A. Yes, sir. But generally, on other submarines I've been on, the Captain doesn't also sit in the Wardroom for a good portion of the day. The Wardroom is left to the officers so they have a place to go and unwind a little bit.

Q. Did you read or are aware of the article of Mr Dunlop that was written on 16 December 1991 ... I'm sorry, '93? A. Was that the first article?

Q. The first article - yes? A. Yes, sir.

Q. In the Chronicle-Herald, have you read it? A. I think I read it at the time.

Q. At the time. Where were you at the time?
A. I was at home.

Q. At home, here in Halifax? A. Yes, sir.

Q. Okay. Did you talk, yourself, to Mr Dunlop? A. I spoke to him on the phone. Yes, sir.

796

Lieutenant(N) Pokotylo

Re-examination

Q. What did you tell him? A. Yes, he phoned and said the article was going to be released on Thursday and asked me if he could ask me some questions.

Q. Uh, huh. And what did you answer to his question? A. I said "No. No comment", and carried on with no comment.

Q. And when ... well we already covered that in your interviews with the MPs, the first one would be 21 Feb '94 and the other one 31 March.

ASSISTANT DEFENDING OFFICER: These are all my questions for the witness.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. In cross-examination you were shown a copy of QR&O article 4.02. Would you agree that it says: "**An officer shall: ...**" and then there is subparagraph (e): "**report to the proper authority any infringement ...**"? A. Yes, sir.

Q. Who would be the authority on a submarine when that submarine is dived under the water? A. At sea, sir, the commanding officer.

Q. If you reported or observed an infringement of the Code of Service Discipline involving the commanding officer strike a subordinate, according to this article, who would you have to report it to? A. The commanding officer, sir.

Q. Can you leave a submarine when it's dived? A. No, sir.

797

Lieutenant(N) Pokotylo

Re-examination

Q. Referring to the questions arising out of your MP interview, you just stated that you've had more time to reflect? A. Yes, sir.

Q. Can you describe the circumstances in which you were brought in for that MP interview? Did you get any advance warning, were you told in advance what questions they would ask? A. I was not told in advance of the questions that they would ask. I don't know if I was called. I don't recall there being a lot of notice about it, I'm not certain.

Q. Do you recall if the MPs told you specifically what they in particular were investigating? A. I don't think they did, sir.

Q. After the interview, did you have an opportunity to reflect back on your time on the OJIBWA? A. Yes, sir.

Q. In cross-examination, you were challenged about "That's not right" after seeing the kick, by stating "you would not on that sub challenge that Captain". What did you mean by that? A. I wouldn't go to the Captain and say that I disagreed with how he was conducting business. I certainly wouldn't have gone to him with a complaint about it, seeing that incident.

Q. The defence has asked you about three guiding principles of being an officer: honesty, loyalty, and integrity. Do you recall those questions? A. Yes, sir.

Q. Are you familiar with the phrase that loyalty goes up and down? A. Yes, sir.

Q. Would riders be in the Control Room all the time? A. No, sir.

798

Lieutenant(N) Pokotylo

Re-examination

Q. Would all riders on board be of equal or higher status or rank than Lieutenant-Commander Marsaw all the time? A. No, sir. I don't believe so.

PROSECUTOR: Those are my questions. Thank you, sir.

JUDGE ADVOCATE: Thank you.

Does the court have any questions.

PRESIDENT: None.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1045 hours, 5 October 1995, the court adjourns.

REASSEMBLY: At 1100 hours, 5 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR: The next witness will be Lieutenant[N] Cassivi.

799

Lieutenant(N) Cassivi

Examination-in-chief

EIGHTH WITNESS) Lieutenant(N) L. CASSIVI,
FOR THE) is duly sworn.
PROSECUTOR)

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give the court your full name and spell your last name, please?

A. Luc Cassivi, last name spells as C-A-S-S-I-V-I.

Q. And what is your current position?

A. Current position is Navigator and Operations Officer on HMAS ONSLOW, it's a Royal Australian Navy.

Q. Okay, how long have you been attached with the Royal Australian Navy? A. Since December of last year.

Q. And the ONSLOW is a submarine? A. An OBERON Class submarine.

Q. What year did you join the Canadian Forces? A. 1983.

Q. Okay. And what was your position at that time? A. At that time I was undergoing training at CMR St Jean.

Q. And you graduated from CMR in 1988? A. Correct.

Q. What year were you awarded your "Dolphins"? A. I was awarded my "Dolphins" in February 1992.

Q. And did you sail with the OJIBWA from December 1990 until February '92? A. Yes, I did, sir.

Q. And then subsequently sailed a second time with the OJIBWA, under Lieutenant-Commander Marsaw's command, from July '93 until October '93? A. A period at sea. Yes, sir.

800

Lieutenant(N) Cassivi

Examination-in-chief

Q. Have you sailed for other Canadian submarine commanders as well? A. I've sailed with Lieutenant-Commander Woodburn and Lieutenant-Commander Kavanagh.

Q. Approximately what dates did you sail with Lieutenant-Commander Woodburn? A. It was April to July of 1994, and Lieutenant-Commander Kavanagh was from July until November, which was before I left for Australia.

Q. Okay, of '94 as well? A. Yes, sir.

Q. Both commanders were on the ONONDAGA?
A. Yes, sir.

Q. Did you attend the Wardroom of the OJIBWA after a mess dinner at the Squadron in December of '91?
A. Yes, sir. I did.

Q. Approximately what time, to the best of your recollection, would you have arrived at the OJIBWA Wardroom? A. The best that I can recall, it was around two in the morning.

Q. And how long were you present? A. The best I can recall is approximately half an hour. I didn't stay very long.

Q. And whom do you recall being there?
A. Besides myself, Lieutenant-Commander Marsaw was present, and Lieutenant Kelk, I remember Lieutenant[N] Marr, Kenny Marr to be present, as well as Lieutenant[N] Muir who came on board with myself, and I do believe then Sub-Lieutenant Elford, now Lieutenant[N] Elford, was present. They're the only ones, sir, but there were more than that that were there.

Q. Okay, but those are the people you recall? A. Yes, sir.

801

Lieutenant(N) Cassivi

Examination-in-chief

Q. What do you recall observing while you were there in the Wardroom? A. It was getting late after the mess dinner and some people were starting to fall asleep, so Wardroom games were taking place as to marking on the exposed skin of the people who were falling asleep.

Q. What was your state of sobriety at that point? A. I was in good spirits, so I was close to falling asleep myself, so it was time for me to consider leaving.

Q. Was that because of alcohol consumption?
A. Yes, with being tired.

Q. Okay. And why did you leave the Wardroom at that time? A. Well, when I saw the activities taking place and I was feeling dozy myself, I figured instinct of survival made it a very good time to return home, and I did.

Q. Okay. During your second trip on the OJIBWA from July until October '93, how would you describe the atmosphere in the Control Room? A. My perception was that the Control Room was that the watch keepers were tense a lot during that period.

Q. Why would that be? A. Well it was a constant feeling that, you know, to always double-guess ourselves and look out for Lucas. There was that feeling that the Captain will come in at anytime and pick up something, so there was that feeling all the time of second-guessing ourselves and making sure everything was all right.

Q. What might the Captain do if he perceived that someone had made an error? A. It would normally consist of letting us know verbally, and depending on the mistake the intensity of the discussion it would warrant, his level of concern.

802

Lieutenant(N) Cassivi

Examination-in-chief

Q. When you say "let us know verbally", what do you mean by that? A. Well, it would be some ... depending on the occasion, some yelling.

Q. Do you recall any words that were used? A. One that I remember the most is "Am I going to have to do this myself? Can't you do this? Don't you know this?", and other terms that were used along the line of "Are you incompetent?" or "Are you an idiot?"

Q. Any other words? A. "Cunt" and "Asshole" might have been used a few times.

Q. Based on your personal observations, how would Lieutenant-Commanders Kavanagh and Woodburn respond if they perceived that an individual had made a mistake in their Control Rooms? A. In my experience, both of these commanding officers had more of a teaching approach. I think that they knew that we didn't know everything and that part of getting the responsibility of being a watch leader or whatever other position you assume on watches, that you could attain a certain level of understanding but there's more learning to be done. And they always approach it as a teaching tool, unless the situation warranted quick action, but they would always take the person after and say: "Okay, this is what happened here, and this is why I was overly concerned and I'd like it this way".

Q. Do you feel that you developed professionally and learned under Lieutenant-Commanders Woodburn and Kavanagh? A. Yes, quite a bit.

Q. How about under Marsaw from July '93 until October '93? A. I did learn but in a totally different aspect, in the sense that there was more learning by fear of doing something wrong than actually more of concentrating on what was the purpose and more than sort of developing the reflexes.

Q. Uh, huh. So relative to your development under Woodburn and Kavanagh which you've developed, can you contrast the rate of development under Marsaw?

803

Lieutenant(N) Cassivi

Examination-in-chief

A. Well, I think it was a lot quicker and a lot more positive with Lieutenant-Commander Woodburn.

Q. Did you ever have occasion to hear or witness Lieutenant-Commander Marsaw discuss or express his opinion of his Wardroom? A. I remember one occasion when I was under training during my first period of service.

Q. Where were you at the time? A. I was at the Wardroom inboard at the Squadron at the time.

Q. Okay. A. And there wasn't a lot of people present. I can't remember exactly who was there and what the conversation was and who it was addressed to. I entered the Wardroom, I think I was going to the phone to make some calls, and I heard Lieutenant-Commander Marsaw state at that point that he had no confidence in the members of his Wardroom and thought they were incompetent.

Q. He thought they were incompetent. How did you feel upon hearing that? A. Pretty crummy, actually. I was still under training at the time. I was learning the ropes.

Q. Did you ever have occasion during your time from July '93 to October '93 to witness Lieutenant-Commander Marsaw ever verbally express his thoughts on francophones or bilingualism? A. Yes, I did. During that period some comments had been passed.

Q. How frequently would he make comments? A. They weren't regular, I'd say they were every other day or so when conversation would bring it up in the Wardroom.

Q. Could you give an example of things he might say? A. There's really one statement that sticks to mind during that period, and it went in the line that "It seems the only way to get ahead in this Navy now is to either be a francophone or a faggot".

804

Lieutenant(N) Cassivi

Examination-in-chief

Q. Did he ever comment as to which option might be easier? A. Yeah, the second one. Becoming a faggot would be easier.

Q. What was your initial reaction upon hearing this comment for the first time? A. Actually, I laughed, because it's the first time I heard that one in 11 years. I thought that it was somewhat original.

Q. Okay. And what was your reaction to it when it continued to occur on a regular basis? A. Well, it lost somewhat of its novelty with time, and it started bugging me after awhile.

Q. Was there a particular point in time where it would start bugging you? A. We did a number of port visits during that deployment, one of the ones we did was in Boston. Up to that point the particular statement was mainly stated within the Wardroom. It wasn't stated anywhere else. And there was an ex-US Navy personnel, I can't remember his name, he was looking after visits of the units when we were in Boston as part of the USO MWR, that organization that the Americans have, and he was familiar with a lot of the Wardroom because the boat had been there before. And during a conversation while he was on board it was stated at him. Well it started: a comment being passed to ..., you know, ... foreigners or, you know, people who are not within the boat, and it just kind of started making somewhat of a difference.

Q. Could you contrast the morale on board Lieutenant-Commander Kavanagh's and Woodburn's boat and contrast that to the state of morale that existed under Lieutenant-Commander Marsaw's command from July to October '93? A. Well I saw the morale ... you know, it's probably one of the hardest things to assess, but the feeling, I can say for the Wardrooms that I've experienced, during the period I did serve on the OJIBWA was "Oh, we're going to sea again", you know, "Let's get this one over with", "The end is coming" and

805

Lieutenant(N) Cassivi

Examination-in-chief

"The boat is coming out of commission and it's all going to be over". So people were kind of ... not dreading, but say, it's something we've got to do. And my experience on ONONDAGA is that "Okay, we're going on a trip" and everybody was interested and everybody was motivated to work for the Captain and get the mission done, and it was a healthier feeling going to sea and people were more motivated actually to go out and carry out the job.

Q. So on the ONONDAGA they were motivated to go out and help the Captain? A. Help the Captain, and everybody wanted to work for him, and everybody really respected him, he respected his crew and his officers continuously. And that was felt and therefore it brought him that pride of working for him and supported him.

Q. Did that exist on the OJIBWA? A. Not really. The experience was more that "Okay, we've got to get this done. Hopefully we won't get bollocked too much and we'll get the job done". The job got done but the perspective was totally different.

Q. Would you wish to sail for Lieutenant-Commander Kavanagh or Woodburn again in the future? A. Yes, without hesitation.

Q. Would you wish to sail with Lieutenant-Commander Marsaw? A. Knowing my previous experience that I've gone through. No. No.

Q. Have you ever had or have you ever been approached by Lieutenant-Commander Marsaw concerning a statement you gave to the military police? A. Once I did. Yes.

Q. Okay. And could you describe when and where that statement occurred? A. I was serving on ONONDAGA at the time.

806

16th *voir dire*

DEFENDING OFFICER: Mr Judge Advocate, I'm sorry. I believe the evidence that's about to come up I will take the position that it is not relevant and I will have to object at this point.

JUDGE ADVOCATE: Very well. Mr President and Members, would you please withdraw from the courtroom.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: This court is now sitting in a **voir dire**.

TRIAL WITHIN A TRIAL

s.19(1)

807

Trial within a trial

Lieutenant(N) Cassivi

Examination-in-chief

FIRST WITNESS) Lieutenant(N) L. CASSIVI.
FOR THE)
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Again, Lieutenant[N] Cassivi, could you tell the Judge Advocate where and approximately when or what event this conversation occurred? A. It was in late July, I believe it was the last Friday of July, we just came back from the west coast of Florida, I was serving on ONONDAGA at the time.

JUDGE ADVOCATE: What year?

WITNESS: Pardon me?

JUDGE ADVOCATE: What year?

WITNESS: That was in 1994, sir. And it was one of my confrère, Lieutenant[N] Reid, was just about to depart for Australia, where I'm now serving, and he was having his departure RPC at the Wardroom at the Squadron that Friday afternoon over lunch in the afternoon. I was on leave at the time for post-deployment leave and I came in because I needed to address some issues with him regarding the move because I was looking at the same adventure that he experienced. Later on that afternoon as the festivities progressed, the crowd started getting a lot lighter in the Wardroom, those that had to work had to go back and those who were off were continuing with the festivities. Lieutenant-Commander Marsaw was present, being a close friend to Lieutenant[N] Reid and it was quite appropriate for him to come and wish farewell. And later on that afternoon I remember he approached, there was myself and Lieutenant[N] Byrne, we were discussing in the corner, I think Lieutenant[N] Ellis was also present at the time - I'm not quite sure about that. And he approached us stating that things that we said were, in the case of Lieutenant[N] Byrne, "pretty damning", and in my case "very damning".

808

Trial within a trial

Lieutenant(N) Cassivi

Examination-in-chief

Q. What was the tone of his voice at that time? A. You could sense some anger and surprise. It was a bit provocative in a sense. That's the way I felt.

Q. What did you think he was referring to at that point? A. Well, because of that point, I think he referred to the statement we made to the Military Police at that time ... prior to that.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Do you wish to cross-examine?

DEFENDING OFFICER: Yes, very briefly.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. What time of day was that? A. It was about, I think, about two-thirty in the afternoon.

Q. And had you been drinking? A. Yes, I had about four beers by then.

Q. Uh, huh. And how certain are you of the words? A. I'm quite confident about my statement of the words.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Re-examination?

PROSECUTOR: No re-examination, sir.

JUDGE ADVOCATE: Thank you.

Are you ready to address?

809

Trial within a trial

Lieutenant(N) Cassivi

Cross-examination

PROSECUTOR: I am, sir. I wonder whether the witness should ...

JUDGE ADVOCATE: Lieutenant[N] Cassivi, would you please withdraw from the courtroom for a little while. Thank you.

WITNESS WITHDRAWS

PROSECUTOR: Mr Judge Advocate, I would respectfully argue that that conversation is relevant for the issues of credibility and also relevant in terms of evidence upon which to argue consciousness of guilt. Evidence that the Crown anticipates to call in the future will show that some of it has come, we've talked about the Craven and the Marr statements, where Lieutenant-Commander Marsaw approaches witnesses and discusses some aspect of the testimony they had given or about to give to the Military Police. The prosecution anticipates that you will hear evidence from Lieutenant[N] Elford, Lieutenant[N] Watt, Chief [CPO1] Tovey, Lieutenant-Commander Dussault and Lieutenant[N] Byrne that they were also approached by Lieutenant-Commander Marsaw during the investigation or charging moments that lead to this case. The witnesses will have a variety of stories, but in essence it gets reduced down to Marsaw makes some confrontation or challenge to them. In the case of Elford, we anticipate he will ask Elford whether Elford is trying to demise him and his family. Elford responds he's telling the truth. Lieutenant-Commander Marsaw then calls him a "cunt". Watt, he will approach and say words like "I'm not very impressed" and accuse him of jumping on some sort of band wagon. Tovey will say that Marsaw will approach him and say "I saw your video and I'm not impressed" or words to that effect and Tovey felt threatened and left the Wardroom as a consequence of it. With Dussault, Dussault's evidence will state that Marsaw threatened Dussault by calling him different names and then threatened to take him and his family down with him.

810

Trial within a trial

Defending Officer

Address

This statement in conjunction with other evidence is relative and necessary for the prosecution to have to deal with the issue of credibility and also evidence of consciousness of guilt. This shows directly sometimes, other times implicitly, in conjunction with the Craven and the Marr statements as well, of an individual who is attempting sometimes boldly, other times more subtly, to confront witnesses who are simply trying to tell the truth when they get interviewed by the Military Police and have been identified as prosecution witnesses. It can be used as evidence to challenge the credibility of Lieutenant-Commander Marsaw should he take a certain position if he does testify on the stand. I'll be able to pose questions that challenge whether or not he's truly interested in seeking the truth, if he's asserting his superior rank, using confrontational or angry tones, and making sometimes threatening comments to witnesses. Overall he's shown a pattern of honing in on certain witnesses and challenging them directly or indirectly. And therefore it is relevant both to credibility as well as consciousness of guilt. Thank you.

DEFENDING OFFICER: Mr Judge Advocate, I continue to rely on **Krause** and **Aalders**, the Supreme Court cases I referred to you earlier in this trial in another **voir dire**. Our position is that it is not relevant. Our position is it doesn't go to intent, and even if it did, it doesn't go ... if it goes only to credibility on an issue that is very collateral, again I rely on **Krause** and **Aalders**.

In making those comments, we fully appreciate that it's not for you to appreciate the weight, etcetera, the members of the court will do that later. Nonetheless, it is our position that it is your duty to control the evidence that will be brought before the court, and that if we keep indulging in that sort of evidence ... I mean, it appears that there will be no limit to the debate or debates that this court will have to address. I would add too that if the prosecution had wanted to charge Lieutenant-Commander Marsaw

811

Trial within a trial

Defending Officer

Address

with obstructing justice, I mean it was open to them to do it. And if it was their position that he attempted to influence the witnesses, they could have charged him and I suppose, in that scenario, that that evidence might be relevant as to what weight or probative value it would have is a different story. But we continue to take the position that the statement, like "it's damning", I mean what other statements are going to be brought forward before this court? I mean the court will be left with countless mounds of evidence that will simply detract from the main issues, and that is the very matter that is discussed in **Krause** and **Aalders**. This is why there is such a rule against collateral issues and limiting a debate to the actual charge sheet.

So for those reasons we maintain that ... we take the position that that evidence should not go in. And the prosecution has alluded to other statements that obviously he says will come later. I mean this statement has got to be taken as it is, and on its face is not relevant. We'll deal with the statement that may have been made to Dussault. I mean, okay, suppose he calls Dussault ... whatever the prosecution may have referred to. Suppose he called Elford a "cunt" in 1994. What does it have to do with the charges in front of this court which pertain to an incident in December 1991 and other incidents that have earlier been told as being a continuous offence between '92 and approximately '93?

JUDGE ADVOCATE: Yes, but that's not the evidence we have right now, Lieutenant-Colonel Couture. The evidence we have right now is to the effect that those comments were made after the witnesses made an interview to the Military Police concerning the offences before this court.

DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: So do you see a relevance there? I mean it's not that far, it's not because he said one word, one time, not related to anything. Here

812

Trial within a trial

Defending Officer

Address

it is closely related to the interview that the witnesses gave to the Military Police.

DEFENDING OFFICER: Yes, he refers to that. Yes. And according, anyway, if we take ... I mean I will not discuss the weight of this evidence now, but assuming for a moment - yes, the witness suggests, he referred to "my statement" or "our statement", and he says "it's damning". So ...

JUDGE ADVOCATE: And don't you see any relevancy if later on in your case your client takes the stand and says that this never happened? Don't you see the relevancy of this evidence, for example, for the prosecution to attack your client's credibility?

DEFENDING OFFICER: Mr Judge Advocate, I mean why wouldn't the prosecution call evidence as to what time my client took a meal in 1994 in case he takes the stand and says "you're lying, you didn't have your meal"? I mean I don't see the relevancy. A comment that goes to a witness to say that statement is damning, so ...

JUDGE ADVOCATE: Done, according to the witness, with some anger and a provocative tone. That's the evidence I have before me now.

DEFENDING OFFICER: Anyway, those are my representations.

JUDGE ADVOCATE: Very well. Thank you. Your objection is denied. The evidence is admissible as I find it relevant to the issue of credibility.

Would you please invite the president and members, the witness first, and the court after. Thank you.

TRIAL WITHIN A TRIAL IS TERMINATED

WITNESS RETURNS TO THE COURTROOM.

813

Trial within a trial

Judge Advocate

Decision

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

s.19(1)

814

Lieutenant(N) Cassivi

Examination-in-chief

EIGHTH WITNESS) Lieutenant(N) L. CASSIVI.
FOR THE)
PROSECUTION)

JUDGE ADVOCATE: You may be seated.

Welcome back, Mr President and Members. In your absence I ruled some evidence to be admissible. You will now hear it in the main trial.

EXAMINED BY PROSECUTOR

Q. Lieutenant[N] Cassivi, before the members had left I had asked you had you ever been approached by Lieutenant-Commander Marsaw concerning the statement that you gave to the military police, and you responded that you did. Can you tell the court when and where or what event this conversation occurred? A. It was shortly after I returned from the west coast deployment while serving on board the OJIBWA ... correction, ONONDAGA. We arrived in late July, it was the 27th or 28th July of '94. It was the middle of the week and the Friday, Lieutenant[N] Reid, who was a fellow engineer submariner - the departure RPC, he was leaving for service with the RAN and so we were all invited to that. On was on post deployment leave and took a day to come in because I was shortly leaving for the RAN myself and I wanted to find out some details about arrangements. So that was the Friday afternoon over lunch and it continued in the afternoon. Lieutenant-Commander Marsaw was present, Lieutenant[N] Reid served under him quite a bit and they were good friends, so it was quite appropriate that he be present. Later on in the afternoon I was having a discussion with Lieutenant[N] Byrne, and I believe Lieutenant[N] Ellis was also present, when our group was approached by Lieutenant-Commander Marsaw. He approached us and stated to Lieutenant[N] Byrne and myself ... and in the case of Lieutenant[N] Byrne, that things he said were pretty damning and on my level that the things I said were very damning, which at that point ...

815

Lieutenant(N) Cassivi

Cross-examination

Q. When he was talking about the things you said, what was he referring to? A. Well, it became obvious to us or our judgement was that he was referring to the interviews we made with the military police months earlier.

Q. How would you describe the tone of his voice at the time he approached you and said these words to you, yourself and Byrne? A. There was some, you know, like it's anger and shock or surprise that we would say such a thing, and it was also confrontational in some ways.

PROSECUTOR: Those are my questions, Mr Judge Advocate. Thank you.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: Yes, sir.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. So I understand that you served on board OJIBWA under Lieutenant-Commander Marsaw from July '93 to October '93. Is that correct? A. Yes, sir. I also served during my training period as a Part 3 under his command.

Q. So July - end July, early July? A. I think it was the middle of July.

Q. So mid-August, mid-September, October ... like a period of three months at best? A. Yeah, three-four months.

Q. And before that? A. Before that, as I said, I did all my Part 3 training on board on OJIBWA under Lieutenant-Commander Marsaw. And in February '92 when I left OJIBWA, I went to MARLANT at M32.

Q. So how long were you there for you Part 3? A. A total of 14 months.

816

Lieutenant(N) Cassivi

Cross-examination

Q. It took you 14 months to do your Part 3?

A. We had a period of engineering difficulties during my stay with L-valves which reduced the sea time. I went to the RAN, on board HMAS OXLEY with a fellow engineer for a period of roughly five weeks to try to get more sea time dived. They ended up having some problems themselves. We went through a typhoon and ended up with some defeats which prevented us from achieving much dive time, I think we only achieved 16 hours out of five weeks. And then I came back. When I did my first board on return and I didn't pass that board, and the consensus at that time, if I remember well, was that I needed more time at sea. And I knew that because my time was somewhat limited.

Q. Okay. So 14 months, and what I'm interested in knowing is how many months did you actually sail with Lieutenant-Commander Marsaw? A. Altogether?

Q. You just mentioned 14 here, but if the boat is ashore - you're not sailing ... so? A. Let's say seven months during that period.

Q. Seven months? A. My best recollection.

Q. Regarding the ... and with Woodburn, you sailed April to July? A. Yes.

Q. Early April or late April? A. Mid-April.

Q. And July? A. July, we arrived end July.

Q. So that's really well close to three months or so: May, June, July, three months, two and a half months? A. Four months.

Q. July to November under Kavanagh?
A. Yes.

817

Lieutenant(N) Cassivi

Cross-examination

Q. Another short period? A. Another short period. Yes.

Q. At some point you compared the morale on board OJIBWA to that on board ONONDAGA? A. Yes.

Q. Is that correct to say that ONONDAGA had been in refit the year before? A. Yes, she was coming out.

Q. Would you say that when a boat is in refit people are now, having been ashore for awhile, they're now anxious to go out and sail? A. Part of the crew - yes. I found that a lot of the crew were on other submarines and then came on board ...

Q. And then some would have been ashore and sort of keen to get at it? A. Yes, most definitely, sir.

Q. You're a submariner to go at sea - not to stay ashore? A. Yes, sir.

Q. And when you joined OJIBWA in July '93, you were joining the crew that on OJIBWA for awhile already? A. Quite awhile. Yes, sir.

Q. Is that correct that OJIBWA had been at sea a fair amount? A. Yes, it had been extremely busy over the previous two years.

Q. Wouldn't you say that this fact that the ONONDAGA was so keen to go and the fact that OJIBWA was ... well, less keen to go, was that one was just out of refit and the other one had been extensively used for operation and spent a lot of time at sea? A. It could definitely be a factor, sir.

Q. Yes. The night of the mess dinner in 1991, you went to the Wardroom. How certain are you about the time you boarded OJIBWA? A. I don't remember if I said ... well, two o'clock is the start of the

818

Lieutenant(N) Cassivi

Cross-examination

bracket, but I remember it's sometime between two and four. Exactly what time, I wasn't checking my watch. I wasn't paying close attention to time.

Q. And I understand your evidence in direct-examination that you were ... A. I was having a good night, as most people were.

Q. ... closer to be drunk than sober?
A. Oh, yes.

Q. And that Muir got on board with you? Are you sure of that? A. Yeah, quite sure of that, sir, because we were talking for a long time at the squadron. There was only us left I think.

Q. If I suggested to you that Muir was passed out by 12:30 in the Wardroom already, what would you say to that? A. I couldn't say much, as I wasn't watching my watch, I wasn't keeping track of time. Like two o'clock is my best estimate of the time.

Q. Do you recall Muir passing out? A. I don't remember him passing out, essentially, no.

Q. No. In your testimony you said that the Control Room was often tense. Is that correct?
A. Yes, sir.

Q. Is that something that's unheard of, like when you're in action stations and all that, there's always a level of intensity and things get pressured, stressed? A. The level of intensity, you know, it all depends on the type of operations you're doing at the time. Action stations is a more tense period, a higher stress level than just patrol quite state and snorting.

Q. Would you agree as well that the boat is sailing on the surface things don't tend to be all that tense after all? A. Not on the surface. No.

819

Lieutenant(N) Cassivi

Cross-examination

Q. And when the boat is sailing on the surface is the Captain normally on board? A. Yes.

Q. But then there's no tension? A. Less tension because there's reduced manning, there's less people on watch, so there's less things that can potentially go wrong too.

Q. Uh, huh. A. And if they go wrong - they're less critical.

Q. So isn't that right that what creates the tension is the situation, the action stations and so on; and when you're on the surface tension reduces because it more relaxed? A. I see your point, sir, and it is a contributing factor. I'll agree with that. But I think, in my judgement as I testified earlier, I think it was quite more than that and from my experience with other units that there was a much higher level of tension.

Q. So, basically, what you're telling this court today is it's tense because Marsaw is there? A. Well, that by itself, because of rightly or wrongly the perceived reputation was the contributing factor to the level of tension.

Q. Now, as I put to you before, Marsaw, the Captain, was on board too when the ship was sailing on the surface, wasn't he? A. Yes. Yes, sir.

Q. But it wasn't tense. So doesn't that drive one to the conclusion that it was not Marsaw that created the tension, but the situation? A. I don't agree, sir, because ... as I said, things are less tense as we're surface running and therefore all around people still relaxed but people are still ... were still concerned and nervous and watching themselves continuously. I mean, there was a mood that was there and it was quite prominent.

820

Lieutenant(N) Cassivi

Cross-examination

Q. As you said, if you made a mistake he'd let you know? A. Yeah.

Q. Isn't that right that that's what you would expect of your Captain? A. Yes.

Q. Then in some cases, and you did use I believe the words "sometimes some yelling". Is that correct? A. Yes.

Q. So he was not yelling all the time, was he? A. Not all the time.

Q. And then you said the words that he would use would be "Well, will I have to do this myself?" or something like that. Is that true? Is that what you said this morning? A. That's true. Yes.

Q. Do you see anything wrong with that?
A. No, sir. It becomes very frustrating when every little thing the same that that comment comes out regularly. Really, it destroys your confidence a lot and I would say "Can I do anything right?", "Am I actually accomplishing something here?". And it does get frustrating and it creates, I would say, an atmosphere that in that case with people to make the working environment a lot more difficult and unpleasant.

Q. If I suggest to you that actually that yelling you hear from time to time, actually did not affect you and the others, the men, all that much because you, at sea, you cannot take things too seriously? How's that for a proposition? A. It certainly an approach that's used my many.

Q. Uh, huh. A. I practice it to a point myself where, when I finish a watch at sea, I look at the lessons learned from that watch and then whatever else I try to leave behind and forget because otherwise things just creep up and become a snowball effect and I just get overloaded with them.

821

Lieutenant(N) Cassivi

Cross-examination

Q. That's right. As you say, when you leave the Control Room you leave that behind, you take your lesson and that's it. Is that correct? A. That's what I try to accomplish myself. Yes, sir.

Q. And that actually, because of that, whatever takes place, all of that did not affect you much. Is that correct? A. In my case, no, I don't think it did affect me much.

Q. You didn't feel like degraded or anything like that? A. Only on one occasion.

Q. Yeah, and when was that? A. Specifically, that I recall.

Q. Uh, huh. Yeah. What was it? A. That was an incident where I was requested to vacate the Control Room.

Q. Uh, huh. And I see you say that with a smile, so I take it there was some humour in it? A. Well, later on there was. I'll describe the incident. It was after I returned on board in the July period in '93. At that particular occasion we were preparing to dive the submarine and I was the trimming officer of the watch, which was the position I hadn't filled in a long time, I just qualified in '92, posted ashore and then come back to sea. So there was a lot of these things that I didn't get much consultation after I got awarded my qualifications. To make a long story short, preps were done and we were getting ready to dive the submarine and the Captain decided to dive the submarine on the Klaxon. There's different methods to dive the submarine, diving on the Klaxon is the most expeditious method of doing it, to which he asked the officer of the watch on the bridge to dive the submarine, and the officer of the watch then passed to ship control to press the Klaxon twice, and then he proceeds below and everybody carries out the actual diving. On that occasion, as I went to press the Klaxon, my finger slipped and I actually pressed the Klaxon three times

822

Lieutenant(N) Cassivi

Cross-examination

instead of two. The rule that I'd been taught and I was working by at that point was that "two" dive the submarine, anything else is a no go. Safety, you know, the signal is "two". So I sat down on my seat and said "Well, what do I do now?" And I said in a moment of blankness, I said "Well, how do I recuperate this one". Well, it got clarified very quickly. I was told to "What, are you incompetent. Get out of my Control Room. I don't want to see you anymore. I don't want to see this officer in my Control Room." So I left and I went to the Wardroom, a little bit in shock at the time, and then I had to laugh about it after because, you know, stuff happens - yes, I made a mistake but again I thought it was cute.

Q. How did you call that button again?

A. Pardon me? Oh, the Klaxon.

Q. The Klaxon. And what was the mistake you made? A. Well pressing the Klaxon twice, ringing the Klaxon twice is the executive order to dive the submarine.

Q. Yeah. A. My finger slipped and it actually pressed three times. So, as I did it, it went one ring of the Klaxon, a second one started and then it stopped, and then a third one went. And that, in my instinct, added ...

Q. Isn't that right though that the Klaxon has got to be pressed each time to operate? A. Yes. Yes.

Q. So how could your finger slip? A. Well we could go on board and try to show it. It did happen and I ended up pressed it three times.

Q. Yeah. As I can see you don't appear to have lost sleep over that? A. No, not through the years. No.

Q. No. A. No.

823

Lieutenant(N) Cassivi

Cross-examination

Q. So he did not physically remove you or anything like that? A. No, I was told to leave and I left expeditiously.

Q. So, basically, it was "Get out of here. Get out of my Control Room"? A. "Get out of my sight. Get out of my Control Room".

Q. Okay. That's what he said. A. Yes.

Q. Okay. Would you agree that Lieutenant-Commander Marsaw never physically abused anyone, to your knowledge? A. To my knowledge - no, I never saw such actions.

Q. He has never physically abused yourself? A. No, not physically. No. I have not witnessed any physical abuse while I was there.

Q. Would you say that he has a strong charisma? A. Yes, I would say. I'd qualify that. Yes.

Q. And you would have qualified his leadership style as authoritarian? A. Mainly. Yes, sir.

Q. And would you say that his temper was pretty regular and controlled? A. Well, I'm not quite sure how to answer that one.

Q. I'll make it easier for you, I will rephrase the question. Would he lose his temper? A. At times. Yes.

Q. How often? A. Sometimes. I'd have a hard time saying how often.

Q. Uh, huh. Do you recall talking to the military policeman? A. Yes, I do, sir.

Q. Taped interview? A. Yes.

824

Lieutenant(N) Cassivi

Cross-examination

Q. Do you recall discussing this issue of temper? A. Yes, sir.

Q. And if I suggested to you that you stated to the MPs that he was hard to pick for temper, meaning in answering the question "Did he loose his temper?" "He's hard to pick for temper". Do you recall that? A. Yeah.

Q. And I understand that to mean that if he was hard to pick for losing temper, it means he didn't loose his temper often? A. I think that the "hard to pick" was it was hard for me to pin down what exactly, you know, his temper. I think it's fair to say, and I might say better, it was predictable. His reactions to situations ... you knew what to expect, so in that respect you knew what you were getting yourself into basically. So you knew if something was ... if a mistake was made, something was wrong, you knew how he would react, there was no real surprise to that.

Q. That's what "hard to pick" for temper means to you? A. Well, no. As I said, I'd have a hard time saying that: Yeah, he loses his temper. I knew what his reactions were. I didn't see it as such, as temper.

Q. Would you say that sometimes when he yelled and screamed it was well deserved? Life he didn't do it like: Oh, it's a boring day, let's have a yelling session? A. In other words, when there were yelling and screaming, there was a mistake, you know, a situation that rendered some reaction from command.

Q. And I take it that you don't like to be yelled at? A. Not particularly, no. I don't think anyone does.

Q. Uh, huh. And that constituted a good motivator for you, so you do the job right and don't get yelled at. Is that right? A. That was my basic approach to life. Yes.

825

Lieutenant(N) Cassivi

Cross-examination

Q. And he didn't yell very much at you, did he? A. No, sir.

Q. And would you say that for the brief period you were on board, you always accomplished your mission? A. I'd like to think I did, sir. And the feedback I received generally would indicate that.

Q. And there's no apparent catastrophe that struck you during your service there? A. I'm still here and got an exchange posting, so things can't be that bad.

Q. Uh, huh. And would you say as well that the odd time he would yell that there was no ... it was not maliciously done? A. I don't think there was malice, I think that he saw it as his way of getting a point across most of the time.

Q. Okay, do you recall having discussed that particular issue with the MPs when they were talking about the shouting and ...? A. Yes. Yes, sir.

Q. And do you recall saying that as far as you see it you couldn't say that it was malicious? A. No. As I just stated, I said it was ...

Q. It was not? A. ... getting a point across - not malice.

Q. And I guess the example you gave of if something wasn't done properly, would you agree he would say something like "Get this boat in trim. If you can't do the job I'll do it myself"? A. Yes.

Q. Something along that line? A. Yes.

Q. This morning, earlier in your testimony, I believe you have used the word "cunt" and "asshole", and you said "may" have been used. Now have they or haven't they been used? A. I've heard the words, I

826

Lieutenant(N) Cassivi

Cross-examination

just can't recall incidents as such. I mean, they're just terms that I remember being used but I don't remember particular incidents. Yes.

Q. If I suggested to you that when interviewed by the military police, those words were not mentioned by you at all? A. Yeah, that's possible I omitted them. Yes.

Q. And I suppose if you would not have mentioned the words to the military police, it's ... you couldn't remember the words? A. Well, I tried to be as honest as I could with the military police but I don't ... I mean, missing out on things is human I suppose and as I can see it is possible that I forgot to mention them.

Q. As far as I understand it, that interview was video taped? A. Yes, it was.

Q. And you were provided with a copy of it?
A. Yes, I was.

Q. And you had an opportunity to review it?
A. Yes, sir.

Q. Would you say it's fair to say that Master Corporal Rice, the policeman, he was asking you lots of questions regarding to words used by the Captain? He wanted specifics, he wanted specific words?
A. Yes, it's fair to say.

Q. So if you didn't mention those words then, it's not because it was not mentioned? A. They weren't mentioned then.

Q. You did not mention them? A. No, I didn't.

Q. But you were ask for those words, or words he would say, but you did not mention them?
A. No, I did not, sir.

827

Lieutenant(N) Cassivi

Cross-examination

Q. Now the francos and faggots. Do I understand your testimony right that the Captain would say that as a joke? A. Originally, my first reaction was as a joke. Yes.

Q. And ... A. And I also saw it as ... I've been in the service for about 12 years now and comments about Francophones - I've heard plenty, and most of us have at one point or another ... so I took it for what it's worth.

Q. Isn't that right that comments maybe of that nature, I believe you stated that earlier in your testimony, and if not correct me, but that would come about mainly in the Wardroom, maybe after a newscast or whenever, something prompted the conversation?

A. Yes, usually, sir. There was plenty of activities on the scene at that time with the Constitutional Accord and everything else that brought that subject up.

Q. Okay, and that was the topic of conversation in the Wardroom on various topics, and that might have been one? A. Yes.

Q. So it's not as if the Captain was walking around all the time and saying: "I hate fags. I hate Francophones" or anything like that? A. No.

Q. There was a context to it? A. Yes, there was a context to it, sir.

Q. And I bet that others were expressing views as well on those issues? A. They didn't ... well, like I said, the Wardroom wasn't well populated around meal times.

Q. But there must have been some people. I mean if conversations were taking place? A. The sittings were somewhat light at times, but - yes, there were other members and opinions were exchanged. But nothing ... nothing. No.

828

Lieutenant(N) Cassivi

Cross-examination

Q. There were conversations and he was not the only one making a point of passing comments. Others would too? A. No. Yes, sir.

Q. If I understand your testimony about getting out of the Wardroom, you were getting pretty drunk and it is your belief that when you passed out in the Wardroom you become a free target. Is that right?

A. Well, my time in patrol boats it certainly happened, I had some markings on myself and liquid paper around my ears and things of that nature, it happened before.

Q. So you were getting close to the point where it was safer to get out of there? A. Yeah, survival and previous experience dictated that I should probably leave at that point.

Q. And I understand that you went to work the next day? A. Yes, sir.

Q. And I understand that lots of people took the day off, did they? A. Yes, a lot of people took the day off.

Q. You didn't see Elford, Craven and company, did you? A. I didn't see a lot of people. I arranged to get in a little late myself. I got in around nine o'clock. I didn't see a lot of people. I just came in to check the message file and to see what was happening, and carried on from there.

Q. Did you see Hart, Lieutenant[N] Hart?
A. Oh, Lieutenant[N] Hart. No, I don't recall seeing him.

Q. And would you say that Lieutenant-Commander Marsaw sometimes surprised you inasmuch as he wouldn't lose his temper on occasion where you thought he might? A. I'd say it probably happened a few times. Yes.

829

Lieutenant(N) Cassivi

Cross-examination

Q. So it happened? A. I'd say it happened a few times. Yes. I can't remember specifics, but I remember being surprised at times. Yes.

Q. He was pretty cool, wasn't he? A. Well, sometimes. Yes.

Q. Well as a way of saying that he wouldn't lose his temper - he remained cool. Would you agree with that? A. On occasion.

Q. On occasion only? A. Well, you know, on occasion.

Q. And when you were thrown out of the Control Room ... I guess "thrown out" is an expression that's used? A. Yeah, actually "red carded" was ...

Q. It doesn't actually mean physically?
A. "Red carded" was more of the expression at the time that was used.

Q. And what Lieutenant-Commander Marsaw said to you was ... or yelled "Get this officer out of my Control Room". That was it? A. That was my indication to leave. Yes. Something like "What are you doing? You're not racketing. Now get out of here. You fucked this one up. Get out of my Control Room". You know, along those lines.

Q. He didn't call you incompetent, as you stated earlier? A. Sir, it was in those lines of what I said. I remember distinctly "Get out of my Control Room. Get out." but ...

Q. But I suppose one doesn't feel too good being so evicted? A. No, no.

Q. And it might have been in your mind that you felt that what you had done there was not so good?
A. There was, and I was more concerned at that point,

830

Lieutenant(N) Cassivi

Cross-examination

I said, what that made me feel bad about this situation was that I knew that most members in the Control Room knew what was going on and understood it, and I was more concerned that junior members of the Control Room watchkeeping team that didn't really understand what was happening that I would have lost my credibility with those people, and it would be hard to regain.

Q. Do you recall who was there? A. I really can't, sir.

Q. You cannot? A. It was quite a long time ago.

Q. But you can recall though the words, but you cannot quite recall who was present though?
A. Well, watches change quite regularly.

Q. So do words, don't they? And you were sort of laughing, laughing this morning, when you talk about this incident and, as I recall watching the video tape, I believe you were laughing as well when you recounted that to the MPs? A. I thought it was a bit of a humour piece - after it's all passed.

Q. Did you read an article concerning allegations on the Captain of the OJIBWA published in the Chronicle-Herald on 16 December 1993? A. I probably did, sir.

Q. And did you have an opportunity to speak to Mr Malcolm Dunlop, who was the writer of that article? A. No, I've never contacted the press, sir.

Q. Or did he contact you? A. No, he never tried to contact me. I can't, you know, remember what the circumstances were. I wasn't in the area I think, and a lot of people when I came back told me that they were approached by some form, and I said "Okay, well it will happen soon to me" and it never did.

831

Lieutenant(N) Cassivi

Re-examination

Q. Okay. I take it that you recall that article though, it was in December '93? A. Yeah, it had started a commotion. Yes, something.

Q. Yes. And that your interview with the military police took place on 28 January 1994?

A. Yes.

DEFENDING OFFICER: Thank you. I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. In cross-examination there was discussion of unspecified others making unspecified types of anti-Francophone comments. Were others saying "To get ahead in the Navy you have to be a Francophone or a faggot, and it would be easier to be a faggot"? A. No, sir. No.

Q. Were any of the others ... have you ever had occasion to hear a commanding officer make a statement like that, other than Lieutenant-Commander Marsaw?

A. No, sir.

PROSECUTOR: Okay. Thank you.

PRESIDENT: No questions.

JUDGE ADVOCATE: The court has no questions. Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court is adjourned until 1330.

ADJOURNMENT: At 1210 hours, 5 October 1995, the court adjourns.

832

Lieutenant(N) Cassivi

Re-examination

REASSEMBLY: At 1330 hours, 5 October 1995,
the court reassembles and the
accused is before it.

JUDGE ADVOCATE: You may be seated.

ASSISTANT PROSECUTOR: The next witness is
Lieutenant-Commander Dickinson.

s.19(1)

833

Lieutenant-Commander Dickinson Examination-in-chief

NINTH WITNESS) Lieutenant-Commander
FOR THE) C. P. DICKINSON, is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Sir, could you state your full name,
please? A. Christopher Pierre Dickinson.

Q. And would you spell your last name?
A. D-I-C-K-I-N-S-O-N.

Q. And your service number is ?
A. That is correct.

Q. And you joined the Canadian Forces in
1981? A. Yes, that is correct.

Q. And at that time you enrolled as a MARS
officer? A. Correct.

Q. And completed MARS training in '84?
A. Yes.

Q. And transferred to the Sub Service in
1988? A. That is correct.

Q. I understand you qualified on HMCS
OKANAGAN? A. Yes, I did.

Q. And then served on board OKANAGAN as a
qualified officer? A. Yes, I did.

Q. In 1993 you left on an exchange posting
with the Dutch Sub Service? A. Yes, I did.

Q. And when did you return to Canada? A. I
returned in August of '95?

Q. And what is your current position?
A. I'm the executive officer of HMCS OKANAGAN.

834

Lieutenant-Commander Dickinson Examination-in-chief

Q. Sir, did you attend a mess dinner in late 1991? A. Yes, I did.

Q. And where was that mess dinner? A. The mess dinner was held in the Chiefs and POs Mess at the Submarine Squadron in Halifax Dockyard.

Q. And after the dinner, did you have occasion to visit the Wardroom on board HMCS OJIBWA? A. Yes, I did.

Q. Do you recall what time you arrived on board OJIBWA? A. No, I don't, sir.

Q. Okay. Do you recall if you arrived alone or if other people were with you when you arrived? A. There were people in the Wardroom and I believe I went down to the boat with Lieutenant-Commander Craven.

Q. Okay. And when you arrived, do you recall who was in the Wardroom? A. There were a number of people in the Wardroom. I don't remember who everybody was. There was myself, Captain[N] Plante, Lieutenant-Commander Marsaw, Lieutenant-Commander Craven, Lieutenant[N] Marr and Lieutenant[N] Reid, at least.

Q. And when you say "at least", what do you mean by that? A. There may have been others.

Q. And what was taking place in the Wardroom when you arrived? A. Drinking and conversation.

Q. Okay. Do you recall anything unusual happening on the OJIBWA that evening ... or that morning, I guess? A. Yes, I do.

Q. Would you just generally describe what took place? A. There were several individuals who had passed out. One of the individuals was given tattoos, and at some time he was stripped down and given more

835

Lieutenant-Commander Dickinson Examination-in-chief

tattoos, and later in the evening there was a cigar tube inserted in his anus.

Q. Do you recall who this person was?

A. Since returning to Halifax from Holland I've been told it was Lieutenant Steve Kelk, one of the exchange officers, however, I believe ... I thought that it was either the exchange officer or Lieutenant[N] Kavanagh.

Q. So to your knowledge, who ...

DEFENDING OFFICER: I have an objection ...

JUDGE ADVOCATE: If you have an objection, state it.

DEFENDING OFFICER: ... to formulate.

JUDGE ADVOCATE: Coughing is not sufficient.

DEFENDING OFFICER: I nearly choked. I apologize for that. I have an objection here, of course, on the ground of hearsay, and quite clearly the witness indicated that he didn't know who it was and he learned since he had returned who it was. So I think the court should be advised to ...

JUDGE ADVOCATE: Your objection is sustained.

Lieutenant-Commander Dickinson, you must not report what was told you by other persons unless told to do so.

WITNESS: Yes, sir.

ASSISTANT PROSECUTOR:

Q. So, sir, to your knowledge, with respect to your own personal knowledge, who was the victim?

A. It was either Lieutenant Kelk or Lieutenant[N] Kavanagh.

836

Lieutenant-Commander Dickinson Examination-in-chief

Q. Do you recall who ... I think the term you used was "stripped", who stripped the victim?

A. No, I don't.

Q. You indicated that he was tattooed. What do you mean when you say that? A. He was drawn on with CP markers, sort of green markers.

Q. And do you recall who drew on him? A. I don't know who drew on him.

Q. Who inserted the cigar tube?
A. Lieutenant-Commander Marsaw.

Q. At this point I'd like to refer you to a diagram of the OJIBWA Wardroom, Exhibit "J". I'm wondering if you could, to the best of your recollection, indicate where you were located that evening?
A. Yes, sir. I was either sitting here or here.

Q. Okay, when you say "here", you're pointing to bed settee two? A. Yes.

Q. Approximately at the number two?
A. Yes, just forward. I was having a conversation with Lieutenant-Commander Craven ...

Q. Okay? A. And one of us was sitting at one seat in this area.

Q. The other seat was the foot locker marked "seat" just in front of the desk? A. That's correct.

Q. Okay. Where was the victim? A. He was in this area here. I believe that he was on and draped over the bed seat three.

Q. Okay. And where was Lieutenant-Commander Marsaw? A. He was in the area of the victim, approximately here.

Q. Again, near bed settee three? A. Yes.

837

Lieutenant-Commander Dickinson Examination-in-chief

Q. Can you describe how the cigar tube was inserted into this individual's anus? A. Lieutenant-Commander Marsaw parted the cheeks of the individual and inserted the cigar tube in his anus.

Q. What was your reaction to this? A. I was very drunk at the time, but at the time I felt that it was very strange. The party broke up shortly thereafter. And it disturbed me after that ... well, when I was sober.

Q. Do you recall providing the military police with a written statement in early May of '94? A. Yes, I do.

Q. And do you recall what you indicated to the MPs had been inserted into the victim's anus? A. Yes, I do. I said that it was either a cigar tube or a cigar.

Q. Okay. Which was it? A. It was a cigar tube.

Q. How certain are you that it was a cigar tube? A. I'm positive.

Q. Okay. How certain are you that it was Lieutenant-Commander Marsaw that inserted it? A. I'm also certain of that.

Q. What time did you leave the OJIBWA that night? A. Very late, between four and five.

Q. Do you recall if anyone left with you? A. I left with Lieutenant-Commander Craven and other individuals whom I can't remember.

Q. And where did you go when you left the Wardroom? A. I went home.

838

Lieutenant-Commander Dickinson Examination-in-chief

Q. Where was the victim when you left?

A. He was still in the Wardroom.

Q. And where was the cigar tube? A. I believe that it was still in his anus.

Q. Do you recall what time you got home that night? A. About half an hour after leaving the Wardroom of OJIBWA.

Q. Did you go to work the following day? A. Yes, I did.

Q. What time would you have arrived at work? A. Before eight.

Q. When you went in to work the next day, did you report the incident that you had observed in the OJIBWA Wardroom? A. No, I did not.

Q. And why didn't you do that? A. At the time of the incident the Squadron Commander was present, Captain[N] Plante, plus the commanding officer of the submarine. I did not believe it was my place to report it and I was also concerned for my career at the time.

Q. You've been a submariner since 1988? A. Yes, I have.

Q. And I understand you've sailed under three Canadian commanding officers? A. Submariner commanding officers.

Q. Yes. A. Yes.

Q. And who would they be? A. My first Captain was Commander Nicholson. I sailed under Lieutenant-Commander Irvine and finally under Lieutenant-Commander Mosher.

839

Lieutenant-Commander Dickinson

Cross-examination

Q. And what about during your exchange tour with the Dutch Navy? How many COs would you have served under? A. I sailed under two Captains.

Q. Have you ever witnessed a commanding officer raise his voice in the Control Room? A. Yes, I have.

Q. Have you ever witnessed a commanding officer routinely use personally degrading adjectives towards an individual in the Control Room? A. No, I haven't.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate and Mr President.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. How was dinner that night? A. The meal, sir, you mean?

Q. Yes? A. To the best of my recollection it was fine.

Q. Uh, huh. How was the atmosphere at the mess dinner? Was it rowdy or quiet? A. Extremely rowdy, sir.

Q. Extremely rowdy. And is that correct that at some point an officer threw up or something in there? A. That is correct, sir.

Q. Who would that have been? A. That would be, at the time, Lieutenant[N] Dussault.

Q. Lieutenant[N] Dussault. How sober were you at that time? A. During the mess dinner?

840

Lieutenant-Commander Dickinson

Cross-examination

Q. Yes? A. I was drunk.

Q. You were drunk during the mess dinner as well? A. Yes, sir.

Q. Do you know what time you got on board OJIBWA? A. No, I do not.

Q. But you did go on board OJIBWA with Lieutenant-Commander Craven? A. To the best of my recollection. Yes, sir.

Q. Do you recall going to HMCS FRASER or HMCS MARGAREE with Lieutenant-Commander Craven? A. I went to neither of the two surface ships mentioned.

Q. You did not? So you met Craven by coincidence at some point, or did you walk away from the POs Mess to OJIBWA with Craven? A. We didn't go directly from the POs Mess to OJIBWA, first we went to the Wardroom in the Squadron.

Q. The Squadron Wardroom. A. Had more drinks there. At some time we were invited back by the commanding officer of OJIBWA to his boat, to his Wardroom. I went down to that boat. I thought that I had gone with Lieutenant-Commander Craven and I spent most of the evening on board talking with him.

Q. Do you recall what you were drinking that night? A. No, I don't.

Q. And as far as you're concerned the recipient of the tube was either Kelk or Kavanagh? A. That is correct.

Q. But you're not even sure which of the two? A. No, I'm not.

Q. However, you got no doubt in your mind as to who put it there? A. That's correct.

841

Lieutenant-Commander Dickinson

Cross-examination

Q. And the recipient was on settee number three? A. Yes, sir.

Q. For more certainty ... A. He was on the deck draped over in this area here.

Q. So he was sitting on settee number three, by the bulkhead close to the door? A. Yes, sir.

Q. And you were sitting ... well were you sitting or standing when you saw that? A. Sitting.

Q. How was the visibility, if I may ask?
A. The visibility was readable. The two seat lockers that we see next to the table from my knowledge were not there, and I don't even remember the table being there actually.

Q. So you don't really remember much of that evening? A. I remember certain points.

Q. You don't know who did any markings?
A. No.

Q. You don't know who the victim was?
A. No.

Q. You don't know what time you got there?
A. No.

Q. You're not too sure how you got there?
A. I walked, sir.

Q. You did walk. You don't know whether you went on a surface ship prior to boarding OJIBWA? A. I did not go on board a surface ship, sir.

Q. You did not go. Do you know whether Sub-Lieutenant Elford was present? A. I don't remember him being present.

842

Lieutenant-Commander Dickinson

Cross-examination

Q. Do you remember how you went back home that night? A. In a vehicle. If it was a car or a taxi, I don't remember.

Q. It was a vehicle, motorized like?
A. Sir?

Q. A motor vehicle? A. Yes, a motor vehicle.

Q. Okay. Do you recall who went with you in that vehicle? A. Lieutenant-Commander Craven, plus other individuals whom I can't remember.

Q. You cannot remember the other individuals that were there? A. No, sir.

Q. You cannot remember at what time the tube was inserted? A. No, I cannot.

Q. I understand a friend of yours sent you a copy of an article of the Chronicle-Herald, dated 16 December 1993, when you were in Deutschland ... or the Netherlands, I should say? A. I'm not sure what the date on it would have been, sir. It was over a year ago. I was sent a copy of an article by a civilian friend at some point while I was over there.

Q. Uh, huh. And that was an article that dealt with allegations against a Captain of OJIBWA and that sort of thing? A. I don't remember exactly what was in the article actually, sir. But I think it was very early in this case and there wasn't very much information given.

Q. When did you leave for the Netherlands?
A. I left for the Netherlands in August of 1993.

Q. And to that point you had not reported any incident that you might have witnessed that night to any authorities? A. No, I had not.

843

Lieutenant-Commander Dickinson

Cross-examination

Q. You didn't know who took the victim's pants down either? A. No, I did not.

Q. Do you recall any specifics about the writings? A. No, I do not, sir.

Q. Do you recall any writing on one's penis for example? A. I believe that that did happen. Yes.

Q. But you are not too sure? A. No, sir.

Q. You said that other Captains under which you have served have occasionally raised their voice? A. Yes, sir.

Q. Do a bit of yelling sometimes to shake up the crew? A. Yes, sir.

Q. And do I understand you to say that it's not ... well, nothing all that uncommon. It's not out of the ordinary for a Captain to yell at times or raise his voice? A. It depends very much on the Captain, sir.

Q. Yeah. And of course that is based only on what you've observed? Like you can only say whether you were yelled at or not? A. Yes, sir.

Q. And the Captain may have done a number of other things that you wouldn't be aware of? A. I'm sure.

Q. How certain are you about the location of the recipient, as I have called him, of the two? A. I'm very certain that he was in that area. Whether he was on the deck or on the settee, or draped between the two, I'm not so sure.

Q. Do you recall whether he was hog-tied, taped somehow? A. I don't remember.

844

Lieutenant(N) Dickinson

Re-examination

DEFENDING OFFICER: You don't remember that either.

Thank you. I have no further questions.

JUDGE ADVOCATE: Re-examine?

ASSISTANT PROSECUTOR: I'm wondering if my friend might have a copy of the newspaper article he referred to?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Sir, I'm wondering if you might just review that quickly. I guess, first of all, if you could indicate if that's the article that you received when you were overseas? A. I believe this is the article, sir.

Q. Does that article refer to the mess dinner incident that you've described here today? A. I didn't read it actually that closely?

Q. Well, would you just skim through it? A. No, it does not.

Q. Thank you. Lieutenant-Commander Dickinson, did you discuss what you had seen in the Wardroom of OJIBWA with anyone else the following day? A. With my wife, sir.

Q. And did you comment to her on what you had observed? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I don't think this arises from the cross-examination in any event.

JUDGE ADVOCATE: I don't think it does either. I don't remember the defence having raised that matter.

845

Lieutenant(N) Dickinson

Re-examination

ASSISTANT PROSECUTOR: Pardon me, sir?

JUDGE ADVOCATE: I don't remember that the defence has raised this matter in cross-examination.

ASSISTANT PROSECUTOR: He has raised the matter of the witness' memory, Mr Judge Advocate, and whether or not he recalled what happened or what didn't happen, given his drunken state. Obviously, if he had discussed it the following day that would indicate that he did have a memory and did observed what he indicated he observed.

JUDGE ADVOCATE: Okay, I will permit the question.

ASSISTANT PROSECUTOR:

Q. Did you comment to your wife on what you had observed the evening before? A. Yes, I did.

ASSISTANT PROSECUTOR: Okay. Thank you.

Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness will be
Lieutenant[N] Higginson.

s.19(1)

846

Lieutenant(N) Higginson

Examination-in-chief

TENTH WITNESS) Lieutenant(N) M. E.
FOR THE) HIGGINSON, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Would you give your full name to the court and spell your last name, please?

A. Mark Edward Higginson, H-I-G-G-I-N-S-O-N.

Q. What year did you enrol in the Canadian Forces? A. 1985.

Q. And what year were you awarded your "Dolphins"? A. 1989.

Q. What is your current position? A. Operations Officer, HMCS OJIBWA.

Q. Prior to serving on the OJIBWA at this time, had you served on the OJIBWA from May '92 until October '93 under command of Lieutenant-Commander Marsaw? A. Yes, I did.

Q. And did you also sail on the ONONDAGA as well? A. Yes, I have.

Q. At that time your CO was Lieutenant-Commander Truscott? A. Yes, he was.

Q. Previously, who had been your other COs on the OJIBWA? A. On OJIBWA it was Lieutenant-Commander Bush and Lieutenant-Commander Davidson.

Q. While you were serving under Lieutenant-Commander Marsaw's command, what were your positions? A. Officer of the Watch and Navigating Officer.

Q. I want to read down a list of members of the Wardroom and if you could just simply answer yes or no at the end of this question as to whether they were present while you were serving under Lieutenant-Com-

847

Lieutenant(N) Higginson

Examination-in-chief

mander Marsaw's command. Executive Officer Virgin, Executive Officer Dussault, Lieutenant[N] LeClaire, Tingle, Soper, Duff, Jacques, Pokotylo, Kelk, Pitman, Byrne, Watt and Gensey? A. That is correct.

Q. How would you describe the atmosphere on board the OJIBWA under Lieutenant-Commander Marsaw's command? A. It was fearful and morale was poor.

Q. Why do you describe it as being fearful?
A. People were scared of doing the wrong thing, not being able to please the Captain.

Q. At times were you scared? A. Yes.

Q. What would be the problem of never pleasing the Captain? Why would that cause you to be scared or others to be scared? A. He had a bad temper. He would often lose his temper and yell at people.

Q. Did sometimes he keep his temper?
A. Yes.

Q. When he did yell at people, what sort of words would he use ... to you, for example? What sort of words would he yell to you on occasion? A. He has called me a "fucking idiot", "asshole", "stupid", everything like that.

Q. Has he called others or yelled at others referring to those types of words as well? A. Yes.

Q. What type of words can you recall that he might direct towards others? A. I remember for Lieutenant[N] Watt and Lieutenant[N] Duff, he called them "stupid fucking lazy cunts".

Q. Okay. What other words would others be called? A. The same ones that I was called.

Q. "Stupid", and "F'ing idiot"? A. And an "asshole".

848

Lieutenant(N) Higginson

Examination-in-chief

Q. How frequently would you be yelled at using those types of words as officer of the watch and navigator? A. At sea often.

Q. Can you recall any officers that you did sail with that he did not yell at in this type of manner? A. I don't recall him yelling at Lieutenant-Commander Virgin.

Q. He was the first of the two XOs you sailed with? A. Correct.

Q. For the most part, though, who was your XO while you sailed? A. For the most part it was Lieutenant-Commander Dussault.

Q. Based on your observations, can you recall how Lieutenant-Commander Marsaw would treat Lieutenant[N] Dussault? A. He treated him much the same he treated us. He would reprimand him in front of the Wardroom and yell at him as well.

Q. Lieutenant[N] Dussault is ?
A. Yes, he is.

Q. Did you ever have occasion to observe any francophone comments be made towards Lieutenant[N] Dussault? A. Yes. In the Wardroom when the Captain was talking and the XO was present, he said that in reference to Frenchmen in wars, he said that they had never won any wars and that Frenchmen were losers.

Q. And he said this to Lieutenant[N] Dussault? A. He said it to all of us and Lieutenant[N] Dussault was present.

Q. Were there any other francophone officers in the Wardroom at that time? A. I cannot recall.

Q. What was your response to this? A. At the time - nothing.

849

Lieutenant(N) Higginson

Examination-in-chief

Q. Subsequently? A. Once the Captain had left the Wardroom, I said "You're strong to take it, Marty, I don't know if I could have".

Q. Did you discuss the accused's verbal treatment of you to the XO ... the way that he verbally treated you or others on your watch? A. Yes, I did.

Q. And you did this to Lieutenant[N] Dussault? A. Correct.

Q. Did you ever discuss to Lieutenant-Commander Marsaw his verbal treatment towards you and others? A. Once. Yes.

Q. Can you describe that situation? A. We had been doing a series of evolutions in the submarine and the Control Room couldn't get it right, we couldn't do it properly, and every time we failed to do it properly we would do it over again.

Q. How would the accused respond during these evolutions, while you were doing them over and over again? A. He was angry. He was losing his temper with the officers in the Control Room. And it was ... floods were the evolution, when we did a flood we would surfaced the submarine and then when something didn't go right to his satisfaction, we would dive the submarine again and do it over again and surface the submarine.

Q. Okay. A. After a series of times, I think we did this about five times, in between the last three to four times he would gather all the Wardroom into ... or gather all the officers into the Wardroom and he would shut the door and he would tell us that he wasn't happy with our performance and that the rest of the crew was doing their job - we weren't doing ours, that it was embarrassing for him the way we were performing. And then we would go out and do it again and something else would go wrong and then we'd be back in for another meeting. The final meeting we had, which

850

Lieutenant(N) Higginson

Examination-in-chief

was I think the third time, third or fourth time, he seemed extremely frustrated and he said, after he shut the door and everybody was in the Wardroom with the exception of the officer of the watch who was on the bridge, he said "Somebody tell me something. Somebody help me out. I'm at a loss. I don't understand why we can't do this right. Somebody say something". And there was a long pause for five - seven - ten seconds as he looked through the Wardroom. Nobody was saying anything, so I put up my hand and he said "Yes?", and I said "Sir, I think a large part of the problem is the screaming and yelling in the Control Room. I think people are having difficulty performing under those conditions". And he ...

Q. I'm sorry, go ahead. What was his response? A. He cut me off and said "Bullshit, that's wrong. That's not the case. In wartime people have to be able to perform under stressful conditions in the Control Room and that's what this is, and that's not the problem". And after that nobody volunteered any more information.

Q. Okay. While a member of the OJIBWA under Lieutenant-Commander Marsaw's command, did you at any time have concerns for your career? A. Yes.

Q. What incidents caused you to have concern for your career? A. On more than one occasion the Captain had said things to me that made me perceive he was going to fire me.

Q. Can you recall how many times this happened and quickly touch on each situation? A. It happened about five times that I can recall. The first time, I had been navigating for him for approximately a month and I forget what I did that displeased him, I can't recall what it was, but I remember him saying to me in his cabin, just in my presence and his, he said "Don't let it happen again or I'll helio you off". So I took that as a threat of being fired. Another time was when we were heading up to Newfoundland on a DRUG

851

Lieutenant(N) Higginson

Examination-in-chief

PATROL, I had missed a sounding on the chart and he discovered this. And again he called me into his cabin and he said "Don't let it happen again or else".

Q. That was during the COUNTER DRUGS trip?

A. That's correct.

Q. As navigator, did you know where he was going on that trip? A. No. Initially, I did not know where we were going. No.

Q. As you plotted your way along, did you know where you were going on that trip? A. Once I started planning, he told me where to plan to go - yes.

Q. How far in advance? A. There was no advance. We turned the point of the submarine in the direction and he told me then where he wanted to go.

Q. Have you ever had to plot as a navigator like that any time prior or since that trip? A. And not being told where to go? No.

Q. Other incidents? A. Our second port visit ... my second port visit as navigator, which was Groton, Connecticut, when we were leaving the port it started to rain and he asked me what the weather was doing, for a weather forecast, and I didn't have that information available. After we left the port he called me into his cabin and again he used the words "don't let that happen again or else". And one time we were travelling between Bermuda and Baltimore, because of the speed required that the submarine had to travel at, we were unable to dive the submarine and he lost his temper and he said to me in the Control Room "I guess it's too late to get rid of you now". And one time before, we were heading into Boston, he through the XO ... I found from the XO, he had come and told me that "If I'm not happy with the present circumstances he will fly me home from Boston".

852

Lieutenant(N) Higginson

Examination-in-chief

Q. What triggered that response from the XO?

A. The Captain had been altering the state of different things in the Control Room, different mechanical devices, indicators for the submarine in the Control Room, and he would wait to see if the officers of the watch pick up these alterations. And if you didn't pick them up he would lose his temper. This was going on over a long period of time, a number of watches, and it was extremely stressful. So I went to the executive officer, who was Lieutenant[N] Dussault at the time, and said "This is enough, let's quit doing this". I said "It's ridiculous".

Q. Was there any one particular piece of equipment that was being turned on or off? A. He turned down the volume on the underwater telephone.

Q. What's the underwater telephone? What function does that serve on a submarine while dived? A. It serves two main functions. One is to conduct underwater communications with other vessels, and it's also one of our sonars that will initially detect sound in the water.

Q. Did you actually see him turn this off? A. No, I did not.

Q. Why do you conclude that he turned it off? A. I had seen him doing it with other switches and indicators in the Control Room and I had done rounds of the submarine, because I was officer of the watch at the time, I had done Control Room rounds and it was in its proper position prior to that, and generally people don't alter it. If anybody is going to touch it, it's going to be me or the Captain.

Q. Had the Captain, after you had done those rounds, walked through the Control Room? A. I cannot recall.

853

Lieutenant(N) Higginson

Examination-in-chief

Q. This Bermuda to Baltimore dive, when he said "It's too late to get rid of you now", where was that said to you? A. In the Control Room.

Q. Were your subordinates present at the time? A. Yes.

Q. How would you describe your personal morale on the OJIBWA? A. Poor.

Q. How did it feel for you to go on watch as a watch leader? A. You were scared. It was fearful to go on watch.

Q. Again, you had said, I believe, that you discussed your concerns with the XO? A. Yes, I had.

Q. Did you notice any changes occurring after your conversations with the XO? A. No.

Q. Did you go higher with your complaints? A. Passed the XO? No.

Q. Who would you have had to have gone to? A. Well, I would have had to have gone to the Squadron Commander, in my opinion.

Q. Your former commanding officers, Truscott, Davidson and Bush, how would you contrast their leadership style with Lieutenant-Commander Marsaw's? A. Different.

Q. In what way? A. Their tempers weren't as bad and the name-calling ... I don't remember the name-calling like there was in OJIBWA when I was there.

Q. Do you recall Bush, Truscott or Davidson ever using personally insulting adjectives towards subordinates? A. I don't recall.

854

Lieutenant(N) Higginson

Examination-in-chief

Q. Don't recall whether they did or didn't, or don't recall any situations that they did use it?
A. I don't recall any situations that they did use it.

Q. As navigator, where would you perform your navigation work within the Control Room? A. At the plot table.

Q. Did you have occasion to work at the plot table during the COUNTER-DRUGS trip of '92? A. Yes.

Q. And did you experience anything unusual during that trip while you were at the plot table?
A. Yes. I received a blow to my left ankle.

Q. Okay. How did it feel? How strong was the blow? A. It was a strong blow, it bruised my left ankle.

Q. At the time that this occurred was the curtain up or down around the plot table? A. The curtain was down.

Q. Could you see who would be at the helms seat or the periscope, for example, if you're inside the curtain? A. No.

Q. Were you an eye-witness to how that blow came to land on your ankle? A. No.

Q. Can you tell the court, based on your own personal eye-witness observations, who in fact landed the blow? A. Could you say that question again, please?

Q. Can you tell the court, based on your personal eye-witness observations, who landed the blow?
A. ...

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, on his personal eye-witness experience, he just said that he has not seen because he was behind the

855

Lieutenant(N) Higginson

Examination-in-chief

curtain. I don't see how he can report what he has seen and what he has not seen.

JUDGE ADVOCATE: I think the witness has already answered your question by answering your previous one. He didn't see it.

PROSECUTOR:

Q. Did you see what direction the person was moving in? A. No.

Q. Would you wish to sail with Lieutenant-Commander Marsaw again? A. No, I would not.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, before I proceed, could I just ask for a very short recess? I want to do a housekeeping matter that I had planned on doing during the lunch hour but wasn't able to do so.

JUDGE ADVOCATE: For how long?

ASSISTANT DEFENDING OFFICER: To avoid getting into longer delays later.

JUDGE ADVOCATE: For how long?

ASSISTANT DEFENDING OFFICER: Outside - five minutes at the most.

JUDGE ADVOCATE: The court is adjourned for ten minutes.

ADJOURNMENT: At 1417 hours, 5 October 1995, the court adjourns.

856

Lieutenant(N) Higginson

Cross-examination

REASSEMBLY: At 1427 hours, 5 October 1995,
the court reassembles and the
accused is before it.

JUDGE ADVOCATE: Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge
Advocate. Thank you very much.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Lieutenant[N] Higginson, how would you
describe the standards of Lieutenant-Commander Marsaw?

A. Very high.

Q. What does that mean to you - very high?

A. He had his own standard, in my opinion he had his
own standard and it wasn't necessarily textbook, it was
Lieutenant-Commander Marsaw's standard, and he wanted
everybody to meet that standard.

Q. You referred earlier in your direct-
examination to a drill that he had you do and repeat it
a number of times, and then take you in and ask why.
Was that drill written in any publication, EOPs, SOPs?

A. Yes, it is.

Q. And how would his standard be too high if
he's just asking you what's in the book? A. I'm
sorry, I don't understand?

Q. Perform the drill as it is put down in
the book? A. That's what he was asking. Yes.

Q. And that's too high? A. That's what the
drill calls for? No, that's not too high. That's the
proper way of doing the drill.

Q. You quoted specific terms that you say he
used to refer ... he used to refer to trainees "stupid
fucking cunts" and "asshole" and "stupid". Are you
sure about those words? A. Positive.

857

Lieutenant(N) Higginson

Cross-examination

Q. Positive. Do you recall being asked the same question by the investigators? Well, first of all, do you recall having met with investigators in this case? A. Yes, the MPs you're talking about?

Q. The MPs, yeah? A. Yes.

Q. Do you recall the date, the dates?

A. January ... January of '94, I believe.

Q. Ninety-four, around what, would it be around 10 January? A. Ten and 26, I believe.

Q. Okay. And during the course of your first interview on January 10, do you recall being asked the same question by the investigator: What terms he would use? A. Yes, I believe they did ask me that. Yes.

Q. And do you recall being as sure then?

A. I wasn't as sure about the question they were asking.

Q. Well, was it the same question or no, or do you know? Do you recall, that's what I'm asking?

A. Not a hundred percent. No.

Q. Not a hundred percent. Was that interview video taped? A. Yes, it was.

Q. Were you provided with a copy of that tape? A. Yes, I was.

Q. Did you have a chance to review that tape? A. Yes, I have.

Q. Were you also provided with a copy of the transcript of the taped interview? A. Yes, I was.

Q. And were you provided with the opportunity to go to review the tape, going along with the

858

Lieutenant(N) Higginson

Cross-examination

transcript, and verify the transcript for accuracy? A.
Yes, I was.

Q. When did you do that? A. Last week, I
believe.

Q. Last week? A. Last week. Yes.

Q. And in that process, once you were finished, were you satisfied, to the best of your ability, that that transcript accurately reflected or accurately reflects what's on the tape? A. Yes.

ASSISTANT DEFENDING OFFICER: So, Mr Judge Advocate, if I can refer the witness to the transcript of his tape?

Q. I refer you to page 7 of your transcript, at the last paragraph or the second to last: "Ivan Rice, Military Police". You were asked phrases "that you can remember that he used against these two?", referring to two individuals. Then you answer. Could you read for yourself the answer? No, for yourself, not for the court, just read it to yourself? A. Oh. I just want to make sure I'm on the right one here. This is the very bottom of the page?

Q. Yes, the very bottom of page 7? A. All right.

Q. I believe you had handwritten at the top "10:02:29"? A. Yes.

Q. Okay. So the question is the second to last paragraph, the question from the police asking you about phrases? A. Uh, huh.

Q. And read your answer: "Lieutenant Higginson", starting there and finishing the last two words on page 8? A. Yes. Yes.

Q. Okay. Now is it true to say that when you answered that question, you referred to the word

859

Lieutenant(N) Higginson

Cross-examination

"asshole" but you couldn't remember? It was just your word to give a general description? A. ...

PROSECUTOR: Mr Judge Advocate, I'm going to object. There's Rule 100, it's there to be done fairly. This transcript is filled with adjectives that Lieutenant[N] Higginson claims are said to other members. If we even go the paragraph above or the page over, we see the words "stupid fucking cunt" referred towards Part 3's, and I think the line of questioning is unfair.

JUDGE ADVOCATE: I don't have a copy of this transcript before me. First of all, I mean, if there is a disagreement on this matter you should show the transcript to me. Secondly, I mean, that's not the way to put the questions to the witness. Do it properly, please. Objection sustained.

ASSISTANT DEFENDING OFFICER: If I could just take a second, Mr Judge Advocate? For the moment, Mr Judge Advocate, I'll move along to a different section and come back.

Q. Your question about a kicking incident, do you recall earlier in your direct testimony? A. I believe it was a kick. Yes.

Q. A kick. And you said "to your left ankle". Could you physically show to the court which part of your ankle was hit? A. Right in this area here.

Q. Could you describe whether it is the inside, outside, back of your ankle? A. It is the left outside portion of my ankle ... I don't know what that bone is called ... ankle.

Q. Ankle. Were you questioned by the investigators ... in the course of your interview with the investigators, do you recall being questioned by them

860

Lieutenant(N) Higginson

Cross-examination

concerning a kicking incident? A. The second visit, yeah ... or the second interview. Yes.

Q. The second interview, you were questioned about a kicking incident. During the first interview, were you asked whether or not you had witnessed physical abuse by anybody on board OJIBWA while you were there? A. Yes, I was.

Q. How many times were you asked that the first time, the first interview? A. I would say about four to five times.

Q. And what did you answer then? A. Every time I said the same thing, that I never witnessed any physical abuse from anybody to anybody in OJIBWA.

Q. And during the course of the second interview, the first one being on 10 January - the second one on 26 January, what was your answer then? A. I was never asked that same question then. I was asked a different question.

Q. Which was? A. "Have you ever been kicked?" and I answered "Yes".

Q. You answered "yes". Do you see a difference between being asked "if you ever witnessed physical abuse" or the other question being "have you ever been kicked"? A. I determined the difference, that's why I answered differently to both questions.

Q. And what was your answer to that second question "Have you ever been kicked"? A. I answered "Yes".

Q. You answered "Yes". Did you answer anything else? Did you say why you didn't answer the first time? A. Yeah, I explained ... I don't know if it was right with that question, but I did explain further in the interview why I answered ... I'm sorry. What was the question again?

861

Lieutenant (N) Higginson

Cross-examination

Q. When you were asked "Were you ever kicked?", you said "Yes", did you at that moment say why you didn't answer to that question during the course of the first interview? Do you remember giving an explanation? A. I said "Yes. You've never asked me that before". I explained further in it ... I can't recall exactly what was said, I'd have to look at the transcript, but - yes, I did go into more detail.

Q. Do you recall saying that you didn't report that the first time because in your mind it was too shady an incident? A. Something to that effect. Yes.

Q. And during the course of the second interview, do you recall being asked whether or not you heard words right after the kick? A. Yes.

Q. Do you recall what you answered? A. I did not remember hearing anything after the kick.

Q. You did not remember hearing anything after the kick. When you received that kick, what did you do? A. I moved out of ... I moved further aft on the plot table. In other words, the kick came from ... or the blow came from this direction, I moved in the opposite direction away from it.

Q. Did you open the curtain to look what was going on? A. No, I did not.

Q. Were you curious? A. No, not really.

Q. We'll go back for awhile. You've described fear for your career, being threatened to be fired, and described five different incidents. The one you didn't recall any specifics but you said you were called into the cabin and Lieutenant-Commander Marsaw would have told you "Don't let it happen again"? A. The first time he said something to the effect of "Don't let it happen again or I'll helio you off".

862

Lieutenant(N) Higginson

Cross-examination

Q. Uh, huh. And then the third one was sailing out of Groton. Do you remember your ...

A. It was probably the third one I said in here, but it was actually in time-wise it was the second time.

Q. It was the second time? A. Yeah.

Q. Sailing out of Groton you didn't have the weather report and because of that, again, the same thing happened? A. Yeah, he didn't threaten "helio" but he said "Don't let it happen again or else".

Q. Do you recall volunteering that information during the course of your second interview with the MPs as an example of things that would happen and Lieutenant-Commander Marsaw being wrong in yelling at you and getting angry at you? A. Could you ask that question again, please?

Q. During the course of your second interview, and that was not in answer to a direct question by the investigators, do you recall telling them "Do you want to hear another one", giving examples of ...
A. You mean, do I recall saying to the MPs "Do you want to hear another one"?

Q. Yes, and then giving the example of Groton? A. I don't know what example I gave, but I do remember saying "Do you want to hear another one?" and they said "Yes".

Q. Okay. A. Yeah, I remember that.

Q. But isn't it a fact that in fact you used that example with them that the Captain came on board, as you described it, asked you for the weather and you said "I don't have it" and you said that ... to get the exact words ... he asked you what the weather was doing and that it had never occurred to you to check the weather and he got pretty wild about it and said "Why didn't you check it?" Do you recall? A. That sounds familiar. Yes.

863

Lieutenant(N) Higginson

Cross-examination

Q. That sounds familiar? A. Yes.

Q. And do you recall the rest of what you said concerning why you did not get it? A. In the interview, you mean?

Q. Yes, in the interview? A. I'd have to look again at it.

Q. But you don't recall? A. Word for word - No. I remember the incident.

Q. Well can you just refresh your memory then by looking at the passage? A. Yes.

Q. And I will refer to ... A. Could you tell me what page it is, please?

Q. Page 110. It's the first paragraph, it finishes with you offering another occasion. Ivan Rice: Yes, yes. "Yeah, yeah ..." and then the next paragraph is your explanation. Read that for yourself.
A. Okay.

Q. What was the reason that you gave as an explanation in this part as to why you did not get the weather report? A. Do you want me to read from here or do you want me to ...

Q. Well, you were supposed to read it to refresh your memory. Now without reading from the transcript, can you relate to the court what was the reason that you gave? A. I can't, because the paragraph is that long and I don't remember it word for word.

Q. Okay. Refresh your memory. That was part of the question that I asked you first. A. Okay.

864

Lieutenant(N) Higginson

Cross-examination

Q. I led you to that point, and I asked you the reason ... do you remember the reason you gave?

A. Okay.

Q. And this is what I want you to direct your attention to ... A. I'll read specifically ...

Q. The reason you gave for not having obtained the weather report? A. Okay. I said ...

Q. Can you relate to the court what was the reason that you stated to the MPs? A. I said I had never done it on course, so it never occurred to me to do it now.

Q. You have never done it on course, it never occurred to you to do it now, to get the weather report prior to sailing? A. Correct.

Q. What was your position on the submarine at the time? A. Navigating officer.

Q. Navigating officer. So you're basically telling that, as the navigating officer, on course you were never taught that the weather report would be necessary? A. What I meant by that was that the warrant officer on board ship, which is who looks after the weather on board ship, it's a meteorology technician, gave the weather. I did not give it. So that is when I said "I never did it on course" meaning I never briefed the weather on the DNO Course, why would I do it now. That's what I meant by that statement. It was somebody else who briefed the weather, it wasn't me.

Q. And why did the Captain want to know then? A. Part of his job to be in command of a submarine is to be totally informed, to know as much as he can. We were leaving harbour, it was his interest to know what the weather was. He had a right to know what the weather was and I couldn't provide it for him.

865

Lieutenant(N) Higginson

Cross-examination

Q. And you were leaving harbour. How are you to know whether or not you can leave there blind or visual if you didn't check it? A. Inside the harbour you can look, outside the harbour it could be a different story. Obviously, visually as far as your eye is going to be able to see, you just take a look outside and you know. But further, beyond what your eye can see outside the harbour, perhaps it could be a different story.

Q. Were you ready for that? A. Was I ready for blind?

Q. Well, not having checked the weather, were you ready for that ... you were leaving? A. I was ready to visual and blind. I was not ready to provide the Captain with the weather.

Q. Did that effect your estimated time of departure? A. No, it did not.

Q. No, but could it ... the weather? A. If something like a hurricane was coming or if it was a harbour, where some harbours if visibility is bad enough, they don't want vessels moving in the harbour. If that was the case it could have delayed - yes.

Q. And could it effect the tides? A. The weather effect the tides? Under extreme circumstances - Yes, it can.

Q. You knew you were ready to go, but you had not checked the weather? I mean, you must be able to pass some elements of information. If you're ready to go and you're the navigator, you have taken all this into consideration, either you checked or you didn't? A. No, I've already admitted, I did not check the weather.

Q. Okay. What was the problem with Bermuda, Bermuda to Baltimore? A. There was a moving haven that the submarine was in, and within this moving haven

866

Lieutenant(N) Higginson

Cross-examination

is the only position a submarine can dive and it can't dive outside the moving haven. And the moving haven, it's like an invisible box that travels and you have to be internal within in.

Q. Your allocated waters? A. Correct. And we were astern in it, such that when a Canadian submarine dives it has to slow down, you make better speed on the surface, sustain better speed on the surface than you do dived. And the Captain wanted to dive the submarine but we were far enough back in the box that had he dived we may have been late in Baltimore.

Q. So how did you come to be late in the box? It's my understanding, and correct me if I'm wrong, but this box ... you say you call in and you say "We're starting - this is the track". So you would call for your box and that box would have a starting point. Correct? A. Yes, that's correct.

Q. And that box moves along the track at a certain speed? A. Correct.

Q. And this is how - you just travel along your track and keep within your water? A. Correct.

Q. Where did it start from? A. It started outside of Bermuda.

Q. Where outside of Bermuda? Northeast? Northwest? South? A. It started, if I recall correctly, northwest of Bermuda.

Q. Northwest of Bermuda. Is it possible that you were late or falling behind in the box because you got there late? A. We did get there late.

Q. And why did you get there late, do you remember? A. Yes. The buses that were supposed to transport the crew from their hotels to the submarine for us to leave had to pick up school children in Bermuda; and the buses, because they had to do the

867

Lieutenant(N) Higginson

Cross-examination

school run, were late delivering the crew to the submarine. The figure that comes to mind was something like two hours. Two hours at the speed that our box travels put us a little over 20 miles back in the box.

Q. And who calls for that box? Who puts in the request? A. The person who signs the message is the commanding officer, the people who draft the message will be myself and the Operations Officer.

Q. Okay. And why did the box start at the northwest part in reference to the island? A. The Operations Officer at the time said that he believed that we would be coming out on the west side of Bermuda, therefore he said "start it from there".

Q. And how do you get out of the Great Reef of Bermuda from the west side? A. I cannot answer that question.

Q. How many exits are there to the Great Reef of Bermuda? Do you know? A. No, I can't answer that question.

Q. Isn't it true that there is but one exit, the eastern exit? A. As I've already said, I can't answer that question.

Q. Morale on board was poor is your statement. Is that correct? A. Yes.

Q. What can effect morale, other than what you have already related to the court? A. Well, it's my opinion that people-wise there's three people that have direct influence on the morale of the submarine: the Captain, the XO and the Coxswain.

Q. Uh, huh. A. Aside from the people, it could be the program of the submarine; the work it's doing ... in other words, the time spent away from home; and how difficult the work is away from home; how difficult the conditions are to work under; how good

868

Lieutenant(N) Higginson

Cross-examination

the food is on board effects morale; how good the ports are ... if you've got good hotels when you get to port; if you get duty-free; if you don't get duty-free, obviously, they're not as happy. There's other ...

Q. What about confidence in the leadership? Does that have an effect on the morale of the ship's company? A. Yes, I would say it does.

Q. And what about junior officers discussing their aches and pains in between themselves in front of the junior ranks in the fore-ends? Would that effect morale? A. It could. Yes.

Q. Because it would effect the confidence in the leadership? A. Correct.

Q. Did that happen? A. Yes, that did happen.

Q. And what was your impression at the time? Did you take part in that? A. Yes, I did.

Q. And when you were there discussing aches and pains in front of the junior ranks, what did you think that the junior ranks would think about the officers? A. Since they were discussing ... it wasn't always in front of the junior ranks, but sometimes I'm sure they heard what we were saying. They agreed with us sometimes and other times they wouldn't comment at all.

Q. You said that you went to the XO with problems you had with the switching off of equipment? A. Correct.

Q. And you had concern for that? A. Correct.

Q. Was that concern for safety? A. Yes, it was.

869

Lieutenant (N) Higginson

Cross-examination

Q. Do you actually think that the Captain would have put deliberately the safety of the submarine at risk? A. In this situation, in my opinion, he put the safety of the submarine in jeopardy.

Q. How do you know that? A. In my opinion, he was building up the stress level of myself and people who were ... officers who were in the Control Room that worked for and with me, to a level that we were losing confidence in ourselves. And we felt demoralized and because of that I think that's creating a dangerous condition in the Control Room. That's one point. The other point was some of the switches and some of the indicators he was tampering with in the Control Room, it happened so often that I began to forget which position it was supposed to be in, and I'd have to ask one of the engineers who was responsible for that piece of equipment "What position is this supposed to be in?" and he would set it up.

Q. But do you think he would deliberately switch equipment off and just walk off to the other end of the boat not being around to make sure that if something happens - he's available to just intervene? A. I don't know.

Q. You don't know. And in the same line, I mean ... A. Can I answer that question that you just asked?

Q. I you wish? A. I don't think that he would have adjusted settings in the submarine and have gone to the other end of the submarine not knowing what was going to happen. I don't think he would do that.

Q. And what's the purpose of something like that? What do you think his purpose was to that practice? A. He was testing the officers in the Control Room.

Q. He was testing the officers in the Control Room. And you said he took you to the breaking

870

Lieutenant(N) Higginson

Cross-examination

point or almost to the breaking point. How is he to know how you will actually react under real conditions of stress if he doesn't take you there? A. Well, that's what workups are for. The submarine gets worked up like any other naval unit and they put the crew through its paces which are stressful, and that determines how your crew performs.

Q. Are you supposed to be ready and able only during the work ups or all the time when you're at sea? A. All the time when you're at sea.

Q. Would it be reasonable, if you have a tendency to believe that people are slacking off, that it would be time to step in and just check, just to raise the level of awareness? A. The way he did it? No.

Q. Do you recall saying that Lieutenant-Commander Marsaw ran the submarine as if he was always going at war? A. Correct.

Q. Do you see any problem with that?
A. Yes, I did.

Q. What's his responsibility or duty in being the commander or the Captain? A. To have the submarine operationally ready for any tasking that might come from MARLANT.

Q. And which is the highest tasking for a submarine or any fighting unit? A. Wartime.

Q. Wartime. So he was ready for the worst?
A. Yes.

Q. Do you think it's appropriate for the '90s to still require the fighting ships to be ready for war? A. Yes.

Q. It's still required? A. In my opinion.
Yes.

871

Lieutenant(N) Higginson

Cross-examination

Q. Do you recall making a statement to the investigators in your first interview that these are the '90s, people have had enough? A. I probably did make that statement.

Q. Well where's the difference between what you're telling us now and what you told them then?

A. What was the question that was asked to me when I said that statement?

Q. Okay, I can refer you to the questions.

A. Is it okay if I ...?

Q. I'll find it first and then direct it to you. A. Okay.

Q. Look at page 44 and the answer carries on to 46 ... sorry, 45 and carries on to 46? A. So it's the bottom answer on page 44?

Q. You are discussing Lieutenant Kelk, the answer from the police: "Is that right?" You answer back comparing temperaments? A. ...

PROSECUTOR: Is this on page 44?

ASSISTANT DEFENDING OFFICER: Page 45.

Q. And then the question, you are asked to compare Lieutenant Kelk to Lieutenant-Commander Marsaw, and then you start answering. I direct you to the third line that starts: "I don't think ..." Would you read that to yourself and carry on to the end of the answer on page 46. A. Okay.

Q. So would you relate to the court in what context you stated the '90s in that answer? A. I stated the 1990s in that answer in reference to the way the commanding officer was treating the submarine, the way he was ... yeah, in my own words, treated the submarine.

872

Lieutenant(N) Higginson

Cross-examination

Q. As if he was going at war, but these are the '90s, people have had enough? Is that part of the answer? A. In that paragraph I do say that. That is correct.

PROSECUTOR: Mr Judge Advocate, if he's going to play Swiss cheese with the witness' answer on the transcript it might be easier just to have the witness answer his entire question. I mean, it's a seven sentence answer perhaps and some of the key parts of it are being cross-examined out of it, at the same time asking the witness to give the answer he gave to the MPs on page 46. So if defence counsel wants the answer on 46 - let's hear it and he can read the whole thing rather than every second sentence.

JUDGE ADVOCATE: Major MacKay?

ASSISTANT DEFENDING OFFICER: I don't have objection for the witness to read the entire answer, Mr Judge Advocate.

JUDGE ADVOCATE: Well, try to be fair to the witness. It doesn't seem to be too easy to answer from the type of questioning that you're doing.

ASSISTANT DEFENDING OFFICER:

Q. Well for the court, could you please read the entire answer starting on page 45? A. Starting on page 45: "Compare him to Marsaw." My answer is: "They were the same on watch, I guess, in one sense of the word, but off watch, you know, Steve Kelk could relax and be normal, whereas I don't think Dean Marsaw was ever relaxed, I don't think he was ... he ever let his guard down. He always, you know, treated the submarine as if ... I've never been in war, but he treated it as if you were always going to war and I wouldn't want to go to war with him because if that's what he was like in peace time, I'd hate to see what it was like in ... or what it would be like in war time, you know. I

873

Lieutenant(N) Higginson

Cross-examination

think there'd be a mutiny. People are ... in the 1990's, people have had enough ... you know ..."

Q. Thank you. So is it still your answer that he was meeting his objective in terms of preparing for the worst possible scenario? A. In what respect?

Q. He's the Captain, he's the commanding officer of a warship, what is he prepared for?
A. War.

Q. War. And did he attain the objective, according to these words? A. Can I refer back to the ...

Q. You've just read your answer, and in that answer is it not correct that you said that he was treating the submarine as if it was going to war? Is that what he was aiming for? A. Yes.

Q. And I'm asking now, according to you, did he get there? A. In my opinion?

Q. Yes? A. Did he prepare the submarine for war?

Q. Yes? A. No.

Q. Okay. You also, going back to the yelling issue, is it correct that you said you were yelled at? A. Yes.

Q. Do you recall being asked by the investigators whether or not you were yelled at? A. Yes.

Q. What was your answer then? Do you recall what your answer was? A. Not exactly. No, I don't.

PROSECUTOR: Again, Mr Judge Advocate, I think he's asked the question a variety of times in a variety of places in the transcript and gives different types of answers, sometimes he's cut off by the MPs and sometimes he gives full answers. So if my friend is

874

Lieutenant(N) Higginson

Cross-examination

going to start asking questions about referring and recalling, maybe he can let us know which particular time he is talking about.

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: Please.

ASSISTANT DEFENDING OFFICER: Certainly.

Q. Referring to page 77 of the transcript
... A. May I?

Q. Yes. A. Okay.

Q. Is that an example of where you were asked whether or not Lieutenant-Commander Marsaw yelled at you ... middle of the page: "Ivan Rice ... Did he yell at you"? A. ...

PROSECUTOR: Excuse me, Mr Judge Advocate, I'm going to object. I think the question, the way it is phrased by defence counsel is unfair. They're talking about a specific incident. He goes on at length for a paragraph and talks about the incident, and "Ivan Rice ... Did he yell at you?" "... call you any names?", and then the witness answers "... in that session he did." So they're referring to a specific session.

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, perhaps for this one, if I may, I'm just setting up the foundations for my next question.

JUDGE ADVOCATE: Well, it's not clear, it's not clear what you're doing. It's not clear to the court, it's not clear to the witness, it's not clear to your friend on the other side. We have a hard time following where you're getting at. It's not an exercise here to confuse the witness and to confuse the court. So if you have a question to put to the witness - put it to the witness and then, if he cannot answer, ask him why and then refer him to a previous statement

875

Lieutenant(N) Higginson

Cross-examination

he would have made to the Military Police. And if he made many in the same document he has there, refer him to all those different places because he may have discussed this particular incident, the way it looks like now, on various occasions during the same interview. So it's not an exercise to confuse the witness here. So be precise.

ASSISTANT DEFENDING OFFICER: I'm not trying, Mr Judge Advocate, and I'm sorry. I'm not trying to confuse ...

JUDGE ADVOCATE: No. I'm sure you don't do it deliberately, but it's what happens actually.

ASSISTANT DEFENDING OFFICER: Okay. Again, I'll come back to this area again.

Q. Now you mentioned ... did you or did you not mention to the investigators ... you can put the transcript down, I'll come back to it ... having had discussions with the XO, Lieutenant[N] Dussault? Did you? A. Yes. Sorry, I didn't know you were asking a question. Yes.

Q. And it's my understanding, from your examination and your testimony in direct-examination, that it was to express some concerns? A. Correct.

Q. Correct. Could you repeat what those concerns were? A. I hope I'm talking about the right time here that you're talking about, or answering the question you want me to answer. I went to the XO because I was unhappy on watch that the Captain was altering, continuing to alter, a number of items in the Control Room, and I said to him that I was unhappy to remain as officer of the watch under these conditions.

Q. Okay, and there was another occasion that you expressed about the yelling, did you? A. Yes, I would have discussed the yelling on more than one occasion with the XO.

876

Lieutenant(N) Higginson

Cross-examination

Q. Did you expect anything to come out of that? A. I was hoping. Yes.

Q. I was hoping. Did anything come out of that? A. Not that I saw. No.

Q. And do you blame the XO for not acting on it? A. I didn't know whether the XO had acted on it. I wasn't privy to any conversations he might have had with the Captain in his cabin. So I was in a position of mentioning my concern to him, but I don't know what he did or did not do.

Q. And was it your position that you felt that the XO was in a situation of conflict of interest? A. Yes, I felt the XO was definitely in a conflict of interest.

Q. Can you tell the court how you feel that the XO in such a situation can be in a conflict of interest? A. It was ... this might be a long answer. There was more than one condition. One was that the Captain had self-proclaimed that he had outstanding PERs from his assessor, so the XO found that difficult to go up against; and also, even more important, was that the Captain was going to be posted to the Warfare Centre when he left the submarine going into refit, and in that position he was going to be teacher of the Canadian "Perisher", which is the command course of Canadian submarines or submariners, and the XO was going to possibly be a candidate while Lieutenant-Commander Marsaw was in that position. So he was going to be teacher, he was going to be student, and had the XO complained and nothing happened, nothing had occurred, and the Captain like essentially won, then they might leave the submarine, go on course together, and the Captain would have a direct influence on whether he passed that course or didn't pass. And if you don't pass the command course, tradition has been ... well, it was with the Royal Navy, if you don't pass the

877

Lieutenant(N) Higginson

Cross-examination

command course - you're out of submarines. No second chance.

Q. Was it also your position that he was in a conflict of interest because everybody up the chain of command knew of what was going on in OJIBWA but nothing was being done? A. In my personal opinion, I think other people knew what was going on in OJIBWA. Yes.

Q. Can you identify those other people you refer to? A. I can identify who I think knew. I have no way of saying that they did know.

Q. But if you say "other people", you were working under the assumption that something is going on but nobody is doing anything? A. Correct.

Q. There is a chain of command. Correct?
A. Yes.

Q. Who is the superior of Lieutenant-Commander Marsaw? A. The Squadron Commander and the Admiral.

Q. Is it possible for the XO to go to the Squadron Commander ... A. Yes, it is.

Q. ... if it concerns the XO? A. Yes, it is.

Q. So then how would he be in a situation of a conflict of interest? A. If he had gone to the Squadron Commander and the Squadron Commander disagreed with him, in other words did not rule in his favour and sent him back down to the submarine as XO, and then they went on course together, Lieutenant-Commander Marsaw would know that his XO went around him to the Squadron Commander and complained.

Q. Well there must be then some value to the complaint in the first place. If there's nothing to

878

Lieutenant(N) Higginson

Cross-examination

complain about to raise it, you don't raise it. If there's something to raise, you raise it. Right?

A. Well, yes, that's generally the way it goes. Yes.

Q. And would you let yourself be stopped by that? A. I asked myself that many times. I don't have an answer for you.

Q. Okay. And on the submarine, who is responsible overall for morale and discipline?

A. Overall?

Q. I mean, whose primary responsibility is it? A. For morale and discipline?

Q. Uh, huh? A. The Executive Officer.

Q. Do you have any knowledge of an incident that would have occurred after a mess dinner in 1991?

A. From hearsay. Yes.

ASSISTANT DEFENDING OFFICER: From hearsay.

Mr Judge Advocate, at this point I would ask that we go into a **voir dire** as to the admissibility of the hearsay evidence that this witness has? And I can explain briefly my position on this and I intend to rely on Rule of Evidence 27(d).

JUDGE ADVOCATE: Very well, I will hear your arguments in the absence of the court.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: You may be seated. This court is now sitting in a **voir dire**.

Would you tell me what is the gist of your application?

ASSISTANT DEFENDING OFFICER: The gist of the application, Mr Judge Advocate, is that Lieutenant[N]

879

17th voir dire

Lieutenant(N) Higginson

Higginson the day he was interviewed by the investigators in this case was asked what he knows of the incident, then went to say what he had learned from another member, one of the members who has already testified in these proceedings. We know what his story is. He has told us various elements of what he saw that night, but then goes the next morning and tells a somewhat slightly different story to Lieutenant[N] Higginson. And it's my position that the words that were related to Lieutenant[N] Higginson show in fact that what that person has denied prior shows some implication on his part.

JUDGE ADVOCATE: Shows what?

ASSISTANT DEFENDING OFFICER: Some implication. Not Lieutenant[N] Higginson's implication, but the person who has reported those events to Lieutenant[N] Higginson has previously denied taking part and in these words that he has now reported to Higginson, he shows that he has to a certain extent taken part in the events. And my position is that this information would tend to show the foundation or, as the rule says ... I'll just state the right word here ...

JUDGE ADVOCATE: I have a hard time to follow what you're saying now.

PROSECUTOR: Maybe, Mr Judge Advocate, the witness could leave and we could quit speaking in code and maybe get to the heart of the issue?

JUDGE ADVOCATE: Yes, the witness is excused. Would you please withdraw from the courtroom for a certain while. Thank you.

WITNESS RETIRES.

JUDGE ADVOCATE: So tell me that again. When interviewed by the Military Police this actual witness said what?

880

ASSISTANT DEFENDING OFFICER: He was asked what he knew of the cigar tube incident, the mess dinner.

JUDGE ADVOCATE: Okay.

ASSISTANT DEFENDING OFFICER: So he said "Stories". Okay. What stories have you heard? Then he tells that the story that he has heard was that Lieutenant-Commander Marsaw had taped, marked and tubed the individual. And when they asked him to go into description and said - okay, who told you that? Then he refers to Lieutenant[N] Hart. What did he tell you?

And the description that he reports, it's our contention, shows that when the words are reported, Lieutenant[N] Hart did take part in the taping and in the marking and even possibly in the tubing. So if that's the case and Lieutenant[N] Hart has denied it, it surely goes to the credibility of Lieutenant[N] Hart. And he has one story saying that Lieutenant[N] Marr and Lieutenant-Commander Marsaw has taped, marked and tubed ... and when he reports it, there's no mention of Lieutenant-Commander Marsaw doing any of that.

Look at page 12.

PROSECUTOR: Twelve?

ASSISTANT DEFENDING OFFICER: Actually, the passage where he says "Lieutenant-Commander Marsaw had taped ..." blah, blah, blah. It's at the middle of page 11. And then he's questioned as to where he got it from.

PROSECUTOR: Later on, down below, and he doesn't even attribute it to Hart.

JUDGE ADVOCATE: So the witness said, when interviewed by the MPs, that what he knew about the taping incident was hearsay. In other words, perhaps he didn't use those words, but ...

881

ASSISTANT DEFENDING OFFICER: Well he said he had stories.

JUDGE ADVOCATE: He said he had stories and he heard those stories from Hart, and then he gets into what Hart would have told him.

ASSISTANT DEFENDING OFFICER: Yes, about ...

JUDGE ADVOCATE: The taping.

ASSISTANT DEFENDING OFFICER: ... what happened the night before on OJIBWA at the mess dinner, or after the mess dinner.

JUDGE ADVOCATE: And what you want to be declared admissible in evidence is the words. Well what is it? Is it the words that Hart told him?

ASSISTANT DEFENDING OFFICER: Yes. What he told ...

JUDGE ADVOCATE: What he was told by Hart. Yes, but what did Hart say?

ASSISTANT DEFENDING OFFICER: What did Hart say?

JUDGE ADVOCATE: Yes.

ASSISTANT DEFENDING OFFICER: Hart said, regarding to the tubing, the taping and the marking, he did not take part in any of that.

JUDGE ADVOCATE: That Hart did not take part in any of that?

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: So then you referred to 27(d).

882

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: How is that the substance of a legal defence of the offence charged?

ASSISTANT DEFENDING OFFICER: A legal defence, Mr Judge Advocate, is that the incident or if any incident happened that night, Lieutenant-Commander Marsaw did not take part in it. Now we had witnesses who have come here one after the other saying that he did, but when they tell the story ... when Hart tells Higginson what he saw the night before, the name Marsaw does not come up.

JUDGE ADVOCATE: I have a hard time to follow you. All Hart said, you said, is Hart said that he did not take part in the taping and the tubing?

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: How is that a defence to Marsaw?

ASSISTANT DEFENDING OFFICER: He has said that he did not, but he has said ... and also in doing so, said that it was Lieutenant-Commander Marsaw who took part in that.

JUDGE ADVOCATE: Okay.

PROSECUTOR: Excuse me. Do you have a copy of the transcript, sir?

JUDGE ADVOCATE: I don't

PROSECUTOR: I think it would help us all out if you did, because I don't agree with my friend's interpretation of what he is trying to assert here.

JUDGE ADVOCATE: Please provide me with a copy of the transcript.

883

ASSISTANT DEFENDING OFFICER: Well, I've got my marked copy here, although there is ...

JUDGE ADVOCATE: Is there not another one there on the witness stand?

ASSISTANT DEFENDING OFFICER: Oh.

JUDGE ADVOCATE: First of all, what did this witness, Higginson, say about this taping and the tubing incident?

ASSISTANT DEFENDING OFFICER: That's what I want to go ... he said that all he has is hearsay.

JUDGE ADVOCATE: No, no. But in the main trial, I mean? In the main trial, that's what he said?

ASSISTANT DEFENDING OFFICER: No, no. Not in the main trial. This is a question that came out in cross-examination.

JUDGE ADVOCATE: Okay, it's a new matter that you raised in your cross-examination.

ASSISTANT DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: Okay.

ASSISTANT DEFENDING OFFICER: Yes, it's pages 11 and 12. It starts around the middle when the Military Police officer asked him what he knows, or what he learned and what he knows.

JUDGE ADVOCATE: Where does it start? It starts where the arrow is?

ASSISTANT DEFENDING OFFICER: Well, it starts there when he was asked ...

JUDGE ADVOCATE: I'm sorry?

884

ASSISTANT DEFENDING OFFICER: Where just a little bit above ... or you can start there if you wish. He first starts by saying that he has heard that Lieutenant-Commander Marsaw had taped a couple of guys and took a cigar tube and put it up somebody's anus and marked 'em up with a magic marker.

JUDGE ADVOCATE: Well, it's not there that he says he's heard, it's higher than that.

ASSISTANT DEFENDING OFFICER: Yes, but then I'm starting there because he's being asked to identify who told him that.

JUDGE ADVOCATE: Okay.

ASSISTANT DEFENDING OFFICER: And the last paragraph he says "... I think it was Doug Hart, I think, yeah" ... in the middle.

JUDGE ADVOCATE: Let me read that. Until when do you want me to read?

ASSISTANT DEFENDING OFFICER: Actually, the last big paragraph of page 12. This is where he recants what Hart has told him.

JUDGE ADVOCATE: So what do you want to do with this?

ASSISTANT DEFENDING OFFICER: What I want to do with this, Mr Judge Advocate, is just as I said earlier, the first thing when he talks about it he attributes all the acts to Lieutenant-Commander Marsaw. From the middle of page 11 "What did you hear that specific time?" "That Lieutenant-Commander Marsaw had taped up a couple of guys and took a cigar tube and put it up somebody's anus and marked 'em up with magic markers." There's nobody else in that picture.

885

JUDGE ADVOCATE: Okay, so he first says what he heard about the gestures or the acts made by Marsaw on that occasion. And then later on ...

ASSISTANT DEFENDING OFFICER: What he heard on that occasion. "As much detail as you can remember?" Then he goes into the details: "He had ... I think they were passed out, I think that we had been drinking so much that Gord Muir and Steve Kelk had passed out."

JUDGE ADVOCATE: Yes. "I think ... I think ... and I think" He's not sure of anything.

ASSISTANT DEFENDING OFFICER: "They took ..."

JUDGE ADVOCATE: Yeah, but he's not sure. He says: "I think" this and "I think" that and "I don't know".

PROSECUTOR: Mr Judge Advocate, I'd like to put this whole transcript in proper context. I mean, going to the top of page 10, Higginson is asked ... I believe even earlier, but whether he's even present at the OJIBWA Wardroom that night, and I believe he answers that he hasn't been.

ASSISTANT DEFENDING OFFICER: He went to the mess dinner but not to the ...

PROSECUTOR: He went to the mess dinner and didn't go to the OJIBWA Wardroom. So then the MPs interview him and said: do you know anything about it? And he says "That Lieutenant-Commander Marsaw had taped up a couple of guys and took a cigar tube and put it up somebody's anus and marked 'em up with magic markers". And then the MPs asked him at the bottom of page 11 "... who did you hear it from?" He goes: "If this is going on record, I don't want to get somebody into trouble because I don't honestly remember, but I think it was Doug Hart, I think, yeah. I think it was him. Yeah, because he would have been in the Squadron at

886

that time." So he's not sure. He thinks it's Hart because Hart happens to be in the Squadron at that time. And then later on, halfway down page 12, he goes: "... I think it was him, I think it was him that told me ...". And at the bottom of page 12 he talks about apparently what has been told to him by Hart because Higginson has previously stated he didn't go to the OJIBWA Wardroom that morning. And then you've got Higginson on the first line slipping in the word "we".

If you take that literally, it means that Higginson is now confessing to taping up people in the Wardroom of the OJIBWA, I guess, based on something that somebody, who he thinks might have been Hart because it was a person in the Squadron, told him. I don't see how that falls into 27(d) at all, not at all.

JUDGE ADVOCATE: I don't see either. And perhaps you could try to explain that to me again. I mean, how does this form the substance of a legal defence to the offence charged? I don't see it. Explain it to me?

ASSISTANT DEFENDING OFFICER: The explanation I want to give is that it's exactly how he answered the question the first time as to what he knew - stories. He was told a story the day ... we're not talking the day of the interview, we're not talking the day of this trial. Hart told him, according to him, and I recognize the passage that Major Abbott has read, but on top of page 12 about his concern of going on the record, "... if this is on the record kind of thing, I just want to make sure I get the facts straight ...".

JUDGE ADVOCATE: Yeah, but he says "I honestly don't remember".

ASSISTANT DEFENDING OFFICER: Well, he's recanting in as much detail as he can, according to his memory, what Hart has told him.

JUDGE ADVOCATE: But again, how does that form the substance of a defence?

887

ASSISTANT DEFENDING OFFICER: Well, the defence here, Mr Judge Advocate, is that this is a story that has been carried on since 1991, because nobody ever came up with it up to and until there was an article in the paper.

PROSECUTOR: I'd submit that's not a defence.

JUDGE ADVOCATE: So what question do you want to put to him?

ASSISTANT DEFENDING OFFICER: Well, I want him to read that paragraph, paragraph 12 (sic). He has made ...

JUDGE ADVOCATE: Paragraph 12?

ASSISTANT DEFENDING OFFICER: Page 12, sorry. There is a little over seven lines in that paragraph, he has made six changes but has not felt it appropriate to change the word "we" or "they".

PROSECUTOR: That's because he was asked to comment on the words that were said on tape, not to reconstruct history.

ASSISTANT DEFENDING OFFICER: Yeah, on what the words he used then on his best recollection of what Hart told him.

JUDGE ADVOCATE: No, but start from the beginning. I mean, what do you want to get from this witness? What first question will you put to him? What do you want to know?

ASSISTANT DEFENDING OFFICER: What he has heard. And I want to know if he has heard stories.

JUDGE ADVOCATE: And then?

ASSISTANT DEFENDING OFFICER: Ask him ...

888

JUDGE ADVOCATE: Those stories will be what we can read on page seven of the transcript and you submit that this forms, under 27(d), the substance of a legal defence to the offence charged?

ASSISTANT DEFENDING OFFICER: Well part of the substance ... the whole thing is for us, the defence, to discredit to a certain extent the people who say that they witnessed that act. And it would be part of attacking the credibility of one witness.

JUDGE ADVOCATE: Yeah, but the problem I have is that you won't go very far with that, first of all, but that's not the only reason, you won't go far because the evidence is not reliable. What it says here is that the witness said "I honestly don't remember". So that's unreliable evidence. That's the problem I have. It will confuse everybody.

ASSISTANT DEFENDING OFFICER: Well, if that's your position. I'm asking because it's there in this transcript and I feel it's my duty to raise it. There was a rule and I'm trying to put it in. I'm waiting for your ruling.

JUDGE ADVOCATE: Well, I have no problem with you cross-examining the witness on what he said previously. But again, it is not an exercise of confusion. I mean, it's clear here from the record, from the transcript, that the witness said that he honestly doesn't remember. So I don't know what you will achieve by doing that.

ASSISTANT DEFENDING OFFICER: Just what I said, that I have nothing more to state, Mr Judge Advocate, and I'm just going to leave it in your hands.

JUDGE ADVOCATE: Would you say something, Major Abbott?

889

PROSECUTOR: Yes. I would object even to the question being asked. If all the witnesses that come in here, all 44, are going to start to be asked on the accuracy and hearsay statements they made to people, we just create a whole other broader set of issue that this court is going to have to deal with. Every witness who comes in, are we going to ask about who has told him what about what, and whether it's truthful or not, and whether they can remember who said it to them or not?

The other fundamental problem I have with all this is they're using it to try and attack Hart. And they have never ever on examination of Hart, and they have a legal obligation to do so, squarely and fairly put the question to Hart: Did you at any time ever say to Lieutenant[N] Higginson in the Squadron the day after the mess dinner the following passage? They've never ever done that for Hart. It comes out through hearsay through Higginson ... he's saying - well, maybe it was Hart, I'm not sure, I don't remember. He's even got himself in this passage saying that he's in the OJIBWA Wardroom with the word "we". And this is now being used before the court to discredit Hart who has never had an opportunity even to respond to it. And possibly, given the way that the cross-examination is conducted, for even Higginson to properly respond to it. I don't see how cross-examining somebody on a double-hearsay statement, and in fact Higginson says "I'm not even sure if Hart was in the OJIBWA Wardroom", it's that close to the issue, I submit that it puts us much further away and creates a line of questioning for future witnesses that we haven't had to date. And I don't even think it falls under 27(d) by looking at the Notes to that particular pigeon hole, the old hearsay rule. I think this is meant for something completely different. I guess, as my colleague has pointed out, even under the new rules it is not reliable to be admitted. Under **Smith** and **Khan**, there's no degree of reliability at all.

890

JUDGE ADVOCATE: That has been my main concern since the beginning. I don't see any degree of reliability at all in what I have read in pages 11 and 12 of the transcript given to me.

So for this reason I rule that this evidence is not admissible in the main trial.

Please invite the president and the members to come back to the courtroom.

ASSISTANT DEFENDING OFFICER: I won't be long, Mr Judge Advocate, I'm just about finished.

THE WITNESS RETURNS TO THE COURTROOM.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

s.19(1)

891

Lieutenant(N) Higginson

Cross-examination

TENTH WITNESS) Lieutenant(N) M. E.
FOR THE) HIGGINSON.
PROSECUTION)

JUDGE ADVOCATE: Please be seated.

You may proceed.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Lieutenant[N] Higginson, earlier on I had asked you whether or not you had said, the second time, second interview, you were asked whether or not Lieutenant-Commander Marsaw kicked you, then you say "yes" and I asked you to carry on with your response and you responded that you thought that the incident was too shady. Do you recall that? A. Yes.

Q. Could you qualify the use of the word "shady" here? Does it relate ... and my question goes directly, does it relate to you believing that it was done on purpose or not? A. Is my word the word "shady"?

Q. Shady. A. That's the word I used?

Q. Yes and I had you refer to the transcript for this one. A. Yes. I referred to it shady in that I did not see who kicked me. And I don't know if it was on purpose or not.

Q. Is it your understanding that in the Forces there is a system put in place for putting in a proper complaint? A. Yes.

Q. Do you know the name of that process?
A. One is grievance.

Q. Grievance. Have you ever used it?
A. No, I have not.

892

Lieutenant(N) Higginson

Cross-examination

Q. Have you spoken to ... first of all, have you read or aware of the article of 16 December 1993, written by Mr Dunlop? A. Yes.

Q. Yes. Have you spoken to Mr Dunlop?
A. Yes.

Q. What did you tell Mr Dunlop? A. He did most of the talking. I directed him to Public Relations and said I had not comment, and he kept talking and I eventually hung up on him.

Q. You had nothing further to tell him regarding all you knew of your time on OJIBWA? A. The conversation lasted longer than that but that's the ... from my recollection, that's the way the conversation went.

Q. When you say your ankle was bruised after the kick, was it bruised to the point where you would require or had to seek medical attention? A. No, I did not seek medical attention.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. When you had just answered that you thought the incident was too shady, and that was because you didn't know if whoever kicked you did it on purpose or not? A. Correct.

Q. And the reason you don't know is because you weren't a witness to what happened, were you?
A. I did not see what happened to me. No.

Lieutenant(N) Higginson

Re-examination

Q. Talking about conflicts of interest, the XO, Dussault, and Lieutenant-Commander Marsaw. Did this conflict of interest ever get expressed by Lieutenant-Commander Dussault? A. Yes, it did.

Q. You were asked whether Marsaw's boat was prepared for a war and you answered "no". Why did you say that? A. In my opinion, morale was the number one reason. Despite all the technical problems that the submarine has, which we did have and still have, morale in my opinion was the biggest problem.

Q. In the passage that you read, I believe on page 64 ... A. Do you want me to pick it up?

Q. Forty-six, I can just pick it up and re-read it to you and save some time. You said "I think there would be a mutiny". Why did you say that? A. Why did I say that?

Q. Yes? A. Because I believed it.

Q. This mention of the DNO Course, when did you take the DNO course? A. The summer of ... the summer of '91, I believe.

Q. Okay. And what was the next operational posting you had after that DNO Course? A. I went back to ONONDAGA ... when I went on the course I was from ONONDAGA and I went back to ONONDAGA after the course.

Q. Was the ONONDAGA sailing at that time? A. Yes, it was.

Q. So you were used to the ONONDAGA's routine about weather forecast then? A. I was not the navigator in ONONDAGA, so no, I was not.

Q. Okay. And you stated that ... on the DNO course, how did you do on that course? A. I came in first place.

Lieutenant(N) Higginson

Re-examination

Q. Why did you think Lieutenant-Commander Marsaw ran it as if going to war? A. I don't know that I have an answer for that question. He seemed to enjoy what he was doing and the harder he pushed the harder he seemed to enjoy it. But I don't know if that's answering your question or not.

Q. Well, you've answered the best you can, I guess. I'm going to show you a sailing schedule here, and I'm just going to refer to some of the stuff that this boat did, and you can tell me whether or not you were in a war at the time. The fisheries patrol, would that be a war? A. No.

Q. But the boat was tasked to do fisheries patrols? A. Yes, it was.

Q. Counter-drugs patrols, is that at war? A. No.

Q. But the boat was tasked to do counter-drugs patrols? A. Correct.

Q. And were there people that were trying to get trained for submariner "dolphins" ever on board this boat as well? A. Officers and NCMs. Yes.

Q. So would training be part of the function of the OJIBWA? A. Yes, it would be.

Q. Apart from everything else it did? A. Correct.

Q. So there were other things OJIBWA did than just sit around and wait for a war? A. Correct.

Q. Do you know if Lieutenant-Commander Marsaw has ever personally fought in a war, in a submarine? A. I don't know for a fact if he has or not.

Q. Do you know if he has any personal experience about what it's like to fight in a war in a submarine? A. I don't know.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Thank you.

Questions from the court? No questions.

Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness I believe will be fairly lengthy, from the defence side I believe, and there will also be one **voir dire** issue that will arise some time during his testimony.

JUDGE ADVOCATE: Okay. Now will the **voir dire** come up at the beginning? In other words, do we need the court first time tomorrow morning or can we start with the **voir dire** and may I inform the court immediately at this time that their presence will be required only later?

PROSECUTOR: We can structure it any way that meets the convenience of the court. We can do the **voir dire** at the end of the witness' testimony, mid-morning, or we can do it right up front at the very beginning and not start up with his testimony before the members of the court until earlier on in the morning.

JUDGE ADVOCATE: It's probably better to do it right up front. This way you won't have to come here and wait, wait and wait until the time comes to call you back in the courtroom. It's just a suggestion.

PRESIDENT: Any estimate of when you would want us here?

JUDGE ADVOCATE: How long do you think the **voir dire** will last?

ASSISTANT PROSECUTOR: The actual evidence will be fairly short, Mr Judge Advocate. It's a similar fact issue ... argument probably 20 minutes for each side, so I would say an hour to deal with it and then your decision.

JUDGE ADVOCATE: For your part, and then there will be my part. It's very hard to tell. Would you prefer to be on an hour notice or what length of notice you want?

PRESIDENT: An hour's notice is more than adequate. Yes.

JUDGE ADVOCATE: An hour's notice?

PRESIDENT: Yes, certainly.

JUDGE ADVOCATE: That's what we will do then. So the court will adjourn until nine o'clock tomorrow morning and as far as the court is concerned, you will be on a one hour notice. The court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1555 hours, 5 October 1995, the court adjourns.

REASSEMBLY: At 1000 hours, 6 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

Good morning. Is the prosecution ready to call its next witness?

ASSISTANT PROSECUTOR: Yes. Yes, we are, Mr Judge Advocate. The next witness will be Lieutenant[N] Byrne.

s.19(1)

Lieutenant(N) Byrne

Examination-in-chief

ELEVENTH WITNESS) Lieutenant(N) M.J.C.
FOR THE) BYRNE, is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Would you state your full name, please?

A. Lieutenant[N] Martin James Connor Byrne.

Q. And would you spell your last name?

A. B-Y-R-N-E.

Q. Your service number is

A. Yes, that's correct.

Q. And you're currently posted to HMCS

OJIBWA? A. Yes, I am.

Q. You joined the Canadian Forces in 1988?

A. Yes, I did.

Q. And after completion of your NOC course you then went to your Basic Submarine Course?

A. That's correct.

Q. Okay. And on completion of your Basic Submarine Course, where were you posted? A. To HMCS OJIBWA.

Q. And when would that have been? A. That would have been in late June of 1991.

Q. Okay. Who was the CO on board OJIBWA when you arrived? A. Lieutenant-Commander Marsaw.

Q. Okay. And when did you leave OJIBWA?

A. September 1992.

Q. And did Lieutenant-Commander Marsaw remain your CO for the duration of that period?

A. Yes, he did.

Lieutenant(N) Byrne

Examination-in-chief

Q. I'm just going to go through a list of names of officers. I'm wondering if you could indicate whether or not these officers were on board while you served on board OJIBWA? A. ...

DEFENDING OFFICER: Mr Judge Advocate, maybe the question could be put to the witness to name the witnesses that were on board rather than putting a question that would call for a "yes" or "no".

JUDGE ADVOCATE: It's been done before and you never objected. It's really a preliminary but ...

ASSISTANT PROSECUTOR: I could take that approach if my friend would wish, I thought for the benefit the court, it would be faster.

JUDGE ADVOCATE: Very well.

ASSISTANT PROSECUTOR:

Q. Lieutenant[N] Byrne, could you list or name the officers that you recall serving with you on board OJIBWA? A. When I first joined OJIBWA in June of 1991, Lieutenant-Commander Virgin, or Lieutenant[N] Virgin then, was the XO; the Combat Systems Engineer was Lieutenant[N] Soper; the Engineering Officer was Lieutenant[N] Halle; the Operations Officer was Lieutenant[N] Wamback; the Navigation Officer was Lieutenant[N] Marr; the Sonar Officer or Sonex Officer was Lieutenant Kelk, RN on exchange; there was Lieutenant[N] Cassivi ... sorry, Sub-Lieutenant Cassivi then; Sub-Lieutenant Duffley; myself; Sub-Lieutenant Lineham and Sub-Lieutenant MacLean.

Q. And did anybody else ... A. Those positions did change over the course of the time that I was on board OJIBWA. Lieutenant[N] Virgin was replaced by Lieutenant[N] Dussault as the XO at one point in time. The engineer, Lieutenant[N] Halle, was replaced by Lieutenant[N] LeClaire. The Combat Systems Engineer remained the same. The Navigator was replaced by Lieutenant[N] Higginson. Lieutenant Kelk moved from

Lieutenant (N) Byrne

Examination-in-chief

Sonar Officer to Operations Officer and replaced Lieutenant[N] Wamback. Also Sub-Lieutenant Lineham and Sub-Lieutenant MacLean were people who were under qualification with me at the time, were replaced by Sub-Lieutenant Pitman; Sub-Lieutenant Gensey, who was an engineer under training; Sub-Lieutenant Elford and Sub-Lieutenant Kohli. And that is all the names that I can remember.

Q. Great. Thank you. Do you recall attending the mess dinner in late 1991? A. Yes, in December 1991.

Q. And where was that mess dinner held?
A. The mess dinner was held at the First Canadian Submarine Squadron Headquarters at the end of Jetty "NC" in HMCS Dockyard, Halifax.

Q. Do you recall when you would have left that dinner? A. I left the mess dinner sometime between 11:30 and midnight.

Q. And where did you go when you left?
A. I had shared a cab home and went home.

Q. Did you report for duty the next day?
A. Yes, I did.

Q. And where would you have reported for duty? A. To the Wardroom of the submarine as I walked into the Dockyard.

Q. And what submarine would that have been?
A. HMCS OJIBWA.

Q. Do you recall the day of the week or even the date? A. It was a Friday morning.

Q. Was there anybody in the Wardroom when you arrived on board? A. Yes.

Q. Can you recall who was there? A. There were two officers of the ship's company that were

Lieutenant (N) Byrne

Examination-in-chief

either having a coffee or getting some books out of their drawers or something, and there were also two other officers who were stretched out or still asleep on the settees in the Wardroom.

Q. Do you recall who those officers were, the ones that were asleep? A. Lieutenant[N] Gord Muir, who was the Squadron Supply Officer at the time, and Lieutenant Steve Kelk.

Q. Do you recall where they were located in the Wardroom? A. As you walked into the Wardroom through the doorway, there is a settee which faces the ... a lower settee faces directly at the doorway, and that's where Lieutenant[N] Muir was; and as you turn to your left as walking through the door, there's the inboard lower settee which is where Lieutenant Kelk was.

Q. I'm going to show you a diagram of the Wardroom, Exhibit "J", and I'm just wondering if you could point that on the diagram? A. Lieutenant Kelk was in bed settee number one and Lieutenant[N] Muir was on bed settee number three.

Q. Okay. Can you describe how Lieutenant[N] Muir was positioned on the settee? A. Lieutenant[N] Muir was on his back with his legs slightly raised on his heels, his knees were bent and he was lying on his back on the settee.

Q. Do you recall how he was dressed? A. He had on a mess shirt to go with his mess dress. The shirt was undone. He had on silk boxer shorts, I cannot remember the colour of the silk boxer shorts; he had on shoes and socks and sock-suspenders to hold his socks up.

Q. Do you recall where his ... Was he wearing a pair of pants? A. I believe his pants were around his ankles.

Lieutenant(N) Byrne

Examination-in-chief

Q. Besides his state of undress, did you observe anything else unusual about Lieutenant[N] Muir?

A. Yes. There was tape around his ankles and also there were some markings from a green and black felt markers on his body.

Q. Do you recall what would have been marked on his body? A. I don't recall what would have been marked specifically. No.

Q. Lieutenant Kelk, do you recall how he was positioned on the settee? A. Lieutenant Kelk was on the inboard lower settee on his right-hand side, with his head facing inboard.

Q. Again, can you describe how Lieutenant Kelk was dressed? A. Again, he was in a state of undress, he had his mess shirt on that he would have had on with his mess dress the night before and that was undone; he had shoes and socks on; his pants were down around his ankles. And I cannot remember ... I think his boxer shorts were up but I can't remember.

Q. And again, with respect to Lieutenant Kelk, did you observe anything else that was unusual? A. Yes. Again, Lieutenant Kelk had various black and green felt marker pen marks all over the exposed skin that I could see on his body.

Q. And with respect to Lieutenant Kelk, can you recall what was marked on him? A. There were lots of things on his arms, on his legs, on his chest, on his back. There were markings on his face and on his forehead. Specifically across the top of his forehead, I can remember the words: "I love frogs" written on his forehead, and there were other things that may have been on his body but I can't remember.

Q. Okay, can you recall any designs or symbols that were on his body? A. There may have been some swastikas on him, however I cannot remember if they were there at this time.

Lieutenant(N) Byrne

Examination-in-chief

Q. Did you ever hear Lieutenant-Commander Marsaw discuss cigar tubes at any time? A. I had overheard Lieutenant-Commander Marsaw in the Squadron mess joking about cigar tubes at that bar, but that was the only other time I ever heard about it.

Q. When would that incident have occurred? A. It would have been sometime in early 1992 in the Squadron mess, however I did not catch the gist of the conversation, just the joke about cigar tubes at the bar.

Q. Do you recall who he was talking to? A. He was at the bar with several other officers, and Lieutenant Kelk was present as well.

Q. Lieutenant[N] Byrne, have you ever been kicked while you served on board OJIBWA? A. Yes.

Q. Do you recall or do you know by whom? A. I was kicked by Lieutenant-Commander Marsaw while I was working at the plot on board HMCS OJIBWA.

Q. Could you describe generally what occurred? A. The watch had been stood to, the submarine was returning to periscope depth. My position when watch was stood to was at the plot table. I heard as we went through the procedure for bringing us up to periscope depth, I heard Lieutenant-Commander Marsaw say "raise forward". Then as he was doing his all around look as he was revolving the periscope around, I was kicked in the back of the leg as I was behind the plot table curtain.

Q. Do you recall what leg you were kicked on? A. It was on the back of the left leg in the middle of the calf area.

Q. I'm just wondering if you could point out to the court where that kick would have occurred? A. Right about there.

Lieutenant(N) Byrne

Examination-in-chief

ASSISTANT PROSECUTOR: For the record, Mr Judge Advocate, the accused (sic) has pointed to the middle of his lower calf ... or his calf, excuse me, of his left leg.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR:

Q. Lieutenant[N] Byrne, I'm wondering if you could ...? A. ...

And again, Mr Judge Advocate, with your leave if the witness could demonstrate the force that was applied to him at that time.

JUDGE ADVOCATE: Go ahead.

ASSISTANT PROSECUTOR:

Q. If you could just on the leg of the chair ... maybe turn around so that the defence counsel ... I don't know if you will be able to demonstrate from that side? A. ...

WITNESS KICKS CHAIR.

ASSISTANT PROSECUTOR: Thank you.

Again, Mr Judge Advocate, I would ask the record to show that the force applied was enough to certainly move the chair into the table beside the witness.

Q. How did you react when that kick was applied to you? A. It's the first time I've ever been kicked by anybody on a ship or in a submarine, so it took me by shock at first. However, I took it to be an act that was to get me out of the way in a hurry, which I did.

Lieutenant (N) Byrne

Examination-in-chief

Q. Were you only kicked on the one occasion?

A. I was kicked on that occasion and I can remember it distinctly because of the shock of being kicked. However I think there may have been one, maybe two, other incidents where it wasn't as strong or it's was just being in the way. But needless to say, I did learn very quickly from that incident to get out of the way whenever I heard somebody say "Raise the forward periscope".

Q. Do you recall when this incident occurred? A. It would have been very early on in my time on board OJIBWA, while I was working at the plot, because as I said, after that I learned to get out of the way whenever I heard the forward periscope being raised.

Q. Would any of the incidents in which you were kicked have occurred during your COUNTER-DRUG trip in I believe it was August to October of 1992? A. No.

Q. Is it possible that your feet just became entangled when that occurred? A. I don't believe so.

Q. And why is that? A. Because if my feet had become entangled with somebody, I would expect our feet to meet somewhere in the ankle vicinity rather than up around the middle of somebody's calf.

Q. Is there any other reason that you don't believe you feet were just entangled? A. Well the force of the kick to the back of my leg was definitely strong enough to know that I had to move. So it wasn't an inadvertent thing that could have been mistaken as a tap or just a rubbing or anything like that.

Q. Have you ever been kicked by anybody else in the Control Room? A. No.

Q. Have you ever seen another CO kick a member of the Control Room staff? A. I've never sailed with another CO in Canadian submarines.

Lieutenant (N) Byrne

Examination-in-chief

Q. Have you ever seen any other officer in a Control Room kick a member of the Control Room staff?

A. No.

Q. Have you ever kicked somebody in the Control Room? A. No.

Q. In your opinion and given your experience on board OBERON Class submarines, is it necessary to kick somebody in the Control Room to get them out of your way? A. I don't believe so.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, I'm not sure, first of all, of the relevancy of that opinion and the qualification of the witness to answer that question?

JUDGE ADVOCATE: Captain Gleeson?

ASSISTANT PROSECUTOR: Again, Mr Judge Advocate, the witness obviously has indicated that he does have experience on board a submarine, he's certainly had been asked to give an opinion, but I think it's well within the scope of ... and I can't cite you the MRE number, but a lay opinion, something that somebody in his position would have experienced and certainly who is a position to expound upon.

JUDGE ADVOCATE: You're relying under MRE 64?

ASSISTANT PROSECUTOR: I believe so, Mr Judge Advocate. That's correct, Mr Judge Advocate.

JUDGE ADVOCATE: Very well, the objection is denied.

You may ask your question.

ASSISTANT PROSECUTOR:

Lieutenant(N) Byrne

Examination-in-chief

Q. So again, Lieutenant[N] Byrne, in your opinion, is it necessary to kick somebody in the Control Room on a submarine? A. No.

Q. And why not? A. I don't think it should be necessary to kick anybody regardless of where you are.

Q. Would you describe Lieutenant-Commander Marsaw's leadership style? A. Lieutenant-Commander Marsaw was the commanding officer of the submarine and the way that he governed around the submarine was through threat, intimidation and coercion within the Control Room of the submarine.

Q. How would you describe the atmosphere in the Control Room when Lieutenant-Commander Marsaw was present? A. Extremely tense and stressful.

Q. And why was it tense and stressful?
A. People had been almost preconditioned to the notion that if anything was noticed that was wrong within the Control Room or if anything was out of order within the view of the commanding officer, that there would be a lot of screaming and yelling and people would be reprimanded or chastised on the spot in the Control Room.

Q. Did you ever have occasion to be addressed by Lieutenant-Commander Marsaw in that manner?
A. Yes.

Q. And when he would yell and scream, can you give any example of the words or phrases he would use? A. He would call people "fucking idiots", "stupid Part 3's", "fucking stupid Part 3's", "useless", "very slow" "stupid". Things of that nature.

Q. And you just indicated that you have been addressed in that manner in the past? A. Yes.

Q. What would be the volume and tone of his voice be like when he would address people in that way?

Lieutenant(N) Byrne

Examination-in-chief

A. It was very loud and it was a very agitated and angry voice.

Q. And besides yourself, did you witness other members of the crew addressed in the manner you've described? A. It was a daily occurrence in the Control Room of the submarine.

Q. And who would have been subject to that type of treatment besides yourself? A. Every officer on board that I've served with had at one point in time been subject to that kind of treatment in the Control Room.

Q. And would that include the officers you listed earlier in your testimony? A. Yes.

Q. Can you give any examples of situations where you were subject to that type of treatment yourself? A. There were a number of occasions. The ones that stick out in my mind the most are the first time that I had such a run in and the last time that I had such a run in. In between there, there may have been several occasions that I either can't remember or they were just so numerous that you just tend to forget them. But I can certainly remember the first time that I was verbally chastised and reprimanded in front of everybody in the Control Room, and the last time.

Q. I'm wondering if you could I guess begin with the first instance then, if you could describe that? A. The first incident occurred fairly shortly after I joined the submarine. The submarine was in dry dock when I joined, for a valve problem, and we sailed in September of 1991. My position was on the plot table navigating on the way out of Halifax Harbour. We had gotten to a position just to the east of ... just to the east and passed Sambro Island, and I was attempting to put the fix on the chart on our way out to the diving position. There was a running fix with Sambro Island being tried and used, as well as trying to figure out the Loran Charlie and where that put us

Lieutenant(N) Byrne

Examination-in-chief

on track. There was a SATNAV fix that had been made available ... but that was DR'd and EP'd along. The Captain and the XO had left the bridge by this point in time and the only person who was up on the bridge was Lieutenant[N] Marr, who was the navigator, and I was reporting the submarine's position relative to track on the way out to the diving position. I was fairly confused as to why three different fixes were all over the place. One fix had us about one cable or 200 yards to starboard of track; one of the other methods of fixing had us two cables or 400 yards to the port of our intended track; and the running fix had us 100 yards to the port of our intended track. I reported to the bridge that we were on track, although we had three fixes that were not necessarily on the track. The Captain had overheard this and was directly behind me, and at hearing that and looking over my shoulder and seeing the chart, he said "You are a fucking liar". And then he turns to the XO and he said "XO, get this fucking liar off the plot".

Q. Were you fudging the sub's position when you made that report? A. No.

Q. How did you feel when Lieutenant-Commander Marsaw addressed you in that manner? A. Not very good. It was very early on in my qualification period, as a matter of fact, probably the first time I had been to sea on a submarine. It had been made known to us ... I can't remember by whom, but it had been suggested to us that if we failed to qualify in submarines, we would no longer be in the Canadian Navy.

DEFENDING OFFICER: Mr Judge Advocate, we're indulging in hearsay here. It appears to be long enough without doing that.

ASSISTANT PROSECUTOR: The words of the witness certainly aren't be entered for the truth of the matter he's reporting and simply goes to his state of mind, what he believed when the incident that he just described occurred, and how he reacted to it, sir.

Lieutenant (N) Byrne

Examination-in-chief

JUDGE ADVOCATE: The objection is sustained.

ASSISTANT PROSECUTOR:

Q. Okay, Lieutenant[N] Byrne, I'd ask you not to report what other people may have said to you, simply your own personal observations? A. Okay.

Q. So again, if you could continue about how you reacted to that particular incident? A. I had just started my qualification process and the fact that the Captain had screamed at me, in public in front of so many people in the Control Room, it didn't make me feel very good and it didn't make me feel very confident about myself. It also made me feel that I was going to have an extremely difficult time in qualifying on board the submarine.

Q. Were subordinates present in the Control Room when that occurred? A. Yes.

Q. And what was the volume of Lieutenant-Commander Marsaw's voice when he made this comment? A. He was yelling and he was angry.

Q. You also indicated there was a second incident that you can give us an example of? A. Yes. That was the last incident that occurred with me on board the submarine and that was during the Counter-Narcotics deployment in 1992.

Q. Could you describe that one? A. The submarine was at periscope depth, we had just finished snorting and we were continuing on at periscope depth. I was on the after periscope and the routine is for the helmsman to brief you or stay where he is and record as to periscope depth by saying "one foot shallow, on depth; one foot deep, on depth", whatever the case may be. At one point in time the submarine went ... or the helmsman reported "one, two, three, four, five foot shallow" at which time I lowered all

Lieutenant (N) Byrne

Examination-in-chief

masts, which is the standard procedure for the person on the after periscope, and started to check out the left-hand side of the ship control side of the submarine to make sure that the efforts were being made to get the submarine back on depth. The commanding officer heard this go on and came running out of his cabin. He came straight to me on the after periscope and was about a foot away from my face when he said "Do you want to play my fucking game?" And then he repeated it when I didn't answer him. I did not know what the game was so I said "No". At that point in time he came closer to me, he said "What do you mean you don't want to play my fucking game?" He then said "You want to be out here for two months and you want to be detected" to which I said "No". The commanding officer then left the Control Room.

Q. What would his tone of voice have been on that occasion? A. Extremely angry and extremely loud.

Q. Again, were others present in the Control Room? A. The whole Control Room watch was present.

Q. Can you comment on the manner in which you performed your duties, given the atmosphere on board the OJIBWA? A. Knowing that you could be yelled at or screamed at for any insufficient work or for any lack of effort, I tried as hard as I could and to the best of my abilities to do my job in the Control Room on board OJIBWA.

Q. Did you ever discuss your feelings and concerns with anybody else on board? A. Yes, I did.

Q. Who would that have been? A. With my peers who were under qualification with me at the same time, with other officers in the Wardroom on board the submarine and with various senior rates on board the submarine as well.

Q. Did Lieutenant-Commander Marsaw's leadership style have any personal affect on you? A. There

Lieutenant (N) Byrne

Examination-in-chief

were some very hard days going home and some very hard times at sea to just think that you were under the ball and you couldn't get out and there was no way that you were ever going to get qualified and go ahead.

Q. What was the morale like on board the OJIBWA? A. Poor.

Q. Can you comment on your own personal morale? A. My own personal morale went up and down. There were good times and there were bad times. I would say that there were few good times when I was feeling very good about myself and very good about the way that I was working, but they were off-weighted greatly by the times that I was getting in trouble for various things and when I was not feeling very good about my performance or what I was doing on board the submarine.

Q. You qualified on board OJIBWA? A. Yes, I did.

Q. Under Lieutenant-Commander Marsaw? A. Yes, I did.

Q. Do you know how many Part 3's qualified on board OJIBWA? A. Five.

Q. And during the time you were on board, how many Part 3's served on board OJIBWA? A. Eleven.

Q. Is that qualification rate, in your experience, normal? A. No.

Q. And why is it not normal? A. It's not normal because the other running boats, in my experience in submarines, which is not that long, have never had a failure in the qualification process.

Q. How would you describe your treatment on board OJIBWA? A. I think that as far as treatments for the officers under training on OJIBWA was concerned

Lieutenant(N) Byrne

Examination-in-chief

I was probably right down the middle. I don't think I was overly treated badly and I don't think I was treated very well, or I don't think that I was treated extremely well but I think I was right down the middle as far as the qualification process on board OJIBWA.

Q. How would you describe your confidence level when you left OJIBWA? A. ...

DEFENDING OFFICER: Mr Judge Advocate, the confidence level of the witness, I question the relevancy of that.

JUDGE ADVOCATE: It's in the same line of questioning as his morale and everything he has talked about previously.

DEFENDING OFFICER: I withdraw that.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR:

Q. Again, Lieutenant[N] Byrne, could you comment on your confidence level when you left?

A. Having finished the qualification process on OJIBWA and having been there for a year and maybe four or five months and having finally gotten away, I figure that if I could qualify on OJIBWA and get through what I had been through in the qualification process, then I would have no problems anywhere else. So I was fairly confident on leaving OJIBWA that I had gone through probably the hardest part of my submarine career.

ASSISTANT PROSECUTOR: Thank you.

Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

Lieutenant (N) Byrne

Cross-examination

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Lieutenant[N] Byrne, I understand that on 21 January 1994 you were interviewed by the Military Police regarding some allegations and circumstances regarding this case? A. Yes, I was.

Q. I understand at that time you were informed that this interview was videotaped, and you were informed of that at that time? A. Yes, I was.

Q. And that indeed it was videotaped and that later on that videotape was produced to you so that you could review it? A. Yes, it was.

Q. Were you satisfied, upon review of that videotape, that what took place there was effectively what happened? A. Yes. I reviewed the videotape, I reviewed the videotape again with a written copy of the transcript of the videotape, and I was satisfied that it was accurate with what I had said during the interview.

Q. I show you here a 56-page document. Could you look at this document and tell the court whether you recognize the document? A. Yes, I recognize the document.

Q. So I understand that this is the document ... this is a transcript of the videotape that you have viewed? A. Yes. This is the transcript and this is also the one that I personally corrected. It's got my penmanship.

Q. It's got your pencil on it. So you are satisfied that what is contained in that transcript reflects what took place during the interview?
A. This is what took place during that interview.
Yes.

Lieutenant(N) Byrne

Cross-examination

DEFENDING OFFICER: Okay. You can put it aside. I'm giving it to you just in case we need to refer to it later.

I will give you a copy, Mr Judge Advocate. Whether or not I will refer to it, I don't know.

JUDGE ADVOCATE: I appreciate it. Thank you.

DEFENDING OFFICER:

Q. So would you say, Lieutenant[N] Byrne, that when you were interviewed by the Military Police you told them the truth? I mean, you answered truthfully to their questions? A. Yes.

Q. Okay. The morning after the mess dinner in 1991, is it possible that Lieutenant Kelk was covered by a sleeping bag? A. No.

Q. Is it possible that Muir was not taped or that he didn't have tape around his ankles? A. No. I believe that I did see tape around his ankles.

Q. The plot table, that's just by the periscope, the attack periscope, isn't it? A. Yes, it's slightly aft of the attack periscope on the right-hand side.

Q. It's very close to it? A. Yes.

Q. What would be the distance between the attack periscope itself, it's head, and then the plot table? A. Between the periscope well and the plot table - two, probably two and a half feet.

Q. Two-two and a half feet. And then, of course, if somebody operates the periscope, he's very close to the officer who would be at the plot table? A. Yes. As you're standing at the plot table with your back is to the periscope you can actually feel the

Lieutenant(N) Byrne

Cross-examination

person go by, not with contact, but you know that somebody has gone by you unannounced.

Q. That is if you are right close in, but if you are just a little away from the plot table then there will be a collision? A. It is quite possible that peoples can make contact in that circumstance. Yes.

Q. Now I understand there's a drape?
A. Yes, it's called a blackout curtain.

Q. Okay. Now when you are at the plot table, what if any ... what are the rules about this, the blackout being on or what? A. If you're coming to periscope depth at night in black lighting, all the lights are reduced to a minimum and the blackout curtain is rigged and fully down.

Q. The blackout curtain is? A. Is lowered, it's down, you're behind it.

Q. You're behind it? A. Yes.

Q. And I take it it was lowered when ...?
A. That is correct.

Q. Yes. So how would you know if it was Lieutenant-Commander Marsaw who kicked you?
A. Because I heard Lieutenant-Commander Marsaw saying "Raise the forward periscope", which means he is going to be the one on the forward periscope. And also, as we were returning to periscope depth, it was Lieutenant-Commander Marsaw who was on the periscope because he very rarely let anybody else take the boat to periscope depth.

Q. Okay. So I believe a reasonable inference can be drawn that Marsaw was at the periscope. That's the inference you're drawing. Would you say though it maybe possible that somebody else that might have gone by could have kicked you? A. Nobody else

Lieutenant (N) Byrne

Cross-examination

would have been moving within the Control Room with the periscope raised. People would not be moving positions with the watch stood to on its way to periscope depth.

Q. Normally people wouldn't, but would you agree that it is possible? A. It is possible, but it is highly unlikely that people would be moving throughout the Control Room.

Q. If I suggest to you that the kick, as you have called it ... Now, why would you even call that a kick anyway? A. Because it was a deliberate foot to the back of my leg to get me out of the way, it was a kick. It wasn't a pat or a rub. It was a kick.

Q. Now you didn't see the person who kicked you and yet you are prepared to qualify it as a deliberate kick. How can you draw that conclusion? A. I felt that I was kicked in the back of the leg to get me out of the way.

Q. Yeah. I'm asking about your conclusion as to why it was deliberate? How do you reach that conclusion without seeing the person? A. Somebody struck me or kicked me in order to get me out of the way in a hurry. And I had no doubt in my mind what the intention of it was, I had no doubt in my mind what my actions were when it happened. I moved very quickly.

Q. Okay. Now suppose that I am on the periscope there and I'm turning around and I extend the leg and make contact, my foot to your ankle or calf. Now I say that it's accidental. You're behind there and you draw the conclusion that it was deliberate? A. Yes, it was intended to make me move and move in a hurry.

Q. Now do you think the concept of deliberate and malicious sort of work together? A. I don't think that the ... it was a deliberate action to make me move in a hurry. I don't know ... I don't think ... I don't regard it as being malicious because I don't

Lieutenant (N) Byrne

Cross-examination

think that it was intended to hurt me, I think it was intended to make me move and move in a hurry.

Q. Is it possible that it could have been accidental, despite your own believe that it was deliberate? A. I don't think that a foot could have hit me in the middle of the calf with somebody walking around the periscope, because people usually don't raise their feet that high as they're shuffling around with a periscope in their hands.

Q. So it's absolutely impossible, although you didn't see how it happened, it's absolutely impossible that it could be an accident? A. No, I would not say it could be absolutely impossible that it was an accident.

Q. So then it is possible that it was an accident? A. Yes, it is possible that it was an accident.

Q. And would you say that the likelihood of that possibility is greater, given the very confined space? A. I'd say that given the confined space, the likelihood of people making contact is present, however it would be bodily contact and not a foot hitting you in the middle of the calf.

Q. It would depend, of course, how one does move around the periscope? A. Yes, very much so.

Q. And that's something that you were not able to observe? A. In that particular incident - no, I was not able to observe that.

Q. Did you read an article in the Chronicle-Herald on 16 December 1993? A. Yes, I did.

Q. And is that right too that you were aware, like several weeks before its publication, that something along that line was brewing and would be coming up? A. Yes. I had been told ...

Lieutenant (N) Byrne

Cross-examination

Q. Okay, don't ... A. Yes.

Q. Don't repeat words here. But is that correct that Lieutenant[N] Hart was instrumental in this knowledge that you had that the article was coming? A. Yes, it was.

Q. And you read the article ...? A. Yes.

Q. ... on 16 December, and you were interviewed in January '94? A. Yes.

Q. The kicking, as we have been calling it, incident, you said that you don't think it was malicious? A. No.

Q. Now, how do you correlate the expressions "deliberate", "intentional", "accidental" and "malicious" in the context of this incident? A. With regard to the incident, I believe it was a deliberate attempt to make me move from my current position to another position in a hurry. I don't think it was intended to hurt me while I was standing there. However it was intended to draw my attention to the fact that I was in the way and that I had to move very quickly.

Q. The word "malicious" that I propose has not been incorporated in this answer of yours? A. No, because if there was malicious intent, in my own opinion, like if it was a malicious intent, if it was a kick that was maliciously intended to hurt me then I would consider it malicious in that if somebody was trying to attempt to hurt me would be malicious.

Q. So it is your belief that whatever happened there was not malicious? A. It is my belief that it was not malicious, as it was not intended to hurt me. However, it was intended to make me move and move very quickly from my current position.

Lieutenant (N) Byrne

Cross-examination

Q. Is that correct that at the time that really didn't bother you too much at all? A. No. I was fairly shocked by it at the beginning, but as I was moving so quickly to get out of the way, it was just I was out of the way, it was over with, it was done. I had been kicked in the back of the leg to make me move. It was a learning experience for me.

Q. In answering a question of the prosecution, you stated that you never saw anybody else kicking? A. Yes.

Q. And you also said that it was not appropriate to kick? A. That is correct.

Q. If I suggest to you that you stated something slightly different to the Military Police in terms of having seen other people doing it, is that possible? A. That maybe possible.

Q. Could you please look at page 32 of the transcript and read the second last paragraph for yourself. It starts with the word "No"? A. Yes.

Q. Okay, forget that. I mistook this here. Forget that question. Talking about what is accidental or inadvertent, if I suggest to you that you told the MPs that it was ... this act of kicking of yours, was you thought at the time inadvertent, is that possible? A. No, I never thought it was inadvertent. I thought it was intended to make me move.

Q. Could you have mentioned to the MPs, for example, that collisions and all that can be easily accidental? A. Yes. I have seen a person on the periscope collide with somebody who was walking through the Control Room when he shouldn't have been at the same time.

Q. Okay. How would you distinguish between what you have referred to as a kick and a collision, or isn't a kick some form of collision? A. No. When I

Lieutenant(N) Byrne

Cross-examination

referred to collisions in my videotape, or a collision in my videotape which I had witnessed, it was a person going around on the periscope running bodily, the whole side of his body, hitting somebody as they were walking through the periscope. It was not just a foot hitting somebody with the periscope, which I construe if it is deliberate to be kicking.

Q. Would you say that when somebody is working on the periscope, I mean his arms would be going around and his feet will be sort of moving forward and one lagging? Is that correct? A. He would be moving himself with his feet around in a circle around the periscope well. Yes.

Q. That's right. Now if a leg was moving like this, touches something ... A. Yes.

Q. Is that a collision? A. Yes, if it was inadvertent ... a collision. If it is inadvertent it is bodily contact between two bodies. Yes.

Q. Would you agree that the concept of collision, what amounts to collision does not depend on advertent or inadvertent, it is a physical contact, a physical contact is a collision? A. A collision would be a physical contact. Yes.

Q. Okay. So a leg touching something on the way as a person goes around the periscope - that amounts to a collision? A. Yes. Two bodies making contact would be a collision.

Q. Do you recall during the interview demonstrating to the MPs the level of force of this contact? A. Yes.

Q. Given that you've testified this morning that you may have been hit ... how many times approximately like this? A. Two, possibly three times.

Lieutenant (N) Byrne

Cross-examination

Q. Okay. Which of the two or three times did you demonstrate to the MPs? A. The first time.

Q. Do you consider the demonstration you made this morning as amounting to a hard kick as you demonstrated? A. Personally I don't think it was that hard.

Q. So what you did this morning, you do not consider it hard? A. No.

Q. And basically it's then your approach throughout that that kick or collision, as we now have established a kick might be ...? A. ...

PROSECUTOR: I'd object to that, Mr Judge Advocate. I don't think he has established that at all. I think the word "collision" is a contact with bodies and the witness has consistently stated that intent is something that he attributes to the definition of a "kick". But I think my friend is putting words in the witness' mouth in making the statement of a fact that doesn't exist.

JUDGE ADVOCATE: It is sustained. You have not established anything like that.

DEFENDING OFFICER: Okay.

Q. So that kick, as you call it, is that right then to say that it has been your position throughout that it was not a hard kick at all? A. Yes. It is my position that it was not intended to injure, it was intended to get me to move ...

Q. No, just answer my question. Don't talk about the intent or anything like that. Just tell the court how hard it was? What is your position as to how hard it was? A. It was hard enough to notice.

Q. But you did not consider it very hard? A. No, I did not consider it very hard.

Lieutenant (N) Byrne

Cross-examination

Q. Now, you talked about ... you used words such as "fucking idiot" and others like that. If I suggest to you that at the time of the interview with the MPs you did not recall such words, would that be correct? A. No.

Q. You've used the words this morning "stupid Part 3". Is that a word that you would recall having mentioned to the MPs? A. It's not in my transcript to the MPs. No.

Q. It is not? A. No.

Q. Therefore, it's a word that you did not mention to the MPs? A. In that videotaped interview it is a word that I did not mention to the MPs. Yes.

Q. Although the matter of the words used was raised by the MPs, they were asking you to tell them? A. Correct.

Q. You did not tell them about that expression? A. No.

Q. And you did not tell them about being very slow? A. I can't remember exactly what I said to the MPs at this point in time, except for I mentioned "slow", "stupid" and things like that in my interview with the MPs.

Q. If you look at page 6, para 5, there is reference made to some adjectives. The para 5 starts with "Okay"? A. Uh-huh.

Q. And then you give an answer to that. Now is the word "slow" ever mentioned there? A. It's mentioned in the paragraph preceding "in what manner".

JUDGE ADVOCATE: Where's that?

WITNESS: Sorry. The paragraph after, the Military Police say "In what manner". "Straightforward

Lieutenant(N) Byrne

Cross-examination

in the face, sometimes are being called stupid, or slow, or dim-witted, or something like that".

PROSECUTOR: Mr Judge Advocate, another MRE 100 objection.

JUDGE ADVOCATE: Yes. We have the same problem as he had yesterday when your friend was cross-examining.

PROSECUTOR: The defence counsel is standing up, shoving words in the witness' face, saying that you didn't say this or you didn't say that to the MPs. The proper way is to ask whether the question was asked, do you recall your answer, if not the witness has a chance to refer to his transcript. In fact, when we do, we see in fact that those words were adopted by the witness although ... trying to put down his throat that he never did say them.

JUDGE ADVOCATE: You may not do that intentionally.

DEFENDING OFFICER: No.

JUDGE ADVOCATE: I'm not accusing you of doing it, Lieutenant-Colonel Couture, but the way you ask your question confuses the witness and that's a very good example of it because the word that you are trying to have the witness say he never used was used the paragraph immediately after where you refer him.

DEFENDING OFFICER: Yes, and it was a mistake. Now I was not though, in answer to the prosecution there, I must say that I was not first of all operating under 100 and I was not ... and I apologize if ... and apparently I did, it may have been confusing. I had missed that word there. But I was at that point and proceeding, as I have ask the witness to look only at the transcript for himself, I was merely attempting to refresh his memory as to the use of words. And I was to put the question to him again and it

Lieutenant(N) Byrne

Cross-examination

would have been, if it hadn't been for the objection ... in fact he did answer. So he's refreshed his memory and his answer.

JUDGE ADVOCATE: I understand that, but the problem in doing so is that when you refresh the witness' memory you ask him only to refer to one very specific paragraph

DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: ... although the part of the interview that may have dealt with that specific matter may last for pages in the transcript. So it's not fair to the witness.

DEFENDING OFFICER: No, absolutely, and I fully agree with you, Mr Judge Advocate. I made a mistake. The word was there, okay, and after ... and as I was going down I realized. One question earlier I directed the witness to a page and I withdrew my question. So, obviously, I'm not here to mislead the witness.

JUDGE ADVOCATE: I don't say it's intentional at all, but believe me ...

DEFENDING OFFICER: But you appreciate the difficulty of having to go through that as well as to be prepared as one can be ... those things may happen. And as it happened before, I withdrew my question and that's it.

PROSECUTOR: I'd just like to add, Mr Judge Advocate, I in no way think that my friend has, ever will, and ever has intentionally tried to mislead anybody in any court. Simply, I'm objecting to the effect of the procedure, the method that's used.

JUDGE ADVOCATE: Yes. That's the way I understood it too. Yes.

Lieutenant(N) Byrne

Cross-examination

DEFENDING OFFICER:

Q. Okay now, having said all this, Lieutenant[N] Byrne, aside from the two incidents you just testified about, the fix and the lowering of the mast ... you can put that down for now. Is that correct to say that you cannot recall any specific incident of what you'd call verbal abuse or anything like that? A. No, it's not correct to say that. There were several incidents in between the first and the last. That's what I said. I can't remember any specifics of any in between.

Q. That's right. So you cannot recall any specifics? A. Yes.

Q. Specific incident? A. That's correct.

Q. Let's talk about the fix. In your testimony you said that ... and I noted the very word "attempting" ...? A. Correct.

Q. ... to put a fix? A. Yes.

Q. Do I understand that you were having problems putting your fix? A. No, I was confused about the actual position of the submarine.

Q. Okay. If I suggest to you that maybe as arising out of confusion you draw a line and you put a fix there ... like you move your ruler to make the two points meet as they should. Like, basically, one would call that fudging a fix. Like it doesn't seem to jive too much so we just move the ruler and draw the line? A. If I had fudged the fix, the fix would have been on the track. I had three fixes on the chart neither of which were on the track.

Q. Uh-huh. How important are the two other fixes to establish and determine your current position?

A. Which two other fixes?

Lieutenant(N) Byrne

Cross-examination

Q. Well, you say that there were two other fixes? A. Yes.

Q. Now at a given time, if you want to know your position, isn't it the fix that you're putting there that is determinant of your position and not the fix from before? A. I'm afraid I don't understand your question there.

Q. Okay, let's try to understand together. You said that you were confused yourself as to what was going on with the fix? A. I was confused as to the actual submarine's position because I had three possible positions on the chart.

Q. Okay. Now what did you do in an attempt to solve that problem? A. I don't think I did anything to attempt to solve that problem.

Q. So you didn't know where you were but you didn't take any action to try to determine where you were? A. I knew where I was within three or four hundred yards of the actual position of the submarine. Yes. In the traffic lanes, outbound from Halifax.

Q. Now did you say that this took place as you were going in or out in your testimony today? A. Out.

Q. Out. This morning in your testimony, I believe you said that Lieutenant-Commander Marsaw said "You are a fucking liar" and continued on "XO, take this fucking liar off the plot"? A. "Get this fucking liar off the plot".

Q. "Get". Let's correct this right now. So that's what you said? A. Yes.

Q. If I suggest to you that when you were interviewed by the MPs on 21 January 1994 you did not recall that quote? A. I can't remember what's in the transcript regarding that quote.

Lieutenant(N) Byrne

Cross-examination

Q. Okay. To assist you in refreshing your memory under Rule 92 of the Military Rules of Evidence, would you look at page seven of the transcript that starts with the two lines on top, so let's not count that as a paragraph. Then there's the big paragraph followed by another which is a question, followed by an answer. Read that to yourself, just to yourself?

A. Yes.

Q. Okay, now isn't that ... I put the question to you now, is it a fact that at the time of the interview you did not recall the exact quote?

A. That's correct. And at this time I don't recall the exact quote either.

Q. So why then did you testify as to what you testified in direct, that he said "You're a fucking liar. XO, get this fucking liar off the plot"?

A. There was more said prior to being called a fucking liar, and some said after being called a fucking liar, which would have been in the direct quote of the whole circumstance. I can only remember two points of it which were "You're a fucking liar" and "XO, get this fucking liar off the plot".

Q. Well my point, I have only one point here, and my point is that you didn't tell this quote to the MPs because you said you could not remember the quote. Is that correct or not? A. ...

JUDGE ADVOCATE: Exact quote.

WITNESS: Exact quote.

JUDGE ADVOCATE: That's different, Lieutenant-Colonel Couture.

WITNESS: Yes.

DEFENDING OFFICER: I mean, what's ...

Lieutenant(N) Byrne

Cross-examination

JUDGE ADVOCATE: Don't ... I mean, the purpose is not to play on words. The witness has said from the beginning that he does not know the exact quote. That's different than not to remember what was said. I mean we're talking about exactly what was said, words verbatim.

DEFENDING OFFICER: I understand, but what has ...

JUDGE ADVOCATE: That's all what he says.

DEFENDING OFFICER: But what has the witness testified on this morning?

JUDGE ADVOCATE: He never said it, but I will check my notes. I don't think he ever said it was the exact quote from Marsaw. He may have. Tell me if I'm wrong. I'm just referring to my notes.

DEFENDING OFFICER: Can we excuse the witness for a moment and I would like to address this issue a little further.

JUDGE ADVOCATE: Very well. Would you please withdraw from the courtroom.

WITNESS RETIRES.

DEFENDING OFFICER: Mr Judge Advocate, it is not my position that the witness has said this morning, has used even the word "exact". That's all right, I am prepared to concede that. Nonetheless, the question by the prosecution is "Do you remember the words?" "What did he tell you then?" Okay. He has testified here and he says "He told me ..." the words that I won't repeat again. Now, although he may not use the word "exact", what he is giving there is a quote which he represents to this court as being the exact ...

JUDGE ADVOCATE: But he never said that. He never said that. And now you try to contradict him, if

you want, with a statement he has previously made to the Military Police when he said something, and you referred to it, when he said that he "... can't really remember the exact quote". So, again, I would not like this exercise to be an exercise of confusion in misleading the witness.

DEFENDING OFFICER: No. But the witness ... and I can carry on my examination of the witness by saying - did you give any quote to the Military Police?, and he didn't.

JUDGE ADVOCATE: I think we already have an answer. You may proceed on that line if you want, but we already have an answer to the effect that you note again this area of the transcript where you referred him to, as he said - it's just part of the answer, there were words pronounced before and after and, in any event, he never gave an exact quote either before or today in court. But you may elaborate on that if you want, but I think we have an answer. But again, it's important not to mislead the witness because I think again he was ... I shouldn't say he was misled, but he was confused as to words he said or exact words. I mean the word "exact" is very important, in other words, in your question.

DEFENDING OFFICER: Yes. But although, as I said, he did give this quote to the court.

JUDGE ADVOCATE: No, you may elaborate on that.

DEFENDING OFFICER: Anyway, I understand. I don't want to split hairs, but anyway I'll carry on in that line.

JUDGE ADVOCATE: Would you please recall the witness.

WITNESS RETURNS TO THE COURTROOM.

Lieutenant (N) Byrne

Cross-examination

DEFENDING OFFICER:

Q. If I suggest to you that this answer at page seven was the last of your discussion on this particular matter with the MPs, would you agree with that ... on the very matter of the liar? A. I would agree, but I haven't memorized the whole transcript, so I don't know if we went back to that question again later on in the transcript.

Q. Uh, huh. Okay, I'll rephrase the question maybe to help you to understand better again. If I suggest to you that you did not offer any specific or any quotes at all to the MPs as to this being called a liar, you did not offer a quote. You said the ... A. I said I was called ...

Q. The word liar, is it there? A. Yes.

Q. But you don't have a full quote, for example, like you said this morning. Would you consider what you said this morning ...? A. ...

PROSECUTOR: Objection. He says again, like a full quote like you said this morning. The witness has already testified that he doesn't have a full quote even this morning. So this is another example, without intending it to happen, of words being put into the witness' mouth. And he's being interrupted when he's trying to give his answers.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, the witness said he did not quote this morning when he testified. He said the same way I did not quote to the MPs, I did not quote in examination-in-chief when I was asked that question. That's what I have in my notes at least.

DEFENDING OFFICER: Mr Judge Advocate, the witness may say that he didn't quote as long as he wants. I believe he did quote. When a person says ...

Lieutenant (N) Byrne

Cross-examination

JUDGE ADVOCATE: Well, ask him again if he did quote. He already said he did not, but you may ask him again.

DEFENDING OFFICER:

Q. When you said this morning in your direct examination, you said that Lieutenant-Commander Marsaw said "You're a fucking liar. XO, get this fucking liar off the plot". A. I did say that.

Q. Okay, do you consider that a quote of what was said? A. It is not a quote of exactly the whole thing that was said in the Control Room, it is the main points that I remember hearing because they were necessarily directed directly at me in the Control Room.

Q. Now let's explore that a little more. Are you saying that this is not a quote of the whole conversation, but this is a quote of a portion of what was said? A. I am saying it's not an exact quote of everything that was said at that period of time in the Control Room. It is an excerpt from what may have been said and it's what I recall from what was said in the Control Room.

Q. Would you consider an excerpt of a whole conversation to be a quote? A. It was said within the conversation. Yes.

Q. Is that a quote? Are you quoting what you recall Lieutenant-Commander Marsaw told you or not? A. I am re-saying what Lieutenant-Commander Marsaw called me in the Control Room.

DEFENDING OFFICER: Mr Judge Advocate, might you assist me by inviting the witness to answer the question.

JUDGE ADVOCATE: I think he did, I understood very well what he said. I don't if you did or not, but

Lieutenant(N) Byrne

Cross-examination

in my mind it's very clear. It may not be the words that you wanted to have as an answer, but what can I say? We can not ask the witness to change his words.

DEFENDING OFFICER: I asked him if it's a quote and he is deliberately avoiding to talk about the quote, which has been the whole subject of this matter.

JUDGE ADVOCATE: That's not my view of this matter. I don't think we can say that he's deliberately avoiding the answer. He may not give the words you want to have as an answer - that's different.

Yes, Major Abbott?

PROSECUTOR: I think my friend has taken numerous runs at the same question over and over again. I would respectfully ask that he be invited to move on.

JUDGE ADVOCATE: Well, he's in cross-examination and he knows how to proceed with his case. I have to agree with you that he's had several good runs at it, but let's hope that we will see the end of it sometime.

DEFENDING OFFICER: And we are getting there, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER:

Q. If I suggest to you that the words spoken were more along the line "Don't lie to me", what would be your reaction? A. I do not recall anybody saying "Don't lie to me".

Q. Is that correct that after whatever words were spoken that you went to the Captain's room and had a heart to heart? A. Yes, it is correct.

Lieutenant (N) Byrne

Cross-examination

Q. And that he debriefed you and you discussed this matter about whatever ... you discussed the incident that had taken place and he counselled you?

A. It was a very short discussion and it was one-way. Yes.

Q. You did not mention that in your direct examination this morning, did you? A. No, I did not.

Q. You gave another example about the Counter-Narcotic deployment in 1992 and being five-foot shallow or something, and lowering the mast, etcetera?

A. Yes, I did.

Q. Do you recall telling the MPs about this, this particular example? A. I may have told the MPs about it. I can't recall exactly.

Q. Could you quickly go through the ...
A. Can you direct me to a specific page?

Q. No, no. I'm just asking you to verify or attempt to determine whether you mentioned this incident? A. ...

JUDGE ADVOCATE: There are 56 pages.

PROSECUTOR: Perhaps if my friend knows that it is mentioned in the transcript he could let us know what page it is, it would save time.

JUDGE ADVOCATE: He said he did not, I think.

DEFENDING OFFICER: I believe it is not, but my fear of misleading the witness, I want him to ascertain for himself. If it was, I could direct him to a specific page.

JUDGE ADVOCATE: I understand. I understand.

DEFENDING OFFICER: If it is not ...

Lieutenant (N) Byrne

Cross-examination

WITNESS: No. I made no reference in this transcript of the videotape of the incident that I described this morning.

DEFENDING OFFICER:

Q. That's the incident where you talk about the fucking game, and playing one's game or not, and that sort of thing? A. Yes, that incident.

Q. And you have explained that this morning with quite some confidence and in quite some detail, would you say? A. Yes, I have.

Q. Yes. And as the MPs were looking for examples of words and what not during that investigation, you did not mention that at all to them? A. No, I did not.

Q. Now, you talked about five officers qualified out of eleven and you have claimed that this was a low rate? A. Yes.

Q. You haven't sailed on other submarines?
A. No, I have not sailed on other submarines.

Q. So on what basis can you make that sort of comparison? A. On the basis that everybody I know over the last four years, who has come down to submarines to qualify from the Basic Submarine Course, has qualified with the exception of the members on board OJIBWA, which did not qualify.

Q. Everybody that has been on any other submarine has qualified? A. Yes. I can't remember anybody on ONONDAGA or OKANAGAN who has failed to qualify on board the submarine.

Q. But you weren't there? A. No, I was not there.

Lieutenant (N) Byrne

Cross-examination

Q. So there might have been other trainees there that you don't know that have qualified? A. I'm talking about officers qualifying. Yes.

Q. Yes. And I guess you wouldn't get to know them if they did not qualify because they're not around any more? A. I know all the officers who have come down to qualify in submarines from the Basic Officers Course in recent time. Yes.

Q. You know all officers that have ...
A. Well, maybe not. Maybe not perhaps all, however, over the course of my period in submarines, all people who have successfully completed the Basic Submarine Officers Course, who have come down to the Submarine Squadron to qualify on board submarines, I have met and I know.

Q. Yes, and I said, those who haven't qualified you wouldn't know because you haven't met them - they're not around any more? A. Well those who haven't qualified, I still know some of them, but yes.

Q. And is that correct to say that you don't know personally the real reason as to why for example some officers may not have completed or may have been ceased training? A. Yes, that's correct.

Q. Okay. So many people did not qualify but you don't know the very reason? A. I don't know the extenuating circumstances for all people who did not qualify.

Q. You said at the end of your testimony that your confidence was up, so you felt that a good hand and some good demands on an officer ... I mean, if you've been through this you're up for anybody else, aren't you? A. I was fairly confident in my abilities to succeed after having qualified on board OJIBWA. Yes.

Lieutenant(N) Byrne

Cross-examination

Q. Yes. And for that, I suppose, you are thankful to Lieutenant-Commander Marsaw? A. Yes, he was instrumental in preparing me for my submarine qualification board.

Q. And I take it that you would have no fear to go and work for him? A. No, I have no fear of going to work for Lieutenant-Commander Marsaw.

Q. On the basis of your observations, and that is different from my previous line of questioning, that you wouldn't know all the reasons for a failure of a trainee? A. Yes.

Q. Did you have an opportunity to form an opinion on Elford and Kohli as trainees? A. Yes, I did.

Q. And what would you say, how did you consider them? A. They were under training at the same time as myself and Lieutenant[N] Pitman, and I considered them not to be as strong at doing their job as Lieutenant[N] Pitman and myself were.

Q. So weak? A. Yes, they were weaker than Lieutenant[N] Pitman and myself.

Q. I gather that at times you wouldn't eat in the Wardroom? A. Which Wardroom?

Q. The submarine, OJIBWA's Wardroom?
A. Yes.

Q. And I understand that you wouldn't eat in there because there was no room? A. That is correct.

Q. Not enough space, physical space?
A. Yes.

Q. It was not because you were intimidated by Lieutenant-Commander Marsaw that you wouldn't eat there? A. No.

Lieutenant(N) Byrne

Cross-examination

Q. In fact, you claimed the privilege of maybe being the only officer on board OJIBWA to chase Lieutenant-Commander Marsaw out of the Wardroom? A. I didn't chase Lieutenant-Commander Marsaw out of the Wardroom.

Q. Could you tell the court about that?
A. I had been moved from the Control Room into the Engine Room for qualification for a two-week period as, a Part 3 officer, they gave me all the great jobs in the Engine Room: cleaning lube oil separators, doing fastenings and keeps and the diesel generators and what not. You get very dirty doing those jobs. I came in for lunch into the Wardroom on board the submarine one day after being on watch in the Engine Room for four hours and because I had been in there for two weeks I was not necessarily the cleanest person on board the submarine. My shirt was fairly dirty. Lieutenant-Commander Marsaw had a look at me and said "You know, if you need a clean shirt, I'll give you one", to which I responded "I don't think it will fit". And then he left.

Q. So, for all intent and purpose, you chased him. A. I did not chase him.

Q. Okay. And there's been some evidence sometime that questions were being asked during meals from time to time of trainees? A. Yes.

Q. Was that correct that it was sort of part of the training, like you're there to qualify to train and it's a tool of training? A. Yes.

Q. It was done in that context? A. It was done in that context. Yes.

Q. And is that correct too that some of the qualified officers were having problems with some of the questions? A. Yes.

Lieutenant (N) Byrne

Cross-examination

Q. That was a little odd, wasn't it? A. I thought so. Yes.

Q. Would you say that officers in general on subs were accessible to discuss problems, like if there were complaints or anything like that, it was open to you to go and talk to an officer? A. Yes.

Q. So if something was really not working to one's liking it was open, according to your own observations and what you said, to go to officers that would be open to listen and try to help? A. As an officer under qualification - yes, I would have gone to other officers within the Wardroom if I had problems.

Q. Now would you agree that your own training was a little slow, like the average period sometimes is said to be seven or eight months and you took a little longer? A. I did take longer than seven or eight months. Yes.

Q. And there was a bit maybe of an attitude problem or something with you, and Lieutenant-Commander Marsaw gave you a reproof, and that sort of shook you up and you carried on and got it? A. Yes, I did sign a reproof for failure to progress in qualification as fast as Lieutenant-Commander Marsaw wanted me to.

Q. Uh-huh. But that shook you up and you successfully completed your training as you stated earlier? A. Well, that was one of the factors in shaking me up and getting through the training - yes. There were other factors as well.

DEFENDING OFFICER: Yes.

If I may have a minute, Mr Judge Advocate, to review my notes?

JUDGE ADVOCATE: Certainly.

Lieutenant(N) Byrne

Cross-examination

DEFENDING OFFICER: Okay, I'll have one or two questions only left.

Q. When you were on board OJIBWA, do you recall Lieutenant-Commander Marsaw praising officers sometimes? A. Yes.

Q. You do. And is that correct that you have recollection of one particular incident where he praised Lieutenant[N] Higginson, the Navigator? A. Yes, that is correct.

Q. And it was in a passage somewhere ... where was it? A. It was just after he completed his passage into Portsmouth, New Hampshire for a port visit.

Q. Okay. And so the story goes that the Captain went to Higginson and said what? A. Yes. After the submarine had tied up alongside, in the Wardroom the Captain said to Lieutenant[N] Higginson "That was a good passage. Way to go" or something to that effect.

Q. And overall the situation, like on board OJIBWA, the training and of course the work and the way Lieutenant-Commander Marsaw was running the submarine, how would you qualify that, and is that correct that you have qualified it as not abusive but amounting to some hardship? A. Yes. For myself, personally, I do not think that I was ever abused, however, I did go through some very hard times on board OJIBWA.

Q. And I believe that you were prepared for that, like you knew ... A. I testified that I was prepared for the kind of events that I was going to go through on board the submarine in the qualification process. Yes.

Q. Because the submarine qualification is, I mean, it is not an easy program? A. Correct.

Lieutenant(N) Byrne

Re-examination

Q. And you were prepared for it and it doesn't come easy and that's what you mean by hardship, is it? A. Yes.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Lieutenant(N) Byrne, in response to the question my friend just asked, at this time do you consider yourself to have been abused while you were on board OJIBWA? A. I would consider myself to have been treated fairly harshly in several subjects on board OJIBWA. Yes.

Q. With respect to the question on praise, how frequent was praise given by the CO on board OJIBWA? A. I don't know how frequently it was given, in the time that I was on board I witnessed it three times.

Q. What about criticism or rebuking, how frequent did that occur? A. That was an almost daily occasion.

Q. You indicated that you wouldn't go to anybody within the Wardroom with respect to problems you were having on board. Is the commanding officer part of the Wardroom on the submarine? A. ...

DEFENDING OFFICER: Mr Judge Advocate ...

WITNESS: I never said that.

DEFENDING OFFICER: I disagree here and object on the basis that I don't think the witness

Lieutenant(N) Byrne

Re-examination

testified to anything like the prosecutor was putting to him.

ASSISTANT PROSECUTOR: I apologize, I misread my notes.

Q. You indicated that you would speak with other officers within the Wardroom, I think, about the situation on board? A. That's correct.

ASSISTANT PROSECUTOR: Yes. I apologize for that, Mr Judge Advocate.

JUDGE ADVOCATE: Very well.

ASSISTANT PROSECUTOR:

Q. Is the commanding officer of OJIBWA part of the Wardroom? A. He lives and eats in the Wardroom. Yes.

Q. Is he a member of the Wardroom?
A. Technically, the commanding officer is not a member of the Wardroom. No.

Q. You also indicated that you didn't fear going back to work for Lieutenant-Commander Marsaw again. Would you desire to go back or wish to work for Lieutenant-Commander Marsaw again? A. I have in the past volunteered to go and work for Lieutenant-Commander Marsaw after I got off OJIBWA.

Q. And why was that? A. That was because when I qualified in September of 1992 and then left the submarine, I was shore-posted, and being shore-posted I was not getting the required sea time to progress within the submarine environment. The other officer that I qualified with on the same day has, in the time of the last three years, gone through all of the qualifications to be an XO, where I have only gone through one, having finished the DNO course. So I was anxious

Lieutenant(N) Byrne

Re-examination

to get to sea and anxious to get sea time in, in order to qualify within the submarine community.

Q. So today, given your situation today, would you wish or desire to serve with Lieutenant-Commander Marsaw? A. No.

Q. My friend raised a couple of issues, one with respect to not reporting the second incident you've described on the after periscope, and with respect to the words that you reported. Since your MP interview, have you considered your experience on board OJIBWA? A. Yes.

Q. And what has been the effect of considering that experience? A. I wasn't given a list of questions that the MPs were going to ask me before the videotape, and also I've had opportunity to reflect upon lots of things that had happened to me on board OJIBWA and have been questioned quite a lot about things that happened to me on board OJIBWA.

Q. My friend also touched on a discussion in the Captain's cabin after the incident you described about leaving Halifax harbour? A. Yes.

Q. Did I ask you any questions about that in your examination-in-chief, about the Captain's cabin discussion? A. Yes, you did. One question I believe.

Q. How did you feel after that discussion? A. Not very confident, as it was a very short and terse discussion.

Q. You were also asked a question about other incidents, other than the two examples that you gave, and I believe your response was you can't recall other specifics? A. That is correct.

Q. Why can't you recall the specifics of other incidents? A. The ones that stay in my mind the

Lieutenant (N) Byrne

Re-examination

most are the first one and the last one because there were so many in between.

Q. Defence counsel also discussed with you how you would describe the kick, was it a hard kick. Would you describe the kick that you demonstrated during your examination by myself as a hard kick, and you responded "No"? A. Yes.

Q. I wonder if you could stand up and maybe move the chair and demonstrate what you would consider a hard kick on the leg of the chair? A. ...

ASSISTANT PROSECUTOR: I'd ask that the record indicate that the demonstration of a hard kick, the chair moved approximately 10 inches, I think would be a fair description. I don't know if my friend would agree?

DEFENDING OFFICER: I disagree with the distance.

JUDGE ADVOCATE: I'm sure you would.

ASSISTANT PROSECUTOR: Perhaps we could reach some agreement on that?

Q. You also talked about whether or not the kick was malicious? A. Yes.

Q. What do you believe would have had to occur for that to have been a malicious kick? What would have had happen to characterize it as malicious? A. Well I didn't bruise or anything from the kick, so it wasn't an injury or anything like that. If I had bruised or something like that I would have considered it to be malicious and intended to hurt me.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

Lieutenant (N) Byrne

Questioned by court

JUDGE ADVOCATE: I have one question.

QUESTIONED BY THE COURT

JUDGE ADVOCATE:

Q. The kicking incident again. When you were kicked, or after you were kicked, were apologies made to you? A. No.

JUDGE ADVOCATE: Questions arising? Prosecution?

ASSISTANT PROSECUTOR: None, sir.

JUDGE ADVOCATE: Defence?

DEFENDING OFFICER: Yes, please.

QUESTIONED BY DEFENDING OFFICER THROUGH COURT

Q. How often have you ... how customary is it for officers in the Control Room to apologize, like when they touch and bang into each other? A. Not very often.

Q. Because would you say that ...? A. ...

DEFENDING OFFICER: Is there a problem, Mr Judge Advocate?

JUDGE ADVOCATE: Well, I mean when they touch? I was referring to a kick not to a touch.

DEFENDING OFFICER: When they collide?

JUDGE ADVOCATE: When they kick, if they kick. I mean I don't want to put your questions in your mouth, but the fact that you're asking a different question arising, I will have to be in a position to ask another question after that, even though it's not in the rules. My question was "After you were kicked

Lieutenant(N) Byrne Defending Officer through court

were apologies made to you?" Then you ask a question that is aside that.

DEFENDING OFFICER: Okay.

Q. To avoid any further complications, when people are kicking each other in the Wardroom, is it normal or are you accustomed ... A. I never witnessed other people being kicked, except for myself which I thought I was kicked, and I was not apologized to.

DEFENDING OFFICER: Okay.

JUDGE ADVOCATE: Thank you.
Thank you, Lieutenant[N].

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court is adjourned for fifteen minutes.

ADJOURNMENT: At 1140 hours, 6 October 1995, the court adjourns.

REASSEMBLY: At 1200 hours, 6 October 1995, the court reassembles and the accused is before it.

PROSECUTOR: The next witness will be Lieutenant[N] Watt.

s.19(1)

Lieutenant(N) Watt

Examination-in-chief

TWELFTH WITNESS) Lieutenant(N)
FOR THE) R. J. WATT, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you give your full name to the court and spell your last name please?

A. My full name is Robert Jeffery Watt, last name is spelled W-A-T-T.

Q. What's your current position? A. I'm OIC of Diving Tender Nine, Fleet Diving Unit (Pacific).

Q. I understand you began your interest in the military at an early age, joined Army Cadets, so you were 13 and stayed in cadets until you were 17?

A. Yes.

Q. You joined the Reserves in 1985?

A. Yes.

Q. And in 1986 joined the Canadian Forces, Regular Force? A. That's correct.

Q. Attended Royal Military College and then transferred to Royal Roads? A. Yes.

Q. And graduated in 1990? A. Yes.

Q. From October '92 until October '93, you were a member of the OJIBWA? A. Yes.

Q. And you attempted unsuccessfully during that time period to qualify for your "Dolphins"?

A. Yes.

Q. Subsequently, October '93, you were posted to OKANAGAN? A. That's correct.

Q. And subsequently did obtain and qualify for your "Dolphins"? A. In December of that year.

Lieutenant(N) Watt

Examination-in-chief

Q. In December of that year, and you stayed on the OKANAGAN from October '93 until January '94?

A. Yes.

Q. And who was your commanding officer on the OKANAGAN? A. It was Lieutenant-Commander Hickey.

Q. Apart from Lieutenant-Commander Marsaw, when you were on the OJIBWA, and Hickey on the OKANAGAN, had you sailed with any other Canadian submarine COs? A. Yes. I sailed with Lieutenant-Commander Woodburn on ONONDAGA.

Q. And who was his XO at the time? A. It was Lieutenant[N] Kavanagh.

Q. Can you describe for the court your first conversation with Lieutenant-Commander Marsaw when you joined the OJIBWA and was in the Wardroom having a meal with him? A. During my first conversation, it was just prior of sailing for work ups. I was asked by him if the haircut which I had got, if I had gone to a barber or a hair stylist for fags.

Q. Okay, who was present with he when he made that comment? A. The entire Wardroom.

Q. Was that the first conversation you had with Lieutenant-Commander Marsaw? A. I had met him before but that was the first conversation I likely had with him.

Q. How would you describe his leadership style? A. I would describe it as leadership by fear.

Q. Based on your observations, how would the watch officer respond when Lieutenant-Commander Marsaw entered the Control Room? A. Usually the watch officer would whisper to us that the CO was present, especially if it was black lighting when we wouldn't always be aware. He would also usually whisper corrections, any corrections that had to be made and thus minimize

Lieutenant(N) Watt

Examination-in-chief

the chance that there would be yelling or it would become a big blowup.

Q. Okay. How did you feel when Marsaw entered the Control Room? A. Well my stress level went up a lot higher, basically try and stay out of the way.

Q. Why would you do that? A. Just to avoid getting picked up on a minor correction. Once anyone on the watch got picked up then it would just become ... it would usually start snowballing, and the stress level of the watch would go up, stupid mistakes would start getting made. Basically, all we would try to do is make it through the watch.

Q. Okay. How might Lieutenant-Commander Marsaw react on occasion if he perceived that you or someone else had made an error? A. He'd usually ask why ... whether we were stupid, what we were thinking, or what the hell was going through our head. Several times he would ask the watch officer to send the person right out of the Control Room or tell them to get the hell out of the Control Room.

Q. Did you seek opportunities to learn and develop your skills on the OJIBWA? A. No. Usually I'd just try and make it through the watch, minimize the chance of myself or the watch officer getting picked up for something, rarely try to do anything that would increase the chance of getting picked up.

Q. Do you recall any occasions where Lieutenant-Commander Marsaw would use personally insulting adjectives towards you? A. Several. There were ... he personally referred to me as a "lazy shit" during one meal. He referred to all of the officers as "worthless jerks".

Q. Did he refer to, apart from "lazy shit", any other words he would refer to you? A. Well "id-

Lieutenant(N) Watt

Examination-in-chief

iot" because I wasn't progressing well enough with my qualification during that period.

Q. You said "worthless jerks", in what context ... or "stupid jerks", I'm sorry. In what context would that have been said? A. That was during a period ... it was prior to our ... or during a deployment, we were on our way to Boston and he had the whole Wardroom right up to the XO doing planes drills which were relatively ... or one of the simpler emergency drills, and we did them for several hours straight on the surface, just mock planes drills. And he wouldn't go on to anything else and he used it to the rest of the crewmen, the non-commissioned crewmen that were on board or in the Control Room, saying "Well until these officers get their heads out of their butts and stop being such worthless jerks, you know, we can get on with it, but until then we're going to keep doing this".

Q. And who did he say that to? A. All of the on watch personnel.

Q. And what rank groupings would they include? A. From leading seaman on.

Q. Have you ever had occasion to hear Lieutenant-Commander Marsaw comment upon Petty Officer, 2nd Class Brown? A. Petty Officer[PO2] Brown, the XO was commenting on him and Lieutenant-Commander Marsaw stated that Petty Officer[PO2] Brown was a waste of oxygen.

Q. As an officer, have you been trained on proper corrective methods? A. Many times.

Q. And what's your understanding, based on the training that you've received, if you see a subordinate who isn't properly performing a task, what is to be done? A. At least it's my understanding, what I try to follow is pick the person up on it, point it out, correct it if it's possible. If the person does-

Lieutenant(N) Watt

Examination-in-chief

n't know how to do something, show him how to do it or make sure he is shown how to do it. If you have to punish him or rant at him, you do that in private. If you're going to praise him, do it in public.

Q. Were you ever corrected in private by Lieutenant-Commander Marsaw for your errors? A. No, I wasn't correct at all. That was, I think, what drove our stress level up was there wasn't an attempt to correct, it was just an attempt to punish and just keep the stress level up.

Q. During the 12 months that you were under training on Lieutenant-Commander Marsaw's boat, how many occasions can you recall ever being taught by Lieutenant-Commander Marsaw how to do something that you had made an error in? A. I can't recall being taught on something, being corrected on anything that I was picked up on a error for. I can recall being taught, the only time I can remember or recall being taught anything by Marsaw was during a lecture I had asked him to give me on berthing a submarine. But that wasn't in response to a correction, that was something I was doing for a requirement.

Q. Based on your personal observations, how would Woodburn, Kavanagh and Hickey react if you had made an error or if somebody in the Control Room had made an error? A. If it was something that required immediate action they would do it. I mean, if it was an emergency drill they would get someone else to do it right away or pick you up on it right away. Even then they would come and get back to you when there was time and tell you what you did wrong and how to do it properly. If it wasn't something that required an emergency, they'd correct me on the spot and show me how to do it properly.

Q. Based on your personal observations, what Part 3's did you sail with under Lieutenant-Commander Marsaw's leadership? A. I sailed with Richard Duff, Chris Jacques, Chris Ellis. I replace Greg Carr. I

Lieutenant(N) Watt

Examination-in-chief

sailed with Mike Burke. I think that's all the Part 3 officers that were aboard when I was there.

Q. Were Byrne and Pitman Part 3's at the time you were on board? A. They were just prior to me.

Q. Okay. Out of those individuals, Ellis, yourself, Kohli, Jacques, Duff, Elford, Cairn and Burke, how many qualified? A. Kohli was just before me.

DEFENDING OFFICER: Mr Judge Advocate, the witness has not mentioned Elford, I believe.

WITNESS: No. Elford and Kohli were both just before me. Kohli was still in Squadron, as was Elford.

PROSECUTOR:

Q. How many qualified while you were on that boat? A. Nobody qualified while I was on that boat.

Q. Have you ever had occasion to observe Lieutenant-Commander Marsaw comment on bilingualism or francophones? A. Not on francophones in particular, but on the policy. He was quite verbal. He commented that the bilingual policy in Canada was ridiculous and the rest of Canada was having to pull its pants down for Quebec, and that it was a waste of money.

Q. Did you ever have a bunk in the Wardroom?
A. For the very ... probably the last couple of months that I was on board. Most of the time I was bunked up in the forward Torpedo Room. The last few months I sail I had a bunk in the Wardroom.

Q. Did you use that bunk? A. Very rarely. Usually it wasn't available because the CO was watching movies during most of the evening shift.

Lieutenant(N) Watt

Examination-in-chief

Q. In those circumstances, where you didn't use your bunk in the Wardroom, where would you sleep?

A. If there was a bunk available in the forward Torpedo Room I would use that. If not, there were occasions when I would sleep in the Motor Room, occasions when I would sleep on the deck in the forward Torpedo Room.

Q. You'd sleep on the deck? A. I'd use a weather jacket and sleep on the deck.

Q. Where would you eat some of your meals?

A. I ate some meals in the passage way. I mean, I ate most of my meals in the Wardroom, but there were occasions when I ate meals in the passage way. There were occasions, a lot of occasions, I'd skip meals. And there were occasions when I was eating meals in the Auxiliary Machinery Space, which is where they blow the galley. Although the XO found out about that and stopped Lieutenant[N] Ellis and myself ... it was Sub-Lieutenant Ellis at the time, from eating down there.

Q. Okay. Why would you skip meals or eat them outside the Wardroom? A. It got to the point where none of us were comfortable in the Wardroom, it was just ... we weren't made to feel comfortable - we were made to feel uncomfortable. We'd either be questioned during the whole meal or, you know, be referred to derogatorily.

Q. Did you relax and unwind after your shift in the Control Room in the Wardroom? A. Not in the Wardroom.

Q. Where would you go to unwind? A. Well, it was hard to go anywhere. A submarine is pretty small. It's hard to go anywhere to unwind while we're at sea. I usually would go to the fore-ends.

Q. Did you ever discuss you state of affairs with anybody in the fore-ends? A. Quite often I'd discuss ... I mean, very often with the other Part 3's,

Lieutenant(N) Watt

Examination-in-chief

sometimes with some of the other officers who would come up forward. They often used the fore-ends as an auxiliary chart table, so there would often be ... especially a navigator up there.

Q. How would you describe the degree of morale and cohesion on board the OJIBWA? A. Morale was always remarkably low on OJIBWA right from the very point I joined. Lieutenant-Commander Woodburn even apologized when he said I had to go there from ONON-DAGA. The morale of the crew, the NCMs, improved after the Command Chief's visit. But the morale of officers was always abysmally low.

Q. What about cohesion as a team in the Control Room? A. There wasn't any, certainly not to the extent I saw in the other submarines. There was no attempt ... there was no sense that it was a one-team working together towards a given purpose. It was sort of everyone in the Control Room trying to survive a watch.

Q. Did you feel like you had to survive a watch when you were in Hickey or Woodburn's control room? A. No. It was very very different atmosphere. Usually it was ... I would be trying to learn a particular thing during the course of on watch.

Q. Again how would Marsaw react if there was a perceived error that was made by you or any other individual in the Control Room? A. I believe it would be if it was the periscope for instance, if you screwed up there, you would be ripped off the periscope, somebody else would be put on. He would yell at you in front of the rest of the members. He would ask, "What the hell were you thinking?" Often tell the watch officer to get you the hell out of the wardroom ... or get you the hell out of the Control Room, out of my sight. And you'd have to wait until things cool down and eventually he would send someone up to get you in the fore-ends ... myself, or Chris Jacques, or whoever happened to have been kicked out.

Lieutenant(N) Watt

Examination-in-chief

Q. Have you ever had occasion for Lieutenant-Commander Marsaw to discuss with you a statement you gave to the military police? A. During the summer I was in the wardroom at the Submarine Squadron and he told me ... he said I was saying ...

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, please, we're getting into hearsay. He is about to relate from his words the words of Lieutenant-Commander Marsaw. The position here, objections were made to similar matters previous. You had ruled on it and my position now is just I want to make an objection on the issue, although I will not ask the court to go into a **voir dire**. I just want the objection to be on the record.

JUDGE ADVOCATE: Your objection is well recorded and is denied.

You may proceed.

PROSECUTOR:

Q. If you could continue with your story of what unfolded in the Squadron Wardroom? A. He told that I was saying some pretty bad stuff about him and that I was jumping on this bandwagon that was coming against him.

Q. Who was present at the time that he said this? A. Lieutenant[N] Ellis was there and Lieutenant-Commander Hickey was also there.

Q. And he was your CO at the time? A. He was no longer my CO by that time, I was serving as a staff officer in the squadron.

Q. But a superior officer was present at the time? A. Yes.

Q. What was the tone of Lieutenant-Commander Marsaw's voice when he said these words? A. Well, he

Lieutenant(N) Watt

Examination-in-chief

said it with a lot of confidence. I was very surprised because at that time I didn't realize he had been reading our statements. And I was surprised that he was saying that when other officers were present.

Q. How did you feel, react? A. I mean, I was a little shocked hearing him say it. And I mean I think I was a little bit intimidated because I had other senior officers to me, people that are still making an impression about me, where there within hearing.

Q. While you were on board the OJIBWA, did you consider your career in the Forces and in the sub service? A. Yes, I did. In fact I had put a memorandum requesting to be released from the ... or requesting to return to the surface fleet in to Lieutenant-Commander Marsaw while I was on OJIBWA. And I had also actively started looking into getting into the RCMP, which is where my grandfather and father served.

Q. Whatever happened to your memo, your request? A. It went up to and was considered by Lieutenant-Commander Marsaw. He told me at the time that all of the negative feedback I got was wrong, that I was doing quite well, and he expected me to go up for my board in June.

Q. Did you in fact go for your board?
A. No, I did a pre-board and failed that, and failed two subsequent pre-boards with Lieutenant-Commander Marsaw.

Q. So you weren't doing well at all?
A. No.

Q. Do you recall your memo, what was in it, how you drafted it? A. I drafted it using ... Chris Jacques had put in a memo and he had just got off OJIBWA about two months previous. And he still had it on disk. I essentially modified it a little bit and put it in.

Lieutenant(N) Watt

Examination-in-chief

Q. So you were trying to use Jacques' memo to ...? A. He had got off ... he had left the boat for many of the same reasons that I wanted to.

Q. I would like you to look at this memorandum dated 12 February '93, signed by Lieutenant[N] Jacques, and ask you whether you can identify that? A. That's his version of the memo. I modified that a little bit, but that's the same memo.

PROSECUTOR: Mr Judge Advocate, at this time I would like to introduce Lieutenant[N] Jacques's 12 February '93 request to general service.

JUDGE ADVOCATE: Any objection?

DEFENDING OFFICER: No objection, subject to weight. It's somebody else's memo, so the court will appreciate.

JUDGE ADVOCATE: "T".

MEMORANDUM, DATED 12 FEBRUARY 1993, IS MARKED EXHIBIT "T".

PROSECUTOR:

Q. So you used Jacques's memo as a basis to write your own request? A. Yes.

Q. Why did you wish to return to general service? A. By that point I got nothing but negative feedback on the boat. I absolutely hated going to sea on the boat, spending any time on it. I didn't feel I was doing well on my job. And it didn't look like things were going to get any better or that I was going to qualify at any point in the near future. And by that point I figured I would be better off returning to the surface fleet and then get on with my COC Part 2 service.

Lieutenant(N) Watt

Examination-in-chief

Q. Negative feedback. Did Lieutenant-Commander Marsaw's leadership style play any role in your decision? A. Certainly. It made trying to qualify on the boat miserable. We were watching guys on the other boats get ... you know, continue to move along in their training and learn stuff. All we were doing is getting more and more demoralized.

Q. Did you include that in the memo that you gave Lieutenant-Commander Marsaw? A. No. I think it would have been undiplomatic. It wouldn't have furthered my end. I think all it would have done was anger him.

Q. Did you raise your concerns to the XO? A. No. In fact I didn't even bring that memo to the XO. The leadership style I saw came from both of them. I didn't see a difference and so I put that direct to the CO.

Q. Do you recall when you first considered a career as a submariner, when did you decide you wanted to be in submarines? A. At the same time that I decided to try a transfer from the Army. It was still my first year, I was just finishing my first at military college. I had been going to RMC but I was sent to Victoria to learn French for the summer. And coming from the Prairies, that was the first time I had actually visited a naval dockyard or actually seen one at all. And while we were there doing French training, I got a chance to visit an American LA Class submarine. It was also the same summer that I saw "Das Boat" and I was fascinated. I was nominally an artillery officer at the time, but I knew the Navy was screaming for officers and the submarine project was happening at that time and I figured it was a great time, a great chance, to put in a reclass. It ended up taking me three years to get into the Navy. But that's when I first wanted to become a submariner.

Q. You eventually got in and under Hickey you eventually got your Dolphins. Why didn't you stay

Lieutenant(N) Watt

Cross-examination

in the sub service? A. By the time I got my Dolphins I think I was so disenchanted with what I had gone through I don't think I could have served as an effective submarine officer. I think I was in a sense poisoned to the atmosphere in the submarine squadron.

Q. And why was that? A. I think I just put up with so much on OJIBWA that I had a hard time enjoying my work in which case I couldn't do well in my work. And at that time the opportunity came up to join the Clearance Diver Branch.

Q. So now you've got two sets of Dolphins on? A. Yes.

PROSECUTOR: Okay. Those are my questions. Thank you.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: Thank you, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. In your direct examination when asked to quote derogatory comments, you used the word "lazy ..."? A. Lazy shit.

Q. "Lazy shit". Are those the exact words that were used by Lieutenant-Commander Marsaw? A. Either lazy shit or lazy fuck, specifically.

Q. Lazy shit or lazy fuck, were those the only words or just the words that you remember from the phrase or the conversation that you had? A. Those are the words I remember with that specifically conversation.

Q. But you can't relate anything to what was said either before those words or after? A. It had to do with if I wasn't such a lazy shit I would be farther

Lieutenant(N) Watt

Cross-examination

along in my qualifying and I wouldn't be failing three boards and I would have done my dolphins by then.

Q. How long would that conversation have gone? Seconds, minutes? A. A few minutes. The comment was just a specific part of it. It stuck out in my mind because it was personally at me.

Q. And other derogatory words, "idiot", I think you mentioned, or "stupid"? A. That was not specifically at me. It was about me in a wardroom conversation.

Q. About you but you don't know, you can't recall any of the rest of the conversation? A. It is the insult that sticks in my mind not the rest of the conversation. The insult was the part that affects me.

Q. Uh, huh. A. But certainly it was about ... again about my qualification.

Q. And about the general aspect of derogatory comments or the yelling in the control room, do you have any recollection of specific times or specific events? A. Most of the time I spent at sea, because you're six on and six off, it sort of flows into the one sort of amorphous memory. Going to sea, it was of an air, it was a whole atmosphere of sort of fear and intimidation, but specific episodes don't stick out. Most of what I remember was watch to watch. I don't even remember ...

Q. Fear and intimidation. Fear, of course, has a concept to it. You want to instill fear. But if you put it in context can you remember anything about the context, example: an error was made he would yell and then you correlate to leading by fear. Where are the foundations for that opinion of that "he lead by fear"? Do you know any of the incidents that you can relate to? A. I can remember being pulled off a periscope because of an aircraft that I picked up visually and he yelled at me in front of the rest of

Lieutenant(N) Watt

Cross-examination

the crew because I didn't pick it up until it was too close. I can remember being pulled off for not doing a plane jams correctly, pulled off for not doing stop trim correctly, and in all occasions yelled at in the control room.

Q. And a plane jam, if you don't do it correctly, is that a minor error or is that a major error? A. It's a fairly major evolution ... or not a major evolution but it's something that has to be done fairly quickly.

Q. Fairly quickly. Fairly quickly as in immediately? A. Yes.

Q. And then there's a specific procedure to be followed? A. Yes.

Q. And that procedure is published?
A. Yes.

Q. And where can you find that drill?
A. You can find it in CANSOs, or in a control room pack that we keep on board, which is excerpts.

Q. Is that something that an officer in your position is expected to know? A. Well it's something that I was learning at the time. Certainly something that a dolphin-wearing qualified officer should know. I was a trainee at the time.

Q. Going to qualifications, you said that you started on ONONDAGA, right? A. Yes.

Q. How long were you there? A. A very short period on ONONDAGA.

Q. Three months? A. OJIBWA about three months, I think, most of which were in the Dockyard over in Dartmouth up on the lift. But then I was only on there until I had to replace Kerr and Kohli who had left OJIBWA.

Lieutenant(N) Watt

Cross-examination

Q. Even for that short period, had you done any kind of qualification while you were there? A. I did my officer of the day qualification and began work on my Sea Recs.

Q. Then you're posted to OJIBWA? A. Yes.

Q. Was it to carry your entire qualification package or some of it? A. To carry out the rest of my qualification pack to get my Dolphins.

Q. And how does it work? Do all officers on training ... are sent to a submarine to do their entire qualification package according to you? A. Yes. You do a basic course but you don't get any of your recs done on that course. You do them all once you get to your submarine.

Q. And at that time was OJIBWA the only operational submarine? A. For most of that period. ONONDAGA was operational. It ran into some mechanical problems. But it had trainees on board the entire time.

Q. Then would you say it would be fairly accurate to say that people would be posted on OJIBWA to do whatever qualifications or requirements needed to be done at sea and then be posted back to do the rest of the qualifications? A. There were two qualifiers on board ONONDAGA doing the same thing during the entire period. It wasn't the only submarine operating with trainees, no.

Q. And you mentioned about the board. How does that work, the board? A. Once the submarine CO feels that you are ready and once you have ... generally you would finish all your requirements - the requirements are written in a book, essentially each time you learn something you get a check in a box. Once those are all done then you would normally do a

Lieutenant(N) Watt

Cross-examination

pre-board with the officers of the submarine you are serving on. And once you have satisfied ...

Q. And who chaired that board? A. The CO of the submarine, Lieutenant-Commander Marsaw, in this case.

Q. And who else would be on the board?
A. The engineering officer, the combat systems engineer and the XO.

Q. Is that what occurred in your case?
A. Yes, several times.

Q. Was the CO the actual chairman of the board? A. Yes.

Q. What about the XO? A. The XO would be present at the boards as well.

Q. He would be present as well? A. Yes.

Q. Present or president, I didn't understand the word? A. He would be present.

Q. Present? A. The XO would actually ask the majority of questions.

Q. And is he the training officer? A. Yes, for the trainees.

Q. Would the decision be left entirely to the commanding officer? A. I am not sure who made the decision. I was informed after the board that I hadn't passed.

Q. So you're not sure who made the decision actually? A. I assumed it was Lieutenant-Commander Marsaw.

Q. You assumed. You also mentioned that sometimes you did not eat in the wardroom and that was put a stop to by the XO. Who was the XO? A. Not the

Lieutenant(N) Watt

Cross-examination

not eating in the wardroom, that I wasn't allowed to eat in the AMS, that was put a stop to.

Q. I probably mis-formulate my question, that is what I am getting at. Eating in the AMS, the XO put a stop to it. Who was the XO? A. The XO at the time was Lieutenant[N] Dussault.

Q. Lieutenant[N] Dussault. How did he approach that? Did he just tell you or did he yell it at you? A. No. He told me. He said he didn't want us eating in the AMS anymore because it looked bad.

Q. Did you participate or were present during some discussions that took place in the fore ends? A. I was present for many conversations in the fore ends.

Q. Were complaints or disagreements or whatever voiced out by junior officers in the fore ends? A. Several times.

Q. Were there junior ranks there present? A. There was always a mixture of ranks in the fore ends. I mean we would make, if we were talking among ourselves, make every effort to talk among ourselves.

Q. Would it be loud enough for them to overhear the conversation? A. It may have been.

Q. And you mentioned about morale being low. As a naval officer, what do you think of the principle of junior officers voicing out their preoccupations and aches and pain in front of junior ranks? A. It normally shouldn't be done. But probably any discussions we had were about how we could improve the morale of the boat in general. The morale of the boat was dismally low. There was an occasion when Lieutenant[N] Jacques entered the after ends and the crew told him: "We're with you, Mr Christian."

Q. Making reference to what? A. The Mutiny on the Bounty.

Lieutenant(N) Watt

Cross-examination

Q. Was that the attitude of the crew? A. I mean, they were joking about that, but I mean the morale of the crew was very very low and I mean most felt there was nothing that could be done about it.

Q. You said you were an OIC. Do you expect your crew to joke about mutiny? A. No, I don't. It should never get to that point.

Q. And about improving morale, what solutions if any did you come up with? A. Essentially none, other than carrying on with our jobs and waiting for to boat when into refit.

Q. Would you say that the general attitude or atmosphere, as it was referred to, is something that you can't ... you can't actually put your finger on that. Was it actual actions that were done, example: continuous beating of the crew? A. Yeah, it's nothing that overt.

Q. It is something very subtle? A. I wouldn't say it was subtle either. It was something that was acknowledged throughout the whole submarine squadron, and something that affected certainly me personally the entire year I was aboard.

Q. You mentioned "acknowledged throughout the entire submarine squadron", beyond the actual physical limits of the submarine? A. I mean the submarine community is very small. Within the entire submarine squadron, yes.

Q. Including the chain of command, higher up? A. I don't know about higher up. I mean, I know about people at my level.

Q. People at your level. And the skipping meals, I think you mentioned that you sometimes skipped meals. Was that simply to avoid the wardroom or was that to put some more time on your qualifications?

Lieutenant(N) Watt

Cross-examination

A. It was both. Sometimes it was to get sleep because I was missing so much sleep.

Q. And in that context were there any other reasons why you wouldn't actually go to the wardroom for your meals? A. No. I was made to feel uncomfortable. I was made to feel unwelcomed in the wardroom despite it being my mess that I paid dues in, and I avoided it.

Q. Were you ever told by the commanding officer or the XO that you are not welcomed there? A. No. I was told by the Ops O, when I first joined the boat, that as a qualifier I shouldn't spend any time in the squadron wardroom.

Q. Did you raise that issue with the XO? A. No.

Q. What about the number of officers you had on board at the time? Would that allow for more than one sitting for a meal? A. There were usually several sittings.

Q. Several sittings, because of the number of individuals? A. Yes.

Q. Would there be times that you wanted to get in there but people would, after finishing their meals, specially the people the ones that had their bunks in there, would just not leave because they were staying behind and taking care of their own stuff? A. Not so much that. There were occasions when we would wait until the XO and CO had left the wardroom and there would be a mad rush to eat some meals very very quickly before went on watch.

Q. And when you mentioned the CO and the XO, was the attitude the same towards the XO? A. Yes. Most of watch officers would avoid both of them in the wardroom.

Lieutenant(N) Watt

Cross-examination

Q. Would avoid both of them. Do you think that Lieutenant-Commander Marsaw got along with, then the XO, Dussault? A. I really couldn't say. They both, to me, represented the same sort of leadership style. Whether they got along, I don't know.

Q. Did you witness any open disagreement between the two of them? A. No.

Q. No? A. Other than when he had all of us, right up to the XO, doing the planes jams.

Q. And is he, Lieutenant[N] Dussault, is he francophone? A. Yes, he is.

Q. Yes, he is. Was he present when Lieutenant-Commander Marsaw made the comments you referred to as regarding the official bilingualism policy? A. Yes, I think he was.

Q. In what context did that take place? Was it a comment that he made or was it ...? A. I think it was in response to a ...

Q. Wait, I haven't finished my question.
A. Okay.

Q. Was it a comment that he made or in the context of an opened discussion between officers?
A. I think it was in response to a message concerning bilingualism. It would have been in the daily log.

Q. And did you ever see him act on that opinion of his concerning the bilingualism policy?
A. Act on it?

Q. Well, you stated that he stated his opinion. It was more of an opinion on the bilingualism policy. Did he take action? Did he overtly ...?
A. Other than, in his position as CO, stating an opinion on something the Forces already has a policy on
- No.

Lieutenant(N) Watt

Cross-examination

Q. We discussed the matter of the board. Then you went to the other submarine and qualified shortly thereafter. How long did you stay after that in submarines? A. I qualified at Christmas. In January, to make room for other trainees, I took a position as a staff officer in the squadron. And then I stayed just until the start of the Clearance Diver Officer Course in August.

Q. So it was a fairly short period?
A. Yes.

Q. And your disenchantment, do you attribute that to solely your time on OJIBWA? A. Almost entirely, yes.

Q. What about family life, were you married then? A. Yes, I was.

Q. Do you feel that a number of times or the amount of days a year a submarine spends at sea had any effect on your decision? A. I don't think so. When I was in the Army I would be looking at that much time in the field. As it is I am looking at that much time or more, up to nine months away on course a year.

Q. Huh, huh. And how would you compare the level of knowledge or the amount of information you have to take in for qualifications on submarine as opposed to surface ships? Are you expected to cover more areas because of the limited amount of people that are on board? A. I would say definitely, yes.

Q. Would that affect your decision? A. No. I think it was more the attitude. Learning on a submarine when it's running quite well, it's quite enjoyable. It's a lot of responsibility, especially for junior officers. But I think I had become so disenchanted with it I didn't want to stay in the submarine squadron.

Lieutenant(N) Watt

Cross-examination

Q. Do you recall exactly the reasons you put down in your request to leave? You said you made changes to ... you used the ...? A. Slight changes. I had added that I didn't think I was doing very well.

I wasn't getting any positive feedback on what I was doing. One thing I added was inability to ... and there was no encouragement of training for physical fitness in the squadron or in a submarine environment.

I essentially had put anything in the memo which I thought would expedite my transfer back to the surface fleet.

Q. On morale issue, again you approached the point where morale the last six months was better after the visit of Chief[CPO1] Brown, I think, it was your comment. A. Yes.

Q. Were you present? A. No.

Q. So you don't know if anything was done or if anything was said? A. Was that - was I present during ... I was present during his visit.

Q. Do you have any direct knowledge that this visit actually had a direct effect ... A. No.

Q. ... on morale? A. I noticed ...

Q. You assumed? A. I noticed that morale had improved after that point and several people commented that the Command Chief's visit maybe had an effect on it. That was only the morale of the NCOs that improved.

Q. Anybody else visited the boat during your term on OJIBWA? A. We sailed with a Fisheries officer on one occasion, a RCMP officer on other occasions.

Q. Command people? Anybody in the chain of command? A. I don't recall.

Q. You don't recall. Sea Training?
A. Yes, during work ups.

Lieutenant(N) Watt

Cross-examination

Q. During work ups. I don't want to qualify them as complaints but the issues that were discussed between junior officers in the fore ends, did any of that make it up the chain as a formal complaint?

A. No. We talked about things we were trying to point out that the conditions on board had reached abyss ... morale on board had reached abysmal low levels and decided against it on the basis that given what we had seen, given the way we had seen people treated when they did try to bring it up in the wardroom, that nothing would come of it and whoever did try to bring it up would be punished for it.

Q. Why would anybody be punished for it?

A. Because there was an episode when Lieutenant-Commander Marsaw asked the wardroom around the same time as the planes drill, you know: What the hell is he going to do with us. Did he have to treat us like children. And they said: What do we have to do to improve. And he said: "Let me know, honestly, I really want to know." And Lieutenant[N] Higginson said at time that if there was perhaps a little less yelling in the control room then people would be able to relax and do their jobs a little bit better.

Q. You saw that as a punishment? A. Well, the way he was treated afterwards, yes. Nothing came of it and he was personally rebuked by the CO just for bringing that up in front of the other officers.

Q. Were you present? Where did that rebuke take place, in the COs cabin or ...? A. Yes. Just outside the wardroom.

Q. Just outside the wardroom? A. So he did it in private but actually everything turned out to be in public? A. Yes.

Q. Because there's no privacy whether you do it in the cabin or not? A. Yes.

Lieutenant(N) Watt

Cross-examination

Q. And then that stopped everybody from ... if it was that serious, that stopped everybody from going over in the chain of command? A. Going over the CO seems disloyal and none of us were willing to do that.

Q. How would that be disloyal? I mean the CO is above the law? A. No. I think it was seen certainly by the junior officers as disloyal to be going to the squadron level about our commanding officer and just not seen as feasible.

Q. Was that based on any specific regulation or is that a feeling? A. I think it was the feeling in the squadron at the time that the morale of the boat was well known in the squadron, and that certainly at the junior officer level nothing could be done about it.

Q. You said that you didn't get any ... or you were not getting positive feedback as one of the reasons. When you put in your request, were you told that you were doing well, that you were within your ...? A. The CO said he was surprised and shocked by the memo and said that I was progressing fine, and he turned down the request and he wanted me to continue to qualify in the submarine.

Q. And based on that you didn't push it further? A. I thought maybe I had mistaken all the negative feedback. I carried on with training and within several weeks did my first pre-board and failed that.

ASSISTANT DEFENDING OFFICER: May I just go over my notes, Mr Judge Advocate.

JUDGE ADVOCATE: Certainly.

ASSISTANT DEFENDING OFFICER:

Lieutenant(N) Watt

Cross-examination

Q. I am going to show you a document and I am going to ask you if you identify it for the court, please? A. Yes, that's the memo I submitted.

Q. That's your memo? A. Yes.

Q. Okay. The one that was drafted based on Lieutenant[N] Jacques' memo? A. Yes.

Q. The one you referred to earlier in your testimony? A. Yes.

ASSISTANT DEFENDING OFFICER: I would to introduce this document and I undertake to provide copies to the court as soon as ... unless ...

PROSECUTOR: I've never seen the document.

Do you have a copy for us?

ASSISTANT DEFENDING OFFICER: It is the only I have got. I am going to make copies of it for everyone.

PROSECUTOR: It's fine. No objection.

JUDGE ADVOCATE: Thank you.

MEMORANDUM, DATED 6 JUNE 1993, IS MARKED EXHIBIT "U".

JUDGE ADVOCATE: Okay.

ASSISTANT DEFENDING OFFICER:

Q. Have you read or have any knowledge of the article published 16 December 1993 in the Chronicle-Herald by Mr Dunlop? A. I think I've read the article you're referring to.

Q. And if I show you the article, would you recognize it? A. Yes.

Lieutenant(N) Watt

Cross-examination

Q. This of course being an enlarged ...?
A. Yes, I'm familiar with this article.

Q. That's the one? Were you contacted by Mr Dunlop? A. No.

Q. No? And you did not contact him yourself? A. Negative.

Q. No? So you never answered any question?
A. I've never talked to Mr Dunlop.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You were asked a question about what you would think, if you were OIC on your diving tender and crews were joking about mutiny, and you said, "It should never get to that point." What did you mean when you said that? A. If the morale on my boat ever got half as bad as it was on OJIBWA it would certainly be clear to me. I would talk to my senior crew members and see what we could do to improve it. I don't think the morale of any vessel or unit would get to the point without the CO being well aware of it.

Q. As an officer in charge of a diving tender, have you adopted Lieutenant-Commander Marsaw's leadership style? A. No.

PROSECUTOR: No further questions. Thank you.

JUDGE ADVOCATE: Questions from the court?
No questions.

Lieutenant(N) Watt

Re-examination

Thank you, Lieutenant[N].

WITNESS WITHDRAWS.

PROSECUTOR: I wonder if we could have a five-minute break just to get set up for the next witness. And five minutes in the members' clocks and not lawyers' clocks.

DEFENDING OFFICER: You may as well make it 10 and in that way we will be sure that ...

JUDGE ADVOCATE: Safer.

DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: The court is adjourned for 10 minutes.

ADJOURNMENT: At 1255 hours, 6 October 1995, the court adjourns.

REASSEMBLY: At 1305 hours, 6 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR: The next witness, Mr Judge Advocate, is Master Seaman Madgett.

REASSEMBLY: At 0930 hours, 5 October 1995,.....760

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957

Master Seaman Madgett

Examination-in-chief

Q. And you also indicated that you sailed for a time on OKANAGAN? A. Yes, sir.

Q. Who was your commanding officer at that time? A. Lieutenant-Commander Hickey.

Q. And do you recall when you sailed on the OKANAGAN? A. It would have been in the spring of 1993. Correction in the spring of 1994.

Q. On board HMCS OJIBWA where were you employed? A. In the radar office and at the chart table as the navigator's yeoman.

Q. I have a diagram. I would like you to have a look at it. It is Exhibit "I" in these proceedings. I'm just wondering if you could point out where the radar office is located? A. This is the radar office right here, sir.

Q. Okay. And could you explain to me what this gap is in the diagram? A. This is the entrance to the radar office.

Q. Okay. And what's the V-shaped symbol on this diagram? A. The V-shape is the folding door at the entrance to the radar office, sir.

Q. Okay. And the other position that you were employed at on the OJIBWA was where? A. At the chart table which is right here. My normal position would be at this end of the chart table.

Q. Thank you. How would you generally describe your experience on board OJIBWA between October '92 and October '93? A. Frustrating, sir.

Q. And why would you say it was frustrating?
A. Because no matter how much effort I put in or how professional I tried to be, it just didn't seem to be good enough, sir.

958

Master Seaman Madgett

Examination-in-chief

Q. Good enough for who? A. Lieutenant-Commander Marsaw, sir.

Q. Can you comment on Lieutenant-Commander Marsaw's leadership style? A. It was domineering.

Q. What was the atmosphere like in the control room when Lieutenant-Commander Marsaw was present? A. Very very tense. And when he would enter the control room, if there was any talking going on at the time, the control room went silent.

Q. Why would it get tense and why would it become silent? A. They were intimidated and afraid that if they said the wrong thing or if they said something that wasn't appropriate for the time that they would immediately be chastised.

Q. Okay. And when you say "they" who are you referring to? A. The control room staff, the navigator and the engineering officer.

Q. Can you describe how Lieutenant-Commander Marsaw would react when he wasn't satisfied with somebody's performance? A. When he was dissatisfied he would usually ... you could tell when he was going to get upset because he would ... I guess the precursor would be a deep sigh, and at that point he would begin yelling at the officer or whoever he was upset with at the time.

Q. When you say he would yell, can you describe the volume of his voice? A. Loud, sir.

Q. What about the tone? A. The tone was gruff.

Q. Can you recall any examples of phrases or words he would use when he'd do this? A. Yes, sir. On occasion, with both engineering officers that I recall serving with, he had told both of them during

959

Master Seaman Madgett

Examination-in-chief

incidents at the trim seat to stand up and kick themselves in the ass.

Q. Do you recall who those engineering officers were? A. The first one was Lieutenant[N] LeClaire and the second one was Lieutenant[N] Tingle.

Q. And where did he make that comment?
A. In the control room.

Q. And again what was the tone and volume of his voice like? A. The tone was gruff, the volume was loud.

Q. Did you witness, other than the engineering officers which you just described, any other officers treated in the way you described in the control room? A. Yes, sir.

Q. And who would that have been? A. There were several officers during exercising plane jams that the plane jams weren't going as successful as the CO wanted and he called everybody together in a group in the centre of the control room and asked if anybody ... what they didn't understand, or if they were having any problems, and he wanted to know now. At that time Sub-Lieutenant Ellis raised his hand and the CO became enraged. He said, "One guy doesn't know and everybody else is just doing this thing correctly." And at the time the officers I recall being there were Sub-Lieutenant Ellis; the navigator, Lieutenant[N] Higginson; Lieutenant[N] Watt, at that time Sub-Lieutenant Watt; and as far as other specific officers I couldn't be sure, sir.

Q. What was your impression of that incident? A. They were very intimidated.

DEFENDING OFFICER: Mr Judge Advocate, I don't think the ... unless the prosecution purports to have this witness testify on behalf of the others, I

960

Master Seaman Madgett

Examination-in-chief

don't think that he can comment on how those other individuals felt.

JUDGE ADVOCATE: Well, it's not what he asked. It's what the answer was all about, but the question was, "What were your impressions?"

DEFENDING OFFICER: It's inviting that sort of response and if the question is appropriate - that's one thing, but the answer must also be appropriate and in accordance with the rule. He can only testify on what he knows.

JUDGE ADVOCATE: That's a fact.

ASSISTANT PROSECUTOR: Mr Judge Advocate, I do think the question was appropriate but perhaps I can rephrase it to ensure that the answer is also appropriate.

JUDGE ADVOCATE: Very well.

ASSISTANT PROSECUTOR:

Q. Master Seaman Madgett, what did you observe to be the reaction of the officers during that particular incident? A. They appeared to be intimidated.

Q. Were there any other incidents that you can recall which involved officers being addressed by Lieutenant-Commander Marsaw in the way you've described? A. Yes, sir.

Q. What incident would that be, if you can describe it for us? A. There was an incident upon leaving the port in Bermuda on our last trip before going into refit. The navigator had set maximum safety tracks going out of Bermuda towards Baltimore, but specifically around Bermuda itself the tracks did not allow ... the tracks allowed us to reach our destination on time but would not have allowed time for the submarine to dive. The commanding officer came out to

961

Master Seaman Madgett

Examination-in-chief

the chart table and looked at the charts, made some measurements on his own and realized that we wouldn't have time to make one last dive and again he became enraged. He crumpled the charts up and threw them on the chart table and said "This is bullshit". And then started to walk out, came back, have a look at a chart, crumple it up, threw it on the table, walked back towards the forward part of the Control Room and said "If I could get another navigator, I'd fly you off here now".

Q. Do you recall who the navigator was at that time? A. Yes, sir. Lieutenant[N] Mark Higginson.

Q. Based on your personal observations, did the treatment of the officers in the manner you've described by Lieutenant-Commander Marsaw effect their ability to lead? A. Yes, sir.

Q. And could you tell me how, if that was effected? A. They would often second guess decisions that they had made.

Q. Did you have occasion while serving on board OJIBWA to brief Lieutenant-Commander Marsaw? A. Yes, sir.

Q. Can you describe what that would involve? A. Briefing, from my part of the briefing, was to brief the current threats for that exercise for that area. In one particular instance I had prepared a brief and in order to insure that my information was correct I went to the Executive Officer to make sure that he was happy with what I was going to brief and how I was going to brief it. Then I went to the Combat Officer and asked him if he would go to the New Zealand Wing Commander that was on board for that trip to confirm the aircraft in the threat, because the aircraft were in fact from New Zealand.

Q. And where did the briefing occur? A. In the Wardroom.

962

Master Seaman Madgett

Examination-in-chief

Q. And can you describe what occurred during the briefing? A. Yes, sir. When I commenced the brief, I had gotten a few words into the brief and the CO said "No". And unsure of what I had done wrong, I commenced again and he said "No". At that point the Executive Officer pointed at a new starting point on my brief for me and I read it. He was still unsatisfied with the brief. The wing commander had said that ...

DEFENDING OFFICER: Mr Judge Advocate, we're leading into hearsay again.

ASSISTANT PROSECUTOR: It's part of the narrative, Mr Judge Advocate. It's certainly not being asked for the truth of the contents, and he's telling the story as to what occurred. We're certainly not submitting it for the truth of what was said, but it certainly goes to what the witness understood in his state of mind and also goes to the narrative of what occurred.

JUDGE ADVOCATE: Yes, but before a GCM I would prefer that you brief your witness to stay away from hearsay.

ASSISTANT PROSECUTOR:

Q. Master Seaman Madgett, I'd ask you not to repeat the words of other people, other than the accused, in your testimony. So if you'd just tell me what you did or didn't do as a result of any conversations you had with other persons, that would be fine. And if you can continue then and try to keep that in mind? A. Yes, sir.

Q. So you briefed them, he said "no". You went on to a further part of the brief and then a conversation took place with the Exchange Officer on board or the foreign officer on board? A. Yes, sir.

963

Master Seaman Madgett

Examination-in-chief

Q. And what occurred after that? A. After that the commanding officer told me that when I came into a briefing that I should ensure that I had all my facts straight before I entered that briefing.

Q. Okay. Did the CO at any time advise you of what he expected in a briefing of that nature?
A. The CO did not advise me, the XO advised me.

Q. Okay, and when did he advise you of that?
A. On that day, just before the briefing itself.

Q. And after the briefing, did the CO discuss the content of your briefing with you?
A. No, sir.

Q. Are there any other incidents that come to mind when you were subject to the kind of treatment that you've described, the verbal treatment that you've described? A. Yes, sir.

Q. And what occasion was that? A. There was an occasion in radar where there was some sort of commotion in the Control Room. The radar door was shut and I had reached for the radar door, but before I could open the radar door, the radar door hit me and knocked me onto the deck, and in turn as I was falling I hit Leading Seaman Bidinost and knocked him onto the deck.

Q. And what occurred after you hit the deck?
A. After I hit the deck, I looked up, I felt shocked at the moment, and when I looked up the commanding officer had his head just in under the top frame of the radar door and he said "Are you gentlemen going to fucking join us?"

Q. What was the tone and volume of his voice like when he made that statement? A. The tone was gruff and the volume was loud.

964

Master Seaman Madgett

Examination-in-chief

ASSISTANT PROSECUTOR: At this time, Mr Judge Advocate, I'd ask that the Officer of the Court bring in the Radar Room door itself.

JUDGE ADVOCATE: I'm sorry, would you say that again?

ASSISTANT PROSECUTOR: We have the Radar Room door, Mr Judge Advocate, and I'd like to ask your permission to have the Officer of the Court bring it in so that we can show that door to the members of the court.

JUDGE ADVOCATE: Go ahead.

ASSISTANT PROSECUTOR:

Q. Master Seaman Madgett, do you recognize this door? A. It appears to be the door off my radar office on OJIBWA, sir.

Q. And is this the door that would have been on the OJIBWA radar office at the time the incident you've just described occurred? A. Yes, sir.

Q. I also show you two pictures, I wonder if you could describe what the contents of those pictures are? A. They're pictures, both pictures of the door. This picture showing the inside portion of the door and this is the portion that would be outside.

ASSISTANT PROSECUTOR: At this time, Mr Judge Advocate, I'd ask that you mark both of these pictures as exhibits.

JUDGE ADVOCATE: No objection?

DEFENDING OFFICER: No objection, Mr Judge Advocate.

JUDGE ADVOCATE: Okay, "V" and "W".

965

Master Seaman Madgett

Examination-in-chief

PHOTOGRAPH OF RADAR ROOM DOOR IS MARKED EXHIBIT "V".

PHOTOGRAPH OF RADIO ROOM DOOR IS MARKED EXHIBIT "W".

ASSISTANT PROSECUTOR:

Q. Master Seaman Madgett, I'm wondering if you could describe for the court how this door is mounted in the submarine? A. The door is mounted with these hinges on the port side of the door frame, and there's a latch on the top that goes into a runner that's on the top, on the frame of the door.

Q. And how many hinges are there on the door? A. Three, sir.

Q. And how many screw holes are there in each hinge? A. There's four holes in each hinge, sir.

Q. And is the door mounted using all four screw holes? A. Yes, sir.

Q. So how many screws in total would be holding that door to the frame? A. Twelve.

Q. I wonder if you could stand up, Master Seaman Madgett, and just pick that door up? How heavy would you estimate that door to be? A. Approximately 70 pounds, sir.

Q. Thank you, you can be seated again. Now Master Seaman Madgett, during the incident you've just described, what precisely happened with the door when it was kicked in on you or pushed in on you? A. When the door came in, this part up here let go ...

Q. Okay, when you're pointing at "this part"? A. The runner, that part right there, the top right.

Q. Okay, the top right corner of the door? A. Out of the runner, which caused the door to swing out away from the frame, and when it swung out away

966

Master Seaman Madgett

Examination-in-chief

from the frame it hit my arm and came forward, and by that time I was on the deck, and I looked up and the door was back behind me on a angle over the top.

Q. Okay. And was the door in any way attached to the submarine after that evolution was completed? A. No, sir.

Q. Okay. And what happened after the door struck you? A. The door struck me, I fell on the deck off of the seat locker I was sitting on, and in the process knocked Leading Seaman Bidinost onto the deck. He was sitting directly beside me.

Q. And who is Leading Seaman Bidinost? A. Leading Seaman Bidinost is a radar operator.

Q. Once you had been struck by the door, what occurred after that ... and you hit the deck? A. I hit the deck and that's when Lieutenant-Commander Marsaw put his head in the radar door and said "Are you gentlemen going to fucking join us?"

Q. And then what occurred? A. We began realizing by that time that something was going on in Control. I still wasn't clear on what it was. By the reaction, it must have been some type of an emergency. That's why I originally reached for the door, because in an emergency situation the standard order is to open the radar door so that we can understand what is going on in the Control Room.

Q. Okay. So what did you do immediately after this then, if there was some kind of an emergency taking place? A. At that point I was shocked, confused and angry that I had been knocked down by the door. By the time we got the door back in out of the way, it seemed that everything was basically over.

Q. So what did you do with the door at this point? A. Leading Seaman Bidinost and myself did our

967

Master Seaman Madgett

Examination-in-chief

best to re-attach the screws so that it would hold, at least temporarily.

Q. And were you able to do that? A. Yes, sir.

Q. Okay. Is there anything that you couldn't do with the door once you got it attached?

A. Yes, sir.

Q. Or re-attached? A. The top piece had been bent and the bolt had been stripped out, and at the time we didn't have a bolt to replace it, so for some time afterward the door instead of folding it would just swing on the railing.

Q. Did Lieutenant-Commander Marsaw at any time come back to the Radar Room after making the comment when he stuck his head in the door? A. Yes, sir.

Q. And what occurred when he returned? A. He came back and asked if I was all right.

Q. Did he apologize? A. No, sir. He just asked if I was all right.

Q. What was your response? A. I said I was fine, sir.

ASSISTANT PROSECUTOR: Mr Judge Advocate, those are the requirements for the door. Now if I could just have the Officer of the Court move it to the side ... maybe back here.

Q. Did Lieutenant-Commander Marsaw ever explain to you what the emergency was that required the door to be kicked in on you? A. No, sir.

Q. Are you aware whether or not an emergency had actually occurred? A. No, sir.

968

Master Seaman Madgett

Examination-in-chief

Q. Were you on board HMCS OJIBWA for a COUNTER-DRUG trip in August, in the period of August to October 1992? A. Yes, sir.

Q. Okay. Did you have riders on board during that trip? A. Yes, sir.

Q. More specifically, was there an RCMP officer on board? A. Yes, there was, sir.

Q. Where did the RCMP officer spend the majority of his time? A. The majority of his time seemed to be spent between the chart table and the periscope.

Q. Okay. And did he spend all of his time in the Control Room then while on board? A. Yes, sir. He did have occasion to look in on radar, but because there wasn't anything that could really help him radar, he never stayed very long.

Q. Okay. And was he there during all aspects of the trip or did he come to the Control Room for a specific purpose? A. He would come to the Control Room if he were called for anything interesting by the officer of the watch, something that would pertain to his purpose for being on board.

Q. And where did he spend his time when he wasn't called by the officer of the watch? A. I observed him spending a lot of his time around the accommodations space and forward torpedo room.

Q. How did you feel about going on watch when you served on board OJIBWA? A. I dreaded going on watch. I liked my job, but I didn't like the trip through the Control Room, sir.

Q. And why was that? A. I was afraid of making a mistake on the way through and upsetting the commanding officer, sir.

969

Master Seaman Madgett

Examination-in-chief

Q. I understand you spent some time on board OKANAGAN? A. Yes, sir.

Q. Can you contrast your experience on board OKANAGAN with your experience on board OJIBWA A. Yes, sir. The experience on HMCS OKANAGAN was pleasant. The first day on board the Executive Officer, Lieutenant[N] Wamback, needed to get to the chart table urgently, I'm not aware of why, but he pushed me aside on his way to the chart table and then later apologized for doing it and asked if I had felt offended - I didn't. On the second day on HMCS OKANAGAN the commanding officer, Lieutenant-Commander Hickey, asked me how I was ...

Q. I would again ask you not to repeat the words of others. Simply say - and you spoke with him, but don't repeat the conversation as such? A. Yes, sir.

Q. You can tell us what you said, but not what Lieutenant-Commander Hickey said. A. Yes, sir. I spoke with Lieutenant-Commander Hickey and told him that my experience so far on HMCS OKANAGAN was like Disney World.

Q. And did you give a further explanation as to what you meant when you said that? A. I had just said to him that it was like winning a trip to Disney World.

Q. Why would you make a comment like that? A. I felt very relaxed on board, sir.

Q. As compared to what? A. As compared to being on board OJIBWA.

Q. How would you describe the stress level on board OJIBWA A. Extremely high.

970

Master Seaman Madgett

Examination-in-chief

Q. And how would you describe the stress level on board OKANAGAN? A. Virtually non-existent, sir.

Q. Did Lieutenant-Commander Marsaw's leadership style and the atmosphere on OJIBWA have any affect on you personally? A. ...

DEFENDING OFFICER: Mr Judge Advocate ... sorry, I must have been thinking of something else.

JUDGE ADVOCATE: Very well.

WITNESS: Could you repeat that question?

ASSISTANT PROSECUTOR:

Q. The question was, did Lieutenant-Commander Marsaw's leadership style and the atmosphere on board HMCS OJIBWA have any affect on you personally? A. Yes, sir. I pride myself in being very career oriented, and at one point while on OJIBWA I could have cared less whether my career continued at that point or not.

Q. What was morale like on board? A. Low.

Q. How did that contrast with your own personal morale? A. My own personal morale was low as well.

Q. Would you sail with Lieutenant-Commander Marsaw again? A. No, sir.

ASSISTANT PROSECUTOR: That completes my questions, Mr Judge Advocate. Obviously, it was certainly not the prosecution's intention to enter the door as an exhibit, but with your permission I would certainly invite the members of the court to go and see how heavy that door actually is. Again, I leave that to your discretion and maybe at some time prior to a break it could be done.

971

Master Seaman Madgett

Cross-examination

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. In your direct examination you mentioned that no matter how much effort you put into doing your job it was never good enough for Lieutenant-Commander Marsaw. Could you give examples of times it wasn't good enough? A. Yes, sir. In one instance in our radar office we had what appeared to be "seek water" on the radar itself, and from my experience on radar it was "seek water". When I explained that I felt it was "seek water", he said "Bullshit". And I didn't get any explanation as to why it was or wasn't, sir.

Q. It was based on your experience on radar?
A. Yes, sir.

Q. You mentioned that when he came into the Control Room, that if there was some talking - it got silenced; and you went on to say that it was by intimidation. What kind of talking would be going on? A. The navigator would be talking with the officer of the watch. It would depend on the situation, sir. But it was usually about whatever operation we were on at the time.

Q. Well, was it orders or necessary information that was being passed, or just chit-chat? A. In some cases probably both, sir.

Q. But then the chit-chat would stop when Lieutenant-Commander Marsaw would come in? A. Yes, sir.

972

Master Seaman Madgett

Cross-examination

Q. And when he was there, were orders and information, required information, still being passed?

A. Yes, sir.

Q. You also mentioned that you could tell when he would get upset, he would have a deep sigh and then yell at the officer? A. Yes, sir.

Q. Did he react like that just to react like that or was he reacting to a specific event? A. It would be reacting to a specific event, sir.

Q. But you can't comment on any event in particular? A. No, sir.

Q. You were asked to quote phrases or words, and the examples you gave was with the EO, the two of them, you referred to Lieutenant[N] LeClaire and Lieutenant[N] Tingle. The phrase was "Stand up and kick yourself in the ass"? A. Yes, sir.

Q. Does it attach to any event in particular? A. Yes, sir. On both occasions the engineering officers were at the trim seat and they were having trouble adjusting the trim on the submarine.

Q. And was that a quick reaction or did it happen after a certain number of remarks that were made to get the officer of the trim to get the boat back in trim? A. I can't recall, sir.

Q. You can't recall. The incident with Lieutenant[N] Higginson coming out of the port of Bermuda? A. Yes, sir.

Q. You said it referred to a safety track. What is a safety track? A. The safety track, around Bermuda there's a lot of hazards, there are safety lanes, and the safety lanes have a minimum and maximum limits, sir.

973

Master Seaman Madgett

Cross-examination

Q. Uh, huh? A. And Lieutenant[N] Higginson had set the track for the maximum safety limit.

Q. And you said that the commanding officer, Lieutenant-Commander Marsaw, took measurements and realized that he would not be able to dive during that passage? A. Yes, sir.

Q. How do you know that? A. How do I know that he would not be able to dive?

Q. Uh, huh? A. I'm unclear, sir.

Q. Well, you said he took measurements and realized that he would not be able to dive, and he crumpled the chart? A. He was up, he had already made his intentions clear that he wanted to get one dive in before we went home, sir.

Q. Oh, but you assume that it was because of that that he wasn't satisfied? A. Yes, sir.

Q. And you said he crumpled the chart. How did he do that? A. He balled them up, sir.

Q. What's the use of a chart that has been balled up? A. There is no use for a chart that has been balled up, sir.

Q. And why is that? A. It's still possible to use it, but the chart itself has more wrinkles, the more wrinkles on the chart the more the possibility of errors, of an inaccuracy because of the wrinkles.

Q. Where do you get these charts from?
A. The charts come from Hydrographic Services in the Dockyard, sir.

Q. In the Dockyard. How many charts do you carry? A. Anywhere, depending on the chart, anywhere from two to five copies.

974

Master Seaman Madgett

Cross-examination

Q. Do you have yourself any knowledge of navigation? A. Yes, sir.

Q. What courses would you take?
A. Navigation is part of the radar trade, at least on the basic level, sir.

Q. You said that the effect of the leadership of Lieutenant-Commander Marsaw affected the officers' ability to lead, they would second guess their decision. Do you relate that to errors being made and people being yelled at? A. Yes, sir.

Q. Yes. The first time when you say that officers were yelled at, would they make mistakes?
A. Yes, sir.

Q. And that would tend them to second guess their own decisions. Is this what you're relating to the court? Because I have a difficulty making a connection. Well, I don't know. I'm asking you, are you making a connection between the two concepts? A. No, sir. What I'm saying is that when the officer was forced to make a decision on his own, not necessarily after making a wrong decision, but when he would have to make a decision on his own he would not be confident in the decision that he was making.

Q. Is it your assumption that he would not be confident or just develop a ... I'm looking for the English word, I'm sorry ... a reflex to just go back and check before he made final decision? A. I'm not sure, sir.

Q. You're not sure. The briefing that you mentioned having to give in the ... I didn't write down the ...? A. In the Wardroom, sir.

Q. In the Wardroom. Would that part of the FINCASTLE Exercise that you took part in? A. Yes, sir.

975

Master Seaman Madgett

Cross-examination

Q. Okay, and I'll move right now to another area. The Radar Room door, the door that we have seen, when would it be open and when would it be closed?

A. The Radar Room door was kept closed for several reasons. If we were running opened up, the condensation would get into the transmitter/receiver and a lot of the parts of the radar display itself and cause corrosion and rust.

Q. Uh, huh? A. So the radar door would be kept shut to try to block that out. Specifically, it would be opened in an emergency whenever if we heard an emergency, if an emergency was piped, the door would automatically come open because depending on the situation if there is an extra man in the radar, that extra man could be quite useful other places on the submarine, and if the door is open and he's available at the door, then they know that there's an extra man there for use in an emergency.

Q. Okay. And you said it took you by surprise, that obviously something was going on in the Control Room. Was there an emergency going on in the Control Room? A. I don't know, sir. We were unaware at the time. I heard a commotion in the Control Room that caused me to believe that there was an emergency, that's why I was reaching for the door to open it up.

Q. And if there is an emergency, what is the first signal that is given for any emergency? A. The first signal should be the alarm.

Q. Should be the alarm? A. Yes, sir.

Q. Okay, if there was an emergency there would have been, according to the standard procedure, the general alarm which is what? What is the general ... what mechanical ...? A. What sound does it make?

Q. Yes, what sound? A. It's, I guess, basically a ...

976

Master Seaman Madgett

Cross-examination

Q. Is it a horn? A. Basically a horn that sounds.

Q. And how long does it go on? A. It goes on for about five or six seconds.

Q. Is it loud enough for everybody throughout the submarine to hear? A. Yes, sir.

Q. Even you inside the Radar Room with the door closed? A. Not necessarily, sir.

Q. Not necessarily? A. No, sir. In order to keep the radar equipment cool the radar exhaust would be running, and depending because radar is a varied size restricted space, depending on where we are in proportion to the exhaust, we may or may not hear it or we may think we've heard it.

Q. And you were about to open the door?
A. Yes, sir.

Q. And the door came on you? A. Yes, sir.

Q. If somebody approaches the door from the outside, that specific door, is there any way a person can see if somebody else is on the other side? A. No, sir.

Q. So therefore you on your side cannot see inside towards the Control Room as well? A. No, sir.

Q. How do you know it was Lieutenant-Commander Marsaw who kicked the door? A. I don't, sir.

Q. How long are the screws, like the 12 screws that are used to attach the door to the frame?
A. I couldn't quote exactly, sir. I would say approximately three inches.

977

Master Seaman Madgett

Cross-examination

Q. Approximately three inches. What do they screw in? A. They screw into the frame around the door, sir.

Q. And is that a wooden frame? A. Yes, sir.

Q. A wooden frame. And yourself and Bidinost, you mentioned put the door back in. Is that correct? A. Yes, sir.

Q. And that door, if I understand correctly the way it's designed, would bend from the middle? A. Yes, sir.

Q. Was it totally completely off the hinges? A. Yes, sir.

Q. It fell on the floor? A. It fell onto the seat locker.

Q. And do you recall approximately when that incident occurred? A. No, sir. I don't.

Q. Could it have been in January during the work up period? A. Possibly, sir. Yes.

Q. Who's on board during work ups? A. Sea Training is on board during work ups.

Q. Do you recall approximately the time of day? A. No, sir.

Q. You don't recall the time of day. But if Sea Training was on board and that happened when Sea Training was there, other people would have seen that? A. Yes, sir.

Q. How long did you spend on OKANAGAN ... and I'm just going to put some information around that question first. You mentioned earlier on when you started your direct examination, that you had served on OJIBWA, ONONDAGA and OKANAGAN? A. Yes, sir.

978

Master Seaman Madgett

Cross-examination

Q. That you did your basic submarine course in 1992? A. Yes, sir.

Q. Approximately what period of the year was that? A. I completed the course approximately the 22nd of October.

Q. The 22nd of October? A. Yes, sir.

Q. And then you joined OJIBWA early October until now? A. October 26th.

Q. October 26th '92 until the present time. A. Yes, sir.

Q. You're still with OJIBWA? A. Yes, sir.

Q. So those trips on ONONDAGA and OKANAGAN, how long were they? A. The trip on ONONDAGA was just for a week for safety work ups to replace the senior NCI Op who had gone elsewhere.

Q. Uh, huh. And OKANAGAN? A. OKANAGAN was approximately five weeks, I'm not sure of the exact duration.

Q. Approximately five weeks. And what operations, exercises or anything of that nature did you take part in on OKANAGAN? A. I can't really recall, sir.

Q. You can't really recall. So basically you had spend a lot of time on OJIBWA and you're basing your comparison, or as you quoted "Disney World" approach to the other submarine, on a five-week period during which you don't recall exactly what type of exercise, operation or if, for that matter, that compares to OJIBWA? A. Yes, sir.

Q. Basically how many, according to your recollection, how many days would OJIBWA have spent at

979

Master Seaman Madgett

Cross-examination

sea when you were on while Lieutenant-Commander Marsaw was there? A. I'm not sure, sir, but quite a few.

Q. Quite a few. And would that effect morale? A. Yes, sir.

Q. Away from home? A. Yes, sir.

Q. Long hours? A. Yes.

Q. When you go out in your present trade, what kind of watches or shifts do you have? A. Depending on the personnel we have in the branch at the time, it varies from one in two to a one in three watch rotation, sir.

Q. And that translates in what, in terms of hours? A. Are you counting the portion of the day, sir?

Q. Hours on/hours off ... portion of the day? A. Portion of the day ...

Q. But is it six on/six off? A. Probably six on and six off in a one in two.

Q. So you would basically put in a 12-hour day and the rest you have to spend around the submarine because there's no where else to go? A. Yes, sir.

Q. Do you think it has an effect on you over long periods? A. Yes, sir.

ASSISTANT DEFENDING OFFICER: I'm just going over my notes, Mr Judge Advocate.

Q. When the door was opened during the incident that you related, how much noise did it make? Did it come down crashing on you or did it just go to the floor? A. I honestly don't recall, sir. That particular incident I was in shock. It took me a few seconds to realize what had happened.

980

Master Seaman Madgett

Cross-examination

Q. Uh, huh. Have you seen officers, junior officers or unqualified officers, not eat in the Wardroom? A. Yes, sir.

Q. Who would that be? Do you know, recognize the names or the people? A. Yes, sir. I had occasion to see Sub-Lieutenant Ellis not eating in the Wardroom and he had been down in the AMS.

Q. Ellis? A. Yes, sir.

Q. Did that last long? A. Not that I'm aware of, sir.

Q. And I don't want you to relate words, but what is your personal knowledge of him not eating in the Wardroom? A. That one occasion, sir.

Q. But your personal knowledge as to why he was not? A. As to why?

Q. Why he was not eating in the Wardroom? A. None, sir.

Q. None. Have you had the occasion to read the article that was published in the Chronicle-Herald, 16 December 1993? If it can help you, I can show you the article I'm referring to. A. Yes, sir. I believe I have seen this.

Q. You have read that at the time? Any specific recollection as to when you read that? A. If I could just have a minute, sir?

Q. Yes, sure. Read it through if you need to have the time. A. The reason I recall for seeing this, sir, was the fact that I had taken an harassment advisers course on Base.

Q. Uh, huh? A. And this was one of the examples they had used.

981

Master Seaman Madgett

Cross-examination

Q. Were you contacted or did you contact the writer of this article, Mr Dunlop? A. No, sir.

Q. Were you interviewed by the Military Police with reference to this case? A. I was interviewed by Internal Investigation.

Q. Well, investigators, the NIS? A. Yes, sir.

Q. Do you recall when you were interviewed? A. It would have been in the summer of '94, sir.

Q. June, would that be possible - June '94? A. That would be possible, sir.

Q. The early part of June? A. Yes, sir.

ASSISTANT DEFENDING OFFICER: These are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate.

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Master Seaman Madgett, during your five or so weeks on board OKANAGAN, did OKANAGAN go to sea? A. Yes, sir.

Q. In the Radar office, my friend was discussing whether or not you would have heard if an emergency had been piped. What communication channels do you receive in the Radar office? A. We receive ... we work on 20 and 27 Mc, and we would also receive 1 Mc as 1 Mc would override the circuit, sir.

982

Master Seaman Madgett

Re-examination

Q. So if something was piped on another channel, would you have heard it in the Radar office?
A. No, sir.

Q. When you're working in the Radar office, how far do you normally sit away from the door? Where are you normally location in relation to the door in the Radar office? A. It could vary, sir. If I were working at the radar I would be approximately a foot and a half away from the door. If I were working at UA4, which is the EW set that is also in there, I would be about two and a half feet from the door.

Q. Okay. And is the Radar office only manned when you're at periscope depth at sea? A. Yes, sir.

Q. Would the CO be aware of that? A. Yes, sir.

Q. Given your unique experience, would you say that you're probably better able to respond to an emergency if the door was open than you are if you find yourself laying on the deck underneath the door?
A. At the time, sir, I wasn't even aware there was an emergency, so I would have to say - No, I couldn't respond if I was.

Q. Master Seaman Madgett, can charts be re-used if they haven't been crumpled up? A. Yes, sir.

Q. I wondering if you could read for the court Article 4.02, the portions that are underlined in ink, and maybe the title of that section as well?
A. Yes, sir. "Article 4.02. General

DEFENDING OFFICER: Excuse me. I would at this point question the relevancy of this as I cannot, possible mistakenly, but I cannot see this arising from cross-examination.

983

Master Seaman Madgett

Re-examination

PROSECUTOR: I think it clearly arises on cross-examination. We've been hearing repeatedly and repeatedly about Article 4.02, discussion has come up about charts being crumpled, and 4.02 says: "An officer shall ensure the proper care and maintenance to prevent the waste of all public and non-public property within the officers' control". I would argue that it is relevant and defence counsel has repeatedly raised this article in the past.

JUDGE ADVOCATE: But what is your question?

PROSECUTOR: We're asking the witness to read that article right now.

JUDGE ADVOCATE: Why?

PROSECUTOR: And we're going to relate it to the fact that he had a perfectly good chart that had been crumpled and no longer being able to be used and therefore an infringement of 4.02.

DEFENDING OFFICER: I'm afraid that it's still not relevant. It does not arise from cross-examination. That matter of the crumpling of the map has been raised in direct and I see no relevancy to all of this.

JUDGE ADVOCATE: Your objection is sustained.

ASSISTANT PROSECUTOR: Thank you, Mr Judge Advocate. Those are our questions.

JUDGE ADVOCATE: Thank you.

Questions from the court? No questions?

Thank you very much.

WITNESS WITHDRAWS.

984

ASSISTANT PROSECUTOR: Mr Judge Advocate, that's all the witnesses we were prepared to call today from the prosecution's side.

JUDGE ADVOCATE: That was the menu of the day?

ASSISTANT PROSECUTOR: That was the menu of the day. Yes, sir. So given that it's a long weekend, it wouldn't be a bad idea to break early and proceed.

JUDGE ADVOCATE: Very well. This court is adjourned until 0900 hours, 11 October.

ADJOURNMENT: At 1405 hours, 6 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 11 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Before being seated, I would ask the court reporter to take his oath, please. Would you please remove your head-dress.

THE COURT REPORTER, WARRANT OFFICER R.K. GAUDET, IS DULY SWORN.

JUDGE ADVOCATE: Thank you. You may be seated.

Is the prosecution ready to call its next witness?

PROSECUTOR: Yes, we are, Mr Judge Advocate, I'd like to call Mr LeClaire, please.

985

Mr LeClaire

Examination-in-chief

FOURTEENTH WITNESS) Mr D.J. LeClaire, is duly sworn.
FOR THE)
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last name, please?

A. My name is David John LeClaire, L-E-C-L-A-I-R-E.

Q. I understand you recently retired from the Canadian Forces. When did you retire? A. I left the Canadian Forces in June of last year.

Q. What year did you join the Canadian Forces? A. 1981.

Q. I understand you went to RMC and graduated in 1985 as an engineer? A. That's correct.

Q. You were awarded your dolphins in 1990? A. Correct.

Q. And from August '91 until April '93, you served as the engineering officer on the HMCS OJIBWA? A. That's correct.

Q. Prior to that, you'd sailed on the OKANAGAN, the summer of 1989 until July '90? A. Correct.

Q. And during that time Lieutenant-Commander Marsaw, then Lieutenant[N] Marsaw, was your XO? A. That's true.

Q. Do you recall reading an article in the *Mail-Star* dated December 16th, 1993, concerning allegations of abuse on the OJIBWA? A. I do.

Q. Did it come as a surprise to you that this article was published? A. No, it did not.

986

Mr LeClaire

Examination-in-chief

Q. Why not? A. I was contacted in August by a reporter from the *Mail-Star*, who identified himself and requested he speak to me about matters concerning OJIBWA.

Q. Did you talk to him? A. No, I did not.

Q. As a consequence of your conversation with this reporter in the summer, what did you do?
A. I called my immediate superior as soon as I got off the phone with the reporter, and then briefed the squadron commander on the conversation the next day.

Q. What was the workload like for the engineering department while you were a member of the OJIBWA? A. Throughout my term it was what I would describe as a challenging workload, OJIBWA was in the latter half of her commission. We'd also picked up additional commitments because the other operational boat was down for a period and so our workload as a department was high.

Q. What about December '92/January '93, what was the workload like at that point for the engineers?

A. The workload I would describe as extreme through that period. We had entered a docking period that grew in proportion as we progressed. During that period my engineering staff was in seven days a week, twelve hours a day.

Q. And prior to going in that docking period, had the boat been sailing? A. Yes, it had.

Q. For how long approximately? A. I believe we were away for 86 days.

Q. So you were away for 86 days and you get into this work period? A. Yes.

987

Mr LeClaire

Examination-in-chief

Q. When did you go sailing after the work period finished in January, do you recall the date or the approximate date? A. Mid July approximately.

Q. Mid January? A. Excuse me, I meant January.

Q. What was the fatigue level like for your crew in January? A. I think the crew in general was tired. My department specifically had been heavily, heavily tasked after being laid safe.

Q. Was the amount of work you had to do and the time you had to do it cause any concern in your mind? A. I believe that when we undocked, especially after undocking just after the Christmas period, that we had insufficient amount of time to prepare the boat in the time given.

Q. Did you raise this with Lieutenant-Commander Marsaw? A. Yes, I did.

Q. And what was his response? A. His response, that he would take the issue to the admiral to see if we could get some more time.

Q. How much extra time do you figure you needed? A. As I recall our schedule slip rate, two, possibly three days.

Q. That's what you ended up getting?
A. Yes.

Q. And after that time, before you sailed, did you have any concerns? A. Just prior to slipping and proceeding to the ammunition jetty where we got our ammunition and then depart, my chief ERA expressed his concern that he thought the department ... it would be unsafe, unwise to sail because the engineers had been pressed so hard.

988

Mr LeClaire

Examination-in-chief

DEFENDING OFFICER: Mr Judge Advocate, that's clearly hearsay, an opinion of his chief ERA and all that, so I have to object to this.

PROSECUTOR: I believe ...

Q. Did you pass this on to Lieutenant-Commander Marsaw? A. Yes, I did.

JUDGE ADVOCATE: That is still hearsay, I mean, he may say what he passed on to Marsaw but not what other people told him.

The objection is sustained.

PROSECUTOR: Okay.

Q. Did you raise any concerns with Lieutenant-Commander Marsaw, without getting into the conversation of anybody else? A. Yes, I did. I expressed my concern with the state of tiredness of my department and expressed concern proceeding to sea immediately after the ammunitioning.

Q. Were you given extra time? A. We stayed alongside the ammunition jetty overnight and then proceeded to sea the next morning.

Q. How would you describe Lieutenant-Commander Marsaw's primary methods of leadership? A. I would describe his primary method as negative reinforcement, primarily manifested as screaming and yelling.

Q. How would he react on occasion if somebody made an error or wasn't working up to his standard? A. At times I thought he lost control. He would scream, yell, profanity, call down his officers and men.

Q. Do you recall any specific words he would use towards you or others? A. Profanity in general, "incompetent, must I do everything myself?"

989

Mr LeClaire

Examination-in-chief

Q. Did he ever refer to you as incompetent?

A. Yes, he would.

Q. What about others? A. Yes, he would.

Q. How frequently would you see this type of behaviour from Lieutenant-Commander Marsaw while at sea? A. That depended on the task at hand. As we were in higher pressure situations it became more frequently, on a daily basis, and up to and including on a on-watch basis.

Q. On a watch basis at times. Can you recall any officers who did not get yelled at by Lieutenant-Commander Marsaw? A. The executive officer.

Q. Which would have been who at the time? A. Steve Virgin.

Q. Would his style have any effects or impact on how you performed your job in the control room? A. Yes, it would. It caused myself to be fearful and I think that degraded my ability to function.

Q. Okay, in what way? How would it impact on your way to function? A. I was fearful of making mistakes, and I was fearful of the consequences of making mistakes and I think that compounded errors.

Q. Did you feel you worked to your full potential? A. I don't think I realized my full potential given the atmosphere on the OJIBWA.

Q. Did it effect in any way the way that you approached Lieutenant-Commander Marsaw? A. I didn't enjoy approaching him with problems, however, I did my best to keep him informed.

990

Mr LeClaire

Examination-in-chief

Q. In terms of reporting information to him, can you give examples of where you might have been impeded? A. The situations that I recall were on-watch situations. Specifically, in his standing orders there were off-depth limitations when he was to be informed and that was not always done.

Q. Would this be known amongst the control room at the time? A. Yes, it would.

Q. Did you ever have an occasion to discuss with Lieutenant-Commander Marsaw or express your concerns about the way that you were treated? A. Yes, I did.

Q. What was his response? A. His response was to tell me to learn my job and kicked me ... or asked me to leave his cabin.

Q. Did you ever have occasion to observe the reaction of others in the control room who were being yelled at by Lieutenant-Commander Marsaw in the ways you've described? A. Yes, I did.

Q. How would they react? A. You could see them become cowed and subtle, and you could see that they were experiencing humiliation as well.

Q. Where would you do part of your job in the control room, it would be on the trim seat or ... ?
A. The trim seat was a big part of my job, yes.

Q. How would the helmsman react on occasion?
A. The helmsman - one or two in particular - were quite fearful of getting on the helm and it was ...

DEFENDING OFFICER: Mr Judge Advocate, again, I'm not sure how the witness can testify as to that. I did not object earlier on when he said, well, they would become silent, that's one thing, that's something he can observe. As to what he's testifying about, what others felt and then becoming fearful and all that, I

991

Mr LeClaire

Examination-in-chief

don't think it's permissible. He's not in a position to testify on that matter.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I'm simply asking based on Lieutenant LeClaire's observations how others appeared. It's a question I've asked repeatedly without objection prior to this.

JUDGE ADVOCATE: Well, ask your witness how he's aware of that.

PROSECUTOR: Okay.

Q. How would you be aware of a helmsman appearing fearful? A. Observing them physically and what was said to me.

JUDGE ADVOCATE: The objection is denied.

PROSECUTOR:

Q. Did you ever have occasion to observe Lieutenant Kelk? A. Yes, I did.

Q. What position did he have in the control room? A. Steve was a watch leader.

Q. Can you contrast how he would react when Marsaw was and wasn't present in the control room? A. I think he was a different person when the captain was in the control room. With the captain out, he was an average standard fellow who was a good watch leader and easy to get along with. When the Captain was in, he became excessively demanding and shouting, things like that.

Q. Do you know Lieutenant[N] Wamback? A. I do.

992

Mr LeClaire

Examination-in-chief

Q. How would he react? A. Art was a very stoic individual, would take whatever was given to him by the Captain and generally keep it to himself.

Q. Did you have confidence and trust in Lieutenant-Commander Marsaw? A. I had confidence and trust in him as a submariner, but not as a captain.

Q. Why not? A. I don't believe he put the welfare of his crew at the forefront.

Q. Did you receive praise from Lieutenant-Commander Marsaw? A. No, I did not.

Q. Did you ever observe Lieutenant-Commander Marsaw make a mistake? A. I did.

Q. And how would he react when he made a mistake? A. I found that they were ... it was either just ignored or blame was portioned out to subordinates.

Q. Could you contrast for the court Marsaw's leadership style as XO on the OKANAGAN compared to when he was commanding officer of the OJIBWA?
A. Completely different. I didn't find him as an executive officer overly approachable, but certainly not any of the screaming and yelling that I experienced under his captaincy.

Q. How would he behave when riders were actually present in the control room? A. It was a much calmer control room.

Q. You were part of the counter-drugs trip in the summer of '92? A. I was.

Q. Were there riders on board then?
A. There were.

Q. What sort of riders? A. RCMP officers.

993

Mr LeClaire

Cross-examination

Q. Were they always present in the control room? A. No.

Q. Where would did they usually stay?
A. Primarily, they passed their time in the fore ends of the wardroom, and they spent time in the communication shack.

PROSECUTOR: Okay, no further questions, thank you.

JUDGE ADVOCATE: Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Were you always present in the control room? A. No, sir.

Q. So nothing unusual about anybody else not being always there. There's nobody on-board that's always present in the control room? A. No, sir, I stood six ... when we were dived during that operation, I was six hours on, six hours off, so I was in the control room a fair bit.

Q. You joined the Forces in 1981? A. Yes.

Q. Left in June '94? A. Yes.

Q. Because when you were serving under then I believe Lieutenant-Commander Irvine, an IE was offered to you and you did not accept it? A. That's correct.

Q. And that was in 1990, wasn't it? A. I don't recall exactly when I was offered it, but ...

Q. 1990/91? A. Around that time.

Q. So would you agree that when you started your service on-board OJIBWA you knew that your time was counted in the navy, or even in the Forces? A. At that time it would've been three years left, yes.

994

Mr LeClaire

Cross-examination

Q. And is that right too that you changed your mind and sought the support of Lieutenant-Commander Marsaw to attempt to reverse your earlier decision of not accepting IE? A. Yes, I do.

Q. And to your knowledge, was Lieutenant-Commander Marsaw supportive of it? A. Initially the letter that left OJIBWA was not what I would describe as supportive, and when the issue was raised again some months later, yes, it was. A second letter left OJIBWA that was supportive.

Q. And eventually, anyway, I guess, the decision wasn't changed and so out you went?
A. That's correct.

Q. When you say you were contacted by a reporter, was that Malcolm Dunlop? A. Yes, it was.

Q. How certain are you that it was in August of '93? A. I'm not certain of ... specifically certain of the date or the time, but it was in that time frame.

Q. If I suggest to you it was more like November of '93? A. No.

Q. So you're saying that it was prior to October '93, or could it have been in October of '93? A. No, I believe it was earlier.

Q. Do you recall during the docking work period of early '93, that lots of people worked long hours? A. Yes.

Q. And the ship being scrubbed at one point and it was cold and all that? A. Well, it was cold, it was during the Christmas season, yeah.

Q. Do you recall Lieutenant-Commander Marsaw asking or having the XO to pipe the ... to take the

995

Mr LeClaire

Cross-examination

rest of the day off because it was cold, do you remember that one incident? A. I don't recall it.

Q. No? A. No.

Q. And when you went to him and expressed your concern about the time to get the boat ready, Lieutenant-Commander Marsaw was quite willing to take it up and that's what he stated to you? A. He stated that he would approach the admiral with the issue, yes.

Q. And, in fact, you gained an extra three days? A. Two or three days, yes.

Q. And you say that when mistakes were made he would yell or scream or state words like, do I have to do it myself? A. Yes.

Q. Was Virgin a good XO? A. I thought he was.

Q. And you stated he was not yelled at?
A. No.

Q. Can one draw a conclusion that, I mean, those who got yelled at were deserving of ... because they were making mistakes? A. I often thought that the response to the mistake was excessive and not constructive in correcting the mistake.

Q. Would you say that the boat did well under the captainship of Lieutenant-Commander Marsaw?
A. We certainly met our commitments. I don't know how senior officers felt about OJIBWA's performance.

Q. Would you say that you did well in, like, exercises, NATO exercises? A. Yeah.

Q. Did a good job there, like, remain undetected and, I mean, really played a good game there under his captainship? A. Yes.

996

Mr LeClaire

Cross-examination

Q. Were you on-board when OJIBWA went to the torpedo range and obtained quite a spectacular score?

A. You'd have to refresh my memory, what time frame that was?

Q. That would've been '92/'93 ... '91, actually. Were you on-board then? A. It was in the fall.

Q. Okay? A. Whether or not I was on-board at the time, I recall OJIBWA getting a near perfect or perfect record on the range, yes.

Q. You probably recall that because it's basically unprecedented in the squadron? A. I don't know if it's unprecedented or not. I know it was very good.

Q. When you say that he'd yell, you cannot give any specific example, can you? A. I have one in mind that involved myself.

Q. Yes, let's hear it? A. We were ... during our drug-interdiction op, the echo sounder started to go very, very shallow, very, very quickly, although it didn't jive with the chart. But I was operating the echo sounder at the time, brought that to the attention of the officer of the watch, brought that to the attention of the XO. The echo sounder continued to come shallow very quickly. The captain came into control. The XO took the echo sounder, continued to call out the depths which shallowed and the captain surfaced the boat. And after that, was subjected to what I would describe as a tirade because we had potentially compromised our covertness.

Q. So basically because of a problem with the sonar or because the position the sub appeared to be in, in accordance with the reading of the sonar, the captain had to surface the boat? A. Yes.

Q. And is that correct that he did that for safety because of the result ... or the reading of the

997

Mr LeClaire

Cross-examination

sonar there was the perceived danger of collision?

A. Perceived danger of grounding, yes.

Q. Of grounding, as it was, okay? A. Yes.

Q. And the captain took the decision to surface the ship? A. Yes.

Q. Ascertained the facts of the matter and then dived again? A. As far as I know there was never any investigation into why.

Q. No, no, but he dove after the ... ?
A. Yes, oh, sorry, yes, the boat dove.

Q. Would you say that to be undetected was the most important factor of this mission after safety, of course? A. Yes.

Q. Was Chief Tovey working for you?
A. Yes, he was.

Q. Would you say he was a sort of a forceful individual? A. Yes.

Q. When he had something in mind that's what he wanted to do? A. Yes.

Q. Can you give me an example of a mistake that Lieutenant-Commander Marsaw made? A. The submarine was found to be out of area during an exercise.

Q. Uh-huh? A. Because the area had been defined incorrectly. I believe that was one. I also thought that calling into question my competence and others competence when the submarine surfaced was a mistake.

Q. Because you don't make mistakes yourself?
A. No.

998

Mr LeClaire

Cross-examination

Q. So questioning your competence is not in order? A. Questioning my competence in front of subordinates in public is not in order.

Q. Does that relate to an incident when you briefed Lieutenant-Commander Marsaw in presence of others, and he interrupted you because you had some of your facts wrong? A. You're speaking about the incident of surfacing the submarine?

Q. I'm talking about you being ... having your competence questioned in front of others, you say is not right. And I'm saying, does that relate to one incident where you were briefing the Captain and he interrupted you because you had some of your facts wrong and that took place in presence of others? A. If it's the incident I believe you're referring to, we were ... yes, he was being briefed in the wardroom in front of other officers. I made a mistake, a technical mistake, and he questioned my competence there in front of others.

Q. He corrected you on the spot? A. No, he did not correct me. Excuse me, he did correct me, and he also questioned my competence.

Q. And then you are not ... you didn't like that very much, you went to see him and said, well, I don't like my competence being questioned in the presence of others, is that correct? A. I said to him that if he was going to speak to me in that manner I would appreciate it if he did it privately.

Q. And did he reply that to you, that you should've been briefing him on this matter one on one as per his request, and had you done that he would not have had to interrupt you in the presence of others? A. No, he did not.

Q. He did not say that? A. No, he did not. He said, "Learn your job and get out of my cabin".

999

Mr LeClaire

Cross-examination

Q. You're sure of that? A. Yes, I am.

Q. You said that the helmsman appeared scared, you said, from what I observed and what was said to me? A. Yes.

Q. So part of your testimony relies on what was said to you, is that correct? A. Yes.

Q. Were you present on board, probably in the '92 period, April '92, or thereabouts, on your way to Dublin when the captain, Lieutenant-Commander Marsaw, called his officers on board and discussed the matter of use of violence on board? A. Yes, I was.

Q. And is that correct that the gist of Lieutenant-Commander Marsaw was that he would not tolerate violence on board and reminded his officers to play the rule as they should be? A. Yes.

Q. Would you say that the submarine environment lent itself rather well to lots of rumours flying around? A. No more so than anywhere else in the navy.

Q. No? A. No.

Q. Would the fact that it's smaller than; for example, other component of the navy, that it would intensify the rumour mill because it is smaller? A. It might.

Q. It might. Was there a rumour or an allegation that you had kicked an officer on board? A. Yes, there was.

PROSECUTOR: Again, I object to this, that we're getting into hearsay now. I think we're going way off track, we're into rumours and we're into hearsay, maybe double/triple hearsay, so I'm objecting to getting into this area.

1000

Mr LeClaire

Cross-examination

DEFENDING OFFICER: I will rephrase the question.

JUDGE ADVOCATE: Please, do.

The objection is sustained.

DEFENDING OFFICER:

Q. Were you once confronted with the allegation that you had kicked an officer ... ? A. ...

PROSECUTOR: Again, this is hearsay.

DEFENDING OFFICER: What's hearsay there? I didn't say a word, I did not repeat the word.

JUDGE ADVOCATE: No, but the witness will be allowed to repeat some though.

DEFENDING OFFICER: No, no, I just want to know if he was or not. That's all. And I'll ask him whether he did or not. Were you confronted ... I mean, I'm not repeating anybody else's words. Were you confronted with the fact that you might have kicked an officer? Answer: yes or no.

JUDGE ADVOCATE: That who might have kicked?

DEFENDING OFFICER: Him.

JUDGE ADVOCATE: Confronted by whom?

DEFENDING OFFICER: Does it matter, I mean, I think if he says yes or no we'll take it from there. I don't think it's hearsay.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I think it is hearsay. He's posing questions based on hearsay to the witness about rumours that people have come up and told him about,

1001

Mr LeClaire

Cross-examination

and we're going to start pursuing in this trial what rumours were said to who, by who to who, when, and find out whether or not they're true or not. That's what we're starting to get into with this line of questioning. I object to it, I think it relates to hearsay.

JUDGE ADVOCATE: It really depends the way the witness will answer. Ask your question and then, of course, I remind the witness that it has to be your personal knowledge, you're not allowed to repeat words pronounced by other people.

DEFENDING OFFICER: Uh-huh. Yeah, I mean, the fact that it comes after the line of questioning I had adopted may have created some fear that it was hearsay but I promise it's not.

Q. Were you indeed confronted with the fact that you had kicked an officer on board OJIBWA?

A. May I ask for clarification of that question?

Q. Lieutenant[N] Gensey? A. Yes.

Q. Yes. And did you, in fact, kick Lieutenant[N] Gensey? A. No, I did not.

Q. And is that right that in relation to that very incident or absence thereof, should I say, you were interviewed by the military police? A. I was cautioned by the military police, yes.

Q. As a suspect? A. I was told I was under investigation for that allegation.

Q. And you were given your rights, et cetera? A. Yes, I was.

Q. And Lieutenant[N] Gensey was serving on board OJIBWA, I assume, during the time you were there?

A. He was my assistant engineer.

1002

Mr LeClaire

Cross-examination

Q. And it is your position that you never kicked him? A. Yes, it is.

Q. When were you confronted with this allegation? A. It was after the investigation into OJIBWA had begun by the military police and Lieutenant[N] Gensey phoned me and ...

Q. Don't repeat what he might've told you, I'm talking about the MPs. When did you meet the MPs? When were you investigated on this matter, like, is it in '91/2/3/4? A. I believe it would've been in early 1994.

Q. Okay, so it would've been after the article my learned friend was talking about in the *Chronicle-Herald* of 16 December 1993? A. Yes, I believe so.

DEFENDING OFFICER: If I may have a moment, please?

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. Did you ever see Lieutenant-Commander Marsaw kick anyone aboard or physically abuse somebody on board? A. No, I did not.

DEFENDING OFFICER: Thank you, I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. I'd like to ask you some questions about this echo sounder incident so I understand it. What's the function of an echo sounder, what does it do? A. The function of an echo sounder is to indicate the depth below the keel of the bottom.

1003

Mr LeClaire

Re-examination

Q. So it tells the boat how shallow it is or how close it is to grounding? A. Yes.

Q. On that particular incident during the counter-drugs trip, what was the echo sounder displaying? A. The echo sounder was displaying ... it was indicating that the bottom was rising quickly.

Q. As a consequence of that, the ballast would be blown and the boat surfaces? A. That was the ultimate decision, yes.

Q. Thereby compromising the covertness of the boat? A. Essentially, yes.

Q. Well, why would Lieutenant-Commander Marsaw ...

DEFENDING OFFICER: Mr learned friend, although in re-examination, should not offer conclusions and leading question to the witness.

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. As a consequence of the boat surfacing, you stated that Lieutenant-Commander Marsaw went into a tirade? A. Yes.

Q. Why would he do that? A. I believe because we had compromised our covertness on our mission.

Q. Even though the sub surfaced because you thought you were shallow? A. Yes.

Q. As a consequence of this tirade directed at you, what did you do? A. After we sorted ourselves out and got back down, I took the tape from the echo sounder.

1004

Mr LeClaire

Re-examination

Q. Why? A. Because it showed clearly that we were shallow.

Q. But why would you have to take it? A. I was concerned about potential action that may be taken against me, being sort of the cause of what precipitated the surfacing.

PROSECUTOR: Thank you, no further questions.

JUDGE ADVOCATE: Questions from the Court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

ASSISTANT PROSECUTOR: The next witness is
Warrant Officer Shea, Mr Judge Advocate.

1006

Warrant Officer Shea

Examination-in-chief

Q. In addition to Lieutenant-Commander Marsaw, do you recall what officers served while you were on board OJIBWA? A. Yes, I do.

Q. I'm wondering if you could list those that you recall? A. Lieutenant[N] Virgin, Lieutenant[N] Dussault, Lieutenant[N] Pokotylo, Lieutenant[N] Higginson, Lieutenant[N] Watt, Lieutenant[N] Wamback, Sub-Lieutenant Kohli, Sub-Lieutenant Elford, Lieutenant[N] Byrne, Lieutenant Kelk, Lieutenant[N] LeClaire, Lieutenant[N] Gensey.

Q. Do you know who were the XO's while you were on board? A. Lieutenant[N] Virgin and Lieutenant[N] Dussault.

Q. As a Physicians Assistant, what were your duties on board OJIBWA? A. I was the only Physicians Assistant on board, plus also I was also a control room watchkeeper.

Q. And what percentage of your time would've been spent doing traditional PA duties? A. Approximately ten per cent of my day.

Q. And the rest of your time? A. Ninety per cent routine was control room watch keeping.

Q. And that duty would be done where? A. In the control room itself.

Q. Did you happen to witness anyone being kicked on board OJIBWA? A. Yes, I have.

Q. And where did this incident occur? A. In the control room.

Q. Who did the kicking? A. Lieutenant-Commander Marsaw.

Q. I'm wondering, in general terms, if you could describe what you observed? A. I observed

1007

Warrant Officer Shea

Examination-in-chief

Lieutenant-Commander Marsaw on the attack periscope, and going around he bumped into Lieutenant[N] Higginson who was at the plot table, and on the next go around he lashed out and kicked him in the left ankle.

Q. And where were you located when this occurred? A. I was sitting on the CDC seat.

Q. How far away from Lieutenant-Commander Marsaw were you when the kick took place?

A. Approximately two feet, 18 inches/two feet.

Q. And how were you positioned at the CDC?

A. I was sitting kitty-corner on the seat itself, facing aft.

Q. Why were you positioned in that manner?

A. So I can hear better and actually see the periscope going up and down.

Q. So is that a normal position to be seated in at the CDC? A. I was positioned like that for most of the time when the forward periscope is up, yes.

Q. What was the position of the blackout curtain around the plot table at the time of the kick?

A. The blackout curtain was draped down and the people were behind it.

Q. Do you know who was kicked? A. Yes, I do.

Q. How do you know who it was? A. When the forward periscope went up I seen Lieutenant[N] Higginson go behind the curtain and he hadn't moved.

Q. So who was kicked then?

A. Lieutenant[N] Higginson.

Q. I show you Exhibit "I", which is a diagram of the control room. I'm just wondering if you

1008

Warrant Officer Shea

Examination-in-chief

could point out on this diagram where you were located?

A. Right here, I was sitting at the CDC.

Q. So the box marked CDC on the diagram?

A. Yes.

Q. Okay, and where was Lieutenant-Commander Marsaw? A. He was on the attack periscope, right here.

Q. And where would Lieutenant[N] Higginson have been? A. He was standing right here at the plot table.

Q. Now, you indicated that you were sitting kitty-corner on the locker. What would you have been looking at sitting kitty-corner? A. I was taking in this general area right here.

ASSISTANT PROSECUTOR: Again, when he says, "this general area right here", he's indicating the area of the attack periscope, the plot table and the search periscope area on the diagram.

Q. What foot did Lieutenant-Commander Marsaw kick out with? A. It was his right foot.

Q. And where was the kick landed? A. On the left ankle of Lieutenant[N] Higginson.

DEFENDING OFFICER: I'm sorry, I apologize. I missed the last answer, the witness is talking quite fast. What was the answer?

WITNESS: The left ankle of Lieutenant[N] Higginson.

DEFENDING OFFICER: The left ankle.

ASSISTANT PROSECUTOR:

Q. What were the lighting conditions like in the control room? A. Red lighting.

1009

Warrant Officer Shea

Examination-in-chief

Q. Do you recall when this incident took place, what trip you were on? A. It was a patrol we were doing off Newfoundland.

Q. What was the purpose of that patrol?
A. It's classified.

Q. Its been declassified actually, so you can certainly indicate what was going on, what the purpose of that patrol was? A. It was a drug run.

Q. I wonder if you could go through in detail what you observed from the moment the periscope came up until the kick was landed, if you could describe exactly what you observed? A. Okay, Lieutenant-Commander Marsaw was on the attack periscope, he was doing a counter-clockwise rotation. On his first pass he bumped into Lieutenant[N] Higginson ...

Q. If I could interrupt you. What parts of their bodies bumped on that ... ? A. His buttocks because he was in a semi-stooped position and he bumped into his leg/buttock region as well. On his next go-round, he slowed his motion down and lashed out and kicked Lieutenant[N] Higginson in the ankle.

Q. Are you able to describe the force that was used when the kick was applied? A. There was no doubt as to the intent of the kick itself. It was more than get his attention.

Q. Did the Lieutenant-Commander say anything after the kick was landed? A. Yes, he did. He said, "That'll teach you for getting in my way".

Q. What was the volume of his voice like when he made that comment? A. Loud enough that everybody in the control room knew exactly what ... understood what he was saying.

1010

Warrant Officer Shea

Examination-in-chief

Q. What was the tone of his voice like?

A. Anger.

Q. Do you recall what Lieutenant-Commander Marsaw was wearing on his feet at the time? A. Yes, he was wearing brown sandals and white socks.

Q. Was there anything impeding your view of what occurred from where you are on the CDC counsel to the periscope? Was anything in your way? A. No, there wasn't.

Q. What happened after the kick was applied?

A. Lieutenant-Commander Marsaw continued his rounds on the forward periscope and then left the control room.

Q. What about Lieutenant[N] Higginson?

A. Shortly after the CO left the control room, Lieutenant[N] Higginson came to me.

Q. Did Lieutenant[N] Higginson react to the kick then? A. He moved further down the plot table towards the aft end.

Q. You just indicated that Lieutenant[N] Higginson came to see you after the kick, is that correct? A. Yes.

Q. And without repeating what Lieutenant[N] Higginson would've said, can you describe what you would've said, if anything, to Higginson? A. I mentioned to him at the time that if he so wished that I'd be a witness to the incident itself.

Q. Why did you make that statement?

A. Because he had made some comments.

Q. Do you recall being interviewed by the military police in January of 1994? A. Yes, I do.

1011

Warrant Officer Shea

Examination-in-chief

Q. Do you recall being asked on a number of occasions whether or not you had witnessed any physical violence on board OJIBWA? A. Yes, I had.

Q. What was your response at that time?
A. At that time, it was no.

Q. Why did you give that reply to the military police? A. Because nothing had passed on the incident prior to and I'd completely forgotten about it.

Q. Did you have any subsequent contact with the military police? A. Yes.

Q. And can you describe the circumstances surrounding that? A. I phoned them a couple of weeks after my interview. I can't say what triggered my memory because I don't remember, but the incident came to light and I'd phoned them wanting to elaborate on my previous meeting with them.

Q. How did the incident come to light?
A. I'm not sure, I just remembered it.

Q. And did a subsequent interview take place? A. Yes, it did.

Q. How would you generally describe your experience on board OJIBWA? A. A living hell, it was a nightmare.

Q. Why do you say that? A. The verbal abuse, the attitudes, the morale on board.

Q. When you say "verbal abuse", what do you mean by that? A. The name calling.

Q. What kind of name calling went on?
A. People were called: "shit heads, assholes, fucking cunts, lazy ingrates". A full range of innuendos and comments.

1012

Warrant Officer Shea

Examination-in-chief

Q. And who would use those names? A. The CO.

Q. And who would he use them towards?
A. Everybody.

Q. Any comment on Lieutenant-Commander Marsaw's leadership style? A. It was mainly through fear and intimidation.

Q. What was the atmosphere like in the control room when Lieutenant-Commander Marsaw was present? A. Very tense. Everybody would tense up, most people would get very nervous, trying not to provoke him.

Q. And why was that? A. Because the rebuke they would get should anything occur that wasn't to his satisfaction.

Q. So just to clarify, how would he react then when he was dissatisfied with somebodys performance? A. He would name call, shout, scream, throw things around occasionally, tell the officer of the watch to get that person or that piece of shit or whatever out of there.

Q. When you say he'd, "throw things around", what types of things would he throw around? A. A parallel ruler, protractors that were on the plot table, fling things across the plot table when he wasn't happy.

Q. Were you ever subjected to that type of treatment? A. Yes, I was.

Q. What words or phrases did Lieutenant-Commander Marsaw use when he addressed you in that way?
A. "Stupid, idiot, fucking idiot", I believe, at one time.

1013

Warrant Officer Shea

Examination-in-chief

Q. What was the tone of his voice like when he addressed you? A. Angry.

Q. What about his volume? A. It was loud. Loud enough for the entire control room to hear what was going on.

Q. How close would he be to you when he'd address you in that manner? A. It varied. Sometimes he'd be in the centre of the control room and shout it out so that everybody hears, at other times he leaned over and shout it right into your face.

Q. Can you give me an example? A. While I was under training, shortly after I got there, we're on the surface, I was trying to listen to the officer of the watch up on the bridge down through the voice pipe, and being new to the environment, I had no idea what he was saying and trying to repeat his message. And after four or five attempts I was sort of pushed forward and called a "fucking idiot", so he could listen to the commands that were coming down.

Q. Where did this occur? A. On the helm.

Q. Were other members of the crew present?
A. Yes.

Q. Would other members of the crew have heard Lieutenant-Commander Marsaw's comment?
A. Definitely.

Q. You were under training when you first joined OJIBWA, were you not? A. Yes.

Q. When Marsaw was correcting an error you made, did he ever show you how to do the job properly?
A. No.

Q. Did you witness other members of the crew being treated in the way you've described, the verbal abuse that you've described? A. Yes, I have.

1014

Warrant Officer Shea

Examination-in-chief

Q. And what members of the crew specifically were treated that way? A. All of them.

Q. Would that include the list of officers you gave me earlier on in your testimony? A. Yes, it does.

Q. With respect to other members of the crew, did he use any different terminology when dealing with them other than what you've already described? A. All along the same lines. Anything that would be demeaning or degrading, yes.

Q. What rank levels would normally be in the control room when this would be going on? A. This could be from lieutenant[N], lieutenant-commander, even on down to an ordinary seaman.

Q. Did Lieutenant-Commander Marsaw ever have occasion to address your particular watch as a whole? A. Yes, he did.

Q. And describe the circumstances, or what occurred? A. I'm not sure of the incident, but the entire watch was classed as a "piece of shit watch".

Q. And who classified it as a "piece of shit watch"? A. The CO, Lieutenant-Commander Marsaw.

Q. How frequently did this type of behaviour take place in the control room? A. Well, I'd say pretty well on a daily basis.

Q. Based on your personal observations, did Lieutenant-Commander Marsaw's style have any effect on the way the officers did their duties and led the submarine? A. Oh, definitely. When Lieutenant-Commander Marsaw would come into the control room or within earshot, they would tense up, they'd adopt a more aggressive stance, just trying to appease his

1015

Warrant Officer Shea

Examination-in-chief

moods. But they were very, very tensed up. The stress would double or triple what it would normally be.

Q. Describe how you felt on the occasions you were dealt with by Lieutenant-Commander Marsaw?

A. Demoralized, humiliated, your self-confidence drops. You're embarrassed because you're being chastised and rebuked in front of your peers, your subordinates. Very uneasy feeling.

Q. Have you ever been treated in the manner Lieutenant-Commander Marsaw treated you under any other CO? A. No, I haven't.

Q. Have you ever felt the way you've just described as a member of any other unit? A. No, I haven't.

Q. What was your personal morale like while you were on board OJIBWA? A. It was low because of the degrading comments and so on. You'd start losing your self-confidence. You started losing faith in yourself.

Q. Did you ever discuss your feelings with anyone? A. Yes, I have.

Q. Who would you have had discussions with? A. The submarine coxswain, the squadron coxswain, the XO which was Lieutenant[N] Dussault, and we tried to get in and speak to Chief Brown.

Q. Did anything change as a result of any of these discussions? A. No.

Q. How often would you've discussed the matter with the submarine coxswain? A. A couple of dozen times.

Q. Why did you go to these individuals? A. Because I was dissatisfied, upset about the antics and carrying on of the CO.

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1016

Warrant Officer Shea

Cross-examination

Q. Would you volunteer to sail with Lieutenant-Commander Marsaw again? A. No, I would not.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. You were a sergeant at the time, weren't you? A. Yes, I was.

Q. You got promoted out of there? A. Not out of there, no.

Q. I suppose your PER could not have been that bad though that you were promoted? A. The first two on OJIBWA were not very good, no.

Q. And yet you managed to be promoted when exactly? A. 1 August, this year.

Q. And you were out of OJIBWA in '93?
A. Yes.

Q.

Q. What do you think of Lieutenant-Commander Marsaw? A. I think he's a very poor leader.

Q. Okay. Do you remember using other words?
A. In the video, yes.

Q. Is it your opinion that he's a raving lunatic? A. I don't believe I used those words, no.

1017

Warrant Officer Shea

Cross-examination

Q. Is it your opinion that he's not fit to command a dog team? A. Not in those words but some line similar to that, yes.

Q. Is it or is it not your opinion that he's not fit to command a dog team? A. I did not use those words, no.

Q. You did not use those words. You know PO Conrad? A. Yes, I do.

Q. Tovey? A. Yes.

Q. And what do you three have in common? A. We served on OJIBWA together.

Q. Do you have anything else in common? If I suggest to you all three intensely dislike Marsaw? A. I would say there'd be a lot more than three of us. I'd say ninety-five per cent of his crew, or ninety-nine per cent of the crew.

Q. Yeah, but you three in particular? A. I know a lot of people who were dissatisfied with their tour on OJIBWA.

Q. But talking about these three. I'm not talking about others? A. ...

PROSECUTOR: Objection, Mr Judge Advocate. I think the only way he can answer that would be, if possible, based on hearsay evidence. And so the question, although not specifically going to it, requires the admission of hearsay to answer the question.

He can certainly answer whether he likes or dislikes Marsaw, but he can't comment on Conrad or Tovey. They'll be witnesses later on and I guess my friend can ask those witnesses at that time.

1018

Warrant Officer Shea

Cross-examination

DEFENDING OFFICER: The witness has testified for 15 minutes as to what others felt, whether they were afraid, whether ... et cetera, et cetera. He must be able to answer that question too.

JUDGE ADVOCATE: Based on his personal observation?

DEFENDING OFFICER: Yeah.

JUDGE ADVOCATE: The objection is denied, you may answer. I think you already did, but ...

WITNESS: Yes, those three and many others were not happy, disliked Lieutenant-Commander Marsaw.

DEFENDING OFFICER:

Q. How certain are you about the number of times you spoke to Hamilton expressing your complaints?

A. I'm positive I went four times seeing him.

Q. Do you recall stating that ... is it your impression that your PERs weren't good on board OJIBWA because you wear an army uniform? A. I said it in the video, yes.

Q. And yet you got promoted? A. Not from the PERs from Lieutenant-Commander Marsaw.

Q. Uh-huh. If I suggest to you that the way Lieutenant-Commander Marsaw treated you, not the rest, you, was alright, what would you say to that? A. I'd say that was false because I was not treated right.

Q. If I suggested to you, you stated to somebody that you were treated alright by Marsaw, what would you say? A. That it wasn't true, I was not treated right.

1019

Warrant Officer Shea

Cross-examination

Q. If I suggested to you that you said that to the MPs at the occasion of an interview, what would you say to that? A. I don't think so.

Q. You don't think so? A. No.

Q. I believe you do know ... you realize that your interviews with the MPs was videotaped? A. Yes, I do, I have a copy.

Q. You have a copy and you have had plenty of time to familiarize yourself with it. You viewed it and, I mean, you had it with you for how long? A. A year or more.

Q. A year or more. So you had time to view it time and time after again. And would you say that what's on that tape reflects appropriately what took place in the interview room? This is you there and what's being said there has been said, hasn't it? A. Yes.

Q. How often have you seen the tape? A. Five or six times.

Q. Did you ever count the number of times you said that you had never seen any physical abuse on board OJIBWA? A. Four or five times, yes.

Q. Four or five times. Can you be more precise, like, with more certainty - I mean, we can look into the video later - at least five times you stated there was no ... that you had witnessed no physical abuse? A. Four or five. I can't remember the exact number, but several times.

ASSISTANT PROSECUTOR: Mr Judge Advocate, I would object to that question. I think it's unfair to ask the witness to try and characterize how many times he may have made a statement. He's admitted that he did, in fact, make that statement numerous times. If my friend wants an exact number then the witness should

1020

Warrant Officer Shea

Cross-examination

be given an opportunity to review the videotape and answer the question, not speculate on what the answer is.

DEFENDING OFFICER: We might do that later.

There's nothing wrong with asking the question and see what the answer is. If I'm satisfied with the answer, that's the end of it. I do not intend to press him more on this issue. I want him to answer the question which he did. If later I determine that this is in disagreement with something else and I want to confront the witness further, well, I'll use the tape at that time. But at this point in time I think the question is proper.

JUDGE ADVOCATE: The objection is denied.

DEFENDING OFFICER:

Q. That first interview with the MPs took place on 10 January '94? A. Correct.

Q. And you stated earlier to the prosecution that on 8 February you had the second interview?
A. Yes.

Q. And by that time you had remembered about the Higginson incident? A. Yes.

Q. And I believe you stated to the prosecution you did not mention it to the MPs because you'd forgotten about it. Then the incident came to light, and you weren't sure how the incident came to light. Could you make an effort and try to explain to this court ... ? A. ...

ASSISTANT PROSECUTOR: I would object to that. I think the witness' evidence was he remembered it. I think he did originally say it came to light but then clarified that and said he remembered the inci-

1021

Warrant Officer Shea

Cross-examination

dent. I think my friend's notes may not accurately reflect the evidence given.

DEFENDING OFFICER: He said that the incident came to light but he did not remember how it came to light, like, he didn't remember why. That's what I want to pursue now.

ASSISTANT PROSECUTOR: Again, Mr Judge Advocate, my recollection of the evidence was he then recalled that he ... or did make a statement to the effect, I remembered it. I don't have notes but that's certainly my recollection.

JUDGE ADVOCATE: I have in my notes that the incident came to light.

The objection is denied.

DEFENDING OFFICER:

Q. So could you tell the court how this came to light? A. I have no idea just, like, I remembered it and I phoned the military police.

Q. I suggest to you, you spoke to Conrad about it? A. No, we haven't, I believe, discussed the case at all.

Q. No, no, not at all, eh. How about Higginson? Would you have discussed it with Higginson after your interview? A. No, I believe he's been away on course or something.

Q. You're telling this court that this whole incident you had forgotten about and three weeks later you come back with details that includes the direction, clockwise/counterclockwise; what he's wearing on his feet, the CO that is; where he is; where the kick lands. Explain that to the court how such an incident altogether can be out of your mind and two weeks later you come with such details? A. Well, when I went for the interview, of course, like everybody else I was

1022

Warrant Officer Shea

Cross-examination

nervous and that just didn't register. Afterwards, I remembered it and I phoned the military police, given such that if I remembered anything to give them a call which I had done.

Q. Another opinion that you have of Lieutenant-Commander Marsaw is that he is a "flagrant asshole", is that correct? A. Flagrant, yes.

Q. So aside from being a "raving lunatic", he is a "flagrant asshole who's not fit to command a dog team", is that correct? A. I made some statements on the tape, I can't remember my exact words right now what I said about the dog team or not.

Q. Uh-huh. Do you remember making a statement in the presence of other senior rates that you would take great pleasure to take Marsaw down? A. No, I do not.

Q. You do not. Are you sure of that?
A. Yes.

Q. In a senior rate environment in 1994?
A. Not coming out with an exact statement like that, no.

Q. You never said that? A. No.

Q. Did you ever ... do you recall after the 16th December 1993 publication of an article in the *Calgary-Herald* ... ? A. ...

JUDGE ADVOCATE: *Calgary-Herald*?

DEFENDING OFFICER: Sorry. I keep calling it the *Calgary-Herald*. I apologize, the *Chronicle-Herald*.

Q. You took great pleasure to make a copy of the article and put it on board everywhere and were enjoying that and telling to people that he was finally getting what he deserved and that'd be nice and he'd go

1023

Warrant Officer Shea

Cross-examination

down. Do you recall that? A. I recall bringing the article in the paper definitely and photocopying it, yes.

Q. And very proudly displayed it all over the place? A. Not ... photocopies because a couple of guys that wanted copies. Sit down at morning coffee break, started reading the paper, everybody makes comments or talks about it.

Q. I suppose when you hate a person like Marsaw you don't feel you owe him any loyalty, I suppose? A. If he's the CO, yes, but which he wasn't at that time.

Q. Oh, so the minute you get off board that's it, he is open game now, is he? A. When he was on the submarine, whatever he'd say do was done out of loyalty because of the position he was in.

Q. Of course when you're off board now it's a good time to talk to reporters as well because we're no longer on board and we don't owe him any loyalty anymore, don't we? A. I've never talked to a reporter reference this case.

Q. How about he called you three times?
A. Yes, he did and my comments each time was, no comment.

Q. And you swear today that you didn't say a word about anything? A. That is correct.

Q. Why would he call you three times, I mean, if you say "no comment", most journalist would give up eventually? A. Persistence.

Q. Persistence it is, eh? A. Yes.

Q. Or is it more the attitude of a journalist who's getting more and more information from one

1024

Warrant Officer Shea

Cross-examination

source? A. I think not. Because my comment was, "no comment", at all three occasions.

ASSISTANT PROSECUTOR: I'm not sure what the relevance of this is with the ... we've dealt with this article on numerous times. Who spoke to the reporter, who didn't speak to the reporter, has been ruled not relevant to the case.

JUDGE ADVOCATE: I don't see any relevance at all, Lieutenant-Colonel Couture

DEFENDING OFFICER: No, no. It goes to credibility though, doesn't it?

JUDGE ADVOCATE: You may proceed but, I mean, it doesn't bring anything to this case.

DEFENDING OFFICER:

Q. So you didn't give him any information whatsoever? A. None whatsoever.

Q. No. And you were saying that that's it, you're no longer on board, so loyalty is gone and now he's an open target, is he, your CO? A. No, I'm here under oath. I was questioned by the military police to give honest and truthful answers.

Q. And is that what you're doing today?
A. Yes, I am.

Q. Including the impossibility of recalling how this incident came to light in your mind? A. Yes.

Q. Does that happen to you often that things disappear from your mind and then they reappear with such clarity? A. No, they don't.

Q. Can you give me one other example of a situation where a situation has completely disappeared from your mind to reappear a month later with a great

1025

Warrant Officer Shea

Cross-examination

deal of clarity? A. There's times you forget about things and they come back to you after a while ...

Q. That's what I'm asking you. Give me an example of other situations besides this one where it happened to you? A. Nothing that pertains to this here.

Q. Now, is it your testimony today that you told the MPs that Marsaw was a "raving lunatic"? A. I said words to that, yes.

Q. You did say that? A. To that extent, yes.

Q. "Flagrant asshole"? A. Yes, I did say that.

Q. And "not fit to command a dog team", is that correct? A. I don't remember that one, no.

Q. Do you recall telling the MPs that his attitude, Marsaw, towards you was alright, do you recall that? A. Yes, there was times he was alright towards me, but not all the time. The majority of the time was more looking down.

Q. My question is, do you recall at this point a question being asked to you, what was Marsaw's attitude towards you personally as MA? Do you recall your answer to that? A. As an MA, I was alright, yes.

Q. So you did say that he treated you as an MA alright? A. As an MA. Not as a control room watchkeeper.

Q. I suppose today you're going to make the difference that what you meant was limited to MA, is that right? A. Yes.

Q. Because you have sort of two personalities, one ... ? A. ...

1026

Warrant Officer Shea

Cross-examination

ASSISTANT PROSECUTOR: Mr Judge Advocate, I object. My friend reads a quote in which he says specifically that, "As an MA I was treated alright", I believe were the words he said. There's no inconsistency there.

JUDGE ADVOCATE: Not only that, you're not here to insult the witness, Lieutenant-Colonel Couture. The last comment you made was a comment not a question.

DEFENDING OFFICER: Okay.

JUDGE ADVOCATE: Ask questions to the witness.

DEFENDING OFFICER:

Q. So are you telling the court, basically, that as an MA you're treated alright but when you are not acting as an MA you're not treated alright, is that what you're saying today? A. Yes, I am.

Q. And it is the same person that treats you like this? A. Yes.

Q. Are you a good MED A? A. I feel I am, yes.

Q. Are you a good planesman? A. I'm adequate.

Q. So could you explain to the court the difference between the treatment? A. Because as a MED A I'm required to rely upon my professional judgement in the medical field and to brief him on patients and the medical care of people; and as a control room watchkeeper it's a totally different ball game, I mean, as a helmsman, CDC operator, which is not what you (sic) actually trained for all my career.

1027

Warrant Officer Shea

Cross-examination

Q. Would you agree with me that a raving lunatic would not distinguish between one or the other and would treat you like shit all the time? A. Sure they could.

Q. But he didn't, did he? He didn't treat you like shit all the time the Captain? A. Not all the time. No one ever got treated like shit all the time but there was enough there to make comments about it definitely.

Q. I'll give you here a few quotes and I'll just ask you whether you remember those and we'll take it from there: "MP: So you never witnessed any assault on board?", do you recall that question? A. Yes, I do.

Q. And do you recall the answer? A. Yes, I do.

Q. The answer is? A. No, I did witness.

Q. Okay. Very, very shortly thereafter, like, immediately thereafter, your answer: "Never ..."

ASSISTANT PROSECUTOR: Mr Judge Advocate, again, I'd object. He's using a prior statement, for what, I'm not sure. There's no inconsistency between the witness' evidence and what was said in the interview, at least not that I'm aware of, and my friend certainly hasn't demonstrated that. He's covered this area twice already, he's back to it again. If there's an inconsistency, let the witness see the tape, let him review it and either adopt or not adopt what was said in the videotape.

But I don't think we're being fair to the witness by reading quotes to him from a 45 or 55 minute interview and expecting him to reply to that, especially in light of the fact that there's nothing inconsistent. The witness has quite readily admitted that

1028

Warrant Officer Shea

Cross-examination

he did not advise the MPs about any physical violence during his first interview.

Again, MRE 100, you refer to a prior statement if there's an inconsistency, not simply to reinforce evidence that was given by the witness.

JUDGE ADVOCATE: What's the purpose of this line of questioning, Lieutenant-Colonel Couture?

DEFENDING OFFICER: First of all, I have not claimed any inconsistency at this point.

The witness earlier on has testified that he didn't know the number of times that he told the MPs about this and that. I'm going through ...

JUDGE ADVOCATE: Yes, five or six times.

DEFENDING OFFICER: Five or six times. I'm going through a slow process now to attempt to investigate and determine whether he recalled the exact number of times, and I put a question to him ... I did put one and he answered, so what ...

JUDGE ADVOCATE: But you've put that question to him before. How many times? He said he wasn't exactly sure, perhaps five, six times.

DEFENDING OFFICER: Uh-huh.

JUDGE ADVOCATE: If you really want to know the amount of time, give him the transcript. He will find out.

DEFENDING OFFICER: Yeah, we don't have a transcript so that's what I'm trying to avoid here ...

JUDGE ADVOCATE: So what you're doing now is that you will put that question by question to him, and finally make a count of that? You will put all those questions to him, all those questions referring to the

1029

Warrant Officer Shea

Cross-examination

effect that he has not witnessed any physical abuse, something like that?

DEFENDING OFFICER: Uh-huh. That's right and see what of that that he recalls and if he recalls there's no problem.

JUDGE ADVOCATE: How can you recall where in the statement that was said if it was not always the same question that was put to him.

I mean it's not fair to the witness to ask him those questions in the way you do without him having a chance for viewing the interview, or we need a transcript, whatever.

DEFENDING OFFICER: Mr Judge Advocate, I'm quite prepared to go in a **voir dire** and show him the statement, I mean, I don't intend to mislead him at all. The fact of the matter is, it's not where it is in the transcript that's important. What is important is, does he recall saying this. I'm asking a question, do you recall saying that? If he says, yes, well, that's fine. We're not into any contradiction or anything like that. If he doesn't recall then there are rules that exist including 92 about refreshing ones memory.

JUDGE ADVOCATE: But it's not the way it goes, I mean, you ask him ... before asking a witness if he recalls having said this and that, you should put a question to him. And then in order to refresh his memory or to contradict him you use the interview. But now if you're going to ask if he remembers everything or recalls everything that was said in the interview, I mean, that will end up nowhere.

DEFENDING OFFICER: No, it's not everything. I'm talking about the question, the number of times he has stated that he had not witnessed anything. That's what I'm trying to establish.

1030

Warrant Officer Shea

Cross-examination

JUDGE ADVOCATE: And you put that to him before.

Yes?

ASSISTANT PROSECUTOR: Again, I think he's got an answer to that question. There's no inconsistency, there's no need to refer to the transcript. He's referring to questions that were asked, which the witness has answered here today and given exactly the same answer to. So to suggest there's an inconsistency and any need to go to the transcript I don't think is accurate.

But if it is necessary, then I think the witness should be given an opportunity to review the interview and count the number of times. Because I don't think it was five or six, I think it might've been two or three. But anyway that's for the witness to answer based on reviewing the transcript, and to ask him to do that from memory is not fair to the witness.

JUDGE ADVOCATE: Your objection is sustained.

I mean, I have nothing against the fact that you asked the witness how many times he said that to the military police, but I will not accept that you go through all those questions the way you are to achieve whatever result you're looking for, so if that question is of ... or if that answer is of importance to you, have the witness watch the tape or read a transcript or whatever. But that's the way you have to proceed.

DEFENDING OFFICER:

Q. When you left the interview room the first time around, were you satisfied that you had had an opportunity to tell everything you knew? A. At that time, yes.

1031

Warrant Officer Shea

Cross-examination

Q. Were you invited several times to tell everything you knew? A. During the interview, yes.

Q. And if I understand well, although at that time you stated up to four times, five times, as you may have testified earlier that you had witnessed no physical abuse on board, later on this Higginson incident came back to you? A. That's correct.

Q. What leg was struck or kicked by Marsaw, of Higginson? A. His left ankle, the outer aspect.

Q. Okay. And I gather that he was going counterclockwise, Marsaw? A. He was going counterclockwise.

Q. So can you indicate - just to make sure we don't get confused here - counterclockwise goes ... ? A. Okay, the bow was up that way and rotating this direction here.

Q. So you are motioning from your right to your left? A. You're going from your left towards your right. This is the right hand going towards your right counterclockwise.

Q. You are motioning ... if I'm moving counterclockwise I move from my right towards my left and then of course I end up turning, is that about that? A. You start at twelve o'clock, you're moving towards nine, six, three, twelve.

Q. Okay? A. Counterclockwise.

Q. Now, you said he slowed down, Marsaw slowed down, the second time around? A. Yes.

Q. Slowed down, what for? A. You'd have to ask Lieutenant-Commander Marsaw that.

Q. Yeah. And he lashed out? A. Yes.

1032

Warrant Officer Shea

Cross-examination

Q. Okay. I'm trying to understand that expression. Could you explain what you mean by that?

A. He was on the periscope, he was in a grouched position and he took his right foot and across to where the plot table was, where Lieutenant[N] Higginson was standing.

Q. Where exactly did the kick land? A. On his left ankle.

Q. On his left ankle. Outside, any side? A. The outside portion.

Q. The outside portion of his ankle. Could you think about that for a second? A. Uh-huh.

Q. He's coming counterclockwise, lashes out, kicks and lands a kick on the outside portion of the left ankle of Higginson. Could you try to explain how exactly he would do that? A. Easily, if you're two feet from the forward portion of the plot table, the ankle is right here, he comes around, kicks right here, the right foot is here.

Q. Yeah, that works well with the right foot but that doesn't seem to work quite as well for the left foot? A. Yes, it does because the left foot ...

Q. Outside of the left foot? A. Because the left foot, when he's facing the starboard bulkhead there, therefore his left foot is towards the forward end of the boat.

Q. Oh, well, it's getting confusing here. I'm using here Exhibit "I". Okay, attack periscope. You're standing somewhere near the CDC, the box ... ? A. I'm sitting right there.

Q. And Higginson is standing at the chart table? A. Correct.

1033

Warrant Officer Shea

Cross-examination

Q. He must be facing the chart table. There's no point being there and looking at the curtain, would you agree? A. That is correct.

Q. Okay, if you place Higginson standing at the chart table? A. Uh-huh.

Q. Looking at the chart table as he should, where's his left foot, is it forward or aft? A. Forward.

Q. It's forward. And the kick that you saw is delivered at some point here, which is approximate middle of the plot table, that's where the kick is delivered from? A. Approximately.

Q. Now, how does that kick reach the outside of the left ankle of Higginson? A. It just comes straight across and hits him.

Q. Wouldn't you agree that he would hit the right side of the ankle, like the inside of the ankle of the left leg, but not the outside? A. No.

Q. And the sandal, is that right, is that footwear that Lieutenant-Commander Marsaw wore often or what? What do you know about this? A. Yes, it is.

Q. It is, eh? A. Yes.

Q. Like, how often? A. I didn't keep an accurate record of how many times he wore his sandals.

Q. Commonly? A. He wore his sea boots, he wore his shoes, he wore his sandals, you know, depending what he felt like putting on, I suppose.

Q. Do you know if ... you said you talked to Hamilton at least a couple a couple times ... couple dozen of times should I say? A. No, Hamilton, four times. I spoke to Chief Parlee a dozen of times.

1034

Warrant Officer Shea

Cross-examination

Q. Four times to Hamilton then. Is it to your knowledge that others did or didn't take action to denounce this terrible situation, is it to your knowledge? A. No, it is not to my knowledge.

Q. Is there an instance in January 1983, as you were preparing for work ups, where everybody was working hard and the people didn't have time to do their banking and so on and so forth? A. Not in '83, no.

Q. Sorry, '93, then? A. Yes.

Q. Yes. Did you see the CO at that time?
A. No, I seen Lieutenant[N] Dussault.

Q. So the CO was not in the picture from what happened there, is that correct? A. I'm not sure if the XO passed it on to him or not.

Q. Yeah, but I'm saying the CO was not in the picture, the CO wasn't there at that time? A. You mean, physically?

Q. Yeah? A. He was ...

Q. He was not with you and the XO? A. No.

Q. Do you also blame the CO for shutting down the heads or the toilets sometime at sea? A. Not blame, that was an order that was given.

Q. An order with which you disagree?
A. Yes.

Q. Irrespective of the reason it was done for? A. At times it's very difficult for members of the crew to control their bodily function. If you got to go, you got to go.

Q. Uh-huh. My question pertained more to the legitimacy of the order rather than the need to go.

1035

Warrant Officer Shea

Cross-examination

Did you know the reason why the heads might be shut at some time? A. Yeah, the heads were backing up, we were in a bow-down angle, therefore, it would be more difficult to flush the toilets through, they make noise.

Q. So if they're backing up it appears to make sense that one would order them shut, wouldn't it?

A. No, because how does he have control over bodily functions.

Q. I suppose if it was somebody else than the captain it might make sense but ... ? A. No, it wouldn't make sense to anybody.

Q. That they're plugged up and you just let people go at it? A. No, if they were plugged solid, you couldn't go definitely. But just to shut them down for the sake of doing it, to prevent it ...

Q. Do you know personally? Did you hear the CO say that? A. Yes, I did.

Q. Just for the sake of it, I'm closing it? A. Not for the sake ... just, the heads were shut down, that was the pipe.

Q. Are you quoting the CO? A. I'm quoting the ...

Q. Just for the fun of it I'm closing the heads, are you doing that? A. I didn't say that.

Q. So you don't know, do you? A. The heads were shut down.

Q. Yes, that you know. But you don't know by whom, on whose authority and for what reason, do you? A. Yes, all operations like that would have to come from the CO. Somebody on board just could not arbitrarily do it.

1036

Warrant Officer Shea

Cross-examination

Q. But the CO could do it arbitrarily, could he? A. If he's the CO, he can make what orders he likes whether they're right or wrong.

Q. If I suggested to you that Conrad might've been present when you were talking about taking Marsaw down, would that help you recollect?

A. No, because I don't ever remember making a statement that I was going to take anybody down.

Q. Uh-huh. And what was the reason again that you were putting ... making copies of those articles of the paper and putting them on the boards?

A. I didn't say I put them on the boards. I said a couple of people asked me for copies of the paper, general interest.

Q. General interest? A. Yes, it's something that happened when we were on board and I brought the paper in and so did several other people.

Q. Did you or did you not put it on a board so that people could read it? A. I don't recall. I know there was a lot of articles that were put on the board reference the stories from OJIBWA.

Q. This one would be special, wouldn't it? A. Of general interest, yes.

Q. Especially if it was denouncing this person for whom you've got so much time. Would you say that it added significance? A. Not overly, because there was a lot of notices posted up with stuff like that.

DEFENDING OFFICER: Mr Judge Advocate, Mr President, I wonder if I could have a brief adjournment. I'm trying to determine whether any use of the video might be made or not and I'd like a few minutes to consider. I don't want to make that decision lightly and waste the court's time, so if we had a 10 minute adjournment possibly.

1037

Warrant Officer Shea

Re-examination

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1038 hours, 11 October 1995, the court adjourns.

REASSEMBLY: At 1053 hours, 11 October 1995, the court reassembles and the accused is before it.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Warrant Officer Shea, just to clarify the situation on the plot table with respect to Lieutenant[N] Higginson, can you point out where on the chart table Lieutenant[N] Higginson was located?

A. Approximately right here.

Q. Okay, so slightly aft of the attack periscope, is that correct? A. Slightly aft.

Q. So his left ankle would've been facing on the forward side of the submarine, is that correct?

A. Yes, it would.

Q. Thank you. During my friend's questioning he indicated that you've made a number of statements to the MPs advising them about how you felt about Lieutenant-Commander Marsaw? A. Yes, I did.

Q. Were those statements your true feelings with respect to Lieutenant-Commander Marsaw?

A. That's what they asked, they asked for what do you really feel.

1038

Warrant Officer Shea

Re-examination

Q. And is that what you really felt?

A. Yes, it was.

Q. Why do you feel that way about Lieutenant-Commander Marsaw? A. Because of the degradation, the humiliation, and, you know, the loss of face in front of my peers and subordinates, for the browbeatings and browbeating of others.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: ...

JUDGE ADVOCATE: No questions. Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: Thank you, sir. My next witness will be Chief Petty Officer, 1st Class Tovey.

1039

CPO1 Tovey

Examination-in-chief

SIXTEENTH WITNESS) Chief Petty Officer,
FOR THE) 1st Class K.D. Tovey, is duly
PROSECUTION) sworn.

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last name, please?

A. My name is Keith David Tovey, T-O-V-E-Y.

Q. And what's your current position?

A. I'm the chief ERA of the submarine squadron.

Q. That'd be the First Canadian Submarine Squadron? A. Yes.

Q. What year did you first join the Armed Forces? A. 1963.

Q. That was the Royal Navy? A. That's correct.

Q. And which year did you join the Canadian Forces? A. 1988.

Q. Had you served with the Canadian Forces prior to enrolling with the Canadian Forces? A. I was on exchange from 1985 to 1987 with the submarine squadron.

Q. And I wonder if I could just list through the different submarines that you've sailed on and you could ask me whether the list is complete and accurate. For the Royal Navy; the TOKIN, the TIPTOE, the APFINE, OPPORTUNE, SUBERB, which is the nuclear submarine, PORPOISE, ODIN and OBERON? A. Correct.

Q. And with the Canadian Forces you sailed on all three boats; the OKANAGAN, the OJIBWA and the ONONDAGA? A. Correct.

1040

CP01 Tovey

Examination-in-chief

Q. You've had nineteen different commanding officers during your career as a submariner? A. Yes.

Q. And they would include - please, confirm if the list is complete and accurate - for Canadian commanding officers; MacDonald, Bush, Davidson, Truscott, Marsaw, Hickey, Irvine, Woodburn and Nicholson? A. Correct.

Q. And you served on the OJIBWA from 1988 until 1992? A. Yes.

Q. And what was your position on the OJIBWA ? A. I was the chief ERA.

Q. And chief ERA stands for what? A. Chief Engine-Room Artificer.

Q. What ranks did you hold while a member of the OJIBWA? A. I joined as a P1 and I was promoted C2.

Q. And prior to that you'd been the coxswain and the chief ERA, as well, in the OKANAGAN and ONONDAGA? A. Not prior to, after leaving.

Q. After leaving. Do you recall reading an article in 16th December '93, concerning allegations of abuse in the *Mail-Star*? A. I read the article.

Q. What was your response to it? A. I was ...

Q. In terms of the article coming out?
A. I was taken aback that anything had been mentioned or said.

Q. Had you ever been contacted by Malcolm Dunlop, the reporter? A. No.

1041

CPO1 Tovey

Examination-in-chief

Q. Did you ever have occasion to enter the wardroom of the OJIBWA the morning after a mess dinner in December 1991? A. Yes.

Q. Why did you enter the wardroom? A. I was invited to witness what had transpired the night before.

Q. Did you observe any individuals in the wardroom? A. There was Lieutenant Kelk, Royal Navy, and the then supply officer.

Q. Do you recall the state of dress of Lieutenant Kelk? A. I recall his pants were down and he was lying face down.

Q. Who gave you the invitation to enter the wardroom? A. Lieutenant[N] Marr.

Q. Have you ever had an occasion for Lieutenant-Commander Marsaw to discuss your MP interview that you gave to the military police? A. We didn't discuss, but I was invited by Lieutenant[N] Reid into the wardroom for his going away bash before he went to Australia.

Q. That would've been the sub squadron wardroom? A. Yes.

Q. Do you recall the general time frame? A. It was at lunch time.

Q. Okay, would that be in late July? A. I really can't remember.

Q. Okay? A. And Lieutenant-Commander Marsaw approached me and said he'd seen my videos and transcripts and he wasn't impressed.

Q. What was the tone of his voice? A. I took it to be intimidating, so I left.

1042

CP01 Tovey

Examination-in-chief

Q. Do you know if Lieutenant-Commander Marsaw even had access to your videotape or any transcripts at that point? A. I was not aware that he had those privileges, no.

Q. As a consequence of him saying this to you, what did you do? A. I left the wardroom.

Q. Why? A. Because I felt it just ... after that it wasn't my place to be there. I was a guest and it was his wardroom so I thought it best to leave.

Q. In terms of the job of a chief ERA, how would you quickly describe your job on board a boat? A. The job of the chief ERA on the submarine is to ensure that all machinery and bulk liquids are ... all the machinery is running correctly and all the maintenance is done, and we have enough fuel, portable liquids and everything else like that to carry out the task at hand.

Q. Okay, what rank does a chief ERA usually hold on board a boat? A. Chief petty officer, 2nd class.

Q. And that was the rank that you did hold at the time that you were a member of the OJIBWA, near the end? A. At the end, yes.

Q. Who's the most senior rate on board a submarine? A. By virtue of the position, the coxswain is.

Q. And as the chief ERA, who would comprise your subordinates, what types of occupations? A. The rest of the engineering department, senior rates and junior rates; and the electrical department.

Q. How would you describe the workload for the engineering folks and electrical folks under

1043

CP01 Tovey

Examination-in-chief

Marsaw's command? A. We had a very, very heavy workload.

Q. Relative to your experience in other boats, how did it compare? A. Because of the age of the submarine it was harder, a bigger workload.

Q. Did the boat always leave the wall on time? A. I tried to make it my goal that we met every sailing commitment.

Q. How would you describe Lieutenant-Commander Marsaw's leadership style? A. His leadership style is one of, you will, there was no ... it was leadership by fear, basically.

Q. How would you describe the atmosphere on board the boat under his command? A. It was just an umbrella of fear and everybody had the impression ... or I got the impression that certainly the officers and everybody was on eggshells at all times.

Q. What happened in your mind for you to feel that fear existed on board the boat, that there was an atmosphere of eggshells? A. People were frightened to do things automatically for fear of being shouted at or they'd made the wrong decision.

Q. Do you ever have occasions to pass through the control room? A. My job entailed passing through the control room constantly.

Q. And did you ever have occasion to observe Lieutenant-Commander Marsaw yell? A. On numerous occasions.

Q. Can you recall some of the words he would use towards individuals? A. He would people "cunts, fucking idiots".

Q. How frequent would this be, based on your observations of passing through? A. It wasn't continually, but enough to be noticed.

1044

CP01 Tovey

Examination-in-chief

Q. With regard to your other 18 commanding officers, have you ever observed this type of conduct?

A. Never.

Q. Based on your observations, have you ever observed any of your other commanding officers use personally insulting adjectives towards subordinates?

A. No.

Q. What would your response be to any assertion by defence counsel that Lieutenant-Commander Marsaw had to lead in this particular style because the crew was incompetent or inexperienced? A. I would say that is a personal insult as maybe ninety-nine per cent of the rest of the crew was. I consider myself to be competent, not incompetent. My last submarine, before leaving the Royal Navy, was a sneaky boat and certainly the chief ERA of a sneaky boat is not incompetent. I took over for a short time as the engineer on OJIBWA, and if I was deemed incompetent I would never have been allowed to do that.

Q. Can you comment on how watch leaders led or made decisions when you would discuss engineering matters with them? A. Watch leaders never actually made decisions. Every simple little thing the Captain was informed of.

Q. Before any action was taken? A. Before any action was taken.

Q. How did that compare with your experience on other boats? A. On other boats when the captain - prior to leaving the control room - gave the submarine to the officer of the watch, he had certain duties that he could carry out without informing the captain; pumping oily bilges to plotting starboard, things like that. But if we requested anything like that the officer of the watch would get the captain's permission to do simple everyday ...

1045

CP01 Tovey

Examination-in-chief

Q. How would you contrast the leadership style of Marsaw with that of your other commanding officers? What would be the point of distinction?

A. Compassion. There was no compassion on OJIBWA at all, sir, and it wasn't a team.

Q. How important is it to be a team? A. It is probably the number one thing.

Q. Relative to your other 19 commanding officers, where would Lieutenant-Commander Marsaw rank in terms of desire to sail during peace or intense situations; such as, Baltic or Mediterranean, cold war type missions? A. At the bottom.

Q. And why would that be? A. Because I personally wouldn't want to go to war with Lieutenant-Commander Marsaw or into a proper patrol type situation.

Q. Why not? A. Because in my opinion it was a one-man show. He had no faith in his officers. The officers were frightened to make decisions, and when go on long patrols he would've got tired because he's human, and I wouldn't have felt happy.

Q. How does it feel to have to testify in a court martial? A. This is a position I've never ever thought I'd find myself in and I feel quite ... I'm not happy to be here.

PROSECUTOR: Thank you, those are my questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Thank you, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

1046

CP01 Tovey

Cross-examination

Q. Did I understand you correctly when you mentioned, after being asked if you'd read the article, that you were taken aback that anything was said?

A. Not take ... but I was taken aback that it had got that far, that anything had been mentioned as far as the press was concerned or anything else like that.

Q. And why did it surprise you? A. Because certainly I would never consider going to the press or anything else like that, it was just a bad experience.

When I left the submarine that was it. It was behind me, it was history. So to see it rear itself up again was somewhat unusual.

Q. And when you were called in to the officers ... the wardroom of OJIBWA on December '91, by Lieutenant[N] Marr, what time approximately would it've been? A. It would've been between seven o'clock and 7:15 in the morning.

Q. Lieutenant[N] Marr was the outgoing officer of the day that day was he, or do you recall?

A. I can't recall that, sir.

Q. You can't recall. Anybody else was present when you went there? A. In the wardroom?

Q. Yes? A. No, sir. I don't recall anybody else being there.

Q. Do you recall anybody else being around the wardroom that morning on the submarine? A. No, sir.

Q. And concerning Lieutenant[N] Reid's RPC, in the squadron wardroom, was it that it took place?

A. Yes, sir.

Q. And the statement that was made to you by Lieutenant-Commander Marsaw, do you recall the time of - in months I mean - that was what month of the year it

1047

CP01 Tovey

Cross-examination

was? A. It was whenever Lieutenant[N] Reid's RPC was before he left for Australia, or upon leaving.

Q. Would it've been during the middle of the summer, or do you recall? A. I really can't recall, sir.

Q. Can't recall. Now, as a chief ERA you are responsible for aspects of engineering? A. Yes, sir.

Q. Who do you answer to? A. I answer to the engineering officer.

Q. Uh-huh. And who would that have been at the time? A. At which time, sir?

Q. When you joined OJIBWA, the last time? A. When I first joined it was Lieutenant[N] Percey.

Q. Did you ever serve under Lieutenant[N] LeClaire? A. Yes, sir.

Q. What period would that be? A. That was the last running period from when we came out of the undocking period and I relieved Lieutenant[N] Hallee as the engineer and Lieutenant[N] LeClaire took over from me as the engineer.

Q. And what was your impression of Lieutenant[N] LeClaire as an engineer? A. ...

PROSECUTOR: Relevance, I'd object, Mr Judge Advocate. I'm not sure what this has to do with this case, in this trial. It's not Lieutenant[N] LeClaire's trial.

JUDGE ADVOCATE: Major MacKay?

ASSISTANT DEFENDING OFFICER: I'm just trying to lay a foundation because he's comparing Lieutenant-Commander Marsaw to other commanding officers and

1048

CP01 Tovey

Cross-examination

saying that he had no confidence in his officers. I wanted to find out why somebody like Lieutenant-Commander Marsaw had no confidence in his officers. He worked directly under Lieutenant[N] LeClaire, knowledgeable of engineering.

JUDGE ADVOCATE: Very well, objection denied. You may proceed.

ASSISTANT DEFENDING OFFICER:

Q. As an engineer, or working in the engineering field, what was your perception of Lieutenant[N] LeClaire? A. My perception of Lieutenant[N] LeClaire was he would've been a very capable engineer officer. He was very young, he had only just qualified in submarines. He had a lot to learn and I had a lot to offer.

Q. Did you at any point make any statement to the effect that Lieutenant-Commander Marsaw would not take briefings or information from yourself? A. The Captain never took briefings from me as the chief ERA. It was always through the engineer officer.

Q. Always through the engineer? A. Yes.

Q. You feel that it's inappropriate? A. At certain times, yes.

Q. Why would that be? A. Because of the time loss. If we have a break down that we have to get - and I'll just explain that Lieutenant[N] LeClaire was a young officer and he didn't have the technical ... that's not true. He didn't understand fully the workings of all the machinery. So by the time that the machine went down, I found out what was wrong with it, I ascertained what the fix would be, how long it would take, I would then have to explain all this to the engineer, who maybe I had to shake because he was one and two. And on my other submarines I had direct access to the captain for machinery break downs when

1049

CP01 Tovey

Cross-examination

the engineer had his head down, and it cut out, not the middle man, but it certainly saved time.

Q. And if Lieutenant-Commander Marsaw insisted on you going through LeClaire so he would gain experience, is that one of his prerogative? A. That certainly is one of the captain's prerogatives, yes.

Q. Compared to your other submarines, or the other submarines you have served in, OJIBWA, what kind of shape was it in? A. That is a difficult question to answer. Obviously, the age of it was ... she was an old lady. But as far as the shape - and you mean mechanically?

Q. Mechanically, yes? A. We tried our hardest to keep it A-1.

Q. Previously to OJIBWA, did you ever serve on another submarine that was as old? A. No, not as the chief ERA. Obviously, in my younger days when I first joined submarines they were old submarines, but they were not expected to do what we did.

Q. Regarding Lieutenant-Commander Marsaw's style of command, before mentioning fear, you said, "you will". Do you recall in direct-examination just saying that? A. Yes.

Q. What did you mean by that? Was it that it was his style that he wanted things to be done his way? A. Yes.

Q. And what is wrong with the commanding officer asking that things be done his way? A. There is nothing wrong, I mean, that is the captain's prerogative again. But there are occasions when even with the best will in the world you don't know everything, so to say this is the way it will be done without consulting experts in that field I felt was wrong.

1050

CP01 Tovey

Cross-examination

Q. Are there any occasions that stick out or come up to your mind as to an incident where he would've been wrong in doing that, specific incident?

A. There's none that I can recall at this time.

Q. And with the atmosphere, you mentioned that there was an umbrella of fear that the officers were afraid to do things automatically for fear of making the wrong decision. Is that necessarily fear or would it be more before making the wrong decision thinking twice? A. No, it was fear because every officer goes through a rigorous training period. He goes in front of his peers, he's examined and he's given a set of dolphins. And in so far as I'm concerned that set of dolphins gives him the wherewithal to carry out simple orders without having to go to the captain for everything.

Q. How often would you discuss technical matters with Lieutenant-Commander Marsaw? A. I never discussed technical matters with Lieutenant ...

Q. You never discussed technical matters? A. The only time that I talked directly to Lieutenant-Commander Marsaw was every time the submarine dived, I checked the submarine from forward to aft for leaks or whatever, and I reported to him that the submarine was dry.

Q. So you would have no knowledge of his technical grasp of submarines, or that particular submarine? A. That is true.

Q. You mentioned also that you had to pass several times through the control room and on those occasions you would've heard him yell and use derogatory words towards the members. Were you present during the entire moment or just passing through you heard a word? A. On occasions I was there for the whole of the tirade because my first panel watchkeeper, I would ask him questions about, do we have any de-

1051

CP01 Tovey

Cross-examination

fects? or how's the watch going? anything else like that? And, yes, I did hear.

Q. In what circumstances would he yell at his people? Did they make mistakes? A. I can't say that they made mistakes because it was operational type scenarios. But certainly as far as the helmsman was concerned, you know, in rough weather or anything else like that if you a couple of feet off depth, I mean, that's accepted, but on occasions the Captain didn't accept that and gave the helmsman a rough time.

Q. But you have no personal knowledge, basically, to base your opinion as to whether or not he would be right or wrong on those specific occasions that you mentioned? A. There is never any time where it is right to use obscenities to anybody in the crew.

Q. Even if that person just put the boat and the crew in danger? A. I never thought that the submarine, as far as depth keeping or anything else like that, snorting or anything, was putting the submarine in danger.

Q. But you don't know either at the time what was going through Lieutenant-Commander Marsaw's mind? A. That's correct. But that still does not give anybody the authority to use obscenities.

Q. And in the control room, who of anybody holds the master plan? A. The captain.

Q. The captain. He's the one who knows where he's going, what he wants to be done, and how he wants things to be done, that's it, is that correct? A. Well, I would ... the XO will know, the operations officer will know what's going on.

Q. Uh-huh. But in terms in the complete plan, exactly where he wants to go and what he wants to do? A. No, I would disagree with that, sir, for the simple fact that if the captain was fall over dead,

1052

CP01 Tovey

Cross-examination

that means we would stop in the water and nobody else would know what was going on. The captain cannot be the only person who knows what's ...

Q. No, I'm not talking about the destination of the submarine. I'm now talking about the nature of the operation. What I'm talking about is that a specific moment you're doing an operation - to be more precise, the submarine is doing an attack? A. Yes.

Q. Who controls the plan? Who has the plan of that attack? A. In his head, the captain, but there is also the XO is there as part of the attack team. The whole attack team is closed up.

Q. The whole attack team is there and the captain controls the whole attack team? A. That is correct.

Q. So if somebody, one of these people, made a mistake that just, basically, brought down the entire plan? A. No, because there are people watching people. On OJIBWA, in the control room when attack teams closed up there was anything up to 20 people in the control room, so for one person not to be watched didn't happen.

Q. Didn't happen. And they didn't make mistakes? A. Nobody is perfect, sir.

Q. You also mentioned that you have never seen any compassion on the part of Lieutenant-Commander Marsaw. Did ... ? A. ...

PROSECUTOR: I object to that. I think he's putting words in the witness' mouth. I don't think the witness ever said he had never seen any compassion displayed by Lieutenant-Commander Marsaw. I think he was making a general statement about how the atmosphere on board the boat that there wasn't any compassion. He never got into specific incidents.

ASSISTANT DEFENDING OFFICER:

1053

CP01 Tovey

Cross-examination

Q. There was no compassion without quoting your words? A. That is my belief.

Q. That is your belief. Did anybody by the name of MacLellan ever serve under you as an engineer?

A. MacLellan?

Q. MacLellan? A. Yes.

Q. Yes. Did you at one point want to get rid of him because he couldn't get qualified? A. Yes.

Q. What happened to that individual, do you recall? A. Yes, he eventually qualified.

Q. Not on OJIBWA though? A. No.

Q. How did that transfer come about? A. I can't recall, sir.

Q. You can't recall. So you wouldn't recall Chief Petty Officer Hamilton having him transferred to a different submarine? A. No, I can't recall that, sir.

Q. You can't recall that, okay. Why did you want to get rid of him? Did he have that many problems to qualify? A. I can recall MacLellan's case, but I don't think ... he had family problems, he had all sorts of problems.

Q. Do you recall Lieutenant-Commander Marsaw sending your wife flowers on one occasion? A. No, sir.

Q. And in your opinion all that atmosphere and command style of fear, was there on board OJIBWA any way, or anybody, that could've tried at one point in time to control it, to do something about it? A. Yes, it was a thing called the divisional system.

1054

CP01 Tovey

Cross-examination

Q. And did the divisional system do something about it? A. No, sir.

Q. Were you surprised by that? A. No, sir.

Q. And when you refer to the divisional system, any individuals in particular you're thinking about, the XO? A. The whole of the divisional system starting with myself who made comments to the engineer, and the coxswain, and the coxswain in board and nothing changed.

Q. Nothing changed? A. Nothing changed.

Q. I'm asking you, were there any efforts made? A. Not that I can recall, sir, no.

Q. Do you recall ever being flown off the submarine to deal with a problem of a compassionate nature? A. Yes, I can, sir.

Q. And was that a problem, did you have to fight for it, or was it granted on request? A. I didn't request to be flown off, sir.

Q. You didn't request? A. No.

Q. The problem just came down and you were told, we will fly you back to deal with this problem? A. Yes.

Q. You talked about the competence of the crew - and I'm not challenging you on the crews competence - but if everybody is competent and he's acting the way you have described, wouldn't that prompt you to do something because it's unwarranted and it's actually abusive? A. Yes.

Q. Yes. But still nothing was done?
A. That's correct, sir.

1055

CP01 Tovey

Re-examination

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. Yes, you were asked questions on, nothing was done in the divisional system. Is the coxswain part of the divisional system? A. Yes.

Q. Have you ever had, based on your personal observations, a witness to the coxswain receiving complaints of physical as well as verbal abuse? A. Yes.

Q. Did anything change after the coxswain received these complaints? A. No.

Q. What's your understanding of the divisional system, what does it include in it? A. My understanding of the divisional system is it's a system that's set up to ensure, basically, fair play by ... nobody is overlooked. Everybody has access to the next higher authority for any grievances or anything that he doesn't feel is right; including leave, working conditions, anything else like that, and the divisional system is there to ensure that the people who should know what is going on is aware of what's going on.

Q. Have the types of missions - including you've mentioned the sneaky boat with the Royal Navy - did any of your commanding officers while closed up in attack teams with 20 individuals in the control room try to keep an eye on all those individuals at the same time? A. No, because we never had 20 individuals in the control room, it was down to probably a maximum a dozen people in the control room.

1056

CP01 Tovey

Re-examination

Q. Do you recall Sub-Lieutenant Elford?

A. Yes.

Q. Did he ever approach the coxswain when you were in the Chief's and PO's Mess? A. Yes.

Q. Can you describe his emotional state at the time he approached the coxswain, without getting into any words that he spoke of? A. He was very upset.

PROSECUTOR: No further questions, thank you.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much, Chief.

WITNESS: Thank you.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Next witness.

PROSECUTOR: The next witness, I wonder, Mr Judge Advocate, if I could call at 12:30. We may be entering into a **voir dire**. If I can have time to meet my friend, we might be able to get around that.

JUDGE ADVOCATE: You want to meet with your friend before calling the next witness?

PROSECUTOR: I'd like to have an adjournment in the hopes of trying to resolve a possible **voir dire**, and if we can, it's going to save us an hour this afternoon.

1057

JUDGE ADVOCATE: Well, if it's going to help I'll give you that chance.

So until when do you want an adjournment?

PROSECUTOR: We'd be ready to go back in at 12:30, sir.

JUDGE ADVOCATE: The court is adjourned until 12:30.

ADJOURNMENT: At 1133 hours, 11 October 1995, the court adjourns.

REASSEMBLY: At 1230 hours, 11 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Next witness.

DEFENDING OFFICER: Mr Judge Advocate and President, the next witness - and I have conferred with my learned friend over lunch-time - appears to present a question of admissibility, admissibility of some evidence has to be tested. So I believe my learned friend is prepared to proceed that way immediately so that we can after that resume with evidence in front of the court.

JUDGE ADVOCATE: Very well.

Mr President and Members, would you please retire from the courtroom.

THE PRESIDENT AND MEMBERS RETIRE.

TRIAL WITHIN A TRIAL

JUDGE ADVOCATE: Mr Prosecutor, would you tell me about the gist of this **voir dire**.

1058

18th voir dire

PROSECUTOR: Okay, the next witness, Mr Judge Advocate, is Petty Officer, 1st Class Stone. He was the chief electrician on the OJIBWA under Lieutenant-Commander Marsaw's command. He was posted there in January '92.

Shortly thereafter, the boat went to Faslane, Scotland. While alongside he had a conversation with Lieutenant-Commander Marsaw at one of the bars in Faslane, Scotland. The conversation goes something like, Petty Officer Stone, is at the bar; Marsaw is there; Marsaw turns to Petty Officer Stone and says, "You know, P2 Stone, you're a fucking prick." Stone replies, "Thank you, sir." Marsaw says, "You know why I'm so hard on my officers? It's to make them better officers." That's the statement we'd be seeking to have introduced as evidence, sir.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: If, Mr Judge Advocate, you want to be informed of our position, it might help you focusing on the issue.

We certainly and very strongly object to the first part of that statement as presented by my learned friend. As to the second part, we are cognizant that it bears some similarity with some other of your rulings, so the debate on the second part may not be as strenuous as the first one by reason of some of your previous rulings, but the first part we feel is totally inappropriate, inadmissible and should not be admitted.

JUDGE ADVOCATE: For what reason?

DEFENDING OFFICER: Relevancy, essentially. The PO in question, Stone, is not part of any members in the Annexes as I recall it, Annexes to the charge sheet - and I will reconfirm that for more certainty here. In fact, it is, yeah, my submission here that he's not a person addressed in the Annexes "A" and "B" - "A" or "B" for that matter - and we claim it renders

1059

Trial within a trial

this evidence inadmissible. I have an indication, I believe, that the prosecution may refer to this as possibly similar facts, that's I believe what the prosecution is going to argue, and on that basis we oppose it as similar facts is as a rule inadmissible and that's essentially our position.

Having said that I don't want to make representation for the prosecution, but it is my understanding that they will, I believe, argue similar facts which I suppose constitute an admission that indeed Stone is not one of the members addressed in Annexes "A" or "B" which pertain to charges three and four.

JUDGE ADVOCATE: Would it be your position, Mr Prosecutor, that you wish to argue that based on similar fact evidence?

PROSECUTOR: That would be one of the grounds. I have, basically, three different areas in where I would argue that the statement is relevant, the similar fact argument being only one of the three.

With respect to the statement of, "Do you know why I'm hard on your [sic] officers? It's to make them better officers", we would argue that that is an admission on the part of the accused that he is, in fact, hard on his officers. One of the things the Crown has to prove is that he ill-treated and verbally abused members of his crew. So that certainly is some powerful evidence that allows us to - in conjunction with other evidence - argue that he did ill-treat and was abusive to members of his crew.

It also goes to his intent. Under 129, we have to prove that the accused knew or ought to have known that his acts were prejudicial to good order and discipline. In conjunction with a number of witnesses telling him, please, don't approach me this way; please, don't call me these names, I don't like it, which is evidence that he knew that his actions were abusive. This is an admission that he knew that he

1060

Trial within a trial

was, in fact, hard on his officers and goes also to intent for a 129.

It's also a statement of motive because it tells why he is hard on his officers. He believes he's hard on his officers because it makes them better officers. The Crown's arguing the exact opposite, it made them worse officers than better officers. But it refutes to some extent one of the reasons that defence has asserted in their opening statement but also through lines of cross-examination that he had to act this way, he had to have this leadership style because of the inherent nature and danger of being in a submarine. This is a completely different reason than the ones submitted by his counsel as to why he was hard or abusive on his officers. He somehow thinks this is part of the training or the regime officers should go through. So it's evidence not only of an admission of intent for a 129 but also shows motive.

With regard to the first comment, "You're a prick", Petty Officer Stone isn't listed in any of the Annexes, that's true, but when you ask Petty Officer Stone what was his response to that and how did he act as a consequence of hearing that statement, I anticipate he will tell you that as chief electrician he was very cautious in how he approached Lieutenant-Commander Marsaw and how he performed his job, and he had career concerns because of that comment that he lived with throughout his time on board the OJIBWA.

That is evidence that the prosecution can use in conjunction with other evidence to argue before the panel that when a commanding officer refers to his subordinates in insulting ways, it is actually prejudicial to good order and discipline because it inhibits them in the way that they do their job and interact with their superiors.

I'll be getting evidence from a number of witnesses, and have already, that when Marsaw would verbally abuse them in the control room or wherever,

1061

Trial within a trial

they felt intimidated, they felt degraded, they felt humiliated. As a consequence they were more apprehensive in going to him, doing certain types of work, compounding their mistakes. So the experience of Petty Officer Stone, because of the statement made to him, gives me evidence that I can use in conjunction with other evidence that goes to proving actual prejudice to good order and discipline. So the statement is relative that way as well.

Finally, but only if these two other issues, I guess, aren't persuasive would we assert similar fact, and that portion of our argument would be argued quite quickly by Captain Gleeson who has done research into the area. But acts of a similar nature can be introduced for rebutting or proving a variety of things. It can be used for rebutting defence; the defence is Marsaw never used insulting words. Well, this is evidence that allows us to use that. If similar fact can be called to prove motive or malice, a hostility towards subordinates.

JUDGE ADVOCATE: Just a moment. MRE 22 refers to similar fact, has to prove the state of mind or identity of the accused.

PROSECUTOR: Uh-huh, that's right. And there's a broader area based on common law we would argue that it ... yet similar fact has now been allowed to be introduced for ...

JUDGE ADVOCATE: You may if you wish but here we have a Rule and we are bound by the Rule we have. In any event, I will let you argue ...

PROSECUTOR: I would argue under sub (4), I guess, the common law existence of the Rule. Thank you.

JUDGE ADVOCATE: You may call your witness.

PROSECUTOR: Petty Officer Stone, please

1062

Trial within a trial

s.19(1)

1063 Trial within a trial

PO1 Stone Examination-in-chief

FIRST WITNESS) Petty Officer, 1st Class
FOR THE) B.G. Stone, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you give your full name to the court please and spell your last name?

A. Brian Gerald Stone, S-T-O-N-E.

Q. And I understand that you were the chief electrician and posted to the OJIBWA in January '92 until October '93? A. Yes, sir.

Q. After being posted in January '92 to the OJIBWA, did you have an occasion to travel with the boat to Faslane, Scotland? A. Yes, sir.

Q. And did you have an occasion to visit the bar at the Imperial Hotel in Faslane or outside of Faslane, Scotland? A. Yes, sir.

Q. And at that time did you have occasion to have a conversation with Lieutenant-Commander Marsaw at the bar? A. Yes, sir.

Q. Could you tell the court ... relive that conversation from the moment that both you and Lieutenant-Commander Marsaw at the bar, please?

A. When I went to the bar to buy a round of drinks Lieutenant-Commander Marsaw happened to be standing next to the available opening at the bar, he was to my right side. After I placed my order Lieutenant-Commander Marsaw and I exchanged greetings and Lieutenant-Commander Marsaw said, "You know, Petty Officer Stone, you're a fucking prick.", and I said, "Thank you, sir."

A few seconds elapsed and then Lieutenant-Commander Marsaw asked me ... or stated, "Do you know why I'm so hard on my officers?", and I said, "No, sir.", and he said: it was to make them better officers. And that was the end of the conversation as far as I can remember.

1064

Trial within a trial

PO1 Stone

Examination-in-chief

Q. When he told you, you were "a fucking prick" and you said "Thank you, sir", why did you respond in that way? A. I thought it would be the best way to respond. If I responded in any other manner, I wasn't sure how Lieutenant-Commander Marsaw would receive it.

Q. When he said that to you, how did you feel? A. I was taken aback. It wasn't a statement I'd expected from my CO.

Q. Did this affect the way that you approached Lieutenant-Commander Marsaw as chief electrician? A. Yes, sir.

Q. In what ways? A. It gave me a feeling that we probably wouldn't have a good working relationship, that he possibly harboured some ill feelings towards me, dislike, and that my time on the OJIBWA could affect my career.

Q. What was your state of sobriety at the time? A. I wasn't sober, I had had - I don't know how many drinks - I had a few drinks.

Q. In light of that, how certain are you that this conversation did, in fact, occur? A. I'm absolutely certain it occurred.

Q. Okay, why? A. It's one of those instances that stand out in your mind. It's an occurrence that is totally out of the ordinary.

PROSECUTOR: Okay, I have no further questions, thank you.

JUDGE ADVOCATE: Cross-examination

CROSS-EXAMINED BY DEFENDING OFFICER

1065

Trial within a trial

PO1 Stone

Cross-examination

Q. What day of the week was that, PO Stone?

A. Beg pardon, sir?

Q. What day of the week did that take place?

A. It was either a Saturday or a Sunday because of the number of patrons that were in the bar at the time.

Q. And what time ... what was the date, or have you mentioned a date? A. I didn't mention a date, sir.

Q. Did you mention a year? A. It was in '92, sir.

Q. When did you get on board OJIBWA originally? Jan '92, is it? A. January 13th, '92, sir.

Q. Okay, can you try to narrow down when that took place exactly, that conversation, in '92? A. As close as I can recollect, sir, it was late February or early March of '92.

Q. Uh-huh. What had you been drinking that night? A. This was early in the day, sir, somewhere close to lunch-hour.

Q. It was lunch-hour? A. In that area, sir.

Q. Oh, sorry, I guess maybe it was not mentioned it was at night. So it was at lunch time then, was it? A. In around that time.

Q. In Faslane, Scotland, is that correct? A. It was at the Imperial Hotel in Helensburg, at the public bar.

Q. So what did you have to drink then at lunch? A. We were drinking beer, sir.

Q. And you were a few of you? A. Yes, sir.

1066

Trial within a trial

PO1 Stone

Cross-examination

Q. And you had a few beers? A. Yes, sir.

Q. How many approximately? A. I'm afraid I can't recall, sir.

Q. Would you say that you had been at sea for a little while prior to that? A. I'm afraid I can't recollect how long we were at sea prior to that, sir.

Q. Uh-huh. Okay, without recalling exactly how long you'd been at sea, would you agree with me that it is customary for sailors when they go to a port after having been at sea to celebrate, it's a relief, it's a well deserved break, isn't it? A. Yes, sir.

Q. And so you were doing just that, celebrating and, I mean, enjoying some time off after a time at sea? A. Yes, sir.

Q. Now, you just stated that that sticks to mind because it's so unusual, but you don't recall very much really surrounding the incident except those words? A. Yes, sir.

PROSECUTOR: I'd object. I don't believe the witness said that at all, that he doesn't recall very much except for those words. Again, it's a circumstance of maybe the witness having words put in his mouth.

DEFENDING OFFICER: I think I formulated my question ...

JUDGE ADVOCATE: It's a way to formulate the question. I will deny the objection.

DEFENDING OFFICER:

Q. So that is correct that ... you agree that you don't remember very much at all surrounding this whole event? A. I wouldn't say I don't remember

1067

Trial within a trial

PO1 Stone

Cross-examination

very much. The day and other things are ... I don't recall, no, sir.

Q. Uh-huh. You don't recall how long you'd been at sea, you don't recall how long you'd been ashore, is that correct? A. I believe it was the second day in Faslane, sir.

Q. Uh-huh. And you'd been at sea for how long then? A. I don't recall, sir.

Q. You don't recall. Do you recall ... was there anybody else present? A. Yes, sir.

Q. During that conversation? A. Not during the conversation, no, sir.

Q. You were sitting with a group of other senior rates presumably, or were you? A. There was one junior rate, one senior rate and one officer, sir.

Q. And do you recall exactly who they were?
A. Yes, sir.

Q. Who were they? A. At the time it was Master Seaman Polseon, Petty Officer Palmer, and Sub-Lieutenant Elsford (sic).

Q. Sub-Lieutenant? A. Elsford (sic).

Q. Elsford, how do you spell it? A. E-L-S-F-O-R-D.

Q. But they were not around there? A. No, sir.

Q. What was the state of sobriety of Lieutenant-Commander Marsaw as you recall it? A. I can't recall what state of sobriety he was ... I can only conjecture, sir.

1068

Trial within a trial

PO1 Stone

Cross-examination

Q. Okay. Can you recall anything about the state of sobriety of your partners, of your colleagues there, your brothers that you were drinking with?

A. All I can say, sir, is they were probably about the same state as I was.

Q. Which was not sober, correct?

A. Correct, sir.

Q. Not falling drunk but closer to drunk than closer to be sober? A. That's hard to say, sir.

Q. And just out of the blues, you said that you exchanged greetings with Lieutenant-Commander Marsaw? A. Yes, sir.

Q. And then he just said, well, you know, "you're a fucking prick" or words to that effect, just like this? A. Basically, yes, sir.

Q. Did you say anything to incur such a talk from Lieutenant-Commander Marsaw, or what? A. No, sir.

Q. Would you agree with me that such a statement in such a context, I mean, is hard to figure out, like, it doesn't appear much reasonable, does it?

A. I'm sorry, could you repeat, please?

Q. It doesn't sound like a reasonable statement to be made in that particular context that you've described? A. I'm afraid I don't see what you're getting at, sir?

Q. Okay, if people have an argument maybe you would expect at some point that insults would be thrown by people at each other, would you? A. Yes, sir, yes.

Q. What I'm saying is that in this context I take that you took that as an insult being "a fucking prick", did you? A. Yes, sir.

1069

Trial within a trial

PO1 Stone

Cross-examination

Q. Okay. An insult being thrown out of the blue like this doesn't appear to make sense, does it?

A. No, sir.

Q. And you cannot provide any further explanation or details as to what might have led to that at all? A. No, sir.

Q. You were posted out of OJIBWA in 1993, what was the month? - If you mentioned it, I forgot it, I missed it when you said - were you posted out of OJIBWA in 1993? A. No, sir.

Q. Okay. When were you posted out then? A. I was posted August of '94 to MARLANT SML.

DEFENDING OFFICER: Excuse me, Mr Judge Advocate, I'll check.

JUDGE ADVOCATE: I had something different too.

DEFENDING OFFICER: Yeah.

Q. And you sort of suggested that, I don't know, you felt that you would not have a good relationship. Do you feel that in the ensuing year you were in anyway prejudiced by the CO or ill-treated? A. No, sir.

DEFENDING OFFICER: No. These will be my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You said didn't feel ill-treated by the CO during the balance of your tour, did you still have the concern that you had that day though? A. Yes, sir.

PROSECUTOR: No further questions.

1070

Trial within a trial

PO1 Stone

Re-examination

QUESTIONED BY COURT

JUDGE ADVOCATE:

Q. Did you not say as an answer to the very first question, that you were posted on OJIBWA from January '92 to October '93? A. No, sir.

Q. So what are the right dates? A. I'm sorry. My posting period was from January 13th '92 till August of '94.

JUDGE ADVOCATE: Questions arising?

PROSECUTOR: No questions, sir.

DEFENDING OFFICER: No, sir.

JUDGE ADVOCATE: Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Do you wish to call any other witness in your **voir dire**?

PROSECUTOR: No other witnesses, sir, thank you.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, do you wish to call witnesses in this **voir dire**?

DEFENDING OFFICER: No, I do not.

JUDGE ADVOCATE: You're both ready to argue?

PROSECUTOR: Sir. I'll not repeat all the arguments that I raised initially, just ask that my earlier comments are incorporated into my final argument, sir, to save time.

1071

Trial within a trial

Prosecution

Address

Essentially, we would argue that there's three main areas why the statement is relevant for the trial. First of all, the comments about being hard on his officers and to make them better officers first of all identify an admission on the part of the accused that he was, in fact, hard on his officers. The Crown has to prove through some of the charges that Lieutenant-Commander Marsaw ill-treated and abused verbally members of his crew. This is evidence that is relevant to the Crown arguing those points.

The reason why he was hard on his officers, to make them better officers, is a statement of motive which is useful because it admits implicitly that he was, in fact, hard on his officers and then goes on to explain why.

The statement as to why he is hard on his officers is contrary to the explanation that's been raised at the opening argument of the defence counsel and also through different lines of cross-examination which attempt to explain his conduct in part on the inherent nature of dangerous submarine operation. So this is an admission or a statement that allows the Crown to argue that it wasn't done for interest of safety, in fact, it was done because Lieutenant-Commander Marsaw has a certain idea of what's required to train officers and a certain idea of what's required for professional development. So it's a motive that's quite useful for the Crown in making their argument as to what he did and why he did it. And for that reason that portion of the statement, we would argue, is admissible.

The comments referring to Petty Officer Stone as a prick, that is evidence both of ... that allows the Crown in conjunction with other evidence to argue that there was actual evidence that was prejudicial to good order and discipline, and it's also similar fact evidence.

1072

Trial within a trial

Prosecution

Address

In terms of evidence prejudicial to good order and discipline under the 129 charges, the Crown is able to call evidence to show that there was, in fact, prejudice to good order and discipline. Specifically, the Crown can call evidence to show that there was evidence that a commanding officer - Lieutenant-Commander Marsaw in particular - by referring to his subordinates in insulting ways did actually cause prejudice to good order and discipline. And from Petty Officer Stone we know that he felt inhibited or that he had certain concerns as a consequence of Marsaw stating this to him.

Whether he was actually, in fact, ill-treated or not, he still has the concerns that he says carried on with him as chief electrician during his entire tour on the OJIBWA. This is evidence in conjunction with other evidence that we've called so far and will call in the future that allows the Crown - therefore it is relevant - and allows the Crown to argue that when you refer to your subordinates in personally insulting ways, it does have the effect of inhibiting them and in approaching the commanding officer, whether it's to give reports of whether you're off depth, whether it's to pass on a DR or an EP or a fire control solution, or raise other concerns or matters you have with him. If people are verbally insulted and abused they tend to shy away, the divisional system starts to break down.

Clearly Petty Officer Stone's evidence in and of itself doesn't say all that but it is evidence that allows us to make that argument in conjunction with other evidence, and we'd submit, therefore, it is relevant.

The third ...

JUDGE ADVOCATE: But there is no 129 before the court that refers to this witness.

PROSECUTOR: No, there isn't for this witness but we still can make the argument - and are allowed to make the argument - that if you verbally insult your

1073

Trial within a trial

Prosecution

Address

subordinates, it is prejudicial to good order and discipline in a variety of ways including inhibiting them in their ability to approach you or to interact with you.

And this is one small piece of a larger body of evidence that we would like to refer to in making that argument. Whether the court agrees with my proposition is a matter of weight but clearly it's an issue that is relevant, that we have to prove, and it's up to the court to give the weight. But I would argue that that's a matter of weight not admissibility.

I forgot to mention earlier on with regard to the hard on the officer statement that one of the things we can prove under a 129 is that the accused knew or ought to have known the consequences of his actions. By having Lieutenant-Commander Marsaw admit that he is hard on his officers that's evidence that we can use to prove the objective or the subjective intent required to proving a 129 as well.

If those two grounds fail to persuade you, Mr Judge Advocate, then our third basis would be that it is admissible on the basis of similar fact. Note that the Military Rule of Evidence 22 is restricted in relating to state of minds or identity, we would simply argue that there is a wider ambit of admissibility based on the law of similar fact and would rely on MRE Rule 4 as well, and Captain Gleeson will make submissions on similar fact. Thank you.

ASSISTANT PROSECUTOR: Mr Judge Advocate, as you have pointed out, MRE 22 does deal with similar fact and in effect restricts it to being used for two purposes: one, to establish the state of mind of the accused; and secondly, to identify or to establish the identity of the accused or the actor.

I'd note, looking at Rule 22 (1)(a), where it talks about state of mind, the Rule states:

1074

Trial within a trial

Prosecution

Address

" ... that the state of mind of the accused was wrongful as charged at the material time, that is, that he did the act charged either knowingly, or with wrongful intent, motive or purpose;"

In this case we've heard both in the opening provided by defence counsel and as a result of their cross-examination, numerous suggestions that if the accused did speak the words and used personally derogatory adjectives, et cetera, towards members of his crew, it was done out of necessity. The submarine was in danger, safety was an issue, mistakes had been made and he was required to do that.

Here we have a situation where the accused is in a bar having a drink and calls one of the members of his crew a fucking prick. That clearly establishes, at least in this case, that safety of the submarine or an error by the crew member is not the reason for that statement being made. So on that basis alone, we would argue, that it's admissible under MRE 22 as going to establish the state of mind of the accused when he makes these statements to members of the crew. It's not because of safety, it's not because of errors. It's for reasons best known to the accused, but essentially personally derogatory comments being made to crew members for whatever reason.

As Major Abbott has indicated, it's our position that despite the narrow wording in MRE 22, the Crown's not restricted to simply those two purposes or reasons for putting in similar fact evidence, and in effect under MRE 4, the common law as it deals with similar fact, is clearly applicable in a court martial situation.

And I have, Mr Judge Advocate, a memo which is quite lengthy on similar fact and goes well beyond what would be necessary in this case for a ruling on this matter, but I'll certainly provide you a copy of

1075

Trial within a trial

Prosecution

Address

it. It may be of some help in at least establishing the basic.

JUDGE ADVOCATE: So what you're basically saying is that although there is a Rule of Evidence on this matter I'm not bound by that Rule.

ASSISTANT PROSECUTOR: No, that's correct, Mr Judge Advocate. You're bound by it in the sense that the Rule is there, but if the case law is developed since that Rule was written - which in our submission it has - then you can certainly consider the case law as well, and the Rule does not prevent you from going to the case law and, in fact, MRE 4 tells you, you can go to the case law. And it'd be our submission that it would be both proper for you to do so and it's an appropriate course of action for you to take.

JUDGE ADVOCATE: So what's the difference then - if I follow your argumentation - what's the difference between MRE 22 and the common law evidence relating to it, saying that it should be open to more purposes than what there is in 22 when compared with 83, and the decision of the Supreme Court of Canada on testimony of accomplices where our Court Martial Appeal Court decided that the fact that we have a Rule on this matter that we have to follow it and we're bound by it even though the common law is contrary to that?

ASSISTANT PROSECUTOR: Well, it would be our position, Mr Judge Advocate, that you would not be not following MRE 22, you would simply be broadening the scope of it to be consistent with the common law. I think the accomplice evidence Rule was totally withdrawn as a result of the Supreme Court of Canada decision on that particular fact and so, therefore, no longer exists. And there's a difference here, the similar fact Rule clearly exists at common law as well and it would be a matter of simply expanding that and incorporating it into MRE 22.

1076

Trial within a trial

Prosecution

Address

JUDGE ADVOCATE: But the other Rule still exists also on accomplices. It is left to the discretion of the judge to address in certain circumstances on this matter and not in others, but it's left to the discretion of the judge. So I fail to see your point on that.

ASSISTANT PROSECUTOR: Well, that's fine, Mr Judge Advocate, we think ... again, I refer you to Rule 4. It is our position that you can expand the applicability of that Rule and I certainly don't want to take up the court's time going through this memo. I can certainly hit the highlights if you wish, or if you just want to skim it yourself that's fine.

JUDGE ADVOCATE: Go ahead.

ASSISTANT PROSECUTOR: On similar fact.

JUDGE ADVOCATE: I'll listen to everything you have to say.

ASSISTANT PROSECUTOR: Okay, thank you. I don't know how much longer I can speak, but anyway I'll try.

Essentially, the similar fact Rule is developed out of the **Makin** case out of the 1800's, essentially establishes two branches. The first branch is a rule of exclusion, you cannot admit similar fact if it's simply for the purpose of establishing that the accused has the propensity to commit the offence he's charged with; however, the second branch states that such evidence is admissible if it's relevant to an issue before the jury other than propensity to commit the offence. So if you can pigeon-hole it into another category it's admissible under **Makin**.

The **Makin** rule has been considered on a number of occasions and the **Boardman** case - again, another English decision - deals with this and in effect **Boardman** reconsiders the first branch of **Makin**

1077

Trial within a trial

Prosecution

Address

and determines that in some cases, even where the evidence is simply for the purpose of establishing propensity to commit the offence, it can be admissible.

Its probative value must outweigh its prejudicial effect. And if it's extremely probative evidence, then even if it just simply shows propensity, it could be admissible as evidence.

The Supreme Court of Canada considered **Boardman** and **Makin** in the case of **R. v. B. (C.R.)** - and I can certainly provide you a copy of that - its found at (1990) 55 C.C.C. (3d) 1. And in that case Madam Justice McLachlin adopts the **Boardman** position with respect to the first branch, that in fact, it can be admitted as long as its prejudicial effect outweighs ... or its probative value outweighs its prejudicial effect with respect to the accused.

The second branch of **Makin** has also been developed. The issues before the jury don't relate simply to matters for which the accused has committed a criminal offence. So if the accused has committed any kind of discreditable conduct, that's admissible as similar fact evidence, and I'd refer you to page 4 of the memo I've given you which deals with that particular point.

And, again, this was addressed by the Supreme Court of Canada in the case of **R. v. Robertson** (1987) 33 C.C.C. (3d) 481. And at page 499 of that decision Madam Justice Wilson stated:

"It appears, however, that discreditable conduct extends beyond criminal acts. This was the view taken by the English Court of Appeal in R. v. Barrington ... In that case, the prosecution sought to bolster the evidence of three complainants of indecency by the accused with evidence from three other girls.

1078

Trial within a trial

Prosecution

Address

The evidence of these girls indicated that the accused had gone through much the same process of recruiting the girls supposedly for baby-sitting and showing them pornographic magazines and photographs. It was not, however, alleged that any acts of criminal conduct or indecency took place. The court treated this as similar fact evidence."

So discreditable conduct is the test and not criminal activity for similar fact.

It's also interesting at page 6 of the memo - talks about how you go about the balancing process; probative value, prejudicial effect - and the courts have in effect adopted a sliding scale in which they look at the seriousness of the offences charged, the prejudicial effect to the accused. And there's no defined test but those must all be measured on a sliding scale which, again, is dealt with the **B. (C.R.)** - and I will make sure a copy is provided to you, Mr Judge Advocate.

Finally, the final point I'd make on similar fact which is in effect, the terminology "similar fact" is a misnomer. There's no requirement in law for the acts which you're seeking to admit to be the same as the acts for which the accused has been charged. Again, it's the relevancy test. Is the information relevant?

And page 33 of the memo deals with that, gain, in the **Robertson** case where Madam Justice Wilson states at page 500:

"The probative value of evidence may increase if there is a degree of similarity in circumstances and

1079

Trial within a trial

Prosecution

Address

proximity in time and place. However, admissibility does not turn on such a striking similarity:"

So the more similar the incidents, the more relevant they may be. But simply because you don't have similarity, you're not automatically excluded from considering the evidence.

And in this case, other than the fact that the words were not spoken on a submarine, it's the prosecution's submission that they're very similar to the type of words that were being used in the submarine and relevant to charges three and four.

I'm just going to wrap up here, Mr Judge Advocate, but at page 8 of the memo, it sets out the grounds on which similar fact could be admissible at common law, and there's a number of them; goes through (a) through (k). It would be our submission that these words fall within a number of these categories to prove the intent of the accused; the identity of the accused; malice of the accused towards members of his crew; the motive of the accused when he spoke these words; evidence that establishes what the surrounding circumstances were of the offence; and also, again, to rebut any defences which may be raised which in this case would include, as already discussed with respect to state of mind, the defence of innocence or lawful purpose; also the defence of knowledge or ignorance on the part of the accused. He admits he was being hard on his officers in the statement.

Again, the memo then goes on and deals with all of these different issues and gives a brief summary on how it should be used - and I won't go through those for you - I'll leave that with you.

So to conclude, Mr Judge Advocate, in addition to the reasons raised by Major Abbott, it's our submission that the evidence is clearly admissible under MRE 22 as establishing state of mind, so even if

1080

Trial within a trial

Prosecution

Address

you restrict yourself simply to MRE 22 that's where we are. The defence has raised the issue of these words that they were spoken, being spoken for reasons other than to degrade or insult members of the crew. We now have an instance where, in fact, the same words or similar words were spoken in a situation where clearly no issue of safety or errors could've been made. So it's admissible under 22.

If you find that it is not, in fact, admissible then it's our position that you can go to MRE 4 and the common law with respect to similar fact evidence is applicable, and there's a number of grounds on which the evidence is admissible under the common law.

Thank you, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Lieutenant-Colonel Couture?

DEFENDING OFFICER: First of all, Mr Judge Advocate, I will take the position that you are, as suggested, bound by Rule 22 of the MREs, and that Rule 4 of the MREs could only kick into play in the absence of an area that is not covered in this Rule. And 4 reads:

"Where, in any trial, a question respecting the law of evidence arises that is not provided for in these Rules, that question shall be determined ... ",

in such a manner, et cetera.

Clearly similar fact, at least as it pertains to the prosecution case, is provided for in there at Military Rule of Evidence number 22. Therefore, broadening the Rule 22, I would suggest, would be inappropriate in the circumstances because there is no recourse or no need to go outside of the Rule of Evi-

1081

Trial within a trial

Defending Officer

Address

dence. And I do not intend to indulge much more into some of the cases my learned friend has cited, but it is submitted that you should limit yourself to Rule 22 which goes to identity and intent, basically, or state of mind as indicated there.

These will be my opening remarks only.

I would like to address some other - and I will come back on similar facts in a few moments. The prosecution contends that the fact that the accused would have stated that he was treating his officers hard as to make them better - I mean, I'm not quoting here but something along that line - constitutes an admission. I suggest to you that the word "treating hard" has no resemblance with, or to, ill-treating. To conclude that because one says I treat them hard would constitute an admission on a charge of ill-treatment or conduct to the prejudice of good order and discipline, I suggest cannot be supported.

As to going to intent, just assuming for a moment - and it's only an assumption for the time being - that the accused had said, "You're a fucking prick", to Stone in a bar ashore, et cetera. How does that prove any intent of charges - I suppose those must be the only two charges the prosecution has in mind - charges three and four?

The prosecution also referred to motive. How does calling somebody a prick could be construed as amounting to a motive for having called somebody else other names? The prosecution says that its presented as a pre-emptive strike ... peremptory strike against a defence to the effect that was justified for safety. We take the position - and I suggest we have taken the position both in opening address and through cross-examination - we have, first of all, contested even the existence of those words and all that, and there's never been any admission to that effect throughout the evidence. And to the line of questioning as to raising voice and all that, I believe, has come out - and I

1082

Trial within a trial

Defending Officer

Address

would like to believe that it has come reasonably clear - pertained to raising voice or yelling.

And even if that was ... even if it had been our position - which is not the case we claim - if our position was as described by the prosecution, still how would calling somebody a prick ashore would have anything to do with the charges before you? I absolutely fail to see the relevancy of that.

As to the phrase about treating hard, I suppose it could go either way. It might turn out to be favourable to the defence, who knows. I'm not too sure of that. But I surely object to the conclusion of the prosecution that "hard" means ill-treatment and try to draw a connection between these two.

The prosecution discussed about inhibiting, and PO Stone was inhibited, and it affected his state of mind, I suppose, and his rapport with the Captain, and says that's relevant to prove good order and discipline. I suggest - and I respectfully disagree with that position. I may very well be inhibited after having been very appropriately and properly rebuked and I feel inhibited, and what does it have to do with good order and discipline. If somebody does something wrong and is appropriately ... I'm not arguing that was the case here but I'm trying to demonstrate here the fact that one feels inhibited has got nothing to do with good order and discipline.

What we're dealing with, with good order and discipline, is an act that is such that would amount to good order and discipline. We cannot just take a conclusion that this person was inhibited, hence, it is contrary to good order and discipline. And if I have understood well the argument of my learned friend it appears that that's the theory as advanced, that this may be useful for that purpose. The prosecution, I mean, could have added the name of Stone if they had any views of this amounting to an offence, but they

1083

Trial within a trial

Defending Officer

Address

obviously have not. His name is not found in Annexes "A" and "B".

I would suggest to you, Mr Judge Advocate, that calling somebody a prick it may not be very polite, but does it amount to an offence? Or as my learned friend was suggesting, does it amount to such a behaviour that could even be considered as amounting to similar fact evidence?

He says we don't need a criminal behaviour or something like that, and in that respect I would refer you at page 25 of the **R. v. B. (C.R.)** that my learned friend has given to you, or has he? I believe he has.

Have you given the ... ?

JUDGE ADVOCATE: Page 25 of ... ?

DEFENDING OFFICER: Oh, yeah, you don't have it. We will make a copy available to you.

In this case, an extract of Justice McLachlin ...

JUDGE ADVOCATE: What's the name of the case, again?

DEFENDING OFFICER: **R. v. B. (C.R.)**.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: And my learned friend has referred to this case, it's a Supreme Court of Canada of 1990, and the copy provided me is reported at 55 C.C.C. (3d) 1. And in that particular case they talk - and it's just by way of parallel or similarity here - they talk about prejudicial effect and the sort of evidence that may be adduced, and they say at page 25:

**"In a case such as the present,
where the similar fact evidence**

1084

Trial within a trial

Defending Officer

Address

sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential for prejudice is great and the probative value ... ",

et cetera must be weight carefully.

I say that to present such evidence as adduced or presented by PO Stone would ... it is not relevant for various reasons I have enunciated, and maybe would only risk to send a wrong message to the members of the court that they can ... to derive conclusion or any rational conclusion or inferences from that evidence which is by definition inadmissible under at least the chapter of similar fact.

Furthermore - and I carry on a little bit here in the matter of similar facts - a concept that I would like to refer this court to as to your duty, Mr Judge Advocate. Whether you apply a limited version of similar facts under Rule 22, or a broader interpretation of similar facts as the prosecution has invited you to do, which I don't think you should, but no matter which interpretation of similar facts you want to go, strictly to 22 or broader, it is submitted that your duty remains the same. And your duty as judge advocate, Mr Judge Advocate, has been related in the same decision of **R. v. B. (C.R.)** that I was just referring to a moment ago, and I'll quote from page 24 of the said decision:

"The difficulty of the trial judge's ... ",

it's again from the majority decision Madam Justice McLachlin,

"The difficulty of the trial judge's task and the amount of discretion entrusted to him or her

1085

Trial within a trial

Defending Officer

Address

is great. As Forbes ... puts it at
pp. 54-5:

'A judge presented with similar facts for the prosecution has to exercise an extraordinary complex of duties and powers. First he has to assess not only the relevance ... ',

and that has been our first objection here on relevancy,

"' ... but also the weight of the disputed evidence, although the latter task is normally one for the jury. Second, he must somehow amalgamate relevance and weight to arrive at 'probative value'. Third, and with due regard to the exclusory presumption, he has to outweigh that probative value, in some rough balance, if (sic) imponderables, against any prejudice which the evidence is likely to excite in the jurors' minds.",

et cetera, et cetera.

So unlike the situation you are in, in some of your previous rulings where weight of the evidence had no bearing, or the threshold was very low; for example, there is some evidence that a statement may have been made that was good enough according to some authorities that have been discussed. In this case, and under the hat of similar facts, your duties go well beyond that and I believe my learned friend was eluding

1086

Trial within a trial

Defending Officer

Address

to that and it is commonplace that similar facts is inadmissible, that's the first statement to be made about it, and then there's the process of further enquiries to determine whether eventually it may become admissible.

I suggest to you that process is as well discussed - and I won't read it to you - but it is as well discussed in the same case of **R. v. B. (C.R.)** at page 24 and 25, the last paragraph of page 24 and the top paragraph of page 25 discuss this process.

So for in this particular case and to link my argument to the evidence before you, I want to address a few words on the weight of that evidence that you've heard. Because we submit, in this particular occasion, it is properly a duty of yours to assess it.

PO Stone has testified - well, I won't go through it all again, I attempted to make my point as clearly as possible in cross - basically, he can quote the sentence in question but he knows nothing else, I mean, he hardly knows how long they'd been ashore; he admits he was inebriated; he won't chance it even as to making a statement whether he was closer to being drunk than sober; he admits that the statement doesn't make sense in a normal context; I believe - and it may be that your notes are in accord with mine in that - that he was even mixed up as to his own date of posting on board OJIBWA.

So at the end of the day, what kind of weight would that evidence have if it was even at all considered to be relevant? And I suggest to you that you must first determine its relevant. We take the position it is not. But even if you were to reach a conclusion that it is relevant, what kind of weight does such evidence have? We submit none or so little that it would not meet the standard of evidence capable of outweighing the potential prejudice.

1087

Trial within a trial

Defending Officer

Address

So for all those reasons we suggest to you that the whole statement as proposed to be adduced by the prosecution should not be admitted and presented to the General Court Martial.

Thank you.

JUDGE ADVOCATE: Thank you.

You will bring me that decision you referred to?

ASSISTANT PROSECUTOR: Yes, I will.

JUDGE ADVOCATE: The court is closed to determine the objection made by the defence.

AT 1335 HOURS, 11 OCTOBER 1995, THE COURT CLOSSES TO DETERMINE DECISION.

AT 1513 HOURS, 11 OCTOBER 1995, THE COURT REOPENS.

JUDGE ADVOCATE: The purpose of this **voir dire** is to determine the admissibility of words pronounced by the accused during a conversation that he had with PO1 Stone while in a bar in Scotland sometime during the months of February or March 1992. The evidence sought to be admitted is to the effect that the accused would have said to PO1 Stone: " You are a fucking prick. Do you know why I am so hard on my officers? It is to make them better."

This court is satisfied that the statements are relevant and admissible. Starting with the reasons why the accused said that he was hard with his officers, such statement may be used to prove the accused's intent or motives in committing the acts charged. It can also be used to refute a defence brought by the accused to the effect that he has never been hard with his officers. As to the insults made to PO1 Stone, they are admissible under MRE 22 which reads as follows:

1088

Trial within a trial

Judge Advocate

Decision

" ... If it has been established that the act referred to in the charge was done by someone, but the state of mind or identity of the actor is in doubt, the prosecutor may, subject to ... (2) and (3), ... ", of this article, " ... introduce evidence of another act or other acts of the accused similar in essential respects to the act charged, where either or both of the following facts are in issue and the evidence tends to prove one or both of them:

(a) that the state of mind of the accused was wrongful as charged at the material time, that is, that he did the act charged either knowingly, or with wrongful intent, motive or purpose; or

(b) that there has been no mistake in the identity of the accused as being the person who did the act charged.

(2) When attempting to prove the charge against the accused, the prosecutor shall establish a real suspicion of the guilt of the accused on issues of state of mind or identity with evidence other than that of essentially similar acts of the accused, before he may introduce evidence of essentially similar acts of the accused.

1089

Trial within a trial

Judge Advocate

Decision

(3) Although the prosecutor has evidence to offer within ... (1) and (2), ... ", of this article, ... "the judge advocate shall exclude that evidence if he decides that its probative value is slight or that it would have an undue tendency to arouse prejudice against the accused, thereby impairing the fairness of the trial."

Charges number three and four refer to verbal abuse towards persons cited in Annexes "A" and "B". The evidence before this court has already established a real suspicion of the guilt of the accused on the issue of state of mind of the accused with evidence other than that of essentially similar acts of the accused. The defence line of questioning has been, so far, to the effect that the accused may have been justified in the circumstances to behave the way he did and therefore he may not have had the required **mens rea**.

As to the evidence, in the way of insults made by the accused, sought by the prosecution, it is admissible under MRE 22, even when interpreted restrictively, to establish the state of mind of the accused where he made similar verbal abuse to the persons cited in Exhibit "A".

I must add that in reaching my decision on this matter I have considered such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection of the evidence to issues other than propensity to the end of determining whether, in the context of this case, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

1090

Trial within a trial

Judge Advocate

Decision

For all the above reasons I am satisfied that the evidence sought by the prosecution is admissible.

Is there any other matter that you wish to raise at this time before we invite the members to join us?

PROSECUTOR: None, sir.

JUDGE ADVOCATE: Very well, Officer of the Court, would you please invite the president and members to join us.

TRIAL WITHIN A TRIAL IS TERMINATED

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

PROSECUTOR: I'd like to call Petty Officer, 1st Class Stone, please.

s.19(1)

1091

PO1 Stone

Examination-in-chief

SEVENTEENTH WITNESS) Petty Officer, 1st
FOR THE) Class B.G. Stone.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you give your full name to the court and spell your last name, please?

A. Brian Gerald Stone, S-T-O-N-E.

Q. And what is your current position?

A. I'm a plan maintenance coordinator at MAR OPS Group 5.

Q. What year did you initially join the Canadian Forces? A. 1966.

Q. And what year did you become a submariner? A. 1973.

Q. Did you sail with Lieutenant-Commander Marsaw while he was commanding officer of the OJIBWA?

A. Yes, sir.

Q. What dates were you posted on and off the OJIBWA? A. I was posted on board HMCS OJIBWA 13 of January 1992, and was posted off the OJIBWA August of '94.

Q. What was your job at that time? A. I was the chief electrician.

Q. I understand in your career you've also sailed on the ONONDAGA and the OKANAGAN as well?

A. Yes, sir.

Q. And you've had the following commanding officers: Cairns, Hunt, Nesbitt, Furgeson, Dierks and Gray? A. Yes, sir.

Q. And also sailed on numerous surface vessels as well? A. Yes, sir.

1092

PO1 Stone

Examination-in-chief

Q. Shortly after being posted to OJIBWA in January '92, did you have occasion to sail to Scotland on the boat? A. Yes, sir.

Q. Do you recall the general time of the year that you did go alongside in Scotland? A. It was around late February or early March, sir, of '92.

PROSECUTOR: Mr Judge Advocate, I'd just like to refer to an exhibit, please.

JUDGE ADVOCATE: ...

PROSECUTOR:

Q. I'm referring to Exhibit "Q". I wonder if you can look at the calendar for late February 1992, early March 1992, and ask if it corresponds with your recollection of being at sea and also the reports that are listed there? A. Yes, sir. Okay, yes, sir.

Q. The calendar suggests that you were alongside in Faslane, Scotland, on the 29th of February and continued to remain there until the 4th of March? A. Yes, sir.

Q. While alongside in Faslane, did you have occasion to attend the Imperial Hotel bar which is outside of Faslane, Scotland? A. Yes, sir.

Q. And at that time did you have a discussion with Lieutenant-Commander Marsaw at the bar? A. Yes, sir.

Q. Could you relive that conversation for the members of the court from the point in time where you and Marsaw are both at the bar, please? A. When I arrived at the bar to order drinks, Lieutenant-Commander Marsaw and I exchanged greetings, and a couple of seconds later Lieutenant-Commander Marsaw said, "You know Petty Officer Stone, you're a fucking prick." I said, "Thank you, sir.", and a few more seconds past,

1093

PO1 Stone

Examination-in-chief

and then Lieutenant-Commander Marsaw went on to say, "You probably wonder why I'm so hard on my officers?", and he said, it was to make them better officers. That, basically, was the conversation.

Q. When he returned to you as "a fucking prick", why did you respond, "Thank you, sir"? A. I was taken aback by the comment and I wasn't really sure how to respond to it. It was in my opinion the safest way to respond to it.

Q. How did you feel when you heard him say that? A. It made me leery of what our relationship on board the submarine would be, how it would be serving under him.

Q. Did you have any concerns? A. I thought that my career could be in jeopardy while I was on board the OJIBWA. It gave me the feeling that maybe there was some dislike on Lieutenant-Commander Marsaw's part towards myself.

Q. Have you ever been addressed by a commanding officer in this way before? A. No, sir.

Q. You mentioned at the bar getting drinks. What was your state of sobriety like at that time? A. I wasn't sober, but my degree of drunkenness, I can't say exactly what degree it was.

Q. In light of the fact that you had been drinking, how certain are you that this conversation did, in fact, occur? A. I'm absolutely certain it did occur, sir.

Q. And why? A. It's the sort of thing that is totally out of the ordinary, it stands out in a persons mind when it happens. It's the sort of incident that's very difficult to forget.

PROSECUTOR: I have no further questions, thank you.

1094

PO1 Stone

Cross-examination

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. When this incident happened, how long had you been at the hotel at that time? A. I can't recollect how long we'd been there, sir. At the hotel, I'd say it was probably our third or fourth drink, so it would be only a guestimate on my part, I'd say probably two hours.

Q. Probably two hours. You said when you went to the bar to order drinks you saw Lieutenant-Commander Marsaw, you exchanged greetings. Had you seen him there before? A. No, sir.

Q. So you didn't notice that he was there?
A. No, sir.

Q. And to order drinks, how many drinks were you ordering? A. Four, sir.

Q. Who else was with you? A. There was Master Seaman Polson, Petty Officer Palmer and at the time Sub-Lieutenant Elsford(sic).

Q. And were they all members of the crew of OJIBWA? A. Yes, sir.

Q. How far was that table from the bar?
A. I'd say, from what I can recollect, it would've been about 30 feet.

Q. Thirty feet? A. Yes, sir.

1095

PO1 Stone

Cross-examination

Q. Then you exchanged your greetings and the first thing that Lieutenant-Commander Marsaw tells you is, "You know, Petty Officer Stone, you're a fucking prick"? A. Yes, sir.

Q. Is it possible that he could've overheard the conversation that you had with these people at the table and wouldn't agree with what you were saying? A. No, sir.

Q. So it just came out of the blue like this? A. Yes, sir.

Q. And then after making that comment, do you think it shows concern towards you, "you're a fucking prick", do you think it shows concern towards you? A. I'm sorry, sir, I don't understand what you're asking here?

Q. I'm trying to find a better word here or better expression. Does it show that - how should I put it - that he appreciated your person, your professional opinion, your thoughts, your whatever? A. I don't know, sir.

Q. You don't know. And then after making a comment like this, how do you explain that he would feel compelled to explain himself to you? A. I don't know, sir.

Q. He just comes out, tells you, "you're a fucking prick", and then tells ... shortly, you said seconds later, went on to explain why he was so hard on his officers? A. Yes, sir.

Q. Would you say that that shows compulsion on his part to explain himself? A. I don't know, sir.

Q. You don't know. And you don't know whether or not that second comment was in relation to the conversation you had with these people at the

1096

PO1 Stone

Cross-examination

table? A. I'm sorry, I don't understand? The conversation I had with the people at the table?

Q. Well, you were in the bar for two hours, you're sitting with a couple of people, members of the crew of OJIBWA? A. Yes, sir.

Q. You don't notice that the commanding officer is there? A. No, sir.

Q. You're at a certain distance. How many people were there? A. In the bar, sir?

Q. Yeah? A. The bar was fairly packed, sir.

Q. Fairly packed. And that's why I asked earlier if it was possible for him to have overheard part of your conversation, comments about life on OJIBWA? A. I don't believe so, sir. I don't know.

Q. You don't believe so. Okay. What time did you depart? A. I don't recall, sir.

Q. What, if anything, do you recall of your conversation at the table? A. Conversation at the table was ... I really couldn't say, recall exactly what was said at the table, sir.

Q. So other than those words, you basically don't remember much of that episode? A. No, sir.

Q. When you joined OJIBWA in January of '92, was that on a voluntary basis? A. No, sir.

Q. How long had you been away from submarine staff? A. Approximately 13 years, sir.

Q. And why didn't you volunteer? Any reasons why you wouldn't volunteer to go back on submarines? A. I had done one stint on submarines and I figured I'd done my part for the submarine service.

1097

PO1 Stone

Cross-examination

Q. Uh-huh. What about the living environment on a submarine, did you enjoy that? A. No, sir.

Q. No. So you weren't too keen on going back in the first place? A. No, sir.

Q. How was the morale on the submarine at the time when you joined in January of '92? A. It was low, sir.

Q. Would the sailing schedule have anything to do with that? A. Partially, sir.

Q. Partially, and the workload?
A. Partial.

Q. And at that time they were just coming off a dock and work period, weren't they? A. No, sir.

Q. No, okay. As an electrician did you find that given the age of the boat, it would require a lot of work? A. Yes, sir.

Q. And how many people worked with or for you? A. Average of 11, sir.

Q. Average of eleven. And they put in a lot of hours, did they? A. Yes, sir.

Q. Would you say it was more than usual, as compared to your previous life on the submarines?
A. Yes, sir.

Q. Have you ever seen anybody being "thrown out of the control room"? A. No, sir.

Q. Were you yelled at personally by Lieutenant-Commander Marsaw? A. No, sir.

1098

PO1 Stone

Cross-examination

Q. What about correction by Lieutenant-Commander Marsaw when a mistake was made. Have you witnessed that yourself? A. Not personally, sir, no.

Q. Not personal. Were you on the submarine when the heads, the toilets, had to be put out of bounds for a period of time? A. Yes, sir.

Q. Do you know the reason why? A. I believe so, sir.

Q. What is the reason? A. During the bottoming ...

Q. Uh-huh? A. Yes, sir.

Q. And what happened? Why were they put out of bounds? A. Because of the angle of the boat, sir.

Q. Because of the angle of the boat. And if somebody had to go, was it possible for them to go? A. If it was an absolute necessity, yes, sir.

Q. How much time did you spend in the control room, overall? A. Very little, sir.

Q. Very little. But during that time, did you witness anything in particular? A. No, sir.

Q. No. Nothing that stands out? A. No, sir.

ASSISTANT DEFENDING OFFICER: Those will be all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

1099

PO1 Stone

Re-examination

Q. As chief electrician, where would you spend the vast majority of your time on the sub?

A. In the motor room, sir.

Q. The motor room. Is that a loud or a noisy place? A. Usually noisy, sir.

Q. And where would the commanding officer spend the vast majority of his time while the submarine was at sea? A. Control room, sir.

PROSECUTOR: Thank you. No further questions.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: ...

JUDGE ADVOCATE: No.

Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Next witness?

ASSISTANT PROSECUTOR: The next witness, Mr Judge Advocate, is Leading Seaman Avant, and he'll be swearing an affirmation, I think.

JUDGE ADVOCATE: What's his name again?

ASSISTANT PROSECUTOR: Avant, A-V-A-N-T.

s.19(1)

1100

Leading Seaman Avant

Examination-in-chief

EIGHTEENTH WITNESS) Leading Seaman R.A.
FOR THE) Avant, is duly affirmed.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good afternoon. Could you state your full name, please? A. The name is Richard Andrew Avant.

Q. Could you slowly spell your last name? A. A-V-A-N-T.

Q. Your service number is ? A. Yes, it is, sir.

Q. And your currently posted to HMCS FREDER- ICTON? A. Yes, I am.

Q. Your trade is MAR ENG? A. Yes, it is.

Q. I understand you joined the Canadian Forces in 1987? A. Yes.

Q. And after completion of basic training you volunteered for the submarine service? A. Yes.

Q. In 1988, you were posted to OJIBWA? A. Yes.

Q. What commanding officers have you served under on submarines? A. Lieutenant-Commander MacDon-ald, Lieutenant-Commander Bush, Lieutenant-Commander Davidson and Lieutenant-Commander Marsaw.

Q. For what period was Lieutenant-Commander Marsaw your commanding officer? A. From about October '91 until I was posted out in July of '93.

Q. And where were you employed on board OJIBWA? A. The second panel watchkeeper, engine room watchkeeper or after end watchkeeper.

1101

Leading Seaman Avant

Examination-in-chief

Q. And as second panel watchkeeper, where would you stand watch? A. In the control room.

Q. Can you generally describe what life was like on board OJIBWA under Lieutenant-Commander Marsaw?

A. When he was present in the control room - and I suppose as the other times - tense when he was out there. Everybody would be more subdued, I guess, on edge more.

Q. And why was that? A. Because they were afraid of ... if he'd lose his temper or something like ... something they did.

Q. And if he lost his temper, what would happen? A. He'd start yelling, screaming at you, call you names.

Q. What kind of names would he call you? A. "Idiot, incompetent, stupid", didn't you know your job, things like that.

Q. How would you contrast that style with what you had observed on other submarines under; for example, Lieutenant-Commanders Bush and Davidson? A. He lost his temper a lot compared to them. He didn't maintain his cool as they did. A lot more vocal about things.

Q. What was the atmosphere like in the control room when Lieutenant-Commander Marsaw was present? A. Tense, everybody would be quiet. Very little what normally went on would go on.

Q. And what would provoke him to lose his temper? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I'm not sure if the witness is in a real good position to testify as to what would or would not provoke the Captain to lose his temper.

1102

Leading Seaman Avant

Examination-in-chief

JUDGE ADVOCATE: He may have observed certain things that made the, I don't know, that made the accused to lose his temper. He may. I'm not saying that he did.

DEFENDING OFFICER: Okay, maybe we'll wait for the answer. It might have been premature.

ASSISTANT PROSECUTOR: Maybe I can rephrase the question a little bit too, Mr Judge Advocate.

JUDGE ADVOCATE: Very well.

ASSISTANT PROSECUTOR:

Q. Based on your observations, what would cause Lieutenant-Commander Marsaw to lose his temper?

A. Screwing up at your job; not completing a job as quick as he wanted or as he wanted it done.

Q. Did he use profanity? A. Yes.

Q. What type of profanity would he use?

A. ...

DEFENDING OFFICER: This question has been answered, I think, before.

JUDGE ADVOCATE: Are you referring to something different this time or ... ?

ASSISTANT PROSECUTOR: I don't believe he quoted profanity originally. Again, he used ... described some adjectives. I'm asking him if the accused actually swore at people.

JUDGE ADVOCATE: Very well. Objection denied.

ASSISTANT PROSECUTOR:

1103

Leading Seaman Avant

Examination-in-chief

Q. I'm sorry, we were at the point where I'd asked you whether or not Lieutenant-Commander Marsaw used profanities or swore at individuals in the control room? A. Yes.

Q. And do you recall what types of words he would use? A. "Fucking idiot", things like that.

Q. What was the volume of his voice like when he'd be ... ? A. A lot louder than that, more upset.

Q. I'm sorry, go ahead? A. A lot louder than that and more upset.

Q. Who in the control room was treated in this manner? A. There was not specifics as to who was treated like that. It was just generally if you made a mistake or - not all the time either - but if you'd made a mistake or it just happened that something didn't go the way it was supposed to go.

Q. Were officers addressed in that manner?
A. Yes.

Q. What rank levels would be present in the control room? A. Any rank, ordinary seaman all the way up.

Q. And did you actually witness officers being treated in the manner you've described? A. Yes.

Q. What was the focus of his words when he'd yell and scream at people? A. To deride or belittle the person and make it known that he'd made a mistake.

DEFENDING OFFICER: Mr Judge Advocate, I mean, I don't think ... I have difficulty understanding the question and I have even more so difficulty with this answer. I mean, the witness cannot just say what the captain had in mind when he used those words.

1104

Leading Seaman Avant

Examination-in-chief

ASSISTANT PROSECUTOR: He's not saying that, Mr Judge Advocate. Maybe I'll ask a question prior to this to find out ... to make it clear that it's based on his personal observation.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR:

Q. Were you addressed by Lieutenant-Commander Marsaw in the way you've described? A. Yes.

Q. And how did you feel when you were yelled and screamed at by Lieutenant-Commander Marsaw?

A. Upset, mad and embarrassed.

Q. In what situations were you subject to that kind of treatment? A. ...

DEFENDING OFFICER: That has been asked before, Mr Judge Advocate.

ASSISTANT PROSECUTOR: I'm asking the witness in what situations he was subjected to that kind of treatment. He has not been asked that question before.

JUDGE ADVOCATE: No, it was asked generally before.

The objection is denied.

ASSISTANT PROSECUTOR:

Q. So, again, Leading Seaman Avant, in what situations were you subjected to that kind of treatment? A. One of the times I remember, it was at night, we were in dark lighting in the control room and the captain had come out to take a look on the attack periscope. In dark lighting you can't see all that well the periscope when it comes up except for a little red light on it. Now, if somebody was blocking the light, then you can't see at all if you can't get a

1105

Leading Seaman Avant

Examination-in-chief

reflection off the mast itself as it's going up. And he happened to be in front of the light when it came up and I didn't see it and I guess he flipped down the controls and by that time it was all the way up and sticking too far up out of the water, and he proceeded to scream at me to ... turned around and said, "Okay, if you'd do your fucking job right", and at that time, I mean, if ...

Q: Have you ever seen ... or excuse me, what was morale like on board OJIBWA? A. Generally, among the crew towards each other it was fairly good. Towards the captain, he wasn't really well liked at all by anybody, I think.

Q. Why was that? A. Just generally because he was perceived as losing control a lot and he just wasn't liked.

Q. Have you ever seen any other CO yell and scream at officers in the control room? A. No.

Q. Contrast the morale on OJIBWA under Lieutenant-Commander Marsaw with the morale on OJIBWA under then Lieutenant-Commanders Bush and Davidson? A. Well, I'd say the morale was pretty good underneath Bush and Davidson and they were respected as captains, good leaders. And then when Lieutenant-Commander Marsaw came on board that part of it, I guess, took a big nosedive in respect towards, I don't know, looking at your captain as the leader.

Q. Were members in the radar room ever subjected to any kind of screaming and yelling by Lieutenant-Commander Marsaw? A. Yes.

Q. What would happen? A. If they weren't calling out the headings or bearings quick enough, or if something wasn't being done the way it was supposed to be done that he'd wanted it done - not all the time - but on occasion he would push his head in through the door, into the radar office and scream at the guys in

1106

Leading Seaman Avant

Examination-in-chief

the radar office to smarten-up or stuff like that. Or push the door open really hard, kick it open and pull the curtain to the side.

Q. You were on board OJIBWA when Lieutenant-Commander Marsaw took over command? A. Yes.

Q. Did he make a speech at that time?
A. Yes, he did.

Q. Were you present for that speech?
A. Yes.

Q. What did he say? A. Basically, we were called lazy, we didn't work properly, he was going to show us what hard work was underneath him. That's the general theme of the speech.

Q. And Lieutenant-Commander Marsaw took over command from Lieutenant-Commander Davidson, is that correct? A. Yes.

Q. Did Lieutenant-Commander Davidson address the crew before he left? A. Yes, he did.

Q. And did any other senior officers have occasion to address the crew shortly before Lieutenant-Commander Marsaw took command? A. Yes.

Q. Who would that be? A. The commander of Perisher Training for the British navy.

Q. And contrast what Lieutenant-Commander Davidson and the Perisher commander had to say with what Lieutenant-Commander Marsaw said to you? A. ...

DEFENDING OFFICER: Mr Judge Advocate, is that relevant? I mean, I know that earlier in this trial you have made some rulings about the way other COs were behaving and so on and so forth. Now, we are talking about the British, I guess, naval officer who's making an address. I mean, whilst I understand your

1107

Leading Seaman Avant

Examination-in-chief

previous rulings, I fail to see how that falls within that ruling and I question the relevancy.

JUDGE ADVOCATE: The way I understand it is to establish a contrast between the way others did the same type of thing and the accused.

Is it not that?

ASSISTANT PROSECUTOR: That's absolutely correct, Mr Judge Advocate.

JUDGE ADVOCATE: Your objection is denied.

ASSISTANT PROSECUTOR:

Q. So, again, Leading Seaman Avant, could you contrast what was said by these two individuals with what Lieutenant-Commander Marsaw said in his first speech on board? A. Well, the commander of British sea training left - it was in the morning - and he commented that he'd never seen a well ...

Q. Again, I'd ask you not to repeat his words, just contrast? A. It was completely different from what Lieutenant-Commander Marsaw had said.

Q. Was the crew ever praised by Lieutenant-Commander Marsaw? A. Not that I remember, no.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

1108

Leading Seaman Avant

Cross-examination

Q. Starting with the last question of the prosecution, was it that he never praised the crew or never praised in your presence? A. Never praised in my presence.

Q. In your presence. You served under Lieutenant-Commander Marsaw starting in October of '91 until July of '93 when you're posted out, correct? A. ...

Q. When did Lieutenant-Commander Marsaw take over command of OJIBWA? A. As far as I remember in October.

Q. October, what year? A. '91.

Q. '91? A. Yes.

Q. And you were present at that speech? A. Yes.

Q. Is it possible that you weren't present at that speech? A. No, I was at the speech. I may have the date wrong as to when he took over, but I was present at the speech.

Q. And he's taking over the command of the submarine, was he there for a certain period of time under Lieutenant-Commander Davidson prior to taking command? A. Not that I remember, no. I don't remember him sailing with us.

Q. So how can you make an assessment that you don't work properly? A. I don't know, sir.

Q. You don't know. And the yelling you mentioned would happen when mistakes would be made or things would not be done properly, not all the time, but in that case. What kind of mistakes are we talking about? Can you identify any? A. The ones that I specifically remember were keeping the boat on depth during runs.

1109

Leading Seaman Avant

Cross-examination

Q. Other mistakes by anybody else? A. The radar people, I don't know exactly what would set him off but occasionally - I can't recall specific times - but there were times when he would go charging into the radar office to yell at whoever was in the office.

Q. And would these things be known, what was expected? You say, when things weren't done the way they should've been. Was that something new that he came up with or was it the usual day-to-day business of running the submarine? A. The usual day-to-day.

Q. And the same mistakes, I gather, since you were there since October '91 until July '93. Were they all different mistakes or would the same mistake just reoccur over and over? A. Sometimes it would be different mistakes and sometimes, like, as in the case of staying on depth or that kind of thing.

Q. But specific situations, like, staying on depth, do you recall the event? What was going on when the submarine was not on depth? A. We were doing a run on one of the ships for training, like, a set up for the ship for targeting.

Q. Uh-huh. So how important is that to be on depth in that situation? A. Important.

Q. It's important. You mentioned that he lost his temper a lot. Is it your conclusion that he lost his temper a lot or did he react with less patience toward mistakes as other commanding officers would tolerate? A. I'd say both. He reacted differently to situations.

Q. He reacted differently. Would the other captains or the other commanding officers you served under; for instance, Lieutenant-Commander Davidson, have you ever witnessed times where the boat would be off depth and nothing would be said? A. No.

s.19(1)

1110

Leading Seaman Avant

Cross-examination

Q. No. And the profanities you've heard, would he have been the only person on board to have used those words? A. No.

Q. No, it was part of the language?
A. Yes.

Q. What was your sailing schedule like?
A. I can't really gauge it against anything. It was busy for awhile ...

Q. But as compared to your other service in other submarines? A. I'd never served on another submarine.

Q. You never served on another submarine. But it was busy? A. Yes.

Q. Would after awhile people get tired?
A. Yes.

Q. From the work and the stress? A. Yes.

Q. Would tempers tend to flare at times?
A. Yes.

Q. Would the level of concentration tend to drop down a bit? A. I honestly don't know about that. It would ...

Q. But your personal ability, did you feel at times that you had problems or difficulty concentrating more on the job at hand because you were tired?
A.

Q. When you're under night conditions, when the red lighting is on, isn't it a fact that the signal to indicate that the periscope is ... to stop raising it, that the signal is "well"? A. Not all the time, sir.

Q. Not all the time. How would that go about switching between watching the red light and the

1111

Leading Seaman Avant

Cross-examination

verbal signal because of the difficulty to see? A. As I said, sometimes they would lower the handles, sometimes they would say "well", and if you can't see it coming up you can control the speed of the periscope coming up by the valve handle and usually on a start up, when you pull it up, it comes up pretty quick especially if the hydraulics are topped up and they haven't been used for awhile.

Q. And what would be the purpose then of having a red light and follow the red light if you say you were following the hand signals because it's hard to see, raising of the handles? A. The right light really is there for reading off the bearings for the periscope. It's not really set up to be a signal to show you.

Q. So the raising of the handles would be the day signal? A. Yeah, or to lower them.

Q. Or to lower? A. Or to signal.

Q. But under difficult lighting conditions, you would have to resort to a different type of signal?
A. Yes.

Q. Where were you positioned in relation to the first ... how far away are you? A. I'd say about ...

Q. Well, I can use a diagram here, it may help, which is Exhibit "I". Could you first indicate where the periscope used by the captain is? A. The attack periscope is here and the control room, he's standing over here.

Q. So how far away would you estimate that to be? A. About 10/12 feet.

Q. What is in your approximation the usual noise level in the control room? A. It varies.

1112

Leading Seaman Avant

Cross-examination

Q. It varies. But from that distance and that environment, you said people could block it off. Are you talking about the one person, the Captain or ... ? A. Well, when the attack periscope goes up, passage through the control room from forward to aft or aft to forward, it stops. But there are other people in the control room at the time.

Q. What about coming off the docking work period, in January '93. Did that require a lot of work? A. Yes.

Q. Were you involved in that? A. Yes.

Q. To what extent? A. The same as everybody else.

Q. Did you find that to be excessive?
A. Yes.

Q. In what respect? A. Well, the work period had been cut short for the sailing that we were going to be doing in January and we were putting in seven days a week, full days, 12 hour days, constantly.

Q. And when did that docking work period start? A. In either the end of October or near the beginning of November.

Q. What was your daily schedule during that period? A. In at eight o'clock in the morning, off at three o'clock, 3:30.

Q. So it was a fairly routine schedule?
A. Routine.

Q. It gave you time for three months or thereabouts to have normal days? A. For about a month and a half.

Q. For about a month and a half of normal days? A. Yes.

1113

Leading Seaman Avant

Cross-examination

Q. Now, the orders come down that you have to sail, and so you just to crank it up? A. Yes.

Q. You still say that it was excessive to get ready to sail when the orders came down? A. In my opinion it was, sir.

Q. The words you quoted, "idiot, stupid, incompetent", are those exact quotes or words that you were picking out of phrases that were spoken, as examples? A. For some of them I would say they were exact quotes used in one particular incident that I remembered, and some of them would be just taken out of sentences.

Q. Okay, so if you take the word, the exact quote "stupid", could you put it back in the exact phrase in which it was said? Connect it to the exact event that led to that comment being made? A. We were doing ... this was the run again on the ship and the trimming officer brought depth and, well, the helmsman kept the boat ... the boat wasn't staying on depth and the helmsman at the time was being yelled at and it continually got worse and the Captain called and said, "Are you too stupid to do your job? If you can't do your job, we can get somebody else in to replace you. If you're incompetent, you can't do your work".

Q. Do you see a difference between calling somebody stupid and asking him if he's stupid in the sense that, you know, "Are you too stupid to your job?" I see it as a question as opposed to ... ? A. No, I didn't see any difference.

Q. In that example, do you recall who was the helmsman? A. I don't recall the helmsman, no, sir.

ASSISTANT DEFENDING OFFICER: Just a moment, Mr Judge Advocate.

1114

Leading Seaman Avant

Cross-examination

JUDGE ADVOCATE: ...

ASSISTANT DEFENDING OFFICER:

Q. Do you recall reading an article that was published in December of 1993, concerning allegations of abuse on the submarine? A. I'm not sure.

Q. You're not sure. If I showed you the article, would you be able to remember? A. Probably.

Q. Well, did you read an article on or about that period concerning ... ? A. Yes, I remember reading about something at the time.

Q. Can you just look at this, and take your time and ascertain whether or not it is the article that you've read? A. Yes, that's the article I read. I think I read it in the *Chronicle-Herald* though, not the *Daily News*.

Q. Were you contacted by any reporters?
A. No.

Q. No. When were you interviewed by the military police concerning this case, do you recall?
A. August of '94.

Q. August. Could it have been earlier, a little bit earlier, June? A. June, yeah, sometime in the summer.

Q. '94, summer of '94. The episodes you just told the court about, the periscope and the treatment that you got being yelled at, did you complain to anybody on board about that incident? A. No, not that I recall.

Q. You didn't lay any ... ? A. If I did, I didn't make it as a complaint, just the general griping.

1115

Leading Seaman Avant

Cross-examination

Q. General griping, but no official complaint as to the treatment to anybody on the submarine or even in the chain of command outside the submarine?
A. No.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR:

Q. Leading Seaman Avant, you've indicated that you only sailed on OJIBWA? A. Yes.

Q. Just to clarify that point. You had a number of COs while on OJIBWA, is that correct?
A. Yes.

Q. You also gave evidence to my friend about other COs correcting people for errors. Did other COs use personally insulting adjectives when they corrected members of the crew? A. No.

Q. Pardon me? A. No.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: ...

JUDGE ADVOCATE: No questions.

Thank you very much. You may withdraw from the courtroom.

1116

Leading Seaman Avant

Re-examination

WITNESS WITHDRAWS.

ASSISTANT PROSECUTOR: The next witness, Mr Judge Advocate, we estimate will take about an hour and a half for direct and cross portion, and are prepared to proceed if the court and our friends opposite are prepared to listen.

PROSECUTOR: I think it's been a long day for you, Mr Judge Advocate.

JUDGE ADVOCATE: An hour and a half for both sides?

ASSISTANT PROSECUTOR: Again, just an estimate. But I figure I'll probably be 20 to 25 minutes. Twenty-five minutes I think is a fair estimate. I don't want to speak for my friends obviously.

DEFENDING OFFICER: It might be awhile.

JUDGE ADVOCATE: If you say so.

DEFENDING OFFICER: But there is good news in all this, Mr President, is that despite the delay this afternoon, I believe we are one witness ahead of the original plan.

JUDGE ADVOCATE: Yes, but we're two weeks back from the original plan too.

DEFENDING OFFICER: But as indicated though I'm prepared to go, or it's entirely up to you, but it will be awhile.

JUDGE ADVOCATE: Well, perhaps we may at least hear the examination-in-chief. We'll see how late it is in the day when it's over.

ASSISTANT PROSECUTOR: The next witness then, Mr Judge Advocate, is Petty Officer Conrad.

s.19(1)

1117

PO2 Conrad

Examination-in-chief

NINETEENTH WITNESS) Petty Officer, 2nd
FOR THE) Class M.R. Conrad, is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good afternoon. Would you state your full name for the court, please? A. Michael Randall Conrad.

Q. And would you spell your last name slowly? A. C-O-N-R-A-D.

Q. Your service number is
A. That's correct.

Q. And you're a Nav Electrician [sic] Tech?
A. Yes, sir.

Q. I understand you're currently posted to HMCS OKANAGAN? A. Yes, sir.

Q. You've been in the Canadian Forces for approximately 20 years? A. That's correct, sir.

Q. And you completed your basic submarine course in 1981? A. Yes, sir.

Q. What submarines have you served on?
A. HMCS OKANAGAN; HMCS OJIBWA; I was attached to HMCS ONONDAGA, and I'm presently on the OKANAGAN.

Q. And what submarine COs have you served under? A. Lieutenant-Commander Davidson, Lieutenant-Commander Marsaw, Lieutenant-Commander Dunlop, and when I was attached to the ONONDAGA, Lieutenant-Commander Kavanagh.

Q. When were you posted to HMCS OJIBWA?
A. July 20th, 1990, sir.

1118

PO2 Conrad

Examination-in-chief

Q. And did you remain on board after that?
A. I remained on board for around a month, sir, and then I was attached posted to the PROTECTEUR for the Persian Gulf War.

Q. And when did you return from the Persian Gulf?
A. July ... correction, January 15th, 1991.

Q. What did you do on your return?
A. I had 33 days disembarkation leave and then I rejoined SM1. The OJIBWA was down south and when she came alongside in March, I rejoined my boat.

Q. And who was the CO at the time you re-joined?
A. Lieutenant-Commander Marsaw.

Q. For what period was he your CO on OJIBWA?
A. From when the boat returned in March until I was posted off April 3rd of 1993; and then I was attached to OJIBWA again in August of '93, to complete a trip until October 4th of '93.

Q. When on watch aboard OJIBWA, where were you employed?
A. I was employed in the control room.

Q. And what were your duties there?
A. Helmsman and the contact evaluation plotter.

Q. During your time on board OJIBWA, are you aware of Lieutenant-Commander Marsaw having kicked anybody, any member of the crew?
A. Yes, sir.

Q. Could you generally describe that incident, or what occurred?
A. We had just returned to periscope depth, Lieutenant[N] Higginson was on the plot. Lieutenant-Commander Marsaw had the forward periscope raised and was doing an all around look. He kicked Lieutenant[N] Higginson, and after the kick occurred I heard him say, "That'll teach you to get the fuck out of the way."

1119

PO2 Conrad

Examination-in-chief

Q. Did you actually witness the kick? A. I did not see the kick. I saw the skirmish that occurred afterwards and that was Lieutenant[N] Higginson moving aft on the plot.

Q. Do you recall when this occurred?
A. Say again, please, sir?

Q. Excuse me, do you recall when this incident occurred? A. As in ... ?

Q. What trip, time of year? A. No, sir, I do not.

Q. I'm going to show you diagram marked Exhibit "I". I'm just wondering if you could point out on that diagram where you were located when you witnessed this? A. In front of this position right here there's the main intercom box, and right in front of the main intercom box we had a little seat bench made. I was sitting on that seat bench, which is about three feet from the attack periscope, sir, towards the well.

Q. And where was Lieutenant[N] Higginson?
A. Lieutenant[N] Higginson was situated right around here on the plot.

Q. You're pointing just aft of the attack periscope, slightly aft? A. Yes, sir, and everybody knew that they had to stay away from this position here because of the close proximity of the attack periscope and the plot.

Q. Okay, and where was Lieutenant-Commander Marsaw? A. Lieutenant-Commander Marsaw was going around in this direction here when he hit Lieutenant[N] Higginson.

Q. When you say in this direction here, you're indicating a counter-clockwise turn? A. Yes, from port, aft, starboard, forward, sir.

1120

PO2 Conrad

Examination-in-chief

Q. What was the position of the black-out curtain around the plot table at the time? A. It was down, sir.

Q. How do you know Lieutenant[N] Higginson was the person that was behind at that time? A. That's normally where the officer of the watch went.

Q. Who was the officer of the watch? A. Lieutenant[N] Higginson was the officer of the watch, sir.

Q. Did you have any discussions with Lieutenant[N] Higginson after this event? A. Yes, sir, after the Captain turned the submarine back over to the officer of the watch, which was Lieutenant[N] Higginson, I approached Lieutenant[N] Higginson and I asked him, I said, "What the hell happened?", and he said, "I just got kicked by ..."

Q. I don't want you to repeat what Lieutenant[N] Higginson said? A. I'm sorry, sir. I asked Lieutenant[N] Higginson if he was kicked and he said yes.

ASSISTANT PROSECUTOR: I apologize, Mr Judge Advocate ...

JUDGE ADVOCATE: Again, disregard the answer.

ASSISTANT PROSECUTOR:

Q. You served on board OJIBWA under Lieutenant-Commander Marsaw for approximately two years? A. A little over two years, sir.

Q. Can you comment on his leadership style? A. It was the worst example of leadership I've ever seen in the twenty years that I've had in the Armed Forces.

1121

PO2 Conrad

Examination-in-chief

Q. Why do you say that? A. Basically, his leadership style was he led by fear, demeaning the individual, screaming, hollering to get the job done.

Q. What was the atmosphere like in the control room when Lieutenant-Commander Marsaw was present? A. Very tense. The watch would be going along quite well, we'd be able to carry on conversations in the control room, but as soon as Lieutenant-Commander Marsaw stepped into the control room all conversation ceased.

Q. And, again, why was that? A. Just the way that he was in the control room with the screaming and the hollering. You just didn't do it or else you knew you were going to get shit for it.

Q. Do you recall what words he would use when he was screaming and yelling at people? A. Basically, he was screaming at the helmsman, the officer of the watch on ship control, and sometimes officers on the after periscope. And it was, for the helmsman, "I told you to keep 54 fucking feet, keep 54 fucking feet", in a very loud tone of voice, it was a holler. Ship control officers of the watch, if they made small errors or just weren't doing things up to his specifications they were yelled at and screamed at.

Q. And would subordinates of these individuals be present in the control room? A. Yes, sir, officers right on down to able seaman would be in the control room, sir.

Q. Do you recall what officers were on board OJIBWA while you were there? A. Yes, sir.

Q. List as many as you can recall? A. The first executive officer was Lieutenant[N] Virgin; the first navigator that I was with when I returned from the Gulf, that is, was Lieutenant[N] Marr; Sub-Lieutenant Byrne joined; Sub-Lieutenant MacLean; Lieutenant[N] Wamback was on board; Lieutenant[N] LeClaire;

1122

PO2 Conrad

Examination-in-chief

Lieutenant[N] Pitman; Lieutenant[N] Higginson; Lieutenant[N] Dussault; Sub-Lieutenant Kohli; Lieutenant Kelk; a British officer whose name I cannot remember at this time.

Q. Were any of the officers you've just listed not treated in the way you've described by Lieutenant-Commander Marsaw? A. Lieutenant[N] Virgin mostly stands out in my mind that he was not treated the same way. It seemed like when Lieutenant[N] Virgin was in the control room that he had an air of confidence about him that, I don't know, it just, like, you couldn't get anything over him, or he wouldn't stand for it. Lieutenant[N] Dussault didn't wear it as much either. But these were two officers that were in the executive officer capacity so they might not stand for that, sir.

Q. Can you provide the court any examples of situations when officers were yelled at by Lieutenant-Commander Marsaw? A. Yes, sir, we were at periscope depth, Sub-Lieutenant Byrne was on the after periscope, and there was nothing stressful going on. Sometimes the helmsman didn't put on the state of the sea, you know, might be a foot deep, a foot shallow. And the after periscope at times, if you're in a tactical situation, would have to raise and lower the mast according to how deep or how shallow you are. Well, Sub-Lieutenant Byrne was on the after periscope, and like I said, it wasn't a stressful situation, and Lieutenant-Commander Marsaw came running out of his cabin and said to Sub-Lieutenant Byrne, "Don't you want to play my fucking game?" Sub-Lieutenant Byrne replied, "No, sir, I don't know what your fucking game is", and Lieutenant-Commander Marsaw then continued to bear down on him.

Q. When you say, "bear down on him", what do you mean by that? A. He continued to talk to him about what his game was and his tone of voice changed, lowered, and for the very first time since I was on

1123

PO2 Conrad

Examination-in-chief

board OJIBWA, I saw him explain to an officer what his job was while he was on the after periscope.

Q. Can you recall, were NCMs treated in the same manner as officers? A. When we were on the helm, yes, sir, we were yelled at.

Q. Can you recall the names of NCMs who were treated in the manner ... ? A. Myself, Sergeant Shea, Petty Officer Blair. It didn't make a difference if, you know, if you were having a hard time keeping depth, he would yell and scream at you to get on depth. Although in some times ... I mean, in a lot of instances it wasn't our fault, it was the sea state. There was one time in particular where a leading seaman on the helm, Leading Seaman Hunt, was really being ragged on and he turned to the Captain and said, "Sir, I'm doing my best", and the CO looked at him and said, "Well, it's obvious your best isn't good enough".

Q. How often would the helmsman be treated in this way by Lieutenant-Commander Marsaw? How frequently would it occur? A. Whenever a helmsman was having difficulty keeping depth - we had a lot of good helmsman on board OJ - and sometimes the sea state made it so that it was very difficult to keep depth, and on that last patrol that we made, I mean, not us, but the drug patrol we made in '82 ...

Q. In '82, excuse me? A. I mean, in '92, sorry.

Q. Okay? A. We were having a hard time and it was because of the sea state that was between the two areas in which we were working. And we were being yelled at all the time. We went through the entire watch in 15 minutes on the helm, there was three of us on the watch. Change around the helm, change around the helm, change around the helm, and no matter what, it wasn't making a difference, and it's, if you can't keep 54 fucking feet, I'll get somebody to keep 54 feet.

1124

PO2 Conrad

Examination-in-chief

Q. How would you feel when you were addressed in that way? A. Well, it's very demeaning address. It's, you know, you just don't feel good about it. We found it very difficult to enter the control room. Whenever we could get out of the control room, we were out. You just didn't want to turn to and go on watch. You knew what was going to happen.

Q. Did Lieutenant-Commander Marsaw ever have occasion to address your watch as a whole? A. One time he ... before he went back up forward he called the watch that was on, a piece of shit watch. And that's the way that we addressed ourselves for the rest of that patrol, blue watch, piece of shit watch.

Q. How did you feel about that? A. It's a ... well, I guess, you know, you get used to it after a while. You just shrug it. It didn't make you feel very good because you're known as a piece of shit watch, especially when it goes through the boat, you know, the piece of shit watch is on.

Q. And when did that ... what patrol was that in? A. That was when we were doing that drug interdiction patrol.

Q. Was the atmosphere in the control room different when there was a rider in the control room? A. Yes, sir.

Q. In what way? A. The yelling was a lot less. There wasn't as much yelling and screaming that was going on. Lieutenant-Commander Marsaw's tone of voice was changed. It wasn't the same tone of voice anymore. But then again as soon as there wasn't anybody in the control room watching what was going on, it went right back to it some more.

Q. Did you ever have occasion to give Lieutenant-Commander Marsaw advice on the communications mast? A. Twice, sir.

1125

PO2 Conrad

Examination-in-chief

Q. Could you describe those instances for us? A. The first time, it was in EASTLANT 1992, we were having difficulties communicating in UHF and VHF which uses the same portion of the comms mast. So I started to investigate it and there was a fault on board, but there were two other faults which I had found at the same time. And one of those faults was a major fault. The comms mast has interlocks on it so you're not able to transmit on the comms mast when the comms mast is in the lowered position. You can have up to one thousand watts of energy leaving the comms mast at any given time, depending on if you're going to use the amplifier or not. So the interlocks were not engaged, there was a fault in the card. I found the fault, repaired the fault and repaired the UHF fault that was on it. Lieutenant-Commander Marsaw came in to radio, and I explained to him, you know, what the fault was and that I had fixed the fault. He said that he didn't want the fault with the interlocks repaired. And I said, sir, I said, we have to have this fixed, I says, because if we transmit with the comms mast in the lowered position and one thousand watts or even three hundred watts of energy goes out into the water, the majority of that is going to be reflected back in. It will probably destroy the major components of the comms mast as well as a lot of equipment that's in the radio. He became very agitated and he said, well, I want you to revert it back. And I said, sir, I can't revert it back because if this happens we'll be in port. And he said, well, what if I make that an order? I said, well, sir, I'd have to ask for that order in writing with yours and the CSE's signature on it. The second time was, again, when we were on that drug patrol in '92, we were having major communications ... major problems communicating with the authorities ashore. He had written down in his orders that any communications that were done with the RCMP ashore that the comms mast was going to be raised to the tactical UHF position, which is basically about four to five feet out of the water. I was being shaken at all hours, standing one and two; six hour on, six hours off, six hours on, six hours off; and to get up and repeatedly check my gear.

1126

PO2 Conrad

Examination-in-chief

And I came back with the same synopsis all the time, saying that there's nothing wrong with my gear. I also plugged in an in-line RF watt metre just to ensure that, yes, we were going out into the comms mast. I then went down into the radio annex and started drawing up a diagram of the comms mast so that I could give Lieutenant-Commander Marsaw a better picture of exactly what the components in the comms mast were, their dimensions and everything else. So the last time that I was shaken, I went back, I again informed the CSE that my gear was good and he instructed me to do a diagram of the comms mast, and I said I almost had it done. I went down, finished the diagram, brought it up to Lieutenant-Commander Marsaw, who was sitting on the ... standing by "George", which is the autopilot for the one man control, and I said, sir, I says, I just got this out of the book, I says, for proper UHF line of site satellite communications, the comms mast has to a minimum of eight to nine feet out of the water, and he said, you're a fucking liar PO. And I said, sir, I just got this out of the book. I says, you know, it's, like, it was in a plastic wrap, the whole bit, and he said, well, obviously the book is wrong. I proved it wrong. I then asked him if he wanted it? He said, no.

I looked at the CSE who was sitting at ship control at the time, Lieutenant[N] Soper, I asked him if he wanted it? He said, no ... I mean, yes. I then gave it to Lieutenant[N] Soper and a copy of that made it into the control room package.

Q. How did you feel when Lieutenant-Commander Marsaw called you a liar, a fucking liar?

A. Well, I mean, like, my job on there was being a tech for the comm equipment that's on board the boat, and I know my gear. I was just trying to give him the best possible comms that I could, and, you know, to be told that I don't know what I'm talking about, well, it just enhanced my wish to leave the boat.

Q. Petty Officer Conrad, I'm showing you a diagram, do you recognize that? A. Yes, sir, this is a copy of the one that I drew, sir.

1127

PO2 Conrad

Examination-in-chief

Q. And that's the diagram you actually prepared on board? A. Yes, sir.

ASSISTANT PROSECUTOR: Mr Judge Advocate, subject to any objections that my friend may have, I'd ask that be marked as the next exhibit.

DEFENDING OFFICER: I'm not terribly convinced or taken by the relevancy, but subject to your call on that, I have no more difficulty than that.

JUDGE ADVOCATE: Exhibit "X".

THE DIAGRAM OF THE COMMUNICATION MAST DRAWN BY PETTY OFFICER CONRAD IS MARKED EXHIBIT "X".

Q. How long did it take you to prepare that diagram, Petty Officer Conrad? A. About four hours, sir, because I had to go into the books, into the comms mast book to complete ...

Q. Did you ever confirm the accuracy of the information contained in that diagram? A. Yes, sir, when we appeared alongside, I went up to the radio shack and they had a comms mast taken apart and I was able to confirm that the UHF portion that I was indicating to Lieutenant-Commander Marsaw at the time was almost exact. I could not take into consideration the spaces between the components but I believe that it came out to ninety-two and three quarter inches overall as per what my ... so I was almost bang on, sir.

Q. How long prior to preparing that diagram had you been experiencing these comms problems on the trip? A. About a week and a half, sir.

Q. What was the morale like on board OJIBWA?
A. It was very poor. There was no morale on board OJ. Nobody wanted to sail OJIBWA.

1128

PO2 Conrad

Examination-in-chief

Q. And, again, why was that? A. Just the atmosphere that was going on on board. Nobody wanted ... it was a very demeaning atmosphere for everybody. The senior rates took it upon themselves to, you know, tell the boys they did a good job, give time off whenever they could because, basically, nobody else was doing it. Not once while I was on board did I ever hear the CO commend the crew for a job well done, and that was one of the best crews I ever sailed with.

Q. What was your personal morale like?

A.

We had tried to inform everybody of what was going on on board.

Q. Who did you inform or speak to? A. We use to talk to Chief Petty Officer Hamilton in the mess a lot.

Q. Who is Chief Petty Officer Hamilton?

A. He was the in board swain at the time, sir.

Q. Who else would you have spoken to?

A. Chief Petty Officer Brown, we talked to him once about it on board, and it was, basically, that's life in boats.

Q. Who else did you speak to? A. Through the swain on board we got the executive officer into the senior rates mess and then told him that we were not happy with everything that was going on on board; that the boys were very exhausted; they needed a day off; there were talks of separation; a lot of drinking going on. And we had him in there and, basically, Petty Officer Noseworthy ... there was a statement that ...

Q. I don't want to know what Petty Officer Noseworthy said, just ... ? A. We told him that we requested one day off and he said that ...

1129

PO2 Conrad

Examination-in-chief

Q. I don't know what he said either?

A. Okay, sir.

Q. Did you talk to the coxswain on the boat?

A. Yes, sir.

Q. Who would that have been? A. The first time it was Chief Petty Officer Parlee, sir.

Q. And as a result of any of these conversations, did anything change on board OJIBWA, from your observation? A. There was one time in late '93, we were on that last trip, we approached Chief Petty Officer Brown, and he told us that there would possibly ...

Q. I don't want to know what he told you?

A. Yes, sir.

Q. Did things change ... ? A. It changed for awhile, sir, yes, for about two weeks and then it went back to its normal situation.

Q. And you were posted off OJIBWA in April of '93? A. That's correct, sir.

Q. Comment on how you felt when you were posted off? A. I was elated. I got off the hell boat.

Q. And what was your reaction when you were told you were going back to OJIBWA in August of '93? A. I went in, I talked to the in board swain at the time, and there was no way that I could get out of going back so you just grin and bear it, and go back, accept it. It's your job, you wear the Queen's chevrons, you draw the Queen's pay.

Q. Did your experience on board OJIBWA under Lieutenant-Commander Marsaw affect you personally?

A. Yes, sir. I started to drink a lot more. I didn't want to go to sea anymore, and I have never ever com-

1130

PO2 Conrad

Examination-in-chief

plained about going to sea, I volunteered for the Gulf War. I still have that that I don't ... there are times when I go to sea, it's great, but it's the start off that I just don't want to go to sea anymore on board boats. But the Armed Forces has given me a two and a half year extension and it's because I'm in subs that I got that extension.

Q. How would you describe your experience on OJIBWA then? A. It was the worse experience I've ever had in my life.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: How long are you going to be?

DEFENDING OFFICER: Possibly a little longer than expected even.

JUDGE ADVOCATE: Which is?

DEFENDING OFFICER: An hour possibly.

JUDGE ADVOCATE: Well, go ahead.

DEFENDING OFFICER: Mr Judge Advocate, if we are to go ahead, can we have maybe a five minute pause so just that we can use some facilities, and if we're going to carry on ...

JUDGE ADVOCATE: I understand what you have in mind.

The court is adjourned for five minutes.

ADJOURNMENT: At 1639 hours, 11 October 1995, the court adjourns.

1131

PO2 Conrad

Cross-examination

REASSEMBLY: At 1646 hours, 11 October
1995, the court reassembles
and the accused is before it.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. PO Conrad, do you recall being inter-
viewed by the military police in relation to this
investigation? A. Yes, sir.

Q. Is that correct that one interview took
place on 17 January 1994? A. I don't know the date,
sir.

Q. Is that correct that you were informed as
to the ... that the interview was going to be video-
taped? A. Yes, sir.

Q. And that you were subsequently provided
with a copy of the videotape and you had an opportunity
to review the videotape? A. Yes, sir.

Q. Would you agree that what's reflected on
the videotape reflects accurately what took place
during the interview? A. Yes, sir.

Q. Would you also agree that subsequent to
that even and more recently, you were provided with a
copy of a transcript of that videotape? A. Yes, sir.

Q. And you were given the opportunity to
review the transcript against the videotape? A. Yes,
sir.

Q. And you were afforded the opportunity to
make amendments on the transcript so that to ensure
that the transcript would reflect what actually was on
the videotape? A. Yes, sir.

Q. And you have done that? A. Yes, sir.

1132

PO2 Conrad

Cross-examination

Q. And in that process you have made a number of amendments or corrections to the transcript?

A. Yes, sir.

Q. I show you here a document which contains 79 pages. Could you have a quick look at this and confirm to the court whether you recognize that document? A. I recognize the document, sir.

Q. This is the document you reviewed?

A. Yes, sir.

Q. And it contains red markings which reflect the corrections that you felt appropriate as you compared the transcript to the video? A. Yes, sir.

Q. Would you say that this transcript reflects accurately what took place during the interview?

A. During the two interviews, yes, sir.

Q. And I take that you told the truth to the police when you spoke to them in those occasions?

A. Yes, sir.

Q. Do you recall reading an article in the *Chronicle-Herald* on 16th December 1993, pertaining to some allegation regarding ... about the captain of OJIBWA? A. Yes, sir.

Q. You read that article? A. Yes, sir, like everybody else did, sir.

Q. I take that you didn't make - let's call it any formal complaints - regarding the way you were treated on board OJIBWA? A. No, sir.

Q. You mentioned a few times having chats in an informal setting with CPO1 Hamilton? A. Yes, sir.

Q. But you didn't; for example, write a redress of grievance, as to this unbearable treatment that you were subjected to? A. No, sir.

1133

PO2 Conrad

Cross-examination

Q. You have, however, written or prepared and submitted one redress of grievance regarding a PER of yours? A. Yes, sir.

Q. Do I take that you had confidence in the system that something would be done and that your redress would be addressed? A. Something was done, sir.

Q. So I take that some minimal or basic confidence, anyway, in the naval authorities and the chain of command that your redress could be... or your grievance could be addressed? A. Yes, sir.

Q. And you just confirmed that it was actually? A. And then readdressed again, sir.

Q. Why then didn't you make a complaint regarding the treatment on board OJIBWA? A. Ignorance.

Q. But you were not that ignorant as to not to submit one regarding your PER? A. We had figured that we had informed all the individuals that we possibly could, including the executive officer, sir, about what was going on on board and if they couldn't do anything about it, what's a P2 going to do submitting a redress. You fight the system, sir, you lose.

Q. Okay, who's "we"? You have used that expression very often during your testimony, "we figured", "we" this, "we" that? A. Did you want the names of the individuals that were in on the executive officers meeting, sir?

Q. No. But; for example, we determined that it would go nowhere? Is that you and Shea and you and Tovey? A. No, sir. I determined that I could not do anything about it, that's why I requested to leave submarines.

1134

PO2 Conrad

Cross-examination

Q. Throughout your testimony, answering questions of the prosecutor, you've used the expression "we"? A. Yes, sir.

Q. Why would you do that? Doesn't that infer that you consulted, you discussed those matters with some people and "we" agreed there was no point taking this any further? A. Not in that line, sir.

Q. No. So "we" means "I", is that what you're saying? A. Yes, sir.

Q. Did you speak to Mr Dunlop, Malcolm Dunlop, the author of the article in the *Chronicle-Herald*? A. No, sir.

Q. Not at all? A. No, sir.

Q. He did not even approach you? A. He did not, sir.

Q. Outraged as you were and knowing that you couldn't do nothing more, wasn't it tempting to go to the press? A. It's illegal for a military member to go to the press, sir.

ASSISTANT PROSECUTOR: Mr Judge Advocate, I'd object, that's pure speculation in any event. The witness has given his answer, he did not speak to the reporter. And I might even think even the reporter questions are not relevant, I would submit.

JUDGE ADVOCATE: Sustained.

DEFENDING OFFICER:

Q. You were interviewed twice by the MPs, is that correct? A. That's correct, sir.

Q. 17 January 1984 [sic], you may confirm that if it helps you? A. It doesn't have it here,

1135

PO2 Conrad

Cross-examination

sir. I do not know the dates off the top of my head, sir, but, yes, I was interviewed twice.

Q. Actually, that was the 7th of January. Look at para 1 of page 1 to see if that helps you remembering? A. Yes, sir.

Q. So that was the 7th? A. That was the date I was there, sir, not the 17th.

Q. I'm sorry, I said 17. A digit got there by inadvertence. And I understand that you were interviewed as well on the 24th of May - and you may want to refer to page 38 if it might help you to confirm that?

A. The 24th of May '94, yes, sir.

Q. That's correct. You stated in direct examination that Virgin was not treated the same way? A. He was the executive officer on board, sir.

Q. Yeah. Were you inferring that he received a special treatment or were you saying that Virgin performed in such a manner that he wouldn't be yelled at? A. I can't answer that, sir, I do not know.

Q. Did you see Virgin perform? A. Yes, sir.

Q. Can you compare that to the performance of others that may have been yelled at from time to time? A. Yes, sir.

Q. So? A. Just as good as what some of the other officers of the watches were, sir.

Q. So Virgin's performance was as good as others? A. Or others were as good as his, sir.

Q. Are you saying that some people would be yelled at for absolutely no reason sometime? A. No, sir.

1136

PO2 Conrad

Cross-examination

Q. The depth, you said that sometime there'd be yelling to helmsman and whatnot. Those are general examples, is that correct? You cannot recall any specific incident? A. Leading Seaman Hunt was one, sir.

Q. Oh, yeah. And what happened exactly in that context? A. He was about the third individual we had on the helm, he was the attack-team helmsman. The attack-team helmsman is the best helmsman ... or one of the best that we have on board.

Q. Uh-huh? A. He was trying to keep depth, he was having a hard time. Lieutenant-Commander Marsaw was on the after periscope ...

Q. Uh-huh, on the after periscope? A. He was on the after periscope. He was telling Leading Seaman Hunt, "I told you to keep 54 feet, now keep 54 fucking feet". Leading Seaman Hunt turned around and said, "I'm doing my best, sir". Lieutenant-Commander Marsaw said, "Well, it's obvious your best isn't good enough". That's a specific incident.

Q. Okay. But he didn't call him a fucking idiot or stupid or anything like that, did he? A. No, sir.

Q. That example about the 54 feet, is that correct to say that this is one example that you did not relate to the military police during the interview? A. No, sir, it's in there.

Q. It is? A. Yes, sir.

Q. Okay, could you please look at it and help me locating where it is mentioned? A. Page 3. There was examples where a killick was on the helm, Leading Seaman Hunt, and the captain, you know, excuse my language but, "Get your fucking ass on depth", and Hunt would return and say, "Well, sir, I'm doing my

1137

PO2 Conrad

Cross-examination

best." And the captain would turn around and, "Well, your fucking best isn't good enough."

Q. Okay, so where do you see the word "54" there, "54 feet"? A. Fifty-four feet is just a general, sir.

Q. Just a general? A. Sometimes you kept it at 53 feet, sometimes you were keeping 56 feet.

Q. So what you're giving the court here is an example, it's an approximate. It is not necessarily what was said that day? A. That day it was 54 feet, sir.

Q. That day was 54 feet? A. Yes, sir.

Q. When you were called by the police, I take that you knew exactly why you were there? A. Yes, sir.

Q. And they asked you and you confirmed that, so you knew it was in relation to that investigation? A. Yes, sir.

Q. And you were asked if you had witnessed physical or verbal abuse on board OJIBWA, do you remember that generally? I refer you to page 5 of the transcript ... ? A. ...

JUDGE ADVOCATE: Well, what's your question? Ask your question first.

DEFENDING OFFICER: Okay.

Q. Do you recall stating that you had witnessed a - "a", like one - a physical abuse, do you recall that? A. Yes, sir.

Q. Okay. And you described an incident that pertained to LeClaire and Gensey, is that correct? A. Yes, sir.

1138

PO2 Conrad

Cross-examination

Q. And is that correct too that having described that, you were asked whether there were other instance of physical abuse that you observed while on board, do you recall that? A. If it's in the transcript there as well ...

ASSISTANT PROSECUTOR: Mr Judge Advocate, again, I know we keep coming back to the same point but I don't understand why my friend can't simply ask the question, were you asked about other incidents of physical abuse? and get an answer. The witness is now being asked to second-guess what he may have said or didn't say in the interview without having the benefit of having the transcript to review.

DEFENDING OFFICER: Well, I was about to show the transcript ...

JUDGE ADVOCATE: Well, get to the point, ask your questions.

ASSISTANT PROSECUTOR: He can't ...

JUDGE ADVOCATE: It's not the first time, it's always the same thing. How many times will I have to tell you? Ask your question to the witness. If he doesn't recall, show him the transcript.

DEFENDING OFFICER: That's what I did, Mr Judge Advocate.

JUDGE ADVOCATE: Well, it's not the way I understand it and it's not the way your friend understands it too. We may both be wrong, but ...

DEFENDING OFFICER:

Q. Were you asked whether you had witnessed other physical abuse? A. Yes, sir.

1139

PO2 Conrad

Cross-examination

Q. You were? A. As far as I can recollect on the transcript, yes, sir.

Q. Why don't you - at page 8 of the transcript? A. Yes, sir.

Q. And I will tell you what to read, see if it helps your memory? A. ...

ASSISTANT PROSECUTOR: Again, Mr Judge Advocate, his memory seems fine. Unless there's an inconsistency, why are we going to the transcript?

DEFENDING OFFICER: I'm not talking about inconsistency, Mr Judge Advocate. He says, as far as I can remember, so for more certainty.

JUDGE ADVOCATE: Well, that's not the way to proceed. I mean, do you need an adjournment to read your Military Rules of Evidence? If you need one, I'll give you one, perhaps, we'll save time.

DEFENDING OFFICER: I don't think I need an adjournment, Mr ...

JUDGE ADVOCATE: So if you don't need an adjournment, get to the point.

The objection is sustained.

DEFENDING OFFICER: Mr Judge Advocate, it is my position that under ... even if I go to Rule 100, about contradiction, which I'm not doing now, I am entitled in accordance with 100(3) to ask a question to the witness without showing him the statement.

In this case I asked a question to the witness. He answers in a fashion that suggests that he does not quite recall too well that last question. He says, yeah, maybe as far as I can remember.

JUDGE ADVOCATE: It's not the way I understood it.

1140

PO2 Conrad

Cross-examination

ASSISTANT PROSECUTOR: Again, that's not my recollection of his evidence either. I think he says he was asked, I think it was a clear answer. He may have gone on and said something about that ...

DEFENDING OFFICER: So maybe we'll save ...

JUDGE ADVOCATE: Perhaps, ask your question again if we're not clear on that.

DEFENDING OFFICER: No. Well, if everybody's clear on what was said, we'll save maybe the argument about the Rules for later.

Q. And do you recall saying "no" to that?

A. ...

JUDGE ADVOCATE: To what?

DEFENDING OFFICER: To that question that we just discussed.

JUDGE ADVOCATE: Please, repeat it. I don't want you to get into confusion again.

DEFENDING OFFICER: My learned friend claims ...

JUDGE ADVOCATE: Put your question to the witness.

DEFENDING OFFICER:

Q. Do you recall being asked whether you had witnessed other physical abuse aside from the one LeClaire/Gensey? A. I recall from viewing the tape, yes, sir.

Q. That you were asked that question?

A. Yes, sir.

1141

PO2 Conrad

Cross-examination

Q. My question to you, isn't that right that your answer was "no"? A. Yes, sir.

Q. So you were telling the MPs that you had not witnessed other physical abuse or other physical abuse - whatever, as used - except that an incident LeClaire/Gensey that you had related, is that correct?

A. I did not recollect at that time, sir.

Q. And is that correct too that later in the course of the same interview you were asked in general terms whether there was anything else that had happened that they should be aware of, the MPs, they're asking you questions. They asked ... do you recall the question being put to you, is there anything else that you can tell us that we should be aware of? A. Yes, sir, after I reviewed the tape and the transcript, sir.

Q. Yeah. And that later - again in the same interview - you were extended the opportunity to provide more information, whatever, concerning this investigation and that the MPs stated, we got all day if you want. Whatever you want to add we'll take our time and listen to you, do you recall that? A. No, sir, I do not.

Q. Okay, could you please look at page 34 of the transcript and go to the third last paragraph? A. Yes, sir.

Q. Now, have you read this paragraph? Just for yourself, don't read it loud, just read it to yourself, okay? A. Yes, sir.

Q. Now, I will rephrase my question. Is that right that that question was put to you, "Is there anything else you want to tell us, like we got all day if you want." Was that question asked to you? A. As per the transcript, yes, sir.

Q. And is that right that your answer was, "Not much really. It's just that ... "? A. Yes, sir.

1142

PO2 Conrad

Cross-examination

Q. Do I understand that to mean that what you had stated to them to that point was just what there was, like, that's what you had to say, is that correct? A. At that point in time, sir, yes.

Q. And is that correct to say that the, lets call it, kicking incident - the Captain of the ship and Higginson - that you related to the court today, you had not told the MPs to that point, is that correct? A. Not during the first interview, but during the second one I did.

Q. Okay. So then it is in the course of a second interview on 24 May 1994, some four months later, that this incident came to mind? A. Yes, sir.

Q. Would you agree with me that the nature of the questions put to you by the MPs in the first interview and the nature of the information you provided them was unequivocal as to the information that was sought, do you? It's not as if it was something unrelated to the investigation, that Higginson and the Captain incident? A. It's just something that I failed to remember at that particular point in time, sir.

Q. And then four months later you remembered. Why did it come back to you just like this, four months later? A. I don't know, sir.

Q. Might it be that you have discussed with somebody? A. No, sir.

Q. Do you know Warrant Officer Shea who was a sergeant during the time of your service? A. Yes, sir.

Q. Could you have discussed this with him? A. No, sir.

1143

PO2 Conrad

Cross-examination

Q. Lieutenant[N] Higginson, could you have discussed with him? A. No, sir.

Q. So this incident that you could not recall in early January '94, just popped back in your mind four months later for no reason? A. A lot of things pop back up in my mind four months afterwards, sir.

Q. Uh-huh. And then at that time, although you could not remember even the existence of the incident in January, in May you are now in a position to indicate the direction the Captain was going, counter-clockwise and so on and so forth, is that correct? That's what you're saying? A. Yes, sir.

Q. Are there other incidents that you may have testified on today here that you had forgotten and have come back to mind? Okay, lets try to be more precise. The incident that you related to the court this afternoon about Lieutenant[N] Byrne, do you want to play my fucking game, or whatever, something along that line. You know what I'm talking about? A. Yes, sir.

Q. Isn't that true that this you did not relate at all to the MPs at the occasion of your interview of 7 January? A. I am not sure, sir.

Q. Could you please look, the first 37 pages of the transcript there? A. You want me to review the whole 37 pages, sir?

Q. The first 37 pages which is the total of the first interview? A. If it's not in that interview then, sir, I guess I didn't relate it to them, sir.

Q. But if you need to satisfy yourself, I mean, I'm asking the question, I want your answer? A. If it's not in the first 37 pages of this interview, sir, then I did not give it to them, the military police.

1144

PO2 Conrad

Cross-examination

Q. Could you please confirm to the court whether it is there or not? A. Yes, sir.

ASSISTANT PROSECUTOR: Mr Judge Advocate, is he asking him to read the transcript? I think that would be fair to ask him to skim it. My friend knows whether or not it's there. Perhaps, he could assist the witness.

JUDGE ADVOCATE: As it was told to the witness before, take your time, we have the whole day.

WITNESS: No, sir, it's not in the first 37 pages of this interview transcript.

DEFENDING OFFICER:

Q. So it is not. So you didn't tell the military policeman during the course of that first interview about this incident you related to the court today with Byrne or one or the others - fucking game? A. No, sir.

Q. Now, would you agree with me that this afternoon you gave a, you know, pretty clear testimony as to the conversation that took place, the words exchanged, especially those words of the Captain. Could you explain to the court why those words that can come out so clearly today were not related to the military police on 7 January 1994? A. No, I cannot, sir.

Q. Would you agree that in May '94 you mentioned this incidents to the MPs? A. Yes, sir. If it's in the transcript, I did, sir.

Q. Uh-huh. But again it just came back to mind like this, is that what you're saying? A. The kick and the yelling to me didn't seem as significant as the kick that Lieutenant[N] LeClaire dealt Lieutenant[N] Gensey. The yelling at that particular

1145

PO2 Conrad

Cross-examination

point in time, it was a regular thing, sir. Sometimes I wouldn't admit it.

Q. So the kick LeClaire/Gensey was ... ?

A. That was predominant in my mind.

Q. ... significant enough to be reported, but the kick Marsaw - who's the Captain - Higginson was not significant? A. It didn't seem as ... to me it seemed, like I said, I did not actually see the kick, but he was going around on the after periscope and I don't know if it was a deliberate kick or not. The one that Lieutenant[N] LeClaire dealt Lieutenant[N] Gensey was a deliberate kick.

Q. But then having gone through this situation and all that something must have happened between January and May that then made you realize that it was significant? A. No, sir, I just brought it up.

Q. Isn't that right that you indicated to the military police that you had something else to add that you had not had a chance to tell them before?

A. I don't know what I said, sir.

Q. Okay. Could you please look at page 47 of the transcript and read the last two lines of the first paragraph? A. ...

ASSISTANT PROSECUTOR: Mr Judge Advocate, I would suggest that that is misleading the witness. I'm sure it's not intentional on the part of my friend, but I think he should also refer him to page 46 of the transcript ...

DEFENDING OFFICER: I was going to refer to page 46 as well.

But my first question to the witness was, didn't you say to the MPs that you wanted to tell about something that you did not have a chance to do before.

He says I don't recall that. So I'm offering this

1146

PO2 Conrad

Cross-examination

line to help refreshing his memory if possible and we'll see what he says.

There's another portion at page 46 which I intend to go back after that ... to go back to.

ASSISTANT PROSECUTOR: I would submit, Mr Judge Advocate, the witness has to review both to give a fair answer to my friend. I think the witness becomes confused if he's only referred to one passage when there's clearly a passage on the previous page which indicates how this whole issue came up in the first place. And I think that's probably much more relevant than this last thing at the end of the explanation.

JUDGE ADVOCATE: It's not the first time we go through that. Why don't you refer the witness to everything that was said on this particular regard in the transcript.

DEFENDING OFFICER: I'm trying to keep things as simple as possible.

JUDGE ADVOCATE: My gosh. I can tell you that there are much easier ways.

DEFENDING OFFICER: I cannot refer the witness to 10 passages at once, I mean, I intended to refer to 46.

JUDGE ADVOCATE: Well, you may tell him, I refer you to page so, so, so and so, read them and then tell me your answer.

DEFENDING OFFICER: Okay. Well, sure, it will take longer but if ... sure.

JUDGE ADVOCATE: I don't think so. At least it will not confuse the witness.

1147

PO2 Conrad

Cross-examination

DEFENDING OFFICER: Okay, so why don't you, PO Conrad, read page 46, from mid page, the sentence starting, "There was another incident ... , and read through that last point at page 47 I mentioned to you.

Q. Now, I have the following questions for you - which will be different from the last one that I asked, I will come back to that one after. Did you tell the MPs that it was jogged - presumably referring to your memory - your memory was jogged regarding an incident that you had not discussed before? A. Yes, sir.

Q. You did? A. If that's what it says in the transcript, sir, that's what I said.

Q. Could you tell what jogged your memory? A. When I went in for the first interview, sir, I was nervous and I was scared. When I went in for the ... when you have that time frame between the first interview and the second interview, you just start to remember things, it comes off. When you're talking about giving evidence against a lieutenant-commander, you get scared. I'm sorry, but when that happens to me I don't always remember everything that happens.

Q. I suggest to you that you were quite comfortable during the first interview. You discussed lots and lots of topics? A. Yes, sir. A lot just started flowing off my chest.

Q. And you discussed in detail a number of incidents over which you have not testified today, isn't that correct? A. That came out in that particular point in time, yes, sir.

Q. During the first interview you discussed lots and lots of matters that you have not testified on today, is that correct? A. Questions that were not asked of me, yes, sir.

1148

PO2 Conrad

Cross-examination

Q. But what I'm saying, you discussed a lot of matters. You discussed the canteen; you discussed the smoking policy; you discussed details of incidents about mast, about periscope, about helm. You didn't seem to be concerned at all about lack of information. You provided what you had, didn't you? A. Yes, sir.

Q. So what was it that jogged your memory anyway? A. I don't know, sir.

Q. You don't know. And is that true that you stated to the MPs that this matter of the Captain and Higginson was one that you didn't get or had not got to say the last time, did you say that? A. Yes, sir.

Q. You did. Although you have been offered all the time in the world, the MPs stated to you, we've got all day? A. Yes, sir.

Q. When you said that the Captain called you a fucking liar? A. Yes, sir.

Q. You state that Lieutenant[N] Soper was there, the CSE, is that correct? A. That's correct, sir.

Q. At what distance was he? A. The commanding officer was standing in front of the one man patrol, Lieutenant[N] Soper was sitting on the ship control, sir.

Q. So in terms of feet, what's the difference? There's three players there? A. Two feet.

Q. Two feet. And those words were spoken fairly loud, I understand? A. You're a fucking liar, PO.

Q. Louder than that? A. Just that loud, sir.

1149

PO2 Conrad

Cross-examination

Q. Uh-huh? A. Loud enough that the first panel, Petty Officer Wilkinson also heard it, sir.

Q. So are you suggesting that Soper would have been closer than Wilkinson? A. Yes, sir.

Q. Do you recall, once ashore in a foreign port, talking to Lieutenant Kelk during a sport afternoon, I guess, it was in Ireland or something? A. No, sir, it was in Baltimore. We had been invited to a clam bake. No pardon me, a crab ... that's correct, and we were playing - I got it wrong there - I said polo. We were playing ...

Q. A game anyway? A. It was a game on the lawn, yes, sir.

Q. Okay. And is that right that at that time you approached Kelk and you told him, "You're a pretty nice guy on the field, why do you act like such a fucking asshole on board?" A. Can I have that page, please, sir?

Q. I'm asking you. Do you recall saying that? A. May I have the page, please?

JUDGE ADVOCATE: Do you recall saying that or not?

WITNESS: On the field, yes, sir. But I just wanted to see if it was that expression.

JUDGE ADVOCATE: No, no, say if you recall or not and we'll see if there are other questions afterwards.

WITNESS: Okay, sir.

DEFENDING OFFICER:

Q. Okay, do you recall saying those words?
A. Yes, sir.

1150

PO2 Conrad

Cross-examination

Q. Are you satisfied that the words I just quoted to you are the words you used? A. What comes to mind with me is, how come you're such a nice guy on the field and you act like such an asshole on board.

Q. Okay, so maybe it would appropriate to see if looking at page 24, to see if it would help refreshing your memory as to what you told the MPs on that subject? A. Yes, sir.

Q. So is the quote I gave you, "you're a pretty nice guy on the field why do you act like such a fucking asshole on board", is that quote correct? A. As per what's said here, sir.

Q. That's what you said to the MPs that that had happened? A. Yes, sir.

Q. Is that always the way you address officers? A. No, sir.

Q. Would you agree with me that there were, I mean, lots of work to be done on board the submarine especially, like, preparing to sail, preparing for work ups? The missions were very numerous, weren't they? A. Yes, sir.

Q. And that as a result the crew was put through some long hours, is that correct? A. Yes, sir.

Q. Is that, I mean, something that you can understand, like, preparing to sail, would it make sense that at times, depending on the shape of the boat, it requires long hours of preparation? A. Yes, sir.

Q. And isn't that what the people are paid for, there are better times and there are tougher times? A. Yes, sir.

1151

PO2 Conrad

Cross-examination

Q. So you don't have any real complaint about working long hours? A. No, sir.

Q. You said earlier in your testimony that it was the best crew you sailed with? A. Yes, sir.

Q. And added words to the effect, to bad we had such poor command, or words to that effect?
A. ...

ASSISTANT PROSECUTOR: Mr Judge Advocate, I don't recall him making that qualifying statement. At the end he just said it was the best crew he'd sailed with.

JUDGE ADVOCATE: I don't either.

DEFENDING OFFICER: Or the words spoke, maybe I'm mistaken. I'll withdraw that portion, it's very little. It has little relevancy to my question anyway. I was just trying to describe the question as closely.

Q. How much credit would you give to Lieutenant-Commander Marsaw for that, the captain of the ship? A. It's his boat. We do what we're told, sir.

Q. So wouldn't you agree then that if that was a good crew that the captain would have played a role in that? A. No, sir.

Q. He didn't. Did not participate into improving performance, did not participate into training or anything like that. You were good because you were good and, in fact, you were good despite the captain, is that what you're saying? A. Yes, sir.

Q. How many mistakes have you made on board OJIBWA in the three years you were there? A. What type of mistakes are you referring to, sir?

1152

PO2 Conrad

Cross-examination

Q. Well, general mistakes that one might make in the course of a days work or a tour on submarines; taking wrong readings, whatever type of mistake that one might do during his work? A. I honestly don't recollect, sir.

Q. You were stating, and a document was introduced that you had made a diagram and you were right and it was out of the book and the CO, the Captain, was wrong, is that correct? You did that today, the diagram? A. I never said the CO was wrong, sir. I provided him with more information to make it better.

Q. Uh-huh. But you were right, and you did not appreciate being called a liar? A. Yes, sir.

Q. Wasn't there a bit of a kerfuffle in January '93 whilst preparing the boat for a work up, like, there was lots of work and the work up was coming fast and ... ? A. There was a lot of work going on, yes, sir.

Q. Yeah, and is that right that you for one would have appreciated that the work up might be delayed because it was an impossible task to get the boat ready? A. No, sir, that wasn't it at all, sir.

Q. No? A. No, sir.

Q. What was it, if ... ? A. We asked the executive officer for one day off so the boys could have a day off.

Q. Uh-huh? A. It wasn't for the senior rates, it was for the men.

Q. Okay. And when you say "we", that's you?
A. No, sir, that's the senior rates: Petty Officer Stone ... both Petty Officer Stones, Petty Officer Lalancette, Petty Officer Noseworthy, Chief Petty Officer Lavoie, we had a conference with the executive officer in the senior rates mess.

1153

PO2 Conrad

Cross-examination

Q. And I take it that some time off was granted, is that correct? A. Two hours.

Q. Two hours. Were you present when the decision was made? Do you know whose decision that was to give or take or not, two hours or a day? A. I was just told that the Captain gave two ...

Q. Excuse me? A. Sir.

Q. Without repeating, I'm asking you, do you know from your own observation, your very own knowledge, who gave or take or granted or did not? A. I would imagine that the Captain did, sir.

Q. Okay. So that's an assumption you're making because you don't know with certainty whether it was him or not? A. That's correct, sir.

Q. And the XO's also responsible for personnel matters and it would be conceivable that it might have been the XO? A. I can't see that, sir, because the captain is the one who delays any type of sailing. The XO, it's not in his capacity.

Q. Can you conceive the captain not having much choice in relation to some sailing date and some mission? A. I don't know, sir.

Q. How long have you been in the navy?
A. Twenty years, sir.

Q. You know of the chain of command, you got some experience? A. Yes, sir.

Q. Would you agree that the CO of a ship or a boat - ship as well - is responsible to higher superior as well? A. That's correct, sir, yes, sir.

Q. Now, I take it that you were not familiar with the dealings of the captain of the ship with his own superior, is that correct? A. That's correct, sir.

1154

PO2 Conrad

Cross-examination

Q. Now, this incident, the Captain and Higginson, you didn't see the kick? A. No, sir.

Q. So we will call it an incident because we're not too sure if it's a kick or not? A. Yes, sir.

Q. Then the captain was going counter-clockwise, is that correct? A. That's correct, sir.

Q. I suppose if you didn't see a kick you probably didn't see where a kick might have landed?
A. I was looking at the contact evaluation plot which was right there. The attack periscope was three feet in front of me. Lieutenant[N] Higginson was one foot away from me and across from the attack periscope. I was looking at the CEP, and all I saw was Lieutenant ... I heard something, I looked over, Lieutenant[N] Higginson was moving aft and that's when the statement was made.

Q. How certain are you about that statement?
A. I'm certain, sir.

Q. You're certain. No chance of error on that one? A. That's what I heard, sir.

Q. Although it's part of the whole incident that you did not recall in January '94, you're guaranteeing that it's correct. You don't know whether this whole episode would have been accidental or intentional? A. No, sir.

Q. In fact it might be quite possible that it would be accidental given the confined space. If such a kick had taken place - we're not too sure of that because you didn't see it - but if a kick or a collision of some sort had taken place, would you agree that that could be accidental given the very confined space? A. Yes, sir.

1155

PO2 Conrad

Cross-examination

Q. You would. Now, that same incident that you did not recall in January you recall with some details in May and you related that again here today. You also now recall that then Sergeant Shea was a witness to that? A. Yes, sir, he was on the CEP.

Q. So you went from not remembering the incident at all, to remembering the whole incident with the exact direction of the periscope, the words spoken and the fact that Shea was a witness? A. Yes, sir.

Q. The incident with Byrne with the - my fucking game or whomever's fucking game - is that correct that you don't recall exactly when that took place? A. No, sir, I do not.

Q. Actually, you do not recall even on what trip it took place? A. No, sir, I do not.

Q. Actually, you do not recall in what year it took place? A. No, sir.

Q. But you do recall that Shea was present, is that correct? A. Yes, sir.

Q. And you recall the exact conversation or those exact words said by the CO and Byrne, don't you want to play my fucking game? No sir, because I don't know what your game is, and so on and so forth. Those you are sure ... about that? A. Yes, sir.

Q. What's a "dit"? Is that an expression you're familiar with? A. A "dit" is something that gets spread around, a rumour.

Q. A rumour. Is that a characteristic of a "dit" to be amplified and, like, a bit like a fishing story. The story starts, the fish is about three inches and by the time it goes around the fish is three feet, is that ... ? A. No, sir. I was in the control room when that incident happened, sir.

1156

PO2 Conrad

Cross-examination

Q. Sorry? A. I was in the control room when that ...

Q. Oh no, I'm not talking about the incident here. I'm talking about a "dit", no connection. Is that characteristic of a "dit" to grow, like, the story grows up? A. Rumours grow up, sir, I guess so.

Q. Would you agree that you don't have much time for Lieutenant-Commander Marsaw, like, you just plainly dislike him? A. I do now, sir.

Q. And you did in January '94, when you spoke to the MPs? A. Yes, sir.

Q. And things have not improved since. You hated him then and you just probably hate him even more so today? A. No, sir.

Q. Is that possible that you might have said to other senior rates that you would take great pleasure to take Marsaw down? A. Never.

Q. Never. Is that possible that you could have commented to another person as recently as a couple of days ago that there would be some nice stuff coming out in court in the next day or two? A. No, sir.

Q. How close are you to Warrant Officer Shea? A. We were friends on board the submarine. I lived down the street from him.

Q. Uh-huh? A. I no longer live down the street from him, I've moved away since.

Q. Would you agree with me that you share at least one thing with him, is he doesn't like Marsaw either at all? A. I don't know that, sir.

Q. You don't know that? A. No, sir.

1157

PO2 Conrad

Cross-examination

Q. On the basis of your observation, did Shea enjoy his tour on board OJIBWA? A. Nobody enjoyed their tour on OJIBWA, sir.

Q. Nobody at all? A. I guess I can't speak for all seventy-two.

Q. It was hell, wasn't it? A. Yes, sir.

Q. Can you think of one thing that the captain might have done right during that two and a half years that you were there? A. With reference to what in mind, sir?

Q. Anything, I'll take? A. He cooked a mean pot of chili.

Q. He cooked a ... ? A. He cooked a mean pot of chili.

Q. Okay, that's one. Anything else good that he might have done during that whole period?
A. Sir, maybe the accomplishments of all our missions. There's nothing that I can say, I mean, he's the commanding officer, I'm not. I'm here just giving testimony of what I saw.

Q. Well, you did not hesitate to share your views as to what you thought of him, and that you had no time for him, like, the words, "I have absolutely no use for him". Do those words ring a bell? A. Quite possibly, sir.

Q. Could you please look at page 10 of the transcript? A. Yes, sir.

Q. And to avoid any confusion, go also at page 9, I guess, the question was put to you - do you recall that? "What's your personal opinion of Lieutenant-Commander Marsaw?", is that correct?
A. Yes, sir.

1158

PO2 Conrad

Cross-examination

Q. And you're at liberty to read the last paragraph of page 9 and then the top of para ten?

A. I know what I says, sir.

Q. Okay. And is that correct that you're ... "So my personal regard to Lieutenant-Commander Marsaw is I have absolutely no use for him"? A. Yes, sir.

ASSISTANT PROSECUTOR: Perhaps, my friend could put that in context and let the court know what was being discussed at the time he made that statement.

JUDGE ADVOCATE: Well, you will have a chance to re-examine.

DEFENDING OFFICER: Could I have just a brief moment to review my notes?

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. Can you reconfirm for me that Lieutenant-Commander Marsaw never complimented anyone? A. Not while I was on board, sir.

Q. Probably Lieutenant-Commander Marsaw responsible for the problems you have had with your PERs as well? A. Yes, sir.

Q. Although he would not be your reporting officer? A. That's correct, sir.

Q. And your own performance couldn't have any bearing as to why a PER was not as high as you had expected? A. I was the only department on board to pass the "RIs".

Q. So whomever assessed you, blew the call, that had nothing to do with you? A. They even told me that, sir, during my divisional interviews.

1159

PO2 Conrad

Cross-examination

Q. Is that common practice in the navy to indicate to somebody that he's performing greatly but then say, sorry, as good as it may have been, we'll write you down? A. What was told to me, sir, is this is what the Captain thinks of you. This is the score he wants you to have, this is what you're going to have.

Q. Did you meet person to person with the Captain over your PER? A. No, sir.

Q. When you sent your redress to your Captain, did he reply to it? A. Yes, sir.

Q. You've discussed this matter quite a bit with other people of the sub squadron, haven't you? A. No, sir. If it comes out in mess room talk, I do not discuss it, or I'll leave. I discussed no evidence but I did discuss that Lieutenant-Commander Marsaw was going on trial. Some of the things that he did, maybe.

Q. Would you say that - and don't tell me or repeat me any words - but have you acquired knowledge; for example, that Lieutenant[N] Gensey had to undertake and did undertake a polygraph? A. Yes, sir.

Q. And I take that the MPs did not tell you that? A. I don't know who did, sir.

Q. But it was not the MPs? A. I don't know, sir.

Q. Everybody read the article in December '93. There must have been talks about it? A. Yes, sir.

Q. And those talks would include you? A. Probably in the mess deck, sir.

Q. So you did discuss matters pertaining to this ... to the investigation and to this court martial

1160

PO2 Conrad

Re-examination

with other people of the squadron? A. Not with regards to my testimony, no. But with regards to conditions on board OJIBWA, probably yes.

Q. And if somebody would mention something to you that you might have forgotten, it might jog your memory and say, oh, yeah, that's right? A. Quite possibly, sir.

Q. Aside from the chili, was there anything else good that the Captain did? A. I don't recall, sir.

DEFENDING OFFICER: Thank you very much. I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. How was your performance rated prior to joining the OJIBWA? A. I received a recommendation for commissioning from the rank off the PROTECTEUR during the Gulf War, sir. I then returned to OJIBWA and received a recommendation for commissioning from the rank from Lieutenant-Commander Marsaw.

Q. I'd just like to refer you to page 9 and 10 of your transcript - perhaps, you don't require it, maybe I should ask you the question first. What was being discussed with the military police at the time you made the statement that my friend referred to where you said you had absolutely no use for Lieutenant-Commander Marsaw, he's the worst example of command I've seen in 18 years. What was being discussed at that point? A. The comms mast, sir. He would not take the advice of his most experienced technician in communications on board, sir. I gave him sound advice, he would not take it.

Q. And was that the incident in which he called you a fucking liar? A. Yes, sir.

1161

PO2 Conrad

Re-examination

Q. You indicated to my friend that you disliked Lieutenant-Commander Marsaw. Did you dislike him when he joined the OJIBWA? A. No, sir.

Q. Why do you say now that you dislike him?

A. Because of what he's done. Because of me being here. He turned a damn good crew into a crew that'd go to sea because they had to. They did their job because they had to, and they did a fine job. Nobody wanted to be there. He was ... at the very beginning we were getting talks about swapping to CFB Gagetown, learning how to drive a tank; getting some of those boys to learn how to drive a boat. It sounded like we were going to have ... it's not always a good time, you work hard, you play hard. And this is what the atmosphere at the very beginning was and then it just turned to hell.

Q. Were you on board for the counter-drug trip in the late summer/early fall of '92? A. Yes, sir.

Q. Was Petty Officer [sic] Shea on your watch? A. Yes, sir.

Q. When you went in for your military police interview in January, did you indicate to the military police at all that you were scared about coming in, it was a difficult experience? A.

DEFENDING OFFICER: The question is leading, I believe.

ASSISTANT PROSECUTOR: Again, my friend raised the issue in his cross-examination, Mr Judge Advocate, and the witness indicated that he was scared. I'm just asking him whether or not, in fact, that he told the military police that.

JUDGE ADVOCATE: Perhaps, could you rephrase it to please your friend.

1162

PO2 Conrad

Re-examination

ASSISTANT PROSECUTOR: Certainly, Mr Judge Advocate.

Q. Did you say anything to the military police about your phycological condition when you went in for the MP interview in January? A. No, sir.

Q. I was just wondering if I could refer you to page 34 of the transcript, specifically, three quarters of the way down the page. I'm just wondering if you could read the sentence that starts with, "I feel like ... ? A. "I feel like a weight ...

Q. No, it's okay now. Don't read it to the court, just read it to yourself? A. Okay, sir.

Q. Did you indicate to the police how you felt when you were contacted for the interview? A. In the last page of the statement, yes, sir.

Q. And how did you feel? How did you tell them you felt, excuse me? A. I felt relieved, you know, like a huge weight had come off ...

Q. Okay, what else did you tell them?
A. When I initially got the phone call, I was scared.

Q. Moving back to the incident with respect to Lieutenant[N] Higginson and Lieutenant-Commander Marsaw. Do you recall what you were discussing with the military police prior to your memory being jogged with respect to the incident involving Higginson and ... ? A. No, sir, I don't.

Q. Again, I refer you to page 45/46 from the transcript and I'd ask you just to review quickly, and also page 40 of the transcript, when you're done that, the paragraph that starts, "...or 94". Halfway through that paragraph there's a sentence that starts, "For instance ... "? A. Yes, sir.

1163

PO2 Conrad

Re-examination

Q. Does that refresh your memory as to what was being discussed before your memory was jogged?

A. An abuse case, sir.

Q. What was being discussed? A. The kick that Lieutenant[N] LeClaire dealt Lieutenant[N] Gensey, sir.

Q. Did you ever tell the military police about the incident involving Lieutenant[N] Byrne and the after periscope? A. I don't recall, sir, that was during the second interview. I'm not sure, sir.

Q. Again, page 58 of your transcript?

A. Yes, sir.

Q. Yes, sir ... I'm sorry? A. Yes, sir, it is in ... I did talk to the military police about the incident with Sub-Lieutenant[N] Byrne on the after periscope.

Q. My friend was asking you about Lieutenant[N] Virgin and the way he was treated on board and I believe your evidence was his performance was as good as others? A. Yes, sir.

Q. Did Lieutenant[N] Virgin ever make mistakes in the control room that you're aware of? A. I don't recall, sir.

ASSISTANT PROSECUTOR: Okay. Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: ...

JUDGE ADVOCATE: The court has no questions.

1164

PO2 Conrad

Re-examination

Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Unless both counsel insist to call another witness tonight, I propose to adjourn until nine o'clock tomorrow morning.

ADJOURNMENT: At 1805 hours, 11 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 12 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Thank you. Be seated. Are you ready to call your next witness, Major Abbott?

PROSECUTOR: Thank you, sir. My next witness will be Mr Harris.

1165

REASSEMBLY: At 0900 hours, 11 October.....981
REASSEMBLY: At 0900 hours, 12 October.....1146

1147

TWENTIETH WITNESS) Mr W.J. Harris, is duly sworn.
FOR THE)
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last name, please?

A. William John Harris, H-A-R-R-I-S.

Q. I understand that you've recently retired from the Canadian Forces in May of 1995? A. That's correct.

Q. What rank did you hold at the time of retirement? A. P1.

Q. And you joined the Canadian Forces in 1975? A. Correct.

Q. And you were a member of HMCS OJIBWA from 1981 until August of 1992? A. Correct.

Q. And at that time you would have had the following individuals as commanding officers - I'm sorry, I should strike that. You've also sailed on the OKANAGAN and the ONONDAGA as well? A. Both of them.

Q. And you would have had the following individuals as commanding officers, Lieutenant-Commander Marsaw, Bush, Nicholson, McDonald, Webster, Hickey, Scherber, Davidson, Irvine, Plante, and Truscott? A. Correct.

Q. And you've also sailed on surface vessels as well? A. That's right.

Q. What position did you hold under Lieutenant-Command Marsaw's command when he was commanding the OJIBWA? A. Mostly I was the first panel watch keeper on watch and he was outside wrecker for the better part of the time he was on board.

1148

Q. You would be an engineer by trade?

A. That's right, sir.

Q. In the control room, where would you work? A. First panel watch keeper position which would be at the main diving down, sir.

Q. Okay. And had you worked in the control room for other commanding officers? A. I think I worked in the control room with all commanding officers I've had.

Q. Either as a first or second panel watch keeper? A. One or the other.

Q. How would Lieutenant-Commander Marsaw react on occasion if he was not happy with the running of the control room? A. He'd kind of fly off the handle. He'd rant and rave at the watch. He'd bring down on either the whole watch as a whole or individuals individually.

Q. Do you recall what sort of words on occasion he would be using while he did this? A. He'd call the watch a bunch of fools, stupid, imbecile, "What did your mother raise? A bunch of idiots", fucking assholes.

Q. How frequent would he say this sort of things? A. I'd say very frequently, pretty much every watch.

Q. Would he ever refer to a watch as a whole? A. Yes, he would.

Q. What sorts of words and phrases do you recall him using toward the watch as a whole? A. The same type of thing. This watch is a piece of shit, that sort of thing.

1149

Mr Harris

Examination-in-chief

Q. What would your response be to any assertion that Lieutenant-Commander Marsaw had to lead using this particular technique because the crew was inexperienced or incompetent? A. It's the same crew we had before Lieutenant-Commander Marsaw got there and I don't think we were incompetent.

Q. Were you referred to in that manner by your previous COs? A. No, never.

Q. Do you recall what officers would have been addressed in this manner by Lieutenant-Commander Marsaw? A. It would be mostly the wardroom's junior officers, Elford, Kohli, Jacques, Soper, Kelk, LeClaire, Cassivi.

Q. Do you recall how Lieutenant Kelk would react on occasion when he was treated this way? A. I think he'd sort of pick on the watch and then fly off the handle a little bit himself and probably kind of drain down on the watch a bit but he was more like a dog get back in the corner. You could only take so much.

Q. The second panel watch keepers, I understand, are your subordinates? A. Correct.

Q. Would they wish to go on watch in the control room? A. Not usually.

Q. Have you, in your experience as a submariner, ever seen any other commanding officers use personally insulting adjectives towards subordinates in the control room? A. Not personally insulting, no.

Q. I mentioned there, I raised that Lieutenant-Commander then Webster was one of your COs. How would he react in the control room when things weren't going the way he wanted them to? A. In all the time I sailed with Lieutenant-Commander Webster, I don't think I ever heard him raise his voice.

1150

Mr Harris

Examination-in-chief

Q. Did the boat get its job done? A. I think the boat was probably one of the most efficient we ever had when he was the Captain.

Q. What would be the point of distinction between Lieutenant-Commander Marsaw and the other commanding officers you sailed under? A. Mostly, other commanding officers, they would pretty well always or all rant a bit from time to time but it was more to get the job done like, "Get on with the job", key everybody up to a point. Lieutenant-Commander Marsaw would tend to belittle somebody at the same time. He would tend to try to cut somebody down in front of everybody or cut the whole watch down as a whole.

Q. Occasionally, these other COs, did they ever yell and scream personally insulting adjectives? A. Not that I recall.

Q. Do you recall the next time you sailed after you left Lieutenant-Commander Marsaw's command? A. Yes, it would have been August of '94 on the ONON-DAGA.

Q. Who was the commanding officer at the time? A. Lieutenant-Commander Kavanagh.

Q. Do you remember coming after your first watch as the first panel watch keeper in Kavanagh's boat? A. Yes, I do.

Q. What was that experience like? A. We were walking back into the mess looking for the Chief ERA and saying, "What a joy!"

Q. And why would you say that? A. Because we couldn't believe the watch was over so quietly and so peacefully as it would have been. It was just a pleasure to go on watch.

1151

Mr Harris

Examination-in-chief

Q. Can you contrast the morale on the OJIBWA under Marsaw's command compared to what it was like in your previous nine or ten years on the OJIBWA?

A. OJIBWA was like an old slipper. It was just comfortable to put on. After Lieutenant-Commander Marsaw took over, the morale just dropped right to the bottom in a fairly short period of time and people didn't want to be on there anymore. It was just the bottom, just dropped, and the morale ...

Q. Was that because the boat was busy with sailing schedules and things? A. We had busy sailing schedules prior to that.

PROSECUTOR: Okay. No further questions.
Thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

ASSISTANT PROSECUTOR: Yes. Thank you, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. You said that before Lieutenant-Commander Marsaw took over command, you compared OJIBWA to a nice comfortable slipper, that morale bottomed out over the command and that the same schedule was just as busy. However, who was the commanding officer at the time just before Lieutenant-Commander Marsaw? A. I think it was Lieutenant-Commander Bush. I'm not quite sure what order they fell in, sir.

Q. Now, having comparable sailing schedules is something, but in terms of results, getting the job done, how would you compare that? A. Getting the job done?

Q. In terms of results, performance? A. I think the crew always stuck together as a crew and got

1152

Mr Harris

Cross-examination

the job done anyway but there is getting the job done and getting the job done with a happy crew.

Q. Were you with Lieutenant-Commander Marsaw at the time he did his first weapon certification?

A. I believe I was.

Q. Do you remember what the achievement was at that particular time? A. I believe all the weapon certifications we did were good certifications.

Q. But in terms of top score? A. It may have been top score. Weapons wasn't my department so I didn't particularly watch what was happening on the weapons end.

Q. So you wouldn't take interest in the boat's performance? A. I take interest in the boat's performance that the boat was doing what it could do from an engineering standpoint and if the torpedo can't fire it's not really my problem unless it's hydraulics or the gear going to the heart of the torpedo that are causing it not to fire.

Q. As a submariner, it is my understanding that there were three other submarines at the time, did you take pride in comparing your performance with other submarines? A. Sure, we always did.

Q. And how did it fair against the others? A. Morale wise, nobody wanted to be on that boat.

Q. Performance wise? A. Performance wise, we were probably on par with any of the other boats.

Q. It is my understanding as well that part of the time under Lieutenant-Commander Marsaw, your boat had to pick up the slack on the others because one in particular was in refit but a second one had problems, technical problems? A. That's also happened on every other boats, sir.

1153

Mr Harris

Cross-examination

Q. And how does that fair against the other crews? Were you happy that you had to pick up the slack with them? A. I don't think anybody is ever happy that they've got to take extra sailing schedule, sir, but we've done extra sailing schedule on all three boats.

Q. When you were asked to compare with other commanding officers how they would react to things, it is my understanding that you answered that they would react but at the action not at the person, not to degrade or to put down the person? A. That's right.

Q. What were they picking on? A. If things weren't ... If the guys were being slightly slack, if their performance that we should have been a little quicker doing something, there would be a snap of, "Come on. Let's go. Come on, we've got to get this done." It was to get the watch together as a whole.

Q. And what about mistakes? A. Everybody makes mistakes from time to time but I never saw any of the other captains like really drain down on somebody especially in front of the crew.

Q. And would Lieutenant-Commander Marsaw pick on the same things? A. The same things?

Q. As the other captains? A. ...

Q. Slackness, mistakes? A. He'd pick on the same things but it was almost as though he'd look for things to pick on.

Q. What do you base that on? A. Just personal experience, sir. I mean I sailed with ten other captains, I sailed with Lieutenant-Commander Marsaw and I never saw any of them drain down on the watches as much as he did.

Q. Would you say then that he would tolerate less and ask for more? A. Probably tolerate less. I

1154

Mr Harris

Cross-examination

don't think he asked for anymore than any of the other captains.

Q. But he would tolerate less? A. I would think so.

Q. And the words: fools, imbeciles, stupid, idiots, that you reported, could you connect that to any specific event, an individual making something at a specific time being called down for a specific thing he did wrong? You named a few. You named Elford, Kohli, Jacques, Soper, Kelk. A. A specific event? No, not a specific event because it was an every watch occurrence. It didn't really matter who was on watch at the time, somebody would get crapped on.

Q. And were you surprised at the words?
A. After the first bit I think they just took it in stride, sir.

Q. H'm h'm. So if I point out that binder to you, what do you look at, the finger or the book?
A. The binder.

Q. The binder but you can't remember when I tell you, "These are the words." You're criticizing Lieutenant-Commander Marsaw's style, what he was saying but you can only remember what he was saying. You can't remember what he was saying it for? A. A guy may have been six inches off depth, he'd get crapped on. He'd go over, look at the chart and if the chart wasn't updated in the last two minutes to his liking or whoever ... whoever was supposed to be on the chart would get crapped on, if it wasn't neat enough they would get crapped on.

Q. And were those things known to him, the person who was being crapped on, that being on depth, how to lay down the information on the charter, was that anything new? A. No, it wasn't anything new, sir, but it was nothing new to any of the other cap-

1155

Mr Harris

Cross-examination

tains as well. I mean the boat wasn't being driven any differently than it had been previously.

Q. He would just accept less slackness in the work? A. Well, I don't really like the word "slackness", but yes.

Q. Were any of the second panel watch keeper working under you criticized by Lieutenant-Commander Marsaw? A. From time to time, but the panel is sort of at the back end of the control room and we're not ... to what's going on per se with the sonar or the fire control system, is out of it. The only time that there would be running is, you know, I mean, the periscope wasn't going fast enough or going down fast enough, that type of thing.

Q. And yourself, were you criticized by Lieutenant-Commander Marsaw? A. I don't think so, sir.

Q. And if one of your second panel watch keeper had problems and be criticized, as the senior, what would you do with that person? A. I'd just coach them along, tell them to keep their cool, just try a bit harder with it.

Q. Would you take it upon yourself to, once the watch was over, to bring a guy along and tell him what he did wrong and tell him how to do it right the next time and make sure that he doesn't do it again? A. If I thought he was in the wrong, yes.

Q. And based on your experience, did you have tricks you could teach him to show him how to do it and do it better? A. There is all sorts of tricks, sir, we taught our guys. Every watch they learned something.

Q. Did you ever make any complaints through anyone in the divisional system about the yelling and screaming and the words? A. Not as a formal com-

1156

Mr Harris

Cross-examination

plaint, no, but I mean it was a general topic, discussion from one end of the boat to the other.

Q. Well, do you feel they should have been addressed as a formal complaint by someone? A. Maybe I was a bit too long in the tube, sir. I just sort of took it in stride and it was just one more captain and you get good ones and bad ones per se and you've only got to live with them for a fairly short period of time and you're going to get another captain anyway.

Q. Have you had any worse than Lieutenant-Commander Marsaw? A. No.

Q. No. And you said that Lieutenant-Commander Webster never raised his voice. Could you describe his voice? Is he somebody who is capable of raising the voice? A. We used to have him nicknamed as Donny Osmond because he was such a quiet individual and I don't think I ever heard him raise his voice much louder than what I am speaking right now.

Q. And you said that the other commanding officers would rant a bit, but to get the job done, do you think that Lieutenant-Commander Marsaw had any ulterior motive than to get the job done? A. ...

PROSECUTOR: Objection. I think he is trying to ask the witness what's in Lieutenant-Commander Marsaw's mind, "What ulterior motive did he have?" I'm not sure the witness can't answer that question.

ASSISTANT DEFENDING OFFICER: I'll rephrase the question.

JUDGE ADVOCATE: Thank you.

ASSISTANT DEFENDING OFFICER:

Q. Based on your own observation of Lieutenant-Commander Marsaw, as compared to other commanding officers, did you perceive a purpose to his

1157

Mr Harris

Cross-examination

yelling and screaming? A. His purpose was probably to get the job done. It was the way he would yell and scream.

Q. Was Lieutenant-Commander Marsaw the only person who raised his voice at times on the OJIBWA?

A. No, other people would have occasionally raised their voice, the officer of the watch, I think, senior people here and there in the control room or in the engine room or whatever, if they needed to get watches attention for something, you're going to raise your voice.

Q. And did you hear them use at times words like idiot, stupid? A. No.

Q. Swearing, cursing? A. Not as a general rule, no.

ASSISTANT DEFENDING OFFICER: Just checking my notes, Mr Judge Advocate.

Q. And other than Lieutenant-Commander Marsaw bearing like you said responsibility for dropping the morale, were there any other factors in your mind that would contribute to the lowering of morale at that particular time? A. I think the single most factor was just the general morale through the control room. The control room is the heart of the boat. Everything spreads from there. If the watch in the control room is not a happy watch and everybody is coming off watch and they are really in a pissed off and down mood it doesn't take long to spread through the boat and it just drops.

Q. If he is reacting to mistakes, errors, lack of concentration. Which is the cause and which is the effect? Is he yelling and screaming because he likes to yell and scream or yelling and screaming because there is a trigger? A. ...

1158

Mr Harris

Cross-examination

PROSECUTOR: Again, I would object. He is asking the witness to say what's in Lieutenant-Commander Marsaw's mind. Is he happy? Is he sad? What is his purpose, his intent?

ASSISTANT DEFENDING OFFICER: The purpose of the question is not to ask what he thinks in his mind. The purpose is in actual fact. What happens first, the screaming or the mistake?

JUDGE ADVOCATE: That's not the way I understood the question.

ASSISTANT DEFENDING OFFICER: I can rephrase the question.

JUDGE ADVOCATE: I even understood it to be hypothetical. But perhaps, could you rephrase it?

ASSISTANT DEFENDING OFFICER:

Q. In all the incidents that you have witnessed, would the action of the crew member come first and the correction second or the correction first?

A. I'd think for the most part the action would come first, correction second, but some of the actions were as simple as being six inches off depth. When you're bouncing around on the submarine, sir, it's not uncommon to be anything but three and four or five feet off depth and it's pretty hard to keep a 300 foot boat on a perfect level plane. The water doesn't cooperate with that.

Q. I can understand that but is it a dynamic process keeping a boat on depth? Is it something like an automatic pilot, once you hit 54 feet you just switch it on and it's going to stay there or you have to work at it continuously? A. It's a continuous workout. At periscope depth we never use automatic pilot, sir.

1159

Mr Harris

Cross-examination

Q. And would it be wrong for a captain to continually insist that people keep working at it all the time? A. No, it wouldn't be wrong to insist that everyone keeps working on it but you can only get so accurate with it.

Q. And comparing with other commanding officers on the professional ability, tactician and work wise, how would you compare him? A. Tactically, as in to do an attack?

Q. ... A. He was probably one of the better ones that I have seen. I mean there is no doubt about it he was smart in calculating the number in his head on an attack with the periscope, but men management wise, he forgot to bring along with him.

Q. What about his ... was he asking more from the crew than he would put in himself? A. Asking more from the crew?

Q. Based on what you observed and the amount of time he would put in? A. I don't think it really matters how much the crew put in, sir, he was number one and no one was to forget it. If you got in his way he'd step on you. I mean even on National TV he stated it out in an interview that his only limitation was his crew.

Q. Do you see that as a fault? A. I see it as a fault when I'm part of the crew, sir, because I don't think I'm a limitation and I don't think anybody else in that crew thought they were a limitation to the Captain.

Q. In December of 1993, did you have an opportunity to read an article that was published in the Chronicle Herald concerning activities, actions, and incidents that would have taken place on OJIBWA?
A. I may have, sir.

Q. If I showed you the article, maybe that would help you. A. Possibly.

1160

Mr Harris

Cross-examination

Q. Just read it for yourself and tell us if you remember having read that? A. I believe I remember it.

Q. Were you contacted by a reporter, Mr Dunlop? A. Not that I recall, no.

Q. And the TV interview that you related to earlier, were those his exact words, were those the exact words as he said them or is it your interpretation of basically what was said? A. I can quote it. It was, "My own limitation is my crew", is probably the exact words of it, and I'm going back in my mind three or four years, sir.

Q. Do you remember a moment you were in the control room and the submarine was six feet off depth ... six inches, you related to that. Is there any specifics? Do you recall the time, the date, who was the helmsman, who was the trimming officer? A. The time and date, no, sir, but I've heard it more than once. Who was on the helm at the time, I couldn't tell you. Most of the time I couldn't tell you who was on the watches with me at the time. I stood up one and three watch. The rest of the control room for the most part stood a one and two watch. We rotated around. Every couple of days I was seeing different faces on the watches. To pinpoint down a face and name to a watch ...

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You were asked the question by defence counsel, what would you do if the second panel watch keeping had made a mistake and you would say, "I'd coax them along if I thought he was wrong." Would you or

1161

Mr Harris

Re-examination

have you ever called them an idiot and an asshole?

A. Not that I ever recall, no.

Q. Why not? A. There is no need for me to do it.

Q. Defence counsel asked whether or not you thought it was wrong for a Captain to continually insist on keeping on depth and you answered, "No". Is it wrong for a Captain to continually call members of his crew, assholes, idiots, imbeciles and morons?

A. I think it is.

PROSECUTOR: I have no further questions.
Thank you.

JUDGE ADVOCATE: Thank you. Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: The court has no questions.
Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Next witness?

PROSECUTOR: The next witness will be Petty Officer, 2nd Class Parsons.

s.19(1)

1162

PO2 Parsons

Examination-in-chief

TWENTY-FIRST WITNESS) Petty Officer,
FOR THE) 2nd Class E.S. Parsons, is
PROSECUTION) duly sworn.

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last name, please?

A. Eric Scott Parsons. My last name is spelt P-A-R-S-O-N-S.

Q. What is your current position? A. I am support staff HMCS PREVOST, Naval Reserve Unit, in northern Ontario.

Q. And I understand you joined the Canadian Forces in 1980? A. Correct.

Q. And you became a submariner in 1985? A. Correct.

Q. What time period did you serve on the HMCS OJIBWA? A. From early 1987 until approximately April 1993.

Q. And under that period of time you would have had the following COs as commanding officers, McDonald, Bush, Davidson and Marsaw? A. Correct.

Q. And have you also sailed on the ONONDAGA as well as the OKANAGAN? A. Yes.

Q. Okay, have you had Lieutenant-Commander Woodburn as well as Hickey as COs as well? A. I have.

Q. Please define your observation, how would you describe Lieutenant-Commander Marsaw's knowledge of the submarine and the way the boat operated? A. Extensive, very knowledgeable.

Q. How would you describe the way he led his crew? A. Poor, I didn't agree with it.

1163

PO2 Parsons

Examination-in-chief

Q. What was he doing on occasion when things weren't going well in the control room? A. He would go through a rage and yell and scream primarily at the officers of the watch.

Q. And in the control room, what would your job be? A. First panel watch keeper.

Q. Okay. Do you recall what sort of words on occasion he would yell and scream? A. Fucking idiot, get that useless ... fuck off the helm, or words to that effect.

Q. Do you recall being interviewed by the MPs in January 1994? A. Yes.

Q. Do you recall being asked a similar question about recalling types of words that he would use? A. Yes.

Q. Now, were you able to come up with any during that interview? A. Not really, no.

Q. But today you are? A. Yes.

Q. And why is that? A. Well, the MP interview was ... I dropped in within about an hour's notice, not much time to collect my thoughts and since the interview I've had almost two years to collect my thoughts.

Q. And think back on things? A. Yes, sir.

Q. How frequent would Marsaw yell and scream those sorts of words? A. It was a daily occurrence.

Q. Do you know Lieutenant Kelk? A. Yes, I do, sir.

Q. Can you tell the court how Kelk would lead when Marsaw was in the control room compared to

1164

PO2 Parsons

Examination-in-chief

times when Lieutenant-Commander Marsaw was not in the control room? A. When the CO was not in the control room, Lieutenant Kelk was very competent, very calm, a pleasant person in charge of his watch. When the CO was present he would be panic stricken, he'd start to yell and was incapable of making ... he didn't seem capable of making decisions.

Q. Would he sometimes use the words that Lieutenant-Commander Marsaw would use? A. Yes.

Q. How would Woodburn or Hickey respond in the control room if an individual had made an error, simply things weren't going the way they wanted them to in the control room? A. Certainly not ... they would not go through a rage and start yelling and screaming.

Q. Did you ever witness Hickey or Woodburn use personally insulting adjectives towards their subordinates? A. No.

Q. Do you recall an incident in the control room involving a Leading Seaman Smyth? A. Yes.

Q. Okay, and approximately what date or month or year would that incident that you recall has happened? A. I believe we're talking a time frame of February or March of '92.

Q. Okay and where were you in the control room at the time? A. I was at my watch position.

Q. So the first panel watch position?
A. Yes, sir.

Q. Leading Seaman Smyth, where is he?
A. He was in the radar room.

Q. Okay. Could you describe the circumstances and what was going on at the time? A. The commanding officer came into the control room and he had made it clear that we had to receive a radio broadcast and he had ordered that the watch keepers neutral-

1165

PO2 Parsons

Examination-in-chief

ize all contacts on the radio station in order to receive this radio broadcast. Sometime had passed, I'm not sure of how long, and the radio ... correction, the radar operator went racket dangerous causing the submarine to stop snorting and lower all masts and lose the radio transmission. The CO quickly came into the control room enraged, kicked open the radar door and said words to the effect to the radar watch keeper, "Who the fuck do you think you are? I should kick you in the nuts."

Q. What was the tone and the volume of his voice at that time? A. Very loud.

Q. What was your personal reaction to watching this? A. Disturbed, very much that he'd take that attitude against a leading seaman.

Q. Did you ever see any other CO tell his subordinate that they should kick them in the fucking nuts? A. No, sir.

PROSECUTOR: No further questions. Thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

ASSISTANT DEFENDING OFFICER: Thank you, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Now, you said that the words that you reported, fucking idiot and so on, you didn't recall them at the time of your interview but now you had time to think and you recall these words now? A. Yes, sir.

Q. Didn't you say during your interview, the one that you had with the military police, didn't you tell them that you had been, prior to going to your interview, you had been talking to other people and

1166

PO2 Parsons

Cross-examination

told what to expect? A. Yes, I made that statement, sir.

Q. And being told what to expect you had time to reflect before you went there? A. I don't think time to ... I was made - Just excuse me for one second. I was informed by other members some of the questions they were asked, yes.

Q. So you basically knew what the MPs were looking for? A. Yes.

Q. As a first panel watch keeper, were you criticized by Lieutenant-Commander Marsaw? A. No.

Q. He never had any problems with you with your job performance? A. No.

Q. And did he have any problems with your second panel watch keeper? A. There was one incident I had in person, where the watch keeper was yelled at by the commanding officer and I had called for the Chief ERA to come to the control room.

Q. And what was that incident? A. The commanding officer made some orders which couldn't be carried out at the speed which he wanted carried out.

Q. And did the problem get solved? A. To the best of my knowledge, yes, sir.

Q. But it was addressed? A. Yes, sir.

Q. Have you had a chance to read an article that was published in December of '93 concerning allegations of misconduct on board OJIBWA? A. Are we making reference to the Chronicle Herald by Malcolm Dunlop?

Q. Yes, the Chronicle-Herald by Malcolm Dunlop, yes. A. Yes, I read that article.

1167

PO2 Parsons

Cross-examination

Q. And what was your impression after reading that? A. Upset, some of it, I found to be exaggerated.

Q. Which was which part? A. The safety aspect.

Q. Other aspects? A. ...

Q. Verbal abuse, physical abuse? A. The verbal abuse happened and I wouldn't ... I won't deny it.

Q. Did you find it to be exaggerated? A. I can't totally recall the article right now at this moment, sir.

Q. H'm, h'm. But didn't you tell the military police investigators that you found that the safety, physical, mental and verbal were out of proportion? Do you recall making that statement to the military investigator? A. Yes, I do.

Q. And based on your personal observations concerning the criticizing by Lieutenant-Commander Marsaw, did you find that at times some of it was warranted? A. Yes, but sometimes I believe it went too far.

Q. Can you compare examples, specific examples with persons, places, dates, events as to one that was warranted and one that wasn't warranted? A. The yelling and screaming that came, the comments against the junior officers, I just tuned it out, and when it happened to the subordinates, leading seaman was a change and it caught me totally by surprise.

Q. Apart from Lieutenant-Commander Marsaw and Lieutenant Kelk, have you seen anybody else criticizing harshly members of the crew? A. To that extent, no.

1168

PO2 Parsons

Cross-examination

Q. To what extent? A. ...

Q. Lesser extent but to what extent? What words were used by them in what circumstances? A. Can you repeat the question?

Q. Was there any formal complaints made concerning that criticizing by Lieutenant-Commander Marsaw by yourself? A. Pertaining to what situation, sir?

Q. To how he was conducting himself?
A. No, sir.

Q. No. Did you receive complaints from your second panel watch keeper? A. To that one incident that I mentioned?

Q. Yes. A. He was unhappy and I thought that the issue was resolved at that time, sir.

Q. Did you have any complaints yourself about the routine, hard work, long hours? A. Yes, I did. It certainly would have been a ... We were working 16 hour days, 6 days a week. There is going to be grumbling and I brought it to my superior that the troops were exhausted at times and the morale would be ... the morale is going down.

Q. Under those circumstances it would be a factor? A. Yes.

Q. When people are tired and long days, long sailing schedules? A. Yes, sir.

Q. The incident with Leading Seaman Smyth, the actual communication, was it an important message or a must-receive situation? A. I believe it was a must-receive, sir.

Q. And what is the context of a must-receive, what happens? A. The submarine would have to

1169

PO2 Parsons

Cross-examination

surface and we were ... I believe then we were in the middle of the exercise.

Q. So if the message doesn't come in, if he doesn't receive the message then you have to surface and basically be detected, would that be it? A. I'm not exactly sure, sir, but I know we would have had to surface.

Q. You mentioned also that he kicked the door. Did he kick it or use his foot to open it or push it hard or are you describing an actual kick or using the word kick to generally paint the situation? A. The door was pushed open with his foot, the door.

Q. And the words that you reported following the words of Lieutenant-Commander Marsaw that he should kick him in the nuts, are those his exact words or, again, your interpretation, general interpretation of the conversation or what was being told to Leading Seaman Smyth? A. No, I was ... this one incident stands out specifically because it was yelling at a subordinate, a leading seaman, and it stuck with me for quite a while afterwards. Yes, those are the words.

Q. And did you raise this issue with anybody in the chain in the divisional system? A. No, I did not.

Q. Did you discuss the issue with Smyth?
A. No.

Q. When I showed you the article, the newspaper article earlier, were you, yourself, contacted by Mr Dunlop? A. No, I was not.

Q. You were not? A. No.

Q. And do you recall the date of your interview with the military police investigators?
A. January of '94.

1170

PO2 Parsons

Re-examination

ASSISTANT PROSECUTOR: Ninety-four. These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You were asked, your comments upon reading the article, and you said that with regard to verbal abuse it was ... the article was exaggerated but it happened. What do you mean by "it happened"?

A. The verbal abuse happened. I think my statement there was that the paper went to extremes when they were describing what had happened.

Q. During the interview, you were being told by some people what sorts of questions they were asking before you came. At that actual MP interview at the time, did you give them a three page statement discussing what words were said to Leading Seaman Smyth?

A. Yes, I did, sir.

Q. And with regard to if the message doesn't come in, you'd have to surface and you could be detected. Would that cause the sub to be in any danger if it was detected? A. No.

PROSECUTOR: Okay. No further questions.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No questions.

JUDGE ADVOCATE: No questions. Thank you.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Who is your next witness?

PROSECUTOR: Lieutenant[N] Pitman, please.

s.19(1)

1171

Lieutenant(N) Pitman

Examination-in-chief

TWENTY-SECOND WITNESS) Lieutenant(N)
FOR THE) J.H.F. Pitman, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last name, please?

A. John Harris Frank Pitman, P-I-T-M-A-N.

Q. And what is your current position?

A. I'm the warfare training officer in the submarine section of the Naval Operation School.

Q. Did you join the Canadian Forces in 1988?

A. Yes, I did, sir.

Q. And you were awarded your dolphins in October '92? A. Yes, I did, sir.

Q. And were you a member of the OJIBWA under Lieutenant-Commander Marsaw's command from October '91 until October '93? A. Yes, I was.

Q. So you actually trained under him, got your dolphins and then became a qualified officer under his command? A. That's correct, yes.

Q. And under his command, did you also become a watch leader? A. Yes, I did.

Q. Apart from the OJIBWA under Lieutenant-Commander Marsaw's command, have you sailed on any other boats with any other commanding officers? A. Yes, I have, sir.

Q. Which ones? A. I sailed in OKANAGAN under Lieutenant-Commander Hickey and Lieutenant-Commander Mosher and I sailed in ONONDAGA under Lieutenant-Commander Kavanagh.

1172

Lieutenant(N) Pitman

Examination-in-chief

Q. How would Lieutenant-Commander Marsaw react if he wasn't happy with the way things were going on watch? A. Typically, he would scream and yell at the members of the crew who were on watch at the time.

Q. And what sorts of words would he use when he did this? A. "Idiots, assholes, fucking idiots, mother fucker, cunt", words to that effect.

Q. How would you describe the atmosphere in the control room? A. Very unpleasant, authoritarian, just generally a poor place to work.

Q. When were you interviewed by the military police? A. It was in January of 1994.

Q. And when you were interviewed by the MPs, do you recall being asked what types of words Lieutenant-Commander Marsaw might use on occasion? A. Yes, I do.

Q. Do you recall what your answers were then? A. I used some of the words I've described but not all.

Q. Have you had an opportunity in the last two or three years to reflect back? A. Yes, I have.

Q. Would he use those types of words towards you as a watch leader? A. Some, yes.

Q. Would he use others or the same types of words to other officers as well in the control room? A. Yes, he would.

Q. How frequently would he use those types of words while he was at sea? A. Typically on a daily basis.

Q. Can you recall specific times, dates, places, grid references or whatever involved in these

1173

Lieutenant(N) Pitman

Examination-in-chief

every moment that the words were used? A. No, I cannot.

Q. Why not? A. Because it was an everyday occurrence. This went on from day to day and the time seems to just flow together.

Q. At times, what names can you recall him referring to you as on occasion? A. Idiot, stupid.

Q. How would you feel on occasions when he called you stupid or called you an idiot?
A. Generally angry, upset.

Q. And why would you be angry or upset?
A. Because I didn't agree with what he was saying to us.

Q. Do you recall what it was like for you to be on watch or to come on watch, just about to go on watch? A. I guess I do.

Q. What was it like? A. I tended to be very nervous, jumpy.

Q. Why was that? A. Because you knew what the six hours that laid ahead of you were going to entail.

Q. How do you feel you performed in this atmosphere? A. Certainly not to my full potential.

Q. Why not? A. I would say because I was preoccupied with the things that were going on at the time. I was concerned about what was going to happen while I was on watch.

Q. Preoccupied with what and concerned about what? A. Just taking verbal abuse and the screaming and yelling that was going to take place.

1174

Lieutenant(N) Pitman

Examination-in-chief

Q. Generally speaking, where would you eat most of your meals? A. Most in the wardroom.

Q. On occasion, where would you eat some of your meals? A. In the passage way.

Q. Why? A. Because at particular times things were worse than other times and a lot of times we just didn't want to eat in the wardroom when the Captain was there. So if you had to go on watch you would just eat something in the passage way and then go on watch.

Q. Would personally insulting adjectives be used by the Captain in the wardroom? A. Yes.

Q. What would your response be to any assertion that Lieutenant-Commander Marsaw had incorporated this type of leadership style because the crew was inexperienced or incompetent? A. I would disagree with that.

Q. Why? A. Because the crew was not inexperienced or incompetent. The experience level varied, but OJIBWA's crew was probably the best that I've sailed with.

Q. What would your response be to an assertion that he had to lead in this style because submarines are always in immediate danger? A. I would disagree with that comment, sir.

Q. And why would you disagree with that? A. I can't remember one time when the submarine was actually in immediate danger.

Q. How would your other commanding officers, Hickey, Kavanagh, respond in the control room when things weren't going the way they had wished? A. They responded in different manner by employing different leadership style, identifying any problems that existed and rectifying the situation pointing out the correct way to do things.

1175

Lieutenant(N) Pitman

Examination-in-chief

Q. Did they ever use personally insulting adjectives? A. Not to my recollection, no.

Q. How would you describe the atmosphere in their control room? A. Professional, relaxed, just generally a positive place to work.

Q. After you left the OJIBWA, which boat did you sail on next? A. OKANAGAN.

Q. And what was your position on the OKANAGAN? A. I was the navigating officer.

Q. That would have been under Hickey?
A. Yes, it would, sir.

Q. What were you like when you first came on board in the control room of the OKANAGAN? A. Very jumpy, agitated, nervous.

Q. While you were a member of the OJIBWA, did it acquire a nickname used throughout the sub squadron? A. Yes, it did.

Q. What was that nickname? A. I've heard the OJIBWA being referred to as the death boat.

Q. Would you wish to sail with Lieutenant-Commander Marsaw again? A. No, I would not.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

DEFENDING OFFICER: Yes, Mr President, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

1176

Lieutenant(N) Pitman

Cross-examination

Q. How long have you served on OKANAGAN?

A. Eighteen months.

Q. And you served 24 or so on OJIBWA?

A. Yes, I did, sir.

Q. So, some of those adjectives such as idiot, asshole, cunt, mother fucker and what not were not in your mind at the time of the interview but on thinking about it now you recollect those? A. ...

PROSECUTOR: I'd object, Mr Judge Advocate, because I believe some of those words were actually said by the witness during his MP interview.

JUDGE ADVOCATE: And what did you specifically ask?

DEFENDING OFFICER: I specifically asked, I said ...

JUDGE ADVOCATE: No, the last comment you made at the end or is it a comment or a question? You said, "Some of those ...".

DEFENDING OFFICER: Some of the words: idiot, asshole, cunt, mother fucker; et cetera, were not present in your mind at the time of the interview.

PROSECUTOR: And I guess what I am saying is that some of those words actually were present in his mind, were actually said.

JUDGE ADVOCATE: Of course, some were not and some were said. Objection denied. You may proceed.

DEFENDING OFFICER:

Q. So what caused you to recall those other words that you did not recall? A. After I left the MP interview, I went home. I tried to put myself back on

1177

Lieutenant(N) Pitman

Cross-examination

board OJIBWA. I thought about some things that happened there and some of the general words came to me.

Q. Isn't that right that the MPs were looking and they were pressing you for insulting words and they pressed you several times? A. Yes, that's right.

Q. And repeatedly you said that you could not remember except the word "idiot", I believe and "stupid"? A. I don't recall.

Q. Do you recall saying to the MPs that you could not recall other words? A. Yes, I do recall that.

Q. And they were pressing you. Several times, in the course of the interview, they came back and tried to push you into giving words and your answer would be, "Well, it's been two years ago", et cetera, et cetera and you could not recall other words, is that correct? A. Possibly, I don't recall. I don't recall exactly what I said in the MP interview.

Q. Would you agree with me that if somebody pressed me for insulting words in the English language that is, that those of cunts, asshole, prick, idiots, I mean, those would be the first words that would come to mind, wouldn't it? A. Possibly.

Q. Possibly? Were those ...? A. I don't understand the question.

JUDGE ADVOCATE: Well, neither do I.

DEFENDING OFFICER: Sorry?

JUDGE ADVOCATE: Neither do I?

DEFENDING OFFICER: I will rephrase then.

JUDGE ADVOCATE: Thank you.

1178

Lieutenant(N) Pitman

Cross-examination

DEFENDING OFFICER:

Q. We have agreed - and I will replace it in the context to try to make it as easy as possible - We have agreed that the MPs were pressing you for words, verbal abuse words, is that correct? A. They were asking questions about what words were used there, yes, sir.

Q. Several of them and they kept coming back wanting specific words? A. Okay.

Q. What does that mean, "okay"? A. Well, were you asking me a question or were you making a statement, sir?

Q. Is that right ... That's the start of a question. You know some grammar? A. ...

Q. Isn't English your mother tongue?
A. Yes, it is, sir.

Q. Okay. Is that right they kept asking you specific words that would amount to verbal abuse and be degrading? A. I don't recall if they asked me specific words, no, sir.

Q. Didn't you say to the prosecution that they asked you about specific words? A. They asked me if I remembered what the specific words were. I don't recall them actually asking specific words.

Q. I would like to think back. Now, I forgot my question. I was trying to put you in the context. I asked you, give me words in English that would be insulting and degrading to people? What words would come to your mind? A. There would be a long list. Would you like examples, sir?

Q. Absolutely. A. "Idiots, mother fucker, cunt, asshole."

1179

Lieutenant (N) Pitman

Cross-examination

Q. Carry on. A. "Stupid."

Q. "Bastard." A. "Bastard, shit head."

Q. "Dickhead." A. "Son of a bitch, dick-head."

Q. H'm, h'm. So wouldn't you agree with me that at the end of the day when one is pressed upon giving words that are insulting and derogatory in nature, those are the words that do come to mind?

A. I would agree with that, yes, sir.

Q. And that it would be easy to say, "Well, those are the words he said because that's the type of words we're looking for"? A. Those are the words that he said.

Q. That you recall very specifically? A. I recall words and words to that effect being used. Specific times and places, I don't recall.

Q. Did you see the Captain striking anyone, kicking anyone on board? A. No, I did not, sir.

Q. And do you recall telling to the MPs as they were asking for words that he was just yelling and screaming and that you could not recall specific words?

A. ...

PROSECUTOR: Mr Judge Advocate, I would object. If he is going to go back and refer the witness to a previous statement he made, he should present it to the witness, give him an opportunity to look at it and identify all parts of that statement that deal with that issue because the witness did give words.

JUDGE ADVOCATE: We won't get back into the same situation again. I mean your friend asked a question, a legitimate question and your objection is denied. You may proceed.

1180

Lieutenant(N) Pitman

Cross-examination

WITNESS: Can you repeat the question, sir?

DEFENDING OFFICER:

Q. Do you recall being asked by the MPs what words he, the Captain, used and you saying just yelling and screaming as indicating you did not recall the words? A. Yes, I do recall that.

Q. And do you agree that some of the yelling and screaming irrespective of the word used, like I'm talking about raising voice, is there any difference incidentally between yelling and raising one's voice? How would you describe that? A. I don't understand what you mean, sir.

Q. Okay, the word "yell"? A. I don't understand what you mean by the difference between yelling and raising one's voice.

Q. Well, okay, I'll rephrase my question even more simply, if I may. Is there a difference between the words "yell" and "raised his voice"? A. I don't know.

Q. Did you say to the MPs, "Don't take me wrong. Don't get the idea. He was on the rampage for two years"? A. I may have.

Q. Suggesting, contrary to what you said this morning, that he was not screaming all the time but that he would raise his voice, since there is no difference, when mistakes were made? A. You're asking if I said that to the MPs?

Q. Yes, I am. A. Possibly, yes.

Q. And thinking back, take a minute, think back, maybe like the words, your memory will improve and allow you to recall whether he said those words or not? A. It's possible. I don't specifically recall saying that to the MPs.

1181

Lieutenant(N) Pitman

Cross-examination

Q. How many times have you been interviewed by the MPs? A. Once.

Q. How many times have you reviewed the tapes, which I believe you have, of that interview? A. Twice.

Q. And when was the last time you reviewed it? A. Last night.

Q. Once you ... the mess dinner of 1991 ... you were not feeling well and you asked the Captain to be excused from attending, is that correct? A. That's correct, yes.

Q. And was permission granted? A. Yes, it was.

Q. Is that correct that among the crew, lots of you had not been exposed to submarines before? A. At what time, sir?

Q. When you started your service on board OJIBWA? A. That's correct, yes.

Q. And would you say that serving on a submarine involves somewhat of a cultural shock? A. It's fair to say that, yes.

Q. That the conditions are not the best even irrespective of the Captain? A. I would agree with that.

Q. Tight space, long hours, no privacy, it's hard, isn't it? A. The conditions are difficult.

Q. Yes. A. Yes, sir.

Q. And it takes special people to be able to cope with such an environment? A. I would agree with that.

1182

Lieutenant(N) Pitman

Cross-examination

Q. That was a question. A. Yes, sir.

Q. So would you find it surprising that some people who are first exposed to such hard conditions find it, I mean, difficult and it gets to them and what not? A. No, I would not find that surprising.

Q. It's like learning a new job, isn't it? It's ... at first, you're not comfortable. Eventually, it works, is it? Would you think it's a fair comparison? A. Yes, I would.

Q. You qualified under Lieutenant-Commander Marsaw? A. Yes, I did.

Q. So, you figure that you've learned something of him? A. Yes, I did.

Q. Would you say that the boat looked good under the captainship of Lieutenant-Commander Marsaw? A. In what context, sir?

Q. It looked good in terms of achieving, of completion of the mission, of achieving results? A. I would say it did, yes.

Q. Would you think that the Captain can accomplish that alone? A. Can he accomplish it alone?

Q. Yes. A. No, absolutely not.

Q. And would you agree with me that performance is related to morale, or there is a relation in any event? A. Not specifically, I wouldn't agree with that, no, sir.

Q. Don't you think that if one's morale is very low he would tend to maybe produce less or not as well as somebody who is keen, enthusiastic and has got a high morale? A. Not necessarily, no, sir.

1183

Lieutenant(N) Pitman

Cross-examination

Q. Wouldn't you agree that one of the most commonly used expression that the Captain would use and if he had to use words, to use the word "fuck" would be "Come on for fuck sake", or something like that?

A. Which Captain?

Q. Lieutenant-Commander Marsaw. A. I would agree that he would use that often, yes.

Q. "Come on. Come on. Let's go. Do this, that." That's the sort of things he'd use? A. Yes.

Q. And sometimes he might use expression such as "for fuck sake"? A. Yes, he would.

Q. Have you ever used that expression as well? A. Yes, I have.

Q. Do you find that expression very degrading or enraging or so out of proportion? A. No, I don't.

DEFENDING OFFICER: If I may have a minute just to review my notes.

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. Do you use the word "fuck" yourself?
A. Yes, I do.

Q. Often? A. I don't know what you mean by often.

Q. Regularly? A. What would you describe as regularly?

Q. Always? A. No, not always.

Q. You know the meaning of always, I take it? A. I think I do.

1184

Lieutenant(N) Pitman

Cross-examination

Q. But you don't know the meaning of often?

A. I think always is at all times. Often is a personal opinion.

DEFENDING OFFICER: I have no further questions, sir.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Sorry, I apologize. I have two more questions.

Q. Did you read an article in the newspaper, the Chronicle-Herald? A. I've read many in the Chronicle-Herald, sir.

Q. Yes, 16 December 1993, about allegations of wrongdoing or misconduct on board OJIBWA? A. Yes, I did read the article.

Q. And it was written, I believe, by Mr Malcolm Dunlop? A. Okay.

Q. What does that mean? It's a question. Was it written by Mr Malcolm Dunlop? A. I believe it was, yes, sir.

Q. Did you talk to Mr Malcolm Dunlop? A. No, I did not.

Q. Did he call you? A. No, he did not.

Q. So you had no contact whatsoever with him? A. I did not talk to him, no, sir.

Q. Did you write to him? A. No, I did not write to him.

Q. And when was your interview with the MPs? A. It was in January of 1994.

1185

Lieutenant(N) Pitman

Cross-examination

Q. Did you ever write any formal complaint through the chain of command about this awful treatment you were subjected to in OJIBWA? A. No, I did not.

Q. Why? A. Because I didn't think it would do any good.

Q. That's all the confidence you've got in your superiors, your chain of command of the Navy?
A. No, it is not.

Q. I suggest to you, you didn't make any complaints because there was nothing to complain about?
A. Is that another question, sir?

Q. I suggest to you, tell me if what I am saying is right or wrong? A. I would tell you that you're wrong.

Q. So there was something to complain about and you do trust the chain of command and yet you decided not to complain? A. That's correct, yes.

Q. Because it wouldn't do any good?
A. Sure, yes.

Q. How do you reconcile that with your statement that you have trust in your chain of command, in the naval chain of command? A. I don't.

Q. You don't. A. I don't.

Q. What you're saying is it cannot be reconciled? A. I didn't say that. I said I just don't.

Q. You don't reconcile it? A. No. I have confidence in the chain of command, with the Armed Forces.

Q. But you won't use it because it won't do any good? A. I didn't say I won't. I said I didn't.

1186

Lieutenant(N) Pitman

Cross-examination

Q. Yes, but you didn't do it. You didn't do it because it wouldn't do any good? A. In that particular case it wouldn't do any good, no.

Q. Why? A. That was my belief at the time.

Q. And then an article is published and people start talking and getting together and then it's a whole new story, isn't it? A. No, the story was the same.

DEFENDING OFFICER: No further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. When you were interviewed by the military police, was this a case of you running down the street, going to approach them and all of a sudden ready to complain? A. No, it was not, sir.

Q. And when you were interviewed by the military police, did you provide them a statement just slightly over four pages long? A. Yes, I did, sir.

Q. And in that statement, did you refer to verbal attacks, personal verbal attacks, name calling, belittling eight times during this four page statement?

A. The particular amount of times, I don't recall. I would have to see the statement, sir.

Q. Would you like to see it? A. Sure. This is my statement and if you say that I referred to those items eight times, I wouldn't disagree with it.

Q. Did you ever raise your concerns about the verbal treatment by Lieutenant-Commander Marsaw to Lieutenant-Commander Marsaw? A. Yes, I did.

Q. Did he change his ways? A. No, he did not.

1187

Lieutenant(N) Pitman

Re-examination

PROSECUTOR: Thank you. No further questions.

JUDGE ADVOCATE: No questions?

PRESIDENT: ...

JUDGE ADVOCATE: The court has no questions. Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court will adjourn for 15 minutes.

ADJOURNMENT: At 1027 hours, 12 Oct 1995, the court adjourns.

REASSEMBLY: At 1103 hours, 12 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated. Sorry about the delay, Mr President. Counsel and I discussed potential problems for this afternoon. So we hope it can be solved. Are you ready to call your next witness, Major Abbott?

ASSISTANT PROSECUTOR: Yes, we are. We're ready, Mr Judge Advocate.

JUDGE ADVOCATE: Captain Gleeson, okay.

ASSISTANT PROSECUTOR: The next witness will be Leading Seaman Bidinost.

1188

Leading Seaman Bidinost

Examination-in-chief

TWENTY-THIRD WITNESS)	Leading Seaman M.A.
FOR THE)	Bidinost, is duly sworn.
PROSECUTION)	

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good morning. Could you state your full name, please? A. Michael Anthony Bidinost, sir.

Q. And would you slowly spell your last name? A. B-I-D-I-N-O-S-T.

Q. Your service number is ?
A. Correct.

Q. And I understand you're currently posted to HMCS OJIBWA? A. Correct.

Q. You've also served on board all three submarines OJIBWA, OKANAGAN AND ONONDAGA? A. That's correct, sir.

Q. And the COs you've served under in the past have been Plante, Hickey, Dierks, Carter, Kavanagh and Woodburn? A. Correct, sir.

Q. And I understand you served on board OJIBWA from what, December of 1992 until October of 1993? A. Correct, sir.

Q. And who was your commanding officer during that period? A. It would be Lieutenant-Commander Marsaw.

Q. And while on board OJIBWA during that period, where were you employed? A. Radar department, sir.

Q. So you're a Radar Operator or ...?
A. Yes, that's correct, sir, Naval Combat Information Operator.

1189

Leading Seaman Bidinost

Examination-in-chief

Q. Based on your time on board OJIBWA, can you comment on Lieutenant-Commander Marsaw's leadership style? A. Unlike anything I have ever seen in any of my years as a staff in the squadron, sir.

Q. And what do you mean when you say unlike anything you have ever seen? A. The way in which his leadership affected morale and the general feeling of unease on board the boat.

Q. And how did it affect morale? A. In two words, sir, fear for one's own career and intimidation.

Q. What was the atmosphere in the control room like when Lieutenant-Commander Marsaw was there? A. Well, personally, sir, all I ... when I had to fill in, it was just trying to survive the watch, just trying to get through a watch without being ... without incurring anybody's wrath, specifically the CO's.

Q. And if you incurred his wrath, what would happen? A. Well, in my experience, sir, it wasn't anything I had gone through before and I don't wish to repeat it again but he would get pretty vehement with the party concerned regardless of who was present. Things would heat up and become very loud and vocal.

Q. And who would become loud and vocal? A. The CO, sir.

Q. Can you recall any words or phrases he would use when he would become loud and vocal? A. Well, I recall one incident in particular, sir, the engineer on board the ... on board the submarine, he was on the trim and at this particular time he was having a hard time with the trim and he was told to stand up and give himself a kick in the cunt.

Q. Who told him to do that? A. The commanding officer, sir, and if he could not do the job properly he would find a Part III, ie, an officer who is still qualifying to replace him to do the job properly.

1190

Leading Seaman Bidinost

Examination-in-chief

Q. What was Lieutenant-Commander Marsaw's tone of voice like when he made those comments to the engineering officer? A. I would say vehement, sir, personal.

Q. What about volume? A. It was quite loud. I had no problem hearing him sitting in the radar's room.

Q. What rank are those employed in the control room? A. Right from Lieutenant[N] down to ordinary seaman, sir.

Q. Based on your observation, how did the individuals in the control room react to being verbally berated by the commanding officer? A. Nobody said a word, sir. They just got on with it. There was really no other recourse at the time. There is only one Captain. He squares you off, in whatever manner he does, you just get on with it. You say nothing.

Q. Again, based on your observations, did it affect the way people did their job in the control room? A. In my opinion, yes, sir.

Q. In what way? A. You had the element of survival. People were just trying to make it through the watch and were very unwilling I would think to take a chance in the performance of their duties to get a little more results, you know, or, or, or ... you know, just results out of their job, so to speak, come up, a little bit of information, go a step further for fear of incurring somebody's wrath.

Q. How often did Lieutenant-Commander Marsaw yell and scream or raise his voice at people in the control room? A. From my experience, sir, every other day. I can't be specific about that. After a while, I just, you know, it's just one day blended with another but I would say every other day.

1191

Leading Seaman Bidinost

Examination-in-chief

Q. And the words he would use, you gave me the example about telling the engineering officer to stand up and kick himself in the cunt. Would he use other phrases or terminology that you can recall?

A. I've heard the words jerk, idiots, you know, he was ... in particular, other than that, no.

Q. How did you personally react to Lieutenant-Commander Marsaw's style in the control room? A. Well, sir, my motivation there was to try to make sure that we ... the radar primary's job was to hopefully give up to 110% to give nobody, especially the Captain, any reason to have to come into radar, and, you know, have an incident, you know, such as I had, you know, seen initiated as far as the radar person on watch.

Q. Did you ever have an occasion to have the radar room door kicked on you? A. I did, sir.

Q. Can you describe that incident for me? A. It was approximately the second or third week of February of '93 around work ups, and we were exercising, it was for EXERCISE EVOLUTION. The alarm went off on a loop, a circuit that was not available in radar, okay. We heard the alarm. We were in the process of just going for the door and opening it and Master Seaman then Leading Seaman Madgett who was sitting closest to the door, the next thing we knew I guess the door, the whole door came in. He hit me. I hit the desk. I went on the deck and Madgett handed up on the deck behind me. Immediately after that, we looked up and we saw the Captain standing there, and I believe his words were, "Would you, gentlemen, care to fucking join us", and up we got and put the door against the bulkhead and carried on with the exercise whereupon we secured it after the exercise was over. About two or three minutes later, the Captain came back and asked if everything was okay in there, you know, "Are you, gentlemen, alright?", or words to that effect and that was the end of it. We had secured the door afterwards,

1192

Leading Seaman Bidinost

Examination-in-chief

tied it in a day or so later. We had got the thing halfway back together and back up on the hinges.

Q. What portion of the door broke away when it was kicked in? A. My recollection was the whole door, sir.

Q. When Lieutenant-Commander Marsaw stuck his head in the door and said, I believe the words you said, "Are you, gentlemen, going to fucking join us?", what is the relationship between him sticking his head in the door and the door actually come in on you?

A. I would say not two seconds after the door came in on us he was right there.

Q. Did you see anybody else in the area?

A. No, sir, because when the Captain had a ... you know, when he ... I hate to use the word "lost it", but when, you know, he had, you know, one of these events happening, people would clear away from him, given there is not, you know, there is not ... as a matter of fact there is not a whole lot of room in the control room with the amount of people in there, any time like that, people would clear back, at least, if they just stay away from him. There is nobody else there, nobody per se.

Q. Describe the tone and the volume of his voice when he stuck his head in the radar office and made that statement? A. Oh, he was pretty upset, yes. He snarled. He was pretty upset, yes.

Q. What was his facial expression like?

A. Well, it wasn't like mine and yours, sir, for lack of a better expression, contorted.

Q. Did he ever apologize to you for that?

A. Well, we took it, coming back later and asking if everything was okay and, you know, or, "Are you, gentlemen, alright?". Now, I can't quote them ... we took that as an apology because nothing else was said after that.

1193

Leading Seaman Bidinost

Examination-in-chief

Q. How did you feel when the door got kicked in on you like that? A. Well, until I saw who was there, immediately thereafter, and then, well, you just clamped the old teeth together and get on with it and do what you're told.

Q. Did you say anything to Lieutenant-Commander Marsaw? A. Yes, sir. I said, "It shan't happen again" referring to the door being shut.

Q. Do you feel that your OJIBWA experience had any effect on you, personally? A. Yes, sir, it did.

Q. In what way? A. Well, for the first time in approximately 17 years, I was unable to separate work from home, take the work things home and, well, the wife and I went through a pretty rough time for a period of six to eight months and, I was diagnosed by a military psychologist as having chronic fatigue due to ... it came out of stress. It was something at the time I did not want to even admit to myself not realizing what was wrong with me. This went on for about eight months after, and we finally got things squared off, a lot of talking, a lot of sorting out. But it's something I'll never forget, sir.

Q. How did you feel about going to sea on board OJIBWA when you were sailing under Lieutenant-Commander Marsaw? A. Are you referring to how would I feel about going to sea with him again?

Q. About going to sea - no, going to sea with him at that time? How did you feel about sailing on board OJIBWA? A. Well, after the incident I have described in January, sir, my only concern was, excuse me ... if he had lost it again ... how much worse would he lose it and in what way or who would be involved when it happened next?

1194

Leading Seaman Bidinost

Examination-in-chief

Q. Can you contrast your feelings on board OJIBWA with the way you felt when you served on other boats? A. Black and white, sir, insofar as my time on OJIBWA represented ... or couldn't represent anything further than what my experience were, or my time in the squadron as far as with the submarine service was to me.

Q. How long have you served on submarines?
A. I've been in submarines almost 12 years, sir.

Q. In that time have you ever seen a CO treat his crew the way Lieutenant-Commander Marsaw did?
A. No, sir.

Q. What was your personal motivation like on board? A. Well, again, sir, my personal motivation, I considered it high insofar as I was trying to do the job 110%, to make sure or preclude any event, yell, happening that would concern radar personnel.

Q. Would you sail with Lieutenant-Commander Marsaw again? A. No, sir.

ASSISTANT PROSECUTOR: Those are all the questions I have, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, thank you, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. When you were asked by the prosecution how the style of command would affect morale, you said people would fear for their career or a real fear for their career and intimidation. How do you feel your career would be threatened? A. Okay, sir. My career, specifically?

1195

Leading Seaman Bidinost

Cross-examination

Q. Yes. A. Or people I had observed?

Q. Your career, yes, your career to start with? A. Okay, right. My career, sir, I didn't fear for my career because there is subsequently very little left of it. I know I'm at a level where I feel I've gone as far as I'm going to go and that was just a feeling I got when I talked with the senior rates and sometimes officers.

Q. Well, just not refer to any words that people would have told you, just from observation and not hearsay. Carry on with the words not reporting the words of others. Did you, just an observation, see signs that people feared for their careers? A. Physical signs you mean, sir?

Q. Yes. A. Yes, sir, that's what I interpreted it as. I had personally observed half a dozen members going to the auxiliary machinery space, engineering space on a daily basis to eat their lunch and their supper rather than eat it in the wardroom and, based on my personal experienced that is how I interpreted that.

Q. That's your interpretation? A. That's my interpretation only, sir.

Q. In terms of technical and tactical ability, how would you compare Lieutenant-Commander Marsaw to other commanding officers that you had served under? A. As good if not better, sir.

Q. And did that attitude reflect in how he approached his work? A. No, sir.

Q. Would he put in less time than what he required from the crew? A. I don't understand the question, sir.

Q. Would he, as in approaching his work, would he just give orders and go back to his cabin and

1196

Leading Seaman Bidinost

Cross-examination

push people to fatigue and stress or would he be physically present? A. He would be physically present with the men, sir, yes, not all the time but I would say most of the time he would be physically present there as well.

Q. Did he carefully watch what people were doing? A. Oh, yes, sir. Yes, sir. In my own opinion, my own observation, almost to the point of micro-managing. He was ... he tried in my observation to be on top of everything, personally.

Q. How do you define micro-managing in that sense? A. How do I define micro-managing, insofar as a person such as the CO would delegate out a half dozen different tasks but he would be on top of the half dozen different people that he delegated the tasks to constantly, always on top.

Q. He was just supervising? A. Supervising, checking them.

Q. And during the engineering officer was on the trim seat, do you recall who that was? A. Yes, I do, sir.

Q. Who would that be? A. It would be Lieutenant[N] Tingle.

Q. Lieutenant[N] Tingle. A. Yes, sir.

Q. And what was the submarine doing at the time? A. The submarine was trying to catch a trim, sir.

Q. In what context? Was it during an operation or a mission? A. I believe it was during an exercise, sir, okay, and it's not an easy thing to do and he was having a hard time with it and that's what was happening at the time.

1197

Leading Seaman Bidinost

Cross-examination

JUDGE ADVOCATE: Would you speak a little bit louder?

WITNESS: Yes, sir. Yes, sir.

ASSISTANT DEFENDING OFFICER:

Q. With respect to the radar room incident at the door, you said that the alarm went on a circuit that you didn't hear. When you say the alarm, what are you talking about? Are you talking the general alarm or a pipe? A. There was a pipe, sir. I believe it was the pipe, okay, and it was on a loop slant circuit that was not available in radar and, as a result of that, after that happening, okay, in order to hear the pipes, you know, clearly and concisely, the door was left open. It was tied open for ever after. But the actual pipe itself, okay ...

Q. What immediately precedes an emergency action? A. The general alarm, sir.

Q. And would that sound in the radar room? A. No, that doesn't sound in the radar room itself that I'm aware of.

Q. Where do you sit in the radar room? We have a display here. A. Right here, sir.

Q. Just take your seat and I'll explain to you so that all the members can see it. A. I would be sitting anywhere here. I'm back here.

JUDGE ADVOCATE: Major MacKay, would you first refer to the exhibit you have in your hands now?

ASSISTANT DEFENDING OFFICER: Oh, sorry. What I'm showing him is Exhibit "I", in there, sir.

JUDGE ADVOCATE: Thank you.

1198

Leading Seaman Bidinost

Cross-examination

WITNESS: So, that would be here in the radar office back here.

ASSISTANT DEFENDING OFFICER:

Q. Could you describe in more words "here", because for the purpose of the transcript, "this here" doesn't exactly describe it? A. Okay, alright, starboard side, okay, in front of the UA Fort or aft side against the desk. There was two seat lockers between the door and the desk which is immediately across the aft part of the ... and the ESM here was all on the starboard side. So depending on whether or not there was one person in the office or two people in the office, there are two seat lockers. Seat lockers are not anchored and they're moved around the limited area in the shack itself.

Q. And where is the speaker for the pipes? Where would it be located? A. Over in the aft port portion.

Q. And the alarm would be the same as the speaker, the general alarm? A. The general alarm, sir.

Q. So, is your testimony then that the general alarm which is the mechanical ... what sound does it make? A. Bong, bong, bong.

Q. And that would not ... A. When we heard that we went to open the door, okay, but the actual voice itself, okay, the voice that was announcing the alarm, what kind of evolution it was, what kind of incident it was, okay, that did not go in there.

Q. The actual pipe, the words being?
A. The actual pipe itself, sir, that's correct.

Q. Describing what the emergency was?
A. Exactly, sir, exactly.

1199

Leading Seaman Bidinost

Cross-examination

Q. The bong, bong, bong, you heard that?

A. Oh, yes, yes, sir.

Q. Does it sound in there? Doesn't it override all communication there is? A. Yes, it does inside in the radar shack itself but the actual voice describing the evolution, okay, was made on a loop that was not available in radar at the time.

Q. And then Madgett, you said, went to open the door and he was hit by the door, fell back on you, you fell down to the ground, then he fell as well?

A. That's correct. Yes, he hit me. I hit the desk. I went down and I turned around. He was down the deck too.

Q. And the door, what happened to it? It is my understanding from what you said that it completely came off the hinges? A. Yes, it did, sir. Yes, it did. It came right into the shack.

Q. What about the top latch? A. The top latch, sir, there is two arms that run in, runners across the top. They were dislocated as well. When we went to put the door back up and secured it to the bulkhead afterwards, it was my recollection that the bottom hinge was twisted and the rotors that go on the tracks, they were completely broken off of the arms that fall over the tracks across the top of the door.

Q. The bottom hinge was twisted? A. That's correct, sir.

Q. What kind of a hinge would that be?

A. A normal ...

Q. Well, is it one, two, three inches? Is it brass? Is it steel? A. It's about that, about that big, sir. I couldn't tell you, you know, exactly. It's been a long time since I have seen the door. I just recall that the bottom hinge was twisted.

1200

Leading Seaman Bidinost

Cross-examination

Q. The bottom hinge? A. The bottom hinge was twisted.

Q. What about the other two? A. The other two weren't twisted. They were there. I just recall the bottom hinge being twisted and the rollers that go on the arms at the top of the door that slide in the tracks, they were there on the deck.

Q. Aside from Lieutenant-Commander Marsaw, who would have been there at the time when this happened? A. Well, the only person I remember looking at directly, sir, was Lieutenant-Commander Beverage who was in charge of sea training at the time. He was an exchange officer from Australia who was standing directly forward of the attack periscope looking back at the radar shack and it was my assumption he saw everything.

Q. He saw everything? A. That is correct, sir.

Q. And the words that you reported, I missed the first but, "You, gentlemen ... Would you, gentlemen, care to fucking join us"? A. That is correct, sir.

Q. Would those be the exact words that Lieutenant-Commander Marsaw used? A. To the best of my recollection, sir, yes.

Q. To the best of your ...? A. That is correct, sir.

Q. But that would be an exact quote?
A. That's as close as I can put it, sir.

Q. And you said you put the door back or put it against the bulkhead? A. We propped it up, sir, and secured it with parachute cord.

1201

Leading Seaman Bidinost

Cross-examination

Q. But it fell on the ground completely?

A. It came right off the hinges, sir.

Q. And regarding the atmosphere and the style, it was something that you said you had never seen before and you would not like to experience again?

A. That is correct, sir.

Q. During that period you served under Lieutenant-Commander Marsaw, did you raise any kind of formal complaint? A. No, sir.

Q. And in your years in the Service, have you ever raised complaints or redresses of grievance or ...? A. No, sir.

Q. You know it exists? A. Yes, I do, sir.

Q. Any reason why you didn't raise any complaint? A. At the time, sir, I made a personal assessment and my assessment was, "Let's just get on with it and do the best we can."

Q. Was there anyway in your mind as well to put a stop to it? A. No, sir, no.

Q. Why wouldn't there be anyway to put a stop to it? A. In my opinion, sir, when you get ... when you get into an area like that on a submarine, in my opinion, you not only show yourself as ... well as disloyal to the boat and impede any, you know, any progress they might be able to make operationally or your department ... It's never been my style to raise, you know, redresses, to put in complaints, whatever, I'm just not that type of person. My style has been to "Why don't you just get on with it", and deal with what we have and try to do the best we could.

Q. Well, if you would impede to that extent, would it not be helpful to raise the issue? You perceive that this impedes everybody's performance. How come you're saying now that raising the issue, making a

1202

Leading Seaman Bidinost

Cross-examination

complaint, would impede performance, would go against the submarine and ...? A. I didn't want to attract any more attention to the radar department than I absolutely wanted to, sir, in that atmosphere.

Q. Do you believe in the chain of command, the divisional system? A. Yes, I do, sir, yes.

Q. And the chain of command, I don't mean up to and including Lieutenant-Commander Marsaw but above Lieutenant-Commander Marsaw? A. Yes, sir, yes, sir, I believe in that.

Q. And was it your belief at the time that above Lieutenant-Commander Marsaw, these would have been seen only as moans and gripes? A. To a certain extent, yes, sir, but that was only a personal opinion.

Q. I think you mentioned yet you served with Lieutenant-Commander Plante? A. That's correct, sir.

Q. How do you describe the man? A. In what way, sir?

Q. When he was the commanding officer, how he behaved, what he did? A. He chose his words very carefully, sir. He would have outbursts but he would always talk to the person later to make sure that the person understood why he had been, you know, squared off, for lack of a better expression, and to make sure that the person didn't take it personally and he felt okay about what the Captain had to tell him.

Q. Do you recall your interview with the military police? A. Yes, sir.

Q. Do you recall when it was? A. I don't recall what day it was, sir, no.

Q. Well, the approximate period? A. ...

1203

Leading Seaman Bidinost

Cross-examination

Q. Starting with the year, this year, last year? A. It was the summer of ... the summer of '94, roughly, sir.

Q. Summer of '94. A. I was in a couple of times.

Q. And didn't you describe when you were asked ... didn't you describe Lieutenant-Commander Plante as a tough bastard, made people mad? A. Yes, he was a tough bastard, sir, yes, I did, yes, I did.

Q. Did he have an imposing personality, physically? A. No, sir. I never personally got that feeling from Lieutenant-Commander Plante that he was physically imposing. It was more personality as far as anyone was concerned.

Q. Strong personality? A. Exactly, sir, nothing physical.

Q. He would have a different style to him but ...? A. Yes, but I never got ... personally got the feeling he was physically imposing even though he was not a small man. You know, he never came across that way but ...

Q. Would you say that the senior rates operated as a group when you were there? A. On the OJIBWA, sir?

Q. Yes. A. Yes, sir, yes, sir.

Q. It wouldn't be each man for himself? A. It would be each man for himself but the senior rates looked after each other. The junior rates tried to look after each other. As I imagine, the wardroom would too look after each other.

Q. Would Lieutenant-Commander Plante yell at people sometimes? A. Yes, he did, sir.

1204

Leading Seaman Bidinost

Cross-examination

Q. What about safety? A. Safety?

Q. H'm, h'm. A. With Lieutenant-Commander Plante?

Q. Plante and Marsaw, who would you rank highest in the safety? A. Well, I'm not qualified to rank a Captain, sir, but just personal opinion ...

Q. Well, in terms of ... forget the comparison then just your appraisal on safety. You witnessed Lieutenant-Commander Marsaw. Was he strong or weak on safety? A. He was very big on safety, sir.

Q. Very big on safety? A. Yes, Lieutenant-Commander Marsaw was, yes.

ASSISTANT DEFENDING OFFICER: If I might just go through my notes, Mr Judge Advocate.

JUDGE ADVOCATE: Certainly.

ASSISTANT DEFENDING OFFICER:

Q. When Lieutenant-Commander Marsaw made his remark after kicking the door, how loud was his voice? A. Are you referring to, "Would you, gentlemen, care to fucking join us"?

Q. Yes, that's it. A. He wasn't screaming, okay, but it was louder than in a normal conversation.

Q. Just a stern tone of voice, passed the point? A. Oh, yes, yes, it was more than just stern but he wasn't screeching.

Q. He wasn't screeching. A. No.

Q. And when the door was kicked in, how much noise did it make? A. Well, it made a fair amount of noise, a bang, and when the thing flew open and come off the tracks, I don't know how I would rate that in a

1205

Leading Seaman Bidinost

Cross-examination

decibel level, sir, but it made a fair amount of noise, yes, yes.

Q. And how much time elapsed between the time the general alarm sounded and Madgett went for the door to open it? A. To the best of my recollection, sir, within five seconds.

Q. Within five seconds. A. Within five seconds, probably less.

Q. And do you have any special procedure if you hear a general alarm but you don't hear the pipe and you're in that radar room with the door closed? A. Yes, we do, sir.

Q. What is it? A. Get the door open and find out what the heck is going on.

Q. As soon as possible? A. Exactly, sir.

Q. To find out what's going on? A. And that's why the door remained open forever after.

Q. Have you read the newspaper article that was published December 16th, 1993, by Mr Dunlop? Do you recall reading that? A. No, sir.

Q. Do you recall reading an article on treatment and allegations of abuse on a submarine? A. Not back in December, sir. I have read ... I don't read the newspaper everyday but I have read articles, okay.

Q. Later on? A. Later on, yes, sir, I have.

Q. Shortly after or ...? A. Shortly after December?

Q. Yes or recently? A. Recently, sir, yes.

1206

Leading Seaman Bidinost

Cross-examination

Q. Recently but not at the time? A. No, not at the time I don't recall reading anything about that. We were at sea and we had heard about ... We heard something to the effect that, you know, he was ... he was being hauled up. He was in Québec at the time on a French language training course but I didn't read anything in particular.

Q. I'm just asking you not to report the words of other people. A. Okay, sir.

Q. Just ... A. Right.

Q. Because you're ... A. Not personally, sir, no.

Q. Not personally. Were you contacted yourself by Mr Dunlop, the reporter? A. No, sir, no, sir.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. The situations where you witnessed Lieutenant-Commander Marsaw yelling and screaming at his crew and using the adjectives you described, was the submarine in an immediate danger? A. In my opinion, no, sir.

Q. My friend asked about Captain[N] Plante and how he dealt with people. Did you ever witness Captain[N] Plante on a regular basis use personally insulting adjectives towards members of his crew and rebuking them? A. No, sir, not on a regular basis, no, sir.

Q. With respect to the incidents you witnessed in the control room and my friend was asking

1207

Leading Seaman Bidinost

Re-examination

whether or not you submitted a formal complaint, were there other people senior to you in the control room that witnessed those incidents as well? A. Yes, sir.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you very much. Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions. Thank you.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Do you propose to call the next witness at this time considering that it is 18 minutes to 12?

PROSECUTOR: We have our next witness here, Mr Judge Advocate, but he certainly won't get done in 20 minutes. I'd request, if we could, just have a lunch break now and come back at 1300.

JUDGE ADVOCATE: Or 1230?

PRESIDENT: Or 1245?

PROSECUTOR: Twelve forty-five, certainly. Thank you.

JUDGE ADVOCATE: Twelve forty-five. The court is adjourned until 1245.

ADJOURNMENT: At 1140 hours, 12 October 1995, the court adjourns.

REASSEMBLY: At 1245 hours, 12 October 1995, the court reassembles and the accused is before it.

1208

JUDGE ADVOCATE: You may be seated. Are you ready to proceed, Captain Gleeson?

ASSISTANT PROSECUTOR: Yes, we are, sir. The next witness is Petty Officer, 2nd Class Brown.

s.19(1)

1209

PO2 Brown

Examination-in-chief

TWENTY-FOURTH WITNESS) Petty Officer, 2nd
FOR THE) Class R.L. Brown, is duly
PROSECUTOR) sworn.

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good afternoon. Would you state your full name, please? A. Rodney Leslie Brown.

Q. And spell your last name? A. B-R-O-W-N.

Q. Your service number is ?
A. Yes, it is.

Q. And your trade is NAC OP? A. Yes, it is.

Q. And you've been in the Canadian Forces for about 16 years? A. Yes.

Q. And you became a submariner in 1985?
A. Yes, I did.

Q. What submarines have you served on?
A. OJIBWA, OKANAGAN AND ONONDAGA.

Q. And during that time, what commanding officers have you served under? A. Lieutenant-Commander Webster, Lieutenant-Commander McDonald, Lieutenant-Commander Plante, Lieutenant-Commander Bush, Lieutenant-Commander Davidson, Lieutenant-Commander Hickey, Lieutenant-Commander Dierks, Commander Carter and Lieutenant-Commander Marsaw.

Q. And what boat were you serving on when Lieutenant-Commander Marsaw was commanding officer?
A. HMCS OJIBWA.

Q. And for what period were you posted to OJIBWA under Lieutenant-Commander Marsaw? A. From the 6th of August 1992 to the 9th of August 1993.

1210

PO2 Brown

Examination-in-chief

Q. And during that period on OJIBWA, where were you employed while the submarine was at sea?

A. While the submarine was dived I was employed in the sonar room. While the submarine was on the surface I was employed in the control room as petty officer of the watch.

Q. Can you describe how Lieutenant-Commander Marsaw would react when he was unhappy with somebody's performance in the control room? A. He would yell and scream.

Q. Did he ever ... I'm sorry. Go ahead.
A. He would yell and scream at the individual who agitated him.

Q. Did he ever have occasion to yell and scream at you? A. Yes.

Q. Can you give me an example? A. Yes, I can.

Q. Please describe the situation for the court? A. The submarine was on the surface. We were about to do a fore trip with a helo. It was the transfer of personnel to the submarine. The XO and the navigator were up on the bridge controlling the evolution from up top. I, myself, was acting as the petty officer in the ship control. I basically controlled the communications throughout the submarine to let the rest of the submarine crew know what was going on. An order came down from the XO on the bridge. It was passed through a communication circuit. The box itself is on the farther side of the control room. I actually didn't hear the information that the XO had passed. Subsequently, Lieutenant-Commander Marsaw walked over to where I was sitting and put his face about six inches from mine and screamed, "Do you have ears?" and then said after that something to the effect, "I need somebody in the control room that can hear."

1211

PO2 Brown

Examination-in-chief

Q. Could you demonstrate the volume of his voice when he yelled that at you? A. Yes, I can, sir.

ASSISTANT PROSECUTOR: With your leave, Mr Judge Advocate?

JUDGE ADVOCATE: Go ahead.

ASSISTANT PROSECUTOR:

Q. I'd ask you to do that. A. "Do you have ears?"

Q. How did you react and feel when that occurred? A. I felt belittled, however, I did respond by saying, "Yes, sir."

Q. Were there other people present in the control room at that time? A. Yes, Petty Officer Blair was the helmsman at the time. He was also a special sea duty man. The ship control officer stands directly behind me in the control room and that was Lieutenant[N] Soper. Although, there were other personnel in the control room, I can't remember exactly who was there.

Q. Based on what you observed on board the submarine, were you the only person that was treated that way? A. No.

Q. Generally, who else was subject to that kind of treatment by the commanding officer? A. In general, anyone who just happened to be in the control room.

Q. And can you give me an example where someone other than yourself was treated that way by Lieutenant-Commander Marsaw? A. Yes, I can. While we were on the surface, we were proceeding into Boston. I was coming on watch as the petty officer of the watch. When I entered the control room, Lieutenant-Commander

1212

PO2 Brown

Examination-in-chief

Marsaw, Lieutenant[N] Higginson, the navigator, were up at the plot table. The Captain appeared not to be happy with the submarine's track that the navigator had laid out. Subsequently, Lieutenant[N] Higginson was changing that track. Once the change had been made he was passing up to the bridge officer who is in control of the submarine, the safety of the submarine at that time. The bridge officer who was aware of the previous track responded. He wanted to query why the track had changed. It appeared to me that the navigator knowing the submarine ... correction, the Captain was agitated, passed up, "This is the Captain's track" or "... the CO's track." After making that response, Lieutenant-Commander Marsaw approached the plot table, slammed his fist down on it and yelled the statement, something to the effect of, "You're damn right this is my track. This is my plot table. This is my fucking submarine. Do you have any other questions?"

Q. You're currently posted to HMCS GATINEAU?

A. Yes, I am.

Q. And GATINEAU is a surface ship? A. Yes, it is.

Q. When did you leave the submarine service?

A. August 9th, 1993.

Q. How do you currently feel about the sub service? A. I wish I was still on them.

Q. So can you describe the circumstances under which you left? A. We had a two week deployment coming up. This was approximately Jul of '93. I physically dreaded at this time going to sea on OJIBWA.

I asked the MED A on board to get me an eye clinic appointment. When I went up for the appointment, I passed to them that my eyes bothered me. I'm a contact wearer. I constantly leave my contacts in for extended periods of time to decrease the amount of diesel that I get in my eyes. They sent me to an eye specialist and, subsequently, I was pronounced unfit submarines.

1213

PO2 Brown

Examination-in-chief

Q. Was the information you gave the medical authority accurate? A. No.

Q. Why did you go and gave them that information then? A. Like I said, I physically dreaded going to sea on that submarine again.

Q. So what occurred as a result of going through the medical authorities and the specialist? A. Once I was pronounced unfit submarines, I was placed on a CMRB, Career Medical Review Board.

Q. Were you aware of the consequences ... of the potential consequences that the CMRB are? A. Yes. I could have a trade or military restrictions placed against me. In the worst case scenario, I could be released from the Canadian Armed Forces.

Q. Were you aware of that at the time you went to see the medical authorities? A. Yes, I was.

Q. You say you dreaded ... the reason you did this was you dreaded going to sea on that submarine. Why was that? A. I felt that I was constantly being ridiculed, however, the biggest motivation behind my seeking the eye clinic appointment was the fact that I had no divisional system.

Q. Why do you believe you didn't have a divisional system? A. The officers in my direct divisional system, which were two, would say or do anything to alleviate the chance of having the CO's wrath felt upon them.

Q. Would you volunteer to sail with Lieutenant-Commander Marsaw again? A. Under the same circumstances, no.

ASSISTANT PROSECUTOR: Thank you. These are my questions.

1214

PO2 Brown

Cross-examination

JUDGE ADVOCATE: Thank you. Cross-examination?

ASSISTANT DEFENDING OFFICER: Thank you, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. When you're doing a personnel transfer from ... this is what you were explaining, a person being transferred on the submarine using a helicopter?

A. Yes.

Q. Is there any inherent danger to that practice? A. Yes, there is.

Q. And would that required everybody's attention at all times given the element of danger? A. Yes, it would.

Q. And you said you couldn't hear, the communication box, where it was coming down from the bridge. Where was that located in relation to you in distance? A. Approximately 12 to 15 feet.

Q. And where was Lieutenant-Commander Marsaw located when he came to you? Was he closer to you to that box or farther? A. I believe he was. I believe he was on the far side of the control room or at the attack periscope which is directly centre of the submarine.

Q. Directly centre. So he would have been closer or further? A. Closer.

Q. Closer. The other incident to Boston that you witnessed where Lieutenant-Commander Marsaw appeared not to be happy about the track on the map or the chart, sorry, and it was subsequently changed and the word was passed on, you said because Lieutenant[N] Higginson passed ... what information did he pass, just

1215

PO2 Brown

Cross-examination

that it was the CO's track? A. The first time or the second time?

Q. The first time when it came down ... sorry, the second time when he was asked by the bridge officer why the track had changed? A. His only statement the second time that he passed information up to the bridge was, "This is the CO's track."

Q. Should there have been any more complete explanation to the bridge officer to tell him why it had been changed? A. Yes, I believe there would be.

Q. There would be but all he said that this is the CO's track, period? A. Yes.

Q. And that agitated Lieutenant-Commander Marsaw? A. From my recollection, yes.

Q. Were you also on the submarine during a fisheries' patrol in '93? A. Yes, I was.

Q. Were you present at the moment when the submarine found itself surrounded by fishing vessels? A. Yes, I was.

Q. And what happened then? Do you recall anything that happened during that time that you were surrounded by fishing vessels? A. Yes, subsequently after the incident was over with I was relieved of my duties.

Q. But in between that time and the time you were relieved what happened? What led to you being relieved, can you tell the court? A. Yes, I can. The actual incident when we were in the middle of a fishing fleet, there was one trawler that was out there and had a fishing net out. I believe the Captain was extremely worried about where this fishing vessel was. He had asked which vessel was the strongest by sonar which would give an indication of which one is the closest one. I believe I passed out the information to 72 loud all channels. That would indicate to the CO that this

1216

PO2 Brown

Cross-examination

contact was extremely close. A short time later, the CO has screamed into the sound room, "Which one is the loudest one?" Since I had already passed it out once, I believed he didn't get the information. So this time I passed out the information at the same strength or the voice level that he did. Subsequently, I was relieved of my duties.

Q. And when that information is passed along, how does it go from you to the Captain? Is it transmitted through somebody or anybody? A. In this particular incident it was passed through me as a UC1 to Master Seaman Seaborn who was actually doing my job at the time because we had quite a few close contact. It would have then passed to Petty Officer Upson and then out to the CDC operator which is a NAT trade.

Q. And it came back. He requested a second time to have the information, "Which one is the loudest?" A. Yes, he did.

Q. Did you know whether he had gotten the information the first time? A. No, but I believed that since he is asking for it a second time, it probably didn't get to him.

Q. It didn't get to him. So when he raised his voice to get the information the second time, did he raise his voice in anger or did he raise his voice simply to make sure he would be understood? From your perception, I'm not trying for you to use a crystal ball to look in his mind, but from the appearance. You were there in your environment. You passed along the information. The second time comes around louder making the same request. A. The second time wasn't just louder, it was extremely loud. I definitely heard what he was asking for this time and I definitely passed it back to him. I don't know what his motivation was, whether he was angry, or he was just worried. I have no idea what ...

1217

PO2 Brown

Cross-examination

Q. Yes, just stay away from speculations and just the environment that I want, the actual physical facts. And what kind of danger would that represent to a submarine surrounded by fishing vessels with the fishing nets are out? A. If we had got caught in the net, it would have been a serious situation. We don't have ... Once we're inside the net we have no real way of getting out without endangering ourselves as well as the fishing vessel.

Q. And at the time that happened, when the actual discovery was made, that the submarine was in the middle of the fishing fleet, was he on the bridge or was the officer of the watch that had the control of the submarine at the time? A. The submarine was dived. Therefore, there was no one on the bridge.

Q. Not the bridge, sorry, the control room. Was the Captain in the control room at that time or was the submarine under the control of someone else and he would have been called from his cabin or somewhere else from the submarine? A. I believe that throughout the whole evolution the CO was in the control room. He would have been called at some time but I'm not sure exactly when.

Q. Did you think that being relieved the way you were, was an actual ill-treatment or injustice or any matter like this that would open the door to a grievance? A. No.

Q. No. And in respect to the other incident when he asked you if you had ears. Would that also be the type of matter that would make the subject matter of a grievance? A. In my mind, yes.

Q. Yes. And I gathered from what you said earlier, you didn't raise one because you didn't have confidence in your divisional system? A. No, actually I did commence raising a redress of grievance. However, by the time it was submitted, I was on HMCS GATINEAU. We were down South. I subsequently heard

1218

PO2 Brown

Cross-examination

that this court martial was convening and felt that it was a conflict of interest and, therefore, I did not go any further with it.

Q. And who initially did you submit that grievance to? A. To my divisional system on HMCS GATINEAU.

Q. GATINEAU but not on OJIBWA? A. No.

Q. Who were the two officers on your divisional system? A. When most of the incidences occurred, it was Lieutenant Tabart and Lieutenant[N] McVicar.

Q. And you didn't raise it with them. Did you discuss it with them? A. Yes, I discussed many things with my divisional officer.

Q. But nothing ever went any further than those discussions? A. ...

Q. Were they informal, or formal, or semi-formal? A. Semi-formal, if I can give any kind of ...

Q. And above your divisional officers, the two directly above you and who is there, who else is there in the chain of command? It goes from your divisional officer to, who is the next person? A. It would be the XO after that.

Q. Did you have any confidence in him?
A. No.

Q. And above the XO, of course, is the commanding officer but above the commanding officer, did you have confidence in the people above Lieutenant-Commander Marsaw? A. Yes.

Q. Yes, okay. And when you put in a grievance, isn't it the normal process that when it goes up

1219

PO2 Brown

Cross-examination

if it is refused you have the right to ask that it be pushed at a higher level? A. Yes, it does.

Q. So, do you think that eventually it would have made its way to somebody in which you would have had the confidence? A. Yes.

Q. Again, you didn't push it to that level. You didn't even initiate it when you were on the submarine? A. No, I did not initiate any grievance for any incidents on board the submarine whatsoever.

Q. What it just for lack of confidence or any other reason that you didn't raise the issue when you were on OJIBWA? A. I really thought that it wouldn't get me anywhere.

Q. It wouldn't get you anywhere. So instead of doing that you used the medical, a medical reason to get out of the submarine"? A. Yes.

Q. Did you have an opportunity to read an article that was published December 16th, 1993, published in the Chronicle Herald regarding an investigation to allegations of abuse and mistreatment on board OJIBWA? A. Yes, I did.

Q. You did. Did you read it at the time when it was published or shortly thereafter? A. I believe I was on a trip down South on HMCS GATINEAU. My wife had actually cut the article out of the paper and saved it for me.

Q. Saved it for you. So you weren't contacted by the author of the article, Mr Dunlop? A. No, I wasn't.

Q. No. Did you contact him? A. No, I didn't.

Q. Do you recall what date was your interview with the military police investigator into this

1220

PO2 Brown

Cross-examination

matter, approximately, not the exact day or date but month or year? A. June 1994. I believe it was June 10th, 1994.

Q. And when you went for your medical appointment for your eyes, were you eyes actually examined, physically examined by a professional there?
A. Yes, they were.

Q. And what was the final diagnosis as to your visual category? A. My visual category has for the last five or six years now been V4, borderline V5.

Q. V4 and what is the minimum requirement for submarines? A. V3.

Q. And based on the reasons you gave to go to your medical appointment, was there any other occasions that you lied to the military authority? A. No.

Q. And the incident regarding the track with Lieutenant[N] Higginson being dissatisfied of the track that was on the chart, do you recall if it was in Boston or could it have been going out of Bermuda?
A. I believe it was Boston. I know that I never went to Bermuda with the OJIBWA. So, therefore, it couldn't have been that trip.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Re-examination?

ASSISTANT PROSECUTOR: No questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Questions from the court?

PRESIDENT: No.

1221

PO2 Brown

Cross-examination

JUDGE ADVOCATE: No questions. Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness, Mr Judge Advocate, will be Master Corporal Schubert.

1223

Master Corporal Schubert

Examination-in-chief

Q. It would be marked "galley" and approximately how far would that be from the beginning of the control room? A. From the beginning?

Q. Yes, from where it would be, from where the control room starts, how many feet? A. Five feet, six feet.

Q. While you're working in the galley, is it possible to hear people speak in the control room?

A. When the engines aren't running.

Q. And when the engines aren't, it is possible to hear people? A. Yes, sir.

Q. Do you recall ever hearing Lieutenant-Commander Marsaw yelling in the control room? A. Yes, sir.

Q. And do you recall any words that he would use while he was yelling in the control room?

A. Fucking idiot.

Q. Have you ever heard any other commanding officers other than the Airborne Regiment in sub service use personally insulting adjectives such as fucking idiot to refer to subordinates? A. No, sir.

Q. Generally speaking, where would the officers eat their meals? A. Wardroom.

Q. Would all the officers always eat their meals there? A. Yes, sir.

Q. Would they ever eat them anywhere else? A. Sometime, sir.

Q. Where would they sometimes eat their meals? A. Sometimes in the officers' heads, sometimes in the cubby space, sometimes down the gyro.

1224

Master Corporal Schubert

Examination-in-chief

Q. Did you ever have occasions to bake cookies and hand them out to officers? A. All the time, sir.

Q. How would they appear when you were to give them some cookies? A. Hesitant I'm sure, whether they would take them or not.

Q. Did you ever have discussion ... to discuss ... or an occasion to discuss with Lieutenant-Commander Marsaw morale on board the OJIBWA during the counter drugs trip of 1992? A. Yes, sir.

Q. Can you recall what you said to Lieutenant-Commander Marsaw? A. "This isn't my job to build morale."

Q. Do you recall what his response was? A. "I don't give a fuck about morale."

Q. What sort of tone did he say this in? A. Cold, callous.

Q. Did you ever have occasions to discuss rumours with Lieutenant-Commander Marsaw? A. Sometimes, sir.

Q. Can you inform the court of an occasion where you did discuss this with Lieutenant-Commander Marsaw? A. On one occasion, one time in ... he told me we were going in on a Friday. So I asked if that was true. He said, "No. Why don't you start a rumour?" Then, I wouldn't do it.

PROSECUTOR: I have no further questions. Thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

1225

Master Corporal Schubert

Cross-examination

Q. Was he joking about the business of the rumour?
A. I didn't believe so, sir.

Q. You didn't believe so?
A. No, sir.

Q. Did he joke sometimes?
A. I never seen it, sir.

Q. He never said a joke. You were pretty close to the Captain as a ... you served his meal and you worked fairly closely to him?
A. Not really, sir.

Q. You're a cook?
A. Yes, sir.

Q. Did you read the article on 16 December 1983[sic] relating to allegation of misconduct on board OJIBWA?
A. No, sir.

Q. You didn't?
A. No, sir.

Q. Where were you in 1993?
A. On HMCS TERRA NOVA.

Q. And you never read that article on allegations of wrongdoing on board OJIBWA?
A. No, sir.

Q. Did you ever talk to any reporter about matters that have occurred on board OJIBWA?
A. No, sir.

Q. Did you ever write to any reporter in that respect?
A. No, sir.

Q. So you were not working really closely to the Captain then?
A. Sir, he is the CO and I'm the chief cook. We discussed matters of storing and things like that.

Q. Well, I'm talking about ... I'm not talking of being close on a personal basis. I'm talking about being close physically and in terms of work?

1226

Master Corporal Schubert

Cross-examination

A. Sure, he'd come by and ask what was for the monthly supper and that would be about it.

Q. Now, what might be said in the control room you said maybe heard if the engines are not running? A. Yes, sir, the submarine is awfully quiet when the engines aren't running.

Q. Of course, there is always a fair number of people in the control room? A. At certain times.

Q. You wouldn't know ... like if you hear something, you wouldn't know necessarily to whom it's addressed to and you might even be confused as to who said what? A. No, sir. You get to know people's ... you get to know a person's voice.

Q. You do hey? A. Yes, sir.

Q. H'm, h'm. Now, I would like to know for my own mind the significance of officers being reluctant to take cookies. Were they afraid that you'd poison them or what? What's this all about? A. Well, maybe, sir, I was known to be a little obnoxious.

Q. You were? A. Oh yeah, sir.

Q. Lieutenant-Commander Marsaw, did he ever yell at you? A. No, sir.

Q. As far as you were concerned, was there any major problem on board? A. For me personally, sir?

Q. For you personally? A. No.

Q. And generally? A. The morale, sir.

Q. I hear you're a pretty good cook?
A. They tell me that, sir.

1227

Master Corporal Schubert

Cross-examination

Q. So I guess you'd keep people happy making good food? A. This is part of my job, sir.

Q. About that conversation on morale, if I told you that ... suggested to you that conversation you had with Lieutenant-Commander Marsaw was more in the following line, "As long as you keep cooking as good a food, I won't have to worry too much about morale", is that possible? A. It's possible, yes, sir.

Q. That, that would have taken place rather than, "I don't give a fuck about morale"? A. No, sir.

Q. No what? A. About my cooking capabilities, it never came up, sir.

Q. So he never told you, that's your testimony, that it is not possible the conversation could have been, "As long as you keep doing your job so well ...", or words to that effect, "... I don't have to worry too much about morale", meaning you're keeping the troops happy and that makes my job easier? A. Not to the best of my recollection, sir.

Q. Not to the best of your recollection. Is that possible though that it might have been the gist of the conversation? A. No, sir. I heard what I heard.

DEFENDING OFFICER: You heard what you heard. Thank you.

JUDGE ADVOCATE: Re-examination?

PROSECUTOR: None.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No.

1228

Master Corporal Schubert

Cross-examination

JUDGE ADVOCATE: No questions. Thank you,
Master Corporal.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Next witness?

PROSECUTOR: I think my friend and I are
wondering if we could have a short break, five minutes?

JUDGE ADVOCATE: Five minutes, it has shown
to be too short.

DEFENDING OFFICER: Let's ... maybe ...

PROSECUTOR: Maybe if we'd adjourn before we
actually call the witness to the stand and swear the
oath, it might be helpful, sir. So five minutes, ten
minutes at the most?

JUDGE ADVOCATE: Fine. The court is ad-
journed for 10 minutes.

ADJOURNMENT: At 1326 hours, 12 October
1995, the court adjourns.

REASSEMBLY: At 1350 hours, 12 October
1995, the court reassembles
and the accused is before it.

JUDGE ADVOCATE: Thank you. Be seated.

ASSISTANT PROSECUTOR: The next witness,
Mr Judge Advocate, Mr President, is Leading Seaman
Bourassa.

s.19(1)

1229

Leading Seaman Bourassa

Examination-in-chief

TWENTY-SIXTH WITNESS) Leading Seaman
FOR THE) J.G.A.P. Bourassa, is duly
PROSECUTION) sworn.

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good afternoon. Would you state your full name, please? A. Leading Seaman Joseph Gilles André Patrick Bourassa.

Q. And would you slowly spell your last name? A. B-O-U-R-A-S-S-A.

Q. And I understand you're currently at the Naval Operation School on course? A. Yes, sir.

Q. How long have you been in the Regular Force? A. Nine and a half years, sir.

Q. And when did you qualify on the submarines? A. That would have been in 1988, I believe.

Q. And what submarines have you served on? A. Three of them, OJIBWA, OKANAGAN and ONONDAGA.

Q. Can you tell the court who your commanding officers were on board the submarines?

A. Lieutenant-Commander Bush, Lieutenant-Commander Marsaw, Lieutenant-Commander Truscott, Lieutenant-Commander Hickey, Lieutenant-Commander McDonald, Lieutenant-Commander Davidson. I believe that's it.

Q. And when was Lieutenant-Commander Marsaw your commanding officer, what period of time? A. On my second time on OJIBWA which would have been October '91 to December '92, I believe, something like that.

Q. And did you remain on board OJIBWA for that whole period? A. No, in January of '92, I was td'd to ONONDAGA under Lieutenant-Commander Truscott.

1230

Leading Seaman Bourassa

Examination-in-chief

Q. And for what period were you on ONONDAGA?

A. I was there for about three months. It was a trip down South for MARK 48 CHARLIE.

Q. Where were you employed on board the OJIBWA when the submarine was at sea? A. In the control room as helmsman on the CDC Operator.

Q. As what, sorry? A. CDC Operator or helmsman.

Q. How would you describe Lieutenant-Commander Marsaw's leadership style? A. It seems to me there wasn't any leadership. It was just ... he was Captain of the submarine and everybody respected his position more than himself.

Q. What was the atmosphere in the control room like when Lieutenant-Commander Marsaw was there? A. I would say stressful.

Q. Why would you say that? A. Because nobody never knew when he would be yelling at somebody because something didn't fit him. If he didn't like something, often, he would be yelling to put his point across.

Q. Did you ever witness Lieutenant-Commander Marsaw yelling at people? A. Yes, sir.

Q. Did you witness him yelling at people on occasion when the boat was being trimmed? A. Yes, actually it wasn't directly at somebody. It was at everybody in general. He was just yelling really loud.

DEFENDING OFFICER: Mr Judge Advocate, it appears ... I had a discussion with my learned friend. It appears that we're getting close to some evidence that needs to be tested for admissibility and unless the prosecution says otherwise, I would believe that it would be an appropriate to enter a **voir dire** at this point.

1231

Leading Seaman Bourassa

Examination-in-chief

ASSISTANT PROSECUTOR: We're certainly approaching the evidence in question, Mr Judge Advocate. So my friend is objecting and I just ...

JUDGE ADVOCATE: We're approaching but are we that close, I mean?

DEFENDING OFFICER: I'm not too sure but I mean ...

ASSISTANT PROSECUTOR: We are, Mr Judge Advocate.

JUDGE ADVOCATE: It would be safer to go into a **voir dire**. Very well, Mr President, according to my information we have business for the rest of the day. So you're free until 9 o'clock tomorrow morning.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: You may be seated. This court is now sitting in a **voir dire**.

TRIAL WITHIN A TRIAL

1232 Trial within a trial

Leading Seaman Bourassa Examination-in-chief

FIRST WITNESS) Leading Seaman
FOR THE) J.G.A.P. Bourassa.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Leading Seaman Bourassa, before we broke for a moment, I was asking you about an incident in which you were on a trimming team and you were trimming the boat. Could you describe that incident for the court? A. Yes, it's what they call a trimming party. There is three, four people in a trimming party. There is usually about five trimming party on the boat and everybody is in a different position on the boat. And what happened at that time is my trimming party was called to go up forward and, as we went to the control room, Lieutenant-Commander Marsaw was there and started to tell us, "Let's go, you. Hurry up. Get on with it. Fuck. Go on. Go on." And he made a motion to kick somebody in the rear end.

Q. And did you witness both the words and the motion? A. Yes, sir.

Q. Where were you in relation to the individual that he made a motion to kick in the rear end? A. I was about five or six feet behind him.

Q. And what were you as a trimming party doing at that point? A. My job with ... either to fill, was to move forward toward ... if I remember well, we're going in the accommodation space.

Q. The members of the trimming party, what rank are they? A. They are usually ordinary seaman to leading seaman.

Q. Do you recall the rank of the individual that would have been in front of you on this occasion? A. No.

1233

Trial within a trial

Leading Seaman Bourassa

Examination-in-chief

Q. How did you feel, going through the control room and being yelled at by the CO and seeing one of the members of your party being ...? A. I didn't feel good at all. It seems to me that it wasn't the place for it. Like, the way I look at it is whether we get to the accommodation space 10 seconds earlier or 10 seconds later, it's not going to put the boat in jeopardy. It's just, if the thing is done, and really slow and we actually have time to make it there. So I did not see the need for yelling and running through the submarine which is one thing we should not be doing anyway.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, this matter of this **voir dire** has arisen just fairly recently and I would seek the indulgence of the ... your indulgence in granting a 15 minute adjournment to the defence so we can determine our position before proceeding through cross-examination.

JUDGE ADVOCATE: Any objection from the prosecution?

ASSISTANT PROSECUTOR: No objection, Mr Judge Advocate.

JUDGE ADVOCATE: The court is adjourned for 15 minutes. Meanwhile, I would ask the witness not to discuss his testimony with anybody.

ADJOURNMENT: At 1400 hours, 12 October 1995, the court adjourns.

REASSEMBLY: At 1420 hours, 12 October 1995, the court reassembles and the accused is before it.

1234

Trial within a trial

Leading Seaman Bourassa

Examination-in-chief

JUDGE ADVOCATE: You may be seated.

DEFENDING OFFICER: Would you call the witness. Thank you.

JUDGE ADVOCATE: Thank you. You may be seated.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Leading Seaman Bourassa, this incident that you just described to the court about you being on the trimming party and what not, when did that occur again? A. I can't tell you exactly which trip it was, sir. If I remember well, it was during the work up, it was one of the work ups exercise that we had to do.

Q. Okay. So basically, you're on surface at that point? A. No, we're underwater, sir.

Q. Sorry? A. We are already underwater.

Q. You're under the water. What caused the trimming party to get going? You said something was about to happen. Were you about to surface? A. No, we're about to bottom, sir.

Q. To bottom, okay. A. We sit the nose of the submarine to the bottom of the ocean.

Q. H'm, h'm. Okay, and then there is a trimming party despatched to execute that, with helm, trim and all, planes? A. What it is, is that they move the water around in the submarine to try to get a perfect trim which is zero degree and they use people to move on the boat to help it because just moving water it's pretty hard. So if you take five people say 500 pounds then you just move them in the submarine it helps you to get a trim on the submarine.

1235

Trial within a trial

Leading Seaman Bourassa

Cross-examination

Q. So the trimming party then is a group of people that is displaced on board the submarine to affect the weight to help the operation? A. Yes, sir.

Q. To help the helms, the planes and what not? A. Yes, sir.

Q. Isn't that right to say that if people had to move and to be in position "A", to have the right inference, that they must get there, of course, I mean not necessarily running but they must get there? A. Yes, sir.

Q. Isn't that a fact that in that particular incident you were relating, as the trimming party was on the move, one of the individual stopped at the panel level at some point to discuss or to chat or something? A. No, sir, we were just going to our position.

Q. Okay, so what might have caused then the Captain to say, "Get moving", if in fact you are moving? A. I believe he just wanted us to get there ASAP, as soon as possible. I don't know I can't tell you exactly ...

Q. So you cannot recall somebody stopping to ... I mean, I'm not talking about here about engaging in a long conversation but don't you recall even somebody stopping, even briefly, to say something to somebody else, do you recall that at all? A. No, sir, because if he had stopped I would have just walked into him. Because when we move we actually move one right behind the other and we just get through.

Q. But you don't know who the individual was? A. I can't remember who it was because it's quite a few years ago already, sir.

Q. So are we talking '92 here, or what '90 ...? A. It's sometimes ...

1236

Trial within a trial

Leading Seaman Bourassa

Cross-examination

Q. It might have been as early as November, December '91? A. Yes, sir, it's sometimes in that time frame.

Q. Now, the individual that you say the CO took a swing at or ... a swing, a motion of a kick, where was he in relation to you? A. In front of me, about five, six feet in front of me.

Q. And where was the CO? A. He was on the side, like you got the attack periscope, the search periscope, and the individual was in between both and the Captain was towards the search periscope, in front of the search periscope in between both.

Q. Okay, and what did the Captain say? A. "Let's go. You, hurry up. Get on with it. Fuck. Move it. Move it." And he made a motion to kick.

Q. Hurry up. Now, did you tell that story to the MPs before? A. Yes, I did.

Q. Would you recall, is it possible that when you told the MPs the story you didn't use the word fuck in there, like the word fuck was not in the sentence you related to them, "Come on. Let's go. Move it"? A. No, I'm quite sure that yes the word was there.

ASSISTANT PROSECUTOR: Mr Judge Advocate, my notes of the interview clearly indicate that the word was there. I don't think it's fair to the witness to suggest that's not the case.

DEFENDING OFFICER: Well, I can ask the question, anyway.

JUDGE ADVOCATE: In the future, Lieutenant-Colonel Couture, when you refer - this incident has happened too often. When you raise a question like this, I would like you to refer to the transcript and show it to me before you ask the question. That should happen from now on until the end of this trial.

1237

Trial within a trial

Leading Seaman Bourassa

Cross-examination

DEFENDING OFFICER: Even if I want to refresh the memory of a witness?

JUDGE ADVOCATE: We have had too many incidents where, I mean, this exercise led the witness into confusion.

DEFENDING OFFICER: H'm, h'm.

JUDGE ADVOCATE: I don't want it to happen again.

DEFENDING OFFICER: So, that includes, of course, the video.

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER:

Q. And the movement that he made, could you describe it again? Describe it physically and describe orally what you're doing physically. A. Okay, it would have meant he would have had the attack periscope there, the search periscope there, I was about there and my friend was about there. We're moving on, okay, "Let's go. Get up. Fuck. Move it. Move it." And he made a motion to kick him. Whether he actually wanted to kick him or not, I'll never be able to say. He is the only one who knows that but he did make the motion.

Q. So he was moving his arms, signalling ...? A. Oh yes, "Move it. Move it."

Q. Move. Did he lift his foot as high as you just ...? A. Oh, yeah, he ... I believe like to kick him, it seems like. That's what it seemed like.

Q. Okay. You may sit down. Do you remember who else was present there? A. I can't tell you for sure by name but it would have been the panel watch

1238

Trial within a trial

Leading Seaman Bourassa

Cross-examination

keeper, first and second panel watch keeper, the trimming officer.

Q. No, that's useless. I mean we know the positions. I mean, people would have been at their positions. I'm talking about individual's names?

A. I can't tell you for sure.

Q. Do you recall a senior, a very senior officer, like a guest on board being present? A. The only people that would have been there present would have been sea training ... personnel from sea training.

Q. Now, you said that the only people that would have been there, like are you saying that they were or are you guessing? A. As long as I can remember, they would have been the ones that were there if it was actually while we were doing the work ups. I guess I can't remember exactly when it was. I bottomed only once with Lieutenant-Commander Marsaw. So if you look in the operational schedule of the OJIBWA at that time, there is a time we had to bottom for an exercise.

DEFENDING OFFICER: If I may have a brief moment. I'm not finished.

JUDGE ADVOCATE: Sure.

DEFENDING OFFICER:

Q. So you don't quite remember the time of year? A. No, sir.

Q. Like whether it was in October, November or December? A. No.

Q. And you're saying that in between October '91 and December '92 with the exception of three months you were away, that's the only time you bottomed with OJIBWA? A. Yes, it is.

Q. H'm, h'm. You didn't really believe that he tried to kick him, did you? A. I don't know. It's

1239

Trial within a trial

Leading Seaman Bourassa

Cross-examination

hard to say. He is probably the only one who actually knows whether he was trying to do so or not.

Q. H'm, h'm. But you, like as you saw it, it's not something that struck you as being, I mean, totally unreal, unacceptable, like to the point of going to report it to somebody? A. Actually, yes, it would have been but there is one thing you have to remember is that on OJIBWA at that time there was a lot of fear from the junior rates. Everybody was actually afraid. To my knowledge, everybody was afraid of Lieutenant-Commander Marsaw.

Q. So you were, of course, I take it?

A. Yes, I was.

Q. Is there something called the divisional system? A. Yes, there is, sir, but there is certain point where I have never believed in the divisional system. When you have a junior rate which tries to go against an officer. I'm sorry, it seems like most of the time it just gets covered. Nothing happens. So it seems safer for most of the junior rates to my knowledge to just ignore it, it's safer for our careers.

Q. That doesn't say much for the confidence you've got in the rest of your chain of command either, does it? A. I agree with you, sir.

Q. So you have no time for ... no confidence, no trust whatsoever in the higher echelon of the naval authorities here in Maritime Command? A. It depends on certain case, sir.

Q. But not in this ...? A. I'm sorry, but in this case that's my thinking.

Q. Isn't it more like it, that actually you didn't feel there was anything to be reported on because you didn't believe there was anything worthwhile reporting? A. No, sir. I believe it's just the fear because if I report something and it ends up just being

1240

Trial within a trial

Leading Seaman Bourassa

Cross-examination

covered up, I'm the one who is going to wear it for having reported it.

Q. Why are you here today? Are you fearful today? A. I was asked to come and I'll be honest with you I would not like to sail again with Lieutenant-Commander Marsaw after being here.

Q. Yes, that has little to do with my question though. Are you fearful to be here today?
A. Yes.

Q. You are? A. Yes.

Q. You look pretty calm. A. That's a look.

Q. H'm, h'm. So you thought that was definitely wrong but you did not report it just because you don't trust the system, period? A. Something like that, sir, in this, even ... if I don't, the junior rate trying to go against the senior officer, I actually never heard of the fact, me, like it happened without any cover-up.

Q. How long have you been in the Forces?
A. Nine and a half years, sir.

Q. And you must have met other junior rates or possibly other ranks from possibly the Air Force environment, the Army environment, are you familiar with those? A. Not really, sir.

Q. No. So you're more Navy? A. It's Navy, sir.

Q. Navy. You must have heard of junior rates in the Navy putting in the odd redress of grievance on subject or others? A. Yes, and it usually takes years before something happen.

1241

Trial within a trial

Leading Seaman Bourassa

Cross-examination

Q. H'm, h'm. So it's not unheard of, like to put a redress in or to raise a complaint? A. It does happen. I agree with you.

Q. Have you ever done it yourself in any circumstances? A. Yes.

Q. You have? A. Yes.

Q. When? A. Actually, after I left OJIBWA, I put a redress of grievance on my PER.

Q. And that you felt was okay. You did not fear about that? A. No, because I wasn't on the boat anymore.

Q. The Navy is small, isn't? A. ...

Q. The submarine squadron especially is very small. So could you explain to the court why you at one moment you have trust in the system and the next, or before on something else you didn't? A. If I put a redress of grievance on my PER, it will not affect the career of the person who wrote my PER. In this case, it might have implication on the career of the officer.

Q. Ha! So you are concerned about the effect on the career of Lieutenant-Commander Marsaw. So you wanted to be nice to him, basically? A. In a way, yes. I don't like the idea of destroying somebody's career.

Q. Okay. So although he may have done something wrong, you are afraid of him and, yet, you're not prepared to take any corrective action. So your body can get kicked in the arse and that's doesn't matter to you, does it? A. In this case, he did not actually get kicked. If he had got kicked it would have been something else. He did the motion to do it. I found it ... it's not his position to do it as the commanding officer. That's what my thought was. But I did not have the courage to go see somebody and talk

1242

Trial within a trial

Leading Seaman Bourassa

Cross-examination

about it because if all you're being told is, "Look it, body, it's none of your business." Then it's going to come to the ears of somebody else and eventually you will wear it. And it did happen in the past in the submarine community.

Q. Now, tell me, who was present - Sorry. You cannot recall any name of anybody else that could have witnessed that? A. It's over three years ago, sir.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

ASSISTANT PROSECUTOR: No re-examination, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. I have no questions. Would you please withdraw from the courtroom. Thank you.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Do you have any further witnesses to call?

ASSISTANT PROSECUTOR: No further witnesses, sir.

JUDGE ADVOCATE: Your case is closed?

ASSISTANT PROSECUTOR: Yes.

JUDGE ADVOCATE: Defence?

DEFENDING OFFICER: Yes, I would like to call Lieutenant-Commander Marsaw.

JUDGE ADVOCATE: Very well.

1243

Trial within a trial

ASSISTANT PROSECUTOR: Mr Judge Advocate, before the witness takes the stand, maybe we could clarify the purpose of him being called. I think we've gone through this exercise once before, it's simply to challenge the fact that the statement was made or the incident occurred. Our position is that goes to weight. As long as you've got some evidence before you that this occurred you should be satisfied. The threshold has been satisfied. And I think there is some evidence from the witness whether it's believed or not it's for the panel to determine.

JUDGE ADVOCATE: You're not really only at the statement here. You are at the act allegedly performed by the accused also, is it not the case?

ASSISTANT PROSECUTOR: Yes, we are, Mr Judge Advocate.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: As far as I recall the events my learned friend is referring to, it was I believe a ruling as to whether a particular statement had been made by the accused and whether it was admissible on the basis of relevancy. And you ruled on the basis of the Supreme Court decision, I believe it was **Parker**, was it, I forget the actual name, that the threshold in terms of the decision you have made was whether there was some evidence that the statement had been made. And having determined that, you did not indulge into the credibility of witnesses, of course, the accused seeing black and the witness seeing white. Then, you further concluded that it was admissible for various reasons that have nothing to do with this debate.

Now, I suggest to you that in term of a scenario like this, I believe the only way I can see this evidence being admitted would be under an exception to the rule of similar fact evidence. And, in such a scenario, I submit to you, as I have before,

1244

Trial within a trial

that your role as a judge advocate is different, and I believe I had ... and if I had not, I will, let me make sure I have the right case here, yes, I may have referred to it in a previous argument but I will now give you an actual copy of the case of the Supreme Court of Canada, **R. v. C.R.B.** This is reported at 55 C.C.C., (3d) at page 20, I believe.

Now, I would like to refer you at page 24 of that decision, and I do not intend to argue the whole theory and the whole concept of law on similar fact but at this point in time I would like to refer you to that page which deals with one and only one issue, paragraph 2, if you wish in that page:

"The difficulty of the trial judge's task and the amount of discretion entrusted to him or her is great."

And it goes on to the following quote:

" A judge presented with similar facts for the prosecution has to exercise an extraordinary complex of duties and powers. First, he has to assess not only the relevance but also the weight of the disputed evidence, although the latter task is normally one for the jury.

In other cases, it would be like it was, for example, in the other situation that you ruled on, as you, yourself, stated. The quote continues:

"Second, he must somehow amalgamate relevance and weight to arrive at 'probative value'. Third, and with due regard to the exclusory presumption, he has to outweigh that probative value, in some rough

1245

Trial within a trial

**balance if[sic] imponderables,
against any prejudice which the
evidence is likely to excite in the
jurors' minds.**

On that basis, Mr Judge Advocate, I suggest to you that the task that you performed, in that other decision my learned friend has alluded to, is completely different from the present task before you. It is quite clear that similar fact evidence is as a rule inadmissible and that's the first step that one must consider and then get into this process that I described to you to determine if at the end of the day it can be admitted. And, I suggest that in that light, the weight of the evidence becomes of prime importance as you have a weighing duty to do and that it would be appropriate and only fair that we can actually attack the weight of that evidence whilst that might not have been the case in the other scenario that the prosecution is referring you to. Those are my comments.

JUDGE ADVOCATE: Very well. You may call
your witness.

s.19(1)

1246

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

FIRST WITNESS) Lieutenant-Commander D.C.
FOR THE) Marsaw, is duly sworn.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. Lieutenant-Commander Marsaw, you are testifying here only for the purpose of this **voir dire**.

You've just heard Leading Seaman Bourassa telling the court ... or giving the court an account of some events that happened at an undetermined time between '91 and '92 according to his dates of posting. Could you tell the court whether this recounting of those events has triggered some recollection or has enabled you to pinpoint any event of that nature that might have occurred on board OJIBWA while you were there?

A. Yes, sir. I believe I know with some certainty as to the event he is speaking of.

Q. Okay. Could you inform the court as to, as far as you can link up the two incidents, tell the court as to what you believe that incident to refer to, when it took place and what actually took place? A. I believe, sir, that he is referring to an incident where the submarine bottomed on the 10th of December '91. We had left Norfolk a week prior after being in Norfolk to brief in this particular exercise. We then went into against the United States SSM. On the 10th, I gave the executive officer, then Lieutenant[N] Virgin, permission to bottom the submarine himself with my supervision behind him. So I of course was in there in the control room monitoring his activities and just ready to step in should he make a mistake. With me, at the time also, was a United States' Navy Commander by the name of Commander Oliver, a submarine command qualified officer, I'm sorry, not quite command qualified, awaiting his respective commanding officer's course. We were making preparations to start our descent to the bottom. At a particular stage in that evolution, you're about 50 feet off the bottom and you've done your best to trim the submarine with the major water movements and we have usually three but sometimes four

1247

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

trimming parties established for the absolute fine tuning that's required when the submarine is in fact making no weight at all. That's the state we're in and we descend from 50 feet. We then take on an angle ideally about three to four degrees bow down and descend to the bottom in that fashion. In order to maintain that angle, particularly as you get closer to the bottom, it's absolutely critical that you do not ... or that you continue to move weight as you descend such that you do not achieve a zero bubble meaning a perfectly even keel or even worse that you get it fouled up because the consequence would then be that your point of impact would be your rudder which is unprotected as opposed to the forward part of your keel which is in fact specifically designed to bottom. The XO is doing a very good job and the figure was continuing. The trimming officer ordered one of the trimming parties to move from aft to forward. This is a critical movement because when they move through the control room in this procedure they are actually passing over the longitudinal focus on the submarine. So it's more significant than say having somebody go from a position forward of the control room to a position further aboard, to the torpedo room, for example, moving across that pivot point is quite critical. As I said, the trimming officer ordered the party forward and they started to proceed through the control room. One of the members, Leading Seaman Mullin, a Marine Engineer, stopped and started chatting with one of his confederates on the panel. I saw this and said, "Come on. Get moving", and made an arm motion, probably, I can't say for sure that it was my left arm but I would certainly have made a motion to get them moving. My concern was that because we were getting close to the bottom by this point, any delays and movements especially across the focal point of the submarine, the focus of the submarine, would hinder the trimming officer in achieving his desired angle for the actual bottoming and could result in the worst case putting the rudder at the bottom.

1248

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Let me interrupt here for a moment. You just described what you did. Now, is that all you did or you've seen Leading Seaman Bourassa describing a motion of a kick. Could you tell the court whether this was done or not, what more you have done except what you have shown now? A. I made no motion to kick or simulate a kick.

Q. Now, could you tell the court as to why you've been able to link that account of Leading Seaman Bourassa to this one that you have just narrated. Is that ... what? A. It was the first bottoming that I have done in command and in permitting the executive officer to do it, I had to go through in my own mind very carefully how I would supervise such a function with the executive officer actually executing the function. The subsequent bottomings I did myself. Subsequent bottomings, in fact, were later in that year ... or later the following year, I'm sorry, in '92. The perspective of standing back and watching the XO do it also allowed me to monitor the rest of the team's performance. The fact that a man would stop to chat in performing a very delicate function, it doesn't ... it is in fact quite delicate at that point of the bottoming. At this stage, it upset me because the executive officer should have briefed the trimming party thoroughly and, in fact, he told me afterwards that he had briefed them. For this particular fellow, I guess, the point didn't get across that when he was ordered to move from one position to another it was to be done smartly and properly without delays.

Q. Okay, about the move, the way to move, Leading Seaman Bourassa mentioned, made reference to running or not being supposed to run and all that. What's your position on that? Can you inform the court as to what the actual drill is about that? A. You don't run but you move quickly, in a case like that you move smartly. It's in response to a direct order.

DEFENDING OFFICER: Those were my questions, Mr Judge Advocate.

1249

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

JUDGE ADVOCATE: Thank you. Cross-examination?

ASSISTANT PROSECUTOR: Mr Judge Advocate, I'd request a short adjournment prior to cross-examining the witness, approximately 20 minutes or so?

JUDGE ADVOCATE: Twenty minutes!

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate.

JUDGE ADVOCATE: I mean you had a 15-minute adjournment at the time the defence had one.

ASSISTANT PROSECUTOR: We had no idea ...

JUDGE ADVOCATE: It was time to consider if he would call a defence or not. Did you not use that period of time to prepare?

ASSISTANT PROSECUTOR: We were not advised that they would be calling any evidence at that time, Mr Judge Advocate, until the witness took the stand. Perhaps even 10 or 15 minutes if ...

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1454 hours, 12 October 1995, the court adjourns.

REASSEMBLY: At 1506 hours, 12 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

CROSS-EXAMINED BY PROSECUTOR

1250

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Do you recall testifying under oath previously in a **voir dire** during these proceedings?

A. Yes, sir.

Q. Do you recall agreeing with me that calling somebody a cunt in the wardroom could be considered insulting? A. Yes, sir.

Q. Why would it be considered insulting?

A. ...

DEFENDING OFFICER: Mr Judge Advocate, I appreciate my learned friend is in cross-examination but I don't see the relevancy to the issue of this **voir dire**, nor do I see how could this go to credibility. My submission is, and I mean, fair enough, the prosecution has a right to test the credibility of the witnesses and put questions that pertain to the direct examination but such a cross-examination in a **voir dire** is not a free practice to discuss matters that have absolutely no relevancy to the issue at bar which is presently whether or not the event as reported by Bourassa took place or not.

I will admit that the prosecution in this scenario has a right to cross-examine but I would ask that he be limited to the issue and on matters that may affect credibility as it relates to this issue. Otherwise, I mean, they could have a free practice to go over all the events of the mess dinner again as they did in the previous **voir dire** and go through the running of the boat for three years and so on and so forth which is totally, in my opinion, unreasonable and not permissible at law. We submit that in cross-examination of Bourassa we limited ourselves to the issue at bar and that the same should be required from the prosecution in this scenario where they are now cross-examining.

JUDGE ADVOCATE: Major Abbott?

1251

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

PROSECUTOR: I understand the matter before us, Mr Judge Advocate. We have one witness saying one thing and another witness saying another thing. Therefore, credibility is an issue. I can ask questions that attempt to impeach the credibility of the witness. As I understand it, in this particular motion, there is two main points of disagreement between the witnesses, the words that are spoken and any acts and gestures. I am able to ask questions that go to the issue of credibility as to whether or not Lieutenant-Commander Marsaw would say words, "Let's go. Get on the fucking move" or "Get fucking going" or words of that nature to determine whether or not he is credible or he is not credible. I would like to have a line in the cross-examination that allows him to test whether or not he is asserting that he is a person who wouldn't say these sorts of things or doesn't say these sorts of things, to test his credibility on whether his claim overrides Bourassa's.

With regard to the other aspect, whether he is capable of making acts or gestures of kicking, I'm allowed to get into other areas to test his credibility of whether he may have done that in the past. If I can't ask him whether or not he has used insulting language, whether he has sworn at subordinates or not, I don't know how I could ever possibly test his credibility when he asserts that he never said the things Bourassa claims he did.

JUDGE ADVOCATE: There is no doubt that you can test his credibility but as your friend said it's not the occasion here to do the whole cross-examination, to do a rehearsal of the cross-examination that you may do ... you might do if the accused chooses later on to testify. So please try to limit your cross-examination to what is in issue.

PROSECUTOR: Okay, I'll do my very best.

Q. Do you use personally insulting adjectives towards your subordinates? A. I'm trying to

1252

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

recall an incident where I might have. Never that I can recall within the context of an insult.

Q. And would you agree with me that calling somebody a cunt or an asshole or a fucking idiot or words of that nature would be considered an insult?

A. It could be, yes.

Q. So your testimony is that you would never refer to an individual as a cunt, an idiot, a fucking idiot or an asshole in the control room? A. I believe I said that ... in fact, if I have been asked that question, then I would have said that I certainly never have used words like that in the context of a personal insult or to intend it as such. If I can make myself clearer?

Q. Please. A. I recall when I was an ordinary seaman on the submarines, we had an audiotape on board that was held in the chief and petty officer's mess, an entertainment audiotape called "Derek and Clyde", they were both comedians, a very blue humour, and one of the lines that they used repeatedly in a skit was: "You fucking cunt ...", you have these two chaps talking to each other. For quite a long period afterwards, that became a very common expression throughout the submarine again, using it in a humorous fashion, and I've heard that expression used in a humorous fashion and in a camaraderie fashion but I've never used it as a vicious or insulting fashion.

Q. So, you've never used those words directly at subordinates to yell at them with a degree of anger in your voice? A. No.

Q. So if Lieutenant[N] Byrne has testified that you'd referred to him as stupid, slow and a liar, would you deny or accept that? A. ...

DEFENDING OFFICER: Mr Judge Advocate, we're back in the main trial and we'll never see the end of it. I mean, not that they could make use of it, but it

1253

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

looks as if the prosecution is just trying to set up the accused, not that I claim that he could make use of this, but it looks as if they are practising again for the main trial. Byrne has got nothing to do with the incident at bar, with the **voir dire**, with the issue that has to be decided now and I'm afraid I'll have to keep objecting because it's ... we would do the whole trial.

JUDGE ADVOCATE: I have the same concerns, although credibility is in issue. We all agree on that. But the problem is where to cut the prosecution in attempting to attack the credibility of the accused, to ... how should it be restrained? I have a problem with this line of questioning, Major Abbott, again, for the reasons your friend expressed. Again, you may ask questions to attack the accused's credibility but I will not let you proceed with the whole cross-examination of this witness as to everything that came up in this trial. It's not the place to do it. Try to limit it to the issue of this **voir dire**.

PROSECUTOR: I am in a difficult situation, Mr Judge Advocate.

JUDGE ADVOCATE: I know.

PROSECUTOR: Because the issue is credibility and we have a witness here who says that what the witness just before him said was wrong, in effect, the other witness is lying. So the only way that I know that I can attack his credibility right now, is to challenge it by saying, "You've heard other witnesses say other things. Are they lying as well?" I won't put it that way but, "Are they truthful or not?" Sooner or later, I have created through a line of cross-examination a point of credibility. He is saying that none of this ever happened and 25 other witnesses who said other things are completely in error. That's the best way and the only way that I know how to challenge his credibility. If that causes my friend some concern, I don't think I'm reliving my cross-

1254

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

examination because during the regular trial, it's going to be a lot longer. I think that's my friend's problem. He is the man who made the decision to put his accused on the stand. I don't think I should be unfettered in attempting to challenge his credibility.

I don't know how I - What questions could I possibly ask him that are limited within the specific fact situation to attack his assertion that what he says is right and what somebody else says is wrong without going to other instances and challenging and probing him and testing him. I know of no other way.

JUDGE ADVOCATE: Well, I'll stop you here.

Lieutenant-Colonel Couture, the problem is that credibility is in issue. I don't find this exercise necessary but I mean, I feel obliged to let your friend go on this aspect because credibility is an issue in this **voir dire**. Objection is denied. Go ahead.

DEFENDING OFFICER:

Q. So your response, Lieutenant-Commander Marsaw, to Lieutenant[N] Byrne's testimony under oath that you referred to him yelling stupid, calling him slow and a liar. Do you agree that that in fact occurred or do you deny it? A. I deny it.

Q. Do you deny that you've yelled at Lieutenant[N] Higginson by referring to him as stupid, fucking idiot and asshole? A. Yes.

Q. Do you deny that you've referred to individuals in a way described by Leading Seaman Pilon as stupid, fucker, asshole, incompetent and mother fucker? A. In front of subordinates?

Q. Yes. A. Yes.

Q. Do you deny the testimony of Lieutenant[N] Watt who says that you have referred to

1255

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

him as an idiot, a lazy shit or a lazy fuck? A. In front of subordinates, I don't agree with it. I'm sorry?

Q. Yes? A. Yes.

Q. The testimony of Ordinary Seaman Kohli that you've referred to him in the presence of peers as stupid? A. Yes.

Q. The testimony of Warrant Officer Shea that you referred to him in the presence of subordinates as an idiot or a piece of shit? A. Yes.

Q. Master Seaman Madgett's claim, that you kicked the radar room door off its hinges while yelling "Are you, gentlemen, going to fucking join us"? A. Yes.

Q. Petty Officer Parsons' testimony that you kicked or pushed in with your foot the radar room door on Leading Seaman Smyth and said, "I should kick you in the fucking nuts"? A. Yes.

Q. Lieutenant[N] Pokotylo who says that you've said to him, "If you don't get this watch sorted out, blood will be spilled"? A. I said words nearly to that effect, yes.

Q. Did you make a threat of physical violence to Lieutenant[N] Pokotylo? A. No.

Q. You did not threaten to spill blood?
A. That's not what that phrase means.

Q. What did you say to Lieutenant[N] Pokotylo? A. Words to the effect of, "Get the watch sorted out or blood will be spilled."

Q. You don't consider that a threat, do you?
A. No, I don't. It's a figure of speech.

1256

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. In your mind it's a figure of speech. Master Seaman Cumberland testifies under oath that you have referred to subordinates in the presence of others as fucking idiots, ordinary seamen, assholes, slow and useless, what would your response be? A. I presume "ordinary seamen" used in direction toward someone other than ordinary seamen?

Q. Yes. A. That's false.

Q. And you deny that you made a motion to kick the individual in front of Leading Seaman Bourassa? A. Yes, I did.

Q. And is that because you do not tolerate violence? A. No, the reason is it didn't happen.

Q. Do you use violence on subordinates? A. No, I don't.

Q. Did you kick Lieutenant[N] Higginson at the periscope during the counter drugs trip? A. Certainly not.

Q. Do you deny Lieutenant[N] Pokotylo's testimony that he saw you raise your right leg, angle it and trust it down with force against an individual's leg behind the blackout curtain while on the forward periscope? A. Yes, I do.

Q. And you deny the testimony to the same effect from Sergeant now Warrant Officer Shea? A. Yes, I do.

Q. Do you deny that you stated at that moment, "That will teach you to get the fuck out of the way"? A. Yes, sir.

Q. Do you know Lieutenant-Commander Craven? A. Yes, I do.

1257

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. Did you ever have occasion to have drink with him in the Empress room bar in Halifax, Nova Scotia, approximately in 1985? A. ...

DEFENDING OFFICER: Objection, Mr Judge Advocate. We're talking now way back and I can see what my learned friend is coming with, that has absolutely nothing to do, not even with this trial. And if I see him coming right, what he is trying to do is to bring what he considers bad character evidence and it's totally unacceptable. The witness has not put his character in issue and it's totally not permissible that he would go back to events ... I mean there is enough of a campaign of dirt being done as is, without starting to go so far back so patently against the rules of evidence.

JUDGE ADVOCATE: Is not your objection a bit premature? I have not even heard a question related to that. So far the question has been put to the witness, "Has he talked to Craven ..."

DEFENDING OFFICER: "... Craven at the Empress bar ...". It's just that I know what the event is.

JUDGE ADVOCATE: I understand.

PROSECUTOR: To allow the proceedings to continue, I'll ...

JUDGE ADVOCATE: What do you wish to establish by this line of questioning?

PROSECUTOR: I was going to ask him whether or not any acts of violence were committed by him on that occasion.

JUDGE ADVOCATE: Is it what you had in mind, Lieutenant-Colonel Couture?

DEFENDING OFFICER: Yes.

1258

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

JUDGE ADVOCATE: In what is it different to asking the witness if he has kicked anybody in the past as he was asked two or three questions ago to the last question?

DEFENDING OFFICER: The difference is when he says, "Do you deny having kicked Byrne at the periscope ..." or whatever the question was, "Do you deny having called so and so mother fucker? ... Yes, I do", "Do you deny this? Do you deny that?" This pertained to the charges. You have allowed. Okay, so that's it. He goes through that. When he says, "Did you ever do this or do that?, in the past, which has nothing to do even in the main trial, bad character evidence would not be allowable, surely is not within this **voir dire**. I mean, he is talking about an incident, I believe took place or allegedly took place, in 1985 or 1987. I forget the exact year. That's what he is leading to now.

JUDGE ADVOCATE: Do we have any evidence of that in the main trial?

DEFENDING OFFICER: Of course, not. Of course, not. It's an incident that took place, allegedly, in '85 or '87. That's evidence that would not have been admissible in the main trial thus far and could never be admitted in the main trial. Possibly, with a subject to good character, if it was put in evidence! But this is absolutely, I mean, it's got nothing to do not only with this **voir dire** but even with the main trial. What are we getting ourselves into now?

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: Without having the issue resolved and whether it happened, I'll move on to another question just to simply keep the thing going and then causing you to have to deliberate on a particular question.

1259

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

JUDGE ADVOCATE: Very well.

PROSECUTOR:

Q. Have you ever observed in the control room subordinates assaulting superiors? A. During my command or do you want me to go back?

Q. During your command? A. No.

Q. How about superiors assaulting subordinates in your presence? A. No.

Q. If you saw that happen, what would you do? A. It would depend on the severity. I would, if there was anything except the most ... I suppose if there is a scale on such a thing, if there was anything except on the most innocent side of the scale, I would have the offender disciplined.

Q. Why would it have to depend on the severity? If an assault is an assault, why would it have to go past a certain spectrum for you before you would discipline the officer? A. Well, if the abuse that you ... because I think what you're talking about was an accidental kick or say a push out of the way as you're rushing to get to a position in the control room or you've got a helmsman who has gone unconscious.

Q. I'm not talking about those situations, I ask you ...? A. ...

JUDGE ADVOCATE: Let the witness answer, please.

PROSECUTOR: Excuse me.

WITNESS: If you've got a helmsman, for example, who has fainted in his seat then, and you ... someone grabs him and pulls him out and puts in a conscious helmsman. I would think of that differently

1260

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

than if somebody deliberately assaulted another individual with malicious intent.

PROSECUTOR:

Q. So you're qualifying your answer, now you just got tripped up on because I asked you whether you had seen a subordinate or a superior assault each other, what would you do? You then said that it would depend on the severity of it. A. We're still in the realm of hypothetical, am I correct?

Q. Right and when I challenged you on it, now, you're trying to re-adjust your answer, aren't you? A. No, I'm not.

Q. Is it your opinion that if there are some assaults that aren't that serious, you'll let them go as commanding officer? A. Well, I would say that but not knowing the legal wording of the word "assault". Perhaps, when I use it as a colloquial term, I'm not meaning the same thing as you are. I think that might be the problem here.

Q. Okay. How do you define assault? A. I would think of it as a malicious attack but I can also imagine scenarios where I would use the same word to mean an unmalicious act.

Q. What about the intentional application of force without the consent of another, would that follow within your definition of assault? A. That sounds good, yes. But I ... in my use of the word I'm afraid I'm not that narrow.

Q. So if you saw somebody intentionally apply force to another without their consent, regardless of how hard or how soft, as the commanding officer, what would you do? A. If I saw someone tap someone just the way you tapped Captain Gleeson without his apparent intent ... or ascent, I would do nothing.

1261

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. How hard would it have to be before you'd jump in to do something? A. I would take a long time to think about that because it's never ... I've never seen that situation. But certainly, your tap on Captain Gleeson, I would ... I can't believe anybody would count that as an assault.

Q. So you would agree with me that there is sometimes where a person would apply force with intent against somebody else without their consent. That wouldn't cause you any concern? A. ...

DEFENDING OFFICER: Mr Judge Advocate, the witness is not being cross-examined as an expert witness in the matter of law. He has explained his reaction, his thought as a CO. But as my learned friend carries on, it sounds more like a cross-examination of an expert witness in a very specialized field.

JUDGE ADVOCATE: For what it's worth, Lieutenant-Colonel Couture.

PROSECUTOR:

Q. Have you ever observed Lieutenant[N] Reid and Leading Seaman Hunt punch each other when Lieutenant[N] Reid was on the trim seat and Lieutenant[N] Hunt[sic] was on the helm seat? A. No, I have not.

Q. And if you did, what would you have done about it in that sort of scenario? A. I would have raised charges.

Q. Why would you raise charges? A. Well, the way you've just described it, a superior and a subordinate punching each other. To me, the way you've described it, it's not equivocal at all.

Q. Were you aware if there is allegations of Lieutenant Kelk and Lieutenant[N] Elford have been assaulted on your boat when you were in command? A. I have become aware of those allegations.

1262

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. When did you first become aware of them?

A. I believe that's one of the things ... although I'm not sure their names were attached to it that early. I heard in December of '93 that there was an allegation that two officers had been hitting each other which I think, subsequently referring to those two officers. So December of '93 but again, I can't say that their names were certainly attached to it at that point. I think it was after that that I heard their names.

Q. Certainly, long after you were in command of the OJIBWA, did you ever hear about any of this, Kelk and Elford? A. Well, it's not that long after I had left, August 30th.

Q. But it was after? A. Yes, it was after.

Q. So you would never have spoken to anybody on OJIBWA at the time about whether Elford had or hadn't been assaulted or whether Kelk had been assaulted while you were alongside in Dublin? A. The Dublin ... what I did in Dublin was I had heard a rumour that Kelk had been smacked in some fashion. What I did in that case, because it was a rumour, was I told the executive officer to investigate and get back to me to find out if there was anything substantive to it.

Q. So the XO investigated? A. Yes.

Q. Did you have any investigation for Elford? A. Well, the Elford ... the Elford incident I didn't hear of his name being attached to an incident, again until I think it was December '93. I'm not sure if his name was even attached to it then. But subsequently ...

DEFENDING OFFICER: Mr Judge Advocate, I mean this is ... I mean this cannot even bear as to credibility. It looks to me like a fishing expedition. What we're asking the accused to tell the prosecution,

1263

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

what line of defence are you likely to take on those main charges and what should we do with our case and so on and so forth. That's what it looks like to me and I think it's got nothing to do with relevancy on this issue or even credibility.

JUDGE ADVOCATE: It does not. The objection is sustained.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

DEFENDING OFFICER: No, Mr Judge Advocate.

JUDGE ADVOCATE: I have no questions. Thank you.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Do you wish to call any other witnesses?

DEFENDING OFFICER: No. That's my case, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Is the prosecution ready to address?

ASSISTANT PROSECUTOR: Yes, we are, Mr Judge Advocate. We'll actually split our submission, although it won't be very lengthy, having done a little bit of research into the issue raised yesterday on MRE 4, similar fact, and Major Abbott is prepared to address that issue. So we'll break the matter up.

Mr Judge Advocate, the prosecution is seeking to admit the evidence of Leading Seaman Bourassa with respect to an incident which the accused attempted to have kicked a member of the trimming party and at the same time spoke words to the effect of, "Come on. Get

1264

Trial within a trial

Prosecution

Address

fucking moving", or words to that effect, in any event.

The prosecution would seek to admit this evidence on essentially two grounds. The first is that it's admissible as relevant evidence in the trial on the basis that it's an issue that has been made a live issue by the defence in the way it's cross-examined witnesses throughout the trial in raising the whole issue of, "Have you ever witnessed Lieutenant-Commander Marsaw use physical force or violence towards anybody in the control room?" And that question has been asked of numerous witnesses in cross-examination including this morning, Lieutenant[N] Pitman, was asked that question, I believe.

So a number of witnesses have been asked that question. It's been raised by the defence and made an issue in the trial. To now not allow the Crown to call evidence where in fact witnesses have seen the accused do so would, it is submitted, result in a situation where the defence can - to decide which witnesses they will question on that ground, giving the impression with the court that the accused has never done anything like this except for the allegations that are specifically contained in the charges. So, they can pick and choose which witnesses they will ask the question of. The prosecution is prohibited from asking the very same question of the witnesses and the court arguably is misled as a result of that.

So, on that basis alone, the prosecution would submit that the evidence of Leading Seaman Bourassa with regard to what happened is admissible and the words spoken are simply a whole part of ... a part of a whole transaction and it should be admitted.

JUDGE ADVOCATE: Part of the same transaction. Which transaction?

ASSISTANT PROSECUTOR: The transaction of rushing the people through the control room, moving to the front of the submarine, the motion of the arm, the

1265

Trial within a trial

Prosecution

Address

motion of the leg, the words spoken, "Come on, come on, come on. Let's go", et cetera. They are all part of what occurred according to Leading Seaman Bourassa on that occasion and the profanity used and the kick that he described is all part of that event.

JUDGE ADVOCATE: So everything that was said or done by the accused during all the time he was in charge should be admissible under that principle.

ASSISTANT PROSECUTOR: No, Mr Judge Advocate, I think it's admissible because the defence has made the whole issue of whether or not he has a propensity towards violence an issue of the trial. It's admissible on that ground. And they've asked whether or not the accused ... or the witnesses have ever seen the accused kick, push or punch anybody in the control room on OJIBWA and we're simply requesting that we be permitted to ask the same question of the witnesses.

The second ground that we would submit the evidence is admissible is on the basis that it is similar fact. It's similar fact evidence with respect to the assault charge against ... in charge number five, I believe it is, against Lieutenant[N] Higginson, and it is also similar fact with respect to charges three and four, verbally abusing persons under his command. And again, we made the argument yesterday, Mr Judge Advocate, again we'd refer you to MRE 22 which allows similar fact evidence to be put before the court where its purpose is to establish either state of mind or identity.

JUDGE ADVOCATE: So under which one do you rely here?

ASSISTANT PROSECUTOR: We would be relying on both, state of mind and identity, with respect to this evidence. The kick, the defence has raised the whole issue of, "Was it Lieutenant-Commander Marsaw who actually administered the kick to Higginson at the table when the curtain was down? Did he see or didn't

1266

Trial within a trial

Prosecution

Address

he see?" So identity is clearly in issue with respect to that charge. And also, state of mind, again this is a situation where defence in cross-examination has questioned witnesses on what the circumstances were when these alleged words were spoken, when personally insulting adjectives were used towards members of the crew, et cetera. They questioned witnesses in an effort to establish that when this occurred there was some kind of dire emergency on board that required immediate response or something would happened to the safety of the submarine.

So again, that state of mind issue is here as well. And the accused is, according to Leading Seaman Bourassa's evidence, is attempting to kick a member of the crew and using profanity as they run through the control room or move quickly through the control room to again, without any evidence that there is any kind of emergency and the accused himself has taken the stand and said, "It's a delicate operation." But he wasn't suggesting that the submarine was in danger. He simply said it was a delicate operation. That was his evidence.

Under 22(2), before similar fact is admissible of course there has to be established a reasonable suspicion through the evidence. It would be the Crown's position that that has been established through the evidence in the main trial of Lieutenant[N] Byrne, Warrant Shea, Petty Officer Conrad, Lieutenant[N] Higginson and Lieutenant[N] Pokotylo with respect to the actual kicking and numerous other incidents on the witnesses, excuse me, with respect to the issue of the use of profanity and verbal abuse. So I think 22(2) has been satisfied. We would submit it has been satisfied.

So on the basis of Rule 22, the Crown would submit that the evidence is also admissible on that ground, again with respect to state of mind and identity. The Crown maintains its position as was argued yesterday that even if you find that we don't fall

1267

Trial within a trial

Prosecution

Address

within the scope of MRE 22 with respect to this evidence, whether it'd be the kicking portion or the verbal portion, that under MRE number 4 you can and should consider the relevance with respect to similar fact evidence within the common law. The concern was raised yesterday in this regard given the accomplice evidence rule and the decision of the Court Martial Appeal Court on the applicability of that rule despite developments in the common law. Major Abbott is prepared to address you on that matter and perhaps assist you in determining whether or not you can refer to the common law and similar fact under MRE 4.

JUDGE ADVOCATE: Is it your intention to address on 22(3)?

ASSISTANT PROSECUTOR: On probative value and prejudicial effect?

JUDGE ADVOCATE: H'm, h'm.

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate, I can certainly touch that issue. Again, I would come back to the argument made yesterday with respect to balancing probative value and prejudicial effect. I think, in going through that process, I think the Supreme Court of Canada decision in **C.R.B.** is certainly helpful. Also in **Robertson**, I believe, is the other Supreme Court of Canada decision you were provided with yesterday. And, in fact it is a balancing process. There is no requirement, as pointed out yesterday, for the act that's seeking to be admitted, to be precisely or exactly the same as the allegations which the accused faces.

As stated by, I believe, it was Madam Justice Wilson in **Robertson**, the fact that the similar fact evidence and the allegations are strikingly similar, is a matter that makes it easier for the court to admit but it's certainly in no way a requirement before similar fact evidence can be admitted. In fact, the name similar fact, is a misnomer in that regard but the

1268

Trial within a trial

Prosecution

Address

evidence can and should be admitted where the balancing of probative value and prejudicial effect falls on the side of letting the evidence in. And, again the Supreme Court of Canada has made clear that that process is done to a sliding scale.

You've got to look at all of that evidence and consider whether or not on that sliding scale the probative value and the prejudicial effect are such that the probative nature of the evidence makes it admissible and it would be the Crown's submission that it's clearly admissible in this case for a number of grounds. Again, state of mind and identity are relative issues with respect to the charges. The whole issue of rebutting defences and possible defences that the accused may raise and appears to have been raising through the nature of the cross-examination they have been entering into. The defence as such, again, his mistaken identity, knowledge, **mens rea**, did he actually have the **animus** to commit the act, et cetera, et cetera?

And, again, those are set out in the memo you were provided with yesterday, the various grounds which could be listed - excuse me, for one minute, I'll just pull out a copy of that memo and identify the areas that we would be relying on. Again, Mr Judge Advocate, this is found at paragraph 38 of the memo and we would be relying on this evidence again to prove the intent of the accused, the identity of the accused, malice by the accused, again, evidence, simply evidence to establish what the surrounding circumstances of the events are in establishing a regime of fear. And we heard Leading Seaman Bourassa's evidence that there was a state of fear on board that submarine, at least as far as he was concerned and people feared the commanding officer, Lieutenant-Commander Marsaw, on board that sub. Again, it moves into the defence again to rebut the defences and, again isn't this for a lawful purpose, mistake, lack of **mens rea**, knowledge or ignorance, accident for mistake and identity or, again

1269

Trial within a trial

Prosecution

Address

credibility of a complainant and that obviously is in issue as well.

The accused sat in the witness chair on two separate **voir dire**s and denied numerous statements which witnesses have come before the court under oath and said have occurred. So it is a question of credibility that the accused takes the witness stand in the main trial and gives similar evidence that credibility would clearly be in issue. So under MRE 22(3), the balancing of probative value and prejudicial effect should be dealt with on a sliding scale as set in **C.R.B.**, and when using that sliding scale, it is submitted that you have to consider all the relevant and possible uses of that evidence in the main trial. It is submitted that clearly, it is admissible on that basis and the probative value outweighs any prejudicial effect to the accused. The accused, his counsel are in a position to cross-examine the witnesses, challenge their credibility on the evidence they give in this regard.

That's essentially all I would - Again, the whole regime of fear issue comes back to another line of questioning that has been adopted in cross-examination which deals with the whole issue of, "Why didn't you complain? There is a grievance process. There is a chain of command. Why didn't go and tell anybody what was going on?" And again, the regime of fear is such that witnesses were not prepared to do that. At least, that's their evidence and there is a number of cases out there that talk about the relevance of regime of fear in explaining why a witness did not make a complaint or a complainant did not complain earlier in **R. v. Littlejohn**. I don't have a cite for you but it is dealt within the brief and I can certainly get a copy for you. It is a case that deals with that very issue on regime of fear and the admissibility of the evidence to establish that. Unless you have any other questions, Mr Judge Advocate, I'd let my friend speak to you on the issue of MRE 4 and the applicability of the common law.

1270

Trial within a trial

Prosecution

Address

JUDGE ADVOCATE: I have another one.

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate.

JUDGE ADVOCATE: I would like to have your views on the following matter. To what degree should I be satisfied that the incident, as reported by Bourassa, occurred?

ASSISTANT PROSECUTOR: It is the Crown's submission, Mr Judge Advocate, that you need only ... it's the same threshold that would have been used in the previous **voir dire**. You need some evidence that in fact it is there and there is no requirement for you to make a finding on credibility. It's the Crown's submission that the portion of the **C.R.B.** decision read by my friend, I believe it's on page 24 of the decision, does talk about weight but weight in the sense - Maybe I should get a copy of the decision to make it ... I need the correct quote.

The court in **C.R.B.**, it is submitted, is talking about weighing the evidence in the sense of weighing the probative value against the prejudicial effect. There is no requirement for the court to actually be satisfied on either a balance of probabilities or beyond a reasonable doubt that an incident did or did not occur. The weighing process that's dealt with in this case is just that. If the event occurred and, assuming that it did, the court must then weigh whether or not the admission of that evidence into the main trial is such that ... the probative value of that evidence is such that it outweighs any prejudicial effect it would have to the accused if it were admitted at the main trial.

JUDGE ADVOCATE: Yes, but if I am not satisfied that the incident occurred, I mean, how can I make that decision?

1271

Trial within a trial

Prosecution

Address

ASSISTANT PROSECUTOR: Again, Mr Judge Advocate, it's the Crown's submission that you just need some evidence to the fact that it occurred and the evidence is Leading Seaman Bourassa's. He sat here and said this is what I witnessed. The defence is in a position to cross-examine him and challenge his credibility on that matter, should you admit the evidence. It's a matter for the jury to weigh, excuse me, the panel to weigh if you admit it, that the accused takes the stand and denies the incident ever occurred as he did here this afternoon, then the panel can weigh that and if they want to reject that evidence then that's their decision but it is submitted that's not a matter you have to resolve at this point in time. I don't think the **C.R.B.** decision requires you to resolve it at this point in time.

JUDGE ADVOCATE: Very well. Thank you.

PROSECUTOR: Thank you, Mr Judge Advocate, in trying to persuade you that some common law body of evidence concerning the similar fact law can be relied upon through Military of Evidence, Rule 4, I would just like to refer to the **Vetrovec** case which has been mentioned before, 1982, 67 C.C.C. (2d) at page 1.

JUDGE ADVOCATE: That's the one I had in mind yesterday and I couldn't remember the name.

PROSECUTOR: We couldn't remember the date. I thought it happened in 1950 and my boss thought it happened in 1987. So it's 1967. If I could begin by turning to MRE 22, paragraph (1) agrees that the very first sentence - I should back up, I guess. Actually, I apologize. I'll begin with MRE 83, the accomplice evidence rule. Paragraph (1) reads:

" When evidence is given by a person who may be an accomplice, the judge advocate shall ..."

1272

Trial within a trial

Prosecution

Address

So, it's mandatory wording, "... **the judge advocate shall ...**", and then I look at page 18 of the **Vetrovec** decision, the first full paragraph that states:

" I would point out that my comments have been limited to situations in which corroboration is required as a matter of common law. The *Criminal Code* specifies a number of instances in which corroboration is required, and defines the nature of the corroboration which must be supplied: see for example, ss. 139 and 195. ... The statutory requirements would, of course, be controlling in cases coming under any of those sections."

So this is a common law decision about accomplice evidence and in that statement itself on page 18 it says that the statutory requirements would, of course, be controlling in cases coming under any of those sections. For our purposes, under MRE 83, we have mandatory wording that the judge advocate must refer to Rule 83 when the evidence is given by a person who may be an accomplice. So it's mandatory, an all encompassing paragraph or rule.

Turning to the wording for MRE 22. First of all, you'll note that you will not see mandatory wording. In subparagraph (1) of 22 it says:

"If it has been established that the act referred to in the charge was done by someone, but the state of mind or identity of the actor is in doubt, the prosecutor may, subject to subsections (2) and (3),

1273

Trial within a trial

Prosecution

Address

**introduce evidence of another act
or other acts ..."**

Our argument would be that it is a perfectly valid rule but it only encompasses those moments where the state of mind or the identity of the actor is in doubt. What do we do when we're confronted at trial with a situation where a live issue has been created by the defence that doesn't deal with identity or state of mind? What do we do if there is an issue raised by the defence that challenges the credibility of the witness by saying why didn't you complain? So there is a whole bunch of other areas under the emerging law of similar fact that allow similar fact evidence to be introduced that have absolutely nothing to do with the two grounds that are cited in MRE 22.

Our line of argument would be: What do we do when we have a case that deals, for example, with evidence of another act or other acts that goes to the issue, not of a state of mind or identity but to rebut a live issue raised by the defence? Why didn't anybody complain? The accused is a person who does not tolerate violence. The accused is a person that no one else has seen commit acts of violence. Rule 22 in those situations isn't all that encompassing and we would submit we are therefore bound by MRE 4 which allows to tap into the very developing and dynamic common law area of similar fact evidence. Those would be our arguments as to why our memo that we've presented does outline the common law rules concerning the similar fact evidence, could be incorporated through MRE 4. Thank you.

JUDGE ADVOCATE: Thank you.

Lieutenant-Colonel Couture?

DEFENDING OFFICER: I still, as I did yesterday, yesterday I believe it was, still adopt the position that as you had enquired and invited the prosecution to address the rule, Military Rule of Evidence 4

1274

Trial within a trial

Defending Officer

Address

does not apply in this particular case because 22 is there. Whether, I mean, 22 is more limited than the developing common law practice, is one situation of fact. Nonetheless, nonetheless, and whether it might be convenient for the prosecution to have access to the wider range, apparently, of similar facts as recognized by common law, again has nothing to do. It appears that 22 is there and ... it does not appear ... 22 is there and it does rule that these are the two exceptions. And in fact, one must look as well at Rule 20:

" Except as prescribed in this Division, the prosecutor shall not introduce evidence of the general bad character or reputation of the accused, or of another act or other acts of the accused similar in essential respects to the act charged."

Twenty is absolutely unequivocal. It is a clear prohibition that such type of evidence shall not be presented and for you, of course, as Judge Advocate, it's your duty to enforce the rule. So you shall not accept that sort of evidence unless or except as prescribed in this division. Well, 22 states the condition under which similar fact may be admitted. So in that respect, I suggest you are ... it is not open to you in these proceedings to expand beyond the realms of Military Rule of Evidence 22 because Rule 20, that excludes it.

The prosecution, toward the end of their presentation, were referring to the reign of fear and why people did not report. What does the fact that Bourassa may have seen or believed he has seen Lieutenant-Commander Marsaw making a motion that looked like a kick? What does it have to do with the fact that people did not report? Of course, we are attacking the credibility of the witnesses of the prosecution which is our right in any event and we say, "Okay, if something so terrible happened, why didn't you report

1275

Trial within a trial

Defending Officer

Address

it?" That's fair ball and you have allowed those questions. Now, what would this particular evidence, if it ever existed, of course it is contradicted but even if it existed, what would that do? What help would it be vis-a-vis this proclaimed dilemma the prosecution say they have? It has nothing to do in our respectful opinion.

A second matter raised by the prosecution is there is a live issue of, although they have appeared to have been reluctant to use the word "character", I understand that's what they are talking about because the defence would have asked Captain ... Lieutenant[N], should I say, Cassivi, "Did you see Lieutenant-Commander Marsaw kick or push somebody on board?" Yes, I asked a question similar to that. That is not exactly the exact words but something along that line. So this is not raising character of the accused, not whatsoever. And I will expand a little more on this and I will refer you, Mr Judge Advocate, to the case of **McNamara**. I have an extract here. As you may be aware, **McNamara** here is a decision of almost 400 pages. This is an Ontario Court of Appeal. It is reported at 56 C.C.C. (2d) starting at page 183 and it goes up to 516. So the book will be available to you here should you need to look at other portions of this humongous decision but the character evidence portion is related in those pages, 343 to 356, mainly character evidence and similar facts.

I do not intend to go too much in depth at this point in time on this but I will draw your attention, for example, at page 346 of that decision, the second paragraph, it starts with "**Mr. McLeod ...**" So the second sentence of that second paragraph goes:

"... Manifestly, an accused does not put his character in issue by denying his guilt and repudiating the allegations made against him, nor by giving an explanation of

1276

Trial within a trial

Defending Officer

Address

**matters which are essential to his
defence."**

And in so stating the Supreme Court of Canada relied on some English law, **R. v. Ellis**, which is cited a little below in that page. I will not read it but I invite you, if you so feel inclined, to look at page 347 the first, let's see, the first two big paragraphs if you wish, give example as to where ... situations as to where good character was deemed to have been raised.

Then, I would invite you at page ... to read possibly pages 348 and 349 where an interesting analysis is made as to what is ... what situation arises when the so-called extrinsic evidence of good character is called and the difference when the accused is called and you will see that at page 349.

The first paragraph indicates that there is a difference between the two and what is discussed in that particular decision, as you will see, Mr Judge Advocate, is that when for example ... it sets the limit as to what the prosecution can do in various scenario but even in the scenario where it's so-called extrinsic, good character evidence is called, that is, by means of for example cross-examination of witnesses or calling other witnesses, that will result in the set of rules applying. The prosecution can do so much only in those circumstances. Then if the accused himself when testifying brings his own good character evidence then there is another set of rules yet that apply. We haven't crossed that line yet. Clearly, the accused has not testified as to character whatsoever in this trial. He has not testified, period.

So, I submit to you that a reading of this case in the **McNamara** will clearly confirm in your mind, if you need to be more convinced, that on the basis of the evidence presented before you, clearly, there has been no evidence of good character. Yes, we have touched upon a great number of fields. It is not by preference. The defence in this situation is facing a debate that has been made extremely wide by the prose-

1277

Trial within a trial

Defending Officer

Address

cution and all offences occurred on board, and as far as we are concerned, all our questions were directed to people as to whether they had seen people.

We didn't call evidence or we did not try to adduce through prosecution witnesses as to how Lieutenant-Commander Marsaw behaved two years ago in that social party or what was his reputation. And then, clearly, you would have realized, if we had attempted to bring the reputation of the accused in evidence because the rules concerning that in our very own military rules of evidence are quite clear. I believe it is Rule 21, so it is, of the Military Rule of Evidence:

"The accused may, by cross-examination ..."

Et cetera, that's para (1), introduce good character. What is interesting, of course, is para (2) of that same rule:

"A witness testifying as to the character or reputation of the accused may

(a) report the general reputation of the accused among those who know him or would know about him respecting traits of his character relevant to the charge; and

(b) state his personal opinion of the general character of the accused ..."

The prosecution in this case has been adducing evidence left, right and centre, about fear, leadership, what sort of leader is he, and so on and so forth. We take the position that whatever line of cross-examination we have adopted so far has not in anyway or did not even get close to demonstrate charac-

1278

Trial within a trial

Defending Officer

Address

ter. So that would not be admissible under that. What else? How could this evidence be admitted? Similar fact, as suggested by the prosecution, I have given to you, Mr Judge Advocate, the decision of **R. v. ...**, one of those with initials ...

JUDGE ADVOCATE: **C.R.B.**

DEFENDING OFFICER: **C.R.B.**, that's the one, and I do not intend at this point in time to review. This case makes a long review of the English law and then into Canadian law and so on. Our position is quite simple. Whilst there might be ... the prosecution may have met possibly Military Rule of Evidence 22(2), that maybe there is a semblance of evidence, that's 22(1) actually ... (2) actually, a suspicion, yeah, and basically our position on the evidence adduced before you today, both Bourassa and the accused, and I'll make reference to the evidence in the main trial too. Actually weak evidence, we view it as the prosecution trying to pad weak evidence on matters such as kicking incident and so on and so forth, with weaker, I mean, the act, even if one took for granted and even if the evidence of Bourassa was not contested.

Let's assume for a moment. Bourassa's evidence is not contested. Where does that leave you with - What does that leave you with, Mr Judge Advocate? It leaves you with an act that is extremely ambiguous because the witness admits himself that he doesn't know whether it was intentional, whether he tried to kick or anything. He described a very ambiguous act. So, what would this bring to this trial? Are we going to bring all kinds of little pieces of acts, of words and try to get the court to say, "Well, for all those reasons, I mean, he must be guilty." I mean the evidence that might form the basis of similar fact evidence certainly must be reliable, must be relevant and, as you commented at some point during, I believe, it was either an argument earlier to the prosecution, for that matter anything the Captain of a submarine or the boat may have done over the three years would become relevant.

1279

Trial within a trial

Defending Officer

Address

I mean, this must be stopped somewhere, Mr Judge Advocate. We talk about intent. We talk about live issues. We talk about rebutting defences. It's all nice but at the end of the day, what is the relevancy of that? What is the reliability of that? We cannot ... the prosecution cannot purport to pad evidence with ambiguous, at best, facts like those. Alternatively, of course, we take the position that was the best possible scenario, ambiguous evidence.

The other scenario is that this evidence is clearly contradicted and whilst the prosecution claims that you don't have to assess credibility and the matter of weighing the evidence, does not include weighing credibility, I would respectfully disagree with that inasmuch as to weigh the evidence you must take into account all the factors. Okay, some of the factors that would not involve the testimony of the accused would be Bourassa's. What capability does he have to recollect? He does not recollect the year. He does not recollect who was present. He does not recollect nothing basically but this gesture.

That alone would suffice to render this piece of evidence totally unreliable and unworthy to be presented to the court. On top of that, the accused takes the stand and says, "That didn't happen", and his credibility on this issue has not been challenged, not even a single question was put to him by the prosecution on the event that we're trying to look at today, not a single one. And the fact that the accused may have denied having said this or that to one and another at the end of the day does not affect his credibility.

So even more reasons to be extremely careful with this, an intent to rebut a defence. It is that particular part of the argument of the prosecution, Mr Judge Advocate, I invite you to be extremely careful about that sort of argument. You have adopted that argument in a number of occasions in respect of other arguments made by the prosecution. However, I would

1280

Trial within a trial

Defending Officer

Address

submit to you, most respectfully, that as this trial is unfolding, the danger inherent into accepting those what I call pre-emptive strike becomes more and more apparent because, where the prosecution cannot successfully or reasonably argue relevance, they always fall back on the position, "Oh, it might be relevant to credibility. It might be relevant to rebut a potential defence", and so on and so forth.

I suggest to you, Mr Judge Advocate, that this is very dangerous to adduce that much evidence or have that much evidence just in case what if the accused doesn't take the stand? All that evidence is supposed to be introduced in case we need it for credibility for the accused, in case the defence attempts to argue in the final address having or not called the accused, that there was no blameworthy state of mind or whatever. What if we don't argue anything of that. What if the accused doesn't take the stand.

Then we end up with a load of evidence which sole purpose was to be admitted, was to be admitted to possibly contradict the accused and he hasn't taken the stand and that evidence can be highly prejudicial to the accused and yet, it's there. And I can see other situations, possibly, that will develop in this trial where maybe the prosecution will attempt to adduce other type of evidence or other pieces of evidence that may be similar to this one today. Where do we stop? I mean, how much? How careful must the prosecution be in preparing for the eventuality the accused testifies? If the accused testifies, if something happens that was totally unforeseen by the line of the conduct of the defence, reasonably unforeseen, they may have a right to rebut.

I suggest to you with the greatest respect that admitting evidence that only amounts to pre-emptive strike represents an enormous danger because if it's not ... if it's only relevant to credibility, what if? I mean, it just cannot simply be admitted with that in mind and, of course, I go back to similar fact

1281

Trial within a trial

Defending Officer

Address

issue that I had started on, weighing the evidence available here and, maybe, before you ask me the question, I will submit to you that it should be at least on the balance of probability, the standard, not some evidence because, quite clearly, I'm quite prepared to accept, and I guess I have very little choice as it is the Supreme Court of Canada, that some matters can be so introduced if there is some evidence. But I suggest to you that this matter of similar facts is totally different. You have a role to play and, in fact, they make a direct reference to a task normally performed by the jury in that quote that I gave you.

So you have to weigh and I would say ... I wouldn't go as far as talking about beyond a reasonable doubt. If you feel so inclined, Mr Judge Advocate, you may do so but I would suggest that a balance of probability would be the minimum required as to the existence even of the facts. And, of course, after that, there are the other steps of weighing. Does the fact exist? Does the evidence exist on a balance of probability? It's weight and then it's weight against the potential prejudice.

So for all those reasons and unless you have any questions, Mr Judge Advocate, these are my representations and I suggest that this evidence should not be admitted.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: If I may have one minute, Mr Judge Advocate, to respond quickly to **McNamara** and do some housekeeping. We had submitted to you earlier on a written memo on similar fact evidence. We omitted to have it introduced as an exhibit and for the record I would like to do so at this time.

JUDGE ADVOCATE: Okay. In a **voir dire**, I have no problem with that. Do you?

1282

Trial within a trial

Defending Officer

Address

DEFENDING OFFICER: In fact, it is interesting that my learned friend thought of that because I was thinking the same thing this morning early, whether this shouldn't be made an exhibit.

PROSECUTOR: All I can say is I've introduced written submissions in courts martial before and they have been introduced as exhibits.

DEFENDING OFFICER: Yes, I had that thought, the ...

PROSECUTOR: To have something that's a record for the court because our arguments are much more elaborate in writing than we have in terms of our oral representations.

DEFENDING OFFICER: I have no objection to that.

JUDGE ADVOCATE: Very well.

PROSECUTOR: We misquoted ourselves too referring to the regime of fear cases by referring to the **Littlejohn** case. It's actually in paragraph 38, it's the **Benson** case and **Littlejohn** as well but **Benson** also. My friend talked about the **McNamara** case under MRE 20 arguing that we were bringing character evidence. A quick answer is paragraph 2 of our memo states the law, similar fact evidence is an exception to the character evidence rule. We in no way at any time have argued in this submission that we were trying to bring in character evidence. Similar fact evidence is legally distinct from character evidence. It's an exception to that rule. So the long submission from my friend in MRE 20 and **McNamara** we would argue is completely irrelevant for this matter.

In terms of his comments on the what if the pre-emptive strikes, the rebuttal evidence. The case law is clear in paragraphs 56 and 57 of our memo as to when we're allowed to raise these matters. We don't

1283

Trial within a trial

Prosecutor

Reply

have to wait until defence counsel talks about in them in their closing arguments. If they arise naturally given the facts of the case, the law surrounding the essential elements or any issues that arise in cross-examination, there is then live issues that we can get into and that's elaborated in paragraphs 56 and 57. Thank you, sir.

JUDGE ADVOCATE: "VD 19-1".

MEMO OF CASE LAW PRESENTED BY THE PROSECUTION IS MARKED "VD19-1".

JUDGE ADVOCATE: In view of the time of the day, I won't ask you to wait around here for my decision to be given. You may go to your respective other duties and I will give my decision at 9 o'clock tomorrow morning, if that is agreeable to you.

DEFENDING OFFICER: That's perfectly so.

AT 1625 HOURS, 12 OCTOBER 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 0915 HOURS, 13 OCTOBER 1995, THE COURT RE-OPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: The purpose of this **voir dire** is to determine the admissibility of some evidence offered by Leading Seaman Bourassa related to a kicking motion that the accused would have made towards a member of his crew while on board HMCS OJIBWA.

The evidence consists of the testimonies of Leading Seaman Bourassa and Lieutenant-Commander Marsaw, the accused in the present case. Leading Seaman Bourassa described an incident which allegedly happened on board the submarine at an unknown date while the trimming team was present to assist in the bottoming of the submarine. The witness said that for no apparent reason, the accused started yelling and asking the crew to move towards the bow of the subma-

1284

Trial within a trial

Judge Advocate

Decision

rine and in the process of doing so he made a motion to kick a member of the crew. The witness described the incident and made a demonstration in court.

As to the accused, he described that particular exercise during which this incident took place and denied any kicking motion towards a member of his crew.

He related that one of the members of the trimming team suddenly stopped, that he told him to get moving and explained his reasons for doing so.

The prosecution argues that the evidence sought to be admitted is admissible, first, because it is relevant to an issue before the court as such a line of questioning has been adopted by the defence since the beginning of this trial and, secondly, that it is admissible under the exception of similar fact evidence.

The relevance of the kind of evidence before the court in this **voir dire** which could prove commission of another crime or discreditable acts can never be in doubt. Care must be taken to ensure that the similar fact evidence which is tendered for this alleged incidental purpose really possesses the probative force claimed. If it does not, then it may amount to nothing more than evidence of bad character. As decided in **Sweitzer v. The Queen** (1982), 68 C.C.C. (2d) 193, a Supreme Court of Canada decision, I quote:

" Before evidence may be admitted as evidence of similar facts, there must be a link between the allegedly similar facts and the accused. In other words there must be some evidence upon which the trier of fact can make a proper finding that the similar facts to be relied upon were in fact the acts of the accused for it is clear that if they were not his own but

1285

Trial within a trial

Judge Advocate

Decision

those of another they have no relevance to the matters at issue under the indictment."

After weighing the evidence and its potential prejudice I arrive at the conclusion that I do not find the similar facts relied upon in this **voir dire** to be sufficiently reliable to establish with sufficient certainty that they are in fact the acts of the accused. Although I accept and apply the concept of the necessity of only some evidence being sufficient, I do not find here such evidence to have the sufficient probative value when compared with the prejudicial effect of admitting it.

It is therefore my decision that the evidence sought to be admitted by the prosecution is not admissible. Mr Officer of the court, would you please invite the members to come back.

TRIAL WITHIN A TRIAL IS TERMINATED

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Would you please call the witness back to the chair.

s.19(1)

1286

Leading Seaman Bourassa

Examination-in-chief

TWENTY-SIXTH WITNESS) Leading Seaman P.A.
FOR THE) Bourassa.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good morning. Leading Seaman Bourassa, yesterday before we broke, I had asked you to describe Lieutenant-Commander Marsaw's leadership style, and now I would just like to continue with my examination along those lines. How would Lieutenant-Commander Marsaw react when he wasn't happy in the control room or unhappy with somebody's performance in the control room?
A. He would usually be screaming and yelling.

Q. Can you tell me what types of words he would use when he would be screaming and yelling at individual?
A. "Fucking idiot", "fucking asshole", "you fucked up".

Q. What would the volume of his voice be like when he was addressing people in that manner?
A. He would sound angry.

Q. He would sound angry. But what about volume, what would his volume be?
A. It would be loud. Like everybody in the control room would be able to hear him.

Q. Were you ever subjected to that type of treatment while on the helm?
A. Yes, once. I was on the helm and I had a hard time to keep depth. I was off depth and he told me, "Get the fuck out of there." And if I remember well it was Petty Officer Stone that was there and he said, "PO, take his place." And he told me not to come back until I knew how to drive. It was pretty hard - I was learning.

Q. How did you feel?
A. Bad. I don't think that was the place to be yelled at. I was trying to

1287

Leading Seaman Bourassa

Examination-in-chief

learn. I had a hard time which is trying to learn to drive a submarine underwater is actually pretty hard. It is normal not to be on depth when you're learning.

Q. Did you witness other people on board being treated in this way? A. Yes, it happened once on the bridge. I was on the bridge lookout and Lieutenant[N] Elford was there and there was a ship coming at us. It was at night. To my knowledge he had read the night order and he wasn't sure what to do so he asked the captain for advice and the captain said, "What are you, fucking idiot? You didn't read my night order?" Then he gave him the advice.

Q. How did the captain communicate?
A. Over 20 Mc which is heard in the sound room, radar, control room, captain's cabin, radio and the bridge.

Q. How frequently did Lieutenant-Commander Marsaw act in the way you described? A. Sir, it would be every day, every second day, whenever there was something stressful going on around, then we could wait to have him scream at somebody.

Q. And based on what you observed, how did other members of the control room react to that type of treatment? A. Nobody really like it. We were rather stressed and nervous. Like nobody knew, "Okay, who is he going to yell at next? Who is going to make a mistake?" And being nervous we made more mistakes than we would have probably made otherwise.

Q. I understand you spent approximately two months on board ONONDAGA in 1992? A. Yes, sir.

Q. And your CO on that occasion was Lieutenant-Commander Truscott? A. Yes, sir.

Q. Can you contrast the atmosphere in the control room on ONONDAGA with the atmosphere in the OJIBWA control room? A. On OJIBWA pretty much everybody was nervous and stressed, while on ONONDAGA it was

1288

Leading Seaman Bourassa

Examination-in-chief

just smooth. There wasn't any yelling. Everybody just ... it just seemed like everybody was doing his job because we actually liked doing the job for the captain.

Q. Did you have occasion while you were on ONONDAGA to interact with Lieutenant-Commander Truscott? A. Yes. We were on the surface. I was at the helm. And he came around and he asked, "Did you ever dive a submarine?" I said, "No, sir." So he knelt in between George and the trimming officer's seat and he started to explain me every one of the order and what he expected me to do diving the submarine.

Q. How did you do? A. Bad. Like I am supposed to go down to 75 feet and come back to 53 feet. I went to 120 odd feet and came back to 43, 45 feet. And all he said is, "I guess you fucked up, Leading Seaman." And that was it.

Q. What was his tone of voice like when he made that comment? A. Just pretty much the same way, "I guess you fucked up." Like I am learning and I didn't do it properly. That was it.

Q. Were you ever taught by Lieutenant-Commander Marsaw how to carry out an evolution when you were under training on OJIBWA? A. Not that I can recall.

ASSISTANT PROSECUTOR: Those are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

1289

Leading Seaman Bourassa

Cross-examination

Q. When you were on the helm for Lieutenant-Commander Marsaw, when you started off, who was sitting on the trim seat? A. I can't remember. I believe it was one of the Part 3 officers.

Q. And is it usually the commanding officer's job to teach people what they should do on the helm or anywhere else or do you have training people who are responsible to oversee your training? A. It depends what's going on, sir.

Q. It depends what's going on? A. Like in that case, diving the submarine, the captain is the man in charge. So in that case, he's the one to explain to me what he would do. It was his choice to let me dive the submarine on ONONDAGA. He could have just said, "No, you don't have enough experience yet."

Q. And with the other occasion with Lieutenant-Commander Marsaw, after you were relieved did the training officer or anybody else responsible for your training went to see you and sat you down and explained to you what went wrong and how things should be done? A. No. Because there wasn't any explanation to give in that case. It was just, I was off depth which I knew. But when you are learning to drive a submarine underneath the water you always have the current going around; you have the weight of the submarine; the water moving; people who are walking through; and it makes a difference on how the submarine will react. So it's just experience.

Q. Experience and nobody ...? A. The more time you pass on the helm the better you get at.

Q. And nobody with experience would come to you and teach you tricks on what they observed, saying you had problem keeping a trim because you were fighting a current or whatever? A. They would do it when we're sitting on the helm as you do it and as the event happens.

1290

Leading Seaman Bourassa

Cross-examination

Q. But at the time was that officer doing that? A. No.

Q. He wasn't doing that? A. No. At the time ... like the trimming officer was sitting and Petty Officer Stone, if I remember well, he was on the fire control console.

Q. And the incident with Lieutenant[N] Elford on the bridge, is there any set way written down how to make a report to the captain on a specific contact whenever you are on the surface, whereas the bridge officer would have a format to pass it on down? A. Yes, there is, sir.

Q. Did he use that format? A. I can't be sure, sir, because like I'm lookout up there - I don't know the exact format in which everything is supposed to be passed to the captain.

Q. So you basically don't have any idea whether or not what he passed down made sense or not? A. No, I don't know, sir.

Q. On his reactions when things went wrong, can you recall any specifics or mistakes that were made that would trigger his reaction? Were they big mistakes, small mistakes? A. On the bridge or on the helm, sir?

Q. No, not these two, others. When you were asked initially how he would react when ... what would be ...? A. It would usually be ... sometimes it would be just a small mistake that somebody would have made. Other times it would have been something more serious.

Q. And the small mistake, would it be a mistake on a day to day occurrence on driving the submarine, something that should have been known, something that is repetitive? A. Sometimes it would have been like the panel watchkeeper wouldn't raise the

1291

Leading Seaman Bourassa

Cross-examination

periscope fast enough. So he would be yelling at him to hurry up.

Q. When you say "yelling", that occurs in the control room. What is the noise level in the control room? A. There again it depends, like there is noise but depending on what we are doing there is more or less noise. Usually when the captain is in the control room pretty much everything becomes quiet. Like everybody usually shuts up and listens to what the captain says.

Q. I am not talking only about voices. I am talking about ventilation, valves, pressure being pumped from one end to the other? A. Yes, but there is not enough noise to have to yell.

Q. And the person who is actually operating the periscope up and down, where does he stand? A. He stands at about 10 to 15 feet from the forward periscope.

Q. And is he close to the panel? A. Yes.

Q. What constitutes the panel? What do you call the panel? A. You have the blowing panel. You have the main vent. You have all the HP air gauge are there.

Q. High pressure and ...? A. High pressure gauge ...

Q. These are all the valves ... A. The hydraulic pumps.

Q. ... that the panel composed and comprises of valves all over and he is standing right next to that? A. Valves and switches and stuff like that. Yes, sir.

Q. And when you were relieved from the helm, you said you felt bad. Do you think you were ill-

1292

Leading Seaman Bourassa

Cross-examination

treated in that circumstance? A. Yes, I think so. I think that I should have been told what my mistake was and I could have been just told ... really the helmsman.

Q. Would that ill-treatment or treatment by Lieutenant-Commander Marsaw would have been sufficient for you to raise an official complaint or a grievance?

A. It could have probably be enough, yes.

Q. Did you? A. No, I did not.

Q. Why not? A. Because I don't really believe in the system when a leading seaman goes against a senior officer. It's usually what happens and it just get shoved back. So he's the captain, he told you to do that, you just have to do it and that's the end of it.

Q. Yes, but if he's wrong and you were right, you just don't believe in the system because of the rank or you don't believe in the system because he was actually wrong but the system will not do anything?

A. Because the system will not do anything. It will just be covered up.

Q. It would be covered up? A. Yes.

Q. You have no confidence whatsoever in the divisional system? A. When you have a junior rate going against a senior rate or an officer - no, I am sorry, sir.

Q. Have you ever tried before? A. Yes, I did.

Q. In what circumstances? A. I did a redress of grievance for a PER.

Q. For a PER? A. Yes, and I was told "Leave it as it is and we will get you back next time."

1293

Leading Seaman Bourassa

Cross-examination

Q. Is the captain the one who writes your PER? A. He has input on my PERs. He is the last one to sign my PER.

Q. No, but who actually observes you? Who is your divisional officer? A. My PO, who at that time, was Petty Officer Blair. There was Lieutenant[N] Soper which was my CSC officer. There was Petty Officer Stone which was the CSC coordinator. Then there's the captain and he's under the Captain's command.

Q. So he actually didn't make the decision on your PER. He just reviewed it? A. The PER went back to the submarine with what my concerns were and it came back to the squadron commander. Then I went to see the squadron commander and he told me, "Leave it as it is, we will get you back next year."

Q. What about safety on the submarine. Did you have any concerns at any point about safety? A. Yes, I did for a while. Like on one occasion there was, in the "F" ends there's the bibs pressure isolation valve which is in the after ends, there was something wrong with it and it ordered shut. And that valve went to the gauge which told you how much air was in it. And by having that valve shut we didn't know how much air was in it anymore. So if there was actually something wrong with it we had to open that valve and we could have found out that - hey, there is no more air left in it.

Q. And did you know actually what was wrong with the valve? Was it wrong with the valve or was there a leak above the valve? A. I never knew exactly what was wrong with it. All I know is that the valve had been ordered shut.

Q. Did you relate that incident to the military investigator when you were interviewed? A. Yes, I did.

1294

Leading Seaman Bourassa

Cross-examination

Q. Any other problems with safety that you related? A. Not really. I'd have to think about it.

Q. Did you relate a problem with the battery? A. Yes, at one time. Yes, now that you're talking about it. Yes, at one time the chief electrician even refused to sail because he did not trust the battery. There was something wrong with the battery and since nobody really knew the battery that well because it was a new battery, he considered that it was not safe to sail with the submarine and we did sail a few times anyway and one day the chief elec said, "No, that's it. I'm not sailing."

Q. Who was the chief electrician? A. It was Petty Officer Rollin.

Q. Petty Officer Rollin. And the new battery, what type was it? A. Varta.

Q. A Varta battery. Is it possible that the ... A. It is a French battery or a German battery.

Q. Is it possible that the OJIBWA was fitted with Varta batteries in its last refit prior to Lieutenant-Commander Marsaw's taking over command of the submarine? A. Yes, it did. It was like we had a refit, the Varta was installed in it, and then I can't remember who was the captain at the time because when I got back Lieutenant-Commander Marsaw was already the captain. But I believe it was Lieutenant-Commander Davidson.

Q. So was it under Lieutenant-Commander Davidson or Lieutenant-Commander Marsaw that the problem arose with the battery? A. Under Lieutenant-Commander Marsaw.

Q. And there was no problem with the battery under Davidson even though he took the submarine before Lieutenant-Commander Marsaw with that battery on? A. The thing is that nobody knew exactly how the

1295

Leading Seaman Bourassa

Cross-examination

battery worked and after working for a while there was problem in the way that the battery would charge and discharge to Petty Officer Rollin's eyes. And because he wasn't sure how it works, that is why they ended up having the factory coming down and inspect every cell of the battery. And it ended up - yes, the battery was good.

Q. Did you relate as well an incident about the escape hatch ... or not an incident but problems with the escape hatch? A. I remember one time they had to take the crane to open the escape hatch, the upper lid of the escape hatch. It wouldn't open. It had not been open for a long time I guess, where there should be regular maintenance done on it.

Q. Have you had the opportunity to read an article that was published in the Chronicle-Herald in December of 1993 concerning allegations of unsafe diving and treatment on OJIBWA? A. I don't read the Chronicle-Herald, sir.

Q. So you never read the article? A. Not that I remember of. I might have heard about it but I don't remember reading it.

Q. Were you contacted by Mr Dunlop, the reporter who wrote that article? Were you contacted by the media? A. No.

Q. Do you recall when you were interviewed once with the investigators in relation to this matter? Not the exact date but the year, month? A. If I remember well it was sometime last summer. Like not just the past one but over a year ago, because at the time I was still on OKANAGAN.

Q. Summer of '94? A. Something like that, sir, yes.

Q. Did you work often in the control room?
A. That was my watch position.

1296

Leading Seaman Bourassa

Cross-examination

Q. Your watch position? A. So being one in two, I was there for say four hours, for eight hours - say in a day. Because the way it works it's six hours on, six hours off.

Q. Uh, huh? A. And on your six hours on you have a break every once in a while. So during a rotation usually you're going to do one hour on the command display console, one hour on the helm and one hour either off or one hour doing some further training in the control room.

Q. In the incident with Lieutenant[N] Elford on the bridge, you said that he used which communication circuit? A. 20Mc.

Q. Is it the only one that goes to the bridge? A. No, there is also 18Mc A.

Q. What about 1Mc? A. 1Mc is the whole submarine.

Q. So it would go up there as well?
A. Yes, it would.

Q. What about 12Mc D? A. Those are channels that are not usually used. The ones that are mostly used is 20Mc and 1Mc, if there is something of emergency occurring, or 18Mc A which is in between the helmsman, the plot table and the bridge. Like that's the regular route.

Q. And how would you know that he used 20Mc ... you are up there, everybody's down there?
A. Because 18Mc A is usually used by the helmsman. Usually he's the only one who uses it. It's in between the helmsman and the bridge. On the plot table they're going to use 20Mc so that the captain can hear everything which is going on. And it's rather awkward for the captain to go over to the helm and using 18Mc A. And I have pretty much never saw the captain changing

1297

Leading Seaman Bourassa

Cross-examination

the channel to go from 20Mc to 18Mc A to talk to the bridge.

Q. But you heard it up there, but you don't know exactly if it was 20? A. No. I am not sure whether it was 20 or 18Mc A. But since Lieutenant[N] Elford talked to the captain on 20Mc, usually the captain would answer him on 20Mc.

Q. And when Lieutenant-Commander Truscott explained to you what he expected, then you dove the submarine, and you missed and he told you that "You fucked up, Leading Seaman". Is that usual for the captain to address his people like that? A. Knowing Lieutenant-Commander Truscott - no, it was not. Like he just threw that away as it happened.

Q. It happened? A. I screwed up - I screwed up.

Q. So it is a throw away phrase that once in a while would pop up? A. In an occasion like that - yes. But the difference is that he would not be yelling it. He would just state a fact.

Q. He would just state a fact? A. Yes. "You fucked up."

Q. So do you see a difference between stating a fact in a normal tone of voice or stating a fact in a higher tone of voice? A. To my eyes - yes, it makes a big difference. If you just go in a normal tone of voice, you just told the guy, "Hey, try to do better next time". While if you are yelling or screaming it shows anger on top of it and I know that I don't like to be screamed at.

Q. And the chief electrician, Petty Officer [PO1] Rollin, do you recall if it was him or someone else? It could have been another chief electrician? A. I'm pretty sure it was.

1298

Leading Seaman Bourassa

Cross-examination

Q. You're pretty sure it was? A. I'm pretty sure it was Petty Officer[PO1] Rollin. Yes.

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, just a few seconds. These are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Leading Seaman Bourassa, my friend was asking you about the comment that Lieutenant-Commander Truscott made to you. Did Lieutenant-Commander Truscott ever call anybody in his control room an idiot or an asshole? A. No, sir.

DEFENDING OFFICER: Mr Judge Advocate, we have not objected all the time on leading questions. But again this is clearly leading and even in re-examination the prosecution should not.

JUDGE ADVOCATE: Objection sustained.

ASSISTANT PROSECUTOR:

Q. Leading Seaman Bourassa you have been serving in the Navy for nine and a half years or so? A. Yes, sir.

Q. On a ship or a submarine who has ultimate responsibility for everything that takes place on board? A. The captain.

ASSISTANT DEFENDING OFFICER: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Questions from the court? No questions.

1299

Leading Seaman Bourassa

Re-examination

Thank you, Leading Seaman.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Who is your next witness?

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate. Our next witness will be Leading Seaman Hunt. But in light of your decision that was rendered earlier, if we could have a short adjournment it may be possible to actually eliminate this witness. But I need a few minutes to consult.

JUDGE ADVOCATE: Certainly. How long do you need?

ASSISTANT PROSECUTOR: Ten minutes would be fine. Well, let's say 15, Mr Judge Advocate.

JUDGE ADVOCATE: To be on the safe side.

ASSISTANT PROSECUTOR: Yes.

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 0945 hours, 13 October 1995, the court adjourns.

REASSEMBLY: At 1000 hours, 13 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Are you ready to proceed?

ASSISTANT PROSECUTOR: Yes, we are, Mr Judge Advocate. The next witness is Master Seaman Szucs.

s.19(1)

1300

Master Seaman Szucs

Examination-in-chief

TWENTY-SEVENTH WITNESS) : Master Seaman
FOR THE) T.C. Szucs is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good morning. Could you state your full name, please? A. Tony Chandler Szucs.

Q. And would you slowly spell your last name? A. S-Z-U-C-S.

Q. Your service number is :
A. Correct.

Q. And you've been a member of the Canadian Forces for approximately 15 years? A. Yes.

Q. And a submariner since 1992? A. Yes.

Q. And in May of 1992 you joined the OJIBWA. Is that correct? A. That's correct.

Q. Who was your commanding officer on board OJIBWA? A. Lieutenant-Commander Marsaw.

Q. And you remained on board OJIBWA from May '92 until November '92? A. That is correct.

Q. And when you left OJIBWA I understand you were posted to ONONDAGA? A. That is correct..

Q. And your commanding officer on ONONDAGA was Lieutenant-Commander Woodburn? A. Correct.

Q. And you're currently posted to ONONDAGA?
A. That is correct..

Q. What was the atmosphere like in the OJIBWA control room when Lieutenant-Commander Marsaw

1301

Master Seaman Szucs

Examination-in-chief

was present? A. It was withdrawn. People remained quiet. They didn't carry on the way I have seen on other submarines.

Q. How would you describe Lieutenant-Commander Marsaw's leadership style? A. Domineering. He liked to have his way. He was forceful in his orders.

Q. How would Lieutenant-Commander Marsaw react in the control room if he was unhappy with somebody's performance? A. He would pace back and forth violently. He would swing his arms and he would shout obscenities if things didn't go as planned.

Q. You stated he would shout obscenities. What types of words would he shout? A. Things like, "You're an idiot. You don't know what you're doing. Get the fuck off the helm" or whatever he was doing at the time, or the person was doing.

Q. Did you ever witness him address, for example, the helmsman in that way? A. Yes, I have.

Q. And can you give us an example of situations such as that? A. One incident I recall was Sergeant Shea. He was the helmsman at the time and he had problems keeping depth and he called him an idiot and told him to get off the fucking helm.

Q. What was his tone of voice when he made that statement to Sergeant Shea? A. It was loud and aggressive in nature.

Q. Did you ever observe him use derogatory adjectives towards officers on board? A. Yes. One instance, as I recall, there was an officer on the after-periscope. He let the handles of the periscope slop upside and it made a clicking sound and he said that if he hears the periscope handles slop upside the periscope again he will slap him upside the head.

1302

Master Seaman Szucs

Examination-in-chief

Q. Based on what you observed on board OJIBWA, did Lieutenant-Commander Marsaw's style affect the way the crew did their job on board? A. I believe so. As for myself I was training at the time. I didn't want to make the mistakes because I didn't want the verbal harassment to be thrown at me. So I was a little bit hesitant on making the mistakes that I should have made as non-qual at the time.

Q. How was the morale on board OJIBWA?
A. People had a low esteem of themselves.

Q. And then in November of '92 you went to ONONDAGA, is that correct? A. That is correct.

Q. Contrast the morale on board ONONDAGA with that on board OJIBWA? A. One hundred percent better.

Q. While on ONONDAGA, did you ever witness Lieutenant-Commander Woodburn use personally insulting adjectives towards a member of his crew? A. No, I did not.

Q. Do you recall being interviewed by the military police in December of '93? A. Yes, I do.

Q. Prior to the MPs interviewing you, did you impose any conditions on them with respect to that interview? A. No, I did not.

Q. Did you advise them that you wish to be a confidential informant? A. No, I did not.

Q. What were the circumstances under which you were interviewed? A. My wife works at the Military Police, Dockyard Detachment, and the investigators knew her from her past service record with the military police and they knew of my background on submarines and specifically on the OJIBWA. One day I came to pick up my wife after work and they asked if they could speak to me and that was my first interview.

1303

Master Seaman Szucs

Examination-in-chief

Q. Would you wish to sail on board OJIBWA again under Lieutenant-Commander Marsaw? A. No, I would not.

ASSISTANT PROSECUTOR: Those were all my questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. You said that the atmosphere when Lieutenant-Commander Marsaw was in the control room was withdrawn. People remained quiet and were not carrying on like on other submarines. Could you describe that in more detail. A. Okay.

Q. What changed? A. What changed?

Q. What changed? A. Okay. On the ONONDAGA people were more happy. They knew that they weren't going to be verbally degraded if anything was to happen. If they were doing their job, it's common for a person to make mistakes -okay? We're not all one hundred percent subjected to not making mistakes. And if you did that on the OJ at the time, then you were verbally harassed and some people were withdrawn. They didn't want to make suggestions to that kind of nature.

Q. Was there any kind of talk going on that was not work related? People having talks about what's coming up, the next port, next ...? A. Well, I'm sure there was - Yes.

Q. And that would be the part that would become quiet. People would stop talking about what

1304

Master Seaman Szucs

Cross-examination

they were going to do at the next port and then would just concentrate on the business at hand, is that ...?

A. Not only that. They would ... doing their duty, like the helmsman and the trim seat and the second panel during their course of duties, you know like, if they were under training they wouldn't ask advice, that kind of ...

Q. Why wouldn't they ask advice? A. Well, if they were asking advice and it was overheard and it was something that they should have known then they would have been addressed.

Q. And you said yourself that the effect it had on you was that you didn't want to make mistakes. You hesitated to make mistakes. When you learn the process, isn't it to learn not to make mistakes?

A. Joining a submarine from a surface ship there is a lot of differences. You've got to go through a submarine package. You've got to learn the equipment. It is completely different than on a surface ship. And if you went in with an attitude that, "I am going to make mistakes, that is my job, I am going to learn it, and everybody is going to learn the proper sequence." To learn something you've got to make mistakes. And from what I saw in the control room, I didn't want to make any mistakes so some of the things that I should have done I didn't.

Q. So when Lieutenant-Commander Marsaw ... my understanding is that he was not in the control room 24 hours a day. Would that be an opportunity then to make mistakes? A. Lieutenant-Commander Marsaw, in his cabin, monitors 20Mc and that is the reporting for radar to control.

Q. And when you join the submarine and you don't have your training package done, who supervises you in your training? A. I was double-banked with Leading Seaman MacGillivray. So I had the opportunity to ask him advice if I required it.

1305

Master Seaman Szucs

Cross-examination

Q. Did he give you advice? A. Yes, to a certain extent. But what I'm referring to when I say "make mistakes" it's going on 20Mc and making reports to control. And if I was to make a wrong report, by that time Leading Seaman MacGillivray couldn't stop me, it would be in the hands of control already.

Q. And when mistakes like that were done, when your shift or your watch was over, did anybody approach to teach the right procedure - anybody that was above you. I'm not talking about Lieutenant-Commander Marsaw, but your direct supervisor approach after watch and say, "Listen, you did this wrong and here's how you're supposed to do it"? A. Yes, they did approach after the watch was done, but by that time it would have already been occurred.

Q. And did that happen frequently or was that on sporadic occasions? A. Not for me. But I brought that up as an instance for what happens in control.

Q. What was the problem with the slapping of the handles on the periscope? A. I don't understand the question?

Q. You said the officer who was on the periscope slapped the handles? A. Yes. Well when you're going to lower the periscope the handles, they're like spring loaded, when you put them up to about 45 degrees they will go up without any assistance from a person. And what they did was they slipped out of his hands and they hit the side of the periscope.

Q. And would that periscope be used by officers on a regular basis? A. Yes, it would.

Q. It would have been known to him that the handles would slip or could slip? A. Well, it depends on the operator who is operating it at the time.

1306

Master Seaman Szucs

Cross-examination

Q. Do you recall who it was, who the operator was? A. Lieutenant[N] Gensey.

Q. Gensey. You said that morale was low because you relate that to people having low esteem of themselves. What other factors in your experience would affect morale? A. On the OJIBWA or in general?

Q. In general in the submarine environment?
A. Well, low morale, not being able to purchase things through the canteen; keeping the submarine atmosphere in general. The CO is the overall ruling authority and he sees something that needs to be done to boost up morale he should do it. And that's from everything that pertains to the submarine - how he conducts himself, how people conduct themselves in the control room and throughout the boat.

Q. And in between yourself and the captain, what system is in place to look after morale and to look after day to day running of the submarine? Is there a divisional system? A. Yes, there is.

Q. You have heads of department? A. Yes.

Q. You have the XO? A. Yes.

Q. Were any of these concerns ever addressed to these people? A. On my behalf I've reported to Leading Seaman MacGillivray, which was my supervisor while I was under training. I don't know if he took it any further than that. Again I was under training so I wasn't familiar with the workings of a submarine at that time.

Q. You don't know if anything went up to the captain? A. No, I don't.

Q. Have you ever witnessed, on ONONDAGA, Lieutenant-Commander Woodburn raise his voice at someone? A. Raise his voice? Very rarely. He does not shout obscenities, though.

1307

Master Seaman Szucs

Cross-examination

Q. And obscenities, have you heard that from anybody else in a submarine - officers, non-commissioned members? A. No.

Q. Nobody swears in the submarine environment? A. Not giving orders. Like if you're in the messes and things like that, when you're watching TV and things like that - yes.

Q. So while giving orders, no matter what the emergency or whatnot, the captain, it's your testimony, would be the only one to use obscenities? A. That I recall.

Q. That you recall. The incident with Sergeant Shea it is that you related, called him an idiot and took him off the helm. What was the submarine doing at the time? What kind of evolutions were you going through? A. I cannot recollect.

Q. You cannot recollect. But what was the problem, because he couldn't keep depth? A. Yes. He was probably snorting at the time and he wasn't keeping the required depth and the periscope or the mast was getting flooded.

Q. Getting flooded. What kind of problems does that create? A. A vacuum in the boat.

Q. And what's the usual drill when that happens, do you know? A. Well, if the submarine is at periscope depth then it's just ... he can just bring the submarine up. Like you're only going to get the vacuum for a while unless it's corrected.

Q. Unless this is corrected. Keeping depth, for the helmsman, how important is that performance of the submarine depending on the evolutions that you're doing? A. I don't have first knowledge on that.

Q. You don't have first knowledge on that. Did you ever see Lieutenant-Commander Marsaw push someone off the periscope for safety reasons? A. For

1308

Master Seaman Szucs

Cross-examination

safety reasons? I don't know if it was a safety reason but I've seen him push people off the periscope.

Q. Do you recall approximately when that was? A. Month-wise or ...?

Q. Or the closest you can get, or month-wise or during a specific operation, any event that would be going on that would trigger your memory? A. I believe it was the Baltimore trip.

Q. The Baltimore trip. And what was the purpose of that trip, do you know? A. Exercise.

Q. Exercise. Could it have been in the fall of '92 in local waters? A. I don't recall.

Q. Did you have an opportunity to read an article that was published in December 1993 in the Chronicle-Herald? A. No, I did not.

Q. You did not? A. Can you give me ...?

Q. Have you, in December, read an article pertaining to unsafe diving practices and allegations of abuse on board a submarine? A. This is the first I've heard of that particular article. I do not recall.

Q. Were you contacted by a Mr Dunlop, a reporter for the Chronicle-Herald? A. No, I was not.

Q. And you didn't contact him as well?
A. I did not.

ASSISTANT DEFENDING OFFICER: Just a minute, Mr Judge Advocate.

Q. During that period from May '92 to November '92 that you were on board OJIBWA, how many riders ... did you ever go out to sea with OJIBWA when there were no riders on board? Riders for, depending on the

1309

Master Seaman Szucs

Re-examination

mission, SOCT, exercises? A. During my period on OJIBWA we did have riders on board.

Q. During the entire period or part of or can you remember specifically? A. We did a "sneaky" and we did have riders on board for that.

Q. By "sneaky", you're referring to the DRUG OP? A. Yes.

Q. Okay. A. And we had riders on for that. Down south I can't recall if we had riders on or not.

Q. Down south with ...? A. To Baltimore.

Q. To Baltimore. Okay.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Riders on board OJIBWA, would those riders have been of superior rank, in all cases, to Lieutenant-Commander Marsaw? A. With their position? Can you ...?

Q. Would they be superior to Lieutenant-Commander Marsaw in rank: commanders, captain[N]? A. Yes, because sometimes we took on SM1 for training purposes.

Q. In all cases though, would all riders have been superior? A. No.

Q. How often was SM1 on board? A. I can recall of two incidences.

1310

Master Seaman Szucs

Re-examination

Q. For how long? A. Maybe three weeks, tops.

Q. My friend asked you about Lieutenant-Commander Marsaw pushing people off the periscope. And you answered that you had seen him do that. Have you ever seen him push people in any other circumstance? A. Yes. I was pushed going through control in black lighting.

Q. By whom? A. Lieutenant-Commander Marsaw.

Q. During your time on board ONONDAGA, have you ever seen somebody lose a snort? A. Many times.

Q. Were they referred to using personally insulting adjectives by the CO? A. No. No, they were not.

Q. My friend also talked to you about morale and the number of factors that affect morale. Based on your observations while you were on board OJIBWA, what was the biggest factor that resulted in the low morale that you described? A. The way that the CO was conducting himself professionally. He made people that were doing their job, he made them feel that they weren't doing their job to their best ability. He made them feel low by calling them names, kicking them off the helm and to that effect.

Q. You've been in the Canadian Forces for almost 15 years. Based on your experience, who on a submarine or a ship is ultimately responsible for everything that goes on on board that unit? A. The commanding officer.

ASSISTANT PROSECUTOR: Okay. Thank you.

JUDGE ADVOCATE: Questions from the court? No questions.

1311

Thank you very much.

WITNESS WITHDRAWS.

ASSISTANT PROSECUTOR: The next witness will
be Master Seaman Smyth.

1313

Master Seaman Smyth

Examination-in-chief

Q. And based on your observations, why would they be a little more on edge? A. It was a long exercise and people or their nerves ... everybody's nerves were starting to get shot and there was a lot of yelling and screaming and it made for a very tense atmosphere.

Q. Who was yelling and screaming in the control room? A. The Captain.

Q. Could you contrast Lieutenant-Commander Marsaw, how he acted as a commanding officer, compared to how he acted as executive officer on the OKANAGAN? A. He was different.

Q. In what way? A. When he was XO he was very fair, strict but very fair. And on the OJIBWA - it wasn't the same person.

Q. On your junior leader course have been taught how to address subordinates who made errors? A. Yes.

Q. And what is the corrective method that you're instructed to use? A. If they need to - discipline at the time. But you are going to discipline them on the job - of the mistake they have made, nothing personal, and then take them aside later and explain to them what they did wrong.

Q. Would you show them how to correct their mistake? A. Yes.

Q. Would Lieutenant-Commander Marsaw take this approach? A. Not that I observed.

Q. While you were on the OJIBWA, have you ever had occasion for Lieutenant-Commander Marsaw to yell at you? A. Yes.

Q. And where did work in the control room? A. In the Radar shop.

s.19(1)

1314

Master Seaman Smyth

Examination-in-chief

Q. Can you describe the circumstances in which that incident occurred? A. We were on exercise. I had just come on watch, I believe it was around seven o'clock, and on the watch change-over I was given a bad turnover report - I was told not to report a racket dangerous on the Aurora and I called one on something else.

Q. And as a consequence what happen?
A. The door was opened, kicked in, and the Captain told me that I wasn't supposed to make any racket dangerous reports and then he left.

Q. Okay. Do you recall the exact words he used? A. No.

Q. Do you recall the thrust of what he said to you when he told you you weren't supposed to make those reports? A. Something about kick, kick my butt or something like that. I don't remember.

Q. But the word "kick" stays in your mind?
A. Yes.

Q. With reference to some part of your anatomy? A. Yes.

Q. Okay. What was the volume of his voice at the time? A. Loud.

Q. Did you take that as a threat? A. No.

Q. How big are you? How tall are you? How much do you weigh? A.

Q. How did you interpret Lieutenant-Commander Marsaw's remarks about kicking some part of your anatomy? A. Just that I made the wrong report and it was his way of telling me I did it wrong.

Q. Based upon your observations, how did the officers in the control room react to being yelled at?

1315

Master Seaman Smyth

Examination-in-chief

A. I didn't really observe them in the control room, but the sub-lieutenants seemed very stressed out.

Q. And would you ever have occasion to hear them talk or to observe the sub-lieutenants? A. Yes. They use to come into the Radar shack to do their qualifying drawings.

Q. How would you describe the morale on board the OJIBWA? A. Low.

Q. Why was that? A. Everybody was on edge. It was a long exercise to start with and things just weren't going very good.

Q. Would Lieutenant-Commander Marsaw consistently yell and scream? A. It was during the day, during attacks mostly, that I observed him doing it.

Q. Did this cause you any concern? A. It just made it a lot more stressful. It was already stressful enough.

Q. Has any other commanding officer yelled at you with regard to kicking some part of your anatomy? A. No.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. The comment that was made to you by Lieutenant-Commander Marsaw, you say you don't remember exactly - just the gist of it, something about a kick? A. Yes.

Q. The word kick, did you report that to the investigators? A. No, I did not.

1316

Master Seaman Smyth

Cross-examination

Q. You did not. Did you remember it at the time? A. No, I did not.

Q. How did it come about that you remembered? A. Well, after I left, I went home and I had written a letter to my wife and when I read that then things started to come back to me.

Q. If somebody says to you, "I'm going to kick you", would you take that as a threat? A. I didn't at the time. No.

Q. You didn't at the time? A. No.

Q. Was it ... well, since you only remember the word and not the rest, you didn't fear what was told to you? A. Well, it upset me but I wasn't afraid of being kicked.

Q. You weren't afraid of being kicked?
A. No.

Q. What is the procedure in your trade - you are working in the radar room, when you come on watch, how does the turnover go about? Was it your responsibility as incoming and the responsibility of the outgoing? A. He was to tell me all, what reports were to be made. And when he told, he passed on that I wasn't supposed to a racket dangerous on the Aurora.

Q. That you were not supposed to? A. Yes.

Q. Yet you did? And you were during an exercise period, is that correct? A. Yes.

Q. How does that affect what you were doing? If you weren't supposed to report it, there must have been a reason why the Captain would get upset at that report being made? A. Yes. I was given the report. When we turned-over, he told me to not call it on a certain racket. I called it on another racket and I

1317

Master Seaman Smyth

Cross-examination

wasn't supposed to call any racket dangerous at all.
All rackets were supposed to be neutralized.

Q. What I'm looking for is, do you have any
knowledge of the simple fact that you reported the
racket? A. Yes.

Q. How did it affect what you were doing at
the time? A. We had to down all masts and went deep.

Q. And go deep? A. Yes.

Q. But you don't know anymore than that, as
to the overall. When you had to go deep, did it break
off any requirements, necessities? A. I'm not sure if
we were doing an attack at the time.

Q. And you said that as an XO he was differ-
ent. He was strict but fair? A. Yes.

Q. How does one's responsibility change when
you go from XO to CO? A. There's a lot more responsi-
bility.

Q. And that change and accepting those
responsibilities, do you think it's unfair to not want
your people to do mistakes? A. No.

Q. Would you agree that the purpose of
training is to not do mistakes? A. Yes.

Q. And you said also that "for that exer-
cise, it was a long exercise, people were more on edge,
nerves were shot." Was that everybody in general?
A. No. Mostly people in the control room.

Q. Mostly people in the control room?
A. Yes.

Q. And would tempers tend to flare up?
A. Not that I noticed.

1318

Master Seaman Smyth

Cross-examination

Q. Not that you noticed. Anybody else than the commanding officer yelling and screaming? Officer of the watch? XO? A. No.

Q. So going back to the incident when you were in the radar room. I gather, since you didn't take that as a threat, even then did you think that was a matter that should be brought up with the chain of command, how it made you feel? A. At the time I did not.

Q. You did not. Did you serve with other commanding officers? A. yes, I did.

Q. How would they react when they were making attacks? A. They would be in control in the control room, but there was not usually yelling.

Q. Not yelling? A. No.

Q. And at that exercise that you were doing, that involved Aurora? A. No, there were lots of other ships.

Q. What basically was the exercise? Were you being chased? Do you know what type of exercise and what was your role in the exercise? A. It was TEAMWORK, and we were with ... there was two different forces, I believe they were orange and blue forces. And we were doing attacks on the opposite force.

Q. What was the submarine's performance during that exercise? Did you do good? A. Yes.

Q. Can you range it from 0 to 100, for instance? A. I am not sure, but I remember we sank most of the other force.

Q. But that takes a lot of concentration and hard work, doesn't it? A. Yes, it does.

1319

Master Seaman Smyth

Cross-examination

Q. When you explained that others, my note doesn't show here if it was other commanding officers, you may correct me if I am wrong but ... Oh no, sorry. I recall now on your leadership course, taught how to correct people who make mistakes - to point it out and then talk to the individual later in private. Would you say that in some circumstances there is no time to pull the individual aside and the problem must be corrected there? A. Yes.

Q. Would you say that sometimes, even though you are not supposed to correct in front of individuals it would be required for discipline purposes? A. Yes.

Q. Have you had an opportunity to read an article that was published in December '93 concerning allegation of unsafe diving and abuse on aboard a submarine? A. No, I did not.

Q. You did not. And I gather you did not contact Mr Dunlop, the writer of this article, did you? A. No, I did not.

Q. Were you contacted by him? A. No.

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, if I may? These are all my question, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. In cross-examination my friend asked you a question about your comment, "As an XO he was strict but fair" and then he said, "As a CO there's a lot more responsibility", to which you agreed. Does the CO still have a responsibility to be fair? A. Yes.

1320

Master Seaman Smyth

Re-examination

Q. Which ship are you with right now?

A. HMCS KOOTENAY.

Q. Is your CO fair? A. Yes.

Q. How would you describe your commanding officer in terms of his relationship with you and the crew? A. He knows a lot about everybody and he is very fair.

Q. Could an incompetent or an inexperienced control room sink most of the other force during TEAM-WORK? A. No.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Questions from the court?
No questions.

Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: Our next witness is
Lieutenant[N] Elford.

s.19(1)

1321

Lieutenant(N) Elford

Examination-in-chief

TWENTY-NINTH WITNESS) Lieutenant(N) R.T.
FOR THE) Elford is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and slowly spell your last name please? A. My full name is Robert Todd Elford, E-L-F-O-R-D.

Q. And what is your current position? A. I am the ASW officer on board HMCS CALGARY.

Q. And are you posted with the CALGARY? A. No. I'm actually posted to HMCS WINNIPEG, on loan to CALGARY for their trip.

Q. What year did you join the Canadian Forces? A. The 2nd of January '89, my first day of basic training.

Q. And did you have an opportunity to be part of the First Canadian Submarine Squadron at some point in your career? A. Yes, sir.

Q. What year was that? A. In June of '91 I did the Submarine Officer Training Course, and I joined OJIBWA in early January of '92, sir.

Q. And when did you officially leave OJIBWA? A. In November of '92, sir.

Q. And I understand that you were an officer under training? A. Yes, sir.

Q. And eventually were unsuccessful in obtaining your Dolphins? A. Yes, sir.

1322

Lieutenant(N) Elford

Examination-in-chief

Q. Do you recall attending a mess dinner in the Sub Squadron in December of 1991? A. Yes, sir, I do.

Q. Can you retrace your steps for the court, where you went that evening and all the way along from which place to which place until you eventually left the sub squadron jetty for the night? A. Well, we all met in the SM1 wardroom, I had a sherry there; we went to the Chiefs and POs at SM1 for dinner; I proceeded from there back to the wardroom for a couple after dinner drinks; and a group of us went to HMCS FRASER where we again had a few more drinks before we proceeded to OJIBWA for an after dinner party.

Q. Okay, and where in the OJIBWA did you go? A. To the wardroom, sir.

Q. Upon your arrival on the OJIBWA and in the wardroom, who do you recall being present in the wardroom? A. I remember Captain[N] Plante, when I arrived he was there.

Q. He was SM1 at the time? A. Yes, sir, he was.

Q. Okay? A. Lieutenant[N] Hart, Lieutenant-Commander Kavanagh, Lieutenant[N] Muir, Lieutenant[N] Waller, Lieutenant Kelk, Lieutenant-Commander Marsaw, Lieutenant-Commander Craven.

Q. What was the rank of Lieutenant-Commander Kavanagh at the time? A. Lieutenant[N], sir, as was Lieutenant[N] Dickinson, now Lieutenant-Commander Dickinson.

Q. Do you know if there were others apart from these individuals? A. That is all I recall.

Q. Upon your arrival, was Lieutenant-Commander Marsaw present? A. Yes, sir, he was.

1323

Lieutenant(N) Elford

Examination-in-chief

Q. Did you or he speak to each other?

A. Yes, sir, briefly. I was wearing anti-flash gear which I had taken from HMCS FRASER while in mess kit, and he just greeted me by saying, "It is good to see somebody who has got some spirit." or something to that effect, sir.

Q. Did Captain[N] Plante speak to you upon your arrival? A. When I arrived he was actually slumped over in his chair, asleep. And when I sat down he awoke and said ... looked at me, and which he called me numerous times, he just looked and said, "McFlag".

Q. That was the name that he would use to refer to you? A. Yes, sir.

Q. Had you known Captain[N] Plante socially as well as professionally? A. Yes, sir.

Q. How would you describe Lieutenant Kelk's condition upon your arrival? A. I believe he was actually passed out drunk when I arrived.

Q. Do you recall the condition of a Lieutenant[N] Muir? A. Yes, sir. He was drunk but still able to speak and carry on normal conversations but he was inebriated.

Q. Okay. Very briefly, did you notice anything unusual happen to Kelk or Muir after your arrival? A. Yes, sir. As I mentioned, Kelk was passed out, his pants were hauled down, he was marked, and shortly afterwards his shorts were actually pulled down and a cigar tube was inserted in his rectum.

Q. Okay. Do you recall who pulled his pants down? A. No, sir, I don't.

Q. What was he marked upon with? A. A marker. There was a couple of markers, a couple of different colours, I recall actually a black marker and a green marker.

1324

Lieutenant(N) Elford

Examination-in-chief

Q. Do you know where these markers came from? A. I know Lieutenant[N] Marr went to the control room to get a couple of markers. I assumed they came from the control room. He left the wardroom and came back with markers.

Q. Do you know who did the marking on Kelk? A. I honestly cannot ... I can't recall, no. I know I wrote on his lower leg, I wrote a couple of words and drew an arrow up his leg to the middle of his upper thigh.

Q. Apart from that marking, did you do any other marking? A. No, sir. That was it.

Q. Was any other marking done to Kelk? A. Yes, sir. A fair amount.

Q. Do you recall who would have done that other marking? A. No, sir, I don't recall.

Q. I would like to refer to one of the exhibits. If you can identify where Kelk would have been at the time that he had passed out. I'm referring to Exhibit "J". To the best of your recollection where would Kelk have been? A. He would have been on bed settee 1.

Q. So bed settee 1. And where would Muir have been? A. He was sitting right here.

Q. Bed settee 3? A. Yes, sir.

Q. Do you recall being interviewed by the military police? A. yes, sir, I do.

Q. Do you recall being asked the question of who did the marking on Kelk? A. Yes, sir, I do.

s.19(1)

1325

Lieutenant(N) Elford

Examination-in-chief

Q. And did you volunteer information that you had marked on Kelk at that time? A. No, sir, I did not.

Q. Why not? A. In hindsight, I was embarrassed about actually being involved in it at all. So I tried to avoid incriminating myself.

Q. But you're under oath today and it's your testimony that you did some marking on Kelk? A. Yes, sir. I did the marks as I pointed earlier and that was all as I recall.

Q. You mentioned the cigar tube being inserted in his anus. Who do you recall inserted the cigar tube? A. Lieutenant-Commander Marsaw.

Q. Was he assisted by anybody? A. No, sir, not that I recall.

Q. At the moment that the cigar tube was inserted who do recall being in the wardroom? A. Myself, Lieutenant-Commander Craven, Lieutenant-Commander Marsaw, Lieutenant-Commander Dickinson, Lieutenant[N] Muir, Lieutenant[N] Hart. I believe that's all, sir.

Q. Do you recall if Captain[N] Plante, whom you previously stated was passed out, was he present or not? A. No, sir. He had gone.

Q. Can you comment on your state of sobriety by the time you are in the OJIBWA Wardroom? A.

Q. After you left the boat that night, where did you go? A. I took a cab with Lieutenant-Commander Craven and went to his house and slept in his basement.

Q. When you woke up the next morning, did you know where you were? A. Yes, sir.

1326

Lieutenant(N) Elford

Examination-in-chief

Q. Did you recall how you got there?

A. Yes, sir.

Q. How many drinks do you figure you had that night? A. Ten to twelve, would be an estimate.

Q. In light of that, how certain are you that a cigar tube was inserted in Lieutenant Kelk's anus and that it was done by Lieutenant-Commander Marsaw? A. I'm positive. I remember it clearly.

Q. Had you ever seen anything like this done before or after? A. I had seen people passed out and people marked on their bodies, not to that extreme, but I had never seen anyone actually insert anything up another man's rectum.

Q. I would like to move along and switch topics now and ask you questions concerning your experiences while under training on board the OJIBWA. I believe you said you were posted to the OJIBWA from January '92 until November '92. A. Yes, sir.

Q. Did you actually sail right up until November '92? A. No, sir. I left OJIBWA and stood officer of the day type duties on board ONONDAGA after late August I believe.

Q. And as you mentioned, at that time you were Part III trying to train and qualify for your Dolphins? A. Yes, sir.

Q. What officers can you recall being on board during your period? A. The CO was Lieutenant-Commander Marsaw; the XO, Lieutenant-Commander Virgin; the engineer was Lieutenant[N] LeClaire; the CSC, Lieutenant[N] Soper; the deputy CSC, Lieutenant[N] Jacques; the deputy MSC, Lieutenant[N] Gensey; the OpsO was Lieutenant Kelk; the navigator was Lieutenant[N] Marr and Lieutenant[N] Higginson. Other trainees were: Lieutenant[N] Pitman; Lieutenant[N] Byrne; Lieutenant

s.19(1)

1327

Lieutenant(N) Elford

Examination-in-chief

[N] Cassivi for short period of time; and Sub-Lieutenant Kohli.

Q. What was your outlook upon initially joining the OJIBWA? A. I approached my submarine training with as much vigour as I could. I did well on the submarine officer training course. And I really wanted to do well in submarine service. I attempted my training with as much enthusiasm and excitement as I could.

Q. What atmosphere greeted you upon your arrival in the OJIBWA? A.

Q. What was it like for you to work in the control room? A.

Q. Why? A. Because of the stress I was under. I was actually to the point of afraid to be proactive in my training because every time I tried to do something which I thought was what I should do, and obviously being a trainee you don't always do everything right. I made some mistakes and I would be verbally dressed down to the extent I have never been before.

Q. Who would you be verbally dressed down by? A. Regularly by both Lieutenant Kelk and Lieutenant-Commander Marsaw.

Q. What sorts of words do you recall Lieutenant[N][sic] Marsaw and Kelk using towards you? A. I have been called regularly, a "fucking idiot", a "fucking asshole", a "fucking cunt".

Q. Okay. Now would this be said by Kelk as well? A. Yes.

Q. Would he ever refer to you in this way in the presence of Lieutenant-Commander Marsaw? A. Yes.

1328

Lieutenant(N) Elford

Examination-in-chief

Q. Would the other officers you've mentioned on occasion be referred to in this way as well?

A. Yes, sir.

Q. Can you recall any of the officers not being addressed in this manner? A. Well, at times they were addressed normally but I remember many officers being addressed unfairly often.

Q. In terms of frequency, how often would you or somebody be referred to as a "fucking idiot" or an "asshole"? A. On average maybe three times every two days.

Q. Would you ever be rebuked by Lieutenant-Commander Marsaw for performance of your non-control room secondary type duties? A. Yes, sir.

Q. What was your secondary duty? A. I had several. I was the diving officer on board, the supply officer, recreation officer, sports officer.

Q. Have you ever been rebuked as a supply officer? A. Yes, sir. On one occasion which I particularly remember.

Q. Can you describe that situation?
A. Yes, sir. I was shaken, I was sleeping in the fore ends. I was shaken actually by the on-watch. It was a call from the XO who told me to go to the Captain's cabin immediately. I went there and he was drinking V8 juice and he cursed and swore at me because I was the supply officer responsible for our stock being in date and this in fact was out of date. So I just responded that we will be more diligent in ensuring that the stock is in date next time we store ship.

Q. You were being cursed because the V8 juice was out of date? A. Yes, sir.

DEFENDING OFFICER: Mr Judge Advocate, there's lots of leading going on. I am quite prepared

1329

Lieutenant(N) Elford

Examination-in-chief

to allow some leeway and not object all the time, but the prosecution should be careful.

JUDGE ADVOCATE: Sustained.

Try not to lead, Major Abbott.

PROSECUTOR: Thank you, sir.

Q. What was Lieutenant-Commander Marsaw's emotional state when he addressed you? A. He was very very upset.

Q. Did you ever raise or express your concerns about the way you were verbally treated to your superior? A. Yes, sir, I did. I approached Lieutenant Kelk after a particularly stressful watch and I told him point blank, "I do not like being called a fucking idiot."

Q. Okay. You can't into words that Kelk would have said to you. Was there a change in the way he treated you? A. None whatsoever, sir.

Q. Or in the way that you were treated generally? A. None whatsoever, sir. None.

Q. Apart from Lieutenant Kelk, did you at any time ever raise concerns about how you were treated to the coxswain? A. Yes, sir, on one occasion.

Q. Were there any changes in the way that you would have been treated after that conversation? A. No, sir.

Q. As an unsuccessful Part III, did you learn anything while you were on the OJIBWA? What things do you recall learning? A. Very much so. I mean I'm an ASW officer now. I have a better appreciation for what submarines do but in particular I have learned a lot about leadership and I think I've become a better leader because of my experiences there.

1330

Lieutenant(N) Elford

Examination-in-chief

Q. In what way? A. I learned a lot of what not to be in a leader, or what I don't want to become in a leader.

Q. Do you recall any occasion where Lieutenant-Commander Marsaw, when he did identify an error you were making, would use a corrective method and show you how to properly do the job? A. No, sir.

Q. Generally speaking where would you eat your meals? A. Many times in the wardroom. I have on occasion eaten in the wardroom pantry.

Q. Why would you eat there? A. I didn't like the atmosphere in the wardroom. I felt why should I subject myself to that stressful environment if I really didn't have to.

Q. Do you have a bunk in the wardroom?
A. On the second trip - yes, sir, I did.

Q. Would you always sleep in the wardroom?
A. No, sir. I hot-racked with Sub-Lieutenant Kohli in the fore ends.

Q. While the MPs were conducting their investigation concerning allegations on the OJIBWA, did you ever an occasion for Lieutenant-Commander Marsaw to approach you? A. Yes, sir. In the STADACONA Wardroom.

Q. Approximately when did he, when did this occur? A. In July of '94.

Q. And can you relive that conversation for the members of the court, please? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I believe there is a conversation at a date that is not ... I mean that is post time of the charges. I know

1331

Lieutenant(N) Elford

Examination-in-chief

you have made a ruling in the past on that but just for the record I will put an objection on this.

JUDGE ADVOCATE: Very well. Your objection is well recorded and denied.

You may proceed.

PROSECUTOR:

Q. Could you, Lieutenant[N] Elford, relive that conversation to the best of your recollection for the members of the court? A. Yes, sir. I recall it well. I was approached by Lieutenant-Commander Marsaw in the anti-room of the Stadacona Wardroom. He said, "Do you mind if I ask you a few questions about the case?" And I said, "No, sir, not at all. Whatever I've said is truthful and I will say it to you if you're interested in listening." And he said, "You know, Rob, you can call me Dean." I said, "That is fine, sir." He said, "Why do you hate me so much?" And I said, "Well, sir, I don't hate you. I've just been asked by the MPs to answer questions and I've done so honestly." And then he asked, "Well why are you trying to demise both me and my family?" And I said, "I am trying to demise neither you nor your family and if what I say does cause you the demise of your family I suggest you deal with it." And that is exactly what I said. And he rebutted by saying, "I always thought you were a good guy but I guess you're just another fucking cunt." And that was the end of the conversation.

Q. I guess I'll ask the question: Have you ever been contacted by Malcolm Dunlop? A. Yes, sir. I was phoned in late November and he asked if I would like to speak about the allegations of my time in submarines and I said, "No, thanks." And he actually even made a dinner offer if I wasn't happy talking over the phone, which I declined. And the second time he called ... the first time he asked specifically for me. The second time he asked for either Lieutenant[N]

1332

Lieutenant(N) Elford

Cross-examination

Pitman or myself. Lieutenant[N] Pitman and I were roommates. And I said, "John is not in, but Rob speaking." And he again asked if I would be interested in coming forward. I again declined and at this time I actually called my boss on board the VANCOUVER because I was really worried that I would

Q. Sorry, I cut you off ... A. I was worried about how people would perceive me of being a naval officer and going to the press with a personal redress of mine. I did not go to the press.

Q. So you phoned your ...? A. Yes, sir. I called my boss and told him what had happened. And that's it.

Q. So have you ever discussed anything with Malcolm Dunlop? A. No, sir.

PROSECUTOR: Those are my questions. Thank you.

JUDGE ADVOCATE: Thank you.

Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Lieutenant[N] Elford, do you recall being interviewed by the military police on 29 December 1993? A. Yes, sir, I do.

Q. And a further interview on 6 January 1994? A. Yes, sir. I recall both.

Q. Is that correct that this interview was taped, video taped? A. Yes, sir, it was.

1333

Lieutenant(N) Elford

Cross-examination

Q. Is that correct that in the past couple of weeks or so ... first of all, that you were given a copy of the video taped interview? A. Yes, sir.

Q. A copy that you had an opportunity to view on several occasions? A. Yes, sir.

Q. How many times approximately? A. In part - twice and fully - once.

Q. Okay. And that more recently, like in the past couple of weeks or so, you were provided with a copy of a transcript of that video taped interview? A. Yes, sir.

Q. And you were given an opportunity, that you avail yourself of, of reviewing the tape to confirm the accuracy of the transcript? A. Yes, sir, I did.

Q. And you did note a few minor changes. Is that correct? A. Yes, sir.

Q. And they were minor in nature? A. Sir, there were 30 changes to the text.

Q. Yes, but of minor nature? I show you a document here. Could you look at it and tell the court whether this is the transcript? A. Yes, sir. This is it. Yes, sir - complete.

Q. And it's got your markings in some places on the transcript as well? A. Yes, sir.

Q. You recognize it as being the one you have verified for accuracy? A. Yes, sir.

DEFENDING OFFICER: Just leave it there for now.

JUDGE ADVOCATE: Thank you.

1334

Lieutenant(N) Elford

Cross-examination

DEFENDING OFFICER: Mr Judge Advocate, I am going to ask a couple of questions to explain this sheet there.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER:

Q. There are two or three sheets with red pencil on top there, could you explain to the court how you proceeded to make the changes? They were all like amendments as they were in the transcript? A. I listened to the tape while I was reading the text and I made changes as appropriate.

Q. Okay now, those - could you explain to the court ... I understand this to be that the hand-written sheet there referred to some portion in the tape, in the transcript that you have marked? A. Yes, sir. Here are the numbers which correspond to numbers in the text which I have ... I have led all these statements by a word or two, so you can figure out where in the text it actually should join.

Q. So if, for example, you have number 1 somewhere in the text if we see number 1 in the margin that means that it is a correction that correspond to what you have written there? A. Yes, sir.

Q. Okay. And subject to those changes, would you consider those changes relatively minor? Like overall? A. I don't think they would impact on the content or what I meant.

Q. Okay. So you're satisfied that this transcript accurately reflects what took place during those two interviews? A. Yes, sir. This does.

Q. And I take that you were truthful ... well, maybe with the exception of the marking which was raised in the direct examination, that you were truthful while talking to the MPs? A. Yes, sir.

1335

Lieutenant(N) Elford

Cross-examination

Q. In direct examination today, you stated that at the end of the mess dinner you took a cab with Craven and ended up in his basement where you slept; and on a question by the prosecution you said that you knew where you were. He asked you, "Did you know where you were?" "Yes, I was at Craven's place." And you answered that this morning, didn't you? A. Yes, sir.

Q. I'd refer you at page 23 of the transcript, paragraph 8, and I'd just like to read that for yourself now. Don't read it aloud? A. Yes, sir?

Q. My question to you is, isn't that right that you were so drunk that in fact you didn't know where you ended up and you didn't know how you got there? A. I recall taking the cab and I recall waking up. Regrettably, during the MP interview, because they were really playing up the cigar tube incident and as I mentioned I was absolutely humiliated that I was actually part of it. I may have ... I overemphasized how inebriated I was so as to lessen the burden on me.

Q. Isn't that right that you told the MPs ... and that is from that page 23, the question was put to you "Do you recall when you may have left?" Answer: "No. I know I woke up in a place I didn't know I ended up." And later you state, "I woke up in his house, in his basement. I have no idea what the hell happened." Is that right that you told that to the MPs? A. Yes, sir.

Q. And you're telling the court today that it was another lie to the MPs? A. Yes, sir.

Q. How many drinks did you have during the mess dinner? A. During the dinner itself?

Q. Yes? A. A couple ... mainly wine, and again it was, you know, refill as you drink. I would say probably four or five glasses of wine.

1336

Lieutenant(N) Elford

Cross-examination

Q. Easily? A. Four or five glasses of wine.

Q. Possibly more? A. No, sir. I think that's the most you could actually reasonably drink while eating.

Q. So you went to FRASER that night?
A. Yes, sir.

Q. What time was it? A. I don't know, sir. It was 45 minutes to an hour after we retired to the SM1 Wardroom.

Q. And what time did you retire from SM1 Wardroom? A. An hour after the dinner, sir.

Q. And what time was the dinner over? A. I don't know, sir.

Q. With whom, if any, did you go to FRASER?
A. I went with Lieutenant-Commander Craven, Lieutenant[N] Hart and with Lieutenant-Commander Dickinson. Those are the only people I can remember because we sort of were together most of the night.

Q. Could you look at the last question at page 23 of the transcript and the answer you give at the top of page 24? Isn't that right that, contrary to the answer you just gave to the court, you don't even actually remember for sure who was with you when you went on FRASER? A. There was a group of us. I pointed out that it was Doug Hart and Lieutenant-Commander Craven.

Q. Is that correct that you stated to the MPs that it was ... when asked who accompanied you there, that it was a tough question and that "the only one I really remember is Craven." I've cut short here the rest of ... "The only one I really remember because he sort of took me under his wing that night obviously because I ended up crashing in his basement it was

1337

Lieutenant(N) Elford

Cross-examination

Craven." That's what you told the MP, isn't it?

A. Yes, sir.

PROSECUTOR: Mr Judge Advocate, I would object. My friend did cut it short when he was referring to the answer the witness gave on page 24. If he continues on later on he'll see that the witness also adopts that Doug Hart was there.

JUDGE ADVOCATE: Objection denied.

You may proceed.

DEFENDING OFFICER:

Q. And isn't that right that having made that statement regarding Lieutenant-Commander Craven, you further suggested that you were not sure "Whether he was with me all night I don't know. Or probably he met up with me five minutes before we left." Is that correct? A. We obviously didn't spend the whole night just he and I conversing. It was a party. We both spoke with other people. However, we always seemed to ... our track basically following each other through the night.

Q. Uh, huh. And then in relation to Lieutenant[N] Hart, Doug Hart, is that correct, Doug Hart? A. Yes, sir.

Q. You said "And Doug Hart, I think Doug Hart, Doug Hart got a cab back with us that night." Is that correct? That's what you said? A. Yes, sir.

Q. Would you agree with me that that doesn't go a very long way to say that Hart was with you at the FRASER. In fact you don't recall Hart being at the FRASER? A. ...

PROSECUTOR: Again I object, Mr Judge Advocate. My friend has left out one important word here. "Ya, Doug Hart." He skipped that over when he was

1338

Lieutenant(N) Elford

Cross-examination

going back to the witness on it. Maybe it is a matter of interpretation. It could be read to say, "Ya, Doug Hart was there also." He has left that word out when he was posing the quote to the witness and I think it is unfair.

JUDGE ADVOCATE: Objection denied.

DEFENDING OFFICER:

Q. Would you answer the question? Wouldn't you agree that this answer you gave there doesn't go much of a way at all in saying that Craven was with you on FRASER? A. I think the whole paragraph in question can be summarized by saying that I was in fact with Lieutenant-Commander Craven and Lieutenant[N] Doug Hart.

Q. That's what you conclude of this paragraph? A. Yes, sir.

Q. I show you a two-page document here ... actually wrong - it's a three-page document, two sheets, a three-page document?

JUDGE ADVOCATE: You gave me a two-page document which is classified, and I don't want it.

DEFENDING OFFICER: I am sorry. Okay we will fix that. I apologize for that.

Officer of the Court, could you have this document ... there was a page missing, so just have it copied and we'll take care of that after.

I apologize for that, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: The document will be properly copied and we can come back on that later.

1339

Lieutenant(N) Elford

Cross-examination

Q. What time did you get on board OJIBWA?

A. When I was posted, sir?

Q. Sorry. What time did you get on board the night of the mess dinner? A. Perhaps an hour after we went to FRASER. I am sure what time of eating, sir.

Q. What time did you leave OJIBWA?

A. Perhaps another hour and half to two hours after that. I am not sure of time of leaving, sir.

Q. Would you agree with me that if you ... if one wakes up in a place and he doesn't know where he is that that person has a serious perception problem as to how he ... he doesn't know how he ended there and where he is, would you agree that this is indicative of a person who has had a very serious perception problem?

A. I knew where I was when I woke up, sir.

Q. But that's not what you told the MPs?

A. No, sir.

Q. And in fact you told the MPs that you didn't know what time you left? A. And I don't know what time I left, sir.

Q. I refer you to page 23 again, the passage that I read to you that we discussed a few minutes ago, "No, I woke up in a place I didn't know I ended up." Isn't that correct that this was in answer to a question from the MPs as to at what time ... "Do you recall when you may have left?" So that the time you left the boat. Is that correct? That's the question asked of you? A. Yes, sir.

Q. And you don't answer the question. You don't know what time you left. I mean you say, "No, I don't know what time I left." Is that correct?

A. Yes, sir. I do not know what time of the day it was when I left OJIBWA.

1340

Lieutenant(N) Elford

Cross-examination

Q. Okay. You say so. "Do you recall when you may have left?" Answer: "No." And then you continue on, "I know I woke up at ...", etc. So you don't know what time you left. How long after you got on board was that cigar tube inserted? A. I'm not sure, sir. I'd be guessing to say. I'm really not sure.

Q. What happened to the tube after it was placed there? A. I'm not sure, sir. It was left there for a short period of time. But after that I'm not sure.

Q. Are you saying it was removed? A. I cannot recall if it was removed or who removed it.

Q. Can you recall who pulled Kelk's pants down? A. No, sir, I cannot.

Q. Do you recall if his shirt was either opened up or lifted up? A. No, sir, I cannot.

Q. Do you recall Lieutenant[N] Cassivi being on board at a certain time? A. No, sir, I cannot.

Q. Can you recall Lieutenant[N] Kavanagh being on board? A. He left prior to the actual cigar tube.

Q. So you do recall Kavanagh being on board?
A. Yes, sir, I do.

Q. Where was Lieutenant-Commander Marsaw just prior to the tube being inserted? A. He was ... when he actually inserted it?

Q. No, I'm asking prior, immediately prior to? A. Immediately prior to he was sitting on the settee, bed settee number 1, the after part of it.

Q. How long had he been there for? A. Not long, sir.

1341

Lieutenant(N) Elford

Cross-examination

Q. Okay. Could you tell me again ... I sort of missed your indication, on bed settee number 1 where was Lieutenant Kelk? A. He was here, sir.

Q. He was like basically in the middle?
A. More forward. His head would have been forward.

Q. If I suggested to you that he was closer to the bulkhead by the door, what would you say?
A. I'm saying it to you as I recall it, sir.

Q. No. So I'm suggesting to you that he was there, what would you say? No? A. No. No, sir, he wasn't.

Q. Do you remember Lieutenant-Commander Bush being there ... or Commander Bush? A. Actually, yes, sir. I believe he was there when I first showed up. But I don't think he stayed long. I'm pretty certain of that.

Q. I believe you stated that when the tube was inserted there was only Craven, Marsaw, yourself, Dickinson, Muir and Hart. Is that correct? A. Yes, sir. That's all I recall.

Q. Can you recall who else did marking?
A. No, sir. I've thought about this long and hard and I can't remember who else did it.

Q. How far was the tube inserted? A. I'm not certain, sir.

Q. How easily did it go in? A. Well, there was a condom over the top of it, I recall that. And I remember the cigar wasn't actually inside.

Q. There was a condom though on the tube?
A. Yes, sir.

Q. Okay. Yet how easily? Was it difficult? Was it ... did he use one hand, two hands? Describe

1342

Lieutenant(N) Elford

Cross-examination

exactly what he did? A. I can't recall to that detail, sir, if he used one or two hands.

Q. And we touched upon that a moment ago, but I'd like to try to clarify. Was the cigar removed or not. I believe you may have suggested that it was or did you suggest that it was removed? A. I cannot recall the cigar tube being removed. I remember it being inserted, but I cannot recall it being removed, sir.

Q. Okay. So, as far as you are concerned, when you left Kelk was there and the cigar in his rectum? A. He may have been, sir. I can't recall if the cigar tube was removed.

Q. Can you recall in what position Kelk was? Like was he laying on his belly? Was he on his side? What position at all was he in? A. He was on his side. I remember his hands were taped together, as for his ankles. I know his head was forward and, as I say, in the middle of the settee facing forward.

Q. Was he in a foetal position? A. Yes, sir. Because his hands and legs were tied together, he was in the foetal position.

Q. How certain are you that he was in the foetal position? A. I can remember him being there. I mean ...

Q. You can or can't? A. I can. I can remember him laying on the settee.

Q. I'm sorry, are you saying ...? A. To the best of my knowledge he was in the foetal position.

Q. How certain are you of that? Are you a hundred per cent sure or what? A. I'm certain. Yes, sir.

1343

Lieutenant(N) Elford

Cross-examination

Q. Could you look at page 63, paragraph 3? In fact you can look at paragraph 2 and 3, paragraph 2 being a question and paragraph 3 being your answer. Is that right that when you were asked that very question by the military police as to what position Kelk was in, your answer was, "I think he was in the foetal, I'm not a hundred per cent sure. I really ... I can't. I was pretty intoxicated at the time." That's the answer you gave the MPs, isn't it? A. Yes, sir, it is.

Q. Is that answer true? A. I am certain that he was in the foetal position.

Q. And although you were not on 29 December '93. Is that correct? A. As I mentioned, sir, I overplayed my intoxication for fear of being personally incriminated for anything that may have happen to Lieutenant Kelk.

Q. Writing on him, you though might amount to an offence? A. It may have, sir. Yes.

Q. Did you say earlier in your testimony that you were really struck or the cigar incident sticks to mind because you never seen anything like that. But other things you've seen, people undress on the party and marking, haven't you seen that before? A. Not to that extreme, sir. But I have, you know, seen people fall asleep and marked on their forehead or cheeks or hands but not exactly to that extreme.

Q. Yes. And are you aware personally of anyone ever being charged for having played those tricks on people? Like do you know or you weren't charge yourself or anything like that before? A. No, sir.

Q. The pants of Kelk, were they simply put down or cut down, or what is the exact status of his pants? A. They were hauled down, and I believe that ... they were hauled down for a short while and I

1344

Lieutenant(N) Elford

Cross-examination

believe they were actually removed in the course of all this.

JUDGE ADVOCATE: In the course of what?

WITNESS: In the course of the marking, they were actually completely removed.

DEFENDING OFFICER:

Q. So that was done when you were there. That was done in your presence, when you were there?

A. Yes, sir.

Q. I direct you at page 63 again, paragraphs 5 and 6, 5 being the question and 6 being your answer. Now I ask you the question. Isn't that right that when you were asked by the MPs the question about undressing Kelk, you answered, "That the cigar tube was inserted." Okay "See, I don't know if they hauled his pants down or if they got them off, I don't know. I wasn't there because I was at FRASER." Isn't that what you told the MPs? A. Well, I further state, sir, that I was there. I mean I did in fact ...

Q. And you continue, "I mean I did in fact see the cigar tube being inserted but did I come in during, you know, after it started, I don't know. When was I in FRASER, I'm not really sure, but I know I was there too." So you are telling the MPs you don't even know when you were in FRASER. Is that correct?

A. I'm saying I'm not really sure.

Q. Okay, what do you mean by that? Are you saying that you're not even sure if you went to FRASER before or after OJIBWA? Is that what you're talking about? A. I am positive that I went to FRASER first, because I arrived in OJIBWA wearing anti-flash gear which was commented on.

Q. Good. Now, isn't your answer to the MPs regarding the pants, "I don't know if they hauled

1345

Lieutenant(N) Elford

Cross-examination

his pants down or if they cut them off, I don't know. I wasn't there because I was at FRASER." That's what you told the MPs, isn't it? A. My statement ends off, "I'm not really sure, but I know I was there too." I know I was in both places.

Q. That's right. But you just said to me, to this court, moments ago that you were present when the pants of Kelk were taken down? A. Yes, sir, I was.

Q. And you said to the MPs something that is contrary to that. You said, I don't know, I was not, I was on FRASER. So is that in fact what you said - that you were not on FRASER? A. In the early part of that statement I did state, "I wasn't there because I was at FRASER" but later ...

Q. Hold it. I am relating this to when the pants were taken down. I know that later you say that you were on FRASER. That's fine. But that's not what I'm questioning. My question is very specific. Didn't you say to the MPs, didn't you tell to the MPs: "Who would have been dressed at this time?" You say, "See, I don't know if they hauled his pants down or if they cut off, I don't know, I wasn't there because I was at FRASER." That is my simple question to you" it's whether or not this is true? You told the MPs you don't know who took the pants down because you weren't there? A. But, sir, in this same statement I question myself by saying, "I did see the cigar tube being inserted but did I come in during, you know, or after it started? I don't know." That's all in the same statement, the same response to the same question, sir.

Q. I show you here a document, a three-page document. Could you look at it and tell the court whether you recognize that document? A. Yes, sir. It's after my first interview with the military police, they asked me to write a statement and this is the statement that I wrote.

1346

Lieutenant(N) Elford

Cross-examination

Q. Okay. You recognize your signature and everything? A. Yes, sir. That's my document.

Q. Could you please declassify the document? It is your document, so could you please just scratch the PROTECTED "B" on the respective pages and initial it, please? A. Is this normal?

Q. Yes. It is your document, so if you would declassify it. A. ...

PROSECUTOR: I believe it is up to him. He is the person that can consent or not. I certainly don't have any objection.

DEFENDING OFFICER: I do not intend to introduce it in any event. I just want to show it to you. I didn't intend to introduce it.

WITNESS: The reason I am a little embarrassed about this document is there are instances in here which refer to me and which have nothing to do with this case in particular.

DEFENDING OFFICER: Oh, yes. Don't worry. It's not going before the court. I just have a few questions to ask you.

JUDGE ADVOCATE: So you don't want it marked as an exhibit.

DEFENDING OFFICER: No.

JUDGE ADVOCATE: Okay. I was under that impression.

DEFENDING OFFICER:

Q. In your testimony you referred to the fact that you had been called a fucking idiot, is that correct? A. Yes, sir, I had been.

1347

Lieutenant(N) Elford

Cross-examination

Q. And I suggest to you that this was mainly by Kelk? A. Yes, sir, more often by Kelk.

Q. In fact, almost exclusively by Kelk. Isn't that right? A. Yes, sir. More often by Kelk.

Q. Almost exclusively by Kelk? A. Yes, sir.

Q. And that, in fact, Lieutenant-Commander Marsaw would scream but never called you a fucking idiot? A. I beg your pardon, sir.

Q. Lieutenant-Commander Marsaw, although he may have screamed at times and what not, never called you a fucking idiot? A. Yes, sir. Lieutenant-Commander Marsaw did refer to me as a fucking idiot on more than one case.

Q. Would you please look at page 4? A. ...

JUDGE ADVOCATE: Page 4?

DEFENDING OFFICER: Of the transcript. Sorry, I apologize. Yes, the written statement I will touch on later.

Q. Look, let us say from the fourth last paragraph, down the page, and then the top of page 5, the first four paragraphs. In fact, you can read the whole of page 5 actually to avoid any confusion. Isn't that right that you told the MPs that you could not give actual quote, "I wouldn't be able to quote him actually"? A. Yes, sir. My intent for saying that was that it's not fair for Lieutenant-Commander Marsaw for me to say he said this statement. I am one hundred per cent sure that in that statement which I wouldn't want to quote him on, fucking idiot was there and it was referring to me. But I wouldn't want to quote him in the entire statement of what he said.

1348

Lieutenant(N) Elford

Cross-examination

Q. Uh, huh. And that you don't remember any specific occasion, example, as to when that might have taken place. Is that correct? A. I do remember one in particular, sir. The one where I ... we wear flashlights in black lighting on our belt, and mine fell off and hit the deck and of course as I mentioned in the statement, noise is probably the most single important thing in the submarine, and it made a crash as it hit the deck and I got reamed out.

Q. Uh, huh. So you dropped the flashlight?

A. Yes, sir.

Q. Isn't that where your account stops at page 6, top paragraph? A. Well, that incident was referring to use of language, use of foul language. That is why I gave that example, sir.

Q. You and Kelk didn't get along well at all, did you? A. No, sir. We ... before I joined the submarine service, actually got posted to OJIBWA, we had gone out and we've partied together. And I'd call him a close acquaintance, but when I got to a working environment - No, sir, we didn't see eye to eye at all.

Q. And he called you a fucking idiot an awful lot of times and even punched you and whatnot? A. Yes, sir, he did.

Q. Regarding the conduct of the Captain, did you ever make a formal complaint, aside from talking to Kelk? Now you mentioned that in direct. I mean, you were not talking about a complaint to Kelk about the Captain, weren't you this morning when you testified that you complained to Kelk? A. No, sir. My complaint was, I wanted to approach him and in person say, "Please stop referring to me as a fucking idiot."

Q. So you wanted to sort out matters between you and Kelk. You were not complaining to Kelk about the Captain. Is that correct? A. That's correct, sir.

1349

Lieutenant(N) Elford

Cross-examination

Q. Okay. And you did not complain to the coxswain about the Captain. You spoke to the coxswain about Kelk? A. The conversation the coxswain and I had was much more global. It dealt with OJIBWA in general and specifically those two instances.

Q. Okay. So not specifically the Captain?
A. The boat in general, sir.

Q. Yeah. Is that right that somehow - and I don't want you to indulge in anything that other people might have said or anything like that - that the CO became aware of the possibility of some violence between you and Kelk? A. I'm not sure if he became aware of violence between actual Kelk and I, but he did address the Wardroom on physical assault or harassment at one point. He got us all together and said it won't be tolerated.

Q. Okay. So he called his Wardroom, and his officers in the Wardroom, and told them that this would not be tolerated? A. Yes, sir, he did.

Q. You didn't make any complaint about the way the Captain treated you? A. The conversation I had with the coxswain was more of just as I mentioned, global unhappiness with OJIBWA.

Q. Uh, huh. Now I see that you did not complete your training. You don't have your Dolphins. Isn't that right though that you left OJIBWA because of a medical reason? A. Yes, sir.

Q. You had a skin problem and I guess maybe the submarine and the air of the submarine did not agree with you? A. The doctors actually accredit ...

Q. Without necessarily repeating what the doctor may have told you, it was essentially the reason you left the submarine? A. Psoriasis and actually when I left I had both pityriasis rosea and psoriasis which are ... they're not exactly sure, but stress is

1350

Lieutenant(N) Elford

Cross-examination

greatly related to psoriasis and pityriasis. And of course the poor hygienic working condition I'm sure wouldn't help any skin condition.

Q. So you have reoriented your career to surface ships? A. Yes, sir.

Q. And you asked to leave because of those reasons that your system did not agree with the sub? A. Yes, sir.

Q. You never wrote a redress of grievance or made any formal complaint to anyone about the way the Captain treated you? A. No, sir.

Q. Actually, when you wrote that three-page statement, you did not even mention the name of Marsaw in there once? A. Yes, sir. In referring to me as fucking idiot, "Even in the presence of the commanding officer, Lieutenant-Commander Dean Marsaw."

Q. Well okay. So I do apologize. I mean that was ...? A. ...

DEFENDING OFFICER: I apologize.

JUDGE ADVOCATE: We're getting used to that by now.

DEFENDING OFFICER: Okay.

PROSECUTOR: And I stopped objecting.

DEFENDING OFFICER:

Q. But who called you a fucking idiot, according to your statement? A. According to this statement, Lieutenant Kelk.

Q. Okay, so I apologize if I misled. Is that the only place in this text that you used the name of Marsaw? A. Yes, sir.

1351

Lieutenant(N) Elford

Cross-examination

Q. So basically this statement, wouldn't you agree, is totally relating to the hard time that Kelk gave you. There's nothing about Marsaw there giving you a hard time in that statement, is there? A. Well, I mentioned this created by several personalities on board not by the obvious physical constraints of living on board. The several personalities of course are Lieutenant Kelk and Lieutenant-Commander Marsaw.

Q. You say that today, "of course". but you didn't write it down then, did you? A. No, sir.

DEFENDING OFFICER: If I may I have a moment, Mr Judge Advocate?

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER:

Q. When you were on board OJIBWA, is that right that you didn't see Marsaw physically abusing anyone? A. That's correct, sir.

Q. And where were you when the tube was inserted, in the wardroom that is, if you were in the wardroom? A. Yes, sir, I was in the wardroom. I was seated about bed settee number 2. Approximately here. There was Lieutenant[N] Hart. I was here.

Q. You were sitting across, completely across the room in the forward part of bed settee number 2. Is that correct? A. Yes, sir.

Q. Muir - was there anything special that happened to him that night? A. Yes, sir. I remember his pants were hauled down as well. He was on the port side of bed settee number 3. His pants were hauled down and they were writing on his forehead. And actually, when I was leaving they had scissors and they were cutting off his underwear.

1352

Lieutenant(N) Elford

Re-examination

Q. Who is "they"? A. I am not sure, sir, not a hundred per cent sure.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You mentioned you were punched by Lieutenant Kelk. With regard to the divisional system, who is Lieutenant Kelk in relation to your position?

A. He was my divisional officer, sir.

Q. And on how many occasions did Kelk punch or assault you? A. Twice.

Q. And where did these assaults occur?

A. In the control room, sir.

Q. Did you discuss this with the coxswain?

A. Yes, sir, I did.

Q. To the best of your knowledge, based on your personal observations, were any charges ever laid?

A. No, sir.

Q. Do you know a Petty Officer Lesiuk?

A. Yes, sir. He was the chief Ops on board.

Q. Without getting into words that he spoke, did he ever approach you after one of these incidents in the control room? A. Yes, sir, he did.

Q. Did the coxswain or anybody in authority on the OJIBWA ever ask you for a written statement outlining these incidents? A. No, sir.

1353

Lieutenant(N) Elford

Re-examination

Q. Based on your personal observations, did anybody in a position of authority on that submarine asked Petty Officer Lesiuk for a written statement?

A. No, sir.

DEFENDING OFFICER: How could he know that?
I mean ...

PROSECUTOR: I am asking, based on his personal observations, Mr Judge Advocate.

DEFENDING OFFICER: Yeah, but he would ...

JUDGE ADVOCATE: It's not worth too much.
Sustained.

PROSECUTOR:

Q. Did this wardroom meeting by Lieutenant-Commander Marsaw happen before or after the assaults by Kelk? The wardroom meeting about violence, did that happen before or after the assaults by Kelk? A. That happened after the first one, sir.

Q. You were questioned about this three-page written statement about whether Lieutenant-Commander Marsaw's name is or isn't mentioned in it. I would like you to read this highlighted sentence please?

A. He insisted on referring to me as "fucking idiot" even in the presence of my commanding officer, Lieutenant-Commander Dean Marsaw.

Q. Is that an accurate statement? A. ...

DEFENDING OFFICER: I would ask for accuracy, as my learned friend has objected many times, that the sentence should at least be complete as to indicate who did call him a "fucking idiot". Otherwise it's misleading to the court.

JUDGE ADVOCATE: Major Abbott?

1354

Lieutenant(N) Elford

Re-examination

PROSECUTOR:

Q. Who was "he" that you referred to and said these words, in Lieutenant-Commander Marsaw's presence, to you? A. Lieutenant Kelk, sir.

Q. Did Lieutenant-Commander Marsaw respond in any way to Lieutenant Kelk when he said this? A. No, sir.

Q. Although Lieutenant-Commander Marsaw is not mentioned as a direct participant in this three-page written statement, during your military police interview did you tell them what words Lieutenant-Commander Marsaw would use towards you? A. Yes, sir, I did.

Q. And what words did you tell them? A. In the statement I mentioned "fucking idiot", "fucking asshole" and I believe "fucking stupid" is in my statement as well.

Q. Do you know Lieutenant-Commander Hickey? A. Yes, sir.

Q. Did any individual from the submarine squadron ever discussed with you the assaults? A. ...

DEFENDING OFFICER: Objection, Mr Judge Advocate. From what I can tell at this point anyway, that does seem to arise at all of my line of questioning of the cross-examination.

JUDGE ADVOCATE: Where is this coming from?

PROSECUTOR: I think this issue is entirely relevant. I would like to bring out evidence to show that in fact this matter was known throughout the submarine squadron and nothing was done about it. It goes to rebut ...

1355

Lieutenant(N) Elford

Re-examination

JUDGE ADVOCATE: Was it raised in cross-examination?

PROSECUTOR: "Who did you complain to? Did you put in a written redress of grievance? Who knew what was done?" I think it's entirely relevant.

JUDGE ADVOCATE: And what's your question again?

PROSECUTOR: Whether anybody from the 1st Canadian Submarine Squadron talked to Lieutenant[N] Elford about the assaults he sustained from Kelk.

JUDGE ADVOCATE: Objection sustained.

PROSECUTOR: No further questions. Thank you.

JUDGE ADVOCATE: Thank you.

QUESTIONED BY COURT

PRESIDENT:

Q. The written that has been referred to, the three-page handwritten statement, can I just clarify what was that statement? What was it in relation to? A. After my first MP interview, the MPs asked me to go home, write a statement and bring it in the next day.

PRESIDENT: Thank you.

JUDGE ADVOCATE: Questions arising?

PROSECUTOR: None, sir.

DEFENDING OFFICER: No.

JUDGE ADVOCATE: Thank you very much.

1356

Lieutenant(N) Elford

Questioned by court

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court is adjourned until
1330.

ADJOURNMENT: At 1210 hours, 13 October
1995, the court adjourns.

REASSEMBLY: At 1330 hours, 13 October
1995, the court reassembles
and the accused is before it.

JUDGE ADVOCATE: Next witness.

PROSECUTOR: Thank you.

Lieutenant-Commander Kavanagh, please.

1357

AT 0915 HOURS, 13 OCTOBER 1995, THE COURT RE-OPENS AND1274

s.19(1)

1342

Lieutenant-Commander Kavanagh Examination-in-chief

THIRTIETH WITNESS) Lieutenant-Commander
FOR THE) P. Kavanagh, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you please give your full name to the court and spell your last name?

A. Lieutenant-Commander Peter Kavanagh,
K-A-V-A-N-A-G-H.

Q. And what is your current position?

A. CO of ONONDAGA.

Q. I understand you initially joined the Canadian Forces as a member of the militia in 1978?

A. Yes.

Q. And you joined the Regular Force in 1982?

A. Yes.

Q. You became a submariner in January of 1986? A. Yes.

Q. Apart from being a member on the ONONDAGA, have also sailed on the OJIBWA and OKANAGAN?

A. Yes.

Q. Prior COs have been Young, Crowe, Hickey, Plante, Truscott, Davidson, Mosher and Woodburn?

A. Yes.

Q. Did you have occasion to attend a mess dinner at the sub squadron in December of 1991?

A. Yes.

Q. After the dinner was over, did you have occasion to attend the wardroom the HMCS OJIBWA?

A. Yes, I did.

Q. Could you describe for the court what you observed upon your arrival into the wardroom of the

1343

Lieutenant-Commander Kavanagh Examination-in-chief

OJIBWA, who was present? A. When I got down to the OJIBWA there was red lighting, it was very smoky, the people that I saw in the OJIBWA when I got down there was Lieutenant-Commander Craven, Lieutenant[N] Hart, Sub-Lieutenant Elford, Lieutenant-Commander Dickinson, Lieutenant-Commander Marsaw and Lieutenant[N] Marr.

Q. How long did you stay in the OJIBWA wardroom upon your entrance into it? A. I think I actually left halfway through that night to get some air, but I think I would certainly have been there half an hour anyway, half an hour to 40 minutes, the first time that I was there.

Q. Did you re-enter the wardroom after you got some air? A. Yes.

Q. Just with regard to your first visit into the wardroom of the OJIBWA, did you notice anything unusual at that time? A. The first visit - no. There was drinking going on. Lieutenant Kelk passed out on his left side, the first time I was there but I didn't see any unusual activity.

Q. Upon your second time arriving into the wardroom of the OJIBWA, who do you recall being in the wardroom? A. Lieutenant[N] Muir, Lieutenant-Commander Marsaw, Lieutenant-Commander Craven, Sub-Lieutenant Elford, Lieutenant[N] Dickinson, Lieutenant[N] Marr and Lieutenant[N] Hart.

Q. Can you comment on the condition of Lieutenant Kelk at the time you entered the wardroom the second time? A. He was passed out on his left side on the settee on the port side of the wardroom.

Q. And can you discuss the events, as you observed them, as they unfolded as they relate to Lieutenant Kelk? A. When I came in the second time I sat down at the after end of the wardroom. Lieutenant Kelk was passed out on his side, his shirt had been

1344

Lieutenant-Commander Kavanagh Examination-in-chief

pulled up and there somebody writing on the right side of his back in the area of his hip.

Q. Do you recall who was writing at that time? A. I believe it was Lieutenant-Commander Marsaw.

Q. Did you observe anything else happen to Lieutenant Kelk while you were in the wardroom the second time? A. No.

Q. How long were you in the wardroom the second time? A. No more than half an hour. I had another beer open there but I didn't finish it.

Q. What was the state of your sobriety that night? A. I was very drunk.

Q. And why did you leave the wardroom when you did? A. Because I'd had enough to drink.

Q. Have you ever had occasion to discuss or relive those moments in the OJIBWA wardroom with Lieutenant-Commander Marsaw? A. Yes.

Q. On how many occasions? A. Twice.

Q. Can you describe the circumstances in which you first discussed it with him? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I will, again ... I believe this evidence leads into some words of the accused. Again, I know you made your ruling. Those would be similar to, I guess, the ruling you made in Craven earlier on, and I'm just putting an objection on the record.

JUDGE ADVOCATE: Your objection is recorded.

You may proceed.

PROSECUTOR:

1345

Lieutenant-Commander Kavanagh

Examination-in-chief

Q. Could you describe the circumstances upon the first time you discussed ... or had the wardroom incident or activities discussed with Lieutenant-Commander Marsaw? A. The first time was when we met for lunch at the Granite Street Brewery in January of '94.

We met because Lieutenant-Commander Marsaw had to give me some PERs and we hadn't seen each other since I'd got back from Perisher. We discussed generally the case, and the alleged incident at the mess dinner came up and Lieutenant-Commander Marsaw told me that he was not there that night and he had gone home with Commander Bush.

Q. Did you respond when he said that?

A. No.

Q. What was your personal reaction to hearing that comment? A. I was surprised because I had seen him on board that night.

Q. When did you discuss the matter with him the second time? A. The second time was the Monday after, after my military police interview. Lieutenant-Commander Marsaw called me at home that night and asked me how it went, and I told him what we had talked about and one of the things that came up was the mess dinner incident. And he said that, again, he had gone home with Commander Bush. And I said, "No, I saw you there that night. You were, I believe, writing on Steve Kelk", and he told me that he would have to reconsider his recollection of that night.

Q. Prior to him saying this, had you told him what you told the military police? A. Yes.

Q. Did you know on a personal and professional basis the members of the wardroom under Lieutenant-Commander Marsaw's command when he was sailing the OJIBWA? A. I knew some of them.

1346

Lieutenant-Commander Kavanagh Examination-in-chief

Q. Would you have occasion to meet, see and talk to those individuals when they would come back from sea? A. Yes.

Q. Can you comment, based on your personal observations, how those individuals you did talk to appeared? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I fail to see the relevancy of this, how they appeared, I mean ...

JUDGE ADVOCATE: When was that? I missed the ...

DEFENDING OFFICER: In the wardroom at some point, anytime. It's not related to anything from what I can see.

JUDGE ADVOCATE: Well, I don't know at this point. If it is not very clear what the prosecution is after, but it may be that on several occasions you raised the matter of an incompetent crew. I don't know if it's on that line or if it's not? It doesn't seem to be that according to what I see.

PROSECUTOR: The line of my questioning at this point, Mr Judge Advocate, was simply to ask the witness, based on his personal observations, how did the people from the wardroom appear when they would be in board in the squadron. And then ask him to contrast that compared to how they appeared when he knew them prior to them being in the wardroom under Lieutenant-Commander Marsaw's command.

DEFENDING OFFICER: I cannot see the relevancy of that. I mean, it can be completely misleading. I mean, what one guy looks one day, I mean, why isn't he in a good mood today? Why is he in a good mood the next? Why one is in a good mood while one isn't? I mean, that cannot ... it's not conclusive of anything. It's in a way, in my view, irrelevant and it

1347

Lieutenant-Commander Kavanagh Examination-in-chief

would call for a conclusion that cannot be substantiated. I mean, he would have to give a history of the case, the character of those people as to why. I mean, has the guy left his mother? Has the guy got a letter from his girlfriend telling him that she's ...

JUDGE ADVOCATE: And he would not know why unless getting into hearsay.

DEFENDING OFFICER: Exactly.

JUDGE ADVOCATE: The objection is sustained.

PROSECUTOR:

Q. What position did Captain[N] Plante hold within the squadron? A. He was the submarine squadron commander.

Q. Did you ever have occasion to observe the relationship between Captain[N] Plante and Lieutenant-Commander Marsaw when he was in command of the OJIBWA?

A. From a distance. They were professionally very close. They were often in the wardroom at night together. I saw them downtown a couple of times together. But beyond that - No.

Q. With regard to the list of the commanding officers I read to you earlier on, based on your personal observations, have any of these commanding officers ever referred to individuals, subordinates in the control room, using personally insulting adjectives while you've been a submariner? A. No.

Q. How long have you been a submariner?
A. Since January of '86, nine years.

Q. As commanding officer of the ONONDAGA, have you ever used personally insulting adjectives directed towards your subordinates when you're in the control room? A. No.

1348

Lieutenant-Commander Kavanagh Examination-in-chief

Q. Do you recall an incident in August of 1994 at the CFB Halifax Wardroom involving Lieutenant-Commander Dussault and Lieutenant-Commander Marsaw?

A. Yes.

Q. Could you relate to the court what you did observe during that exchange? A. That was at the wardroom as you say in August of '94 during a super weepers. I had gone to the washroom and when I came back Lieutenant-Commander Dussault was standing with two people that we'd been having a beer with, and one of those persons was writing his address down for Lieutenant-Commander Dussault on a piece of paper, saying, ...

Q. Don't get into the words that that individual spoke, but simply passed the piece of paper?

A. With his address on it.

Q. Prior to you going to the heads, do you recall any words spoken by Lieutenant-Commander Marsaw to Lieutenant-Commander Dussault? A. Earlier on ...

DEFENDING OFFICER: Mr Judge Advocate, I would, again, like to record my objection as words spoken in whatever the year was, I forget ...'94?

JUDGE ADVOCATE: August '94.

DEFENDING OFFICER: Way after the incident and I have to question the relevancy of those words.

JUDGE ADVOCATE: In what is it relevant, Mr Prosecutor?

PROSECUTOR: It can be relevant for the reasons I had articulated in past motions, including the one concerning Craven.

JUDGE ADVOCATE: Very well.

Your objection is recorded and denied.

1349

WITNESS: Earlier on that evening I was standing with Lieutenant-Commander Dussault and from my right side I heard Lieutenant-Commander Marsaw call out, "Marty Dussault is a liar."

PROSECUTOR: I have no further questions. Thank you.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: No questions, Mr Judge Advocate.

JUDGE ADVOCATE: Any questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: I must say I'm coming to appreciate my friend's style of cross-examination. If it could speed things up in the future it'd be great.

At this point in time, Mr Judge Advocate, we have exhausted all the witnesses we've brought in or flown in for today. It was a combination of going through them quickly plus the effect of your ruling this morning. The witnesses that we have lined up are now completely examined.

The next group of witnesses I have - I think with the exception of two of them that are in the Halifax area - are all being flown in from other units to be ready for next week. I have no other witnesses to call this afternoon and at this time I would request

1350

that the court adjourn until nine o'clock tomorrow morning?

DEFENDING OFFICER: Monday morning.

PROSECUTOR: Monday morning.

JUDGE ADVOCATE: If you wish to proceed tomorrow, we may be ready.

PROSECUTOR: Tomorrow I've got witnesses coming in from Colorado, from Esquimalt, from Germany, from all over, different parts of the world, but they won't be ready to testify tomorrow.

JUDGE ADVOCATE: All your witnesses will be here and ready to testify by Monday?

PROSECUTOR: All my witnesses will be ready in here, ready to testify next week. Some are coming at different times, some have engagements in the United States or whatever. One's a commanding officer who's in the Bahamas, for example, right now, but is flying out this weekend.

The only witness I have a serious problem with right now concerns a witness who's a member of the Royal Navy, a commander, who was initially scheduled to testify, I believe, on the 11th. That was when we had originally slated him for, then that day was stood down for this trial. The only available day that we could re-book him back in for ... and that we have booked him back in for is to have him fly in on the 24th, testify on the 25th. We're trying to make arrangements to shake his calendar to see if he can fly in this weekend as well.

JUDGE ADVOCATE: Yes, I suggest you do because if you close your case much before that date, I'm not too sure that we will wait that long, and spend one week of taxpayers' ... to wait for a witness that is not here. I'm sure that you can ...

1351

PROSECUTOR: Yeah, I understand. I've got 44 witnesses from every hemisphere in the world and we've seen some witnesses today that flew in from Saudi Arabia and Chile today to be here.

JUDGE ADVOCATE: I understand that. And you still have a weekend to make some planifications so ...

PROSECUTOR: Yeah, and we also have the schedule of somebody in a different Navy as well to worry about. But we're doing our best and hopefully we won't having any scheduling problems at all.

JUDGE ADVOCATE: Very well.

Mr Defending Officer, what are your views on this request?

DEFENDING OFFICER: If the prosecution is not ready to proceed, there's nothing I can do on my side.

JUDGE ADVOCATE: And you say that with a nice smile.

DEFENDING OFFICER: And actually that's it. We had received notification, and I must say that we have scrambled a bit, more witnesses were heard. And our state of preparation now takes us really - four witnesses of next week, so that's why it's not feasible. The prosecution is not ready and we are not, so I won't object to this request for the adjournment.

As to the other matter, the difficulty with the one witness, well, we'll take it as it comes. I sympathize with the difficulties of my learned friend but there's not much I can do about it myself.

JUDGE ADVOCATE: So you would not be ready either to proceed this afternoon with that witness?

DEFENDING OFFICER: No.

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1352

JUDGE ADVOCATE: I guess we don't have much of a choice, Mr President. In these circumstances I would suggest that we adjourn the court until nine o'clock Monday morning.

PRESIDENT: ...

PRESIDENT INDICATES AGREEMENT.

JUDGE ADVOCATE: Thank you.

ADJOURNMENT: At 1352 hours, 13 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 16 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Good morning.

Major Abbott?

PROSECUTOR: Thank you. The first witness will be Lieutenant-Commander Virgin.

THIRTY-FIRST WITNESS)

Lieutenant-

1353

Lieutenant-Commander Virgin

Examination-in-chief

FOR THE) Commander S.A. Virgin, is duly
PROSECUTION) sworn.

EXAMINED BY PROSECUTOR

Q. Good morning. Can you give your full name to the court and spell your last name, please?

A. Steven Alexander Virgin, V-I-R-G-I-N.

Q. And what is your current position?

A. I'm currently employed at Maritime Headquarters, I'm the Senior staff Officer Underwater Warfare Submarines.

Q. And what year did you join the Canadian Forces? A. I joined the Canadian Forces in 1982.

Q. What year were you awarded your dolphins?

A. In December 1985.

Q. Which Canadian submarines have you been a member of? A. HMCS OJIBWA.

Q. And have you ever been a member of any other submarines? A. Yes, I served on exchange in the Royal Navy for two years in HMS OTUS.

Q. I understand you were the executive officer from March '91 until August '92, on board HMCS OJIBWA? A. That is correct.

Q. And that was under the command of Lieutenant-Commander Marsaw? A. Yes.

Q. Which officers comprised the wardroom while you were XO of the OJIBWA? A. Lieutenants Kelk, Wamback, Higginson, Halle, Kent, Marr; Sub-Lieutenants Elford, Kohli, Jacques, Pitman, Byrne; and Lieutenant[N] Gensey.

Q. How would Lieutenant-Commander Marsaw react if he perceived that a person made a mistake or

1354

Lieutenant-Commander Virgin

Examination-in-chief

was not performing up to his expected standards?

A. He would address them right then and there on the spot, screaming, yelling, to correct them.

Q. Would that be for any type of mistake?

A. Yes.

Q. How frequent would this occur? A. Very frequently, daily, sometimes hourly, virtually all the time whenever a mistake occurred.

Q. Were you ever personally responded to in this way by Lieutenant-Commander Marsaw? A. Very rarely. Maybe once or twice that I can remember.

Q. Based upon your personal observations, how would members of the wardroom react to this type of response? A. Their morale was low because of it. They would become incredibly withdrawn, very low spirited. They became very scared and intimidated and they feared and loath Lieutenant-Commander Marsaw because of that.

Q. Did they express this to you? A. Yes, they did. Sometimes it was expressed to me as a friend because I was friends with some of them; sometimes it was in a more professional setting at a meeting which we would have in the wardroom, being the head of department.

DEFENDING OFFICER: Mr Judge Advocate, that's, I believe, hearsay, although the exact words are not being mentioned. All those comments he made about scared, intimidated and so on and so forth obviously are the result of words spoken to him by members, and although he has not mentioned the words, it remains hearsay.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I'd have to accept my friend's comments. I'll try to pose my question a different way.

1355

Lieutenant-Commander Virgin

Examination-in-chief

Q. Based on your personal observations, how did they appear? A. Well, I knew most of them prior to joining OJIBWA and certainly in hindsight, because I know I've seen them in the workplace and socially since OJIBWA, so I was able to compare; for example, the navigator Lieutenant[N] Marr, his demeanour prior to joining OJIBWA and then his demeanour during the time he was on board OJIBWA and then now after OJIBWA.

Q. This type of response from the wardroom, did this cause you any concerns as executive officer? A. It did cause me quite a bit of concern for a number of reasons. First of all, because their morale was low and they would not respond favourably to the way the captain dealt with them. The morale of the wardroom is crucial to the morale of the submarine and it rolled downhill from there, so the effect was a domino effect on the morale of the crew. It concerned me because as leader of that team, particularly of the command team, but as the whole team, because of the way they felt were becoming ineffective at their jobs and hence were not giving the support to the captain that I believed they were capable of, so I was concerned.

Q. Did you ever have occasion to discuss with Lieutenant-Commander Marsaw the manner in which he behaved towards members of his wardroom? A. Yes, I did.

Q. On how many occasions? A. Twice.

Q. Can you tell us about the first time you raised this concern with Lieutenant-Commander Marsaw? A. The first time was in December, late December I believe of 1991. It was on completion of an operational running period through that fall, and that was my first real sea trip on a submarine. I was quite concerned about the well-being of the officers in particular in the way in which Lieutenant-Commander Marsaw dealt with them when they made mistakes at sea. I approached him in the wardroom of the submarine

1356

Lieutenant-Commander Virgin

Examination-in-chief

squadron in the headquarters building on jetty eight and requested that I speak with him privately in our office upstairs. We went upstairs and I confronted him with the way in which he was dealing with people, saying to him that I thought he was very vindictive, very belittling. In fact one of the reasons it stands out in my mind is I also said that he was very condoning when he spoke to them, and because I was nervous, he said, you mean condemning. I went, yes, a miss word on my part.

Q. Did you explain to him why you thought he was that way in the way that he approached the members of the crew? A. Yes, I told him that the manner in which he dealt with them and the consistent yelling and screaming and the effect it was having on them.

Q. What was his response? A. He listened to me, we discussed it. He presented me with his side, so to speak, that he did not tolerate anything less than the standards that he demanded which were very high standards, and that we could not afford to make mistakes in our business, in our preparations for war. And essentially he was not going to change, it would be up to the members of the wardroom and the ship's company to change and come up to his standards.

Q. Can you outline for the court the circumstances surrounding the second time you raised your concerns with Lieutenant-Commander Marsaw? A. It was in the spring of 1992, the Captain had called me into his cabin. It was mid to three quarters of the way through our spring deployment - which was February till Easter '92 - and he was showing me a message that he was sending to the squadron commander at the time - an exclusive message - and he was making a point of showing me the message, not in my capacity as executive officer but as a future submarine captain, showing me the traffic he was sending home to his squadron commander to let him know how things were going on board. And in the message he stated that the wardroom, including the executive officer, were kowtowed by him.

1357

Lieutenant-Commander Virgin

Examination-in-chief

I didn't understand what that meant. I had not heard that expression before and I asked him. And then he explained to me the fear and intimidation, his definition of being "kowtowed". I said to him, well, it's no wonder, you yell and scream at them all the time. And, again, similar to the first time, I brought up that when you treat people like that what do you expect?

Q. And what was his response? A. Again, similar to the first time, he acknowledged me raising the point but, again, stated that he would not tolerate anything less than his standards and that he was not going to change and it was my job as the executive officer then to bring them up to speed.

Q. After these two meetings, did you feel that Lieutenant-Commander Marsaw would change his overall behaviour in the balance of your tour as XO?
A. No.

Q. How would you describe the morale of the wardroom by that point in time? A. It was rock-bottom. It did go up and down over a period of time. It was cyclical, but it went up and down between rock-bottom and low.

Q. What do you attribute the fluctuation in morale to? A. It was the constant screaming and yelling by the captain. They feared their jobs, they feared going out into the control room, they were making mistakes. If operations were less intense, for example, and fewer mistakes were made than fewer bollockings were handed out, so morale may get a little better, or perhaps a port visit to relieve the stress. But inevitably when we'd get back to sea and conduct operations, it would be back to the same and hence morale would plummet.

Q. Without getting into any of the words that are spoken, did the wardroom discuss their concerns with you? A. They discussed them but for the most part it was done informally, it was done ashore.

1358

Lieutenant-Commander Virgin

Examination-in-chief

My approach to the situation at the time was supporting the captain as best as I could and hence I would attempt not to be any part of it. If it was done in an informal atmosphere, in a bar, for example, I would vacate and not hang around to listen to it because I wouldn't tolerate ill-speaking of the captain.

Q. In terms of balancing things between the Captain and the wardroom, which side did your scales tip towards? A. The Captain.

Q. And why is that? A. I felt at the end of the day that my loyalties should lie with him and, therefore, although I tried to balance the crew and the wardroom against the Captain, ultimately I felt it was my duty to support his aim, to be prepared to go to war and undertake any mission given to us and in doing that I lent my support or favoured my support towards him.

Q. As XO, do you recall hearing any allegations of physical abuse on board the OJIBWA? A. Yes, I do.

Q. Could you tell the court who the alleged victims were surrounding these allegations? A. Lieutenant Kelk and Sub-Lieutenant Elford.

Q. In relation to Kelk, at what time or port did these allegations arise? A. It was during a port visit to Dublin, Ireland.

Q. Okay. In regard to Elford as the alleged victim, what time frame did these allegations arise? A. It was during the spring trip, February to April '92, in the beginning to middle of that trip, I don't remember exactly when.

Q. Did the Captain ever inform you of the nature of the complaint against Kelk? A. ...

1359

Lieutenant-Commander Virgin

Examination-in-chief

DEFENDING OFFICER: Mr Judge Advocate, there's not even any indication that the Captain was aware. I think the question is leading as well.

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. Did you ever have occasion to discuss the allegation of physical abuse against Elford as a victim with Lieutenant-Commander Marsaw? A. Yes.

Q. What information or what did he pass on to you were the nature of the allegations concerning Elford as the victim? A. He called me into his cabin one evening at sea to say that he had received a complaint from, I believe it was the Coxswain but I don't know exactly who, that Lieutenant Kelk was ...

DEFENDING OFFICER: Again, Mr Judge Advocate, I think we're indulging in hearsay. If the Captain instructed the witness to do something, that's fine. But as to what the Captain may have been told - and that's what we are into now - what the Captain has been told by somebody else is hearsay.

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. If you can just simply, without repeating words that might've been told Lieutenant-Commander Marsaw, tell the court what Marsaw told you about the nature of the allegations against Elford as the victim?

A. Lieutenant-Commander Marsaw told me to sort out Lieutenant Kelk for allegations against him that he'd been mistreating junior officers, particularly Sub-Lieutenant Elford on his watch.

Q. Were you ever tasked by Lieutenant-Commander Marsaw to conduct an investigation? A. No.

1360

Lieutenant-Commander Virgin

Examination-in-chief

Q. Did you ever fully explore the allegations? A. No.

Q. Were you ever asked to or produce collected written statements from possible witnesses? A. No.

Q. Was Lieutenant[N] Elford ever interviewed? A. ...

DEFENDING OFFICER: Again, sir, those questions are still leading and are always calling for a yes or a no answer.

PROSECUTOR: I don't find they're leading. They're not asking for the answer and they're not assuming any facts that have not been proven yet in court. The witness can answer, yes, Elford was interviewed; no, he wasn't; or I haven't a clue.

JUDGE ADVOCATE: I will allow the last question.

WITNESS: Could you repeat it, please?

PROSECUTOR:

Q. And I'll make it more specific to avoid any further objections. Did you ever interview Lieutenant[N] Elford? A. No.

Q. Did you ever interview Petty Officer Lesuick? A. No, not to my knowledge.

PROSECUTOR: No further questions, thank you.

JUDGE ADVOCATE: Thank you.

Cross-examination?

PROSECUTOR: Oh, excuse me. Sorry, I've mis-spoke. I've two more questions left, sorry.

1361

Lieutenant-Commander Virgin

Examination-in-chief

Q. Are you aware of allegations concerning the cigar tubing of Lieutenant Kelk? A. Yes.

DEFENDING OFFICER: I know this is hearsay. The witness will testify in a moment that he did not go on board OJIBWA the night of the alleged incident.

PROSECUTOR: I'm simply talking about the allegations that currently exist in this courtroom today concerning Lieutenant Kelk. I'm asking him whether he's aware of the charges ...

JUDGE ADVOCATE: Yeah, but if he's aware through hearsay, we're not interested with that.

PROSECUTOR: Okay. I'll rephrase my question.

Q. Based on your personal observations, have you ever observed any discussion amongst the sub squadron wardroom concerning the events ... ? A. ...

DEFENDING OFFICER: It calls for the same thing.

JUDGE ADVOCATE: It does. Sustained.

PROSECUTOR:

Q. Are you familiar with the 1993, December, article that came out in the *Chronicle-Herald* concerning allegations on board the HMCS OJIBWA? A. Yes.

Q. Did you ever personally discuss the possibility of such an article coming out prior to its actual publication? A. I heard that it was going to come out.

Q. Was that the subject of a discussion that you engaged in? A. I don't understand the question.

1362

Lieutenant-Commander Virgin

Cross-examination

Q. Did you discuss with anybody this article coming out? A. Yes.

Q. Where? A. In the submarine squadron.

Q. How far prior to it being published?
A. I don't recall exactly, three/four weeks, when the reporter was calling around.

PROSECUTOR: Okay. No further questions, thank you.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Lieutenant-Commander Virgin, I understand that you were interviewed by the military police on 7 January 1994, regarding this matter? A. Yes.

Q. I understand that this interview was videotaped, like, to your knowledge it was videotaped and that subsequently a copy of the videotape was produced and given to you? A. Yes.

Q. And you have had ample opportunity to review that tape for yourself? A. Yes, sir.

Q. And that more recently, in the past three weeks, you were given a transcript of that interview and were asked to compare its accuracy with the tape that you had of the interview? A. Yes.

Q. I show you a document here. Could you please look at it. Is it right that this is the document, the transcript, of that interview of the 7th January that you have reviewed? A. Yes.

Q. Is that correct that you have made a number of amendments, like, sometime it would show "too

1363

Lieutenant-Commander Virgin

Cross-examination

low", you were able to fill it because it's your voice and all that, so you made a number of correction in there? A. Yes.

Q. And that you're satisfied that the content of this reflects accurately what you discussed with the military police? A. Yes.

Q. Did you tell the truth to the military police? A. Yes.

Q. Put that aside for a moment, if needed we'll refer to it later. I believe you alluded to the fact in your examination-in-chief that Lieutenant-Commander Marsaw was demanding a very high standard? A. Yes.

Q. Do you see anything wrong with that?
A. No.

Q. You mentioned that morale was low, not the whole time, but it was up and down, is that correct? A. Yes.

Q. You also used the expression "morale was rock-bottom" this morning you did use that expression, didn't you? A. ...

Q. If you would please look at page 16 of the transcript, the first paragraph, you can read the whole first paragraph as you see fit? A. Aloud?

Q. No, no, just for yourself, please. Would you agree with me that at that time of the interview with the military police you never mentioned that the ... you did not mention that the morale was rock-bottom? A. No, I did not. But if I may, the question that I was asked was, "What was life like aboard the submarine?" and I was trying to capture as much as I could in one question.

1364

Lieutenant-Commander Virgin

Cross-examination

Q. Would you agree that it takes time to be prepared especially when you're dealing with an old submarine that needs lots of maintenance, and that officers must work hard to be ready and to be fully operational? A. Yes, they must.

Q. And would you agree that was a bit of a reason ... a bit of a clash between Lieutenant-Commander Marsaw and the crew sometimes is that he demanded very high standards whilst people were not prepared to put the time in? A. Yes.

Q. Do you agree with that? A. Yes.

Q. And would you agree that in such circumstances it rests upon the captain ultimately and, of course, you to motivate the team and get them going? A. Yes.

Q. And that would include at times yelling and screaming, correct? A. No, I don't believe that yelling and screaming is required to motivate people.

Q. You don't. From your observation of Lieutenant-Commander Marsaw on board, would you say that he led by example? A. I'd say that he led by example with respect to the standards he set for himself and his professional knowledge, it was second to none.

Q. Okay. That he was very competent but a little grumpy? A. Yes, I said that.

Q. And would you agree that if you got a demanding captain, who's a little grumpy on top of that, that doesn't make necessarily for a lot of fun? A. Yes.

Q. Would you agree that his main preoccupation was to be prepared to go to war and be operational as his mandate was? A. I'm sorry, could you say the first part of the question?

1365

Lieutenant-Commander Virgin

Cross-examination

Q. Would you agree that Lieutenant-Commander Marsaw main preoccupation was to have his boat ready to go to war and fully operational as it was his mandate?

A. Yes.

Q. And that not everybody on board shared the same enthusiasm towards that goal? A. Yes.

Q. And that sometime when people were yelled at they did not like it? A. No, they did not.

Q. Did you ever witness Lieutenant-Commander Marsaw physically abuse somebody on board? A. No.

Q. Would you agree that he would yell at people in the control room when errors, mistakes, were being made? A. Yes.

Q. Would you agree that you did not mind that all that much as you believe that mistakes can cost lives? A. I'm sorry, I don't understand. With respect to me personally?

Q. Oh-huh? A. No.

Q. Would you go at page 19 of the transcript, at para two - para one consists of one line - para two is about 10 lines - actually seven. Could you read that second paragraph to yourself? A. You mean the final paragraph on the page?

Q. The second paragraph of the page. Now, I ask you a question again. Don't you agree that you accept that, in circumstances, correction must happen right then and there on the spot rather than a few hours later because there are safety concerns? A. If the situation is such that safety is the concern and immediate action is required to retain or maintain a safe situation then, yes.

1366

Lieutenant-Commander Virgin

Cross-examination

Q. Would you agree that Lieutenant-Commander Marsaw may at times have used the four letter word or the word fuck? A. Yes.

Q. Would you agree that this is not necessarily uncommon for a captain, submarine officer, to use that word? A. No, it is not uncommon.

Q. Isn't that right that you never heard Lieutenant-Commander Marsaw calling somebody a stupid idiot, or a fucking idiot, or words along that line? A. I don't recall what I said in my interview with the military police, is I don't remember the specific words when he would rebuke somebody for making a mistake. I think I gave sample expressions but I don't remember him calling a particular individual an idiot or something like that.

Q. Could you read to yourself the last big paragraph of page 19. Would you agree with me that you told the MPs that you cannot remember Lieutenant-Commander Marsaw saying to somebody, you stupid fucking idiot, or words to that effect? A. Yes.

Q. But he might use words like, for fuck sake do your job otherwise we'll all get killed, or words to that effect? A. Yes.

Q. You do recall that? That's the type of word he would use? A. Yes. It's not captured in the transcript, and I talked about it at the end, but it was the tone more so than the words themselves that I was trying to get across in describing the bollocking in the control room.

Q. I believe we just touched upon that, that it's not uncommon for captains or other officers on board the submarine to use the word fuck, fuck sake, or words along that line? A. Yes.

Q. And would you agree with me that it's a form of encouragement to people that made serious

1367

Lieutenant-Commander Virgin

Cross-examination

mistakes? A. No, when I said that to the military police I was being sarcastic.

Q. That's, although, what you told the military police, "that it's not uncommon for many submarine Captains or submarine officers to use that type of...I wouldn't call it degrading, I mean that type of...encouragement to people that made serious mistakes." You said that to the MPs? A. Yes, I did.

Q. And you're now saying today that you were being sarcastic? A. Yes.

Q. Could you tell the court if you were sarcastic when you mentioned not recalling about him calling people fucking stupid or fucking idiot, and that ... how sarcastic you were when you said that he would use expressions like, for fuck sake do your job, or get on with it. Were you sarcastic when you were saying that? A. No.

Q. But in the very same vein, in the very same breath, you end up by making this comment which is sarcastic? A. Yes.

Q. Would you agree that Lieutenant-Commander Marsaw did not yell at everybody? A. He yelled at - I can't answer it with a simple yes or no - he ...

Q. Well, could you attempt to answer my question whether he did yell at everybody or not? A. What I can say is he yelled at everybody who made mistakes and I believe almost everybody made mistakes, hence, yes.

Q. Would you look at the last two paragraphs of page 20 of the transcript. When asked the very same question by the military police, didn't you answer, "No", rather than yes, with an explanation? This morning you are saying yes with an explanation, but at the time you said, "No", and then you went on "I mean...". Is that what you said to the military police at the time, "No", when asked the very same question I

1368

Lieutenant-Commander Virgin

Cross-examination

just put to you? A. Yes. I then - similar to this morning - because it was, "So he didn't yell at everybody?", said, "No", and went on to try to explain and then I believe the next question was, "He wouldn't yell at Lieutenant[N] Marr ... ", and then I went on to try to explain.

Q. Yeah, and you explained why he wouldn't yell at Marr because Marr was a little more sensitive than other people, is that correct? He wouldn't cope with yelling as well as others? A. I believe I went on to explain that, no he wouldn't never yell at Marr, what he would do is perhaps take his personal reaction, Marr's, into consideration particularly; for example, on the bridge as a navigator, and I believe as I said, he would still yell at him but then he would make more of a concerted effort after the bollocking to take him aside because he was getting very jittery and particularly in pilotage waters you couldn't afford that, he would attempt to calm him down by saying, you know, come on you can't afford to make mistakes like that. But at the instant that he made the mistake; for example, the example I believe I gave, giving an incorrect helm order, he would still yell at Marr.

Q. And what would he yell? A. Depending on the mistake - an example you mean?

Q. Uh-huh. In that particular example you're giving? A. Alright, in this example here I said, if Marr gave a helm order to go to port instead of to starboard, then the reaction from the Captain would be, you know, for fuck sakes, wake up. If you do that again we'll die, or something to that effect.

Q. And then you'd go and ... ? A. And then he's say, okay, Ken.

Q. ... when it was corrected and then he'd say okay ... after he would say, okay, Ken, and this and that? A. Yes.

1369

Lieutenant-Commander Virgin

Cross-examination

Q. Using that tone of voice you just used in court is not all that uncommon either on board submarines, is it? A. Depending on the individual and how much stress they're under.

Q. Isn't that right that people are taught on the command course - Submarine Command Course - to be aggressive, to be able to get attention of the people and it's not uncommon to have to raise your voice like this? A. No, it's not. I'm presently on that course and, in fact, have been praised for my very cool, calm and collected, very low key nature in dealing with people.

Q. So is that your testimony that aggressiveness is not part of a good leader? A. No, sir, I'm just going back to the question about whether it's taught on the command course.

Q. Is aggressiveness discussed during the course? A. Aggressiveness in terms of tactics and aggressively prosecuting an enemy, yes. Aggressively dealing with people?

Q. Well, let's say ... but aggressiveness is discussed in those terms you mentioned, is that correct? A. In terms of aggressively prosecuting a target?

Q. Yeah? A. Yes.

Q. And being firm, unequivocal about orders? A. To a small extent, yes.

Q. Isn't that right that when Lieutenant-Commander Marsaw would correct like this, people, like, sometime yelling or whatnot, that wouldn't be an attack on the character, on the individual, would you agree with that? A. Yes.

1370

Lieutenant-Commander Virgin

Cross-examination

Q. He was not attacking the individual. He would not call the person, you fat stupid lazy shit, or words to that effect? A. No.

Q. That his correction was directed at the mistake and not at the individual? A. No, what I was saying and the way it was, was he would not be attacking, in my observation, the person as an individual. He would be correcting them or rebuking them for the mistake they made. But in using that tone and language I didn't believe that, you know; for example, if the officer was of an ethnic origin, he wouldn't be discriminatory in his remarks against him. Like the example I gave, if, for example, an overweight officer, he wouldn't be attacking the size of the officer or the fact that he wears glasses or the fact that he's of an ethnic origin, he wouldn't be doing that, but he would be ... the yelling and the screaming was in itself, it didn't make you feel very good.

Q. Yeah, but it would be made right then and there on the spot as required? A. Yes, he never did it ... he didn't do it for no reason. He did it if there was a mistake.

Q. Okay. And then, isn't that right, that he would usually follow it up by a chat with the individual in his cabin, for example? A. For serious mistakes.

Q. And look at it on a more trivial or like fashion so that the people would know what to do? A. For a serious mistake, yes, he would do that.

Q. So ... ? A. I wouldn't ...

JUDGE ADVOCATE: Go ahead.

WITNESS: I was going to say, he wouldn't trivialize or try to minimize the mistake, if that's what you mean, like, he would; for example, may I give an example? As I said, he very rarely yelled at me. I

1371

Lieutenant-Commander Virgin

Cross-examination

can remember going to his cabin afterwards and him explaining it fully.

DEFENDING OFFICER:

Q. Yeah. So would you agree with me it's not true that he was only screaming and yelling for no reason and that he never took officers aside to explain to them about their mistake and how to do it? Such a statement wouldn't be true, would it? A. I'm sorry, there's two parts. You say he would never take them aside?

Q. Okay, I will try to reformulate more clearly. One - in fact, it'll be only one, so pay attention, please. One, that it is not quite true that he would only yell and scream at people but that rather than only yelling and screaming at people he would also take them to his cabin for debriefing and let them know more about it and how to work it out? A. No. He would yell and scream at people. He would not always take them aside for a more civilized debriefing in his cabin. Only that was used for more serious mistakes or mistakes which, you know, would lend themselves well to that; for example, that I was trying to give earlier, when I was duty captain and failed to surface the submarine in a potentially dangerous situation, he ...

Q. So he yelled at you at that time because you had endangered the boat? A. Yes.

Q. And then he took you aside in his cabin and explained to you what had happened, what he expected you to do? A. And where I went wrong, yes.

Q. I gather that sometime guys were playing rough on board. They were big on wrestling and WW - I don't know what exactly? A. Yes, sir.

Q. Horsing around on board and all that?
A. Yes.

1372

Lieutenant-Commander Virgin

Cross-examination

Q. And that, that along with some other rumours flying around that you have alluded to caused the captain to call a meeting with the wardroom?

A. Yes.

Q. Where he clearly indicated that he would not tolerate any physical abuse or harassment of any sort? A. Yes.

Q. And that was during the period February/April 1992? A. Yes.

Q. So you personally never received any complaints whatsoever of physical abuse when you were on board? A. Not to my recollection, no.

Q. You did not. Do you know Elford, Kohli, Pitman and Byrne? A. Yes.

Q. And is that correct that these four were on board at some time or another as you were there? A. Yes.

Q. Would you say that these guys had difficulty living up to the standard of Lieutenant-Commander Marsaw? A. Yes.

Q. And partly, based on your observation, because they did not necessarily want to play the game? A. What do you mean by "play the game"?

Q. They were not as committed as far as you can tell? A. No.

Q. Would you agree that sometime they have displayed to you that they didn't know some of the basic drill they should've known? A. That's correct.

Q. And that would result into them, of course, being corrected by the Captain and possibly yourself at occasions? A. Yes, them, and particularly in the control room it would be - I don't know the

1373

Lieutenant-Commander Virgin

Cross-examination

ratio so to speak - but it would be the individual who perhaps made that mistake, if one of those sub-lieutenants was to make a mistake, but the officer of the watch as well because he is working for the officer of the watch. So the officer of the watch - again, I can't remember statistically the numbers of times - but it would be either the sub-Lieutenant would get the bollocking, or the officer of the watch would get the bollocking for it happened on his watch, or they would both get it.

Q. And is there anything wrong with that, as far as you can see, if somebody doesn't know a basic drill that he should know that he be rebuked and corrected. Is there anything wrong with that, as far as you can see, from your experience on board a submarine?

A. There is to an extent. It's very subjective obviously but it depends on ... I just find it difficult to say yes or no in such a broad circumstance. Depending on the mistake, depending on the severity of it, depending on the frequency of it. It certainly would do no good to bollock them continuously, I mean, if they made the mistake again and again and again obviously that style of dealing with it is not correcting it. But then again you can't let it go unnoticed either if you want to try to bring that officer up so that he does know what he's supposed to do, or NCM, whoever.

Q. So it's very much a matter of opinion, isn't it, and style? A. Yes.

Q. How did you get along with Lieutenant-Commander Marsaw? A. Very well.

Q. What was your rapport with him? A. Very good.

Q. And I believe you indicated earlier that he very rarely yelled at you? A. That's correct.

Q. I take you were doing your job, so you do your job and you're not being either yelled at or

1374

Lieutenant-Commander Virgin

Cross-examination

rebuked or anything like that? A. I believe it was twofold: one, because I worked incredibly hard and I did put out good results; but also I think he cut me some more slack, so to speak, because I worked so hard.

Q. So you're saying that the captain was capable of differentiating between those who put the effort in and those who were not? A. Yes.

Q. And capable of appreciating good and poor results on the part of the individuals concerned? A. Yes.

Q. And that he wouldn't scream or raise his voice at people unless they had done a mistake, he wouldn't do it for the fun of it? A. No, he would not.

Q. Would you say that it's not uncommon for people in the control room to bang into each other or get, I mean, like, involved in some physical contact, that it be a foot, an elbow, or a bum, or a shoulder, or whatever? Would you say that it's not uncommon, like, for those contact to happen in the control room because of the small space? A. No, it is not uncommon.

Q. And would you agree that those things happen as in action stations, for example, I mean, everybody's busy and the tensions high, yeah? A. It certainly happens more frequently in stressful - particularly black lighting ...

Q. And you don't have always the time to pay nice little niceties, and, oh, sorry, would you mind moving from there because I have to proceed there, I mean, people are businesslike and that's it? A. That is correct. I wouldn't say "businesslike" but ...

Q. You don't have time to take two sentences to ... ? A. Yeah, you don't have time to say, excuse me, could you please get out of the way while I, you know, go over here and do this.

1375

Lieutenant-Commander Virgin

Cross-examination

Q. So you don't have time for that, so you would just sort of make your way and proceed and that's it? A. It's not nice but life in the control room.

Q. You've been in submarines for what, almost 10 years now? A. Yes.

Q. And would you agree that life in a submarine is quite difficult? A. Yes.

Q. Demanding? A. Yes.

Q. And that not everybody is cut for that life? A. Yes.

Q. And those that are not are likely to find it quite miserable? A. Yes.

Q. Because even those that are cut for it or learn to become a submariner, I mean, like you, even you find it difficult, is that correct? It's a difficult life, it's not a love cruise? A. I would say demanding is perhaps a better word than difficult but, yes.

Q. Demanding, conditions are not the nicest?
A. No.

Q. You've got to be dedicated to your job?
A. Yes, it takes a lot.

Q. And if one is not cut for it, to use the expression, chances are he will not enjoy it very much?
A. Yes.

Q. Would you agree that Lieutenant-Commander Marsaw was disliked and not popular? A. Yes.

Q. In the submarine service? A. Yes.

1376

Lieutenant-Commander Virgin

Cross-examination

Q. And is that true too that he won the "grinch award" every Christmas, hands down? A. Yes.

Q. What's the "grinch award"? A. I don't know if it's still running but certainly I recall it in my training days, and specifically when I was in OJIBWA with Lieutenant-Commander Marsaw, it was an award handed out at Christmas time to the officer or NCM who was the most grinch like, from "The Grinch Who Stole Christmas". And I believe it was also a charitable thing where you would pay a dollar for a vote and you got to vote for who you thought the biggest grinch was. I remember it was always the standing joke where, you know, people would get out their cheque books to buy as many tickets as they could on Lieutenant-Commander Marsaw's behalf. It was almost a competition between him and Chief Hamilton, the squadron coxswain, to see who could win it.

Q. But at the end of the day though he would achieve good result, wouldn't he, in terms of operations? A. Oh, yes.

Q. Would you say that Lieutenant-Commander Marsaw would not hesitate to have people work over a weekend if it was required for the operational readiness of the boat? A. No, he would not hesitate.

Q. And from your observation, how did that go with some of the officers and some of the crew? A. It did not go over well.

Q. With some, others would just, I mean, get to business and do it and others would bitch and complain, is that basically it? A. Yes.

Q. I understand that you had an exercise with the Americans at some point where you really - to use, I believe, your own expression - kicked the shit out of them, like, in an exercise of attack against other ships and so on and so forth? A. Yes.

1377

Lieutenant-Commander Virgin

Cross-examination

Q. And that was quite the result? A. Yes.

Q. But that didn't come easy, did it?

A. No.

Q. And I understand that you would go on close up station early so to avoid detection, it's a 150 degrees on board and so on and so forth. That doesn't make for very good conditions, does it?

A. No.

Q. But the result was extremely, I mean, was excellent, as you've put it, is that correct? A. Yes, the result was excellent.

Q. And for that you respect Lieutenant-Commander Marsaw? A. Very much so. Particularly, because it was largely due to him himself. He was able to make up for strengths, weaknesses, I mean, it was ... the large part of that success was due to his personal brilliance.

Q. Is that right ... could you comment as to Lieutenant-Commander Marsaw whether he would praise members of his crew? A. He did but very rarely.

Q. Uh-huh. And why was that? A. I believe it was for a number of reasons: Firstly, to achieve a standard which would warrant his praise was difficult for even the best of people so, therefore, he was not one to hand out praise for no reason ...

Q. Is that true ... isn't that correct that the way you see it, is that he wouldn't praise just because you did your job? A. No, he would not.

Q. You had to do something a little beyond that, is that correct? A. A lot beyond, yes.

Q. That he wouldn't give you praise just for showing up for work, obviously? A. No, he would not.

1378

Lieutenant-Commander Virgin

Cross-examination

Q. Would you say that ... is that correct that you witnessed him ... you've been on board close to two years? A. I was on board for approximately 18 months as the executive officer.

Q. Eighteen months, and that you saw him - although he's a little cheap on his praise - but you saw him praising twenty times or possibly in excess of twenty times? A. Approximately twenty times, it was difficult to remember when I was asked the question. But essentially I just, in trying to answer that question, I thought about the 18 months and basically said, well, maybe I saw it once a month, so that would be 18, so it was 20 times, give or take.

Q. So it could be more? A. It could be.

Q. Would you say that, for one, Lieutenant[N] Marr was prone to mistakes, making mistakes? A. More so than the average person or in comparison to ... ?

Q. Yeah, in comparison to, I guess, the rest of the crew there? A. Yes.

Q. He was. That's the same Marr that you used as an example earlier on in your testimony? A. Yes.

Q. About the port business and ... ? A. And as I believe I said in my interview with the military police, one of the reasons or the principal reasons that he was more prone to making mistakes was because of his fear of the Captain.

Q. Uh-huh. But would you say ... isn't that right too that even Marr got praised when he did his job well? A. He did, yes.

Q. He did. In one particular incident he had done a good navigation work and the CO, the Captain, did praise him? A. Yes, he did.

1379

Lieutenant-Commander Virgin

Cross-examination

Q. And you were not one, in your observation and to your own experience, you wouldn't go to the cabin only for correction or blast or feedback that were negative. He would call you, as well, in sometime for just positive feedback and let you know that everything was working right? A. Sorry, you asked me if he would do that?

Q. Yeah, has he done that to you? A. I don't recall specifics, possibly. It would usually be part of a larger conversation. It's hard to remember.

Q. But he would give you, like, positive feedback. The only time you spoke to him was not when you were in trouble or when you had made a mistake. He would keep you appraised of your evolution, of your progress and you knew where you stood? A. Me personally?

Q. Yeah? A. Yes. You also knew and he made it clear that he didn't feel that officers needed - I mean, although he did praise - he also said that officers particularly didn't need to be praised, which I know is a bit of a contradiction, but he would say that, and so you would ... I certainly understood that if you weren't being praised but if you also weren't being criticized then the very fact that you had neither meant that you were doing okay.

Q. You suggested in your examination-in-chief that you heard some of the junior officers talking, basically, in the back of the Captain, and that, I think, you were mentioning in a bar, and you sort of wanted to stay out of it, so you left the bar, basically? A. Yes.

Q. In retrospect, don't you think it would've been more appropriate for you as the 2 i/c of the captain to talk to those people, try to teach them some of the basics of officer attributes like loyalty, dedication, try to teach them ways of resolving the

1380

Lieutenant-Commander Virgin

Cross-examination

apparent or the perceived problem rather than just leaving and let things go? A. I guess it's twofold really. I believe, and I believed at the time, that they needed their time to "mank" - the expression I used, they needed their time to bitch. I certainly wouldn't tolerate it or do it myself or engage in it, so I felt it was one of my responsibilities as XO is to give them that breathing space, particularly in the confines of the submarine but even if it was in a bar or wherever. But, yes, as training officer one of my biggest roles on board was to train those officers and men, so I attempted to do that in a more formal sense, but, yes, I agree, I guess, to your question, I feel a bit of a ... there was a failure on my part there.

Q. And you're not disassociated with morale either, like the morale on board is part of your ship as well, it's part of every member, of course, and you as an XO as well? A. Very much a part of my mandate, yes.

Q. You've heard the whining and the bitching but you never received any formal complaints?
A. Formal complaints about, sorry?

Q. The treatment of the CO? A. Not formal complaints in the sense of a harassment allegation or something like you would see as an XO, no. Just complaints that, you know, Christ, does he have to yell and scream at us so much and things like that, you know, do we have to work this weekend? And I very much had the attitude that once I came out of the Captain's cabin it was ... his policies were mine, the debates about what we should or shouldn't do, what happened between us in closed doors, and if I had been in to see him to say that he should ease up on the troops or whatever. But it was his decision not to. I would then approach the submarine's crew, the wardroom, backing him fully as if it was my own because that's what I consider to be loyal, that's what I would want my coxswain to do when he went into his mess to talk to the senior NCMs. I wouldn't want him walking in there

1381

Lieutenant-Commander Virgin

Cross-examination

slagging me off, so to speak, to the senior NCMs and saying, the fucking XO's making us work this weekend boys. I'd expect him to go in there and take charge, and I would do the same for the Captain. And, yes, perhaps, I could've done it better.

Q. Would you agree that even yourself you disregarded some of those complaints and bitching as being merely attributable to sometime young non-motivated officers that were just whining and bitching and you said, well, just carry on, get on with life and do the work, is that correct? A. Sometimes, yes.

Q. And that sometime - and maybe on a number of occasion - you observed officers being corrected or rebuked, and even if they fully deserved it they still would not accept that to be rebuked. In their words they never do wrong. Others accept it and got on with life and others did not? A. I'm sorry, what's the question?

Q. Based on your observation, isn't that right that officers on board, when either rebuked or criticized or corrected, whatever, some would take it, let's say, to use an expression, "take it like a man", and carry on with business. Others, although they had deserved it they would not recognize that and still object and bitch that they're not treated fairly? A. Yes, there would be a mix of reactions, but certainly the common denominator was that nobody felt that they deserved to be treated like that regardless of the mistake they made. But some, yes, were more, to use your expression, "take it like a man", and try to forget about it for awhile.

Q. When you talked to the Captain about, well, like, people being intimidated and all that, isn't that right that he didn't shut you off or anything. He did listen to you and he'd try maybe different ways, or try to listen to you and possibly adapt. Of course, not at the expense of the mission though? A. Yes, he did listen to me and although he would

1382

Lieutenant-Commander Virgin

Cross-examination

generally close off those meetings with, he's not going to change, it's up to everyone else to change, but then he would, in fact, alter his style in dealing with people. After that it would be very short-lived - I can't remember exactly, perhaps, a week or two - it's not like he would just sacrifice his standards for the mission, as you say, but he would try to ease back. But invariably within, like I said, I'm not actually ... a couple of weeks, it would be back to the old style.

Q. Would you say that Lieutenant-Commander Marsaw showed concern - again, that's on the basis of your observation and your discussion with him - he showed concern about his crew, their physical state, like, whether they're fatigued, tired, like, over worked, morale and all that, that this was something that he cared about all the time? A. It was in his list of priorities but it was ... I don't think I would say he cared about it all the time, he left it up to me quite a bit. He used to like to talk to the coxswain directly about morale of the NCMs because I remember him sort of telling me ... asking me that, you know, if I minded if he would ... direct liaison with the coxswain regarding the morale of the troops.

Q. He would ask you permission deal directly with the coxswain, would he? A. Yes.

Q. He would ask you if you didn't mind? A. Yeah. It worked two ways, we kept each other in the picture as best we could. So he showed concern for it but it was also willingly sacrificed in support of higher priorities, completing the mission, operational readiness.

Q. Would you agree that he did consider - and I believe that's what you just suggested but for more certainty - that he did consider the chain of command, like, very important, like, he wouldn't go to the coxswain without letting you know, and likewise up and down, he considered the chain of command important? A. Yes.

1383

Lieutenant-Commander Virgin

Cross-examination

Q. And that he dealt with you and department heads and all that as it should be, like, in the divisional system? A. For the most part, yes. I think I can remember perhaps one or two of the technical officers being upset when he would deal with one of their technicians on a defect and hence know about it prior to them, but other than that for the most part, yes, it worked very well.

Q. It would be very uncommon for him to skip the chain of command? A. Within the sub, yes.

DEFENDING OFFICER: Yeah. If I may have a minute, Mr Judge Advocate?

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. As an XO on board, I guess, overall administrative personnel matters were your responsibility? A. Yes.

Q. Training was your responsibility?
A. Yes.

Q. Discipline, with the coxswain, of course, was also your responsibility? A. Yes, they were all part of my terms of reference.

Q. You mentioned a number of officers that were on board at the time you were there; Kohli, was he a strong officer or rather, like, from one to ten officer? A. Sorry, do you mean rate him on a scale of one to ten?

Q. Yeah? A. In comparison to other sub-lieutenants of his experience, four.

Q. Byrne? A. Sorry, again scale?

1384

Lieutenant-Commander Virgin

Cross-examination

Q. Yeah? A. Six.

Q. Elford? A. Four.

Q. Now, I believe I heard you saying in direct examination that Lieutenant-Commander Marsaw was vindictive although throughout your testimony I found little indication of that. Would you comment further on this? A. I suppose that perhaps it was a poor choice of words, maybe it wasn't. I was, during the interview and discussions of all this, trying to think back to events that happened years ago. But I do remember quite vividly, as I'm sure any executive officer who goes to confront his commanding officer would remember that day, and although some things perhaps I don't remember exactly, I remember walking into that office and using those words. As I mentioned with the other one using, in fact, the opposite meaning, that was the word I chose at the time to describe the way he dealt with people. I didn't choose that word by, you know, looking it up in the Oxford Dictionary and I'm not a Master's graduate in the English language. The point I was trying to get across, and I don't know if I actually used the expression, but what I was trying to say is, you know, you treat people like shit.

Q. You used it this morning but then I found there was not much, like, he didn't yell at people if they did not make a mistake. When he did, he did it, it was right then on the spot and not directed at the individual. He would not degrade the individual. Sometime he would follow up with interviews in his cabin? A. I guess where the vindictiveness comes from, to the best of my recollection again, was the fact that, I guess, for repeated mistakes or, you know, officers who weren't the strongest or who weren't as dedicated as he thought they should be, the bollockings would be more severe.

Q. Uh-huh. Did you speak to Malcolm Dunlop?
 A. No, I never spoke to him.

1385

Lieutenant-Commander Virgin

Re-examination

Q. In relation to that article that you referred to in 1993? A. No.

Q. You did not? A. No.

Q. And your interview ... that article was on 16 December 1993, that's correct? A. I don't remember what date it was, but December.

Q. December '93? A. Yes.

Q. And you knew for a few weeks in advance that this was coming up? A. I believe it was a few weeks.

Q. And your interview with the military police took place in early January of 1994? A. Yes.

DEFENDING OFFICER: Thank you. I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. Talking about vindictiveness and repeated mistakes for officers who weren't the strongest, the bollockings would be more severe. Would they also be more frequent or infrequent? A. They would also be more frequent.

Q. You made a comment in response to one of the questions, saying that, that you were trying to say to the military police that it wasn't so much the words but the tone. What did you mean by that, "the tone"? A. When I was interviewed I was asked if he ever verbally abused any members of the ship's company. I said to the military police investigator define "verbal abuse"? He said, if I called you an idiot that's verbal abuse ...

1386

Lieutenant-Commander Virgin

Re-examination

DEFENDING OFFICER: Mr Judge Advocate, this is clearly hearsay and especially now indulging into an MP's opinion, I mean ...

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. Could you just describe and answer simply the question, "what do you mean by tone"? A. The tone that he used was very fierce, ferocious, intense. The intonation of his voice, the words that came out, well, academic he could've been calling you a bouquet of flowers, I mean, it was the ferocity of the voice.

Q. Can you demonstrate for the court this tone. Pretend I'm you, I don't like something that's happened in the wardroom, you're Lieutenant-Commander Marsaw. Demonstrate the tone, the words, that you've experienced? Stand up if you have to? A. Well, if ...

Q. Approach me the same way Marsaw would approach you? A. If he came into the control room and something was not liked, that he wasn't happy with, say the sonar operator was not wearing his flank headset which they had a tendency to take it off, and so if he came out and noticed that, then I guess if I was him coming out of his cabin and he looks in and sees it, and lets out a big exasperated sigh and then, for fuck sakes, wake up, what the fuck is going on in the sound room? How many fucking times do I have to tell you to get those fucking headsets on? Get the fucking ECl out here. Sort out your fucking watch or I'll fucking sort you out.

Q. Would he ever approach you in that manner? A. Rarely.

Q. Can you think of occasion where he had? A. There was the time when I failed to surface the submarine and a few other times where - and it was

1387

Lieutenant-Commander Virgin

Re-examination

predominately SSXs, serials of one submarine versus another - where we would make a mistake. One time we made a mistake that the submarine was outside its allocated area. But that was the type of ...

Q. How frequent would that type of tone occur? A. Daily.

Q. You talked about going to the cabin for serious mistakes, but how could he or would he respond to even trivial mistakes? A. With respect to going to his cabin?

Q. No, just in general, how would he respond to a trivial mistake? A. Virtually the same way. A mistake was a mistake.

Q. What would be an example of a trivial mistake? A. Not updating the fixed position in the fire control system which should be done at frequent intervals; being a foot or two shallow off depth; making an incorrect pipe; an incorrect aspect of a standing operating procedure; giving an incorrect order.

Q. Would these include mistakes that did not trigger immediate safety concerns? A. Yes.

Q. You were asked whether or not Lieutenant-Commander Marsaw achieved good results in terms of operation. Did he achieve good results in terms of professional development and leadership? A. Good results for professional development and leadership of?

Q. Of his wardroom? A. It varied. Some people, the majority did not respond well at all and had no desire to learn. I personally did.

Q. What would your response be if you learned that a number of individuals have testified at this court martial saying they have been referred to by Lieutenant-Commander Marsaw using a variety of person-

1388

Lieutenant-Commander Virgin

Re-examination

ally insulting adjectives? A. As I said in my interview, I don't recall it. I wouldn't be surprised if he did, I wouldn't be surprised if he didn't. I remember the times he used them with me personally. But as I mentioned with the example, it wasn't so much the words, it was the way they came out, and I didn't distinguish certainly the members of my watch or the wardroom of the ship's company within, you know, the context of those words.

Q. When asked about the particular use of the word "vindictive", you said, perhaps it's a poor choice of words, don't have a Master's degree in English, the point I was trying to get across was "you treat people like shit". Can you elaborate what you meant by that? A. The constant yelling and screaming like that at people, particularly for what I would call minor mistakes, wears or wore them down and legal definitions aside, it's not appropriate particularly because of the frequency and the ferocity of it.

PROSECUTOR: There are no further questions, thank you.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court will adjourn for 15 minutes.

ADJOURNMENT: At 1035 hours, 16 October 1995, the court adjourns.

1389

Lieutenant-Commander Virgin

Re-examination

REASSEMBLY: At 1055 hours, 16 October
1995, the court reassembles
and the accused is before it.

JUDGE ADVOCATE: Next witness?

ASSISTANT PROSECUTOR: Lieutenant[N] Soper.

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1390

Lieutenant(N) Soper

Examination-in-chief

THIRTY-SECOND WITNESS) Lieutenant[N]
FOR THE) M.A. Soper, is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good morning. Could you state your full name, please? A. Mark Andrew Soper.

Q. And would you slowly spell your last name? A. S-O-P-E-R.

Q. Your service number is ?
A. Yes, it is.

Q. And you're currently posted to the First Canadian Submarine Squadron? A. Yes.

Q. You joined the Canadian Forces in 1983?
A. Yes, I did.

Q. And graduated from RMC in '87, as an electrical engineer? A. Yes.

Q. I understand you were awarded your dolphins in early 1990? A. Yes.

Q. And you've served on both the HMCS OKANAGAN and the HMCS OJIBWA? A. Yes, I have.

Q. What submarine commanding officers have you served under? A. In my first stint on HMCS OJIBWA under Lieutenant-Commander MacDonald, Lieutenant-Commander Bush, Lieutenant-Commander Davidson and Lieutenant-Commander Marsaw; and on OKANAGAN under Lieutenant-Commander Mosher.

Q. For what period did you serve on board OJIBWA under Lieutenant-Commander Marsaw? A. Under Lieutenant-Commander Marsaw from May of 1991 until November of 1993.

1391

Lieutenant (N) Soper

Examination-in-chief

Q. And what was your position on board OJIBWA? A. I was the combat systems engineering officer.

Q. As a combat systems engineering officer, where would you be employed while the submarine was at sea? A. My watchkeeping station was as a second officer of the watch dived and as an officer of the watch surfaced.

Q. And as second officer of the watch, where would you be employed? A. In the control room.

Q. How would you describe Lieutenant-Commander Marsaw's leadership style? A. He's very authoritarian and task oriented.

Q. When you say "authoritarian", what do you mean by that? A. He took positive control of all activities under his command and ensured that things were conducted in a letter-perfect fashion.

Q. And how would he go about taking positive control? A. By imposing his direction onto his subordinates.

Q. And how would he impose his direction? A. By correcting any deficiencies in a very acute manner.

Q. And when you say he would correct any deficiencies in a very acute manner, can you describe how he would correct a deficiency, perceived or actual? A. Well, normally by yelling at the individual or by taking him back to his cabin and discussing it there.

Q. And if he were to yell at the individual, where would this occur? A. In the control room.

Q. And what was the more common method for dealing with the problem? A. By yelling at the person involved.

1392

Lieutenant(N) Soper

Examination-in-chief

Q. And from the perspective of those on watch, what was the preferred method when dealing with the problem, would they prefer to be yelled at or be taken to his cabin? A. They actually preferred to be yelled at.

Q. And why was that? A. Because then the incident was over and done with and there weren't any long-term ramifications to the incident.

Q. Now, when he would yell to correct an individual, what types of words would he use? A. When he would yell at an individual, it would instigated by a concrete activity, such that he, you know, didn't yell at people at random. They were in response to something that had occurred on board, either perceived or otherwise, and the attack would be at the event that took place and would progress into attacks at the individual.

Q. And, again, the words that would be used when it would progress to attacks against the individual? A. Comments to the individuals intelligence, words like, "idiot, fucking idiots, stupid, lazy, incompetent", things of that nature.

Q. When you say it would be towards the intelligence of the individual, what do you mean by that? A. Indicating that the person wasn't thinking about what he was doing, wasn't as smart as he should be, something to that effect.

Q. Can you describe Lieutenant-Commander Marsaw's tone of voice would be when he'd be dealing with somebody in this manner? A. Anywhere from a very stern voice to actually yelling at an individual.

Q. And, again, the tone, would it be angry, friendly? A. Angry.

1393

Lieutenant(N) Soper

Examination-in-chief

Q. And you indicated earlier that this yelling, when this approach was used, would take place in the control room? A. Yes, primarily in the control room. It also took place in other places as well but mainly in the control room.

Q. When it occurred in the control room, what rank levels are normally employed in the control room? A. Well, the officers on watch would be at the lieutenant and sub-lieutenant rank level; there would also be petty officers of the watches at the petty officer first and second class and master seaman levels; and also within earshot there would be the radar and sound room watchkeepers at the master seaman/leading seaman/ordinary seaman level.

Q. Okay. And who in the control room would be subjected to this type of treatment by Lieutenant-Commander Marsaw? A. Primarily, the officers.

Q. Anybody else? A. Well, on occasion the petty officers and the watchkeepers in radar and in the sound room.

Q. Do you recall what officers served with you on board OJIBWA during your period there? A. Lieutenant-Commander Virgin, Lieutenant-Commander Dussault, Lieutenant Kelk, Lieutenant Tabcart, Lieutenant[N] Higginson, Lieutenant[N] Byrne, Lieutenant[N] Bryan, Lieutenant[N] Tingle, Lieutenant[N] LeClaire, Lieutenant-Commander Halle, Lieutenant[N] Hart and more.

Q. Were any of the officers that served on board with you during that time not subjected to the type of treatment you've described? A. No, everybody got it at one point or another to varying degrees.

Q. With respect to the non-officers that were subjected to the treatment, were there any individuals or positions that seemed to be subjected to it more frequently than others? A. The more frequent

1394

Lieutenant(N) Soper

Examination-in-chief

positions would be the CEP operator, the helmsman, the sound room supervisor and the radar watchkeeper.

Q. How frequently did Lieutenant-Commander Marsaw behave in that manner, the yelling and screaming? A. It depended on the nature of what operations we were conducting at the time, on average two or three times a watch.

Q. In addition to yelling at people, you indicated on occasion he would take someone to their cabin ... or to his cabin, excuse me. Was there anything else he might do in response to an error or perceived error? A. Well, there could be direction in the CO's cabin or in the wardroom. As well there could be written correction in terms of a reproof.

Q. Do you recall being interviewed by the military police in January of '94? A. Yes, I do.

Q. And did they question you at that time in the way the Captain verbally treated members of the crew on board OJIBWA? A. Yes, they did.

Q. And how did you respond to their enquiries? A. I responded that, yes, he had yelled at the crew on occasion, and I also indicated that the yelling was initiated by actions that had taken place on board. They weren't random assaults.

Q. Did you specifically use the words that you've used here today as far as the terminology he would use, "idiot, stupid idiot, fucking idiot", et cetera? A. No, I did not.

Q. Why didn't you provide them with those words? Did they ask you to give them those words? A. Well, they didn't specifically ask me. At the time of the interviews it wasn't really clear what their direction was in the interviews. I perceived it as kind of a witch-hunt at the time. The MPs were interviewing people in response to an article that had appeared in the *Chronicle-Herald*, and they were basi-

1395

Lieutenant(N) Soper

Examination-in-chief

cally asking everybody in and asking them very general questions. Most of their questions to me were actually in terms of physical abuse that had taken place on board.

Q. What was the ... how would you describe the atmosphere in the control room of the OJIBWA when Lieutenant-Commander Marsaw was present? A. It was very tense. Certainly, everybody was nervous to ensure that nothing went wrong that could trigger a tirade.

Q. Were you ever personally subjected to this type of verbal treatment by Lieutenant-Commander Marsaw? A. I was yelled at on frequent occasions.

Q. Can you give me an example or situation where you would've been yelled at? A. The most dramatic event occurred on a drug operation which we were conducting in the fall of 1992 when I was actually figuratively thrown out of the control room.

Q. So what occurred in that situation? A. I was acting as the ship control officer of the watch and the Captain and I had a confrontation on how operations were being conducted on ship control, and I lost and I was thrown out.

Q. So what resulted in this confrontation that you described to the court? What were the circumstances? A. Well, the submarine was snorting in fairly rough weather, we were fairly close to shore. There was a risk of counter-detection so, of course, there was a desire to keep the fin under water. Depth keeping was very difficult and I was given direction to use as much speed as required in order to keep the submarine under control, and I gradually did increase the speed until, of course, the submarine started cavitating. I was hesitant to reduce the speed of the submarine because I was more concerned with the visual counter-detection and the Captain disagreed, and we slowed down and I left the control room.

1396

Lieutenant(N) Soper

Examination-in-chief

Q. Did you leave on good terms? A. I was told, "CSE get out of my control room."

Q. What was the tone of voice when that ...
? A. Very loud and very direct.

Q. How did you respond to that or feel about that? A. Well, tail between my legs, I left the control room and we discussed it in his cabin at a later time.

Q. What was your reaction to being removed from the control room? A. Well, having never had it happen before it came as a shock. I played through the events in my mind as what had led up to it, to try to figure out what had gone wrong and how to avoid the situation in the future. I approached the radio watchkeeper to see if he had been recording the incident so I could play it through in my mind, but he had not been running "big brother" at that time.

Q. Did Lieutenant-Commander Marsaw's leadership style and his method of dealing with people in the control room affect the way the officers did their job on board, again, based on your observations? A. Well, it certainly did. People were, you know, took special precautions to try not to trigger the captain. They were trying to anticipate anything that would meet his concerns and that he would be, you know, possibly upset about. So certainly they were nervous on a continuous basis.

Q. And why was that? A. Well, nobody likes being yelled at.

Q. What about the watch leaders and the XOs, did it effect the way they performed their duties?
A. It did. Certainly, while they were on watch in the control room they were influenced by the Captain's leadership style in kind of a self-preservation type response. They would promulgate the yelling and the

1397

Lieutenant(N) Soper

Examination-in-chief

authoritarian style on to their watches in order to try to take some of the heat off their backs.

Q. What was the atmosphere like in the wardroom on board OJIBWA? A. Well, it was tense as well. With the proximity of the wardroom to the CO's cabin, certainly it wasn't a sanctuary where you could vent frustration.

Q. Were there frustrations to be vented? A. Well, certainly the amount of pressure that was on all of the officers while on watch, you know, does build up and the easiest way to get rid of it is to talk about it.

Q. What were mealtimes like on board? A. They were tense as well. The Captain eats his meal in the wardroom with the on-going watch, and he would take the opportunity to, you know, sitting with the junior officers to bounce qualifying type questions off of the junior officers to gauge how they were progressing in their qualifications. That, of course, also bounced back on the qualified officers as well, in that if the junior officers answers weren't as complete as Lieutenant-Commander Marsaw expected, he would then bounce similar type of questions off of the officers who were training them - the junior officers.

Q. How would he react if he wasn't satisfied with the answers? A. Anything from yelling at the individual, to talking to the individual, to providing extra training opportunities in terms of extra drills, extra watches, that sort of thing.

Q. What was your opinion of this practice in the wardroom with respect to officers? A. Well, there are few opportunities on a submarine to relax and for recreation, and meal hour is one of those few times for people to sit back and relax. So the idea of qualifying questions being bounced off of people during meal hours takes away that moment of recreation.

1398

Lieutenant(N) Soper

Examination-in-chief

Q. Based on your observations, what was the effect of this practice? A. Well, several of the junior officers actually refused to eat in the wardroom and they either didn't eat at all or they would take their meals into machinery spaces to eat them.

Q. What was the morale like on board OJIBWA?
A. I'd assess it over the period as low to moderate.

Q. What was the reason for this based, again, on your observations? A. Well, it would rise to moderate when we were looking forward to good foreign ports, that tended to raise morale temporarily.

Q. And why was it so low, otherwise?
A. Because of Lieutenant-Commander Marsaw and his leadership style.

Q. Did the OJIBWA have a nickname within the submarine squadron? A. The qualifying officers referred to it OJIBWA as the "death ship".

Q. Did you ever have occasion to witness Lieutenant-Commander Marsaw make anti-Francophone type comments? A. I did witness him making anti-Francophone comments both in the wardroom and in the control room, primarily to Lieutenant[N] Jacques.

Q. And what type of comments would he have made? A. Statements to the effect of, stupid Frenchman, lazy Frenchman, things of that nature.

Q. Would Lieutenant[N] Jacques, for example, be present when these comments were made?
A. Normally, yes.

Q. Were there other francophones in the wardroom while you served on board OJIBWA? A. Yes, there were: Lieutenant-Commander Dussault and Lieutenant[N] Cassivi, I believe, they come to mind.

1399

Lieutenant(N) Soper

Cross-examination

Q. Would either of them have been present when these types of comments were made? A. Yes.

Q. Given your experience on board submarines, have you ever witnessed another commanding officer use personally insulting adjectives or derogatory comments towards his officers? A. No, I have not.

Q. Did you raise your concerns with anyone at any time? A. I did discuss them with the executive officers, Lieutenant-Commander Virgin and Lieutenant-Commander Dussault, and I also raised them with the squadron technical officer, Lieutenant-Commander Carter at the time.

Q. To your knowledge, did anything change as a result of your conversations? A. No.

ASSISTANT PROSECUTOR: Thank you, those are my questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. First, a couple of questions that were put to you in direct examination pertaining to leadership style. Basically, in your response, take positive control to impose his direction and so on and so forth.

If I asked you to describe - and your perception - how you saw Lieutenant-Commander Marsaw approach his job, how would you put him? A. He was very professional, a perfectionist. He paid attention to detail in everything that took place.

1400

Lieutenant (N) Soper

Cross-examination

Q. And did you personally learn a lot by trying to meet his standards? A. Certainly.

Q. But it was not easy? A. It was not easy. It was a lot of work but certainly I learned a lot about my job in having to meet his standards.

Q. And when you talk about standards, was he asking anything that was not written down in the emergency operation procedures, CANSO's or the drills, the basic operation for everybody. Was that written down and he expected the exact drill to be known and followed? A. That's correct. He expected it to be known as it was written down in the various references, yes.

Q. And there were no surprise questions or tricks in there? A. There were no surprises.

Q. And was there any kind of forewarning when drills were going to come down, or that during a particular outing such and such a drill would be performed or was required to be performed? A. Sometimes, yes, sometimes, no. But more often than not we knew what was coming.

Q. And it was obvious ... or not obvious, but it was an opportunity then to go to the books and just refresh your memory as to what was expected? A. Correct.

Q. Would you say that he led by example? A. Yes, he did.

Q. Would he expect anyone to work harder than he did? A. No, he did not.

Q. But he's not a man-person in terms of personality. He's not ... by looking at him operate in the control room, is he person oriented? A. No, he was task oriented, meeting the requirements of whatever operations we were completing at the time.

1401

Lieutenant (N) Soper

Cross-examination

Q. And applying those standards the way they were applied, how would you rate the performance of the submarine throughout the period that you were there?

A. Extremely high.

Q. But then again, what was your sailing schedule like during that time? A. It was very busy. We spent a lot of time at sea during that period.

Q. And with the age of the submarine and the repairs and the state of age, I guess, it would require more on people to achieve that standard with equipment that is fading or slowly fading? A. Certainly, the amount of maintenance was extensive in keeping the boat completely operational. And as well with all the cut-backs on the shore support and overtime, the support we were getting from outside agencies was diminishing as well, so there was more and more pressure on ship staff.

Q. Pressure on ship staff because overtime was being cut and then it would run into your self-work period because the outsiders were there, the crew couldn't perform their tasks and therefore would have to work on weekends before sailing and stuff like that?

A. Weekends, evenings, that sort of thing, to get the boat ready to sail, yes.

Q. And as to the atmosphere - a question on the atmosphere when Lieutenant-Commander Marsaw was in the control room - it was tense, people not trying to trigger a tirade and comments like that. In your perception, as you looked at it, was it done simply to be harsh with people or would it be done to teach officers of the watch, or the watch leaders and the senior officers to tighten the reins on what was going on in the control room and make sure that everything was under control at all times? A. The goal of it was to ensure that operations were being conducted correctly.

1402

Lieutenant(N) Soper

Cross-examination

Q. Yeah. And to avoid - when you say their reactions was to avoid triggering a tirade - would that boil down to not doing mistakes that were not supposed to be done? A. Yes.

Q. According to the standards, again, and the known drill and the procedures for conducting a watch? A. Yes.

Q. Would you go to war with Lieutenant-Commander Marsaw? A. He wouldn't be my first choice but, yes, I would.

Q. And that type of environment, the tension that was, as you put it, created by his presence, the pressure by his standards and the application of a strict standard, would that create or provide a learning or training environment? In preparing people for the worse, I mean? A. Yes. Yes, it would.

Q. It would allow them an environment in ... ? A. In simulating very stressful situations and that, trying to simulate, you know, perhaps wartime conditions, yes, certainly that would be a means to an end.

Q. To train people to react and react properly under pressure? A. Correct.

Q. You mentioned the time that you were thrown out of the "out of the control room". Were you on the trim seat at the time? A. Yes, I was.

Q. And how much of a job is it to control? A. Well, there's a fair bit of activities to control, and at the time we were snorting, running our diesel engines, trying depth keeping in very rough weather and, you know, controlling the trim of the submarine under those conditions.

Q. And that was during the, I think, August to October period, during the drug op? A. Correct.

1403

Lieutenant (N) Soper

Cross-examination

Q. And there was a clear danger of detection if; for instance, like you mentioned, the fin was to get out of the water? A. That's right.

Q. But then at the time, since you were doing the snort, I gather it was required to do the snort at that specific time? A. I was required to do a snort. Whether it was that specific time, I don't recall the details to that.

Q. When do you do a snort? A. Normally, whenever an opportunity presents itself. We want to keep our battery as close to a hundred per cent as we can.

Q. So it's a balance in-between not being detected and keep everything ready in case it's needed? A. Correct, yes.

Q. Is there a difference trying to keep depth when you're in shallow waters? A. Yes, there is. The swell tends to build quicker in shallow waters and tends to be a shorter swell, closer together, tends to affect the submarine more so than a long rolling swell.

Q. What was your disagreement with the Captain then concerning the necessity of that going on at the time? A. The depth keeping was very difficult. My perception of it was that the priority was depth keeping and keeping the fin out of the water so that when the submarine started cavitating, making more noise into the water, I did not perceive that as a problem.

Q. But it appeared to be a concern to him? A. Correct.

Q. Were you ever thrown out on other occasions from the trim seat? A. Not under Lieutenant-Commander Marsaw, no.

1404

Lieutenant (N) Soper

Cross-examination

Q. Under whose command? A. As I was a qualifier under Lieutenant-Commander Bush there was an incident - it was my first time dived at sea during sea training evolutions - and during a multiple evolution the submarine actually hit bottom, and a qualified officer took over on the trim seat at the time.

Q. There's a danger in not keeping a proper depth though? A. Oh, certainly.

Q. And the proper to learn it would be a time when the submarine is not in danger, would you agree? A. That's correct, yes.

Q. But then when you're doing it there, the purpose is to learn to do it properly whether or not - because you don't know when the time is going to come - if you're going to be capable of doing it? A. I believe I'm following that but ...

Q. Let me rephrase to make ... yes, to make it more clear. If you are not in a situation of immediate danger and you're just being put on the trim seat and there would be a consistent requirement from either the officer of the watch or the captain for you to keep on depth, would that requirement be justified because you are learning to do it properly when the time comes? A. Yes.

Q. And the effect, you mentioned, on officers, especially the officer of the watch and the XO, the influence it would have on them, on their style, they would adopt the same style and do the same things that when he was around. Same things in terms of, I guess how you'd put it, taking direction and being more forceful in the control room. Would the same mistakes happen when they were not doing that? If, let's say, Lieutenant-Commander Marsaw is not there, they change their style, do they go to their more relaxed state? Would the same mistakes happen from people?

A. Sometimes, yes; sometimes, no. Certainly, when a

1405

Lieutenant(N) Soper

Cross-examination

person is more relaxed sometimes they'd perform their jobs better because they're not concerned about other things going on, and sometimes they do get lazy in what they're doing and will tend to cut corners.

Q. Now, with respect to the issue of verbal abuse, you mentioned the words "idiot, fucking idiots, lazy, stupid" and terms like that, and you were questioned by the prosecution as to why you would not mention those words to the MPs, and you mentioned that they didn't ask for that, do you recall that? A. Yes.

Q. Were you, in fact, asked if you had heard the word "stupid"? A. I believe I was, yes.

Q. And you mentioned the same word now and you say that you weren't asked then. Were you ... ?
A. I just forget the details of how they worded the question, but at the time what the MPs were driving at is they really had no, sort of, focus as to where they were going with their investigation. I hold no resentment against Lieutenant-Commander Marsaw, I feel no reason to persecute him for how he treats people, for how he treated me. And as such I didn't want to give the MPs the indications that he had, in fact ... you know, yelling at people is a leadership style that the military teaches to people, I mean, certainly my experiences at the military colleges, I've been yelled at far worse than I ever was under Lieutenant-Commander Marsaw. So being yelled at is not, in my mind, a problem and I didn't want to give that impression to the military police.

Q. Uh-huh. But the words that you just reported in direct examination, is there more to the context of those words? Did you hear him call somebody an idiot or did you hear him say, ah, come on, don't be an idiot? Can you recall any specifics? A. Well, certainly it was used in both contexts on board. Again, when he yelled at people it wasn't random, it was always triggered by a certain action or activity

1406

Lieutenant (N) Soper

Cross-examination

that had taken place. So the intent of the yelling was to correct the activity that had taken place.

Q. So, basically, what you're telling us is that when he would point out to; let's say, the folder that's there on the table, it was directed at the folder and you should not necessarily look at the finger? A. I don't understand?

Q. Well, if I point out there and you keep staring at my finger, you'll miss the point, you'll miss the book, and you'll only recall the finger? A. Okay.

Q. Okay. So what you're basically telling us is that when he did that, when he yelled or raised his voice at people, it was directed at the action? A. Yes.

Q. And for the part about the specifics, you can't necessarily recall specifics because you were looking and you saw it as being pointed at the action and not necessarily the finger, you didn't pay that much attention to the finger? A. Correct, yes.

Q. And sometimes the yelling would take part (sic) in the control room, sometimes it would take part (sic) in the cabin. Do you see a difference in the environment of OJIBWA at the time that it would take place in the control room or in the cabin? Would people in the control room still be able to hear what was going on in the Captain's cabin? A. Well, depending on the volume of what was happening in the Captain's cabin, but certainly if done in the control room there's no attempt to, you know, keep it within the officers because there are all ranks in the control room.

Q. But if he was to say to someone, without going into a tirade - like for the word that you used - but was visibly angry in the control room and tell

1407

Lieutenant(N) Soper

Cross-examination

somebody, you, my cabin. Would people know what was going to happen then? A. Yes.

Q. Would that change the perceived effect by the individual, knowing that in front of everybody he was being told by the Captain, I want to see you in there because I have to talk to you? A. Well, as I've indicated, it was actually preferred to get the direction at the time because then it was over and done with.

Q. And in that respect, did you ever see him dwell on someone's mistake or weakness, drag it on for a couple of days? A. No.

Q. Other captains that you have ... Lieutenant-Commander MacDonald, Lieutenant-Commander Bush, Lieutenant-Commander Davidson and Lieutenant-Commander Mosher, did these individuals occasionally raise their voice? A. Yes, they did.

Q. They did. Would the word "fuck" come out once in a while in a sentence, get the fuck back on depth, or ... ? A. I don't recall any specific incidents but it could've.

Q. And they would, basically, also I suggest react to triggers, react to - they're not going on a rampage as well - they're just ... when something happens they react, direct, pointed at the action; done and over with and finished? A. Yes.

Q. Do you have any examples that you can relate to the court of where direction was being given at officers in the wardroom? You mentioned earlier that direction would be given either in his cabin - I would suspect given the size of the place, I've seen it, that it would be one on one because there's no more room for that - but the wardroom, he would generally address the wardroom as a whole? A. Well, we did have meetings of the wardroom where the Captain would address all officers, is that what you were alluding to?

1408

Lieutenant (N) Soper

Cross-examination

Q. Uh-huh, yes. And would that be done just to degrade and down the individuals, or was it made to make a point with the officers that he had noticed weaknesses and was looking for solutions to that or reasons why? A. It would be in response to perceived performance difficulties either during sea training activities or in preparation for operations.

Q. Uh-huh. And during one of those occasions, did he address his concern about violence?
A. Yes, he did.

Q. But he didn't relate any specific incident that he was pointing at, just ... ? A. The specific incident that he was pointing at - the example that comes to mind anyway - was on leaving Dublin, Ireland, one of the officers was injured while we were in Dublin, Ireland, and some of the rumours that were flying around was that some of those injuries had been provided by another officer.

JUDGE ADVOCATE: Please, don't report rumours.

WITNESS: I'm merely telling what that briefing was about.

ASSISTANT DEFENDING OFFICER:

Q. Yes, but without going into what the rumours necessarily were but speaking which - and I don't want any words on rumours. In your position, did you get to read the Captain's Standing Orders?
A. Yes.

Q. Was there anything in there about complaints that you recall? A. It's been sometime since I've read those orders. I believe there was a section on complaints but I don't recall the specifics of what was detailed.

1409

Lieutenant (N) Soper

Cross-examination

Q. Complaints and how complaints should be addressed? A. I believe there was a section to that effect.

Q. Okay. With the questioning in the ward-room during mealtimes, was that done on a regular basis but would happen once in a while? A. That was done on a regular basis.

Q. Uh-huh. And would those be difficult questions, or questions of general submarine service knowledge? A. It would vary. Certainly, the majority of them were on general submarine knowledge.

Q. Uh-huh. Addressed most of the time at the Part IIIs? A. That's right.

Q. And when you saw - in your capacity as a qualified officer - you saw people either who had a difficulty answering the questions during the mealtimes or people who had problems performing their tasks or duties or responsibilities in the control room, how did you approach that personally? A. Well, certainly you have ... as the junior officers are working through their performance objectives and the submarine qualification, they would come to the appropriate officers to receive instruction if it related to their performance objectives.

Q. Did you have a chance to do that yourself when you saw that somebody had problems or weaknesses to just kind of take them under your wing and direct them at the publications and saying, now, if you want to avoid that problem or don't do that mistake again look at this, this and that, and I suggest that next time you read it before? A. Yes.

Q. Did you see results after that, would people tend to do the same mistakes or would they just benefit from ... ? A. Well, they would benefit from them in that it would steer them at, you know, stuff that they hadn't looked at closely enough or what have

1410

Lieutenant (N) Soper

Cross-examination

you. But more often the result was that those officers just wouldn't eat in the wardroom.

Q. And how long did that last, the not eating in the wardroom? A. It would go in fits and spurts, about, you know, two or three weeks before it would be noticed.

Q. Uh-huh? A. As the watches were progressing.

Q. How many officers did you have on board at the time? A. The number of officers we had on board bounced from about 12 to as many as 16, 17.

Q. And how many people can you sit at one sitting in the wardroom? A. Six people can sit at one sitting.

Q. So is it possible that at times people were ready to eat but there was no room, and especially the Part IIIs have to put in qualifying or put time in their qualifications, would just eat out there so they could hit the books later? A. Yes.

Q. Now, you said that morale was low to moderate, would go better as you were getting closer to hit a foreign port. Is that usual in the navy, based on your experience? A. Sailors do look forward to foreign ports, yes.

Q. Get a break from the hard work and the long schedule and being away for so long. But how can you attribute that solely to ... or mostly to Lieutenant-Commander Marsaw, that morale would be low?

A. Well, in comparisons with crews on other boats and discussions with people on other boats as to how, you know, their crews were behaving.

Q. And you said that the Part IIIs had nicknamed the OJIBWA "the death ship". What were the

1411

Lieutenant(N) Soper

Cross-examination

other submarines called? A. I don't know the terms that they referred to the other submarines.

Q. Ever heard the term "love boat"? A. No.

Q. No? A. I have heard the term "show-boat".

Q. What does that mean, "showboat"? A. As the boats went through their cycles they got the nicknames of the "go boat", the "no boat" and the "showboat". The go boat being sort of recently out of refit and doing the majority of the operations; the show boat winding down its commission and doing the majority of the foreign ports; and the no boat being the boat in refit which wasn't going to sea.

Q. Uh-huh. And were qualifications of officers or NCMS ... if a submarine is operational and the other two are - one is either in refit or the other is plagued with technical problems, would you have to pick up the slack on that too? A. Yes, we would.

Q. I see. So that would account for the fairly large number of officers - you said, up to 16 at one point? A. Yes, certainly, we had a large number of trainees on board cycling them through to receive operational experience which they couldn't get on the refit submarine.

Q. And the turnover, the cycle, would you say was, average, low, fairly high, high? A. The turnover rate was fairly high in that there was quite a bit of pressure to get the qualifiers through. They'd be there about six or eight months, so then a new batch would be in.

Q. In and out. Did you ever sit on officer qualification boards? A. I sat on officer of the day qualification boards and on the submarine qualification boards in squadron.

1412

Lieutenant(N) Soper

Cross-examination

Q. How did these boards function? Who's the chairman and who sits on the board and who, basically, makes the decision? A. Well, for the officer of the day qualification boards held on board, those are chaired by either the XO or by the CO if he's available, and the heads of department form the other members of the board to determine the member's suitability to stand as officer of the day. For the submarine qualification boards, those are chaired by the squadron commander. Members of the board include the squadron technical officer; one of the other boats commanding officers; I believe the squadron operations officer if he's submarine qualified; and as well the member's commanding officer would be on the board as an observer.

Q. As an observer, but that the decision would never ... the final decision as to whether or not somebody goes on his command course is never left to the captain himself? A. Well, the command course is something different.

Q. Not the command course, but the latter one you mentioned? A. Oh, the submarine qualification board?

Q. Uh-huh? A. Well, certainly he had to be recommended by his commanding officer in order for the member to even appear in front of that board, in front of that panel.

Q. And once he's recommended, goes before the board, but whether or not the board decides as ... this is not left up to the captain? A. No, it's not.

Q. Anti-francophone remarks, can you qualify them as well, can you put them in context? Was it part of a wardroom discussion, was it a bar discussion, or did he just come out and tell Lieutenant[N] Jacques that he's a stupid Frenchman? A. It would be in the course of a discussion.

1413

Lieutenant(N) Soper

Cross-examination

Q. The course of a discussion. Were they discussing politics, policies, bilingualism in the Forces, performance of French countries in past wars?

A. Yes, all of those examples were experienced, yes.

ASSISTANT DEFENDING OFFICER: Were experienced in the course of general discussions.

If I may, Mr Judge Advocate.

JUDGE ADVOCATE: ...

ASSISTANT DEFENDING OFFICER:

Q. When you were asked by Lieutenant-Commander Marsaw, when he told you, CSE, leave the control room, or - I'd have to go back to get your exact words - but was anything harsher than that was said to you by Lieutenant-Commander Marsaw? A. Well, at the time, certainly, there was a lot happening in the control room. Whether anything else was said at the time, I don't recall.

Q. Uh-huh. And throughout your tour with him, did he use any harsher language than, CSE, get out of my control room, or get a grip, or do this, or ... ?

A. Well, certainly in my experiences in the military, I've been desensitized to it such that if he did, I don't recall it.

Q. You don't recall, it doesn't stick ... ?

A. I didn't take offence to it on any occasion.

Q. Uh-huh. Do you know Petty Officer Conrad? A. Yes, I do.

Q. Did you ever witness Lieutenant-Commander Marsaw calling him a liar in front of the control room?

A. No, I don't.

Q. Did you ever tell Petty Officer Conrad not to brief Lieutenant-Commander Marsaw directly?

A. I did. You know, when you follow the divisional

1414

Lieutenant(N) Soper

Cross-examination

system, I preferred all reports related to the combat systems equipment to be channelled through me to the commanding officer.

Q. So in order that being the divisional officer you would know before the captain would know, and then the captain coming down on you asking you, what the hell's going on with this, and then you'd be stuck without an answer? A. That's right.

Q. That's right. Did you have a chance to read an article published in the *Chronicle-Herald* in December 1993? A. I did read it at the time. The details of it I don't recall.

Q. How did you react to the article? Just the general terms of it about abuse and three years of hell on the submarine and all that? A. Well, at that point, I mean, I was off the submarine, Lieutenant-Commander Marsaw was off the submarine, it was over. So there was no requirement in my mind for the article.

Q. Uh-huh? A. I mean, the events were all water under the bridge.

Q. Were you contacted by Mr Dunlop, the reporter who wrote the article? A. I believe, yes, I was called by him, as I believe many other of the officers and NCMs on board were contacted by him.

Q. Did you answer his questions? A. No, I did not.

Q. You did not. And do you recall the date of your interview with the investigators? A. It was early January, I believe around the 10th or 11th.

Q. Oh, what year, sorry? A. '94.

ASSISTANT DEFENDING OFFICER: '94.

1415

Lieutenant (N) Soper

Re-examination

These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR:

Q. Petty Officer Conrad briefing the CO, if you were present would you let him brief the CO correctly, if you're all standing in a group and Conrad ... ? A. I preferred that things weren't done in that fashion.

Q. But if you were ... ? A. But certainly with ... if I was on watch in the control room, I mean, it happened frequently.

Q. Yeah, okay. Just to clarify boards, et cetera, indicted the CO was an observer on qualification boards? A. On the submarine qualification boards in the squadron, yes.

Q. And I think you did indicate this and I just wanted to make sure it's clear. How does an officer get to the qualification board? Whose recommendation does he need? A. They're recommended by their commanding officer.

Q. Okay. You also indicated that he sat on officer of the day qualification boards. How does an officer under training become qualified as an officer of the day? A. Well, as the MARS officer - I'll talk about, well, the MARS officers and the engineering officers - they receive their surfaced officer qualifications on their Phase IV, generally - well, It used to be done on the west coast in the training squadron. Following that they do their basic submarine course at Fleet School and so that when ... the normal state of events was when we got them down on the submarines, they had very little experience as even an officer of

1416

Lieutenant(N) Soper

Re-examination

the day on a surface ship, and they were also progressing in their submarine qualifications and the first section of that was geared towards their officer of the day qualification. So it was a general knowledge of submarine systems that would be used while the boat was in harbour and the procedures to keep the submarine safe while alongside.

Q. So do they stand watches as officers of the day? A. While they were training they would double-bank with a qualified officer until they'd successfully completed their officer of the day board.

Q. Approximately how long would it take a qualified officer to achieve that qualification? A. Well, these officers weren't qualified at the time. They were qualifying.

Q. Right? A. It would take them about a month, a month and a half, depending on what the submarine operations were at the time.

Q. Okay. In cross-examination my friend asked you if it was normal for morale to increase when you were going into a foreign port. You indicated that it was. Is it normal on the boats that you've served on to categorize morale as low? A. No.

Q. You also indicated, in response to my friend, that other COs that you've had have raised their voices in certain instances in the control room. On those occasions would they ever use personally insulting adjectives or derogatory comments? A. Not that I recall.

Q. Okay. And the occasion that you described where the boat bottomed or grounded, struck the bottom, and you were removed from the trim seat as an officer under training. Did the CO on that occasion use any personally insulting adjectives or derogatory comments towards you? A. No, he did not.

1417

Lieutenant(N) Soper

Re-examination

Q. And when you were removed from the trim seat during the drug trip, was the submarine in danger on that occasion, physical danger? A. Well, it was in danger of counter-detection.

Q. Was it in physical danger? A. No, it was not.

Q. And what was your goal on the trim seat at that time? What were you trying to do? A. Well, I was trying to keep the snort and keep the submarine on depth, keep it under water.

Q. By whose direction? Who directed you to do that? A. Well, I was on watch at the time as one of the watchkeeping officers - the ship control is part of that function - so then the first officer of the watch would've directed me into that position.

Q. You indicated that Lieutenant-Commander Marsaw's ... you'd rate his performance as high with respect to obtaining the objectives of a submarine. How would you rate his performance with respect to dealing with personnel in training? A. Well, certainly that wasn't his priority, and it did receive a lot of his efforts and attention and it was done in a very, sort of, strict educational manner. As far as, you know, did he care whether any particular individual qualified or not, no, I don't think that personal interest was there.

Q. You also indicated that Lieutenant-Commander Marsaw was very professional. Was it professional to use personally degrading adjectives towards members of your wardroom in the presence of subordinates? A. No, it is not.

DEFENDING OFFICER: Mr, again, that's, sort of, leading and calling for opinion that the court can determine just as well as the witness.

1418

Lieutenant(N) Soper

Re-examination

JUDGE ADVOCATE: It is. Unfortunately, your objection came a bit late because the answer was given, but your objection is sustained.

ASSISTANT PROSECUTOR: Those are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Any questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: The court is adjourned until 1300 hours.

ADJOURNMENT: At 1150 hours, 16 October 1995, the court adjourns.

REASSEMBLY: At 1300 hours, 16 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated. The next witness, Mr Judge Advocate, is Master Seaman Cumberland.

s.19(1)

1419

Leading Seaman Cumberland

Examination-in-chief

THIRTY-THIRD WITNESS) Leading Seaman P.D.
FOR THE) Cumberland, is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good afternoon. Would you state your full name, please? A. Paul David Cumberland.

Q. And would you slowly spell your last name? A. C-U-M-B-E-R-L-A-N-D.

Q. Your service number is ?
A. Yes.

Q. And you're a signalman? A. Radioman, sir.

Q. Okay, and currently posted to Canadian Forces Base Esquimalt? A. Yes, sir.

Q. When did you join the sub service?
A. July 1989.

Q. And I understand you served on both OJIBWA and OKANAGAN? A. Yes, sir.

Q. And you served on board OJIBWA from July '89 until July '93? A. Yes, sir.

Q. What submarine commanding officers have you sailed with? A. I sailed under Lieutenant-Commander Davidson, Mosher, Marsaw, Truscott.

Q. And for what period was Lieutenant-Commander Marsaw your CO? A. From December '91 until July of '93 ... correction '90.

Q. I'm sorry. So from December ...?
A. Ninety.

1420

Leading Seaman Cumberland

Examination-in-chief

Q. Okay. What were your duties on board OJIBWA? A. I was a leading seaman radioman and a bridge signalman.

Q. And as the radioman, where were you employed on board? A. In the radio room, wireless telephone office, sir.

JUDGE ADVOCATE: Could you repeat what you have said at the end, the court reporter has missed it.

WITNESS: The wireless telephone office.

ASSISTANT PROSECUTOR:

Q. I'm just showing you Exhibit "I" which is a diagram of the OJIBWA control room. Could you point out where on that diagram you were employed? A. Right here, sir.

Q. Okay, the witness has indicated the box marked W/T Office on the diagram. Given where you stood watch both in the W/T Office and on the bridge, did you have any opportunity to observe Lieutenant-Commander Marsaw in the control room? A. Yes.

Q. And how were you able to observe what was going on? A. Primarily in two different ways. I was listening on Big Brother and also interacting with the control room staff and the CO as the releasing messages, delivering the broadcast routine or atmospheric monitoring.

Q. Okay, so to perform those duties, where would you be for the atmospheric monitoring, the broadcast messages, etcetera? Would you actually be in the control room? A. Yes, sir.

Q. Okay. And you mentioned "Big Brother". What is Big Brother? A. Essentially, Big Brother is a recording device that records all the intercom communications on the ship and also there is an open mike in

1421

Leading Seaman Cumberland

Examination-in-chief

the control room to record non-electronic communications.

Q. Okay, I'm just trying to understand. Then there is this open mike in the control room, what does it do? A. It feeds the inter-connecting box that sends all the signals to the tape recorder.

Q. Okay. So what does this mike in the control room allow you to do in the radio room? A. We listened in on the activities in the control room.

Q. And were these activities recorded? A. On occasion.

Q. Okay. And when would they be recorded? A. They'd be recorded if we were ordered to turn the tape machine on, or in an emergency procedure, or if common sense prevailed this thing should be on.

Q. Okay. What would happen with these tapes after you would return from a deployment? A. One of two things, we would either recycle them ourselves or they would be returned to the XO on completion of an exercise or a deployment and he would box them up with other data.

Q. Okay. How would you determine whether or not the tapes would be turned over to the XO or if they were to simply be recycled? A. Well, we knew ahead of time before the deployment, the decision, this a record keeping procedure we were to turn in the Big Brother tapes.

Q. Given your time on board OJIBWA, and I know you can only approximate, but approximately how many tapes would you have turned over to the XO to be transmitted to whatever higher authority or where ever they went? A. Several hundred.

1422

Leading Seaman Cumberland

Examination-in-chief

Q. Based on your observation, how would you describe Lieutenant-Commander Marsaw's leadership style? A. Stern to the point of being tyrannical.

Q. When you say "tyrannical", what do you mean by that? A. Essentially, he ruled by instilling fear in us.

Q. What was the atmosphere like in the control room when Lieutenant-Commander Marsaw would be there? A. It was extremely tense, sir, and intense.

Q. And why would that be? A. He demanded perfection and I think, in my opinion, to the point where his perfection couldn't be achieved. So we were on pins and needles.

Q. How would he react if he were dissatisfied with something in the control room? A. Can you repeat that, sir?

Q. How would he react if he were dissatisfied with something in the control room? A. He would get upset and yell.

Q. Do you recall who would be subjected to that treatment in the control room? A. Anybody that worked there.

Q. Was there any particular group? A. The senior NAC OPS, the officer of the watch, the second officer of the watch, the trimming officer, the helmsman.

Q. Was there anybody employed in the control room that wasn't subject to that type of treatment by Lieutenant-Commander Marsaw? A. No, sir.

Q. Do you recall what types of words or phrases he would use when he was upset and he'd be yelling at people? A. The word stupid, idiots. It was ... everything was preceded by the word fucking. It was intense.

1423

Leading Seaman Cumberland

Examination-in-chief

Q. How would the officers or the control room staff in general react to that type of treatment?

A. Personalities are different. They reacted differently. Some reacted more poorly than others. Others just satisfied the Captain and corrected what the Captain wanted them to correct and have the problem solved.

Q. How did the others react? A. Are you looking for an example, sir?

Q. Well, I guess what I wanted is, did it affect the way they did their jobs? If I phrase the question in that way it might be easier for you to ...

A. Yes, it did affect their job. You could not be yourself. So everybody laid on a persona of what we wanted ... we thought the CO wanted us to do. When I'm saying this I'm talking more of the control room staff than myself.

Q. Did you ever have occasion to witness Lieutenant-Commander Marsaw comment on bilingualism or Francophones? A. Yes.

Q. And what type of comments or phrases would he have used? A. It was Lieutenant[N] Jacques then Sub-Lieutenant Jacques. I believe he was scolded for his voice procedure on VHF and, essentially, it boiled down to it was, "A fucking toad", because of his lack of English ability, it was, "The fucking toad, get him off that radio."

Q. Would Lieutenant[N] Jacques have been present for when Lieutenant-Commander Marsaw made those comments? A. No, we were on the bridge and he was down below.

Q. Was there other francophone officers on board OJIBWA when you served? A. Yes, sir.

1424

Leading Seaman Cumberland

Examination-in-chief

Q. Who else would have been on board?

A. Lieutenant[N] Dussault, Lieutenant-Commander Dussault now.

Q. Would comments have been directed towards or about Lieutenant-Commander Dussault? A. He was referred to as a fucking Frenchman but I don't recall if he was present.

Q. Were you personally subjected to that

type of treatment by Lieutenant-Commander Marsaw?
A. No, sir.

Q. Have you ever witnessed any of your other COs use personally degrading comments such as you described towards people in the control room? A. No, sir.

Q. Did you ever have occasion to discuss the competency of the officers on board with Lieutenant-Commander Marsaw? A. On one occasion we were in radio and he said to me in ... an other ... it was a conversation and he said that everyone of his officers was incompetent.

ASSISTANT PROSECUTOR: Those were my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Cross-examination

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Where were you posted in 1993? A. I was posted to CFS Aldergrove, sir.

Q. Did you hear of an article that was published in the Chronicle Herald on 16 December 1993?

A. I did hear of it.

Q. Is that correct that you were not interviewed by the military police? A. That's true.

1425

Leading Seaman Cumberland

Cross-examination

Q. Would you agree with me that ... you don't need to repeat exactly what was told to you but you became aware of the sort of allegation that were in the paper, allegation of verbal abuse or physical abuse, that sort of thing? A. Do you mean at ...in that December ...?

Q. Yes, from the paper, yes or from ...?
A. Not really. Yes, I talked to people in Halifax. I wasn't really sure of what was going on.

Q. Were you expecting a call from the military police? A. Quite frankly, yes, I was.

Q. And it didn't happen, I take it? A. No, sir.

Q. And as it did not happen, did it occur to you to contact them? A. No, sir.

Q. Why? A. I assume that they would. If they wanted me they'd get in contact with them. I had no axe to grind with my old CO.

Q. But I take it that you don't quite agree with the way he was treating his people? A. That's true.

Q. So why are you showing up here today? Why didn't you think back then that those events you just recounted to the court were worthwhile reporting to the military police? A. Because he never personally wronged me. I was on the West Coast and it just didn't cross my mind ever to present myself.

Q. But you knew he had wronged others or you believed that he had wronged others? A. I did not know what the charges were. I read in the paper or heard from it of the allegations. I didn't any of specifics so I was happy to go on with my life.

1426

Leading Seaman Cumberland

Cross-examination

Q. And actually, isn't that true that today you don't know anymore specifics? A. That is true.

Q. You don't know anymore specifics today anymore than you did way back then? You don't have any specifics to give to the court? A. No, sir, on my knowledge of this case.

Q. You said that you worked in on Exhibit ... from Exhibit "I", that you worked from the office W/T office here on this exhibit? A. Yes, sir.

Q. Where would the Captain be? A. The Captain ...

Q. Normally during action station and other events that might be recorded on Big Brother? A. Do you want me to point, sir?

Q. Yes, please. So you're pointing just ...? A. In the control room.

Q. In the control room. So you point the area of ... the general area of the attack periscope, is that correct? A. Yes, sir.

Q. So that's a fair distance from your place of work, isn't it? A. Yes, sir.

Q. How many feet approximately? A. Twenty, twenty-five feet, sir.

Q. And when you were asked the question, how would people react to the yelling, you said people reacted differently, is that correct? A. Yes, sir.

Q. Isn't that right that you couldn't see how people were reacting? A. No, I could not see.

Q. So when you're saying that people were reacting differently, that's what you're saying but

1427

Leading Seaman Cumberland

Cross-examination

it's surely not based on what you saw? A. It's what I heard, sir.

Q. That's what you heard, yes, but it's not what you saw, isn't it? It's not what you saw? A. I did not see anything unless I was in the control room at the time.

Q. And that Big Brother with the mike in the control room would pick ... that mike would pick the actual voices, or conversation, or whatever? A. Yes, sir.

Q. It was placed in the control room?
A. Yes, sir.

Q. Example, if the Captain would say, "Periscope up", that would be picked up on the Big Brother, is that correct? A. Yes, sir.

Q. It is not your decision to keep or destroy a tape ... a Big Brother tape? A. No, sir.

Q. You are acting upon direction given to you by superiors? A. Yes, sir.

Q. And when you hand over a ... or brought a tape to your XO, I guess, you alluded to ...? A. Yes, sir.

Q. That's the last of it you see and you don't know what happened to it after? A. Yes, sir.

Q. Is most of the yelling or the words that would be picked up by you on the communication net would come from the control room, of course, as part of the Big Brother? A. Yes, sir.

Q. And you wouldn't be able to say with certainty who was speaking, at what time, at what moment? A. I couldn't say with certainty.

1428

Leading Seaman Cumberland

Re-examination

Q. Who was speaking at what time, at what moment? A. From memory, no. When the actions were happening, I knew who in the control room who was speaking. I don't remember specifics now. A fair example, if the CO was changing course and the helmsman was Roger, or the trimming officer was making adjustment on the CO's comment, or whatever, I knew the players in that.

Q. But you could only hear what was going on the tape without knowing exactly what had provoked or you couldn't see anything in the control room, is that correct? It's not part of your job? A. That is correct.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. My friend asked you a question about not being able to see what was going on in the control room. Listening to the feed from the microphone, did you have any difficulty determining whether or not the commanding officer was upset? A. No difficulty, sir.

Q. Why was that? A. I could pick him up plainly and clearly in a normal conversation or a normal tone of voice if he said, "Radio Captain" in a tone like that, I would be able to answer him on my MC. When he was yelling, I knew he was yelling.

Q. My friend also asked you how you would know if different people reacted differently when they were subjected to that type of treatment in the control room. Did officers ever visit you in the radio room after they were ... there was some yelling in the control room? A. Yes, sir.

1429

Leading Seaman Cumberland

Re-examination

Q. Do you recall any officers in particular?

A. Lieutenant[N] Soper.

Q. Did Lieutenant[N] Soper ever request that you do anything or ...? A. He requested ...

Q. I'd ask you not to repeat the words?

A. ...

DEFENDING OFFICER: It is leading and in any event the witness has already answered a few moments ago in cross-examination that he heard. I mean, I don't see the sense in pursuing such line of questioning.

JUDGE ADVOCATE: Sustained.

ASSISTANT PROSECUTOR:

Q. What did you do after Lieutenant[N] Soper visited you? A. Really, I did not do anything.

Q. Okay. Were you able to satisfy any requests that he might have made? A. No requests were satisfied.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions. Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness will be Lieutenant-Commander Dussault.

s.19(1)

1430

Lieutenant-Commander Dussault Examination-in-chief

THIRTY-FOURTH WITNESS) Lieutenant-
FOR THE) Commander M. Dussault, is
PROSECUTION) duly sworn.

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you give your full name to the court and spell your last name, please?

A. Lieutenant-Commander Martin Dussault, D-U-S-S-A-U-L-T.

Q. What year did you join the Canadian Forces? A. 1981.

Q. And what year were you awarded your dolphins? A. 1982.

Q. What is your current position? A. I'm the commanding officer of HMCS OJIBWA.

Q. I understand you're the former XO of the OJIBWA as well? A. Yes.

Q. What time period were you the executive officer of HMCS OJIBWA? A. From August '92 to October '93.

Q. And that would have been under the command of Lieutenant-Commander Marsaw? A. Yes.

Q. Prior to that, which boats have you sailed on and who have your COs been? A. Prior to that I served on the OKANAGAN and the OJIBWA under Lieutenant-Commander Irvine, Commander Nicholson and Lieutenant-Commander Mosher.

Q. Could you contrast Lieutenant-Commander Marsaw's leadership style with that of your other former commanding officers? A. His style of leadership was different than the other COs in that when he scolded the officers he'd tend to belittle them in a

1431

Lieutenant-Commander Dussault

Examination-in-chief

way which diminished their character and you'd never know when he would do that. It was inconsistent.

Q. What was the tone of his voice when he would do that? A. He was yelling.

Q. How frequent would that be? A. On a regular basis.

Q. From your perspective as XO, did his leadership style present any concerns for you? A. Can you rephrase the question?

Q. Sure. From an XO's point of view, did his leadership style cause any concerns for you? A. Well, yes because it was very difficult for me to try to keep the officers to do their jobs knowing that the commanding officer would be berating them on a frequent basis.

Q. How did they appear based on your personal observations when Lieutenant-Commander Marsaw would approach them in this way? In terms of your personal observations, how did they appear? How would they react when Lieutenant-Commander Marsaw approached them in this way? A. They were afraid.

Q. Did you ever inform Lieutenant-Commander Marsaw of this? A. Yes, on a few occasions.

Q. Can you recall what you did say to him on those occasions? A. Well, on one occasion, during an exercise, we were doing plane jam drills and I told the Captain the reason that things weren't going so well was that because the officers were scared of him because he was yelling at them all the time and his response was that, "Well, if they can't take it they shouldn't be here."

Q. Did you raise your concerns about yelling and screaming on any other occasions? A. Yelling and screaming, not so much that but there was an occasion when I found out that some of the junior officers were

1432

Lieutenant-Commander Dussault

Examination-in-chief

eating in the machinery space and the reason they were doing that was because they were afraid at his questioning at the dinner table in the wardroom.

Q. Did you ever skip over Lieutenant-Commander Marsaw in the chain of command and raise your concerns with SM1? A. No.

Q. Why not? A. Because I did not believe it would do anything. Lieutenant-Commander Marsaw has told us in the wardroom that he had received outstanding PERs from the squadron commander.

Q. What's the significance of that for you?
A. Well, for me it's just, in my own belief, it meant that it would have been fruitless to go out there and tell the squadron commander. I thought that he would not have been ... he would not have done anything about it.

Q. At this point you were an XO. Where are you in terms of your career progression? A. I am waiting for a recommendation from the commanding officer to be able to attend the submarine commanding officer's course.

Q. At that point in your career, had you gone on any SOCTs? A. Yes, several.

Q. And prior to joining Lieutenant-Commander Marsaw's boat, what was the evaluation on your last test OCT? A. As I recall, the evaluation on my last SOCT said that I was a natural candidate, that I was ready to go to the submarine commanding officer's course at that time.

Q. I would like to show you three documents. See if you can identify them. A. ...

1433

Lieutenant-Commander Dussault Examination-in-chief

Q. One is dated 1st of August 1990. Could you briefly tell me what that is? A. That's a SOCT course report.

Q. That's your signature? A. Yes.

Q. And it's your evaluation by Capt[N] Dunlop? A. That's correct.

Q. Okay. I wonder if you could identify this one dated 2 November '90? A. It's another SOCT course report signed by Captain[N] Webster... Commander Webster.

Q. And the third one with your signature, can you identify that? A. It's another SOCT course report signed by Captain[N] Plante.

Q. Thank you. Can you read the comments of Captain[N] Plante for your latest SOCT report? A. "Lt[N] Dussault is a natural. He possesses excellent attacking skills and is a quiet but thoroughly effective leader. It has been a real pleasure watching him perform in the Control Room. Lt[N] Dussault is ready now for SMCC but must first be employed as a SM XO and complete five command exams."

PROSECUTOR: Mr Judge Advocate, I would like to introduce each one of these SOCT reports as evidence, please.

JUDGE ADVOCATE: Any objection?

DEFENDING OFFICER: No objection, Mr Judge Advocate.

PROSECUTOR: They are in a chronological order, the first one being dated 1 August '90.

JUDGE ADVOCATE: The first one is marked Exhibit "Y".

1434

Lieutenant-Commander Dussault Examination-in-chief

SOCT REPORT DATED 1 AUGUST 1990 IS MARKED EXHIBIT "Y".

PROSECUTOR: Sorry, Mr Judge Advocate. It's nine copies of the same singular document.

JUDGE ADVOCATE: Oh, is it?

PROSECUTOR: Yes, I'm sorry.

JUDGE ADVOCATE: So why did you give me nine?

PROSECUTOR: Copies for the members of the court. I should have informed you of that prior to giving them to you. My apologies.

JUDGE ADVOCATE: That makes six. Five plus the original.

PROSECUTOR: The original, one for my friend, one for us and one for the court reporter. And the next SOCT report which is dated, one page, dated 02 November '90, that will be one page.

JUDGE ADVOCATE: Exhibit "Z".

SOCT REPORT DATED 2 NOVEMBER 1990 IS MARKED EXHIBIT "Z".

PROSECUTOR: And the last document, SOCT report, one page, dated 8 February 1991.

JUDGE ADVOCATE: Exhibit "AA".

SOCT REPORT DATED 8 FEBRUARY 1991 IS MARKED EXHIBIT "AA".

PROSECUTOR:

Q. Lieutenant-Commander Dussault, I wonder if you could read the other prior SOCT report, this is the one, first of all, the one dated 1 August '90?

A. "I was very impressed with Lt[N] Dussault's first

1435

Lieutenant-Commander Dussault

Examination-in-chief

SOCT. He has a quick mind and obviously enjoys number crunching. He did have difficulty dealing with simultaneous inputs (if I talked to him while he was doing something else, he literally did not notice). He had a good 'take charge' approach during attacking drills but becomes very quiet once he moves away from the periscope. This is fine if the Command Team is working well but in his case he should spend less time glued to the periscope and more moving around the Control Room and, where necessary, injecting adrenalin."

Q. That was written by Captain[N] Dunlop. So at this point in your career as XO you've received a favourable SOCT report from Captain[N] Plante which states that you're ready for the perisher course subject to command exams and an XO appointment? A. Yes.

Q. And again, who would be required to give you that perisher or command course recommend? A. The commanding officer of the unit.

Q. At the time that you were XO, what was your understanding of who would be teaching the Canadian perisher course? A. The posting plot from the submarine squadron had Lieutenant-Commander Marsaw as the first instructor of the Canadian submarine commanding officer's course.

Q. During your tenure as XO, did you subsequently receive two submarine command assessments from Lieutenant-Commander Marsaw? A. Yes, I did.

Q. One dated 09 February 1993 under a cover letter of that date, another one of 26 October 1993? A. Correct.

PROSECUTOR: Mr Judge Advocate, I would like to have these two assessments introduced as exhibits, please.

JUDGE ADVOCATE: Any objections?

1436

Lieutenant-Commander Dussault Examination-in-chief

DEFENDING OFFICER: No objections, Mr Judge Advocate.

JUDGE ADVOCATE: Exhibit "BB".

ASSESSMENT DATED 9 FEBRUARY 1993 IS MARKED EXHIBIT "BB".

PROSECUTOR: The second document, a submarine command assessment dated 26 October '93.

JUDGE ADVOCATE: EXHIBIT "CC".

SUBMARINE COMMAND ASSESSMENT IS MARKED EXHIBIT "CC".

PROSECUTOR:

Q. Lieutenant-Commander Dussault, could you read the narrative of the first assessment that you received from Lieutenant-Commander Marsaw for the court? A. "During Lt[N] Dussault's tenure as XO in OJIBWA he has participated in an operational patrol, a DWP and AWUPs. His quiet, unassertive manner has resulted in a lack lustre performance thus far. He needs to demonstrate more leadership in the wardroom and more aggression in the control room before he can be recommended for submarine command."

Q. Would you then read the *AMPLIFYING REMARKS* please? A. "Lt[N] Dussault usually does what he is told but has demonstrated little initiative. He has shown very little inclination to seek responsibility and provides nearly no leadership in the wardroom. He tends to avoid the control room and seems eager to surrender the day to day running of the submarine to the CO. He cannot be recommended for command at this time."

Q. Would you read the bottom paragraph of the SM1 Commander's comments? A. "I am somewhat at a loss to explain Lt[N] Dussault's performance because he actually had a good SOCT. He readily took charge of

1437

Lieutenant-Commander Dussault

Examination-in-chief

the control room team during his evolutions and demonstrated a good command appreciation and presence. I intend to provide another opportunity for Lt[N] Dussault to take advantage of the talents that he has by requesting a further one year sea going appointment as executive officer. He should be ready to attend SMCC in 1994."

Q. Would you read the narrative on your final submarine command assessment dated 26 October 1993 by Lieutenant-Commander Marsaw? A. "Lt[N] Dussault has made some progress over the reporting period in those areas where he has received specific direction. He still needs to learn to assert himself and to be more aggressive. It is suggested that he would benefit from serving under another CO prior to undertaking perisher."

Q. Relative to your SOCT assessments, how does your command assessments compare from Lieutenant-Commander Marsaw? A. I would say they are about 180 degrees in the opposite direction.

Q. Did you have concerns for your career under Lieutenant-Commander Marsaw's command? A. Yes, I did.

Q. Why? A. A few months after joining the unit, the attack team was in the trainer at the now Naval Operations School in Stadacona and we had just completed a second ASW scenario which was the same as the first one where the commanding officer took a different tack for attacking and at the debrief I raised my hand and asked the CO why he had chosen this particular tack as opposed to the previous game and at that time he told me, "Never question my judgement." After everybody had left he confronted me in the passage way outside the trainer and told me, "You better watch your step if you know what happened to Lieutenant-Commander Larkin."

1438

Lieutenant-Commander Dussault

Examination-in-chief

Q. "You better watch your step if you know what happened to Lieutenant-Commander Larkin." What is the significance of this statement to you? A. Well, to me it meant that my career was in jeopardy because I knew that Lieutenant-Commander Larkin had been prevented to attend the perisher course on his recommendation.

Q. So that was your state of mind at the time? A. Yes.

Q. Did you have any other concerns for your career while XO under Lieutenant-Commander Marsaw based on conversations with him? A. On another occasion, after doing some plane jam exercises, I stepped into his cabin and at that time he was writing a form letter of displeasure for the wardroom and he rose his hand and went like that with it and he told me, "With this pen I can ruin all of your careers."

Q. Did Lieutenant-Commander Marsaw instruct you on how he expected you to lead? A. Yes.

Q. And what did he expect you to do, its type ... the type of leadership style? A. As is mentioned in my perisher debrief, he expected me to go out in the control room and yell at people to make sure that they were on their toes all the time.

Q. Is that your style? A. No, sir.

Q. Given his comments in where you are in your career, did his instruction affect the way you did your job as XO? A. Yes, it did.

Q. In what way? A. I tried in every which way possible to avoid him.

Q. I asked you earlier whether you'd ever gone to SM1 with any complaints or concerns. You replied you hadn't. As XO, in those circumstances at that point in your career, did you feel you were in a conflict of any sorts? A. Well, yes, I suppose so.

1439

Lieutenant-Commander Dussault

Examination-in-chief

Q. In what way? A. Well, on one hand there was ... I was supposed to go out and be a ... yell at people to do my job and on the other hand I knew that they were unhappy because they were afraid of the Captain for just the same reasons. So I was basically caught in the middle trying to maintain both sides, I suppose.

Q. Did you have any concerns about going to SM1? A. Yes, I did, as I stated previously.

Q. Did you form any belief in your mind of what might happen to your career if you were unsuccessful? A. Yes, I believed that I would not be where I am right now with respect to my employment.

Q. Did Lieutenant-Commander Marsaw ever express his opinion on Francophones or bilingualism in your presence? A. Yes, he did.

Q. How often? A. On several occasions, and as the date was nearing where he would be going on a French language course to St-Jean in Québec, his remarks would be getting more and more frequent.

Q. Can you give the court examples of the types of things he would say in your presence? A. Well, this was mostly at the dinner table and he would be saying things like, "To get promoted in the Forces, I would need to be a one legged black woman that speaks only French and I'd have to be a lesbian", things to the effect, "French people are cowards. They've never won any awards. They've been in things like ... The official language policy in the Canadian Forces is rubbish. It should not be there. We could save a lot of money and not have any," so on and so forth.

Q. Did you respond to him? A. No, I didn't because I didn't want to upset him but I remember on one occasion there is one comment he made that dis-

1440

Lieutenant-Commander Dussault

Examination-in-chief

turbed me so much I felt like reaching across the table and striking him.

Q. How would you describe morale amongst the wardroom? A. It was very low.

Q. Did you ever make pipes at night prior to the end of the evening? A. Yes, after daily rounds and evening rounds the XO makes a pipe to the ship's company to let them know the program for the next couple of days and how things are going around in the submarine with respect to the cleanliness and so on and so forth.

Q. Did you ever consult the Captain before you made your daily pipe? A. Yes, before making that pipe, we'd go and see the Captain and report the state of rounds to him and at that time ask him if he has any comments or anything for me to tell the troop and he would say very often, "Tell them to fuck off" or "Fuck them" or things of that nature.

Q. Did you ever have an occasion to be approached by Lieutenant-Commander Marsaw at the CFB Halifax wardroom in August of '94? A. Yes, I did.

Q. Can you outline to the court the circumstances in which that conversation or occasion that did arise, who was present, where you were in proximity to Lieutenant-Commander Marsaw and so on? A. It was the 5th of August 1994 at the Stadacona wardroom in the Sea room. I was there for weepers. But a few of the officers from the submarine squadron, Lieutenant-Commander Kavanagh, namely, was there and I was standing at the bar and in the other corner was Lieutenant-Commander Marsaw. He was speaking to someone else.

PROSECUTOR: Okay. At this point, I'll just stop you because my friend has a comment he'd like to make for the record.

1441

Lieutenant-Commander Dussault

Examination-in-chief

ASSISTANT DEFENDING OFFICER: I'm aware of the words, Mr Judge Advocate, that are about to be reported by the witness, and again, given your prior decision on similar matters, the defence is simply objecting to state an objection on the record.

JUDGE ADVOCATE: The objection is so recorded. You may proceed.

PROSECUTOR:

Q. Okay. And who are you with again, Lieutenant-Commander Kavanagh and who else? A. There is several other people there. A lot of them were people that I know from my MQC and a lot of officers that I have known through the years and in the corner was Lieutenant-Commander Marsaw speaking to someone and he was speaking loudly enough so that I could hear him and he was telling him, "That guy over there, Marty Dussault, he is a liar." And at that point I told him to get a life and he asked me to repeat and I said it again and that was it for a while and during a period of time, the positions at the bar were changed and eventually I was in the corner with that group of people and he was talking to, I believe, the same person and he turned around, faced me and he said, "Marty Dussault there, he is a coward and a nincompoop", and he said, "Marty, I'm going to take you and your family down with me."

Q. What was your reaction to hearing that?
A. My reaction, I was afraid, but afraid for my family, really.

Q. As a consequence of that statement being made, what happened next? A. There is a couple of guys standing a few feet away from us and one of them turned around and told me, "What was that all about?"

Q. Okay, without getting into the words that they spoke, did that person do anything? A. Yes, he offered me to ... he said, "If you ever need any help

1442

Lieutenant-Commander Dussault Examination-in-chief

with that, just give me a shout," and he left me his name and address on the back of a business card that his friend had.

Q. Okay. I wonder if you could identify this for me, please? A. Yes, that is the card.

PROSECUTOR: I would like to have this introduced as an exhibit, Mr Judge Advocate.

ASSISTANT DEFENDING OFFICER: No objection, thank you.

JUDGE ADVOCATE: Exhibit "DD".

A BUSINESS CARD IS MARKED EXHIBIT "DD".

PROSECUTOR:

Q. Would you read the name on the back of the card, please? A. It says, "Captain A. Whynott, CFB Cold Lake."

PROSECUTOR: Thank you. No further questions.

JUDGE ADVOCATE: Cross-examination?

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, before proceeding with the cross-examination I have a request from my client for a five minute adjournment.

JUDGE ADVOCATE: Very well, the court is adjourned for 10 minutes.

ADJOURNMENT: At 1358 hours, 16 October 1995, the court adjourns.

REASSEMBLY: At 1407 hours, 16 October 1995, the court reassembles and the accused is before it.

1443

Lieutenant-Commander Dussault

Examination-in-chief

JUDGE ADVOCATE: You may be seated. You may proceed.

ASSISTANT DEFENDING OFFICER: Thank you very much, Mr Judge Advocate, for the adjournment, Mr President.

CROSS-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Lieutenant-Commander Dussault, in direct examination, you were asked by the prosecution to contrast Lieutenant-Commander Marsaw's style of command with other commanding officers that you had and your comments, two of them, I find to be a little bit irreconcilable, one was that he was inconsistent and, asked on how, what regular basis he would be yelling at people you said it was on a regular basis. What is the inconsistency there? A. The inconsistency is that you'd never know whether or not, what you were going to tell Lieutenant-Commander Marsaw, whether or not it would trigger him off to become irate at you.

Q. And can you give examples of what would trigger him off? A. Somebody slamming the fridge door would trigger him off, something like that, anything really, you never knew what it could be.

Q. Slamming the fridge door, you mean the wardroom refrigerator that is in the passage way just outside the wardroom? A. Yes.

Q. At the time you were the XO, have you had the chance ... or I guess you had the chance to read his standing orders? A. The Captain's ...

Q. Standing orders? A. ... instructions to officers, yes, I have.

Q. Was there anything in there about noise or self-control of noise? A. Yes.

1444

Lieutenant-Commander Dussault

Cross-examination

Q. And how important would that be, self-control of noise? Would that be a noise that would be transmitted through the hall and augment changes of detection or counter-detection? A. Well, yes, but it depends on what type of operation you're in really. I mean there is ... there is limits as to what's acceptable and what's not.

Q. Is it acceptable to expect your people to learn when it's time to learn so that we can get to do the job to the point when it's time to do the job they will know the drill, they will know how to walk around the submarine? A. Yes.

Q. And was it also according to that, every officers' responsibility to see that other officers or members of the crew would adhere to that policy? A. It's not just the officers. That's everybody's responsibility on board. As soon as you become a submariner you're expected to do the things you're supposed to and that's one of them.

Q. Did you ever witness an incident that the fridge door became an issue? A. Yes, I have.

Q. Where were you at the time? A. I was in the wardroom, I believe.

Q. And where was he at the time? A. In his cabin.

Q. Did you intervene before he did it? A. Intervene?

Q. Intervene, did you go to see the individual who was making the noise? A. I did not hear it myself, no.

Q. If you had heard it, would you have intervened, would you have taken action? A. Yes, I would have.

1445

Lieutenant-Commander Dussault

Cross-examination

Q. Further on, in the questioning in direct examination, you indicated that because of that as an XO it was more difficult for you to keep the officers to do their job because the officers were afraid?

A. What, because of the fridge incident?

Q. No, not the fridge, because of the yelling, the attitude of Lieutenant-Commander Marsaw, his style of command, they would be afraid and it would be difficult for you to keep them to do their job. Do you recall that? A. I didn't say it was difficult for me to keep them to do their job. I said I had to be a buffer between him and them.

Q. And what were they afraid of, the yelling or afraid of making mistakes? A. They were afraid of being berated by him publicly.

Q. And the berating, what would trigger it?

A. You tell me, I don't know.

Q. Well, you were there. I'm asking you.

A. I don't know what's going on in his head.

Q. But what did you witness? A. What did I witness? I witnessed him several times fall off his rockers and start yelling at people.

Q. But you can't recall whether or not it was in reaction to something or ...? A. Well, it's always in reaction to something. Like something has got to trigger your anger for you to set yourself out and lash at somebody.

Q. The plane jam drill that you referred to, how did that come about? A. How did that come about?

Q. H'm h'm. Was it an exercise or was it something that was planned? A. It was drills really.

1446

Lieutenant-Commander Dussault

Cross-examination

Q. Drills and it's something that is set down in orders, emergency operations and procedures?
A. The procedures for it, yes.

Q. And was that something that was triggered without anybody knowing or did he just decide to gather some people and say we'll go with this? A. No, no, this is announced drills.

Q. Announced drills? A. Yes.

Q. And what was the performance on the first one? A. Not very good. The reason for that is that Lieutenant-Commander Marsaw would diverge from what it said in the OPs, the reaction that is the reaction that you're supposed to take and tell people different from different scenarios. This is how you're supposed to react when the plane jams. So every officer in the wardroom was confused about how you're really supposed to carry these things out. They were scared of sitting on the trim seat and actually performing as it says on the OPs because Lieutenant-Commander Marsaw in previous people sitting down had told them, "Well, in this case this is not what you're doing. In this case this is not what you do."

Q. Are there various factors that can affect how the drill is supposed to be carried out? A. Well, there is drills set out in the emergency operating procedure manual and that's what you ... that's how you're supposed to react to the drill.

Q. H'm, h'm. But can a drill and under different ... will the submarine always encounter a plane jam drill in the exact same conditions or will conditions affect how you're supposed to vary the drill? A. What conditions are you talking about, sir?

Q. I don't know. I'm asking you. I have no submarine experience. A. You have to set the picture, I mean, in that particular case we were in deep water

1447

Lieutenant-Commander Dussault

Cross-examination

and there was no special constraints around the submarine.

Q. If you're in shallow water, close to the bottom? A. Yes, there might be ... you know, the outcome of the drill might be different because - but at that particular time, if you're operating in shallow water, the commanding officer is sitting in the control room ready to take action himself.

Q. And? A. This is not the case. What we're doing and what we're talking about now is practising officers of the wardroom to react to the drill that is in the emergency operating procedure volume.

Q. And the concerns that were voiced by yourself to Lieutenant-Commander Marsaw, the second one, was the officers not eating in the wardroom. Did you tell him first or did he tell you first? A. I told him.

Q. You told him. And what did you do after the telling him? A. After I told him, I made sure that the ... I spoke to the individuals and I told them that we were to eat in the wardroom.

Q. The documents that were introduced through you being the SOCT and the other ones which I want to get the ... the submarine command assessment procedure ... not ... the submarine command assessments, are they both serving the same purpose? A. The two different documents?

Q. The two different documents? A. No.

Q. No. The SOCT, when do you start being reported on for SOCT as an officer when you get your qualifications? A. It all depends if you can be loaded on a course. It's as soon as the opportunity presents itself, usually MARS's officers are sent there you know, early on.

1448

Lieutenant-Commander Dussault

Cross-examination

Q. In the case of the SOCT, isn't it a fact that when you go on SOCT, it's what two weeks? A. No, usually now they are ... well, anywhere between a week and two weeks.

Q. A week and two. So you're being loaded on a course where you are specifically sent for the purposes of evaluation. What are you evaluated on, on everything or if I refer you for example to ...?

A. Exactly the same things that's on the perisher recommend forms.

Q. I refer you to Exhibit "Z" first.

A. Yes.

Q. This one in the paragraph (3) "EXPERIENCE GAINED DURING SOCT.....:1 Minelay Planned and executed in fog. 1 Periphot Planned". Did this SOCT concentrate on and then to decide two single ship attacks, two ship attacks? Did that focus on these experiences only? A. No, the aim of the SOCT is to give an insight to students as to the difficulties, problems of commanding the submarine so you're actually given a period of time during that two weeks. Sometimes more frequently for the more senior persons where you're actually the duty commanding officer. So all reports of activities of the submarine come to you during that period of time and you're responsible to make the decisions as to the functioning of the unit for that period.

Q. And that would be a one to two weeks snapshot at you? A. Yes.

Q. Looking at you? A. Exactly.

Q. And the other one, the submarine command assessment, is your unit, your commanding officer's assessment view as a whole as he has observed you under his command for whatever period of time you were there?

A. Yes.

1449

Lieutenant-Commander Dussault

Cross-examination

Q. So it would be a more ...?

A. Theoretically, yes.

Q. Theoretically, it would be a more all encompassing assessment? A. Yes.

Q. And would you also agree that commanding officers doing assessments, be it under submarine officer continuation training or submarine command assessment would ... different commanders and the submarine commanders would see you in a different eye?

A. Yes.

Q. You mentioned that you have not laid any complaint to SM1 because nothing would be done it would be fruitless? A. I believed.

Q. You believed? A. Yes.

Q. Did you test the grounds before forming that belief? A. Well, testing the grounds, by the things we heard, we had heard in the wardroom of people ...

Q. Without referring to the exact quotes or conversations because this is considered hearsay.

A. Yes, some of the officers who had left OJIBWA on a sour note had divisional interviews with the squadron commander and we'd speak to them after the interviews and nothing came out of them. So a pre-sentiment or you know a feeling that nothing would have been done plus the fact that Lieutenant-Commander Marsaw had publicly told us that he had received outstanding PERs and that his next job was going to be the most prestigious job in the submarine service where he would become the instructor for the submarine commanding officers' course.

Q. Would you say that this shows a little bit of a lack of trust in the chain of command? A. A lack of trust?

1450

Lieutenant-Commander Dussault

Cross-examination

Q. Trust in the chain of command? A. No, I wouldn't say that, not a lack of trust in the chain of command but perhaps a belief that if nothing had come out of the complaints, the steps taken by the commanding officer after that might have been detrimental not only to me but to the rest of the wardroom also.

Q. And were you personally privy to what happened in the office at SM1 when these people went to make their complaints? A. No, sir.

Q. You don't actually know other than them telling you that they have complained that there was an actual complaint laid? A. I'm not saying that, that they laid a complaint. I'm just relaying that they ... from what they said after what was discussed in ...

Q. Yes, from what they said but nobody knows and yet, you'd rather trust these people than trust the chain of command, your superiors? A. Well, after threats that were made to your career, yes, sir.

Q. Threats to your career, yes. A. Yes.

Q. Because Lieutenant-Commander Marsaw was, as the posting plot would have it, the next in line to teach perisher and you were lined up for that and you felt that if you did something or anything and you fell short of the mark he'd come back on you? A. No, sir, not at all. I had no bad feelings about going on a sub CO with Lieutenant-Commander Marsaw because he is not the only link in the chain. There is always somebody else to assess you there. So whatever he says is not the final word on the assessment.

Q. Why did you make that comment, because he was next in line then if ... What was the purpose of that comment earlier in your direct examination that he was the next ...? A. What comment are you referring to?

1451

Lieutenant-Commander Dussault

Cross-examination

Q. That Lieutenant-Commander Marsaw in the posting plot was the one to be teaching the Canadian perisher? A. Yes, I knew that and that got nothing to do with ...

Q. That wasn't a threat to you. A. No.

Q. You didn't fear going before him even if he was a teacher? A. No.

Q. And that comment about Larkin, "Never question my judgement ...", blah, blah, blah, and what happened to Larkin. Again, were you present at the moment that the discussion took place between Lieutenant-Commander Marsaw and who ever else was there to assess Lieutenant-Commander Marsaw? A. No, I was not present but this was in Bermuda, Lieutenant-Commander Marsaw told me what happened at that meeting.

Q. After the plane jam drills you went to his cabin. He was writing a form letter and the comment that, "With that pen I can ruin your careers." Was he actually writing it on paper or using his computer? A. No, he was writing on his personal computer but he took his pen and waived it in the air and said "With this pen I can ruin all of your careers."

Q. And did he show you the form letter that he was writing? A. Yes, he did.

Q. Would you recognize it if I showed it to you? A. No, because he never served it.

Q. He never served it but you saw it?
A. Yes, I did see it. I saw the title and it was a letter of displeasure.

Q. A letter of displeasure. A. Yes.

Q. Or ... if I can get the document. I'm looking for the document, Mr Judge Advocate ... or a

1452

Lieutenant-Commander Dussault

Cross-examination

performance observation? A. No, it was a letter of displeasure.

Q. A letter of displeasure. Were any formal complaints made to you about Lieutenant-Commander Marsaw's style of command, behaviour or ...? A. Yes.

Q. What happened to those complaints? A. I brought them up to him.

Q. You brought them up to him. And did you bring him any further up? A. No, because he had two weeks left to his command at that time. So after I had discussed with the two individuals in question it was decided that we were just going to hang in there for the remainder of his command and just go about our business.

Q. And who were the two individuals?
A. Lieutenant[N] Pitman and Lieutenant[N] Higginson.

Q. And what was the nature of their complaints, without the specific word, but the nature of the complaints? A. The nature of the complaint, they were worried about the safety of the submarine because Lieutenant-Commander Marsaw was going into the control room and changing settings on equipments.

Q. Did you feel that was a legitimate complaint? A. Yes.

Q. As an XO would you believe that Lieutenant-Commander Marsaw would deliberately put the safety of the submarine in jeopardy? A. Well, one can only suspect. I know that on two occasions when I was the DCO aboard, he purposely left the induction haul valve open to see if I would pick it up before diving the submarine.

Q. And where was he when ...? A. Standing in the corner.

1453

Lieutenant-Commander Dussault

Cross-examination

Q. Standing in the corner just watching to see if it would be picked up? A. Yes.

Q. He wouldn't stray away and not be present if anything happened. He would be there just to make sure that if the thing had been missed he would pick up on it and just correct the mistake at that time?
A. One would hope so.

Q. And the effect on you, you said you tried to avoid him, do you recall making that ... giving that answer in direct examination? A. Yes, sir.

Q. Would you think you would be at the source of his comment that you lacked presence in the control room, that you should be there more often?
A. No, sir, I was always there in the control room a lot of times except that he tended to be sleeping when I would be there so he wouldn't know the times I would be there.

Q. And that effect that you have noticed of his style of command on the performance of officers, did that last throughout the period that you were there under his command? A. Yes, sir.

Q. Did you feel that it was detrimental to the service or the effectiveness of the unit as a whole? A. Well, the unit functioned well, sir. It's just that the mind set of the individuals had to be adjusted in order to be able to accept the abuse that was being given. It's like the battered wife syndrome.

Q. In your opinion, that's not something that was worthy. We're not talking only the comments the last couple of weeks that were not reported. I'm talking about the entire behaviour. You just mentioned the word "abuse". A. Yes.

Q. So for a certain period of time you were there, you were the XO, but still you didn't bring it

1454

Lieutenant-Commander Dussault

Cross-examination

up with the chain of command? A. Exactly what I told you, sir, I explained to you why before.

Q. What is your duty as an officer in the Forces when you see ill-treatment of subordinates or any offences for that matter committed by whom ever? A. It's to bring it up and on several occasions that matter was brought up to the commanding officer who chose to do nothing about it.

Q. Well, if he is the ... the commanding officer is the one doing it, would you expect him to do something about it? A. Well ...

Q. Or would you raise it up with his superiors? A. You would hope that his character would be able to change in order to carry on with the job as he is supposed to.

Q. And if he does not, do you then ...? A. The style of leadership has to be re-assessed everyday, sir, and then to reflect the requirements of the job.

Q. And speaking of requirements of the job, what are the three principle objectives in terms of order of priority? Mission would be number one? A. No, sir.

Q. Personnel second? A. ...

Q. And training ...? A. The safety of the submarine and personnel is always the first priority.

Q. Is that what you have in your standing orders? A. Yes, sir.

Q. Safety and personnel? A. Safety of the unit and personnel.

1455

Lieutenant-Commander Dussault

Cross-examination

Q. Unit and personnel then we'd go to personnel and then management, if I'm correct, and then into training? A. ...

Q. Do you think that people that are running afraid in the control room can be a safety issue, a safety concern? A. There is nobody running around afraid in the control room.

Q. You said that the effect that he had on his officers was that they were afraid? A. Yes, they were afraid of him but they were still able to carry out their duties.

Q. So finally my last question on the subject is that. Was that something that you felt was serious enough to raise, yourself as per your duty as an officer, a formal complaint with his superiors concerning his behaviour and what he was doing? A. Yes, sir, it probably was and as I explained earlier I believe it to be pointless to do that because of the retaliation that was possible from Lieutenant-Commander Marsaw. I didn't want to make things anymore difficult for the wardroom than they were.

Q. Are you aware of the regulations that we have in the Forces concerning a redress of grievance? A. Yes.

Q. Are you aware that regulation provides that there shall not be any retaliation for somebody who makes a legitimate complaint? A. Sir, a redress of grievance takes forever to come back to the unit and it would have been pointless to do that. Again, I believe so because by the time results would have come back the unit would have had a different CO.

Q. But do you compare the ...? A. There is a big problem with the redress of grievance process right now. It's been re-evaluated just for that specific reason.

1456

Lieutenant-Commander Dussault

Cross-examination

Q. Do you think that a complaint of ill-treatment, or abuse, or no matter what, put in a form of a redress of grievance in the chain of command would be treated as effectively as a redress on your PER?

A. Sir, the redress of grievance is addressed at the unit first.

Q. And if the unit turns it down? A. It doesn't go anywhere.

Q. It doesn't go anywhere. In your capacity as XO, were you ever asked by Lieutenant-Commander Marsaw to investigate a rumour that had made its way that somebody was going around saying that he had called officers incompetent? A. Yes.

Q. And he is the one who asked you that, to go out and ...? A. I brought it up to him, sir.

Q. You brought it up to him and subsequently to that conversation what did you do? A. And it went around and that rumour had been there from the time we went to a port visit in Sydney, Nova Scotia during a patrol and came about when Lieutenant-Commander Marsaw got out drinking with some of the NCMs and told them that his officers were incompetent. That had been floating around and what we're talking about now is approximately six to eight months after when the matter had come up again and actually, he is the one that cornered me outside the wardroom to say that he had heard people talking in the wardroom about it.

Q. And what were your findings? A. I told him that the rumours as far as I was concerned were true and he told me it was bullshit.

ASSISTANT DEFENDING OFFICER: I'm just going through my notes, Mr Judge Advocate.

Q. And during your period under Lieutenant-Commander Marsaw, was there an occasion that Lieutenant-Commander Marsaw distributed a quiz to his

1457

Lieutenant-Commander Dussault

Cross-examination

officers, a written quiz where the qualified officers were not allowed to touch the books? A. Yes, sir, every ... well, for that period of time, Lieutenant-Commander Marsaw would review his Part III notes and going to his cabin and formulate some questions from his Part III notes, bring them out to everybody and asked obscure questions to everybody to see what their submarine knowledge was.

Q. What do you mean by obscure questions?

A. Things that you would not be able to know unless you had read a volume of writing of it just prior to, sir, that you would not remember from you know during your day to day business.

Q. Well, is it true that the qualified officers were not allowed to refer to the books but then Part IIIs could refer to the books because these questions concerned general knowledge of submarines, not specific knowledge of submarines? A. Some were and some weren't, sir.

Q. Some were and some weren't. When is a vacuum test required, for instance? A. Yes, I'd say that's pretty basic.

Q. Pretty basic. Where is the main power breakers? A. Yes, that's basic, too.

Q. Where are the fittings on a "Q" tank?

A. Yes.

Q. Describe how to load and burn an oxygen candle? A. Yes. Things like asking what the explosive mixture of hydrogen is in the air before the danger point arrives, questions like that, they are more on the obscure side, sir.

Q. But was the quiz riddled with such questions? A. It was about half and half, I suppose.

1458

Lieutenant-Commander Dussault

Cross-examination

Q. Did you, yourself, as the XO had to take the quiz? A. Yes.

Q. How did you fair on the quiz? A. I don't remember.

Q. You don't remember. But, in general, the rest of the officers, what was the results, did it show lack of knowledge? A. I really don't remember, sir, because I really couldn't careless at that time with things like that, sir.

Q. And you're a training officer, if I'm not wrong? A. That's correct, and every single person who was on the OJIBWA when I was there, sir, got qualified.

Q. Got qualified but you couldn't careless anyway? A. Not about stupid quiz's like that, no, because we had other things to do and that prevented the officers from going on with their business.

Q. Did you have the opportunity to read an article that was published in the Chronicle Herald in December 1993? A. I sure did.

Q. Were you contacted yourself by Mr Dunlop who wrote the article? A. No, no.

Q. Do you recall the date of your interview with the MPs, but I'm talking general, I don't need you to expand, the day of the week or the ...? A. It was in January.

Q. January of? A. 1994.

Q. Ninety-four, and when you said you weren't contacted but did you contact Mr Dunlop yourself? A. No.

Q. And did you on one occasion actually tell Lieutenant-Commander Hickey and Woodburn that you would consider not going on perisher if Lieutenant-Commander Marsaw was instructing it? A. Yes, I may have.

1459

Lieutenant-Commander Dussault

Re-examination

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY DEFENDING OFFICER

Q. And again, in cross-examination, you were asked some questions with regard to the Captain's Standing Orders and self-control of noise in relation to an incident of a fridge door shutting in the wardroom. What type of fridge or how big is this fridge that's in the wardroom? A. It's a domestic fridge. It's about one third the size of what you would have in a kitchen in your home.

Q. So what was the issue on that particular occasion with the fridge door? A. The issue was that Sub-Lieutenant Watt at the time had shut the fridge and apparently, Lieutenant-Commander Marsaw heard the fridge door slam and consequently confiscated the fridge keys and told me that everybody from now on who wanted to get something from the fridge had to come and get the keys from him.

Q. Why would people want access to the fridge? For pops? What was in the ...? A. To get soda pop.

Q. So you had to ask permission to get the keys to get a pop? A. Yes.

Q. How much noise can a fridge door being shut make? A. I think it could make ... well, it makes noise but it's not a noise that would be transferred through the pressure hull that could be ... you could hear outside.

Q. Would it be quieter or louder than if you kicked the radar room door off 12 screws and three hinges? A. That would probably be a lot less loud.

1460

Lieutenant-Commander Dussault

Re-examination

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions. Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness is Captain
Whynott.

s.19(1)

1461

Captain Whynott

Examination-in-chief

THIRTY-FIFTH WITNESS) Captain A.T.
FOR THE) Whynott, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good afternoon. Could you give your full name to the court and spell your last name slowly, please? A. Allen Trevor Whynott, W-H-Y-N-O-T-T.

Q. What's your current position? A. I'm the chief controller of the terminal control unit in Cold Lake.

Q. Did you have occasion to be at CFB Halifax in August of 1994? A. Yes, I did.

Q. What was the purpose of you being at CFB Halifax during that time period? A. I was here on a programmer's course at Fleet School.

Q. Did you have occasion in early August of 1994 to attend the CFB Halifax wardroom? A. Yes, I did.

Q. And during your visit there, did anything unusual happen? A. Yes.

Q. Briefly, can you just state what did happen that was considered unusual? A. I was talking with a young Lieutenant[N] at the bar in the big ballroom and another gentleman down at the other end of the bar around the corner from us pointed across and said words to the effect, "I will get you no matter what it takes. I'll get you."

Q. Okay. Do you recall the exact words? A. I don't know the exact words though. There was more but I can't remember.

Q. When you heard these words, what thoughts entered your mind? A. I was ... I felt a little bit

1462

Captain Whynott

Examination-in-chief

threatened and I felt threatened for the individual that I was talking to.

Q. Okay. Is that how you saw it, as a threat? A. Yes, I did.

Q. As a consequence of that, what did you do? A. I told the fellow that I was talking to, that to me that was a threat and I got a piece of paper or a card and I wrote my name down on it for him. I instructed him that if he had any problems then he could feel free to call me.

Q. I'd like to show you Exhibit "DD" and ask you if you could identify this, please? A. Yes, I wrote that.

Q. Okay, is that your handwriting? A. Yes, it is.

PROSECUTOR: I have no further questions.
Thank you.

JUDGE ADVOCATE: Thank you. Cross-examination?

DEFENDING OFFICER: No questions.

JUDGE ADVOCATE: No questions?

DEFENDING OFFICER: No.

JUDGE ADVOCATE: Thank you. Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions. Thank you, Captain.

WITNESS WITHDRAWS.

1463

Captain Whynott

Examination-in-chief

JUDGE ADVOCATE: Next witness?

PROSECUTOR: I'm informed by my friend, Mr Judge Advocate, that the next witness does raise a question concerning the admissibility of evidence. As a consequence, we'd require a **voir dire**.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR: I wonder, Mr Judge Advocate, if we could have a five minute adjournment before we begin.

JUDGE ADVOCATE: Could you first tell me what's the gist of the **voir dire**?

PROSECUTOR: Okay. That's in Captain Gleeson's hands, sir. I'll let him address your question.

ASSISTANT PROSECUTOR: Essentially, Mr Judge Advocate, it's similar to prior evidence that we have sought to admit with respect to evidence that would indicate the accused has a propensity toward violence and in fact, committed violent acts on board the OJIBWA. This Petty Officer will, Petty Officer Lalancette, will testify that he was posted to OJIBWA and actually joined OJIBWA in early December of '91 in Norfolk. As they left harbour in Norfolk, he stood two watches, had not been on board a submarine for an extended period of time and after his second watch was basically wandering through the submarine just looking at the changes that had occurred on board since he had last served.

He was standing in the passage way between the control room and the Captain's cabin at the fire control panel just observing that. He was serving on the forward torpedo room. As he was standing there, the Captain's cabin door opened up. Lieutenant-Com-

1464

20th voir dire

mander Marsaw came out of the cabin, came rushing past him, as he went past him, pushed him on the chest with both hands and said words to the effect of, "Get out of my way." And he will testify that he assumed there was some kind of emergency in control and at the time was taken aback but felt that if there was an emergency it was probably necessary. He then looked in the control room and saw Lieutenant-Commander Marsaw sitting on the roundabout ... or a portion of the roundabout on the aft periscope smoking a cigarette. So that's essentially the evidence that we wish to call.

JUDGE ADVOCATE: And when did that take place?

ASSISTANT PROSECUTOR: In early December '91, Mr Judge Advocate.

JUDGE ADVOCATE: And you will be calling witnesses, you said, Lalancette?

ASSISTANT PROSECUTOR: That's correct. One witness, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. You may proceed.

ASSISTANT PROSECUTOR: Okay. May we have a short five-minute adjournment before we proceed?

JUDGE ADVOCATE: For what purpose?

ASSISTANT PROSECUTOR: I believe ... I'm not ... My friend would like a short adjournment. Maybe I should let him speak.

DEFENDING OFFICER: I thought that we ... I discussed with the prosecutor that it might be in order to discuss a matter with him and possibly with you so that we know where we stand in those proceedings.

JUDGE ADVOCATE: Very well. Five minutes is enough?

1465

DEFENDING OFFICER: Well, make it 10 if you wish. That might be safer.

JUDGE ADVOCATE: The court is adjourned for 10 minutes.

ADJOURNMENT: At 1449 hours, 16 October 1995, the court adjourns.

REASSEMBLY: At 1500 hours, 16 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated. You may proceed.

ASSISTANT PROSECUTOR: The next witness, Mr Judge Advocate, is Petty Officer Lalancette.

TRIAL WITHIN A TRIAL

s.19(1)

1466 Trial within a trial

PO2 Lalancette Examination-in-chief

FIRST WITNESS) Petty Officer, 2nd Class
FOR THE) J.A. Lalancette, is duly sworn.
PROSECUTION)

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good afternoon. Would you state your full name, please? A. Jean André Lalancette.

Q. And would you slowly spell your last name? A. L-A-L-A-N-C-E-T-T-E.

Q. And your service number is
A. Yes.

Q. And you're currently posted to Canadian Forces Naval Engineering School? A. Yes, sir.

Q. And I understand you served on board HMCS OJIBWA? A. Yes, sir.

Q. What dates were you on board OJIBWA?
A. From December of 1991 until May 1995.

Q. Okay. And when you joined OJIBWA, who was your commanding officer? A. Lieutenant-Commander Marsaw.

Q. Okay. Where did you join OJIBWA?
A. Norfolk, Virginia.

Q. Can you just briefly describe the circumstances that resulted in you joining in Norfolk?
A. At the time, I was serving on board HMCS OKANAGAN which was in refit. I had been there approximately two months on OKANAGAN and I was told that I was going to have to fly down to Norfolk, Virginia to join the OJIBWA to replace their TI.

Q. And you say TI, what ...? A. Torpedo instructor. It's the term that they use for the senior weapons tech.

1467

Trial within a trial

PO2 Lalancette

Examination-in-chief

Q. So you then joined OJIBWA in Norfolk and ...? A. I flew down. OJIBWA had just pulled in. So I met the crew at the hotel. I spoke with the Cox'n. He told me not to report down to the boat until the boat was to sail. There was no reason to. So I waited in ... I spent the week at the time there in the hotel. When it came time to sail, I went down to the boat. we left Norfolk, Virginia. Since I had been gone from submarines for approximately eight years, I wasn't familiar with their operation. So I double banked up in the forward torpedo room. I spent the first watch double banked in the forward torpedo room until one in the afternoon then I had the one to seven off that night and that afternoon and then I was double banked again from the seven at night to one o'clock in the morning, double banked again then I came off watch.

Q. What did you do after you came off watch?

A. After I came off watch I wasn't overly tired so I figured I might as well make use of my time and start to re-familiarize myself with the remainder of the submarine. Again, I had been gone for a while. So I was back in the control room. I was standing outside the Captain's cabin just a little aft the cabin looking at the fire control computers. The fire control computers were vastly different than from what I sailed with. So I was standing there looking at them. I was a little back from the computers. The Captain had to come out of his cabin in a big rush and I was just angled slightly towards his cabin, he put both his hands up against my chest, pushed me back against the bulkhead and told me to get out of his way.

Q. What happened after that? A. The Captain proceeded into the control room. I didn't think much of it at that split second. I thought this could be an emergency. There is obviously a reason why the Captain has to get by in a hurry. Then I noticed the Captain went down and sat back by the after periscope, actually on that, the periscope ring, he sat back there and lit up a cigarette and did nothing.

1468

Trial within a trial

PO2 Lalancette

Examination-in-chief

Q. How did you feel when you saw all of this, got pushed against the bulkhead ...? A. Well, once I've seen him sit down I made it a mental note that if he was ever to touch me again that I'd break his neck.

Q. Did you provide the military police with a statement regarding this incident? A. Yes, I did.

Q. In the statement, do you recall what date you indicated this occurred? Perhaps, I could show you a copy of the statement. It might make it a little easier for you. A. The date, December 1990, is not correct.

Q. Okay. So when did it actually occur? A. It would have been in December of '91.

Q. Does the statement make any mention about the CO sitting down on the after periscope and having a cigarette? It's right to the bottom of the statement, actually, but if you ... A. No, it doesn't. It says, it's like, "... he was sitting down by the periscope", but not having a cigarette.

Q. Okay. Why doesn't the statement indicate that he was having a cigarette? A. At the time, as the time has worn on, I didn't remember the cigarette incident at the time but as we have discussed this more and more it has come back to, or I remember him sitting back there and, just so much, I watched him sitting back and having a smoke on the after periscope and I was ... I remembered that part, it's the thinking is like, "Oh, great way to meet the new Captain."

Q. Can you describe the amount of force that was used to move you out of the way when he came out of his cabin? A. I am a fair size lad and he used enough force to knock me back up against the side of the bulkhead.

1469

Trial within a trial

PO2 Lalancette

Examination-in-chief

Q. Describe the tone of his voice when he said the words, I believe you said, "Get out of my way"? A. It was, "Get out of my way."

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Cross-examination?

CROSS-EXAMINED BY DEFENDING OFFICER

Q. So it was in '91 and not '90 as you previously stated in the interview? A. Yes, sir.

Q. Would it make sense that your recollection, you were interviewed by the MPs on 12 May 1994, that's in excess of 16 months ago. Would it be correct to say that your recollection of the events at that time would have been better than it is today? A. Equal to or less than.

Q. Did you have the occasion of being involved peripherally if nothing else in the court martial of PO1 Stone? A. Yes, sir.

Q. Do you remember talking to a Major Smithers, a lawyer here? A. Yes, sir.

Q. Isn't that right that you spoke to him three or four times? A. Yes, sir.

Q. Is that correct too that each time you discussed with him the same subject, your story changed from time to time, every ... every ... three times that you spoke, there was something different from the previous time? A. That's possible, sir.

Q. Is it correct that as a result that you were not called as a witness at that court martial? A. That's correct, sir.

1470

Trial within a trial

PO2 Lalancette

Cross-examination

Q. And I take it that your memory of the events in **Stone** was similar to this event here where it kept changing? A. No, sir.

Q. It did not. A. No, sir.

Q. This one story here has changed from '94 to present, hasn't it? A. Yes, it has, sir.

Q. And the story in **Stone** was changing too, as you have stated earlier? A. Yes, sir.

Q. You said, "As we discussed that more and more", now it came back to you about the cigarette. You were asked the question, "In your statement, did you mention a cigarette? Answer: No." And then you continued on by saying, "As we discussed that more and more that came back."? A. That is correct, sir.

Q. So you discussed that event ...? A. As I started thinking about the event more and more I remembered the cigarette.

Q. It's not what you said. You said, "As we discussed that more and more ..."? A. "As", when the court had called me up as a witness and I started talking about it again, I've started to remember that part of the cigarette and I was asked about that by the prosecution and they said, "Well, your statement says such", and I said, "Yes, I realize what my statement says. However, I do remember now thinking back that there was a cigarette."

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

ASSISTANT PROSECUTOR: A couple questions, Mr Judge Advocate. If I could just access one of the exhibits.

1471

Trial within a trial

PO2 Lalancette

Re-examination

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. Petty Officer, 2nd Class Lalancette, I'm showing you Exhibit "Q" which is the sailing schedule for the OJIBWA, December of 1991 specifically, and where does that indicate the OJIBWA was on the 1st or 2nd of December? A. Norfolk.

Q. And where did you join OJIBWA?
A. Norfolk.

JUDGE ADVOCATE: Did you mention a year, I'm sorry?

ASSISTANT PROSECUTOR: Nineteen ninety-one, Mr Judge Advocate.

Those are my questions.

JUDGE ADVOCATE: Thank you. I have no questions. Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Do you wish to call any other witnesses in this **voir dire**?

ASSISTANT PROSECUTOR: No, Mr Judge Advocate.

JUDGE ADVOCATE: Does the defence wish to call any witnesses in this **voir dire**?

DEFENDING OFFICER: No, we do not, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Are you ready to address the court?

ASSISTANT PROSECUTOR: Yes, I am, Mr Judge Advocate.

Mr Judge Advocate, the prosecution seeks admission of Petty Officer 2nd Class Lalancette's

1472

Trial within a trial

Assistant Prosecutor

Address

evidence again on a similar basis to that which we dealt with, with respect to Leading Seaman Bourassa. Essentially, we'd first argue that it is simply relevant to the matters in issue before the court and that would be based on the fact that the defence has raised repeatedly in the cross-examination of witnesses, the question of whether or not they had witnessed any pushing, shoving, kicking, et cetera, being committed by the accused on board the OJIBWA. They've asked witnesses that question and have been permitted to ask witnesses that question.

In this case, we have a witness who has come before the court and indicated that within a short time of joining the OJIBWA, he was in fact shoved and spoken to in a rather aggressive tone by the commanding officer as he stood in the passage way between the control room and the CO's cabin. The prosecution would submit that that is clearly relevant and should be admissible in response to the type of questions and the impression that has been left with the panel that the accused ... none of the witnesses have ever witnessed the accused perform any act of violence on board the submarine.

JUDGE ADVOCATE: Under Rule 22?

ASSISTANT PROSECUTOR: No. This is just ... just simple relevance, Mr Judge Advocate. It's simply relevant because it's an issue. It's a live issue that's been raised by the defence as part of its case which it's put forward through cross-examination of other witnesses. So that is essentially the first ground on which we would seek admissibility of the evidence.

Alternatively, we would argue that it's admissible under MRE 22 as similar fact evidence. And again, 22(1) allows the admission of evidence which establishes either identity or state of mind of the actor. In this case we have evidence from the witness that it was the accused that in fact pushed him against the bulkhead. There is no issue of identity and there

1473

Trial within a trial

Assistant Prosecutor

Address

is no conflicting evidence before the court on this matter to suggest that it wasn't the accused that in fact pushed him against the bulkhead. We've got evidence that there was no emergency. There was no reason to justify the action. The accused moved into the control room and sat on the roundabout of the after periscope after he pushed by him.

The prosecution would submit that this clearly is evidence that goes to state of mind of the accused with respect to other acts of violence for which he is charged. There is no question of this being a mistake or an accident or being done of necessity and again, it also establishes his identity. Clearly, the accused was the individual that pushed the witness in this particular case.

With respect to MRE 22(2), there is a requirement that the prosecution establish a real suspicion of guilt with respect to state of mind or identity. Again, the prosecution would submit as we did on the **voir dire** with respect to Bourassa, in fact, the witnesses Shea, Conrad, Pokotylo, Byrne, establish a real suspicion of guilt with respect to state of mind and identity. So 22(2) has been satisfied through the evidence of other witnesses that have already appeared before the court.

And with respect to 22(3), again, the prosecution would refer you to the memorandum that we've provided on similar fact evidence which deals with the scale, the moving scale test and that, obviously, it's a balancing that you will have to do based on the principle set out in the case law in **Robertson v. C.R.B.**, and as articulated in the memo, the prejudice to the accused must be balanced with the probative value of the evidence. And our submission again, obviously, is that the probative value in this case outweighs any prejudice that would arise to the accused with respect to the evidence.

1474

Trial within a trial

Assistant Prosecutor

Address

We would again argue that under MRE 4, you're entitled to look, go beyond MRE 22 to determine admissibility, if you determine it's necessary to do so, and then you can consider the common law and again as we've articulated before, there is numerous reasons at common law why similar fact evidence can and should be admitted. And again, the grounds on which we would be relying or prove intent to the accused, identity of the accused, **actus reus**, malice by the accused, again, this was a member of his crew as was the case with respect to the victim in charges number, I believe, it's four and five, or five and six to the charge sheet with respect to the assault, knowledge and again establishes the circumstances where a regime of dominance and violence is alleged. Again, it's the prosecution's position that the atmosphere on board the OJIBWA was such that there was a regime of dominance and violence or a regime of fear on board.

Perhaps, more importantly, the defence would argue that the evidence would rebut a possible defence that could be raised by the accused. Again, the defence of innocent or lawful purpose would clearly be rebutted by evidence of a wilful act that was not justified by the circumstances. The defence of mistake would obviously be rebutted, lack of **mens rea**, accident, mistake and identity. All of those defences are available to the accused and this type of evidence could clearly be utilized by the panel in conjunction with other evidence before it, to rebut that type of defence.

With respect to the issue of the **Switzer** case and identity, I won't spend much time on it but I would suggest that again, in this case we have no conflicting evidence. The witness has testified that it was the accused that pushed him and it clearly was the act of the accused and you don't ... it's not something that you're required to determine at this time as to whether or not the act occurred. You've got evidence before you, there is some evidence that what has been alleged by the witness did occur and as long as you're satis-

1475

Trial within a trial

Assistant Prosecutor

Address

fied with that, that the threshold has been met, then it's a matter for the panel to then determine as to whether or not they would give that evidence any weight and if they are going to give it weight, how much.

So in summary, Mr Judge Advocate, the prosecution submits that the evidence is admissible simply on the basis that it's relevant to respond to a live issue that has been raised by the defence in his cross-examination. Alternatively, it's admissible under MRE 22 as similar fact evidence that goes to state of mind and identity and the requirements of MRE 22 have been satisfied. And finally, it would be our submission that, should you find it necessary, the common law rules with respect to similar fact evidence are applicable under Rule 4 and it's admissible under a number of heads of admissibility at common law. Those are my comments unless you have any questions, Mr Judge Advocate.

JUDGE ADVOCATE: No, thank you.

DEFENDING OFFICER: I wonder if I could ask you to take judicial notice of my argument of last week in Bourassa. That's basically what I'm going to repeat.

JUDGE ADVOCATE: If you wish, I have no problem with incorporating your address on that occasion from that **voir dire** into this one if you so request.

DEFENDING OFFICER: Yes.

ASSISTANT PROSECUTOR: I certainly have no objection to that, Mr Judge Advocate.

JUDGE ADVOCATE: Without a request I could not do that, of course, but with a request, I agree to do it.

DEFENDING OFFICER: Yes, that will shorten my present address.

1476

Trial within a trial

Defending Officer

Address

ASSISTANT PROSECUTOR: My friend is just trying to make me look bad, Mr Judge Advocate.

DEFENDING OFFICER: Having done so however I would like to make a few comments and of course I will not repeat all of those of last week. I suggest to you the issue is essentially the same as in Bourassa and I will invite you to render the same decision as you did in Bourassa. We respectfully disagree that ... the prosecution claims that there is a live issue that we have raised. I mean the defence has been putting questions to witnesses that were on board the ship at the time of the alleged offences and so on. The number of the alleged offences which would involve physical contact have been allegedly committed at a non-certain time and by putting questions to people as to whether they saw something. They saw it. We're not raising anything new.

This particular instance falls outside again the period charged, pertained to an individual who is not listed in either Annexes "A" or "B" and should not be admitted for that reason. My comments regarding Military Rule of Evidence 22 apply. My comments regarding the application of Rule 4 apply again. And my comments regarding the Supreme Court of Canada in **C.R.B.**, that's correct, still apply in terms of assessing the probative value of that evidence. Is this evidence of any probative value, of any assistance, working from the basis that - To start with, this evidence is not admissible, if we're talking about 22, and we can only talk about 22 since the events took place prior to the period charged. How else could it be admitted? It is not directly relevant to the charge as contemplated in Rule 7 of the MREs. So we have to address then Rule 22 and under Rule 22 we suggest it is not admissible because of the poor probative value of that evidence that would amount to a greater prejudice than its probative value and in that respect you have a role to play which is greater than the mere difficulty

1477

Trial within a trial

Judge Advocate

Decision

of other type of evidence because of the general rule of inadmissibility of similar facts.

You've heard the witness and you have a role to play in terms of the reliance of the witness and assessing the weight and the probative value and we respectfully submit for those reasons, as well as those we invoked in the Bourassa **voir dire** last week, that you should refuse to admit that evidence essentially for the same reason as you did in Bourassa.

JUDGE ADVOCATE: Thank you. The court will now close to consider this matter.

AT 1525 HOURS, 16 OCTOBER 1995, THE COURT CLOSES TO CONSIDER ADMISSIBILITY OF EVIDENCE.

AT 1558 HOURS, 16 OCTOBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: You may be seated. The purpose of this **voir dire** is to determine the admissibility of some evidence offered by Petty Officer 2nd Class Lalancette related to a pushing incident that the accused would have made towards the witness while on board the OJIBWA during the month of December 1991.

The evidence consists only of the testimony of Petty Officer 2nd Class Lalancette who testified to the effect that while he was standing in the passage way between the control room and the Captain's cabin, the accused came out of his cabin, pushed him with both hands and told him to get out of his way.

The prosecution argues that such evidence is admissible first because of its relevancy to issues before the court as the same line of questioning has been raised by the defence in cross-examination to establish that the accused has never pushed or kicked anybody onboard. Alternatively, the prosecution submits that such evidence is admissible as similar fact evidence under Military Rule of Evidence 22.

1478

Trial within a trial

Judge Advocate

Decision

Both counsel referred to my decision concerning the admissibility of similar fact evidence as reported by Leading Seaman Bourassa, the prosecution arguing that there is no doubt in this present **voir dire** that the acts committed by the accused are really the acts of the accused while the defence argues that although such evidence could be admitted under MRE 22, it should not be admitted here because of the poor probative value the evidence has when compared with the prejudice it might cause to the accused.

I will start by saying that I find a major difference between the evidence offered in this **voir dire** and the evidence offered in the previous **voir dire** involving Leading Seaman Bourassa. As I stated in the **voir dire** related to the evidence offered by Bourassa, I was not satisfied that the evidence offered represented the acts of the accused. I came to that conclusion because I found Leading Seaman Bourassa to have a poor memory on all other aspects of his testimony. On the other hand, the accused testified, denied the incident and offered a reasonable explanation of what took place.

In this present **voir dire**, there is non contradicted and reliable evidence before the court which in my opinion constitutes similar fact evidence as contemplated by MRE 22. After weighing the evidence and its potential prejudice I come to the conclusion that I find this similar fact evidence sufficiently reliable to be presented to the court. The evidence is therefore admissible.

Would you please invite the members to join us.

TRIAL WITHIN A TRIAL IS TERMINATED

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: You may be seated. Would you call the witness back, please.

1479

Trial within a trial

Judge Advocate

Decision

Thank you. Petty Officer Lalancette, you may be seated. You will testify under the same oath that you took previously.

1480

PO2 Lalancette

Examination-in-chief

THIRTY-SIXTH WITNESS) Petty Officer, 2nd
FOR THE) Class J.A. Lalancette, is duly
PROSECUTION) sworn.

EXAMINED BY ASSISTANT PROSECUTOR

Q. Would you state your full name, please?

A. Jean André Lalancette.

Q. And spell your last name? A. L-A-L-A-N-C-E-T-T-E.

Q. Your service number is ?

A. Yes, it is, sir.

Q. And you're currently posted to the Naval Engineering School here in Halifax? A. Yes, sir.

Q. I understand you've served on board HMCS OJIBWA? A. Yes, sir.

Q. Do you recall what date you were on board? A. From '91 ... December '91 until May '95.

Q. Okay. Who was your CO when you first joined OJIBWA? A. Lieutenant-Commander Marsaw.

Q. And where did you first join OJIBWA? A. Norfolk, Virginia.

Q. And can you please describe the circumstances that surrounded you joining in Norfolk? A. I was serving on board HMCS OKANAGAN which was in refit. I had been back to submarines for two months then I was told that I had to fly down to replace a TI on the submarine OJIBWA down in Norfolk, Virginia. I flew down to join the submarine in Norfolk, Virginia. The submarine had just pulled in. I met the Cox'n at the hotel. The Cox'n told me there was no need to report on board until such time as the submarine was going to sail away from Norfolk.

1481

PO2 Lalancette

Examination-in-chief

Q. Okay. What was a TI, just for the benefit of the court? A. The TI is the senior weapons technician.

Q. Okay. So presumably you reported to OJIBWA when she sailed? A. Yes, I did, sir.

Q. And what occurred during your first watch or two on board OJIBWA? A. We sailed out of Norfolk, I was double banked in the forward torpedo room. I had been gone from the submarines for approximately eight years at the time. The first watch went by. Then I was off watch from one to seven in the evening and then I come back on watch from seven to one, double banked again, and then when I came off watch at that time, I made a point to go back to the control room and have a look around and check some of the equipment in the control room since I had been gone from the submarines for a while. I was standing in front of the fire control console just beside the Captain's cabin and I was on a bit of an angle looking at the fire control unit because we did not have this type of fire control equipment on board when I served. Then the Captain came out of his cabin and as he came up towards me he put both his hands up, shoved me into the chest up against the bulkhead and told me to get out of his way, "Get out of my way."

Q. And what occurred after that? A. I was up against the bulkhead. The Captain went by, went back to the after periscope, sat down on the side of the after periscope and lit up a cigarette. I looked at him. The first impression when he went by me was, "It must be some type of emergency. He is required in the control room." Then when I seen him sitting back by the side of the periscope having a cigarette and realizing that there was no emergency, I made it a mental note that if he was ever to lay hands on me again that I'd break his neck.

Q. Can you describe the amount of force he used when he pushed you out of the way? A. I'm a fair

1482

PO2 Lalancette

Examination-in-chief

size lad. He used enough force that I was off my feet but there is not that much area to fall back again, so it's like up against the bulkhead.

Q. And the demonstration you just gave about him pushing you and the words he spoke, was that an accurate depiction of the tone of voice? A. Yes, "Get out of my way."

Q. Okay. Did you give the military police a written statement with respect to this incident after that? A. Yes, I did, sir.

Q. I'd just like to show you a copy of this and my friend does have a copy of the statement. In that statement, when did you indicate to the military police that this incident occurred? A. December 1990.

Q. And today you've indicated that it occurred in December '91? A. December '91.

Q. When did it occur? A. December '91 when I joined the submarine in Norfolk, Virginia.

Q. Okay. I also noted at the bottom of the statement, if you could just look at the last four, five lines, just review that. Do you indicate there that Lieutenant-Commander Marsaw then went and sat on the after periscope and had a cigarette? A. No, I did not put down the cigarette.

Q. So what do you indicate? A. That he went down and sat down. "I noticed the CO sitting down by the after periscope, looked around and didn't see any reason for him to have pushed me out of the way."

Q. Okay. Today you recall that he had a cigarette at that time? A. Yes, I did, sir.

Q. Is that in fact your evidence that he did have a cigarette? A. Yes, he did, sir.

1483

PO2 Lalancette

Examination-in-chief

Q. Have you ever been pushed out of the way like that by any other CO on board the submarine?

A. Never, sir.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Cross-examination?

DEFENDING OFFICER: Yes.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Actually, I believe you were interviewed by the military police twice, is that correct?

A. Yes, sir.

Q. First time on 12 May 1994, is that correct? A. It's very possible, sir.

Q. So in May 1994, roughly? A. Yes, sir.

Q. And that at that time you did not mention that incident at all? A. ...

ASSISTANT PROSECUTOR: Mr Judge Advocate, I would object. I don't believe that is in fact an accurate ...

DEFENDING OFFICER: I can ask the question.

ASSISTANT PROSECUTOR: I think he is misleading the witness, Mr Judge Advocate.

JUDGE ADVOCATE: Well, I ... No, it's not the way to proceed at all, Lieutenant-Colonel Couture. I told you before. I mean, what are you trying to do with doing such a line of questioning?

1484

PO2 Lalancette

Cross-examination

DEFENDING OFFICER: I'm asking him if he mentioned or not that incident in the interview of May.

JUDGE ADVOCATE: Knowing that he did?

DEFENDING OFFICER: Sorry?

JUDGE ADVOCATE: Knowing that he didn't mention it?

ASSISTANT PROSECUTOR: I believe the question was phrased not "Did you" but "You did not ..."

JUDGE ADVOCATE: That's what I heard too, "You did not mention ...". If such is the case it's okay but your friend seems to say that he did mention it.

DEFENDING OFFICER: Mr Judge Advocate, the statement to which my learned friend has been referring to is dated 19 July '94.

ASSISTANT PROSECUTOR: And, Mr Judge Advocate, I have a summary of the original MP interview which I can certainly provide to you. I believe my friend has a copy of that as well and I'd refer him to paragraph (e) of that.

JUDGE ADVOCATE: Well, first, gentlemen, are you talking about the same statement I have in my hands right now dated 19 July 1994?

ASSISTANT PROSECUTOR: I referred to the statement, Mr Judge Advocate, but again this is ... if you wish to see that, that is a summary of the first interview and paragraph (b).

JUDGE ADVOCATE: But it's not the same date.

ASSISTANT PROSECUTOR: No, that's what my friend has indicated. There were two interviews. The first interview and then he subsequently provided a

1485

PO2 Lalancette

Cross-examination

written statement. But my friend has suggested that during the first interview the witness did not advise the MP about this incident. Clearly, that document indicates he did.

JUDGE ADVOCATE: You relate to two interviews but was there not three interviews? The witness already referred to having talked to the military police in December 1991. I'm a bit confused in this situation.

ASSISTANT PROSECUTOR: December '91 was when this incident occurred. He spoke to the military police as part of this investigation originally, and I believe it was May '94.

DEFENDING OFFICER: May '94, that's what I asked him.

ASSISTANT PROSECUTOR: And subsequently provided a written statement in July of '94 with respect to this specific incident. But during the May '94 interview he clearly advised the military police about the incident he described here today.

JUDGE ADVOCATE: May '94 and now you gave me two documents, one is dated 11 March and the other one is dated 19 July. I'm totally confused.

ASSISTANT PROSECUTOR: Perhaps, I can assist you, Mr Judge Advocate, by pointing to the documentation.

JUDGE ADVOCATE: Please do.

ASSISTANT PROSECUTOR: Mr Judge Advocate, this is a report completed by the military police in which they indicated they conducted the interview on 12 May '94. The date up here is a typographical error in preparing their report. But they indicate in this report at paragraph (b) what was discussed during the 12 May '94 interview. Then, if I can refer you to the

1486

PO2 Lalancette

Cross-examination

second page, Mr Judge Advocate, that the witness appeared on 20 July '94.

JUDGE ADVOCATE: That's not the statement itself. The statement is what accompanies this document.

ASSISTANT PROSECUTOR: That's correct. But my friend is suggesting that he never advised the military police when he originally met with them in May about this incident. That in fact is not correct. I have a clear indication that he did.

DEFENDING OFFICER: I'm asking him whether he did or not.

ASSISTANT PROSECUTOR: That's not what I heard.

JUDGE ADVOCATE: Well, that's not what I heard either. I heard that, "You did not mention ..."
So, it is based on that that your friend made an objection and on that, the objection is accepted by the court.

DEFENDING OFFICER: I'll rephrase my question to avoid confusion.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: I apologize for any confusion created.

Q. Do you recall or not whether you referred to that incident in the course of your first interview?

A. Yes, I did.

Q. A few minutes ago, I believe you did not. When I asked you the question a few minutes ago and just before the other counsel stood up, I believe you were saying you did not recall whether you had or not?

A. I was unclear of what your question was, sir.

1487

PO2 Lalancette

Cross-examination

Q. So you met with the MPs in May '94 and you mentioned that incident? A. Yes, I did, sir.

Q. And then you met again with them in July and you provided a written statement? A. I didn't meet with them. I brought my written statement in. At the time of the interview, the military police asked after we had done the interview if I would fill out a statement. I said yes. The difference in the dates of the statement, in past experience, I have acted properly once before in my past career and I got heavily burned for it.

Q. You were what? A. I had made a statement in my past career and I was persecuted in a way for it. This time when I made my statement to the police I knew that they could not proceed unless I gave them my written statement. I was scared for my career that if I put down a written statement and that this didn't go any further that this would be held against me. So when I heard that Lieutenant-Commander Marsaw was actually being charged with the offences, I knew that they were going to carry on with it, I dropped down, I think it was a day later, with my statement and I dropped it off to the military police.

Q. And this explains what exactly, why you didn't provide a written statement in May? A. That is correct, sir.

Q. But that does not explain why you made a mistake in your written statement as to the date as being 1990 whilst today you're saying 1991? A. I was under a lot of personal pressure inside, feeling, as to whether to go through with it or not.

Q. Yes but you did that at home. You were not pressured by the MPs and you did not sign or write that statement in the presence of the military police, is that correct? A. That is correct.

1488

PO2 Lalancette

Cross-examination

Q. You did that on your own time? A. Yes, I did, sir.

Q. And just as you testified when you believed anyhow, you had reason to believe that Lieutenant-Commander Marsaw had been charged then you decided to come forward? A. Yes.

Q. And you said that at that time you were relieved from the fear you had had before? A. That I did not want to submit a document that was going to stand out and if the charges would have been dropped for whatever reason, that this document would have been out in the open and my name would have been out in the open.

Q. Was the interview, the first interview with the MPs videotaped? A. Yes, it was, sir, unknown to myself.

Q. Unknown to yourself? A. That is correct, sir.

Q. So how do you know now? A. Because I viewed the videotape in the last week, sir.

Q. And that's only last week you found out about it? A. Of the existence of the videotape?

Q. Yes. A. I have heard other people speak that their interviews were videotaped later on.

Q. If I suggested to you that it was standard procedure for the MPs to inform interviewees that the interview was videotaped and ask them if they had any problem with that? A. No, they did not tell me that.

Q. So you would say that to you they didn't say anything? A. No, they did not, sir.

Q. They did that surreptitiously? A. That is correct, sir.

1489

PO2 Lalancette

Cross-examination

Q. Is that right that you were involved even indirectly with the court martial of a PO1 Stone?

A. Yes, sir.

Q. Is that correct that on that occasion and that pertained for what, a shortage of canteen on board OJIBWA, something like that? A. Yes, sir.

Q. But in the course of the preparation for that trial you were interviewed three times? A. Yes, sir.

Q. By the prosecutor, Major Smithers?

A. Yes, sir.

Q. Is that correct that each time you were interviewed although on the same basic facts, your account of the facts kept changing? A. That is correct, sir.

Q. So what you told the first time was different from what you told the second time and, what you told the second time yet turned out to be different from what you told the third time? A. Yes, sir.

Q. Is that correct that you were not called as a witness in that case? A. Yes, sir.

Q. Did you ever break Lieutenant-Commander Marsaw's neck? A. No, I did not, sir.

Q. So I gather he never touched you again? A. That is correct, sir.

Q. How much time elapsed between the time this incident you said occurred and the time you saw Lieutenant-Commander Marsaw later near the periscope? A. Instantly or a couple of minutes, the time it took him to get by me to go up to the after periscope.

Q. Instantly? A. Well, minute.

1490

PO2 Lalancette

Cross-examination

Q. A minute. A. ...

Q. Now, you say that you didn't see any cause for emergency? A. No, I did not, sir.

Q. You don't know what he was thinking, what he had in mind when he walked out of his room? A. No, I did not, sir.

Q. And actually, you don't know exactly where he went having gone by you? A. He walked by me. He went over to the after periscope and sat down.

Q. But it wouldn't take a minute, would it, from his cabin to go to the periscope? A. Okay, less than a minute, ten seconds, five seconds, instantly, by me, straight to the periscope.

Q. Did he talk to somebody there? A. No, sir.

Q. How sure are you of that? A. I didn't see him. I watched him the whole time as he left by me as I went back against the bulkhead. I watched him go by because I was interested to see what the emergency was, that if I should be paying attention which is what I am supposed to be doing and I watched him to go over directly to the periscope. He didn't stop anywhere.

Q. When I asked you how much time had elapsed between the time he went by you and the time you saw him at the periscope, you said a minute. I did not suggest ...? A. Well, when I said instantly, I didn't think like he was beamed there, sir.

Q. But you said a minute? A. He went ...

Q. I asked you how much time elapsed between the time he got by you and the time you saw him at the periscope, you said one minute. I did not suggest

1491

PO2 Lalancette

Re-examination

that. A. From the time he pushed me, I had my eyes on him the whole time as he walked to the periscope.

Q. Okay, and having got to the periscope?

A. He sat down on the periscope, pulled out a cigarette, lit it up, didn't say nothing to no one.

Q. Was he on the attack periscope or the after ...? A. Search periscope, the after periscope.

Q. Search periscope. Is that the place normally that the CO occupies on the submarine, the search periscope? A. He was not occupying the periscope. He was sitting on the ring by the side of the periscope, with the periscope, was down the hull, sitting back having a cigarette. I walked by before and I have seen him even before hand many times sitting back there.

Q. And would you agree that the periscope that the Captain works with almost exclusively or the more often is the attack periscope? A. That is correct, sir.

Q. And that the after periscope or the search periscope is mainly for the officer of the watch? A. That is correct, sir.

Q. So what you're telling now is that the CO in a big hurry to go and sit down and have a cigarette on the seat of the aft periscope pushed you, just sat there, had a cigarette? A. Yes, sir.

DEFENDING OFFICER: Thank you very much.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. With respect to the issue of dates, you indicated that you had joined the OJIBWA in Norfolk?
A. That is correct, sir.

1492

PO2 Lalancette

Re-examination

Q. I'll show you Exhibit "Q" which is a sailing schedule for the OJIBWA, the December of '91, and I wonder if you could indicate where that indicates OJIBWA was on the 1st and 2nd of December of '91?
A. Norfolk, sir.

Q. With respect to your military police interview, was that first interview held prior to Lieutenant-Commander Marsaw being charged to the best of your knowledge? A. Yes, it was, sir.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: The court has no questions. Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Captain Gleeson, I understand that, having told me in chambers that your next witness will take quite a long period of time, having to be qualified as an expert witness before testifying and so on. So you would suggest that we adjourn until tomorrow morning?

ASSISTANT PROSECUTOR: That would certainly be the prosecution's suggestion, Mr Judge Advocate, subject to the president's and your concurrence.

JUDGE ADVOCATE: Mr Defending Officer?

DEFENDING OFFICER: No comments.

JUDGE ADVOCATE: The court is adjourned until 9 o'clock tomorrow morning.

1493

PO2 Lalancette

Re-examination

ADJOURNMENT: At 1624 hours, 16 October
1995, the court adjourns.

REASSEMBLY: At 0900 hours, 17 October
1995, the court reassembles
and the accused is before it.

JUDGE ADVOCATE: You may proceed.

PROSECUTOR: Thank you. My next witness will
be Chief Petty Officer, 1st Class Brown.

s.19(1)

CPO1 Brown

Examination-in-chief

THIRTY-SEVENTH WITNESS) Chief Petty
FOR THE) Officer, 1st Class D. H.
PROSECUTION) BROWN, is duly sworn.

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last name, please?

A. Donald Henry Brown, spelled B-R-O-W-N.

Q. I understand currently you're a member of the Supplementary Ready Reserve? A. Yes, I am, sir.

Q. And your former position was Maritime Command Chief Petty Officer? A. Maritime Command Chief Petty Officer, sir.

Q. Okay. I'll get more into your background later on through introductions. Right now I'd like to ask you whether you had occasion to visit the HMCS OJIBWA while at sea for an overnight visit on the 12th and 13th of August 1993? A. Yes, I did, sir.

Q. And in what capacity did you perform that visit? A. As Command Chief Petty Officer, sir.

Q. During that period, did you have opportunity to discuss matters informally with both the junior and the senior rates of the OJIBWA? A. Yes, I did, sir.

Q. And did you also have an opportunity to discuss matters informally with individuals as you walked from different parts of the boat? A. Yes, I did.

Q. And an opportunity to visit the wardroom as well as the Captain's cabin? A. I was invited to the wardroom and the Captain's cabin, sir.

Q. Okay. With regard to your visit to the wardroom, what was discussed or presented there?

CPO1 Brown

Examination-in-chief

A. The scenario was a debrief after the day's activities at sea, sir.

Q. Okay. What time did that occur at?

A. Approximately 2200 in the evening, sir.

Q. In your role as Command Chief visiting the boat, was there anything unusual about your visiting the wardroom for a debrief? A. At the time I didn't think it was much of a surprise, but where in fact it was involved with the ship's company and the submarine's interest, I thought of it later that it was rather different that I was invited to the debrief as well as the Captain's cabin.

Q. Okay. What was unusual about being invited to the Captain's cabin? A. The Captain asked me to his cabin and, of course, I didn't turn that opportunity down and just to ask how I felt about the submarine ship's company that day.

Q. Was the coxswain present during that meeting? A. Negative, sir.

Q. Okay. What points did you raise during your discussion with the CO in his cabin? A. Well, it seemed to be the popular dissatisfier that particular day was the submarine had just finished the maintenance in docking, which is typical of the submarine service, it was a rush to get back to sea. There were a lot of tests to be done, and one of the big things was that the private contractor who had done the sand blasting had caused a lot of the systems and so on to be affected by sand insertion in pipes and valves and so on. And I don't know all the details of that but, being familiar with that sort of activity after maintenances myself, I can certainly understand the pressure on the ship's company.

Q. Huh, huh. A. The hours put in and everything else, only to find that instead of getting home for a day or two with the family before you'd sail

CPO1 Brown

Examination-in-chief

- it was straight to sea. So people were tired and they were a little upset that the private contractor should have been, let's say, overseen somewhat better than he had been.

Q. Okay. Without get into words that anybody spoke to you, what points did you say and raise with Lieutenant-Commander Marsaw apart from that point?

A. Well, he asked me what I thought of the day's activities and I had mentioned that I had spoken to the junior rates as a general audience, as well as the senior rates in different scenarios, and he asked what I thought of the boat's performance and everything seemed to circle around the fact that everybody was a little down ... well, were down on having just come off the dock and getting to sea. I can't quite recollect but the discussion on damage control ensued on the day's activities because a lot of safety aspects were being done that day.

Q. Huh, huh. A. And I can recall saying that "Well, if you're not satisfied with the state of the damage control readiness ..." then I suggested that why not ask for a work up assist from the Sea Training Group.

Q. Huh, huh. A. And then after that the ... shall I continue with the discussion?

Q. Sure. Just continue with the discussion, again keeping in mind you can't repeat the words that were spoken to you but what you simply told Lieutenant-Commander Marsaw. A. Yeah, it wasn't a long deliberation, it was five maybe to ten minutes on those things and I finished up by ... I can't quite recollect, but Lieutenant-Commander Marsaw asked "How's the crew?" Apart from the tiredness and the fatigue, there was one individual who had come to me through the day which inspired me to make a comment to the Captain that "You can't do those things anymore" in the sense that an individual had been chucked off the wheel at a partic-

CPO1 Brown

Examination-in-chief

ular time before that ... I don't know whether it was that day, probably before - based on his discussion.

Q. Huh, huh. A. And he seemed rather ...

DEFENDING OFFICER: Mr Judge Advocate, we are I think in the hearsay domain here, I mean, clearly, and I would object to that line of questioning and the witness cannot repeat what may have happened the day before or something like that when he was not on board.

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. Okay, Chief[CPO1] Brown, if you could just tell the court what you said to Marsaw, what you informed him about and what you said to him?

A. Because an individual had come to me to say that he had been chucked off the wheel ...

Q. Okay, again, did you inform Lieutenant-Commander Marsaw of that? A. I said that "You can't do that shit anymore".

Q. Okay and did you express to him what you were referring to? Would he have any idea based on your conversation with him of what you were referring to?

DEFENDING OFFICER: But again, if he asked the witness to say what he referred the CO to, that calls directly for that same hearsay I objected to a moment ago.

JUDGE ADVOCATE: I come to the same result. Sustained.

PROSECUTOR:

Q. Apart from informing Lieutenant-Commander Marsaw that "You can't do that anymore", did you say

CPO1 Brown

Examination-in-chief

any words to him prior to that so that he would know what you were talking about? A. ...

DEFENDING OFFICER: I think it is the same question again, Mr Judge Advocate, that calls for exactly the same type of answer.

JUDGE ADVOCATE: Major Abbott, you cannot do from the back door what you cannot do from the front door. It's still inadmissible.

PROSECUTOR: Maybe I could try to explain my point, Mr Judge Advocate. What I'm simply trying to do is not to get the witness to say what was told to you outside the presence of Lieutenant-Commander Marsaw, but simply re-live as fully as he can what he actually said to Lieutenant-Commander Marsaw.

JUDGE ADVOCATE: Sure.

PROSECUTOR: If he tells Lieutenant-Commander Marsaw that "I was speaking to somebody who told me ...", that isn't hearsay because he is asked to say the words that he spoke to Lieutenant-Commander Marsaw. That's not hearsay.

DEFENDING OFFICER: I object to that. It is. It is hearsay. As soon as he asks the witness to say "What did you tell Marsaw" and we know and it appears to be quite obvious that what he's about to tell him is based on what somebody else told him at the time he wasn't on board - that is hearsay.

JUDGE ADVOCATE: It is. Sustained.

PROSECUTOR:

Q. So after telling him that he can't do that anymore, did he respond? A. Yes, he said to me with a bit of a smile to say that "Yeah, I know that".

Q. And did he say anything else in response to your comment to him? A. No.

CPO1 Brown

Examination-in-chief

Q. At this time I would like to go more into your background.

PROSECUTOR: And it's for the purpose of having Chief[CPO1] Brown qualified as a expert, Mr Judge Advocate, so that he can answer questions giving his opinion in the area of leadership of an operational naval unit.

JUDGE ADVOCATE: Leadership ...

PROSECUTOR: Of an operational naval unit. I have it typed up if that will be of assistance for you and I can provide you with a copy of the area that I'm seeking to have him qualified in.

JUDGE ADVOCATE: Thank you.

PROSECUTOR:

Q. At this point, Chief[CPO1] Brown, I'd like to go a bit more into your career. The Military Rules of Evidence require that I provide some evidentiary background to show why you would be qualified as an expert to give opinions in areas of leadership of an operational naval unit.

JUDGE ADVOCATE: First of all, I will ask the defence if they have any objection as to the qualifications of the witness in this particular field of experience.

DEFENDING OFFICER: I don't think so, subject to what the witness is about to say. I will hear the basis for his expertise, and I do not anticipate an objection.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: The only question ... and that can be discussed after the examination of the witness in that respect, I was wondering if there is a

CPO1 Brown

Examination-in-chief

difference between leadership "of" or "in" an operational naval unit, but I'll see that as it unfolds. But I don't expect any major problem.

JUDGE ADVOCATE: Well, it would have been nice to know in advance so that I could have told your friend to go faster on the qualifications if there is no objection on your part. But ...

DEFENDING OFFICER: Oh, no. No, I'm sorry. I did not understand your question in that way. Yes, I have no problem with the leadership and his qualifications.

JUDGE ADVOCATE: Very well then.

DEFENDING OFFICER: Subject to this only comment of "on" or "of" or "in" and whether it matters or not, but we'll see later. But basically I have no objection.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: I apologize. I misread your question.

JUDGE ADVOCATE: That's okay.

PROSECUTOR: Okay, Mr Judge Advocate, I don't see any distinction between getting somebody qualified as an expert in leadership "of" an operational naval unit. If that's a concern to my friend, I'll also ask that he be qualified in the area of leadership "of" and "in" an operational naval unit as well.

JUDGE ADVOCATE: Of and in?

PROSECUTOR: Yes.

Q. I understand, Chief[CPO1], you've been associated with the Navy for 41 years? A. Sir.

CPO1 Brown

Examination-in-chief

Q. And you've sailed on the following submarines: HMS GRAMPUS, ANDREW, ANCHORITE, ALLIANCE, AENEAS? A. Yes, sir.

Q. And also HMCS ONONDAGA, OKANAGAN and OJIBWA? A. Yes, sir.

Q. And you sailed on those three boats for a total of 13 years? A. Yes, sir.

Q. And also sailed on HMC Ships: HMCS FORTUNE, HMCS CRESCENT, MICMAC, NIPIGON, SKEENA, PROTECTEUR? A. Yes, sir.

Q. And in your position as Command Chief from April '91 until July '95, four years and four months, you've been Command Chief for the following admirals: George, Anderson, Cairns, Murray and Mason? A. That's correct, sir.

Q. And at that time the following Chiefs of Staff were in position: Rear-Admiral Waller, Commodore Moore and Commodore Cagdon? A. Yes, sir.

Q. And the Chief of Staff or Personnel would have been: Commodore Westropp, Commodore King and Commodore Madison? A. That's correct, sir.

Q. And from August '89 until April '91, you've been a member of the Submarine Sea Training? A. Yes, sir.

Q. And your superiors at that time would have been Commander Gladman as well as Dierks? A. Yes, sir.

Q. Also recalled back to Ship Sea Training, during the Gulf War, for work ups on the TERRA NOVA under Commander Andrews? A. Yes, sir.

Q. And at that time and with your experience would have had an opportunity to observe the whole leadership role and team effort being observed on both

CPO1 Brown

Examination-in-chief

the boats as well as the ships? A. That's correct, sir.

Q. You've also observed, although not served with, the following Canadian submarine commanders: Nicholson, Bush, Truscott, Davidson and Mosher?

A. Yes, sir.

Q. And in the summer of '87 to September of '88 you were the coxswain on the PROTECTEUR? A. Yes, sir.

Q. Under the following captains: Steele, Davies and Tanguay? A. That's correct, sir.

Q. From January until June '87, you were in Fleet Maintenance Group under the leadership of the commanding officer Towill? A. Towill, sir.

Q. And from March '85 until January '87 with the Surface Sea Training under leadership of the then Commander Garnett and then Hendel? A. Yes, sir.

Q. During that period of time you done work ups on the OTTAWA, CORMORANT, HURON, ASSINIBOINE, MARGAREE, YUKON, PROTECTEUR, FRASER, TERRA NOVA, ATHA-BASKAN, SAGUENAY, PORTE ST JEAN, PORTE ST LOUIS, PORTE STEELE, and some FDU vessels? A. Yes, sir.

Q. Under the following COs: Hodgskins, Andrews, Steele, Morres, Delamere, Ballard, Bernard, King, Perusse, Bowen and Beardmore? A. That's correct, sir.

Q. September '83 to March '85 you were with DCOS P&T, under Captain[N] Moore, Captain[N] Murray and ... I can't pronounce his name "D-Z...."? A. Dzieba.

Q. Dzieba? A. Captain[N] Dzieba, sir.

CPO1 Brown

Examination-in-chief

Q. Thank you. From November '81 until September '83 you were a member of HMCS SKEENA under Commanders Boucher and Foldesi? A. Yes, sir.

Q. As the Chief ERA? A. Yes, sir.

Q. And February '81 to November '81 you were a member of the First Canadian Submarine Squadron under Commodore Sloane? A. Commander Sloane, sir. Yes.

Q. Okay. And the Squadron Chief ERA at that time? A. Yes, sir.

Q. In 1968 until November '81 you were a member of the OKANAGAN and rose to the position of Chief ERA? A. Yes, sir.

Q. And you had the following commanding officers on the OKANAGAN: Frawley, Temple, Meek, Waddell, Crow, Bell, Hunt, Nesbitt, Falstrum, Furgeson, Sloane and Ewan? A. That's correct, sir.

Q. Served on the ONONDAGA for four months in 1968 under Lieutenant-Commander Meek? A. Correct.

Q. In 1962 sailed on the British subs that I mentioned before with: Sharpe, Graig, Purdy, Pogson? A. That's correct, sir.

Q. Dingemans, Swinley. And under the MICMAC: Commanders Stuart, Smith and Germain (sic)? A. German, sir. Yes, sir.

Q. Okay. And also time as a sea cadet at the very beginning of your career. In terms of leadership training, you've been on the Warrant Officer Qualifying Course in 1974? A. That's correct, sir.

Q. The Chief Warrant Officer's Course in 1986? A. Yes, sir.

CPO1 Brown

Examination-in-chief

Q. You've also been on the Directing Staff for four successive years on the Chief Warrant Officer's Course from '91 to '94? A. That's correct.

Q. And you've also lectured at that school as well? A. Yes, sir.

Q. Taken part in the CO and the XO Refresher Course in Halifax from 1991 to '94, and did countless lectures on leadership and discipline during your time as coxswain and Command Chief? A. Yes, sir.

PROSECUTOR: Given this evidence, Mr Judge Advocate, I would feel that Chief Petty Officer, 1st Class Brown is more than qualified as an expert in the area of leadership of and in an operational naval unit and would request that he be classed as such. Thank you.

JUDGE ADVOCATE: Thank you. Lieutenant-Colonel Couture, do you wish to cross-examine the witness on his qualifications?

DEFENDING OFFICER: No, I don't.

JUDGE ADVOCATE: Do you have any objections to his qualifications in the field requested by the prosecution?

DEFENDING OFFICER: No, I don't object to it.

JUDGE ADVOCATE: Thank you very much. So it's my ruling that the witness has the requisite knowledge, skill, experience and training to be qualified in the area requested by the prosecution.

PROSECUTOR: Mr Judge Advocate, I have typed-up copies of Chief[CPO1] Brown's CV, and I would like to introduce it as an exhibit for this purpose?

JUDGE ADVOCATE: Any objection from the defence?

CPO1 Brown

Examination-in-chief

DEFENDING OFFICER: No objection.

JUDGE ADVOCATE: "EE".

CURRICULUM VITAE FOR CHIEF PETTY OFFICER, 1ST CLASS
BROWN IS MARKED EXHIBIT "EE".

PROSECUTOR:

Q. Chief[CPO1] Brown, based upon your time in boats, have you ever had occasion to see a commanding officer refer to subordinates in the control room using personally insulting adjectives towards them?
A. Negative, sir.

Q. Based upon your 41 years with the Navy and observation of over 65 commanding officers, have you ever had occasion to see a commanding officer refer to a member of his crew using personally insulting adjectives? A. No, sir.

Q. Would you have any concerns if a commanding officer of a submarine referred to members of his control room in the presence of others using personally insulting adjectives, such as: "idiot", "incompetent", "asshole", "fucking idiot", "fucking asshole", "cunt", "stupid", "slow" on average once a day to one member of the control room while at sea? A. What was the first part of the question?

Q. Would you have any concerns if that occurred? A. Yes, sir, I'd have concerns.

Q. Okay. And what sorts of concerns, generally speaking, would you have if that type of activity occurred? A. Well, I'd have concerns about first of all the embarrassment and the loyalty of the team spirit, the embarrassment to the individual to try to deliver his best product and be effected by such adjectives to embarrass him and to just have an overall

CP01 Brown

Examination-in-chief

feeling of the whole team concept that it would be effected.

Q. Would this type of activity have any activity or any effect on the leadership within a divisional system? A. Yes, I believe it would.

Q. In what sorts of ways? A. Well, I would feel that if there were some dressing down to be done that there would be a time later, that I would expect that the CO would discuss that with the member's superior, his divisional officer as an example, or his divisional chief through his divisional officer to be able to, let's say, fix the shortage.

Q. Would you have any concerns from a leadership point of view if members of the officers in the control room appeared fearful and hesitant in the presence of their subordinates? A. Yes, I would.

Q. Why? A. Well, I believe that if their effected, therefore their confidence would be effected, and I feel that that distraction might cause a risk situation to result in danger, at sea in a submarine as an example.

Q. Is a submarine in continual danger while at sea? A. In my experience ...

DEFENDING OFFICER: Mr Judge Advocate, I would object to that question. I would believe that it does not necessarily fall within the level of expertise ... and that's it.

PROSECUTOR: I'll rephrase the question and get away from my friend's concern.

Q. Based on your personal observations and your personal experience, were you in continual danger while you were at sea? A. ...

DEFENDING OFFICER: I would say that it is the same. I mean, I believe that the testimony of the

CPO1 Brown

Examination-in-chief

witness in that regard would have to pertain to the facts that pertain to this charge. If he talks about his sailing on other submarines and answer that question, it cannot be compared. He can testify on whether he has been in danger before on a submarine, for example, what does it have to do with the charges before this court? So on relevancy as well.

PROSECUTOR: It has absolutely everything to do with the charges that are before this court. In the opening statement of my friend and continually through cross-examination, he would raise the issue of "Maybe Lieutenant-Commander Marsaw had to rebuke people in the presence of others given the dangerous nature or the things that submarines do". What I'm going to do is to draw from probably the most experienced submariner to find out how many situations he has been in danger; whether the sub is always in danger; and then ask how his COs, based on his personal observations, have reacted and responded while the submarine is doing its business, and then particularly in moments of danger. So this evidence is completely relevant. The questions have been asked, generally speaking, on cross-examination to a number of witnesses and sometimes "If his snort was of six inches - that could be dangerous, couldn't it?", "If this happened - that could be dangerous?" So I am merely already asking questions in an area that my friend has opened up even from the time that he gave his opening address. So I think it's directly relevant.

JUDGE ADVOCATE: Yeah, but you didn't need to qualify the witness as an expert to qualify him to testify in this field.

PROSECUTOR: I don't think I'm relying upon his expert qualification to answer this particular question. There's no rule that says I can't ask him questions based on his personal observation while at the same time he is already classed as an expert.

JUDGE ADVOCATE: Go ahead. Objection denied.

CPO1 Brown

Examination-in-chief

PROSECUTOR:

Q. Based on your personal observations in sailing in the submarine, is it always in continual danger? A. In my experience, no, sir.

Q. How many times in your career as a submariner have you been in immediate danger? A. Four times, sir.

Q. In those situations, did your COs react by referring to the crew using personally insulting adjectives? A. Negative, sir.

Q. Can you give us an example of a time where the sub was in immediate danger and discuss how the commanding officer lead and how the team reacted? A. In the summer of July 1973, I was in OKANAGAN as the outside wrecker. And we were just on the tail-end of a work up for seven weeks and the operational phase whereby I was on the diving panel as first panel watch keeper. The Captain was Lieutenant-Commander Bell, the XO was then Lieutenant-Commander Fischer, and we were doing a photo recce with an RFA GREY ROVER from the west of Scotland in the approaches. The Captain had been on his "pins" for some 18 hours and it was typical of RN work ups in those days, they were very very tiring, very consuming of ship's companies. It was a case of "beat you down until you fall asleep". The last exercise prior to the work up completing, with Captain SM on board as the senior inspecting officer as well the entire SSD from Faslane, required that we do this photo recce and the captain wanted to get in close range of the stern of GREY ROVER to be able to get a photograph of her propeller, single shaft. I can recall, although I'm not part of the fire control or operational part of the submarine, but being in the control room I could see that on the "fruit machine" as it was known in those days, that was the calculator for estimating range and depth and so on, that Lieutenant-Commander Fischer seemed a little concerned that the

CP01 Brown

Examination-in-chief

captain was in very very close to the tanker. Where the captain thought that the ship may have been in this position - she was probably a little closer and over this way. What he tried to do, from what I can recollect, is that she would come across our fin and we'd be below, and just as she crossed the fin he'd take a picture to the starboard beam of the propeller. His estimation of where the ship was caused ... because she was in so close, caused the submarine to ... we were at periscope depth at the time, to have his last look before we'd go deep to get that picture, and when he came up at periscope depth we could feel the surge, the whole boat went to starboard by some ... oh, 15 or 18 degrees, and then of course she came back, and by this time the propeller chopped through the hole on the conning tower, through the fin. At that particular time we had had the ALN mast, communications mast was still raised, and the after-periscope through which the photography was being taken was ordered down. My second panel watch keeper put it to the down position and it got jammed with debris on impact. The forward-periscope, at the same time as the captain was trying to get one more look, had raised. He ordered it down and it got damaged on the way down, and the submarine heeled to something ... I'd say about 20 to 25 degrees to starboard. And it was all shaking dramatically to the extent that the rams in the forward-periscope tube were banging against the mast tube. Well, in that situation, I would imagine that the captain assumed that there was no way that if the submarine should surface he could get to the bridge because it appeared that the bridge was entirely gone, or at least we had thought that at the time. Lieutenant Jones was then the engineer, who was on the trim at the time, he was the control officer, and the captain departed the control room and went to the accommodations space. And one could easily see that with the potential confusion in the control room that everyone remained under control to the extent that we knew what had happened, we knew the state of the masts, and the captain would now take charge of the submarine from a remote position, i.e., from an intercom in the accommodations space,

CP01 Brown

Examination-in-chief

knowing that it was the only way he could gain access to the casing was via the accommodations space hatch. He ordered the submarine surfaced from that position, at which time I blew main ballast under the secondary direction of the engineer officer on the trim, and we managed to get to the surface.

Q. Okay. During that entire period, did the captain ever use personally insulting adjectives towards you? A. There was no need, sir. Negative. No.

Q. Can you give an example of how a captain has reprimanded an officer in a potentially dangerous situation because of his poor performance? A. I can recollect in OKANAGAN, as Chief ERA in 1975, around that time, possibly ... no, sorry, '76. We were on the surface entering into Halifax Harbour and requirements were such that you go to what is known as "two rams" on the steering system. And inadvertently, we'd found out later, that the watch keeper back aft had put both rams in bypass, and in fact instead of putting them to the positive shut position, on the steering system. Consequently, when it was found on the surface that the officer of the watch had lost steerage, he piped steering gear failure. It was in the middle of the night, I'd say at about 0300 in there somewhere, and the engineer officer of the day, Lieutenant-Commander Larsen, was reputed as "loving to play chess and like to drink a lot of coffee" that when he came off watch he would often go to the cafeteria in OKANAGAN and play chess with the boys and drink coffee. Invariably he used to stay up long hours doing that after his watch. And at this particular time when he was summons to the control room he did appear. I was in the control room, stood by the Captain's cabin door and knowing he was in there although the lights were out, it was very very dark in the control room that night, knew that we had a steering gear failure, and I had one of my men from the outside staff despatched to the after ends to see what the immediate problem was and stand by for a report, because if it could have been a leak or a burst or whatever the case on the hydraulic system, he could get

CPO1 Brown

Examination-in-chief

to me and tell me what the problem was. In the meantime we would have to go onto the steering gear breakdown procedures on the roof, on the surface. The engineer officer was summoned to the Captain's cabin for advice to the captain as to what to do with the situation, and on three ... I can recollect about three times, the engineer officer hadn't or just didn't arrive at the Captain's cabin door. And I would suggest that he was probably still turned in and they couldn't arouse him out. The captain had asked me for some advice as to what to do and I suggested that all he can do is "Steer on main motors, sir, until we can determine what the problem is", and then I could hear his voice over the intercom to the bridge saying "Bridge Officer of the Watch, Captain speaking, Steer by main motors" or whatever the relevant orders were. We got alongside Halifax the next morning and it was the last time I ever saw that engineer officer.

Q. Okay. Was he ever reprimanded in public in your presence? A. Negative, sir.

Q. From the leadership perspective and point of view, what is the significance of that engineering officer not being reprimanded in public in the presence of his subordinates by the commanding officer?

A. Well, I would think that when that engineer finally did wake up and realized what had happened, he was quite bothered by the whole affair, because the captain decided that he would take this into a very confidential situation whereby he wouldn't embarrass the situation, and I would think as I look back at it now, he probably did it so quickly and quietly that people had forgotten the incident, which is probably you know if that officer was to succeed in other intentions in the Navy in the future he wouldn't be affected by it, at least by having been, let's say, embarrassed openly by the captain in front of any individual juniors.

Q. Is that important to do it in private rather than public? A. I believe so.

CPO1 Brown

Examination-in-chief

Q. From a leadership point of view? A. I believe so, no matter what rank you are, sir.

Q. Why? A. Well, because maybe there were good substantial reasons as to why the individual couldn't appear to the Captain's cabin door in that particular case. Or in another situation, maybe there's always a reason why someone has shortages, maybe he hasn't had the adequate training, maybe he's ill, maybe he's not well. There could be a number of things that I would think if you were given the reasons as to why you did have shortages - then so be it. If you're totally at fault - then fine. And there are regulations in place to deal with those situations and methods by which you can have people relieved.

PROSECUTOR: Okay. Thank you. No further questions.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: No questions.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: None.

JUDGE ADVOCATE: No questions. Thank you very much.

WITNESS: Thank you, sir. Will that be all, sir?

JUDGE ADVOCATE: That's all. Thank you very much.

WITNESS WITHDRAWS

PROSECUTOR: Our next witness will be Lieutenant-Commander Hickey.

s.19(1)

Lieutenant-Commander Hickey

Examination-in-chief

THIRTY-EIGHTH WITNESS) Lieutenant-
FOR THE) Commander L.M. Hickey is duly
PROSECUTION) sworn.

EXAMINED BY PROSECUTOR

Q. Good morning. Can you give your full name to the court and spell your last name please?

A. My name is Lawrence Michael Hickey, H-I-C-K-E-Y.

Q. I understand you joined the Canadian Forces in 1974? A. Correct.

Q. What's your current position? A. I'm presently a student at the Command and Staff College in Toronto.

Q. And I understand as well that you have been commanding officer on two occasions of Canadian submarines? A. That's correct.

Q. In 1986 to 1987 you were the CO of the ONONDAGA? A. Yes.

Q. And in 1992 to 1995 you were the CO of the HMCS OKANAGAN? A. That's correct.

Q. And as a submariner you acquired your Dolphins in 1978? A. Yes.

Q. And have sailed with the following commanding officers, Radford-Brown, Sloane, Jones, Ewing, McMillan, Dunlop, Plante, Webster and Irvine? A. That is correct. It was Rayford-Brown.

Q. Rayford-Brown? A. He is a Royal Navy officer.

Q. Okay. That was with a Royal Navy boat? A. That's correct.

Lieutenant-Commander Hickey

Examination-in-chief

Q. During your time as CO of HMCS OKANAGAN from June '92 until 1995, did you ever have any ex-OJIBWA officer transferred over to your boat? A. I had several.

Q. Okay. Can you recall some of the names of the ex-OJIBWA officers that came over to your boat?

A. Initially it was Lieutenant[N] Art Wamback who was the XO, also Lieutenant[N] Jim Reid who was the engineer, followed by Lieutenant[N] John Pitman who was a navigator, and then there were two officers under training, Sub-Lieutenant Rob Watt and Sub-Lieutenant Chris Ellis.

Q. Based upon your own personal observations, how did they physically appear when they started and began working in the control room under your command? A. Once we got to sea or ...?

Q. Once you were at sea? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I would object to this line of questioning. I believe I have formulated a similar objection before that their appearance, I mean, how they appear, I mean, is one thing. But then after that to tie this up, it's a matter of relevancy. Again it's got to be relevant to the charges in front of this court. And if the prosecution intended to try to make it relevant, it would call for facts or matters that this witness could not have observed. It would be conclusions that he could not draw from his own personal observations but rather either on the basis of hearsay or speculations. So for that reason I object to this line of questioning as I did before and I believe you had ruled that this was not admissible.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I can't recall which particular ruling my friend is referring to because I don't think I've gotten into this sort of area before yet.

Lieutenant-Commander Hickey

Examination-in-chief

What I am driving at is to ask Lieutenant-Commander Hickey how these ex-OJIBWA officers appeared in the control room, how they performed their job, what were their strengths, what were their weaknesses. The thrust of the evidence is to demonstrate prejudicial effects caused by the verbal abuse of the accused.

One of the things I have to prove under the 129 charge is that not only was there particular conduct and act, in this case we are alleging verbal abuse, but it did indeed have prejudice to good order and discipline. Based on his evidence there is evidence that allows us to show the after effects of a certain leadership style which we accuse is being prejudicial to good order and discipline. So my questions to the witness, "How did they appear? Were they this way? Were they that way? How would they react in this situation? What were their strengths and what were their weaknesses?" This all goes to providing me with evidence that I can argue with at the end of the day that this leadership style in question was indeed prejudicial to good order and discipline because this is the type of officer that was getting produced.

JUDGE ADVOCATE: And how will this witness tie their performance with what you want it to be tied?

PROSECUTOR: I have no problem talking in front of the witness or the panel. I am getting into anticipatory evidence if you have to ...

JUDGE ADVOCATE: But he would have to go into hearsay to do that?

PROSECUTOR: No. He is saying they appear very jittery and jumpy and nervous whenever he entered the control room. They had tremendous strengths in being able to do emergency drills but no ability or very little ability to use their initiative and decide and work out problems on their own in the control room. This is consistent with the evidence that has

Lieutenant-Commander Hickey

Examination-in-chief

come in from other witnesses about they appeared to do their job in the control room. We had Chief[CP01] Tovey, the Chief ERA, saying he couldn't get an answer from these guys when they were in the control room of the OJIBWA to decide minor engineering points. They would always have to go to the cabin. We've got junior and senior rates saying that they appeared frightened and scared whenever the CO would enter the wardroom. The thrust of our case is that this is a particular leadership style that breached the Code of Service Discipline. It is important to identify it because it is prejudicial to good order and discipline in the Canadian Forces. We are now producing evidence that shows what the after effects of this particular type of leadership style are. It is very important that we're able to bring out evidence that shows if this leadership style is allowed to continue this is the type of crew you're going to have in the future in the Canadian Forces. Lieutenant-Commander Hickey is that future. He provides us evidence to demonstrate that.

DEFENDING OFFICER: I insist and keep insisting that it's totally inadmissible. There is no rational or probative conclusion that can be drawn on how they were. The guy might have been hung over from the day before. He may have been scared because he had ... his place was broke into and whatnot the night before. There is absolutely no probative value to this and any attempt to link it to this charge to make it relevant would have necessarily to call for hearsay. This is totally non-probative and just cannot be admitted.

PROSECUTOR: If I may, Mr Judge Advocate. I'm not asking him for a single speck of hearsay. I'm not asking him to tell the court what these people said to him. I'm asking him to tell the court what he saw based on his own personal observations. If my friend says it might have been because they had a rough time the night before by drinking or a fight with their mother - that's my friend's problem. He can challenge the evidence. He can cross-examine it. He can bring in witnesses to show that Pitman and Watt and Reid and

Lieutenant-Commander Hickey

Examination-in-chief

Wamback acted that way because they had a bad day the day before they joined the OJIBWA. It's entirely up to my friend.

DEFENDING OFFICER: It's not up to me.

JUDGE ADVOCATE: That's enough. That's enough. That's enough. I'm ready to make my ruling. The objection is sustained. I see no relevancy of this matter before the court and I see no probative value when weighed to the prejudicial effect on the accused.

PROSECUTOR:

Q. Based upon ... strike that question. Have you ever had occasions to observe any of your commanding officers use personally insulting language towards subordinates in the control room? A. Over the space of 16 or 17 years I've only seen one or two instances where the commanding officer has used a personal slur towards an officer in the control room.

Q. How many occasions? A. One or two. And that was one particular commanding officer and that would have been in 1977 or '78. It was Lieutenant-Commander Ewing.

Q. And how many years have you been a submariner? A. I volunteered for submarines in 1976 until the present and I spent four years out of service - so 16 years.

Q. How do you deal with a situation, as commanding officer, in your control room when an individual is not performing up to the standards or making an error? A. Could you be more specific in what sort of context?

Q. You just come into the control room.
A. Right.

Lieutenant-Commander Hickey

Examination-in-chief

Q. Things aren't going the way you want or you notice an individual is making some type of mistake. How would you react in those type of situations?

A. It depends on what it is that the submarine is doing to start off with. If the mistake is an error in safety, safety related sort of mistake, you'd deal with that right away. If it is a matter of maintaining a standard of watch keeping or something like that, well then I would try to assess whether or not there would be some lesson to be learned by allowing the individual to carry on with it, whatever course of action he was pursuing, the idea being that, my personal view is, that you learn more from making a mistake to the point where it becomes obvious that the lesson stays with you longer than if you're corrected. So if it was safe and it was a realistic scenario I would ... there'd be no other bad consequences become of it, chances are I would allowed the individual to pursue whatever course of action he was taking to make a teaching point.

Q. Okay. Have you ever been in immediate danger as a submariner during your career? A. A few times.

Q. How many times would you think? A. Over the space of my career I can think of maybe three or four times. My first brush I guess ... With actual danger as opposed to perceived danger?

Q. Yes. How many times out of those three or four as a CO? A. As a CO, one particular one that I can recall. The other times I was a junior officer under training on OJIBWA when we very nearly had a collision with a Los Angeles Class submarine in 1977. I was the Ops officer in HMCS ONONDAGA in 1980 when we ran aground trying to go underneath a Soviet vessel to do an underwater look.

Q. In those situations, when you were the CO or when you were working for COs, did they ever use personally insulting adjectives towards their crew in those moments? A. Not directed to the crew, no. No.

Lieutenant-Commander Hickey

Examination-in-chief

It was not uncommon to perhaps hear the odd curse, you know, or "Oh, shit".

Q. My question though is whether you had ever heard personally insulting adjectives? A. Not directed to an individual. No.

PROSECUTOR: I wonder if we have the exhibit book here, Mr Judge Advocate. I'd like to refer to some exhibits.

JUDGE ADVOCATE: Certainly.

PROSECUTOR: It will just be a moment. I'm going to refer to an exhibit book.

I would like to show the witness, Mr Judge Advocate, Exhibit "R" and Exhibit "S". These are two Annual Historical Reports from the OJIBWA for 1992 and 1993. On the last page of each of the reports is a list of the officers who were members of the wardroom.

I'd like the witness to look at each of the lists before I ask him some questions.

WITNESS: What I have is copies of the OJIBWA Annual Historical Report from 1992 dated 25th February, 1993 and the Annual Historical Report from the OJIBWA for 1993 dated 23rd of March 1994.

PROSECUTOR:

Q. Can you look at the lists of the wardroom for those two years? A. Right.

Q. Are you familiar with these officers?
A. I am familiar with all of the officers.

Q. Relative to your wardroom and the other wardrooms that you've been associated with, as your career as a submariner, how do these wardrooms stack up? A. May I keep these for a second?

Lieutenant-Commander Hickey

Examination-in-chief

Q. Sure. How do these wardrooms stack up with other wardrooms? A. I would say that they're average to, and in some cases, better than average. Some very very strong individuals, in particular, this is the OJIBWA one and this is the OJIBWA as well.

Q. I'm not talking about particular individuals. I'm just asking about the wardroom as a whole?
A. ...

DEFENDING OFFICER: Mr Judge Advocate, I will question the relevancy of this. What's the opinion of the witness got to do with the charges? Relevancy again. And I will confess I did ask similar questions.

JUDGE ADVOCATE: You certainly did.

DEFENDING OFFICER: I did, yes. However, my questions were directed at the performance at the time on board.

JUDGE ADVOCATE: And the competence.

DEFENDING OFFICER: Yes, based on his observation of their performance on board at the time. I suggest that was relevant and appropriate. But his opinion as to how, I mean, what he thinks of them - on what basis? Not on the basis of their performance on board OJIBWA, he wasn't there. So his opinion of those individuals based on their performance before, after or whatnot, in our view, is not relevant. And that is the big difference between the line of questioning the defence has adopted with, I believe it was Soper, amongst others, and it was his direct observation of a few officers that he mentioned, including Elford as I recall. That was proper. This is not for the reason I just mentioned. So I object to that line of questioning.

JUDGE ADVOCATE: Could you particularize your question in time?

Lieutenant-Commander Hickey

Examination-in-chief

PROSECUTOR: I am trying to change the wording of the question so I can speed things up and avoid legal wrangling I guess.

JUDGE ADVOCATE: Very well.

PROSECUTOR:

Q. Would you go to sea as a commanding officer with either one of those wardrooms? A. I have been to sea in OJIBWA while these officers were embarked and had opportunity to observe all the officers.

Q. My question is, would you go to sea with either one of those wardrooms as commanding officer? A. As they are stacked here?

Q. Yes? A. Certainly.

PROSECUTOR: Thank you.

No further questions.

DEFENDING OFFICER: No questions.

JUDGE ADVOCATE: Thank you.

Any questions from the court?

PROSECUTOR: Mr Judge Advocate, I realize I said no further questions. I have one other question. And I know it's discretionary but I would request the opportunity to ask that question.

JUDGE ADVOCATE: May I ask what are the defence's views on this matter?

DEFENDING OFFICER: I said I had no questions and it appears there is no re-examination opened in those circumstances.

JUDGE ADVOCATE: I fully agree with you.

Your time is over.

Thank you very much.

WITNESS WITHDRAWS.

DEFENDING OFFICER: Mr Judge Advocate, before the prosecution calls their next witness, I wonder if it would be in order to take a 10-minute break. I have matters to attend to and I'd feel better after.

JUDGE ADVOCATE: Very well. The court is adjourned for 10 minutes.

ADJOURNMENT: At 1000 hours, 17 October 1995, the court adjourns.

REASSEMBLY: At 1010 hours, 17 October 1995, the court reassembles and the accused is before it.

ASSISTANT PROSECUTOR: The next witness is Sergeant Wiley, Mr Judge Advocate.

Sergeant Wiley

Examination-in-chief

Q. Specifically, would the commanding officer have been aware? A. Yes.

DEFENDING OFFICER: Mr Judge Advocate, how would the witness know whether the CO or other members of the crew were aware?

ASSISTANT PROSECUTOR: Mr Judge Advocate, perhaps my next question ... the questions should have been asked in the opposite order perhaps.

JUDGE ADVOCATE: Go ahead.

PROSECUTOR:

Q. Did you ever provide CFAOs to anybody on board? A. Yes.

Q. And specifically, did you ever provide CFAOs to the commanding officer? A. Yes.

Q. And did the crew have access to them?
A. Yes.

Q. During your time on board OJIBWA did the submarine ever sail without CFAOs on board? A. No.

Q. Were CFAO amendments received from time to time? A. Yes.

Q. Could you describe how they were received and what was done with them? A. They'd be sent from Ottawa via mail and when I got them I'd open up the mail bag and that's how I received amendments.

Q. Okay, and what would you do with them once they were received in the mail? A. Generally, what would happen is I'd hold them until the time period where I had time enough to amend the CFAOs.

Q. Would you do anything with them prior to amending the CFAOs? A. Yes. I'd give them to the XO.

Sergeant Wiley

Examination-in-chief

Q. And what was the purpose of that? A. To distribute them throughout the wardroom.

Q. And once the XO ... or they had been distributed throughout the wardroom, what would happen?

A. I'd get them back from the XO and then hold them until a time I could do the amendments.

Q. Sergeant Wiley, I'm showing you a document. Do you recognize that? A. Yes.

Q. Would you describe for the court what it is? A. It's a record of change to the CFAOs.

Q. And specifically, do you recognize the writing and the signatures on that document? A. Two of them.

Q. Yes, and whose are they? A. Mine and Master Seaman Breese.

ASSISTANT PROSECUTOR: At this time, Mr Judge Advocate, subject to any objection that my friend might have ...

DEFENDING OFFICER: No objection.

ASSISTANT PROSECUTOR: I would ask that this be marked as the next exhibit.

CFAO RECORD OF CHANGES IS MARKED EXHIBIT "FF".

PROSECUTOR: And I have copies as well for the court.

Q. Sergeant Wiley, what is the purpose of this document, Exhibit "FF"? A. It's to show the amendments received and who had amended the CFAO.

Sergeant Wiley

Examination-in-chief

Q. Okay. And if there's a signature beside the amendment number, what does that indicate?

A. That that's the person who did the amendment.

Q. And what has he done with the amendment? When you say, "He did the amendment", what does that mean? A. Oh, okay. I would have taken that amendment and put it into the CFAO and taken out the old amendment and dispose of the old amendment.

Q. Okay. The sections on that sheet or the entries that you would have done include what? What is the last entry that you would have completed on this change sheet? A. It would have been the change of 8 of '91.

Q. Okay. And the changes where you have drawn a line across a number of boxes, what does that indicate? A. That means I would have done all those amendments at the same time.

Q. Okay. A. So I'd cross out and then sign.

Q. Okay. And the portions of the sheet where there is no signature beside the change number, what does that indicate? A. That I never received that amendment.

Q. Okay. Who was the commanding officer on board OJIBWA from December 1990 until July of 1992? A. Lieutenant-Commander Marsaw.

Q. And did you serve on board OJIBWA during that period, December '90 to July '92? A. Yes, I did.

Q. Would you recognize Lieutenant-Commander Marsaw if you saw him today? A. Yes, I would.

Q. I'd ask to look around the courtroom and indicate whether or not he's present? A. Yes, he is.

Sergeant Wiley

Examination-in-chief

Q. Could you please identify him?

A. That's him there.

JUDGE ADVOCATE: The witness indicates the accused.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

DEFENDING OFFICER: No questions.

JUDGE ADVOCATE: Any questions from the court.

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness, Mr Judge Advocate, is Petty Officer[PO2] Breese. And Petty Officer[PO2] Breese will be taking an affirmation.

s.19(1)

PO2 Breese

Examination-in-chief

FORTIETH WITNESS) Petty Officer, 2nd
FOR THE) Class C.I. Breese, is duly
PROSECUTION) affirmed.

EXAMINED BY ASSISTANT PROSECUTOR

Q. Good morning. Could you state your full name, please? A. It's Petty Officer[PO2] Breese.

Q. And your given names? A. It's Carl Ian.

Q. And would you spell your last name?
A. B-R-E-E-S-E.

Q. Your service number is ?
A. Yes, sir.

Q. And you're currently posted to Allied Command Europe, Rapid Response Corps, Germany?
A. Correct, sir.

Q. And your trade is administration clerk?
A. Yes, sir.

Q. Were you posted to the HMCS OJIBWA during your career? A. Yes, sir.

Q. What period did you serve on board OJIBWA? A. Between May '92 to June '94.

Q. And what was your job on board the OJIBWA? A. Administration clerk, sir.

Q. Okay. And in that position were you responsible for administrative orders and instructions held by the submarine? A. Yes, sir.

Q. Were the Canadian Forces Administration Orders held on board the submarine? A. Yes, sir.

PO2 Breese

Examination-in-chief

Q. And where they held? A. They were held in the lower motor room.

Q. Did members of the crew have access to the CFAOs? A. Yes, they did.

Q. And were CFAOs carried on board when OJIBWA would go to sea? A. Yes.

Q. Was there any occasion that OJIBWA would have sailed without CFAOs on board? A. No, sir.

Q. And from time to time were amendments received to CFAOs? A. Yes, sir.

Q. Could you describe for me how they were received and what would happen when they were received?

A. There's two ways I received them: one would be through the sub squadron orderly room, just in my mail box; or if we're out to sea I would receive them in the mail bag with the mail as well.

Q. Okay. A. Upon receipt of them, they would be given to the XO for dissemination in the wardroom so everybody could be aware of what amendments are being done. They would probably take two or three days to look at them, come back to me, and they would be amended within a couple of days upon my receipt again.

Q. And when you say "amended", what does that involve? A. Well, on the check list it will tell you to remove certain pages or remove certain orders and you just follow the list and remove the orders and insert the new orders.

Q. Okay. I refer you to Exhibit "FF". I wonder if you recognize that document? A. Yes, sir.

Q. Could you describe what it is? A. It's just a record of changes that I have to the CFAOs while I was on board.

PO2 Breese

Examination-in-chief

Q. I note the document has a number of blocks with a four-digit number on the left column and then a signature to the right of that in most cases. What does that information tell? A. What that tells me is that on the change ... like if I could use an example, change 1 of '93 has been amended into the CFAOs and that is my signature saying I have carried that out.

Q. Okay. I note there's a block in the first column that says, "unable to acquire". What does that ...? A. What that was, is when I first of all went down to the OJ there was a bunch of amendments that were not done. So I have to go back and acquire ones. Those ones where I was unable to acquire, therefore I had to go through another set of CFAOs and to a page by page check to see which ones that were missing.

Q. So having done that, would those amendments have been included in the CFAOs held on board OJIBWA? A. Yes, they would have, sir.

Q. Okay. Also I note in the second column, amendment 2/93, there is a signature which I presume is yours? A. Yes, sir.

Q. And then there's a phrase "page muster" ...? A. Yes.

Q. ... written there. What's the significance of that? A. What that is, on a yearly basis we receive one amendment from NDHQ Ottawa that has a list of all current and effective page numbers for the whole entire CFAO. And you do a page by page check to make sure that the two correlate.

Q. And when you made the comment, "page muster" here, what does that indicate you've done there? A. Well, when I signed for it, that means I've carried out the page muster and it's correct.

PO2 Breese

Examination-in-chief

Q. And what does that indicate with respect to the state of the CFAOs held on board OJIBWA? A. At that date the CFAOs are one hundred per cent correct with what NDHQ holds.

Q. Okay. And specifically, there's an amendment marked 6/93 further down that column? A. Yes, sir.

Q. There's a block which ... it looks like two blocks have been signed over. Was that amendment entered? A. That amendment is entered. Instead of signing each line I would just make a big signature for those in total.

Q. Okay. So what would that indicate when you'd sign over one or more ... or more than one block? A. That I've done that amendment.

Q. Okay. Who was the commanding officer on board OJIBWA during the period May '92 to June '94? A. It was Lieutenant-Commander Marsaw.

Q. And was he the commanding officer for the whole of that period? A. Just near the end of my time he was not the commanding officer.

Q. And if you were to see Lieutenant-Commander Marsaw today would you recognize him? A. Yes, sir.

Q. I'd ask you to look around the courtroom and see if he's present today? A. Lieutenant-Commander Marsaw is just on my right here.

JUDGE ADVOCATE: The witness indicates the accused.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

PO2 Breese

Cross-examination

Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. If I may, I lost you at some point with ... not necessarily you, the prosecutor as well ... with the "unable to acquire". He was I suppose referring to the top left, the left column? A. Yes, sir.

Q. Is that your writing? A. Yes, sir.

Q. But that is in the first column which deals with '91? A. Correct.

Q. But you were not on board at the time?
A. No. When I came on board the CFAOs were not up to date. There was a period of time when the clerk that clerk that was scheduled on OJ was off and they were being ... a guy in place who did not do the amendments and that was my job when I got there.

Q. So when you came on board in May of '92 the CFAOs were not in order, were not complete? A. Correct.

Q. They were a mess, in essence?
A. Correct, sir.

Q. And then that's where we get to the page muster or words to that effect. Is that what it says, "page muster"? A. Page muster, sir.

Q. Page muster. That suggests that by then you figured that you had your CFAO? A. Not figured, sir. They were up to date at that time.

Q. Okay. Now 1/93, look at the change 1/93. Did you make that change? A. Yes, sir.

PO2 Breese

Cross-examination

Q. How do you know? A. Well, if I've got it recorded there with my signature covering more than one block, I've done that.

Q. Even though it's just exceeding ...?
A. I've done it, sir.

Q. Just the first letter of your name exceeds a tiny bit on 1/93? A. I have done it.

Q. That means that? A. Yes, sir.

Q. And you testified earlier that you'd done 6/93. Now 6/93 appears to exceed a little more?
A. I've done them all, sir. Those ones there are done.

Q. Now I understand that you don't get amendments at sea ... or seldom? A. You won't get them at sea. You will get them on the occasion when you come into a foreign port, which was rare.

Q. Okay. Now looking at this document, Exhibit "FF", can you tell the court when you made, let us say amendment 6/93? A. No, sir.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY ASSISTANT PROSECUTOR

Q. The amendment that my friend referred you as amendment 6/93 and asked when you would have made it. You weren't able to provide him a date. In relation to receipt of the amendment, when would you have made it? A. Approximately, it will take about a week for it to go through our system.

Q. He also questioned you on amendment 1/93 and whether or not you had done that. Would you have

PO2 Breese

Re-examination

done 1/93 prior to putting in subsequent amendments?

Would you have done 2/93 if you didn't have 1/93?

A. I normally would always do them in a sequence.

ASSISTANT PROSECUTOR: Those are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: None.

JUDGE ADVOCATE: No questions.

Thank you.

WITNESS WITHDRAWS.

PROSECUTOR: Our next witness will be
Lieutenant[N] Wamback.

s.19(1)

Lieutenant(N) Wamback

Examination-in-chief

FORTY-FIRST WITNESS) Lieutenant(N) A.R.
FOR THE) Wamback, is duly sworn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give the court your full name and spell your last name slowly please?

A. My name is Lieutenant[N] Arthur Wamback, W-A-M-B-A-C-K.

Q. And what year did you join the Canadian Forces? A. I joined the Canadian Forces in April of 1983.

Q. And what year were you awarded your dolphins? A. I was awarded my dolphins in 1987.

Q. Which submarines have you been a member of? A. I have sailed on all three submarines: the OKANAGAN, OJIBWA, and ONONDAGA at different periods of time, sir.

Q. I understand you've had the following commanding officers: Plante, Hickey, Carter, Dierks, Davidson, Marsaw, Bush and Hickey? A. That's correct, sir.

Q. While a member of Lieutenant-Commander Marsaw's crew, what was your position? A. I served as navigator and operations officer.

Q. Could you contrast Lieutenant-Commander Marsaw's leadership style to that of other commanding officer? A. Lieutenant-Commander Marsaw was more ruthless and determined with his crew, often unforgiving and not as instructional in his nature as others. And often, at times, would use what I believed to be demeaning and demoralizing statements and attitude towards subordinates.

Lieutenant(N) Wamback

Examination-in-chief

Q. What types of words might he use? A. In direct personal attacks he would use phrases like, "You idiot", "incompetence", as well as a various range of other profanities. But however, I believe the direct assaults of being called "incompetent" or an "idiot" to be more damaging.

Q. Okay. Were you ever referred to by him with those types of words? A. Yes, sir, I was.

Q. How frequently would you or another individual in the control room be referred to in that way while at sea? A. At sea, I would expect statements like that to be occurring on a daily basis.

Q. Would your COs, Davidson and Hickey, ever refer to you in that way? A. No, sir, they would not.

Q. Based on your own personal observations while in the control room, how would your fellow officers react when they were referred to in this way? A. Often individuals would be withdrawn into a shell, a protective shell. I'd term it as survival mode, to get through the dressing down of the moment and then once it was over they would carry on. At times people would be shaken. However, they would recover and carry on with their duties as required.

Q. When you were referred to on occasions using words such as idiot or incompetent, how did you personally react and feel? A. Well, naturally, sir, I didn't appreciate the statement. The control room not being the place to defend myself, I would just take the statement and then carry on with my duties after it was done.

Q. Did you have any personal concerns about this style of leadership? A. At times, yes, sir, I did. Because individuals would be more concerned with pleasing him than getting what was actually required of the job or mission at the time. And sometimes if

Lieutenant(N) Wamback

Examination-in-chief

people were shaken by the incident or actually upset, after he had left the control room they'd be more concerned with that than carrying on with the job at hand.

Q. Did you ever raise your concern and speak to Lieutenant-Commander Marsaw about this? A. Yes, sir, I did.

Q. On how many occasions? A. Two particular occasions come to mind, sir.

Q. Okay. Could you outline for the court what you said to him on the first occasion? A. On the first occasion, sir, I asked to see him in his cabin. I explained to him that I was having problems, or what I perceived as problems, because I had been receiving nothing but negative feedback from him and I felt I wasn't performing my job as required. I told him I wasn't comfortable on board. And that's what I explained to him at that time, sir.

Q. What was his response to you raising these concerns? A. It was made clear to me, sir, that that was his style and that I had to take it and get on with it.

Q. Could outline to the court what you said to him on the second occasion? A. On the second occasion I again restated my concern that I just was not comfortable in the atmosphere of the submarine at that time. His style of leadership and mine were in conflict. And at that time I had requested to leave.

Q. At this point, where were you in your career? A. I was the operations officer on board the submarine. I had been selected for the executive officer's course in Australia. However, as a result of my requesting to leave, I was withdrawn from that course.

Lieutenant(N) Wamback

Examination-in-chief

Q. If you had taken the course and had qualified as an XO, what was your understanding at the time of who you would be XO for? A. Upon my return from Australia I would be ...

DEFENDING OFFICER: Excuse me, Mr Judge Advocate. That sounds hypothetical and not based on any facts that the witness would know by himself.

PROSECUTOR: I don't believe it is. I am simply asking him what his understanding is, what his own state of mind and personal belief is at the time, to explain his consequential actions, in that he's already told the court about before, he expressed a desire to leave the boat. So I'm getting him to explain why. What was in his head at the time that made him make the request and have the second conversation that he did have.

JUDGE ADVOCATE: And what exactly is your question?

PROSECUTOR: What was his understanding, at the time that he was given this opportunity to take the XO course, of who he would be working for, who his commanding officer would be upon being qualified as an XO.

JUDGE ADVOCATE: I will allow the question. The objection is denied.

PROSECUTOR:

Q. Again, Lieutenant[N] Wamback, what was your understanding of who you would be XO for if you continued in your career? A. It was my belief, on return from Australia, that I would be assigned to the OJIBWA as executive officer.

Q. When you expressed your decision to Lieutenant-Commander Marsaw, what was his reaction to it? A. He was not at all happy, sir, because he had

Lieutenant (N) Wamback

Examination-in-chief

in fact made arrangements with the squadron to have me placed on the course vice another individual. And I feel, it's my belief, that he took it as a personal affront that I chose not to take that route.

DEFENDING OFFICER: How would he know, Mr Judge Advocate?

JUDGE ADVOCATE: That's an objection?

DEFENDING OFFICER: Yes. I mean, that should be struck out. I mean, he doesn't know.

PROSECUTOR: I agree the comment concerning his perceived belief of Lieutenant-Commander Marsaw's intention be struck, and simply the first part relating to the conversations maintained. But I don't think it's proper or fair to have that part of the evidence introduced.

JUDGE ADVOCATE: The objection is sustained.

Would you please strike the last answer given by the witness.

PROSECUTOR:

Q. At that point in your career, after this meeting with Lieutenant-Commander Marsaw or generally speaking near that time period, did you consider your future career as a submariner? A. When I chose to leave, sir?

Q. Yes? A. Yes. At that point when I'd made that choice, it was my understanding that I would no longer be in the submarine service.

Q. Okay. I'd like to show a memo and ask if you can identify it? Can you identify this, please?
A. Yes, sir.

Lieutenant(N) Wamback

Examination-in-chief

Q. Is this a memo that you wrote on the 5th of December '91 to your CO requesting to return to general service? A. That is correct, sir.

PROSECUTOR: Mr Judge Advocate, subject to my friend's comments, I'd like to introduce this as the next exhibit.

DEFENDING OFFICER: No objection.

JUDGE ADVOCATE: Thank you.

MEMORANDUM DATED 5 DECEMBER 1991 IS MARKED EXHIBIT "GG".

PROSECUTOR:

Q. Lieutenant[N] Wamback, I'm reading the last sentence in the second paragraph. "Although I have no doubts as to my ability to complete a full career with the submarine service, I no longer have the burning ambition to achieve submarine command." Why did you make that statement? What did you mean by, "No longer having the burning ambition"? A. In that statement, sir, at the time, I felt the price to pay to achieve my ultimate goals of a submarine command was not worth ... wasn't worth the price and my ambition at that point would not have been sufficient to carry me through what I would have had to have gone through to carry on at that point.

Q. What price did you envisage having to pay? A. Of further service on board the OJIBWA, sir.

Q. Under whose command? A. Lieutenant-Commander Marsaw, sir.

Q. As a consequence of your request, can you outline to the court what happened next in terms of who dealt with it and procedurally how it was handled? A. The next step, sir, was an interview with the squadron commander, at which time ... following that

Lieutenant(N) Wamback

Examination-in-chief

interview with the squadron commander I was assigned as executive officer of HMCS OKANAGAN.

Q. And at that time were arrangements made for you to visit him in the future and reconsider your decision? A. Yes, sir. The intent of that was for me to go to OKANAGAN as XO for a six-month period in which to ensure that I thought clearly and fully the consequences of my request and give me a chance to reconsider.

Q. Okay, and you have stayed in the sub service since then? A. Yes, sir, I did.

Q. I would like you to look at a second document and wonder if you could just read it slowly, silently to yourself and then I'll ask you questions about whether you can identify it. Can you identify this document, please? A. Yes, sir. It's a submarine command assessment file.

Q. Okay, and it's dated 16 January 1992. Is that your signature? A. Yes, sir, it is.

Q. And who is the assessor? A. Lieutenant-Commander Marsaw, sir.

PROSECUTOR: Mr Judge Advocate, subject to my friend's comments, I'd like to introduce this document as an exhibit.

DEFENDING OFFICER: No objection.

JUDGE ADVOCATE: Thank you.

THE ASSESSMENT FOR SUBMARINE COMMAND OF LIEUTENANT(N) WAMBACK IS MARKED EXHIBIT "HH".

PROSECUTOR:

Q. Lieutenant[N] Wamback, I wonder if you could read the narrative portion for the court, please, on the first page? A. "Wamback is a competent Watch

Lieutenant(N) Wamback

Examination-in-chief

Leader. His passive leadership style is occasionally inappropriate, however, he is learning to become more aggressive. Prior to attending SMCC Wamback must demonstrate attacking skills and develop the resolve to be a submarine CO".

Q. And could you turn to the second page, please, and read the amplifying remarks? A. "Wamback will require a short period ashore in which to refresh his enthusiasm, which has flagged. At his own request he was removed from the AC course. This action has called into question his commitment and perhaps more importantly, his judgement. He has a reasonable prospect for command, however, he must learn to pursue the aim aggressively."

Q. Thank you. Subsequent to this did you receive a Performance Evaluation Report from Lieutenant-Commander Marsaw? A. Yes, sir.

Q. What was your score with regard to the quality of loyalty? A. Below average, sir.

PROSECUTOR: I have no further questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.
CROSS-EXAMINED BY DEFENDING OFFICER

Q. You said that twice you spoke to Lieutenant-Commander Marsaw. Is that correct?
A. Yes, sir.

Q. And you said that the second time ... it was after the second time that you put in your request to leave? A. Yes, sir.

Q. Now tell me again the exact period of service, your exact period of service on OJIBWA? A. I

Lieutenant(N) Wamback

Cross-examination

joined, when Lieutenant-Commander Marsaw joined as commanding officer, in December of 1990. In fact we both received turn over the same day. And I remained on board for all of '91 and left in February of '92, sir.

JUDGE ADVOCATE: '92?

WITNESS: Yes, sir.

DEFENDING OFFICER:

Q. I'm showing you Exhibit "GG". Could you read the second sentence of the third paragraph? Read it out loud? A. Yes, sir. "I have no regrets with my time spent in the submarine, however, I now have a strong desire to return to the surface fleet and become part of the new Navy."

Q. And that was following your comments, of course, the sentence before that the introduction of new ships and equipment in the Navy was encouraging and that's what you wanted to joined. Did you ever state in there that the horrible conditions and treatment you received on the part of Lieutenant-Commander Marsaw were contributing factors to this request? A. No, sir, I did not.

Q. And actually the real reason, the main reason, is just as stated there - it was you thought it'd be challenging, new Navy, whilst new surface Navy, whilst the future of submarines was going down. Isn't that right? I'll simplify. Isn't that right that the perspectives for the submarines were not looking too great at that time? A. That was not my belief at that time, sir. No.

Q. That was not? A. No, sir.

Q. How about submarine acquisition and all that. Are you aware of what was happening in those days? A. No, sir. But I've been there throughout the

Lieutenant (N) Wamback

Cross-examination

ups and downs of the submarine service and at that time it was no different than any other time to me, sir.

Q. So basically, you stated that you wanted to leave the sub service because you wanted to go to the surface. And you didn't state in there, that I can see on Exhibit "GG", that it was because of the unbearable treatment and whatnot on the part of Marsaw?

A. That is what I stated in the memo, sir. Yes, sir.

Q. How career oriented are you? A. Very much, sir.

Q. And would you agree that if you had been interested in pursuing a career in submarines, you would have pursued it? A. No, sir. Because I felt myself becoming less and less effective under Lieutenant-Commander Marsaw's command. I knew and I still know that I was a good naval officer, and it was having a detrimental effect on me at that time, sir.

Q. You said you were very committed to you career? A. Yes, sir.

Q. Or words to that effect anyway. I suggest to you that if you had been committed to the service - submarine service, and because you can be so committed and career oriented, why wouldn't you get rid of the problem? Why wouldn't you put a redress of grievance in the system? You have spoken, which appears to be fair enough, you've spoken twice to the CO and by all accounts things were not working out to your satisfaction. Why didn't you then go to the formal route that is provided for? A. Sir, it was my belief at that time that that avenue would not have worked for me due to the command atmosphere within the submarine service at that time, sir.

Q. Huh! No trust in the chain of command?
A. It is not a lack of trust, sir. It was just the perception at that time that the establishment was

Lieutenant(N) Wamback

Cross-examination

right and by bucking the establishment would not be effective, sir.

Q. So you threw your career away. You were forced out of the submarine and you did not fight. You, who are so career oriented? Is that what you're saying? A. Sir, I didn't want to sacrifice what I had, my own beliefs in the leadership at that time, to support the command structure in place at time, and yes, in order to maintain what I feel to be appropriate behaviour I did resolve to give up my submarine career at that time.

Q. Which one must understand you are not all that interested in because if you had been, as you claim you are - career oriented, you should have fought for it. My question is, isn't that right that you were not really that interested in your career? A. No, sir.

Q. It is not? A. That's not my belief.

Q. I show you a copy of QR&O 4.02. I direct your attention to subpara (a) and (e) of this article. Could you read them please to yourself? A. ...

PROSECUTOR: Excuse me, which paragraphs?

DEFENDING OFFICER: 4.02(a) and (e).

Q. So you would agree with me that an officer, of the Canadian Forces we're talking about here, shall be acquainted with, observe and enforce regulations, instructions, and so on and so forth? Would you agree with that? A. Yes, sir.

Q. And I suppose you will also agree that: "an officer shall report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to Code of Service Discipline when the officer cannot deal adequately with the matter"?

Lieutenant(N) Wamback

Cross-examination

Would you agree with me that Lieutenant-Commander Marsaw or for that matter any other Captain is subject to the Code of Service Discipline? A. Yes, sir.

Q. What, if any, offence did you report during your service? A. I reported no offences, sir.

Q. So you reported no offences, you put no redress of grievance and you went to a surface ship. Is that correct? A. I didn't actually go to the surface ship, sir.

Q. Oh, I am sorry. Maybe I missed. I am confused with the request. You did not go to surface? A. No, sir.

Q. So where are you now? A. I'm with the submarine squadron now, sir.

Q. The submarine squadron? A. Yes, sir.

Q. So you didn't leave the sub service after all? A. No, sir, I did not.

Q. You did not. And I think you were interviewed by the military police regarding this matter? A. Yes, sir, I was.

Q. On 13 January 1994 or thereabouts? A. Yes, sir.

Q. And until then you had not reported anything to anyone, like under QR&O 4.02 or anything like that? A. No, sir, I had not.

Q. Did you read an article on the Chronicle-Herald on 16 December 1993 pertaining to allegation of misconduct on the part of the captain and other related matters on OJIBWA? A. I have read such an article, sir. Whether it was that exact date, I'm not clear, sir.

Lieutenant (N) Wamback

Cross-examination

Q. Huh, huh. If I show you a copy of the article? You don't have to read it all or memorize it but is that essentially the article you read? A. Yes, sir.

Q. And this says 16 December? A. That's right.

Q. Were you contacted by Mr Dunlop, the author of this article? A. No, sir, I was not.

Q. Did you contact Malcolm Dunlop? A. No, sir, I did not.

DEFENDING OFFICER: If I may have a moment, please?

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. I understand that at some point you served under Lieutenant-Commander Hickey? A. Yes, sir.

Q. Would you recall being assessed by Lieutenant-Commander Hickey, referring to your leadership style, as quiet unassuming? A. Yes, sir.

Q. With the additional comment that whilst that may be nice for admin function, for "Perisher" it is a bit of a handicap? A. I believe that's what the statement was, sir ... the assessment was.

PROSECUTOR: Mr Judge Advocate, I don't have a copy of the statement. I'm wondering if my friend is going to be referring and cross-examining the witness on it. If I could be provided with a copy, because at this point my understanding of the report is a bit different and fuller.

Lieutenant(N) Wamback

Cross-examination

DEFENDING OFFICER: I'm finished anyway.
These were the two questions.

JUDGE ADVOCATE: You now have a copy of the
document, Major Abbott?

PROSECUTOR: I do.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: As promised, that was my
last question.

JUDGE ADVOCATE: Thank you.

Re-examination?

PROSECUTOR: If I could have just a moment to
read the document.

JUDGE ADVOCATE: Certainly.

RE-EXAMINED BY PROSECUTOR

Q. Do you recall Lieutenant-Commander
Hickey, in that report, also stated that you had the
potential to succeed at "Perisher"? A. Yes, sir.

Q. You made a comment on cross-examination
that you didn't want to sacrifice your own beliefs on
leadership with regard to the squadron command. Can
you comment on what you meant by that? A. If I had
remained, sir, and carried on with my next appointment
as executive officer, it is my belief, in that duty or
that capacity, I would not only have to support the
commanding officer as all officers do but I would
additionally have to adopt and solicit his style to the
rest of the crew.

DEFENDING OFFICER: Those are opinions that
are questionable in terms of basis and speculative as
far as I'm concerned.

Lieutenant(N) Wamback

Re-examination

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: Again to go to the state of mind in his belief to explain actions he took that he discussed in cross-examination.

JUDGE ADVOCATE: The objection is denied.

PROSECUTOR:

Q. I'd like if you could read along with me. I'm referring to QR&O Article 4.02(c): "An officer shall: ... promote the welfare, efficiency and good discipline of all subordinates". Your decision not to support Lieutenant-Commander Marsaw's leadership style, by taking on the XO appointment, would that be done for the purpose of promoting the welfare of all subordinates? A. ...

DEFENDING OFFICER: This is leading, Mr Judge Advocate.

JUDGE ADVOCATE: It is. Sustained.

PROSECUTOR: No further questions. Thank you.

JUDGE ADVOCATE: Thank you.

Questions from the court? No questions.

Thank you very much.

WITNESS WITHDRAWS.

PROSECUTOR: The next witness would be Lieutenant-Commander Woodburn.

s.19(1)

Lieutenant-Commander Woodburn Examination-in-chief

FORTY-SECOND WITNESS) Lieutenant-Com-
FOR THE) mander W.A. Woodburn, is duly
PROSECUTION) sworn.

EXAMINED BY PROSECUTOR

Q. Good morning. Could you give your full name to the court and spell your last slowly, please?

A. Yes. My full name is William Angus Woodburn, and W-O-O-D-B-U-R-N.

Q. And what is your current position?

A. I'm presently in charge of the Submarine Training Division at CFNLS.

Q. Okay. And I understand that previous to that you were the CO of the ONONDAGA? A. That's correct.

Q. What time period were you the CO of the ONONDAGA for? A. From July 1992 to August 1994.

Q. And I understand you first had contact with the Canadian Forces as a reservist in 1975?

A. That's correct.

Q. You joined the Regular Force in 1983?

A. Yes.

Q. Awarded your dolphins in 1986? A. Yes.

Q. And you've either been posted to or sailed on the ONONDAGA, the OJIBWA, as well as the OKANAGAN? A. That's correct.

Q. You sailed on UK boats while a member of Perisher? A. Yes.

Q. Do you recall who your "Perisher" teacher was? A. Yes. It was Commander Dave Charlton.

Lieutenant-Commander Woodburn

Examination-in-chief

Q. And I understand you also went on ... I'll call it the French Perisher Course, I'm not sure of the proper name for it? A. Yes. It's the French Submarine Commanding Officer's Course.

Q. Okay. To your knowledge, has any other Canadian submarine commanding officer ever been a member of that course? A. No.

Q. And I understand you sailed for the following commanding officers: Plante, MacDonald, Irvine, Nicholson, and Mosher? A. That's correct.

Q. In your career as a submariner, have you ever had occasion to observe a commanding officer use personally insulting adjectives towards a subordinate in the control room? A. Not that I can remember.

Q. As a commanding officer of the ONONDAGA, have you ever referred to subordinates in the presence of others in the control room using personally insulting adjectives? A. No.

Q. What was the highlight of your tour as CO of the ONONDAGA? A. ...

DEFENDING OFFICER: Mr Judge Advocate, relevancy, maybe?

JUDGE ADVOCATE: Relevancy is far away.

PROSECUTOR: It is just a question to get into another area, Mr Judge Advocate. It takes more time to deal with the objections, and I'll rephrase the question then.

Q. What is the longest trip you've been on while a member ... the CO of the ONONDAGA? A. The longest trip would have been the EASTPAC trip, six and a half months.

Lieutenant-Commander Woodburn

Examination-in-chief

Q. Six and a half months. To your knowledge has a Canadian submarine ever been deployed for that period of time? A. No.

Q. And during that six and a half month trip, did you ever require the need or use personally insulting adjectives towards members of your crew? A. Definitely not.

Q. How do you deal with a situation, while a commanding officer, in the control room where an individual has made an error or is simply not working up to expected standards? A. ...

DEFENDING OFFICER: Mr Judge Advocate, this matter has arisen before. And, obviously, I know that earlier on in this trial you have ruled about words ... and words like whether reference could be made by some witnesses to words used by others in order to establish a standard. But I question here the relevancy or the propriety of questioning this witness as to what he did. How relevant is it to this particular charge? Obviously, what he did on ONONDAGA at a given time, I fail to see the relevancy to that. Like for the words and I have not objected to the prosecutor asking questions as to the use of words, but as to his reaction to other matters I question the relevancy of that.

PROSECUTOR: I think I have asked this question several times to commanding officers as well as witnesses. It's kind of late in the day at this point of the trial when I'm about to finish my case, to raise the objection. I would though however assert that one of the things I have to prove as a prosecutor is a standard of conduct in order to establish whether somebody has acted prejudicial to good order and discipline. In order to establish what the objective standard of conduct is of a submarine CO, I am allowed as a prosecutor to ask other commanding officers how they react in certain situations. This case deals with situations where things happen in the control room and people aren't working up to standards. The evidence I

Lieutenant-Commander Woodburn

Examination-in-chief

get from the witness allows me to use that piece of evidence, in conjunction with others, to show what an objective standard of conduct is and how it does exist within the submarine world.

JUDGE ADVOCATE: The same question has been asked several times by the prosecution. You never objected to it. In any event I find it totally relevant to the issue. So the objection is denied.

PROSECUTOR:

Q. Lieutenant-Commander Woodburn, if you could tell the court how you would react, how you have actually reacted, as a commanding officer of the ONONDAGA in the control room where an individual has made an error or is not working up to expected standards?

A. I would say in the case of an error, the first objective is to rectify the error, to make sure that everything is proceeding properly. Normally that individual would carry on with whatever evolution you could be talking about after that. And if I felt it was serious enough, I would tend to take the individual aside, after the fact, after the watch or the evolution, and sit down and discuss the issue with the individual to make sure it wouldn't happen again.

Q. Where would the issue be discussed?

A. Most normally in my cabin.

Q. Do you know Lieutenant-Commander Martin Dussault? A. Yes, I do.

Q. In what capacity? A. I would have to say that I have known Martin for most of my time in submarines. We have worked together on many occasions on different submarines.

Q. Okay. And from a professional point of view, when was the last time you actually worked with him? A. He would have been my XO for the EASTPAC trip.

Lieutenant-Commander Woodburn

Examination-in-chief

Q. Okay. Do you recall what his rank would have been in August '94? A. In August of '94 he was still a Lieutenant[N].

Q. Okay. As his commanding officer, would you have occasion to write a summary command qualification recommend concerning Lieutenant[N] Dussault? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I would question the relevancy of this. I'm not entirely sure where is that driving us, but the fact that this witness, this officer, knows Dussault and the fact that he has written something on him which is clearly totally outside of the period in question here, I fail to see the relevancy of that.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: Again, more than willing to respond, Mr Judge Advocate. I'll have to make my argument by responding to other evidence that has been in the trial and I just give that caution before I go in in case you have any concerns about it happening in the presence of the witness or members of the court.

JUDGE ADVOCATE: I mean, how is it relevant in 1994?

PROSECUTOR: Because the actual memo and recommendation that is written by Lieutenant-Commander Woodburn describes the leadership style of then Lieutenant[N] Dussault upon his arrival as XO of the ONONDAGA. Just prior to that he had left XO of the OJIBWA. And there's ... his opinion and assessment produces evidence that allows me to argue prejudicial conduct given that he receives a man who has been subjected to a personal type of ...

21st voir dire

JUDGE ADVOCATE: Well, just a second. I will ask the members to withdraw from the courtroom while I hear what you have to say on that.

PRESIDENT AND MEMBERS OF THE COURT RETIRE.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: Perhaps the witness could leave as well, sir.

JUDGE ADVOCATE: I would also ask the witness to withdraw from the courtroom please. Thank you.

WITNESS RETIRES.

This court is now sitting in a **voir dire**.

JUDGE ADVOCATE: So what do you wish to accomplish with this line of questioning?

PROSECUTOR: Okay, I'm seeking to have his assessment of Dussault introduced as an exhibit. I note that we have assessments of Dussault already introduced as evidence as exhibits from four other commanding officers. We have two from Lieutenant-Commander Marsaw that have already been put in place, and we have SOCT evaluations prior to him ever going to Marsaw from then Commander Webster, Captain[N] Dunlop and Captain[N] Plante.

JUDGE ADVOCATE: Okay. You said that there are four other assessments of Dussault produced as exhibits?

PROSECUTOR: They are.

JUDGE ADVOCATE: Covering what dates?

PROSECUTOR: Covering ... I'm going to refer to the exhibit book so I'm clear. Basically I've been tracking Dussault's career through the exhibits. These have already been admitted. I have submarine command

assessment which has already been introduced as evidence, dated 26 October '93, Exhibit "CC", signed by Marsaw, and then Exhibit ...

JUDGE ADVOCATE: Covering what date?

PROSECUTOR: The cover letter is 26 October '93. And then Exhibit "BB", which again is a submarine command assessment dated 09 February '93 from Marsaw. Then we've got Exhibit "AA", which is SOCT report dated 8 Feb '91, signed by Captain[N] Plante. Then we've got Exhibit "Z", which is an SOCT evaluation of Dussault dated 02 November '90, from Commander Webster.

JUDGE ADVOCATE: And now what you have in your hands is an assessment made by the witness before the court on Dussault.

PROSECUTOR: Dated 6 March '94. And prior to that we have Exhibit "Y" as well, which is an SOCT report.

JUDGE ADVOCATE: Dated 6 March '94? You said August '94 before.

PROSECUTOR: No that was ... August '94, I believe was ...

JUDGE ADVOCATE: No, no, but the one that you wish to introduce was made in August '94?

PROSECUTOR: 6 March '94, I am sorry.

DEFENDING OFFICER: Woodburn?

PROSECUTOR: Woodburn.

JUDGE ADVOCATE: You said August '94 before.

PROSECUTOR: I am sorry.

JUDGE ADVOCATE: It's March '94?

PROSECUTOR: Yes.

JUDGE ADVOCATE: And what do you intend to prove with that?

PROSECUTOR: And then as I said, we also have another SOCT, Exhibit "Y".

If I can, I would like to refer to the relative portion of the proposed exhibit so you can understand the significance of it.

JUDGE ADVOCATE: Go ahead.

DEFENDING OFFICER: Do I have a copy of this?

PROSECUTOR: You've been given a copy before. Of course, I don't have copies made right now. I can have some made. I'll read it alongside my friend.

Paragraph 3 starts out in the assessment. "In the role of executive officer Lieutenant[N] Dussault to be frank is not the same man who originally joined the submarine. He accepted his responsibilities with enthusiasm and drive although initially expressed his desire in a somewhat overbearing autocratic style."

So this is how he gets Dussault from the OJIBWA under Lieutenant-Commander Marsaw's command.

JUDGE ADVOCATE: So you are trying to do the same thing that you tried to do with one of the previous witnesses when your friend objected.

PROSECUTOR: Essentially, yes. What I'm trying to do is provide evidence to the court of the prejudicial effects of being verbally abused by Lieutenant-Commander Marsaw. In essence, the effect of verbally abusing members of your crew, amongst other things, produces autocratic overly aggressive leaders which is something that is prejudicial to good order and discipline. That's the thrust and the essence of

the evidence I seek and the basis upon which I seek it.
Thank you.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: This is what my learned friend has tried to do this morning with Lieutenant-Commander Hickey on the stand. I formulated an objection at the time which you sustained. I respectfully submit to you that this has nothing to do with good order and discipline. This is designed to depict the accused as a monster who contaminated everybody on board and anything coming out of OJIBWA was terrible because they had served under him. I mean, those are conclusions that cannot reasonably be drawn. The passage to which my learned friend has referred in this letter that he intends to produce, constitutes nothing but an opinion of one officer who has no basis to even state that. Sure he can express as many opinions as he wants. But for the purpose of a court martial, where there are such things as rules of evidence, I suggest it's totally inadmissible. It has no probative value.

It calls for a conclusion on facts that cannot be verified by the witness. And I would suggest for the same reason as you denied the prosecution's previous attempt, to do that with Hickey, that you do the same with this witness.

JUDGE ADVOCATE: I'm ready to rule. I find this evidence not admissible in the present trial, having no probative value when weighed to the prejudicial effect it could have on the accused.

Would you please invite the president and the members back to the courtroom.

PROSECUTOR: The witness first, sir?

JUDGE ADVOCATE: The witness first. Yes, please.

WITNESS RETURNS TO THE COURTROOM.

PRESIDENT AND MEMBERS OF THE COURT RETURN TO COURTROOM.

REASSEMBLY: At 0900 hours, 16 October.....1351
REASSEMBLY: At 1300 hours, 16 October.....1412
REASSEMBLY: At 0900 hours, 17 October.....1480

|

s.19(1)

1542

FORTY-SECOND WITNESS) Lieutenant-Com-
FOR THE) mander W.A. Woodburn.
PROSECUTION)

EXAMINED BY PROSECUTOR

Q. Lieutenant-Commander Woodburn, have you ever had an opportunity to discuss with SM1, allegations of verbal or physical abuse arising from the OJIBWA? A. Yes.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Cross-examination?

DEFENDING OFFICER: No questions.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, if I may with your leave and in your presence just confer with my learned friend for a few seconds.

JUDGE ADVOCATE: Certainly.

PROSECUTOR: Mr President, Mr Judge Advocate, I have one witness left to call. In order to fit the schedule, I will not call Commander Charlton from the Royal Navy. I'll cut him from my witness list. However, I do have Naval Captain Webster remaining as a witness. Right now he's torn between his commitments

1543

to attend the court martial and fulfill his duties as required by the Canadian Forces.

JUDGE ADVOCATE: He should know where his primary duty is, and it is right here at this time.

PROSECUTOR: If he has failed to understand that it is entirely my fault and is entirely not Captain[N] Webster's fault. Nonetheless, sometimes there are things in the business of the Canadian Forces that require people not to be available. At this time I would respectfully request if we can adjourn the court until tomorrow morning at 9 o'clock when I will call Captain[N] Webster and conclude my evidence.

JUDGE ADVOCATE: What are the defence's views on that?

DEFENDING OFFICER: Well, my learned friend had informed me of the situation. I know at times there are difficulties attached to calling witnesses from all over. I may face some of the difficulties myself when maybe if eventually we elect to call some evidence. I will not ... I had been warned and I will not object to the request because if he's not there - he's not there. And maybe I will need the mercy of the court later on. So those are my comments.

JUDGE ADVOCATE: Well, I first of all must mention that I am not happy at all about the way this thing turns out. I mean there are steps that could have been taken well in advance to ensure the presence of this witness in court and obviously they have not been taken because the first duty is to testify here before this court martial.

Now, we are faced with the situation where there is no witness before the court. What are your views on that, Mr President.

1544

PRESIDENT: Given that the defence hasn't objected, certainly as president of the court I am interested in hearing the testimony of that witness.

JUDGE ADVOCATE: The problem we have also is that it's true that the defence has not objected, but we may face the same request from the defence later on to the same effect, to the effect that for God knows what reason, a witness is not here and ...

PRESIDENT: Are the obligations to attend as a witness the same as the obligations to attend as a member of the court whatsoever?

JUDGE ADVOCATE: They do. So I don't want, in other words, this excuse to be repeated again and again because of the fact that we accepted the excuses of the prosecution. Of course, it may happen later that the same request will come from the defence and our hands will be tied because we accepted the request of the prosecution. I don't want to get into this situation.

Anyway, I'm totally unhappy about it. I told it. I guess we have no choice now because the witness is not here. The decision is yours, Mr President. I said what I had to say.

PRESIDENT: I would like to hear the testimony of this witness.

JUDGE ADVOCATE: Very well. This court is adjourned until 9 o'clock tomorrow morning.

ADJOURNMENT: At 1130 hours, 17 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 18 October 1995, the court reassembles and the accused is before it.

1545

PROSECUTOR: Mr Judge Advocate, my next
witness will be Captain[N] Webster.

1547

Captain(N) Webster

Examination-in-chief

Q. And you've been active in the sub community from 1975 until 1985 and have sailed in all three boats? A. That's correct.

PROSECUTOR: Mr Judge Advocate, at this time, and given the evidence before you, I would make a request that Captain[N] Webster be qualified as an expert in the area of leadership of and in an operational naval unit.

JUDGE ADVOCATE: Thank you.

Cross-examination from the defence.

DEFENDING OFFICER: No, there's no objection to the qualification of the witness.

JUDGE ADVOCATE: Very well, I am satisfied that the witness can be qualified as an expert in the area of leadership of and in an operational naval unit. The witness will now testify as an expert witness in that area.

PROSECUTOR:

Q. Now, Captain[N] Webster, as a commanding officer, both surface and sub-surface vessels, have you ever used personally insulting adjectives towards a subordinate in the presence of others? A. No.

Q. From a leadership perspective, would you have any concerns if a commanding officer of a submarine rebuked at least one of his subordinates with personally insulting adjectives; such as, idiot, incompetent, asshole, stupid, slow, liar, fucker, cunt, or words to that effect, in the presence of others on average of one person per day while at sea? A. Yes.

Q. What sorts of concerns from a leadership point of view would you have with that behaviour? A. Well, I think the respect between the captain and his subordinates would be reduced significantly if ...

1548

Captain(N) Webster

Examination-in-chief

it's just that language like that. I think the crew might feel that the commanding officer may not be able to handle the pressure that's on him all the time. There's certainly a question of ... rebuking in public reduces the effectiveness of any counselling that you might want to give him, and things along that nature would be suspect.

Q. You mentioned the respect between the captain and the subordinates might be reduced. Why is it important that a captain have respect? A. Well, the crew has to trust the captain implicitly, and vice versa the captain has to trust the crew especially in a submarine. If the respect isn't there then the trust is reduced also.

Q. What is the significance with your comment of rebuking in public might reduce the effectiveness of his commanding? A. Well, first off, of course, the sailor may be ... or the officer who's being rebuked would be embarrassed that it's done in public and probably not receive the full ... probably you wouldn't be able to get your point across as well as if you took him aside, either at the time or later, and went through the problem with him and suggested or directed him to do it a different way.

Q. What about an individual who makes the same mistake repeatedly. What approach would a leader take towards that individual? A. Well, if it wasn't an urgent matter and the captain's already talked to him and he continues to make the same mistake, then I would find ... personally, I would call the person's supervisor - if I wasn't the supervisor, if it wasn't the XO - and tell the supervisor the problem, tell his supervisor, that this is the way I want it done, go make it happen. I certainly wouldn't get involved in a long drawn out interaction with a subordinate.

Q. Why wouldn't you? A. Number one, as a captain in a submarine or a surface ship it's not my job. If it's an urgent thing, yes. But in the long

1549

Captain(N) Webster

Examination-in-chief

term, the way I want the ship run, I have department heads that I give direction to, I have an XO, let that direction filter down. If that direction isn't being actioned properly then I go back to who's giving the direction and say, look, it's not being done correctly, sort it out.

Q. From a leadership perspective, would you have any concerns if the officers in the control room appeared fearful and afraid in the presence of the captain, through the eyes of the subordinates?

A. Yes.

Q. In what way? A. Well ... if the officers are afraid of the captain?

Q. And appeared that way in the presence of subordinates? A. Well, first of all, the officers would lose respect in front of their subordinates or from their subordinates. I mean, it's the same relationship that they would have with the captain, the respect has to be mutual, back and forth. If they appeared afraid of the captain there'd definitely be ... there's a problem in leadership there.

Q. The type of behaviour that I mentioned previously, using personally insulting words or adjectives by the CO to a subordinate, one subordinate a day while at sea, would that have any effect on the divisional system? A. It could. Yes, it could.

Q. In what way? A. If the CO is belittling his crew and the divisional system isn't reacting to that, then the whole divisional system, I guess, would be reduced in its effectiveness. If there's a problem with that, the divisional system should be able to handle that problem and if it isn't then the morale, the effectiveness of the unit, or the submarine would be reduced.

PROSECUTOR: Thank you. I have no further questions.

1550

Captain(N) Webster

Cross-examination

JUDGE ADVOCATE: Thank you.

Cross-examination?

DEFENDING OFFICER: Yes, Mr Judge Advocate.

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Sir, to one of the questions put to you - and I believe the question was - what if an individual made the same mistake repeatedly, how would you treat it? And you prefaced your answer by saying, if it was not an urgent matter I would go to the XO. Now, I take here that it is a mistake that you witnessed yourself, for example. If it is urgent, what do you do? Do you intervene yourself? A. In the control room?

Q. Yeah? A. Or in the submarine?

Q. That's right? A. If it's an urgent matter I would intervene, yes.

Q. Yeah. And would that intervention might possibly involve yourself raising your voice, like, to snap and get the attention because, of course, it is urgent? A. Yes.

Q. You would. You have served for a number of years on board submarines and surface ships. Would you say that the word "fuck" has been used during your service even by captains during their tenure as captain? A. Yes.

Q. And it might be used like, for fuck sake, or that sort of thing. It could be used? A. Yes.

Q. Would you say that on board submarines swearing amongst the crew is not at all uncommon? A. No, it's not uncommon.

Q. A question was put to you regarding if you would have concern if officers appeared to be fearful of the captain. Would you agree with me that

1551

Captain(N) Webster

Cross-examination

there is a very fine line between; for example, an officer who appears fearful or an officer who's merely under stress especially, like, in the control room scenario, context, at action station, for example. Would you agree that the line is very fine as to what may constitute being afraid and/or under the normal tension of the moment? A. I think I'd have to have a scenario but no, in my experience I don't think there is a ... obviously, there's some tension but I've never experienced somebody being afraid of their captain.

Q. Uh-huh, okay. So you wouldn't know exactly how that would reflect itself? A. No.

Q. Would you agree with me that in submarines as on surface ships, the captain ... when a captain enters the control room, for example, he must make his presence felt, like, it's business. You're going to the attack periscope, for example, and obviously, like, there's business coming up, you're action station, you're about to launch an attack. Would you agree that the CO's got to be ... his presence is felt and must be felt by everyone so that the focus is on the job at hand? A. Yes, depending on the scenario. If you're coming up from deep; if you're doing an attack; if you're in close-in work, either close-in to other ships or doing coastal operations, the captain has got to be in charge and everyone has to know that he's in charge.

Q. Uh-huh. And, again, that might include raising voice, like, to show the presence, I'm taking control, now you watch, I'm running the show, type of thing? A. Yes, depending on the captain's style.

Q. Uh-huh? A. Yes.

Q. A question was put to you about words, like, well, a captain calling people, "cunt, asshole", et cetera, et cetera, how it would effect the divisional system, and it is sort of suggested that such behaviour would adversely affect the divisional system.

1552

Captain(N) Webster

Cross-examination

My question to you is; isn't that right that the ... in fact, the divisional system is there to look after people on board and that if such words were being pronounced you would expect a reaction from your divisional system? I don't know if I make myself clear?
A. Yes. Yeah, and to a certain extent I would. If the captain was losing respect from his men because of actions that he was doing, I would certainly expect that his officers would ... his XO, in particular, would take some action to ensure that the divisional system reacted to that.

Q. And you just mentioned the XO and you said, the XO in particular. So you do consider that the XO ... it would be the XO's duty - of course, if he is aware, obviously - to bring it to your attention and discuss the matter and then make whatever adjustments may be required? A. The XO, perhaps the coxswain. But it's the right of any individual, of course, to have an interview with the captain if there's something bothering him.

Q. You are familiar to an extent with QR&O 19.26, like, Redress of Grievance? A. Yes.

Q. This QR&O applies throughout the Forces, including the navy, of course. Would you say that - again, in the same scenario where people are called names and unkind things - that there would be two distinct channels that would be available to the crew. One would be divisional system, talk to superior and all that and bring it to the attention of individuals, that would be the first reaction would you say?
A. Yes.

Q. And the second would be - and I'm asking you if you conceive that as being right - the second would be if the first course of action has not solved the problem, would be to seek possibly an interview with the captain? A. Perhaps. Perhaps, that should be part of the divisional process.

1553

Captain(N) Webster

Cross-examination

Q. Okay. And then if that is not done then it would be open to put in a redress of grievance, the individual could do that? A. Every member has the right to do that if he thought he was being grieved.

Q. Would you agree that - you have stated earlier and I don't want to misquote you - but I believe you have recognized the need for a captain, for one, to raise his voice from time to time to get attention or correct mistakes, is that correct? You agree to that? A. Perhaps, to, well, to make his presence known. Correct mistakes? I don't know. I don't think you need to yell at somebody to correct a mistake.

Q. Have you ever seen; for example, a helmsman being replaced because he, I don't know, for a reason or another he's having a bad day or he's not keeping depth. Would it be normal to replace that person, I mean, in given circumstances? If your snorting, for example, you want to snort, you don't want to ... ? A. It's a possibility, you could replace him. But they're replaced, I mean, there's a rotation of helmsman through a watch anyway so you may have another helmsman, a stronger helmsman to be placed on the planes.

Q. That wouldn't be uncommon, like, you're snorting, the boats got to be kept at proper depth and if this helmsman through incompetence, inexperience or fatigue, for that matter, is not keeping the boat on depth, it wouldn't be uncommon to replace him? A. No. That's right.

DEFENDING OFFICER: If I may have a moment, please?

JUDGE ADVOCATE: ...

DEFENDING OFFICER:

Q. Again, and to reconfirm in my mind, I believe you expressed or testified to the effect that

1554

Captain(N) Webster

Cross-examination

the captain is overall responsible for the running of the ship, the accomplishment of the mission?

A. That's correct.

Q. And that the XO - and I believe this equally applies to boats or submarines and surface ship - and the XO is responsible for what we call personnel and administration. You rely on him to ... ?

A. Well, you rely on him. The captain is responsible.

Q. He's got the ultimate responsibility?

A. But the XO is responsible, I guess, for the process of making sure that the administration of the crews personnel needs is done efficiently and effectively.

Q. And would you say that if one captain had a weak XO that might result in him being closer to the action, like, than he would otherwise be? For example, if you have a first class XO you can sit back and focus on your own responsibilities. If you have an XO that is not as strong, that might require of you a closer supervision and, like, you could not just sit back as much? A. I think his supervision of the XO would be more intense to make sure that he was doing his job, and if he wasn't then you'd be working with him to teach him how to do it.

DEFENDING OFFICER: Uh-huh, okay. Thank you, sir. I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. You were commenting on situations dealing with urgent matters and not urgent matters. What would you define as an urgent matter? A. A situation where the submarine could be put into danger, or is in danger. But on a routine basis, in submarine operations there's a number of urgent matters, in my opinion. Number one, is probably the most common, is when you

1555

Captain(N) Webster

Re-examination

take the submarine to periscope depth from deep, that could be an urgent matter.

Q. When raising your voice to insert adrenaline or to motivate people before an attack, would you use personally insulting language? A. No.

Q. Why not? A. Why? What's the purpose of insulting somebody.

Q. You commented about the use of profanity in submarines and sometimes that the word "fuck" would be used, like, for fuck sakes. Would a person ever be referred to as a fuck? A. As a fuck. No, not in my experience.

Q. Within the hypothetical circumstance of a CO who belittles one of his members of the crew on average once a day. What factors may be at play from the leadership point of view that may cause the redress of ... system not to be used? A. ...

DEFENDING OFFICER: Mr ... what were the last word of the question?

PROSECUTOR: The redress of grievance system not to be used.

DEFENDING OFFICER: Okay, that's all right.

At first it looked objectionable and then it turned out not to be. I apologize.

JUDGE ADVOCATE: Good news. Thank you.

WITNESS: Why the redress would not be used, the redress system?

PROSECUTOR:

Q. Yeah, within the context of a scenario of a CO who uses personally insulting language to one of

1556

Captain(N) Webster

Re-examination

his subordinates an average once a day. What factors from a leadership point of view may be in place causing the redress of grievance system not to be used? A. I suppose lack of knowledge on the individual on how the system works. And if; for example, he submitted a redress and it was returned to him, not supported, not realizing; for example, that he has the right to forward it to the next level of command. You can't, I mean, the chain of command cannot stop a redress. I can't imagine that happening where pressure is put on an individual not to submit a redress. He has the right. It's his prerogative and it happens all the time.

Q. You were asked a question concerning the duties of an XO, and I believe the question was phrased, that the XO is responsible for things like morale and administration, I believe. Then you replied, the captain is ultimately or always responsible. What did you mean by that comment? A. When anything that happens in the unit or leaves the unit, it's the captain's responsibility, especially in a submarine where the XO isn't command qualified and is usually less experienced. The captain has to have a good feel on what's happening with administration, personnel, with operations, with engineering, weapons. He's got to know what's going on.

PROSECUTOR: I have no further questions, thank you.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: Nothing.

JUDGE ADVOCATE: No questions.

Thank you.

WITNESS WITHDRAWS.

1557

Defending Officer

Admissions

PROSECUTOR: May I have just a moment,
Mr Judge Advocate?

JUDGE ADVOCATE: Certainly.

PROSECUTOR: If I could have a moment just to
consult with my friend?

JUDGE ADVOCATE: ...

PROSECUTOR: Thank you.

DEFENDING OFFICER: Mr Judge Advocate,
Mr President, I have agreed to make some admissions
here at this point in time, and those admissions are
made under Military Rule of Evidence 37(b).

And the admissions are as follows - and I
will give you a copy, Mr Judge Advocate. I have three
admissions. I gave you the text of two, Mr Judge
Advocate. You will realize that there's no need for a
text for the third one.

And so the accused admits that:

The verbal abuse of members of the crew by a
naval commanding officer including the use of
personally insulting adjectives such as "id-
iot", "mother fucker", "fucking idiot",
"cunt", "stupid", "asshole", "slow", "liar",
and "lazy" and words to that effect could be
prejudicial to good order and discipline.

It's also an admission of the accused:

That Queen's Regulations and Orders for The
Canadian Forces - commonly referred to as
(QR&O) - were published and sufficiently
notified to all members of the crew of HMCS
OJIBWA including the Commanding Officer,
Lieutenant-Commander Dean Marsaw, during the

s.19(1)

1558

Defending Officer

Admissions

period 5 February 1991 to 4 October 1993,
this is notification in accordance with QR&O
article 1.21.

And the third admission which relates to ...
very specifically charge number one and number two on
the charge sheet, and the admission is simply to the
effect that:

Lieutenant Kelk's service number is as stated
in the particulars of the charge sheet,

And that's the third admission.

JUDGE ADVOCATE: Thank you.

Mr Prosecutor, do you accept these admissions
as forming part of your case?

PROSECUTOR: I do, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. So the admis-
sions are accepted by the court.

PROSECUTOR: And for the assistance of the
court, Mr Judge Advocate, I have photocopies of the
first two admissions that have been made by my friend.

JUDGE ADVOCATE: Appreciate it.

Did you wish the admissions to be marked as
exhibits or are you happy the way it is now?

DEFENDING OFFICER: It really doesn't matter
to me. As you see fit, Mr Judge Advocate.

PROSECUTOR: I think the effect is the same
either way.

JUDGE ADVOCATE: Yes.

1559

Defending Officer

Admissions

PROSECUTOR: The next matter, Mr Judge Advocate, is I have two publications I would like the court to take judicial notice of. I believe they're on consent of my friend.

The first one is entitled "Guide to THE DIVISIONAL SYSTEM" which is issued on authority of the Chief of Defence Staff.

JUDGE ADVOCATE: So, Mr Defending Officer, do you wish to argue as to the competence of the court to take ... or the propriety of the court taking judicial notice of this document?

DEFENDING OFFICER: No, I don't. I believe this book to ... I believe it falls within the category of contemplated orders, and if it does not fall - I haven't reviewed it - I will simply consent to its production anyway. So it's either by way of judicial notice if you feel that it falls in the category described there or it's produced by consent, so I do not object in any event.

JUDGE ADVOCATE: Do you, gentlemen, prefer to produce it as an exhibit?

PROSECUTOR: I'd prefer that it is entered as an exhibit.

DEFENDING OFFICER: So that way we avoid the debate of the judicial notice.

JUDGE ADVOCATE: Exactly.

The document is marked Exhibit "II".

THE GUIDE TO THE DIVISIONAL SYSTEM DOCUMENT IS MARKED EXHIBIT "II".

PROSECUTOR: I'd like to confirm at this time, Mr Judge Advocate, that the court has taken judicial notice of QR&Os and CFAOs.

1560

JUDGE ADVOCATE: We did that at the very beginning under MRE 15.

PROSECUTOR: Just confirming.

And as a final matter, I would like the court to take judicial notice of what is referred to as the "Mainguy Report". It's produced by the Department of National Defence, published by King's Printer, 1949. Its official title is, "REPORT on certain 'incidents' which occurred on board H.M.C. Ships ATHABASKAN, CRESCENT and MAGNIFICENT and on other matters concerning THE ROYAL CANADIAN NAVY", and I would like the court to take judicial notice of this and enter it as an exhibit.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, again, do you wish to argue, as I asked you before, on the competence or propriety of the court taking judicial notice of it, or do you request that this document be marked as an exhibit?

DEFENDING OFFICER: Again, if we mark it as an exhibit we don't have to worry about judicial notice, whether it falls within or not the Rules. So I do not object, and that it be produced as an exhibit.

JUDGE ADVOCATE: So we'll mark it as an exhibit.

THE MAINGUY REPORT IS MARKED EXHIBIT "JJ".

JUDGE ADVOCATE: Anything else?

PROSECUTOR: Mr Judge Advocate, Mr President, Members of the Court, the prosecution now closes its case. Thank you.

JUDGE ADVOCATE: Thank you.

1561

Now, Lieutenant-Colonel Couture, do you wish to call a defence?

DEFENDING OFFICER: Mr Judge Advocate and Mr President, if I might have maybe an adjournment until ten o'clock. I can inform the court at this time that we do intend to call some evidence. I have to ascertain availability of witnesses and may be able to appraise the court of our plans and how we anticipate to be able to proceed.

JUDGE ADVOCATE: Very well.

The court is adjourned until ten o'clock.
ADJOURNMENT: At 0941 hours, 18 October 1995, the court adjourns.

REASSEMBLY: At 1000 hours, 18 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may proceed.

DEFENDING OFFICER: Yes, Mr Judge Advocate, Mr President, before I am, in fact, ready to call the witness, I do not want, however, to mislead the court. I have been able to call this one. After this one witness I will have to more than likely apply for an adjournment, but I don't want the court to be misled; that is, to believing that I am fully ready to proceed at this time. But I will call one witness and I will make further representation after that.

I call Lieutenant-Commander Truscott, please.

1562

Lieutenant-Commander Truscott Examination-in-chief

FIRST WITNESS) Lieutenant-Commander
FOR THE) R.M. Truscott, is duly sworn.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. Lieutenant-Commander Truscott, for the purpose of the record and benefit of the court, could you fully identify yourself by stating your service number, rank and full name, please? A. Lieutenant-Commander R.M. Truscott

Q. Where are you presently employed, Lieutenant-Commander? A. I am the tactics officer at the Canadian Forces Maritime Warfare Centre and one of my duties is to be the instructor for the Submarine Commanding Officers Course which I'm doing now.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, at this point I would like to inform you that I will want to have this witness qualified as an expert in the area of leadership and submarine command, and I will put now some questions to the witness in that respect.

Q. Could you inform the court as to when you joined the Canadian Forces? A. 1978, August of '78.

Q. And I understand that you completed your naval training in June of 1980? A. Correct.

Q. You served on HMCS OTTAWA from June '80 to '81 ... sorry, from June '80, yeah, to August '81? A. Correct.

Q. You joined the submarines in September of '81? A. Correct, yes.

Q. And you completed your basic submarine training in the UK in December of 1981? A. Correct.

1563

Lieutenant-Commander Truscott

Examination-in-chief

Q. You qualified in submarines in May of '83, like, fully qualified submariner? A. Yes.

Q. What ships have you served under since your full qualification as submariner? A. I qualified in OJIBWA under then Lieutenant-Commander Nicholson; and served in ONONDAGA with Lieutenant-Commander Plante; and in OKANAGAN under Lieutenant-Commander MacDonald.

Q. Okay. I understand that August to December you completed the ... what is often referred to as the UK "Perisher"? A. Correct. That was in 1989.

Q. Could you briefly inform the court as to what is the Perisher? What's the aim? What sort of raining ... what sort of assessment training, and what's the aim of that? A. The UK "Perisher"?

Q. Yeah? A. That course was intended to make sure or ensure that the officers that would be taking command were capable and safe of dealing with any circumstance that they might be encountering in peacetime and in war. So it was a process of taking them through a trainer and then taking them to sea to put them through those various scenarios.

Q. And this is, I understand, a prerequisite to become a captain of a submarine? A. Was, until that course was repatriated to Canada, last year as a matter of fact.

Q. And that's the course that we now refer to as "The Submarine Commanding Officer Course"? A. Correct.

Q. And that's the course on which you are the chief instructor at present? A. Correct.

Q. I understand you took command after having completed your Perisher? A. HMCS ONONDAGA from January of '90 through June of '92.

1564

Lieutenant-Commander Truscott

Examination-in-chief

Q. And what other employment did you have after that? A. I left ONONDAGA and took over as the submarine division commander at the Naval Operations School - it's been called a couple of names in various transitions since then but the same job - and last year, in June, I moved down to the Warfare Centre and I've been there ever since.

DEFENDING OFFICER: Those are my questions with respect to the qualification of the witness.

JUDGE ADVOCATE: Any cross-examination?

PROSECUTOR: No cross-examination, nor any difficulties in accepting this qualification, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. So the court is satisfied that the witness has the requisite knowledge, skill, experience and training to be qualified in the area sought by the defence.

You will now testify as an expert witness in the field of leadership and submarine command.

WITNESS: Sir.

DEFENDING OFFICER: Thank you, sir.

Q. I understand that you have been involved in submarine operation team trainer in 1992? A. Yes. Part of my duties as the submarine division commander was to run the submarine operations team trainer. Very similar to the operations team trainer for those surface ship drivers.

Q. Could you explain to the court the purpose of that training and what it consists of? A. The trainer is a very rough mock-up of a submarine control room. It contains all of the combat systems; plots, a periscope simulator, so that all of the information and

1565

Lieutenant-Commander Truscott

Examination-in-chief

actions that would be taken by a command team can be simulated there, all of the different types of operations that would be undertaken. Everything from basic navigation right through to weapons control and the like.

Q. So I understand ... you say it's a mock-up, so I understand this is run ashore? A. Yes, it's in a building.

Q. A simulator type? A. Yes, exactly.

Q. Now, who exactly do you assess and what exactly do you assess during that trainer? A. My involvement was on a lot of different levels but specifically when we did weapons certification training we would have the entire team involved, the whole attack team. So I would have a total of six officers manning the position of: commanding officer; executive officer or attack coordinator in that role; there are two officers who run the combat system; a plot operator/navigator; and a principal sensor coordinator who is involved with sonar and other Team "A" activities. There are four non-commissioned members in the trainer as part of the attack team: a sonar operator; and various assistants that are used around ... in the team.

Q. Okay, so that's basically the team that would perform those attacks, like, on board a submarine? A. Anytime that you would go to action stations, that would be the team that would close up, yes.

Q. I understand that in August 1992, you had an occasion to assess the OJIBWA team? A. That's correct. They were conducting weapons certification training during that period.

Q. Could you inform the court who was a member of that team in as much as you recall?

A. Lieutenant-Commander Marsaw was the CO; then Lieutenant[N] Dussault was the executive officer; and I

1566

Lieutenant-Commander Truscott

Examination-in-chief

cannot recall who all the other members were at the time. They were the members of his wardroom. I've seen 15 or 20 different teams over the last three years so I can't ... it's been lost in the fog.

Q. Okay. You just referred to Lieutenant-Commander Marsaw. Could you identify him if you saw him? A. Certainly, right there.

JUDGE ADVOCATE: Indicates the accused.

DEFENDING OFFICER:

Q. Could you comment to this court - you have alluded to what the course consisted of or the trainer. First of all, how long does that last? A. It comes in a number of phases. The trainer phase consists of some watch team training for a week and then command team training for a period, in this case, of a further week where the entire team closes up. The watch phase with the entire command team consists of starting on a Monday morning with very basic runs of attacks against a surface ship or a submarine that's intended to be very basic in level and look at the Team "A" skills and the weapons control activities at the very basic level; through to the end of the week where we would have tried to work them through every possible scenario that they might meet and have to fight multiple forces, multi-threat type of scenarios involving simulated nuclear submarines and task group of ships and this sort of thing. So that there's a very, very steep curve of learning required in that week.

Q. Could you comment as to the realism of the scenario and the environment, the atmosphere created? A. We try - and I think we do - achieve a fairly high degree of realism. All of the different noises that are made by sonars are inputted into the trainer. The visual graphics systems is quite modern, it looks good when you look through the periscope, very realistic. The data that's transferred across is very realistic. So you find that the teams do get right

1567

Lieutenant-Commander Truscott

Examination-in-chief

into it and that a bead of sweat does come out on the brow, and they do have to work hard and do get right into it. Yeah, it's very realistic.

Q. Now, what is your very duty as this happens? Are you a player, are you an assessor? What is exactly your duty? A. I brief the team on the "game", the scenario that they're about to play out. Give them enough information so that they would have the same information as they would at sea. They then set themselves up and work themselves through the game that I then direct. So I have a staff that direct the simulation as I see required and I assess the team on how they have performed those duties as well. So I'm behind the desk, as it were, the desk that's our simulator, directing the team to manoeuvre a ship or to introduce an aircraft or something like that. And then I will go into the control room area and assess how a team has received that information and how the information flow is going and the skills that they're using, the tools they're using to be able to deal with that information.

Q. Could you please inform the court of your assessment of that particular OJIBWA teams performance in August 1992? A. That team in the end was deemed to be safe, but it was my observation then and remains the same after seeing a number of other teams as to be less than the normal standard that I would've wanted to see come out of the trainer. Ultimately, the standard has to be that they're safe and they were safe. But they were not the best team that I had seen come through, far from it.

Q. Could you comment on some of the reasons, of your observation that made you reach that conclusion? A. Some of it was inexperience. Some of it was lack of motivation. There may have been a lack of synergy between the team members, the team players, that didn't make it work as well as it could've.

1568

Lieutenant-Commander Truscott

Examination-in-chief

Q. In terms of knowledge, could you comment on the knowledge most members of the team displayed?

A. I was surprised at the lack of knowledge of the team members. As we worked through the week there has to be a degree of assumption on my part that some of the more senior members of the team have experience and have background in certain areas. And when we brought forth scenarios that we would have to assume they had the necessary understanding, the recognition, or acoustics, or capabilities of units, that wasn't there, that wasn't present. And so as part of the debriefing process after each run that was brought out to the team and again and again I was surprised that they lacked the background knowledge in those areas.

Q. Now, you stated that the overall results was, yes, they were declared safe. Could you inform the court as to what role the captain, Lieutenant-Commander Marsaw, did play in achieving that result?

A. The bottom line, if it was left to the team they wouldn't have done it. However, the captain carried the team in that regard and had to be more personally involved in all aspects of what the team was doing than I believed he should've been. However, I recognized that and myself and Lieutenant-Commander Marsaw spoke about that as part of our debriefs. So in the end the team as a whole, including the captain, were quite satisfactory in going to sea and getting on with doing their next phase of weapons certification safely, but it was recognized that without him carrying the team that it might not have been the same result.

Q. Now, earlier in your testimony you referred to maybe lack of motivation on the part of the members of the team? A. Yes.

Q. Could you tell the court what, if any, motivational tools were used by Lieutenant-Commander Marsaw? A. We started the first day with allowing the team to make mistakes and to allow the trainer staff to make the debriefing points necessary. But as I said earlier, the learning curve is steep. And when we got

1569

Lieutenant-Commander Truscott

Examination-in-chief

into day two and day three and the team was not making progress, they were still making the same mistakes, the Captain then started to step in, recognizing that he had to achieve a certain goal in the final days, and: (a) he started doing some of their work; and (b) he would raise his voice and try and get them going in the right direction.

Q. What was your observation as to the result of this motivational tool used by the captain?
A. Well, on somebody [sic] ... of the team, you have a lot of reactions depending on the individuals and some of these individuals reacted as best they could, they got on with it and tried to improve themselves, and others didn't change their performance at all.

Q. What, if any, profanities or insults did you observe or hear Lieutenant-Commander Marsaw use?
A. No insults, that's something that I would step on and I don't allow in the trainer. That's not on. Profanity, well, yeah, some. But in the course of motivating the team would be, oh for fuck sakes team get on with it, or, come on, lets go, or something like that. That would be sort of the level and, you know, intensity that would be required. But not uncommon to what an officer might use on the bridge or control room of the submarine or ship for that matter.

Q. Have you used yourself such tool of raising voice and maybe the odd time using the word "fuck"?
A. Yes, I have. In fact, clapping my hands is my own personal idiosyncrasy.

Q. So you have done it, and could you inform the court as to whether you would do it again and how important this may be to the accomplishment of the mission?
A. When an officer is directing or leading a team, regardless of where it is, there may be occasion when you're going to have to use more direct means of motivation than a simple order in a normal tone will suffice. If the team isn't recognizing the importance of what they have to do or isn't acting on it quickly

1570

Lieutenant-Commander Truscott

Examination-in-chief

enough and that particular issue involves safety or the expending of large resources or practice weapons activity which has safety involved in it as well, those are circumstances when that individual is going to have to use motivational tools. And there are occasions when you have to raise your voice to get the point across that you mean business and that they can't dawdle or whatever. You need to get them moving in the right direction.

Q. What, if any, physical punishment or otherwise of that nature did you observe Lieutenant-Commander Marsaw use during that trainer? A. None. And that is not on in the trainer, it's just not done, it would stop.

Q. You talked about raising voice and motivation. We've heard the word "aggressive" in the course of this trial. Could you comment for the court the meaning ... or what you understand in the submarine context, or even surface ships for that matter, of the word "aggressive" and how that relates to your teaching at the commanding officer course? A. I think that we have to be careful in what context we talk about aggressive nature. If we were to go right back into the background or first documentation for the MARS occupation and the integrated occupation specification, you'll find words like "aggressive" and "cunning" and "guile" are all in that description of what the MARS officer is supposed to be when he is out there doing his job. And those are meant to be positive not negative traits that we want those people to have. So it's important to look at what context we're dealing with here. A fighter pilot flies his air plane to the limits of his capabilities. He is an aggressive pilot, he's not unsafe, but you want him to be as aggressive as possible. So the context is very important here. So in the purely submarine context we want to have aggressive officers, not unsafe - and in fact one of the things and one of the very reasons we had a Perisher course in the UK and why we run parts of the course we do now - is to ensure that the officers that

1571

Lieutenant-Commander Truscott

Examination-in-chief

we send on to command are aggressive and take the unit to its limits, but that they are not so aggressive that they take it over the limit and become unsafe. And I deliberately concoct scenarios to see if those individuals will take their unit beyond what is deemed safe and if they do, then that is grounds for failure and those officers don't go on to command.

Q. Again, on the subject of raising voice, especially in the control room environment, and I'm talking here either simulator or the actual control room. Could you expand as to the reason why one would raise his voice in a control room environment, exterior factors effecting noise level, whatnot? A. Control room, ops room, bridge, it doesn't matter. There are occasions when the officer who is in charge or in command requires the team to listen to him and to know what direction they are to take their next action. In the submarine context we teach now for the team, or the officers who are going on to command, to use the term, "Right team, listen up", and then he waits a second. So he's raised his voice above all the din that's out there and if somebody isn't being quiet, and they're trained to be quiet, then they'll say, "Hey, you, watch me", and they want the whole team looking at him for that minute while he is saying, "Right team, this is what I want done." And he's going to have to throw his voice loud to get into all the corners and make sure all the people on his team have a good clear direction, and then when he's stated what he believes to be the situation and what he wants to do, then he will direct orders as far as weapons or sensors or whatever, and then, "Carry on", and gets on with the team. And then he should be standing back and watching the team get on with it. Whether it's an ops room team or control room team, there's lots of information flow and those teams will see how it will get too loud and you have to say to the team, "Right, keep it quiet", you know, direct the team and even use profanity if necessary to keep the team as quiet as possible so that important information does get passed but not lost in

1572

Lieutenant-Commander Truscott

Examination-in-chief

the din. And that's a matter, of course, that happens regularly.

Q. Could you inform the court as to ... you alluded to information being passed and so on and so forth. Could you inform the court as to other environmental noises that are present? A. Yeah, on board there is ventilation noise, hydraulic pumps that are operating, and all the other sundry items that are around making noise, so that adds to the level of noise on board that would cause you to have to raise your voice and get out there, yeah. And the fact that the captain stands behind the periscope a lot and the rest of his team is kind of around the corner causes him to have to get around there and get his voice out as well, yeah.

Q. I'd like to go back to the trainer of '92 - we had, sort of, got away from for a moment - I'd like to get back to the trainer of '92 you conducted with the OJIBWA team. Could you inform the court as to any impropriety at all that you might have observed during that trainer? A. The only time there was an impropriety is that on an occasion the executive officer was challenging the Captain on a decision or an action that he'd taken during a team debrief. Now, the team debriefs, in this case, because there's a small group of people, we just gather them around a chalkboard inside the trainer and we immediately go through all the points. So there's only a group of eight or ten people total around. And in this particular circumstance the XO disagreed with the Captain. Now, that's not something that we discourage, in fact, we encourage the officers to question what's going on but there is a time and a place for everything and if you disagree with your captain or superior then you try not to do it in front of the entire team. I suppose only if there were an extreme safety issue involved would you challenge a superior in front of the rest of the team. And although there wasn't a lot of direct verbal challenge, there was a lot of body language and posturing by the XO to say that he wasn't really very happy

1573

Lieutenant-Commander Truscott

Examination-in-chief

about this decision. So Lieutenant-Commander Marsaw at the time started to give his reasons, explained to the XO and this continued. I could see that there was ... we were at an impasse here and the rest of the team was, I guess, starting to wonder what was happening, why the XO was doing this. So I stepped in and finished the debrief, got them onto a different track - it was just before dinner, in fact, so we sent the rest of the team off. After this I said to Lieutenant-Commander Marsaw that he and his XO were going to have to get that issue sorted out and off he went. Sometime afterwards he approached me - I can't recollect exactly when - but it was during that training period. He asked me whether he thought ... or whether I thought that that ... his XO's actions were inappropriate and I said, "Yeah, I kind of thought it was a little out of line", and that maybe he should go and speak to the XO separately about this and, you know, shut the door and have their donnybrook and resolve their differences. And that I take it was done. I never heard anything further about the issue.

Q. Okay. And the XO was? A. Lieutenant-Commander - then Lieutenant[N] - Dussault. He'd just taken over the job.

Q. And is now Lieutenant-Commander Dussault?
A. Dussault, yeah.

Q. Is he captain of a submarine now?
A. He's the CO of HMCS OJIBWA, yes. He was, in fact, the first Canadian student on our Canadian Submarine Commanding Officers course.

Q. Now, I would like to ask you some questions regarding the daily operation, the running of a submarine. Could you comment to the court whether it is appropriate, when, and how often those things may happen ... appropriate or inappropriate; for example, for a captain to replace a helmsman? A. A helmsman or planesman, it does happen in the case of a submarine doing an operation where you can't afford to have the

1574

Lieutenant-Commander Truscott

Examination-in-chief

most exposure that might occur if the planesman's having a bad day or is inexperienced or whatever. Yeah, you've got to get him off there and get somebody else who's more experienced and going to provide you with the kind of service that you need at that point in time. Helmsman are replaced entering and leaving harbour if they're not doing their job. Yeah, it's not frequent but there are occasions when it is necessary, yes.

Q. And, of course, the frequency, would you agree, would depend on the type of mission and activity at hand? A. Absolutely, yeah. And I suppose the number of inexperienced planesman you have as well to deal with, you know, what sort of experience you have in your crew, yeah.

Q. If you as captain you're walking in the control room or something and you happen to see somebody fudging a fix, what would that mean and how would that strike you? A. Well, I wouldn't be very bloody happy, that's for damn sure. Two actions: One would be, take immediate action to make sure that your unit isn't standing into danger. If the fix is fudged and you're not where you think you are, you might, at the very least end of embarrassing yourself by being in the wrong traffic lane or the wrong area or something like that, right through to running aground or something horrific. So you have to deal with that first; once that's been dealt with then you have to look at the individual who was navigating. If it's an officer, then those officers receive quite extensive training in navigation and there's absolutely no doubt in my mind that they are doing something wrong and they know it. A non-commission member receives quite a considerable amount of training on this point as well. I'd have to look at their level of experience before I made any specific decision. In any case, regardless of whether it's an officer or non-commissioned member, we're talking about an issue of dishonesty and you have to deal with it from there.

1575

Lieutenant-Commander Truscott

Examination-in-chief

Q. Could you comment to the court about the frequency or possibility of accidental contact in the wardroom, particularly when the captain is on the attack periscope? A. Yeah, that definitely can occur. It's a very confined space around the periscope, particularly confined on the side where the plot table is and right beside the one-man control, so it's very difficult. There are many occasions when the submarine is a little shallower than you would like for the operation of the attack periscope. That may be because you're off depth or it may be because you're trying to employ other masts which aren't quite as long as the attack periscope. So what you'll do is meet the periscope as it comes above the deck and crouch down and try not to expose as much mast as possible. In the process of doing that though, you're crouched right down and your rear end is sticking out and you're trying to work yourself around a very difficult, sort of, process of getting around. The all-around look, we try to make sure that it's not too short, so that you ensure that you actually see what's out there in that all-around look, that's why you're doing it. And we don't try and make it too long - and we can't make it too long - because then it exposes that mast to radar counter-detection. So finite periods of time that we try and keep that within and we're ruthless about that. So if somebody's in the way of the captain then he's going to be pushed out of the way, not in a personal ... or for a personal reason but simply because he's got to meet those criteria. I suppose a similar circumstance would be when you would call the captain to the bridge, "Captain, to the bridge". Well, you're going to go and you may bump into people on the way but it's not meant as a personal issue, it's a matter of getting to the bridge as quickly as you can.

Q. You've alluded to the importance of that task. Could you comment about, like, the focus and the concentration required from the captain when he does that, the periscope look and whatnot? A. We train all the teams that when they hear or know that the periscope is going up and the captain is doing a look, that

1576

Lieutenant-Commander Truscott

Examination-in-chief

they are not to ... they're to stop any reports they're doing. They're to cease any discussion. There's to be complete silence in the control room except for emergency reports. And for that 20 to 30 second period while the periscope is being operated there is silence in the control room. Anybody who doesn't pick up on the fact that the periscope is up is going to be directed to keep his mouth shut, for that period of time, immediately by the executive officer or whoever notices. The captain's concentration has to be complete.

The safety issue that he's dealing with is that he has to make sure that he sees everything out there in a very finite period of time. And in doing so he must concentrate completely on what he's looking at, and for that 20 to 30 second period his concentration is going to be total in that area. And then when he puts the periscope down he can be certain that nobody is going to run into him for a certain period of time before he has to look again, and that he has sucked in all the tactical information that he could and then he can feed that into the team as necessary.

Q. Could you comment to the court to what extent it is customary to make apologies or something like that if you accidentally touched somebody during such an operation? A. Most of the crew know and understand that, you know, if they do get bumped while the captain's going around - well, first of all they get out of the way - and if they accidentally don't get out of the way then they're going to be bumped because he has that finite period of time to deal with. They understand that if they're going to get bumped and pushed out of the way that it's not a personal thing, it's that he's got to get around the periscope. Again, like when the captain or commanding officer is called to the control room or to the bridge and it's an emergency, you're going to bump people on occasion and it's not meant as a personal issue, but they understand that you've got to get there.

1577

Lieutenant-Commander Truscott

Examination-in-chief

Q. Could you comment for the benefit of the court on the emergency Klaxon, I guess it's called?

A. The general alarm.

Q. General alarm? A. Yeah.

Q. Could you explain to the court when that may be done and where it is being heard, like, ... ?

A. Okay. The general alarm is used whenever you need the ships company to listen very closely to the next pipe or use of the main broadcast. So it proceeds any very important pipe; so, action stations, diving stations, or any emergency as well would be proceeded by the general alarm. It's meant to say, hey crew, wake up, the next pipe is real important, and that next pipe would follow to send them to fight a fire or a flood or to go to action stations or whatever. But that alarm is designed to go to every compartment at maximum volume for a period of five cycles which takes about five seconds. So unless there's a defect there's nowhere in the boat that it's not going to be heard.

Q. How loud is that? A. Very.

Q. Very loud? A. Yes.

Q. And it's going to be heard all over the boat? A. There is no compartment or speaker that it doesn't go to. It goes everywhere short of confined spaces, of course.

Q. What if a radar or communication tech is involved on some communication or something like that with the earphones or whatnot? A. Well, if he has earphones on ... it's still pretty unlikely because it's designed to get everybody's attention. I find it unlikely that they're not going to notice that the general alarm has been piped. It's designed to make sure that that sort of thing doesn't happen.

Q. Could you inform the court, to your knowledge, does that general alarm override other

1578

Lieutenant-Commander Truscott

Examination-in-chief

stations or how does that go? A. Yes. It overrides all the other circuits. When the general alarm is pressed, regardless of who's using it, where or what, it's going to stop what's being transmitted regardless of what position the mike might happen to be in and it's going to go out, yes.

Q. I believe you have - I don't know if it's code - but when identifying ships, you make reference to red and green as to determining their position?

A. Yes. Relative to the ship.

Q. Okay? A. Whether it's to port side or the starboard side.

Q. Okay. Now, in a scenario where an officer of the watch would pass on erroneous information as to the position of a surface ship. What sort of reaction would that call from the captain? How minor or important is that and what sort of reaction should it be met with? A. I think one would have to paint the circumstances a little bit, but if you have a scenario where you're trained to be operational, or are operational, then if the officer of the watch says, you know, the ships on the wrong bearing or something like that, what you'll end up doing is putting the periscope up, risking more mast exposure and gawking down completely the wrong bearing, so it's not ... operationally it's kind of not a good thing to do. You want your officers to make sure they get the team and yourself pointed in the right direction. So it's a mistake that's easily made but not one that should be made, you know.

Q. A plane jam drill. Could you inform the court as to how basic or complex it is, and how important or unimportant this is? A. Seven steps to it. It's taught right from the basic submarine course through to the use of Olympus where they get time in her doing these drills. They then go to sea and have an opportunity to do them fairly frequently during working up processes and any ISE periods and anytime

1579

Lieutenant-Commander Truscott

Examination-in-chief

the captain feels it's necessary. So there should be no excuses for those very important drills to be ... it's bread and butter. It's stuff that any submariner can do in his sleep and he has to. There are certain drills that you just have to have down without any cards to help you, and the plane jam drills is one of them. So you have to expect that the officers and planesman know that one very well, yes.

Q. What are the consequences if a plane jam drill is not effected appropriately or not at all?
A. Well, if you're lucky and you don't have a plane ... if you have a plane jam and you don't react, if you're lucky, you have enough bottom to just auger into the bottom. If you don't have enough bottom then you're going to reach excessive angles and the manoeuvring envelope will not allow you then to recover before you get below crush depth. Other consequences: If you do happen to pull out of getting to excessive angle, involve spillage of battery acid into the battery compartment and release of various nasty gases from that; machinery and stored items are going to fall and injure personnel; people are going to fall and injure themselves. So there's a wide variety of things that are going to occur once you get over a certain number of degrees of angle, and we limit ourselves to that and above that we don't train or even get close to. So the consequences are quite extreme if you don't get it right.

Q. Would you be concerned if your team was not apt at conducting that drill?
A. One of the first reactions I would have is to plan time to make sure that they had an opportunity to get the drill right.

Q. And having regard to safety and all that, what would be the options for having the drill conducted?
A. I would try and pick a time as soon as possible to make sure that we could get with it. There are many factors that are going to impact on this. What is the units commitment at that time? The flex program? The estimated time of arrival? You know, a

1580

Lieutenant-Commander Truscott

Examination-in-chief

whole wide variety of things that may be pushing you to pick a certain period of time. Time of day? You may not want the cooks cooking because these angles are going to be fairly extreme even in the training and things like soup and whatnot you don't want splashing all over the place. So you want to pick a time of day that's going to work for you, but as soon as possible.

Q. In a scenario where; for example, you're tired. I suppose you would like to monitor that training yourself? A. I would be very uncomfortable with turning it over to my executive officer until such time as I had seen that officer in action for a considerable length of time, and even then I'd likely let him do it and I'd be, sort of my head out of my cabin, I would definitely not turn in, I would definitely not be down for that, no way.

Q. And in a scenario where you required rest, as I guess all human beings do, and you wanted that conducted. What option ... would surfacing the ship to practice there be an option, like, ... ? A. If there was no operational or tactical issues involved, yeah, absolutely, yeah, that would be one way of dealing with it, yeah.

Q. And that would be safe for the ship? A. Yeah, then you'd deal with the plane jam issue. You can do them without putting the angle on the vessel. Yeah, that would be definitely a good option, yeah.

DEFENDING OFFICER: Could I have a moment, please?

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER:

Q. Yeah, I'd like one thing if you don't mind I ask you, when we discussed the possibility, likelihood and whatnot, of accidental contact in the

1581

Lieutenant-Commander Truscott

Examination-in-chief

control room. Could you show the court, demonstrate to the court, how you would do a round on the periscope?

A. Okay, fine - if I may remove my hat for a second? First, I guess to demonstrate the local operations plot here in ... this is about the right width area.

Q. Sorry, did you put the plot table at ...
? A. You put the plot table here, as this table and you we could put the OMC, the one man control, about here. In fact, it might be a little closer and the periscope well, and the periscope itself in the middle.

Q. Are you ... sorry, to interrupt. Are you standing in a position that accurately reflects the distance between the plot table and the periscope?

A. Yes, this would be forward. This would be a little closer, not much, maybe six inches or so, and I would be facing the periscope here and the rest of the control room team out this way. So if I'm standing here and I had to squat - in fact, I would always squat to meet the periscope - then you would meet it as it comes through, open the handles up - and now the handles are about like so - and ...

Q. How many feet is that apart, you're hands?
A. From half on either side, maybe two feet, something like that.

Q. And how far from the plot table are you then?
A. At that point in time, I'm standing right where I am, so that would be ... when it gets a little higher, so it's very tight. In fact, you can't get around this way without having the two operators move one way or the other. It just cannot be done regardless of the size of the man doing it. So you then meet the periscope, you crouch right down as low as you possibly can, and then follow it around, do this sort of thing as you go around, depending how low you are. So you can see as you come around here, you're going to be ... there's just no way you can get around without

1582

Lieutenant-Commander Truscott

Examination-in-chief

either having the people move or bumping into people. It's a relatively ...

Q. Before you sit down again - and I don't know if there's any requirement - in moving around like this, what would be the possibility or likelihood of your foot to bump into somebody at the plot table?

A. Very possible. And there's a variety of ways that different officers go around depending on their build and so on and so forth. But, yeah, there's some gents who get one foot out like this, and go around like that, so they get that foot out quite a distance in trying to follow the periscope around so, yes, it is possible to get the foot out a fair ways, yeah.

Q. And I noticed that you were going clockwise in this demonstration? A. In that demonstration. There are rules for which direction you go. It's just that my left leg is better than my right so I go that way.

Q. So a captain does not always go clockwise on the periscope? A. Definitely not, no. There are rules that govern which way you're going to turn involving things like if you're doing a look during a turn of the vessel; which way a target may be going; if he's going from left to right then you do an all-around look from left to right and vice versa if he's going the other way. So, no, it can be done in both directions, yes.

Q. Okay. You may sit down. In that last demonstration you just made and you were discussing the possibility, likelihood, whatnot of bumping into somebody. You are on the periscope and you do bump into somebody. Could you tell the court what form of apology, if any, that you would use? A. At the time I wouldn't say a thing. I'd be concentrating on what I'm doing and, in fact, afterwards I don't ... I find it difficult to see a reason why a crew member wouldn't understand that the captain's trying to get around his periscope and that I didn't get out of the bloody way

1583

Lieutenant-Commander Truscott

Cross-examination

and he bumped me. Well, that's my fault. Now, I've stood in the LOP and was a navigator, an LOP operator, for three and a half years for three different captains and, yeah, it happened. If you didn't get out of the way, you were going to be pushed out of the way as his rear end started to move you and then you legged it, so that is not expected or ... yeah, it just wasn't expected.

Q. Earlier on in your testimony we discussed the raising of voice and sometime use of the famous four letter word "fuck". How often have you used it yourself or other captains under which you have worked, like, is that something that's totally uncommon or what? A. We're talking about leadership styles now and every officer is going to have a different style of doing business. I personally used the word but tried to keep it down to as little as possible so that when I did use it, its effect was at its maximum and the team then really understood that, you know, the old man means business now. The more you use it maybe the less ... not maybe, certainly the less effective it becomes. But I think that we could all be accused at a certain time of being guilty of using that word when we're frustrated or need to motivate the team or whatever, yes.

DEFENDING OFFICER: Thank you, I have no further questions.

JUDGE ADVOCATE: Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. You were asked about how you run the trainer and you were asked a question about whether or not Lieutenant-Commander Marsaw used insults at members of his crew, and I believe you said you wouldn't, I would step on that. Now what did you mean by, I would step on that? A. There's a wide variety of training conducted in the trainer, everything from basic operator training through to watch team level where the

1584

Lieutenant-Commander Truscott

Cross-examination

officers of the watch are driving the control room through to the full command team. Regardless of the level of the training that we're conducting when insults, personal insults, and that sort of thing start to fly, I don't allow that. And I know my predecessor and my successor in the job both apply that sort of rule. We just don't ... personal insults just don't cut it in the control room at all.

Q. Okay. What about when you're teaching these aspiring people for command positions, do you train them on how to insult members of their crew, or instruct them otherwise? A. All members coming through the Naval Operations School for the past three years, I believe, have been given instruction on - I'm just searching for the correct term here - not sensitivity training, but they're shown videos on making sure that they understand what harassment is, they're given harassment training. It's not part of the trainer phase but it is part of what every sailor and officer gets when they come through the Naval Ops School, yes.

Q. And indeed that's a particular aspect that you yourself have incorporated into part of the Perisher training? A. It's not part of Perisher ... it is part of the Submarine Commanding Officers course and it's part of all courses that are more than two weeks in length at the Naval Ops School. So it's not unique to the SMCOC.

Q. But the bottom line is that if you do see people using insulting language to their subordinates, you're going to step on it? A. I'm going to deal with it, yes.

Q. Yes. And the other side of the coin is that you teach people not to lead that way as well? A. Very much so.

Q. So you would make a point of creating leaders that do not demean, belittle, insult or humili-

1585

Lieutenant-Commander Truscott

Cross-examination

ate other people? A. Absolutely. But that's not part of the training standard. This course is designed to make sure the individual is safe. There are other means of selection for command, through PERs, the command selection board goes through its process and selects officers for submarine command and surface ship command. They deal with the subjective aspect of command. I'm dealing with objective measurable issues.

However, I also feel I have an obligation to ensure that if I think there's a flaw in a leadership style to make the individual aware of it.

Q. And would you agree with me that language which insults, demeans, belittles or humiliates subordinates in any form is insidious conduct that erodes mutual trust and confidence, both of which are conditions that are essential to military operational effectiveness? A. Yes.

Q. And that if you insult or belittle an individual, that attacks their dignity and self-respect and therefore weakens the cohesion and morale of a unit? A. Yes.

Q. So one of the reasons why if you observe behaviour like this in the trainer, one of the reason why you would step on it is not only to protect the dignity of the subordinate, but your job is to make sure you have a trained operationally, military effective unit, isn't it? A. Yes.

Q. And having somebody insult subordinates will produce quite the contrary? A. I would agree.

Q. And if somebody is belittled or humiliated or degraded in that sort of way that, as I've said, can affect the performance of a team, can't it? A. Yes.

Q. And one of the factors in team performance is using initiative and motivation, isn't it? A. Yes.

1586

Lieutenant-Commander Truscott

Cross-examination

Q. So if you observe a team in a trainer that lacks motivation, that could be one of the signals to you that there's something wrong with leadership style? A. Potentially.

Q. Potentially. I understand you've never sailed with Lieutenant-Commander Marsaw while he was commanding officer at sea? A. No.

Q. So you have absolutely no idea how he led his crew while at sea? A. Actual?

Q. Based on personal observation?
A. Personal observation? No personal observation, no.

Q. So you cannot give any opinion to this court as to why that team lacked motivation in the trainer that day, can you? A. No.

Q. And with regard to questions about, did you observe any physical abuse in the trainer? Your response was, "That's not on". What did you mean by that? A. Touching, hitting people, pushing people, grabbing them by the shoulders, moving them out of the way. Any sort of behaviour like that is just, as you've described, is not going to build a team. It's not what we want to see in our command teams and, therefore, it is discouraged completely.

Q. Sure? A. That's not to say there aren't occasion when any one of the leaders of the team, the executive officer or the commanding officer, has to use means that might be a little more politically incorrect than normal, yelling ...

Q. Punching somebody in the face, is that politically incorrect in your opinion? A. That would be a chargeable offence in my ...

1587

Lieutenant-Commander Truscott

Cross-examination

Q. Kicking somebody, is that politically incorrect in your opinion? A. Yes, more than politically incorrect, it's a chargeable offence.

Q. Threatening to kick somebody in the nuts, is that politically incorrect? A. I suppose it depends in what context. You might be saying that joke ...

Q. When you're yelling at somebody, rebuking them in a rage, say, "I should fucking kick you in the nuts"? A. No, that's not on.

Q. "If you don't get this watch sorted out blood's going to be spilled"? A. It's pretty strong, but it does get the point across to the officer of the watch that ...

Q. Could it have the possible effect of reducing team cohesion and morale? A. It depends on how much it's used. Again, it's an issue of leadership style and you try and keep it down to as little as possible. But I've been through a number of work up where the team needed to be ...

Q. Threatened with physical violence?
A. Oh, no, that would never work. There's always somebody bigger than you.

PROSECUTOR: Sure. There always is, there always is.

I wonder, Mr Judge Advocate, if I could pull out one of the chairs. I'd like to demonstrate this periscope manoeuvre for the witness and have him comment on it.

JUDGE ADVOCATE: Very well.

PROSECUTOR: Thank you.

Q. First of all, you identified a position to the court where you were on the periscope and you

1588

Lieutenant-Commander Truscott

Cross-examination

were crouched, basically, right down so your buttocks were very close as possible to the floor? A. Correct.

Q. Is it possible as a technique to use on the periscope to stand in a more crouched ... or a lesser crouched level? A. Very much so, yeah.

Q. You're standing bent? A. Ideally, that's where you want to be. It's much more comfortable.

Q. So that this is another option of how you could ...? A. You can meet it anywhere within the length of travel above the deck.

Q. Okay. It is possible to get your feet entangled with somebody at the plot table, around the periscope while you're on it? A. Yes, yeah.

Q. I would think that would be quite common?
A. Yes.

Q. Touching buttocks as you go around would be common as well? A. Yeah.

Q. If I'm going around the periscope and this is an individual, the chair - I guess I should be going this way in my counter-clock motion - I bumped him and then I go around this time. In terms of you as an expert in leadership, would it be permissible to deal with this individual by lifting your right leg forward, angling it towards the individual and thrusting it down with force? A. ...

DEFENDING OFFICER: Is the prosecutor testifying here. I think that's a show. I mean, if he ...

JUDGE ADVOCATE: He is not at all. It's a hypothetical question. We'll see if it's based on facts or not.

1589

Lieutenant-Commander Truscott

Cross-examination

DEFENDING OFFICER: Yeah, but kicking the chair like this. I mean it's got to ...

JUDGE ADVOCATE: The objection is denied.

PROSECUTOR:

Q. Would that constitute more than getting feet entangled? A. Yes.

Q. Is that something that you would say, to use your words, "That's not on"? A. Yes.

Q. If you're on a periscope, you mentioned, you only have so much time to look around, and need your full concentration? A. Yes.

Q. Would you want to use up some of that time and distract your concentration by deciding whether you should kick somebody or not? A. The training we provide and demand at sea is that once you have your eyes on the periscope that you don't take them away unless the most extreme of circumstances demand it. Whether it be on the after periscope, maintaining an all-around look continuously, his eyes would be there. In fact, we train our officers to talk while they're looking and give orders while they're looking at the periscope, so we discourage it, yes.

Q. Because it's kind of inefficient from a military point of view to have to take your eyes off the periscope, maybe get readjusted to the light conditions, put your eyes back on the periscope? A. There are occasions when you would but you try and avoid it.

Q. The aim is not to. If you've got a problem, you deal with it later, you're focussed on one thing only? A. Correct, yes.

Q. And you said that things like plane jam drills are pretty basic procedures that all submariners are trained on before they even leave the wall and go

1590

Lieutenant-Commander Truscott

Cross-examination

out in a submarine? A. I wouldn't describe it as basic. It's straightforward, but it's something that you want to have deeply ingrained in the officers ... yes, before they join their unit, to try and get as much into them so that the unit doesn't have to do too much training.

Q. But they would've had training in it and you would expect them to be trained before they left as part of a wardroom or whatever? A. Yes.

Q. If the wardroom wasn't able to perform that type of function, as an expert in leadership, is it possible that one of the reasons could be not their training but some other external factor apart from training? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I would think that ... although the witness is an expert and a hypothetical question can be put to him, I would say that suggests ... that this calls for mere speculation, I think.

JUDGE ADVOCATE: Put your question again.

PROSECUTOR: I was, maybe inarticulately, trying to ask the witness whether there could be some other factor apart from lack of training that could explain why a wardroom wouldn't be able to perform a function such as plane jam drills. Asking the witness, of course, as an expert in leadership.

JUDGE ADVOCATE: The objection is denied.

You may proceed.

WITNESS: There are certain drills that we do regardless of the type of vessel you go to sea in that require that the officers who are directing them to know by rote: man overboard; plane jam drills; go deep in emergency, in the case of a submarine. All of those need to be known by the team and are trained by the school completely.

1591

Lieutenant-Commander Truscott

Cross-examination

PROSECUTOR:

Q. Uh-huh? A. People can get rusty. People can lack experience in the case of very junior officers and having never done one for real, but any officer who has his dolphins up has done them for real and has been qualified and if he is rusty, it is his duty to make sure he gets himself back up to speed and approach his executive or commanding officer and say, I'm rusty, I need more drill, time or whatever. At the very least, hit the books again and repeat, repeat, repeat, repeat, because it is a drill.

Q. Do submariners have to have some degree of confidence to be able to perform their emergency operating procedures? A. I would suspect you need to have a degree of confidence in operating any procedure.

Q. Sure. So if you have no confidence at all, could that possibly affect the performance of conducting an emergency operating procedure? A. No self-confidence?

Q. No self-confidence? A. I would suspect it would, yes.

Q. Being flustered by repeatedly being belittled, insulted, degraded, through the use of adjectives by the commanding officer; such as, idiot, stupid, incompetent? A. If you are put in ... any human beings who's put into a situation where they're going to be flustered then, I think, it's obvious that you want to have them removed from the situation for awhile, regain their composure and then bring them back into it again.

Q. And that's because hypothetically speaking there are certain types of leadership styles, I guess, that may be so insulting verbally, that it could fluster a crew, that would have impact on their performance, wouldn't it? A. Potentially, yes.

1592

Lieutenant-Commander Truscott

Cross-examination

Q. Talking about things like taking a helmsman off, you've said that's been done before. Would it be appropriate leadership style, in your opinion, to refer to the helmsman as a piece of shit to him while you did that? A. Any personal insults, anything of that nature, personal insults are not on. There are many occasions when you have to take an individual from the team and take them aside separately and counsel them separately and have some pretty pointed conversations with him to get them going in the right direction because you're not happy. But insofar as possible the submarine service is no different than any other. We try to praise in public and criticize in private.

Q. So though we talk about things like crush depths - and I understand no Canadian submarine has ever been crushed? A. Well, we're still here, so.

Q. You're still here. So the hypothetical you were discussing with my friend about, well, maybe the batteries can spill and maybe you'll hit crush depth, is a very extreme example, isn't it? A. Our boats are not new. You don't have a great envelope to operate in. I don't want to make more of it than it is but I don't want to make less of it either. It is very serious drill that we must get right.

Q. Sure. But given the fact that a crush depth does exist, you've said that the submarine service is no different than any other part of the Canadian Forces in terms of how leaders lead and treat subordinates? A. I believe that, yes.

Q. So submariners are thrown into certain conditions but the same is still expected of them as leaders? A. Yes.

Q. Would you agree with me that the fact that the commanding officer may be a commanding officer of a submarine does not justify him to change and go into a leadership style that incorporates verbal abuse?

1593

Lieutenant-Commander Truscott

Cross-examination

A. The fact that he's a submarine commanding officer has no bearing on the fact. As a leader he should not use verbal abuse.

Q. As a professional submariner, an expert now in leadership, would you have any concerns about a CO, hypothetically speaking, that was so verbally abusive to members of his crew that they were afraid to come with [sic] him and make simple reports; including things like fire control solutions, being off depth, DRs and Eps? A. Yes.

Q. Why? A. The potential then exists for the unit to go from one extreme of not being safe to the other extreme where the commanding officer hasn't enough information to potentially be safe at all times. There's a lot of little pieces of information that the commanding officer would recognize as being significant that the team may not.

Q. Uh-huh? A. And you have to have it all to make sure that you're doing the job right.

Q. Sure. I understand one of the golden rules in being a submariner is that you're always honest because if you're not it could impact on safety? A. There may be others who may disagree with that, but I would agree with that statement.

Q. I mean, if you've got a problem you confess it so that the problem gets rectified? A. One of the things that we use in the submarine division - we say to our young fellows joining on the first day - there's only one stupid question in the submarine service and that's the one that goes unasked.

Q. Uh-huh. So what concerns would you have if a person adopted a leadership style that was so abusive that it hindered his subordinates from being able to be honest, upfront, open and consultative with the CO.? A. I would have to deal with it. As in all cases we would have to start with counselling and work our way through the process, like we would with any

1594

Lieutenant-Commander Truscott

Cross-examination

other problem, with job performance, that we would with anybody else regardless of rank.

Q. And you'd be counselling the CO? A. If I was his superior, yes.

Q. This issue about the trainer with the XO Dussault and Lieutenant-Commander Marsaw, I understand Lieutenant[N], now Lieutenant-Commander, Dussault has got the stamp of approval thus ... NCOC. He's been proven to be a command qualified individual? A. I was his instructor.

Q. Do you have any hesitancy in having him take a crew out to sea on the OJIBWA? A. After 21 days at sea and observing him in all sorts of situations, none at all.

Q. And during this confrontation between him and Lieutenant-Commander Marsaw, is it fair to say that Lieutenant-Commander Marsaw was upset? A. Actually, I think he initially didn't even recognize that his XO was being - insubordinate is far too strong - but along those lines. After it sort of struck him as such then, yeah, the two of them were of opposed minds, yes.

Q. Okay. And to use your words I said ... he said he was going to go speak to the XO? A. Yes.

Q. You don't have any clue at all what Lieutenant-Commander Marsaw said Lieutenant[N] Dussault at the time, do you? A. And nor should I. I consider that to be an issue where a superior and a subordinate get together in a closed room as COs and XOs have done for years and have a pointed discussion and come out as a united front.

Q. Uh-huh. And I understand that that's your leadership style. When you're the commanding officer, if you really had to go nose to nose with an individual you made sure you did it in the cabin, didn't you? A. In every possible opportunity I would

1595

Lieutenant-Commander Truscott

Re-examination

do that, yes. There are occasions when the safety, or operational reasons that would not allow me to take the luxury of taking the individual away but even then you would give a pointed order and say, get on with it, and they would. And then afterwards try and explain or elaborate on the reasoning that you used.

Q. Sure. And even when you had to do it in public you'd never use personally insulting adjectives or language directed towards the person? A. Directed towards the individual as a person?

Q. Yeah, sure? A. No, never.

Q. Like you might say fuck in your sentence but you would never call him, you're a fuck? A. No, no.

Q. And what is the importance of taking the person aside, away from public view when you talk to them? Why do you do that? Why does it matter?
A. Public beratement is humiliating and it doesn't lead to that individual feeling like he's a member of the team, if he does have those feelings. So as much as possible you want to make them look good amongst the rest of the team, amongst the rest of the ship's company, yes.

PROSECUTOR: No, that's good. Thank you very much.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Excuse me, Mr Judge Advocate.

JUDGE ADVOCATE: Yes, we were in the re-examination.

RE-EXAMINED BY DEFENDING OFFICER

1596

Lieutenant-Commander Truscott

Re-examination

Q. I'll be very brief. In question to the prosecutor, dealing with the effect of calling people insulting names, insulting language all the time, that it would effect morale, it would effect cohesion - those insults - and would at the end jeopardize the accomplishment of the mission because the team wouldn't work cohesively and whatnot, that's correct? A. One could draw that conclusion, yes.

Q. Yeah. What, if any, conclusion can you derive from a boat, a ship, that consistently accomplishes its mission with remarkable success? A. Some things got to be working. But the team must be getting on with the job, yes.

Q. Could you comment as to the feasibility or not of a captain to accomplish his mission if he is fed, intentionally or not, wrong information in a daily operation of his business; the DRs, fix and all that? A. Some officers are capable of doing it all. They're highly technically competent, and they are rare but they do exist, and they're capable of doing it all so if the team doesn't support them they can deal with it. Myself, if I was being fed that sort of information, mistakes would be made. I cannot do it all as I think most of us are.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

1597

DEFENDING OFFICER: Mr President, Judge Advocate, I wonder if I could have at this point a 15-minute adjournment. I would like to verify with my assistant Major MacKay and some other people, who are trying to round up some people, where we stand and then after that I could make representation to the court or call witnesses - although, I doubt that - but make representation as to when we could resume.

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1127 hours, 18 October 1995, the court adjourns.

REASSEMBLY: At 1146 hours, 18 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Lieutenant-Colonel Couture?

DEFENDING OFFICER: Yes, sir. Mr President, Mr Judge Advocate, Members, at this point, as I forewarned earlier this morning, I will have to ask for an adjournment and with your leave I will explain the reason and how I perceive this case unfolding from now.

As you know it's been a long case for the prosecution who has called in excess of 40 witnesses and timings have changed. To the best of my ability we tried to assess the time of the closing. At one time I had some potential witnesses lined up for the week of the 23rd, which is Monday. As the case has, sort of, shifted and an earlier date for closure became more apparent we have devoted, my assistant and my team, time to readjust witnesses. I was able to have one this morning. This witness is leaving tomorrow and won't be available. Others are outside of province. Some are from abroad. So we have been left with a massive spread out in potential witnesses.

1598

There is one thing I can assure you is that by Wednesday the 25th, or Thursday at the very latest, the 26th of October which is next Thursday, the case for the defence will be closed approximately then and I know I will do that.

I know that as of Monday, I will have a number of witnesses that will be available and should allow us to proceed rather smoothly and continuously.

On Friday, I am in a position to call a number of witnesses, whether it be one to four, and I will need more time to continue to attempt to reach those people. I can assure you we have done our best. It's not a lack of cooperation on the part of the individuals involved but a simple fact we have to face as we just cannot reach that one person no matter how we try. So we keep trying and I know that Friday morning at nine o'clock I would be ready to proceed with one to four witnesses and then after that resume on Monday with a more continuous flow of witnesses.

So I would ask your indulgence and request an adjournment till Friday morning at nine o'clock and I, of course, undertake to do my very best to call as many witnesses as possible for Friday so that we don't fall behind.

JUDGE ADVOCATE: I guess there are no objections from the prosecution.

PROSECUTOR: None at all. Lieutenant-Commander Marsaw faces some serious charges. You just heard 42 witnesses from the Crown. I believe in fairness to him if he needs time to make a full representation in response, and if that means till Friday, we have no objection whatsoever.

JUDGE ADVOCATE: So be it. The court is adjourned until nine o'clock Friday morning.

1599

ADJOURNMENT: At 1150 hours, 18 October
1995, the court adjourns.

REASSEMBLY: At 0900 hours, 20 October
1995, the court reassembles
and the accused is before it.

JUDGE ADVOCATE: You may be seated. Good
morning. Are you ready to call your next witness.

ASSISTANT DEFENDING OFFICER: Yes, I am,
Mr Judge Advocate. Good morning, Mr President and
Members. My first witness will be Lieutenant[N] Tin-
gle.

s.19(1)

1600

Lieutenant(N) Tingle

Examination-in-chief

SECOND WITNESS) Lieutenant(N) C.P.
FOR THE) Tingle, is duly sworn.
DEFENCE)

EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Would you tell the court your full name and spell your last name, please? A. My full name is Christopher Tingle ... Christopher Paul Tingle. My last name spelled out is T-I-N-G-L-E.

Q. And your service number? A.

Q. When did you join the Forces? A. June '83.

Q. And when did you get your dolphins?
A. August '92.

Q. Which submarines have you served on?
A. All three.

Q. All three, ONONDAGA, OJIBWA and OKANAGAN?
A. Yes.

Q. Which commanding officers have you served under? A. Lieutenant-Commander Mosher, Lieutenant-Commander Truscott, Lieutenant-Commander Woodburn, Lieutenant-Commander Marsaw and Lieutenant-Commander Kavanagh and Dussault.

Q. When did you serve under Lieutenant-Commander Marsaw on OJIBWA? A. From approximately the middle of April '93 until the time he was posted in October '93.

Q. And what position did you hold on OJIBWA at that time? A. I was the Marine Systems Engineering Officer.

1601

Lieutenant(N) Tingle

Examination-in-chief

Q. Who did you replace? A. Lieutenant[N] LeClaire.

Q. And how did that come about, your posting to OJIBWA? A. I was given a very short notice, approximately three days and I arrived on board.

Q. You arrived on board. How did you react to that short time announcement? A. I was quite shocked. It came on such short notice and having what I heard about the OJIBWA at the time, I was quite shocked.

Q. Quite shocked. Why do you say you would be quite shocked having heard what you heard at the time of OJIBWA? A. Well, there was talk of the death boat, reign of tear, screaming and yelling.

Q. And how did you approach that? A. I went on board and I met with the Captain, sat down, discussed things with him as to what his expectations were, got on with the job at hand.

Q. What preparations, if any, did you do to join? A. We were proceeding about five days after I got posted there on to a self-assisted work ups and I reviewed the OPs, CANSUB, Vol III.

Q. And what was Lieutenant-Commander Marsaw's initial reaction to your first couple of weeks or months on board? A. He was quite patient. He took the time to ... the screaming and yelling, I believe, didn't start until much later but he was patient enough to realize that I was on a steep learning curb.

Q. And what do you mean when you said the screaming and yelling? A. Well, the disciplining ... the, the ... the disciplining in the control room.

Q. The disciplining in the control room. Was he the first commanding officer you had who would scream and yell? A. No, no, in fact, the first boat I

1602

Lieutenant(N) Tingle

Examination-in-chief

started on, OKANAGAN, the Captain there Lieutenant-Commander Mosher had a much higher pitched voice and his screaming and yelling was more detrimental to my performance in the control room.

Q. What do you mean when you say it was more detrimental to your performance? A. I found that his disciplining in the control room had in most cases no reason for it. He would scream for the sake of screaming and I would always leave the control room questioning how I had ... what I had done wrong and if I deserved that treatment.

Q. And what was the difference with Lieutenant-Commander Marsaw? A. I realized that if he raised his voice or screamed or yell at me he would have a good reason for it, either I was screwing up or hadn't performed to his standards.

Q. How would you describe the atmosphere in the control room when Lieutenant-Commander Marsaw would get in there? A. It was tense.

Q. Tense. Why? A. Everyone's motivation on board is towards getting a good PER, outstanding PER. The Captain has his final stab on it. If you're not meeting his standards you'd possibly come away without a very good PER.

Q. And how would you describe his standards?
A. High.

Q. High. A. Yes.

Q. Can you compare his standards or the work environment under him with other commanding officers that you've had? A. I found working on OJIBWA to be more stressful. We had a tighter operational schedule and compared to the other boats I had worked on it didn't have such a tightly packed operational schedule that the stress, the tension wasn't there.

1603

Lieutenant(N) Tingle

Examination-in-chief

Q. Which would you have preferred? A. Oh, the other boats, obviously, I mean it's the path of least resistance. They all seemed to have a better time on these boats.

Q. And working in these stressful conditions, how did that affect your work performance? A. I felt much better actually working under these stressful conditions because I felt it a means by which I could improve my own personal performance to do my own personal best. So consequently, his high standards allowed me to realize what I was capable of.

Q. And how did that come into play when it came time to do actual real operations? A. I found given the stress level in the control room in the normal operating periods gave me appreciation and a confidence when the actual thing came about, the actual operational phase we went through.

Q. Then what difference, if any, did you notice between non-actual operations and the usual day to day? A. Very little, except the excitement of actually doing something real realizing that all this training we've had has resulted in us actually doing something worthwhile.

Q. How prepared did you feel at the time? A. Very.

Q. Other than the stress level that you mentioned earlier, are there any other factors that you would say contributed to the work load in the control room? A. Well, as I said, the ... you're talking about the control room, now?

Q. Yes. A. Besides Lieutenant-Commander Marsaw's presence?

Q. Yes, what other factors? You mentioned the stress in the control room. Were there any factors that would influence as well? A. The day to day

1604

Lieutenant(N) Tingle

Examination-in-chief

operations of the boat. I mean, the left hand side of the control room is the heart and soul of the boat. So it wasn't operating correctly, we were always very close to having any OP anyway. So I was always on my toes for that.

Q. With respect to the high standards that Lieutenant-Commander Marsaw you say had, how would he approach that in terms of carrying on drills or exercises? A. How he applied those standards?

Q. Yes. Can you give specific examples of how drills, emergency procedures that you practised under him? A. We went through a phase of planes jams towards the end I think it was September '93. He wasn't satisfied with the capability of the officers on board to successfully do a plane's jam. He had us all go through at one time and thereafter giving his dissatisfaction and the dissatisfaction in my performance as well. He had us all doing planes jams on the watch almost one or two per watch.

Q. And now would you say that affected your abilities afterwards? A. I would say the officers on board were probably the best, capable in the Fleet for doing planes jams.

Q. With respect to - you're a Marine Systems Engineer, is that correct? A. Yes, sir.

Q. In terms of knowledge of engineering or general submarine knowledge, what, if anything, did you take out of OJIBWA in your accomplishment and knowledge? A. I think given the age of the boat, given the high standards Lieutenant-Commander Marsaw had, that I came out with that, with a great deal of experience I gained in six months working under him.

Q. Were there things that you did under him that you would not have done or have not done under other captains? A. Oh, yeah, yeah. We would do different line ups for systems. We attempted to do

1605

Lieutenant(N) Tingle

Examination-in-chief

Chinese planing which is instead of the planes working this way would in fact work that way. We couldn't quite do it but at least we attempted it more so than on other boats would attempt to do.

Q. And how would that come about? Was it planned in the exercise or ...? A. He pulled me aside and asked me, "Do you want to try this?" I would say, "Sure." Another day we did ... planing the boat astern which was quite interesting. The operational period we went through was quite exciting. He always had formulative answers or recommendations for me on how to improve things on board which was good.

Q. How would you describe his knowledge, technical knowledge of specifically the engineering side? A. Very good, very good.

Q. And did that create any kind of problem with you and ... with you and him? A. Not at all. In fact, I was able to converse with him almost on an equal level. Having to brief a MARS officer on engineering matters you have to be careful with applying too many technical terms but with him I could throw these terms out quite easily and he knew exactly what I was talking about.

Q. And when you were in the control room, what position exactly or role did you play? A. I was the 2nd officer of the watch but I mainly stuck to the left hand side of the control room.

Q. And did you have any problems or made any mistakes when you were there in that position? A. Oh, yes.

Q. How would he react to that? A. He would be visibly upset.

Q. How would he show that attitude? A. He would scream and yell.

1606

Lieutenant(N) Tingle

Examination-in-chief

Q. Scream and yell. A. Yeah.

Q. What words, if any, do you recall him using in those circumstances? A. The normal range of expletives. I don't recall anything in particular. I got used to it. I have been used to it before on submarines. So, basically, you just ... the Captain is talking and you're picking out the salient points from his discussion with you and the expletives just don't make any difference to your performance.

Q. And how did that make you feel, all those bouts make you feel? A. I'd be embarrassed if I wasn't performing up to his standards. If I felt strong enough about it, that I didn't exactly understand what he was getting at, I'd go and see him afterwards and we would have a very low key discussion about what happened.

Q. And what would be embarrassing about it? A. The fact that it was in the control room in amongst my peers, possibly subordinates.

Q. And do you think there are circumstances where this could be warranted? A. Yes.

Q. Is it always necessary for the Captain to pull somebody aside and out of the control room to explain his dissatisfaction? A. No, no. With Lieutenant-Commander Marsaw, if he felt strongly enough about screaming and yelling at you, in most cases, I'd say 90 percent of the cases, that would be the end of it. In some cases he'd follow up and discuss it with you later.

Q. And these episodes of yelling and screaming, what would trigger that other than mistakes? A. I don't recall. In my time on board, it was mainly just mistakes.

Q. Do you recall Lieutenant-Commander Marsaw addressing members of the control room, the watch or

1607

Lieutenant(N) Tingle

Examination-in-chief

anything in any fashion different than you were addressed? A. No.

Q. Do you recall, if any, Lieutenant-Commander Marsaw telling you to stand up and kick yourself in the ass? A. Yes.

Q. How come you can recall that?

A. Because I have discussed this with other people who have said the word ass was not anatomically correct from what they understand. The instance surrounding his disciplining at me was ... in fact, we had come out of a short work period. We were doing a camber dive for a functional escape tower test and things weren't going as well as he would have liked things to have been going and he basically said - in fact, I think it was addressed to everyone in the control room, "Give yourselves a kick in the ass" and that was pretty much the end of it. Afterwards, I went and saw him in his cabin about something else and I made a joke of it saying I couldn't quite get my foot around the back of my body to kick myself in the ass.

Q. And when he would address people like that, how would he approach the person? Would it be personally or ...? A. In that particular instance, it was directed to everyone in the control room.

Q. H'm, h'm. And in other instances?

A. He would ... The means by which he would address them?

Q. Yes. A. It would be mostly by position.

If you're the trimming officer or the 2nd officer of the watch he'd call that. He wouldn't call you by your last name or your departmental title. So he wouldn't say, "Engines" or "Engineer" or "Marine Systems Engineering Officer" or "Lieutenant[N] Tingle", it would be just trimming officer or 2nd officer of the watch.

Q. As opposed to the screaming and yelling for discontent, did he have an opposite side to that?

A. Yes, yes. He had pretty big control room boots but

1608

Lieutenant(N) Tingle

Examination-in-chief

when he came out of the control room I found him to be in most cases quite lucid, easy to talk to.

Q. And praise, what about praise? A. Not very often but if you did get it from him it was ... you knew you did something well.

Q. On engineering matters, were you present on the submarine when there was a problem with the bibs breathing system? A. Yes.

Q. What was the problem with the system?
A. We had a leak upstream of the valve, the haul valve on the haul pad where the haul valve screws into the pressure haul. Nothing you could do about that at sea. You basically have to, because it's an escape item, you have to go back in alongside drain down the bottles.

Q. Did you? A. Yes.

Q. And what, if anything, would be the result of a shutting the valve then? A. Nothing.

Q. It wouldn't have any effect? A. No.

Q. And were you present as well when a crane was used with the forward escape hatch? A. Yes, we did load testing on the hatches.

Q. What was the purpose of the load testing?
A. We had welded on a DSRB grappling handles which are necessary for escape and we had to load test the welds.

Q. It had nothing to do with the state of the escape hatch then? A. No.

ASSISTANT DEFENDING OFFICER: If I could just go over my notes, Mr Judge Advocate.

JUDGE ADVOCATE: Certainly.

1609

Lieutenant(N) Tingle

Cross-examination

ASSISTANT DEFENDING OFFICER:

Q. Earlier, I asked you to compare the work intensity between OJIBWA and the other submarines you had served on. How would you qualify the performance of OJIBWA while you were there in terms of achievements, work and ...? A. I think considering what they had been through operationally, they were quite possibly the best worked up crew in the submarine fleet.

Q. And a final question, do you have any recollection of Lieutenant-Commander Marsaw addressing members of his crew in personally degrading terms?

A. No distinct recollection of that, no.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

CROSS-EXAMINED BY PROSECUTOR

Q. So the OJIBWA was the best worked up submarine in the Fleet. How many submarines were there in the Fleet that were operational at that time?

A. At that time it was ONONDAGA and OJIBWA.

Q. Okay. Verbally degrading terms like calling someone a fucking idiot, if used on people, you never really filed that away in your memory as something significant because that's just the nature of a submariner's existence as far as you're concerned, isn't it? A. Yes.

Q. So if in fact you may have encountered situations where you or others have been call a fucking idiot by Marsaw on the trim seat, you can't actually recall those episodes because as a submariner you're used to it, isn't that correct? A. Yes.

1610

Lieutenant(N) Tingle

Cross-examination

Q. And by stating being used to it, I mean as you developed and as time goes on, you just sort of began to absorb these sorts of words? A. I really would not pay much attention to them.

Q. And maybe to use your words you would absorb them, isn't that correct? A. Absorb them?

Q. Yes. A. Did I say that in the tape?

Q. I'm asking you whether or not you'd consider that you absorbed the words. It didn't bother you? A. Yes, it did not bother me.

Q. Because figuratively speaking by the time you were on Marsaw's boat, according to you, you had developed enough scar tissue on your back so those sorts of words wouldn't bother you? A. Yes, that's correct.

Q. Are you familiar with the term, "Philosopher Nietzsche"? A. "That which does not kill me makes me stronger"?

Q. Yes. A. Yeah.

Q. Is that one of your philosophies?
A. Yes.

Q. So you sort of took a Nietzsche approach to life on the OJIBWA? A. I saw it as a means of improving my personal performance.

Q. And you took life on the OJIBWA hearing all these stories about the death boat and stuff. So you entered it from a Nietzsche approach and took it as a challenge? A. I entered the boat with not a lot of confidence and I came out with a lot more confidence.

Q. And you took your time there as a challenge? A. Yes.

1611

Lieutenant(N) Tingle

Cross-examination

Q. In many ways? A. Yes.

Q. And when the Captain was going to bear down on you, you used his bearing down on you to your advantage to improve yourself? A. Yes.

Q. So you, yourself, could absorb and deal with being called a fucking idiot because that would make you stronger. You'd just bluff it off? A. The fact that he was using those terms, if he did that I don't recall, meant that I was screwing up and I'd look more into why was I screwing up. Was it because I wasn't keeping depth? Was it because I had lost the control over the left hand side of the control room? So I'd use that as a means by which to ... based on his response to improve myself.

Q. So it'd make you stronger and if those words were used you'd just bluff it off? A. Yes.

Q. When you read the December 16th, '93 article concerning the allegations of different types of abuse you chuckled over it because you thought it was uplifting because it showed that it made submariners appear that they could put up with quite a lot, didn't you? A. That and the description of submarine life on board being quite Spartan, yes, it did. It did make me feel like I was able to put up with a lot more.

Q. So you chuckled at the article and you found it uplifting? A. No.

Q. You never found the article uplifting?
A. I don't believe I found it uplifting. Whether I chuckled over it, yes, I probably did by virtue of the fact that the civilian will perceive us to live in this Spartan conditions and yet thrive.

Q. You can't deny today to this court, can't you, any testimony your brother submariners may have given in which they claim that they have been referred

1612

Lieutenant(N) Tingle

Cross-examination

to using personally insulting adjectives such as fucking idiots or assholes by Lieutenant-Commander Marsaw, can you? A. They may have been called those words. I don't have any specific recollection of them.

Q. So if any of your brother submariners have gone before this court and said they have been referred to using those words, you can't deny that? A. Not having heard their testimony, no.

Q. You can say, "I don't recall those sorts of words being used" but you cannot put your hand on your heart and say those words were never used by Lieutenant-Commander Marsaw? A. I cannot deny they were never used.

Q. Without recalling specific incidents, Lieutenant-Commander Marsaw would put people down on occasion, wouldn't he? A. In what context?

Q. By saying things behind their back that are degrading or embarrassing or insulting to them? A. I don't recall anything like that.

Q. And again, in terms of using personally insulting language, you can't recall a lot of the specifics because as far as you're concerned that's just normal life being on a submarine and it's nothing important to really file away, is it? A. Yes.

Q. But even though you take this Nietzsche approach, even though you don't file these sorts of memories away, there are times that you, yourself, even felt embarrassed or humiliated when you were on the trim seat, wasn't there? A. Oh, yes.

Q. And there were times that you were yelled at and you took it as a personal affront? A. I don't ... in retrospect, no, I did not take it as a personal affront. I perceived his reaction to my personal performance, if it was negative then I obviously didn't perform to his standard.

1613

Lieutenant(N) Tingle

Cross-examination

Q. So in retrospect, you didn't take it as a personal affront? A. In retrospect, no.

Q. Did you take it as a personal affront when you looked at it from the 11th of April 1994?

A. Eleventh of April 1994?

Q. The day you were interviewed by the military police? A. Right. Right. If I said those words, I don't agree with those words now.

Q. So you're changing your story? A. As a personal affront, if you could be a little more explicit?

Q. Using your words. A. And I said, "personal affront"?

Q. I'll get back to it later on. You felt that Marsaw liked you, didn't you? A. I think we got along quite well. He didn't come out and say, "I like you", but we did have a good working relationship.

Q. Mr Judge Advocate, I'd just like to refer to one of the exhibits. I refer you, Lieutenant[N] Tingle, to the charge sheet, Exhibit "A". In Exhibit "A", there is ... it lists Annex A and Annex B. Can you see if your name is on these annexes? A. No, my name is not on this.

Q. So there is no allegations before this court that Lieutenant-Commander Marsaw verbally abused you but again you cannot deny before this court that he may have used derogatory personal insults against any of the individuals listed in these annexes, can you? A. I have nothing to offer that would suggest that.

Q. That's because your Nietzsche approach does not allow you to file instance like that in your memory chip, does it? A. No.

1614

Lieutenant(N) Tingle

Cross-examination

Q. Who did you first work for after you were qualified as an engineering officer? What was your next posting on an operational boat? A. That's been my posting to an operational boat as an engineering officer.

Q. So that was your very first experience of being a qualified engineering officer on a boat? A. Yes.

Q. So you had absolutely no other experiences as a qualified engineering officer to compare your existence to as a submariner, had you? A. Personally, no, but having been serving on other boats I saw how the engineering officers performed and behaved.

Q. But personally no? A. That's right.

Q. Lieutenant-Commander Woodburn doesn't behave the way that Lieutenant-Commander Marsaw does, does he? A. No.

Q. I would submit to you, Lieutenant[N] Tingle, that you are a relatively inexperienced submariner and you have bought into a myth that submariners are cowboys and that it is normal to be called an idiot and to have commanding officers calling you idiots, do you agree with me? A. No.

Q. Would you agree with me that just because you wear dolphins and because a submarine has a crush depth, that a submariner officer has no extra elite status that allows him to verbally insult members of his crew in any manner that he wishes while he leads? A. As far as I'm concerned, the commanding officer can use whatever style of leadership it takes to make that boat safe.

Q. So if he wants to call one of his subordinates a fucking cunt you have absolutely no problem

1615

Lieutenant(N) Tingle

Cross-examination

with that, do you? A. It's a means by which it's positive control, leadership.

Q. Do you understand that you are still an officer in the Canadian Forces? A. I am.

Q. Do you believe that you are bound by the Code of Service Discipline? A. Yes.

Q. Wouldn't the Code Service Discipline be limited on the way that you verbally address your subordinates? A. If there is, I haven't read it.

Q. So you may be negligent in that regard then in your duties as an officer? A. Possibly.

Q. I'd submit to you, Lieutenant[N] Tingle, that the tragedy isn't that you, yourself, while wearing this uniform state under oath that it is permissible and acceptable to personally insult people, but the real tragedy is that you've been put in a position and entrusted with the leadership of individuals like Leading Seaman Cox, do you agree with me? A. Yes.

PROSECUTOR: No further questions. Thank you.

JUDGE ADVOCATE: Re-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

RE-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. With respect to the Nietzsche approach the prosecution referred to, saying that because of that you would block whatever words that would have a degrading effect on you and what not, would that approach also have a blocking effect if you had witnessed somebody being blatantly verbally abused? A. No at all. In fact, I was quite on the lookout if any of my engineers in the control room, first and second panel, would be rebuked by the commanding officer. I know for

1616

Lieutenant(N) Tingle

Re-examination

a fact that you cannot hit anyone in the CF. I know there are rules of engagement for verbally accosting somebody, what those are at the time I wasn't aware of.

However, I was looking out for any physical contact and any verbal rebuking on my subordinates in the control room.

Q. In that position, what would be your limit? What would you see as acceptable to what a Captain could say? A. I haven't got any limits set. I have to take that case by case.

Q. And did you ever meet that limit when you were with Lieutenant-Commander Marsaw? A. No.

Q. You said you could not deny that Lieutenant-Commander Marsaw never used those words, but can you testify under oath today saying to this court, "I'm telling the truth" and say, "I have never used them" or "I have never heard him use them"? A. I have never used words that the prosecution just used in the control room against anyone else and I have not got any specific recollection with Lieutenant-Commander Marsaw using those words.

Q. So you can't actually tell the court whether or not with certainty that he never used them or that he used them? A. With certainty, I cannot.

Q. And again, you said when you were addressed in that fashion by Lieutenant-Commander Marsaw you were embarrassed and humiliated. What was the humiliation? What was the factor, the fact that you were addressed or ...? A. The fact that I was addressed was because I had obviously made a mistake. I hadn't met his standard. That was the case and yes I was embarrassed that I hadn't performed to my best.

Q. So were his words humiliating or the action that you did and the fact that it was out in public? A. His words, I cannot think of any particular instance. The chastising in the control room is an

1617

Lieutenant(N) Tingle

Re-examination

embarrassing moment for me. Whatever words he had used to embellish that would still be an embarrassing situation.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Questions from the court.

PRESIDENT: No.

JUDGE ADVOCATE: No questions. Thank you.

WITNESS WITHDRAWS.

ASSISTANT DEFENDING OFFICER: The next witness, Mr Judge Advocate, is a Leading Seaman Cox.

1619

Leading Seaman Cox

Examination-in-chief

Q. And during that period, did you have the opportunity to work in the control room? A. Yes, I worked second panel for a short time in the control room.

Q. From about when, do you recall? A. From about March until the decommissioning in 1993.

Q. And how much time would that be when you said you spent second ... how much time would you spend in the control room? A. Four hour watches on a one to three rotation.

Q. And what were your responsibilities as a second panel watch keeper? A. Operate periscope, operate trim pumps, draining down the induction system.

Q. Based in your observations when you were in the control room, how would you describe Lieutenant-Commander Marsaw regarding his approach to his work? A. He is a very hard worker, demanded a lot from the crew, high standards but not extreme.

Q. Did you have problems trying to reach his standards? A. No, sir.

Q. How would Lieutenant-Commander Marsaw react when things didn't go the way he would like them to go? A. He would holler at the person who had made an error and not having done what they were supposed to do at the time.

Q. Were you ever hollered at by Lieutenant-Commander Marsaw? A. Yes, sir.

Q. When you use the word "holler", what do you use that word as opposed to other words? A. Raise your voice, get above the noise of the control room, get your attention.

Q. And how would people react in the control room when he would come in? A. If there was any

1620

Leading Seaman Cox

Examination-in-chief

chattering or joking going on in the control room, when the Captain entered it would stop. It would straighten up a bit.

Q. How would you react? A. The same way, sir, except that I would have to watch the Captain who was in control.

Q. When you say you had to watch him, why would you have to watch him? A. It was my responsibility to raise and lower the mast and the periscope which the Captain would order so. I had to keep a close eye on him.

Q. What kind of signal would that be? A. If we were on black lighting he would use and verbally say, "Raise or lower". If we're in the normal lighting in the control room he would raise his hands.

Q. So you basically kept your eyes on him at the time he was there? A. Yes, sir.

Q. So you joined, unqualified and you were ordinary seaman. When did you get your leading seaman? A. October of '93.

Q. While you were still on OJIBWA? A. Yes, sir.

Q. Who gave them to you? A. Lieutenant-Commander Marsaw.

Q. And how was he when he gave them to you? A. When I was brought up before him, he said that normally - I was advance promoted for my killick and he said normally when he does advance promote anyone he asks them a simple question whether they believe they deserve it or not and he carried on and said this wasn't the case this time that luckily he had the opportunity to watch me perform in the control room and he said I was willing or I was deserving of my advancement.

1621

Leading Seaman Cox

Examination-in-chief

Q. How did you take that? A. I was taken aback, surprised.

Q. Why would you be surprised?
A. Lieutenant-Commander Marsaw didn't give a lot of compliments or high praise and when you did, you knew you deserved it.

Q. How would you describe the submarine environment with respect to people accidentally bumping into each other? A. The submarine is a tight working space, sir.

Q. Were you ever in that kind of situation yourself? A. If you have to get somewhere or do something you might have to push someone out of the way or make your way through or something.

Q. And how would you feel about your life or your experience on board OJIBWA? A. I learned a lot on board, done a lot.

Q. What about your morale? A. Well, the harder the crew worked, usually the lower morale would get but it's in the nature of sailors to complain, sir.

Q. What other experiences can you compare that to? A. When I was aboard the ship before I went to submarines during the work up periods for long deployments at sea the crew would normally be irritated and morale would be low.

Q. You reacted basically in the same way?
A. Yes, sir.

Q. And when Lieutenant-Commander Marsaw addressed people, and the question I asked you earlier in his reaction, when things didn't go the way he wanted them to, what recollection, if any, do you have of the words he would use? A. I have no direct recol-

1622

Leading Seaman Cox

Examination-in-chief

lection of any specific statement he would say directed to me anyway.

Q. What would stick to your mind if you had heard something that you found to be above the limit? Could you give an example of what you ...? A. What do you mean by above the limit, sir? I'm not quite clear.

Q. Well, if you see something in terms of verbally addressing someone that you find to be degrading or humiliating. What type of words would stick to your mind? A. Well, any comments made towards any ways, race or anything like that would stick in my mind but I don't recall any such statement.

Q. And words like idiot, asshole or words to that effect? A. I have heard those mentioned.

Q. Can you put them in any kind of specific context or phrase, a moment, a person? A. Not really, sir.

Q. And how frequently would you say that would happen, the hollering and ...? A. It all depends if something was going on, if we were in the process of doing something pretty intense such as an underwater look, if we're in the middle of SOCTs or something, if the member made a mistake or an error, the Captain would address them clearly and tell them what they were doing wrong.

Q. Would there be any other triggers than mistakes? A. No.

Q. Do you recall the names of some officers or junior rates or senior rates that would be serving in the control room while you were there? A. My first panel was Petty Officer Wilkinson. The trimming officers and the officers of the watch would rotate constantly because we're on a different rotation than I was. So I basically served in the control room.

1623

Leading Seaman Cox

Cross-examination

Q. In your recollection, are there any names that come to your mind, names of officers and other senior ...? A. Not anyone specific, sir.

Q. Not anyone specific. A. I served basically with the wheel officer in the control room some of my time as second panel that I was on board at that time.

ASSISTANT DEFENDING OFFICER: These are my questions for this witness, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you. Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. Good morning. A. Good morning.

Q. So I understand you came on board the OJIBWA as an ordinary seaman? A. Yes, sir.

Q. And you were trained while you were on the OJIBWA. Were you in the second panel watch position throughout your entire stay on the OJIBWA from the very beginning or did you only start to work on the second panel on a regular basis near the end of your tour? A. Near the end of my tour, sir.

Q. So there would have been times for you on board that you weren't, especially at the beginning I guess, working in the control room with a designated spot? A. Yes, sir. The first part of my tour was spent in the engine room.

Q. Have you worked on ... maybe I missed it ... any other boats since the OJIBWA under Marsaw? A. No, sir.

Q. So the only ... your only definition, I guess, of normal would be based upon your experiences under Marsaw on the OJIBWA? A. Yes, sir.

1624

Leading Seaman Cox

Cross-examination

Q. And I believe you had agreed that it was common for Lieutenant-Commander Marsaw to yell and scream and swear at people at times? A. I wouldn't say common, sir.

Q. Okay. Do you recall being interviewed by the military police? A. Yes, sir.

Q. Were you ever yelled at on occasion?
A. Yes, sir.

Q. And you do have a recollection of on occasion Lieutenant-Commander Marsaw using words like idiots and asshole? A. Yes, sir, when he became very agitated.

Q. And do you also recall the word stupid being used at times? A. Yes, sir.

Q. In terms of your definition of degrading, that would deal with if there was comments, I guess, made to somebody's race or ethnic origin? A. Yes, sir.

Q. But if somebody was called an idiot or an asshole or stupid, that wouldn't fall within your definition of degrading, would it? A. No, sir.

Q. And as a sailor you've been trained, I guess, by somebody that it's not in your nature to complain? A. Yes, sir.

Q. Is Lieutenant[N] Tingle your boss?
A. He was my engineering officer when I was on board the OJIBWA, sir.

Q. So he was your leader? A. He was my engineering officer.

Q. Okay. And in a position of leadership?
A. Yes, sir.

1625

Leading Seaman Cox

Cross-examination

Q. Did Lieutenant[N] Tingle ever take the time to sit down with you and read to you the Canadian Forces policy on harassment? A. I don't believe so, sir.

Q. Did he ever take the time with you as a subordinate to tell you how the term degrading is defined by the Canadian Forces? A. No, sir, not Lieutenant[N] Tingle.

Q. Would you agree with me that every member of the Canadian Forces is allowed to maintain his dignity and a sense of self-worth while he does his job? A. Yes, sir.

Q. And that nobody under any condition should ever be in a position to humiliate that person or destroy their self-worth? A. Yes, sir.

Q. Did Lieutenant[N] Tingle ever tell you that? A. Telling what, sir?

Q. What I've just said to you, those principles? A. No, sir, I don't believe so.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you. Re-examination?

RE-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. In an answer to a question from the prosecution, you said that Lieutenant[N] Tingle basically has not read to you the policy on harassment. Do you think that you need a policy to tell you when somebody is being degraded, belittled or humiliated? A. Not for myself, sir.

Q. And based on those guidelines, have you seen anything that were beyond that personal belief of yours? A. No, sir.

1626

Leading Seaman Cox

Re-examination

PROSECUTOR: I object to that last question. I don't think he has established that the witness has even ever seen the guidelines. I don't know how the witness can answer the question.

ASSISTANT DEFENDING OFFICER: No. I'm speaking about his personal guidelines that I just asked him.

JUDGE ADVOCATE: Denied.

ASSISTANT DEFENDING OFFICER:

Q. And the words idiot, stupid and asshole, can you put it in actual context as to who it was told to, when, why, the exact quote? A. No, sir, I cannot.

Q. That word could be standing alone or could be standing in a phrase but you wouldn't be able to say where it was and in what context it was put in? A. No, sir, I cannot remember.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Questions from the court.

PRESIDENT: No.

JUDGE ADVOCATE: No questions. Thank you very much.

WITNESS WITHDRAWS.

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, these are the two witnesses I had prepared for and Lieutenant-Colonel Couture will carry on with the next part. I would just ask for a short adjournment so we can do the turnover.

1627

JUDGE ADVOCATE: How long? Ten minutes, is it okay?

PROSECUTOR: Ten minutes I think might be appropriate because we have some matters to discuss as we have agreed to before, I believe.

JUDGE ADVOCATE: The court is adjourned for 10 minutes.

ADJOURNMENT: At 1000 hours, 20 October 1995, the court adjourns.

REASSEMBLY: At 1115 hours, 20 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, I apologize for this long delay. A matter of evidence has arisen that has caused me great difficulty and concern and at this point I would ask a further adjournment until 1 o'clock so I can resolve that. We have attempted and I have discussed with my learned friend some way out of a situation that I cannot discuss further now, but at this point I would greatly appreciate an adjournment until 1, and I will be ready to proceed at 1 no matter what, but I would appreciate this extra time to resolve this issue.

JUDGE ADVOCATE: I think it's worth giving the adjournment, Mr President.

PRESIDENT: Yes.

JUDGE ADVOCATE: The court is adjourned until 1300 hours.

ADJOURNMENT: At 1116 hours, 20 October 1995, the court adjourns.

REASSEMBLY: At 1300 hours, 20 October
1995, the court reassembles
and the accused is before it.

| DEFENDING OFFICER: Mr President, thank you
for the adjournment. I am now ready to proceed. I'd
like to call Chief Petty Officer, 1st Class Smith.

s.19(1)

CPO1 Smith

Examination-in-chief

FOURTH WITNESS) Chief Petty Officer,
FOR THE) 1st Class L. Smith, is duly sworn.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. Chief [CPO1] Smith, for the purpose of the court and the record, could you please fully identify yourself by stating your service number, rank, name and surname, please? A. Chief Petty Officer, 1st Class Larry Smith, [REDACTED].

Q. Chief [CPO1] Smith, I understand you joined the Canadian Forces in 1966? A. Yes, sir.

Q. And you obtained your dolphins in March of 1972? A. Yes, sir.

Q. Could you inform the court on which submarines, if any, you have served? A. I've served on all three submarines, ONONDAGA, OKANAGAN, and OJIBWA.

Q. And for how long, like, throughout what period of your career have you served in submarines? A. Since December 1970 until February 1985; and then I returned to submarines in May of 1988 until I was drafted to sea training in July of 1990.

JUDGE ADVOCATE: '90?

WITNESS: '90.

DEFENDING OFFICER:

Q. I understand you also have served on submarines of other countries like England, I believe?

A. I did a two year exchange with the RN in HMS DOLPHIN.

Q. Could you inform the court of a number - anyway, in as much as you can remember - of the COs

CPO1 Smith

Examination-in-chief

you've served under? A. To the best of my recollection, I've served with at least 12 different COs and possibly a few more, I'm not ...

Q. Could you mention a few names?

A. Lieutenant-Commander Waddell, now Admiral Peter Cairns, Lieutenant-Commander James Furgeson, Commander Scherber, Lieutenant-Commander Bush, Captain[N] Phil Webster - do you want some more?

Q. Yeah, those that you can recall. Just take your time and ... ? A. Yeah. Lieutenant-Commander "Wolfie" Lawdon, Lieutenant-Commander Ewan, Commander Scherber and a few more.

Q. Okay, it's been quite a few years so ...?

A. Uh-huh.

Q. Now, you said that you served on board submarines, and roughly and essentially, until 1990 at which time, as you put it, you were drafted to the Submarine Sea Training Group? A. Yes, sir.

Q. Could you please inform the court what is the Submarine Sea Training Group and what its mandate is? A. We are an independent assessment agency to assess the operational readiness of HMC Submarines on behalf of the admiral MARLANT.

Q. Uh-huh. And what in particular ... I believe you mentioned operational readiness. Is safety also a part of assessment? A. Safety is a definite part of the assessment. The ability to fight the submarine under all foreseeable wartime conditions.

Q. Now, could you tell the court how you perform those assessments and how frequently that is being done, if we take an example of one submarine? A. If a submarine completes a refit, it does a post-refit work up which consists of approximately seven to eight weeks, of which three weeks will be dedicated to safety and then three weeks will be dedicated opera-

CPO1 Smith

Examination-in-chief

tional type evolutions. And then the submarine will do an annual work up between every 12 and 16 months which is two weeks of, basically, operations; one week safety, one week operations. If a submarine for some reason has had mechanical problems and it's been more than 16 months they will ask for an additional four or five days so she'll have three weeks. In addition the captain may call upon the Submarine Sea Training Group to go on, at his invitation, and do a staff assisted indexes which can range from two to three, up to five days at a time.

Q. Okay. Could you explain to the court exactly - let's take the example of an annual work up which is two weeks in duration? A. Yes, sir.

Q. What's a work up about, like, what is being observed, what is being achieved during a work up? A. In the case of an annual work up, in which case a submarine would've already been classed as operational, we would start off at a fairly medium standard for the safety evolutions, and then work into multi-action damage types of scenarios where they would have the damage control organization would have to handle six or eight simultaneous different instances of battle damage; that would be the safety side of it. And then the operational side, we would task the boat to do a variety of operational tasks; be it, in-shore ops, basic intelligence gathering, post-transit, mine lays, bottomings, a whole gamut of operational tasks.

Q. Now, you were a member of that assessment. I believe you have referred to a team, is that correct? A. Yes, sir.

Q. Okay, what does a team consist of, how many people and their composition, and how the team works as a group? A. The person in charge, the OIC is a lieutenant-commander submarine qualified, command qualified; there is five NCM people consisting of a chief electrician ... CPO electrician, CPO ERA, a chief

CP01 Smith

Examination-in-chief

operations type, a petty officer - usually a NAC OP - and a petty officer NET, systems tech.

Q. Now, this assessment you've been referring to I understand is being conducted at sea as such?

A. Yes, sir.

Q. And the whole team is on board the submarine? A. The whole team is definitely on board for the safety phase and we may be on board for the operational phase depending on other commitments and bunks.

Q. Okay. What, if any, specific responsibilities ... I understand that you have conducted a few annual work ups with OJIBWA? A. Yes, sir.

Q. Do you remember when that was? A. If I can refer to my ... I've actually done some research and ...

Q. What have you looked at for that?
A. The actual areas of responsibility?

Q. No, no. To refresh your memory about the dates? A. I've reviewed the files - the OJIBWA work up files - going back to 1988 when we started to do work ups in Canada.

Q. Okay. So I see my friend has no objection, so ... ? A. I have personally conducted two work ups on OJIBWA: One the 11th till the 20th of October 1991; and the second, from the 20th of January to the 4th of February 1993. In addition to that ... on the completion of that, we couldn't get off because of unavailability of ... the sea was too rough so we stayed an extra five or six days, I'm not sure exactly. In addition, I've done two staff assisted indexes: One from the 26th to the 28th of May 1992; and the 28th to the 30th of April 1993.

Q. So those dates you mentioned are actual times spent by you on board OJIBWA? A. Yes, sir.

CPO1 Smith

Examination-in-chief

Q. Could you inform the court as to who was the captain of OJIBWA at the occasion of those numerous visits that you made? A. Lieutenant-Commander Marsaw.

Q. Could you recognize Lieutenant-Commander Marsaw if you saw him? A. Yes, sir.

Q. Could you look around and if he's present point him out, please? A. Next to you, sir.

JUDGE ADVOCATE: The witness indicates the accused.

DEFENDING OFFICER:

Q. Now, I understand that a report is being prepared at the end of this assessment phase, is that correct? A. Yes, sir. A report is rendered for annual and for all official work ups.

Q. And to whom does that report go? A. The report is written by submarine sea training for the commander sea training Atlantic. He then forwards it on to the captain of the Destroyer Squadron, at present CMOC7, who then forwards it on, I believe, to the admiral MARLANT.

Q. Now, I assume that a copy of that report is kept and you have your own filing system at the sea training group? A. Yes, sir.

Q. Could you inform the court as to who is responsible for the sea training group files, like, who is the person responsible for the custody of those files and whatnot? A. At present, I am, sir.

Q. You are? A. Yes, sir.

Q. I show you here a document, the subject of which is described as, "HMCS OJIBWA ANNUAL WORK UPS - FINAL REPORT". Could you look at this document and

CPO1 Smith

Examination-in-chief

tell the court whether you recognize that document and what it is? A. Yes, sir, that is the final report from sea training for the work up in 1991.

Q. Okay, and this is a photocopy. Could you inform the court whether you have had an opportunity to compare this copy to the original? A. Yes, sir.

Q. And this is ... ? A. This is a true copy of the original.

DEFENDING OFFICER: At this point in time - I have provided a copy of this document to the prosecution - I would like to introduce this document as an exhibit.

JUDGE ADVOCATE: Any objection?

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: Very well. "KK".

THE WORK UPS REPORT DATED 4 NOVEMBER 1991 IS MARKED AS EXHIBIT "KK".

DEFENDING OFFICER:

Q. Chief [CPO1] Smith, I show you here another document, subject of which is, "HMCS OJIBWA ANNUAL WORK UPS - FINAL REPORT", this document is dated 25 March '93? A. Okay, sir.

Q. Could you look at the document and, again, inform the court whether you recognize that document, what it is and whether it is a true copy of documents held in your file? A. This is a true copy of the documents that are held presently under my files.

DEFENDING OFFICER: Again, Mr Judge Advocate, I have provided a copy of this report to the prosecu-

CPO1 Smith

Examination-in-chief

tion and I believe there's no objection. I would like to introduce it.

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: Thank you. "LL".

THE WORK UPS REPORT DATED 25 MARCH 1993 IS MARKED EXHIBIT "LL".

DEFENDING OFFICER:

Q. Chief [CPO1] Smith, what would be your own area of responsibility within the team when you are conducting a work up? A. Personally, I'm responsible for the electrical section, the NBC section and the submarine escape section, and I assist with the administration section of my chief operator.

Q. Okay. When you referred to the administration section, what does that include? A. Routine running of the boat, the administration; the coxswain's duties really; the morale, all that sort of stuff.

Q. Now, in performing those various assessments, what do you do, like, on board? Do you park yourself somewhere, are you mobile on board the submarine? What does that assessment from yours involve in terms of observing and what do you observe and where do you go? A. For that particular section a lot of the routine administration is just by checking the records of the training and on the other things; and the morale and the general running of the submarine is basically just looking and watching the routine running of the submarine day-to-day, just observing the ship's company doing their job.

Q. Uh-huh, okay. Now, if we look back at '91 - and I'll put Exhibit "KK", you're at liberty to refer to it if you need to. What did you have a chance to observe in terms of morale on board OJIBWA in 1991?

A. In 1991 there were no specific morale problems. Everything seemed to be working quite well. There was

CPO1 Smith

Examination-in-chief

a fairly new coxswain in place but he was very long in the tooth and he was adapting quite well. He'd been out of submarines for awhile but he was right back in.

Q. Now, when you make those assessments, could you inform the court whether or not you see the captain, for example, performing? A. We would see the captain any time we would pass in the control room which you have to do to get forward and aft. You would see the captain if he was in the control room, you had to see him because his cabin is just off ... he's always very close to the control room. He never leaves the control room at sea, basically, so you would always observe as you passed fore to aft.

Q. Okay. Could you inform the court as to the situation that you observed and the amount of tension involved in those drills and other things that you observed? A. The safety evolutions are deliberately planned to introduce action damage which is a lot of stress, particularly multiple evolutions. There was a lot of things going on at once, a lot of information flow, and it's meant to really put the damage control network and HQ1 under pressure to perform well.

Q. And is the captain involved in the operation of those drills? A. The captain is the ultimate authority and his duty is to fight the submarine, no matter what's going on.

Q. So you would have observed Lieutenant-Commander Marsaw in those situations? A. Yes, sir.

Q. Could you comment to the court as to whether you have seen him raise his voice and in what circumstances? A. Yes, sir, he's raised his voice. A couple of times I've noted him raise his voice to the helmsman because we were off depth or slightly off course or it's something that ... not being inattentive but because of the weather conditions, it sometimes very hard to keep depth and sometimes it's very safety orientated to have an exact depth.

CPO1 Smith

Examination-in-chief

Q. Okay, now, can you comment for the benefit of the court whether at that time, to your recollection, you heard Lieutenant-Commander Marsaw use insulting language or profanities toward his helmsman, for example? A. No, sir, I haven't.

Q. We're still in '91 here? A. Yes, sir.

Q. During your whole stay in 1991 on board the submarine, could you inform the court of any insulting, like, language; piece of shit, asshole or words to that effect that Lieutenant-Commander Marsaw would've used towards his crew? A. I never personally heard Lieutenant-Commander Marsaw use that language towards his crew.

Q. Could you comment to the court whether you have heard Lieutenant-Commander Marsaw possibly use the word "fuck" and, if so, to what extent? A. I heard everybody use that word. You have to understand that this is almost an adjective because it's a very male orientated environment. Depending on the person, every second word is a curse word or like that.

Q. Could you comment as to the frequency that you have observed; for example, Lieutenant-Commander Marsaw use that word? A. Not frequently - I'm trying to think of the right word here - again, it comes up in general conversation so it'll be used throughout, you know, it could slip into any conversation.

Q. You served under a great number of other commanding officers. Could you comment to the court whether or not you have heard those or some or all of those other commanding officers use the word "fuck" as well? A. To the best of my recollection I can only think of one commanding officer that wouldn't have used that word, and I can't say for sure that he never did.

CPO1 Smith

Examination-in-chief

Q. Uh-huh. And who was that? A. That was Captain[N] Webster.

Q. Uh-huh. So others would use it on and off? A. Routinely, routinely.

Q. You stated earlier in your testimony that you're an independent agency. Any special meaning to the word "independent", like, what did you mean by that? A. The concept of operational readiness means that you can't be testing yourself, and the best way that the Maritime commander has found to do that is to set up the sea training organization which is a completely separate unit - its own UIC - which goes on board and delivers independent, unbiased opinions of the readiness of the ship's company, be they surface or sub-surface, to the commander Maritime Command.

Q. Having been in the service, I mean, so long and in the submarine, could you comment to the court whether; for example, in 1991 and in 1993 when you were on OJIBWA, whether or not you knew the senior rates on board and other members of the crew? A. Because I'd just left the squadron and gone to sea training, I knew the vast majority of the senior rates and most of its junior rates, and in '93 I would know at least seventy-five per cent of the ship's company, probably.

Q. Now, if we go to 1993 - and you can refer as you see fit to Exhibit "LL" - could you inform the court on the occasion of the annual work up of 1993, again, what you observed especially in your own field of responsibility which includes morale and others? A. Again, there was no morale problems that we saw and, in fact, we commented, because they had just come out of a very heavy docking and a very, very intensive period over Christmas and they had sailed just before ... they had worked right up, basically, the night before to get ready for work up, to get the boat ready materially, we complimented on that. We actually used the time to ... we picked them up because the boat was

CPO1 Smith

Examination-in-chief

... they had been so intense on getting the boat operationally ready that cleanliness had slid to the right and we commented on that. But we complimented them on the professionalism, getting the boat ready to go to sea.

Q. And would you inform the court whether that impression that you observed earlier on carried out through the whole work ups or ... ? A. There was not a ... the boat had a few mechanical problems later on during the trip, but overall she worked fairly well.

Q. Again, during that annual work up, did you have an occasion to observe Lieutenant-Commander Marsaw ... that would have been the same as in '91, all the same drill and routine? A. Yes, sir.

Q. And the tension and all that, the pressure, all the same? A. Yes, sir.

Q. Did you see Captain Marsaw operating or running the boat at that time? A. Yes, sir, in the same manner.

Q. Could you comment to this court as to whether he raised his voice, whether he used insulting language, or whether he called any of his crew derogatory names; such as, asshole, idiot, or words ... ? A. I never heard him say that to any of his crew, sir.

Q. What was the assessment of the operation of the sub, of OJIBWA, in 1993? A. On the damage control she got a very satisfactory, almost a "high sat", which is very, very seldom given; and on the operational part she had a satisfactory.

Q. Being on board ... or during these two occasions - and we'll come to other smaller work ups later - during these two occasions, did any of the senior rates or junior rates for that matter ever approach you with any complaint of any nature regarding life on board, or the Captain, or any complaints what-

CP01 Smith

Examination-in-chief

soever? A. No, sir, not directly. There was ... we overheard bitching in the mess, if you want to call it that, but we considered that just a normal part of everyday life. People always bitch about something.

Q. But aside from what you call the normal bitching there was no complaint that would have caught your attention in any way? A. No, sir.

Q. Now, you stated earlier, Chief [CP01] Smith, in your testimony that once bad weather had prevented you from leaving? A. Yes, sir, on the completion of the work up in '93, we were supposed to transfer to an American destroyer but they deemed it too rough to transfer so we actually rode the boat back to Halifax.

Q. And thereby you spent an extra ... ?
A. I'm not sure if it was ... it was between five and seven days.

Q. And then you went on, I believe you called that, work ups assist? A. Staff assisted indexes, sir, yes.

Q. Okay. Which are shorter periods?
A. Yes, sir.

Q. What were the dates again of that?
A. If I can use my cheat-sheet here. From the 26th to the 28th of May of 1992, and the 28th to the 30th April 1993.

Q. Okay. In '92, in May '92, I guess, as it was, what were your observations at the time on board regarding morale and running of the boat? A. There was no change of morale from any other times that we had done it. It was our impression the boat ran well.

Q. And how about the conduct and the style of the Captain? Anything special that you noticed; any

CPO1 Smith

Examination-in-chief

name calling, yelling, shouting all the time? A. No, sir.

Q. Could you comment on the other visit, that one in April, I believe, '93. What, if anything, different you observed at that time? A. The boat, again, ran well. There was no major problems. These were very short, intense. We, basically, arrived early in the morning, eight o'clock in the morning, and evolute for three days continuously, twelve hours a day, and then go off at the end of three days either by helo or ship. So, no problem.

Q. How would you compare, if you can, the running of OJIBWA during those periods you were on board to other submarines that you've been on before? A. OJIBWA seemed to run better than other submarines. They were much more professional in their output. Their output for us was much more professional than other people.

Q. That you have observed as well? A. Yes, sir.

Q. Earlier on in your testimony you referred to a helmsman being replaced because he had problem keeping depth? A. Yes, sir.

Q. Could you comment, to your experience is that something that is uncommon, grossly uncommon, frequent, infrequent? Could you advise the court as to ... ? A. Planing or being a helmsman is a very difficult job. Some people have a natural knack; some people don't. It's not uncommon to replace a helmsman, get him off, get him away for a couple of hours, give him a chance to breath and to get his thoughts together again. It's quite common, quite common.

DEFENDING OFFICER: If I may have a moment, please?

JUDGE ADVOCATE: Sure.

CPO1 Smith

Examination-in-chief

DEFENDING OFFICER: No further questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. It's not uncommon to replace a helmsman in your experience. Is it common while replacing that helmsman to refer to them as a piece of shit, in your experience? A. No, sir.

Q. A bit over 20 days you've sailed on the OJIBWA between February '92 and October '93? A. I haven't actually counted them out. I would venture to say closer to 30 days.

Q. Thirty days? A. Perhaps, a bit more, possibly less.

Q. Okay, if you want to count them feel free? A. Alright. Thirty-seven days, sir.

Q. So thirty-seven days between 5 February '92 and 4 October '93? A. Yes, sir.

Q. And that wasn't a continuous period of time? A. No, sir.

Q. So you can't assist this court by providing eyewitness testimony to what may or may not have occurred on the OJIBWA outside the time frames that you were on board it? A. No, sir.

Q. And within those twenty to thirty days that you were on board her ... in excess of thirty days you were on board the OJIBWA, how many hours a day on average would you spend in the control room? A. Six.

Q. Six? A. Five to six.

CPO1 Smith

Cross-examination

Q. Okay. So you can't assist the court in telling them what may or may not have happened during the other 19 hours in that control room? A. No, sir.

Q. Is it fair to say that when sea training is on board doing their thing, as far as you're concerned very seldom would you see the normal running of the day-to-day sub? A. Yes, sir.

Q. In terms of sea training, what's the biggest sanction they could put on a CO or a boat? Can you educate me and tell me what they could possibly do? Do they have the power to make a recommendation to stop that boat from operating or ... ? A. We have made that a recommendation, sir, on occasion.

Q. So is it fair to say that sea training has got a bit of bite to their bark if they want to use it? A. Yes, sir.

Q. So the CO who likes to sail had better be on his best behaviour and have his crew on his best behaviour as well? A. I don't believe that any captain controls the truth completely. But, yes, the captain would be on his best behaviour.

Q. Would you admit, given the fact that the time that you did spend in the control room, that it could've been possible for Lieutenant-Commander Marsaw to personally insult one of his subordinates in the control room on average of one person a day without you knowing it? A. Yes, sir.

DEFENDING OFFICER: Mr Judge Advocate, I think that calls for speculation. My friend has already asked the witness earlier on that he cannot assist the court for the other 18 hours, he was not in the control room and so on and so forth, and now, I think, that question is very objectionable.

JUDGE ADVOCATE: Sustained.

CPO1 Smith

Cross-examination

PROSECUTOR:

Q. Would you state that Lieutenant-Commander Marsaw's leadership style tried to emanate old-style skippers but he didn't do a very good job of it? A. I believe that or words to that effect, yeah.

Q. Do you agree that he ruled his wardroom with an iron fist? A. From my knowledge I would say that at times, yes.

Q. There's reference on the very first report from 1991 to the issue of morale? A. Yes, sir.

Q. You can help me find it here. Maybe on the next page, I'm not sure? A. "Considering the period of inactivity, the enthusiasm and morale shown at the start of AWUPS was high. A visible sag in spirit was noted as technical problems once again encroached on the published programme, but to their credit the crew put on a brave face and took each day in their stride."

Q. Okay, so this is the first time the OJIBWA is going to sea in seven months and you stated here clearly that enthusiasm and morale was high? A. Yes, sir.

Q. So the crew hadn't been sailing with the CO for over seven months, had they? A. No, sir.

Q. And I believe you said you had made an entry concerning morale in the 1993 report. Can you find that entry for me? A. Not there.

Q. Okay, would you agree with me that the 1991 report makes a point of noting that morale is high, but that the 1993 report is completely silent on any comment about morale? A. That's not true, sir. There's several comments on morale in there.

CP01 Smith

Cross-examination

Q. Okay, can you point out where the word morale is used? A. Okay. "The positive effect on morale by the galley staff headed by MCpl Schubert was noteworthy."

Q. And that's in relation to Shcubert's activities? A. Yes, sir, yeah, and there's ...

Q. I'm talking about a general overall statement of the morale of the boat such as the one found in 1991? A. No, sir, I don't believe there is.

Q. Okay. And you can't comment on the morale inside the wardroom because you're on the other side of the wardroom, aren't you? A. That's true, sir.

Q. And in terms of the senior rates mess, you've noted that there was complaining going on but took that to be just the normal complaining that submariners do? A. Yes, sir.

Q. Would it be your opinion that the crew of the OJIBWA was incompetent or inexperienced, generally speaking? A. In 1993 we made specific reference to it, that certain members of the planesman were inexperienced and had to be replaced on a frequent basis and, in fact, I believe that it was the OIC's recommendation that they be removed from the helmsman for the duration of the work up. I cannot be a hundred per cent positive on that. An, I believe there's another reference to poor leadership by the operations officer at one point in that report as well.

Q. In terms of the boat as a whole, would I be incorrect if I suggested to you that the boat was incompetent? A. No, sir. Would you be ... ?

Q. I would be incorrect? A. You would be incorrect, yes, sir.

CPO1 Smith

Re-examination

PROSECUTOR: Thank you very much, no further questions.

JUDGE ADVOCATE: Re-examination?

DEFENDING OFFICER: Yes, with your leave.

RE-EXAMINED BY DEFENDING OFFICER

Q. I refer you to Exhibit "LL" at page A - 3/3, para 11? A. Do you want me to read that?

Q. No, no, just read it - the members have it too - and my question to you, could you comment to the court whether anything in there - although the word "morale" is not there - is there anything there that alludes to morale? A. Yes, sir, this alludes that the boat was well run, efficient and it states: capable of a very high ... of doing the job well, doing their operations well.

Q. There is talk about motivation of the crew. In an answer to a question from the prosecutor, you said that you didn't see the normal running of the boat. Could you expand on that, like, did you testify that those evolutions are the normal thing, the normal life of a submarine, is that ... ? A. No, no, that's not true. When we go on board normally we introduce stress because that's our job to stress the ship's company to make them either perform well or perform badly. If they perform badly then they don't get a good write-up. It's a test of operational readiness.

Q. Are you in a position to; for example, draw or compare, for example, that year that you were stranded and if you wish, like, you couldn't leave the boat because of the weather? A. Yes, sir.

Q. Can you compare the situation as you were then a mere rider, I suppose, you were not ... work ups were complete? A. Yes, sir.

CPO1 Smith

Re-examination

Q. Was there any difference between being a rider, from what you observed, or during the work up?

A. No, sir. The routine running of the ship's business, if you want to call it that, was the same, very professional and a lot of attention to detail that makes a good running submarine.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, I understand that the next proposed evidence must be tested for admissibility, and my learned friends have discussed that. So I would propose at this time that we might have a **voir dire**.

JUDGE ADVOCATE: And according to my information, Mr President, your presence will not be required in court before Monday morning. It's always the same, but have a nice weekend.

THE PRESIDENT AND MEMBERS RETIRE.

DEFENDING OFFICER: Mr Judge Advocate, the purpose of this **voir dire** is to determine the admissibility of some proposed evidence by the defence.

In essence - and I believe my friend will have no objection if I tender those - there are two folds: One are proposed admissions that you have on the sheet there, there are five propositions there; and

22nd voir dire

the other, of course, the 82 x 14 document you have there is a copy of the article in the *Chronicle-Herald* 16 December 1993.

The issue here appears to be that whilst my learned friend does not dispute the accuracy of those facts, he disputes that they are inadmissible because non-relevant. And it is our position ... we take the position that they are relevant.

That's in a nutshell what it is.

JUDGE ADVOCATE: Okay. Let's clarify that. You don't wish to call evidence during this application?

DEFENDING OFFICER: That's correct.

JUDGE ADVOCATE: Neither does the prosecution intend to call evidence?

PROSECUTOR: No evidence, sir.

JUDGE ADVOCATE: Very well. So are you gentlemen ready to argue at this time?

DEFENDING OFFICER: Yes, I am.

JUDGE ADVOCATE: Very well. Go ahead.

DEFENDING OFFICER: The issue, of course - and that's the only issue here - is relevancy. And it is our position that the admissions as well as the article are relevant to these proceedings for the following reasons - and, of course, I will comment further with you, of course, fully realizing that you, Mr Judge Advocate, rendered the decision earlier on with respect to whether some source of information had to be disclosed and all that, at the very beginning of this trial in September.

JUDGE ADVOCATE: On sources of information.

Defending Officer

Admissibility of evidence

DEFENDING OFFICER: Uh-huh.

JUDGE ADVOCATE: Yes. Informants I should say.

DEFENDING OFFICER: Yeah. And that's *passé* and that's settled.

Now, the facts stated here do not focus anymore on this particular issue but focus on the following points that there was indeed an article published which we tend to introduce as well. That an unedited draft had been given to some Canadian Forces authorities; namely, Lieutenant-Commander Jeff Agnew, - and that's para 3 on the sheet here - as a result of that draft article commander Maritime Command Atlantic tasked the base commander to initiate the military police. And then para 4, that indeed an investigation military police took place and interviewed so many people and that these proceedings are directly related to the article of 16 December and the military police investigation ordered on the 15th of December.

Earlier on in this trial we argued, or tried to argue, that the disclosure of the name of people who had passed information was relevant and we failed in doing that. That was then. This time - and those proposed admissions do not refer to the disclosure of sources but rather merely to some milestone - the ordering of the police investigation; the publication of the article; and the fact that all those events are directly related to this court we're having now. That's why we are here. Those are instrumental steps.

We submit to you this is very relevant and it is very important for the court to know exactly how this matter resulted in a court martial. In the course of cross-examination the defence has repeatedly put questions to witnesses: whether they had spoken to the reporter? when they were interviewed? and so on and so forth.

Defending Officer

Admissibility of evidence

And it is also very interesting to note that although some of the witnesses have testified as to what they claim to be a breach of the Code of Service Discipline either whether we talk about the cigar tube or whether we talk about verbal abuse or kicking or otherwise, none of those witnesses has put any formal complaint, has put in a redress of grievance, or anything of that nature. All of this, according to the core of the witnesses or most of witnesses of the prosecution, all those matters took place over a three year period. We have heard how some of the witnesses have described the accused as being a raving lunatic and so on and so forth. It was hell, et cetera, et cetera, et cetera.

I think that in terms of credibility and bias those facts that are submitted before you now are very important and the court should have full access to that information so that they can assess fully the merit of this case. It is quite clear, Mr Judge Advocate, and many witnesses have testified to that effect, that they disliked the CO, the Captain was well disliked and so on and so forth. Although witnesses would admit to some of those facts that he was disliked and so on and so forth, none of them though would admit any bias or anything like that. They would insist and come back, oh, yes, but the fact that he was disliked is not the reason why I'm here today. And they always pushed back any inference that they were biased towards the CO, or the Captain.

I believe that ... it is part of the theory of the defence that those facts, and I believe the evidence is quite clear on that that nobody complained, et cetera, and then all of a sudden an article is published and just before the military police investigation is ordered, the day before - so actually it hasn't started yet - so the article is in the paper and all of a sudden so many people that have had to endure such terrible conditions and verbal abuse and physical abuse and so on and so forth now start to come forward at an incredible pace, and they're all interviewed in

Defending Officer

Admissibility of evidence

December/January/February, et cetera. We have asked all those witnesses when they were interviewed.

JUDGE ADVOCATE: It's not exactly that, that they start to come forward. I mean, the police has requested them to come and give a statement from what we have heard.

DEFENDING OFFICER: Oh, yeah, I mean, I'm not quoting evidence on that. It's an argument if you wish. I do not claim it is evidence.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: But whether they're asked or not, those events of 15/16 December, that seemed to have triggered this whole affair.

JUDGE ADVOCATE: So what does it prove?

DEFENDING OFFICER: It might prove bias on the part of some witnesses who have been questioned in court in that respect. I believe whether, I mean, how strongly does it prove it? I don't know. It will be for the court to decide.

And I would like to refer you to Military Rules of Evidence 99 (1) and (2) especially, which deals with effect of answers and the showing of bias.

What we suggest, Mr Judge Advocate, is that many witnesses whether the word "bias" formed part of the actual question in cross-examination or not, I cannot recall, but I would submit to you that it has been a consistent line of questioning of the defence to attempt to determine a bias, and the fact that they disliked. Why didn't they report? Why didn't you report when it occurred and you come out so long after and so on and so forth? It is suggested to you that this line of questioning on the part of the defence was very consistent with attempting to determine a bias against the accused, and not one single witness that I

Prosecutor

Rebuttal

can recall has come up and said, yes, I have a bias against the accused.

So I believe it is open to the defence, having approached it - and I certainly do not want to mislead you by saying that we have used the word "bias". We may not have. I cannot recall at this point - but I believe that the important aspect of this is that whether or not we used the actual word, the line of questioning was such as to try to detect bias on the part of the witnesses, and we haven't been all that successful because most of them would say, oh, no, no, no, and they all have come up with reasons as to why it didn't come up before? Why they did not complain and so on and so forth?

And it is suggested that those facts there are sufficiently relevant to be put to the court for them to weigh, as you put it to me just a moment ago, what does it prove? Well, we'll never be too sure, but we believe that it is admissible and it is in support of this theory of the defence that indeed there existed bias. It is somewhat circumstantial, nonetheless, it is capable of demonstrating that a biased existed and it will be for the court to determine how much of this or how much weight they want to give to this. They may give very little or they may give more. But I believe it is relevant and it should be put before the court for them to make whatever they want of this information with the rest of the evidence.

Those are my representations.

JUDGE ADVOCATE: Thank you.

Mr Prosecutor?

PROSECUTOR: Thank you, Mr Judge Advocate.

The information my friend has provided you with does not in anyway give you any more evidence to resolve the issue than you already have of whether any

Prosecutor

Rebuttal

particular witness is biased or not. There's not a single thing on any of these sheets of paper that tells you that Lieutenant[N] Hart is more biased or unbiased than you thought before; that Lieutenant[N] Marr is more biased or unbiased than you thought before; or any other witness. My friend's asserting this in because it helps him prove credibility or bias, but the evidence here doesn't do that at all.

What it does is it gives him an extra dimension of shadow to hide behind, to make inferences in closing argument that he can't do now. I would submit to you that the Crown's case against the accused is very, very strong. They had an opportunity to fully and thoroughly cross-examine everyone of these witnesses in areas that were relevant. They attempted to do so. The accused was fully and capably represented by two counsel and they haven't knocked the Crown's case off. There's not even been a motion for no **prima facie** case. The accused has failed to squarely confront and successfully challenge the Crown's evidence, so what he must do now is try to find a way that he can make a peripheral attack.

And I'll give you an example of how they've tried to that during the trial. At the very beginning with Lieutenant[N] Hart, the question was raised about the *Mail-Star* article. I objected to defence counsel being able to get into that in any way whatsoever and I think the words I used was that you were going to open up a can of worms. You let arguments go back and forth, back and forth, and you allowed Colonel [Lieutenant-Colonel] Couture the opportunity to ask and nibble into that area, but warned him that at some point in time you may cut him off.

Lieutenant[N] Hart was then questioned about, did you ever have a conversation with Lieutenant[N] Byrne and tell him that there would be an article published next week? That went in. From our point of view, we find that completely irrelevant. But we respect your decision and it was admitted. If you

Prosecutor

Rebuttal

review your notes you'll find nowhere was Lieutenant[N] Byrne ever asked the question of whether or not Lieutenant[N] Hart told him that. So the court is left hanging there thinking that Lieutenant[N] Hart must be some sort of rat to the media. There's absolutely no evidence that he ever did talk to Byrne. He denied it.

Byrne was never asked about it. But the court may have a seed planted in their head that Hart is some sort of guy who doesn't follow 19.26 of QR&O and goes to the media. I don't think that process at all is helpful in finding the truth. It creates a shadow that doesn't shed any light at all on what happened on the OJIBWA between February '92 and October '93.

And there's other examples, if you follow the testimony of witnesses where that sort of game happens.

Given the fact that those types of questions were allowed to be admitted I had to jump into it and sometimes took the initiative and simply asked the witness myself, did you talk to Malcolm Dunlop? Sort of a game between defence and the Crown. We took turns asking the question. But at one point I try to get into the area with one of the witnesses, and I can't recall now - if need I can get an adjournment and check my notes - but I tried to ask one of the witnesses whether he was surprised that the article had come out. And what I was trying to elicit from him was that there was discussion widely known in the wardroom of the sub squadron long before this article came out that it was going to be published, and it was known amongst people who had never ever been contacted by Dunlop.

What I was trying to do is provide evidence to the court to rebut the type of aspersion that was cast on people like Lieutenant[N] Hart who predicted the outcome of the article by showing the court that everybody in the sub squadron knew the damn article was coming out. I was cut-off, there was an objection. The question that I asked would've called for hearsay and it was ruled a question that I couldn't ask. So the can of worms is left slightly open. I tried to

Prosecutor

Rebuttal

rebut it. The extra line of questions I wanted to get into are ruled irrelevant.

Now, my friend wants to bring in this type of material which I would argue is irrelevant based on the decision that you ruled on when I tried to get into the area by asking witnesses whether they were surprised to see the article come out. You had found it was irrelevant and I would argue for the same reasons this material now is irrelevant. And I would also rely upon your decision - what I would call the Dunlop motion - where you stated quite clearly with a fully reasoned legal decision of why getting into that whole can of worms was irrelevant.

So I'm relying upon two of your other previous decisions, plus your comment initially during Hart's testimony that you may at some point cut Lieutenant-Colonel Couture off if he delved too much into this can of worms. We're now at the point where we're about to jump into the can of worms. If this material is allowed to be let in, and presumably I have a right to call evidence on rebuttal. I presumably should then ...

JUDGE ADVOCATE: That will be decided at a later step.

PROSECUTOR: Well, we're talking about if we look at the admissions here: A hundred and fifty-three people interviewed by the military police that are involved; allegations. Again, more shadows are cast. I have to try to respond to that by showing that there aren't that many shadows out there at all. That there's "X" number of people that were contacted by Dunlop and that "X" number of people extra, in addition to that, knew the article was coming out.

We're still nowhere near knowing who the sources are, which is something you've deemed to be irrelevant. So why in the world are we even pursuing towards that. All we do is create new issues, side-

Prosecutor

Rebuttal

tracks, that force us to try to shed light onto the shadows and the thing goes from one dimension to a second, to a third dimension. Definition of relevancy then, therefore, becomes widened and the purpose of seeking the truth as it relates to those seven charges in Exhibit "A" is further removed. We're nowhere closer to shedding any light on bias.

In fact, I would argue that by allowing that information to go in, it's allowing the court to be less capable of determining issues of bias. You're just dumping more shadows onto them. They have no more information than they do now to determine the bias of people like Lieutenant[N] Hart. Throw this on top of them and you've exasperated the problem and we're further away from this purpose in this court of trying to find the truth.

JUDGE ADVOCATE: You're saying it has no probative value?

PROSECUTOR: None. And it ties in with other shadows in my friend's arguments because, again, they can't confront the strength of the Crown's evidence head-on so they've got to do it with shadows. By saying that, how come you didn't do a redress of grievance through 19.26? I've been cut-off when I asked Elford, did you go to the sub squadron or did you talk to anybody in the sub squadron about your complaints of physical abuse? So I can't get into that with Elford but somehow the other side is allowed to challenge witnesses and to argue in a closing statement that these are the same slugs that couldn't fill out a redress of grievance or make a complaint to the squadron, but then the inference is drawn, some of them must've gone to the press.

How can it be that I'm blocked from asking questions of Elford, whether he took his complaints to the next level, where the defence is able to use evidence that allows him to jump to inferences that people didn't bother complaining, they didn't bother using the

Prosecutor

Rebuttal

redress of grievance system and look at them. Some of these guys must've gone to the press without any hard evidence whatsoever.

And that's tied in with their argument that's just been made that these guys are running to the MP shack to do an interview. I think that's far from the truth. I think the only people that ran to the MP shack for the interview were probably the first 10 people they interviewed who were all in support of Lieutenant-Commander Marsaw. None of them ever sailed with him as CO but they all decided that he was a great guy and they were going to go down and knock on the MPs doors and tell them what knew. So, again, another shadow sort of hinting that these witnesses are now on some sort of a bandwagon, running to the MP station, when that's not the truth at all.

So what this does, if this information goes in, it doesn't shed any light on the truth. It creates shadows that try to entice the court to draw inferences that aren't based on any fact at all and the whole process is further removed and I'm confronted with the possibility of having to call - or at least seeking or hoping to call - rebuttal evidence. I believe the onus is on my friend to prove relevance and probative value and I believe he has not met that hurdle.

Thank you.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: With your leave, Mr Judge Advocate.

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: Every time - not quite every time - but quite often the defence tried to adduce some form of evidence, the prosecution keeps answering by threatening to go to rebuttal. I mean,

Defending Officer

Reply

that is as you, I believe, have indicated or referred to, is a totally different issue.

JUDGE ADVOCATE: It is.

DEFENDING OFFICER: The prosecution talks about a strong case of the prosecution that we haven't been able to challenge and we could have made a non **prima facie** case. Non **prima facie** case does not touch credibility. And that's what credibility, I mean, that's what it's all about now credibility.

The prosecution complains that they were not allowed to ask the question, what did you think of the article? Yes, because it calls for an opinion. It's not an opinion that's got nothing to do with the actual facts. I mean, you cannot ask everybody what they think of the article. And we never asked any witness what they thought of the article because we conceived that it's not permissible under the Rules of Evidence.

Throughout, and I don't know in how many **voir dire**, throughout this case, the prosecution's case, the prosecution has planted various pieces and bits of evidence, most of the time ... mostly, if not exclusively on the basis that credibility was an issue in this case and that they needed that because credibility is the name of the game in this trial. And we need this now so that we are prepared to face the music and challenge the accuse should he take the stand and so on and so forth. How many times? I won't even suggest the number of times for fear of misleading you, but many, many times has the prosecution relied on that, credibility, credibility, credibility.

We suggest to you that the evidence that is proposed there, what exact for weight it will have I don't know, and I cannot make any prediction on that. But, nonetheless, I suggest to you that the credibility of many witnesses has been seriously challenged. Already we have many - and I don't want to indulge in

Defending Officer

Reply

my final address now - but we have had many witnesses who have been respectfully caught in contradiction with previous statements that they've made. Not only that, when they were clearly caught contradicting themselves they did not even want to admit that. I mean, at some point one would cave in and say, ah, yes, I've contradicted myself. They even tried to explain away very obvious contradictions.

JUDGE ADVOCATE: I understand that and that's a different matter and I will address the court on this different matter of previous inconsistent statements. But I'm still trying to figure out how these admissions here I have in my hands will help you attacking the credibility of those witnesses. I still have difficulties to understand that.

An article was published. You say that because of the article that was published a military police investigation ensued, and because of that we're here today. Of course, it's always following a military police investigation that we're in court, or most of the time, I should say.

DEFENDING OFFICER: Yeah, and often an article.

JUDGE ADVOCATE: Yes, and often an article, yes. But how does this bring evidence to establish that the witnesses, or some of the witnesses, were biased?

DEFENDING OFFICER: Because in testing them along - and we have made inference that they were possibly biased - it is circumstantial, I will admit that much. It is evidence that is circumstantial in as much as it might be derived that there is a bias. This evidence, along with the rest of the evidence produced, the answers given by the witnesses to a number of questions - I mean, they're supposed to have lived in hell there and observed and witnessed offences but none of them will do his duty as an officer or a non-commis-

Defending Officer

Reply

sioned member to report the offence. We've talked about QR&O article 4.02 quite often. It is just not happening.

There is evidence that Lieutenant-Commander Marsaw left the boat in October of 1993. That fear that they had to report matters because he was there and nobody would take on Marsaw and so on and so forth, why weren't matters reported in November, for example, when he had left the ship or the boat, or later in October? What we suggest to you is that it is conceivable and with that evidence, along with the rest of the evidence heard especially in cross-examination that from circumstantial evidence it might be derived that the trigger or the triggering mechanism to this whole thing was the article.

And after the article - which, of course, itself triggered the military police investigation - then people started coming out. And the fact the articles says - that's why we want the article in as well - four people who talked to us only under a guarantee to remain anonymous have stated this and this and that. Now, four people who didn't have the guts to stand up and report offences as they must be reported under our own regulations have started this investigation ruling, and from that point on people start throwing the stuff.

I think that this evidence along with the evidence heard thus far is capable of supporting this to an extent - which I cannot comment further because it'll be for the court to decide - but is capable of supporting this inference of bias against the accused. This is why we claim it is relevant.

Thank you, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

The court will now close to consider this matter.

Judge Advocate

Ruling

AT 1425 HOURS, 20 OCTOBER 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 1525 HOURS, 20 OCTOBER 1995, THE COURT REOPENS.

JUDGE ADVOCATE: The defence seeks the admissibility into evidence of the following facts:

1. On 16 December 1993, the *Chronicle-Herald* Halifax, published an article entitled "Sub's Captain Under Scrutiny";
2. Prior to the publication of this article, Mr Malcolm Dunlop contacted Lieutenant-Commander Jeff Agnew, Public Affairs Officer with MARLANT, and provided him with a copy of the unedited draft of his proposed article;
3. On 15 December 1993, as a result of Mr Dunlop's draft article, the commander Maritime Forces Atlantic tasked the base commander CFB Halifax to initiate a military police investigation into the allegations that were published the next day;
4. In the ensuing investigation military police investigators interviewed approximately 153 people including Mr Dunlop;
5. These proceedings are directly related to Mr Dunlop's article and the military police investigation ordered on 15 December 1993.

The defence also seeks the admissibility into evidence of an article published by Mr Malcom Dunlop in the *Chronicle-Herald*.

The defence argues that the evidence sought to be admitted is relevant to establish the issue of credibility of some of the prosecution witnesses. The

Judge Advocate

Ruling

prosecution objects to the admissibility of this type of evidence as being of no probative value.

During the course of this trial the court has used its discretion at times to exclude evidence proffered by the prosecution. It did so upon coming to the conclusion that its prejudicial effects would exceed its probative value. The prosecution argues today that the same rule should apply in this application and that the trial judge should use his discretion to exclude certain evidence proffered by the defence.

Although the trial judge has a discretion to exclude evidence proffered by the prosecution, no such discretion exists to exclude relevant evidence offered by an accused on a ground that it is prejudicial to the Crown. If the proffered defence evidence is sufficiently relevant to assist the trier of fact, there is little or no likelihood of a court excluding such evidence. In **R. v. Seaboyer** (1991) 2 S.C.R. 577, at 611, McLachlin J., discussed the extent to which our courts will exclude relevant defence evidence. After observing that our courts have traditionally been reluctant to exclude even tenuous defence evidence, she said, and I quote:

"The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted."

Judge Advocate

Ruling

And at page 630 and 631 she noted:

" ... relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the value of the evidence must outweigh its potential prejudice to the conduct of a fair trial. Moreover, the focus must be not on the evidence itself, but on the use to which it is put."

As a trial judge I must exercise caution in refusing to admit defence evidence on the ground that it does not have sufficient probative value in relation to the issues before the court. Although I have an overriding responsibility to ensure a fair trial by protecting the right of the accused to make full answer and defence, I also have a responsibility to prevent the trial record being cluttered with evidence of little or no probative value.

Although I am of the view that the evidence offered by the defence has very little weight, this is a matter for the trier of fact to consider and for me, as a trial judge, to exclude evidence offered by the accused which is relevant to prove his innocence would not, in my view, be in the interest of justice. It is therefore my ruling that the evidence sought by the defence is admissible.

Do you have any other matters to raise in the **voir dire**?

DEFENDING OFFICER: No, Mr Judge Advocate. I would believe then that it would be probably appropriate to adjourn until Monday, ask the court reconvene and carry on from there.

JUDGE ADVOCATE: Any objection?

Judge Advocate

Ruling

PROSECUTOR: No objections, no.

JUDGE ADVOCATE: Thank you.

This court is adjourned until Monday morning, nine o'clock.

ADJOURNMENT: At 1533 hours, 20 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 23 October 1995, the court reassembles and the accused is before it.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Whenever you're ready to proceed, Lieutenant-Colonel Couture.

DEFENDING OFFICER: Yes, I am, however, before I do proceed, I just want to inform the President and the members of this Court as well as you, Mr Judge Advocate, that my next witness CPO2 Lavoie is presently posted in Saint-Jean, Québec, and he was on a course in Borden. We pulled him out of the course to come here, so he didn't have the opportunity to return home and take his tunic and medals and all that, so it is through no fault of his that he was brought from a TD here. So he will be testifying in a sweater and dress of the day as it was at the school.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: Please, call CPO2 Lavoie.

s.19(1)

CPO2 Lavoie

Examination-in-chief

FIFTH WITNESS) Chief Petty Officer,
FOR THE) 2nd Class J.A.D. Lavoie, is duly
DEFENCE) sworn.

EXAMINED BY DEFENDING OFFICER

Q. Chief [CPO2] Lavoie, for the purpose of the court and the record, could you please fully identify yourself by stating your rank, full name and service number, please? A. Chief Petty Officer, 2nd Class Lavoie, .

Q. I understand, Chief [CPO2] Lavoie, that you served on board OJIBWA? A. Yes, sir.

Q. Could you inform the court as to the period you served on board OJIBWA? A. The last time I served on the OJIBWA was in January 1993. I served prior to that around 1978, when I joined the submarine in 1976 from OKANAGAN, then went to OJIBWA from that, and the last time was January 1993.

Q. Let's go back a bit on your background. I understand that you joined the Forces in 1973, is that correct? A. Yes, sir.

Q. And you obtained your dolphins in 1977? A. Yes, sir.

Q. And you have served on all three submarines; that is, OJIBWA, ONONDAGA and OKANAGAN? A. Yes, sir.

Q. I understand that you were posted in Ottawa for a few years, '88 to '91? A. Yeah.

Q. And that you joined the submarine squadron back in 1991? A. Yes, sir.

CPO2 Lavoie

Examination-in-chief

Q. In 1993 you joined OJIBWA. What was your position and appointment at the time? A. I joined in January '93 as the coxswain of the OJIBWA.

Q. Okay. Who was the CO, the captain of the boat at that time? A. Lieutenant-Commander Marsaw, sir.

Q. Could you recognize Lieutenant-Commander Marsaw if you saw him? A. Yes, sir.

Q. Could you look in this courtroom and if he is present point him out, please? A. Sitting right on my right, sir.

JUDGE ADVOCATE: The witness indicates the accused.

DEFENDING OFFICER:

Q. When were you posted out of OJIBWA?
A. August 1995.

Q. Could you tell the court how life was in OJIBWA during your stay there, January ... and under Lieutenant-Commander Marsaw? A. I joined in January '93, took over from Chief Petty Officer Parlee, who was the coxswain there. We had a turnover from ... OJIBWA's coxswain turnover. Everything went fine. He talked to me about the morale of the crew on board, what exercise we were doing next and so on. Everything seemed to be very normal to me. When I took over I talked to all my crew. I talked to my JR NCOs. Nobody had any complaint. Everybody seemed to be quite happy to serve on OJIBWA at that time.

Q. Could you relate to the court the work, like, how it was? Were you working hard, like, when you were there? How was it going in relation to work?

A. We had a good relationship with the crew of OJIBWA. When I took over we had a lot of work to be done because work ups was on the go at that time, so we

CPO2 Lavoie

Examination-in-chief

had to get prepared to take the boat out to sea for work ups. We worked very hard. But, again, I would talk to my crews and everybody seemed to be quite happy to work, to work hard and get ready for the work ups period.

Q. What was your relation with, or describe your relation with the captain, the XO, the officers, your crew? A. Well, at first I was very happy when I heard was posted to OJIBWA to serve under the command of Lieutenant-Commander Marsaw. I knew him before that as a navigation officer. I also knew him as a senior rates, as a leading seaman fire control, and I knew that we will have a good relationship together.

Q. And how was actually the relationship when you went on board? A. Very good. I had many occasion to talk to the CO on different occasion. We sat together, we talked about it and we always come up to a resolution for what we had to do. We had no problem whatsoever. The same as with my XO, no problem. At that time it was Lieutenant[N] Dussault. We had no problem together to get the boat back to its operational commitments. With my senior rates, no problem. I knew them all from experience before. We had no problem. And all my JR, I was well respected by the JRs and they knew what I was doing on board all the time. It was a normal ship company. No problem.

Q. How was the captain, Lieutenant-Commander Marsaw? How was he in terms of leadership, training, rebuking people and all this, on a day-to-day basis? A. Day-to-day basis as coxswain I'm usually looking a lot for training, all kind of training. We deal with submarine training, make sure that everything is done on that point. Also, I'm looking for any training after we do work ups or before the work ups. We always had a chat down together to make sure the training will be done; for example, for the helmsman to drive, to make sure that they had enough time on the helm to learn how to drive. The same for all officers who were on the panel, who were on the periscope, whatever they

CPO2 Lavoie

Examination-in-chief

do. We always had a good relation on training. I occasionally asked the CO for extra training because I thought that my helmsman wasn't qualified enough to drive the boat, and he always agreed with me that if we had a chance to do it, we'll do it, and we did a lot of training on the helm. The same for officer training. I had no problem with training on board.

Q. How often were you in the control room yourself and where were you positioned on board and what were your whereabouts on board? A. As coxswain I don't have any specific position on board. I just go around the boat to make sure everything is in proper working order. I always make sure I was in control for specific occasion, especially when people would close up, action station, or any kind of relations. I'd make sure I was there, and I always asked the CO if he was happy with the crew falling up and get back on position for operational commitments.

Q. Uh-huh? A. So I was there to make sure everything was set up properly. Give a thumbs up to the CO, he was happy, then I used to leave the control.

Q. Could you inform the court what you observed from the CO in the control room during various actions and evolutions in terms of how he was running the boat, whether he would increase his voice, whether he would yell or anything of that nature. Could you comment on that? A. Yes, sir. While the CO is a very capable commanding officer, there's no doubt in my mind. He was always ahead of the situation, always two or three steps ahead of everybody in control, so that's when maybe it was hard to figure out what was going on on board. He was always ahead of it. So nothing went by him, like, he didn't know. So you cannot really say, well, I won't say nothing at this time or wait later; for example, on a sonar set if he knew that a sonar buoy will be beeped up in a few second, he knew that. So he was waiting for that call to be given and there's sometime people did not report that properly. He's a very capable commanding officer. Yes, on occa-

CPO2 Lavoie

Examination-in-chief

sion he used to raise his voice but, again, on the operation commitments there's a lot of activity in the control, everybody's talking at one time and he usually raised his voice to make sure that people knew he was still in command of the submarine, to be sure that people knew their actions and what to do, basically.

Q. When he was raising his voice like this, could you comment to the court when, if at all, you heard him using derogatory language, like calling a crew member, fucking asshole, idiot, incompetent or words to that effect. Did you ever witness anything like that and if so when? A. I never witnessed any bad words from the CO. Maybe the "F" word which is, I guess, a normal speaking in that kind of environment, but not to a specific individual. Any order that the "F" word ... when he was raising his voice. Usually, he was raising his voice not to one specific person but to the - people call it, the command team, training people who was in the control at that time - to make sure they were still doing the job and they were reporting the correct operation.

Q. Uh-huh. You just finished stating that he would raise his voice. Could you give an example in as much as you can of the sort of tone of voice and the expression he would use when he was raising his voice?

A. Ah, sure I can give it a try. For example, if we were at the periscope depth, okay, with the forward periscope raised and he was looking at a target and the helmsman could not keep the depth and the forward periscope was dipping down, or the trim seemed to be in a bad trim-state, he used to raise his voice, saying, get me up I can't see nothing, let's go, let's go, got to see something, okay, that kind of voice, okay, basically.

Q. You stated earlier that you had a good rapport with your senior rates and junior rates. Without repeating any words that might have been told to you, could you answer this general question, whether you've received complaints from your senior rates or

CPO2 Lavoie

Examination-in-chief

junior rates about the attitude of the CO or something along that line? A. No, I never received any complaint from any of my crew members. Maybe on occasion you used to come in the mess and they would be angry about the control room, I guess, there's a lot of yelling in the control room and so on, or I've been ... the CO took me off from the helm and stuff like that. But never heard anything about he called me names or talking to a ... some bad names to him or not. It was, basically, well, the CO, you know, screaming in control. He throw me off from control and I'm here now. It wasn't my fault and I couldn't keep depth because the officer couldn't keep the trim up, okay, that kind of situation.

Q. Okay. Now, let's take this example of keeping depth and having a helmsman removed from the helm. Did you see that happen for one; and two, can you comment whether this is uncommon, how uncommon it is, or common? In what kind of situation would that arise? A. Well, when I came to OJIBWA, when I was doing my watch in quarter bill - that's where all the positions are for my people to stand watches - we didn't have that many good helmsmen, that means people who really could keep depth and stay right where they're supposed to be. We had usually one main good driver, who's one of the best, so we use him in those occasions. The CO did in many occasion remove people from the helm. When I was there in control, he always looked who was on the helm first, and I could agree with him that if the man could not keep depth, he had two solutions: remove the helmsman; or make sure the trim was set up properly. And sometime it's very hard to set a trim if your helmsman doesn't know what he's doing, so it's a lot easier to remove the helmsman, put somebody competent there, then readjust what's happening. If the main driver cannot keep depth, well, there's another problem somewhere, it could be on the trim, and I think that's what he was thinking of. He never removed someone for nothing, okay. When he was removed it's because there was a mistake made somewhere and he was just adjusting his comments. So remove the

CPO2 Lavoie

Examination-in-chief

helmsman, get somebody else there who knows what he's doing. If I cannot keep depth, there's another problem, we'll resolve that.

Q. How would he do that? Would he do that, like, physically or shouting at the individual or ... ?

A. Not when I was present in those rooms on board, those helmsmen, it was just, basically, "Remove the helmsman, bring me somebody else", in that tone of voice. So I relieved the helmsman, put somebody else up there.

Q. Could you comment to the court, in as much as you have observed, how much, if at all the captain, Lieutenant-Commander Marsaw, how much he cared for his junior rates on board and maybe give an example? A. I had two occasion that Lieutenant-Commander Marsaw approached me on that: One, was one time on a - I wasn't coxswain at that time - I was in squadron, I was asked to go do a firing down south with OJIBWA. I went down there, then they did the firing ... before the firing, sorry, and he approached me on saying that he had some problem with his NWT senior officer, that he did a lot of mistakes during training and he thought the boat wasn't safe with him to try to do the firing; by example, leaving valves open when the boat was diving and so on and so on. So he wasn't happy. He was very concerned about the crew there, so they asked me if I wouldn't take the boat for the firing. So I said, yes, I'd take the boat for firing so they attached me posting to OJIBWA for that time - I think it was for about two weeks or three weeks - and I took over there; another time I wasn't happy with the ... just during the refit that they were changing the configuration of the Chief and PO's Mess because they had to change the Wardroom, the officers quarters, because the sound room was getting bigger, so they took some part of the chief and PO's living quarters to make a longer Wardroom. So I approached the CO, just saying, "Well, maybe I should make one bigger and go to the JR side of it." He told me, "No, because the JRs need a bit more room than you do, Chief", and he says,

CPO2 Lavoie

Examination-in-chief

"I'm not going with that." He said, "I want my JR to have a better living quarter, those are my people I need the most on board." So we agreed with that.

DEFENDING OFFICER: If I may have a minute here, please?

JUDGE ADVOCATE: ...

DEFENDING OFFICER:

Q. Chief [CPO2] Lavoie, I understand that you served under Lieutenant-Commander Marsaw until he was posted out of OJIBWA? A. Yes, sir.

Q. In October '93? A. Yes, sir.

Q. And you served continuously for that period of January to October '93? You were on board all the time? A. I was on board from January '93 till October '93, when Lieutenant-Commander Marsaw was there.

DEFENDING OFFICER: Thank you. I have no further questions.

JUDGE ADVOCATE: Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. I understand that you said you replaced the coxswain Parlee? A. Yes, sir.

Q. And Parlee had been a coxswain under Lieutenant-Commander Marsaw for a longer period of time than you had been, isn't that true? A. Yes, sir, it is true.

Q. You joined in January '93 as coxswain?
A. Yes, sir.

CPO2 Lavoie

Cross-examination

Q. Okay. Would you agree with me that there's nothing at all improper about a CO raising his voice in the manner that you demonstrated before the court? A. I don't see any problem with that, sir, that's part of leadership.

Q. So you would agree with me that there's no problem with that then? It's perfectly permissible? A. Yes, sir.

Q. Would you agree with me though, that it is not proper when yelling at the crew to refer to them as, "pieces of shit", or "fucking idiots", or "assholes"? A. That's right, sir, I don't think it's proper.

Q. Okay. And Lieutenant-Commander Marsaw did yell a lot in the control room, didn't he? A. Yes, sir, he did.

Q. And he used to yell at his officers a lot in the control room in the presence of the men, didn't he? A. He was yelling to his officers; he was yelling to his senior rates; he was yelling to his JR rates. Same tone of voice.

Q. And I'm asking you whether he yelled at his officers in the presence of men in the control room? A. Yes, sir.

Q. And isn't it also true that as a coxswain, as a senior rate, you felt that on some of these occasions he should never have talked to his officers like that in front of the junior people? A. That's right, sir.

Q. And isn't it also true that while he's yelling at his officers on occasion, you can't recall whether swear words or derogatory adjectives were used? A. That's right, sir, I cannot recall.

CPO2 Lavoie

Cross-examination

Q. That's right. So you've got a bit of a faulty memory in that area to some extent, don't you? You don't have a perfect recollection of every word that was said by him when he yelled, didn't you? A. I can recall that he did use "F" words, not directly to one person, was, basically, around the control room. I can't recall for sure he didn't call anybody, "fucking idiot, fucking asshole". He might've used the "F" word, but nothing after that "F" word, sir.

Q. Uh-huh. As coxswain, do you have a designated job in the control room? A. No, I don't, sir.

Q. And would you agree that you didn't spend a lot of time in the control room? A. Yes, I agree that I didn't spend as much time as everybody else. I was just there to make sure everybody, like I said before, was closed up and the CO was happy with all the people on watch.

Q. So relative to the people that do have designated positions in the control room you didn't spend a lot of time in the control room, did you? A. You're right, sir.

Q. And, in fact, there are even some days where you didn't even go into the control room at all, isn't there? A. That's right, sir.

Q. During this trial over 30 prosecution witnesses who are crew members who worked in the control room have testified that on occasion Lieutenant-Commander Marsaw would refer to them or others in the control room using personally insulting adjectives; such as, "fucking idiot, cunt, piece of shit, asshole". Is it your testimony today that Lieutenant-Commander Marsaw never used those words or simply that you can't recall him using them? A. I never heard Lieutenant-Commander Marsaw call someone a fucking idiot, fucking asshole, or whatever, except he used the "F" word when he was speaking to a general comment.

CPO2 Lavoie

Cross-examination

Q. So is it your testimony today that these witnesses cannot make the claim that they have been referred to in that way by Lieutenant-Commander Marsaw?

A. ...

DEFENDING OFFICER: Mr Judge Advocate, the witness can only testify as to what he saw, what he heard. It is not for him to comment on whether or not those other witnesses - no matter how many of them - I mean, why they say things or whether they can claim something or not, that's for them to do, they have done that. He can only testify to what he saw and heard.

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. So you weren't in the control room all the time, that's correct? A. That's correct, sir.

Q. And you wouldn't have been in the control room all the time when individuals like Petty Officer [PO2] Parsons, Lieutenant[N] Marr, Lieutenant[N] Dussault, Petty Officer [PO2] Conrad were in the control room, were you? A. Can you repeat that, sir, please?

Q. You wouldn't be in the control room at the same time all the time as individuals such as the ones that I have listed were in the control room, would you? A. That's right. They might've been in the control when I wasn't there, yes, it's possible.

Q. So you would agree with me that they may have seen or heard things that you could not have seen or heard? A. ...

DEFENDING OFFICER: Well, he's again ...

JUDGE ADVOCATE: Everything is possible when he was not there.

CPO2 Lavoie

Cross-examination

DEFENDING OFFICER: Yeah.

JUDGE ADVOCATE: It doesn't prove too much.

PROSECUTOR:

Q. And would you agree that in the senior rates mess, the senior rates who did work in the control room would on occasion complain about the way that they had been treated by Lieutenant-Commander Marsaw in the control room? A. Yes, in the occasion they used to come in the mess saying that he was yelling in control, but they never mentioned to me or talked about, he called me names or I got kicked or whatever it is. It was just a general thing about there was a lot of confusion in control and there was a lot of yelling. Nobody ever mentioned to me they'd been called names, I've been kicked or whatever else.

Q. So is it your testimony today that they have never said to you that he was using degrading names or terms to me and describe them? A. That's right, sir.

Q. Do you recall being interviewed by the military police? A. Yes, sir.

Q. During an interview on 20 December 1993?
A. Yes, sir.

Q. Were the answers you gave at that time truthful and honest? A. Yes, sir, the most I can recall, yes.

Q. Were you aware as to whether or not some of your senior rates skipped you and decided to make complaints to the executive officer about the way they were treated by Lieutenant-Commander Marsaw? A. I don't recall that one, sir.

Q. Is it fair to say, based on your testimony, that as far as you're concerned there was no

CPO2 Lavoie

Cross-examination

problem on the OJIBWA? A. As far as I was concerned I didn't see any problem on the OJIBWA. The morale was good, people worked hard. When I was in control, I didn't hear anything dramatically important to the people. Like I said before, there was a lot of confusion, yelling in control. I didn't see anything to specific individuals, said to them.

Q. So as far as you're concerned there's no problems on the OJIBWA? A. As far as I was concerned there was no problem from January '93 to October '93, sir.

Q. And that would include as you've mentioned no problems training for officers, for example?

A. No, no problem. We trained our officers the best we could. We all showed ... they already was briefed before we sailed, they had to read the OPs action to make sure they know what they were doing there, and that was the purpose of doing our job.

Q. Would you agree with me that the general pass rate for officers qualifying in the sub squadron is about eighty per cent? A. I'm not aware of that, sir.

Q. Are you aware as to whether or not the pass rate for officers in OJIBWA was around thirty per cent? A. I'm not aware, sir, I don't deal with officer training.

Q. You just testified under oath that as far as you're concerned there was no problem with officers being trained on the OJIBWA. Now, you're telling me that you're not aware of officer training? A. I'm aware of officer training, but I don't deal personally with the training. I just make sure that when we're at sea that we did the training required, but I'm never on the officer training board for training or keeping books, records, and so on.

CPO2 Lavoie

Cross-examination

Q. So when you talk about there being no problems, you're talking about it in a very limited way then? A. Yes, sir.

Q. Was the CF Policy on harassment circulated throughout the boat through Routine Orders? A. Yes, sir, they were.

Q. And would that have been signed off by Lieutenant-Commander Marsaw? A. Yes, sir.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

DEFENDING OFFICER: No, Mr President and Judge Advocate, I have no re-examination.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

ASSISTANT DEFENDING OFFICER: The next witness, Mr Judge Advocate, will be Chief Petty [CPO2] Officer Kramble.

s.19(1)

CPO2 Kramble

Examination-in-chief

SIXTH WITNESS) Chief Petty Officer,
FOR THE) 2nd Class T.C. Kramble, is duly
DEFENCE) sworn.

EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. For purpose of the record, Chief Petty Officer, could you give your full name and spell out your last name, please? A. Yes, sir. Timothy Charles Kramble, K-R-A-M-B-L-E.

Q. And your service number? A.

Q. When did you join the Canadian Forces? A. December 10th, 1975.

Q. And when did you get your dolphins for submarines? A. The 16th of June 1977.

Q. What is your trade? A. I'm a Marine Engineering Artificer.

Q. Can you tell the court which submarines you have served on? A. I've served on all three.

Q. And could you out of memory give the names of the commanding officers you have served under?

A. Lieutenant-Commander Sloan, Lieutenant-Commander Jones, Lieutenant-Commander Hickey, Lieutenant-Commander Plante, Lieutenant-Commander Dierks, Commander Carter, Lieutenant-Commander Mosher, Lieutenant-Commander Marsaw, Lieutenant-Commander MacMillan. That's all I can remember right now, sir.

Q. A fair number. Where are you presently posted? A. I'm the chief ERA of the HMCS OKANAGAN.

Q. When did you leave the boat the last time? A. Which boat, sir?

CPO2 Kramble

Examination-in-chief

Q. The one you're presently on? A. I've just joined her on the beginning of May this year.

Q. The beginning of May this year. And are you presently sailing? A. Yes, sir.

Q. When did you serve under Lieutenant-Commander Marsaw? A. I was posted to the OJIBWA 15th of July '92 and I left her May 1995.

Q. What position were you holding at the time? A. While I was on the OJIBWA I was the i/c of the engine room.

Q. I/C of the engine room. Did you on occasion have the opportunity to go to the control room? A. Yes, sir, I lived forward so I passed through there regularly and I also stood by for Petty Officer Noseworthy, who is a chronic smoker, and there's no smoking in the control room so I'd often be there on the average of about at least once a day for 15/20 minutes so he could whip off for a cigarette.

Q. Would that be on a fixed schedule or variable? A. No, the way our watch system works it's a rotational system, so that it's always at different times.

Q. Different times. And on those occasion, who would be present in the control room? A. It would vary, sir, from whichever watch it was because we stood one in three, the control room was usually one and two, so it was constantly changing.

Q. Constantly changing. Lieutenant-Commander Marsaw, if you saw him today would you be able to recognize him? A. Yes, sir.

Q. Could you look in the courtroom and identify him if you see him? A. Yes, sir, he's sitting to your left.

CPO2 Kramble

Examination-in-chief

JUDGE ADVOCATE: The witness indicates the accused.

ASSISTANT DEFENDING OFFICER:

Q. Was he present when you were in the control room on those occasions? A. Several occasions, sir.

Q. Several occasions. How would you describe him in his approach to work and what was going on in the control room? A. Lieutenant-Commander Marsaw set a very high standard for the control room watchkeepers and he expected people to meet that standard, so when they made a mistake he would address it immediately.

Q. And how would he address the mistake? A. Normally, it would be a comment to the effect, if it was the trimming officer, "Take charge of the situation, Trim", and then carry on. If he didn't, then his voice would be elevated and say, "For fuck sakes take charge of the situation", and then digress back to the original state.

Q. And who in particular would he address in that manner? A. Whoever the perpetrator was of the mistake.

Q. Were you ever addressed in that manner by him? A. No, sir.

Q. Did he ever address anybody working under you in that fashion? A. Yes, sir. There was an incident after we came off a dock in the summer of '93, where we were coupling-up our fuel system and one of the fuel vents was inadvertently left open which allowed fuel to spill into the bilge in the engine room. By the time I got back to the engine room, the captain, Lieutenant-Commander Marsaw and the individual were there, and when I got back there, being I was in charge, he said, you know, how did he put it? "For

CPO2 Kramble

Examination-in-chief

fuck sakes, who was the idiot that let this happen", and then when I got back there, he says, "Alright, handle it Horse" and then he left.

Q. Why did he call you horse? A. Well, that's the kipper term for the i/c of the engine room.

Q. Okay, and what did you do? A. Well, I had a long hard chat with the master seaman who made the mistake.

Q. Did you ever see Lieutenant-Commander Marsaw go back on the individual? A. No, sir, not at all. He told me to take care of it and I did.

Q. And the word that you mentioned, who was the idiot that did that? Did you ever observe him use that in other context? A. No, sir, that's about it, just a general.

Q. When you were in the control room?
A. No, sir.

Q. In terms of his approach to people in the control room or wherever you have had the chance to observe him on the submarine. How would you compare him to other commanding officers that you had?
A. Well, he was by no means the worst, but he was definitely not Mr Congeniality.

Q. In terms of his approach to the workload, how would you compare him to others? A. He worked hard and he set a high standard for himself and he expected us to do the same, sir, and for the most part most of the skippers I sailed for were like that.

Q. And how did that make life for you?
A. It's a job I signed on for, sir, it was what I did.

Q. You were a member of the ship's company when the submarine came off the slips in the Christmas period of '92? A. Yes, sir.

CPO2 Kramble

Examination-in-chief

Q. Could you describe the period at that time and the workload and ... ? A. Well, it was a labour intensive docking period because the boat just came back from a long trip. At the beginning there was a leave period, then Christmas leave period. So to allow the crew to have some time off we had to work exceptionally long hours when we were all there.

Q. I'm sorry, I may have misled you. The year, was it '92 or '93, do you remember? A. No, it was December '92 ... no, pardon me, November '92 we went up and January 3rd or 4th we came down, of '93.

Q. '93. How was morale at that time? A. Generally, on the ship I would have to say it was on par with normal, but the engineering department as a whole it was quite high.

Q. It was quite high. And after that period, during the rest of your time under Lieutenant-Commander Marsaw, how would you describe morale in general on the submarine? A. It was good, sir.

Q. You were part of the Chiefs' and POs' Mess? A. Yes, sir.

Q. How was morale within the Chiefs' and POS' MESS? A. For the most part it was quite good. There was a few complainers that no matter what happened they would always having something to whine about.

Q. And without citing the exact words what was the general nature of the complaints? A. About the long hours and the hard work.

Q. Anybody in particular who would complain more than anybody else? A. The most chronic complainer in the senior rates mess was a Petty Officer, 2nd Class Conrad.

CPO2 Kramble

Examination-in-chief

ASSISTANT DEFENDING OFFICER: If I may go through my notes, Mr Judge Advocate?

JUDGE ADVOCATE: ...

ASSISTANT DEFENDING OFFICER:

Q. When you were serving under Lieutenant-Commander Marsaw, did you participate in exercises or operations? A. When you mean exercises, sir, ... ?

Q. If there was an exercise, like a fleet ex or ... ? A. Oh, yes, sir.

Q. Yes, you did. What was the attitude of the crew, given the results? A. For the most part it was quite professional.

Q. And were they happy about the results? A. Yes, sir.

Q. In that general sense, what about yourself, how did you feel about that? A. I was proud to be a member of the HMCS OJIBWA, sir, we had the "can do" attitude. If there was a job to be done, the squadron and the rest of the fleet could depend upon us to do it.

Q. And how would you compare the morale that you have observed and lived under during your time on OJIBWA to the morale presently on your submarine? A. I would have to compare the morale on the OJIBWA actually a little bit better than what it is right now on my boat.

Q. What factors would influence morale? A. Workload is the biggest thing it seems. As long as you can get a break once in a while, get home to see your family, morale seems to pick up, and the final outcome of whatever you're doing, like, when you get a "Bravo Zulu" from the admiral it's always good ... you feel proud of that and right now on the OKANAGAN we

CPO2 Kramble

Examination-in-chief

just don't seem to get the recognition we deserve. And with Lieutenant-Commander Marsaw because we did such a good job we always got the recognitions.

Q. But that's also a factor. Any other things, the day-to-day preoccupations that you can think of? A. Nothing I can really think of, sir.

Q. Was there any big factor that you saw under Lieutenant-Commander Marsaw that was the clincher for morale going up or down? A. No, like I say, sir, it was just doing a good job is what helped morale in our department.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. Petty Officer Kramble, do you recall being interviewed by the military police on the 9th of May 1994? A. I don't recall the date, sir, but I do remember being interviewed.

Q. Okay. Did you have an opportunity to review your videotape testimony that you gave during that time? A. No, sir, I do not.

Q. You did not. You began sailing on the OJIBWA in January '93, did you take any time off at all between January '93 and October '93, for sick leave? A. Yes, I was off for two days when I had bronchitis in January and I was flown off for seven days when I had a blood clot in my knee.

Q. You've seen Lieutenant-Commander Marsaw yell and holler at people? A. Raise his voice, sir, yes.

CPO2 Kramble

Cross-examination

Q. Yell and holler at people? A. Hollering is a pretty arbitrary term if you ask me, sir. Raise his voice would've said it better.

Q. Okay, so it's your testimony that you would never see Lieutenant-Commander Marsaw yell and holler at people? A. I wouldn't say yell and holler, again.

Q. Okay, that's fine. Would you ever see Lieutenant-Commander Marsaw, given the way that he would speak to people or call them, that you could see them being embarrassed by it? A. I think everybody's embarrassed when their mistakes are shown, sir.

Q. But I'm asking you not about when mistakes are shown, I'm asking about when Lieutenant-Commander Marsaw on occasion would call at them. Could you see them being embarrassed at that time? A. Because of their mistakes, yes, sir, not because they're being hollered at.

Q. Would you agree that your job on the OJIBWA was i/c engine room and that you spent a couple of times standing a watch for guys and at the very best maybe a dozen? A. No, it would be substantively more than that.

Q. Okay. So definitely substantially more than just a couple of times, maybe at most a dozen? A. Yes, sir.

Q. Is it your opinion that as far as your concerned that submarines have their own definition of what constitutes verbal and physical abuse and maybe your definition of it is a bit different than the navy line or the government line? A. It could be, yes, sir.

Q. Could be or is? A. Could be.

CPO2 Kramble

Cross-examination

Q. But not is? A. That's quite difficult to say though. There's different times when I think that hollering and screaming at somebody is perfectly legitimate. And also there's a point that in the safety of the submarine if somebody gets pushed out of the way I know the government line is that is physical assault, but trying to preserve the safety of 64 other men I don't think it's physical assault.

Q. Okay, and I'm asking you about your own personal definitions of verbal and physical abuse. Is your personal definition of physical and verbal abuse different than the navy line and the government line? A. Depending on the situation I think it's the same as the government, except in emergencies.

Q. You don't get upset if somebody gets a cuff behind the ear, do you? A. Do I get upset? Depending upon the cuff behind the ear. If somebody gets tapped up alongside the head to tell them ... get their attention, no, it doesn't bother me, sir.

Q. So if it's ... somebody gets a cuff upon the ear that doesn't really bother you? A. If it's to draw their attention to what they're doing, wake them up.

Q. What if it's just a cuff behind the ear without for the purpose of drawing their attention? A. Provocation? Well, then I'd disagree with it, sir.

Q. Okay. Is it your perception that you bet ninety per cent of the people on board have actually given someone a cuff up the back of the head? A. Oh, easily, sir, if it draws somebody's attention when they're falling asleep on watch, wake them up.

Q. Okay, you tell the court right now how many people on the OJIBWA that you've observed cuff somebody behind the back of the ear to wake them up? A. Well, I myself have done it, sir.

CPO2 Kramble

Cross-examination

Q. I'm asking you to tell me the crew.
You've just agreed that ninety per cent of the people
on board have done this, I want to know their names?
A. Oh, sir, I haven't witnessed them.

Q. You haven't witnessed them? A. No, sir.

Q. But you're saying under oath that ninety
per cent ... ? A. Oh, quite easily because we talk
about stuff like that, you know, had to shove somebody,
shake them. That's still assault, touching them.

Q. So as far as your concerned a cuff to the
back of the ear is okay, and you feel that ninety per
cent of the people on board the OJIBWA do this although
you haven't personally observed it? A. Yes, sir.

Q. So you're willing to state facts although
you've never had any personal observation of things you
state under oath, isn't that true? A. Yes, sir.

Q. Do you believe in protecting your own?
A. Yes, sir.

Q. And you believe in protecting your own
because when it comes to looking after your people you
go a little bit extra if it's just a minor thing to
help them, because you don't think anyone learns from
being hauled up on a carpet and having it entered on
their record, do you? A. Yes, sir, we call that
keeping the problem in the division.

Q. And that's how you like to take care of
things? A. For minor things, yes, sir. When it's
major things then it goes in front of the captain.

Q. What about things like this? A. If it's
a physical or verbal assault, no, I think it should be
dealt with in accordance with the rules, sir.

Q. But for some things you believe that you
should look after your own and keep things in house?
A. Yes, sir. Again, the fuel incident, somebody

CPO2 Kramble

Cross-examination

sleeping on watch, I can handle that in my department rather than taking it out to the captain.

Q. So if somebody commits verbal abuse that doesn't fall within your definition but may fall in line with the navy definition, you'll still possibly keep that in house and ... ? A. Normally, we'll start there, chat to the people who ... the perpetrator and the victim, and if everybody's happy then that's it, nothing more is said.

Q. And you apply the harassment policy in your own way then, don't you? A. For somewhat, yes, sir.

Q. At the time you gave your interview to the military police, was Lieutenant[N] Tingle ever in charge of you? A. Yes, sir, at that particular point in time he was my divisional officer.

Q. Did you ever have any supervisory function over Leading Seaman Cox? A. Yes, sir. For a short period of time on the OJIBWA he was in my engine room, on my watch, and also we were a technical service team during refit.

PROSECUTOR: At this point, Mr Judge Advocate, I believe we're going to have to enter into a **voir dire**.

JUDGE ADVOCATE: Very well.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: So what's the gist of the **voir dire**?

PROSECUTOR: Mr Judge Advocate, I'd like to refer ... re-ask my questions again to Petty Officer [CPO2] Kramble, the same questions I've asked him during my cross and before the members of the court, then ask him whether he's aware of certain questions

23rd voir dire

CPO2 Kramble

Cross-examination

that have been asked of him and certain answers given during an MP interview on the 9th of May 1994, and wonder whether or not he wishes an opportunity to review his answers that he gave to those questions at this time.

JUDGE ADVOCATE: Very well.

PROSECUTOR:

Q. Petty Officer [CPO2] Kramble, you're aware during my cross-examination before the members of the court that you stated under oath that you would've spent much more time in the control room than simply a couple of times standing watch for guys and at the very best maybe a dozen watches? A. Yes, sir.

Q. Do you recall giving that answer?
A. Yes, sir.

Q. Do you recall being interviewed by the military police on the 9th of May 1994, being asked a question, "What was your job on the OJIBWA?", and responding, "I was i/c engine room"? A. I wouldn't go and answer that a hundred per cent sure.

Q. Do you recall being asked the question, "I/C of the engine room. Did you spend any time in the control room?", and then giving the following answer, "A couple of times I stood by for guys a bit." Question: "Very much time?" Answer: "I'd probably say about maybe a dozen watches at best." Do you recall giving that answer? A. No, sir.

Q. Would it assist you if we put in the videotape and you had an opportunity to refresh your memory? A. Well, if it's on the videotape then I did give it, sir, I'll have to admit that, but I don't recall.

Q. Are you now adopting that that is the statement that you did give to the military police

CPO2 Kramble

Cross-examination

during your interview? A. Again, sir, I don't recall, but if it's on the tape then obviously I did.

PROSECUTOR: Well, then let's go look at the tape, I guess, then, Mr Judge Advocate.

Mr Judge Advocate, I'd like to cue it up a bit earlier, just let the witness listen to it and the questions will be asked at 10.12.54.

VIEWING OF THE VIDEOTAPED INTERVIEW BY THE MILITARY POLICE OF PETTY OFFICER, 2ND CLASS KRAMBLE.

PROSECUTOR:

Q. Would you like to watch that again?

A. No, sir.

Q. Would you agree that that is ... those are the questions you were asked and that was the answer you gave at that time? A. Yes, sir.

DEFENDING OFFICER: Mr Judge Advocate, I'd like to intervene here. I believe there is a portion immediately after this segment that was just played that indicates that he was walking back and forth and circulating freely in the wardroom, and ... sorry, in the control room, and I think that should be played too to ...

PROSECUTOR: The question, Mr Judge Advocate, was how many watches he stood? That's what I asked him on cross-examination and that's the focus of my answers. I haven't asked him if he's wandered around the sub or anything. I asked the man specifically how many watches he stood.

JUDGE ADVOCATE: Well, we'll clarify this immediately because your friend will have the opportunity to ask that question in re-examination, so we'd better listen to the tape during this **voir dire**.

CPO2 Kramble

Cross-examination

Do you have any instructions to give to the
... ?

DEFENDING OFFICER: Just carry on from the
... you were at 12.54?

COURT ORDERLY: Yes, sir.

DEFENDING OFFICER: Mr Judge Advocate, maybe
we should take a short adjournment, the time to fix
this.

JUDGE ADVOCATE: Yes. How long?

DEFENDING OFFICER: Say 10 minutes.

JUDGE ADVOCATE: The court is adjourned for
10 minutes.

ADJOURNMENT: At 1001 hours, 23 October
1995, the court adjourns.

REASSEMBLY: At 1010 hours, 23 October
1995, the court reassembles
and the accused is before it.

VIEWING THE VIDEOTAPED INTERVIEW BY THE MILITARY POLICE
OF PETTY OFFICER, 2ND CLASS KRAMBLE.

JUDGE ADVOCATE: Proceed.

PROSECUTOR:

Q. Do you recall being asked a question,
"Have you seen Lieutenant-Commander Marsaw holler at
people?", during my cross-examination before the mem-
bers of the court? A. Yes, I do, sir.

Q. And do you recall saying, "I would not
say he hollered"? A. Yes, I did, sir.

CPO2 Kramble

Cross-examination

Q. Do you recall being asked a question by the military police, verbal abuse, answer: "Verbal abuse, that's a pretty grey line, I think. As far as I am concerned I don't think I ever saw him, I've seen him holler at people, but in our job I think that's well within the realm of our duties but I don't think I've ever seen him call anyone down to the point where embarrassed by what he called them, I can see them being embarrassed because he hollered at them, because they screwed their job or whatever task they had been assigned but never to the point that he was demeaning." Do you recall giving that answer? A. Not exactly, sir, but if that's what the tape said or the transcript, yes, I must've.

PROSECUTOR: Then I would play if I could, Mr Judge Advocate, start the tape at 10.02, two minutes after ten.

VIEWING THE VIDEOTAPED INTERVIEW BY THE MILITARY POLICE OF PETTY OFFICER, 2ND CLASS KRAMBLE.

PROSECUTOR:

Q. So do you now recall giving that answer to the military police? A. Yes, sir, now I do.

Q. And you were truthful and honest at the time that you did your military police interview? A. Yes, sir, to the best of my knowledge.

PROSECUTOR: I have no further questions within this **voir dire**, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Do you have any questions in the **voir dire**, Lieutenant-Colonel Couture?

DEFENDING OFFICER: No, Mr Judge Advocate.

JUDGE ADVOCATE: No. Thank you.

CPO2 Kramble

Cross-examination

Do you wish that we invite the members back?

PROSECUTOR: Yes, Mr Judge Advocate, at that time I would wish to continue my cross-examination of the witness.

JUDGE ADVOCATE: Very well.

Please, invite the Members back to the courtroom.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

PROSECUTOR:

Q. Petty Officer [CPO2] Kramble, what subordinates do you have that do work watches in the control room? A. Pardon me, sir?

Q. What positions do your subordinates play a role in when they're in the control room, what positions? A. I have people that are either stand first and second panel.

Q. Okay, for a second panel watchkeeper, how long would his watch last? A. If we're one in three, during the days it's three hours and during the nights it's four hours; if we're one and two, it'll be six hours on/six hours off.

Q. And how long would it be for a first panel watchkeeper, how long would his watch ... ? A. Same, again, sir.

Q. Do you recall being interviewed by the military police on the 9th of May 1994? A. Yes, sir.

Q. And did the answers you give them at that time, were they honest and truthful? A. To the best of my knowledge, yes, sir.

CPO2 Kramble

Cross-examination

Q. And you recall me asking you questions today under oath about whether or not you at most stood a couple of watches, at most perhaps a dozen watches during your time on the OJIBWA? A. Yes, sir.

Q. And your answer to me at that time that you stood substantially more than a dozen watches and stood one watch a day? A. Well, to be perfectly accurate, sir, it wasn't ever a complete watch. It was ten minutes here, five minutes there.

Q. So your testimony now is that, in terms of standing watches, you only stood a couple of times, maybe a dozen at most in the control room? A. No, sir, it was substantially more than that but, like I said, it was only short bursts so the guy could go for a cigarette or the heads or a coffee.

Q. So you're not really standing a watch then, are you? You're not standing the three hour watch or a six hour watch? A. No, no. When you're in there though, sir, you're on watch so ...

Q. Do you recall being asked a question by the military police on the 9th of May 1994 - engine room i/c - "Did you spend any time in the control room?", and giving this as the following answer, "A couple of times I stood for guys a bit." Question: "Very much time?" Answer: "I'd probably say about maybe a dozen watches at best."? A. Yes, sir.

Q. But your testimony today in court is that you stood more than a dozen watches at best now? A. Again, sir, it wasn't a complete watch. It was substantially more but at shorter bursts, like, 10/15 minutes.

Q. You never told that to the military police during the interview, did you? A. No, sir, I did not.

CPO2 Kramble

Cross-examination

Q. So your definition of a watch has changed from the time you were interviewed by the military police to the time that you're before this court now today, hasn't it? A. No, sir, my definition of watch is still the same, I just said it wrong at the interview.

Q. You just said it wrong at the interview?
A. Yes, sir.

Q. But now you're saying it right before the court? A. Yes, sir.

Q. Do you remember being asked the question of whether you seen Lieutenant-Commander Marsaw holler at people? A. Yes, sir.

Q. And do you recall telling me that you would not say holler as an answer? A. Yes, sir.

Q. Do you recall being asked a question by the military police and responding, "I've seen him holler at people."? A. Yes, sir.

Q. So what is your testimony now? Did you see Lieutenant-Commander Marsaw holler at people or did you not see him holler at people? A. I would say, no, sir, because holler goes with ranting and raving and he never did that.

Q. So although you said that and you were truthful and honest to the military police on the 9th of May, you now recant that and say that he never did holler at people? A. Yes, sir.

Q. And again you've testified under oath that as far as you're concerned ninety per cent of the people on the OJIBWA cuff people behind the back of the head? A. Yes, sir.

Q. And although that's your statement of fact, you've never personally observed anybody other than you do it? A. I've seen a few people do it, sir.

CPO2 Kramble

Cross-examination

Q. Who? A. I'd rather not say, sir.

Q. I'm asking you the question, you're under oath, answer the question? A. Some of my subordinates, the master seaman that worked for me.

Q. Your subordinates. Are you familiar with the expression, bad leaders make bad soldiers?
A. Yes, sir.

Q. Did you ever have any concerns that maybe your ethos and your particular definition of verbal and physical abuse would transcend down to Leading Seaman Cox and your other subordinates? A. No, sir.

Q. And that they would acquire a behaviour that is inconsistent with Canadian Forces policy?
A. No, sir.

Q. That's never entered your brain once?
A. No, sir.

Q. It's never struck you as a problem?
A. No, sir.

Q. But you will condone your subordinates cuffing people in the back of the head? A. To wake somebody up, sir, yes.

Q. Were these people sleeping at the time or were they just inattentive? A. Both, sir.

Q. So cuffing people in the back of the head because they're inattentive is acceptable conduct by your subordinates in your presence? A. In an emergency situation, if it warrants.

Q. Which emergency situations were these individuals in at the time? A. Any snorting situation is an emergency as far as I'm concerned, sir.

CPO2 Kramble

Cross-examination

Q. I'm asking you the particular incidents that you've told the court about when your subordinates have cuffed people in the back of the head, what particular emergency were at place at that time? A. We were snorting, one of the individuals in the centres fell asleep on the engine.

Q. And what about the time when the person wasn't sleeping? A. Just lackadaisical, off in la-la land, sitting there dreaming about something else.

Q. As far as you're concerned you like to look after your people and you go a little bit extra to keep them from being hauled in on the carpet, isn't that true? A. Yes, sir.

Q. And Lieutenant[N] Tingle is your superior? A. Yes, sir.

Q. At the time you gave this interview to the military police? A. Yes, sir.

Q. And that Leading Seaman Cox at some point in time has been your subordinate? A. Yes, sir.

Q. And if people complain about the way they're verbally treated, in your opinion they bitch and drip most of the time, don't they? A. Yes, sir.

Q. So if Petty Officer [PO2] Conrad complained about the way he was verbally treated, he would just be a drip or a bitcher? A. Yes, sir.

Q. And so would other people who complained about the way they're verbally treated if it doesn't fall within your definition of verbal abuse? A. Yes, sir.

Q. And your definition of verbal and physical abuse is different than the navy line or the government line? A. No, sir, I believe that for the most part it's the same, except that the rules can't apply

CPO2 Kramble

Cross-examination

to every situation because the rules can't be written for every situation.

Q. So there is a bit of a distinction then in the way that you define and apply your definition of verbal abuse? A. Yes, sir.

Q. So you think that there is some significance of wearing dolphins, does that allow you to change the definition of verbal abuse? A. No, sir, it does not.

Q. Or the situations in when it can be condoned or can't be condoned? A. The situation, if it warrants, yes, sir.

Q. So there's times when the Canadian Forces policy as a submariner can be waived and that's just because of the nature of submariners ... the nature of the work that submariner do? A. I don't think it's only related to submarines, sir.

Q. You only relate it to submarines? A. I don't think that is only related to submarines. There's several other jobs that when an emergency occurs, if somebody needs to be pushed out of the way, you push them out of the way, unless ...

Q. I'm talking about verbal abuse here. I'm talking about calling people fucking idiots and fucking cunts and pieces of shit? A. I've never called people a fucking idiot or a fucking cunt, sir.

Q. I'm not asking whether you have or not. I'm asking whether or not you believe the CFAO policy on harassment applies fully to submariners or whether there's some exceptions that it doesn't apply or shouldn't apply? A. To degrade somebody like ...

DEFENDING OFFICER: Mr Judge Advocate, I think the witness has quite fully answered the question and now the prosecution is starting to asking him

CPO2 Kramble

Cross-examination

opinion of interpretation of policy in CFAOs and, I mean, the witness has expressed how he understands it.

He cannot now elaborate any more. He's not an expert in the law and interpretation of Canadian Forces policy. He has given his view. He cannot be asked much more at present.

JUDGE ADVOCATE: Well, your friend is in cross-examination. So far those questions are admissible.

You may proceed.

PROSECUTOR:

Q. As a supervisor you're entrusted with enforcing CF policy on harassment? A. Yes, sir.

Q. Can you find anywhere in the CFAOs where it says that Petty Officer, 1st Class (sic) Kramble can apply it differently than anybody else to his subordinates; such as, Leading Seaman Cox? A. No, sir.

Q. You've just decided to take it upon yourself that way? A. No, sir, I feel that in an emergency situation or if the situation dictates that I have to move somebody or say something in the heat of battle, fine.

Q. So if you feel ... if you personally feel that the situation dictates it, that will allow you and justify you to use your own interpretation and application of things like verbal abuse? A. Yes, sir.

Q. During your testimony before this court, now you shifted certain areas from what you said to the military police. We now know that you sat a watch once a day, all the time, you were always in the control room? A. No, sir, I was there ...

Q. When you were interviewed by the military police ... ? A. ...

CPO2 Kramble

Cross-examination

DEFENDING OFFICER: Mr Judge Advocate, I mean, the prosecution must not mislead the witness. I mean, if he wants to refer again to the interview, he must ... I don't think it was anything like that that was said by the witness.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR:

Q. Okay, you've testified today that you sat one watch a day in the control room? A. I said probably about one watch a day which was also incorrect, sir, because it wasn't a full watch. It was portion of.

Q. Was this your attempt to do that little bit extra to ensure that Lieutenant-Commander Marsaw doesn't get hauled up on the carpet? A. No, sir, I'm under oath and I would tell the truth.

Q. Oh, you said you were telling the truth when you spoke to the MPs and your under oath now, but we're getting inconsistent answers to the same questions, aren't we? A. Yes, sir.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge Advocate.

RE-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. You were just questioned in cross-examination about cuffing in the back of the head during snorting? A. Yes, sir.

CPO2 Kramble

Re-examination

Q. What is the noise level in the engine room during the snorting? A. Extremely loud, sir.

Q. Anything to protect your hearing? A. We have ear-defenders with built-in headsets but unfortunately they don't work to the best of ... a lot of times you can't hear each other.

Q. How easy does it make it to communicate amongst yourselves? A. Well, people who have got a lot of time in and experience we've got hand signals that everybody understands, but if somebody's not paying attention it's a little harder.

Q. And you were questioned about if you considered if Petty Officer [CPO2] Conrad made complaints, you considered him a dripper and a bitcher? A. A whiner.

Q. A whiner or - I don't recall exactly the words that you used - did he ever complain about verbal abuse? A. No, sir.

Q. And about the rules, how do you apply the rules, the CFAO on harassment ... ? A. Could you ...

Q. I haven't finished my question. You were asked about your application of the rule and that under circumstances and it was your interpretation and all of that. Would you deliberately protect a criminal? A. No, sir, I would not.

Q. Where do you draw the line? A. When it comes to something like that, if somebody's done something wrong, fine, I'll try to keep it in my department. But if somebody has actually done something criminal then, no sir, I will not.

Q. And criminal, do you apply the respect of regulations to that? A. Yes, sir.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

PRESIDENT: No questions.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

JUDGE ADVOCATE: Next witness.

DEFENDING OFFICER: Please, call Lieutenant-
Commander Scherber, please ... Commander, I'm sorry.

Commander Scherber

Examination-in-chief

and DSR? A. Actually, during the first time in Ottawa, sir, I was only in DNR, from 1981 till 1983 and then I had other staff positions when I came back from the States, sir.

Q. Okay, then you had an exchange posting in the States, '83 to '86? A. Yes, sir.

Q. And that's where you came back to the other staff positions in Ottawa that I just mentioned?

A. That's correct, sir.

Q. You were captain of HMCS HURON, 1991/1992? A. Yes, sir.

Q. And I understand that in, I believe, April of '92, you became the commander of First Canadian Submarine Squadron? A. That's correct, sir.

Q. How long did you stay as commander of the squadron? A. As the commander of the First Canadian Submarine Squadron, from April 1992 to July 1994, sir.

Q. Okay. Is that correct that Lieutenant-Commander Marsaw was captain of OJIBWA for that period ... for a period when you were the commander? A. That is correct, sir.

Q. Could you recognize Lieutenant-Commander Marsaw if you saw him? A. Yes, sir.

Q. Could you look and if he's present, point him out, please? A. ...

JUDGE ADVOCATE: The witness indicates the accused.

DEFENDING OFFICER:

Q. Could you please inform the court as to - in general terms here - the terms of reference of the commander of First Canadian Submarine Squadron?

A. Yes, sir, as the squadron commander I'm responsible

Commander Scherber

Examination-in-chief

for ensuring that the submarines are operationally ready to meet the tasking of the commander Maritime Command Atlantic, and I'm also responsible for the running of the submarine squadron itself which is located down on jetty 8, in the Dockyard.

Q. Okay. Could you inform the court as to the situation when you took the squadron ... became commander of the squadron in '92 with respect to the three boats, OKANAGAN, ONONDAGA and OJIBWA, what each boat was doing? A. Sir, when I took over command of the submarine squadron HMCS OJIBWA was operational with Lieutenant-Commander Marsaw in command; HMCS ONONDAGA was in the process of changing command between Lieutenant-Commander Truscott and Lieutenant-Commander Woodburn was taking over in the summer, I believe that was May or June '92; and HMCS OKANAGAN, the third submarine, was in refit and we were just in the process at that time of changing over the commanding officers on OKANAGAN from Lieutenant-Commander Bush to Lieutenant-Commander Hickey.

Q. Could you comment on the operation and the challenge that was facing OJIBWA during the command of Lieutenant-Commander Marsaw whilst you were there? A. Sir, the submarines had an extensive period of mechanical problems associated with the engines, primarily, and all three of the submarines had extensive work that had to be done. During that time OJIBWA was in the position of being the one that was finished up first and managed to meet the operational requirements while the repairs were completed on board ONONDAGA in particular, because that was the other operational submarine, and OKANAGAN, of course, was in refit so she really didn't play into the equation here. The engine problem should not be minimized because they were very, very extensive and took a long time to complete the repairs and to make sure that the appropriate activities were undertaken to ensure that the job was correctly done. In the meantime, after those repairs, they ended up finding another significant problem on board ONONDAGA with respect to the crankshaft on board

Commander Scherber

Examination-in-chief

that submarine and this required an extensive docking period during the time that Lieutenant-Commander Marsaw was in charge of OJIBWA. Because ONONDAGA was not available to go to sea during the time that Lieutenant-Commander Marsaw was in command, during my time at the squadron, he was ... he spent a significant amount of time at sea during the 1992 period, in excess of 200 days on board the submarine, and these involved with not only providing training to our own courses in the local areas but he was also involved with doing exercises with the Americans and also doing some other rather special operations that we had worked very hard to build into the schedule. It's very difficult some-time on board the submarine to be involved in a training world all of the time because while it's good training for the people in the surface world and in the air world, in the point of view of the submariner it becomes very, very tedious and rote activities to, you know, to work out at sea. Having said that, the job is, in fact, very, very important and we spend a lot of time at it, and that goes for all the submarines at sea. We had managed to include a couple of operational support missions for OJIBWA, these were operations in support of other government departments. One of them was in support of the Solicitor-General, the RCMP in particular and involved the utilization of a submarine in a counter-drug operation; and a second operational patrol involved the utilization of a submarine in support of the Department of Fisheries on Georges Bank, just off the coast.

Q. Would you comment what, if anything, was peculiar about these two type of operation you just referred to? A. These two operations, in fact, sir, were in support of other ... what we call operations in support of other government departments and the submarines, in fact, were not heavily involved in doing this. There's been numerous discussions about the fact that we should be involved in supporting other government departments and those discussions really only came to fruition here in the last ... during the period from, sort of, 1990 to 1993. OJIBWA, in fact, was the

Commander Scherber

Examination-in-chief

first submarine to be involved in this counter-drug operation. It was a very demanding role for the submarine and involved an extended patrol period. During that time there were some unforecasted mechanical problems with the submarine that they had to overcome and these things were accomplished without jeopardizing that particular mission. With respect to the fisheries operations, once again, submarines had not been used in that sort of a role before. It's very, very difficult for submariners in general that've been told for years to stay away from ships and to then be instructed that, well, we don't really want you to stay away from ships, we want you to get rather close to those ships for identification purposes. It requires a while different mind set, not only for the commanding officer, but indeed the rest of the command team. For those operations specific training exercises were developed at the submarine trainer up at the Fleet School under the charge of Lieutenant-Commander Truscott, and with utilizing those resources and getting the command team involved from OJIBWA, these particular operations were well developed and tried to make sure that they could be, in fact, conducted in a safe and a professional manner. They were extremely successful in the point of view of the fisheries operation in particular, and that got a lot of press here within Halifax. The drug operation, although not nearly as successful from the point of view of nailing someone at the other end for a variety of reasons, none of which were due to the submarine, primarily that the vessel of interest was not very cooperative in its manoeuvring. But it did prove the viability of using a submarine in that particular role, and in my present capacity we have an opportunity to envisage using submarines in those kind of roles again if they come up.

Q. Thank you. I understand that as commander of First Sub [Submarine] Squadron one of your responsibility would've been to write the PERs of a number of people including the three captains of each boat, all three boats, is that correct? A. Yes, sir.

Commander Scherber

Examination-in-chief

Q. I show you a document here. Could you please look at this document and tell the court if you recognize that document? A. Yes, sir, this is a copy of the initial PER that I prepared on Lieutenant-Commander Marsaw and I believe it covers the reporting period from ...

JUDGE ADVOCATE: Could you speak up, please.

WITNESS: I'm sorry, sir. This is the first PER ... initial PER that I prepared on Lieutenant-Commander Marsaw. I believe it covers the reporting period from May 1992 to April 1993.

DEFENDING OFFICER: The prosecution has a copy of this. I would like to introduce the report.

JUDGE ADVOCATE: No objection?

PROSECUTOR: No objection.
THE PER COVERING THE REPORTING PERIOD FROM MAY 1992 TO APRIL 1993 IS MARKED EXHIBIT "MM".

DEFENDING OFFICER: I have additional copies for the president and members of the court.

Q. Commander Scherber, I show you a second document. Could you please look at it and inform the court whether you recognize that document and what it is and for what period? A. Yes, sir, this is the final PER that I prepared on Lieutenant-Commander Marsaw at the time that he was posted from OJIBWA up to the Maritime Warfare School, and it covered the period from May 1993 to October 1993. And both the PERs were rated as outstanding, sir.

DEFENDING OFFICER: I'd like to introduce a certified true copy of the second PER.

JUDGE ADVOCATE: "NN".

Commander Scherber

Examination-in-chief

THE PER COVERING THE PERIOD FROM MAY 1993 TO OCTOBER 1993 IS MARKED EXHIBIT "NN".

DEFENDING OFFICER: Again, I have extra copies for the president and members of the court.

I'll just leave the exhibits here for now. We might refer to it in a moment.

WITNESS: Thank you, sir.

DEFENDING OFFICER:

Q. Actually, let's refer to the first of the PER, for the period '92 ... May '92/April '93 and refer to it as need be. You don't need to repeat the whole content, it's already an exhibit, but can you in general terms inform the court as to what your assessment of Lieutenant-Commander Marsaw had been for that period? A. Yes, sir. During this particular period - as I mentioned this was the initial PER that I'd prepared on Lieutenant-Commander Marsaw in his capacity as the commanding officer of HMCS OJIBWA - I note that during that reporting period he'd been involved in extremely challenging and demanding program: included Maritime Command operations training exercises; two Canadian/US joint submarine exercises where his submarine operated against opposition to American submarines; two operational support patrols which I've already indicated to the court, sir.

Q. I note that in the narrative you have not detailed much more about the two operations. Could you explain to the court why? A. Yes, sir. At the time that this PER was prepared the use of a submarine in support to another government departments, such as a counter drug operation or even in support of the Department of Fisheries, was held very close hold within the command. The Operation Order was prepared for the commander Maritime Command Atlantic signature. The operation itself was run outside of the Maritime Command Headquarters, not involving the submarine command

Commander Scherber

Examination-in-chief

or submarine command personnel, and so it was by direction that the use of the submarine in that particular role was not well publicized. Of course, over the last couple of years we have become somewhat more open in our acknowledgement of what we're using the submarines and ships and airplanes for, and, therefore, if I was writing this particular Performance Evaluation Report today I would be able to expand on in some detail what the operational support patrol actually included.

Q. Okay? A. And there's a number of other activities that the submarine was involved with during the reporting period. I don't propose to run through all of them. I would state, as I have on the PER, that the performance of Lieutenant-Commander Marsaw in his position as a commanding officer of OJIBWA was outstanding and he was rated as the top commanding officer in my submarine squadron during this reporting period. And certainly the manner in which he conducted these operations was also well commented upon by other personnel that were involved in these operations.

Q. Thank you. If you direct your attention to Exhibit "NN", and again without entering into all the details, could you briefly summarize your assessment and any salient point you want to bring to the attention of the court? A. Yes, sir, the second PER, Performance Evaluation Review (sic), was during the protracted time that Lieutenant-Commander Marsaw finished his time of command on board HMCS OJIBWA. His program continued to be quite extensive and he was specifically involved with yet another special operations in support of a joint Canadian/United States scientific endeavour. He also, at the end of the commission of the submarine that had been operating for in excess of five years, was the submarine that was tasked to provide the opposition for the international Fincastle competition which is, in fact, the top level anti-submarine warfare competition for the air community, the maritime patrol air community. It involved participants from the United Kingdom, Australia, New Zealand and Canada. To be the target in such a compe-

Commander Scherber

Examination-in-chief

tition where the people competing have been chosen by their respective Forces is not a simple manner at all, and the submarine in general did extremely well and Lieutenant-Commander Marsaw was largely responsible for that particular result. Once again, this PER was rated as outstanding. Lieutenant-Commander Marsaw continued to demonstrate exceptional performance in his duties and responsibilities, and indeed this PER recommended that Lieutenant-Commander Marsaw should be highly recommended for promotion and employment as the officer in charge of the Canadian Submarine Officers Commanding Course... Commanding Officers Qualifying Course that we were just in the process of getting started up, to be run by Canadians for the first time, in 1994, in September 1994. And I'd also like to point out that in this particular PER that Admiral Mason, the commander of Maritime Command Atlantic, had indicated that Lieutenant-Commander Marsaw was the top lieutenant-commander in a very strong and experienced group of nearly forty lieutenant-commanders in MARLANT. He was also the top lieutenant-commander within my submarine squadron during that reporting period.

Q. I understand you were writing, of course, the PERs for all captains in the squadron? A. Yes, sir.

Q. Could you explain to the court - of course, the boats at sea a lot - could you explain to the court how you prepared the PER and on what basis and observation and whatnot, so that you can truly assess the officers, like, all three captains?

A. It's a very difficult question, sir. I'll try my best. To write the Performance Evaluation Report of a submarine commanding officer is indeed very difficult.

The reason for that is - unlike a surface ship - when the surface ship goes to sea and the task group squadron commander goes along with the task group and he has the opportunity to see his commanding officers at sea, working on their ships, working with other ships, okay.

Whereas in the submarine, of course, the opportunity

Commander Scherber

Examination-in-chief

to deploy more than one submarine or to go to sea for any length of time to see how the submarine is being operated is indeed very, very difficult, since there's only one of me at the submarine squadron. Therefore, it's incumbent upon me to be very cognizant of how I might be able to get the necessary information that will enable me to, in fact, capture the performance of an individual over the reporting period. And to that end I'm, of course, privy to the operations of that submarine, what it is involved in and I also have the opportunity to see the message traffic and reports with respect to how the submarine is performing in exercises in my capacity as the squadron commander. I also took the opportunity to make myself aware of how the submarine was performing in its role during these special operational support roles because, as I mentioned to the court earlier, sir, the information was very close-hold and so I was required to go up to the headquarters in Maritime Command Atlantic and actually seek out specific information on how the operation was going. Of course, I had the opportunity to review any sorts of letters of commendation and messages of observation that might be put forward on the submarine during the course of an operation. I also find it very, very useful to be able to speak to other people that have an opportunity to interact with individuals on the submarine in general, but with the submarine commanding officer in particular. And by that I mean personnel like Lieutenant-Commander Truscott, the officer in charge of the submarine school that was involved in developing the scenarios for the operational support patrols and how he interacted with Lieutenant-Commander Marsaw and his command team. Also there's a requirement for the submarine to be on completion of a working ... extended work period, or docking work period, for the submarine to be visited by the sea training staff to ensure that the submarine is, in fact, safe to be conducting operations at sea, and I rely indeed very heavily on observations from the officer in charge of submarine sea training. I mention that it, in fact, was very difficult for me to get to sea on the submarine, however, in the case of HMCS OJIBWA I was fortu-

Commander Scherber

Examination-in-chief

nate enough to get to sea on three separate occasions on board the submarine and had an opportunity to see how the submarine was being run at that particular time. I think one of the most useful things that actually comes my way is amongst all the other reports and returns that get made by ships and submarines, is the Monthly Report of Proceedings that every commanding officer ... not monthly, I'm sorry, Quarterly Report of Proceedings that every commanding officer is required to provide to the admiral, the commander of Maritime ...

Q. Who's the admiral ... sorry, to interrupt. Which admiral are they providing this for?
A. In this case, it's the commander Maritime Forces Atlantic, and what this report is, is a demi-official letter gets forwarded to the commander Maritime Command Atlantic four times a year, June, April, July, October. And within that letter the commanding officer is entitled to speak about virtually anything that he wants to and highlight to the admiral ... I say I found that particular useful because in my capacity as a squadron commander I get an information copy of that particular report of proceedings and so I get the opportunity to see what the captain's saying to the admiral. I also have the opportunity to ascertain what his assessment is of the morale of the ship's company; what his particular concerns are, if any, that he's bringing forward to the admiral because it's useful for me to know that because if there's something to be actioned, I'd like to know about it ahead of time; any other sort of observations that the commanding officer might have about whatever he's been doing for the last three months, it's virtually fair game to be put into the letter. Normally, the commanding officer would try to limit his observations and comments, but because we are really talking about a three month period here and often times if the submarine is in a docking work period, for example, it's pretty obvious what the submarine is doing. You know, if the submariners or the sailors aren't out at sea then their morale is affected differently than if they're operationally

Commander Scherber

Examination-in-chief

running and that sort of thing, so I found those Reports of Proceeding very, very useful. And with all that particular information I tried to capture what every commanding officer has done during the reporting period, and also tried to develop some sort of a comparative assessment between the commanding officers in my squadron, as I'm required to do.

Q. And that process and those various sources of information, observation and whatnot that you just described, that would be the same way you would assess your other captains as well, of course, subject to if they are in refit it's a little different, but that's the way, the standard practice, to assess your captains? A. That is correct, sir. And the fact that the submarine is in refit does not ... the submarine commanding officer is still invited to produce his Report of Proceedings on a quarterly basis.

Q. Uh-huh, okay. Now, you mentioned that you had been for visits - you said, three visits, I believe - on board OJIBWA. Do you remember roughly the dates and what was the occasion? A. Yes, sir, within the submarine squadron we've developed a specific training course that we call, Submarine Officers Continuation Training, and what this is, is essentially a two week, 10 day to 14 day, course that we have prepared in squadron and what it involves is taking officers to sea, normally executive officers or operations officers, at that sort of level, and, in fact, giving them the opportunity to experience what it's like to be in command of a submarine. And we break the training up into two phases really out at sea, where the first week is normally involved with conducting attacks against surface ships; and the second week is involved with conducting special operations that we'd normally expect a submarine to get involved in; such as, taking photographic reconnaissance of a lighthouse; or getting ready to land ... sorry, doing a bottoming in a particular area; or dummy a torpedo firing; laying of mines, okay, those sorts of activities. And the reason why we do that is that we are very anxious to give officers an

Commander Scherber

Examination-in-chief

opportunity to experience what it's like to be the duty captain, and the only way that we can really do that is to take them out to sea. We spend a lot of time up at the submarine trainer giving people the necessary tours so that when they get out to sea they can perform the job. But there's no substitute to being actually at sea, on board a submarine with 20 other people in the control room, and then you're trying to conduct an attack on two or three ships that are operating in close proximity to the submarine.

Q. What's your role? I understand that you supervise and assess this particular course, is that correct? A. I'm the officer in charge of the course, it's my course, which brings a very interesting state to the submarine when I march on board and explain to the commanding officer that it's my course, but, of course, he's responsible for the safety of the submarine. But, yes, the course is run by the squadron and it is, in fact, a very demanding sort of activity for the submarine. The reason I say that is that at some particular time these additional individuals come on board the submarine, they have to be billeted in the living spaces of the submarine, and it's an additional number of people that have to be borne by the submarine. There's that particular aspect and, of course, the other aspect is that during that two weeks it's just like having a commanding officer for ... or another commanding officer for 24 hours a day. There are numerous briefings that have to be provided to the ship's company, the command team, and it's very, very disruptive to the normal operations of the submarine. And having said all that, the support that was provided for the course on board OJIBWA was simply outstanding and second to none.

Q. Did you observe Lieutenant-Commander Marsaw, the captain of OJIBWA, did you observe him performing, running phases of operations? A. Yes, sir, as the commanding officer of the submarine he is, in fact, responsible for the overall safety of the submarine. While the students were doing their partic-

Commander Scherber

Examination-in-chief

ular attack, using the forward periscope, for example, Lieutenant-Commander Marsaw was responsible for the safety of his submarine, and he was using the after periscope. So for every operation that we conducted he was doing each and every one of them along with the students. Also the command team on board, it put a big demand and strain on them and not one time did they indicate that they were unhappy with providing support to this particular training initiative from the top to the bottom, and it did involve the entire command team.

Q. The running of the ship, could you tell the court whether you had a chance to observe Lieutenant-Commander Marsaw raise his voice or type of activity like this on board? A. During my time on board, sir, for the submarine officers continuation training serials, one of the things that we tried to stress to the students was that you need to be very, very aware of everything that's going on around you as the duty captain. You're not just conducting an attack on three or four surface ships, or you're not just, you know, conducting a dummy mine lay. You've got all sorts of other things in the control room that you need to be aware of and need to be cognizant of. We spent a lot of time briefing, Lieutenant-Commander Marsaw and myself, and the students spent a lot of time talking about, you know, being aware of what's going on in the control room and also taking charge of the individuals there. There can be no doubt that during those particular serials when people were at their stations for a considerable period of time, yes, they were swamped around and things, okay, but if a person wasn't on ... if the, you know, the submarine wasn't in trim, we would wait for one of the duty captains to say something and if he didn't say something then, of course, Lieutenant-Commander Marsaw would say, "The submarine isn't in trim. Engineer get the trim sorted out", "Helmsman", you know, "mind the course", okay, but those sorts of things that you would expect a commanding officer to do. And that, in fact, is one of the more difficult things for the students because, of course, they are apart of their ship's company and some

Commander Scherber

Examination-in-chief

of the students that were on the course were from OJIBWA, and sometimes you almost take it for granted that everything's going to work out well for you when you're doing your attacks and things, and that's not really reality. Therefore, the requirement to identify things that are incorrect and correct them exists regardless of whether you're on course or whether you're out at sea.

Q. And I understand you had three similar visits on board OJIBWA for that purpose of OCT in June '92? A. Yes, sir, I was on board the submarine during the early part of June 1992, just after I got to the squadron. In fact, that was my first submarine officers continuation training course also, so it was a bit of a learning experience for myself. I had the opportunity to ride OJIBWA again during February of 1993 when we did one of these serials, and we did a second one in June of 1993. In addition to providing me the opportunity to be on board to assess the students that were being put into this particular position, it also gave me the opportunity to walk through the submarine at anytime that I wanted to and talk to the members of the ship's company and that is something that I normally don't get a grand opportunity to do. So while I was out I, in fact, tried to do that as much as I could and took the opportunity to visit the various messes and speak to the people in the engine room and just ... a lot of them sometimes don't see the submarine squadron commander. So it was an opportunity for me to meet them and talk to them about things, submarines in general, or what the, you know, whatever they were sort of interested in, everything from the replacement of submarines to whether they were going to get a pay raise or not.

Q. Could you inform the court whether at that time ... I should say in those occasion, I understand you carried such visits and all three times you were on board and you would talk to people like this. Could you inform the court whether any concern or complaint were brought to your attention by either

Commander Scherber

Examination-in-chief

junior rates, senior rates, or officers regarding the way the Captain was treating them or anything of that nature? A. No, sir, submariners being submariners will probably always find something to complain about, but how the submarine itself was being run and how they were supporting our course in particular was never brought up in an adverse fashion at all during my time on board.

Q. Or any complaints whatsoever about the way the captain was treating the crew? A. No, sir.

Q. What, if any, opinion did you form from your observation of the morale of the crew, as you saw it? A. My assessment of the morale of the crew was that it was very good. As I mentioned earlier on, sailors tend to ... their morale tends to be higher when they're out at sea, and even the fact that we were working them very hard in support of this particular training activity, they were anxious to get on with it and looking forward to the next operation, looking forward to the next opportunity to visit a foreign port, and overall I would say the morale was very, very good.

DEFENDING OFFICER: If I may have a moment?

JUDGE ADVOCATE: ...

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

PROSECUTOR: Thank you, Mr Judge Advocate. I'd like to raise a couple of matters in a **voir dire** before I begin my questioning in the presence of the members of the court. I think that's going to take us right up to the lunch hour as well.

24th *voir dire*

THE PRESIDENT AND MEMBERS RETIRE.

PROSECUTOR: Mr Judge Advocate, I wonder before I begin if I could have a five minute adjournment?

JUDGE ADVOCATE: Very well. Do you need the witness to start with or ... ?

PROSECUTOR: No. If the witness is free for an adjournment as well, that's fine.

I just have to go get some papers ...

JUDGE ADVOCATE: No, but I mean when we start with the **voir dire**, do you need the witness or should we release him right now?

PROSECUTOR: Perhaps, then I can explain to you where I'm going, so in the absence of the witness, that might be preferable.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: Maybe we should take 10 minutes since we've been here for a little while.

JUDGE ADVOCATE: I will ask the witness to withdraw from the courtroom and we'll adjourn the court for 10 minutes.

THE WITNESS RETIRES.

ADJOURNMENT: At 1120 hours, 23 October 1995, the court adjourns.

REASSEMBLY: At 1130 hours, 23 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Can you inform me about the gist of the **voir dire**?

PROSECUTOR: Yes, Mr Judge Advocate. There's two distinct pieces of evidence the prosecution is seeking to have introduced, or be able to question the witness on during the main trial.

The first concerns an incident in July of 1992, where Commander Scherber witnessed Lieutenant-Commander Marsaw at the CFB Halifax Wardroom using inappropriate language to a fellow officer. It's my understanding that Commander Scherber did formally discuss the matter with Lieutenant-Commander Marsaw, orally reprimanded Lieutenant-Commander Marsaw for the conduct and had Lieutenant-Commander Marsaw write a formal apology.

We're seeking the introduction of this evidence, or the ability to question in this area because it's relevant for proving an incident where Lieutenant-Commander Marsaw is told and counselled by a superior on not using inappropriate language or insulting language to fellow Canadian Forces members.

One of the things I have to prove on the 129 - I believe it's charge four concerning verbal abuse - is that the accused knew or ought to have known that his language was abusive or insulting and that could cause prejudicial effects. One of the ways in proving this is obviously showing what a reasonable person would have known. At the same time focussing in on incidents where the accused himself would have known that certain types of language is insulting or abusive.

We have other witnesses such as Wamback, Virgin, Dussault, LeClaire, Higginson going up to the accused saying, this is the effect of your type of language and in different ways saying, I don't appreciate it. That's evidence that I can use to showing that he - not only a reasonable person would've known but the accused himself. But here we have a situation where his exact superior is reprimanding him for being verbally abusive.

Perhaps, my friend will say it's not relevant because it didn't happen in a submarine. I believe it is relevant because what is at play here in this court with this charge is a Canadian Forces policy on harassment, 19-39, using belittling, insulting or demeaning language.

This is a very clear incident of where he, in fact, has been informed, been formally reprimanded for it and brought to his attention, and this in July '92. We know that he continues his subsequent activity - at least alleged by the prosecution - until October '93. So that's one piece of evidence we're seeking to get in.

Another distinct area of evidence that the Crown is seeking to be able to question the witness on in the presence of members of the court concerns events surrounding the breaking story in the *Mail-Star* concerning allegations on board the OJIBWA. In December 16th, '93, we know the story comes out but the sub squadron and MARLANT know that the story is breaking at least a week in advance.

And at that point Commander Scherber contacts Lieutenant-Commander Marsaw, informs him of the allegations, asks him for his response. Lieutenant-Commander Marsaw provides, I believe, a seven page written response to Commander Scherber, who knowing that an investigation, we would allege, is coming about - that this is a key issue - shreds the document, destroys the document.

This information - and it can be worded in the presence of the members of the court without referring to the actual statement - but simply, did he receive any evidence which he considered relevant to the allegations that were being raised by the *Mail-Star*? Did he destroy any evidence that might've been relevant to those allegations?

That's what we're seeking or attempting to have brought before the court. It's relevant because the Crown witnesses, or the prosecution witnesses, have been repeatedly challenged with regards to their credibility. If verbal abuse is really happening on board the boat, why didn't you complain? The witnesses - a number of them - have consistently said that they simply didn't have faith in the chain of command above Marsaw, and that's SML. This is evidence which buttresses their credibility given that the issue has been raised by defence counsel and been used as a point of attack on cross-examination.

I now have some evidence to show that SML - at least with regard to this particular occasion - didn't want to deal with the situation. And one of the ways I could argue that is by showing that he did have relevant information concerning allegations of verbal abuse and harassment and rather than use the information, take the initiative, he ends up shredding the document. So those ...

JUDGE ADVOCATE: What you want to do is to back up the credibility of your witnesses?

PROSECUTOR: It's a live issue now. The defence, because of their line of cross-examination, has consistently challenged the credibility of the witnesses by saying, why didn't you report it? Don't you recall there's QR&O 19.26? Don't you know you can go around the chain of authority? The witnesses are getting battered on that question because they all have the response, we didn't have faith in the chain of command.

This piece of evidence in conjunction with other pieces of evidence allows me to show that the chain of command did know, did have knowledge, and in some cases ignored it, or in this case destroyed it. And that is evidence that allows me - because it is now a live issue before this court given the line of cross-

Trial within a trial

examination - it is a live issue, therefore, evidence such as this, I would argue, is relevant.

Otherwise, the court is left in a position where they just simply see prosecution witnesses getting questioned on this, them saying, we had no faith in SMI, and the Crown not able to provide evidence to show what the attitude of SMI to things like harassment was at the time.

TRIAL WITHIN A TRIAL

JUDGE ADVOCATE: Very well. You may call your witness.

PROSECUTOR: Thank you.

Trial within a trial

Commander Scherber

Examination-in-chief

Q. Okay. What was there in particular about what you had observed at the wardroom that caused you to take the action you took. You just, I think, referred to conduct of Marsaw, but I'm not sure if that was his verbal acts or his physical acts or ... ?

A. Just more his ... the fact that he was conducting a one sided conversation and was quite vocal in his particular opinion.

Q. And do you recall, to the best of your recollection, what you said to him when you verbally counselled him? A. I said just about the same thing that was in the letter, and in my mind that closed out that particular incident.

Q. Okay, and we don't have the letter before us though. If you could relive what was in the letter and what you verbally said to him? A. To the best of my recollection I indicated that his behaviour in the wardroom on that particular time was inappropriate and I wanted him to know it and that's it.

Q. Now, turning to another matter, you're aware of the 16th December '93 article that was published in the *Chronicle-Herald* concerning allegations arising from the OJIBWA? A. Yes, sir.

Q. How far in advance were you aware that these types of allegations may be published? A. To the best of my recollection I was initially made aware that there was some questions about the operation of the submarine that was being looked at by one of the reporters from the *Chronicle* newspaper, and I believe that this was around the middle of November. I approached the public affairs officer in MARLANT, advised him and he - in fact I wanted him to be the point of contact for the reporter with respect to questions about OJIBWA.

Q. Okay. At any time prior to the actual publication on the 16th of December '93, did you take

Trial within a trial

Commander Scherber

Examination-in-chief

any effort or make any actions to notify Lieutenant-Commander Marsaw of the substance of the allegations?
A. Yes, sir, there were in fact numerous allegations and initially when the reporter was pressed for specific questions for the command to answer, he talked about submarine safety issues and engineering issues, okay, that were well within the scope of myself or the squadron staff or the MARLANT staff to answer. When the initial investigation was going on I, in fact, did call Lieutenant-Commander Marsaw, who was on the French language training course, Block course, in Québec, and indicated that, you know, there were these questions being asked and that from what I saw up to that time, you know, we had the requisite information to answer those particular questions about the engineering status of the submarine. And I advised him that I was providing him a heads up that this was going on. I didn't know when they were likely to publish the story because we were still very anxious to - we, being the public affairs and myself - very anxious to get the specific questions where answers were being sought.

Q. Did he give you a response to the various allegations? A. Who?

Q. Lieutenant-Commander Marsaw? A. Not for the initial ones because they all had to do with the submarine operations and some allegations about specific equipment on board the submarine. As I mentioned the expertise to answer that was well available within the squadron.

Q. Sure, okay? A. As the reporter kept developing the story there was a second set of allegations that were put forward that now didn't involve the operation of the submarine. I think they talked about ... made allegations of physical abuse against Lieutenant-Commander Marsaw, and we got a fax copy of the specific questions that the reporter was ... or the allegations that he was making, and the public affairs officer in MARLANT provided that to me. I had a look at it and the issues and the allegations that were

Trial within a trial

Commander Scherber

Examination-in-chief

being made, there was no expertise in my squadron to deal with them. The majority of them - these particular allegations involved the time before I assumed command of the squadron - and it wasn't really clear ... I had nobody to refer to, okay, to sort of say, well, you know, are these true, okay? What do you know about them, okay? Because the only person that was really available to me in the squadron was Lieutenant-Commander Virgin, who was on board OJIBWA prior to coming into the squadron, but not even he would've been necessarily aware of all of the allegations. I felt that it was important for me to, you know, try to ascertain the validity of the allegations in case they were, in fact, going to be printed.

Q. Did you take steps to do that? A. Yeah, bearing in mind that the article had still not been published. We weren't, within MARLANT, certain what eventually was going to come out of it. And on the advice of the public affairs person and, indeed, myself, I, in fact, told Lieutenant-Commander Marsaw that we had the second set of allegations and invited him to provide background information to me, okay, about these particular allegations from the point of view of being able to speak to them if, in fact, they were put forward as part of the story. Lieutenant-Commander Marsaw reviewed the papers and, in fact, provided some background information to me from St-Jean.

Q. And how did he provide that information to you? Was it over the phone or in writing or ... ? A. No, he provided me a summary of background information to the various allegations that were on the facsimile sheet. Having done that we're now in the position where I have obviously been briefing Lieutenant-Commander Marsaw's commanding officer, who is Captain[N] MacLean, up at the Warfare Centre at this time, and also, of course, have had discussions with the chief of staff and indeed the admiral in MARLANT as to these particular allegations and the story. Based on those discussions it was decided that I, in my position as the commander of the squadron, would pre-

Trial within a trial

Commander Scherber

Examination-in-chief

pare a Significant Incident Report which is a normal report of that goes to the headquarters to provide information about virtually anything that's deemed important to inform the headquarter of. I did that on the - I think it was the 13th of December - and at that time I also spoke to the British Defence Attaché in Ottawa because within the allegations they were talking about an exchange officer who had been serving on board a Canadian submarine.

Q. Would it be fair to say that by the 13th of December an investigation has or is about to be conducted concerning the allegations arising from the OJIBWA within MARLANT? A. No, sir, I think it's fair to say that probably as of the 15th of December, when there was an update to the Significant Incident Report and prior to the article being written. It was very clear in there that there was, in fact, an investigation by the MPs, the admiral had ordered so, and that the investigation would be conducted under the auspices of the base, the base commander, for obvious reasons.

Q. And that was on the 15th? A. To the best of my recollection, yes, sir.

Q. Lieutenant-Commander Marsaw's summary that he gave to you, what was its eventual fate? A. Its eventual fate was that once the investigation was commenced, okay, and once the story was printed, which was two or three days later - I can't recall exactly how many days, but there's not many days between them - within the story none of the allegations that had been faxed to the public affairs officer in MARLANT were used in the story, and as a consequence I say no reason whatsoever to retain that background information and it was destroyed.

Q. Okay, on what date? A. Probably it would've been after the story was actually printed because we didn't know what was going to be in the story and, in fact, I believe that the reporter provided a fax copy of the article in advance of publica-

Trial within a trial

Commander Scherber

Examination-in-chief

tion, some half a day in advance to indicate what the story was going to say or that - I can't recall exactly what the procedure is - that the story, in fact, had been vetted by their legal personnel and that's it.

Q. Uh-huh, sure. By the time you were interviewed by the military police for this investigation, had that document been destroyed? A. Yes, sir.

Q. Do you recall the allegations that were printed in the 16th December '93 article? A. Not in great detail. They were more of a general nature that talked about verbal and physical abuse of the ... utilized by the commanding officer.

Q. And is it your testimony today that the draft material that you were getting from the public affairs officer that you passed on the Lieutenant-Commander Marsaw did not include any allegations of verbal or physical abuse? A. No, I'm saying that the ... I, in fact, did not run through the second set of ... specifically what the second set of questions were, but those were the ones that did talk about the abuse, okay. If you recall the first questions that we got were simply to do with submarine operations. The second set of allegations, okay, involved the, you know, alleged misconduct of the, you know, the submarine commanding officer.

Q. And did you on the 8th of December '93 send a minute sheet to Lieutenant-Commander Marsaw, including the public affairs statement concerning allegations of physical and verbal abuse, to Lieutenant-Commander Marsaw? A. Yes, sir, I did.

Q. So you sent him allegations concerning physical and verbal abuse and that's, in fact, what the newspaper reported on the 16th of December? A. Not the specific allegations that were provided ... sorry, the specific allegations that were provided to MARLANT were not simply restated within the article.

Trial within a trial

Commander Scherber

Cross-examination

Q. No, they were more general, but the subject matter was the same? A. Yes, yes, sir.

Q. But nonetheless you destroyed Marsaw's response somewhere around the ... shortly after the 16th? A. If that's when the article came out, yes, sir.

PROSECUTOR: There are no further questions.

JUDGE ADVOCATE: Thank you.

Cross-examination?

DEFENDING OFFICER: There's a document that I needed, I don't have here. If I may have a moment, please?

JUDGE ADVOCATE: ...

CROSS-EXAMINED BY DEFENDING OFFICER

Q. Commander Scherber, isn't that right that the so-called July incident, July '92 incident at Stadacona, you did not actually witness the whole episode? A. That is correct, sir, I only saw the last portion of something.

Q. Yeah, and it involved a lady? A. That is correct, sir, yes.

Q. And she's not an officer? A. I did not know, sir. I believe I mis-stated the answer. I don't believe that she was an officer. Or she may have been an officer at one time and she's not an officer now. I don't really know her status.

Q. Okay? A. I think that when we ... excuse me.

Q. And the reason that - and I understand that you formed the opinion that Lieutenant-Commander

Trial within a trial

Commander Scherber

Cross-examination

Marsaw was intoxicated at the time - he was, like, under the effect of alcohol and that was part of the behaviour that you did not appreciate? A. That was my assessment, yes, sir.

Q. You cannot even quote any precise words he may have used. What you were not impressed with was his general demeanour, the fact that he was drunk and that he was running a one-way conversation with that lady? A. That is correct, sir. That woman was also not in uniform at the time.

Q. Is that correct to say that you wrote a letter to him and that's all you thought this incident was warranted, just that he was drunk and maybe somewhat behaving in an inappropriate manner? A. That is correct, sir, what I ... my intent was to make it very clear to Lieutenant-Commander Marsaw that I didn't approve of that sort of activity and I believe that I achieved that.

Q. In fact, yeah, you did place a letter on his file for a period of one year and after that, when you were satisfied, that was removed and that was the end of this? A. Yes, sir, I notified Lieutenant-Commander Marsaw that I removed the correspondence from the squadron file.

Q. Okay, and you are aware that there are provisions; for example, in the QR&O for a reproof and so on and so forth? A. Yes, sir, I'm aware of that, and in my opinion it was not warranted in this particular instance for the simple reason I looked upon it as a mistake, a one time activity, and a mistake that was brought to the commanding officer's attention and, as I mentioned, that he readily admitted to.

Q. Uh-huh? A. Error of judgement.

DEFENDING OFFICER: If I may have a little moment, I'm getting lost in my paperwork here?

Trial within a trial

Commander Scherber

Cross-examination

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER:

Q. I show you here the ... sorry. Commander Scherber, I show you four sheets here, of paper, could you tell the court whether you recognize this? Isn't that the document that you sent to Lieutenant-Commander Marsaw sometime in December '93? A. That is correct, sir.

DEFENDING OFFICER: I would like to introduce this document, subject to the prosecution's position

PROSECUTOR: No objection.

JUDGE ADVOCATE: All under the same ... ?

DEFENDING OFFICER: Yeah, it's a one document. It should be stapled together.

JUDGE ADVOCATE: Thank you. "VD24-1", four pages.

THE FOUR-PAGE MEMORANDUM IS MARKED "VD24-1".

DEFENDING OFFICER:

Q. I show you a document here, could you look at that document, please? Is that correct that this is the document you received, having sent the other document I just showed you, the document that you would have eventually destroyed? A. That is correct, sir.

Q. That is correct. Isn't that correct too that this document bears no date? A. No, sir.

Q. No signature and no signature block even?
A. That is correct, sir.

Trial within a trial

Commander Scherber

Cross-examination

Q. So, basically, you only assumed. You don't even know the actual author of this document by looking at the document? A. By looking at the document, no, sir.

Q. And that document that I showed you just came to you and that's it. You look at this document, there's no date and there's no signature block nor any signature, is that correct? A. That's correct, sir.

Q. I know we have touched upon that in the main trial but now we are in a **voir dire**. I show you "VD24-1" ...

JUDGE ADVOCATE: It's to remind you that it is the 24th **voir dire**.

DEFENDING OFFICER: That's correct, sir, that caught me by surprise.

Q. At para 3 of the "VD24-1", reference is made to MARLANT. Could you tell the court what MARLANT is and who's the head of MARLANT? A. MARLANT stands for Maritime Atlantic and I use this particular term collectively in that, as I mentioned earlier on, I had apprised the admiral of the allegations and I had also had discussions with the chief of staff and I was also speaking to the public affairs officer within MARLANT and ...

Q. So MARLANT is headed by an admiral, is that correct? A. That's correct, sir.

Q. And you had spoken to a chief of staff at MARLANT who ... what rank would that be, captain or ...? A. It's a naval captain, sir.

Q. A naval captain. And you said also that you briefed the Warfare Centre was it? A. Yes, sir.?

Q. Concerning the matter? A. Yes, sir, I spoke to the commanding officer of the Warfare Centre

Trial within a trial

Commander Scherber

Re-examination

because, of course, Lieutenant-Commander Marsaw had been posted from the submarine in October and was actually on the staff of the Warfare School. In my discussions with the commanding officer of the Warfare School, he indicated that it would probably be better for the submarine squadron; i.e., myself, to be involved with addressing these allegations because he, in fact, didn't have anyone at the Warfare School to do it. Lieutenant-Commander Marsaw was on course, and the original allocations ... excuse me, the original allegations, as I mentioned, were well within the purview of the submarine squadron to answer.

Q. And isn't that right too to say that this request you had arranged with the public affairs officer and all that, and it was in your mind anyway, it was for that purpose that you were obtaining that?

A. That is correct, sir, to be in the position to respond to ... if a specific allegation was made to be able to respond to it.

Q. And that was ... when was it that you sent the special incident report regarding this whole matter? A. I believe that the Significant Incident Report ...

Q. Significant, sorry? A. Was sent on the 13th of December with an update on the 15th, sir, to the best of my recollection.

DEFENDING OFFICER: Thank you very much. I have no further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY PROSECUTOR

Q. With regard to the July '92 incident, is it your testimony that the individual female was a civilian that you saw Lieutenant-Commander Marsaw having the one-sided conversation with? A. I didn't

Trial within a trial

Commander Scherber

Re-examination

know. She was not in uniform. She was in the wardroom
...

Q. Did you see a copy of the letter Lieutenant-Commander Marsaw had sent to her? A. He asked me if I wanted to see it and I said, "No". I took his word that having been directed to send a letter of apology that he indeed would as it turned out.

Q. Can you conclusively state that she was a civilian at the time? A. No, sir, I can't.

Q. Again, sir, with regard to the response, you stated that there's no name or date on it that could connect it to an individual, is that correct? A. There's no date. There's no name or date on the papers.

Q. When you read through it, sir, does the individual who wrote that use the first person I and discuss certain aspects of the OJIBWA? A. The first person I is used, yes.

Q. Based on the comments that are made in there with regard to the first person I, who do you think may have written that document? A. ...

DEFENDING OFFICER: Mr ... well, I suppose it's probably a matter of weight. He didn't saw the letter written. The word "I" is used but he just simply cannot say. I can say, I, Kirby Abbott, I'm pleased to be here today, and does that mean that it's significant as to who wrote it.

PROSECUTOR: It is significant if I present my friend with a letter that says that, I, Kirby Abbott, am pleased to be here today, and I'm physically present at the time I deliver the letter. I think when you add different pieces of facts together you can quickly identify who the author of the document is.

Trial within a trial

Commander Scherber

Re-examination

JUDGE ADVOCATE: It's a matter of weight.

PROSECUTOR:

Q. Again, sir, with regard to reading that and seeing how the first person I is used with regard to some of the facts in there, referring to an individual's XO and things like that. From your reading who would you think has written that document? A. It could've been the commanding officer.

Q. And how did you receive this document, do you recall? A. This was couriered to me from St-Jean. There was some sense of urgency to ... from the point of view of not knowing when the story was likely to be published.

Q. So it was couriered to you from St-Jean. Any return address on it or name? A. I can't recall because I personally didn't sign.

Q. Where was Lieutenant-Commander Marsaw at the time that you received this? Was he in St-Jean? A. He was doing a block French course, that's correct, sir.

Q. Do you recall being interviewed by the military police on 18th January '94? A. Yes, sir.

Q. Do you recall being asked whether you had any copies of the letter and responding, "No, I may have it. He may have had on file, I believe I may have passed any discs or stuff to Captain[N] MacLean. I destroyed mine."? A. ...

DEFENDING OFFICER: Mr Judge Advocate, does that arise from cross-examination? It doesn't appear very clear to me in any event.

JUDGE ADVOCATE: That's a good question.

Trial within a trial

Commander Scherber

Re-examination

PROSECUTOR: Well, we know possibly, depending on the answer, that there is a letter that comes in to the office couriered from St-Jean. We know Lieutenant-Commander Marsaw is in St-Jean. We now know that the writing style and the contents of the response appear to be coming from the CO of the OJIBWA and now we may, in fact, have an additional link where discs are actually passed from Commander Scherber to Captain[N] MacLean. And depending on what those discs are and where they came from that would be a further evidentiary link to go to the weight concerning the issue of identity.

JUDGE ADVOCATE: But that does not answer the question if the matter was raised in cross-examination or not.

PROSECUTOR: I believe it was in the sense that my friend gave the witness a letter that hadn't been introduced or in direct examination, asked him whether this was the response he received. Further asked him whether he could identify by anything on the document, the name, the identity of the author. These are all issues that relate to that matter being raised.

DEFENDING OFFICER: Yeah, I said the date and the signature block.

JUDGE ADVOCATE: You may proceed.

PROSECUTOR:

Q. Sir, do you recall whether you may have passed discs to Captain[N] MacLean? A. I don't recall passing discs to Captain[N] MacLean.

Q. Okay, do you recall being asked that question and giving that answer to the military police on 18 January 1994? A. To the best of my recollection I can only recall briefing Captain[N] MacLean as to what the status of the allegations were and may have shown him the fax for his own information so that he

Trial within a trial

Commander Scherber

Re-examination

would have background information from the point of view of if it came out in the ... if a specific allegation came out in the press.

Q. Regardless of the actual author of that response, would you agree that it does include information concerning allegations of verbal and physical abuse? A. ...

DEFENDING OFFICER: Mr Judge Advocate, again, I don't think that arises, I mean, if we're going to start a new examination. My question was directed as to the identity, I talked about the July incident, about a number of things but I did not raise this particular subject, again.

JUDGE ADVOCATE: No, but you raised the fact that it was not signed and dated and your friend is trying to prove who's the author of the document, so objection denied.

Go ahead.

PROSECUTOR:

Q. In terms of the substance of the response, would you agree that it includes reference in relation to allegations of verbal abuse and physical abuse? A. The response attempts to answer the allegations that were provided ... or that were indicated, provide background information about specific allegations.

Q. Which was eventually published in general terms a day or two later? A. Yes, sir.

Q. And a day or two before you shredded that document? A. That's right.

PROSECUTOR: No further questions, thank you.

Trial within a trial

JUDGE ADVOCATE: Thank you. I have no question for the witness.

WITNESS WITHDRAWS.

Do you wish to call any other witness in this **voir dire**?

PROSECUTOR: I do not, sir, thank you.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, do you wish to call witnesses in this **voir dire**?

DEFENDING OFFICER: No, I do not.

JUDGE ADVOCATE: Now, it's twenty-two after twelve. We have already passed lunch-time, do you wish to address at this time or after lunch?

PROSECUTOR: I'm completely easy, sir, whatever you wish to do is fine by me.

DEFENDING OFFICER: I'd be ready to address if my learned friend is. It's up to you as well.

JUDGE ADVOCATE: How long are you going to take?

DEFENDING OFFICER: I won't be very long.

PROSECUTOR: The infamous five minutes. I'm going to incorporate my previous comments to you and adopt those and that'll save a lot of time.

JUDGE ADVOCATE: Okay, I will hear your arguments right now.

PROSECUTOR: Okay, Mr Judge Advocate, I'd simply incorporate the arguments that I made to you prior to the witness being called to the stand to argue why both areas of evidence are relevant for the Crown.

Trial within a trial

Prosecutor

Address

I may have omitted with regard to the instant involving Lieutenant-Commander Marsaw's conduct in the wardroom to include another base upon which it is relevant. The defence has introduced his PERs, has got the witness to discuss Lieutenant-Commander Marsaw's conduct and performance and officer-like qualities, directly and indirectly through introducing the PERs. This is a piece of information that I can use to challenge his credibility on the image that he projects of Lieutenant-Commander Marsaw before the court.

So in addition to, the knew or ought to have known requirement under the 129, this ...

JUDGE ADVOCATE: I don't follow you, I mean, you referred to what document that it's a piece of information you can use to challenge his credibility, "VD24-1"?

PROSECUTOR: No, I'm sorry, I apologize. The incident in the wardroom mess.

JUDGE ADVOCATE: Okay, the incident ...

PROSECUTOR: He sees Lieutenant-Commander Marsaw drunk having a one-way conversation with an individual ...

JUDGE ADVOCATE: Could be used to challenge whose credibility?

PROSECUTOR: The witness' credibility when he makes certain claims concerning Lieutenant-Commander Marsaw's performance and conduct.

JUDGE ADVOCATE: Okay.

PROSECUTOR: So with regard to the first base of information that would be one purpose. A second purpose would be that this is yet another example, but an important one because it's coming from his immediate superior where he's counselled on inappropriately

Trial within a trial

Prosecutor

Address

verbally conducting himself, and that goes to the issue of verbal abuse for the 129, the **mens rea** requirement.

The second area of evidence, the shredding of the document is simply powerful evidence that allows me to rebut a live issue that has been raised by the defence when they challenged witnesses saying, why didn't you complain? Why didn't you do a redress of grievance? The response was that SMI, they didn't have any faith in that organization.

And this gives me evidence upon which, without ever attributing that statement came from Marsaw, but simply allows me to show that he did receive some information at a point in time where he knew an investigation was being conducted.

Regardless of its origin this is SMI who has information that is relevant to the allegations that he knows are about to be investigated and he shreds or destroys the material. His reasons are because the newspaper article covered verbal abuse which was different than the areas that we were looking at before, and when you asked him the question you find out the areas they were looking at before were verbal and physical abuse. He lacks credibility in his response.

So this provides evidence upon which to argue that, in fact, the people who have been challenged did not have faith in SMI and there is a reason for it. It's an individual who tried to ignore a problem that was there for his entire tenure.

Thank you.

DEFENDING OFFICER: I'm ready. First, the incident of July '92. The prosecution claims that if that evidence is brought in that will affect the credibility of the witness Scherber because he assessed the performance of Marsaw. I see absolutely no link whatsoever.

Trial within a trial

Defending Officer

Address

On one hand I would suggest that the conduct of the witness Scherber appears perfectly normal and appropriate. If he perceived a conduct that he felt was not appropriate for a CO of a submarine - and that's basically what he said - he addressed the matter. I mean, I don't see how that affects Scherber's credibility whatsoever. He addresses the matter, having given regard to reproof or other actions, and he determined that the incident was so minor as to not warrant any more than a letter like this - lets call it a letter of displeasure, I was not impressed - and refrain from doing that. And he testified that was it. He was satisfied that that so happened. So on one hand I don't see how it can effect the credibility of the witness.

What it is more about it's an attempt to bring evidence that is adverse to the accused and that is not relevant. It is not relevant for a couple of reasons: One, there's no words mentioned whatsoever, the witness cannot repeat any words. The prosecution claims that because the accused is charged with verbal abusing and all that, there's not even evidence of verbal abuse in what the witness says. He talks about inappropriate conduct including, including - and he repeats twice - the fact that Marsaw was under the influence of alcohol which was one of the reasons and that he couldn't appreciate a one-way conversation, and that was a lady. So that sort of evidence which absolutely has nothing to do with the charges before this court cannot be admitted. It cannot amount to similar facts whatsoever. It has, basically, no use except an attempt to dirty the accused and bring evidence that might look prejudicial to him.

For those reasons that part should not be admitted.

As to what the prosecution refers as to the destroying of a document and trying to put emphasis on the fact that the witness deliberately destroyed a

Trial within a trial

Defending Officer

Address

document and how it affected the ... how this has become a live issue because of questions put to prosecution witnesses.

I have - it's, basically, three lines of comments on this - one, it is not the evidence of the witness that he adopted any inappropriate conduct in relation to the investigation. He has worked with the public relation officers. He was involved because, of course, the allegation that he had been informed off pertained to the running of submarines, the safety of submarines and so on and so forth. He was legitimately involved. He worked with the public affairs officer and he wanted to - in his mind anyway - to get some information so that they could reply to enquiries, media enquiries, or anything of that nature.

He said he put out an unusual incident report. He briefed the CO or some authorities at the Warfare School, Warfare Centre. He briefed the chief of staff of MARLANT, and I'm not sure if he briefed the admiral, I know he mentioned the name. Whether he briefed the admiral personally or not, but nonetheless he briefed MARLANT authorities. That's the evidence before you. It is quite clear that there's nothing inappropriate there at all.

And, again, I suggest to you that this line of the prosecution to say, this will allow us to attack the credibility of the witness, I mean, first of all, it's not tenable, having regard to the evidence; and two, it is a way to make reference to a statement that the accused might have made.

But before I get to that I will address the second point I had in mind. The prosecution says it's a live issue because the defence put questions to prosecution witnesses as to why they did not complain and they said they had no faith in the system. How does that evidence support that they were right. None whatsoever. First of all, those people never complained during a period, lets say, '91 to October '93,

Trial within a trial

Defending Officer

Address

which was the time the Captain was replaced there, the date of posting.

They did not complain during that period of time, that's what the prosecution says make up this a live issue. What's the action of Commander Scherber one month or one month and a half after the posting of the accused got to do with the belief of some of the prosecution witnesses that the chain of command was not to be trusted? Witnesses wouldn't know in any event in '91 and '92 and '93 that Scherber was in the future going to destroy some evidence, so suggests the prosecution. Actually, isn't the reason for them to lose faith in the system because it's an event that hadn't taken place.

So I suggest to you that first of all there was no inappropriate action on the part of the witness, so that pretty well puts the argument to rest; and two, even if somebody wanted to claim there was something inappropriate, it would not advance the theory of the prosecution whatsoever that the prosecution witnesses were right in not having confidence in the system; and thirdly, and even more critically, all of this raises the possibility, the issue, the innuendos about an accused making a statement.

And the evidence introduced, the memo signed there would clearly support the position that any such statement made by a potential accused, a suspect, would be irrelevant if one just looks at the text of the document. Admittedly it uses the word "should", nonetheless it says at para 2, "You should prepare a written response to allegations ... In addition, specific clarification", are required for this or, "regarding alleged incidents ... inclusive ... should also be prepared."

And para 3, "Your reply should be forwarded to me personally on a priority basis as I am dealing with MARLANT." Quite clearly this alone, if it was in the context of a **voir dire**, would justify the rejection

Trial within a trial

Prosecutor

Reply

or the admissibility of a statement on the basis of not being made on a free and voluntary basis.

In addition, the document, the so-called reply to this memo, has got no name - it's got names referred to in the document - but has got no signature block, no date and, again, it has absolutely zero value as to the author of that reply. I suggest to you that the prosecution if they want to introduce a statement, well, that there is a procedure for that. They could have done it earlier on. I suppose they possibly could do it now, but they have to do it in accordance with the rules.

And it's got to be proven beyond a reasonable doubt that any statement made by a suspect, later becoming an accused, was made freely and voluntarily, and first of all, of course, that he made it. And quite clearly the evidence here is not there whatsoever. And if the prosecution was even allowed to ask the question, didn't you receive a statement from Marsaw? First of all, this is not substantiated because it cannot be said that he did receive a statement from Marsaw. And if he did, I mean, a use of a statement like this cannot be made. No reference whatsoever can be made to a statement of an accused unless it had been legitimately proven and established as being admissible in accordance with the Rules.

So for all those reasons I suggest to you that the prosecution should fail on both counts.

PROSECUTOR: If I could raise just two quick points in response to the material my friend's just raised.

With regard to this material for it not being relevant because it happens after the witnesses who are members of the OJIBWA have had their experience on the OJIBWA. I'm not saying this in of itself if the totality and all the evidence that allows me to challenge this individual's credibility in terms of covering

Trial within a trial

Judge Advocate

Decision

things up. I mean, I'm going to be asking him questions about his two other commanding officers of his other operational boats coming to him during the relevant time period with allegations of verbal and physical abuse and him not doing anything about it. So that type of evidence in conjunction with this starts to paint a certain picture that allows me to rebut that line of cross-examination.

The second point, I can completely agree with my friend, there's nothing to tie the identity of the accused to that particular statement, and his concerns about the voluntariness of statements can very easily be gotten around by simply asking the witness questions referring to material concerning the allegations that he received of unknown origin and that whole problem is completely skirted.

Those are my two submissions. Thank you.

JUDGE ADVOCATE: Thank you.

The court will now close to consider this matter.

AT 1240 HOURS, 23 OCTOBER 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 1415 HOURS, 23 OCTOBER 19, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: The prosecution seeks to introduce in evidence a conversation which took place in the Stadacona Wardroom sometime in July 1992 between the accused and an unidentified lady and during which conversation the accused would have verbally abused the said person in the presence of others namely Commander Scherber.

In a second time, the prosecution seeks to introduce evidence to the effect that the witness Scherber destroyed a response he received from the

Trial within a trial

Judge Advocate

Decision

accused following a letter the witness had sent to him requesting information concerning allegations made against the accused.

I will start with the July incident at the Stadacona Wardroom. The evidence is to the effect that the accused, while under the influence of alcohol, conducted a one sided conversation with an unidentified lady. Commander Scherber, who witnessed parts of the conversation, sent a letter to Lieutenant-Commander Marsaw indicating to him that he did not approve his conduct on that occasion. There is no evidence before this court as to the content of the said conversation which would tend to prove that verbal abuse took place on that occasion.

The prosecution argues that such evidence is admissible because it is relevant to challenge the witness' credibility and to establish evidence of the accused's **mens rea** when proving charges number four and seven.

I find absolutely no relevance in the evidence sought. First, there is no evidence of verbal abuse or of anything that was said by the accused during that conversation; second, I fail to see how such evidence could be used to challenge the witness' credibility; and finally, I, again, fail to see how such evidence would in any way establish the state of mind of the accused as, again, there is no evidence of verbal abuse. For all these reasons it is my decision that such evidence is not admissible.

As to the second incident related to the destruction of a document, the evidence is to the effect that the witness wrote a memorandum to the accused on 8 December 1993 in which he requested him to provide a written response to the allegations made against the accused. The witness received an unsigned response to his request and destroyed it shortly after.

Trial within a trial

Judge Advocate

Decision

The prosecution argues that such evidence is admissible to rebut the defence line of questioning to the effect that the prosecution witnesses who were not happy about the accused's behaviour should have reported it through the chain of command. The prosecution submits that such evidence would support their reasons to have no faith in the divisional system.

Although Commander Scherber's actions, as the accused's superior, to request a response from a suspect in a criminal investigation and later destroy evidence obtained was not the wisest behaviour, to say the least, in the circumstances, I find such evidence to have no relevance to the charges before this court.

First, the prosecution is not allowed to use or even refer to an alleged statement made by the accused to a person in authority without first establishing the admissibility of such document; second, it would be impossible and pointless to cross-examine this witness on a document that he is not allowed to identify and to refer to; third, even if it were possible such evidence would not add anything to establish a motive as to why the officers did not have any faith in the divisional system.

It is my decision that none of the evidence sought by the prosecution in this **voir dire** is admissible, first, because it is not relevant; and second, because its prejudicial effects outweigh its probative value.

TRIAL WITHIN A TRIAL IS TERMINATED

JUDGE ADVOCATE: Would you please invite the witness and then the members to join us.

OFFICER OF THE COURT: Sir.

THE WITNESS RETURNS TO THE COURTROOM.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

Trial within a trial

Judge Advocate

Decision

REASSEMBLY:	At 0900 hours, 18 October.....	1544
REASSEMBLY:	At 0900 hours, 20 October.....	1593
REASSEMBLY:	At 1300 hours, 20 October.....	1619
REASSEMBLY:	At 0900 hours, 23 October.....	1652

|

1732

Commander Scherber

Cross-examination

Q. So it was your intent and understanding that that would apply to all of the boats? A. Yes, sir.

Q. And would you agree with me that just because someone wears dolphins they are no different than any other person in the Canadian Forces and are bound by the same orders and policies on harassment? A. ...

Q. Would you like me to repeat? A. Yes, sir, yes, please.

Q. I'm asking whether you would agree with the assertion that just because somebody wears dolphins they are no different than any other person in the Canadian Forces and are therefore bound by the same orders and policies on harassment? A. That is correct, the policy is Forces wide.

Q. If you knew or learned that your commanding officer would on a range of five to six times a watch to once a day yell at subordinates in the control room calling them names such as; fucking idiots, fucking assholes, cunts or pieces of shit, would you tolerate that behaviour? A. No, I don't think I would if I knew that, in fact, was going on, or as I mentioned to you there may be some time during some evolution where you would have to swear at someone perhaps to make the point but not on a continuous basis.

Q. I'm talking here on a continual basis? A. And certainly not with a lot of the vocabulary that you're using.

Q. Okay. In terms of screaming, would you agree with me that a line gets crossed when you go from screaming or yelling out commands to screaming and yelling out personally insulting adjectives towards subordinates? A. Once again, it depends on the situation. You don't ... we try not to obviously unnecessarily raise your voice or try to detract from a normal

1733

Commander Scherber

Cross-examination

... people would consider to be a normal, or perhaps a way of doing business at sea on board a submarine. Clearly there are a number of people on watch at any given time and depending on what the submarine is doing you may have occasion to raise your voice. But I don't believe, okay, that that is the norm, okay. That should be an exception and one would hope that that, in fact, was the case.

Q. And that's just in terms of yelling out orders, I believe you're talking about? A. ...

Q. What about yelling out these types of personally insulting profanities that I've used before, is that the norm or not the ... ? A. That is not the norm and would not be expected and would not be acceptable.

Q. Again, if that had ever been brought to your attention, you as SM1 would not tolerate that type of leadership style? A. Not on a continual basis, no, sir.

Q. If you had a commanding officer who screamed and yelled personally insulting adjectives at crew members while at sea five to six times a watch to one time a day, how would that officer rate in terms of your personal evaluation reports? A. It's a very difficult question, I mean, clearly if this sort of behaviour is bothering individuals on board the submarine and I was made aware of it then I would be obligated to do something about it.

Q. Sure? A. And that involves addressing the problem with the commanding officer, so ...

Q. Okay, my question though, you're SM1 and you're confronted with a commanding officer who as a continual part of his leadership style uses these personally insulting adjectives towards subordinates, are you going to assess that officer as being; for example, outstanding? A. I don't think that an individual that uses that kind of leadership style can

1734

Commander Scherber

Cross-examination

generate over a period of time the continued support that's required to achieve the aims and missions that are applied to him. I mean, people react to those sorts of things in various different ways. But from the point of view of being able to conduct operations and complete taskings and do the other things that, you know, that the submarine was shown to do extremely well, I think it would be quite impossible to achieve that particular level of expertise using that style on a continuous basis, sir.

Q. Would you like me to repeat my question? Would you rate an officer, a commanding officer who uses personally insulting adjectives, such as the ones I've mentioned before, on a continual basis as part of his leadership style as an outstanding CO? A. No, I would not.

Q. Would you allow an individual to get away with that type of conduct if they had a good performance rating or were a warrior? A. No, I don't think I would.

Q. Could you repeat the terms of reference for the First Canadian Submarine Squadron? You were asked the question earlier, I didn't get it all written down? A. The primary terms of reference are to ... is for me to be responsible for providing operationally ready submarines in support of the tasks that the commander of Maritime Command Atlantic gets assigned and I also have the responsibility as being in charge of the submarine squadron proper down on jetty 8.

Q. Okay? A. So it's a sort of ...

Q. Did the tasks that your boats were assigned, I guess, were diverse. You mentioned a drug op, fisheries patrol, different types of exercises? A. That is correct, sir.

Q. Would the primary and sole mission of the boat be to maintain itself in the highest state of

1735

Commander Scherber

Cross-examination

preparedness for war? A. I think the boat when it is doing operations does need to be in a high state of preparedness. There are requirements that the submarine has to meet from an operational readiness point of view and for the safety of the submarine and the operation it is important that the members be at a high state of readiness as you call it. But certainly a lot of the ... it's somewhat dependant, I guess, on the specific task that you're involved with. Overall though, a high state of preparedness and readiness is indeed expected from the submarines.

Q. Uh-huh, okay. And as SM1 at the time, did you feel that an individual could get a waiver on the CF policy for harassment if they achieved a certain performance level? A. There's no waiver on the policy to harassment that I know about, sir.

Q. Okay. So there's no slack cut for somebody who may be a harasser just because they happen to be a good performer? A. No, sir, it's the desire of the policy on harassment to make it very clear to individuals that it doesn't really matter who you are or in what position you are that the rules and the guidelines apply.

Q. So would you agree that you expected all of your commanding officers to do their jobs, do their missions, within the parameters of the Code of Service Discipline? A. Yes, sir, I do.

Q. And the purpose of doing that is to ensure you have a well disciplined fighting force?
A. Yes, sir.

Q. Because if you lose discipline as a commander, you lose discipline over a deadly force, isn't that correct? A. Yes, a submarine is, in fact, could be considered a deadly force as would any other ship in the navy.

1736

Commander Scherber

Cross-examination

Q. With regard to the different matters or things you referred to in drafting up PERs, you noticed a number of things including: the operations of the submarine; message traffic; being aware of how the sub prepared for an operation; going to the Ops Centre at headquarters; reviewing letters of recommendation or commendations; talking to others who interact with the sub COs such as Lieutenant-Commander Truscott, sea training; also reviewing monthly reports of proceedings which you described, I believe, as one of the most useful sources of information? A. Yes, sir.

Q. The monthly report of proceedings as a useful source for you for drafting up PER assessment is something that is, in fact, created by the person you're assessing, isn't it? A. Yes, sir, it is.

Q. Okay. So you'll be reviewing the person who you are assessing, his assessment of operational readiness, his assessment of morale and anything else that he wants to put in? A. The letter indeed is for the admiral.

Q. Uh-huh? A. And my utilization of that particular report as part of the overall considerations that go into making up the PER are based on the same fact that the admiral reads those reports of proceedings and there is a great desire, I guess, or perhaps requirement for commanding officers to be candid in their assessments and observations to the admiral.

Q. Yeah, and it's important for the CO to be candid? A. Yes, sir. He's given the opportunity to do that in this particular letter rather than having a specific form of things that he had to cover so ...

Q. So one of the ways you assessed morale on board the OJIBWA; for example, would be reading the COs assessment on how he feels morale is ... at what state morale is in on the OJIBWA? A. That is one part of the equation, yes, sir. I also have the opportunity to speak to my squadron coxswain about morale on board the

1737

Commander Scherber

Cross-examination

submarines and, of course, in the case of OJIBWA, I mentioned that I had the opportunity to ride the submarine for three periods albeit short to, in fact, you know, speak to people myself, and I would like to think, that given the opportunity, individuals that have specific concerns take the opportunity to bring them up, sir.

Q. How many occasions did the squadron coxswain come to you with complaints from senior or junior rates about treatment on the OJIBWA? A. None, sir.

Q. What would your response be if the squadron coxswain had indeed received several complaints in that area? A. I would get an investigation going immediately, sir.

Q. Would it be fair to say that the squadron coxswain is an important set of eyes and ears for you? A. Yes, sir, he is.

Q. So if his eyes and ears aren't working, or if he's failing to pass information on to you, you could be blind sided? A. I don't think I could be totally blind sided because there are other inputs that I am working with, and also the submarine community itself, I believe, is quite small and these allegations or examples that you would be using would be quite difficult to overlook in that kind of a small community.

Q. But the bottom line is the squadron coxswain's an important set of eyes and ears for you and if he's not passing information he receives on to you, your capacity to do your job as a supervisor is limited? A. Yes, sir.

Q. And I believe you had stated that you had gone out as well three times on the OJIBWA for visits? A. Yes, sir.

1738

Commander Scherber

Cross-examination

Q. Were they all for SOCTs? A. Yes, sir.

Q. And to use your words on direct examination, would you agree that SOCTs are very disruptive to the normal ops of a submarine? A. I don't believe that they're disruptive to the normal operations of a submarine, what I meant was they're disruptive to the normal day-to-day activities on board that submarine from the point of view of the fact that you've got approximately six additional personnel on board that are occupying space. We make unique demands on the crew to support that particular training and that's the context that I meant it in.

Q. And also you've got people that are acting as duty CO, I guess, or duty captain? A. Yes, sir.

Q. So is it fair, and if it isn't please correct me, but isn't it fair to say that when you see the OJIBWA going through a period of SOCT, you're not seeing the normal day-to-day running of the OJIBWA? A. Well, I think that, in fact, it's just the opposite. You do see the normal everyday running of the OJIBWA plus that additional effort that they went out of their way to ensure that we got everything that we needed on board the submarine to support our specific training.

Q. Would the normal running, of day-to-day, of the OJIBWA include having six people acting as duty captains? A. No, sir. There's only one captain aboard when the SOCT isn't there.

Q. But acting as duty captains, would that happen in normal life of the OJIBWA, apart from SOCT? A. It may be dependant on whether from time to time the commanding officer of a submarine would pass command of the submarine to his XO, for example, for training, and he could be called the duty captain at that time but it would only be the one additional person at that particular time. It would not be, sort of, part of my specific submarine directed training

1739

Commander Scherber

Cross-examination

and, you know, it would be up to the commanding officer of the submarine whether or not he decided to do that for his executive officer, for example.

Q. So in what ways is it the same and what ways is it different from the normal day-to-day activity of the OJIBWA when SOCT comes on board? A. I think the only difference is that when an SOCT comes on board the submarine, sir, that you have between four to six officers, additional officers and myself, riding on board a submarine. The submarine is scheduled to provide the support for that particular training and as part of the training involves giving each candidate an opportunity to be "duty commanding officer" it puts an additional load, if you like, on the ship's company with respect to; for example, informing the duty captain that you have a defect, okay. So the ship's company now has to speak to the duty captain; they also have to make a report to the commanding officer of the submarine, okay, that's the way we set it up to play it for practice. And the ship's company adapted very well to providing that sort of realistic support for the students that we had on board. But clearly, you know, while the candidates were on board the submarine, we were using up room in the wardroom; officers were displaced so that we could have bunks; we had operational briefings for each and every scenario that the student does, he has to provide a briefing to the ship's company; and, of course, it takes up a lot of time if you've got seven operations going, you know, consecutively. And so from that point of view it provided an extra burden just from an overall activity point of view.

Q. Okay. I think you alluded to it in part of your answer, but another difference between the normal everyday operation of the OJIBWA when SOCT comes aboard is that you're present? A. Yes, sir.

Q. When you took those occasions to walk around, you said you talked to people on board the boat between your three visits. What sorts of questions did

1740

Commander Scherber

Cross-examination

you ask them? A. I spoke to them about things of a general nature, you know, I would go and have a cup of coffee or a cup of tea with them and ask them how things were going and, you know, if they had any hot rumours and if they had questions for me and, you know, just sort of general conversation, and take the opportunity to meet a number of these people that I would normally not get a chance to talk to.

Q. Did you specifically ask them, especially the members of the control room, how they would describe and define Lieutenant-Commander Marsaw's leadership style? A. I didn't ask the members of the control room because I didn't specifically visit people in the control room. I visited the hands in the forward and after messes and I talked about generalities, okay, I did not talk about the submarine commanding officer's style of command, okay, or whatever.

Q. Okay. So you didn't get into questions like that then? A. No, sir.

Q. Okay. What sorts of complaints did they raise with you? Anything in particular or nothing or ... ? A. Nothing in particular.

Q. Nothing in particular? A. They were concerned about the fact that we weren't appearing to get any new submarines. They had, you know, spoken about their previous port visits. I asked them if they enjoyed them and things like that, and it was a discussion of a very, very general nature. I didn't specifically seek any specific information.

Q. Given that you'd said on direct examination that submariners always find something to complain about, did this silence cause you any thought at all? A. It wasn't really a silence, sir, I did mention that they complain about not having new submarines and ...

Q. But nothing about their own boat?
A. No, sir.

1741

Commander Scherber

Cross-examination

Q. Was it a surprise to you to see the 16th December '93 article in the *Mail-Star* come out in publication, or did you have prior knowledge of that coming out? A. I believe that I had knowledge that a reporter was asking some general questions about OJIBWA sometime in November.

Q. So if one of the members of your ward-room, Lieutenant[N] Hart or somebody, came up to you on say the 9th of December and said, I hear there might be a newspaper article coming out, that wouldn't be a surprise to you by the 9th of December? A. No, because the investigations into ... raising inquiries about, making speculations about OJIBWA continued during that time.

Q. Did Lieutenant-Commander Hickey on October of '92, one of the two COs ... one of the COs of your two operational boats, I guess, at the time, visit you in your office for 20 minutes and discuss allegations of physical abuse on the OJIBWA? A. Not that I can recall, sir, no.

Q. Not that you recall? A. No, sir.

Q. Did Lieutenant-Commander Woodburn on 6 December '93, your other CO of your other operational boat, come into your office with concerns about harassment aboard the OJIBWA? A. No specific examples, no, sir.

Q. Did he come and discuss it in general terms? A. No. No, sir.

Q. Do you recall ever telling Lieutenant-Commander Woodburn on 6 December '93 that if anybody had a problem with harassment there's a policy, they should follow that? A. I may have mentioned that to him as the ... you can imagine the investigation into looking for information was quite intense. An issue of

1742

Commander Scherber

Cross-examination

harassment on board the submarine in particular was never mentioned to the best of my recollection.

Q. What would your response be if Lieutenant-Commander Woodburn testifies that he did speak to you about harassment on the OJIBWA on the 6th of December '93 in your office? A. I wouldn't be able to recall it.

Q. And what would your testimony be if Lieutenant-Commander Hickey takes the stand and states that on October '92 he entered your office and spoke to you for 20 minutes about concerns of physical abuse on the OJIBWA and wanted to bring the matter to you so that you didn't get blind sided like he did in the Farler incident? A. I believe that if the commanding officers had specific examples or concerns that they had the opportunity to lay them out to me. If a commanding officer says, well, there's rumours or, you know, there are 120 rumours on the submarine squadron at any given day, at any given time. The idea that an individual would say, you know, there's harassment on board a submarine and that I wouldn't do anything about it, I think, is not a fair assessment.

Q. No, I'm not suggesting it, I was simply asking your response if these two individuals have or did testify that they did raise the issue with you, on the 6th of December for Woodburn, October '92 for Hickey? A. I would have to ask the specific example that they gave.

PROSECUTOR: Okay. I wonder, Mr Judge Advocate, if I can go farther with the witness in this line of questioning that make the examples more specific or should that be done perhaps later on in a **voir dire**?

JUDGE ADVOCATE: Examples of what?

PROSECUTOR: The conversations that Lieutenant-Commander Woodburn and Lieutenant-Commander Hickey raised.

1743

Commander Scherber

Cross-examination

JUDGE ADVOCATE: Lieutenant-Colonel Couture, what are your views on that?

DEFENDING OFFICER: I don't have all my notes here, that's the matter I was conferring about. I did not intervene the prosecution in cross. I'm far from being certain that exactly even such testimony had taken place during the trial. I did not intervene, okay, it's cross-examination, I surely was proposing though to review my notes very carefully in due course.

I have no personal recollection of such evidence myself and I suppose I could have intervened, I did not. But now that you're asking, I do not have personal recollection of such evidence taking place, so ...

JUDGE ADVOCATE: Neither do I.

What do you suggest we do?

PROSECUTOR: I'll try to get around my line of questioning through a different type of question. Maybe that'll resolve it and if it does then I won't have to bring it to a head.

JUDGE ADVOCATE: Okay.

PROSECUTOR:

Q. You talked about a 120 rumours floating around the sub squadron at any one day, or a 102 rumours, I'm not sure the exact number. I understand that's just a figure of speech. How many rumours at any one time would be going through the sub squadron concerning allegations of physical or verbal abuse on any one day? A. There'd be no rumours at all through the submarine squadron ...

JUDGE ADVOCATE: Would you speak up, please?

1744

Commander Scherber

Cross-examination

WITNESS: There would be no rumours going through the submarine squadron about specific examples of verbal or physical abuse.

PROSECUTOR:

Q. If Lieutenant-Commander Woodburn did on the 6 of December '93 come to you and raise some concerns about harassment with regard to a particular member of the OJIBWA, what would you have done?

A. ...

DEFENDING OFFICER: Well, Mr Judge Advocate, there's been a lot of questions of that nature. I believe that the law stands for the proposition that hypothetical questions cannot be answered by witnesses unless it is to experts, and for the past quite a few minutes we have passed from complaints to rumours. I don't think that ... which, of course, is indulging or risking to indulge in hearsay.

Whilst there was no objection and there might be some relevancy to very specifics, like, complaints, was there any complaints about a subject or another. When we go from there and start indulging in rumours and 120 rumours a day and then we start about asking what type of rumours they are, and then after that if this would happen, what would you do. I mean, I think we're getting away from both the Rules of Evidence and relevancy.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I'd like to ask the witness squarely whether or not he's had a particular conversation with Lieutenant-Commander Hickey on October '92, then ask him specifically whether he's had a particular conversation with Lieutenant-Commander Woodburn, and include enough facts to make it specific in his mind.

JUDGE ADVOCATE: Go ahead.

1745

Commander Scherber

Cross-examination

PROSECUTOR:

Q. On October 1992, did Lieutenant-Commander Hickey visit your office and report to you that he had concerns about physical abuse occurring on board the HMCS OJIBWA involving a Lieutenant[N] Elford and a Lieutenant Kelk, and inform you that he knew that this was a delicate matter, but wanted to raise it with you because he had been CO of the boat in which the **Farler** case arose on? A. I don't recall the name of those two individuals, I'm sorry.

Q. You don't recall. Do you recall having a ... ? A. ...

DEFENDING OFFICER: Mr Judge Advocate, I understand my learned friend here is having problems, of course, he wants to be specific. But at the same time in doing so he is literally indulging of what would be hearsay, if it ever happened, and I don't think that ... I know that questions asked by counsel do not necessarily form part of evidence, but at the same time if the question is formulated in such a way that the witness adopts part of the question so he can answer, then it becomes hearsay.

And I still have difficulty with those direct reference to apparently previous witnesses in this case where I have personally no recollection of that type of evidence. So if it places the ... on one hand the witness in a difficult position but more importantly we indulge in hearsay and on top of that it might be misleading to a point whereby if such a thing did not occur, if such evidence is not available before the court, it places the witness in a difficult position, and if it is the case that no such evidence was adduced then it's improper to ask the question that way.

JUDGE ADVOCATE: Well, as to the matter if such evidence was given before the court before today that is something that we can find out, reviewing our notes will give us an answer on that. I personally

1746

Commander Scherber

Cross-examination

don't remember myself, but that doesn't prove anything. It maybe there, it's just a matter of reviewing the notes.

As to the matter of hearsay, well, it all depends the way the question is asked. The prosecution may refer to a conversation that allegedly took place on such date and such time. Then depending on the question that he will put to the witness it may or may not be admissible.

I think the main problem we have at this time is were those matters brought before in this trial. It seems to be the major point of the objection.

PROSECUTOR: Part of it relating to one person was, part of it relating to another person wasn't. I would still submit, Mr Judge Advocate, that my question is proper. I simply asked the question of the witness. He either adopts it or he doesn't. It either becomes evidence or it doesn't. And that is a question that I am obliged to ask the witness should I get into issues relating to rebuttal later on.

DEFENDING OFFICER: But I suggest though that if it is suggested to the witness that this took place in court that is misleading. That's my point. If he wants to ask the question, is it possible that so and so told you such a thing, that's one way. But if he says, if I told you that so and so came here in court, we are pressuring the witness to, I mean, to adopt this position.

JUDGE ADVOCATE: Okay. We'll find out what was said.

Hickey, you said?

PROSECUTOR: With Hickey, sir, there's nothing on Hickey from his testimony.

1747

Commander Scherber

Cross-examination

JUDGE ADVOCATE: Well, what are you trying to obtain with this line of questioning then?

PROSECUTOR: I'm trying to simply ask if he recalls an interview with Hickey. He'll either say he does or he does not. If he does then I pursue some questions concerning that. If he says no conversation took place then that's the end of the questions.

DEFENDING OFFICER: I mean that's exactly what I was objecting to.

JUDGE ADVOCATE: You answered my concerns.

The objection is sustained.

PROSECUTOR:

Q. And, again, sir, did you have any conversations with Lieutenant-Commander Woodburn concerning allegations of harassment? A. I did not have a specific incident of harassment mentioned to me by Lieutenant-Commander Woodburn.

Q. Did you have a conversation with Lieutenant-Commander Woodburn concerning harassment in general on the OJIBWA? A. No, I did not have that conversation with Lieutenant-Commander Woodburn on that particular subject, sir.

Q. Okay. Would you agree, in ballpark figures, that the pass rate for Part III officers under training is eighty per cent? A. Which pass rate are you talking about, sir?

Q. For officers under training to acquire their dolphins? A. I think that in the dolphin boards that I was training in the submarine squadron I don't believe the percentage was quite that high. I may be wrong, okay, but it seems a little bit high.

1748

Commander Scherber

Cross-examination

Q. What would be your ballpark figure of pass rates? A. I think for the ... around sixty-five to seventy per cent for the first time.

Q. For the first time? A. Yes, sir, if, in fact, he didn't pass the board the first time then you had an opportunity to ... there was a report prepared on where your weaknesses were and that report was sent back to the submarine that you were doing your training on, in the point of view of giving the submarine the opportunity to give you enough experience to get yourself up to speed to address those particular areas of deficiency that you demonstrated for the board.

Q. Do you know how many officers attempted to train and qualify for their dolphins under Lieutenant-Commander Marsaw's command? A. No, sir, not right off the top of my head.

Q. I'd like to read you a list and ask whether you're familiar with these individuals?
A. Yes, sir.

Q. Lieutenant[N] Reid, Lieutenant[N] Cassavi, Sub-Lieutenant MacLean, Lieutenant[N] Byrne, Sub-Lieutenant Lyman, Lieutenant[N] Duff, Lieutenant[N] Elford, Lieutenant[N] Gensey, Jacques, Kohli, Pitman, Watt, Kerr, Burke and Ellis? A. I recognize a large majority of them. I'm not sure I can say I recognize each and everyone of them.

Q. Just persons who attempted to qualify under Lieutenant-Commander Marsaw for their dolphins? A. It's quite possible. I go back to what I mentioned this morning in that we were using the OJIBWA as a training submarine while OKANAGAN was in refit and, indeed, while ONONDAGA was having mechanical problems. So the idea that there were a lot of people going through the OJIBWA *per se* for submarine qualification training is one of those situations that had to be endured in the submarine squadron. There are a number of requirements for, not only the officers to get sea

1749

Commander Scherber

Cross-examination

time, but also for enlisted personnel to get sea time, and if you've only got the one submarine that's available to go to sea, it's a real difficult coordination job between the submarine's coxswain and executive officer and the squadron's coxswain and executive ... sorry, the squadron coxswain to try to ensure that the maximum number of trainees could have the opportunity to get their qualifications out of the way, sir.

Q. And that was a problem not only for the OJIBWA but for other boats as well? A. Well, the problems on the other boats were reflected in the fact that OJIBWA ended up taking a lot more people to sea to get through the final qualification process.

Q. Would you agree that when Lieutenant-Commander Hickey left command he had 14 officers in his wardroom? A. When he left command, sir?

Q. Of the OKANAGAN? A. I don't recall the exact number.

Q. Out of those 15 names that I just read off as people who trained under Lieutenant-Commander Marsaw, would you agree with me that five got their dolphins under Lieutenant-Commander Marsaw? A. I don't have the exact numbers of how many people ... available to me. Perhaps, if you go through the list slowly, I could try to ... or a little more slowly, I could try to actually ascertain at least for the officers what the disposition was.

Q. Okay. Lieutenant[N] Reid?
A. Lieutenant[N] Reid, the engineer?

Q. Yeah? A. Yes.

Q. Lieutenant[N] Cassavi? A. If you could just excuse me for a second, sir. I think it's important to understand that I was away from the submarine community for an extended period of time from when I left command of my own submarine, I came back as a

1750

Commander Scherber

Cross-examination

squadron, more than 10 years. And during that time there were a large number of officers that when I came back into the spot, the squadron commander, sir, I had no previous knowledge of and that's why I may be a bit slow on some of these questions.

Q. Was it your sense as SM1 that Lieutenant-Commander Marsaw provided countless training opportunities for other submariners and balanced the training requirements with operational imperatives? A. Yes, I do, sir, and I think he did a very good job of it.

Q. If five people out of fifteen were qualified as officers under Lieutenant-Commander Marsaw, would that fall within the definition of providing countless training opportunities for submariners? A. It falls under the category of providing lots of opportunity. You take advantage of the opportunities to get your qualifications and, I mean, that's incumbent upon the individual.

Q. Okay. So if only five out of fifteen passed, that wouldn't cause any alarm bells or lights to go on, of concern for you, as SM1? A. Well, in fact, I would, in fact, be looking at what the problem with this particular situation is. When I got down to the submarine squadron I spent a significant amount of my time trying to come to grips with some of the training issues on board the submarines to the end that I ended up convening a meeting of the submarine XOs and coxswains in the submarine squadron in the fall of '92 to talk about submarine training and their dolphin training because a lot of it had changed from the time that I was in boats and I needed to understand what those changes were and where some of the problem areas were. And then specific direction was provided to the submarines to try to ensure that a standard, as much as possible, package of training was available for the officers and for the enlisted personnel. When I got to the squadron every submarine had their own, sort of, ideas as to how they should be doing training and yet they were all using the same ... some of them were

1751

Commander Scherber

Cross-examination

different submarine qualification books; for example, for officers. So I tried to get that sorted out. And the idea that five officers out of fifteen should fail a submarine qualification thing, I mean, doesn't sort of ring true with what my appreciation was for the individuals that were coming in to sit their dolphin boards. And some of those individuals that you talk about there are engineers and so my squadron technical officer was involved with their qualification and their training packages and things like that, and I let him run the engineering portion of that particular training aspect.

Q. I'm not talking about five failing, I'm talking about five passing? A. Sorry, five passing, ten failing.

Q. Okay. Do you know how many officers under Lieutenant-Commander Marsaw's command put in a request for general service? A. I think I have a rough idea about how many put them in while I was in as the squadron commander. I don't know if there were more before I took over in April '92.

Q. Didn't you check? Wouldn't you be curious about that? A. No, sir, I really didn't have the time to check that particular ...

Q. Do you know how many ops officers put in their request for general service under Lieutenant-Commander Marsaw's command? A. Could you refresh me with some names? As I mentioned there were a number of officers that I didn't know before I came back to the submarine squadron, so if you say, well, an ops officer, I mean, the only ones that I can recall myself was Lieutenant[N] Pokotylo asked to return to general service and I had the opportunity to speak to Lieutenant[N] Pokotylo about his request to return to general service in my squadron. Lieutenant[N] Brissette who would be, sort of, ops level put in a request to return to general service and to remuster to MARS 74(E) which is a computer systems individual. A

1752

Commander Scherber

Cross-examination

Lieutenant[N] Watt put in a request to return to general service because he wanted to remuster to an EOD occupation and I invited him to complete his submarine qualification training which, in fact, he did and then went back to general service. I mentioned Brissette, and I recall one combat systems lieutenant.

Q. Do you recall if Sub-Lieutenant MacLean, Lyman, Jacques, Kohli, Kerr, Burke, Larkin, Wamback and Pokotylo put in requests for general service ... ?

A. ...

DEFENDING OFFICER: Mr Judge Advocate, I mean, the evidence has demonstrated that some of those people made those requests in '91, I mean, it is unfair to the witness. I mean, he didn't come here to testify on the running of the whole squadron. I mean, not even during his own time. Absolutely not and surely not at the time when he was not even at the squadron, and I recognize some of the names mentioned there. They are people who did make such requests in '91, how could the witness know. And he's answered already, he hasn't checked, so I think the prosecutor is not being fair.

JUDGE ADVOCATE: And we're not going anywhere with that.

Sustained.

PROSECUTOR:

Q. Is it your testimony, sir, that as far as you're concerned the OJIBWA was a happy boat? A. A happy boat?

Q. Yes? A. Was that my testimony?

Q. No, I'm simply asking you whether you would agree with that? A. From my observation it was.

Q. It was. Would it be your belief as SM1 at the time that Lieutenant-Commander Marsaw showed particular concern for his men and his job? A. During

1753

Commander Scherber

Cross-examination

the period that I was down at the submarine squadron that, in fact, was the case, yes, sir.

Q. And that as SM1 at the time, would it be your impression that Lieutenant-Commander Marsaw was a highly cooperative ... had a highly cooperative attitude which has consistently boosted the morale of his subordinates and inspired them to do their best for him? A. Yes, sir.

Q. You're Lieutenant-Commander Marsaw's supervisor at the time? As SM1 you were his supervisor? A. Yes, sir.

Q. As supervisor, did you have a responsibility towards his subordinates as well as the people above you in the chain of command? A. As his supervisor I had a direct responsibility for him.

Q. What about towards his subordinates? A. As the submarine squadron commander I'm interested in what everyone in the submarine squadron is doing.

Q. And you also have a responsibility to the admiral to keep him informed on how Lieutenant-Commander Marsaw and the OJIBWA are doing? A. Yes, sir, I do.

Q. So if you reported to him that Lieutenant-Commander Marsaw shows particular concern for his men and his job and has a highly cooperative attitude which has consistently boosted the morale of his subordinates and inspired them to do their best for him, that may very well be the impression that the admiral has of Lieutenant-Commander Marsaw as well, isn't that true? A. I would hope so, yes, sir.

Q. So in some ways you're the eyes and the ears for the admiral as well, just as the squadron coxswain is for you? A. Yes, sir.

1754

Commander Scherber

Cross-examination

Q. Somewhere in excess of 30 witnesses have testified under oath during this court martial that your assessment of Lieutenant-Commander Marsaw is different than their experiences. They've testified that they've been referred to in a variety of ways by Lieutenant-Commander Marsaw, referred to them as a fucking idiot, a cunt, an asshole and words to that effect. What's your response to this type of testimony in light of your position and recollection of Lieutenant-Commander Marsaw and the state of morale on the OJIBWA? A. Well, I think that I can only clearly speak for any observations that I may have had while I was on board the submarine. If in fact this is the type of activity that, in fact, occurred on board that submarine when I wasn't there, I would be very surprised. True, I still do not believe that the submarine could've achieved what it did if, in fact, these things that you're saying, okay, was the way that the submarine was being driven.

Q. Is it possible for things to happen on a boat wouldn't SM1 knowing about it? A. I'm sure you could say there are possibilities. I would find it very difficult to believe that something like this could happen on board a submarine without me knowing about it. In fact I would expect to notice it.

Q. You'd expect to? A. Yes, sir.

Q. So it'd be your position that if anybody did testify to that effect that their testimony would be incorrect? A. ...

DEFENDING OFFICER: Mr Judge Advocate, how can the witness testify on that, and he has answered the question before. He testified as to his observation. He testified as to his conclusion. What more can he say on that. Why should we force the witness to say that the others were incorrect, I mean, he can only testify for what he saw, what he may reasonably conclude, which he has done. But he cannot go any further than that.

1755

Commander Scherber

Cross-examination

JUDGE ADVOCATE: Sustained.

PROSECUTOR:

Q. So is it your belief, sir, that because the OJIBWA made its operational commitments in the way that it did, that harassment like this could not have occurred? A. ...

JUDGE ADVOCATE: Just a moment, please. We can't hear anything.

PROSECUTOR: Certainly.

JUDGE ADVOCATE: Okay, it seems to be okay. Sorry.

PROSECUTOR: No problem, sir.

Q. Is it your testimony today, sir, that because the OJIBWA met its operational commitments in the way that it did, that harassment as alleged could not have occurred on the boat? A. I would find it very difficult to believe, yes.

Q. Would you agree with me that it's a rather complex issue in understanding whether things did or didn't occur on that boat. It can't be reduced to looking at the performance level of the OJIBWA? A. I would agree with you, sir, that it's a complex issue. Whether or not it can be distilled to one particular aspect of the submarine I don't know. But certainly in my previous experience I found it rather difficult to believe that individuals that would be treated like that would, in fact, be able to do the job. It's like a very difficult proposition, in fact, it's unworkable. So ...

Q. So in terms of your testimony then you feel that it can be reduced to one indicator, performance? A. That is one indicator, yeah, I mean, there may be others too. I mean, I don't ...

1756

Commander Scherber

Cross-examination

Q. What about fear, is that a possible indicator? A. I don't know. You can't maintain fear for, you know, an infinite ... I don't understand your example.

Q. Fear, would that be a factor that might come into play to explaining this situation? A. I don't know.

Q. What about peoples concern to make complaints as they've got wives and families at home and are not sure how the complaint will be received by SM1, could that be a factor? A. ...

DEFENDING OFFICER: Mr Judge Advocate, again, I appreciate the prosecution's in cross-examination but we're asking the witness to speculate about a number of things and obviously in some areas where that's all he can do is speculate. The questions are vague and, I mean, we will be here all day speculating if that line of questioning carries on.

JUDGE ADVOCATE: Sustained.

PROSECUTOR: No further questions, sir, thank you.

JUDGE ADVOCATE: Thank you.

Re-examination?

DEFENDING OFFICER: No, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: Thank you very much.

1757

WITNESS WITHDRAWS.

DEFENDING OFFICER: Before I call my next witness, I understand that ... I would like to dispose of two matters. One, would be to introduce - and I understand by consent of the prosecution - a document, a photocopy of an article published in the *Chronicle-Herald*, it is on 16 December. I apologize, the photocopy ... maybe the record will reflect that it was on 16th December because the date on this copy is not very clear.

So this document that I want to introduce with consent is a copy of an article in the *Chronicle-Herald* on 16th December '93, titled, "Sub's Captain Under Scrutiny".

JUDGE ADVOCATE: Exhibit "OO".

THE NEWSPAPER ARTICLE DATED 16 DECEMBER 1993 ENTITLED "SUB'S CAPTAIN UNDER SCRUTINY" IS MARKED EXHIBIT "OO".

DEFENDING OFFICER: Also, Mr Judge Advocate, I understand at this point that the prosecution is prepared to make an admission, and with your leave I will give you a copy of the text to be read. I have enough for all members as well.

PROSECUTOR: Mr Judge Advocate, Members of the Court, pursuant to Military Rule of Evidence 8(d) and for the purpose of dispensing proof thereof and having to call live witnesses, the prosecution admits the following facts:

1. On 16 December 1993 the *Chronicle-Herald* (Halifax) published an article entitled "Sub's Captain Under Scrutiny";
2. Prior to the publication of this article, Mr Malcolm Dunlop contacted Lieutenant-Commander Jeff Agnew, Public Affairs Officer

1758

Prosecutor

Admissions

with MARLANT, and provided him with a copy of the unedited draft of his proposed article;

3. On 15 December 1993, and as a result of Mr Dunlop's draft article, the Commander Maritime Forces Atlantic tasked the Base Commander CFB Halifax to initiate a military police investigation into the allegations that were published the next day;

4. In the ensuing investigation military police investigators interviewed approximately 153 people including Mr Dunlop; and

5. These proceedings are directly related to Mr Dunlop's article and the military police investigation ordered on 15 December 1993.

Thank you.

JUDGE ADVOCATE: So, Lieutenant-Colonel Couture, do you accept these admissions as forming part of your case?

DEFENDING OFFICER: Yes, I do, Mr Judge Advocate.

JUDGE ADVOCATE: Very well. So the admissions are so accepted by the court.

DEFENDING OFFICER: And at this point if the court - I don't know if the court wishes a brief adjournment? We're prepared to carry on with another witness. I'll leave it at the discretion of the court.

JUDGE ADVOCATE: Let's proceed.

DEFENDING OFFICER: Okay.

Please, call PO Hallonquist.

1759

Prosecutor

Admissions

JUDGE ADVOCATE: Could you spell his name,
please.

DEFENDING OFFICER: My learned friend will,
sir.

s.19(1)

1760

PO2 Hallonquist

Examination-in-chief

EIGHTH WITNESS)
FOR THE) Class G.A. Hallonquist, is duly
DEFENCE) sworn.

EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Petty Officer, for the purpose of the record, could you give your full name and spell your last name please, slowly? A. Petty Officer Hallonquist, H-A-L-L-O-N-Q-U-I-S-T, first name, Gregory and initial "A".

Q. Could you give your service number, please? A.

Q. And what is your trade? A. Cook.

Q. Where are you presently posted? A. HMCS OJIBWA.

Q. When did you join the Forces? A. I joined the Reserve Force on the 4th of July '76, and the Regular Force on the 9th of September '81.

Q. When did you obtain your dolphins? A. July of '83.

Q. Which of the submarines have you served on? A. All three.

Q. Could you, from memory, give the names of those you remember of the commanding officers you have served under in submarines? A. Starting from '81, I've served under Lieutenant-Commander Dunlop, Lieutenant-Commander Nicholson, Lieutenant-Commander MacLean, Lieutenant-Commander Plante, Lieutenant-Commander Irvine, then Lieutenant-Commander Marsaw.

Q. And as a cook, I presume that your normal place of duty on the submarine is in the galley. I'm going to show an exhibit here, it's Exhibit "I". If

1761

PO2 Hallonquist

Examination-in-chief

you could indicate where the galley on OJIBWA was found? A. It's ...

ASSISTANT DEFENDING OFFICER: Indicates the square marked as "galley".

Q. Where would the control room be in relation to this? Would that be forward or aft?

A. Forward of the galley.

Q. Forward of the galley. In your approximation, how far is it from the galley to the control room? A. Between 15 to 20 feet.

Q. And under normal noise conditions on the submarine when you are attending your duties in the galley what, if anything, can you hear of what's going on in the control room? A. You can only hear the fan noises from the galley exhaust and from the ship's ventilation.

Q. Would you be able to make out words?
A. No.

Q. You have mentioned you have served under Lieutenant-Commander Marsaw. If you saw him today in this courtroom would you be able to identify him?
A. Yes, sir.

Q. Could you look around the courtroom and see if you see him? A. Sir.

JUDGE ADVOCATE: The witness indicates the accused.

ASSISTANT DEFENDING OFFICER:

Q. Have you had an opportunity to read an article that was published in the *Chronicle-Herald* in December of 1993 concerning allegations of abuse on the submarine? A. Yes, I did.

1762

PO2 Hallonquist

Examination-in-chief

Q. How did you react to that article when you read it? What was your impression? A. My first impression was that I was surprised about the article, and I was also surprised that after such a period of time, after we'd gone into refit, that the article would've been published.

Q. What did you find surprising about the article and the allegations? A. I found on there that the no mentions of the names or the people who had made the allegations. There was nothing to say who they were. All it said, as far as I can recollect, that it was confirmed by two veteran submariners which was confirmed by two other submariners, and I was very surprised that these people did not bring up these allegations while the submarine was still sailing.

Q. And during that time that you served under Lieutenant-Commander Marsaw, how many times would you say you had the opportunity to see him interact with members of the control room even though you worked in the galley? A. On my passing through the control room, going forward, coming from forward to the galley ... I don't understand your question? Is it, like, how many times a day or is it ... ?

Q. If you can give an average of times a day, periods you would've been there? I can't put words in your mouth? A. No, okay.

Q. I'm just asking a question in general based on the times that you were there? A. Everyday. I'm not sure the times that I'd have to go back and forth to the galley from forward, 20/25 times a day. I really don't know because I don't keep track of the times that I go back and forth.

Q. Would you say it was frequent during the course of a day? A. Yes.

1763

PO2 Hallonquist

Examination-in-chief

Q. And during those times, have you had the opportunity to see him address members of his control room? A. Yes.

Q. What about somebody sitting on the trim seat? A. Yes.

Q. How did he address them, the occasions you can remember? A. Well, firmly, authoritatively. Everything was ... the orders being passed back and forth between the officer of the watch to the trimming officer; from the trimming officer to the captain when the captain had the boat.

Q. On any of those occasions, what, if any, degrading terms have you heard him use when he addressed the people in the control room? A. What? All the people in the control room or ... ?

Q. Well, that you have noticed. What, if any, words that you would deem to be degrading would you remember? A. I can't recall anything that the CO ... I don't understand your ... ? Is it, let's say, to the actual people in the control room?

Q. Yes? A. Okay. I find it hard to understand. Is it for the people that ... because they'd done something or is it just general?

Q. If you want to give that example, how would he react when somebody did something he didn't like? A. For an example, if the person on the trim was playing with the trim, which means by pumping water in or flooding water in, and the boat wasn't being kept in trim the Captain would tell the person, let's say, to get the boat back in trim, on what speed for trimming when we're snorting. There's a term used to increase revolutions to obtain a better trim by increasing the speed of the submarine, telling the helmsman to watch his depth and to keep on depth, and then it's a team effort between the trimming officer and the helmsman to keep the submarine on depth.

1764

PO2 Hallonquist

Examination-in-chief

Q. Anything unusual that you have seen?

A. No.

Q. And you have mentioned a certain number of names of people you have served ... commanding officers you have served under. How would you compare Lieutenant-Commander Marsaw to the others that you had the opportunity to observe? A. Compared to which way, sir?

Q. Compared in department in the control room? How these people reacted? How he reacted? A. Lieutenant-Commander Marsaw was a very firm, very authoritative. He knew what he wanted out of his control room team ... mainly what he wanted and compared to other COs he was a very good CO. I had no problems with anything that was passed down to the galley. I was happy serving with him. I was happy serving with all the COs.

Q. And how would you describe Lieutenant-Commander Marsaw's standard from what you could observe in your job? A. Very high standards.

Q. Could you give examples or an example as to how he applied those standards to your specific department, the galley? A. I recall the first time when I joined the submarine in '91 that during the first Friday routine, which is a major cleaning day for the submarine, that he was very, very thorough. And the points that he picked up for the galley itself, in the galley and in the food services spaces, when he pointed them out to me, he made sure that I understood that these points that were picked up would be - not by saying so outright - but the feeling I got was that he knew where the dirty corners were to be, so to speak, and so I knew that he'd be going back there again and it made me realize the standard that he had and it made me realize the standard that I had to bring up. It made me realize the standard that I had to bring the galley up to, to meet those high standards.

1765

PO2 Hallonquist

Examination-in-chief

Q. And in your general working relationship as the cook on board - were you the first or second cook or ... ? A. I was referred to as either the chief cook or the PO chef.

Q. The PO chef. And in your working relationship, how would you approach him for needs or requests or demands? A. Through the chain of command, or through the supply officer and through the executive officer on board.

Q. Did you ever have any problems with your requests or your demands or ... ? A. None whatsoever.

Q. How would you qualify or define his approach to morale when it came to the ship's company? A. I'm sorry?

Q. How would you say that his approach was to morale regarding the ship's company? A. I believe the approach to morale was to work hard, give one hundred per cent, and it was a firm approach. He expected one hundred per cent from all the crew and with that approach in mind, the morale for the ops that we were doing was sometimes low, but due to the busy schedule of the boat - the other two boats were alongside - OJIBWA was tasked with more running periods. So with more running periods we didn't have that many foreign ports, so it was hard to find the time to really let off steam and morale would come down a bit. But on any trips that were planned, where we knew that we had a foreign port in, I found that the morale of the submarine was good.

Q. Would food for instance, based on your observation, play a role in morale? A. A very big part.

Q. And what did you do to play that part? A. I ensured that as being chief cook that the menu was varied. There was always lots of food and were done to the best of our ability, myself and Leading

1766

PO2 Hallonquist

Examination-in-chief

Seaman Dietrich, who was my second cook. And from the favourable comments from all the crew I felt that the crew was happy with my service.

Q. Did you get comments from the Captain?

A. Yes, I did.

Q. And were they good or bad or ... ?

A. They were very good.

Q. Were there any occasions where Lieutenant-Commander Marsaw would've had to raise his voice towards you? A. Never.

Q. My understanding is that given your rank you were a part of the Chiefs' and POs' Mess. How was morale in that mess? A. I said, depending on the operations and the running periods and whatnot, the morale went from low to average, and I thought that morale was generally good. It had its low times, but I would say that generally that the morale was good.

Q. Have you had occasions to see Lieutenant-Commander Marsaw raise his voice? A. Yes, I have.

Q. Could you describe some of those occasions? A. Operations in the control room under very, very tense situations; for example, attacks, underwater look, about ready to do a firing solution, the adrenalin being built up to the actual firing and then immediately after the firing.

Q. And how would you describe such a use of his voice? How did he use that from what you could see? A. When he raised his voice he had to be heard above everything else that was in the control room because through the passing of information coming from about six or seven different outlets he had to take everything into perspective and make sure that the next order was directed to the right people to carry on the process, whether it be the underwater look or firing solution or giving the way after you've fired.

1767

PO2 Hallonquist

Cross-examination

Q. Yes, I forgot to ask you, could you specify to the best of your recollection the dates that you were on OJIBWA under Lieutenant-Commander Marsaw?

A. I joined OJIBWA on the 17th of July 1991. I was on board until July of '92. I was landed for compassionate reasons which was until it returned from operations on the 4th of October, I believe, of '92, back on board the boat. We were in a docking period until January I became ill, in the first part of January, and I was landed medically until April, I believe, the latter part of April, that would've been '93, April '93. From January to April of '93 I was landed medically.

Q. And after April '93? A. I was on the boat which I'm presently still.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. Is it your testimony that Lieutenant-Commander Marsaw did not yell and scream profanities at members of his crew in the control room? A. At the crew or to the crew or ... at the crew?

Q. At or to the crew? A. No, it is not.

Q. So do you agree that at times he did yell and scream profanities at or to the crew in his control room? A. Yes, he did.

Q. And I understand as a cook you spend the vast majority of your time working you're in the galley? A. Yes, sir.

Q. How long does it take to pass through a control room? A. It depends on the ops that'd be

1768

PO2 Hallonquist

Re-examination

going on. If it's in black lighting at night, you have to wait by the second panel and you have to ask permission to go forward, and it could be almost 30 seconds, it could be a minute, or it could be two minutes.

Q. Okay. So two minutes is the maximum time you're going to spend in that control room at any one time? A. At that part of the control room, yes.

Q. What noise sources exist in the galley?
A. Engine room noise coming through bulkhead 77, galley ventilation and the galley exhaust and a galley radio.

Q. So I understand you used to play a "ghetto blaster" in the galley? A. Yes, sir.

Q. So when you're in there working in the galley, you can't hear what's going on in the control room at all, can you? A. No, sir.

Q. And you didn't have a job in the control room like a helmsman or working the CDC panel? A. No, sir.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Re-examination?

RE-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. I just want to clarify, did you say that when you witnessed Lieutenant-Commander Marsaw in the control room he did or did not yell profanities, dirty words or ... ? A. He did yell profanities at the direction towards the trim and the helmsman.

Q. Do you have any recollection of the words? A. Words to the effect of when we get on depth, it's a meal pond up there; call up speed for trimming ... on the speed for trimming, don't ... you want to use the words?

1769

PO2 Hallonquist

Re-examination

Q. The words, yes, if, you know, they're curse words don't be afraid to mention them? A. Words to the effect of, don't fuck with the trim. That's all, sir.

Q. And that's what you mean by profanities?
A. Yes, sir.

Q. For the time that you spent - you were asked in cross-examination the duration, how long it would last - did you ever for other reasons stop and watch what was going on? A. Periodically, yes, sir.

Q. How would you go about doing that?
A. Coming through from ... if I wasn't on watch in the galley, if I was off watch for a couple of hours, I would come from forward and sit just forward of the control room - there was a seat that was next to the sound room - I would, for lack of a better term, I guess, I would visit the sound room. I would visit the plot table to see where we were at, or the speed that we're doing - only if we were on the surface. It was the only way to find out exactly where you were and how much time to come home, and a time where you're going to.

ASSISTANT DEFENDING OFFICER: These are my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Questions from the court?

PRESIDENT: Nothing.

JUDGE ADVOCATE: Thank you very much.

WITNESS WITHDRAWS.

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, if we could have a 10-minute adjournment to do the turnover between myself and Lieutenant-Colonel

1770

Couture, who's going to take over the continuation of the day.

JUDGE ADVOCATE: Very well. The court is adjourned for 10 minutes.

ADJOURNMENT: At 1553 hours, 23 October 1995, the court adjourns.

REASSEMBLY: At 1608 hours, 23 October 1995, the court reassembles and the accused is before it.

ASSISTANT DEFENDING OFFICER: Mr Judge Advocate, given the time of day and the structure of the evidence to come, I would suggest that it would be an appropriate time to ask for an adjournment until nine o'clock tomorrow morning.

My understanding, that the prosecution would not be disagreeable to this request. I'll leave it up to you, but ...

JUDGE ADVOCATE: Any objections from the prosecution?

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: The court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1609 hours, 23 October 1995, the court adjourns.

REASSEMBLY: At 0910 hours, 24 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may call your next witness.

1771

ASSISTANT DEFENDING OFFICER: Yes, Mr Judge
Advocate.

Good morning, Mr President and Members. I'd
like to call Mr Calnan.

s.19(1)

1772

Mr Calnan

Examination-in-chief

NINTH WITNESS) Mr J.D. Calnan, is duly sworn.
FOR THE)
DEFENCE)

EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Mr Calnan, for the purpose of the record, I would ask you to give your full name and spell out your last name, please? A. James Daniel Calnan, C-A-L-N-A-N.

Q. Could you give your social insurance number? A.

Q. And what is your present address? A.

Q. When did you join the Forces? A. April of 1962.

Q. And it's my understanding that you are retired now. When did you retire? A. 31st of July of this year.

Q. This year. What was your trade when you retired? A. AESOP, Airborne Electronic Sensor Operator.

Q. And what was your rank? A. Warrant Officer.

Q. Could you briefly summarize your career for the court? A. I enlisted in the RCAF in 1962, trained as an Aircraft Electronics Technician; spent four years in Germany in both Zweibrucken and Baden; remustered to Observer at that point in 1971; flew on Argus, Sea King and Aurora aircraft over a 20 year span; and the last five years I was in the intelligence in MARCOM and the EWOC school in Shearwater as an instructor.

1773

Mr Calnan

Examination-in-chief

Q. Towards the end of your career, did you have the opportunity to participate in an operation on a Canadian submarine? A. Yes.

Q. Which submarine was it? A. HMCS OJIBWA.

Q. And what was the time period of that operation? A. Approximately the 18th of August through to the 10th of October.

Q. And you were on board during that period?
A. Yes.

Q. Who was the commanding officer?
A. Lieutenant-Commander Marsaw.

JUDGE ADVOCATE: Excuse me, what year was that?

WITNESS: 1992.

JUDGE ADVOCATE: Thank you.

ASSISTANT DEFENDING OFFICER:

Q. And you said Lieutenant-Commander Marsaw, would you be able to recognize that person? A. Yes.

Q. I would ask you to look in the court and tell the court if you can identify him? A. That's Lieutenant-Commander Marsaw sitting there.

JUDGE ADVOCATE: The witness indicates the accused.

ASSISTANT DEFENDING OFFICER:

Q. Could you briefly describe your first meeting with Lieutenant-Commander Marsaw when you went on board for that operation? A. We loaded our equipment on the submarine and myself, an RCMP officer and two Comm Research NCOs met with the Captain prior to

1774

Mr Calnan

Examination-in-chief

sailing and received instructions from him, what he wanted and what he expected, and there was no question ... he outlined what he wanted.

Q. Okay, and then you went on board the submarine. You spent approximately what, two months?
A. Two months.

Q. During the period - and your time - where were you bunked on the submarine? A. The forward end in the torpedo room.

Q. Did you interact on a regular basis with the members of the crew? A. Yes, very much so.

Q. And based on your observation, what was the attitude of some members towards Lieutenant-Commander Marsaw? A. I got the impression by listening to them talking that he wasn't a particularly popular CO. Beyond that, that was all that was stated really.

Q. Where would you work on the submarine during that period? A. My job was to intercept and interpret the radar emissions from a vessel of interest, in other words to fingerprint the particular radar and aid in the tracking of the vessel that way, electronically, particularly at night. It was quite easy for me, with the equipment I had, to identify the vessel with virtually a hundred per cent accuracy and we could then follow him.

Q. And physically on the submarine where were you located during that ... ? A. In the radar room.

Q. In the radar room? A. Just off the ops room.

Q. Just off the ops room, okay. How many times did you transit through other parts ... ? A. My duties were not specific. I wouldn't be there at any time, okay, it was whenever it was required. So in

1775

Mr Calnan

Examination-in-chief

some days it may be half a dozen times, other days it may be two or three times and other days it may be as many a dozen. It would vary.

Q. And other than the times that you were required for your duty, did you have the opportunity to observe what was going on in the control room?

A. Yes, periodically.

Q. How would that come about? A. I'd ask to sit there to watch different evolutions, and they'd put me to one side out of the way.

Q. Based on your observations, how would Lieutenant-Commander Marsaw interact with members of the crew in the control room? A. He was very much the boss. There was no doubt when he came on board and into the control room that he was there. His presence was felt which is perfectly normal.

Q. During those occasions, did you have the opportunity to see him address members when he wasn't satisfied with how things were going? A. Yes.

JUDGE ADVOCATE: Excuse me. Would you please face the court when you give your answer and speak up so that everybody has a chance to hear what you say.

WITNESS: Okay, sir.

ASSISTANT DEFENDING OFFICER:

Q. I'll just put my question again then. When you observed him interacting with members when things weren't to his liking, how was he, how did he react? A. Very direct. He left no doubt in anybody's mind what he wanted, what he expected, that type of thing.

Q. What particular evolution that you witnessed when you were in the control room that comes to your mind? A. The one that comes to mind, and I spent the whole time during this evolution, was a deep-test

1776

Mr Calnan

Examination-in-chief

dive that we did, and it's the first time I'd ever been on a submarine, of course, and it was kind of very interesting to me. I asked to sit in the control room and I just simply watched the whole evolution take place and the way it was done. I was impressed with the professionalism and the safety of it. We went down in steps and it was done very, very professionally. I thought it was handled very well. It made me feel very safe.

Q. And during that trip is there another incident that would've involved surfacing that you remember? A. The incident that comes to mind was the ... we did an emergency surfacing and I wasn't in the control room at the time. Apparently, there was a navigation error of some kind and we had to do an emergency ...

PROSECUTOR: Objection, at this point. I think he's getting into hearsay, Mr Judge Advocate.

JUDGE ADVOCATE: Sustained.

ASSISTANT DEFENDING OFFICER:

Q. You weren't in the control room at the time? A. No, I was not.

Q. As an outsider coming off the submarine, what was your impression of your trip? A. Very, very favourably impressed. I thought it was a very good submarine, very good crew. Very demanding and dangerous job. Being aircrew, of course, I can sympathize with their difficulties. I was very favourably impressed with everything about the whole operation.

ASSISTANT DEFENDING OFFICER: These are all my questions, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Cross-examination?

1777

Mr Calnan

Cross-examination

CROSS-EXAMINED BY PROSECUTOR

Q. I understand you didn't sit any watches in the control room? A. No, sir, I did not.

Q. And the longest stretch of time that you spent in the control room at any one sitting would've been maybe an hour? A. An hour or so, yes.

Q. And at that time that's when you were let to sit on the helm seat and actually drive the boat? A. At one particular time they let me handle the plane and I was allowed to start the engines, do various things that I took an interest in.

Q. The vast majority of your time in the control room would've been composed of passing through and out of the control room on the way to the radar room? A. As a rule.

Q. And your workplace was really the radar room I understand? A. That's correct.

Q. And usually when you worked in the radar room the door would be closed? A. That's correct.

Q. And when you're in the radar room, when the door is closed, you can't hear or make out voices that are said in the control room? A. Not distinctive, no.

Q. So if someone was calling somebody an idiot or words like that you wouldn't be able to hear them when you're in the radar room? A. Unless it was extremely loud, no.

Q. And then even then, it would be muffled? A. Probably muffled, yes.

Q. At times when you're in the radar room - not most of the time but some of the time - you'd have

1778

Mr Calnan

Cross-examination

headsets on? A. For a few moments at a time to identify a radar of interest by its particular sound, yes. Not very long, just momentarily.

Q. No, that wouldn't be the majority of time, but sometimes you did have headsets on?
A. Occasionally, yes.

Q. In terms of your position throughout the sub, would it be fair to say that you spent the majority of the time in the fore ends where your bunk was or in the mess? A. Yes.

Q. And if you were needed to do some work in the radar room that's when you'd get the call and you'd go in and go out? A. That's right. At anytime day or night, it wasn't a specified watch period.

Q. As a member of an Aurora crew is one of the principles of leadership to keep the crew informed of what you're doing and where you're going? A. Very much so.

Q. Were you instructed by Lieutenant-Commander Marsaw not to discuss where you were going and what you were doing with the other members of the crew?
A. Yes, we were.

Q. Members of the crew aren't stupid people, are they? A. No, absolutely not.

Q. And they were doing different things to try to find out what they were doing and where they were going? A. Yes.

Q. They tried to construct a plot to find out ... ? A. I understand that's true.

Q. And you were peppered with questions about what we're doing and where we're going? A. Some very pointed questions within a very short while, yes.

1779

Mr Calnan

Cross-examination

Q. Did that put you in a difficult position?

A. A little bit uncomfortable, not difficult.

Q. Okay. Was this a source of discontent or unease for some of the members of the crew? A. I think it was more curiosity. They were very curious as to what was taking place and what we were doing, as opposed to anything else.

Q. Did it cause any unease from some of the members of the crew not to know what they were doing and where they were? A. I assumed it must've. I know if I was in that situation I'd want to know what I was dealing with, preferably.

Q. Is a person who's got ... how many years did you have in the military? A. Thirty-three finished, when I retired.

Q. Thirty-three. How many of your aircraft commanders in your experience would refer to subordinates as members of the aircrew using personally insulting adjectives; such as, idiot or asshole to them as part of their leadership style? A. I've never heard it.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

ASSISTANT DEFENDING OFFICER: Just one question, Mr Judge Advocate.

RE-EXAMINED BY ASSISTANT DEFENDING OFFICER

Q. Concerning instructions or information not being given to the crew as to what it was all about and where and when and all of that. Do you have any knowledge of what the Captain's orders were at the time? A. No, I do not. I have no idea what his direction was.

1780

Mr Calnan

Re-examination

ASSISTANT DEFENDING OFFICER: Thank you.

JUDGE ADVOCATE: Questions from the court?

PRESIDENT: No.

JUDGE ADVOCATE: No questions.

Thank you very much.

WITNESS WITHDRAWS.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, we are essentially ready to call our next witness and, of course, I put the word "essentially" because there's something coming. There is a brief matter that needs to be discussed with the "JA", a matter of law. So I would ask please to enter a **voir dire** which I suspect will not be very long and then we can carry on.

JUDGE ADVOCATE: Very well.

THE PRESIDENT AND MEMBERS RETIRE.

DEFENDING OFFICER: Mr Judge Advocate, at this point in time, and I thought it - after discussion with the prosecution - I thought it would be wise to appraise you first in the absence of the members of the court. The defence now proposes that a visit on board the submarine OJIBWA, who's here in Halifax thankfully, a visit of the boat with the members of the court under provision of Military Rules of Evidence 111(c), and the ...

JUDGE ADVOCATE: Say that again? What's that?

DEFENDING OFFICER: It's 111.

JUDGE ADVOCATE: Of what?

1781

25th voir dire

DEFENDING OFFICER: Military Rule of Evidence
111.

JUDGE ADVOCATE: Sorry, okay.

DEFENDING OFFICER: 111(c) and, of course,
with direct, of course, reference to QR&O 112.63, which
provides for the president ... I will read, it's a very
short article which in turn refers to the **National
Defence Act**. 112.63 reads as follows:

**" ... Section 186 of the National
Defence Act provides:**

**'186. A court martial may,
where the president considers
it necessary, view any place,
thing or person.'**

**(2) Any proceedings during a view
shall, subject to article 112.10
... be in open court."**

It is suggested by the defence - and I'm led
to understand that the prosecution doesn't take any
strong exception to this position - that given the very
special environment of a submarine, I mean, we have
been talking about locations, we have several pieces of
evidence in this court amongst others many diagrams and
so on and so forth, that do not, of course, fully
reflect the real dimensions and so on and so forth.
We've heard a lot of evidence throughout this testimony
about the helm, the helm seat, the plot table, the
attack pericope, the after periscope, the galley and so
on and so forth.

It is our position, of course - and that will
be for the president to decide on the usefulness of
that - but it is our position that such a view would
definitely help the court in better understanding the

1782

evidence and might be useful to them in considering the evidence and in their future deliberations.

At this point, Mr Judge Advocate, I would like to give you a copy of a document that I have entitled "Proposed Itinerary for Submarine Visit". I have provided the prosecution with a copy of that document. In fact we have discussed the document, and I understand all items on this document - you don't find it necessary, sir, that I put on the record the content or should we mark this as an exhibit or ... ?

JUDGE ADVOCATE: You may mark it. As you wish.

ASSISTANT PROSECUTOR: I certainly have no objection to it being marked.

DEFENDING OFFICER: It might easier to mark it as an exhibit and that way it'll save me to ...

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: VD ...

JUDGE ADVOCATE: Yes, we'll have to mark it in the **voir dire**. I mean, do we have to mark it in the **voir dire**?

DEFENDING OFFICER: Okay, let's say that we won't and possibly we can enter it later as exhibit for the benefit of the court.

Essentially, I will refer to it. What we intend to do, I mean, knowing of certain limitations that exist; knowing that the court reporter has to be there and so on and so forth; knowing that it's cramped on board the submarine and that everything that is said must be first recorded, of course, by the court reporter and must be heard too by the court, so what we intend to do is keep it to a minimum.

1783

So, essentially, the witness who will conduct this visit will merely, essentially, identify various areas of the ship. So we would proceed from forward to after, show this is the torpedo room, this is this, this is that, and go throughout the submarine like this. And after that we would request that, of course, pay a little more attention to the famous control room that has been discussed so much here, identify the periscope and various pieces of equipment, and we will seek that the witness, as well, makes a demonstration on the use of a periscope; namely, the attack periscope.

On this list that I have here in front of me there is one item at page 2, the very first after the title that's underlined, "After general tour", the first line, "On order, test the general alarm and diving alarm". I understand my learned friend has difficulty with that. I believe it can be stated, and it is even agreed by the defence, that what the court sees there - I'm not talking about what the witness says - but what the court sees is not evidence as such, of course, because we cannot transplant their minds on the record. It is suggested, therefore, that this wouldn't be evidence either. It was believed by the defence that it might be of some usefulness, again, in assisting them in assessing the evidence.

The relevancy of that - and we don't have, I believe, to prove that is relevant in as much as it is not evidence - but the usefulness evidence of that action or demonstration would be that it would help the court because the noise level has often been raised, reference have been made; for one, by Lieutenant[N] Cassivi about pressing the Klaxon, I guess, three times or something; general alarm has been discussed by Bidinost, Madgett and others in relation to a radar door incident and so on and so forth.

How critical is it? I mean, we cannot fully assess, it's pretty difficult to do. But we claim that there may be some usefulness and that we would like

1784

that to happen, I mean, it's matters of seconds when we're on board. It will happen or not, of course, depending on your ruling and that's it. We'll, of course, as always will accept your decision on that. We believe it can be useful and that's it.

I believe that was the only point in issue, I guess, with the prosecution, but I will let him address you on the subject. Unless you have any further questions, those are my representations.

And, basically, the purpose of this **voir dire**, Mr Judge Advocate - I should have maybe have clarified more - is that we can, basically, agree or obtain a ruling on your part that if the president - of course that is his decision under 112.36 - if the president determines that such a visit might be useful, I understand that you as judge advocate have to set some rules and you will have to advise the court as to what can be done, what cannot be done, how it's going to be done. And the purpose of this **voir dire** is to, basically, try to provide you with our view as to what should be done, et cetera.

Unless you have any questions, those are my representations.

JUDGE ADVOCATE: Very well, thank you.

Prosecution?

ASSISTANT PROSECUTOR: A couple of general concerns, Mr Judge Advocate. The prosecution doesn't oppose the view *per se*. Again, subject, of course, to your ruling and the president's determination as to whether or not it would be useful, I guess, point out that the law requires that a decision to take a view is an exercise of discretion and the discretion has to be exercised judicially. So it's a matter obviously for the court and the president to deal with after you've determined whether or not it's even appropriate to view certain things.

1785

As my friend has indicated, the major concern the prosecution has is with respect to the test of the alarm system on board. It's the prosecution's position that even though the view may not in itself form evidence it clearly leaves the court and the members of the court with an impression, and it's an impression that they will take with them into their deliberations when they consider the evidence that they have before them.

The general alarm, the evidence is - and I think the evidence came out in cross and it's more suggestion to the witnesses that the alarm was ringing or would've been ringing if there was an emergency - but the evidence clearly is that the individuals were sitting in an operating submarine inside a radar room with the door closed with or without a speaker that would've piped the alarm in there. I think that's unclear in the evidence as to whether or not the alarm rings or they simply pick it up from the control room in general.

To then go into the control room and have the members congregated in the control room and test the alarm, in our submission, would result in leaving the court with an unfair and inaccurate impression of what actually occurred with respect to the evidence. It's not of any assistance to them, it would be submitted, in fact, it would merely confuse the issue for them. They'll be standing in the control room, the alarm bell will be ringing. The witnesses were in the radar room with the door closed, if the alarm bell even did ring. So our position is that whether we deal with this on the basis of relevancy or we deal with it on the basis of fairness, it simply shouldn't happen. It won't assist the court, it will confuse them.

And I'd refer you, Mr Judge Advocate, to the case of **Meyers v. the Government of Manitoba** - and I apologize I don't have a copy for my friend but I will provide him with one as soon as we adjourn.

1786

DEFENDING OFFICER: I'm probably aware of the case.

ASSISTANT PROSECUTOR: It's found at 26 D.L.R. (2d) 551, it's a decision of the Manitoba Court of Appeal.

JUDGE ADVOCATE: Thank you.

ASSISTANT PROSECUTOR: And, essentially, that case discusses the propriety of taking a view, et cetera. And at page 555, the bottom paragraph - I won't read it, I'll just paraphrase - but, essentially, the court states that when it is decided to exercise a view, the judge or the court must ensure that it's fair to all parties.

So for my friend to stand up and say, well, there's evidence of the alarm and we just want to turn it on and it will only take a minute, and let the members of the court hear it. That's fine. But I don't it fairly represents the evidence, and I don't think it could possibly be fair to all parties to go through that exercise, unless it's decided we're going to put the members of the court in the radar room, close the door, turn on all the equipment that would normally be on when the submarine is operating and do it that way, which I think goes well beyond the intent of the view. So it would be our position that that simply should not happen and is inappropriate.

The other area that we have some concern is with respect to the wardroom and the fact that we won't be visiting the wardroom on board OJIBWA for obvious reasons. It isn't an accurate representation of what the wardroom was like in December of 1991 when the allegations in charges number one and two took place. I think it's important that the court be advised that they won't be seeing the wardroom and be told why.

And we also have the option of visiting the OLYMPUS which is the training submarine, which I've

1787

been advised has a wardroom that's very similar in layout to what the OJIBWA wardroom was like. And while the prosecution certainly won't insist that it happen, the prosecution would submit that the court should be made aware, the president should be made aware, of the fact that the OLYMPUS wardroom is similar and it is available for the members to view should they feel it necessary. And I go back to the words of my friend, the purpose of the view is to assist them to better understand the evidence before them, and if they feel that viewing the OLYMPUS wardroom would assist them in understanding the evidence with respect to charges one and two, that they should be given that option to go to the OLYMPUS as well.

So, again, we won't be insisting before the court that they either see the OLYMPUS wardroom or we don't go at all, but we would ask that the president be made aware of the option and be given the opportunity to make the decision as to whether or not it would be an appropriate thing for the court to do.

And, again, the prosecution's understanding is that the view itself is not evidence. It's simply an exercise to assist the court and that'll be the understanding.

Those are my comments, Mr Judge Advocate, unless you have any questions.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, if I may very briefly. I fully agree and that's something I had meant to raise myself, I forgot, about the wardroom. You will note that the wardroom does not appear on the list, the proposed visit there, for that very reason. It is clear and there is an agreement - the odd agreement between the prosecution and the defence - that the wardroom is totally different now from what it was before. It's barely half the size of what it was, and so it would be totally misleading for the court to

1788

take any notice of that. And I agree with the prosecution that the court should be warned of that fact. That's why it's not on the list.

As to whether the proposal of going on OLYMPUS to see the wardroom, I will not oppose it period. But, I guess, it will have to be decided by the court whether it is useful. It appears that the wardroom ... a view of the wardroom, having regard to the evidence heard, might serve very little purpose contrary to the rest of the view and I wonder, like, if it's worthwhile, the time, I mean, of even taking all those nice people on board the second submarine just to look at the wardroom.

So we don't take a strong position against it. We simply say if the court wants to see a wardroom, well, it will have to be the OLYMPUS, and if we have comments to make about whether it is exactly or not the same as OJIBWA was, well, we can take care of that in evidence.

JUDGE ADVOCATE: Just to clarify. I mean, why do you say that a visit of the wardroom on board the OLYMPUS might serve very little purpose? We know that the evidence seems to be indicating so far that an incident allegedly took place in the wardroom and other incidents allegedly took place in the control room, so you submit that a visit of the control room is necessary and you submit that a visit of the wardroom is not, so ...

DEFENDING OFFICER: I say may not be necessary. I'm just comparing the relative value.

JUDGE ADVOCATE: But why is that?

DEFENDING OFFICER: Because essentially the wardroom pertains to ... okay, the wardroom is relevant to charges one and two.

JUDGE ADVOCATE: Yes.

1789

DEFENDING OFFICER: And then maybe a few others who said they were not eating there. Well, we've got all kind of evidence to say it's too small, they had to have so many sittings and so on and so forth. I just find this not nearly as critical; for example, as the control room where the size, the dimension, the various things, have been referred to all along. I am not saying - and I apologize if I sounded as if I said there was no usefulness. I was just taking it in a sort of ... relatively to the case, the importance of the evidence and all that. Much more has been said about other factors, and the wardroom itself and the rest of the boat. The view of the boat is important to, basically, the whole context, so it's just a matter that is relative ...

JUDGE ADVOCATE: No, my only concern was that I wanted to know the difference between the two offers, if you want, because we heard lots of evidence - mainly called from you if I remember well - to the effect that depending where the victim was in the wardroom, perhaps, it was or was not possible for a witness to see what happened to Kelk and things like that. That's why I raised the question, I mean, I'm not suggesting anything.

DEFENDING OFFICER: Yeah, in that respect I have not seen the OLYMPUS wardroom myself. I'm sure that if we go to see it, well, we'll make good notes of what it's like ...

JUDGE ADVOCATE: Because you made reference to a bar that was there and it could be unfolded and like impossible to see or not.

DEFENDING OFFICER: That's right. Yeah, my information, however, is that that sort of bar, as I called it at the time, was sort of unique to OJIBWA, that's my understanding. So that's why I'm far from sure - and not having seen the OLYMPUS wardroom - I know, like, the bar - there's always a slight differ-

1790

ence between the various wardrooms and that one I understand was peculiar. I might be wrong, I'm not testifying here. But that's on my understanding it was unique to OJIBWA that little bar. So if we go on OLYMPUS, for example, and it's not there, then it might have an adverse affect.

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: So that's why. And I think that I've tried to be fair by agreeing and asking you to tell the court to disregard the OJIBWA wardroom as it is, fair to the prosecution because I don't want to leave any wrong impression. Conversely, if the wardroom of OLYMPUS is to leave a similar impression that can be misleading, I would say that we should stay away because it might or might not be an important piece of evidence that bar and if they don't see it there, I mean, that might throw some doubt in their minds as to the witnesses who testified on that and it's not fair to either party.

Finally, I suppose that one of the reasons of this **voir dire** in addition to, of course, having a ruling as to what can be done and what cannot be done, I suppose you probably will indicate to us which way you will advise the president.

JUDGE ADVOCATE: Certainly.

DEFENDING OFFICER: Although it is his decision, I'm sure you will take part by advising him as it is your role.

JUDGE ADVOCATE: I will.

DEFENDING OFFICER: Yeah, thank you.

ASSISTANT PROSECUTOR: If I might just add, Mr Judge Advocate, in line with the concerns my friend has raised with respect to the OLYMPUS wardroom. It's my understanding that the control room on OJIBWA,

1791

although essentially the same as it was in '91, '92, '93, has had some minor adjustments made to it. I think the sound room is somewhat larger.

I understand my friend will be putting a witness on ... swearing a witness before we go on the view and it might be appropriate before we go to have that witness indicate what the differences are, although slight as they may be, the fact that the sound room is bigger. The control room, I believe, is slightly smaller in some locations than it was at the time, some equipment is closer to certain areas where bulkheads were moved out. I don't know if that's accurate or not - but maybe we can discuss that during the break - but if there are differences along those lines, I think, again, in fairness to the court, even though they're probably not appreciably noticeably different, they should be raised.

JUDGE ADVOCATE: But did that ...

ASSISTANT PROSECUTOR: So the increased size of the sound room is the one thing that comes to mind.

JUDGE ADVOCATE: Of course. But this matter can be raised by either of you in your examination or cross-examination in court.

DEFENDING OFFICER: That's right, yeah.

ASSISTANT PROSECUTOR: Yes, that's correct, yeah.

DEFENDING OFFICER: And if it may help the prosecution, the prosecution and I had intended anyway, as soon as we're back from the visit right then and there to address those matters; for example, we'll see the forward torpedo room. It's empty now. I'm not going to have him elaborate on that on board just to make life easier for everyone. When we come back here in court, I will say, okay, we saw that, and then he

1792

can testify that was empty, and, I mean, when we're at sea normally it's full, et cetera.

And I'll pick on all those differences that we believe exist and that'd be there for the court, and I believe they are minor, but we will in all fairness try to address them. And then if there's a dispute between the prosecution and the defence, well, that wouldn't be the first time and that would be for the court decide which go to go about that.

JUDGE ADVOCATE: Very well. So I will take a few minutes to consider this matter, and also if I come to a decision that I should advise the members or recommend the members to conduct such a visit, I will take some time to draft some guidelines on this matter also.

DEFENDING OFFICER: Before you retire, Mr Judge Advocate, it appears that such a visit could take place anywhere after 11:00 this morning or more likely 11:30, the time for the officer of the court to give notice and all that. So just for your information.

JUDGE ADVOCATE: Very well.

AT 0955 HOURS, 24 OCTOBER 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 1015 HOURS, 24 OCTOBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: Having heard the representations made by counsel and read the proposed itinerary for the submarine visit, I am ready to advise the president of the court that he may order to take a view of the OJIBWA if he considers it necessary.

I see no indication of any abuse in such a request as the conditions necessary to ensure fairness for all the parties have been met, including the conditions precedent to such a view and the opportunity to

1793

present further evidence in court. There seems to me to be no valid reason for advising the president not to take a view.

There is only one matter that could cause confusion and perhaps a lack a fairness, and I am referring here to the matter of testing the alarms. As the evidence shows that several pieces of equipment were functioning at the time the alarms went off, it could mislead the court to make such a test while no other pieces of equipment are functioning. There shall therefore be no test of the alarm system.

Unless you have other matters to raise we will invite the members to join us, then you will make your request, Lieutenant-Colonel Couture.

DEFENDING OFFICER: Yeah.

JUDGE ADVOCATE: And I will provide them with the instructions. Perhaps, I should give you the proposed itinerary back and you could delete the part that I don't want.

DEFENDING OFFICER: That's right and then reproduce it to be introduced as an exhibit.

ASSISTANT PROSECUTOR: I guess the only other matter, Mr Judge Advocate, is the OLYMPUS wardroom. Will we address that in argument or will you deal with that with the president?

JUDGE ADVOCATE: Well, no, that's a good point you raised. Because I had already taken a note to that effect for my instructions to the members and this note is to the effect ... yeah, well, I will inform them - and perhaps you will before I do which I have no objection to - that there should be no visit of the OJIBWA wardroom because alterations have been made since the time the incidents were allegedly committed, and I would also mention that there should be no visit of any other wardroom on board other boats like the

1794

OLYMPUS as I am informed that the layout is different.
But it's not ...

ASSISTANT PROSECUTOR: I guess the only issue was whether or not there was a bar in the OLYMPUS wardroom. Maybe we should confirm that before you give that instruction, Mr Judge Advocate, if we could?

JUDGE ADVOCATE: Okay, very well.

ASSISTANT PROSECUTOR: I'm certainly not an expert.

JUDGE ADVOCATE: Oh, I can ...

ASSISTANT PROSECUTOR: They're certainly very similar and, I think, I mean, we're going to the control room and that's not exactly the same as it was before either, I mean, we certainly wouldn't suggest it's not very, very similar. I think the same is true of the OLYMPUS wardroom.

JUDGE ADVOCATE: Would you just prefer that I delete this part from my comments to the members?

ASSISTANT PROSECUTOR: I would prefer that we leave it strictly to the president as to ... my friend can certainly raise the question as to whether or not the bar is there. I don't know if it is or not, I really don't, and I certainly wouldn't want to mislead the court.

JUDGE ADVOCATE: But from what I understand the defence does not recommend ... will not recommend to the court that we visit the OLYMPUS, is it so?

DEFENDING OFFICER: Yeah, I mean, one of the problems is we haven't seen it now. Maybe, I mean, the prosecution had mentioned to me they might want to do that but, I mean, I've been busy with other things, but ...

1795

JUDGE ADVOCATE: No, but if you both agree that they should not visit, we'll just not mention or not make any other offer at all.

ASSISTANT PROSECUTOR: I guess we don't agree that they should not, I think. Our position is that the offer should be made. We're not going to stand up and insist that if they don't visit the OLYMPUS wardroom there shouldn't be a view period. But we will take the position that they're strikingly similar, the two wardrooms. There's no prejudice to anybody if they go down and see the OLYMPUS wardroom.

Whether there's a bar or not, the description of the bar is very vague in my mind. I think, it's more of a cabinet that was on the bulkhead to some degree. Whether or not it went from floor to the top, I'm not sure, and whether or not it even exists in OLYMPUS we don't know. The settees are where the settees were in OJIBWA, the table is where the table was in OJIBWA, you know, the bar, the entrance. Essentially, the only area that may not be precisely the same is this cabinet or whatever it was that was there.

JUDGE ADVOCATE: But if ...

ASSISTANT PROSECUTOR: And, again, it's a matter for evidence. The accused can come back ... or the witness, whoever the witness is, can back and give evidence to the effect that, you saw the OLYMPUS wardroom, that's exactly what it was like on OJIBWA except we had a cabinet that came out a foot from bulkhead "A" or bulkhead "B", from floor to ceiling, or from halfway up to ceiling, whatever the case may be. Which is essentially what will happen with the control room; come back and indicate that the control room's the same, but you looked in the sound room and it's bigger now than it would've been then, so it's ...

JUDGE ADVOCATE: But I have two questions: first of all, is it necessary to visit the OLYMPUS; and secondly, I know that arrangements have been made by

1796

the officer of the court to visit the OJIBWA, but would a visit of the OLYMPUS cause any problems as no arrangements have been made?

ASSISTANT PROSECUTOR: I requested the officer of the court to make arrangements to have the OLYMPUS wardroom available if the court ... what the status of that is, I can't tell you, but that request was certainly made. And I understand ... and it's okay? It's just been indicated that it is available.

And, again, it's not our position ... it won't be our position that the court must visit the wardroom, but I think it should certainly be made available to them, and presumably we have a right to rebuttal. If we don't see it now we could make a motion on rebuttal to go see it, and I know you don't want to do that and I'm not ...

JUDGE ADVOCATE: Well, if you have any request to make to take a view make it now because there won't be any other.

ASSISTANT PROSECUTOR: Well, I guess, if that's the case then we're making it now, so maybe we should adopt the position that we must visit the OLYMPUS wardroom, maybe, and I apologize. It's certainly not what we discussed with my friend and ...

JUDGE ADVOCATE: How long will it ... how much time would it add to our visit by including the OLYMPUS?

ASSISTANT PROSECUTOR: I would suggest it's going to take, again, probably 10 minutes to get in and out of the OLYMPUS, to view the wardroom would take minutes, I would expect, five minutes maximum for everybody to go ... I mean, it's certainly not a large space and won't take long. So maybe 20 minutes, I think, would be a reasonable estimate.

1797

JUDGE ADVOCATE: And those boats are in the same area? They're not far away one from the other?

ASSISTANT PROSECUTOR: No, one's on one side of the jetty, and the other one, you walk around a u-shaped jetty and it's on the other side.

JUDGE ADVOCATE: Very well, we'll leave it to the members.

Do you have other points?

DEFENDING OFFICER: If I may, I have asked the officer of the court to black out that portion according to your ruling and I will seek to introduce that.

JUDGE ADVOCATE: That's fine.

Would you please invite the members back to the courtroom.

OFFICER OF THE COURT: Sir.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, I will be directing my comments to you this time, Mr President, more particularly. The defence at this point makes a motion for you, Mr President, and, of course, under the advice of the judge advocate as required, that under QR&O article 112.63 that if you deem it necessary and appropriate that we have a visit of the boat OJIBWA, which is here in Halifax now, to visit the boat, having a tour of the boat and, of course, focusing particularly in the control room area where the periscopes are, the plot table and so on and so forth.

With your leave - and the prosecution has a copy of this - I would like to introduce as exhibit, Mr Judge Advocate, a proposed itinerary for the visit, so that the court may refer to it.

1798

Defending Officer

Request to take a view

JUDGE ADVOCATE: "PP".

THE PROPOSED ITINERARY FOR THE SUBMARINE VISIT IS MARKED EXHIBIT "PP".

DEFENDING OFFICER: I will tell you, basically, what is our position. Throughout the trial we have heard, of course, lots of evidence, and most of the evidence, if not all of the evidence, has turned around the life on the submarine; the action that was taking place in the control room; people being, I don't know, one, a few cooks working near the galley and so on; the heads that had been ... some were, and et cetera, et cetera.

So we take the position - and despite the fact that we have diagrams here and which are before the court - we take the position that it may be of assistance in helping the court to understand the evidence presented before you that you view a boat, and maybe many of you have or maybe some of you have not. It is our position that it might be of assistance and that will be your decision, of course. But we feel that it might be of assistance.

The proposed visit would be something like, we will have a witness who will indicate a few places. So, basically, it would be a visit from the forward torpedo room and then back to the engine room, pointing out as we go along various places of interest. We have not indicated here anything about the wardroom, and I must advise the court that I am reliably informed that the wardroom is totally different from what it was in 1991, so that's why the wardroom does not appear on this list.

And then having made this rather quick visit pointing out various pieces of equipment and whatnot, we would come back to the control room where a more detailed - again, it won't be long testimony but more

1799

Defending Officer

Request to take a view

showing, this is the plot table, the attack periscope, the after periscope, helm seat, et cetera, et cetera.

I can tell you now that we would like as well to have a demonstration on the use of the radar at various height.

JUDGE ADVOCATE: The radar?

DEFENDING OFFICER: Sorry, the periscope. I apologize - yeah, how to use a radar that might be something different - but on the use of the periscope, and that would conclude this visit as far as we are concerned.

So, subject to any questions that either you, Mr President, or the judge advocate have those are my representations. We think that it'd be fair to all parties and that it might assist you.

JUDGE ADVOCATE: Thank you.

Mr Prosecutor?

ASSISTANT PROSECUTOR: Mr President, Mr Judge Advocate, we don't oppose the request for a view. Obviously, it's a matter within your discretion, Mr President, as to whether or not you're of the opinion that it would be of assistance to yourself and the other members of the court in understanding the evidence, with the understanding that that's the purpose of the view, to assist you in dealing with the evidence you've heard here in the courtroom, and in itself it is not evidence before the court.

The other area that does cause us some concern is the fact that obviously we cannot visit the OJIBWA wardroom because it is not the wardroom that existed in 1991. However, we would like you to see and to consider visiting the OLYMPUS as well, which is in the same location as the OJIBWA, it's around the jetty. The OLYMPUS wardroom is very similar to the wardroom

1800

Assistant Prosecutor

Rebuttal

that was on board the OJIBWA at the time of the allegations contained in charges number one and two, and as a result the prosecution would submit, for the same reasons that the defence has put forward with respect to viewing the submarine itself and the control room, that to have a look at the OLYMPUS wardroom will assist you in understanding the evidence that was given.

The OLYMPUS wardroom has its door in the same place as the wardroom that was on board the OJIBWA at the time of the incidents in charges number one and two. The settees are in the same location, the table is in the same location. There may or may not be a small bar that came out in the evidence that may be there, but certainly my friend can deal with that later on. Simply, in the same way there are some minor changes to the control room on board OJIBWA.

So the prosecution would submit that in considering whether or not to visit the OJIBWA, you also consider the OLYMPUS wardroom as well. I don't think it would add an appreciable amount of time to the visit. The purpose of going on board OLYMPUS would be strictly to visit the wardroom, we, obviously, wouldn't be doing a tour of the OLYMPUS as well. It would be simply a matter of the members ... yourself and the other members of the court going on board, viewing the wardroom and departing the OLYMPUS.

So, again, I would leave that with you, Mr President, and ask that you certainly consider that and request that if you do decide to take a view of the OJIBWA you also view the OLYMPUS wardroom.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, may I offer a very brief reply on this last matter?

JUDGE ADVOCATE: Yes.

1801

Defending Officer

Reply

DEFENDING OFFICER: We haven't seen the OLYMPUS and we don't really know - my learned friend has mentioned how similar it is, like, he's not testifying, he's arguing here that he believes it is similar. My position is it remains for you to decide.

Of course, the relative importance of the wardroom in this case is somewhat or greatly less, I believe, than the control room. But, again, it is for you, Mr President, and Members of the Court, would be in position to assess. So we don't formally oppose that portion. But I think you should consider in its relative importance how useful it can be to you compared to the rest, and if you direct that it be visited, then we'll address it and, I don't know, we'll see what we have to say having seen it.

JUDGE ADVOCATE: Thank you.

Mr President, QR&O 112.63 reads as follows:
**" ... Section 186 of the National
Defence Act provides:**

**' ... A court martial may,
where the president considers
it necessary, view any place,
thing or person.'**

**(2) Any proceedings during a view
shall, subject to article 112.10
... be in open court."**

And there are two notes under 112.63. Note "A" reads as follows:

**" ... Where a court considers it
necessary to view any place, thing
or person, it may do so at any time
before the finding, but there must
be present at such a view not only
the president and members of the**

1802

Judge Advocate

Address in respect view

court and the judge advocate, but also the prosecutor, the accused and his defending officer or counsel and, except when excluded under article 112.10 ..., the public.

(B) Any evidence taken during the course of a view must be recorded in the minutes of the proceedings."

So as I have just read, Mr President, the decision is yours to take a view if you consider it necessary in the circumstances.

So we have two requests here. The first one is to take a view of the OJIBWA except the wardroom; and the second request is to visit the wardroom of the OLYMPUS.

Again, if you consider it necessary - as I have already indicated to counsel in a **voir dire** that preceded this application in open court - I see no objection personally to it as I see no indication of any abuse in such a request, as the conditions necessary to ensure fairness for all the parties have been met including the conditions precedent to such a view and the opportunity to present further evidence in court.

So if you wish some time to consider this matter in your deliberating room, it's offered to you. There is no problem with that. Or if you don't need it, your decision could be given right away. It's as you wish.

PRESIDENT: Can I seek a point of clarification with respect to the ... if anyone here can clarify, with respect to the OJIBWA wardroom, is it substantially larger or smaller than it was in December '91, or is it just the layout or the configuration that's different.

1803

President

Decision

DEFENDING OFFICER: My information, sir, is that it is substantially. It's half the size of what it was and the configuration, or disposition, of course, having been so reduced even configuration would be slightly different as well.

PRESIDENT: So it is substantially smaller than it was in '91.

DEFENDING OFFICER: Substantially smaller, yes.

PRESIDENT: Okay.

JUDGE ADVOCATE: Again, those comments, again, are not evidence, Mr President. It's just to inform you on the decision that you have to make and, of course, I mean, when we come ... if you decide that there should be a view, when we come back all those clarification questions can be asked by the court, or can be put by counsel to any remaining witnesses that will be heard.

PRESIDENT: I think from the perspective of the court we would be very interested in visiting certainly OJIBWA, and also having a look at the ward-room in OLYMPUS given that it has been described as being similar in nature, primarily, because there have been several points of evidence during this trial where we've referred to 10 to 15 feet, or 15 to 20 feet. And I think the court would like to have a good sense of what we're really talking about in terms of space, and also we would like to get a sense of - in a control room with the court and yourself and the accused and legal representatives present - we might get some concept of how confined that control room is with a crowd of people in it.

And I think that would be useful to us, so I would like to take advantage of the opportunity to do

1804

President

Decision

both the OJIBWA and the visit to the wardroom of the OLYMPUS.

JUDGE ADVOCATE: Very well. So before doing so, Mr President and members of the Court, I would like to give you a preliminary warning. You're going to be taken to a place outside the courtroom so that you may take a view of two submarines. You're being taken there so that you will have an easier time understanding the evidence given in court.

You must understand that what you see when you go to the location in question is not evidence, what you see there is not evidence. You are only allowed to use the evidence given here in court when you decide whether or not the accused is guilty. However, you may find that you are better able to understand the evidence given in court after you have seen the submarines.

I would like to say a few words about how you should conduct yourselves while you are taking the view. First, you should not discuss any aspect of the case with anyone including your fellow members of the court while you are viewing the submarines because your deliberations are supposed to take place in the privacy of your deliberating room; second, you should not try to reconstruct the events disclosed by the evidence while you are taking the view.

I remind you that the only reason you are being taken to view the submarines is to help you to understand the evidence given here in the courtroom. You must use only the evidence given here in court when you decide how the submarines looked at the time we are concerned with.

So before we proceed to have a view of the submarines, I understand that the defence wishes to call a witness.

DEFENDING OFFICER: That's correct.

1805

I call Lieutenant-Commander Marsaw.

s.19(1)

1806

Lieutenant-Commander Marsaw

Examination-in-chief

TENTH WITNESS) Lieutenant-Commander D.C.
FOR THE) Marsaw, is duly sworn.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. Lieutenant-Commander Marsaw, could you for the benefit of the record fully identify yourself by stating your name, rank and service number, please?

A. Lieutenant-Commander Dean Carey Marsaw,

Q. And you are the accused in the present proceedings? A. I am, sir.

DEFENDING OFFICER: Mr President, Mr Judge Advocate, these are all the questions I intend to put to the witness at this point in time. I must inform you that I had to go through this because Lieutenant-Commander Marsaw will be the person taking us for the visit and I am informed by the officer of the court that the visit could take place as early as ... we would have to depart at ...

OFFICER OF THE COURT: 11:15/11:20, sir.

DEFENDING OFFICER: So I understand that some administration or administrative arrangements have been made to equip or provide the court and personnel with coveralls and all that. So I would request at this time that we adjourn until we can proceed to the visit, so that people can be outfitted, then proceed to the visit and then carry on with the testimony of Lieutenant-Commander Marsaw upon completion of the visit.

JUDGE ADVOCATE: Very well.

Any objection from the prosecution?

ASSISTANT PROSECUTOR: No objection, Mr Judge Advocate.

1807

Lieutenant-Commander Marsaw

Examination-in-chief

JUDGE ADVOCATE: Very well. The court is adjourned until 11:15.

ADJOURNMENT: At 1045 hours, 24 October 1995, the court adjourns.

REASSEMBLY: At 1145 hours, 24 October 1995, the court reassembles outside HMCS OJIBWA for the purpose of taking a view, and the accused is before it.

JUDGE ADVOCATE: If I may, we will try to keep our conversations as short as possible inside the boat, but if any of you want to ask a question, please raise you hand before so that the court reporter gets close to you because everything has to be recorded. Okay? Thank you.

WITNESS: Sir, this is the large structure we refer to as the fin. From forward you see the attack periscope, then the search periscope, the radar mast and the warner mast or ESM mast. You can see there is a small light aft the warner mast, that's the lowered position for the snort induction mast. Where you see the spray of water coming up there, they've got the pre-wet on to raise the comms mast but they obviously haven't done that yet, the communications mast. And then immediate aft of that position is the snort exhaust mast, also in a lowered position and they can't raise that in harbour.

Now I'll just point out the fore planes in the casing. Okay, sirs, the vertical structure is: just above the bow are the fore planes in the housed position. The fore planes in the housed at sea they're in the horizontal position. And the casing runs right from forward to aft, that's the structure over top of the tank tops to provide a working area in harbour.

Lieutenant-Commander Marsaw

Guiding the view

DEFENDING OFFICER: Sirs, it would be time to proceed on board.

THE COURT ENTERS THE SUBMARINE - HMCS OJIBWA

WITNESS: Sirs, this is the forward torpedo room and you will sometimes hear it referred to as the fore ends.

COURT: Who normally bunks here?

WITNESS: Normally, here we will have junior NCMs and junior officer overflow from the wardroom.

The bunks, we call them bread boxes, sir. They are portable bunks that are stiff-framed with a Naugahyde surface to sleep on that you place your sleeping bag over.

COURT: Okay.

DEFENDING OFFICER: If you want to lead and stop at the next station.

WITNESS: Okay.

From this bulkhead to the next one we go through is called the accommodation space. This portion of it is the junior NCMs messing area.

Sir, perhaps it would be best if people just look in as we pass by here because we won't all fit in there.

DEFENDING OFFICER: Okay, and what is this?

WITNESS: The senior rates messing area.

DEFENDING OFFICER: Okay, can you repeat that loud please?

Lieutenant-Commander Marsaw

Guiding the view

WITNESS: Sirs, as you come close to this bulkhead, if you'll just put your head in over to the starboard side you will see the senior NCMs messing area, but there isn't room for us all to get in there.

Sirs, this is the control room and we will be coming back here at the end to point out specific items. But if you care to, the first door to the port side, just forward of this, is the COs cabin. But if you just perhaps one at a time would like to glance in there, and then we'll come back and I'll show you the rest of the control room.

As we proceed aft, on your left the first door will be the radio office and to your right the heads.

This, sirs, is the engine room.

And this, sirs, is the motor room.

This, sirs, is the after torpedo room, also known as the after ends, and it's a junior NCMs messing area. If we now go back to the control room, I'll point out more items within the control room itself.

Okay, within in the control room, sirs, forward and starboard is the sound room. This panel here is called the command display console - usually it's called CDC, it can also be called the contact evaluation plot - CEP. This is the plot table. Through that door is the radar office. This area is called the panel, with this gentleman sitting where the first panel watch keeper might be, and that man is standing where the second panel watch keeper might be. The whole area is referred to as the panel. This is the trim seat. And this panel is called the ship control officer of the watch panel. This structure is the OMC, meaning one man control. It can also be referred to as the helm or the planes. These consoles immediately forward of the OMC are the fire control consoles. This is the after periscope, also called the

Lieutenant-Commander Marsaw

Guiding the view

search periscope. This is the forward periscope, also called the attack periscope.

I will now walk around the periscope. It's stiff. I couldn't do what you did because it's fairly stiff because it's hard up against the stops right now.

DEFENDING OFFICER: Gentlemen, this is the end of the tour or of the visit as such. If the court wishes to look at a few things here, as far as we are concerned, we are prepared to move.

COURT: Anything extra you want to see here?

COURT: I want to see the radar room.

WITNESS: This one, sir, is the radar office.

COURT: That's the radar office.

WITNESS: I will now lower the blackout curtain which covers the plot table. The blackout curtain is now in a lowered position.

COURT: What is the lowest position you would be looking through the periscope in? How low would you get that thing - as low as you can crouch? Is that the physical limitation?

WITNESS: Can I show them?

WITNESS: Is this on the pins?

CREWMAN: No, sir, it's not.

WITNESS: Lower slowly until I say "Well".

CREWMAN: Lower periscope.

WITNESS: Well.

Approximately.

Lieutenant-Commander Marsaw

Guiding the view

DEFENDING OFFICER: Louder, please?

WITNESS: Approximately like this is about
the lowest you could practically use it.

Raise forward until I say "Well".

CREWMAN: Sir.

WITNESS: Well.

COURT: Thank you.

DEFENDING OFFICER: Are there any other
questions from the Members of the Court?

COURT: No.

JUDGE ADVOCATE: Thank you.

ADJOURNMENT: At 1215 hours, 24 October
1995, the court adjourns.

REASSEMBLY: At 1217 hours, 24 October
1995, the court reassembles in
the Wardroom of HTSM OLYMPUS
for the purpose of taking a
view, and the accused is be-
fore it.

WITNESS: This is the Wardroom.

PRESIDENT: Any questions from the court
about the Wardroom?

JUDGE ADVOCATE: No questions?

DEFENDING OFFICER: Sir, we intend to raise
in court the difference that we see and try to help the
court more with the actual layout of OJIBWA's Wardroom.

Lieutenant-Commander Marsaw

Guiding the view

PRESIDENT: Good. But is it fair to say that, in the broadest sense, that this is approximately the size of the OJIBWA Wardroom at the time of the alleged incidents?

WITNESS: Yes, sir.

PRESIDENT: Are there any questions from the other court members? Nothing else then from the court.

ADJOURNMENT: At 1222 hours, 24 October 1995, the court adjourns.

REASSEMBLY: At 1345 hours, 24 October 1995, the court reassembles in the courtroom, and the accused is before it.

JUDGE ADVOCATE: Before we proceed with the accused's testimony, Mr President, I would like to add something to the preliminary warning that I gave you before taking a view of the two submarines. I mentioned to you that you were only allowed to use the evidence given here in court when you decide whether or not the accused is guilty. As the accused was asked questions under oath on the location, and also provided explanations during the view everything that the accused said there constitutes evidence.

Whenever you're ready, Lieutenant-Colonel Couture.

DEFENDING OFFICER: I am, Mr President, Judge Advocate, and I would like to ... my first line of questioning will address the visit.

Q. Lieutenant-Commander Marsaw, during the visit that this court took, or the view that this court took of the submarine OJIBWA, we first visited the torpedo room. Did that torpedo room reflect the state it would have been when you were sailing the boat?

Lieutenant-Commander Marsaw

Examination-in-chief

A. No, sir. The port forms that we saw, they had not stored our ammunition yet. In fact, the torpedo room at sea would have up to 20 Mark 48 torpedoes in it, or a combination of torpedoes and bunks, to the ratio of for every torpedo you take off, you can put in two bunks. And also there were no lockers or crew's gear, which is normally kept stowed up there.

Q. However, dimension-wise it's what it is?

A. Yes.

Q. Could you inform the court as to other, like, differences that you may have noted in this special part that you have directed the court's attention to? A. The sound room, which I pointed out as it exists now on OJIBWA, is slightly deeper. In fact, if I can refer to the exhibit there, I can point that out.

Q. Yes, absolutely. I am now using Exhibit "I"? A. The forward bulkhead in the sound room, rather than the way it's shown here, currently in OJIBWA is pushed forward several feet, so the sound room itself is deeper. This door no longer exists, so when you went by there you may have noticed there is no door there because that's been blocked off, and with the reduction to the wardroom space shown here, that's the principle reason why the wardroom no longer resembles its format as it was under my command. The dimensions of the radar office are the same, but the equipment in there is different than when I commanded OJIBWA. Specifically, they've got where we used to have equipment arrayed along this bulkhead, the starboard bulkhead, they now have a different set that's aligned on the after bulkhead. Those are the principle differences, sir.

Q. Then we went on board OLYMPUS, and I would like at this time to refer you to Exhibit "J", and possibly, as best as you can recall, could you indicate - first of all, let's testify at this time just on the accuracy of this very exhibit. Does it, in your view, reflect exactly what OJIBWA's Wardroom was?

Lieutenant-Commander Marsaw

Examination-in-chief

A. No, sir. For the entire period of my command there was a cabinet in this position here, sitting aback to the forward bulkhead, which extended from the deck to within a few inches of the deck head.

Q. What was the width of that, for example?

A. Approximately 14 inches, as I recall. And that cabinet, the lower part of it, was used for stowage of officer's books and divisional materials, and the upper part of it was used to store the bar. And it had a hinged door which lowered to form a small table in front of a bar area.

Q. Okay. Now, is that the only major difference that exists between Exhibit "J" and the actual wardroom as it was then? A. Yes, sir.

Q. So otherwise Exhibit "J" reflects it accurately now. Between Exhibit "J" and what you saw this morning in OLYMPUS, could you tell the court in rough terms what, if any, differences there are?

A. The seat lockers that were in OLYMPUS were roughly half the size of the seat lockers that were in OJIBWA.

In OLYMPUS there was a, sort of, desk cabinet here with a fridge recessed inside that desk or cabinet, and it came up to about hip level. So that's the spot that the cabinet in OJIBWA would have been in, but the one in OJIBWA went all the way up, almost to the deck head.

That structure in OLYMPUS extended pass this bulkhead to perhaps eight inches or a foot and then extended into another desk area. In OJIBWA it was more like as shown here. The cabinet that's not shown ended here and this desk and cupboard structure was like this - not as extensive as the one in OLYMPUS.

Q. Okay. Subject to those comments that you've just made, could you comment in general terms as to the dimension, the size, of what we saw this morning. How close is it to the size of what OJIBWA's Wardroom was under your command? A. The major structures appear the same. It appears to be the same size as the wardroom in OJIBWA was.

s.19(1)

Lieutenant-Commander Marsaw

Examination-in-chief

Q. And I understand - I refer again to the Exhibit "J" - entrance, location of entrance, and bulkhead at the entrance by settee, bed settee number one, it's all accurate here and pretty close to what was seen this morning? A. Yes. This area is all the same, the fact that we've got a bulkhead here and the entrance there. In OLYMPUS there was a series of cupboards in this spot here. In OJIBWA, the way she was set up then, we didn't have those cupboards, we just had little slots to put materials in.

Q. Okay. And the settees, the same number of settees, same location as what was seen? A. Yes, sir.

DEFENDING OFFICER: At this point in time I will enter a review of Lieutenant-Commander Marsaw's career, and I'm sure my learned friend has no objection to lead a little bit through that, which we normally do not do, or not supposed to do in direct.

Q. I understand you were born on _____ ?
A. Yes, sir.

Q. You joined the CF in May of 1978?
A. Correct, sir.

Q. What was your rank then and your trade or classification? A. I joined as an ordinary seaman, fire control man, and went to recruit school in Cornwallis on joining.

Q. Okay. How did you make out at Cornwallis? A. I finished first in my class and won the Commandant Shield for top recruit.

Q. I understand you served on HMCS OKANAGAN from 1978 to 1980? A. Correct, sir.

Q. And you got your dolphins as an enlisted man in 1979? A. Yes, sir.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. In 1980, you were promoted to leading seaman? A. Yes, sir.

Q. In June '80 to October '80, of the same year, you completed your TQ4 training? A. Yes, sir.

Q. How did you make out on that course? A. I finished first on that course, and also my TQ3 course prior to that.

Q. In October 1980 ... or from October '80 to March '81, you served on board OKANAGAN? A. Yes, sir.

Q. September 1981, I understand you attended BOTC at Chilliwack? A. Yes, sir.

Q. BOTC stands for? A. Basic Officers Training Course.

Q. And under what plan did you make that? A. That was under the OCTPM, Officer Candidate Training Plan for Members.

Q. Having completed your basic training course in Chilliwack, you attended four phases of MARS training? A. Yes, sir, at ADVENTURE.

Q. How did you make out in those? A. I finished first on every phase of the course. In doing so won the Gilner Trophy for Navigational Excellence and the Naval Officers' Association of Canada Proficiency Award as top student at the end of the course.

Q. You completed your Naval Operations Course in June 1983? A. Yes, sir.

Q. '83, did I say? A. I think you said '83, yeah.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Yeah, '83. Yeah. How did you make out on this particular course? A. I finished first on that course, sir.

Q. From June '83 to January '84, you served on board OKANAGAN? A. Yes, sir.

Q. And I understand you got your dolphins in December '83? A. That's correct, sir.

Q. That was dolphins then as an officer? A. As an officers qualification package, yes.

Q. In January '84, you served on ONONDAGA as the a weapons officer, then navigator and other positions commensurate to your rank? A. Yes, sir.

Q. At the time, which was? A. Sub-Lieutenant, and I think I was promoted in that period to lieutenant.

Q. Then in January '86 you went to OKANAGAN until August of '87? A. Yes, sir.

Q. And you served at that time as a nav and ops officer? A. Yes, sir.

Q. Then you went back to ONONDAGA from August '87 to May of '88? A. Correct, sir.

Q. Correct. Then you were posted for one year, '88 to '89, at First Canadian Submarine Squadron, a shore job? A. Yes, sir.

Q. And in July 1989 you went under OKANAGAN as XO, executive officer? A. Yes, sir.

Q. And you served there until April of 1990? A. Until April '90 as the XO, yes, sir.

Q. Okay. Who was the commanding officer at the time? A. Lieutenant-Commander Bill Irvine.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Okay. From August 1990 to November 1990, you attended what has been referred to as the Perisher Course in UK? A. Yes, sir.

Q. And you completed it successfully, I understand? A. Yes, sir. I did.

Q. In January '91, you took ... I apologize here. In December 1990, should I say, you took command of OJIBWA? A. Yes, sir.

Q. And you remained in command of OJIBWA until October 1993? A. That's correct, sir.

Q. Before we get into specifics of your command and other incidents that have been discussed in this court, I would like to treat with you of some general matters that, of course, arise of your command. Could you inform the court as to how you approached your command of a submarine? Let's relate that to safety of personnel, mission, sort of concept?

A. Yes, sir. I felt that my appointment and command of OJIBWA had several responsibilities associated with it. First in my mind was the safety of the unit and her crew. I've had several instances in my career where I've seen people pay lip service to that principle, and I felt that to be my principle responsibility because I had seen the results of not making it so. Would you like some examples of that?

Q. Sure? A. Including, and principally one of the most important things that I learned on Perisher, was during my Perisher course that four men were killed as a result of some inattention in a submarine control room, and that left me with a huge impression. It did not happen in my submarine but it was in our sister submarine that was carrying the other half of the course. And I've seen men injured at sea, I've seen fires at sea. It has done a lot to shape my attitude towards safety, which is that in order to ensure safety of a submarine you must approach the problem pro-actively. And I feel firmly that it's only

Lieutenant-Commander Marsaw

Examination-in-chief

through prevention of accidents that safety is maintained, not reacting to them once they occur but making sure they don't happen. I've heard testimony here that ... people talking about submarines as being not inherently dangerous, or that they have seldom been in danger. I don't agree with that philosophy and it certainly has not been my experience. Submarines have been lost sitting alongside the jetty. One of our ... when I did my basic training as a man, one of the basic things we learned about was the accident of HMS ARTEMIS, who sank while sitting alongside with a duty watch on board.

Q. Okay. Let's pass on that example and stay close to the issue. A. Sorry, sir.

Q. That's alright. On the mission, like, again in terms of general approach, we've heard lots of reference as you always ready to go to war and being ready. What was your philosophy? A. I believe very much that the missions assigned by the Maritime commander I must do my best to carry them out. In order to prepare for that, other than being safe, I must have the right personnel on board with the right qualifications, I must have them trained to a certain standard, that the submarine must be in a particular material state in order to accomplish that. Once I've got all those aspects of the submarine and the team working together, then I feel that I can report to the Maritime commander that I'm ready to undertake a mission. My priorities in missions and preparedness for missions was that I would work to try and be able to execute whatever mission he assigned me at the time, but I must also maintain a preparedness to maintain a mission that he might choose to assign me the next day. So I do not work towards just the mission assigned but must keep in mind also that there's a lot of other things that I could be assigned to do, which he would reasonably expect me to be able to do that I must also be responsible for.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Okay. You've touched, of course, on safety and, of course, there were testimonies, like, is it always dangerous to be in a submarine? and all that.

Obviously you seem very conscious of safety. Could you outline to the court some of the dangerous hazards that do actually exist whilst swimming a submarine? A.

Well, the principal hazard is the people in the submarine and how they operate. But perhaps before I get into that, just some of the other material dangers. A huge amount of explosive in the fore ends because of the torpedoes. In fact, the Mark 48 is the most powerful weapon in the Canadian inventory. We also carry in that same space, plastic explosives, detonators, pyrotechnics, depth-coord. The space itself is pressurized with high-pressure air up to 4000 pounds per square inch. There are hydraulic lines pressurizing that compartment at up to 2500 pounds per square inch.

There are very large holes in the submarine up there by way of hatches and torpedo tubes, which the potential exists that, if they were mishandled, water could come into the submarine. There is a certain amount of chemical material on board that is hazardous. There is the rotating machinery which presents the same hazard it would in industry, for example, are on board ship. The operation of a periscope itself is much like sitting next to a pile-driver, certainly the force that it is capable of exerting is similar. When you're carrying out operations such as snorting you've got a large hole open into the submarine which is intended to permit the passage of air from outside into the submarine, but a mistake could permit the ingress of water.

You operate the submarine in an environment that, I believe, is inherently dangerous and the only thing that keeps us safe there is the training of our personnel and our material state, the maintenance of our material state. The boat is expected to operate within a certain depth bracket in which pressure is exerted upon her. There are all the normal hazards of a ship at sea on the surface due to weather, the hazards associated with bad stowage and a ship rolling and personnel moving around. But as I mentioned to start with, the personnel themselves have great potential to

Lieutenant-Commander Marsaw

Examination-in-chief

inflict damage on themselves if they aren't attentive in their duties, or if they're ill-trained for those duties.

Q. What's your concept and philosophy on training? How did you feel you should train for the mission? A. Well I believe that you do not train people or teach them by allowing them to make mistakes.

In many, many circumstances, although that philosophy may exist in some areas, I believe that you learn to do something which is essentially hazardous by watching it done correctly and then trying to emulate it. There is a certain amount of latitude for learning by a mistake in a submarine but it's certainly not, I think, the principal method that we use. There's many different training programs that we run on board, you've heard a great deal about the qualification program. But that's only one of the areas in which we train. I insisted in that particular area that we try and achieve the highest possible standard with each person, and that at the end of the day when that person is awarded that qualification, that he can go to another submarine or work for another commanding officer or work in a particular department of a submarine and that he can do so with good self-confidence and that he can inspire confidence in the people around him and trust.

Q. Now throughout this trial, pretty well throughout it, there has always been references made to failure rate and turnover and all that. Now, in that context, could you explain to the court the training, how it went, the various levels of training that were conducted on board, and comment whether ... I mean, either failure or turnover was excessive or not?

A. With respect, perhaps if I address first of all the Basic Officers Submarine Qualification training. There were periods - over the three year period of my command - there were periods when I was tied up with the problems in OJIBWA and there were periods when other submarines were tied up with problems. Whenever I looked like I was not going to be able provide training opportunities for a period of time, I would seek out oppor-

Lieutenant-Commander Marsaw

Examination-in-chief

tunities to transfer officers to other submarines. For example, in '91, we had a significant engineering problem which kept us alongside. I had two officers, then Lieutenant[N] Cassivi and Lieutenant[N] Duffley, who were very close to achieving their qualification but they just needed a bit more sea time and we didn't have a boat running, so I was able to find them an opportunity in Australia. Very similar submarines, they're OBERONS as well, and their set-up is quite similar to ours. So I managed to get them off to Australia to get more sea time and come back and do their boards. As it turned out, Lieutenant[N] Duffley passed his board on coming back from Australia and Lieutenant[N] Cassivi failed his first time but got another shot at it a little later. Similarly, when I was in a good state of operational repair and was running well, the submarines that weren't would give me officers. So you'd say an officer might; for example, in a refit submarine, he might achieve 30 per cent of his sub-recs - we refer to them as sub-recs, the items in his OJT package. And that's probably as much as he can do in a refit submarine. So we would coordinate at the executive officer level, with respect to officers, to get those officers into bunks that we had available in OJIBWA. So over a period of months they might sail with us and get up to 90 per cent of the sub-recs done. At that point the follow should have enough experience to go back, even to a refit submarine, and complete the final 10 per cent of his training, and perhaps even conduct sufficient review to pass the board. Sometimes they would have to get back to see again to brush up on the skills they'd perhaps forgot from the earlier part of their training. But that's entirely common.

Q. So are you suggesting - and I don't want to lead into this - but are you suggesting - and if I'm wrong - correct and explain appropriately. But you seem to suggest that some of those people were not expected to complete necessarily the full training there and it was normal they would do so much there and then they would go and finish elsewhere. Is that the gist? A. Yes. And not only in officers dolphin

Lieutenant-Commander Marsaw

Examination-in-chief

training, but it would be the same thing; for example, for engineering certificate training. If we've got a marine engineer who is trying to get his certificate level two or level three and he's in a submarine that's alongside, he needs so much time at sea to accomplish that. And so in that case, because it would be an NCM, it's coordinated at the coxswain level. Is there a bunk available in OJIBWA? Yes. Okay, let's take this guy out of the refit boat, get him into OJIBWA, get his hours in that he needs on the plates to accomplish this package, and then we send him back. And, you know, we would take a certain amount of pride in being able to send back a well trained man to his home unit. And likewise, we also had many people come down ... well, not many, I'm sorry. It seemed like an exaggerated number to me at the time. When we stopped doing psychological testing prior to joining submarines - when I first joined and for many years thereafter - every time you had a volunteer you would complete - I forget the name of the test - but just to see if you were ... indicated anything that would perhaps make you unused to the environment, or unable to adapt to the environment. And for some reason that was stopped. I think it streamlined the system somewhat. And there was one period we had, I believe, two, perhaps three, officers who reported down on board assigned to the submarine having completed the Basic Submarine Course, ready for training. And these chaps, in one case, within 24 hours, came to me and said, "I can't hack it here, I want off", you know, and I sent him for assessment and so on. But the gist of it was that the environment was not something that he was suited for. Another officer, I believe, spent two days on board before coming to the same conclusion. So figures like that tend to distort statistics when you throw out names like that in and say, that's OJIBWA's failure rate, it's not getting a fair picture, I believe.

Q. Okay. Could you comment on the importance of teamwork and morale on board a submarine, and what was your general philosophy on that aspect? A. A submarine can't be run by having a collection of par-

Lieutenant-Commander Marsaw

Examination-in-chief

ticularly good individuals who all work in their own different direction, no matter how well qualified they are. You have to work as a team to accomplish the task you were given. There are just so many complex problems that require teamwork to solve. I've seen one submarine that had absolutely no teamwork and it was an example that has stuck in my mind because it was just such a, I don't know, disaster is a strong word, but it was clear to me that that submarine was not going to accomplish very much. In OJIBWA I worked to try and make sure that we had all the departments working together, individuals within the department getting along together, and, of course, one of the very basic bricks that go into that wall is the morale of the people working there. And I was constantly monitoring the state of morale in that submarine.

Q. Uh-huh. Could you inform the court as to factors that influence morale and how morale has been effected on and off during your command? Like in general, I'm not talking specifics now but ... ?

A. When the submarine is working through different cycles you can see morale cycle with it and there seems to be quite a direct relationship. When you go into a docking period, for example, initially morale will be expected to be pretty good, guys are getting to see their families and so on. But then in the course of a docking the submarine gets filthy, it gets crowded with the Dockyard staff all the time. It seems like no matter how hard you work you don't see the immediate results of a job well done, and you see morale start to decline. And usually at the end of a docking period guys are pretty keen to get back to sea for some normal operations again. There are times when that's not the case, of course, but that's the general rule as I've observed it. When you get to sea, if you're doing a "clockward mouse running" is an expression we use where you're providing target services for someone, so you're not really exercising your skills as a submarine team, that can tend to drag down morale. But then when you get assigned something that's more challenging where you get; for example, to pit your skills against equiv-

Lieutenant-Commander Marsaw

Examination-in-chief

alently trained foreign force, you can see everybody in the ship's company suddenly becomes more interested. They're now keyed up for an action and they also, of course, want to know the results so you'll see guys coming into the control room more often. They'll be hanging around because they know we're attacking another submarine, they want to see how we do, and you see morale rise after that. But then there comes a point, if you've been at sea too long, that it's like being at the end of a docking period. You need a change of routine again, so you'll see the attention level start to drop, you'll see guys will start missing their families, they want to get back home, and you've got to be conscious of that and as much as you can control it keep it within certain acceptable limits.

DEFENDING OFFICER: If I may have a moment, please?

JUDGE ADVOCATE: ...

DEFENDING OFFICER:

Q. We've heard about the divisional system during the trial and chain of command. Can you inform the court as to what was your approach in that respect?

A. I've always trusted the divisional system and still do to this day. I think it is an excellent system. The divisional system, as it was organized in OJIBWA, was not too similar to the exhibit that currently exists before the court.

Q. Okay, we'll just hold on and we'll have a look at Exhibit "O". This is Exhibit "O" that I will present to you. I'm showing you Exhibit "O", and as need be, turn it pointing toward the court, if you need to refer to the actual diagram. What do you take exception to on this exhibit? A. Well, it appears to me to be mislabelled, it's not like a divisional organization I've seen on any submarine. In OJIBWA, and in fact in every submarine I've served in, you'd have the commanding officer at the top, followed by the execu-

Lieutenant-Commander Marsaw

Examination-in-chief

tive officer. And the commanding officer serves as divisional officer for the four department heads, and in a submarine there are only four department heads: the Executive Officer, the Operations Officer, the Combat Systems Engineer and the Marine Systems Engineer. The supply officer in a submarine is not a department head because we don't carry a supply officer proper. The function of ... or the duties of the supply officer are executed by a junior MARS officer, usually an officer under training. And, of course, he's not expected to do the full functions of a properly trained supply officer, he's essentially a cash officer. And the more complicated supply functions are performed by the squadron supply officer in board, and when we deploy he will sign over so much cash and so on. In any case, the executive officer, OpsO, CSE and MSE are the commanding officer's responsibility immediately, divisionally. The XO is then the divisional officer for all other officers on board. As for the remainder of the divisional organization you will have; for example, the Marine Systems Department, the marine systems officer will answer directly to the commanding officer for the operations of his department, for the function of his department, but divisionally he answers to the Executive Officer. So a request which has been put in through the divisional system by a leading seaman stoker will go through his divisional PO, the Chief ERA, the marine systems engineering officer, the executive officer, and me in that system. And I just don't see how that is reflected in this diagram. The divisional system within submarines is ordered in the Canadian Submarine Standing Orders. There is within the departmental sections of those standing orders, flow charts indicating how the divisional system works, and that's the way it worked in OJIBWA.

Q. If you can hold a moment, I'll replace those, then we carry on. What was your general approach to the divisional system in terms of, like you said, you respected, like, the chain of command? Let's first clarify one matter. In the context you've just explained, the divisional system, sometimes it seems to

Lieutenant-Commander Marsaw

Examination-in-chief

be used as a term like people are looked after by their divisional system, and then sometimes the divisional system seems to be used in a term ... a context of chain of command. Is there a distinction that exists or what? A. Yes. The divisional system is all about caring for your men and keeping them informed and making sure that their grievances, concerns, are addressed in an appropriate fashion and that they have a definite line straight ... or a line through to the commanding officer in which to have those concerns addressed should he have any.

Q. Is that distinct ... ? A. The departmental organization is different. The executive officer, for example ... the marine systems engineer will not report to the XO that he's got a broken engine, he'll come straight to me and tell me that. That's a different organization altogether.

Q. Okay. That last example you gave, is that more like chain of command vice divisional system?

A. Well, the chain of command goes through the executive officer, he is the second in command of the submarine. And then there is an order of command, which is a different matter altogether. Should the captain die and the XO die, then there is an order of seniority amongst officers who will take command. But the chain of command is frequently, I'm afraid, used to mean several different things, probably not very accurately in any case.

Q. In your view, what did you expect your people to do on board and how did you see you dealing with a PO or leading seaman? Or how would you handle that? Would you go through a chain, what did you expect? A. In that respect, sir, we're talking about the divisional system. And that's where if a leading seaman; for example, wishes to be landed during an upcoming deployment because he's getting married or his wife's having a child, any number of reasons like that, he will put in a request. It may be as simple as a request to see the captain or a memorandum. It's up to

26th voir dire

Lieutenant-Commander Marsaw

him. Once he's made that request we expect that it will go to - in the case of a leading seaman - his divisional PO, and then the divisional chief, who will consult with the coxswain about it. It will then be presented to the executive officer and, depending on the timing and the number of requests that have been submitted by different individuals over a period, the XO in consultation with the coxswain ... Oh, I'm sorry, I missed the divisional officer in that route, I beg your pardon. But the divisional officer will consult with the XO, and will then organize a "requestman" - in OJIBWA we usually held that in the wardroom, that was the most convenient space - and depending on the nature of the request I would see the man with usually his divisional officer and divisional chief; the coxswain and XO would attend with me; we would listen to the man's request; consider it; and approve or deny and take whatever action necessary as to satisfy the request. And that was done regularly in OJIBWA. I had many "requestmen", many examples of people who had prepared it and wished to approach it through a memorandum, and many people who just wished to approach me and speak to me at the table. And people who wished to see me on a private matter, in which case the divisional system still handles it, but it's done and executed in private. And I saw that system operate well in OJIBWA.

DEFENDING OFFICER: At this point in time, Mr President and Judge Advocate, the defence intends to introduce a number of documents to which I understand the prosecution has difficulty with. So it appears that I will need to test the admissibility of those documents in a **voir dire**.

THE PRESIDENT AND MEMBERS RETIRE.

DEFENDING OFFICER: Essentially - and I have a big stack of documents, so we'll have to go through it - but I want to give you an idea of the proposed evidence which I will put in front of you in a moment for ID here, and I will have probably a few questions.

Lieutenant-Commander Marsaw

The prosecution has agreed that we speed up a bit so we'll just put all the documents. He's received copies of them all.

Essentially, those documents are various ... there are three messages and there are a number of report of proceedings - you've heard that expression in the main trial - that were prepared by the accused in the normal course of his duty and forwarded to the admiral as per the way it should be. So we want to adduce those.

There is a Captain's Instruction. One was discussed, I guess, with Davidson, we will refer to it. In this particular case I want to introduce the Captain's Instruction, from Lieutenant-Commander Marsaw, for his boat at the time.

And the last, there's a two sailing ... copies of a log, or notes, summary of the boat's logs. There's no objection to those, so at that point it won't present a problem. And, I believe, there's no objection to the test, the quiz.

PROSECUTOR: Sorry, I didn't hear you?

DEFENDING OFFICER: The quiz, the questionnaire.

PROSECUTOR: No, none.

DEFENDING OFFICER: So, basically, there are three types of documents in this evidence, and I will start giving them to you now. I'm giving you the three together. I believe, Mr Judge Advocate, they should be marked separately, they're three separate messages.

JUDGE ADVOCATE: Do you want these documents to be marked in the **voir dire**?

Lieutenant-Commander Marsaw

DEFENDING OFFICER: Well, whether it is necessary or not, if you rule them admissible they would be ruled as exhibits, so ...

JUDGE ADVOCATE: Well, if you have many of them it's probably better to mark them as documents in the **voir dire** so that if I have to refer to them in the decision, then if the ruling is not the same for all the documents, it will be easier to refer to them.

DEFENDING OFFICER: So let's mark them then separately, if you would, please.

JUDGE ADVOCATE: Okay. "VD26-1, ... 2, ... 3".

DEFENDING OFFICER: I'm not sure what order ... we could refer to them by time group ...

JUDGE ADVOCATE: Which one do you want first?

DEFENDING OFFICER: Oh, it doesn't matter actually. There are three. Let's say, first, a message time group 12035 ... no, sorry.

JUDGE ADVOCATE: 0305 Zulu?

DEFENDING OFFICER: 120305Z December '91.

JUDGE ADVOCATE: So that will become "VD26-1".

THE MESSAGE DATED 120305Z DEC 91 IS MARKED EXHIBIT "VD26-1".

DEFENDING OFFICER: The second one - I'll take them in the order I have them here - 241915Z November '91.

JUDGE ADVOCATE: "VD26-2".

Lieutenant-Commander Marsaw

THE MESSAGE DATED 241915Z NOV 91 IS MARKED
EXHIBIT "VD26-2".

DEFENDING OFFICER: And the third one ...

JUDGE ADVOCATE: And the only third one I
have.

DEFENDING OFFICER: That's right, that's the
one, 281401Z February '92.

JUDGE ADVOCATE: "VD26-3".
THE MESSAGE DATED 281401Z FEB 92 IS MARKED
EXHIBIT "VD26-3".

DEFENDING OFFICER: The next document,
SOJ 1610-1 dated 31 March '91, Report of Proceedings.

JUDGE ADVOCATE: Two pages?

DEFENDING OFFICER: Two pages.

JUDGE ADVOCATE: "VD26-4".

THE REPORT SOJ 1610-1 DATED 31 MARCH 1991 IS MARKED
EXHIBIT "VD26-4".

DEFENDING OFFICER: The second document,
SOJ 1610-1, 2 July '91, Report of Proceedings.

THE REPORT SOJ 1610-1 DATED 2 JULY 1991 IS MARKED
EXHIBIT "VD26-5".

DEFENDING OFFICER: I should point out at
this time, Mr Judge Advocate, and the prosecution will
confirm that, there are portions that are blacked out.
All those documents were once classified. They have
been properly declassified and there are some blacked
out portions that the prosecution has seen. They were
matters relating to either security, operations, other
nations, or that sort of thing, that are not relevant

Lieutenant-Commander Marsaw

to these proceedings and both parties have agreed to that. That's why they are so blacked out.

I apologize, I made a mistake. The first Report of Proceedings, 31 March, that I have put before you.

JUDGE ADVOCATE: December '91?

DEFENDING OFFICER: No, the first Report of Proceedings, not the first message, but the ...

JUDGE ADVOCATE: Yes, 31st March '91?

DEFENDING OFFICER: Yes. I want you to note right now that I won't seek the admission of that document. It's my mistake. I intended to introduce only two.

PROSECUTOR: If you want to replace it with another one, that's fine.

DEFENDING OFFICER: Yeah.

I have 4 October '91 that I'm coming with, so ...

JUDGE ADVOCATE: So do you want this one back?

DEFENDING OFFICER: Well, keep it and I'll ... because I had not intended to introduce it so - I mean, there's nothing wrong with it, but I thought it was too far and ...

JUDGE ADVOCATE: We'll just forget about it.

DEFENDING OFFICER: Yeah. The only two reports for '91 that I do want are those of 2 July, which I have in front of you already, and this one here dated 4 October 1991 that I will seek to have marked.

Lieutenant-Commander Marsaw

JUDGE ADVOCATE: Okay, this one will replace the other.

DEFENDING OFFICER: Yeah. I had only two for '91.

JUDGE ADVOCATE: It's "VD26-4".

THE REPORT SOJ 1610-1 DATED 4 OCTOBER 1991 IS MARKED EXHIBIT "VD26-4".

DEFENDING OFFICER: It's getting a little confusing with the number of reports.

The next one is SOJ 1610-1, 16 January '92. It doesn't have a title like the others but it is in line of Reports of Proceedings as well.

JUDGE ADVOCATE: "VD26-6".

THE REPORT SOJ 1610-1 DATED 16 JANUARY 1992 IS MARKED EXHIBIT "VD26-6".

DEFENDING OFFICER: The next one is SOJ 1610-1, same format as the previous one, this one's dated 5 April 1992. It's also a Report of Proceedings.

THE REPORT SOJ 1610-1 DATED 5 APRIL 1992 IS MARKED EXHIBIT "VD26-7".

DEFENDING OFFICER: I apologize, it takes a little while but it might be preferable that they be identified separately like this.

The next one is another SOJ 1610-1. This one's dated 4 July 1992.

THE REPORT SOJ 1610-1 DATED 4 JULY 1992 IS MARKED EXHIBIT "VD26-8".

DEFENDING OFFICER: Another SOJ 1630-1 dated 6 January '93.

Lieutenant-Commander Marsaw

THE REPORT SOJ 1630-1 DATED 6 JANUARY 1993 IS MARKED EXHIBIT "VD26-9".

DEFENDING OFFICER: Another SOJ 1630-1 dated 8 April '93.

THE REPORT SOJ 1630-1 DATED 8 APRIL 1993 IS MARKED EXHIBIT "VD26-10".

DEFENDING OFFICER: Another SOJ 1630-1 dated 8 July '93.

THE REPORT SOJ 1630-1 DATED 8 JULY 1993 IS MARKED EXHIBIT "VD26-11".

DEFENDING OFFICER: And the last of that nature, 1630-1 dated 4 October '93, sir.

THE REPORT SOJ 1630-1 DATED 4 OCTOBER 1993 IS MARKED EXHIBIT "VD26-12".

DEFENDING OFFICER: And the last document, CIO's, Captain's Instructions to Officers, Letter of Promulgation, is page one and it has 48 pages altogether. It's not dated but I will call evidence on that.

JUDGE ADVOCATE: Forty-eight pages total, "VD26-13".

THE 48-PAGE DOCUMENT ENTITLED CAPTAIN'S INSTRUCTION TO OFFICERS LETTER OF PROMULGATION IS MARKED EXHIBIT "VD26-13".

DEFENDING OFFICER: And I guess I'll go in reverse order and put a few questions to the witness now, before I can go in my original order.

JUDGE ADVOCATE: They are in order anyway.

Lieutenant-Commander Marsaw

DEFENDING OFFICER: So may I proceed with
some evidence in this **voir dire** with the witness?

TRIAL WITHIN A TRIAL

JUDGE ADVOCATE: Certainly.

s.19(1)

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

FIRST WITNESS) Lieutenant-Commander D.C.
FOR THE) Marsaw.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. I show you "VD26-1", " ... 2" and " ... 3". Could you please look at these three documents and tell the court whether you recognize those documents?

A. Yes, sir, these are messages sent from me while CO HMCS OJIBWA to CANCOMSUBRON ONE - being the submarine squadron commander - all messages being sent during my command.

Q. Okay. Are those originals, like, the ...? A. With a message ... the way our message system is handled on board, what is transmitted - in this case because they were ordinarily exclusive signals - they were transmitted in off-line encryption groups. When it's drafted by me, this is the format it takes, it then goes through the encryption process. When it is received at the other end, it is again off-line decrypted, to come up with a result like this.

Q. So this is the ... those are messages you drafted to be sent? A. That's correct, sir.

Q. Why are you in possession of those and where have they been since their respective dates that they were sent? A. After sending them the radioman gives me a copy which I keep in my safe in my cabin on board. When I left OJIBWA, I took some classified files and destroyed them and others I locked up in my safe in my office at the Warfare Centre and these were ones I kept in that safe.

Q. Have you tampered in anyway - except for the part that have been blacked out - have you tampered or modified those messages in any fashion since they were sent at their respective dates? A. Not at all, sir.

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Okay. How customary is it for you, or even other people, to send those messages to their commander? A. It's generally at the prerogative of the commander. Some commanders like to be kept informed in that fashion and some prefer a phone call. In that case, with that commanding officer, he preferred a hard signal.

DEFENDING OFFICER: They are indeed in the right order.

JUDGE ADVOCATE: Let's keep them this way.

DEFENDING OFFICER:

Q. I show you, Lieutenant-Commander Marsaw, "VD26-4" through "... 26-12". Could you have a look at those and tell the court what they are? Signature, whether they are yours, whether you recognize them, and what they are? A. Yes, sir, these are reports of proceedings that I submitted to the admiral during my command. There was a reorganization within the command during that period so originally you'll see them addressed to the Commander Maritime Command and by the end they're addressed to the Commander Maritime Forces Atlantic simply because of a reorganization on the coast. But they are a requirement that all commanding officers must submit every quarter by order of the admiral commanding, and he issues a letter instructing his commanding officers how he wishes those submissions to be entered and that's why you see the difference in style, from a more formal to a less formal style. Different admirals require them in different formats.

Q. Okay, and when were those made? A. They were written while I was in command and sent on the dates noted.

Q. On each of those documents? A. Yes, sir.

Trial within a trial

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Did you in any way tamper with those documents, those copies that you've got in front of you? A. Just to take away the classification marks.

Q. And I now show you "VD26-13", "Captain's Instructions to Officers", it is indeed 48 pages. Could you have a look and tell the court whether you recognize that document and, if so, why and what is it?

A. This is revision three to the orders I issued on board. This revision was issued in July of '92.

Q. Although there's no date on ... is that correct? A. That's correct, sir.

Q. So you know it was done that date?
A. Yes, I know it was done that date and, in fact, I still have the computer disk which records the date of the last amendment to a file. And what I would do is use my original version and as I accumulated changes I wished to make, I would then go that computer file, update it and put out a new revision, and this was the last one I did.

Q. Okay. So if I understand your testimony this became effective in July of '92? A. Yes, sir.

Q. Until when? A. Until I left command October 30th, '93.

Q. Okay. How different is, if any at all, like, you referred it was your third amendment or your third revision. Is there much difference between this and the previous one? A. Not significant. I think I amended which books I wished to see, weekly and monthly reports, some small amendments. I haven't compared it with my second revision but I don't think there's anything really significant there with two.

Q. So those were prepared and, of course, they are signed by you and they were distributed to your personnel who are posted on board the submarine?

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

A. Yes, sir, and as I ordered in there, they were required to be read and signed.

DEFENDING OFFICER: I have no further questions.

JUDGE ADVOCATE: Cross-examination?

CROSS-EXAMINED BY PROSECUTOR

Q. I understand with all these documents, Lieutenant-Commander Marsaw, you're not only the releasing authority but you're the person that actually created and drafted those documents? A. That's correct, yes, sir.

Q. You said that with regard to "VD27-1" to number " ... 3" inclusive, these were kept in ...

JUDGE ADVOCATE: Which number, I'm sorry?

PROSECUTOR: "VD27-1" to ...

JUDGE ADVOCATE: 26, you mean.

PROSECUTOR: 26, sorry.

Q. " ... 26-1" to " ... 3" inclusive, the messages, these were kept in your safe on board the OJIBWA and then when you left the OJIBWA you took them to the Warfare Centre? A. Yes, sir.

Q. Were you CO of the OJIBWA at the time that you took these to the Warfare Centre? A. Yes, I was.

Q. You were. And when did you no longer become the CO of the OJIBWA? A. 30 October '93, sir.

Q. And did you keep those documents in your possession after you were the CO of the OJIBWA? A. In my safe in the Warfare Centre, yes.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. What was your position at that time?

A. Submarine Tactics Officer, sir.

Q. And you said that when you left the OJIBWA you had a number of documents, some of which were destroyed and some you took with you in the Warfare Centre? A. That's correct.

Q. Which documents did you destroy?

A. Quite a number. I had some divisional files, files on my officers; I had programs of how ... I had sheets that I used for planning operations at sea, and then I'd record what I actually did on top of them and I had quite a stack of those that I destroyed; I had other message files related to specific operations which I destroyed; I had some exercise debriefing material that I'd been presented with that were no longer valid and destroyed them; I had some drafts of tactical appreciations that I destroyed. I'm sure there were other things as well. It's quite a clean out when you leave a cabin you've been in for three years.

Q. One of the documents that was introduced through your counsel was your request for general service, I believe, by Lieutenant[N] Watt. Did you have request for general service that you had in your possession at sometime as well? A. That particular one, yes. I found it, it was in the wrong file. I destroyed almost all the divisional documents I had, but I had some that I'd mis-filed.

Q. Ever make Destruction Certificates for these? A. For that which is accountable, I had Destruction Certificates, yeah. But I don't think - if I can withdraw it? - I don't think I had anything that was accountable. In one of the on board systems ... the things that I had that were registered into our CB or CSD systems, I had to sign back to the custodian of those accounts. So; for example, although I kept a copy of my war orders in my cabin I actually, I myself, signed for that from him, from the CSD officer, so I

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

had to sign it back to him, and I suspect he's probably now since destroyed it.

Q. So there's some documents you used in the course of your business as CO of OJIBWA that don't have Destruction Certificates for them and you have other documents that you did have Destruction Certificates for, that you did destroy? A. Well, the ones that are destroyed that would have Destruction Certificates for them would be the ones that were destroyed that were part of larger accounts.

Q. Uh-huh? A. In accordance with MCCOs, we don't keep Destruction Certificates on message files. Things like divisional documents are not formally classified beyond ... they're designated vice classified.

Q. You don't consider them to be Canadian Forces documents? A. No, I mean, they're designated, not classified. Not classified Canadian Forces documents, divisional documents.

Q. And they were destroyed? A. Yes, in accordance with the handbook and instructions they always have.

Q. These documents you had during the investigation? A. No.

Q. Messages, you never kept in your possession during the investigation and subsequent to the charges being laid against you? A. Which messages?

Q. The messages that have been introduced here? A. These? Well, I'm sorry, do you mean have I destroyed them?

Q. No, have you had them in your possession during the investigation and after you've been charged? A. Yes, always in my safe at the Warfare Centre.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. The report of proceedings, they're written to the admiral and they're info'd to SM1? A. Yes, and the early ones you'll see are also info'd to commander Canadian Fleet when that was our structure.

Q. Okay, at that time who wrote your PERs and who signed off and reviewed your PERs? A. When I took command my PERs were signed by the squadron commander and reviewed by the Maritime commander or Maritime Forces Atlantic commander as ...

Q. So these are reports that you write to the people that are going to be signing off your PER? A. They are the people that sign off my PER, yes.

Q. And while they tell you the format and style to write them in, there's no expressed direction upon the content, what you can put in them, is there? A. No, I believe that the instruction that comes from the admiral does say that you should touch on certain areas. I haven't reviewed the admiral's direction in that regard for a couple of years anyway, but I seem to recall that he would say, I expect these areas to be addressed as a minimum. And he would also say such things as, talk about length, format, dates of reporting.

Q. But under those topics, you're free to write anything you want in them? A. Yes, and that's the value of them is that you can address that which you think needs to be reported.

Q. And the messages themselves are going to your immediate supervisor who is the primary person who writes your PERs? A. They're going to my immediate operational commander who is also the person who writes my PERs.

Q. And the Captain's Instructions to Officers, you said that existed on disc? A. Yes, it does.

Trial within a trial

Lieutenant-Commander Marsaw

Cross-examination

Q. And do you still have the disc with you?

A. I believe so, and not with me personally, but I believe I have it.

Q. Is it capable, the disc in its current condition, to have that document amended? A. Yes, but it would then update the date block on the file page of the disc, I think. I'm not an expert on computers but I think that if you make an amendment, then your file date as shown in the file page will be updated as well to ... say, if I amended it today, it would show today's date.

Q. Okay? A. I believe that's the case.

Q. And the Exhibit "VD26-12", "Captain's Instructions to Officers" has no date listed on it? A. On my file on the disc?

Q. No, on the printout? A. That's correct.

Q. Do you know the expression "CYA"? A. Yes, I do.

Q. Have you ever heard the joke within the sub squadron that these are sometimes not called CIOs but CYAs? A. No, I've never heard that joke.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Re-examination?

DEFENDING OFFICER: No, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

You may resume your seat, thank you.

WITNESS WITHDRAWS.

DEFENDING OFFICER: If I may talk to the prosecution here?

Trial within a trial

JUDGE ADVOCATE: Sure.

Do you wish to call other evidence in this **voir dire**?

DEFENDING OFFICER: No, in light of the comment I believe the prosecution - I mean, although you now know in the main trial the date of the investigation and the charges - the prosecution agrees to admit, if you wish, or does not dispute that the investigation in this matter was ordered on 15 December 1993 and that the accused was actually charged, served with documents in July - July will do - '94.

JUDGE ADVOCATE: You said that the investigation was ordered what date?

DEFENDING OFFICER: 15 December 1993.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: And that the accused was served with documents in July.

JUDGE ADVOCATE: In July '94.

DEFENDING OFFICER: I don't think the date is of any significance for this purpose - July of '94, and that all reports of proceedings that the prosecution ... sorry, the defence intends to produce have been disclosed by the prosecution to the defence. The reports of proceedings, yeah, have been disclosed to the defence by the prosecution.

JUDGE ADVOCATE: To the defence?

DEFENDING OFFICER: To the defence by the prosecution. So meaning that they come from reliable sources in the system.

PROSECUTOR: Thank you, sir.

Trial within a trial

DEFENDING OFFICER: And if the prosecution will nod or express its agreement with those comments, then I have no further evidence to call.

JUDGE ADVOCATE: Thank you.

PROSECUTOR: I will, sir.

JUDGE ADVOCATE: Thank you. Do you wish to call evidence, Mr Prosecutor?

PROSECUTOR: No, we don't, sir.

JUDGE ADVOCATE: Okay.

So you're ready to address, Lieutenant-Colonel Couture?

DEFENDING OFFICER: I was, sort of, asking myself ...

JUDGE ADVOCATE: All that ... it's done?

DEFENDING OFFICER: No, whether ... who was going to start?

JUDGE ADVOCATE: Aha.

DEFENDING OFFICER: I probably would like to hear more ...

JUDGE ADVOCATE: Yes, the prosecution is objecting, I guess?

DEFENDING OFFICER: He's objecting, so I probably would like him to formulate clearly his objections so I ...

JUDGE ADVOCATE: Yes, we'll hear the objection first, yes.

Trial within a trial

Assistant Prosecutor

Address

ASSISTANT PROSECUTOR: Mr Judge Advocate, it's the prosecution's position that essentially all of the exhibits that have been marked in the **voir dire** fall within Rule 35 of Military Rules of Evidence.

JUDGE ADVOCATE: 35?

ASSISTANT PROSECUTOR: 35, yes. And, in fact, what they are is self-serving documents. If I could just read you Rule 35, 35(1) states:

" ... For the purposes of this article, 'self-serving evidence' means any extra-judicial statement of the accused, or evidence of any other nature manufactured, created or arranged by the accused, that tends to exonerate him of the charge."

It's the prosecution's submission that all the documents that have been put before you are documents that were created by the accused, and that's clear from the evidence before you in the **voir dire**, and that's ... as I say, that's evidence that was put before you in the **voir dire**, that, in fact, the accused has created both the messages, the reports of proceedings and the instructions that you have before you.

And in effect this documentation is being put before the court presumably to demonstrate such things as the level of morale on board, the accused's interest in his crew or members of his crew, or training, a whole number of things are addressed. As you review those you'll find it deals with a variety of matters, and essentially showing morale is high, therefore, presumably abuse couldn't have been taking place because morale wouldn't be high if there was no abuse.

Again, these are the words of the accused, it's documentation prepared by the accused that's being

Trial within a trial

Assistant Prosecutor

Address

sent to his superiors. It's clearly before you that his superiors are the people that write his PERs and assess his performance. So there again arguably the documentation is self-serving even from its inception. It's being prepared for a specific purpose, to report to superiors, and arguably the image to be projected to superiors would not be a negative one. So the Crown would submit it's clearly self-serving evidence on that basis.

JUDGE ADVOCATE: Just a second. Did you not agree that all those documents were prepared before the accused was charged?

ASSISTANT PROSECUTOR: Yes, Mr Judge Advocate, all the documents were prepared before the accused was charged. There's no issue that they were not. I also am not aware of anything that would suggest self-serving evidence is restricted to documentation or statements made after an accused is charged.

JUDGE ADVOCATE: So when you say that all those documents were prepared for a specific purpose, what is that purpose, if it was prepared before he was charged?

ASSISTANT PROSECUTOR: Well, what I'm saying, Mr Judge Advocate, is even from its very inception, this documentation was self-serving in the sense that its intent was to report to superiors and to report the state on board the OJIBWA essentially, either through message traffic or through reports of proceedings.

JUDGE ADVOCATE: Yes, but the purpose of 35, as it is said there, and I'll read it again:

" ... For the purposes of this article 'self-serving evidence' means any extra-judicial statement of the accused, or evidence of any other nature manufactured, created or arranged by the accused, that

Trial within a trial

Assistant Prosecutor

Address

tends to exonerate him of the charge."

We're referred to documents or other types of evidence that were prepared after an accused was charged. Otherwise, how could it be prepared to exonerate him if he's not even charged?

ASSISTANT PROSECUTOR: It's not prepared to exonerate him, it's documentation that tends to exonerate him. When it's prepared, the purpose does not have to be ...

JUDGE ADVOCATE: So if I follow your line of reasoning, there is not a single document that an accused could produce in court, if he has prepared that document himself at any time?

ASSISTANT PROSECUTOR: No, Mr Judge Advocate, that's not what we're suggesting. If it deals with the very issue before the court, the prosecution submission would be no. There are restrictions under 27 ... or 35(2), excuse me, or exceptions under 35(2) which allow for the admissibility of documents or statements by the accused. It's obvious ... the prosecution's position that this documentation does not fall within any of those exceptions set out.

The case law in the area, it is submitted, is also very similar to Rule 35 and there's no distinction drawn between documents created prior to or after a charge is laid; for example, wire-tap evidence. If there's wire-tap evidence and nothing is found in the wire-tap, and it may be exculpatory evidence that's contained therein, those are tapes or statements that are created before a charge is laid, but the accused has no right to admit those. They're self-serving. It's up to the prosecution. Should the prosecution choose to admit them and there's exculpatory portions, then obviously defence has a right to use that evidence. But the defence in and of itself has no right to admit it or seek its admission.

Trial within a trial

Assistant Prosecutor

Address

And I would refer you to chapter 12, Mr Judge Advocate, of McWilliams. I don't have a copy for you but I certainly will run a copy of chapter 12 off for you in the break. And specifically at page 12-6.1 of McWilliams, there's an extract from the case of **R. v. Higgins**, again, a very old case. However, it's been cited and used in a number of subsequent decisions which are set out in McWilliams. And at 12-6.1 it states the following:

"Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it ... ", or not.

And that's the point I'm trying to make. The prosecution can clearly seek the admission of these messages or the reports of proceedings. And had the prosecution done so, then they would've been available to the defence to use in their case. The prosecution has not sought the admission of the documents, and for the defence to now do so is a violation of MRE 35 in that they are documents which tend to exonerate him of the charges in the sense that they're discussing issues of morale leading to the inference that abuse and mistreatment could not have been taking place on board the submarine. They clearly indicate the operational efficiency of the submarine

Having said that, as I say, there are a number of exceptions set out in MRE 35, and at the common law there's also a number of exceptions to the

Trial within a trial

Assistant Prosecutor

Address

rule on self-serving evidence; such as, where the evidence is required to rebut a suggestion of recent concoction of an alibi, for example, or of a story. I mean, those are clear exceptions to the Rule, but the defence, it's submitted, does not fall within any of those exceptions.

Excuse me for a moment, Mr Judge Advocate.

JUDGE ADVOCATE: ...

ASSISTANT PROSECUTOR: Excuse me, I'm sorry about that, Mr Judge Advocate.

So we're not within any exceptions in MRE 35, we're not within any exceptions, it is submitted, under the common law to admit self-serving evidence. And 35(2) deals with ... the last portion of it says - gives a number of exceptions - and then says:

" ... subject to the right of the accused to give evidence, self-serving evidence is not admissible when submitted by an accused."

So clearly 35 isn't taking away the right of the accused to testify and give evidence, but it also does not give him the right to put in evidence that clearly is self-serving or clearly boosts his oath, essentially is what we're doing. The accused will get on the stand and say morale was good on board the submarine. We have an operationally effective and efficient boat. The crew was happy. I did my job, I acted in accordance with what was required to maintain safety and efficiency at sea. That's fine. That's his evidence. This documentation essentially establishes arguably the same thing and it's boosting his oath. He can give that evidence very clearly.

JUDGE ADVOCATE: But it's not boosting anything. I mean, if he takes the stand and says, the morale was very high all the time I commanded that boat. And the fact that he put that in writing and

Trial within a trial

Assistant Prosecutor

Address

sent it to his admiral does not boost anything, I mean, it's just saying exactly the same thing that he says in court but doesn't boost his testimony by doing that.

ASSISTANT PROSECUTOR: But it's very self-serving, and arguably the prosecution would submit it is boosting. And it's a violation of 35(1). 35(1), the wording, the prosecution would submit, is quite clear.

JUDGE ADVOCATE: So the issue, I see it very well, is to decide if it is self-serving evidence or not. I mean, the whole issue is right there.

ASSISTANT PROSECUTOR: That's correct.

Again, I haven't had a chance to review this case in any detail, the case of **R. v. Campbell**, which deals with self-serving evidence and a statement made by an accused. But it sets out at page 18 - and I'll provide you with a copy, Mr Judge Advocate:

" The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:

- I. The rule which precludes an accused from eliciting from witnesses self-serving statements which he has previously made.**
- II. The rule which provides that a witness, whether a party or not, may not repeat his own previous statements concerning the matter before the Court,**

Trial within a trial

Assistant Prosecutor

Address

**made to other persons out of
Court, and may not call other
persons to testify to those
statements."**

So, again, I haven't had the opportunity to review that case in any detail but I would submit that the principles set out there, and they're applicable in this case and, in fact, these are out of court statements made by the accused to his superiors, the purpose of which are to report to them the state of affairs on board the submarine, which is a very issue before this court. The atmosphere, the treatment, the morale are the very issues that are being ... that evidence has been given on, and the fact that the accused made prior statements in those areas is a matter which should not be put before the court pursuant to Rule 35.

Those are my comments, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Mr Defending Officer?

DEFENDING OFFICER: If one adopted the position of the prosecution in this matter an accused would never have a chance to defend himself because it is the prosecution who controls whether or not evidence could be admitted. He was saying ... he was talking about the statement. Here we're talking about; the example, he must have been talking about the statement to military police, for example, or a person in authority, is one thing and obviously, the prosecution controls such a statement.

But here we're far from talking even of hearsay. That that whole section in which 35 is contained deals with hearsay, Division V of the Rules of Evidence deals with hearsay. We're not even dealing with hearsay in this case, 35 is part of that section. And clearly, the exception at 35(2), the various exceptions, 27, 28, 29, 30 and all that are all exceptions

Trial within a trial

Defending Officer

Address

to hearsay. We're not dealing with hearsay here. Those are the very words of the author. I mean, it's not as if I was calling witness "A" to come in court and report what the accused might have said after he was charged.

It's just simply is not self-serving evidence for several reasons. First of all, how could it have been manufactured, created or arranged by the accused in such a fashion that would tend to exonerate him of the charge. He would have had to have a crystal ball to be able to determine those fancy charges that have arisen some 14 months or more after his command. It's impossible that he could have done anything to exonerate himself from the charges. It is not hearsay. It cannot, it simply could not have been manufactured to exonerate himself.

And the exception, of course, at (2) says:

" ... subject to the right of the accused to give evidence ..."

So of course the accused has got the right to say something good for himself. It is not the prosecution that will adduce evidence of the accused's innocence. So when the accused takes the stand, he's perfectly entitled to try to exonerate himself and he can produce evidence that is relevant, admissible. And this evidence clearly is because it cannot, by no stretch of the imagination, be called self-serving. The witness has testified ... the accused has testified when he has prepared those documents. He has testified why he prepared those documents. They were prepared at the request of his various superiors, like all the reports of proceedings.

In '91, when ... November and December '91 and February '92, when the accused sent a business message to his superior, how could it be said that he has done that in an attempt to exonerate himself from the charges. Inconceivable. What those documents are,

Trial within a trial

Defending Officer

Address

they are merely documents that could be admitted at anytime under Rules of Evidence that pertain to documents of the Canadian Forces. Rule of Evidence 53 where:

" ... Documents and records kept for official purposes, including those kept in respect of officers and men."

They could fall into that. They could fall under the Rule, I believe, 103, as regular entry in a business, normal procedure. So those documents are admissible on countless grounds and just simply, simply cannot be said to amount to self-serving evidence, not in the context of the evidence in front of you and especially the admission of the prosecution to the effect about the date of investigation. The man was not even investigated when those documents were made. How could he? The fact that he wrote to his superior, or people that eventually would participate to the writing of his PER. So what? People do that everyday in their military career and, I mean, it cannot be excluded for that.

So for all those reasons, I submit to you that Rule 35 has got nothing to do with this evidence, and that should be clearly admitted.

JUDGE ADVOCATE: Thank you.

Do you wish to add anything?

ASSISTANT PROSECUTOR: Just a few points, Mr Judge Advocate, if I may. First of all, my friend has pointed out Rule 35(1) and I'd stress that it doesn't restrict itself to any extra-judicial statement of the accused. It goes on to state:

" ... or evidence of any other nature manufactured, created or arranged by the accused ... "

Trial within a trial

Assistant Prosecutor

Reply

This is clearly evidence that was manufactured and created by the accused. There is no dispute that that's what you've got before you.

Again, I'd also go back to 35(2). My friend quoted the portion that allows the accused to give evidence. He didn't go on with the last portion of the statement that says despite that self-serving evidence is not admissible. So, yes, he can certainly call evidence and he can give evidence in the trial but he can't give self-serving evidence.

The prosecution would further submit, again, and stress the point that the purpose for which this documentation was prepared is also extremely relevant. It was prepared as a report to superiors. By its very nature, it's going to be a positive piece of paper. Human nature dictates that that will be the case, and that's the very reason why self-serving statements aren't admissible because an individual by the very virtue of human nature will tend to make statements that cast himself in a positive light. So the purpose for the self-serving evidence rule is such ... is there and the very reason it's there is relevant to this case because these statements were statements that will be made to persons in authority over the accused.

In other words, they were going to write his PER. He wasn't going to write them and tell them morale is abysmal on board OJIBWA and it's my fault. You're not going to get a statement like that from the accused or from anybody in that type of document. You're going to get a positive reflection to the people in authority.

As far as the point being made that the accused wasn't even under investigation at the time these reports were prepared, the prosecution would submit that that is really irrelevant and if you consider the fact that what if the accused had made a statement to a person in authority that he had commit-

Trial within a trial

Judge Advocate

Decision

ted a criminal act before any investigation was done, before any charges were laid. That's clearly not admissible. You still have to prove the voluntariness of the statement.

JUDGE ADVOCATE: You're mixing carrots with oranges, I mean, declarations made to a person in authority, we're talking about inculpatory statements, and self-serving evidence is exactly the contrary.

ASSISTANT PROSECUTOR: That's right but a **voir dire** is required to put in any statement, Mr Judge Advocate, whether it be inculpatory, exculpatory. The courts don't distinguish, I would submit, any longer between the nature of a statement by the accused. So the prosecution would submit, Mr Judge Advocate, that it's clearly self-serving evidence. It falls within the definition of 35(1) and should not be admitted for that purpose.

JUDGE ADVOCATE: Thank you. I'm ready to make my ruling.

The objection is denied. The evidence is admissible. The arguments by the prosecution to the effect that the evidence sought by the defence to be admitted constitutes self-serving evidence, in my opinion, does not even come close to the definition of self-serving evidence. To be self-serving evidence, the evidence itself, as MRE 35 says, has to be manufactured, created or arranged by the accused and it must tend to exonerate him of the charge. This contemplates that the accused must, first of all, it should be exculpatory and; secondly, that the accused must have had sufficient time and reflection to fabricate the evidence.

The evidence we have here before this court is to the effect that it was prepared a long time ... in any event, it was prepared before the accused was investigated for the charges before the court, so it

cannot fall within the definition of 35 and it is admissible under MREs 53 and 103.

TRIAL WITHIN A TRIAL IS TERMINATED

Would you please invite the president and the members to join us.

Do you have something else?

DEFENDING OFFICER: Well, I was thinking, before we carry on, maybe, if we could take a 15-minute break. I don't know if you want me to request that before the court or wait for the court, to take 15 minutes now and then come back.

JUDGE ADVOCATE: Will you take perhaps the documents that are marked as "VD26 ...".

DEFENDING OFFICER: And I will re-submit them to you in the main trial.

JUDGE ADVOCATE: Yes. Fifteen minutes?

DEFENDING OFFICER: Yes, please.

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1535 hours, 24 October 1995, the court adjourns.

REASSEMBLY: At 1547 hours, 24 October 1995, the court reassembles and the accused is before it.

THE PRESIDENT AND THE MEMBERS RETURN TO THE COURTROOM.

DEFENDING OFFICER: At this point, Mr President and Judge Advocate, I would like to enter a series of documents. The first one is a message time group 120305Z December 1991. I have five extra copies for the members.

JUDGE ADVOCATE: "QQ".

THE MESSAGE DATED 120305Z DEC 91 IS MARKED
EXHIBIT "QQ".

DEFENDING OFFICER: I should comment for the benefit of the court that those documents have been declassified and you will see from time to time on some of those documents there are portions that are blacked out, it is that they related to either operations or some information that still cannot be disclosed and that has no relevance to this case as agreed between the defence and the prosecution.

The second document is a message, again, time group 241915Z November '91, and I have extra copies for the court.

JUDGE ADVOCATE: "RR".

THE MESSAGE DATED 241915Z NOV 91 IS MARKED
EXHIBIT "RR".

DEFENDING OFFICER: The third document, another message, 281401Z Feb '92, again with extra copies for the court.

JUDGE ADVOCATE: "SS".

THE MESSAGE DATED 281401Z FEB 92 IS MARKED
EXHIBIT "SS".

DEFENDING OFFICER: The next document is one called, "Captain's Instructions to Officers, Letter of Promulgation", and actual instructions, a total of 48 pages. I have copies for each, the president and members.

JUDGE ADVOCATE: "TT".

THE CAPTAIN'S INSTRUCTIONS TO OFFICERS IS MARKED EXHIBIT "TT".

DEFENDING OFFICER: Then I have a series of document which are Reports of Proceedings, the first one dated 4 October 1991, it is SOJ 1610-1.

JUDGE ADVOCATE: "UU".

THE REPORT SOJ 1610-1 DATED 16 OCTOBER 1991 IS MARKED EXHIBIT "UU".

DEFENDING OFFICER: The next one SOJ 1610-1, 2 July '91.

JUDGE ADVOCATE: "VV".

THE REPORT SOJ 1610-1 DATED 2 JULY 1991 IS MARKED EXHIBIT "VV".

DEFENDING OFFICER: The next one SOJ 1610-1 dated 6 January 1992.

JUDGE ADVOCATE: "WW".

THE REPORT SOJ 1610-1 DATED 6 JANUARY 1992 IS MARKED EXHIBIT "WW".

DEFENDING OFFICER: The next one SOJ 1610-1 dated 5 April '92.

JUDGE ADVOCATE: "XX".

THE REPORT SOJ 1610-1 DATED 5 APRIL 1992 IS MARKED EXHIBIT "XX".

DEFENDING OFFICER: The next one SOJ 1610-1, 4 July '92.

JUDGE ADVOCATE: "YY".

THE REPORT SOJ 1610-1 DATED 4 JULY 1992 IS MARKED
EXHIBIT "YY".

DEFENDING OFFICER: The next one SOJ 1630-1
dated 6 January 1993.
JUDGE ADVOCATE: "ZZ".

THE REPORT SOJ 1630-1 DATED 6 JANUARY 1993 IS MARKED
EXHIBIT "ZZ".

DEFENDING OFFICER: The next one SOJ 1630-1,
8 April '93.

JUDGE ADVOCATE: Exhibit "AAA".

THE REPORT SOJ 1630-1 DATED 8 APRIL 1993 IS MARKED
EXHIBIT "AAA".

DEFENDING OFFICER: The next one SOJ 1630-1
dated 8 July '93.

JUDGE ADVOCATE: Exhibit "BBB".

THE REPORT SOJ 1630-1 DATED 8 JULY 1993 IS MARKED
EXHIBIT "BBB".

DEFENDING OFFICER: And the last Report of
Proceedings, SOJ 1630-1 dated 4 October '93.

JUDGE ADVOCATE: Exhibit "CCC".

THE REPORT SOJ 1630-1 DATED 4 OCTOBER 1993 IS MARKED
EXHIBIT "CCC".

DEFENDING OFFICER: With consent of the
prosecution, I would like to file in the additional
documents.

PROSECUTOR: On consent, sir.

DEFENDING OFFICER: The document, 13 pages,
sir, with extra copies for the court. This document,

Mr President and Members, is tendered for any use you may wish to make. It is, basically, a summary prepared from the Uh-huh of OJIBWA for the activities of 1992. In some places, it says little. In other places, for example, like at page 2, item 6, for example, there would be reference that at 5:11 the boat surfaced and at 7:45 it was at harbour stations and so on and so forth.

JUDGE ADVOCATE: Exhibit "DDD".

THE 1992 OJIBWA LOG BOOK IS MARKED EXHIBIT "DDD".

DEFENDING OFFICER: The next document is a 16-page document, similar to the one I just introduced, which again is a summary from the OJIBWA's Log describing some activities.

JUDGE ADVOCATE: Exhibit "EEE".

THE 1993 OJIBWA LOG BOOK IS MARKED EXHIBIT "EEE".

DEFENDING OFFICER: A one-page document which is a summary by year of hours spent either at sea, dived, surfaced, bottomed, et cetera for OJIBWA.

JUDGE ADVOCATE: Exhibit "FFF".

THE SUMMARY BY YEAR OF HOURS SPENT AT SEA IS MARKED EXHIBIT "FFF".

DEFENDING OFFICER: If I may have all the documents.

JUDGE ADVOCATE: With great pleasure.

DEFENDING OFFICER: I'll resume my examination.

Lieutenant-Commander Marsaw

Examination-in-chief

TENTH WITNESS) Lieutenant-Commander D.C.
FOR THE) Marsaw.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. If we start with Exhibit "TT", Captain's Instructions to Officers. Lieutenant-Commander Marsaw, could you look at that document and tell the court what this is, who prepared it and the date during which ... or the period during which this was effective?

A. Yes, sir, these are instructions I prepared for personnel under my command. It is the third revision which I issued in July of 1992 and which remained in effect until I left command in October of '93.

Q. And could you inform the court as to - you mentioned it's a third revision - whether changes from your previous order were significant or not?

A. I haven't compared this recently to earlier versions but I don't believe there are significant changes. What my technique was at the time was that if I issued a number of temporary memoranda over a year, I would take that information which was still valid and incorporate it into my formal orders, thus negating the requirement for temporary memoranda. And this is Part I of my orders. Just for reference, Part II were "Patrollers" and Part III were "War Orders".

Q. And orders similar to those would have been in existence for the whole duration of your posting as the CO of OJIBWA? A. Yes, sir.

Q. I show you Exhibits "SS" ... "QQ", "RR" and "SS", these are three messages. Could you look at them and tell the court whether you recognize those and when they were sent and for what purpose? A. Yes, sir, these are exclusives signals that I sent to my commander, Commander First Canadian Submarine Squadron, from sea to alert him as to the state of affairs on board while I was deployed.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. And could you inform the court as to how accurately you depicted the situation at the time?

A. I was extremely frank in these signals, which I believed was my duty to be. It was my duty to be frank and that's ... and the purpose of them was to apprise my superiors as to what I thought the state of the submarine was.

Q. And I see that those reflect as well on morale, whether it has improved, declined, in that ...?

A. Yes, sir. Yes, I discussed operations, morale, how our morale is doing? where it gets worse? why I think it might be? I discussed those issues in there.

Q. I show you Exhibits "UU" through "CCC" - and I see that on one on top that I present to you is "CCC" dated 4 October - could you tell the court what those are? I mean, who prepared those, when, for what purpose and to whom it was sent? A. Yes, sir, these are reports of proceedings prepared by myself while in command of OJIBWA, addressed to, variously the Maritime Commander or the Commander Maritime Forces Atlantic, the difference being the restructuring that we had here on the coast changed which admiral I was reporting to, with information copies to the commander, First Canadian Submarine Squadron. Reports of proceedings are a requirement that commanding officers must report quarterly to the admiral explaining to him what, if any, significant concerns you have, your assessment as to the state of your unit and I prepared them on the dates indicated at the top and submitted them to those authorities.

Q. I see that Exhibits "UU" and "VV" are from a ... or display a different format than Exhibits "WW" to "CCC". Could you explain, if there is any explanation for that, why, or is it just coincidental?

A. No, certainly, it was my observation in command that each admiral has his own personal preferences to the format of reports of proceedings. One of his first acts in taking command is to issue instructions to his commanding officers on what format he expects them to

Lieutenant-Commander Marsaw

Examination-in-chief

write to him in, and as it turns out these the Admiral that these were written to specified this format. The Admiral that these were addressed to specified this format.

Q. And it all, basically, contained the same information, in essence? A. Yes, there is not a significant requirement to change content or style, just the format.

Q. And could you comment to the court how accurately this reflects the situation as you saw it at the time? A. They are a frank assessment of my appreciation of the state of my unit and the problems that she was dealing with and I reported it, as I understood it my duty to be to do so, in an entirely forthright manner.

Q. I show you Exhibits "EEE" and "DDD". Could you inform the court as to who prepared those documents, what they are, what they purport to indicate? A. These are summaries from the ship's logs of HMCS OJIBWA that I prepared through examination of the logs. What I intended to do here was to just provide some sort of easier structure, referring to dates and activities than actually having to go through the logs themselves all the time.

Q. Now, could you explain to the court - if the court would please direct its attention to "DDD" - on "DDD", item 9 is left blank. What, if anything, does that mean? A. That means that when I reviewed the log I could not decipher the signature of the officer of the day for that day and so I just left it blank. In other places where you'll see blanks; for example, on the 3rd page of the document, under the date February 23rd, you'll see it's blank. That's blank because we're at sea and thus don't have an officer of the day and nothing that would be recorded in the log of significance ... that I found significant was recorded in the log for that day, so it's merely left blank. But you can tell from the earlier and than

Lieutenant-Commander Marsaw

Examination-in-chief

later entries that the submarine was at sea doing something. In this case, you could see that we were on the surface because the entry on the 21st has the submarine surfacing and there is no entry afterwards having the submarine diving. So that would mean that we were on the surface at that time.

Q. And if you want to carry on this example so that the court can understand, according to the - and you're still at the same page you were talking about - when would the ... have the submarine dived?

A. In fact, it didn't dive for the remainder of that period. It has us going to harbour stations and then securing in Faslane, and that's my own annotation there "o/b" as meaning outboard; "Superb" meaning Her Majesty's Submarine SUPERB in Faslane. We then went into duty watches and did not sail and dive again until the 4th of March at 1752 when the submarine dived.

Q. And that's item 4 in the same page there?

A. That's right.

Q. And at item 8 of March at 0425, you're dived; and then 9, 10, 11, 12, are blank; and the next page "0731 - surfaced". So is the inference that you were dived for those four days? A. That's correct, sir. And there is one spot - and I can't recall which portion it is - in one of these documents where you'll note that, I think, there are two consecutive annotations of diving on the same day without a surfacing in between. That's because there was an error in the log. The surfacing was not recorded between those two diving periods. However, I am quite certain that the number of surfacing equals the number of dives that the submarine executed.

Q. And could you inform the court whether Exhibit "EE" is prepared in the same fashion and the explanation you provided in relation to, sorry ...

JUDGE ADVOCATE: "EEE".

Lieutenant-Commander Marsaw

Examination-in-chief

DEFENDING OFFICER:

Q. The explanation you provided in relation to "DDD" applies equally to "EEE"? A. Yes, sir, and some of the ... I initially prepared this for my own use as a quick reference, so some of the abbreviations may not be familiar to you but this is my shorthand.

Q. Finally, I show you Exhibit "FFF", a summary by year of hours spent. Could you inform the court as to who prepared that document and on what basis was that document prepared? A. I prepared this, sir, and again, because I wanted some kind of figures I could look at to compare with other information that was available to me. Figures that have the - I'm not sure what you call that punctuation mark - the "@" with the circle, they indicate that that information comes from the logs. Where you see a dollar sign, that is information that I've derived principally from memory or other documents that would indicate when people were on board, such as sea training reports and that sort of material. Where you see I've broken each year, '92 and '93, into two parts, the second part of each year includes approximate figures for specific operations. The reason for that is that I did not have access to the logs for those operations. They were held out of my access and so I couldn't get exact figures and approximated for those. So the figures that show the second entry for each year will include my estimate of hours spent doing various activities during those operations.

Q. That is; for example, 1993, second line, you have approximately 109 days. That means that it's one of those where you didn't access to the actual log?

A. Actually, that means that ... if you look at the first entry for '93, second line, you'll see "2498 hrs 59 min at sea" and then in the second entry for '93 second line, you'll see "2618 hours 59 minutes at sea." The larger figure for the second entry is because I've included my approximate figures for the operation, which I did not hold the logs for, and the approxi-

Lieutenant-Commander Marsaw

Examination-in-chief

mately 109 days is just for quick reference of dividing 24 into 2618, just to show the number of days at sea in an approximate fashion.

Q. Thank you. Now, as we left before we introduced those documents, we were talking of you taking ... having taken the command in December 1990 and we had discussed a number of matters. Could you inform the court as to, again, an overall before we get into the particulars, the challenges that awaited you as you took OJIBWA and, in general terms, activities for '90, '91 - '91 mainly, since you took command only in December '90 - so an overall view of activities '91, '92, '93? A. Yes, sir. I think like any other seaman officer I was very much looking forward to the challenges of having a sea command and I was quite delighted that OJIBWA was the boat that I was ordered to take. OJIBWA, in fact, I knew slightly by reputation before I took her. She had been to Faslane and visited Faslane while I was doing my command course and the comments that I got from my classmates ...

Q. Okay, we'll not indulge in those comments. A. Oh, I'm sorry.

Q. If you would please give ...? A. I was left with a very positive impression of her in her current state.

Q. Okay. How did the first year go, like in general terms '91, activities and what not? A. The first year started very, very well. We went South and did a torpedo firing and got quite excellent results from it and I was very happy with the way the team was performing. But then shortly thereafter we went in a docking work period during which we discovered more significant engineering problems than we had anticipated and that caused us to, for one reason or another, remain in Halifax for the next, I believe, seven months. That was a new challenge for me. I had expected the challenges at sea, but to be faced with that sort of problem was quite a surprise and I had to re-

Lieutenant-Commander Marsaw

Examination-in-chief

think the morale issues that would become prominent during that period, as indeed it did. And we had to take some measures to remedy that and I believe that problem is addressed in one of the exhibits that you have. Then at the end of '91, when we finally got these problems sorted out and did get back to sea, we went down South. We did another torpedo firing which went reasonably well but we also had some very good interaction with other navy units which did a great deal towards getting us back up unto a decent state of combat readiness after being so long in the dock and it had also helped renew the faith that the ship's company had in the submarine, that faith, I think, having been shaken somewhat by the extended period ashore.

Q. Okay, then in '92, as I recall, we've heard some evidence, work ups in early '92, et cetera, or was it work ups in '92? A. Yes. Could I refresh my memory of the year by looking at the general schedule of the ...

Q. Yeah. Actually, I might have misled you. Anyway, would you comment to the court on the activities of '92? Again, it's general purpose? A. The first big event we had in '92 was the team work exercise which we went over for to EASTLANT and that, again, was terrific work for the ship's company. The exercise itself, we had a very good part to play in it. We got lots of good results which pleased the team and, again, reinforced their faith in their own fighting capabilities. And we had a couple of quite enjoyable port visits in there that always helps morale. We did a CANFLEET OPS that year which incorporated an SOCT, and one of the things that I think the ship's company gets out of SOCT is the satisfaction of knowing that they are participating in training their future COs and they see how an officer develops from someone who might be a little bit nervous behind a periscope, to somebody who over a couple of years you see him develop into somebody who really looks quite smart behind the periscope and certainly gives the impression he knows what he is doing. The

Lieutenant-Commander Marsaw

Examination-in-chief

most difficult thing, I think, I did in my command then happened ... started happening in later '92 and that was the counter-narcotics operation, certainly the most difficult from the point of view of applying tactical knowledge and operations because it was a unique tasking that we hadn't had before and we really had to think about how we were going to approach it. It was requiring the submarine to do certain activities which were at the absolute limit of our operating envelope, and the very nature of the operation itself was so unusual that we had to pick up a lot of lessons learned as we went along and applied them. And then the duration of the operation itself, it was, I believe, the longest operational patrol that a Canadian submarine had done and that, of course, presented its own challenge, just trying to keep people spirits up for such a long period.

Q. Is that ... it was '92. You heard ex, former Officer Kavanagh, is that the operation that he ...? A. Yes, sir, that's the operation he's talking about where we went from the middle of August '92 to the second week of October '92 and that was a good challenge.

Q. There's been reference made in the course of this trial that you had kept people in the dark as to your destination and so on and so forth. Could you comment to the court on that, whether that happened and if so, why? A. Yes, sir, that was the case and, in fact, when I was first ordered to prepare for that operation, I was at sea doing another task and I got a message exclusive for me telling me that I was going to have to come in, do a quick work period and then get back out for this special op. And, in fact, what they did, which was I thought very unusual, they actually moved my docking work period and re-scheduled it and I had never heard of that being done before because those things are cast in stone, I certainly believed. But that message I got at sea, in fact, outlined right then that what I was going to be doing was ... it was not to

Lieutenant-Commander Marsaw

Examination-in-chief

be disclosed to anyone and, in fact, I was given a cover story at that time to issue to the ship's company so that they would think that, ah, something is up, but they would not know what it was and we would, in fact, deliberately keep the specific nature of the operation away from them. When I got back to Halifax and got more briefings on what the nature of the operation was, why the security requirements were so intense, I came to understand that as well and, in fact, it was because lives were at risk and the information that was given to me at that time, had it become spread around beyond the tight circle in which it was kept, it could've caused some lives to be endangered. And I was given a cover story for the public and a cover story for the ship's company, and at the time of sailing, in fact, I was the only person on board the submarine who knew what was going on. As the operation progressed I was able to expand that knowledge, or those information areas further, with the people who could be involved. And at one point, due to a defect, we had to go into a port. I decided that with all the rumours and such that were flying about the submarine, my best way to make sure that the ship's company now understood the seriousness of this operation, the seriousness of the security requirements was to tell them. And I discussed it with the authorities on board and they agreed with me. So I did that. And although that said, I was able to keep certain information back from them because they simply did not need to know and was able to; for example, keep our specific target areas unknown to them, because of the danger of something like that slipping out in accidental conversation. They don't need to know it to do their jobs. They did need to know the basic nature of the operation in order for them to understand the security requirements in my assessment.

Q. Okay, if you would, okay, I wanted to en passant mention that, if you would carry on with your overall review of the activity of that year? Or that finished in what, October? A. Yes, sir, the 10th of

Lieutenant-Commander Marsaw

Examination-in-chief

October '92, we got back to Halifax from that deployment.

Q. Anything else significant in '92?

A. Well, the only other thing of major significance there is the late start to the docking work period. Because the docking work period had been shifted right, so that we could do this patrol, all of the training that we had organized for the ship's company, refresher training and such that we'd scheduled for the original docking work period dates, we had to scramble pretty hard to try and reschedule a lot of that. It's also pushed it into the Christmas period, which is quite a tough time to get a lot of work done especially on the scale of the work that we tried to accomplish in that period.

Q. Then '93, that was ... I had misled you I believe. It was in '93 that you started work ups in fairly early January? A. Yes, sir, and, in fact, we were a bit late coming out of the docking work period, not surprisingly, and I do treat in one of my reports of proceedings, I mean, the reasons for that. And then we had a very, very hectic schedule to try and get ready for work ups. We had just an enormous amount of work to do, but the dockyard continued to work through our self-maintenance period, and this was one of my ... one of the topics I continually tried to address with people, with my superiors. I felt that this was really interfering with the ability of the ship's company to get their job done and get a weekend off before going to sea - and, in fact, I note from the schedule of work posted in the AJAG office here that they don't even mention SMPs anymore so I get the impression I've failed in that regard. But we did get our work done in time, or almost in time rather, we were delayed a couple of days to make the preps for sea and we did go to sea and do work ups. The work ups did not go at all well in my opinion, principally because we didn't get a good shake down period before hand and so we had mechanical defects that caused us to go in and interrupt training, and we also had a couple of problems beyond

Lieutenant-Commander Marsaw

Examination-in-chief

our control of other fleet units which couldn't make their commitments to us and so we weren't able to utilize those resources. And then we went again, unfortunately, into a rather boring international exercise in which we really didn't get a lot of opportunity to exercise combat skills. So at the end of that period I was not at all convinced that we were where we should've been by that stage and people were tired. It was a lot of work. In March of that year we did a fisheries' patrol which, again, was interesting and I think the ship's company enjoyed that because it was a unique tasking, again. It was only a short operation but it was the first time that we had ever tried to perform that type of service for DFO. And it did involve actually, and much to my surprise, the exercise of a lot of combat readiness skills to get in that close to a fishing vessels such that we could properly identify him while remaining undetected ourselves and, of course, making sure that all safety requirements were met, in working in shallow water, heavily congested water. And so it was quite a good op. The last work we did towards the end of the commission, again, it was significant to me that it was not a good programme for maintaining combat readiness skills and it was a lot of clock work mousing, particularly, a scientific trial that we did. And it was one of those occasions where you could've pretty much done it in your sleep. So what I did there was to really try and inject the basic training that we could accomplish in that period. So lots of safety evolutions trying to give people opportunities to see how the submarine could be operated under various modes, that sort of thing, so that we could make best use internally of the sub, what the submarine was doing externally which was rather boring. And then we finished up the commission with a couple of very good port visits. We came back to Halifax and started into refit preparations.

Q. Okay. Let's go back to 1991, December mess dinner. You heard a fair amount of evidence on

Lieutenant-Commander Marsaw

Examination-in-chief

the mess dinner. I gather that you attended the mess dinner? A. Yes, sir.

Q. You've heard evidence that previous mess dinners had been rowdy and that, I guess, it had been intended that this one be quieter. What, if anything, was your role in that mess dinner yourself? A. I was acting PMC for that mess dinner. The actual PMC was ill. The vice-PMC didn't want to do it. So I was asked by the squadron commander to act as PMC and was given quite specific instructions because the previous year's mess dinner had gotten a little out of control, and so I directed that one in a very conservative fashion.

Q. Okay. I believe we heard evidence about Lieutenant[N] Pitman not attending. Can you tell the court what this is about? A. That's correct. He was not well. He communicated that he was not well and I let him go and it was ... I assume that the reason he asked me was because he knew that would leave an empty space and so it was my duty as PMC, I had to make sure that space was filled.

Q. At what time would the dinner start, who was the guest speaker and give a bit of the events? A. It started ... it was ordered 1930 for 2000 [hours]. Commodore Moore, then CANCOMFLEET, was the guest of honour. I met him when he arrived at about 1930 [hours]. The officers at that point were in the submarine squadron headquarter's wardroom where we went for pre-dinner drinks and at 2000 [hours], we moved into the Chief and Petty Officer's Mess where the dinning tables were set up.

Q. Without indulging into unnecessary details, how did the dinner go? A. It was the most conservative submarine officer's mess dinner I ever attended. It was not without its point of humour but there was none of the normal rambunctious behaviour that I have seen at other dinners. It went ... it was a civilized dinner.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Okay. What time, approximately, did that end and what took place, like leaving the table, getting off the table? A. At approximately 2200 [hours], the dinner would have been finished and, 2200, 2230 [hours] with speeches over and actually leaving, and then adjourning back into the squadron wardroom.

Q. Okay. Did you go there yourself when ... what did you do? A. Yes, I did. I went in with the guest of honour, had a drink with him and then saw him off. He didn't stay long after that.

Q. So approximately what time did he leave as far as you can recall? A. Well, if we got there ... well, he was gone within half an hour of adjourning to the wardroom.

Q. And then what? I gather you invited people to attend OJIBWA for a final drink? A. That's correct. In fact, in all three mess dinners I attended in command I made it my practice to invite the squadron commander and any other COs that were there back down on board for a drink, and I did that that night as well, inviting Captain[N] Plante, and the only other submarine CO who was left at the time was Commander Bush so I invited him as well down on board for a drink.

Q. Okay. To this point of the evening as you invite them, could you tell the court approximately - I know it's almost four years ago - how many drinks you had? A. Given that it is almost four years ago this is approximate, but I'll do my best, sir. A glass of sherry before dinner; two glasses of wine with dinner but I say that keeping in mind that the stewards tend not let them go empty so that's an approximate; I believe we passed the port twice after dinner and I would have had a glass of port of each of those occasions; I had a drink with the guest of honour after dinner, a beer in the Wardroom; and ...

Lieutenant-Commander Marsaw

Examination-in-chief

Q. How did you feel at the time? Oh, sorry. Had you finished your ... ? A. And then another couple of beers on board the submarine.

Q. Okay, forget the submarine for now. At that time, just at the Squadron Wardroom, is that it after the drink with the guest of honour? A. Yes, sir.

Q. What was your state of sobriety or intoxication at that point, before you proceeded to the sub?

A. Well, at that point that to me is ... that's more than my limit for driving so I was not able to drive. But I was quite in possession of my faculties, I was aware of the fact that my duties as PMC had still not expired, that there were other things that I had to do that night; such as, keeping an eye on the conduct of the other officers. It appeared not to be too bad at that point. I was not drunk.

Q. What time ... you said you invited Captain[N] Plante and Lieutenant-Commander or Commander, I'm not sure, Bush? A. It was Lieutenant-Commander Bush then.

Q. Okay. So did they attend, did they go with you? When did you go, approximately the time and whatnot? A. Between 2300 [hours] and midnight is my best approximation as to when we left the Submarine Squadron Wardroom and went down on board OJIBWA which was berth at NC5, so it's just opposite the doors to the squadron headquarters.

Q. Who do you recall being on board when you arrived there, if anyone, that is, of course? A. The officer of the day, and I'm not certain if he was there then, you know, I'm not certain if he was there when we arrived or if he arrived shortly after us, it was Lieutenant[N] Soper, it was my CSE.

Q. Do you remember who the officer of the day was and can you explain that to the court?

Lieutenant-Commander Marsaw

Examination-in-chief

A. Sub-Lieutenant Ken Marr, he was my navigating officer.

Q. Okay. How certain are you that it was Marr or how could ... ? A. Well, from what I've heard in the court and looking at the logs, I can say with a great deal of certainty it was [Sub-]Lieutenant[N] Marr. But that certainly is ... that has helped to influence me. I can't remember who the officer of the day was in '92, on December the 19th without checking logs.

Q. Who else did you see there? First of all, let's clarify. Did Plante and Bush go with you eventually? A. Yes, they went with me on the OJIBWA, sir.

Q. So that's you, Plante and Bush, and then Marr's the officer of the day as you now recall. Soper might have been there when you arrived, or you saw him or something. Is that Soper that you mentioned? A. Yes, sir, Soper.

Q. Okay. Who else, if anybody, I mean, came or went or you saw on board that night? A. I recall - I think she was Sub-Lieutenant then - Waller came down with then Lieutenant[N] Kavanagh, and that's, you know, the only reason I recall them was that she had changed into civilian dress before coming down, and it first struck me as odd but, of course, thinking about it now it makes a lot of sense. She was wearing RCN mess kit, very expensive piece of gear I'm sure, and she probably didn't want to bring it down aboard a submarine.

Q. Who else was there that you can remember?
A. Lieutenant Kelk, Lieutenant[N] Muir.

Q. You've heard evidence that - let's forget the ranks if we may for a moment because the ranks have changed all the time - Hart, Craven, Dickinson, who are there, you've heard evidence to that effect. Can you comment about that? A. I have no recollection of

Lieutenant-Commander Marsaw

Examination-in-chief

seeing Hart, Craven or Dickinson, but in that group that they were going around with that night, also included Elford. I recall Elford only because when I was seeing off then Lieutenant-Commander Bush on the jetty, I saw Elford and he stuck in my mind because he was wearing anti-flash gear that I learned later he had ...

Q. Forget what you learned later?

A. Sorry.

Q. But he was wearing flash gear anyway, that you recall for sure? A. That's right.

DEFENDING OFFICER: Okay. Mr Judge Advocate, I wonder - I want to seek some guidance - is it acceptable if I don't mention the rank because many have changed all the time ... have changed ranks since so it would complicate the formulation of the question.

JUDGE ADVOCATE: Go ahead.

DEFENDING OFFICER:

Q. What time you said that you saw Bush away, can you recall approximately what time?

A. Approximately two o'clock. He had a cold and I believe Captain Plante had a cold then as well, so they were not feeling well and that's about my limit of endurance as well for a night. Two o'clock is a long day for me.

Q. Could it have been a little later, like, how are you formally stating it was two, or around two, or ... ? A. No, over four years I can't say that it was two o'clock but it was approximately that.

Q. Okay, let's say after you saw Bush away, what did you do, did you return to the wardroom? Inform the court as to what you've done? A. No, after I saw Commander Bush off - I'd previously seen Captain Plante off - so my last remaining personal guest was

Lieutenant-Commander Marsaw

Examination-in-chief

Commander Bush. So then I went down in my cabin and went to bed.

Q. You did return at all to the wardroom that night? A. No, sir, I didn't.

Q. Okay. You've heard evidence as to Kelk being passed out on settee one, one position or another, of settee one. Can you inform the court as to what condition was Kelk in when you left, like, I guess, as you left when you went to see Bush away, that's the last time you were there? A. May I refer to the exhibit, sir?

Q. Certainly? A. In fact, I can show you where he was as well.

Q. Exhibit "J". Okay, first his condition? A. He was passed out.

Q. He was passed out. And where was he located as far as you can recall? A. He was at the forward end of settee one, leaning against this bulkhead.

Q. Forward end of settee one? A. Leaning at an angle with his shoulders against this bulkhead and his legs down, you know, not vertical, bent over.

Q. Now, before we carry on on this subject of Kelk, do you recall approximately how many drinks you had when you were on OJIBWA? A. Approximately two beers.

Q. Could you comment as to your state of sobriety, like, before you went to bed, like? A. Well, I was not ... I would not say I was drunk, again, I was still, you know, certainly in no condition to drive. But when I came down I put a note on the lower deck trot sheet. We have a board that the lower deck roundsman carries around the submarine when he's doing rounds and one of the sections on there is a

Lieutenant-Commander Marsaw

Examination-in-chief

place for "shakes", and I put in a "shake" for a particular time, before I turned in. When I woke up in the morning, I woke up, you know, before my shake was ...

Q. So your shake is, like, shake up, wake up call type? A. Yes.

Q. That's what it is, isn't it? A. Yeah.

Q. Okay? A. And I was awake before that came around.

Q. Uh-huh, okay. Now, you've heard evidence throughout ... or not throughout but at least early in this trial that Kelk and Muir had been written on. What do you comment on this? A. Nothing like that happened in my presence.

Q. You've heard evidence that Kelk and Muir - I guess both, depending on the evidence which varies a little bit - had been taped to various extent, you've heard the evidence on that. What can you comment to the court about that? A. Nothing like that happened while I was there.

Q. You even heard evidence that you might have done yourself some marking on Kelk, I believe it was, according to some evidence. Could you comment to the court on that? A. I did not.

Q. You heard evidence that you inserted a cigar tube in Kelk's rectum at some point in the evening. What do you have to say about that? A. I did not.

Q. Did you see anything like that happen that night? A. No, I saw no activity of that kind that night.

Q. The next morning, you got up before your shake and did what? A. Shaved, dressed in my cabin,

Lieutenant-Commander Marsaw

Examination-in-chief

went into the Squadron Wardroom for coffee. The coffee in the squadron is always better than the coffee on board. I had my normal two or three cups. I tried to avoid crossing the brow within a few minutes of colours so that I'm not inconveniencing the officer of the day who might have to - in fact be on the after end of the submarine with the brow forward when he's trying to pipe in such - so I stayed in the Squadron Wardroom till about 8:15/8:30. Then I went back down on board and started working in my cabin.

Q. And a normal days work? A. Normal days work. I don't recall what time I went home that afternoon, whether it was early or late, but it was ... at that time 19/20 December, you're just trying to tidy things up prior to taking some Christmas leave.

Q. And how certain and positive are you about you not being involved in any of those activities that I related to you in my last four or five questions? A. I could not be more certain of anything in my life.

DEFENDING OFFICER: Mr President, Judge Advocate, I realize that it will take a little longer than I anticipated. Maybe we could take a 10-minute pause to allow both the court reporter and everybody to have a quick rest, 10 minutes, and we'll come back and resume, with your leave.

JUDGE ADVOCATE: Do you intend to complete your examination-in-chief today?

DEFENDING OFFICER: Yes, I would. That's why I think a short pause might be in order and then continue on possibly until it's over, that's what I would like.

JUDGE ADVOCATE: Very well. The court is adjourned for 10 minutes.

Lieutenant-Commander Marsaw

Examination-in-chief

ADJOURNMENT: At 1654 hours, 24 October
1995, the court adjourns.

REASSEMBLY: At 1710 hours, 24 October
1995, the court reassembles
and the accused is before it.

DEFENDING OFFICER: Thank you, Mr President.

At this point of the examination I may warn the court that I'd like to go through various pieces of evidence that have been presented throughout the trial and invite Lieutenant-Commander Marsaw to comment and give his side of the story.

Q. You've heard Lieutenant[N] Elford telling or giving an account as to how he had been awoken - he was asleep - he had been awoken over a can of V-8 juice that was out of date. Do you remember that incident, the context? A. I can remember the context, sir. I can't remember the exact date of it beyond saying I believe it occurred during Team Work '92, and Lieutenant[N] Elford at the time was the supply officer and I had spoken to him prior to that deployment. We had in an earlier deployment received a lot of out of date fresh goods - and the other sort of dated goods that we get in a submarine, like salad dressings and that sort of thing of which have an expiry date - and I had noticed that we'd been continually getting goods out of date. Well, on a submarine you don't have all the refrigeration facilities available in messes like you normally would in another unit. So it's quite important that you get the freshest possible materials.

I am surprised he's made quite so much of it. It was the middle of the day, I noticed that I had a can of juice - I can't recall if it was V-8 juice - but some kind of stuff that I noticed was out of date. And as it was the middle of the day, I said to the XO, send the supply officer to see me. I said, look, this is exactly what I was talking about. This is what I asked you to prevent, getting materials that are out of date, we should be sending them back. There was no big scene about it, that was ...

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Were you aware that he was asleep? I believe he has testified that he was asleep? A. No, I would have no way of knowing that. It's the middle of the day, I would expect most officers to be up and around.

Q. Lieutenant[N] Elford I believe has stated that in relation to some problem he had with Kelk that he tried to complaint through his divisional system and he mentioned that Kelk was his divisional officer? A. Yes, and the first that I heard of that was when he testified to that effect here in court. I found it somewhat disappointing that he felt that Kelk was his divisional officer to start with. His divisional officer was the executive officer as I've explained earlier about our divisional system. And I always had a temporary memoranda in effect outlining who was whom's divisional officer and he should have had no question in his mind about it. So as regards his making a complaint through Kelk I have no knowledge. I'm just disappointed to hear that he thought Kelk his DO.

Q. He's referred - still Elford - referred to a conversation with you in the Stadacona Wardroom, I guess in the presence of Byrne, you stating to one, what you said is damning, or was it? Do you ... ? A. No, I think his testimony, sir, was that in the Stad Wardroom that I'd accused him of trying ... or asking him the question, why would you demise my family?, words to that effect.

Q. Oh, yes, you're right. Yeah, I apologize? A. Well, that conversation did not take the tone that he suggested at all. I can state with some certainty I've never, for example, used the word "demise" as a verb myself. I do recall that he wished to speak to me in the Stad Wardroom and sent another fellow to say such, and I can recall what he said but I can - I guess I'm not allowed to say that - but I certainly never said anything like that to him.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. I believe Lieutenant[N] Elford ... ?

A. ...

DEFENDING OFFICER: If I may ask the indulgence of the court. I'm trying to quote, of course, this evidence to the best of my recollection and notes, so if it happens that there is a misquote, of course, your notes will prevail as always and all that.

Q. I believe that he testified to the effect that Kelk had called him, "a fucking idiot", in your presence? A. That did not happen.

Q. And he did testify - possibly in cross or in direct, I do not recall exactly - about you holding a meeting in the wardroom regarding violence, physical abuse, or something of that nature? A. That's correct, that was during Team Work '92. And what had happened is the coxswain came to me and gave me to understand that there was a rumour going around the senior rates mess to the effect that officers had been ... officer or officers had been giving each other smacks in the control room. He advised me of it, that it was a rumour, but he should keep me informed. I called the XO into my cabin - at the time it was Lieutenant[N] Virgin - and essentially told him that this rumour was going about and telling him to look into it and get back to me if there was anything of substance to it at all. He came back, I believe, the next day and told me that he had ...

Q. Okay, don't report what he told you?

A. Oh, I'm sorry. Reported or gave me to understand that this, in fact, had not occurred. But it caused me to think about how could such a rumour get started. I thought, well, something could be, you know, an officer rushing back and forth from one control room to another, pushing somebody out of the way and somebody who is not familiar with the submarines taking it as an aggressive act. And I also considered that at that particular time in my wardroom I had some officers who

Lieutenant-Commander Marsaw

Examination-in-chief

were quite keen on WWF style wrestling and would often have little wrestling matches themselves in the wardroom for fun, and at the time some of them were quite sizeable, like Lieutenant[N] Soper, who you've seen, Lieutenant[N] LeClaire, who you've seen. Lieutenant Kelk himself, though not a large man, is a rugby player and is fit and such, and so they would carry on this way. And I thought, well, you know, perhaps if someone was passing by the wardroom they would see this and think they're fighting in the wardroom. So I decided to get all the officers together just to make sure that I was not letting something go which I had not investigated thoroughly enough, and so I spoke to them and made it quite clear, in very unequivocal terms that physical violence would not be tolerated on board, that, in fact ... because I had it in my mind these wrestling games they played, as I said, that they ought to be very careful of the perception of physical violence because somebody might misinterpret it. I got a lot of nods and that was the end of that. Never heard another thing about it.

Q. Leading Seaman Bourassa testified that whilst on bridge lookout he heard you say to Elford, "Are you a fucking idiot", or words to that effect, "Didn't you read my orders?"? A. That event did not happen. I myself am very careful about voice procedure on any communications net even if it's internal, and I try and encourage other people to do it as well. Using terminology like that is clearly outside even correct voice procedure. I have on occasion had to call officers on the bridge to see what they were doing or question what they were up to, but I never did so using language like that.

Q. Bourassa testified, I believe, that you relieved him from the helm. I'm not sure if he specified the number of time or not. What can you recall, if anything, on that? A. I can only recall relieving Leading Seaman Bourassa from the helm once and that was departing Nassau, in the Bahamas. We were on the surface, we had just cleared the harbour and I still

Lieutenant-Commander Marsaw

Examination-in-chief

had an anchor party on the casing having just cleared the reef, my anchor party was now getting ready to secure. But I was on a good course such that it was safe to work there. We'd gone to river routine but his steering was all over the place, well out of the brackets of what's normally acceptable from a helmsman. And he had been reminded of his duty a couple of times already by the navigating officer and to no avail apparently, so I called down and spoke to the fixing officer - who at that point in river routine is on the plot - and said, one of the requirements of river routine is that you have a qualified helmsman on the helm in accordance with our Standing Orders and I expect you to maintain a watch in the control room, make sure those items are addressed. So the helmsman was relieved, another helmsman came on and when I came down from the bridge Leading Seaman Bourassa was in the control room and he said ...

DEFENDING OFFICER: It's ...

WITNESS: Beg your pardon?

DEFENDING OFFICER: I would suggest that it's not tendered to prove the content but rather the reaction of the witness.

WITNESS: I think I can get around it, sir.

DEFENDING OFFICER: Well, with your leave I would suggest that this is permissible in those conditions.

JUDGE ADVOCATE: Any objection?

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: Go ahead.

DEFENDING OFFICER:

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Okay, what did he say? A. He said to me, "Sir, I am qualified", and indeed he was and it had slipped my mind that he was in fact a qualified dolphin wearing submariner. And so purely by a virtue of qualification was entitled to be sitting there at river routine. Nonetheless, his job performance on that occasion wasn't satisfactory. And I apologized to him, I said, I know, I'm sorry, it slipped my mind.

Q. Okay, he stated that he redressed a PER. Did you ever receive a PER redress from him? A. No, I never did.

Q. He's referred to a battery problem on board OJIBWA and I have it that he referred to a PO Collin or Poland? A. Rollin.

Q. Rollin. What can you make out of this? A. Now as I recall he referred to the chief electrician being Petty Officer [1st Class] Rollin. And during my command I had two chief electricians, the first one was Petty Officer [1st Class] Goodman; and the second one was Petty Officer [1st Class] Stone. I don't think I've ever sailed with Petty Officer [1st Class] Rollin, but I may have many years ago and not recall it. I do, however, know of the incident he's alluding to. I also know that that incident did not occur in OJIBWA and not under my command. It was another submarine, another CO.

Q. There is some testimony on his part about a crane, opening an escape hatch or something along that line? A. He testified that it caused him some concern when he believed that an escape tower upper lid could not be opened even by putting a crane on it. That was in the summer of '93. We were doing tests to ensure that the American Deep Submergence Rescue Vehicle could mate with a Canadian escape tower, and one of those tests included a load test on some lugs that had been put on the escape tower. If that hatch had opened, I would've been very concerned. He, I think, misunderstood what was going on.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Who was he, that's ... ? A. Leading Seaman Bourassa.

Q. I believe he also testified that another CO of his, possibly Truscott, was teaching a planesman how to plane, or words along that line. What are your comments on that? A. Well, I certainly never found many opportunities myself to be able to teach to that level. I think a commanding officer must be in a very advantageous position if he can teach his helmsman or planesman himself. I have petty officers and senior NCMs that can do that much more adequately than I can.

Q. Master Corporal Schubert. He testified that he would hear you yelling from the galley. Could you comment to the court in your own view and experience and opinion how possible this is and whatnot? A. I find it difficult to believe that you can hear even yelling from the control room in the galley, in a normal quiet state it would be difficult.

Q. Okay, I now show you Exhibit "H". Could you describe not only physically but vocally as well where the galley is? A. The galley is in the very after end of the control room, the very after end meaning bulkhead 77 which is here.

Q. Okay. And the control room is where? A. In colloquial terms we refer to the control room as being this area here - and if I can relate it to what you saw this morning on board - there's the radar office, the search periscope and attack periscope.

Q. Okay, now what to the best of your knowledge, what would be the distance between, let's say, any position between the aft and attack periscope and the galley? A. Between the after periscope and the galley - I see the frame spacings are inconsistent on that - but I would estimate 18 feet.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Eighteen feet? A. I could work it out exactly by just taking the spaces between frames.

Q. So 18 feet, probably plus/minus a couple of feet? A. Yes, sir. Certainly more than, I think, five feet which is ...

Q. And the noise level. Can you describe to the court what the normal noise level be, like, let's say in a dived situation? A. Normal, let's say, dive without snorting, you'd have all 10 x 3 exhaust fans running including the galley exhaust itself; you'd have one 10 x 6 which is the main ship's ventilation fan running; your hydraulic pumps are cycling on and off which increase significantly the noise level; there are other equipments which have internal ventilation fans which can be quite noisy, all adding up to a general noise level. It's actually reasonably loud in a submarine unless you go to the ultra-quiet state, in which case you shut that equipment down. But we rarely do that because it's very hard on the combat systems equipment to be without the ventilation.

Q. He, Master Corporal Schubert too, stated that you had said to him, "I don't a fuck about morale", that's you talking to Schubert. Can you comment on that? A. Well, I certainly never said that to him. I do recall on one occasion talking to him about the issue of morale and he ... or I said to him rather, that, you know, as long as he kept his standard of food service, I wouldn't have to worry too much about morale. I intended that as a compliment to him for doing what I thought of to be a very good job.

Q. And that he says - still Schubert - that you invited him to start a rumour that you were going home or something along that line? A. One thing I never had to do to anyone was to invite rumours to start. Rumours start quite happily without my inputting any and I would never encourage him to start a particular one, especially one of that nature.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Master Seaman Madgett, I believe testified along the line that you would've told LeClaire and Tingle to, "Stand-up and kick yourself in the ass", or words to that effect. Can you recall anything of that nature or what? A. The only time I can recall using an expression like that ... similar to that is when I would be taking the submarine ... or rather supervising the XO bringing the submarine into harbour. And by the time you reach the jetty coming into Halifax, for example, you've been on the bridge for about an hour. We generally go to the bridge an hour before we get there to conduct the navigation through the harbour. And typically in Halifax if it's raining or cold - on the bridge of a submarine there is absolutely no protection from the elements - you're feeling pretty miserable by the time you get to the jetty, which is the time when you have to be most alert. You're making the finest adjustments and you're really watching for things that are going to set you astray toward the jetty or other ships. And I would use the expression, speaking to the XO while supervising him doing it, I'd say, "This is where you give yourself a kick in the ass and make sure that you're watching what's going on." You know, you've really got to take your last bit of strength and muster it for making that final approach to the jetty. And I don't believe that anyone I've ever said that to in conducting that kind of manoeuvre ever took it as an invitation to physically abuse themselves. I can believe that I would use an expression, such as, okay, everybody let's give ourselves a kick in the ass to get moving. And that sort of, again, in a similar type of situation where you've been closed up at action stations for a long while and now you're approaching the final target of what you're after. You need to do something or say something to get people reminded that though they've been closed up for a long time this is the meat of the problem that we're about to get to, get alert.

Q. Okay, several witnesses, I believe including Madgett, have discussed plane jam drills and, I don't know, there was an overtone in many of them that

Lieutenant-Commander Marsaw

Examination-in-chief

it was abusive or something like that. Could you comment to the court about whether one or more of those plane jam drills took place and what was the context?

A. Over three years I probably conducted scores of plane jam exercises. I can only assume that he's referring to one that went particularly badly and that was, I believe, the night of 13/14 August '93. It was a routine matter to get people together for training, to exercise conducting these drills. And the way I've always done them and the way I've seen other COs do them, you start by letting the XO demonstrate the first one because he's the guy who's going to show how to do it right, and the other officers are gathered around watching him do it. On this particular occasion, on that night, late afternoon or early evening, that night we were doing this training and the XO got it badly wrong, which is something that really surprised me, and I had to take control of the submarine, which I did, and restored things to normal and then discussed why it was wrong and what the implications could've been and reviewed again how to do it right.

Q. Who was the XO? A. The XO at the time was Lieutenant-Commander Virgin, Lieutenant[N] Virgin at the time. I'm sorry, Lieutenant[N] Dussault at the time.

Q. Dussault, is it? A. Dussault, yes. We then went through the other officers and I was very disappointed to see that, in fact, they were all getting it wrong, making different mistakes each. But it's such a simple drill that I feel it should be able to be addressed perfectly. And the consequences of getting it wrong, if there is not someone there to take over the submarine, can be severe. So I went and had a discussion with Lieutenant[N] Dussault about this issue and because of what he said to me, I thought, okay, what we'll do is surface and we'll set up a schedule, as the watch's turn over you can go in and practice this for each of the watch's as the officers come on watch and then in the morning on completion I'll come

Lieutenant-Commander Marsaw

Examination-in-chief

out and dive the submarine and we'll carry on with what we're doing.

Q. Why did you tell him to surface the ship?

A. Well, we talked about the other alternatives and I was not ... one of the alternatives we discussed was not acceptable to me which was to continue to do these dives without my supervision. I would not permit that no matter who my XO was. It's just things can go badly wrong in that exercise and the commanding officer must be present. On the surface the danger doesn't exist because you're not going to be inducing angles on the submarine.

Q. There was some reference made to an incident on departure by Madgett, on departure for Bermuda. Can you recall that precisely? A. Departing from Bermuda in '93, en route to Baltimore. Should I tell the full incident to include also the part that Lieutenant[N] Higginson discussed, like, perhaps kill two birds with one stone?

Q. Yeah. Okay, could you identify possibly who else mentioned that and what that or those incidents could have been and then tell the whole thing as you saw it? A. Well, Lieutenant[N] Higginson mentioned it, I believe, in connection with the allegation that I'd made some comment to him - which I can't recall now of the top of my head - and Madgett mentioned it, and said something about me crumpling charts and being upset.

Q. Uh-huh? A. I don't think anyone else mentioned it in the court. But in any case I can explain that whole business. The day before sailing from Bermuda I got a phone call alerting me to the fact that the bus that was supposed to pick up the ship's company from their hotels and bring them to the submarine in time for sailing in the morning would not be available because the Canadian Forces liaison staff there had a higher priority tasking for it. And I was

27th voir dire

given the option of picking up the crew early, much earlier, or a little later than we'd planned. While I didn't like the idea of picking people up much earlier - we were talking about, like, four o'clock in the morning which is not a good time to shake people to bring them in to sail and then have them sit on board actually waiting for the sailing time - so I preferred the latter option but I needed to know before I could say that that was okay, whether or not we could sail at a later time than planned and still make it into the back of our moving haven prior to that moving haven carrying off towards Baltimore. In a coastal passage I don't have a moving haven but I have a time to get to the start of an ocean moving haven, and this was the case here. So I instructed the officer that had informed me of the problem to get a hold of the navigator, Lieutenant[N] Higginson, and have him work out whether or not we could said - I think it was two hours later than planned - and still make it to our point of origin for the moving haven prior to the expiry of that allocated water because the submarine operating authority expects me to be in that allocated water when it starts moving. A short while later I was informed that, yes, indeed it had been worked out and we could sail at the later time and still make it into our moving haven. So I authorized the later pick up of the crew and thus a later sailing time. The next morning I went down to the submarine and got to Lieutenant[N] Higginson and we were looking at the tracks to exit the harbour and I wanted to see what he'd done to make sure that we got to the moving haven on time. I should mention we were berth in St. George which is at the eastern edge of the island. I looked at the tracks and I was completely satisfied with the actual tracks to get out of St-Georges. There's really no two ways to do it, there's only one way to do it, and he had done it properly. But the tracks that he'd plotted around the northern side of the island which includes the Great Bermuda Reef took us initially well to the east and then the north of where we wanted to be to start our passage to Baltimore. And then I looked at the next chart and found that he had plotted the start

27th voir dire

position for the moving haven very close to the centre of the Bermuda reef. And I said to him, why would you plot the point of origin this far to the west when you know that we got ... there's only one way out of Bermuda, it's to the east? And he expressed to me ... or I understood from what he said that, in fact, he was not aware that there was only one way out, that you can't exit the Bermuda islands by going west, the reef prevents that, and there is only one way out of Bermuda and that is through an eastern passage which is marked to the reef. I was upset that he would tell me that it was because he didn't know whether I wanted to use the western or eastern passage because I know well full myself that there is only one, and it became clear to me that he had not studied an appropriately scaled chart prior to picking that position and he had not read the pilot, the sailing directions for Bermuda, which either one of those sources would've made that information immediately obvious to him. I thought that it was quite a basic error to make and one which I didn't expect from an experienced navigator. I found though that by amending his tracks I could make up for the lost time that would be required to get us over that far west to a new point of origin. But by that time it was close to harbour stations and I was satisfied that the tracks that would get me out of St. George were satisfactory, I could start off on his tracks and when I came off the bridge I would amend those tracks, such that we would be able to make it to that point of origin within our allotted time. So we did that. When I came off the bridge - we're now at sea to the east of Bermuda - and I came below, I laid on some new tracks which cut off approximately 10 to 15 miles of passage, but I was still well ... completely safe tracks with respect to the location of the reef. I told Lieutenant[N] Higginson at that point, who was working with me at the chart table, I said, okay, tell the officer of the watch to come left onto this new course so that we can follow these new tracks I've just laid down here. And the manner in which he communicated that information to the officer of the watch, I thought to be petulant. So I said, yes, these are my

27th voir dire

tracks, this is my plot table, this is my submarine, that's my officer of the watch and he's just been told to come to tracks, to come to courses, which he did brief himself on before he went up to the bridge. He's wondering why he's coming to these new tracks and he deserves a good explanation and he deserves the other information that he must get which he would normally get prior to going to the bridge: distance away from the reef that he's expected to pass; any other navigational hazards on these new tracks. I then instructed the navigator to give him a proper turnover. There was no crumpling of charts. I'm a navigator myself, I have a respect for charts. There was no yelling and screaming involved. I spoke in a stern voice, yes.

PROSECUTOR: Mr Judge Advocate, at this time I'd like to raise an issue and it's probably preferable that it's done in the absence of the court. I regret that I have to make it but I don't think I have any other choice.

THE PRESIDENT AND MEMBERS RETIRE.

PROSECUTOR: My apologies for calling a **voir dire**, Mr Judge Advocate, but I don't believe I have any other choice. I'd like to provide you with an excerpt from Sopinka on Evidence, page 876 to 879, relating to the rule in **Browne v. Dunn**.

The last round of questions and answers is only the latest set of a number of exchanges in the questioning of the accused during this trial where evidence is coming forward concerning incidents arising on direct examination of Crown witnesses, where the Crown witnesses themselves have not had any opportunity whatsoever to hear this type of information and to have a chance to respond to it.

I notice at the top of page 876, in the indented paragraph, it says:

"Now, my Lords, I cannot help saying that it seems to me to be abso-

Prosecutor

Exclusion of evidence

lutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do so if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that this is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with the witnesses."

A number of times now defence counsel has related to the accused, do you remember so and so saying this? Then we get an answer where there's a completely different factual context or spin put on it that has never been given to the Crown witnesses when they were in the box. This has the effect of indirectly attacking their credibility when credibility is, I would say, the key issue in this case, and it's a style of examination on my friend which I would argue

Prosecutor

Exclusion of evidence

is unfair. If this evidence is going to come out in the courtroom, it should've come out when the witnesses were in the box and did have the opportunity to challenge it and to confront it.

What we're seeing now is a peripheral back door attack on their credibility. I would argue and request that you ask defence counsel to apply the rule in **Browne v. Dunn**. They can't get into eliciting evidence from the witness which they have not given, in fairness to the Crown witnesses so that they have an opportunity to respond, I mean, it's completely unfair.

The purpose of **Brown v. Dunn** is stated in the paragraph. It's to make sure that if you intend to impeach a witness you are bound whilst he is in the box. And what's happening here right now through the last series of exchanges is that the witnesses are being impeached through the evidence of the accused without them ever having had an opportunity to respond.

Our position would be that this rule is enforced for the remainder of the examination of the accused, Mr Judge Advocate. Thank you.

JUDGE ADVOCATE: Lieutenant-Colonel Couture?

DEFENDING OFFICER: Yes. First of all, it is my understanding that Higginson, for one, was cross-examined on the subject. Second of all, that is not the most important though, I believe, that this rule does not apply the way the prosecution interprets it.

Throughout - and, of course, there is a matter of credibility - but throughout the prosecution case, how many times has the prosecution asked a witness, and how certain are you of this and that? Certain, absolutely certain, I saw that, I heard that. What am I supposed to do? Go, is that possible that it's not that? No. How many times? I'm not impeaching the credibility of anybody here. I mean it's incidental obviously. The witness, who happens incidentally to be the accused, is just telling his side of the story which he certainly is allowed to do.

Defending Officer

Rebuttal

I believe that the defence, that it be myself or Major MacKay have done everything possible in cross-examination to test the credibility, or the veracity, or accuracy of information. But you can only do so much if a witness insists that's what happened. If the witness has already stated to the prosecution as many - I cannot quote a number now - but certainly many have been asked the question, and how certain are you of that? Absolutely certain, sir. What's the defence going to do when a witness has answered like this? By poking around when he has given an answer like that.

We are not impeaching as such the credibility of the witness. Higginson who was involved in this particular incident gave his account of the story. I do believe incidentally that he was cross-examined on the circumstances and that was it. Now, all the witness does is to tell his own account.

And I would say that it is, for example, quite different, for example, from a scenario, let's say, if I may give you an example. In a sexual assault case - because that's the first example that comes to mind - if the defence contention in a sexual assault case is that the victim made an earlier statement to the effect that she had consented to the act, and when the victim testifies, does not raise that, and after calls the accused and the accused says, no problem, she told me that she consented. That is impeaching credibility, that is unfair, sure, because the information existed and this matter of impeaching credibility deals with impeaching credibility on the basis of previous testimony.

And for that matter, the defence is not even compelled to cross-examine a witness and rely on its own case as it sees fit. So I suggest to you that this matter of impeaching credibility has no application in this situation, and that the defence should be at liberty to present its case, and the accused who has been standing here for five weeks, or whatsoever,

Prosecutor

Reply

listening to evidence should have his day in court and be allowed to tell his side of the story.

JUDGE ADVOCATE: Do you wish to add something?

PROSECUTOR: Yes, sir. I have some case law which might help us. The first case is **Regina v. Jackson and Woods** (1974), 20 C.C.C. 2(d) 113, it's an Ontario High Court of Justice decision; and the second one is **Regina v. Verney** (1993) 87 C.C.C. 3(d) 363, Ontario Court of Appeal. Both cases, I believe, apply the **Browne v. Dunn** case.

I mean, just to give some examples of some of the last rounds of questions for the accused. Leading Seaman Bourassa was never given an opportunity when he was in the box to say, weren't you mistaken and didn't, in fact, Lieutenant-Commander Marsaw come down later to you and apologize to you because he forgot that you were qualified? That was never ever given to Lieutenant(sic) Bourassa. He never had an opportunity to respond to that.

Madgett, was he ever asked the question of, are you sure it wasn't simply Lieutenant-Commander Marsaw telling to the XO, because he would only say things like this to the XO, that this is the time where you've got to give yourself a kick?, or words to that effect.

Lieutenant[N] Higginson was asked about the entry and exit points to the Great Bermuda Reef and that was the extent of the cross-examination on him. He was never confronted with any of these aspects of the conversation, never challenged that he had put a track through the middle of the Great Bermuda Reef. Now, he can't respond to that. His time as a witness is over, and he's getting peripherally challenged in terms of his credibility.

Prosecutor

Reply

These cases give us some guidance. The discretion is yours as to whether or not you want to force defence counsel to have the rule applied firmly to them. If you choose not to, **Regina v. Jackson and Woods** I think is helpful, because I believe it legally requires the judge to then instruct the jury that they must weigh the evidence coming from the witness because of counsel's failure to confront the witness.

So if you in your discretion do not wish to firmly apply the rule to defence counsel then at the end of the day we're going to ask you for a very sharp clear warning to the jury that they must take in mind that although these are the responses from the accused, the witnesses because of the style of cross-examination from defence counsel were never given the opportunity to confront the new evidence that arises.

But in any event, I would submit whether you deal with it that way or through enforcing the rule strictly at this point, I think this line of examination is improper.

JUDGE ADVOCATE: Thank you.

The court will close to consider this matter.

AT 1801 HOURS, 24 OCTOBER 1995, THE COURT CLOSES TO DETERMINE DECISION.

AT 0925 HOURS, 25 OCTOBER 1995, THE COURT REOPENS AND THE ACCUSED IS BEFORE IT.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR: Mr Judge Advocate, before you give your decision, I wonder if I could say one word for the record, please?

JUDGE ADVOCATE: Go ahead.

Judge Advocate

Ruling

PROSECUTOR: Yesterday, in making my arguments, I referred to the line of questioning from defence counsel as being improper and I think my word ... and I know my word was too strong. That's simply a matter of strategy or tactics that defence counsel has available to them.

At this time I'd like to state for the record that I feel my use of the language or that adjective at that point in time to characterize their conduct was too strong. I think they've conducted themselves entirely properly throughout this entire trial. Thank you.

JUDGE ADVOCATE: Thank you. The prosecution objects to the defence line of questioning on the basis that certain of the evidence which was given by the accused is inconsistent with the evidence of some prosecution witnesses without such evidence having been put to them during their cross-examination.

The prosecution argues that in doing so the defence prevents the prosecution witnesses from having an opportunity to respond to a factual situation. In support of its arguments the prosecution referred to the following case law: **Browne v. Dunn** (1893) 6 R., 67; **Regina v. Verney** (1993) 87 C.C.C. (3d) 363; and **Regina v. Jackson and Woods** (1974) 20 C.C.C. (2d) 113.

The line of questioning adopted by the defence so far in the examination-in-chief of the accused has been to refer the accused to a particular incident related by a prosecution witness during his testimony and asked the accused to give his side of the story. The accused would do so, sometime completely denying the incident, sometime by placing it in a different context or giving a different interpretation of it.

As decided in the **Verney** case, **Browne v. Dunn** is a rule of fairness that prevents the ambush of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter. It is not, however,

Judge Advocate

Ruling

an absolute rule and counsel must not feel obliged to slog through a witness's evidence-in-chief putting him on notice of every detail that the defence does not accept.

On occasions the defence has cross-examined certain witnesses by offering them the same very specific situation testified on by the accused. On other occasions the witnesses were cross-examined on those specific incidents but in a more general way. I do not recall any particular situation where a specific incident related by a prosecution witness would have been completely ignored by the defence in cross-examination.

Defence counsel must be free to use his own judgment about how to cross-examine a hostile witness.

Having the witness repeat in cross-examination everything he said in-chief is rarely the tactic of choice.

I cannot see how on the facts of this case there was anything unfair to the prosecution witnesses arising out of the way in which the defending officer cross-examined them.

This objection is therefore denied.

Would you please invite the members to join us.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

DEFENDING OFFICER: Good morning, Mr President, Members of the court. With your leave I will resume the direct examination of Lieutenant-Commander Marsaw.

JUDGE ADVOCATE: Go ahead.

s.19(1)

Lieutenant-Commander Marsaw

Examination-in-chief

TENTH WITNESS) Lieutenant-Commander D.C.
FOR THE) Marsaw.
DEFENCE)

EXAMINED BY DEFENDING OFFICER

Q. As we left late in the day yesterday, Lieutenant-Commander Marsaw, we were talking about some evidence provided by Master Seaman Madgett and you had last related the departure from Bermuda and you had completed that portion. I would like to resume now with some of the evidence provided by Madgett, Master Seaman Madgett and Bidinost as well who testified on a radar door incident that would've been kicked off its hinges, et cetera. Could you please inform the court as to your side of ... your account of that event if it took place? A. Yes, sir, the only incident that I can relate to Master Seaman Madgett's and Leading Seaman Bidinost's testimony is an event during Work Ups '93 and I believe the date was 22nd of January. The submarine was conducting an auto-fuel spill incident in the forward torpedo room, auto-fuel being the fuel that fuels our torpedoes. It's an emergency evolution in which we start by sounding the general alarm to get everyone's attention, making a pipe as to the nature of the emergency, repeating that and then carrying out emergency operating procedures to contain the incident and then going into a full-blown response to that evolution. On this particular day I was in the control room. With me at the time was the submarine sea training commander, then Lieutenant-Commander Beverage, as it is his position as well to be in the control room with me during virtually every event during work up. I observed the correct actions being taken by the trimming officer, the two men that testified that they did not hear the pipe because it came across on the wrong circuit and I find that eminently believable. If you don't select the correct circuit to pipe on, it will not go into the radar office. However, the general alarm goes into every space on board, it overrides all of the circuits and it sounds, indeed, in the radar office and I know that to be a fact. After a couple of

Lieutenant-Commander Marsaw

Examination-in-chief

minutes into the evolution I was standing back observing the trimming officer doing his job and things were going reasonably well. I did a set of control room rounds as is my practice and noticed that the radar office door was shut. And by that point, certainly, it should've been open because if there was people in there they should've been paying attention to what was going on in the evolution. I opened the radar office door in a normal fashion and said to them, "You guys can join us anytime. Get that door open, pay attention to what's going on" and then I walked away and that was the end of my encounter with the radar office people. I've heard testimony that I kicked the door off the hinges and quite frankly for a number of reasons I cannot believe that to be possible, the least of which is that it was my practice to always wear ... almost always wear sandals at sea with white or grey sweat socks. I'm familiar with the construction of that door and the way it is hinged. It's hinged on the inboard side of the door by three hinges with four screws, so twelve wood screws going into a wood frame and the door is also hinged in the centre which is its natural point to swing on if force is applied. There was not room between the after periscope roundabout and the radar door to swing a cat let alone wind up and give it a good kick. I personally believe I do not have the strength to knock that door off its hinges, nor I believe anyone I know would have the strength to do that. It would have to be a, I don't know, perhaps a martial arts artist, but it would be impossible in my opinion for a normal human being to do that. With my sandals I would've broken my foot before I would've broken that door.

Q. Aside from that particular evolution that you just referred to, can you inform the court whether at anytime during your command of OJIBWA whether or not you have at anytime kicked a door like this or kicked a radar door? A. I most certainly have not, sir. It's something I have never done.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Okay. I'd like to discuss very briefly some part of the evidence of - I forget the rank - Avant? A. Leading Seaman Avant?

Q. Avant, Leading Seaman, who stated that when you first took command and joined the boat, it would've been December 1990, you made a speech and addressed the crew to the effect that they were all lazy. Could you comment on that whether it happened? What is your recollection of that? A. That did not happen. When I joined OJIBWA I knew that her reputation was good and I was very eager to work with these people and in that particular submarine. When I joined the submarine I spoke to the officers, the senior rates and the junior rates and I discussed our upcoming program. I expressed my pleasure at being posted to that unit and certainly never had cause to, nor did without cause, speak to the ship's company in such a fashion.

Q. We've heard PO[PO1] Harris state that you called the watch a piece of shit. Can you comment on that as much as you can? A. I think it's important to bring this point out to start with. We use the term "watch" to refer to two different things ... well, three if you include the watches we used to measure ... bearing or range rate which are kept by myself or the officer of the watch. We also refer to a watch as being a group of people; for example, starboard watch we know is led by this officer and these are the people in his team. We also refer to a watch as being a particular period of time and, for example, when I was an officer of the watch, on completion of our watch we would go into the wardroom and discuss how the watch went; it was a good watch, it was a bad watch. It was a good watch if we got the submarine into an attacking position; it was a bad watch if we did something wrong that prevented us from getting into an attacking position. This one particular watch, meaning the period of time, I had gone into the control room. On that watch I recall seeing ... twice going into the control room and finding no DR or EP on the chart; no pool of errors

Lieutenant-Commander Marsaw

Examination-in-chief

constructed on two separated occasions during the watch. I found Petty Officer[PO2] Brown sleeping with his head against the command display counsel. I had found the hydraulic boost pressure, which is measured by a gauge in the control room, to be zero. The consequence of that is that there is no positive pressure supplying hydraulic fluid to the hydraulic pumps which means that the pumps will run continuously. When they do that they tend to overheat and you also end up, if you do not pick it up in time, with a hydraulic failure. I thought the watch was being conducted very, very badly indeed and, towards the end of that watch, I said to the officer of the watch, "I want there to be no question in your mind that this watch has been a piece of shit. It was a bad watch." And I was referring to the specific period of time, the previous six hours, not to any individuals and I do not believe that ... or cannot understand how that would be interpreted in any other way.

Q. For one, Master Seaman, I believe, Kohli?

A. I think he's a Leading Seaman now, sir.

Q. Leading Seaman Kohli referred to - and I say for one, there might have been others as well - referred to an incident I believe in 1992 when you were coming back from a mission or a trip and you got home late and sort of missed Easter as the crew of course was hoping and expecting to make it back to home port for Easter. Could you tell the court of the events surrounding this? A. Yes, sir, that was on returning home from Team Work '92. We had sailed from Dublin and were doing a passage back home. I believe I had one or two tasks to do on the way home, some trials that needed to be accomplished before getting back. After sailing Dublin we ran into some very heavy weather and this slowed us down significantly. I have seen the results of submarines pressing through heavy weather and it is not something that I make a practice of doing myself. If the weather dictates then I will slow down and try and stay safe vice pressing on.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. If I may interrupt just briefly. Were you dived or sailing on surface at that time? A. I had one or two tasks that required me to be dived for short periods but the majority of that transit was spent on the surface. It became clear to me about, oh, two-thirds of the way home, that we were falling well back in our moving haven and were simply not able to maintain the ordered speed of advance because of the weather. At that point before I fall out of the back of the box completely, I'm required to alert the submarine operating authority and request a change to my sub note and that's what I did. The message I send is a Sub Note Change Request, it goes to the submarine operating authority. I requested a box to be reoriented so that I would start further forward. Once the box became effective, I would be immediately transported to a further forward section of it and I requested a slower SOA because the forecast weather I had was that I could expect this weather all the way home and I did not anticipate that I would be able to recover sufficiently to make our planned ETA. As it turned out the weather abated I think a day or two before we got in. However, by that time I was not in position to make my original ETA at all. I had been slowed down to such an extent and my ETA had then been set for early morning on the Tuesday following the Easter Monday and that's when we arrived. In retrospect, perhaps it would've been possible to get in the Monday night, but I'm not convinced of that. I say it may have been possible. But my chief concern was safety of the submarine and personnel and I did not believe it would be safe to press on at maximum speed in that weather.

Q. If I may come back to PO[P01] Harris for a moment. I believe that was he who stated that you stated on national TV that your only limitation was the crew or something along that line. First of all, can you inform the court whether you made any such statement? What's the CBC or national TV business? Could you give a background to this? A. Yes, sir. In '91, I took a CBC and a daily news reporter to sea for a day

Lieutenant-Commander Marsaw

Examination-in-chief

overnight and then part of the next day. The CBC filmed several activities in the control room, throughout the submarine, interviewed several people, and what we were doing at that time was a safety ISE period, so we were going through a lot of emergency evolutions and it struck the CBC reporter that people were busy. And on the way into harbour he asked me about this and in the context of the conversation I was talking about how in the training of submarine captains you learn what your own limits are. One of the key points on perisher is to learn when you're too tired; when there's just too many forces out there for you to cope with the mathematics required to keep safe; the various aspects that set your own personal limitations. I was discussing this with the reporter and he brought up the idea of how hard the crew was working and what we'd accomplished in those two days. And I said, another thing I've got to consider is how tired is the crew, what's their training state, have they had enough? I believe that my exact words were, "So the crew is also a limitation", and I discussed the material state of the submarine and said, "That's another limitation." So I can't be responsible for his editing of that program, but I know that within that conversation I discussed with him my limitations, the mechanical limitations of the submarine and the limitations as to what the crew could take and I said it was important that the commanding officer know of all these limitations so that he knows not to exceed any of them. The crew had worked very hard in those couple of days and it was certainly something that was obvious to the reporters and obvious to me.

Q. Okay. It appears that we have another kicking of the radar door or maybe not. Parsons, I believe, testified that you would have kicked open the radar door and mentioned words like, "You should kick yourself in the nuts" or something like that. Is this at all related to the other incident you've discussed or what can you make out of this? A. I believe it's not, sir. I think it's related to the testimony of, I think, Leading Seaman Smyth.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Uh-huh. A. I'm not certain if it came out in court or not, the time period, but that incident did not occur. I think they talked about the requirement ... I had to copy a must routine which would've provoked this manic behaviour. It simply did not happen. I can't imagine what incident I could relate that to which I've been able to do, I hope, in other cases, but I simply cannot recall anything like that happening ever.

Q. Lieutenant[N] Soper stated that he had been kicked out of the control room, I'm not sure if he indicated the number of times or not, but as far as you are concerned can you relate to any event where you would have kicked him out of the control room?

A. During my three years in command I ejected three officers from the control room. The time of Lieutenant[N] Soper, he related it as occurring during the counter-narcotics operation, and that is not my recollection, it was in fact in '93. The situation was, I had the submarine, meaning I was in the control room and I had given orders such that I was conducting the submarine's operation personally vice through an officer of the watch. He was on the trim seat. I'd given him an order, instruction, as to how to do something, I can't remember exactly what it was. It was my perception that he was then muttering to the planesman about what I had told him to do and so I said, because I thought that was bordering on insubordination, I said, "CSE, get out of my control room." He did and then afterwards I went ... I was in my cabin after a period of time had elapsed, I'd turned the submarine back over to the officer of the watch and he came to me and discussed it and I listened to his version of events which, in fact, was clear to me I had misinterpreted his actions. I apologized to him for it. And indeed, I found his explanation very believable because it was not within his ... it was not his character at all to mutter or complain about an order I'd given him.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. He and several other witnesses have referred to questioning, what has been referred to as Part III trainees, in the wardroom, is that a fact? If so, what was it aimed at? What is your account of that? A. I would frequently ask questions of people, not only in the wardroom but in the control room, wherever I would happen to meet them because I wanted to have a good understanding of how much progress they were making as trainees. Whether they'd be Part III trainees or more senior officers who were working on their command exams or marine engineer officers who were working towards their head of department tickets, and I found a very efficient way to do that was to ask them questions. "Have you figured out how to do this yet? Do you know the implications of that?" And I also found that it was a good way to get people to get back into the books. If I'd asked them a question that they hadn't thought about for example and say, "Okay, I'll get back to the books and find out about that." It was not ... I did not conduct barrages of questions. It was, you know, one or two at a time. It was not intended to do anything except help the individual. In fact, I had been asked earlier on by the executive officer to discuss tactical problems over meals. I found that was a bit too complex, that tactical issues could better be dealt with in another forum and then I organized, through the executive officer, organized teachings on tactical problems, usually assigning another officer to make a presentation followed by a discussion period. I think this is entirely normal and is to be encouraged and, provided it's not taken to excessive levels, perfectly acceptable.

Q. Lieutenant[N] Cassivi stated in some fashion that you told him that you thought the crew was incompetent. Can you comment on that? Do you have any recollection of that conversation or any similar conversation taking place? A. I could think of nothing similar to that, but I can recall two examples which might relate to that issue. The first was during Work Ups '91. In that work up period we didn't have a sea training officer on board because he was ill and it was

Lieutenant-Commander Marsaw

Examination-in-chief

decided that I would, as well as commanding the submarine, I would also lead the sea training team and then at the end of the work up period we'd bring in another officer to do the assessment, the assessment phase. Not the best way to do it but it was dictated by the circumstances. My executive officer was giving a brief in the wardroom on an operation that we'd be conducting the next day and he gave a particularly bad brief, such that a chief petty officer, who was with the sea training group, started to make what I thought were some pretty rough comments in front of the ship's company briefing team. So I stopped the brief and took that chief into my cabin and told him that I would not ... that though I agreed that the brief was weak, I would not tolerate that kind of language spoken to my executive officer, about my executive officer in front of the ship's company briefing team. He understood what I meant quite clearly I think. But I suspect the XO would've been embarrassed by that and indeed I understand why he would be. The only other incident that I can recall where that issue came up was after ... it was in October of '92 ... after the counter narcotics operation, the submarine squadron Cox'n came to me and said that he'd heard ...

Q. Oh ... A. Ah, I'm sorry ... indicated that a rumour was circulating that I had referred to an officer or officers as being incompetent. This of course distressed me that amongst all the other rumours that normally do fly around the submarine or a submarine squadron this is one I certainly wanted to know about. So I called my XO, then Lieutenant[N] Dussault, and told him that I'd become aware of this rumour, that I wished him to investigate and get back to me. I believe it was a day or two later before he got back to me and said that the ...

Q. Okay. A. I'm sorry ... and then told me that he - A day or two later I found out that the rumour had been investigated and we had found the source and it turned out to be a ...

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Sorry, it's not necessary to ... ?

A. In any case, I addressed the problem, found out who had started this rumour and put a stop to it.

Q. Lieutenant[N] Cassivi made reference to you as having made anti-Franco comments and there might have been a couple of other witnesses that might have indicated something along that line. Could you indicate and tell the court whether or not - and I guess in the case of Lieutenant[N] Cassivi, I guess, you'd mentioned something in front of some US guess or something in a foreign port. So address the court about whether or not at anytime or as you can relate it to Cassivi or other witnesses you made such comments?

A. This is one of the allegations that I find particularly galling because in the course of any conversation that I've had with people, I think I've made my opinions on this matter abundantly clear. The only comment that I've ever made that I think could be construed as being anti-Franco would be in talking about French naval officers, meaning of the French Navy, saying that I thought them ... or I found them to be more pompous than the Brits. That has been my observation and that's not anything more than that. I have also discussed some of my experiences with officers with respect to meeting French naval officers and the fact that during my perisher, the French submarine RUBIS visited Faslane. I thought that the way they were hosted was not in accordance with the traditions of the service. I think that the sort of historical animosity between the Royal Navy and the French Navy was taken a bit too far, that I subsequently went and spoke to the commanding officer of the French submarine and found him to be a most interesting fellow, and I've used that as an example when talking to officers about keeping in mind and not being prejudiced and influenced by traditions of services other than our own. We have of course in the last three years in OJIBWA as in the rest of the country, we have been discussing casually the state of the nation, the bilingualism policy, its impact on the country and in the course of those discussions I've, I believe, made my opinion along with

Lieutenant-Commander Marsaw

Examination-in-chief

everyone else's. I personally feel strongly that bilingualism is important to the future of this country.

I think it's important. I'm not very proud of the fact that I'm not very good at it. It hurts me to think that somebody would say that about me because it's not my opinion at all. I would not express opinions along those lines at all.

Q. In Faslane, PO[PO1] Stone has testified that you called him a "fucking prick" and that you said that you were hard on your officers to make them better. Could you give your account of this event, if it took place or what, to the court? A. On the 1st or 2nd of March, I believe it was, 1992, the submarine was in Faslane preparing for Exercise Team Work, and just outside of the submarine base in Faslane there's a town, Helensburgh, and in that ... one of the more popular public bars in that town is called the Imperial Hotel. I went in there one evening and it was ... I went to the bar to order a drink. Petty Officer[PO1] Stone came up to me and I said good evening to him. In fact, my words were - which in fact became the subject of the conversation a bit later was - I said, "Good evening chief elect", an abbreviation for chief electrician which was his appointment on board. He was I would say slightly inebriated at the time, but it's been my experience from the time I've known Petty Officer[PO1] Stone that he gets rather maudlin when he drinks. The impression I got from him in the course of that conversation was that he didn't want me to use the term "chief" because he wasn't one. I explained to him that he was entitled to that designation because of his appointment, that he should not feel embarrassed about being called chief electrician and that was the gist of the conversation. I did not call him a fucking prick. In fact, the conversation was not like that at all. I did not raise the issue of how I trained officers or

Lieutenant-Commander Marsaw

Examination-in-chief

why I trained officers. We didn't discuss officers at all. I recall that it was a not unpleasant conversation.

Q. Lieutenant[N] Virgin referred to an incident where you would have yelled at him for failing to surface the submarine or not surfacing it properly or something along that line. Do you have any recollection of that and can you comment? A. Yes, I do, sir. That happened during an SOCT, a Submarine Officers Continuation Training period. Lieutenant[N] Dussault was duty Captain for an evolution where he had to take the submarine close into shore, dived, and he had briefed the ship's company briefing team prior to the evolution as to what his intentions would be. One of the things that I always insisted on during these training evolutions is that, though it's slightly artificial to do so, that the echo-sounder be left running for my benefit and that if the student wished to make use of that information he could do so as it is not a command level course. It is intended to gradually bring people up to command level. We were approaching the target area when the echo-sounder suddenly started to give indication of shoaling which was completely unexpected in this particular area. We were approaching the measurement by which it had been briefed, the duty Captain would order the submarine to surface because if something's gone badly wrong, you don't know what it is, you surface and sort it out. I was standing in the after part of the control room. He was standing in the forward part. I heard the figure announced at which he should've surfaced the submarine. I looked at him and made a motion as to say, "What are you going to do?" He looked at me and did nothing. The only shout I then gave was, "Blow main ballast."

Q. Which means what? What's the effect of that? A. Upon hearing that order, the first panel watch keeper opens up air to all main ballast tanks and surfaces the submarine. We then left the target area on the surface and we had a debrief in the wardroom afterwards as to how we progressed and what went wrong

Lieutenant-Commander Marsaw

Examination-in-chief

and so on. There was no shouting beyond my giving the order to surface the submarine.

Q. Lieutenant[N] Kavanagh, I believe ...?

A. Lieutenant-Commander now, sir.

Q. Lieutenant-Commander, okay, and I suppose now Lieutenant-Commander Dussault. There was some evidence called to the effect that you would have called Dussault something in the wardroom, a liar or it may vary from ... I think Kavanagh said you called him a liar, Dussault. Dussault may have a slightly different account. But did you insult in anyway Dussault in that environment, in that context, approximately that time? A. On the 5th of August '94, I went to the Stadacona Wardroom and I was particularly upset that day in that I had been made aware that an officer with whom I had been on, I thought, normally friendly terms was bringing accusations against me that were completely unjustified and I was quite upset about that. I'd also formed the opinion by that time that Lieutenant-Commander Dussault was attempting to, for lack of a better term, stab me in the back. I felt that this was ... well, I think, I could just say I was quite upset to the point that I didn't need too much to drink before I lost my normal reserve. And when I saw him there I called him a coward. I realize this is ... as soon as the words were out of my mouth, I was aware it was not the thing to do and not commendable behaviour on my part. But nonetheless that's what I did. I did not call him a liar. I did not in fact carry on that line of behaviour any further than I already had. As I say, as soon as the words were out of my mouth I knew that I'd done something wrong. I did not, as I think in some testimony suggests, threatened him and his family. I did not do anything like that. I was sufficiently upset with my behaviour after uttering those words that I rang my temper back in.

Q. Then Lieutenant[N] now Mr, I guess, LeClaire testified that at some point after surfacing the ship during the DRUGOP, you went into a tirade of some sort. Could you tell the court about this event,

Lieutenant-Commander Marsaw

Examination-in-chief

whether it took place, whether the ship ... the boat - Did I say the ship? I meant the boat anyway - whether the boat was surfaced? What were the circumstances and what was your action and your involvement? A. Yes, sir, I recall that incident quite well as it was one of the more unusual things that happened during the anti-narcotics, counter-attack narcotics patrol. The submarine was operating in an area of relatively shallow water and there were areas that we were marked on the chart to which we were not ... it would not be safe to go into, but the nature of the operation required us to be reasonably close to them. I was sitting in my cabin when I first heard the echo-sounder reports start to shoal and I immediately came into the control room. I saw the engineering officer Lieutenant[N] LeClaire quite properly at this point monitoring the echo-sounder like a hawk and calling out the shoaling soundings as they continued.

Q. What was the sonar showing? What was he calling? A. Well, the shallow echo-sounder that we have on board produces a black mark on a paper trace indicating that, and then you read it against a scale to indicate the depth that it's measuring.

Q. So he was calling, essentially, that you were getting shallower and shallower or was ... ? A. Exactly, as the trace came shallow he was reporting the depths as they shoaled.

Q. Okay. A. I looked at the chart. The DR and EP appeared to be in order. I applied our pool of errors to the EP and it indicated that we could not possibly be in a depth of water like that. I raised the attack periscope to see if I could get a fixing mark and I found that I couldn't. The conditions at the time were such that from the attack periscope I could not gain sufficient height of eye to get a fixing point. The shoaling continued and I then ordered, "Blow main ballast." My concerns included the fact that by surfacing the submarine in that situation I might well compromise the mission. However, my over-

Lieutenant-Commander Marsaw

Examination-in-chief

riding concern as always was the safety of the submarine and the personnel and I was not in any doubt as to what my responsibilities were in that regard. So I surfaced the submarine, put the attack periscope up and with that increased height of eye was able to gain fixing marks. So I took a fix, plotted it on the chart. It turned out that in fact we were where we should've been. We were where we thought we were and that ... so there was obviously some other problem. I immediately then dived the submarine in order to minimize the risk of counter-detection. Then there are actions one takes on diving to get various matters sorted out, to get back into a safe state and then turned the submarine back over to the officer of the watch.

Q. About that tirade? A. There was no tirade nor was there ... there was no cause for a tirade. The engineer was reading it as he saw it and there was nothing wrong in that. It turned out afterwards when I investigated the paper trace that the reason that the echo-sounder was showing that information was because it was set to the wrong scale and it was shoaling an echo or a shadow we sometimes call it. So, in fact, the submarine was never in danger. It was just a mistake made on the echo-sounder. And on looking at the trace you can see the difference between a clear sounding and a shadow. No, we discussed it afterwards in perfectly sensible terms as to, you know, make sure that the lessons get learned and reapplied. There was no tirade nor cause for one.

Q. PO[PO2] Conrad stated, at some point, that over a matter involving communication mast and whatnot, I guess he had been briefing you and according to him I guess you were not accepting his opinion or there was some kind of disagreement and he, as far as I can recall, stated here in court that he attributed to you the following words, "PO, you are a fucking liar" or words to that effect. Do you have any recollection of this incident and can you account or give your side of this event? A. I certainly never said anything

Lieutenant-Commander Marsaw

Examination-in-chief

like that to him. There was ... and I am not sure from his testimony, I have difficulty narrowing down from his testimony exactly what the problem was that he was talking about, whether it was a UHF problem, a VHF problem, whether it was related to UHF SATCOM or in fact some other special VHF equipment we had on board for special operations. So it is difficult for me to put it in a time period. But what I can say on that issue generally is that I did have some problems with Petty Officer[PO2] Conrad attempting to brief me by going around his department head. And I alerted my combat systems engineer several times that he was to counsel Petty Officer[PO2] Conrad that I expected his reports to be relayed through the department and that my briefings would come from the head of department. That is the way I perceive the system is working and there are some good reasons why it works that way; not the least of which is I expect my department heads to know whether or not the various reports they are getting from within their department merit taking my attention away from something else at the time. I don't expect the PO to necessarily know that but I expect the department head to. I insisted that Petty Officer[PO2] Conrad not brief me on these matters. It is not his job to do so. If he does I am not certain that the head of department is even aware of the problem which then puts us in a very awkward position. So, no, certainly I would not accept a brief in that kind of detail from Petty Officer[PO2] Conrad. I would expect that brief from my engineer.

Q. PO[PO2] Conrad also testified that you have referred to a watch as a piece of shit watch. Now, this appears to be very similar to what we discussed in relation to Harris earlier on. Now, do you know whether it is ... do you have any recollection as to these two being the same incident possibly or can you comment on that? A. I can only say possibly, sir. But that was again a loose interpretation of my words which were to make clear to the officer of the watch that this particular watch had been a piece of shit,

Lieutenant-Commander Marsaw

Examination-in-chief

not a good watch, not one that you go back to the wardroom afterwards and pat yourself in the back for.

Q. CPO Tovey ... CPO2 or ... A. One, sir, yes.

Q. One, yes, testified that on the occasion of Reid's RPC, which I believe was in '94, was it?

A. 29 July '94, sir.

Q. Okay. It was suggested that you had words with him that were intimidating or words ... he testified along that line that you had intimidated him at the RPC? A. Yes, I heard that, sir, and that's not what happened on the 29th of July 1994 to Lieutenant[N] Reid's RPC at all. With respect to a meeting with Chief Petty Officer[CPO1] Tovey that day, he came into the wardroom, offered me his hand and I think that perhaps the fact that I hesitated a moment before I took his hand made him feel a little awkward. By that time I had not had disclosure from the prosecution, so I had not seen any videotapes or transcripts of interviews, so I was quite ... the only information that I had had by that point - I mention that because I believe he said that I had ... was not impressed with his tape or transcript or something like that - Anyway, I had not seen them by that point. The only information that I had by that point, that was what was getting to me through the rumour mill was the synopsis. But in any case, Chief[CPO1] Tovey and I talked. He has always been very friendly to me in his manner and speech and I have always reciprocated. The only event during my command that I can recall where I may have ticked him off was in Portsmouth, New Hampshire, where I was approaching the submarine and I saw a civilian guest departing carrying two unopened tins of Keith beer and he was carrying them in a prominent fashion. I guess he was quite delighted to get, you know, a foreign beer for his collection, perhaps he was a collector. I went down aboard the submarine and told the officer of the day to shut the bar because I was not happy with that sort of thing going on. Then I

Lieutenant-Commander Marsaw

Examination-in-chief

spoke to the Cox'n and he said he would find out how this had happened and then eventually got a - without saying what he said to me - got indication that I was not satisfied ... he was given information that I was not satisfied with ... that I did not believe as to what had just occurred because I am afraid the evidence of my own eyes outweighed what I was being told. And once I had satisfied myself that the bar was going to be running correctly I gave the officer of the day permission to restore the privileges. But that's the only indication or the only conflict that I can recall ever having with Chief Petty Officer[CPO1] Tovey. And as I say we had got on quite well when he was Chief ERA in OJIBWA.

Q. I believe it was Lieutenant[N] Watt who referred you to his haircut as being one looking like ... you having asked him where he had got this haircut at a barber shop or at a gay something ... gay whatever ... stylist, I'm not sure. Do you recall that? Could you comment on that and your position? A. Well, I think the first that I heard of that was in this courtroom. I am afraid it is not something that is likely to come out of my mouth on several counts, not the least of which is ... that I do not have ... I make deliberate effort not to fall into stereotyping people. I really can't say where this came from. My best friend on perisher was gay and in fact, he has been on television since perisher.

Q. What nationality was he? A. He is a Dutch officer and when the Americans were debating whether or not to permit gays into their military, there was a 60 minutes program in which they featured as one of the segments him doing his business and doing it quite well and this fellow and I were the best of friends on perisher. I don't know that many gay people that I am ... well, perhaps I do but I don't know if they are gay nor would I ... I just don't inquire about such things, it's ... I don't, nor would I make that sort of comment.

Lieutenant-Commander Marsaw

Examination-in-chief

DEFENDING OFFICER: At this point, Mr President, maybe we could take a 15 minutes adjournment and resume after and give me an opportunity to review my notes and give the witness a rest.

PRESIDENT: Of course.

JUDGE ADVOCATE: The court is adjourned for 15 minutes.

ADJOURNMENT: At 1028 hours, 25 October 1995, the court adjourns.

REASSEMBLY: At 1043 hours, 25 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

DEFENDING OFFICER:

Q. Lieutenant-Commander Marsaw, I'd like to bring your attention to a part of the testimony of Lieutenant-Commander Craven who testified to the effect that at some point in July, and I won't quote the date by fear of quoting the wrong date, but in the summer, I guess, of July he met you at your place and a conversation ensued. And in the course of that conversation you would have told him words to the the following effect, "That you had no recollection of the night of the mess dinner and that you would have to challenge his credibility" or some words to that effect. First of all, did that visit of Craven to your home take place, to give the context and inform the court as to what if anything you stated to him that night?

A. Yes, sir. In July of '94, Lieutenant-Commander Craven came to my home. He brought with him a copy of his written statement that he had submitted to the military police during the course of the investigation that has led to this court martial. He allowed me to read it and at the end I thanked him for being honest and forthright with me in allowing me to look at this.

Lieutenant-Commander Marsaw

Examination-in-chief

As he was departing, this meeting taking approximately half an hour, as he was departing he said to me ... sorry. I asked him one question, I asked him if he was sure that it was MARGAREE that he had attended before coming down to OJIBWA and in fact, I added, my question was, "Are you sure it was MARGAREE because I thought FRASER was berthed at NC4 which is the berth kitty-corner to where OJIBWA was berthed. I made no such statement that I would challenge his credibility. I made no such statement that I did not recollect the events of that evening well or ill. In fact, I did not mention that at all beyond telling him that this did not happen. But nonetheless, I thanked him for what I perceived to be his honesty and forthright manner.

Q. Now, I would like to get into the subject of you kicking personnel, particularly personnel at the plot table and to direct a bit your mind to the evidence I have in mind or to which I am referring, Lieutenant[N] Byrne indicated that you might have kicked him a number of times when he was at the plot table and you at the periscope. And then there has been evidence from other sources, Shea, Conrad, Higginson, to the effect that one particular incident you would have kicked Higginson as he was at the plot table. Could you relate to the court in the order you see fit whether you kicked Byrne, Higginson and what is your account of this? A. Well, the circumstance that Lieutenant[N] Byrne described, that the submarine ... I believe he described it as the submarine returned to periscope depth and I put the periscope up and when I was going around I kicked him. Stated plainly in those terms, I find that to be entirely likely. When I go around the periscope, depending on what height I'm at, depending on how fast I am going around, depending in which direction I am going around, it is a daily occurrence to come into contact with someone else. Indeed, I suspect that I probably kicked the CANCOMFLEET in the same fashion. However, that is the nature of close quarters. All submariners know that that is going to happen.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Let me interject here for a moment. We have been using the word "kick". And you have seen demonstration from a number of witnesses as to kick. I would like your comment like about kick or earlier on you mentioned physical contact. Can you indicate to the court like your position on that? A. Yes, sir. When I just used the word "kick", I meant my feet coming into contact with somebody else, you know, and that this, my meaning of that is it's a completely a non deliberate function. When you go around the periscope your shoulders will hit people, your rear end will hit people, your feet will hit people. We learn pretty quickly when the periscope goes up to get out of the way. The periscope going up in a submarine it's almost a religious sign, when the periscope goes up, the talking stops, people move. In a typical all-around look, for example, which should take between 20 and 25 seconds, the commanding officer or whoever is on the periscope is devoting their entire attention to getting as much information from that short period as you possibly can. No orders are given. No reports are made other than emergency reports. Your entire concentration is on that little window. And that's both for safety and tactical reasons. You don't want the periscope to be up any longer than it has to be for fear of counter-detection and you don't want to have anybody run over you that you haven't seen and gotten out of the way of. And that's why it is treated in that regard. I could not begin to number the times that I've had my head smacked into a periscope by somebody inadvertently being too close. And it hurts but you know it's nobody's fault. It happens. As for the demonstration that was given to the court with reference to what ostensibly looked like a very deliberate kick, I would say that that certainly never happened. I've never deliberately kicked, punched, knocked in a way that would be described as being malicious anyway in the submarine.

Q. Now, could you stand up and even undo your buttons if needed to demonstrate to the court how you would handle the periscope for this all-around look

Lieutenant-Commander Marsaw

Examination-in-chief

as you referred to it and you could possibly do it, let's say in two or three heights or the most common height that you would use. And maybe if you want to do it in this area so that all members of the court can see your movements. So we'll move the chair. A. This is going to be a little difficult because one of - I, I think in common with most people, we tend to either put our weight against the periscope or pull on the periscope as we are going around. But if the periscope is completely raised, fully raised, it's very difficult to move because it's hard against the stops. So most people, if I stand at my full height like this, I would have a lot of difficulty, (1) because I have no leverage and the other is that being hard against the stops, it's very stiff to turn. So the periscope is almost always lowered at least a few inches so that it's not against the stops. And if the submarine is on a perfect depth and I'm able to achieve a comfortable position, I would normally be slightly hunched. Again, without putting my weight against it, a motion for a wrap all-around look which is the look I would use immediately upon return to periscope depth, just as the periscope window breaks the surface of the water, I would move something like this. And the idea is - Then the periscope goes down. The idea for that is I'm clearing myself for one minute. It's not a very good look. But I know there is nothing within one minute's run of my go deep circle. A standard all-around look would be much slower and it would go something like that. Keeping in mind that the distance between the cowling which protects the periscope when it is lowered which is the area on the deck; there is a cowling that rises up I think about six or seven inches off the deck. The distance between that and the chart table is I think exactly two feet. When I'm on this side of it that distance of course is reduced substantially and if another person is standing behind me they're likely to get a bump. If the submarine comes shallow when you've got the periscope up or you're a bit shallow but you're deep enough to put the attack periscope up without a major risk of counter-detection, you'd be down something like this. And again, with putting your weight

Lieutenant-Commander Marsaw

Examination-in-chief

... usually I would put my weight against the periscope and pull it around. I would be pulling something like that with my weight assisting me in that. And there are other situations where if the submarine is quite shallow, but you still need to have a look, you're trying to avoid exposing too much mast, it does make a visual and radar target for counter-detection, you'd actually get on the deck and it will vary depending on if I got up the handles at that level, then I could be right down low, I could be on both knees like that in which case I would be ... again, it is easier to do with a periscope there because you're putting your weight against it. But moving around in that fashion and you are very liable to come into contact with people doing that because your feet are splayed out. There are other operations that we do with the periscope where you have only get it up for seconds. You're physically throwing the periscope around to get into where ... as you lower it so that you get it to where ... your approximate bearing of where you want it to be next time you put it up. And that situation arises frequently if you're trying to penetrate a screen or you're trying to get through the screening vessels of a formation and the high value unit. And in a case like that you're getting the periscope up. You're usually meeting it right at the deck just in case you do come shallow. You don't want two masts up. So as soon as it clears the deck you are looking through the eyepiece. You throw it up until you've seen what you wanted. It's close and you got a high bearing rate of contact. You are moving constantly to try to keep it in your field of view. A situation like that would be what we call an ATB check, for example, where all I want to see is that the target or the escort is not altering towards me. That's the only piece of information I need from that. So it's up, move like that, down, up, down. And when you're in a situation where you're doing that, if the escort has altered towards you, you must go deep right away. It's operating a submarine to the edge of the limits. And in that situation if the maritime commander is behind me, I'm going to try to force him with some part of my

Lieutenant-Commander Marsaw

Examination-in-chief

body out of my way. That's the nature of submarine work. All submariners know that when the Captain is on the periscope you get out of the way or you learn it very quickly. It is an issue of safety.

Q. Are you complete with the demonstration?

A. I believe so, sir.

Q. So replace your hat and please sit down.

Lieutenant-Commander Dussault, among many things, testified to the effect that at some point you showed him a pen or something and told him that, words to the effect, "With this pen I can ruin all your careers." Do you have any recollection of this event? I guess that's something that took place in your cabin? A. I have never made such a comment but I am aware, sir, that that is a legend that goes around the submarine squadron. However, I have never before heard it attributed to me. It is attributed to another commanding officer in another submarine.

Q. I show you a three-page document here.

Could you look at this document and tell the court if you recognize the document and what it is? A. Yes, sir. This is a quiz that I prepared at the end of August. In fact, it would have been on the 30th or 31st of August.

Q. Is the document dated or is that your recollection? A. Well, it's my recollection but I also note that I have marked on here that "Answers to this quiz are to be back to me by 312200P." So it's a reinforced recollection.

Q. Okay, and so is that a document that you prepared? A. Yes, sir.

Q. And what did you do with it? A. I prepared this ... I believe I spoke yesterday that our last deployment in the last part of the year, because of the nature of the work we are doing, presented a lot of opportunity to do watch keeping training, basic

Lieutenant-Commander Marsaw

Examination-in-chief

officer dolphin training, NCM training, NCM dolphin training and so on. And this was part of the process that I wished to utilize or one of the techniques I utilized during that period. I would prepare quizzes usually directed solely for the Part III officers which they could then take away and work on it and bring it back to me I could get some feel for what areas we needed to address during the last part of the running period. This one was intended for all officers to complete. And the rules that I provided under ... stated at the top, were that qualified officers, I mean submarine qualified officers were not to use references in completing this but then the trainee officers could use whatever references they wished.

DEFENDING OFFICER: Okay, with your leave and I believe with the consent of the prosecution I would like to introduce this document as exhibit, please.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: I have extra copies, Mr Judge Advocate.

JUDGE ADVOCATE: "GGG".

THE QUIZ IS MARKED EXHIBIT "GGG".

DEFENDING OFFICER:

Q. I now show you the same document which has now been marked Exhibit "GGG". Can you look at this document, and I mean without entering in undue details but in general terms, inform the court as to the complexity of that questionnaire? A. These are questions that I would expect any submarine qualified officer to be able to answer dealing with operation of basic equipment, simple to operate equipments and some very simple definitions, some safety issues, a few items on full ship knowledge. In some cases what I was really after here was to see if the trainee officers knew where to look to find the information to answer

Lieutenant-Commander Marsaw

Examination-in-chief

these questions. But I also wanted to get a feel for the qualified officers as to if there were areas of weakness that we needed to address in their training.

Q. Now, you alluded before that this was passed to all officers in the manner you prescribed, qualified: no books, and trainees: entitled to books. That was done I understand? A. Yes, sir.

Q. And that was marked, I suppose, or evaluated or something like that? A. Yes, sir, I marked them and as I noted on the top, I took into account officers classification when doing so. I expect my marine systems engineer to be stronger in one area and weaker in another and I expect the MARS officers to be stronger in this area and weaker in another.

Q. There was a discussion in Lieutenant-Commander Dussault's testimony about this quiz and he did not recall the result or anything like that. Do you recall the result? A. I recall his result particularly, sir, because it was very shocking to me that the executive officer who is responsible for doing the final examination on NCMs for he then presents them to me for award of their dolphins, that he is the officers training officer who is expected to take the lead in training the junior officers, got in fact the lowest mark of all the officers on this exam. And when I returned the marked copies to the executive officer, in response to a rather glib ... what I perceive to be a glib attitude towards the exam, told him that I felt he should examine them before returning them to the other officers because I did not wish him to embarrass himself by sitting with the lowest paper. That was Lieutenant[N] Dussault at the time, sir. I am not sure if I mentioned that.

Q. He was Lieutenant[N] Dussault at the time? A. Yes, sir.

Q. The third charge that alleges that you ill-treated person under your command who were subordi-

Lieutenant-Commander Marsaw

Examination-in-chief

nate to you and which refers to you as having called a number of people listed in the Annex which I won't read here: fucker, fucking idiot, cunt, stupid, asshole, incompetent, slow and lazy, or words to that effect. Can you inform the court, aside from any specific matters that we have discussed during the course of your testimony any other time that was not discussed whether you have called somebody on board your submarine with those expressions? A. I have never outside of my cabin addressed people using those words and in fact in my cabin there are a great number of those words that I did not use. In my cabin, I would say to an officer, "That was stupid." But I have not said to an officer, "You're stupid" even in the confines of my cabin. I think "liar" is in that group. I've used the expression, "Don't lie to me." In fact, I recall a particular example of using that, if you ...

Q. Oh yeah, If you would. A. It was entering Halifax harbour in February of '92 prior to deploying for Team Work. Lieutenant[N] Byrne was on the plot as fixing officer at river routine. As is my common practice I do a set of control room rounds prior to proceeding to the bridge at which time I would normally then order the officer of the watch to close up special sea duty man before entering harbour. And as I was doing my set of rounds, one thing I guess must be understood here is that because of the confines of the bridge we don't have fixing being done. As in a destroyer you have the fixing being done on the bridge and the Captain or the officer of the watch can refer to it as often as he likes. The plot table is in the control room and the fixing of the submarine is done from there and then reported to the bridge and the officer of the watch who I understand relies on that information. Anyway, one of the last things I check before going to the bridge is the last fix on the chart, the DR and AP: Are we where I expect to be? Then I go up to the bridge having satisfied myself. In this particular case entering Halifax I watched as Lieutenant[N] Byrne was actually applying a fix to the chart. So I waited over his shoulder while he finished

Lieutenant-Commander Marsaw

Examination-in-chief

and then that would be the fix I would look at before going to the bridge. As I watched him, he took a ... he had ... when I arrived he had already plotted two lines of position and he was applying a third line of position and, as I watched, he measured the angle for the parallel ruler that he wished to apply. He then moved his parallel ruler to the point the bearing of which he had measured. He saw that it did not line up with the other two lines of position by a fair mark. He then moved the parallel ruler so that it indicated a perfect three-point fix and drew the line and marked it to indicate that it was a fix. I said to him, "You just fudged that fix." He denied it. And I said, "Don't lie to me, I just saw you do it." At that point, I called the XO in the control room and said, "I want another fixing officer on the plot because I am not happy to go to a bridge when I feel that an officer responsible for plotting those fixes is going to deceive me." When we got in Halifax I took him in my cabin. I reminded him that this particular error of fudging a fix is something that we learn in our very early MARS training. The seriousness of it is impressed upon us at a very early stage of training, that I don't expect to see it of an officer who has graduated from that training and I certainly don't expect to have the sin compounded by being lied to. I did not call him a liar. However, I did say, "Don't lie to me." The remainder of those words which I am alleged to have said, I did not. I can imagine how in the mess decks of a submarine these stories evolve. But during my command I have heard none of them other than the ones that I've already indicated to you and they were not issued from my mouth.

Q. During your command were you approached or was there any redress of grievance or any form of complaints at all regarding that sort of language or questioning the way you were running the ship or running the crew? A. Not a single one that I can recall. I did deal with ... I can only recall three redresses and they were to do with PERs, two of them from the same man.

Lieutenant-Commander Marsaw

Examination-in-chief

Q. Who was that? A. That was Petty Officer[PO2] Conrad. And that sticks in my mind very clearly because he redressed his annual PER. I saw him, formerly a requestman, and I listened to his argument and I agreed with him that he had grounds for redress and that decision was substantially based on the fact that I had reviewed his divisional officers notes. I thought that indeed he had legitimate grievances. His PER certainly did not reflect what the divisional officer's notes said. So I granted that.

Q. Okay. There is probably no need to get in further details of this incident. A. But no, formally nor informally did I receive any complaints of my behaviour or the behaviour of other officers other than the extent to which I've discussed, hearing rumours and having them investigated. The manner in which I encountered the ship's company, both officers and men socially, always gave me reason to believe that things were going well. People would go out of their way to introduce me to their guests, their parents, their families. I have interacted with the officers and men at that level many many times and I had the impression that I got on well with the vast majority of the ship's company.

Q. You completed your tour as commanding officer of OJIBWA in October 1993, is that correct? A. Yes, sir. October 30th, '93.

Q. And where did you go from there? A. In fact, the very next day I went to Saint-Jean for a block French course.

Q. Saint-Jean? A. Saint-Jean, Québec.

Q. Saint-Jean, Québec, okay, for a block ...? A. For a block French course.

Q. Okay. And when did you first become aware of any allegations of impropriety on board OJIBWA under your command, roughly, I don't need an exact

Lieutenant-Commander Marsaw

Examination-in-chief

date? A. I can only say roughly, sir, that it was end of November, I think more likely early December of '93 when I heard about safety issues being raised.

Q. Okay, so that was end November is the first time you heard of any impropriety or anything on board OJIBWA? A. I think more likely early December, sir.

DEFENDING OFFICER: If I may have a moment please. Those are all my questions.

JUDGE ADVOCATE: Thank you very much.

Major Abbott?

PROSECUTOR: Thank you, Mr Judge Advocate. Given what I've heard today, I've got a little bit of running around to track down a few things, set to digest the evidence and incorporate it in the cross-examination that I've already drafted. I would request an adjournment until 2 o'clock. I can tell the court that at a maximum my cross-examination will last three and a half hours.

JUDGE ADVOCATE: So it will be done today.

PROSECUTOR: It will be.

JUDGE ADVOCATE: The court is adjourned until 2 o'clock.

ADJOURNMENT: At 1120 hours, 25 October
1995, the court adjourns.

REASSEMBLY: At 0910 hours, 24 October.....1766
REASSEMBLY: At 1145 hours, 24 October.....1800
REASSEMBLY: At 1345 hours, 24 October.....1804
AT 0925 HOURS, 25 OCTOBER 1995, THE COURT REOPENS AND1884
|

1915

Lieutenant-Commander Marsaw Cross-examination

REASSEMBLY: At 1400 hours, 25 October
 1995, the court reassembles
 and the accused is before it.

JUDGE ADVOCATE: Cross-examination?

PROSECUTOR: Thank you, Mr Judge
Advocate.

CROSS-EXAMINED BY PROSECUTOR

Q. Lieutenant-Commander Marsaw, would you agree with me that prior to the allegations that you are now facing before the court, prior to those being investigated your career was on the rise with three outstanding PERs? A. Yes, sir. That was my perception.

Q. Would you agree with me that this court martial, and today in particular, is a very important day in your career? A. A very important day in my life, sir.

Q. And a certain answer here or there could cause injury to your career as it relates to any decision that this court martial will make about the charges? A. I'm not sure to what extent any particular statement, sir, but I'm certainly doing my best to remain alert and attentive.

Q. Would you agree with me, to adopt defence counsel's phrase of bias, that you have something at stake in this case or that you have an interest in the outcome of this matter? A. That's certainly true, sir.

1916

Lieutenant-Commander Marsaw Cross-examination

Q. Do you recall Lieutenant-Commander Kavanagh's testimony during this court martial?

A. I believe to a large extent, sir.

Q. Do you recall that aspect of his testimony concerning the 5th of August 1994 where he alleges that you at some point had referred to Lieutenant-Commander Dussault as a liar? A.

Yes, I recall that testimony.

Q. Is Lieutenant-Commander Kavanagh incorrect or mistaken when he made that statement before this court? A. Yes. That story as he related it did not occur.

Q. What's the current position of Lieutenant-Commander Kavanagh? A. I believe he's the CO of ONONDAGA.

Q. Would agree that you were on board the HMCS OJIBWA on the 20th of December 1991? A. Yes, sir.

Q. And that was alongside at CFB Halifax, Halifax, Nova Scotia? A. Yes, sir.

Q. But you deny that you were present during any disrobing or marking upon Kelk? A. Yes, I deny that.

Q. And you also deny that you inserted a cigar tube between the buttocks of Lieutenant, RN, Kelk? A. Yes, I deny that.

Q. Where were you from two o'clock onward on the 20th of December 1991? A. From

1917

Lieutenant-Commander Marsaw Cross-examination

approximately two o'clock until approximately seven-thirty, I was in my cabin.

Q. How far away is the entrance to your cabin from the entrance to the Wardroom on the OJIBWA? A. Approximately four feet, sir.

Q. Do you need a chart to be able to answer that question? A. Well, I'm just looking at it to try and give the best answer I can, I don't know it off the top of my head.

Q. So how many feet? A. Approximately four feet.

Q. So your testimony that Lieutenant [N] Cassivi is mistaken when he states that he attended the Wardroom of the OJIBWA around two o'clock, was there for half an hour and saw you and other people present while an individual was having his exposed skin marked upon? A. He did not see me there.

Q. So he would be mistaken? A. Yes, he did not see me there.

Q. Would Lieutenant-Commander Kavanagh be mistaken when he says that on his second visit to the Wardroom of the OJIBWA he saw Kelk passed out on the settee with his shirt up and you writing on his back on the left side? A. That did not occur, sir.

Q. So he would be mistaken as well? A. All I can say is that that did not occur.

1918

Lieutenant-Commander Marsaw Cross-examination

Q. So his testimony would be a mistake in that area? A. I believe that what he said to the court did not occur.

Q. Would Lieutenant[N] Marr be mistaken when he told the court that he recalls coming into the Wardroom of the OJIBWA, seeing you writing on Kelk with markers quote "I love France and the French Flag", and continuing to write on Kelk while a cigar tube is nestled between the waistband of Kelk and the crack of his buttocks?

A. That did not occur, sir.

Q. So Lieutenant[N] Marr would be mistaken in that aspect of his testimony as well, would he? A. All I can say is that that did not occur.

Q. Would Lieutenant[N] Hart be mistaken when he testified that Lieutenant Kelk was on settee number one, passed out, having his face, neck and shirt pulled up, marked upon; having his pants pulled down below his legs and having you picking up a Tueros cigar tube, lifting Kelk's leg and inserting the tube between his buttocks?

A. Those events did not occur, sir.

Q. Would Lieutenant[N] Elford be mistaken when he states that Kelk was passed out, his pants were hauled down and that you had inserted a cigar tube with a condom around it between the buttocks of Kelk? A. Those events did not occur, sir.

Q. Would Leading Seaman Pilon be incorrect in his testimony when he says he

1919

Lieutenant-Commander Marsaw Cross-examination

entered the Wardroom of the OJIBWA after the partiers left and saw a cauliflowered cigar tube protruding from Kelk's anus? A. I can't comment on that, sir. I don't know what Leading Seaman Pilon saw.

Q. Would Lieutenant-Commander Dickinson be mistaken when he states that he saw you insert a cigar tube in a victim who was passed out in the Wardroom of the OJIBWA? A. That did not occur, sir.

Q. Would you agree with me that if this conduct did in fact occur by any officer of the Canadian Forces that that type of conduct would be disgusting? A. I find it extremely disgusting, sir.

Q. The next morning, Kohli, Byrne and Tovey have all testified to seeing Lieutenant Kelk in the Wardroom of the OJIBWA with his pants down, various markings including "Margaret Atwood ate here", "I love frogs", possibly swastikas. Would you agree with their testimony that that is what the scene was in the OJIBWA the next morning? A. I saw no such scene so I can't comment on what they saw, sir.

Q. Because you were six feet away in your cabin? A. Well, I'm sorry, what time are we talking about now?

Q. Seven, seven-thirty in the morning?
A. By around seven I was up and shaving, by seven-thirty I was off the boat. I did not look into the Wardroom prior to leaving the boat, sir.

1920

Lieutenant-Commander Marsaw

Cross-examination

Q. Would this type of conduct, the disrobing of a Royal Navy officer, inserting a cigar tube between his buttocks, having various marking put on him and having that officer be left alone in the Wardroom, would this sort of thing happen on a well-led boat? A. I don't believe it would. No.

Q. Do you believe that it could happen because the commanding officer condoned it with participation? A. No, I would not believe that.

Q. Is it your testimony that you never ever looked into the Wardroom of the OJIBWA that morning but rather went to the Squadron because the coffee there is better and you wanted to get off before colours were done? A. That's my testimony. Yes, sir. The getting off before colours was not my top concern, but I mentioned that as being incidental to the time that I left.

Q. But you never once looked into the Wardroom of the OJIBWA? A. Not until later in the morning, sir.

Q. Never peeked in to see how Kelk was doing since the last time you had saw him he had been passed out the night before? A. No, sir. I've got an officer of the day who is I believe fully capable of taking care of that officer.

Q. Would you agree that there was common talk spread throughout the entire Squadron Wardroom of this incident and your participation in it, this beginning the very next day?

1921

Lieutenant-Commander Marsaw Cross-examination

DEFENDING OFFICER: Mr Judge Advocate,
I would believe that this calls for hearsay.
Whether or not the witness knows is one thing, if
he knows then obviously that's hearsay and that
just can't be reported before this court, I mean,
the prosecution cannot attempt to prove by
hearsay facts that have been denied here or it's
just not an approved mode of proof.

JUDGE ADVOCATE: Major Abbott?

PROSECUTOR: I'm simply going to his
state of mind wondering whether he has ever
observed any of this sort of discussion. If he
says "no" then that's the end of the matter. If
he adopts it, well then that allows me to ask
some other questions.

JUDGE ADVOCATE: Very well. Objection
denied.

WITNESS: In fact the Squadron the next
day was pretty sparsely populated. The only
officer I can remember running into the next day,
which was a Friday, was on the jetty. In fact it
was then Commander Bill Webster whose ship was
berthed at an adjacent berth.

PROSECUTOR:

Q. So you went into the Squadron
Wardroom the next morning for coffee but never
that day ran into an officer in the Squadron
Wardroom? A. I may have run into an officer in
the Wardroom, I don't recall it. Certainly
nothing ... there was no special event.

1922

Lieutenant-Commander Marsaw

Cross-examination

Q. You never observed any discussion about you cigar tubing Kelk? A. No, sir. That was news to me in December of '93.

Q. Would Lieutenant[N] Byrne then be mistaken when he gave evidence that he heard you making jokes and innuendo in Kelk's presence about cigar tubes early in 1992 in the Squadron Wardroom? A. I never made any such joke to anyone.

Q. If you weren't present in the Wardroom of the OJIBWA in the early hours of the 20th of December '91, and you weren't there, how can you explain why Marr, Craven, Elford, Cassivi, Kavanagh, Hart and Dickinson would all now give evidence which implicates you? A. I can't without speculating, sir, and I'm not sure I'm allowed to do that.

Q. Do you have any hard evidence at all ... A. I'm sorry?

Q. ... to present to this court to explain why these officers would give false testimony against you? A. No, sir.

Q. So any explanation you would have would be mere speculation? A. Well, beyond saying that I know I was not there, I know I saw none of that, as for their reason for testifying as such, I can only speculate.

1923

Lieutenant-Commander Marsaw Cross-examination

Q. Do you recall Lieutenant-Commander Dickinson's demeanour in this courtroom? A. Not in particular, sir. No.

Q. Very very quiet giving his testimony, very pale. Did it appear to you that Lieutenant-Commander Dickinson enjoyed being here having to say what he had to say? A. I'm afraid, sir, that my perception of other people's demeanour in this courtroom has been somewhat affected by my own ... my attention to keeping myself in a fit state to defend myself. I really haven't concentrated a lot on the other witnesses' demeanour.

Q. You testified that you were sober because ... and I believe I have it as a quote, if I'm incorrect please correct me, that you were keeping an eye on the conduct of other officers because you were PMC of the mess dinner. Is that correct? A. I believe that's correct, sir.

Q. Could you again tell the court what the condition of Kelk was when you last saw him?

A. He was leaning against the forward bulkhead on what we have identified as settee number one, I think, on the exhibit, passed out, to the best of my observation.

Q. And you also stated that you saw Lieutenant[N] Elford wearing flash-gear?

A. Yes, sir.

Q. In keeping with your stated purpose of being PMC and keeping an eye on the conduct of other officers, did you do anything for Kelk to

1924

Lieutenant-Commander Marsaw Cross-examination

ensure that he wouldn't fall on his face and cause injury to himself? A. That's one of the understood duties of the officer of the day when an extension to bar hours is authorized. I have confidence in my officers of the day that they are conscious of their duty, that they would not for example let him drive, that they would watch an officer or a man who was drunk. And I have seen examples several times over my career of officers of the day or duty coxswains or duty petty officers taking care of their OpOs who have had too much to drink.

Q. If that's the case then why would you ever have to be keeping an eye on the conduct of other officers? A. Just another safety measure.

Q. It seems to be an inconsistency?
A. Not to me at all, sir.

Q. Not to you. What did you do about Lieutenant[N] Elford wearing this flash-gear?
A. I told him to make sure it went back to the ship where he got it from, or I presumed he got it from.

Q. And Lieutenant[N] Elford was drunk at the time? A. I only saw him for an instant. I really don't recollect his state of sobriety. But the following morning when I spoke to Commander Webster, we talked about the mess dinner and then ... I don't think it was that day but within a reasonable time period of that day I spoke to my XO, then Lieutenant[N] Virgin, and he told me that some officers had been over to visit

1925

Lieutenant-Commander Marsaw Cross-examination

FRASER and I said "Okay, make sure that they've paid any mess bill they've accumulated there so that the officer of the day of FRASER doesn't get stuck with it, and that Elford gets that flash-gear back as I suspect that's where it may have come from." And in fact I got a phone call, I think it was several weeks later, that was ... without getting into exact words, it was thanking me for making sure that these people did get over and pay their bills.

Q. But you didn't do anything to Elford that night in terms of positive action? A. No.

I didn't see that anything was to be gained from provoking into a major incident something that I thought was quite relatively minor.

Q. I would submit to you, Lieutenant-Commander Marsaw, that you weren't keeping an eye on the conduct of any of your officers that night. Would you agree or disagree? A. I disagree, sir.

Q. Do you agree that you have a recollection of being in the OJIBWA Wardroom in the early hours of December 20 1991? A. I recall being there. Yes.

Q. And throughout the night of December 19th/the 20th of December '91, I understand you drank a total consumption of a glass of sherry, two glasses of wine, two passes of the port, one beer with a guest and two cans of beer before you went to bed at somewhere around two o'clock? A. That's an approximate figure. Yes, sir.

1926

Lieutenant-Commander Marsaw Cross-examination

Q. You were not drunk at that time?

A. I was in possession of my faculties. I was too drunk to drive. But I was not in what I would call a drunk condition.

Q. Excuse me - sorry. Continue.

A. No.

Q. Did you have more drinks that night than it took you to lose your resolve on the 5th of August when you yelled at Dussault and called him a coward? A. Yes, I certainly did. Yes. It didn't take much in the way of drink at all, I'm afraid, on the 5th of August before I lost my cool with Lieutenant-Commander Dussault.

Q. Would you agree that your consumption of alcohol has not clouded your recollection of the important significant events of the 19th of December and the early morning of 20 December '91? A. No. My consumption of alcohol that evening has not clouded my memory of that event at all. It was ...

Q. You're vague on some aspects, like time, but not vague on other aspects, like you weren't there when the incident happened?

A. Yes. I can only approximate times for an event four years ago. But significant actions or things that would strike me as being odd I can recall.

Q. When you gave direct testimony, you mentioned you thought Soper was the officer of the day and now maintain it was Lieutenant[N] Marr ... and again correct me if my words are

1927

Lieutenant-Commander Marsaw Cross-examination

wrong, this is the quote I have ... "because looking at logs and what I heard in court has helped to influence me that it was in fact Lieutenant[N] Marr who was the officer of the day"? A. I thought I said that Lieutenant[N] Soper was there, but I couldn't recall whether he arrived before or after me.

Q. Would you agree that ... are you sure now that Lieutenant[N] Marr was the officer of the day? A. Yes, I am.

Q. And has that been in part ... again to take what I wrote down as a quote ... "because you've looked at logs and based on what you've heard in court" has helped influence you to that decision? A. I've heard a great deal over the past couple of years about all of these events that I'm in front of this court martial for, and each time I hear one, in fact sometimes when I hear something for the first time here in court, it will remind me of something and I will think on it. But - yes, certainly seeing a name in a log certainly helps to refresh my memory.

Q. And would you agree that it's helped influence you to take the position now that Lieutenant[N] Marr was officer of the day? A. It's helped me to recollect that he was the officer of the day.

Q. I'm using your words "influence you". Would you like to retract those words that you gave on direct testimony or do you still go by them? A. No. But right now I'm saying it's helped me to recollect.

1928

Lieutenant-Commander Marsaw Cross-examination

Q. I would submit to you that the testimony you've heard in court today has helped you reconstruct a lot of your memories to the 19th and 20th of December 1991. Would you agree?

A. No, that's not true.

Q. And that a lot of your story has been changed and influenced and reconsidered based on what you've heard in court? A. No. That's not true, sir.

Q. And some of the answers you've given in court today have been woven around what you now know the evidence to be, which is in fact different than what you've stated to other people in the past. Would you agree or disagree with that statement? A. I disagree with that, sir.

Q. You stated on direct testimony that you had no recollection of Hart, Craven and Dickinson but recall Elford wearing flash-gear, and you knew that Elford was with the gang. Why do you know that Elford was with the gang? A. I think I said that I suspected or I thought he was with some other officers. And it's just my recollection from the jetty that he was not alone, but I don't remember who the other officers were.

Q. But in your direct testimony you've connected Elford with the words Hart, Craven and Dickinson. Is this another example of how you've been influenced by hearing what you've heard in court? A. No. I think the connection probably occurred in my mind with Hart, Craven, Dickinson and Elford when during the investigation I heard

1929

Lieutenant-Commander Marsaw Cross-examination

that they had all left together. And that in itself is something that strikes me as odd that these four who left together seem to have similar stories. And so when someone mentions "Did you see any of these people?" I would say, if I remembered one of them I would come up with that name. In this case I remember Elford who comes to mind because of that fact that he was wearing flash-gear.

Q. Is Lieutenant-Commander Kavanagh mistaken when he stated that you spoke to him in January '94 at the Granite Brewery, and you saying in reference to the cigar tube allegations that you were not there that night because you had went home with Bob Bush? A. That is a very inaccurate representation of the conversation I had with Lieutenant-Commander Kavanagh.

Q. Is he also mistaken when he says that you phoned him a second time after his MP interview in early January '94, that he told you what he had told the MPs, you stated that you went home with Bob Bush and he said "No, I recall you being there and writing on Kelk" and then you responding "I'll have to reconsider this"? A. I don't recall ever phoning Lieutenant-Commander Kavanagh.

Q. Is Lieutenant[N] Marr mistaken when he states that on the 2nd of January '94, while in Plymouth, England, he received a phone call from you in which you tell him, after he says he doesn't recall anything happening, you breathed a sigh of relief and said that you had no recollection of that evening? A. That is not an

1930

Lieutenant-Commander Marsaw Cross-examination

accurate representation of the conversation I had with Lieutenant[N] Marr.

Q. Is Lieutenant-Commander Craven incorrect when he testified that after discussing the incident with you and showing you the MP statement he gave them, that you said you don't remember that? A. That is not what I said.

Q. What did you say to him? A. I said "Are you sure it was MARGAREE you were aboard, because I think it was FRASER that was berthed there". I thanked him for being what I thought was honest and forthright with me, and I believe that's it.

Q. Is this a copy, with the exception of the right-hand corner, a copy of the written statement that Craven gave to you that day?

A. Yes, sir.

Q. Can you read for the court the highlighted portion at the bottom of the page?

A. Sure. "Shortly after our arrival on board, an indelible black felt tipped pen was produced.

This object was used to decorate Lt(RN) Kelk's head with markings. Subsequently his shirt was undone, trousers and shorts lowered to his ankles, and his torso and legs were further adorned with felt pen markings. On completion of these antics Lt(RN) Kelk was rolled on his side.

At this point Lieutenant-Commander Marsaw, sitting beside the unconscious RN officer, inserted a TUERO cigar tube between Lt(RN) Kelk's exposed buttocks. Shortly thereafter Lieutenant-Commander Marsaw exited (sic) the Wardroom, and

1931

Lieutenant-Commander Marsaw

Cross-examination

proceeded to his cabin, not to be seen for the remainder of the evening. This extraordinary incident became widespread knowledge within the Submarine Squadron Wardroom in following weeks".

Q. Is it your testimony that after reading this statement, the only words you spoke to Lieutenant-Commander Craven was "Are you sure it was the MARGAREE"? A. I was already familiar with that allegation and I had already heard it, and that he in fact was one of the people saying it, so it did not strike me as odd to see that in his statement. What struck me as odd was that he was saying it was MARGAREE he was on, because I was quite certain that ... well, actually I didn't have any idea where MARGAREE was berthed but I knew that FRASER was the ship berthed closest to OJIBWA. So that's what struck me, as I hadn't heard that somebody was saying they were on MARGAREE, and so I asked him about that. The section I just read did not come as a great shock to me by that point. I had heard that story since December of '93.

Q. So you thanked him for being honest and forthright with you? A. Yes, I did.

Q. But he, although honest and forthright, would be mistaken if he claims that you told him you didn't remember that? A. Despite his attempts or my perception at the time that he was honest and forthright, I don't think bears on any part of his testimony. I just thought he was being honest and forthright by coming to me and saying this to me.

1932

Lieutenant-Commander Marsaw Cross-examination

Q. So he'd be mistaken if he alleged in court, as he has, that you said you didn't remember that? A. Yes. I never said that.

Q. Was Commander Bob Bush your friend on 20 December '91? A. Yes.

Q. Is he your friend now? A. I haven't been in touch with him since he was posted to Norfolk where he went summer of '94 I believe. I know my wife continues to keep in touch with their family, but I haven't spoken to him myself since he went down there.

Q. And you deny, at least on Byrnes' story, that you had any knowledge of these allegations and stories of you cigar tubing Kelk going around the Squadron Wardroom? A. I'm sorry, did I have any knowledge of it?

Q. You deny Lieutenant[N] Byrnes' testimony where he asserts that you had knowledge of the cigar tubing of Kelk that was going on in the Sub Squadron Wardroom? A. I deny that I had any knowledge of that or heard any stories about it.

Q. And you deny the allegations made by Kavanagh, Marr and Craven that you had no, or only part of a recollection? A. Yes, I deny that.

Q. And you deny that part of Kavanagh's story where you tell him that you had left with Bob Bush? A. Yes. When I met with Lieutenant-Commander Kavanagh, that was at his invitation,

1933

Lieutenant-Commander Marsaw Cross-examination

we needed to discuss an officer's PER, and officer who had served with me for a short period and he wanted some input from me. I had insufficient period of observation myself to write a PER, and he was on the edge of the limit to write one, and he wanted some input from me and I was quite happy to give it. And that's what that conversation was about.

Q. I guess you misunderstood my question. I wasn't asking why you were there. I'm asking whether or not you still deny that aspect of Kavanagh's testimony where he alleges that you told him you left with Bob Bush that night? A. Yes, I deny that.

Q. I'm submitting to you, Lieutenant-Commander Marsaw, that you were attempting at that point in time, in January, to run a story up a flag pole that you left with Bob Bush to see if Kavanagh will bite when you talked to him on both occasions. Would you agree or disagree with me? A. That's not true, sir.

Q. And that you're attempting to bring Commander Bush into this in hopes that people will be more hesitant in alleging the cigar tube allegation because you're now trying to bring a more senior officer into it? A. No, sir. That's not true.

Q. And that you tried to put the story of leaving with Bob Bush to Commander Bush himself, but he wouldn't agree with it? A. No, sir. That's not true.

1934

Lieutenant-Commander Marsaw Cross-examination

Q. Would you agree with me that nobody was buying your story that you don't recollect or that you left with Bob Bush, so now you have to revise your story, change it and backtrack and say I have a clear recollection of everything and it wasn't me who cigar tubed Kelk? A. No, sir. That's not true.

Q. Stating that you have a clear recollection and that you weren't in the OJIBWA Wardroom is the only story that gives you a glimmer of hope, isn't it? A. No, sir. I haven't thought about what other stories might give me a glimmer of hope. I'm saying what I know to be the case.

Q. If you state that you don't recollect that evening that leaves open the possibility that you may have done it, doesn't it? A. Even were I to say such that I don't recollect, I still would not believe that I had done it.

Q. I'd submit to you, Lieutenant-Commander Marsaw, that you caught yourself in a web, first your joking about the Sub Squadron, then things get serious and you try the "I left with Bob Bush" story, it doesn't work with Kavanagh in January, you say "I'll have to reconsider it", go into your third revision which is I don't have a recollection of it to Craven, and now you're in your fourth revision of it before this court saying you have a clear recollection of everything that night and it wasn't you. Do you agree or disagree with that

1935

Lieutenant-Commander Marsaw Cross-examination

assertion? A. I disagree with that assertion, sir.

Q. Would this be an example of your bias at work? A. I'm sorry, sir? I don't understand. Would what be an example of my bias?

Q. Your current testimony today?
A. My current testimony is I'm speaking under oath and I'm saying what I know to be the case.

Q. Is it your position that there's nothing wrong with a commanding officer who yells or screams out his orders? A. I know that there are occasions when orders must be spoken of loudly to provoke a reaction. I would not think that a commanding officer needs to do that on a too frequent basis, but I have both as a junior officer and as a commanding officer seen and used loud voice commands to provoke an action.

Q. Would you agree with me that a CO who verbally degrades, insults and belittles members of his crew, takes part in insidious conduct, that it erodes mutual trust and confidence, conditions of which are essential to military operational effectiveness? A. I'm sorry, I didn't catch the question very well?

Q. Would you agree with me that a commanding officer who verbally degrades ...? A. Oh, yes. Okay. Yes, I would agree with that.

Q. And would you agree with me that a CO who verbally degrades insults and belittles members of his crew, attacks the dignity and

1936

Lieutenant-Commander Marsaw Cross-examination

self-respect of the victim and weakens cohesion and morale of the unit or the group? A. I would agree with that, sir. Yes.

Q. It doesn't completely destroy the morale or the cohesion but it weakens and erodes it, doesn't it? A. I would think it would. Yes.

Q. A team that's being belittled, insulted or degraded can still do its job but its performance level will be eroded and weakened? A. I would think, under the conditions that you've described, I would not believe that that team could do its job.

Q. There's lots of reference in this courtroom to your scores on the first torpedo range shoot by the OJIBWA under your command. I believe that score was near excellent or near perfect? A. It was 12 hits in 12 shots, sir.

Q. But by the time the second torpedo range visit takes place, those scores have dropped? A. And I believe that the reason for that, sir, is still classified.

Q. The overall performance of the boat has dropped? A. No. In fact I was quite happy with the performance of the command team on that occasion, on the second shot, on the second firing. I thought they did very well. However, problems beyond their control, beyond my control, beyond anyone's control I think, caused that we got the final score was less than the first one.

1937

Lieutenant-Commander Marsaw Cross-examination

Q. You stated that when you first saw the OJIBWA before you became the actual CO in Faslane, you were left with a positive impression? A. Yes. Yes, I was, sir.

Q. It was a good boat, it was well respected? A. Yes, sir.

Q. Could you explain how it ever could possibly acquire the nickname "Death Boat" under your command? A. If I may speculate ...

Q. I'd like some evidence, not speculation? A. Well, I'm sorry, I can't provide that.

Q. You have no evidence. Would you agree that verbal abuse of members of the crew by a naval commanding officer, including the use of personally insulting adjectives, such as "idiot", "fucking idiot", "cunt", "stupid asshole", "slow", "liar" and "lazy" and words to that effect could be prejudicial to good order and discipline? A. I would agree with that, sir.

Q. As CO of the OJIBWA, was it important for you to have an harassment free workplace so that conditions of mutual trust and confidence could be maintained? A. Yes. I think that's part of the equation that goes into morale and, indeed, from there to performance.

Q. Did you in fact have a harassment free workplace while you were CO of the OJIBWA? A. I believe I did, sir.

1938

Lieutenant-Commander Marsaw

Cross-examination

Q. What is your understanding of how harrassment is defined? A. I would understand it to mean that if a person is being prejudiced against or degraded due to race, sex, religion, any number of factors like that, as much as to first or second language, that if they are not getting every opportunity or are being in anyway intimidated through use of reference to those sort of things that that would constitute harrassment.

Q. Would so too using personally insulting adjectives towards that individual, regardless of their race or linguistic background? A. Yes.

Q. Does harrassment, in your mind, depend on whether or not the person saying the words intends to be harassing or not? A. I would think that you could in the on board adjudication, should such be required, that would be one thing you would consider. If somebody said something accidentally without intent to harm I would be interested in knowing that. Perhaps we do tend to ... or not perhaps, but we certainly even within the divisional system, we try and get things sorted out at a low level rather than ... for example, if an otherwise good sailor is five minutes adrift, I don't expect to see him on charge at a summary trial. So I think in many of these things it's a matter of scope. If someone has made an unintentional remark and has apologized for it, I don't think that man should be charged.

1939

Lieutenant-Commander Marsaw

Cross-examination

Q. I'm not asking about whether you should be charged, I'm simply asking you what your understanding of the definition of harrasment is. Does it depend upon the intent of the person saying the words? A. I'm not sure what the legal definitions of it is, sir, but my understanding, having read it a few months ago, I think that's the way it's worded. I'm not sure though.

What way? A. That it would not have a relation to the intent.

Q. It would not? A. I believe so, I'm not certain.

Q. Was that your understanding when you were the CO of the OJIBWA? A. Yes, sir.

Q. So if one of your sailors said "Sure, I called somebody an "asshole" or an "idiot", but I didn't intend to insult them, that would still constitute harrasment in your definition? A. If the individual were to make a complaint, if the victim were to make a complaint based on that language, then I would not immediately dismiss that complaint because the perpetrator didn't mean anything by it. If the victim has gone to the extent of making a complaint, clearly they feel offended. And if the perpetrator was then to give an explanation and apologize or whatever and correct his behaviour, then provided the complainant was satisfied with that, I wouldn't see a requirement to take it further. If the complainant was unsatisfied with that, I would then have to look

1940

Lieutenant-Commander Marsaw Cross-examination

at the regulations. If I was still unsure after looking at the regulations I would be on the phone to the AJAG office here for advice ... something that I have availed myself of a few times while in command, but I think that with the back up that you have as a commanding officer you can get those issues resolved and get the information you need. I don't recall the exact wording of all Canadian Forces regulations, of course, and where I need to I refresh my memory.

Q. As CO of the OJIBWA, if officers were calling subordinates "idiots" and "assholes", would that constitute harassment in your mind? A. Yes, it would.

Q. Can you explain why your subordinates, such as Lieutenant[N] Tingle and Leading Seaman Cox have a different interpretation of harassment? A. Possibly because they haven't read it recently. There are any number of reasons, I can only guess.

Q. Could poor leadership be one of them? A. I would think not, I think OJIBWA was a well led unit.

Q. So if there's any mixup between Kramble, Tingle and Cox about what constitutes physical or verbal abuse, then it wouldn't be because of any of your shortcomings as a leader, would it? A. I'm not sure that there is a significant mixup there, sir. I think that they're putting into layman's terms, sailor's terms, documents or orders that are originally formulated in language that they don't use every

1941

Lieutenant-Commander Marsaw

Cross-examination

day and they're probably in front of the court here doing their best to explain how they feel.

Q. So you would agree with Kramble that 90 per cent of the members of OJIBWA cuffed somebody in the back of the head once in awhile?

A. No, I wouldn't agree with that. I think he's exaggerating significantly there.

Q. But you would agree with his definition that cuffing somebody in the back of the head doesn't fall within the definition of physical abuse? A. I understand that the definition of physical abuse ... and please correct me if I'm wrong, is now something like any intentional application of force without consent. Is that correct?

Q. Is it your testimony, in your mind, that you don't think Leading Seaman Cox, Kramble and Tingle had a significantly different definition of harassment than Canadian Forces policy? A. I really don't know, sir. I think that under the circumstances under which they were expressing their opinion, in front of this court, is probably ... it was a little more difficult for them. I'm only guessing that because I don't know what they were feeling.

Q. Would you agree that yelling at a subordinate in the control room, calling him words like "fucking asshole", "fucking idiot", "cunt", "piece of shit" would be insulting and belittling for a CO to do and it would be abusive? A. I would agree with that. Yes, sir.

1942

Lieutenant-Commander Marsaw Cross-examination

Q. You have stated and this is the quote that I have here, correct me if I'm wrong, "I have never addressed people outside the cabin using those words"? A. And I think I went on to say that ... I think I said any of those words, or some of those words. I can't remember my exact words. But I did go on to say that there are many of those words that I would not even use within the confines of my cabin.

Q. But clearly you would not have used any of those words to any subordinates at anytime when you were CO of the OJIBWA in the control room? A. Not in the control room and not addressed at an individual. No.

Q. Not even once? A. Not that I recall.

Q. Not that you recall. You can't recall a time when you might have had two or three hours sleep over a three-day period and things aren't going well and you might have just called someone an "idiot" or an "asshole"? A. The only time that I can recall using a term like that, and it was certainly not addressed to a crew-member ... is an example, let's see, if I got an order to meet with a MPA at 1600 in a major exercise and in order to speak to that MPA, to make the rendezvous, I have to raise my comms mast, something that presents a counter-detection opportunity. At five seconds to 1600 I get that mast up and at 1600 I make the call and he's not there. Then I might say in frustration "Oh, you asshole", because now I have presented a counter-detection opportunity for no reason.

1943

Lieutenant-Commander Marsaw Cross-examination

Q. And who would you be saying this towards? A. This is directed towards the aircrew.

Q. But you would never ever call any of your subordinates those types of names? A. No.

Q. You never have? A. Not that I recall, sir.

Q. Can you explain Leading Seaman Cox's testimony, your defence witness, who says that you referred to individuals as "idiot" and "stupid"? Is he incorrect? A. I think the ... I seem to recall that he also could not put that within any sentence or context, and I can only wonder that perhaps he's thinking of me saying "Well that would be idiotic" or "that would be stupid".

Q. So his testimony, if it did suggest that you did refer to individuals in the control room using the words "idiot" and "stupid", would be mistaken? A. He'd be mistaken on that point, I believe, sir.

Q. Can you explain the testimony of Lieutenant[N] Tingle who said on occasions you would yell at him in a way that he felt humiliated? Would he be mistaken? A. I would think that one of the things he didn't get into was the fact that in a submarine, in a control room especially, but many places in a submarine, you can't make a mistake without it being noticed by somebody. And that's what is embarrassing, is you made the mistake, the person standing next to

1944

Lieutenant-Commander Marsaw Cross-examination

you notices it, perhaps he's subordinate to you.
That mistake then gets rectified. And I don't recall ever seeing anybody leave the control room in tears - they were so embarrassed. I think we're talking a matter of scale there as well.

Q. I'm not talking about tears, I'm talking about humiliating and insulting the dignity of subordinates in your control room. Have you ever done that? A. No, I have not, sir.

Q. So if your own defence witness, Lieutenant[N] Tingle, says that you have, he would be mistaken in that assertion? A. I can suspect that he was less articulate than he would have liked to have been.

Q. Maybe less articulate than you would have liked him to be, wouldn't you agree? A. No.

Q. Is Leading Seaman Avant mistaken when he says you referred to subordinates in the control room using the words "idiot", "incompetent", "stupid" and "fucking idiot"? A. I have not done that.

Q. Is Master Seaman Bidinost mistaken when he stated that you would say words like "Stand up and give yourself a kick in the cunt", "jerks", "idiots", "find a Part 3 to replace you" on a frequency of every other day? Would he be mistaken? A. I have not done that.

1945

Lieutenant-Commander Marsaw Cross-examination

Q. Would Lieutenant[N] Byrne be mistaken when alleges that you have used the terms "fucking idiot", "stupid Part 3's", "slow", "stupid", "fucking liar" on a daily occurrence towards your subordinates? A. I have not done that.

Q. Would Lieutenant[N] Cassivi be mistaken when he says you have referred to your subordinates using the terms "incompetent", "idiot", "cunt", "asshole" on a regular basis? A. I haven't done that.

Q. Would Petty Officer Conrad be mistaken when he says that you have referred to him as a "fucking liar"? A. I did not do so.

Q. Would Master Seaman Cumberland be mistaken when he says he overheard through Big Brother you referring to subordinates as "stupid", "idiot" and "fucking toad"? A. I didn't do that.

QQ. Would he be mistaken when he says that you've had a conversation with him in which you told him that you thought your officers were incompetent? A. I had no such conversation with him.

Q. Would Lieutenant[N] Elford be mistaken when he says that you have referred to him as a "fucking idiot", a "fucking asshole" and a "fucking cunt" on an average of three times every two days? A. I have not referred to him in such a fashion.

1946

Lieutenant-Commander Marsaw Cross-examination

Q. Would Petty Officer Harris be mistaken when he would say that you would refer to subordinates as "fucking idiots", "pieces of shit", "fools" on a watch basis? A. He would not have heard me say that.

Q. Would Lieutenant[N] Higginson be mistaken when he says you have referred to him and others as "fucking idiots", "assholes", "stupid", "stupid fucking lazy cunt" and yelled these terms often? A. He has not heard me do that.

Q. He claims he has. Would he be mistaken? A. I never said any such thing.

Q. Lieutenant[N] Kohli, would he be mistaken when he says you have referred to him as "stupid"? A. I have not referred to him that way.

Q. Lieutenant[N] LeClaire, would he be mistaken when he says that you would scream and yell profanities and call members of the crew, including himself, as "incompetent" on a frequency which depended on what was happening but on average every watch? A. I have not behaved that way.

JUDGE ADVOCATE: Sorry.

PROSECUTOR: Excuse me.

JUDGE ADVOCATE: The court reporter cannot hear you. Would you please stay in front of your mike.

1947

Lieutenant-Commander Marsaw

Cross-examination

PROSECUTOR: I'll try. It's a nervous habit of mine and I apologize, it's almost unconscious. But I've been scolded several times by the reporters and I'll try to keep in my spot.

Q. Master Seaman Madgett would be incorrect when he claims you have stated, that you have told officers to stand up and kick themselves in the ass? A. No, I believe, at some point, I stated that it is entirely possible that I could collectively speak to a group in the control room and, for example; we've penetrated the screen, I'm now in the short strokes of the attack, the target is clear, but we've worked at it for perhaps a couple of hours to get in that position. Is a figure of speech that I would use, to say: "Okay team, pay attention, we are now to the weighty part of the problem, everybody kick yourself in the ass, make sure you're awake, let's go". I believe in so doing and using that expression ... well, rather I do not believe that anyone took that as a personal insult or as direction to any particular physical activity. That is a figure of speech I have used.

Q. Lieutenant[N] Marr would be mistaken when he says that you would refer to subordinates in your control room using terms such as "bastard" or "incompetent idiot" on average once a day? A. I did not do that.

Q. Petty Officer Parsons would be mistaken when he says that you have referred to subordinates as "fucking idiots", "get that useless fuck off the helm" and then with regard to Leading Seaman Smyth, saying "who the fuck do

1948

Lieutenant-Commander Marsaw Cross-examination

you think you are, I should kick you in the nuts"? A. I did not say that.

Q. The steward, Leading Seaman Pilon, would be incorrect when he says that he has heard you refer to individuals in the control room as "mother fucker", "asshole", "incompetent", "stupid fuck" in a loud voice and harsh voice on a frequency which depended anywhere from three times a day to six times a watch? A. I did not say that.

Q. Lieutenant[N] Pitman would be mistaken when he says you referred to individuals in the control room as "idiots", "asshole", "fucking idiot", "mother fucker", "cunts" and "stupid" on a daily basis while at sea? A. I did not say that.

Q. Lieutenant[N] Pokotylo would be mistaken if he said you would refer to qualified officers as "fucking Part 3's" and referred to one officer as a "donkey"? A. I did not refer to officers in that way.

Q. Master Corporal Schubert would be mistaken when he says he has heard you refer to subordinates as "fucking idiots"? A. I have not done so.

Q. Warrant Officer Shea is mistaken when he says you have referred to him and others as "shit heads", "assholes", "fucking cunts" and "lazy ingrates"? A. I haven't done that.

1949

Lieutenant-Commander Marsaw Cross-examination

Q. Lieutenant[N] Soper would be mistaken when he says you referred to subordinates as "idiots", "fucking idiots", "stupid", "lazy" and "stupid lazy Frenchman" an average of two to three times a watch? A. I did not say that.

Q. Master Seaman Szucs would be mistaken if he said that you shouted obscenities at the crew and referred to them as "idiots"? A. I did not.

Q. Tovey would be mistaken if he said that you referred to individuals as "fucking idiots" and "cunts" whenever he would pass through the control room? A. I did not.

Q. The XO, Lieutenant[N] Virgin, now Lieutenant-Commander Virgin, would be mistaken when he said that you would refer to individuals with a particular type of ferocity on a daily basis, and in fact the way that he demonstrated in court? A. No, that is not the way I behaved.

Q. Lieutenant[N] Wamback would be mistaken when he would say that you referred to subordinates in the control room, including himself, with phrases such as "idiot", "incompetent" profanity on a daily basis while at sea? A. I did not do that.

Q. Lieutenant[N] Watt would be mistaken when he says that you have referred to him as a "lazy shit" an "idiot", and that you have referred to junior rates calling your officers in their presence "worthless jerks"? A. I have not

1950

Lieutenant-Commander Marsaw Cross-examination

referred to him that way nor made those other comments.

Q. And that you have not referred to Petty Officer Brown as a "waste of oxygen"? A. I have not.

Q. And you have not kicked in a Radar Room door towards Master Seaman Smyth and threatened to kick some part of his anatomy? A. I did not.

Q. And again your defence witnesses, Cox for example, would be mistaken if he stated that you had referred to subordinates in the control room as "idiots" and "stupid"? A. I didn't refer to people that way.

Q. Apart from the 30 or 40 crew-members that have testified, both for prosecution and defence in this court martial, are there other people who did work in the control room who have not been called as Crown witnesses? A. Yes, there are.

Q. What type of weapons could sink the OJIBWA? A. I'm sorry, sir?

Q. What type of weapons could sink the OJIBWA? What would be your most feared weapon that might attack you? A. Well, each weapon system has its own strengths and weaknesses. I would have to give it some thought, sir.

Q. Would any of these weapon systems which could destroy your sub distinguish between

1951

Lieutenant-Commander Marsaw Cross-examination

whether the member was French or English? A.
Certainly not that I'm aware of.

Q. Would you agree with me that it would be completely insulting and totally improper for a commanding officer ever to say "Only Francos and faggots get promoted in the Canadian Forces"? A. I agree that that would be insulting.

Q. And that "Frenchmen are losers and have never won wars" or that "Frenchmen are cowards"? A. That would be insulting. I agree.

Q. Because these sorts of comments would create division and threaten cohesion of a military operational unit? A. I believe they would.

Q. And that they would insult French speaking members of the Canadian Forces who have stated oaths and are willing to sacrifice their life for their country? A. I agree with you, sir.

Q. Is Lieutenant[N] Cassivi mistaken when he says that he has heard you make anti-Francophone comments on a regular almost everyday basis with such as "the only way to get ahead in the Canadian Forces is to be a Franco or a faggot, and it's probably easier to be a faggot"? A. I have not said anything like that.

Q. Would Master Seaman Cumberland be mistaken if he says that you have referred to Frenchmen as "fucking toads"? A. I have not.

1952

Lieutenant-Commander Marsaw Cross-examination

Q. Or Lieutenant[N] Dussault as a "fucking Frenchman"? A. I did not.

Q. Would Lieutenant-Commander Dussault be mistaken when he says that you would say that in order to get promoted in the Forces, you have to be "a one-legged black woman who speaks French"? A. I did not.

Q. Or that "Frenchmen are cowards"? A. I have not said that.

Q. And that "the bilingualism policy is rubbish and a waste of money"? A. No, I haven't said that.

Q. And Lieutenant[N] Watt would be mistaken if he said that you had ever said that "the rest of Canada has to take its pants down for Quebec"? A. I have not said any such thing.

Q. And Lieutenant[N] Soper would be mistaken if he says that you have called Frenchmen "stupid" and "lazy Frenchmen" in the presence of Lieutenant[N] Jacques, Dussault and Cassivi? A. I haven't said that.

Q. Do you feel that you are a reasonable person? A. Yes, sir. I do.

Q. Would you agree that any reasonable person would know that it's improper to verbally insult, degrade and belittle subordinates with the types of phrases and words that I have

1953

Lieutenant-Commander Marsaw Cross-examination

offered to you in the last 15 or 20 minutes? A.
Yes, I would agree with that.

Q. Were you in fact lectured during your "Perisher" training by Commander Charlton that submarine commanding officers should praise in public and criticize in private? A. I don't remember him using that phrase, but we discussed the issues of when to praise, when not to praise. We certainly discussed that issue.

Q. But you would have been taught that on your "Perisher" course? A. Well, I don't recall him using that phrase, but we discussed the issue of when to give praise, when to give criticism. Certainly, we discussed that issue on course.

Q. Were you in fact informed by Commander Charlton, near the mid-way point of your "Perisher" course, that you were failing "Perisher"? A. No, I was not.

Q. Were you in fact informed by Commander Charlton of your shortcomings, which included the verbal treatment of your crew and the failing to accept blame and try to attribute it to the rest of the crew? A. No. No such assertion was made during my "Perisher".

Q. In your final report signed by Commander Charlton did he state, with regard to you, that "once he was warned of the dangers of self-delusion he was able to re-appraise his position and worked hard to achieve the necessary

1954

Lieutenant-Commander Marsaw Cross-examination

standard"? A. It's been some time since I've looked at that report, sir. But ...

Q. Would you care to look at it?

A. Certainly. Sir.

Q. Would you agree that you changed your style at the mid-way point briefing and got a pass in "Perisher"? A. No. I maintained my style throughout and I got a very satisfactory standard.

Q. I believe it's your testimony in direct examination that you never received any formal or informal complaints concerning the way you verbally treated the crew? A. I never got one.

Q. Do you deny the testimony of Lieutenant[N] Wamback who claimed that he had spoke to you twice about the way that you had verbally treated him and that he did not feel comfortable on board, received only negative feedback? A. I recall the conversations with Lieutenant[N] Wamback and that is not what their content was at all.

Q. Is Lieutenant-Commander Virgin mistaken when he says that he spoke to you on two different occasions about the way you verbally treated the crew, the first time telling you that your style was vindictive, belittling and condoning, to which you replied "you mean condemning"? A. I'm sorry. You mean "condemning" is what I was supposed to have responded to him?

1955

Lieutenant-Commander Marsaw Cross-examination

Q. Yes? A. No, that conversation is not correct ...

Q. Did he ever tell you your style was vindictive, belittling and condoning? A. No.

Q. And did he ever raise this a second time during the TEAMWORK trip? A. No, sir.

Q. And I see that you got a message, it's entered as one of the exhibits, that talks about the XO in the Wardroom being cowed of you?

A. Cowed.

Q. And that would be in December of '91? A. Is that the date? I can't remember which signal it was?

Q. Dated 24 November '91, Exhibit "RR"?
A. Uh-huh. 10th November ... yes, November, sir.

Q. Do you recall Lieutenant-Commander Virgin's testimony that he raised the second matter with you during the TEAMWORK Exercise? A. But this was before TEAMWORK, sir.

Q. I'm asking you whether you recall his testimony where he claims that he raised the matter a second time with you during the TEAMWORK Exercise? A. I recall him saying he raised it a second time. I can't remember when he said it was, I think he said Spring '92.

1956

Lieutenant-Commander Marsaw Cross-examination

Q. And at the time you were drafting a message, that used the word "kowitzed"? A. Yes, I recall him using that expression.

Q. So the message that he claims he saw you drafting occurred in different format and at a different date than the one that's dated in Exhibit "RR"? A. When I heard him use that expression, I thought when he said "kowitzed", I thought - what's he talking about, because to me "kowitz" ... I'm not sure of this, but I think it means - it's an oriental expression of genuflection. And so I thought about perhaps he was referring to that message where I said "cowed".

Q. So Lieutenant-Commander Virgin would be mistaken in that regard then? A. I don't think I've ever used the term "kowitzed" in a message.

Q. Apart from Wambach and Virgin, would Lieutenant[N] LeClaire be mistaken when he claims he met you in the cabin and raised concerns about the way that you had verbally treated him in the presence of the other Wardroom members? A. No, I recall that meeting well, and the way he represented it is not the way it occurred.

Q. Would Lieutenant[N] Higginson be mistaken when he says that at one time during some drills you had gathered the Wardroom together and said "Somebody tell me what's going on. I'm at a loss. I can't understand what to do" and Higginson responded saying that part of the problem is your yelling and screaming? A. I

1957

Lieutenant-Commander Marsaw Cross-examination

recall that meeting and it did not go the way it has been represented in front of this court.

Q. Would Lieutenant-Commander Dussault be incorrect when he stated that on a number of occasions he approached you concerning the way that you were verbally treating the crew and informed you that some of the members were afraid? A. That did not happen.

Q. Would Chief Petty Officer, 1st Class Brown be mistaken in his testimony when he said to you "You can't be doing that anymore" to which you replied with a smile saying "Yeah, I know"? A. I recall the conversation with Chief Petty Officer Brown quite well and that was not discussed in my cabin.

Q. So Chief Petty Officer, 1st Class Brown would be mistaken as well? A. I'm saying that that conversation did not occur as related.

Q. I'd submit to you that you received numerous informal complaints about your style, and the fact that you don't remember them is not because they didn't happen, but it's because you didn't listen? A. That's not true, sir.

Q. Do you understand now, after listening to all the evidence in this court, that you did treat your crew improperly? A. No, sir, I did not. I do not believe it to this day. I did not.

1958

Lieutenant-Commander Marsaw Cross-examination

Q. There's been a line of questions asked prosecution witnesses to the effect that morale is the responsibility of the XO. Do you agree that morale is the responsibility of the XO? A. No. Morale, I believe, is the responsibility of every one on board, whether it be the commanding officer down to a senior hand of a mess or a leading hand in the mess, or indeed right down to ordinary seaman. It's all our responsibility. Ultimately, I am responsible as the commanding officer for morale, and I expect the rest of the team to help me work towards achieving it, but any results achieved are my responsibility as with the rest of the submarine.

Q. Do you feel that Master Corporal Schubert is mistaken when he said that you had told him "I don't give a fuck about morale"? A. I recall my conversation with Master Corporal Schubert and that is not what I said.

Q. Would you feel that Lieutenant-Commander Dussault is mistaken when he claimed that he would ask you if you had anything to tell the crew during evening pipes and you would respond "Tell them to fuck off"? A. I never said any such thing.

Q. And Master Corporal Schubert is also mistaken in the regard that you had tried to get him to spread rumours that the boat would be coming home on Friday? A. The last thing I would need to do in a submarine is start a rumour. I would not do so and did not.

1959

Lieutenant-Commander Marsaw

Cross-examination

Q. So you didn't want to start a rumour about the boat coming home on Friday because there was already enough rumours. Is that your testimony? A. A submarine is a rumour mill. I filter them out, I take the ones that I think need to be looked at, for example, if I hear a rumour that there's been officers striking each other or a rumour that someone is saying I called officers incompetent, those rumours I'll have investigated. If I was to investigate every rumour I heard on board a submarine, I wouldn't have enough ship's company to chair each investigation. There is a certain amount of filtration that goes on.

Q. During your direct testimony, you identified and spoke of the cycles of morale a submarine crew goes through. Can you quickly identify what factors effected that cycle again? I got some of them but I didn't get them all, I know that ... ? A. In fact, sir, I didn't discuss them all. We didn't get very deeply into that issue. But some of the factors that go into it would be where you are in a work period or a running period; as to what sort of employment you have for your men; one of the factors will be - what's the turnover rate been like amongst the crew, particularly the key members of the crew - the CO, XO, coxswain, department heads; if there's been for some reason a large change in the divisional petty officers - that could effect morale because as the lines of familiarity and communication change within a crew you've got to make adjustments - you've got to grow; the leadership style of the senior leaders on board, if you go from a Chief ERA who likes to wing it

1960

Lieutenant-Commander Marsaw Cross-examination

to a Chief ERA who is strictly by the book - that will effect morale one way or another as people will learn to work for a new style of leader. If the commanding officer or the executive officer or the coxswain are unfeeling or are not up to the mark - that will have a huge effect on morale. There are a lot of factors, sir. Morale is a sensitive issue.

Q. So a non-caring CO would have a huge effect on morale, wouldn't it? A. Yes, it would.

PROSECUTOR: Perhaps we could have a break at this point? I am well passed ... not well passed, I'm about 60 percent done my examination.

JUDGE ADVOCATE: How long?

PROSECUTOR: Fifteen minutes?

JUDGE ADVOCATE: The court is adjourned for fifteen minutes.

ADJOURNMENT: At 1510 hours, 25 October 1995, the court adjourns.

REASSEMBLY: At 1525 hours, 25 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR:

1961

Lieutenant-Commander Marsaw Cross-examination

Q. Lieutenant-Commander Marsaw, do you believe that you intimidated members of your crew? A. I do not.

Q. Do you believe that they were intimidated by you? A. No, I don't, except on the ... well, there were occasions when I got the impression that if I was after a particular aim or a particular standard, they found that sometimes hard to cope with, that I would continue to insist on a standard which ... But I think the end result I found was that the great majority were pleased when they were finally able to meet that standard. And sometimes it took a lot of work, but I think they took pride in their final achievements.

Q. And we know, because we've been told several times, you're a perfectionist and always demanded high high standards. Are those the standards that you were referring to in your last answer? A. Well, I would not call myself a perfectionist. I think that it's our duty to do our best and we try and do that.

Q. Do you believe that you intimidated members of your crew in trying to have them meet your high standards? A. No. No, I certainly didn't intimidate anybody, but I could understand how people who were struggling to meet the standard might feel that way to start with. But I believe they overcame it and achieved good results.

Q. So you believe at some point in your CO-ship the crew was intimidated of you?

1962

Lieutenant-Commander Marsaw

Cross-examination

A. Some members probably felt intimidated. I don't know if using the term "by me" would be as accurate as "the challenge". I think that would be a better way to put it. That the challenge itself may be a bit daunting, but I believe that through overcoming challenges that you initially feel to be daunting that you gain a new strength and a satisfaction of a job well-done.

Q. Was there ever a point in your mind as CO that you believed the entire Wardroom, XO included, were intimidated by you when you pressed for your standards to be met by them? A. I believe that there were some tasks that we had that the officers in particular did not realize that they could accomplish at first. But I think we overcame that.

Q. My question is quite simple. Did you ever believe that your Wardroom as a whole, altogether, including the XO, at any one time were intimidated by you when you attempted to have them meet your standards? A. Yes, there was a time when I felt that was the case.

Q. When? A. I think it was around the time of a SUBDEVEX, I think it was towards the end of '91, I thought ... what I was aiming for in that exercise was hard and it really required a lot of work, a lot of tactical thought from the Wardroom. And I think that they found that challenging, but they overcame it and I think we all learned a lot from it.

Q. And that would have been just before the point in time where Lieutenant-Commander

1963

Lieutenant-Commander Marsaw Cross-examination

Virgin states that he went into the office and said you're "belittling, vindictive and condoning in your leadership style"? A. Well, I don't remember him ever coming into my cabin and saying that, so I can't say anymore on this.

Q. But in terms of his point of time and reference that would have been, the SUBDEVEX would have been just before that point in time that he alleges he came and talked to you about your style? A. I'm afraid I can't remember, from his testimony, when he said that, when he said it occurred.

Q. Christmas '91. A. Was it? Okay. Then that could well be the situation he's talking about.

Q. Did your crew continue to be intimidated by you after Christmas and into 1992? A. No, I don't believe so. I think we got, if I recall correctly, we really picked things up after Christmas. By then, of course, we'd had the results of that exercise in which we did end up doing well, and I think it was then that the real satisfaction of having accomplished that task came in. I think that by the time we sailed for TEAMWORK, which is in I believe February '92, I think that things were looking quite a bit better by then. We had had time to digest all the lessons, we had had some feedback on how the other Forces that we were participating with viewed our work, which gives people a boost when they get that kind of feedback, especially from a foreign Navy.

1964

Lieutenant-Commander Marsaw Cross-examination

Q. What things did you observe from your Wardroom that caused you to feel that you intimidated them before Christmas of '92? A. '92, sir, or '91?

Q. '91? A. Well, I remember a discussion with Lieutenant[N] Wambach, I believe it was at that time, and we were in a particular part of that exercise I was doing a lot of the driving myself and I felt that the officers really would have appreciated if they could have gotten to have done more during that particular exercise, and I had to explain why I was doing it myself in the context of that particular exercise.

Q. But I'm asking you, what did you personally observe that allows you to form the opinion that you intimidated your crew at that time, or your Wardroom? A. Well, that's what I mean, sir, that when people are saying things like that, I try and think - what's the bigger problem? What are people trying to get at here? What are they trying to tell me? And that's the conclusion I came to around that time, that they thought there was not enough chance for themselves to get their hands into that evolution. And what I addressed at the time was to try and explain why I was doing it this way, and, you know, that it was no reflection at all on my faith in the officers, but it was just the nature of the exercise required the commanding officer's direction.

Q. But you agree that you did intimidate them at that time? A. I would think

1965

Lieutenant-Commander Marsaw

Cross-examination

that they felt intimidated, not through any deliberate effort by myself to intimidate them, but I can see ... or I thought at the time that may have been the case, that they would feel that way and it's something I've got to take measures to correct.

Q. But you'd agree with me that the officers, including the XO, have been cowed by your efforts to instill standards at that time?
A. That was my impression at the time. Yes.

Q. And "cowed", at least in the Concise Oxford Dictionary, is defined as: "to intimidate" and "dispirit". Would you agree with that definition? A. I wouldn't have used that word if I had looked it up in the dictionary. But that's ... I'm afraid my use of the English language is not always perfect.

Q. Would you agree with the definition of "intimidate" which means: to "overawe with fear"? A. I didn't realize fear was involved in the use of the word.

Q. So when you write "the officers, including the XO, have been cowed by my efforts to instill standards" in Exhibit "RR", you don't really mean to say "intimidate" or to "overawe with fear"? A. No, not overawe with fear. I'm sorry, that's not what I meant by the use of that word.

Q. Because you would agree with me that a CO who did use insulting language could cause serious problems for good order and discipline for a submarine crew, because that crew could

1966

Lieutenant-Commander Marsaw

Cross-examination

very well be overawed by fear? A. Yes, I agree with that.

Q. Would you agree with Leading Seaman Avant when he testified that he felt your leadership style created tension, put everybody on the edge, and made everybody quiet, upset, mad and embarrassed? A. No, I wouldn't agree with that, sir.

Q. Would you agree with Master Seaman Bidinost who testified that he had fear for his own career and felt intimidated, and for the first time in 17 years was unable to separate work from home? A. I don't understand why he would feel that way.

Q. Having a Radio Room door kicked in on him wouldn't be a factor, would it? A. Should any such action have occurred, then I indeed would be frightened.

Q. And should any such action have in fact occurred, that might be an explanation for his chronic fatigue that he was diagnosed with? A. Well, I don't know, sir. But no such incident occurred, nor was there anybody on board that submarine who was capable of committing such an act.

Q. You've got to admit if a radar room door gets kicked repeatedly, repeatedly, repeatedly, sooner or later the hinges get a bit loose, don't they? A. I wouldn't know, sir. That door is pretty solid.

1967

Lieutenant-Commander Marsaw

Cross-examination

Q. So Leading Seaman Stevenson, for example, would have absolutely no reason to have to re-hinge it while he was on board the OJIBWA?

A. Leading Seaman Stevenson, sir? I haven't heard about this in court.

Q. Would Petty Officer Brown be mistaken when he said that he felt belittled by the way you verbally responded to him at times, and physically dreaded going on board the OJIBWA to the point where he faked his medical condition? A. Would he what, sir?

Q. Would he be mistaken when he says that given the way you would verbally treat him at times, he felt belittled and physically dreaded going on board the OJIBWA as a consequence of it? A. I did nothing to make him feel that way.

Q. Would Lieutenant[N] Byrne be mistaken when he found that your leadership style caused tension and produced stressful situations to the point where he didn't feel good or confident and that morale consequently was poor?

A. I did not perceive Lieutenant[N] Byrne as feeling that way at all.

Q. Would Lieutenant[N] Cassivi be mistaken when he felt that the leadership style produced watchkeepers which were tense and always double-guessing or second-guessing themselves?

A. I would hope that the watchkeepers are somewhat tense when on watch in a submarine control room.

1968

Lieutenant-Commander Marsaw Cross-examination

Q. To the point of second-guessing themselves? A. And I was about to say that I do expect officers on watch to second-guess themselves to make sure that they're checking their own work, checking each other's work. That's part of the practise, that's the way we do business.

Q. To the point where they're incapable of making decisions, if the Chief ERA comes up and talks to them? A. Well, the sort of decisions that Chief Petty Officer Tovey alluded to in his testimony, that I recall, were situations that, as far as I know, every submarine captain has in his Standing Orders as requiring his own permission. There are areas where an officer of the watch is given freedom, but there are some areas where the officer of the watch requires the captain's permission. Chief Petty Officer Tovey is required to read my Standing Orders as well as the officers. He knows what requires the captain's permission and what doesn't, as do the officers of the watch.

Q. Would Lieutenant-Commander Dussault be mistaken when he said that the mind set of the crew had to be adjusted because it was like the battered-wife syndrome as a consequence of that leadership style? A. That was not the crew that I saw on OJIBWA.

Q. Lieutenant[N] Elford would be mistaken when he says that as a consequence of the leadership style he felt stonewalled, disappointed and demotivated and dreaded every watch? A. I'm sorry to hear that that was his

1969

Lieutenant-Commander Marsaw Cross-examination

impression, but that was certainly not the impression I got from him when he was on board.

Q. Lieutenant[N] Higginson would be mistaken if he described as a consequence of your leadership style, an atmosphere which was fearful and poor for morale? A. I did not see a fearful atmosphere nor did I see, except on rare occasions, low morale.

Q. And Leading Seaman Kohli would be mistaken if he said that as a consequence of names you would call him, he would feel like he was stupid? A. I never called him names, and my recollection, of then Sub-Lieutenant Kohli, was that he was a good fellow in the mess, appeared happy, appeared content. except as regards his progress in training.

Q. Lieutenant[N] LeClaire would be mistaken if he said that the leadership style by you produced individuals, including himself, who were fearful of making mistakes and being yelled at, consequently not being able to reach his full potential? A. I think that Lieutenant[N] LeClaire made enormous strides while he was on board, and I think I saw him develop from an officer ... over the period of time that he was on board, develop from an officer who was hesitant and unsure of himself into a good officer.

Q. Master Seaman Madgett would be mistaken if he felt, as a consequence of your leadership style, he felt he was intimidated and that the officers appeared to be intimidated? A.

1970

Lieutenant-Commander Marsaw Cross-examination

I did nothing to intimidate him and I don't know why he would feel that way.

Q. Lieutenant[N] Marr would be incorrect if he described your leadership style as leadership by intimidation? A. I did not lead by intimidation.

Q. Any similar allegations or comments or evidence by Pittman, Lieutenant[N] Pokotylo, Master Corporal Schubert, Master Seaman Szucs, Warrant Officer Shea, Lieutenant[N] Soper, Chief[CP01] Tovey would be incorrect as well? A. What I observed of those people on board was good hard work, for the most part, and the feedback I got from them, from their supervisors, was usually positive. And I can recall many examples of where they did excellent work and appeared to be content.

Q. And Lieutenant[N] Wamback would be mistaken if he says as a consequence of your style people withdrew into a shell and adopted a survival mode to get through the moment? A. I did not perceive any such activity on board or any such attitude.

Q. And if Watt, which he has described your leadership style as leadership by fear, he would be mistaken as well? A. I did not lead by fear.

Q. Are people mistaken if they claim that they felt fear and intimidated by your leadership style? A. I would be surprised that they felt that. I can't of course say with

1971

Lieutenant-Commander Marsaw Cross-examination

absolute certainty how they felt, but my perception of how people reacted to my style was that they were doing well, and generally speaking, doing their job to a high standard.

Q. Is it possible, for a slight second, that you could ever be mistaken about your perceptions? A. Of course, sir.

Q. And that you may in fact be entirely wrong about your perceptions? A. No. I could be wrong for a slight second or a period of time, but I was there for nearly three years, I had plenty of opportunity to examine myself, to receive reports, to take advice, to seek other people's opinions both within the ship's company and outside the ship's company, and to see men at "requestmen", to discuss with appropriate authorities what they thought of my ship's company, and in fact all that information is vital to me to determine what is the state of that submarine.

Q. Lieutenant-Commander ... Sorry, continue? A. And the information I got through those sources in fact helped confirm in my mind that what I was seeing was correct, and what I was seeing was what was actually happening.

Q. Lieutenant-Commander Larkin, he was your first XO I understand? A. That's correct, sir.

Q. While you were his commanding officer he requested general service? A. Yes. Immediately upon or when it was decided that ...

1972

Lieutenant-Commander Marsaw Cross-examination

actually, I can't say for sure now whether it was immediately after it was decided that he would not be going on the next "Perisher" or whether it was sometime after that. I can't recall.

Q. But at some point he, as your XO, requested to go general service? A. Well, that's what I can't recall if it was while he was my XO or shortly afterwards. That's early '91, I think, and I can't recall whether it was before he left the boat or after he left the boat.

Q. You had identified Lieutenant[N] Wamback as the successor to Lieutenant[N] Virgin to be your third XO? A. No. I don't pick and choose officers that are assigned to the boat. At senior appointment level, such as Executive Officer or heads of department, we discuss those issues with the Squadron Commander, and we'll have a CO's meeting within the Squadron Commander's office and we'll talk about who is available and who might become available. But in fact I don't recall ... it may be so, but I don't recall identifying him as such.

Q. May it be so that you lobbied for him and asked Captain[N] Plante to take Lieutenant[N] Kavanagh off the AC course and replace him with Wamback, so he would be available after Virgin did his run? A. No. That's not the case at all. In fact I believe it was while Lieutenant-Commander Larkin was my XO that ... and I'm trying to recall something a long time ago here, so it might take me a moment. I believe it was during the SOCT in the early part of '91, for a period Lieutenant-Commander

1973

Lieutenant-Commander Marsaw

Cross-examination

Larkin had to go to the other submarine which was then hosting the course, which was OKANAGAN, so he went over to OKANAGAN. And for a period Lieutenant[N] Wamback served as Acting Executive Officer. And I was delighted with the job he did, I thought ... he in fact surprised me that an officer of his seniority was really ready to move, he had done such a good job as Acting XO. And I discussed this with the Squadron Commander and at that time I said something along the lines of ... and this is going back a ways, but something along the lines of this guy is ready to do the AC course and he's ready to subsequently get an Executive Officer's appointment. And I can't remember when it was arranged that he would do the AC course, and that's outside my sphere altogether I'm afraid. I can make a recommendation along those regards but it's the Squadron Commander who looks at all the implications as to his scheduled posting plot for officers. And of course the career manager ...

Q. I'd suggest you're minimizing your role. You are within the sphere of influence because you can directly advise SMI who makes the decision? A. Well, he takes my opinion, I'm sure, into his final decision but he's got other factors I'm not aware of. I certainly don't expect him to do whatever I say.

Q. And while Lieutenant[N] Wamback was under your leadership he put in for a request for general service as well? A. That's correct.

Q. And you have Lieutenant[N] Virgin as your next XO, I guess, after Larkin. Would you

1974

Lieutenant-Commander Marsaw Cross-examination

define him as a very loyal individual? A.
Lieutenant[N] Virgin?

Q. Yes? A. Yes, I believe he was.

Q. And then the next XO after that
would be Lieutenant[N] Dussault? A. That's
correct.

Q. Who was progressing fairly well in
his career, at least up to the point that he was
posted to OJIBWA, wouldn't you agree? A. And
beyond that point as well, sir.

Q. I would submit to you that you
attempted to hobble Lieutenant[N] Dussault, and
that's found in the evidence of the different
command performance evaluations you wrote on him
after he became your XO? A. That is certainly
not true, and it would take a misunderstanding of
the purpose of submarine command course
recommends to come to that conclusion, and that
is not the case at all. If I may, explain what a
command course recommend is about and what a
"now" and "earlier" and "not yet" assessment
means, I think it will become more clear to the
court. A "now" recommend from a commanding
officer towards another officer to go on
"Perisher", or the submarine command course,
means that in his opinion that person is ready to
take command tomorrow. And the purpose of the
command course is going to fine-tune him, just
give him a couple of extra areas of skill that he
needs in order to perform that function, but that
he is in all other respects ready to step into

1975

Lieutenant-Commander Marsaw

Cross-examination

the commanding officer's shoes. There are many many occasions when a guy has gone through the average time period to achieve that "now" recommend, which I think on average is about a year as Executive Officer to get a "now", where the guy is not quite there. And in the Canadian Navy we made some huge mistakes a few years ago which prompted the Pollard Report, so-called because it was chaired by Captain[N] Pollard, and those mistakes were that we were sending officers to "Perisher" who then failed - three in a row in fact, officers who were not prepared for the course, officers who hadn't been brought up to that standard. And so we're taking an officer and putting him on a one-shot course, because you do not get a second chance at "Perisher", and sending him there early when he's not ready. At the time, because we were doing it in the UK, at a very high cost to the Crown as well as a high cost to the officer who would then go there, fail the course, and that would be the end of his submarine career. Where the alternative was to hold the guy back, perhaps even as little as three or four months to give him that little extra bit of training he needs, so that he then goes to the course prepared, passes and has a fruitful career. It was my belief that Lieutenant[N] Dussault was doing all the right things, he was making progress, but he was not doing so at the rate that is the norm. But he was still making progress and I thought that he had some areas that were weak, that if given the opportunity to work on he could solve, so that when he did attend the course he would pass. And I believe that I'm not the only submarine captain who has taken that sort of interest and

1976

Lieutenant-Commander Marsaw Cross-examination

appreciation of the problem. There's little to be gained from sending a guy if you don't think he's got the skill yet. And as a commanding officer it is our duty to make that assessment.

Q. So you would disagree with me if I suggested out of your real or potential XO candidates, Larkin, Wamback, Dussault and Virgin, almost three of them suffered adversely in terms of their careers as a submariner because of your acts? A. No. I would not agree with that. That's not the case.

Q. Was Lieutenant[N] Wamback and Lieutenant[N] Pokotylo your Ops Os at certain points during your command? A. Yes, they were, sir.

Q. They both made a request for general service? A. Yes, they did.

Q. Do you agree with the testimony of Lieutenant[N] Marr when he stated that you had taken himself and Kelk aside and told them both to be more aggressive? A. I don't remember that being his testimony, but if I tell watch leaders to be aggressive - Yes, I would say such a thing. I believe it's an important characteristic to learn.

Q. Did you ever have any concerns that Kelk may take it as meaning that he should start acting more like you? A. No, I didn't take it as such. I was not aiming to produce Marsaw clones, if that's what you mean, sir.

1977

Lieutenant-Commander Marsaw

Cross-examination

Q. Do you agree that Kelk, in fact, did become like you and did, to use one of the witness' words, succumb to your style? A. No. I think Kelk was a good officer. In fact, he had his own style in the control room which was perfectly effective. In fact I can recall on occasion where he, through his action, saved the submarine from being put into a very embarrassing situation. His conduct in the control room I thought to be good, such that ... in fact I contacted his appointer, which is the Royal Navy equivalent of a career manager, in the UK a couple of times to make sure that I was capable of giving the things to him that he needed to progress once he went back to the UK, because their requirements are slightly different than ours, and I wanted to make sure that I knew about them. I don't think he became like me, I think he developed into quite a good tactical officer of the watch.

Q. Do you agree with Petty Officer Parsons' testimony that Kelk would change whenever you would enter the control room, his leadership style? A. No, I wouldn't. And although, of course, I can't know everything that an officer of the watch does when I'm not in the control room, I know a great deal of it simply because my cabin is so close to the control room and if we're in a sonar-quiet state or quieter, I can hear a great amount of discussion and orders that are being passed in the control room. And so even when I'm not there, I can still hear what's going on.

1978

Lieutenant-Commander Marsaw Cross-examination

Q. It was a simple question. I simply asked you whether you agreed or disagreed with Petty Officer Parsons' testimony on that particular aspect? A. I disagree, sir.

Q. Thank you for answering the question. Would you disagree with Lieutenant[N] Elford if he said that Kelk started calling him names like "fucking idiot" in your presence? A. He certainly never done that, sir.

Q. Do you have any concerns with the testimony of Lieutenant[N] Tingle, who I would refer to I guess as the Nietzschean man, who figuratively speaking stated that he had developed scar tissue on his back to protect him from different types of verbal floggings? A. I don't know what he experienced that made him feel that way.

Q. But you wouldn't have any concerns that he would develop a mind set like this on your boat? If it doesn't kill me, it makes me stronger. Is that the type of culture that you like to sustain on your boat? A. No, and I didn't.

Q. It obviously thrived with Lieutenant[N] Tingle and his subordinates, didn't it? A. Well, I don't know, sir. That was not my perception two years ago and for the three years prior to that when I was in command.

Q. He's a defence witness, I mean, you heard it from his mouth, and then you had Leading Seaman Cox. These individuals are developing a

1979

Lieutenant-Commander Marsaw Cross-examination

certain type of ethos and mind set. How could that be produced under your leadership? A. I don't believe it was. The conditions that I saw in OJIBWA were not as has been represented to this court.

Q. Do you believe that the Navy needs individuals who develop an ethos like Lieutenant[N] Tingle who believes that it's okay to verbally insult people because it will make them stronger if it doesn't kill them? A. I don't think he said that, did he? But no, we don't need extremists in any regard I'd say.

Q. And you would agree that that problem could be compounded if individuals such as that were entrusted with the leadership of subordinates in the Navy as well? A. What I saw in Lieutenant[N] Tingle was a good leader, effective department head, I saw his men responding to him well, he appeared to be well respected by his men. I certainly respected and trusted him.

Q. Do you agree with my proposition that if every Navy vessel was led by officers with your leadership style, there wouldn't be a Navy left in the Canadian Forces? A. I would suggest that if any particular leadership style became the sole leadership style in our Navy that it would eventually be bad for the Navy. My leadership style is going to be different from any other commanding officer and I think that's what we need.

1980

Lieutenant-Commander Marsaw Cross-examination

Q. So your style doesn't cause you any particular concern? A. The way I conducted myself in that submarine was, I believe, entirely in concert with the conditions of the service, I executed my duty as well as I could, I made some mistakes, I had some successes. But I believe in the traditions of our service and I've had good training through the service, I've performed, I believe, to a high standard in that submarine and I'm proud of what she achieved and I hope that the majority of the people who served under me are proud of what they achieved and proud of how they conducted themselves.

Q. Would you agree with me that your leadership style destroys our best candidates for the future in the Canadian Forces? A. No, I wouldn't agree with that.

Q. Do you recall the testimony of Lieutenant[N] Watt who said he joined the Army Cadets when he was 13 years old, he went to Royal Roads, saw an LA-Class sub, spent three years trying to transfer from the artillery to the submarine service and left the sub service, as he testified, as a consequence of the experiences on the OJIBWA under your command? A. I recall that testimony. Yes, sir.

Q. Can you explain why an individual such as this would ever want to leave the submarine service? A. As I recall, he wanted to leave the submarine service so that he could remuster as a clearance diver.

1981

Lieutenant-Commander Marsaw

Cross-examination

Q. It wasn't for any other reason, you don't think? A. I had one discussion with him where he expressed concerns about ... he's a very physically fit individual and that's quite difficult to maintain in a submarine if you're an athlete that kind of standard, and that gave him some concern. He was concerned about his family life with the sort of hours we were spending working. I can't remember all his concerns, I'm afraid, off the top of my head, but he had what I thought were legitimate concerns. I also got the impression when I talked to him ... I think it was in June '93 the first time we talked about it, I also got the impression that he was getting a bit tired. He was reaching the end of his sub-req qualification, and having been through it myself I know that your spirit can tend to drag around that time - you've been working at it for a long time. And I encouraged him that he was almost there, he's only got a small number of sub-reqs left to do, and asked him if he wished to reconsider after our talk, and he told me that he indeed would. We then went into a period where now my concern for his training is that he's got to refresh himself with all the knowledge that, from perhaps his early part of his training that he's forgotten - now he's got to get it all together. And that took longer than I expected. And over that time, I guess, he developed the desire to be a clearance diver and I understand he's been successful at it.

Q. So it couldn't have possibly been because on his very first conversation with you in the presence of other officers, you said "You must have got a haircut at stylist for faggots"

1982

Lieutenant-Commander Marsaw Cross-examination

or it couldn't have been possible because he had to sleep on the deck in the fore-ends, because you would always be staying up all night watching movies in the Wardroom taking up his bunk? A. No, that wouldn't be possible because those two events never happened.

Q. And it couldn't be because you called him a "lazy shit" or a "lazy fuck", could it? A. No, it couldn't, because I didn't.

Q. Would you agree that you broke his ambition to be a submariner? A. No, I don't.

Q. Do you agree that you burned out Wamback's ambition for command? A. No, I don't.

Q. Do you agree that you burned out Pokotylo's ambition to be a submariner? A. No. Lieutenant[N] Pokotylo couldn't see through a periscope. That was the principle reason why he couldn't continue his career. In fact I remember the night he called me into the control room, surrounded by ...

Q. It's a simple question. I asked you whether you agreed or disagreed? A. I beg your pardon, sir. I disagree.

Q. And you disagree that you burned out Kohli's, Kerr's, MacLean's, Jacques', Elford's, Larkin's and Bidinost's and Browns' ambitions to be submariners? A. Yes, sir.

Q. You stated during direct testimony concerning training of Part 3's that "some people

1983

Lieutenant-Commander Marsaw Cross-examination

are not expected to complete. It's normal to go on the OJIBWA and finish elsewhere". Would you agree with that statement? A. Yes. Not expected to complete your training in one submarine.

Q. It would be abnormal though, I would think, to start your training on the OJIBWA but have it ended there without completing your training, wouldn't it? A. That depends on bunk availability, the ...

Q. So whether somebody completes their training or not on the OJIBWA, depends solely on bunk availability? A. Not solely. That's one of the factors.

Q. It couldn't be your leadership style? A. No, it couldn't.

Q. So when Burke, MacLean, Kerr, Kohli, Elford and Jacques, to name a few, had their aspirations to become submariners ended on your boat under your leadership, that couldn't have been a factor? A. No. Each of those officers had a reason for leaving and they were all different.

Q. Could it be because they in fact, to use your words, were cowed as defined by intimidation or overawed with fear? A. No, it couldn't.

Q. Can you explain why your officers would eat their meals in the heads on occasion or be fearful even to take a cookie from a cook? A.

1984

Lieutenant-Commander Marsaw

Cross-examination

I'm afraid I've yet to understand their reference to cookies and I can't associate that with anything that I recall. I can only recall seeing one officer who was not eating in the Wardroom, and I recall that quite well - it was Lieutenant[N] Watt. And when I saw it, I saw him returning a soiled plate into the pantry, and I said to the XO "What's going on here, is Lieutenant[N] Watt not eating in the Wardroom?" and tasked him to investigate. And he came back and the report I got was that there was an explanation for it which was related to the speed of service in the Wardroom. I found it believable with the number of officers on board and the number of hours available to him to take his meals, that he would find it more efficient to eat elsewhere. In any case, I told the XO that no matter what the reason it was not appropriate and that he was to do what he could to make the Wardroom service more efficient. And he said "Aye, aye, sir" and that was the end of that. That's the only incident I've heard of.

Q. And you've heard testimony from other people, of Higginson, Pittman, Kohli, that they would eat meals on occasion outside the Wardroom because they didn't want to be in your presence. You never noticed that? A. No, because it didn't occur, as far as I know.

Q. It didn't occur. Looking at Exhibit "FFF". Have you had a chance to look at it? It's a summary by year of hours spent at sea with annotations estimating the number of hours that riders were on board? A. Yes, sir.

1985

Lieutenant-Commander Marsaw

Cross-examination

Q. For 1993 you've got 2,031 hours with riders on board, 1992 you've listed 1,995 hours with riders on board. Is that correct? A. That's correct.

Q. Would you agree with me that if riders is defined not broadly, the way it's done in here, but more narrowly meaning people of superior military rank to you, these numbers drop significantly, don't they? A. Oh, yes. Riders, to me in that context, include anybody who is not a member, a regular member, of the ship's company.

Q. So the actual hours that SM1 went sailing with you, the actual hours that the Admiral went with you, or the Command Chief, is quite small compared to the numbers you've got listed here as riders on board, isn't it? A. Oh, absolutely. They don't have the time to come out to sea with me as much as I or they would like, I'm sure.

Q. When there were riders on board, of the status that could hold influence over your career, you behaved differently as commanding officer, didn't you? A. No, I didn't.

Q. You acted nice to your crew and you were pleasant, didn't you? A. I maintained my normal demeanour, I conducted myself in no way differently. In fact, I behaved the same way whether it was the press on board, the Commander Canadian Fleet, or a fellow submarine CO, or Sea Training Group. In fact, usually my attempt would be to, for example, I worked very hard to

1986

Lieutenant-Commander Marsaw

Cross-examination

try and get a senior engineering officer to come to sea with me. My motive was that it's quite easy to get senior MARS officers out to sea in a ship with you, the Admiral and such, and they have a good understanding anyway of the work that a MARS officer goes through, but my concern for quite awhile was to get a senior engineer out because I didn't feel that the officers who were sitting on my engineer's merit boards had a good appreciation of what work they did on board. The fact that a submarine engineering officer may stand 12 hours watch a day and then do his head of department job as well. And in a case like that, where I finally got my hooks into a senior engineer and get him out to sea, I want him to see exactly what goes on in day-to-day running.

Q. Would you agree with me that you've been extremely evasive in answering about the last 20 questions I've asked? A. No, sir. And I apologize if I've given that impression.

Q. Could you listen carefully to the questions that I'm about to ask for the balance of my examination and try to answer them? A. I've been trying to do that, sir.

Q. When riders were on board, meaning people who hold influence over your career, did you behave differently? A. No, I did not.

Q. Would you get your crew to perform in a special way and would you act a different way when they were on board? A. No, I would not.

1987

Lieutenant-Commander Marsaw Cross-examination

Q. Would you be conscious of the status and rank of the person who was on board, and would that influence your behaviour? A. I would be conscious of status and rank, it would not influence my behaviour.

Q. When people of superior military rank are on board, would you want your crew ... and get them to perform, show off, and put the mask on? A. I would not ask them to put a mask on. I would ask them to perform the way they normally would.

Q. But not to do anything extra? A. No. What they did day-to-day was enough.

Q. I note that you've introduced a number of Report of Proceedings for the OJIBWA, but you've omitted to have one of them introduced as an exhibit. Can you identify this one, please? A. This is for the first quarter of '91, and I did not neglect to have it introduced, sir.

Q. It's an exhibit before this court? A. I don't know. I didn't neglect to have it introduced. I understood it was not introduced for a reason.

Q. Is this a report that you wrote? A. Yes, it is.

PROSECUTOR: At this time, Mr Judge Advocate, I'd like to have it introduced as an exhibit.

1988

Lieutenant-Commander Marsaw Cross-examination

JUDGE ADVOCATE: Any objection?

DEFENDING OFFICER: I'm just having a look at it. I know that yesterday I had it and then it didn't go in. I just want to look at it briefly. Yes, I have no objection. I will read it at my convenience.

THE REPORT SOJ 1610-1, DATED 31 MARCH 1991 IS MARKED EXHIBIT "HHH".

PROSECUTOR:

Q. I understand this is a report that was sent to the Admiral, a person who does your PER, as well as SM1, the person who is directly responsible for writing your PER? A. It goes to those people, and they also have those duties.

Q. Can you read for the court paragraph (3), please? A. "OJIBWA was tasked at short notice to support SOCT 1/91. The crew, once again, responded in admirable fashion, using the opportunity to 'show off' to their new Squadron Commander. Support to the students of this very demanding and exciting course was given with enthusiasm and a certain amount of natural curiosity, as they realized that they were participating in the training of their future commanding officers".

Q. Do you honestly believe that Petty Officer, 1st Class Harris, who had been a member of the OJIBWA for 12 years would sit at the first panel watch showing and displaying an amount of natural curiosity realizing that he was participating in the training of future

1989

Lieutenant-Commander Marsaw Cross-examination

commanding officers? A. Yes, I would, sir, in the case of Harris, as I recall him. Yes, in that particular case, I would believe that.

Q. He would have just sat there on the first panel and said this is amazing, we're training our future commanding officers? A. Yes. The SOCTs were not that common at that point, we had done very few of them. And the only other exposure that our men would have seen is if they were lucky enough to be on a boat that was doing "Perisher" running.

Q. You submitted some other documents, including Exhibit "QQ", Exhibit "RR", which are messages going to SMI. Do you recall those messages? A. Yes, sir.

Q. And you've also submitted a number of Reports of Proceedings, beginning at Exhibit "UU", going to Exhibit "CCC". Do you recall those reports? A. Yes, sir.

Q. And these all outline your interpretation or your impression of the operational state of the boat and the level of morale and other things, don't they? A. Yes, they do.

Q. And these are going to the individuals that write your PERs, aren't they? A. That's one of the duties of those individuals, is also to write my PER. Yes.

1990

Lieutenant-Commander Marsaw Cross-examination

Q. And in your words, these are frank assessments of your appreciation of the state of the unit? A. That's correct. They are.

Q. Would you agree with me that if Master Seaman Bidinost or Chief [PO1] Tovey were allowed to write these reports, they may read a little differently than what you would have in them? A. Oh, undoubtedly they would. Yes. Their perspective is somewhat different than the commanding officer's.

Q. With regard to the kicking incident, you've stated on direct testimony that all submariners know to get out of the way or you learn very quickly. Do you agree with that comment? A. Yes. That's true.

Q. Yet, at the same time, you've given evidence that bumping is quite common on a periscope? A. Yes, it is. Sometimes you are not successful in getting out of the way.

Q. So at the same time submariners learn how to get out of the way quite quickly they still commonly bump into each other? A. Absolutely. The space is confined, most people do their best, but they're not always successful.

Q. When you kicked Lieutenant[N] Higginson and said "That'll teach you to get the fuck out of the way", was this your method of insuring that all submariners know you get out of the way, or learn very quickly? A. I didn't kick Lieutenant[N] Higginson ... I'm sorry, say

1991

Lieutenant-Commander Marsaw Cross-examination

those words. And no - that's not the way they're taught to get out of the way.

Q. Are you physically capable of raising your right leg, angling it at a 45 degree angle and thrusting it down with force? A. Yes, I am.

Q. So there's nothing physically restricting you from kicking Lieutenant[N] Higginson or anybody else, for example, is there? A. Nothing physical that would prevent it. No.

Q. I notice on your demonstration in court, you used the periscope going in a clockwise fashion. Do you recall doing that? A. Yes, sir.

Q. Was this done intentionally to contradict the evidence of the witnesses that stated that you went in a counter-clockwise fashion? A. Not at all. If I do not have a reason to go counter-clockwise, and there are a few reasons that cause you to go counter-clockwise, tactical reasons, it's my habit to go clockwise. And so when I did the demonstration I reverted to habit.

Q. So you'd agree with Lieutenant-Commander Truscott's testimony that it is common to go counter-clockwise on the periscope? A. There are a couple of reasons why. If you're under helm to port - you go counter-clockwise. If you have a contact with a bearing rate drawing left - you'd go counter-clockwise. If you have no contacts - you go either way you like. My

1992

Lieutenant-Commander Marsaw Cross-examination

habit was to go clockwise. I don't know if it's related to perhaps being right-handed and exerting force on a periscope more easily in that direction - I don't know.

Q. Do you recall Lieutenant[N] Pokotylo's demonstration where he showed you lifting your right leg ... or showed himself lifting the right leg, angling it at a 45 degree angle and thrusting it downwards with force - kicking the chair approximately 12 inches? A. I recall that, sir.

Q. Is that type of manoeuvre required to work your way around the periscope? A. No, it's not.

Q. Do you deny that you stated to Lieutenant[N] Higginson in the presence of a subordinate "It's too late to fire you off now"? A. I deny that.

Q. Do you agree that Lieutenant[N] Higginson stood up to you and told you in front of a group that your screaming and yelling wasn't helpful? A. That's not what he said.

Q. So you would deny that? A. Yes, I do.

Q. Do you deny telling Lieutenant-Commander Dussault, with regard to Higginson's and Pittman's complaint about switching off equipment, that if they don't like it we can fly them back from Boston? A. I deny that.

1993

Lieutenant-Commander Marsaw Cross-examination

Q. So it's your testimony that it never occurred while you were CO of the OJIBWA, any allegation that Lieutenant Kelk was physically abusing members of the control room? A. I never heard Kelk's name associated with any abuse like that. And I only presume, since the investigation had started, that his is what they're talking about in the Elford incident during TEAMWORK.

Q. Simple question? A. I beg your pardon. I deny hearing that Kelk was involved with physical abuse.

Q. So you would find that Lieutenant-Commander Virgin was mistaken when he testified that you did have knowledge? A. I did not have knowledge.

Q. Do you agree that Lieutenant-Commander Virgin was never tasked by you to conduct any sort of investigation into these allegations you had received? A. No, that's not true.

Q. So you would find that Lieutenant-Commander Virgin was mistaken if he asserted that? A. I did task him.

Q. Did you ask to see any written statements? A. No. Nor would I in asking an officer to investigate a rumour.

Q. Did you ask him who the alleged victims were? A. I believe I did. Yes.

1994

Lieutenant-Commander Marsaw Cross-examination

Q. What did he say? A. Am I allowed to refer to that?

Q. It goes to your state of mind. A. When he came back and told me that he had investigated the rumour, I said: Well, you know, who is suggested to be the perpetrator, who is suggested to be the victim. And he said: I can't find out anything about that, it appears to me that it was just somebody mistaking an accidental shove or a movement across the control room, and that they then had gone back to the mess with that story and it got blown up from there. That's the sort of report and words to that effect that I got after his investigation.

Q. Did you tell him to beat the bushes harder, to conduct a more thorough investigation, to contact witnesses and interview them independently of each other? A. No, I didn't. Not for a rumour.

Q. Do you know if Petty Officer Lesiuk was ever asked for a witness statement in the context of this investigation? A. No, I don't.

Q. Do you recall Kelk getting a black eye in Dublin? A. Well, he didn't get a black eye. I recall Kelk having two small scratches underneath his right eye.

Q. So you would deny that he had a black eye? A. I did not see a black eye on Lieutenant Kelk.

1995

Lieutenant-Commander Marsaw Cross-examination

Q. Were there any investigations conducted with regards to Kelk? A. Yes. Once again I told the XO to investigate because I heard again a rumour some days ... I believe it was after we had sailed, a rumour that an officer had deliberately given Kelk a smack. And I said to the XO again: Is there anything to this? Find out. And he got back to me and said: No, it was just, you know, Kelk slipped and it was just one of those things. It's just a story that's gotten blown up.

Q. Did you ask him if there were any written statements, who he had interviewed, who he didn't interview? A. No, not for a rumour. I talked to a few people myself about it, but I came to the same conclusion that the XO did, that it was a rumour that got blown up.

Q. So you didn't take any positive steps yourself to determine or probe the rumour beyond simply asking the XO to check it out and come back to you verbally? A. And speaking to a few people myself as well, but no, I don't order a full admin investigation based on a rumour.

Q. Do you know if Petty Officer Blair or Leading Seaman Hunt were ever interviewed about what happened to Kelk? A. I think I talked to Petty Officer Blair myself. I don't know about Leading Seaman Hunt.

Q. Do you deny pushing Master Seaman Lalancette? A. Petty Officer Lalancette? Yes, I deny it.

1996

Lieutenant-Commander Marsaw Cross-examination

Q. And you deny Byrne's assertion that you intentionally kicked him three times while you were on the periscope? A. I never intentionally kicked him.

Q. And you deny Petty Officer Parson's statement that you yelled at Master Seaman Smyth "I should kick you in the fucking nuts"? A. I deny that, sir.

Q. And you deny Master Seaman Smyth's statement that you yelled at him threatening ... or stating, excuse me, to kick some part of his anatomy he can't recall? A. I deny that. Yes, sir.

Q. And you deny stating to Gensey, concerning his movement of the periscope handles "I'll slap you across the head" or words to that effect? A. I deny that.

Q. And you deny Petty Officer Kramble, a defence witness, stating that 90 per cent of the crew members of the OJIBWA would cuff each other on the back of the head? A. I think that's a gross exaggeration.

Q. Did you undertake a process of intimidating your crew by verbally abusing them and threatening a number of them with various types of career action? A. I did not, sir.

Q. Is Lieutenant-Commander Craven mistaken when he refers to your state of the union address when you first became CO of the OJIBWA, that you might fail the first SOCT

1997

Lieutenant-Commander Marsaw Cross-examination

candidates? A. I did not say that, and it's an absurd thing to say.

Q. Is Lieutenant[N] Higginson mistaken when you stated to him that "If you were closer to home I would fire you" or "it's too late to fire you now"? A. I deny that.

Q. And you deny Master Seaman Madgett's comments to the same effect? A. Yes, I do, sir.

Q. And do you deny that you attempted to adversely affect Lieutenant[N] Wamback's career after he made the decision not to be your XO? A. I certainly did not.

Q. Do you deny that you threatened Lieutenant[N] LeClaire with actions arising from the echo sounder incident? A. Yes, I deny that.

Q. Do you have any explanation why Lieutenant[N] LeClaire would have kept the echo sounder paper? A. Perhaps as a memento, it's an interesting example of what can happen.

Q. Do you deny Lieutenant[N] Marr's testimony that you left hanging over him a threat of some type of career action because of an incident involving not having the proper crypto on board during Exercise TEAMWORK? A. Yes. That's not true.

Q. Do you deny Lieutenant-Commander Dussault's allegation that you said to him in the trainer "Remember what I did to Larkin" or words to that effect? A. I deny that, yes.

1998

Lieutenant-Commander Marsaw Cross-examination

Q. Do you also deny the comment "With this pen I could ruin your careers"? A. Yes. That's not my comment.

Q. And you deny on the 5th of August '94 stating to Lieutenant-Commander Dussault "I'll take you and your family down with me" or making a threat of some sort? A. I deny that.

Q. And you deny the testimony of Captain Whynott who says that an individual gave a threat to Lieutenant-Commander Dussault? A. I did not.

Q. Would you agree that intimidating people and threatening their careers is an abuse of authority? A. Yes, I would.

Q. And that it can be particularly insidious if it's coupled with a style of leadership that verbally insults and degrades individuals as well? A. I would agree with that, sir.

Q. Do you deny Lieutenant[N] Cassivi's testimony that during the RPC for Lieutenant[N] Reid, you approached him in a confrontational manner and said "What you said was pretty damning" and "what you said was very damning" to himself and Lieutenant[N] Byrne? A. That's not the way that conversation went at all.

Q. Do you deny Lieutenant-Commander Craven's statements to the effect that you will have to discredit him while he gives his testimony? A. Yes. I deny that.

1999

Lieutenant-Commander Marsaw Cross-examination

Q. Do you deny Lieutenant[N] Elford's testimony when he says that you approached him in a confrontational manner, asking him why he was going to demise your family, and then later referred to him a "cunt"? A. Yes. That's not the way that conversation went.

DEFENDING OFFICER: Mr ... sorry. I didn't want to interrupt the prosecution, and I don't know if it's in the middle of a run ...

PROSECUTOR: Four more questions.

DEFENDING OFFICER: Yes, okay. I just wanted to enquire whether it will be much longer or whether it would be appropriate to adjourn or not.

PROSECUTOR:

Q. And do you deny the testimony of Chief Petty Officer, 1st Class Tovey when he said you approached him and he felt intimidated at the Squadron Wardroom for the RPC for Lieutenant[N] Reid, saying "I saw your video and transcript and I'm not impressed"? A. That is not the way the conversation went.

Q. At that point you hadn't even had the video or a transcript, had you? A. That's correct. I didn't get them until mid-August.

Q. But you knew they were coming through the disclosure process by talking to your counsel, didn't you? A. Actually, I can't

2000

Lieutenant-Commander Marsaw Cross-examination

recall when I found out that I was getting videos and transcripts. I'm not sure of the date.

Q. You can't recall? A. No, I don't recall when I got that information.

Q. And you deny Lieutenant[N] Watt's testimony that says you approached him in the Wardroom at the Sub Squadron in a confrontational way, saying that "you were saying all sorts of bad things about me and jumping on the band wagon" in the presence of his superiors? A. No. That conversation didn't occur.

Q. Did you embark on a process to intimidate individuals? A. No, I did not.

Q. To keep them in line? A. No, I don't.

PROSECUTOR: No further questions at this time, for a 15-minute break?

JUDGE ADVOCATE: How much more time do you need to finish your cross-examination?

DEFENDING OFFICER: Yes, that was my question that, if he had for much longer, we could adjourn. If he ...

JUDGE ADVOCATE: Yes, because according to your previous calculation it should be over by now.

PROSECUTOR: Yes, okay. I would say that I've got 20-25 minutes left.

2001

Lieutenant-Commander Marsaw Cross-examination

JUDGE ADVOCATE: And you wish an adjournment before going on?

PROSECUTOR: I was asking for the adjournment because I thought my friend wanted a break. I'm sorry.

DEFENDING OFFICER: Maybe, the witness has been on the stand awhile. Maybe if we took 10 minutes, that would be all just to ... 10 minutes.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: If it's all right, I mean?

JUDGE ADVOCATE: The court is adjourned for 10 minutes.

ADJOURNMENT: At 1635 hours, 25 October 1995, the court adjourns.

REASSEMBLY: At 1645 hours, 25 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: You may be seated.

PROSECUTOR:

Q. Lieutenant-Commander Marsaw, when it comes to being a commanding officer, are you a perfectionist? A. No. That's not how I would characterize myself.

2002

Lieutenant-Commander Marsaw Cross-examination

Q. Is that how you were characterized in the opening statement by defence counsel, as a perfectionist? A. Yes, it was.

Q. But you would disagree with that?
A. It's not my perception of myself, sir.

Q. You've testified during this court martial that approximately ... it's a ball park figure, that in one way or another, through denial or admitting these individuals are mistaken, that 40 witnesses or so are mistaken in some aspects of their testimony. Do you agree with that? A. Their relation of events is not the same as mine, sir.

Q. And I would submit to you that that applies in the control room when you were the commanding officer as well. You would see mistakes from them when none existed? A. I'm sorry, sir? I would see mistakes from them when none existed?

Q. In the control room while you were the commanding officer. Do you agree or disagree with that statement? A. I suspect that it would have happened occasionally, not often I hope.

Q. Would you agree with me that the members of the control room were not making mistakes, although you may have perceived them as such, and that you simply used your position to vent on them, as CO of the control room of the OJIBWA? A. No, sir. I didn't.

2003

Lieutenant-Commander Marsaw Cross-examination

Q. Would you agree with me that you micro-managed everything and would react with temper by screaming and yelling personal insults when something wasn't going your way? A. No, sir. I didn't.

Q. Would you agree you micro-managed?
A. On occasion I micro-managed.

Q. When you got the keys to the OJIBWA from Davidson, it had just won a fighting efficiency award, did it not? A. That's correct.

Q. And the first big activity the boat undertook was the torpedo shoot? A. That was our first major activity. Yes.

Q. Which you said was 12 hits with 12 torpedoes? A. That's correct.

Q. Then, according to Lieutenant-Commander Truscott's testimony, you had to carry the team through the trainer. Do you agree with that? A. In '92? No, I wouldn't agree with that assessment. I understand what he means by that, but I think that's a simplistic way of putting it.

Q. It is, because you weren't carrying the team, were you, they weren't following your leadership? A. That's a far less accurate assessment.

Q. Why do you think that 30 or 40 of your crew members, including some of your own defence witnesses, another five or so cigar tube

2004

Lieutenant-Commander Marsaw Cross-examination

type witnesses, would say all these adverse things about you, if you've denied them and said they were mistaken? A. I would have to speculate on that, sir.

Q. Do you have any hard evidence to offer this court in your defence that would explain why all these individuals are mistaken in their testimony? A. Well, I'm not sure what the definition of hard evidence is. It is my intent to defend myself and we've brought witnesses to that effect and materials and my testimony, I understand, constitutes part of that. But I don't know what is hard evidence. I'm afraid I don't know.

Q. Why do you think they've come here and said the things they've said? Speculate if you wish? A. I think different people for different reasons ... I think there are some people who have succumbed to peer pressure. I think there are some people who have various motives, that would like to see me hurt. I think there are some people who have participated in the way rumours and stories grow and evolve. And it wouldn't surprise at all if some of them have repeated these rumours and stories so often that they've learned to accept them. I don't have the training to make a psychological assessment of what goes on in a person's mind that would lead them to this, and I would not feel comfortable even in using what little knowledge I have of human nature to come to a firm conclusion on that. I hope to understand it someday, I don't today.

2005

Lieutenant-Commander Marsaw Cross-examination

Q. Could it be that there is only one singular force, one common denominator, that unified all the witnesses that have testified as crew members concerning your leadership style, and that that one single force and that one common denominator is nothing other than the way that you treated them as commanding officer? A. No, sir. That could not be.

Q. Because it could never be you that would have caused this to happen? A. It's because I didn't, sir.

Q. Because you're a perfectionist?
A. No. I'm not a perfectionist. I try to work hard.

Q. It couldn't be your insulting manner and the way that you treated them that could be the common denominator and the unifying force?
A. No, sir.

Q. Do you believe that a good CO has the respect of his crew? A. He should do. Yes, sir.

Q. He should. But does a good CO have the respect of his crew? A. In every case I've seen, that's been the case.

Q. Do you believe that you have the respect of your crew? A. I believe that when I was there and after I left - yes.

Q. Today, do you believe you have the respect of your crew? A. That's something I

2006

Lieutenant-Commander Marsaw Cross-examination

struggle with, sir. You've brought in a number of people, a percentage of those who have worked for me and with me, and it has hurt to listen to their testimony ...

Q. I'd like to read you ... A. I beg your pardon?

Q. Sorry, go ahead? A. I am by no means convinced that that is the perception of the majority of people who worked for me.

Q. I'm going to read you an extract of a lecture given in 1943 by Captain Wolfgang Lüth, who was one of the most successfully U-boat commanders. In 14 patrols between January 1940 and October 1943, he sank over a quarter of a million tons of shipping, and at one time spent over 600 days at sea continually. He's a holder of the Knight's Cross and the Iron Cross with Oak Leaves, Swords and Brilliants. In giving a lecture to officers, of German submariners - and perhaps you're familiar with this lecture - he stated: "My task as a U-boat commander is to sink ships. To succeed in this task I need a crew to help me, and if they are to be of any help they must not only be efficient in the performance of the enumerable daily jobs in the U-boat at sea, but must enjoy doing them." And then he goes on to state to his officers: "Do not forget: it is the duty of the commander to have faith in his men and to be determined to go on trusting them despite sometimes being let down. For we have one great advantage: our young men are unreservedly eager and ready to come to grips with the enemy, and so long as they

2007

Lieutenant-Commander Marsaw Cross-examination

are led with ardour, they will gladly return again and again to the attack. But we must respect them and we must like them." Would you agree with that statement? A. Yes, sir. That's a good statement.

Q. Do you believe that you respected your crew? A. Yes, sir.

Q. Do you know how respect is defined? A. No, and I would be weary to hazard a guess with the dictionary there.

Q. The dictionary is here and "respect", amongst other ways, is defined as: "avoid degrading or insulting or injuring; refrain from offending" Do you believe that you had the respect of your crew?

A. Yes, I did.

Q. Do you believe that you refrained from degrading, insulting, injuring and offending them? A. Yes, I did, sir.

Q. Isn't it even possible for a split second that the reason these members have come to testify today ... and in the past I should say, under oath, is because you did not respect them?

A. No. That's not possible.

Q. Are you certain you did not threaten Lieutenant-Commander Dussault on the 5th of August '95 at the CFB Halifax Wardroom? A. I did not threaten him.

Q. Are you certain of that? A. Yes, I am.

2008

Lieutenant-Commander Marsaw Cross-examination

Q. Are you certain you did not kick Lieutenant[N] Higginson? A. Yes, I am, sir. I did not.

DEFENDING OFFICER: Mr Judge Advocate, I have refrained from intervening. This is cross-examination and the prosecution, as any cross-examiner, must have leeway, but I believe those questions have been answered, countless times anyway, already.

JUDGE ADVOCATE: They have. I don't know how many times we will have to hear them, but your friend is in cross-examination.

PROSECUTOR: Not too often. I'm about to get to a statement the accused made.

Q. You've testified with regard to refuting the cigar tube allegations "I could not be more certain of anything in my life". Is that correct? A. That's what I said. Yes.

Q. Are you as equally certain that you didn't kick Higginson and threaten Dussault as you are that you did not cigar tube Kelk? A. Yes, I am.

Q. Can you explain the Whynott card, why a Captain Whynott, an air traffic controller, on TV, having a beer, minding his own business in the Wardroom, would provide evidence that establishes or points to you threatening Lieutenant-Commander Dussault? Can you explain this? A. Only through speculation, sir.

2009

Lieutenant-Commander Marsaw

Cross-examination

Q. Can you explain it through evidence, through facts, through logic? A. Well, through logic, but that would involve speculation.

Q. So you cannot explain it through facts and logic, but only speculation? A. No, that's not what I said, sir. I said that I could use logic, but it would include speculation.

Q. I'd submit to you that you have a standard denial and you have a complete vacuum of explanation and hard facts to support your position. Do you agree with me or disagree? A. I disagree, sir.

Q. I would submit to you that the only thing you have is an absolute faith in your answer "I could not be more certain of anything in my life", and that's all you have to go on. Do you agree or disagree? A. I disagree, sir.

Q. And you feel that the testimony of Command Chief Brown, when he asserts that you said "You can't be doing that any more, Dean" and you responded with a smile "I know", he is mistaken in that regard? A. That is not what occurred in that conversation.

Q. Would it be more precise to say rather "I cannot be more certain of anything in my life", would it be more precise to rather say "I have never wanted to be more certain of anything more in my life"? A. No, that would not be more precise.

2010

Lieutenant-Commander Marsaw Cross-examination

Q. Because you're right and everyone is wrong. Isn't that correct? A. No, because I can only testify to what I know, sir.

Q. And when you do that, everyone is mistaken and you are not? A. I am stating what I know in front of this court. That's the best I can do, sir.

Q. And the evidence which is adverse to you is mistaken? A. The evidence that has been presented against me is incorrect.

PROSECUTOR: No further questions.

JUDGE ADVOCATE: Thank you.

Re-examination?

DEFENDING OFFICER: I have no re-examination.

JUDGE ADVOCATE: Questions from the court?

JUDGE ADVOCATE: No questions?

Thank you very much, and you may resume your seat.

WITNESS WITHDRAWS

DEFENDING OFFICER: Mr President and Mr Judge Advocate, it is five o'clock. I would at this point propose an adjournment till nine tomorrow morning, at which point I may call some

2011

Lieutenant-Commander Marsaw Cross-examination

further evidence that would be short, if at all.
But in any event, I will be in a position to let my position known to this court tomorrow morning at nine, and with the assurance that, no matter what, my case should be closed no later than noon tomorrow or something along that line.

JUDGE ADVOCATE: No objection?

PROSECUTOR: No objection, sir.

JUDGE ADVOCATE: Very well. This court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1700 hours, 25 October 1995, the court adjourns.

REASSEMBLY: At 0916 hours, 26 October 1995, the court reassembles and the accused is before it.

DEFENDING OFFICER: Good morning, Mr Judge Advocate, President.

JUDGE ADVOCATE: Good morning.

DEFENDING OFFICER: I apologize for the delay, I had misplaced some documents and I was looking them up and located them.

At this point I would like to introduce - and with consent of the prosecution - one Personnel Evaluation Report on Lieutenant-Commander Marsaw for the period May '91/April '92.

2012

Defending Officer

Admission

PROSECUTOR: On consent, sir.

DEFENDING OFFICER: It's a five-page document ... six.

JUDGE ADVOCATE: "III".

THE PERSONNEL EVALUATION REPORT FOR THE PERIOD MAY 1991 TO APRIL 1992 IS MARKED EXHIBIT "III".

DEFENDING OFFICER: I would simply, and for the purpose of the record, reconfirm that this is a performance evaluation report on Lieutenant-Commander Marsaw when he was captain of OJIBWA. It is for the period May 1991 to April 1992. It is an outstanding PER and the reporting officer on this particular PER is Captain[N] J. Plante, then the SM1 commander.

The other matter, and it is an admission on the part of the prosecution that I would like to formulate and I understand that the prosecution will concur, of all the reports of proceedings ...

JUDGE ADVOCATE: You have it in writing?

DEFENDING OFFICER: No, I don't. I apologize for that.

JUDGE ADVOCATE: So go slowly so that I take it down.

DEFENDING OFFICER: Yeah.

All reports of proceedings introduced as exhibits before this court were disclosed by the

2013

Defending Officer

Admission

prosecution to the defence. There is one report of proceedings that is missing for the period of '92, and this report simply could not be found, or was classified, or could not be found by either party and this is the sole reason why the document in question was not produced before this court.

For more certainty, it is the third quarter of '92 that is not produced, third quarter of '92.

JUDGE ADVOCATE: Do you make this admission, Major Abbott?

PROSECUTOR: I do, sir.

JUDGE ADVOCATE: And, Lieutenant-Colonel Couture, do you accept this admission as forming part of your case?

DEFENDING OFFICER: Yes, I do.

JUDGE ADVOCATE: The admission is so accepted by the court. Thank you.

DEFENDING OFFICER: That being the case, the defence closes its case and doesn't intend to call any further witnesses.

JUDGE ADVOCATE: Very well.

Major Abbott or Lieutenant-Colonel Couture, do you have any submissions to make at this time?

2014

28th *voir dire*

PROSECUTOR: No submissions to make at this time, Mr Judge Advocate. We'd like to make submissions with defence counsel concerning matters of law in a **voir dire** tomorrow morning.

JUDGE ADVOCATE: Very well. For the information of the court, I have been advised, as you have just been, that counsel will address the judge advocate at nine o'clock tomorrow morning during something that we call a pre-charge conference. It is held in the absence of the court and the purpose of that is to discuss the matters of law that should be addressed to you in the final addresses made by counsel.

We expect that this could take a good part of the day and it is also my information that counsel will be ready to address the court Saturday afternoon at 1300 hours, if you agree to sit on Saturday.

PRESIDENT: Yes, so that would be for both counsel on Saturday afternoon?

JUDGE ADVOCATE: Both counsel on Saturday afternoon. It can be done in half a day.

PRESIDENT: Yes, okay.

JUDGE ADVOCATE: Then just for further information, after that I will request some time to prepare my final instructions to the court. It's a matter of a couple of days, and I will know with more certainty after I have heard the submissions of counsel tomorrow during the pre-

2015

28th *voir dire*

charge conference and after I have heard their final address.

So as far as you are concerned, Mr President and members of the Court, your presence will not be required here before Saturday afternoon, 1300 hours.

PRESIDENT: 1300 [hours], okay.

JUDGE ADVOCATE: And for the other aspect this court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 0925 hours, 26 October 1995, the court adjourns.

REASSEMBLY: At 0905 hours, 27 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott.

PROSECUTOR: Thank you, sir. I would like to raise 13 separate points with you concerning matters of law and in the process of doing so, the first three points will concern our position on the substantive legal issues as well as the nature of an objective test, and we've prepared some memos on those points that I'd like to introduce now as exhibits. My friend already has a copy of them.

Here's an outline of the points I'd like to discuss with you as well as four separate

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legal memoranda we've prepared that we'd like to have introduced as exhibits, please.

JUDGE ADVOCATE: Thank you. "VD28-1".

THE 5-PAGE MEMORANDUM INTRODUCED BY THE PROSECUTOR IS MARKED EXHIBIT "VD28-1".

THE 5-PAGE MEMORANDUM INTRODUCED BY THE PROSECUTOR IS MARKED EXHIBIT "VD28-2".

THE 10-PAGE MEMORANDUM INTRODUCED BY THE PROSECUTOR IS MARKED EXHIBIT "VD28-3".

THE 5-PAGE MEMORANDUM INTRODUCED BY THE PROSECUTOR IS MARKED EXHIBIT "VD28-4".

JUDGE ADVOCATE: So these documents are marked "VD28-1, -2, -3" and "-4".

PROSECUTOR: Thank you. With regards to our first point, Mr Judge Advocate, concerns the substantive nature of the disgraceful conduct charge. The points we'd like to emphasize are found on page 4 of the memorandum concerning cruel and disgraceful conduct. These are points taken from the case law that's described in the first three pages.

The position of the prosecution that the term "disgraceful" is defined with reference to "The Concise Oxford Dictionary, Ninth Edition 1995" defines "disgraceful" as meaning: "shameful; dishonourable;" and "degrading."

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A second point, acts which fall within the ambit of disgraceful are not limited to actions which are done within the course of duty but may be conduct performed by a Canadian Forces member.

So, although, it could arguably be said that attending the wardroom of the OJIBWA after a mess dinner is not work within the conduct of someone's duty, it still can fall within the ambit of being classified as disgraceful. Nor does the act in question have to constitute a civil offence and importantly whether an act is or isn't disgraceful, as determined by the case law, is to be determined objectively by using an objective test. So in viewing the act, the question is simply asked, would a reasonable person find it to be disgraceful, shameful, dishonourable or degrading?

We would submit that the **mens rea** required for this offence, in this particular case, is a general intent offence: simply, did the accuse have the intent to insert a cigar tube between the buttocks of Kelk? Not, did he intent to be disgraceful when he did it? Simply, did he intent to pick up the cigar tube and place it between the buttocks. Then that act is looked at objectively and asked whether or not it is disgraceful. In terms of defining the nature of the objective test, we referred to the Supreme Court of Canada decision in **Creighton**.

And importantly as a sixth point, in dealing with the cruel or disgraceful conduct charges, the sixth point on the last page of the

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memo deals with the warning that sometimes judge advocates have used in the past, if there is any defence based on evidence or pleadings that suggest that the accused had to perform a certain function and used violence in the process of doing so.

So that would be our submissions on the disgraceful conduct charge.

With regard to the second point we'd like to discuss, the 129 charge. The prosecution will be relying on both methods of proving a 129, contravention of an order; as well as breach of an objective standard of conduct.

JUDGE ADVOCATE: Contravention of what order?

PROSECUTOR: With regard to the orders, contravention of QR&O article 19.13, a copy of which I'll provide you shortly. QR&O 4.02, subparagraph (c), and CFAO 19-39, the harassment CFAO.

What I'd like to do at this point, Mr Judge Advocate, is give you copies of all the orders that we will be relying upon. And I note - and it's done on the consent, I think, of my friend - that I'm submitting to you the CFAO that existed at the time between February '92 and October '93. It's changed since then. We're not relying on the current revision of the CFAO 19-39 but rather the one that existed at the time we allege the offence occurred. And that was slightly amended through one of the amendment

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changes 6/93, so you have both versions of the CFAO that existed during that time period.

JUDGE ADVOCATE: So you're relying on the one that existed at the time?

PROSECUTOR: Yes. It's QR&O 4.02 paragraph (c), QR&O 19.13 and CFAO 19-39, as it existed in February '92 under change 25/88, and then with change 6/93 it was subsequently amended in two areas.

For charge number four, we're relying upon all three orders. For charge number seven, alleging anti-Francophone comments, we're relying simply upon CFAO 19-39. And in both cases, with charge four and seven, we're also alleging that we have proven an objective standard of conduct which the accused has breached.

In my memo concerning the substantive nature surrounding proving 129, on the first two pages we outline different methods of proof. We're relying upon contravention of an order found in paragraph 4, at page 2 of the memo, and also starting at page 6 of the memo, showing the alternative way in which a 129 can be proved. Essentially, by proving:

1. That there is an objective standard of conduct required of the accused in the circumstances;
2. That the accused knew or ought to have known the existence and nature of

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the standard of the conduct required of him;

3. That the conduct complained of breached the standard of conduct required of the accused; and

4. That the breach by the accused of the standard of conduct required in this case resulted or may have resulted in injury to good order and discipline.

We would submit that in terms, I guess, of the disgraceful conduct charge as well as the 129, through cross-examining the accused he has admitted all the material elements of both offences with the exception of inserting the cigar tube and being present at the time it was and of speaking the words that are alleged to him in the particulars of charge seven and of conducting himself in a way that would equate to verbal abuse.

I don't believe my friend finds any controversy in my assertion that we've proven probably about ninety per cent of the charge with only ten per cent being in contest.

In terms of the **mens rea** required for the second method of proving a 129 by showing breach of an objective standard, there's really two elements to it, I guess. One, we have to prove that he said the words that are verbally abusive or words that are of an anti-Francophone derogatory nature. We believe it's a general intent. We don't have to prove that he intended

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to be verbally abusive. This may be a point that would require particular instruction on to the members of the court because in the opening arguments of defence counsel, he alluded at the end of his opening instructions that he may have said words but never intended it to be insulting or abusive. So the issue of what type of intent is required may be something that the members should be highlighted to.

The other aspect of **mens rea** is simply, knew or ought to have known, and I believe that's not a controversial point. On cross-examination the accused admitted that a CO would know that using verbally abusive language, personally insulting adjectives is not the standard, and that making anti-Francophone comments by a commanding officer would be completely improper.

That takes care of the 129 submissions.

Submissions concerning ill-treatment, again, with reference to our memo on ill-treatment, our position is summarized at page 4 of our memo. Again, ill-treatment is defined with reference to "The Concise Oxford Dictionary". The ninth edition of the dictionary defines "ill-treatment" as to: "treat badly" and "abuse." And I know in the **Tamblyn** case, the judge advocate then went on and pulled out the definition of abuse to help him define ill-treatment, and we would like you to do the same as well. "Ill-treatment" is defined as: "to treat badly" or "abuse". "Abuse" is defined as: "insult verbally, maltreat, incorrect or improper use (... of power)" or "insulting

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language", amongst other things is listed in the first paragraph on page 4 of our memo.

The second point, ill-treatment is not limited - and this is I would believe is important for an instruction to the members of the court - it's not limited to simply to physical acts. Rather ill-treatment may include psychological, emotional or any harm or injuries of that nature. And that's taken from the **Tamblyn** case.

We have two different types of ill-treatment charges here. One, deals with verbal words spoken; and the other one deals with kicking.

The fourth point, ill-treatment in Note (B) of the relevant QR&O defines "ill-treatment" as: "kicking". We would appreciate it if the members of the court could be highlighted to that Note.

The **mens rea** required for an ill-treatment charge we would submit is a general intent offence. There has to be an intent to kick someone, or an intent to speak the words which are listed in charge three. But again to highlight, given the opening statement made by defence, there is no intent required that he intended to ill-treat or insult or verbally abuse people when he spoke the words. Nor do we have to prove that he intended to ill-treat an individual if he kicked that person. It's simply a general intent offence.

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So there's really two things we'd ask that the court be highlighted to. One, is the fact that it's not limited simply to acts of physical violence but can include psychological, emotional or any other types of harm or injuries; and second of all, it's a general intent offence, it does not require the actor to intend to speak words that are verbally abusive.

Whether something is ill-treatment or not is determined objectively having regard to all the circumstances and based upon what reasonable men think. And the definition of the objective ... the nature of the objective test can be found in the Supreme Court of Canada decision of **Creighton**.

When looking at the cases dealing with ill-treatment judge advocates have instructed in previous decisions that it is up to the court whether to decide or not whether the acts alleged did in fact occur. But when you read the decision in **Bota**, for example, from Judge Advocate Brais, the judge advocate can give instructions to the court that should they find that the alleged acts - either the words spoken or the kick - did in fact occur, they may conclude that those acts, if they were carried out, do amount to ill-treatment. So the judge advocate has to leave up to the members of the court for them to decide whether the words were spoken or the kick was done, but he can instruct them that if they do find that the kick did occur, that the words were spoken, that would constitute ill-treatment.

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And again that instruction is an example that can be found in the **Bota** decision.

Dealing with the fourth topic, the objective test, I note that all these substantive charges - disgraceful conduct, 129s and ill-treatment - all have some aspects with regard to the essential elements that include expressly an objective test. Disgraceful conduct is defined objectively. Knew or ought to have known component for the second way of proving a 129 is defined objectively. Whether something is ill-treatment or not is defined objectively.

In the past the case is a bit uncertain as to what exactly constitutes an objective test, what factors can be considered into it and what factors can't be considered into it. The Supreme Court of Canada decision in **Creighton**, although dealing with the issue of criminal negligence, resolved the outstanding issues about the nature of objective standards and also of objective **mens rea**.

At page 3 and 4 of my memo, on objective standards, I stress the importance ... or the court stresses the importance of why an objective standard has to be included and defined in the way that they have. They note at paragraph 9 that the criminal law is concerned amongst other things with fixing standards for human behaviour. We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility.

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And paragraph 10 there's a quote from **Creighton** that states:

"The criminal law, as noted, is concerned with setting minimum standards of behaviour in defined circumstances. If this goal is to be achieved, the minimum cannot be lowered because of the frailties or inexperience of the accused short of ... incapacity."

They go on to emphasize again the underlying reason why certain things aren't considered when defining what the objective standard is.

This memo was written before the evidence unfolded so some of the issues concerning, I would suggest, objective **mens rea** aren't relevant for the instructions. But in defining to the court what you mean by objective, we would request that they are told why it is an objective test and what they can incorporate within the test, and most importantly what things aren't to be considered in determining whether or not an objective standard exists. The behaviour, the inexperience, the personal frailties, the mind-set of the accused is not a factor in determining whether a reasonable person would've done this or would've done that. Those things are now all excluded under **Creighton**.

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So it is not what Lieutenant-Commander Marsaw would have done in the surrounding circumstances of being in his boat, it is rather what a reasonable person would have done in the circumstances that Lieutenant-Commander Marsaw found himself in. I think that's an extremely important point and it's one unless the jury ... or the members of the court are expressly instructed on, they may be misguiding themselves on.

The next point concerns special findings. This is an important area, I guess, with regard to the third charge and the fourth charge. The third charge alleges certain types of words were said to individuals that are listed in Annex "A". The fourth charge alleges that individuals listed in Annex "B" were verbally abused.

The prosecution is relying upon the same evidence to make its allegations under the third charge and the fourth charges, it relates to, I believe, to the first group of individuals in Annex "A" and Annex "B". So, for example, if we've proven that Lieutenant[N] Soper, for example - the first person listed on Annex "A" - if we have proven beyond a reasonable doubt that he has been called words such as; idiot, asshole, et cetera, that is evidence that we can rely upon to argue for a finding of guilty on the third charge, but also for a finding of guilty on the fourth charge. Because we would argue that not only do those types of words fall within the particulars of the third charge, but they are also verbally abusing, as verbally abusing is

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defined as "insulting". So calling someone an idiot and an asshole, for example, can be considered verbal abuse as well as defined in the fourth charge. It can also be considered to be rebuking contrary to QR&O 19.13, for example.

So generally speaking we can use that type of evidence to argue why we've met the test under the third charge and the fourth charge. The problem arises, however, when we get into a **Kienapple** situation, and clearly it would be unfair for Lieutenant-Commander Marsaw to be convicted on the third charge as it relates to the evidence of Soper and then have the panel rely upon the identical evidence to enter a finding a guilt in relation to Lieutenant[N] Soper on the fourth charge.

So we're highlighting to the court, I guess, the possibility that - depending on how the members deliberate - we could be entering a type of **Kienapple** situation, I guess, and consequently it may be important for them to be highlighted about the issues concerning special findings.

They may rely upon all the evidence that they've heard in court to enter a conviction on the third charge because the individuals listed in Annex "A" they have found have been referred to with words like; idiot, asshole, et cetera. They may very well find that that is verbally abusive as well. But if they have entered a conviction, or have decided a finding of guilt on the third charge, they cannot rely upon that same evidence to enter a finding of guilt with regard

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to the individuals listed in the first 10 lines of Annex "B" of the fourth charge.

With the remainder of the individuals listed in Annex "B", from LeClaire down to Marr, there still exists evidence, however, which is independent of that required to prove the third charge that would support a special finding of charge four. For example, Madgett and Bidinost were never ... I don't believe there's any evidence that they were called idiots or assholes or words like that. But the Crown alleges there is evidence where a radar room door is kicked in on them and they're screamed at, "Will you gentlemen fucking join us?" There's evidence from Parsons and Smith, for example, that Lieutenant-Commander Marsaw kicks the door open on Smith and threatens to kick him in the fucking nuts.

This we would allege is all abusive language that is prejudicial to good order and discipline.

JUDGE ADVOCATE: So what you're submitting is that ... a way to summarize that would be that if they don't use the same evidence on number four than they used on number three, they can still convict on number four the same way they would have been in a possibility to convict had all those charges been laid individually.

PROSECUTOR: Exactly.

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And whether we get into **Kienapple** and special finding, I guess, depends on what status you as the judge advocate attach to Annex "A". Does it really form part of the particulars or is it peripheral information? If it forms part of the particulars then clearly a conviction couldn't be entered as charges three and four are drafted right now if they're using the same evidence with regard to Soper in both charges.

So what I've done is I've drafted - and it's for consideration for my friend - I'm putting this in the spirit of ... as the first attempt, the first draft, of maybe what could be a special finding instruction.

And it's triggered primarily by the fact that you'll see Lieutenant[N] Wamback's name in both Annex "A" and "B", and we know from the evidence, the way that that has unfolded in this case is that Lieutenant[N] Wamback was a member of the OJIBWA in February '92, but left the boat before the 5th of February '92. So although he's been referred to using these types of words as a member of the crew of OJIBWA and although he suffered prejudicial effects between the 5th of February and October of '93, he was never specifically referred to by the accused with those words between the dates in the particulars.

So if you give Annex "A" and "B" the status of being particulars rather than just simply peripheral information then, I think, the Crown has no other choice but then to request a special finding be made if there are going to be findings of guilt entered for charge three or four.

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What I'd like to do at this point, Mr Judge Advocate, is present you with an instruction that we've drafted concerning special findings of charges three and four, and only if you find that Annex "A" and "B" are, in fact, part of the particulars: "The prosecution has made a request for special finding with regard to charges three and four. Given the nature of the evidence with regard to Lieutenant[N] Wamback, I instruct you that you cannot find the accused guilty of either charge three or four as it is currently written as there is no evidence before this court upon which it could be suggested that Lieutenant[N] Wamback was verbally treated in the manner alleged in those charges between the dates particularized in charges three and four. Furthermore, the same evidence cannot be relied upon to convict the accused of two different offences. Consequently, with regard to charges three and four, it is still open to the court to make a special finding of guilt by striking out Lieutenant[N] Wamback from Annexes "A" and "B" of the charge sheet. Additionally, given my previous comments about relying upon the same evidence for a conviction on two offences, should you find that any of the individuals listed in Annex "A" have been ill-treated in the manner particularized in charge three, you cannot rely upon the same evidence to enter a conviction with regard to that very same individual when considering charge four. Should you, in fact, find that the individual was ill-treated in the manner particularized in charge three, his name, like that of Lieutenant[N] Wamback, should be struck from Annex "B" of charge four.

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Consequently, it would still be open for the court to make a special finding of guilt with regard to charge four as it relates to the individuals remaining on Annex "B". In short, you cannot find that Lieutenant[N] Wamback was verbally treated in the manner specified in charges three and four, nor can you find any other individual was verbally abused in the manner particularized in charge four if, and I repeat if, you have previously decided that the accused has ill-treated that same individual in the manner specified in charge three. Given that, it is open for the court to make a special finding in accordance with the prescriptions of section 138 of the **National Defence Act** which is found in article 112.42 of QR&O Volume 11, that article for your purposes reads as follows:", and then it concludes by directing their attention to the form described in QR&O 112.40.

What I've done is I've taken special finding instructions, I believe, from the **Farler** case, in the other submarine case dealing with ill-treatment, used the same format and then changed the factual content to fit this case. This is submitted as a proposition on special finding instructions and I'll leave it with you.

At this point, Mr Judge Advocate, we're into item number six, consciousness of guilt and similar fact, reasonable doubt instructions in **Browne v. Dunn**. They're all going to be discussed by Captain Gleeson. Thank you.

JUDGE ADVOCATE: Thank you.

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ASSISTANT PROSECUTOR: Mr Judge Advocate, the first matter I'll address is consciousness of guilt, and I realize that during the trial there was a number of occasions where evidence was proposed to be put in by the prosecution and after argument you recognized that that evidence was properly admissible although only on one specific ground of a number of grounds that were put forward by the Crown at that time. And I believe in most, if not all, cases that ground was for purposes of credibility. I believe we also argued that it was admissible for purposes of rebutting a defence with respect to intent; for purposes of showing consciousness of guilt; and, I believe, also similar fact, although I may be mistaken on the fourth ground.

Although at the time you let the evidence in, you specified you were only ... there was no need for you to deal with other issues because you found it was admissible for the purpose of credibility. It would be our position at this time that the evidence is before the court and it is, in fact, available for the court to use in a number of different ways. Credibility obviously remains an issue in this matter and the evidence can be used for that purpose. But we would submit it's also available for purposes of showing consciousness of guilt and also for similar fact.

And I'll just very briefly mention the evidence that I've collected that I think falls within these categories. The first is the evidence of Lieutenant-Commander Craven as it

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dealt with the incident in Lieutenant-Commander Marsaw's family room and a conversation that arose out of that incident.

The second is the evidence of Lieutenant-Commander Dussault which deals with the matter that occurred in the Stadacona Wardroom, where Lieutenant-Commander Dussault was called a coward, I believe, and then words to the effect "I'm going to take you and your family down with me" were spoken ... or allegedly spoken by the accused.

The third incident is the evidence of Lieutenant[N] Elford. Again, this incident occurred in the Stadacona Wardroom where after a number of words were exchanged, words to the effect of "I thought you were a good guy but you're actually just another cunt" were allegedly spoken by the accused.

The fourth piece of evidence is the evidence of Chief Tovey, and, again, this arose during an RPC, I believe, at the squadron wardroom in July of '94, in which Lieutenant-Commander Marsaw approached him and made a comment to the effect "I've seen your video and transcript and I'm not impressed". And, again, Chief Tovey's evidence was he felt quite intimidated by the manner in which those words were spoken and in the situation in which they arose and as a result left.

You also have the evidence of Lieutenant[N] Watt, again, at the squadron wardroom ...

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JUDGE ADVOCATE: Watt?

ASSISTANT PROSECUTOR: Lieutenant[N]
Watt.

JUDGE ADVOCATE: Okay.

ASSISTANT PROSECUTOR: Yes, and, again, comments about jumping on the bandwagon - these were made in front of superiors by Lieutenant-Commander Marsaw to Lieutenant[N] Watt in the presence of superior officers. Again, his evidence was he felt intimidated by both the circumstances and the words used.

Lieutenant[N] Cassivi gave evidence, again, of a conversation in the squadron wardroom during the Reid RPC in which he was told, in the presence of Lieutenant[N] Byrne, the accused allegedly stated to Byrne that his evidence was damning and that Cassivi's evidence was very damning ... or statements were very damning. Again, Lieutenant[N] Cassivi's evidence was that he was intimidated or felt intimidated in those circumstances.

And finally the last piece of evidence that I draw your attention to were the discussions with Lieutenant-Commander Kavanagh, and there were two such discussions put into evidence by Lieutenant-Commander Kavanagh. One was at a pub in which Lieutenant-Commander Marsaw made a statement to the effect that he was not in the wardroom on the morning of the 20th of December '91, in fact he'd gone home with

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Lieutenant-Commander Bush. And a similar statement was made to Lieutenant-Commander Kavanagh approximately a week later during a telephone conversation after Lieutenant-Commander Kavanagh's MP interview.

I think that's an accurate summary of the evidence that we would put forth as establishing ... or it could be used for the purpose of showing consciousness of guilt.

Mr Judge Advocate, I have for you a copy of an extract from Ewaschuk that deals with consciousness of guilt which I think has some information that may be of use to you in formulating an instruction if you feel that it's a proper instruction to give in this case. I also have an extract from the National Criminal Evidence Program, again, on issue of consciousness of guilt.

My friend doesn't have a copy but I'll certainly provide him with one. I apologize for that.

Essentially, Ewaschuk and the extract set out a number of reasons for which ... or a number of situations in which evidence can be put in on the basis of consciousness of guilt, and Ewaschuk refers to it at paragraph 16:19020 and the extract from the Criminal Law program refers to it at pages 6 and 7. And among those reasons are: for the purposes of showing intimidation of witnesses; false explanations; and false alibis.

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And it's on those three grounds that the Crown submits that all of the evidence I've just reviewed is admissible and an instruction should be given to the panel with regard to consciousness of guilt. Essentially, it's admissible where the evidence is such that it shows that the conduct of the accused was such that it permits the trier of fact to draw an inference of guilt from that conduct.

And, again, the false alibi type evidence we would suggest is the evidence ... or the alleged statements made by the accused to Lieutenant-Commander Kavanagh "I wasn't there". Also the statement made to Lieutenant-Commander Craven, allegedly made in the accused's family room "I don't remember anything about that", and "I'll have to attack your credibility".

False statements, the Crown would submit, are precisely the same incidence. Those two incidents are both false alibis and false statements and they're one and the same.

And finally all of the other incidents that I described fall within the ambit of intimidation or intervening or interfering with witnesses I'd suggest. And I would also suggest that the comments to Craven fall within this category as well given the relationship between the two and the comment that "I'm going to have to attack your credibility", again, could very well be taken as a threat and could be intimidating.

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It's also important to note that the accused was aware at the time that these statements were made to witnesses that all of these people were in fact witnesses in proceedings against the accused. They all happened after the date on the charge sheet and, I believe, the accused in cross-examination also indicated that he had a copy of the synopsis at some point near the end of July.

With respect to false alibi - and I don't want to go into this in a whole lot of detail, Mr Judge Advocate - but essentially the extract from the Criminal Law program deals with what the panel must be satisfied with before they can use that evidence - at page 8 - and essentially it must be more than a mere disbelief in the accused's evidence that he did or didn't make the statement. They must be satisfied that the alibi was a deliberate concoction or fabrication, and if they're satisfied with that, it's proper for them to use it with respect to consciousness of guilt.

With respect to false statements, they have to be satisfied of four things before it can be used: First, the statement clearly has to be shown as a lie. Again, it's our submission that there's evidence for them to reach that conclusion. It's their conclusion to reach of course; that the false statements were deliberate; that they relate to a material matter; and that the motive was a realization of guilt and the lie was made out of fear of the truth, is the test that's set out at pages 9 and 10 of the extract.

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Again, it's our position with respect to both the Craven and Kavanagh statements that there is evidence that would allow them to reach a conclusion that all four of those conditions have been satisfied and, therefore, the evidence could properly be used as evidence of consciousness of guilt.

I have a number of cases, Mr Judge Advocate, I'm going to give them to you, I'm certainly not going to go through them. I have a copy for my friend as well.

Essentially, these are cases that deal with the whole issue of consciousness of guilt and false statements and false alibis. Perhaps, what I'll do rather than even put the cites in the record, I'll provide a list of the cites to the court reporter once we've adjourned. As I say a number of these cases are referred to in both Ewaschuk and in the extract I've given you, and I hope they'll be of some assistance to you if you feel it's necessary to instruct in this area.

The final area under consciousness of guilt is, again, the interference or intimidation of witnesses. Again, we suggest that all the other statements fall within this category. The Dussault statement "I'll take you and your family down with me" clearly intimidating, a threat to a known witness in a proceeding against the accused.

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Tovey, Cassivi, Watt, all gave evidence that they were intimidated by the words spoken to them by the accused. Again, the accused was well aware that they were witnesses at the time he approached them, and also discussed the purpose of the approach, at least according to the witnesses that testified, was to comment on the proposed evidence that they would be giving in a proceeding against him. Our position is, again, that is clearly interference or intimidation of the witnesses especially in light of the fact that all of these people were subordinate in rank to the accused as well. It's another aggravating factor that's appropriate to consider.

Finally, the Craven evidence, given the relationship, it would be reasonable to assume that a comment that "I will attack your credibility" could intimidate an individual who has been involved in what may be considered a number of private matters with the accused in the past.

The final point I'd like to make with respect to consciousness of guilt, Mr Judge Advocate, and I will be brief with it, is that the Criminal Law extract at pages 3 and 4 discuss the use of similar fact evidence and whether it is available to go to the issue of merely the **actus reus** of the offence, or it can also be used to establish the intent to commit the offence. And the discussion goes on for a couple of pages in here, and talks about ... it is not clear whether, if consciousness of guilt evidence is admitted and the panel finds that it does in fact exist, the preconditions have been met, whether

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or not it can also be used to establish intent. And there's a number of lines of authorities, some say, no, it can never be used; some saying, yes, it can be used.

It would be our submission that the panel should be instructed in this area, and it's our position that the confusion arises in this area out of use of consciousness of guilt evidence where an accused is charged with a specific intent offence; murder, for example. Obviously, included offence of manslaughter is available. Can the consciousness of guilt evidence be used to establish ... or be used to assist in establishing the requisite **mens rea**, the requisite specific intent to commit murder? And that's where the divergent opinions exist. The Crown submits that there is no divergence in the area where you're dealing with a general intent offence, that the consciousness of guilt evidence is clearly applicable to determining intent as well in the general intent offence area.

And I'd specifically refer you to a note at page 4 of the extract which deals with the **Arcangioli** decision out of the Supreme Court of Canada in which consciousness of guilt evidence was properly used to infer the requisite intent.

And the comment by the author of this paper is to the effect that there was no issue of different levels of intent required and therefore it was a proper use of the consciousness of guilt test in that case.

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And we would submit we're in precisely the same situation here, and all of the offences which the accused is facing are general intent offences and therefore the evidence is properly ... if the court finds consciousness of guilt evidence, it can properly be used to infer intent as well.

I'll give you a copy of that decision which is found at 87 C.C.C. (3d) 289.

I'll also provide you with a couple of cases that deal with interfering with witnesses, consciousness of guilt, and, again, I'll provide a listing of those for the court reporter at the break.

So essentially, Mr Judge Advocate, our position is that this evidence, while admitted for the purpose of credibility, is also appropriate consciousness of guilt evidence and the panel should be instructed on it in these areas.

Unless you have any questions in that area, Mr Judge Advocate, I'll move on and briefly deal with the issue of similar fact.

JUDGE ADVOCATE: You may proceed.

ASSISTANT PROSECUTOR: Thank you.

Essentially, Mr Judge Advocate, we dealt with similar fact on, I believe, two or maybe even three **voir dires** during the trial, and at that time we submitted a memo to you on similar

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fact which may be helpful to you, and may not be.

I also have an extract on use of similar fact evidence, again, of Ewaschuk and, again, I don't have a copy of my friend but we'll provide you with one.

Essentially, Mr Judge Advocate, it's our position that the evidence which I previously reviewed with respect to consciousness of guilt can also be used as similar fact as it relates to the intimidation of the witnesses, and, I guess, the only evidence that I covered previously that wouldn't fall within this category would be the conversations that were alleged by Lieutenant-Commander Kavanagh. They were simply statements "I wasn't there."

But the conversations with Craven, Hart, ... excuse me, Craven, Tovey, Elford, Watt, Cassivi and Dussault, the Crown would submit are all similar fact type conversations which could be used to both prove identity, although identity is not really an issue with respect to the verbal abuse evidence, however, state of mind very well may be. And these are all instances where there was no overwhelming emergency, there was no sense of danger. They all happened in a wardroom or social setting, yet these words were used.

So under MRE 22, we would submit that that evidence is admissible and I'd also refer you to CFAO 19-39, the definition of abuse of authority which talks about interfering with the career of another member, again, and also goes on

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to state that abuse of authority includes but is not limited to intimidation. And, again, we'd submit under MRE 22 that we fall within the ambit of that rule with respect to that evidence.

We also have the similar fact evidence of Lieutenant[N] Wamback, if a special finding were to be made - and obviously as Major Abbott has indicated, he was not on board during the relevant period from 5 February '92 until October of '93 - however, that evidence clearly is similar fact evidence occurring on board the submarine with respect to Lieutenant[N] Wamback.

So it's available to the court. We also have Lieutenant[N] Wamback's evidence that he spoke to the accused which, again, goes to state of mind in showing that the accused knew or ought to have known that his behaviour was not appropriate.

We have Lieutenant[N] Byrne's similar fact evidence as well which you admitted on that basis as similar fact of the kicking charge, as well as the evidence of Petty Officer Lalancette on the use of physical force.

So Wamback's evidence is admissible as well as any other evidence that we would suggest that the panel should be instructed, any other evidence that they've heard that they find is outside the relevant period should be properly considered by them as similar fact.

Should you find that - and you haven't directly ruled on the whole issue of whether or not you are entitled to consider the common law similar fact under MRE 4 - however, should you

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find you do, we would also rely on that similar fact evidence to establish malice, intent and a regime of dominance and fear.

JUDGE ADVOCATE: I already tell you that I will not use that.

ASSISTANT PROSECUTOR: Okay, thank you.

Finally, Mr Judge Advocate, Ewaschuk makes reference to similar fact and states at paragraph 17:2120, sub (p), after going through similar fact evidence states the following: "... and that similar fact evidence, if accepted, enhances the credibility of the complainant when credibility is in issue, ... ". Credibility is in issue in this case and we would suggest that the evidence can and should be used for that purpose.

Again, I have two cases that Ewaschuk refers to in that regard. The first is **Regina v. G.F.P.** (1994) 89 C.C.C. (3d) 176, Ontario Court of Appeal decision; and the second is **Regina v. C.R.B.** (1990) 55 C.C.C. (3d) 1, which is a Supreme Court of Canada decision. Both of these cases deal with use of similar fact evidence to assess credibility where credibility is in issue.

Those are my comments on similar fact, Mr Judge Advocate.

I'd like to address the use of the accused's testimony with respect to a charge to the panel as to how that evidence can be used

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depending on what conclusions they reach with respect to that evidence. The law, the Crown would submit, is quite clear in that an instruction should not be given to the effect that the panel has to decide whether to believe the Crown or the accused. And, again, I'll give you an extract from Ewaschuk which deals with the accused's testimony.

There has been some confusion with respect to charges ... or at least it appears there has been from the case law that I've reviewed. I think it has been resolved, at least to some extent, as a result of a couple of decisions out of the Supreme Court of Canada on charging the panel with respect to the use of the accused's testimony. And the two cases that I'm specifically referring to are **D.W. v. The Queen** (1991) 63 C.C.C. (3d) 396; and the second case is, again, a Supreme Court of Canada decision, **R. v. S. (W.D.)** (1994) 34 C.R. (4th) 1.

I'd also like to refer you to a third case which is **Regina v. Chan** (1993) 87 C.C.C. (3d) 25, Alberta Court of Appeal decision.

Essentially, Mr Judge Advocate, the **D.W.** decision gives a preferred instruction with respect to credibility at page 409. Mr Justice Cory provides that. It's affirmed in the **S. (W.D.)** decision. However, in the **Chan** decision, at pages 30 and 31, the court talks about some confusion arising out of the second portion of the charge, which was suggested in **D.W.**.. Maybe I'll just read the charges - it's

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very short - that's suggested by Cory in S.(W.D.). It reads:

"'First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.'"

In the **Chan** decision they talk about some confusion arising out of the second portion of that charge where, in fact, a panel or a jury may feel they have to acquit the accused even if they don't believe his evidence. And in the **Chan** case an instruction was given to the effect that if they disbelieved the evidence of the accused and rejected it as untrue they need have no further regard to it, is the charge that was given in that case. And the Court of Appeal felt that was an appropriate charge and it clarified this whole issue.

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As a result - again, simply for your consideration - based on these three cases, perhaps a very brief charge on this respect which incorporates both the comments in **Chan** and the decision of the Supreme Court of Canada in **S. (W.D.)** - and as I say, it's merely something for you to consider - and I'll provide you with a copy of it.

Essentially, it's very close to the charge given or suggested by Mr Justice Cory in **S. (W.D.)** but it incorporates the comments in **Chan**, and it reads as follows: "With respect to the testimony of the accused; first, if you believe the evidence of the accused you must acquit him; secondly, if you are unable to decide whether or not you believe the evidence of the accused but you are left in a reasonable doubt by it, you must acquit him; thirdly, if you do not believe the evidence of the accused and reject it as untrue, you need have no further regard to it and you must ask yourself whether on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

That's, again, for your consideration, Mr Judge Advocate, and based on ... drafted from the cases that I've provided you with.

Final point I'd like to touch, Mr Judge Advocate - and very briefly because I realize you have made a decision on it - and that's the matter of **Browne v. Dunn**. We certainly respect your earlier decision in that regard, however, we would ask that you consider providing a very

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short instruction to the panel on the issue of Crown witnesses not being cross-examined on their actions or words which were later contradicted in the evidence of the accused or other defence witnesses but, I think, primarily in the evidence of the accused, or otherwise brought out in the evidence.

We certainly would not ask that you review the whole totality of the evidence and read it back to the panel and tell them on this point or that point. It would simply be a very brief instruction that witnesses were not cross-examined on their words or actions. There was contradictory evidence given at certain portions during the trial, and where your notes reflect there was no cross-examination of the witnesses, then they should consider that when they consider the weight of the contradictory evidence.

Essentially, it's the test set out in **Regina v. Jackson and Woods** (1974) 20 C.C.C. 2(d) 113, which I believe you have a copy of, 1974 decision of the Ontario High Court of Justice. If you don't have a copy of that case, Mr Judge Advocate, I can certainly provide you with a copy.

JUDGE ADVOCATE: I do.

ASSISTANT PROSECUTOR: Those are my comments on **Browne v. Dunn**.

PROSECUTOR: Very quickly, Mr Judge Advocate, with our points from 10 to 13, I don't know which defences the accused will raise. I

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suspect the whole battleground is going to be around the issue of credibility. Within the issue of credibility, the defence may very well try to persuade the panel and yourself that these witnesses are not credible because they have formed - and various types of words can be used to describe it - but formed some sort of collaborating conspiracy in which they've been swept into a whirlwind of rumours and adopted rumours as their own and have then convinced themselves that they are now fact.

This is the sort of suggestion that came out in cross-examination of the accused but it's one that's been sort of suggested throughout the trial and one of the purposes of having the *Mail-Star, Chronicle-Herald* article introduced.

On cross-examination I squarely put to the accused, "Where are your facts and where are your logic to explain why seven or eight witnesses say that you were in the wardroom of the OJIBWA and you inserted the cigar tube or were participating in markings?". I have no facts, I have no logic to explain it, I have only speculation. "Where are your facts and logic to explain why forty witnesses including some of your defence witnesses say you've used words like idiots and assholes?" I have no facts and logic to explain why they come here today and say this. I just know that it never happened. Speculate. And then we get into things like, they've adopted rumours that have evolved, they've talked to each other, things like that.

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This aspect of the defence as it relates to the only issue in this case, credibility, may very well be raised by defence counsel. And I am submitting that there isn't any evidence that gives this aspect of a defence, as it relates to credibility, an air of reality.

Because there was an article and because people are testifying against the accused does not provide any evidentiary links or basis for them to argue some sort of conspiracy in any type of form has existed to cause the Crown witnesses to now concoct the stories that they're concocting. There has to be some air of reality based on evidence, not speculation, before defence counsel can propose that defence to the panel.

Out of all the things we are submitting to you today, this is the most serious submission we're submitting to you. That defence, if allowed to go before the panel, takes them well into the area of speculation and completely off the tracks of focusing in on evidence, hard evidence that's been brought under oath before this court. And we'd simply ask you to seriously consider or not whether there is an air of reality to any type of defence that might be raised that relates to credibility that suggests that the whole thing was concocted.

The next point concerns what I've called in point number 11, Subs aren't different, warning. In the **Buttar** case and the **Farler** case which both deal with disgraceful and cruel conduct arising off the HMCS ONONDAGA, there was

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evidence that kept on weaving its way in and out of the courtroom from different witnesses to the effect that, well, subs are different and what might be normal conduct outside a boat, is a little differently defined when you're inside a boat. Electric shocks, hanging people upside down and dropping them on the deck by ropes is sort of the rough and tumble life of being a submariner.

We heard the same sort of evidence through what I call the Nietzsche men; Kramble, Tingle and Cox, who all testified under oath that, well, verbal abuse and physical abuse is a little different because it's the nature - as Tingle said, of what submariners do. We have different thresholds, we deal with things a little differently because subs are different and we're submariners.

The judge advocate in the **Buttar** case, and also the other judge advocate in the **Farler** case had to give a sharp warning to the court to the effect that although people have legitimate rights to pursue their missions, they cannot do it in a way that takes them outside the rule of civilization and the rule of law.

And I would ask - and I've got a sharp warning drafted for your consideration - that a similar type of warning be given to the jury ... for the members of the court as well, and it simply reads - and it's drafted on the basis of the **Buttar** and the **Farler** instruction, the sharp warning that was given to the members of the court there: "Section 25 and 129 [I guess, of

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the **National Defence Act**] do not renounce or restrict the right given to all Canadian Forces commanding officers by their superiors to accomplish their mission, but the law imposes upon all of them, in or outside submarines, the rule of civilization by which they must in all circumstances renounce, condemn, repress and not participate in conduct which verbally belittles, humiliates, degrades or demeans subordinates."

Point twelve, deliberation instructions, pulling out some of the instructions that have been given to GCMs in the past where the prosecution is posing alternative theories of liability within a single charge, either as aiders and abettors, or relying on different statutory basis. At least some of the instructions have read as follows: "May I suggest in your individual consideration of the charges you address the essential ingredients of each charge sequentially. If it is concluded that a particular essential ingredient of a charge has not been made out beyond a reasonable doubt, then you can cease your consideration of that charge since at that point the charge would not have been made out and there would be no requirement to consider the remainder of the essential ingredients of that charge."

If those instructions are followed to a letter, I would submit that a GCM could never consider an alternative theory of liability, and I would submit that this instruction is deficient based on the Supreme Court of Canada decision in **Thatcher**.

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I'm not sure what instruction you use when different theories of 129s or different types of orders are relied upon to prove 129s are used. Maybe you go into more detail. But I'm simply highlighting to your attention that in **Thatcher**, the court has to be instructed on the various theories of liability and the fact that they can reject one theory and still convict on another theory - and this becomes particularly important in a system of military justice because we don't have unanimity of vote. We have a majority decision of five panel members who theoretically could convict on a 129: one person saying I find guilt based on QR&O 19.13; another individual can derive his finding of guilt based on CFAO 19-39; a third person could find guilt based on breach of an objective standard of conduct.

But nowhere in the instructions, at least this type of instruction that I've read, are the members informed of that, or instructed to. They're simply told that if you find that one of the essential elements has not been made out dispense with any further consideration of the charge.

If this instruction was properly followed by the members of the court, they could get to the point where they considered that 19.13 not to have been met and reject any further consideration of other basis of liability under a 129, so I'm simply highlighting the **Thatcher** problem as it relates to the unique nature of a military justice tribunal that can find guilt on a majority decision and enquire as to whether or

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not that instruction, if that's the one that you're intending on using, can be flushed out a bit more so they fully understand that just because they may reject one theory of liability, they can still consider the other theories dealing with that particular charge.

As the final point - I consulted my friend - what I intend on doing when I address the members of the court tomorrow is not go through all the evidence. I'm getting tired of swearing and using profanity for one, and it takes up a large amount of time to go through each individual witness. What I propose on doing is giving them sheets of paper dealing with the key essential elements of some of the charges and saying this is from the prosecution point of view the evidence we believe we have called that substantiates the evidence on that particular essential element with regard witness by witness.

Certainly, we'll tell them, and realize you will as well that what I'm submitting to them is not evidence. It's based on our notes which have all the frailties of a person taking notes, so they must rely completely on theirs if there's any discrepancy. But what I would like to do - and I believe I have the consent of my friend - is to give them what I called these fact sheets and say please consider them. This is our interpretation of how the evidence has fallen out with regard to the key essential elements of the case.

That'll allow me to not get into the evidence witness by witness. Not get into it by

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essential element by essential element, and save me from using profanities, you know, a hundred times or so. So that's what I would like to do.

At the same time I have some case law I can dig up that allows me to do it, but wanted to get your sense first before I just simply jump into it and find out at the very beginning of my presentation I'm unable to do so and my game plan's been completely knocked off the tracks.

Those are all of our submissions. Thank you very much.

JUDGE ADVOCATE: Thank you.

Lieutenant-Colonel Couture, perhaps the first thing I would ask you is - in order to simplify the debate - to refer me to matters that have been raised by the prosecution to which you disagree, and those will most probably be the matters that I will have to rule on before you address the court. It will be easier this way instead of repeating everything or giving another side of the theory.

DEFENDING OFFICER: Can we take maybe a 15-minute so to search a bit, and I'll be ready to address the court in fifteen.

JUDGE ADVOCATE: Very well.

DEFENDING OFFICER: And I will proceed as you requested. I will outline for you a few points that I wish you to consider and then address those that I disagree with.

JUDGE ADVOCATE: Okay.

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The court is adjourned for 15 minutes.

ADJOURNMENT: At 1020 hours, 27 October
1995, the court adjourns.

REASSEMBLY: At 1035 hours, 27 October
1995, the court
reassembles and the
accused is before it.

DEFENDING OFFICER: Thank you, Mr Judge
Advocate. As I suggested before the adjournment,
I would briefly address you as to what I would
like you to include in your address as a matter
of law and then I will touch upon those matters
with which I disagree with the prosecution.

I believe that having regard to the
evidence presented - and I'm sure you have
thought of it but I'm just suggesting it in case
- that the court should be addressed on how to
treat opinion evidence both expert and ordinary
witness. And the main aspect, of course, with
the expert witness is that it is not ... the
court is not bound by their expert testimony,
that's pretty standard I believe.

With respect to 64, which is opinion of
ordinary witnesses, and based on the evidence we
have heard I would invite you, Mr Judge Advocate,
to advise the court as to how and on what basis
they must assess the probative value of those
opinions. In that regard I sort of referred to
64(4) of the Military Rules of Evidence which
reads:

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"When permitted to give an opinion under subsection (1), an ordinary witness may be questioned as to the grounds of his opinion."

And it is our position that throughout the trial we have questioned a number of witnesses as to the grounds for their opinions. I can't give you any particular quotes now but, let's say, for example, I believe, Shea comes to mind, who has given opinion evidence that Lieutenant-Commander Marsaw was, I don't know, he expressed an opinion on him, that he was a, "flagrant asshole", for example. On what basis?

Others have given opinion that Lieutenant-Commander Marsaw was leading by intimidation and terror. We take the position - and of course I know that credibility is not your field, and we will argue with the court on credibility of witnesses and all that - but I believe they should be given a bit of a warning as to how to assess, that opinion given must be based on some facts. And I can think of a number of witnesses where he would say, well, yes, he leads by terror or intimidation. But in many instances though there were very little fact to support this. So we claim that it then becomes a gratuitous affirmation or opinion of them and the court must be given a bit of a direction as to how to assess an opinion.

Similar facts. I would like you to incorporate, of course, in your address the use they can make of similar facts and the type of

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address that we believe should be made is represented in possibly two cases of the Supreme Court of Canada, **Regina v. C.R.B.** [1990] - I believe the prosecution has provided you a copy of this this morning, which is reported at 55 C.C.C. (3d) 1. And particularly at page 27, I don't intend to read it. I just want to direct your attention to it.

The second paragraph at page 27 - of course I know you will read the whole ... or greater portion of the case - but particularly the second paragraph at page 97, the Supreme Court gave some indication as to what should be the, sort of, address given to the jury.

Also in the Supreme Court of Canada decision of **Regina v. L.E.D.** [1989] 50 C.C.C. (3d) 142. And again I don't intend to read a lot to you. But at page 161 ... in fact it starts with the words, or subsection if you wish: "Charge to the jury ... " at page 161 and it goes on at page 62 and it ... **Regina v. L.E.D.**

JUDGE ADVOCATE: Do I have this case?

DEFENDING OFFICER: I believe it may have been given to you but for more certainty after we have completed this matter I'll have a copy made for you. It may have been referred to you ... given to you earlier, but essentially the Supreme Court talks about:

"The inherent prejudicial effect of similar fact evidence may be felt by a jury in three main ways ... "

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which are described, the first, the second and the third, and then it's addressed how to best avoid that in the address to the jury.

I believe you do have **C.R.B.**, it was given to you this morning. I'll make sure that a copy of **L.E.D.** is given to you.

We have identified three clear areas which we consider similar fact evidence: Byrne, reference kicking; Lalancette, referring to being pushed out of the way; and Stone, I believe, it must be similar fact because he's not listed in any of the Annexes "A" or "B", "You're a fucking prick PO", or words to that effect.

We take the position, and you seem to have indicated earlier on this morning that you will stay with the use of similar facts evidence as contemplated in the Military Rule of Evidence 22 without exceeding the boundary as you've been invited to do so by the prosecution.

Harris and Parsons have testified something along the line "I should kick you in the nuts" or words to that effect. They are not listed on Annexes "A" or "B" these two, as I recall, and of course a special finding is not open if there was something reprehensible in those alleged words, he could not be found guilty, and I suppose the only value of this then could be only similar fact, I suppose.

Then there's a series of quotes ...

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JUDGE ADVOCATE: So are you saying that Harris and Parsons should be included in the similar facts, in the list of ... ?

DEFENDING OFFICER: I guess they must because, I mean ...

JUDGE ADVOCATE: So it's more than three areas. We're up to five now.

PROSECUTOR: I wonder if I can assist my friend. Harris and Parsons have never testified that they have been referred to in that manner. Parsons was a witness saying that he saw Master Seaman Smyth being yelled at, "I should kick you in the fucking nuts". It's Master Seaman Smyth who's listed in the Annex, not Parsons.

DEFENDING OFFICER: Okay, so to that extent anyway. If those words are directed - and I apologize - I did intend to mislead you here. I may have misunderstood that portion. If it is, of course, as presented by the prosecution and, in fact, they say that in relation to a person who wasn't on the charge sheet then that's all right. In that respect, and further to the prosecution comments this morning, I take the position that Annexes "A" and "B" do form part - I'll get back to that - but they do form part of the particulars and it's just not there for mere information.

Consciousness of guilt. I will make some general comments. I believe I have given you a number of cases during the trial. But, again, for more certainty, as soon as we're

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finished - I didn't have an opportunity to re-copy them all this morning. I would like to refer this court to four cases, **Regina v. Cole** [1990] 53 C.C.C. (2d) 269, Ontario Court of Appeal decision; **Regina v. Minhas** [1987], M-I-N-H-A-S, 29 C.C.C. (3d) 193; **Regina v. Burdick** [1986], B-U-R-D-I-C-K, 27 C.C.C. (2d) 497; and **Regina v. Parrington** [1985], P-A-R-R-I-N-G-T-O-N, 20 C.C.C. (3d) 184. I will not indulge in any quotes of those cases. I will make sure that those are provided to you shortly after this session.

I will just give you the gist - or my understanding of those cases. First of all, the action or words that can be used, and eventually to draw an inference of guilt, must be clear and their proof to start with must be clear. In most of those cases the accused had admitted; for example, having lied to an investigator. In another case there was clear evidence of trying to fabricate an alibi and so on and so forth. That was not even contested, like, it was there.

Then those cases deal with - even when proven. And, in fact, in one case the accused had admitted - I think lied but then explained why she had lied. And the court was instructed that if they had any reasonable doubt as to the reason of her lie they could not draw any inference.

So I suggest to you that in this particular case there are two problematic areas. One, the evidence that those events even took place is strong ... and even if those were not

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contested, which they are, we suggest that most of those quotes are such that no reasonable person can draw an inference of guilt from them, and I would suggest that it would be for you - and I will explain to you why - to explain to the court that what I call quotes, like, to Craven "I don't recall. I'll have to challenge your credibility"; to Marr "I don't recall that night"; Cassivi "Damning"; Byrne "Very damning", or vice versa; Tovey "I'm not impressed", with this, with what I've seen; Elford "Why are you trying to demise me and my family", et cetera.

I suggest to you - and I rely on your earlier decision in this case. In fact, that was the second witness, I believe, Craven, in any event. In Craven, you ruled that the words that I referred to a moment ago were admissible as they might be used to challenge credibility. I would suggest, and I would submit that those words now that they are before the court, I mean, you have admitted them, and most of those quotes form part of those that we objected to routinely throughout the trial and that you denied, of course, our objection. All those quotes we submit can only be used on the matter of credibility, and we believe that you should advise the court that no more can be made out of this than credibility.

The **Kienapple** issue at three and four. And, in fact, three and four ... and for that matter three and four is one aspect of it - charges three and four that is. The other aspect of it is also seven and three which may present a

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Kienapple situation because charges seven alleges
...

JUDGE ADVOCATE: Seven and three?

DEFENDING OFFICER: Yeah.

JUDGE ADVOCATE: Three and four, okay.

DEFENDING OFFICER: Three and four is a clear situation and on top of that seven, which is the last charge, I believe.

JUDGE ADVOCATE: Uh-huh.

DEFENDING OFFICER: If he made those comments to Dussault, like anti-Francophone comments to Dussault, that's harassment, that's verbal abuse and that would also fall under number four.

JUDGE ADVOCATE: That would be because you consider that they are words to the same effect than the words reported in charge number three?

DEFENDING OFFICER: No, sir. Let me ...

JUDGE ADVOCATE: "Fucking idiot, cunt, stupid, asshole, incompetent, slow" and "lazy."

DEFENDING OFFICER: No, sir. Charge four alleges ...

JUDGE ADVOCATE: Oh, I'm sorry. I was in three. Charge number four, okay.

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DEFENDING OFFICER: Charge four alleges that the people listed at Annex "B", which includes Dussault, were verbally abused in the presence of other crew members, alright.

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: Charge seven alleges ...

JUDGE ADVOCATE: Yes, but I'm being confused here. You said three and four and then you said seven and three, not seven and four.

DEFENDING OFFICER: Oh, I apologize, okay. I misled you then. It was a slip of the tongue.

JUDGE ADVOCATE: So it's seven and ...

DEFENDING OFFICER: Three and four.

JUDGE ADVOCATE: Three and four, yes.

DEFENDING OFFICER: The prosecution has identified, and I will address it in a moment. And then the other is seven and four.

JUDGE ADVOCATE: Ah, okay.

DEFENDING OFFICER: I apologize, I misstate myself.

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So four states that the people in Annex "B", which includes Dussault, have been verbally abused in the presence of other crew members.

Seven alleges a conduct to the prejudice of good order and discipline in that the accused would have personally harassed Lieutenant[N] Dussault by making anti-Francophone comments which would fall within the definition ... harassment falls within the definition of verbal abuse in CFAO 19-39. So that's another aspect of **Kienapple** there that I would say would have to be considered.

My comments with respect to the submission of the prosecution. Charges three and four, **Kienapple** and special finding, well, I won't tell you about **Kienapple**, you're familiar with it, and it is quite clear that if there was a guilty finding on three, it would include, basically, the people in four, at least a good part of them.

But my representation here though is that the prosecution has worded those charges in such broad terms, and I believe that reflection must be given to the propriety of further expanding the boundaries by adding the possibility of special findings in here, where the possibility are ... they are capable of being counted. But the various possible scenarios, I mean, are so far reaching in terms of possibilities and number, at the end of the day is it a case that lends itself to that sort of very minute study of each little detail, or would at the end of the day, on the basis of fairness,

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if they don't find the charges as they are, well, that's it. We're talking about Wamback, special finding for Wamback. I mean, Wamback apparently, according to the prosecution, is not within the period, so now we want to incorporate him. I mean, we take the position that the prosecution has been allowed to bring a wide range of evidence and trying to dissect each little portion of it as they suggest gets very difficult in any event.

Those are about my comments on
Kienapple.

Oh, on special finding, if that situation ever arose; for example, especially in relation to three. I would like if at all possible, and I'm submitting it to you for your consideration, if they come with a special finding I would expect to hear if he's not found guilty just as charged which would indicate that all the words or all the people, I don't know, sort of, didn't match or something, that they say exactly what they found him guilty of.

For example, if at the end of their deliberation - although very unlikely I must admit - but they said, in relation to three we find that anyone on list "A" was called a "fuck", example. In my view they should be able to tell the court exactly what they have found in the evidence. Because if they come back and they just enter a guilty finding on three without specifying what they have determined to have happened, it would appear from the conviction

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that the accused has been found guilty of having said all those words to all those people.

JUDGE ADVOCATE: No. Because I will give them special instructions to that effect that it doesn't have to apply to all the words and all the people. One person being told one of the words included in number three is sufficient to prove that third offence.

DEFENDING OFFICER: As is.

JUDGE ADVOCATE: As is. Of course if all the other ingredients are proved. But, I mean, the prosecution does not have to prove that; for example, charge number three, that the accused told all the words mentioned in number three to all the people mentioned in Annex "A".

DEFENDING OFFICER: Uh-huh.

JUDGE ADVOCATE: That doesn't have to be proven. I mean, as long as one of those words, or words to that effect mentioned in number three has been spoken by the accused to one of the persons mentioned in Annex "A", the instructions will be to the effect that this is sufficient to prove that essential ingredient, so there can be no confusion at that point.

DEFENDING OFFICER: So what you are saying, Mr Judge Advocate, is that they may find that - let's take an example that will bear. If I look at Annex "A", Soper, let's say Soper.

JUDGE ADVOCATE: Okay.

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DEFENDING OFFICER: And the evidence, the court concludes that they have no doubt in their minds that Soper was called an idiot.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: And everything else seems to be in order by the accused, et cetera, so they want to reflect that conclusion of theirs. Are they going to say guilty as charged, or are they going to say guilty by special finding of having called Soper an idiot? Because you see what I'm saying, sir, is that it would be ...

JUDGE ADVOCATE: Okay, I understand your point. Do they have to refer ... I mean, they can still do it but do they have to mention it in a special finding, that's the point you're raising.

DEFENDING OFFICER: That's right. Because if they do not mention it in a special finding, a finding of guilt on the third charge would appear to indicate that the accused has just been found guilty of having called all the people at least one of those names, which in terms of gravity or seriousness of the offence becomes a concern.

JUDGE ADVOCATE: I see.

DEFENDING OFFICER: Have I made my position clear?

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JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: Okay, now I'd like to turn to the comments of the prosecution.

I am concerned by the presence of the decision of **Creighton** in the various briefs that the prosecution submitted to you. **Creighton**, of course, as you know, which is the broader decision of **Gosset**, deals with criminal negligence. And although I believe I understand the prosecutor's position, he's talking about objective standards for various things. I suggest to you however that **Creighton** stands for a mental element and how to appreciate it. A mental element that is different than the typical **mens rea** in criminal law or disciplinary law. So I would merely invite you to be careful as to making sure there's no confusion. By throwing in **Creighton**, I think that could be ...

JUDGE ADVOCATE: Distinctions have to be made.

DEFENDING OFFICER: Yes.

JUDGE ADVOCATE: I agree with that.

DEFENDING OFFICER: And that we take the position that each and all of the offences on the charge sheet at Exhibit "A" are all offences that do require **mens rea**, albeit general intent, but it is a **mens rea** that is distinct from the mental ... or the blameworthiness of actions in negligence.

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JUDGE ADVOCATE: But you still agree that it is an objective test that must be used?

DEFENDING OFFICER: Yeah.

JUDGE ADVOCATE: Yes, okay, I see your point.

DEFENDING OFFICER: That's right, as to a standard. The way - and one of my fear as I was listening to my friend ...

JUDGE ADVOCATE: As to the standard, but what about the **mens rea** of the accused?

DEFENDING OFFICER: But that's it. I was about to say, one of my fears as I was listening to my friend was the way he was going about it, I was wondering if he was attempting to make those offences almost look like strict liability offences. And I'm sure that's not what he's trying to do, but that's what struck me that by loading the deck, if you wish, time and time and time after again with comments on the objective standard and all that, I think it becomes more important to make the distinction which pertains to **mens rea**. Because otherwise we run the danger of having the court almost to believe that we're dealing with strict liability offence type of thing, whilst the requirement for a **mens rea** is still present. So that was one of my major concerns.

For example, the prosecution has referred to CFAO 19-39 as part of their objective standard and all that. Now, at the same time -

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and I believe you would have to raise that too - maybe to properly reflect that we're not in the domain of strict liability. Para (5) of that order, 19-39, reads:

"The enforcement of high standards for training and work performance does not constitute personal harassment provided that the standards are not arbitrary and are uniformly applied."

That is an indication there that qualifies, of course, the objective standard that the prosecution is referring to, and that is another indication that, I mean, there must be **mens rea**.

I don't know if I make myself clear there?

JUDGE ADVOCATE: I'm not too sure on the **mens rea** aspect. What **mens rea** must the accused have on ... I don't know, choose one charge?

DEFENDING OFFICER: Well, let's take an example. The accused has testified in court himself, he said ...

JUDGE ADVOCATE: Take number one.

DEFENDING OFFICER: May I take another one?

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JUDGE ADVOCATE: Oh, sure, okay.

DEFENDING OFFICER: Number one is straightforward, I don't have much difficulty with that. And I agree with the position of the prosecution that he doesn't need to prove that the accused meant to behave disgracefully, okay. If he did it, and then you advise the court ... instruct the court if you find this disgraceful then he's guilty of that and if you don't find it disgraceful then he can be found guilty, I suppose, of two which is an assault. I have no difficulty with that.

Where I have difficulty is with; for example, the accuse has testified to one of this officers as they're getting close to the port, to harbour, he says, okay, kick yourself in the ass, let's be alert and, okay, that sort of thing. I don't want this court to believe that because he said, kick yourself in the ass, that he's guilty, because it was done in such a way that he explained and all that. So that is my fear, still is, that if you put too much emphasis on the words and the objective, so-called objective standard, that it might lead to confusion in terms of the proper appreciation of **actus reus** and **mens rea**.

JUDGE ADVOCATE: Okay.

DEFENDING OFFICER: I've made myself a little more clear now?

JUDGE ADVOCATE: Yes.

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DEFENDING OFFICER: Thank you.

Now, I strongly disagree with a number of comments of the prosecution on the quotes, the use that can be made of the quote, what I call the quote. You know what I mean by "quotes", sir?

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: They suggested that it might go for ... it shows, well, consciousness of guilt. I have already addressed that. Intimidation, I mean, I don't think it's there. I don't think there's any strong evidence there that those words were intimidating. He said that people felt intimidated, and again there's very little evidence to show why.

But more importantly though those quotes, and some other comments of the prosecution that I will allude to now, they suggest that it might ... similar facts may be used to enhance credibility of a complainant. They suggest that the defence must have an air of reality and so on and so forth, and that we could not comment about ... that people were biased and all that.

They propose a sharp warning regarding Tingle, Kramble and Cox. All of those I perceive ... the way I see it, and it's only the way I see it, I'm not saying that's the way they mean it. But the way I see it, it looks like an invitation to you to interfere with the function of the court, whose function it is to determine credibility.

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I surely very strongly oppose the sharp warning, not because the wording is wrong, but the sharp warning re defence witnesses. I believe that the way they ... I mean if we excluded that the sharp warning was for defence witnesses, I mean, it is true that section 95 and 129 do not renounce or restrict, like, the text proposed by itself is alright. But then when we attach this to defence witnesses, it's as if it has something to do with ... it touches on their credibility.

Now, similarly, I suppose, I could ask you - if we do that for the defence witnesses - I could ask you to incorporate in your address a sharp warning with reference to many, many, many prosecution witnesses that 4.02, QR&O article 4.02(e), I believe, prescribes that officers must report any derogation or breach of regulations and orders, et cetera, et cetera. If I'm asking you to make such a warning to the court in a fashion that would be similar to what the prosecution has presented to you, that would amount to you somewhat interfering with the credibility assessment that the members have to do.

I claim, rightly or wrongly - in fact, I can assure you that I will raise myself 4.02 as a factor that may affect credibility. The prosecution may very well use that proposed sharp warning. They can use that themselves in their address to the court to say, members of the court, it is our position that this, this, this. They can do that. But if they have you doing

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it, then I believe there's a bit of a risk that you maybe interfere with the credibility assessment which is the function of the court.

And of course if you were to decide that such a sharp - I call it the "sharp warning" as presented by the prosecution - if you were to agree that such a sharp warning is required, then when I know that I might look at several other sharp warnings that could be done in relation to; for example, the prosecution witnesses. QR&O article 4.02 being one, for example.

Have I made myself clear on that portion?

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: Okay. With your leave I'll discuss the air of reality and, again, that's my understanding of the prosecution's address. He refers to defences and talks about air of reality. And he gives the example though of people having got together and so on and so forth, a bias and refers to the article, et cetera, et cetera - journal article.

I suggest to you this is not a defence. For example, what I consider a defence, a defence of intoxication or drunkenness, a defence of mistake of fact where the expression "air of reality" comes in the defence of error of fact. Very seldom in the ... seldom accepted defence of as a matter of law. But anyhow, the expression "air of reality" as I understand it is normally

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attached to a real defence and especially in these two domains.

But what the prosecution's talking about here is not a defence. He's talking about a pure matter of credibility and he seems to indicate that I would be somewhat boxed as to the use of the evidence I could make. He was talking about speculation and other evidence. I suggest that as a proposition of argument for the purpose of final argument I can use evidence that is present in the court and invite the members to draw inferences from various pieces of evidence, to draw inferences that, yes, there was a bias or, yes, there was some factors that affected the credibility of those witnesses. And I think it is very legitimate for me to do that because there is a basis of evidence.

I cannot ... of course no one can in a final address stand up and speculate about matters that are not even closely related to the evidence. But when there is evidence that there is before this court certainly the defence must be allowed to present a position and attempt to convince the court that on the basis of so many factors, the reliability, the credibility of the witnesses is highly questionable and invite them to do that. And I suggest that in that context, the air of reality has nothing to do.

Browne v. Dunn I submit has no place there, and I rely on your previous ruling in the course of the trial, and should not be raised. There is nothing in this case ... there was no such situation or practice of counsel that would

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place us, you, in a **Browne v. Dunn** situation and I think it should be disregarded.

And that's it. Unless you have any particular question that I might be able to answer, those are basically ... a moment, please?

Oh, yes. One point I had meant to address. That'll be my last comment unless you have questions.

The fact sheet that the prosecution has talked about, I believe, that's how it was called, "The Fact Sheets".

JUDGE ADVOCATE: Yes. It's number 13 on the list of items.

DEFENDING OFFICER: Ah, here it is, Fact Sheets for Panel, not evidence. My only comment, I don't object to the prosecution doing that. My only request to you, Mr Judge Advocate, would be maybe to give a sharper warning to the court that this is not evidence and so on and so forth.

The reason I'm mentioning that and I hope ... I believe it's a reasonable approach is that when we make final argument, if the court, I mean, the court listens and they will, I don't know, be interested and expect more than in an another and, I mean, collectively they make notes and all that. So if I say something, maybe this member is not impressed with my argument and he doesn't make much notes. Then I say something that he sees as important or relevant, et cetera, he writes it down. So what I'm driving at is

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that when that sort of argument or review of evidence is presented orally, the court has a chance to weed it, if you wish, as it comes up and they make notes and so on and so forth. If it's only presented in writing, if they want to know what the prosecution; for example, how he sees the evidence, they have no choice but to read it. You see the difference.

In one case they can note what they ... because they can follow him and they can take notes of what they find appropriate or not, but then if he doesn't touch it at all orally, then they have to read the paper to find out what he thinks of it. And because they have to go through this exercise of reading the fact sheet, I believe that would justify a sharper warning.

And that was my last request. Subject to any questions you have, those are my representations.

JUDGE ADVOCATE: I think it's okay for the moment. So I thank you very much.

I would like to meet counsel in my chambers before you leave.

So this court is adjourned until tomorrow afternoon, Saturday, 1300 hours.

ADJOURNMENT: At 1126 hours, 27 October 1995, the court adjourns.

REASSEMBLY: At 1300 hours, 28 October 1995, the court

2079

reassembles and the
accused is before it.

THE PRESIDENT AND MEMBERS ARE PRESENT.

JUDGE ADVOCATE: You may be seated.
Good afternoon.

Major Abbott?

PROSECUTOR: Thank you, Mr Judge Advocate. Before I begin I would like to present yourself and the members of the court with some material I'll be referring to during my closing argument. It really composes two distinct groups. The first group is called the prosecution notes. Essentially they are in three different sections: one concerning the allegations of the cigar tube incident; a second group concerning the verbal conduct; and the third group concerning the kicking allegations.

I'd like to present these to the members of the court. They are copies of the prosecution's notes of the evidence and as such I should give a warning to all members that they do not constitute evidence in and of themselves. They are rather what we perceive the evidence to be based on our notes. And we would like to give them to members of court, because it will speed things up. Rather than orally have to refer to the evidence, I can simply make reference to certain pages and the members can read them in their own time.

2080

Prosecutor

Closing address

The second packet of documents I would like to present to the members of the court with, Mr Judge Advocate, are three different orders that I will be relying upon during my closing arguments, CFAO 19-39 involving personnel harassment as well as QR&O 19.13 and QR&O 4.02(c). All three orders will be the basis for the prosecution arguments concerning the 129 charge.

Mr President, Mr Judge Advocate, Members of the court, as I stated about four weeks ago during my opening remarks, this is not a case about a commanding officer who simply yells and screams his orders. It's not a case about a commanding officer who simply swears while giving instructions to the members of his crew. It's not a case about the tactical ability of a commanding officer. But rather this is a case about how a commanding officer conducts himself. What is his manner and his style when he seeks to achieve a certain standard of performance.

I'll quickly run through the charges but I stress at this point that it is the judge advocate who is the expert in law and he will be the individual who instructs you on what I refer to as the essential elements that the prosecution must prove in order to establish convictions against the accused. With regard to the first two charges surrounding what I refer to as the cigar tube incident, I would submit to you that the Crown has proven all essential elements without any contest or controversy at all with regard to the peripheral essential elements: the name, the date, the time, the place, these types

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Prosecutor

Closing address

of essential elements that are listed in the particulars that the prosecution has to prove beyond a reasonable doubt.

I'd also submit during cross-examination the accused himself admitted that if this conduct were to have happened, if a cigar tube was placed between the buttocks of an officer, that indeed, it would be disgusting or extremely disgusting conduct. I would submit to you that there is only one issue related to the first two charges and that is whether or not Lieutenant-Commander Marsaw was in fact the individual who inserted the cigar tube between the buttocks of Lieutenant Kelk. All other peripheral essential elements I believe have been proven beyond a reasonable doubt, that is the last remaining contentious issue.

Given that the accused has admitted that such conduct would be extremely disgusting, I believe what is at issue here is only the first charge, disgraceful conduct. Whether it's insult or not given the admission by the accused clearly puts the battle ground with this charge squarely within the first charge. It is in fact, if it had occurred, disgraceful conduct. So again, the only issue with regard to the first charge is whether or not Lieutenant-Commander Marsaw did in fact insert the tube between Lieutenant Kelk's buttocks.

Seven witnesses have testified that the accused was present during ... or actually did participate in the marking of Lieutenant Kelk and four witnesses have said that he actually put the

2082

Prosecutor

Closing address

cigar tube between the buttocks. No witnesses say that it was not him. On the other side we have one witness, the accused, who says it didn't happen, he was not there. That is the only issue left to be determined concerning the first charge.

With regard to the kicking charges, charge 5 and charge 6, I would again submit that the Crown, the prosecution, has proven all peripheral issues: date, time, place, location. The only issue remaining is whether in fact the accused did intend to kick Lieutenant[N] Higginson. We have the evidence of Shea, Pokotylo and Conrad saying that he did. And on the other side we have the accused stating that it did not happen. He admits bumping, entangling feet with individuals when he is on the periscope but says this sort of bumping is not intentional or not done with intent. Given Note B of QR&O Article 103.28, "ill-treatment" is defined as including kicking. I would submit that we're not dealing here with an assault as defined in charge 6 but we're dealing as to simply whether or not ill-treatment by way of kicking did in fact occur.

With regard to the verbal treatment charges, charge 3, charge 4, and charge 7, we have approximately 35 witnesses of Crown and both defence witnesses who claimed that Lieutenant-Commander Marsaw in the ways alleged in charges 3 and 4 and also 7 did in fact do what he is accused of. On the other side of the fence we have the accused stating that those words were never used. "I have never used words like that

2083

Prosecutor

Closing address

outside my cabin." Again, the Crown would submit that we have proven all the peripheral material or essential ingredients of the charge. The only issue remaining is whether or not Lieutenant-Commander Marsaw did speak the words that he is alleged to have spoken.

So given this and reviewing the evidence in the charges I would submit that this case has now reduced itself to one single issue. And that is whether or not the testimony of the accused has sustained a reasonable doubt in your mind as to whether the accused did what he has been alleged to have done and testified to by over 35 Crown and defence witnesses. The sole issue in this case is credibility; 35 witnesses on one side, the accused on the other side. Credibility is really the heart of the matter and the sole issue in this case. And that will resolve all outstanding issues with regard to all the charges.

The accused, of course, is presumed innocent and the burden is entirely upon the prosecution to prove beyond a reasonable doubt that he is in fact guilty. The accused has nothing to prove. The burden is all upon the Crown. But it's important to note that the prosecution does not have to prove the case beyond any doubt. It's extremely important to note. The Crown does not have to prove the case beyond any doubt. We simply have to prove the case beyond a reasonable doubt.

Now I would submit that a mere denial saying that it didn't happen in the face of

2084

Prosecutor

Closing address

overwhelming evidence does not in and of itself sustain a reasonable doubt, for it is not based upon fact, is not based upon logic, is not based upon inference, logical inference of facts from the evidence. For an accused to simply stand before you and say, "It didn't happen, I didn't do it" is of zero evidentiary weight. There must be some evidence that creates that reasonable doubt where that allows the prosecution not to prove its case beyond a reasonable doubt before such a defence would be successful. Facts, logic and inference are what the defence must challenge the Crown's case with. Hope and speculation are of little or not evidentiary value.

With regard to reasonable doubt you can come across many definitions of what "reasonable doubt" means. If you're a lawyer you can collect them as a hobby. The one I will submit to you is the one given by Lord Denning, an eminent British judge, that has been relied upon by various courts and I'll read it slowly and highlight parts of it:

"The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so

2085

Prosecutor

Closing address

**strong against a man as to
leave only a remote possibility
in his favour which can be
dismissed with the sentence,
'Of course, it is possible but
not in the least probable' the
case is proved beyond
reasonable doubt ..."**

Again, it's not up to the prosecution to prove beyond any doubt. To put the prosecution to that high standard would, to use the words of Lord Denning,

**"...fail to protect the
community if it admitted
fanciful possibilities to
deflect the course of justice."**

We simply have to prove the case beyond a reasonable doubt. The Supreme Court of Canada has defined reasonable doubt with the following quotation:

**"I recognize that the onus of
proof must rest with the Crown
to establish the guilt of an
accused beyond a reasonable
doubt, but I do not understand
the proposition to mean that
the Crown must negative every
possible conjecture, no matter
how irrational or fanciful,**

2086

Prosecutor

Closing address

**which might be consisted with
the innocence of the accused."**

Again, we do not have to prove the case beyond any doubt. We have to prove the case beyond a reasonable doubt. And a reasonable doubt is based on facts, evidence, logic and inference. It's not based upon speculation or hope.

In the face of overwhelming evidence from the prosecution witnesses as well as the accused's own defence witnesses, the accused has taken the position, "I wasn't there. I have never been more certain of anything in my life. I didn't say those words. That conversation did not happen. I have never addressed people outside my cabin with those words. It wasn't me." It didn't happen defence.

Within this context of saying these things under oath to you, the trial reached a key moment from the prosecution's point of view when the accused was asked in cross-examination with regard to what I call the cigar tube witnesses and later on again he was asked with regard to the evidence as a whole and the witnesses as a whole, "What facts in logic do you have to explain by seven witnesses and then later over 40 witnesses who testified under oath and come before this court and say that you did what you are accused of?"

As far as the prosecution is concerned, given what the position of the accused was, "I have never been more certain in my life. This

2087

Prosecutor

Closing address

never happened. That never took place", as far as the prosecution is concerned those questions that we put to the accused were the key moment in his defence and in the trial. His answer was he had no facts. He had no explanation. He had no logic. He could offer me speculation. And that's what I invited him to do at the end. But speculation doesn't create reasonable doubt.

He responded with speculation as to why officers and men would come under oath and testify and say things against him that he did he claims did not happen "because men for various motives would like to see me hurt." Others were repeating stories that had evolved. They've learned to accept them. Some had succumbed to peer pressure. That's his response. And faced with the overwhelming evidence from Crown and defence witnesses he offers no facts, he offers no explanation, he offers no logic, he gives us speculation that someone would like to see him hurt; stories have been repeated and evolved; rumours have been adopted as truth and marched into this courtroom; people have succumbed to peer pressure.

My response to that is, where is the evidence to prove that happened? Where is the evidence to prove that there were rumours that evolved over and over again, that were adopted by these witnesses prior to coming into court that they have now unconsciously zombie like taken as truths? Where is the evidence that people have become succumbed to peer pressure? How has Chief Brown been succumbed to peer pressure? How has Chief Tovey been succumbed to peer pressure?

2088

Prosecutor

Closing address

Where is Captain Whynott? How is he involved in this from Cold Lake? There is no explanation. There is no fact. There is no logic that can support this proposition. There is no reasonable doubt.

The speculation proposed by the accused is pure fiction and fiction doesn't create a reasonable doubt. Defence counsel I suspect will attempt to create, through a loose string of evidence, trying to support this speculation, this proposition perhaps by referring to a newspaper article that came out on the 16th of December '93 and then arguing by inference without any evidence whatsoever that people read this and then created stories in their head that they then marched into the courtroom with or the MP interview rooms with.

Again, prove it. Where is the evidence? This is the moment of truth. This is the courtroom. Where is the evidence to prove that theory? There is none. The article doesn't provide any detail whatsoever. It mentions when you look at it: physical abuse, mental abuse, verbal abuse. But there are no details about radar room doors getting kicked in. There are no details of the words that were used. There are no details of people eating in the heads. There are no details of people not sleeping in the wardroom. How could all this have been made up? And there is no mention at all of the cigar tube incident. So how could that have been created through the newspaper article?

2089

Prosecutor

Closing address

The position by the accused, that he has no facts or logic but speculation even when you accept his theory for a second doesn't explain the evidence. How could it explain somebody like Captain Whynott who is not a submariner, hasn't grown up in that community, who is on TD from Cold Lake, having a beer at Stadacona, and here is something said to Lieutenant-Commander Dussault. He's sure in his mind that is a threat and as a consequence of that takes the initiative and gives him his name on a card, goes back to Cold Lake, comes back into this courtroom a couple of years later. Where is the evidence that he has been succumbed to peer pressure, that he has fallen into this type of web? There is no evidence to support the speculative explanation for why 40 witnesses or so would come in to this courtroom under oath and say things that the accused suggests are untrue or that it did not happen.

Where is the explanation based on fact and logic to explain why the defence own witnesses, Tingle would say that he yelled at him at times which either embarrassed him or humiliated him, things that the accused denied? Where is the fact, the logic or the explanation explaining why Leading Seaman Cox would come into this room and say, "He would scream at people and sometimes refer and use the word such as idiot and stupid"? Again, the accused denies his own testimony from his own defence witnesses. The reason people are here testifying before you, telling you things that they say happened is because, in fact, they did indeed happen. They

2090

Prosecutor

Closing address

weren't created after the 16th of December '93 or weeks prior to it.

The accused doesn't even agree with parts of his own expert witness, Lieutenant-Commander Truscott, who testified the accused had to carry the team in the trainer. He says that he disagrees with that part of his own expert defence witness testimony. And his own defence counsel during the opening statement told you, "It will become clear that Lieutenant-Commander Marsaw is indeed a perfectionist and consequently a very demanding Captain." The accused on the stand when he is questioned about it says he disagrees with his own counsel on that point. This is an accused who disagrees with everybody.

During the opening defence counsel moments, defence counsel stated that credibility would be in issue because alcohol was involved and because witnesses had a bias. Sure, alcohol was involved in the cigar tube incident. But you're here, you're brought in here to use your common sense when deliberating. Have you ever drunk alcohol before? Have you ever had a few too many drinks? Do you still remember what happened the night before the next morning? Sure you do. Just because you have drunk some alcohol doesn't mean you're not credible if you're asked to testify about what you saw the night before.

I asked to Hart, are you a binge drinker? He replies he was. He talks about some points in his life. He defines a binge drinker based on what the medical people say with those forms he used to fill out I guess. If you don't

2091

Prosecutor

Closing address

drink at all for a long period of time and then you go and have a number of drinks you're considered a binge drinker. I'd submit most sailors I guess would be binge drinkers. You're at sea for 30 days, you have a run ashore, you're a binge drinker. Hart used the term "was". He wasn't that night. He said he had six to eight drinks over a ten-hour period. He went to work the next morning. He wasn't hung over. Defence counsel never asked him "Well, you were a binge drinker. Are you still now?" They never asked that question.

Bias, the witnesses lack credibility because they display a bias. There is absolutely no doubt that some of these witnesses have a bias against Lieutenant-Commander Marsaw. And there is absolutely no doubt that some of the witnesses before you don't have a bias against Lieutenant-Commander Marsaw. Does that mean they're not credible?

I would submit to you that most witnesses at criminal proceedings have a bias against the accused. Usually, they're the victims. Does that mean a victim of a violent crime or of some other criminal act cannot testify against an accused because they have a bias and they're not credible? Of course not. It's one of the things obviously you have to consider. Has the emotional state of the witnesses or the baggage they carry caused them to exaggerate what they testify to? I think that's a proper consideration. All witnesses will have some interest or some bias generally speaking during a criminal proceeding. That

2092

Prosecutor

Closing address

doesn't mean that they are not credible. It simply means you got to look and attach the proper amount of weight to what they say.

Defence counsel no doubt will talk about witnesses not being credible because there are contradictions in some of their evidence. They say certain things at the MP interview and then they say certain things before you. I would submit that the areas of contradiction usually with those witnesses that have displayed some contradiction fall in the form of omissions. The witness, for example, will say that the accused stated A and B to them during the MP interview room. They come into court under oath and testify that the accused said A, B and C to them. They're cross-examined on that point. "How come you didn't tell the military police that he was calling you C as well as A and B?" Does that make them unbelievable?

The witnesses, some have and some haven't as you know through the evidence, have been interviewed by the military police. Some have been brought up for an interview. There is no evidence that any of them were told what questions they were going to ask before they were brought in. They were told, when some of the witnesses are questioned that they just simply said we're here investigating the OJIBWA and that's about the extent of the information the military police tells them. Tell us what you saw and heard on the OJIBWA. They don't get the questions in advance. They answer them as soon as they're asked in the MP interview room. They give the best answer they can. Later on they

2093

Prosecutor

Closing address

reflect upon their time on the OJIBWA and maybe rather than answering A and B they now answer A, B and C.

But put yourself in their boots. Say you're brought down to the MP interview room tomorrow and you're all asked individually in front of a videotape, "What did you do on October the 3rd?" Maybe you leave out a detail here and there. You're then thrown into a courtroom under oath and asked the same question and between the time you were interviewed by the MPs and between the time you're questioned in court you think of C. Does that mean you're not to be believed? I'd submit not.

I'd submit to you that the 43 prosecution witnesses as a whole are the standard lot of naval officers and career sailors that you'd find anywhere else. Some are articulate, some are not. Some are nervous, some are not. Some are pale and frightened when they testify before you and others aren't. They're the standard lot of naval officers and career sailors you'd find anywhere else. To submit that there is something worse or more than that I think cannot be sustained upon the evidence.

They've done their best to relive part of their experiences on the OJIBWA for you and answered questions as best they could. If they haven't said exactly the same things they said when they got interviewed by the military police two years ago, I'd say that's more because of human nature and the frailties that we all have than it is because they've got some inner secret

2094

Prosecutor

Closing address

or purpose for saying what they've said to you under oath.

The other thing they are not is they are not a bunch of zombies who unconsciously have adopted a whirlwind of rumours to the point where they've now adopted them as truths and taken them upon their own. Who has put into their head that this is what actually happened to you? Who has told Lieutenant[N] Watt that he couldn't speak in the wardroom, that he would sleep on the deck? Who has told Lieutenant[N] Watt that he was called a lazy shit or something else? Where is the evidence to support this theory that these witnesses are zombie like and have come into the room and testified to things that never did happen? It's a court of law. It's not a place for speculation.

Apart from the linchpin in the entire defence case, the "It wasn't me, it didn't happen" defence, let's look for a second at the defence witnesses and see what they have told this court. Tingle: Tingle testifies that yes indeed the accused would yell at him and at times, I forget the word I put to him, he was either embarrassed or humiliated and he agreed, at times it would be humiliating or embarrassing, I forget the exact word. That is evidence from defence own witnesses that sustains the fourth charge, verbal abuse. The accused disagrees with that testimony and tells you that Tingle didn't mean that. He was inarticulate.

Leading Seaman Cox testifies that the accused would yell in the control room and use

2095

Prosecutor

Closing address

words like idiot and stupid. That is evidence that supports a conviction on the third and the fourth charges. The accused takes the stand and tells you, "The words he said were out of context." Another defence witness he disagrees with. I mean these are his own witnesses. How can he explain this? Are they sucked up into some sort of web of adopting rumours as truths in some unconscious fashion?

The Cox'n, Chief Lavoie, testifies he'd never heard profanities being used by the accused. But as a key moment, I asked him a question, I said, "Isn't it true that he would yell at his officers in the control room in a way that you thought was inappropriate in front of the junior men?" And he said, "Yes". He can't recall if profanities are used but he said yes to that question. QR&O 19.13 that I'll be relying upon for the 129 talks about not publicly rebuking your subordinates in the presence of others. Chief Lavoie's evidence is evidence to support a conviction on the fourth charge.

We've got Chief Petty Officer[CP02] Kramble. He states that he didn't have a dedicated position as a watch keeper in the control room but he was in charge of the motor room. He says he answered the MP questions honestly. At that point he told them that he was only sitting in two to maybe a dozen watches. He comes before you under oath and he says that he did a watch every day. We had a **voir dire**. You folks came back in. Keep in mind the key question I asked him at the very beginning. "How long is a watch, Chief Petty Officer Kramble?"

2096

Prosecutor

Closing address

"Well, it depends. Watches are three hours long or they're six hours long." I say, "How many watches did you sit?" "Oh, I sat a watch every day." He has defined a watch already as being three or six hours. He has told the MPs he only sat two to twelve. Then he tells you folks that he sat in every day. You press him and he goes, "Well, I mean a watch is only 10 minutes." He replaces some guys who is having a smoke. He's backtracking. He's shifting his evidence and he admits that he likes to go a little extra.

Some guys avoid having to get hauled on the carpet and he admits he has a different view of verbal abuse and physical abuse than the Navy line. And he tells the court that Lieutenant-Commander Marsaw never hollered because hollered means sort of screaming or ranting. But then he says he was honest with the MPs and he admits that he told the MPs Lieutenant-Commander Marsaw hollered. The key thing from Kramble's evidence I'd submit is that he didn't have a dedicated watch while he was member of the OJIBWA crew. He never had a job in the control room. He also goes on to state that 90 per cent of the OJIBWA members would cuff each other in the back of the head. He has seen his subordinates do it. And he also admits that he can answer the same question in different ways.

Petty Officer[PO2] Hallonquist, a cook, he spends most of his time in the galley, can't hear the control room from the galley, he has never heard anything from the control room while he works in the galley. He has no, and this is the most important point, dedicated position in

2097

Prosecutor

Closing address

the control room. He passes through once in a while. He sits in there and watches the guys. He has heard the accused yell profanities at the crew but doesn't call them profane insulting adjectives.

Warrant Officer Calnan was on board for one trip. Again, importantly, no dedicated spot in the control room. He spent most of his time in the fore ends or the mess, would pass through the control room to go to the radar room. Once in there, usually the door was shut, he admits he can't hear anything happening in the control room when he is in the radar room. Voices are muffled and if words were spoken he couldn't hear them.

C1 Smith, during the relevant time frame that we're dealing with, 5 February to October '93, spent approximately 22 days when you look at the dates that he was on board, on the OJIBWA, at most five hours a day in the control room. He says he had never the words alleged that the accused had spoken at the same time says that it could have happened just that he didn't see it.

The defence is under absolutely no obligation to call any evidence at all because the onus rests entirely upon the prosecution to prove the case beyond a reasonable doubt. But this is the evidence that the defence has brought in. A lot of it has been damaging to their own case. But I would submit that there is something even more damaging than the testimony of Cox and Tingle and people like that to the defence case.

I don't know if you've picked it up or not but

2098

Prosecutor

Closing address

it's a very serious weakness with the defence case.

The accused on cross-examination admitted that not all the members of the control room had been called by prosecution witnesses. There are still folks out there who hadn't been called as witnesses who did have an actual dedicated role in the control room. The defence has not called a single witness who had a dedicated role in that control room, who has testified that that type of verbal abuse or those types of words were not spoken. There are only two witnesses in their entire line up that had dedicated roles in the control room: Tingle and Cox. And they both give powerful evidence that can be used for a conviction on the third and the fourth charges.

They can bring a parade of people into the courtroom and say those words were never spoken but if they spent their time in the fore ends or locked behind the radar room door or in the galley, they can't hear anything. Sure, you are going to get that kind of evidence. The real test to their defence is whether they brought anybody who had a dedicated spot in that control room who said that never happened and they haven't.

Apart from those types of witnesses then there is Commander Scherber who has defined Lieutenant-Commander Marsaw as an inspiration to his crew. He has also agreed that it was his opinion that Lieutenant-Commander Marsaw provided countless training opportunities for other

2099

Prosecutor

Closing address

submariners and balanced the training requirements with the operation imperatives. He has always been highly regarded for showing particular concern for his men and his job. His highly cooperative attitude has consistently boosted the morale of his subordinate and inspired them to do his best for him. This is Commander Scherber's view of life on board the OJIBWA with Lieutenant-Commander Marsaw. When asked, Commander Scherber can't recall if the CO of the OKANAGAN and the CO of the ONONDAGA raised concerns with him about verbal or physical abuse on board the OJIBWA.

I would submit to you that if you were SM1 and you're only in charge of three boats and only one of them happens to be running and the OJ is picking up the operational commitments of everybody else that you would very clearly be able to state that you do recall or that it never happened. His answer is, "I can't recall." Commander Scherber never did one single ride on the OJIBWA when it was going about its normal business despite the fact that with regard to the time frame these charges are dealing with, it was away from port for 300 days. He made three trips, 10 days each on SOCTs which he admitted on direct examination were disrupting the normal running of the boat. On cross when pressed about it he says, "That's still the normal running of the boat just that it's a little extra."

I'd submit it's a lot of extra: six duty captains taking over the attack periscope in the presence of SM1 himself. Commander Scherber never ever saw the normal running of the OJIBWA.

2100

Prosecutor

Closing address

He claims he is busy. He has got other boats to be on. It's a difficult job as SM1. Well, the evidence from the defence is that the OJIBWA was the only boat running. So what's Commander Scherber talking about that he has got other boats he has to be on as well!

In fairness to Commander Scherber I would submit that the accused was very conscious of when riders of status were on board. In a 31 March report which has been introduced as evidence and we've had the accused read before you, he states:

"OJIBWA was tasked at short notice to support SOCT 1/91. The crew, once again, responded in admirable fashion, using the opportunity to 'show off' to their new Squadron Commander. Support to the students of this very demanding and exciting course was given with enthusiasm and a certain amount of natural curiosity, as they realized that they were participating in the training of their future commanding officers."

The accused is very much aware who is on board his boat and when the guy who writes his PER is on board it's time to show off. On cross, as a side note, the accused firmly believes that people like Petty Officer[PO1] Harris who has

2101

Prosecutor

Closing address

been on the OJIBWA for 12 years as a first panel watch keeper are going to sit there with an amount of natural curiosity realizing that he is training future commanding officers. He says, "Well it is a rare thing. It doesn't happen too often." Scherber tells us it happened three times on the OJIBWA in '93 or late '92. There is a disjunction there.

Commander Scherber is adamant that nothing happened on the OJIBWA. He's not an eye witness to the sailing of the OJIBWA but he'll stand here under oath and be adamant that nothing happened on the OJIBWA. Why? Because they couldn't perform if that sort of things was going on. He admits he doesn't know what complaints the squadron commander received about treatment on board the OJIBWA although there is evidence that people did go to the squadron ... sorry, the squadron cox'n. He admits that the squadron cox'n was his eyes and ears. He doesn't recall if the CO of the OKANAGAN or the ONONDAGA approached him. But he is adamant that if this sort of thing happened people wouldn't be able to perform. Says who? CFAO 19-39 talks about personal harassment. CFAO 19-39 doesn't say personal harassment totally destroys the ability of an operational unit to do its job. It simply says it weakens or erodes cohesion.

I'd submit to you that the OJIBWA at the point in which Lieutenant-Commander Marsaw took command of the boat was a fine tuned Cadillac. It had won the fighting efficiency award under Davidson. And the first time that he really took the keys and took it for a run he got 12 hits in

2102

Prosecutor

Closing address

12 shots. It was a high performer. It was the work boat in the 1st Canadian Submarine Squadron. The second time they do a torpedo shoot the scores drop. They go into the trainer later on. Truscott claims that the crew is being carried. Harassing conduct doesn't completely destroy a person's ability to perform their job but it does erode that performance. I think the evidence was there all along. Perhaps Commander Scherber didn't know what the performance level was of the OJIBWA before.

I'd submit to you that the performance level of the OJIBWA when they won the fighting efficiency award under Lieutenant-Commander Davidson never reached that state of efficiency again. It worked hard and it did its patrols but it slowly developed the name of the death boat over a year and a half after that. Its image had changed.

Again, the accused is correct when he cannot explain with facts or logic why 40 witnesses or so, defence and prosecution, will take the stand under oath and allege things that he claims never happened. He claims this because based on speculation these rumours had flowed around later on and later on at some point in time prior to perhaps the article coming out. But if none of this ever happened, how can he explain the Whynott card? How could Captain Whynott get sucked into this role when from Cold Lake? He's just having a beer minding his own business. Did he enter some sort of pact with Lieutenant-Commander Dussault to create this evidence and take him out of his schedule in Cold

2103

Prosecutor

Closing address

Lake to come here and testify under oath? How can it be explained that there is a 35 per cent pass rate of 15 Part III junior officers on board? Contemporaneous evidence, symptoms of things that are going wrong. The requests for general service by Wamback, Clark and Pokotylo, Jacques, McLean, Kohli, Watt, Care, Burke Lyman and others, if it's such a happy boat and if everything is fine, how can you explain that?

The OJIBWA was a dead end street for Part IIIs under training. They never got to finish up anywhere else. Their ambitions and their dreams died in the OJIBWA. How can you explain P2 Brown dreading to go on the OJIBWA and risking his entire career before a CMRB? How can you explain officers eating their meals in the heads or junior rates seeing the look of fear in the officers' faces in the control room? The list goes on and on.

The intimidation was there all along. It wasn't something concocted by witnesses after the fact. But the accused even disagrees on this point, that there was no intimidation, there was no fear. Exhibit "RR" paragraph 8 says in part and this is written by the accused in November of '91:

**"THE OFFICERS, INCLUDING THE XO
HAVE BEEN COWED BY MY EFFORTS
TO INSTILL STANDARDS."**

The accused is providing you with contemporaneous evidence from November '91 that his way of instilling standards is cowing his

2104

Prosecutor

Closing address

wardroom. "Cowed" is defined as intimidation to awe by fear. The writing is on the wall in November '91. Two weeks after this Virgin is in his office telling him, "You're belittling, you're vindictive and you're condoning." The response is, "You mean condemning."

Lieutenant-Commander Virgin has stated to you that he doesn't have a masters in English, maybe belittling, vindictive, condoning were not the totally articulate or correct words. When you ask him what he means, he said, "That you treat people like shit." That's what he really means and then he demonstrated to you why he said what he said by giving you verbal example of how the commanding officer would address members of his crew. That's why in December he goes up to the shore office and says what he says. He says what he says because in November the accused admits that he cows his wardroom in the way that he instills the standards. The evidence is there although the accused now denies that it was or that he knew about it.

Unlike Virgin who recalls the ferocity and the tone but not the words, other witnesses remember the words. Witnesses have testified Virgin was probably the only officer that didn't get bollocked in front of everybody else. Maybe it's natural he didn't remember the words. They didn't sting him. People who were stung by them, were humiliated by them, still remember them.

**"THE OFFICERS, INCLUDING THE XO
HAVE BEEN COWED BY MY EFFORTS
TO INSTILL STANDARDS."**

2105

Prosecutor

Closing address

He goes on in that very same message saying:

**"... DESPITE [THE] FACT THAT
[THEY] ARE ... CAPABLE [THIS IS
GOING TO CAUSE] ME TO [HAVE TO]
MICRO-MANAGE ..."**

When you micro-manage you find mistakes anywhere. And that's what the witnesses have testified to, "Always looking over our shoulders, always going to be a mistake. Who is going to get bollocked next?"

CFA 19-39 defines abuse of authority as including intimidation. "Cowed" is defined as intimidation in the dictionary. This message is going to SM1 at the time, Captain[N] Plante. Captain[N] Plante is reading a message by the commanding officer of one of his units stating that:

**"THE OFFICERS INCLUDING THE XO
HAVE BEEN COWED BY MY EFFORTS
TO INSTILL THE STANDARDS."**

SM1 knew. Where is SM1? Lieutenant-Commander Kavanagh says he was drinking beer in the squadron wardroom with the accused and sometimes downtown. They were friends. November '91, the writing is on the wall. This is going from the fighting efficiency boat slowly to becoming the death boat.

2106

Prosecutor

Closing address

The accused says he has a positive impression of the OJIBWA when he saw it in Faslane during perisher training. How can he go from that positive image to being called the death boat? A well run ship does not have a name attached to it like the death boat. The culture of a well run ship cannot sustain the image of a death boat. The fact that this boat was called the death boat is proof in and of itself of a prejudicial effect of an abusive style of leadership.

Two weeks after this message, as I said, Virgin has his first but not his only confrontation with the CO. By the time December '91 hits Wamback is in his office saying, "I am not going to be your next XO. I can't support your leadership style." Why would Wamback ever do that? Why would any naval officer ever give up the opportunity to become an XO if everything was fine. What happens to Wamback? At the same time that Virgin is in there, a month after, the accused is writing statements that he is cowing the members of his wardroom, the accused hobbles Wamback. Go back into the evidence, look at the command assessment that Wamback got right after he informs him that he's not going to be the XO, he can't support his leadership style. It's written:

"At his own request he was removed from the AC course. This action has called into question his commitment and perhaps more importantly, his judgement. He has a reasonable

2107

Prosecutor

Closing address

**prospect for command, however,
he must learn to pursue the aim
aggressively."**

And to top it off Wamback of course scores below average on loyalty on his next PER. Ten months later Virgin's XO replacement is Dussault. Dussault is defined by Captain[N] Plante as a natural who is recommended for the command course. The only problem is Dussault isn't even at an XO level yet. But Dussault gets hobbled as well. It's another career left in the wake of Lieutenant-Commander Marsaw through intimidation, in contravention of 19-39, harassment CFAO. And what is Dussault told a month into his tenure as XO, "You had better watch your step if you know what happened to Larkin." Who is Larkin? Larkin is the first XO of Lieutenant-Commander Marsaw. Larkin is the individual that also put in a request for general service.

How many careers have been destroyed? How many ambitions have been burned out to use in Wamback's words? CFAO 19-39 defines "abuse of authority" as the misuse of authority to undermine sabotage or otherwise interfere with the career of another individual including to but not limited to intimidation. "Cowed" is defined as intimidation in the dictionary.

But the accused will tell you that it never happened. But even his own theory based purely on speculation not facts and logic, even his own theory cannot explain these contemporaneous incidents that happened during

2108

Prosecutor

Closing address

his command. These are things that happened when he is in the driver seat, not things that happened after he leaves and this alleged whirlwind of rumours starts flying around the squadron. He states, "I thought my crew respected me. I didn't notice anything."

He certainly noticed that they had been cowed, overawed by fear. But he'll tell you under oath now that he doesn't remember that at all. They were cowed before November '91 and they were cowed consistently after '91. Virgin talks to him. Wamback talks to him. Dussault talks to him. Higginson talks to him. LeClaire talks to him. And many other people talked to him. But he says he never received any complaints. He thought everything was right.

I wonder if we could have a short break, Mr Judge Advocate.

JUDGE ADVOCATE: How long?

PROSECUTOR: Five minutes. I can keep on going if you want. I'm just wondering if the panellists want a break.

JUDGE ADVOCATE: Do you want a break?

PRESIDENT: No.

PROSECUTOR: Okay, going to charges 1 and 2, let's get away from the defence case now, I have just been talking about the defence case. From here on end I'm talking about the prosecution case.

2109

Prosecutor

Closing address

The charges 1 and 2, the cigar tube incident, what's the response? "I wasn't there. I have never been more certain of anything of my life" under oath looking directly into your eyes. "Do you have any facts or logic or explanation to say what Kavanagh, Cassivi, and Marr would all say that they saw you in the room marking on Kelk? Do you have any facts, logic or explanation to say why Hart, Craven, Elford and Dickinson were absolutely certain that you inserted a cigar tube between the buttocks of Kelk or some individual? I have no facts. I have no logic. I have no explanation. I can speculate." Speculation doesn't create a reasonable doubt.

Then you have the evidence as well of Pilon, of Kohli, Byrne and Tovey who corroborate the testimony of the first seven witnesses. The accused says, "I was sober. As PMC, I was keeping an eye on the conduct of officers." He had eight drinks over a six-hour period. But he had enough to drink that he couldn't drive home. But he had more to drink that night than he did when he lost his resolve on the 5th of August in the wardroom and started yelling at Dussault. But he still has a clear recollection of everything although he can't drive and although he has drank more than he did when lost his resolve in August. He still has a clear recollection. "It wasn't me. It never happened."

When the heat isn't on in December '91, he jokes based on Byrne's testimony about the

2110

Prosecutor

Closing address

cigar tubing through innuendo in the presence of Kelk. All of a sudden the squadron wardroom joke is no longer a joke anymore. Things heat up. It's December '91. It's, "I left with Bob Bush." The 4th of January '94, Granite Brewery, "I left with Bob Bush." A telephone call with Lieutenant-Commander Kavanagh, a few days after that, the 19th of January I believe, "I left with Bob Bush." "No, I saw you, you were there." "I'll have to reconsider this." Time to change the story again. To Marr, "I have no recollection of that night." To Craven, "I don't remember that"; revision number 3. Before you, revision number 4, "I have a clear recollection. I was not there. I have never been more certain of anything in my life."

During my opening statement I told you that you would hear through the prosecution witnesses concerning the cigar tube allegations inconsistency in the story. Were they on this steamer or were they on that steamer? Was he on bed settee number 1 or was he on bed settee number 3? Who is sitting where? What colour were the markers? There are inconsistencies like that from all the witnesses. But as I said in my opening statement and as the evidence has come out under the heat of cross-examination it still stayed true.

There is one single consistent point. They all say, "I was in the room. Marsaw was in the room. Lieutenant-Commander Marsaw inserted a tube between the buttocks." Three of them say it was Kelk and the fourth one, Dickinson says, "I don't remember if the victim was Kavanagh or

2111

Prosecutor

Closing address

Kelk." But there is a consistency and there hasn't been one single witness apart from the accused to deny that evidence. And the accused's response is, "I wasn't in the room", which is not only inconsistent with that evidence, it's inconsistent with Marr, Cassivi and Kavanagh who claim he was in the room and he was marking, although he denies being in the room for the marking as well.

The simple statement, "I have never been more certain of anything in my life" from a lieutenant-commander who very well may have gotten three outstanding PERs signed off by the Admiral is worth zero evidentiary weight if it is not supported by facts, logic or inference. There has to be some evidence to explain on the defence side of the house why three lieutenant-commanders and one lieutenant[N] would cook this thing up. People like Kavanagh weren't even cross-examined. Show us facts. Show us logic which explains why it didn't happen, why these people are mistaken and maybe there is a reasonable doubt. But to stand up before you and say, "I have never been more certain of anything more in my life" and that's it, "... and the witnesses are not credible because there is alcohol involved" doesn't create a reasonable doubt.

The kicking allegations, charges 5 and 6, like others, there is evidence that Lieutenant[N] Higginson was intimidated and had his career threatened, "Too late to fire you now. If I had another NAV I'd fly you back. If you don't like it you can fly back from Boston", and

2112

Prosecutor

Closing address

referred to as a fucking idiot and asshole and stupid by the accused, there was an **animus** by the accused towards Lieutenant[N] Higginson. He was not a person, based on the evidence, he appeared to like.

In direct examination the accused stated, "All submariners know you get out of the way or you learn very quickly." All submariners know to get out of the way or you learn very quickly. He admits he is physically capable of lifting his right leg off the deck holding it to the knee of his left leg, incline it at a 45-degree angle and thrusting it down with force. He is physically capable of kicking somebody. He admits that this wouldn't be a required movement to move around the periscope.

Higginson didn't see who kicked him. He is not really, I would submit, a witness to this whole thing. There is a black out curtain and he has got his back turned. He gets what feels like a kick and that's about as far as Higginson can go to shed any light on this whole thing. Lieutenant[N] Pokotylo saw it and demonstrated for you the foot movements going around the periscope, raising the right leg, angling it off, thrusting it down and kicking that chair 12 inches across the floor. Shea saw it, gave you evidence. Conrad didn't see it but heard words similar, "That will teach to get out of the way."

What did the accused say on direct examination? "All submariners know to get out of the way or you learn very quickly." Conrad says

2113

Prosecutor

Closing address

the word spoken were, "That will teach you to get out of the way." Same thrust, same types of words, same message; it's a threat. You get out of the way or you're going to get it. That will teach you. The accused admits bumping, entangling feet, just not the intent. "I would never intentionally kick somebody; just bumping; it's an accident."

The evidence of Lieutenant[N] Byrne rebuts this accident defence. Lieutenant[N] Byrne under very heavy cross-examination was consistent and unwavering that he had been kicked three times by the accused, at least three times by the accused. Where was he kicked? He was kicked in the top part of his calf. It is not a case of feet getting entangled. For an individual on the periscope to make contact with that part of a person's body is an intentional act. There is absolutely no way the accused foot could be at the top of Byrne's calf unless he intended to put it there. Byrne who is a Part III did in fact learn how to get out of the way very quickly. He had been taught his lesson through the intentional use of force.

The accused showed you how easy it is by demonstration to bump somebody when you're on the periscope. He goes into an exaggerated style like a goal-tender doing a butterfly stance where his knees are on the floor and his legs are spread apart covering over four feet of the carpet here. That demonstration was a complete exaggeration for a number of reasons, (1) because the evidence isn't that he was in that position when it happened. There is no need to go into

2114

Prosecutor

Closing address

that exaggerated stance. He's trying to show you, possibly it's okay or it's possible to have your feet entangled.

But you know if you look, to recall your visit to the OJIBWA, you'll see the one man console, I'm pointing to Exhibit "I", the one man console. It's closer to the periscope well than the plot table is, and I would say it's probably about a foot and a half away from the periscope well. There is absolutely no way the accused could do what he was demonstrating to you if that was done in the OJIBWA because the one man console was this high, a couple of feet high, it's a square metal box, you probably recall seeing it. There is no way he could do that butterfly goal-tender manoeuvre in the OJIBWA. He is exaggerating it to try to enhance his position that this is just accidental kicking.

It's very important to understand the prosecution's theory as it relates to the kicking allegations. The prosecution is not for a second ... in fact we are saying, it is entirely possible and it's an everyday occurrence for people to have their feet entangled around the periscope. It's an everyday occurrence for people to get bumped between their buttocks from the guys going around the attack periscope and the plot table. But that's not the evidence in this case. The evidence in this case is he raised his right leg up to his knee of his left leg, put it at a 45-degree angle and thrust downwards. That is not getting feet entangled. That is not an accident. It's done to teach someone a lesson.

2115

Prosecutor

Closing address

Byrne's evidence rebuts the accident excuse. As for the comment, "I don't tolerate violence", the evidence is that he knows his watch leader Kelk is physically rough or abusive towards some undefined people in the control room. He does nothing. There is no formal investigation. There is no witness statements. There is no inquiry by him as to exactly who is involved and what happened. He hasn't taken any steps at all. He is not really concerned about the violence happening in the control room. Based on the evidence of Parsons he yells at Leading Seaman Smyth, "I should kick you in the fucking nuts." Based on Smyth's evidence he recalls being yelled at by Marsaw, "I should kick you to some part of his anatomy." Bidinost didn't imagine having a radar room door kicked in on him. Gensey is told one time with regard to his periscope use, "I should slap you across the head" or the ears or words to that effect. Pokotylo is told, "If you don't get this watch sorted out blood will be spilled." Hardly words from the angel of peace. He didn't like Higginson and as the accused has stated in the direct examination, "All submariners know you get out of the way or you learn very quickly." It was done. It was intentional and it was to teach Higginson a lesson.

With regard to verbal treatment, charges 3, 4 and 7, the prosecution would submit that the evidence is completely and totally overwhelming.

And in the face of such evidence the accused says, "I have never used those words outside my cabin." There is a big disjunction between the

2116

Prosecutor

Closing address

evidence of witnesses and the accused on the other side.

If you look at the prosecution's notes, the thick one, as they relate to allegations of verbal misconduct by the accused, you will see a mountain of evidence. The first several pages deal with the words that each witness alleges the accused would use and the frequency. I am not going to read this over but I just bring it to your attention. We will save ourselves an hour going through this orally. On page 1 and 2 you will see next Francophone comments. Then following that you'll see the prejudicial effects the witnesses talk about as a consequence of this leadership style which is relevant to the fourth charge. That goes on for ten pages. Then you'll see a subheading called "Standard" which goes on for four pages that provides evidence of what the actual standard of conduct expected of a commanding officer is based on witness's testimony. And then that's followed by other verbal types of encounter outside the sub that are relevant for this court; the wardroom moments involving Cassivi, Craven, Dussault, Elford, Kavanagh, Marr, Tovey, Watt, Whynott and evidence from the accused's testimony as well. The final page concerns issues concerning publication and notification of CFAOs and QR&Os that the judge advocate will instruct you on concerning a 129. It's a thick, thick document. It is chock full of overwhelming evidence to support a conviction on charges 3, 4 and 7. I will not go over it but I would request that you consider it during your deliberations.

2117

Prosecutor

Closing address

With regard to charges 4 and 7, these are charges pursuant to section 129 of the **National Defence Act**, conduct to the prejudice of good order and discipline. It's different than the third charge which involves ill-treatment based on words spoken. And there are different things that have to be proven for 129 than there are for the ill-treatment charge. Under 129 there are two ways the prosecution can prove its case.

The first way is to prove that the accused breached an order; QR&O or CFAO. For charge 4, we allege that he breached a number of orders. He breached a CFAO on harassment. He breached QR&O Article 19.13 which, if you could just pull it out for a second:

**"19.13 - REBUKE IN THE PRESENCE
OF JUNIOR**

No officer or non-commissioned member shall rebuke any person in the presence or hearing of anyone junior to that person in rank, unless a public rebuke is absolutely necessary for the preservation of discipline."

He breached that order. We allege he breached that order. He went far beyond that order. This isn't simply a case of simply rebuking someone in the presences. It's a case of even going far beyond of using personally insulting adjectives in the process of doing so.

2118

Prosecutor

Closing address

He also, we allege, breached QR&O article 4.02(c). If you could turn to that just for a second, it reads:

"An officer shall

...

**(c) promote the welfare,
efficiency and good discipline
of all subordinates;"**

And the way that he verbally treated his crew we allege that he contravened that order as well. And then we have CFAO 19-39, "Personal harassment". Paragraph 6 says:

**"No member of the CF shall
subject any other member or any
other person with whom the
member works to any type of
personal harassment including
sexual harassment."**

And "harassment" is defined under paragraph 2. And that's based not on the intents of the accused or what he thinks he was doing but rather objectively by what a reasonable person ought to have known. And a reasonable person ought to have known that if you use these personally insulting adjectives it's improper. So that's one way in which we can prove that charge 4 was contravened.

2119

Prosecutor

Closing address

With regard to charge 7 the anti-francophone comments, we're relying on the proposition that he simply breached CFAO 19-39. So for the 129 charges we're arguing that he, for charge 4, breached three orders and for charge 7 that he breached the one order. So that's one method of proving a 129.

There is another method however of proving conduct to the prejudice of good order and discipline. In a nutshell that the accused breached an objective standard of conduct in a manner that he knew or ought to have known would breach that standard of conduct and did so in a manner that may have caused prejudice to good order and discipline. Then again the learned judge advocate, the expert in law, will advise you onto the essential elements that I would have to prove to sustain that charge.

The only twist with regard to charges 3 and 4 and that I will raise with you at this time concern Lieutenant[N] Wamback. You will recall that Lieutenant[N] Wamback was referred to in a variety of words such as idiot by the accused. But you'll also recall from the evidence that he left the boat in early February '92. And the charges for charges 3 and 4 have a time frame involved: 5 February '92 and 4 October '93 for charges 3 and 4. Although this type of behaviour was allegedly made towards Lieutenant[N] Wamback, it happened outside the time frame and as a consequence and fairness to the accused, we'd like you to make a special finding of guilt with regard to 3 and 4 by striking Lieutenant[N] Wamback's name off the list. And the learned

2120

Prosecutor

Closing address

judge advocate will instruct you on the possibilities relating to special findings.

With regard to charge 3, it's pretty straightforward. It doesn't rely upon any orders being breached or any standard of conduct being proven. We simply have to prove that the words cited in the particulars, idiot, asshole, things like that, were in fact said to all or some of the people that are listed in Annex A.

With regard to the anti-francophone comments, as they relate to Dussault, you will note from the evidence that Dussault is as, I suppose, verbally treated in two different ways; one specifically under charge 7 with anti-francophone comments but in another way by simply getting the usual bollocking that the officers got. I omitted to ask Lieutenant-Commander Dussault whether he had in fact been referred to in that way but there is evidence to support a conviction as it relates to Lieutenant-Commander Dussault for charges 3 and 4 based on the testimony of other witnesses who said, "All the officers got it." Some of the witnesses said like, "I never recall Lieutenant-Commander Virgin getting it but all the other officers got it." So there is two pools of evidence as they related to Lieutenant-Commander Dussault.

And again, I won't go through all the evidence concerning charge 7, the anti-francophone comments. You've heard it before. It is listed on our list. "Only fagots and Francos get promoted in the Canadian Forces. It would be easier to be a fagot. The rest of

2121

Prosecutor

Closing address

Canada has to take down its pants for Canada. Frenchmen are looser or cowards." Those types of comments, all directed or said to Lieutenant-Commander Dussault when he is present. The exception of a short time period when Lieutenant[N] Cassivi was on board and an earlier time when Lieutenant[N] Jacques was on board. He was the only francophone officer.

With regard to the 129 charges, conduct to the prejudice of good order and discipline, there are four things that we have to prove for the second method of proving them. One is to prove an objective standard of conduct, then prove that the accused knew or ought to have known the standard of conduct, that he breached the standard of conduct and that this breaching may have caused prejudice to good order and discipline. I want to focus on the first part and the last part for a second. We have to prove that there is an objective standard of conduct. We also have to prove that there may have been prejudicial effect to good order and discipline to sustain a conviction for the two 129 charges, 4 and 7.

I would submit to you that in many ways the reason why you're here concerns the standard of conduct and prejudicial effects to good order and discipline. I would submit to you that the fundamental reason why you gentlemen are here, is five reasonable men to hear the evidence and deliberate and make a verdict to dispense military justice, is about ensuring that a certain objective standard of conduct is maintained in the Canadian Forces. You've been

2122

Prosecutor

Closing address

called upon to do that. And that is maintained in a way so that prejudicial effects do not flow, or are stopped.

It's important to stress under the 129s that what I have to prove is an objective standard of conduct to which the accused is measured and compared to. It is a standard of reasonableness and not a standard expected of supermen but simply one of reasonableness. The question to be asked in determining his guilt with regard to the 129s is not whether or not Lieutenant-Commander Marsaw lived up to his own standard but whether or not Lieutenant-Commander Marsaw lived up to an objectively defined standard of conduct expected of all Canadian Forces officers who are entrusted with command.

Perhaps you haven't taken notice of it but it is an objective standard he is put to. It's not his own standard. We're not asking whether he is guilty for failing to meet his own standard. We're asking whether he is guilty of failing to meet an objective reasonable standard of conduct expected of all Canadian Forces officers. There is a reason why an accused is put to an objective standard. The Supreme Court of Canada has stated with regard to objective standards:

"... when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare."

2123

Prosecutor

Closing address

Later on:

"'the reason for importing into this branch of law the concept of the reasonable man[was] ... to avoid the injustice of a man being entitled to rely on his exceptional excitability ... or ill-temper or on his drunkenness.'" "

Later on they state:

"It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned among other things with fixing standards for human behaviour."

Importantly they note:

"We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility."

That is why I would submit you're here. You're here to ensure that individuals live up

2124

Prosecutor

Closing address

to a certain expected minimum standard of conduct and to assess whether or not Lieutenant-Commander Marsaw has met that standard or not. It's a societal interest that put you here. And if you recall my definition at the beginning with Lord Denning of what a reasonable doubt is. He said:

"The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."

These legal concepts of reasonable doubt of objective standard incorporate societal interests. You are here as five reasonable men who whether you like it or not I guess for a spit out of a computer in Ottawa over a year ago were given this task. You represent society, Canadian Forces society.

I would submit to you that the standard expected of a naval commanding officer can be defined in this way. It includes many things but the standard expected of a CO does not include a conduct in which he is allowed to address subordinates in an insulting, belittling, degrading, or humiliating manner and does not refer to them with personally insulting

2125

Prosecutor

Closing address

adjectives. Some other day in some other case in some other part of the world, we'll have to find out what else is including in the standard expected of the Canadian Forces commanding officer. But right now in this room in Halifax today, I submit to you that the standard does not include insulting, belittling, humiliating subordinates.

You recall, and I'm sure you have got the questions I would ask each witness memorized in your heard, "Where do you work? Who have been your other commanding officers? Describe the atmosphere? What was his leadership style? How would he react?" Remember the question, "Who were your other commanding officers in the past?" "Contrast them to Lieutenant-Commander Marsaw?" The reason I had to ask that question is because I have to prove what the standard of conduct is of a naval commanding officer.

Throughout this trial, if you kept track, the witnesses have referred to over a hundred naval commanding officers. Command Chief Brown himself if you look at his CV refers to 65. And with the exception of Lieutenant-Commander Craven who recalls one single incident when a CO calls someone stupid in a wardroom on one single isolated incident and with the exception of Lieutenant-Commander Hickey's testimony who talks about one single isolated incident when a CO insulted a member in the control room, this prosecution has proven by having witnesses testified upon their experiences over a hundred naval commanding officers, if you throw in Warrant Officer Calnan, his career has seen

2126

Prosecutor

Closing address

aircrew, aircraft commanders as well, the prosecution has proven a consistent and strong body of evidence to show that naval commanding officers have always conducted themselves in a highly professional manner.

We've asked witnesses at times to talk about situations of dangerous moments. We've had Command Chief Brown talk about getting a cunning tower sheered off. Even under the most extreme stress and danger naval commanding officers conduct themselves in a certain way of high professionalism and conduct. And we submit to you that Lieutenant-Commander Marsaw is completely and totally outside the bracket of the conduct established by naval commanding officers. He is outside that group.

Although the evidence deals with difficult pieces of evidence, disturbing pieces of evidence, I would ask you to reflect on this and submit to you that this court martial has been one of the Navy's finest moments because the leadership of the naval community has been put on trial and it has come out demonstrating that it has always conducted itself in a highly professional manner in a wide variety of circumstances sometimes involving immediate danger. Lieutenant-Commander Marsaw's leadership style is not a symptom of the structure as a whole. The structure as a whole conducts itself in a highly professional manner.

Lieutenant-Commander Marsaw has breached the objective standard of conduct. The single most important piece of evidence from the

2127

Prosecutor

Closing address

prosecution's case that helps you define what the objective standard of conduct is, comes from the last piece of evidence I introduced. I did it for that reason; the Mainguy report. The purpose of introducing the Mainguy report is not to have you contrast the conditions on the OJIBWA with the conditions of the ships that are documented there. Please do not that. That's not relevant to this enquiry. The purpose of introducing the Mainguy report is because of pages upon pages in the Mainguy report that define what the divisional system should be like, that define what is expected of naval commanding officer. It's those pages and the evidence from there that is your strongest beacon to guide into defining what the objective standard of conduct is of the Canadian Forces naval commanding officer.

In 1949 the Mainguy report is like a lighthouse. It's a beacon. It's turned on and from that point on it has been a defining document that guides naval commanding officer throughout their careers to how they should conduct themselves. It defines leadership style. It defines the divisional system. It defines an ethic.

In your deliberations please read through it to gather the evidence you need to define what the standard expected of Lieutenant-Commander Marsaw was. But at this point, given the fundamental issue that is raised by this court martial is, what's the leadership style of a naval commanding officer? Let's go back to the basics, go back to the Mainguy report and you'll find at page 52 they adopt the quote that you

2128

Prosecutor

Closing address

have probably all seen, at least the naval officers on the panel have probably all seen, from 1776, the medieval times, John Paul Jones, the Scots-American Admiral:

"The Naval Officer should be the soul of tact, patience, justice, firmness, charity and understanding. No meritorious act of a subordinate should escape his attention or be left to pass without reward, even if the reward be only one word of approval. He should not be blind to a single fault in any subordinate; at the same time he should be quick to distinguish error from malice, thoughtlessness from incompetency and well-meant shortcoming from heedless and stupid blunder. As he should be universal and impartial in his rewards and approval of merit, so should he be judicial and unbending in his punishment or reproof of misconduct."

That's your beacon. That's the light that defines the standards. Compare Lieutenant-Commander Marsaw with that. And at the bottom of page 52 they state:

2129

Prosecutor

Closing address

"In order that part of it may be welded together in a happy and efficient Naval community of officers and men, we wish to repeat that discipline is the most important element in the whole fabric. Perhaps we may use here a sentence which we have included at an earlier stage in this report: The only discipline which in the final analysis is worth while is one that is based upon pride in a great service, a belief in essential justice, and the willing obedience that is given to superior character, skill, education and knowledge. Any other form of discipline is bound to break down under stress."

Soon you'll begin your deliberations and I would submit to you that there is overwhelming evidence beyond a reasonable doubt, a doubt that is based on evidence, facts and inferences, not speculation. To enter conviction against the accused on charge 1 for disgraceful conduct, charge 3 for ill-treatment, charge 4 for conduct to the prejudice of good order and discipline, charge 5 for ill-treatment and charge 7 for conduct to the prejudice of good order and discipline. There is overwhelming evidence.

2130

Prosecutor

Closing address

In the process of doing so I would submit that within the context of hearing evidence concerning 100 commanding officers having entered the courtroom through witnesses and the standard that is expressed in the Mainguy report, your convictions in these areas would be nothing new, nothing radical. You're not going where no man has gone before. You are simply with your verdicts of guilty reaffirming in one calm, confirmatory moment what naval officers do every day in their business, what they've been trained to do every day in their business, what they've learned to do every day in their business from watching their predecessors. You're asked just to do it in a different way, to put your stamp on it to say this is the way naval officers conduct themselves.

Para 3 of Lieutenant-Commander Davidson's Captain Instructions to Officers, you don't have his evidence but he read it into the record. He was the former CO of the OJIBWA as you recall. Paragraph 3 on the front cover page of his Captain's Instructions to Officers states:

"The inherent nature of a submariners' duties demands a high level of professionalism. To a great extent, this professionalism is gained through observation, experience and teamwork. These orders reflect the framework around which my command will be structured and are based on the

2131

Prosecutor

Closing address

**observations and experiences I
have developed while serving in
submarines."**

Only the first sentence of paragraph 3 remains in Lieutenant-Commander Marsaw's Captain's Instructions to Officers. The balance is not there. I believe that paragraph is correct. The nature of a submariner's duties are defined through observation, through experience and teamwork. Submariners are a small group, that's how they learn their trade. They learn their trade when Lieutenant-Commander Woodburn sits beside Master Seaman Bourassa and teaches him how to drive a boat. They learn their trade when Lieutenant-Commander Hickey sits beside the lieutenant and lets him learn by making mistakes.

Lieutenant[N] Tingle and Leading Seaman Cox first time's qualified submariners and their only time since then existed under Lieutenant-Commander Marsaw. They developed their definition of normal and their way of thinking of what a submariner does through observation and experience by watching Lieutenant-Commander Marsaw, I would allege. They have developed an ethic and an ethos which I submit has a prejudicial effect of a certain leadership style. It is those prejudicial effects you must turn your mind to. An acquittal will redefine what is acceptable conduct. An acquittal will redefine what is acceptable conduct and changes the definition that has been in place since 1949, I would submit.

2132

Prosecutor

Closing address

By reviewing the evidence you may have different concerns, some things that you've heard in this courtroom may be disturbing. But you are to carry out your duty, your deliberations within the parameters and within the confines of the judge advocate instructions. Although you are the individuals that make the decision you make it within the instructions of the judge advocate.

If you're concerned about the newspaper article and that some individuals may have gone to the Press that may very well and understandably concern you but it has no effect on your deliberations as to whether or not Lieutenant-Commander Marsaw is guilty or innocent of the charges he faces.

You may feel that some of the cigar tube witnesses conduct was improper and why aren't they charged? I would submit that's not your concern either. You are here to do one trial at one time with one person. You may be disturbed that some of the witnesses said they didn't fill out redress of grievances or didn't have faith in SM1. You don't have all the evidence to understand that explanation. I, in fact, had an objection sustained against me when I asked Lieutenant[N] Elford whether he had gone to the squadron. You may be concerned about whether or not if you convict on these charges what would that do for other commanders if they say one word that's listed in annex or charge 3 in the heat of the moment, does that mean they are now liable for court martial?

Remember my words of my closing and the opening of my opening address. This is not a

2133

Prosecutor

Closing address

case about a commanding officer who yells out a word in the heat of the moment under stress. This is about a leadership style. I would submit to you that no other naval commanding officer conducts himself in the way that Lieutenant-Commander Marsaw has. Don't go off the tracks with peripheral issues. If something bothers you, there is nothing stopping you as officers to making a point with the Chief of Staff and talk about it.

I would submit that a conviction in these areas could confirm the naval standard of conduct and arrest a cancerous growth of prejudicial effects that has been created by this particular leadership style. When Lieutenant-Commander Marsaw replies that it didn't happen the prosecution replies that it did. There is a mass of evidence of humiliation, of degradation, of ill-treatment and prejudicial effects unfolding in the wake of Lieutenant-Commander Marsaw's commandship.

Lieutenant-Commander Marsaw cannot tell this court that it did not happen by offering only speculation through a 35 Crown or defence witnesses who say that the various allegations did happen. He cannot tell you that he did not intimidate. He cannot tell you that he did not notice the fear. When he sends the message in Exhibit "RR" to the effect that the wardroom is cowed when he attempts to instil certain standards.

2134

Defending Officer

Closing address

**"THE OFFICERS INCLUDING THE XO
HAVE BEEN COWED BY MY EFFORTS
TO INSTILL STANDARDS."**

That is in complete contradiction to what is expected of a naval commanding officer as defined since 1776 and adopted in 1949. The Mainguy report defines the standards. So when Lieutenant-Commander Marsaw stands here before you and says, "I have never been more certain of anything in my life. It didn't happen. I didn't intimidate. I didn't know I was feared." I would ask you to pick up Exhibit "RR", read through paragraph 8 and look at his own words that he wrote in November '91:

**"THE OFFICERS INCLUDING THE XO
HAVE BEEN COWED BY MY EFFORTS
TO INSTILL STANDARDS."**

And tell him with verdicts of guilty that he did in fact intimidate, he did awe by fear and he was very much aware of what he was doing. He decided not to pay attention to Virgin, to Wamback, to Dussault, to Higginson, to LeClaire and many others who told him all the way along, that what he was doing was wrong. Thank you.

JUDGE ADVOCATE: Thank you. The court will adjourn for 15 minutes.

ADJOURNMENT: At 1435 hours, 28 October 1995, the court adjourns.

2135

Defending Officer

Closing address

REASSEMBLY: At 1452 hours, 28 October
1995, the court
reassembles and the
accused is before it.

JUDGE ADVOCATE: You may be seated.

DEFENDING OFFICER: Mr President,
Members of the Court, Mr Judge Advocate, I will
in a moment give you an outline of my
presentation. Before I do so though and enter my
own address proper I would like to make some
comments on the position adopted by the
prosecution in their address. As far as I recall
it, it started with evidence of the accused
denying is of zero evidentiary weight. Further,
later on, explanation by accused is pure fiction
and fiction is no evidence. And the prosecution
was sort of putting a burden on the defence to
show facts, logic as to why the prosecution
witnesses would lie.

I submit very respectfully that this
position is not correct in law as the accused has
nothing to prove for one. And two, when the
accused as he did in this case, takes the stand
and denies it is evidence for you to weigh. I
would most strongly disagree that the explanation
by the accused is pure fiction. When the accused
says, "I did that", it is no fiction. It is
evidence. Why would the witnesses lie? There is
no burden on the accused to prove why. I would
speculate on it although the witness could not do
it on the stand. I can offer you some theories
on that. But it is, in my opinion, wrong in law
to attempt to place such a burden on the accused

2136

Defending Officer

Closing address

and I would ask you, Mr Judge Advocate, to place a warning before this court in the strongest possible terms about this portion of the prosecution's address.

There is another area of the prosecution's address which causes me great concern. When the prosecution says that an acquittal would redefine standards, when the prosecution invites you to consider what a conviction or an acquittal would do to others, meaning other captains in the Navy, I believe this has no relevancy whatsoever because you are not here to judge leadership standards. You are not here to enforce one or the other style of leadership that may exist in the Canadian Forces and more particularly in the Navy.

You are here to determine on the basis of the evidence presented before you whether Lieutenant-Commander Marsaw has stuck a cigar tube in somebody's rectum. Whether the words he has used, the words that are alleged, for example, in charge 3, whether he has verbally abused people as alleged in charge 4, whether he has intentionally kicked Higginson as alleged in charge 5, thereby ill-treating him, and whether he has used words that would be discriminatory to French speaking people as alleged in relation to Dussault as alleged in charge 7. And again, Mr Judge Advocate, I would ask you to place or give the strongest possible warning to the court that this court is not here to overall set standards for the Navy but rather to perform that very function I just referred to.

2137

Defending Officer

Closing address

And my last comment on the prosecution's address will be to say that I disagree, which hasn't been uncommon throughout this trial, with their version or interpretation of the evidence especially as it relates to some of the defence witnesses whose names have come often; Tingle, Cox, Kramble. We take the position that none of those witnesses as contended by the prosecution testified that the accused was abusing or was using words like "stupid". In any event as for any other part of the evidence it is for you, Mr President and Members of the court, to decide and to pick in accordance with of course your own notes what is the evidence. Of course the same warning and the prosecution has invited you as well to do that that those brief, if I may call them, are merely notes from the prosecution and they do not necessarily reflect fact or even evidence. They are what they believe to be the evidence and you may have notes that are different.

For that matter, and I agree with the prosecution on that point, what I am going to tell you is not binding on you either. So if I put some facts to you or my perception of the evidence that does not accord with your own understanding of the evidence, of course, it is for you to adopt your own notes and I can assure you that I will remain sufficiently vague that I hope not to induce you in error and if it does happen it would be purely accidental.

Your duty here is to determine whether Lieutenant-Commander Marsaw is guilty beyond a

2138

Defending Officer

Closing address

reasonable doubt of those offences charged. And if you have a reasonable doubt the accused must benefit of it. As stated, the defence has nothing to prove and even if the defence hadn't called any evidence you would still have to make a decision and you would be left with the body of the evidence presented by the prosecution to determine whether those witnesses called by the prosecution have satisfied you beyond a reasonable doubt that those acts were committed, that those words were spoken.

My address will be divided basically in five portions. I will briefly expose to you the theory of the defence. I will make comment of a general nature about the prosecution witnesses. Then I will address charges 1 and 2, then charges 5 and 6 and then charges 3, 4, 7 in general terms. I will make a brief review of the evidence called by the defence and then make a few concluding remarks.

The theory of the the defence is quite simple. It's nothing very fancy. There will be no big argument in law. Our theory is that those awful things did not happen. Lieutenant-Commander Marsaw did not use those words. He did not insert a cigar tube. He did not intentionally with the guilty mind kick Higginson nor Byrne for that matter. It simply did not happen. And the judge advocate will tell you, the prosecution has alluded to lots of objective standard that is one thing. Nonetheless, and if not more importantly, equally importantly, those acts must be if they took place there, must be a blameworthy intent. There must be an intent to

2139

Defending Officer

Closing address

do those things, a guilty mind. That's the **mens rea**. The judge advocate will address you on that.

What happened is that the demanding and I retract from the word "perfectionist" as I may have wrongly used the word in my opening address, a demanding Captain, Lieutenant-Commander Marsaw, worked hard to accomplish various missions, and in some cases, as you have heard, he was breaking new grounds on some type of patrols. As Captain, he was consumed by the accomplishment of the mission ensuring high standard and professionalism among his crew for if he hadn't done so this might have endangered life and equipment.

Quite obviously, some members of the crew did not share his enthusiasm and his goals. They were not as motivated as he was and quite obviously many of them did not appreciate the hard work they had to put in. Yet, despite all those adverse conditions, OJIBWA is an old boat and the crew lacked motivation at times, the team performed extremely well which according to some witnesses would not have been feasible if the life had been such as described by the prosecution witnesses: hellish, terrible, morale is rock bottom. Witnesses have said here in this court that such performance as was described would have been impossible in such conditions. One of those witnesses was Commander Scherber, and I will come back on that later, and Captain[N] Webster to an extent has adopted that position as well that in such conditions the efficiency of the unit would be affected. So,

2140

Defending Officer

Closing address

essentially, that is the theory of the defence. The ship performed well and Lieutenant-Commander Marsaw did not indulge in any of those activities that the prosecution witnesses have testified on.

General comments on the prosecution witnesses. Remember, Mr President and Members of the court, how willing the prosecution witnesses were to give evidence that would obviously be adverse to the accused. "Do you recall this?" "Can you tell the court what happened?" "Yes, I can." And they very willingly indulged into evidence that is adverse to the accused. Remember at the same time how not so willing they were to give any form of evidence that might have been considered favourable to the accused. They have been given that opportunity countless time through cross-examination and they would always resist. They were not willing to bring anything good about the Captain. Remember how willing they were to refer to insults and intimidation. That's very easy to do so. If I ask you to give me a few words that are insulting, that's very easy. Whether one recalls actual, specifics, insulting words are easy to find and the description of the particulars at charge number 3 contains most of them. So that's easy enough. It is a safe bet to put words there because those are the typical insulting words in the English language.

Remember they were not so willing to give specific examples as to when, where, why, what were the circumstances. How easy to say, "Yes, he called me fucking stupid." "He was intimidating." Sure. I mean, who hasn't been

2141

Defending Officer

Closing address

intimidated in one's life. I have. Who hasn't been yelled at at some point or another? People in office environment can be intimidated by their superior. What does that prove? "Life was terrible on board. I mean, that was day in and day. It was terrifying and it happened several times per watch and several times per day that the Captain was behaving in such outraging fashion."

Yet, no one has reported the commission of any of those so obvious offences. No one has done that in three years. No one has even written a redress of grievance. Even Wamback, remember Wamback who was very career oriented he told me, and he would fight hard for his career and he is career oriented. When asked, "Well if you are so career oriented, why did you cave in so easily without doing anything? You would cave in and just because a maniac is running the ship, you are prepared to just let go of your career?" Those are a few examples.

Life was so terrible on board that many asked for transfer to general service. Yet, not a single one in their correspondence requesting return to general service put a single word blaming the Captain or his leadership style as being a factor in their request. In that respect, I invite your attention to Exhibits "P", Pokotylo, "T", Jacques, "U" Exhibit "U" that is, Watt, and Exhibit "GG", Wamback. Not a single of those memo contain a word that might even come close or be construed as representing a criticism of the Captain.

2142

Defending Officer

Closing address

And I suggest to you this is very important because those memos were written at the time. Three years later or two years later, whatever the actual time may be, those individuals come to court and they ask you to believe that, "Oh yes, the real reason I really left was because he was a tyrant, a monster, life was unbearable." Where should we place the emphasis? On the memo they wrote at the time or on the story they tell you three years after the fact? Elford, it is not substantiated by an exhibit, but Elford when he testified in direct was suggesting he left the service because of life on board. Actually, in answer to question from the defence he admitted that he had medical reasons; that is why he left. He had a skin problem and the skin did not agree with the environment of a submarine.

Elford, for one, has admitted lying to the MPs. Many others have been confronted with previous statements that didn't match their testimony in court. Why is that? And how does that affect the credibility you should place on their testimony? Remember how nervous most prosecution witnesses appeared to be and their demeanour on the stand. The judge advocate at the outset of these proceedings has warned you that you may account for some nervousness because it's a new environment, et cetera, et cetera. I suggest to you that their demeanour on the stand went well well beyond that sort of nervousness that might be expected of an individual who is in an environment with which he is not familiar.

2143

Defending Officer

Closing address

Remember Wamback he was so reluctant to answer my questions that he forced me to repeat them two and three times because he did not understand my questions. And I asked him, "What's your mother tongue?" Oh! I believe though there are factors you must consider when assessing the credibility of witnesses.

I am ready to address charges 1 and 2. I picked about five or six witnesses and my summary in that respect will be in very general terms. Hart states that the tube was inserted twice. He doesn't have any clue when that happened, who was present, who did the marking, who took the pants down. He placed Kelk at one place, others placed him elsewhere. All right. Craven thought he had gone on MARGAREE who turned out not to have been on the jetty at the time. He states that the tube incident, as I call it, happened shortly like within 30 minutes to an hour from his arrival on board which he has situated between, as I recall, 12:00 and 1 o'clock, let's say.

So the tube incident would have been consumed, if I may use the expression, by 2 o'clock, no matter what. He doesn't know who did the marking, who took the pants, he doesn't recall exactly who was there. And then he states this extraordinary incident. He was shocked. What has he done about this? Nothing. In fact, he doesn't quite recall whether the cigar tube stayed there or popped out or whatnot. And according to him, this extraordinary incident would have taken place at 2:00. He seemed to vaguely remember leaving at 4:30 in the morning,

2144

Defending Officer

Closing address

the cigar staying there I suppose. For so shocking an incident he didn't seem too concerned. He was the senior officer on board aside from the Captain. He didn't think of reporting it. It was not his business.

Pilon in the morning didn't see a tube. He saw a real cigar and one was shown to you in a cauliflower shape and whatnot. I don't know what that means, more confusion I suppose. Elford admits lying to the police. He did. Yes, he did. "I lied to the police because I was nervous. I exaggerated my state of drunkenness." He was wearing the flash gear and whatnot. Yes, he admitted that. But he was drunk. He did some markings himself. That was the first time that somebody volunteered some information. He doesn't know who else. He doesn't know who put the pants down. He has no idea about timings. He didn't know where he woke up the next morning. That's how bad of a shape he was in. Now in court he may have stated, "Yes, I was at Craven's." All right. Nonetheless he had stated in his ... to the military police and again he attributed that to his game plan to deceive the military police by exaggerating his state of drunkenness. He did state to them he didn't know where he was when he woke up.

Dickinson admits he was drunk. What's new? He doesn't know about any timing. He says that then Captain[N] Plante was passed out on the settee. That was new. That was a new twist in the description of the events. He saw Marsaw place a condom on the tube, that was new as well, before he inserted it. So we have two new twists

2145

Defending Officer

Closing address

with Dickinson except that he, like the others, cannot recall who did the marking, who took the pants down. I mean, the room is not that big. Not one can say who did what. And we're not talking about the Congress Centre here. We're talking about the wardroom of the OJIBWA. I mean people that are there are bound to see what's going on. Yet, they cannot.

Lieutenant[N] Marr is always conveniently out of the wardroom whenever something of significance happens. He's on the round. Remember the number of rounds that he described to you. And every time he came something new had developed. When he left, the shirt was pulled and when he came back the pants were down too as well. So very conveniently he wasn't around as things developed. That's the same Marr who knew that some Part IIIs after plotting would forget to plot necessary DR and AP but wouldn't do anything about it. He has testified on that as well.

What do we derive of all this? I suggest to you that the confusion is absolute with regard to timings, the location of Kelk, either on the aft side of the settee, at bulk or forward. What was done to Kelk and Muir? Great confusion exists as well about that. Who was taped? Who wasn't? To what extent and so on? How many times was the tube inserted? Hence, how many times did it go out? Whether it stayed there, whether it stayed there for some three hours as people are continuing the party? Even who was there appears to be questionable? Although we have appeared to have narrowed it

2146

Defending Officer

Closing address

down to about four players but yet none of the four players seemed to be playing, that is, doing anything.

According to the witnesses there is one certainty, Marsaw did it. There is certainty, no one reported this extraordinary incident. And there is one three-quarters certainty, I would suggest, they were basically all drunk. Is there enough evidence there to satisfy you beyond a reasonable doubt that those events took place? I believe it's absolute confusion and even without the need of the accused to have testified I suggest that on those sketchy accounts of the incident you would have to be left with a reasonable doubt. On top of that the accused, Lieutenant-Commander Marsaw, has clearly, unequivocally, denied this event happening.

With respect to charges 5 and 6, that is the kick to Higginson, I would like to bring to your attention the following. Higginson was interviewed on 10 and 26 January 1994. During the first interview he was asked on four or five occasions whether he had ever witnessed any physical abuse on board. He said no. Then some 16 days later he is asked whether he was kicked and then he says yes. And he tries to explain to the court that he didn't talk about this incident in the previous occasion as the question was merely, "Did you witness an incident? Is it believed that being part, I mean, that he would have drawn the line "Since I was the victim of the kick I suppose I did not witness an incident. Therefore, I answered to the MPs 'No, I didn't'". I think it's stretching a bit although

2147

Defending Officer

Closing address

that is the explanation he provided. Then he recalls stating to the MP something to the effect that, "Well, I didn't see anything because I thought it was too shady an incident, unimportant." Eventually, he will state that he was kicked on the outer portion of his left ankle. This will have some significance as well later.

Sergeant Shea testified also on this incident. He admitted telling the MPs that during the first interview he did not witness any physical abuse. He told the MPs on four or five occasions that he did not witness physical abuse. Now, in court, he testifies that he did witness this incident. He testified that he just remembered it. He had forgotten but now just remembered it and he has no idea as to how the incident came to light. He just remembered it. And then I asked him, because you know Conrad was also a witness to that, I said, "What's in common between you, Shea, Conrad and Tovey?" And he answered with no hesitation, "We all hate Marsaw." The prosecution was talking about bias. I believe that sounds like evidence of bias.

Conrad is another person who has been interviewed twice; on the 7th of January '94 and on the 24th of May. In direct examination he talks about Higginson being at the plot table. The periscope was raised. Marsaw kicked Higginson. "That will teach you to get the fuck out of the way", so he says. But then he quickly admits that he did not see the kick. Although he says Marsaw kicked Higginson, he comes up seconds later and say, "Well, actually I didn't see the

2148

Defending Officer

Closing address

kick." Marsaw was going counterclockwise which is that way and he was not too sure finally about the kick. Then in cross-examination he admits that when asked by the MP if he witnessed any incident of physical abuse he answered that he witnessed a ... a (one) ... physical abuse and described an incident involving LeClaire and Gensey. That's what he said to the MPs. When he was asked by the MPs if he witnessed any other incident of physical abuse he said no. When he was provided with the opportunity to give more examples and the MP stating as you may recall, "We have all day, take you time, just tell us what happened, we will take the time it takes." He answered, "No, just that, that one incident."

And then guess what? He, too, remembers out of the blue that, "Now that I think of it, this took place." He stated that a lot of things popped in his mind four months after. Now, the day of his testimony, he recalls the incident. He says that his memory was jogged but he doesn't know what jogged his memory. This is the Conrad who has in common with Shea that he hates the CO.

Higginson, I have mentioned already, didn't I?

JUDGE ADVOCATE: Yes, you did.

DEFENDING OFFICER: So it must be time to review my notes here briefly. Okay, now I remember.

The first three witnesses I indicated there, Mr President and Members of the court, were to show you the unreliability of those

2149

Defending Officer

Closing address

witnesses who, when given opportunity to answer question on the incident, all claim that it's not there. But then it's all at the occasion of a second interview that those matters come up. I suggest to you that it's very suspicious.

Now, if we look at the actual description in court now of the incident another reason to be suspicious about that evidence is that Higginson claims the blow was to the outside or outer part of his left ankle, the protruding bone. So it was fairly low. Shea says that Marsaw was going counterclockwise, used his right foot to kick him on the left ankle. So if he is going counterclockwise and he is using his right foot, it would be quite a challenge to hit the outer part of the left ankle of Higginson who is standing to Marsaw's left. Pokotylo states that Marsaw was facing forward and kicked as well with his right foot. Shea was stating that Marsaw was wearing sandals. Conrad! Well, he didn't see the kick but he also placed Lieutenant-Commander Marsaw going counterclockwise. It's interesting to see how three or four people who could not even recall the incident at a given time, when they do recall it, all three of them come with essentially the same story to the effect that Marsaw is going counterclockwise and so on and so forth.

Lieutenant-Commander Marsaw has testified. He has explained to you how he works the periscope. He has explained to you that when he is on the periscope, I mean, there is no time to stop. And he said to you, "Even if the Admiral was in my way it just might happen that I

2150

Defending Officer

Closing address

would bump into him and that would be the end of it because I'm there to do my turn, my round", and he explained to you the importance of that. Is he going to waste time, to stop his movement, his all around that must be done in a fast or short period of time to kick somebody? I mean, this is not reasonable.

There is another person who mentioned about kick and that was Byrne. Now, Byrne was not talking about the kick to Higginson but to the fact that he had been kicked himself three times or more, I'm not sure about the number. Now, Byrne when he was interviewed by the military police, yeah, indicated he had been kicked or contact had been made, but stated there was no malice. Remember we engaged, Byrne and I, in a mini-debate on what is malice and what is not, what is intentional, what is not, and it depends on the bruises and so on and so forth. He too remembered all of a sudden now that "Yes, after all, yes, it was malicious." Yet, to the MPs several months prior, he had dismissed this as meaning nothing. Then he shows up in court and it becomes important. And he won't let go. All of a sudden it has become malicious. So it will be for you to determine whether that was credible.

Many witnesses have discussed the very small space, limited area, Truscott, Lieutenant-Commander Marsaw, lots and lots of people, reasonably had to indicate and admit that it is a very small area and the possibility of a physical contact exists. Lieutenant-Commander Marsaw has not denied having had any physical contact with

2151

Defending Officer

Closing address

anyone, has he? No. He hasn't, because it is a daily occurrence. And he stated, "Even if the Admiral was there it might just happen the same way because I got a job, a duty, a job at end and I've got to do it in this short period of time."

Lieutenant-Commander Truscott, teacher on perisher, told you something along the same line.

Can it be said that beyond a reasonable doubt on the basis of that evidence that Lieutenant-Commander Marsaw has ill-treated Higginson. I submit to you, not.

Charges 3, 4 and 7, I will address together and I will just try to share some views with you regarding that evidence. Dussault obviously didn't have much time, that was the XO at one time as you recall, didn't have much time for Marsaw. Reference was made about either some complaints or disagreement about Marsaw's style and all that and so, "Well, there is nothing I could do about it. Chain of command now, I mean, Marsaw is too big. He has got the connection. It might affect my career. I won't do nothing."

That's the one who said the quiz that Lieutenant-Commander Marsaw asked his officers to complete ... well, he didn't recall the results. "Anyway, I wouldn't pay attention, so goddamn stupid. I mean, I had better things to do." You heard of the result through Lieutenant-Commander Marsaw. The XO had the worst result on a questionnaire, a little quiz that is before you; quite simple. Very convenient that Dussault did not recall the result. It would have been a little embarrassing for him to say so.

2152

Defending Officer

Closing address

Madgett and Bidinost, the radar room incident, as I call it. You saw the door in court. You have some photos somewhere; a 75 pound door attached to a wooden frame with four screws of 3 inches each in three different spots, twelve 3-inch screws solidly ... because there is no evidence that they were not implanted in the wooden frame and here comes superman Marsaw who with a kick - the leg was mentioned so anyway one or the other - kicks that door with such a force that it is blown off its hinges. Twelve screws.

Can you imagine! And whether it's Bidinost or Madgett, is on his back and he has got the door on him. Not only that, that is a door that folds in the centre. Can you imagine kicking a door, I mean unless ... if you kick the door three or four inches from the hinges, the door will just fold on you. It makes sense. He would have to have it, that door, just like within an inch or two off the wooden frame with an incredible amount of force so that those twelve 3-inch screws would fly off. Not only that, he did that in the presence of Lieutenant-Commander Beverage according to Bidinost. Beverage was standing behind and watching the scene.

I would refer you to the work ups annual report of 1993 where it is stated I believe at paragraph 11, I'll give you the exact reference when I get there, when I review the evidence of the defence that it was reported that ... conclusion that the OJIBWA was well led and morale was good and all that. Can you imagine an officer of the sea training group who obviously according to Bidinost would have seen it, because

2153

Defending Officer

Closing address

it is in the testimony of Bidinost that he was standing right there and watching it. Can you imagine such an officer putting a report that the submarine is well led having witnessed such a thing? That report was prepared at the time. It's not anything that was concocted or made after. You have heard that PO[sic] Smyth talking about how that works.

Let's look at some other portion of the evidence. That was Madgett, I just finished with him. Bidinost. Many of the prosecution witnesses, and I'm not being specific here with purpose, said that when Marsaw entered the room, there was tension, the atmosphere would tense up.

So. Is that an offence? Captain[N] Webster testified that when a Captain walks in the wardroom his presence must be felt, he did say that, as a Captain of a surface ship I'm sure, must have his presence felt. There was an interesting incident narrated by, I forget who exactly, that the sub got sort of mixed up and lost amongst a bunch of surface fishery ships that had the nets and so on and so forth. And that person explained the danger of being entangled in the nets and et cetera. So is that too much to ask a crew to be attentive and avoid that sort of situation? And if the Captain came in situation like this to the wardroom, I suppose people would have good reasons to be tense, not only because he is there but because they're in trouble and maybe they're glad to see him after all.

Avant, A-V-A-N-T, I'm not sure how to pronounce it, that's the one who says as I

2154

Defending Officer

Closing address

recall, and you may want to take down this date, it might be important for the sake of this argument, as I recall it, he says he served on OJIBWA from October '91 to July '93, he said that in direct, and he was there when Marsaw in his inaugural speech as to taking command, called the whole crew lazy. He was asked in cross-examination and it appeared that he was mixed up with his dates but he insists that he was there.

We all know by now that Lieutenant-Commander Marsaw took command of OJIBWA in December 1990. So why would have Avant been there for this incredible speech? Who would get on board a ship, a boat, take a regiment and just by the by, "You're all lazy and I'm going to fix you." What a way to start.

Sergeant Shea. When the prosecution was looking for an evidence of bias although we don't have to prove it as I stated earlier but you may find some comfort in the evidence of Sergeant Shea who thought, and that's what he said in court that Marsaw was a flagrant asshole, a raving lunatic and although he was a bit reluctant to say, he may have said and I don't want to mislead you on that, he may have said it was possible that he said to the MPs that he was not fit to command a dog team. Maybe one could read some bias into that.

Bourassa states that there was this funny battery problem and that at one point with Chief Electrician Rollin, R-O-L-L-I-N, there was a problem with the batteries. Remember that it was the first time we heard the name of Rollin in this trial. Later, Lieutenant-Commander Marsaw

2155

Defending Officer

Closing address

testified that Rollin had never served under him and that battery problem similar to that explained by Bourassa had taken place on board another ship but never under his command. Isn't that evidence that maybe those people are confused, mixing up facts.

Another good one about Bourassa, he stated that the Captain was so negligent and so inattentive to details that one day they had to use a crane to open the escape tower upper lid. That was his account for why they had to use a crane. I would call that at best a wild guess which turned out to be wrong because Lieutenant-Commander Marsaw, who I suggest to you would have been in a much better position to know what this was all about, has indicated to you that it was a test that was being conducted. How can a witness from simple facts like this turn all that information against the Captain?

Wamback. I alluded to him about how career oriented he was earlier and how he just merely caved in. He was working for a maniac who is threatening his career, making life difficult. Although he's very career oriented he won't take on that maniac. He just caved in and let go. He didn't say anything about this raving maniac or this Captain whose leadership is such as to make everybody's life miserable in his memo of 5 December '91. I gave you the reference of that exhibit earlier on.

PO2 Brown relayed to the plot table incident with Higginson where the Captain would have said, "This is my track, my plot, my

2156

Defending Officer

Closing address

submarine" and so on and he might have crumbled a map as well. According to my notes I believe Higginson, or for sure in any event Lieutenant-Commander Marsaw, has stated that this event took place in Bermuda. PO2 Brown however states that he believes the event occurred when entering Boston. And he states that he never went to Bermuda. So if your notes do confirm that Brown never went to Bermuda, how could he testify on that incident? Maybe he heard it from somebody else. He states that he gave ... he was so fed up with this place that he tried to get out there and provided false medical information. Under cross-examination though he admitted that he was a V4 borderline V5 and that the minimum requirement for submarine is V3. So why did he leave the submarine service?

Byrne, we've discussed already the kick. Byrne was called a fucking liar, so he says. But that is the incident where Lieutenant-Commander Marsaw testified that he'd just seen him fudging a fix. No, Lieutenant[N] Byrne would not admit to fudging a fix, not a nice thing to do and he stood by his position and would not admit to having fudged the fix. Okay. Lieutenant-Commander Marsaw said, "I saw it. It is very serious and I say don't lie to me. I just saw you." It sounds like a pretty reasonable scenario to me. And then the business of the, "Don't you want to play my fucking game?" or words to that effect. Anyhow, you would remember I believe this. Again, that's one ... that was one of those things that Byrne had not mentioned to the military police. He just did not mention it. He read 37 pages or thereabouts of the transcript of his interview with the

2157

Defending Officer

Closing address

military police and said, "No, I did not mention that." Okay. In court though he was there and giving details very vivid and detailed account of that incident. Why? I guess it was not important to be told to the MPs.

But what's even better, even Conrad got into that story as well because Conrad had not mentioned that on the occasion of his first interview. So in the case of Conrad, not only have we added a kick but we've added the story about the, "My fucking game" or whomever's game and whatnot. And I invite you to compare your notes of Conrad and Byrne and you will find a striking resemblance between Byrne and Conrad on that. Again, for two individuals who at the time of their interview didn't think anything of it and it came as Conrad puts it, lots of things came to mind in four months, yeah, I can see that. And yet it comes in the same fashion. Is that hard evidence of bias or concoction?

Pokotylo, got out of the submarine service. He couldn't see. He was ... I'm not saying he was blind, but he had eyes problem. Where do we find that in Pokotylo's complaint against the Captain? Higginson on the Bermuda exit placed the box way too far on the west end of the reef and his excuse was that he didn't know whether the Captain wanted to use the east or west exit in Bermuda. They missed the box. They had to change, I mean a big kafuffle. Weather report; "Weather report? You must be joking. Me, as a navigator, I have nothing to do with that. I can navigate independent of the

2158

Defending Officer

Closing address

weather." Not surprising that the Captain would have to get a grip sometimes and raise his voice.

Watt. The prosecution has referred a lot to Watt; a brilliant career ruined; this man, maniac. Watt was out of military college, gunner, he saw an LA Class submarine, nuclear, and watched the movie, "**Das Boot.**" That's it. That is all he needed. "I want to be a submariner from now on. He goes on board the submarine, OJIBWA, of the OBERON Class. It's a bit of a step down from an LA Class sub. He just found the reality of life and realized he was not cut for submarine life. Does that make the Captain guilty of any offence? And this young man whom one might say was slightly immature, if he makes career decision the way he has explained here, comes on board and then he sits here in front of you and he takes the liberty, and he does that with a great deal of ease too, to criticize the Captain. The first time he steps on board a submarine out of military college, convinced to join the submarine life by visiting one and seeing a movie on TV. And he said toward the end, "Yeah, if it was my boat that's how I would do it." Well, thank you very much for your opinion. Let's compare his background to that of the Captain and then try to assess whose opinion one should consider.

I'd like to look at some evidence called by the defence. Exhibit "FFF" - It's approaching 4 o'clock. Everybody is happy and I can carry on - Everybody was saying that every time those rage demonstration and yelling and shouting happened at action station and happened all the

2159

Defending Officer

Closing address

time, all the time. Well, I invite you to look at Exhibit "FFF" which gives you a summary of hours spent, either surfaced, dived, bottomed. For example, '92 the boat was at sea, 2315 hours, with your permission I'll skip the minutes, and it was dived for 1,079 hours. Now those are the critical situations that we may have. Although it was on the surface though 1236 hours. So that should be that many hours where there is no room or reason to get excited according to many prosecution witnesses. Yet, they say that it happened all the time. '93 including some approximate figures incorporated by Lieutenant-Commander Marsaw, 1557 hours dived and 1,061 hours surfaced. We're looking at half and half here. Now those are the stats of the boat. And yet those people say it happened all the time although it only happened when they were dived. It will be for you to draw some conclusion out of that information. At the same time and on the same exhibit there are the number of hours during riders were present on board. And you remember that they all said, "Well, when there were riders though he'd tend to be a little smoother or not as maniac", which ever you want. Yet, there were riders all the time and that's listed on the exhibit and that is uncontradicted evidence.

Let's look at some of the messages, Exhibit "QQ", December '91, this person who is so inconsiderate of his crew and called them names day in and day out states at page 1 of that exhibit that the:

"XO AS DCO BOTTOMED THE SM VERY WELL."

2160

Defending Officer

Closing address

Well, maybe he is capable of paying the odd compliment which most witnesses would say that he'd never do. Oh, here is the bad news at page 2:

**"AFTER ABOVE CROWING MUST NOW
INFORM YOU THAT I BELIEVE I WAS
OUT OF AREA FOR A PORTION OF
THE EXERCISE."**

I skip a few lines:

**"THE POINT WAS SO ANNOUNCED AND
PLOTTED CORRECTLY BY THE NAVO
AND CHECKED BY MYSELF.
SUBSEQUENTLY HOWEVER HE PLOTTED
A 35 X 35 NM BOX. I DID NOT
CHECK THIS."**

He goes on further down at para 7:

**"I RECOGNIZE THAT THIS NEWS IS
NOT GOING TO MAKE ME VERY
POPULAR PARTICULARLY ON THE
HEELS OF THE BALTIMORE/ONO
INCIDENT. I ACCEPT FULL AND
SOLE RESPONSIBILITY FOR REPER-
CUSSIONS."**

Now, here is the raving lunatic who yells at people for fun, who doesn't know how to praise. Well, he has praised the XO and now, it must have been a good day, he even took full responsibility for an incident. Isn't that was a

2161

Defending Officer

Closing address

good Captain is supposed to do? To crown it all though at para 9 of this message:

**"REQUEST YOU DIRECT SYO TO HAVE
FLOWERS DELIVERED FROM ME TO
CPO TOVEYS WIFE."**

H'm! A little touch of sensitivity too.

I'd like to direct your attention - I will invite you to read other ... there are two other signals of that nature. I don't want to go through them all because it would be too long. I invite your attention, and again, I won't refer to them all, all the exhibits, the reports of proceedings that have been introduced. They are extremely important because they reflect what was happening at the time. He discussed the morale.

In the other two messages which I haven't read now, and in those quarterly reports of proceeding, Lieutenant-Commander Marsaw believes reporting candidly the ups and downs of the morale. So, yeah morale cannot be at a hundred per cent all the time. And he expresses concerns, he discusses ... he says, "Well ..." in one of the messages as I recall it, he says, "Well, that style of leadership, what has worked well for me, I mean, doesn't seem to work too well now. I'm looking forward to discuss with you, SMI, about this." What does that show? Does that show a raving lunatic or somebody who is concerned and is doing his job?

And all those report of proceedings which I won't indulge into right now confirming

2162

Defending Officer

Closing address

just that. And it's important because unlike witnesses he prepared those way back when. Unless he had one of those very sophisticated crystal ball, how could he have known that he was going to be charged some 12 or 16 months after his command? I mean, who could conceive that somebody would fabricate this? For the sake of covering his ass basically. This is extremely important evidence as was, as I mentioned to you, that of those individuals who were putting requests for general service. What was the real reason for them requesting to go to general service. I submit to you it is in the memo; not in what they told you in court.

I invite your attention to Exhibits "KK" and "LL" which are the sea training group reports and I shall as promised refer you to the exact portion of the '93 report that is actually para 11 at Annex A of Exhibit "LL" and that paragraph reads as follow:

"11. (U) What the Submarine Sea Training Group observed in OJIBWA during AWUPS fostered the opinion that the submarine was well led and motivated and capable of a high standard of operational readiness."

That's when Beverage was involved in that. He was standing behind Bidinost. The story doesn't say whether he yelled removing the door from Bidinost. I'd like to refer you to Exhibit "III", outstanding PER, May '91, April '92, signed by Captain[N] J.A.Y. Plante, reviewed

2163

Defending Officer

Closing address

by Commodore Moore and then Vice-Admiral Anderson, outstanding PER. It's there for you to be read. He was already highly recommended by then Vice-Admiral Anderson for promotion in '91.

Exhibit "MM", reporting period May '92 to April '93, signed Lieutenant-Commander Scherber, revised at the time by Rear-Admiral Mason then. The prosecution was saying that Lieutenant-Commander Marsaw was riding on OJIBWA on the reputation of the previous CO. I suggest to you this is not the case as Rear-Admiral Mason puts it in the last two lines of his review: **"He ranks ..."**, he, that is Lieutenant-Commander Marsaw:

"He ranks as the top LCDR commanding officer serving in an operational billet within Atlantic maritime forces."

It's not Woodburn. It's not Hickey. It's not Truscott. It's nobody else that's running his business. That report says that quite clearly. Exhibit "NN", report May '93 to October '93, still Scherber, Rear-Admiral Mason, the narrative is quite long. I won't read it to you. Let's look at Vice-Admiral Mason. He must be getting to know this man by now. Para 2 of comments by reviewing officer:

"I strongly support his selection for Staff College. Also, I strongly recommend his

2164

Defending Officer

Closing address

**immediate promotion to
Commander. LCDR Marsaw has the
potential to achieve very
senior rank in the Canadian
Forces."**

I don't think that the Admiral or Commander, should I say, Scherber could have written that many PERs on submariner or submarine COs at the time. What is that theory that he was living off the reputation of other COs and that he turned that into a disaster. He turned OJIBWA into a disaster? He ruined the career of officers? I fail to find any such evidence.

A brief word about the other evidence brought by the defence. Lieutenant-Commander Scherber, of course, he testified and explained to you how it's done, a PER, what information. He explained that in no way could he conceive OJIBWA having performed as she did had the course of conduct described by the prosecution taken place. And Captain[N] Webster has agreed to that. He may not have spent as much time as Scherber explaining that but I submit to you that he did address this matter as well.

Calnan, Air Force guy, 30 some years of service, new on board the submarine, a totally new experience to a difficult environment. He was quite happy with it. He saw nothing wrong. Tingle, I submit to you that we disagree of course on the evidence but he didn't say any words that he had been humiliated. He said that, "I was a little nervous about getting on this because of some reputation I had heard, that on

2165

Defending Officer

Closing address

board I found a very patient CO. I found a patient CO who helped me out."

Cox, questioned by the prosecution, "Can you swear hand on your heart that he didn't say the word 'stupid'?" "No". I mean, who could really? I mean he can only testify as to what he saw. In re-examination, "Could you swear, hand on your heart, that he did?" "No". I mean, okay, so we are even there. Certainly, Cox nor Tingle have suggested that the CO, the Captain, behaved in a manner as some witnesses have claimed he had.

Hallonquist, Kramble, Lavoie, the big beef of the prosecution is that those people didn't spend much time in the control room. Of course Tingle did spend time in the control room so did Cox. The next three may have spent less time admittedly, nonetheless if truly the Captain behaved in such a manner as described by some of the prosecution witnesses he didn't need to spend much time in the control room to observe. It was continuous, relentless, screaming, hollering, I mean Christ being on board would have sufficed to be aware of such a conduct, let alone being in the control room.

I submit to you, Mr President and Members of the court, that the prosecution has not at all met its duty to prove beyond a reasonable doubt. They may have put in front of you lots and lots of words, swear, insults. They are in those briefs you have there. Okay, that's fine. The idea though is that, is this

2166

Defending Officer

Closing address

reliable evidence that you can say this is how Lieutenant-Commander Dean Marsaw behaved.

The prosecution was greatly concerned about the - and again, and despite my early intervention, we don't have to prove why they're lying. I would submit to you we have established an extremely poor credibility on the part of Crown witnesses. As to why, well I gave you a few examples, the Shea, Conrad and Tovey hate him. Craven for that matter said, "Yeah, the man is disliked, widely disliked." It is not for us to establish to you exactly why they may have lied or why they may have come to court. But I believe that their performance in court was self-explanatory.

If life was so terrible on board?
Nobody does anything. Craven, a senior officer, I mean I could conceive one, two, three, let's push it, four people, weak character who are prepared to take abuse without fighting back. The prosecution has called 30 witnesses of people who served on board. Not one of them has stood up. Not one of them has gone to the MPs, for example, it's one source, to lodge a complaint to the MPs possibility and say, "I've been physically abused" and the MPs would have referred them elsewhere. None of them have gone to anybody in the system. All they say is, "I didn't trust the system." H'm, nobody went there. I can conceive one or two or a few weak characters. Thirty people like this! What's the likelihood of this happening? They did not complain to anyone. Lieutenant-Commander Marsaw left the boat in October '94 and it's not until

2167

Defending Officer

Closing address

November and then December with this article where people went to the paper, as it's stated:

"Four veteran submariners, who spoke only on condition their names not be released, ..."

All those people do know their duty or should know their duty, who are supposed to have gone through hell under this lieutenant-commander. Nobody made a redress. Nobody denounced anything. They go to the Press, not only that, that's when people start being interviewed. Going to the Press is one thing but then one interview doesn't do the trick either. One interview with the MPs doesn't do the trick.

Count the number of people who have been interviewed more than once and compare how much more was added the second time than the first and then, if you want to further compare, compare what more was even added in court compared to the first two interviews.

The prosecution wants you to believe that those 30 people are right but all 30 of them didn't have the guts to stand up and they just waited until he was gone and went to the Press. The prosecution would then suggest to you that Lieutenant-Commander Marsaw has blind-sided, as the prosecution used the expression, with Commander Scherber, blind-sided the whole command, including Admirals Mason, Moore, Anderson, for three years, getting excellent PERs. So on one hand he is a maniac, a raving lunatic, and yet those obviously experienced and

2168

Defending Officer

Closing address

knowledgeable officers rate him as an outstanding.

You've heard evidence how rumours flied around in ... especially the sub squadron. Many witnesses have referred to it including Scherber and many prosecution witnesses. Scherber was saying, "I mean you say something and zap within minutes and then at best within days it's known throughout the whole community. Is that conceivable that such a monster as, has been described by the prosecution witnesses, would have fooled the whole chain of command? When you consider that Lieutenant-Commander Marsaw throughout his progress has been demanding for himself and he succeeded well. I mean what he has done on board OJIBWA is just consistent with the rest of his career. Why should it be an different and the PERs are there to prove it.

Just a brief quote from - I will be very brief now - a brief quote from the guide to the divisional system that has been introduced by the prosecution at page 1-2 of that system:

"The outlined objects of the organization are to decentralize command and the responsibility for discipline, ship work and welfare."

Then they go on to talk about the DO, divisional officer.

"He is also charged with the responsibility of receiving

2169

Defending Officer

Closing address

**requests and representations
and submitting them to higher
authority when required."**

Later on:

**"He is charged with the payment
of particular attention to the
training of those inferior to
him in rank, to check harshness
and irritating language, to
correct bad habits and
carelessness and generally to
act as a guide, philosopher,
friend, father-confessor,
reforger and superintendent of
the men, their welfare, their
living space and their working
conditions."**

Where does that leave all those
prosecution witnesses that have come here and
testified the way they did. From the same
divisional guideline to divisional
responsibilities at page 2-5 under the title
"Know the Division":

**"If a relationship of trust and
mutual respect is to be
fostered among the members of
the Division, it is imperative
that divisional leaders know
their subordinates well. Field
Marshall Slim said,**

2170

Defending Officer

Closing address

'When you command a group of men you ought to know each man better than his mother does; you must know which man responds to encouragement, which to reason; and which needs a good kick in the pants.'

And that's what Lieutenant-Commander Marsaw has been struggling with throughout his command as demonstrated in those signals, the three of them, the reports of proceedings, that's what he has done. That's what he is paid to do.

Where does that leave those officers that sat in that chair for the prosecution in terms of responsibilities? Who are you going to believe, because that's what you will have to do, believe or disbelieve somebody at some point. Although the judge advocate will explain that even if you did not believe the accused you still would have to require proof beyond a reasonable doubt that he is guilty. If one has a choice to make it'll be your choice.

Before I make my very final comment, Mr Judge Advocate, I would ask you to incorporate in your address a few comments about the rule against multiple convictions of **Kienapple** in relation to charges 3 and 4 and then in relation as well to charges 7 and 4.

We had announced that credibility in our opening address would be a crucial point of this

2171

Defending Officer

Closing address

trial. We had announced that prosecution witnesses would turn to be unreliable because of either alcohol, that would be the example of the mess dinner, bias or other reasons. We believe that the evidence heard, including cross-examination of course which is an important phase, has demonstrated the lack of reliability of those witnesses, that the evidence produced by the defence has demonstrated an exemplary conduct on the part of Lieutenant-Commander Marsaw and simply for those reasons that he should be found not guilty of all charges. Thank you.

JUDGE ADVOCATE: Thank you. Now, Mr President and Members of the court, it's now for me as judge advocate to address the court and make my remarks. In order for me to do so and to do so properly I will need some time to review the evidence, the law and more specifically the comments and addresses that have been made to you by the prosecution and defence. Consequently, I suggest that the court adjourn until 9 o'clock Tuesday morning. That gives me two full days. I make no promise that I will be ready but I will do my very best.

The court is adjourned until 9 o'clock Tuesday morning.

ADJOURNMENT: At 1628 hours, 28 October 1995, the court adjourns.

2172

Defending Officer

Closing address

REASSEMBLY: At 1400 hours, 25 October1915
REASSEMBLY: At 0916 hours, 26 October1985
REASSEMBLY: At 1300 hours, 28 October2033

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2100

Judge Advocate

Summation

REASSEMBLY: At 0900 hours, 31 October 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Good morning, Mr President and Members of the Court.

PRESIDENT: Good morning.

JUDGE ADVOCATE: The time has come for you to make your findings in this case. You are engaged in one of the most important duties which Canadian citizens and an officer of the Canadian Forces can be called upon to perform. As the finders of fact you have a direct and deciding voice in the administration of justice in the Canadian Forces.

It is of fundamental importance that no accused should be found guilty of an offence which he did not commit. Your responsibility as finders of fact is to protect an accused from unjust convictions, and to protect the safety and security of both the Canadian Forces and civilian communities by finding guilt against those persons subject to the Code of Service Discipline who have committed service offences.

It now becomes my duty as judge advocate to address you in respect of the law applicable to the charges against Lieutenant-Commander Marsaw; to briefly summarize the evidence that you have heard on the charges; and to also advise you about the positions of the prosecution and the defence in this case.

I have appreciated the time you have afforded me to prepare my remarks and hope you will find I have put it to good use. At this point in time it is difficult for me to assess with precision the amount of time it will take me to make my remarks but I expect that it could be done this morning, although we may have to stretch it a little bit. I would ask you then to take as complete notes as possible. Please, do not hesitate at any moment to indicate that an adjournment is neces-

2101

Judge Advocate

Summation

sary. It is understood that when concentration reaches a saturation point it is necessary to take a pause, and then to recommence after being refreshed.

If at any time during my remarks you feel I am speaking too quickly do not hesitate to say so immediately and I can repeat my remarks and/or slow down. You could, of course, wait until the conclusion of my remarks but I believe it would be much easier to deal with it as it happens. I am, of course, not speaking at this point about questions.

You should reserve your questions until that point in my remarks where I will ask you for them. I say this out of no lack of respect but simply that I think it wiser that you wait until then. You may find that the question you have now will have been answered some time later in my remarks. Again, if I tend to speak too quickly please do not hesitate to ask me to slow down.

I would like, once again, to invite your attention to some of the basic principles to which I have already referred in my preliminary remarks. The court is the sole judge of the facts. However, as I told you earlier, you are bound by the rulings I made during the trial pursuant to Queen's Regulations and Orders for the Canadian Forces article 112.06. Where such rulings involved a question of admissibility of evidence, they did not involve the weight or probative value to be attached to the evidence admitted, since the weight and probative value to be attached to admitted evidence is solely for you as the court to determine.

In the course of my remarks to you in this address I will review some of the evidence. In doing so, I may fail to mention something that you believe to be important, or I may mention something which you believe is not important. If that occurs you must remember that my view as to the significance of the various parts of the evidence is in no way binding upon

2102

Judge Advocate

Summation

you. The same applies to any opinions expressed by either counsel. It is not only your right but your duty to make your own decisions on the evidence adduced at this trial. You determine the facts and the weight to be given to the evidence tendered at this court martial.

During my remarks I may, either consciously or unconsciously, express my opinion with regard to the evidence which has been given by a witness. If I do so, I wish to emphasize that you are in no way bound to follow my opinion on such matters because they involve questions of fact and the weight of the evidence which, as I stated earlier, is the sole domain of the court and upon which you must make your own decisions. Once again, the same instruction applies to any such opinion expressed by either counsel.

Also if, in the course of my review, my account of the evidence should differ from your own notes or recollection, then you will have to disregard my account and rely strictly on your own notes or recollection. Further, should you be left in doubt as to any portion of the evidence presented to the court, you will have to ask the court reporter to read back that portion of the evidence in open court.

At this stage of the trial, you have only one function to perform and that is to determine whether the accused is guilty or not guilty of the charges against him. In doing so, you must determine the facts from the evidence heard or produced in this court. It's only the evidence produced in this court by way of the testimony of witnesses, admissions and exhibits that can influence the decision of the court, and you must put entirely from your minds everything but that heard in open court, including the evidence I ruled inadmissible.

There is only one exception and that is the rule of judicial notice as described in Rules 14 to 19 of the Military Rules of Evidence which are found at

2103

Judge Advocate

Summation

Appendix 1.3 to Volume IV of QR&Os. You will recall I dealt with this during my opening remarks to you and I will have more to say about judicial notice in a moment.

As I pointed out, you must determine what are the facts. In making that determination you are not compelled to accept the story of any witness except to the extent that it has impressed you as being credible.

The court should properly accept as trustworthy the evidence it has heard unless there is some reason for disbelieving it. Often witnesses see and hear things differently. Minor discrepancies do not necessarily mean that testimony should be disregarded, and discrepancies and trivial matters may not be, and usually are not, of great importance. I am speaking here of mere discrepancies which can easily and innocently occur. A deliberate falsehood is an entirely different matter. It's always serious and may well taint a witness' entire testimony.

The court is the sole judge of the credibility of witnesses and when weighing their testimony, in addition to those matters to which I have just now referred, it is proper for you to consider the human factors which may affect the giving of perfectly honest testimony. Your response to the following types of questions may help you to appreciate such factors:

1. Did the witness have any particular reason to assist him in recalling the precise event that he attempted to describe? Or could the witness, because of the relative unimportance of the event at the time it occurred, be easily and understandably in error as to detail, or even the day and time of the occurrence?
2. What real opportunity did the witness have to observe the event described?

2104

Judge Advocate

Summation

3. Did the witness have any interest in the outcome of the trial, or any reason for favouring the prosecution or the accused, or was the witness impartial?

4. What was the apparent memory capacity of the witness?

5. What was the appearance and demeanour of the witness while testifying? Was the witness forthright and responsive to questions or was he evasive, hesitant or argumentative with counsel?

6. Was the witness' testimony reasonable and consistent within itself and the uncontradicted facts? To put it in the vernacular - how does his evidence stack up?

Essentially, use your everyday experience and good common sense in judging people and what they have to say. Keep in mind in assessing a witness' testimony that a witness may be truthful in the sense of accurately reflecting reality when testifying to a matter; or may be deliberately lying as to a matter; or may be honestly mistaken as to a matter. You may, therefore, believe all the evidence given by a witness, part of the evidence or none of it. I repeat, you may believe all the evidence given by a witness, part of that evidence or none of it. It is also important to remember that if you reject part of the evidence of a witness as not being credible, you should only accept the remainder of the evidence of that witness with extreme caution.

Also, keep in mind that in determining whether or not the accused is guilty or not guilty of the offences on the charge sheet, you must assess the evidence cumulatively and as a whole. However, in this respect, the evidence of one credible witness is sufficient to establish a fact and you are entitled to believe one witness in preference to any number of

2105

Judge Advocate

Summation

opposing witnesses. As I mentioned earlier, the court is under an obligation to consider the facts as established by the evidence and only those facts. Maintain an open mind and do not be influenced by anything you may know or may have heard of the facts outside of this courtroom. You must ignore such knowledge when making your decision and you must consider only the facts brought out at this trial.

I would now like to explain to you two fundamental principles of our law, the presumption of innocence and the requirement for proof beyond a reasonable doubt. An accused person is presumed to be innocent until the prosecution has satisfied you beyond a reasonable doubt of his guilt. Accordingly, the presumption of innocence remains with Lieutenant-Commander Marsaw for his benefit from the beginning of the trial until the end. In this respect, you must always remember that the fact an accused has been arrested or charged is in no way indicative of his guilt.

The burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts. There is no burden on an accused person to prove his innocence. It is of crucial importance that you pay special attention to this principle in view of the comments made by the prosecution in his final address to the court. In his final address, the prosecution said something to the effect that because the accused brought no facts, no explanations, no logic to support his position and simply denied the incidents by saying that they did not happen, such testimony is of zero evidentiary weight. Well, those comments are wrong in law. I emphasize that there is no burden on an accused person to prove his innocence.

The prosecution, in his cross examination of the accused, asked him the following question: "Do you have any hard evidence at all to present to this court to explain why these officers would give false testimony against you?" When the prosecution called such evidence, the defending officer made no objection to

2106

Judge Advocate

Summation

its admissibility at the time it was given. Now that all the evidence is completed, I have determined that the evidence relating to such line of questioning is of no probative value and, therefore, you should give it no weight. I therefore ask you to disregard such questions and answers for the following reasons: Such evidence is irrelevant because it invites the accused to advance a theory or opinion as to the witnesses' motives; it also tends to place an improper burden on the accused to account for another's conduct. If you have a reasonable doubt as to whether the accused committed any offence with which he is charged, it is your duty to give the accused the benefit of the doubt and find him not guilty on that charge or charges.

It is rarely possible to prove anything with absolute certainty and so the burden of proof on the prosecution is only to prove guilt beyond a reasonable doubt. But what exactly is a reasonable doubt? When I speak of a reasonable doubt I use the words in their ordinary, natural meaning, not as a legal term having some special connotation. A reasonable doubt is a real doubt. It is not an illusory doubt. A reasonable doubt is a doubt that a person acting in good faith can have based upon reason and common sense.

If after a fair and impartial consideration of all the evidence, you have a decided conviction or a moral certainty as to the guilt of the accused, then you have no reasonable doubt. But if the evidence has left you in such a state of mind that you do not have that deep conviction or moral certainty of the guilt of the accused, then you have a reasonable doubt and you must give the accused the benefit of it in respect of any such charge.

You must consider the evidence as a whole and determine therefrom whether the guilt of the accused is established by the prosecution beyond a reasonable doubt. This, of necessity, requires that each essential ingredient of a charge must be proved by the prosecution beyond a reasonable doubt. If you have a

2107

Judge Advocate

Summation

reasonable doubt concerning only one of the essential ingredients of a charge, you must give the accused the benefit of that doubt and find him not guilty of that charge.

The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or the separate pieces of evidence which make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove each and every essential ingredient beyond a reasonable doubt. I must, however, caution you that if there is a doubtful fact, a piece of evidence or inference adverse to the accused which is essential to a finding of guilt, and this fact or inference remains doubtful notwithstanding the support of other facts and in the context of all the evidence, then there will be a reasonable doubt as to the guilt of the accused and he must be found not guilty.

To put it another way, individual facts do not necessarily establish guilt but are a link in the chain of ultimate proof. Just as a weak link may cause the whole chain to fail when put to the ultimate test, so too may a dubious fact cause the whole body of evidence relied upon by the prosecution to fail the ultimate test of proof beyond a reasonable doubt.

You may have trouble deciding which witnesses you do not believe. You should know that the rule of reasonable doubt also applies to the issue of credibility. You need not definitely decide on the credibility of a witness or a group of witnesses. You need not fully believe or disbelieve one witness or a group of witnesses. If you have a reasonable doubt as to the guilt of the accused arising from the credibility of the witnesses then you should find him not guilty.

In this trial the accused testified on his own behalf. In addition to the instructions I just gave you as to the credibility of all the witnesses, I must also instruct you as to the issues of credibility and reasonable doubt in circumstances such as this

2108

Judge Advocate

Summation

where the accused testifies. First, if you believe the evidence of the accused, you must acquit him. Secondly, if you are unable to decide whether or not you believe the evidence of the accused but you are left in a reasonable doubt by it, you must acquit him. Thirdly, if you do not believe the evidence of the accused and reject it as untrue, you need have no further regard to it and must ask yourself whether on the basis of the evidence which you accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Simply put, Lieutenant-Commander Marsaw does not have to establish anything. Any evidence favourable to him does not have to meet any particular standard of persuasion. If such evidence raises a reasonable doubt, in the context of all the evidence, Lieutenant-Commander Marsaw must be found not guilty.

Again, in view of the comments made by the prosecution in its final address to the court, I remind you of my previous instructions on this matter. I will also add that the inability of the accused to explain a conflict between his evidence and that of a prosecution witness is not, of itself, a ground for disbelieving the accused and the prosecution's submission to the effect that a mere denial from the accused saying that the incidents did not happen is of zero evidentiary weight is wrong in law.

To sum up on the principle of reasonable doubt, it applies to the whole body of evidence on the ultimate issue of guilt, and to the determination of whether each essential ingredient of an offence has been proved. If the court, at the conclusion of the case, is left in a state of reasonable doubt concerning only one of the essential ingredients of a charge, it must give the accused the benefit of this doubt and find him not guilty of that charge.

A distinction lies between mere conjecture and an inference that has been properly drawn. Conjec-

2109

Judge Advocate

Summation

ture is a conclusion drawn upon a possibility or the probability that a particular thing could or may have occurred without proof that it did occur.

An inference, on the other hand, is a conclusion reasonably drawn from facts established by the evidence. It is a reasonable deduction and conclusion which can be drawn from proven facts. It is a much stronger kind of belief than conjecture or speculation.

If there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference. At best you would be speculating or guessing and that is not good enough. An accused must not be convicted on a guess no matter how shrewd that guess may be.

I mentioned in my preliminary address the matter of circumstantial and direct evidence. Let me simply remind you that direct evidence means evidence that tends directly to establish the existence or non-existence of an ingredient of the offence charged. Circumstantial evidence, however, means evidence tending to establish the existence or non-existence of a fact which is not part of the evidence charged, but which leads to an inference concerning the existence or non-existence of a fact that is one of the ingredients of the offence charged. You may recall the example I gave you in my opening remarks regarding the wet street in front of your house. You must remember that direct evidence is not better than circumstantial evidence, the difference between them being one of kind rather than probative value.

I would like, notwithstanding my comments to you during my preliminary address, to revisit and perhaps add to the comments I just made, the following remarks concerning circumstantial and direct evidence.

There are two types of evidence in any case such as the one before you. One is direct evidence, the other is circumstantial evidence. Both direct and

2110

Judge Advocate

Summation

circumstantial evidence are admissible as a means of proof. Sometimes circumstantial evidence is more persuasive than direct evidence. The evidence of one witness may contradict that of another but the circumstances of an event are often not in dispute. I will explain the difference between these two types of evidence by way of an example.

Here is the first example. Suppose a woman is on trial for murder. It is alleged that she killed a man by stabbing him to death. A witness testifies that he saw the accused stab the victim with a knife. This is direct evidence that the accused stabbed the victim. Direct evidence has two possible sources of error. First, the witness might be lying for one reason or another. Second, the witness might be mistaken when identifying the accused as the person who did the stabbing. On the other hand if the witness is not lying or is not mistaken then the proper conclusion is that the accused stabbed the victim.

Now, the second example. Take the same accused and the same allegation that she killed a man by stabbing him to death. A witness testifies that he heard a noise and went into the room where he found the accused standing over the body of the victim with a knife in her hand. That is circumstantial evidence that the accused stabbed the victim since there is no direct evidence from the witness that he saw the actual stabbing.

In this example there are three possible sources of error. First, the witness may be lying. Second, the witness may have mistakenly identified the accused. Third, there is the possibility of drawing the wrong inference arising from the circumstances. For instance, assume the witness is truthful and not mistaken about the identity of the accused as the person with the knife in her hand, it is still possible the accused did not stab the victim. The accused may have been outside the room when the victim was stabbed. She may have heard the same noise, entered the room

2111

Judge Advocate

Summation

before the witness and innocently picked up the knife. After doing so, the witness came into the room and saw the accused with a knife in her hand. If that actually happened it would, of course, be wrong to infer or conclude that the accused stabbed the victim even though the witness was not lying or mistaken.

As I have said, facts may be proved by either or both direct and circumstantial evidence. I have already explained that the burden on the prosecution is to prove beyond a reasonable doubt that the offence charged was committed and that the accused committed it. Before you can base a verdict on circumstantial evidence you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.

Now, each offence with which an accused is charged necessarily requires proof, not only that he committed the act which is alleged, but also proof that the act was accompanied by the necessary blameworthy intention. Without both of these ingredients being present, an accused cannot be found guilty of a criminal or a service offence. In order to convict, therefore, the court must be satisfied beyond a reasonable doubt that both the guilty mind and the guilty act have been established.

The blameworthy intention necessary is essentially that the action of the accused is a product of his volition and free will and was not an act that was unavoidable in the circumstances. This intention can rarely be proven by direct evidence. Very often it must be inferred or deduced from other facts. This is because intention is a state of mind and we cannot see inside other people's minds to decide whether or not they intend to do things. As a proposition of common sense, it can be stated that a person is usually able to foresee what are the natural and probable consequences of his acts. It is reasonable to infer that he did foresee them and intended them. But while this is

2112

Judge Advocate

Summation

an inference that may be drawn, it is not one which must be drawn.

If on all the facts of the case it is not the correct inference, then it should not be drawn. It follows then that it is only from facts proven that the inference of the guilty intent can be drawn. You should consider what facts have been proven, and then consider if they undoubtedly manifest the blameworthy state of mind of the accused beyond a reasonable doubt.

For example, suppose a man walks up to a plate door. He looks around furtively, and then kicks in the door. In those circumstances you would probably conclude that he intended to kick in the door. On the other hand, suppose the same man is walking along the sidewalk not watching where he is going. He trips over something that has been left on the sidewalk, and his foot goes through the glass door. In this case, you would probably conclude that it was an accident, that he did not intend to kick in the door.

Before you can find that the accused had the necessary blameworthy intention, you must be satisfied beyond a reasonable doubt that this intention is the only reasonable inference to be drawn from the proven facts. Please, remember that the question for you to decide is, what did the accused in fact intend?

I would now like to discuss with you the evidentiary matters that have been raised in this trial, and I would like to do so before turning to the evidence and the law applicable to the charges on the charge sheet.

The first matter I would like to address is that of judicial notice. You have taken judicial notice pursuant to Military Rule of Evidence 15 of the facts and matters contained in that rule. Military Rule of Evidence 19(2) provides in part that when a court has taken judicial notice of a fact or matter, the fact or matter is conclusively taken to be true.

2113

Judge Advocate

Summation

This means that you can accept as true the contents of the matters you have taken judicial notice of. However, you cannot conclude that the matters of which you have taken judicial notice of have been sufficiently notified to the accused unless you find, on the basis of the evidence presented to you in this trial, that the accused had knowledge of the matters of which you have taken judicial notice.

There is another general rule that you will need to know when you assess the evidence. A trial is not a numbers game. You must not decide an issue by simply counting which side has the larger number of witnesses on that issue. For example, 20 witnesses may testify to a particular fact and one witness may testify to the contrary. You may accept the evidence of the one over the 20 if it is more worthy of belief. On the other hand, you are not allowed to disregard the testimony of the greater number of witnesses merely because of prejudice or whim. It is the convincing force of the evidence which is important, not the number of witnesses.

I now wish to address you on exhibits, more specifically the exhibits that were produced as documents in this trial.

Direct evidence is proved by the testimony of a person who has perceived or apprehended through his senses a given thing, a fact or an event. The thing may be produced before you as proof of its existence and it then becomes an exhibit. The purpose of such exhibits is to assist the court in arriving at a proper decision. These exhibits should be considered as a means to enable the court to understand and more easily follow the testimony. You may inspect them and, of course, draw your own conclusions based on the evidence you have heard, and from the weight you give to the evidence of the witnesses who have appeared before you to describe these exhibits and to introduce them before you.

2114

Judge Advocate

Summation

Several times during the course of this trial I made rulings with respect to the admissibility of evidence or on the objections made by counsel. Where I maintained the objections, the questions posed and the answers that followed are not to be considered by you.

Where the objections were overruled this meant that you were entitled to hear the questions and answers put to and received from the witnesses respectively.

I am now going to tell you about expert evidence. In this trial, Lieutenant-Commander Davidson, CPO1 Brown, Captain[N] Webster and Lieutenant-Commander Truscott gave evidence as expert witnesses. Lieutenant-Commander Davidson was qualified to give expert evidence because of his special skill and knowledge in the field of the organization of the First Canadian Submarine Squadron, the training and career progression of submariner officers and the operation of Oberon class submarines. CPO1 Brown was qualified to give expert evidence because of his special skill and knowledge in the field of leadership of and in an operational naval unit. Captain[N] Webster was qualified to give expert evidence because of his special skill and knowledge in the area of leadership of and in an operational naval unit. Lieutenant-Commander Truscott was qualified to give expert evidence because of his special skill and knowledge in the area of leadership and submarine command.

These witnesses were qualified to give that evidence pursuant to Military Rule of Evidence 81, which reads as follows:

"A witness is an expert witness and is qualified to give testimony if the judge advocate finds that

(a) to perceive, know or understand the matter concerning which the witness is to testify requires special

2115

Judge Advocate

Summation

knowledge, skill, experience
or training;

(b) the witness has the
requisite knowledge, skill,
experience or training; and

(c) the expert testimony of
the witness would substan-
tially assist the court."

They gave their evidence pursuant to Military
Rules of Evidence 62 and 63, which read as follows:

"62.(1) When permitted to give an
opinion under this Division or
Division VII, an expert witness may
give the court that opinion whether
or not he has observed the facts
needing further interpretation.

(2) Unless leave is granted by the
judge advocate before any experts
have been called by a party, not
more than three experts may be
examined by that party.

63.(1) When a matter is within the
special knowledge of an expert
witness, he may give his expert
opinion of the direct or indirect
significance relative to the charge
or issue

(a) of certain relevant facts
that have been or may be es-
tablished by evidence; and

2116

Judge Advocate

Summation

(b) hypothetically on the basis of any acceptable version of the facts.

(2) An expert witness may be questioned as to the grounds of his opinion, and in answering may quote the hearsay statement of another expert in the same field."

There is a special rule about the testimony of experts I must tell you about. Normally, a witness is not allowed to give an opinion. Witnesses can only testify about what they saw and heard. However, our Rules of Evidence make an exception in the case of experts. Expert witnesses are allowed to give their opinions, but only in the area of their expertise. Therefore, Lieutenant-Commander Davidson, CPO1 Brown, Captain[N] Webster and Lieutenant-Commander Truscott were allowed to give their opinion in their respective area of expertise.

It is up to you to decide how much weight you will give to an expert opinion. You do not have to accept the testimony or the opinion of an expert witness. The only reason an expert is allowed to give you an opinion is to help you decide an issue. You should consider carefully the testimony and opinion of an expert witness, just as you should consider carefully the evidence of any other witness.

You will not find it easy to decide how much weight you should give to the opinion of an expert witness. I would suggest that you use a three-step process.

First, you should consider the qualifications of each expert witness. Examine his training and experience. Ask yourselves whether these qualifications add to or detract from the opinion he expressed. I would also suggest that you ask yourselves whether

2117

Judge Advocate

Summation

each expert was impartial, or whether he appeared to favour the party who called him.

Second, you should examine the facts or assumptions that each expert relied upon to form his opinion. The more an expert relies on facts not proved in evidence, the less weight you should give to his testimony. If there is no evidence of any facts or assumptions upon which the expert relied to form his opinion, then you must attach no weight to the opinion.

When some expert witnesses gave their opinion, it was based on a hypothetical set of assumptions put to them by counsel. As I told you earlier, what counsel said is not evidence. You must therefore examine the evidence carefully to see if it supports the hypothetical assumptions used by the expert when he formed his opinion. If the evidence does not support those assumptions, then you should attach no weight to the opinion. On the other hand, if the evidence does support those assumptions, it is up to you to decide how much weight you give to that expert's opinion.

Third, you should examine the opinion itself. You should examine the process used by the expert when he arrived at his opinion. This, of course, is where the special skill and knowledge of the expert comes in. If you are satisfied with the qualifications and impartiality of the expert and find that the evidence supports the assumptions used by the expert, then you should not reject the expert's opinion without good reason. If, however, you are of the view, on a consideration of all of the evidence in the case, that the opinion of the expert should not be accepted by you, you are at liberty to reject it.

If you find that there was a conflict between the opinion of one expert witness and the opinion of another, you must decide how much weight you will give to each expert's opinion. You may use the three-step process I told you about. First, consider the qualifications and impartiality of each expert; second, con-

2118

Judge Advocate

Summation

sider whether the assumptions or facts upon which his opinion is based are supported by the evidence you heard; and third, consider the opinion itself.

Once you have considered the three-stage process I have told you about, you will be in a position to decide how much weight you will attach to each expert's opinion. Remember that you are not obliged to accept any expert's opinion as conclusive. You may reject an opinion entirely if you find it unreasonable.

You will recall that the prosecution presented evidence about other similar incidents involving the accused. This evidence was admitted only for the purpose of allowing the prosecution to prove the issue of identity of the accused as being the person who did the acts charged in charges number three to seven and also for the purpose of establishing that the state of mind of the accused was wrongful as charged at the material time; that is, that he did the acts charged either knowingly, or with wrongful intent, motive or purpose.

I will now tell you what use you can make of this evidence during your deliberations.

The evidence concerning the incidents reported by Petty Officers Stone and Lalancette had to do with the issue of identity and state of mind. You should use this evidence only for the purpose of deciding whether or not the prosecution has proved that particular issue. When examining that evidence, you should not conclude that the accused is a criminal sort of person and that, therefore, he probably committed the offences charged in the charge sheet.

It is up to you, as the judges of the facts, to decide whether the prosecution has proved beyond a reasonable doubt that the accused did the similar acts.

If you are satisfied that the prosecution has proved the similar acts beyond a reasonable doubt, you will have to go on and decide whether you should make the

2119

Judge Advocate

Summation

inference that the prosecution urges you to make; namely, that the accused is the same person who committed the offences charged in charges number three to seven inclusive in the charge sheet; or that the accused intended to commit the said offences.

You may find from the evidence that the similar acts related to you by those two witnesses indicate that there are common characteristics between what they told you and what you heard from the witnesses at this trial relating to charges three to seven in the charge sheet. If you reach that conclusion, you may draw the inference that both incidents involved the accused. Whether you make that finding or draw that inference is entirely up to you.

When deciding whether there are similarities between the two incidents, you should look at all the evidence. If you conclude that charges number three to seven, and the other incidents related to you by Lalancette and Stone were likely committed by one person, then the evidence of Lalancette and Stone may help you in deciding whether the accused is guilty or not guilty of charges number three to seven. However, if you do not draw the inference that the incidents as reported by those two witnesses and charges three to seven were likely committed by one and the same person, then you must put out of your minds the evidence you heard from Petty Officers Stone and Lalancette when deciding whether the accused is guilty or not guilty.

You should consider the evidence given by Petty Officers Stone and Lalancette and any other relevant evidence when deciding whether the accused was properly identified as the person who committed the offences described at charges three to seven and that he had the necessary intent to commit those offences.

You must ignore the similar fact evidence if it has not been proved beyond a reasonable doubt. But if you accept that evidence, you can draw the inference

2120

Judge Advocate

Summation

that the previous incidents and charges three to seven in the charge sheet were both committed by one person.

Keep in mind that the accused cannot be convicted of the charges in the charge sheet unless you are satisfied beyond a reasonable doubt that he is guilty as charged.

I'm now going to discuss with you the rules of evidence with respect to prior inconsistent statements of a witness. You heard several witnesses who admitted that they made one or two out-of-court statements prior to this trial. There are special rules of evidence which I will now tell you about as to how you should make use of these prior inconsistent statements in assessing these witnesses's credibility.

Normally, a statement made by a witness to another person outside the courtroom in the absence of the accused is not admissible in evidence because it is hearsay. But an out-of-court statement made by a person which is inconsistent with his testimony given under oath at the trial may be admitted for the purpose of testing the credibility of the witness.

You can only use an out-of-court statement made by a witness to assess his credibility and not for the truth of what was said or written on that previous occasion except to the extent it was adopted by the witness as true when he gave evidence at this trial. Anything a witness tells you in this courtroom can be used as proof of the truth of what the witness says in his testimony. On the other hand, where a witness does not admit an out-of-court statement is true, you can only use that out-of-court statement to assess his credibility.

In this trial, counsel for the accused argued that the testimony of some witnesses were inconsistent with their previous out-of-court statements.

It is for you to decide whether or not the out-of-court statement is inconsistent with the testi-

2121

Judge Advocate

Summation

mony given by the witness here in this courtroom. It is also for you to decide whether or not the witness adopted all or part of the statement when he testified before you. Before you can find that the witness adopted the out-of-court statement, you must be satisfied that he acknowledged he had made the statement and that it was true, or, of course, that he had made part of the statement and that part was true.

If you decide that the out-of-court statement is consistent with what the witness said in the courtroom, then you should ignore the statement and simply consider the witness' evidence as you would the evidence of any other witness. However, if you decide that the out-of-court statement is inconsistent with what the witness said here under oath, then you may use the statement to decide whether or not you believe the witness. Once you decide whether or not you believe the sworn testimony of the witness which was given in this courtroom, then you must not make any further use of the out-of-court statement because it is not evidence which proves the matter contained within it.

At the beginning of this trial I told you that statements by counsel are not evidence unless I instruct you otherwise. For example, the "fact sheets" that the prosecutor distributed to you at the beginning of his final address are not evidence. The only purpose of those documents, as the prosecution pointed out, is to help you refer to what the prosecution considers to be the prosecution's evidence on a particular matter. You must rely on your own notes when you want to refer to the evidence that was presented in court.

I will now tell you what statements by counsel you should treat as evidence.

You will recall that during the trial the defending officer told us that the accused admitted that:

s.19(1)

2122

Judge Advocate

Summation

1. The verbal abuse of members of the crew by a naval commanding officer including the use of personally insulting adjectives; such as, idiot, mother fucker, fucking idiot, cunt, stupid, asshole, slow, liar and lazy and words to that effect could be prejudicial to good order and discipline;

2. That Queen=s Regulations and Orders for the Canadian Forces (QR&Os) were published and sufficiently notified to all members of the crew of HMCS OJIBWA including the commanding officer, Lieutenant-Commander Dean Marsaw, during the period 5 February '91 to 4 October '93 in accordance with QR&O article 1.21;

3. That Lieutenant Kelk=s service number is as stated in the particulars of the charge sheet; i.e.,

The prosecution also made the following admissions:

1. On 16 December 1993 the *Chronicle-Herald* (Halifax) published an article entitled "Sub=s Captain Under Scrutiny";

2. Prior to the publication of this article, Mr Malcolm Dunlop contacted Lieutenant-Commander Jeff Agnew, public affairs officer with MARLANT and provided him with a copy of the unedited draft of his proposed article;

3. On 15 December 1993, as a result of Mr Dunlop's draft article, the commander Maritime Forces Atlantic tasked the base commander CFB Halifax to initiate a military police investigation into the allegations that were published the next day;

2123

Judge Advocate

Summation

4. In the ensuing investigation military police investigators interviewed approximately 153 people, including Mr Dunlop;

5. These proceedings are directly related to Mr Dunlop's article and the military police investigation ordered on 15 December 1993; and

6. And final, all Reports of Proceedings introduced as exhibits before the court were disclosed by the prosecution to the defence. There is one Report of Proceedings that is missing for the period of 1992 and this report simply could not be found or was classified by either party. This is the sole reason why the document in question was not produced before the court. It would refer to the third period of 1992.

You should consider these facts as conclusively proven, even though nobody testified under oath that they are true. You see, our Military Rules of Evidence allow an accused person to admit facts so that we do not have to listen to evidence of facts which are not disputed. However, this is the only case where you can treat statements by counsel as evidence.

In this trial, there is some evidence that the accused may have made false statements or tried to threaten or otherwise interfere with witnesses in this trial. I refer you here to three statements allegedly made by the accused. The first one refers to a conversation that the accused allegedly had with Lieutenant-Commander Craven at the accused's residence where the accused would have told Craven that, "He certainly did not remember that", referring to the cigar tube incident. The second statement refers to a conversation that the accused allegedly had with Lieutenant-Commander Kavanagh where the accused would have said to Lieutenant-Commander Kavanagh that, "He was not there

2124

Judge Advocate

Summation

that night", referring to the night following the mess dinner.

I also refer you to the accused testimony where he said that he did not insert the cigar tube in Lieutenant Kelk's anus and that he has never been more certain of something in his life.

On the matter of interference with witnesses, I refer you to the testimony of Lieutenant-Commander Dussault who testified to the effect that he was threatened by the accused on 15 August 1994 when the accused would have told him that, "He was a coward and that he would take him and his family down with him."

Evidence that an accused person made false statements or tried to threaten or interfere with witnesses can be evidence of consciousness of guilt. The law recognizes that a guilty person will sometimes try to do such things in order to escape the consequences of his crime.

It is up to you to decide whether or not the conduct of the accused indicates consciousness of guilt. You must, of course, be satisfied beyond a reasonable doubt that the accused did make false statements or tried to threaten or interfere with a witness before you may use this as evidence of consciousness of guilt. If you are not satisfied that the accused did such things, then you must ignore such evidence.

In this case the accused gave evidence. He denied that he ever made such statements and threats. If his evidence leaves you with a reasonable doubt about the alleged false statements and attempts to threaten or interfere with a witness, you must give the benefit of that doubt to the accused, and you must ignore the evidence of the alleged false statements and attempts to threaten or interfere with a witness.

If you are satisfied that the accused made such statements and did try to threaten or interfere

2125

Judge Advocate

Summation

with a witness, you must consider whether or not those statements are evidence of consciousness of guilt. Please, remember that guilty knowledge is not the only reason someone might try to make false statements or interfere with witnesses. For example, someone might try to do such things out of fear or for some reason that has nothing to do with guilty knowledge.

You should consider all the circumstances surrounding the alleged conversations when you decide whether or not they are evidence of consciousness of guilt. Keep in mind that any inference you may draw to the effect that the accused made false statements or tried to interfere with witnesses is not by itself sufficient to prove his guilt beyond a reasonable doubt. It is just one piece of evidence that you can make use of in deciding whether the accused is guilty or not guilty.

Having instructed you of what specific use you can make of the evidence brought by Petty Officers Lalancette and Stone and what other specific use you can make of certain evidence brought by Lieutenant-Commanders Craven, Kavanagh and Dussault, I would now like to instruct you on what specific use you can make of all remaining evidence concerning statements made or acts posed by the accused on other occasions than the ones particularized in the charge sheet before the court. The only reason why this evidence was admitted was to prove the state of mind of the accused. You are not allowed to use this evidence for any other purpose.

I would now like to repeat what I told you earlier in this trial concerning the view you took of the submarines. You were taken there so that you would have an easier time understanding the evidence given in court.

You must understand that what you saw when we went to the submarines is not evidence. You are only allowed to use the evidence given here in court - plus, of course, the testimony of the accused at the location

2126

Judge Advocate

Summation

- when you decide whether or not the accused is guilty. However, you may find that you are better able to understand the evidence given in court after you have seen the submarines.

I remind you that the only reason you were being taken to view the submarines is to help you to understand the evidence given here in the courtroom. You must use only the evidence given here in court - again, plus the portion of the accused's testimony given at the location - when you decide how the submarine looked at the time we are concerned with.

I will now tell you about alternate charges. You will note that charges number one and two, and five and six are laid in the alternative to one another. In this regard, I invite your attention to the provisions of articles 112.05 (18)(g)(i) and 112.80 of QR&O.

As charges number one and two are of equal gravity, if you are convinced beyond a reasonable doubt as to the guilt of the accused in respect of both charges, you shall find the accused guilty of one of the charges and direct a stay of proceedings in respect of the other charge.

If however you are convinced beyond a reasonable doubt of the accused's guilt in respect of only one of these two charges, you shall find the accused guilty of that charge and not guilty of the other charge.

Finally, if you are not convinced beyond a reasonable doubt of the accused's guilt in respect of these two charges, you shall find the accused not guilty in respect of both charges.

With respect now to charges number five and six which are also laid in alternative but are of different gravity. If you are convinced beyond a reasonable doubt as to the guilt of the accused in

2127

Judge Advocate

Summation

respect of both charges, the law requires that you find the accused guilty of the most serious charge and direct a stay of proceedings in respect of the less serious charge. Having reviewed charges number five and six it is my advice to you that charge number six is the most serious charge as reflected by its maximum punishment.

If however you are convinced beyond a reasonable doubt of the accused's guilt in respect of only one of these two charges, you shall find the accused guilty of that charge and not guilty of the other charge.

Finally, if you are not convinced beyond a reasonable doubt as to the accused's guilt in respect of these two charges, you shall find the accused not guilty in respect of both charges.

PRESIDENT: Could I ask you at this point to reread from the top your instructions on five and six, please?

JUDGE ADVOCATE: Certainly.

With respect now to charges number five and six which are also laid in alternative but are of different gravity. If you are convinced beyond a reasonable doubt as to the guilt of the accused in respect of both charges, the law requires that you find the accused guilty of the most serious charge and direct a stay of proceedings in respect of the less serious charge. Having reviewed charges number five and six, it is my advice to you that charge number six is the most serious charge as reflected by its maximum punishment.

If however you are convinced beyond a reasonable doubt of the accused's guilt in respect of only one of these two charges, you shall find the accused guilty of that charge and not guilty of the other charge.

2128

Judge Advocate

Summation

Finally, if you are not convinced beyond a reasonable doubt of the accused's guilt in respect of these two charges, you shall find the accused not guilty in respect of both charges.

PRESIDENT: Thank you.

JUDGE ADVOCATE: I will now address you on special findings. Section 138 of the **National Defence Act**, which is found in article 112.42 of QR&O reads as follows:

" ... Where a service tribunal concludes that

(a) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and

(b) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,

the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars."

2129

Judge Advocate

Summation

Dealing first with charges number three and four. Given the nature of the evidence with regard to Lieutenant[N] Wamback, I instruct you that you cannot find the accused guilty of either charge three or four as it is currently written as there is no evidence before this court upon which it could be suggested that Lieutenant[N] Wamback was verbally treated in the manner alleged in those charges between the dates particularized in charges three and four.

Furthermore, the same evidence cannot be relied upon to convict the accused on two different offences.

Consequently, with regard, again, to charges three and four, it is still open to you to make a special finding of guilt by striking out Lieutenant[N] Wamback from Annexes "A" and "B" of the charge sheet. Additionally, given my previous comments about relying upon the same evidence for conviction on two offences, should you find that any of the individuals listed in Annex "A" was ill-treated in the manner particularized in charge three, you cannot rely upon that same evidence to enter a conviction with regard to that very same individual when considering charge four.

Should you, in fact, find that that individual was ill-treated in the manner particularized in charge three, his name, like that of Lieutenant[N] Wamback, should be struck from Annex "B" of charge four. Consequently, it would still be open for the court to make a special finding of guilt with regard to charge four as it relates to the individuals remaining on Annex "B".

In short, you cannot find that Lieutenant[N] Wamback was verbally treated in the manner specified in charges three and four, nor can you find that any other individual was verbally abused in the manner particularized in charge four if, and I repeat if, you have previously decided that the accused has ill-treated

2130

Judge Advocate

Summation

that same individual in the manner specified in charge three.

Now, before going to charges four and seven, is that clear or should I read it back?

PRESIDENT: Can you repeat that, please.

JUDGE ADVOCATE: It's clear?

PRESIDENT: No. The Court would like to have it repeated, please.

JUDGE ADVOCATE: Very well, okay. So I will repeat the whole thing on charges three and four because it's not easy to understand.

PRESIDENT: Please.

JUDGE ADVOCATE: Dealing first with charges number three and four. Given the nature of the evidence with regard to Lieutenant[N] Wamback, I instruct you that you cannot find the accused guilty of either charge three or four as it is currently written as there is no evidence before this court upon which it could be suggested that Lieutenant[N] Wamback was verbally treated in the manner alleged in those charges between the dates particularized in charges three and four.

Furthermore, the same evidence cannot be relied upon to convict the accused on two different offences.

Consequently, with regard to charges three and four, it is still open to the Court to make a special finding of guilt by striking out Lieutenant[N] Wamback from Annexes "A" and "B" of the charge sheet. Additionally, given my previous comments about relying upon the same evidence for conviction on two offences, should you find that any of the individuals listed in Annex "A" was ill-treated in the manner particularized

2131

Judge Advocate

Summation

in charge three, you cannot rely upon the same evidence to enter a conviction with regard to that very same individual when considering charge four.

Should you, in fact, find that that individual was ill-treated in the manner particularized in charge three, his name, like that of Wamback, should be struck from Annex "B" of charge four. Consequently, it would still be open for the court to make a special finding of guilt with regard to charge four as it relates to the individuals remaining on Annex "B".

In short, you cannot find that Lieutenant[N] Wamback was verbally treated in the manner specified in charges three and four, nor can you find that any other individual was verbally abused in the manner particularized in charge four if, and I repeat if, you have previously decided that the accused has ill-treated that same individual in the manner specified in charge three.

Now, on this same matter of special findings but dealing now with charges number four and seven. The same evidence as it relates to Lieutenant[N] Dussault - now Lieutenant-Commander Dussault - cannot be relied upon to convict the accused on those charges. Should you find that Lieutenant[N] Dussault was abused in the manner particularized in charge seven, you cannot rely upon the same evidence to enter a conviction with regard to that very same individual when considering charge four. Consequently, should you come to that conclusion based on the same evidence, Lieutenant[N] Dussault's name should be struck from Annex "B".

Is that clear for four and seven?

PRESIDENT: ...

JUDGE ADVOCATE: Now, another point. I would ask you also, should you conclude that special findings should be made, to strike out from Annexes "A"

2132

Judge Advocate

Summation

and "B" to the charge sheet the names of the individuals which you have concluded are not included in your findings.

If I may just open a bracket here. Please, don't do that on the original charge sheet, do that on another document that you would have prepared.

Now, as to the form to be used for special findings, I direct your attention to the Notes under QR&O article 112.42. For example - and it's just an example - it could be in the following form: "The Court finds the accused guilty on charge number four as it relates to the following individuals listed in Annex "B", followed by the names of the individuals."

Now, to conclude on this matter of special findings. If you are convinced beyond a reasonable doubt that the facts of this case are sufficient to establish the commission of the offences charged and that the facts of this case differ materially from the facts alleged in the particulars of the charge, it is my advice to you that it would be open to you to make a special finding of guilty because no prejudice has been caused to the accused in his defence.

I would also like to warn you again about the comments made to you by the prosecution in its final address to the court, but this time as it relates to your duty as members of the court. The prosecution referred to the fact that "an acquittal would redefine what is an acceptable conduct and change the definition that has been in place since 1949."

Your duty in the present case is to determine, based on all the evidence before the court, if the accused is guilty or not guilty of the charges before the court. In doing so, you must not, and I repeat not, be influenced by what type of message an acquittal would send to the military community.

2133

Judge Advocate

Summation

Now, I think it's the appropriate place to cut my address because I will deal with totally different matters. So if we could take a short break?

PRESIDENT: Fifteen minutes sufficient?

JUDGE ADVOCATE: Okay, sir. The court is adjourned for 15 minutes.

ADJOURNMENT: At 1015 hours, 31 October 1995, the court adjourns.

REASSEMBLY: At 1030 hours, 31 October 1995, the court reassembles and the accused is before it.

Mr President and Members of the Court, all of what I have said so far applies to the task which is now before you, that is of reaching a finding of guilt or innocence of this accused. In addition to those general remarks, I would now like to add some more specific guidance with respect to the seven charges before you; that is, charges number one to seven on the charge sheet that has been marked as Exhibit "A" in this trial.

Turning now to

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2134

Judge Advocate

Summation

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Judge Advocate

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2136

Judge Advocate

Summation

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Judge Advocate

Summation

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2138

Judge Advocate

Summation

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**"'Every person who behaves in a
cruel or disgraceful manner is
guilty of an offence ... '"**

The particulars of this first charge read as
follows:

**" ... In that he, on 20 December
1991, onboard HMCS OJIBWA, while
alongside at Canadian Forces Base
Halifax, Halifax, Nova Scotia, did**

s.19(1)

2139

Judge Advocate

Summation

**insert a cigar tube between the
buttocks of Lieutenant-
ant(N) Kelk, S.J."**

For the prosecution to succeed on charge number one, it must prove beyond a reasonable doubt the following ingredients:

1. The identity of the accused, and that is Lieutenant Commander Marsaw;
2. The date and place of the offence; that is, on 20 December 1991 on board HMCS OJIBWA, while alongside at Canadian Forces Base Halifax, Halifax, Nova Scotia;
3. That Lieutenant-Commander Marsaw did insert a cigar tube between the buttocks of Lieutenant Kelk;
4. That such an act constitutes disgraceful behaviour; and
5. The blameworthy state of mind of the accused at the time and place of the commission of the offence.

The term "disgraceful" is defined in the Concise Oxford Dictionary, 9th Edition (1995) as meaning: "shameful, dishonourable, degrading". Acts which fall within the ambit of "disgraceful" are not limited to actions which are done within the course of duty but may be any conduct performed by a Canadian Forces member. Also the act in question does not have to constitute a civil offence for it to be disgraceful.

The determination of whether an act is disgraceful is for you to determine with regard to the surrounding circumstances by using an objective test. Such test requires that you consider what a reasonable person and not the accused would consider a disgraceful act to be.

2140

Judge Advocate

Summation

And finally, on this same matter, I would add that it is no defence to say that as commanding officers there is a right to inflict pain, suffering or an injury in order to accomplish their mission or while taking place in the pursuit of a legitimate purpose.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this first charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, you must then return a finding of not guilty on this first charge.

The theory of the prosecution on this first charge is to the effect that all the essential elements of the charge were proven beyond a reasonable doubt.

The theory of the defence is to the effect that such incident did not happen or was never committed by the accused.

Turning to the second charge, it is laid under section 130 of the **National Defence Act**. Section 130 of the **National Defence Act** provides at subsection (1)(a) as follows:

"An act or omission

(a) that takes place in Canada and is punishable under Part XII of this Act ... of Parliament,

is an offence ... "

This section makes contravention of the **Criminal Code** or other Acts of the Parliament of Canada punishable under the Code of Service Discipline. Note (A) to article 103.61 of QR&O provides in part:

2141

Judge Advocate

Summation

"The purpose of section 130 of the National Defence Act is to give the character of service offences to all civil offences prescribed in statutes of the Parliament of Canada."

The **Criminal Code** offence allegedly committed or contravened by the accused in this case is the offence contained at section 266 of the **Criminal Code of Canada**. The operative portion of this section for your present purposes reads as follows:

**" ... Everyone who commits an assault is guilty of
... an offence ..."**

Section 265 of the **Criminal Code** reads in part as follows:

**" ... A person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;"**

The particulars of that second charge read as follows:

" ... In that he, on 20 December 1991, onboard HMCS OJIBWA, while alongside at Canadian Forces Base Halifax, Halifax, Nova Scotia, did commit an assault upon C03 191 19E Lieutenant(N) Kelk, S.J."

2142

Judge Advocate

Summation

The essential elements of this charge are:

1. The identity of the accused, and that is Lieutenant-Commander Marsaw;
2. The date and place of the offence; that is, on 20 December 1991 onboard HMCS OJIBWA, while alongside at Canadian Forces Base Halifax, Halifax, Nova Scotia;
3. That Lieutenant-Commander Marsaw applied force directly or indirectly to Lieutenant Kelk, S.J.;
4. That Lieutenant-Commander Marsaw intended to apply force to Lieutenant Kelk; and
5. That Lieutenant Kelk did not consent to the application of force by Lieutenant-Commander Marsaw.

Force simply means physical contact. There can be force without physical violence. In other words, this ingredient is proved if you are satisfied beyond a reasonable doubt that the accused touched the victim.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this second charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, you must then return a finding of not guilty on this second charge.

I remind you that the prosecution must prove each of these ingredients beyond a reasonable doubt. You must return a finding of not guilty on the offence laid if the prosecution has not proved each of these ingredients beyond a reasonable doubt.

2143

Judge Advocate

Summation

Now, again, the theory of the prosecution in respect of this second charge is to the effect that all of the essential elements of the charge were proven beyond a reasonable doubt.

The theory of the defence is to the effect that such incident did not happen or was never committed by the accused.

Turning to the third charge on the charge sheet, it is laid under section 95 of the **National Defence Act**. The operative portion for your present purposes reads as follows:

" ... Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence ... "

The particulars of that third charge read as follows:

" ... In that he, between 5 February 1992 and 4 October 1993 onboard HMCS OJIBWA, while Commanding Officer, verbally abused members of his crew cited in Annex 'A' by calling them 'mother fucker', 'fucking idiot', 'cunt', 'stupid', 'asshole', 'incompetent', 'slow', 'lazy', or words to that effect in the presence of other members of the crew."

The essential elements of this charge which the prosecution must prove beyond a reasonable doubt are:

1. The identity of the accused, and that is Lieutenant-Commander Marsaw;

2144

Judge Advocate

Summation

2. The date and place of the offence; that is, between 5 February 1992 and 4 October 1993 onboard HMCS OJIBWA;
3. That Lieutenant-Commander Marsaw verbally abused members of his crew cited in Annex "A" by calling them "mother fucker, fucking idiot, cunt, stupid, asshole, incompetent, slow, lazy", or words to that effect in the presence of other members of the crew;
4. That the verbal abuse constitutes ill-treatment;
5. That the members cited in Annex "A" were persons subordinate to Lieutenant-Commander Marsaw by reason of his rank;
6. That Lieutenant-Commander Marsaw knew that such members cited in Annex "A" were persons subordinate to him; and
7. The blameworthy state of mind of the accused at the time and place of the commission of the offence.

The word "ill-treat" is not defined in the **National Defence Act**. The Concise Oxford Dictionary, 9th Edition (1995) defines the word "ill-treat" as to: "treat badly; abuse". The word "abuse" is defined in the same dictionary as including: "use to bad effect or for a bad purpose ... "; "insult verbally; maltreat; assault; incorrect or improper use (the abuse of power); insulting language; unjust or corrupt practice."

There is no limitation imposed as to the nature of the ill-treatment envisaged by section 95. The words "strike or otherwise ill-treat" in this section mean, in my opinion, treat badly, to maltreat or maltreat in a different way, in a manner different

2145

Judge Advocate

Summation

than by striking. It is not only limited to physical violence or physical harm or injuries. It could be maltreatment for a variety of reasons other than physical; for example, it could be psychological or emotional.

Whether ill-treatment has occurred is for you to determine by using an objective test. Again, it is based upon what reasonable men think.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this third charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, you must then return a finding of not guilty on this third charge.

I must also add that the prosecution does not have to prove that all the insulting adjectives listed in charge number three were spoken by the accused to all the persons listed in Annex "A". If you are satisfied beyond a reasonable doubt that at least one of these insulting adjectives, or words to that effect, have been used by the accused towards at least one of the persons listed in Annex "A", this is sufficient to establish this essential ingredient.

The theory of the prosecution in respect of this third charge is to the effect that all the essential elements of the charge were proven beyond a reasonable doubt.

The theory of the defence is to the effect that such incidents did not happen.

Turning to the fourth charge, it is laid under section 129 of the **National Defence Act**. The operative portion of section 129 of the **National Defence Act** for your present purposes reads as follows:

2146

Judge Advocate

Summation

" ... Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence ... "

Consequently, the essential elements of this charge which the prosecution must prove beyond a reasonable doubt are:

1. The identity of the accused as the offender;
2. The date and place of commission of the offence as alleged in the charge sheet;
3. The conduct of the accused;
4. The prejudice to good order and discipline resulting from the conduct; and
5. The blameworthy state of mind of the accused at the time of the alleged conduct.

In respect of the first and second essential elements of identity and date and place of commission of the offence you should not have much difficulty with these elements and what they mean. The charge alleges that Lieutenant-Commander Marsaw is the accused and you must be satisfied beyond a reasonable doubt on the evidence presented to you as to his identity as the accused. You must also be satisfied beyond a reasonable doubt that the offence occurred between 5 February 1992 and 4 October 1993 onboard HMCS OJIBWA as alleged in the charge.

As to the third element, the conduct of the accused, here it is alleged that he did on the date and at the place alleged in the charge sheet the following: "verbally abused persons cited in Annex 'B' in the presence of other members of the crew" and you must be satisfied beyond a reasonable doubt that the accused did commit the act alleged against him.

2147

Judge Advocate

Summation

I must also add that the prosecution does not have to prove that all the persons listed in Annex "B" were verbally abused. If you are satisfied beyond a reasonable doubt that at least one of these persons has been verbally abused by the accused, this is sufficient to establish this essential ingredient.

In regards to the fourth element of the charge, the prejudice to good order and discipline resulting from the alleged conduct of the accused, it may be proved in either of two ways.

The first way: You will note that the charge as laid against the accused does not allege that he contravened any particular order, regulation or instruction. However, the prosecution in the presentation of its case has had evidence, first of all, relating to specific orders, and further has argued that the conduct of the accused as described in the evidence before you amounts to a contravention of these orders.

Consequently, I must address you on the applicability of subsection 129(2) of the **National Defence Act** which reads in part as follows:

" ... 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,

2148

Judge Advocate

Summation

is an act, conduct, disorder, or neglect to the prejudice of good order and discipline."

The effect in law of subsection 129(2) is that any contravention of an order, regulation or instruction is deemed to be prejudicial to good order and discipline. However, before subsection 129(2) can have application you must be satisfied beyond a reasonable doubt as to:

- the nature and existence of the orders;
- the accused's knowledge of the orders; and
- that his conduct amounted to a contravention of the orders.

Once you are satisfied that these three matters have been proven beyond a reasonable doubt the law provides that there is prejudice to good order and discipline.

Turning to the nature and existence of the orders, you have already taken judicial notice of the contents of the orders - I refer here to QR&O articles 19.13, 4.02(c) and CFAO 19.39 - so in accordance with the Military Rules of Evidence you shall consider their contents proven.

Turning to the matter of the accused's knowledge of the orders allegedly contravened, you must be satisfied beyond a reasonable doubt that the orders were published and sufficiently notified to the accused.

On this matter and as it refers to QR&O articles, I refer you to the following admission made by the accused: "That Queen=s Regulations and Orders for the Canadian Forces (QR&O) were published and sufficiently notified to all members of the crew of

2149

Judge Advocate

Summation

HMCS OJIBWA including the commanding officer, Lieutenant-Commander Dean Marsaw, during the period 5 February '91 to 4 October '93 in accordance with QR&O article 1.21."

Now, on this same matter of the accused's knowledge but this time of CFAO 19.39, again, you must be satisfied beyond a reasonable doubt that the CFAO was published and sufficiently notified to the accused.

But this time you cannot use the admission made by the defence that I have previously read to you because it only applies to QR&O articles. So you need to proceed as follows: QR&O article 1.21 entitled, "Notification by Receipt of Regulations, Orders and Instructions", provides in part as follows:

"1.21 ... all regulations, orders and instructions issued to the Canadian Forces shall be held to be published and sufficiently notified to any person whom they may concern if:

(a) they are received at the base, unit or element at which that person is serving; and

(b) the commanding officer of the base, unit or element takes such measures as may seem practical to ensure that the regulations, orders and instructions are drawn to the attention of and made available to those whom they may concern. (See article 4.26 - Circulation of Regulations, Orders, Instructions, Correspondence and Publications)."

2150

Judge Advocate

Summation

So if you are satisfied beyond a reasonable doubt that CFAO 19-39 has been received at the OJIBWA, and on this matter I refer you to the testimony of Sergeant Wiley and PO2 Breeze, you should go on to consider QR&O 1.21(b) and its reference to QR&O article 4.26 which reads as follows:

"(1) A commanding officer shall ensure that all regulations, orders, instructions, correspondence and publications affecting members, whether in the performance of their duties or in the conditions of their service, are given such publicity as will enable those members to study them and become acquainted with the contents.

(2) Orders relating to any matters requiring special explanation shall be read and explained to non-commissioned members immediately as soon as they are received."

and so, therefore, you must be satisfied beyond a reasonable doubt that the accused, as commanding officer in this case, has:

- taken the necessary measures required by him to draw his own attention to the order; and
- taken the necessary measures required to make the order available to those whom it may concern including himself.,

then by operation of law the accused is deemed to have knowledge of the contents of the order and it is no defence for him to say that he was unaware of its existence or was ignorant of its contents.

2151

Judge Advocate

Summation

Turning to the last matter in respect of the first way of proving beyond a reasonable doubt the fourth element of the charge, you must be satisfied beyond a reasonable doubt that the act of the accused contravened the orders.

Now, the second way: If you find that the prosecution has failed to prove beyond a reasonable doubt all of the requirements of subsection 129(2) of the **National Defence Act** then, alternatively, the prosecution must establish beyond a reasonable doubt the prejudice to good order and discipline resulting from the alleged conduct of the accused.

I want, therefore, to refer you to certain notes to article 103.60 of the Queen's Regulations and Orders for the Canadian Forces, in particular Notes (A) and (C). You will find these notes very helpful in appreciating this charge but I want briefly to address the terms "good order", "military discipline" and "prejudice".

What is good order as opposed to bad order, if you like, is for you as officers with normal human judgement to decide. Good order, as used in section 129 of the **National Defence Act**, is wide enough to include good order in the sense in which the words are understood in civil life as applicable to civilians, and in the sense in which they would be understood in military life and applicable to members of a military force.

Military discipline is a concept which, I suggest, has been with you throughout your respective service careers. I do not propose to enter upon a detailed discussion or instruction to you on this concept. You will be cognizant of the requirement for military discipline as the cornerstone to an effective and efficient standing armed force in a democracy. If the requirement for military discipline is not met, military authority can be undermined and this can only bring discredit to the Service by diminishing the

2152

Judge Advocate

Summation

authority of those concerned. You may well consider that this would be prejudicial to the concept of military discipline.

Now, conduct which is to the prejudice of good order is not necessarily to the prejudice of military discipline, depending on the circumstances. On the other hand, however, conduct which is prejudicial to military discipline is also held to be prejudicial to good order. An example is provided for you at Note (C) to QR&O 103.60.

Let me deal now with the word "prejudice". The word prejudice is not defined in the **National Defence Act** or QR&Os. In accordance with QR&O article 1.04, words and phrases shall be construed according to the common approved meaning given in the Concise Oxford Dictionary. The Concise Oxford Dictionary defines the word prejudice when used in the phrase "to the prejudice of" as meaning: "... injury that results or may result from some action or judgement ...".

In the way in which it is used in this charge, it means an injury that results or may result to good order and discipline. In other words, and this is important, for the prosecution to prove prejudice to good order and discipline, it does not have to prove that an actual injury to good order and discipline has occurred, but only that such an injury may have or could have resulted from what the accused did. You must ask yourself whether the action of the accused, if you have found it proved, was such as to cause damage to, or adversely affect, or bring into danger the concepts of both good order and discipline. If you find that it was then this element of prejudice is present.

I would also like to refer you, on this matter of prejudice to the good order and discipline, to an admission made by the defence which reads in part as follows: "The verbal abuse of members of the crew

2153

Judge Advocate

Summation

by a naval commanding officer could be prejudicial to good order and discipline".

When using the second method available to it to prove beyond a reasonable doubt the fourth element of this charge; that is to say, that there has been a prejudice to good order and discipline resulting from the act of the accused, the prosecution must have proven beyond a reasonable doubt that:

1. There was a standard of conduct required of the accused. This standard of conduct must be an objective standard of conduct required of all persons subject to the Code of Service Discipline similarly situated to the accused and against which his conduct can be measured. In this case, the objective standard of conduct required to be proved beyond a reasonable doubt is one that does not include a conduct in which an officer is allowed to address his subordinates in an insulting, belittling, degrading or humiliating manner, and to refer to them by using personally insulting adjectives. Pursuant to Military Rules of Evidence you have taken judicial notice of the Mainguy Report, QR&Os and CFAOs which includes such standard and therefore you can be satisfied that the conduct required of the accused has been proven beyond a reasonable doubt - so that was one;
2. That the accused knew or ought to have known of the standard of conduct required of him; and
3. The act of the accused breached the standard of conduct required of him.

To summarize on this method of proving the fourth essential element, the prosecution must have proven beyond a reasonable doubt that:

2154

Judge Advocate

Summation

1. The objective standard of conduct required of the accused does not include a conduct in which an officer is allowed to address his subordinates in an insulting, belittling, degrading or humiliating manner, and to refer to them by using personally insulting adjectives;
2. The accused knew or ought to have known that standard of conduct; and
3. What the accused did breached the objective standard of conduct.

Now, the fifth element. The last or fifth essential element is the blameworthy state of mind of the accused in relation to the act charged, and for this ingredient to be proven you must be convinced beyond a reasonable doubt that the accused knew what he was doing, and either intended to do it, or was so reckless about its consequences that his state of mind was blameworthy.

You must look at all the circumstances and determine from what you accept as proven facts whether you may infer this essential ingredient.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this fourth charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, and only after having considered the two different ways of proving the fourth element, you must then return a finding of not guilty on this fourth charge.

The prosecution contends that it has proved beyond a reasonable doubt all the essential elements of charge number four.

2155

Judge Advocate

Summation

The defence contends that such incidents did not happen.

Turning now to the fifth charge on Exhibit "A", it is laid under section 95 of the **National Defence Act**. The operative portion for your present purposes reads as follows:

" ... Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence ... "

The particulars of that fifth charge read as follows:

" ... In that he, between 1 August 1992 and 30 October 1992, while onboard HMCS OJIBWA, while at sea, did kick F43 860 244 Lieutenant(N) Higginson, M.E. on the ankle."

The essential elements of this charge which the prosecution must prove beyond a reasonable doubt are:

1. The identity of the accused, and that is Lieutenant-Commander Marsaw;
2. The date and place of the offence; that is, between 1 August 1992 and 30 October 1992, while onboard HMCS OJIBWA, while at sea;
3. That Lieutenant-Commander Marsaw did kick Lieutenant[N] Higginson, M.E. on the ankle;
4. That the kick constitutes an ill-treatment;

2156

Judge Advocate

Summation

5. That Lieutenant-Commander Marsaw knew that Lieutenant[N] Higginson was a person subordinate to him; and

7. The blameworthy state of mind of the accused at the time and place of the commission of the offence.

Again, I remind you that there is no limitation imposed as to the nature of the ill-treatment envisaged by section 95. The words "Astrike or otherwise ill-treat" in this section mean, in my opinion, treat badly, to maltreat or maltreat in a different way, in a manner different than by striking. Although ill-treatment can include other than physical violence, it can still include all other types of physical violence like kicking. Whether ill-treatment has occurred is for you to determine by using an objective test. Again, it is based upon what reasonable men think.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this fifth charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, you must then return a finding of not guilty on this fifth charge.

The theory of the prosecution on this fifth charge is to the effect that all the essential elements of the charge were proven beyond a reasonable doubt.

The theory of the defence is to the effect that such incident did not happen or if it did, it was not intentional and therefore the accused must be found not guilty.

Turning now to the sixth charge on Exhibit "A", it is laid under section 130 of the **National Defence Act**. I refer you to my explanations of section 130 when I addressed you on the second charge.

2157

Judge Advocate

Summation

The **Criminal Code** offence allegedly committed or contravened by the accused in this case is the offence contained at section 266 of the **Criminal Code of Canada**. Again, the operative portion of this section for your present purposes reads as follows:

" ... **Every one who commits an assault is guilty of**

(a) ... an offence ... "

Section 265 of the **Criminal Code** reads in part as follows:

" ... **A person commits an assault when**

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;"

The particulars of that sixth charge read as follows:

" ... **In that he, between 1 August 1992 and 30 October 1992, while onboard HMCS OJIBWA, while at sea, did commit an assault upon F43 860 244 Lieutenant (N) Higginson, M.E."**

The essential elements of this charge are:

1. The identity of the accused, and that is Lieutenant-Commander Marsaw;
2. The date and place of the offence; that is, between 1 August 1992 and 30 October 1992, while onboard HMCS OJIBWA, while at sea;

2158

Judge Advocate

Summation

3. That Lieutenant-Commander Marsaw applied force directly or indirectly to Lieutenant[N] Higginson;
4. That Lieutenant-Commander Marsaw intended to apply force to Lieutenant[N] Higginson;
and
5. That Lieutenant[N] Higginson did not consent to the application of force by Lieutenant-Commander Marsaw.

Again, force simply means physical contact. There can be force without physical violence. In other words, this ingredient is proved if you are satisfied beyond a reasonable doubt that the accused touched the victim.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this sixth charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, you must then return a finding of not guilty on this sixth charge.

I remind you that the prosecution must prove each of these ingredients beyond a reasonable doubt. You must return a finding of not guilty on the offence laid if the prosecution has not proved each of these ingredients beyond a reasonable doubt.

The theory of the prosecution on this sixth charge is to the effect that all the essential elements of the charge were proven beyond a reasonable doubt.

The theory of the defence is to the effect that such incident did not happen or if it did, it was not intentional and therefore the accused must be found not guilty.

2159

Judge Advocate

Summation

Turning to the seventh charge on Exhibit "A", it is laid under section 129 of the **National Defence Act**. Again, the operative portion of section 129 of the **National Defence Act** for your present purposes reads as follows:

" ... Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence ... "

Consequently, the essential elements of this charge which the prosecution must prove beyond a reasonable doubt are:

1. The identity of the accused as the offender;
2. The date and place of commission of the offence as alleged in the charge sheet;
3. The conduct of the accused;
4. The prejudice to good order and discipline resulting from the conduct; and
5. The blameworthy state of mind of the accused at the time of the alleged conduct.

In respect of the first and second essential elements of identity and date and place of commission of the offence, you should not have much difficulty with these elements and what they mean. The charge alleges that Lieutenant-Commander Marsaw is the accused and you must be satisfied beyond a reasonable doubt on the evidence presented to you as to his identity as the accused. You must also be satisfied beyond a reasonable doubt that the offence occurred between October 1992 and October 1993, onboard HMCS OJIBWA, as alleged in the charge.

2160

Judge Advocate

Summation

As to the third element "the conduct of the accused" here it is alleged that he did on the date and at the place alleged in the charge sheet, the following: did personally harass D49 627 612 Lieutenant[N] Dussault, M.G. by making derogatory anti-Francophone comments, and you must be satisfied beyond a reasonable doubt that the accused did commit the act alleged against him.

In regards to the fourth element of the charge, the prejudice to good order and discipline resulting from the alleged conduct of the accused, again, it may be proved in either of two ways.

The first way: You will note that the charge as laid against the accused does not allege that he contravened any particular order, regulation or instruction. However, the prosecution in the presentation of its case has had evidence, first of all relating to a specific order - a specific order in this case - and further has argued that the conduct of the accused as described in the evidence before you amounts to a contravention of this order.

Consequently, I must address you on the applicability of subsection 129(2) of the **National Defence Act** which I have already read to you.

The effect in law, again, of subsection 129(2) is that any contravention of an order, regulation or instruction is deemed to be prejudicial to good order and discipline. However, before subsection 129(2) can have application, you must be satisfied beyond a reasonable doubt as to:

- The nature and existence of the order; that is, CFAO 19-39;
- (2) The accused's knowledge of the order; and
- (3) That his conduct amounted to a contravention of the order.

2161

Judge Advocate

Summation

Once you are satisfied that these three matters have been proven beyond a reasonable doubt the law provides that there is prejudice to good order and discipline.

Turning to the nature and existence of the order, you have already taken judicial notice of the contents of CFAO 19-39, so in accordance with the Military Rules of Evidence you shall consider its contents proven.

Turning to the matter of the accused's knowledge of the order allegedly contravened, you must be satisfied beyond a reasonable doubt that the order was published and sufficiently notified to the accused.

On this matter QR&O article 1.21 entitled "Notification by Receipt of Regulations, Orders and Instructions" provides in part - and I have already read that to you previously - so I ask you to refer to QR&O article 1.21.

So if you are satisfied beyond a reasonable doubt that CFAO 19-39 has been received onboard the OJIBWA - and on this matter, again, I refer you to the testimony of Sergeant Whiley and PO2 Breeze - you should go on to consider QR&O 1.21(b) and its reference to QR&O article 4.26 which I have also read to you. And so therefore you must be satisfied beyond a reasonable doubt that the accused, as commanding officer in this case, has:

- taken the necessary measures required to draw his own attention of the order; and
- taken the necessary measures required to make the order available to those whom it concerned including himself.,

then by operation of the law the accused is deemed to have knowledge of the contents of the order, and it is

2162

Judge Advocate

Summation

no defence for him to say that he was unaware of its existence or was ignorant of its contents.

Turning to the last matter in respect of the first way of proving beyond a reasonable doubt the fourth essential element of the charge, you must be satisfied beyond a reasonable doubt that the act of the accused contravened the orders.

Now, the second way: If you find that the prosecution has failed to prove beyond a reasonable doubt all of the requirements of subsection 129(2) of the **National Defence Act** then, alternatively, the prosecution must establish beyond a reasonable doubt the prejudice to good order and discipline resulting from the alleged conduct of the accused.

I want, therefore, to refer you to certain notes to article 103.60 of the Queen's Regulations and Orders for the Canadian Forces, in particular Notes (A) and (C). You will find these notes very helpful in appreciating this charge and here I would like to refer you to my instructions on charge number 4 where I addressed the terms "good order", "military discipline" and "prejudice".

When using the second method available to it to prove beyond a reasonable doubt the fourth element of this charge; that is to say, that there has been a prejudice to good order and discipline resulting from the act of the accused, the prosecution must have proven beyond a reasonable doubt that - and I have already read that when I addressed you on charge number four - that:

- there was a standard of conduct required of the accused. This standard of conduct must be an objective standard of conduct required of all persons subject to the Code of Service Discipline similarly situated to the accused and against which his conduct can be measured. In this case, the objective

2163

Judge Advocate

Summation

standard of conduct required to be proved beyond a reasonable doubt is one that does not include a conduct in which an officer is allowed to address his subordinates in an insulting, belittling, degrading or humiliating manner, and to refer to them by using personally insulting adjectives. Pursuant to Military Rules of Evidence you have taken judicial notice of the Mainguy Report, QR&Os and CFAOs which include such objective standard of conduct and therefore you can be satisfied that the conduct required of the accused has been proven beyond a reasonable doubt;

(b) the accused knew or ought to have known of the standard of conduct required of him; and

(c) the act of the accused breached the standard of conduct required of him.

So to summarize on this method of proving the fourth essential element, the prosecution must have proven beyond a reasonable doubt:

- the objective standard of conduct required of the accused, which I have already read;
- the accused knew or ought to have known that standard of conduct; and
- what the accused did breached the objective standard of conduct.

On the fifth element: The blameworthy state of mind of the accused in relation to the act charged, and for this ingredient to be proven you must be convinced beyond a reasonable doubt that the accused knew what he was doing, and either intended to do it, or was so reckless about its consequences that his state of mind was blameworthy.

2164

Judge Advocate

Summation

You must look at all the circumstances and determine from what you accept as proven facts whether you may infer this essential ingredient.

Those elements are all the essential elements that must be established beyond a reasonable doubt in order for you to return a finding of guilty on this seventh charge. Should you not be satisfied beyond a reasonable doubt that all, or any, of those elements have been established, and, again, only after having considered the two different ways of proving the fourth element, you must then return a finding of not guilty on this seventh charge.

The prosecution contends that it has proved beyond a reasonable doubt all the essential elements of charge number seven.

The theory of the defence is to the effect that such incident did not happen.

I do not propose to go over the evidence in detail as you have taken extensive notes during the whole trial. A total of 43 witnesses testified for the prosecution.

Lieutenant[N] Hart described the events that took place after a mess dinner in the early hours of December 20, 1991. He explained that while he, Lieutenant-Commander Marsaw, Lieutenant Kelk and several others were in the wardroom of the submarine, Lieutenant Kelk became inebriated and passed out some time during the evening. Markers were then produced and Lieutenant Kelk's neck, face and torso were marked. Lieutenant Kelk's pants were then pulled down, his wrists were tied to his ankles and while he was lying on the settee the accused picked up a Tuero cigar tube, lifted up his legs and inserted the tube in Lieutenant Kelk's anus. The tube came up and the accused, using the same method, inserted it back in. The witness described the tube as being similar to the one produced as Exhibit "K". He also described where he and the

2165

Judge Advocate

Summation

victim were in the settee, and added that nothing blocked his view when he saw the incident. He said that although he was disgusted with the incident he did not report it. Finally, the witness said that he had worked for other commanding officers on board HMCS OJIBWA between 1988 and 1990 and that words of the nature of those particularized in charge number three have never been used in the control room by other commanding officers when addressing to their crew.

Lieutenant-Commander Craven testified to the effect that he attended the mess dinner on December 19, 1991. He related who was present upon his arrival and described the events that took place in the wardroom in his presence. He related that Lieutenant Kelk's body was marked with a marker pen, that his trousers and shorts were pulled down and that the accused, without being prompted or solicited, inserted a cigar tube in Lieutenant Kelk's buttocks. He described the location of the persons present, their condition and the atmosphere in the wardroom before and after that incident. He also described another incident which took place after the departure of the accused and which involved Lieutenant[N] Muir. He described what his reaction was at the time and explained why he did not report the incidents. The witness also referred to a conversation he had with the accused in July 1994, and related the extent of that conversation. Lieutenant (sic) Craven said that he sailed with four other commanding officers and explained how those commanding officers would react when unhappy about a situation on board their ship.

Leading Seaman Pilon testified to the effect that upon being invited by the officer of the day, he entered the wardroom on the morning of December 29, (sic) 1991. He related that he saw Lieutenant Kelk and Muir and described in which condition they were. He also described the atmosphere in the control room when the accused was present, the words used by the accused, his tone of voice and how frequently the words were said.

2166

Judge Advocate

Summation

Leading Seaman Kohli testified to the effect that upon reporting for duty on the morning of December 20, 1991, he went into the wardroom and saw Lieutenant Kelk and Lieutenant[N] Muir. He described their state and positions. He also described the accused's style of leadership, his vocabulary and the atmosphere on the ship when the accused was present. He said that the accused called him stupid once in the control room in the presence of subordinates, how he felt about it and how it affected his work. He finally explained the circumstances surrounding his removal from HMCS OJIBWA.

Lieutenant[N] Marr who was the officer of the day from 0800 hours on December 19, 1991 to 0800 hours on December 20, described his rounds on board the boat that night. He also related the incidents that took place inside the wardroom in his presence. He described Lieutenant Kelk's condition and position before and after his round and how the accused made drawings on the body of Lieutenant Kelk. He also described the accused's state of sobriety. He related a telephone conversation which took place on January 2nd, 1994, between him and the accused and described how the accused seemed relieved when he told him that he had not noticed anything bad done by the accused that evening. He described the atmosphere of intimidation on board HMCS OJIBWA and the choice of words that the accused used towards him and others in the presence of subordinates. He explained how the accused's attitude would make subordinates commit more mistakes. He described an incident in which Lieutenant-Commander Marsaw accused him of being incompetent and threatened to charge him. He said that the accused invited his subordinate officers to yell more in the control room because he felt that it was the way to do.

Lieutenant-Commander Davidson testified as an expert witness in the field of the organization of the First Canadian Submarine Squadron, the training and career progression of submarine officers and the operation of Oberon class submarines. He explained the chain of command for redress of grievances, the career

2167

Judge Advocate

Summation

progression of submariners, the role of the commanding officer of a boat. He also described certain parts of a submarine and its operation. He referred to other commanding officers under which he served and commented to the use of derogatory adjectives by them in the control room. He said that when he left the OJIBWA, the wardroom was composed of professionals and that the morale was excellent. The witness also expressed his opinion when asked four hypothetical questions by the defence. I have already addressed you on this specific matter when I addressed you on the topic of expert witnesses.

Lieutenant[N] Pokotylo described a kick that he saw the accused give to another officer in the control room of the OJIBWA and the words pronounced by the accused immediately after it, "Keep this area clear." He commented on the degree of force used by the accused when he gave that kick. He also described the atmosphere in the control room when the accused was present, his leadership style, how the accused would react when an error was committed in comparison with how other commanding officers would react in similar circumstances. He also compared the accused's deportment when visitors were or were not on board. He explained how the accused's attitude affected him and described the circumstances surrounding his request to leave the OJIBWA.

Lieutenant[N] Cassivi related his attendance at the mess dinner, and his experience under the command of the accused in comparison with his service under the command of other commanding officers. He described the tone of voice, comments and vocabulary used by the accused towards his officers and explained how it affected him and others. He expressly referred to anti-Francophone remarks made by the accused on several occasions in the presence of foreign visitors. He referred to remarks made by the accused to him and Lieutenant[N] Ellis on July 1994, concerning statements they had made to the military police.

2168

Judge Advocate

Summation

Lieutenant-Commander Dickinson described the cigar tube incident that he witnessed on board the OJIBWA. He described his state of intoxication and said that he did not report the incident and explained why.

Lieutenant[N] Higginson described the atmosphere in the control room of HMCS OJIBWA when the accused was present and the words that the accused used towards him and other officers in the presence of others. He also reported other derogatory remarks made by the accused to Lieutenant-Commander Dussault towards Francophones. He described a confrontation he had with the accused about his yelling in the control room and the attitude of the accused at the time. He related the differences in leadership when he served under the command of other commanding officers and finally described a kick that he received to his ankle while working at the plot table.

Lieutenant[N] Byrne described his observations in the wardroom on the morning after the mess dinner and the jokes made by the accused in early January '92, about the cigar tube incident. He also described an incident which took place on board OJIBWA when he was kicked by the accused while at the plot table. He related the leadership style of the accused, the morale on board the boat, the atmosphere in the control room when the accused was present, the words used by the accused towards him, the frequency at which they were used and gave two specific examples of such incidents.

Lieutenant[N] Watt related the first conversation he had with the accused on board the OJIBWA, the leadership style of the accused, the insulting adjectives used by the accused towards him and the comments made by the accused on the policy on bilingualism. He also described the morale on board the boat and related a conversation he had with the accused concerning a statement that the witness made to the military police.

2169

Judge Advocate

Summation

Master Seaman Madgett described the leadership style of the accused, the atmosphere onboard the boat, the behaviour of the accused when he was not satisfied and gave examples of words used by the accused on such occasions. He explained how the accused's attitude affected his morale and his ability to lead and gave examples. He also described an incident where he was hit by the heavy door of the control room which the accused had kicked. He compared his experience on board OJIBWA with his experience onboard other submarines and said that he would not sail with the accused again.

Mr LeClaire related his experience on board the OJIBWA under the command of the accused. He described the accused's leadership style, the insulting language used towards him and others, its frequency and the effect it had on him and others.

Warrant Officer Shea, a medical assistant, described the kick that he said the accused gave to Lieutenant[N] Higginson in the control room and the degree of force that was used. He related his experience on board the OJIBWA, the accused's leadership style, the atmosphere in the control room when the accused was present, the accused's reaction when he was dissatisfied, the words used by the accused towards him and the effect they had on him.

CP01 Tovey related a conversation he had with the accused in the wardroom and the intimidating remarks made to him concerning a statement he had made to the accused. He described the accused's leadership style and the atmosphere in the control room. He related the words used by the accused and said that he never heard similar words said by any other commanding officers towards their crew. He said that he would take as a personal insult the fact that the crew on board OJIBWA was incompetent. He gave his personal impressions on the accused's behaviour and command and described him as a man without compassion and with no faith in his officers.

2170

Judge Advocate

Summation

PO1 Stone related a conversation he had with the accused in January 1992, during which the accused told him why he was so hard with his officers.

Leading Seaman Avant described what was life on board when the accused was present in the control room, the atmosphere in the control room, the morale and the use of profanities by the accused towards his crew. He described the differences with other boats commanded by other commanding officers.

PO [PO2] Conrad described the incident where he saw the accused kick Lieutenant[N] Higginson while he was at the plot table and reported the words spoken by the accused on that occasion. He described the accused's leadership as the worst example of leadership he had seen in his 20 year career. He gave examples of the words spoken by the accused towards his crew and explained how he felt about the situation. He described the atmosphere in the control room, compared the difference when riders were present or not, the morale and explained how his sad experience affected his personal life.

Mr Harris described the situation on board when the accused was dissatisfied and the words spoken by the accused to his crew. He said that the crew was competent and explained how other COs would behave while placed in similar situations. Finally, he said that although he would rate the accused one of the best in attack situations, his main problem was that he forgot to bring his crew along with him.

PO2 Parsons described the accused's leadership and behaviour, the words spoken by the accused towards his crew and gave an example. He described how the situation was different under the command of other commanding officers.

Lieutenant[N] Pitman described the accused's attitude when he was not happy, the atmosphere in the control room, the words spoken by the accused towards

2171

Judge Advocate

Summation

him and others and explained how it affected him. He qualified the crew as a competent crew and related how other COs would respond in similar situations.

Leading Seaman Bidinost described the accused's leadership style, the atmosphere in the control room, the words used by the accused and gave specific examples. He related how his experience on board affected his health.

PO2 Brown described the accused's attitude when he was unhappy, the words used by the accused towards him and other members of the crew and gave examples. He also related the circumstances under which he left the service on board submarines, giving false information about his health in order to be medically excused.

Master Corporal Schubert, who served onboard three submarines, testified to the effect that he has never heard any other commanding officer use insulting adjectives towards his crew. He described the morale on board OJIBWA and reported words spoken by the accused to the effect that, he did not give a fuck about morale.

Leading Seaman Bourassa described the accused's leadership style, the atmosphere in the control room, the accused's reaction when he was unhappy and gave examples in which he and others were involved.

Master Seaman Szucs described the atmosphere in the control room when the accused was present, the accused's leadership style, his reaction when he was dissatisfied, the words used, the tone of voice and the morale on board.

Master Seaman Smyth compared the situation on board the OKANAGAN and the OJIBWA. He described the attitude of the accused towards him and others, the morale on board, the effect the situation had on him

2172

Judge Advocate

Summation

and others, and described the incident when the door was kicked.

Lieutenant[N] Elford described the incidents which took place in the wardroom of the OJIBWA after the mess dinner he attended in December of 1991. He said that he clearly saw the accused inserting the cigar tube into Lieutenant Kelk's rectum and that he was not assisted by anybody. He described his sobriety condition and explained why he exaggerated it to the military police during his interview. He also described the atmosphere on board the OJIBWA and the words spoken by the accused towards him and others. He related a conversation he had with the accused in July 1994.

Lieutenant-Commander Kavanagh related his observations in the wardroom on the night of the mess dinner and his sobriety condition at the time. He also reported two conversations he had with the accused in 1994 and said that he had to contradict the accused who had told him that he was not present during the incidents which took place in the wardroom in December 1991. He also described the relationship between the accused and Captain[N] Plante. The witness said that other commanding officers never used insulting adjectives when they address their subordinates in the control room.

Lieutenant-Commander Virgin described the accused's reaction when an error had been committed, the morale of the officers and how it caused concerns to him. He related two conversations he had with the accused during which he raised that topic and said that the accused did not change his behaviour. He said that motivation does not require yelling and screaming. The witness said that he did go along very well with the accused. He personally has never heard the accused using derogatory adjectives towards the members of his crew. He also said that when the accused was yelling at an individual it was to rebuke him for the mistakes he had made and not to attack the individual. He added

2173

Judge Advocate

Summation

that, on some occasions, the accused would take an individual aside in his cabin. He also added that the accused did praise members of his crew approximately 20 times over his 18 month service under the accused's command.

Lieutenant[N] Soper described the accused's leadership style, the words used by him in the control room, his tone of voice and the atmosphere in the control room and the wardroom. He gave an example where the accused threw him out of the control room and explained how it affected him. He explained why some officers chose to eat their meal outside the control room and how low was the morale. He related anti-Francophone comments made by the accused towards Lieutenant[N] Jacques in the presence of other Francophone officers.

Master Seaman Cumberland described the accused's leadership style, the atmosphere in the control room, the accused's reaction when he was dissatisfied, the reaction of the members and how it affected their job. He related one incident where he witnessed the accused insulting Lieutenant[N] Jacques because he was a Francophone.

Lieutenant-Commander Dussault related the contrast between the accused's leadership style compared with other COs. He also related two conversations he had with the accused during which he raised the topic of the accused yelling at his crew and reported the accused's answers on those occasions. He explained the concerns he had for his career and related threats made to him by the accused. The witness also related comments that the accused made on several occasions against Francophones and gave examples.

Captain Whynott described an incident which took place sometime during the month of August 1994 in the wardroom of CFB Halifax where he heard an individual threatening another individual. He said what he did following that incident.

2174

Judge Advocate

Summation

PO2 Lalancette described an incident during which the accused pushed him and told him to get out of the way. He said that the accused had no reason to do so as there was no emergency. He demonstrated the tone of voice used by the accused and said that the accused used enough force to push him against the bulkhead.

CP01 Brown related a visit that took place on board the OJIBWA during which the accused invited him in his cabin without the coxswain being present. He related the conversation that took place on this occasion. The witness, who was qualified as an expert witness in the area of leadership of and in an operational naval unit, gave his opinion on certain matters including the concerns he would have if a CO would use derogatory adjectives on a regular basis towards the members of his crew. He related two specific examples when the submarine in which he was in was in a situation of danger. He described how the CO reacted to those situations and added that in neither situation did the CO use derogatory adjectives towards the persons who had made mistakes.

Lieutenant-Commander Hickey described how he would deal with an individual in the control room who would not perform to his standards or who would have made errors. He also said that as the commanding officer he has never used insulting adjectives towards his crew.

Sergeant Wiley and PO2 Breese, two admin clerks, testified to the effect that CFAOs were present at all times on board the OJIBWA, that the accused was aware of that and explained how amendments were made to the books.

Lieutenant[N] Wamback related the contrast in leadership style between the accused and other COs, the words used by the accused towards his crew, his reaction and the other officers reactions when such words were spoken. He related two incidents where he raised

2175

Judge Advocate

Summation

his concerns to the accused and how it ended. He related the effects the situation had on his career.

Lieutenant-Commander Woodburn testified to the effect that he never saw a commanding officer using insulting adjectives towards his crew and he never did it himself. He explained what he would do if an error was committed in the control room.

Captain[N] Webster testified to the effect that he has never used personally insulting adjectives towards his crew, that he would have concerns if a commanding officer was doing it and explained why. He related what he would do if a member of his crew would continuously make the same mistakes. He explained in which circumstances he would expect a captain to raise his voice in the control room and said that there is no need to yell at somebody to correct his mistakes. He said that if a captain was losing respect from his crew he would expect his officers to take some action to ensure that the divisional system would react to it. He also related the reasons why, in his opinion, a member would not use the system of redress of grievance.

The defence called 10 witnesses. Lieutenant-Commander Truscott described the Submarine Officer Training Course. He related his assessment of the OJIBWA team in August 1992, explained the reasons for its below standard assessment and described the role played by the accused on that occasion. He gave his opinion on the use of profanities and insults by a commanding officer, described what should be understood by the word "aggressiveness", gave examples when it would be appropriate for a captain to raise his voice and commented on several circumstances in the daily operation of a submarine.

Lieutenant[N] Tingle related his experience on board the OJIBWA. He said that although the atmosphere was tense in the control room and that it was more stressful to work on OJIBWA than on other boats,

2176

Judge Advocate

Summation

he learned a lot working under [Lieutenant-]Commander Marsaw. He described the accused's attitude in the control room but said that screaming and yelling would only occur when an error was made by a member of the crew. He said that he did not recall any insulting adjectives spoken by the accused towards his subordinates and that, in any event, it did not bother him. When asked to comment on the performance of the crew while he was there, he said that it was the best work up crew in the submarine fleet.

Leading Seaman Cox who qualified on board OJIBWA described his responsibilities and the accused's reactions when people made errors. He said that he heard words like, "idiot, asshole and stupid", spoken by the accused towards his subordinates but that such words did not fall within his definition of degrading adjectives.

CPO1 Smith described his observations as a member of the Submarine Sea Training Group who has conducted two work ups on board the OJIBWA between 1991 and 1993. According to him there were no morale problems on board and he heard no insulting language used by the accused towards his subordinates. He said that the crew was not incompetent.

CPO2 Lavoie described life on board OJIBWA and under the accused's command as being happy and without problems. He said that he had a very good relationship with the accused and praised the accused's qualities as captain. He does not recall the accused using insulting language towards his subordinates and he said that he never received complaints from the crew to that regard.

CPO2 Kramble described how the accused would address people committing mistakes and described the morale on board as good and better than morale on his actual boat.

2177

Judge Advocate

Summation

Commander Scherber who was SM1 during the time the accused was commanding the OJIBWA described the situation in the squadron at the time he took command. He described his responsibilities and referred to two outstanding PERs he wrote on the accused. He also related three visits he conducted on the OJIBWA. On all those occasions, he said that morale was very good and that no complaints were received from the crew. He described the OJIBWA as a happy boat. He said that the accused showed particular concern for his subordinates and that his attitude contributed to boost morale. When confronted to evidence given by some prosecution witnesses who would have raised to him the issue of physical and verbal abuse, he said having no recollection of the incidents. He said that he would find it difficult to believe that harassment occurred on this boat.

PO2 Hallonquist described the accused's reactions and leadership style compared to others. He said that when morale was low on occasions, it was because of a heavy schedule. He related occasions when the accused raised his voice in the control room and explained why.

Mr Calnan described his two month stay on board the OJIBWA and the first meeting he had with the accused. Although he had the impression that the accused was not considered as a popular commanding officer, he said that he had a favourable experience on board and that the crew was very good.

The accused, Lieutenant-Commander Marsaw, made a description of what you saw on board the OJIBWA and the OLYMPUS. He made a review of his military career and explained certain matters relating to command, like safety of the unit, his philosophy in the training of people, the importance of team work and the divisional system. He also described several exhibits that he introduced and related his challenges before he took command. He described the activities that took place on board during the years 1991, 1992 and 1993.

2178

He then related the events that took place on the evening and night of the mess dinner and denied having participated to the incident related to Lieutenant Kelk [RN]. The accused then offered his explanations on the testimony of several prosecution witnesses; namely, Lieutenant[N] Elford, Leading Seaman Bourassa, Master Corporal Schubert, Master Seaman Madgett, Leading Seaman Bidinost, Leading Seaman Avant, Mr Harris, Leading Seaman Kohli, PO2 Parsons, Lieutenant[N] Soper, Lieutenant[N] Cassivi, PO1 Stone, Lieutenant-Commanders Virgin, Kavanagh and Dussault, Mr LeClaire, PO2 Conrad, CPO1 Tovey, Lieutenant[N] Watt and Lieutenant-Commander Craven. As it relates to the third charge, the accused denied having ever addressed his subordinates using such words. He said that he has never been approached by anybody concerning the manner he was addressing his personnel and said that, beside three redress of grievances, he never received complaints on his behaviour.

At this stage I propose to inquire from counsel whether they have any comments on the evidence that I have related to you in my address. The purpose is to correct any minor errors I might have made when discussing the evidence and not to invite re-argument.

Mr Prosecutor, do you have any comments on any of the evidence that I may have failed to emphasize, or I may have inadvertently misstated when mentioning it to the Court?

PROSECUTOR: Just some minor comments, Mr Judge Advocate. You had a phrase, I think, when you were going through the testimony of the witnesses that so and so would identify the words spoken to him and others. I particularly note though that that wasn't done with regard to a couple of witnesses who do appear on the annexes, and for that reason would raise that these witnesses words were spoken in their testimony towards them by the accused as well. That would be for Pokotylo, Bidinost, and Smyth.

2179

And as a second matter, you referred to some of the testimony from the witnesses, Virgin, for example, how he did have conversations with the accused to raise up his concerns. That was, I believe, also said with reference to Wamback and Dussault's evidence. There were other witnesses who as well did testify that they did raise their concerns; such as, LeClaire and Higginson and that wasn't admitted.

But apart from that, my comments are only minor and I have no problems with your summation of the evidence. Thank you.

JUDGE ADVOCATE: Thank you.

Mr Defending Officer, do you have any comments on any of the evidence that I may have failed to emphasized, or I may have inadvertently misstated when mentioning it to the Court?

DEFENDING OFFICER: No. Concerning that as you have advised the court, this is a rough summary and that at the end the court will refer to their own notes. From that point of view I have no problems.

JUDGE ADVOCATE: Thank you.

Mr President and Members of the Court, you heard the helpful comments of counsel with respect to the evidence. As I told you earlier in my address, it is your memory of the evidence that counts.

At this time, Mr President and Members of the Court, I shall inquire from counsel whether they want me to give you some additional instructions on the law or to alter or qualify what I have already said. For that purpose, I would ask you to retire until I have determined whether such instructions are required and, if so, to prepare them.

THE PRESIDENT AND MEMBERS RETIRE.

JUDGE ADVOCATE: Mr Prosecutor, do you have any matters to raise?

2180

PROSECUTOR: I'm going to flip through my notes, Mr Judge Advocate, and I don't have that many matters. In fact, bring to my mind right now, I have only one serious concern and that's it, given the hundred of things you had to address on, so my comments won't be that detailed. I'm just flipping through my pages to refer to the comments that were made as they arose.

One point, you made a point of discussing similar fact evidence and discussed Stone and Lalancette. I noted that Byrne's similar fact evidence wasn't discussed, and I believe this may cause a problem for the members of the court when viewed within the way that the defence counsel in their closing arguments reviewed that evidence.

One of the key facts with regard to the kicking charges is the purpose of Byrne's testimony, that he was kicked approximately three times by the accused. On cross-examine, he was pressed as to whether or not this was done maliciously. The evidence came out that although it wasn't a malicious or a hard kick as described and demonstrated by Byrne, it was one that he steadfastly and was adamant upon was done intentionally, in part because of the position of his leg that he was kicked upon. Defence counsel in their closing arguments simply said that Byrne when crossed said it wasn't done maliciously.

Byrne's testimony or evidence wasn't reviewed in any detail by you. That coupled with the fact that the use that could be made of his evidence specifically, because I believe it's a linchpin and it's key to fully understanding the nature of the evidence on the fifth and sixth charge, I would like some instruction to the members of the court about the evidence that Byrne gave and the use that can be made to it with rebutting the argument of the state of mind and accident. So that would be one point.

2181

JUDGE ADVOCATE: State of mind and?

PROSECUTOR: Rebut the defence of accident. Lack of intent, I guess, state of mind, the same thing, worded differently.

JUDGE ADVOCATE: Are you suggesting that I should include it in my address on similar fact?

PROSECUTOR: Yes, please. I believe that's how defence on the record is using ... coloured the evidence, Byrne's evidence, of being similar fact evidence.

And then the only other - and this is the most serious concern that we have right now - concerns the way that **mens rea** has been defined. Generally, at the beginning of your instructions is blameworthy state of mind, and then as you go to describe the essential elements required to prove; for example, the ill-treatment charge, the 129 on verbal abuse, the 129 on anti-Francophone comments, as well as the assault on kicking, you simply instructed them that they must find a blameworthy state of mind.

Defence counsel in the very beginning of their case, from their opening statement onwards, has made a comment that if words were used, that the accused did not intend to insult. I believe that's his words that he stated right in the opening address. I have a written copy of his opening address and the point that he was trying to make in written form as well as the one that he made verbally is that there is some sort of distinction between saying things which people may be insulted by and saying things that the accused intended to insult with.

Given the definition of blameworthy state of mind, it is entirely possible, given the way the instructions are framed right now to the members of the court, that they may find the Lieutenant-Commander Marsaw intended to speak the words but not intend to

2182

insult anybody, and that could very well give rise to an acquittal when, in fact, the evidence required for a conviction is there.

We would appreciate it if they could be a bit more quickly, specifically instructed on what type of **mens rea** is required for charges one, two, three, four, five, six and seven. He had to intend to insert the cigar tube, not intend it to be disgraceful - and thinking about it, one and two, I think, you've already dealt with in terms of the issue of intent. With charges three, four and seven - I'll try to flip through my notes and see - it's either referred to as requiring the blameworthy state of mind or we must prove that the accused knew what he was doing. So by referring to blameworthy ...

JUDGE ADVOCATE: Or was so reckless about it and so on.

PROSECUTOR: Or was so reckless about it. But what does that word mean? The accused knew what he was doing. If they adopt the position taken by defence counsel in the opening statement, they will say, well, the accused didn't intend to insult anybody. He was so caught up in doing the attack or commanding or concern for safety that he didn't intend to insult anybody.

JUDGE ADVOCATE: But how do you submit it should read?

PROSECUTOR: Simply by telling them that we must prove beyond a reasonable doubt that the accused intended to say the words that he's alleged to have spoken, but we're not required to prove beyond a reasonable doubt that he was intending to verbally abuse or insult people in the process of doing so.

I'd respectfully submit that there's an extra layer to this problem with regard to the 129 charges, and where we have to prove beyond a reasonable doubt that the accused knew or ought to have known. They

2183

have been instructed in a very general way that we have to prove beyond a reasonable doubt there's a blameworthy state of mind, that you then go on to define that the accused knew what he was doing or was reckless or otherwise. But they've received, in this case, with the 129s, absolutely no instruction on what's required to prove objective **mens rea**, ought to have known.

JUDGE ADVOCATE: Well, I have defined it somewhere else.

PROSECUTOR: Okay, we haven't heard it and looking at the way that the 129s were then defined with regard to the **mens rea** required, both times for charges four and charges seven, you focussed on the **mens rea** blameworthy state of mind required of the accused but there is no particular instruction or counter-instruction that would deal with how we would have to prove objective **mens rea** on the ought to have known.

So those are really our two points. As I said, you had to cover well over a hundred different things and the only concerns we have are the one with Byrne's, similar fact; and more significantly and more importantly the way that **mens rea** has been defined right now. The words that were used to define the blameworthy state of mind and what we had to prove could right now, given their definition, sustain two legitimate interpretations, one meaning that we'd have to prove specific intent and one meaning that we had to prove general intent.

And if they adopt the position taken by defence in their opening statements, the Crown is right now in a position where acquittals could result although we have proven the general intent, because they think that we have to prove that Lieutenant-Commander Marsaw intended to be verbally abusive or intended to insult rather than simply just intent to say that words that he spoke.

Those are our comments, thank you very much.

2184

JUDGE ADVOCATE: Thank you.

Mr Defending Officer?

DEFENDING OFFICER: I will first address the very matter of intent. I find your address to have been very complete and, in fact, very much in line with what the prosecution asked you to do when we had a **voir dire** a few days ago, last Friday, as it was.

You have addressed about **mens rea**. You have addressed about objective standard. I believe your address is complete. I believe the prosecution's asking you to somehow almost turn this into a matter of strict liability which is not the case, which cannot be the case. The prosecution talks about the specific intent. I heard nothing that could be construed that way, and I find that your address on **mens rea** quite apropos and I would invite you not to add anything to it.

Byrne, I had that as well, was not mentioned with Lalancette and Stone in the similar fact. So the evidence which relates to Byrne is sort of hanging there, hasn't been put in a box somewhere like you did for the others. I believe it was admitted, I believe, as similar fact and, I believe, that you should address the court in that respect so that they don't, I don't know, run the danger of finding the accused guilty of kicking Byrne for one; and two, you will have, I respectfully submit, to address them about the standard as you did; for example, for the standard of evidence, before they can use it, they must be satisfied beyond a reasonable doubt that this took place, et cetera, et cetera.

JUDGE ADVOCATE: Will you be satisfied if I refer them to the instructions I gave them on the similar fact evidence and mention to them that they should include in all those instructions that I gave them the name of Lieutenant[N] Byrne?

2185

DEFENDING OFFICER: Yeah, and possibly ...

JUDGE ADVOCATE: Otherwise, I have to repeat the whole thing, which is something I can do also.

DEFENDING OFFICER: Possibly invite them - I mean, it's not all that long as I recall, your part on similar fact - or invite them anyway, make sure that in their mind they're clear with that. I believe it is quite important.

The prosecution, in talking about Byrne, stated that I said in final address that in cross-examination Bryne said it was not malicious. I don't think I said that, maybe I mis-spoke myself or didn't make myself clear. What I intended to say, for sure anyway, was that Byrne when he spoke to the military police said there was no malicious intent, that's how I understood the evidence and that's how I meant to put it to the members of the court in my final address and I believe that's the way I put it.

In any event, all this to say that I don't think you should readdress the court on this issue because, I mean, for the evidence ... it's a matter of evidence and your review of the evidence has been kept in general terms, and that's for them to review their own notes and all that, so I don't think there's any need at all to further address particulars of Byrne's evidence.

In relation to charges ... those are my comments on points raised by the prosecution.

On charge number four, you exposed that the theory of the defence was that such incident did not happen.

JUDGE ADVOCATE: Let me refer to it.

DEFENDING OFFICER: Which is our main theory of course.

2186

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: Okay. Also, though I know how precise I may have been in my address on that, but we contend, like, this did not happen, I mean, that sort of events as alleged did not happen and whatever may have happened; like, for the accused to have raised his voice or rebuke personnel, that it would've been done within the confine of QR&O 19.13 which says that one should not make rebuke in public unless necessary for discipline; and CFAO 19-39 para 5 also indicates that the - I don't have the text right in front of me - but basically that it is not abuse of power or something like that, the enforcement of high standards, et cetera does not constitute abuse of power.

So our position on charge number four especially is that whatever sort of rebuke may have taken place falls ... we say that the treatment was not such as to amount to verbal abuse, like, denying actual words as they were presented by prosecution witnesses. But the accused has admitted raising his voice, the accused has admitted applying correction or rebuking people but he has explained that it was in given circumstances which we claim would fall within QR&O 19.13 and para 5 of CFAO 19-39. And I believe that the fact that the accused testified to that effect makes it even more important that you address the court on these two articles or paragraphs or whatever.

Finally - I forget if that was approached or discussed in the **voir dire** last Friday - there's an amendment to CFAO 19-39 that took place in March of 1993. As I recall charge seven refers to a period of February '92, I believe, to October '93, and there was during that period an amendment made to the CFAO, it's Amendment List 6/93, where the word "unsolicited" which formed part of the defence ... sorry, formed part of the definition of harassment, unsolicited comments, et cetera, was removed in March '93.

2187

JUDGE ADVOCATE: Which words were that?

DEFENDING OFFICER: The word "unsolicited comments" found in the definition of harassment at CFAO 19-39, that word disappeared in March of '93. And as you have pointed out, members of the court must be satisfied beyond a reasonable doubt about the publication of the article and all that ... not of the article but of the order. And we claim there's no firm date anyway. Whatever they find as a matter of evidence there's been a change, so I'd like to know which CFAO they're going to apply. They've got to know which to apply or they've got to be given some direction as to how to determine for themselves which to apply.

I don't know if you follow that?

JUDGE ADVOCATE: Yes, and none of you argued on that, I think.

DEFENDING OFFICER: Uh-huh. Because as I recall weren't the two CFAOs given to the court?

JUDGE ADVOCATE: I think so.

DEFENDING OFFICER: The two versions, yeah.

JUDGE ADVOCATE: What are your views on what should apply?

DEFENDING OFFICER: It depends when this incident alleged, of course, is supposed to have happened for one. I don't think the evidence is very precise on that at all to start with. So they got to be able to find when it happened if at all possible, I'm not sure; and two, they got to be able to decide ... they'll have, I think, to address their minds as to when and if that new CFAO became available on board. The evidence was not quite, like, all that one hundred per cent sure on that. I remember asking Breese, "So can you tell the court when you made the amendment?". He said, "No."

2188

So we appear to have maybe a bit of a difficulty there. They will have to, first of all, try to decide when that CFAO was amended. It appeared that it was amended but they don't know when. I don't think anyway, the evidence suggests as to exactly when. So there's two uncertainties, uncertainty as to the timing of the alleged offence or the alleged words that would amount to an offence under the CFAO; and then the timing of the actual amendment and, of course, as all of that relates to unsolicited.

Because there was a body of evidence that suggested that sometime they would have discussions in the wardroom and opinions were being expressed. So, again, if from that evidence the court was to find that he has expressed some views, I think they should be able to determine whether it falls within that CFAO or not. If they find that the accused said the words that some witnesses have said, well, that exception may not apply and that's it. But if they find that the accused did not speak those words but rather - and according to his own testimony - participated into discussions, then that may very well become of some importance. They have two versions in their hands, so they've got to be told something about it.

Those are my comments.

JUDGE ADVOCATE: Thank you.

Well, in view of the time I think we should take this opportunity to have lunch and during the lunch period I will make a decision on what both counsel submitted. And if I have to readdress the court on one or more matters I will also take this opportunity to prepare my comments on that and let you know when I'll be ready.

ADJOURNMENT: At 1215 hours, 31 October
1995, the court adjourns.

2189

Judge Advocate

Summation

REASSEMBLY: At 1400 hours, 31 October 1995, the court reassembles and the accused is before it.

THE PRESIDENT AND MEMBERS RETURN TO THE COURTROOM.

JUDGE ADVOCATE: Mr President and Members of the Court, in view of an invitation made to me by counsel I wish to give you some additional instructions on the law and/or to qualify what I have already said in some areas.

First, when I addressed you on the matter of similar fact evidence, I referred to the testimony of Petty Officers Stone and Lalancette. I should also have included the similar fact reported by Lieutenant[N] Byrne when he testified to the effect that he was kicked by the accused while he was working at the plot table. All the instructions I gave you on this matter of similar fact evidence must also apply to the testimony of Lieutenant[N] Byrne as it relates to such an alleged kicking or kick. I would ask you to refer to my previous instructions on this matter as to what use, if any, you can make of such type of evidence.

Should you also wish, I can read my instructions again on this particular matter.

PRESIDENT: That's fine.

JUDGE ADVOCATE: It's fine, sir. Secondly, I have explained to you the concept of blameworthy state of mind and I have referred to it when I enumerated all the essential elements of the charges that must be proved beyond a reasonable doubt by the prosecution before you can find the accused guilty of any of those charges.

When I referred to such concept under each charge, I have not repeated every time what must constitute the blameworthy state of mind. This is because

2190

Judge Advocate

Summation

I thought it was sufficiently clear from my explanations on this matter at the beginning of my final instructions.

If such is not the case, I only wish to emphasize that my general remarks on this matter, or my general instructions on this matter, apply to each and everyone of the charges before the court. All those charges are what we call "general intent" offences which means that the accused must have known what he was doing, as I said before, what he was doing and either intended to do it or was so reckless about its consequences that his state of mind was blameworthy. This does not mean, when you consider charges number three, four and seven that the accused must have intended his words to be insulting, belittling, degrading, et cetera.

Thirdly, when I summarized the defence theory on charge number four, I should have said or added that although it is the general theory of the defence that the accused denied that such incidents as particularized in charge number four ever took place, when the accused did raise his voice, because there is evidence on this matter, or did rebuke subordinates, it is the defence theory that it was done within the ambit of QR&O 19.13 and CFAO 19-39 (5).

Fourthly, and finally, I must bring your attention to the fact that two versions of CFAO 19-39 were given to you. This is because CFAO 19-39 was amended sometime in March 1993. As charge number seven covers the period between October '92 and October '93, it will be for you to consider, based on the evidence heard, if the comments particularized in charge number seven were made to the accused and in the affirmative when they were made, and then determine which version of the CFAO applied and also determine if the accused had knowledge of the appropriate CFAO.

You must also determine if the amendments made in March as they refer to the definition of "per-

2191

Judge Advocate

Summation

sonal harassment" have application in the case before the court.

Those are all the matters I wish to add at this time.

It's also what I have to say in respect of the evidence on the charges that have been placed before you and I would ask you now whether or not - before I proceed with my other comments in terms of procedures - whether or not you have any questions to this point?

PRESIDENT: No.

JUDGE ADVOCATE: Thank you.

DEFENDING OFFICER: Mr Judge Advocate, if I may before you change the subject?

JUDGE ADVOCATE: Sure.

DEFENDING OFFICER: When you referred to CFAO 19-39, I believe you said 19-39 (5).

JUDGE ADVOCATE: Yes.

DEFENDING OFFICER: I think you may have intended to say, 19-39 para 5.

JUDGE ADVOCATE: Sure, right, it's what I said but let's check again.

It's 19-39 paragraph 5. Thank you, Lieutenant-Colonel Couture.

It may be that during the course of your deliberations questions will arise concerning what I have said to you during my final address. If that occurs I would ask you to put your questions in writing and to give them to the officer of the court who will deliver them directly to me. I will inform you in open

2192

Judge Advocate

Summation

court after having given both counsel the opportunity to comment thereon of my response in respect of your questions.

The court should now close to determine its finding; in other words, to come to a conclusion on the basis of a majority vote as to whether the accused is guilty or not guilty of the charges before the court. When you have closed, you should first discuss the evidence generally. Each member should be given an opportunity to formulate an opinion, and following that you should vote on a finding. Perhaps, I may suggest that the discussions be initiated by you, Mr President, but you should not endeavour to sway the opinion of the other members. The members of the court should vote orally in succession beginning with the junior member and proceeding with the senior member and you, Mr President, should vote last. I invite you to read QR&O articles 112.40 and 112.41 in that respect.

As you know, I will not be with you during your deliberations. If in the course of your discussions you should require advice on the law or if you wish some evidence read to you, the court must be reopened and my advice sought or the evidence read in open court.

Article 112.51 of QR&O is entitled "VERIFICATION BY JUDGE ADVOCATE OF LEGALITY OF PROPOSED FINDING AND SENTENCE" and it reads in part as follows - where a judge advocate has been appointed to officiate at a court martial:

"(1) The court shall in open court immediately prior to pronouncing a finding ... inform the judge advocate of the proposed finding.

(2) The judge advocate shall review the finding ... and inform the court whether or not it is legal.

2193

Judge Advocate

Summation

(3) The court shall not pronounce the proposed finding ... unless the judge advocate informs the court that it is legal.

(4) Where the judge advocate informs the court that the proposed finding ... is illegal, the judge advocate shall provide such further advice as the judge advocate considers appropriate and the court shall close to reconsider the finding ...

(5) When the court has reconsidered the finding ..., the court shall reopen and proceedings shall continue in accordance with paragraphs (1) to (4) until the judge advocate informs the court that the proposed finding ... is legal."

In order to comply with this article, Mr President, I would ask you to write down on a sheet of paper the findings, in this case, the court has made in respect of each charge in the form that I have already suggested to you to use, and upon your return to open court to present the sheet of paper to me prior to pronouncing your finding so that I may determine whether or not the finding is legal. And thereafter we would mark it as an exhibit.

Mr President, perhaps I should give you some instructions on your deliberations. You, of course, are free to determine the amount of time you wish to deliberate in your deliberation room but I remind you of my earlier instructions at the pre-trial conference concerning when the court is closed and when it is adjourned. You will now be embarking upon the process of closing the court, which is to say, you will go into

2194

Judge Advocate

Summation

your deliberation room to deliberate in respect of your findings.

When you feel that you have worked hard enough or have had enough and have not yet reached your conclusions or your findings and you wish to retire to your quarters for the day, then you must return to open court and adjourn the proceedings until the next morning, for example, at which time you would come back into court, close the court and go back into your deliberation room. In other words your decisions take place in the deliberation room and it is for you to determine how much time you wish to spend in that room.

Now, it may be convenient, again, the choice is yours, it may be convenient if we were all on call, for example, giving us a sufficient amount of time to come back here, to either hear your findings or adjourn the court until tomorrow. It's been brought to my attention that the minimum time period that would be required is an hour and fifteen minutes, as some people live far away from the office.

Otherwise - and that's also a possibility and it's your choice - we may all sit here and wait until you're ready. As I said, the choice is yours. So is it possible to have an indication as to what you would prefer at this time or ... ?

PRESIDENT: I'm quite happy for people to be on call. It's the intention of the court to work, sort of, the balance of the day today if you will until 1800 [hours] and see where we get by then in terms of our deliberations. And then we would propose to, if we have not completed our deliberations, to adjourn at that time until the following day. But certainly the issue of folks being on call is most acceptable from my perspective.

JUDGE ADVOCATE: So should we agree on the fact that if we have not heard from you before 1800 hours, we should all be here?

2195

PRESIDENT: Yes.

JUDGE ADVOCATE: Okay, I think it's clear to everybody. Very well. So thank you, Mr President.

At your convenience, Mr President, you should close the court to consider the finding and you may do so by pronouncing as follows: The court is closed to - consider finding, march out the accused.

PRESIDENT: The court is closed to consider findings. March out the accused.

AT 1417 HOURS, 31 OCTOBER 1995, THE COURT CLOSES TO DETERMINE FINDINGS.

AT 1800 HOURS, 31 OCTOBER 1995, THE COURT REOPENS AND THE ACCUSED IS BROUGHT BEFORE IT.

JUDGE ADVOCATE: Has the court reached a finding, Mr President?

PRESIDENT: No, we haven't. At this stage I think we've reached the saturation point on our deliberations. We have a requirement to continue deliberating tomorrow and on that basis I would propose that we adjourn until 0900 hours tomorrow morning.

JUDGE ADVOCATE: Very well, thank you.

ADJOURNMENT: At 1801 hours, 31 October 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 1 November 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Good morning.

PRESIDENT: Good morning.

s.19(1)

2196

JUDGE ADVOCATE: Are you ready to resume your deliberations, Mr President?

PRESIDENT: Yes, we will continue our deliberations for some time yet. I'm happy to go with the arrangement we had in place yesterday of folks being on about an hour - I think it was an hours notice - for recall.

JUDGE ADVOCATE: Very well. So the court will close to resume its deliberations. March out the accused.

AT 0901 HOURS, 1 NOVEMBER 1995, THE COURT CLOSES TO DETERMINE FINDINGS.

AT 1147 HOURS, 1 NOVEMBER 1995, THE COURT REOPENS AND THE ACCUSED IS BROUGHT BEFORE IT.

JUDGE ADVOCATE: Have you reached your findings, Mr President?

PRESIDENT: Yes, we have.

JUDGE ADVOCATE: Thank you. The findings are legal, Mr President. You may read them to the accused.

FINDING

PRESIDENT: In the case of the charges brought against the accused Lieutenant-Commander Dean Carey Marsaw, the court finds the accused guilty of the first charge and directs that proceedings on the second charge be stayed; the court makes a special finding of guilty on the third charge for persons cited at the revised Annex "A"; the court makes a special finding of guilty on the fourth charge for persons cited at the revised Annex "B"; the court finds the accused guilty of the sixth charge and directs that proceedings on the fifth charge be stayed; the court finds the accused guilty of the seventh charge.

2197

President

Finding

JUDGE ADVOCATE: Lieutenant-Commander Marsaw, you may break off and sit with your defending officer.

I will mark this document, Mr President, as Exhibit, I think, it's "JJJ".

THE FINDINGS DOCUMENT IS MARKED EXHIBIT "JJJ".

JUDGE ADVOCATE: Mr Prosecutor, considering the time; that is, ten to twelve, do you prefer to adjourn after lunch to proceed with the sentencing procedures or would you prefer to do it now?

PROSECUTOR: I would prefer to ask for an adjournment, Mr Judge Advocate, in terms of the time that we should be allowed to come back, I would like to give my friend a time to make his submission on that point. Thank you.

JUDGE ADVOCATE: Very well.

Lieutenant-Colonel Couture?

DEFENDING OFFICER: No objection.

JUDGE ADVOCATE: And what time would be convenient for you to resume the proceedings?

DEFENDING OFFICER: Two.

JUDGE ADVOCATE: 1400 [hours]. This court is adjourned until 1400 hours.

ADJOURNMENT: At 1152 hours, 1 November 1995, the court adjourns.

REASSEMBLY: At 1400 hours, 1 November 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Major Abbott.

2198

PROSECUTOR: Thank you, Mr Judge Advocate. At this time I have three documents I'd like to introduce to the court as exhibits, please. One is a Statement as to Particulars of Service of Accused; another document is the Canadian Forces Personnel Record Resumé (CF 490); and the third document is the pay guide of Lieutenant-Commander Marsaw. All these documents have been reviewed by my friend.

THE STATEMENT AS TO PARTICULARS OF SERVICE OF ACCUSED IS MARKED EXHIBIT "KKK".

THE MEMBER'S PERSONNEL RECORD RESUMÉ IS MARKED EXHIBIT "LLL".

THE PAY GUIDE FOR THE ACCUSED IS MARKED EXHIBIT "MMM".

JUDGE ADVOCATE: Any other document?

PROSECUTOR: No other documents, sir.

JUDGE ADVOCATE: Very well. Do you wish to call any witness on severity?

PROSECUTOR: The prosecution will be relying entirely upon the evidence that's come out during the trial and will not call further witnesses. Thank you, Mr Judge Advocate.

JUDGE ADVOCATE: Thank you.

Lieutenant-Colonel Couture, do you wish to introduce documents or call witnesses?

DEFENDING OFFICER: I understand the prosecution will request an adjournment till 9:00 tomorrow morning and at that time I will be ready to produce documents.

JUDGE ADVOCATE: He's requesting an adjournment for his final address on sentence?

2199

DEFENDING OFFICER: That's correct. And I will precede that by introducing documents and be ready to address at that time.

JUDGE ADVOCATE: Very well.

And Major Abbott, you're not ready to address the court this afternoon?

PROSECUTOR: No, I understand my friend may have evidence he wishes to call. After that I will have to make a submission on sentencing. I will not be ready to do so until nine o'clock tomorrow morning, sir.

JUDGE ADVOCATE: Lieutenant-Colonel Couture, are you ready to proceed with your evidence this afternoon?

DEFENDING OFFICER: No, I'll have the documents tomorrow morning, but they're documents only. So it'll take a minute to introduce.

JUDGE ADVOCATE: So you both agree that we should adjourn the proceedings until nine o'clock tomorrow morning.

In these circumstances, the court is adjourned until nine o'clock tomorrow morning.

ADJOURNMENT: At 1408 hours, 1 November 1995, the court adjourns.

REASSEMBLY: At 0900 hours, 2 November 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: So, Lieutenant-Colonel Couture, do you wish to produce documents and/or call witnesses in mitigation?

2200

DEFENDING OFFICER: I wish to produce documents. As a warning it'll take a few minutes but ...

JUDGE ADVOCATE: Do you wish to introduce them separately or ... ?

DEFENDING OFFICER: Yes. The first document is a ... it'll be a series of PERs. This one is for the period January '90 to April '91. It is a superior PER.

JUDGE ADVOCATE: No objection?

PROSECUTOR: No objection to this or any other documents, sir.

JUDGE ADVOCATE: Thank you. "NNN"

THE PER FOR THE PERIOD JANUARY 1990 TO APRIL 1991 IS MARKED EXHIBIT "NNN".

DEFENDING OFFICER: The second one will be for the period of August '89/April '90. This is an outstanding PER.

THE PER FOR THE PERIOD AUGUST 1989 TO APRIL 1990 IS MARKED EXHIBIT "OOO".

DEFENDING OFFICER: The next one is for the period April '88/March '89. Another outstanding.

THE PER FOR THE PERIOD APRIL 1988 TO MARCH 1989 IS MARKED EXHIBIT "PPP".

DEFENDING OFFICER: The next one for the period August '87/December '87.

THE PER FOR THE PERIOD AUGUST TO DECEMBER 1987 IS MARKED EXHIBIT "QQQ".

DEFENDING OFFICER: The next one will be March '86/March '87.

2201

THE PER FOR THE PERIOD MARCH 1986 TO MARCH 1987 IS MARKED EXHIBIT "RRR".

DEFENDING OFFICER: May '85/December '85.

THE PER FOR THE PERIOD MAY TO DECEMBER 1985 IS MARKED EXHIBIT "SSS".

DEFENDING OFFICER: Jun '84 to May '85.
Another outstanding.

THE PER FOR THE PERIOD JUNE 1984 TO MAY 1985 IS MARKED EXHIBIT "TTT".

DEFENDING OFFICER: January '84/June '84.
Outstanding as well.

THE PER FOR THE PERIOD JANUARY TO JUNE 1984 IS MARKED EXHIBIT "UUU".

DEFENDING OFFICER: July '83/February '84.
Outstanding.

THE PER FOR THE PERIOD JULY 1983 TO FEBRUARY 1984 IS MARKED EXHIBIT "VVV".

DEFENDING OFFICER: Ten-page document, various course reports.

THE 10-PAGE DOCUMENT OF VARIOUS COURSE REPORTS IS MARKED EXHIBIT "WWW".

DEFENDING OFFICER: One memo dated 1 Jan '81, approval of ... recommendation for accelerated promotion signed by then Captain[N] Boyle.

THE MEMORANDUM DATED 1 JANUARY 1981 IS MARKED EXHIBIT "XXX".

2202

DEFENDING OFFICER: A memo dated 24 January '83, nominee for MQC 31 top student award signed by then Commander C.J. Crow.

THE MEMORANDUM DATED 24 JANUARY 1983 IS MARKED EXHIBIT "YYY".

DEFENDING OFFICER: Memo 6 April 1989, letter of appreciation signed by then Commander D.S. MacKay.

THE MEMORANDUM DATED 6 APRIL 1989 IS MARKED EXHIBIT "ZZZ".

DEFENDING OFFICER: A message time group 241147Z FEB 91 from CANCOMFLT to HMCS OJIBWA.

THE MESSAGE DATED 241147Z FEBRUARY 1991 IS MARKED EXHIBIT "AAAA".

DEFENDING OFFICER: Message time group 021425Z DEC 91 from COMPATWING ELEVEN JACKSONVILLE to HMCS OJIBWA.

THE MESSAGE DATED 021425Z DECEMBER 1991 IS MARKED EXHIBIT "BBBB".

DEFENDING OFFICER: Message 131640Z DEC 91 from COMSUBLANT NORFOLK to OJIBWA.

THE MESSAGE DATED 131640Z DECEMBER 1991 IS MARKED EXHIBIT "CCCC".

DEFENDING OFFICER: Message 221715Z JUL 92 from COMPATWING ELEVEN JACKSONVILLE to OJIBWA.

THE MESSAGE DATED 221715Z JULY 1992 IS MARKED EXHIBIT "DDDD".

DEFENDING OFFICER: A demi-official letter dated 29 April '93, from Lieutenant-Commander J.L. Concannon, Royal Navy, to Lieutenant-Commander Marsaw.

2203

THE DEMI-OFFICIAL LETTER DATED 29 APRIL 1993 IS MARKED EXHIBIT "EEEE".

DEFENDING OFFICER: Demi-official letter 12 May 1993, signed by Commander J.R.M. Bouchard to Lieutenant-Commander Marsaw.

THE DEMI-OFFICIAL LETTER DATED 12 MAY 1993 IS MARKED EXHIBIT "FFFF".

JUDGE ADVOCATE: Letter 16 September 1993, on behalf of the Fincastle Committee to Lieutenant-Commander Marsaw.

THE LETTER DATED 16 SEPTEMBER 1993 IS MARKED EXHIBIT "GGGG".

DEFENDING OFFICER: Demi-official letter dated 8 October '93, from Lieutenant-Commander W.L. Nesbitt to Lieutenant-Commander Marsaw.

THE DEMI-OFFICIAL LETTER DATED 8 OCTOBER 1993 IS MARKED EXHIBIT "HHHH".

DEFENDING OFFICER: A five page document related to a letter of appreciation Fincastle 1993 support.

THE FIVE-PAGE DOCUMENT DATED 30 NOVEMBER 1993 IS MARKED EXHIBIT "IIII".

DEFENDING OFFICER: An assessment dated 16 November 1988, it's an assessment for submarine command.

THE ASSESSMENT DOCUMENT DATED 16 NOVEMBER 1988 IS MARKED EXHIBIT "JJJJ".

DEFENDING OFFICER: Those are all the documents I have and I do not intend to call any further evidence.

2204

JUDGE ADVOCATE: Thank you very much.

Mr Prosecutor, are you ready to address the court as to punishment?

PROSECUTOR: Yes, I am, Mr Judge Advocate. My presentation will take approximately 45 minutes. In terms of housekeeping I have three cases that I'd like to present to you that I will be referring to during my presentation. One is a copy of the relative portions of a transcript of the Standing Court Martial of Lieutenant-Commander **Page** which occurred in November of 1994; the next, a Supreme Court of Canada decision of **Regina v. Généreux**; and the third case is a Court Martial Appeal Court decision of Sergeant **Boland**. I've already provided my friend copies of these cases.

Mr President, Mr Judge Advocate, Members of the Court, as I stated before I will be relying upon evidence that's come out during the trial in support of my submissions on sentencing, and I have not called any further evidence during the sentencing part of this trial.

The learned judge advocate is the expert in the area of law on sentencing and he will guide you on the proper legal principles.

I would submit to you that sentencing is a process which is fairly complex because it involves weighing a number of different factors that are usually considered in the sentencing process. There are a couple of guiding principles, however, that are sometimes referred to as general and specific deterrents.

By general deterrence, I mean the requirement in any sentence to protect the public and to ensure that others who are similarly situated as the accused are put on warning and do not develop a propensity to commit similar offences.

With regard to specific deterrence, that component deals with the need in a sentence to punish

2205

Prosecutor

Address as to punishment

the offender, to ensure or to attempt that he does not repeat again.

Much of my submission will touch upon these two principles, relate evidence to the principles of general as well as specific deterrence in making my submissions to you.

I would submit at this point, however, that it's important to note at the outset that when deciding what is an appropriate sentence, the purpose of sentencing as I've alluded to is not simply to deal with punishing the offender but includes a number of other important factors in addition to that as well, and that is to protect society and to ensure that others who are similarly situated will take heed of the sentence that's given and discourage them from committing similar acts.

Perhaps, you recall my comments dealing with the definition of reasonable doubt as well as the definition of objective standard that I used in my closing arguments. Both of those concepts included a notion of societal interests, and I'd submit to you that societal interests are very much alive and factors to be considered when dealing with the principles of general and specific deterrence. Sentencing is a societal process.

The Supreme Court of Canada, a number of years ago, in the decision of **Regina v. Généreux** looks specifically at the sentencing process as it exists within a military system of justice. And I'd like quickly to touch upon an extract of that decision because it highlights some of the points that I've touched upon already. In looking at the military system of justice, the Supreme Court noted at page 25:

"To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and

2206

Prosecutor

Address as to punishment

efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs."

Later on, the Supreme Court of Canada goes on to quote a previous decision they made, **Re MacKay and the Queen** that also touched upon the principles of sentencing within the system of military justice. And they noted that:

"Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life-style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a

2207

Prosecutor

Address as to punishment

most serious offence, in some instances punishable by death."

The theme in that decision and the point that I'd like to draw out from the Supreme Court of Canada decision is simply that what may happen in a civilian world may have different ramifications if the same act occurs within the military context. An assault between two civilians in a bar is clearly something that should be stopped. Violence between citizens is something that society doesn't tolerate.

However, there's other ramifications of the same act if it's done between a subordinate and a superior. Not only is society concerned about the violence perpetuated by one individual on another but within a military society there's other factors that have to be looked at as well. What does this act do to the chain of the command, to the divisional system, to the type of trust and confidence that must be maintained in an operational unit.

At this point I'm simply attempting to illustrate that there are other factors involved, as the Supreme Court of Canada has noted, when sentencing in a military system of justice than may exist if the same offence occurred within a purely civilian context. The societal interests in sentencing in a military system are different to some extent.

With regard to specific deterrence of individuals, one of the two principles involved in sentencing, courts, military courts, in the past have considered the evidence in light of the following such factors - and this isn't an exhaustive list - but first of all, ensuring that the penalty imposed when dealing with individuals is sufficiently severe that the offender will refrain from committing further crimes for fear of further punishment.

And in dealing with specific deterrence they've considered such evidence that deals with the

2208

Prosecutor

Address as to punishment

individual himself: His conduct sheet or possibly past criminal record; the attitude of the individual who's to be sentenced; and the motivation that he had in place for doing the offences that he's been convicted of.

With regard to the evidence at trial there's a number of points I'd like to raise with regard to specific deterrence. First of all, I would submit, the evidence has demonstrated there's been a total absence of any acknowledgment of responsibility or wrongdoing on Lieutenant-Commander Marsaw's part. He testified that he thought everything was fine, that morale was fine, that he'd never had any formal or informal complaints about his conduct, that the whole thing did not happen. There's been a complete absence of any acceptance of any responsibility for these acts or even acknowledgment that they may, in fact, possibly have occurred.

Evidence has shown that on numerous occasions the following individuals did, in fact, inform Lieutenant-Commander Marsaw of his conduct and warned him to stop: Lieutenants[N] Wambach, Virgin, Dussault, Higginson, LeClaire and Command Chief Brown. But in light of their protests or complaints, there was never any acknowledgment of responsibility on Lieutenant-Commander Marsaw's part. It's a factor that should be considered with regard to specific deterrence of sentencing. The warnings from these individuals were blindly ignored and that further demonstrates not only an inability to accept personal responsibility but an inability to admit mistakes or to acknowledge that he, in fact, could even make mistakes.

The second point, we would submit, can be drawn from the evidence, is a total and complete lack of remorse, another factor which is considered for specific deterrence purposes on sentencing. His demeanour that he displayed during his testimony, his complete and adamant rejection that he may have psychologically or physically harmed people and total denial

2209

Prosecutor

Address as to punishment

of the existence of any prejudicial effects of his leadership are factors which, we would submit, display a complete lack of remorse on his part for his conduct.

In fact what we see is the contrary. After charges are laid, after the investigation is continued, Lieutenant-Commander Marsaw confronts a number of individuals in a number of social settings and rather than apologizing intimidates or threatens them, "I'll take you and your family down with me".

As a final point concerning specific deterrence, it's noted and submitted as evidence on behalf of Lieutenant-Commander Marsaw a number of PERs, many of which are outstanding. I would submit that it is not appropriate for you to consider the PERs that were outstanding that he received while commanding officer of the OJIBWA. He cannot benefit from these PERs in mitigation, I would submit, because they were based on inaccurate reporting to his superiors by him.

Nor can the fact that he was number one on the merit listing have any effect on your sentencing. Again, the product of his status on the Merit List was a product of his inaccurate reporting to his superiors who had to evaluate him.

Although he is currently in his 17th year of service, I would emphasize and it should be kept in mind that these offences occurred during his 14th and 15th year of service.

With regard to principles of general deterrence, the need to protect society, the courts in the past have considered a number of factors including a sentence which demonstrates to potential offenders that this type of conduct will not be tolerated in the hope that they will refrain from committing similar offences because of the fear of punishment that would be imposed.

Courts have also looked at the sheer gravity of the offence that's been committed, the nature of the

2210

Prosecutor

Address as to punishment

offence committed as well as its consequences, in particular, including the harm that this conduct has caused other individuals or military units or the Canadian Forces as a whole.

Additionally, courts have also considered in sentencing with regard to general deterrence, the public attitude or reaction to this type of conduct that's been displayed.

With regard to the evidence that came out during trial, I'd submit a number of points. First of all, I would submit that commanding officers of operational units are entrusted with an enormous amount of power over their subordinates. They're entrusted with the physical, the mental, the personal and the professional development of their subordinates. It's a very important trust. Few civilians ever have a trust like this. Ultimately, the commanding officer of an operational unit has the power to cause his subordinates to go into harms way in a context that it will give them zero or little survivability. It's an enormous burden, it's an enormous trust. It's one that all commanding officers of operational units have.

And given that commanding officers do have this type of trust there does exist opportunities and perhaps temptations to use this power in proper ways. It is to those individuals that the sentence must deter. I would submit that commanding officers of operational units can never think that they can enforce or encourage individuals to follow fictitious personal standards, to redefine the Canadian Forces definition for competence or incompetence or whether an individual is qualified. I would submit that the sentence must send out a signal to those in similar positions who may think otherwise. I'd submit that there's no valid or authorized purpose for an operational commander of a military unit to inflict physical or mental pain upon his subordinates.

2211

Prosecutor

Address as to punishment

All leaders are accountable and the message that your sentence could send today must, I would submit, be to the effect that to all those who are entrusted with this type of powers as commanding officers over their subordinates, that they should use this power for purely military, legitimate, authorized purposes. Any other use will subject them perhaps to the same fate.

With regard to the gravity of the offence, I'd submit with regard to the principles defined in the CF policy as well as documents like the Mainguy Report, that Lieutenant-Commander Marsaw violated all the basic principles of leadership. The gravity of his offence was enormous.

Additionally, with regard to this particular issue, it's important not only to consider the sheer gravity of the offence but also its consequences, of this particular type of leadership style. The more immediate effect, I would submit, of this particular leadership style is the same with any other leadership style in the sense that a leader will produce followers. Bad leaders will produce bad soldiers. A leader with bad ethos will produce followers with a bad ethos. It's important that the sentence identify this and act as a check for all those who may have adopted or been encouraged to adopt the leadership style of Lieutenant-Commander Marsaw.

We heard from the testimony of LeClaire that Kelk eventually succumbed to this leadership style. We've seen evidence from Lieutenant[N] Tingle, from Leading Seaman Cox, from P1 Kramble that they ... and two of these individuals this was their only time as a qualified submariner, their first time and their only time of seeing what a leader of a submarine operates, what his style is like. They had developed and adopted part of this ethos which said that we're submariners, we're different, that if you're in a submarine, the definition of verbal and physical abuse is a bit different. I would submit that any sentence must be

2212

Prosecutor

Address as to punishment

directed in part as it relates to general deterrence keeping those types of individuals in mind and sending those types of individuals a signal.

In the past courts have identified that the fact that an offence may have occurred while on operation is not a mitigating factor. In fact, quite the contrary. For offences to occur in operation make them much more serious. And I refer to page 16 of the Court Martial Appeal Court decision in Sergeant **Boland's** case - that was the individual who was involved with the beating death of Shindane Arone. The court had noted at page 16:

"No one can dispute the difficult and sometimes hazardous circumstances under which Canadian forces were operating in Somalia in general, nor the physical problems which Boland himself was experiencing at this time. Nevertheless these circumstances call for the exercise of greater rather than less discipline particularly on the part of those in command of others."

So simply put, I would submit, the fact that these offences occurred on a warship while on operations does not mitigate the sentence. In fact, it requires a more severe sentence.

I would submit that the Code of Service Discipline is not designed to impede operational effectiveness but rather to enhance operational effectiveness by ensuring constantly that there's a well disciplined unit in place.

With regard to the harm that this conduct has caused others, I would submit that there's really two types of harm: harm that's been caused to the individ-

2213

Prosecutor

Address as to punishment

ual's subordinates; and harm caused to the unit as a whole.

With regard to harm caused to individuals, the evidence is before you. People have testified about how they felt, how it affected them. There are individuals that have testified before you that have been either physically or mentally harmed in some way by this conduct. And there's another group of individuals who've been harmed in another way as well and that's harm to their careers or to their ambitions. Some of the names that come to mind are Larkin, Wamback, Kerr, MacLean, Jacques, Lyman, Kohli, Elford, Watt, P2 Brown, Pokotylo and Dussault. These individuals have had their careers affected in one way or another, wholly or partly because of the leadership style of Lieutenant-Commander Marsaw. And it is appropriate, I would submit, to consider in your sentencing not only the gravity of the offence but the harm that has been caused to others by the consequence of his conduct.

The second type of harm, I would submit, is the harm that was done to the unit as a whole. We have argued, there's evidence before the court to argue that the operational effectiveness, the morale, the cohesion of the unit as a whole suffered as a consequence of this leadership style.

Mr Judge Advocate, I would submit that in terms of balancing the various principles in sentencing that it would be appropriate in this case to direct the members of the court that the primary consideration should be one of general deterrence.

Last year in this courtroom, Lieutenant-Commander Page, the CO of the HMCS ANTICOSTI was court martialled, convicted of a sexual assault and sentenced. He had been found guilty of one count of sexually assaulting a subordinate on board the ship. The facts as briefly stated are such: That while CO of the HMCS ANTICOSTI while in port in Norfolk, Virginia,

2214

Prosecutor

Address as to punishment

after visiting the wardroom of another naval vessel and consuming an unknown quantity of alcohol, Lieutenant-Commander Page returned to the ANTICOSTI where he engaged in a conversation with the victim who was a newly promoted petty officer and a member of his own crew. While descending a ladder near the flats on board Lieutenant-Commander Page touched the victims buttocks, subsequently pushed the victim against the bulkhead, propositioned her and kissed her.

This trial occurred in November of 1994. It was a single, brief moment while the accused ... or the convicted individual was in some state of intoxication.

In determining the sentence, the president of that court martial stressed the principle of deterrence and he arrived at a sentence of Lieutenant-Commander Page involving dismissal and reduction in rank to Lieutenant.

In doing to, the following sentencing factors were considered: First of all, that he was commanding officer of the ANTICOSTI; the conduct charge was not a continuing pattern of conduct but an isolated incident; he was heavily under the influence of alcohol; had been a naval officer since 1977; had a clean conduct sheet; ten PERs were placed in evidence demonstrating his past 10 years of conduct with a promising career and as a competent officer; there were five letters of statutory declarations submitted attesting to Lieutenant-Commander Page's professionalism, dedication, past performance, family life. There were also other letters written by subordinates, peers and superiors in support of Lieutenant-Commander Page.

Two witnesses were called in mitigation; Commander Shubaly and Lieutenant-Commander Page himself. While testifying in mitigation Lieutenant-Commander Page told the court that he very much regretted the incident and made no excuses for it. Days after the incident occurred itself, he had sent a letter of apology to the victim. In sentencing, the judge stressed the principles of deterrence, commented upon

2215

Prosecutor

Address as to punishment

these facts, and then passed a sentence of dismissal from Her Majesty's Service and reduction in rank to the rank of Lieutenant.

When contrasting these two cases of Marsaw and **Page**, I would submit that the case before you is far more serious for a variety of reasons. This case requires a greater need for specific deterrence. Unlike Lieutenant-Commander Page ... or Lieutenant[N] Page there was no letters of apology, there was no acknowledgment of remorse under oath before you. With regard to a greater need for general deterrence we're not dealing here in this trial with a single isolated act in a state of drunkenness. We're dealing with a continued pattern of behaviour in excess of a year and a half. Many more victims with far greater damage - with all respect to the victim of Lieutenant-Commander Page. There's no denying the harm that she has incurred. I'm simply stating with regard to this case there are many more victims and the extent of the damage is far deeper.

Thirdly, as an important factor to consider and differentiate from Lieutenant-Commander **Page's** case, most of these offences occurred as a conduct of a particular leadership style while on operation on a warship, not alongside in a social function.

Both the cases, of course, are similar, I would submit, in the sense that much is expected and demanded of a commanding officer and a lieutenant-commander. But they differ as I've said because this case is far more serious in terms of the nature of the offence, the gravity of it, and the consequences that flew from it.

In light of the above, I would submit, that the sentence imposed upon Lieutenant[N] Page is the starting point for the sentence that I would submit you impose upon Lieutenant-Commander Marsaw. At a minimum the prosecution would submit and request that Lieutenant-Commander Marsaw be dismissed from Her

2216

Prosecutor

Address as to punishment

Majesty's Service and in the process of doing so be reduced in rank to the rank of lieutenant[N].

Why dismissal? I would submit because the breach of his trust that he owed to his subordinates was so significant that he can no longer continue to be associated with fellow commanding officers and fellow officers who themselves have been in difficult situations but conducted themselves in highly professional ways, in a wide variety of circumstances, some involving danger. I'd submit that Lieutenant-Commander Marsaw by adopting the style of conduct that he undertook disassociated himself with his fellow officers. He disassociated himself with the highly professional manner in which naval officers conduct themselves and commanding officers in particular. Requesting at this time dismissal from Her Majesty's Service formalizes the disassociation that occurred in 1992.

Why reduction in rank? I believe a reduction in rank is significant and important because it protects the integrity of the rank of lieutenant-commander and the appointment of a commanding officer. The rank and the position and the appointment are a privilege. If an individual does not conduct themselves in a manner that's fitting of that rank and that appointment, it's not something they keep forever or can take for granted. It's something that must be taken away. One, to punish them; but two, to maintain the integrity of the appointment and the rank for all those who hold it and must carry out their duties.

Again, using the sentence of **Page** as a benchmark and arguing that the consequences, the nature of the offences, the manner in which they were conducted are far more serious in this case than in the **Page** case.

It is also submitted that the sentence should incur a short and sharp period of incarceration. When considering this request, I'd simply ask you as commanding officers, if these offences had been committed

2217

Prosecutor

Address as to punishment

by an ordinary seaman or a kellick would you've incarcerated that individual? There's only one Code of Service Discipline, it applies equally to all who wear the uniform and I would submit that there's a greater duty and a greater burden upon those in command than a kellick or an ordinary seaman.

I submit that this isn't a case where a fine is appropriate. This is a case that fundamentally strikes at the basic tenets of leadership. Deal with leadership problems by giving leadership type sanctions. This case isn't about money. I think a fine would be ... I would submit, I'm sorry, that I fine would be inappropriate.

So in summary, the prosecution would request dismissal from Her Majesty's Service, a period of incarceration up to 90 days and reduction in rank to lieutenant[N], so that the injury to others in the operational unit is acknowledged, so that there's an appropriate message of general deterrence send out to those who are in similar positions or to those who've developed an ethos that suggests that for operational commanders there's some sort of waiver to the Code of Service Discipline or CF policy. And importantly and additionally to ensure that Lieutenant-Commander Marsaw finally becomes aware of his conduct and the consequences that flowed from it.

I would submit that a clear unambiguous message is required so others who are entrusted with power do not follow his example, and I'd submit that this sentence is required also, and equally important, so that subordinates such as those that lived on the OJIBWA never ever again suffer the mental and physical harm that those subordinates have faced.

Thank you.

JUDGE ADVOCATE: Thank you.

Lieutenant-Colonel Couture?

2218

Defending Officer

Address as to punishment

DEFENDING OFFICER: The prosecution refers to the denial of the accused. That was his right to deny. He took the stand in front of you and he told you his side of the story. Obviously, you have chosen a different course and you have found him guilty.

The prosecution talks about ignore the PERs. Sure, it's all lies. Can one say that? Three outstanding PERs during his service. They're lies, so claims the prosecution. Are the five other outstanding PERs lies as well? Is his whole outstanding career a lie?

Harm to individuals. I don't know exactly what you have accepted of the evidence but I take exception to the proposition by the prosecution that people like Wamback, Kohli and company have been harmed. Kohli was an individual who just did not have it. He didn't have it. He didn't have the officer quality. He didn't make it. How can it be said today that it was Lieutenant-Commander Marsaw's fault. I don't know what you have accepted of the evidence but I claim that Wamback, Watt, they were not harmed. Oh, they may have had their personal feelings touched. We're not talking about serious harm. We're talking about individuals that were not made for submarine life. That's what it is. Elford had skin problems, that's why he left the submarine service. You've heard evidence that swearing is not at all uncommon on board ships, on board submarines. Okay, it's not nice but the harm, seriousness of the harm.

The accomplishment of the boat, you've heard witnesses saying that a boat could not have performed, or the crew could not have performed as well as they did should such an horrible treatment have taken place. So, obviously, there was something there so that you have determined that the accused had to be found guilty, but I suggest to you that it was not nearly as bad as portrayed by some of the witnesses.

2219

Defending Officer

Address as to punishment

The prosecution wants the accused in jail, dismissed, reduced in rank. What more can we do to him? He has had an exemplary career and now he's been found guilty. I mean, a kick. You have determined he had kicked. Was there any serious harm to that kick? Obviously, you must have found that there was an intent on his part to kick. Maybe he just wanted to do his work. You have heard that sometime people push. You've seen a submarine how small it is. He was trying to do his job. You have determined that he had some **mens rea**, some criminal intent in kicking Higginson, but it's not like somebody who attacks another person for no reason, in a bar, you know, on the street. He was performing his duty, he thought.

The accomplishment of OJIBWA over three years must mean something, and the PERs they cannot be all lying. The prosecution suggests to you to disregard them. I suggest to you that they cannot be disregarded in fairness to the accused. His whole career cannot have been a lie. He cannot have fooled as many people who have reported on him. It's impossible. How could he? And in sentencing, you must recognize the record of the accused. It is an important factor.

The prosecution talks about general deterrence. I suggest to you a mere conviction in this case is quite a deterrent. Not only a mere conviction, I mean, a conviction on every possible charge on the charge sheet. That sends a message alright, doesn't it? A conviction on a person with such a record of service, that alone sends a message.

The prosecution talking about the accused having disassociated himself from others. Yeah, maybe he did because he was one step above. How many other officers would have had that many outstanding PERs?

It appears clear to me that the accused always strived for excellence and during his command of OJIBWA, obviously you have determined that he may have crossed the line. But all he wanted to do was to

2220

Defending Officer

Address as to punishment

achieve the mission. You have found him guilty. There's got to be some intent that you have found but I suggest to you - it's no longer at the defence stage - that there was no intent to harm people. The ultimate intent was to run a boat, to run it safely.

The accused is married, has got one child. We're going to disregard the fact that he's married, that he's got a child, that he's got a life, responsibilities. We're going to send him in jail. We disregard his career, disregard his performance. I suggest not.

Those are my comments.

JUDGE ADVOCATE: Thank you.

Mr President, it will now be time for me to address you on sentence. I suggest perhaps that we just take a very short adjournment to stretch our legs, like fifteen minutes, and I will be ready to address the court.

ADJOURNMENT: At 0955 hours, 2 November 1995, the court adjourns.

REASSEMBLY: At 1012 hours, 2 November 1995, the court reassembles and the accused is before it.

JUDGE ADVOCATE: Mr President, Members of the Court, having found Lieutenant-Commander Marsaw guilty of charges number one, three, four, six and seven, you will retire shortly to consider what sentence you will impose. I propose at this time to address you on this aspect of the trial.

Arriving at a fit and just sentence is a very difficult task. But it is also a very necessary one. The purpose of a court martial is to allow the Canadian Forces to deal with matters that pertain directly to its discipline, efficiency and morale. The safety and

2221

Judge Advocate

Address in respect of sentence

well being of Canadians depend considerably on the willingness and readiness of the members of its military forces to defend against threats to peace and security. To maintain itself in a state of readiness, the Canadian Forces must be in a position to enforce internal discipline effectively and efficiently.

Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case of a civilian engaged in such conduct. To that end Parliament has put in place within the **National Defence Act**, the Code of Service Discipline to allow the Canadian Forces to meet its particular disciplinary needs. This Code helps to ensure that the Canadian Forces remain a disciplined, efficient and operationally capable armed force, with a high morale and *esprit de corps*, ever conscious of safety and security requirements. All of this is essential in order that when called upon the Canadian Forces may react in a timely manner in the interests of Canada, and if necessary, with the application of force.

A breach of the Code of Service Discipline not only adversely affects discipline, but also indicates a failure in the leadership and integrity expected of all serving members. The fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions. You, as serving officers, are considered by Parliament to be in the best position to determine what sentence, in the circumstances, will fulfil this fundamental purpose of sentencing and best achieve the requirements of discipline.

Lieutenant-Commander Marsaw stands convicted of one charge under section 93, one charge under section 95, two charges under section 129 and one charge under section 130 of the **National Defence Act**. The relevant portions of these sections for the purposes of sentencing read as follows, section:

2222

Judge Advocate

Address in respect of sentence

"93. Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment."

Section:

"95. Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment."

Section:

"129. ... 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."

Section:

"130. ... An act or omission

(a) that takes place in Canada and is punishable under Part XII of this Act, the *Criminal Code* or any other Act of Parliament, ...

is an offence under this Part and every person convicted thereof is

2223

Judge Advocate

Address in respect of sentence

liable to suffer punishment as provided in subsection (2).

(2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall, ...

...

(b) ...

(i) impose the punishment prescribed for the offence by Part XII of this Act, the *Criminal Code* or that other Act, or

(ii) impose dismissal with disgrace from Her Majesty's service or less punishment."

Section 266 of the **Criminal Code** reads in part as follows:

" ... Every one who commits an assault is guilty of

(a) an ... offence and liable to imprisonment for a term not exceeding five years;"

Section 139 of the **National Defence Act** sets out the Scale of Punishments and it reads in part as follows:

2224

Judge Advocate

Address in respect of sentence

**"139.(1) The following punishment
may be imposed in respect of ser-
vice offences:**

subparagraph (a) has no application in this case

- "(b) imprisonment for two
years or more,**
- (c) dismissal with disgrace
from Her Majesty's ser-
vice,**
- (d) imprisonment for less
than two years,**
- (e) dismissal from Her Maj-
esty's service,**
- (f) detention,"**

and detention has no application to an officer,

- "(g) reduction in rank,**
- (h) forfeiture of seniority,**
- (i) severe reprimand,**
- (j) reprimand,**
- (k) fine, and**
- (l) minor punishments,**

**and each of the punishments set out
in paragraphs (b) to (l) shall be
deemed to be a punishment less than
every punishment preceding it.**

2225

Judge Advocate

Address in respect of sentence

(2) Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression 'less punishment' means any one or more of the punishments lower in the scale of punishments than the specified punishment ... "

As a General Court Martial, there is a limitation imposed upon your powers of punishments. Article 111.17 of the Queen's Regulations and Orders for the Canadian Forces provides:

"No General Court Martial shall pass a sentence that includes a minor punishment."

Queen's Regulations and Orders for the Canadian Forces article 104.13 provides that the following are minor punishments:

- (a) confinement to ship or barracks;
- (b) extra work and drill;
- (c) stoppage of leave;
- (d) extra work and drill not exceeding two hours a day; and
- (e) caution."

There is also a limit in respect of the punishment of a fine. Section 145 of the **National Defence Act** provides that you cannot impose a fine, the amount of which exceeds three times the basic monthly

2226

Judge Advocate

Address in respect of sentence

pay of an accused. Pay is defined at article 1.02 of the QR&O as follows:

"'pay' means, in respect of an officer or non-commissioned member, the entitlement to pay under Chapter 204;"

To determine the basic monthly pay of a person having the rank and status of the accused, I invite your attention to the appropriate pay table of a person of the rank and status of the accused provided in Chapter 204 of QR&O.

As to the distinction to be made between a reprimand and a severe reprimand, suffice it to say that a severe reprimand is more severe because it is higher in the scale of punishments.

Now, the following punishment options are open to you as a General Court Martial - and I suggest you take them down because it's not easy:

Your first option, is to impose a period of imprisonment under section 139(1)(b), which is two years or more up to a maximum of five years;

Your second option, is to impose a period of imprisonment under 139(1)(d), which is imprisonment for less than two years;

Now, in respect of the first and second options, I must advise you of section 140(b) and (c) of the **National Defence Act** which provides as follows:

" ... The punishment of imprisonment for two years or more or imprisonment for less than two years is subject to the following conditions:

2227

Judge Advocate

Address in respect of sentence

(b) a sentence that includes a punishment of imprisonment for two years or more imposed on an officer shall be deemed to include a punishment of dismissal with disgrace from Her Majesty's service, whether or not the punishment of dismissal with disgrace is specified in the sentence passed by the service tribunal;

(c) a sentence that includes a punishment of imprisonment for less than two years imposed on an officer shall be deemed to include a punishment of dismissal from Her Majesty's service, whether or not the punishment of dismissal is specified in the sentence passed by the service tribunal;"

Now, your third punishment option that is available to you is to impose less punishment, which means any punishment starting at section 139(1)(c) down to and including 1(k) in the scale of punishments, but excluding 1(f) which does not apply to an officer.

In respect of this third punishment option, I must advise you of section 141(1) of the **National Defence Act** which provides as follows:

" ... Where a service tribunal imposes a punishment of dismissal with disgrace from Her Majesty's service on an officer or non-commissioned member, the service tribunal may in addition, notwith-

2228

Judge Advocate

Address in respect of sentence

**standing any other provision of
this Part, impose a punishment of
imprisonment for less than two
years."**

You must realize that the order in which you pronounce your punishments - if more than one - is of crucial importance, otherwise it may render the whole sentence illegal.

Chapter 104 of the Queen's Regulations and Orders for the Canadian Forces deals with the punishments and sentences that may be passed by a service tribunal, and you should review that chapter when you retire before proceeding with your discussions, particularly articles 104.02 to 104.12 inclusive as they pertain not only to the limitations applicable to each type of punishment but as well to certain consequences which flow as the result of the imposition of certain punishments.

Only one sentence may be passed, and in that respect you must have regard to article 104.14 of the QR&O for the Canadian Forces as well as Notes (A) and (B) thereto. Having said you may only pass one sentence, I must advise you that one sentence may be composed of one or more punishments. I illustrate this point by advising you that while a reprimand and a fine in the amount "x" dollars are two punishments, it's only one sentence.

Article 112.49, 112.50 and 112.51 of the QR&O are also important and I shall review the relevant portions of those articles and the Notes which follow them.

Article 112.49 is entitled "Directions as to Sentence" and reads as follows:

**" ... Section 148 of the National
Defence Act provides:**

2229

Judge Advocate

Address in respect of sentence

' ... Only one sentence shall be passed on an offender at a trial under the Code of Service Discipline and, where the offender is convicted of more than one offence, the sentence is good if any one of the offences would have justified it.'

... In determining the severity of punishment, the court shall:

(a) take into consideration any indirect consequence of the finding or of the punishment;

(b) impose a punishment commensurate with the gravity of the offence and the previous character of the offender."

NOTE (C) reads as follows:

"The consequences of punishment may include such general consequences as delayed promotion and an adverse effect upon the subsequent service career of the offender. In addition, there are certain specific consequences following conviction for certain offences."

Note (E):

"The court should particularly consider whether the offences of which the accused has been found guilty were committed with or without premeditation and with or with-

2230

Judge Advocate

Address in respect of sentence

out provocation. For example, a theft committed after prolonged preparation deserves more severe punishment than when committed on the spur of the moment. A court would be justified in awarding a more lenient sentence to a member who has been provoked into striking a superior officer than to one who had struck a superior officer without provocation."

Note (F):

"The court must not presume that the convening authority, in sending the case for trial, took a more serious view of the facts than the court takes."

The sentence to be imposed on an offender in a particular case is at the discretion of the court. To assist you in exercising this discretion you must be guided by the law as I give it to you, the principles of sentencing and the circumstances of this case and this offender.

The principles of sentencing have been expressed countless times in various ways but in general they relate to the following:

- (a) the protection of the public, and here I must emphasize that the public includes the Canadian Forces;
- (b) the punishment of the offender;
- (c) the deterrent effect of the punishment not only on the offender but, as well, upon others who might be tempted to commit such offences; and

2231

Judge Advocate

Address in respect of sentence

(d) the reformation and rehabilitation of the offender.

Punishment does not mean vengeance or retribution, rather it refers to the gravity of the offence. By this principle we mean that the sentence must reflect the seriousness of the offence indicated by the particular provisions of the law which has been breached. This is sometimes referred to as public disapproval of the accused's conduct.

By general deterrence it is meant, demonstrating to potential offenders, that this type of conduct will not be tolerated in the hope that they will refrain from committing similar crimes because of fear of punishment. In determining the importance of general deterrence the Court will consider, among other things, the gravity of the offences, the incidence of the crime in the community, the harm caused by it to the individual or the community, and the public attitude toward such offences.

Individual deterrence, this has as its object the teaching of a lesson to the particular offender so that he will not repeat this offence. The penalty imposed when dealing with individual deterrence should be sufficiently severe that the offender will refrain from committing further crime through fear of punishment. In applying the principle of individual deterrence the Court will consider such matters as the individual, his prior criminal record, if any, his attitude and his motivation.

It has been the practice of the courts and in particular of courts martial to give primary consideration to the protection of the public and the maintenance of discipline, and then to consider whether this primary objective could best be attained by punishment, deterrence, reformation and rehabilitation of the offender. How much emphasis will be placed on each of these principles will depend on many circumstances and will, obviously, vary from case to case. In some cases

2232

Judge Advocate

Address in respect of sentence

the major, if not the only, concern will be the deterrent effect on the accused and/or others and little, if any, concern will be given to the reformation and rehabilitation of the accused. In other cases the emphasis will be altered.

To apply these principles you should give consideration to any one or more of the following:

1. The sentence imposed must be proportionate to the gravity of the offences and the degree of responsibility of the offender for the offences;
2. The sentence imposed should be the least onerous punishment required to maintain discipline and to protect the public;
3. The maximum penalty prescribed for an offence should be imposed only in the most serious of cases;
4. The sentence imposed should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
5. A term of incarceration should not be imposed, or its duration determined, solely for the purpose of rehabilitation but should be imposed only where any other punishment would not sufficiently reflect either the gravity of the offences; or the repetitive nature of the culpable conduct of an offender; or adequately protect the public; or maintain discipline; or protect the integrity of the administration of justice;
6. Denouncing blameworthy behaviour;
7. Separating the offender from society, where necessary; and finally

2233

Judge Advocate

Address in respect of sentence

- Promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

Thus far I have spoken to you mostly of the objective criteria of sentencing. In addition to all of these objective criteria you must also turn your minds to the subjective criteria of sentencing; that is to say, to the particular circumstances surrounding the commission of the offences and to this offender. The most vital resource of the Canadian Forces is its personnel and the sentence you pass must be tempered by the accused. You cannot consider the various possibilities open to you in a vacuum. You must determine what type of person the accused is, what kind of service person he is and what his personal circumstances are. A fit and proper sentence is one that is a wise blend of both the objective and subjective criteria of sentencing.

In order for you to properly apply those criteria you should consider the following:

1. The nature of the offences and the prescribed punishment;
2. The circumstances surrounding the commission of the offences;
3. The documentary evidence before you as exhibits;
4. The arguments of both counsel.

You must consider also the age of the accused; his mental and physical health; his personal and family circumstances, particularly as reflected in the exhibit that has been presented to you as his personal record resumé; his rank and equity in the Canadian

2234

Judge Advocate

Address in respect of sentence

Forces; the length of time since the offences; his work performance; also consider the consequences of his conduct, namely, on his subordinates; and also the position of trust that Lieutenant-Commander Marsaw occupied as the commanding officer of a submarine.

You must also consider my advice to you but in particular my advice on the principles of sentencing. Given the nature of the offences, the circumstances of its commission and the character, rank, and status of this accused, it is my advice to you that the protection of the public and the maintenance of discipline would be best met in this case by the imposition of a sentence which would reflect the application of the principle of sentencing of general deterrence.

Returning for a moment to QR&O 112.49, Note (H) thereof speaks to the general form of sentence which in this case should be pronounced by you, Mr President, in the following manner and I quote: "Lieutenant-Commander Marsaw, having found you guilty of charges number one, three, four, six and seven, the Court now sentences you to ... ", followed by whatever that sentence may be.

Article 112.50 of the QR&O is entitled "Method of Determining Sentence" and reads in part as follows:

"(1) Subsection 192(1) of the National Defence Act provides:

**' ... Subject to this section
... the sentence of a court
martial ... shall be deter-
mined by the vote of a major-
ity of the members.'**

...

2235

Judge Advocate

Address in respect of sentence

(3) The members of the court shall vote orally in succession, beginning with the junior in rank.

(4) The court may at any time during the determination of sentence reopen and require the judge advocate to give further advice upon the law applicable."

Note "A" reads:

"A judge advocate will not be present during the determination of sentence ... "

So, accordingly, I will not be with you when you close to consider sentence.

Article 112.51 of QR&O is entitled "Verification by Judge Advocate of Legality of Proposed Finding and Sentence" and reads in part as follows:

" ... The court shall in open court immediately prior to pronouncing a ... sentence inform the judge advocate of the proposed ... sentence.

... The judge advocate shall review the ... sentence and inform the court whether or not it is legal.

... The court shall not pronounce the proposed ... sentence unless the judge advocate informs the court that it is legal.

... Where the judge advocate informs the court that the proposed ... sentence is illegal, the judge

2236

Judge Advocate

Address in respect of sentence

advocate shall provide such further advice as the judge advocate considers appropriate and the court shall close to reconsider the ... sentence.

... When the court has reconsidered the ... sentence, the court shall reopen and proceedings shall continue in accordance with paragraphs (1) and (4) until the judge advocate informs the court that the proposed ... sentence is legal."

In order to comply with the provisions of this article I would advise you, Mr President, to write out on a sheet of paper the sentence that the court proposes to impose in the format that I have already advised you to use and to provide me with that sheet of paper upon your return to open court. At that time we can complete the requirements of this article.

Now, Mr Prosecutor and Mr Defending Officer, do either of you have any comments on my address to the court concerning sentence?

PROSECUTOR: No comments, sir.

DEFENDING OFFICER: No comments.

JUDGE ADVOCATE: Thank you.

Those are all the matters I wish to raise at this time, Mr President and members of the Court. I should ask you, perhaps now, whether or not you have any questions on any of the matters I have referred to in my address as to sentence.

PRESIDENT: No, no questions.

JUDGE ADVOCATE: Thank you.

2237

Judge Advocate

Address in respect of sentence

The court should close to determine sentence. When you have closed, you should first read Chapter 104 and articles 112.49 and 112.50 of the QR&O. You should then discuss the matter generally. Each member should be given the opportunity to formulate an opinion and following that, you should vote on a sentence. Again, Mr President, you should lead the discussion but you should not endeavour to sway the opinion of the other members. The members of the court should vote orally in succession, beginning with the junior member and proceeding with the senior member and finally the president giving his opinion last.

As I indicated earlier, I will not be with you during your deliberations. If in the course of your discussion you should require further advice or guidance, the court must be reopened and my advice sought in open court.

So at your convenience, Mr President, you should close the court to consider sentence.

March out the offender.

The court is closed to consider sentence.

AT 1042 HOURS, 2 NOVEMBER 1995, THE COURT CLOSES TO DETERMINE SENTENCE.

AT 1358 HOURS, 2 NOVEMBER 1995, THE COURT REOPENS AND THE ACCUSED IS BROUGHT BEFORE IT.

SENTENCE

JUDGE ADVOCATE: The sentence is legal, Mr President.

I will now mark the document as an exhibit.

THE SENTENCING DOCUMENT IS MARKED EXHIBIT "KKKK".

2238

President

Sentence

JUDGE ADVOCATE: You may now read the sentence.

PRESIDENT: Lieutenant-Commander Marsaw, having found you guilty of charges one, three, four, six and seven, the court now sentences you to dismissal from Her Majesty's service and reduction in rank to the rank of lieutenant[N].

JUDGE ADVOCATE: Thank you, Mr President.

The proceedings of this court martial in respect of Lieutenant[N] Marsaw are terminated.

2239

President

Certification

CERTIFICATION BY THE PRESIDENT

I certify that the court found the accused guilty of charges number one, three, four, six and seven. The court directed a stay of proceedings on charges number two and five.

I further certify that the court sentenced the accused to dismissal from Her Majesty's service and to reduction in rank to the rank of Lieutenant(N); and I also certify that the sentence was pronounced to the accused at 1359 hours on the 2nd day of November 1995.

I further certify that the court did accept and follow the instructions of the judge advocate on matters of law as given by him during this trial.

Date:

President

2240

Judge Advocates

Certification

CERTIFICATION BY JUDGE ADVOCATES

I certify that the minutes of proceedings from pages 12 to 186 accurately reflect any address, direction or decision by the judge advocate.

Date:

Col G.L. Brais

I certify that the minutes of proceedings from pages 187 to 2224 accurately reflect any address, direction or decision by the judge advocate.

Date:

LCol A. Ménard

2241

Court Reporters

Certification

CERTIFICATION BY COURT REPORTERS

I certify that the minutes of proceedings from pages 12 to 186, 1146 to 1273, 1412 to 1479, 1594 to 1619, 1729 to 1766, 1884 to 1914, 2034 to 1099 and 2177 to 2185 accurately reflect the proceedings of the court martial.

Date:

CPO2 P. Gauthier

I certify that the minutes of proceedings from pages 187 to 287, 355 to 376, 448 to 489 and 568 to 654, accurately reflect the proceedings of the court martial.

Date:

WO M.C. Roy

I certify that the minutes of proceedings from pages 288 to 319, 350 to 354, 421 to 447, 492 to 567 and 684 to 759, accurately reflect the proceedings of the court martial.

2242

Court Reporters

Certification

Date:

MWO G. Marsolais

I certify that the minutes of proceedings from pages 320 to 349, 377 to 420, 490 to 491, 655 to 683, 760 to 981, 1274 to 1351, 1480 to 1544, 1620 to 1651, 1767 to 1804 and 1915 to 1984, accurately reflect the proceedings of the court martial.

Date:

Mr R.M. Martin

I certify that the minutes of proceedings from pages 982 to 1145, 1352 to 1411, 1545 to 1593, 1652 to 1728, 1805 to 1883, 1985 to 2033, 2100 to 2176 and 2186 to 2220, accurately reflect the proceedings of the court martial.

Date:

WO R.K. Gaudet

2243

Court Reporters

Certification

REASSEMBLY:	At 0900 hours, 31 October.....	2100
REASSEMBLY:	At 1400 hours, 31 October.....	2176
REASSEMBLY:	At 0900 hours, 2 November.....	2186