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[On the rationale for a military justice system]

Mr. Chairman, Commissioners, I thought I would divide the oral presentation in support of the written brief on the Canadian Forces military justice into two parts.

First, a few words on the rationale for a military justice system, and second, and this part will be advanced by Major Herst, a very brief presentation on the existing Canadian Forces military justice system, of course, not reading the brief provided to you but rather highlighting certain aspects of the process.

Turning to the rationale. Within virtually all societies or states, military forces exist. The depressing truth is that at no time since mankind began to write history has any organized community voluntarily renounced its means of defence or aggression.

The military forces of a state may be either large in number or small, be composed of either volunteers or conscripts, and perform duties either full-time or part-time.

Military forces are now, certainly for the most part, state-raised, with a state-sanctioned purpose.

If one accepts the basic premise that there will always be armed forces, then one must also conclude that military justice in one form or another will continue to exist, because as old as armies and navies is the idea of a special discipline and a special body of law applicable to armed forces.

The foundation of the Roman Military Law was complete subjugation of the soldier to the will of the commander, who is at liberty to behead any man serving in his camp.

The crude beginnings of military law were greatly improved upon in the 16th and 17th centuries by elaborate and far less barbarous military codes, which provided the rudiments of what would become a regular judicial process for the ascertainment of guilt and the assessment of punishment through tribunals known as courts or councils of war and later, courts martial.

In 1689 the British Parliament passed the original Mutiny Act which established a standing regular army

and provided for its discipline. Thus began the modern history of the Anglo-Canadian-American Military Justice System.

I thought it might prove useful to establish a backdrop against which a rationale could be placed, and that backdrop would be the purpose or the *raison d'être* on a standing armed force in a democracy.

In making these remarks I must say I lay little claim to originality. I have borrowed unsparingly from writers in military law, who themselves are very few.

The purpose or reason for a standing armed force has been expressed in a variety of ways by a variety of authors.

I have chosen to use that which appears to have been adopted by the former Chief Justice of the Court Martial Appeal Court, Chief Justice Mahoney. It is set out in the Court Martial Appeal Court monograph, the general memorandum portion, and is taken from the paper entitled "Military Justice: An Overview of Courts Martial", at Page II-04, Paragraph 3, and I quote: "The sole purpose of military forces and in particular a standing armed force such as the Canadian Forces, in a democracy, is to be the ultimate instrument by which a society or state, on direction from its elected officials, may apply disciplined force or threat of force to advance its perceived interests or to protect its existence. Historically this has been so and remains so today. That the society interests and methods may have changed over the span of years, and most rapidly are changing today, does not alter the basic purpose of military forces. That military forces may be employed in a variety of roles, related or unrelated to their purpose, does not alter their basic purpose, or indeed their responsibility to achieve that purpose when called."

The purpose of law in civilian society, if I can use that term, is to produce satisfactory order. A civilian's conduct should be orderly and should interact with others as smoothly as possible.

There should be no loss of freedom for any person, unless such loss is of benefit to the community.

Civilian criminal law seeks to restrict and regulate behaviour so that people can live together in relative peace and tranquility.

Military justice has a similar but much more positive purpose, in that not only must it promote good order but also high morale, esprit de corps, discipline, group cohesion, and operational efficiency and capability.

In this context, discipline, in addition to its ordinary military meaning, means a state of mind in the individual service member, often spoken of as self-discipline, wherein he or she will instantly obey a lawful order whenever, wherever and however given, no matter how unpleasant or indeed dangerous the task may be.

The military justice system and its administration is to provide one part of the framework for the encouragement and demonstration of this self-discipline.

Regrettably it is beyond argument that if our societies are to continue to exist in their present territory under the present political systems and with their present life-values, there always remains the possibility -- the possibility -- that force may have to be employed against external or internal threats.

Given then the purpose and need for armed forces in a contemporary, democratic society, there is one concept which requires that the military be viewed differently from the rest of society.

This concept has been referred to as the concept of required response and has been described as the obligation assumed by military personnel to respond appropriately, without argument or hesitation, to lawful commands of those in authority as directed by the state, or, to give orders in the accomplishment of their purpose in the same manner.

No matter how onerous, monotonous, distasteful or dangerous the task may be, how real the ultimate sacrifice, the duty must be done; there is no option to drop out.

Therein, then, lies the essence of military justice. The team must continue to perform, whether enthusiasm is high or low, whether the team is winning or losing. There must be something approaching a guarantee of discipline, even if under the most disruptive and arduous circumstances.

It is at this point that the first truly peculiar characteristic of an armed force or military team emerges.

Now, I have referred to the military team. This is perhaps what distinguishes the armed forces from, for example, a police force.

Day-to-day policing work in a given situation is done, for the most part, by one or two officers who certainly may call upon re-enforcements should the need arise.

In the armed forces, it is the mission-oriented team, with each member performing his or her role, that is vital.

The role of military justice must be seen in the context of the role of the military in contemporary Canadian society. The role has essentially remained the same over the past 50 years: the defense of Canada.

The Canadian Forces remain the ultimate instrument for the Government of Canada in implementing Canadian policy.

Most recently, the specific goals in achieving this policy have included participation in defence of treaties, such as NATO and NORAD; aid and assistance to civil authorities; and, contributions to United Nations' operations which have run the gambit from the more traditional peacekeeping operation such as in Cyprus; clear conflicts such as the Gulf War; and humanitarian operations such as in the former Yugoslavia.

Even if the immediate goals and the means of achieving those goals change, the requirement for the military team to be prepared at any time to be committed to a demanding and dangerous task continues.

As was seen in the summer of 1990, the transition from a training environment to operational activity may be almost instantaneous.

I refer specifically to the provision of aid to the civil power at Oka by the army and the dispatch of naval forces from Halifax and air forces from Canadian bases in Germany to the Persian Gulf.

Individual service members' commitment to serve on the Canadian Forces team means that he or she

may be required at any time to undergo risk of injury or even death in the service of Canada. Because the Canadian Forces must always be prepared on very short notice to fulfil its tasking, training must be as real as possible.

Demanding and sometimes dangerous, training is the norm, even in times of peace.

In addition, the military service regularly requires an individual to undergo lengthy and sometimes very intense periods of personal hardship.

A service member may be required to perform physically demanding labour, over long periods and extremely arduous weather conditions, or may be required to serve in an isolated location, away from home and family, and in stressful circumstances for lengthy periods. All of these requirements exist, even in time of peace, but they are magnified in times of tension or war.

Military forces are therefore a unique group and each service member belongs to that group: the profession of arms. This profession is a micro society within our Canadian macro society and it is characterized by the adoption of certain fundamental principles, the most basic being the concept of unlimited liability to the state. Acceptance of this concept more than anything else sets the service member apart from other members of society.

In peacetime that commitment requires continuous exercising in a realistic manner, thereby exposing service personnel to the rigors of the operational environment and to the machines and the equipments of war.

As well, personnel may be required to react in an efficient and disciplined manner in respect of aid to the civil power in time of internal disorder, such as insurrection or disasters. 11:30 a.m.

In periods of armed conflict and international tension and, indeed, in peacekeeping operations the operational environment is a reality, and required response all too often becomes unlimited liability.

Thus, in the final analysis, the service member's decisions and actions imply an acceptance of a wide range of possible consequences, up to and including death for himself or herself or for others.

An essential quality, which ensures that members of the Canadian Forces will be capable of carrying out their assigned missions in these difficult conditions is discipline. Without discipline, the Canadian Forces, or indeed any military force, cannot function effectively and can become a danger not only to themselves but to others.

The most successful form of discipline is self-discipline. This is developed through training and fostered by good leadership. The Canadian Forces consciously begins developing this during initial recruit and officer training, where candidates are taught the values of team work, confidence in themselves, their comrades and their leaders, self-reliance and obedience to lawful commands. They learn the value of working together to achieve common goals and of being prepared to sacrifice individual preferences, comfort and, indeed, physical safety if required to achieve those common goals.

These principles are reinforced through a service member's career in both positive and negative ways. In the military positive leadership through rewards and personal example is perhaps the best reinforcement of this concept. Certain of these positive rewards might be, for example, increases in rank or pay over a period of time with concomitant responsibilities.

Good discipline is explicitly and continuously stressed as the necessary foundation for successful completion of the mission. Negative reinforcement may take a variety of forms, again both formal and informal. Informal sanctions may range from verbal reprimands to remedial additional training. Also, administrative measures may be used, measures such as recorded warnings, counselling and probation which point out shortcomings and indicate how improvement may be effected. These actions are short of disciplinary proceedings.

In cases in which formal sanctions are required, the Canadian Forces relies upon the military justice system.

An argument is often made that, if leaders are worth their salt, their troops will follow them to the ends of the earth without any compulsion of any type. According to this view, military justice, which adopts the more formal disciplinary process, tends merely to reflect the inadequacy of leadership. The acid test for this theory would be a combat situation, the very type of situation where experiments and tests of this kind would be too risky to be undertaken. At any rate, in modern armies it is often impossible to create the close relationship between commanders and their troops that might result in unquestioning loyalty and discipline. Especially in periods of emergency or rapid deployment, where units are quickly assembled and both leaders and followers selected, it is unlikely indeed that efficient armed forces could be put into the field without aid from a strong system of military justice.

That is not to say that military justice can ever be a substitute for good, positive leadership, but only, under modern conditions, an indispensable supplement to good leadership.

The military justice system is unique because of the emphasis placed on the standard of conduct expected from the Canadian Forces member when compared to that member's civilian counterpart. For example, no service member is given the right to unilaterally leave the service, for that would be desertion; whereas, a civilian may be free to leave a job or employment without liability involving penal sanction and only perhaps damages for breach of contract.

Further, a civilian employee can combine with others to protest against management; whereas, for Canadian service members to do that could be the offence of mutiny.

Furthermore, many duties in civilian life will take on a special meaning when members of the armed forces are concerned. For instance, "thou shalt not steal" is a well-recognized legal and moral doctrine, but in the armed forces stealing may deserve special censure even if the value of the item stolen is negligible. Crowded barracks, ships' mess decks and other places where occupants have little chance for privacy are a thief's happy hunting ground. Yet, widespread theft will not only injure the victim, but could wreak havoc with morale, breed mistrust, discontent, suspicion, bickering and even fights. Ultimately, the efficiency of those units will suffer and their ability to conduct operations and achieve the mission will be called into question.

Since military conditions present a golden opportunity for theft and since military effectiveness would be ultimately lowered because of repeated stealings, armed forces have a special need to enforce the duty not to steal.

In this regard, I would simply invite your attention to paragraph 54 of the written paragraph, wherein is set out a portion of the reasons for decision of the Chief Justice of the Supreme Court of Canada, speaking for the majority, in the *Généreux* case, where he highlights certain examples.

I would close there the first portion of the presentation, and Major Herst will carry on with the second portion.