

THE RULES OF EVIDENCE AT COURTS MARTIAL  
(A STUDY OF THE MILITARY RULES OF EVIDENCE)

---

A Thesis  
Presented To  
the Faculty of Graduate Studies  
University of Manitoba

---

In Partial Fulfilment  
of the Requirements for the Degree  
Master of Laws

---

by  
Lieutenant-Colonel  
Arthur K. Swainson  
July 1976

"THE RULES OF EVIDENCE AT COURTS MARTIAL  
(A STUDY OF THE MILITARY RULES OF EVIDENCE)"

by

ARTHUR K. SWAINSON

A dissertation submitted to the Faculty of Graduate Studies of  
the University of Manitoba in partial fulfillment of the requirements  
of the degree of

MASTER OF LAWS

© 1976

Permission has been granted to the LIBRARY OF THE UNIVERSITY OF MANITOBA to lend or sell copies of this dissertation, to the NATIONAL LIBRARY OF CANADA to microfilm this dissertation and to lend or sell copies of the film, and UNIVERSITY MICROFILMS to publish an abstract of this dissertation.

The author reserves other publication rights, and neither the dissertation nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

THE RULES OF EVIDENCE AT COURTS MARTIAL

(A STUDY OF THE MILITARY RULES OF EVIDENCE)<sup>1</sup>

"The Adoption of a code is not<sup>2</sup>  
likely to do any harm...  
However, a code is not a  
panacea. One must not  
expect too much of it."

1. Order in Council P.C. 1959-1027, 13 August, 1959
2. Lawson, H.F. "A Common Law Lawyer Looks at  
Codification" (1960) 2 Inter-American L.R. 5,6

TABLE OF CONTENTS

	PAGE
ABSTRACT .....	
INTRODUCTION .....	1
CHAPTER	
PART ONE - <u>HISTORICAL INTRODUCTION</u>	
I SHORT HISTORY OF CANADIAN MILITARY LAW .....	9
Introduction .....	9
(i) General .....	9
(ii) British Background .....	11
(iii) Canadian Military Law .....	15
(iv) General .....	22
Present Relationship Between Civilians and the Military .....	24
(i) military and civilian population .....	25
(ii) military and civilian lawyers .....	32
Military Legal Writing and Research .	33
Conclusion .....	36

CHAPTER	PAGE
II PRACTICE AND PROCEDURE AT COURTS MARTIAL .....	38
Introduction .....	38
The Code of Service Discipline .....	40
Attitude and Atmosphere .....	42
III MILITARY RULES OF EVIDENCE - HISTORY AND INTRODUCTION .....	49
Description of Enactments .....	49
Rules of Evidence Applicable at Courts Martial (1867-1950) .....	52
Rules of Evidence Applicable at Courts Martial (1950-1959) .....	53
Difficulties Encountered Employing The Rules Prior to 1 October, 1959 .....	54
Military Rules of Evidence (1 October, 1959) .....	57
Method of Preparation .....	59
Is There Actually a Need to Codify the Law of Evidence? .....	60
<p>PART TWO - SCOPE OF THE <u>MILITARY RULES OF EVIDENCE</u></p>	
IV WORDS AND PHRASES .....	72
Introduction .....	72
Evidence .....	73
Law of Evidence .....	76
Rules of Evidence .....	77

CHAPTER	PAGE
Procedure .....	82
Comments .....	85
V SECTIONS 12(1) AND 158(1) OF THE NATIONAL DEFENCE ACT (1970) ...	86
Introduction .....	86
Constitutionality of Courts Martial .....	86
Constitutionality of Evidence Law in The National Defence Act (1970) ...	90
Other Statutes Legislating Law of Evidence in Criminal Matters .....	91
Sections 12(1) and 158(1) Quoted ....	93
Section 12(1) - A General Provision for Making Regulations .....	94
Section 158(1) - A Special Provision for Making Regulations .....	99
(i) "Subject to this Act" .....	101
(ii) "Shall" .....	111
(iii) Other Applicable Statutes ...	112
Conclusion .....	113
VI ARE THE MILITARY RULES OF EVIDENCE EXHAUSTIVE .....	116
Introduction .....	116
Parliamentary Debates .....	118
Court Martial Appeal Court .....	121
The Change in 1959 .....	123

CHAPTER	PAGE
Reason and Purpose for The National Defence Act .....	129
Parliament's Alternatives .....	133
The British and American Practice ...	136
Special Procedure in Section 158(1) .....	140
Conclusion .....	142
VII CASES NOT PROVIDED FOR .....	145
Introduction .....	145
Provisions in Other Codes of Evidence .....	147
(i) Canadian Law Reform Commission Code .....	147
(ii) Model Code .....	151
(iii) Uniform Rules of Evidence (1953) .....	152
(iv) The California Code .....	153
(v) British and American Military Rules of Evidence .....	154
The Canada Evidence Act .....	156
The Criminal Code .....	167
Special Cases .....	171
Where There is No Provision in Any Rules of Evidence .....	177
Where There is No Military Rule of Evidence But There is a Civilian Rule .....	184

CHAPTER	PAGE
<u>PART THREE - ILLUSTRATIONS</u>	
VIII GENERAL COMMENTS ON THE EMPLOYMENT OF THE MILITARY RULES OF EVIDENCE .....	192
Introduction .....	192
Practice .....	194
Conclusion .....	196
IX CONFESIONS .....	199
Inculpatory and Exculpatory Statements .....	199
Trial Within a Trial .....	205
"A Reasonable Man" .....	209
The Cases Reviewed .....	214
X PUBLIC DOCUMENTS .....	219
Introduction .....	219
Article 53(c) .....	219
Difficulties at Courts Martial .....	224
Public Documents .....	230
The Court Martial Appeal Court .....	234
Conclusion .....	236
XI JUDICIAL NOTICE .....	241
Regulations, Orders and Instructions .....	241

CHAPTER	PAGE
General Military Knowledge .....	250
Conclusion .....	258
<b>XII PRIVILEGE .....</b>	<b>260</b>
Crown Privilege .....	260
Penitential Privilege .....	268
Confidentiality .....	270
Conclusion .....	274
<b>XIII THE CANADIAN BILL OF RIGHTS .....</b>	<b>276</b>
General .....	276
The Court Martial Appeal Court .....	278
Equality Before the Law .....	284
The Canadian Bill of Rights at Courts Martial .....	295
Conclusion .....	299
<b>XIV CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>303</b>
Conclusions .....	303
(i) A Semi-Exhaustive Code .....	303
(ii) Application .....	305
(iii) Amendments .....	308
Recommendations .....	310
(i) "Confessions" .....	310
(ii) Documents .....	311

CHAPTER	PAGE
(iii) Judicial Notice of Military Regulations and Orders .....	313
(iv) Penitential Privilege .....	314
(v) New Law .....	314
(vi) Technical Amendments .....	315
(a) The Order in Council Format .....	315
(b) Reference to Statutes ..	315
(c) Notes .....	316
(d) Regularity of Amendments .....	318
Final Concluding Remarks .....	319
APPENDIX A, Selected Bibliography ...	321
APPENDIX B, The Military Rules of Evidence .....	337

ABSTRACT

THE RULES OF EVIDENCE AT COURTS MARTIAL  
(A STUDY OF THE MILITARY RULES OF EVIDENCE)

Arthur K. SWAINSON, LL.M.  
The University of Manitoba, 1976

This thesis is a study of Canadian Government Order in Council P.C. 1959-1027, 13 August, 1959, called The Military Rules of Evidence. The authority for the Order in Council was an amendment in 1959 to Section 152(1) of The National Defence Act of 1950.

This amendment states that "the rules of evidence at a trial by court martial shall be such as are established by the Governor in Council." This section is now Section 158(1) of The National Defence Act (R.S.C. (1970) c.N-4).

Prior to 1950, the rules of evidence at Canadian courts martial were those practised in English courts of criminal jurisdiction. From 1950 to 1959, the rules of evidence at Canadian courts martial were those practised in the criminal courts of the province in which the court martial was held, or in the home province of the accused if the court

martial was held out of Canada.

This thesis is written in three parts as follows:

- (a) Part I contains a short historical review of military law, an historical examination of the rules of evidence at courts martial from 1867 to the present, and an outline of practices and procedures at Canadian courts martial.
- (b) Part II contains an examination of the meaning and scope of the 1959 Amendment to Section 152(1) of The National Defence Act of 1950, a discussion of whether The Military Rules of Evidence established by that section are in fact a code, and consequently exhaustive, and a review of the civil law of evidence that is applicable at courts martial if The Military Rules of Evidence make no provision.
- (c) Part III consists firstly; of the study, as illustrative examples, of confessions, documents, judicial notice, and privilege, and a comparison in these areas between military and civilian evidence law;

secondly; a review of The Canadian Bill of Rights and relevant cases in the field of equality before the law, and thirdly; a chapter consisting of conclusions and recommendations.

The writer concludes that Section 158(1) of The National Defence Act of 1970 is intra vires Parliament, and that The Military Rules of Evidence are not, and need not be an exact summary of civil rules of evidence, although they are very similar. In effect, Order in Council P.C. 1959-1027 is a code of evidence.

If there is an article of The Military Rules of Evidence, even of a general nature, dealing with a question of evidence before a court martial, that article should prevail over a conflicting civil rule of evidence. Alternatively, if there is no provision in The Military Rules of Evidence covering a question of evidence law before the court, the law of evidence practised in Ontario criminal courts of ordinary jurisdiction will prevail.

Some changes in The Military Rules of Evidence are recommended in the final chapter, although none of them are major in scope. The Military Rules of Evidence have served the military well for seventeen

years, and should continue to do so. It is unfortunate that no civilian lawyers have written about this code, which is the only code of evidence in Canada. What is even more surprising is that Federal and Provincial Law Reform Commissions have never commented on this code.

Finally, the importance of this code lies in the fact that it would apply at the trial of Canadian citizens subject to the Code of Service Discipline, regardless of the size of the military. It is therefore possible, that in unforeseeable circumstances or emergencies, The Military Rules of Evidence could apply to millions of Canadians.

THE RULES OF EVIDENCE AT COURTS MARTIAL  
(A STUDY OF THE MILITARY RULES OF EVIDENCE)

INTRODUCTION

Codification of the law of evidence in common law jurisdictions has generally been resisted by common law lawyers. There has been some codification, particularly in the United States, and their codes appear to be reasonably satisfactory in practice. There are no codes of evidence in any of the Canadian civilian jurisdictions.

The reasons for lawyers resisting the establishment of legal codes of any kind are almost as numerous as the objectors. Mr. Bill Pierce, who became President of the National Conference of Commissioners on Uniform State Laws in 1968, probably knows as well as anyone why common law lawyers object to codes. Mr. Pierce's comments on the objections to the probate code are just as applicable to other codes. He stated "The uniform probate code will especially bring out a lot of resistance. There's always general inertia, of course, but a lot of lawyers will battle it because when you propose a changed way of handling probate you're

repealing their knowledge."<sup>1</sup> Since many codes, including The Military Rules of Evidence, are written with the rather idealistic hope that laymen can understand and use them, such codes do amount to a form of repeal of some lawyers' knowledge since they presumably feel much of their knowledge will become redundant.

It has only been in the Canadian Armed Forces, with their very strong desire for conciseness, ease of access to information, and uniformity, that a code of evidence has been enacted, and has been in force for almost seventeen years.

As will be stated in the final Chapter, The Military Rules of Evidence, which are a Code, have been accepted by military lawyers and laymen who also use them. This Code has functioned successfully for years, and while it certainly is not perfect, it contains a very large part of the general law of evidence continuously employed in court. Unfortunately, The Military Rules of Evidence are

---

1. Bloom, M.T., The Trouble with Lawyers (Richmond Hill: Simon and Schuster of Canada Ltd, 1969)

virtually unknown outside military legal circles, and the writer can find no written comments about them in civilian legal publications.

Even the Canada Law Reform Commission has, ~~so~~ far as the writer can determine from the Commission's Working Paper and Reports, never mentioned The Military Rules of Evidence. When the Commission published its Research Program<sup>2</sup> it did state that the law of evidence practised at military courts martial would be studied in detail. However, by the time Study Papers on Evidence No.s 1 to 4<sup>3</sup> was published a few months later, the Commission had apparently forgotten about The Military Rules of Evidence. The acknowledgements in the introduction to Study Papers on Evidence No.s 1 to 4 list Law Revision Committee Reports, Evidence Acts and proposed and enacted Codes of Evidence from many countries and particularly from the United States. Strangely enough, there is no mention made of The Military Rules of Evidence, although the writer knows quite well that The

---

2. Canada: Law Reform Commission: Research Program, 16

3. Canada: Law Reform Commission: Study Papers on Evidence No.s 1 to 4, at 5,6

Military Rules of Evidence were studied by the Commission. Apparently the Commission had simply dismissed The Military Rules of Evidence out of hand.

Three years later when the Commission's Report on Evidence<sup>4</sup> was published, including a proposed Code of Evidence, there was still no acknowledgement of the existence of The Military Rules of Evidence. This omission is very unfortunate, since the Law Reform Commission was an ideal forum in which to study and comment on The Military Rules of Evidence.

The purpose of this thesis is to examine the statutory authority for The Military Rules of Evidence, form an opinion as to the scope of that authority, and attempt to determine whether or not The Military Rules of Evidence authorized by the Governor in Council are intra vires the authority provided by statute, namely The National Defence Act.<sup>5</sup>

To accomplish this aim, the writer has divided this thesis into three parts as follows:

---

4. Infra fn 43 p.35

5. R.S.C. (1970) c.N-4 s.158(1)

- (a) Part I is composed of three Chapters which examine the history of military law in general, military evidence law in particular, the relationship between the civil population and the military in Canada since 1945, and the practices, procedures and problems of courts martial which are unique to military courts as distinguished from civilian criminal courts.
- (b) Part II contains four Chapters which examine Sections 12(1) and 158(1) of The National Defence Act, try to determine whether The Military Rules of Evidence are exhaustive, and study the difficulties created by questions of law not provided for in the Rules.
- (c) Part III contains seven Chapters. Firstly, four areas of The Military Rules of Evidence are selected and discussed as illustrative examples of how The Military Rules of Evidence are employed in practice, and what the Court Martial Appeal Court has said about them, if anything. The areas

selected for examination are confessions, public documents, judicial notice, and privilege. There is a separate Chapter dealing with The Canadian Bill of Rights<sup>6</sup> and its application to The National Defence Act and The Military Rules of Evidence. The final Chapter contains comments and recommendations which the author hopes would, if acted upon, improve the clarity, effectiveness, and employment of The Military Rules of Evidence.

The writing of a Code of evidence is very difficult under any circumstance, but employing it within the framework of the larger, more diversified civilian legal system is extremely difficult. Military judges have, on the whole, dealt adequately with The Military Rules of Evidence. However, even when the Rules were applied with some uncertainty, the rights of the accused were always scrupulously protected. Unfortunately, until lately, judges rarely gave reasons for their rulings, and consequently, trial lawyers did not have available to them the benefit of the judges' thoughts and approach

---

6. R.S.C. (1970) App III

in arriving at decisions. The result has been that prosecutors and defending officers have often been unable to learn with certainty why a particular rule could not be applied, or was interpreted as it was. However, in the last two years, military judges have begun giving reasons in some cases, and this has been most helpful.

The comments in this thesis and the recommendations in Chapter XIV are those of the writer only, and may be found to be rather theoretical in some cases. Neither comments nor recommendations herein are intended, in any way, to be critical of military judges, Court Martial Appeal Court Justices, or military lawyers responsible for administration of the Code of Service Discipline, The Military Rules of Evidence, or the court martial system. Consequently, those who take the time to read this paper should not search for comments or innuendoes that reflect criticism of themselves personally, since none exist or are intended.

While the writer has no illusions about the importance of this paper in the scheme of things, it is hoped that it will stimulate some interest in the only code of evidence in effect in Canada, and

will encourage military lawyers in particular to look more deeply into The Military Rules of Evidence and perhaps to write the occasional article or even book on this very interesting subject.

## PART ONE

## HISTORICAL INTRODUCTION

## CHAPTER I

SHORT HISTORY OF CANADIAN MILITARY LAWIntroduction(i) General

The introduction to a thesis should normally be quite short because the subject under study, while often a very narrow one, is familiar, at least to a degree, to most anticipated readers. Such, however, is not the case in Canada with the subject of Military Law. Unfamiliarity is even greater in the specialized military law field of the rules of evidence applicable at courts martial. The writer, therefore, considers it is only fair to the reader to write a considerably longer introduction than normally would be expected, so the reader will have some understanding of the history, circumstances, and environment, which led to the present Canadian court martial system.

Military law is a very specialized field practised by few lawyers in Canada. It has evolved from British law to meet unusual circumstances, both in peace and in war. Practice, pleading, and the

rules of evidence employed at a court martial are sometimes different in many respects from those in civil courts.<sup>1</sup> Some of these differences will be dealt with later in this thesis, but two examples will serve as illustrations. Firstly, the Code of Service Discipline,<sup>2</sup> being Parts IV to IX inclusive of The National Defence Act<sup>3</sup> contains no provisions at all for the holding of a Preliminary Hearing, a procedure dear to the hearts of so many civilian defence counsel. Secondly, most Canadian courts martial are held far from law libraries and other source material, thus creating a need for a fairly simple and complete law of evidence. This latter example is one reason why The Military Rules of Evidence<sup>4</sup> were written.

The whole field of Canadian military law, including substantive, procedural, and evidentiary

---

1. National Defence Act, R.S.C. (1970) c.N-4 s.2

It is appreciated that the expression "civil court" normally applies to "civil" as opposed to "criminal" proceedings. However, unless the context otherwise suggests, "civil court" in this thesis means "a criminal court of ordinary jurisdiction" as opposed to a "military court martial."

2. See Chapter II

3. R.S.C. (1970) c.N-4

4. Order in Council P.C. 1959-1027 13 August, 1959

law has come to us from the United Kingdom. Thus, it is appropriate to examine briefly the development of British military organization, and the law that evolved along with it from its earliest inception up to 1950.

(ii) British Background

Prior to The Restoration in 1660, British forces were only raised as required. Every able bodied freeman between the ages of fifteen and sixty was duty bound to answer the King's summons to arms. These troops were required only to serve in the United Kingdom, and even in some cases only in their own county. This was called the General Levy.

Additionally, there was the Feudal Levy by which the Monarch required lords to whom he had granted lands to provide troops, or funds and equipment. Usually, however, fully equipped troops were supplied. The problem with the Feudal Levy was that troops could only be required to serve out of the United Kingdom for 40 days, and even this requirement was eventually called into question and dropped.

These two procedures for raising troops gradually began to be abused by the Monarch, culminating in the activities of Charles I who made demands for

Feudal Levies almost exclusively in the form of money and arms. This tactic was looked upon as a form of taxation without the sanction of Parliament, and needless to say, it was one of the reasons for the Civil War that followed.

After the Restoration, Charles II was authorized by Parliament to maintain certain regiments on a permanent basis: this was the first standing army in British history, and one has been maintained continuously ever since. This standing army was maintained in accordance with The Bill of Rights<sup>5</sup> of 1689 which contained as declaration number four under the heading of the declaration of rights and liberties "that the raising or keeping of a standing army within the Kingdom in time of peace unless it be with the consent of Parliament is against the law." All standing armies in England since 1689 have been maintained with the consent of Parliament, and authorized on a yearly basis.

During this period, military law only existed in time of war and troops "were governed, while in the field, by Ordinances or Articles-of-War made by the

---

5. 1 William and Mary (2nd Sess.) c.2 (1689)

Crown, or by the Commander-in-Chief under authority delegated to him by the Crown."<sup>6</sup>

In 1662, the first Mutiny Act<sup>7</sup> was passed and included for the first time, in Section 25, an offence of desertion. The offence of desertion is specifically mentioned because it is the first truly military offence created by statute in England. Prior to this time, soldiers were tried in civil courts for civil offences created under the Articles-of-War. When purely military offences were created, it followed that military courts would be established eventually, which they were. The Mutiny Act was to expire six months later but it was renewed continually until 1878. From 1689 to 1878, the successive Mutiny Acts expanded the geographical jurisdiction of the Act to all parts of the world where British forces were stationed. Additionally, more and more "military" offences were added as the years went by, with the result that by 1878 these successive changes had created a complete code of military discipline along with the disciplinary and judicial system required to

---

6. B. Singer and R. Langford - Handbook of Canadian Military Law (1941), 6

7. 3 Charles II c.3 (1662)

enforce it.

These very gradual changes resulted in the removal of the enforcement of discipline in the Army from the civil courts to military tribunals, although the civil courts always had primary jurisdiction if they wanted it, which they normally did not, and that is still the case today.<sup>8</sup>

In 1879, The Army Discipline and Regulation Act<sup>9</sup> was passed, which in 1881 became, with only a few amendments, The Army Act.<sup>10</sup>

The development of military law respecting the Royal Navy will only be discussed briefly in this thesis because the root of Canadian Military Law comes from the military law of the British Army. The Royal Navy, however, was governed by The Naval Discipline Act<sup>11</sup> of 1866.

In 1917, the new Royal Air Force simply

- 
8. National Defence Act, R.S.C. (1970) c.N-4 s.61(1)
  9. 42-43 Vict c.33 (1879)
  10. 44-45 Vict c.58 (1881). This Act, combined with the Regulation of the Forces Act, 44-45 Vict c.57 (1881), contain 124 pages, and are very detailed and complete statutes covering the organization, administration and discipline of the British Army.
  11. 29 and 30 Vict c.109 (1866)

incorporated by reference, The Army Act, into The Air Force (Constitution) Act.<sup>12</sup> This was the method that had been employed by the Canadian Militia in 1868, and would again be employed by Canada to create a whole set of law for the Royal Canadian Air Force after World War I.

(iii) Canadian Military Law

Canadian Military Law did not develop or evolve, in any sense of the word, between Confederation and 1944. In 1868, The Militia and Defence of the Dominion of Canada Act<sup>13</sup> was passed creating a Militia and an Active Militia. Section 73 provided that "the regulations for the compensation of Militia Courts of Enquiry and Courts Martial, and the modes of procedure and powers thereof, shall be the same as the regulations which may from time to time be in force for the composition, modes of procedure and powers, of Courts of Enquiry and Courts Martial for Her Majesty's regular Army, and which are not inconsistent with this Act..."

The very few Canadian military writers before

---

12. 7 and 8 Geo V c.51 s.12(1) (1917)

13. S.C. (1868) c.40

1945 seem to suggest that The Militia Act of 1868 simply adopted the whole of British Military Law to govern the Canadian Forces in being at the time, and indeed, the quotation in the previous paragraph seems to cover most of the "incorporation" that took place, at least ~~so~~ far as courts martial are concerned. In addition, however, it appears that pursuant to Section 96, which authorized the Governor in Council to "make regulations relating to anything necessary to be done for the carrying into effect of this Act..." much of The Army Act of 1881 (particularly Sections 4 to 44)<sup>14</sup> was later incorporated into Canadian Military Law. This incorporation does not seem to have occurred by specific incorporation of the various sections of The Army Act. The offence sections were incorporated because the British Regulations themselves quoted the various offence sections of The British Act, in whole or in part, and thus most of the sections of The Army Act became incorporated in Canadian Military Law because they were part of the British Regulations.

The practice and custom in the Canadian Army

---

14. King's Regulations and Orders for the Canadian militia (1939) para 420(a)

and Royal Canadian Air Force up to 1950 was that the whole of the Code of Service Discipline in the British Statutes and Regulations (including amendments) were incorporated by reference. While this was quite satisfactory for the Royal Canadian Air Force after 1940, it seems to have been rather stretching a point in the Canadian Army, particularly regarding later amendments to the British Statute. Generally speaking, legislation by reference incorporates the referenced Statute as at the time of incorporation but does not include later amendments unless construction would so suggest.<sup>15</sup>

However, The Naval Service Act<sup>16</sup> was much more explicit in that Section 48 of the Act provided that The Naval Discipline Act, 1866,<sup>17</sup> amendments thereto, and the King's Regulations and Admiralty Instructions, if not inconsistent with The Naval Service Act, "shall apply to the Naval Service and shall have the same force in law as if they formed part of this Act."

The Air Force did not fare too well in

---

15. Mainwaring v Mainwaring (1942) 1 W.W.R. 728

16. S.C. (1910) c.43

17. Supra fn 11 p.14

Parliament for many years. At first, the air element was clearly part of the Militia or the Navy and was governed by The Militia Act<sup>18</sup> or The Naval Service Act.<sup>19</sup> Air Force activities after 1919 were governed originally by The Air Board Act<sup>20</sup> of 1919 (which became The Aeronautics Act)<sup>21</sup> and later The National Defence Act 1922.<sup>22</sup>

On 1 April, 1924, the military air element officially became the Royal Canadian Air Force. The air element was known as the Canadian Air Force from 1919 until 1923. The word "Royal" appeared as a result of an application to the King through the Inspector General (Army) and the Secretary of State for the Colonies. Authority to add the prefix "Royal" was granted on 15 February, 1923. It was first published in Royal Canadian Air Force orders on 13 March, 1923, but was not officially adopted until 19 April, 1924.

However, while the Royal Canadian Air Force appeared as a separate service, "administrative control

---

18. R.S.C. (1906) c.41

19. S.C. (1910) c.43

20. S.C. (1919) c.11

21. R.S.C. (1927) c.3

22. S.C. (1922) c.34

of the Royal Canadian Air Force remained with Army officials until a few months before World War II."<sup>23</sup> This control included some disciplinary control by the Army, although courts martial in the Air Force were governed after 1 April, 1924, by the Royal Air Force Act and the relevant regulations.<sup>24</sup>

In 1940, The Royal Canadian Air Force Act<sup>25</sup> was passed which, by statute, created the Royal Canadian Air Force as a separate military force with its own Chief of Staff independent of the Army. Parliament acted similarly for the Air Force, as it had for the Navy in 1910, in that by Section 11 of The Royal Canadian Air Force Act "the provisions of the Air Force Act for the time being in force in the United Kingdom and not inconsistent with this Act or with any regulation, shall have force and effect as if such provisions formed part of this Act..."

The first step away from simply incorporating British Military Law into Canadian statutes occurred in 1944 when The Naval Service Act 1944<sup>26</sup> was passed.

---

23. Roberts L. - There Shall Be Wings (1959) 55

24. Order in Council P.C. 353 dated 4 March, 1924

25. S.C. (1940) c.15

26. S.C. (1944-45) c.23

Section 104(15) provided that "the Minister may make regulations governing the assembling, constitution, procedure and practice of courts martial and shall include among them provision for evidence to be taken on oath..." This was a start, and some regulations of an evidentiary nature were published in King's Regulations for the Canadian Navy between 1944 and 1950.

The Army Act<sup>27</sup> provided in para 128 "The rules of evidence to be adopted in proceedings before courts martial shall be the same as those followed in civil courts in England, and no person shall be required to answer any question or to produce any document which he could not be required to answer or produce in similar proceedings before a civil court." Consequently, rules of evidence employed at British Civil Courts applied by reference to Canadian Navy, Canadian Army, and Royal Canadian Air Force courts martial from the respective inception of these forces until 1 October, 1950, except that the Royal Canadian Navy could apply other rules of evidence after 1944.

---

27. Supra fn 10 p.14

In 1950, The National Defence Act<sup>28</sup> was passed, and in Section 152(1) it provided that the rules of evidence applicable in the home province of the accused would apply at his court martial.

For reasons that will be outlined later in the thesis, this amendment was not found satisfactory. In 1959, The National Defence Act was amended<sup>29</sup> to provide that the Governor in Council could establish rules of evidence for use at courts martial. Rules of evidence were prepared in the form of a Code and were published in 1959, with effect on and after 1 October, 1959.<sup>30</sup> These rules have been in effect with only minor amendments ever since.

This summary of the development of Canadian military law from the military law of England includes brief comments on the rules of evidence applicable at courts martial. The rules of evidence at courts martial in England appear to have always been the rules of evidence employed at civil courts in England. The principle of applying civil court rules of evidence

---

28. S.C. (1950) c.43

29. S.C. (1959) c.5 s.3

30. Supra fn 4 p.10

was clearly stated in The Army Act of 1881, and by reference, in The Air Force Act, 1917. The rules of evidence at Royal Navy courts martial were the same as those for the Army and Air Force.

Canada was consistent in this respect until 1950. At that time, partly because of our federal constitutional system and partly because of a desire to apply Canadian law rather than British, the law of evidence in the province where the court martial was held, was made applicable. The amendment of Section 152(1) of The National Defence Act in 1959<sup>31</sup> (now Section 158(1) of The National Defence Act)<sup>32</sup> along with the publication of The Military Rules of Evidence thereunder, constituted a radical departure from the traditional method of applying civil court rules of evidence at courts martial.

(iv) General

The system of law of the three Arms of the Canadian Forces and the rules of evidence at courts martial prior to 1950 probably sound quite confusing to the reader. The incorporation by reference of the

---

31. Supra fn 29 p.21

32. R.S.C. (1970) c.N-4

Code of Service Discipline in the British Army Act to our forces was incredibly confusing, particularly since we amended our publications to reflect amendments to the applicable British statute or regulations made thereunder. For example, the 1944 manual of regulations for the Royal Canadian Air Force was entitled Extracts from the Manual of Air Force Law - Canadian Consolidation (1944),<sup>33</sup> and that is exactly what the publication was. The manual was a reprint of parts of the British Air Force Manual which in turn was a reprint (with some changes) of the British Army Manual.

Canadian military libraries are full of a mixture of British and Canadian Air Force and Army Manuals of military law dating back to the last century. Prior to 1950, it was extremely difficult for a legal officer to determine which publication applied. Most of the problems occurred because our incorporation by reference included, by practice and custom, most British amendments.

After 1950, the British manuals were not often used, and after 1959, they were relegated to the back

---

33. Extracts from the Manual of Air Force Law - Canadian Consolidation (1944)

shelves of the various libraries and are now only referred to as historical source material if our regulations contain no background information. However, the continuing influence of British military law, even in The Military Rules of Evidence, is clear from the acknowledgement at the end of the index to those Rules, which reads as follows:

"Permission of the Admiralty, the War Office and the Air Ministry of the United Kingdom to use material from these Service Manuals is acknowledged with gratitude. To a considerable extent the explanatory portion of this work is drawn from these sources."<sup>34</sup>

#### Present Relationships Between Civilians and the Military

In addition to a few pages of introduction by way of a short history of the development of military law, it is considered necessary to discuss briefly the present status of civilian and military relationships in Canada, along with some comment on

---

34. Queen's Regulations and Orders, Volume II, App VIII, (iv)

military writing.

The practice of Canadian military law, and for the purposes of this thesis, the creation and employment of Military Rules of Evidence, are difficult to understand and assess without a fair idea of the place that the military holds in our society. Development of Canadian military law over the last thirty years has not been co-ordinated with development of similar law in civil courts. Much of the development was in the form of custom and practise. However, the most dramatic changes occurred with the passing of The National Defence Act in 1950, and the establishment of the Military Rules of Evidence in 1959.

(i) Military and Civilian Population

Since 1945, the Canadian Armed Forces have been isolated from the civilian population to a greater degree than has occurred in other countries such as England and the United States. This has happened largely because of our population's pre-occupation with other than military affairs and the reaction by the military of withdrawing internally. As a consequence, the military has usually been able to conduct its internal affairs with very little interference. It may well have

been this environment that permitted the military to go "on a frolic of their own" and create the rules of evidence that they did in 1959. The next few paragraphs will examine some of the factors that created this phenomenon, and some examples of the reaction, or lack of it, by civilian and military personnel to changes in the society.

With the exception of the Canadian Legion and other veterans organizations, there is very little military tradition within the civilian population. We have only rarely had conscription and have normally possessed small regular and reserve forces. Thus, there is not a large body of younger men who are or were actively involved in the Armed Forces. Our industrial and research complex does not depend heavily on military spending and consequently wealthy and powerful civilians in large corporations do not usually find they have any personal or business reasons for becoming interested in or associated with the Armed Forces.

Canada has not been invaded or attacked in over a hundred years, except for some minor shelling and submarine activity in World War II. As a result, the general population has seen no requirement to

become concerned with or involved in the military. Furthermore, Canada's size, population, and location, is such that many citizens are unable to grasp any concept of independent self-defence or even the need for it at all. The general population has vague and confused ideas about the Armed Forces, except that it generally supports peace keeping operations.

The final factor is that our political-social philosophy over the last thirty years has been to give priority to social betterment, and equality of opportunity for all. It has therefore been found more acceptable by Parliament to spend available funds on social programs than on the Armed Forces. Growth and development of the Armed Forces has also been reduced by budget cuts and economy drives, which occur every few years. These cuts often bite deeply into National Defence operations because the National Defence budget itself constitutes a high proportion of the whole federal budget that is not committed by statute or firmly binding agreements. Consequently, the Department of National Defence has suffered numerous financial restrictions, and of course, has usually had difficulty obtaining increases in its budget. A continuous shortage of funds hampers

the encouragement of activities whose cost is not immediately and obviously justifiable. Military law research certainly falls into this category.

This, therefore, in very brief and general form, is the situation and environment in which the Armed Forces have functioned for many years.

The members of the Armed Forces, on the other hand, are all volunteers and are virtually all committed to and believe in the need for military forces. Consequently, during their whole careers, many officers have found their most sincere beliefs frustrated and rebuffed by an indifferent population, and Parliaments which often resisted requests for more funds and higher force levels. In these circumstances, the military have carried on and developed almost in parallel with civilian society, but often only marginally integrated with it.

The above situation, which has sometimes been discouraging to military operations personnel, has also applied to the field of military law. Almost the whole of our law is British, and changes

in Canadian criminal law have only affected the military peripherally, at least until the last two or three years. A few examples will suffice to demonstrate this curious situation.

- (a) A national debate on capital punishment has been conducted in Canada for years, but The National Defence Act has rarely been mentioned although there are eight sections of the Act that provide for the death penalty as a punishment.<sup>35</sup>
- (b) Bail Reform legislation was enacted because of apparent abuses by civilian magistrates. The bail reform legislation does not apply to arrested servicemen. Obviously, bail reform legislation could have been written to include the military but this was not done. Complaints in this regard are rare indeed.
- (c) Another national debate went on for years about non-prescription drugs,

---

35. R.S.C. (1970) c.N-4 s.63, 64, 65, 66, 68, 69, 70, 95

with strong movements and pressures to change the law especially with respect to marihuana. As a result, prosecutions for possession of marihuana for personal use have become quite rare among civilians, while the Armed Forces continue to prosecute possessors and "social traffickers." The military, of course, have special reasons of security and discipline for trying such charges. Only in the last two years, have there been some hesitant and tentative steps taken by the military to proceed in drug cases in a manner somewhat similar to that followed by civilians.

- (d) In 1976, the civilian society is particularly permissive and turbulent, whereas the military society has remained autocratic and ordered.

These are only a few examples of the significant differences in the two societies and it is surprising that there has been so little complaint about these differences from either the members of the Armed Forces or knowledgeable civilians. Possibly,

because all servicemen are volunteers, they are prepared to accept some of the major differences as part of service in the Canadian Armed Forces. It is, however, surprising that the Canadian intellectual community has not objected to or even observed upon certain military legal procedures such as lack of bail, Summary Trials, and The Military Rules of Evidence. These procedures are quite fair, but they are both very different to anything that civilians must face if they commit offences.

It does not, therefore, seem unusual to the writer that the military would rely on its own resources and its own code of evidence, as they did in 1959. The writer is not suggesting this is good or bad, but the fact remains that in law, the population walks one path and the military walks a rather different one, even in fields where it would be expected that the law and its application would be substantially the same.

In the light of recent budget increases and heavy capital expenditures authorized for the Armed Forces, along with protection of the budget against inflation and protection of force levels, it may well be that more attention will be directed to the military in the future.

(ii) Military and Civilian Lawyers

Considering the situation described in the preceding paragraphs, it is not surprising that there is little professional intercourse between military and civilian lawyers except in the Ottawa area. Every serviceman tried by a court martial may retain a civilian lawyer if he does not want one of the military lawyers made available to him, but it is rare indeed that a civilian lawyer is retained. With the exception of a handful of civilian lawyers across Canada, and provided the charge is not a regular Criminal Code charge laid under Section 120 of The National Defence Act,<sup>36</sup> the vast majority of civilian lawyers have no background knowledge of military law and usually do not represent their clients well unless assisted by a military lawyer. It is quite a different matter in the Court Martial Appeal Court, where some civilian lawyers are quite successful.

This is an unfortunate situation, but under the circumstances, it is hardly reasonable to expect civilian lawyers to maintain an adequate working knowledge of military law. Finally, it

---

36. R.S.C. (1970) c.N-4

is pointed out that with small forces, only fifty military lawyers, and no conscription, professional relationships between the civilian and military lawyers are unlikely to increase.

An obvious comparison can be made with the United States, where almost none of the factors governing the relationship of civilian and military populations in Canada apply. Additionally, in the United States forces, there are some 3000 lawyers and there is a special section of the American Bar Association called the "Military Justice Section."

#### Military Legal Writing and Research

The writer considers that military lawyers are highly skilled and knowledgeable and compare very favourably with their civilian counterparts.

However, as writers, they are not prolific. In fact, with the exception of a thesis written on

The National Defence Act two years ago by Lieutenant-Colonel J.B. Fay,<sup>37</sup> a general article

---

37. (1975) 23 Chitty's Law Journal. A chapter of the thesis was published in each of a number of the issues of this Journal in 1975, but the bound volume No. 23 has not been published at the time of writing.

entitled Canadian Military Law by Mr. H.G. Oliver<sup>38</sup> (formerly the Chief Judge Advocate), The Citizen as a Soldier by Mr. B. Starkman<sup>39</sup> (formerly a member of the Legal Branch) and Canadian Military Law by Brigadier W.J. Lawson<sup>40</sup> (formerly the Judge Advocate General), the writer is unaware of any other book or article on any military law subject published by a serving or former officer of the Legal Branch between 1950 and the present. There have been a few articles, speeches and briefs on Military Law prepared from time to time for various departments or agencies, but there is nothing else at all that the writer can find.<sup>41</sup>

This lack of published material is understandable in light of the circumstances outlined in these pages and the fact that such material would probably only be read by the fifty lawyers in the Legal Branch along with a few interested civilian lawyers.

---

38. (1975) 23 Chitty's Law Journal 109

39. (1965) 43 C.B.R. 414

40. (1951) 29 C.B.R. 241

41. Some other military lawyers have written articles or books on legal or military subjects, but not on military law

Civilian lawyers also have shown little interest in military law in the last few years, although there was some writing about it during and shortly after World War II.

The Military Rules of Evidence were mentioned in passing in one article by D.J. Morton in 1960 entitled Do We Need a Code of Evidence<sup>42</sup> and the Federal Law Reform Commission has examined them in the course of its study while drafting its own code of evidence. Except for these two examples, there has been no civilian legal writing or examination of The Military Rules of Evidence.

The Canadian Law Reform Commission has now published a Report on Evidence<sup>43</sup> which includes a proposed code. The writer knows from his own personal knowledge that the Law Reform Commission has examined The Military Rules of Evidence in detail. However, it is not only astounding but quite incomprehensible that the Commissioners have not only failed to acknowledge the existence of The Military Rules of Evidence, but have made no comments of any type about

---

42. (1960) 38 C.B.R. 35 at 46

43. Canadian Law Reform Commission, Report on Evidence, 15 Dec 75

them. It is somewhat difficult to take the Report on Evidence very seriously when it totally ignores the only code of evidence in force in Canada, and which is actually in the federal domain, the very arena in which the Commission is working. Surely the credibility of the Report on Evidence would have been higher if the Commissioners had made comments, even derogatory ones, about The Military Rules of Evidence. However, this omission is an excellent example of the all-too-frequent practice, in many fields, of ignoring what the military is doing in the area being examined.

### Conclusion

The contents of this Chapter should be kept in mind when considering the material hereafter. Unfortunately, much of our military law is either transplanted from the United Kingdom, or has been created and employed without the benefit and testing by civilian examination and criticism. Whether or not this is a good thing is a moot point, but this seems to be the situation. However, these factors may well be part of the reason why the military in Canada obtained authority from Parliament to make such a radical departure from tradition in the

establishment of rules of evidence as they did in the amendment of 1959,<sup>44</sup> which amendment constitutes the authority for the establishment of The Military Rules of Evidence.

---

44. S.C. (1959) c.5

## CHAPTER II

PRACTICE AND PROCEDURE AT COURTS MARTIALIntroduction

Chapter I consisted of a brief review of the development of military law, and a few comments on the present relationship, or lack of one, between military personnel and civilians, both in the ordinary sense and as between professionals, such as lawyers.

A short outline of the development of the military law of evidence is provided in Chapter III as the immediate introduction to:

- (a) The Military Rules of Evidence; and
- (b) a discussion of selected legal situations created by or resulting from the establishment of The Military Rules of Evidence.

However, a detailed discussion of selected articles of The Military Rules of Evidence is difficult to follow unless some of the practices and procedures at courts martial are examined. At civil trials, lawyers employ a variety of statutes, regulations and court rules or practices. At courts martial, on the other hand, legal material is quite consolidated. It would consequently be helpful to

explain that the "Bible" of the Canadian Armed Forces, from a legal, administrative and financial point of view is Queen's Regulations and Orders for the Canadian Forces, hereafter referred to as Queen's Regulations and Orders.

These regulations consist of three volumes: Volume I is Administrative, Volume II is Disciplinary, and Volume III is Financial.

Volume II of Queen's Regulations and Orders, which is the Volume of primary interest in this thesis, contains most important regulations and orders established in relation to the various sections of The National Defence Act which constitute the Code of Service Discipline. Volume II also contains a number of appendices, two of which are The National Defence Act<sup>1</sup> and The Military Rules of Evidence.<sup>2</sup> While Volume II contains many **Orders in Council**, **Ministerial Orders** and **Chief of Defence Staff Orders**, these orders do not contain the official number assigned to them at the time of establishment. Additionally, Notes, which do not have the force of

---

1. R.S.C. (1970) c.N-4

2. Order in Council P.C. 1959-1027 dated 13 August, 1959

law, are also included. Volume II, and indeed Volumes I and II, are in loose leaf form and are amended on a regular basis.

Chapters 101 to 117 of Volume II of Queen's Regulations and Orders all deal with the Code of Service Discipline. When these orders are used, even in court, they are referred to or quoted by the Queen's Regulations and Order Number assigned in Volume II and not by the Order in Council or other number originally assigned. This practice is effective and convenient, and precludes the need to possess and continually refer to the Canada Gazette.

#### The Code of Service Discipline

The Code of Service Discipline is constituted by Parts IV to IX inclusive of The National Defence Act. More particularly, the Headings for these parts, in numerical order in The National Defence Act are:

- IV - Disciplinary Jurisdiction of the Services
- V - Service Offences and Punishments
- VI - Arrest
- VII - Service Tribunals
- VIII - Provisions Applicable to Findings and Sentences After Trial

## IX - Appeal. Review and Petition

Considering the contents of Queen's Regulations and Orders, Volume II, now including The National Defence Act and The Military Rules of Evidence, it is clear that prior to 1 October, 1959, Volume II was only of limited usefulness at a court martial because none of the rules of evidence applicable in the province in which the court martial was held were included. Most military lawyers carried one of the standard Criminal Code text books with them wherever they went, but it was always difficult to have a fully amended one, because the intervals between publication of textbook Codes was much longer than it is now, and the Supplements were often difficult to understand. However, The Criminal Code did include The Canada Evidence Act<sup>3</sup> and considerable evidence law in the form of cases and comments.

The above explanation describing the lack of source material on evidence law, no doubt was a factor contributing to the evolution of a code of evidence for use at courts martial. It is included here

---

3. R.S.C. (1970) c.E-10

to provide the reader with an idea of the circumstances in which courts martial were and are conducted, and the difficulties that military lawyers faced in attempting to carry out their duties in a thorough and workmanlike manner.

#### Attitude and Atmosphere

The writer attended a Criminal Law Seminar at Halifax, Nova Scotia, in the summer of 1974, which was sponsored by the Federation of Canadian Law Societies. The instruction was excellent, but the writer was very surprised to learn how much effort is made by prosecutors to prevent the defence from obtaining relevant and material information possessed by the police. Consequently, prior to civilian criminal cases commencing, considerable time and effort is consumed by both sides in trying to obtain or prevent information reaching the defence, as applicable. This is not to say that many Crown counsel do not provide full disclosure to their opponents; they do. However, this seems to be more the exception than the rule. For example, in many jurisdictions, it is next to impossible for the defence to question a police witness, because many of them simply refuse to

discuss the case before court, unless ordered to by a competent authority. Conversely, of course, there are some defence counsel whose capability of using such information properly and ethically is somewhat limited.

This situation is virtually unheard of in military legal pre-trial procedures. The defence receives a synopsis of evidence with copies of all statements made by the accused. Prosecution witnesses are available to the defence and they are normally instructed to answer all questions put to them by the defending officer. Documents in the hands of the prosecutor or the Crown (usually Department of National Defence documents) are almost always made available to the defence. Financial and other support is provided equally to both sides. There are situations known to the writer where a prosecutor has assisted a defending officer in obtaining documents, witnesses or other assistance which the military unit involved was reluctant to provide, but this situation is rare.

Normally, the defending officer is not stationed in the area where the court martial is held, but the prosecutor is living there, and has considerable physical and psychological advantages.

The defending officer has a perfect right to use the prosecutor's library; he is often provided with clerical and administrative assistance if necessary before court, and with a technical adviser at court if he so desires and one can be made available.

The general rule is that the prosecution makes full disclosure to the defence, and this is practised both in the spirit and the letter of the law by all military lawyers, **so** far as the writer knows. In fact, the defence is normally provided with copies of all Military Police reports, summary investigations, and Boards of Inquiry. The only exception of any significance is Boards of Inquiry on aircraft accidents, which are normally not made available to either the prosecutor or defending officer.<sup>4</sup>

However, since this Order is a Chief of Defence Staff Order, it is probably ultra vires in light of Military Rules of Evidence Article 71 which states as follows:

"Except as provided in this Section or in an Act of the Parliament of Canada, there is no official or governmental privilege to withhold relevant evidence

---

4. Canadian Forces Publication 135, Flight Safety for the Canadian Forces, Article 1502 para 1.b.

from a court martial."

Obviously, the Board of Inquiry itself could not be admitted as evidence at the court martial, but the defence has a right to see it if he has a valid reason, in order to determine if it contains evidence or information that could form the basis of a defence.

The general rule in the Armed Forces as to pre-trial production is similar to that enunciated by Mr. Justice Haines of the Ontario High Court in Regina v Lalonde,<sup>5</sup> where he discussed production for the defence of statements of accused persons and reports and investigations as to statements of witnesses, except that the military system is considerably broader in practice.

There are numerous reasons over and above a legal duty as to why full and complete disclosure is made to military defence counsel. Firstly, prosecutors and defending officers know they must live with each other during their whole careers and an unreasonable attitude today might cost dearly tomorrow. Civilian lawyers are naturally given the same disclosure as military defending officers at courts martial, providing they can be given the

---

5. (1971) 15 C.R.N.S. 5

necessary security clearance where applicable.

However, security clearance problems are rare.

Secondly, most accused persons at military courts are not the same kind of people who appear rather regularly in civil courts. Many accused that appear before civil courts are not first time offenders, and are well known to the police, whereas at courts martial, the accused ordinarily has a good military record and normally no previous convictions of a serious nature. Thus, in most cases, military prosecutors have no real concern over safety of witnesses, destruction of evidence, or other such actions, when they provide information and material to defending officers.

Thirdly, a military prosecutor has very little to gain personally by withholding information from the defence. Long records of convictions have little effect, by themselves, on promotion or salary increases. If a prosecutor prepares his case well, and presents it with reasonable skill, he has no cause to expect censure from superiors if the accused is acquitted. Some civilian prosecutors are able to find benefits from a good conviction record, although the duties of civilian and military prosecutors are the same; namely to present all the relevant

admissible evidence and let the court make the finding.

Fourthly, plea bargaining in the military is prohibited and thus there is little reason for the prosecutor to keep his case to himself prior to the commencement of the trial.

Finally, there is no preliminary inquiry in the military trial process. The case goes directly from charge to trial, much like the procedure provided for in Section 505 of The Criminal Code<sup>6</sup> whereby the Attorney General may prefer a bill of indictment without a preliminary inquiry being conducted. This intermediary step of holding a preliminary inquiry is certainly the cause of much argument among civilian counsel as to disclosure of information to the defence.

There are other differences between the pre-trial environment of military and civil courts, but most of them are less significant than those listed in the preceding paragraphs. Those listed should provide the reader with some insight into the military court martial atmosphere prior to trial, which is the time when most disclosure

---

6. R.S.C. (1970) c.C-34

problems occur.

Once the trial has commenced, most of the procedure is similar to that practised in civil courts, except with respect to questions about preliminary hearings.

It should be mentioned that at courts martial, adjournments are rare. They are usually only granted if the defence can convince the Judge Advocate that he has had insufficient time, or is unable to prepare and present his defence. Considering the assistance and co-operation the defence receives prior to a court martial, requests for postponement must be fully substantiated. The fact that a court martial, once it commences, continues virtually uninterrupted by adjournments and postponements to completion, is important for the reader to know. Knowledge that requests for adjournments are seldom granted unless the defending officer has arrived too late to adequately prepare his defence, forces him to conduct his investigation, obtain what information he can from the prosecutor, and prepare his case, all in one period of time. As a result of this time period situation and the co-operation of the prosecutor, arguments in court about the Crown's failure to provide relevant information rarely arise.

## CHAPTER III

MILITARY RULES OF EVIDENCE -  
HISTORY AND INTRODUCTIONDescription of Enactments

An examination of the footnotes to Chapter I will show that two National Defence Acts and an amendment in 1959 are discussed and referred to repeatedly. It will also be noted that the numbering of sections of The National Defence Act of 1950 and the Act in the Revised Statutes of Canada (1970) is not the same. Unless it is clear which National Defence Act is being referred to, confusion could be caused throughout the balance of this thesis. Therefore, while the writer will be following the normal practice regarding citations and footnotes, he will describe certain enactments that are continually mentioned throughout this thesis as follows without including the citation as a footnote:

- (a) The National Defence Act<sup>1</sup> will be called "The National Defence Act (1950)";
- (b) The National Defence Act amendment<sup>2</sup> which created the new authority for the

---

1. S.C. (1950) c.43

2. S.C. (1959) c.5

establishment of Military Rules of Evidence will be called "The Amendment (1959)";

- (c) The National Defence Act<sup>3</sup> in the Revised Statutes of 1970 will be called "The National Defence Act (1970)"; and
- (d) The Military Rules of Evidence<sup>4</sup> will be called "The Military Rules of Evidence."

Since the paragraph numbers in The National Defence Act (1950) and The National Defence Act (1970) are different, the writer will attempt to avoid cross-referring the two Acts by section number, but will rely on quoting a section number applicable to the 1950 or 1970 National Defence Act quoted. In all cases except those described above, the normal footnotes and citations will be used.

The Military Rules of Evidence are only available in most civilian law libraries in the form of Order in Council P.C. 1959-1027 13 August, 1959, found in Canada Gazette Volume 93 at 770. Therefore, the whole of The Military Rules of Evidence are included in this thesis as Appendix B. Minor changes were made to the 1959 Order in Council by

---

3. R.S.C. (1970) c.N-4

4. Order in Council P.C. 1959-1027 dated 13 August, 1959

Order in Council P.C. 1971-31 12 January, 1971.

These changes are incorporated in the rules at Appendix B, and were mostly of a technical nature as a result of military integration.

Pursuant to Section 55 of The National Defence Act (1970), officers and men of the regular and reserve forces, certain civilians accompanying the forces out of Canada, and certain persons already released from the Canadian Armed Forces are subject to the Code of Service Discipline. Any of these persons tried by Special General Court Martial<sup>5</sup> would be tried under The Military Rules of Evidence. Throughout this paper, many references will be made to "servicemen," "military personnel," and "persons" being tried by court martial.

If references to trial by courts martial were, in all cases, to include the fact that some persons subject to the Code of Service Discipline are civilians and would be tried by Special General Court Martial, then sentence structure would be extremely awkward and virtually unmanageable. Therefore, persons

---

5. National Defence Act R.S.C. (1970) c.N-4 s.155

subject to the Code of Service Discipline will generally be described as "servicemen" or "military personnel," which will include, as applicable, all other non-military personnel subject to trial by a military court martial. The reader should, therefore, keep in mind that for those very few civilians actually tried by a military court martial, The Military Rules of Evidence apply equally to them as they do to military personnel.

Rules of Evidence Applicable  
to Courts Martial (1867-1950)

This paragraph is included in this Chapter simply to provide continuity and to include all evidence law back to 1867 in one chapter. As stated in Chapter I, under the heading "Canadian Military Law," it was explained that the rules of evidence at a Canadian court martial prior to 1950 were the rules of evidence employed by civilian criminal courts in England. The complexity of this practice, combined with the difficulty of determining the law at any given time because of amendments to British and Canadian law, has already been outlined. It is, however, somewhat surprising that the practice of using British rules of evidence survived for eighty-three years. Therefore, this heading simply serves

as an introduction to the changes that occurred in 1950 and 1959, which will be discussed in the balance of this Chapter.

Rules of Evidence Applicable  
to Courts Martial (1950-1959)

The National Defence Act (1950) came into force on 30 June, 1950. The rules of evidence to be applied at trials by court martial in Canada were no longer to be the English rules of evidence but "the same as those from time to time followed in proceedings under the Criminal Code in civil courts in the province of Canada in which the court martial was held."<sup>6</sup> If the court martial was held out of Canada, the accused declared his province of ordinary residence, and the rules of evidence in proceedings under the Criminal Code in civil courts in that province were applied.<sup>7</sup> This was a major advance because it meant that as of 30 June, 1950, Canadian evidence law, federal and provincial as applicable, would be applied at courts martial, except in the rather rare circumstances when English common law would still apply. However, there were still problems.

---

6. Supra fn 1 p.43, s.152(1)

7. Supra fn 1 p.43, s.152(2)

Difficulties Encountered Employing  
the Rules Prior to 1 October, 1959

Most courts martial were, and still are held at military bases, and a large percentage of those bases are far from any adequate law library. When courts were held out of Canada, mainly in Europe, Japan, Korea, Cyprus or Egypt, no law library at all was available.

Evidence law research relevant to the case the military lawyer was then preparing for could only be accomplished either:

- (a) before the Judge Advocate, prosecutor, or defending officer departed for the base or station at which the court martial was to be held; or
- (b) at a well stocked library near the location of the trial.

From experience, it has been found that while provincial Law Schools and Law Societies have been most helpful whenever military legal officers desired to use their libraries, the occasions when this could be done were few and far between.

Unfortunately, partly because of misplaced optimism and partly because of the unexpected in the preparation for trial, military defending officers and Judge Advocates in particular, often encountered their

most difficult legal problems after they are well advanced in their work on the case at the location of the trial. When this happens to a civilian lawyer, for example in Winnipeg, Manitoba, he has easy and immediate access to at least two excellent and comprehensive law libraries. However, a military lawyer in the same predicament was by that time at the base where the court martial was to be held (or was in fact actually in progress), and he had no access to any useful legal research facility. Consequently, military lawyers had only the legal texts, cases and statutes they brought from their own libraries, which were also usually limited in size and scope.

Occasionally, they would be at a location where there was another military legal library, but even then, that library was usually very limited. Only in the last four or five years has there been a significant improvement in the size and scope of law libraries at military field offices. However, because of the very high cost of stocking a library, these research facilities will understandably remain limited.

The situation overseas was particularly difficult since Canadian military libraries there were located only at Soest in Germany and Metz in France

(now combined at Lahr, Germany), and earlier in Tokyo, Japan. Again, these libraries were far from complete. Indeed, unless the accused stated he was from Ontario, it was virtually impossible to determine the law of any other province, since not even the statutes of all provinces are held by regional military law libraries. Military law libraries tend to stock case books and texts based on Ontario law and practice, along with the statutes and reports for the province in which the library is located.

However, while the employment of civilian rules of evidence at courts martial prior to 1959 was complicated and cumbersome, it did have one excellent advantage which flowed from Section 119 (1)(b) of The National Defence Act (1950):

"(1) 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 the Parliament of Canada; or
- (b) that takes place out of Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the Criminal Code or any other Act of the

Parliament of Canada,  
is an offence under this part and every  
person convicted thereof is liable to suffer  
punishment as provided in subsection (2)."

This section had, and still has today, the effect  
of making all offences under every federal statute  
an offence under The National Defence Act (1970).

Therefore, laws of evidence, procedure, or  
practice applicable to civilian criminal courts in  
the province where the court martial was being held  
could also be employed at that court martial, with  
the result that the rules of evidence applicable to  
a charge under Section 119 of The National Defence  
Act (1950) were the same as those employed in a civil  
court trying the same federal charge.

Military Rules of  
Evidence (1 October, 1959)

As a result of the difficulties discussed in  
the preceding three pages, combined with a desire to  
create uniformity of rules of evidence for all courts  
martial, Section 152 of The National Defence Act (1950)  
was amended in 1959<sup>8</sup> authorizing the creation of  
uniform rules of evidence. What was in fact created  
is the subject of examination in Chapters VI and VII.

---

8. S.C. (1959) c.5

A matter about The Military Rules of Evidence that can appropriately be included here is that there have only been two amendments to the Rules since their inception. The first amendment was in 1967,<sup>9</sup> and it was needed because of integration of the forces. In the original Order in Council of 1959, the expressions "Queen's Regulations," "the services" and "Chief of Staff" were used to apply to each of the three services, namely, the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force. The amendment in 1967 replaced the above phrases with "Queen's Regulations and Orders," "the Service" and "Chief of the Defence Staff." These were purely technical amendments.

The amendment of 1971<sup>10</sup> was more substantial. It affected Articles 39, 41 and 42 of The Military Rules of Evidence and dealt with the admissibility of incriminating evidence obtained compulsorily from a serviceman overseas, in compliance with a military regulation similar to Section 233(1) of The Criminal Code, whereby a person involved in an automobile accident is required to provide certain particulars

---

9. Order in Council P.C. 1967-2255 30 November, 1967

10. Order in Council P.C. 1971-31 12 January, 1971

and render assistance.

#### Method of Preparation

Only a very few years after the enactment of The National Defence Act (1950) whereby the rules of evidence at courts martial were established to be those practised in civil courts in the province where the court martial was held, it had become obvious that that system was totally unsatisfactory. It was then decided that uniform rules of evidence would be much fairer and more satisfactory. Accordingly, in 1952, the Faculty of Law at Dalhousie University was commissioned to prepare military rules of evidence. The Faculty of Law at Dalhousie University completed their work in 1957 and forwarded a draft to the Office of the Judge Advocate General at Ottawa. In Ottawa, the draft was studied and amended until it was in a form satisfactory to the Judge Advocate General. Some of the officers who participated in the work in Ottawa were Brigadier W.J. Lawson, Brigadier-General H.A. McLearn, Colonel W.M.W. Shaw, and Group Captain J.H. Hollies. A number of other officers participated at various times and in various aspects.<sup>11</sup> As an example of the

---

11. Personal correspondence

difficulties faced by these officers, it took months to resolve the problem of what to call the rules. Indeed, the name finally chosen indicates the uncertainty felt by these men. The words "code" and "uniform" are not included.

Possibly they suspected the rules they created were not uniform because there would be situations not covered by the rules, in spite of the fact that such situations would be governed by the rules of evidence applicable in civil courts in Ottawa. Additionally, if they were uncertain as to whether they had created a code of evidence, they seem to have solved their quandry temporarily in good lawyers' fashion by evading the problem and not including the word "code" at all, but still creating the impression that a code had in fact been established.

#### Is There Actually a Need to Codify the Law of Evidence?

This Chapter has reviewed the history of the rules of evidence at courts martial, along with an explanation of the method of preparation of the code. In conclusion, it is helpful to consider whether or not there is any benefit at all in promulgating a code of evidence.

A code can be defined as "a body of law established by the legislative authority of the state,

and designed to regulate completely, so far as a statute may, the subject to which it relates."<sup>12</sup> The importance of later determining whether or not The Military Rules of Evidence are a code is that if they are, it would mean that very little of the common law, statute law, or case law existing prior to 1 October, 1959, has specific application to courts martial. This certainly is not what has happened, but there is the possibility that all of us have read and applied these rules incorrectly.

If one stands back and looks at the whole of the law of evidence, there seems to be something wrong with it when one considers the following factors:

- (a) only in the common law is there a body of law called the law of evidence;<sup>13</sup>
- (b) the hearsay rule contains approximately thirty-seven major exceptions which are listed in The Uniform Rules;<sup>14</sup>

- 
- 12. Bouvier's Law Dictionary (Baldwin's Students Edition) (1948) 178
  - 13. Murray, R.G., "Evidence: A Fresh Approach - The American Uniform Rules of Evidence (1953)" (1959) 37 C.B.R. 577
  - 14. Uniform Rules of Evidence 1953, National Conference of Commissioners on Uniform State Laws, 1155 East Sixteenth Street, Chicago 37, Illinois

- (c) Phipson's Law of Evidence,<sup>15</sup> which seems to be the most complete current work contains over 7000 precedents, and probably a skilful lawyer, who had sufficient time could find a precedent to keep out practically the whole of his opponent's case;
- (d) many aspects of the law of evidence, such as the admissibility of certain documents, admissibility of confessions in some cases, and the compellability of the spouse of an accused by the accused, are not entirely clear, even though these matters have been adjudicated for hundreds of years;
- (e) the meaning of the expression "res gestae" is simply not understood even though it is used daily in courts throughout the nation. In 1934, Mr. Justice Ross of Nova Scotia stated about the "res gestae" rule "As for me, I still see it through a glass darkly;"<sup>16</sup>

---

15. Buzzard, J.H.; Amlat, R.D.; Mitchell, S.:  
Phipson's Manual of the Law of Evidence (11th)

16. R v Wilkinson (1934) 7 M.P.R. 562

- (f) judges tend to let most evidence in, with the possible exception of confessions, "for what it is worth," often regardless of the rule of evidence that seems to apply to that situation; and
- (g) the federal and provincial governments seem to consider that the rules of evidence are unrealistically complex and strict, if applied at administrative tribunals, even those of an appellate nature.<sup>17</sup>

Mr. Justice L.P. de Grandpré made some interesting observations on the present rules of evidence when he was the President of the Canadian Bar Association. In an address made by him to the annual meeting (Maritime Bar Association)

he stated in part:

"Our rules of evidence in criminal matters are much too complicated; they are geared to the needs of the underworld; they do not afford to the ordinary accused and to the

---

17. Anti-Inflation Act, 24 Eliz II, 3 December, 1975 Section 31(4) - "The Appeal Tribunal is not bound by any legal or technical rules of evidence in conducting a hearing, and all appeals shall be dealt with by the Tribunal as informally and expeditiously as circumstances and considerations of fairness permit."

innocent citizen any greater protection than could be afforded by other rules much simpler and much more efficient...it (the law of evidence) is so complicated that only highly specialized lawyers understand it (and even that is doubtful)."<sup>18</sup>

As a result of observing the above factors, and many others, attempts have been made in common law jurisdictions in the last forty years to do something about this confusing situation. In 1942, the American Law Institute adopted The Model Code.<sup>19</sup> In 1953, The Uniform Rules<sup>20</sup> were published. Neither of these proposed codes were adopted. However, a Code of Evidence is in force in California.<sup>21</sup>

Additionally, other jurisdictions have by statute swept away some of the common law of evidence. In Manitoba, proof of foreign law in all Canadian jurisdictions, all Commonwealth countries and the United States federal and state jurisdictions can be

---

18. Canadian Bar Bulletin, May, 1973

19. Model Code of Evidence (1942) - as adopted and promulgated by the American Law Institute at Philadelphia, Pennsylvania, 15 May, 1942 (Philadelphia: American Law Institute 1942)

20. Supra fn 14 p.61

21. 29B West's California Evidence Code (1966)

determined by the court taking judicial notice of it.<sup>22</sup>  
 In Massachusetts, the trustworthy verbal and written evidence of deceased persons is admissible as a result of statute law.<sup>23</sup> The United States government has made the introduction of business documents far more simple than it was under the common law rules.<sup>24</sup> In England, the admissibility of oral and written evidence has been made much simpler to place before the court than it was under the common law by legislating that if oral or written evidence could be admitted through the originating witness, it can be admitted in documentary form through someone else.<sup>25</sup> In Canada, we have gone as far as the English, but only with respect to records.<sup>26</sup>

All of the above legislative moves are simplifications of cumbersome rules, but they only

---

22. The Manitoba Evidence Act, R.S.M. (1970) c.E150 s.32(1)

23. Witnesses and Evidence (1959) 40 Mass G.L. (Ann)

24. (1966) 28 U.S.C.A. s.1732

25. The Civil Evidence Act (1968) 16 and 17 Eliz II c.64, s.1,2,3,4

26. The Canada Evidence Act, R.S.C. (1970) c.E10, s.30(1)

cover very limited aspects of the law of evidence. A Code would no doubt be more definitive and even if it was not all perfectly clear, it would allow the courts to start over again in interpreting the law of evidence. The present maize of case law is so large, so negative in many ways, and often so contradictory that it is almost incomprehensible. Professor Morton of Osgoode Hall argued in 1960<sup>27</sup> that a code was unnecessary because the judges seemed to understand the law of evidence, and were interpreting it to adjust to the times and circumstances. The argument of retaining the present very confusing and difficult law of evidence simply because some people appear to understand it, is a little weak.

It is interesting that The Law Reform Commission Act<sup>28</sup> made no provision for the Commission to prepare a code of evidence, but the Commission did so anyway.<sup>29</sup> The statutory authority provided in part as follows:

"The objects of the Commission are to study and keep under review on a continuing and

---

27. Morton, J.D., "Do We Need a Code of Evidence?" (1960). 38 C.B.R. 35

28. R.S.C. (1970) 1st Supp c.23

29. Canada: Law Reform Commission Report: Possible Areas of Study (Ottawa: The Queen's Printer 1972)

systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform..."<sup>30</sup>

A study of the Commission's rules of evidence will show that they lean towards The Uniform Code. When the Commission disseminated its first draft of the code, the reaction was violent indeed, and the members were subject to considerable written abuse. Correspondence from across the country showed that many lawyers and judges just simply did not understand the present rules of evidence. A group of Manitoba judges were apparently the most reasonable in their comments and displayed a willingness to deal directly with the need for change.<sup>31</sup>

The Law Reform Commission Working Paper on the rules is thirty-seven pages long, contains eighty-nine rules, and they are intended to be exhaustive. Regarding matters not provided for, Section 4 states:

"If a matter of evidence is not provided

---

30. Supra fn 27 p.66

31. Personal correspondence

for by this Code, the principles of common law as they may be interpreted in the light of reason and experience shall govern."<sup>32</sup>

Thus, the intent appears to be to cease the use of case law, except to the degree necessary to determine the rules applicable when not provided for in the code. This very situation is the one that causes serious difficulties in The Military Rules of Evidence, as will be discussed in Chapter VII.

However, a section dealing with cases not provided for probably creates the greatest weakness in any argument to establish a code of evidence. The whole body of law is so vast and deeply inter-related to other areas of law, that it is almost impossible to write a code of sufficient brevity and clarity to be acceptable to common law lawyers. A code for civilian criminal courts would no doubt be handled much like the judges of the Court Martial Appeal Court handle The Military Rules of Evidence. That is, there is a continuous drift back to case

---

32. Supra fn 43 p.35. The final published Report on Evidence still contains eighty-nine rules. Section 4 of the Working Paper is Section 3 of the final report.

law, precedents, and the common law. The Court Martial Appeal Court does not seem to have dealt with any particular rule except possibly with Article 53(c).<sup>33</sup> But, this may well be caused by the manner in which Crown counsel submitted their arguments; that is, they too, may be arguing case law and not the relevant Article of The Military Rules of Evidence.

As will be noted from the quotation on the title page of this thesis, the writer is not necessarily supporting codes of evidence. Indeed, probably the main weakness of codes is that people expect too much of them. Codifications such as The Napoleonic Code in France, The Bürgerliches Gesetzbuch in Germany, and The Burgerlijk Wetboek in Holland, to name a few, are in constant need of revision. The Napoleonic Code has recently undergone major revisions. Furthermore, these codes are not necessarily any clearer than law in common law countries.

Another imagined benefit of a code is that it brings clear and understandable law to the people.

---

33. Zeisman v The Queen (1966) 3 C.M.A.R. 17

This has always failed, beginning with Justinian's Code which simply shifted knowledge of the law from one group to another.<sup>34</sup>

Statutes that clarify, simplify or change the law of evidence, are not codes, and are simply law superimposed on the law that was there before.<sup>35</sup> In some cases, these statutes specifically wipe out existing law, but normally they do not. The use of statutes to hopefully improve and clarify law is useful, but it is a patchwork.

Codes, on the other hand, are extremely useful in changing law, co-ordinating different regional law, and organizing the law of evidence, or any other law, into a manageable system. Causing confusion, however, between codes and statutes are statutes such as The Criminal Code of Canada, which does not even make the pretence now of being a code, although it is still called one.

On balance, then, from a military point of view, a code of evidence is attractive. Firstly, it creates the same rules of evidence for all

---

34. Hahlo, H.R.; Gower L.C.B. "Here Lies the Common Law: Rest in Peace (1967)" 30 Modern L.R. 245

35. Robinson v Canadian Pacific Railway Co. [1892] A.C. 481 at 487

servicemen, regardless of where the court martial is held. Secondly, it avoids the need to select the law of one province as the law of evidence that will apply, even though the differences in the provincial law are more apparent than real, and often apply mostly to procedure. Finally, a code and its supporting source material is small enough in physical size that a military lawyer, no matter where the court martial takes place, can carry enough material to adequately apply the rules of evidence for either the benefit of the Crown or the accused, as applicable.

PART TWO  
SCOPE OF THE MILITARY  
RULES OF EVIDENCE  
CHAPTER IV

WORDS AND PHRASES

Introduction

Many of the words and phrases employed continually in evidence law are somewhat unclear in meaning. Additionally, confusion arises when some judges, lawyers and writers use some of these words and phrases almost interchangeably. For example, what is the meaning of "evidence," "law of evidence," "rules of evidence," and "procedure" to list only a few.

An incredible amount of time and paper has been consumed writing about these points, and surprisingly enough, there is still not complete consensus as to the meaning of these words and phrases. The works of Thayer,<sup>1</sup> Wigmore,<sup>2</sup> and

- 
1. Thayer, J.B., Part of his works were published originally in the Harvard Law Review. See  
 (1889-90) 3 Harvard L.R. 285,  
 (1890-91) 4 Harvard L.R. 45,  
 (1891-92) 5 Harvard L.R. 45,  
 (1892-93) 6 Harvard L.R. 325, 418  
 (1898-99) 12 Harvard L.R. 71  
 These are examples of the quantity alone of some of the writings of one man.
  2. Wigmore, J.H., A Treatise on the Anglo American System of Evidence in Trials at Common Law (Vols 1 to X) (3rd Ed) (Boston: Little, Brown & Company, 1940)

The Canadian Abridgement<sup>3</sup> are only a few examples of the huge amount of writing available. In light of all that has already been written, it may be somewhat presumptuous to even discuss the meaning of the words and phrases mentioned earlier. However, the following attempts at defining these expressions are simply intended to be a guide, both for the writer and the reader, so that at least for the purposes of this paper, these words and phrases will have a consistent meaning.

#### Evidence

This word is often used almost interchangeably with the phrase "Law of Evidence," thus creating some confusion in the mind of this student, at least. There are many examples. One can be found in the judgement of Hughes, J.A., in the New Brunswick Court of Appeal where he stated in part at page 232 "Evidence has been defined as part of procedure which..."<sup>4</sup> and again in a Forward to A Symposium on Evidence, Chief Justice Orie L. Phillips of the

- 
3. Riddell, W.R., Editor - The Canadian Abridgement (Vols 1 to 35) - (See Vol 18) (Toronto: Burroughs & Company (Eastern) Ltd, 1935)
  4. Regina v Murphy, ex Parte Belisle and Moreau (1968) 4 C.C.C. 229 at 232

United States Court of Appeal, Tenth Circuit, stated in part, "The term "Evidence" imports the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."<sup>5</sup> It is suggested, with respect, that both of these learned gentlemen were referring to "Law of Evidence," and not "Evidence," although the statement by Chief Justice Phillips could apply to either expression.

One good and succinct definition of "evidence" is "Any species of proof, or probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to this contention."<sup>6</sup>

Evidence appears to consist of the relevant information<sup>7</sup> legally presented to the court in one

---

5. (1951-52) Vanderbelt L.R., Vol 5, 275

6. Black, H.C., Blacks Law Dictionary, 4th Ed., 656 (St. Paul: West Publishing Co. 1968)

7. The word "information" in law has many connotations, such as being an accusation or complaint of a criminal offence against a person. However, the ordinary meaning of the word is intended in this paper. See Webster Third New International Dictionary, 1965, at 1160 where it is defined as "communication or reception of knowledge or intelligence."

or all of the forms described above. However, while the word "information" may be considered too loose to define evidence, it is a word of modern usage and it is not that inaccurate when one considers the following statement - "The subjects of dispute between parties are particular propositions of fact."<sup>8</sup> Montrose's submission is a good one in that courts do not often listen to "facts," but listen mainly to "propositions of fact." The expression "proposition of fact" would fall into a definition of "information."

Evidence is also defined in The Military Rules of Evidence as meaning "anything that has a significant rational tendency to make something manifest."<sup>9</sup> While this definition may be technically correct, it is considered to be too vague and general to be useful, or for that matter very understandable.

Therefore, for the purpose of this thesis, reference to the word "evidence" will mean relevant information (propositions of fact) legally presented

---

8. Montrose, J.L., "Basic Concepts of the Law of Evidence" - (1954) 70 L.Q.R. 527 at 534

9. Military Rules of Evidence, Article 2(j)

to a court in oral, written or real form, and including judicial notice, but will not include inferences, presumptions,<sup>10</sup> or arguments and pleadings.

### Law of Evidence

Lord Dunedin provided an excellent and still valid definition of the law of evidence in 1918 when he stated "My Lords, the law of evidence in criminal cases is nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt, without causing undue prejudice to the prisoner."<sup>11</sup> The law of evidence does not regulate the process of reasoning and argument.<sup>12</sup> Further, there seems to be a difference in the law of procedure and the law of evidence. "Procedure" will be discussed later, but suffice it to say for now that the law of procedure and the law of evidence are separate,

- 
10. McWilliams, P.K. - Canadian Criminal Evidence, 38 (Agincourt: Canada Law Book Co., 1974) - the author mentions "presumptive evidence" which he describes as employing a relation between the facts and the inference. The writer has no intention of using this term as it is almost impossible to use with clarity.
  11. Thompson v The King, [1918] A.C. 221 at 226
  12. Supra fn 2 p.72, See Vol 1, at 5

although the law of evidence may well be a branch of the law of procedure.<sup>13</sup>

### Rules of Evidence

The writer is somewhat bemused as to what the expression "rules of evidence" really means, and how firm and permanent they really are. Lord Dunedin said that the law of evidence was nothing more than a set of practical rules.<sup>14</sup> That may well be, but are they a "set" and are they all practical, particularly in a 1976 environment? In the first place, no "set" appears to exist in Canada (except The Military Rules of Evidence) although the rules of evidence have been codified in some other jurisdictions. Secondly, some rules do not seem all that practical, particularly when one remembers that some rules were established in a bygone era for crimes or circumstances that no longer exist.<sup>15</sup> Of course, the principle behind the rule is usually the governing factor as to whether the rule is practical or even applicable in a particular case.

---

13. Phipson, S.L., Phipson's Manual of the Law of Evidence (9th ed) 2 (Elliot, D.W., Editor) (London: Sweet & Maxwell, 1966)

14. Supra fn 11 p.76

15. Toms v Whitby (1875) 37 U.C.Q.B. 100

Consequently, the business of actually sitting down and writing a "set" (or consolidation) of "rules of evidence" appears to be an extremely difficult task if the work is to be at all definitive, because it is so difficult to determine when all of the "rules of evidence" have been included.

Some judges, lawyers and writers view these "rules" with considerable awe as apparently constituting the accumulated wisdom of the ages. The writer has gained the impression from some cases and texts that often less attention is paid to ordinary common sense in matters of admissibility than to exhaustive examinations of case law to determine the exact legal situation in a multitude of different circumstances.

This attitude is best described by Johnston, J. in 1865 as follows: "The rules of evidence, which have been sanctioned by the wisest and best judges, and ratified by the experience of ages, as the safest guide in the investigation of criminal accusations in British courts of justice, are not subtle refinements, barren technicalities, or arbitrary enactments; they are deductions drawn from a deep insight into human nature, and being founded on a close observation of the ordinary

current of human action under the influence of the motives, passions, interests and affections which sway men..."<sup>16</sup>

At the opposite end of the pole is Edward W. Cleary<sup>17</sup> who stated "...the rules of evidence largely have been constructed out of anecdotes and unsystematic observation, plus what hopefully passes for reason but could more honestly be labelled conjecture about human behaviour. In the main, the jurists have been over-awed by the powers of their own minds. Yet the human brain weighs only about three pounds, and too much ought not to be expected of it."<sup>18</sup>

Neither quotation about the rules is particularly easy to support, but probably the truth about their inception, evolution, and practicability lies somewhere in between. From experience, it is fairly clear that even if the rules are often hard to understand, let alone find, they are, for the most part, sensible and practical methods for controlling the introduction of evidence in court.

---

16. Queen v Dowsey, Douglas and Lambruert, (1865)  
6 Nova Scotia R. 93 at 113

17. Professor of Law, University of Illinois

18. Cleary, E.M. "Evidence as a Problem in Communications" (1951-52) 5 Vanderbilt L.R. 277 at 279

When examining The Military Rules of Evidence, (including those which differ from civilian rules of evidence), the writer is under no illusion that these rules are anywhere close to being perfect; but they do represent an excellent and obviously workable code so far as they go.

The difficulty appears to be that a "rule" is always evolving and is not static for very long unless it is incorporated into a statute. Thus, a rule that was sensible in 1931 may not be sensible today and will be "bent" or changed by a court. However, when the rules have been codified with effect from a certain time, the process of evolution may continue, but always within the confines of the words of the rule. This is so because of the canons of construction, which the writer agrees are sensible, that are employed in the interpretation of statutes and codes.

Rules of evidence are a combination of Statute Law rules and Common Law Rules.<sup>19</sup> While common law rules of evidence can be "bent"<sup>20</sup> if the underlying reason for the rule does not fit the circumstance

---

19. American Casualty Co. v Horton (1941) 152 S.W.R. (2d), 395 at 398

20. Doe D. Murphy v Mulholland (1846-48) 2 U.C.Q.B. (O.S.) 115 at 119

before the court,<sup>21</sup> it is quite difficult to "bend" a statutory rule of evidence. The alternative in this latter case appears to be to refuse to apply the rule at all if the circumstances before the court are not in harmony with its underlying principle. Thus, when a court says that a certain codified rule is not applicable, the lawyer who tried to use that rule is often at a loss as to what law then applies. Usually, it is not quite as simple as merely saying that the criminal law that was in force in a province immediately before the first day of April, 1955, continues in force unless altered by Parliament.<sup>22</sup>

Therefore, for the purpose of this thesis, the rules of evidence will be considered to be all common law and statutory rules of evidence applicable in a civilian court of ordinary criminal jurisdiction or at a military court martial. Later on in this paper, the writer will attempt to deal with the question of whether The Military Rules of Evidence need be consistent with the rules of evidence employed in civilian criminal courts in Canada, and whether or

---

21. Caldwell v Kinsman (1853-55) 2 Nova Scotia Reports, 398 at 405

22. Criminal Code - R.S.C. (1970) c.C-34 s.7(2)

not they constitute a code.

### Procedure

The question as to whether some matter is a rule of procedure or a rule of evidence is often important, particularly from a constitutional point of view,<sup>23</sup> but when the question is discussed in a federal court and the problem involves two federal enactments with different "procedures," the writer has always had difficulty in determining the consequences that flow when the matter is determined to be either a rule of evidence or a procedural matter.

Judge Advocates or Presidents at courts martial have made such rulings, and apparently, if the item under examination is not a rule of procedure, the provisions (if any) of The Military Rules of Evidence must be applied because of Article 3 thereof. Conversely, if the matter under review is determined to be a rule of procedure, the law prescribed in the federal enactment other than The Military Rules of Evidence could be applied. This situation is somewhat unsatisfactory. The question of conflict in

---

23. Supra fn 4 p.73

federal statutes will be discussed later.

What is a rule of procedure? Phipson<sup>24</sup> describes it as follows: "Adjective law is divided into two main heads: procedure and evidence. Procedure is the part of adjective law that deals with the initiation of proceedings in the appropriate court, the ascertaining of the precise nature of the dispute between the parties and the due and regular conduct of the proceedings. Inasmuch as it is usually in the course of such proceedings that evidence is required, there is a real sense in which the law of evidence may be regarded as a branch of the law of procedure, but it is more convenient to divide them and treat them as separate branches of adjective law."

P.K. McWilliams,<sup>25</sup> in his index at 693 seems to imply procedure to be the formal and physical steps taken prior to and during a trial. An excellent description (and one that the writer understands) of the difference between a rule of procedure and a rule of evidence is as follows:

"The necessity for serving notice to

---

24. Supra fn 13 p.77

25. Supra fn 10 p.76

produce documents as a pre-requisite for the introduction of secondary evidence may be regarded as a rule of evidence, but the manner of serving such notice is undoubtedly subject to rule of court."<sup>26</sup>

The Municipal Court in which this case was heard was empowered to enact rules of practice and procedure and therefore the expression "rule of court" can be read as "rule of procedure."

Again, procedure has been explained as "that which regulates the formal steps in an action or other judicial proceedings; the course of procedures in court; the form, manner, and order in which proceedings have been and are accustomed to be held."<sup>27</sup>

The judges and writers seem to agree that the rules of procedure are not substantive law, but are in reality administrative and policy rules governing the physical means by which charges, suits and evidence are brought before the court. The question of whether the evidence is accepted by the court,

---

26. Schratt v Accurate Instrument Co. Inc. (1942)  
40 N.E.R. (2d) 823

27. Mahoning Valley Ry Co. v Santoro (1915) 112  
N.E.R. 190,191

even after all the "procedure" has been followed is a question of the law of evidence, at least as the writer understands it, and he will endeavour to maintain this distinction throughout this thesis.

#### Comments

The above discussion of the meaning of four words and phrases is important, as the writer feels that any study of the law of evidence is certain to be at least partially unsuccessful unless the student or writer has a clear understanding of the difference in the meaning of these words and phrases. Often difficulty is caused by writers and judges mis-using these expressions, or in fact using them incorrectly, and if the student is not clear in his own mind as to their meaning, he can easily be confused.

## CHAPTER V

SECTIONS 12(1) AND 158(1) OF  
THE NATIONAL DEFENCE ACT

Introduction

Before discussing the scope of Section 158(1) of The National Defence Act (1970)<sup>1</sup> which provides for the publication of The Military Rules of Evidence, the writer considers he should mention briefly the Federal Government's authority to establish courts martial and a Court Martial Appeal Court.

Constitutionality of Courts Martial

The British North America Act<sup>2</sup> contains two

- 
1. R.S.C. (1970) c.N-4
  2. (1867) 30 and 31 Vict. c.3 - While it is irrelevant and probably well known to scholars, it is interesting to note the statutes which were assented to on 29 March, 1867; on the same day as our Constitution came into existence. Five statutes, including our Constitution were assented to, and the other four were: (1) an act for removing doubts as to the validity of certain marriages between British subjects at Odessa; (2) an act to supply £369,118 to the Service of the Year ending 31 March, 1867; (3) an act to repeal dog licences; and (4) the Metropolitan Poor Act. Our Constitution was therefore assented to along with other legislation dealing with confused people, poor people and animals. Considering the subject of the five statutes placed before Queen Victoria as a result of whatever system caused all five to appear the same day, no doubt can be left in the reader's mind as to the importance placed on the Canadian Constitution at that time, at least by the British Monarch and Government.

authorities to support the right of the Federal Government to establish military courts. Firstly, Section 101 states as follows: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional courts for the better administration of the laws of Canada." Additionally, and more specifically, Section 91(7) of the same Act provides that the Federal Government has exclusive jurisdiction in matters of "Militia, Military and Naval Service and Defence." Therefore, there is authority to establish military forces, and to establish courts. However, does The British North America Act authorize the establishment of courts martial for the purpose of hearing military offences?

A leading case on Section 101 of The British North America Act is Reference re Privy Council Appeals.<sup>3</sup> This was a reference to the Supreme Court of Canada to determine whether the Federal Parliament had authority to amend The Supreme Court Act<sup>4</sup> to

---

3. [1940] 1 D.L.R. 289

4. R.S.C. (1927) c.35

prohibit appeals to the Privy Council, and make the Supreme Court the final court of appeal in criminal and civil matters in Canada.

In his judgement, Sir Lyman P. Duff, C.J.C. decided that Parliament had such authority and that the amendment to The Supreme Court Act was intra vires the Parliament of Canada. The decision was partly based on the fact that the rules of construction were such that if a matter did not fall within provincial jurisdiction pursuant to Section 92 of The British North America Act, "then it must fall within the legislative competence of the Dominion Parliament."

While this decision dealt only with the power to establish a general court of appeal, the reasoning applied to construction of The British North America Act to establish the Supreme Court would also apply to the phrase in Section 101 "...of any additional courts for the better administration of the laws of Canada." It was held in Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919, that "additional courts" may be established by Parliament pursuant to Section 101 of The British North America Act provided their jurisdiction does not trench upon

provincial rights.<sup>5</sup>

Another factor is that these military courts are for the purpose of maintaining peace, order and good government in the Canadian Forces. The expression "peace, order and good government" is discussed in the Privy Council Reference in the context of peace, order and good government in the federal domain, and military courts martial are clearly in the federal domain and deal only with federal law. For example, Section 120(1)(a) of The National Defence Act (1970) makes all offences under any federal act an offence under The National Defence Act (1970) and nowhere in the Act is there any attempt to make provincial offences chargeable under the Act.

Therefore, since national defence is a federal responsibility, the establishment of military courts martial and appeal courts to administer the law of the Armed Forces seems clearly to be intra vires the Federal Parliament.

Additionally, other courts, such as the Federal Court,<sup>6</sup> which is not a final court of appeal,

---

5. [1922] 1 A.C. 191

6. R.S.C. (1970) (2d Supp) c.10

have been established under the authority of Section 101 of The British North America Act. Thus, there seems to be a sound constitutional basis for the establishment of military courts martial.

Constitutionality of Evidence Law  
in The National Defence Act (1970)

Courts martial deal with criminal matters and are thus criminal proceedings. A criminal proceeding has been defined as "A proceeding in Court in the prosecution of a person charged or to be charged with the commission of a crime, contemplating the conviction and punishment of the person charged or to be charged."<sup>7</sup> There are other equally accurate definitions which all relate either to "a crime" or "a violation of criminal law." Sections 63 to 121 of The National Defence Act (1970) are all offence sections that constitute crimes, many of which are offences that do not exist under civilian law. Therefore, there is a need for rules of evidence of some type, because there are no civilian rules that strictly apply to some of these offences.

It seems reasonable to conclude that Parliament can establish "law of evidence" in criminal

---

7. Ballentines Law Dictionary (3rd) 291

matters at courts martial by reason of Section 91(27) of The British North America Act. It is clearly quite proper for Parliament to authorize the use of rules of evidence employed in civil courts at courts martial because these rules apply to criminal proceedings and fall within Section 91(27) of The British North America Act.

Additionally, it is equally proper for Parliament to establish any other rules as rules of evidence at courts martial. The important factor being that Parliament is not limited in establishing rules of evidence for civil or military courts to those rules that exist at any certain point in time. Parliament appears to have the authority to create whatever rules of evidence it wishes to, so long as it does so in the federal domain. Whether or not there are any restrictions on the rules that can be established will be examined later in this Chapter. However, before doing so, a few paragraphs are included showing examples of legislation in other federal statutes relating to rules of evidence.

Other Statutes Legislating Law of Evidence in Criminal Matters

The Royal Canadian Mounted Police Act<sup>8</sup>

---

8. R.S.C. (1970) c.R-9

provides in Section 34(6) that the rules of evidence at a trial authorized by that Act will be the same as those followed in proceedings under The Criminal Code in the province where the trial is held. The North West Mounted Police Act<sup>9</sup> legislated rules of evidence in Sections 10 and 24(2) when a member served with the Militia, or when charged with desertion. Additionally, earlier military legislation, as discussed in Chapter III of this thesis, legislated rules of evidence to be applied at courts martial. There seems to have been no question over the years that the Royal Canadian Mounted Police and the Armed Forces had and have the authority to legislate rules of evidence for their courts and tribunals.

It therefore follows that although the present Section 158(1) of The National Defence Act (1970) is somewhat unusual, federal legislation regarding rules of evidence for courts other than civilian courts of ordinary criminal jurisdiction is neither unusual nor new.

From the foregoing, it is submitted that there

---

9. R.S.C. (1886) c.45

is little doubt that the Federal Government has the authority to make rules of evidence applicable to criminal matters, both for civilian and military courts. The best example of the employment of this authority in the civil domain is The Canada Evidence Act.<sup>10</sup>

Sections 12(1) and 158(1) Quoted

The question to be examined now is the scope of the authority given in The National Defence Act (1970) to the Governor in Council to make regulations respecting the rules of evidence. For easier reference when reading this Chapter, the two pertinent sections of The National Defence Act (1970) are quoted hereunder:

Section 12(1)

"The Governor in Council may make regulations not inconsistent with this Act, for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes of this Act into effect."

---

10. R.S.C. (1970) c.E-10

Section 158(1)

"Subject to this Act, the rules of evidence at a trial by court martial shall be such as are established by regulations made by the Governor in Council."

For the reader's assistance, a copy of the whole of The Military Rules of Evidence are attached to this paper as Appendix B. Since these Rules are generally only available to civilians in the form of the Order in Council, the writer considered it would be next to impossible for the reader to view these Rules as a whole while reading this paper, unless a copy of them was readily available.

Section 12(1) - A General Provision for Making Regulations

Section 12(1) of The National Defence Act (1970) is a general authority to make regulations covering all aspects of the operation and government of the Canadian Forces. The wording of the section is virtually identical to Section 42 of The Naval Services Act<sup>11</sup> and Section 139 of The Militia Act.<sup>12</sup>

---

11. R.S.C. (1927) c.139

12. R.S.C. (1927) c.132

Going back to the first Militia Act,<sup>13</sup> Section 96 provided for a somewhat wider authority in that the section provided that "the Governor in Council may make regulations relating to anything necessary to be done for the carrying into effect of this Act..."

A very modern comparison with Section 12(1) is Section 21(1) of The Royal Canadian Mounted Police Act.<sup>14</sup> The two sections are identical except that The Royal Canadian Mounted Police Act section does not contain the words "not inconsistent with this Act." However, this expression has little meaning in law when included in a section of this nature because subordinate legislation must, in any event, remain within the parameters of the authorizing Statute.<sup>15</sup>

It is doubted that the present Military Rules of Evidence would have been valid, had they been established solely under the authority of Section 12(1). The phrase "for carrying the purposes and provisions of this Act into effect" might appear at first

---

13. S.C. (1868) c.40

14. Supra fn 8 p.91

15. E.A. Driedger - The Construction of Statutes  
(Toronto: Butterworth & Co. (Canada) Ltd., (1974)  
200 and 306

glance to provide a very wide regulation-making authority, but such is not the case. The authority provided in Section 12(1) seems to be limited to making regulations of a procedural and administrative nature,<sup>16</sup> and while a fairly wide interpretation can be given to this authority, it should not be used to impose penalties or affect rights.<sup>17</sup>

Section 12(1), as presently worded, is identical to Section 13(1) of the original National Defence Act<sup>18</sup> of 1950. At that time, the rules of evidence at a court martial were stated in Section 152(1) to be the rules of evidence applicable in the province where the court martial was held. However, Section 152(4) specifically stated that "a court martial, wherever held, shall not as respects the conduct of its proceedings or the reception or rejection of evidence or as respects any other matter or thing, be subject to any Act, law or regulations not in force in Canada." This provision was not included in the amendment to Section 152 of

---

16. Ibid at 306

17. M.M. Hoyt, Bill Drafting Manual (Fredericton: The Queen's Printer for the Province of New Brunswick, 1966) 90

18. S.C. (1950) c.43

The National Defence Act<sup>19</sup> in 1959, which section is now Section 158 of The National Defence Act (1970). This omission in the amendment of 1959 will be discussed more fully in the paragraphs dealing with Section 158(1).

However, it seems that the inclusion of sub-paragraph (4) in Section 152 in 1950 would suggest that Section 13 (now Section 12(1)) was not intended to be used to create new law in the field of evidence. Section 152(4) was a special rather than general section of the Act and it mentioned regulations. Clearly, Section 13, a general section, would have been subject to Section 152(4), a special section. The normal rule of construction is that the general yields to the special. Therefore, even if the old Section 13 of The National Defence Act (1950) could have been interpreted so as to allow new law for courts martial to be established, Section 152(4) specifically prohibited this in the field of evidence. In The City of Ottawa v The Town of Eastview,<sup>20</sup> Rinfrit J. stated: "The principle, is, therefore,

---

19. S.C. (1959) c.5

20. [1941] S.C.R. 448 at 462

that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject matter of the rule from the general Act." This decision of the Supreme Court of Canada deals with two statutes, one being general and one being special, but it is submitted that the same rule of construction would apply to a general and special section of the same Act.

This proposition is further supported by the provision of The Royal Canadian Mounted Police Act.<sup>21</sup> Section 21(1) of that Act is the general regulation-making authority, and, as mentioned already, is virtually identical to Section 12(1) of The National Defence Act (1970). Section 34(6) of The Royal Canadian Mounted Police Act provides that "the rules of evidence at a trial under this part shall be the same as those followed in proceedings under the Criminal Code..." In that statute, no effort is made to create by regulation rules of evidence which are different to those that

---

21. Supra fn 8 p.91

exist in civilian criminal courts, presumably because under the wording of Section 21(1) of The Royal Canadian Mounted Police Act no such authority exists, and there is no other section of the Act which could be used to make additional or new rules of evidence.

Under the rules of construction of statutes, the general yields to the special or particular. Section 12(1), a general section, yields to Section 158(1), a special or particular section. Therefore, Section 12(1) of The National Defence Act (1970) is the section that creates authority for the establishment of all Governor in Council regulations except those relating to rules of evidence.

Section 158(1) - A Special Provision  
for Making Regulations

Section 158(1) of The National Defence Act (1970)<sup>22</sup> is so short and indeed so general with respect to conditions imposed, that it can easily be passed over without being given a proper and thorough study. However, considering the rather voluminous regulations made under this section, namely The

---

22. Quoted in full at p.94

Military Rules of Evidence, it is considered necessary, before actually examining The Military Rules of Evidence, to determine the scope and intention of this section.

To begin with, the wording of this section is not detailed or specific and, in fact, is somewhat imprecise because the phrase "rules of evidence" is neither defined nor limited. The meaning of the phrase "rules of evidence" was discussed in Chapter IV of this thesis explicitly because the phrase is not defined in The National Defence Act (1970) and is often used improperly or in a rather vague and inexact manner.

It may be that in dealing with the words in Section 158(1), "the vaguer they are, the more imprecise they are, the greater the delegation."<sup>23</sup> Section 158(1) is the only section that deals with the establishment of rules of evidence by regulation. Furthermore, it was enacted nine years<sup>24</sup> after The National Defence Act (1950) came into force. Therefore, while the wording is somewhat imprecise, it is quite clear that it deals with two specific

---

23. Charles P. Curtiss - A Theory of Legislative Interpretation - (an excerpt contained in (1957) C.B.R. p. 528)

24. Supra fn 19 p.97

matters, namely:

- (a) the establishment of regulations and
- (b) the creation of rules of evidence.

This section could not be used to make regulations for any purpose other than the creation of rules of evidence. Regulations on other subjects must be established pursuant to Section 12(1) of The National Defence Act (1970).

The question, therefore, in this Chapter is to attempt to assess what Parliament intended when it repealed the old Section 152(1) of The National Defence Act (1950) and enacted what is now Section 158(1). In order to come to some conclusions on this question, the writer now proposes to examine some of the words in Section 158(1), including the implication of these words, and will comment briefly on other federal statutes that appear to apply to Section 158(1).

(i) "Subject to this Act"

To determine the meaning of a section in a statute, one must examine the ordinary and usual meaning of the words used,<sup>25</sup> and examine all the

---

25. Victoria City v Bishop of Vancouver Island  
[1921] 2 A.C. 384 at 287

surrounding circumstances including the statute itself as a whole.<sup>26</sup> With this in mind, the words "Subject to this Act" will be examined at length, because they are the only words in Section 158(1) that could create any restrictions on the making of regulations establishing rules of evidence.

There are relatively few cases dealing with the meaning of the expression "Subject to this Act," and consequently, most of the discussion in this Chapter will deal with the words themselves and the sections of The National Defence Act (1970) that seem to apply.

Firstly, a few comments on some of the cases decided on the subject words. The construction of a statute or a section is a matter of law.<sup>27</sup> Sections of a statute should not be interpreted to conflict, unless that intention is clearly shown in the statute,<sup>28</sup> and in fact, every effort should be made to read the various sections of the statute "in harmony." This, the writer proposes to attempt, although it has been held that the words "Subject to

---

26. Director of Public Prosecutions v Schildkamp [1969] 3 All E.R. 1640 at 1655

27. Vancouver v Township of Richmond (1959) 17 D.L.R. (2d) 548

28. R v Deckert [1958] O.W.N. 163 at 164

the provisions of this Act" show the intention of the legislature to modify and alter, as well as codify the law.<sup>29</sup> The question of whether The Military Rules of Evidence are a code will be discussed in the next Chapter, but it is informative to note that the expression "Subject to this Act" suggests modification and alteration in the law.

Obviously, the authority to establish Military Rules of Evidence is not subject to every section of The National Defence Act (1970) but only to those related, directly or indirectly, to the law of evidence. There is no doubt that the definition section, Section 2, applies to the meaning of words in Section 158(1). Additionally, the following sections, and possibly others, apply directly: Sections 9 and 10 (appointment and duties of Judge Advocate General); Section 12 (authority to make regulations); Section 29 (redress of grievance); Sections 48 and 49 (publication of regulations and validity of documents issued under The National Defence Act); Sections 56 to 62 (pleas in bar of

---

29. Hinton Electric Co. v Bank of Montreal  
(1903) 9 B.C.L.R. 545 at 550

trial, place of offence and trial, limitations, civil jurisdiction and parties); Sections 78, 87, 101, 104, 109, and 119 (auxiliary legal definitions regarding certain offences); Section 120 (civil offences are offences under this Act); Section 121 (foreign law); Sections 122 and 123 (cognate offences and attempts); Section 128 (ignorance of law no excuse); Section 129 (civil defences); Sections 130 and 131 (insanity); Section 158(2) (publication); Section 159 (documents); Section 161 (evidence on commission); Section 162 (view); Section 164 (oaths); Section 172 (insanity at trial); Section 173 (insanity at time of offence); Section 181 (new trial); Sections 197 and 198 (right to appeal); and Section 201 (Court Martial Appeal Court).

The majority of the sections of The National Defence Act (1970) listed in the preceding paragraph, have some effect on the establishment of the rules of evidence, but their main impact is at trial where these sections actually supplement the rules of evidence. For example, Section 78(3) provides that unless the contrary is shown, six months absence without authority shall constitute an intention to desert. This section would have to be read in

conjunction with any Military Rules of Evidence dealing with proof of intention.

There is, however, one section that may significantly affect the rules of evidence established pursuant to Section 158(1) and that is Section 129, which reads as follows:

"All rules and principles from time to time followed in the civil courts in proceedings under the Criminal Code that would render any circumstance a justification or excuse for any act or omission or a defence to any charge, are applicable to any defence to a charge under The Code of Service Discipline, except in so far as such rules and principles are altered by or inconsistent with this Act."

This section is very similar to Section 7(3) of The Criminal Code,<sup>30</sup> and is repeated in full in this paper so that it can readily be examined while reading the next few pages. In the first place, it is contended that the rules and principles referred to in this section would only be those rules and

---

30. R.S.C. (1970) c.C-34

principles applicable to offences included in The Criminal Code. Additionally, Section 129 would not appear to apply rules and principles followed in proceedings under any other federal statute, to charges under The National Defence Act (1970).

However, if a charge is laid under Section 120 of The National Defence Act (1970) of contravening a section of, for example, The Narcotic Control Act,<sup>31</sup> rules and principles in that Act which constitute a justification or excuse, or a defence could certainly be used. But, this would not be so because of Section 129 of The National Defence Act (1970), but because such excuse or defence is included in The Narcotic Control Act, or is covered by Article 11(2) of The Military Rules of Evidence.

Secondly, none of the rules or principles followed in Criminal Code charges would apply if they were altered by or inconsistent with The National Defence Act (1970). For example, the defence of alibi is not inconsistent with The National Defence Act (1970) and is thus a valid defence at a court martial. However, a defence that the alleged crime

---

31. R.S.C. (1970) c.N-1

occurred outside Canada might be valid in the civil court pursuant to Section 5(2) of The Criminal Code but would be inconsistent with Section 57 of The National Defence Act (1970) which specifically provides that a charge can be laid regardless of where the offence occurred.

Thirdly, Section 129 seems to refer to substantive law as distinguished from the law of evidence. For example, the word "defence" refers to a "circumstance" and "charge." The wording suggests substantive defences such as alibi, provocation, lack of intent, insanity, to name a few. The section does not seem to suggest that all the rules of evidence applicable in a civil court hearing a charge under The Criminal Code apply to courts martial.

In any event, probably many excuses or defences provided by The Criminal Code are not applicable because they are inconsistent with The National Defence Act (1970). In this regard, it must be remembered that most of the offences in The National Defence Act (1970) do not exist in civil law and thus civil defences in The Criminal Code are usually inconsistent with defences applicable to military offences.

Finally, when Parliament enacted Section 158(1) of The National Defence Act in 1959, and commenced it with the expression "Subject to this Act," it must have been aware of Section 129, because if Section 129 includes all rules of evidence available to defend Criminal Code charges, there would have been little reason to enact Section 158(1) in the first place. In this regard, it should be remembered that Section 129 of The National Defence Act (1970) includes the expression "except in so far as such rules and principles are altered by or are inconsistent with this Act." It would seem that this expression would clearly make Section 129 subject to Section 158(1). In any event, Parliament is deemed to know what it is doing and not to make mistakes.<sup>32</sup>

Therefore, it appears that Section 129 does not apply to the rules of evidence employed to present a defence or prevent the prosecution from introducing damaging evidence, but applies only to certain of the defences themselves being available to a serviceman on trial before a court martial, and only if the charge is one under Section 120 of The National Defence Act (1970) of contravening a section

---

32. Commissioners for Special Purposes of Income Tax v Pemsel [1891] A.C. 531 at 549

of The Criminal Code. The manner of presenting the defence provided in The Criminal Code would be guided by The Military Rules of Evidence, and not by civilian rules of evidence.

It should be noted that some of the "defences" open in The Criminal Code include shifts of onus to the accused. For example, Section 730(2) of The Criminal Code provides that the burden of proof shifts to the accused when he attempts to prove an exception or the exemption. In the case of Cherkas v the Queen,<sup>33</sup> it was stated that Section 129 of The National Defence Act (1970) brought Section 730(2) of The Criminal Code into operation. The accused, charged with absence without leave, used as a defence "custom of the Service." The court stated this defence was an exception of excuse and that the burden of proving "custom of the Service" shifted to the accused. The Learned Judge of the Court Martial Appeal Court in that case, referred only to The National Defence Act (1970) and The Criminal Code, but made no mention of Article 11 of The Military Rules of Evidence which includes virtually that exact provision. This practice by the Court Martial

---

33. (1974) C.M.A.C. (unbound) dated 31 May, 1974,  
at 2

Appeal Court exemplifies the difficulty that will be discussed later, that the judges of that court often discuss the rules of evidence in a civilian context, as if The Military Rules of Evidence did not exist, when in fact there is a Military Rule of Evidence on that very point. The result is that it is often difficult to follow and understand the decisions, particularly as to whether a certain Military Rule of Evidence used at the court martial applies at all. The way in which the judges of the Court Martial Appeal Court write their judgement could be predicated on the way in which counsel for the Crown presents their arguments. That is, if Crown counsel do not emphasize or quote The Military Rules of Evidence, there is little reason for the judges to do so either.

As a matter of interest, Section 4 of The Criminal Code provides that "nothing in this Act affects any law relating to the government of the Canadian Forces," while at the same time The National Defence Act (1970) provides in Section 129 that some of the law in The Criminal Code applies at courts martial. This appears to be a rather strange and uncertain situation. However, it probably has no significant effect on the problem being

discussed in this Chapter.

(ii) "Shall"

The word "shall" is of paramount importance in Section 158(1). It is doubted that the meaning of this word can be more clearly stated than it was in Re Public Finance Corporation and Edwards Garage Ltd<sup>34</sup> where it was held that the provision is imperative. Where, however, an Interpretation Act expressly provides that "shall" is to be construed as imperative, and "may" is to be construed as permissive, the court is bound to assume that the Legislature when it used "shall" intends that the provision shall be imperative.

Considering the fact that Section 28 of The Interpretation Act<sup>35</sup> defines "shall" and "may," there is little doubt that it is mandatory that the rules of evidence established under Section 158(1) of The National Defence Act must be used at courts martial. Whether or not the rules established, namely The Military Rules of Evidence, are the only rules of evidence applicable, will be discussed in the next Chapter, although the clear and simple wording of Section 158(1) may leave little alternative to that proposition.

---

34. (1957) 22 W.W.R. 312 at 317

35. R.S.C. (1970) c.I-23

(iii) Other Applicable Statutes

Federal statutes do not stand entirely alone, and cannot be interpreted without reference to some other federal statutes which have general application to all legislation, unless otherwise stated in the statute under examination. A principle to be remembered when referring to other federal statutes for assistance in interpreting the meaning of a statute or section is that federal statutes are all equal in authority, in the same way as French and English versions of the same statute are equal in authority.<sup>36</sup>

Therefore, unless expressly provided, The National Defence Act (1970) is not subject to any other Acts. However, while The National Defence Act (1970) is not subject to any other statutes, some statutes such as those mentioned hereunder must be considered when reading The National Defence Act (1970). In the first place, the Act must be construed so as not to contravene The Canadian Bill of Rights.<sup>37</sup> At this stage, while studying Section 158(1), The Canadian Bill of Rights does not appear to present

---

36. John D. Honsberger, "Bilingualism in Canadian Statutes" (1965) 43 C.B.R. 314 at 321

37. R.S.C. (1970) Appendix III s.2

any difficulties, although it will be discussed again when some of The Military Rules of Evidence themselves are being examined. The Interpretation Act<sup>38</sup> also applies since The National Defence Act (1970) does not otherwise state, and the words and expressions of Section 158(1) must be read in conjunction with that Act. The Statutory Instruments Act<sup>39</sup> has some minor application to this part of the study but will be discussed in more detail when The Military Rules of Evidence themselves are examined. The Canada Evidence Act<sup>40</sup> presents some interesting problems respecting its application at courts martial, but this statute has no real application to Section 158(1) itself.

The British North America Act<sup>41</sup> has application, but only as previously outlined in this Chapter, in that Parliament has the right to establish rules of evidence for courts martial.

### Conclusion

It can be seen from the comments in this

---

38. R.S.C. (1970) c.I-23 s.3(1)

39. S.C. (1970-71-72) c.38

40. Supra fn 10 p.93

41. Supra fn 2 p.86

Chapter that there are some statutes, other than The National Defence Act (1970) that must be considered when reading Sections 12(1) and 158(1), and indeed The Military Rules of Evidence themselves. Additionally, there are a number of sections of The National Defence Act (1970) that limit or restrict the rules of evidence that can be established, such as Section 78(3) (presumption of desertion). On the other hand, Section 129 incorporates certain civilian criminal law into The National Defence Act (1970) and might even include some evidence law, provided that evidence law is only incorporated regarding offences under The Criminal Code and charged under Section 120 of The National Defence Act (1970).

The writer has, as a result of the above examination, concluded that Parliament had the power to establish rules of evidence for use at courts martial pursuant to Section 158(1) of The National Defence Act (1970) and that those rules must be employed at courts martial. This opinion is consistent with Article 3 of The Military Rules of Evidence, which makes it mandatory that the rules apply at all courts martial. It is also clear that a number of sections of The National Defence Act (1970) expand or restrict the authority to make rules of

evidence, but there are few restrictions, except possibly in The Canadian Bill of Rights, on the type of rules of evidence that the Governor in Council can establish.

The next Chapter of this paper will try to come to grips with the question of what kind of evidence rules could be established under Section 158(1) and what rules of evidence, were in fact, established thereunder. There will be particular emphasis in the next Chapter on whether the rules of evidence established constitute an exhaustive code.

## CHAPTER VI

ARE THE MILITARY RULES OF EVIDENCE EXHAUSTIVEIntroduction

It is difficult, when thinking back over the years in the Legal Branch of the Canadian Armed Forces, to picture in one's mind the concept that legal officers have had of what The Military Rules of Evidence really are. Most of the officers involved in the final drafts of these Rules and their submission to cabinet have since retired or died. Additionally, there was no need, under The Regulations Act<sup>1</sup> (since repealed) to submit a draft of new regulations to the Department of Justice, as there is now under Section 3(2) of The Statutory Instruments Act.<sup>2</sup> Consequently, Department of Justice comments on the Rules would not have been prepared at that time.

The Rules were, however, required to be placed before Parliament either within fifteen days after publication in the Canada Gazette or within the first fifteen days of the next session.<sup>3</sup> Since Parliament

---

1. R.S.C. (1952) c.235

2. S.C. (1970-71-72) c.38

3. S.C. (1959) c.5 s.3(1)

was not sitting on 1 October, 1959, it was required that The Military Rules of Evidence be placed before Parliament before the end of January, 1960.<sup>4</sup> They were, in fact, placed before Parliament on 20 January, 1960.<sup>5</sup>

The amendment to Section 152(1) of The National Defence Act (1950) in 1959, was totally new.

Thus, when attempting to determine the meaning of a section, about which there is no precedent, no case law, and little other comments, it is useful to fall back on such factors as the purpose of the whole statute, alternatives available but not employed, traditional and statutory practice in countries with legislation on the same subject, and even on Parliamentary debates. It appears to the writer, that since Section 158(1) (originally Section 152(1)) is so different from previous authority regarding rules of evidence at courts martial, the intention of Parliament can only be determined by inference combined with a common sense interpretation of the actual words of the section in light of the whole Act. It should also be remembered that laymen can act as prosecutors

---

4. Debates: House of Commons, Index for 1959 and 1960 -  
Sittings of the House

5. Personal correspondence

and defending officers at courts martial. This factor is important when one is considering whether the intent of Parliament was to create a code of evidence, which would add to uniformity, particularly if laymen were participating. Therefore, all of these factors will be examined in this Chapter to assist in determining what was intended when Section 158(1) was enacted.

#### Parliamentary Debates

It is interesting to note that the elected representatives who spoke on Bill C-27, which is described herein as The Amendment (1959), and included an amendment to what is now Section 158, were rather unclear as to what the rules were actually intended to be. When introducing Bill C-27 (which became law on 21 March, 1959), the Honourable Mr. Pearkes stated regarding the rules of evidence:

"The second subject dealt with in the Bill is the question of rules of evidence at trials by courts martial. A codification of the Canadian law of evidence applicable to courts martial has been prepared, and authority will be sought to introduce this code."<sup>6</sup>

---

6. Debates - House of Commons - 19 February, 1959 - 1959-Vol II p.1217

On 25 February, 1959, at second reading, the Honourable Mr. Pearkes stated as follows:

"New rules of evidence are being prepared which will cover all aspects of the law of evidence which normally arise in connection with courts martial. As the Honourable member realizes, the rules of evidence in the various provinces are not all uniform. Therefore, it is considered desirable, as service personnel move from one province to another, to have a uniform code of evidence and that it will be published and circulated to all concerned."<sup>7</sup>

When asked by the Honourable Mr. Hellyer (of wide renown at a later time to the Canadian Forces) on which province's rules of evidence The Military Rules of Evidence were based, the Honourable Mr. Pearkes replied:

"We are preparing a codification of the law of evidence. It will be applied to all service personnel, no matter where they are serving, whether in a province of Canada or overseas."<sup>8</sup>

---

7. Debates - House of Commons - 25 February, 1959 - 1959-Vol II p.1378

8. Id at 1378

At this stage, Mr. Pearkes appears to consider that The Military Rules of Evidence will be a codification, but not based on the law of evidence practised in any particular province. However, his idea that the rules will be a code is somewhat denigrated when the Honourable Mr. Nielsen questions him about amendments to The Military Rules of Evidence when the civilian law of evidence is changed by precedent. Mr. Pearkes replied:

"I am informed that there is no uniform code of rules of evidence that applies in all provinces. The Code will be tabled. When amendments are made to the rules of evidence any changes required in the code will be made by way of amendment."<sup>9</sup>

The Minister of National Defence seems to be saying that The Military Rules of Evidence are a code, and that the only way changes in civilian evidence can be incorporated is by amending The Military Rules of Evidence. The preceding quotations constitute virtually the whole of the Parliamentary debates on this matter, and thus have been quoted extensively. However, it certainly appears that

---

9. Id at 1379

neither the Minister nor the Members who asked questions were entirely clear in their own minds as to the implications of the proposed code. The words "code" or "codification" are used by the Minister seven times in the few words he spoke on this subject so it would be reasonable to assume that he thought The Military Rules of Evidence were a code. However, the Minister was less clear on what this implied. It should be noted, at this time, that while the debates are of interest from a research and scholar's point of view, they are not admissible in court as evidence of the intentions of Parliament.<sup>10</sup> Therefore, any intentions or assumptions apparent from these debates will not be discussed further, as they would simply confuse the issue of interpreting Section 158(1) of The National Defence Act (1970). In fact, the extreme brevity of Parliamentary debate probably reflects very little one way or the other.

#### Court Martial Appeal Court

The Court Martial Appeal Court was also established in The Amendment (1959), discussed in the

---

10. Corry, J.A. "The Use of Legislative History in the Interpretation of Statutes" (1954) 32 C.B.R. 624 at 637

immediately preceding section. Prior to that time, there was a Court Martial Appeal Board. The present Court Martial Appeal Court does not appear to have specifically addressed itself to what the rules really are, although it has commented on a number of them and even in one case suggested that a rule might be ultra vires the Governor in Council.<sup>11</sup> In Burgess v The Queen,<sup>12</sup> one of the first cases heard after the establishment of the Court Martial Appeal Court, Cameron, P., stated:

"In reaching that conclusion we have not found it necessary to take into consideration the effect of the new 'Regulation respecting the Rules of Evidence at trial by Court Martial,' which were approved by Order in Council 1959-1027 of August 13, 1959, and became effective October 1, 1959 after the trial of the appellant."

From this quotation, it is clear that the court considered The Military Rules of Evidence would have some impact on their future decisions regarding appeals from courts martial.

---

11. Ziesman v The Queen, (1966) 3 C.M.A.R. 17 at 21

12. (1960) 2 C.M.A.R. 151 at 154

However, the manner in which the Court thereafter discusses The Military Rules of Evidence, or does not discuss them, in its judgements, leaves unclear the Judges' views on what they think the Rules really are. This matter will be examined further when certain selected rules are examined by way of illustration. However, the Court Martial Appeal Court judgements offer little assistance in determining what Parliament intended when it enacted The Amendment (1959).

#### The Change in 1959

The change in 1959 in the statutory authority for the establishment of rules of evidence at courts martial was so significant that this change, in itself, must be compared with previous legislation to shed what light it can on Parliament's intention.

In Chapter III of this paper, the rules of evidence traditionally applicable at courts martial were discussed. It will be noted from that Chapter that, by statute, the rules of evidence at courts martial from 1868 to 1950 were those applicable in English Criminal Courts, except insofar as changes have been made under The Naval Service Act, 1944.<sup>13</sup>

---

13. S.C. (1944-45) c.23 s.104(15)

With the passage of The National Defence Act (1950), the rules of evidence in Canadian civil courts were applied at courts martial. Thus, it can be seen that for eight-two years, the rules of evidence at Canadian courts martial were the rules of evidence in civil courts, and that in most cases, this was specifically provided for in the statute itself.

To re-enforce the obvious intent of Parliament between 1868 and 1950 that the civilian evidence law applied, Section 152(4) of The National Defence Act (1950) provided that "a court martial, wherever held, shall not as respects the conduct of its proceedings or the reception or rejection of evidence or as respects any other matter or thing, be subject to any Act, law or regulation not in force in Canada..."

This section is clear indication, at least to the writer, that respecting the rules of evidence at that time, no rule could be established by anyone, for use outside Canada, that was inconsistent with the evidentiary law on that subject in Canada. The intention of Parliament throughout the ninety-one years prior to 1959 was clear, only British, and then Canadian civilian evidence rules applied.

The only hint of an exception to this was Section 104(15) of The Naval Service Act, 1944, but in that case the Minister, not the Governor in Council, was authorized to make regulations "governing the assembling, constitution, precedence and practice of courts-martial and shall include among them provision for evidence to be taken on oath."<sup>14</sup> The Minister, in his Regulations effective 15 October, 1945, simply stated "The rules of evidence applied by civil courts of Canada in criminal cases tried before them, apply to courts martial."<sup>15</sup>

Section 104(15) is important, but it does not signify any major departure from the past, because there are two major differences in that section and Section 158(1) of The National Defence Act (1970). Firstly, in The Naval Service Act (1944), the area in which regulations could be made were carefully specified. Included were "procedure and practice of courts martial." While the law of procedure is often taken to include the law of evidence, it is doubted that the word "procedure" when included with the word "practice" was intended to authorize the establishment

---

14. S.C. (1944-45) c.23

15. King's Regulations for the Government of His Majesty's Canadian Naval Service (1945), Article 15.88(1)

of rules of evidence. Probably, it was simply assumed by the legislature that the rules of evidence in civil courts<sup>16</sup> would apply to courts martial as they had traditionally in both the United Kingdom and Canada. That, of course, is exactly what the Minister provided in his regulation. The only change he made from the custom and practice over the preceding seventy-six years was to provide that the rules of evidence in Canadian, rather than British civil courts would apply.

Section 158(1) of The National Defence Act (1970) simply states that "the rules of evidence... shall be as established by the Governor in Council." This is a far wider authority with no restriction at all except the few mentioned in Chapter V. The new wording is such a drastic change that it must be assumed to mean much more than had been intended by the various earlier statutes.

The second difference is that Section 104(15) of The Naval Service Act (1944) authorized regulations by the Minister, whereas Section 158(1) of The National Defence Act (1970) authorized regulations by the Governor in Council. The difference is substantial.

The authorities suggest that if the enabling section of a statute is clear as to the purpose of

---

16. Supra fn 1 Chapter I p.10

the regulations to be enacted, the Governor in Council has very wide powers. In fact, that power is not even restricted if it affects freedom of the person.<sup>17</sup> The Halliday case dealt with preventative detention under The Defence of the Realm (Consolidation) Regulation, 1914, established pursuant to The Defence of the Realm Act (1914).<sup>18</sup> The case arose out of the preventative detention, without trial, of one Arthur Zadig. The judgement dealt at length with the emergency of 1914 created by World War I. It was argued, among other points by Mr. Zadig's counsel, that some limitation must be placed on the general words in the statute; that general words in a statute could not take away the vested rights of a subject or alter the fundamental law of the constitution; that the statute was penal and must be strictly construed; and that a construction said to be repugnant to the constitutional tradition of England could not be adopted. The court did not agree with any of these arguments and looked extensively into the reason and purpose for the legislation.

The above case was followed with approval in The Attorney General for Canada v Hallet and Carey Ltd.<sup>19</sup>

---

17. The King v Halliday, [1917] A.C. 260 at 270

18. (1914) 4 and 5 Geo. 5 c.29

19. [1952] A.C. 247

Both of these cases dealt with emergency legislation and the decision of the court might be slightly different when interpreting peacetime legislation. However, Mr. Elmer Driedger has stated that "the doctrine of unreasonableness does not apply to Governor in Council orders."<sup>20</sup>

Consequently, it is submitted that regulations established by Governor in Council can be very wide in their scope, and can even change the general law of the land so long as they are not inconsistent with the statute which contains the enabling authority. In effect, regulations established by the Governor in Council can make substantive law.<sup>21</sup>

It should, at this time, be remembered that The National Defence Act (1970), while it legislates extensively about day to day matters involving the operation of the military forces, is in many ways emergency legislation. Interpretations of its various sections by the courts might well be decided in the same way as were The Halliday case and The Hallet and Carey cases; namely by an extensive

---

20. Driedger, E., The Construction of Statutes, 292 (Toronto: The Butterworth Co., 1974)

21. Blackwood v The London Chartered Bank of Australia (1874) 30 L.T. (N.S.) 45

examination of the intention of the statute as a whole. The courts might well decide that in order to maintain order, discipline and justice in the Canadian Armed Forces at all times and under all circumstances, the power of the Governor in Council pursuant to Sections 12(1) and 158(1) of The National Defence Act (1970) is very extensive.

Reason and Purpose for  
The National Defence Act

The reason and purpose for a statute can be examined to assist in determining the scope of the regulations made under one of its sections.

The National Defence Act (1970) is a statute, which, in effect, is a constitution for the military arm of the Canadian Government. Canadian military forces have, since 1914, operated in many parts of the world, often in very large numbers, and continue to do so today. The Government must establish and operate its forces in such a fashion that they can react immediately, and can operate wherever they are sent.

Discipline and simplicity of direction or instruction are both traditional and vital to any military force. Huge efforts, not always successful, are made to keep orders and instructions, both

written and verbal, as simple and uniform as possible. This is not done because of any lack of intelligence or education on the part of military personnel, but because simple orders, instructions and regulations are less likely to be misunderstood in emergency or uncertain situations. The vast majority of the written material by which the military is governed is designed to be as easy to use abroad or during wartime, as it is in the more leisurely pace of peacetime. Simplicity is greatly assisted by uniformity. An order that applies at Canadian Forces Station Beausejour in Manitoba can usually apply equally as well at Canadian Forces Base Europe in Lahr, Germany, or at Canadian Forces Station Bermuda. Most units have local orders, but they cover only matters clearly applicable to that geographical location.

Virtually all provisions of The National Defence Act (1970) apply wherever units of the Canadian Forces operate, and considering the various places Canadian Forces are based, the importance of uniformity and simplicity becomes obvious. Discipline is to a large degree based on uniformity, and the same breaches of discipline can be charged regardless of where a serviceman is stationed.

It is therefore surprising that it took Canada so long to establish uniform rules of evidence for courts martial, considering the integral part courts martial and uniformity play in the Canadian Forces. As mentioned in Chapter III, the old system of applying provincial rules, particularly at courts martial out of the country, was invariably difficult and awkward, and it is a high compliment to legal officers who practised at courts martial prior to 1959, that they were able to conduct these courts with high quality and accuracy.

It appears to the writer that The Amendment (1959) was simply a further step in uniformity to attempt to ensure that the quality of courts martial proceedings was maintained at a high level, and to ensure that all servicemen tried by courts martial were tried under the same rules of evidence.

Therefore, the very wide scope allowed by the words of Section 158(1) must have been intended to create as much uniformity as was possible, while at the same time making allowance for new developments in the law or for matters unintentionally omitted. From a very practical point of view, it is much more convenient to carry a codification from place to place

throughout the world where military lawyers travel, than to attempt to carry all the law of evidence necessary to comply with the rules in the jurisdiction where the court is held, or which the accused declares to be his domicile.

If The Military Rules of Evidence had been written for the whole of Canada, they would no doubt have provided that where there was no rule established, the common law would be interpreted in the light of reason and experience.<sup>22</sup> Since the military is just one small segment of the whole Canadian society, it was logical and sensible that where no Military Rule of Evidence was established, the rules of evidence in some particular place in Canada would apply.

Military Rule of Evidence Article 4 reads as follows:

"Where, in a trial, a question respecting the law of evidence arises that is not provided for in these Rules, that question shall be determined by the law of evidence, in so far as not inconsistent with these Rules, that would apply in respect of the same question before a civil court sitting in Ottawa."

---

22. Canada: Law Reform Commission, Draft Rules of Evidence, s.4

However, in spite of Article 4, The Military Rules of Evidence are as uniform as they can reasonably be made.

#### Parliament's Alternatives

Parliament had many options open to it in 1959. If Parliament had intended that the rules of evidence at courts martial were to continue to be the rules of evidence used in "criminal courts of ordinary jurisdiction" in the province where the court was being held, no change in Section 152 of The National Defence Act (1950) would have been necessary. If Parliament had intended that the rules of evidence at courts martial were to be the rules of evidence used in "criminal courts of ordinary jurisdiction" in Ontario, Manitoba, or in fact any one province in the Confederation so as to create uniformity, Section 152(1), (2) and (3) of The National Defence Act (1950) could have been repealed and the following section enacted:

"The rules of evidence at a trial by court martial held in Canada or outside Canada shall be the same as those from time to time followed in proceedings under the Criminal Code in civil courts

in the Province of Manitoba, except in so far as such rules are inconsistent with this Act or regulations."

An amendment of this nature to replace Section 152(1), (2) and (3) of The National Defence Act (1950), but leaving subsection 4 as it was,<sup>23</sup> would have ensured that the rules of evidence at courts martial continued to be the same as those followed in civil courts. Further, the amendment suggested above would have continued the traditional custom in Canadian courts martial which had been followed for 82 years before 1950, but at the same time would have created uniformity at all courts martial.

Another alternative was to leave Section 152 as it was, and, there seems to be no reason that an accurate summary of the rules of evidence in one or all of the province of Canada could not have been prepared in the form of a regulation made pursuant to Section 12(1) of The National Defence Act (1970), which is the general regulation-making authority. The regulation would have had the advantage of summarizing the rules of evidence used in civil courts in order that a manageable amount of reference

---

23. Section 152(4) of The National Defence Act (1950) is quoted in full at p.124

and source material could be carried by military lawyers when practising in court, regardless of where the court martial was held. Obviously, such a summary would have been much easier to prepare if only the rules of evidence of one province were to be summarized, but the rules could have been summarized for all ten provinces.

Neither Parliament nor the Governor in Council selected any of these obvious alternatives. It therefore seems that since Parliament did not select obvious or traditional options, it must have intended to do something quite different.

What Parliament did in 1959 was to repeal any reference in The National Defence Act (1950) to the rules of evidence applicable in ordinary courts of criminal jurisdiction and to enact a special section dealing with rules of evidence established by regulation. This is the first time in the history of rules of evidence at courts martial in Canada that such a broad authority has been created. The Naval Service Act (1944)<sup>24</sup> mentioned earlier, gave the Minister authority to make rules

---

24. S.C. (1944-45) c.23

in certain specified areas of evidence and procedure. It is emphasized here that such authority was given, not to the Governor in Council but to the Minister, who has much less regulation-making authority.

#### The British and American Practice

In the United Kingdom, courts martial are still governed by the rules of evidence in criminal proceedings in British civil courts. The Army Act,<sup>25</sup> as an example, so specifies in Section 99. The British Forces, however, have not issued rules of evidence as a separate chapter or book, but publish a manual of Navy, Army and Air Force law which includes a great deal of evidence law and evidence rules.

The situation in the United States is similar to that in England. The Uniform Code of Military Justice, Section 611(a) provides as follows:

"The procedure, including modes of proof in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations

---

25. (1955) 3 & 4 Eliz. 2, c.18

which shall, so far as he deems practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to, or inconsistent with this Chapter."<sup>26</sup>

However, rather than operate as the British do, by simply using the same source material as civilian lawyers to determine the rules of evidence, the Americans have prepared "rules of evidence" as Chapter 13 of the Manual for Courts-Martial United States. These rules are written in narrative form and attempt to summarize the rules of evidence up to the date of publication. For example, Article 140 in the Manual for Courts-Martial (1951) did not contain reference to the rules established by Miranda v Arizona<sup>27</sup> or United States v Tempin,<sup>28</sup> which cases had occurred after the revision of 1951. These two cases dealt with the warnings given to accused persons

---

26. U.S.C. (1952) Title 50 c.22 at 7397

27. (1966) 384 U.S. 436

28. (1967) 16 U.S.C.M.A. 629

or suspects prior to the taking of statements. The changes created by these cases were incorporated into the revision entitled Manual for Courts-Martial United States (1969). Another illustrative example is that the 1969 revision of The Manual for Courts-Martial changed sub-paragraph (a)(5) of Article 140 on corroboration in confessions to reflect the decision in Opper v United States<sup>29</sup> and Smith v United States.<sup>30</sup> These two cases dealt with a change in the corroborating of statements made by the accused. Prior to these cases, actual corroboration of the statements were necessary before the statements themselves could be considered as evidence. The two above cases held that if there was independent evidence corroborating at least some of the essential facts in a statement by an accused, then those essential facts could be admitted as evidence.

There were, of course, many changes in the 1969 revision, but the two changes just mentioned will serve as examples. From the above, and an examination of the rules themselves, it is clear that the Rules of Evidence in the Manual for Courts-Martial United States (1969) are simply a summary or

---

29. (1954) 348 U.S. 84

30. (1954) 348 U.S. 147

consolidation of the existing civilian criminal rules of evidence.

The President can make rules inconsistent with district court rules as was explained in United States v Jarvis.<sup>31</sup> However, this simply seems to make things more complicated than ever for American military lawyers.

The preceding few paragraphs serve to illustrate that both the United Kingdom and the United States are continuing the practice and tradition now centuries old that the rules of evidence at courts martial are the rules practised in comparable civilian criminal courts.

If Canada had intended that this traditional practice was to continue, Section 152 of The National Defence Act (1950) would have remained as it was, the rules of evidence in one province would have been selected, or The Amendment (1959) would have contained the phrase "not inconsistent with the rules of evidence in civil courts."

---

31. (1952) U.S.C.M.A. 368 - The law officer at a court martial allowed in evidence of the identity of a victim through a Korean doctor who had heard friends name and discuss the victim, at the scene of a murder, whereas federal court rules required that a person be identified by a witness personally familiar with that person. (affirmed (1952) 3 C.M.R. 102)

The new section (now Section 158(1) of The National Defence Act (1970)) simply states that the rules of evidence at courts martial shall be such as are established by regulations. No limitations or restrictions except for the introductory words "subject to this Act" were included.

It is considered important to include in this Chapter both the traditional practice in England and the United States and to outline the alternatives that were and are available to Parliament. In the interpretation of statutes, it is often vital to ascertain what Parliament could have done, when trying to determine what Parliament actually did do.

#### Special Procedure in Section 158(1)

A final factor deals with special procedures, as distinguished from general procedures enacted by statute.

Mr. E. Driedger<sup>32</sup> has stated that "where a special procedure or modus operandi is prescribed for a special case, as in Blackburn v Flavelle<sup>33</sup>

---

32. Driedger, E.A., Construction of Statutes, 99

33. (1881) 6 A.C. 628.

the courts are likely to regard it as exclusive on the same principle that a codifying statute is regarded as exhaustive, namely that the legislature has manifested an intention to create a complete legislative code governing the subject matter." It is difficult to imagine an authoritative statement being more applicable to Section 158(1) of The National Defence Act (1970) than is the above. Section 158(1) envisages a special procedure; the establishment of regulations, to accomplish a special purpose, the creation of rules of evidence.

Mr. Driedger goes on to say "But if the special statute is later, then why say there is a repeal to the extent of the inconsistency; why not simply say that Parliament in enacting the later impliedly excluded its subject matter from the former."<sup>34</sup> Section 158(1) enacted in 1959 is certainly later than Section 13 (now Section 12(1)) which was enacted in 1950. Consequently, since Section 12(1), a general section, lists those areas in which Governor in Council regulations could be made, and Section 158(1), a special section, lists a different subject about which Governor in Council

---

34. Supra fn 32 at 183 and 184.

regulations can be established, it seems clear that the regulations made pursuant to Section 158(1) are not limited within the confines applicable to regulations made under Section 12(1).

### Conclusion

In the construction of statutes, it is fair to say that the doctrine of literal construction applies but literal in total context and not as in the past, being literal in part of the context.

Therefore, considering:

- (a) The National Defence Act (1970) as a whole;
- (b) the time sequence of the enactment of Sections 12(1) and 158(1);
- (c) the purpose of the Act;
- (d) the other options available to Parliament;
- (e) the circumstances and physical problems of access to source material at military courts under the old rules;
- (f) the sharp break away from traditional rules of evidence authorized in 1959; and
- (g) the words themselves that constitute Section 158(1),

it appears to the writer that Section 158(1) created

authority for the establishment of any reasonable rules of evidence the Governor in Council saw fit to make which were not inconsistent with The Canadian Bill of Rights. This, in effect, is a code, and codes are generally considered to be exhaustive unless they specify otherwise.

Thus, at courts martial, it is The Military Rules of Evidence alone that apply. Unfortunately, partly because of lack of clarity in Articles 3 and 4 of The Military Rules of Evidence and difficulties encountered when trying charges laid under Sections 120 and 121 of The National Defence Act (1970), some problems and confusion arise as to whether any other rules of evidence except The Military Rules of Evidence apply at courts martial. These difficulties are the subject of the next Chapter. It should, however, be noted here that the very existence in the rules of an article such as Article 4 dealing with cases not provided for, supports the contention that The Military Rules of Evidence are in fact an exhaustive code.

There is little doubt but that this opinion will not be universally accepted by readers of this thesis, but it is far more difficult to support the theory that Section 158(1) only authorized a summary

of existing law, than it is to support the position that Parliament intended the Governor in Council to create a substantially exhaustive code of evidence.

The exhaustiveness of the code is the subject of comments in the next Chapter.

## CHAPTER VII

CASES NOT PROVIDED FORIntroduction

In the first six Chapters of this thesis, the writer has examined:

- (a) very briefly the historical and social development of military law firstly in the United Kingdom and secondly in Canada;
- (b) the traditional rules of evidence employed at courts martial in the United Kingdom, the United States, and Canada; and
- (c) The Amendment (1959), now Section 158(1) of The National Defence Act (1970), along with relevant sections of that Act, and other applicable statutes.

As a result of this examination, the writer has concluded that The Military Rules of Evidence:

- (a) are intra vires the Parliament of Canada and the Governor in Council regardless of whether or not they reflect the present rules of evidence applied in civil courts;

- (b) are a code and thus substantially exhaustive;
- (c) are limited in scope only by other sections of The National Defence Act (1970) discussed in Chapter VI hereof and The Canadian Bill of Rights; and
- (d) must be employed at all courts martial.

Having come to the above possibly contentious conclusions, the writer will now direct his attention to Article 4 of The Military Rules of Evidence, which reads as follows:

"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 by the law of evidence, in so far as not inconsistent with these Rules, that would apply in respect of the same question before a civil court sitting in Ottawa."

Article 4 must be read in conjunction with Military Rule of Evidence Article 3 which reads in part:

"These Rules apply to all court martial proceedings..."

Therefore, as a starting point, it is submitted that as a general rule, when a question regarding the law of evidence arises, The Military Rules of Evidence

shall apply, if there is a rule on that point. Having come to this conclusion, the problems begin. However, before Article 4 is examined further, it will be helpful to see how other codes of evidence deal with cases not provided for in those codes.

Provisions in Other  
Codes of Evidence

(i) Canadian Law Reform Commission Code

The Canadian Law Reform Commission Draft Evidence Code provides at Section 4:

"If a matter of evidence is not provided for by this Code, the principles of common law as they may be interpreted in the light of reason and experience shall govern."<sup>1</sup>

When reading commentaries by the Commissioners on the various sections of the Code, it is surprising to note that they seem confident that most, if not all, matters of admissibility are covered by their Code. This confidence may spring from the fact that the Code is very broad in scope and general in its wording.

---

1. Canada: Law Reform Commission, Draft Evidence Code (unpublished)

Presumably, if it was decided to adopt The Evidence Code, it would be enacted as a statute by Parliament and would thus be equal in authority to other federal statutes. However, unless the Code contains a section which requires its provisions to override evidentiary rules in other federal statutes, the Code could be largely ineffective. For example, Section 2 provides in part that "This Code applies to (a) criminal proceedings..." while at the same time, Section 2 of The Canada Evidence Act<sup>2</sup> provides that Part I of that Act will apply to all criminal and civil proceedings over which Parliament has jurisdiction. The Federal Court Act<sup>3</sup> provides in Section 53(2) that if a question of evidence is not provided for in The Canada Evidence Act, the court can apply any provincial rule of evidence by which that piece of evidence would become admissible.

The Criminal Code<sup>4</sup> provides in Section 7(1) that the Code applies "throughout Canada..." and The Criminal Code has a number of rules of evidence,

- 
2. R.S.C. (1970) c.E-10 s.2
  3. R.S.C. (1970) (2nd Supp) c.10
  4. R.S.C. (1970) c.C-34

such as Section 237(1)(a) and (c). The Narcotic Control Act<sup>5</sup> provides in Section 9(1) that a certificate of analysis is admissible in evidence, and in the absence of evidence to the contrary, is proof of the statements therein.

Both The Criminal Code and The Narcotic Control Act provisions mentioned might be covered by Section 78 (Hearsay Exception: Availability of Declarant Immaterial) and Section 79 (Requirement for Authentication and Identification), of The Evidence Code, but these sections are extremely wide and general and are likely to be restricted by the courts, in spite of Section 5 which encourages the courts to apply the Code.

From the above examples, it is clear that the Law Reform Commission Draft Evidence Code faces enormous difficulties if and when it is applied in court. Probably, the only effective way to ensure that The Evidence Code operates as intended by the Commissioners would be to repeal all evidence law in all federal statutes. Such a task would certainly be formidable and would take years to accomplish.

If The Evidence Code were enacted now without

---

5. R.S.C. (1970) c.N-1

other statutes being amended, the law of evidence could become an even more impenetrable jungle than it is now.

The above comments on the original draft of the Law Reform Commission Evidence Code were written in November, 1975. In December, 1975, the Commission published a "Report on Evidence"<sup>6</sup> which includes its proposed Evidence Code in final form along with commentaries. Normally, the writer would have deleted the previous paragraphs and started again with the Evidence Code published on 15 December, 1975. However, the new Code seems to have attempted to solve some of the difficulties incorporated in the first draft and which were commented upon by the writer.

Section 4 of the original draft Code is now Section 3 of the Code of December 1975, and is the same except that principles of common law are no longer to apply in determining what to do in cases not provided for. This omission creates a system of interpretation based solely on reason and experience and is possibly a somewhat dubious innovation.

It is interesting to note in the commentaries

---

6. Canadian Law Reform Commission; Report on Evidence, 15 December, 1975

to Section 3 of the final Code the following sentences "Precedent is, of course, a major source of experience and may be looked to, but it will not have binding force. The completeness of treatment made possible by this section makes the rules a Code."<sup>7</sup>

However, a substantial change in the new Code on the present subject, and one suggested by the writer earlier, has been included. Section 89 repeals The Canada Evidence Act, Sections 47(2), 123, 139(1), 195(3), 256(2) and 586 of The Criminal Code, Section 41 of The Federal Court Act, and Section 19 of The Juvenile Delinquents Act. The Canada Evidence Act and all of the specified sections of the other statutes mentioned above deal with evidence law.

The repealing of other evidence law, along with the requirement in Section 2 that the Code be liberally interpreted, removes much of the difficulty that the first code encountered in attempting to make the Code the final and only law of evidence applicable to courts or proceedings described in Sections 86 and 87 of the Code.

(ii) Model Code<sup>8</sup>

Rule 2 of The Model Code simply states that

---

7. Ibid at 51

8. American Law Institute, Model Code of Evidence (Philadelphia: American Law Institute, 1942)

these Rules shall apply in all actions. Comments about this Rule<sup>9</sup> suggest that, if enacted into law, The Model Code provisions would abrogate prior judicial decisions contrary to the Rules and would prevail over inconsistent statutory law. However, the comments also suggest that possibly there should be a provision in the Rules repealing all inconsistent evidentiary law. As can be seen, the drafters of The Model Code certainly faced this problem squarely, although the Code never was enacted into law as Rules of Court in any American jurisdiction.

(iii) Uniform Rules of Evidence (1953)<sup>10</sup>

Rule 2 of The Uniform Rules provides:

"Except to the extent to which they may be relaxed by other procedural rules or statutes applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."

This Rule specifically makes provision for exceptions

---

9. Ibid at 76

10. Handbook of the National Conference of Commissioners on Uniform State Laws (1953), 165, (Baltimore: The Lord Baltimore Press, 1953)

to The Uniform Rules being enacted in other legislation. This is most surprising considering that the Commissioners who wrote them were attempting to make uniform the law of evidence in any State that adopted them. They may, however, simply have realized that States which adopted the Rules would make exceptions anyway. The California Code has a similar provision, and possibly it is necessary to allow for this type of flexibility if the codification of the law of evidence is to be realistic and workable.

(iv) The California Code<sup>11</sup>

This Code provides at Section 300 as follows:

"Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a district court of appeal, Superior Court, Municipal Court, or justice court..."<sup>12</sup>

The annotations make the interesting observation that the Code applies to all proceedings in California courts except to those court proceedings to which it is made inapplicable by Statute. Creating evidence law in other statutes and providing that it will prevail notwithstanding the Code of Evidence would

---

11. 29B West's Annotated California Code (1966)

12. Ibid at 29

simply make the Code inapplicable in more and more situations as the years passed. This concept seems to be rather complex but it appears to operate reasonably satisfactorily in California. Unlike the Canadian Law Reform Commissioners, the drafters of The California Code were under no illusions as to its completeness.

(v) British and American Military Rules of Evidence

Neither the United Kingdom nor the United States have enacted a "code" of military evidence. In both countries, military courts employ civilian criminal evidence rules. The Americans have their Manual for Courts Martial United States (1969) and the British have Manuals of Military Law, but all of these publications are really summaries of civil criminal evidence law, up to the date of the current summary or revision.<sup>13</sup>

(vi) Conclusion

The Uniform Code and The California Code make provision for statutory exceptions to the evidence provisions of the Codes. The Canadian Law Reform Commission Code and The Model Code make

---

13. See Chapter VI

no such provisions, although the end result in all four codes is probably the same: that is, that exceptions can be made.

Considering the fact that the four Codes described hereinbefore are designed to cover all evidence law within a particular jurisdiction, and there are still difficulties with cases not provided for, it is not surprising that Article 4 of The Military Rules of Evidence, which Rules constitute a field of law within a larger field of law, causes problems of interpretation.

While the writer has concluded that by virtue of Section 158(1) of The National Defence Act (1970) and Article 3 of The Military Rules of Evidence, they must be applied at courts martial, a conclusion has not been reached as to whether any other rules of evidence can also be applied simultaneously, and regardless of Article 4.

It is unfortunate that Article 3 was not drafted so as to be more exclusive. The Article clearly states that The Military Rules of Evidence apply at courts martial, but it does not state what other rules apply or do not apply. This omission is one of the main reasons for the difficulties encountered in interpreting Article 4. It therefore is necessary, for the purpose of this thesis, to

examine the applicability of certain civilian evidence rules, and then to determine their relevance; (a) when The Military Rules of Evidence cover a question of evidence; (b) when they do not; and (c) when the question has never been decided any Court.

The Canada Evidence Act<sup>14</sup>

Section 2 provides that "This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatever respecting which the Parliament of Canada has jurisdiction in this behalf."

The Canada Evidence Act, on the one hand, is a general Act intended to cover all judicial proceedings over which Parliament has authority, while The Military Rules of Evidence, on the other hand, are special rules established for a particular type of court. Additionally, The Military Rules of Evidence were established many years after The Canada Evidence Act. The situation therefore may appear to be that Section 158(1) of The National Defence Act (1970) and Section 2 of The Canada Evidence Act are in conflict, and that Section 158(1)

---

14. R.S.C. (1970) c.E-10

has impliedly repealed Section 2 as regards the rules of evidence at courts martial. However, it is not necessary to come to such a conclusion, when a more reasonable alternative is available.

Therefore, because Section 158(1) of The National Defence Act (1970) authorizes a special procedure, and The Military Rules of Evidence were enacted much later than The Canada Evidence Act, it seems reasonable to conclude that Section 158(1) excluded The Canada Evidence Act from being employed at a court martial except pursuant to Article 4 of The Military Rules of Evidence.

In The Construction of Statutes, Mr. E. Driedger states as follows:

"But where a special procedure or modus operandi is prescribed for a special case, as in Blackburn v Flavelle ( [1881] 6 A.C. 628), the courts are likely to regard it as exclusive on the same principle that a codifying statute is regarded as exhaustive (Bank of England v Vogliano Bros ( [1891] A.C. 107)), namely that the legislature has manifested an intention to create a complete legislative code governing

the subject matter."<sup>15</sup>

The above opinion by Mr. Driedger clearly contemplates the situation under discussion here and supports the conclusion that The Canada Evidence Act only applies if Article 4 of The Military Rules of Evidence can be invoked.

There are, therefore, two situations of interest involving The Canada Evidence Act. Firstly, if a question of law of evidence is not provided for at all in The Military Rules of Evidence but is provided for in The Canada Evidence Act, then The Canada Evidence Act provision would clearly apply because of Article 4 of The Military Rules of Evidence.

Secondly, if a Canada Evidence Act section is incorporated by reference into The Military Rules of Evidence, there should be little difficulty. For example, Article 105(4) of The Military Rules of Evidence states in part that "the documents referred to in Sections 19, 21, 22, 23, 24, 25, 26, 27, 30 and 31 of The Canada Evidence Act are public documents within the meaning of these Rules and may be proved as provided in those sections." The numbering of the

---

15. Driedger, E.A., The Construction of Statutes, 52 (Toronto: The Butterworth Co. (Canada) Ltd., 1974)

sections of The Canada Evidence Act listed in The Military Rules of Evidence are in accordance with the section numbers in The Revised Statutes of Canada (1952).<sup>16</sup> In The Revised Statutes of Canada (1970), section numbering is the same, except that Sections 30 and 31 of the 1952 revision are now Sections 31 and 32 respectively.

While incorporation by reference should cause little trouble, there are problems which seem to baffle most military lawyers when dealing with Sections 19, 21, 22, 23, 24, 25, 26, 27, 30 and 31 of The Canada Evidence Act. In law, legislation by reference does not normally include later amendments,<sup>17</sup> and there seems to be little reason in this case, on the basis of The National Defence Act (1952) and the construction of Article 105 of The Military Rules of Evidence, to include such later amendments as part of The Military Rules of Evidence.<sup>18</sup> Therefore, the incorporated part of The Canada Evidence Act is those sections previously

---

16. R.S.C. (1952) c.307

17. Mainwaring v Mainwaring [1942] 1 W.W.R. 728 at 732

18. Couglen v Ontario Highway Transport Board [1968] S.C.R. 569 at 574

listed and as written in The Revised Statutes of 1952, and including the amendment to Section 30 enacted in 1953.<sup>19</sup> There were no other amendments to the relevant sections of The Canada Evidence Act between 1952 and 1 October, 1959.

As mentioned in Chapter II, The Military Rules of Evidence are published for use by the Armed Forces in Queen's Regulations and Orders for the Canadian Forces, Volume II, Appendix XVII. Explanatory notes have been added, and under Article 105, these notes repeat the incorporated sections of The Canada Evidence Act, without specifying that they are taken from the 1952 and 1952-53 Statutes. However, today most lawyers use The Revised Statutes of Canada (1970) and find that not only is the numbering of Sections 30 and 31 different in the latest revision which they are using, but also, if they read very carefully they find that Sections 21(b), 23, 26 and 27 are not identical to the 1970 Revision, although they appear to be. For example, in Section 26(2) and (3), the 1952 Revision uses the expression "as prima facie evidence" whereas the 1970 Revision uses the expression "in evidence as prima facie proof." There is no doubt

---

19. S.C. (1952-53) c.2

that the Commissioners who wrote the 1970 Revision of the Statutes of Canada had the authority to make such alterations in language as they thought necessary to preserve uniformity and bring out more clearly what is deemed to be the intention of Parliament.<sup>20</sup> However, this type of tinkering with words has little to be said for it, particularly in a statute such as The Canada Evidence Act which has extremely wide and continuous application.

Be that as it may, those sections of The Canada Evidence Act, as amended to 1 October, 1959, and listed in Article 105 apply at all courts martial. No other sections of The Canada Evidence Act are specifically mentioned in The Military Rules of Evidence.

Having concluded that The Canada Evidence Act applies if:

- (a) there is no provision at all in The Military Rules of Evidence but there is in The Canada Evidence Act, of which Section 37 is an example; and
- (b) specific sections are incorporated as

---

20. The Revised Statutes of Canada Act S.C. (1964-65)  
c.48 s.5

certain ones are by virtue of Article 105; the writer will now discuss briefly situations where a section of The Canada Evidence Act is substantially repeated in an article of The Military Rules of Evidence.

Article 74(2)(b) and (3) of The Military Rules of Evidence is substantially the same as Section 4(2) and (5) of The Canada Evidence Act, which deals with the competency and compellability of a spouse when the marital partner is charged with one of a listed series of offences under The Juvenile Delinquents Act or The Criminal Code. However, Section 4(2) of The Canada Evidence Act makes a spouse compellable only in listed offences, whereas Article 74(2)(a) of The Military Rules of Evidence expands this compellability to any situation where the spouse is charged with inflicting personal injuries or violence or coercion on his or her spouse.

In another instance, Section 5(2) of The Canada Evidence Act provides that answers to incriminating questions are inadmissible against a witness at any criminal trial or other criminal proceedings, providing the witness objects to answering the question. Article 97(2) of The Military Rules of Evidence is similar to Section 5(2) of The Canada

Evidence Act, except that in Article 97(2), the protection of the Article is afforded without the witness raising any objection.

In both examples above, the provisions of The Military Rules of Evidence are broader in scope than the comparable section of The Canada Evidence Act. The result is that the serviceman normally has more protection under The Military Rules of Evidence than he has under The Canada Evidence Act if he is a witness. However, he may have less protection at a court martial when charged with an offence where his wife can give evidence under Article 74(2)(a) of The Military Rules of Evidence, if the charge is one where the wife could not give evidence if heard before a civil court. Probably, if an attempt were made to argue that The Canada Evidence Act provisions applied, the Judge Advocate would decide that The Military Rules of Evidence would prevail, firstly because there is a provision on the point, and secondly, if they enhance the rights of the accused.

There are other similar cases such as the comparable articles and sections dealing with judicial notice and privilege, but the general rule would still apply that The Military Rules of Evidence would prevail,

unless, of course, they contravened The Canadian Bill of Rights.

A more subtle problem arises in a few cases where The Military Rules of Evidence make general provision regarding a question of evidence, and The Canada Evidence Act makes a particular but different provision on the same point. For example, except for public documents, the best evidence rule applies to prove the content of a document at a court martial.

Section 159(1) of The National Defence Act (1970) provides that "such classes of documents and records as are prescribed in regulations made by the Governor in Council may be admitted as evidence of the facts therein stated..." On the authority of this section, Articles 2(1)(g), 51, 52, 53, 104(1)(c) and 105 were included in The Military Rules of Evidence. However, Article 59 provides that the content of documents, except for public documents, must be proved by primary evidence or as provided in Article 103(1) by secondary evidence, if primary evidence is not available. The general effect is to require the maker to appear as a witness.

Article 104(1)(c) contains a peculiar provision directly related to the present subject and to Article 4. This Article provides that secondary

evidence of the existence, character or content of a document may be given when the original is a document that may be proved by secondary evidence before a civil court sitting in Ottawa. This Article could not apply in the first instance, at least with respect to regular entries and business records because of Articles 54 and 106 which require that primary evidence be produced.

However, Section 30 of The Canada Evidence Act, which section was enacted in 1969,<sup>21</sup> provides that in certain types of business records which are not public documents, contents can be proved by admission of the document if oral evidence in respect of the matter would be admissible. Air Canada weigh bills used to prove the origin of items in a marijuana importing case were held to be admissible under this section.<sup>22</sup>

At a court martial, such documents as were admitted in the Martin case, could only be admitted and the contents thereof proved by the best evidence rule. The reasoning here is that while there is a

---

21. An Act to Amend The Canada Evidence Act  
S.C. (1968-69) c.14 s.4

22. Re Martin and The Queen (1973) 11 C.C.C. (2d)  
224 at 230

section in The Canada Evidence Act dealing with the admissibility of such documents, there is a general, although different Article in The Military Rules of Evidence on the same subject and consequently, The Military Rules of Evidence would prevail.

This situation raises a point common to codes, and that is that they are all very general in nature. Thus, if The Canada Evidence Act has a specific provision on a matter of evidence, that point is most likely covered generally in The Military Rules of Evidence and thus those rules would prevail.

A final item regarding The Canada Evidence Act and its applicability at courts martial is Section 37 which provides that the relevant provincial law of evidence applies to proceedings over which Parliament has legislative authority. A court martial is a criminal proceeding, over which Parliament has authority, but it seems highly unlikely that Section 37 would ever have application. The cases seem to hold that provincial evidence legislation applies only to matters over which the provincial legislature has jurisdiction under The British North America Act.<sup>23</sup> In any event, the mandatory nature of Section 158(1) of The National

---

23. Marshall v Regina (1960) 129 C.C.C. 232 at 238

Defence Act (1970) is such that The Military Rules of Evidence would prevail.

In the final analysis, it would appear that The Canada Evidence Act does not apply at courts martial except for sections incorporated by reference into The Military Rules of Evidence. In cases where there is no provision in The Military Rules of Evidence, but there is in The Canada Evidence Act, the applicable section of The Canada Evidence Act combined with case law and common law would be applied.

The Criminal Code<sup>24</sup>

The comments in the previous section about The Canada Evidence Act would generally apply to The Criminal Code regarding evidence law contained therein. The difficulties faced in dealing with Section 129 of The National Defence Act (1970) and Article 11(2) of The Military Rules of Evidence were discussed at some length in Chapter V of this paper. Further, the question of the admissibility of certain certificates of analysis referred to in Section 234(1)(d) and 4 of The Criminal Code, will be discussed in the next section and are an exception

---

24. R.S.C. (1970) c.C-34

to the comments in this section.

Section (7)(1) of The Criminal Code provides that the provisions of the Act apply throughout Canada except for certain instances in the Yukon and The Northwest Territories. However, like The Canada Evidence Act, The Criminal Code is a general statute and thus the evidentiary sections could not, as a general rule, be applied at courts martial, since Section 158(1) of The National Defence Act (1970) applies special evidence laws to particular courts, namely military courts.

Section 4 of The Criminal Code provides that "nothing in this Act affects any law relating to the government of the Canadian Forces." The Military Rules of Evidence would seem to be a set of laws relating to the government of the Canadian Forces. Thus, Section 4 takes the application of the law in The Criminal Code out of military legislation, although Section 129 of The National Defence Act (1970) and Article 4(2) of The Military Rules of Evidence bring some of it back into application. The situation as to the applicability of The Criminal Code is rather confusing and uncertain even if an offence in The Criminal Code is charged under Section 120 of The National Defence Act (1970).

The invasion of privacy legislation in Part IV.I of The Criminal Code appears to complicate the situation further. Section 178.16(1) deals with the admissibility of an intercepted private communication and evidence obtained directly or indirectly as a result of information acquired by interception of the private communication, and provides that all such evidence is inadmissible unless certain conditions have been met. Subsection (3) provides that subsection (1) applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction. While this may seem to be a special section dealing with a special situation and thus capable of overriding the special evidence provisions applicable to courts martial, the writer does not think that such is the case.

In the writer's view, the rule stands that only The Military Rules of Evidence apply to the admissibility of evidence at courts martial unless The Military Rules of Evidence make no provision at all. The application of this principle might well put the witness in an impossible situation. For example, evidence obtained as a result of an illegally

intercepted private communication which was a "confession" would be inadmissible under Section 178.16 of The Criminal Code, but might be quite admissible under Article 47 of The Military Rules of Evidence. Pursuant to Article 7 of The Military Rules of Evidence, all relevant evidence is admissible unless excluded pursuant to Article 4 (cases not provided for), Part III (Methods of Proof and Forbidden Types of Evidence) and Part IV (Permitted Methods of Proof). Since Part III and Part IV constitute 93 out of 112 Articles, Article 7 is really subject to The Military Rules of Evidence. However, if evidence is relevant and not inadmissible under Parts III and IV of The Military Rules of Evidence, it is admissible regardless of any contrary provision in The Criminal Code, and this principle would apply equally to intercepted private communications.

This is not to say that a witness who had contravened Section 178.11 of The Criminal Code in intercepting a private communication is immune from prosecution in the civil courts: he could be prosecuted unless he can put himself into the "random monitoring" classification provided in Section 178.11(3).

In general, therefore, the rules of evidence in The Criminal Code do not apply at courts martial

provided The Military Rules of Evidence contain even a very general rule of evidence on the point. The problems of admissibility created by Part IV.I of The Criminal Code are unique in their nature. The questions that arise are most interesting but it would be more appropriate to discuss them in a separate paper.

### Special Cases

Before considering what law actually does apply in cases where there is no rule of evidence, even in a general case, in The Military Rules of Evidence, it is appropriate here to discuss the rules of evidence applicable in certain very special cases.

Some federal statutes contain rules of evidence applicable only to certain offences within that statute. The Narcotic Control Act,<sup>25</sup> The Food and Drug Act,<sup>26</sup> and The Criminal Code<sup>27</sup> all provide that, in the absence of any evidence to the contrary, the introduction of a certificate

---

25. R.S.C. (1970) c.N-1 s.9(1) and (2)

26. R.S.C. (1970) c.F-27 s.30(1) and (2)

27. R.S.C. (1970) c.C-34 s.237(1)(d) and (4)

of an analyst is proof of the statements contained therein, or of the proportion of alcohol in the blood, as the case may be. The admissibility of such a certificate as proof of its contents applies only to charges of possession of a narcotic, possession of a narcotic or controlled drug for the purpose of trafficking, and trafficking under The Narcotic Control Act or The Food and Drug Act, as applicable, and to charges of impaired driving and driving with more than 80 mgs of alcohol in the blood under The Criminal Code. Under all of these statutes, the analyst may only be called by the defence with the permission of the court. There is no identical provision in The Military Rules of Evidence or The National Defence Act (1970) and one would think that the normal best evidence rule would apply since that rule is included in The Military Rules of Evidence.

However, the writer considers that these certificates would be admissible as proof of their contents without the analyst being called as a witness, provided the charge before the court martial was one laid under Section 120 of The National Defence Act (1970) alleging a contravention of the relevant section of The Narcotic Control Act, The Food and Drug Act or The Criminal Code. The reasoning is that

Section 120 of The National Defence Act (1970) incorporates by reference all of the offences included in all federal statutes, as offences under Section 120. Section 120(1) simply provides in part that "An act or omission (a) that takes place in Canada or (b) that takes place outside Canada...and is punishable under Part XII of this Act, The Criminal Code or any other Act of the Parliament of Canada is an offence under this Part."<sup>28</sup>

The section deals in two sub-paragraphs with punishment and states that if the federal statute involved provides a minimum punishment, the punishment awarded by a court martial shall not be less than

- 
28. For the benefit of the reader who is unfamiliar with Section 120 of The National Defence Act (1970), Queen's Regulations and Orders, Volume II, Article 103.61 contains, in the Notes, a number of specimen charges, one of which reads as follows:

"AN OFFENCE PUNISHABLE UNDER SECTION 120 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ATTEMPTED RAPE, CONTRARY TO SECTION 145 OF THE CRIMINAL CODE.

Particulars: In that he, on (date) at (place) did unlawfully assault (name), a woman not his wife, and attempted to have sexual intercourse with her without her consent."

that minimum. It is interesting to note that Section 120(5) specifically deals with the definition of an analyst, but says nothing about a certificate. Further, Section 120 contains no provisions one way or another about rules of evidence.

Since Section 120 of The National Defence Act (1970) is legislation by reference which creates offences and requires the imposition of a minimum punishment by a court martial for an offence committed in Canada if a minimum punishment is provided by that statute, it would seem illogical not to include also by reference permitted methods of proof that apply specifically to the particular charge being heard.

This matter has long been a contentious one among military lawyers, but there really seems to be no other sensible interpretation than to allow the analyst's certificate to be admitted as proof of its contents, providing the charge is laid under Section 120 of The National Defence Act (1970) and an analyst's certificate is admissible regarding that charge if heard in a civil court. To rule otherwise would be to thwart the intent of Section 9(1) of The Narcotic Control Act, and Section 237(1)(c) of The Criminal Code,

which was to avoid the endless and time consuming requirement to have the analyst attend at every relevant trial as a witness.

Therefore, the Commanding Officer, when he lays a charge under Section 120 of The National Defence Act (1970), knows that he has other alternatives open to him, and if he elects to use Section 120, he is bound by any specific rule of evidence that applies to that specific charge. Section 158(1) of The National Defence Act (1970), which authorizes the establishment of The Military Rules of Evidence, commences with the words "Subject to this Act..." which means The Military Rules of Evidence are subject to Section 120.

However, if an accused is charged with, for example, Drunkenness under Section 87 of The National Defence Act (1970), impaired driving under Section 101(1)(a), or possession or trafficking in narcotics contrary to Section 119 (An Act to the Prejudice of Good Order and Discipline), a certificate of an analyst as discussed hereinbefore could not be introduced as proof of its contents because the charges are not laid under Section 120 of The National Defence Act (1970) as being acts punishable under another federal statute. In the

examples in this paragraph, it would be necessary to call the analyst.

Probably the most interesting evidentiary situation occurs when a charge is laid under Section 121<sup>29</sup> of The National Defence Act (1970) which, for servicemen out of Canada, incorporates foreign offences into The National Defence Act (1970) in the same fashion as Section 120 incorporates Canadian civilian offences into the Act for servicemen in Canada.

There is no doubt, that pursuant to Article 112 of The Military Rules of Evidence, the foreign substantive law must be proved by a foreign

---

29. The reader might not be familiar with Section 121 of The National Defence Act (1970). A specimen charge would read as follows:

"AN OFFENCE PUNISHABLE UNDER SECTION 121 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, NEGLIGENCE CAUSING DEATH TO ANOTHER CONTRARY TO SECTION 222 OF THE GERMAN PENAL CODE.

Particulars: In that he, at approximately 2230 hours, 31 July, 1968, on Highway No. 63 in the vicinity of Werl, Federal Republic of Germany, so negligently drove automobile bearing licence no. CV74B, as to become involved in an accident which resulted in death to (name)."

legal expert. However, considering that, (a) the military was provided with a code of evidence; (b) uniformity is vital to the military; and (c) all service personnel should be tried under the same rules as a matter of fairness and equity; The Military Rules of Evidence would apply to the admission of evidence in the same manner as if the trial were held in Canada. If a matter of evidence law arose as a result of a foreign offence, and that problem simply did not exist in Canadian jurisprudence, the Judge Advocate would invoke Article 4 of The Military Rules of Evidence. This is probably the only circumstance where the expression in Article 4 "not inconsistent with these Rules..." would apply. The Judge Advocate would apply the principles of common law and natural justice to the question before him and make a ruling as to admissibility.

Where There is No Provision  
In Any Rules of Evidence

Having concluded that certain sections of The Canada Evidence Act and some special evidentiary sections, such as Section 9 of The Narcotic Control Act apply at courts martial, while at the same time concluding that other sections of The Canada Evidence Act and The Criminal Code do not apply at courts

martial, it now follows that the writer must consider what other rules of evidence apply at courts martial in cases not provided for in The Military Rules of Evidence, The National Defence Act (1970) or any other Canadian evidence law.

Article 4 of The Military Rules of Evidence is not a well written Article and its wording will be discussed again under "Recommendations" in Chapter XIV.

Some of the phrases in Article 4 will be examined hereunder to assist in determining the law of evidence that applies if no rule of evidence is included in The Military Rules of Evidence or anywhere else.

Where The Military Rules of Evidence provide no rule of evidence on a matter that comes before a court martial, Article 4 requires that the question be decided in the same manner that it would be decided before a civil court.<sup>30</sup> The obvious weakness of this expression is that the Article makes no provision for a case where the civil courts have never ruled on that question either. In such a

---

30. In this thesis, a civil court means a court of ordinary criminal jurisdiction

situation, the authority of the Judge Advocate becomes particularly important.

The appointment of a Judge Advocate at a Disciplinary and General Court Martial is provided for in Sections 146 and 152 respectively of The National Defence Act (1970). The appointment of a President of a Standing Court Martial or the designation of a Special General Court Martial is provided for in Sections 154(1) and 155 respectively of The National Defence Act (1970). The President of a Standing Court Martial or a person designated a Special General Court Martial is normally a military legal officer or a civilian judge.

Pursuant to Section 168(4) of The National Defence Act (1970), the Judge Advocate may, subject to regulations established by the Governor in Council, decide questions of law or mixed law and fact. A question of evidence is clearly a question of law.

Article 112.06 of Queen's Regulations and Orders for the Canadian Forces is the Order in Council established pursuant to Section 168(4) of The National Defence Act (1970), and it lists the powers of a Judge Advocate to decide questions of law. The Article provides that the President of a Disciplinary or General Court Martial may (and he usually does)

direct that the Judge Advocate determine question of law or mixed law and fact in the absence or presence of the members of the court, as appropriate. More precisely, Section (9)(g) of Article 112.06 states that "the following questions of law and mixed law and fact may be determined by the Judge Advocate under this article:

- (i) all matters respecting the admissibility and exclusion of evidence, which, without limiting the generality of the foregoing, include whether..."

Listed thereafter in that sub-paragraph are a number of evidence matters such as admissibility of documents, competency of witnesses, to name only two.

Article 5 of The Military Rules of Evidence states that where a Judge Advocate has the power under the rules to determine a question (and he normally receives this authority at the outset of a trial), he can only do so within the limitations of Article 112.06 of Queen's Regulations and Orders for the Canadian Forces. Since Article 112.06 para (9)(g) refers to "all matters respecting the admissibility and exclusion of evidence" there is little doubt that this very wide expression would

include the authority to make all necessary decisions as to what rule of evidence applied in a particular situation and to rule on the admissibility of that evidence.

Thus, the Judge Advocate has authority to determine all matters respecting admissibility, and that is really what the rules of evidence are all about. Where a matter arises that is not included in The Military Rules of Evidence, but has been dealt with by civil courts, the Judge Advocate can hear argument from counsel and pursuant to Articles 14 to 19 of The Military Rules of Evidence, he must take judicial notice of federal and provincial statutes, he may take judicial notice of decisions of the Court Martial Appeal Court, the Supreme Court of Canada, other courts in Canada and presumably of the common law itself. The Judge Advocate can then simply make his ruling. This situation will be discussed in more detail later in this Chapter.

However, when the matter has never been dealt with before, and such cases are rare, the Judge Advocate seems to be entirely on his own. Questions of evidence never encountered before are most likely to arise when the charge is a purely military one such as Absence Without Leave or An Act to the

Prejudice of Good Order and Discipline. His authority to make a ruling, and there is no doubt a ruling must be made,<sup>31</sup> rests firstly on his powers under Article 112.06 Section (9)(g) of Queen's Regulations and Orders for the Canadian Forces to determine questions of law in all matters respecting the admissibility and exclusion of evidence, and secondly, on his duty to ensure that the accused receives a fair trial.<sup>32</sup>

A Judge Advocate at a General or Disciplinary Court Martial seems to be in exactly the same position respecting responsibility for the admission of evidence and the rules to be applied thereto as is a civilian judge at a jury trial.<sup>33</sup>

A Judge Advocate at a court martial does not, however, have the same inherent powers as a Judge of a court such as the Manitoba Court of Queen's Bench, in which case the Judge's inherent powers appear to flow from his being a Judge of that Court. A court martial, on the other hand, is a statutory court, and the Judge Advocate's powers would be

---

31. Freedman, S., "Judges and the Law" (1962)  
5 Can.B.J. 208

32. Queen's Regulations and Orders, Article 112.55

33. Doutre v The Queen (1953) C.M.A.R. 155, 163 to 171

limited to those provided by statute or regulations thereunder. Since authority to make decisions on questions of evidence is clearly covered in Queen's Regulations and Orders for the Canadian Forces, inherent powers of military judges are not of crucial importance in the present context.

The American military, on the other hand, seems to be much more concerned about the inherent power of military judges.<sup>34</sup>

Problems of the inherent power of Canadian Military Judges rarely arise, probably because, except in matters of evidence law, the President is the real authority. However, now that Standing Courts Martial, actually a military judge sitting alone, have become much more popular, the question will no doubt arise more often.

Therefore, if the question of evidence has never been decided by a civil court, the Judge Advocate must simply employ his knowledge of the law, and apply it as best he can in reason and justice, to the question that confronts him.<sup>35</sup>

The Canadian Law Reform Commission Evidence Code

---

34. Stevenson, Major G.D., "The Inherent Authority of the Military Judge" (1975) 17 Air Force Law Review, 1

35. Re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 [1947] 2 W.W.R. 510 at 518

states in Section 3 that if a matter of evidence is not provided for, the principles of common law as they may be interpreted in the light of reason and experience, shall govern. A Judge Advocate could probably do no better than apply the principles in that section, which would include the principles of natural justice.

To interpret Article 4 of The Military Rules of Evidence to mean that if a question of evidence had never been decided or referred to by civil courts, no ruling at all could be made, would be to literally construct Article 4 in an irrational manner. Since enactments must be interpreted reasonably, and in light of the whole legislative authority involved, the writer concludes that the Judge Advocate has the authority to make a decision even though the same question he has before him at a court martial has never arisen in civil courts.

Where There is No Military Rule  
of Evidence But There is a  
Civilian Rule

The last few pages have discussed the difficulties caused by the expression "the same question before a civil court" in the context where the question has never arisen. The next few

paragraphs will refine this problem further by discussing the next three words of Article 4, namely "sitting in Ottawa" in the context of where the question has arisen and been ruled upon in Ottawa. For the whole text of Article 4, see page 13 of The Military Rules of Evidence attached hereto as Appendix B.

Considering the fact that most Canadian military activities are, or can be expected to be worldwide in scope, it is reasonable that regulations and orders establish a geographical or other representative standard by which situations in other parts of the country or the world are examined, governed, or guided. For example, some financial regulations authorizing foreign allowances calculate these allowances on the basis of a factor, such as cost-of-living in Ottawa. While conditions in Ottawa can hardly be considered representative of conditions in Canada, they can be used with reasonable adequacy as a standard. Unfortunately, such is not the case when it comes to determining a question of evidence in accordance with the law of evidence practised in an Ottawa court. Apparently, it was assumed when The Military Rules of Evidence were written, that the law of evidence practised in Ottawa civil courts

was the same as the law of evidence practised in all Ontario courts, but such may not be the case.

To rely only on decisions of civil courts in Ottawa on questions of evidence would mean that no ruling on the admissibility of evidence by another civil court in Ontario would be considered under Article 4 of The Military Rules of Evidence, unless it could be shown that such decision had also been made in an Ottawa civil court. Obviously, many questions of evidence that have often been ruled upon in Ontario have not been ruled on specifically in Ottawa. Presumably, in this case, a Judge Advocate would rule on the basis of what he thought an Ottawa judge would decide, if the question arose in the future in an Ottawa civil court. To second guess Ottawa judges in this way would require all military judges to be clairvoyant.

Therefore, Article 4, with respect to the geographical law of evidence that applies in cases not provided for in The Military Rules of Evidence, must mean a "civil court" in Ontario.

The phrase "in so far as not inconsistent with these Rules," as contained in Article 4, is often used when drafting a statutory authority to make regulations, and in that context, it has at least

some limited meaning. However, it is probably redundant even there because regulations made pursuant to a statutory authority must be consistent with that authority regardless of whether such limitation is included or not.

When such a phrase is included in Article 4 of The Military Rules of Evidence, which deals with matters not provided for at all, it is difficult to imagine an evidentiary situation not covered by the rules, which would be consistent or inconsistent with The Military Rules of Evidence. A question of evidence arising in relation to a purely military offence, or a foreign offence charged under Section 121 of The National Defence Act (1970) may be an exception. Since the question of evidence contemplated is not covered in the rules at all, the subject phrase, while it probably does no harm, has little significant meaning.

The writer concluded in Chapter VI that the law of evidence in The Military Rules of Evidence is a code, and that this code is exhaustive except as regards Article 4 (Cases Not Provided For). This code, and indeed all the codes of evidence are general in character, and thus almost every question of evidence is covered generally by some article. As

a result of the general nature of the code, it seems that subject to a few rare exceptions, two of which were mentioned by way of example earlier in this Chapter, The Military Rules of Evidence are largely complete and exhaustive.

Therefore, the only way in which Article 4 can be employed, is if nothing at all is included in The Military Rules of Evidence, even in the most general form, which could be applied to the question before the court martial. In that case, the rules of evidence in courts of ordinary criminal jurisdiction including courts of summary jurisdiction in Ontario will be applied in the same manner as if that question of evidence had arisen in similar circumstances before one of those courts.

Civil courts as mentioned in Article 4 are defined in Section 2 of The National Defence Act (1970) as courts of ordinary criminal jurisdiction in Canada and including courts of summary jurisdiction. Unfortunately, courts of ordinary criminal jurisdiction are not defined in The National Defence Act (1970). However, Section 2 of The Criminal Code states that a "court of criminal jurisdiction means a court of general or quarter sessions of the peace, when presided over by a superior court judge or a county or district

court judge or a magistrate or judge acting under Part XVI of the Criminal Code." Under Part XVI of The Criminal Code, Section 482 defines a judge in Ontario as being a judge or a junior judge of a county or district court, and a magistrate as a person appointed under the law of the province and specially authorized to exercise the jurisdiction conferred on a magistrate in Part XVI, but does not include two justices of the peace sitting together. The writer would therefore conclude that by including the word "ordinary" in the definition of civil court in The National Defence Act (1970) before the words "court of criminal jurisdiction," it was intended to encompass those courts defined in The Criminal Code which ordinarily deal with criminal matters. Such courts would be the Ontario Supreme Court (High Court of Justice),<sup>36</sup> the Provincial Court (Criminal Division),<sup>37</sup> and the County or District Court Judges' Criminal Court.<sup>38</sup>

Although the Federal Court can try criminal cases, it would appear to be mainly a court intended

---

36. The Judicature Act, R.S.O. (1970) c.228 s.2,3

37. The Provincial Courts Act, R.S.O. (1970) c.369, s.9 and 14

38. The County Court Judges' Criminal Court Act, R.S.O. (1970) c.93 s.1

to hear civil matters,<sup>39</sup> and thus, while it operates in Ontario, it is not a court of ordinary criminal jurisdiction as envisaged in Article 4. The Supreme Court of Canada and the Ontario Supreme Court (Court of Appeal) are both appellate courts, and thus they do not fall within the definition of an ordinary court of criminal jurisdiction.

It would therefore follow that, except where a question of evidence has never arisen in any court, the rules of evidence applicable at courts martial in cases not provided for in The Military Rules of Evidence are:

- (a) the rules of court established by the Rules Committee under Section 114 of The Judicature Act of Ontario;
- (b) the rules of court established by the Rules Committee under Section 26 of The Provincial Courts Act of Ontario;
- (c) the rules of court established by the Rules Committee under Section 46 of The Federal Court Act;
- (d) the common law rules of evidence in England prior to 1 April, 1955<sup>40</sup> not

---

39. The Federal Court Act, R.S.C. (1970) (2nd Supp) c.10 s.3 and 17-25

40. The Criminal Code, R.S.C. (1970) c.C-34 s.7(2)

- altered or repealed by either of the committees referred to in (a), (b) or (c) above;
- (e) those rules of evidence in The Canada Evidence Act not included in The Military Rules of Evidence;
  - (f) those special rules of evidence regarding analysts' certificates mentioned earlier in this Chapter if the charge was laid under Section 120 of The National Defence Act (1970) and the civilian statute contained special evidentiary provisions applicable only to such offences; and
  - (g) case law which would be employed by Judges of the:
    - (i) Ontario Supreme Court (High Court of Justice);
    - (ii) Provincial Court (Criminal Division); and
    - (iii) Country or District Court Judges' Criminal Court.

In conclusion, it can therefore be seen that while Article 4 seems to be rather general, the law that can be applied in cases not provided for is quite specific and limited to the rules of evidence in only certain courts in Ontario.

PART THREE  
ILLUSTRATIONS  
CHAPTER VIII

GENERAL COMMENTS ON THE EMPLOYMENT  
OF THE MILITARY RULES OF EVIDENCE

Introduction

The validity of The Military Rules of Evidence as a code of evidence has been examined in detail, particularly in Chapters V, VI, and VII. This Part will deal with detailed illustrations of how certain Articles, selected as examples, have been handled by the Legal Branch and the Court Martial Appeal Court. There have already been a number of illustrative examples mentioned in earlier Chapters of this thesis when appropriate occasions arose. While appeals to the Supreme Court of Canada from the Court Martial Appeal Court are permissible in certain cases,<sup>1</sup> there have been no such appeals by the Crown, and thus there are no Supreme Court

---

1. The National Defence Act, R.S.C. (1970)  
c.N-4 s.208(1)

decisions on The Military Rules of Evidence.<sup>2</sup>

In Chapter III under the heading "Is there actually a need to codify the law of evidence?" the writer outlined some of the weaknesses of the present evidence law. The Military Rules of Evidence attempted in three ways to correct some of these difficulties. Firstly, a codification in itself has a tendency to make the law more manageable and hopefully easier to understand. Secondly, the drafters attempted to move away from some of the words and phrases in the law of evidence that are so difficult to understand. For example, the phrase burden of proof has been replaced by the expressions burden of persuasion and burden of producing evidence. Additionally, the phrase

---

2. (a) Hartin v The Queen (1959) 2 C.M.A.R. 93

The accused appealed to the Court Martial Appeal Court on the ground that the Judge Advocate had mis-directed the court martial as to mens rea. The appeal was dismissed and the accused appealed to the Supreme Court of Canada which upheld the Court Martial Appeal Court.

(b) MacDonald v The Queen (1974) 4 C.M.A.R. 30 December, 1974

This case was appealed to the Supreme Court of Canada, but at the time of writing, no decision has been handed down. Again, it was the accused who appealed.

res gestae has not been used at all. Articles 27 to 30 inclusive substantially encompass the res gestae doctrine as regards verbal evidence, without once using the phrase, res gestae. Also, the drafters attempted to simplify and remove some of the anomalies from the law of evidence regarding documents. Whether or not they succeeded is another matter, but they did try. Documents will be discussed in more detail in Chapter X.

Thirdly, the drafters changed the law of evidence as known in civil courts in a number of areas. Some of these areas will be discussed in separate Chapters hereinafter under the headings: Confessions and Documents.

### Practise

The drafters of The Military Rules of Evidence wrote a code that generally reflected the law of evidence practised in criminal matters in the civil courts<sup>3</sup> of this country in 1959. Possibly there was some misunderstanding in the early 1960s as to what The Military Rules of Evidence really were. Group Captain J.H. Hollies, the Chief Judge Advocate at

---

3. Civil courts in this thesis mean civilian courts of ordinary criminal jurisdiction in Canada

the time seemed to have no doubts. In a paper written by him in 1960, he stated that The Military Rules of Evidence "replace all other rules of evidence, except so far as they are silent upon any particular point."<sup>4</sup> The result, however, was that as a matter of practice, The Military Rules of Evidence were considered a summary of the civilian rules of evidence and were subject to change to reflect subsequent civil court appeal decisions.

The writer has been just as guilty as others of quoting civil court decisions handed down long after 1 October, 1959, dealing with civil law which was different to the law in The Military Rules of Evidence, and arguing that law just as if The Military Rules of Evidence did not exist at all. The Legal Branch itself has tended to avoid confrontation on some of our rules by directing, as a matter of policy, or simply through court practice, that a particular rule would not be applied. This point is discussed in the next Chapter.

When submitting briefs to, and arguing before the Court Martial Appeal Court, civilian criminal

---

4. Hollies, J.H., Group Captain; "Canadian Military Law" 20 (1961) unpublished

cases prior to, and after 1 October, 1959,<sup>5</sup> are quoted as if their application was equally valid to The Military Rules of Evidence before and after that date. Obviously, if a rule of evidence being argued before the Appeal Court is not the same in civil as in military law, cases after, and indeed even before 1 October, 1959, might not apply at all. Additionally, when arguing before the Court Martial Appeal Court, lawyers tend to refer to the rules of evidence in a civilian context, rather than quoting or identifying the Article of The Military Rules of Evidence that applies.

#### Conclusion

The writer is not suggesting that the policy the Legal Branch follows is wrong; he is simply observing on what it seems to have been. However, the end result is that there are extremely few decisions on the validity or meaning of the one hundred and twelve articles that constitute The Military Rules of Evidence.

It is interesting to speculate on what would have happened had the Legal Branch in 1960 decided

---

5. The date 1 October, 1959 is the date on which The Military Rules of Evidence became law

to take the position that The Military Rules of Evidence were an exhaustive code. In that case, The Military Rules of Evidence would have been employed exclusively in court except when Article 4 applied. Civilian criminal case law would only have been applied if the law, civil and military, appeared identical. In other cases, the civil court authorities would only have applied it to assist mainly as historical or background source material. It would also have followed that the Crown would have appealed to the Supreme Court in every instance permitted by Section 208 of The National Defence Act (1970) in order to obtain as binding an authority as possible on the particular rule under appeal.

No doubt such a policy would have caused considerable difficulty and possibly some startling results, but it would certainly have settled the question of whether The Military Rules of Evidence were in fact an exhaustive code and, if so, whether they were workable at all.

The merits and defects of the above described military approach would most definitely have become public knowledge and would have been discussed and written about by experienced civilian lawyers.

Consequently, the idea of enacting a code of evidence would have been a familiar one to most lawyers working in the criminal law field. No doubt, if the above had occurred, the Canadian Law Reform Commission might have drafted its code differently, and there would have been less opposition to the concept of a code.

Probably the main reason that a confrontation policy was not followed was that the Department of National Defence was just simply not prepared to spend the time and money following such a policy. The writer can see a great deal of merit in a policy of trying to convince the Court Martial Appeal Court that The Military Rules of Evidence were an exhaustive code, but he certainly understands why that policy was not followed.

Unfortunately, because of the policy that was followed, the Armed Forces are no further ahead now than in 1959, in learning what it is they have on their hands in The Military Rules of Evidence. The following Chapters will hopefully show what has happened in a few selected cases.

## CHAPTER IX

CONFESSIONSInculpatory and  
Exculpatory Statements.

A confession is defined in Article 2(1)(f) of The Military Rules of Evidence as "a statement made by an accused person, whether made before or after he is accused of an offence, that is completely or partially self-incriminating with respect to the offence of which he is accused." Article 36 states that "Confessions are judicial, official, or unofficial."<sup>1</sup> Article 41 defines an unofficial confession as a self-incriminating statement made by the accused respecting the offence charged, and includes a statement made by the accused to civil or military police or other persons in authority.

The admissibility of such statements is governed by Queen's Regulations and Orders for the Canadian Forces, Article 112.605, a Ministerial Article, which provides that the Judge Advocate may

- 
1. Unofficial confessions are the only type discussed in this Chapter. As defined above, these confessions are the ordinary kind that are introduced every day throughout Canada by civilian and military prosecutors.

determine the admissibility of a statement by an accused which is in the nature of a confession to a person in authority. Procedurally, the Judge Advocate must conduct a voir dire.<sup>2</sup> The rules for a trial within a trial reflect generally the civilian criminal law in 1959.

An exculpatory statement is admissible pursuant to Article 42(6) only if it is included in an admissible inculpatory statement. It is not surprising that there was no other specific reference to exculpatory statements when The Military Rules of Evidence were written. The law at that time was uncertain as is reflected in a number of decisions, one example of which is R v Black.<sup>3</sup> In that case, it was stated in part "It is quite clear that the rules which govern the admission of a confession relate generally to what may be called inculpatory statements; if the statement is totally exculpatory in its nature other consideration may or may not apply. The cases are in conflict in this point."<sup>4</sup>

However, Article 26(1) provides that except

- 
2. In Queen's Regulations and Orders, a voir dire is always referred to as a trial within a trial
  3. (1966-67) 49 C.R. 357
  4. Ibid at 384

as provided in Section 7 (Confessions) and Section 8 (Other Kinds of Hearsay Evidence) an extra-judicial statement is not admissible. Presumably, therefore, an accused as a witness could not ordinarily state what he had said before, including exculpatory remarks. Further, Article 35, provides that a self-serving statement, except in certain limited situations, is also inadmissible. An exculpatory statement made around the time of, or shortly after a crime with which the accused is charged would normally be classified as self-serving.<sup>5</sup>

It therefore appears that under The Military Rules of Evidence, an incriminating statement is admissible in certain cases after a trial within a trial has been held, but that an exculpatory statement is inadmissible, except as a part of an admissible inculpatory statement. Indeed, the above description is not unlike the civilian criminal law in 1959.<sup>6</sup>

There is, of course, an exception to the rule and it would apply at a court martial. That is, that if a statement is being tendered by the prosecution,

---

5. Torcia, C.E., Wharton's Criminal Evidence (13 ed. Vol II)97

6. Boudreau v The King [1949] S.C.R. 262

then regardless of whether it is exculpatory or not, it is admissible if it was freely and voluntarily made. The reasoning is that the prosecution will only tender evidence that can be used to incriminate the accused in some way and that, therefore, the statement is in reality an incriminating statement.

The question of whether or not a statement is exculpatory seems to have arisen only once before the Court Martial Appeal Court. In Syme v The Queen,<sup>7</sup> the Appeal Court dealt with the admissibility of a confession. Dumoulin, P. stated that one question to be decided was whether the statement involved was in fact a confession. He ruled that the statement had been admitted improperly because all of the military police witnesses had not been called at the voir dire. However, at the end of his judgment, he stated "The respondent (Crown) should be heard to say that the statement could be offered in evidence because it did not tend to incriminate the accused. It cannot be said that the statement tendered in evidence was not so used, nor is it permissible to presume that the evidence improperly admitted

---

7. (1968) 3 C.M.A.R. 33

could not have in any way, influenced the court martial's verdict."<sup>8</sup>

The above quote is somewhat difficult to understand, but it may suggest that an exculpatory statement is admissible, although it makes no mention of the basis for admitting it. It does appear, however, that exculpatory statements by an accused person would normally be inadmissible under The Military Rules of Evidence because of Articles 26 and 35 regardless of whether a trial within a trial was held or not.

The uncertainty came to a head in 1970 when the Supreme Court of Canada in Piche v Regina<sup>9</sup> decided there must be a voir dire to determine the admissibility of any statement by an accused to a person in authority, even though the statement was exculpatory. As a result of this decision, and probably in light of the uncertainty of the relevant Military Rules of Evidence, military judges have since that time as a matter of practice, normally ruled that there must be a trial within a trial to determine the admissibility of exculpatory statements.

---

8. Ibid at 34

9. [1970] 4 C.C.C. 27

As stated earlier, the writer considers most such statements inadmissible under The Military Rules of Evidence, but since the practice being followed by military judges adds to the advantages of the accused, it is not a violation of Section 2(e) of The Canadian Bill of Rights.<sup>10</sup> In any event, even if this practice is not in accordance with The Military Rules of Evidence, who is going to complain about it?

It is clear that an exculpatory statement is a proper subject for a trial within a trial in the civilian law of evidence, whereas in The Military Rules of Evidence and the Court Martial Appeal Court decisions, the question is unresolved.

This is the first example of conflict between civil and military law described in this Chapter, and it shows that in this case the conflict is dealt with by way of military court practice. It will be interesting to see whether court practice is amended to follow the rules laid down by Martin, J.A. in the Ontario Court of Appeal in R v Sweezy<sup>11</sup> where he stated that a voir dire was not always required.

---

10. R.S.C. (1970) Appendix III

11. (1975) 20 C.C.C. (2d) 400 at 417

### Trial Within a Trial Procedure

The procedure to be followed when a trial within a trial is held during a court martial seems to be the same as the procedure before a civil court. Queen's Regulations and Orders for the Canadian Forces, Article 112.06(4) provides that in the case of a General or Disciplinary Court Martial (where there is a Judge Advocate and members of the court), the Judge Advocate may determine the issue of admissibility in the absence of the members of the court. If the court martial is a Standing or a Special General Court Martial, where a military or civilian judge sits alone, Queen's Regulations and Orders for the Canadian Forces, Article 113.15 and 113.64 respectively provide that the military judge shall decide on the admissibility of an alleged confession by the accused to a person in authority.

Regardless of the type of court martial, the presiding judge will:

- (a) hear prosecution witnesses;
- (b) hear defence witnesses including the accused, if called by the defence;
- (c) allow cross-examination of all witnesses;
- (d) question the witnesses himself as he considers appropriate;

- (e) peruse the alleged confession to see if it is relevant;
- (f) call or recall any witnesses;
- (g) allow the prosecution to sum up; and
- (h) allow the defence to sum up.

The military judge then rules solely as to admissibility. If the court martial is a General or a Disciplinary one, the members of the court return to the courtroom at this time and if the statement has been ruled admissible, the prosecution recalls all his witnesses for the benefit of the whole court to hear and then introduces his statement. There have been few problems at this type of court martial regarding the trial within a trial procedure. Most appeals in this situation have dealt with the Judge Advocate's ruling on admissibility,<sup>12</sup> not on the procedure he employed.

Procedural problems have arisen lately at Standing Courts Martial, mainly because these courts have become much more popular than they were in the past. The practice is to hear the evidence as to admissibility at a trial within a trial, and for the military judge to read the statement itself to ensure relevancy. When the military judge has ruled a

---

12. Robinson v The Queen (1971) 3 C.M.A.R. 43

statement to be voluntary and thus admissible, he will state that, subject to objection from counsel, he is hereby incorporating the evidence at the trial within a trial into the main trial. The procedure is somewhat more complicated if the accused has given evidence at the trial within a trial because the judge must exclude all things said by the accused except as to voluntariness from his mind.<sup>13</sup> R v Van Dingen<sup>14</sup> complements the Gauthier case in that it was held in that case that no evidence by the accused who gave evidence at a voir dire, after which the confession was ruled inadmissible, can be considered by the Judge when determining guilt or innocence.

There is neither a rule of evidence in The Military Rules of Evidence nor a rule of procedure in Queen's Regulations and Orders for the Canadian Forces outlining exactly how the military judge sitting alone is to handle the trial within a trial and the introduction of the alleged confession. Therefore, pursuant to Article 4 of The Military Rules of Evidence, the civil court practice prevails.

---

13. R v Gauthier, S.C.R. (unbound) 24 June, 1974

14. [1975] 4 W.W.R. 246

In the case of Reid v The Queen<sup>15</sup> the Court Martial Appeal Court judgement was delivered by Cattanach J., who stated that at a voir dire during a Standing Court Martial, the President could and should have ruled that he was satisfied that, subject to what was in the statement, the statement was free and voluntary. Not only did the President not read the alleged confession, but after ruling it admissible, he apparently only stated an intention of incorporating the evidence at the trial within a trial into the main trial, at least in the eyes of Cattanach, J. However, regardless of the exact words of incorporation, the fact remains that the President did not read the statement to ensure relevancy. This requirement is provided for in Queen's Regulations and Orders for the Canadian Forces, Article 113.64(4)(a) and also seems to be the law in civil courts.<sup>16</sup>

In this second example, under Confessions, there is really very little conflict because neither The Military Rules of Evidence nor Queen's Regulations and Orders for the Canadian Forces make any provision

---

15. (1975) 20 C.C.C. (2d) 257

16. Supra fn 13 p.207

for the exact procedure to be followed when introducing an alleged confession at a trial within a trial during a Standing Court Martial. Since there is no clear rule in The Military Rules of Evidence, Article 4 has been applied, and the civilian practice as described above employed at Standing Courts Martial.

"A Reasonable Man"

So far in this Chapter, two examples of a form of conflict or anomaly existing between the civil and military law of evidence have been examined. In one case, the difficulty was solved by court practice, and in the other by turning to Article 4 of The Military Rules of Evidence.

In this last example, it is the military law that has been considered different and possibly more oppressive than the civilian law.

Article 42(2) states as follows:

"The only inducements by way of threats or promises significant for the purpose of excluding a statement of the accused under (1) of this article are those that a reasonable man would think might have the tendency to cause an innocent accused person to make a false confession."

Right from the very inception of The Military Rules of Evidence, military lawyers have considered this sub-article to be a definition of an objective test as to what a threat or promise is, whereas the civilian law seems to use the subjective test.<sup>17</sup>

Military lawyers have found considerable difficulty in dealing with Article 42(2) and have in fact often ignored it and followed the general civilian practice. Because of the confusion that was occurring continually, the Chief Judge Advocate published a Directive advising military prosecutors that "since paragraph 2 of Rule 42 has been considered too restrictive and contrary to the practice followed in Civilian Courts of Criminal Jurisdiction, it is not to be used at trials by Court Martial."<sup>18</sup>

The above quote is illuminating for two reasons. Firstly, the Directive states that one of the reasons for not continuing to use Article 42(2) is that it is contrary to the practice followed in civilian criminal courts. So far as the writer is concerned, and as outlined in Chapter VI, there is

---

17. Hollies, J.H., Group Captain; "Canadian Military Law" 21 (1961) unpublished

18. Judge Advocate General Directive B7/75 dated 16 October, 1975

no reason that The Military Rules of Evidence must be identical to the law of evidence practised in civil courts. However, this reason does reinforce the writer's suggestion in Chapter VIII that the Legal Branch was interpreting The Military Rules of Evidence to conform to civil court practice.

The second reason given for not employing Article 42(2) is that it "has been considered too restrictive." If the phrase "a reasonable man" in Article 42(2) means "an accused" and not "a judge" then there is no doubt that the rule would be more restrictive than the civil court rules. Whether or not this factor would render the military rule invalid is another matter which will be examined later.

In effect, the Judge Advocate General has by publishing Directive B7/75, made certain that the wider and more lenient civil practice is followed. The use of a Directive constitutes the third method used to resolve what appears to be a conflict between civil and military rules of evidence.

There is really no doubt at all, that the subjective test applies in civil courts as to whether a threat or promise made by a person in authority is an inducement or constitutes oppression.

This view is amply shown by P.K. McWilliams in Canadian Criminal Evidence where he lists cases that state that the mental condition, age, sex, sobriety, willpower, disposition, and past experience of the accused are factors to be considered by a Judge when determining what constitutes inducements or oppression.<sup>19</sup>

The general view in the Legal Branch has been that Article 42(2) is an objective test and this view has been based on the idea that the phrase "a reasonable man" in Article 42(2) refers to the person who is being subjected to the inducement. It is certainly an interpretation that can be made and one which the writer has made in the past. However, when the sub-paragraph is read a number of times and reduced to its essentials, it is no longer as clear that "a reasonable man" is the person being questioned. For example, if the words "a reasonable man" are replaced by "a Judge" the article reflects with reasonable accuracy the present civil court practice. A reasonable man might well interpret a certain act to be an inducement if the accused is a young girl, whereas that same reasonable man might not consider

---

19. McWilliams, P.K., Canadian Criminal Evidence  
242 to 246

the same act to be an inducement to a lawyer who was the accused.

If "a reasonable man" means a Judge, Article 42(2) would then also include allowance for the discretion of the Judge to disallow a confession otherwise admissible because he considered it unfair for one reason or another.<sup>20</sup> In civil criminal court, while the point is not entirely clear, a Judge does appear to have such a discretion. In R v Washer, McRuer, C.J.<sup>21</sup> considered that admissibility was always one of discretion although this discretion must be exercised cautiously. The Wray case<sup>22</sup> discussed discretion further and re-affirmed that the Judge did have a discretion.

However, if in fact the phrase "a reasonable man" does apply to the person being subjected to the threat or promise, Article 42(2) is still quite valid provided a military judge, when determining admissibility, first determines if the accused falls into the general category of a reasonable man. Obviously, retarded persons or children, for example, would not fall into the category of "a reasonable man."

---

20. Kaufman, F., The Admissibility of Confessions in Criminal Matters (2nd ed) 28,29

21. (1947) 92 C.C.C. 218

22. R v Wray [1971] S.C.R. 272

In that case, the military judge could rule that the accused did not fall into that category. Therefore, since The Military Rules of Evidence contain the objective test, Article 4 requires that in that case, the military judge fall back on the civil law, which is the subjective test. However, considering the general uniformity at the lower rank levels of the Armed Forces, in age, education and experience, probably most accused servicemen would fall into the category of "a reasonable man."

Whether the courts interpreted "a reasonable man" in Article 42(2) to be the accused or the Judge, the Article is still valid. The writer certainly leans towards the first interpretation mainly because the second one described in the above paragraph requires an additional ruling by the Judge, before deciding on admissibility.

#### The Cases Reviewed

The Court Martial Appeal Court has never made a specific ruling on Article 42(2). In Robinson v The Queen,<sup>23</sup> Kerr, J. in his judgement quoted a number

---

23. (1971) 3 C.M.A.R. 43

articles concerning confessions, including Article 42(2). The appeal was allowed because the Judge Advocate had permitted the introduction of a verbal confession without the exact words being proved with sufficient certainty. At one point, the learned Appeal Judge stated, "The background to and the circumstance in which the interrogation of Robinson took place are pertinent. Robinson was 19 years of age, far from home, having just arrived in Puerto Rico."<sup>24</sup> This is surely a good description of a subjective test, but no where in the judgement is an objection taken to Article 42(2) quoted earlier in the same judgement.

In Weselak v The Queen,<sup>25</sup> one of the grounds of appeal was that a statement by a military policeman to the accused serviceman that no charges would be pressed by the Royal Canadian Mounted Police, was an inducement. In his judgement, Cattnach, J. held that:

"For the foregoing reasons, I conclude that the Standing Court Martial was not in error in admitting the three statements of the appellant as evidenced on the ground

---

24. Ibid at 65.

25. (1972) 3 C.M.A.R. 95

that the appellant made those statements freely and voluntarily without fear or prejudice or hope of advantages and that neither was he threatened, nor was any promise of advantage made to him by a person in authority as an inducement to making the statements in question."<sup>26</sup>

Again, there is no mention of any "reasonable man" or "objective test."

In Reid v The Queen,<sup>27</sup> Cattanach, J. stated that "the Court might well come to the conclusion that the statement was not free and voluntary beyond a reasonable doubt, in accordance with the well established principle pertaining to the definition of a free and voluntary statement."<sup>28</sup>

There can be no doubt that in the Reid case the learned President was referring to the well established civil court principles. There is also no doubt that he was aware of Article 42(2) of The Military Rules of Evidence and if he had thought that this Article enacted a rule of evidence different

---

26. Ibid at 100 and 101

27. (1975) 20 C.C.C. (2d) 257

28. Ibid at 260

to that used in civil courts, it seems certain he would have said so in this case.

The cases cited above tend to show that the Court Martial Appeal Court has never seen fit to comment one way or another on Article 42(2). It may thus be that the Legal Branch may have reacted where it was not necessary. However, Directive B37/75 illustrates two points:

- (a) the deep concern that the Legal Branch has for the rights of accused servicemen; and
- (b) a third method of dealing with what appears to be a conflict between civil and military rules of evidence; namely a policy directive.

This concludes the examination of the manner in which the military resolves conflicts in the field of confessions that arise between military and civil law. As mentioned in Chapter VIII, the Legal Branch has generally leaned towards interpreting The Military Rules of Evidence to conform to civil evidence law. This policy has been illustrated in this Chapter.

Since the military, at least in the confession field, generally conforms to civilian evidence law, any questions about The Military Rules of Evidence

contravening The Canadian Bill of Rights, do not arise. However, that possibility may exist in other areas to be discussed in the next few Chapters. Consequently, comments about The Canadian Bill of Rights and its application, if any, will be reserved for a separate Chapter towards the end of this paper.

## CHAPTER X

PUBLIC DOCUMENTSIntroduction

Approximately twenty-seven Articles of The Military Rules of Evidence deal wholly or partially with rules of evidence relating to documents. In addition, as outlined in Chapter VII, ten sections of The Canada Evidence Act are incorporated by reference into The Military Rules of Evidence. Since over one-quarter of the Code deals with documentary evidence, it is clear that documents form a major part of the evidence that is likely to be tendered at a court martial. This Chapter on Public Documents is included to illustrate the manner in which The Military Rules of Evidence have been applied to documents since inception of the Code. However, in order that the examination remains manageable in scope, it will be limited primarily to a discussion of Article 53(c).

Article 53(c)

Section 159(1) of The National Defence Act (1970) provides in part:

"Such classes of documents and records

as are prescribed in regulations made by the Governor in Council may be admitted as evidence of the facts therein stated at trial by court martial..., and the conditions governing the admissibility of such classes of documents and records or copies thereof shall be prescribed in those regulations."

The phrase "as evidence of the facts therein stated" is somewhat unclear, but this phrase is clarified in Section 24(1) of The Interpretation Act<sup>1</sup> which states that if an enactment provides that a document is evidence of a fact without stating it is conclusive evidence, then in a judicial proceeding the document is admissible in evidence and the fact shall be deemed to be established in the absence of evidence to the contrary.

For some reason, no article of The Military Rules of Evidence prescribes a list or class of documents that are admissible as evidence of the facts therein stated pursuant to Section 159(1) of The National Defence Act. If Section 159(1) had been

---

1. R.S.C. (1970) c.I-23

specified in an Article of The Military Rules of Evidence and then a list or class of documents included, it would have been much easier to determine what documents listed in The Military Rules of Evidence are the ones prescribed pursuant to Section 159(1). While Section 159(1) is never mentioned in The Military Rules of Evidence, the section is quoted in Note A at the end of Article 53. Articles 51 and 52 deal with domestic and foreign public documents. Article 53 is simply headed "Documents of Canadian Forces." Therefore, because of the location of Article 53, its heading, its contents, and Note A, it might be possible to infer that Article 53 lists classes of documents admissible as evidence of the facts therein stated pursuant to Section 159(1) of The National Defence Act.

Article 53(c) provides as follows:

"Subject to Article 55 (Limitations on Admission of Certain Documents) and without limiting the general provisions of Article 51 (Public Documents), the following classes of service documents are deemed to be public documents and may be proved in the manner provided in

Section 13 (Documents) without requiring the personal appearance of the maker as a witness:

- (c) documents and records kept for official purposes, including those kept in respect of officers and men."

It is interesting to note that Article 53(c) deems certain documents to be public documents, and provides that the maker need not appear as a witness. While Section 159(1) of The National Defence Act (1970) does not mention public documents, the fact that admissibility of documents or copies is governed by regulations and when admitted, are evidence of the facts therein, is in reality a loose definition of a public document as understood in civilian evidence law.

In a civilian context, public documents could be defined by saying that "their usual method of proof being by copy and their contents being evidence of the facts stated against strangers as well as parties and privies."<sup>2</sup> There is, of course, further explanatory law as to what is a public document,<sup>3</sup>

---

2. Sopinka, J., and Lederman, S.N., The Law of Evidence in Civil Cases, 419

3. Id at 107 to 109, and 420 to 429

but the definition need not be expanded here. Article 2(q) of The Military Rules of Evidence defines a public document to "include a documentary statement made for an official purpose by a public officer acting under a duty or authority to make the statement." The definition seems to imply that a public document, for court martial purposes, is the same as a public document is understood for civil court purposes, but is expanded in scope by the definition to include all government documents. To support the conclusion that all government documents are contemplated, Article 2(r) defines a "public officer" (referred to in Article 2(q)), as an official of Federal, Provincial or Municipal government and including a member of the Canadian Forces. The scope is swiftly reduced, however, in Article 53 by referring to "service documents." Neither this phrase nor the word "service" are defined, but it seems reasonable to conclude that "service" means "military or pertaining thereto." Thus, the documents referred to in Article 53(c) are military documents only.

Section 159(1) of The National Defence Act (1970) does not specifically mention public documents but mentions classes of documents and

conditions governing admissibility. While Article 53(c) in conjunction with Articles 103 and 105 refers to public documents, these Articles actually do conform with Section 159(1) by mentioning classes of documents and conditions governing admissibility. Therefore, by a rather complicated process of interpretation and inference, it would appear that the documents mentioned in Article 53(c) are one of the classes of documents referred to in Section 159(1).

Once this point is reached, the problems really begin. In the first place, Article 53 deems certain classes of documents to be public documents, rather than prescribing them pursuant to Section 159(1). Probably "deeming" in Article 53 is sufficient for the purposes of Section 159(1), since The Military Rules of Evidence are an Order in Council. However, it is certainly clear that the drafting and the cross-referencing could be much improved. The second difficulty arises when deciding what is meant by "documents and records kept for official purposes" in Article 53(c).

#### Difficulties in Courts Martial

Article 53(c) has probably caused more difficulty and confusion at courts martial than any

other Article in The Military Rules of Evidence. The general view is that virtually any document of a military nature can be introduced as proof of its contents provided it is on file in some military office. The reasoning is that by introducing such a document through the officer or non-commissioned officer in charge of the file room, it is admissible pursuant to Article 103(3)(c). Often dozens and occasionally hundreds of documents such as invoices, accounting records, requisitions, stock taking reports, and inventory sheets are introduced through one witness. Other witnesses are then called to explain all or part of each piece of paper. Since the contents of all these pieces of paper are as often as not taken to have been conclusively proved simply by introduction, questioning of witnesses is normally only for general explanatory purposes and much of what is in each of the documents is neither read to the court nor explained by a witness. The end result is rather confusing to the members of the court and often to the Judge Advocate.

The above description is not to suggest that something similar does not happen in civil court: it does. However, because of the ease with which

prosecutors and defending officers can acquire documents, combined with their strong faith in Article 53(c), military prosecutors do, wherever possible, lean heavily to the use of documents to support their cases.

Added to this is the general difficulty of understanding The Military Rules of Evidence as related to documents. Some of the problems emanate from the incorporation of some sections of The Canada Evidence Act;<sup>3</sup> others from the fact that rules of evidence on documents are scattered throughout The Military Rules of Evidence. Furthermore, the rules of evidence on documents included in The Military Rules of Evidence are somewhat out of date and are just awkward to use. The end result is that some strange things happen, and since the class of documents prescribed in Article 53(c) is, or appears to be very wide, prosecutors have occasionally used rather poor judgement in selecting documents to introduce in support of their case.

---

3. See Chapter VII

Grenon v The Queen<sup>4</sup> is probably the best example of temptation and difficulties facing prosecutors when deciding how to prove their cases with documents. Lieutenant Grenon was charged with being absent without leave from his ship, H.M.C.S. Kootenay, from 12 April, 1962, until released from the Royal Canadian Navy on 12 October, 1962. Following a naval practice, when a sailor or officer is absent from a ship at sea, the absentee is transferred through a paper transaction from his ship to a shore establishment, in this case H.M.C.S. Stadacona, after twenty-one days absence. In the Grenon case, that transfer occurred on 3 May, 1962.

The prosecutor called a witness to give evidence that Lieutenant Grenon was not aboard H.M.C.S. Kootenay from 12 April, 1962 until its return to Canada. The secretary to the Commanding Officer of H.M.C.S. Stadacona, the shore establishment to which Lieutenant Grenon had been transferred on paper since his whereabouts was unknown, was also called to introduce three documents. His capacity

---

4. (1963) 2 C.M.A.R. 237

was that of a person entrusted with custody of these documents along with others of the same class or type, as described in Article 103(3)(c).

The secretary introduced two documents regarding Lieutenant Grenon's posting to H.M.C.S. Kootenay and his subsequent transfer to H.M.C.S. Stadacona on 3 May, 1962. The third document, however, is the one that caused the problem. This document was called "Appointments" and was issued by the Chief of Naval Staff dealing with various appointments and dispositions of a number of naval personnel. Among those was Lieutenant Grenon and the notation was:

"Change - Released Misconduct  
Q.R.C.N. 15.01 (table) Item 1(e) -  
Illegally absent and not claimed for  
further service effective 12 October, 1962."

What the Chief of Naval Staff had simply done was administratively released an officer who had been absent without explanation for six months.

While neither Section 159(1) of The National Defence Act (1970) nor Article 53(c) is mentioned in the judgement, the document in question must have been introduced under Article 53(c). However,

Cameron, P., in his judgement, seems to imply that the document was not a public document although it was technically admissible, but not as proof of the facts therein.

He states that "this document was not admissible as evidence of the truth of the matters stated in respect of the appellant...the court martial was not warned that the admission of the document did not mean that the statements contained in it must be accepted as accurate (Vide s.59 s-s(2) of the Rules of Evidence.)"<sup>5</sup> Article 59(2) refers to documents generally, and provides exactly as the learned President of the Court Martial Appeal Court stated. Unfortunately, the court made no comment on Articles 53(c) or 59(2) even though it was clearly open to them to do so.

The court made a further observation which points out the difficulties caused to prosecutors by the uncertainty of Article 53(c). Cameron, P. also stated in part regarding this document "its admission must have been seriously prejudicial to him (Lieutenant Grenon)...in the circumstances it

---

5. Id at 243

may not be inappropriate to observe that the matter appears to us to point up the need for great care on the part of persons responsible for the presentation of military documents as evidence before courts martial to see that documents which are open to serious objection are not tendered."<sup>6</sup>

The writer would never even attempt to introduce such a document now. However, considering his experience in 1962 when the Grenon case occurred, he may well have acted exactly as the prosecutor in that case did.

#### Public Documents

The difficulties encountered by military lawyers with Article 53(c) remain today. This Article seems to say that all military documents are admissible as public documents and thus are evidence of the facts therein. The whole concept of the admissibility of public documents is quite inconsistent with the content and purpose of many documents that are kept for official purposes by the Armed Forces.

For a document to be considered a public

---

6. Id at 243

document, it must be available to some degree to the public and it must have been prepared by a public official and kept with a view to being retained for public access.<sup>7</sup> It is reasoned that documents prepared as above are trustworthy and thus the best evidence rule of proof of contents by calling the maker is unnecessary.

The second aspect of public documents is that copies can be introduced by a custodian. This procedure is one largely based on the need to get evidence before a court without keeping legions of public servants on hand and away from their duties. In effect the courts conduct a balancing act between avoiding too much inconvenience to holders and makers of documents while at the same time doing the best they can to ensure that documents admitted in evidence are accurate, while always keeping in mind the right of the accused to cross-examine. When the balance goes out of kilter, the problems begin.

In the case of Dagdick v Franks et al<sup>8</sup> the plaintiff sought to introduce records of conversations between Mr. Dagdick and a doctor, for the purpose of showing that Mr. Dagdick was insane.

---

7. R v Kaipainen (1953) 107 C.C.C. 377

8. (1961-62) 36 W.W.R. 395

Plaintiff argued that the conversations were a "record" within the meaning of Section 34 of The Manitoba Evidence Act,<sup>9</sup> and admissible since they were kept by the Psychopathic Hospital. Section 34 provides in part that a copy of an entry in any book, record, document or writing kept by any provincial government department, commission or board, shall be received as evidence of that entry and of the matters, transactions and accounts therein recorded. Williams C.J.Q.B. refused to accept the record of conversations and stated, "In my opinion, even if I assume that the hospital is a department of government or otherwise a branch of the public service, the records in question, so sketchily described, are not such records as are contemplated by Section 34."<sup>10</sup> It can thus be seen in this case that the Learned Chief Justice, while somewhat satisfied that the hospital or custodian might fall within Section 34, the contents of the documents were not such that he was convinced of their accuracy.

In Nowlan v Elderken,<sup>11</sup> the question arose as

---

9. R.S.M. (1954) c.75

10. Supra fn 8 at 402

11. [1950] 3 D.L.R. 773

to whether enlistment records of the Armed Forces were admissible pursuant to Section 26 of The Canada Evidence Act<sup>12</sup> which section is very similar to Section 34 of The Manitoba Evidence Act discussed in the preceding paragraph. Here the Nova Scotia Supreme Court held that the enlistment records were made in the ordinary course of business of the Forces, and thus admissible. The court further held that if it were not for decisions of higher courts, it would have admitted these records as public documents. In this case, there was no balancing problem in that the court was satisfied with the custody, content and accuracy of the documents in question.

Many military documents are of the nature described in the Nowlan case, and there is little problem with those. However, many others are similar to those in the Dagdick case, namely subjective and sketchily prepared. Because of the very wide scope of Article 53(c), not only is the military prosecutor or defending officer required to determine as best he can whether the court will accept his documents as evidence, he must also decide whether it is appropriate and proper to introduce them at all.

---

12. R.S.C. (1927) c.59

This is a tall order, particularly for relatively inexperienced counsel.

#### Court Martial Appeal Court

The Court Martial Appeal Court has had relatively few opportunities to rule on the admissibility of public documents as described in The Military Rules of Evidence. In the Grenon case, the court ruled a document inadmissible without referring to Article 53(c), and also observed on the care prosecutors must take to consider the propriety of submitting a particular document to the court as evidence at all. However, the court did not deal specifically with Article 53(c), although the document in question in that case must have been admitted under that Article. The matter did not arise again before the court for three years until 1966, at which time the court addressed itself specifically to Article 53(c).

Ziesman v The Queen<sup>13</sup> was a murder case heard by a General Court Martial at Royal Canadian Air Force 3 Wing, Zweibrücken, Germany. Leading Aircraftsman Ziesman was charged with three separate

---

13. (1966) 3 C.M.A.R. 17

charges of murdering his wife and two daughters. The main defence was insanity within the meaning of what are now Sections 130 and 131 of The National Defence Act (1970). A specialist in psychiatry was called by the defence. In rebuttal, the prosecutor called Lieutenant-Colonel Badgley to give evidence that the accused was not insane and to introduce a "Sanity Board Report." This document was prepared for the Royal Canadian Air Force by three psychiatrists and was filed with Ziesman's military medical records. Only Lieutenant-Colonel Badgley was called. The Judge Advocate ruled the document admissible under Article 53(c), but he did warn the members of the court as to the weight to be attached to it, and stated that the members of the court did not have to accept the truth of the statements or the validity of the opinions in the document.

Gibson P., in his judgement stated that "It is perfectly clear that Article 53(c) is not a regulation made pursuant to Section 153<sup>14</sup> of The National Defence Act...The Court is also of the opinion that there is nothing in The National Defence Act or in any regulations thereunder permitting the

---

14. Now Section 159(1) of The National Defence Act (1970)

introduction in evidence of documents such as Exhibit "U", the Sanity Board Report, whereby the best evidence rule would be circumvented and whereby an accused person would be deprived of his right to cross-examine witnesses, that were not called, but whose evidence was contained in such report. It would require very clear language in a statute to persuade the court that Parliament intended that a document, such as Exhibit "U" could be introduced into evidence so as to circumvent such rights of an accused person."<sup>15</sup>

The court stated that the admissibility of the Sanity Board Report was wrong in law; it was a question of admissibility and not weight. A new trial was ordered.

The court was clear that at least it thought Article 53(c) was not made pursuant to Section 159. If that is correct, what is the meaning of Article 53(c)?

#### Conclusion

It is unfortunate that the Court Martial Appeal Court did not simply state that Article 53(c) was ultra vires the Governor in Council. The court said that very clear language in the statute would have

---

15. Supra fn 13 at 21

been required to satisfy it that a document such as the Sanity Board Report was contemplated. Section 159(1) of The National Defence Act (1970) is a very clear section. It provides extremely broad scope to the Governor in Council. The problem, therefore, seems to be less with Section 159(1) than with Article 53(c). As it stands, Article 53(c) could allow the introduction of all kinds of inaccurate, subjective, biased, and incomplete documents, provided only that they are kept for official purposes. The impact of the Ziesman case and Grenon case is really that prosecutors and Judge Advocates must be extremely careful in deciding what documents to submit to or accept at a court martial. Had all three psychiatrists been called in the Ziesman case, it seems that the Sanity Board Report would have been admissible.

For example, in MacDonald v The Queen,<sup>16</sup> a medical report was admitted as evidence through the psychiatrist who prepared it, and there was no observation on it at all in the judgement. The report in the MacDonald case was similar in nature to the one rejected by the Court Martial Appeal Court in

---

16. (1974) 4 C.M.A.R. 30 December, 1974

the Ziesman case.

The introduction of medical documents without calling the maker has always caused some difficulty in court. However, if the Ziesman case restricts Article 53(c), how does the restriction operate? For example, personal assessments on the accused made by a superior, letters of commendation, medical reports, and social worker assessments are among the type of documents that probably would not be admitted. In fact, the prosecution should probably not even try. However, could Article 53(c) be used to introduce as public documents (and thus evidence against the accused) official correspondence such as letters, memoranda and telegrams?

Such documents could often be as damaging as a personal assessment or medical report. Where is the line to be drawn?

In spite of the decision in the Ziesman case, it is difficult to convince oneself that Article 53(c) is not a regulation made pursuant to Section 159(1) of The National Defence Act (1970). However, the Court Martial Appeal Court is correct in saying that some documents are not contemplated by Section 159(1).

The writer has stated his opinion a number of times in this paper that The Military Rules of Evidence

are an exhaustive code and that the Governor in Council can make whatever rules of evidence he wishes to, providing they are reasonable and do not conflict with The Canadian Bill of Rights. The writer agrees with the decision in the Ziesman case that the Sanity Board Report was inadmissible, not because of the general reason that Article 53(c) is not made pursuant to Section 159(1) of The National Defence Act (1970), but because Article 53(c), because of its unlimited scope, is unreasonable and contrary to The Canadian Bill of Rights.

The second problem is that Article 53(c) is much too wide and is thus open to attack as being unreasonable. Further, many cases similar to the Ziesman case can arise when the defence can argue The Canadian Bill of Rights in that the accused is deprived of the right to cross-examine.

Chapter IX on Confessions outlined the methods the Legal Branch has employed to deal with apparent conflicts between Article 42 and the law applicable in civil court. In this Chapter, which deals primarily with Article 53(c), the problem is one, not so much of conflict, but of confusion. Considering Section 159(1) of The National Defence Act (1970) and the other Articles in The Military Rules of Evidence dealing

with public documents, Article 53(c) does not really make very much sense. No obvious attempt has been made to clarify this Article. For example, there is no Policy Directive concerning Article 53(c).

Generally, the difficulties caused by this Article, and indeed by the rules applicable to documents in general, have simply been left alone. The result is that military lawyers continue to have major problems when introducing documents at courts martial.

## CHAPTER XI

JUDICIAL NOTICERegulations, Orders and Instructions

The law of the Armed Forces exists in and emanates from The National Defence Act (1970). However, the main body of law is contained in Regulations, Instructions, Orders and Directives published by the Governor in Council, the Treasury Board, the Minister of National Defence, the Chief of the Defence Staff, the Commanders of Commands, Groups and Bases, and Commanding Officers of Stations or Units. The volume of such law is becoming immense and will apparently continue to increase.

Section 48 of The National Defence Act (1970) provides that Regulations, Orders and Instructions are sufficiently notified to servicemen if published as required by Queen's Regulations and Orders at the unit where the serviceman is stationed. Section 48 also provides that regardless of publication at a serviceman's unit, a Regulation, Order or Instruction is deemed properly notified if published in the Canada Gazette. Taking judicial notice because of publication in the Canada Gazette is also provided for in

The Statutory Instruments Act,<sup>1</sup> but only applies to Governor in Council and Treasury Board Orders along with some other Regulations in the Queen's Regulations and Orders.

In the Armed Forces, and to some degree among civilians, there is a connection between notification of regulations, judicial notice, and public documents. Consequently, there is often a problem in deciding whether judicial notice can be taken of a Regulation, Order or Instruction and whether there also has to be notification.

Unfortunately, the words Regulation, Order and Instruction are not defined in The National Defence Act (1970). Further, Directives are not mentioned at all, although most of them are published under the signature of the Chief of the Defence Staff and would thus fall within Article 15(2) of The Military Rules of Evidence. As a matter of custom and practice, it seems that Regulations and Orders and occasionally Instructions are issued by the Chief of Defence Staff; Instructions only are normally issued by the Commanders of Commands and Groups; and Orders only are issued by Base Commanders and Commanding Officers. However,

---

1. S.C. (1970-71-72) c.38 s.23(1)

there is no consistency, and certainly no general rule as to the name to be attached to documents published at different levels of command in the Armed Forces.

While the words Regulation, Order and Instruction are employed in The Military Rules of Evidence, the guiding factor seems to be the authority publishing a document, and not the name of the document. For example, Article 15(2) provides for mandatory judicial notice of certain publications and "including but not limited to Queen's Regulations and Orders, and orders and instructions issued in writing by or on behalf of the Chief of Defence Staff under QR&O 1.23." Would, for example, Non-Public Fund Directives<sup>2</sup> be a Regulation, Order or Instruction of which a court martial could take judicial notice? These Directives are published on behalf of the Chief of Defence Staff. However, if they are not published pursuant to Queen's Regulations and Orders (QR&O) Article 1.23, but pursuant to some other authority, judicial notice could not be taken. It would thus appear that Article 15(2) of The Military Rules of Evidence would

---

2. Non-Public Fund Directives (Ottawa: Department of National Defence, 1969)

only apply regardless of what the publication was described as if:

- (a) it was issued by the Chief of Defence Staff; and
- (b) it was issued pursuant to Queen's Regulations and Orders Article 1.23.

In spite of the very technical aspects of judicial notice in the above situation, the writer has found that at courts martial there is normally little argument regarding judicial notice of publications issued by the Chief of Defence Staff. This lack of objection appears to occur for two reasons:

- (a) Military Regulations issued by the Chief of Defence Staff receive very wide publication and are easily available to all servicemen; and
- (b) Queen's Regulations and Orders Article 19.01 provides that every officer and man shall acquaint himself with, obey, and enforce The National Defence Act, The Official Secrets Act,<sup>3</sup> Queen's Regulations and Orders and all other Regulations, Rules, Orders and Instructions necessary for the performance of his duties.

---

3. R.S.C. (1970) c.O-3

It is extremely difficult at a court martial to argue that the accused was unaware of a Regulation, Order or Instruction relevant to his specific duties as a military man, because that could leave him open to a charge under Section 114 (Negligent Performance of Duties) of The National Defence Act (1970).

There is an exception where it is doubted a court martial would take judicial notice of a Regulation, Order or Instruction that appears to fall within Article 15(2) of The Military Rules of Evidence. That would occur when the security classification of the publication was higher than that of the accused. However, even if the security classification of the accused and the document were Secret or above, it is doubted that judicial notice would be taken because the whole concept and physical machinery involved in notification ceases to apply in the normal manner to highly classified documents due to the cautious way in which they are disseminated and handled. In this case, the court would most likely be held in camera and the prosecutor would be required to prove that the accused had been notified

of the document or was aware of its content.<sup>4</sup>

There have only been a few appeals to the Court Martial Appeal Court in which the question of judicial notice was of significance. Judicial notice is normally explained to the court martial at the outset of the trial and is usually referred to again in the Judge Advocate's summing up. However, as mentioned earlier, there are few arguments at courts martial about judicial notice, and thus appeals based partly on a court martial taking, or not taking judicial notice are usually instigated by appeal lawyers, rather than being the continuation of an argument already made before the court martial.

The case of Hellberg v The Queen<sup>5</sup> arose because of the conduct of a Pilot Officer of the Royal Canadian Air Force at Val D'Or, Quebec. This officer had been on standby duty to fly, and during this time he consumed alcoholic beverages at the Officers' Mess and in the town of Val D'Or. When

---

4. Fay, J.B., Lieutenant-Colonel, Canadian Military Law: An Examination of Military Justice (1975) 23 Chitty's Law Journal No. 4 at 125. There is an interesting discussion in Volume 4 on Regulations, Orders and Instructions at pages 125 to 129 which looks at the problem from a different angle, but is useful particularly from the notification and historical point of view.

5. (1966) 3 C.M.A.R. 11

aircrew are on standby at Air Defence Command Bases, they must be available for immediate take-off in their interceptor aircraft either to intercept an enemy or unknown aircraft, or to get their own aircraft off the ground before an enemy nuclear missile strikes the base where the aircraft is located.

The second charge was laid under Section 118 (now 119) of The National Defence Act (1970) to the effect that Pilot Officer Hellberg drank alcohol while on standby, contrary to Article 2.25 of Canadian Forces Publication 100, an order issued by the Chief of the Air Staff (equivalent to orders now issued by the Chief of Defence Staff). This article provides, in effect, that aircrew may not drink alcoholic beverages for eight hours prior to being scheduled for flying duties.

The prosecutor sought to introduce an Air Defence Command Instruction issued by the Commander of Air Defence Command which provided that aircrew shall not drink for eight hours prior to standby duties. The purpose of introducing this instruction was to explain, interpret, and presumably expand Canadian Forces Publication 100, Article 2.25 prohibiting drinking for eight hours prior to

scheduled flight.

The defence argued that being on standby duty was not being "scheduled to fly" because a pilot might be called upon anytime, or never, during the eight hour period to fly and thus was not "scheduled to fly" and consequently had not contravened the order he had been charged with disobeying. There was no doubt, however, that the accused contravened the Air Defence Command Instruction.

The accused was found guilty of the second charge and appealed. One ground of appeal was that the charge was one of contravening Article 2.25 of Canadian Forces Publication 100 and that the court martial could not take judicial notice of the Air Defence Command Instruction in order to extend the meaning of Article 2.25. It is not clear whether the prosecutor requested the court martial take judicial notice of the Air Defence Command Instruction or if it did, did so on its own. However, the Court Martial Appeal Court ruled that the court martial would not have been entitled to take judicial notice of the Instruction, particularly because the defence was given no opportunity to dispute the competency or propriety of the court martial doing so. The appeal

was allowed.

This case really clarifies very little as to when judicial notice can be taken of instructions. The case does, however, emphasize the need for the Judge Advocate to be extremely cautious in taking judicial notice without clearly stating it is being done and allowing the defence to argue the point.

In Platt v The Queen<sup>6</sup> regulations, orders, instructions, and general service knowledge were discussed. This case involved charges under Section 118 ( An Act to the Prejudice of Good Order and Discipline) of The National Defence Act (1950) of smuggling gold from Vietnam to Laos contrary to a routine order published in Vietnam. The court held that the court martial could not take judicial notice of the Routine Order in question because there was no proof of the promulgation to the accused of the order contravened.

It is interesting to note that apparently the court is inferring that if publication had been proven, the court martial could have taken judicial notice of it. However, would it not be a better practice to

---

6. (1963) 2 C.M.A.R. 213

introduce the order as an exhibit as a public document pursuant to Article 53(a) of The Military Rules of Evidence?

General Military Knowledge

Section 119 of The National Defence Act (1970) provides that a multitude of acts are offences under this section, if the court martial concludes that the act was prejudicial to both good order and discipline. Except in the case of contravention of regulations, orders and instructions, the court is entitled to take judicial notice, based on its "general service knowledge" as to what is good order and discipline in the circumstances. Authority to take judicial notice in these circumstances is included in Note G to Queen's Regulations and Orders for the Canadian Forces, Article 103.60, and in Article 16(2)(a) of The Military Rules of Evidence which provides that a court martial may, whether requested to do so or not, take judicial notice of all matters of general service knowledge. Because of the very nature of Section 119 of The National Defence Act (1970), the areas in which general service knowledge can be applied to take judicial notice are very wide indeed.

Judicial notice based on "general service knowledge"

is a concept somewhat at odds with the rules applied in civil court. For example, G.D. Nokes, in his Article "The Limits of Judicial Notice"<sup>7</sup> states that among the considerations affecting the determination of taking judicial notice is whether a fact may be common knowledge among only a certain class in the community. He suggests this may not be a proper subject of which judicial notice should be taken. Again, R v Blick<sup>8</sup> certainly implies that judicial notice should not be taken based on special or private knowledge. On the other hand, R v Purcell<sup>9</sup> is an example of unreasonable rigidity by a Magistrate as regards matters of common knowledge. The accused was charged with assault in or near Halifax and in fact near the police station. The magistrate dismissed the charge on the basis that there was insufficient evidence that the police station was in Halifax. The Nova Scotia Supreme Court stated that there was ample basis for the Magistrate to take judicial notice that the police station was in Halifax; there were street names and place names mentioned in evidence which were

---

7. (1958) 74 L.Q.R. 59 at 67

8. (1966) 50 Cr. App. R. 280

9. (1975) 11 N.S.R. (2d) 309

common to Halifax. While the Supreme Court did not say so, a factor in taking judicial notice would be that the trial was in Halifax and it is quite likely that all participants in the trial knew perfectly well what was being discussed.

Members of the Forces who are sitting as members of a court martial are clearly authorized, pursuant to Article 16(2)(a) of The Military Rules of Evidence, to use their special or private knowledge as members of the Forces to take judicial notice of certain facts of a well known military nature.

Some examples might help to illustrate the point. The writer sees no reason why a court martial could not take judicial notice of the fact that military personnel in the Canadian Forces only salute indoors when they wear headgear. The court martial could not take judicial notice of whether the accused actually wore a hat, or did or did not salute. Whether a court could also take judicial notice of the fact that United States military personnel salute indoors without their hats on is doubtful because it is a practice followed in a foreign country. A court could take judicial notice of the fact that the initials ADCHQ referred to Air Defence Command Headquarters and that was located at North Bay, Ontario

until 1975. A court could not take judicial notice that "The Hole" is the Senior Air Ground Environment underground control centre at North Bay although it probably could take judicial notice that the initials SAGE constituted the Senior Air Ground Environment underground control centre. These are examples of "general service knowledge" well known to military personnel.

The question of judicial notice based on general service knowledge had been argued in the Court Martial Appeal Court. However, the cases add only slightly to military law. The reason for this is that rulings on judicial notice are extremely specific and are difficult to use as precedents.

In Owen v The Queen,<sup>10</sup> a case involving a charge of negligently hazarding a warship, the Court Martial Appeal Court judicially approved of a statement by the Judge Advocate which was as follows: "A service tribunal may take judicial notice of facts particular to service life, but these facts or matters must be so well known to all servicemen that they are to be taken more or less for granted." This is certainly a very broad statement, especially the expression "more or less for granted."

---

10. (1959) 2 C.M.A.R. 103 at 116

Two earlier cases will be mentioned only briefly as they were decided well before The Military Rules of Evidence came into force. Hryhoriw v The Queen<sup>11</sup> dealt with judicial notice of the duties and obligations of servicemen. Chenoweth v The Queen<sup>12</sup> discussed general service knowledge but it is of limited use because the quantity of prosecution evidence was so small.

In Smith v The Queen,<sup>13</sup> the situation arose which was discussed earlier in this Chapter: namely that the question of the taking of judicial notice and objections thereto seldom arises. It is more or less assumed that since the prosecutor, defending officer, Judge Advocate, and members of the court, are all military officers, everyone involved knows what is being discussed when it refers to a military matter. In the Smith case, one ground of appeal was that the Judge Advocate was guilty of mis-direction or non-direction. He directed the members of the court martial that they could exercise their general military knowledge as to what was an act to the prejudice of good order and discipline by taking judicial notice, in that he failed to comply with

---

11. (1954) 1 C.M.A.R. 277

12. (1954) 1 C.M.A.R. 253

13. (1961) 2 C.M.A.R. 159

Article 18(2) of The Military Rules of Evidence, which provides that the Judge Advocate shall decide the question.

At no time during the trial, except for remarks by the Judge Advocate, did the question of the taking of judicial notice arise. The Judge Advocate did tell the court martial that in exercising its general military knowledge, it should be guided by the judicial notice Articles of The Military Rules of Evidence.

The appeal court held that since neither the prosecutor nor the defending officer raised the question of judicial notice, and since there was no evidence as to whether the court martial took judicial notice of anything, Article 18(2) did not apply. The Court Martial Appeal Court dismissed the appeal.

In Platt v The Queen,<sup>14</sup> Major Platt was charged with Scandalous Conduct under Section 83 of The National Defence Act (1950) and in the alternative under Section 119 with An Act to the Prejudice of Good Order and Discipline. The effect of the charges was that Major Platt organized and participated in the improper

---

14. Supra at fn 6 p.249

transportation of gold from Vietnam to Laos. Such transportation was not illegal under Vietnamese law but may have been contrary to a Routine Order published in Vietnam and mentioned earlier in the Chapter.<sup>15</sup> The court held that it could not be said that a prohibition against the transportation of gold is a matter of "general service knowledge" as such transportation was not per se illegal. In effect, the court said that the court martial could not take judicial notice of the fact that gold transportation was illegal, as a general proposition. Further, it could not take judicial notice that gold transportation was illegal as being contrary to a Routine Order, because there is no evidence that the Routine Order was promulgated to the accused.

It therefore seems clear that there will be a number of cases where publication or notification of an order and "general service knowledge" of the facts in that order are inextricably connected. Possibly, therefore, judicial notice of facts in orders and instructions is based more on notification to the accused than on "general service knowledge." This suggestion probably would not apply to Regulations,

---

15. Supra at p.249

Orders and Instructions published to the Armed Forces at large by the Chief of Defence Staff.

The last case to be examined as regards judicial notice is Cherkas v The Queen.<sup>16</sup> In that case, the accused was charged with Absence Without Leave under Section 81 of The National Defence Act (1970) and was found guilty. One of the defences was that it was "custom" at his unit for the non-commissioned officer to be absent from the guardroom, but available by telephone. The only reason the case is mentioned here at all is that the Court Martial Appeal Court was clear in saying that this custom, which was alleged to be purely a unit or local custom, must be supported by an evidentiary base. There was no discussion or even mention at the court martial, in the Crown's Statement of Facts and Law Relied on by Respondent, or in the judgement of the Court Martial Appeal Court, that judicial notice had any application at all. By implication, this judgement suggests that a court martial may not use its general service knowledge to take judicial notice of a local custom of the service. The question of local custom or knowledge was mentioned earlier in this Chapter

---

16. (1974) 4 C.M.A.R. (unbound), 31 May, 1974

regarding "The Hole" at the Canadian Forces Base North Bay, Ontario.

### Conclusion

This Chapter has only dealt with judicial notice as regards Regulations, Orders and Instructions and judicial notice based on "general service knowledge" as referred to in Article 16(2)(a). These two items were selected by way of illustrative examples.

While the question of "general service knowledge" is limited to a specific class or group of people in the military, the facts thus proved by taking judicial notice are within the military "of such general and common knowledge in the community that proof is dispensed with."<sup>17</sup> It certainly is a matter of speculation, however, as to whether a Canadian civilian judge, sitting as a President of a Standing Court Martial or a Presiding Judge at a Special General Court Martial could, or would, take judicial notice based on "general service knowledge." Probably Article 16(2)(a) would not apply if the President or Presiding Judge was not a serving military officer. Possibly a more refined question would be

---

17. McWilliams P.K., Canadian Criminal Evidence (1974) 379

whether a presiding civilian judge, who was a retired member of the Legal Branch of the Canadian Forces, could take judicial notice based on his "general service knowledge."

The Military Rules of Evidence do not reflect a particularly different law of judicial notice than is encountered in civil courts. The difficulty in military courts occurs more with Orders and Instructions issued by local commanders. However, this can largely be solved by applying Article 15(a) of The Military Rules of Evidence regarding public documents.

In conclusion, it can thankfully be said that military courts have relatively few difficulties with judicial notice. Furthermore, the Court Martial Appeal Court decisions have been quite helpful because they stay with The Military Rules of Evidence and do not discuss judicial notice in an exclusively civilian context, as happens in some areas of military evidence law.

## CHAPTER XII

PRIVILEGECrown Privilege

It seems that until very recently, public servants have had everything their own way when it came to claiming Crown privilege. Some claims of privilege have been unreasonably unfair to litigants<sup>1</sup> while others have been just plain silly.<sup>2</sup> In the Reese case, the Crown sought successfully to claim privilege for inter-departmental documents which could apparently prove or disprove the plaintiff's case. These documents dealt with nothing more significant than mineral rights. In the Snider case, the Crown unsuccessfully attempted to claim privilege for income tax returns, apparently on the ground that criminals who reported illegal earnings for taxation purposes, would cease to do so if the confidentiality of their returns could not be protected. In both these cases, there was also the matter of people making statements in documents with some type of understanding that their statements were confidential, but the

---

1. Reese v R. [1955] Ex. C.R. 187

2. R v Snider (1954) 109 C.C.C. 193

specific examples in these two cases were rather weak. There is obviously a need for Crown privilege if disclosure would seriously injure national defence, good international relations, or other vital national interests. The best example the writer can think of is the case of Duncan v Cammell, Laird & Co. Ltd.<sup>3</sup> Here privilege was claimed for a sensible reason. The British Admiralty sought successfully to protect from production documents relating to the structure and construction of a military submarine.

It seems that the general law of Crown privilege is that Crown privilege attaches almost without reservation to documents and information involving national security, good international relations and other vital national interests. However, in other cases, the privilege seems to attach only if it is in the public interest to withhold production, as balanced against the public interest of the administration of justice.

It is interesting to note that most writers see nothing wrong with fairly wide privilege attaching to matters of national defence,<sup>4</sup> while at the same

---

3. [1942] A.C. 624

4. British Columbia Law Reform Commission  
Working Paper No. 7, Legal Position of the Crown, 57

time, The Military Rules of Evidence claim virtually no privilege for military information. Article 71 of The Military Rules of Evidence states that "Except as provided in this Section or in an Act of the Parliament of Canada, there is no official or governmental privilege to withhold relevant evidence from a court martial." Articles 67 and 68 additionally provide a series of alternatives where difficulties arise regarding the admission of evidence of matters affecting national defence, good international relations or vital national interests.

If the question of privilege comes up in pre-trial investigation, or at trial, the procedure would be somewhat as follows: Firstly, a privilege will be claimed if the convening authority does not consider that the accused will be prejudiced if the information is not provided. Secondly, if the information can be provided, is necessary to the defence of the accused, and is of a highly classified nature, the court martial will be held in camera and the evidence heard if admissible. Thirdly, if the information is vital to the accused but cannot be provided to the accused at a court martial held in camera, the charges will be dropped.

The following comments on privilege are made

without the benefit of examining any decisions of the Court Martial Appeal Court, because as far as the writer can determine, that Court has never ruled on the subject.

It appears that the drafters of the Articles of The Military Rules of Evidence dealing with Crown privilege and which were written in the late 1950's, were guided by the principles set forth in the Snider case.<sup>5</sup> That case may have expanded the law of privilege to some degree. However, its importance seems to be more in its rulings on the rights of the judiciary than the meaning of Crown privilege itself. The Supreme Court decided that just because a statute provided that certain classes of documents were privileged, did not automatically mean that such was the case. In that case, the privilege appears to have been provided more for the real or imagined benefit of the citizen than for the government itself. Thus there was no national interest or security of the state question involved that would override the principle that a court must be provided with all relevant facts. Further, the court clearly stated that a Crown official has no right to refuse production on the basis of his own opinion that production

---

5. Supra fn 2 p.260

would be prejudicial to the public interest.

Having been employed by the Federal Government for many years, the writer finds it quite easy to picture situations where an official could use a statute to refuse production "as prejudicial to the public interest" whereas in fact it might be just as likely that production is prejudicial to that official, his department, or the political career of his Minister. It is obviously much fairer for the information to be examined by the judge and the discretion left to him rather than the official. After all, the government has to trust somebody and a judge seems to be as reliable a person as anyone. If some of our more fanatical security people are concerned about the judge's discretion, they can take comfort in the fact that the judge is most likely bound by The Official Secrets Act.<sup>6</sup> Furthermore, this very procedure is now provided for in Section 41(1) of The Federal Court Act.<sup>7</sup>

Articles 67 and 68 of The Military Rules of Evidence do not provide that the Judge Advocate decides whether a privilege claimed is really a

---

6. R.S.C. (1970) c.0-3

7. R.S.C. (1970) (2nd Supp) c.10

privilege, but they do provide that the convening authority so decide in writing. The convening authority is the senior military officer responsible for ordering the convening of a court martial. On the surface, it would appear that the Judge Advocate should decide questions of privilege and it may well be that he should. However, Article 69(1) provides that the convening authority shall consult with the Judge Advocate General. Traditionally, the Judge Advocate General himself has maintained a very impartial position regarding courts martial and thus is certainly in as good a position, if not a better one, than the Judge Advocate sitting at the court martial, to advise on this question.

Regarding the difficulty of deciding whether a matter is really privileged by content, or simply by statute, Article 71 of The Military Rules of Evidence has solved most of the problem by claiming no privilege except as provided in Articles 67 and 68 and by other Acts of Parliament.

An example may serve to illustrate how, in practice, the Crown does not claim privilege at courts martial. In 1975, the writer was the defending officer for an accused who was to be tried by General Court Martial. In the writer's view, it was vital to the

defence to see and possibly introduce into evidence documents involving the security clearance of an individual and documents of a confidential nature involving the handling of an officer's career. Prior to and during trial, the following events occurred:

- (a) One authority at a level below National Defence Headquarters attempted to prevent the defence from seeing certain classified documents. The Prosecutor became aware of this and on his own initiative arranged for the necessary documents to be made available.
- (b) Not a single officer at National Defence Headquarters made any attempt to argue the writer's entitlement to see the requested information, and use it in court if needed. Senior security officials were somewhat nervous, but only over the possibility that other classified information, mainly of a security procedural nature, might become known through the form and content of information to be used at the court martial.
- (c) In all cases but one, documents classified as confidential were unclassified and thus could be introduced and discussed in open court.

(d) One document that could not be unclassified was still introduced at the court martial, but in camera.

In this case, while the classification of the documents was not high, it was confidential. The material was in some cases very sensitive and in others it was embarrassing to the officials involved. It was a credit to the intellectual honesty of the officers concerned that no attempt was made to hide behind any type of Crown privilege. In the writer's experience, National Defence officials have rarely concerned themselves with privilege as such, but do concern themselves with the security classification of the material they are releasing.

In general, the Armed Forces, through The Military Rules of Evidence, and in the actual practise and conduct of its officials, has achieved a very fair and just balance in the field of Crown privilege. In this regard, the words of Lord Justice Morris in Ellis v Home Office<sup>8</sup> are applicable here. When discussing privilege, he said that "when considering what might be injurious to the public interest, it seems to me that it is to be remembered that one

---

8. [1953] 2 Q.B.R. 135 at 147

feature and one facet of public interest is that justice should always be done and should be seen to be done." The writer is of the view that this principle is followed in The Military Rules of Evidence and in trial and pre-trial practise in regard to Crown privilege.

### Penitential Privilege

The present civil law seems to be that the courts would not require a clergyman to give evidence of a penitential communication except in the most serious case.<sup>9</sup> However, while in practice, there is no penitential privilege in Canada, except in Newfoundland<sup>10</sup> and Quebec,<sup>11</sup> clergymen are rarely put in the position of being required to give evidence of penitential communications or to have to refuse to do so. The writer has some doubt that provincial legislation could be used in a criminal court to claim penitential privilege, because provincial legislatures are normally deemed not to be legislating on matters purely within the jurisdiction of the Federal Government under The British North America Act.

---

9. A.G. v Mulholland; A.G. v Foster [1963] 2 W.L.R. 658

10. The Evidence Act, R.S.Nfld (1970) c.115 s.6

11. S.Q. (1965) (Vol II) c.80 s.308(1)

Furthermore, on the basis of Cook v Carroll,<sup>12</sup> it would probably make little difference even if the person making the communication to the clergyman agreed. What penitential privilege there is in civil courts<sup>13</sup> in Canada seems to be based more on practise than on law.

Article 78 of The Military Rules of Evidence grants penitential privilege for a penitential communication, providing it is made secretly and in confidence by a person to a clergyman or priest in the course of the discipline or practise of the church, religious denomination or organization of which the person making the communication is a member. Additionally, the clergyman receiving the communication can prevent a witness from reporting it.

In one respect Article 78 is quite wide, namely that it covers not only churches but religious denominations and organizations. These expressions would include a number of organizations that might not fall within what are traditionally considered "churches" or "religious denominations."

On the other hand, Article 78 is somewhat

---

12. [1945] I.R. 515

13. Supra fn 9 p.268

confusing in that the privilege only applies if the person making the confession or communication does so in accordance with the discipline or practice of that church, denomination or organization. For example, it is doubtful that the privilege would attach if the communication was made to a Roman Catholic priest by a person whose religious organization did not recognize any discipline or practice of secret and confidential communications to a clergyman. Of course, the priest would probably refuse to answer questions about the communication and we would then probably, as a matter of practice not law, revert to the Mulholland case.

There are no Court Martial Appeal Court decisions in penitential privilege. This fact is not surprising, as the civil courts rarely encounter this circumstance either. The writer doubts very much if a military prosecutor would ever put a clergyman in the position of having to claim the privilege under Article 78, or of refusing to answer if that Article did not apply.

#### Confidentiality

It almost seems unfortunate that there are no Court Martial Appeal Court decisions on privilege as

outlined in The Military Rules of Evidence. However, privilege has rarely caused any difficulties at courts martial. This may well be because military lawyers who act as defending officers "know their way around" the Department of National Defence and are able to obtain the material they need. Additionally, departmental officials and military officers are very co-operative in assisting defending officers.

One area where problems of privilege may arise in the future is in regard to charges against servicemen as a result of confidential documents or correspondence prepared by them about other servicemen. Such documents would probably be inadmissible because of the decision in Slavutych v Baker et al.<sup>14</sup>

In the Slavutych case, the University of Alberta attempted to dismiss Professor Slavutych after he had written a confidential personal assessment about another professor, at the request of a University official, and on the understanding it was in confidence and would be destroyed after it had been used. He was encouraged to be frank. The purpose of the report was to assist the University in determining whether

---

14. [1975] S.C.R. 28 January, 1975

to grant tenure to the subject of the report. (The type of document involved here and the circumstance of its preparation and use are remarkably similar to the circumstance surrounding the preparation of military Personal Assessments on subordinates, along with any additional relevant correspondence.)

The University then decided to dismiss Professor Slavutych on grounds that his report contained serious charges against the subject, based on flimsy reasons without supporting evidence. The Arbitration Board in Alberta came to the conclusion Professor Slavutych should be dismissed. Professor Slavutych appealed on the basis that the Arbitration Board should not have considered the confidential "tenure form sheet" which he had prepared as a confidential document at the request of the University.

Sinclair J.A., of the Appellant Division of Alberta, decided that the "tenure form sheet" was inadmissible, not because it fell into any particular class that privilege attaches to, but because of the nature and circumstance of the confidentiality under which the report was prepared. Consequently, a confidence attaches to the document and it is inadmissible as evidence to support a charge against the author.

Sinclair J.A. states four fundamental conditions that must be present and were present in this case, if the document is to be ruled inadmissible.

- (a) The communication must originate in a confidence that will not be disclosed.
- (b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (c) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (d) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

The learned Appellant Judge cited as the authority for the above conditions Wigmore on Evidence.<sup>15</sup>

The Supreme Court of Canada agreed with the judgement of Sinclair J.A. and upheld the Alberta Appellant Court.

---

15. Wigmore J.H., Evidence (3d) sec 2285. Sinclair J.A. uses as his authority the McNaughton Revision (1961) of Wigmore. However, the section has the same number (2285) in the Third Edition as it has in the Revision of 1961.

While the above case does not deal specifically with privilege, it is included here because the result of the decision is, in effect, a new form of privilege.

At courts martial, documents of the nature described in the Slavutych case and supporting correspondence, could be submitted in evidence as public documents under Article 53(c). However, in view of this case and Ziesman v The Queen,<sup>16</sup> it is now doubted that such documents are admissible at all.

If such documents are not admissible to support a charge against an accused at a court martial, could they be admissible as evidence for the accused, and if they were, would this only be so if the author concurred? The additional question raised by the Slavutych case is whether some form of confidentiality privilege would arise if such documents were submitted as evidence for some other reason than for or against the writer of such report or correspondence. Admissibility of such documents at courts martial seems rather doubtful to the writer.

### Conclusion

This Chapter completes the illustrative examples

---

16. (1966) 3 C.M.A.R. 17

of how The Military Rules of Evidence operate in practice, and how the Court Martial Appeal Court has dealt with certain articles. While only four subjects, namely confessions, public documents, judicial notice and privilege were discussed by way of illustration, others could have been used or added. However, these four Chapters provide a general idea to the reader of how well The Military Rules of Evidence are working.

The last Chapter prior to the conclusion will discuss The Canadian Bill of Rights<sup>17</sup> and its effect on or application to The Military Rules of Evidence.

---

17. R.S.C. (1970) App III

## CHAPTER XIII

THE CANADIAN BILL OF RIGHTS<sup>1</sup>General

It is interesting to note that The Military Rules of Evidence, which came into force on 1 October, 1959,<sup>2</sup> were in the drafting stage and were being approved at the same time as The Canadian Bill of Rights was in the final stages of preparation, discussion and passage. The Canadian Bill of Rights came into force on 10 August, 1960.<sup>3</sup>

There is no doubt that the final examiners of The Military Rules of Evidence must have had the then completed Bill of Rights very much in mind when preparing final drafts for submission to the Governor in Council. However, the proposed Bill of Rights was never mentioned during the Parliamentary debates on the amendment of Section 152(1) of The National Defence Act (1950). It could be, of course, that the Parliamentarians and the members of the Cabinet just did not realize that Section 158(1) of

---

1. R.S.C. (1970) App III

2. Order in Council P.C. 1027-1959 dated 13 August, 1959

3. Tarnopalsky, W.S., The Canadian Bill of Rights (2d ed) 14

The National Defence Act (1970), as it is now, and certain Articles of The Military Rules of Evidence, might discriminate to an extent unacceptable to the Court Martial Appeal Court or the Supreme Court of Canada. It is equally possible that these elected officials, along with senior military and Department of Justice officers, had concluded that this new code of evidence did not abrogate, abridge, or infringe the proposed Bill of Rights.

In any event, neither Section 158(1) of The National Defence Act (1970) nor any of the Articles of The Military Rules of Evidence have been adjudicated upon, from a Canadian Bill of Rights point of view, by the Court Martial Appeal Court in the last seventeen years.

Military lawyers have, however, on numerous occasions, argued at courts martial that one section or another of The National Defence Act (1970), and indeed the whole of The Military Rules of Evidence, are inoperative because of The Canadian Bill of Rights. None of these arguments have met with much success at courts martial. Further on in this Chapter, some of these arguments will be discussed.

It is not surprising that most arguments to the effect that The Canadian Bill of Rights renders

some military legislation or other inoperative, are based, generally speaking, on "discrimination" and "equality before the law." Arguments along this line are certainly to be expected from defence counsel because military law and The Military Rules of Evidence are "different" from civil criminal law and evidence. Thus, the concepts of "discrimination" and "equality" quickly come to mind when preparing to defend an accused at a court martial.

However, before discussing this subject in some detail, the writer proposes to review the very few Court Martial Appeal Court decisions involving The Canadian Bill of Rights. There are just three decisions, and they deal only peripherally with The Military Rules of Evidence.

#### The Court Martial Appeal Court

Platt v The Queen<sup>4</sup> was an appeal from a court martial held on 11 May, 1962, almost exactly two years and nine months after The Canadian Bill of Rights came into force. One of the motions at the trial was that the accused was not provided with the assistance of a legal officer before the convening of the court

---

4. (1963) 2 C.M.A.R. 213 and 218

martial, and that this was a failure to provide protection to the accused in accordance with the provisions of The Canadian Bill of Rights. Presumably, the argument at court was based on the fact that there is no provision in Queen's Regulations and Orders for the Canadian Forces for the appointment of a defending officer until the Convening Authority decides to order a court martial. It is not clear to the writer what the defending officer hoped to achieve if the Judge Advocate ruled in his favour. The Judge Advocate denied the motion.

On appeal, the appellant listed fifteen grounds of appeal, four of which dealt with the rulings of the Judge Advocate on pleas in bar of trial made by the defending officer, including the one described above. Norris, J. stated, in regard to these motions, which in effect constituted a plea in bar of trial, that while he did not agree with all of the grounds used by the Judge Advocate, there was no error in the result and the plea was properly disallowed.

Two later cases dealt with the question of the members of the court martial accepting or not accepting the advice of the Judge Advocate on a matter of law when deciding in this finding. The problem related to Article 112.54(3) of Queen's Regulations and Orders

for the Canadian Forces, which provides:

"Except as provided in Article 112.06 (Question of Law or Mixed Law and Fact where Judge Advocate appointed), the court shall be guided by the opinion of the judge advocate upon all matters of law and procedure, and shall not disregard his opinion except for very weighty reasons."

This article appears to be a hold-over from the time when the Judge Advocate may not have been a legally qualified person. Even yet, there seems to be no mandatory requirement that a Judge Advocate be a qualified lawyer,<sup>5</sup> although the practice for the last twenty years at least has always been to appoint a qualified lawyer.

Article 112.54(3) commences with the words "Except as provided in Article 112.06..." Article 112.06 lists fifteen questions of law and mixed law and fact that a Judge Advocate may decide, and whose decision on those questions is final providing the President so directs at the commencement of the trial, and he invariably does so direct. Ten

---

5. Queen's Regulations and Orders for the Canadian Forces, Article 111.22

of these fifteen questions pertain to matters of evidence and include in a general way, virtually the whole of The Military Rules of Evidence. Since the decision of the Judge Advocate in all these cases is final, there is very little left over in the way of legal opinions by the Judge Advocate that a member of a court martial can refuse to accept under Article 112.54(3).

In Robinson v The Queen,<sup>6</sup> which was decided on other grounds, the question came up as to what law a court martial was using if it ignored the legal opinions of the Judge Advocate. It was argued that Article 112.54(3) negated the concept of a fair trial according to law and represents a denial to an accused person of equality before the law and due process of law, and as such, is a denial of natural justice as contemplated by The Canadian Bill of Rights.

By the time the Court Martial Appeal Court reached this ground of appeal, it had already decided to order a new trial. However, it did observe that, in future, unless a court martial, when announcing its verdict stated it had not disregarded the advice

---

6. (1971) 3 C.M.A.R. 43

of the Judge Advocate, similar grounds of appeal would be raised again. The appeal court seemed to imply it would look at such a ground of appeal with favour.<sup>7</sup>

As a result of this case, the Judge Advocate General directed that at General and Disciplinary Courts Martial, the Judge Advocate was to instruct the court to state, at the time a finding was announced, whether or not it had disregarded the legal advice of the Judge Advocate.

The matter came up again in Nye v The Queen<sup>8</sup> and the court decided as follows:

"I am also of the opinion that Article 112.54(3) does not, as argued by counsel, infringe the Canadian Bill of Rights in that it would deny to an accused person due process of law and natural justice. Article 112.54(3) does not allow a Court Martial to disregard the law but only, in exceptional cases, to disregard the opinion of the Judge Advocate upon a matter of law. As the members of a Court Martial are bound by the oath that they

---

7. Id at 78

8. (1972) 3 C.M.A.R. 85 at 87

have to take under Article 112.15 'to administer justice according to law,' it is obvious that the article in question merely allows them to disregard the opinion of the Judge Advocate on a question of law when they are convinced that his opinion is ill-founded."

This interpretation of Article 112.54(3) is quite sound in that it allows the President to continue a trial and maintain its validity in the unlikely event that a Judge Advocate began making rulings that were obviously wrong.

The three Court Martial Appeal Court cases discussed above are the only ones that have dealt with The Canadian Bill of Rights. It is obvious that the motion by the defence in the Platt case had nothing to do with The Military Rules of Evidence. The Robinson case and the Nye case, on the other hand, have a rather tenuous connection with The Military Rules of Evidence. However, as long as Presidents of General and Disciplinary Courts Martial continue to give the Judge Advocate authority, at the outset of trials, to make final rulings on questions of law and mixed law and fact as described in Article 112.06 of Queen's Regulations and Orders

for the Canadian Forces, the question of what law of evidence is being applied at courts martial by the members of the court should not arise.

### Equality Before the Law

Legislation concerning discrimination and equality before the law is not new in Canada. In 1793, the Legislative Assembly of Upper Canada enacted "An Act to prevent the further introduction of slaves and to limit the term of contracts for servitude within the province."<sup>9</sup> However, not much more happened in this field until 1944 when Ontario enacted The Racial Discrimination Act.<sup>10</sup>

In 1947, the first bill of rights, namely The Saskatchewan Bill of Rights<sup>11</sup> was passed. Since then, there has been a sharp increase in "anti-discrimination" and "equality before the law" legislation. However, from a federal point of view, The Canadian Bill of Rights is probably the most important such enactment.

Because the Canadian constitution, The British North America Act,<sup>12</sup> is a foreign statute, our

---

9. (1793) S.U.C. (2nd Session) c.7

10. S.O. (1944) c.51

11. R.S.S. (1965) c.378

12. (1867) 30 and 31 Vict c.3

Bill of Rights could not easily be incorporated into it. Thus, The Canadian Bill of Rights is simply another federal statute being largely equal in authority to other federal statutes. However, because of the way it is written, this statute may well be more equal than others. It appears to be somewhat similar in operation to The Interpretation Act<sup>13</sup> in that other statutes must be read "in light of it" and interpreted where possible, so as not to be contrary to the Bill's provisions. Section 2 of The Canadian Bill of Rights provides in part, "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared..." There is, however, some suggestion by Mr. W.S. Tarnopalsky that The Canadian Bill of Rights may have some constitutional status.<sup>14</sup>

Neither The National Defence Act (1970) nor The Military Rules of Evidence contain any provision

---

13. R.S.C. (1970) c.I-23

14. Tarnopalsky, W.S., "The Supreme Court and The Canadian Bill of Rights" (1975) 53 C.B.R. 649 at 672

exempting this legislation from the provisions of The Canadian Bill of Rights. Therefore, The Canadian Bill of Rights applies to both The National Defence Act (1970) and to The Military Rules of Evidence.

The writer is unable to find any section or article of The National Defence Act (1970) or The Military Rules of Evidence that discriminates on the basis of race, national origin, colour, religion or sex. The same kind of statement cannot be made for some of the military subordinate regulations and orders, but they are not the subject of this paper.

It is, however, crystal clear that The National Defence Act (1970) and The Military Rules of Evidence do, in a way, "discriminate" and create "inequality before the law" as between Canadians who are subject to these enactments, and Canadians who are not subject to such legislation.

The gradual accumulation of legal precedent has created some rules as regards "discrimination" and "equality before the law." The writer will therefore list briefly in a more or less historical sequence, some of these rules in an attempt to show how they have developed, and where The National Defence Act (1970) and The Military Rules of Evidence

are now situated vis-a-vis The Canadian Bill of Rights.

- (a) "Equality before the law" does not mean that the law must be identical for all regardless of age, characteristics, or other factors, but means that every person to whom a particular law applies has the right to be treated by the law equally with all others to whom that law applies.<sup>15</sup>
- (b) Common sense, experience, and knowledge make clear the fact that laws do discriminate between citizens and that certain forms of discrimination are neither illegal nor bad in themselves.<sup>16</sup>
- (c) The Canadian Bill of Rights prohibits discrimination only by reason of race, national origin, colour, religion, and sex. Other forms of discrimination are not affected by The Canadian Bill of Rights.<sup>17</sup>

---

15. R v Gonzales (1962) 32 D.L.R. (2d) 290

16. Smith, J.C., "Regina and Drybones and Equality Before the Law" (1971) 49 C.B.R. 163

17. R v Drybones (1970) 9 D.L.R. (3d) 473

- (d) The interpretation of the Drybones case in (c) above, can be extended to mean that there cannot be inequality of treatment "without adequate justification."<sup>18</sup>
- (e) The discretion of the Crown to proceed by way of indictment or summary trial is not rendered inoperative by The Canadian Bill of Rights in that Section 2(e) thereof refers to a trial and not to the charge.<sup>19</sup>
- (f) If a person, by some act, is deprived of rights within a special group, but as a result of that act acquires the same rights as other Canadians, that person is not deprived of equality before the law. This statement is a generalization of the situation of the Indian woman in Re Lavall and Attorney General of Canada<sup>20</sup> who lost Indian rights on marrying a white man.

---

18. McLaughlin, R.N., "R v Smythe - The Canadian Bill of Rights - Equality Before the Law" (1973) 51 C.B.R. 517 at 520

19. R v Smythe [1971] 2 O.R. 209

20. [1972] 1 O.R. 390

- (g) The fact that there is no discrimination by reason of race, national origin, colour, religion, or sex does not in itself determine the issue.<sup>21</sup> This may be an expansion of sub-paragraph (c) above.
- (h) The Canadian Bill of Rights merely declares and continues rights and freedoms existing in 1960, and equality before the law cannot mean that all statutes apply equally to everyone in all areas of Canada.<sup>22</sup>
- (i) The British North America Act refers specifically to "Indians" in Section 91(24) and thus recognizes a racial group for whom special treatment is contemplated. Thus, Sections 42, 43, and 44 of The Indian Act,<sup>23</sup> which provides such special treatment in matters of successions and authorizes the Minister rather than the provincial courts to rule in such matters, is not in conflict with The Canadian Bill of Rights since the creation of a special

---

21. R v Burnshine (1974) 44 D.L.R. (3d) 584

22. Ibid

23. R.S.C. (1970) c.I-6

forum does not of itself create discrimination or amount to unequal treatment before the law. In this case, the federal Crown is simply enacting legislation to carry out its federal responsibilities under The British North America Act.<sup>24</sup>

- (j) Since Section 91(7) of The British North America Act specifically mentions "Militia, Military and Naval Service and Defence," it may well be that the Canard case applies here too, in that The National Defence Act (1970) and The Military Rules of Evidence are simply legislation by the Federal Crown to carry out its duty under the Canadian constitution, unless a section or article is, in itself, unjustifiably discriminatory, and treats military personnel unequally before the law contrary to the objects and intention of The National Defence Act (1970).

The ten general propositions, listed in

---

24. Attorney General of Canada et al v Canard et al  
(1975) 52 D.L.R. (3d) 548

historical order in the above paragraph, are obviously not complete, because of their brevity. Furthermore, some of them can be attacked as not being totally accurate, either because of brevity, or because the writer has made some general statements based on a particular situation, such as in sub-paragraphs (i) and (j).

However, these propositions are sufficient in one Chapter to provide a general idea as to how the courts are interpreting "discrimination" and "equality before the law" in Section 1(a) and (b) of The Canadian Bill of Rights. With these general propositions in mind and taking into account the fact that the Court Martial Appeal Court has not ruled at all on The Military Rules of Evidence in the context of The Canadian Bill of Rights, it is now appropriate to make some comments on what the Court Martial Appeal Court might do if such a question arose.

There is no doubt in the writer's mind that the Court Martial Appeal Court would be profoundly affected by the decisions of the Supreme Court. Obviously, the Court Martial Appeal Court is bound by the Supreme Court decisions if the facts are the same, but it is not necessarily bound by any policy

the Supreme Court of Canada might be following. A factor of greater significance in contemplating what the Court Martial Appeal Court might decide is that it, like the Supreme Court, is a federal court and it sits for the most part in Ottawa, as does the Supreme Court. In the writer's mind, these factors would suggest that the Court Martial Appeal Court would tend to follow the apparent intent and policy that the Supreme Court is following in its judgements on The Canadian Bill of Rights.

The Supreme Court has been quite hesitant and sometimes inconsistent in its treatment of The Canadian Bill of Rights, largely because it is so very difficult to impose a set of general standards on over one hundred years of Canadian Statutes.<sup>25</sup> In the fifties, the Supreme Court was quite sympathetic to so-called "civil liberties." However, in the sixties, arguments based on the newly enacted Canadian Bill of Rights were normally rejected.<sup>26</sup> In the seventies, particularly as a result of the Burnshine, Lavall, and Canard decisions, the Supreme Court is unlikely to start widening the application of the meaning of

---

25. Russell, P.H., "The Political Role of the Supreme Court of Canada in its First Century" (1975) 53 C.B.R. 576 at 592

26. Gibson, D., "One Step Backward: The Supreme Court and Constitutional Law in the Sixties" (1975) 53 C.B.R. 621 at 629

"discrimination" and "equality before the law."

Consequently, there is little likelihood that either Section 158(1) of The National Defence Act (1970) or any of the articles of The Military Rules of Evidence will be ruled inoperative because of The Canadian Bill of Rights. In fact, it is doubted that the Court Martial Appeal Court or the Supreme Court would want to interfere in the internal disciplinary and judicial system of the Armed Forces.

In Regina and Archer v White,<sup>27</sup> the Supreme Court held that Parliament had specified the punishable breaches of discipline under The Royal Canadian Mounted Police Act<sup>28</sup> and had equipped the Force with its own courts. Such a matter was considered to be the exclusive jurisdiction of the Force and was not subject to review unless there was an abuse of power or want of jurisdiction. This case was also followed in Re Walsh and Jordan<sup>29</sup> where the Ontario High Court held that Royal Canadian Mounted Police summary trial procedures were proper and were not inoperative because of The Canadian Bill of Rights. The question here was whether a Royal Canadian Mounted

---

27. (1956) 1 D.L.R. (2d) 305

28. R.S.C. (1970) c.R-9

29. (1962) 31 D.L.R. (2d) 88

Police constable had a right to instruct counsel, and to a fair hearing. The question of the right to instruct counsel was avoided since the court held that Section 2(c)(ii) of The Canadian Bill of Rights did not apply as the constable had not been arrested or detained. The constable's right to counsel at trial was not infringed because "counsel" did not necessarily mean "legal counsel." The accused was represented by another member of the Royal Canadian Mounted Police at trial, and thus had a fair hearing.

It is appreciated that both of these cases dealt with Summary Trials in the Royal Canadian Mounted Police, and not with military courts martial where there is an appeal, in certain cases, as far as the Supreme Court. However, these cases do illustrate the reluctance of the courts to interfere in the internal disciplinary operations of the Royal Canadian Mounted Police and the Armed Forces. While the writer is quite aware that the Court Martial Appeal Court or the Supreme Court could interfere if one of them decided to, it seems that both courts are unlikely to do so to any significant extent unless there is an obvious abuse of power, or an unjustifiable suppression of the civil rights of military personnel.

The Canadian Bill of Rights  
at Courts Martial

Military lawyers have had considerable difficulty trying to argue the provisions of The Canadian Bill of Rights for the benefit of their clients at courts martial. Unfortunately, many military lawyers do not appear to understand how The Canadian Bill of Rights can be applied, and what the result is if they win their argument.

Some lawyers have argued that since there is no provision in military legislation for bail, The Canadian Bill of Rights has been infringed. They also argue that accused are often denied access to counsel until well after the charges are laid, particularly if the offence and trial occur in places such as Cyprus, Germany, Egypt, or Syria. Military personnel are not entitled to bail, but they certainly are entitled to access to counsel. However, arguments on these points are usually made at the beginning of a court martial in the form of a plea in bar of trial. One argument is that since these practices are an infringement of The Canadian Bill of Rights, the court martial has no jurisdiction. The writer is unable to follow this "leap in logic."

Denial of access to counsel could possibly

result in a confession being inadmissible at trial, but denial of bail has no effect at all at trial as far as the writer can see. The writer does, however, consider that The National Defence Act (1970) should be amended to provide for bail for persons charged under The Code of Service Discipline.

A rather interesting argument occasionally presented is that The Military Rules of Evidence are "somewhat at variance" with the rules of evidence applicable at civil courts, and consequently, a military accused person does not enjoy equality before the law. When the court martial is held out of Canada, military counsel will also sometimes argue that the accused is deprived of equality before the law because he has no preliminary hearing, and he is not tried by a judge and jury as in Canada.

These arguments appear to be based on four assumptions:

- (a) that "discrimination" and "equality before the law" operate on a principle of complete universality;
- (b) that rules of evidence at civil courts are somehow better than The Military Rules of Evidence and thus fairer to the accused;
- (c) that if one Article of The Military Rules of

Evidence is inoperative, the whole set of rules are inoperative; and

- (d) that a preliminary hearing and a trial by judge and jury provide an accused with greater civil rights than he enjoys if tried before a military court martial.

Some points to be considered when examining the above motions and the apparent basis for them are:

- (a) justifiable discrimination is a perfectly acceptable principle of law;
- (b) it is impossible to have total and absolute equality before the law, and in fact, in proper circumstances, it is not desirable;
- (c) it is very doubtful whether a defending officer's success in striking down one article of The Military Rules of Evidence would render the whole code inoperative;
- (d) the fact that the pre-trial procedure in military and civil courts is different is not in itself an infringement of the provisions of The Canadian Bill of Rights;
- and
- (e) there is no universal right to trial by jury either in Canadian criminal law or

The Canadian Bill of Rights, although every citizen has a right to a fair hearing in accordance with the principles of fundamental justice.

It thus appears to the writer that none of the pleas in bar of trial presently made from time to time have much merit. If, on the other hand, a military defending officer could successfully argue that Section 158(1) of The National Defence Act (1970) is unjustifiably discriminatory and unfairly denies a serviceman equality before the law, the whole of The Military Rules of Evidence might fall. However, considering the judgements on The Canadian Bill of Rights discussed earlier in this Chapter, the probable reluctance of the Court Martial Appeal Court and Supreme Court to intervene any more than absolutely necessary in military courts, the object of The National Defence Act (1970) and Section 91(7) of The British North America Act, it is considered highly unlikely that the Court Martial Appeal Court or the Supreme Court would ever declare Section 158(1) of The National Defence Act (1970) and The Military Rules of Evidence inoperative as infringing the provisions of The Canadian Bill of Rights.

### Conclusion

Only a small portion of this Chapter has dealt directly with Section 158(1) of The National Defence Act (1970) and The Military Rules of Evidence vis-a-vis The Canadian Bill of Rights. The major portion of the Chapter has examined the manner in which courts have dealt with alleged infringement of civil rights. The text books, reviews, articles, and cases on The Canadian Bill of Rights are extremely complicated and difficult to understand. This is not surprising. Consequently, this Chapter was written as it was simply to provide a kind of "general overview" of Bill of Rights decisions, and examine them in the context of The National Defence Act (1970), and in particular, Section 158(1) and The Military Rules of Evidence.

The concept that a rule of evidence currently in force in civil or military courts is inoperative in relation to an accused, because of The Canadian Bill of Rights, is extremely difficult to contemplate in the context of "discrimination" or "equality before the law." It would seem to the writer that such a situation could only exist if a rule of evidence was discriminatory in itself and directed at an accused by reason of his race, national origin, colour, religion,

or sex, or was directed at an identifiable group without justifiable cause. The writer is unaware of any such existing situation which could occur at a civil trial.

Additionally, there seems to be no such circumstance in Section 158(1) or The Military Rules of Evidence. In fact, the military court martial system, the manner in which the pre-trial procedures are handled, the practices followed by military lawyers, and The Military Rules of Evidence, provide a military accused person with a fairer and more impartial trial than a civilian accused, on the average, is likely to receive.

The vast majority of military personnel consider they have no right to legal counsel prior to being questioned by the Military Police. Where this idea came from, the writer does not know. However, it may be partially fostered by legal officers who state, quite correctly, that accused military personnel are not entitled to military legal counsel until after a court martial has been ordered.

Consequently, the military may be on shaky ground regarding Section 2(c) of The Canadian Bill of Rights. Military personnel are seldom advised promptly of the exact reason why they are being detained. They

are almost never told they have the right to instruct civilian counsel without delay. Finally, the question of bail or habeas corpus just does not seem to arise.

It is very clear from such cases as O'Connor v The Queen,<sup>30</sup> R v Drybones,<sup>31</sup> R v Brownridge,<sup>32</sup> and R v Ballegeer,<sup>33</sup> that it is not so much what the law provides, as what the accused does or does not do, that decides his rights under Section 2(c) of The Canadian Bill of Rights. Therefore, since detained servicemen rarely raise the question of reason for detention, counsel or bail, appeal court judgements on these points will probably not come about for some time.

However, even if these points do arise, infringements of The Canadian Bill of Rights contained in The National Defence Act (1970) would probably result only in certain evidence being inadmissible, but would be unlikely to deprive a court martial of jurisdiction.

---

30. (1966) 57 D.L.R. (2d) 123

31. Supra fn 17 p.287

32. (1971) 15 C.R.N.S. 78

33. (1969) 1 D.L.R. (3d) 74

In conclusion, therefore, unless the Supreme Court of Canada decides that Section 158(1) of The National Defence Act (1970) is unjustifiably discriminatory in itself, which it is unlikely to do, the writer considers that The Military Rules of Evidence themselves do not abrogate, abridge, or infringe any of the rights and freedoms recognized and declared in The Canadian Bill of Rights.

## CHAPTER XIV

CONCLUSIONS AND RECOMMENDATIONSConclusions(i) A Semi-Exhaustive Code

From an examination of Chapters V and VI, there should be no doubt that the writer considers The Military Rules of Evidence to be a code in the traditional sense of the word, and consequently exhaustive. However, because the Armed Forces are always subordinate to civil authority, civil courts may try military charges if they see fit to do so. Over the years, the practice has developed in common law countries whereby the civilians try "civilian" charges against service personnel, and the military try "military" charges against service personnel. However, because The National Defence Act (1970) authorizes the military to try all federal civil offences except murder, rape and manslaughter in Canada,<sup>1</sup> there is a grey area in this country whereby many civil offences are tried by the military, often because civil prosecutors are already overworked in their own bailiwick. Additionally, many common law

---

1. The National Defence Act, R.S.C. (1970) c.N-4, s.60 and 120

countries do not have in their military legislation, a section quite like Section 120.

The United States and the United Kingdom still apply civil court rules of evidence at courts martial and Canada did the same until 1 October, 1959. However, because of the unique and far ranging authority provided by The Amendment (1959), The Military Rules of Evidence established as a result, created a whole new situation. In effect, The Military Rules of Evidence are a set of rules of evidence that apply within the major field of Canadian evidence law practised in the civil courts. Had Article 4 of The Military Rules of Evidence stated that in cases not provided for "reason and common sense" would apply in determining a question of evidence law not provided for in the rules, The Military Rules of Evidence would have been truly exhaustive.

However, probably having in mind the overriding authority of the civil courts, the drafters of The Military Rules of Evidence linked these Rules to civil rules of evidence through Article 4 which not only provided for situations omitted for one reason or another from The Military Rules of Evidence, but also allowed military courts to apply totally new civil rules of evidence not provided for at all in

The Military Rules of Evidence. Indeed, The Military Rules of Evidence are in most instances a reasonably accurate summary of the civil law of evidence as it was in the late 1950's.

Therefore, the expression "semi-exhaustive code" has meaning in this particular situation, and reflects reasonably accurately the bounds of The Military Rules of Evidence.

(ii) Application

The Military Rules of Evidence are a good set of rules of evidence for use at courts martial. The rules are reasonable, relatively easy to understand, and sufficiently brief while at the same time being fairly complete. They were written for lawyers and laymen and should be understandable to both. These rules have worked very well for seventeen years, and there is no indication that they are either objectionable in part, or should be abandoned in whole.

Unfortunately, The Military Rules of Evidence have been applied inconsistently, and often quite hesitantly. This difficulty has arisen because of the strong similarity between most of The Military Rules of Evidence and civil rules of evidence. The writer is not satisfied what military lawyers either understand or are convinced of what The Military Rules

Evidence really are. For example, the writer has often quoted from civil criminal cases at a court martial to support some argument or other on a matter of admissibility of evidence and has heard other lawyers argue in a similar manner. However, never once has he heard a President or Judge Advocate direct the lawyer in question to show that the civil evidence point adduced from the quoted cases is based on civil evidence law identical to the military evidence law in The Military Rules of Evidence.

A very obvious example would be penitential privilege. In the civil law of evidence, there is no penitential privilege, and the law on this point is reasonably well described in Cook v Carroll.<sup>2</sup> Pursuant to Article 78(2), a clergyman may claim penitential privilege if called as a witness at a court martial. Obviously, any attempt by a prosecutor or defending officer to convince a military judge to compel a clergyman to give evidence of information obtained during a confession based on the law in Cook v Carroll would fail out of hand.

The situation is much more difficult where the civil and military rules are similar, but not

---

2. [1945] I.R. 515

identical. Questions concerning the admissibility of documents are a good example. In this case, if the military judge is going to decide on admissibility of a document, and he has been referred to a number of civil cases as authority, he must not only decide if the facts are sufficiently similar for the cases cited to apply, but he must also determine if the civil evidence law on which the civil cases were determined is identical to the relevant provisions of The Military Rules of Evidence.

Military judges as well as military lawyers seem to have had a sort of ambivalent attitude towards The Military Rules of Evidence and have oscillated between applying The Military Rules of Evidence at one time and the civil rules of evidence at another. In the writer's view, The Military Rules of Evidence are a clear, definite, and identifiable body of evidence law. However, because of our refusal, inability, or unwillingness to employ these rules as a code of law, the shape and form of military evidence law has become somewhat amorphous.

The military has "managed" for the last seventeen years with its present method of using The Military Rules of Evidence, but it would no doubt be easier, and would create more certainty at courts

martial, if The Military Rules of Evidence were applied as a code.

(iii) Amendment

One of the significant benefits of applying The Military Rules of Evidence as we have, rather than as a semi-exhaustive code, is that the need to amend The Military Rules of Evidence has not really become a matter of urgency. If we can shift away from The Military Rules of Evidence more or less at will and apply a new civil rule of evidence, why amend the code?

The writer considers that the whole of The Military Rules of Evidence should be re-examined and, where necessary, amended. There are, however, not very many major changes that should be made. Most of the articles are perfectly sound, and there is no reason to change the majority of them, unless changes in the civil law since 1959 constitute an improvement and provide additional rational protection to the accused.

The few articles that should be amended would clarify a number of the rather irritating problems that presently exist. The amendments, or even the addition of some articles would sharply improve the clarity and simplicity of The Military Rules of

Evidence. However, while some amendments are necessary, it is probably more important for military lawyers to make a conscious decision to apply The Military Rules of Evidence as they are, rather than to continue moving back and forth between civil and military rules of evidence.

In the next and final section of this paper, a limited number of substantial changes are recommended in a general fashion. Exact and specific recommendations in this area would be of very limited value because the substantive changes suggested should be weighed and examined by a number of people and viewed in a number of theoretical circumstances. The writer considers he is going far enough here in simply identifying the areas that appear to need study and possible revision.

In addition, the writer will propose a number of specific amendments and changes of a more technical nature. These amendments and changes could have been made over the years, but no doubt, and with good reason, the priority to do this work was low. However, the time is now probably appropriate to make these necessary corrections and alterations.

## Recommendations

### (i) "Confessions"

This subject was examined in some detail in Chapter IX, where it was stated that the meaning of Article 42(2) was less than clear. Additionally, however, the meaning of "confession" and "self-incriminating statement" are repeatedly defined. Article 36 states that confessions are judicial, official and unofficial. Next, Articles 37, 39 and 41 explain or define these three types of confessions. Over and above these four Articles, Article (2)(1)(f) and 2(1)(x) again define "confession" and "self-incriminating statement."

There is no doubt that Article 42(2) concerning threats and promises should be carefully examined, and possibly revised. Additionally, the various definitions for the three types of confessions should be examined and reduced to the lowest possible number of definitions. A multitude of definitions are probably just as confusing and open to misinterpretation as is an absence of definitions.

Finally, if the Governor in Council decides to amend The Military Rules of Evidence regarding "confessions" to bring them clearly into line with the civil law of evidence, Piche v The Queen<sup>3</sup> must

---

3. [1970] 4 C.C.C. 27

be kept in mind. It appears from that case that any statement by the accused to a person in authority is only admissible if it is proved to be voluntary. Consequently, if the military decides to follow the civil law of evidence regarding "confessions" the definition will have to be carefully written, because a "confession" is somewhat different to "a statement to a person in authority." Possibly, it will be necessary to have two definitions to cover incriminating statements "to persons in authority" and "to persons not in authority."

(ii) Documents

Article 53(c) was discussed in Chapter X along with the decision in Ziesman v The Queen.<sup>4</sup> There seems to be considerable doubt that the Governor in Council has authority to enact such a wide article. In any event, whether or not authority for Article 53(c) exists, the article would appear to be far too wide. This article should be revised and some limitations placed on the admissibility, as public documents, of "documents and records kept for official purposes, including those kept in respect

---

4. (1966) 3 C.M.A.R. 17

of officers and men." Probably Article 53(c) should be connected more clearly to Section 159(1) of The National Defence Act (1970).

Article 2 is the Definitions article. With one exception, every sub-paragraph commences with the word or phrase to be defined, followed by the word "means"; the sub-paragraph then goes on to create a definition. However, Article 2(1)(g) commences with the words "public document," followed by the word "includes." The definition then goes on to "include" in the meaning of "public document" a documentary statement by a public officer in the course of his duties. However, there is no definition of a "public document." This apparently unintentional oversight seems to have caused much of the difficulty among military lawyers when dealing with other articles of The Military Rules of Evidence in which "public documents" are mentioned.

The writer is unable to find a statutory definition of "public document." The concept appears to be one of common law. However, many statutes discuss various kinds of documents of a public nature that, when admitted, are evidence or prima facie evidence, of their content.

The meaning of "public document" in The

Military Rules of Evidence should be clarified and all of the articles dealing with "public documents" should be re-examined in the light of the proposed definition.

(iii) Judicial Notice of Military Regulations and Orders

The various groupings or classifications of regulations, orders and instructions were examined in Chapter XI. The words "including, but not limited to QR&O and orders and instructions issued in writing by or on behalf of the Chief of the Defence Staff under QR&O 1.23," in Article 15(2) create vast confusion as to the regulations, orders and instructions of which the court shall take judicial notice. The confusion is further compounded by Article 16(1)(e) regarding discretionary judicial notice of books and other publications and amendments to them, that are authorized officially for military use. To further add to the problem, many of the regulations, orders and instructions that seem to come within Article 15(2) and 16(1)(e) also appear to come within Article 53(a) as "public documents."

The Military Rules of Evidence dealing with judicial notice of military regulations and orders are at present adequate, but only barely so. Clarification of terms and the identification of issuing authorities to create consistency with expressions

used in other military publications would be most useful in the documentary part of the judicial notice area.

(iv) Penitential Privilege

As outlined in Chapter XII, the definition of penitential privilege in Article 78(1) is extremely difficult to understand. While this article is not of major importance, and as far as the writer is aware, has never been applied at a court martial, it is important and should be clarified.

(v) New Law

In order that The Military Rules of Evidence do not remain static indefinitely, the emergence of new law of evidence in civilian jurisdictions should be studied as it arises and either incorporated or not, as applicable, in the next regular revision of the rules. For example, the rules of evidence regarding certificates of analysis in drug and alcohol cases, and the rules of evidence concerning illegal wire taps are not adequately covered in The Military Rules of Evidence. In these two cases, and probably some others, The Military Rules of Evidence should be amended to reflect these new rules or to show clearly that these rules do not apply at courts martial.

(vi) Technical Amendment

(a) The Order in Council Format

The Military Rules of Evidence are included as Appendix XVII to Volume II of Queen's Regulations and Orders for the Canadian Forces, and it should remain there. However, for the use by military lawyers practising at courts martial, a separate set of The Military Rules of Evidence, printed on one side of the paper, in one language, should be published in loose leaf form. This would, of course, require two sets, one in English and one in French. The difficulty with the present format and its location in Volume II, is that it is next to impossible for those lawyers who use these rules continuously to annotate the articles with case law, cross references, or other material.

(b) Reference to Statutes

All of the relevant articles should be examined and section numbers of statutes referred to in The Military Rules of Evidence corrected to compliment The Revised Statutes

of Canada (1970), or clarified to show which statute applies. For example, Articles 11(1), 16(1), 50(1), 55(d) and 58 clearly refer to the wrong section of The National Defence Act (1970), which statute is included as Appendix XI to Volume II of Queen's Regulations and Orders. Article 105(4) was discussed in Chapter VII, and it is clear that the sections of The Canada Evidence Act listed therein must refer to The Canada Evidence Act as published in The Revised Statutes of Canada (1952), and not to the 1970 Revision which is normally used.

(c) Notes

Many of the Notes are now out of date and should be corrected. For example, the notes to Article 13 are out of date and new illustrations should be incorporated. The writer agrees that the present notes are reasonably suitable as examples, but it would be much better if current examples were used. At least, however, in Article 13, the statutes listed do contain a citation, which is not the case in the notes to Article 105. This omission has caused considerable confusion over the past years.

Many articles contain within them cross-references to other articles. However, for greater clarity and ease of handling The Military Rules of Evidence, every article should be cross-referenced in the notes.

All Court Martial Appeal Court cases should be listed in the Notes below the relevant article or articles of The Military Rules of Evidence. Additionally, civil court cases should also be listed in relevant notes, providing the civil law is identical to the article of The Military Rules of Evidence involved. Finally, relevant legal reviews and older civil court cases should also be included in the notes as additional source material.

A standard format for all notes would be very helpful. For example, every note could have the following headings, regardless of whether, at that time, there was any material to insert:

1. General;
2. Article cross-reference;
3. Court Martial Appeal Court cases;

4. Civil cases; and
5. Additional source material.

The writer will no doubt be accused of "spoon feeding" with the above recommendations about the notes. However, it is considered that the aim in court should be to provide the accused with the latest and best legal information available, and not to test the ingenuity and resourcefulness of defence counsel. The latter very desirable characteristics would apply in any event, and if the particular defending officer possessed them, the defence would be just that much better. On the other hand, if a defending officer in a particular case was of a lower calibre, at least his knowledge of the existence of the supporting material would be of assistance in defending the accused.

(d) Regularity of Amendments

As stated earlier, the amendment of The Military Rules of Evidence has had a fairly low priority, and with good reason. However, because the number of

courts martial has increased in the last few years, and taking into account the ever present possibility that Canadian military forces could increase sharply because of an unforeseeable turn of internal or international events, the time is now appropriate, and the priority should be raised, to make the necessary revisions. Thereafter, The Military Rules of Evidence and the notes should be reviewed and amended as necessary every five years.

#### Final Concluding Remarks

In the interests of uniformity, simplicity, and ease of access to source material, a code of evidence should continue to be employed at courts martial. While studying to prepare this paper and while writing it, the writer has been unable to find any sensible argument against the use of a code of evidence at military courts. In fact, it is quite surprising that the British, Americans and Australians continue to employ civil court rules of evidence at their courts martial. A uniform code of evidence lends itself extremely well to military forces that operate in many parts of the world outside their own homeland.

While it is agreed that most of the civilian rules of evidence are good, it is also clear that some do not lend themselves easily to military situations, particularly out of the country. Therefore, we should have no fear of incorporating different and hopefully better rules of evidence into our code.

The Canadian Armed Forces should therefore continue to use their Code of Evidence, but should:

- (a) carefully avoid employing a mixture of civil and military evidence law when the question of law is dealt with in The Military Rules of Evidence; and
- (b) be prepared to accept new civilian legal concepts and incorporate them promptly into the code if they will serve the interests of the Armed Forces and the accused serviceman.

S E L E C T E D  
B I B L I O G R A P H Y

Reference Books

- Bloom, M.T., The Trouble with Lawyers (Richmond Hill: Simon & Schuster of Canada Ltd, 1969)
- Clarke, R.F., The Science of Law and Law Making (New York: The Macmillan Co., 1898)
- Cross, R., Evidence (3rd ed.) (London: The Butterworth Co., 1967)
- Driedger, E.A., The Construction of Statutes (Toronto: The Butterworth Co, Canada Ltd., 1974)
- Evershed, F.R.E., Great Britain Committee on Supreme Court Practise and Procedure - Final Report (London: H.M. Stationery Office, 1953)
- Fay, J.B., Lieutenant-Colonel, Canadian Military Law - An Examination of Military Justice (Toronto: 23 Chitty's Law Journal, unbound, No.s 4, 5, 6 and 7)
- Hoyt, M.M., Bill Drafting Manual (Fredericton: The Queen's Printer for the Province of New Brunswick, 1966)
- Kaufman, F., The Admissibility of Confessions in Criminal Matters (2nd ed.) (Toronto: The Carswell Co. Ltd., 1974)
- Leley, J.M., Best's, The Principles of the Law of Evidence (10th ed.) (London: Sweet & Maxwell, 1966)
- Martin, J.C., Annual Criminal Code (1974) (Agincourt: Canada Law Book Co., 1974)
- McWilliams, P.K., Canadian Criminal Evidence (Agincourt: Canada Law Book Co., 1974)
- Odgers, W.B., Construction of Deeds and Statutes (5th ed) (London: Sweet & Maxwell, 1967)

- Phipson, S.L., Manual of the Law of Evidence (9th ed)  
(Elliot, D.W., editor) (London: Sweet & Maxwell, 1966)
- Phipson, S.L., Manual of the Law of Evidence (11th ed)  
(Buzzard, J.H., Amlat, R.D., Mitchell, S., editors)  
(London: Sweet & Maxwell, 1970)
- Riddell, W.R., Editor, The Canadian Abridgement  
(Toronto: Burroughs & Co. (Eastern) Ltd., 1935)
- Roberts, L., There Shall Be Wings (Toronto: Clarke  
Irwin & Co. Ltd., 1959)
- Schmeiser, D.A., Criminal Law - Cases and Comments  
(2nd ed) (Toronto: The Butterworth Co., 1973)
- Singer, B., and Langford, R., Handbook of Canadian  
Military Law (Toronto: Copp Clarke Co. Ltd., 1941)
- Sopinka, J., Lederman, S.N., The Law of Evidence in  
Civil Cases (Toronto: The Butterworth Co., 1974)
- Tarnopalsky, W.S., The Canadian Bill of Rights (2nd ed)  
(Toronto: McLelland & Stewart Ltd., 1975)
- Torcia, C.E., Wharton's Criminal Evidence (13th ed)  
(San Fransisco: Bancroft - Whitney Co., 1972)
- West's, Annotated California Codes, Vol 29B  
Sections 1-699 (St. Paul: West Publishing Co., 1966)
- Wigmore, J.H., Evidence (3rd ed) (Boston: Little,  
Brown & Company, 1940)

#### Military Publications

- Canadian Forces Publication 135, Flight Safety for  
the Canadian Forces (Ottawa: Queen's Printer, 1975)
- Department of the U.S. Air Force (AFP 111-8)  
Military Criminal Law Evidence (Washington:  
Department of the Army, 1975)
- Extracts from the Manual of Air Forces Law - Canadian  
Consolidation (1944) (Ottawa: King's Printer, 1944)
- Judge Advocate General, Opinions and Directives  
(Ottawa: Queen's Printer, 1975)

King's Regulations and Orders for the Canadian Militia  
(1939) (Ottawa: King's Printer, 1939)

Manual of Military Law (1965) (Part I) (Ministry of  
Defence) (London: Her Majesty's Stationery  
Office, 1965)

Queen's Regulations and Orders for the Canadian  
Forces (Volumes I and II) (Ottawa: Queen's  
Printer, 1968)

Law Reform Commissions

British Columbia:

Legal Position of the Crown (Vancouver: Law  
Reform Commission of British Columbia, July, 1973)

Report on Evidence No. 10 (Vancouver: Law Reform  
Commission of British Columbia, 1973)

Canada:

Research Program (Ottawa: Information Canada, 1972)

Study Papers on Evidence No.s 1 to 4 (Ottawa:  
Law Reform Commission, 1972)

Working Paper, - Evidence, 6. Judicial Notice  
(Ottawa: Law Reform Commission, July, 1973)

Report on Evidence (Ottawa: Information Canada, 1975)

Manitoba:

Comments on the Law of Evidence Project's Study Paper  
No. 5 - Compellability of the Accused and the  
Admissibility of his Statement, Winnipeg, 1973

Report on a Review of "The Privacy Act" Cap. P125,  
and the proposed amendment to the Criminal Code  
expressed in Bill C-6, Winnipeg, 1972

Working Paper on the Case for a Provincial Bill of  
Rights, Winnipeg, 1974

(Winnipeg, Queen's Printer 1972-1974)

Ontario:

Report on Protection of Privacy in Ontario  
(Toronto: Department of the Attorney General, 1968)

Reports and Proceedings

American Law Institute; Model Code of Evidence  
(Philadelphia: American Law Institute, 1942)

Proceedings of the 56th Annual Meeting of the Conference  
of Commissions on Uniformity of Legislation in  
Canada: Appendix P, Courts Martial, Use of Self-  
Criminating Evidence (Toronto: Executive Secretary,  
Parliament Buildings, Queen's Park, 1974)

Handbook of the National Conference of Commissioners  
on Uniform State Laws (1953), and Proceedings of  
the Annual Conference Meeting in its Sixty-Second  
year. The Uniform Evidence Code (Baltimore: The  
Lord Baltimore Press, 1953)

The Law Society of Upper Canada: Basic Problems in  
Evidence (Toronto: Department of Continuing Education,  
Law Society of Upper Canada, 1973)

Reviews and Articles

Bushnell, S.I., "Crown Privilege"  
(1973) 51 C.B.R. 551

Clarence-Smith, J.A., "The Interpretation of Statutes"  
(1970-71) 4 Man. Law Journal 212

Clark, C.E., "Forward to a Symposium on the Uniform  
Rules of Evidence"  
(1956) 10 Rutgers L. Rev. 479

Cleary, E.M., "Evidence as a Problem in Communications"  
(1951-52) 5 Vanderbilt L.R. 277

Corry, J.A., "The Use of Legislative History in the  
Interpretation of Statutes"  
(1954) 32 C.B.R. 624

de Grandpré, Mr. Justice; "Criminals Coddled in Court"  
(1973) Can. Bar. Bulletin, (May) at 3

- Driedger, E.A., "Canadian Bill of Rights and the Lavall Case - A Possible Solution"  
(1973-74) 6 Ottawa L.R. 620
- Gibson, D., "-One Step Backward: The Supreme Court and Constitutional Law in the Sixties"  
(1975) 53 C.B.R. 621
- Goldstein, S., "The Limits to the Admissibility of Extrinsic Evidence"  
(1975) 23 Chitty's L.J. 54
- Hahlo, H.R.; Gower, L.C.B., "Here Lies the Common Law: Rest in Peace"  
(1967) 30 Modern L. Rev. 241
- Hahlo, H.R., "Codifying the Common Law: Protracted Gestation"  
(1975) 38 Modern L. Rev. 23
- Hall, Mr. Justice E.M., "Law Reform and the Judiciary's Rule"  
(1972) 20 Chitty's L. Rev. 77
- Hart, P., "Codification of the Law of Evidence: The American Precedent"  
(1966-67) 2 Man.Law Journal 201
- Hartt, E.P., "Some Thoughts on the Criminal Law and the Future"  
(1973) 51 C.B.R. 59
- Harvey, C., "The Significance of Punctuation in Statutory Interpretation"  
(1970-71) 4 Man. Law Journal 354
- Hodson, K.J., Major-General, "The Manual for Courts Martial - 1984"  
(1972) 57 Military Law Review 1
- Hogg, P.W., "The Canadian Bill of Rights - Equality Before the Law"  
(1974) 52 C.B.R. 263
- Hollies, J.H., Group Captain, "Canadian Military Law"  
(1960) (mimeographed) (unpublished)
- Honsberger, J.D., "Bi-lingualism in Canadian Statutes"  
(1965) 43 C.B.R. 314

- Hucker, J., "Immigration, Deportation, Bill of Rights"  
(1975) 53 C.B.R. 810
- Jacobs, N.L., "The Uniform Rules of Evidence - General Provisions"  
(1956) 10 Rutgers L. Rev. 485
- Katz, L., "The Indian Act and Equality Before the Law"  
(1973-74) 6 Ottawa L.R. 277
- Killeen, G., "Recent Developments in the Law of Evidence"  
(1975) 18 C.L.Q. 103
- Ladd, M., "A Modern Code of Evidence"  
(1941-42) 27 Iowa L. Rev. 213
- Lawson, F.H., "A Common Law Lawyer Looks at Codification"  
(1960) 2 Inter-American L.R. 1
- Lawson, W.J., Brigadier, "The Canadian Constitution"  
The Queen's Printer (Ottawa) 1960
- Lawson, W.J., Brigadier, "Canadian Military Law"  
(1951) 29 C.B.R. 241
- Lederman, W.R., "Nature and Problems of a Bill of Rights"  
(1959) 37 C.B.R. 4
- Lyman, S., "The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation"  
(1968-69) 3 Man. Law Journal (No. 2) 53
- Lyon, J.N., "Privileged Communications - Penitent and Priest"  
(1964-65) 7 Cr. L.Q. 327
- Mandel, M., "The Presumption of Innocence and the Canadian Bill of Rights: Regina v Appleby"  
(1972) 10 Osgoode Hall L.J. 450
- Maugham, Lord, "Observations on the Law of Evidence with Special Reference to Documentary Evidence"  
(1939) 17 C.B.R. 469
- McLaughlin, R.N., " R. v. Smythe - The Canadian Bill of Rights - Equality Before the Law - The Meaning of 'Discrimination'"  
(1973) 51 C.B.R. 517

- Meyer, P., "Evidence in the Future"  
(1973) 51 C.B.R. 107
- Montrose, J.L., "Basic Concepts of the Law of Evidence"  
(1954) 70 L.Q.R. 527
- Morton, J.D., "Do We Need a Code of Evidence?"  
(1960) 38 C.B.R. 35
- Murry, R.G., "Evidence: A Fresh Approach, The American  
Uniform Rules of Evidence (1953)"  
(1959) 37 C.B.R. 576
- Nokes, G.D., "The English Jury and the Law of Evidence"  
(1956-57) 31 Tulane L. Rev. 153
- Nokes, G.D., "The Limits of Judicial Notice"  
(1958) 74 L.Q.R. 59
- Oliver, H.G., "Canadian Military Law"  
(1975) 23 Chitty's L.J. 109
- Ollivier, M., "The Revised Statutes of Canada"  
(1948) 26 C.B.R. 797
- Ratushny, E.J., "Statements of an Accused: Some Loose  
Strands (Part I)"  
(1971-72) 14 Cr. L.Q. 306
- Ratushny, E.J., "Statements of an Accused: Some Loose  
Strands (Part II)"  
(1971-72) 14 Cr. L.Q. 425
- Russell, P.H., "The Political Role of the Supreme  
Court of Canada in its First Century"  
(1975) 53 C.B.R. 576
- Sheppard, A.F., "Statements Made During the Investigatory  
Stage"  
(1972) 20 Chitty's L.J. 6
- Smith, J.C., "Regina v. Drybones and Equality Before  
the Law"  
(1971) 49 C.B.R. 163
- Starkman, B., "The Citizen as Soldier"  
(1965) 43 C.B.R. 414
- Stevenson, G.D., Major, "The Inherent Authority of  
The Military Judge"  
(1975) 17 Air Force Law Review 1

- Stuart, D.R., "The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence" (1972-73) 15 Cr. L.Q. 160
- Stuart-Smith, J., "Without Partiality, Favour or Affection" (1963) 2 Military Law and Law of War Review 223
- Tarnopalsky, W.S., "The Canadian Bill of Rights and The Supreme Court Decisions in Lavall and Burnshine: The Retreat from Drybones and Dicey" (1974-75) 7 Ottawa Law Review, Autumn Issue
- Tarnopalsky, W.S., "The Supreme Court and the Canadian Bill of Rights" (1975) 53 C.B.R. 649
- Thayer, J.B., "Selected Readings on Evidence"  
 (1889-90) 3 Harvard L.R. 285  
 (1890-91) 4 Harvard L.R. 45  
 (1891-92) 5 Harvard L.R. 45  
 (1892-93) 6 Harvard L.R. 325, 418  
 (1898-99) 12 Harvard L.R. 71
- Thompson, R., "Discovery Against the Crown - Crown Privilege" (1968) 46 C.B.R. 482
- Trautman, H.L., "Logical or Legal Relevancy - A Conflict in Theory" (1951-52) 5 Vanderbilt L.R. 385
- Willis, J., "Interdepartmental Communications as Such, Privileged From Production" (1955) 33 C.B.R. 1186

#### Canadian and Provincial Statutes

Act to Prevent Introduction of Slaves	S.U.C. (1793) (2nd Sess)c.7
Aeronautics Act	R.S.C. (1927) c.3
Air Board Act	S.C. (1919) c.11
Anti-Inflation Act	34 Eliz. II, 3 Dec 1975
Canada Evidence Act	R.S.C. (1927) c.59

Canada Evidence Act, Act to Amend	S.C. (1968-69) c.14
Canada Evidence Act, Act to Amend	S.C. (1952-53) c.2
Canada Evidence Act	R.S.C. (1952) c.307
Canada Evidence Act	R.S.C. (1970) c.E-10
Canadian Bill of Rights Act	R.S.C. (1970) App. III
Canadian Naval Service Act	S.C. (1910) c.43
Criminal Code	R.S.C. (1970) c.C-34
County Court Judges' Criminal Courts Act	R.S.O. (1970) c.93
Evidence Act	R.S.Nfld. (1970) c.115
Federal Court Act	R.S.C. (1970) (2d Supp) c.10
Food and Drug Act	R.S.C. (1970) c.F-27
Indian Act	R.S.C. (1970) c.I-6
Interpretation Act	R.S.C. (1970) c.I-23
Judicature Act	R.S.O. (1970) c.228
Law Reform Commission Act	R.S.C. (1970) (1st Supp) c.23
Manitoba Evidence Act	R.S.M. (1970) c.E150
Manitoba Evidence Act	R.S.M. (1954) c.75
Militia and Defence of the Dominion of Canada Act	S.C. (1868) c.40
Militia Act	R.S.C. (1906) c.41
Militia Act	R.S.C. (1927) c.132
Narcotic Control Act	R.S.C. (1970) c.N-1
National Defence Act (1922)	S.C. (1922) c.34

National Defence Act	S.C. (1950) c.43
National Defence Act, Act to amend	S.C. (1959) c.5
National Defence Act	R.S.C. (1970) c.N-4
Naval Service Act	S.C. (1910) c.43
Naval Services Act	R.S.C. (1927) c.139
Naval Services Act (1944)	S.C. (1944-45) c.23
North West Mounted Police Act	R.S.C. (1886) c.45
Official Secrets Act	R.S.C. (1970) c.O-3
Provincial Courts Act	R.S.O. (1970) c.369
Quebec Code of Civil Procedure	S.Q. (1965) (Vol II) c.80 s.308(1)
Racial Discrimination Act	S.O. (1944) c.51
Regulations Act	R.S.C. (1952) c.235
Revised Statutes of Canada Act	S.C. (1964-65) c.48
Royal Canadian Air Force Act	S.C. (1940) c.15
Royal Canadian Mounted Police Act	R.S.C. (1970) c.R-9
Saskatchewan Bill of Rights Act	R.S.S. (1965) c.378
Statutory Instruments Act	S.C. (1970-71-72) c.38
Supreme Court Act	R.S.C. (1927) c.35
<u>British Statutes</u>	
Air Force (Constitution) Act	(1917) 7-8 Geo. V c.51

Army Discipline and Regulation Act	(1879) 42-43 Vict. c.33
Army Act	(1881) 44-45 Vict. c.58
Army Act	(1955) 3-4 Eliz. 2 c.18
Bill of Rights	(1689) 1 Will. & Mary (2d sess.) c.2
British North America Act	(1867) 30-31 Vict. c.3
Civil Evidence Act 1968	(1968) 16-17 Eliz II c.64
Defence of the Realm Act (1914)	(1914) 4 & 5 Geo. 5 c.29
Mutiny Act	(1662) 3 Charles II c.3
Naval Discipline Act	(1866) 29-30 Vict. c.109

#### United States Statutes

Uniform Code of Military Justice	(1950) U.S.C. Title 50 c.22
United States Code Annotated	(1966) 28 U.S.C.A. s.1732
Witnesses and Evidence	(1959) 40 Mass. G.L. Ann.

#### Cases

American Casualty Co. v Horton (Texas Civ. Appeal)	(1941) 152 South Western Reporter (2d) 395
Attorney General of Canada et al v Canard et al	(1975) 52 D.L.R. (3d) 548
Attorney General for Canada v Hallet and Carey Ltd.	[1952] A.C. 427

- Attorney General v  
Mulholland; Attorney  
General v Foster [1963] 2 Q.B. 477
- Blackburn v Flavelle (1881) 6 A.C. 628
- Blackwood v The London  
Chartered Bank of  
Australia (1874) 30 L.T. (N.S.) 45
- Boudreau v The King [1949] S.C.R. 262
- Burgess v The Queen (1960) 2 C.M.A.R. 151
- Caldwell v Kinsman (1853-55) 2 Nova Scotia  
Reports 398
- Chenoweth v The Queen (1954) 1 C.M.A.R. 253
- Cherkas v The Queen (1974) 4 C.M.A.R. (unbound)  
31 May 1974
- City of Ottawa v The  
Town of Eastview [1941] S.C.R. 448
- Commissioners for Special  
Purposes of Income Tax  
v Pemsel [1891] A.C. 531
- Cook v Carroll [1945] I.R. 515
- Couglen v Ontario Highway  
Transport Board [1968] S.C.R. 569
- Curr v The Queen [1972] S.C.R. 889
- Dagdeck v Franks et al (1961-62) 36 W.W.R. 395
- Director of Public  
Prosecutions v  
Schildkamp [1969] 3 All. E.R. 1640
- Doe D. Murphy v  
Mulholland (1846-48) 2 U.C.Q.B. (O.S.) 115
- Doutre v The Queen (1953) 1 C.M.A.R. 155
- Duncan v Cammell, Laird  
& Co. [1942] A.C. 624

Ellis v Home Office	[1953] 2 Q.B.R. 135
Garfield v The Queen	4 C.M.A.R. 20 November 1974
Grennon v The Queen	(1963) 2 C.M.A.R. 237
Hartin v The Queen	(1959) 2 C.M.A.R. 93
Heide v The Queen	(1974) 4 C.M.A.R. 20 Nov 1974
Hellberg v The Queen	(1966) 3 C.M.A.R. 11
Hinton Electric Co. v Bank of Montreal	(1903) 9 B.C.L.R. 545
Hryhoriw v The Queen	(1954) 1 C.M.A.R. 277
The King v Halliday	[1917] A.C. 260
La Belle v The Queen	(1965) 3 C.M.A.R. 9
MacDonald v The Queen	(1974) 4 C.M.A.R. 30 December 1974
Mainwaring v Mainwaring	[1942] 1 W.W.R. 728
Marshall v The Queen	(1960) 129 C.C.C. 232
Miranda v Arizona	(1966) 384 U.S. 436
Mohoning Valley Ry. Co. v Santoro	(1915) 112 N.E.R. 190
Nowlan v Elderkin	[1950] 3 D.L.R. 773
Nye v The Queen	(1972) 3 C.M.A.R. 85
O'Connor v The Queen	(1966) 57 D.L.R. (2d) 123
Opper v United States	(1954) 348 U.S. 84
Owen v The Queen	(1959) 2 C.M.A.R. 103
Piche v The Queen	[1970] 4 C.C.C. 27
Platt v The Queen	(1963) 2 C.M.A.R. 213
Prata v Minister of Manpower and Immigration	(1975) 52 D.L.R. (3d) 383

Queen v Dowsey, Douglas and Lambruert	(1865) 6 N.S.R. 93
Reese v The Queen	(1955) Ex.C.R. 187
Reference re Privy Council Appeals	[1940] 1 D.L.R. 289
Regina & Archer v White	(1956) 1 D.L.R. (2d) 305
Reid v The Queen	(1975) 20 C.C.C. (2d) 257
Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919	[1922] 1 A.C. 191
Re Lavell and Attorney General of Canada	[1972] 1 O.R. 390
Re Martin v The Queen	(1973) 11 C.C.C. (2d) 224
Re Murphy, ex Parte Belisle and Moreau	(1968) 4 C.C.C. 229
Re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1	[1947] 2 W.W.R. 510
Re Public Finance Corp. and Edward's Garage Ltd.	(1957) 22 W.W.R. 312
Re Walsh and Jordan	(1962) 31 D.L.R. (2d) 88
Robinson v C.P.R.	[1892] A.C. 481
Robinson v The Queen	(1971) 3 C.M.A.R. 43
R v Ballegeer	(1969) 1 D.L.R. (3d) 74
R v Black and Mackie	(1966-67) 49 C.R. 357
R v Blick	(1966) 50 Cr. App. R. 280
R v Brownridge	(1971) 15 C.R.N.S. 78
R v Burnshine	(1974) 44 D.L.R. (3d) 584
R v Deckert	[1958] O.W.N. 163

R v Drybones	(1970) 9 D.L.R. (3d) 473
R v Gauthier	[1975] S.C.R. 26 June 1975
R v Gonzales	(1962) 32 D.L.R. (2d) 290
R v Kaipainen	(1953) 107 C.C.C. 377
R v Lalonde	(1971) 15 C.R.N.S. 1
R v Purcell	(1975) 11 N.S.R. (2d) 309
R v Roestad	[1972] 1 O.R. 814
R v Smythe	[1971] 2 O.R. 209
R v Snider	(1954) 109 C.C.C. 193
R v Sweezy	(1975) 20 C.C.C. (2d) 400
R v Van Dongen	[1975] 4 W.W.R. 246
R v Washer	(1974) 92 C.C.C. 218
R v Wilkinson	(1934) 62 C.C.C. 63
R v Wray	[1971] S.C.R. 272
Schratt v Accurate Instrument Co. Inc.	(1942) 40 N.E.R. (2d) 823
Smith v United States	(1954) 348 U.S. 147
Smith v The Queen	(1961) 2 C.M.A.R. 159
Slavutych v Baker et al	[1975] S.C.R. 28 January 1975
Syme v The Queen	(1968) 3 C.M.A.R. 33
Thompson v The King	[1918] A.C. 221
Toms v Whitby	(1875) 37 U.C.Q.B. 100
United States v Tempin	(1967) 16 U.S.C.M.A. 629
United States v Jarvis	(1952) 1 U.S.C.M.A. 368
Vancouver v Township of Richmond	(1959) 17 D.L.R. (2d) 548

Victoria City v Bishop  
of Vancouver Island

[1921] 2 A.C. 384

Weselak v The Queen

(1972) 3 C.M.A.R. 95

Williams v The Queen

(1974) 4 C.M.A.R. 23 July 1974

Ziesman v The Queen

(1966) 3 C.M.A.R. 17

## EVIDENCE

### TABLE OF CONTENTS

#### FIRST DIVISION

EXPLANATORY	PAGE
Para. 1. Objectives of court martial .....	1
“ 2. Matters to be determined .....	1
“ 3. Rules of evidence .....	1
“ 4. Difference — judicial & non-judicial inquiries .....	1
“ 5. Reasons for excluding certain evidence .....	2
“ 6. Meaning of “facts in issue” .....	2
“ 7. Importance of charge .....	2
“ 8. Charge brought must be proved .....	3
“ 9. Substance only of charge need be proved .....	3
“ 10. Matters peculiarly within accused's knowledge .....	3
“ 11. Strongest possible assurance not essential .....	3
“ 12. The nature of evidence .....	4
“ 13. Relevancy and admissibility .....	4
“ 14. Direct and circumstantial evidence .....	5
“ 15. Illustrations — circumstantial evidence .....	5
“ 16. What facts are assumed to be known .....	7
“ 17. Burden of persuasion .....	7
“ 18. Burden of producing evidence .....	8
“ 19. Presumptions and inferences .....	8
“ 20. Proof of intention .....	9
“ 21. General statement of rules of evidence .....	10

#### SECOND DIVISION

### THE MILITARY RULES OF EVIDENCE

#### SECTION 1 — INTRODUCTORY

Article 1. — Short Title .....	11
“ 2. — Definitions .....	11
“ 3. — Application of Rules .....	13
“ 4. — Cases not Provided for .....	13
“ 5. — Functions of Judge Advocate under Rules .....	13
“ 6. — Effect of Failure to Comply with Rules .....	13

#### PART I — EVIDENCE AND PROOF GENERALLY

#### SECTION 2 — ADMISSION OF EVIDENCE GENERALLY

Article 7. — Admission of Evidence .....	13
“ 8. — Necessity for Evidence .....	14

#### SECTION 3 — BURDEN OF PERSUASION AND REBUTTABLE PRESUMPTIONS OF LAW

Article 9. — Burden of Persuasion — General Rule .....	14
“ 10. — Burden of Persuasion on Prosecutor .....	14
“ 11. — Burden of Persuasion on Accused .....	14
“ 12. — Burden of Producing Evidence .....	15
“ 13. — Rebuttable Presumptions of Law .....	15

## (Table of Contents)

*Evidence*

## PART II — JUDICIAL NOTICE

## SECTION 4 — JUDICIAL NOTICE

Article 14. — Limitation on Judicial Notice .....	16
“ 15. — Required Judicial Notice .....	16
“ 16. — Discretionary Judicial Notice .....	17
“ 17. — Judicial Notice on Request .....	18
“ 18. — Determination of Propriety of Taking Judicial Notice .....	18
“ 19. — Effect of Taking Judicial Notice .....	19

PART III — METHODS OF PROOF AND FORBIDDEN  
TYPES OF EVIDENCE

## SECTION 5 — CHARACTER AND SIMILAR FACTS

Article 20. — Evidence of Character and Similar Facts Not Ordinarily Admissible before Finding .....	19
“ 21. — Character Evidence .....	19
“ 22. — Evidence of Similar Facts .....	20
“ 23. — Possession of Property Obtained by Commission of Offence .....	20
“ 24. — Offences under Official Secrets Act .....	21
“ 25. — Admissibility after Finding .....	21

## SECTION 6 — HEARSAY EVIDENCE

Article 26. — Hearsay Generally Excluded .....	21
“ 27. — Words as Facts in Issue .....	22
“ 28. — Words Essential to give Character to Acts that are Facts in Issue ..	22
“ 29. — Words Essential to Prove Relevant Mental or Internal Physical State ..	23
“ 30. — Spontaneous Words in Emergency Situation .....	23
“ 31. — Complaints .....	23
“ 32. — Dying Declarations .....	24
“ 33. — Statements Made In Course of Duty by Persons since Deceased ..	24
“ 34. — Declarations on Character Reputation of Accused .....	24
“ 35. — Self-Serving Evidence .....	24

## SECTION 7 — CONFESSIONS OF ACCUSED PERSONS

Article 36. — Types of Confessions .....	25
“ 37. — Judicial Confession Explained .....	25
“ 38. — Effect of Judicial Confession .....	25
“ 39. — Official Confession Defined .....	25
“ 40. — Admissibility of Official Confession .....	25
“ 41. — Unofficial Confession Defined .....	26
“ 42. — Admissibility of Unofficial Confession .....	26
“ 43. — Statements in Presence of Accused .....	27
“ 44. — Evaluation of Unofficial Confession .....	27
“ 45. — Accomplice's Evidence .....	27
“ 46. — Conspirator's Evidence .....	27
“ 47. — Evidence Discovered from Inadmissible Confession .....	27
“ 48. — Self-Incrimination .....	27
“ 49. — Statements Not Treated as Confessions .....	28

## SECTION 8 — OTHER KINDS OF HEARSAY EVIDENCE

Article 50. — Statements by Persons Other Than Accused Made in Judicial or Other Official Proceedings .....	28
“ 51. — Public Documents .....	29
“ 52. — Public Documents of Other Countries .....	29
“ 53. — Documents of Canadian Forces .....	29
“ 54. — Regular Entries .....	30
“ 55. — Limitations on Admission of Certain Documents .....	30

## (Table of Contents)

*Evidence*

## SECTION 8 — OTHER KINDS OF HEARSAY EVIDENCE — Continued

Article 56. — Expert Opinion as Hearsay.....	30
“ 57. — Statements in Learned Treatises.....	30
“ 58. — Statutory Declarations.....	31
“ 59. — Mode of Proving Documentary Statements and Effect of Admission	31
“ 60. — Kinds of Hearsay not Specifically Covered.....	31

## SECTION 9 — OPINION

Article 61. — Opinion — General Rule.....	31
“ 62. — Expert Witness.....	32
“ 63. — Opinion of Expert Witness.....	32
“ 64. — Opinion Evidence of Ordinary Witness.....	32
“ 65. — Opinions of Experts and Ordinary Witnesses.....	33
“ 66. — Opinion in Comparison of Writing.....	33

## SECTION 10 — EFFECT OF PUBLIC POLICY AND PRIVILEGE

Article 67. — Secrecy.....	33
“ 68. — Effect on Trial if Secrecy Precludes Disclosure.....	33
“ 69. — Decision on Secrecy.....	33
“ 70. — Concealment of Identity of Informants.....	33
“ 71. — Governmental Privilege on Disclosure.....	34
“ 72. — Privilege — Generally.....	34
“ 73. — Privilege of Accused.....	34
“ 74. — Privilege of Spouse of Accused.....	34
“ 75. — Communications During Marriage.....	34
“ 76. — Witness — Incriminating Questions.....	34
“ 77. — Solicitor-Client Privilege.....	34
“ 78. — Penitential Privilege.....	35

## PART IV — PERMITTED METHODS OF PROOF

## SECTION 11 — ORAL TESTIMONY

Article 79. — Competence of Witnesses.....	35
“ 80. — Testimonial Qualification of Witness.....	36
“ 81. — Qualification of Expert Witness.....	36
“ 82. — Testimony by Graphic Media.....	36
“ 83. — Testimony of Accomplice.....	36
“ 84. — Meaning of Corroboration.....	37
“ 85. — Corroboration of Certain Offences.....	37
“ 86. — Child's Evidence.....	37

## SECTION 12 — EXAMINATION OF WITNESSES

Article 87. — Order of Testimony.....	38
“ 88. — Direct Examination — General Rules.....	38
“ 89. — Direct Examination — Leading Questions.....	38
“ 90. — Hostile Witness.....	39
“ 91. — Recorded Past Recollection.....	39
“ 92. — Refreshing Memory of Witness.....	40
“ 93. — Cross-Examination — General Rules.....	40
“ 94. — Cross-Examination — Exemptions.....	41
“ 95. — Postponement of Cross-Examination.....	41
“ 96. — Re-Examination.....	41
“ 97. — Examination of Witnesses — Incriminating Questions.....	41
“ 98. — Credibility of Witness Generally.....	41
“ 99. — Credibility — Effect of Answers.....	42
“ 100. — Credibility — Use of Former Statements to Contradict.....	42
“ 101. — Credibility — General Reputation of Witness for Veracity.....	43

---

**(Table of Contents)***Evidence***SECTION 13 — DOCUMENTS**

Article 102. — Original Documents — Explanation .....	43
“ 103. — Proof of Documents by Primary Evidence .....	43
“ 104. — Proof of Documents by Secondary Evidence .....	44
“ 105. — Proof of Public Documents .....	44
“ 106. — Proof of Regular Entries .....	47
“ 107. — Bankers' Books .....	47
“ 108. — Proof of Date, Handwriting and Signature of Documents .....	48
“ 109. — Proof of Execution of Attested Documents .....	48

**SECTION 14 — REAL EVIDENCE**

Article 110. — Admissibility of Real Evidence .....	49
“ 111. — Introduction of Real Evidence .....	49

**SECTION 15 — FOREIGN LAW**

Article 112. — Foreign Law .....	49
----------------------------------	----

**ACKNOWLEDGEMENT**

Permission of the Admiralty, the War Office and the Air Ministry of the United Kingdom to use material from their Service manuals is acknowledged with gratitude. To a considerable extent the explanatory portion of this work is drawn from these sources.

## EVIDENCE

## SECOND DIVISION

## THE MILITARY RULES OF EVIDENCE

(Approved by Order in Council 1959-1027 of 13 Aug 59, effective 1 Oct 59, amended by P.C. 1967-2255 of 30 Nov 67 and P.C. 1971-31 of 12 Jan 71, with additional explanatory NOTES approved by the Minister.)

## Introductory

**Short Title**

1. These regulations may be cited as the *Military Rules of Evidence*.

## NOTES

- (A) These regulations are established under section 152 of the *National Defence Act* which, in part is as follows:  
 "152. (1) Subject to this Act, the rules of evidence at a trial by court martial shall be such as are established by regulations made by the Governor in Council.  
 (2) No regulation made under this section is effective until it has been published in the *Canada Gazette* and every such regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session".
- (B) The notes to these regulations are inserted on the authority of the Minister of National Defence. They are based upon decisions of court martial appeal courts, civil courts, principles stated in legal text books and opinions of the Judge Advocate General. They should not be deviated from when they are clearly applicable.

## (M)

**Definitions**

2. (1) In these Rules, unless the context otherwise requires:
- (a) "accused" means the accused personally or counsel or a defending officer acting on behalf of the accused, but does not include an adviser acting on behalf of the accused;
  - (b) "admissible" means admissible in evidence;
  - (c) "burden of persuasion" means the burden of convincing the court of the existence or non-existence, or probable existence or non-existence, of any fact;
  - (d) "business" means every kind of business, occupation or calling, and includes the practice of a profession, and the operation of an institute and every kind of institution, whether carried on for profit or not;
  - (e) "circumstantial evidence" means evidence tending to establish the existence or non-existence of a fact that is not one of the elements of the offence charged, where the existence or non-existence of that fact reasonably leads to an inference concerning the existence or non-existence of a fact that is one of the elements of the offence charged;
  - (f) "confession" means a statement made by an accused person, whether made before or after he is accused of an offence, that is completely or partially self-incriminating with respect to the offence of which he is accused;
  - (g) "credibility" means the degree of credit the court should give to the testimony of a witness;
  - (h) "declarant" means the person who originally makes a hearsay statement;
  - (i) "direct evidence" means evidence tending directly to establish the existence or non-existence of an element of the offence charged;
  - (j) "evidence" means anything that has a significant rational tendency to make something manifest;
  - (k) "examined copy" means a copy proved to have been compared with the original and to correspond to it;

*Evidence***Definitions — Continued**

- (l) "expert witness" means a witness qualified under article 81 (Qualification as Expert Witness);
- (m) "extra-judicial statement" means in any proceedings of a court martial a hearsay statement that has been made by a declarant, other than in the course of those proceedings or in the course of taking evidence taken on commission for that court martial, and includes:
  - (i) words, oral or written, used by him,
  - (ii) the adoption, in some way, in whole or in part, of meaningful words uttered by another person as an accurate expression of the declarant's own observations or experience, and
  - (iii) the expression, in an intelligible manner, of the declarant's observations or experience;
- (n) "judicial notice" means acceptance by a court of the truth of a fact or matter without requiring the introduction of evidence to prove its truth;
- (o) "opinion" means interpretation of, or inference concerning, the significance in some respect of a given fact;
- (p) "ordinary witness" means a witness who testifies to facts observed or experienced by him, but who is not testifying as an expert in the matter concerned;
- (q) "public document" includes a documentary statement made for an official purpose by a public officer acting under a duty or authority to make the statement;
- (r) "public officer" means a person having a legal duty or authority to make official statements which duty or authority is expressly imposed by or given in a statute, regulation, or specific instruction, or implied from the nature of the office because he is an official of the Government of Canada, the government of a Canadian province, a Canadian municipality, or because he is a member of the Canadian Forces;
- (s) "Queen's Regulations and Orders" or "QR&O" means the Queen's Regulations and Orders for the Canadian Forces;
- (t) "real evidence" means all evidence supplied by material objects when they are offered for direct perception by the court;
- (u) "rebuttable presumption of law" means a presumption authorized by the *National Defence Act*, the *Criminal Code* or other Act of the Parliament of Canada that upon proof of a certain fact or set of facts, another fact exists, unless evidence to the degree required by law renders its existence unlikely;
- (v) "relevant evidence" means evidence relating to a fact in issue at the trial, and includes evidence that tends to establish the cogency or accuracy of either direct or circumstantial evidence;
- (w) "reporting witness" means a witness who is permitted to quote an extra-judicial statement;
- (x) "self-incriminating statement" means a statement by the accused that, if admitted in evidence and believed in whole or in part, would directly or indirectly tend to prove the accused guilty of the charge;
- (y) "trial" means trial by court-martial.
- (2) Unless otherwise prescribed, or the context otherwise requires, words and phrases used in these Rules bear the meaning given to them in the *National Defence Act* and Queen's Regulations and Orders.

*Evidence**Application of Rules*

3. These Rules apply to all court martial proceedings and are not affected by the territorial location of the place where the court martial is sitting.

*Cases not Provided for*

4. 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 by the law of evidence, in so far as not inconsistent with these Rules, that would apply in respect of the same question before a civil court sitting in Ottawa.

*Functions of Judge Advocate under Rules*

5. (1) Subject to (2) of this article, when the judge advocate has the power or obligation under these Rules to determine a question, that power may be exercised or that obligation discharged only in accordance with QR&O 112.06 (Questions of Law or Mixed Law and Fact where Judge Advocate Appointed).

(2) If the judge advocate is not directed by the president to hear and determine a question, or if there is no judge advocate, the court shall hear and determine the question.

## NOTES

(A) When the judge advocate has ruled that an item of evidence is admissible, his ruling is on the question of admissibility only. The determination of the cogency, weight and probative value of such an item of evidence is entirely and exclusively a matter for decision by the court. The prosecutor and the accused shall be given the opportunity to present for the consideration of the court evidence relating to the cogency, weight and probative value of that item of evidence, including all or any part of the evidence adduced before the judge advocate when sitting alone. Moreover, when a fact of significance touching the reliability of an item of evidence that has been admitted was also a preliminary fact upon which its admissibility depended, the court, in determining the main issue under the charge, is free to take a different view of the truth or significance of this fact than did the judge advocate in determining admissibility only.

(M)

*Effect of Failure to Comply with Rules*

6. A finding made or a sentence passed by a court martial is not invalid by reason only of deviation from or failure to comply with these Rules unless it appears that a substantial miscarriage of justice has been caused by that deviation or failure.

## PART I — EVIDENCE AND PROOF GENERALLY

## Section 2—Admission of Evidence Generally

*Admission of Evidence*

7. Subject to article 4 (Cases not Provided for) and except as prescribed in Part III (Methods of Proof and Forbidden Types of Evidence) and Part IV (Permitted Methods of Proof), the court shall not admit irrelevant evidence but shall admit and consider all relevant evidence.

## NOTES

(A) This article applies to all stages of the trial and all issues arising during its course.

(B) If evidence tendered does not seem to be relevant, the person adducing it should be asked either to explain its relevance or to undertake that later evidence will show its relevance. Where the evidence consists of an object tendered as an exhibit, and its relevance is not apparent when it is tendered, it should be marked for identification purposes. It should not be accepted as an exhibit until its relevance is established. When oral evidence has been heard on the undertaking of the person adducing it that he will at a later stage show its relevance, but its relevance is not in fact later established, the court should be directed to disregard that evidence.

(M)

*Evidence**Necessity for Evidence*

8. Except for those facts of which it has taken judicial notice under Section 4 (Judicial Notice), the court shall not consider a fact unless evidence of that fact has been adduced in one of the following ways

- (a) by the oral testimony of a witness in court pursuant to Part III (Methods of Proof and Forbidden Types of Evidence) and Part IV (Permitted Methods of Proof);
- (b) by the production and reading or inspection of documents in court pursuant to Parts III and IV;
- (c) by the inspection or viewing by the court of real evidence pursuant to Part IV;
- (d) by the admission by the prosecutor during the course of the trial of the existence of a fact, for the purpose of dispensing with proof thereof, the effect of which is to narrow the area of facts to be proved by the defence; or
- (e) by a judicial confession pursuant to article 37 (Judicial Confession Explained).

### Section 3—Burden of Persuasion and Rebuttable Presumptions of Law

*Burden of Persuasion — General Rule*

9. Notwithstanding that the burden of persuasion is on the prosecutor or the accused, the court shall not find the accused guilty unless persuaded beyond reasonable doubt of the truth of every essential element of the charge.

*Burden of Persuasion on Prosecutor*

10. Subject to article 11, the prosecutor has the burden of persuading the court beyond reasonable doubt of the truth of every essential element of the charge.

*Burden of Persuasion on Accused*

11. (1) When the accused seeks acquittal on the ground of insanity, he has the burden of persuasion as to the existence of the type and degree of insanity necessary for acquittal (see sections 126 and 126A of the *National Defence Act*).

(2) When, under the *Criminal Code* or other Act of the Parliament of Canada, the accused would, in the trial of a criminal offence before a civil court, have the burden of persuasion on a material fact other than or in addition to insanity, the accused has that burden of persuasion in a trial by court martial involving the same offence and material fact.

(3) The accused has the burden of persuasion under the *National Defence Act* when that Act so provides.

(4) When the accused has a burden of persuasion under this article, the court shall consider him to have satisfied that burden if he establishes the probable truth or existence of the material fact.

## NOTES

## (A) Burden of Persuasion on Accused

The following are some of the statutory provisions that fix the accused with a burden of persuasion:

(i) *Criminal Code*, S.C. 1953-54, c. 51

"295 (1) Everyone who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence . . . ."

"360 (2) Everyone who, without lawful authority, the proof of which lies upon him, receives, possesses, keeps, sells or delivers public stores that he knows bear a distinguishing mark is guilty of an . . . . offence."

*Evidence*(ii) *National Defence Act*, R.S.C. 1952, c. 184

"98 Every person who signs an inaccurate certificate in relation to an aircraft or aircraft material, unless he proves that he took reasonable steps to ensure that it was accurate, is guilty of an offence . . . ."

(iii) *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201

"16 (1) If any person charged with an offence under section 6 pleads or alleges that the drug in question was required for medicinal purposes, or was prescribed for the medical treatment of a person under professional treatment by the accused, or was required for medicinal purposes in connection with his practice as a dentist or veterinary surgeon, as the case may be, the burden of proof, thereof shall be upon the person so charged". (Section 6 makes it an offence for a physician, veterinary surgeon or dentist to provide anyone with a narcotic drug except for proper curative purposes.)

(iv) *Official Secrets Act*, R.S.C. 1952, c. 198

"4 (3) Every person who receives any secret official code word, or pass word, or sketch, plan, model, article, note, document or information, knowing, or having reasonable ground to believe, at the time when he receives it, that . . . (it) . . . is communicated to him in contravention of this Act, is guilty of an offence under this Act, unless he proves that the communication to him of the code word, pass word, sketch, plan, model, article, note, document or information was contrary to his desire."

The foregoing extracts from statutes are merely examples.

The effect of article 11 is to incorporate by reference provisions of the *National Defence Act*, the *Criminal Code* and other Acts of the Parliament of Canada that, in prescribing offences, specify circumstances in which an accused person facing a criminal charge must prove in the first instance the probable truth of a material fact if he is to secure an acquittal on that ground. It does not matter what statutory words have been used if their substantial effect is as here described.

(M)

*Burden of Producing Evidence*

12. (1) The burden of producing evidence of a material fact or on an issue is in the first instance upon the party who has the burden of persuasion on that fact or issue.

(2) The burden of producing evidence of a material fact or on an issue shifts to the other party during the course of a trial when the party on whom for the time being the burden of producing evidence rests has

- (a) produced evidence that reasonable men might consider has proved the fact in issue to the extent that it is required to be proved by that party, or
- (b) established the fact in his favour by a rebuttable presumption of law under article 13.

*Rebuttable Presumptions of Law*

13. A rebuttable presumption of law applies in a trial when the offence to which it is applicable is in issue.

## NOTES

## [(A) Examples of Rebuttable Presumptions

The following are examples of rebuttable presumptions of law:

(i) *Criminal Code*, S.C. 1953-54, c. 51

"169 (b) Evidence that a place was found to be equipped with gaming equipment or any device for concealing, removing or destroying gaming equipment is *prima facie* evidence that the place is a common gaming house or a common betting house, as the case may be."

"364 (1) In proceedings under sections 360 to 363, evidence that a person was at any time performing duties in the Canadian Forces is *prima facie* evidence that his enrolment in the Canadian Forces prior to that time was regular." (Sections 360 to 363 involve fraudulent dealings in public stores and unauthorized uses of military uniforms, medals and similar things).

(ii) *National Defence Act*, R.S.C. 1952, c. 184

(a) "79 (3) A person who has been absent without authority for a continuous period of six months or more shall, unless the contrary is proved, be presumed to have had the intention of not returning to his unit or formation or the place where his duty requires him to be."

(b) "101 (2) For the purposes of paragraph (b) of subsection 101, [driving while impaired] where a person occupies the seat ordinarily occupied by a driver of a vehicle, he shall be deemed to have attempted to drive such vehicle, unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion."

*Evidence*

(iii) *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201

"18 In any prosecution under this Act a certificate as to the analysis of any drug or drugs signed . . . by a Dominion or provincial analyst shall be *prima facie* evidence of the facts stated in such certificate . . ."

(iv) *Official Secrets Act*, R.S.C. 1952, c. 198

"3 (3) In any proceedings against a person for an offence under this section, the fact that he has been in communication with, or attempted to communicate with, an agent of a foreign power, whether within or without Canada, is evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power."

(M)

## PART II — JUDICIAL NOTICE

## Section 4—Judicial Notice

*Limitation on Judicial Notice*

14. Except as authorized by these Rules, a court shall not take judicial notice of a fact or matter.

## NOTES

(A) Although courts in arriving at a decision are authorized to use their general information and knowledge of common affairs of life that men of ordinary intelligence possess, they may not act on the private knowledge or belief of their members regarding the facts of the cases being tried or on any information acquired from sources personal and private to their own experience, including knowledge gained from evidence in a previous case.

(M)

*Required Judicial Notice*

15. (1) A court shall, whether or not requested to do so by the prosecutor or the accused, take judicial notice of

- (a) the accession and death of the Sovereign;
- (b) the title and sign manual of the Sovereign;
- (c) the constitution of Canada;
- (d) the Great Seal of Canada;
- (e) Acts and resolutions of the Parliament of Canada;
- (f) Acts and resolutions of the legislatures of the provinces and Territories of Canada;
- (g) the territorial limits of Canada and of the provinces of Canada;
- (h) the existence of an emergency recognized by the Government of Canada;
- (i) the Service, component, or unit being on active service;  
and
- (j) the status of foreign governments.

(2) A court shall, whether or not requested to do so by the prosecutor or the accused, take judicial notice of the contents of, but not of the publication or sufficiency of notification of, proclamations, orders in council, ministerial orders, warrants, letters patent, rules, regulations, or by-laws, made directly under authority of a public Act of the Parliament of Canada or of the legislature of a province of Canada, including but not limited to QR&O, and orders and instructions issued in writing by or on behalf of the Chief of the Defence Staff under QR&O 1.23 (Authority of the Chief of the Defence Staff to Issue Orders and Instructions).

*Evidence*

## NOTES

(A) Sections 48 and 49 of the *National Defence Act* provide:

"48. Orders made under this Act may be signified by an order, instruction or letter under the hand of any officer whom the authority who made such orders has authorized to issue orders on his behalf; and any order, instruction or letter purporting to be signed by any officer appearing therein so to be authorized is evidence of his being so authorized. 1950, c. 43, s. 48.

49. (1) All regulations and all orders and instructions issued to the Canadian Forces shall be held to be sufficiently notified to any person whom they may concern by their publication, in the manner prescribed in regulations made by the Governor in Council, in the unit or other element in which that person is serving.

(2) All regulations and all orders and instructions relating to or in any way affecting an officer or man of the reserve force, other than an officer or man who is serving with a unit or other element, when sent to him by registered mail, addressed to his last known place of abode or business, shall be held to be sufficiently notified.

(3) Notwithstanding subsections (1) and (2), all regulations and all orders and instructions mentioned in those subsections shall be held to be sufficiently notified to any person whom they may concern by their publication in the *Canada Gazette*. 1950, c. 43, s. 49."

(M)

*Discretionary Judicial Notice*

16. (1) Subject to article 18 (Determination of Propriety of Taking Judicial Notice), a court may, whether or not requested to do so by the prosecutor or the accused, take judicial notice of the contents of:

- (a) law reports containing decisions, and the reasons therefor, of the Court Martial Appeal Board and appeal courts mentioned in sections 190 and 196 of the *National Defence Act*;
- (b) the *Canada Gazette*, and official gazettes of the provinces of Canada;
- (c) subject to Section 5 (Character and Similar Facts) and to proof of identity of the person named therein,
  - (i) records of findings made and sentences passed at courts martial and summary trials, but not of the evidence adduced thereat,
  - (ii) records of the disposition made on appeals from courts martial or reviews of courts martial or petitions for new trial, and
  - (iii) subject to article 105 (Proof of Public Documents), certificates of civil courts setting forth an offence for which a person was tried, and the judgment or order of the court thereon;
- (d) official and departmental reports, forms, documents, commissions, and other papers purporting to be printed by the Queen's Printer, or by the Queen's Printer of a province of Canada; and
- (e) books and other publications, and amendments to them, that are authorized officially for military use.

(2) Subject to article 18 (Determination of Propriety of Taking Judicial Notice), a court may, whether or not requested to do so by the prosecutor or the accused, take judicial notice of:

- (a) all matters of general service knowledge;
- (b) particular facts and propositions of general knowledge that, in view of the state of commerce, industry, history, language, science or human activity, are at the time of the trial so well known in the community where the offence is alleged to have been committed that they are not the subject of reasonable dispute; and
- (c) particular facts and propositions of general knowledge, the accuracy of which is not the subject of reasonable dispute, that are capable of immediate and accurate verification by means of readily available sources.

*Evidence*

## NOTES

- (A) Examples of facts of which members of a court may take judicial notice under (2)(a) of this article are:
- (i) the general duties, authority and obligations of officers and men, having regard to rank, appointment and status;
  - (ii) naval, army or air force customs;
  - (iii) the meaning of service technical terms;
  - (iv) when and where major military engagements were fought, but not what officers or men participated or how they conducted themselves; and
  - (v) the law and usages of war.
- (B) Examples of facts of which members of a court may take judicial notice under (2)(b) of this article are:
- (i) the so-called "ordinary course of nature", such as the fact that extremely cold weather is likely to be experienced in some localities in January and February, or the fact that gestation ordinarily lasts for a particular period of time, but not what are the particular limits for extraordinary periods of gestation;
  - (ii) the public coinage and currency;
  - (iii) the dangerous character of highway traffic, but not that a particular person is a dangerous driver; and
  - (iv) the popular meaning of words, but not the scientific or technical meaning.
- (C) Examples of facts of which members of a court may take judicial notice under (2)(c) of this article are:
- (i) the number of days in a year, a given month or that a certain day of a month was a Sunday, but not the occurrences on a particular day such as the time of sunset;
  - (ii) the differences in time in places east and west of Greenwich;
  - (iii) the meaning of scientific and technical terms, but not a peculiar meaning within a particular trade or profession; and
  - (iv) who are holders of public office.
- (D) When in doubt concerning a fact that is being considered for judicial notice under (2) of this article, members of a court may, to refresh their memory:
- (i) refer to appropriate trustworthy aids such as histories, standard dictionaries, standard almanacs, the Canada Year Book, the Canadian Law List, international treaties, and scientific records; and
  - (ii) admit evidence by persons of recognized authority on the particular subject.
- (M)

*Judicial Notice on Request*

17. (1) The prosecutor or the accused may request the court to rule that a fact or matter is within article 15 (Required Judicial Notice) or 16, and he shall, if requested by the court, furnish the court with information relevant to the fact or matter.
- (2) The court shall give the adverse party an opportunity to oppose the granting of the request.

*Determination of Propriety of Taking Judicial Notice*

18. (1) When a court proposes to take or appears to be taking judicial notice of a fact or matter under article 15 (Required Judicial Notice) or 16 (Discretionary Judicial Notice), or is requested to take judicial notice of it under article 17, both prosecutor and accused have the right to submit informally evidence and argument as to the competence of the court to take, or the propriety of the court taking, judicial notice.
- (2) When the court or the judge advocate raises a question as to whether judicial notice may be taken of a fact or matter under article 15 or 16, the judge advocate shall decide the question, and his decision shall be final.
- (3) When determining whether to take judicial notice of a fact or matter, the members of a court and the judge advocate may consult any source of pertinent information, including a person, document or book, whether or not furnished by a party, and use the information obtained therefrom.
- (4) If the information possessed by the court, regardless of source, fails to convince the judge advocate that a fact or matter is clearly within article 15 or 16, he shall rule against taking judicial notice of the fact or matter.

*Evidence*

## NOTES

- (A) Whether or not a fact is one of which a court may with propriety take judicial notice, is a question of law and not a question of fact. Consequently, the question should be decided by the judge advocate under QR&O 112.06 (Questions of Law or Mixed Law and Fact where Judge Advocate Appointed).
- (B) Careful attention should be paid to the efforts made by a party to demonstrate that a particular fact or matter is or is not appropriate for judicial notice. He may for this purpose bring to the attention of the court, informally, any information that tends to show that the truth of the fact or matter is or is not open to question. (See also Note (D) to article 16).
- (C) If judicial notice of a fact or matter is not taken, either party may formally submit evidence on the point that judicial notice would have covered.

(M)

*Effect of Taking Judicial Notice*

**19.** (1) No evidence of a fact of which a court has taken judicial notice need be given by the party alleging its existence or truth.

(2) When a court has taken judicial notice of a fact, it is conclusively taken to be true, and no allegedly contradictory evidence is thereafter admissible.

## NOTES

- (A) Although a party, before the court has taken judicial notice of a fact or matter, may proceed under article 18 to attempt to demonstrate that the particular fact or matter is not proper for judicial notice, once the court have taken judicial notice of it, its truth has been found, not merely presumed, and no evidence is afterward admissible to rebut its truth. To admit rebuttal evidence at this stage would be inconsistent with the basic principle and would defeat the purpose of taking judicial notice.
- (B) There may be a case in which judicial notice is taken of the truth of a general proposition and therefore its truth is conclusive, yet evidence is admissible not to rebut its truth but to establish that a particular thing is outside the scope of the proposition. For example, courts have taken judicial notice that a cat and dog usually will fight, but a party may prove that a particular dog is afraid of cats and will run rather than fight with one.

(M)

PART III — METHODS OF PROOF AND FORBIDDEN  
TYPES OF EVIDENCE

**Section 5—Character and Similar Facts**

*Evidence of Character and Similar Facts Not Ordinarily  
Admissible before Finding*

**20.** Except as prescribed in this Section, 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.

*Character Evidence*

**21.** (1) The accused may, by cross-examination or by witnesses, introduce evidence of his good character or reputation and, if he does so, the prosecutor may similarly introduce evidence to rebut it.

- (2) 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 in respects relevant to the charge.

*Evidence*

(3) When a witness is testifying as to the character or reputation of the accused, he shall not give evidence of particular acts of the accused as the basis of his report or opinion of the reputation or character of the accused, but shall answer questions concerning the duration and nature of his acquaintance or association with the accused, or with others who would be likely to know the accused.

(4) Notwithstanding Sections 6 (Hearsay Evidence), 7 (Confessions of Accused Persons), 8 (Other Kinds of Hearsay Evidence) and 9 (Opinion), hearsay or opinion evidence permitted under this article is admissible.

(5) This article applies to testimony in the course of examination-in-chief, cross-examination and re-examination.

*Evidence of Similar Facts*

**22.** (1) 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.

(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.

## NOTES

(A) The decision to admit or exclude evidence as similar facts under this Section should be made by the judge advocate. For this purpose the judge advocate alone should hear the necessary evidence and argument. The president and members of the Court should absent themselves from such a hearing (see QR&O 112.06 (Questions of Law or Mixed Law and Fact where Judge Advocate Appointed) and Notes).

(M)

*Possession of Property Obtained by Commission of Offence*

**23.** (1) Subject to (2) of this article, when a person is charged with an offence under section 105 of the *National Defence Act* of receiving or retaining in possession property obtained by the commission of a service offence, evidence may be introduced by the prosecutor to show

- (a) that property other than the property that is the subject matter of the charge
  - (i) was found in the possession of the accused, and
  - (ii) was stolen within twelve months before the charge was laid; and
- (b) if evidence is adduced that the property that is the subject matter of the charge was found in the possession of the accused, that the accused was, within five years before the charge was laid, convicted of an offence
  - (i) involving theft,

*Evidence*

- (ii) under section 105 of the *National Defence Act*,
- or
- (iii) under section 296 or paragraph (b) of subsection (1) of section 298 of the *Criminal Code*,

and that evidence may be taken into consideration for the purpose of proving that the accused knew that the property forming the subject matter of the charge was unlawfully obtained.

(2) Subject to article 99 (Credibility — Effect of Answers), this article shall not apply unless the accused is given at least three days' notice in writing of the details of the matters it is intended to prove and, in respect of property other than that forming the subject of the charge, a description of that property and of the person from whom it is alleged to have been stolen.

***Offences under Official Secrets Act***

**24.** When a person is charged under section 119 of the *National Defence Act* with having committed an offence under subsection (1) of section 3 of the *Official Secrets Act*, the prosecutor may adduce evidence of that person's character.

***Admissibility after Finding***

**25.** When there has been a finding of guilty and the trial continues to determine the appropriate sentence, evidence may be submitted in accordance with paragraphs 20 and 21 of QR&O 112.05 (Procedure to be Followed at a Court Martial), QR&O 112.47 (Address as to Punishment) and QR&O 113.13 (Procedure to be followed at a Special General Court Martial).

**Section 6—Hearsay Evidence*****Hearsay Generally Excluded***

**26.** (1) Except as provided in this Section, Section 7 (Confessions of Accused Persons), and Section 8 (Other Kinds of Hearsay Evidence), an extra-judicial statement is not admissible.

(2) Except where the declarant is an accused person whose confession is admissible under Section 7, and subject to (4) of this article, the declarant must meet the same requirements for competence and qualification respecting his extra-judicial statement that a witness must meet under Section 11 (Oral Testimony), and the credibility of the declarant may be impeached or supported in the same way as that of a witness under Section 11 in so far as this is practical.

(3) Subject to (4), (5) and (6) of this article, the reporting witness must be a competent and qualified witness within Section 11, and must personally have heard or seen the declarant make the hearsay statement in question.

(4) A witness who is a person who would be likely to know about the accused may report the reputation of the accused among those associated with him, in accordance with article 21 (Character Evidence) and article 34 (Declarations on Character Reputation of Accused).

(5) A witness may offer primary or secondary evidence of a document as permitted by Section 13 (Documents), if the documentary statement concerned is admissible under article 51 (Public Documents), 52 (Public Documents of Other Countries), 53 (Documents of Canadian Forces) or 54 (Regular Entries).

*Evidence*

(6) An expert witness may quote the hearsay statement of another expert as permitted by articles 56 (Expert Opinion as Hearsay) and 57 (Statements in Learned Treatises).

## NOTES

(A) For the purposes of these Rules, hearsay has been treated broadly as meaning all out-of-court statements relevant to a charge. Of these statements, some are excluded from evidence in spite of their relevance, while the others remain admissible like most other items of relevant evidence. Section 6 (Hearsay Evidence) sets out these two classes of extra-judicial statements by providing in article 26 that all such statements are inadmissible and to be excluded except such of them as can be brought within the terms of the types of such statements mentioned in articles 27 to 34 and Section 7 (Confessions of Accused Persons) and Section 8 (Other Kinds of Hearsay Evidence). In other words, articles 27 to 34 and Sections 7 and 8 contain the list of admissible type of hearsay statements.

(M)

*Words as Facts in Issue*

**27.** An extra-judicial statement is admissible and may be quoted by a reporting witness where the essential elements of the offence charged are such that the words constituting the statement might themselves be

- (a) the very means or instrument whereby the offence charged was committed,
- (b) an essential feature of the commission of the offence charged,
- (c) an indispensable preliminary to the commission of the offence charged, or
- (d) the substance of a legal defence to the offence charged.

## NOTES

(A) Examples:

- (i) *Words as the very means or instrument of an offence:*  
seditious or treasonable words, perjury, libel, words of agreement between collaborators in crime.
- (ii) *Words as an essential feature of the offence charged:*  
words of agreement or instruction between collaborators in crime (co-conspirators), false representation used as part of a scheme to obtain money by false pretences.
- (iii) *Words constituting an indispensable preliminary to the offence charged:*  
words in which a military order was given, when the charge is disobedience of that order.
- (iv) *Defences:*  
words of provocation or insult, where sufficient provocation nullifies the offence charged, e.g., sufficient provocation reduces murder to manslaughter.

(M)

*Words Essential to Give Character to Acts that are Facts in Issue*

**28.** (1) For the purposes of this article, "acts" does not include the uttering of coherent words.

(2) When a person has done acts that are alleged to be criminal acts according to the charge, but their criminal character by themselves is ambiguous or doubtful, words of the actor or another person present that were substantially contemporaneous with the acts and that suggest some further inference concerning the nature or quality of the acts are, subject to (3) of this article, admissible and may be quoted by a reporting witness.

(3) The words of a declarant under (2) of this article shall not be admissible if the party to whom the statement is adverse shows that the declarant had motive and opportunity before making the hearsay statement to contrive deceitful words to his own advantage, and in the particular circumstances was likely to have done so.

## NOTES

(A) For example, the act of handing over or receiving money may be explained by words of the payer or payee as a gift or a loan or a bribe or the sharing of ill-gotten gains. Also the words of a possessor of stolen goods at the time they were found in his possession may indicate whether his possession was innocent or fraudulent.

(M)

*Evidence****Words Essential to Prove Relevant Mental or Internal Physical State***

**29.** (1) When the formation, occurrence or existence at some moment or during some period of a particular state of mind or internal physical condition of a person is relevant directly or indirectly to proof of the charge, words uttered by that person contemporaneously with the formation, occurrence or existence of that mental or physical state, and manifesting or implying something about the nature of it, are, subject to (2) of this article, admissible and may be quoted by a reporting witness.

(2) The words of a declarant under (1) of this article shall not be admissible if the party to whom the statement is adverse shows that the declarant had motive and opportunity before making the hearsay statement to contrive deceitful words to his own advantage, and in the particular circumstances was likely to have done so.

## NOTES

(A) For example, letters or statements may be such as to tend to show the insanity of their author. Also threats uttered by a person accused of murder or assault respecting the person killed or injured may indicate an intention at the material time on the part of the accused to kill or injure such person. Also statements by a deceased person a few days before his death that he was in good health may have some tendency to show that he did not die a natural death.

(M)

***Spontaneous Words in Emergency Situation***

**30.** Where a person has participated in or observed acts or events with which the charge in question is concerned, and these acts or events were of an exciting, startling or shocking character, words about them spoken spontaneously by the participant or observer, while he was under the influence of the original excitement or shock engendered by those acts or events, whether during or after their occurrence, are admissible and may be quoted by a reporting witness.

## NOTES

(A) An example would be the spontaneous words concerning the collision of persons involved in or observing a collision of automobiles.

(M)

***Complaints***

**31.** (1) For the purposes of this article

- (a) "complaint" means an extra-judicial statement concerning an offence made after the alleged commission of that offence to a person other than the accused by the person in respect of whom it is alleged to have been committed; and
- (b) "complainant" means a person who has made a complaint.

(2) Subject to (3) of this article, a complaint is not admissible but the fact of a complaint having been made is admissible in respect of any offence.

(3) The details of a complaint, in so far as they relate to the charge, are admissible for the purposes of (4) of this article if

- (a) the offence charged is a sexual offence;
- (b) the complainant has given evidence at the trial; and
- (c) the prosecutor proves that the complaint was made
  - (i) at the first opportunity reasonably available after the offence was committed, and
  - (ii) spontaneously, and not elicited by leading questions, inducement or intimidation.

(4) A complaint shall not be considered as evidence of the facts complained of, but may be considered as evidence of the consistency or otherwise of the conduct of the complainant with the evidence given by the complainant.

*Evidence*

## NOTES

- (A) The admissibility of a complaint is a matter to be decided by the judge advocate.
- (B) A complaint should be proved by calling both the complainant and the person to whom the complaint was made.
- (C) A complaint does not constitute corroboration within the meaning of article 85 (Corroboration of Certain Offences) of the complainant's evidence in such a case, and the judge advocate must so advise the court.
- (D) Where a complaint has been admitted, the judge advocate must advise the court, in accordance with (4) of this article, of the purpose for which it may be considered as evidence.
- (M)

*Dying Declarations*

**32.** The words of a deceased person whose death is the subject of the charge are admissible and may be quoted by a reporting witness if

- (a) they are concerned with the facts leading up to or attending the injurious act which resulted in the declarant's death;
- (b) they were spoken while the declarant had a settled hopeless expectation that his death was near, whether or not death did thereafter occur as or when expected; and
- (c) it appears that the declarant had completed uttering what he wished to say before death intervened.

*Statements Made in Course of Duty by Persons since Deceased*

**33.** An extra-judicial statement made during the lifetime of a declarant since deceased is, in so far as it relates to the charge, admissible and may be quoted or submitted by a reporting witness as proof of the facts which it was the duty of the declarant in the ordinary course of his business to include in that statement, if the declarant

- (a) had a personal knowledge of the facts;
- (b) had a duty to make the statement in the ordinary course of his business;
- (c) made the statement at or near the time of the act or event to which it relates; and
- (d) had no motive to misrepresent the facts.

*Declarations on Character Reputation of Accused*

**34.** When, in accordance with article 21 (Character Evidence), a witness is called at a court to testify as to the reputation of the accused respecting traits of his character relevant to the charge, the hearsay statements on this subject of other persons who had or who have some significant direct or indirect association with the accused are admissible and may be quoted by the witness.

*Self-Serving Evidence*

**35.** (1) 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.

(2) Except to the extent that it may be admissible under article 27 (Words as Facts in Issue), 28 (Words Essential to give Character to Acts that are Facts in Issue), 29 (Words Essential to Prove Relevant Mental or Internal Physical State), 30 (Spontaneous Words in Emergency Situation) or 60 (Kinds of Hearsay not Specifically Covered), and subject to the right of the accused to give evidence, self-serving evidence is not admissible when submitted by an accused.

## Evidence

## Section 7 – Confessions of Accused Persons

## Types of Confessions

36. Confessions are judicial, official, or unofficial.

## Judicial Confession Explained

37. When, at his trial, the accused chooses to make a complete or partial admission of incriminating facts in respect of an offence for which he is being tried, he may make a judicial confession

- (a) by pleading guilty, including pleading guilty subject to variations and exceptions, when this plea is accepted by the court under QR&O 112.25 (Acceptance of Plea of Guilty);
- (b) after pleading not guilty, and whether or not he also decides to testify as a witness under oath, by personally or through his counsel or defending officer admitting, for the purpose of dispensing with proof, any fact the prosecutor must prove; or
- (c) after pleading not guilty, and having elected to testify under oath as a witness in accordance with article 73 (Privilege of Accused), by making a self-incriminating statement in the course of his testimony.

## Effect of Judicial Confession

38. (1) Subject to QR&O 112.26 (Change of Plea During Trial), when a plea of guilty has been made by the accused and accepted by the court, it is conclusive proof of guilt.

(2) If the accused, after pleading not guilty, admits, other than in the course of his own testimony, a fact alleged against him, the court may accept that admission as conclusive proof of the fact concerned.

(3) If the accused testifies on his own behalf, the court may believe or disbelieve his testimony in whole or part, including a self-incriminating statement made in the course of that testimony.

## Official Confession Defined

39. (1) An official confession is a confession made by the accused, whether or not he has been charged, or might expect to be charged, with an offence at the time of making a statement

- (a) when testifying as a legally compellable witness in the course of any judicial or other official proceeding or inquiry, civil or military, other than his own trial for the offence in question; or
- (b) in the course of giving information pursuant to regulations, or orders issued by the Chief of the Defence Staff under QR&O 1.23 (Authority for the Chief of the Defence Staff to Issue Orders and Instructions), or in response to an order to him by a superior officer to give information required for any proper military purpose.

(2) Notwithstanding paragraph (b) of (1), a statement made by the accused in the course of giving information in respect of an accident that has occurred outside Canada involving a motor vehicle under the care, charge or control of the accused is not an official confession for the purpose of these Rules to the extent that the accused, if the accident had occurred in Canada, would have been required by subsection (2) of section 221 of the *Criminal Code* to make the statement.

## Admissibility of Official Confession

40. (1) Subject to (2) of this article, an official confession by the accused shall not be admissible or used in his trial for an offence in respect of which it is a confession.

*Evidence*

(2) When the charge involves perjury, giving false or contradictory evidence, or making a false or contradictory statement, and is based upon a previous statement of the accused purporting at least in part to be an official confession, the prosecutor may introduce this previous statement in evidence.

**Unofficial Confession Defined**

**41.** An unofficial confession is a self-incriminating statement made by the accused respecting the offence charged, other than a statement which is a judicial confession under article 37 (Judicial Confession Explained) or an official confession under article 39 (Official Confession Defined), and includes a statement made by the accused to civil or military police or other persons in authority as defined in paragraph (3) of article 42, whether or not in response to questions by such a person.

**Admissibility of Unofficial Confession**

**42.** (1) Subject to (9) of this article and to Section 10 (Effect of Public Policy and Privilege), a statement by the accused alleged to be an unofficial confession may be introduced in evidence by the prosecutor if he proves that

- (a) there is evidence that the accused did make the statement attributed to him; and
- (b) the statement was voluntary in the sense that it was not made by the accused when or because he was or might have been significantly under the influence of
  - (i) fear of prejudice induced by threats exercised, or
  - (ii) hope of advantage induced by promises held out,in relation to the offence in question, by a person in authority.

(2) The only inducements by way of threats or promises significant for the purpose of excluding a statement of the accused under (1) of this article are those that a reasonable man would think might have a tendency to cause an innocent accused person to make a false confession.

(3) A person in authority is one who was in a position relative to the accused at the material time to exercise or hold out inducements of the character described in (1) and (2) of this article, or was someone who might reasonably have appeared to the accused to be in such position.

(4) A person may be a person in authority within (3) of this article and possess power by military law to order the accused to answer relevant questions, and yet clearly not exercise nor purport to exercise this power in a particular case, so that a voluntary confession within (1) and (2) of this article might in some circumstances be made by the accused to such a person.

(5) A person who holds a higher service rank than the accused is not, for that reason alone, a person in authority within (3) of this article.

(6) Subject to (7) of this article, when an unofficial confession is admissible under this article, the whole of it, including any part that is exculpatory, shall be admitted.

(7) When an unofficial confession contains a statement that the accused has committed an offence other than that with which he is charged, the part of the confession relating to that other offence shall not be admitted unless it is relevant to and otherwise admissible in respect of the offence with which he is charged.

(8) The admissibility of an alleged unofficial confession tendered by the prosecutor should be determined at a hearing by the judge advocate in the absence of the court.

*Evidence*

(9) The admissibility of a statement made by an accused in the circumstances described in (2) of article 39 to the extent that the statement is not an official confession shall be determined in accordance with the rules of evidence that would have been applied by a Court of criminal jurisdiction as defined in the *Criminal Code* sitting in Ottawa if the statement had been made by the accused in the course of giving his name and address pursuant to subsection (2) of section 221 of the *Criminal Code*.

## NOTES

(A) If a confession has been made as a result of a threat or promise by a person in authority as explained in (2) and (3) of this article, a subsequent confession will be considered to flow from the same influence. A subsequent confession must therefore be rejected unless it appears from clear and positive evidence that the improper influence had disappeared before it was made.

(M)

**Statements in Presence of Accused**

**43.** (1) When a statement has been made by another person in the presence of the accused that, if true, would incriminate the accused in whole or in part respecting the offence in question, and the statement was fully understood by the accused, then if it was also clear from the contemporaneous words, conduct or demeanour of the accused that he accepted the statement as true in whole or in part, the statement to the extent that he so accepted it may be treated as an unofficial confession made by the accused.

(2) Whether a statement described in (1) of this article should be deemed to have been fully understood and accepted by the accused as true in whole or in part is, as regards admissibility, a question for the judge advocate under (8) of article 42.

**Evaluation of Unofficial Confession**

**44.** (1) The decision as to the truth or falsity in whole or in part of an unofficial confession is exclusively a matter for the court.

(2) It is the duty of the court to consider whether an unofficial confession is to be believed or disbelieved in whole or in part in the light of its nature, the circumstances in which it was made, and other relevant and admissible evidence available.

(3) The court may convict on the basis of a complete unofficial confession alone, if it is satisfied beyond a reasonable doubt of its truth.

**Accomplice's Evidence**

**45.** Subject to article 46, where two or more persons are accused of complicity in the same offence, the confession of any one of them is admissible evidence against that one alone, and not against the others.

**Conspirator's Evidence**

**46.** (1) When two or more persons are alleged to have been parties to a common criminal plan or design, the words of one of them, apparently spoken or written as part of or in furtherance of the formation or carrying out of that plan, are admissible as evidence against the others as well as against the speaker or writer.

(2) Paragraph (1) of this article applies whether the charge alleges the conspiracy itself, or the commission of the offence planned, or the attempt to commit it, and whether an accused is charged singly, or jointly with the alleged co-conspirator whose words purport to incriminate them.

(3) The probative value of evidence admitted under (1) of this article is a matter for the court.

## Evidence

**Evidence Discovered from Inadmissible Confession**

47. Where an official or unofficial confession is inadmissible under article 40 (Admissibility of Official Confession), or 42 (Admissibility of Unofficial Confession), but has led to the discovery of other evidence of independent probative value tending to show the accused guilty as charged, that evidence may be given or produced in the usual way by prosecution witnesses, and they may also tell the court that the evidence was discovered because of information given by the accused, but there shall be no other reference to the inadmissible confession.

**Self-Incrimination**

48. Except as provided in these Rules, an accused person, when giving evidence, has no privilege against self-incrimination by his own statements.

**Statements not Treated as Confessions**

49. A Statement that meets the conditions for admission in article

- 27 (Words as Facts in Issue),
- 28 (Words Essential to Give Character to Acts that are Facts in Issue),
- 29 (Words Essential to Prove Relevant Mental or Internal Physical State),
- 30 (Spontaneous Words in Emergency Situation), or
- 60 (Kinds of Hearsay not Specifically Covered)

need not also meet the requirements of this Section, though the statement is classifiable as an unofficial confession.

**Section 8 – Other Kinds of Hearsay Evidence****Statements by Persons Other than Accused Made in Judicial or Other Official Proceedings**

50. (1) Evidence taken on commission under section 155 of the *National Defence Act* is admissible as provided therein.

(2) When an accused person has been tried by court martial and found guilty, but a new trial on the same charge has been ordered, evidence given at the former trial by a witness other than the accused may be quoted at the new trial when proved as provided by Section 13 (Documents) if it appears that

- (a) the former witness is not available to testify at the new trial because he refuses to be sworn or to give evidence at the new trial, or he is dead, or insane, or absent from the country where the trial is being held, or so ill as to be unable to travel; and
- (b) the evidence of the former witness was given in such circumstances that the parties had full opportunity to exercise their respective rights of examination of the witness.

**NOTES**

(A) Section 155 of the *National Defence Act*, provides:

“155. (1) Where it appears to the Judge Advocate General, or to such person as he may appoint for that purpose,

- (a) that the attendance at a trial by court martial of a witness for the prosecution is not readily obtainable because the witness is ill or is absent from the country in which the trial is held, or that the attendance of a witness for the accused person is not readily obtainable for any reason, or
- (b) that the attendance of a witness for the prosecution at a trial by court martial in any place out of Canada is not readily obtainable and under the law of that place there is no provision for compulsory attendance of that witness at such court martial,

the Judge Advocate General, or such person as he may appoint for that purpose, may appoint any officer or other qualified person, in this section referred to as a “commissioner”, to take the evidence of the witness under oath.

### *Evidence*

(2) The document containing the evidence of a witness, taken under subsection (1) and duly certified by the commissioner, is admissible in evidence at a court martial to the same extent and subject to the same objections as if the witness had given that evidence in person at the trial.

(3) Where in the opinion of the president of a court martial, a witness whose evidence has been taken on commission, should in the interests of justice appear and give evidence before the court martial and that witness is not too ill to attend the trial and is not outside the country in which the trial is held, the president may require the attendance of that witness.

(4) Repealed. R.S.C. 1952, c. 310, s. 2 (10).

(4) At any proceedings before a commissioner the accused person and the prosecutor are entitled to be represented and the persons representing them have the right to examine and cross-examine any witness.

(5) The accused person shall, at least twenty-four hours before it is admitted at the court martial be furnished without charge with a copy of the document mentioned in subsection (2). 1950, c. 43, s. 155."

(M)

#### **Public Documents**

**51.** (1) Subject to article 55 (Limitations on Admission of Certain Documents), a public document is admissible in evidence at a court martial when relevant to the charge.

(2) The making and content of a public document may be proved in the manner provided in Section 13 (Documents) without requiring the personal appearance of the maker as a witness.

(3) A public officer making a public document need not have personally observed or experienced the facts which he records or certifies by virtue of his duty or office; it is enough if the information concerned has come to him in a manner considered reliable and usual in the discharge of his duty or the exercise of his authority, and this includes facts reported to him by his superiors, equals or subordinates or by members of his staff, when acting in the discharge of their duties or the exercise of their authorities.

(4) Public documents may be in any form including registers, records, books, maps, recordings, photographs, returns, reports and letters.

(5) It is immaterial for purposes of admission how public documents are filed, collected, bound or stored by the person or persons responsible for their custody, or whether such documents are normally classified for security purposes and it is not a requirement for its admissibility that a public document should form part of a register or record to which members of the general public are entitled to access, it is enough if the document was made for any official purpose.

#### **Public Documents of Other Countries**

**52.** (1) For the purposes of this article, a public officer of a country other than Canada is a person who in the opinion of the judge advocate appears to hold an equivalent position and to possess similar authority to a Canadian public officer.

(2) The judge advocate may permit a documentary statement made for an official purpose by a public officer of a country other than Canada to be admitted in evidence to the same extent and in the same manner than an equivalent Canadian public document would be admissible under article 51 and Section 13 (Documents).

#### **Documents of Canadian Forces**

**53.** Subject to article 55 (Limitations on Admission of Certain Documents), and without limiting the general provisions of article 51 (Public Documents), the following classes of service documents are deemed to be public documents and may be proved in the manner provided in Section 13 (Documents) without requiring the personal appearance of the maker as a witness

- (a) orders and instructions issued in writing by or on behalf of military commanders under the authority of Queen's Regulations and Orders; or
- (b) official gradation and seniority lists; and
- (c) documents and records kept for official purposes, including those kept in respect of officers and men.

## Evidence

## NOTES

(A) Section 153 of the *National Defence Act* provides in part:

"153. (1) Such classes of documents and records as are prescribed in regulations made by the Governor in Council may be admitted as evidence of the facts therein stated at trials by court martial or in any proceedings before civil courts arising out of such trials, and the conditions governing the admissibility of such classes of documents and records or copies thereof shall be as prescribed in those regulations."

(M)

## Regular Entries

54. Subject to article 55, a record in any business of an act, condition or event, in so far as relevant, shall be admissible in evidence if proved under article 106 (Proof of Regular Entries) or 107 (Bankers' Books).

## Limitations on Admission of Certain Documents

55. Except as specified in this article, and notwithstanding articles 51 (Public Documents), 52 (Public Documents of Other Countries), 53 (Documents of Canadian Forces) and 54, the following documents shall not be admitted in evidence at a court martial

- (a) a synopsis prepared pursuant to QR&O 109.02 (Preparation and Disposal of Synopsis);
- (b) a report of a civil or military investigation relating to the alleged offence;
- (c) a document that contains a statement classifiable as an official or unofficial confession by the accused except when such evidence is admissible under Section 7 (Confessions of Accused Persons);
- (d) the record of evidence given before, or the findings or decision of, another judicial or official tribunal or body specifically concerned with the investigation of or punitive action in relation to, the acts and events that form the subject of the charge against the accused before the court martial in question except when necessary as evidence in support of a plea of the accused in bar of trial on the basis of a previous acquittal or conviction for the same offence in accordance with section 57 of the *National Defence Act* and QR&O 112.24 (Plea in Bar of Trial), or when admissible under article 40 (Admissibility of Official Confession), or article 50 (Statements by Persons Other than Accused made in Judicial or Other Official Proceedings); or
- (e) the record of a previous conviction of the accused by a judicial or disciplinary tribunal, except when such evidence is admissible under (d) of this article, Section 5 (Character and Similar Facts) or article 99 (Credibility – Effect of Answers).

## NOTES

- (A) A documentary statement referred to in (c) of this article must, if it is to be admissible, meet the requirements of Section 6 (Hearsay Evidence), or Section 7 (Confessions of Accused Persons).
- (B) A documentary statement described in (d) of this article must, if it is to be admissible, meet the requirements of article 40 (Admissibility of Official Confession), or article 50 (Statements by Persons Other than Accused Made in Judicial or Other Official Proceedings).
- (C) A document described in (e) of this article must, if it is to be admissible, meet the requirements of subparagraph (d) of this article, Section 5 (Character and Similar Facts) or article 99 (Credibility – Effect of Answers).

(M)

## Expert Opinion as Hearsay

56. When the opinion evidence of an expert admissible under Section 9 (Opinion) is based in whole or in part on the hearsay statement of another expert in the same field, that statement is admissible as part of or as a basis for the opinion evidence (see also article 63 (Opinion of Expert Witness)).

## Statements in Learned Treatises

57. Statements in a learned treatise are admissible in evidence if the treatise is identified as authoritative by a witness who is expert in the field with which the treatise is concerned, and any expert in the same field may be asked to explain statements in the treatise (see also article 63 (Opinion of Expert Witness)).

*Evidence***Statutory Declarations**

**58.** A relevant statement contained in a statutory declaration is admissible under subsection (2) of section 153 of the *National Defence Act*.

## NOTES

(A) Section 153 of the *National Defence Act* provides in part:

"153. (2) A court martial may receive, as evidence of the facts therein stated, statutory declarations made in the manner prescribed by the *Canada Evidence Act*, subject to the following conditions,

- (a) where the declaration is one that the prosecutor wishes to introduce, a copy shall be served upon the accused person at least seven days before the trial;
- (b) where the declaration is one that the accused person wishes to introduce, a copy shall be served upon the prosecutor at least three days before the trial; and
- (c) at any time before the trial the party upon whom the copy of the declaration has been served under paragraph (a) or (b) may notify the opposite party that he will not consent to the declaration being received by the court martial, and in that event the declaration shall not be received.

1950, c. 43, s. 153."

(M)

**Mode of Proving Documentary Statements and Effect of Admission**

**59.** (1) Except where special provision is made in these Rules, the party who seeks to rely on a documentary statement admissible under this Section must prove the existence, character and content of the document concerned by primary or secondary evidence in accordance with Section 13 (Documents).

(2) The admission of a document does not mean that statements contained in it must be accepted as accurate.

(3) The probative value of a documentary statement, the character and content of which has been established, is a matter for the court to determine.

**Kinds of Hearsay not Specifically Covered**

**60.** A hearsay statement of a kind not specifically dealt with in Sections

- 6 (Hearsay Evidence),
- 7 (Confessions of Accused Persons), and
- 8 (Other Kinds of Hearsay Evidence),

is admissible and may be quoted by a reporting witness, if

- (a) it would be admissible in a trial involving the same charge or issue in a civil court sitting in Ottawa; and
- (b) its admission would not reduce in any way the rights and privileges of the accused against self-incrimination as provided by these Rules.

## NOTES

(A) The effect of this article is that exceptions to the hearsay rule that are not specified in these Rules are still in effect and may be invoked, if required. These exceptions are rarely applicable before courts martial.

Examples are:

- Declarations against Interest,
- Declarations by Testators as to Contents of Will,
- Declarations as to Public and General Rights, and
- Declarations as to Pedigree.

(M)

**Section 9—Opinion****Opinion — General Rule**

**61.** Except as provided in this Section and Sections 5 (Character and Similar Facts) and 8 (Other Kinds of Hearsay Evidence), the opinion of a witness is not admissible in evidence.

*Evidence**Expert Witness*

**62.** (1) When permitted to give an opinion under this Section or Section 8 (Other Kinds of Hearsay Evidence), 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.

*Opinion of Expert Witness*

**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 established by evidence; and
- (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 (see also articles 56 (Expert Opinion as Hearsay) and 57 (Statements in Learned Treatises)).

*Opinion Evidence of Ordinary Witness*

**64.** (1) Subject to (2) and (3) of this article, an ordinary witness may give his opinion of the significance relative to the charge or issue of certain relevant facts needing further interpretation if

- (a) those facts were observed or experienced by him; and
- (b) the inference embodied in his opinion is of a type that persons without special competence in such matters are qualified to make with some accuracy on the basis of their everyday knowledge or experience.

(2) An ordinary witness may give his opinion under (1) of this article whether or not he can remember the particular personally observed or experienced facts on which he based it, if it was so based.

(3) An ordinary witness shall not give his opinion under (1) of this article if the members of the court are clearly in as good a position as is the witness himself to form the necessary opinion.

(4) When permitted to give an opinion under (1) of this article, an ordinary witness may be questioned as to the grounds of his opinion.

## NOTES

(A) As a general rule an ordinary witness should tell of the facts he observed by his own senses with as much particularity as is practicable and reasonable, leaving the members of the court to decide the proper inference to be drawn. Much time and effort would be wasted if ordinary witnesses were allowed to speculate without limit about inferences that members of the court are just as well qualified to make for themselves. Nevertheless, because of his personal observation of relevant facts, the occurrence of which cannot be reproduced for the court, the ordinary lay witness may be in a better position than the members of the court to infer general facts from particular ones. For instance, on the issue of the identity of the accused, an ordinary witness may testify that the accused looks to him like the very man he saw running away from the scene of the crime just after it was committed. This is opinion or inference based on more particular facts. If the witness is able so recall particular points of similarity that impress him, then of course he tells of them too, but he may give his conclusion on identification. He may, for example, recall the colour of the hair of the fugitive and a peculiar scar on his face. These same considerations apply to other "facts" which need to be arrived at by opinion or inference, such as drunkenness or the speed of vehicles. On the other hand, obviously there are many matters where the opinion or inference needed can be supplied only by an expert, whether or not the expert personally perceived anything relevant. An engineer is needed to give an opinion on the reason for the collapse of a bridge and a chemist or pathologist to tell of the effect of a poison.

(M)

*Evidence**Opinions of Experts and Ordinary Witnesses*

**65.** Where in the circumstances the requirements of both articles 63 (Opinion of Expert Witness) and 64 can be satisfied by an expert and an ordinary witness respectively, each may give his opinion of the significance relative to the charge or issue of the same facts.

## NOTES

(A) While there is some degree of personal interpretation in all appreciation and reporting of facts by those who observe or experience them, many facts as originally given in evidence need further interpretation to establish their full and true significance with reference to the charge or issue. Opinion evidence is further interpretation by a witness concerning the direct or indirect significance in relation to the charge or issue of certain relevant facts in evidence.

(M)

*Opinion in Comparison of Writing*

**66.** Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine may be made by witnesses acquainted with the writing, or skilled in the comparison of writing, or by the court itself; and the writing, and the evidence of witnesses respecting it, may be submitted to the court as evidence of the genuineness or otherwise of the writing in dispute.

**Section 10—Effect of Public Policy and Privilege***Secrecy*

**67.** When disclosure of any facts relative to the charge would, in the opinion of the convening authority, be prejudicial to national defence, good international relations or other national interests, evidence of those facts may not be given at a trial open to the public but, subject to article 68, may be given at a trial when the public has been excluded in accordance with QR&O 112.10 (Who May be Present at a Court Martial).

*Effect on Trial if Secrecy Precludes Disclosure*

**68.** If in the opinion of the convening authority the need for secrecy of information relative to the charge concerning national defence, good international relations or other national interests is so vital that the facts concerned should not be disclosed even at a trial from which the public has been excluded, the charge

- (a) shall not be proceeded with, if in the opinion of the convening authority the accused would be prejudiced unless evidence of those facts is adduced; or
- (b) shall be proceeded with and no evidence of those facts given, if the convening authority is of the opinion that the accused would not be prejudiced if no evidence of those facts is adduced.

*Decisions on Secrecy*

**69.** (1) The convening authority shall in consultation with the Judge Advocate General or his representative make the decisions required under articles 67 (Secrecy) and 68.

(2) The decisions and opinions of a convening authority under articles 67 and 68 shall be given in writing.

*Concealment of Identity of Informants*

**70.** (1) Subject to (2) of this article, a witness who is officially associated with the prosecution may refuse to answer questions concerning the identity of any informant who assisted in furthering the prosecution.

*Evidence*

(2) If, in the opinion of the judge advocate, it is essential to a fair trial that an informant should be identified and called as a witness, the court shall direct a witness referred to in (1) of this article to answer questions as to the identity of the informant.

*Governmental Privilege on Disclosure*

**71.** Except as provided in this Section or in an Act of the Parliament of Canada, there is no official or governmental privilege to withhold relevant evidence from a court martial.

*Privilege — Generally*

**72.** Except as provided in this Section, no person is privileged to refuse to disclose or to prevent any other person from disclosing a communication or to refuse to produce a document that has passed between them.

*Privilege of Accused*

**73.** (1) The accused is not a compellable witness, but he may, at his option, give evidence when by Queen's Regulations and Orders he is permitted to do so.

(2) Neither the court, the judge advocate nor the prosecutor shall comment upon the failure of an accused to testify.

*Privilege of Spouse of Accused*

**74.** (1) Subject to (2) of this article, the spouse of the accused may not be compelled to testify either on behalf of the defence or the prosecution.

(2) The spouse of the accused may be compelled to testify for the prosecution without the consent of the accused in cases where the accused is charged

- (a) with inflicting personal injuries by violence or coercion on his spouse; or
- (b) under section 119 of the *National Defence Act* with an offence under section 33 or 34 of the *Juvenile Delinquents Act* or with an offence under sections 135 to 138, 140, 142 to 147, 149, 155, 156, 157, 158, 164, 184, 186, 189, 234 to 236, 241 to 244, 275, paragraph (c) of section 408 of the *Criminal Code*, or an attempt to commit an offence under sections 138 or 147 of the *Criminal Code*.

(3) Neither the court, the judge advocate nor the prosecutor shall comment upon the failure of the spouse of an accused to testify.

*Communications during Marriage*

**75.** A husband is not compellable to disclose any communication made to him by his wife during their marriage, and a wife is not compellable to disclose any communication made to her by her husband during their marriage.

*Witness — Incriminating Questions*

**76.** The position of a witness at a court martial in respect of incriminating questions is governed by article 97 (Examination of Witnesses — Incriminating Questions).

*Solicitor-Client Privilege*

**77.** (1) For the purposes of this article, "legal adviser" means

- (a) a defending officer, counsel or adviser qualified under QR&O 111.60, and
- (b) a solicitor.

*Evidence*

(2) A legal adviser is not permitted, except with his client's express consent, to disclose, either during or after the termination of his employment,

(a) any communication, oral or documentary, made to him as legal adviser, by or on behalf of his client, or

(b) any advice given to his client by him as legal adviser.

(3) A clerk, stenographer or assistant of a legal adviser is not permitted to disclose any matter relevant to the case of a client of that legal adviser learned by him or disclosed to him in the course of his employment except with the express consent of that client.

(4) No person may be compelled to disclose any communication that he has made to his legal adviser.

(5) Paragraphs (2), (3) and (4) of this article do not apply to

(a) a communication made in furtherance of any criminal purposes; or

(b) a fact the legal adviser became acquainted with otherwise than in his character as legal adviser or which his clerks, stenographers or assistants became acquainted with otherwise than in the course of their employment.

## NOTES

(A) This article does not prohibit evidence being given as to the facts in respect of which a communication is made to a legal adviser, if it is otherwise admissible. It merely prohibits the proof of such facts by the communications to a legal adviser.

(M)

*Penitential Privilege*

**78.** (1) For the purposes of this article, "penitential communication" means a confession of culpable conduct made secretly and in confidence by a person to a clergyman or priest in the course of the discipline or practice of the church or religious denomination or organization of which the person making the penitential communication is a member.

(2) A person making or receiving a penitential communication may refuse to disclose, or prevent a witness from disclosing, that communication if he claims the privilege and the judge advocate finds

(a) the communication was a penitential communication; and

(b) the witness is the person who made the penitential communication or the clergyman or priest to whom it was made.

## PART IV — PERMITTED METHODS OF PROOF

## Section 11—Oral Testimony

*Competence of Witnesses*

**79.** Every person is competent as a witness unless the judge advocate finds that he is incapable of

(a) making his evidence intelligible, whether by expressing himself so as to be understood by the court directly, through interpretation by a person who can understand him, or in any other manner; or

(b) understanding the duty of a witness to tell the truth.

*Evidence****Testimonial Qualification of Witness***

**80.** (1) Subject to (2) of this article, a witness may testify only to relevant matters that he has perceived with his own senses.

(2) A witness may testify to matters that he has not perceived with his own senses when permitted to do so under Part III (Methods of Proof and Forbidden Types of Evidence), or under article 82 (Testimony by Graphic Media).

***Qualification of Expert Witness***

**81.** 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 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 substantially assist the court.

***Testimony by Graphic Media***

**82.** (1) For the purposes of this article, "graphic medium" means a model, map, diagram, photograph or other pictorial or graphic mode of description and includes a record of data, experience, communications or events made by accurate mechanical, electrical or other scientific methods.

(2) Subject to (3), (4) and (5) of this article, testimony may be given or supplemented by a graphic medium.

(3) A graphic medium shall be presented as part of the testimony of a witness who has sufficient knowledge of the facts represented to prove that the graphic medium used does accurately represent them.

(4) A photograph or other mode of depicting facts, made with scientific apparatus that is capable of disclosing data not perceivable by the unaided sense, may be admitted as part of the evidence of a witness who can prove that the apparatus was of a standard make, in good condition and used by a competent operator.

(5) If proved to be trustworthy, a mechanical, electrical or other device may be employed to display or render audible to the court the data, experience, communications or events recorded by a graphic medium admitted under this article.

***Testimony of Accomplice***

**83.** (1) When evidence is given by a person who may be an accomplice, the judge advocate shall

- (a) instruct the court as to what in law makes a person an accomplice;
- (b) direct the attention of the court particularly to the facts in evidence implicating the witness in the offence charged; and
- (c) submit to the court the issue as to whether or not the facts implicating the witness would make him an accomplice.

(2) Subject to the directions given in connection with articles 85 (Corroboration of Certain Offences) and 86 (Child's Evidence) if the only evidence against the accused is that given by a witness who may be an accomplice, the judge advocate shall, either

*Evidence*

- (a) instruct the court that, if it concludes that the witness was at any stage an accomplice in the offence charged, there is danger of injustice in convicting the accused of that offence upon the evidence of the apparent accomplice standing alone and uncorroborated, but it is at liberty to do so; or
  - (b) advise the court not to convict on the uncorroborated evidence of the apparent accomplice, but that it is at liberty to do so if it chooses.
- (3) The evidence of one accomplice is not corroborative of the evidence of another accomplice.
- (4) Subject to statutory provisions as to corroboration or the number of witnesses necessary for conviction, if the court considers an accomplice to be a credible witness his evidence may of itself be sufficient for a conviction.

*Meaning of Corroboration*

**§4.** (1) Corroboration means independent evidence that confirms in some material particular not only the evidence that the offence has been committed, but also that the accused committed it.

(2) The independent testimony mentioned in (1) of this article need not be direct evidence that the accused committed the offence but may be circumstantial evidence of his connection with the offence.

(3) Corroboration may be found in the evidence of the accused or in the evidence of other witnesses whether called for the defence or for the prosecution.

NOTES

(A) The judge advocate must indicate what evidence, if any, is capable of being corroboration, and inform the court that it is for it to decide whether that evidence is, in fact, corroborative.

(M)

*Corroboration of Certain Offences*

**§5.** (1) Where under the *Criminal Code* or other Act of the Parliament of Canada corroboration of the evidence of a particular witness is required in the trial of a particular issue by a civil court in a criminal case the same corroboration is required in a trial of that issue by a court martial.

(2) In sexual offences, where corroboration is not required under (1) of this article, the judge advocate shall, if applicable, warn the court of the danger of convicting the accused on the uncorroborated evidence of the person in respect of whom the offence is alleged to have been committed.

*Child's Evidence*

**§6.** (1) The evidence of a child of tender years who is a competent witness under article 79 (Competence of Witnesses) may be admitted though not given on oath if the judge advocate finds that the child

- (a) does not understand the nature of an oath; and
- (b) is possessed of sufficient intelligence to justify the admission of his evidence.

(2) An accused shall not be convicted of an offence upon the unsworn evidence of a child admitted under (1) of this article unless that evidence is corroborated.

(3) The corroboration required in (2) of this article cannot be given by another child of tender years whose evidence is also not given on oath.

*Evidence*

## NOTES

- (A) The judge advocate must make inquiries to obtain the information necessary for him to decide whether the child is competent under (1) of this article.
- (B) A complainant in a sexual case cannot be corroborated by the unsworn and uncorroborated evidence of a child.
- (C) If the child understands the nature of an oath, he must be sworn before giving his evidence.  
Corroboration of the sworn evidence of a child is not necessary as a matter of law, but the judge advocate should warn the court that there is a danger in convicting on the uncorroborated evidence of a young child though the court may convict if convinced that the child is telling the truth.
- (M)

**Section 12—Examination of Witnesses***Order of Testimony*

- §7.** (1) Subject to QR&O 112.05 (Procedure to be Followed at a Court Martial), the order of testimony, generally, shall be
- (a) direct examination, that is, the party calling a witness may interrogate him on facts relevant to his case;
  - (b) cross-examination, that is, the opposing party then may interrogate the witness on relevant matters, including matters that may tend to discredit the testimony of the witness or support the case of the opposing party; and
  - (c) re-examination, that is, the party who called the witness then may interrogate him on matters arising out of the opposing party's cross-examination.
- (2) The president, the judge advocate or, with the permission of the president, any member of the court, may put further questions to a witness either during or at the conclusion of the examination described in (1) of this article.
- (3) If a witness has been questioned under (2) of this article, the prosecutor or accused may, with the permission of the president, put to him such questions relative to the answers as seem proper to the court.

## NOTES

- (A) Reference should also be made to the following:  
 QR&O 112.18 — Objection to Interpreter;  
 QR&O 112.19 — Oath to be Taken by Interpreter;  
 QR&O 112.20 — Oath to be Taken by Witnesses;  
 QR&O 112.21 — Affirmation in Lieu of Oath;  
 QR&O 112.31 — Examination of Witnesses.

(M)

*Direct Examination — General Rules*

- §8.** (1) Subject to (2) of this article as soon as a witness has been duly sworn, the party calling him shall examine him by means of oral questions confined to facts that are relevant to the charge.
- (2) Where a witness is called merely for cross-examination by the opposing party, the party calling him need not examine him.

*Direct Examination — Leading Questions*

- §9.** (1) Subject to (2) and (3) of this article and to article 90, the party calling a witness shall not ask him a question that
- (a) is in a form calculated to suggest the answer to it;
  - (b) contains a statement of some fact material to the issue, and that the witness could answer by a simple affirmative or negative; or
  - (c) leads the mind of the witness to a particular subject.

*Evidence*

- (2) Paragraph (1) of this article does not apply to a question
- (a) as to introductory matter;
  - (b) as to undisputed matter; or
  - (c) to contradict an account that a witness called by the opposite party has given of an extra-judicial utterance.
- (3) A question is not forbidden on the ground that it leads the mind of a witness to a particular subject if it will tend to elicit fairly in the circumstances the honest belief of the witness.

## NOTES

- (A) When leading questions are not permitted, the party calling a witness must not ask "Was not the officer a Major?" but, "What was the rank of the officer?"; not "Was it 1300 hours?" but, "What time was it?"; not "When he was leaving, did he hit you?" but, "When he was leaving, what did he do?".
- (B) Introductory matters about which leading questions may be asked are, for example, the name, address and occupation of a witness.
- (C) The party calling a witness may ordinarily employ leading questions to bring a witness to the scene of a crime. Questions such as "Where were you on Thursday afternoon?" or "What did you do next?" do not need to be asked when the enquiry concerns preliminary matters not in dispute.
- (D) If witness A has given an account of his own utterances, a subsequent witness, B, may be asked a leading question such as "Did A say C struck him?". But, before B is asked this question he should be asked to give his own version of what A said. After this though, unless B may be asked whether or not A made the particular statement, there is no way a complete contradiction can be reached.
- (M)

*Hostile Witness*

**90.** (1) If the prosecutor or accused concludes during the direct examination or re-examination of a witness called by him that the witness is

- (a) directly hostile to him, or
- (b) unwilling to give evidence,

the party calling the witness may apply for a declaration that the witness is hostile.

(2) If the judge advocate declares a witness to be hostile, the party who called him may cross-examine him during the remainder of his testimony, whether on direct examination or re-examination.

(3) A declaration that a witness is hostile shall not affect the rights of the opposite party to cross-examine him.

## NOTES

- (A) The mere fact that a witness gives evidence unfavourable to the case of the party calling him is not sufficient grounds to declare that witness to be hostile.
- (M)

*Recorded Past Recollection*

**91.** (1) Where a witness, when the facts are fresh in his mind, has made or verified a written record of them, and is able to swear to the accuracy of that record, it is, subject to (2) of this article, admissible as part of his testimony, even though he does not have an independent recollection of the facts disclosed in the record.

(2) Before a record of past recollection can be introduced in evidence, it must be shown to have been made or verified at a time when it was sufficiently fresh and vivid in the mind of the witness to make it trustworthy.

(3) Where the original record has been lost or destroyed, a copy that was verified by comparison with the lost original, or verified apart from the original while the recollection of the witness was still fresh, may be used under (1) of this article.

## NOTES

- (A) A witness need not, under this article, have been the draftsman of the record, if he verified its correctness when the facts were fresh in his mind.
- (M)

*Evidence***Refreshing Memory of Witness**

**92.** (1) A witness may be shown a written document to enable him to recall a fact that he has forgotten and, if he then recalls that fact, he may testify to it as he would to any other fact that he has perceived.

(2) In order to refresh his memory, a witness may use documents that are not themselves admissible in evidence.

(3) Documents used under (1) of this article

(a) may be inspected by the judge advocate solely for the purpose of determining whether or not they could properly refresh the memory of the witness; and

(b) must be shown to the opposite party, on demand, for inspection and use in questioning the witness.

## NOTES

(A) A witness may not give evidence based on documents prepared by other persons, or by himself, at a time remote from the happening of the relevant fact if the documents simply enable him, by using them, to testify to a fact of which he has no present recollection. The circumstances set out in the foregoing sentence do not constitute recorded past recollection under article 91 as the witness either did not prepare the documents, or check them, when the facts were fresh in his mind. Furthermore, the circumstances do not constitute refreshing the memory under this article as the witness has no present recollection of the events described in the documents.

(M)

**Cross-Examination — General Rules**

**93.** (1) Subject to this article and to articles

94 (Cross-Examination — Exemptions),

98 (Credibility of Witness Generally),

99 (Credibility — Effect of Answers),

100 (Credibility — Use of Former Statements to Contradict), and

101 (Credibility — General Reputation of Witness for Veracity),

when a witness is called by one party and sworn, the opposite party may cross-examine him at the proper stage of the trial (see article 87 (Order of Testimony)).

(2) A witness who has been called and sworn may be cross-examined even if direct examination is waived or if the party calling him asks no questions.

(3) The cross-examining party may interrogate a witness on

(a) matters already dealt with in the direct examination;

(b) other relevant facts that constitute part of the cross-examining party's own case; and

(c) subject to (6) of this article, matters that, though otherwise irrelevant, tend to impeach the credit of the witness.

(4) The provisions of article 89 (Direct Examination — Leading Questions) do not apply to the cross-examination of a witness.

(5) The cross-examining party shall not put questions to a witness in a bullying way or in any other manner calculated to confuse or mislead the witness unnecessarily, or to insult him.

(6) Where a question is put to a witness as to a matter that is not relevant except in so far as it affects the credibility of the witness, and the witness objects to answering the question, the judge advocate shall consider whether the witness should be compelled to answer it, and if the judge advocate is of the opinion that the imputation conveyed by the question, would, if true,

*Evidence*

- (a) seriously affect the opinion of the court as to the credibility of the witness, he shall require the witness to answer the question, or
- (b) not seriously affect the opinion of the court as to the credibility of the witness, he shall excuse the witness from answering the question.

***Cross-Examination — Exemptions***

- 94.** (1) A witness shall not be cross-examined where
- (a) he was called merely to produce a document of which
    - (i) proof is not required, or
    - (ii) proof is to be given by the testimony of other witnesses;
  - (b) he was called in error and knows nothing of the facts in issue; or
  - (c) his examination has been stopped by the court before a material question has been put.
- (2) A witness called and sworn but not asked any questions by the party calling him, being merely offered for cross-examination, shall not be asked, in cross-examination, questions the sole purpose of which is to discredit him.

***Postponement of Cross-Examination***

**95.** The judge advocate may allow the cross-examination of a witness to be postponed where, in his opinion, the application for postponement is not made for purposes of obstruction.

***Re-Examination***

- 96.** (1) Subject to (2) of this article, the party calling a witness may re-examine him for the purpose of meeting or explaining what has been brought out in cross-examination.
- (2) Unless otherwise permitted by the judge advocate, the re-examination of a witness shall be confined to interrogation on matters arising out of cross-examination.
- (3) The provisions of article 89 (Direct Examination — Leading Questions) shall apply to the re-examination of a witness.

***Examination of Witnesses — Incriminating Questions***

- 97.** (1) A witness shall not refuse to answer a question put to him on the ground that the answer may tend to incriminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
- (2) Except in so far as the evidence given by a witness is relevant to a charge against him involving perjury, giving false or contradictory evidence, or making a false or contradictory statement, evidence given by a witness shall not be admissible in any subsequent proceeding against him.

***Credibility of Witness Generally***

**98.** Subject to paragraph (2) of article 94 (Cross-Examination — Exemptions) and articles 99, 100 (Credibility-Use of Former Statements to Contradict) and 101 (Credibility-General Reputation of Witness for Veracity), the prosecutor or accused may, at the proper stage of the trial, (see QR&O 112.05 (Procedure to be Followed at a Court Martial)) by cross-examination or by other witnesses, introduce evidence relevant to the credibility of a witness of the other party.

*Evidence*

## NOTES

- (A) The following circumstances among others, are relevant in estimating the credit of a witness:
- (a) his honesty;
  - (b) his opportunity for observation;
  - (c) his capacity to observe;
  - (d) his general mental capacity;
  - (e) his mental condition when testifying;
  - (f) his power of recollection and narration; and
  - (g) his freedom from emotional prejudice.

(M)

*Credibility — Effect of Answers*

**99.** (1) Where a witness has given testimony on matters not material to the charge, he may be cross-examined on that testimony to test his credibility, but subject to (2) and (3) of this article, his answers on cross-examination are conclusive in the sense that the cross-examining party may not call witnesses to contradict them.

(2) A witness may be cross-examined on matters not material to the charge to test his credibility by disclosing emotional prejudice and, if the witness denies the facts that show his bias or partiality, the cross-examining party may prove these facts by the testimony of other witnesses.

(3) If a witness who has been convicted of an offence is asked whether he has been convicted of any offence, and he denies the fact or refuses to answer, the cross-examining party may prove the conviction.

## NOTES

- (A) A conviction mentioned in paragraph (3) may be proved under article 105 (Proof of Public Documents).  
(M)

*Credibility — Use of Former Statements to Contradict*

- 100.** (1) For the purposes of this article, "statement" does not include
- (a) a statement that a regulation prescribes is not to be used at a trial; or
  - (b) when the accused is a witness, an official or unofficial confession by him that has not been admitted under article 40 (Admissibility of Official Confession), or 42 (Admissibility of Unofficial Confession), respectively.

(2) A witness may be cross-examined in accordance with this article as to a previous statement made by him relative to the charge.

(3) Subject to (4) of this article, a witness may be cross-examined on a statement in writing or reduced to writing without the writing being shown to him.

(4) When a previous statement of a witness is inconsistent with his present evidence and the witness does not admit making the statement, proof may be given that he did make it, but before the proof is given

- (a) when the statement
  - (i) is in writing or reduced to writing, his attention shall be called to the parts of the writing that are to be used to contradict him, or
  - (ii) was oral, the circumstances of the statement sufficient to designate the particular occasion shall be mentioned to him; and
- (b) he shall be asked whether or not he did make the statement.

(5) A writing mentioned in (4) of this article shall, if the judge advocate so requires, be produced for his inspection and decision as to whether or not it may be used for the purpose of contradicting the witness and, if allowed for this purpose, may be used only to the extent necessary to prove that the witness made the statement contained in it.

*Evidence*

(6) A previous statement proved under this article shall not be considered as evidence of the facts therein but may be considered in so far as it is relevant to the credibility of the witness.

***Credibility — General Reputation of Witness for Veracity***

**101.** (1) Subject to (2) and (3) of this article, a cross-examining party may attack the credit of a witness by introducing evidence of his general reputation for veracity.

(2) A witness called to testify to the general reputation for veracity of another witness shall be questioned, first, as to his means of knowledge of the general reputation of the witness to be impeached and shall then be asked: "From your knowledge of the general reputation of the witness for veracity, would you believe him on oath?"

(3) The impeaching witness shall not be asked questions designed to show that the witness whose credit is being attacked has committed particular acts that disentitle him to credit.

**Section 13—Documents*****Original Documents — Explanation***

**102.** (1) When a document is fully executed in several complete and identical copies, each copy is an original document.

(2) When a document is executed in several copies, and each copy is executed by one or more of the parties only, each copy is an original document for purposes adverse to a party who has executed it.

(3) Subject to (5) of this article, when a number of finished documents apparently uniform were each created for the first time in their intended final form by the same operation of printing, lithography, photography or other reproductive process adapted to secure their uniformity, finished documents that result from repeating the operation of the same process are original documents.

(4) Whether certain finished and apparently uniform documents were created in a manner mentioned in (3) of this article may be inferred from an inspection of them.

(5) A document is not an original document if the party to whom it is adverse proves that the particular reproductive operation concerned or the kind of reproductive process used was not or is not reliable in securing the uniformity of the resulting finished documents.

**NOTES**

- (A) The phrase "for the first time in their intended final form" in paragraph (3) has two effects:
- (i) it distinguishes the making or reproduction of copies of an already finished document from that document, e.g., by photography, and
  - (ii) it distinguishes the finished documents themselves from the stencils, printer's plates, engravings or the like which are not the finished or final form intended; stencils, etc., are not original documents by this definition.

(M)

***Proof of Documents by Primary Evidence***

**103.** (1) Except where secondary evidence of a document is permitted under this Section, the existence, character or content of a document shall be proved by primary evidence in accordance with (2) of this article.

*Evidence*

(2) A document is proved by primary evidence by the production of the original document for the inspection of the court and identification of it by a qualified witness as the document it is alleged or appears to be.

- (3) For the purposes of this article, a "qualified witness" includes
- (a) the maker of the document;
  - (b) a person who perceived the making of it; or
  - (c) a person who is properly entrusted with the custody of the document along with others of the same class or type.

*Proof of Documents by Secondary Evidence*

**104.** (1) Secondary evidence of the existence, character or content of a document may be given in accordance with (2) of this article when

- (a) the original document is not available for any reason other than the wrongdoing of the party offering the secondary evidence;
- (b) the original is a public document;
- (c) the original is a document that may be proved by secondary evidence before a civil court sitting in Ottawa in a trial of a similar charge, in which case proof may be given in the manner permitted in that court; or
- (d) the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole and is capable of being ascertained by calculation.

(2) Secondary evidence, either direct or circumstantial, as to the existence, character or content of a document may be given by oral testimony or documents or by an admission under (d) of article 8 (Necessity for Evidence) or (b) of article 37 (Judicial Confession Explained) and, without restricting the generality of the foregoing, will usually be given

- (a) by producing a copy and calling a witness who can testify that the copy is correct; or
- (b) where no copy is obtainable, by calling a witness who has seen the original and can give a reliable account of its character or content.

*Proof of Public Documents*

**105.** (1) Proof of the existence, character or content of a public document may be given by primary evidence or secondary evidence.

- (2) Without limiting the forms of secondary evidence available, they include
- (a) an examined copy of, or extract from, a public document proved under (2) of article 104;
  - (b) the copy received by the addressee, when a public document is communicated by letter, radio, teletype, landline, visual signalling or other reliable means; and
  - (c) a copy of, or extract from, a public document signed and certified as a true copy or extract by an official entrusted with custody of the original.

(3) The signature and appropriate official character of the person purporting to have signed and certified the copy or extract mentioned in (c) of (2) of this article shall, *prima facie*, be deemed authentic as they appear, and, unless the other party produces evidence that it is probably not authentic, the party seeking to rely on the document need give no evidence of the authenticity of the copy or extract in addition to its appearance.

*Evidence*

(4) The documents referred to in sections 19, 21, 22, 23, 24, 25, 26, 27, 30 and 31 of the *Canada Evidence Act* are public documents within the meaning of these Rules and may be proved as provided in those sections.

(5) For the purpose of proving a conviction under (3) of article 99 (Credibility — Effect of Answers), a certificate containing the substance of the charge and conviction, purporting to be signed by the officer having the custody of the records of the court in which the offender was convicted, or by his deputy, shall, upon proof of the identity of the witness as the offender, be evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

## NOTES

(A) Section 50 of the *National Defence Act* provides:

"50. A commission, appointment, warrant, order or instruction in writing purported to be granted, made or issued under this Act is evidence of its authenticity without proof of the signature or seal affixed thereto or the authority of the person granting making or issuing it."

(B) Section 51 of the *National Defence Act* provides:

"51. (1) The Governor General may cause his signature to be affixed to a commission granted to an officer of the Canadian Forces by stamping the signature on the commission with a stamp approved by him and used for the purpose by his authority.

(2) A signature affixed in accordance with subsection (1) is as valid and effectual as if it were in the handwriting of the Governor General, and neither its authenticity nor the authority of the person by whom it was affixed shall be called in question except on behalf of Her Majesty. 1950, c. 43, s. 51."

(C) Sections 19, 21, 22, 23, 24, 25, 26, 27, 30 and 31 of the *Canada Evidence Act* provide:

"19. Every copy of any Act of the Parliament of Canada, public or private, printed by the Queen's Printer, is evidence of such Act and of its contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary is shown."

"21. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada, is a party, may be given in all or any of the modes following, that is to say:

- (a) by the production of a copy of the Canada Gazette, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such treaty, proclamation, order, regulation, or appointment or a notice thereof;
- (b) by the production of a copy of such treaty, proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer for Canada; and
- (c) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the Queen's Privy Council for Canada; and in the case of any order, regulation or appointment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides."

"22. (1) Evidence of any proclamation, order, regulation, or appointment made or issued by a Lieutenant Governor or Lieutenant Governor in Council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the modes following, that is to say:

- (a) by the production of a copy of the official gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;
- (b) by the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the government or Queen's Printer for the province; and
- (c) by the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, or by the head of any department of the government of a province, or by his deputy or acting deputy as the case may be.

(2) *Prima facie* evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted previously to the 1st day of September, 1905, or of the Commissioner in Council of the Northwest Territories or of the Commissioner in Council of the Yukon Territory, may also be given by the production of a copy of the Canada Gazette purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof."

*Evidence*

"23. (1) Evidence of any proceeding or record whatsoever of, in, or before any court in Great Britain or the Supreme or Exchequer Courts of Canada, or any court in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, or before any justice of the peace or coroner in any province of Canada, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever.

(2) Where any such court, justice or coroner, has no seal, or so certifies, such evidence may be made by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner, without any proof of the authenticity of the signature, or other proof whatsoever."

"24. In every case in which the original record could be received in evidence,

- (a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or
- (b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Canada or of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof."

"25. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted."

"26. (1) A copy of any entry in any book kept in any office or department of the Government of Canada, or in any commission, board or other branch of the public service of Canada, shall be received as evidence of such entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department, commission, board or other branch of the said public service, that the book was, at the time of the making of the entry, one of the ordinary books kept in such office, department, commission, board or other branch of the said public service, that the entry was made in the usual and ordinary course of business of such office, department, commission, board or other branch of the said public service, and that such copy is a true copy thereof.

(2) Where by any Act of Canada or regulation thereunder provision is made for the issue by a department, commission, board or other branch of the public service, of a licence requisite to the doing or having of any act or thing or for the issue of any other document, an affidavit of an officer of the department, commission, board or other branch of the public service, sworn before any commissioner or other person authorized to take affidavits, that he has charge of the appropriate records and that after careful examination and search of such records he has been unable to find in any given case that any such licence or other document has been issued, shall be received as *prima facie* evidence that in such case no licence or other document has been issued.

(3) Where by any Act of Canada or regulation thereunder provision is made for sending by mail any request for information, notice or demand by a department or other branch of the public service, an affidavit of an officer of the department or other branch of the public service sworn before any commissioner or other person authorized to take affidavits setting out that he has charge of the appropriate records, that he has a knowledge of the facts in the particular case, that such a request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (indicating such address) and that he identifies as exhibits attached to such affidavit the Post Office certificate of registration of such letter and a true copy of such request, notice or demand, shall, upon production and proof of the Post Office receipt for the delivery of such registered letter to the addressee, be received as *prima facie* evidence of such sending and of such request, notice or demand.

(4) Where proof is offered by affidavit pursuant to this section it is not necessary to prove the official character of the person making the affidavit if that information is set out in the body of the affidavit."

"27. Any document purporting to be a copy of a notarial act or instrument made, filed or enregistered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved; but it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary or be filed, enrolled or enregistered by a notary in the said Province."

*Evidence*

"30. (1) In this section,

- (a) 'corporation' means the Bank of Canada, the Industrial Development Bank and any bank to which the Bank Act applies, or to which the Quebec Savings Banks Act applies, and each and every of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company, (except a street railway and tramway company), insurance company or society, trust company and loan company (except a company subject to Part II of the Small Loans Act);
  - (b) 'government' means the government of Canada or of any province of Canada and includes any department, commission, board or branch of any such government; and
  - (c) 'photographic film' includes any photographic plate, microphotographic film and photostatic negative.
- (2) A print, whether enlarged or not, from any photographic film of,
- (a) an entry in any book or record kept by any government or corporation and destroyed, lost, or delivered to a customer after such film was taken,
  - (b) any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost, or delivered to a customer after such film was taken, or
  - (c) any record, document, plan, book or paper belonging to or deposited with any government or corporation;

is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been received upon proof that

- (i) while such book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book, or paper was in the custody or control of the government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof; and
  - (ii) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.
- (3) Proof of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of such destruction, loss, or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.
- (4) Unless the court otherwise orders, a notarial copy of an affidavit under subsection (3) is admissible in evidence in lieu of the original affidavit."

"31. (1) An order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor General, shall be received in evidence as the order of the Governor General.

(2) All copies of official and other notices, advertisements and documents printed in the Canada Gazette are *prima facie* evidence of the originals, and of the contents thereof."

(M)

***Proof of Regular Entries***

**106.** A record in any business of an act, condition or event is proved by the custodian of the record or other qualified person testifying

- (a) to its identity;
- (b) to its mode of preparation; and
- (c) to its having been made in the usual and ordinary course of business, at or near the time of the act, condition or event,

if in the opinion of the judge advocate, the sources of information and the method and time of preparation were such as to justify its admission as evidence of possibly significant weight (see also article 54 (Regular Entries)).

***Bankers' Books***

**107.** (1) For the purposes of this article

- (a) "bank" means an establishment or corporation in any country authorized to receive deposits and to pay out money on a customer's order, and includes its agencies and successors; and
- (b) "branch" means an office of a bank, and includes the head office of that bank.

*Evidence*

(2) Subject to (3) and (6) of this article, a copy of an entry in any book or record kept in a bank or branch is admissible as evidence of the entry, and of the matters, transactions and accounts therein recorded.

(3) A copy of an entry in a book or record kept in a bank or branch shall not be admitted under this article unless it is first proved

- (a) that the book or record was, at the time of making the entry, one of the ordinary books or records of the bank or branch;
- (b) that the entry was made in the usual and ordinary course of business;
- (c) that the book or record is in the custody or control of the bank or branch; and
- (d) that the copy is a true copy,

and the proof of any of these matters may be given by the manager or accountant or a former manager or accountant of the bank or branch, and may be given orally or by affidavit or statutory declaration.

(4) When a cheque has been drawn on a branch by any person, an affidavit or statutory declaration of the manager or accountant of the branch setting out that

- (a) he has made a careful examination and search of the books and records of the branch for the purpose of ascertaining whether or not that person has an account with the branch, and
- (b) he has been unable to find such an account,

shall be admissible as evidence that the person has no account in the branch.

(5) A statement of the official character of a person making an affidavit or statutory declaration may be included in the body of the affidavit or statutory declaration admissible under this article and when so included is evidence of the official character of that person.

(6) Unless by order of the court made for special cause, a bank or officer of a bank shall not be compellable to produce any book or record the contents of which can be proved in the manner prescribed by this Section, or to appear as a witness to prove the matters, transaction, and accounts therein recorded.

***Proof of Date, Handwriting and Signature of Documents***

**108.** (1) Documents are presumed to have been executed on the date of execution stated therein but, where there is no date, a wrong date, or conflicting dates, the true date may be proved by oral or other evidence.

(2) When the handwriting of or signature on an unattested document is in issue, the disputed fact may be proved

- (a) by the testimony of
  - (i) the writer of the document,
  - (ii) a witness who saw the document signed, or
  - (iii) a witness who can satisfy the court that he knows the writing in question;
- (b) by a comparison of the disputed writing with other writing proved to the satisfaction of the court to be genuine (see article 66 (Opinion in Comparison of Writing)); or
- (c) by an admission under subparagraph (d) of article 8 (Necessity for Evidence) or subparagraph (b) of article 37 (Judicial Confession Explained).

***Proof of Execution of Attested Documents***

**109.** When the execution of an attested document is in issue, whether or not attestation is required by statute for its effective execution, no attester is a necessary witness even if all attestors are available.

*Evidence***Section 14—Real Evidence***Admissibility of Real Evidence*

**110.** (1) Subject to (2) of this article, real evidence is admissible whenever the existence, identity or the quality or condition of a person or thing is relevant (see article 7 (Admission of Evidence)).

(2) Unless the quality or condition of a document is in issue it is not admissible as real evidence.

*Introduction of Real Evidence*

**111.** Real evidence may be introduced in the following ways

- (a) by the production by a witness of the material object for inspection of the court;
- (b) by experimentation in the presence of the court; or
- (c) by a visit of the court to view a place, thing or person, under QR&O 112.63 (View by Court Martial).

**Section 15—Foreign Law***Foreign Law*

**112.** (1) The law of a country other than Canada relevant to a charge or issue is proved by an expert witness testifying as to that law.

(2) The judge advocate shall, if he so desires or the court so requests, advise the court on the effect of the evidence of an expert witness as to the law of a country other than Canada, and the meaning or construction of that law as proved.

## NOTES

(A) Inquiries must be made to obtain the information necessary for the judge advocate to decide whether an expert witness is competent under (1) of this article.

An expert witness testifying as to foreign law may refer to codes, precedents and recognized authorities in support of his evidence, and the passages and references cited by him are part of his testimony. If the evidence of an expert witness is obscure, or if there is a conflict in the evidence of expert witnesses, the judge advocate may interpret the passages and references cited.

(B) This article need not be used to prove Canadian provincial law. The court may take judicial notice of that law.

(M)