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

THE RULES OF EVIDENCE AT COURTS MARTIAL

(A STUDY OF THE MILITARY RULES OF EVIDENCE)[1]

"The Adoption of a code is not[2]
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

CHAPTER PAGE

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 suprising 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 unforseeable 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."[1] 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[2] 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[3] 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[4] 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.[5]

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[6] 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 LAW

Introduction

(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.[1] 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,[2] being Parts IV to IX inclusive of The National Defence Act[3] 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[4] 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[5] 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."[6]

In 1662, the first Mutiny Act[7] 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.[8]

In 1879, The Army Discipline and Regulation Act[9] was passed, which in 1881 became, with only a few amendments, The Army Act.[10]

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[11] 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.[12] 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[13] 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