Citation: *R. v. M.S.*, 2008 CM 3028

Docket: 200820

STANDING COURT MARTIAL
CANADIAN FORCES RECRUITING CENTRE
VALCARTIER GARRISON
COURCELETTE, QUEBEC

Date: 17 December 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
(Respondent)
v.
M.S.
(Applicant)

DECISION ON AN APPLICATION TO EXCLUDE EVIDENCE UNDER SUBSECTION 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* ON THE BASIS OF AN ALLEGED INFRINGEMENT OF SECTION 8 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered orally)

INTRODUCTION

[1] M.S. is charged with committing forgery in violation of section 367 of the *Criminal Code*. He is alternatively charged with having altered documents made for military purposes with intent to deceive contrary to paragraph 125(*c*) of the *National Defence Act*, of having used forged documents contrary to subsection 368(1)(*a*) of the *Criminal Code*, of having knowingly made a false answer to a question set out in a document required to be completed in relation to his enrolment in the Canadian Forces contrary to paragraph 122(*a*) of the *National Defence Act* and, finally, of having knowingly furnished false information in relation to his enrolment in the Canadian Forces contrary to paragraph 122(*b*) of the *National Defence Act*.

[2] At the opening of this trial by Standing Court Martial on October 30, 2008, prior to plea on each of the counts, defence counsel representing M.S. made an application for which written notice was received by the Office of the Court Martial Administrator on October 20, 2008, seeking an order from the Court Martial under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* (hereafter the Charter) excluding certain evidence on the basis of an

alleged infringement of the accused's right to be secure against unreasonable search or seizure under section 8 of the Charter.

[3] This preliminary application is made under subparagraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (hereafter QR&O) as a question of law or mixed law and fact to be determined by the military judge presiding at the Court Martial as specified under article 112.07 of the QR&O.

[4] The Court heard the application on October 30 and 31, 2008. The Court mustered on November 11, 2008. At that time I determined that the voir dire concerning the hearing of this application should be postponed and the prosecution's evidence presented so as to allow me to specifically identify the evidence referred to in M.S. application.

[5] The terms used in subsection 24(2) of the Charter specifically refer to the concept of evidence. Despite the fact that I expressed my fears concerning this specific point before the hearing of this application and that I asked the parties to explain in their argument the reasons why I should render a decision before hearing the prosecution's evidence, and despite some effort made by the parties, especially M.S., to identify the documents that had been seized by the military police investigator, there was still some uncertainty for me about the fact that the applicant had shown that most of these documents were evidence in the main trial and were therefore the subject of this application.

[6] I clearly explained to both parties that I did not intend to dismiss the application only on this ground. In fact, it seemed to me to be quite unnecessary and especially unfair to dismiss the application simply because it was not clear for me which documents I had to consider as evidence in order to dispose of this application. It seemed to me to be much more useful to hear the prosecution's evidence which would allow all the evidence to be disclosed and then M.S. could identify the documents that were the subject of his application.

[7] Relying on the remarks of the Court of Appeal of Ontario in *R.* v. *Kutynec*, (1992) 70 C.C.C. (3d) 289, to the effect that a court has inherent jurisdiction to control the conduct of the trial when a Charter application is submitted, I find that it would be fair for both parties if I heard the prosecution's evidence. Therefore, I allowed M.S. to more specifically identify the evidence that was the subject of his application by authorizing him to make an objection to each element of the prosecution's evidence that he considered was the subject of his application for exclusion and each objection was then taken under advisement. This specific objection made by the applicant with regard to each element of evidence that he considered was covered by his application concerned the fact that it was to be excluded for the reasons mentioned in his application.

[8] Neither party had any particular comments to make about this way of proceeding and they told me that they fully understood the approach taken by the Court and the reasons that warranted proceeding this way. Therefore, I heard the prosecution's evidence except for one last witness regarding whom both parties indicated that it would not be necessary for me to hear to rule on this application. I re-opened the present voir dire, and with the applicant and respondent I proceeded to formally identify each element of evidence produced by the prosecution to which

the accused objected in connection with this application to exclude evidence. I also allowed counsel to make submissions in addition to those made initially. Finally, I closed to determine the application before the prosecution was declared closed.

[9] It appears that of the 37 documents identified by the applicant at the end of this process, 12 had not been initially identified by him when he first submitted his application but were so identified when the prosecution produced its evidence.

EVIDENCE

[10] The evidence produced in support of this application consisted of the following:

a. Testimony given strictly within the voir dire concerning this application by Sergeant Thierry Paré, a military police officer, in charge of the investigation that led to the charges brought before this Court and signatory of the information and affidavit that served as a basis for the issue of the search warrants in this case;

b. Testimony strictly pertaining to the identification and nature of the documents submitted in the main trial, in the order of their appearance, Manon Francoeur, Major Chantal Descoteaux, Francine Martineau, Sonya Sylvain, Roger Lafond, Luc Métayer, Francine Galarneau and Vickie Mercier;

a. Exhibit R1-1, notice of application;

b. Exhibit R1-2, joint summary of facts;

c. Exhibit R1-3, an application for disclosure to a federal investigative body dated October 25, 2005;

d. Exhibit R1-4, an application for disclosure to a federal investigative body dated November 16, 2005;

e. Exhibit R1-5 filed in a bundle with schedules A to U, which are documents obtained on January 24, 2006, following authorization of the application for disclosure to a federal investigative body dated November 16, 2005;

f. Exhibit R1-6 filed in a bundle with schedules A to P, which are documents from the applicant's medical record that were seized on February 24, 2006, under a search warrant issued the day before and used for comparison with those documents that are the subject of the present charges;

g. Exhibit R1-7, an information for the issue of a search warrant and an enclosed affidavit dated February 23, 2006;

h. Exhibit R1-8, a search warrant dated February 23, 2006, and a report of the execution of the search warrant;

i. Exhibit R1-9, an information for the issue of a search warrant and an enclosed affidavit dated March 2, 2006;

j. Exhibit R1-10, a search warrant dated March 2, 2006 and a report of the execution of the search warrant;

k. The following exhibits from the main trial, not identified for the purposes of this application and about which I must make a determination because of the objection of defence counsel representing M.S. to the effect that they should be excluded for the reasons mentioned in this application;

    i. Exhibit 7, Radiograph Requisition (CF 2024) dated August 19, 2002;

    ii. Exhibit 8, Utilization of Emergency Report (CF 2138) dated August 19, 2002;

    iii. Exhibit 9, Dr. Sylvain's feedback to a resident physician dated March 17, 2006;

    iv. Exhibit 10, Dr. Sylvain's feedback to a resident physician dated March 28, 2006;

    v. Exhibit 12, Schedule A, Medical or Dental Report dated April 11, 2005;

    vi. Exhibit 12, Schedule C, Medical Examination Record (CF 2033) dated October 19, 2005;

    vii. Exhibit 12, Schedule E, Utilization of Emergency Report (CF 2138) dated December 16, 2002;

    viii. Exhibit 12, Schedule F, Request for a Dermatological Consultation dated August 21, 2002;

    ix. Exhibit 12, Schedule G, Utilization of Emergency Report (CF 2138) dated April 11, 2005;

    x. Exhibit 12, Schedule H, Laboratory Report dated December 16, 2002;

    xi. Exhibit 19, Schedule Q, Laboratory Report Results dated February 6, 2003;

xii. Exhibit 20, Expert's Report of Vickie Mercier, a document specialist;

l. Judicial knowledge taken by the Court of the facts and issues provided for in rule 15 of the *Military Rules of Evidence*, especially chapters 5023-0 (*Universality of Service*) and 5023-1 (*Minimum Operational Standards Related to Universality of Service*) of Defence Administrative Orders and Directives, and publication A-MD-154-000/FP-000, *Medical Standards for the Canadian Forces;*

m. Judicial knowledge taken by the Court of the facts and issues provided for in rule 16(1)(*e*) of the *Military Rules of Evidence*, especially the Canadian Forces General Message (CANFORGEN) 039/08 dated February 13, 2008, concerning the disclosure of medical information or social work to commanding officers.

FACTS

[11] It would be advisable first of all to explain the facts on which this application is based. To help me in understanding the relationship between each of the documents that were filed for the purposes of the application or were identified at trial as being the subject of this application, I drew a table that is Schedule 1 of this decision. I identified the documents according to the numbers assigned to them for the purposes of the proceedings and by the expert who testified in the main trial, and I checked off at what time each one had been seized. When appropriate, I also checked off each of the documents that are the subject of this application. In this way, I managed to confirm that 37 documents are the subject of this application.

[12] As appears from the memo of Major Descoteaux dated October 12, 2005, and from its schedule relating the events (Exhibit R1-5, Schedule U), on August 29, 2005, Major Descoteaux, the Senior Medical Officer of the Valcartier Garrison, received an invoice from the Department of Veterans Affairs (Exhibit R1-5, Schedule R) for the cost of a series of 30 consultations M.S. had with a psychologist, Mr. Carol Girard, from July 9, 2003, to March 11, 2005. A consultation report from the same psychologist dated April 20, 2005 (Exhibit R1-5, Schedule T), was enclosed with the invoice.

[13] After receiving this invoice and consultation report in August 2005, Major Descoteaux had some serious concerns. In fact, in December 2004, Major Descoteaux, in her capacity as flight surgeon, had apparently met M.S. as part of a consultation for a re-enrolment or a transfer from the Reserve Force to the Regular Force, the evidence is not clear on this point, to conduct a medical assessment of M.S. and his fitness to once again become a pilot with the Canadian Forces. The issue of M.S. psychological health was apparently raised during this medical consultation, especially because of information in his medical record referring to a previous situation in this regard, and the physician concluded on the basis of the information given by M.S. that everything seemed to have been resolved for over a year. Accordingly, she determined that he was fit to serve once again as a pilot in the Regular Force of the Canadian Forces.

[14] Major Descoteaux was consequently surprised, after the Medical Service of the Valcartier Garrison, of which she was the Senior Medical Officer, received the invoice and consultation report, to read and discover that M.S. psychological condition was not in any way resolved. Accordingly, Major Descoteaux immediately conducted a complete review of M.S. medical record and documents to determine if there was anything written about this presumed contradiction.

[15] As a result of this documentary review, Major Descoteaux concluded that certain documents concerning diagnoses were apparently modified and that the signatures of some physicians, including her own, were apparently imitated. In addition, she considered that M.S. had apparently given false or misleading information about his state of health at his medical examination for re-enrolment in December 2004 and in the beginning of 2005. Accordingly, after having obtained a legal opinion, she contacted the military police by email on October 6, 2005, to report her findings in connection with the alleged commission of certain offences.

[16] On October 12, 2005, Major Descoteaux forwarded to her medical superior a memo (Exhibit R1-5, Schedule U) stating her conclusions following the review of M.S. medical record. A schedule was enclosed with this memo in which she gave a chronological description of the events supporting her allegations of document forgery in addition to a copy of the documents numbered 1 to 14 that she included as confirmation.

[17] On October 18, 2005, Sergeant Paré and Sergeant Perry, both investigators with the military police detachment of the Valcartier Garrison, met with Major Descoteaux. Sergeant Paré was assigned to this file as lead investigator.

Application for the disclosure of documents under paragraph 8(2)(e) of the PA

[18] On October 25, 2005, Sergeant Paré submitted an application for disclosure to a federal investigative body (Exhibit R1-3) under paragraph 8(2)(*e*) of the *Privacy Act* (hereafter PA) to obtain certain medical records of M.S., as well as the memo dated October 12, 2005, from Major Descoteaux about the allegations of presumed fraud by the applicant. This application was rejected on the same day because the Acting Director of the Directorate Access to Information and Privacy of the Department of National Defence wanted more information and details about the documents that were the subject of the application.

[19] On November 16, 2005, Sergeant Paré submitted a second application for disclosure to a federal investigative body (Exhibit R1-4) under paragraph 8(2)(*e*) of the PA to obtain disclosure of 21 documents concerning allegations of presumed fraud by M.S. This application was authorized by the Acting Director of the Directorate Access to Information and Privacy of the Department of National Defence. The documents were disclosed to Sergeant Paré on January 24, 2006. Five of the documents remitted were originals while the others were copies.

[20] Of these 21 documents obtained by Sergeant Paré, ten are the subject of this application to exclude evidence (see Schedule 2).

The first search warrant and seizure

[21] Sergeant Paré examined the documents obtained and he then decided that it would be appropriate to obtain M.S. complete medical record and have an expert compare the handwriting in some of the documents in the record with that in the questionable documents and to check other documents in the record that could have possibly been altered or used to commit the alleged fraud.

[22] On February 23, 2006, Sergeant Paré submitted an information to obtain a search warrant and an affidavit in support of the information (Exhibit R1-7) to a justice of the peace. On the same day, a search warrant (Exhibit R1-8) was issued, authorizing a search and seizure of M.S. complete medical record. On February 24, 2006, Sergeant Paré executed the search warrant at the Valcartier Garrison medical clinic and seized M.S.complete medical record.

[23] However, it must be noted that just before seizing M.S. medical record, Sergeant Paré gave Major Descoteaux five original documents obtained on January 24, 2006, following the application for disclosure of documents under the PA so that she could put them back in M.S. medical record. Accordingly, the following documents that are the subject of this application and that had initially been obtained following an application for disclosure to a federal investigative body under paragraph 8(2)(*e*) of the PA were subsequently seized on February 24, 2006, when the search warrant was executed:

a. Medical Attendance Record (CF 2016) containing entries dated September 21 and 26, 2002 (Exhibit R1-5, Schedule I);

b. Type II Aircrew Health Examination (DND 1737) dated September 21, 2002 (Exhibit R1-5, Schedule H);

c. Medical Examination Record (CF 2033) dated September 21, 2002 (Exhibit R1-5, Schedule G);

d. DND 728 B Document Transit and Receipt - Recipient's Copy - dated October 4, 2002 (Exhibit R1-5, Schedule N);

e. Handwritten note of blood pressure readings for the period from August 26 to September 24, 2002 (Exhibit R1-5, Schedule K and Exhibit R1-6, Schedule D).

[24] Following the seizure of the medical record the military police investigator submitted 24 documents from the record to an expert to conduct a handwriting comparison of three documents that had been identified as questionable (see Schedule 3).

The second search warrant and seizure

[25] Because Major Descoteaux's memo dated October 12, 2005, was not in M.S. medical record but in Sergeant Paré's possession following the application for disclosure of

documents under the PA dated January 24, 2006, Sergeant Paré considered that it was appropriate to seize it and, in order to do so, he submitted to a justice of the peace - magistrate on March 2, 2006, an information to obtain a search warrant, together with an affidavit in support of the information (Exhibit R1-9). A search warrant (Exhibit R1-10) authorizing Sergeant Paré to search for and seize the memo in question was issued and executed on the same day. He executed the warrant by seizing the memo, its schedule and the attachments that were already in his possession at the Valcartier Garrison military police detachment.

[26] The memo attachments were copies of documents that Major Descoteaux had withdrawn from the records under the control of the Valcartier Garrison medical clinic, especially the applicant's medical record. With the exception of attachment 14 (a memo from Manon Francoeur dated October 12, 2005, (Exhibit 14)), all of the other attachments had already been previously obtained by the military police investigator, either following his application for disclosure of documents under the PA made on January 24, 2006, or following the execution of the first search warrant for M.S. medical record on February 24, 2006. Only attachments 2 to 13 of this memo are the subject of this application (see Schedule 4) and they are copies of documents that were seized in other circumstances and that I have identified at paragraphs 20 and 24 as also being the subject of the present application (see Schedules 2 and 3).

The document expert's report

[27] On June 21, 2006, Sergeant Paré asked an expert to draft a written report to determine whether certain physicians' signatures and certain diagnoses written by the physicians in some of the documents concerning M.S. were altered by him. More specifically, this request concerned three documents, the originals of which had been obtained on January 24, 2006, by the military police following the application for disclosure of documents under the PA and then following the execution of the search warrant on February 24, 2006, and which were produced as evidence at trial and for this application.

[28] These three documents are at the core of the first three counts in the indictment. They concern forgery and the alteration of documents, as well as the use of forged documents. Sergeant Paré submitted the following documents for expert analysis:

a. Medical Attendance Record (CF 2016) containing entries dated September 21 and 26, 2002 (Exhibit R1-5, Schedule I);

b. Type II Aircrew Health Examination (DND 1737) dated September 21, 2002 (Exhibit R1-5, Schedule H);

c. Medical Examination Record (CF 2033) dated September 21, 2002 (Exhibit R1-5, Schedule G).

[29] In addition, M.S. produced for the purposes of his application, through his counsel and with the consent of counsel for the prosecution, 16 of the 24 documents mentioned at paragraph 24 of this decision (see Exhibits R1-6, Schedules A to P, also identified as Exhibit 19, Schedules A to P) and 2 of the 10 documents mentioned at paragraph 20 of this decision (see

Exhibits R1-5, Schedules P and Q) that were used by the expert to compare the applicant's handwriting with that on the documents that were the subject of the charges. Accordingly, 8 of the 24 documents mentioned at paragraph 24 of this decision (Exhibits 7 and 8 and Exhibit 12, Schedules A, C, E to H) that were used by the expert for the same purpose are also the subject of this motion, as they were so identified by the applicant when the prosecution had produced them as evidence at trial.

[30] It appears that Exhibits 9 and 10, produced as evidence by the prosecution, are also the subject of this motion and were used for comparison purposes by the expert. These are the following documents:

a. a document entitled " feedback to resident" signed by Dr. Sylvain and dated March 17, 2006 (Exhibit 9);

b. a document entitled "feedback to resident" signed by Dr. Sylvain and dated March 28, 2006 (Exhibit 10).

[31] However, it appears that no particular evidence was produced for the purposes of the application or the trial to establish the nature and origin of these two documents aside from the fact that certain inferences could be drawn from the documents themselves.

[32] On January 19, 2007, Vickie Mercier, a document specialist, submitted an expert's report concluding that the signatures of the physicians on the three documents submitted for testing purposes were not those of the physicians in question. However, she was unable to identify who had signed these documents. She concluded that some of the written matter in these documents was not in the handwriting of these physicians, but that it had been written or possibly written by M.S., that is to say, the person she was told was the author of the comparison documents that she had used to draft her report.

[33] The document expert's report was produced at the main trial as Exhibit 20 and was identified by the applicant as a document subject to his application.

POSITIONS OF THE PARTIES

Applicant

[34] The applicant's position in this matter is that the Court should order the exclusion under subsection 24(2) of the Charter of all documents from M.S. medical record because they were the subject of an unreasonable seizure by the military police investigator as a result of an infringement of his right to be secure against unreasonable seizure under section 8 of the Charter. Alternatively, the applicant requested that if the Court did not reach this conclusion, it should order the exclusion of the documents produced as evidence at trial, more specifically the documents I mentioned at paragraphs 20, 24, 30 and 33 of this decision.

[35] M.S. also claims that the Court should also order the exclusion of the memo from Major Descoteaux, dated October 12, 2005, including the schedule and attachments that were

seized by the military police investigator on March 2, 2006, following the issue of a search warrant.

[36] Finally, the applicant is requesting that the Court order the exclusion of the document expert's report, identified at paragraph 33 of this decision, in which the expert bases her analysis and conclusions on documents from M.S. medical record that are the subject of this application for the exclusion of evidence.

[37] According to the applicant, because of his reasonable expectation of privacy in connection with his medical record at the Valcatier Garrison medical clinic, any seizure of a document in his medical record by a police officer acting in the name of the State absolutely requires judicial authorization by means of a search warrant. According to M.S., the fact that Sergeant Paré obtained certain documents from his medical record on January 24, 2006, further to an authorization under the PA constitutes a warrantless seizure, which is unreasonable on its face and infringes M.S. right to be secure against a seizure of the type mentioned in section 8 of the Charter. According to the applicant, the fact of having executed another seizure of the same documents one month later with a search warrant does not validate or legally correct the investigator's failure to proceed properly right from the start.

[38] However, if the Court were to make a different finding, that is to say, if the fact of obtaining medical documents in the applicant's medical record with an authorization granted under the PA is not an infringement of the applicant's right guaranteed under section 8 of the Charter, M.S. submits that the search warrant issued on February 23, 2006, authorizing the seizure of his medical record was illegal because on the one hand the description of the object to be seized was too general, namely, the medical record, and on the other hand, the information does not specify if the informant made a sworn statement and the affidavit in support of the information was not sworn. Accordingly, the execution of an illegally obtained search warrant is an unreasonable seizure and infringes the applicant's right to be secure against such seizures under section 8 of the Charter.

[39] As far as the search warrant obtained and executed by the military police investigator on March 2, 2006, is concerned, the applicant alleges that its execution was unreasonable within the meaning of section 8 of the Charter because Sergeant Paré did not dispose of Major Descoteaux's memo that he had in his possession, including the schedule and attachments, and tried to unnecessarily and unreasonably remedy the illegality of possessing documents obtained further to an authorization under the PA by executing a search warrant. According to M.S., the unreasonableness of the seizure of the memo is shown by the fact that the investigator tried to remedy an illegal warrantless seizure by executing a seizure of the same object, this time with judicial authorization. According to him, this is demonstrated by the fact that the investigator failed to identify the object seized and the place of the seizure in the report remitted by the military police investigator further to the seizure of the memo.

[40] Finally, the applicant concludes that because of the seriousness of the infringement, the administration of justice would be brought into disrepute if the documents identified were not excluded under subsection 24(2) of the Charter.

Respondent

[41] The respondent submits that not all seizures require search warrants. According to the respondent, Sergeant Paré legally obtained the documents requested under paragraph 8(2)(*e*) of the PA and their seizure was valid and did not require any warrant, considering the provisions of the PA. The respondent suggests that the Court analyze each document individually to determine whether the applicant has a reasonable expectation of privacy in connection with each one. In addition, the respondent submits that, for any documents concerning which the Court concludes that there is in fact a reasonable expectation of privacy, this still would not mean that a search warrant would be required considering the enabling provisions of the PA. According to the respondent, the applicant should have challenged the provisions of that Act if he considered that the seizure of documents by the military police was unreasonable.

[42] As far as the search warrants are concerned, the respondent considers that they are both valid. With regard to the one issued on February 23, 2006, the respondent submits that the testimony given by Sergeant Paré for the purposes of this application clearly provides evidence of the type of oath that was given on the information as well as the fact that the police officer was duly sworn respecting his affidavit in support of the information. In addition, the respondent submits that this seizure was appropriately executed and was not in any way unreasonable. As far as the second warrant is concerned, the respondent argues that the omission in the seizure report does not in any way support evidence as to the unreasonableness of the seizure because it was written once the seizure of the memo was executed.

[43] Finally, the prosecution submits that if the Court finds that there was an infringement of the accused's right guaranteed in section 8 of the Charter, the evidence obtained should not be excluded because the infringement would be so minor due to the conduct of the military police officer whose sole purpose was to legally obtain the evidence. In addition, considering the seriousness of the offences and the fact that the infringement was minor, excluding the evidence would be the wrong thing to do as this actually would bring the administration of justice into disrepute.

ISSUES

[44] Subsection 24(2) reads as follows:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[45] Accordingly, the Court must determine if the accused established on a preponderance of evidence that the evidence was obtained in a manner that infringed the accused's right to be secure against unreasonable seizures as specified in section 8 of the Charter.

[46] Subsequently, if the Court concludes that this is the case, it must determine if, having regard to all the circumstances, the admission of this evidence in the proceedings would bring the administration of justice into disrepute.

ANALYSIS

Section 8 of the Charter

[47] In order to determine the first issue, it is appropriate first of all to refer to section 8 of the Charter, which reads as follows:

> 8. Everyone has the right to be secure against unreasonable search or seizure

State intervention

[48] First of all, to assert his right under section 8 of the Charter, it was up to M.S. to show that the seizure of the documents in his medical record was State action or interference. In my mind, there is no doubt that the investigator of the military police detachment of the Valcartier Garrison is a State representative who tried to obtain the documents in the medical record in question in order to obtain evidence of the commission of military offences by M.S. This is therefore State action and interference, which allows for an application of the Charter.

Reasonable expectation of privacy

[49] Now, did M.S. establish the fact that the conduct of the military police investigator constituted a search or a seizure within the meaning of section 8 of the Charter? To answer this question, I must determine in this first part of the analysis under section 8 of the Charter, by considering all of the circumstances presented by M.S. if there was a reasonable expectation of privacy in connection with the documents that are the subject of this application and if the applicant has the benefit of that expectation so as to determine whether he has standing, that is, whether he may submit this application. In other words, could M.S. reasonably expect privacy?

i. Definition of the concept of privacy interest

[50] To do so, I must first of all determine what is a reasonable expectation of privacy. I will then analyze each one of the documents identified by the applicant as being the subject of his application in order to determine whether there is a reasonable expectation of privacy for each one. By doing so, I will be in a position to determine if I must continue my analysis under section 8 of the Charter for each document. In fact, if I find that there is no reasonable expectation of privacy for any given document, I will end my analysis in connection with that document. If, however, I find that there is a reasonable expectation of privacy, I will proceed with the next step of the analysis of the document in question.

[51] The application of section 8 of the Charter, which concerns the protection of persons from unreasonable search and seizure, is fundamental to the relationship existing between a citizen, including a member of the Canadian Forces, and the State. On this point, as determined by the Supreme Court of Canada in various decisions on this issue, it is necessary to find a balance between the respect for the privacy of citizens and the State's obligation to protect its citizens and ensure their safety by repressing crime.

[52] This was mentioned by Mr. Justice Binnie, writing for the Court in *R.* v. *Tessling*, [2004] 3 S.C.R. 432, at paragraph 18:

> On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a 'search' within the meaning of s. 8; *Evans*, *supra*, at para. 11.

ii. The various privacy interests

[53] The Supreme Court of Canada found that case law has determined a certain number of privacy interests that are protected under section 8 of the Charter, namely, personal privacy, territorial privacy and informational privacy (see *R.* v. *Tessling*, above, at paragraph 20).

[54] Except for the document expert's report, it appears that the documents that are the subject of the application all come from the Valcartier Garrison medical clinic, where the applicant received and still receives all of the medical care he needs and where the original of his medical record was filed until it was seized by the military police investigator.

[55] In my opinion, this application essentially involves M.S. personal and informational privacy interests. In fact, the content of the documents concerns his person and these documents were in his medical record. In addition, the military police investigator was seeking information about personal characteristics that concerned, among other things, M.S. handwriting. Accordingly, I find that it was M.S. personal privacy interest that is raised by this application and that he therefore has standing.

[56] Personal privacy specifically refers to M.S. bodily integrity. In fact, it is quite plausible to consider that the documents from his medical record, which are the subject of the application, have information on the analysis of bodily substances or that he gave in connection with his physical or psychological condition. In fact, as counsel for the applicant so aptly stated, in conducting an analysis of an alleged infringement of section 8 of the Charter, the Supreme Court underlined on several occasions the fact that a person's bodily integrity and the related information have the strongest claim to constitutional shelter (see *R.* v. *Tessling*, *supra*, at paragraph 21). This is even more true in a medical or hospital setting as Mr. Justice La Forest pointed out when writing for the majority of the Supreme Court of Canada in *R.* v. *Dyment*, [1988] 2 S.C.R. 417, at paragraph 38:

> However, as I earlier indicated, the sense of privacy transcends the physical. The dignity of the human being is equally seriously violated when use is made of bodily substances taken by others for medical purposes in a manner that does not respect that limitation. In my view, the trust and confidence of the public in the administration of medical facilities would be seriously taxed if an easy and informal flow of information, and particularly of bodily substances from hospitals to the police, were allowed.

[57] The Supreme Court defined what informational privacy entails at paragraph 23 of *Tessling*, *supra*:

> Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit.
>
> (Report of a Task Force established jointly by Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13)

[58] In *R.* v. *Plant*, [1993] 3 S.C.R. 281, the Supreme Court of Canada set certain boundaries on the information that is included in the concept of reasonable expectation of privacy when writing the following at page 293:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

[59] Accordingly, it must be understood that not all the personal information that a person wishes to keep confidential has the benefit of protection under section 8 of the Charter (on this point see *Tessling*, *supra*, at paragraph 26).

[60] It was on the basis of these privacy interests, that it to say, bodily integrity in a medical environment and information, that counsel for the applicant has requested that I rule that all the documents seized by the military police investigator in the medical record of his client, M.S., were without exception subject to a reasonable expectation of privacy. He also included the document expert's report in this request, stating that it should be considered like the others because the conclusions of the report were based on the documents seized in the medical record.

[61] At this step of the analysis it is impossible for me to do this. In fact, each of the items of evidence, that is to say, each of the documents contested by the applicant, must be analyzed, and not all of the documents in M.S. medical record were seized by the military police investigator. Just because documents are in the medical records of a Canadian Forces member does not mean that they necessarily contain medical information automatically covered by a reasonable expectation of privacy.

[62] Doing otherwise would be tantamount to a declaratory judgment to the effect that any document in the medical records of a Canadian Forces member would automatically have the benefit of a reasonable expectation of privacy, without regard to the context in which these documents were created, including the nature and use made of each of them. In addition, this would be ignoring the other criteria of analysis developed by case law to allow a court such as this one to rule on the issue. We must not lose sight of the fact that it is the evidence produced by the prosecution to establish M.S. guilt that is at issue, and not everything seized by the investigator during his investigation.

[63] Accordingly, I dismiss the argument submitted by M.S. to the effect that all of the documents in his medical record that were seized by the military police investigator were,

without any exception, subject to a reasonable expectation of privacy. At this step of my analysis, I reach the same conclusion concerning the document expert's report. That is why, after hearing the application, I concluded that it would be fairer to proceed with the trial by allowing the applicant to specifically identify the evidence produced by the prosecution that would be the subject of this application.

iii. The requirement for a contextual analysis of the right to privacy

[64] Having determined the privacy interests that come into play for the purposes of this application, I must now deal with the manner in order to determine whether each of the documents that I am analyzing is subject to a reasonable expectation of privacy. On this point, the Supreme Court of Canada has consistently ruled that an analysis under section 8 of the Charter must be contextual. In *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, at pages 159-160, the Court stated that, in the application of section 8:

> An assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [our emphasis]

[65] In fact, this principle was reaffirmed in *Edwards* v. *R.*, [1996] 1 S.C.R. 128, *supra,* at paragraph 45, where the Court stated:

> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso*, *supra*, at p. 54, and *Wong*, *supra*, at p. 62.

[66] To do so, as mentioned in *Tessling*, *supra* at paragraph 31, I am of the opinion that there is a series of factors that must be taken into consideration by a court in order to make such a determination. These factors were mentioned in *Edwards, supra*, at paragraph 45:

> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
>
> (i) presence at the time of the search;
>
> (ii) possession or control of the property or place searched;
>
> (iii) ownership of the property or place;
>
> (iv) historical use of the property or item;
>
> (v) the ability to regulate access, including the right to admit or exclude others from the place;
>
> (vi) the existence of a subjective expectation of privacy; and
>
> (vii) the objective reasonableness of the expectation.

iv. General context of analysis

[67] However, before determining where there is a reasonable expectation of privacy for the documents identified by the applicant and produced by the respondent as evidence at trial, it is appropriate to make some general comments about the context in which they were created and handled, which will eventually assist me in giving relevant answers to the various factors that I mentioned in the preceding paragraph.

[68] Subsection 91(7) of the *Constitution Act, 1867*, grants exclusive legislative authority to the Parliament of Canada concerning "militia, military and naval service and defence." Accordingly, the *National Defence Act* (hereafter the NDA) was enacted by the Parliament of Canada to govern this area of our Constitution. Section 14 of this Act provides for the constitution, or creation, of the Canadian Forces. Members of this force are military staff, either officers or non-commissioned members whose enrolment is governed under sections 20 to 26 of the NDA and whose release is governed under section 30 of the NDA.

[69] Under section 33 of the NDA, all officers and non-commissioned members of the Regular Force are at all times liable to perform any lawful duty, while members of the Reserve Force may be subject to such obligation under certain specific circumstances. This obligation of lawful duty refers to the fact that when a person becomes a member of the Canadian Forces, he or she is subject to the duty of performing any military task, regardless of its nature and in spite of the fact that member has a specific trade in a recognized profession. This is called the "soldier first principle", which in fact was discussed by the Court Martial Appeal Court of Canada in its recent judgment, *Master Corporal Billard* v. *R.*, 2008 CMAC 4, at paragraph 7:

> This case raises an important principle, namely, "the Soldier first principle". A member of the Canadian Forces, whatever his or her rank, trade or occupation, is at all times a fighting soldier.

[70] The "soldier first principle" is legally known as the principle of universality of service. As affirmed in chapter 5023-0 of the *Defence Administrative Orders and Directives* (hereafter DAOD), which is based on section 33 of the NDA, this principle is expressed as follows:

> "The principle of universality of service or "soldier first" principle holds that CF members are liable to perform general military duties and common defence and security duties, not just the duties of their military occupation or occupational specification. This may include, but is not limited to, the requirement to be physically fit, employable and deployable for general operational duties."

[71] Chapter 5023-1of the DAOD clearly sets out the minimum criteria of operational efficiency in connection with universality of service that members of the Canadian Forces must meet. According to this directive, a member must be physically fit, meeting the minimum required physical standards, be employable and be deployable without having any medical restrictions. If the minimum criteria cannot be met, the member may be released from the Canadian Forces or may be retained in his or her position subject to employment limitations on a temporary, transitional basis ending when the shortage or the specific need in his or her military occupation ends or when a period of three years has elapsed.

[72] In order to establish if a person may be enrolled in the Canadian Forces and to subsequently determine if there are medical restrictions for this member during his or her career, just as for all members, the Canadian Forces established the Canadian Forces Health Services (hereafter the CFHS). The CFHS provides health care to members of the Canadian Forces in the country and abroad.

[73] CFHS staff must comply with certain standards to determine if a member has any medical restriction when periodic medical examinations are conducted, whether from the point of view of universality of service or of the medical standards applicable to a military occupation held by the member. To do so, the Chief of Defence Staff authorized the publication of the "Medical Standards for the Canadian Forces" under number A-MD-154-000/FP-000, better known in the medical world as the CFP 154 publication of the Canadian Forces. This guidebook sets out specific directives for the medical assessment of members of the Canadian Forces. Among other things, chapter 2 of the guidebook mentions the following:

> 1. In defining the medical fitness of an individual, the Medical Officer (MO) must clearly and precisely describe any limitations resulting from a medical condition in order to optimize access to the appropriate level of health care and provide administrative authorities with a clear, precise medical opinion of the employment capabilities of members (...) The health and safety of the individual and co-workers, as well as the success of the operational mission, rely on the best possible assessment of medical fitness.

[74] It is reasonable to state that a member of the Canadian Forces who consults medical staff, including a physician, discloses private information, whether it is in the form of bodily substances such as blood, or in the form of personal information on his or her state of physical or psychological health, and this information is collected and kept in a record by the Canadian Forces medical authorities. It is also reasonable to state that this information is given confidentially by the member to medical staff on the assumption that it will be disclosed only to the appropriate persons for the purposes for which it must be used.

[75] How is medical information transmitted between the CFHS and the military chain of command that employs the member? It is true that very little evidence was produced on this point to allow me to understand to what extent a member, in the context I just described, may have some expectation of privacy. However, the general message (CANFORGEN) 039/08 submitted by the applicant sheds sufficient light on how medical information given by a member is currently dealt with and most probably how it was dealt with in the past by the CFHS in connection with the military chain of command. Paragraphs 3 and 4 of this CANFORGEN show that medical staff's professional obligation of confidentiality in connection with medical information is acknowledged in the Canadian Forces, especially concerning diagnoses and details of treatment. However, paragraph 9 of the same message acknowledges that health care providers must give clear, detailed and relevant information when there are employment restrictions, especially when the use of weapons or complex devices by the member is considered, and that information other than medical information must be disclosed to the chain of command for the assignment of tasks that are appropriate for the member, while underlining

the fact that medical staff must disclose relevant medical information when required to do so under applicable federal and provincial legislation.

[76] Therefore, I understand that the disclosure of medical information about members of the Canadian Forces is done on a very limited basis, and only to the persons concerned and only for the use for which it was collected, even in a military context where this information may seem to be essential for the chain of command to help determine how a member may be deployed.

[77] A perfect illustration of this was submitted by the applicant in his evidence. M.S. underwent a medical examination on June 28, 1999, which confirmed a problem of tinnitus that had been previously diagnosed (Exhibit R1-5, Schedule A). The military physician concluded that a change of medical category was required and the appropriate form was filled out (Exhibit R1-5, Schedule B) and forwarded to the Central Medical Board for a final recommendation (Exhibit R1-5, Schedule C). A final recommendation was made about the change of medical category of M.S. in connection with his hearing (Exhibit R1-5, Schedule D) and a decision was made about imposing permanent employment restrictions (Exhibit R1-5, Schedule E). This document does not contain any diagnosis, treatment or other medical information, just like the military message sent to M.S. unit (Exhibit R1-5, Schedule F) to forward the decision. Accordingly, the medical information remained confidential as only the medical authorities concerned saw it and the unit located at the Valcartier Garrison, the 430 Tactical Helicopter Squadron (THS), was only advised of the fact that M.S. could no longer be deployed to pilot helicopters but could on the other hand pilot fixed-wing aircraft.

[78] In short, this medical information is gathered from members of the Canadian Forces and used by the State, through its representatives, namely, the medical staff, in order to attain two specific objectives: first, to conduct an adequate follow-up of the state of health of Canadian Forces members and to make the appropriate diagnoses and give the appropriate treatments to maintain their health; and second, to determine if they meet the minimum health standards for the performance of their terms of service, whether from the point of view of the principle of universality of service or from the point of view of their military occupation.

v. Factors concerning the place where the search was conducted

[79] *Edwards*, *supra*, referred to a series of factors concerning the place searched. I have already determined that place was not one of the aspects of M.S. privacy that was at issue in this application. First of all, the applicant did not establish that he was present at the Valcartier Garrison medical clinic where his medical record was kept at the time the military police investigator obtained certain documents pursuant to an application for disclosure under the PA or at the time of the seizure. M.S. did not prove that he owned and had the possession or control of the documents in his medical record as well as possession or control of the place where the documents were seized, that is to say, the medical clinic. He did not establish that he had the ability to regulate access to this place, including the right to admit or exclude others from the place.

[80] On the other hand, I agree that the type of place such as a medical clinic may have an influence in the assessment of the other factors of analysis, and I will refer to this later in my analysis. In fact, this type of place makes it possible to better understand the other factors when they are studied from the perspective of the applicant's personal and informational privacy interests.

vi. Historical use of property or item

[81] In *Tessling*, *supra*, the historical use of the property or item was identified as the purpose. Essentially, for this factor in this application, the issue is as follows: what is the purpose of each of the documents that are the subject of this application?

[82] Some 37 documents are the subject of this application, 34 of which are identified in Schedules 2 and 3 of this decision, in addition to Exhibits 9 and 10 and the document expert's report.

[83] Many of them are identical forms or documents to be used in the same way. Accordingly, in conducting an individual analysis of each of the documents, I managed to group them according to their respective purposes. For ease of understanding, I identified each of the groups which I listed in Schedule 5 of this decision and which I will subsequently use in my analysis of the other criteria.

[84] Several of the documents concerned in this application are documents that establish in writing, at a given point in time, a Canadian Forces member's medical case history, medical diagnosis and appropriate medical treatment. These documents contain personal and medical biographical information given to medical staff in a therapeutic relationship, such as a personal and family medical record, a case history of injuries and certain personal habits that could have an impact on health. In addition, the content of these documents refers to medical results from tests performed on M.S. body, such as his blood pressure or certain other physical characteristics unique to the applicant and showing a particular injury on one part of this body. Therefore, I will identify these documents as **Group 1** (see Schedule 5).

[85] Other documents contain information to allow medical staff to better understand the nature of a medical problem and to have a constant medical follow-up of the member and contain personal and medical biographical information. This type of document may contain all handwritten observations made by a medical staff member or a medical questionnaire/form that is usually filled out by the member himself. For the purposes of this application I have identified these documents as **Group 2** (see Schedule 5).

[86] Some documents are basically used to ask for or give results in connection with a more detailed examination of M.S. body or in connection with a sample of a bodily substance he provided. These documents are part of **Group 3** (see Schedule 5).

[87] Other documents are administrative in nature and contain a series of personal and medical biographical information, such as dates and reasons for medical examinations, and

always include the applicant's medical background. This is **Group 4** and contains only one document (see Schedule 5).

[88] Certain other documents also have an administrative purpose but contain very little personal information and no medical information, that is to say, they are used to give medical staff an assessment of their job performance or to advise the chain of command of any employment restrictions for the member because of a medical condition, to determine the cost of medical services, to allow the medical clinic administration to do a follow-up on the possession of a file, to determine admission and consent to medical care by the member or to document a request for a copy of a medical file. The common characteristic of these documents is that they do not contain any medical information strictly speaking. I identified them as **Group 5** (see Schedule 5).

[89] Finally, the purpose of the document expert's report was to report in writing the results of the analysis and conclusions of the expert to the effect that the some of the writing and content in the documents relevant to the first three counts in the indictment is that of certain physicians and the applicant. In order to conduct this analysis, the expert used several documents mentioned in the 5 groups that I identified at paragraphs 84 to 88 of my decision for comparison purposes. However, I will deal with the expert's report only in my analysis concerning the exclusion of evidence because this report was not seized by the military police investigator.

[90] As far as this specific document is concerned, I must determine if it must be the subject of an exclusion order under subsection 24(2) of the Charter because it is based on documents that were allegedly obtained by infringing the applicant's right under section 8 of the Charter and that should be subject to the same order. I will deal with this document only during the analysis of this last issue. Accordingly, this expert's report will not be considered in connection with the following criteria and will not be subject to an analysis as to the existence of a reasonable expectation of privacy.

vii. <u>The existence of a subjective expectation of privacy</u>

[91] The applicant did not testify during the voir dire on his application for exclusion of the evidence under subsection 24(2) of the Charter, but I consider that I may assume, at least until any evidence to the contrary is adduced, that a person who gave confidential information to medical staff in a medical clinic about himself or herself or supplied a bodily sample for the purposes of obtaining medical information, and where this information is taken down in writing, considers this information to be private. This results from the fact that this is information given willingly and for a specific purpose that concerns the applicant's private life and may ultimately reveal intimate details about the his lifestyle, his bodily integrity and his personal choices. Accordingly, I consider that the documents identified in **Groups 1 to 4** are included in the applicant's subjective expectation of privacy.

[92] As far as the administrative documents identified in **Group 5** and which do not contain any medical information about M.S. body are concerned, I may assume that the applicant also considers that everything concerning the administrative processing of his medical record is also private in nature. In fact, the distribution, processing and archiving of the medical record

and its contents may also reveal information on the applicant's private life and give details about his lifestyle and personal choices. For example, the assignment of certain unit duties to the applicant due to his medical condition, the determination of the cost of consultation of a professional in a specific medical field, the forwarding of the record of one medical organization to another, the admission to a medical clinic for care, and a request for a copy of documents in a medical record are all situations that concern the applicant above all and concerning which he does not expect all the details to be made public. In fact, the reasons that warrant handling the medical record in this way may be connected to administrative actions by medical staff such as a request for a test or a request for a reference to a specialist as a result of events in the applicant's private life that led him to disclose certain personal choices that had an impact on his health. Accordingly, I conclude that except for two documents, the documents in this Group are also part of the applicant's reasonable expectation of privacy.

[93] In fact, I must say that it is difficult for me to conceive that the applicant has any subjective expectation of privacy in connection with the following two documents:

a. Document entitled "feedback to resident" signed by Dr. Sylvain and dated March 17, 2006 (Exhibit 9);

b. Document entitled "feedback to resident" signed by Dr. Sylvain and dated March 28, 2006 (Exhibit 10).

[94] These documents were written after the medical record had been seized by the military police investigator. They do not mention the person who was interviewed and do not contain any medical information in connection with any patient, more specifically the applicant. In addition, the documents do not show who was the resident subject to the assessment. Without any other evidence about the drafting and origin of these documents I cannot do otherwise but conclude that M.S. cannot have any subjective expectation of privacy about them.

viii. Objective reasonableness of the expectation

[95] In other words, the issue here is to determine if M.S. expectation of privacy in connection with the documents that are the subject of this application was objectively reasonable.

[96] To determine this issue and as stated unanimously by the Supreme Court of Canada at paragraph 43 of *Tessling*, *supra*, I will refer to numerous helpful markers.

[97] The first marker to be considered is the place of the seizure. As mentioned at paragraph 44 of *Tessling*, *supra*:

> While s. 8 protects people, not places, the place where the search occurs greatly influences the reasonableness of the individual's expectation. In *Wong*, *supra*, Lamer C.J. put it this way, at p. 62:
>
> > The nature of the place in which the surveillance occurs will always be an important factor to consider in determining whether the target has a reasonable expectation of privacy in the circumstances. It is not, however, determinative.

[98] In this case, we are dealing with a medical clinic operated by the Canadian Forces, in which civil and military medical staff are employed, as shown by the employment held by the witnesses heard at trial, who provide health care to Canadian Forces members.

[99] It is quite reasonable for me to presume that a member who reports to such a place expects that the information he or she gives, whether on the basis of bodily samples or information that he or she discloses to medical staff and that is written down in various forms, is dealt with confidentially. If things were otherwise, Canadian Forces members going to the clinic would not give some essential information, fearing that everyone would know about it, and this could significantly diminish the possibility of resolving their health problems and potentially endanger their fitness to accomplish the military duties that are assigned to them in the performance of their trade or simply as a Canadian Forces member in general. Ultimately, the Canadian Forces' mission could be compromised this way.

[100] The second marker to be considered is whether the documents that are the subject of this application were in public view. The present archivist, as well as the senior medical officer and the archivist at the time when certain documents were obtained further to an application under the PA and then under two search warrants that were executed, clearly established that the documents were placed in a medical record that was filed, and that access to the record was restricted to medical staff at the clinic who had a need to consult it. It is therefore legitimate to conclude that the documents were not in public view.

[101] The third marker to be examined is whether one or more of the documents that are the subject of the application were voluntarily abandoned. I find that there was no voluntary abandonment of the documents by the applicant. In fact, the evidence shows that he never consented to the seizures made by the military police investigator.

[102] It is obvious to me that on the basis of the evidence that was produced, the documents I identified in Groups 1 to 4 were not information in the possession of third parties, that is to say, accessible or available to persons other than the medical staff of the Valcartier medical clinic where they were kept.

[103] As far as the documents in Group 5 are concerned, it appears that the information on the CF 2018 forms (Medical/Dental Disposition Report) is generally intended for staff in the unit where the member is employed. However, no evidence was produced to the effect that these documents were sent or made available to persons or to organizations other than the medical clinic. Lacking such evidence, I can only conclude that they were not in the possession of third parties.

[104] As for the DND 728 form used to send and receive documents and also included in Group 5, the evidence was to the effect that it was obtained from a military organization in Winnipeg. In fact, the original that was produced in evidence in Court is the recipient's copy, as appears from that document. However, at the time it was sent by the medical clinic to the military police in November 2005 further to an application made under the PA, no evidence was produced to the effect that the information was still held by this external organization, which in fact was never identified for the purposes of the application. Lacking any more specific evidence,

that is to say, who exactly was in possession of the documents, what this organization actually did have in its possession and who really had access to what, it is difficult for me to determine to what extent this information was available to third parties.

[105] Finally, as for the Veterans Affairs service records concerning the psychological follow-up of M.S. and the invoice of the psychologist Carol Girard dated April 20, 2005, once again the lack of evidence makes it difficult to determine just to what extent the information was available to third parties. It is plausible that a copy of the Department's service record and the psychologist's invoice that were sent with the document were or are under the control of Veterans Affairs; however, lacking any clear evidence on this point, it is difficult for me to reach such a conclusion without speculating. Once again, it is difficult for me to determine to what extent this information was available to third parties.

[106] It is obvious that the technique used by the military police investigator, that is, an application for the disclosure of certain documents under paragraph 8(2)(*e*) of the PA and the seizures made pursuant to the search warrants issued under the *Criminal Code*, was intrusive in relation to the applicant's privacy interest, but it is also a reasonable procedure objectively speaking. In fact, having recourse to a form of authorization by an authority that is not involved in the application, within a pre-determined legislative framework, makes this procedure reasonable. However, it is clear that by using such legislative mechanisms, the military police investigator also acknowledged the existence of a type of confidentiality of the information contained in the documents he obtained and, although it is not conclusive, this is a factor I will take into consideration.

[107] It is also clear to me that the information obtained by the military police investigator from the documents he seized disclosed details not only concerning the features of the applicant's handwriting, but also intimate details about his lifestyle and biographical information.

ix. Documents as real evidence

[108] It appears that three of the documents that are the subject of this application are at the core of the first three counts in the indictment. In fact, it is because these documents or some part of them were allegedly forged or altered and used as such with criminal intent that a portion of this trial is being conducted. In principle, they are the *actus reus* of these offences. I find that the same comments apply to these documents as were made in my analysis above, up to October 18, 2005, when Major Descoteaux formally indicated at a meeting with the military police investigators that these documents were so questionable that she claimed they were the subject of a criminal fraud in connection with M.S. transfer from the Reserve Force to the Regular Force.

[109] Accordingly, from October 18, 2005, I consider that there was no longer any reasonable expectation of privacy for M.S. in connection with these documents. In fact, knowing that there was information about his private life that had been allegedly modified or altered in the documents in question and ultimately revealing intimate details about his lifestyle that could be incorrect, M.S. no longer had any subjective expectation of privacy. As far as the applicant's reasonable objective expectation of privacy is concerned, it can be asserted that because of the

modified or altered information that these documents contained and which he allegedly used as authentic, the applicant no longer had this expectation.

[110] In fact, a person cannot have a reasonable expectation of privacy in connection with a document that apparently contains precise medical information about the person but that in fact is incorrect because of the alleged commission of a criminal offence or of a military offence in connection with that document, regardless of whether it affects all or part of that document and whether he did it.

[111] On the other hand, without making a very precise parallel with the situations identified in Supreme Court decisions *Quebec (Attorney General)* v. *Laroche*, [2002] 3 S.C.R. 708, *Jarvis* v. *R.*, [2002] 3 S.C.R. 757 and *R.* v. *Ling*, [2002] 3 S.C.R. 814, as well as in *R.* v. *McCullough*, 87 C.R.R. (2d) 50 of the Court of Queen's Bench and in *R.* v. *Dumais*, 125 C.R.R. (2d) 237 of the Provincial Court of Saskatchewan, the fact nevertheless remains that once a document disclosed to the State is used to establish or justify obtaining a benefit or privilege, it is obvious that if this document is the subject of the alleged fraud, the person loses all reasonable expectation of privacy, both subjective and objective, because this document was the instrument that made it possible to obtain the advantage or privilege sought.

[112] In this case, the three documents in question are used to report M.S. state of health, not only to allow for a proper medical follow-up of the applicant and any intervention, but also to confirm that he was fit to perform his duties in connection with the universality of service and with his occupation in the Canadian Forces. When there is a problem of fraud with one of these documents, it is clear that it was the duty of the State representative, in this case Major Descoteaux, to report this problem in connection with disciplinary and criminal conduct so that the military police may undertake an investigation and the perpetrator of the alleged offence may be prosecuted. Accordingly, in such a situation, it seems quite appropriate for Major Descoteaux to justify the problem she identified by showing the documents in question to the military police investigators. In addition, I am of the opinion that she could have given them these documents directly without any other formalities because, in view of the circumstances, M.S. reasonable expectation of privacy did not exist any longer regarding these three documents. In fact, this is the position taken by author Stanley A. Cohen in his book entitled *Privacy, Crime and Terror, Legal Rights and Security in a Time of Peril*, when he mentioned on pages 143 and 144 what the situation should be when a government department or agency is the victim of a criminal offence:

> A victim of a criminal offence, whether an individual or a corporation, has the right to complain to law enforcement officials and request an investigation. The victim-complainant should be in a position to justify the complaint and in that regard would be expected to supply the police with any and all information that it possesses that is germane to its complaint. For example, the bank that is robbed must be in a position to show its records to the police in order to demonstrate its loss. It is normally not necessary for the police to obtain a search warrant in order to examine and retain the information that the victim is in a position to supply.
>
> However, note that there are necessarily limits on the information that may be supplied. The victim can supply any information that is relevant to the offence under investigation but there is no justification in law for the victimized agency to supply all of the information it possesses on the individual under investigation, in particular, information material that is not relevant to the instant investigation. To

> provide otherwise could allow a focussed and *bona fide* investigation to be transformed into a fishing expedition.

[113] In my opinion and as I mentioned previously, only the documents on which the charges are based must be subject to this treatment. The other documents from M.S. medical record were not altered or forged and the applicant therefore has a reasonable expectation of privacy regarding them.

x. Conclusion about a reasonable expectation

[114] The documents for which the applicant did not establish that there was a reasonable expectation of privacy and respecting which he therefore did not establish that the conduct of the military police investigator constituted a seizure within the meaning of section 8 of the Charter are the following:

a. The document entitled "feedback to resident" signed by Dr. Sylvain and dated March 17, 2006 (Exhibit 9);

b. The document entitled "feedback to resident" signed by Dr. Sylvain and dated March 28, 2006 (Exhibit 10);

c. Medical Attendance Record (CF 2016) containing notes dated September 21 and 26, 2002 (Exhibit R1-5, Schedule I);

d. Type II Aircrew Health Examination (DND 1737) dated September 21, 2002 (Exhibit R1-5, Schedule H);

e. Medical Examination Record (CF 2033) dated September 21, 2002 (Exhibit R1-5, Schedule G).

[115] Accordingly, with the exception of the document expert's report for the reasons mentioned above, I find that M.S. had a reasonable expectation of privacy regarding the other 31 documents identified in Groups 1 to 5 above (see Schedule 5), which are the subject of this application. In addition, I find that the applicant thus established that the conduct of the military police investigator regarding these documents constituted a seizure within the meaning of section 8 of the Charter.

Reasonableness of the seizure

[116] This second part of the analysis under section 8 of the Charter concerns only the documents respecting which I found that a seizure was made by the military police within the meaning of this section. To facilitate consultation and conciseness, I identified these documents in Schedule 6 and I grouped them according to the means used to seize them, in accordance with the facts of this case.

[117] It must now be determined whether these documents were unreasonably seized by the military police so as to determine whether the applicant's rights under section 8 of the Charter were infringed. In other words, was the seizure of these documents unreasonable?

[118] To answer this question, I must first of all determine whether each of the seizures was executed by the military police investigator pursuant to a prior authorization. I must then determine the lawfulness of such a seizure on the basis of the criteria applicable to the situation. Finally, I must assess the way in which the seizure was executed.

i. Documents seized pursuant to an application for disclosure to a federal investigative body (Exhibit R1-3) under paragraph 8(2)(e) of the Privacy Act

[119] Counsel for M.S. claims that obtaining documents pursuant to an application for disclosure to a federal investigative body (Exhibit R1-4) pursuant to paragraph 8(2)(*e*) of the PA is a warrantless seizure because the criteria mentioned by the Supreme Court in *Hunter*, *supra*, at paragraph 62 of this decision, were not respected, especially because the authorization obtained by the military police investigator was not given by a judicial authority.

[120] The respondent submits that for the purposes of this application, it is not because there is a reasonable expectation of privacy regarding these documents that it is automatically necessary for the military police investigator to obtain a search warrant under the relevant provisions of the *Criminal Code* to validly seize these documents. In fact, counsel submits that obtaining documents under a statute such as the PA is justified and valid in such a context, as illustrated in *R.* v. *Stucky*, 68 W.C.B. (2d) 288.

[121] I fully agree with the applicant that the authorization obtained by the military police investigator is not a prior judicial authorization within the meaning of *Hunter*, *supra*, and that obtaining the documents listed in Schedule 6 of this decision pursuant to an authorization under the PA constitutes a warrantless seizure.

[122] On the other hand, I also agree with the respondent that in such a context this seizure was not unreasonable because it met the criteria set out by the Supreme Court at paragraph 23 of *R.* v. *Collins*, [1987] 1 S.C.R. 265:

> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. In this case, the Crown argued that the search was carried out under s. 10(1) of the *Narcotic Control Act*, *supra*. As the appellant has not challenged the constitutionality of s. 10(1) of the Act, the issues that remain to be decided here are whether the search was unreasonable because the officer did not come within s. 10 of the Act, or whether, while being within s. 10, he carried out the search in a manner that made the search unreasonable.

[123] As mentioned at paragraph 17 of the Federal Court of Appeal decision in *Privacy Act (Can.) (Re)*, [2000] 3 F.C. 82, confirmed by the Supreme Court of Canada at [2001] 3 S.C.R. 905:

> The *Privacy Act* therefore clearly contemplates, and distinguishes between, the collection of information, which can only be for purposes related to the activity of the institution -- in this case,

> direct collection by Customs of the information found in Form E-311 and indirect collection by the Commission, through Customs, of that part of the information found in Form E-311 which is relevant to the activity of the Commission -- and the disclosure of information, which, in most cases, is for purposes other than those for which it was collected and for purposes related to the activity of the requesting institution.

[124] In fact, this is the approach taken by the judge in *Stucky*, *supra*. Therefore, I am of the opinion that the seizure of the documents was authorized under the PA because they contained personal information within the meaning of this Act, that is to say, information about the applicant's medical record or any identifying number, symbol or other particular assigned to him.

[125] In addition, as the judge mentioned at paragraph 17 in *Stucky*, *supra*, the only way that personal information can be accessed under this Act is if it is within the public domain, if the applicant consents to its disclosure or if the disclosure is sought by an organization under section 8 of the PA. This last possibility was the one applied in this case and the documents containing this information were disclosed in accordance with the exception in paragraph 8(2)(*e*) of the PA, that is to say, to an investigative body specified in the regulations, further to a written application, for the purpose of enforcing federal legislation, namely, the *National Defence Act* and the *Criminal Code*, as part of an investigation concerning the application of the Code of Military Discipline in the *National Defence Act*.

[126] I would like to specify that the military police is mentioned in Schedule II to the *Privacy Regulations* (SOR/83-508) as an investigative body within the meaning of paragraph 8(2)(*e*) of the PA.

[127] As was so aptly mentioned by the respondent, the applicant did not raise the issue of the unreasonableness of the PA or of any of its provisions.

[128] In addition, the seizure of the documents was not unreasonably executed. On the contrary, the military police investigator complied with procedural requirements, as he made his application twice, since the first one did not meet the requirements of the person in charge of the institution. In addition, the military police investigator simply gave his authorization to the staff at the medical clinic, who complied with it when it was possible to do so. In fact, it was the staff at the medical clinic who had access to the applicant's medical record and who prepared the documents mentioned in the authorization and gave them to the military police investigator. From this point of view I do not see anything unreasonable. On the contrary, the investigator barely intervened in the process of obtaining the documents.

[129] Accordingly, the documents identified in Schedule 6 of this decision that were obtained pursuant to an application for disclosure to a federal investigative body (Exhibit R1-4) under paragraph 8(2)(*e*) of the PA, and concerning which I previously determined that the applicant had a reasonable expectation of privacy, were obtained in a reasonable, valid and legal manner, and the applicant's rights under section 8 of the Charter were not infringed.

ii. Documents seized under a search warrant issued on February 23, 2006, and executed on February 24, 2006

[130] M.S. argues that the search warrant issued on February 23, 2006 (Exhibit R1-8) is illegal because:

a. The description of the item to be seized in the information (Exhibit R1-7) and in the warrant itself was too vague and general;

b. The information to obtain the warrant (Exhibit R1-7) did not show if the informant, Sergeant Paré, made a sworn statement or a solemn affirmation before the justice of the peace, and the affidavit submitted in support of the information had not been signed by Sergeant Paré and therefore no sworn statement or solemn affirmation had been made by the affiant before the justice of the peace.

[131] It was on the basis of this warrant that the military police investigator seized the 24 other documents mentioned in Schedule 6 of this decision.

[132] It must be noted that when a court conducts a review of the issuance of a search warrant, it is conducting a judicial review of this decision. Consequently, there is no question here of proceeding *de novo*. Instead, the question to be determined is whether, when the warrant was issued, the judicial authority had the necessary evidence to be satisfied that the prerequisite conditions existed. If the answer is that there was no such evidence, the court's intervention is warranted.

[133] As far as the first ground raised by the applicant is concerned, I am of the opinion that we must rely on the ordinary meaning of the words used in the information and in the search warrant, namely, [TRANSLATION] "will afford evidence with respect to the commission of the following offence". In fact, this is the approach taken by the Supreme Court of Canada in *Canadian Oxy Chemicals Ltd.* v. *Canada (Attorney General)*, [1999] 1 S.C.R. 743. The Court wrote the following at paragraph 15 of the judgment:

> On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.

[134] In the context of this application, uncontradicted evidence was produced to the effect that Sergeant Paré wished to obtain M.S. medical record to determine whether other documents had been altered or forged and used for the purposes of the applicant's request for a transfer to the Regular Force, given the analysis of some documents he had already obtained from the same medical record following his application for disclosure under the PA. In addition, it has already been established that a number of the documents from the medical record could be used for

comparison purposes to confirm the forgery or alteration of the documents that were the subject of the fraud allegations.

[135] I consider that the description of the item to be seized was not too general because the content in question, namely, all the documents in the medical record, could logically relate to the incident being investigated, that is, the fraud, as its actual extent was unknown and could not really be determined without obtaining these documents, some of which already appeared to be questionable.

[136] As for the failure to have the informant sworn, I am aware of the requirements of reliability mentioned in *Hunter*, *supra*. However, as illustrated in the remarks made by Mr. Justice Béliveau of the Quebec Superior Court in *Société Radio-Canada* v. *Montréal (Communauté urbaine) Service de police*, [2000] J. Q. No. 1936, more specifically at paragraphs 24 to 26, such an error may be corrected as part of the amplification process when examining the validity of the search warrant.

[137] In this case, in compliance with the Supreme Court decision in *R.* v. *Garofoli*, [1990] 2 S.C.R. 1421, I authorized the applicant to question Sergeant Paré on the two issues he raised about the validity of the search warrant which I previously identified. I also allowed the respondent to amplify on these two aspects by also allowing the respondent to examine the witness on these two issues.

[138] Sergeant Paré, the military police investigator in this case, testified clearly, directly and coherently. He properly explained the various steps of the seizures he executed and the reasons for his actions. When questioned by counsel for the applicant on the reasons why he used a search warrant, he seemed to me to answer properly, sincerely and on the basis of his knowledge and personal experience.

[139] As for the omission of the informant's oath on the information and the affidavit in support of the information, the testimony given by Sergeant Paré was clear, honest and coherent. Because there was no significant event that occurred that would allow him to precisely remember what happened before the justice of the peace on February 23, 2006, and considering that he has been an informant in several other applications for search warrants since two years, it seems to me to be normal that he could assert in court that he did not precisely remember if he was sworn by the justice of the peace. On the other hand, he was able to state that because of the procedure he usually followed in these matters, it was more than probable that he had been sworn by the justice of the peace, on the affidavit as well as the information. I conclude that his testimony is reliable and credible.

[140] In my opinion, the testimony of Sergeant Paré is sufficient to correct the defect raised by the applicant about the failure to be sworn on the information and the supporting affidavit.

[141] Accordingly, I conclude that the justice of the peace who issued the search warrant was entitled to do so and therefore I will not intervene.

iii. Documents seized under the search warrant issued and executed on March 2, 2006

[142] On March 2, 2006, the military police investigator, Sergeant Paré, submitted an information (Exhibit R1-9) that led to the issue of a search warrant by the justice of the peace - magistrate (Exhibit R1-10) authorizing the seizure of Major Descoteaux's memo and attachments (Exhibit R1-5, Schedule U). It appears from the testimony of Sergent Paré and his affidavit submitted in support of the information that this memo, its schedule and the attachments, were already in the investigator's possession following an application for disclosure to a federal investigative body (Exhibit R1-4) under paragraph 8(2)(*e*) of the PA.

[143] The applicant argues that the execution of the warrant was unreasonable, but is not challenging its validity. In fact, M.S. claims that the fact of seizing the same document with a search warrant, even though it had already been seized without a warrant, is in itself unreasonable and is an infringement of his right guaranteed under section 8 of the Charter.

[144] As Sergeant Paré stated when he was examined on this specific point and as appears from his affidavit in support of the information to obtain the search warrant, the goal was to seize a copy of the documents with the search warrant and for which he had reasonable and probable grounds to believe were evidence of the commission of a criminal offence. It should be recalled that he had previously obtained all the documents attached to the memo by other means, that is, further to his application for disclosure under the PA or when the search warrant was executed on February 24, 2006.

[145] According to the police officer's testimony, he wanted to make sure that he had valid possession of the memo and the attached documents, as this was evidence in his view. My understanding of the police officer's explanations on this point is that after having read the documents supposedly at the crux of the alleged incident and in connection with it that he had obtained pursuant to an application under the PA, he considered that it would be appropriate to have a search warrant to seize a copy of the documents he had in his possession, the originals of which had already been seized with a first search warrant. In no case did I have the impression that Sergeant Paré had tried to validate a warrantless seizure by executing a seizure with a warrant. In addition, considering my conclusion about the validity of the warrantless seizure under the PA, the police officer was attempting to obtain authorization to seize something that he already validly had in his possession.

[146] In my opinion, it is not unreasonable for police authorities to act in this manner as long as the Court is not called on to approve an illegality committed by a judicial authority in granting an authorization prior to a seizure or by clearly making good on a warrantless seizure that the police officer knows is illegal.

[147] Accordingly, the context in which the seizure was conducted and the way in which it was executed do not show any abuse by the police when they seized the memo, the schedule and the attachments under the search warrant that had been issued for that purpose.

iv. Conclusion about the reasonableness of the seizure

[148] Therefore, I find that the seizure of the 31 documents mentioned in Schedule 6 of this decision and for which I determined that M.S. did have a reasonable expectation of privacy was not unreasonably executed.

Conclusion about section 8 of the Charter

[149] I find that M.S. did not establish on a preponderance of evidence that the 36 documents produced as evidence by the prosecution in this trial, that I listed in Schedule 5 of this decision and that he identified by means of the objection he made in their regard were obtained in a way that infringed his right to be secure against unreasonable search or seizure under section 8 of the Charter.

Subsection 24(2) of the *Charte*r

[150] First of all, I would like to specify that because of my finding that M.S. right under section 8 of the Charter was not infringed, I cannot do otherwise than find that the applicant also did not establish on a preponderance of evidence that the document expert's report (Exhibit 20) must be excluded.

[151] In fact, M.S. submitted that if I found that the documents that were used as a basis for the document expert's report had been obtained as a result of an infringement of his rights under section 8 of the Charter and if I ordered their exclusion, I could only arrive at the same conclusion concerning the document expert's report. Because this is not the case, I cannot go along with the applicant's request.

[152] Accordingly, I find that the expert's report is not to be excluded under subsection 24(2) of the Charter.

[153] Finally, if I had concluded that the documents in question had been obtained in conditions that infringed M.S. right to be secure against unreasonable seizures, as specified in section 8 of the Charter, I would have nevertheless concluded that these documents, including the document expert's report, were not to be excluded under subsection 24(2) of the Charter.

[154] The circumstances of the various seizures show that the military police investigator had always tried to use legal authorizations that he considered valid to obtain evidence he considered was required to prove the applicant's guilt. At no time did he try to voluntarily exceed his legal authority or that of another organization. In fact, he took several precautions to ensure that he properly obtained the documents in question, as he understood that there was a certain level of confidentiality about them.

[155] Therefore, I conclude that the conduct of the military police was not reprehensible because the investigator honestly and reasonably believed that he was respecting the applicant's right under section 8 of the Charter. The investigator's conduct does not seem to me to be that of someone who disregards the law.

[156] On the other hand, I am of the opinion that this constitutional infringement would be of minor importance since its intrusiveness was limited, since the investigator had reasonable and probable grounds to execute the seizures, that the number of Charter infringements is very limited and that there were actually no other means of investigation in the circumstances.

[157] This leads me to conclude that the seriousness of any infringement would be minimal, because by his conduct the military police investigator tried to minimize the impact of his intervention on the applicant's right to privacy.

[158] Finally, considering the seriousness of the offences and the nature and importance of the evidence that is the subject of this application, including its probative value, I find that the exclusion of this evidence that would bring the administration of justice into disrepute.

CONCLUSION

[159] The application made by M.S. to have the Court order the exclusion of the evidence identified in Schedule 5 of this decision, as well as the exclusion of the document expert's report, under subsection 24(2) of the Charter because they were obtained in conditions that infringed the applicant's right to be secure against unreasonable seizures as specified under section 8 of the Charter is accordingly dismissed.

[160] The voir dire concerning this application is now closed.

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