

**Citation:** *R. v. Corporal J.L. Hentges*, 2008 CM 1023

**Docket:** 200854

**STANDING COURT MARTIAL  
CANADA  
QUEBEC  
ASTICOU CENTRE, GATINEAU**

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**Date:** 27 November 2008

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**PRESIDING: COLONEL M. DUTIL, C.M.J.**

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**HER MAJESTY THE QUEEN**

**v.**

**CORPORAL J.L. HENTGES  
(Applicant)**

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**DECISION ON AN APPLICATION TO EXCLUDE EVIDENCE UNDER  
SECTION 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*  
FOR AN ALLEGED VIOLATION UNDER SECTION 8 AGAINST  
UNREASONABLE SEARCH OR SEIZURE  
(Rendered Orally)**

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[1] Corporal Hentges is charged with an offence under paragraph 125(c) of the *National Defence Act* for altering a document issued for a military purpose. The particulars of the charge allege that on or about 15 October 2007, at Ottawa, Ontario, with intent to deceive, altered a CF 2018, "sick chit," to indicate that he was off duty.

[2] During the testimony of the first witness called by the prosecution, Sergeant D. Fulljames, defence counsel raised an objection and asked this court to enter into a *voir dire* to hear an application to exclude evidence for an alleged violation of Corporal Hentges' rights against unreasonable search and seizure pursuant to sections 8 and 24(2) of the *Canadian Charter of Rights and Freedoms (Charter)*. The prosecution objected to the *voir dire* as being premature. After hearing submissions from both parties, the court decided to hear the application in order to deal with the issue.

[3] The defence alleges that the conduct of the police in not obtaining a search warrant to obtain two different copies of a Sick Report, CF 2018, from Sergeant Fulljames, violated the rights of Corporal Hentges under section 8 of the *Charter*, and that these reports, even if they were obtained from a person who had them lawfully, should be excluded from evidence at trial. Defence counsel asked also that the

testimony of Sergeant Fulljames and the treating physician, Captain Liew, be ruled inadmissible. Defence counsel submits that the sick reports contain medical information about Corporal Hentges and, therefore, regardless of their inherent purpose, their use was subject to a reasonable expectation of privacy. On the basis that these documents have been raised and transmitted for a different purpose for which Corporal Hentges inherently agreed with, their seizure by the military police at the beginning of their investigation into an alleged offence, without a search warrant, was in direct violation of the right against unreasonable search and seizure. The prosecution argues that the accused had no reasonable expectation of privacy in the Sick Reports, CF 2018s, and that there was no breach under section 8 of the *Charter*. The prosecution, alternatively, submits that if a breach occurred, the court should not exclude the evidence under section 24(2).

[4] During the *voir dire*, the following exhibits were filed by consent of the parties:

Exhibit VD1-1, which is a copy of a sick report dated 15 October 2007 concerning Corporal Hentges, with annotations made by Sergeant Fulljames, that was received by Corporal Meecham from the military police on 18 October 2007;

Exhibit VD1-2, which is a copy of a sick report dated 15 October 2007 concerning Corporal Hentges that was originally received from Canadian Forces Health Services by Sergeant Fulljames and handed to Corporal Meecham on 18 October 2007;

Exhibit VD1-3, which is a series of admissions by both parties; and

Exhibit VD1-4, which is CANFORGEN 128/03 ADMHRMIL 061 241824Z OCT 03 entitled "CDS Direction to the Chain of Command Regarding Medical Care Prescribed and Medical Employment Limitations Assigned By Medical Staff to CF Members."

[5] The court also heard the testimony of Sergeant Fulljames, Captain Liew, and Corporal Meecham.

Sergeant Fulljames testified that he is and was the supervisor of Corporal Hentges at the time of the alleged offence. He stated that on 15 October 2007 Corporal Hentges gave him a sick report which is identical to VD1-1. Upon reading the document, Sergeant Fulljames was not sure exactly what it meant. Corporal Hentges said that he was not sure. He decided to clarify the matter with Health Services, and phoned a Mrs Diane Dakers, a medical services clerk. During the phone conversation, she obtained the original sick report concerning the accused held in the folder

at the sick parade desk, which is located at the emergency department of the CF Health Services Centre, and faxed the document to Sergeant Fulljames, of which a copy was filed in court as Exhibit VD1-2. Sergeant Fulljames told the court that while talking to Mrs Dakers it became clear that the sick report contained discrepancies in the portion entitled "special notes/instructions." The document received from Corporal Hentges stated, in part, "off duty by seven days" or "'x' seven days," where the copy held by Mrs Dakers stated, in part, "desk duty by seven days." She faxed her copy to Sergeant Fulljames and he did the same to her. After noticing the discrepancy on both documents, he discussed the matter with his supervisor, Master Warrant Officer Fillion. Three days later, he was instructed by Master Warrant Officer Fillion to call the military police and file a report. Corporal Meecham, a military police person, arrived in his office and had Sergeant Fulljames file a report. He gave him the documents entered as Exhibits VD1-1 and VD1-2 at the request of the police. Sergeant Fulljames stated that a sick report is a document that provides him with recommendations as to treatment concerning one of his subordinates. He stated that when he spoke to Mrs Diane Dakers he didn't want to know about Corporal Hentges' medical issue with his knee, but he wanted to clarify the instructions on the sick report for the chain of command. He assumed that the original charge was laid by Master Warrant Officer Fillion, and that's the end of his testimony.

Captain Liew, a medical doctor, testified that she had met the accused at a sick parade on 15 October 2007. She wrote the special instructions on the original Sick Report, CF 2018, concerning Corporal Hentges on the set date, as well as the bottom portion of the document which bears her signature. The remaining portions of the document were filled in by a medical assistant or a nurse. She testified that Corporal Hentges came to see her for a knee problem. After making her diagnosis, she gave him a plan to follow, which included work limitations. She wrote the medical information on a medical chart, "notebook," referred to as a CF 2016. She testified that a CF 2018 does not contain a diagnosis despite a box to that effect on the left side of the form. She told the court that normally the original sick report stays at the MIR sick parade and the member is provided with a copy. She explained that the purpose of this document is to inform the chain of command as to work limitations or special instructions and not about medical treatment. She explained that the purpose of this document is limited to information that the chain of command needs to know and contains no medical information, i.e., the sick report protects the patient's confidentiality. Captain Liew testified that the chain of command must respect the information provided on the

sick report concerning employment limitations. In doubt, the chain of command, i.e., commanding officers and supervisors, must clarify, and they must clarify through the medical people. She explained that the document does not contain confidential information, although it is a document that would be available only to those with a need to know.

Finally, Corporal Meecham testified that on October 18, 2007, he received the documents marked as Exhibits VD1-1 and VD1-2 from Sergeant Fulljames after an interview concerning allegations that one of his subordinates, Corporal Hentges, had altered a sick report. In the course of his investigation he spoke to Mrs Dakers and a Ms Bosse, he spoke also to Corporal Hentges over the phone on numerous occasions, but met with him only once. He did not obtain a search warrant to obtain the sick reports after receiving them from Sgt Fulljames because he felt that he was in lawful possession of them. He never obtained the original documents. In response to a question from defence counsel, he explained that he did not obtain a search warrant as he believed that Corporal Hentges had no expectation of privacy in these documents as the copy was in lawful possession of the unit. Corporal Meecham did not take any other action concerning this file and he was not involved in the charge laying process.

[6] The defence does not dispute the fact that the documents were in the lawful possession of the unit. The violation of the rights of the accused would reside in the actions of the police because the police obtained documents in the conduct of police operations for use in a prosecution against Corporal Hentges despite the fact that they were originally transmitted to the unit for other purposes and legitimately in the possession of the chain of command. The defence further argues that since the documents contain medical information for which there is a reasonable expectation of privacy, the conduct of the police in the circumstances equals to a seizure without consent or not pursuant to law and thus a warrantless search in violation of section 8 of the *Charter*.

[7] The defence submits that the case at bar is analogous to the decision of the Supreme Court of Canada in *R. v. Colarusso*,<sup>1</sup> where the majority held that if a bodily sample is seized by a party other than the police, but is ultimately used against a person in a criminal prosecution, the court must go beyond the initial non-police seizure and determine whether the actions of the police constitute a seizure by the state or make the initially valid seizure by non-police unreasonable. Counsel for the defence relies also

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<sup>1</sup> [1994] 1 S.C.R. 20.

on other decisions from the Supreme Court of Canada; namely, *R. v. Dymnt*, *R. v. Dersch*, *Hunter v. Southam*, *R. v. Collins*, and *R. v. Wong*.<sup>2</sup>

[8] Over the last decades, the Supreme Court of Canada has profoundly altered the business of law enforcement and have required the police to substantially modify their practices in order to adapt to new constitutional standards set out in the *Charter*. Section 8 of the *Charter* provides:

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

The purpose of this section was to protect individuals from unjustified state intrusions upon their privacy. In other words, it is concerned with the protection of citizens' privacy. Privacy is a broad concept, touching upon many aspects of human liberty, dignity, self-fulfilment, and autonomy. An accused is only entitled to challenge the propriety of police search or seizure under section 8 of the *Charter* if the state conduct interfered with his or her privacy interests. Any state conduct which interferes with a reasonably held expectation of privacy will constitute a search or seizure for constitutional purposes. The governing principles were set out by Cory J. in the case of *R. v. Edwards*<sup>3</sup>:

1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed....
2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places....
3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated....
4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably....
5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances....
6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:

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<sup>2</sup> *R. v. Dymnt*, [1988] 2 S.C.R. 417; *R. v. Dersch*, [1993] 3 S.C.R. 768; *Hunter v. Southam*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265; and *R. v. Wong*, [1990] 3 S.C.R. 36.

<sup>3</sup> [1996] 1 S.C.R. 128, at pp. 145-146.

- (i) presence of 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.

...

7. If an accused ... establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

The totality of circumstances test is based on two central questions:

1. Does the accused have a reasonable expectation of privacy in the location that was searched; and/or
2. Does the accused have a reasonable expectation of privacy in the item or items seized by the police.

[9] When I look at the evidence before the court, I conclude that a Sick Report, CF 2018, is not a medical record, it is an administrative document for the management of personnel in the Canadian Forces. It is used by medical staff, including doctors and nurses, health service personnel, the member, and his or her chain of command. It serves minimal clinical functions as the medical information protected, such as the diagnosis or medical treatment, is recorded in a separate document described by Captain Liew as the CF 2016. Its main purpose is to notify the member's unit and chain of command in providing the following:

1. The whereabouts of a CF member on duty, but not at his or her regular place of duty; and
2. Inform the chain of command and unit as to any employment limitation for a defined period.

The chain of command is not informed of the specific medical condition or diagnosis of a subordinate nor informed of the prescribed medical treatment. Employment limitations are not medical treatments. The document is not classified. A supervisor can obtain such a document on request, on a need to know basis, without the consent of the member. When the member provides the document to his chain of command on request or otherwise, he doesn't do so by consent, he is only a messenger and the message could be transmitted in other ways, for example, by fax or courier from clerks working at Health Services.

[10] In this context, did Corporal Hentges have an expectation of privacy in the location where the sick reports were handed to the military police? I must answer in the negative. The sick reports were provided to the police by Sergeant Fulljames at his workplace. Corporal Hentges had no expectation of privacy in Sergeant Fulljames's place of work. The documents were in the lawful possession of Sergeant Fulljames. In other words, they were not retrieved from a place where Corporal Hentges could have claimed a reasonable expectation of privacy such as his locker, his personal file cabinet, or even a drawer in his personal desk.

[11] Did Corporal Hentges have a reasonable expectation of privacy in the sick reports or in the information contained in these reports? In this case, the defence concedes that the privacy interest fundamentally is, if not exclusively, informational. In *R. v. Tessling*,<sup>4</sup> Justice Binnie, for the court, provided the following guidance in the context of informational privacy at page 445:

Privacy is a protean concept, and the difficult issue is where the "reasonableness" line should be drawn. Sopinka J. offered a response to this question in the context of informational privacy in *Plant*, *supra*, at p. 293, as follows:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect ... 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...

[12] Corporal Hentges did not testify on the *voir dire* on his section 24(2) application to exclude evidence. The court is bound by the evidence before it. Based on the totality of the circumstances, the court is not satisfied that Corporal Hentges would have had or would have a subjective expectation of privacy in a document that does not contain

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<sup>4</sup>[2004] 3 S.C.R. 432.

private information, according to the testimony of Captain Liew, that is generated for merely administrative purposes independently of the service member. The court concludes that the purpose of a sick report is to largely inform the chain of command of a subordinate's employment limitations for a defined period. Other than the service number, it does not reveal any private or classified information, medical diagnosis, or treatment. The part of the document referred to as diagnosis is not used as such by medical doctors and serves only as a note for medical staff prior to the consultation with a medical doctor. This simple fact could not be reasonably used to change the nature of this document in light of the totality of the evidence. The information generated by this document and its dissemination would not *prima facie* cause any impact on a reasonable privacy interest. It does not intrude in the reasonable sphere of privacy of Corporal Hentges.

[13] It is conceded that Corporal Hentges had a genuine interest in the document, but not because it discloses medical or private information for which he claims a reasonable expectation of privacy. The interest lies in the nature and the purpose of the document because it states precisely the conditions under which his superiors can order him to perform military duties. This should not be confused with a subjective expectation of privacy. In determining whether there is an objective expectation of privacy in those documents, the court has considered the facts that the documents were seized in the area of the workplace where the accused had no personal ownership or privacy interest. However, the crucial issue in this case lies with the nature of the information for which Corporal Hentges claims that he had a reasonable expectation of privacy. It falls to the claimant to point to the evidence sufficient to establish the requisite privacy interest. Counsel for the defence stated that the sick reports contained medical information. This is not supported by the evidence of Dr Liew. The fact that a sick report finds its way into the member's medical file does not make it a document that contains medical information. However, as much as someone does not have any privacy interest in the office of his treating physician, the person has clearly a reasonable expectation of privacy as to what occurred in that office and the written or verbal disclosure on his health condition. The special notes/instructions contained in the sick reports do not reveal any confidential health matters, but work limitations to be followed by the chain of command in the employment of Corporal Hentges. Although it is very well true that persons may have a reasonable expectation of privacy over documents and other information held by other persons in different places, it remains that the nature and purpose of the information in them shall support the claim for a reasonable expectation of privacy because they include items that are of a very personal or private nature. This is not the case here. Therefore, the court concludes that there is no objective expectation of privacy in the document itself and in the information therein.

[14] For these reasons, the court concludes that Corporal Hentges has failed to establish that he had a reasonable expectation of privacy in the information contained in



the sick reports, therefore, he failed to establish that section 8 of the *Charter* was engaged in this context. The application is dismissed.

Colonel M. Dutil, C.M.J.

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