

Citation: *R. v. Master Corporal R.M.F. Fraser*, 2008 CM 2014

Docket: 2007-67

PRELIMINARY PROCEEDING
CANADA
QUEBEC
ASTICOU CENTRE

Date: 19 September 2008

PRESIDING: COMMANDER P.J. LAMONT, M.J.

MASTER CORPORAL R.M.F. FRASER
(Applicant)
v.
HER MAJESTY THE QUEEN
(Respondent)

**DECISION RE AN APPLICATION TO
RESCHEDULE THE DATE OF TRIAL
PURSUANT TO QR&O 112.03**

[1] Master Corporal R.M.F. Fraser is charged in a Charge Sheet with two offences contrary to the *National Defence Act*; that is, a charge of manslaughter contrary to the *Criminal Code*, and a charge of negligently performing a military duty contrary to section 124 of the *National Defence Act*, both said to have occurred on August 9, 2006. The trial is scheduled to proceed before a General Court Martial commencing October 14, 2008 at Canadian Forces Base Shilo, Manitoba.

[2] By a Notice of Application dated September 5, 2008 and returnable September 17, 2008 (marked Exhibit PP1-1) the accused, by counsel, seeks a new date for the trial. On September 19, 2008 I heard the application at Gatineau, Quebec by video-conference. At the conclusion of the argument I denied the application with reasons to follow. These are those reasons.

[3] The applicant seeks a new trial date on the ground of what is said to be a failure on the part of the prosecution to make proper disclosure in accordance with *R. v. Stinchcombe* [1991] 3 S.C.R. 326. The material in issue is described as the “bench notes” of one Darryl G. Barr, a forensic specialist in the firearms section of the Royal Canadian Mounted Police Forensic Laboratory in Halifax. I understand this term to be a reference to the working papers of Mr. Barr which were prepared in the course of his

examination of a Canadian Forces C7A2 automatic rifle. The weapon is the subject of Mr. Barr's report dated September 9, 2008 and sent to the Canadian Forces National Investigation Service in Edmonton. I am told the report was received by the defence on September 14, 2008, nine days after the filing of this application. Since then the defence has communicated to the prosecution a request for the working papers. As of the date of the argument of the application the working papers of Mr. Barr were not yet in the hands of the prosecution and had not yet been supplied to the defence, but it is expected that both the prosecution and the defence will receive those materials within a week or so.

[4] In the course of submissions from counsel I was told that the defence wishes to put the report of Mr. Barr together with his working papers before their own expert. Counsel suggests that a minimum of 90 days is necessary for the defence expert to review the material and prepare to give evidence for the defence, and for counsel to give notice of his intention to call the evidence of an expert under section 657.3 of the *Criminal Code*. For these reasons a new trial date is sought.

[5] The prosecution opposes an adjournment of the trial. The prosecutor points out that the report of Mr. Barr dated September 9, 2008 is but the latest of four reports authored by Mr Barr, and all of them have been disclosed to the defence as they became available at various times back to early August of 2007 when the first report, dated September 26, 2006 was disclosed. It was only very recently that the defence first requested the working papers of Mr. Barr, and they are in the course of being obtained.

[6] I have examined copies of the four reports signed by Mr. Barr. The first three reports were all disclosed by the end of November 2007 and concerned Mr. Barr's examination of the C7A2 rifle referred to above as well as two other firearms, a cartridge case, three damaged cartridges, various metal fragments, and various items of clothing and equipment. The fourth and most recent report deals with a G-Wagon, described as a Canadian Forces Light Utility Vehicle, which is said to be "the type of vehicle involved in the incident." An examination was conducted to determine certain distances inside a G-Wagon and the possible positioning of the C7A2 rifle in relation to the deceased.

[7] The prosecution submits that in determining the application this court should be guided by the decision of the Supreme Court of Canada in *Darville v. The Queen* (1956) 116 C.C.C. 113. Specifically, the prosecution submits that the defence is guilty of delay or neglect in omitting to endeavour to procure the attendance of a properly prepared expert witness, and has therefore failed to meet the conditions for the granting of an adjournment set out in the judgments of Taschereau J and Cartwright J in *Darville*.

[8] I am not persuaded that the *Darville* factors apply to the present case. *Darville* was a case where an adjournment of the trial was sought to permit the defence

to subpoena witnesses. In the present case, the defence is yet to identify a suitable expert, and therefore does not know what a defence expert may be able to say, and therefore could not have yet decided whether to call the expert evidence of a firearms examiner.

[9] Nor do I consider that the issue here is one of a failure to discharge the duty of disclosure. It is suggested by the defence that the working papers of a proposed expert witness such as Mr. Barr are within the obligation upon the prosecution recognized in *Stinchcombe*, and should have been disclosed at the time Mr. Barr's report was disclosed, even without a specific request from the defence identifying a need for the working papers. But if that were the case, then in order to discharge the burden of exercising due diligence, of which the Supreme Court of Canada spoke in *R. v. Dixon* [1998] 1 S.C.R. 244, the defence should have brought this omission to the attention of the prosecution long ago when the first three reports were disclosed, apparently without the accompanying working papers. I have been given no reasons as to why this material was first sought by the defence as late as a few days before the application was argued.

[10] The question of whether an adjournment of the trial should be granted is a matter for the discretion of the trial judge. That discretion is to be exercised judicially taking account of all the relevant circumstances. The relevant circumstances in this case include the following:

- a. the trial date was set some months ago, apparently prior to the time Lieutenant Colonel Sweet was retained to conduct the defence in late April or early May of 2008;
- b. three weeks of court time have been set aside for the trial;
- c. five members of the Canadian Forces, and three alternates, have been designated by the Convening Order to constitute the panel of the Court and ordered to appear and remain available for the duration of the trial;
- d. 31 witnesses have been summonsed by the prosecution;
- e. this is the first application by either party to adjourn the trial;
- f. the defence was aware as long ago as early August of 2007 that the expert evidence of a firearms examiner might be called by the prosecution; and
- g. to this point the defence appears to have taken only very preliminary steps toward consulting a suitable expert.

[11] In all the circumstances I am not persuaded that the applicant has demonstrated a sufficient basis upon which the trial should be adjourned, and therefore the application was denied.

[12] Having said that, it may be that once the reports and working papers are examined by a defence expert, the expert may consider that some period of time is required for the expert to conduct an examination and prepare to give evidence. Of course, the defence is at liberty to apply again to adjourn the trial if there is insufficient time for the defence expert to prepare, but in that event I would normally expect to hear the evidence of the proposed expert witness in support of the application.

[13] Finally, I order that these reasons are not to be published in any manner until either the prosecution is terminated for any reason, or the panel of this General Court Martial delivers its findings, whichever event first occurs.

COMMANDER P.J. LAMONT, M.J.

COUNSEL:

Lieutenant-Colonel D.T. Sweet
Counsel for Master Corporal R.M.F. Fraser

Lieutenant-Colonel B.W. MacGregor
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