

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Desmond, (Re)

Re: An Inquiry under the *Fatality Investigations Act*, S.N.S. 2001, c. 31, as amended, into the death of Aaliyah Desmond, Brenda Desmond, Shanna Desmond and Lionel Desmond

**DECISION
INFORMAL REVIEW**

Judge: The Honourable Judge Warren K. Zimmer
Heard: June 21, 2021, in Port Hawkesbury, Nova Scotia
Counsel: Allen Murray, QC, Inquiry Counsel
Shane Russell, Esq., Inquiry Counsel

By the Court:

[1] This is my decision with regard to the release referred to as Veterans Affairs Canada, the VAC informal review.

[2] On April 20th, 2021, we had a discussion following the evidence that day relating to some documentation that had been provided to the Inquiry by counsel for the Attorney General of Canada.

[3] By way of a brief summary, on April 11th, 2021, Ms. Grant had sent an e-mail to Inquiry Counsel with some notes that had been prepared by Marie-Paule Doucette which had, apparently, been utilized as part of an informal file review conducted by Veterans Affairs Canada. The review is of the information that was documented into VAC's electronic data base called Client Service Directory Network [CSDN].

[4] The informal review document was not provided to Inquiry Counsel at that time as counsel for the Attorney General of Canada took the position that the report was protected by jurisdictional immunity and was outside the Terms of Reference of the Inquiry. Counsel did provide a copy of the informal report to Inquiry Counsel to allow me to review it and make a determination as to whether

or not it should be disclosed with or without redactions prior to disclosure. I understand counsel does not wish to make any further representations on the issue beyond what was earlier stated.

[5] I note that in the e-mail to Inquiry Counsel from Ms. Grant there was the following comment:

While we appreciate the results of any review conducted by CAF or VAC could be of some assistance to the Inquiry, both the review and results are beyond the terms of reference and will not be provided.

[6] The Rules of Procedure for the Desmond Inquiry include a provision relating to relevant document production. Paragraph 17 of the Rule states:

17. The term “relevant” is intended to have a broad meaning and includes anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry.

[7] The Order of the Minister directing this Fatality Inquiry at paragraph 3(d)(ii) reads in part:

3. The judge appointed to conduct the inquiry shall make and file with the Provincial Court a written report containing any findings made by the judge as to:

d. the circumstances under which the death occurred including

(ii) whether Lionel Desmond has access to appropriate mental health services, including treatment for Occupational Stress Injuries;

[8] Ms. Cassandra Desmond testified at this Inquiry, and through counsel, provided some of the e-mail correspondence that she had with Dr Alexandra Heber, Chief Psychiatry, Veterans Affairs Canada. By e-mail from Dr. Heber dated October 31st, 2017, the doctor wrote in part:

We would like to meet with you as part of a medical suicide review that we have been asked to do by Veterans Affairs Canada. The purpose of our meeting will be to get your perspective and thoughts, as we identify areas for improvement in the support of Veterans. We are very interested to hear what you and your family have to tell us.

[9] Later in an e-mail dated December 23rd, 2017, Dr. Heber said in part:

I have read the recent reports that the Nova Scotia medical examiner may call an inquiry. I hope that if this happens, you and your family will get answers to many of the questions.

[10] I have read the informal report and in my view it meets the test of relevancy, and with regard to the issue of jurisdictional immunity raised by Ms. Ward, as I said in my opening remarks on May 21, 2019 at page 15:

This Inquiry must also keep in mind the fact that it has limited authority to inquire into areas of federal jurisdiction.

In *Re Rogers*, [2017] AJ No 1079, Prov Ct Judge Richardson made a number of observations during a Fatality Inquiry, under the Alberta *Fatalities Inquiries Act*, in relation to this limitation. I borrow from her decision as follows, to give an overview of the issues:

17. Appellate courts have repeatedly pronounced that the constitutional jurisdiction for the Fatality Inquiries Act is derived from the assignment of the “administration of justice” to the provinces in s. 92(14) of the *Constitution Act*.

18. The Canadian Forces is a federal entity. The doctrine of paramountcy precludes any provincial statutory authority over a federally created or regulated body. The issue of the jurisdiction of a fatality inquiry over a federally regulated activity was the subject matter of *Mercier v. Alberta (Attorney General)*, 1997 ABCA 161. In that case, the Court found that a “fatality inquiry will be permissible if it does not intrude heavily on the core of the federal subject by regulating aviation accidents or investigating the management of the executive branch of the federal government” (para 13).

19. The Court of Appeal went on to direct the application of the dominant purpose principle to determine the jurisdiction of the scope of the fatality inquiry. Citing *Faber v. The Queen* [1976] 2 S.C.R. 9 from the Supreme Court, the Court of Appeal said “[Fatality inquiries are] to assist and reassure the public by exposing the circumstances of a death. An inquiry dulls speculation, makes us aware of the circumstances which put human life at risk and reassures all of us that public authorities are taking appropriate measures to protect human life” (*Mercier*, para 14).

20. The intersection of provincial authority over the administration of justice and the death of someone within a federal entity or federally regulated activity has attracted appellate consideration. In *Quebec (Attorney General) and Keable v. Canada (Attorney General) et al.*, 1978 CanLII 23 (SCC), Justice Pigeon held that no provincial authority could intrude into the management, regulation and practices of the RCMP, a federal agency. The Supreme Court in *Canadian National Railway Co. v. Courtois*, 1988 CanLII 82 (SCC) at para 24 interpreted *Keable* as standing for the proposition that “provincial commissions of inquiry...cannot be empowered by a province to investigate a federal institution...its services, rules, policies and procedure so as to make recommendations on changes to be made to those rules and methods” (para 24).

21. The appellate authority is clear that a provincial inquiry cannot become a *de facto* review into the organization, management, policies, procedures, practices or regulations of the Canadian Forces. The scope of this inquiry cannot be [that] broad...

In *Keable* the Court noted that when an inquiry into a matter that is within provincial competence reveals the desirability of changes in federal law, that the inquiry could “submit a report in which it appeared that changes in federal laws would be desirable”. This did not mean that the gathering of information for the

purpose of making such a report may be a proper subject of inquiry by a provincial inquiry. The inquiry cannot be indirectly that which it is prohibited from doing directly, as that would engage the doctrine of “colourability”.

[11] I read the informal review carefully and in my view disclosing it in the context of this fatality inquiry does not intrude upon federal jurisdiction. It does not intrude heavily into the federal areas and it does serve to reassure the public, that in this case, Veterans Affairs Canada are taking appropriate measures to protect human life.

[12] The informal review, in my view, is properly subject to disclosure and to be made available to counsel and will be released later today.

Zimmer, JPC