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 deaths of Aaliyah Desmond, Brenda Desmond, Shanna Desmond and Lionel Desmond

Ruling on Application for a Funding Recommendation by Cassandra Desmond, the Personal Representative of Lionel Desmond

Judge:	The Honourable Judge Warren K. Zimmer
Heard:	May 23, 2019, in Guysborough, Nova Scotia
Decision:	June 13, 2019
Counsel:	Adam Rodgers, Esq., for the Applicant Glenn R. Anderson, QC., for the Respondent

By the Court:

[1] Cassandra Desmond, who is appearing as the personal representative of the deceased Cpl. Lionel Desmond, has made an Application requesting that I make a recommendation to the Department of Justice for a funding structure related to her legal costs to participate in the Desmond Inquiry. Mr. Adam Rodgers, Esq., appears on behalf of Ms. Desmond.

[2] It is argued that any recommendation should take into account three principal criteria including the effective representation of the personal representatives, the reasonable indemnification of legal costs and the protection of the public purse by retainer terms that are comparable to other private bar retainers in the province.

[3] The applicant takes the position that I have jurisdiction to make such a recommendation and that it is appropriate in the circumstances to do so.

[4] Mr. Glenn Anderson, Q.C., appears as counsel for the Attorney General of Nova Scotia. During oral argument on May 23, 2019, I asked Mr. Anderson whether or not there was any "real contest" to the issue of whether or not I could make a recommendation if I chose to exercise my discretion in that manner. He commented that, applying the case law from Alberta, it appeared that I may have

implicit authority to recommend funding, however, the issue was whether it extended to a funding structure and the position of the Attorney General was that it did not.

[5] In ***Alberta v Kamel*** [2002] A.J. No. 751, Mason J. on an application for judicial review relating to certain decisions of Judge D.M. MacDonald acting at a public fatality inquiry under the provincial ***Fatality Inquiries Act***, concerning orders relating to the payment of legal costs by the government, at paragraph [41] noted:

> **[41]** However, I do find that there is authority for a Provincial Judge appointed to conduct a fatality inquiry to recommend funding for legal counsel on a proper exercise of discretion. This would depend upon the nature of the inquiry; the issues to be decided; the parties involved; their respective entitlements to appear with legal counsel; the effect on other parties unable, for whatever reason, to appear with legal counsel; and the respective rights and responsibilities of the parties at risk arising out of the inquiry. There may well be other valid considerations to take into account, depending upon the matter to be investigated, the circumstances leading up to the inquiry, its conduct, and the likely results following its conclusion.

[6] The Alberta Court of Appeal in ***Alberta (Minister of Justice) v Bjorgan***, [2005] A.J. No. 1244, considered an appeal from a decision on judicial review that held a judge on a fatality inquiry did not have the authority to order that legal fees and disbursements be paid by the Crown and quashed the funding order. At paragraph 11 the court stated:

> **11.** We therefore conclude that the duty of procedural fairness cannot provide a fatality inquiry judge with the authority to mandate that funded legal counsel be provided to a target of the inquiry. While it maybe desirable to provide this authority to public inquiry commissioners in light of social policy considerations, such authority would have to be specifically provided for in the governing legislation. As it currently stands, a fatality inquiry judge has the authority only to: (1) recommend that an individual obtain legal counsel; (2) recommend that an individual apply for Legal Aid if unable to afford counsel; and (3) recommend that the Crown pay an individual's legal costs in those circumstances where it is considered necessary.

[7] Justice J.J. Gill in ***Martin Estate v Alberta,*** [2011] A.J. No. 1100, on an application for an order requiring the Crown to pay for a parties` legal fees on a fatality inquiry, considered an inquiry judge`s authority with regard to a recommendation. After referencing paragraph 11 from ***Bjorgan***, *supra*, the justice stated, in part:

> **18.** The Applicants submit that the Fatality Inquiry judge is powerless to act because all she can do is recommend that the Crown pay an individual's legal costs in those circumstances where it is considered necessary.
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> **19.** In this case, the Applicants did not request that the Fatality Inquiry judge make such a recommendation. We do not know whether or not the Fatality Inquiry judge would have made such a recommendation if asked, nor do we know whether or not the Crown would pay the fees if the Fatality Inquiry judge were to make such a recommendation.
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> **20.** What is important at this stage of the analysis, however, is to assess whether or not the Fatality Inquiry judge is powerless to act. Clearly, that is not the case. The Fatality Inquiry judge can make a recommendation to the Crown. Making recommendations is an essential component of a fatality inquiry judge's statutory jurisdiction under the *Act*: s. 53(2).

> **22.** The Provincial Court judge conducting a fatality inquiry is in the best position to determine the scope of the inquiry and whether or not a participant requires the assistance of legal counsel. In light of this fact and a fatality inquiry judge's broad powers over procedural matters, it is reasonable to assume that a fatality inquiry judge would recommend that the Crown pay an individual's legal costs if that judge thought it was necessary in the circumstances. Additionally, it is reasonable to assume that any such recommendation would carry some weight and be considered seriously by the Crown given the judge's unique position. If the Crown accepted the recommendation, funding would be provided.
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> **23.** I conclude, therefore, that the Fatality Inquiry judge is not powerless to act and can assist participants who seek publicly funded legal counsel by making recommendations to the Crown where it is considered necessary. The power to make a recommendation is of significance. A participant who requires the assistance of legal counsel should formally request assistance from the fatality inquiry judge. The Applicants failed to do so in this case.

[8] In the present application, I am not being asked to make a general recommendation for funding but rather to recommend a specific hourly rate for counsel, the number of billable hours per day, no limitation on preparation time and an assessment process of the accounts by an independent lawyer.

[9] Mr. Anderson has filed his affidavit, to which he attaches as Exhibit 1 a copy of a letter dated May 1, 2019 to Mr. Rodgers, outlining the government's offer of funding assistance to the personal representatives. It reads in part:

> "I have authority to advise that the commitment of the Province to the personal representatives includes funding for counsel of their choice on the following basis:
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> . . .

> 4. Counsel fees at a rate of $220 per hour;
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> 5. Period for which fees are funded commences on January 1, 2019;
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> 6. Maximum number of counsel hours per day is 9;
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> 7. Maximum number of hours for preparation is 150. (Additional preparation time must be approved in advance);
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> 8. Counsel disbursements, such as copying, travel, mileage, parking, meals and accommodation, are at government employee rates;
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> 9. Counsel accounts (showing detailed time and attaching receipts) are subject to assessment and to be submitted monthly to an assigned official (separate from counsel)."

[10] Mr. Rodgers was in agreement with the funding commencement date of January 1, 2019, however, he suggested an hourly rate of $250 per hour. He recommended the maximum number of counsel hours per day at 10 and was agreeable with the specifications relating to counsel disbursements.

[11] With regard to counsel's accounts, he wanted them to be verified and approved by an independent lawyer either retained by the Inquiry itself for that purpose, or assigned by the provincial Department of Justice and fire-walled off from any lawyers acting in the Inquiry for the province, or alternatively, by a third-party lawyer retained by the province. He did not propose any limitation on preparation time.

[12] During his submissions, Mr. Rodgers in acknowledging that Justice Nunn recognized that limitations on preparation time were appropriate and that they could always be revisited as circumstances required, suggested that if there was going to be an initial limit on preparation time that it should be me and not the Department that reviews that number.

[13] In acknowledging that some assessment or review of the accounts was reasonable, he suggested a process whereby counsel submitted their accounts to the department, that is, to an independent lawyer within the department for review and if there was any dispute then the normal taxation route would be available. In his words: "That would, in some ways, Your Honour, eliminate the need to have a set cap on hours".

[14] At the hearing, Mr. Anderson was asked about a dispute resolution mechanism in the event the account reviewer and Mr. Rodgers could not come to some agreement and he advised that he did not have instructions to deal with that issue.

[15] In substance, I am being asked to make recommendations to the government, that relate to the spending of public funds, on issues that they have already addressed in their proposal to Mr. Rodgers.

[16] At the heart of this application lies a difference in the hourly rate offered by the government and requested by Mr. Rodgers in the amount of $30. The government has also committed 150 hours of preparation time with the caveat that additional hours are to be approved in advance. The parties do not seem to disagree on the need for some assessment of the accounts submitted, however, the government has no proposal for a review in the event any disputes cannot be resolved by agreement.

[17] The Supreme Court of Canada, in ***R v Cunningham,*** [2010] 1 SCR 331, in considering the inherent jurisdiction of superior courts, at paragraph 18, had this to say, at paragraph 19, regarding statutory courts:

> **19.** Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
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> > ... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime …
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> > *(ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board),* 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)
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> At page 343:

> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[18] In ***Ontario v Criminal Lawyers Association of Ontario,*** [2013] 3 SCR 3, (CLA) the Court at paragraph 66 noted that:

> …the experience with *Rowbotham* orders over the last two and a half decades has confirmed that an attitude of restraint, as, even in those *Charter* cases, courts have not considered it necessary to direct the rates to be paid to state-funded lawyers appointed to represent the accused.

[19] The Court referred to several appellate courts that had considered the issue and found it unnecessary to direct the rate of compensation. Reference was made to the case of ***R. v Chan***, 2002 ABCA 299 at paragraph 9 and 18:

> **9.** Courts are not the best qualified agencies to determine spending priorities for public funds: *Robinson, supra* at 487 (C.C.C.); *Rain*, supra at 192 (C.C.C.). Courts do not set, nor are they asked to set, elevated fees for doctors or other professionals such as nurses, accountants, or midwives. Courts do not set health care premiums, levels of taxation, sessional indemnities or jury fees.
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> **18.** Paragraph 65 found that the $150 per hour which the court imposed on the Crown would be "better suited" to this prosecution than would something unstated. But that is not the test. One can always find resources, persons, or means of higher quality. The "best around" is emphatically not the test. All that is required is a level of legal representation which ensures that the accused's answer to the allegations of his guilt is made available to the adjudicating court. Certainly not matchless Nobel-level privately retained representation.

[20] CLA was a decision that dealt with a number of cases before the court in which the trial judges had appointed *amicus* and thereafter had determined rates

and mode of payment that the Attorney General was required to pay. The court stated:

> **75.** In those exceptional cases where *Charter* rights are not at stake but the judge must have help to do justice and appoints an *amicus*, the person appointed and the Attorney General should meet to set rates and mode of payment. The judge may be consulted, but should not make orders regarding payment that the Attorney General would have no choice but to obey.
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> **80.** In summary, the ability to fix rates of compensation is not necessary for the court to make its power to appoint *amici curiae* effective, and the judicial process will not be weakened or imperilled if compensation cannot be ordered. Indeed, even following a *Rowbotham* application, when the courts have the jurisdiction to direct compensation for counsel appointed under s. 24(1) of the *Charter*, [page36] the courts have rarely found it necessary to direct the rates payable to defence counsel.
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> **81.** Allowing superior and statutory court judges to direct an Attorney General as to how to expend funds on the administration of justice, in the absence of a constitutional challenge or statutory authority, is incompatible with the different roles, responsibilities and institutional capacities assigned to trial judges, legislators and the executive in our parliamentary democracy.
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> **82.** In the end, what concerned the Court of Appeal was the proper course to follow if the Attorney General is unreasonable and a particular lawyer is not prepared to accept the rates for service as *amicus*. While trial judges have a number of options regarding how to proceed in the face of such an impasse, they do not have the power to determine what a reasonable fee is or to order the government to pay it. Such orders cross an impermissible line. The other pillars of government are accountable for establishing spending priorities and, so long as their initiatives pass constitutional muster, have the institutional capacity to define public policy and find program solutions. The Court must allow provinces the flexibility they require to meet their constitutional obligation to fund *amici*, when essential.
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> **83.** While the rule of law requires an effective justice system with independent and impartial decision makers, it does not exist independently of financial constraints and the financial choices of the executive and legislature. Furthermore, in our system of parliamentary democracy, an inherent and inalienable right to fix

> a trial participant's compensation oversteps the responsibilities of the judiciary and blurs the roles and public accountability of the three separate branches of [page37] government. In my view, such a state of affairs would imperil the judicial process; judicial orders fixing the expenditures of public funds put public confidence in the judiciary at risk.
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> **84.** For the reasons stated above, the ability to set rates of compensation for *amici* does not form part of the inherent jurisdiction of a superior court. Given this conclusion, it follows that the ability to set rates of compensation for *amici* does not form part of the implicit powers of a statutory court to function as a court of law.

[21] I am satisfied that I have jurisdiction to make a recommendation for funding in appropriate circumstances. A funding scheme has been proposed by the government, however, it is not acceptable to Mr. Rodgers who asks me to make more specific recommendations that relate directly to the expenditure of public funds. In my view, part of what Mr. Rodgers is asking me to do at this time oversteps my judicial authority and I decline to recommend a particular hourly rate or the number a billable hours in a day or preparation time limits.

[22] I accept that I can be consulted and in this regard would suggest that the parties meet to discuss a dispute resolution mechanism to deal with unresolvable billing issues. The taxation procedure in the ***Small Claims Court Act*** is particularly suited to that purpose.

[23] I would observe that the government has already made a decision and commitment to provide funding to the personal representatives of the deceased for the Inquiry. That, in itself, is a recognition of the importance of having them present and participate in the inquiry process with a view to assisting in achieving the mandate of the Inquiry. It would be strange indeed if the government, partway through the Inquiry determined that no additional preparation time was to be permitted, and, thereby, effectively eliminate counsel from further participation except on a *pro bono* basis which in my view would be unreasonable. The only limitation in the offer is that additional preparation time must be approved in advance and that is not unreasonable given the commitment of the province.

[24] The Application is dismissed.

Zimmer, JPC