

# Rules of Procedure

## GENERAL

1. Subject to the *Act* and the Terms of Reference, the conduct of and procedure to be followed at the Inquiry are under the control of the Honourable Warren K. Zimmer, Judge of Provincial Court of Nova Scotia (the “Presiding Judge”).
2. All parties and their counsel shall be deemed to undertake to adhere to these Rules and may raise any issue of non-compliance with the Rules with the Presiding Judge.
3. Upon notice to the parties, these Rules may be amended from time to time or dispensed with by the Presiding Judge as he deems appropriate to ensure that the Inquiry is fair, thorough, and timely.
4. The Presiding Judge shall deal with a breach of these Rules as he deems appropriate including, but not restricted to, by revoking the standing of a party or by imposing restrictions on the further participation in or attendance at the proceedings by any party, counsel, individual or member of the media.
5. The Presiding Judge shall rule on any objections raised, determine all matters of procedure not provided for in these Rules and, when in his discretion it is necessary or desirable for the purposes of fully discharging the duties of the Inquiry, may allow departures from these Rules.
6. Pursuant to s. 29 of the *Act*, the Presiding Judge shall have the power to summons before him any persons or witnesses and to require them to give evidence and to produce such documents and things he deems appropriate.

## DEFINITIONS

### 7. In these Rules

- (i) “the *Act*” means the *Fatality Investigations Act*, S.N.S. 2001, c.31;
- (ii) “document” is intended to have a broad meaning and includes the following: all records, files, audio recordings, audio-videotape recordings, communications, correspondence, notes, medical records, charts, data, memoranda, statements, reports, e-mail, text, cellular or social media messaging, digital reproductions, photographs, films, slides, maps, graphs, microfiche, metadata and any data and information recorded or stored by means of any device and any other information pertaining to the Inquiry, stored in any manner, including in written, electronic or digital form, irrespective of whether such document has been identified as confidential;
- (iii) “party” means any person who has been granted full or partial standing at the Inquiry as an interested person or a personal representative pursuant to s. 36 of the *Act* and is not intended to convey notions of an adversarial proceeding;
- (iv) “person” refers to individuals, groups, government agencies and departments, institutions, corporations or other entities;
- (v) The terms “standing” and the “right to participate” are used synonymously in the Rules.

## INQUIRY COUNSEL

8. Inquiry Counsel shall assist the Inquiry in the orderly conduct of the Inquiry and ensure that all relevant evidence is submitted to the Inquiry. Inquiry counsel shall have standing throughout the Inquiry.

## PRE-INQUIRY INTERVIEWS AND INVESTIGATION

9. The Inquiry will commence with an investigation which shall consist of document review, consultation with interested persons and witness interviews.
10. Inquiry Counsel may request any person or any organization to submit to one or more interviews with Inquiry Counsel or other persons designated by Inquiry Counsel at reasonable times. No person or organization is required to submit to such interviews. Any audio recorded or audio-videotaped interview, any transcript of such interview or any summary of such interview is subject to disclosure to other participants at the Inquiry.

## RIGHT TO PARTICIPATE

11. The Presiding Judge shall determine what persons shall be granted standing at the Inquiry, that is, what persons shall have the right to participate in the Inquiry proceedings and to be heard as interested persons and/or to be designated as a personal representative of the deceased, pursuant to s. 36 of the *Act*.
12. Persons who wish to be granted standing will be required to state in writing why they qualify for standing and how they propose to contribute to the Inquiry. Applicants for

standing will also be given an opportunity to appear in person before the Inquiry in order to explain why standing should be granted to them.

13. A person may be granted full or partial standing at the Inquiry and the Presiding Judge will determine on what terms and in which parts of the Inquiry a party may participate and the nature and extent of such participation.
14. The Presiding Judge may direct that a number of applicants share in a single grant of standing where he is satisfied the parties' interests are not adverse. In order to avoid duplication and to promote time and cost efficiencies, groups of similar interest are encouraged to seek joint standing.
15. The granting of standing at the Inquiry shall be contingent upon the parties' undertaking that they will abide by these Rules and, in particular, that they will comply with the Rules relating to the production of documents.

#### DOCUMENT PRODUCTION

16. All parties granted standing under these Rules shall produce to the Inquiry copies of all relevant documents in their possession or control having any bearing on the subject matter of the Inquiry by July 31, 2019. The obligation to produce all relevant documents is an ongoing and continuous one. Where a party discovers relevant documents subsequent to the initial disclosure, that party shall notify Inquiry Counsel immediately of the existence and nature of these documents and produce the documents to the Inquiry forthwith.
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.

18. Documents shall be provided in the format directed by the Presiding Judge. Upon request, parties shall also provide originals of relevant documents in their possession or control. Unless otherwise requested, parties shall preserve originals of relevant documents until such time as the Presiding Judge has fulfilled his mandate or orders otherwise.
19. Parties granted standing may apply to Inquiry Counsel to require the production of any document and Inquiry Counsel may in his discretion require production of such document.
20. Where Inquiry Counsel refuses to require production of documents or present evidence, a party may apply to the Presiding Judge for an order requiring such production of documents or presentation of evidence. Such application must be made in writing, supported by an affidavit. If the Presiding Judge is satisfied that the production of documents or evidence is needed, Inquiry Counsel will seek production of the documents and present the evidence as requested. All parties shall be notified of any such application.
21. Where the Inquiry requires the production of any documents by any person either of its own motion, or as a result of an application, an Order to Produce may be issued by the Presiding Judge.
22. Any person served with an Order to Produce shall provide all requested information within that person's possession, control or power in the time indicated in the Order or, if no time is indicated, in a timely manner, and in the form directed by the Inquiry.
23. Where a party or person objects to the production of any document on the grounds of privilege, the document shall be produced in its unedited form to Inquiry Counsel who will review and determine the validity of the privilege claim. The party or person and/or their counsel may be present during the review process. Such a review shall not be deemed a waiver of the claim of privilege. In the event the party or person

disagrees with Inquiry Counsel's determination, the Presiding Judge, on application, may inspect the document and make a ruling on the claim of privilege.

24. Where a party or their counsel takes the position that any document that is produced to the Inquiry should be redacted before its disclosure to other parties, the party who wishes the redaction shall produce the document in its proposed redacted form. Inquiry Counsel will determine whether to accept the party's position that the document ought to be so redacted. If Inquiry Counsel is not prepared to recommend to the Presiding Judge that the document be so redacted, the party may apply to the Presiding Judge for a ruling on the redaction.

#### DISCLOSURE OF DOCUMENTS

25. Inquiry Counsel will disclose all documents in his possession, subject to necessary editing for confidentiality and relevance, to parties within a reasonable time prior to the proceedings or as directed by the Presiding Judge.
26. Counsel for parties will be provided with access to an electronic document database (the "Database") and other documents and information gathered or created by the Inquiry, including statements of anticipated evidence, only upon providing the Inquiry with a duly executed written undertaking in the form of Appendix "A" to these Rules. Where the Presiding Judge considers it appropriate, access to all such disclosure may be further restricted.
27. Counsel for parties shall not provide any person with access to the Database. Counsel may provide copies of documents and disclose information to their clients, witnesses or potential witnesses, and experts retained by them for the purposes of the Inquiry, as they deem appropriate, only on terms consistent with their undertakings and after they

have received from those individuals duly executed written undertakings in the form of Appendix “B” to these Rules.

28. Documents received from a party or any other organization or individual shall be treated as confidential by the Inquiry unless they are made part of the public record at the Inquiry or the Presiding Judge otherwise declares. This does not preclude the Inquiry from producing a document to a proposed witness prior to the witness giving their testimony or as part of the investigation.
29. All persons who have entered into a written undertaking pursuant to these Rules shall comply with the terms of their undertaking. Failure to do so is deemed to be a breach of an order of the Inquiry.
30. Counsel and parties are required to return to Inquiry Counsel all documents or witness summaries which are not produced in evidence, including those provided to clients, experts or other third parties, and to delete all electronic copies of documents and confirm such deletion.

#### OPEN HEARING OR IN CAMERA

31. Pursuant to s. 32 of the *Act*, the Inquiry proceedings shall be open to the public except where the Presiding Judge is of the opinion that (a) matters involving public security may be disclosed; or (b) intimate or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure of the matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

32. If any party wishes any portion of the Inquiry proceedings to be held in-camera, they are required to make an application to the Presiding Judge for an order for that portion of the proceedings to be in-camera or an order prohibiting the disclosure, publication, communication of any testimony, document or evidence. Such applications shall be made in writing, supported by affidavit, at the earliest opportunity. The evidence and submission of such applications may be presented in private or in public, or a combination of both, at the discretion of the Presiding Judge.
33. If the proceedings are televised, streamed through the Internet or broadcast by some other medium, application may be made for an order that the evidence of a witness not be televised, streamed or broadcast.

## EVIDENCE

34. The Presiding Judge may receive into evidence at the Inquiry any information that he considers relevant, appropriate and helpful in fulfilling the Inquiry's mandate, whether or not the information would be admissible in a court of law and may receive that information in any form that the Inquiry deems appropriate. The strict rules of evidence will not apply to determine the admissibility of evidence.
35. Without restricting the generality of the foregoing, the Inquiry may admit such written, oral or other evidence as the Inquiry in its discretion deems relevant, whether or not the admission of such evidence is in accordance with the normal rules of evidence.
36. The Presiding Judge may admit as evidence affidavits, statutory declarations or other evidence made or taken under the laws of Canada where the Inquiry considers it fit and proper to have such evidence presented whether such evidence is sworn or unsworn. The Presiding Judge may admit transcripts of related proceedings and

statements of individuals whether or not such individuals are available for examination and cross-examination.

37. Where possible the evidence of witnesses shall be taken under oath or solemn affirmation and witnesses shall be sworn or affirmed in the manner normally used in the Provincial Court of Nova Scotia.
38. All evidence taken in any manner provided for by these Rules of Procedure shall form part of the record of the proceedings of the Inquiry.

#### ACCESS TO INFORMATION

39. All documentary or physical evidence entered as exhibits at the Inquiry shall be identified and marked “P” for public hearings in numerical order and, if necessary, “IC” for in-camera hearings for which any non-disclosure, non-publication, or non-communication order has been issued in numerical order. The aforementioned marking scheme may be modified at the direction of the Presiding Judge.
40. Copies of the “P” transcript of the evidence of the public hearings and a “P” list of exhibits from the public hearings will be made available on the Inquiry website and for public review as soon as reasonably practicable.
41. Only those persons authorized by the Presiding Judge shall have access to the “IC” transcripts and exhibits.

## WITNESSES

42. Where the Inquiry requires the attendance of any witness, either of its own motion or as a result of an application, a subpoena shall be issued and served on the witness.
43. Inquiry Counsel will call and question witnesses to testify at the Inquiry in accordance with s. 31 of the *Act*. Inquiry Counsel will provide each party with a proposed witness and exhibit list well in advance of the commencement of the Inquiry.
44. All parties are encouraged to provide Inquiry Counsel, at the earliest opportunity, the names and addresses of all witnesses whom they feel should be heard, together with a brief statement of the relevance of the witness to the Inquiry, as well as relevant evidence and copies of all relevant documentation.
45. Inquiry Counsel has the discretion to refuse to call a witness or present evidence. Where Inquiry Counsel refuses to call a witness or present evidence, a party may apply to the Presiding Judge for an order that such witness or such evidence be presented. Such application must be made in writing, supported by affidavit. It must indicate the name and address of the witness, give a summary of his or her anticipated testimony or the reasons for not providing it. If the Presiding Judge is satisfied that the witness or evidence is needed, Inquiry Counsel will call the witness or present the evidence. All parties to the Inquiry should be notified of any such application.
46. Inquiry Counsel shall proceed first with the examination of witnesses and may examine, cross-examine or re-examine all witnesses. Except as otherwise directed by the Presiding Judge, Inquiry Counsel can adduce evidence by way of both leading and non-leading questions. Other parties may, in such order as they have agreed or as directed by the Presiding Judge and, subject to such terms as may be imposed upon such right of examination by the Presiding Judge, cross-examine witnesses called by Inquiry Counsel, to the extent of their interest.

47. Counsel for a witness may apply to the Presiding Judge for permission to present that witness' evidence-in-chief. In that case, counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Presiding Judge. Inquiry Counsel will then be entitled to examine the witness by way of both leading and non-leading questions. Other parties with standing will then be entitled to cross-examine the witness, to the extent of their interest and as provided in Rule 46.
48. Parties may suggest, in advance, lines of questioning to be put to witnesses by Inquiry Counsel.
49. Witnesses may be called to give evidence more than once.
50. Any party may apply to the Presiding Judge for an order excluding witnesses for any portion of the proceedings.
51. Witnesses who are not represented by counsel are entitled to have their own counsel present while they testify. Counsel for a witness will have standing for the purpose of that witness' testimony to make any objections thought appropriate and for other purposes set out in these Rules, including the right to cross-examine other witnesses if the Presiding Judge so directs.
52. In the ordinary course, witnesses will give their evidence at a hearing in person but in appropriate circumstances, as determined by the Presiding Judge, a witness may be permitted to give testimony via videoconference or teleconference.

### EXPERT WITNESSES

53. The Inquiry may hear written or oral evidence from experts on topics relating to issues before the Inquiry, if the Presiding Judge believes it would be in the public interest to hear from someone with professional knowledge in particular subject areas. This evidence may include research, background or policy papers commissioned by or submitted to the Inquiry.
  
54. Inquiry Counsel will provide each party with the name, address, and qualifications of each proposed expert witness. This shall include any report which the proposed witness has prepared, as well as the area of expertise in which the opinion is being sought, and a summary of the anticipated evidence and copies of all relevant documentation.

### PROCEDURAL MOTIONS

55. At any time, the Inquiry may hold Procedural Hearings for the purpose of determining what persons shall have the right to be heard as interested persons, for the purpose of having Inquiry Counsel tender documentary or other evidence which Inquiry Counsel determine should be tendered in advance of the public hearings for the convenience of the Inquiry or the parties, or to address any other procedural issue that may arise in the course of the Inquiry.

### PRESENCE OF PARTIES

56. At the time and place appointed for holding the Inquiry, the Inquiry may proceed whether or not parties or their counsel are present.

## SERVICE OF DOCUMENTS

57 Any notice, summons or other document issued under these Rules may be served personally at the address of the person to be served by certified mail, by e-mail or by facsimile to a party's legal counsel with acknowledgement of receipt or by such other method of service as the Presiding Judge may direct.

## SUBMISSIONS BY COUNSEL AND PARTIES

58 When all evidence has been adduced, Inquiry Counsel and the parties shall have the right to address the Inquiry by way of oral and/or written submission in such order as the Presiding Judge directs and Inquiry Counsel shall have the right to address the Inquiry first and make the final submission to the Inquiry.

59 The Presiding Judge may direct that written submissions be made by Inquiry Counsel and parties in lieu of or in addition to their oral submissions.

## ADJOURNMENTS

60 The Inquiry may adjourn its proceedings from time to time and from place to place.

## CLARIFICATION OF RULES

61 These Rules are subject to clarification, amplification and amendment as the Presiding Judge deems appropriate to achieve the mandate of the Inquiry.

## **Acknowledgement**

The Rules of Procedure for the Desmond Fatality Inquiry, including Appendices A and B, were adopted after reviewing various rules and procedures from a number of previous Inquiries and Commissions and commentary from legal writers. The Desmond Inquiry acknowledges the work of those Inquiries, Commissions and writers which has helped to guide our approach to the present proceedings.