

**CANADA**

**PROVINCE OF NOVA SCOTIA**

IN THE MATTER OF THE  
*FATALITY INVESTIGATIONS ACT*

S.N.S. 2001, c. 31

**THE DESMOND FATALITY INQUIRY**

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**TRANSCRIPT**

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**HEARD BEFORE:** The Honourable Judge Warren K. Zimmer

**PLACE HEARD:** Guysborough, Nova Scotia

**DATE HEARD:** May 23, 2019

**COUNSEL:** Allen Murray, Q.C., Inquiry Counsel  
Shane Russell, Esq., Inquiry Counsel

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1 **May 23, 2019**

2 **COURT OPENED (09:30 hrs.)**

3

4 **THE COURT:** Good morning.

5 **COUNSEL:** Good morning, Your Honour.

6 **THE COURT:** We have Mr. Rodgers, Mr. Anderson is present, Ms.  
7 Morrow is here, Ms. Miller is here, and we have Mr. Murray and Mr. Russell.

8 Mr. Rodgers, are you ready to begin?

9 **MR. RODGERS:** Yes, I am, Your Honour. Thank you.

10 **THE COURT:** All right. So just before we begin, we have the  
11 application that was filed by Mr. Rodgers with respect to this matter. We also  
12 have his affidavit and draft order. So for today's purposes they're going to be  
13 marked as exhibits. The application, I think, will be Exhibit 1. The affidavit  
14 will be Exhibit 2. The draft order is Exhibit 3.

15 Mr. Rodgers?

16 **EXHIBIT 1 - APPLICATION BY MR. RODGERS (MARKED AND**  
17 **ENTERED)**

18 **EXHIBIT 2 - AFFIDAVIT OF MR. RODGERS (MARKED AND ENTERED)**

19 **EXHIBIT 3 - DRAFT ORDER (MARKED AND ENTERED)**

20

21

22

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**SUBMISSION BY MR. RODGERS**

1  
2  
3 **MR. RODGERS:** Thank you, Your Honour. Your Honour, before I begin  
4 speaking on the application just a separate issue which is referencing, I guess,  
5 Lionel Desmond's title. Lionel Desmond was a corporal, a retired corporal, and  
6 so I know my client has noted a few times where he has been referred to as "Mr.  
7 Desmond" and I know certainly people, the family would appreciate if he was  
8 referred to as Cpl. Desmond or retired Cpl. Desmond as the case may be as the  
9 context may call.

10 Your Honour ...

11 **THE COURT:** I will take that into consideration.

12 **MR. RODGERS:** Yes. Thank you, Your Honour.

13 Your Honour, the Applicant, the personal representative of the Estate of Cpl.  
14 Lionel Desmond, is asking you to make a recommendation to the Department of  
15 Justice for a funding structure for personal representatives of the deceased that  
16 accommodates all three principled criteria that we submit should apply:

17 (1) The effective representation of the personal representatives;

18 (2) The reasonable indemnification of their legal costs; and

19 (3) The protection of the public purse by retainer terms that are  
20 comparable to other private Bar retainers of the Province.

21 For the reasons I will outline, the Applicant takes the position that making  
22 such a recommendation is both within the jurisdiction of Your Honour and

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1 appropriate under the circumstances.

2 **THE COURT:** Can I stop you for a second? Just have a seat.

3 Mr. Anderson, I've read your brief and I've read the cases that you filed with  
4 your brief. Is there any real contest to the issue of whether or not I can make a  
5 recommendation if I choose to exercise my discretion in that manner?

6 **MR. ANDERSON:** Applying the Alberta case law it appears that you  
7 may have implicit authority to recommend funding, the issue is whether it extends  
8 to a funding structure and the position of the Attorney General is that it doesn't.

9 **THE COURT:** All right. Thank you.

10 So with regard to making a recommendation with respect to funding it  
11 appears that that is not contested; it's with regard to whether I should be making or  
12 can make a recommendation with regard to a funding structure. I understand the  
13 difference between the two and the way it was argued. So you can focus on that  
14 part of it, not so much whether I could legitimately make a ... what I mean is if I  
15 have jurisdiction to make a recommendation and whether or not that authority goes  
16 so far as to make a recommendation as to a structure. We're talking about a  
17 specific structure as opposed to just make a general recommendation about  
18 funding. All right, so, thank you.

19 **MR. RODGERS:** Thank you, Your Honour, and I will cover that,  
20 certainly.

21 Because, Your Honour, in particular the Applicant is asking Your Honour,  
22 to recommend to the Department of Justice funding on certain parameters. The

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1 parameters that we've recommended in our draft order are as follows:

2 That the period for which funding would commence would be January 1st,  
3 2019.

4 That counsel fees would be at a particular rate, and we've suggested that  
5 should be \$250 per hour, but with the caveat that this figure should be in line with  
6 what the Province pays to outside senior counsel in matters involving complex  
7 litigation and, unfortunately, we do not know what that figure might be.

8 We recommend the maximum number of counsel hours per day being ten,  
9 with counsel disbursements such as copying, travel mileage, parking, meals and  
10 accommodation would be at government employee rates and that counsel accounts  
11 would be verified and approved by an independent lawyer either retained by the  
12 Inquiry itself for that purpose or assigned by the Provincial Department of Justice  
13 and fire-walled off from any lawyers acting in the Inquiry for the Province or,  
14 alternately, by a third party lawyer retained by the Province. And, Your Honour,  
15 I'll have more to say about each of those parameters as I proceed through my  
16 remarks.

17 The Applicant suggests, Your Honour, that this approach is in line with the  
18 applicable precedents, is allowed by the foundational legislation, and is a  
19 principled approach to the usage of public funds.

20 Your Honour, if this public inquiry is to fill the mandate that the public  
21 demanded it must be far-reaching, insightful and committed to looking beyond one  
22 soldier and one family tragedy. Cpl. Desmond was a victim of the service he

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1 gave to his country. Too many Canadian soldiers have followed a similar path  
2 with similar tragic consequences. Still others hover over that path and struggle on  
3 a day-to-day basis to find reasons to keep moving forward.

4 The Desmond family feels a deep responsibility to these soldiers and their  
5 families to use their experiences to help educate decision-makers and the public as  
6 to what could be done to strengthen our military and prevent future tragedies.

7 Both the Government of Nova Scotia and the Government of Canada owe  
8 these soldiers and their families the best support that Canadian taxpayers can  
9 provide. It is the mandate and responsibility of your inquiry to understand what  
10 happened to Cpl. Desmond and others like him and to recommend what can be  
11 done to reduce the chances of history repeating itself.

12 Our client and her extended family have been anxiously awaiting the  
13 commencement of public hearings in this Inquiry so that their voices can be heard  
14 through ourselves, as their legal counsel, and eventually witnesses themselves.  
15 They have grown increasingly concerned that the original public momentum for  
16 accountability that led to the creation of your Inquiry is dissipating with the  
17 passage of time. I want to review briefly that passage of time.

18 The tragedy that is the genesis of the Desmond Inquiry occurred almost two  
19 and a half years ago. It took more than a year of protracted lobbying by our client  
20 and other members of the public before this Inquiry was finally sanctioned by the  
21 Province of Nova Scotia. The records will show that the Province initially took  
22 the position that there was no need for this Inquiry and I would suggest, Your



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1 Honour, that it was only through the perseverance of our client which led to the  
2 medical examiner's binding recommendation that Your Honour was eventually  
3 appointed.

4 The Attorney General established this inquiry more than a year ago. It took  
5 then another five months before you were appointed and that was in July of 2018.  
6 In contrast, the Nunn Inquiry convened its first public hearing less than four  
7 months after appointment.

8 The terms of reference, which as we will review do not contain explicit  
9 direction for you to make funding recommendations, were drafted without  
10 consulting our client or anyone in the Desmond family.

11 Given the Province's sustained reticence to convene this Inquiry and the  
12 degree of silence since your appointment, it is not unreasonable for the Desmond  
13 family to be concerned about the assignment of resources to support your Inquiry.  
14 The public will need to see that your Inquiry is being provided with the necessary  
15 judicial and operational independence to ensure you investigation of the various  
16 arms of the Province is not bureaucratically or financially constrained by those  
17 who may be in a conflict of interest.

18 If these substantive contributions to this inquiry are made primarily by  
19 lawyers acting for and employed by the provincial government, which is itself  
20 under scrutiny, it is difficult to conceive how the goals of this Inquiry will be  
21 effectively met and funding for the legal representation for the personal  
22 representatives helps ensure the success of that process.

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1 For the Desmond Inquiry to maintain public confidence and fulfill its  
2 mandate, the inquisitorial investigations prior to evidentiary hearings are a critical  
3 component of success.

4 As is usually the case when complex and overlapping bureaucratic  
5 responsibilities are to be filtered, sorted and understood, it is the investigative due  
6 diligence that will ultimately determine the scope and parameters of your  
7 adjudicative findings and recommendations. This part of the process, the  
8 preparation part, will certainly benefit from the involvement of counsel to the  
9 personal representatives, and I expect that it is the common understanding among  
10 the participants that counsel to the personal representatives will be active  
11 participants at that stage.

12 Your Honour, the sheer volume of material we are expected to digest and  
13 disseminate, the complexities of the factual matrix and the expert evidence in what  
14 is in some ways still an emerging area of study make this a meaningful and serious  
15 enterprise.

16 And, Your Honour, the Desmonds' and Bordens' entitlement to experience  
17 legal counsel should be proportionate to the seriousness of the issue. Unfairly  
18 stifling access to justice by imposing limited preparation time, junior counsel rates  
19 on our clients is tantamount to impeding access to justice. Beyond the interests of  
20 the family, artificially constrained legal representation interferes with the  
21 operational and judicial independence to which you are entitled. Your findings  
22 and recommendations will be qualitatively proportionate to the advocacy in the

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1 evidence placed before you.

2        Provided communication, Your Honour, from the Department of Justice  
3 which has contained, as you've seen, an offer to increase the initial number of  
4 preparation hours offered from 100 to 150 which is approximately three to three  
5 and a half weeks of time, in our view this in no way approaches the terms that  
6 would be required to allow for proper representation and preparation.

7        Our clients ask, and Your Honour might reasonably ask, on what basis was  
8 100 or 150 hours chosen? What information, if any, does the Department of  
9 Justice have with respect to the length of the inquiry that they are not sharing or is  
10 this something that was arbitrarily chosen, these figures?

11        Well, let's consider how long it might take going by some precedents. In  
12 the Hyde Inquiry, Your Honour, which was called under the **Fatality**  
13 **Investigations Act**, Judge Derrick, as she was at that time, in her opening remarks  
14 at the hearing stage thanked counsel for the five months of demanding preparation.  
15 Five months.

16        In her closing remarks at the end of the hearing portion, she noted that they  
17 had 54 days of sittings and heard from 84 witnesses in total, and then they were  
18 going to adjourn for nearly four months during which written submissions were to  
19 be filed and oral submissions prepared by all parties.

20        The Nunn Inquiry heard from 70 witnesses over 30 hearing days and  
21 received 12,000 pages of documents into evidence.

22        In the absence of receiving any evidence or disclosure I, and I expect others,

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1 have been preparing independently, reviewing witness accounts, expert reports and  
2 other relevant materials. This has already taken substantial amounts of time and  
3 yet we know there's much more to come.

4 The Applicants say there can be no set limit placed on preparation hours  
5 while there is such substantial uncertainty as to the degree of preparation that may  
6 be required. This is not to say that the commitment by the Province is unlimited;  
7 the limitation will be relevance and reasonableness to be reviewed by ... I would  
8 say it would be a knowledgeable but independent third party.

9 The Department has stated that accounts are to be "subject to assessment"  
10 but it is unclear under their proposal who might be conducting such an assessment,  
11 guidelines they might use to do so, and how that process might be implemented  
12 while still protecting solicitor-client privilege for the parties. I have a suggestion  
13 on this which I will come to in a few moments.

14 Your Honour, the Province also purports in these letters to be the unilateral  
15 gatekeeper of legal services provided to the parties and to your Inquiry and I  
16 suggest that that degree of control does not resonate with either your operation or  
17 judicial independence. In my brief to the Court I have outlined what I see as the  
18 parameters of your jurisdiction as Commissioner in this Inquiry and I would  
19 suggest that that outline appears to substantially match what you have conveyed in  
20 your opening remarks in this Inquiry two days ago.

21 I have outlined how the principles of judicial independence applies in the  
22 context of an inquiry and that the characteristics of and dimensions of judicial

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1 independence are not diminished in any way by reason of this being an inquiry and  
2 not a traditional court setting, nor by you being a Provincial Court judge.

3 In addition and in, I would suggest, complementary fashion the fact that you  
4 are provided with the same privileges and immunities as that of a Supreme Court  
5 Justice under the **Public Inquiries Act** buttresses the contention that your role here  
6 gives you the right and responsibility to control the process before you in a way  
7 that helps ensure meaningful inquiry outcomes.

8 Just to I guess touch on, Your Honour, the issue of well a funded  
9 recommendation versus a specific structure it would seem to me that if you say,  
10 well, these people should have funding without identifying some parameters of the  
11 structure, that it would be open for the Province then to revert back to what I'm  
12 suggesting are quite restrictive and inappropriately restrictive terms. And so that  
13 would, without providing at least some direction as to what the structure might  
14 entail, without providing some content to the recommendation then I guess the  
15 points that I'm making about the undermining potential of those recommendations  
16 and of that structure are still in place.

17 And, Your Honour, particularly for the Desmond and Borden families, it is  
18 to be remembered that they did not invite the circumstances that led to the tragedy  
19 now being investigated, they are the true victims, and that is why past practice has  
20 specified that their legal costs should be fully covered by the Province. In the  
21 Nunn Commission there were two separate funding levels, I'll put it that way.  
22 There was a level for the family participants and there was a level for other

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1 recognized participants with standing.

2           Your Honour, the Applicant recognizes that the Minister of Justice maintains  
3 ultimate control over your Inquiry's financial constraints, including legal costs.  
4 However, as Commissioner Nunn so pointedly noted such control must be on a  
5 principled basis and recognize both operational and judicial independence, even  
6 moreso when the Province is being scrutinized by the very inquiry it appointed.

7           In addition, as I mentioned, Commissioner Nunn made a specific distinction  
8 between funding for those parties who are granted limited standing as compared to  
9 funding for statutorily empowered personal representatives of the deceased's  
10 family.

11           Specifically, Commissioner Nunn noted: "Family members were  
12 instrumental in the calling for this public inquiry and have an interest in all aspects  
13 of the Commission's mandate." I would suggest that is also the case here.  
14 Justice Nunn continued: "I note their counsel's argument that the public officials,  
15 law enforcement and government bodies will have their full legal fees paid by the  
16 public." That is also the case here. And finally Justice Nunn continues: "In  
17 the interests of fairness, the family should be in a position to have their interests  
18 adequately represented during the work of the Commission." And of course that  
19 should be the case here too. Justice Nunn concluded that: "Their counsel should  
20 be paid at a reasonable rate, one comparable to the maximum paid by the  
21 Government of Nova Scotia when it retains senior outside counsel."

22           Your Honour, both the Nunn Inquiry and the Hyde Inquiry resulted in

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1 exhaustive reports and broad scopes of investigative inquiry. It is reasonable to  
 2 expect and predict that the scope and scale of the Desmond Inquiry will equal or  
 3 exceed the parameters of those two recent Nova Scotia precedents.

4 We respectfully suggest that the constraining parameters suggested by the  
 5 Province, if accepted, would infringe on your independence and materially affect  
 6 the quality of the results and report and recommendations. While the Order in  
 7 Council appointing Commissioner Nunn specifically authorized him to make  
 8 recommendations to the Minister of Justice for public funding of legal costs, and  
 9 while there is no counterpart provision in your order, nor is there anything  
 10 preventing you from adopting the protocols recommended by the Nunn Inquiry.

11 And Your Honour has referred to the work **The Conduct of Public**  
 12 **Inquiries** by Professor Ed Ratushny, and Professor Ed Ratushny noted at page 191  
 13 the following with respect to funding recommendations. He stated:

14 Most terms of reference now authorize a Commissioner  
 15 to make recommendations regarding funding for parties  
 16 with standing. Such recommendations are usually  
 17 conditional on the Commissioner's view that the party  
 18 would not otherwise be able to participate. The extent  
 19 of the recommendation is also restricted by the extent of  
 20 the party's interest and government financial regulations.  
 21 In the absence of such provision, there is nothing to  
 22 prevent a Commissioner from making such a  
 23 recommendation anyway. But where such  
 24 recommendations are expressly invited there may be a  
 25 greater obligation on the government to accept them.  
 26 The obligation might extend to accepting them as long as  
 27 they are reasonable in the circumstances. In practice,  
 28 they are almost inevitably accepted.  
 29

30 Professor Ratushny gave the example of the Morin Inquiry which also

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1 contained no reference to funding in the terms of reference but where  
2 Commissioner Kaufman found that to be an issue and made a recommendation.

3 Established practice, therefore, Your Honour, would appear to support the  
4 contention that even in the absence of specific direction in the terms of reference  
5 that you are authorized to make recommendations to the government and those  
6 recommendations ought to be respected.

7 So, Your Honour, one recommendation that I was trying to consider how  
8 this structure might operate in a way that has some review mechanism but also has  
9 some protections for solicitor-client privilege and confidentiality. Although, of  
10 course, in this setting that is, I will say, less of an issue because it is not an  
11 adversarial process but it is still something to consider.

12 What I'm suggesting, Your Honour, is that Mr. Anderson could have  
13 somebody within the Department reviewing these, a lawyer within the Department  
14 of Justice who is not involved in the Inquiry, could be reviewing the accounts for  
15 relevance and reasonableness.

16 That Mr. Anderson could prepare a memorandum on a monthly basis or a  
17 periodic basis to the reviewer outlining the activity of the Inquiry and anything he  
18 felt might be relevant to the question of time spent by counsel. This would be, I  
19 would suggest, a one-way communication on a periodic basis that would inform  
20 the reviewer, Your Honour, of generally what has been happening and from  
21 counsel's perspective if the hearing has been we sat for two days this month, we sat  
22 for 20 days this month, we were given this load of documents to review, we were



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1 given these expert reports. Whatever the content of those memorandums might  
2 be, Your Honour, it would give the reviewer some context in which to evaluate the  
3 accounts provided to them.

4 Of course, Your Honour, the other protection, if I can put it that way, would  
5 be that I would expect we will all be broadly aware of what each other is doing by  
6 virtue of the fact that we will be working collaboratively and will be sharing our  
7 findings and the products of our labours for the most part.

8 I mean, certainly there will be times when we want to meet with somebody  
9 and we don't disclose that or we don't need to disclose that, but most of the time if  
10 we're reviewing an expert report and we think it's relevant to the Inquiry, we're  
11 going to be sharing that information. If we interview a witness or speak to  
12 somebody and we think it's relevant for the Inquiry to know about it, we're going to  
13 be sharing that information. So the product of our labours is going to be known at  
14 least internally if not publicly. So there are protections. We would not be  
15 operating or invoicing in a vacuum.

16 With respect to the ... so that is, I guess, Your Honour, thinking in terms of  
17 the number of hours spent and the time being spent by each of the counsel to the  
18 personal representatives.

19 With respect to the hourly rate, we had recommended in our brief that the  
20 Province should disclose, and perhaps on a confidential basis, comparable retainers  
21 of the private Bar for matters of comparable significance. We note that in their  
22 responding materials, the Province has not done this which places Your Honour in

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1 a difficult position of perhaps making a recommendation in the absence of such  
2 pertinent information.

3         The proposed rate in the draft order, Your Honour, is simply the family rate  
4 used in the Nunn Commission adjusted to 2019 for inflation. It was just a math  
5 equation. It was not anything particularly chosen otherwise. It is, as was the  
6 case for the McEvoy family, less than the lawyer the personal representatives have  
7 hired would normally charge.

8         The daily limit on hours, ten hours a day, I think, Your Honour, probably  
9 better reflects the reality of operating in a litigation context where you're sitting on  
10 consecutive days. Perhaps if it's not a sitting day, those ten hours would rarely be  
11 reached but we will see when we get into the material.

12         Your Honour, all of the proposed constraints contradict the parameters  
13 identified by the Nunn Inquiry and I would suggest that it's done without a  
14 persuasive explanation. More importantly, we respectfully submit they impede  
15 the operational and jurisdictional effectiveness and independence of Your Honour's  
16 inquiry.

17         The spotlight of transparency and public accountability in an open forum is  
18 the best antidote for the concerns identified by our clients. And we thank you for  
19 listening to our submissions and encourage you to rectify this issue at this early  
20 stage so that all the stakeholders can work together to achieve the objectives and  
21 mandate assigned to you.

22         And, Your Honour, subject to your questions those are my remarks on the

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1 application.

2 **THE COURT:** Couple of things, Mr. Rodgers. Do you have Mr.  
3 Anderson's list of authorities?

4 **MR. RODGERS:** Yes.

5 **THE COURT:** Can we look at Tab 1, which is a portion of The  
6 Honourable D. Merlin Nunn, who was the Commissioner in the Nunn Inquiry,  
7 dated December 2006 and there are certain portions that have been copied. It's  
8 Appendix A entitled "Commission Guidelines for Funding for Legal Counsel." It  
9 provided under "Terms", third paragraph: "It would be open to the Commissioner  
10 to make further recommendations to the Minister of Justice at any stage of the  
11 Commission's work."

12 As well, Mr. Anderson made reference at Tab 3, it's a portion from the text  
13 **The Law of Public Inquiries in Canada** by Simon Ruel and page 64, the last  
14 paragraph, it's talking about the issue of recommendations by a commissioner for  
15 funding and states a proposition that: "Funding needs may evolve as an inquiry  
16 unfolds, and a commission has jurisdiction to reassess the issue of funding as and  
17 when appropriate. In any case, commissioners should be mindful that their  
18 recommendations concern the allocation of public funds."

19 So it would seem that both in Appendix A and in Mr. Ruel's text there's an  
20 ability for a commissioner, and anyway, maybe an obligation to continue to  
21 reassess the issues relating to funding.

22 **MR. RODGERS:** So, Your Honour, that would be another protection

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1 measure.

2 **THE COURT:** So ...

3 **MR. RODGERS:** Sorry, go ahead.

4 **THE COURT:** Well, it would seem then that in the circumstances,  
5 funding even in those circumstances of commissions of inquiry don't ever appear  
6 to be open-ended.

7 **MR. RODGERS:** If you look at it from that perspective, Your Honour, I  
8 guess if we're thinking that perhaps there would be a set number of preparation  
9 hours then these two references you've made or you've brought us to would suggest  
10 that it would be yourself and not the Department that would be consulted when  
11 those hours run out or are about to run out and there's a question as to whether it  
12 makes sense to have more.

13 **THE COURT:** Just go over a couple pages in relation to Appendix A, so  
14 the next page that is in the book of authorities is "Guidelines", it's paragraph five.

15 **MR. RODGERS:** Yes.

16 **THE COURT:** And then if you go over several pages you get to H,  
17 paragraph H.

18 Limits to be set on preparation time. Since Commission  
19 counsel will be doing most of the preparation and the  
20 calling of witnesses, preparation time for individuals with  
21 standing will probably be less than that required for  
22 Commission counsel. One exception might be  
23 preparation for cross-examination of a major witness.  
24

25 So even looking at the principles that Justice Nunn applied here, he  
26 recognized that limits should be set on preparation time. So you would disagree

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1 with that proposition that Justice Nunn adopted in Nunn or would you agree that  
2 limits should be set on preparation time, particularly when they recognize that you  
3 can go back and you can have them reviewed depending on how, in this case, our  
4 Inquiry or their commission happens to be unfolding?

5 **MR. RODGERS:** It would make more sense certainly, Your Honour, if  
6 there's going to be an initial limit on preparation time that it be yourself and not the  
7 Department that reviews that to determine because part of the issue with the  
8 proposal from the Province was it wasn't clear under what circumstances or what  
9 guidelines they would use to make such a review and it was difficult to proceed  
10 with that uncertainty.

11 **THE COURT:** Let me ask you this question. Whatever the initial  
12 number is, whether it's 100, 150 or 200, if it's anticipated that that number will run  
13 out then to me you have to prepare for that eventuality and what is going to happen  
14 at that point, correct?

15 **MR. RODGERS:** Correct.

16 **THE COURT:** You don't want to find yourself in a situation where, you  
17 know, suddenly you're halfway through the Inquiry, you've expended your 200  
18 hours of preparation and hypothetically you still have 30 witnesses to go and 5,000  
19 pages of disclosure to review and to prepare for them and you don't have any other  
20 time.

21 **MR. RODGERS:** And it's July and the Inquiry doesn't sit again until  
22 September.

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1       **THE COURT:**    So but the point is that the matter can be revisited with  
2 the government, with Mr. Anderson.

3       **MR. RODGERS:** Sure.

4       **THE COURT:**    I understand their proposition is that the number of hours  
5 are offered.    You don't have to take the Government's offer.    You don't have to  
6 take their offer of 220 an hour, you don't have to take their offer of 150 hours and  
7 if that's the end of the day and they dig their heels in regardless of what I might  
8 recommend, you always have the opportunity to decline the retainer and file,  
9 correct?

10      **MR. RODGERS:** Correct.

11      **THE COURT:**    Right.    There's no suggestion that you're the only single  
12 lawyer in this province who could handle this matter if you don't like the fees  
13 schedule or the arrangements, correct?

14      **MR. RODGERS:** Correct.

15      **THE COURT:**    All right.    So appreciating that and appreciating that if  
16 there's a demonstration or a commitment by the government, and I appreciate that  
17 this is not one of those situations where as in the appendix to the funding  
18 guidelines in Nunn where there was a suggestion that it should be demonstrable  
19 need, I think the Government's already recognized here that they're going to make  
20 a commitment to have funding available to the personal representatives, to legal  
21 counsel for each of the personal representatives of the deceased.

22      **MR. RODGERS:** Yes.

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1       **THE COURT:**    So you don't have that hurdle here, I appreciate.    So  
2 there's ... it seems to me that it's arguable that you have a commitment of good  
3 faith on the part of the Government because it's not asking you to demonstrate that  
4 and in most of the commissions of inquiry, funding seems to be premised on that,  
5 including the examination of whether or not, but for a contribution by the  
6 government, the individual would be able to participate.    The schemes that Mr.  
7 Anderson referred to from the other provinces are reimbursement schemes, not  
8 fully-funded schemes.    If the Government has said, Mr. Anderson in speaking for  
9 the Government has said, If you reach the 150 hour mark if that happens to be at  
10 the end of the day the number that's agreed upon and the government will continue  
11 to review, are you concerned that somehow if you find yourself in the middle of  
12 July with still these number of pages and you've worked, honestly and diligently,  
13 and no suggestion you wouldn't, and that you've focused your attentions on  
14 preparation for the Inquiry and all the work has been directed towards the mandate  
15 of the Inquiry and that you've run out of time, are you concerned that somehow the  
16 Government won't recognize that?    Is that what your concern is?

17       **MR. RODGERS:** Yes.

18       **THE COURT:**    Because if it is and says to you, if it is and at the end of  
19 the day I'm satisfied that I have jurisdiction to make recommendations and that if  
20 you find yourself in that kind of a situation, there's really nothing to prevent you  
21 from coming back and putting before me the situation that you find yourself in and  
22 look for a recommendation in relation to that issue because particularly at that

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1 stage, I might suggest that we would be somewhere along the road or down the  
2 road. We'd have an idea of what you had been provided by way of disclosure  
3 materials. We'd have an idea of what you had reviewed, if we have had hearings,  
4 what contribution you've made to the hearings on behalf of your client, how you've  
5 engaged with Mr. Anderson, how you've engaged with Mr. Murray and Mr.  
6 Russell and how you've assisted the Inquiry in the manner in which it would be  
7 expected that you would, no reason to doubt you won't. But at least then you  
8 would have some markers, if I will, if I can use that expression, or some indication  
9 of, you know, what we're really looking at instead of being concerned now that  
10 there won't be enough as opposed to coming in again and saying, you know, this is  
11 more than we anticipated. This is how the plate is full. These are the number of  
12 pages of disclosure we have. This is how we are pursuing it even though we tried  
13 to divide up the work to do it in a meaningful way, we still find this much work to  
14 do. Is there any reason why you couldn't do that at that stage?

15 **MR. RODGERS:** It seemed, Your Honour, important to make a distinction  
16 between the quality of the offer and the authority to make the offer. So it seems  
17 important that we establish, at least at this stage, that you have the authority to  
18 make these decisions.

19 **THE COURT:** Authority to make a recommendation.

20 **MR. RODGERS:** Authority to make a recommendation. Of course, as  
21 we've seen, it would seem inconceivable that the recommendation would not be  
22 given due respect. So the question, in the absence of knowing ... in the absence of



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1 establishing, Your Honour, that you can have the authority to make that  
2 recommendation, the counsel to the personal representatives or the personal  
3 representatives were left in the situation of not knowing the basis upon which the  
4 Department might review those hours as they expire, as they run out.

5 **THE COURT:** So you agree with the proposition that accounts should be  
6 subject to some assessment?

7 **MR. RODGERS:** Yes, yes. And that's the proposal I've outlined this  
8 morning, you know, to be subject to fine-tuning or other recommendations but that  
9 at least, Your Honour, seemed to offer some protection and some ability to have  
10 those accounts reviewed.

11 **THE COURT:** And how, when you talk about review mechanisms, what  
12 would you say about the normal taxation procedure that's available through the  
13 Small Claims Court?

14 **MR. RODGERS:** Well, there is no reason why that would be excluded or  
15 there's no particular reason why the Province wouldn't be able to, if ultimately  
16 there was no agreement between the personal representative and the reviewer,  
17 there's no reason why the Province wouldn't have access to that avenue.

18 **THE COURT:** It seems to me because taxation would be a way to deal  
19 with it. I mean a Small Claims Court adjudicator is still concerned with the  
20 solicitor-client privilege. You can request that the hearing be held in private as I  
21 understand the process is and when the documents are filed, the documents are  
22 filed in a sealed envelope, they're not opened except by the adjudicator and

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1 reviewed at that time, hear submissions. I've read the **Act**, I've read the taxation  
2 regulations. I appreciate that that whole scheme is set up to permit lawyers to  
3 have their accounts taxed by a third party, even to the extent where if you had ...  
4 you know, there's been situations where third parties have taxed lawyer's accounts  
5 because they were liable to pay them because of whatever litigation was going on  
6 and even in that situation, the particular lawyer and client who's having their  
7 instructions, if you will, subject to the fees that are subject to the taxation, they  
8 managed to protect solicitor-client privilege in those kinds of situations. It's  
9 designed to do exactly that, is it not?

10 **MR. RODGERS:** Yes, Your Honour. So if we had that kind of a structure  
11 where counsel submits their accounts to the Department but a ... a knowledgeable  
12 but independent lawyer within the Department for review. At that stage,  
13 presumably, hopefully most of them will be approved and paid out and if there was  
14 a dispute then that taxation route would be available. That would, in some ways,  
15 Your Honour, eliminate the need to have a set cap on hours. Like I say, at this  
16 point, we just don't know what's going to be involved. It seems like it'll be more  
17 extensive than the Nunn or Hyde Inquiries and ... well that possibility exists at  
18 least. So between now and whenever we start the hearings, you know, to have  
19 those accounts going in, say, on a monthly basis to be reviewed and paid out would  
20 seem to be an efficient way to operate without having to bring the matter back  
21 before Your Honour to review and if the Province feels that it's getting out of hand  
22 then they have the taxation option.

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1       **THE COURT:**    So I'm clear.    So Justice Nunn made reference to the  
2 fact that in paragraph H, limits should be set on preparation time but you seem to  
3 be suggesting there should be no limitations on preparation time except relevance  
4 to the Inquiry, unlimited hours.

5       **MR. RODGERS:** Well, we have daily limits and we have ... I mean, there's  
6 natural limits because there's only ...

7       **THE COURT:**    You're talking about preparation time, we're not talking  
8 about sitting time, we're not talking about hours spent in here.

9       **MR. RODGERS:** Yes.

10      **THE COURT:**    And during the course of that day, that's nine ... offer of  
11 nine hours and you're looking for ten.    Those are relatively easy to sort out.

12      **MR. RODGERS:** Yes.

13      **THE COURT:**    Right?    Those are all here.    It's the preparation, right,  
14 that, you know, and I can appreciate that the assessment becomes important,  
15 particularly in a context where, correct me if I'm wrong, but there is, apart from  
16 this matter, that Lionel Desmond's estate might be involved, there's other  
17 litigation?

18      **MR. RODGERS:** Well, not at this time, Your Honour.

19      **THE COURT:**    Not at this time?

20      **MR. RODGERS:** There had been.

21      **THE COURT:**    Potentially?

22      **MR. RODGERS:** But it seems to be ...

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1 **THE COURT:** Okay.

2 **MR. RODGERS:** ... seems to be over.

3 **THE COURT:** I would imagine that at some point that any assessment  
4 or review would want to be able to make a determination and make certain that the  
5 time spent in relation to Lionel Desmond's matters are being kept separate and  
6 apart.

7 **MR. RODGERS:** Oh, yes.

8 **THE COURT:** And whether that relates to Brenda Desmond or Shanna  
9 Desmond or Aaliyah Desmond and I don't know what their situations are but I just  
10 would make that observation as well.

11 **MR. RODGERS:** And that's a fair observation. So, Your Honour, I guess  
12 if you're telling me limits on preparation time, that could be either a set number of  
13 hours or I'd suggest it could be a structure and I'm suggesting that a structure, in  
14 the absence of knowing what amount of time might be required between now and  
15 the hearing date, and of course during breaks, during hearings, I mean there'll be  
16 sittings for a few days at a time and then there may be breaks and there'll be  
17 additional preparation at that time. So it could be a set number of hours subject to  
18 review by Your Honour or it could be a structure with protection for the Province.

19 **THE COURT:** Well if you have a set number, if you and Mr. Anderson  
20 agree on a set number of hours, if I make ... if I was inclined to make a  
21 recommendation on a set number of hours that was set, at some point if you reach  
22 that, you're going to go back to renegotiating or having further discussions with the

**SUBMISSIONS BY COUNSEL re FUNDING**

1 government about either how you're going to move forward, either in relation to  
2 another kind of block of hours in anticipation of my time and then dealing but,  
3 again, that's something that is into the future.

4 **MR. RODGERS:** Yes.

5 **THE COURT:** That I would perhaps anticipate you have to have that  
6 discussion just, you know, you have your discussions now and you get to that  
7 point, you have your discussions again and, you know, you have your accounts  
8 reviewed, you're satisfied you know how the accounts should be permitted and  
9 how that goes. I don't think there's anything that really would stop you from  
10 coming back if, given the principles that Justice Nunn referenced and the principles  
11 that were referenced in rules respect to ongoing or continued assessment, really  
12 would be very little impediment to coming back if the necessity arose. I make  
13 that observation.

14 All right, thank you, Mr. Rogers.

15 **MR. RODGERS:** Thank you, Your Honour.

16 **THE COURT:** Mr. Anderson?  
17

18 **SUBMISSIONS BY MR. ANDERSON**

19  
20 **MR. ANDERSON:** Thank you, Your Honour. Well, I'm going to  
21 restrict my comments to the application before the Court and I won't refer to the  
22 timing of the Inquiry and that sort of thing.

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1 **THE COURT:** Thank you.

2 **MR. ANDERSON:** The established practice in Nova Scotia is that  
3 terms of reference for these types of inquiries do not reference counsel funding and  
4 that inquiry judges do not have a role in counsel funding. The provinces have  
5 sole discretion on whether to provide funding and on what terms.

6 Here the Province has made counsel funding available to the personal  
7 representatives. It includes preparation time, and as Your Honour has already  
8 noted, of 150 hours. Additional hours require advance approval. This pertains  
9 to specific Inquiry work such as meetings, document review, and research. As  
10 you have noted, limits should be set on preparation time and that is what the  
11 Province has done.

12 Commissioner Nunn explains the reason for that, among other things, since  
13 commission counsel will be doing most of the preparation. I note in that inquiry  
14 that Commissioner Nunn, although recommending the limit should be set, my  
15 review that he didn't set the hours, he apparently left them up to the Province to set  
16 the limits.

17 **THE COURT:** My understanding is that he expected counsel to conduct  
18 themselves in a particular way, submit their accounts, accounts could have been  
19 reviewed by commission counsel, and if there was any issue, referred to him,  
20 otherwise paid. That was the process.

21 **MR. ANDERSON:** Right. The other component of the Province's  
22 funding terms is that accounts be subject to assessment and submitted to an

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1 assigned official. That official would not be me. An analysis applicable to  
2 state-funded counsel application in the criminal courts, I'll suggest, might be  
3 helpful in looking at the issues here and then I'll apply them to the Inquiry piece.  
4 So this would be the **Rowbotham**, or state-funded counsel, applications.

5 So there an applicant must show he cannot receive a fair trial without  
6 counsel which includes consideration of the risk of incarceration and that he has  
7 exhausted all possible routes to retain private and publicly-funded counsel. So  
8 those applications require evidence that the applicant has exhausted efforts to  
9 obtain a private lawyer without success and has exhausted efforts to get Legal Aid  
10 without success. So the applicants in those cases must show that there are no  
11 personal or public funds available. If successful, judges stay the charges unless  
12 government makes funding available. The funding that is made available is on  
13 the basis of a Legal Aid tariff.

14 Here the Province has made counsel funding available to the personal  
15 representatives and it is considerably more than the Legal Aid tariffs. The  
16 questions, and I'll repeat them again when we talk about this Inquiry, but relating  
17 to the **Rowbotham** judges: Has the applicant provided evidence that he or she does  
18 not have resources to obtain a lawyer? Has he or she exhausted efforts to obtain  
19 Legal Aid and been denied? And he or she exhausted efforts to obtain a private  
20 lawyer and been unsuccessful? What I will add to that analysis is where funding  
21 is available, has she exhausted efforts to obtain a private lawyer on the basis of the  
22 funding available and been unsuccessful?

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1           The application before Your Honour is asking you to recommend to  
2 government what it should pay. That is different from funds available. The  
3 draft order, including a recommendation, is for \$30 more than the \$220 in the  
4 Province's available funding and it's one hour more a day from the nine hours per  
5 day available.

6           The evidence before the Court is Mr. Rodgers' affidavit. This is the  
7 evidence relating to funding are paragraphs 9 to 12 of his affidavit. It includes  
8 the terms of the funding available, that Mr. Rodgers has spent time reviewing  
9 reports, general research, meeting with family, what his regular hourly billing rate  
10 is, and that he anticipates significant preparation and dedication.

11           In the May 1, 2019, letter to counsel, I attached Ontario and Manitoba  
12 guidelines and I appreciate that proceedings may be somewhat different, but my  
13 letter provides general principles regarding funding in inquiries which includes  
14 taxpayer accountability. For context there's reference to the rate and hours per  
15 day at the Hyde Inquiry which is the most recent fatality investigation inquiry.  
16 The Ontario and Manitoba funding guidelines, again for context, sets out funding  
17 rates again for reimbursement, hours per day and limits on preparation time.

18           The issues before the Court, as I suggest, are four issues. Whether the  
19 terms of reference under the **Fatality Investigations Act** provide explicit authority  
20 to recommend funding. I think everyone agrees that the answer is no. 2)  
21 Where implicit authority to recommend funding is available, whether a  
22 recommendation is necessary where the applicant has funding available? I did



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1 want to review what Mr. Ruel describes as implicit funding and that's the language  
2 that I'll use.

3         So Mr. Rodgers cited Ed Ratushny's text and submits that it provides  
4 authority for you to recommend a funding structure. In other words, for you to  
5 recommend the terms of government funding. The Attorney General has cited  
6 Simon Ruel's text. He cites authority, it's that authority that I summarized in the  
7 appendix of the brief. Ed Ratushny didn't cite authority so I thought it would be  
8 helpful for the Court to look at what that authority is and those cases are  
9 summarized.

10         They are mostly Alberta cases and in the brief I've summarized at pages four  
11 and five the case law. Mr. Ruel describes an implicit authority to recommend to a  
12 government that funding be provided. There's no mention of the recommended  
13 rates, the details or structure, it's funding be provided. And similar to  
14 **Rowbotham** applications, that it's up to government to set what that funding is.  
15 The case law further, my suggestion to you, is that implicit authority pertains to  
16 recommendation that funding be provided where necessary and I think the **Oatway**  
17 case in the appendices summarizes some of the things.

18         So it's where it's necessary in circumstances where an applicant's interests  
19 cannot be satisfied either through their own efforts or in consultation with Inquiry  
20 counsel or where the applicant's legal liability or a serious reputational interest may  
21 be impacted by the Inquiry.

22         So I'll suggest the exercise of this authority requires circumstances where

### SUBMISSIONS BY COUNSEL re FUNDING

1 counsel is necessary, applicants do not have personal resources, and public funding  
2 is not available. I'll suggest that a recommendation to provide funding for an  
3 applicant is not necessary where the applicant already has funding.

4 Question three: Where implicit authority or recommended funding is  
5 available where the recommendation would include a funding structure. The  
6 cases that I've cited and summarized discuss whether the recommended funding be  
7 provided where there was none available. So the cases did not include an  
8 adjudication, a settling of terms. I suggest that implicit authority does not include  
9 recommending how much money government should provide. A  
10 recommendation to provide funding is just that. Where funding is recommended,  
11 the government sets the terms.

12 Question four, and this is the last question. If implicit authority includes  
13 authority to recommend a funding structure, should it be exercised in this case?  
14 The applicant is asking you to recommend the Province's funding be increased, \$30  
15 more an hour, one hour more a day, and it appears to be some increased number of  
16 pre-approved preparation time. Again, the evidence on these issues are  
17 paragraphs 10 to 12 of Mr. Rodgers' affidavit.

18 Questions for your consideration. And this dovetails from the **Rowbotham**  
19 questions. Is there evidence that an applicant does not have resources to obtain a  
20 lawyer, has exhausted all efforts to obtain Legal Aid and been denied, has  
21 exhausted efforts to obtain a private lawyer and been unsuccessful, and here has  
22 exhausted efforts to obtain a private lawyer on the basis of the funding available

**SUBMISSIONS BY COUNSEL re FUNDING**

1 and been unsuccessful. There is no evidence to any of those questions.

2 The evidence is, and I'll suggest, that the funding available is reasonable and  
3 that a recommendation to provide funding or funding structure is not necessary to  
4 enable the applicants to obtain counsel.

5 I submit that the application for recommendation be dismissed. Those are  
6 my submissions, Your Honour.

7 **THE COURT:** Mr. Anderson, if ... there is an offer on the table, so to  
8 speak, from ... I guess it comes from the Attorney General. The offer also speaks  
9 of an assessment of the account or a review of the account by someone, not you, in  
10 the Department, I take it. And if it's reviewed and there's a determination that  
11 there's an issue as to either the work that was done or the volume of work that was  
12 done, whatever it might be, how would you propose that that would get settled  
13 short of actually going in front of a third party whether, you know, a Small Claims  
14 Court adjudicator under taxation or some other mechanism? How do you resolve  
15 the issue of dispute?

16 **MR. ANDERSON:** I expect that that would call for discussion between  
17 the reviewer and the lawyer providing the account.

18 **THE COURT:** So if the reviewer and Mr. Rodgers don't agree, for  
19 whatever reason, how do you propose to have that settled?

20 **MR. ANDERSON:** Well, if ...

21 **THE COURT:** Or is it the proposal is that the reviewer will look at it and  
22 have a discussion with Mr. Rodgers and then the reviewer's position will hold and

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1 the account will get paid according to what the reviewer's opinion of it is? Or is  
2 there a third party review mechanism here if there's a dispute?

3 **MR. ANDERSON:** I don't have any instructions to deal with that issue,  
4 Your Honour.

5 **THE COURT:** So, at present, it would stand as simply the reviewer  
6 would look at the account and either accept it or ... I'm not going to use the word  
7 "discount" it, but might reject some claim for preparation time and then, that's it,  
8 there is no mechanism to have that resolved.

9 **MR. ANDERSON:** I don't have any instructions regarding a  
10 mechanism to resolve that.

11 **THE COURT:** All right. So ... all right. Because I appreciate what  
12 you say, Mr. Anderson, that there's ... that if we were here and there was no offer  
13 from the Government but simply an application to have a recommendation made  
14 by me to the Government that would suggest that some funding, whatever words I  
15 would use, be made available, without touching on any numbers that's what you  
16 say I could do. Am I correct?

17 **MR. ANDERSON:** That's what ... if Your Honour finds you have  
18 implicit authority, that's what I ...

19 **THE COURT:** That's ...

20 **MR. ANDERSON:** ... would ... stated that's how far it would go, but  
21 not to any details.

22 **THE COURT:** Okay. But we have an offer here. And are you saying

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1 that I have no authority to make any comment on the offer that's on the table and  
2 that I should simply say, Well, there's no reason for me to make a recommendation  
3 because the Government has already acknowledged and committed ... in your  
4 correspondence, has committed to some level of funding and there simply is a  
5 disagreement as to the amount and how that gets determined and there's really  
6 nothing for me to do in the circumstances because there's ... because the offer is  
7 there. The commitment to make funding available has already been made and,  
8 because that's the only recommendation I could make, there's no reason for it  
9 because you're already committed. Government is committed.

10 **MR. ANDERSON:** Yes. There's ...

11 **THE COURT:** Is that right?

12 **MR. ANDERSON:** There's no need to make a recommendation for  
13 funding because it is available so a recommendation is not necessary.

14 **THE COURT:** All right. I appreciate the difference. Thank you.

15 **MR. ANDERSON:** Thank you, Your Honour.

16 **THE COURT:** Mr. Rodgers, any reply?

17

**REPLY BY MR. RODGERS**

18

19

20 **MR. RODGERS:** Just a few responding remarks, Your Honour. I guess

21 I'd just mention ... of course Your Honour knows the **Rowbotham** context is

22 different. It's ...

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1 **THE COURT:** I understand that.

2 **MR. RODGERS:** ... a criminal context and not a statutory participant.

3 **THE COURT:** I think he was taking the principles for a principled  
4 argument as opposed to as an example ...

5 **MR. RODGERS:** That's fine. Yes. Thank you.

6 **THE COURT:** ... a particular example. Yes.

7 **MR. RODGERS:** The Ratushny text which I quoted did reference the  
8 Morin Inquiry, so there was some authority there besides the professor's own  
9 commentary. I guess I would say and I should have perhaps said this in my other  
10 remarks that I think it's kind of a red herring to wonder whether the personal  
11 representatives could afford a lawyer for an inquiry or whether perhaps anybody  
12 could afford a lawyer for an extended inquiry. If that evidence was ever needed,  
13 certainly it could be provided by affidavit.

14 **THE COURT:** No. And I agree. I had referenced that earlier. But  
15 in this particular case, the Government has already made an acknowledgment and a  
16 commitment and so that aspect of it really becomes somewhat irrelevant, I think.

17 **MR. RODGERS:** And, finally, Your Honour, the last thing I'd say, yes,  
18 there is some evidence in my affidavit but, really, the evidence is all of our  
19 common knowledge that there's going to be just a large amount of work to do with  
20 an inquiry. And that's really where the submission comes from with respect to the  
21 hours suggested and the preparation effort required. Thank you.

22 **THE COURT:** All right. Thank you.

## DISCUSSION

1 I know that Ms. Morrow and Ms. Miller are here, that they have each sent  
2 correspondence to me expressing ... I'm going to paraphrase, generally support for  
3 the position of Mr. Rodgers. They have not filed applications in the same nature  
4 as Mr. Rodgers but I do acknowledge that they're here and what their position is,  
5 which is not an unremarkable position. But just to acknowledge that they're here  
6 and that they have taken a position, as well. All right. Thank you.

7 Thank you, Counsel. I'm going to try and turn this around in short order.  
8 I can get a decision out to you very shortly. All right? After you ... well my  
9 decision will be sent to all the parties. I'll send copies to Ms. Miller and Ms.  
10 Morrow, as well. It'll be sent to counsel.

11 Following my decision, if you think there's some necessity to reconvene for  
12 any further discussions, I realize we have a very loose procedure, right, but the  
13 time between now and when we formally recommence in anticipation in the fall, if  
14 there are matters arise, issues arise, regardless of what it relates to, please just get  
15 in touch with Mr. Murray or Mr. Russell, they'll be in touch with me. We'll make  
16 arrangements to reconvene as need be. If we need to set up video conference  
17 calls, we'll set up video conference calls. And on some occasions, even though  
18 we might not reconvene here, for instance, if we need to be sitting as a hearing of  
19 record ... so we may actually reconvene in a court facility anywhere that's  
20 convenient to everyone. All right?

21 So, again, there's a bit of fluidity to that but have discussions with Mr.  
22 Murray. He'll be your touch point, if you will, on those occasions. So the

**DISCUSSION**

1 matter is adjourned today.

2 We anticipate returning in the fall at some point in time. The schedule will  
3 be posted. Everyone will be notified. The public will be notified through the  
4 website. And we'll have discussions with counsel between now and then, as well.  
5 Okay? Ms. Morrow?

6 **MS. MORROW:** Yes. Thank you, Your Honour. Just one matter. I  
7 have been in some discussion with my friends on the issue of standing in relation  
8 to Aaliyah and I will let Mr. Murray know shortly if we have resolved that. If  
9 not, I would anticipate writing to have the matter returned for ...

10 **THE COURT:** Absolutely.

11 **MS. MORROW:** Thank you. Before September.

12 **THE COURT:** So you ...

13 **MS. MORROW:** Quite soon, if we could.

14 **THE COURT:** Well, that's fine. As I said, have your discussions, know  
15 where you stand on it, convey that to Mr. Murray. Okay? And I don't know  
16 whether Ms. Miller is going to be engaged in any of that. I appreciate that her  
17 client is another potential person who might have an interest in that regard. Not  
18 suggesting it is, but it may be. So I'll leave that for you to have your discussions.  
19 Get in touch with Mr. Murray. We'll come back very quickly, if need be, to get  
20 that sorted out as well as this.

21 **MS. MORROW:** Thank you, Your Honour.

22 **THE COURT:** All right?



**DISCUSSION**

1 **MS. MORROW:** Thank you.

2 **THE COURT:** Okay. And I'm just going to reiterate this again. I  
3 know I probably don't need to. But we're all used to the normal and standard  
4 criminal law practice. I don't know how much time Ms. Miller spends in criminal  
5 court but ...

6 **MS. MILLER:** Maybe not all of it.

7 **THE COURT:** ... you're litigators. You understand. Right? We're  
8 used to the adversarial forum. It's a mindset that we have. We need to work  
9 around that. We need to be able to have open conversations. We need to have  
10 open conversations with each other at this point in time. Nothing ... you know,  
11 there are no rights that are at risk here. We're all, as somebody said, We're all in  
12 the same boat, pulling the oars in the same direction, heading to the same spot.  
13 And that's what we need to try and remember. And I need to do that as much as  
14 anyone, still keeping in mind the necessity for fairness and procedural fairness and  
15 the other guiding principles that come from this spot. But in that spot where you  
16 folks are, I would just ask you to keep that in mind on a go-forward basis. All  
17 right? Thank you then.

18 **COUNSEL:** Thank you, Your Honour.

19

20 **COURT CLOSED (10:44 HRS)**


21

22


## CERTIFICATE OF COURT TRANSCRIBERS

We, the undersigned Margaret Livingstone, Sandra Towers, Wilma VanSickle, Court Transcribers, hereby certify that we have transcribed the foregoing and that it is a true and accurate transcript of the evidence given in this matter, **The Desmond Fatality Inquiry**, taken by way of electronic digital recording.

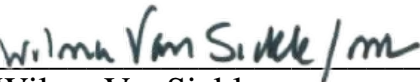
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Margaret Livingstone  
(Registration No. 2006-16)

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\_\_\_\_\_  
Sandra Towers  
(Registration No. 2006-236)

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\_\_\_\_\_  
Wilma VanSickle  
(Registration No. 2006-13)

**DARTMOUTH, NOVA SCOTIA**

**May 24, 2019**