

CANADA

PROVINCE OF NOVA SCOTIA

IN THE MATTER OF THE
FATALITY INVESTIGATIONS ACT

S.N.S. 2001, c. 31

THE DESMOND FATALITY INQUIRY

TRANSCRIPT

HEARD BEFORE: The Honourable Judge Warren K. Zimmer

PLACE HEARD: Guysborough, Nova Scotia

DATE HEARD: November 18, 2019

COUNSEL: Allen Murray, QC, Inquiry Counsel
Shane Russell, Inquiry Counsel

Lori Ward and Melissa Grant,
Counsel for Attorney General of Canada

Glenn R. Anderson, QC,
Counsel for Attorney General of Nova Scotia

Thomas M. Macdonald and Thomas Morehouse,
Counsel for Richard Borden, Thelma Borden and
Sheldon Borden

Tara Miller, QC, and Adam Rodgers,
Counsel for Aaliyah Desmond

Tara Miller, QC,
Counsel for Estate of Brenda Desmond
(Chantel Desmond, Personal Representative)

Adam Rodgers,
Counsel for Estate of Lionel Desmond
(Cassandra Desmond, Personal Representative)

Roderick (Rory) Rogers, QC, Karen Bennett-Clayton
and Amanda Whitehead,
Counsel for Nova Scotia Health Authority

Stewart Hayne,
Counsel for Dr. Faisal Rahman and Dr. Ian Slayter

INDEX

	<u>Page</u>
<u>November 18, 2019</u>	
OPENING REMARKS	4
SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT	15
SUBMISSION BY MS. WARD FOR ADJOURNMENT	22
SUBMISSION BY MR. ANDERSON FOR ADJOURNMENT	22
SUBMISSION BY MR. ROGERS FOR ADJOURNMENT	22
SUBMISSION BY MS. MILLER FOR ADJOURNMENT	24
SUBMISSION BY MR. RODGERS FOR ADJOURNMENT	30
SUBMISSION BY MR. HAYNE FOR ADJOURNMENT	31
SUBMISSION BY MR. MURRAY FOR ADJOURNMENT	33
SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT	36
RULING	37

1 **NOVEMBER 18, 2019**

2 **COURT OPENED** **(TIME: 10:03 HRS.)**

3

4 **THE COURT:** Good morning.

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

6

7

OPENING REMARKS

8

9 **THE COURT:** Today marks the resumption of the Desmond
10 Inquiry. I intend to make a few comments regarding the
11 Inquiry's development both as of today's date and where we see
12 the matter proceeding into the future.

13 On May 21, 2019, the Inquiry was first convened and at that
14 time I made some opening remarks prior to hearing applications
15 for standing. My earlier remarks are posted on the website
16 should anyone wish to refresh their recollection. Following
17 those hearings, I released a decision dated June 20th regarding
18 participation in the Inquiry and, shortly thereafter, gave the
19 parties an opportunity to comment on the proposed rules of
20 procedure. I also directed that, by correspondence of June 27th,
21 2019, that the parties were to produce relevant documents by way
22 of disclosure on or before July 31st, 2019, and prescribed an

OPENING REMARKS

1 electronic format for those documents.

2 Documentary disclosure was received from the Federal
3 Department of Justice in June of 2019 and from other parties
4 through July and August. Several production orders were signed
5 in September and as late as last week we received medical
6 records from a hospital in Quebec relating to Lionel Desmond.
7 Most of those documents were in French and totaled over 400
8 pages. As well, we received documents from the Chief Firearms
9 Officer for the Province of New Brunswick relating to Lionel
10 Desmond's firearm license.

11 The Inquiry presently has over 58,000 electronic files,
12 ranging in size from one page to in excess of 3,500 pages. I am
13 told that the page count is in excess of 120,000 pages. I am
14 sure that most people would appreciate that until you look at
15 any given file and the pages therein, that you would not be able
16 to determine the information's value to the Inquiry's mandate.
17 The bulk of the electronic files were subsequently made
18 available to counsel through a secure database. They were able
19 to download the files to their own computer systems and ingest
20 them into whatever software programs they decided to use to
21 manage them. The total amount of data was approximately 200
22 gigabytes which presented its own set of issues.

OPENING REMARKS

1 The process by which the documents were made accessible was
2 developed and put in place in late July and by mid-August
3 counsel had access in accordance with the rules of procedure.
4 The feedback we received led us to conclude that we needed a
5 different solution to allow counsel more meaningful and
6 practical, workable access to the files. By late September/
7 early October we were able to provide counsel with encrypted
8 hard drives containing all the data originally made available
9 through the secure file transfer server.

10 Additionally, the same file material was ingested into a
11 litigation database together with a software application that
12 produced a very complete document management system, including a
13 refined full search capability. Counsel were given access to
14 in-person tutorials in the use of the software application in an
15 effort to accelerate the learning curve and promote the review
16 and preparation process.

17 October 21, 2019, had been set by me as a proposed date to
18 resume the Inquiry; however, it was determined that more time
19 was required to allow counsel to review and prepare for the
20 evidentiary hearings. The additional time would, in the end,
21 benefit all the parties and ultimately assist the Inquiry in its
22 mandate.

OPENING REMARKS

1 It was clear that, even with a refined search capability,
2 the review of 120,000 documents or pages would be quite onerous.
3 Consider, if you would, that if you flip a thousand pages a day
4 it would take you 120 days to even conduct a cursory review of
5 all of the documents, and at 20 working days a month it would
6 take approximately six months just to flip through all of the
7 pages.

8 The approach to the Inquiry that we have decided on and
9 which seems most workable is to divide the Inquiry into discrete
10 sessions designed to address particular issues within the
11 Inquiry's terms of reference. In this way Inquiry counsel have
12 been able to focus on particular events within the terms of
13 reference and to conduct their searches, witness interviews, and
14 collection of relevant evidence without first reviewing each and
15 every document in the database. To conduct a full review of
16 every document before calling the first witness would likely
17 result in the Inquiry not hearing its first witness for many
18 more months. We are of the view that we can begin to call
19 evidence in a focused way at this time.

20 Consequently, we will first hear evidence relating to some
21 of the events leading to and proximate to January 3rd, 2017, and
22 that was the day that Aaliyah, Shanna, Brenda, and Lionel

OPENING REMARKS

1 Desmond were found together, deceased, in a residence in Upper
2 Big Tracadie, Guysborough County, Nova Scotia. This will
3 include the involvement of the Chief Medical Examiner, Dr.
4 Bowes, and his office. Thereafter, we plan to recess and
5 refocus our review on another area within the Inquiry mandate.
6 I anticipate that there will be overlap and some witnesses may
7 be re-called. Additional disclosure may also require re-calling
8 of witnesses.

9 It is anticipated that Inquiry counsel will have
10 discussions with the various parties relating to the next
11 focused session so that they, too, can concentrate their
12 preparation efforts. Dates will then be announced for
13 resumption. As the timetable comes into more defined focus
14 public announcements will be made through the website.

15 Toward the end of October I asked the parties to confirm by
16 November 4th that they would be prepared to commence hearing
17 evidence on November 18th. All counsel replied in the
18 affirmative; however, I did not hear from Sheldon, Richard, or
19 Thelma Borden. Richard and Thelma Borden had been represented
20 by counsel Coline Morrow from the time of their application to
21 participate until at least October 28th, when Ms. Morrow advised
22 that she was no longer retained and that the Bordens were

OPENING REMARKS

1 seeking a new lawyer.

2 A brief timeline review, I think, is in order. On October
3 17 Ms. Morrow, by email, confirmed that she was available for
4 dates on December 2nd and December 3rd. Those dates had been
5 discussed prior to her email when we were initially looking at a
6 November start date. On October 17th the Inquiry, among others,
7 received an email from Mr. Sheldon Borden that read, in part:

8 To Whom It May Concern:

9
10 As representative for the Borden
11 family, I am wondering what is set out as
12 the essential duties and responsibilities of
13 legal counsel representing my family at the
14 Desmond Inquiry. I believe legal
15 representation is supposed to communicate
16 with clients and other legal counsel as
17 necessary and conduct research and analysis
18 of legal issues. I am not quite sure what,
19 if anything, is being done on behalf of the
20 Borden family to address a number of issues,
21 including, (and the first was) scheduling of
22 our contribution to the Inquiry ...
23

24 And there were a couple of other items, and Mr. Borden
25 recognized that they may not actually be within the mandate of
26 the Inquiry. He was wanting to know whether or not it was too
27 late to seek other counsel and what that procedure might be. He
28 signed off as Sheldon Borden, Family Representative. That was
29 also sent to Mr. Anderson, who is counsel on behalf of the
30 Attorney General of Nova Scotia.

OPENING REMARKS

1 Mr. Anderson, by email of October 18th, replied to Mr.
2 Borden as best he could indicating that it would not be proper
3 for him to discuss or provide advice regarding matters as
4 between Mr. and Mrs. Borden and their lawyer. The letter would
5 have had Mr. Sheldon Borden appearing to speak on behalf of both
6 Richard and Thelma Borden and that was not part of the record of
7 this Inquiry at that point in time. Mr. Anderson rightly
8 directed or suggested that Mr. Borden might want to direct his
9 inquiries to Inquiry counsel, Mr. Murray or Mr. Russell, and
10 that correspondence had been directed to them as well. And it
11 was also pointed out that Victim Services was available as well.

12 That sequence of emails prompted me to have some
13 discussions with Mr. Murray and, as a result, Mr. Murray, by
14 email to the Inquiry of October 21, confirmed that he had
15 reached Ms. Morrow that day and that she had spoken to Richard
16 and Thelma Borden and she was representing them both at the
17 Inquiry but she was not representing Sheldon Borden. By email
18 of October 22nd, we were copied again on an email from Sheldon
19 Borden to Coline Morrow which advised her that her services were
20 no longer required and he signed again as the family
21 spokesperson. It begins, in part - and this was copied to Mr.
22 Anderson and others, including the Inquiry:

OPENING REMARKS

1 I would like to thank you for your services;
2 however, at this point in time your services
3 are no longer required by the Borden family.
4 We require the proactively (sic) of another
5 legal counsel to represent our needs and
6 concerns during the Desmond Inquiry. We
7 will now approach the Inquiry Administration
8 for another legal representative from a list
9 that they may have or seek outside legal
10 representation afforded by the Desmond
11 Inquiry Administration.
12

13 That was October 22nd. It prompted additional inquiries by Mr.
14 Murray.

15 October 23rd, Mr. Murray had spoken to Ms. Morrow that day.
16 She was returning from having just met with Richard and Thelma
17 Borden and maintained that she was still retained by Mr. and
18 Mrs. Borden. She also confirmed that she was not representing
19 Sheldon and expressed that Sheldon did not speak on behalf of
20 his parents.

21 That same day shortly thereafter, and these emails came in
22 proximate to each other, we received a copy of a letter that Mr.
23 Borden, Sheldon Borden, had written to Ms. Morrow, in which he
24 indicated that he had spoken with his dad, who informed him that
25 Ms. Morrow was, in his words, willing to work with another
26 lawyer on his behalf as a team and, if that's the case, he'd
27 like to proceed as soon as possible. If that's not the case,
28 he'd like to know so "we can find new representation". And

OPENING REMARKS

1 there he laid out his expectations, which included "open and
2 timely communication, diligently representing our interests at
3 the Desmond Inquiry, information on scheduling", and then a
4 couple of matters that might be outside the scope of the Inquiry
5 that he had hinted at earlier. That was October 23rd.

6 October 28th, Ms. Morrow, by fax, advised the Inquiry that
7 she was no longer representing Richard and Thelma Borden and
8 that they were seeking a new lawyer.

9 Preparation continued toward the November 18 start,
10 resumption date. There was a housekeeping matter that the
11 Provincial Court, through the office of the Chief Judge, had to
12 resolve with the Department of Justice, provincially, and on
13 November 14th that was settled and, later that day, there was a
14 public announcement regarding the present start date, and
15 counsel were advised shortly thereafter.

16 However, on Friday, November 15th, at approximately 3 p.m.
17 I received an email from Mr. Thomas Macdonald, a Halifax lawyer,
18 advising that he had been retained by the Borden family; that
19 is, by Richard, Thelma, and Sheldon Borden, to represent them at
20 the Inquiry. Mr. MacDonald further requested an adjournment of
21 the Inquiry so that he could prepare. His email states, in
22 part:

OPENING REMARKS

1 On behalf of our clients we are requesting
2 an adjournment of the Inquiry. At the
3 moment we have not seen any documents. I
4 understand there are in excess of 50,000.
5 We understand the Inquiry begins on Monday
6 and it is not possible to adequately
7 prepare, including examining witnesses, in
8 that short timeframe.

9 We see the adjournment request as, in
10 effect, an access to justice issue, enabling
11 the Borden family to have fair and full
12 participation in the Inquiry.
13

14 Thereafter, he provided some contact information.

15 After some consideration, which included discussions with
16 Inquiry counsel, I decided to forward Mr. Macdonald's email to
17 all the counsel and to request to know from them their
18 respective positions on Mr. Macdonald's request. Through Mr.
19 Murray I also encouraged Mr. Macdonald to contact each of the
20 counsel, as well. Counsel's replies were then shared with each
21 other and with Mr. Macdonald.

22 In the email that I sent to counsel I expressed the issue
23 in this way, in part:

24 Given the large community of interest
25 associated with the Desmond Fatality
26 Inquiry, I would like to know what your
27 position would be with respect to the Borden
28 family's request for an adjournment.
29

30 I also indicated that part of the reason I would like to know
31 was because if there was a consensus to adjourn, the Inquiry

OPENING REMARKS

1 would likely resume in January with an extended sitting time
2 that would include the next session - so that no time would be
3 lost, the interim period would be used for additional
4 preparation. I wanted to give counsel some idea of what the
5 thinking might be if, in fact, the matter was to be adjourned.

6 Mr. Macdonald is here today to make his request on the
7 record for the adjournment and, following his submission, I
8 intend to call on each counsel to confirm their position with
9 regard to his request on behalf of the Borden family. And then
10 I'll retire to consider what action I'll take.

11 Mr. Macdonald?

12

13

14

15

16

17

18

19

20

21

22

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1
2
3 **MR. MACDONALD**: Thank you, Your Honour.

4 Your Honour, I am here today with my associate, Thomas
5 Morehouse, who is with me.

6 **THE COURT**: Mr. Morehouse.

7 **MR. MACDONALD**: We are lawyers for the Borden family,
8 specifically Thelma, Ricky, and Sheldon. Ricky is here today.
9 Sheldon is en route. I was in communication with him. There
10 are traffic issues coming from Halifax. Thelma will not be
11 attending today. She finds it, of course, understandably, a
12 very difficult day where we're heading to the substantive
13 beginning of the Inquiry process.

14 Looking at the Rules, I think what we're doing is making a
15 Rule 55 procedural motion under the Inquiry rules and then
16 asking you for an adjournment for a period of time and, of
17 course, Rule 60 permits you to adjourn from time to time. We
18 understand that this request is frustrating, it is inconvenient,
19 it could be said that it is last-minute, and I would say thank
20 you for hearing us this morning. Thank you to counsel and
21 parties who have already communicated they will not oppose an
22 adjournment motion and, to those who are taking an opposite

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 view, we mean no disrespect to any parties who don't agree with
2 our motion.

3 So I think the starting point, Your Honour, is do you have
4 jurisdiction to grant a motion, if you were inclined to do so,
5 and the submission is yes, you do. And I say that for two
6 reasons: the rules of this Inquiry permit you to conduct
7 procedure under your control, both the conduct of the Inquiry
8 and procedures under your control, and Rule 60, of course,
9 specifically allows an adjournment.

10 So then if you do, as we would submit, have the
11 jurisdiction to grant an adjournment, what factors should you
12 consider? We're clearly asking you for an indulgence on behalf
13 of the Borden family who, along, of course, with Mr. Desmond's
14 family, are central parties here. They have been granted
15 standing, as you will know as you did, yourself. We know it's
16 an indulgence.

17 I was retained Friday, November 15th, at 3 p.m. We've
18 made, I think, some considerable movement since that point, but
19 I haven't made movement in terms of looking at what I thought
20 were 50,000 documents now it turns out which are really 50,000
21 electronic files and maybe 120,000 documents, and I simply need
22 time to prepare, a little longer. Your pointing out in your

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 letter to counsel on Friday about a potential of a January start
2 and a bundling, if I can put it that way, of the other portions
3 of the hearing, to me seems reasonable, and we would certainly
4 accept that of course. It seems a reasonable solution. It's
5 not a long time. It is a frustrating time for some people, I
6 get that, but it's not a long time.

7 You're really being asked today, I believe, to balance the
8 interests of parties, but also prejudice and asked to weigh
9 prejudice. Where is the prejudice if there is an adjournment or
10 if there is not an adjournment? How does it flow? And we would
11 say, respectfully, to the Desmond family, but we would say it
12 flows heavily today on an adjournment request on the side of the
13 Bordens, and that's because fundamental to this process is them
14 having a voice, counsel to help them, advise them, take
15 instructions from them as the process unfolds.

16 And I should also add, I meant to say in my thanks, former
17 counsel, who I spoke with at the end of last week, who was most
18 gracious and courteous and I expected, of course, nothing less,
19 and I and the family are grateful for the conversation that I
20 had with that counsel.

21 If you look, and I'm not asking you to turn to it, Your
22 Honour, but the Ministerial Order, Mr. Furey's order sets out

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 the terms of reference. Section 3(d) lists the factors in your
2 mandate, and there are many of them, and so our submission would
3 be and we know at the end of the terms of reference you're going
4 to make findings, you're going to prepare a report. I would
5 submit how can that be done fairly and fully if central parties
6 to the Inquiry are unable, through their lawyer, to look at
7 documents, ask questions in what is really a key phase and that
8 is the first phase that was supposed to, is supposed to start
9 today.

10 Now as you know, some parties over the course of the
11 weekend submitted written submissions in terms of factors - I'm
12 calling them factors - and why the adjournment should not be
13 granted. I'm not covering every factor but I do want to
14 address them. We get that this is - that is, me and, that is,
15 the Borden family - an inquisitional process. It's not an
16 adversarial process, but it's inherent in this inquisitional
17 process that you have competing interests. Different people
18 have different views. If we didn't have competing interests and
19 different views, there'd only be two lawyers here this morning,
20 one for the Inquiry and one for everybody else. Look around.
21 I've counted 14 before I stood, some, of course, two for one
22 party, but my point is there are many interests that need to be

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 considered and, of course, the Bordens' interest is amongst
2 those.

3 So I would submit that the delay for an adjournment needs
4 to be balanced against the very mandate, the very heart of the
5 Ministerial Order that gives you your terms of reference.
6 Participation means participation - it doesn't mean presence,
7 mere presence - it means participation for me as the counsel.
8 Some of the counsel that wrote offered help. While it's
9 appreciated, very frankly - I don't mean it in a disparaging way
10 - I don't need help, I need time. I need time, Your Honour,
11 time to process, time to advise my clients, time to take
12 instructions that are based on informed legal advice.

13 There was a suggestion in one of the submissions relating
14 to Inquiry Rule 56, indicating that the Inquiry has the power to
15 go ahead without counsel or parties present. I'm paraphrasing.
16 Well, yes, you do, but, frankly, what, could there be a worse
17 possible start - I'm asking rhetorically, Your Honour - than to
18 start today with one of the parties, essentially, not being able
19 to participate through counsel in a very important first, very
20 first stage of the proceeding.

21 I can't believe that, whether the Minister or the Inquiry
22 drafting those rules ever meant that that would be the situation

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 that would be covered by that rule for that purpose.

2 **THE COURT:** I might say, Mr. Macdonald, the rules were
3 drafted fundamentally by me with the assistance of counsel.

4 ^^ WV

5 **MR. MACDONALD:** Thank you, Your Honour.

6 So when you balance the factors, I'm submitting that full
7 and fair participation and prejudice are really things you need
8 to give very considerable weight to. What happens if the
9 Bordens don't have a legal voice here for the first part of the
10 proceeding? What does that do to the Ministerial order in terms
11 of what it was intended to do? And if, "if" the result is a
12 lack of fairness, doesn't that really give rise to a denial or a
13 barrier to access to justice by the Bordens in any way, shape,
14 or form? And if there is or if there was a denial of access to
15 justice, doesn't that then possibly, if not give rise to an
16 injustice, it gives rise to the spectre of an injustice.

17 When I spoke with the Bordens on Saturday afternoon by
18 telephone, I spoke with them on Friday, as well, of course, but
19 Thelma and Sheldon and I had a telephone call. And at a point
20 in time on that call, the conversation moved to Dr. Martin
21 Luther King, who is held in very high regard by the Bordens, a
22 special place in all of their hearts and so we spoke about that

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 for a few moments.

2 And I had occasion on the weekend to, as you know ...
3 everyone knows, Dr. King had many famous quotes. But I looked
4 up one and there's one that he said and I think I have it
5 correct ... stating it correctly. And it is that, "a denial of
6 justice anywhere is a denial of justice everywhere". Now I'm
7 not trying to put too fine a point on it, Your Honour, but the
8 point is the Minister saw fit to issue an order calling for the
9 Inquiry. You're here as a judge to conduct the Inquiry.

10 What I'm saying is, Could there be a worse start if, in the
11 air, there is a whisper of some injustice somehow because
12 somebody didn't have their say? Even though it's frustrating;
13 even though it's, some could say, last minute, what I'm saying
14 is, Isn't it worth it for the annoyance, if it's that, or the
15 inconvenience, if it's that, for a very short adjournment, in
16 legal terms really as we all know, it's not that long if we were
17 to come back, and you're the boss, you would tell us when, if
18 it's January.

19 But isn't it worth it to use that balance with great
20 respect to the Desmond family, who obviously want to see things
21 moving? I certainly understand that. And my clients, the
22 Bordens, understand that. But I'm saying just a short

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 adjournment really will help to shine a light on what the
2 justice system is all about, what an Inquiry is all about.

3 So if you were to grant the adjournment, you're not picking
4 favourites between families. You're picking fairness, you're
5 picking access to justice if you grant our adjournment. Those
6 are my submissions, Your Honour. Thank you very much. I'd be
7 pleased to answer any questions you may have.

8 **THE COURT:** Thank you, Mr. Macdonald. Ms. Ward?

9 **MS. WARD:** Thank you, Your Honour. I would just reiterate
10 that the Attorney General of Canada does not oppose this request
11 for an adjournment.

12 **THE COURT:** Thank you. Mr. Anderson?

13 **MR. ANDERSON:** Thank you, Your Honour. The Attorney
14 General of Nova Scotia does not oppose the request for an
15 adjournment.

16 **THE COURT:** Thank you. Mr. Rogers?

17 **MR. ROGERS:** Your Honour, when we learned on Friday
18 afternoon of the request for an adjournment and the suggestion
19 that one possibility might be that if it were adjourned, that
20 the issues that were to be addressed now would also be bundled
21 together with some issues to be addressed early next year, took
22 instructions from our client and our instructions are that we do

SUBMISSION BY MR. MACDONALD FOR ADJOURNMENT

1 not oppose the adjournment.

2 **THE COURT:** Thank you. Ms. Miller?

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

1
2
3 **MS. MILLER:** Thank you, Your Honour.

4 I have submitted the position of my client, who is Chantel
5 Desmond, the personal representative of Brenda Desmond, and I
6 share representation with Mr. Macdonald of Aaliyah Desmond,
7 Retired Cpl. Lionel Desmond's daughter.

8 My clients are not in favour of this adjournment. The
9 reality for them, and certainly for the Borden family, which
10 they have the most compassion for, is that this matter has been
11 in the wind for a long time.

12 The last fatality investigation inquiry held in Nova Scotia
13 was, of course, the Hyde Inquiry. Mr. Hyde's death took place
14 on November 22nd, 2007, and Judge Derrick's report was issued in
15 November of 2010, three years later. We are approaching the
16 three-year anniversary of the deaths of the family members and
17 Retired Cpl. Lionel Desmond in this matter and we haven't
18 started yet.

19 The very real concern for my clients, Your Honour, is that
20 delaying the start of the Inquiry to the new year with an
21 extended sitting at that time, while sounds like a practical
22 solution, is going to present some additional challenges to the

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

1 parties and counsel, with respect, and the real prospect of
2 creating further significant delay.

3 Your Honour referenced earlier in your opening comments
4 that initially your intention had been to start the Inquiry in
5 October. Certainly, more time was needed for certain counsel.
6 But the other reality was that there were a lot of scheduling
7 issues that prevented counsel from being available until
8 November the 18th. And my clients' concern is that is going to
9 be the practical reality, as well; that an extended sitting in
10 January, not just three weeks but perhaps to four-to-six weeks,
11 is going to further delay the start of this Inquiry.

12 The lessons learned from this Inquiry and the
13 recommendations that Your Honour will make for the future and
14 then the implementation of those recommendations will all take
15 some time to formulate. Our Canadian Forces military members,
16 veterans, and their family members are looking for those
17 solutions now. The delay of this Inquiry impacts the
18 implementation of solutions and help for all of those who
19 continue to struggle with operational stress injuries.

20 The focus of the witnesses to be called in the first three
21 weeks of this Inquiry will be, as Your Honour has indicated, to
22 focus on the events proximate to leading up to January the 3rd.

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

1 The deeper analysis of the circumstances which led to the deaths
2 on that day, as noted in the Inquiry terms of reference will be
3 taking place at a later date with evidence then.

4 A practical solution available to Your Honour is to allow
5 Mr. Macdonald and the Borden family to re-call witnesses at a
6 later date to address any issues that may arise that haven't
7 been covered by, as my friend had noted, the 14 lawyers who will
8 have an opportunity to question the witnesses over the next
9 three weeks.

10 My friend has noted a distinction for the Inquiry is that
11 it is not adversarial. It is inquisitorial. And everybody is
12 working collaboratively together to move things forward.
13 Inquiry counsel has done an admirable job with the road map that
14 they have provided us all, with the witnesses and the documents
15 which they intend to enter as exhibits. This is a working
16 example of the collaboration unified amongst all of the lawyers
17 here to get this matter moving.

18 I have offered to Mr. Macdonald to assist in any way I can
19 and I reiterate that. That is the intent of my clients. They
20 are ready to move this forward and we believe that any prejudice
21 to the Bordens can certainly be mitigated by allowing him to re-
22 call witnesses at a later stage, by working collaboratively

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

1 together for the purposes of this inquisitorial process as
2 opposed to what we would traditionally be familiar with in the
3 criminal context or the civil context, being adversarial. I'm
4 happy to respond to any questions Your Honour may have and those
5 are my submissions.

6 **THE COURT:** Ms. Miller, I just ask this question. I
7 don't know ... well, one of the housekeeping matters that we have
8 is with regard to the personal representation of Aaliyah
9 Desmond.

10 **MS. MILLER:** Correct.

11 **THE COURT:** It was raised at the participation hearings
12 and there was discussions and correspondence as between you and
13 Ms. Morrow, and I have that letter, and there was ... you came
14 to a *consensus ad idem* with regard to that representation.

15 **MS. MILLER:** Correct.

16 **THE COURT:** I don't know if Mr. Macdonald was aware of
17 those discussions in particular but, at the same time, if I had
18 two individuals representing Aaliyah's interest and I have one
19 asking for an adjournment to prepare and I have another saying,
20 You don't need the adjournment, you can get caught up. I
21 paraphrased it and I don't mean to treat your argument shortly.
22 But do you see a conflict there?

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

1 **MS. MILLER:** I appreciate the concern Your Honour has
2 raised. I won't speak to Mr. Macdonald's sort of breadth and
3 depth of the background on that issue. I'm not sure what Ms.
4 Morrow would have shared with him.

5 **THE COURT:** Okay.

6 **MS. MILLER:** But we did speak late on Friday, Mr.
7 Macdonald and I, and I shared with him about my role and how we
8 had been ... Coline Morrow and I had been sharing representation
9 of Aaliyah. You know, that is another reason why I think that
10 he and I can certainly work collaboratively together with
11 respect to that representation moving forward but I take your
12 point in terms of that needs to be a procedural issue that we'll
13 have to finalize.

14 Certainly, the documents that my friend has to review to be
15 prepared for this next three-week block of the Inquiry, they
16 don't amount to 120,000. As Your Honour has said it would take
17 months to review all of those documents and we have a road map
18 provided by Inquiry counsel of the documents that I think could
19 help streamline his preparation.

20 **THE COURT:** And I understand that I think Mr. Murray had
21 had discussions with Mr. Macdonald and I think that's why Mr.
22 Macdonald is suggesting weeks and not months. Appreciating that

SUBMISSION BY MS. MILLER FOR ADJOURNMENT

1 it's focused and targeted research preparation, Mr. Murray and
2 Mr. Russell have provided not only witness lists, summaries of
3 the witnesses, a reference to documents, provided timeline
4 documents that I think is of great value to counsel in targeting
5 their preparation, it's meant as a road map. Counsel would
6 still, in their own diligent fashion, conduct their research.
7 But it gives them the springboard or it is a springboard from
8 which they can determine whether or not there's additional
9 information that needs to be brought out or not. And that will
10 continue.

11 So that's why I suggested in my email that if we did
12 adjourn, that when we came back, whenever it was because
13 everyone is now ready, except for Mr. Macdonald, to deal with
14 the first session and we'd simply be adding the second session
15 that might ... I can tell you that in my view, there would have
16 been overlap between the two of them and it may actually be able
17 to streamline some of the witnesses on issues that would have
18 arisen on the second session dealing with the firearms licensing
19 issue. So anyway, thank you for your comments.

20 **MS. MILLER:** Thank you, Your Honour.

21 **THE COURT:** Appreciate that. Mr. Rodgers?
22

SUBMISSION BY MR. RODGERS FOR ADJOURNMENT

SUBMISSION BY MR. RODGERS FOR ADJOURNMENT

1
2
3 **MR. RODGERS:** Thank you, Your Honour.

4 Your Honour, hearing now this morning, from Your Honour
5 some of the details of the circumstances which led to this
6 scenario that we are now facing and certainly while sympathetic
7 in ways to those circumstances, my client, personal
8 representative of Cpl. Lionel Desmond, his sister, Cassandra
9 Desmond, is opposed to the adjournment request.

10 While I won't repeat all of the comments from my friend Ms.
11 Miller but I do echo those in substance, Your Honour, I would
12 suggest that the first days and weeks of the hearing are going
13 to be focused on establishing the facts that led to the calling
14 of this Inquiry and I would expect that that evidence would be
15 led primarily by Inquiry counsel.

16 And I would suggest that it would not unduly prejudice the
17 Borden family to have Mr. Macdonald attend under those
18 circumstances and it would be unlikely to materially affect the
19 quality of the evidence before Your Honour that you'll need to
20 consider in preparing your report.

21 If something arises, upon full review of the disclosure
22 over the course of the next weeks and months and Mr. Macdonald

SUBMISSION BY MR. RODGERS FOR ADJOURNMENT

1 deems it prudent to seek recall of a particular witness, I would
2 suggest that surely that could be accommodated and it is allowed
3 under the rules of procedure.

4 Your Honour, I'm conscious of not drawing undue attention
5 to procedural matters at the expense of the substantive benefits
6 that this Inquiry is expected to foster and we also recognize
7 that the Inquiry is expected to sit for multiple months and
8 perhaps the overall timeline may not be greatly affected.

9 But there is also a benefit to getting started. When
10 things begin, Your Honour, they become real in a tangible way
11 and in a way that contributes to the public understanding of the
12 issues to be reviewed. Time is our most precious thing and as
13 we go more and more time without making the changes that we are
14 expected to see come from this Inquiry, we are delaying the
15 benefits that those are expected to engender.

16 So for those reasons, Your Honour, we submit that we can
17 begin the evidence of the witnesses today. Thank you.

18 **THE COURT:** Mr. Hayne?

19 **MR. HAYNE:** Thank you, Your Honour.

20 On behalf of the physicians, we don't oppose the request;
21 however, I would express a preference to proceed if at all
22 possible. And I just wanted to make one point with respect to

SUBMISSION BY MR. RODGERS FOR ADJOURNMENT

1 the mitigation strategy that has been proposed. Certainly would
2 make our clients available to be re-called in the future, if
3 necessary. I have nothing further. Thank you.

4 **THE COURT:** Mr. Murray?

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

SUBMISSION BY MR. MURRAY FOR ADJOURNMENT

1 **SUBMISSION BY MR. MURRAY FOR ADJOURNMENT**

2

3 **MR. MURRAY:** Yes. Thank you, Your Honour.

4 Thank you for the opportunity to make some comments with
5 respect to this application. And I'd like to thank counsel for
6 all of their submissions with respect to their respective
7 positions.

8 Your Honour, Inquiry counsel recognize that this is a
9 difficult and challenging situation. From our point of view,
10 there are compelling arguments both in favour of proceeding as
11 we had been scheduled but also compelling arguments in favour of
12 taking a short recess to allow counsel for the Borden family to
13 get up to speed and to be fully briefed on what will be taking
14 place when we do begin calling evidence.

15 Your Honour, Inquiry counsel are mindful of the very strong
16 desire on the part of all of the parties here to begin the
17 evidentiary portion of the Inquiry. Indeed, we share that
18 ourselves. As Your Honour knows, a great deal of preparation
19 and work has been put into preparing what will be the initial
20 body of evidence to be called at the Inquiry. So I think it's
21 fair to say that everybody here is anxious to begin.

22 That being said, we have to balance that with the

SUBMISSION BY MR. MURRAY FOR ADJOURNMENT

1 requirement that all parties here have a full representation.
2 And, Your Honour, the Borden family are asking for this
3 adjournment and I would say that there is really no parties to
4 this Inquiry that have a greater interest perhaps in the outcome
5 of the Inquiry than the two families who are most significantly
6 affected by this tragedy, the Desmond and the Borden families.
7 So we must recognize the Bordens' strong and significant
8 interest in participating fully in this Inquiry.

9 As has been said by other counsel, Your Honour, this
10 Inquiry is not like a typical provincial court trial. The word
11 that's been used is that it is "collaborative" and I think
12 that's a good way of describing it. We are working together as
13 counsel to achieve an end. In one respect, we have a common
14 goal and that is to present as much relevant evidence as we
15 possibly can to Your Honour to assist you in your ultimate task,
16 which will be writing a report and making findings and
17 recommendations.

18 And we do recognize, Your Honour, that the evidence and
19 submissions that could be presented by the Borden family with
20 the benefit and assistance of fully-briefed counsel would
21 benefit the Inquiry in fulfilling its mandate. It would enhance
22 the fact-finding function of the Inquiry were that to happen.

SUBMISSION BY MR. MURRAY FOR ADJOURNMENT

1 And I would say, Your Honour, that the timeline that you
2 presented and, indeed, the comments of Mr. Macdonald would seem
3 to indicate that the Borden family have been as diligent as
4 possible in attempting to obtain counsel in a timely fashion.

5 So, Your Honour, ultimately, that is the balancing act that
6 we will be engaged in, that Your Honour will have to decide the
7 need and the desire to begin the process of calling the evidence
8 which we all share in versus the needs of all of the parties to
9 have full participation in this matter.

10 Your Honour, I would say with respect to the potential
11 mitigation strategies or ways of proceeding, should it be Your
12 Honour's decision that we proceed as we had anticipated and as
13 scheduled, Inquiry counsel would be in a position to proceed in
14 the coming weeks as we had scheduled.

15 That being said, Your Honour, should it be your decision to
16 adjourn for a short period of time to allow counsel for the
17 Bordens to become fully briefed, Inquiry counsel would as you
18 have said, we would be continuing to marshal evidence for other
19 sittings and, certainly, we would have the opportunity to
20 prepare more witnesses and potentially sit for a longer period
21 of time were we to return perhaps early in the new year.

22 So, in that sense, we would be attempting to use that time

SUBMISSION BY MR. MURRAY FOR ADJOURNMENT

1 meaningfully if that is Your Honour's decision. So those are
2 essentially the comments of Inquiry counsel, Your Honour. If
3 you have any questions, otherwise those are my comments.

4 **THE COURT:** Thank you.

5 **THE COURT:** Mr. Macdonald, anything further?

6 **MR. MACDONALD:** No, Your Honour, other than just to turn to
7 the Aaliyah issue. We did not discuss it in depth. I'm aware
8 that there was some kind of collaboration. I know no details,
9 no specifics, have not had instructions from my clients on that
10 issue whatsoever. So just saying that part of it. Thank you.

11 **THE COURT:** Okay. Thank you.

12 Thank you, Counsel, for your comments. I'm going to take a
13 few minutes or so and consider what I've heard this morning and
14 I'll return in a short period of time. Thank you.

15 **COURT RECESSED (10:53 HRS)**

16 ^^ ST

17 **COURT RESUMED (12:12 HRS)**

18

19

20

21

22

RULING**ZIMMER, J.P.C.: (ORALLY)**

1
2
3 The timeline relating to the events, including the
4 calling of the Inquiry, I think is something that is important
5 to keep in perspective. I know that Ms. Miller made mention of,
6 for instance, the Hyde Inquiry. It went from November 2007 to
7 November 2010 and I would say that at the beginning of this
8 Inquiry, I read a lot of the Hyde Inquiry Report. I have had
9 discussions with the judge who conducted the Hyde Inquiry as
10 well as counsel involved, and I guess one of the cautionary
11 tales to me was, "Don't start until you're ready to start". You
12 will not read that in the Hyde Report, that was the cautionary
13 tale to me from those that were deeply involved in the Hyde
14 Inquiry.

15 So January 3, 2017, was the date of the tragic deaths that
16 prompted an RCMP investigation and prompted an investigation by
17 the Chief Medical Examiner pursuant to the ***Fatality***
18 ***Investigations Act of Nova Scotia***. I am aware that Dr. Bowes
19 had conversations with many people, including various family
20 members, and as well as police, government officials, hospital
21 officials, others who could provide him with information as he
22 made his determination as to whether or not he would recommend

RULING

1 an inquiry pursuant to the provisions of the **Act**. The **Fatality**
2 **Investigations Act** provides that the Minister of Justice can
3 convene a Fatality Inquiry or if the Chief Medical Examiner
4 recommends an Inquiry, the Minister of Justice is obliged to
5 order the Inquiry.

6 I know, and counsel will have the documentation we have, at
7 some point we are going to hear from Dr. Bowes. We will hear
8 about his correspondence and his dealings with the office of the
9 Minister of Justice. We do know that, at least as of October
10 13, 2017, so we have gone from January 3rd to October 13, 2017,
11 that there is correspondence to the Minister in relation to the
12 issues that arose as a result of the Chief Medical Examiner's
13 investigation to that point in time. The correspondence then
14 proceeds through to December 28, 2017, wherein the Chief Medical
15 Examiner is recommending an Inquiry under the **Fatality**
16 **Investigations Act** and that triggered an obligation on the
17 Minister to call the Inquiry. We know that the Minister's Order
18 for the Inquiry was dated February 14, 2018. Everyone can do
19 the math, we are over a year from January 3rd to the date that
20 the Order was issued by the Minister.

21 It is part of the process. There were a lot of things that
22 were looked at and we will hear from Dr. Bowes and the efforts

RULING

1 that he made, what was involved out of his office, and the RCMP
2 investigation and other investigations that were going on at
3 that time. People were not just sitting on their hands,
4 needless to say.

5 Once the Order was given for the Inquiry, it was necessary
6 to determine a site. On May 24th this location was announced as
7 the site of the Inquiry and it was viewed as very important that
8 it be conducted in the community that Lionel Desmond and his
9 family were from. Appreciate that the room that we are in is
10 the Council Chamber and behind me is the Council desk. I might
11 say it was not until July of 2018 that I was named as the
12 presiding judge for the Inquiry and Mr. Murray was announced as
13 the Crown Counsel that had been assigned to the Inquiry.

14 We started with a room that was the Council Chamber and
15 from there we had to assemble staff. It is not like we were
16 walking into an existing court facility where everything was in
17 place, where you had monitors, where you had recording
18 equipment, where you had Sheriff Services, where you had
19 everything that you would need to be able to conduct a hearing.
20 We had a blank slate which was this room.

21 There were staff requirements for the Inquiry itself.
22 There were various government departments that were engaged, the

RULING

1 Municipality had to be engaged, there were lots of discussions
2 until the plans were agreed upon and the construction began.
3 And everyone worked, I can tell you, heads down to get us to the
4 point where, in May of 2019, we were sufficiently ready to deal
5 with the applications for standing, participation hearings.
6 There was a lot accomplished considering that we started from
7 the blank slate and we could at least then proceed as we should.
8 Since that date in May it again has been heads down, driving
9 steadily to November 18th when we were or we are in a position
10 to begin to hear evidence.

11 But when you look at the amount of time that we have been
12 engaged in the process here, it is difficult to compare it as
13 against what was happening in the Hyde Inquiry because it was
14 entirely different. You know, apart from being in a position to
15 create the physical structure for the hearing with everything
16 that you see in front of you and much of which you do not see,
17 we also had to consider how we were going to deal with the
18 management of the information that we expected to get. Once we
19 started receiving electronic disclosure, for instance, from the
20 Attorney General of Canada and realized that we were looking at
21 52-odd-thousand electronic files, we then had something new that
22 we had to be able to manage. It was nothing that had been

RULING

1 handled by the Hyde Inquiry or, from my understanding, anything
2 in the Provincial Court history. So it was necessary to create
3 a brand new, for us anyway, structure to deal with that
4 information.

5 The cautionary tale from Hyde was, "Don't start till you're
6 ready", and it has been a touchstone for guidance as far as I am
7 concerned. So, that it was going to take us a certain amount of
8 time to get to this point, is not unremarkable at all. In fact,
9 I think it is somewhat remarkable and it is a bit of a
10 compliment to counsel that they have been able to digest the
11 material that they have really only had, in my view, in the most
12 workable format since early October to be ready now. The
13 additional time that would occur on an adjournment, in my view
14 would only effectively enhance the opportunity for preparation
15 and give additional time to counsel to fine tune, be more
16 efficient, and effective if the time is used in that way.

17 Would an adjournment be frustrating? Perhaps. And I say
18 perhaps because there are many different interests that are
19 involved in a delay that might run 60 or 80 days or however much
20 time. Would it be inconvenient? There would be some
21 inconvenience because there is going to be scheduling issues I
22 think. We can work around those. Would it result in a ... and

RULING

1 I appreciate, as well, and counsel pointed out, that this is not
2 an issue of a decision that would favour generally the Desmond
3 family or generally the Borden family. That is not in the
4 equation here.

5 Would it result in a measure of disappointment to the
6 Desmond family not being able to proceed in the expectation that
7 today was going to start the evidence? Perhaps. But it is not
8 likely going to result in any unfairness because we will resume
9 and eventually be at the point where we expect to be. Would it
10 result in an actual or perceived unfairness to the Borden family
11 in the circumstances? And I would say likely because they would
12 be here unprepared, not engaged, the way they would like to be
13 and have a right to be.

14 Now the delay here is, and I know Ms. Miller touched on it,
15 there is a large community of interest, not just the interests
16 that are in this room and the local community, but broader than
17 that, perhaps across the country and whether they are veterans
18 groups or medical groups or doctors or government. The delay
19 here does not prevent the Department of National Defence or
20 Veterans Affairs from conducting their own reviews nor does it
21 stop the provincial government from having discussions with the
22 federal government to identify issues that may have impacted

RULING

1 Lionel Desmond and his family.

2 Given my limited jurisdictional ability to investigate
3 federal departments and agencies and review their policies, a
4 relatively short period of recess is not likely to have a broad
5 impact. Also consider that when we return in January or
6 February for evidentiary hearings that at the conclusion of that
7 session, we are likely to have advanced to where we expected to
8 be at any rate even if an adjournment was not granted.

9 I think in some circumstances it is reasonable to expect
10 that counsel can get caught up with evidence if they are unable
11 to attend for any particular reason. In the present
12 circumstances, to start the Inquiry evidence without the Borden
13 family meaningfully prepared to participate, in my view, would
14 create an unfairness that I do not believe could be overcome by
15 re-calling witnesses as need be to allow them to get caught up.
16 A 60-day-or-thereabouts delay in these circumstances, in my
17 view, is not unreasonable. Preparation will continue through
18 that period of time and we will return and we will get caught up
19 together and hopefully move forward in a cooperative fashion
20 thereafter.

21 We should not feel pressure to get started with the
22 evidence, we should simply feel pressure to get it right. So I

RULING

1 am going to grant the adjournment. This session of the Inquiry
2 is going to be adjourned as of today's date to be re-called at a
3 later date.

4 I am going to ask counsel to, if you could, remain for a
5 few minutes. We are going to shut down and we are going to
6 clear the room and I would like to have a discussion. Thank
7 you.

8

9 **COURT ADJOURNED WITHOUT DAY**

(12:28 HRS)

10

11

12

13