

February 24, 2017

Commissioner Leo Barry
Commission of Inquiry Respecting the Death of Donald Dunphy
Unit 1, 425 Topsail Road
St. John's, NL A1E 5N7

Dear Sir:

Re: Application to edit text messages

As discussed with Commission counsel this application seeks to exclude from evidence a text exchange dated April 9, 2015 between 3:14:32-3:25:13. It is our position that the prejudicial and inflammatory nature of these comments far outweigh any probative value.

At p. 318 of his textbook Professor Ratushny discusses the principle of proportionality in the context of the questioning of witnesses (does the proposed line of questioning assist in understanding or resolving the issues) and if the questioning “contributes only marginally and there is better evidence to serve the same purpose, it should be avoided”. It is our position that the same principle should apply to the admissibility of evidence.

At pp. 326-327 Professor Ratushny discusses the use of evidence of bad character and suggests that questions that are “only marginally relevant” should not be permitted. Again, the Applicant suggests that the same principle should apply to the admissibility of evidence.

On the issue of the use of propensity evidence reference is made to the following comments of Binnie J. in *R. v. Handy* [2002] S.C.J. No. 57 at paragraphs 39-40:

39 It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in B. (C.R.), supra, at p. 744:

The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character.

Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of law is wholly against the process of reasoning.

40 The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": Hamlet, Act I, Scene v, 11. 66-67

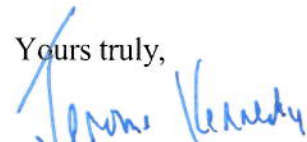
While not diminishing in any way the effect of this tragic incident on Meghan Dunphy it must not be forgotten that Cst. Smyth and his family have also suffered greatly. Cst. Smyth has been vilified in social media and the subject of vitriolic public commentary. Pictures of his wife and child have been posted on Facebook.

Applying the principle of proportionality it is the Applicant's suggestion that the admission of the comments which are requested to be edited will simply result in further public humiliation and add little to the issues which this Commission has to decide.

The Applicant recognizes that the decision to edit lies within the discretion of the Commissioner and the Applicant requests an Order as outlined here. On the principles to be applied in judicial editing the Applicant refers to *R. v. Bonisteel*, 2008 BCCA 344, at paragraph 45 and *R. v. Minoose* [2010] O.J. No. 5941 (Ont. S.C.J.) at paragraphs 24-30.

Thank you for your consideration of this issue and if you have any questions please contact the undersigned.

Yours truly,



JEROME KENNEDY, Q.C.