

IN THE MATTER OF THE COMMISSION OF INQUIRY  
RESPECTING THE DEATH OF DONALD DUNPHY

**Ruling 2: On Application to Edit Blackberry Text Messages**

Counsel for Joseph Smyth has applied to exclude from evidence Blackberry messaging exchanges dated April 9, 2015, between 3:14:32 and 3:25:13, inclusive. Cst. Smyth submits that the comments he exchanged with a friend were nothing but black humour as he sought to ease the mental strain he was experiencing in the days following the death of Mr. Donald Dunphy. On February 27, 2017, I redacted certain portions of the messages with reasons to follow. These are those reasons:

Evidence is admissible if it is relevant and not subject to exclusion under any other rule of law or policy. Justice Sopinka discussed the notion of relevance in *R. v. Mohan*, [1994] 2 S.C.R. 9, when considering the admissibility of expert evidence:

... Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is, 'whether its value is worth what it costs': see *McCormick on Evidence*, ... Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule: see *R. v. Morris* ... Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

The comments in issue in the present case are portrayed by counsel for the Dunphy family as insensitive and tending to establish an attitude by Cst. Smyth which is arguably incompatible with the empathetic, non-confrontational, approach Cst. Smyth says he exhibited while speaking with Mr. Dunphy before the shooting. As such, the evidence of the comments is put forward to challenge the credibility of Cst. Smyth, as well as to support an inference that it was his demeanour and attitude rather than Mr. Dunphy's which led to the confrontation and shooting.

I note the comment in Ratushny, *The Conduct of Public Inquiries: Law, policy and practice* (2009), at p. 317:

While a commissioner has flexibility to the extent to which these [trial rules of evidence] are applied, having them in mind can contribute to the fair and expeditious conduct of hearings.

I will follow this practice and recognize the caution of Professor Ratushny, at p. 318, that "particularly where potential findings of misconduct are engaged, a stricter assessment of the relevance and fairness of receiving evidence should occur".

Cst. Smyth relies upon the principle of proportionality, discussed at p.318 by Professor Ratushny:

The foremost requirement in conducting hearings is to ensure that the evidence adduced is relevant to the terms of reference. Does it relate to some issue arising out of those terms and does it help to reach some conclusion about that issue? This is not a legal question but must be answered simply on the basis of logic and common sense. The legal standard for judicial review is "reasonably" relevant, but that seems inherent in the word "relevant" itself. Still, it is a reminder that it does not mean remotely relevant or potentially relevant through speculation. It may be tempting at the early stages of hearings to be lax in this respect. But, if hearings counsel has done the necessary preparation in advance to define the issues, the standard of relevance can be strictly applied from the outset.

In this respect, the concept of "proportionality" may also be helpful. Even though the proposed line of questioning can be "associated with an issue, to what extent does it really assist in understanding or resolving the issue? If it contributes only marginally and there is better evidence to serve the same purpose, it should be avoided.

I accept that I have a duty to properly exercise my discretion to exclude evidence that would result in an unfair process. I will exclude evidence where its probative value is outweighed by its prejudicial effect.

In assessing probative value I will necessarily be “determining the degree or extent to which the evidence will prove the fact in issue for which it is tendered.” See Lederman, Bryant, Fuerst, *The Law of Evidence in Canada – Fourth Edition, 2014*, at p. 62. In the present case, this requires “an assessment of the strength of the inferential link between the evidence in question and the fact in issue”. Ibid.

In the present case the inferential link between the black humour of Cst. Smyth on April 9, 2015 and what his demeanor or attitude had been on April 5, 2015 is weak. It has minimal probative value. On the other hand, the insensitive nature of his text exchange with his friend between 3:15:40 and 3:25:13, inclusive would have significant prejudicial impact on the Inquiry process in that it risks doing significant damage to Cst. Smyth’s reputation in the community whatever my findings in this Inquiry might be. This prejudicial effect outweighs the probative value.

The prejudicial effect of the comments regarding the firearm, between 3:14:32 and 3:15:40 (to the words “still works”) will not be significant. Their probative value outweighs the prejudicial effect.

It is ordered that the text exchanges from 3:14:32 to 3:15:40 (up to the words “still works”) go in and the exchange from 3:15:40 (“still works”) to 3:25:13, inclusive shall not be admitted.



Leo Barry  
Commissioner