SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Butcher*, 2018 NSSC 105

Date: 2018 04 18
Docket: HFX No. 455873
Registry: Halifax

Between:

Her Majesty the Queen

v.

Nicholas Jordan Butcher

DECISION: *VOIR DIRE* 11
Crown Application – Admissibility of Electronic Communications

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	April 18, 2018, in Halifax, Nova Scotia
Written Submissions:	April 13 and 15, 2018
Written Decision:	May 2, 2018
Counsel:	Carla Ball and Tanya Carter, for the Crown Peter Planetta and Jonathan Hughes, for the Defence

By the Court:

Overview

[1] The Crown alleges that Mr. Butcher murdered Kristin Johnston on March 26, 2016. This decision deals with the admissibility of certain text messages between Nicholas Butcher and others that relate to the following aspects of the evidence:

- The state of the relationship between Mr. Butcher and Ms. Johnston;
- Mr. Butcher's financial situation and related stress in the period leading up to March 26, 2016; and
- Mr. Butcher's stress over his career in the period leading up to March 26, 2016.

[2] The Crown says the texts of Kris Skiba, Phil Dumaresq, Vicky Horne, Adam Chisholm, Fiona Brooks, Kim D'Ambrogi, and Kristin Johnston are admissible as they are relevant, probative and go to Mr. Butcher's motive and possible intent. The Crown says they also corroborate the antemortem hearsay evidence admitted to explain Ms. Johnston's state of mind and present intention as of March 25 and 26, 2016, regarding her relationship with Mr. Butcher (see *R. v. Butcher*, 2018 NSSC 74).

[3] Mr. Butcher objects to the admission of these text messages on the following grounds:

- Many of the texts are stale or not contemporaneous with March 26, 2016;
- They are irrelevant;
- They relate to collateral issues; and
- Their probative value is outweighed by their prejudicial effect.

[4] At the conclusion of argument, the Crown agreed to remove any reference to messages between Mr. Butcher and Ms. Johnston, and Mr. Butcher and Adam Chisholm (a witness already called at trial) from the exhibit in question. The Crown agreed that they would not tender these text messages as part of their case-in-chief

with the caveat that taking this position will not prejudice them from attempting to introduce those messages during their cross-examination of Mr. Butcher, if he chooses to testify. I will deal with any objections regarding the use of those text messages if that becomes an issue.

[5] On April 18, 2018, I issued a bottom-line decision on this issue with written reasons to follow. Subsequently, on April 19, 2018, having elected to call evidence and testify, Mr. Butcher argued during *Voir Dire* 13 for the admission of text message/electronic communications between himself and Ms. Johnston. In *R. v. Butcher*, 2018 NSSC 106, I ruled those electronic messages admissible for consideration by the jury.

Admissibility of Text Messages

[6] Mr. Butcher concedes that text messages can be admissible as admissions against interest. In *R. v. Bridgman*, 2017 ONCA 940, Fairburn J.A., speaking for the court, stated (some citations omitted):

> 67 The documents in possession rule is one of long-standing... The rule applies to paper and electronic documents alike...
>
> 68 The rule is designed to permit the admission of documents in two different circumstances for two different purposes.
>
> 69 First, the rule allows for the admission of documents found in personal, constructive or joint possession of an accused as original circumstantial evidence of their contents to establish the accused's connection to or complicity in the matter to which the documents relate... Second, where evidence exists that the accused has recognized, adopted or acted upon the documents found in possession, the documents may be admitted as an exception to the hearsay rule, allowing the trier of fact to consider them for the truth of their contents. As noted in *B.C. Securities Comm.*, at p. 33, "if the party in possession has recognized, adopted or acted on the document an admission of acceptance of its contents as true may be inferred."
>
> 70 This court addressed the dual nature of the admissibility doctrine in *Turlon*. The court adopted as correct the following passage from Hodge M. Malek & Sidney L. Phipson, *Phipson on Evidence*, 18th ed. (London: Sweet & Maxwell, 2013), at 37-10, pp. 1326-27, which remains substantively unchanged today:
>
> > Documents which are, or have been, in the possession of a party will ... generally be admissible against him as *original (circumstantial)* evidence to show his knowledge of their contents, his connection with or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as *admissions* (i.e.

> exceptions to the hearsay rule) to prove the *truth* of their contents if he has in any way *recognised, adopted or acted upon them.* [Emphasis in original.]
>
> 71 Text messages are documents containing out-of-court statements. I reject the position that *Baldree* forecloses their admissibility under the documents in possession rule. When text messages are found in possession, they may be considered for admission as either original circumstantial evidence or hearsay. It all comes back to the purpose for admission.

[7] In *R. v. Evans*, [1993] 3 S.C.R. 653, Sopinka J., for the court, explained the rationale for admitting admissions:

> 24 The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in *McCormick on Evidence, supra*, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

[8] Although Mr. Butcher concedes the general admissibility of text messages, the instructions of Sopinka J. on the issue of admissibility bear repeating:

> 32. In my opinion, this is the correct approach to be applied in respect of the authenticity of admissions. If there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. While the contents of the statement may only be considered for the limited purpose to which I have referred above in the first stage, in the second stage the contents are evidence of the truth of the assertions contained therein.

Are the text messages stale?

[9] In *R. v. Moo*, 2009 ONCA 645, the court examined the admissibility of antemortem hearsay evidence in the context of a domestic homicide. In outlining

the need for evidence to provide context to the relationship in this type of case, Watt J.A. explained, for the court (some citations omitted):

> [97] Despite this general rule excluding character evidence as circumstantial proof of guilt, we recognize that, sometimes, evidence of prior misconduct, which tends to show bad character, may be so highly relevant and cogent that its probative value in the search for the truth outweighs any potential for misuse... Thus, we permit admission of this evidence by exception where its probative value exceeds its prejudicial effect.
>
> [98] In prosecutions for domestic homicide, evidence is frequently admitted to elucidate the nature of the relationship between the accused and the deceased. This evidence, which often discloses misconduct other than that charged, not only demonstrates the nature of the relationship between the parties, but also may afford evidence of motive and animus relevant to establish the identity of the deceased's killer and the state of mind with which the killing was done...
>
> [99] Evidence of extrinsic misconduct comes with baggage – moral prejudice (the potential stigma of "bad personhood") and reasoning prejudice (including potential confusion and distraction of the jury from the actual crime charged)...
>
> [100] Where evidence of extrinsic misconduct is admitted, one antidote to ensure that prejudice does not substitute for proof are mid-trial and final cautions that educate jurors about the permitted and prohibited use of the evidence. This general rule does not apply, however, where the extrinsic misconduct evidence is offered to demonstrate motive or animus towards the victim in a prosecution for unlawful homicide...

[10] The evidence at trial shows that Mr. Butcher and Ms. Johnston had been in a relationship for less than a year when Ms. Johnston was killed on March 26, 2016. Considering the duration of their relationship, the text messages, having been written between August 2015 and March 2016, are not stale.

Financial Difficulties

[11] Some of the texts relate to Mr. Butcher's alleged financial difficulties. The antemortem hearsay witnesses testified that Ms. Johnston wanted to end her relationship with Mr. Butcher. The jury heard some evidence that Ms. Johnston was having financial difficulties, that Mr. Butcher was living with her in part for financial reasons, and not necessarily for romantic reasons. These texts support the Crown's position.

[12] These texts also support the Crown's theory that Mr. Butcher was feeling stressed about many things leading up to March 26, 2016, including his financial situation. This evidence is relevant.

Job Prospects

[13] Some of the texts show Mr. Butcher's difficulty in securing employment in his chosen field. The antemortem hearsay witnesses testified that Ms. Johnston wanted to end her relationship with Mr. Butcher, in part because he was hanging around the house, not doing much, and not supporting her the way she wanted to be supported.

[14] The texts also confirm Mr. Butcher's unhappiness with his employment situation and how this may have contributed to his stress leading up to March 26, 2016. These texts are relevant.

Breaking up and fighting

[15] Some of the texts reveal that, during the course of their relationship, Mr. Butcher and Ms. Johnston broke up for a period of time. The also reveal disagreements between them. Mr. Butcher speaks in the texts about how poorly this made him feel. Considering the events leading up to Ms. Johnston's death on March 26, 2016, including Mr. Butcher entering Michael Belyea's residence uninvited on two occasions during the early morning hours of March 26, 2016, to look for Ms. Johnston, such evidence is relevant.

[16] One text mentions the fact that Mr. Butcher and Ms. Johnston had a fight. There is no suggestion whatsoever that the fight included any sort of physical violence. These texts are relevant.

"Nervous breakdown" and "going crazy"

[17] In one text, Mr. Butcher says the stresses caused him to have a "nervous breakdown" and in another he says he is "going crazy". These terms are used by Mr. Butcher himself. In the context of the texts, they are clearly being used colloquially, and not clinically. There is nothing about Mr. Butcher's use of these terms in context that would fall under the category of discreditable conduct or bad character. They are his own words explaining how he was feeling at the time he wrote the texts. Mr. Butcher can explain them if he so chooses.

Probative vs. Prejudicial

[18] Mr. Butcher says that the probative value of the text messages is far outweighed by their prejudicial effect. In *R. v. F. (D.S.)* (1999), 169 D.L.R. (4th) 649, [1999] O.J. 688 (Ont. C.A.), the court was faced with allegations of physical and sexual abuse in the course of an ongoing relationship. Justice O'Connor stated for the court (citations omitted):

> 22 In this case it was important to put the complainant's evidence supporting the charges in the context of the overall relationship. The complainant's evidence was that the allegations underlying the charges were consistent with the attitude and behaviour that the appellant exhibited towards her throughout the one year period that they lived together. The challenged evidence would enable the jury to more fairly evaluate the complainant's evidence regarding the specific allegations. Excluding that evidence would have left the jury with an incomplete and possibly misleading impression of the relationship. In my view, the disputed evidence was relevant for the purpose of setting forth the contextual narrative in the course of which the alleged events occurred.
>
> 23 The trial judge also held that the discreditable conduct evidence was admissible for the purpose of demonstrating the motive or animus of the appellant in committing the offences alleged. It is well established that evidence of motive is admissible to prove the doing of an act as well as the intent with which the act is done...
>
> 24 On several occasions courts have held that evidence of discreditable conduct, in particular evidence of abusive behaviour towards a complainant, is admissible for this purpose...
>
> 25 In this case, the evidence, which in general terms described a pattern of abusive behaviour towards the complainant, if accepted, was capable of assisting the jury in understanding why the appellant did what was alleged in the indictment. This evidence demonstrated an animus on the appellant's part towards the complainant that was consistent with the offences with which he was charged. The trial judge was correct in holding that the impugned evidence was relevant for this purpose.
>
> 26 Finally, the trial judge held that the discreditable conduct evidence could be relevant to the explanation by the complainant for her failure to leave the relationship and to report the abuse earlier. The complainant was vigorously challenged in cross-examination about the delay in reporting some of the allegations and her delay in leaving the marriage. The complainant's evidence about the pattern of ongoing abuse and her fear of the appellant were important parts of her explanation for her conduct in this regard. The evidence of discreditable conduct was also relevant for this purpose.
>
> 27 In my view the trial judge was correct in holding that the evidence of discreditable conduct was relevant for the purposes set out above. The evidence

was also clearly material, in that it was directed at the central issue in the case, the credibility of the complainant.

[19] In considering the probative value versus the prejudicial effect in *F. (D.S.)*, O'Connor J.A. stated:

> 28 The fourth step in the test set out in *B.(L.)* is to determine whether the probative value of the evidence in question outweighs its prejudicial effect.
>
> 29 In assessing the probative value, Charron J.A. in *B.(L.)* indicated that consideration should be given to the strength of the evidence, the extent to which it supports the inferences sought to be made and the extent to which the matters it tends to prove are in issue. The trial judge concluded that the discreditable conduct evidence in this case had significant probative value.
>
> 30 The complainant was the only witness who gave evidence of discreditable conduct. The strength of that evidence obviously depended on the jury's assessment of her credibility. However the evidence, if accepted, was strongly supportive of the Crown's case. It helped to show the animus of the appellant without which the jury may have wondered why, in a seemingly otherwise normal relationship, the appellant would behave as the complainant described. The evidence enabled the jury to understand the relationship and, importantly, strongly supported the complainant's explanation for not leaving or reporting sooner. It therefore related to the central issues in the case. I agree with the trial judge that the probative value of this evidence was high.
>
> 31 The trial judge carefully considered the prejudicial effect of the evidence. The primary concern with this type of evidence is that the jury may misuse it by inferring guilt based on the bad character or disposition of an accused.
>
> 32 There are a number of factors which reduce the potential prejudicial effect of the evidence in this case. First, the evidence was highly probative of material issues in the case. In *B.(L.)* at p. 505, Charron J.A. observed that high probative value will tend to make it less likely that the evidence will be used improperly.
>
> 33 Next, the evidence of discreditable conduct was entirely that of the complainant. This was not a case in which the complainant's credibility was bolstered by a third party testifying about the discreditable conduct of the appellant. If the jurors did not accept the complainant's evidence about the charges, they were unlikely to have been greatly swayed by the additional evidence of discreditable conduct. See Gregg, "Other Acts of Sexual Misbehaviour and Perversion as Evidence in Prosecutions for Sexual Offences" (1965), 6 Ariz. L.R. 212 at p. 220.
>
> 34 Finally, in the charge to the jury, the trial judge gave a very clear limiting instruction on the purpose for which the jury could use the evidence, and importantly, the trial judge instructed the jury that they could not use this evidence to conclude that the appellant was the type of person who would be disposed to commit the offences with which he was charged.

> 35 In my view, the trial judge correctly concluded that the probative value of this evidence outweighed its prejudicial effect and properly held the evidence to be admissible. I therefore see no merit in this ground of appeal.

[20] In *R. v. Taweel,* 2015 NSCA 107, Saunders J.A., writing for the court, considered the weighing of probative value versus prejudicial effect in the context of similar fact evidence (of significant discreditable conduct), and stated:

> 70 It is necessary to recall the facts from *Handy* in order to set the stage for the Supreme Court of Canada's explicit warnings concerning the introduction of such evidence in any given case. Let me begin by saying that I would have refused to admit the "similar fact" evidence in this case for virtually the same reasons it was rejected in *Handy*. While it is true that the proffered evidence in *Handy* was being given in a jury trial and by a third party (the accused's ex-wife), I do not consider the difference to be material in this case, nor the risk attached to its admission, lessened to any degree.
>
> 71 There, the accused was charged with sexual assault causing bodily harm. His defence was that the sex was consensual. The complainant's position was that she had consented to vaginal sex but not rough or anal sex. The Crown sought to introduce similar fact evidence from the accused's former wife to the effect that the accused had a propensity to inflict painful sex, including anal sex, and when aroused would not take no for an answer. The similar fact evidence concerned seven alleged prior incidents. The accused denied assaulting the complainant, or committing any of the alleged assaults on his ex-wife. He argued that his ex-wife and the complainant had met and colluded, which then led to false charges against him. The jury convicted the accused of sexual assault. The Ontario Court of Appeal ruled that the former wife's testimony was wrongly admitted and ordered a new trial. The Supreme Court of Canada agreed and dismissed the Crown's appeal. Writing for a unanimous Court, Justice Binnie undertook a comprehensive review of the authorities which have consistently:
>
> > 58 ... fully recognized the potentially poisonous nature of propensity evidence, and sharply circumscribed the circumstances in which it can be introduced.
>
> 72 After describing the nature of the onus and burden on the Crown (quoted at para68 above), Binnie J. explained how the requisite analysis would require the trial judge to assess the probative value of the evidence in relation to the issue in question for which the Crown sought its introduction; assess the prejudicial impact of the evidence which meant that it was "necessary to evaluate both moral prejudice (i.e., the potential stigma of "bad personhood") and reasoning prejudice (including potential confusion and distraction of the jury from the actual charge ...)"; and ultimately weigh and compare the probative value versus prejudice, emphasizing that the starting point of such a balancing was:

> ...of course, ... that the similar fact evidence is presumptively inadmissible. It is for the Crown to establish on a balance of probabilities that the likely probative value will outweigh the potential prejudice. (para99-101)

73 In then applying his framework to the facts of that case and in particular the second step which was to assess the prejudice of the proffered evidence, Binnie J. highlighted the dangers associated with the admission of such evidence. His comments are particularly apt in this case:

> 138 The poisonous potential of similar fact evidence cannot be doubted. Sopinka, Lederman and Bryant, supra, at s.11.173, refer to the observations of an English barrister who has written of that jurisdiction:
>
> > Similar fact evidence poses enormous problems for Judges, jurors and magistrates alike. The reason for this is the headlong conflict between probative force and prejudicial effect. Often, in the Crown Court, it is as close as a Judge comes to singlehandedly deciding the outcome of a case. [Emphasis added, in original.]
> >
> > (G. Durston, "Similar Fact Evidence: A Guide for the Perplexed in the Light of Recent Cases" (1996), 160 Justice of the Peace & Local Government Law 359, at p. 359)
>
> Canadian trial lawyers take the same view.
>
> (a) Moral Prejudice
>
> 139 It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a wrongful conviction. The forbidden chain of reasoning is to infer guilt from general disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.
>
> 140 The inflammatory nature of the ex-wife's evidence in this case cannot be doubted. It is, to the extent these things can be ranked, more reprehensible than the actual charge before the court. The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion. It may be noted that s. 718.2 of the *Criminal Code*, R.S.C. 1985, c. C-46, reflects society's denunciation of spousal abuse by making such abuse an aggravating factor for the purposes of sentencing.
>
> ...
>
> 143 I conclude that this evidence has a serious potential for moral prejudice.
>
> (b) Reasoning Prejudice

144 The major issue here is the distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of multiple incidents involving two victims in divergent circumstances rather than the single offence charged.

145 Distraction can take different forms. In *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384 (C.A.), McLachlin J.A. (as she then was) observed at p. 399 that the similar facts may induce

> in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest.

146 Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in Sopinka, Lederman and Bryant, supra, at s.<check-sect/> 11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

147 In my view, the evidence of the ex-wife had the potential to create, in addition to moral prejudice, significant reasoning prejudice at the respondent's trial.

(Underlining mine)

74 Applying the final step of the requisite analysis which requires a careful balancing of the probative value versus prejudicial affect, Binnie J. said:

(3) Weighing Up Probative Value Versus Prejudice

148 One of the difficulties, as McHugh J. pointed out in *Pfennig, supra*, at p. 147, is the absence of a common basis of measurement: "The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial." The two variables do not operate on the same plane.

149 As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved.

150 In *Director of Public Prosecutions v. P.*, [1991] 2 A.C. 447 (H.L.), at p. 460, Lord Mackay suggested that similar fact evidence should be

> admitted when its probative value is "sufficiently great to make it just to admit the evidence", notwithstanding its prejudicial value. Lord Wilberforce in Boardman, at p. 442, also referred to "the interests of justice". See also *Pfennig, supra*, at pp. 147-48. Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded (*R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 246) and where evidence whose probative value exceeds its prejudice (albeit an exceptional circumstance) is admitted. Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.
>
> 151 In this case, the similar fact evidence was prima facie inadmissible and I agree with Charron J.A. that the Crown did not discharge the onus of establishing on a balance of probabilities that its probative value outweighed its undoubted prejudice. The probative value of the evidence, especially with respect to potential collusion, was not properly evaluated. The potential of such evidence for distraction and prejudice was understated. The threshold for admission of this sort of evidence was set too low.
>
> ...

[21] Mr. Butcher relies on *R. v. Johnson,* 2010 ONCA 646, in arguing for the exclusion of these texts. In that case, Rouleau J.A., speaking for the court, said:

> 99 It is not sufficient for the Crown to identify some past conflict between an accused and a victim, and then speculate that it establishes animus and therefore motive. The Supreme Court in *R. v. Barbour*, [1938] S.C.R. 465, at p. 469, warned that "it is rather important that the court should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or explain the acts charged merely because it discloses some incident in the history of the relations of the parties."
>
> 100 Thus, evidence of past misconduct that is woven into a speculative theory of motive does nothing more than bring in the bad character of the accused, and ought to be excluded on the basis that its prejudicial value exceeds any small probative value it might have: see, e.g. *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 938-941.
>
> 101 On the other hand, evidence that provides the trier of fact with real insight into the background and relationship between the accused and the victim, and which genuinely helps to establish a bona fide theory of motive is highly probative, even in the absence of similarity with the charged offence: see, e.g. *R. v. Moo* (2009), 247 C.C.C. (3d) 34 (Ont. C.A.), at paras. 70-109.

[22] In *Johnson*, the court considered the admissibility of discreditable conduct, in particular, bad character evidence of past criminal conduct on the part of the accused that did not form part of the charges before the court. The court noted:

> 83 The bad character evidence rule is an example of an exclusionary rule that rests upon this general principle. Evidence of the accused's bad character cannot be adduced simply to show that the accused is the sort of person likely to commit the offence charged. While this evidence might arguably be relevant, it is inherently prejudicial when used in this fashion: *Morris*, at pp. 201-202; *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716, at para 63.
>
> 84 One particularly prejudicial form of bad character evidence is evidence that establishes past criminal conduct on the part of the accused that does not form the basis of the charges before the court. This type of past misconduct evidence has been identified as raising two forms of prejudice that will generally outweigh any probative value that might exist in the evidence itself. They are commonly referred to as moral prejudice and reasoning prejudice: *R. v. Handy*, [2002] 2 S.C.R. 908, at paras. 31, 139-147.
>
> 85 Moral prejudice refers to the possibility that a jury, presented with evidence of uncharged misconduct, might choose to convict an accused person for the crimes charged, not because they are satisfied beyond a reasonable doubt that the charges have been proven, but as substitute punishment for the uncharged misconduct: *R. v. D.(L.E.)*, [1989] 2 S.C.R. 111, at p. 128. Even where a jury does not follow this explicit line of reasoning, they might still convict based on a belief that the accused is generally the kind of person likely to commit crimes, rather than on the basis of any particular evidence showing the accused to have committed the specific crime charged: *Handy*, at para. 139.
>
> 86 Reasoning prejudice, on the other hand, refers to the distracting nature of past misconduct evidence. Rather than focusing the trial on the question of whether the charges have been proven by the Crown, past misconduct evidence risks distracting a jury with evidence of other criminal conduct: *D.(L.E.)*, at p. 128; *Handy*, at para. 144.
>
> 87 Evidence that tends to prove the commission of uncharged criminal acts will normally appear much like the evidence adduced to prove the commission of charged criminal conduct. Excessive court time devoted to proof of extraneous criminal conduct might well distract the jury from their ultimate task of considering whether the crimes that have actually been charged by the Crown have been proven beyond a reasonable doubt.

Conclusion

[23] In this case, the text messages are not evidence of bad character or of discreditable conduct on the part of Mr. Butcher. There is no risk of moral prejudice

or reasoning prejudice on the part of the jury. Any possible concern about reasoning prejudice (and there should be none) can be cured with a mid trial and a final jury instruction.

[24] The probative value of this text message/electronic evidence far outweighs any prejudicial effect. Society has an interest in determining the truth of the charges. This text message/electronic evidence is relevant to provide the jury with the entire context of the events leading up to March 26, 2016. There is no impact to Mr. Butcher's right to a fair trial by the admission of this evidence.

Arnold, J.