S.C.C. File No. 33476

In the Supreme Court of Canada
(On Appeal from the Alberta Court of Appeal)

Olga Maria Nixon

Appellant
(Appellant)

-and-

Her Majesty The Queen

Respondent
(Respondent)

APPELLANT'S FACTUM

(Pursuant to Rule 44 of the Rules of the Supreme Court of Canada)

BERESH CUNNINGHAM
ALONEISSI O'NEILL HURLEY
Barristers
#300, 10110 – 107th Street
Edmonton, Alberta T5J 1J4
Telephone: (780) 421-4766
Facsimile: (780) 429-0346
Email: bloos@appeals.ca

Marvin Bloos, Q.C.
Brian A. Beresh, Q.C.
Counsel for the Appellant

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
160 Elgin Street, 26th Floor
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0139
Facsimile: (613) 788-3433
Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.
Ottawa Agents for Counsel for the Appellant

ALBERTA JUSTICE
Appeals and Prosecution Policy Branch
Criminal Justice Division
300 – 322, 6th Avenue, S.W.
Calgary, Alberta T2P 0B2
Telephone: (403) 297-6005
Facsimile: (403) 297-3453
Email: goran.tomljanovic@gov.ab.ca

Goran Tomljanovic, Q.C.
Counsel for the Respondent

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
160 Elgin Street, 26th Floor
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0139
Facsimile: (613) 788-3433
Email: henry.brown@gowlings.com

Henry S. Brown, Q.C.
Ottawa Agents for Counsel for the Respondent

Table of Contents

Part I: Concise Overview and Statement of Facts

1. This appeal is the direct result of the fact that the Attorney General of Alberta had no policy in place to guide his agents respecting pre-trial agreements. He also had no clear policy to guide his agents concerning the threshold prosecution standard to be applied to plea resolutions.

2. Therefore, in this appeal the Court is respectfully asked to determine the proper characterization of the Crown's actions when reneging on a pre-trial resolution agreement in a criminal prosecution. Is that act of repudiation a matter of public conduct taking place within the review and supervision of the courts, or, as found by the Court of Appeal, is it an act of constitutionally protected prosecutorial discretion that is only subject to review under very narrow circumstances?

3. It is submitted below that the law is correctly set out by Hill J. in *R. v. M. (R.)*[1], as recently endorsed by the Quebec Court of Appeal [2]. It is further respectfully submitted that the Court of Appeal erred when it concluded that the Crown's decision to renege on its agreement with the Appellant was an aspect of its traditional, constitutionally protected, core discretionary powers and when it permitted the Crown, on appeal, to repudiate the considered legal position it took at trial in order to raise a new and much different argument on appeal that changed the case the Appellant had to meet.

4. The Appellant relies upon and adopts all of the trial judge's findings of fact and inferences set out in his Reasons. Those were not disputed below. Briefly, this is what happened: In September of 2006 the Appellant was responsible for a serious car accident at Andrew, Alberta. The facts as found by the trial judge are set out in para. 2 of his decision:

> [2] There was an accident near Andrew, Alberta on September 2, 2006. At around 8:25 P.M. Wade Andriashek, accompanied by his wife, Karen, and their 7-year-old son, Jessie, was headed north on secondary highway 855 where it crosses secondary highway 637. After stopping at the stop sign, he proceeded into the intersection where his vehicle was struck by a mobile home driven by Ms. Nixon. Both he and his wife were killed and their son was injured. There is compelling evidence that Ms. Nixon's vehicle did not stop before it entered the intersection from the west. Breath samples were taken from her more than two hours later, samples which upon analysis revealed a blood alcohol concentration of 200 milligrams per cent. In the result she was charged with operating a motor vehicle with more than the legal limit of alcohol in her blood, with two counts of impaired driving causing death, one of impaired driving causing bodily harm, and finally with parallel counts of dangerous driving causing death and causing bodily harm. [Appeal Vol. I (ARI): 5; para. #2]

---

[1] *R. v. M.(R.)* (2006) 213 C.C.C. (3d) 107 (Ont. S.C.J.). **Tab 27**
[2] *R. v. Camiré*, 2010 QCCA 615. **Tab 7**

5. In March of 2007 a preliminary inquiry was held and the Appellant was committed to stand trial on two counts of dangerous driving causing death and one of dangerous driving causing bodily harm. In May, Mr. Hatch, the Crown agent in charge of the prosecution, made a written plea-resolution offer to the Appellant which she accepted. The circumstances were these:

> [4] There followed between May 2nd and May 22nd an exchange of correspondence between Mr. Hatch and Mr. Brian Beresh, Q.C., counsel for Ms. Nixon, which culminated in a written offer to accept a guilty plea to careless driving pursuant to the provincial *Traffic Safety Act* with a joint sentence recommendation for an $1800 fine…Mr. Beresh having accepted that offer on behalf of his client, arrangements were made for her to re-elect trial in the Provincial Court as Mr. Hatch wanted the matter disposed of in Vegreville, the court nearest the scene of the accident, so that any interested parties would be able to observe the proceedings…Counsel fixed June 5th as the date upon which to perfect their agreement. [ARI: 5; Reasons: para. #4]

6. Sometime after May 22nd, in accordance with standing directions, Mr. Hatch prepared a briefing report of the Appellant's case and its proposed resolution and sent that to Edmonton head office. [ARI: 100/36-40; 164/25-29] There it found its way onto the Attorney General's "Sensitive Case List". That fact generated the series of events that underpin the Appellant's appeal:

> [5] Alberta Justice has what is called a "sensitive case list" which is regularly sent to its head office in Edmonton. It contains short summaries of upcoming cases which might attract media attention. The purpose of the list is apparently to ensure that the Minister of Justice will have timely access to information regarding pertinent aspects of such a case in the event he or she is questioned about it…. On Thursday, May 31st Mr. Richard Taylor, the Acting Assistant Deputy Minister, was reviewing that list when his attention was drawn to the Nixon case which was to be dealt with on the following Tuesday. Concerned by the proposed disposition, he initiated an inquiry into the circumstances surrounding the plea agreement. That in turn led to a Crown adjournment of the June 5th date to June 26th without objection from the defence, although it must be acknowledged that Mr. Beresh was not advised of the real reason for that request….On June 25th Mr. Gregory Lepp, the Assistant Deputy Minister, decided to repudiate the resolution agreement and proceed to trial on the dangerous driving charges….Mr. Beresh learned of that new position late that afternoon and accordingly, in Vegreville Provincial Court the next morning, after a formal re-election to this court (exhibit #2, p. 6, l. 8 - p. 7, l. 26), he gave notice of his intention to make this Charter application. It was ultimately heard on October 26, 2007 and, after submissions on November 9th, was adjourned to this date for decision. [ARI: 5-6; para. #5]

7. At the *Charter* hearing before Judge Ayotte, Mr. Hatch testified as to why he decided to enter into a plea resolution agreement with the Appellant. He considered a constellation of facts and factors when determining whether the Appellant's driving constituted dangerous driving or something less.

Mr. Hatch did not believe the Crown's prosecution standard was met – the "all or nothing" dilemma was also a factor

8. Specifically, Mr. Hatch testified that his foremost consideration in making the plea resolution agreement with the Appellant on the evidence that the Crown had available was that he did not believe that the Alberta Crown prosecution standard which he understood to be "a

reasonable likelihood of conviction" was met. [ARI: 99/28-32; 101/7-12; 140/23-151/8; 96/18-36] There was no dispute that each Crown prosecutor determined that standard individually when he or she exercised their Crown discretion. [Reasons: #51-52] [ARI: 99/28-100/6; 176/1-47]

9. Mr. Hatch testified that in his view, based upon his attendance at a meeting on June 1st that he attended, there was disagreement over the applicable standard. [ARI: 140/23-141/4] When Mr. Taylor later testified, he suggested the standard was that there was a probability that a reasonable jury acting judicially would convict. It was not disputed that there were differing opinions and that there was no written policy setting out the standard. [Supplementary Record (SR): 3-4]

10. Mr. Hatch also took into account the fact that within the *Criminal Code* there is no included offence to dangerous driving. Therefore a trial prosecution for dangerous driving, standing alone, becomes an "all or nothing" gamble for the Crown because if the Crown fails to establish the requisite elements of "dangerousness" on the criminal standard, the result for the accused is a complete acquittal. The trial judge reviewed those considerations in detail in his reasons including the problems Mr. Hatch believed existed with the admissibility of the Crown's alcohol evidence and with the "Galloway evidence" respecting alleged bad driving by the Appellant. [Reasons: #28-49, 52] [ARI: 151/13-155/17; 156/22-158/21; ARII: 49/15-26]

11. Mr. Hatch also knew that the Appellant was represented by one of the most experienced and senior criminal defence counsel at the Alberta bar. Therefore, if the matter went to trial, the Crown's evidence respecting the dangerous driving issue would be thoroughly scrutinized and any weaknesses would be exposed. [Reasons: #35, 41-42, 49, 52] [ARI: 171/13-19]

12. His opinion that the prosecution standard could not be met, together with the "all or nothing" dilemma, and therefore the considerable risk of a complete acquittal at trial, were the deciding factors that, in Mr. Hatch's opinion, (and that of his superior), motivated him to make his resolution offer to the Appellant. [Reasons: #42, 47, 52] [ARI: 100/42-102/12; 103/11-26]

13. Mr. Hatch believed that his plea resolution agreement had these public interest benefits: first, it avoided the clear risk of the Appellant's complete acquittal. Second, it would permanently record the Appellant's responsibility and guilt for her driving conduct, albeit for a provincial driving offence. Third, it would result in a punishment of the Appellant for her driving conduct, and, finally, the Appellant's guilty plea "might be of assistance to the families of the victims in any potential civil claim they might bring." [Reasons #52] [ARI: 163/11-18]

Mr. Hatch's supervisor agreed with his decision to make the plea resolution agreement

14. The evidence was undisputed that, before making any plea resolution offer to the Appellant's counsel, Mr. Hatch first discussed the matter with Mr. Marchant of his office who had 29 years experience. He then discussed the matter with Ms. Drissell, his immediate supervisor in the chain-of-command and the Chief Regional Crown prosecutor. She had over 22 years experience. Both agreed with Mr. Hatch's proposed course of action and Ms. Drissell gave her permission for Mr. Hatch to proceed with the plea resolution offer with Mr. Beresh. Mr. Hatch also confirmed that before he made his ultimate decision to extend the Crown's plea offer, he had a "fairly extensive meeting with the lead investigator", following which he believed "she accepted the resolution." [Reasons: #52] [ARI: 85-86; 109/39-44; 131/9-21; 160/40-161/26]

15. Mr. Wiberg, the Acting Director of Alberta General Prosecutions, Regional, testified that his duties included supervising and managing 10 regional prosecution offices including the Vegreville office where Mr. Hatch was based and Ms. Drissell was the Chief Crown Prosecutor. He confirmed that a prosecutor with a certificate of agent status signed by the Attorney General or Deputy A.G. could exercise prosecutorial discretion over a particular case. No restriction on the exercise of that discretion existed with respect to the type of offence at issue. [ARI: 174-175]

16. Mr. Wiberg testified that Alberta Justice utilizes two standards for initiating and continuing a prosecution. The first is public interest and the second is reasonable likelihood of conviction. A Crown agent must be satisfied of both standards to initiate or continue a prosecution. This determination is an exercise of individual prosecutorial discretion that a particular Crown agent makes after assessing all of the evidence. [ARI: 176/15-177/11]

17. Mr. Wiberg explained that when determining whether the standard of reasonable likelihood of conviction was met, the Crown agent assesses all of the expected admissible evidence. This assessment is done bearing in mind the evidence collected by police, *the credibility of the Crown's witnesses and the admissibility of their evidence* at trial, evidence supplied by the defence and the likelihood of such evidence being admitted, the potential for defences that may appear available on the face of the investigation, any defences that defence counsel might raise in discussions with the Crown or through cross-examination at preliminary inquiry, and lastly, any potential *Charter* applications. [ARI: 177, 193] [Emphasis added.]

18. For the years of 2006 and 2007, Mr. Wiberg stated that regional Crown prosecutors under his supervision, including Mr. Hatch, were encouraged to enter plea resolution negotiations without his consent. Regional Crown agents were encouraged to consult with Chief Crown

Prosecutors, such as Ms. Drissell, who were in turn authorized to approve plea negotiations by line Crown agents under their supervision. [ARI: 178/21-45]

19. Mr. Wiberg testified that there was never any policy that a regional Crown prosecutor had to tell the defence that plea agreements or offers were conditional on approval from head office. Mr. Wiberg stated that he never expressed to any regional Crown prosecutors that he, or anyone else, would overrule any plea negotiations made in good faith and that no such policy ever existed. [ARI: 185/37-186/8]

Alberta's Sensitive Case List policy led to the repudiation of the plea agreement

20. The Attorney General of Alberta has no policy concerning Crown plea agreements or their repudiation. The Attorney General's "Sensitive Case List" directive is the policy that gives rise to this appeal. In its essence the "Sensitive Case List" is populated by those Alberta criminal court matters that might attract media attention and could potentially cause public embarrassment to the Minister of Justice in his dual capacity as Attorney General if reported by the media. Mr. Taylor, the Acting Deputy Minister, testified that the "driving concern" of the sensitive case list is so the Minister "doesn't get caught flat footed, and that he is accountable for what goes on in his department…." [ARII: 8/21-25]. He confirmed that not only would the Attorney General, as Minister of Justice, "find it embarrassing if he felt he couldn't support a certain decision made by a prosecutor" but, "He'd be angry." [ARI: 15-16; para. 24]. Mr. Taylor testified that given the Minister's basic stance of being tough on impaired driving, then any case that came along suggesting one of his prosecutors was not tough on impaired driving could result in "political fallout" [Reasons: #24]. That is one reason why Crown prosecutors in Alberta are directed to send summaries of any sensitive cases to head office in Edmonton. [ARII: 13/40-46]

21. Mr. Lepp, the Assistant Deputy Minister (ADM) agreed with the above and confirmed that, respecting cases appearing on the Sensitive Case List, the Attorney General of Alberta did not require Crown agents to obtain pre-approval before making plea resolution agreements with defence counsel, or that Crown agents obtain head office "permission" before concluding a plea resolution agreement. [ARII: 22/45-24/24]

22. Mr. Lepp also confirmed Mr. Wiberg's evidence respecting the extent of the Crown discretion that all Alberta Crown agents had, being that there was no policy requiring Crown agents to get permission to make binding agreements on matters appearing on the Sensitive Case List no matter what the consequences might be to an accused:

> Q: Is it correct that there is no policy in place in relation to cases that appear on the sensitive case list, which mandate that Crown counsel obtain permission before sealing the deal, concluding?
>
> A: There is no policy to that effect.

Q: None at all?

A: No.

Q: So a prosecutor is fully entitled to assess the case, decide to enter into plea negotiations, and confirm a deal?

A: Yes.

Q: Regardless of what jeopardy the accused is put in by that arrangement?

A: Well they're -- they're entitled to take those steps, yes. [ARII: 24/5-24]

The Appellant made admissions of fact and suffered because of her changed expectations

23. Before Judge Ayotte, by consent of the Crown, Mr. Beresh filed the Appellant's Affidavit sworn on October 25th, 2007 [ARI: 205/12-16]. The Appellant, who was 58 years old, stated that as a result of her accident and the criminal charges that followed she was under great emotional strain such that she had to consult two psychologists. She stated that she was told by Mr. Beresh of the Crown's plea resolution offer to careless driving and that on May 3rd, 2007, she gave him instructions to accept the offer. She stated that after that she was "extremely relieved" and that her anxiety levels changed and she was less anxious and less depressed.

24. She further stated that on the evening of June 25th, 2007, she was told that the Crown wished to renege on its plea agreement. She was very shocked at that news and could not believe what she had been told. She stated that since that time she was very depressed, upset and anxious, had considered committing suicide, and there were many days (11) since June 25th and the date of the hearing, that she could not get out of bed and go to work. She further stated that she has had to continue seeking professional help to deal with the situation. [ARII: 164-166]

25. As part of the plea agreement the Appellant admitted that she was the driver of the vehicle and that she drove her vehicle carelessly thereby causing the accident, both of which admissions she later confirmed when pleading guilty to the charge. [ARI: 32/19-29]

26. There was no issue that Mr. Hatch was a designated Crown agent and as noted, that the designation of "Crown agent" permits, in a particular case, a Crown agent to exercise full prosecutorial discretion and to otherwise act with the full authority of the Attorney General in relation to all *Criminal Code* matters, or that all decisions of a Crown agent bind the Crown. Particularly, there was no issue that Mr. Hatch did anything wrong. That is, he did nothing that breached in any way any policies, guidelines or directives issued by the Attorney General for the guidance of his agents. [ARI: 28; para. 53] [ARI: 82-83, 87, 175-180]

27. It was also not disputed below that of all the prosecutors who were involved in this matter, Mr. Hatch was the most familiar with the file. He alone had interviewed the police investigator and the other witnesses, examined them at the preliminary inquiry, saw and heard

them testify, was aware of the other evidence not called at the inquiry, was the only Crown agent who could assess witness "credibility", and was familiar with the strengths and weaknesses of the case. In his final submissions Mr. Marriott agreed that deference was owed to Mr. Hatch. [Reasons: #35, 41; 44-45, 49] [ARII: 78-80] It was not in dispute that Mr. Hatch believed he was acting in the public interest and that he was trying his best to do his job properly as Crown counsel. [Reasons: #52] [ARI: 143/17-24]

The ADM relied upon two legal opinions to renegé on the Crown's plea agreement

28. Between the date of May 31st, when Mr. Taylor, as Acting ADM, first read Mr. Hatch's briefing note, and June 25th, when Mr. Lepp formally decided to repudiate the Crown's plea resolution agreement, several meetings were held, numerous discussions took place and two legal opinions were provided to Mr. Lepp. The legal opinions provided to Mr. Lepp later formed the key basis for his decision to renege on the Crown's plea agreement with the Appellant.

29. A review of the evidence placed before Judge Ayotte indicates that pretty much from the time Mr. Taylor first read Mr. Hatch's briefing report it was his opinion, and later the opinion of Mr. Lepp and his other advisors, that when making the plea resolution agreement with Mr. Beresh, Mr. Hatch made several mistakes respecting the law as it applied to the Crown's potential evidence and therefore a way must be found to renege on the plea agreement. [Reasons: #26, 28, 33, 34, 41, 49, 51, 52] [ARI: 138/28-43; ARII: 1-7; 14/20-33; 15/5-45]

30. The first meeting to be held was called by Mr. Taylor on June 1st. Mr. Hatch attended, along with his supervisor and Chief Crown, Ms. Drissell. Mr. Taylor, Mr. Marriott and Mr. Wiberg, all senior, head office counsel, were also in attendance [ARI: 136/23-138/28]. The purpose of the meeting was to discuss with Mr. Hatch his conduct of the file and his basis for making the plea resolution agreement with the Appellant. [ARI: 136-142; 164; ARII: 1-4]

31. Mr. Wiberg described his attendance at that meeting. His view then was that Mr. Hatch's decision was a reasonable application of discretion. He said if it were his decision he would not have made the plea offer, but he agreed that other Crown prosecutors would have agreed with Mr. Hatch and made the plea resolution offer. [ARI: 191/25-40]

32. After that meeting, the file and its "repudiation issue", which was unprecedented in Alberta, was turned over to Mr. Lepp as ADM. He took two significant steps. The first was to direct that Mr. Hatch's file be sent for an opinion to Mr. Robert Palser, a junior line-prosecutor in Edmonton. [ARII: 16/15-20; 25/25-41; 31/3-11] The second was to ask Mr. Taylor, who was the Director of the Appeal's Branch, to have an opinion prepared concerning "the law in relation to

the repudiation of plea agreements." [ARII: 16/25-40] As set out below, that opinion was prepared by Mr. Marriott, expert counsel in the Appeal's Branch.

33. Ultimately, based primarily on Mr. Palser's opinion [ARII: 31/12-32/5] disagreeing with Mr. Hatch's assessment of the law, and therefore the viability of the prosecution, and Mr. Marriott's legal opinion that the Crown would not infringe the Appellant's *Charter* rights if it reneged on Mr. Hatch's plea agreement, on June 25th, Mr. Lepp gave written instructions to Mr. Marriott to renege on the Crown's agreement with the Appellant. The further choice was made to continue the matter in Provincial Court.

34. The next day, June 26th, at Provincial Court, the Appellant took the position that the Crown's refusal to honour Mr. Hatch's plea agreement constituted an abuse of process and subsequently filed a Notice of Motion seeking s. 24(1) *Charter* relief.

35. Mr. Lepp testified he believed, after reviewing the two opinions that he requested, that:

> It would bring the administration of justice into disrepute if this plea agreement were not repudiated, and … that following in [sic] my review of your [Mr. Marriott's] opinion that it would not, in my opinion, be a *Charter* violation to repudiate this plea agreement, and so I directed that – that it be repudiated. [ARII: 18/5-21]

36. When asked why he believed Mr. Hatch's plea agreement with the Appellant would bring the administration of justice into disrepute, Mr. Lepp testified that after he reviewed Mr. Palser's opinion and following consultation with others, he believed "there was far more than a reasonable likelihood of conviction" on the dangerous driving charges. [ARII: 19/5-18]

37. Mr. Lepp also confirmed that there was no written or other policy concerning plea agreements, that he did not have senior Crown counsel or Appellate Crown counsel review the file to determine the issue of "reasonable likelihood of conviction", that he never spoke to Mr. Hatch before he made his decision to repudiate the plea agreement and that he "relied on Mr. Palser's view of the file" when making his decision. [ARII: 23/45-24/4; 32; 34]

38. In his final submissions Mr. Marriott submitted that the central problem was a disagreement with Mr. Hatch's assessment of the law and credibility of witnesses. He agreed that Mr. Hatch's assessment of the viability of the prosecution was overruled by those who had never talked to the witnesses or heard them testify. [ARII: 76, 83/40-84/42]

The Crown and Appellant agreed on the issues, the test, and the procedure to be followed in provincial court before Judge Ayotte

39. When determining the Crown's options, Mr. Lepp was advised there were two: (i) proceed by preferring a Direct Indictment or (ii) renege on the plea agreement. In response to

those options Mr. Lepp stated he was "cool" to the "direct indictment" advice. [3] As noted, the Alberta Attorney General had no policy about Crown plea resolution agreements or how to deal with the issue of reneging on a Crown plea agreement once made. However, Ontario, at least since the release of the *Martin Committee Report*,[4] has had both written Crown policy specifically adopting the *Martin Committee Report* recommendations concerning plea resolution agreements and specific case law dealing with those recommendations and that Crown policy.[5]

40. Mr. Lepp testified that because Alberta had limited experience with the repudiation of plea resolutions he sought the advice of the Deputy Minister of Ontario. This was also because it had "*a written policy which closely mirrors the case law…that was drawn to my attention [in] Mr. Marriott's memo*…" [ARII: 36/26-37] [Emphasis added.]

41. As noted, Mr. Lepp asked for a legal opinion respecting the Crown's ability to renege on plea resolution agreements. As also noted, that opinion was prepared by Mr. Marriott, a criminal law expert and senior member of the Appeal's Branch. Mr. Marriott later, at Mr. Lepp's direction, took over the prosecution of the Appellant in the proceedings before Judge Ayotte.

42. There is no issue that Mr. Lepp relied heavily on Mr. Marriott's legal opinion not only with respect to his decision to repudiate Mr. Hatch's plea agreement with the Appellant, but with respect to the issues to be decided on the Appellant's *Charter* application before Judge Ayotte in Provincial Court. When Mr. Marriott examined Mr. Lepp on that legal opinion, Mr. Marriot made this statement to the Court:

> MR. MARRIOTT: Sir, I'm not going to make any effort to put that opinion before the court, because essentially it addresses the same issues that, Your Honour, is going to have to address -- [ARII: 17/39-42]

The Crown's position was that *R. v. D.(E.), R. v. Cherry, R. v. M.(R.), R. v. White*, and the *Martin Committee Report* reflected the law

43. Mr. Marriott also prepared a "Memorandum of Argument of the Crown" which he submitted to the Court at the conclusion of the evidence. Aspects of Mr. Marriott's

---

[3] In an email dated June 22nd, 2007, Mr. Rosborough, Q.C., Chief Prosecutor for Edmonton and formerly senior counsel with the Appeal's Branch, recommended that Mr. Lepp proceed by direct indictment because that election would be "unencumbered by any abuse of process or constitutional impediment". [ARII: 156]

[4] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, Ontario,* 1993, herein after the "*Martin Committee Report."* **Tab 47**

[5] As per Hill J. in *R. v. M. (R.)* 2006, 213 C.C.C. (3d) 107 (Ont. S.C.J.) at para. 13 and at footnote 2: "As a general rule, counsel must honour all agreements reached after resolution discussions. However, on rare occasions it is appropriate for a senior Crown counsel after reviewing an agreement made by a Crown, to repudiate that agreement if the accused can be restored to his or her original position, and if the agreement would bring the administration of justice into disrepute. Any such repudiation must be approved in advance by the Crown Attorney or a Director or a Regional Director." See also: *R. v. Cherry, supra* at #39; *R. v. Chen,* 2009 ONCJ 453 at para. #20-22. **Tab 27**

Memorandum were specifically referenced by Judge Ayotte at para. 28 of his reasons. Mr. Marriott's Memorandum of Argument is reproduced at ARII: 167.

44. In that Memorandum Mr. Marriott submitted that in *R. v. D.(E.)*[6] the Ontario Court of Appeal determined "that it may be an abuse of process for the Crown to renege on [a plea] agreement with the accused." [ARII: 169-170; para. #7] In the preceding paragraph he made specific reference to the *Martin Report* stating that its recommendations were "adopted as policy governing pre-trial resolution agreements" and that while the general rule was "that pre-trial agreements should be honoured…it may be appropriate for senior Crown counsel to repudiate a resolution agreement reached by junior counsel, where the agreement would bring the administration of justice into disrepute, provided the accused can be restored to his original position."

45. At para. 10, respecting the Appellant's *Charter* application, Mr. Marriott submitted that:

> The key question [to be resolved] is whether [Mr. Hatch's] agreement will bring the administration of justice into disrepute; one Crown cannot repudiate an agreement which another Crown properly entered into, simply because he doesn't like the deal[7]. *It is not necessary for the accused to show that the Crown acted in bad faith for the court to find that there was an abuse of process.*[8] [Emphasis added.] (See the Court of Appeal Reasons at para. 42: ARI: 49]

46. At para. 11 Mr. Marriott states: "The ability to restore the accused to his original position is crucial." Although Mr. Marriott then submitted there was in this matter no abuse of process, he stated that should Judge Ayotte decide otherwise, then "the appropriate remedy is to require the Crown to conclude the plea agreement negotiated by counsel." [ARII: 171; para. #17]

47. At the very start of the proceedings before Judge Ayotte, Mr. Beresh stated that:

> ….It's not absolutely clear in the case law….that Mrs. Nixon is actually the applicant in this case. We take the position that it's actually the prosecution who applies to renege on the deal….and I'll refer you to Justice Hill's decision where he says there's a heavy onus on the prosecution if they're going to try [to] renege. [ARI: 70/15-30] [*R. v. M.(R.)*: 61-64]

48. That statement was immediately followed by this exchange:

> **The Court**: All right, I understand, *if there's a preliminary burden it's to prove the grievance*.
>
> **Mr. Beresh**: Yes, that's what I think it is, yes.
>
> **The Court**: Right, and after that *then the onus may shift to the Crown*.
>
> **Mr. Beresh:** Yes.
>
> **The Court**: All right. [ARI: 70/33-45] [Emphasis added.]

49. When Mr. Marriott made his final oral submissions he specifically agreed with:

---

[6] *R. v. D.(E.)* (1990), 57 C.C.C. (3d) 151 (Ont. C.A.). **Tab 14**

[7] Mr. Marriott cited *R. v. Cherry* 1994 CarswellOnt 3758 (Ont. C.J.), **Tab 44**, *R. v. M.(M.)* 2001 CarswellOnt 2538, **Tab 26, *Error! Bookmark not defined.***R. v. White*, 2006 ONCJ 291, **Tab 44,**as his authorities.

[8] Mr. Marriott cited *R. v. M. (R.)* (2006), 213 C.C.C. (3d) 107 (Ont. S.C.J.), **Tab 27,** as his authority.

> The learned discussion in the *Martin Committee Report*, and in the Ontario Attorney General's agent's manual….and [with the fact that] a guideline has been established, which has been accepted by the judiciary in Ontario that, generally speaking, plea agreements will be honoured *but that where such a plea agreement, if concluded, would bring the administration of justice into disrepute*, it is appropriate for senior Crown counsel to repudiate a resolution agreement reached by junior counsel. [ARII: 74/20-25] [Emphasis added.]

50. Mr. Marriott then made it clear that as counsel for the Crown, he agreed that *R. v. D.(E.)* and *R. v. M.(R.)* set the judicial framework for Judge Ayotte's decision:

> And you've seen the decision, not only of Justice Hill, but also the – actually, the earlier Court of Appeal decision *in R. v. D. (E.)*, which sort of sets the framework for it. *The two considerations, of course, which **must also apply** are, first of all, whether the agreement itself would bring the administration of justice into disrepute*, *and* whether the Crown is in a position to return the accused to the position he was in before the plea agreement was reached. [ARII: 74/26-35] [Emphasis added.] [See *R. v. M.(R.)* #43-44, and *Martin Committee Report*, #53]
>
> …Although there is virtually no litigation on this issue in this province [therefore]…I would suggest that the *litigation from Ontario is very persuasive, and should be followed by this court*, and that the court should recognize that there is a right of the attorney general to supervise junior crown, and to intervene in those appropriate cases *where the standard that I've just mentioned* [whether the plea agreement itself would bring the administration of justice into disrepute] *has been met*. [ARII: 75/10-18] [Emphasis added.] [Reasons: #17]

51. Later, in exchanges with the Court, Mr. Marriott explicitly acknowledged that *R. v. M.(R.)* is the operative and applicable case [ARII: 81/1-30; 91/1-47]. He never referred to *Krieger v. Law Society* and he never suggested that anything other than the questions raised and answered by Hill J. in *M.(R.)* were relevant.

52. During final submissions, Mr. Beresh based the Appellant's entire legal position on the decision of Mr. Justice Hill in *R. v. M.(R.)* making at least five specific references and submitted that the test the Appellant must meet was not the "clearest of cases" but "is simply on a balance of probabilities." [ARII: 43/11-15; 47/10-12; 51/9-52/35; 54/14-26; 67/15-20; 70/45-47]

53. Following a reserve of two months, Judge Ayotte issued his reasons. After recitation of the facts leading to the Appellant's *Charter* application, Judge Ayotte considered this Court's rulings in *Jewitt* and *O'Connor*. He noted that at para. 71, *O'Connor* did away with the distinction made in *Jewitt* separating the concepts of "abuse of process" at common law with its focus on maintaining confidence in the integrity of the justice system and the breach of s.7 of the *Charter of Rights* with its focus on the breach of individual rights. Judge Ayotte found at para. 9 that "The practical effect of that ruling is that it is now open to a *Charter* applicant to allege abuse of process and invite the court, in an appropriate case, to look beyond personal prejudice in determining whether there has been a s. 7 breach.": *O'Connor* #64.

54. He went on to find, based on *O'Connor* that those seeking remedies for "abuse of process" "were no longer constrained by the traditional remedy of a "stay" but applicants could

seek a lesser remedy where the facts fell short of the "clearest of cases" standard [Reasons: #10]. At para. 12, after earlier noting the Appellant's position on the application, Judge Ayotte specifically noted that the Appellant did not seek, through her application to interfere with or examine the Crown discretion to initiate the prosecution against her, but rather, in accordance with para. 47 of *Krieger*, she sought judicial review of:

> The negotiations between agents of the Attorney General and defence counsel after charges have been laid and when both parties are acting in their capacity as officers of the court [that] clearly come, in my view, within that latter category. A proper foundation for her application having thus been established, the first matter to be decided is the appropriate standard against which to measure the Crown's conduct. [ARI: 8-9; Reasons: #12]

55. At paras. 13 through 16, when determining the test he will apply, Judge Ayotte reviews several authorities beginning with the decision of the Ontario Court of Appeal in *R. v. Agozzino* for the proposition that "the Crown is indivisible" pointing out that Crown agents:

> Will disagree from time to time on the appropriate way to dispose of a given case. It has long been urged that the judicial system depends for its credibility on the ability of those who are caught up in its processes to rely on the positions taken by those agents and therefore that it is important that an undertaking made by any one of them be honoured by the others, so important that the courts themselves will enforce that obligation where appropriate. [Reasons: #14]

56. At paras. 15-16 Judge Ayotte makes specific reference to the *Martin Committee Report* and Recommendation #53 and its commentary both of which he quotes also noting that they were both reproduced by Hill J. in *R. v. M.(R.).* Following that he stated:

> Although the Province of Alberta has neither an analogous report or…a similar Crown Policy manual, Mr. Marriott acknowledges the persuasive authority of the Martin Committee Report. As there is virtually no judicial guidance in this province, ***he directs me instead to the Ontario cases***....Against that background, he takes the position that the resolution agreement entered into by the Crown in this case is validly repudiated *because the accused can be restored unprejudiced to her original position*…***and*** because the agreement itself, if implemented, *would bring the administration of justice into disrepute*…. [ARI: 12; Reasons: #17] [Emphasis added.]

57. After noting that Mr. Marriott urged the Court to "equate the ability of the Attorney General to resile from a plea agreement to the ability of a trial judge to reject a joint submission on sentence since both are predicated on the concept of bringing the administration of justice into disrepute"[9], Judge Ayotte reviewed *R. v. C. (G.W.)* the leading Alberta appellate authority on joint submissions [#18]. With all of that in mind and by analogy to *C. (G.W.)*, Judge Ayotte determined the test he would apply to the issue of whether the Crown had met its burden of establishing that the Crown's resolution agreement was validly repudiated:

> ….In other words, if the submission is legally defensible in the dictionary sense of that term, it cannot, virtually by definition, bring the administration of justice into disrepute. "Defensible" is defined in the Canadian Oxford Dictionary, Second Edition, 2004 as: "justifiable, supportable by argument". Similarly, the Random House Dictionary of the English Language, Second Edition,

[9] See *R. v. M. (R.) supra* at para. 61, **Tab 27**.

> 1987 says it means "that can be defended in argument; justifiable". *In my view, that is the test I should apply to the agreement made by Mr. Hatch in determining whether, if honoured, it would bring the administration of justice into disrepute*. I add to the dictionary definition, for clarification only, the adverb "reasonably". [Reasons: #19] [Emphasis added.]

58. Having set out the test he would apply to the second branch of the common law requirement as embodied in Recommendation 53 from the *Martin Committee Report*, Judge Ayotte reviewed the evidence in light of the issues raised on the Appellant's *Charter* application.

59. One of those issues was the Appellant's concern that the Crown's attempt to renege on her plea resolution agreement was politically motivated. Judge Ayotte dealt with that question at paras. 20-25, concluding that:

> The most that can be said is that their knowledge of the Minister's public stance on impaired driving and crime in general would have been an added incentive to find a reason to renege on Mr. Hatch's offer if they honestly could, given their understanding of the existing law. Mr. Lepp, for the reasons he expressed in his instructions to Mr. Marriott, believed he had found those reasons: see Exhibit #34. There is nothing to suggest that his action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice. Accordingly, Ms. Nixon's complaints on that score are without merit. [Reasons: #25]

Judge Ayotte found the Crown's plea resolution agreement would not bring the administration of justice into disrepute

60. At paras. 26 – 49 Judge Ayotte considered the balance of the evidence in view of his test. At paras. 26- 28 he sets out his findings as to the Crown's specific allegations respecting the mistakes it said Mr. Hatch made when making the plea resolution agreement with the Appellant and how the Court would apply the law and the test he formulated, to the Crown's allegations:

> 26 Those who influenced Mr. Lepp's decision to repudiate the resolution agreement took exception to a pair of Mr. Hatch's conclusions: first, that the analyses of the breath samples provided by Ms. Nixon would be inadmissible at trial and second, that the evidence of Ryan Galloway, who had earlier observed erratic driving by a van with the same licence plate as hers, was too remote in the circumstances to be relevant to the prosecution. In view of those two mistakes, the Assistant Deputy Minister was persuaded that any agreement which permitted Ms. Nixon to escape Criminal Code convictions was contrary to the public interest….

> 27 In considering the validity of those concerns, I emphasize again *that the test I apply is whether Mr. Hatch's conclusions were reasonably defensible based on the evidence he had available to him and not whether they were right in the sense that he had correctly forecast the outcome of the trial had it proceeded.* It is not my function to try the case, but simply to examine the grounds upon which an agent of the Crown made his decision to proceed as he did. As was pointed out in the Martin Committee Report, supra, "Reasonable counsel may often reasonably differ on whether a particular agreement is in the public interest in the circumstances of the case." *If the Crown is to justify its course of action here, it must in my view do more than establish that other, even more senior counsel, have reached a different conclusion than Mr. Hatch did. Rather it must satisfy me that his conclusions were so flawed by his misunderstanding of the law and the weight of the evidence available to him that to proceed to resolution based on those defects would bring the administration of justice into disrepute.* Even if it could be said that Mr. Hatch's resolution offer was ill-advised given the possibility of a conviction had the matter proceeded to trial, that would be in itself insufficient. As Hill J. observed at para. 67 of his judgment…:

> *....prosecutorial error or mistakes characterized as "bad decisions" do not necessarily amount to decisions sufficiently off the mark as to fall within the rare exception described in Recommendation 53 or its equivalent. In other words, the Crown simply has to live with some bad decisions. ...* [Emphasis in the original]

> 28 Judging by Mr. Marriott's Memorandum of Argument, it is Mr. Hatch's "*misunderstanding of the law regarding the admissibility of the breath samples*" that is primarily responsible for his mistaken evaluation of the strength of the Crown's case: see Memorandum of Argument of the Crown, para. 14…. [Emphasis added.]

61. As set out, Mr. Palser's legal opinion was one of the two reasons Mr. Lepp decided to repudiate the Crown's agreement with the Appellant. At paras. 31-49 Judge Ayotte considers the specific concerns raised by Mr. Palser when concluding that Mr. Hatch made significant mistakes when assessing the Appellant's matter. At para. 35 Judge Ayotte stated:

> In addition to those weaknesses in his assessment of the case, I note that Mr. Palser did not speak personally with Mr. Hatch to get some idea of why he was taking the position he was. Nor did he apparently talk personally with any of the witnesses. Considering the preliminary inquiry transcript excerpts quoted above, it would appear that he did not have access to that document either. *All of that is important.*…prosecutors must take many things into account in deciding how best to proceed. They include more than what is written in a Crown brief; they include personal contact with the witnesses themselves and an assessment of how they will fare on the witness stand…. it was clear from her early expressions of concern that Cst. Koopman herself had doubts about how she had obtained the ASD tests. If…the Crown attempted to put the Certificate of Analyses in evidence, the constable would have been subjected to cross-examination by one of the most experienced counsel practicing in the City of Edmonton. Additionally, as canvassed above, at least some of her evidence might well have been contradicted by EMT Taylor. *Finally, Mr. Hatch had the advantage, as Mr. Palser did not, of seeing three of his most crucial witnesses give evidence at the preliminary inquiry. Those are all practical considerations which a trial prosecutor must take into account in making decisions about how best to resolve a prosecution.* [ARI: 21; Reasons: #35] [Emphasis added.]

62. As noted by Judge Ayotte, a significant concern of Mr. Lepp and Mr. Taylor, was Mr. Hatch's determination that the breath samples taken from the Appellant would not be admissible at trial. Mr. Palser considered that issue in taking the position that Mr. Hatch erred in his assessment of the law. At paras. 36-39 Judge Ayotte considered that issue and, applying his test, stated that he did not agree with Mr. Palser's opinion:

> In making that observation, I emphasize yet again that I am not saying that Mr. Palser's opinion is wrong nor am I saying that Mr. Hatch's opinion is right. *What I am saying is that on the evidence available to him, on an objective assessment of the weight of that evidence and on the existing case law, the latter's conclusion with respect to the admissibility and the probative value of the breath samples was reasonably defensible.* [Reasons: #39] [Emphasis added.]

63. Judge Ayotte also considered "whether Mr. Hatch should have anticipated a conviction for dangerous driving even without the breath sample evidence". "Mr. Palser felt that he should have…." [#40]. At para. 47, after applying his test, Judge Ayotte concluded:

> Considering all of that testimony, considering that "fine line" between careless driving and dangerous driving, considering that [Mr. Hatch] had defensibly concluded that the drinking evidence would not be available to him and remembering that Ms. Kowalchuk was his only eye-witness, *the question again* ***is whether Mr. Hatch could reasonably have come to the conclusion***

> ***that he would have some difficulty proving that "marked departure" from the standard of care that a reasonable person would observe in that situation.*** *I am satisfied that he could have. Again I emphasize that the issue is not whether he was right in that conclusion but only whether his decision was defensible, or to put it another way,* ***whether his mistake, if such it was, was so egregious as to make the resolution he pursued one which would bring the administration of justice into disrepute****. My conclusion is that it was not.* [#47] [Emphasis added.]

64. As to Mr. Hatch's decision to discount the "Galloway evidence" Judge Ayotte found:

> *Is that assessment of the value of Galloway's evidence reasonably defensible? In my view it is*. Apart from the fact that there is no reliable estimate of the time the earlier incident occurred and so no idea how much time had elapsed between that incident and the time Ms. Kowalchuk began following the Nixon motor home, Mr. Galloway's identification evidence was clearly unreliable…. Given the inherent weaknesses in his evidence, *it would not be unreasonable*…for a prosecutor to conclude that any attempt to introduce it would be met by an objection that its probative value was far outweighed by its prejudicial effect, that it might well be excluded on that ground and that it would have very limited weight if it were admitted. [#49] [Emphasis added.]

65. Judge Ayotte next pointed out that procedurally Mr. Hatch acted in accordance with the *Martin Committee Report* recommendations, including consulting with his more senior colleagues and obtaining agreement to his plea proposal. He also noted the inevitability:

> …that in some cases, this in my view being one of them, "reasonable counsel may reasonably differ" on the appropriate way to proceed. One need only look to the number of varying opinions put into evidence at this hearing to see the truth of that statement. [ARI: 27; Reasons: #51]

66. Judge Ayotte then stated his conclusion respecting the Crown's submission that Mr. Hatch's plea resolution agreement would bring the administration of justice into disrepute:

> 52 In summary then, *Mr. Hatch made a reasonably defensible assessment of the strength of his case and determined that the best course of action was to make the offer which is the subject of this application.* Before doing so, he discussed the matter with more experienced counsel in his office, got their agreement that his assessment was correct and thereafter obtained the approval of his Chief Crown Prosecutor to make the offer. Throughout he was sensitive both to his obligations to the public interest and to the feelings of the families of the victims, so much so that he met with them to explain his proposal and the reasons for it. ***His choice of resolution was influenced by his again reasonable fear that if he proceeded with the dangerous driving prosecution and failed, there would be nothing on which to fall back, as careless driving is not an included offence of dangerous driving.*** Given that reality, he chose to try and come away with something rather than nothing….
>
> 53 The ultimate thrust of Recommendation 53 of the Martin Committee Report is to encourage policies that will reduce the possibility of mistake and thus reduce the number of cases where repudiation need be considered. At the time of this decision, it would, for example, have been open to the Attorney General through his Assistant Deputy Minister *to have in place a policy which precluded any resolution offer on a sensitive case until first approved by specified legal counsel at head office. Notwithstanding that, Mr. Taylor himself conceded that there was no formal policy in place at that time setting out the steps Crown counsel, of whatever vintage, were required to take before making a plea resolution offer, no matter how serious the case….*
>
> 54 *Accordingly, I am satisfied that if the plea agreement Mr. Hatch offered was honoured by the Crown,* ***it would not bring the administration of justice into disrepute. I am also satisfied that to permit the Crown to renege on its written undertaking would so affect the repute of the judicial process in these circumstances as to amount to an abuse of that process.*** Accordingly, Ms. Nixon's application must succeed. [Emphasis added.]

67. After reaching that conclusion Judge Ayotte stated he was of:

> …the view that the question of prejudice does not arise if the court is satisfied that the original bargain, if honoured, would not be contrary to the public interest and would not bring the administration of justice into disrepute. To hold otherwise would permit the Crown to change its mind at its whim at any time before an agreement was implemented so long as it could show no prejudice to the accused in doing so. In my view, that would also unacceptably undermine the pre-trial negotiation process which is so necessary to the effective operation of the criminal justice system. Defence counsel could never properly advise a client on the merits of accepting an offer if it could be withdrawn at any time. Such an approach would also be incompatible with the view expressed in the Martin Committee Report's commentary, supra, that such agreements are in the nature of undertakings and must accordingly be strictly and scrupulously carried out in accordance with Crown counsel's ethical obligations as a member of the Law Society. [#55]

68. In Judge Ayotte's opinion the question of prejudice only arose if the Court finds that the original "agreement would bring the administration of justice into disrepute if honoured." [#56] He then stated that were he required to find prejudice he would do so because of the Appellant's lost opportunity to test and "discover" the breath sample evidence or the Galloway evidence at the preliminary inquiry: *R. v. Skogman*. [ARI: 29; Reasons: #57-58]

69. Concerning the Appellant's remedy, pursuant to s. 24(1) of the *Charter* Judge Ayotte directed the Crown to honour its agreement before another provincial court judge who, by arrangement of the Chief Judge, would not be aware of the matter. [ARI: 30-31; #60-61]

70. The Appellant's guilty plea to careless driving was entered before another Judge of the Provincial Court, who, in accordance with the directions of Judge Ayotte, was not advised of the proceedings before Judge Ayotte. At those proceedings the Appellant admitted she was the driver of the motorhome and pled guilty to careless driving. Following a joint submission as to the sentence, the Appellant was sentenced. [ARI: 33-36] Following those proceedings the Crown appealed to the Alberta Court of Appeal against the decision of Judge Ayotte.

71. On its appeal to the Alberta Court of Appeal the Crown completely reversed its trial position stating in its factum that Judge Ayotte erred by following Justice Hill's decision in *M.(R.)* and by not following *Krieger*. Appellate counsel acknowledged that at trial the "Crown endorsed the approach articulated in Recommendation 53 of the *Martin Report*….", but he then submitted the Crown's "endorsement was mistaken"[10] [ARII: 177; para. 23]. Counsel next submitted that to the extent the Crown took a different legal position at trial, the Crown's about face on appeal was permissible because "the application of the correct test is a pure legal question" that did not require further evidence and did "not prejudice the Respondent" [ARII:

[10] But see *R. v. Chandrakumar* 2007 ONCA 798 at #36, **Tab 8**; *R. v. R. (G.)* (1993), 61 O.A.C. 198 at p.4.

177; para. #24]. Counsel then repudiated the Crown's trial position that *M.(R.)* applied, submitting that *Krieger* and not *M.(R.)* was determinative. [ARII: 178; para. #27]

72. At paras. 31-32 the Crown acknowledged that before Judge Ayotte, Mr. Marriott did not once refer to *Krieger* or anything to do with the issues discussed in *Krieger*. The Crown submitted, but without any authority in support, that the "trial judge erred [by failing to conclude] that the repudiation of the plea agreement" was "a matter relating to the core of prosecutorial discretion." The rest of the Crown's written submissions on that ground had to do with *Krieger* and the various reasons why Judge Ayotte erred when he did not consider or apply it.

73. At paras. 44-47 counsel makes reference to *R. v. M. (R.)* as being a case "cited by both counsel and the trial judge" and stating that it was "clearly distinguishable". Then counsel submitted that the trial judge made a fundamental error by likening a Crown pre-trial plea resolution agreement to a "pre-trial undertaking." [ARII: 181-182; paras. #47-49]

74. Somewhat later at para. 60, written in support of the Crown's third ground of appeal which was that Judge Ayotte applied the wrong legal test, Crown counsel stated the following:

> Counsel for the Respondent cited the decision of the Ontario Superior Court in ***R. v. M.(R.)*** in support of the framework suggested in the *Martin Committee Report* and accompanying prosecution policy in that province. ***The Crown also articulated the issue in terms of the Martin recommendation as summarized in R. v. M.(R.). The trial judge accepted this approach***…. Further, the trial judge concluded that absent demonstrated compliance with this approach, repudiation of a plea agreement in these circumstances would constitute an abuse of process. [ARII: 183-184; para. 60] [Emphasis added.]

75. The Crown's factum also faulted the trial judge because he did not consider the applicability of *Krieger* and several other cases never put to him by the Crown at trial but relied upon by the Crown on appeal. [ARII: 185-188; paras. 67-68, 74]

76. In its reserved judgement, Paperny J.A., writing for the Court of Appeal accepted the Crown's repudiation of the Crown's trial position and agreed with the Crown's new submissions. In particular she ruled that the issues to be decided by Judge Ayotte were not the agreed upon issues reflected in *R. v. M.(R.)* but rather the new issue of whether the Crown's decision to renege on the plea resolution agreement was a matter of constitutionally protected prosecutorial discretion [ARI: 40-42, 49; CA Reasons: paras. #1, 4-5, 12, 42]. She would later determine that Judge Ayotte, by following *R. v. M.(R.)*, erred because he asked the wrong question and applied the wrong legal test. [ARI: 46-47, 49-50; paras. #31-32, 35, 45]

77. Paperny J.A. noted that Judge Ayotte, as he was invited to do by the Crown, relied upon the *Martin Committee Report*, the Ontario Crown Policy Manual, *R. v. Goodwin, R. v. D.(E.)* and *R. v. M.(R.)*, leading him to wrongly conclude that repudiation of a Crown plea agreement was

subject to review not as core Crown discretion, but as Crown conduct before the Court. [ARI: 44, 46; paras. #22, 28, 31] Paperny J.A. concluded at paras. #33-34 of her reasons that *M.(R.)* was distinguishable, and that had Judge Ayotte applied the correct legal analysis – *Krieger* – he would have concluded that the Crown's decision to renege on Mr. Hatch's plea agreement with the Appellant was a traditional, protected, core prosecutorial power. She also found that when he focused upon Mr. Hatch's reasons for making the agreement and then analyzed the Crown's reasons for reneging, Judge Ayotte "reversed the onus of proof." [ARI: 49-50; para. #45]

78. Following those conclusions Paperny J.A. considered whether the decision of Mr. Lepp to renege on Mr. Hatch's plea agreement constituted an abuse of process. She decided that if there was abuse, it fell into the "residual category" affecting the integrity of the justice system [ARI: 48; para. #38]. However, where, as she found here, the abusive conduct was said to arise from core-element prosecutorial discretion, the threshold test is very high requiring:

> **….**conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community such that it would be genuinely unfair and indecent to proceed**….** [or where it is a case] of 'flagrant impropriety' (for example, where there is proof of misconduct bordering on corruption…) or 'malicious prosecution' [or where] the prosecutor exercised his discretion "abusively, capriciously or for improper motive"… The threshold for review of prosecutorial discretion is very high, and cases of this nature will be extremely rare: *Power* at 616. [ARI: 48-49; para. #41]

79. Since she found that reneging on a plea agreement was a core Crown prosecutorial function, Paperny J.A. stated the following test to apply to such cases:

> Specifically, repudiation of a plea resolution agreement amounts to an abuse of process only in exceptional cases when done "unfairly", or when Crown discretion is exercised "irrationally, unreasonably or oppressively"… Subsumed in this determination is whether the conduct has caused a sufficient degree of prejudice to the accused; that is, whether the accused made any real concession or compromised his position. *Since repudiation of a plea agreement is an act within the core of prosecutorial discretion*, establishing that it amounts to an abuse of process *requires proof of prosecutorial misconduct or bad faith*. [ARI: 49; para. #42] [Emphasis added.]

80. In support of her conclusions, Paperny J.A. stated that it was a matter of Crown policy as to when to renege on plea agreements and "*the correctness of such a policy*" was not an issue on the appeal. She noted that Mr. Lepp relied upon "expert research and opinions" to determine the proper circumstances "under which the Crown can repudiate a plea agreement and essentially followed the Martin Committee Recommendations…and that when making his decision to renege he "relied on legal opinions and took guidance from the Ontario Attorney General's policy to instruct himself on the relevant considerations." [ARI: 51-51; paras. #47, 48, 50]

81. At paras. 48 and 52 Paperny J.A. found that the Appellant did not suffer any "true legal" prejudice because the Crown reneged. Paperny J.A. did not make reference to the Appellant's affidavit or to her factual admissions and guilty plea before reaching that conclusion.

Part II: Issues

Ground I: Where a Crown agent acting within his authority and within what he believes to be his duty and the public interest both initiates and finalizes a plea resolution agreement with an accused, then, where the senior Crown agent thereafter repudiates that plea resolution agreement:

1. Does that latter decision constitute an aspect of the Crown's tactics or conduct before the court that falls within the inherent jurisdiction of the court to control?
2. If the answer is "yes", then where the accused brings an abuse of process application pursuant to s. 7 of the *Canadian Charter of Rights* seeking s. 24(1) relief, is the process or procedure of judicial review and the principles and standards to be applied by the Court when considering whether the Crown's decision to repudiate its plea resolution agreement constitutes an abuse of process correctly set out by Hill J. in *R. v. M. (R.)* and was it correctly applied by the trial judge here?

Ground II: Where, in order to determine its course of action the Crown adopts and then follows a particular policy and body of law interpreting that policy, and where the Crown then advises the trial Court and the accused of that fact and agrees with the accused concerning the law to be applied and thereafter urges the trial Court to determine the issues placed before the Court using the law and policy the Crown both adopted and urged the Court to accept and apply, then here in such circumstances:

1. Did the Court of Appeal err when it permitted the Crown to reverse its position on appeal and to repudiate the position it took at trial?, and,
2. Does a trial judge err in law where she determines the issues raised on the law and policy agreed to, relied upon, and submitted to the Court by the parties?

Part III: Argument

Ground I: Was the ADM's decision to renege on the Crown's pre-trial resolution agreement an aspect of Crown conduct falling within the inherent supervisory and review jurisdiction of the Court, and did the Crown's repudiation of its agreement constitute an abuse of process as determined by the trial judge in accordance with the law as expressed in *R. v. M.(R.)*?

82. As a result of the circumstances played out in the courts below – the Crown's handling of the matter at trial, and then on appeal – and in view of the opposite decisions reached by the two courts below, this appeal raises a novel issue: Once a properly authorized Crown agent, acting in good faith and with good reason, exercises his Crown discretion on a "core power" matter, how, and when, may the Crown, whether the Attorney General or one of her agents, intervene to repudiate the decision made by that first Crown agent?

83. In response to that question the Appellant respectfully submits that in this matter the Attorney General of Alberta, through his agents, both through their actions and through the Crown's stated legal position, adopted as Alberta's policy and procedure concerning the repudiation of pre-trial agreements, the relevant policy and practice of Ontario's Attorney General including that policy's complete reliance upon Recommendation 53 of the *Martin Committee Report*, its commentary, and the jurisprudence interpreting and defining that policy.

84. It is further respectfully submitted that through its conduct and actions, coupled with the legal position that it both acknowledged and adopted at trial, *de facto*, the Alberta Crown agreed that its decision to renege on its plea agreement with the Appellant was a matter of post-discretionary Crown conduct carried out within the purview of the Court and was therefore properly made the subject of a *Charter* application claiming an abuse of process falling within the inherent jurisdiction of the Court to review and control.

85. It is trite to state that the Crown is indivisible. That legal truism was the starting point of Judge Ayotte's analysis [Reasons: #14-17]. Therefore, as a matter of logic it is submitted that it does not matter which Crown agent makes a particular trial decision, that decision, once made, becomes a "Crown" decision, and because of the principle of "indivisibility", is binding on the Crown, and hence on all other Crown agents of whatever rank whether at trial or on appeal.

86. Therefore, the Appellant further submits that the Crown's *volte-face* on appeal constitutes a repudiation of the law, policy and tactics it relied upon at trial and its complete reversal on

appeal changed the Appellant's "case to meet" and was not different in principle than the circumstances of *R. v. Agozzino* discussed below, and it did not present an error of law. [11]

87. Here, the disagreement between the head office Crown agents with the regional office trial Crown's agents (Mr. Hatch and his senior Crown colleagues), concerned differences of opinion over the applicable law and the likely admissibility and credibility of certain evidence [Reasons: #26]. There was neither suggestion or evidence that Mr. Hatch's plea resolution with the Appellant was an "unconscionable agreement", or was based upon a fundamental error of law or professional error, or that there was any dishonesty on the part of the Appellant, or any "hidden matters" such as was the case in *MacDonald*[12], that would, for public policy reasons, vitiate or undermine the validity of the Crown's plea resolution agreement.

88. For these reasons it is respectfully submitted below that not only did the Court of Appeal err by permitting the Crown, on appeal, to repudiate its agreed upon policy and legal position taken at trial, but it further erred when it ruled that Judge Ayotte asked himself the wrong question and applied the wrong legal test. As will shortly be set out it is further respectfully submitted that the Honourable Judge Ayotte did not err when he followed the decision of Hill J. in *R. v. M.(R.)*. He correctly determined the questions he was asked to decide and that in doing that he correctly followed and applied the law.

89. The Appellant found no authorities that agree with the Court of Appeal's decision that the Crown act of "repudiation of a plea resolution agreement is an act within the core of prosecutorial discretion" and that in order to "establish that it amounts to an abuse of process requires proof of prosecutorial misconduct or bad faith." [ARI: 49; para. 42]

90. Contrary to the decision of the Court of Appeal, and as now set out, it is respectfully submitted that the weight of Canadian judicial authorities, including those cited by Mr. Marriott in his written Memorandum to Judge Ayotte, support the Appellant's position that without proper reasons being established, the Crown's repudiation of a plea resolution agreement constitutes an abuse of process and that here, the Crown's impugned act of repudiation, while associated with, or related to a "core" act of prosecutorial discretion[13], is not itself a constitutionally protected core prosecutorial discretionary decision.[14]

---

[11] See *R. v. Agozzino infra*, **Tab 4,** and also *R. v. Betesh, infra,* **Tab 5,** and *infra R. v. Goodwin*, **Tab 17,** *R. v. Nguyen, infra,* **Tab 33**, *R. v. Varga, infra,* **Tab 42**, *R. v. Penno, infra,* **Tab 36** and *R. v. J.G.S., infra,* **Tab 19.**.

[12] *R. v. MacDonald*, (1990) 54 C.C.C. (3d) 97 (Ont. C.A.), **Tab 28**.

[13] *Krieger v. Law Society*, [2002] 2 S.C.R. 372 at paras. 43, 45-46, **Tab 2**.

[14] *R. v. M. (R.), supra,* at para. 62, **Tab 27**; *R. v. Camiré* 2010 QCCA 615 at paras. 31-43, **Tab 7**.

The Crown's reversal of position was found to be an abuse of process

91. It appears that in Canada the Crown's act of reneging on its plea resolution agreements was relatively rare, if not altogether unprecedented until the 1970's. At the same time that the judicial view that the Crown's reneging on a plea agreement was being described as "derogatory to the orderly administration of justice"[15] or as an "abuse of process", and declared as such in individual cases, there was uncertainty concerning the availability of "abuse of process", its guiding principles[16], and when or whether a stay of proceedings could be used as a remedy.[17] Through the 1970's to the early 1990's the Canadian common law continued to develop until Ontario's Attorney General adopted Recommendation 53 of the *Martin Committee Report* and its commentary as Crown policy, after which the developed common law as reflected in that policy, became the national template for Crown practice and procedure respecting Crown repudiation of plea agreements.[18]

92. It is submitted that Canadian courts uniformly viewed the Crown's reneging on pre-trial resolution agreements as an abuse of process within the context of trial tactics and trial conduct and not as a core act of prosecutorial discretion. However, because the issue had not been squarely presented, the jurisprudence did not articulate the problem in those terms. Therefore, when faced with the issue the courts did not specifically identify the matter, or if finding an abuse of process, they left it at that without further analysis.

93. An early example is *R. v. Agozzino*[19]. There, Mr. Aggozino pled guilty to possession of counterfeit money following a Crown undertaking to not seek jail. The trial judge imposed a suspended sentence and fine but no jail, which was an illegal sentence. The Crown appealed asking for a substantial period of custody. Without discussing the doctrine of abuse of process, Gale C.J.O. dismissed the Crown's appeal stating:

---

[15] *R. v. Roy* (Que. Q.B.) (1972) 18 C.R.N.S. 89 at para. 15, **Tab 38**, quoting from *R. v. Kirkpatrick* [1971] Que. C.A. 337, **Tab 22**.

[16] *R. v. D.(E.)* (1990), 57 C.C.C. (3d) 151 (Ont. C.A.) at paras. 18-20, **Tab 14.**

[17] See for example *R. v. Crneck* (1980), *infra* at para. 10 and following, **Tab 12**; *R. v. Betesh*, [1975] 30 C.C.C. (2d) 233 (Ont. Co. Ct.) at 57-65, **Tab** ; *R. v. Abitibi Paper Co.* (1979) 47 C.C.C. (2d) 487 (Ont. C.A.), **Tab 1**; for example: *R. v. Hardick*, (1990) 100 N.S.R. (2d) 123 (Co. Ct.) at 24-25, **Tab 18**; *R. v. Remple*, 1993 CanLII 201 (B.C.S.C.) at pp.7-8, **Tab 37**.

[18] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*,Ontario, *1993*, **Tab 47**. See *R. v. Cherry* 1994 CarswellOnt 3758 (Ont. C.J.), **Tab 10**; *R. v. Taker* [1996] 32 W.C.B. (2d) 124 (Ont. C.J.) at paras. 36-38, **Tab 40**; *R. v. M. M*. (2001), 50 W.C.B. (2d) 412 (Ont. C.J.), **Tab 26;** *R. v. Tallon* (2003), 181 C.C.C. (3d) 261 (Ont. C.A.) at paras. 12-14, **Tab 41**; *R. v. M. (R.)*, *supra*, **Tab 27**; *R. v. Laurin,* 2007 ONCJ 265 at paras. 32-35, **Tab 23***; R. v. Wood* 2007 NSPC 39 at paras. 7-8, 10-11, 14, **Tab 45***; R. v. Melnyk,* [2008] O.J. (Q.L.) 2334 at paras. 50-68, **Tab 31***; R. v. Chen* 2009 ONCJ 453, **Tab 9**; and *R. v. Camire*, Q.C.A., *supra*., **Tab 7**

[19] *R. v. Agozzino*, [1970] 1 O.R. 480-482, **Tab 4**.

> We think that the sentence ought to be altered by the addition of a sentence of one day in jail plus the $2,500 fine. We make this variation because prior to the trial Crown counsel intimated that he would not ask for a jail term and on the basis of such intimation counsel for the accused received instructions to plead guilty….*The circumstances, therefore, dictate a dismissal of the Crown's appeal* as to sentence even though, had we thought ourselves at liberty to consider its propriety, we probably would have come to a different conclusion. *Crown counsel at the trial represented the Attorney-General. He declared that he was not seeking a jail term, whereupon the accused and his counsel made a major decision as to how the trial should be approached.* The imposition of a term of imprisonment of one day in effect carries out the burden of the Crown's submission as to sentence and at the same time removes any question as to its technical accuracy. *We believe it would now be quite unfair, not only to the Magistrate but to the accused, for the Crown, by means of this appeal, to change its position by asking for a substantial term of imprisonment. In effect the appeal repudiates the position taken by Crown counsel at the trial and we do not care to give effect to that repudiation.* [Para. #4] [Emphasis added.]

94. Five years later in *R. v. Betesh*[20], Graburn Co. Ct. J. was faced with the repudiation by a provincial Crown agent of an immunity agreement made by the federal Crown. The decision in *Betesh* arose out of a bitter postal strike in 1974. Mr. Betesh was a member of the postal union and the complainant was a security guard who alleged he was assaulted by Mr. Betesh during the strike. In April of 1974 the strike was settled. The settlement was embodied in an agreement between the Federal Government, represented in part by the Deputy Attorney General of Canada, and the unions, including the Canadian Union of Postal Workers. The agreement provided that no further proceedings of any kind would be taken by her Majesty the Queen against the Union or its members for any act committed during the strike.

95. In May of 1974 Mr. Betesh was charged with assaulting the complainant during the strike. At trial he applied for an order staying the proceedings as an abuse of the court's process. His counsel argued that the provincial Crown attorney, as agent for the Attorney General of Ontario, was bound by the undertaking made on behalf of her Majesty the Queen in right of Canada and ought not to be allowed to repudiate the position taken by that prosecutorial authority. Following an extensive review of the authorities, and specifically relying upon *Agozzino* and *R. v. Brown*[21] Graburn Co. Ct. J. stated:

> 74 It is clear…that in the realm of provincial prosecuting authority, an agreement made by a prosecutor at trial may not be repudiated by another prosecutor on appeal. It is also my respectful view that although the concept of "abuse of process" was not expressly articulated by the Courts in Agozzino, Brown, and Roy, *in effect, those Courts refused the relief sought by the Crown, since to grant it, **would, in fact, constitute an abuse of the process of the Court.** The abuse lies*

[20] *R. v. Betesh*, [1975] 30 C.C.C. (2d) 233 (Ont. Co. Ct.), **Tab 5**; See *R. v. Smith* (1974) 22 C.C.C. (2d) 268 (B.C.S.C.) at paras. 16-21, **Tab 39,** where a writ of prohibition was issued to prevent the Crown from reneging on the "spirit", if not the precise terms of its plea agreement. See also *R. v. Delaney* (1977) 17 N.B.R. (2d) 224, **Tab 15**, a New Brunswick decision where Stratton J. adopted the reasoning in *Smith*, ibid. In *Delaney* the Crown made a deal that in return for his statement it would accept a guilty plea from Mr. Delaney to a lesser offence. He did his part but the police would not go along with the agreement. Stratton J. found abuse of process and issued prohibition against further proceedings.

[21] *R. v. Brown* (1972) 8 C.C.C. (2d) 227 (Ont. C.A.) at p.228, **Tab 6**.

> *in the Crown reneging on an agreement made and presented to a Court. To renege on such an agreement constitutes an abuse of the process of the Court. The Crown is expected to honour the agreements it has made in relation to prosecutions.* [#74] [Emphasis added.]
>
> 75 To this I would add that the Crown is expected to honour such agreements ***whether presented to the Court or otherwise***, [because] *the Federal Attorney General's function is to consider*, as well as *conduct*, prosecutions. [Emphasis added.]

96. Four years after *Betesh*, in *R. v. Abitibi Paper Co.*[22], the doctrine of abuse of process was used to stay a provincial prosecution under pollution legislation. The court characterized the matter as being essentially civil rather than criminal. The accused had voluntarily embarked on a programme of abatement of water pollution and a senior official at the Ministry of the Environment agreed not to prosecute him if the programme was completed by a certain date. Before the completion date the Crown laid 22 charges under the Environmental Protection Act and the Ontario Water Resources Act. Relying upon *Betesh*, *Smith*, *Delaney* and *Agozzino*, Jessup J.A. writing for the Court on this point, ruled that this was one of the "exceptional circumstances" in which the Crown's conduct amounted to an abuse of process.

97. In *R. v. Crneck*[23], Krever J. considered *Agozzino*, *Betesh, Delaney, Smith* and *Abitibi Paper* when arriving at his decision to stay the proceedings against Ms. Bradley as an abuse of process. In *Crneck*, three accused including Ms. Bradley were committed to trial on manslaughter. The Crown essentially made a deal with Ms. Bradley that if she gave a statement to police and testified at Crneck's trial she would not be prosecuted for manslaughter. After Ms. Bradley made her statement and the Crown agreement was confirmed, a different Crown agent took conduct of the file and decided it would be against the interest of justice for the Crown to keep its agreement and reneged. Ms. Bradley and a co-accused brought an abuse of process application asking for a stay of proceedings on the grounds set out at para. #18 of the judgment.

98. Before Krever J. the Crown gave no reasons for reneging on its plea agreement, taking the position that as an agent of the Attorney General the Crown's decision to renege must "be accorded respect as a decision made in the interests of justice…." While Krever J. acknowledged the merit of that position he doubted "that it outweighs the principle that agreements made by a representative of the Attorney General…should…be carried out." [#22]

99. Krever J. found on Ms. Bradley's alternative ground that permitting the Crown to renege on its agreement would cause her serious prejudice. He noted two points. First, that her credibility would be the proper subject of attack on cross-examination by defence counsel for the co-accused thereby weakening her own defence before the jury were she to testify, and second,

---

[22] *Re Abitibi Paper Co.* (1979) 47 C.C.C. (2d) 487 (Ont. C.A.), **Tab 1**.

that if Ms. Bradley did testify "…the jury would thus learn of the agreement, and seeing Miss Bradley in the prisoners' box, *might possibly draw an inference* that for the Crown to have reneged on the agreement points to her guilt." [#24] Krever J. found all of that might deter Ms. Bradley from testifying in her own defence or would otherwise reduce her defence and based upon that "and the principle enunciated by the authorities that the Crown must be expected to carry out its agreement", found hers to be an "exceptional case" and stayed the charge against her as being an abuse of process. [#25]

100. In 1981, in *R. v. Goodwin*[24], the Nova Scotia Court of Appeal heard a sentence appeal concerning a trial plea agreement that was not unconscionable. There, the Crown sought a higher sentence than it agreed to at trial. The court held the Crown to its plea bargain and imposed the agreed upon sentence stating the following principles and test:

> 12…The Crown was under no duty to make any bargain. The fact that it now considers that it should not keep its part of the bargain must be viewed not only in the light of the insufficiency of sentence, but also in fairness to the respondent…*It may be that the bargain should not have been made in view of what this court has stated as being proper sentences in crimes of this nature.* However, it was made and, in my opinion. it must be honoured. *Plain honesty and fairness demand that the agreement not be now repudiated.* [Emphasis added.]
>
> 13 Although the sentence agreed to was insufficient, I do not consider it ***so grossly insufficient to be against the public interest weighed in the light of the alternative*** **[repudiation].** ***A bargain is a bargain and, if the Crown does not wish to be bound by it, the simple solution is to make no bargain at all.*** I do not wish to imply that this court will always uphold a bargain made by counsel however wrong or ill-advised, ***but rather that, in weighing the proper principles to be applied in resolving such matters, the burden is heavy on the party who seeks to repudiate*****. I do not find in this appeal** ***that the Crown has satisfied that burden***. [Emphasis added.]

101. None of the foregoing cases found, or suggested "prosecutorial misconduct or bad faith" on the part of the Crown, nor suggested that the onus was on the applicant to establish such conduct. [25] Bad faith was considered in this context in *R. v. MacDonald*[26]. Zuber J.A.'s reasons indicate that there never was an "agreement" because at all relevant times MacDonald was bargaining in bad faith and lied about the true state of affairs[27]. Viewing the Crown's agreement in terms of the steps necessary to reach a "bargain" Zuber J.A. identified three issues. First, because MacDonald lied to the police, he was not a suspect for murder when the deal was struck. Second, MacDonald did not keep the necessary first step of the agreement which was to give a "complete and truthful statement to the police". Therefore, when the Crown later obtained other

---

[23] *R. v. Crneck et al*, (1980) 55 C.C.C. (2d) 1 (Ont. H.C.J.), **Tab12**.
[24] *R. v. Goodwin* (1981), 43 N.S.R. (2d) 106 (C.A.), **Tab 17**.
[25] See the reasons of Paperny J.A. at #42, and see *R. v. Watt*, 2007 NSSC 20, at paras. 65-66, **Tab 43**.
[26] *R. v. MacDonald*, (1990) 54 C.C.C. (3d) 97 (Ont. C.A.) (Zuber J.A.), **Tab 28**.
[27] See *R. v. Chen* 2009 ONCJ 453 at para. #36, **Tab 9,** where Fairgrieve J. viewed the agreement as being "contingent" on the truthful statement.

information suggesting MacDonald lied, because of his bad faith, Zuber J.A. found that the Crown was no longer bound to its bargain with him. Finally, on the second branch of the developing "repudiation" test – prejudice to the accused – Zuber J.A. found there was no prejudice to MacDonald because, at his trial for murder, the Crown did not use MacDonald's evidence from the preliminary inquiry [p.6]. Drawing from this Court's majority decision in *R. v. Conway*[28], Zuber J.A. ruled that this was "clearly not a case where there is an affront to fair play and decency that outweighs the societal interest in the effective prosecution of criminal cases." [p.6][29]

102. Following on the heels of *Macdonald* was the Ontario Court of Appeal decision in *R. v. D. (E.)*[30]. There, Arbour J.A. (as she then was) considered *Agozzino*, *Abitibi Paper Co.*, *Smith*, *MacDonald*, *Crneck* and *Conway* [#18-20, 36, 38, 40] after which she determined that: "The burden is on the accused to establish the facts that support his claim of abuse of process." [#42]. Following that she stated that "psychological comfort and peace of mind from being told by the authorities that charges would be laid" would give rise to a claim of abuse of process "if the prosecution unfairly reneges on expectations it has generated in the accused", citing *R. v. Conway*. [#43]

Plea agreements are not usual undertakings – once a defendant acts to her prejudice it would be improper for the Crown not to keep its word

103. In 1993, in British Columbia, Oliver J. was faced with circumstances paralleling those of the Appellant. In *R. v. Remple*[31] he found on a *Charter* application for s. 24(1) relief an abuse of process and ordered the Crown to carry out is written plea agreement. That was made following Mr. Remple's committal to trial on four counts of indecent assault. There, the Crown agreed to stay the indecent assault charges in return for Mr. Remple's agreement to a statement of facts and to plead guilty to two counts of simple assault. The sentence to be submitted to the Court was also a part of the plea resolution agreement. After Mr. Remple provided "consideration" for the agreement by admitting certain agreed facts and by agreeing to plead guilty, the Crown reneged on its agreement and wanted to change the sentence submissions.

104. Relying heavily on Krever J.'s decision in *Crneck*, as well as *Betesh, Smith,* and *Abitibi Paper Co.*, Justice Oliver stated his view that "*Betesh* stands for the proposition that the *mere*

---

[28] *R. v. Conway* [1989] 1 S.C.R. 1659 at paras. #21-23, **Tab 11**.
[29] See *R. v. M. (R.),* **Tab 27,** where at para. #60 Hill J. leaves open the question of what degree of "non-performance" by an accused would be required in an individual case to validate a repudiation by the Crown.
[30] *R. v. D.(E.)* (1990), 57 C.C.C. (3d) 151 (Ont. C.A.), **Tab 14**.
[31] *R. v. Remple*, 1993 CanLII 201 (B.C.S.C.), **Tab 37.**.

fact that the Crown reneged on its promise can be sufficient to constitute an abuse of process."

[p. 13] [Emphasis added.] Later, he stated that:

> A plea bargain, due to the public policy considerations involved, is not considered a usual undertaking by either lawyer. Either party may withdraw from the bargain prior to performance. *However, once the defendant has performed his part of the bargain in whole or in part, or has in reliance on the agreement acted to his detriment or been placed in a position of disadvantage, however slight, it would be improper for the prosecution to fail to fulfill the agreement.* [p. 15] [Emphasis added.] (See ARI: 45, CA Reasons, para. #24 where the above is considered.)

105. Justice Oliver then considered the question of "consideration" with respect to the Crown's plea offer noting that:

> The mere fact that the guilty pleas were not entered or that the admissions of fact have not been used (and cannot directly be used) by the Crown, does not change their character as "consideration". [p. 15]

106. Concerning the issue here under consideration, at p.16 Justice Oliver noted that:

> *In the present case,* ***the Crown concedes that it has not made a "unilateral decision***" *not to prosecute all charges but rather came to an agreement with the Applicant to prosecute only two charges provided the Applicant pleaded guilty to those charges and admitted to an agreed statement of facts. This was surely part of the "consideration" to make this binding upon the Crown. On this basis alone,* it could be held that the an abuse of process took place when the Crown reneged on its agreement. [p. 16] [Emphasis added.]

107. Preferring not to decide the application on that basis alone, Oliver J. went on to consider the prejudice that would be caused to Mr. Remple if the Crown were permitted to renege. His observations there also have direct application to the present appeal. Noting that at a new trial the Crown would not be able to refer to its reneged agreement, he did not agree with the Crown's contention that Mr. Remple was therefore not prejudiced finding that Mr. Remple:

> …Has, through his counsel, made certain admissions contained in the agreed statement of facts which, although they cannot be presented in court by the Crown*, will bind any future counsel acting for the Applicant with respect to the charges against him. A lawyer acting for the Applicant in the present case could not ethically ignore the admissions made by the Applicant in the agreed statement of facts in reliance on the Crown's agreement with respect to plea*. Even though the Crown is not able to refer to the statement of facts as an admission *it is, nonetheless, a factor that must constrain the defence presented by the Applicant*. *If the Applicant* chose to return to a plea of Not Guilty to the charges against him (as would normally be his right upon failure to reach a negotiated plea agreement), *Counsel would be inhibited in the evidence he calls, in his cross-examination of Crown witnesses, and in the entire manner in which he conducts the defence* (of the true nature of whose surrounding circumstances he has been made aware. [pp. 17-18] [Emphasis added.]

108. Again relying on Krever J.'s ruling in *Crneck* respecting prejudice, Oliver J. found that:

> *In light of this finding of prejudice, and in light of the Crown's admission that it reneged on its agreement with respect to sentencing,* it seems clear that the *common law requirements* for a finding of abuse of process have been met. [pp. 18] [Emphasis added.]

109. When ordering the Crown to carry out its agreement with Mr. Remple, Oliver J. stated:

> In cases such as *Re Smith…Abitibi Paper Co.* and *Betesh* and *Crneck*, the Crown's agreement had been not to prosecute. Thus, *in effect, the orders by the various courts to stay all proceedings merely carried out the agreement that had been entered into by the Crown in those cases. Here, the Crown did not agree to stay proceedings but rather to make certain submissions as to sentencing outlined in the plea agreement.* In return, the Applicant agreed to plea to certain charges on the basis of a certain statement of facts. The Applicant evidently remains willing to go through with this agreement. *The Crown should therefore be required to carry out its undertaking with respect to the plea agreement*. Were the making of that order not jurisdictionally open to me, I would instead have ordered a judicial stay of proceedings be entered. [p. 19] [Emphasis added.]

To justify repudiation the Crown must show the plea resolution agreement would bring the administration of justice into disrepute

110. The 1994 decision in *R. v. Cherry*[32], very similar to the Appellant's matter, is also instructive. There the charges were impaired driving causing bodily harm and over .08. After Mr. Cherry's preliminary inquiry his counsel and Crown counsel worked out a plea resolution agreement whereby Mr. Cherry would plead guilty to careless driving and the Crown would stay the *Criminal Code* charges. There were no "gaping holes" in the Crown's case and it was a judgment call whether or not to proceed in a case where a complete acquittal was a foreseeable outcome. As with the Appellant's matter, and in accordance with the *Martin Committee Report* and Ontario's *Crown Policy Manual*, Crown counsel obtained approval for the plea resolution agreement from his Director who was familiar with the file.

111. After the agreement was made, but before it could be carried out, the complainants contacted the Acting Regional Director to indicate they did not agree with the resolution. He in turn contacted the first Crown agent, and after a brief telephone discussion concerning the merits of the file, directed that the agreement be repudiated, which it was. Mr. Cherry challenged the Crown's repudiation pursuant to the *Charter*, seeking a stay. As in the present matter evidence was taken from the counsel involved in both reaching and then repudiating the agreement.

112. Poulin J. determined that a plea resolution agreement was made in accordance with the *Martin Report* Recommendations and the Crown's Policy Manual. [Paras. 40-42, 50-51] When determining to issue a stay of proceedings, Poulin J. made the following rulings:

(i) There was no evidence "that adherence to the agreement would bring the administration of justice into disrepute." [#55]

(ii) In view of *Betesh, R. v. Handick*, *Jewitt, Conway and Power*[33], and Directive 5 of the Crown Manual which adopts Recommendation #53 of the *Martin Committee Report*, the test to be applied by "senior Crown" as to "whether an agreement should be revoked was that: the initial plea agreement would only be rovoked in the "clearest of cases" that amounted to an agreement "which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants intervention." [#62]

---

[32] *R. v. Cherry* 1994 CarswellOnt 3758 (Ont. C.J.), **Tab 10**.

[33] *R. v. Hardick,* (1990) 100 N.S.R. (2d) 123 (Co. Ct.), **Tab 18**; *R. v. Jewitt*, [1985] 2 S.C.R. 128, **Tab 21**; *R. v. Conway* [1989] 1 S.C.R. 1659, **Tab 11,** and *R. v. Power* [1994] 1 S.C.R. 601, **Tab** .

(iii) The agreement was made in good faith. [#63]

(iv) The Crown did not establish that the agreement was one "that would shock the conscience of the community or is detrimental to the proper administration of justice so as to warrant intervention." [#63]

The Crown's failure to honour its agreements can be an abuse of process

113. The 2001 decision in *R. v. M. M.*[34] was to similar effect and arose from an:

> Application by three accused for a stay of proceedings…The accused were charged with assault with a weapon. In the pre-trial conference, it was agreed that all of the parties would participate in a family group conference to resolve the charges. The Crown refused to sign a waiver agreeing not to use any statements made during the conference if the conference failed. The accused argued that the Crown's breach of its undertaking to facilitate the group conference constituted an abuse of process and a breach of section 7 of the Charter. [Headnote to *R. v. M.M.*]

114. After considering *O'Connor*, Cohen J. asked and then answered the following question:

> Does the failure of the Crown to honour its undertaking "connote such unfairness" that it contravenes fundamental notions of justice? It has long been recognized that "it is absolutely vital that undertakings by Crown law officers and lawyers be adhered to." (*R. v. Wolf and Doyle…*). There is ample authority for the proposition that the Crown's failure to honour an agreement with the accused can amount to an abuse of process: *Regina v. Crneck…R. v. Goodwin…R. v. Mandate Erector and Welding Ltd…R. v. D.(E.)* ….[Para. #20] [Citations removed]

115. Then, after reviewing *Betesh* and Recommendation 53 and its commentary from the *Martin Committee Report*, Cohen J. ruled that:

> In the case before me the Crown has failed to honour its undertaking made at the pre-trial conference. ***The agreement was not one which would bring the administration of justice into disrepute and thus does not present one of those rare occasions when the Crown might be justified in repudiating its undertaking****.... While the public has an interest in the effective prosecution of criminal offenses, the public also has an interest in a judicial process which is neither capricious nor inconsistent.* [para. #28] [Emphasis added.]

116. In *R. v. White*[35], Mr. White was charged with three *Criminal Code* driving offences and assaulting the police. Following review of a medical report concerning Mr. White, first Crown counsel stated at a pre-trial meeting that all charges against Mr. White would be withdrawn if he agreed to certain conditions. Mr. White agreed to the conditions and carried out his responsibilities under them. Four months later second Crown counsel told Mr. White's counsel that he was reneging and wanted Mr. White to plead guilty to the assault police charge. Mr. White brought a *Charter* based abuse of process application to stay the proceedings.

117. In reaching his decision Griffin J. reviewed *O'Connor* (#63 and #68), *Conway, Abitibi Paper Co*., *R. v. M.(R.)*, and *R. v. D.(E.)* [para. #9]. He stated that he was also guided by Recommendation #53 of the *Martin Committee Report* which he quoted. At the *Charter* hearing the second Crown counsel who decided to renege on the agreement stated he did so because the

[34] *R. v. M. M.* (2001), 50 W.C.B. (2d) 412 (Cohen J.) (Ont. C.J.), **Tab 26**.

original plea agreement "was unconscionable". Griffin J. reviewed the definition of "unconscionable", which included – "contrary to conscience" and "not right or not reasonable" – and stated that he failed to see how the original plea offer was "not right or reasonable." [para. #19]. Then, after instructing himself with this Court's decision in *Power,* he stated:

> *This is not a situation of judicial review of Mr. Burgess' prosecutorial discretion.* Rather, it is answering the issue raised by Recommendation 53; namely, would the agreement made by Mr. Lamain bring the administration of justice into disrepute? [para. #23] [Emphasis added.]

118. When finding an abuse of process Griffin J. found two things. First, as was done here by Judge Ayotte, he found that the original plea resolution agreement "would not undermine the integrity of the Court nor bring the administration of justice into disrepute." Second, he found that for reasons similar to those of Mr. Hatch (the risk the Crown would lose the trial and it was better to come away with something rather than nothing) the first Crown agent "was guided by the public interest" when he made the plea agreement with Mr. White. [para. #18, 24-26]

Protected Crown discretion does not encompass the making of Crown policy

119. In *R. v. Crockford*[36], also from 2006, the British Columbia Court of Appeal had need to consider the issue of "prosecutorial discretion". Writing for the Court respecting her analysis of the issues Levine J.A., relying upon *Krieger*, observed that while the Crown's decision:

> *Whether or not to lay charges and continue a prosecution in a particular case is immune from review*...The creation of a policy by the Attorney General…that guides Crown counsel and others in the prosecution of offences is not so protected.... [para. #60] [Emphasis added.]

120. After reviewing *Krieger* at paras. #46-47 respecting "core functions" of an Attorney General, Levine J.A. stated:

> *The definition of prosecutorial discretion in Krieger does not encompass the role of the Attorney General and Crown counsel in the creation of policy*. Krieger does not preclude a review of a policy created in the public interest. While a policy that guides Crown counsel in deciding whether to prosecute will ultimately touch on the Crown's core functions related to prosecutorial discretion, such as the Policy in this case, creating the policy is not part of the actual exercise of discretion in any particular case [para. #69] [Emphasis added.]
>
> ...
>
> *Thus, the exercise of prosecutorial discretion by Crown counsel in deciding to charge Mr. Crockford is immune from review by tribunals or courts, based on the analysis in Krieger.* The Crown and Attorney General's policy-making activities are not immune from review, as they do not have the same constitutional dimension as the ultimate decisions to bring, continue, cease or characterize criminal charges. [para. #72] [Emphasis added.]

---

[35] *R. v. White*, 2006 ONCJ 291, **Tab 44**.
[36] *R. v. Crockford*, 2006 BCCA 360, **Tab 13**.

121. Although in *Crneck* the question of the characterization of the Crown's decision to renege on a pre-trial agreement was suggested[37] it appears that the 2006 decision in *R. v. M. (R.)* was the first time that the issue was fully considered. [38]

122. In *M.(R.)*, Hill J. decided a summary conviction appeal that raised the issue of the correctness of the Crown's repudiation of a plea resolution agreement for diversion in a youth court prosecution. That issue, together with the Crown's position at trial and then on appeal, prompted Hill J. to do an extensive review of the law concerning the Crown's repudiation of pre-trial agreements, and whether that constituted an abuse of process, the issue of prosecutorial discretion and its limits, the law, practice, and procedure to be applied on a *Charter* application claiming an abuse of process in those circumstances, and the remedies available pursuant to s. 24(1) *Canadian Charter of Rights* relief. It is noted that not only did Hill J. consider almost all of the decisions reviewed below including all but three of the decisions cited by Mr. Marriott in his Memorandum, (one of which *White,* was decided afterwards and followed Hill J.'s decision), but, *M.(R.)* was the very decision that the Crown relied upon at trial in support of its position.

123. It is further noted that Paperny J.A. did not disagree with Hill J.'s thorough, and well documented reasons. Rather, and contrary to his statements otherwise, she found that his reasons did not indicate "that repudiation of a plea agreement necessarily falls outside prosecutorial discretion" and distinguished his judgment because in *M.(R.)* Hill J. "concluded that where a plea agreement entered into by one prosecutor is repudiated by another without supervisory authority, in an arbitrary or capricious manner and/or without reasons, the concept of prosecutorial discretion will not shield it from review." [ARI: 47; para. #34] A review of his reasons shows that Hill J.'s judgment contains a lengthy and comprehensive overview of the common law respecting Crown repudiations of resolution agreements. Contrary to the views of Paperny J.A. Hill J. held as follows:

> **The burden is on the defence – it is not necessary to establish Crown misconduct**
>
> •The defence must establish an abuse of process on a balance of probabilities. A claim of abuse of process is necessarily fact specific: *R. v. D. (E.)* [#39] *and it is not necessary to establish prosecutorial misconduct*: *Keyowski, O'Connor, Regan.* [#41]
>
> **The Martin Committee's Recommendation 53 reflects the common law**
>
> • The parties agreed that "the wisdom of Recommendation 53…as substantially embedded in the Crown Policy Manual, *properly identified the common law position as to when a prosecution repudiation of a pre-trial agreement would amount to an abuse of process or power.*" [#43]
>
> • Even where prosecution error or mistake could be characterized as a "bad decision", short of establishing that the plea agreement was a "rare exception" that justified its repudiation the

[37] *R. v. Crneck* et al., *supra*, at para. 22, **Tab 12**.
[38] *R. v. M. (R.)* (2006), 213 C.C.C. (3d) 107 (Ont. S.C.J.), **Tab 27**.

Crown simply has to live with some bad decisions on its part: Recommendation #53, *Goodwin*. [#44, 67]

• The role of the investigating police officer in agreeing to the plea resolution is a relevant consideration. [#49]

•Traditionally, courts will not interfere with the exercise of executive authority as reflected in the core prosecutorial decision-making process: *Power, Regan, Krieger* [#51-52]. Although "courts should be very slow to second-guess a prosecutor's judgment calls" (*Proulx v. Quebec (Attorney General)*, they are by no means prohibited from review. Review of a potentially arbitrary, unreasonable or improper repudiation decision is not beyond the expertise of the courts: *Nelles v. Ontario."* [#61]

Improper Crown repudiation offends s. 7 of the *Charter* – an abuse can result from the Crown's reneging – an accused's prejudice, concessions, expectations are to be considered

• *The Crown's repudiation of a resolution agreement that itself is not unconscionable is improper and offends s. 7 of the Charter and warrants a s. 24(1) remedy. An abuse of process can result from the Crown reneging on a "deal" or repudiating an agreement with the defence*[39]: *R. v. Goodwin, R. v. D.(E.), R. v. Crneck, R. v. Betesh, R. v. M.M. et al*. [#44, 55]

•A proper factor to consider when compelling the Crown to honour its pre-trial undertakings is whether the Crown *unfairly reneged on legitimate expectations it generated in an accused*: *R. v. Conway; R. v. Mandate Erectors and Welding.* [#57, 59]

• Depending on the circumstances, where the Crown repudiates a plea agreement, a remediable abuse of power may be found even where there is no personal prejudice in the sense of the defendant not genuinely compromising her position or making a real concession in anticipation of some benefit such as abandonment of a prosecution: *R. v. Betesh, R. v. M.M. et al*. [#56] (And see *R. v. Remple*, supra, at p.13, 16)

The issue to be determined is whether the agreement made was disreputable

•Recommendation #53 of the Martin Committee Report does not call for a review of Crown discretion in deciding to repudiate a plea agreement, but whether the agreement itself, if given effect, would bring the administration of justice into disrepute. [#61]

Crown repudiation conduct is not a protected core discretion – the Crown bears a heavy onus of proof to justify repudiation

• *While authority to initiate, continue or terminate a prosecution may be within the core of prosecutorial discretion, repudiation of a pre-trial agreement is not*, even though its context touches upon that subject matter. *A first-instance decision by Crown counsel* whether or not to divert a defendant from the criminal process *is not reviewable subject only to abuse of process for circumstances of flagrant impropriety*. However, an exceptional *decision to not fulfil the Crown's undertaking, where the defence has agreed to the resolution…is not protected within the core elements or function of prosecutorial discretion*. In other words, the same deference is not to be accorded repudiation conduct in the form of an admitted breach of a pre-trial undertaking, which may be reviewed under broader s. 7 *Charter* fairness principles: *Krieger* (#47) [#62]

• ***The burden is heavy on the party who seeks to repudiate a bargain or agreement.*** *Once the defence establishes repudiation of a pre-trial resolution agreement and some articulable and tangible unfairness to the individual accused* and/or the integrity of the justice system as a result,

[39] See *R. v. J.S.R.* (2008) 237 C.C.C. (3d) 326 (Ont. S.C.J.), **Tab 20,** where Nordheimer J. followed Hill J.'s ruling when preventing the Crown from repudiating a written pre-trial position it took respecting its theory in a jury trial for second degree murder.

there is an evidentiary burden upon the prosecution to satisfy the court why the repudiation is justified: *R. v. Goodwin* [#64]

• Some instances of Crown repudiation will constitute an abuse of process. ***The prosecution is in the best position, indeed usually the only position, to know the reason(s) for repudiation of a resolution agreement in the sense of why the original agreement would bring the administration of justice into disrepute. Because the act of repudiation is not an exercise of core prosecutorial discretion, the general rule not requiring the Crown to give reasons for its decision-making is not applicable***: *R. v. O'Connor* (#79)*; R. v. Ng* (#37-68) [#65]

• It is an essential aspect of a justifiable repudiation decision that the enforcement of the agreement *would be offensive to the administration of justice*. [#67]

A stay requires the "clearest of cases", the remedy of "enforcement" is also available

• Section 24(1) of the *Charter* permits an appropriate and just remedy that is both meaningful to the claimant and fair to the party against whom the order is made: *O'Connor*; *Doucet-Boudreau v. Nova Scotia* (Min. of Education) [#69]. The remedy of a stay of the prosecution is reserved for the "clearest of cases" and courts are obliged to consider "less drastic…alternative remedies" short of a stay of proceedings when an abuse of process is found but the "clearest of cases" threshold is not met: *Regan, Mandate Erectors and Welding, O'Connor, Burlingham*. [#71]

124. In view of the poor state of the trial record, Hill J. allowed the accused's appeal and directed a new trial so that a new determination could be made on the appellant's abuse of process argument. [#76-85]

125. A number of decisions have referred to, or followed Justice Hill's decision in *M.(R.)* since it was issued[40], including *R. v. J.S.R.*[41], and *R. v. Chen*[42], a federal prosecution. In *Chen* the same Crown agent who made the agreement reneged upon it the next day. Fairgrieve J., who also reviewed the *Martin Committee Report*, for his own reasons, concluded that the Crown's decision to renege was not an exercise of core prosecutorial discretion stating that Hill J. was also of that opinion [#20-26]. He also agreed with Hill J.'s conclusions concerning the procedure to be used in deciding whether there was an abuse of process and Hill J.'s analysis with respect to a s. 24(1) *Charter* remedy [#27-30]. The decision is also noteworthy because it involved the federal prosecution service which did not appeal the ruling.

The Quebec Court of Appeal endorsed Hill J.'s rulings in *R. v. M.(R.)*

126. Most notably however is the very recent decision of the Quebec Court of Appeal in *R. v. Camiré*[43]. There, the Court fully, and specifically endorsed the relevant reasoning and rulings of Hill J. in *M.(R.)*. In *Camiré* the Crown made a plea agreement with Mr. Camiré in furtherance of

[40] A notable exception is *R. v. Watt*, 2007 NSSC 20, **Tab 43,** decided shortly after *M.(R.)*. There, Cacchione J., who did not have the benefit of *M.(R.)* but who relied upon *Betesh*, *Goodwin*, *Crneck*, *Mandate Erectors and Welding* and *O'Connor*, at paras. 61-66, arrived at the same conclusions as did Hill J.
[41] *R. v. J.S.R.* (2008) 237 C.C.C. (3d) 326 (Ont. S.C.J.), **Tab 20**.
[42] *R. v. Chen* 2009 ONCJ 453, **Tab 9**.
[43] *R. v. Camiré* 2010 QCCA 615, **Tab 7Error! Bookmark not defined.**.

which he took a number of steps to uphold his end of the agreement. After he entered his guilty plea but before sentencing the Crown reneged on the agreement and changed its position respecting sentence. The Crown would not say why it reneged on its agreement but the defence submitted it was because of pressure from the complainant's family and the media [#25]. In the face of the Crown's repudiation Mr. Camiré asked to withdraw his guilty plea but the trial judge refused and also declined to enquire into the circumstances of the Crown's repudiation of its plea agreement when the matter was brought to his attention.

127. Before the trial judge the Crown took the position that the repudiation was an exercise of Crown discretion and therefore no further explanation was required. At para. 26 the Court of Appeal stated that the Crown was wrong in taking that position and that the trial judge erred when he refused to make enquiries. At para. 31 the Court reviewed the decision of Hill J. specifically quoting paras. 55 and 56 therefrom. At para. 32 the Court agreed with Hill J's conclusion that the Crown's act of repudiating a resolution agreement was *not* an exercise of Crown discretion and then quoted para. 62 of *M.(R.)* with the key portions concerning Crown repudiation of plea agreements not being an aspect of core prosecutorial discretion, and, that such tactics or conduct before the Court was governed by the inherent jurisdiction of the court, being emphasized.

128. At para. 33 the Court stated it agreed with Hill J.'s decision that it is for the Crown to establish the reasons that would justify its repudiation of a pre-trial agreement and quoted paras. 64 and 65 from *M.(R.)* emphasizing those portions that stated "….there is an evidentiary burden upon the prosecution to satisfy the court why the repudiation is justified" and "because the act of repudiation is not an exercise of core prosecutorial discretion, the general rule not requiring the Crown to give reasons…is not applicable." [#33]

The Quebec Court of Appeal agreed that the Crown must establish the resolution agreement would be offensive to the administration of justice and lists three criteria

129. At para. 34 the Court stated that it agreed with the opinion of Hill J., and at para. 37 the Court endorsed the position of Hill J. as expressed at para. 67 of his reasons concerning the fact that the Crown has to live with some bad decisions and that to qualify as a "rare exception" by which to validly repudiate its pre-trial agreement, the Crown had to establish that the resolution agreement *would* be offensive to the administration of justice.

130. Referring to the decision of Proulx J.A. in *R. v. Obadia* [1998] R.J.Q. 2581 (C.A.), who in turn relied upon *R. v. Roy, supra*, and at para. 35 quoting from *Roy*, the Court identified what

it considered were the rare circumstances where the Crown could legitimately repudiate its pre-trial agreement:

> The Crown, like any other litigant, ought not to be heard to repudiate before an appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that its counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence. [*R. v. Roy*: #35]

The ADM made a tactical decision – the Crown's repudiation was conduct before the Court

131. In *Krieger* the Court identified five elements falling within the constitutionally protected core of prosecutorial discretion including (a) the discretion to prosecute charges laid by the police and (c) the discretion to accept a guilty plea to a lesser charge. Each of those decisions were made here by the Crown's agent acting "within the authority delegated to him." [*Krieger*: 45-46] The Court had no reason to consider the questions raised here and consequently, post-*Krieger*, other Courts focused on this Court's statement at para. 47, particularly:

> Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [#47]

132. As noted, as ADM, Mr. Lepp had two options: proceed by Direct Indictment, a discretionary choice reserved exclusively for the Attorney General or his deputy, or follow the second option advised by Mr. Marriott. It is respectfully submitted that the choice Mr. Lepp made was the tactical election to continue the Appellant's prosecution "before the court". Following his decision the Crown consented to move the prosecution into the Provincial Court. Therefore, up to that point, all of the discretionary decisions made or agreed to by Mr. Hatch were confirmed and continued by Mr. Lepp as the senior Crown agent.

133. In effect what happened next amounted to this: In Provincial Court the Appellant told the Court that by agreement with the Crown she would be pleading guilty to a lesser offence and the Crown would not be proceeding with the charges on the Indictment. The Crown then stated it had changed its mind and would not honour the agreement it made with the Appellant. The Appellant took the position that the Crown's repudiation was a breach of an agreement and undertaking made in good faith, that she had already acted on the agreement to her prejudice, that she had suffered psychological harm in consequence of the dashed expectations the Crown created in her because of its repudiation, and therefore, for all of those reasons the Crown's conduct was unfair and was an abuse of process contrary to s. 7 of the *Charter*. She asked the Court for a remedy. The parties then agreed on the law and procedure to be followed in order for

the Court to determine whether the Crown had breached the Appellant's s. 7 *Charter* right to a fair trial process. They also agreed on the s. 24(1) remedy should an abuse of process be found.

134. It is therefore respectfully submitted that because Ontario's policy reflects the common law as expressed in the authorities reviewed above, that here, given his evidence, the ADM must be taken, on behalf of the Crown, to have acknowledged that in law, an exceptional decision of the Crown to renege upon a pre-trial resolution agreement is not a protected core act of Crown discretion but constitutes conduct within the Court's inherent jurisdiction to control: *R. v. Krieger*: 47; *R. v. M.(R.)*: 55, 56, 59, 62, 64-65, 67; *R. v. Camiré*: 32-36.

135. It is further respectfully submitted that in view of the Crown's conduct when deciding to renege on the Appellant's resolution agreement including the Memorandum of Law and oral arguments Mr. Marriott submitted to Judge Ayotte, there can be no other conclusion except that the Attorney General of Alberta, through his Crown agents adopted in this matter the Ontario Attorney General's policy concerning the repudiation of pre-trial agreements as reflected in the Ontario *Crown Policy Manual* and its consequent reliance on Recommendation #53 of the *Martin Committee Report* and commentary.

136. It is further respectfully submitted that Hill J.'s decision in *M.(R.)* does accurately reflect the law with respect to the characterization of the Crown's act of repudiation of a pre-trial plea resolution agreement and that he did not err when he determined that the Crown's decision to repudiate a pre- trial resolution agreement was not an act of core Crown prosecutorial discretion, but rather constituted tactics or conduct before and within the jurisdiction of the Court to control in the best interests of the administration of justice, a conclusion confirmed by the Quebec Court of Appeal in *R. v. Camiré*.

137. It is therefore submitted that Judge Ayotte did not err when following and applying the decision of Hill J. in *M.(R.)* and when devising the "reasonably defensible" test in order to determine whether Mr. Hatch's plea agreement would bring the administration of justice into disrepute.

The Appellant acted to her prejudice and suffered considerable emotional harm because the Crown renegéd – she could not be restored to her original position

138. Concerning the issue of prejudice to the Appellant, it is submitted a very relevant consideration is the emotional/psychological effect the Crown's repudiation of its agreement had on her, and that here, because of the effect of the Crown's repudiation, for that reason among others, the Appellant could not be restored to the position she was in prior to the plea resolution

agreement being made because of the continuing, and increased trauma resulting from her destroyed but legitimate expectations.

139. There can be no true issue that the Appellant suffered considerable prejudice as a result of her actions taken in reliance on the Crown's resolution agreement and as a result of her reactions in the face of its repudiation. It is therefore submitted she could never be returned to her original position. In addition to the prejudice found by Judge Ayotte it is respectfully submitted her "legal prejudice" also includes her serious and considerable psychological harm[44] and the giving up of her right to silence. If the matter were to proceed to trial the giving up of her right to silence would seriously compromise and diminish her defence because of her admission of identity as the driver and that she drove her vehicle carelessly. Those admissions would thereby also restrict the ability of her present counsel to defend her, perhaps ultimately affecting her right to her choice of counsel.[45]

140. The Appellant suffers additional prejudice to the above, because, in return for agreeing to give up her right to silence and her right to trial, the Crown made agreements of its own. First, it agreed that alcohol would not be a factor relied upon by the Crown [SR: 5]. Second, the Crown agreed to jointly submit the terms of sentence which did not include custody or a further driving prohibition. Finally, it agreed that in return for the Appellant's guilty plea it would not proceed on the *Criminal Code* charges. By reneging on the resolution agreement, the Appellant would have to undergo a trial on the original charges and thereby face the risk of a significant period in jail and a very lengthy driving prohibition if she were convicted. Those prospects resulted in the psychological harm she suffered together with her dramatically altered "peace of mind" because of being told the Crown was going to renege on the plea agreement that it had made with her.

141. In his Reasons Judge Ayotte found that Mr. Palser's opinion, relied upon by Mr. Lepp, was flawed in several important aspects. Portions of Mr. Palser's opinion were not supported by the evidence, or were factually incorrect, or based upon uncertain legal assumptions, or suffered from the fact that he did not have direct contact with the most relevant witnesses, or access to relevant documents. [ARI: 20-21, 22-23; Reasons: #33-35, 38-40]

142. Based upon the evidence he heard and considered, Judge Ayotte concluded that contrary to making an "unconscionable agreement"[46] or one that would "shock the conscience of the

---

[44] *R. v. D.(E.)*, *supra*, at para. 43, **Tab 14**.
[45] *R. v. Crneck et al, supra,* at paras. 24-25, **Tab 12**; *R. v. Remple, supra*, at pp. 15-19, **Tab 37**.
[46] *R. v. Goodwin, supra*, at para. 13, **Tab 17**; *R. v. M.M., supra*, at para. 28, **Tab 26**; *R. v. White, supra*, at paras. 18, 24-26, **Tab 44**; *R. v. M.(R.), supra,* **Tab 27**; *R. v. Camiré*, *supra*, at para. 34, **Tab 7**.

community"[47] or otherwise bring the administration of justice into disrepute, Judge Ayotte found that Mr. Hatch had exercised due diligence, took all relevant matters into consideration and at the end of that process, as the Crown's agent, made a series of judgement calls that Judge Ayotte found to be "reasonably defensible." [Reasons: #27, 39, 47, 52-54]

143. Therefore, all of the prejudice suffered by the Appellant came about as a direct result of her reliance on a plea resolution agreement made with a properly authorized Crown agent that the trial judge found was acting in good faith in the best interests of justice, and who made an agreement that would not bring the administration of justice into disrepute, a conclusion with which the Court of Appeal did not disagree.

144. Very recently in *Miazga v. Kvello Estate*, 2009 SCC 51[48], this Court stated:

> In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies…*but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference*, thus fulfilling their *quasi*-judicial role as "ministers of justice": *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25, per Locke J. [At #47] [Emphasis added.]

145. It is noted that the Alberta Court of Appeal did not suggest that Mr. Hatch's reasons for acting in the "public interest" were, because of his lesser seniority to be deemed any less, or were inferior to those of the head office Crown's. Mr. Hatch's decision had the approval of the Chief Regional Crown prosecutor. Therefore, when Mr. Lepp overruled Mr. Hatch, he overruled the Regional Chief Crown Prosecutor as well. It is respectfully submitted that to do that behind closed doors and *before* a plea resolution agreement is offered or made public, is one thing, to do that after the agreement is offered and accepted, is quite another.

146. It is further submitted that there was nothing legally significant about the fact that it was Mr. Lepp, as the highest ranking Crown prosecutor rather than some other senior Crown prosecutor who made the decision to renege the Crown's plea resolution agreement. In principle, and it is submitted in law, there would be no practical difference whether it was Mr. Lepp as ADM and Senior Crown agent who reneged, or whether it was Mr. Hatch, who, after the June 1st head office meeting, decided to renege on his agreement with the Appellant[49]. In the end it was still a case of the *Crown* repudiating a resolution agreement and undertaking the *Crown* made with the Appellant, an agreement that she acted upon to her prejudice.

---

[47] *R. v. Cherry, supra*, at para. 63, **Tab 10**.
[48] *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339 at #47, **Tab 3**.
[49] See *R. v. Chen*, 2009 ONCJ 453, **Tab 9**.

147. For all of the above reasons it is respectfully submitted that the Crown's decision to renege on its pre-trial agreement was not, as found by the Alberta Court of Appeal an example of, or an extension of a right included in the constitutionally protected core functions of the office of the Attorney General.

148. For the same reasons it is respectfully submitted that the trial judge did not err when he found the Crown's repudiation of its pre-trial resolution agreement with the Appellant to be an abuse of process.

Ground II: Did the Court of Appeal err when it permitted the Crown to repudiate the position it took at trial and when it found the trial judge erred in law when he decided the issues that the parties agreed were the issues to be decided on the basis of the policy, procedure, and law that the parties agreed should be applied by the Court?

149. The Appellant relies upon all of her submissions set out above and respectfully submits that the Court of Appeal erred in considering the Crown's appeal because it not only constituted a complete repudiation of the position the Crown unequivocally adopted at trial and was therefore an abuse of the appellate process[50], but it also changed the case the Appellant had to meet raising double jeopardy issues[51]. Finally, under the circumstances it did not present a question of law.[52]

150. In *R. v. Nguyen*[53], a Crown appeal, the Crown made a deliberate and tactical choice at trial respecting the statement of one of the accused. On appeal, as here, the Crown claimed the trial judge erred because "the trial judge failed to act on his own initiative" when considering the above noted statement [#37]. Writing for the Court, Jackson J.A., who first considered an unbroken line of appellate authority starting with this Court's decision in *Wexler*, stated:

> On a Crown appeal from an acquittal, a trial judge should not be found to have committed an error of law for having failed to consider a means of convicting the accused, which was effectively taken off the trial judge's plate by Crown counsel. There is no obligation on a trial judge to make a better case for the Crown than that which was presented. [#39]

151. Earlier in *R. v. Varga*, Doherty J.A., writing for the Court stated that "[t]he Crown's right of appeal on any ground that involves a question of law alone is none the less an appellate remedy and not a licence to refer legal questions to the Court of Appeal for its consideration and advice." [#24]. Relying on McLachlin J.'s (as she then was) concurring opinion in *R. v. Penno*[54]

---

[50] *R. v. Agozzino, supra,* **Tab 4**.
[51] *R. v. Varga* [1994] 72 OAC 141, (Doherty J.A.) at para. 26, **Tab 43**.
[52] *R. v. Nguyen* [2008] SKCA 160, (Jackson J.A.) at paras. 37-39, **Tab 33**.
[53] *R. v. Nguyen, ibid,* **Tab 33**.
[54] *R. v. Penno* [1990] 2 S.C.R. 865 at para. 64, **Tab 36**.

he ruled that the Crown cannot "raise arguments on appeal that it *chose not to advance at trial*."

[#25] Concluding that aspect of his reasons Doherty J.A. stated:

> A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial…Double jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial. [#26] [Emphasis added][55]

152. It is respectfully submitted that the Court below erred when allowing the Crown to repudiate the position it took at trial and then when it found the trial judge erred in law and allowed the Crown's appeal.

Part IV: Submissions Concerning Costs

153. The Appellant is not seeking an order regarding costs.

Part V: Order Requested

154. The Appellant respectfully requests that her appeal be allowed and that the sentence imposed by the Honourable Judge White be reinstated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by the Appellant, this 24th day of August, A.D. 2010.

Beresh Cunningham
Aloneissi O'Neill Hurley
Per

_____
Marvin Bloos, Q.C.
Brian A. Beresh, Q.C.
Barrister and Solicitor
Counsel for the Appellant

[55] See also *R. v. J.G.S.* [2002] J.Q.. 516 (C.A.) at paras. #6-8, **Tab 19,** where, under similar circumstances as here, the Quebec Court of Appeal, adopting *Varga* dismissed the Crown's appeal.

Part VI: Table of Authorities

Articles and Journals

Part VII: Statutes

155. Director of Public Prosecutions Act, 2006. S.C. 2006, c. 9, s. 121.

156. *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 s. 7 and s. 24(1)

Canada Federal Statutes
Director of Public Prosecutions Act
Delegation
s 9.

Federal English Statutes reflect amendments current to July 21, 2010

Federal English Regulations are current to Gazette Vol. 144:15 (July 21, 2010)

9.
9(1) Delegation

The Director may, subject to any restrictions or limitations that the Director specifies, authorize a federal prosecutor, a person acting as a federal prosecutor under subsection 7(2) or any person referred to in subsection 8(1) to act for or on behalf of the Director in the exercise of any of the powers or the performance of any of the duties or functions that the Director is authorized to exercise or perform under this or any other Act of Parliament, except the power to delegate under this subsection.

9(2) Agency
Every person who is authorized under subsection (1) acts as an agent of the Director and is not required to prove such authorization.

9(3) Designation
The Director, a Deputy Director and any person referred to in subsection 7(3) may be designated as an agent of the Minister of Public Safety and Emergency Preparedness under section 185 of the *Criminal Code*.

END OF DOCUMENT

PART VII: STATUTES

Canada Federal Statutes French
Directeur des poursuites pénales, Loi sur le
Délégation
s 9.

Federal French Statutes reflect amendments current to June 23, 2010

Federal French Regulations are current to Gazette Vol. 144:15 (July 21, 2010)

9.
9(1) Pouvoir de délégation

Le directeur peut, dans les limites qu'il fixe, autoriser les procureurs de l'État, les personnes agissant à ce titre en vertu du paragraphe 7(2) ou toute autre personne visée au paragraphe 8(1) à exercer, pour lui ou en son nom, les attributions qu'il est autorisé à exercer en vertu de la présente loi ou toute autre loi fédérale, sauf le pouvoir de délégation lui-même.

9(2) Mandat
Toute personne agissant en vertu de la délégation visée au paragraphe (1) est mandataire du directeur et n'a pas à faire la preuve de cette délégation.

9(3) Désignation
Le directeur, ses adjoints ainsi que toute personne visée au paragraphe 7(3) peuvent être des mandataires désignés du ministre de la Sécurité publique et de la Protection civile aux termes de l'article 185 au *Code criminel*.

END OF DOCUMENT

PART VII: STATUTES

Canada Federal Statutes

Constitution Act, 1982
Schedule B — Constitution Act, 1982
I — Canadian Charter of Rights and Freedoms
Legal Rights
s 7. Life, liberty and security of person

Federal English Statutes reflect amendments current to July 21, 2010

Federal English Regulations are current to Gazette Vol. 144:15 (July 21, 2010)

7. Life, liberty and security of person

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

END OF DOCUMENT

PART VII: STATUTES

Canada Federal Statutes French
Loi constitutionnelle de 1982
Partie I — Charte canadienne des droits et libertés
Garanties juridiques
s 7. Vie, liberté et sécurité

Federal French Statutes reflect amendments current to June 23, 2010

Federal French Regulations are current to Gazette Vol. 144:15 (July 21, 2010)

7. Vie, liberté et sécurité

Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

END OF DOCUMENT

PART VII: STATUTES

Canada Federal Statutes

Constitution Act, 1982
Schedule B — Constitution Act, 1982
I — Canadian Charter of Rights and Freedoms
Enforcement
s 24.

Federal English Statutes reflect amendments current to July 21, 2010

Federal English Regulations are current to Gazette Vol. 144:15 (July 21, 2010)

24.
24(1) Enforcement of guaranteed rights and freedoms

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

END OF DOCUMENT

PART VII: STATUTES

Canada Federal Statutes French
Loi constitutionnelle de 1982
Partie I — Charte canadienne des droits et libertés
Recours
s 24.

Federal French Statutes reflect amendments current to June 23, 2010

Federal French Regulations are current to Gazette Vol. 144:15 (July 21, 2010)

24.
24(1) Recours en cas d'atteinte aux droits et libertés

Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

END OF DOCUMENT

CHAPTER 10
THE LAWYER AS ADVOCATE

STATEMENT OF PRINCIPLE

When acting as advocate, a lawyer has a duty to advance the client's cause resolutely and to the best of the lawyer's ability, subject to limitations imposed by law or professional ethics.

RULES

27. A lawyer must not enter a guilty plea, nor make an agreement with the prosecution to enter a guilty plea, on behalf of a client unless:

    (a) the client so instructs the lawyer after receiving full information and advice from the lawyer; and

    (b) the client is prepared to admit in court the necessary factual and mental elements of the charge or charges.

COMMENTARY

R.27 A lawyer must not enter a guilty plea, nor make an agreement with the prosecution to enter a guilty plea, on behalf of a client unless:

(a) the client so instructs the lawyer after receiving full information and advice from the lawyer; and

(b) the client is prepared to admit in court the necessary factual and mental elements of the charge or charges.

C.27 Entering a plea is one of the matters falling outside the implied authority of a lawyer and must therefore be fully discussed with the client. It is preferable that a lawyer receive the client's written instructions with respect to plea. Because of the serious and long-lasting ramifications of a guilty plea, a client's instructions in this respect must be based on all relevant information, including the implications and possible consequences of the plea and the fact that the court is under no obligation to accept it. Assuming compliance with Rule #27, it is proper for a lawyer to agree with the prosecutor that a guilty plea will be entered to the offence charged, or to a lesser or included offence, and to agree on a disposition or sentence to be proposed to the court. However, a plea agreement may not involve a misrepresentation or misstatement of facts to the court (see Rule #14).

An agreement between the prosecution and defence regarding the plea to be entered is not considered a usual lawyers' undertaking due to the policy considerations involved. Either party may withdraw from the agreement prior to performance, although the withdrawing party should afford the other party ample notice. However, once the agreed-upon plea has been entered by the defence, it is generally improper for the prosecution to attempt to repudiate the agreement of the parties.