

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

OLGA MARIA NIXON

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF ALBERTA
PURSUANT TO SECTION 42 OF THE *SUPREME COURT ACT*

GORAN TOMLJANOVIC, Q.C.
Counsel for the Respondent

Appeals and Prosecution Policy Branch
Alberta Justice
Criminal Justice Division
3rd Floor, Centrium Place
300, 332 – 6 Avenue S.W.
Calgary, AB T2P 0B2
Phone: (403) 297-6005
Fax: (403) 297-3453
Email: goran.tomljanovic@gov.ab.ca

HENRY S. BROWN, Q.C.
Ottawa Agent for the Respondent

Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600, 160 Elgin Street
OTTAWA, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

MARVIN BLOOS, Q.C.
Counsel for the Appellant

Beresh Cunningham Aloneissi O'Neill Hurley
Barristers
300, 10110 – 107 Street
Edmonton, AB T5J 1J4
Tel: (780) 421-4766
Fax: (780) 429-0346
Email: bloos@appeals.ca

HENRY S. BROWN, Q.C.
Ottawa Agent for the Respondent

Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600, 160 Elgin Street
OTTAWA, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

TABLE OF CONTENTS

	<u>Page No.</u>
PART I – STATEMENT OF FACTS	1
OVERVIEW	1
BACKGROUND AND FACTS	2
RULINGS OF THE TRIAL JUDGE.....	4
JUDGMENT OF THE ALBERTA COURT OF APPEAL	5
PART II – QUESTIONS IN ISSUE	7
APPELLANT’S STATEMENT OF THE GROUNDS OF APPEAL	7
RESPONDENT’S POSITION.....	8
PART III – ARGUMENT	9
GROUND 1 – REPUDIATION IS NOT AN ABUSE OF PROCESS	9
Overview	9
Prosecutorial Discretion.....	9
Krieger Test Applied to the Repudiation	13
Plea Agreement as an Undertaking	15
Abuse of Process Principles.....	19
GROUND II - NEW ISSUE ON APPEAL.....	24
Overview	24
New Grounds on Appeal	25
Application to the Instant Case.....	26
PART IV – SUBMISSIONS ON COSTS.....	28
PART V – ORDER SOUGHT	29
PART VI - TABLE OF AUTHORITIES	30
PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW	32

MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

Overview

1. This appeal concerns the extent to which a court can interfere with prosecutorial discretion when the Crown decides to revoke a plea agreement and proceed with criminal charges in the case of a fatal car crash.
2. The basic facts are that the Appellant ran a stop sign at a rural intersection with her motor home, killing Wade and Karen Andriashek, and putting their 7 year old son, Jessie, in hospital. The Appellant was initially charged with seven criminal offences: impaired driving causing death (x2), impaired driving causing bodily harm, dangerous driving causing death (x2), dangerous driving causing bodily harm, and driving with blood-alcohol over .08. The matter went to preliminary hearing and, by agreement of the parties, there was a committal for trial on the dangerous driving charges only. A subsequent plea agreement by the crown prosecutor to accept a guilty plea to a reduced charge, a traffic offence of careless driving, was reviewed and repudiated by the Assistant Deputy Minister (ADM) before any pleas were entered. The Appellant then brought an application for *Charter* relief, alleging an abuse of process. The trial judge granted the application and ordered the Crown to comply with the original plea agreement, resulting in an \$1800 fine for careless driving. The Crown successfully appealed that ruling and the matter was ordered back for trial on the dangerous driving charges, the same position the Appellant was in before the plea agreement.
3. The Appellant now challenges the appeal court's ruling setting aside her conviction for careless driving and restoring the dangerous driving charges for trial. There are three main issues in this appeal: 1) whether repudiation of a plea agreement is part of core prosecutorial discretion, 2) whether repudiation in this case constituted an abuse of process, and 3) whether the Crown should have been precluded from arguing a new legal issue on appeal. The Appellant's position is that the trial judge's ruling was correct, that repudiation of a plea agreement is not part of core prosecutorial discretion, but conduct and tactics that are subject to the trial court's supervision. She urges that repudiation of a plea agreement is presumptively an abuse of process

unless the Crown can prove that the agreement would bring disrepute to the administration of justice and that it was indefensible. Finally, she urges that the Crown's appeal, based on a different legal test, should have been denied as an abuse of the appeal process.

4. The Respondent's position is that both the plea agreement and the repudiation fall within core prosecutorial discretion, these being... *decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for.*¹ Such decisions are not open to review or supervision by the courts except through an allegation of abuse of process. Abuse of process that involves core prosecutorial discretion requires proof of flagrant impropriety by the Crown. There was no evidence of any bad faith or impropriety by the Crown officials in their review and repudiation of the plea agreement. Nor did the Appellant suffer any legal prejudice by the repudiation. The Alberta Court of Appeal correctly held that the trial judge had made legal errors in finding an abuse of process, the high threshold of proof not having been met. Arguing the correct legal test before the court of appeal is a proper exception to the rule against raising new issues on appeal and not an abuse of the appeal process.

Background and Facts

5. For the purposes of this appeal the Respondent relies on those findings of fact by the trial judge affirmed by the Alberta Court of Appeal. The Respondent also adopts the Appellant's statement of facts as it concerns the judicial history of the case, including the summary of the rulings at trial and in the court of appeal. The Respondent cannot adopt the Appellant's statements in paragraphs 8-42, as these give only a partial account of the evidence concerning whether either the plea agreement or the repudiation was a good decision. The trial judge made no findings of fact on these issues and they are not material to this appeal.

6. The Alberta Court of Appeal summarized the circumstances as follows:²

6 On September 2, 2006, the respondent drove her motor home through an intersection and struck another vehicle, killing a husband and wife and seriously injuring their young son. The road and weather conditions were good, and the motor home was in good condition. The intersection was marked by more than just a four-way stop sign. There was also a warning light indicating a stop ahead approximately one kilometre before the intersection and there was a series of

¹ *Krieger v. Law Society (Alberta)*, [2002] 3 S.C.R. 372, paras. 24-49 [Tab 7 at pp. 86-98]

² *R. v. Nixon*, 2009 ABCA 269 [Appellant's Record, Vol. I, pp. 41-2]

rumble strips in advance of the stop sign. Recent road work may have obscured the rumble strips to some extent, but they were still discernible at the time of the accident. The stop sign itself was large and featured a blinking red light that was visible from a significant distance.

7 The respondent left no signs of pre-impact braking on the roadway. Police attended at the scene and questioned the respondent about alcohol consumption. A roadside screening test was administered followed by breath samples which resulted in readings of 200 mg.%. Expert extrapolation concluded that the respondent's blood alcohol level would have been between 225 and 250 mg.% at the time of the accident.

8 The trial prosecutor had concerns about some of the evidence, notably the admissibility of the breath sample results and of eyewitness evidence that a motor home, which may or may not have been driven by the respondent, had been seen driving erratically some time before the accident. Based on his assessment of the case, the prosecutor entered into an agreement whereby the respondent consented to committal to stand trial only on the charges of dangerous driving causing death and bodily harm. After the preliminary inquiry, additional discussions were held regarding a plea to a charge of careless driving under the Traffic Safety Act, R.S.A. 2000, c. T-6. A second agreement to that effect was reached on May 22, 2006. The respondent re-elected her mode of trial in order to enter a guilty plea to the lesser charge.

9 The trial prosecutor had discussed the second proposed plea resolution agreement, in general terms, with his immediate supervisor and others in his office. With reluctance, his immediate supervisor accepted its terms. Due to the sensitive nature of the case, it was also included in a report prepared for senior officials in the department. When the Acting Assistant Deputy Minister ("ADM") of the Criminal Justice Division in the office of the Attorney General saw that report and the proposed resolution, he became concerned about its propriety. As a result, he sought additional legal opinions as to the merits of the case and the repudiation of plea resolution agreements.

10 Before the plea was entered, the ADM concluded that the trial prosecutor erred in failing to consider the totality of the evidence. The ADM determined that a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. He also concluded that the respondent could be restored without prejudice to her position prior to the plea agreement. He instructed counsel to withdraw the second plea resolution agreement before the plea was entered.

11 In response, the respondent brought a Charter application under s. 7, alleging abuse of process and seeking a court direction requiring the Crown to complete the agreement. Her application was successful.

Rulings of the Trial Judge

7. The trial judge gave written reasons for finding an abuse of process and granting the Appellant relief. Those reasons included the following rulings:³

- (a) The Supreme Court in ***Krieger v. Law Society of Alberta*** *supra* acknowledged the traditional independence of prosecutorial discretion, subject only to the abuse of process doctrine. (para. 1)
- (b) The test in ***Krieger*** *supra*, distinguishing between matters of prosecutorial discretion and matters of trial conduct and tactics, is based on when the charges are laid. Negotiations after charges are laid clear constitute the latter. (para. 12)
- (c) The Crown is indivisible, so it is important that an undertaking given by one of its agents is honoured by the other agents. (para. 14)
- (d) There is no merit to Ms. Nixon's allegations that the repudiation was motivated by political considerations. There was no evidence of any attempt at political interference by the Attorney General and no evidence that any Crown official would have let it influence their decision. (paras. 20-25)
- (e) There was no evidence the ADM's actions were done in bad faith. (para. 25)
- (f) The ADM was persuaded that the original prosecutor had made two errors in his assessment of the evidence, that allowing Ms. Nixon to escape *Criminal Code* convictions was contrary to the public interest, and that it would bring the administration of justice into disrepute. (para. 26)
- (g) The test to apply, in assessing the ADM's concerns, is whether the plea bargain was "reasonably defensible", not whether it was right. For the Crown to justify its repudiation it must satisfy the court that the plea bargain was so flawed it would bring the administration of justice into disrepute. (para. 27)

³ ***R. v. Nixon***, 2008 ABPC 20 [Appellant's Record, Vol. I, pp. 4-32]

- (h) The original prosecutor's assessments were reasonably defensible. (paras. 39, 47, 49, 52)
- (i) If the plea agreement had been honoured, it would not bring the administration of justice into disrepute. To permit the Crown to renege on its written undertaking would amount to an abuse of process. (para. 54)
- (j) Although prejudice does not have to be shown, prejudice is found in this case in that the defence lost a chance to "discover" the breath sample evidence at the preliminary inquiry. (paras. 55-9)
- (k) The remedy is to direct the Crown to honour the agreement. (para. 60)

Judgment of the Alberta Court of Appeal

8. The Alberta Court of Appeal rulings included the following:⁴

- (a) Citing *Krieger supra*, they held that prosecutorial discretion is a term of art that refers to independent decisions by the Attorney General and his agents through powers that constitute the core of the office of the Attorney General. (para. 17)
- (b) There is a high threshold for review of prosecutorial discretion due to the constitutional imperative requiring a bright line between the roles of judges and prosecutors. Decisions to initiate or terminate a prosecution, or accept a plea to a lesser charge are particularly ill-suited to judicial review. (para. 19)
- (c) The trial judge erred in determining that plea agreements are akin to undertakings. This is contrary to the commentary in the Alberta Code of Professional Conduct. It is also incorrect because a plea agreement is unenforceable against the accused. (paras. 22-30)
- (d) This mischaracterization of a plea agreement led the trial judge to erroneously treat the repudiation of the agreement not as an exercise of prosecutorial discretion, but as a matter of professional misconduct. (para. 31)

⁴ *R. v. Nixon*, 2009 ABCA 269 [Appellant's Record, Vol. I, pp. 39-52]

- (e) The trial judge further erred in concluding that anything done after the charges are laid is no longer prosecutorial discretion, but a prosecutor's tactics and conduct before the court. Core prosecutorial powers are required throughout the court process and do not end artificially at the door of the courtroom. (para. 32)
- (f) A decision of the Attorney General to repudiate a plea agreement falls squarely within the core elements of prosecutorial discretion. (para. 33)
- (g) Prosecutorial discretion can be reviewed only where it amounts to an abuse of process. Where, as here, the conduct in issue does not affect trial fairness it falls under the residual category. (para. 40)
- (h) Under the residual category the test requires "flagrant impropriety", which means misconduct bordering on corruption, violation of the law, bias, malicious prosecution, or an improper motive. The threshold is very high. (para. 41)
- (i) Specifically, repudiation of plea agreements is an abuse of process only when done unfairly, irrationally, unreasonably, or oppressively. This includes considering whether the conduct has caused a sufficient degree of prejudice to the accused. Since it is within the core of prosecutorial discretion, establishing abuse requires proof of prosecutorial misconduct or bad faith. (para. 42)
- (j) The trial judge erred in adopting a novel test that reversed the burden of proof by assumed the repudiation of a plea agreement was *prima facie* an abuse of process which the Crown could negate only by satisfy the court that the plea agreement was not "reasonably defensible". (para. 45)
- (k) The ADM's conduct could not be characterized as unfair, unreasonable, oppressive or irrational. The high threshold needed to find abuse of process was not met here. (para. 50)

PART II – QUESTIONS IN ISSUE

Appellant’s Statement of the Grounds of Appeal

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?

Respondent's Position

9. The Respondent's position is that the decision to repudiate a plea agreement is an act of core prosecutorial discretion, not tactics or conduct before the court. Under the proper test, there was no abuse of process in the Assistant Deputy Minister's decision to repudiate the plea agreement.

10. The Respondent's position is that raising a new issue on appeal is permissible if it is a pure question of law. Courts are obliged to apply the correct legal test regardless of the position of the parties. Arguing the right law on appeal is not an abuse of the appeal process.

PART III – ARGUMENT

Ground 1 – Repudiation is not an Abuse of Process

Overview

11. The Appellant’s first ground contains two issues. The first is whether repudiation of a plea agreement is either a decision within the constitutionally protected core of prosecutorial discretion or an aspect of trial tactics and conduct subject to the court’s inherent supervision. The second issue is whether the repudiation constituted an abuse of process in this case. The Appellant urges that the trial judge was correct in all his rulings: i.e. that the repudiation was part of tactics and conduct before the court, that it is presumptively an abuse of process unless the Crown can provide good reasons to justify it, and that the only good reasons would be a objective determination by the trial judge that the plea agreement was either disreputable, unconscionable, or indefensible.

12. The Respondent’s position is that the decision to repudiate the plea agreement constitutes an act of prosecutorial discretion that is immune from judicial review except under the doctrine of abuse of process. An allegation of abuse of process in the exercise of prosecutorial discretion requires proof of flagrant impropriety. In the instant case there was no evidence of any bad faith, improper motive, or misconduct by the Crown in repudiating the plea agreement. The repudiation caused no real prejudice to the Appellant and there was no basis for finding an abuse of process.

Prosecutorial Discretion

13. The leading case on prosecutorial discretion is this Court’s decision in ***Krieger v. The Law Society of Alberta*** *supra*, which set out principles that included the following:

- (a) Historically, the power of the Attorney General to manage prosecutions of individuals for criminal acts has changed little since early times. (para. 24)
- (b) The office of the Attorney General has constitutional dimensions and significance. (para. 26)

- (c) The power to bring, to manage, and to terminate prosecutions lies at the heart of the Attorney General's role. (para. 29)
- (d) It is a constitutional principle that, in the exercise of the power to supervise prosecutions, the Attorney General will act independently of partisan concerns. (para. 30)
- (e) The court will not interfere with the exercise of this executive authority except under the **doctrine of abuse of process**. The independence of the Attorney General in this function is a hallmark of a free society. (paras. 31-2)
- (f) The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. (para. 32)
- (g) "Prosecutorial discretion" is a term of art and refers to the use of those powers that constitute the core of the Attorney General's office. (para. 42)
- (h) The power to prosecute delegated by the sovereign to the Attorney General and his or her agents is not subject to interference by other arms of the government. As a result, the exercise of these core or essential powers will be treated with significant deference by the court. (para. 45)
- (i) Without being exhaustive, the core elements of this authority of the Attorney General include the discretion to: 1) commence a prosecution, 2) enter a stay of proceedings, 3) **accept a plea to a lesser offence**, 4) withdraw from criminal proceedings, and 5) take control of a private prosecution. (para. 46)
- (j) A central expression of that deference is found in the very high threshold for any review of decisions in any of these "core" areas. Such decisions can only be reviewed in cases of flagrant impropriety or malicious prosecution. (para. 49)

14. **Krieger** also held that the exercise of such “core” functions must be distinguished from professional conduct that is subject to regulation by law societies, or conduct or tactics before the court that is subject to control by the court. This Court characterized the core functions as including ultimate decisions about what a prosecution should be for, by stating:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. 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. (para. 47)
(Emphasis Added)

15. Exercises of core prosecutorial discretion recognized by the courts include the following:

- (a) In **R. v. Cook**, this Court held that the Crown had the discretion to decide which witnesses it would call, had no the obligation to call a particular witness, and had no obligation to explain its decisions.⁵
- (b) In **Kostuch v. Alberta (AG)**, the Attorney General took over a private prosecution and directed a stay of proceedings. The Alberta Court of Appeal found no evidence of flagrant impropriety to permit judicial review of that exercise of discretion.⁶
- (c) In **R. v. Power** the Crown, after an adverse ruling on the admissibility of decisive evidence, made the decision not to call any further evidence and to then seek a remedy on appeal. This Court found that this action was within the Crown's discretion and not an abuse of process.⁷

⁵ **R. v. Cook**, [1997] 1 S.C.R. 1113; 1997 CarswellNB 125 at paras. 19-22, 30-32 [Tab 16 at pp. 188-9, 191-2]

⁶ **Kostuch v. Alberta (AG)**, 1995 CarswellAlta 298 at paras. 17, 37 (C.A.) [Tab 6 at pp. 74, 75]

leave to appeal refused (1996) 105 CCC(3d) vi

⁷ **R. v. Power**, [1994] 1 S.C.R. 601; 1994 CarswellNfld 9 at paras. 2, 20-22, 33-43, 64 [Tab 24 at pp. 299, 304-10, 316]

- (d) In *R. v. Ng*, a murder case, the Crown decided not to consent to a re-election from judge and jury, and declined to give reasons for withholding its consent. The Alberta Court of Appeal found there was no abuse of process and reversed the trial judge's decision to override the Crown's discretion.⁸
 - (e) In *Crockford v. British Columbia (Attorney General)*, the B.C. Court of Appeal concluded that a human rights tribunal had no jurisdiction to inquire into the Crown's decision to continue with a prosecution of the applicant, because such a decision was a protected exercise of discretion as described in *Krieger supra*.⁹
 - (f) In *BC (Criminal Justice Branch) v. Davies*, a commissioner in a public inquiry sought to compel evidence from the Crown regarding the decision not to lay charges when someone died after release from police custody. On appeal the court concluded that, absent flagrant impropriety, no other branch of government could enquire into the Crown decision not to initiate a prosecution.¹⁰
 - (g) In *Picha v. Dolan*, the court concluded that a Crown decision concerning judicial interim release was core prosecutorial discretion, and could therefore only be reviewed on the basis of flagrant impropriety.¹¹
16. Examples of conduct that fall outside core prosecutorial discretion are the following:
- (a) In *Krieger supra* this Court concluded that the Crown's failure to disclose all relevant information was in the nature of a duty, and thus an ethical breach subject to review and discipline by the Law Society. (paras. 54-5)
 - (b) In *R. v. Felderhof*, the Ontario Court of Appeal concluded that the ability of a trial judge to review the order in which certain evidence may be called properly falls within the scope of "tactics or conduct before the court."¹²

⁸ *R. v. Ng*, 2003 CarswellAlta 613 at paras. 1, 27-33, 67 (C.A.) [Tab 22 at pp. 249, 250-3] leave to appeal refused at 2004 CarswellAlta 665

⁹ *Crockford v. British Columbia (AG)*, 2006 CarswellBC 1875 at paras. 1, 9, 60-62 (C.A.) [Tab 5 at pp. 64, 66-8]

¹⁰ *BC (Criminal Justice Branch) v. Davis*, 2008 CarswellBC 1321 at paras. 17-8, 25-6 (S.C.) [Tab 3 at pp. 36-9]

¹¹ *Picha v. Dolan*, 2008 CarswellBC 1292 at paras. 17-8, 25-9 (S.C.) [Tab 10 at pp. 138-140]

¹² *R. v. Felderhof*, 2003 CarswellOnt 4943 at paras. 46-54 (C.A.) [Tab 18 at pp. 207-10]

Krieger Test Applied to the Repudiation

17. Turning to the judicial analysis in the instant case, the trial judge did refer to the principles of prosecutorial discretion set out in **Krieger** *supra*. He recognized the need to properly characterize the decision to repudiate on the dichotomy between acts of core discretion and tactics or conduct before the court. Then, in determining what test to apply, the trial judge inexplicably used the door of the courtroom as the threshold. He stated:

12 As noted at the outset, viewed from one perspective, this is an attempt by Ms. Nixon to persuade the court to interfere with a discretion properly exercised by the Attorney General. Viewed from another, it is not. It must be emphasized that the focus of the analysis in an application like hers is on the court process itself, not on Crown discretion. **The Attorney General, except in the rarest of cases, will always have the choice whether or not to initiate a prosecution, but when that discretion is exercised in favour of proceeding, the matter becomes subject to the processes and procedures sanctioned by the court.** That distinction was emphasized in **Krieger v. Law Society (Alberta)**, *supra* at para. 47:

“Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. *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 that forum.*”
[Emphasis mine.]

*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 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.*¹³ (Emphasis added)

18. While the trial judge quoted other passages from **Krieger**, he made no mention of the critical passage that referred specifically to plea agreements. That passage reads:

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a

¹³ **R. v. Nixon**, 2008 ABPC 20 [Appellant's Record, Vol. I, pp. 8-9, para. 12]

*charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, (c) **the discretion to accept a guilty plea to a lesser charge**; (d) the discretion to withdraw from criminal proceedings altogether; and (e) the discretion to take control of a private prosecution... While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.*¹⁴ (Emphasis Added)

19. The trial judge may have drawn support in his approach from the decision of the Ontario Superior Court in **R. v. M. (R.)**,¹⁵ although he did not cite any other authority but **Krieger** in reaching his decision on the first issue. In **M. (R.)**, Hill, J. concluded that, while the decision to enter into a plea bargain was an exercise of core discretion, the decision to repudiate, in the circumstances of the case before him, was not. He stated:

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 not to fulfil the undertaking of a prosecutor for diversion, an undertaking given during a court-mandated resolution meeting, where the defence has agreed to a plea of guilty to a regulatory offence, and a prosecutor and a police officer have taken significant steps toward execution of the agreement, in my view, 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, admitted breach of a pre-trial undertaking, which may be reviewed under broader s.7 Charter fairness principles.

20. The Alberta Court of Appeal found that the trial judge used the wrong test. Paperney, J.A., writing for the court, stated:

The trial judge used the wrong legal test to distinguish between matters that fall within the scope of prosecutorial discretion and those more properly characterized as a prosecutor's tactics and conduct before the court. He concluded that anything occurring after charges are laid falls outside the scope of prosecutorial discretion. The theory that the line between prosecutorial discretion and tactics and conduct can be drawn on a temporal basis, such as at the time the decision is made to prosecute, or on the accused's first appearance, does not appear to have judicial support. Moreover, it effectively neuters some of the primary purposes of prosecutorial discretion, to resolve cases by accepting pleas to lesser charges and to discontinue prosecutions. Those core powers are

¹⁴ **Krieger**, *supra* at para. 46 [Tab 7 at p. 96]

¹⁵ **R. v. M. (R.)**, 2006 CarswellOnt 5874 at para. 62, (Ont. S.C.) [Appellant's Authorities Tab 27]

*required throughout the court process and do not end artificially at the door of the courtroom. Rather, the relevant inquiry is whether the impugned decision falls within the core of the prosecutor's discretion: is it a decision as to whether a prosecution should be brought, continued or ceased, and if so, what it should be for?*¹⁶

The court of appeal concluded that, applying the correct test, the Attorney General's decision to repudiate the plea agreement fell squarely within the core elements of prosecutorial discretion.¹⁷

21. The Respondent submits that the analysis by Alberta Court of Appeal is correct. The repudiation of the plea agreement falls within the core of prosecutorial discretion. It is clear that the exercise of prosecutorial discretion does not end with the laying of a charge before the court. Nor is the decision to proceed with a prosecution the last act of core discretion. As this Court recently re-affirmed in **Kvello v. Miazga**, "*The decision to initiate **or continue** criminal proceedings lies at the core of prosecutorial discretion, the nature and contents of which were described by this Court in **Krieger**...*" (Emphasis added)¹⁸ That discretion continues to be exercised throughout the process by the Crown either continuing the trial to its conclusion or summarily ending it through a number of options open to it. If, as **Krieger** states, the decision to end a prosecution through a plea agreement is part of core discretion, why would a measured reconsideration of that decision suddenly transform the process from an exercise of discretion to one of trial tactics? If the trial judge were correct, not only would a repudiation of the plea agreement be subject to court supervision, but so too would be the original agreement. On the trial judge's test both parties are acting as officers of the court and subject to its supervision. Accordingly, the court would be entitled to review the propriety of the plea agreement and each party's reasons for their decision. This would undermine not only the Crown's constitutional independence, but it would also undermine the accused's constitutional rights.

Plea Agreement as an Undertaking

22. The trial judge's initial error, mischaracterizing the repudiation decision as tactics and conduct before the court, may have been influenced by his misperception of the plea agreement as an unqualified undertaking. This view is demonstrated by at least three passages in his

¹⁶ **R. v. Nixon**, 2009 ABCA 269 [Appellant's Record, Vol. I, p. 47, para. 33]

¹⁷ **R. v. Nixon** *Supra* [Appellant's Record, Vol. I, p. 47, para. 34]

¹⁸ **Kvello v. Miazga**, [2009] 3 S.C.R. 339 at para. 45 [Tab 8 at p. 111]

reasons.¹⁹ Absent from the reasons is any analysis of the term “undertaking” and its application to the circumstances before him. This misperception by the trial judge was another legal error. Plea agreements are not enforceable undertakings.

23. The word “undertaking” has a variety of meanings. Black’s Law Dictionary defines it as “a promise, pledge, or engagement”.²⁰ The *Criminal Code* refers to an “undertaking” in a number of contexts, but not in relation to a plea agreement. For example:

- (a) In s. 216 a person "who **undertakes** to administer surgical or medical treatment to another person" may commit an offence if that person fails to use "reasonable knowledge, skill, and care in so doing".
- (b) In s. 217 a person "who **undertakes** to do an act" assumes a legal duty to do the act if the failure to do the act is or might be dangerous to life.
- (c) In s. 384 it is an offence for a broker to sell shares belonging to a company or **undertaking** in which the broker, his firm, his partner, or other restricted parties have an interest, in order to produce a prohibited reduction in the stock.
- (d) In s. 493 of the bail provisions it defines an **undertaking** as a document in one of two specific forms.
- (e) In s. 145 it is an offence for a person at large on an **undertaking** to fail to appear in court as required.

24. All of these indicate that the meaning of “undertaking”, unless it is specifically defined, is dependent on the context. For example, in s. 217, where the undertaking creates a specific criminal liability, the threshold definition must be sufficiently high to justify serious penal consequences. That was the ruling in *R. v. Browne* where Abella, J.A. wrote for the Ontario Court of Appeal. She held that the ordinary meaning of undertaking was of little assistance because, to attach liability for criminal negligence causing death, the undertaking had to be in the

¹⁹ *R. v. Nixon*, 2008 ABPC 20 [Appellant’s Record, Vol. I, pp. 11, 28, 29, paras. 16, 54, 55]

²⁰ *Black’s Law Dictionary*, 8th Ed., 2004, Thomson West (not reproduced)

nature of a committal clearly made with binding intent upon which the victim can reasonably be said to have been placed reliance.²¹

25. To give another example, an undertaking under the bail provisions requires a specific promise in writing by the accused to do or refrain from doing certain things, with a breach constituting a criminal offence.

26. On the other hand, an accused that waives his charges to another location for guilty plea or schedules them for “summary disposition” cannot be treated as if he has given an undertaking to plead guilty. That was the issue before Lefever, P.C.J. in **R. v. Jackson**, a case in which the accused was put over to “show cause” why he should not be found in contempt of court for failing to enter a guilty plea as he had indicated he would. Lefever, J. concluded that there was no contempt because the accused was not giving an undertaking to plead guilty. Even if it was his intent to plead guilty, there is no impediment to his changing his mind.²²

27. Oliver, J. of the B.C. Supreme Court has similarly commented on plea agreements. In **R. v. Remple** he held that, for policy reasons, plea agreements between the Crown and defence are not usual undertakings between lawyers. Either side can withdraw from the agreement before performance.²³

28. The Law Society of Alberta Code of Professional Conduct specifically addresses this issue to the same effect in the Comment to Rule 27. It clearly indicates that plea agreements are not undertakings and endorses each party’s right to withdraw from the agreement prior to plea. The Comment states:

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.²⁴ (Emphasis Added)

²¹ **R. v. Browne**, (1997) 116 C.C.C. (3d) 183 at para. 15 (Ont. C.A.) [Tab 13 at p. 153]

²² **R. v. Jackson**, 2002 CarswellAlta 1079 at paras. 65-79 (P.C.) [Tab 19 at pp. 216-9]

²³ **R. v. Remple** 1993 CanLII 201 (B.C. S.C.) [Appellant’s Authorities, Tab 37, p. 274]

²⁴ *The Law Society of Alberta Code of Professional Conduct*, C. 27 at page 10-12 [Tab 11 at p. 141]

29. As noted by the Alberta Court of Appeal in the instant case, the notion that a plea agreement is like a contract entered into by two consenting parties breaks down because the accused's side of the agreement is unenforceable. He or she cannot be compelled to plead guilty if they change their mind. To hold otherwise would be to effectively treat the plea agreement as an irrevocable waiver of the accused's constitutional right to rely on the presumption of innocence by pleading not guilty. Such a proposition has no support in the law. Treating it as an enforceable agreement against the Crown, alone, doesn't work either given the common law principle that the Attorney General can, in appropriate circumstances, repudiate a plea agreement made by one of his or her agents. Finally, the Alberta Court of Appeal noted that plea agreements do not fit either of the common forms of undertakings. Plea agreements are not undertakings between lawyers; nor are they undertakings between a lawyer and the court.²⁵

30. The contract analogy is also inapplicable for another reason. Compliance is not strictly up to the parties. A plea agreement is always conditional on acceptance by the court. Section 606 (1.1) of the *Criminal Code* reads as follows:

(1.1) A court may accept a plea of guilty only if it is satisfied that the accused

(a) is making the plea voluntarily; and

(b) understands

(i) that the plea is an admission of the essential elements of the offence,

(ii) the nature and consequences of the plea, and

(iii) that the court is not bound by any agreement made between the accused and the prosecutor.

A failure to satisfy the trial judge on any of these means the court may reject the guilty plea.

31. In conclusion, characterizing the plea agreement as an enforceable undertaking was a legal error and it caused the trial judge to begin his analysis on a wrong premise. Instead of considering the repudiation as an act of prosecutorial discretion, it caused him to perceive it simply as professional misconduct before the court. And it was this error that led the trial judge to the third, and most critical error, applying the wrong test for abuse of process.

²⁵ *R. v. Nixon*, 2009 ABCA 269 [Appellant's Record, Vol. I, pp. 45-6, paras. 27-30]

Abuse of Process Principles

32. The Alberta Court of Appeal accurately summarized the case law with respect to abuse of process, emphasizing the following principles:²⁶

- (a) Since **O'Connor**²⁷ the common law doctrine of abuse of process and s. 7 of the *Charter* are fundamentally intertwined. (para. 36)
- (b) The two categories of abuse of process are: (1) conduct causing prejudice to the accused by an unfair trial, and (2) conduct that falls into a "residual category" and affects the integrity of the justice system. (para. 36)²⁸
- (c) An accused alleging an abuse of process under the first category must prove, on a balance of probabilities, prejudice or adverse effect to his or her *Charter* rights. (para. 37)²⁹
- (d) In the "residual category" there must be conduct that is egregious, vexatious or oppressive and offends the community's sense of fair play and decency. This means conduct that shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. (para. 38)³⁰
- (e) To satisfy the threshold of "vexatious or oppressive", prosecutorial misconduct or improper motive is not essential, but they are two of the factors to be considered when deciding whether there is conduct or circumstances amounting to an abuse of process. (para. 38)³¹
- (f) Where the conduct involves prosecutorial discretion, the test requires conspicuous evidence of "flagrant impropriety". This means conduct bordering on corruption, violation of the law, bad faith, or an act so wrong that it violates

²⁶ *R. v. Nixon*, 2009 ABCA 269 [Appellant's Record, Vol. I, pp. 47-9, paras. 36-42]

²⁷ *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 70 [Tab 23 at p. 285]

²⁸ *O'Connor*, *supra* at paras. 64, 73 [Tab 23 at pp. 280-1, 286]

²⁹ *O'Connor*, *supra* at paras. 68 [Tab 23 at p. 283-4]

³⁰ *R. v. Regan*, [2002] 1 S.C.R. 297 at paras. 49, 50, 55 [Tab 25 at pp. 329-30, 332]

³¹ *R. v. Keyowski*, [1988] 1 S.C.R. 657 at para. 3 [Tab 20 at p. 225]

the conscience of the community such that it would genuinely be unfair and indecent to proceed. (paras. 40, 41)³²

- (g) Repudiation of a plea agreement amounts to an abuse of process only in exceptional cases when done unfairly, or when prosecutorial discretion is exercised irrationally, unreasonably, or oppressively. (para. 42)³³

33. Other principles that emerge from the case law include the following:

- (a) No abuse of process occurs if the conduct does not lead to prejudice or unfairness. For example, in **R. v. D. (E.)** the Ontario Court of Appeal held that a unilateral breach by the Crown of an agreement between police and complainants on the one side and the accused on the other was not an abuse of process. There was no real prejudice and the charges were very serious (child sexual abuse).³⁴
- (b) The abuse of process must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected. For example, in **Blencoe v. B.C. Human Rights Commission**, this Court held that a 30 month delay in processing a sexual harassment human rights complaint was not an abuse of process. The humiliation, job loss, and clinical depression suffered by the person accused did not flow primarily from the delay, but from the complaint itself and the publicity surrounding it.³⁵
- (c) In determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused.³⁶

³² **Power**, *supra*, at para. 17; [Tab 24 at p. 303] **Krieger**, *supra* at para. 49; [Tab 7 at pp. 97-8] **Kostuch**, *supra* at para. 17 [Tab 6 at p. 74]

³³ **R. v. Conway**, [1989] 1 S.C.R. 1659 at para. 29 [Tab 15 at p. 175]

³⁴ **R. v. D. (E.)**, 1990 CarswellOnt 104, (C.A.) at paras. 29, 46, [Appellant's Authorities, TAB 14, pp. 89-97]

³⁵ **Blencoe v. BC (Human Rights Commission)**, [2000] 2 S.C.R. 307 at para. 133 [Tab 4 at p. 58]

³⁶ **R v. O'Connor**, *supra* at para. 81 [Tab 23 at p. 291]

- (d) The Attorney General reflects the interest of the community to see that justice is properly done. The Attorney General's role is not only to protect the public, but also to honour and express the community's sense of justice. Courts should be careful before they attempt to "second-guess" the prosecutor's motives.³⁷
- (e) The types of conduct giving rise to an abuse of process include conduct where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases.³⁸

Abuse of Process Principles Applied

34. The trial judge committed four errors at this stage of his analysis. First, he reversed the burden of proof by starting with a presumption that the repudiation was an abuse of process unless the Crown could convince him otherwise. Second, he set the threshold of proof very high by requiring the Crown to convince him that the plea agreement would bring the administration of justice into disrepute and was indefensible. Third, he applied a purely objective test to the latter question. Having found that the Crown failed to meet its burden, he found an abuse. Finally, he erred in his *obiter* finding regarding prejudice. He held that, although he did not have to find actual prejudice, he did find prejudice in this case in that the accused was unable to "discover" the breath-test evidence because it had not been called at the preliminary hearing.

35. The trial judge showed no deference to the decision of the ADM even though he accepted that the ADM had reached the following conclusions: a) that the decision to make the plea agreement was based on legal errors, b) that the plea agreement would bring the administration of justice into disrepute, and c) that the accused could be restored, without prejudice, to her position before the agreement. The trial judge also found no impropriety, bad faith, or wrong conduct on the part of Crown officials and the ADM.

36. The Alberta Court of Appeal noted that, while the system relies on prosecutors honouring plea agreements, in exceptional circumstances it will be appropriate to repudiate such agreements. It was for the Crown to decide, as a matter of policy, when the extraordinary step should be taken. The correctness of such a policy was not the issue. The relevant inquiry is

³⁷ *R. v. Power*, *supra*, at para. 17 [Tab 24 at p. 303]

³⁸ *R. v. Conway*, *supra* at para. 22 [Tab 15 at p. 173]

whether there was evidence of flagrant impropriety or bad faith amounting to an abuse of process.³⁹ The appeal court noted that in this case the charges were serious and had deep repercussions for all those involved. The ADM took extensive steps in getting legal and expert opinions on the proper considerations to take into account in repudiating a plea agreement. Moreover, the evidence was that such repudiations were rare and had only occurred in Alberta twice before. The ADM chose to essentially follow the recommendations of the Martin committee report⁴⁰ and Rule 27 of the Alberta Code of Professional Conduct.⁴¹ He concluded that the plea agreement would bring disrepute to the administration of justice and that the repudiation would cause no prejudice to the accused as she had not yet entered her plea. The court of appeal found that the evidence in this case did not meet the test for abuse of process.⁴²

37. The Respondent submits that the court of appeal's analysis was correct. They applied the findings of fact made by the trial judge to the proper legal test and concluded no abuse of process could be made out on this record. The evidence at trial was that, after the preliminary hearing was over and a committal for trial on dangerous driving charges was ordered, the trial prosecutor entered into a plea agreement with the Appellant. Before the plea was entered the ADM began a review of that decision. His review was done carefully, with written legal opinions provided and extensive consultation held with a number of experienced crown counsel. The ADM chose to use the Ontario policy as his guide. His conclusion was that to follow through with the plea agreement would bring the administration of justice into disrepute and that the accused could be restored to her pre-agreement position without prejudice. These findings of fact were made by the trial judge after a full hearing in which the Crown was completely candid with the trial court, providing copies of internal memorandums and opinions, and calling to testify all of the main Alberta Justice officials involved in the review, including the ADM.

38. The fact that Alberta does not have a written policy on repudiation of plea agreements and that the ADM used the Ontario policy as a guide does not determine the test for abuse of process, nor make the decision to repudiate something other than core discretion. A policy is only a guideline. It does not dictate whether prosecutorial discretion was exercised properly or

³⁹ *R. v. Nixon*, 2009 ABCA 269 [Appellant's Record, Vol. I, p. 50, para. 47]

⁴⁰ *Report of the AG Advisory Committee*, Martin, 1993; [Appellant's Authorities, Tab 47, p. 317, para. 53]

⁴¹ *The Law Society of Alberta Code of Professional Conduct*, C. 27, at p. 10-12 [Tab 11 at p. 141]

⁴² *R. v. Nixon*, 2009 ABCA 269, [Appellant's Record, Vol. I, p. 50-1, paras. 48-50]

improperly. Even where there is a specific policy, the failure of the Crown to follow that policy does not prove an improper use of discretion amounting to an abuse of process. The real question, and one that was clearly answered by the evidence in this case, is whether there was any proof of flagrant impropriety by the ADM in making the decision to repudiate the plea agreement. The answer is that there was none. Not only was there no proof of flagrant impropriety, there was no evidence of any bad faith, improper motive, or political influence. The ADM made a good faith assessment after a thorough review. His conclusions, constituting the performance of a quasi-judicial function, were entitled to deference in the same way that a trial judge's findings of fact are entitled to deference. It was not for this trial judge to substitute his view of the propriety of the plea agreement for that of the ADM any more than it was for the trial judge to direct how the Crown's discretion was to be exercised. For a trial judge to do so, in the absence of flagrant impropriety by the Crown, is to commit an unauthorized interference with the constitutionally protected independence of the Crown.

39. Finally, with respect to the finding of prejudice, the Respondent submits that there was no real prejudice to the Appellant. The repudiation of the plea agreement put her back to exactly where she was before the plea negotiations had even begun. The Appellant's inability to "discover" the breath-test evidence is not relevant to the plea agreement as it happened before and is not a real prejudice in any event. The Crown has the discretion to call whatever evidence it wishes at the preliminary hearing and need only call enough to make a *prima facie* case.⁴³ The Crown's decision not to call the breath-test evidence in the preliminary hearing generated no complaint from the Appellant. The agreement between the parties to a committal on the dangerous driving offences only was an earlier agreement that was never disputed. The Crown stipulated in that earlier agreement that it reserved the right to call the breath-test evidence should the case go to trial. There was no evidence in the *Charter* hearing to suggest counsel for the Appellant was misled into believing the breath-test evidence would never be called.

40. The other prejudices that Appellant alleges in her factum are also not real prejudices in the context of abuse of process. The emotional effect on her of the repudiation is not prejudicial to her fair trial concerns since it simply restores her to the legal jeopardy she faced before the plea agreement was made. The Appellant's admissions in the agreed statement of facts are not

⁴³ *R. v. Caccamo*, [1976] 1 S.C.R. 786, at para. 67 [Tab 14 at p. 160]

admissions that the Crown could ever use in proving the criminal offences. The act of signing an agreed statement of facts in support of a plea agreement does not constitute an admissible confession should the deal fall through. Nor does it in anyway restrict the defences the Appellant may raise at trial. She is still entitled to make the Crown prove each element of the offences at trial, including identity. What the Appellant cannot do is raise any defences based on false facts. Since neither the agreed facts nor the defences raised at trial can be based on known falsehoods, the Appellant is under the same principled restrictions in advancing a defence now as she was before the plea agreement. The defence is not entitled to suggest, through cross-examination or the calling of evidence, facts that have no foundation. The same principled restrictions would apply to a choice of counsel issue. The Appellant cannot use the change of counsel as a means of presenting a knowingly false defence.

Ground II - New Issue on Appeal

Overview

41. The Appellant's second ground of appeal alleges that the Alberta Court of Appeal erred in permitting the Crown Respondent, as appellant before the Alberta Court of Appeal, to argue a different legal position than it took at trial. The Appellant further urges that this constituted an abuse of the appeal process by the Crown, raised issues of double jeopardy, and did not present a question of law.

42. The Respondent submits that the only real issue to be addressed under this ground is whether the Crown Respondent brought itself within the exception to raising new issues before the Alberta Court of Appeal: i.e. that they were pure questions of law, that they did not require any further evidence, and that they did not prejudice the Appellant. The other issues raised by the Appellant are peripheral and without foundation. The suggestion of double jeopardy is raised without explanation or application to the circumstances, making it impossible for the Respondent or the Court to address. The suggestion that the Crown committed an abuse of the appellate process is ironic, given that this is a new argument raised by the Appellant for the first time before this Court. The Appellant made no such complaint to the Alberta Court of Appeal either

in her factum⁴⁴ or in her oral submissions before that court. In any event, asking the court of appeal to apply the correct legal test to an allegation of abuse of process, in the circumstances of this case, was not an abuse of the appeal process.

New Grounds on Appeal

43. The principles concerning the raising of a new issue on appeal are as follows:

- (a) There is a general prohibition against raising new issues on appeal that were not argued at trial.⁴⁵
- (b) An exception exists where it is a pure question of law, it does not require further evidence, and it does not prejudice the respondent.⁴⁶
- (c) Appellate courts have permitted such issues to be raised in criminal matters, even in the face of an erroneous concession on a question of law at trial.⁴⁷
- (d) The Supreme Court has stated:

*The general rule is that an appellant may not raise a point that was not pleaded, or argued in the trial court, unless all the relevant evidence is in the record: John Sopinka and Mark A. Gelowitz, The Conduct of an Appeal (1993), at p. 51. In this case, all relevant evidence was part of the record. In fact, all the requisite findings of fact had been made. The point raised by the appellant was purely a question of law.*⁴⁸

- (e) If the new issue on appeal constitutes a change in the Crown's theory of liability, a change in the basis for admissibility, or an issue the Crown deliberately chose not to litigate at trial, then it may be **an abuse of the appeal process** to allow the Crown to advance the new issue on appeal.⁴⁹

⁴⁴ Factum of the Respondent (Nixon), Alberta Court of Appeal [Respondent's Record, Vol. I, p. 2]

⁴⁵ **R. v. Brown**, 1993 CarswellAlta 412, (S.C.C.) per L'Heureu-Dube in dissent at paras. 9-21 [Tab 12 at pp. 145-8]

⁴⁶ **Alberta v. Nilsson** 2002 CarswellAlta 1491 at para's 169-75 (C.A.) [Tab 2 at pp. 27-9]

⁴⁷ See for example, **R. v. D. (F.E.)**, 2007 CarswellOnt 1971 at para's 39-45 (Ont. C.A.), leave to appeal refused 2008 CarswellOnt 2332 [Tab 17 at pp. 199-201], **Mikisew First Nation v. Canada**, 2005 CarswellNat 3756 at para 40 (S.C.C.) [Tab 9 at pp. 132-3], **R. v. Loscerbo**, 1994 CarswellMan 125 at para's 26-29, 33-35, 43-44 (C.A.) [Tab 21 at pp. 234-6, 238]

⁴⁸ **Athey v. Leonati**, 1996 CarswellBC 2295 at para 51-52 (S.C.C.) [Tab 1 at pp. 8-9]

⁴⁹ **R. v. Varga**, [1994] 72 OAC 141 at paras. 26, 39-41 [Tab 27 at pp. 151, 153]

- (f) In bestowing on the Crown a right of appeal, Parliament determined that acquittals tainted by legal error were sufficiently injurious to the due administration of justice to demand a remedy, even if that remedy trespassed somewhat on traditional double jeopardy concepts.⁵⁰

44. Principles concerning abuse of the appeal process include the following:

- (a) All courts have residual discretion to control their own process and prevent abuses of that process.⁵¹
- (b) A court of appeal does not have the discretion, under s. 686(4) of the *Criminal Code*, absent abuse of process, to decline to allow an appeal when a reversible error of law is found in the trial judge's decision.⁵²
- (c) A crown prosecutor cannot, by an undertaking given at trial not to appeal sentence, divest the Attorney General of the power to appeal because that power is statutory in nature. The appeal cannot be barred unless it would constitute an abuse of process.⁵³

Application to the Instant Case

45. Turning to the case in issue, it is important to place this ground of appeal in context. The trial hearing was concerned only with litigating the allegation of abuse of process. The Crown was the defendant accused of a *Charter* infraction. A full record was provided, including the complete trial brief prepared by the police together with related witness statements and reports, the preliminary hearing transcript, and *viva voce* and documentary evidence from the trial prosecutor and other officials in the Justice Department, including both the Acting ADM and the ADM. There is no prejudice to the Appellant in her ability to address the legal issues on this record and no prejudice to her in her ability to make full answer and defence if the criminal charges are returned to trial. There was a full hearing into the circumstances of the plea

⁵⁰ *R.v. Varga* *supra* at para. 24 [Tab 27 at pp. 150]

⁵¹ *R. v. Power*, *supra* at paras. 11, 29 [Tab 24 at pp. 301, 306]

⁵² *R. v. Power*, *supra* at para. 64 [Tab 24 at p. 316]

⁵³ *R. v. Ross & Ryanzon*, 2008 CarswellOnt 5742 (C.A.) at para. 42 [Tab 26 at pp. 338-9]

agreement and the repudiation, with findings of fact and credibility by the trial judge that were given due deference by the court of appeal.

46. The Crown's position on the circumstances and the conclusions to be reached from the evidence was essential unchanged between the trial and the appeal. That position was that: 1) the burden of proof was on the accused, 2) the plea agreement would bring disrepute to the administration of justice, 3) the accused could be restored to her position before the agreement without prejudice, 4) the Crown had not acted in bad faith, or with any improper motive, and 5) the Crown had done a careful review, following the policy of the Ontario Crown in making its decision to repudiate the plea agreement. The only change between the Crown's position at trial and on appeal was with respect to the legal tests for evaluating a repudiation of a plea bargain under the abuse of process doctrine. These are pure questions of law. The standard of review is correctness.

47. The Respondent further submits that the evidentiary record is more than sufficient to resolve the issues on the basis of the correct legal test. The Crown has an obligation to correct the legal errors it made at trial and the courts have an obligation to apply the correct law regardless of the position taken by the parties. Decisions tainted by legal errors are so injurious to the administration of justice that they demand a remedy. The Crown serves the public interest. It cannot be an abuse of the appeal process for the Crown to raise with the court of appeal the question of legal errors committed at trial, any more than it is an abuse of the trial process for the Crown to repudiate a plea agreement that it sees as detrimental to the same administration of justice.

48. Ultimately, this Court's decision must be based on the correct law regardless of the position taken in the courts below. The Appellant's suggestion, that a trial judge does not err in using the wrong test provided it was agreed to by the parties, would turn our entire body of jurisprudence on its ear. A jury charge, for example, could never be appealed no matter how erroneous provided both parties gave it their endorsement. An error of law would have to be judged on a new standard; instead of "correctness" it would be "consensus". Such an approach would constitute a total abrogation of the rule of law.

PART IV – SUBMISSIONS ON COSTS

49. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

50. That this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

A handwritten signature in cursive script, reading "Goran Tomljanovic", written over a horizontal line.

GORAN TOMLJANOVIC, Q.C.
COUNSEL FOR THE RESPONDENT

GMT/md

PART VI - TABLE OF AUTHORITIES

TAB	RESPONDENT'S AUTHORITIES VOLUME I	Cited at Paragraph No.
1	<i>Athey v. Leonati</i> , 1996 CarswellBC 2295 at paras. 51-52 (SCC)	43
2	<i>Alberta v. Nilsson</i> , 2002 CarswellAlta 1491 at paras. 169-75 (C.A.)	43
3	<i>BC (Criminal Justice Branch) v. Davis</i> , 2008 CarswellBC 1321 at para's 17-8, 25-6 (B.C.S.C.)	15
4	<i>Blencoe v. BC (Human Rights Commission)</i> , [2000] 2 S.C.R. 307 at para. 133	33
5	<i>Crockford v. British Columbia (AG)</i> , 2006 CarswellBC 1875 at paras. 1, 9, 60-62 (C.A.)	15
6	<i>Kostuch v. Alberta (AG)</i> , 1995 CarswellAlta 298 at paras. 17, 37 (C.A.)	15, 32
7	<i>Krieger v. Law Society (Alberta)</i> , [2002] 3 S.C.R. 372, paras. 24-49	4, 8, 13, 14, 16-18, 32
8	<i>Kvello v. Miazga</i> , [2009] 3 S.C.R. 339 at para. 45	21
9	<i>Mikisew First Nation v. Canada</i> , 2005 CarswellNat 3756 at para 40 (S.C.C.)	43
10	<i>Picha v. Dolan</i> , 2008 CarswellBC 1292 at paras 17-8, 25-9 (B.C.S.C)	15
11	<i>The Law Society of Alberta Code of Professional Conduct</i> , C. 27, at p. 10-12	28, 36
12	<i>R. v. Brown</i> , 1993 CarswellAlta 412, [1993] 2 S.C.R. 918, per L'Heureu-Dube, in dissent at paras. 9-21	43
13	<i>R. v. Browne</i> , (1997) 116 C.C.C. (3d) 183 at para. 15 (Ont. C.A.)	24
14	<i>R. v. Caccamo</i> , [1976] 1 S.C.R. 786 at para. 67	39
15	<i>R. v. Conway</i> , [1989] 1 S.C.R. 1659 at paras. 22, 29	32, 33
16	<i>R. v. Cook</i> , [1997] 1 S.C.R. 1113; 1997 CarswellNB 125 at paras 19-22, 30-32	15

TAB	RESPONDENT'S AUTHORITIES VOLUME II	Cited at Paragraph No.
17	<i>R. v. D. (F.E.)</i> , 2007 CarswellOnt 1971 at paras. 39-45 (C.A.)	43
18	<i>R. v. Felderhof</i> , 2003 CarswellOnt 4943 at paras. 46-54 (C.A.)	16
19	<i>R. v. Jackson</i> , 2002 CarswellAlta 1079 at paras. 65-79 (P.C.)	26
20	<i>R. v. Keyowski</i> , [1988] 1 S.C.R. 657 at para. 3	32
21	<i>R. v. Loscerbo</i> , 1994 CarswellMan 125 at paras. 26-9, 33-5, 43-4 (C.A.)	43
22	<i>R. v. Ng</i> , 2003 CarswellAlta 613 at paras 1, 27-33, 67 (C.A.)	15
23	<i>R. v. O'Connor</i> , [1995] 4 S.C.R. 411 at paras. 64, 68, 70, 73, 81	32, 33
24	<i>R. v. Power</i> , [1994] 1 S.C.R. 601; 1994 CarswellNfld 9 at paras 2, 11, 17, 20-22, 29, 33-43, 64	15, 32, 33, 44,
25	<i>R. v. Regan</i> , [2002] 1 S.C.R. 297 at paras. 49, 50, 55	32
26	<i>R. v. Ross & Ryanzonv</i> , 2008 CarswellOnt 5742 at para. 42 (C.A.)	44
27	<i>R. v. Varga</i> , [1994] 72 OAC 141 at paras. 24, 26, 39-41	43

TAB	APPELLANT'S AUTHORITIES – Reproduced by Appellant	Cited at Paragraph No.
47	<i>Report of the AG Advisory Committee</i> , Martin, 1993, p. 317, para. 53	36
14	<i>R. v. D.(E.)</i> , 1990 CarswellOnt 104, (C.A.) at paras. 29, 46, pp. 89-97	33
37	<i>R. v. Remple</i> 1993 CanLII 201 (B.C. S.C.) p. 274	27
27	<i>R. v. M.(R.)</i> , 2006 CarswellOnt 5874 at para. 62, (Ont. S.C.)	19

**PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR
BY-LAW**

No additional Statute, Regulation, Rule, Ordinance or By-Law referred to.