B. ***Regina v. Krieger***

12. Prior to *Krieger,* it was clear that Crown exercises of discretion could only be reviewed where there was evidence of an abuse of process. Regrettably, some commentators and jurists have interpreted *Krieger* as inviting greater judicial supervision of Crown decision-making.[25] They suggest that only decisions as to "whether a prosecution should be brought, continued, or ceased and, if so, what it should be for," are matters of prosecutorial discretion. Under this interpretation of *Krieger,* routine decisions, such as the prosecution's choice of witnesses, the decision to call no further evidence following an adverse evidentiary ruling, the decision to proceed summarily or by indictment, the Crown's position on an adjournment request, or the decision to appeal, could be reviewed by the court in the absence of evidence amounting to an abuse of process. Previously, in *R. v. Cook, R. v. Jolivet, R. v. Power,* and *R. v. Beare*[26], this Honourable Court held these were matters of prosecutorial discretion, reviewable only for an abuse of process. Had this Court intended to overrule its previous jurisprudence and narrow the scope of protected prosecutorial decision-making, presumably it would have done so explicitly.

13. The issue in *Krieger* was whether the Law Society had the jurisdiction to discipline Crown counsel for failing to provide full disclosure to a defendant in a criminal proceeding. The court in *Krieger* affirmed that judicial interference with the Crown's discretionary[27] decisions is only warranted in two circumstances. First, it is warranted where the conduct of the Crown amounts to an abuse of process. Second, trial courts have a limited jurisdiction to supervise the courtroom conduct of both Crown and defence counsel.

Matters of Prosecutorial Discretion

14. Matters of prosecutorial discretion may only be reviewed by the courts for an abuse of process. Prosecutorial discretion was broadly defined at paragraph 44 of *Krieger* as "**the discretion exercised by the Attorney General in matters within his authority in relation to the prosecution of criminal offences.**" However, at paragraphs 43 and 47, arguably more narrow definitions were provided. At paragraph 43, Justices Major and Iacobucci referred to prosecutorial

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[25] See, *e.g.:* **Hon. M. Rosenberg, "The Attorney General and the Administration of Justice"** (2009) 34 Queen's L.J. 813 [Respondent's Book of Authorities ("RB"), Tab 14].

[26] ***R. v. Cook*** (1997) 114 C.C.C. (3d) 481 (S.C.C.) [AB, Vol. 1, Tab 11]. ***R. v. Jolivet,*** [2001] 1 S.C.R. 751 [AB, Vol. 2, Tab 21]. *R. v. Powers, supra; R. v. Beare, supra* at p. 410.

[27] In ***R. v. Stinchcombe,*** [1991] 3 S.C.R. 326 [AGO, Tab 11], this Honourable Court recognized that the Crown has a duty to disclose all relevant information in its possession to the defence. In *Krieger,* this court affirmed that, because the Crown has a *duty* to make full disclosure to the defence, the disclosure process does not involve an exercise of prosecutorial discretion. Thus, the accused may apply for *Charter* relief under ss. 7 and 24(1), in the usual course.

discretion as "the use of those powers that constitute the **core** of the Attorney General's office and are protected from the influence of improper political and other vitiating factors by the principle of independence," and at paragraph 47 they wrote:

> "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." [emphasis added]

Crown "Conduct or Tactics Before the Court"

15. The second category of discretionary conduct recognized in *Krieger* was defined as the Crown's "tactics or conduct before the court", which is restricted to matters falling within the court's jurisdiction to control its own process:

> Decisions that do not go to the nature and extent of the prosecution, **i.e.**[28], 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** [emphasis added].[29]

16. As this Honourable Court recognized in *R. v. Cunningham,* both the inferior and superior courts have a limited jurisdiction to supervise the conduct of counsel.[30] This power derives from the court's jurisdiction to control its own process.[31] It may only be invoked where intervention is necessary to ensure the court can fulfil its function.[32] It is invoked in relation to the process of litigation.[33] It does not, in Ontario's respectful submission, apply to the myriad of substantive decisions the Crown makes, or decisions the Attorney General makes before it "enters into the forum". The court's power to control its own process includes the power to make rules of court and to sanction counsel for failing to comply with those rules. The court may also penalize counsel for ignoring rulings or orders, or for inappropriate courtroom behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Unfair trial tactics such as intentionally engendering delay or bringing frivolous or last-minute motions, would also fall within this rubric. Available sanctions include orders to comply,

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[28] *I.e.* is an acronym for "id est", meaning "that is".
[29] *Krieger, supra* at para. 47.
[30] ***R. v. Cunningham,*** [2010] 1 S.C.R. 331 at paras. 18-19 [AGO, Tab 4].
[31] *R. v. Cunningham, ibid.* at paras. 18, 21. *Ontario v. C.L.A, supra* at para. 19.
[32] *R. v. Cunningham, supra* at paras. 18, 19, 21. *Ontario v. C.L.A., supra* at para. 26.
[33] **I.H. Jacob, "The Inherent Jurisdiction of the Court"** (1970) Current Legal Problems 23 at p. 24 [AGO, Tab 16].

adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.[34] If not corrected at trial, Crown abuses may be corrected on appeal.

17. The court's power to control its own process is subject to the principle of supremacy of Parliament and may be curtailed through legislation. **Parliament is "free to refine the respective roles of the Crown and judiciary."[35] Even where there are no legislative limits, the court's jurisdiction must be exercised in a manner that respects the separation of powers,[36] including the unique role of the Attorney General and his or her agents.** It is generally acknowledged that trial judges may supervise the conduct of the litigants, but "should leave the conduct of the litigation, including the calling of witnesses, to those who are most familiar with the case: the parties."[37] Courts have no greater jurisdiction to supervise the conduct of the Crown than the defence. **Accordingly, in distinguishing between Crown "tactics and conduct before the court" and matters of prosecutorial discretion, Ontario submits it may be useful to ask whether the impugned conduct is something for which defence counsel might also be called to task.**

C. The Misapplication of Krieger

18. As previously discussed, the term "prosecutorial discretion" was defined in different ways in *Krieger*. In applying *Krieger*, lower courts in Ontario have tended to focus on the most restrictive definition and have asked whether the impugned decision involves a "core" or "non-core" function, [38] defined as matters relating to the ultimate decision "as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for."[39] This was the approach adopted by Justice Doherty in *R. v. Gill*.[40] Where the courts have concluded that the impugned decision involved a "non-core" function, the Crown's conduct has been reviewed on a variety of standards including arbitrariness, correctness, and reasonableness.[41]

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[34] I.H. Jacob, "The Inherent Jurisdiction of the Court", *supra*; M. Code, "Judicial Review of Prosecutorial Decisions," *supra* at p. 126.
[35] Law Reform Commission of Canada, *Control of the Process, supra* at p. 33.
[36] *Ontario v. C.L.A., supra* at paras. 22 – 31, 34 – 37.
[37] ***R. v. Rybak***, [2008] O.J. No. 1715 (C.A.) [AGO, Tab 8]. In this case, the Ontario Court of Appeal, relying on *R. v Cook, supra*, held that the trial judge had not erred in refusing to interfere with the prosecutor's refusal to call a particular witness, in the absence of evidence of an abuse of process. See also: Law Reform Commission of Canada, Working Paper No. 15, *supra* at p. 37.
[38] *Krieger, supra* at para. 46.
[39] *Krieger, supra* at para. 47.
[40] ***R. v. Gill***, [2012] O.J. No. 4332 (C.A.) [AB, Vol. 2, Tab 17].
[41] In ***R. v. J.S.R.***, (2012), 112 O.R. (3d) 81 at paras. 121, 127 (Ont. C.A.) [AB, Vol. 3, Tab 32], for example, Justice Feldman of the Ontario Court of Appeal held that all exercises of prosecutorial discretion ("core" and "non-core")

19. It is submitted that Ontario courts have failed to appreciate the breadth of the definition of prosecutorial discretion set out in paragraph 43 of *Krieger,* as well as the reference in paragraph 47 to Crown discretion encompassing decisions that go to the "nature" and "extent" of the prosecution, which are expansive terms. It is further submitted that trial courts have failed to properly consider paragraph 32, which clearly prohibits judicial review of the Crown's substantive decision-making:

> **Subject to the abuse of process doctrine, supervising one litigant's decision-making process – rather than the conduct of litigants before the court – is beyond the legitimate reach of the court.** [emphasis added][42]

20. It is Ontario's position that, in the absence of an abuse of process, the court's jurisdiction to review exercises of Crown discretion is restricted to an examination of the Crown's conduct before the court and is, as discussed above, limited to matters falling within the court's jurisdiction to control its own process, which are matters for which defence counsel might also be called to task.

D. Application to Circumstances at Bar

21. Parliament has conferred the discretion to rely upon the Notice to the Crown. The combined effects of s. 255(1) and 727(1) of the *Criminal Code* constitute **"legislative limits" on the court's jurisdiction**. The "inherent or implied jurisdiction of the court cannot be exercised in a way that would circumvent or undermine these laws."[43] As Madam Justice Welsh correctly concluded, the discretion to prove the Notice "does not relate to tactics or conduct before the court which would be subject to the inherent jurisdiction of the court to control its own processes."[44] Accordingly, it is a decision that may only be reviewed for an abuse of process.

22. Further, Ontario submits that the decision to file the Notice is a decision the Attorney General is uniquely qualified to make. In formulating its position on matters relating to sentence (including reliance on the Notice), the Crown must consider not only the circumstances of the offence, but also the offender's past history of criminal misconduct, the prevalence of impaired

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may only be reviewed for an abuse of process, but a relaxed standard of proof applies to "non-core" decisions. In *R. v. Gill,* Justice Doherty, writing for a different bench, held that "core" decisions may only be challenged for an abuse of process; "non-core" decisions may be challenged under s. 7 of the *Charter, i.e.,* the applicant must demonstrate that the Crown has exercised its discretion in a manner that infringes an identifiable "principle of fundamental justice".

[42] *Krieger, supra* at para. 32.

[43] *Ontario v. C.L.A., supra* at para. 55.

[44] *R. v. Anderson, supra* at para. 26.

driving in the locality of the offence, and Crown policy. Only some of the information the Crown considers is readily available to the court.[45]

23. There is no question that charge screening decisions, and the decision to proceed summarily or by indictment, are matters of prosecutorial discretion, reviewable only for an abuse of process. The Crown is "no more limiting the sentencing discretion of a trial judge when it chooses to prove the notice under s. 727 than it is when it chooses to prove the use of a firearm in the commission of certain offences or chooses to charge an offence that attracts a minimum penalty or chooses to proceed by indictment when that attracts a minimum penalty".[46] It makes little sense to treat the decision to file the Notice differently than the Crown's election or charge screening decisions.

E. Consequences of the Misinterpretation

24. Although concerns regarding *Krieger* were raised before this court in *Nixon,* the issue was not resolved.[47] The result, in Ontario, has been continued and increased attacks on the exercise of Crown discretion. Even mundane Crown decisions, such as the ordering of the names of multiple defendants in an indictment, have been the subject of challenges.[48] In a number of cases, Ontario courts have narrowly construed the term "prosecutorial discretion".[49] Arguably, there now appears to be conflicting authority, in Ontario, as to whether "prosecutorial discretion" extends to matters relating to sentence.[50]

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[45] For example, Crown counsel may have resort to Ministry of Transportation records setting out the offender's history of administrative driving suspensions for providing breath samples in the "warn" range; or police occurrence reports and synopses detailing the facts underlying the offender's previous convictions or the offender's history of alcohol abuse. The Crown may also consider information which cannot be shared with the court, such as: the fact than an offender has cooperated with the police in relation to other investigations or has acted as an informant, or confidential information regarding the government's law enforcement priorities.

[46] *R. v. Gill, supra* at para. 49.

[47] This honourable court in *Nixon,* (*supra* at para. 30) merely noted that it may be "useful", in determining whether a decision was a matter of prosecutorial discretion, to ask whether "it is a decision as to whether a prosecution should be brought, continued or ceased and, if so, what is should be for", but did not suggest this constituted an exhaustive test for distinguishing between the two categories of discretionary Crown conduct identified in *Krieger.*

[48] ***R. v. Sandham,*** [2009] O.J. No. 4560 (S.C.) [AGO, Tab 10].

[49] In ***R. v. De Zen*** (2010), 251 C.C.C. (3d) 547 (Ont. S.C.) [AB, Vol. 1, Tab 12], for example, the Superior Court concluded that the Crown's decision to compel a jury trial, a power conferred on the Attorney General by s. 568 of the *Criminal Code,* was a matter of Crown "conduct or tactics before the court" that fell within the court's inherent jurisdiction to control its own process, and could, thus, be reviewed in the absence of an abuse of process. A similar result was reached in ***R. v. G.C.*** (2010), 258 C.C.C. (3d) 550 (Ont. S.C.) [AGO, Tab 7].

[50] Although in *R. v. Gill (supra* at para. 55), Doherty J.A. concluded that the Crown's position on sentencing was not a matter of prosecutorial discretion, in ***R. v. Arcand*** (2008), 92 O.R. (3d) 444 (C.A.) at para. 51 [AGO, Tab 3], another panel of the same court suggested that the Crown's "position on penalty" was the product of both plea negotiations and "prosecutorial discretion" and, accordingly, the court should be hesitant to engage in "second-guessing".

25. Significant judicial resources in Ontario are consumed by impaired driving trials, and a decision which invites judicial review of the Crown's decision to file the Notice in the absence of an abuse of process will only exacerbate the problem of already overburdened trial lists and engender delay.[51] The potential for mischief is great. Moreover, inviting the defence to attack the conduct of Crown counsel by lowering the applicable standard of review, as suggested by the respondent, will contribute to the growing problem of incivility and distract the trier of fact from the real issue: determining the accused's guilt or innocence.[52] The case of *R. v. Elliott*[53] provides an example of the dangers such an approach poses to the administration of justice.

F. There is No Need for Increased Oversight of Prosecutorial Decision-Making

26. Finally, Ontario submits that there is no demonstrated need for increased judicial oversight of exercises of Crown discretion. There is no evidence, for example, to suggest that there is widespread abuse of the Crown's discretionary powers. It is submitted that the existing doctrine of abuse of process provides accused persons with adequate protection from improper exercises of prosecutorial discretion and strikes the appropriate balance between prosecutorial independence, which is itself a principle of fundamental justice recognized by s. 7, and the rights of the accused.

PART IV: SUBMISSIONS CONCERNING COSTS

27. Ontario makes no submissions regarding costs.

PART V: ORDER REQUESTED

28. Ontario seeks leave to make oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Philip Perlmutter
Of Counsel for the Intervener
Attorney General of Ontario

Lorna Bolton
Of Counsel for the Intervener
Attorney General of Ontario

Dated this 28th day of February, 2014

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[51] See: **Hon. M. Moldaver, "Long Criminal Trials: Masters of a System they are Meant to Serve"** (2005), 32 C.R. (6th) 316 [AGO, Tab 15].

[52] See: **M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System"** (2007), 11 Can. Crim. L. Rev. 97, particularly pp. 128 – 133 [AGO, Tab 19].

[53] ***R. v. Elliott*** (2003), 181 C.C.C. (3d) 118 (Ont. C.A.) [AGO, Tab 5]. See also: ***R. v. Felderhof***, [2003] O.J. No. 4819 (C.A.) [AGO, Tab 6].

PART VI: TABLE OF AUTHORITIES

Other References **Para (s)**

PART VII: STATUTE/REGULATION/RULE

CRIMINAL CODE OF CANADA

84.(5) In determining, for the purpose of subsection 85(3), 95(2), 99(2), 100(2) or 103(2), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence: (*a*) an offence under section 85, 95, 96, 98, 98.1, 99, 100, 102 or 103 or subsection 117.01(1); (*b*) an offence under section 244 or 244.2; or (*c*) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 if a firearm was used in the commission of the offence. However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.	**84.(5)** Lorsqu'il s'agit de décider, pour l'application des paragraphes 85(3), 95(2), 99(2), 100(2) ou 103(2), si la personne déclarée coupable se trouve en état de récidive, il est tenu compte de toute condamnation antérieure à l'égard : *a*) d'une infraction prévue aux articles 85, 95, 96, 98, 98.1, 99, 100, 102 ou 103 ou au paragraphe 117.01(1); *b*) d'une infraction prévue aux articles 244 ou 244.2; *c*) d'une infraction prévue aux articles 220, 236, 239, 272 ou 273, au paragraphe 279(1) ou aux articles 279.1, 344 ou 346, s'il y a usage d'une arme à feu lors de la perpétration. Toutefois, il n'est pas tenu compte des condamnations précédant de plus de dix ans la condamnation à l'égard de laquelle la peine doit être déterminée, compte non tenu du temps passé sous garde.
244.(1) Every person commits an offence who discharges a firearm at a person with intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person — whether or not that person is the one at whom the firearm is discharged. **(2)** Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable (*a*) if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of (i) in the case of a first offence, five years, and (ii) in the case of a second or subsequent offence, seven years; and	**244.(1)** Commet une infraction quiconque, dans l'intention de blesser, mutiler ou défigurer une personne, de mettre sa vie en danger ou d'empêcher son arrestation ou sa détention, décharge une arme à feu contre qui que ce soit. **(2)** Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible : *a*) s'il y a usage d'une arme à feu à autorisation restreinte ou d'une arme à feu prohibée lors de la perpétration de l'infraction, ou si celle-ci est perpétrée au profit ou sous la direction d'une organisation criminelle ou en association avec elle, d'un emprisonnement maximal de quatorze ans, la peine minimale étant : (i) de cinq ans, dans le cas d'une première infraction, (ii) de sept ans, en cas de récidive; *b*) dans tous les autres cas, d'un emprisonnement