

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Newfoundland and Labrador)**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

FREDERICK ANDERSON

Respondent

-and-

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**FACTUM OF THE INTERVENER
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**FACTUM OF THE INTERVENER
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PART I: STATEMENT OF FACTS

1. “Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime.”¹ Against this backdrop, Parliament has enacted a scheme of escalating, mandatory minimum sentences for impaired driving and related offences. Mandatory minimum sentences for these offences have been in place for nearly a century.² Unlike many of the other mandatory minimum sentence provisions in the *Criminal Code of Canada* (“*Criminal Code*”³), the minimum penalty for first time offenders is a fine, not imprisonment. Only recidivists face mandatory sentences of imprisonment and, then, only if the Crown files the Notice of Increased Penalty (“Notice”).

2. The purpose of s. 727(1) of the *Criminal Code* is to forewarn offenders, in advance of their plea, of the extent of their legal jeopardy.⁴ The discretion to invoke the increased penalty for subsequent offences is a power that has always been vested with the Crown.⁵ While Parliament has seen fit to impose limits on the exercise of the Crown’s discretion to file the Notice in relation to other offences,⁶ it has declined to impose any limits on the exercise of that discretion in relation to impaired driving offences. Similarly, despite the enactment of s. 718.2(e) of the *Criminal Code*, Parliament has not designated any categories of offenders who are exempt from the mandatory minimum sentence provisions.

3. Parliament’s clear purpose, in enacting s. 255 of the *Criminal Code*, was to eliminate a degree of judicial discretion from the sentencing of offenders convicted of impaired driving offences. While trial judges retain a broad discretion in the sentencing of impaired drivers, s. 255 sets a “floor below which judges cannot go.”⁷ In *R. v. Ferguson*,⁸ this Honourable Court

¹ *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 16 [Appellant’s Book of Authorities (“AB”), Vol. 1, Tab 5].

² Nicole Crutcher, “Mandatory Minimum Penalties of Imprisonment: An Historical Analysis”, [2001] 44 C.L.Q. 279 at 384 - 390. [Attorney General for Ontario’s Book of Authorities (“AGO”), Tab. 20]. See: *An Act to Amend the Criminal Code*, S.C. 1921, c. 25, s. 3 and *An Act to Amend the Criminal Code*, S.C. 1930, c. 11, s. 6.

³ *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (“*Criminal Code*”).

⁴ *R. v. Taylor*, [1964] 1 C.C.C. 207 at paras. 5 - 11 (B.C.C.A.) [AGO, Tab 12].

⁵ Prior to the enactment of the 1953-1954 *Criminal Code*, S.C. 1953-54, c. 51, the Crown was required to make explicit reference to the prior conviction in the Indictment as a condition precedent to the increased penalty. The 1953-1954 *Criminal Code* eliminated that requirement, but enacted a separate notice provision (now s. 727).

⁶ The *Criminal Code* provides for progressive mandatory minimum sentences for a number of offences involving firearms. Proof of service of the Notice is a pre-requisite to the imposition of the greater penalty. However, Parliament has imposed a temporal limit (10 years) on the Crown’s ability to invoke the increased penalty. See: ss. 84(5), 244(3), 279(1.2), 279.1(2.1), 344(2) and 346(1.2) of the *Criminal Code*.

⁷ *R. v. Ferguson* (2008), 228 C.C.C. (3d) 385 at para. 54 (S.C.C.) [AB, Vol. 2, Tab 15].

recognized that the principle of Parliamentary Supremacy dictates that trial judges respect mandatory minimum sentences and that no discretion exists to grant “constitutional exemptions” from their effect. One of the issues raised in this appeal is whether trial judges can do indirectly what they cannot do directly – whether they can go behind the Crown’s decision to file the Notice in the absence of evidence of an abuse of process, set it aside, and thereby regain a discretion that has been purposefully removed by Parliament. It is the position of Ontario that permitting review of the Crown’s decision to prove the Notice, in the absence of a viable allegation of an abuse of process, fails to accord appropriate respect to either the constitutionally protected principle of prosecutorial independence or the principle of Parliamentary Supremacy.

PART II: POINTS IN ISSUE

4. The question upon which Ontario intervenes in this appeal relates to whether Crown counsel’s decision to rely upon the Notice is a matter of “prosecutorial discretion” as defined in *Krieger*. While Ontario agrees with Newfoundland and Labrador (“Newfoundland”) that the decision to file the Notice is an act of prosecutorial discretion that is only subject to review for an abuse of process, the focus of this factum is on broader issues of concern to the administration of justice. The Attorney General for Ontario agrees, generally, with the position advanced by the appellant at paragraphs 52 – 106 of its factum. The manner in which courts in Ontario have interpreted this Honourable Court’s decision *Krieger v. Law Society of Alberta* (“*Krieger*”)⁹ has resulted in considerable confusion and uncertainty as to which exercises of Crown discretion may be reviewed by the courts and on what standard. (Even the respondent, in its factum, concedes that the decision in *Krieger* has spawned confusion.)¹⁰

5. Ontario asks this Honourable Court to confirm that *Krieger* has been misinterpreted as narrowing the scope of prosecutorial discretion. Rather than narrowing the limits of prosecutorial discretion, *Krieger* admonished trial judges against second-guessing the Crown in the exercise of its discretion. In addition, Ontario invites the court to clarify which kinds of Crown conduct are matters of prosecutorial discretion and to affirm that prosecutorial discretion may only be reviewed for an abuse of process.

⁸ *R. v. Ferguson*, *ibid.*

⁹ *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; 2002 SCC 65 [AB, Vol. 1, Tab 1].

¹⁰ Factum of the Respondent, paras. 28 - 30.

PART III: BRIEF OF ARGUMENT

A. The Constitutionally Protected Independence of Prosecutorial Decision-Making

6. The courts have long recognized that prosecutorial decisions made by the Attorney General and his or her agents are unlike other decisions made by cabinet or the executive.¹¹ When acting as prosecutor, the Attorney General performs a quasi-judicial function,¹² and must perform his or her duties free from political interference. The abuse of process doctrine is rooted in respect for the rule of law and the **separation of powers**.¹³ Judicial reluctance to review prosecutorial powers arises partly from their source. Most powers derive from the royal prerogative. Some of the prerogative powers have now been codified. Other areas of prosecutorial discretion have been created by statute. **Parliament has the ability to expand or curtail the scope of prosecutorial discretion.**¹⁴

7. A corollary to prosecutorial independence is the need for judges to remain impartial:

It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.¹⁵

8. Prosecutorial discretion is also a matter of practical necessity.¹⁶ It is essential to the operation of the criminal justice system that the Crown be vested with broad discretion. If defence counsel could routinely challenge Crown decisions, the criminal justice system would collapse under its own weight: "[T]o supervise all aspects of prosecutorial powers would demand that (judges) have access to the same information as the Crown...[i]t would destroy the appearance and

¹¹ M. Code, "Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits in Response to Justice Rosenberg" (2009) 34 Queen's L.J. 863 at p. 867 [AB, Vol. 5, Tab 42].

¹² *Boucher v. The Queen*, [1955] S.C.R. 16 at pp. 23 – 24 [AB, Vol. 1, Tab 8]. See also: *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] S.C.J. No. 43 at para. 37 [AB, Vol. 1, Tab 2].

¹³ *R. v. Power*, [1994] 1 S.C.R. 601 at paras. 28-34 [AB, Vol. 3, Tab 31].

¹⁴ Donna C. Morgan, "Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of the Charter" (1986-1987) Crim. L. Q. 15 at pp. 20 – 21 [AGO, Tab 14].

¹⁵ J.A. Ramsay, "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 Crim. L. Q. 378 at pp. 378 - 380 [AGO, Tab 17], cited in *R. v. Power supra.* at para. 37; *Krieger v. Law Society of Alberta, supra* at para. 31. See also: *Director of Public Prosecutions v. Humphrys*, [1976] 2 All E.R. 497 at p. 511 (H.L.) [AGO, Tab 1].

¹⁶ M. Code, "Judicial Review of Prosecutorial Decisions", *supra* at p. 868; *R. v. Saikaly* (1979), 48 C.C.C. (2d) 192 (Ont. C.A.) [AGO, Tab 9]; Law Reform Commission of Canada, *Control of the Process*, Working Paper No. 15 (Ottawa: Information Canada, 1975) at p. 21 [AGO, Tab 18]. *R. v. Beare*, [1988] 2 S.C.R. 387 at para. 52 [AB, Vol. 1, Tab 6].

probably the reality of judicial independence” and would place an unbearable strain on judicial resources.¹⁷

9. Finally, the abuse of process doctrine recognizes that there are decisions the prosecutor is better equipped to make than the courts:

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. [emphasis added]¹⁸

Prosecutorial discretion is ill-suited to judicial review.¹⁹

10. The importance of the Attorney General’s independence, and that of his or her agents, has been steadfastly acknowledged by this court,²⁰ which has clearly, consistently, and unhesitatingly cautioned trial courts against second-guessing the Attorney General’s discretionary decisions.²¹

11. Ontario submits that abuse of process is the appropriate standard for review of Crown discretion. The test for establishing an abuse of process is whether the conduct of the Crown was either so egregious, or so grossly prejudicial to the appellant’s fair trial interests, that “compelling the accused to stand trial would violate those principles of justice which underlie the community’s sense of fair play or decency” or would otherwise render the proceedings “oppressive or vexatious.”²² The conduct must “shock the conscience of the community.”²³ Not every violation of s. 7 will satisfy this high threshold.²⁴

¹⁷ Law Reform Commission of Canada, *Control of the Process*, *ibid.* at pp. 22 – 23; M. Code, “Judicial Review of Prosecutorial Decisions,” *supra* at p. 874.

¹⁸ *Krieger*, *supra*, at para. 32.

¹⁹ *R. v. Power*, *supra* at para. 34.

²⁰ See: *R. v. Power*, *supra* at para. 37; *Krieger*, *supra* at paras. 3, 25-32, 42, 46-47; *R. v. T.(V.)*, [1992] 1 S.C.R. 749 at p. 761 [AB, Vol. 5, Tab 39]. In *Power*, for example, this court noted that “it is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion.” [emphasis added]

²¹ See: *Miazga v. Kvello Estate* [2009] 3 S.C.R. 339 at paras. 46 – 49 [AGO, Tab 2]; *R. v. Power*, *supra* at para. 12; *R. v. Regan*, [2002] 1 S.C.R. 297 at para. 166 [AB, Vol. 4, Tab 33].

²² *R. v. Nixon*, [2011] 2 S.C.R. 566 at para. 40 (“*Nixon*”) [AB, Vol. 3, Tab 28]. *R. v. O’Connor*, [1995] S.C.J. No. 98 at para. 59 [AB, Vol. 3, Tab 29].

²³ *R. v. Power*, *supra* at paras. 11 – 12.

²⁴ See: *R. v. Anderson*, [2013] N.J. No. 13 (C.A.) at para. 49 [Appellant’s Record, Tab 4]. The Respondent relies on the decision in *U.S.A. v. Burns*, [2001] 1 S.C.R. 283 [AGO, Tab 13] to suggest that conduct which violates other principles of fundamental justice protected by s. 7 (other than prosecutorial independence) necessarily constitutes conduct which amounts to an abuse of process. *Burns* is an immigration law case. It is not a case about abuse of process. With respect, it does not support the proposition advanced by the respondent. [Do we rely on different paragraphs than the respondent – in his book]