File Number: 35246

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal For Newfoundland and Labrador)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant (Appellant)

- and -

FREDERICK ANDERSON

Respondent (Respondent)

-and-

Attorney General of New Brunswick Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Aboriginal Legal Services of Toronto, Inc., David Asper Centre for Constitutional Rights and University of Toronto

Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF NEW BRUNSWICK

CAMERON GUNN, Q.C.
KATHRYN A. GREGORY
Counsel for the Intervener,
Attorney General of New Brunswick

Public Prosecution Services
Office of the Attorney General
Suite 610, 520 King Street
Fredericton, NB E3B 6G3
Tel: (506) 453-2784
Fax: (506) 453-5364
Email: Kathryn.Gregory@gnb.ca

HENRY S. BROWN, Q.C.
Ottawa Agent for the Intervener,
Attorney General of New Brunswick

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

IAIN R. W. HOLLETT
Counsel for the Appellant

Special Prosecutions Office
4th Floor, Atlantic Place
215 Water Street
St. John's, NL A1C 6C9
Tel : (709) 729-4299
Fax : (709) 753-0026
Email : iainhollett@gov.nl.ca

ROBERT HOUSTON, Q.C.
Ottawa Agent for the Appellant

Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, ON K2P 2H3
Tel : (613) 236-9665
Fax : (613) 567-4689
Email: RHouston@burkerobertson.com

DEREK HOGAN
Counsel for the Respondent

NL Legal Aid Commission
Suite 300, 251 Empire Avenue
St. John's, NL A1C 3H9
Tel : (709) 753-7863
Fax : (709) 753-0026
Email : derekhogan@legalaid.nl.ca

HAROLD GELLER
Ottawa Agent for the Respondent

Doucet McBride LLP
100-85 Plymouth Street
Ottawa, ON K1S 3E2
Tel : (613) 233-4474 ext.290
Fax : (613) 233-8868
Email: hgeller@doucetmcbride.com

DAVID W. SCHERMBRUKER
Counsel for the Intervener
Director of Public Prosecutions of Canada

Public Prosecution Service of Canada
Suite 1100, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3
Tel: (902) 426-2285
Fax: (902) 426-1351
Email: david.schermbrucker@ppsc-sppc.gc.ca

FRANCOIS LACASSE
Ottawa Agent for the Intervener
Director of Public Prosecutions of Canada

Public Prosecution Service of Canada
12th Floor,
160 Elgin Street
Ottawa, Ontario K1A 0H8
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: flacasse@ppsc-sppc.gc.ca

PHILIP PERLMUTTER
LAURA BOLTON
Counsel for the Intervener
Attorney General of Ontario

Attorney General of Ontario
Crown Law Office - Criminal
720 Bay Street, 10th Fl
Toronto, Ontario M5G 2K1
Tel : (416) 326-5922
Fax : (416) 326-4656
Email : Philip.perlmutter@jus.gov.on.ca

ROBERT HOUSTON, Q.C.
Ottawa Agent for the Intervener
Attorney General of Ontario

Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, ON K2P 2H3
Tel : (613) 236-9665
Fax : (613) 567-4689
Email:RHouston@burkerobertson.com

TREVOR SHAW
Counsel for the Intervener
Attorney General of British Columbia

Attorney General of British Columbia
865 Hornby Street
6th Floor
Vancouver, British Columbia V6Z 2G3
Tel : (604) 660-4219
Fax : (604) 660-3433
Email : trevor.shaw@gov.bc.ca

ROBERT HOUSTON, Q.C.
Ottawa Agent for the Intervener
Attorney General of British Columbia

Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, ON K2P 2H3
Tel : (613) 236-9665
Fax : (613) 567-4689
Email:RHouston@burkerobertson.com

KENT ROACH
CHERYL MILNE
Counsel for the Intervener
David Asper Centre for Constitutional Rights and University of Toronto Faculty Of Law

University of Toronto
39 Queen's Part Cres. East
Toronto, Ontario M5S 2C3
Tel: (416) 978-0092
Fax: (416) 978-8894
Email: kent.raoch@utoronto.ca

MARTHA A. HEALEY
Ottawa Agent for the Intervener
David Asper Centre for Constitutional Rights and University of Toronto Faculty Of Law

Norton Rose Fulbright Canada LLP
45 O'Connor Street
Ottawa, Ontario K1P 1A4
Tel: (613) 780-8638
Fax: (613) 230-5459
Email: Martha.healey@nortonrose.com

JONATHAN RUDIN
EMILY HILL
Counsel for the Intervener
Aboriginal Legal Services of Toronto, Inc.

Aboriginal Legal Services of Toronto
415 Yonge Street, Suite 803
Toronto, Ontario M5B 2E7
Tel: (416) 408-4041
Fax: (416) 408-4268

EMILY HILL
Ottawa Agent for the Intervener
Aboriginal Legal Services of Toronto, Inc.

Aboriginal Legal Services of Toronto
1 Nicholas Street, Suite 422
Ottawa, Ontario K1N 7B7
Tel: (613) 408-4041 Ext. 224
Email: e_hill@lao.on.ca

TABLE OF CONTENTS

PART I: OVERVIEW AND FACTS

Overview

1. This appeal raises once again the "jurisdictional tug-of-war" between the judiciary and the executive.[1]

2. In theory, these two institutions are divided by a clear constitutional line that recognizes "...their distinct institutional capacities..." and their "...critical and complementary roles in our constitutional democracy."[2]

3. In practice, clarity is the casualty when these powers collide.[3]

4. The Attorney General of New Brunswick (AGNB) invites further guidance on the practical application of the power of judicial review to Crown discretionary power in the wake of *Kreiger v. Law Society of Alberta* and *R. v. Nixon*.[4]

5. The position of the AGNB is aligned in principle with the positions advanced by the Attorneys General of Newfoundland and Labrador, Ontario and British Columbia.

Facts

6. The Intervener takes no position on the facts of this case.

PART II: INTERVENER POSITION RELATIVE TO APPELLANT ISSUES

7. The appellant raises concerns as to scope, onus of proof and the standard for judicial review of prosecutorial discretion.

8. The AGNB's concern in this appeal is the necessity for greater clarity in relation to the power of judicial review applied to the exercise of Crown discretionary power in an

---

[1] Edwards, John. *Attorney General, Politics and the Public Interest.* London: Sweet & Maxwell, 1984, at page 125: "Time may bring about a reconciliation as to the proper jurisdictional boundaries on the part of all three branches of government. All that can be said is that such a prospect is not imminent. Given the level of strong animadversion that is capable of being generated by competing claims to review the exercise of discretionary power by the Attorney General, and by agents of the Attorney General, on the part of the courts and by Parliament, we can look forward to continuing outbursts of the jurisdictional tug-of-war."

[2] *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] SCC 43, at paras. 28-29 ("*CLAO*"); see also *Kreiger v. Law Society*, [2002] 3 S.C.R. 372, at para. 32

[3] See *R. v. Nixon*, [2011] SCC 34, at para. 26 for reference by AGON to the misinterpretation of *Kreiger* by lower courts; see also Code, Michael. *The Attorney General in the 21st Century: A Tribute to Ian Scott: Judicial Review of Prosecutorial Discretion.* (2009), 34 Queen's L.J. 863-890 at paras. 53-56

[4] *Kreiger*, supra; Code, Michael, supra at para.37-38

ongoing criminal prosecution. All three issues raised by the appellant are subsumed under this overarching concern.

PART III: LEGAL ARGUMENT

The Judicial Role

9. The judicial role in the constitutional construct is to maintain "... the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and [to protect] the fundamental liberties and freedoms guaranteed under the Charter."[5]

10. In the context of a criminal prosecution, the primary role of the court is "listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters."[6]

11. In the process of listening to cases, courts are routinely asked to turn their attention away from a determination of the guilt or innocence of an accused to, the decisions or conduct of a party litigant, primarily the Crown. It is this aspect of many cases where significant rights may be in issue, but also where time and cost is expended, confusion abounds and further guidance is needed.

The Areas of Complaint

12. The AGNB distinguishes the three areas of conduct subject to complaint. The first category is defined below but is not an issue in this factum. It is on the latter two categories that the AGNB focuses. The AGNB will argue that despite their conceptual differences, these two categories are subject to the same pre-conditions[7] for judicial review as well as the same standard of review:[8]

    a. litigant conduct in the face of the court[9]

    b. litigation discretion[10]

---

[5] *CLAO*, supra at para. 28

[6] *R. v. Power*, [1994] 1 S.C.R. 601, at para.35 citing *Re Balderstone and the Queen* (1983), 8 C.C.C.(3d) 532 (Man. C.A.) (leave to appeal to S.C.C. refused (1983), 2 S.C.R. v)

[7] A reference to the "evidentiary threshold" in *Nixon*, supra at para. 63

[8] A reference to the standard of abuse of process as argued by Code, Michael, supra at para. 51: "The modern, post-Jewitt law is to the effect that all discretionary prosecutorial decisions are reviewable on the same deferential standard: namely, "bad faith," "dishonesty" or "flagrant impropriety." This standard is justified both by practical reasons related to trial efficiency and by functional reasons related to the separation of roles in an adversarial system."

[9] *R. v. Felderhof* (2003), 68 O.R. (3d) 481, at paras. 39-40

c. prosecutorial discretion[11]

The Definitions

13. The AGNB submits that the first category, litigant conduct in the face of the court, is conduct over which the judiciary has inherent authority to control and sanction as a means of managing its judicial process.[12] It references conduct outside the bounds of that expected of officers of the court. It is conduct which threatens the judicial process itself by interfering with an orderly and effective trial.[13] This is an area of complaint applicable to both Crown and defence counsel.[14]

14. This Court has identified what the AGNB terms "litigation discretion" as "the broad discretionary powers which are said to be within the purview of the Crown attorney, and which are at the very heart of the adversarial system...the adversarial nature of the trial process [being] recognized as a principle of fundamental justice."[15] This is similar in every way to the litigation discretion of defence counsel (subject to the quasi-judicial obligations of the Crown[16]).

15. "Prosecutorial discretion" is described as "a term of art".[17] It is described in both broad terms and in narrow terms.[18] Referencing the words cited in *Kreiger* describing prosecutorial discretion as 'the discretion exercised by the Attorney General in matters within his authority in relation to the prosecution of criminal offences..."[19], the AGNB suggests that prosecutorial discretion includes all decisions and conduct arising from the exclusive role exercised by the Attorney General in a prosecution. This would include all

---

[10] *R. v. Cook*, [1997] 1 S.C.R. 1113, at paras. 19-21; *R. v. Jolivet*, [2000] 1 S.C.R. 751, at paras. 16-17
[11] *Power*, supra at paras. 29-36; *Kreiger*, supra at para. 43-47; *Nixon*, supra at para. 21
[12] *Felderhof*, supra at paras. 39-40
[13] *Felderhof*, supra at paras. 43-45
[14] *Felderhof*, supra at para. 76
[15] *Cook*, supra at para. 19: "As a general principle, we have recognized that for our system of criminal justice to function well, the Crown must possess a fair deal of discretion. Moreover, this discretion extends to all aspects of the criminal justice system."
[16] *Cook*, supra at para. 21
[17] *Kreiger*, supra at para. 43
[18] *Jolivet*, supra at paras. 16 and 18 wherein it references the discretion relating to the calling of witnesses discussed in *Cook* as "prosecutorial discretion"; *Kreiger*, supra at para. 46 distinguishing "core" prosecutorial discretion from "other" types of discretionary decisions
[19] *Kreiger*, supra at para. 43; see also *Power*, supra at para. 32, citing Vanek, David. *Prosecutorial Discretion*. (1987-88) 30 Crim. L.Q. 219

decisions unique to the Crown as Crown and for which there is no counter-part discretionary power exercisable by the defence.[20]

16. The AGNB acknowledges the further refinement of the concept of prosecutorial discretion by reference to its "core"[21] elements, but argues this should not have the consequence of rendering all other discretionary conduct open to liberal review by the court.

17. For the purposes of this intervention, the AGNB focuses on the judicial review process and the decision-making process relating to the categories of conduct involving the exercise of litigation and prosecutorial discretion, referenced together as "Crown discretionary power".

The Judicial Review

18. Judicial review is an element of the inherent jurisdiction of the court, but it is not without limits: "In spite of its amorphous nature, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review, the doctrine of inherent jurisdiction does not operate without limits."[22]

19. It is the extent of those limits both in jurisdiction and in scope that has been the source of confusion, delay and prolix litigation that imperil the very purpose of the criminal justice system.

20. The AGNB notes that the law relating to Crown discretionary power has evolved from its past status as "non-reviewable" to its unfortunate current status as "frequently reviewed":

> For all of the above reasons, the pre-Jewitt regime of complete prosecutorial immunity from judicial review was bound to fail. However, the opposite extreme -- routine judicial review of prosecutorial decision-making -- is equally wrong. The pre-Jewitt jurisprudence had argued that a system of easy and frequent judicial review of the Crown's decisions would lead to inefficiency and confusion of roles. These two negative consequences have arguably come to pass in the twenty years since Jewitt was decided.[23]

---

[20] *CLAO*, supra at para. 37
[21] *Kreiger*, supra at para. 46
[22] *CLAO*, supra at para. 22
[23] Code, Michael, supra at para. 25

21. Subject as it is to limitation,[24] the AGNB argues that the process of judicial review of the Crown decision-making process behind any impugned discretionary conduct must invoke a gatekeeping[25] function on the part of the trial judge to avoid the "real mischief" predicted by Michael Code:

> What is missing from the Court's analysis is some appreciation of the paralyzing effect that liberal review of Crown decision-making will have on the efficiency of criminal trials and on the separate roles of bench and bar within the adversary system.[26]

22. The reasons for this are many. In relation to prosecutorial discretion, given the necessity of maintaining the "clearly drawn constitutional lines"[27], the AGNB argues authority must first be established for the judiciary to cross over into this area of possible constitutional conflict.[28] In relation to litigation discretion, the court must also first assure itself of its reviewing authority to safeguard against possible interference with the balanced workings of the adversarial system so fundamental to the system of justice.[29] The further and overall concern must be with the expending of time and judicial resources on such reviews.[30]

23. This court has indicated repeatedly that should a court sit in review of Crown discretionary power without the authority to do so it casts itself in the position of a supervising prosecutor, this is so whether it is litigation discretion or prosecutorial discretion in issue.[31]

24. To safeguard against such a possibility, the AGNB submits focus must be on the very authority by which the judiciary may initiate a judicial review of Crown decision-making.

---

[24] *CLAO*, supra at paras. 22-26
[25] The "gatekeeping" function of judges is referenced many times in different contexts by this Court, an example of which is *R. v. Stone*, [1999] 2 S.C.R. 290, at para. 74
[26] Code, Michael, supra at para. 54
[27] *Kreiger*, supra at para. 32
[28] *Power*, supra at para. 35 and 37: "...if a judge should attempt to review the actions or conduct of the Attorney General...A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution." (emphasis added)
[29] Code, Michael, supra at paras. 55-56
[30] *Power*, supra at paras. 37 and 40
[31] *Power*, supra at paras. 33 and 40; Code, Michael, supra at para.46

25. The AGNB argues that direction is needed requiring the lower courts to first consider the issue of their jurisdiction to initiate a judicial review of Crown discretionary power. This is so because once a trial judge initiates and enters into a review of Crown discretionary power absent the authority to do so, the damage to constitutional jurisdiction[32], to the adversarial system, and to judicial resources flows immediately or shortly thereafter.[33]

The Jurisdiction

26. The application of the "evidentiary threshold"[34] as directed in *Nixon* serves to protect the executive role in relation to prosecutorial discretion, "...an area subject to such grave potential conflict."[35]

27. With respect to discretionary prosecutorial decision-making, the AGNB argues that the evidentiary threshold is a form of constitutional prerequisite for establishing judicial authority to go behind or into that protected area. The AGNB suggests this from the words used in *Nixon* distinguishing an *R. v. Pires*[36] type "pragmatic threshold" from the "evidentiary threshold" required for reviewing prosecutorial discretion: "Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court..."[37]

28. The AGNB submits that this must be so because there are no other means by which to make clear the constitutional line between the judiciary and the executive and to give power to the caution that:

> 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.[38]

---

[32] *Nixon*, supra at paras. 60 and 62: "I agree that a court should not embark on an inquiry into the reasons behind an act of prosecutorial discretion without a proper evidentiary foundation. ...given that such decisions are generally beyond the reach of the court..." (emphasis added)
[33] *R. v. Elliott*, [2003] 179 O.A.C. 219 (Ont. C.A.)
[34] *Nixon*, supra at para. 63
[35] *Kreiger*, supra at para. 32
[36] *R. v. Pires*, [2005] 3 S.C.R. 343
[37] *Nixon*, supra at para. 62
[38] *Kreiger*, supra at para 31 citing *Power*, supra

29. The AGNB argues that the same restriction should apply to the initiation of a judicial review of the decision-making process in relation to litigation discretion:

> What is needed from the Court in the post-Krieger era is a clear statement that both Crown counsel's and defence counsel's "tactics or conduct before the court" are protected from interference as long as they involve the lawful exercise of adversarial rights. It is only when counsel for either side fail to carry out their over-riding duties as "officers of the court" that the adversarial system breaks down and the court needs to interfere."[39]

30. It is illuminating to note that trial courts would not consider it their proper role to conduct routine reviews of defence counsel's discretionary decisions in relation to the conduct of litigation. The question is why would they do so with respect to the Crown?

> Given that the adversarial system accords a high degree of deference to counsel for both sides to conduct their case as they see best, there should be no special scrutiny of those aspects of the Crown's decision-making processes or tactics that simply reflect the ordinary workings of this system.[40]

31. This accords with the plea for consistency by Michael Code in relation to the judicial review of Crown discretion:

> There is no longer any functional need to revive the pre-Jewitt distinction between "core" and "non-core" decisions. They are all reviewable on the same standard. Krieger may have led to the inference that the old dichotomy has been revived, so that minor decisions (outside the "core") will now be reviewable on a less deferential standard. However, if this inference is drawn from Krieger, it makes little or no sense.
> It therefore appears that the old dichotomy between two kinds of prosecutorial decisions, although it is alluded to in Krieger, has no practical significance. The modern, post-Jewitt law is to the effect that all discretionary prosecutorial decisions are reviewable on the same deferential standard: namely, "bad faith," "dishonesty" or "flagrant impropriety." This standard is justified both by practical reasons related to trial efficiency and by functional reasons related to the separation of roles in an adversarial system.[41]

32. The AGNB submits therefore that allegations of abusive Crown conduct impacting the fair trial rights of the accused will involve a review limited in scope to the "effect"[42] of the

---

[39] Code, Michael, supra at para. 56 (emphasis added)
[40] Code. Michael, supra at para. 46 ; see para. 43, citing the Ontario Court of Appeal in *R. v. Zehr*: "... our Courts will rarely question the decision of counsel, for the system proceeds on the basis that counsel conducts the case....Of importance under our system, counsel is not called upon, or indeed permitted, to explain his conduct of a case."
[41] Code. Michael, supra at paras. 49 and 51
[42] *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 74: "I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a

conduct on fair trial and to a determination of any prejudice that flows therefrom. Such a review operates in accordance with the usual threshold requirements of a *Charter* rights application with the burden on the applicant to establish the prejudice alleged.[43] Such a review will not include a requirement for the Crown to explain itself in relation to the conduct unless authority flows to the trial judge via a proper evidentiary foundation indicative of misconduct/bad faith in the decision-making process itself: "I agree that a court should not embark on an inquiry into the reasons behind an act of prosecutorial discretion without a proper evidentiary foundation."[44]

33. This is not to suggest that evidence relating to Crown decision-making will not come out from either Crown or defence in the course of a review into prejudice to the fair trial rights of the accused. But the focus of any such review must not shift or expand so as impose the burden on the Crown to explain and justify its decision-making absent the evidentiary threshold basis for doing so.

34. The AGNB summarizes its position on this issue by advocating for a middle ground position between non-reviewable Crown discretion and the liberal judicial review that is crippling many prosecutions.[45] The middle ground involves a requirement that when an allegation is made implicating Crown discretionary power, whether prosecutorial or litigation, the court must first establish its jurisdiction to initiate any review of the reasons behind the discretionary exercise by applying the *Nixon* evidentiary threshold showing proof on the record of misconduct, bad faith or improper purpose in the exercise of that discretion.

The Interlocutory Appeal

35. An adjunct issue to that of the authority to initiate a judicial review of Crown discretionary power is what is the remedy for the Attorney General should the court do so without authority particularly in circumstances where the impugned discretion is prosecutorial and the conflict potentially constitutional in nature.

---

fair trial is infringed. The focus must be on the effect of the impugned actions on the fairness of the accused's trial." (emphasis added)

[43] *Nixon*, supra at para. 61

[44] *Nixon*, supra at para. 60 (emphasis added)

[45] *Elliott*, supra; *R .v. Felderhof*, supra; *R. v. Trang*, [2002] 2 Alta. L.R. (4th) 95 (Alta. Q.B.); *R. v. Tingley* (2011) N.B.Q.B. M/I/0007/09 (publication ban in effect)

36. The argument in relation to exceptions to the prohibition against interlocutory appeals dates back to 1983 when the Ontario Court of Appeal was presented with this issue after a defence counsel was removed by a trial judge. An interlocutory appeal was launched but the court sidestepped the interlocutory exception issue saying only "the resolution of the jurisdictional issue is not free from difficulty, but in light of the view that we take of the merits of the matter, it is unnecessary to decide it in this case."[46]

37. It gained some momentum but no further clarity with the dissenting judgment of Lamer J (as he then was) in *Mills v. R.*[47] Lamer J wrote in obiter of a jurisdictional exception to the rule against interlocutory appeals.[48]

38. This "jurisdictional exception" noted by Lamer J was in issue again before the Ontario Court of Appeal in *R. v. Adamson*[49] and the Newfoundland Court of Appeal in *R. v. Druken*[50]. Both majority decisions acknowledge the existence of the exception. When the *Druken* matter went to the Supreme Court, Lamer again referenced the jurisdictional exception while not applying it in that case: "The issue as to whether there is an appeal on a jurisdictional ground is not before us."[51]

39. If the "evidentiary threshold" [52] is in effect a constitutional prerequisite to the jurisdiction for a judicial review of prosecutorial discretion and it is either overlooked or not met, what is the recourse for the Attorney General to protect its institutional independence?

40. Absent jurisdiction to review alleged misconduct in Crown decision-making, the AGNB argues the trial judge is outside "the proceedings" as contemplated by section 674 of the *Criminal Code* and outside the scope of the case law referenced above. Arguably, this is

---

[46] Layton, David. "*The Pre-Trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal.*" (1999) Can. Crim. L. Rev. 25 citing *R. v. Spied* (1983), 8 C.C.C. (3d) 18

[47] *R. v. Mills*, [1986] 1 S.C.R. 863

[48] Mills, supra at para. 98: "Challenges of interlocutory findings have always been available by the mere allegation of jurisdictional error."

[49] *R. v. Adamson* (cited as *R. v. Kerzner*), [1991] 12 O.R. (3d) 224 (Ont. C.A.)

[50] *R. v. Druken*, [1997] 157 Nfld. & P.E.I.R. 93 (Nfld. C.A.)

[51] *Druken*, [1998] 1 S.C.R. 978, at para. 1

[52] *Nixon*, supra at para. 40

the "jurisdictional" exception contemplated by Lamer J in *Mills* and referenced again in *Druken*.

41. The AGNB acknowledges this is a controversial proposition and one that is peripherally implicated in this appeal. It is nonetheless a central concern for the AGNB for which, should leave be granted, additional oral argument can be provided if this Court deems it appropriate.

The Decision on Appeal

42. The decision on appeal makes the argument advanced by the AGNB. The issue for the trial judge in this case was with the legislation pursuant to which a judge is mandated to impose a minimum sentence of 120 days[53] without regard for his discretionary duty to consider the aboriginal status of an accused on sentencing.[54] This conflict should in no way have initiated a review of Crown discretion as a means around what the trial judge deemed a conflict in the provisions of the *Criminal Code*. If Crown discretionary power is indeed to be protected, subject to abuse of process, the Crown decision-making process should not so easily and readily be made subject to judicial review as it was in this case.

PART IV: SUBMISSION ON COSTS

43. The Intervener makes no submission with respect to costs.

PART V: ORDER SOUGHT

44. The Intervener takes no position with respect to the outcome of the appeal at Bar. The Intervener seeks an order permitting the presentation of oral argument at the hearing of the appeal, for such duration as this Court shall permit.

Dated this 4th day of March, 2014 at the City of Fredericton, in the Province of New Brunswick.

Kathryn A. Gregory
Counsel and Agent for the Intervener,
Attorney General of New Brunswick

Cameron Gunn, Q.C.
Counsel and Agent for the Intervener,
Attorney General of New Brunswick

---

[53] *Criminal Code*, R.S.C. 1985, c. C-46, s. 255(1)(a)(iii)
[54] *Criminal Code*, supra at s. 718.2(e)

PART VI: TABLE OF AUTHORITIES

DECISIONS	PARAGRAPHS
1. *Kreiger v. Law Society of Alberta*, [2002] 3 S.C.R. 372	31,32,43
2. *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] SCC 43	22-31, 37
3. *R. v. Adamson*, [1991] 12 O.R. (3d) 224 (Ont. C.A.)	
4. *R. v. Cook*, [1997] 1 S.C.R. 1113	19-21
5. *R. v. Druken*, [1997] 157 Nfld. & P.E.I.R. 93 (Nfld. C.A.)	
6. *R. v. Druken*, [1998] 1 S.C.R. 978	1
7. *R. v. Elliott*, [2003] 179 O.A.C. 219	
8. *R. v. Felderhof*, [2003] 68 O.R. (3d) 481	39-40, 43-45, 76
9. *R. v. Jolivet*, [2000] 1 S.C.R. 751	16-18
10. *R. v. Mills*, [1986] 1 S.C.R. 863	98
11. *R. v. Nixon*, [2011] SCC 34,	21,26,60-65
12. *R. v. O'Connor*, [1995] 4 S.C.R. 411	74
13. *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343	
14. *R. v. Power*, [1994] 1 S.C.R. 601	29-40
15. *R. v. Stone*, [1999] 2 S.C.R. 290	74
16. *R. v. Tingley* (2011), N.B.Q.B. M/I/0007/09	(Publication ban)
17. *R. v. Trang*, [2002] 2 Alta. L.R. (4^{th}) 95	

LEGAL TEXTS:

18. Edwards, John. *Attorney General, Politics and the Public Interest.* London: Sweet & Maxwell, 1984

19. Code, Michael. *The Attorney General in the 21st Century: A Tribute to Ian Scott: Judicial Review of Prosecutorial Discretion.* (2009), 34 Queen's L.J. 863-890

20. Layton, David. "*The Pre-Trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal.*" (1999) Can. Crim. L. Rev. 25

PART VII: LEGISLATION IN ISSUE

Criminal Code. R.S.C. 1985, c. C-46:

255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable, (*a*) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely, (i) for a first offence, to a fine of not less than $1,000, (ii) for a second offence, to imprisonment for not less than 30 days, and (iii) for each subsequent offence, to imprisonment for not less than 120 days; (*b*) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and (*c*) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.	**255.(1)** Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible : *a*) que l'infraction soit poursuivie par mise en accusation ou par procédure sommaire, des peines minimales suivantes : (i) pour la première infraction, une amende minimale de mille dollars, (ii) pour la seconde infraction, un emprisonnement minimal de trente jours, (iii) pour chaque infraction subséquente, un emprisonnement minimal de cent vingt jours; *b*) si l'infraction est poursuivie par mise en accusation, d'un emprisonnement maximal de cinq ans; *c*) si l'infraction est poursuivie par procédure sommaire, d'un emprisonnement maximal de dix-huit mois.
674. No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.	**674.** Nulle procédure autre que celles qui sont autorisées par la présente partie et la partie XXVI ne peut être intentée par voie d'appel dans des procédures concernant des actes criminels.
718.2 A court that imposes a sentence shall also take into consideration the following principles: (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.	**718.2** Le tribunal détermine la peine à infliger compte tenu également des principes suivants : e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.