Court file no. 33476

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

BETWEEN:

OLGA MARIA NIXON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL FOR ONTARIO,
DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF BRITISH COLUMBIA,
CANADIAN TRIAL LAWYERS ASSOCIATION,
and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL FOR ONTARIO

Michal Fairburn and Frank Au
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario
M5G 2K1
Tel: (416) 326-4600
Fax: (416) 326-4656
michal.fairburn@ontario.ca/frank.au@ontario.ca
Counsel for the Intervener AG Ontario

Robert Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
rhouston@burkerobertson.com
Ottawa Agent for the Intervener AG Ontario

Marvin R. Bloos, Q.C.
Beresh Cunningham Aloneissi O'Neill Hurley
300 MacLean Block
10110 - 107 Street N.W.
Edmonton, Alberta T5J 1J4
Tel: (780) 421-4766
Fax: (780) 429-0346
Counsel for the Appellant

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St.
P.O. Box 466, Stn. "D"
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
Ottawa Agent for the Appellant

Goran Tomljanovic, Q.C.
Attorney General of Alberta, Appeals Branch
300, 332 - 6 Avenue S.W.
Calgary, Alberta
T2P 0B2
Tel: (403) 297-6005
Fax: (403) 297-3453
goran.tomljanovic@gov.ab.ca
Counsel for Respondent

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St.
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
henry.brown@gowlings.com
Ottawa Agent for Respondent

Christopher Mainella/Ann Marie Simmons
Public Prosecution Service of Canada
515-234 Donald Street
Winnipeg, Manitoba
R3C 1M8
Tel: (204) 983-8991
Fax: (204) 984-1350
chris.mainella@ppsc-sppc.gc.ca
Counsel for Intervener PPSC

Francois Lacasse
Director, Public Prosecution Service of Canada
284 Wellington St., 2nd Floor
Ottawa, Ontario
K1A 0H8
Tel: (613) 957-4770
Fax: (613) 941-7865
flacasse@ppsc-sppc.gc.ca
Ottawa Agent for Intervener PPSC

M. Joyce DeWitt-Van Oosten, Q.C.
Attorney General of British Columbia
3rd Floor, 940 Blanshard Street
Victoria, British Columbia
V8W 3E6
Tel: (250) 387-0284
Fax: (250) 387-4262
joyce.dewittvanoosten@gov.bc.ca
Counsel for Intervener AG British Columbia

Robert Houston, Q.C.
Burke-Robertston
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
rhouston@burkerobertson.com
Ottawa Agent for Intervener AG British Columbia

Michael Conner
Attorney General of Manitoba
1205 - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Tel: (204) 945-6723
Fax: (204) 945-0053
Counsel for the Intervener AG Manitoba

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St.
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
Ottawa Agent for Intervener AG Manitoba

D'Arcy DePoe
Fleming DePoe Lieslar
9636 - 102 A Avenue
Edmonton, Alberta T5H 0G5
Tel: (780) 424-9505
Fax: (780) 425-0472
Counsel for the Intervener CTLA

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St.
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
Ottawa Agent for the Intervener CTLA

Marie Henein
Henein & Associates
202 - 445 King Street West
Toronto, Ontario
M5V 1K4
Tel: (416) 368-5000
Fax: (613) 542-0502
mhenein@henein.com
Counsel for Intervener CLA-O

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St.
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3500
henry.brown@gowlings.com
Ottawa Agent for Intervener CLA-O

Court file no. 33476

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

BETWEEN:

OLGA MARIA NIXON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL FOR ONTARIO,
DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF BRITISH COLUMBIA,
CANADIAN TRIAL LAWYERS ASSOCIATION,
and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL FOR ONTARIO

Page

PART I: STATEMENT OF FACTS

Overview

1. In 1985 the abuse of process doctrine took root in Canada.[1] In the years following *Jewitt,* this court seized upon opportunities to refine the parameters of the doctrine. That rich body of jurisprudence gave rise to a theme that, until recently, has been largely respected by courts below. The theme is grounded in this court's strong and unwavering commitment to the independence of the Attorney General, and his or her agents, when making decisions in the context of their prosecutorial mandate; an independence with constitutional dimensions grounded in the principles of fundamental justice within s.7 of the *Charter.*[2] Historically, review of discretionary decisions by the Attorney General and his or her agents has only been permitted on the basis of the abuse of process doctrine and that doctrine has been carefully circumscribed by this court. As Justice L'Heureux-Dubé put it in *Power,* there must exist "conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed" before a court should "intervene to prevent an abuse of process which could bring the administration of justice into disrepute".[3] As such, in the past, courts have been chary about finding abuse and have done so only in "extremely rare" and "exceptional" cases.[4]

2. As of late, and relying on the "core"/non-core distinction for exercises of prosecutorial discretion in *Krieger*, a concerning trend has emerged respecting how lower courts have started to narrowly construe the protected sphere of independent decision making by the Attorney General. This trend has been accompanied by a corresponding expansion of the historical underpinnings of the abuse of process doctrine. Both the trial judgment in this case, and its Ontario equivalent in *R.N.M.,*[5] reveal this trend. On the basis of *Krieger,* these judgments conclude that repudiation of a plea agreement falls outside of the Crown's "core" functions. As such, they say that deference is not owed to the decision to repudiate and an abuse of process is presumed until such time as the Attorney

---

[1] *R. v. Jewitt,* [1985] 2 S.C.R. 128.

[2] *Krieger v. Law Society of Alberta,* [2002] 3 S.C.R. 372 at paras. 3, 30, 32.

[3] *R. v. Power,* [1994] 1 S.C.R. 601 at p. 616. More recently this court has described the threshold test for a finding of abuse as "flagrant impropriety": *Krieger v. Law Society, supra,* at para. 49.

[4] *R. v. Power, supra,* at p. 616; *R. v. Jewitt, supra,* at p. 137; *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339 at paras. 48-51; *R. v. Conway,* [1989] 1 S.C.R. 1659 at p. 1670; *R. v. Scott,* [1990] 3 S.C.R. 979 at pp. 1006-9 (McLachlin J. in dissent, but not on this point); *R. v. Keyowski,* [1988] 1 S.C.R. 657.

[5] *R. v. R.N.M.* (2006), 213 C.C.C. (3d) 107 (Ont. Sup. Ct.).

General satisfies the court that the decision to repudiate was appropriate. In other words, *Krieger* has been interpreted to have both severely limited the scope of protected prosecutorial discretion and to have created a new and relaxed approach to finding an abuse of process in relation to non-core decisions. That cannot be right.

3. As will be discussed below, this analytical approach to prosecutorial discretion and abuse of process is gaining steam in trial courts and is a direct result of a misunderstanding of what this court meant by "core" prosecutorial discretion in *Krieger*. While Ontario agrees with Alberta that repudiation of a plea agreement is an act of prosecutorial discretion subject only to the application of the abuse of process doctrine, operating on the level of "flagrant impropriety", this factum focusses on broader issues of concern to the administration of justice. Ontario respectfully requests this court to confirm that *Krieger* was never intended to narrow the area of protected prosecutorial discretion and any interpretation to the contrary is in error. Moreover, Ontario respectfully requests that this court confirm that *Krieger* was never intended to create a schism in threshold tests for finding an abuse of process depending on whether a decision is considered "core" or non-core.[6]

PART II: POINTS IN ISSUE

4. The question upon which Ontario intervenes in this appeal relates to whether the repudiation of a plea agreement engages an act of prosecutorial discretion such that it is only reviewable on the basis of "flagrant impropriety". Ontario adopts Alberta's submissions in this regard and adds submissions on the broader issue of the impact of *Krieger* on the scope of the Attorney General's protected independent decision making and the corresponding application of the abuse of process doctrine.

PART III: BRIEF OF ARGUMENT

I. The Constitutionally Protected Independence of Prosecutorial Decision Making

5. It is impossible to discuss the underpinnings of the abuse of process doctrine without first briefly addressing the fulcrum around which it has historically turned: the recognized independence

---

[6]This factum, of course, focusses on the residual category of abuse of process: *R. v. O'Connor,* [1995] 4 S.C.R. 411 at paras. 65-83.

of the Attorney General in his or her prosecutorial function.[7] The principle stems from the requirement that the Attorney General, and his or her agents, remain independent from partisan political concerns. This is often referred to as the "Shawcross principle".[8]

6. The importance of the Attorney General's independence, and that of his or her agents, in fulfilling their prosecutorial function, has been steadfastly acknowledged by this court.[9] Just as prosecutorial decisions must remain free from partisan political concerns, so too must they remain free from judicial interference. As Justice L'Heureux-Dubé noted in *Power,* and affirmed by this unanimous court in *Krieger*: "It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion." In expanding upon the rationale for demonstrating deference to exercises of prosecutorial discretion, *Power* incorporated the following comment from "Prosecutorial Discretion: A Reply to David Vanek" (later cited with approval in *Krieger*):

> 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.[10]

7. So important is the principle of independence, that it was assigned constitutional status in *Krieger*: "The court's acknowledgement of the Attorney General's independence from judicial

---

[7] While some prosecution services in Canada are set up separate and apart from the Attorney General, like the Public Prosecution Service of Canada (*Director of Public Prosecutions Act,* S.C. 2006, c.9, Part 3), the principle of independence remains the same. In Ontario, the Attorney General is both a member of Cabinet and the Chief Law Officer of the Crown, charged with the responsibility of superintending "all matters connected with the administration of justice": *Ministry of the Attorney General Act,* R.S.O. 1990, c.M.17, s.5.

[8] *Hansard,* House of Commons, United Kingdom (January 29, 1951), vol. 483, cols. 683-684. See also: Robert Frater, *Prosecutorial Misconduct*, (Aurora: Canada Law Book, 2009) at p. 10; Edwards, J.Ll.J., *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at p. 223; Edwards, J.Ll.J., *Walking the Tightrope of Justice: An Examination of the Office of the Attorney General*, prepared for the Royal Commission on the Donald Marshall, Jr. Prosectution (Nova Scotia: Lieutenant Governor in Council, 1989) at pp. 135-146; Law Reform Commission of Canada, *Controlling Criminal Prosecutions*: *The Attorney General and the Crown Prosecutor*, Working Paper 62, (Ottawa: Queen's Printer, 1990) pp. 8-14; The Honourable R. Roy McMurtry, "The Office of the Attorney General" in D. Mendes da Costa, *et al.* (eds.), *The Cambridge Lectures* (Toronto: Butterworths, 1981) at pp. 2-6; Ian Scott, "The Role of the Attorney General and the *Charter of Rights*" (1986-87), 29 C.L.Q. 187 at pp. 189-92.

[9] *Krieger v. Law Society, supra,* paras. 3, 25-32, 42, 46-47; *R. v. Power, supra,* at pp. 621-23; *R. v. T.(V.),* [1992] 1 S.C.R. 749 at p. 761.

[10] J.A. Ramsay, "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 Crim L.Q. 378 at pp. 378-80, cited in *R. v. Power, supra,* at pp. 621-23 and *Krieger v. Law Society, supra,* at para. 31. See also: David Vanek, "Prosecutorial Discretion" (1987-88), 30 Crim. L.Q. 219. In *Re Balderstone and the Queen* (1983), 8 C.C.C. (3d) 532 (Man. C.A.), leave to appeal ref'd [1983] 2 S.C.R. v at p. 169, Chief Justice Monin held: "If a judge should attempt to review the actions or conduct of the Attorney General - barring flagrant impropriety - he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General or his officers. This a judge must not do." This court adopted this statement in *R. v. T.(V.), supra,* at pp. 759-60.

review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution."[11] That discretion covers all manner of decision making in pursuit of the Crown's mandate as quasi-judicial officers charged with the responsibility of representing the interests of the community in ensuring justice is done. This role was defined in *Power* as: "not only to protect the public, but also to honour and express the community's sense of justice".[12] As such, the jurisprudence from this court has clearly, consistently, and unhesitatingly sent a message to trial courts to stay away from "second-guessing"[13] the Attorney General's discretionary decision-making. To fail to do so runs the risk of the court becoming perceived as the prosecutor and, thereby, interfering with a constitutionally informed principle of fundamental justice. The only path to review, and it is important for purposes of this appeal, is through an allegation of abuse of process on the basis of "flagrant impropriety".[14]

II. The Misinterpretation of *Krieger*

8. Coming back to this case, the trial judge concluded that, while the Attorney General has the discretion "whether or not to initiate a prosecution", once that discretion is exercised in favour of proceeding, "the matter becomes subject to the processes and procedures sanctioned by the court". Drawing on *Krieger* for support, the trial judge concluded that plea negotiations that follow charges having been laid, come within the "Crown prosecutor's tactics or conduct before the court", and, as such, are reviewable under the court's inherent jurisdiction. On the basis of *Krieger,* the trial judge presumed an abuse of process until the Attorney General could satisfy him that the original plea decision was not "reasonably defensible".[15] As the Attorney General failed to convince him, the presumption of abuse was never displaced.

9. In *R.N.M.,* figuring prominently in the appellant's submissions, *Krieger* was used for a similar analytical approach. The court determined that repudiation of a plea agreement is not within

---

[11] *Krieger v. Law Society, supra,* at para. 32.

[12] *R. v. Power, supra,* at p. 616.

[13] *Miazga v. Kvello Estate, supra,* at paras. 47-49; *R. v. Power, supra,* at p. 616; *R. v. Regan, supra, per* Binnie J. (in dissent but not on this point) at para. 166.

[14] While the "flagrant impropriety" language has been recently introduced by this court as the threshold test against which to measure whether the court's process has been (and is being) abused, (see *Krieger v. Law Society, supra,* at para. 49), it is a simple phrase that captures earlier embodiments of this robust and difficult to attain threshold test.

[15] Judgment of the Provincial Court of Alberta, January 18, 2009, Appellant's Record, Vol. 1, pp. 8-9 paras. 12-13; p. 13 para. 19, p. 17 para. 27, p. 23 para. 39, p. 26 para. 47, p. 27 para. 49, p. 28 para. 54.

the "core" acts of prosecutorial discretion defined by this court and, as such, "the general rule not requiring the Crown to give reasons for its decision-making ... is not applicable". As the Crown refused to provide the reasons for the repudiation, the court presumed an abuse of process occurred because there was no factual basis upon which to determine whether the initial plea arrangement "*would* be offensive to the administration of justice [emphasis in original]".[16]

10. These cases are not alone in their understanding of *Krieger* as having narrowed the protected sphere of discretion and invited a new and relaxed approach to findings of abuse. In Ontario alone, in the last few years, learned trial judges have been taking a similar view. For instance, in *De Zen*, the Superior Court concluded that the acting Deputy Attorney General for Canada's direction that a trial take place before a judge and jury, pursuant to s. 568 of the *Criminal Code,* fell outside of the *Krieger* "core". Instead, the trial judge concluded this direction as to the mode of trial was an act of "tactics or conduct before the court" and, as such, was reviewable on the basis of "fairness and objectivity".[17] In *Gill,* the Court of Justice concluded that the decision of a prosecutor to serve and file a notice of increased penalty pursuant to s. 727 of the *Criminal Code*, did not fall within the "core" decisions of the Attorney General and, as such, despite the *Code* provisions having been met, the court was not bound by the statutory minimum sentences in s.255.[18] In *G.C.*, the Superior Court found an abuse of process where a direction was made by the Deputy Attorney General pursuant to s.67(6) of the *Youth Criminal Justice Act,* that a young person be tried for murder before a court comprised of judge and jury. Without even discussing "core" and non-core decisions, but citing from *Krieger* for support, the court presumed an abuse of process in the absence of justifying reasons having been provided.[19]

11. This case, *R.N.M.*, and the other examples above, demonstrate that *Krieger* has been interpreted as having a profound narrowing impact on the area of protected independence, which has, in turn, been interpreted as an invitation to free the abuse of process doctrine from its historical chains of "flagrant impropriety". This view has even found its way into academic writings. For instance, The Honourable Marc Rosenberg has written in "The Attorney General and the

---

[16] *R. v. R.N.M, supra,* at paras. 62-68.

[17] *R. v. De Zen* (2010), 251 C.C.C. (3d) 547 (Ont. S.C.) at paras. 25-27, 33-35. This case should have been dealt with under the correct analytical approach.

[18] *R. v. Gill* (2008), 238 C.C.C. (3d) 465 (Ont. Ct. Jus.) at paras. 32-39, 46.

[19] *R. v. G.C.* (2010), 258 C.C.C. (3d) 550 (Ont. S.C.) at paras. 38-42, 64.

Administration of Criminal Justice", the *Krieger* decision "narrowly defined the excluded area" of "core elements of prosecutorial discretion" and, in doing so, "has given way to a more interventionist tone". On this interpretation of *Krieger,* "only a relatively small number of decisions seem to come within the constitutionally protected sphere of prosecutorial discretion" and "a myriad of prosecutorial decisions [are] open for judicial review on a more relaxed standard". Examples of decisions that are cited as being open to review on a "relaxed standard of fairness and objectivity rather than flagrant impropriety", include those where courts have historically been "reluctant to interfere", such as decisions about the "manner of election of hybrid offences and consent to re-election".[20]

12. In discussing the dangers of such an approach, Michael Code (as he then was) notes other Crown decisions that may well be subsumed under such an "interventionist" view, were it to take hold:

> decisions on the order in which the Crown calls certain witnesses; decisions not to examine a witness in certain areas; decisions to tender certain documents but not others; decisions not to tender the accused's statement to the police; and decisions to give various statutory notices, such as notices seeking greater penalties. These kinds of decisions all seem to fit within the *Krieger* definition of 'tactics and conduct before the court" where the standard of review may arguably be something less than the deferential *Power* standard.[21]

13. This interpretation of *Krieger* as an invitation to "intervene" fails to heed this court's prior direction to stay away from second-guessing prosecutorial decisions. Moreover, it adds a level of confusion to the abuse of process doctrine, operating, as it appears to have in this case and others, on two different levels. Core decisions are reviewed on "flagrant impropriety"; non-core decisions are reviewed on, well, "correctness", "fairness", "objectivity", "fairness and objectivity"? Who knows? To cut through it, if the court is asking, "was the decision fair" or "was the decision right", the court is really asking, "would I have decided that way"? Ergo, the court becomes the prosecutor and years of clear jurisprudence from this court falls into the dustbin of jurisprudential history.

---

[20]The Hon. M. Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2008-2009), 34 Queen's L.J. 813 at pp. 838-843, including footnote 93. This article derives from a paper presented at a symposium at Queen's Law School in October of 2003, "The Attorney General in the 21st Century".

[21]See "Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg" (2009), 34 Queen's L.J. at pp. 881-882.

14. Aside from obvious concerns about independence, and the fact that the criminal justice system could collapse under its own weight if exercises of prosecutorial discretion become too easily reviewable,[22] an even more significant concern arises. By decoupling the concept of abuse of process from the need for "flagrant impropriety", it allows Attorney General conduct to be more easily labelled an abuse of the court's process. To be accused of abusing the court's process is one thing, a scathing indictment unto itself. To be found to have abused the court's process is a whole new level. It does the integrity of the administration of criminal justice a disservice to allow for decisions by Crown counsel (and their superiors), charged with the responsibility of expressing the "community's sense of justice", to be too easily labelled abusive. In this sense, Justice L'Heureux-Dubé's comments in *Conway,* come to mind. She held that the abuse of process doctrine "acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function".[23] Equally, the Attorney General and his or her agents must enjoy that respect. It does nothing to advance the community's confidence in the justice system to allow its prosecutors (and Attorneys General) to be so easily labelled abusive.

III. Setting *Krieger* Right

15. This case comes before this court as one of many cases that have misinterpreted *Krieger.* This court did not endorse an erosion of the scope of prosecutorial discretion. Nor did it invite a double-standard approach to findings of abuse of process, depending on whether a prosecutor's decision was "core" or not. Read contextually, the re-investment of this court in its prior jurisprudence pertaining to prosecutorial independence and abuse of process is clear.

16. Importantly, the *Krieger* court did not suggest it was rejecting any of the court's prior jurisprudence. Indeed, the judgment specifically adopts much of that jurisprudence and cites from it extensively. *Krieger* relies upon *Power* for the proposition that "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters *within his authority* in relation to the prosecution of criminal offences [emphasis added]".[24] The *Krieger* court even suggested that

---

[22]As noted by Michael Code, "Judicial Review of Prosecutorial Decisions", *supra,* citing from *Re Saikaly v. R.* (1979), 48 C.C.C. (2d) 192 (Ont. C.A.), if this type of Crown decision making were to become reviewable on a lesser standard, "the administration of criminal justice would come to a standstill". *R. v. Elliott* (2003), 181 C.C.C. (3d) 118 (Ont.C.A.) is an example of the administration of justice being held hostage by baseless claims of Crown impropriety.

[23]*R. v. Conway, supra,* at p. 1667.

[24]*Krieger v. Law Society, supra,* at para. 44; *R. v. Power, supra,* at p. 622.

decisions of the Attorney General, "or of his or her agents, *within the authority delegated to him or her by the sovereign* is not subject to interference by other arms of government" and, therefore, are to be "*treated with deference by the courts* [emphasis added]". While the court provided a list of what it considered to be "core elements of prosecutorial discretion", a list that has been said to tightly hem in the Attorney General's independence, it was careful to note that the list was not exhaustive.[25]

17. Moreover, while the court said that common to the list were decisions as to "whether a prosecution should be brought, continued or ceased and what the prosecution ought to be for", it went on to note that "prosecutorial discretion refers to decisions regarding the *nature and extent* of the prosecution and the Attorney General's participation in it [emphasis added]". "Nature" and "extent" are big words. In providing a context for what the court saw falling outside of "the nature and extent of the prosecution", it used the expression, "decisions that govern a Crown prosecutor's tactics and conduct before the court". With respect, that is not an earthshattering proposition. The court has always had this power, and as discussed below, so it should.

18. Finally, in dealing with the concept of deference, the court cited from *Regan,* where Justice Binnie (in dissent, but not on this point) discussed the "broad scope traditionally and properly afforded to prosecutorial discretion" and the fact that "a system which did not confer a broad discretion on ... prosecutorial authorities would be unworkable". That same passage cites from *Beare,* where Justice LaForest provides examples of prosecutorial discretion: "whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on".[26] One might ask, why would the *Krieger* court cite examples of prosecutorial discretion that did not fit in their list? The answer is clear. As they said, the list was not exhaustive. In its most recent opportunity to do so, this unanimous court in *Miazga* has reinforced the importance of the "unfettered discretion within which Crown attorneys can properly pursue their professional goals", which goals derive from their mandate in reflecting the "interest of the community to see that justice is properly done".[27]

---

[25] *Krieger v. Law Society, supra,* at paras. 45-46.

[26] *Krieger v. Law Society, supra* at para. 48; *R. v. Regan, supra* at para. 166-68; *R. v. Beare*, [1988] 2 S.C.R. 387 at p. 410.

[27] *Miazga v. Kvello Estate, supra,* at para. 47, citing from *R. v. Power, supra,* at p. 616.

19. In the end, it is respectfully submitted that *Krieger* has been misconstrued and, as such, has led courts into error, including in relation to findings that plea negotiations and rare repudiations fall outside acts of protected prosecutorial discretion.[28] Like this court's earlier jurisprudence, *Krieger* recognizes that the role of the Crown is to "protect the public" and "honour and express the community's sense of justice", while functioning as a quasi-judicial officer. When the Attorney General steps outside of that role as a minister of justice, "the general rule of judicial non-intervention with Crown discretion is no longer justified". Nonetheless, the abuse of process doctrine is "narrowly crafted, employing stringent tests" to ensure that "liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact".[29] It is a doctrine that is designed to "protect the integrity of the courts' process and the administration of justice from disrepute".[30] Unless the Crown's conduct rises to this level, the doctrine does not apply.

20. In relation to "tactics or conduct before the court", there is sometimes a fine line between decisions that fall under protected discretion and those that are "conduct or tactics". Trial courts must exercise caution before exerting jurisdiction in this area.[31] A good rule of thumb in determining whether it falls outside of the protected sphere, is to ask whether the decisions are ones over which the defence would be equally susceptible to having control exercised.[32] For instance, the trial court maintains jurisdiction to control decisions that give rise to inappropriate cross-

---

[28]Of course, if there is irremediable prejudice to fair trial interests arising out of the repudiation, a *Charter* remedy may flow, but not as an abuse of process. Rather, it is responsive to the fair trial concern. Even in these circumstances, for an abuse of process to be found, over and above the s. 7 and possibly s. 11(d) breach, "flagrant impropriety" must be demonstrated. See *R. v. O'Connor, supra*, paras. 60-81; *R. v. La*, [1997] 2 S.C.R. 680 at paras. 16-28; *R. v. Baro* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.), at paras. 29-40.

[29]*Miazga v. Kvello Estate, supra,* at para. 51.

[30]*R. v. Campbell,* [1999] 1 S.C.R. 565. See also: *Canada Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at para. 96.

[31]As this court noted in its unanimous judgment in *R. v. Cook,* [1997] 1 S.C.R. 1113 at pp. 1122-24, dealing with whether the Crown had a mandatory duty to call certain witnesses, "decisions on how to present the case against an accused must be left to the Crown's discretion absent evidence that this discretion is being abused". It should be noted that in *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 (Ont. C.A.) at paras. 53-54, the Ontario Court of Appeal concluded that the order in which the Crown wishes to call evidence is a matter of "tactics or conduct before the court" and, as such, is controllable under the court's trial management powers. It arrived at this conclusion on the basis that the "broad statements" in *Cook* must be "read in light" of *Krieger*. On this approach, see: Michael Code, "Judicial Review of Prosecutorial Decisions", *supra,* at pp. 883-885. It is Ontario's position that this court in *Krieger* did not intend to dilute the impact of *Cook*.

[32]Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 Can. Crim. L.R. 97 at pp. 116-19.

examinations, improper opening or closing addresses to the jury, refusals to come to court in appropriate attire, or leading irrelevant evidence.

IV. Conclusion

21. The issue in this case comes to this court because *Krieger* has been misunderstood. That misunderstanding has infected a good deal of jurisprudence below and will continue to do so without clarification. It may be, and with great respect, that the "core"/non-core distinction drawn in *Krieger* has not been particularly helpful. It has the potential to divert the attention of trial courts from the real issues and invites findings of abuse where none exists. Ontario asks this court to confirm the following:

- When the Attorney General and his or her agents make decisions in the context of their prosecutorial mandate, acts of discretion are only reviewable for abuse of process. There is only one kind of abuse of process and it engages a test of "flagrant impropriety". Plea resolution discussions (as articulated by Alberta), including any decision to repudiate, fall within the area of protected prosecutorial independence.[33] Any review for an allegation of abuse of process should only take place where the defence demonstrates an air of reality to the complaint, in the sense that there is a "reasonable likelihood" that it will succeed.[34]

PART IV: SUBMISSIONS ON COSTS

22. The Attorney General for Ontario makes no submissions as to costs.

PART V: ORDER REQUESTED

23. The Attorney General for Ontario takes no position on whether this appeal is allowed or dismissed.

ALL OF WHICH is respectfully submitted by

Michal Fairburn
Counsel for the Attorney General for Ontario

Frank Au
Counsel for the Attorney General for Ontario

[33]In addition to Alberta's position, Ontario relies upon its own policy: "Resolution Discussions", PM [2005] No. 16, March 31, 2006 and The Honourable G. Arthur Martin, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer,1993), Recommendation 53.

[34]In this regard, Ontario adopts the submissions of the Intervener Attorney General for British Columbia.

PART VI: AUTHORITIES CITED

Para(s)

PART VII: STATUTORY PROVISIONS

Para(s)