Court File No.: 33476

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

BETWEEN:

OLGA MARIE NIXON,

APPELLANT,
(Respondent),

-and-

HER MAJESTY THE QUEEN,

RESPONDENT,
(Appellant),

- and -

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

INTERVENERS.

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF MANITOBA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I
OVERVIEW AND STATEMENT OF FACTS

1. This appeal concerns the scope of the Attorney General's supervisory role over the exercise of prosecutorial discretion. The Attorney General of Manitoba ("Manitoba") acknowledges that the repudiation of plea agreements is and should be rare and exceptional as it may be perceived as unfair from the accused's perspective. However, the Attorney General bears primary responsibility for ensuring public confidence in the justice system and is answerable to the legislature for the conduct of prosecutions. As such, the Attorney General must have the ability to exercise supervisory control over the conduct of prosecutions to safeguard the public interest. In particular, the Attorney General is responsible to ensure that a plea agreement, negotiated between counsel in private, does not undermine public confidence in the administration of justice.

2. Manitoba supports the Alberta Court of Appeal's conclusion that a decision to repudiate a plea agreement in order to continue the prosecution of a criminal charge is a matter of core prosecutorial discretion. Such decisions are not reviewable unless there was conspicuous evidence of flagrant impropriety, improper motives, bad faith or an act so wrong that it violates the conscience of the community.

3. Absent flagrant impropriety or serious irremediable prejudice to an accused who has acted in reliance on a plea agreement, any unfairness inherent in repudiation is not so oppressive or vexatious that it contravenes society's fundamental notions of justice and thus undermines the integrity of the judicial process. Rather, when the Attorney General, or a senior delegate, makes a *bona fide* decision to overturn a plea agreement that he or she determines is contrary to the public interest, that decision is part of the proper and usual institutional checks and balances necessary for the justice system to function properly.

4. Manitoba relies on the facts set out by the courts below.

PART II
QUESTIONS IN ISSUE

5. In what circumstances is it an abuse of process for the Attorney General to resile from a plea agreement that the Attorney General considers contrary to the public interest or would otherwise undermine public confidence in the administration of justice?

6. Manitoba submits that the Attorney General, in exercising supervisory control over the conduct of prosecutions, is entitled to repudiate a plea agreement entered into by one of his agents, where the Attorney General, in good faith, believes the plea agreement would undermine the public interest or confidence in the administration of justice. The Attorney General may not repudiate a plea agreement if the accused can demonstrate doing so would amount to an abuse of process due to flagrant impropriety or because repudiation would cause serious prejudice to his or her fair trial rights.

PART III
ARGUMENT

The Attorney General has superintendant responsibility over all prosecutions

7. In *Krieger*[1], this Court held that the ultimate decision whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for, are amongst the core elements of prosecutorial discretion. The independence of the office of the Attorney General in exercising such discretion is a constitutional principle. Courts are ill-equipped to properly evaluate polycentric decisions to bring charges, to prosecute, to plea bargain or to appeal because a myriad of policy factors can affect these decisions.[2]

8. As Chief Law Officer of the Crown, the Attorney General is ultimately responsible to ensure that in every prosecution prosecutorial discretion is exercised objectively, independently

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[1] *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at paras. 3, 23-32, 46-47 [*Krieger*] **[Tab 1]**.
[2] *R. v. T.(V.)*, [1992] 1 S.C.R. 749 at 760-761 **[Tab 11]**; *R. v. Power*, [1994] 1 S.C.R. 601 at 625-626 **[Tab 5]**; *Krieger, supra* note 1 at para. 48 **[Tab 1]**, citing Binnie J. in dissent but not on this point in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12 at paras. 166-168 **[Tab 6]**.

and appropriately in the public interest.[3] Of practical necessity, the Attorney General delegates prosecutorial powers to Crown counsel who act as his or her agents. However, as the Honourable Patrick LeSage and Professor Michael Code (as he then was) stated in their report on large and complex criminal cases, prosecutorial discretion and independence are institutional principles that warrant direction and supervision by the Attorney General:

> Accordingly, if the Attorney General directs Ministry officials to establish an *internal* system of oversight and supervision of major prosecutions, for non-political reasons related to the efficacy of these prosecutions, there is no improper interference with prosecutorial discretion. In short, independence is an institutional principle that insulates both the Attorney General and all Crown prosecutors from political interference, improper pressures and any considerations that detract from their quasi-judicial duty to objectively evaluate each case and the steps to be taken in the case. It is not an individualized principle that insulates inexperienced or misguided counsel from direction and supervision.[4]

9. The modern reality is that the Attorney General rarely becomes personally involved in an individual case. In most jurisdictions, final supervisory control over prosecutorial decisions is usually delegated to either the Assistant Deputy Attorney General (Criminal Law) or a Director of Public Prosecutions. Almost invariably, the ADAG accepts the advice of Crown counsel. Nonetheless, there is nothing improper about the Attorney General directing a prosecution personally and, in the face of contrary advice from the prosecutor, instructing counsel to change the Crown's position.[5] This must be so because the Attorney General is ultimately responsible for safeguarding the public interest in the administration of criminal justice.

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[3] *R. v. Stone* (1997), 6 C.R. (5th) 405, 1997 CarswellBC 413 (B.C.C.A.) per Huddart J.A. (in chambers) at paras. 9-11 **[Tab 10]**; John Ll. J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 223-225 **[Tab 12]**.

[4] The Honourable Patrick LeSage & Professor Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Ontario: Ministry of the Attorney General, 2008) submitted to the Attorney General of Ontario at 126 [*Code/Lesage Report*] **[Tab 20]**.

[5] Michael Code, "Crown Counsel's Responsibilities When Advising Police at Pre-Charge Stage" (1998) 40 Crim LQ 326 at 349-355 **[Tab 16]**.

10. The justice system cannot afford serious errors of judgment, especially when such errors can be avoided by oversight from experienced and respected peers. For example, supervision may be needed to avoid over-charging, to maintain objectivity if a prosecutor has become "too close" to a case, to avoid major mistakes, to ensure appropriate positions are advanced forcefully and sometimes to encourage a prosecutor who is about to abandon a case that should be prosecuted.[6] While the *Code/Lesage Report* concerned large and complex criminal cases, oversight is just as important in more routine cases which, if mishandled, have the potential to harm public confidence in the justice system.

11. Professor Edwards, an eminent authority on this topic, explained that the Attorney General's accountability to the Legislature or Parliament for decisions made by local prosecutors necessarily carries with it the ability to supervise, and where necessary overturn, decisions of his or her agents.[7] Accountability cannot exist without the corresponding ability to control one's agents and overrule decisions. It would be untenable for the Attorney General, if questioned in the House about a particular decision, to lay blame at the feet of a prosecutor.

12. Similarly, the *Martin Report* correctly observed that while agents of the Attorney General exercise the day-to-day discretion necessary for the due administration of criminal justice, those acts are not final and binding upon the Attorney General in law. This is because, unlike the law of agency in other contexts, the relationship between the Attorney General and his or her agents involves the pre-eminent social value of administering criminal justice in the public interest. The Attorney General must pursue the public interest in his supervisory role over the criminal justice

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[6] *Code/LeSage Report, supra* note 4 at 126-128 **[Tab 20]**.

[7] John. Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 117-119 **[Tab 13]**; Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (Working Paper 62) (Ottawa: LRCC, 1990) at 16-17 **[Tab 14]**; Philip C. Stenning, *Appearing for the Crown* (Cowansville, Que: Brown Legal Publications, 1986) at 308-309, 312-316 **[Tab 17]**; The Honourable G. Arthur Martin (Chair), *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Ontario: Ministry of the Attorney General, 1993) at 106-107, 331 [*Martin Report*] **[Tab 18]**; See also *Krieger, supra* note 1 at para. 30 **[Tab 1]**.

system as a matter of duty. Thus, when agency principles and the public interest collide, the latter must prevail.[8]

The nature of plea bargaining requires supervisory control in the public interest

13. Today, no one would question that plea discussions have become an important aspect of the criminal justice system. However, it is worth recalling that the general acceptability of plea bargaining is a relatively recent innovation. Professor Stenning observed that in the late 1970s, plea bargaining had only very recently emerged "from the dark realms of the unmentionable into the light of informed public debate".[9] It has been a controversial subject among the judiciary, lawyers, law enforcement agencies and academics and one that has threatened to diminish public respect for the criminal process.[10]

14. Despite their controversial history, the benefits and practicality of plea discussions are apparent to those who work in the criminal justice system. Manitoba's Policy Directive confirms the propriety of plea bargaining provided the agreement does not bring the administration of justice into disrepute. Crown attorneys must always be guided by the public interest and the need to promote confidence in the justice system.[11]

15. At the same time, Manitoba's Policy recognizes that the public often regards plea bargaining with suspicion and some may still see it as unseemly. In part, this is attributable to the fact that plea bargaining occurs in private. In *Miazga*[12], this Court cited the *Martin Report's* admonition not to forget that much of the public's confidence in the administration of justice is attributable to the public trial where justice is not only done, but is seen to be done.

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[8] *Martin Report, supra* note 7 at 331 **[Tab 18]**, cited with approval in *R. v. Ross* (2008), 237 C.C.C. (3d) 19, 2008 ONCA 667 at paras. 45-46 **[Tab 8]**; See also: *R. v. Dubien* (1982), 67 C.C.C. (2d) 341, 1982 CarswellOnt 71 (Ont. C.A.) **[Tab 4]** and *R. v. Simoneau*, [1978] 3 W.W.R. 461, 1978 CarswellMan (Man. C.A.) at para. 10 **[Tab 9]**.
[9] Philip C. Stenning, *Appearing for the Crown*, *supra* note 7 at 250 **[Tab 17]**.
[10] Law Reform Commission of Canada, *Plea Discussions and Agreements* (Working Paper 60) (Ottawa: LRCC, 1989) at 4-7 **[Tab 15]**.
[11] Manitoba Department of Justice, Prosecutions Policy Directive No. 2:PLE:1 "Plea Bargaining" (May 2009) at paras. 1, 3, 7 **[Tab 22]**.
[12] *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339, 2009 SCC 51 at para. 67 [*Miazga*] **[Tab 2]**.

16. The fact that plea discussions occur outside of the public eye heightens the importance of the Attorney General's supervisory responsibility. There is a very real "risk of undermining public confidence in the administration of justice if an offence which appeared very grave at the time of the arrest is, when disposed of by an agreed-upon plea, treated as a less serious offence with no explanation offered for the change in position".[13] That risk recently materialized in Manitoba when a public inquiry concluded that a plea agreement to recommend a conditional sentence in return for a guilty plea to dangerous driving causing death brought the administration of the criminal justice system into disrepute.[14]

17. For this reason, Crown attorneys in Manitoba are directed to make the plea bargaining process more transparent by providing an explanation on the record of the factors that led to the agreement, especially when dealing with sensitive cases defined in the Policy (which includes any case involving a death). The explanation should be sufficient for the court and the public to understand why the Crown is accepting the plea bargain.[15]

18. However, the Attorney General cannot be put in the untenable position of having to account to the public (through the legislature) and explain to the court the reasons for entering a plea agreement that the Attorney General believes is contrary to the administration of justice. If the Attorney General or a senior delegate independently concludes, in good faith, that the plea resolution would undermine public confidence in the administration of justice, the Attorney General is duty bound to intervene in the public interest.[16]

19. The ability to repudiate plea agreements is equally important to protect the accused. Thus, the Attorney General must intervene to ensure that a fatally flawed prosecution does not proceed (or only proceeds on a lesser charge) in spite of a previous plea agreement.[17] And before pleading guilty, the accused can always change his or her mind and opt for a trial.

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[13] *Martin Report, supra* note 7 at 323 **[Tab 18]**.
[14] The Honourable Roger Salhany, Q.C., *Report of the Taman Inquiry* (2008) at 105 **[Tab 21]**.
[15] Manitoba Department of Justice, Prosecutions Policy Directive on Plea Bargaining, *supra* note 11 at para. 18 **[Tab 22]**; See also: The Honourable Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009) 34 Queen's L.J. 813 at 852-853 **[Tab 19]**; *Martin Report, supra* note 7 at 315 **[Tab 18]**.
[16] *Martin Report, supra* note 7 at 93-94, 106-107, 331 **[Tab 18]**.
[17] See *Code/Lesage Report supra* note 4 at 28-29, citing *Krieger*, *Regan* and the *Martin Report* **[Tab 20]**.

20. Often, counsel may reasonably differ on whether a particular plea agreement is in the public interest and decisions to repudiate must not be taken lightly. Nonetheless, the Attorney General may legitimately take a different view than a prosecutor as to whether it is more harmful to public confidence to secure a guilty plea to a lesser charge than risk a possible acquittal after a fair and open criminal trial. Manitoba submits that the *Martin Report* correctly concluded that: "[w]hile the sanctity of agreements entered into is an important principle of the administration of justice, Crown counsel's primary duty is to the integrity of the system. Accordingly, in the rare cases where the two values clash, the latter must prevail".[18]

21. In *R. v. Riley*, Dambrot J. made comments to similar effect in the context of the Crown resiling from an earlier admission of a s. 8 *Charter* breach. The Court noted there are compelling reasons for all counsel involved in a criminal proceeding to communicate their positions with care and avoid the need for retreat upon further reflection. Nonetheless, the Court concluded there was no abuse of process and held:

> …it would hardly foster cooperation amongst counsel conducting a criminal proceeding to hold that Crown counsel can never retreat from a position once taken, or that any retreat amounts to a violation of the constitutional rights of the accused. If that were the law, it could only result in timidity on the part of prosecutors. Where Crown counsel changes his or her position on an issue as a result of sober second thought, as a result of requiring new information, or otherwise without malice or an oblique motive, it will not amount to a violation of the *Charter* unless it prejudiced the accused and results in an unfair trial.[19]

Repudiation of plea agreements is rare and does not constitute an abuse of process absent flagrant impropriety or serious prejudice to the accused

22. The *Martin Report* provides guidance to the Attorney General as to how to exercise the discretion to repudiate plea agreements. The committee's recommendation was never intended to alter the test for an abuse of process or the basis for judicial review by permitting a court to substitute its view of whether a plea agreement would bring the administration of justice into disrepute. It remains for the Attorney General, or senior delegates, to determine whether it is necessary to override an individual Crown attorney's decision to enter a plea agreement as a

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[18] *Martin Report*, *supra* note 7 at 312-315 **[Tab 18]**.
[19] *R. v. Riley*, 2008 CarswellOnt 4334 (Ont. S.C.J.) at para. 108 **[Tab 7]**.

legitimate exercise of supervisory control over prosecutorial discretion. This is consistent with the Attorney General's important constitutional responsibility to decide objectively whether to proceed with a prosecution.[20]

23. Undoubtedly, the preferred approach is to seek advice during delicate and complicated resolution discussions *before* finalizing any plea agreement.[21] In most cases, this will obviate the need to repudiate any agreement reached. In fact, such institutional safeguards do exist. Manitoba's Policy provides that in all homicide cases in which a reduction of charge is being considered, any decision must first be discussed at an internal case conference, which typically involves the prosecutor, the supervising Crown attorney, two Directors, General Counsel and sometimes the Assistant Deputy Attorney General. This affords an opportunity to discuss any proposed plea resolution with senior counsel at the highest level, before committing to a course of action, to ensure any agreement reached is in the public interest.

24. Despite these safeguards, hundreds of thousands of charges are laid across the country each year.[22] The justice system is human. Mistakes and errors in judgment happen. It should be exceedingly rare to find cases of abuse of process simply based on a *bona fide* change of position by the Attorney General if it does not impinge upon a fair trial or other individual rights. This is because, despite the fact that errors are made, the *institutional integrity* of our system of justice cannot be called into question successfully when the Attorney General acts in good faith.[23]

25. In *R. v. D.(E.)*.[24], Arbour J.A. (as she then was) stated that cases finding an abuse of process where the Crown reneged on an agreement with the accused have typically involved situations where the accused had genuinely compromised his or her position and made a real concession in anticipation of some reward. In other words, the accused suffered real prejudice. Undoubtedly, an accused obtains some psychological comfort and peace of mind when told that a criminal prosecution will not proceed. However, an abuse of process only arises if the

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[20] *Code/Lesage Report, supra* note 4 at 30 **[Tab 20]**.
[21] *Martin Report, supra* note 7 at 314 **[Tab 18]**.
[22] Michael Code noted in his article "Crown Counsel's Responsibilities When Advising Police at Pre-Charge Stage", *supra* note 5 at 349 that during his tenure as ADAG in Ontario alone there were approximately 500,000 criminal charges laid each year, for which the Attorney General was ultimately responsible **[Tab 16]**.
[23] *R. v. Regan, supra* note 2 at para. 171 per Binnie J. (in dissent) **[Tab 6]**.
[24] *R. v. D.(E.),* 57 C.C.C. (3d) 151, 1990 CarswellOnt 104 (Ont. C.A.) at paras. 35, 43-46 **[Tab 3]**.

prosecution *unfairly* reneges on expectations it has generated. Given that the every repudiation will necessarily upset the accused's settled expectations, prejudice in this context must mean prejudice to fair trial rights.

26. In *Miazga*, this Court compared the public law doctrine of abuse of process and the tort of malicious prosecution as two sides of the same coin. They provide remedies for actions that are so egregious that they take a prosecutor outside his or her proper role as minister of justice. These doctrines employ stringent tests to ensure remedies are available in only the most exceptional circumstances so that Crown discretion remains intact.[25]

27. The Attorney General's good faith decision to correct what he or she believes was an error in judgment that would undermine public confidence in the criminal justice system does not create unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. To paraphrase the words of Binnie J. in *Regan*[26] in the context of maintaining independence in screening charges, the proper and usual institutional checks and balances sometimes require the Crown to take a hard, objective second look at decisions taken in the prosecutorial context. The accused, the public and the administration of justice should demand no less.

[25] *Miazga, supra* note 12 at para. 51 **[Tab 2]**.
[26] *R. v. Regan, supra* note 2 at para. 170 **[Tab 6]**.

PART IV
SUBMISSIONS ON COSTS

28. Manitoba does not seek costs in this appeal.

PART V
ORDER SOUGHT

29. Manitoba submits that this Court's order should reflect that it is not an abuse of process for the Attorney General or senior delegate to resile from a prosecutor's decision to enter a plea agreement, in circumstances where the Attorney General believes that the plea bargain is not in the public interest or would otherwise undermine public confidence in the administration of justice. An abuse of process may be found in rare circumstances where it can be shown either that the Attorney General's conduct was flagrantly improper or the accused, having acted on the plea agreement, suffered serious prejudice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of December 2010.

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PART VI
TABLE OF AUTHORITIES

CASES — **Cited at Paragraph Nos.**

SECONDARY SOURCES

POLICY DIRECTIVES