

Summary: R v Nixon, 2011 SCC 34

The case makes an important contribution to refining the scope of prosecutorial discretion, and the proper test for abuse of process under s. 7.

Facts and Judicial History

The appellant was charged with several offences, including dangerous driving causing death, dangerous driving causing bodily harm, and separate impaired driving offences. Due to perceived evidentiary issues, the Crown attorney entered into a plea agreement with Nixon, where the more serious charges were dropped and she agreed to plead guilty to the lesser charge of careless driving. When the Acting Assistant Deputy Minister (ADM) became aware of the plea bargain, he found that Crown counsel erred in evaluating the strength of the prosecution case, and decided that the plea agreement was not in the best interests of justice. As a result, the ADM instructed Crown counsel to withdraw from the resolution of the agreement and to proceed to trial on the dangerous driving offences. Nixon brought an application under s. 7 of the *Charter* claiming that the Crown's repudiation of the agreement amounted to an abuse of process in breach of her rights, and requested a court order that the Crown abide by its terms. The application was successful. The Crown successfully appealed to the Court of Appeal for Alberta; Nixon appealed to the Supreme Court of Canada. The appeal was dismissed.

Issues

At the Supreme Court, two main issues were in dispute: first, whether the decision to repudiate the plea agreement was a matter of "prosecutorial discretion", reviewable only for abuse of process, or whether it fell within the ambit of "tactics and conduct before the court"; second, whether the correct test for determining an abuse of process should focus on the reasonableness of the initial plea bargain, or whether it should focus on the circumstances of the repudiation.

Holding

The Supreme Court held that the decisions to enter and to repudiate a plea agreement are exercises of prosecutorial discretion, subject to judicial review only for abuse of process. For such a decision to qualify as abuse of process under s. 7, it must amount to either (1) prosecutorial conduct affecting the fairness of the trial, or (2) prosecutorial conduct that contravenes fundamental notions of justice. The decision to be assessed for abuse of process is the decision to *repudiate* the plea agreement.

There is an evidentiary threshold for the Court to embark on an abuse of process inquiry into the reasons behind the exercise of prosecutorial discretion. However, "evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold."

While contract doctrines do not capture the public interest dimensions of plea agreements, such agreements should be given their proper weight, and instances of repudiation should remain rare.

Reasons

1. Plea Bargain and Its Repudiation Are Exercises of Prosecutorial Discretion

In holding that the plea bargain agreement and its repudiation are exercises of prosecutorial discretion, Charron J. applied the test from *Krieger*, and agreed with the Court of Appeal interpretation:

In my view, the question of whether the ADM's decision to repudiate the plea agreement is an act of prosecutorial discretion, although disputed in this appeal, is just as easily resolved. As aptly put by Paperny J.A., in determining whether any impugned decision falls within the core of prosecutorial discretion, it is useful to ask: "... is it a decision as to whether a prosecution should be brought, continued or ceased, and if so, what it should be for?" (para. 32). Applying this test, she held that the ADM's decision to repudiate the plea agreement "fell squarely within the core elements of prosecutorial discretion" (para 33). I agree. [para 30]

Also in agreement with the Court of Appeal, Charron J. rejected the argument that the repudiation is a matter of "tactics and conduct before the court":

If the line were to be drawn at the point seemingly chosen by the application judge, namely "when [the] discretion is exercised in favour of proceeding" (para. 12), Crown counsel's decision to enter into a plea agreement would itself be subject to review by the court as a matter of conduct or tactic without regard to the principles of judicial restraint set out in *Krieger*. As noted by Paperny J.A., to artificially draw the line at the courtroom door effectively neuters some of the primary purposes of prosecutorial discretion, to resolve cases by accepting pleas to lesser charges and to discontinue prosecutions (para. 32). [para 29]

2. Proper Test for Abuse of Process: "Reasonable Defensible" Test Was an Error

Second, moving on to the abuse of process analysis under s. 7, the Supreme Court held that the application judge erred in applying the "reasonably defensible" test in assessing the initial decision to *enter* the plea agreement. The proper approach for abuse of process under s. 7 requires the judge to look to the decision to *repudiate*, and to decide whether, in the circumstances, the repudiation amounts to either (1) prosecutorial conduct affecting the fairness of the trial or (2) prosecutorial conduct that contravenes fundamental notions of justice.

First, Charron J. held that the prejudice argued by the appellant was either speculative, or completely disconnected from "trial fairness".

Second, before assessing whether the repudiation contravened fundamental notions of justice, Charron J. emphasized the argument of the intervener AGBC, that "criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a "threshold determination" that the inquiry is warranted". Charron J responded to this concern by holding that "evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold."

In assessing the repudiation decision in terms of this second category, Charron J. found no Crown misconduct that would amount to an abuse of process.

The ADM, in good faith, determined that Crown counsel's assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct. [para 68]

At the same time, Charron J. made it clear that, although contract rules do not capture the public interest dimension of these prosecutorial decisions, pleas bargains should be given proper weight, and repudiations should remain rare.

This does not mean that plea agreements can be overturned on a whim. The method by which the decision was reached can itself reveal misconduct of a sufficient degree to amount to abuse of process. But that is not what occurred here. The act of repudiation was indeed a rare and exceptional occurrence.
[para 69]