

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R.*v.* Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566 | **Date:** 20110624  **Docket:** 33476 |

**Between:**

**Olga Maria Nixon**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario, Attorney General of Manitoba,**

**Attorney General of British Columbia,**

**Criminal Trial Lawyers’ Association and**

**Criminal Lawyers’ Association (Ontario)**

Interveners

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 71) | Charron J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring) |

R. *v.* Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566

Olga Maria Nixon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario,

Attorney General of Manitoba,

Attorney General of British Columbia,

Criminal Trial Lawyers’ Association and

Criminal Lawyers’ Association (Ontario) *Interveners*

**Indexed as:** R. ***v.*** Nixon

2011 SCC 34

File No.: 33476.

2010: December 15; 2011: June 24.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for alberta

Constitutional *law — Charter of Rights — Right to life, liberty and security of person — Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving — Crown and accused entering into plea agreement — Crown subsequently repudiating plea agreement — Whether repudiation amounting to breach of accused’s s. 7 Charter rights — Canadian Charter of Rights and Freedoms, s. 7.*

*Criminal law — Plea agreement — Repudiation — Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving — Crown and accused entering into plea agreement — Crown subsequently repudiating plea agreement — Whether act of repudiation matter of tactics or conduct before court or matter of prosecutorial discretion — Whether act of repudiation reviewable on grounds of abuse of process.*

The accused drove her motor home through an intersection and struck another vehicle, killing a husband and wife and injuring their young son. She was charged with several *Criminal Code* offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. Counsel initially entered into a plea agreement according to which the accused would plead guilty to a charge of careless driving under the provincial *Traffic Safety Act* with a joint sentence recommendation for an $1,800 fine in return for which the Crown agreed to withdraw the *Criminal Code* charges. When the Acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney General saw the proposed resolution, he initiated an inquiry which led him to conclude that Crown counsel’s assessment of the strength of the case was flawed. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. Crown counsel was thus instructed to withdraw the plea agreement and to proceed to trial. In response, the accused brought a s. 7 *Charter* application alleging abuse of process and seeking a court direction requiring the Crown to complete the plea agreement. The application judge held that negotiations between counsel after charges are laid are matters of tactics or conduct which are subject to review by the court, and that the repudiation of the plea agreement, in this case, was not justified. He concluded that the accused’s s. 7 *Charter* right to security of the person had been breached and he directed the Crown to proceed with the agreement. The Court of Appeal allowed the Crown’s appeal, finding that the repudiation of a plea agreement is a matter of prosecutorial discretion not reviewable by the courts, subject to the doctrine of abuse of process.

Held: The appeal should be dismissed.

The crucial importance of the distinction between prosecutorial discretion reviewable only for abuse of process and matters of tactics or conduct before the court governed by the inherent jurisdiction of the criminal trial court to control its own process was fully canvassed and explained in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. Subject to the abuse of process doctrine, supervising one litigant’s decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. The Crown’s decision in this case to resile from the plea agreement and to continue the prosecution clearly constituted an act of prosecutorial discretion subject to the principles set out in *Krieger*: it is only reviewable for abuse of process. Prosecutorial discretion is not spent with the decision to initiate the proceedings, nor does it terminate with a plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued, and if so, in respect of what charges.

There are two categories of abuse of process under s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. While s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused’s fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

The repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. The more difficult question in this appeal is how the initial exercise of prosecutorial discretion — Crown counsel’s offer to resolve the matter on the basis of a plea to a lesser charge — should figure in the analysis regarding abuse of process. A plea agreement should not be regarded as a contractual undertaking. Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party’s right to resile from a bargain, do not fully capture the public interest considerations which are at play. However, the analogy can usefully underscore the utmost importance of honouring the agreement. The situations in which the Crown can properly repudiate a plea agreement are, and must remain, very rare. Moreover, the reasonably defensible test applied by the application judge to Crown counsel’s decision to enter into a plea agreement is not the appropriate measure to determine whether there is an abuse of process. Indeed, it is the circumstances surrounding the repudiation of a plea agreement which should be reviewed to determine whether that decision amounts to an abuse of process. Reviewing for “reasonableness” a decision made in the exercise of prosecutorial discretion runs contrary to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions as well as the principles set out in *Krieger*.

Given that acts of prosecutorial discretion are generally beyond the reach of the court, there is good reason to impose a threshold burden on the applicant who alleges abuse of process. A court should not embark on an inquiry into the reasons behind the exercise of prosecutorial discretion without a proper evidentiary foundation. However, evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. The ultimate burden of proving abuse of process, however, remains on the applicant.

In this case, the Crown’s repudiation conduct cannot be considered so unfair or oppressive to the accused, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system and thus constitute an abuse of process. Indeed, the Acting Assistant Deputy Minister, 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. Finally, the accused was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into and thus suffered no prejudice as a result of the repudiation.

**Cases Cited**

**Applied:** *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; **disapproved:** *R. v. M. (R.)* (2006), 83 O.R. (3d) 349; **referred to:**  *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. O’Connor*, [1995] 4 S.C.R. 411; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Conway*, [1989] 1 S.C.R. 1659; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 24(1).

*Criminal Code*, R.S.C. 1985, c. C‑46.

*Traffic Safety Act*, R.S.A. 2000, c. T‑6.

**Authors Cited**

Law Society of Alberta. *Code of Professional Conduct*, version No. 2009\_V1, June 3, 2009 (online: http://www.lawsociety.ab.ca/files/regulations/Code.pdf).

Ontario. *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*. Toronto: The Committee, 1993.

APPEAL from a judgment of the Alberta Court of Appeal (Côté, Paperny and Slatter JJ.A.), 2009 ABCA 269, 8 Alta. L.R. (5th) 384, 464 A.R. 1, 246 C.C.C. (3d) 149, 195 C.R.R. (2d) 352, [2009] 10 W.W.R. 641, 82 M.V.R. (5th) 191, [2009] A.J. No. 871 (QL), 2009 CarswellAlta 1221, setting aside an order of Ayotte Prov. Ct. J., 2008 ABPC 20, 89 Alta. L.R. (4th) 156, 445 A.R. 111, 233 C.C.C. (3d) 539, [2008] 8 W.W.R. 740, 61 M.V.R. (5th) 287, [2008] A.J. No. 129 (QL), 2008 CarswellAlta 162, directing the Crown to honour the plea agreement. Appeal dismissed.

Marvin R. Bloos, Q.C., for the appellant.

Goran Tomljanovic, Q.C., and Christine Rideout, for the respondent.

Michal Fairburn and Frank Au, for the intervener the Attorney General of Ontario.

Ami Kotler, for the intervener the Attorney General of Manitoba.

M. Joyce DeWitt-Van Oosten, *Q.C.*, for the intervener the Attorney General of British Columbia.

D’Arcy DePoe, for the intervener the Criminal Trial Lawyers’ Association.

Marie Henein, *Matthew Gourlay* and *Lou Strezos*, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of the Court was delivered by

Charron J. —

1. Introduction

1. The question on this appeal is whether the trial judge erred in concluding that the Crown’s repudiation of a plea agreement was an abuse of process in breach of the appellant’s rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. More specifically, the courts below were divided on the appropriate standard against which to measure the repudiation conduct.
2. The application judge held that the repudiation of a plea agreement is a matter of conduct or tactics which is subject to the usual control of the criminal trial court (2008 ABPC 20, 89 Alta. L.R. (4th) 156). In the case at bar, the repudiation of the plea agreement by the Assistant Deputy Minister of the Criminal Justice Division was not justified, as Crown counsel’s decision to enter into a plea agreement was “reasonably defensible”. Thus, he concluded that the repudiation of the plea agreement was an abuse of process in breach of the accused’s s. 7 security and liberty interests and directed the Crown to honour the agreement. The appellant subsequently pleaded guilty to a lesser offence and was acquitted on the more serious charges.
3. The Alberta Court of Appeal overturned the application judge’s decision, holding that the repudiation of a plea agreement is a matter of prosecutorial discretion, reviewable only for abuse of process (2009 ABCA 269, 8 Alta. L.R. (5th) 384). It held that the application judge erred in testing Crown counsel’s decision against a “reasonably defensible” standard. Rather, he should have reviewed the circumstances surrounding the subsequent decision to repudiate. The relevant inquiry for abuse of process under s. 7 of the *Charter* is whether there is conduct which either causes prejudice to the accused by rendering the trial unfair, or affects the integrity of the justice system itself. In the absence of prejudice which renders the trial unfair, there must be proof of “prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate” (para. 49). Applying this test, the Court of Appeal found no evidence to support a finding of abuse of process in the circumstances of this case. The application judge’s order, the resulting plea and the acquittals were set aside, and a new trial was ordered.
4. The appellant, Olga Maria Nixon, appeals to this Court.
5. For the reasons that follow, I agree with the Court of Appeal that the application judge applied the incorrect test for abuse of process. I also agree that there is no basis for finding that the appellant’s s. 7 rights were breached in the circumstances of this case. I would dismiss the appeal.

2. The Proceedings Below

1. The appellant, Ms. Nixon, was charged with several *Criminal Code*, R.S.C. 1985, c. C-46, offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. The charges arose as a result of a motor vehicle accident which occurred on September 2, 2006. The Crown alleged that Ms. Nixon drove her motor home through an intersection without stopping and struck another vehicle, killing a husband and wife and injuring their young son. A roadside screening test was administered at the scene, followed by breath samples which resulted in readings of 200 mg of alcohol in 100 mL of blood. Expert extrapolation concluded that Ms. Nixon’s blood alcohol level would have been between 225 and 250 mg per 100 mL at the time of the accident.
2. Given that Ms. Nixon elected trial by judge and jury, the matter proceeded to a preliminary inquiry on March 1, 2007. Crown counsel who had carriage of the case at the time had concerns about some of the evidence, in particular the admissibility of the breathalyzer results and the probative value of the eyewitness evidence that a motor home had been seen driving erratically some time before the accident. Based on his assessment, Crown counsel did not adduce the breath sample results at the preliminary hearing, although he specifically reserved the right to call this evidence at trial. He also informed the presiding judge that the Crown would not be seeking a committal on any charge other than the dangerous driving counts. Ms. Nixon consented to a committal order on the dangerous driving charges.
3. Following the preliminary inquiry, additional discussions were held between counsel during the first weeks of May 2007 regarding a plea to a charge of careless driving under the *Traffic Safety Act*, R.S.A. 2000, c. T-6, with a joint sentence recommendation for a $1,800 fine. Counsel ultimately entered into a written agreement to that effect on May 22, and Ms. Nixon re-elected her mode of trial in anticipation of entering a guilty plea to the lesser charge on June 5.
4. Before making the offer for a plea resolution, Crown counsel had discussed the matter in general terms with some of his colleagues in the Crown’s office, including his immediate supervisor who reluctantly agreed with the terms of the proposed agreement. Due to the sensitive nature of the case, a report was also prepared for senior officials in the justice department. When the Acting Assistant Deputy Minister (“ADM”) of the Criminal Justice Division of the office of the Attorney General saw the report and the proposed resolution scheduled to be perfected a few days later, he became concerned and initiated an inquiry. This in turn prompted an adjournment of the June 5 date to June 26. The defence was not informed of the reason for the adjournment at the time.
5. The ADM obtained additional legal opinions about the merits of the Nixon prosecution and about the repudiation of plea agreements. Based on the results of this research, the ADM concluded that Crown counsel’s assessment of the strength of the case was flawed as he had failed to consider the totality of the evidence. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. The ADM also concluded that Ms. Nixon could be restored without prejudice to the position she had been in prior to entering into the plea agreement. Thus, it was resolved that the decision by Crown counsel at the preliminary hearing not to proceed on the impaired driving counts would be maintained. However, the ADM instructed Crown counsel to withdraw the May 22 resolution agreement and to proceed to trial on the dangerous driving charges in accordance with the committal order.
6. In response to this turn of events, Ms. Nixon brought an application under s. 7 of the *Charter*, alleging abuse of process and seeking a court direction requiring the Crown to complete the agreement. Ayotte Prov. Ct. J. of the Provincial Court of Alberta embarked on an inquiry into the matter, at the conclusion of which he reserved judgment. At the outset of his written reasons, the application judge noted that the Attorney General has the ultimate power to initiate, conduct and terminate prosecutions, as affirmed by this Court in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. He also acknowledged that the courts will rarely interfere with the exercise of prosecutorial discretion. In his view, however, “when that discretion is exercised in favour of proceeding, the matter becomes subject to the processes and procedures sanctioned by the court” (para. 12). Thus, he held that negotiations between counsel after charges are laid were matters of tactics or conduct which were subject to review by the court.
7. The application judge then discussed the standard against which to measure the Crown’s conduct. He concluded that the Crown’s ability to repudiate a plea agreement is akin to the discretion of a trial judge to reject a joint submission on sentence: the determinative test was whether the plea agreement was “reasonably defensible”. Before delving into that issue, however, the application judge dealt with Ms. Nixon’s concern that the decision to repudiate was motivated by political considerations. After reviewing the relevant evidence, he concluded that “there is absolutely no evidence” of political interference (para. 22) and “nothing to suggest that [the ADM’s] action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice” (para. 25).
8. The application judge emphasized that the relevant test is whether the plea agreement was “reasonably defensible”. In his view, if the Crown is to justify its course of action to repudiate the agreement, then it must do more than establish that others would have reached a different conclusion. In the case at bar, he concluded that the repudiation of the plea agreement was not justified, as Crown counsel’s assessment of the case was “reasonably defensible”. The application judge held further that where the court is satisfied that the original bargain, if honoured, would not be contrary to the public interest and would not bring the administration of justice into disrepute, it is irrelevant whether the accused suffered prejudice. He added that if he were required to find prejudice, he would do so here. In his view, Ms. Nixon was prejudiced because defence counsel was led to believe that the evidence of breath samples would not be adduced at trial and, consequently, did not explore that issue at the preliminary hearing.
9. The application judge concluded that Ms. Nixon’s s. 7 right to security of the person was breached and, by way of remedy, he directed the Crown to proceed with the agreement before another judge. Ms. Nixon subsequently pleaded guilty to the offence of careless driving, was sentenced to a fine of $1,800, and was acquitted of the *Criminal Code* offences.
10. The Crown appealed the acquittals. The Court of Appeal of Alberta allowed the appeal, holding that the application judge erred in law by finding that Ms. Nixon’s s. 7 *Charter* rights were violated. Paperny J.A. (Côté and Slatter JJ.A. concurring) found that the application judge used the wrong test to distinguish between matters that fall within the scope of prosecutorial discretion and those more properly characterized as a prosecutor’s tactics and conduct before the court. The line cannot be artificially drawn at the courtroom door. Paperny J.A. stated: “Rather, the relevant inquiry is whether the impugned decision falls within the core of the prosecutor’s discretion: 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). Here, the decision to continue the prosecution is a matter of prosecutorial discretion which is not reviewable by the courts, subject to the doctrine of abuse of process.
11. Paperny J.A. held that the application judge further erred in finding that a plea agreement can only be repudiated if the original decision is unreasonable or not “reasonably defensible”. Instead of reviewing the initial decision of Crown counsel, he should have reviewed the circumstances surrounding the ADM’s decision to repudiate the plea agreement to determine whether that decision amounted to an abuse of process. The relevant inquiry under s. 7 of the *Charter* is whether there is conduct which either causes prejudice to the accused by rendering the trial unfair, or affects the integrity of the justice system itself. As she put it, “Due regard to the constitutional role occupied by the Crown demands a deferential standard of review” (para. 49). Absent prejudice which renders the trial unfair, there must be proof of “prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate” (para. 49). Applying this test, Paperny J.A. concluded that there was no evidence to support a finding of abuse of process in the circumstances of this case. The acquittals were set aside and a new trial was ordered on the dangerous driving charges.
12. Ms. Nixon appeals to this Court.

3. Analysis

3.1 *The Scope of Prosecutorial Discretion*

1. Much of the debate between the parties in this Court was centred on whether the Crown’s repudiation of a plea agreement is a matter of “prosecutorial discretion” reviewable only for abuse of process, or a matter of “tactics or conduct before the court” governed by the inherent jurisdiction of the criminal trial court to control its own process. The crucial importance of this distinction was fully canvassed and explained in *Krieger*.
2. In *Krieger*, the Law Society of Alberta claimed that it had jurisdiction over all members of the profession within the province, including those employed by the Attorney General of Alberta. Thus, it purported to investigate an allegation of bad faith or dishonesty against Crown counsel in connection with a failure to disclose relevant information to the accused as required by law. The Attorney General and Krieger, who was Crown counsel, challenged the Law Society’s jurisdiction, arguing that decisions made by an agent of the Attorney General in the conduct of a prosecution were immune from review under the doctrine of prosecutorial discretion.
3. Iacobucci and Major JJ., writing for the Court, reviewed the nature and development of the Attorney General’s office in Canada and affirmed the independence of the office as “a constitutional principle in this country” (para. 30). The Court explained that the principle of independence requires that the Attorney General “act independently of partisan concerns when supervising prosecutorial decisions” and how it “finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision‑making process” (paras. 30 and 31). The Court stressed the fundamental importance of the principle of independence in these terms (at para 32):

The court’s acknowledgment of the Attorney General’s independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant’s decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. . . . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

1. The Court ultimately concluded, however, that the Law Society retained jurisdiction over Krieger’s alleged misconduct, as it was a matter that fell outside the scope of the doctrine. In explaining the proper contours of prosecutorial discretion, the Court drew the distinction between acts of prosecutorial discretion, and tactics or conduct. This distinction is now at the heart of the division in this appeal. Iacobucci and Major JJ. explained the difference as follows:

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

. . .

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor’s tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [First emphasis added; second and third emphases in original; paras. 43 and 46-47.]

3.2 *Submissions of the Parties*

1. On the one hand, Ms. Nixon submits that the Court of Appeal erred when it concluded that the Crown’s decision to renege on its agreement with the defence was an aspect of its traditional, constitutionally protected, core discretionary powers. She contends that the Crown’s decision to resile from the agreement constitutes a reversal in tactic subject to broader review. Given that Crown counsel’s offer had been accepted by the defence, the resulting plea agreement is akin to a contractual undertaking. A bargain is a bargain, it is argued. Absent some vitiating flaw in the negotiating process, such as mistake, misrepresentation or fraud, the Crown should be held strictly to its word. It is not necessary for the applicant to show that she has been prejudiced, or to establish independent acts of “bad faith” or “flagrant impropriety”. Unless the Crown can satisfy the court that implementing the plea agreement would itself bring the administration of justice into disrepute, the repudiation of a valid plea agreement, in and of itself, constitutes an abuse of process. In short, Ms. Nixon argues that the application judge adopted the correct approach and urges the Court to restore his decision.
2. The intervener Criminal Trial Lawyers’ Association (“CTLA”) supports Ms. Nixon’s argument that the Crown’s promise to enter into a plea agreement is an undertaking “like any other given by a lawyer”. It argues that the undertaking “must be strictly and scrupulously fulfilled” and that an abuse of process need not be shown before the agreement may be summarily enforced by a court (Factum of the CTLA, at para. 2).
3. The Criminal Lawyers’ Association (Ontario) (“CLA”) also supports Ms. Nixon’s position that the repudiation of a plea agreement does not fall within “core” Crown discretion identified in *Krieger*. Thus, the CLA submits that judicial review of a repudiation decision is warranted even in the absence of “flagrant impropriety” or bad faith. Rather, the test for allowing Crown repudiation of a plea agreement should be essentially the same as the test applied for allowing a sentencing judge to reject a joint submission: would the proposed resolution bring the administration of justice into disrepute? The CLA submits that “[r]epudiation is an abuse of process unless the Crown discharges its onus of demonstrating that the contemplated agreement would have brought the administration of justice into disrepute and the accused can be restored to his or her initial position” (Factum of the CLA, at para. 1 (emphasis in original)).
4. On the other hand, the respondent, the Attorney General of Alberta, takes the position that both the plea agreement and the repudiation are acts that fall within the scope of the doctrine of prosecutorial discretion. As such, neither is open to review or supervision by the courts, except through an allegation of abuse of process. The respondent argues that the test advocated by Ms. Nixon and by the supporting interveners does not meet the high threshold for proving abuse of process. Abuse of process that involves core prosecutorial discretion requires proof of bad faith or flagrant impropriety by the Crown. Here, there was no evidence of any such conduct by the Crown officials in their review and repudiation of the plea agreement. Nor did Ms. Nixon suffer any prejudice as a result of the repudiation, given that she was restored to the position she was in at the conclusion of the preliminary inquiry, before the plea agreement was struck. Therefore, the Court of Appeal rightly concluded that there was no basis for finding a breach of her s. 7 rights.
5. Attorneys General from three provinces intervened in support of the respondent’s position. In particular, they submit that the approach adopted by the application judge runs afoul with the principle of independence affirmed in *Krieger*.The Attorney General of Ontario submits that this Court’s decision in *Krieger* has been misinterpreted by lower courts. It asks this Court to confirm that *Krieger* was never intended to narrow the area of protected prosecutorial discretion, or to create a schism in threshold tests for finding an abuse of process depending on whether a decision is considered “core” or “non-core”. All acts of prosecutorial discretion are immune from judicial supervision, subject only to the same high threshold for abuse of process.
6. Along the same lines, the Attorney General of British Columbia (“AGBC”) emphasizes the importance of criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a “threshold determination” that the inquiry is warranted. In the absence of evidence of irremediable impairment to the fair trial interests of the accused, a criminal trial court should only proceed with an application for relief challenging prosecutorial discretion under the residual category of abuse of process if there is an evidentiary record capable of supporting the claim. This approach helps to avoid scenarios such as the case at bar, where the trial judge engaged in a full examination of the reasons behind the decision to renege on the plea agreement, even though there was nothing to suggest that the decision was motivated by improper considerations, or was made in bad faith.
7. Finally, the Attorney General of Manitoba (“AGM”) intervenes to underscore the importance of the Attorney General’s supervisory role over the exercise of prosecutorial discretion. Acknowledging that the repudiation of plea agreements is and should be rare, it argues that “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” (Factum of the AGM, at para. 3).

3.3 *The Plea Agreement and Its Repudiation Are Acts of Prosecutorial Discretion*

1. None of the participants in this appeal disputes that Crown counsel’s decision to resolve the proceedings by accepting a plea to a lesser offence falls within the scope of prosecutorial discretion as defined in *Krieger*. To the extent that the application judge’s analysis suggests that anything occurring after the charges are laid falls outside the scope of prosecutorial discretion, it cannot be sustained. 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).
2. 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. In my respectful view, it is difficult to see how the ADM’s decision could otherwise be characterized. The ADM effectively decided that the prosecution against Ms. Nixon should becontinuedand that it should be for the *Criminal Code* offences of dangerous driving, not for the traffic infraction of careless driving. Clearly, the ADM’s decision to repudiate the plea agreement also constitutes an act of prosecutorial discretion. Prosecutorial discretion was not spent with the decision to initiate the proceedings, nor did it terminate with the plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued and, if so, in respect of what charges.
3. Thus, it follows that the Crown’s ultimate decision to resile from the plea agreement and to continue the prosecution is subject to the principles set out in *Krieger*: it is *only* subject to judicial review for abuse of process.
4. The more difficult question in this appeal is how the initial exercise of prosecutorial discretion — Crown counsel’s offer to resolve the matter on the basis of a plea to a lesser charge — should figure in the analysis regarding abuse of process. As outlined earlier, the parties and interveners present very divergent views on how this question should be answered. Before dealing with these arguments, I will review the law on abuse of process.

3.4 *The Doctrine of Abuse of Process*

1. Until this Court’s decision in *R. v. Jewitt*, [1985] 2 S.C.R. 128, there was much controversy about whether a court had the power to stay validly instituted criminal proceedings for abuse of process. The inherent jurisdiction of a superior court to control its own process by staying abusive proceedings had long been recognized in Canada. However, it remained uncertain whether criminal courts had the discretion to stay proceedings for abuse of process, or whether this was a power reserved for the Attorney General under s. 508 (now s. 579) of the *Criminal Code* (pp. 131-32).
2. *Jewitt* put an end to the uncertainty by recognizing that a trial court judge had a “residual discretion” to stay proceedings to remedy abuse of process. The Court held that the common law doctrine could be applied in narrow circumstances “where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency and to prevent the abuse of a court’s process through oppressive or vexatious proceedings” (pp. 136-37).
3. Initially, the common law doctrine of abuse of process was viewed as analytically distinct from *Charter* considerations since its focus was more on maintaining confidence in the integrity of the judicial system than on protecting individual rights. The common law and *Charter* analyses were also kept separate because of the different burdens of proof to successfully make out an abuse of process claim under the two regimes. For an applicant to establish a violation under the *Charter*, the burden of proof was the balance of probabilities standard. For an applicant to successfully invoke the court’s common law power to stay proceedings for abuse of process, the burden of proof was the more onerous “clearest of cases” standard.
4. Ten years later in *R. v. O’Connor*, [1995] 4 S.C.R. 411, the Court noted that there was much overlap between the *Charter* and the common law doctrine of abuse of process, as the latter had found application in circumstances involving state conduct touching upon both “the integrity of the judicial system and the fairness of the individual accused’s trial” (para. 73). Consequently, L’Heureux-Dubé J., writing for a unanimous Court on this point, held that the two regimes should be merged under s. 7 of the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged by the alleged abuse of process and thus some claims may be better addressed by reference to the specific procedural guarantee. For example, “where the accused claims that the Crown’s conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(*b*)” (para. 73). The Court identified two categories of abuse of process which would be caught by s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that “contravenes fundamental notions of justice and thus undermines the integrity of the judicial process” (para. 73).
5. The Court held further that there was no practical utility in maintaining two distinct analytic regimes based on the different burdens of proof. Even if a violation of s. 7 is proved on a balance of probabilities, the court would still have to determine the appropriate remedy under s. 24(1) of the *Charter* and the “clearest of cases” burden would still apply to justify the remedy of a judicial stay of proceedings (para. 69). The Court made clear, however, that the fusion of common law and *Charter* claims of abuse of process under s. 7 of the *Charter* does not alter “the essential balancing character of abuse of process”. L’Heureux-Dubé J. explained as follows (at para. 69):

Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the “clearest of cases” threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges’ hands a scalpel instead of an axe — a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. . . . I see no reason why such balancing cannot be performed equally, if not more, effectively under the *Charter*, both in terms of defining violations and in terms of selecting the appropriate remedy to perceived violations. [Emphasis added.]

1. Thus, in defining what constitutes a *violation*, it is important to recall what kind of harm the common law doctrine of abuse of process was intended to address and, in turn, why this degree of harm called for a stay of proceedings as the *appropriate* *remedy*. In other words, while s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused’s fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.
2. Under the first category of cases, the concern is about the fairness of the accused’s trial. Establishing prejudice of the requisite degree is key to meeting the test; proof of prosecutorial misconduct, while relevant, is not a prerequisite: *R. v. Keyowski*, [1988] 1 S.C.R. 657. In *Keyowski*, the accused’s first two trials ended with the jury failing to agree on a verdict; his third trial was stayed by the trial judge for abuse of process. The narrow issue on appeal was whether a series of trials could, in and of itself, constitute an abuse of process, or whether it was necessary for the accused to show prosecutorial misconduct.
3. The Court reiterated that the test for abuse of process was whether “compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency”, or where the proceedings are “oppressive or vexatious” (pp. 658-59, quoting from *Jewitt*,at pp. 136-37). While the Court concluded that the Crown’s exercise of discretion to proceed with a third trial did not constitute an abuse of process in the circumstances of the case, the Court held that the test could be made out in the absence of prosecutorial discretion. Wilson J. explained as follows (at p. 659):

To define “oppressive” as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown’s exercise of its discretion to re-lay the indictment amounts to an abuse of process.

1. Under the residual category of cases, prejudice to the accused’s interests, although relevant, is not determinative. Of course, in most cases, the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society’s expectations of fairness in the administration of justice. This essential balancing character of abuse of process under the residual category of cases was well captured by the words of L’Heureux-Dubé J. in *R. v. Conway*, [1989] 1 S.C.R. 1659. She stated the following:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure “that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society” (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It 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. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added; p. 1667.]

1. The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused’s fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: “(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice” (*Regan*, at para. 54, citing *O’Connor*, at para. 75).
2. Before applying this framework of analysis to this case, I will address some of the arguments advanced in this appeal on how the plea agreement should impact the analysis of abuse of process.

3.5 *The Contractual Undertaking Analogy*

1. As stated earlier, it is argued that a plea agreement should be regarded as a contractual undertaking and enforced just as any other lawyers’ undertaking. This argument cannot be sustained. It completely ignores the public dimension of a plea agreement. Indeed, contrary to Ms. Nixon’s contention, the Law Society of Alberta specifically recognizes in the comment to Rule 27 of its *Code of Professional Conduct* that “[a]n agreement between the prosecution and defence regarding the plea to be entered is not considered a usual lawyers’ undertaking due to the policy considerations involved” (updated 2009 (online)). Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party’s right to resile from a bargain, do not fully capture the public interest considerations which are at play in any decision to repudiate a plea agreement.
2. A plea agreement cannot be summarily enforced by the court as any other lawyers’ undertaking, as Ms. Nixon contends. It is also wrong to suggest that repudiation, in and of itself, warrants a judicial remedy even in the absence of prejudice (as the application judge concluded, at para. 55), or in the absence of conduct amounting to an abuse of process. This argument is founded on the erroneous premise that the decision to repudiate a plea agreement falls outside the scope of prosecutorial discretion and, as such, is not subject to the constitutional principles set out in *Krieger*.
3. However, to the extent that the lawyers’ undertaking analogy underscores the importance of honouring plea agreements, it can usefully contribute to the analysis. Indeed, in the oft-quoted Ontario *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993)(the “*Martin Committee Report*”), the Committee found resolution agreements in criminal proceedings to be “in the nature of undertakings”. The duty of counsel to honour resolution agreements was regarded as “a particular example of the duties of integrity and responsibility” that lie “at the heart of counsel’s professional obligations”. Honouring resolution agreements was not only “ethically imperative”, but also a “practical necessity”, as these agreements “dispose of the great bulk of the contentious issues that come before the criminal courts in Ontario” (commentary to Recommendation 53, at pp. 312-13 of the *Martin Committee Report*).
4. In light of this practical necessity, the *binding effect* of plea agreements is a matter of utmost importance to the administration of justice. It goes without saying that plea resolutions help to resolve the vast majority of criminal cases in Canada and, in doing so, contribute to a fair and efficient criminal justice system.
5. Of course, there may be instances where different Crown counsel will invariably disagree about the appropriate plea agreement in a particular case. Given the number of complex factors that must be weighed over the course of plea resolution discussions, this reality is unsurprising. However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for *both* the accused and the administration of justice cannot be achieved. As a result, I reiterate that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare.
6. All Attorneys General who have participated in this appeal agree that a plea agreement should only be repudiated in exceptional and rare circumstances. However, the lawyers’ undertaking analogy can only go so far on the question that occupies us. The analogy can usefully underscore the importance of honouring plea agreements, but it cannot inform the standard against which any repudiation conduct is to be measured. The *Martin Committee Report* made this clear in the same commentary quoted above, stating the following:

Thus, it is plain that resolution agreements must not undermine the integrity of the court, or otherwise bring the administration of justice into disrepute. While 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 these two values clash, the latter must prevail. [p. 314]

As a result, the argument that a plea agreement can simply be characterized as a contractual undertaking must fail.

3.6 *The Reasonably Defensible Test*

1. This Court was also urged, as was the application judge, “to equate the ability of the Attorney General to resile from a plea agreement to the ability of a trial judge to reject a joint submission on sentence since both are predicated on the concept of bringing the administration of justice into disrepute” (trial decision, at para. 17). The Crown advanced this argument in first instance but subsequently resiled from this position. The application judge accepted this argument and, based on his review of the appellate jurisprudence on joint submissions, crafted the “reasonably defensible test” as the appropriate measure to determine whether there had been an abuse of process in this case. The central question became whether Crown counsel’s plea agreement was “reasonably defensible”. Having determined that it was, and without further considering the circumstances surrounding the ADM’s decision to repudiate, the application judge concluded that the repudiation of the plea agreement amounted to an abuse of process.
2. The Court of Appeal held that the application judge erred in multiple ways by adopting this approach. I agree with Paperny J.A.’s analysis on this point. As she noted, the application judge’s mistaken approach not only had the effect of reversing the onus of proof, his “selected framework for analysis caused him to ask the wrong question”. Instead of reviewing Crown counsel’s decision to enter into the plea agreement to see if it was defensible, he should have reviewed the circumstances surrounding the repudiation to determine whether *that* decision amounted to an abuse of process (para. 45).
3. The selected framework of analysis also occasioned a more fundamental error. The application judge’s assessment of a decision made in the exercise of prosecutorial discretion for “reasonableness” runs contrary to the principles set out in *Krieger*. Paperny J.A. reiterated these principles, and explained that it is not the role of the court to look behind a prosecutor’s discretionary decision to see if it is justified or reasonable in itself (paras. 46-49). By straying into the arena and second-guessing the decision, the reviewing court effectively becomes a supervising prosecutor and risks losing its independence and impartiality. Due regard to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions puts such decisions “beyond the legitimate reach of the court” (*Krieger*,atpara. 32). Thus, the court does not assess the reasonableness or correctness of the decision itself; it only looks behind the decision for “proof of the requisite prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate” (Court of Appeal decision, at para. 49).
4. Quite apart from this fundamental difficulty with the reasonably defensible test, I would add that, conceptually, the analogy to the trial judge’s rejection of a joint submission on sentencing is not particularly helpful in determining the standard against which to measure the repudiation conduct. The sentencing judge who is faced with a joint submission is engaged in a qualitatively different process than the prosecutorial authority faced with the decision of whether or not to resile from a plea agreement. The role of the sentencing judge is to impose a fit sentence, that is, one that “fits” the circumstances of the offence and of the offender as presented to the court. When there is a trial, these circumstances are largely defined by the findings of the court based on the evidence adduced at trial and at the sentence hearing. When the accused pleads guilty, the circumstances of the offence and of the offender are generally determined on the basis of agreed facts. This is particularly so if the plea of guilty is entered pursuant to a resolution agreement. All contentious issues will usually have been ironed out between the Crown and the defence prior to the plea. Counsel certainly have an ethical obligation not to mislead the court about those circumstances, but the fact remains that the judge is presented with the *end product* of the plea negotiations, not with the entire set of circumstances or considerations that went into the mix. By contrast, the prosecuting authority who is faced with the decision whether to honour or to resile from a plea agreement must consider the entirety of circumstances, including the public interest, in proceeding to trial. Thus, sentencing principles relating to joint submissions cannot usefully be transposed in this context.
5. I now turn to the circumstances of this case.

4. Application of the Doctrine of Abuse of Process to This Case

1. Although it is not entirely clear, Ms. Nixon’s claim of abuse of process does not appear to be grounded in an alleged prejudice to her fair trial interests. She certainly alleges that she was prejudiced in various ways by the course of events, but most of the alleged prejudice has nothing to do with trial fairness.
2. First, she describes in an affidavit the emotional and psychological trauma she suffered following the incident and laying of the criminal charges, and then explains how she suffered increased anxiety as a result of the Crown’s change of position. There is no reason to doubt that Ms. Nixon was affected by the course of events as she describes in her affidavit. However, this has no bearing on the fairness of her trial.
3. In addition, Ms. Nixon relies on the application judge’s finding that she was prejudiced because her counsel was led to believe that the evidence of breath samples would not be adduced at trial and, consequently, did not explore that issue at the preliminary hearing. I agree with the Court of Appeal that this finding constitutes a palpable and overriding error, as Crown counsel at the preliminary hearing specifically reserved the right to call the evidence at trial. In any event, as Paperny J.A. rightly noted, there is no obligation on the Crown to present all of its evidence at the preliminary hearing and the evidence can still be tested at trial (para. 51).
4. Finally, Ms. Nixon argues that, if the criminal charges were to proceed to trial, “the giving up of her right to silence would seriously compromise and diminish her defence because of her admission of identity as the driver and that she drove her vehicle carelessly”. She argues further that those admissions would “also restrict the ability of her present counsel to defend her, perhaps ultimately affecting her right to her choice of counsel” (A.F., at para. 139). I see no merit to this argument. The plea agreement was repudiated before Ms. Nixon entered her plea to the reduced charge. Further, the judgment of the Court of Appeal sets aside not only the application judge’s order, but also the resulting plea. Finally, the alleged effect on her counsel’s ability to defend her is entirely speculative.
5. The question, therefore, is whether this case falls in the residual category of cases identified in *O’Connor*. Did the repudiation of the plea agreement, based on all of the circumstances, amount to an abuse of process? In other words, was the Crown’s repudiation conduct so unfair or oppressive to Ms. Nixon, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system?
6. Before discussing the merits of the application, I want to address an important preliminary issue. As stated earlier, the AGBC intervened in this case to emphasize the importance of criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a “threshold determination” that the inquiry is warranted. 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. However, it is my view that evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold. I will explain.
7. As the AGBC rightly points out, mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

1. 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, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. For example, it would not suffice for an applicant to allege abuse of process based on the fact that the Crown decided to pursue the charges against him but withdrew similar charges against a co-accused. Without more, there would be no basis for the court to look behind the exercise of prosecutorial discretion.
2. However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. As everyone agrees, it is of crucial importance to the proper and fair administration of criminal justice that plea agreements be honoured. The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim.
3. This approach is consistent with the principles set out in *Krieger*. Acts of prosecutorial discretion are not immune from judicial review. Rather, they are subject to judicial review for abuse of process. Depending on the circumstances, the repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. In applying the *Krieger* standard to the repudiation of plea agreements, the principles set out in these reasons, notably at paras. 46-48, on the importance of honouring resolution agreements must be kept in mind. Consider, for example, if the repudiation was made arbitrarily, without inquiry into the circumstances leading to the plea agreement, and without regard to any resulting prejudice to the accused. Alternatively, consider if there was evidence of a systemic problem in a particular jurisdiction where Crown counsel regularly and summarily overruled the preceding Crown counsel’s exercise of discretion whenever they disagreed with the terms of the agreed upon plea resolution. In my view, an application judge may well be persuaded in such circumstances that the Crown acted in bad faith or with flagrant impropriety to a degree sufficient to constitute an abuse of process.
4. Thus, it is my view that a threshold showing must be made before the court embarks on a judicial review of an exercise of prosecutorial discretion. Evidence of repudiation meets that threshold.
5. In this case, I agree with the Court of Appeal that there is no evidence to support a finding of abuse of process. While the application judge asked the wrong question and applied the wrong test for abuse of process, he did inquire into the considerations that informed the decision to repudiate, the process adopted, and the conduct of all Crown actors who were involved. In rejecting Ms. Nixon’s claim that the ADM’s decision was made for an improper motive, he concluded that “there is absolutely no evidence” of political interference (para. 22) and “nothing to suggest that [the ADM’s] action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice” (para. 25). There was also nothing improper in the considerations that informed the ADM’s decision to resile from the agreement. The application judge described these considerations as follows (at para. 26):

Those who influenced [the ADM’s] decision to repudiate the resolution agreement took exception to a pair of [Crown counsel’s] conclusions: first, that the analyses of the breath samples provided by Ms. Nixon would be inadmissible at trial and second, that the evidence of Ryan Galloway, who had earlier observed erratic driving by a van with the same licence plate as hers, was too remote in the circumstances to be relevant to the prosecution. In view of those two mistakes, the Assistant Deputy Minister was persuaded that any agreement which permitted Ms. Nixon to escape *Criminal Code* convictions was contrary to the public interest, especially considering that two people had died and another had been orphaned as the result of her driving. He therefore concluded that to honour it would bring the administration of justice into disrepute. [Emphasis added.]

1. The application judge erred by summarily dismissing the ADM’s considered opinion on the ground that the Crown had to show more than “establish that other, even more senior counsel, have reached a different conclusion” than Crown counsel did (para. 27). On this point, the application judge adopted the reasoning of Hill J. in *R. v. M. (R.)* (2006), 83 O.R. (3d) 349 (S.C.J.). However, the approach adopted in *M. (R.)* is based on the erroneous view that “the act of *repudiation* is not an exercise of core prosecutorial discretion” (*M. (R.)*,atpara. 65 (emphasis in original)). Hill J. was thus of the view that, while the plea agreement is not reviewable subject only to abuse of process, the repudiation is governed by the inherent jurisdiction of the court to control its own process (para. 62).
2. As discussed earlier, the ADM’s decision to resile from the plea agreement falls within the scope of prosecutorial discretion. In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown’s alone to make. Reasonable counsel may indeed, and often do, differ on whether a particular disposition is in the public interest in the circumstances of the case. 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.
3. 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. The evidence revealed that there have been only two prior occurrences in Alberta, “one in the 1980s and one within the year prior to the trial in this matter” (Court of Appeal decision, at para. 48). There was also no evidence of abusive conduct in the process leading to the decision to repudiate. I agree with the analysis of Paperny J.A. in this regard (at para. 50):

Further, this is not a case where the repudiation was done “unfairly” or when the discretion of the Attorney General was exercised “irrationally, unreasonably or oppressively”. The ADM carefully reviewed the evidence that was the subject of concern and relied on legal opinions and took guidance from the Ontario Attorney General’s policy to instruct himself on the relevant considerations. Having satisfied himself that the original view of the trial prosecutor was incorrect and that the resulting plea resolution agreement would bring the administration of justice into disrepute, he acted expeditiously in communicating the decision to withdraw the plea resolution agreement to the respondent. He also considered possible prejudice to the respondent and concluded that there would be no such prejudice. The ADM’s conduct, viewed in its totality, cannot be characterized as unfair, unreasonable, oppressive or irrational. The high threshold to find abuse of process has not been met here.

1. Finally, Ms. Nixon was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into. There is no merit to the contention that she suffered prejudice as a result of the repudiation.

5. Disposition

1. For these reasons, the appeal is dismissed.

*Appeal dismissed.*

*Solicitors for the appellant:  Beresh Cunningham Aloneissi O’Neill Hurley, Edmonton.*

*Solicitor for the respondent:  Attorney General of Alberta, Calgary.*

*Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Manitoba:  Attorney General of Manitoba, Winnipeg.*

*Solicitor for the intervener the Attorney General of British Columbia:  Attorney General of British Columbia, Victoria.*

*Solicitors for the intervener the Criminal Trial Lawyers’ Association:  Fleming DePoe Lieslar, Edmonton.*

*Solicitors for the intervener the Criminal Lawyers’ Association (Ontario):  Henein & Associate, Toronto.*