Independence of Attorney General Raised in Alberta Plea Agreement Case

On May 28, 2009, the Alberta Court of Appeal heard a Crown appeal from a Provincial Court decision[1]which held that an accused's Charter rights were violated when the Attorney General revoked a plea bargain with the Crown.[2] The court's decision is pending. At the heart of the dispute is the extent of the Attorney General's independence from judicial review and the Attorney General's right to revoke plea agreements.

On September 2, 2006, Olga Nixon struck the Andriashek family car with her mobile home in an intersection near the town of Andrew, killing the mother and father and injuring their seven-year-old son. Ms. Nixon was charged with two counts of impaired driving causing death, one count of impaired driving causing bodily harm, and parallel counts of dangerous driving causing death and causing bodily harm."[3]

In May 2008, the Crown prosecutor and Ms. Nixon's counsel agreed that Ms. Nixon would plead guilty to careless driving and pay an $1800 fine, substantially less than the potential prison sentence she faced if convicted for impaired driving causing death.[4] On June 25th, one day before Ms. Nixon was to plead guilty, the Attorney General's office revoked the plea agreement and decided to proceed to trial, following review of the case by several members of the Ministry of Justice.[5]

Abuse of Process?

In Provincial Court, Ms. Nixon argued that the revocation of the plea agreement was an abuse of process by the Crown which violated her section 7 *Charter* right not to be deprived of life, liberty and security of the person "except in accordance with the principles of fundamental justice."[6] The Crown contended that the agreement was validly repudiated "because the accused can be restored unprejudiced to her original position" and because if the agreement had been implemented it would have brought "the administration of justice into disrepute."[7]

The abuse of process doctrine traditionally was a narrow doctrine which allowed the court to stay criminal proceedings if compelling the accused to stand trial would violate the principles of fundamental justice. In *R. v. O'Connor*, a unanimous Supreme Court of Canada opened the door for an accused to invoke the abuse of process doctrine as a breach of their section 7 individual rights,

rather than focussing on the integrity of the justice system as a whole.[8]

In *Krieger v. Law Society of Alberta*, the Supreme Court acknowledged the independence of the Attorney General from judicial review, subject to the abuse of process doctrine.[9] The Court favourably quoted from a B.C. Court of Appeal decision: "The independence of the Attorney General, in deciding fairly who should be prosecuted, is also a hallmark of a free society."[10] The Court went on to say, "To subject [decisions regarding who to prosecute] to political interference, or to judicial supervision, could erode our system of prosecution."[11]

In this case at hand, Provincial Court Judge Ayotte found that when the Attorney General exercises discretion to initiate criminal proceedings, such discretion will be open to judicial review.[12] (Thus, when the Attorney General declines to initiate criminal proceedings, the decision will be outside the jurisdiction of the court.)

The court also ruled that Ms. Nixon bore the burden of showing on a balance of probabilities that the Crown had violated her section 7 rights by abuse of judicial process.[13] Relying on Ontario's *Crown Policy Manual* regarding resolution discussions, Justice Ayotte stated that the Attorney General would be justified in revoking the plea agreement on the grounds that it would bring the administration of justice into disrepute *only* if the Crown prosecutor's decision to make the plea agreement was not "reasonably defensible."[14]

In concluding that the Crown prosecutor's decision to make the plea bargain was "reasonably defensible," Justice Ayotte focused on the breath samples taken from Ms. Nixon at the scene of the accident and the "fine line" between careless driving and dangerous driving. The court found that the prosecutor reasonably concluded that the breath samples could not be admitted at trial, and that the lack of eyewitnesses would make a dangerous driving conviction less likely.

As a result, the plea agreement was "reasonably defensible" and did not bring the administration of justice into disrepute. Ms. Nixon's claim that her *Charter* rights were violated by the Attorney General's abuse of process was upheld and the plea agreement was restored as a remedy under section 24 of the *Charter*.

Lobbying the Attorney General: Political Interference?

Judge Ayotte also dealt with Ms. Nixon's claim that political interference had led to the Attorney General's decision to revoke the plea agreement. He found there were "totally inappropriate" efforts by the victims' relatives to influence the prosecution, including: threats to involve Mothers Against Drunk Driving, letters to the Attorney General, and threatening to call in Premier Stelmach's

intervention as “a friend of the family.”[15] In *Krieger*, the Supreme Court stated: “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.”[16] Here, Justice Ayotte determined there was “absolutely no evidence” of political interference in Ms. Nixon’s case.[17]

The Alberta Court of Appeal has not yet ruled on the Crown’s appeal of the Provincial Court decision.

Further Reading

“Crown Prosecutors’ Policy Manual” *Alberta Justice* (15 January 2009).

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[1] *R. v. Nixon*, 2008 ABPC 20.
[2] Renata D’Aliesio, “Court to rule on attorney general’s right to quash plea agreements” *Edmonton Journal*(28 May 2009).
[3] *Supra* note 1 at para. 2.
[4] *Ibid*. at para. 4.
[5] *Ibid*. at para. 5.
[6] *Ibid*. at para. 6.
[7] *Ibid*. at para. 17.
[8] *Ibid*. at paras. 8-9; [1995] 4 S.C.R. 411.
[9] *Ibid*. at para. 1; [2002] 3 S.C.R. 372 .
[10] *Krieger*, at para. 32; *Re Hoem and Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.) at 254.
[11] *Ibid*.
[12] *Supra* note 1 at para. 12.
[13] *Ibid*. at para. 13.
[14] *Ibid*. at para. 19.
[15] *Ibid*. at para. 21.
[16] *Krieger*, at para. 30.
[17] *Supra* note 1 at para. 21.