July 18, 2011

Pleading Fairly

By Alice Woolley

Cases Considered:
R. v. Nixon 2011 SCC 34

Introduction

In its June 3, 2011 Throne Speech, the Canadian government announced its plan to introduce an omnibus crime bill. Based on the limited information provided in the Speech, it appears that this legislation will increase the sanctions for some crimes, and eliminate judicial discretion on some matters of criminal sentencing:

> Our Government will move quickly to reintroduce comprehensive law-and-order legislation to combat crime and terrorism. These measures will protect children from sex offenders. They will eliminate house arrest and pardons for serious crimes. They will give law enforcement officials, courts and victims the legal tools they need to fight criminals and terrorists. Our Government will continue to protect the most vulnerable in society and work to prevent crime. It will propose tougher sentences for those who abuse seniors and will help at□risk youth avoid gangs and criminal activity. It will address the problem of violence against women and girls (Throne Speech, p. 12).

The Throne Speech emphasized that the purpose of this legislation would be to protect "the personal safety of our citizens" and to "place the interests of law-abiding citizens ahead of criminals" (Throne Speech, p. 12).

It seems reasonable to guess that the way proponents of this legislation imagine it working is that a criminal accused will be charged in a way that reflects the crime that was committed. The accused will be tried and convicted of those charges, and sentence will follow as a matter of course, as the legislation provides. The legislation will eliminate scandalous examples of misplaced judicial discretion leading to lighter sentences such as house arrest for violent assault.

What the proponents do not note (and may or may not be aware of) is that when you take discretion in sentencing away from a judge, you effectively give that discretion to someone else, namely, the Crown prosecutor. The Crown prosecutor has the discretion to determine whether to prosecute the charge the police have laid, whether to enter a stay of proceedings, whether to accept a "guilty plea to a lesser charge", whether to "withdraw from criminal proceedings" and whether to "take control of a private prosecution" (*Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 at 394). If an accused is charged with several offences, the sentences for which vary under law, the prosecutor has the discretion to agree that the accused may plead guilty to one of

the lesser offences, thereby avoiding the application of the minimum sentence associated with the more serious offence.

The existence of mandatory minimum sentences for some criminal offences, and the elimination of judicial discretion in sentencing, increases the power of the prosecution relative to an accused with whom the prosecutor is negotiating a plea agreement. This disparate prosecutorial power has been a notable feature of the criminal justice system in the United States, where police may charge aggressively, and mandatory minimum sentences exist across the criminal law (and of course the death penalty may apply). Some prosecutors have used these features of the criminal law to exact guilty pleas even from innocent accused, and criminal defence lawyers may advise innocent clients to accept a plea agreement simply because the downside risk of proceeding to trial is too onerous to contemplate (See, e.g., Abbe Smith, *Case of a Lifetime: A Criminal Defense Lawyer's Story* (New York: Palgrave McMillan, 2008) pp 40-44). In Canada a defence lawyer may not ethically advise an innocent client to accept a plea agreement (since the innocent client would have to mislead the court in attesting to the "facts" of his guilt); however, that ethical restriction simply complicates the job of those lawyers in the face of the reality that mandatory minimum sentences and removal of judicial discretion in sentencing creates: criminal accused are incented to accept plea agreements even when they are innocent.

In light of this proposed change to Canadian criminal law, the Supreme Court's decision in *R. v. Nixon* 2011 SCC 34, in which it unanimously upheld an earlier decision of the Alberta Court of Appeal, has particular salience. The decision affirms the discretion of prosecutors over the process of plea agreements, although maintaining some judicial scrutiny in cases where the exercise of prosecutorial discretion may amount to an abuse of process. This blog reviews that decision, and suggests that while legally coherent and justifiable, the effect of *Nixon* in the context of these proposed changes to the criminal law, will be to further enhance the power of Crown prosecutors to exact concessions from accused.

Summary

Olga Nixon was accused of offences relating to allegations that she had driven her RV through a stop sign, collided with another vehicle, killed the husband and wife driving the vehicle and seriously injured the couple's seven-year-old child. She was charged with offences related to drunk and dangerous driving. Because of the trial Crown's concerns about the admissibility and plausibility of breathalyzer and eyewitness evidence, the Crown offered a highly favourable plea to Ms. Nixon, under which she would plead guilty to careless driving, and the Crown and defence would jointly recommend an $1800 fine (*Nixon*, para. 7-8). Before the plea was finalized, it was brought to the attention of the Acting Assistant Deputy Minister (ADM), who commenced an inquiry into the plea, as a result of which the trial was adjourned. The defence was not at that time advised about the reasons for the adjournment (para. 9). The ADM obtained additional legal opinions about the case, and as a consequence concluded that the "Crown counsel's assessment of the strength of the case was flawed as he had failed to consider the totality of the evidence" (para. 10). He further concluded that the proposed plea was "contrary to the interests of justice and would bring the administration of justice into disrepute" (para. 10). In addition, Ms. Nixon had suffered no prejudice if the plea was withdrawn.

Ms. Nixon was advised of this outcome and brought a section 7 Charter application alleging abuse of process. Her application was granted by the application judge but overturned by the Alberta Court of Appeal, whose decision was affirmed by the Supreme Court of Canada.

The facts were not contested, but the application raised two legal issues. First, is resiling from a plea agreement a matter of prosecutorial discretion, such that a court may not review the prosecutor's decision absent an abuse of process? Second, how should the doctrine of abuse of process be applied to a prosecutorial decision to resile from a plea agreement?

The Supreme Court of Canada held that resiling from a plea agreement was a matter of prosecutorial discretion. Its decision in this respect seems obvious and uncontroversial. The heart of prosecutorial discretion is the decision about whether and how to proceed with charges against an accused; entering into a plea agreement is a matter of prosecutorial discretion and resiling from a plea agreement appears equally to be so. As the Court noted unanimously, 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" (para. 30).

The Court held, however, that once a plea agreement has been entered into, it should rarely be withdrawn. The Court noted that plea agreements are essential to the functioning of the legal system, and as a consequence, "the *binding effect* of plea agreements is a matter of utmost importance to the administration of justice" (para. 47 – emphasis in original). The "situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare" (para. 48).

As a consequence, any decision by the Crown to resile from a plea agreement will automatically trigger a review of that exercise of prosecutorial discretion to determine whether it constituted an abuse of process. Because repudiation of a plea agreement "is a rare and exceptional event" the fact of repudiation alone "provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process" (para. 63). This decision is significant, because generally a court may not review an exercise of prosecutorial discretion unless the party alleging abuse of process establishes a "proper evidentiary foundation" for the court undertaking that review (para. 60). Here an accused need only show that the Crown withdrew its plea, and then it will be up to the Crown to "explain why and how it made the decision not to honour the plea agreement" (para. 63). The accused will retain the obligation of showing that an abuse of process occurred, but "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" (para. 63).

On the facts of the case, the Court held that there was no abuse of process established. To constitute an abuse of process it must be shown either that the Crown's conduct interfered with trial fairness or "undermines the integrity of the judicial process" (para. 36, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411.) Here Ms. Nixon did not present any information to suggest that she could not receive a fair trial, and she also could not demonstrate "prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate" the plea agreement (para. 68). Her appeal was dismissed.

Analysis

Given the observations above about the significance of prosecutorial discretion in a criminal justice system that mandates minimum sentences and reduces judicial discretion, does the Supreme Court's decision strike the right balance? The decision accurately and appropriately applies past precedent on prosecutorial discretion – the argument that resiling from a plea agreement falls outside of the *Krieger* categories is not very compelling. It also both emphasizes the importance of a prosecutor not resiling from a plea agreement, and enables easier judicial

review of those decisions through its determination that evidence a Crown has resiled from a plea agreement is alone sufficient to trigger a review of that decision to see if it constitutes an abuse of process. However, the abuse of process standard is so high, and the ability of Crown counsel to offer moderately plausible reasons for any decision to resile so straightforward, the case also seems to remove legal barriers to a Crown withdrawing from a plea agreement.

In so doing it creates the possibility that a trial Crown could push an accused to accept a plea to a more serious charge than the accused might otherwise accept. The Crown could suggest to the accused or the accused's lawyer that unless the accused accepts the proposed agreement senior people within the Attorney General's office will resile from it later – a sort of "good cop/bad cop" negotiating strategy. Counsel for the accused – or an unrepresented accused – will in that case have to negotiate not just with the trial Crown, but also with the specter of other Crowns who might push for a tougher deal. This may not in practice change how trial Crowns operate since ethical Crown lawyers understand fully the ethical duties they have to the administration of justice in negotiating a plea agreement. However, it does slightly shift the power of plea negotiations towards the Crown in a context in which the Crown's power to extract favourable plea agreements from an accused is already increasing.

That outcome is unsettling. It means that appropriate outcomes will rest in many cases only on the ethics and propriety of individual Crown counsel. While those ethics should not be doubted without some basis for doing so, ethical systems that depend on the good will and propriety of individual actors are not overwhelmingly successful, particularly where the incentives to act more aggressively than those ethical obligations permit – obtaining a higher conviction rate – are meaningful.

Ultimately the problem that this blog addresses is less about the conduct of Crown counsel in entering plea agreements, than with a proposed shift in the criminal law which purports to eliminate discretion to protect the law-abiding, but appears rather simply to shift that discretion to a place where it is the least public, the least accountable and the least subject to meaningful judicial scrutiny and oversight. The Supreme Court's decision in *R. v. Nixon*, while reasonable and doctrinally justifiable, enhances that effect and problem.