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Defining Prosecutorial Discretion (With an Invitation to the Court to Re-define Abuse of Process)

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Case Commented On: *R. v. Anderson*, 2014 SCC 41

With its unanimous judgment in *R. v. Anderson*, 2014 SCC 41, the Supreme Court has clarified the scope of "prosecutorial discretion", distinguishing it from matters that go only to "tactics and conduct before the court" (para 35) while confirming its application to a "wide range of prosecutorial decision making" (para 45). The Court also confirmed the non-reviewable nature of prosecutorial discretion absent demonstration of an abuse of process, and reviewed the law governing assessment of an abuse of process. Finally, the Court held that Crown counsel have no constitutional obligation to consider an accused's aboriginal status when they tender Notice to the accused that the Crown intends to seek the mandatory minimum punishment that may be applicable given that accused's prior convictions.

On the matter of prosecutorial discretion, Justice Moldaver's judgment is persuasive. It is consistent with prior Court decisions on the subject – *Krieger v. Law Society of Alberta*, 2002 SCC 65 and *R. v. Nixon*, 2011 SCC 34 – while also clarifying confusion that had apparently arisen following *Krieger*. The constitutional decision also seems justifiable given that, as the Court points out, the consideration of the accused's aboriginal status is a matter for the trial judge; the Notice offered by the Crown only ensures that the mandatory minimum sentence is properly before a court.

In this brief comment I will summarize the Court's decision and support its approach to prosecutorial discretion. I will also note, however, an issue with the Court's test for establishing abuse of process, and in particular the Court's emphasis on the motivations and intentions of Crown counsel, rather than looking only at the actions taken by the Crown. I suggest that requiring the accused to provide evidence that the Crown has acted in "bad faith" or with "improper motives" (para 55) misdirects the inquiry to the ethics of the actor rather than to the effect of the action. It also places defence counsel in an untenable position given how the law societies have articulated the duty of civility. This latter argument is one that has been made persuasively by Donald Bayne, a criminal defence lawyer in Ottawa, most recently at the Canadian Bar Association's first annual Legal Ethics Forum.

The Decision

Anderson pled guilty to impaired driving contrary to s. 253(1)(b) of the *Criminal Code*, RSC 1985, c C-46. It was his fifth conviction, and the Crown served a Notice that it would be seeking

a mandatory minimum sentence of not less than 120 days imprisonment (para. 6). Anderson argued that the *Criminal Code* provisions imposing the mandatory minimum sentence and requiring the filing of the Notice violated s. 7 of the *Charter* by transferring "what is a judicial function to the prosecutor" (para 7) and violated s 15 because "it deprived an Aboriginal person of the opportunity to argue for a non-custodial sentence" (para 7).

The trial judge accepted this argument, holding that the Crown must "provide justification for relying on the Notice" in all cases, and that the legislative provisions violated s 15 if applied to Aboriginal offenders. He sentenced Anderson to 90 days in prison and imposed two years' probation and a five-year driving ban (para 8).

The Newfoundland and Labrador Court of Appeal denied the Crown's appeal of this decision, holding that the Crown must consider an accused's aboriginal status. The Crown had to include a "*specific* direction to consider the offender's Aboriginal status" (para 9, emphasis in original). The majority of the Court of Appeal also held that tendering the Notice was not part of the Crown's "core prosecutorial function" (para 10).

The Supreme Court rejected the constitutional argument and allowed the Crown's appeal. It held that the constitutional argument "conflates the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that applies only to judges" (para 20). A constitutional issue would arise if "a mandatory minimum regime requires a judge to impose a disproportionate sentence" (para 25); it does not arise simply because a prosecutor puts the mandatory minimum before a court. Further, the Court did not accept that imposing a constitutional requirement on the Crown to consider an accused's aboriginal status in exercising its prosecutorial discretion was consistent with fundamental justice. It would rather be "contrary to a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts" (para 30). It would make a matter that is not properly subject to judicial oversight "up for routine judicial review," which would be "contrary to our constitutional traditions" (para 32).

The Court went on to consider whether, apart from constitutional grounds, the Crown's "decision to tender the Notice is reviewable in some other way, and if so, under what standard" (para 34). The Court held that the decision to issue the Notice was a matter of prosecutorial discretion and, as such, was "*only* reviewable for abuse of process" (para 36, emphasis in original). Prosecutors have independence in their exercise of their discretion to ensure their freedom from "judicial or political interference" and to allow them to fulfill "their quasi-judicial role as 'ministers of justice'" (para 37). Contrary to what has been suggested by some courts subsequent to the *Krieger* decision, there are not "core" and "outside the core" exercises of discretion (para 43); rather, prosecutorial discretion is a single "expansive term that covers all 'decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it'" (para 44). This covers a "wide range of prosecutorial decision making" (para 45) and includes repudiation of a plea agreement, pursuing a dangerous offender application, preferring a direct indictment, proceeding by summary conviction or indictment, charging an accused with multiple offences, negotiating a plea or pursuing an appeal (para 44). And it includes tendering the Notice, given that it "fundamentally alters the *extent* of prosecution" (para 62, emphasis in original)

What prosecutorial discretion does not include are "tactics or conduct before the court" (para 57) or the satisfaction of constitutional obligations, such as providing proper disclosure: "prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence" (para 45).

Prosecutorial discretion can be reviewed for abuse of process – i.e., to determine if it "'undermines the integrity of the judicial process' or 'results in trial unfairness'" (para 49). Also relevant is whether there are "'improper motive[s]' and 'bad faith'" (para 49). If a Crown decision was "motivated by prejudice against Aboriginal persons [it] would certainly meet this standard" (para 50).

To require the Crown to explain its decision the applicant must establish a "proper evidentiary foundation" for the allegation of an abuse of process (para 52); "prosecutorial authorities are not bound to provide reasons for their decision, *absent evidence* of bad faith or improper motives" (para 55, citing *Sriskandarajah v. United States of America*, 2012 SCC 70), emphasis added by Court). A failure to comply with a Crown policy may be relevant to establishing the evidentiary threshold, but "Crown policies and guidelines do not have the force of law, and cannot themselves be subjected to *Charter* scrutiny in the abstract" (para 56)

Where a matter is not one of prosecutorial discretion, but is rather a matter of tactics and conduct, it is subject to the courts' "inherent jurisdiction to ensure that the machinery of the court functions in an orderly and efficient manner" (para 58). The Court also noted, however, that tactical decisions by lawyers are subject to "a high degree of deference" (para 59), and that sanctions should be directed at the "conduct of the *litigants*" but not at the "conduct of the *litigation*" (para 59, emphasis in original). These matters may also be reviewed for abuse of process "but abuse of process is not a precondition for judicial intervention as it is for matters of prosecutorial discretion" (para 61).

Comments

As noted at the outset, Justice Moldaver's analysis of the scope of prosecutorial discretion makes sense, and is consistent with the Court's original approach in *Krieger*. In *Krieger* the Court considered the propriety of law society discipline of Crown prosecutors, and noted that while exercises of prosecutorial discretion are not generally susceptible to law society review (absent egregious impropriety), Crown conduct that does not fall within prosecutorial discretion may be subject to law society review. In *Krieger* the Court had said that "prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger* at para 47; cited in *Anderson* at para 40). The Court's definition of prosecutorial discretion in *Anderson* tracks that definition exactly, and appropriately eschews the idea that a decision can be sort of within prosecutorial discretion, any more than one can be sort of pregnant.

There is, however, some reason to be concerned with the Court's continued linking of abuse of process to a demonstration that the Crown has acted with improper motive or bad faith. There are two difficulties with this emphasis. First, it assesses the propriety of conduct through the motivations or intentions of the actor. While the personal motivations or attitude of a Crown prosecutor may be relevant for a disciplinary hearing, it is hard to see its relevance to the determination of whether conduct undermines the administration of justice. Well-intentioned idiocy that undermines the integrity of the trial process or results in trial unfairness should be as concerning to the court as malicious decisions do so; the effect on the accused and on justice – which is the real concern – is the same in either event.

Further, and this is the point made by Donald Bayne, emphasizing the *mala fides* of the Crown counsel as part of the test for abuse of process places defence counsel in an impossible position, in which their legal obligations conflict. On the one hand is the need to raise issues of trial fairness, and to frame those issues in the relevant legal terms – i.e., with reference to the

improper motives and bad faith of the Crown. On the other hand is the obligation of defence counsel to honour their duty of civility, which has been held to preclude personal attacks on opposing counsel, including prosecutors (See, e.g., *Groia v. Law Society of Upper Canada* 2013 ONLSAP 41 at para 10). If the defence counsel suggests that the Crown acted with improper motives or bad faith that could be construed as a personal attack, yet if the counsel does not allege improper motives or bad faith she will not establish an evidentiary basis for the court to consider whether there has been an abuse of process.

While one response to this is for law societies to refrain from disciplining defence lawyers who make allegations of an abuse of process, another response is for the Court to shift the emphasis in abuse of process cases to the conduct rather than the motives for the conduct. Such an approach makes more sense given that the purpose of abuse of process is to protect the administration of justice, not to explore the ethics of Crown lawyers. And given the ongoing (although tempered) enthusiasm of Canadian law societies for civility regulation, a shift in the abuse of process doctrine may be a more realistic response to this dilemma than an elimination of civility regulation for defence counsel (see this paper I wrote in 2013 indicating the number of civility prosecutions: Uncivil by Too Much Civility).