

A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v Nixon*

*Ari Linds**

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Introduction

R v Nixon gave the Supreme Court of Canada a real opportunity to wrestle with the Crown’s repudiation of plea agreements.¹ Crown withdrawal from a plea bargain is rare, but it can cause great prejudice to the accused and significantly undermine public confidence in the administration of justice. On the other hand, the Supreme Court has held that the complexities inherent in the decision to prosecute are not well-suited to judicial review and necessarily require insulation.² In effect, the Crown’s decision to withdraw a plea agreement in *Nixon* sparked a debate where each side argued that its position best protected the integrity

* JD, Common Law Section, Faculty of Law, University of Ottawa. I would like to thank three anonymous reviewers for their helpful suggestions. My thanks in particular to Professor Elizabeth Sheehy for her comments on earlier drafts of this paper and for her encouragement. All errors and omissions remain my own.

1. 2011 SCC 34, [2011] 2 SCR 566 [*Nixon* SCC], aff’g 2009 ABCA 269, 464 AR 1 [*Nixon* ABCA], rev’g 2008 ABPC 20, 445 AR 111 [*Nixon* ABPC].

2. *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 32, [2002] 2 SCR 372.

of the criminal justice system. It should come as no surprise, then, that such a withdrawal forced the Court in *Nixon* to examine the scope of prosecutorial discretion, the availability of judicial review of the exercise of this discretion, the function of plea agreements and the doctrine of abuse of process.

The central question before the Court in *Nixon* was whether the Crown's repudiation of a plea agreement was a matter of "prosecutorial discretion", which would be reviewable only for abuse of process, or a matter of "tactics and conduct", which would be governed by the court under its inherent jurisdiction to control its own process.³ Following its decision in *Krieger v Law Society of Alberta*, the Court held that the decision to repudiate a plea agreement is properly understood as an exercise of prosecutorial discretion. I argue that in so holding, the Court failed to seize the opportunity before it to improve transparency, strengthen accountability and protect trial fairness within our criminal justice system. Although the Court acknowledged and emphasized that Crown repudiation of plea agreements must remain rare, it decided to limit judicial review of prosecutorial discretion to the doctrine of abuse of process. This decision improperly insulates repudiation from review, disregards the potential for serious prejudice to the accused (particularly to those who are at-risk or vulnerable), and risks undermining public confidence in the administration of justice.

I. Case History

Nixon is an impaired and dangerous driving case—a particularly bad one. The accused drove her motorhome through an intersection and struck another vehicle, killing Wade and Karen Andriashek and injuring their seven-year-old son, Jessie. Nixon was charged with several *Criminal Code* offences, including operating a motor vehicle with more than the legal limit of alcohol in her blood, two counts of impaired driving causing death, one count of impaired driving causing bodily harm, and parallel charges of dangerous driving causing death and causing bodily harm.⁴

3. *Nixon* SCC, *supra* note 1 at para 18.

4. See *Nixon* ABPC, *supra* note 1 at para 2; *Criminal Code*, RSC 1985, c C-46, ss 249 (3)-(4), 253(2)-(3.3).

Crown counsel Gordon Hatch had concerns about the admissibility of Nixon's breathalyzer test results and the quality of the eyewitness evidence available at the scene of the accident.⁵ Consequently, he decided to enter into a plea agreement with the accused to a charge of careless driving under Alberta's Traffic Safety Act,⁶ and agreed to a joint sentencing recommendation for a fine of \$1 800. Before the plea bargain could be put before the court for sentencing, Gregory Lepp, the Assistant Deputy Minister (ADM) of Alberta Justice and Solicitor General's Criminal Justice Division ordered Hatch to withdraw it. The ADM concluded that Hatch's assessment of the strength of the case and the totality of the evidence was flawed. In Lepp's view, a plea to careless driving would have been contrary to the interests of justice in these circumstances, and would have brought the administration of justice into disrepute. In other words, the integrity of the justice system would have been harmed by not proceeding to trial.

Defence counsel brought an application in the Alberta Provincial Court to require the Crown to honour the plea agreement.⁷ The defence claimed that the repudiation was an abuse of process and a breach of Nixon's right to security of the person under section 7 of the *Charter*.⁸ The application judge, Ayotte J, held that the decision to repudiate was a matter of tactics and conduct, rather than an exercise of prosecutorial discretion, and was thus subject to review by the court. He reasoned that

5. See *Nixon ABPC*, *supra* note 1 (Mr. Hatch was concerned, "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" at para 26).

6. RSA 2000, c T-6.

7. *Nixon ABPC*, *supra* note 1 at paras 6, 11.

8. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. See *Nixon ABPC*, *supra* note 1 at para 13:

Ms. Nixon's right to security of the person is jeopardized by the Crown's repudiation of its plea agreement. She now risks conviction for the criminal offence of dangerous driving causing death, a result which would lead to the likelihood of some form of imprisonment, whereas the resolution to which the Crown had previously agreed would result in a conviction for the considerably less serious provincial offence of careless driving and the likely imposition of a monetary penalty.

although the Crown has the discretion to decide whether to pursue a prosecution, once charges are laid, subsequent decisions on the Crown's part are to be analyzed through the aegis of the Court's process, and "not on Crown discretion".⁹ The test for whether this had been an abuse of process was whether the plea agreement was "reasonably defensible".¹⁰ As Ayotte J found that Hatch's assessment—and the plea agreement—was "reasonably defensible", the ADM's repudiation was not justified.¹¹ The restored plea agreement was entered into the record, and Ms. Nixon pleaded guilty to the provincial offence of careless driving, was sentenced to a fine of \$1 800, and acquitted of all charges under the *Criminal Code*.¹²

On appeal by the Crown, the Alberta Court of Appeal reversed the decision on the grounds that the application judge had utilized the wrong test: repudiation of a plea agreement is not a matter of tactics and conduct, but is within the core of the prosecutor's discretion and can thus be reviewed only for abuse of process.¹³ Justice Paperny held that the relevant inquiry under section 7 of the *Charter* for abuse of process is whether there is conduct that either renders a trial unfair or affects the integrity of the justice system itself.¹⁴ Finding no evidence to support either inquiry, the Court of Appeal set aside the acquittals and ordered a new trial on the dangerous driving charges.¹⁵ Nixon appealed to the Supreme Court of Canada.

In endorsing the Court of Appeal's decision, the Supreme Court affirmed that Crown repudiation of a plea agreement is an act of prosecutorial discretion, not a matter of tactics and conduct. Justice Charron, writing for the Court, relied on *Krieger* to clarify the scope of prosecutorial discretion and elaborate the framework for deciding whether an act of prosecutorial discretion is an abuse of process.¹⁶ The Court emphasized

9. *Ibid* at para 12.

10. *Ibid* at para 27, citing *R v M(R)* (2006), 83 OR (3d) 349 at para 67, 42 CR (6th) 186 (Sup Ct J).

11. *Nixon* ABPC, *supra* note 1 at para 52; *Nixon* SCC, *supra* note 1 at para 13.

12. See *ibid* at para 14.

13. *Nixon* ABCA, *supra* note 1 ("[a]pplying the correct test, in my view the decision of the Attorney General to repudiate the plea agreement fell squarely within the core elements of prosecutorial discretion" at para 33).

14. *Nixon* SCC, *supra* note 1 at para 16.

15. *Nixon* ABCA, *supra* note 1 at paras 50, 53; *Nixon* SCC, *supra* note 1 at para 16.

16. *Ibid* at para 19, citing *Krieger*, *supra* note 2.

the constitutionally-supported principle of independence underlying acts of the Crown and how that independence necessarily extends to limiting courts' interference in Crown decision making.¹⁷ It followed that acts of prosecutorial discretion, including repudiation of a plea agreement, are reviewable only for abuse of process.¹⁸ Under section 7 of the *Charter*, an applicant must be able to demonstrate that the repudiation constituted an abuse of process, by establishing either that the act produced an unfair trial or that it undermined the integrity of the judicial process.¹⁹

The Court rejected the “reasonably defensible” test employed by the application judge,²⁰ chiefly because it runs counter to the principles set out in *Krieger* and because such a framework would transform the reviewing court into “a supervising prosecutor”, risking its own impartiality and independence in the process.²¹ It also rejected the analogy between plea agreements and contractual undertakings because plea agreements engage broader public interest considerations, such as the integrity of and the community’s confidence in the administration of justice.²² However, despite placing only minimal limitations on acts of prosecutorial discretion, Charron J explicitly stated that situations where the Crown could properly resile from a plea agreement would be very rare.²³

The repudiation of Ms. Nixon’s plea agreement was one of those rare cases. Applying the framework, the Court ruled that the ADM and Crown counsel in *Nixon* had negotiated in good faith and that the accused had suffered no prejudice as a result of the repudiation but had merely been returned to the position she was in prior to entering the plea agreement.²⁴

17. *Nixon* SCC, *supra* note 1 para 20.

18. See *ibid* at para 31.

19. See *ibid* at para 64.

20. *Ibid* at para 51.

21. *Ibid* at para 52.

22. *Ibid* at para 49.

23. *Ibid* at para 69.

24. *Ibid* at para 70.

II. Abuse of Process As a Limit on Prosecutorial Discretion?

Prosecutors exercise immense power in our criminal justice system. This power tends to be highly discretionary and inherently difficult to define. Roscoe Pound once remarked that discretion is “an authority conferred by law to act in certain conditions or situations in accordance with an official’s or an official agency’s own considered judgment and conscience”.²⁵ He also cautioned that the concept is steeped in a legal fiction—“an idea of morals, belonging to the twilight zone between law and morals”.²⁶

Prosecutors appear mindful of the immense responsibility prosecutorial discretion confers upon them. Famed Nuremberg prosecutor, Robert H Jackson, who was the United States Attorney General and later a Justice of the United States Supreme Court, wrote that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America”.²⁷ More recently, Wayne Gorman, then the Director of Public Prosecutions for Newfoundland and Labrador, stated: “[n]o other participant in the Canadian criminal trial process wields such immense power”.²⁸ Our courts have also found that the exercise of “[prosecutorial] discretion is an essential feature of the criminal justice system”.²⁹ Additionally, a rich body of literature has bolstered the exercise of

25. “Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case” (1960) 35:4 NYUL Rev 925 at 926.

26. *Ibid.*

27. “The Federal Prosecutor” (1940) 24:1 J Am Jud Soc 18 at 18.

28. “Prosecutorial Discretion in a Charter-Dominated Trial Process” (2000) 44:1 Crim LQ 15 at 15.

29. *R v Beare* (1987), [1988] 2 SCR 387 at para 51, 66 CR (3d) 97. Crown attorneys perform an essential “quasi-judicial” function in our criminal justice system, a role famously described by Rand J in *Boucher v R* (1954), [1955] SCR 16, 20 CR 1 (“[i]t cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction. . . . The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility” at 23–24).

prosecutorial discretion by placing it within the rubric of Crown (or Executive) Power and, in some cases, even Royal Prerogative or Privilege.³⁰

Nixon reinforced the legitimacy of prosecutorial discretion by further insulating it from judicial review. The following subsections outline the scope of prosecutorial discretion as articulated by the Court, the high threshold an accused must meet in order to establish an abuse of process, and factors other than abuse of process that restrain the repudiation of plea agreements. I will then go on to identify problems that arise as a result of limiting judicial scrutiny of Crown repudiation to judicial review for abuse of process.

A. The Scope of Prosecutorial Discretion

“Prosecutorial discretion is a term of art”.³¹ What it encompasses, and in particular whether it includes the repudiation of plea agreements, is at the heart of *Nixon*. The Court adopted the principles set out in *Krieger*, which describe prosecutorial discretion as, *inter alia*, the interconnected decisions of whether to initiate, continue or cease prosecution, which includes the discretion to plea bargain:

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; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether and (e) the discretion to take control of a

30. See especially John LJ Edwards, *The Law Officers of the Crown: A Study of the Offices Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London, UK: Sweet and Maxwell, 1964); John LJ Edwards, *Walking the Tightrope of Justice*, prepared for the Royal Commission on the Donald Marshall, Jr Prosecution (Halifax: Province of Nova Scotia, 1989) [Edwards, *Walking the Tightrope*]; Philip C Stenning, *Appearing for the Crown* (Cowansville, QC: Brown Legal Publications, 1986).

31. *Krieger*, *supra* note 2 (“[p]rosecutorial 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” at para 43).

private prosecution. While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.³²

Stated broadly, the Court characterized prosecutorial discretion as encompassing the Crown's decisions "regarding the nature and extent of the prosecution".³³ However, *Krieger* did not leave the scope of prosecutorial discretion boundless:

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.³⁴

Consequently, the *Nixon* Court drew on the need to protect prosecutorial independence and insulate it from review, and held that exercises of prosecutorial discretion to repudiate plea agreements were "only subject to judicial review for abuse of process".³⁵

B. The Limits of the Doctrine of Abuse of Process

The mere act of repudiation is sufficient to trigger a review of the decision for abuse of process.³⁶ While repudiation of a plea agreement is not immune from judicial review altogether,³⁷ the doctrine of abuse of process is the only safeguard for an accused in the event that the Crown withdraws the plea agreement. In other words, although the threshold to satisfy the court that it ought to review the exercise of prosecutorial discretion is easily met by the mere fact that there has been a repudiation, the ultimate threshold to establish abuse of process is a high one with requirements that are unduly onerous given what is at stake, and rarely satisfied.

32. *Nixon* SCC, *supra* note 1 at para 21 [emphasis in original, references omitted], citing *Krieger*, *supra* note 2 at paras 46–47.

33. *Ibid* at para 47.

34. *Ibid*.

35. *Nixon* SCC, *supra* note 1 at para 31 [emphasis in original].

36. See *ibid* at para 63.

37. *Ibid* at para 64.

Although prosecutorial misconduct has not been the subject of extensive abuse of process case law, it is consistent and clear.³⁸ In *R v Jewitt*,³⁹ the Supreme Court affirmed that a trial judge has a residual discretion to stay proceedings to remedy abuse of process. The threshold is high. A stay of proceedings would be appropriate only “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”, or where proceedings are “oppressive or vexatious”.⁴⁰

Ten years later, in *R v O’Connor*,⁴¹ the Court reviewed the common law doctrine of abuse of process in the context of the *Charter* and found that the extent of the overlap between the two regimes left little justification for keeping them distinct.⁴² Consequently, the Court held that depending on the alleged abuse of process, some claims would be better suited to a specific procedural guarantee. It then went on to identify two categories of abuse of process that would fall under section 7: prosecutorial conduct affecting the fairness of the trial and prosecutorial conduct that “contravenes fundamental notions of justice and thus undermines the integrity of the judicial process”.⁴³ Under the first branch, the complainant must establish the requisite degree of prejudice, but need not prove any prosecutorial misconduct. For example, in the earlier case of *R v Keyowski*, it was held that a series of trials against the same accused could constitute an abuse of process affecting trial fairness, even absent prosecutorial misconduct or improper motivation.⁴⁴ By contrast, the second branch focuses on the public’s confidence in the fair administration of justice, as was illustrated in *R v Conway*, where “[t]he prosecution [was] set aside, not on the merits, but because it [was] tainted

38. This may be due to the fact that while abuse of process is a longstanding legal concept, particularly in the context of administrative law, “its widespread application in Canadian criminal law is a relatively recent phenomenon”. Robert J Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 87. See also Robert J Frater, “The Seven Deadly Prosecutorial Sins” (2001) 7:1 Can Crim L Rev 209. But see Morris Manning, “Abuse of Power by Crown Attorneys” in *The Abuse of Power and the Role of an Independent Justice System in its Regulation and Control* (Toronto: Law Society of Upper Canada, 1979) at 571.

39. [1985] 2 SCR 128, 47 CR (3d) 193.

40. *Ibid* at 136–37, citing *R v Young* (1984), 46 OR (2d) 520 at 551, 40 CR (3d) 289 (SC CA).

41. [1995] 4 SCR 411, 44 CR (4th) 1.

42. *Ibid* at para 73.

43. *Ibid*.

44. [1988] 1 SCR 657, 62 CR (3d) 349.

to such a degree that to allow it to proceed would tarnish the integrity of the court”.⁴⁵

According to the Court in *Nixon*, there is no abuse of process in the mere act of repudiation. Justice Charron found that plea agreements are not like contractual undertakings, and the Crown’s repudiation cannot be measured by the same standards that would apply to a private law lawyer’s contractual undertaking.⁴⁶ She agreed with the Martin Report that plea agreements are “in the nature of undertakings” and, furthermore, that honouring them is not only “ethically imperative” but also a “practical necessity”.⁴⁷ However, regarding the plea resolution as a binding contract “completely ignores the public dimension of a plea agreement”.⁴⁸ To decry repudiation absent prejudice to the accused or proof of misconduct would be to follow the application judge’s fundamental error of asking whether the decision to repudiate was reasonable or defensible: “[The] decision to resile from the plea agreement falls within the scope of prosecutorial discretion . . . 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’”.⁴⁹

C. The Prevalence of Plea Agreements and Practical Limits on Repudiation

Our system of criminal justice is so reliant on plea arrangements that without them “the administration of justice could not operate efficiently

45. [1989] 1 SCR 1659 at 1667, 70 CR (3d) 209 (where the prosecution’s attempt to hold a third murder trial following a set-aside verdict and a mistrial amounted to an infringement upon the accused’s right to be tried within a reasonable time as guaranteed by section 11(b) of the *Charter*).

46. *Nixon* SCC, *supra* note 1 at para 49.

47. *Ibid* at para 46, citing The Honourable G Arthur Martin (Chair), *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Ontario: Attorney General, 1993) [Martin Report] (these agreements “dispose of the great bulk of the contentious issues that come before the criminal courts in Ontario” at 312–13).

48. *Nixon* SCC, *supra* note 1 at para 44. See also Alberta, Law Society of Alberta, *Code of Professional Conduct*, r 27. But see Robert E Scott & William J Stuntz, “Plea Bargaining as Contract” (1992) 101:8 Yale LJ 1909; Frank H Easterbrook, “Plea Bargaining as Compromise” (1992) 101:8 Yale LJ 1969 [Easterbrook, “Compromise”].

49. *Nixon* SCC, *supra* note 1 at paras 52, 68, citing *Nixon* ABCA, *supra* note 1 at para 49.

and would in fact grind to a halt”.⁵⁰ In 2008 and 2009, 91 per cent of all adult cases in Canadian criminal courts were disposed of without a trial.⁵¹ This is not a new trend. In 1998, 91.3 per cent of all charges in Ontario were resolved without a trial.⁵²

This dependence upon plea bargaining has been heavily criticized.⁵³ Popular critiques of plea agreements zero in on their lack of openness and transparency, and bemoan the death of the trial.⁵⁴ Previously, plea bargaining was rarely criticized, or even admitted, in Canada. As Philip C Stenning has noted, it was only in the late 1970s that the practice emerged “from the dark realms of the unmentionable into the light of informed public debate”.⁵⁵ Today, a large body of literature suggests that our criminal justice system is too reliant on plea bargaining. For example, Ken Chasse suggests that “efficiency is favoured over justice”.⁵⁶ Even so, some law and economics scholars continue to praise plea bargaining, suggesting that it maximizes freedom of choice, autonomy and efficiency.⁵⁷

50. Milica Potrebic Piccinato, *Plea Bargaining*, online: Department of Justice Canada <<http://www.justice.gc.ca>> .

51. Jennifer Thomas, *Adult Criminal Court Statistics, 2008/2009* (28 July 2010), online: Statistics Canada <<http://www.statcan.gc.ca>> .

52. Piccinato, *supra* note 50.

53. This is especially so in the United States, where concern with dependence on plea agreements has become a “virtual obsession”. See John Baldwin & Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (London UK: Martin Robertson, 1977) at 1. See also John H Langbein, “Torture and Plea Bargaining” (1978) 46:1 U Chicago L Rev 3; Stephen J Schulhofer, “Plea Bargaining as Disaster” (1992) 101:8 Yale LJ 1979; Candace McCoy, “Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform” (2005) 50:1 Crim LQ 67. In 2004, about 95 per cent of criminal cases in the United States ended with felony convictions obtained through plea bargaining. See Matthew R Durose & Patrick A Langan, *National Judicial Reporting Program: Felony Sentences in State Courts, 2004* (Washington, DC: Bureau of Justice Statistics, 2007).

54. See Robert P Burns, *The Death of the American Trial* (Chicago: University of Chicago Press, 2009) at 98.

55. *Supra* note 30 at 250.

56. “The Triumph of Plea Bargaining”, Case Comment on *R v Nixon* (2011), 85 CR (6th) 29 at 39.

57. See e.g. Frank H Easterbrook, “Criminal Procedure as a Market System” (1983) 12:2 J Legal Stud 289; Scott & Stuntz, *supra* note 48; Easterbrook, “Compromise” *supra* note 48.

Given that the practice of plea bargaining has become “so ingrained” in the criminal justice system,⁵⁸ it should come as little surprise that attempts have been made to restrain its exercise. In *R v Burlingham*, Iacobucci J insisted that “to the extent that the plea bargain is an integral element of the Canadian criminal process, the Crown and its officers engaged in the plea bargaining process must act honourably and forthrightly”.⁵⁹ The concrete effect of this moral imperative can be seen in Canada’s rejection of equivocal (or *Alford*⁶⁰) pleas—situations where an accused admits the offence but refuses to admit his or her guilt. Although allowed in the United States, Canada has rejected these “pleas of convenience”, wherein defence counsel and the accused, fearing a conviction and a significant custodial sentence, negotiate lesser (often non-custodial) sentences—in spite of the accused’s protestation of innocence.⁶¹ Law Society of Upper Canada rules in Ontario, for example, require lawyers to ensure that their client is prepared to admit all the necessary factual and mental elements of any guilty plea.⁶² An additional limit on Crown attorneys is that they may not attempt to bargain away their statutory right to appeal a sentence.⁶³

Judges play an important supervisory role in plea bargaining. Pre-trial conferences, where a judge engages the Crown and the defence in a discussion of the case’s issues, in order to promote a fair and expeditious

58. *R v Pashe* (1995), 100 Man R (2d) 61, 91 WAC 61 (“I recognize it as a practice so ingrained in the Manitoba justice system that any attempt on my part to discourage it would fare no better than King Canute’s attempt to stem the tide” at para 18, Twaddle JA, dissenting).

59. [1995] 2 SCR 206 at para 23, 38 CR (4th) 265.

60. *North Carolina v Alford*, 400 US 25 (1970).

61. See *Criminal Code*, *supra* note 4, s 606(1.1); *Adgey v R* (1973), [1975] 2 SCR 426, 13 CCC (2d) 177; *R v K(S)* (1995), 24 OR (3d) 199, 99 CCC (3d) 376 (CA). See also Ontario, Law Society of Upper Canada, *Rules of Professional Conduct*, r 4.01(9) [LSUC, *Rules*] (as one example of how law societies address the requirement of an admission of guilt). See also Martin Report, *supra* note 47 at 320.

62. See LSUC, *Rules*, *supra* note 61, r 4.01(9).

63. See *R v Ryazanov*, 2008 ONCA 667, 92 OR (3d) 81.

hearing, are now an entrenched step in most criminal proceedings.⁶⁴ A judge must inquire into whether a self-represented accused is entering a guilty plea voluntarily, and whether the accused understands the nature of the charges, the consequences of pleading guilty to those charges and the fact that the court is not necessarily bound by any agreement between the Crown and the defence.⁶⁵ A sentencing judge may even reject (or “jump”) a joint sentencing recommendation from the Crown and the defence, but must give clear and cogent reasons for rejecting any so-called “broken bargain”.⁶⁶

It is important to note that our dependence on plea bargaining—and our tolerance for plea arrangements—varies greatly with the circumstances of the offence and the accused. Ms. Nixon, while under the influence of alcohol, killed two people and injured their young child.⁶⁷ Canadian prosecutors are less likely to rely on plea agreements to resolve serious offences of this kind.⁶⁸ Plea bargaining accounts for relatively fewer dispositions (roughly one third) of impaired driving offences as compared

64. See e.g. *Criminal Code*, *supra* note 4, s 625.1; *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7, r 28.05(11)-(12); *Criminal Rules of the Ontario Court of Justice*, SI/2012-30, r 4.2(3)(g). For somewhat differing views on what role, if any, judges ought to play in indicating, prior to a guilty plea, their express or tacit approval of a negotiated joint sentencing recommendation from the Crown and the defence, see Ken Chasse, “Plea Bargaining is Sentencing” (2009) 14:1 Can Crim L Rev 55; Martin Report, *supra* note 47; Gerard A Ferguson, “The Role of the Judge in Plea Bargaining” (1973) 15:1 Crim LQ 26.

65. See *Criminal Code*, *supra* note 4, s 606(1.1).

66. Stenning, *supra* note 30 at 339. See *Pashe*, *supra* note 58; *R v Sinclair*, 2004 MBCA 48, 22 CR (6th) 319; *R v McKay*, 2004 MBCA 78, 22 CR (6th) 327; *R v Douglas* (2002), 49 CR (5th) 188, 162 CCC (3d) 37 (Que CA); *R v Cerasuolo* (2001), 151 CCC (3d) 445, 140 OAC 114; *R v Druken*, 2006 NLCA 67, 261 Nfld & PEIR 271; *R v Cromwell*, 2005 NSCA 137, 238 NSR (2d) 17; *R v Nguyen*, 2006 ABCA 56, 380 AR 353; *R v Oxford*, 2010 NLCA 45, 299 Nfld & PEIR 327.

67. See *Nixon* ABCA, *supra* note 1 (“[e]xpert extrapolation concluded that the respondent’s blood alcohol level would have been between 225 and 250 mg.% at the time of the accident” at para 7). Nixon’s blood alcohol level was roughly three times the legal limit of 80 mg per 100 mL, as set out in *Criminal Code*, *supra* note 4, s 253(1)(b).

68. See *R v Muthuthamby*, 2010 ONCJ 435, 79 CR (6th) 64 (describing impaired driving as “an offence that is so obviously wrong, that [it] has been the object of such routine and decades-long public admonition and that is the foremost criminal cause of death in Canada” at para 34).

to criminal offences overall.⁶⁹ The Traffic Injury Research Foundation provides one explanation for this reduced reliance on plea agreements, stating that Crown policies in some jurisdictions effectively “limit the ability of Crown prosecutors to negotiate beyond certain parameters”.⁷⁰ Although Crown policy manuals contain only non-binding directives, guidelines and practice memoranda, they can—and typically do—impose practical limits on Crown discretion. For example, Ontario’s Crown policies dictate under what circumstances decisions to enter into and repudiate plea agreements will be reviewed by higher-ranking officials within the Office of the Attorney General.⁷¹

Generally speaking, Crown Attorneys are aware that public confidence in the administration of justice is tested every time they offer a plea bargain in exchange for a guilty plea to a lesser charge. This is especially so in an impaired driving case involving death.⁷² They are mindful of the Martin Report’s admonition that there is a very real “risk of undermining public confidence in the administration of justice if an offence which appeared very grave at the time of arrest is, when disposed of by an agreed-upon plea, treated as a less serious offence with no explanation offered

69. See Traffic Injury Research Foundation, *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (June 2009) at 55–56, online: TIRF <<http://www.tirf.ca>> [TIRF]. It should be noted that the introduction of ignition interlock programs across many Canadian jurisdictions has increased reliance on plea agreements. Ontario’s Reduced Suspension with Ignition Interlock Conduct Review Program, for example, has encouraged early guilty pleas. A first impaired driving offence that does not cause bodily harm or death may be eligible for a reduced driving suspension of three months (Stream A) or six months (Stream B) instead of the prescribed one year period. See Ryan Freeston & Jessica Mahon, *Reduced Suspension with Ignition Interlock Conduct Review Program* (24 August 2011) at 12, online: Criminal Layers’ Association (Ontario) <<http://www.criminallawyers.ca>>.

70. TIRF, *supra* note 69 at 55.

71. See e.g. Ministry of the Attorney General (Ontario), “Impaired Driving and Road Safety”, *Crown Policy Manual* (21 March 2005); Ministry of the Attorney General (Ontario), “Impaired Driving and Road Safety Offences: Practice and Procedural Issues”, Practice Memorandum No 36, *Crown Policy Manual* (31 March 2006).

72. See e.g. Ministry of the Attorney General (Ontario), “Resolution Discussions”, Practice Memorandum No 16, *Crown Policy Manual* (31 March 2006) [“Resolution Discussions”, Practice Memorandum] (wherein impaired driving offences raise special considerations for prosecutors: “Absent exceptional circumstances that warrant discontinuance on the basis of the public interest, Crown counsel should not withdraw such charges to facilitate a plea resolution” at 4). See also *Muthuthamby*, *supra* note 68 at para 34.

for the change in position”.⁷³ This recently materialized in Manitoba, where a public inquiry concluded that a plea agreement to recommend a conditional sentence in return for a guilty plea to dangerous driving causing death brought the administration of justice into disrepute.⁷⁴

*D. Repudiations Are a “Rare and Exceptional Occurrence”*⁷⁵

The *Nixon* Court did accept that repudiations of plea agreements by the Crown are rare occurrences. The office of the Attorney General of Alberta stated in its factum that there have only been two prior occurrences in that province—one in the 1980s and one in 2008.⁷⁶ Similarly, there appears to be a strong presumption against Crown repudiation in Ontario: the *Crown Policy Manual* stipulates that “[u]nless there are exceptional circumstances, Crown counsel must honour all agreements reached during resolution discussions”.⁷⁷ The *Federal Prosecution Service Deskbook* contains similar guidelines.⁷⁸ Furthermore, a Crown prosecutor, particularly a junior Crown litigating complex matters, will typically

73. Martin Report, *supra* note 47 at 323.

74. Taman Inquiry Into the Investigation and Prosecution of Derek Harvey-Zenk, *Report of the Taman Inquiry* (Winnipeg: Taman Inquiry, 2008) (Mr. Harvey-Zenk, who was a constable with the Winnipeg Police Service and impaired at the time of his arrest, “should have been sentenced to jail and not given a conditional sentence” at 105).

75. *Nixon* SCC, *supra* note 1 at para 69.

76. See *Nixon* ABCA, *supra* note 1 at para 48. Repudiations are far more common where an accused has failed to live up to his or her end of the bargain. See especially *R v MacDonald* (1990), 75 CR (3d) 238, 54 CCC (3d) 97 (Ont CA). But see *R v Smith* (1974), [1975] 3 WWR 454, 22 CCC (2d) 268 (BCSC); *R v Agozzino* (1968), [1970] 1 OR 480 (available on QL) (CA); *R v Crneck* (1980), 30 OR (2d) 1, 116 DLR (3d) 675 (H Ct J).

77. Ministry of the Attorney General (Ontario), “Resolution Discussions”, *Crown Policy Manual* (21 March 2005) at c 180. See also “Resolution Discussions”, Practice Memorandum, *supra* note 72.

78. See Public Prosecution Service of Canada, *Federal Prosecution Service Deskbook 2005*, r 20.3.8.2, online: PPSC <<http://www.ppsc-sppc.gc.ca>> :

All negotiated plea or sentence agreements should be honoured by the Crown unless fulfilling the agreement would clearly be contrary to the public interest. . . . Additionally, Crown counsel may be justified in refusing to fulfil an agreement if misled about material facts. The decision not to fulfil an agreement should only be made after consultation with, and approval of, the Senior Regional Director.

seek advice before finalizing a plea agreement.⁷⁹ Presumably, this would minimize the need to resort to repudiation. Although this consultation happened in *Nixon*,⁸⁰ there have been suggestions that these safeguards were undermined in Alberta by systemic workplace issues in Crown Prosecutors' Offices.⁸¹

The *Nixon* Court also stressed the rarity of repudiation as a matter of principle. Justice Charron referred to the "binding effect" of a plea agreement as being "a matter of utmost importance to the administration of justice".⁸² The criminal justice system's heavy reliance on plea agreements inextricably links their completion to a fair and efficient administration of justice. It follows that repudiations must remain an infrequent exception to a Crown's general practice. Justice Charron was explicit on this point when she "reiterated that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare".⁸³ However, this point is *obiter dicta* and the thrust of the judgment is to affirm a Crown's right to repudiate a plea agreement. In the following sections I outline the consequences of shielding prosecutorial discretion and, after *Nixon*, the repudiation of plea agreements from judicial review.

III. The Difficulties with Finding Crown Repudiation Is Reviewable Only for Abuse of Process

A. Insulating Prosecutorial Discretion from Judicial Review

Prosecutorial discretion is far too insulated from judicial review. It is true that we have come some way from the old categorical denial of jurisdiction, expressed most clearly by the British courts in *Director*

79. See *Nixon* SCC, *supra* note 1 (Factum of the Intervener—Attorney General of Manitoba at para 23).

80. *Nixon* ABPC, *supra* note 1 at para 50.

81. See Glen E Luther, "The Frayed and Tarnished Silver Thread: *Stinchcombe* and the Role of Crown Counsel in Alberta" (2002) 40:3 *Alta L Rev* 567 at 586.

82. *Nixon* SCC, *supra* note 1 at para 47.

83. *Ibid* at para 48.

of *Public Prosecution v Humphrys*⁸⁴ and *Gouriet v Union Post Office Workers*,⁸⁵ and adopted into Canadian law in *Re Saikaly v R.*⁸⁶ However, the *Jewitt*⁸⁷ approach to judicial review of prosecutorial discretion for abuse of process remains strikingly deferential. It effectively immunizes most Crown decisions, including the decision to repudiate plea bargains. At least one commentator considers this approach to be “arguably, both undemocratic and contrary to post-*Charter* public understandings of the rule of law”.⁸⁸

Justice Michael Code, a former senior Crown attorney and Deputy Attorney General for Ontario, acknowledges that there is a problem but warns of the “paralyzing effect that liberal review of Crown decision-making will have on the efficiency of criminal trials and on the separate roles of bench and bar within the adversary system”.⁸⁹ Others are far more categorical. Justice of Appeal Ramsay, another experienced Crown attorney, warned some years ago that if a court reviews exercises of

84. [1976] 2 All ER 497 (HL Eng) (“[a] judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and judges must not be blurred” at 511).

85. [1977] 3 All ER 70 (HL Eng) (“[i]n the exercise of these [discretionary] powers [the Attorney General] is not subject to direction by his Ministerial colleagues or to control and supervision by the courts” at 88).

86. (1979), 48 CCC (2d) 192 (available on QL) (Ont CA) (where the courts declined to review the Attorney General’s decision to prefer a direct indictment).

87. *Supra* note 39 (as noted above, recognizing the common law jurisdiction to stay criminal proceedings due to abuse of process).

88. Melvyn Green, “Crown Culture and Wrongful Convictions: A Beginning” (2005) 29 CR (6th) 262. (Green, a past president of the Association In Defence of the Wrongly Convicted, now a Judge of the Ontario Court of Justice, referring to the prosecutorial power to stay proceedings, stated: “First, it is a peremptory power. But for manifest impropriety, its exercise is unreviewable by the courts. It is a residual Crown prerogative, an exercise of executive power that defies both judicial review and any other form of accountability. . . . It is the Crown saying, ‘I am the Crown. I can do what I want. I don’t have to answer to anyone’” at 270). See also Donna C Morgan, “Controlling Prosecutorial Powers: Judicial Review, Abuse of Power and Section 7 of the Charter” (1986) 29:1 Crim LQ 15; Kent Roach, “The Attorney General and the Charter Revisited” (2000) 50:1 UTLJ 1; Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the *Charter* Era” (2009) 34:2 Queen’s LJ 773.

89. “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009) 34:2 Queen’s LJ 863 at 889.

prosecutorial discretion, it “becomes a supervising prosecutor” and “ceases to be an independent tribunal”.⁹⁰

The objective of protecting prosecutorial independence has become ingrained as an overriding principle, at the expense of other values such as maintaining public confidence in the administration of justice. Indeed, a series of important Canadian cases have reflected that objective exclusively. For instance, a unanimous Supreme Court concluded in *Miazga v Kvello Estate* that the “public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals”.⁹¹ In *R v T(V)*, the Court suggested that exercises of prosecutorial discretion of all kinds were simply ill-suited to review by the courts: “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake”.⁹²

This chorus of cases came to a crescendo in *R v Power*, where the Court said that the “[j]udicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor’s discretion was correctly exercised, would destroy the very system of justice it was intended to protect”.⁹³

Justice Rosenberg, writing extra-judicially, attempted to counter those arguments:

The independence enjoyed by the Attorney General in decision-making, by convention and by law, is not an end in itself, but is part of a system for ensuring that criminal justice is enforced fairly and impartially, in accordance with the rule of law and with due regard to the rights of all those involved in the system, including the accused.⁹⁴

Justice Rosenberg identified what he called “the system of checks and balances that would protect the prosecution function” without

90. “Prosecutorial Discretion: A Reply to David Vanek” (1988) 30:3 Crim LQ 378 at 380.

91. 2009 SCC 51 at para 47, [2009] 3 SCR 339.

92. [1992] 1 SCR 749 at 761, 12 CR (4th) 133, citing *Wayte v United States*, 470 US 598 (1985).

93. [1994] 1 SCR 601 at 627, 117 Nfld & PEIR 269.

94. “The Attorney General and the Administration of Justice” (2009) 34:2 Queen’s LJ 813 at 861–62 [Rosenberg, “Administration of Justice”].

compromising the administration of justice.⁹⁵ In particular, he suggested that the “highly deferential approach to the review of prosecution decisions, evident less than a decade ago in *Power* . . . has given way to a more interventionist tone in *Krieger*”.⁹⁶ To the same effect, Binnie J opined in his dissent in *R v Regan*⁹⁷ that “[w]here objectivity is shown to be lacking [in Crown decision-making], corrective action may be necessary to protect . . . ‘the integrity’ of the criminal justice system”.⁹⁸

Nixon is not in keeping with Rosenberg J’s assessment. Indeed, one could argue that the recognition of any Crown discretion to repudiate plea agreements—even in very exceptional circumstances and controlling for abuse of process—undermines the integrity of the criminal justice system. Both the Criminal Trial Lawyers’ Association (CTLA) and the Criminal Lawyers’ Association (CLA) take that position in their intervener factums in *Nixon*.⁹⁹ The CTLA cautions that “[i]f the Crown creates the expectation of a resolution in the accused, it not only impacts the accused, but the integrity of the system as a whole suffers if that expectation is suddenly and arbitrarily removed”.¹⁰⁰ The CLA warns of a potential “chill [in] plea negotiations between Crown and defence counsel”.¹⁰¹ “[D]efence lawyers”, it says, “need to have confidence in the finality of negotiated agreements reached with front-line Crown counsel with whom they work on a daily basis”.¹⁰² Largely for the same reasons, Patrick Galligan concluded, after examining the most notorious plea bargain in Canadian history (the plea deal with Karla Homolka), that

95. *Ibid* at 818.

96. *Ibid* at 841–42.

97. 2002 SCC 12, [2002] 1 SCR 297.

98. Rosenberg, “Administration of Justice”, *supra* note 94 at 841–42, citing *Regan*, *supra* note 97 at para 168. *Regan* involved charges against a former Premier of Nova Scotia, who had been accused of committing numerous sexual offences against various young women who had worked for or with him. Crown counsel assigned to the case engaged in, among other things, pre-charge interviews of witnesses and judge shopping. The Supreme Court held that while these practices were “troubling”, no abuse of process occurred in this case.

99. See *Nixon* SCC, *supra* note 1 (Factum of the Intervener–Criminal Trial Lawyers’ Association [CTLA]); *Nixon* SCC, *supra* note 1 (Factum of the Intervener–Criminal Lawyers’ Association [CLA]).

100. *Supra* note 99 at para 35.

101. *Supra* note 99 at para 16.

102. *Ibid*.

taking further proceedings against her would have “tarnish[ed], perhaps irremediably, the honour of the Crown and its reputation for rectitude”.¹⁰³

Justice Rosenberg is right to suggest that the traditional conception of prosecutorial discretion as being largely unfettered is waning. He identifies two practices that have led to more openness, transparency and accountability: the practice of giving reasons for prosecutorial decisions, and the publication of prosecutorial guidelines.¹⁰⁴ Citing a 1986 decision by then Attorney General of Ontario Ian Scott to publicly explain his reasons for staying abortion charges that had been laid against Henry Morgentaler and others,¹⁰⁵ Rosenberg J states that “[t]he characterization of their role, to which the Attorneys General and their agents are so attached—that of ministers of justice performing quasi-judicial functions—is incompatible with the Crown’s refusal to provide reasons for pivotal decisions”.¹⁰⁶ Similarly, he agrees with Kent Roach’s view that “guidelines are constitutionally encouraged as a valuable means to make the exercise of prosecutorial discretion more transparent and accountable and to ensure that the promise of fundamental justice is realized”.¹⁰⁷

I suspect that both reasons and guidelines, if carefully implemented, could discernibly improve the judicial review of the repudiation of plea agreements by the Crown. In particular, the availability of reasons would provide a stronger basis for review, especially after *Nixon*, since the first thing a complainant must do when applying for judicial review for abuse

103. *Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka* by Patrick T Galligan (Toronto: ADR Chambers, 1996) at 213. It is important to note that Homolka had already been convicted and sentenced, and had already completed her part of the plea agreement, which was to testify for the Crown against her accomplice, Paul Bernardo. Nonetheless, the point that Crown attorneys rely heavily on reputation to perform their duties still applies. Furthermore, the repudiation of a plea agreement can have the highly deleterious effect of irreparably harming the reputation of a particular Crown prosecutor. See also *R v Goodwin* (1981), 43 NSR (2d) 106, 21 CR (3d) 263 (SC(AD)) (likely illustrating this point concerning relutation when it stated: “[a] bargain is a bargain and, if the Crown does not wish to be bound by it, the simple solution is to make no bargain at all” at 267). See also Allan Hutchinson & Adam Bernstein, “Bargaining in the Shadow of the Courts” (1996) 17:1 Pol’y Options 21 at 25.

104. See Rosenberg, “Administration of Justice”, *supra* note 94 at 850–54.

105. See *Campbell v Ontario (AG)* (1987), 58 OR (2d) 209, 31 CCC (3d) 289 (H Ct J), aff’d (1987), 60 OR (2d) 617, 35 CCC (3d) 480 (CA).

106. Rosenberg, “Administration of Justice”, *supra* note 94 at 854.

107. *Ibid* at 850, citing Roach, *supra* note 88 at 30.

of process is prove that a plea agreement was in fact entered into and then repudiated.¹⁰⁸ Nevertheless, the more enduring impact of reasons and guidelines could simply be in their other salutary effects. For example, in *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court said that the provision of reasons reduces “to a considerable degree the chances of arbitrary or capricious decisions” and “reinforces public confidence in the judgment”.¹⁰⁹

As noted above,¹¹⁰ Crown policies on plea bargaining and repudiation are publicly available in most Canadian jurisdictions, but Manitoba is the only province with a policy that explicitly encourages Crown attorneys to give reasons on the record that explain their exercise of discretion in

108. See *Nixon* SCC, *supra* note 1 at paras 60–63; *R v Cater*, 2011 NSPC 75 at paras 24–28, 30, 308 NSR (2d) 220 (for an interesting application of the evidentiary threshold test to be met by an accused post-*Nixon*).

109. [1999] 2 SCR 817 at para 38, 174 DLR (4th) 193. See also *R v Gill*, 2012 ONCA 607, 295 OAC 345 (for the most recent pronouncement on the benefits of providing reasons: “By offering an explanation, the prosecutor clearly enhances the transparency of his or her decision making process and, hence, the fairness of the proceeding. Those positive consequences are a good reason for the prosecutor to offer an explanation” at para 77, Doherty JA). The principles set out in *Baker* also apply to the publication of prosecutorial guidelines. It has been suggested that making Crown policy manuals publicly available can also reduce the likelihood of political interference by the Minister of Justice in routine prosecutions. See Michael Code, “Crown Counsel’s Responsibilities When Advising the Police at the Pre-Charge Stage” (1998) 40:3 Crim LQ 326 (“[t]he Attorney General’s normal role and responsibility in ordinary criminal cases is to establish broad policy guidelines for Crown counsel, in writing, and then leave it to counsel to apply those policies in individual cases” at 352).

110. See e.g. *supra* notes 71–72, 77–78 and accompanying text.

plea bargaining.¹¹¹ However, nowhere in Canada do prosecutors have to explain in open court why they have repudiated a plea agreement. That should change. A prosecutor should have to give reasons on the record for every repudiation (this requirement would not in any way interfere with the Crown's responsibility to ensure that communications with defence counsel during plea negotiations remain privileged).

Plea negotiation privilege, which enables the Crown and the defence to have "full, frank and private negotiations in criminal cases",¹¹² was not explicitly identified as an issue before the Court in *Nixon*. It must be observed, however, that Charron J did treat Crown repudiation of plea agreements as presumptively unfair and, therefore, as sufficient to displace plea negotiation privilege:

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 [for] . . . 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.¹¹³

111. Department of Justice (Manitoba), *Prosecutions Policy Directive: Plea Bargaining* (Winnipeg: Department of Justice, 2009), online: Department of Justice (Manitoba) <<http://www.gov.mb.ca>> at 3:

[To reduce inaccurate public perceptions of plea bargaining,] Crown Attorneys should, where it is reasonable to do so, attempt to make the plea bargaining process more transparent by providing an explanation on the record of the factors that led to the plea bargain. This is especially important when dealing with a sensitive case. The explanation may involve pointing out the exigencies of the case or explaining what compromises or concessions have been made by the Crown. The explanation need not be lengthy but it should be sufficient for the judge and the public to understand why the Crown is accepting the plea bargain.

C.f. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) (a significant recommendation of the Canadian Sentencing Commission, Canada's first commission of inquiry exclusively devoted to sentencing, was never adopted but closely resembles the Manitoba policy: "[t]he Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers" at 428).

112. *R v Bernardo*, [1994] OJ no 1718 (QL) at para 16 (Ct J (Gen Div)). See also *R v RFS*, 2003 NWTSC 58 (available on QL) (suggesting that the production of the details of plea negotiations may have a "chilling effect on plea negotiations" at para 20).

113. *Nixon* SCC, *supra* note 1 at para 63.

Furthermore, in the post-*Nixon* decision of *R v Cater* in the Nova Scotia Provincial Court, Derrick J found that “[t]here are circumstances where plea negotiations may become evidence before the court” and that “they may lose their privileged status if there is prosecutorial unfairness”.¹¹⁴

In sum, while Crown policy manuals do not create legal duties, a policy requiring prosecutors to explain in open court any decision to repudiate a plea agreement could improve confidence in the administration of justice and limit the risk of prejudice to an accused—the problems I turn to next.

B. Prejudice to the Accused and Confidence in the Administration of Justice

Reneging on a plea agreement after conviction must surely violate the defendant’s right to a fair trial.¹¹⁵ It is hard to imagine how that repudiation would not meet the *Jewitt* threshold.¹¹⁶ By contrast, repudiation of the arrangement before a plea has been entered in court, as was the case in *Nixon*, was held to be far less clear-cut. The *Nixon* Court heard compelling arguments in favour of being less equivocal. In their submission for the CLA in *Nixon*, Marie Henein, Louis Strezos and Matthew Gourlay argued that the right to a full and fair defence is almost surely compromised by every act of Crown repudiation, because it may be impossible to fully restore the accused to his initial position:

[O]nce a plea agreement has been reached, the accused will likely have made express or implied admissions which, even if withdrawn, could impact the ability of defence counsel to advance certain defences. Therefore, even if the agreement is repudiated before a plea is entered and the accused can be formally returned to his initial position, the accused will nonetheless have ‘put his cards on the table’ in a manner which will almost inevitably be prejudicial.¹¹⁷

They also argued that “defence counsel may feel that he or she is no longer able to act for the accused, thereby interfering with the accused’s right to

114. *Supra* note 108 at para 22. See also *R v Roberts*, 2001 ABQB 520 at para 62, 289 AR 127.

115. See e.g. American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function Standards*, 3d ed (Washington, DC: American Bar Association, 1993) (“a prosecutor’s refusal to honor a plea agreement concerning a recommendation to the court after a guilty plea is made undermines the voluntariness of the plea and results in fundamental unfairness to the defendant” at 89); Galligan, *supra* note 103.

116. *Supra* note 39.

117. *Supra* note 99 at para 10.

counsel of choice and occasioning further delay in the trial process”.¹¹⁸ In these ways, any repudiation of a plea agreement by the Crown has the potential to cause prejudice to the accused. The *Nixon* Court’s failure to recognize these dangers should give us great pause.

Moreover, the ethical dilemma cited by the CLA is not new, but has long been recognized as one of the biggest challenges to arise in defence practice.¹¹⁹ In a spirited address to the Advocates’ Society in 1969, G Arthur Martin said:

An admission of facts which constitutes guilt to counsel does not preclude counsel from testing the evidence submitted by the prosecution and from submitting that such evidence does not establish the guilt of the defendant beyond a reasonable doubt. Such an admission by the client, however, imposes ethical restrictions on defence counsel with respect to the manner in which he is entitled to conduct the defence of his client.¹²⁰

As officers of the court, defence counsel bear a duty to further the administration of justice, which includes a duty not to “knowingly mislead the court and hence unacceptably subvert the truth-finding

118. *Ibid.*

119. See especially Claude Campbell Savage, “The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial” (1958) 1:2 *Crim LQ* 164; G Arthur Martin, “The Role and Responsibility of the Defence Advocate” (1969) 12:4 *Crim LQ* 376 [Martin, “Role and Responsibility”]; Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001); Michael Code, “Ethics and Criminal Law Practice” in Alice Woolley et al, eds, *Lawyers’ Ethics and Professional Regulation* (Toronto: LexisNexis, 2008) at 395. See also Edwards, *Walking the Tightrope*, *supra* note 30 at 77.

120. Martin, “Role and Responsibility”, *supra* note 119 at 386. Those restrictions were elaborated upon in the Commentary to the *Rules of Professional Conduct*. See LSUC, *Rules*, *supra* note 61, r 4.01:

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. . . . The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

function of the criminal justice process” by abetting a guilty client’s wish to evade justice.¹²¹

However, it may not be wise to regard all admissions in plea bargaining as admissions of guilt, and all clients who wish to accept plea agreements in these contexts as being “guilty clients”. For one, a client’s “admission may be made as a means of expressing moral guilt, despite the absence of legal liability”.¹²² Similarly, a client’s conduct, however unsavoury, may support legal defences, such as self-defence, duress, necessity, mistake of fact, or mental disorder. Moreover, and most importantly, a client’s admission of guilt during plea bargaining may be unreliable. What defence counsel need of any client, according to Michael Proulx and David Layton, is “a reliable, unequivocal and unrecanted [admission]”—what those authors describe as an “irresistible knowledge of guilt”.¹²³ However, since a plea bargain depends on a client’s admission of guilt, “[s]ome clients falsely confess in the belief that the admission will put an early end to the unpleasant stress and strain of the criminal process”.¹²⁴

Our criminal justice system does have a series of safety valves meant to guard against the danger of unreliable guilty pleas. Ontario Rule of Professional Conduct 4.01(9) is intended to cleanse plea bargaining of false guilty pleas, by requiring the client to admit (voluntarily) to all necessary factual and mental elements of the offence.¹²⁵ Section 606(1.1) of the *Criminal Code* empowers judges to perform plea comprehension

121. Proulx & Layton, *supra* note 119 at 36. See especially *Rondel v Worsley*, [1967] 3 All ER 993 at 998:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession.

122. Proulx & Layton, *supra* note 119 at 45.

123. *Ibid* at 40, 44.

124. *Ibid* at 47. See the discussion of plea bargaining and wrongful convictions (the criminal justice system’s “dirty little secret”), *infra* note 135 and accompanying text.

125. LSUC, *Rules*, *supra* note 61, r 4.01(9).

hearings.¹²⁶ These measures make it wholly appropriate for defence counsel to form the opinion that their clients have committed the alleged offences and accepted responsibility when they accept a plea bargain.¹²⁷ In other words, once an accused indicates she wishes to accept a plea bargain, she has provided her lawyer with “irresistible knowledge” of her actual guilt.¹²⁸ However, the repudiation of a plea bargain by the Crown leaves defence counsel in a paradoxical position: they are acting for a “guilty” client who, because she has not yet pled, has not been found guilty or admitted to anything, and she must be defended as fearlessly and zealously as any other innocent client. Furthermore, even though most plea bargains involve admissions to reduced charges, the plea itself can still demonstrate a high degree of culpability, which is sufficient to infringe upon the rights of the accused if Crown repudiation occurs. *Nixon* illustrates this point, as it seems that one reason Crown counsel Hatch offered Ms. Nixon the plea bargain he did was because it would force her to accept some responsibility for her conduct, even if it took the form of regulatory or civil liability.¹²⁹ All of this supports the argument put forward by the CLA that prosecutorial repudiation of plea agreements should be presumed to prejudice the fair trial rights of the accused.

The nature of the remedy available to address this prejudice to the accused may pose a number of additional problems. Even if judicial review of exercises of prosecutorial discretion is made more available and enhanced through the provision of reasons and guidelines, and repudiation of the plea agreement is found to have violated the fair trial rights of the accused, judges may still fall short of making full use of their remedial

126. *Supra* note 4, s 606(1.1).

127. It is also not uncommon for defence counsel to go above and beyond these safeguards and seek written instructions from clients who intend to plead guilty in court pursuant to a plea agreement.

128. Proulx & Layton, *supra* note 119 at 40.

129. See *Nixon* ABPC, *supra* note 1 (“[a]lthough not required to do so as part of his prosecutorial duties, [Hatch] also took into consideration that Ms. Nixon’s admission of careless driving as an inherent aspect of her guilty plea might be of some assistance to the families of the victims in any potential civil claim they might [bring]” at para 52).

powers under section 24(1) of the *Charter*.¹³⁰ The test for granting a stay of proceedings for abuse of process in criminal cases is exceedingly difficult to make out.¹³¹ Moreover, tailoring remedies under section 24(1) to the circumstances of a particular case can require a great deal of “creativity” on the part of judges, and prove exceptionally challenging to craft.¹³²

C. The “Innocence Problem” for At-Risk and Vulnerable Accused

Crown repudiation may also exacerbate the “Innocence Problem” of plea bargaining, whereby innocent defendants plead guilty.¹³³ Recent studies have shown a strong relationship between plea bargaining and

130. *Supra* note 8 (“[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”, s 24(1)). Such remedies under section 24(1) include the power to order specific performance of the plea agreement or to stay proceedings, which are generally considered to be exceptional remedies. But see *Keyowski*, *supra* note 44 (one of the rare occasions where the Court exercised its remedial powers to stay proceedings under section 24(1) following a finding of abuse of process under the first category, prosecutorial conduct affecting trial fairness. The circumstances did not deal with Crown repudiation but instead dealt with a situation where a series of jury trials had failed to lead to a conviction of the accused. Too many kicks at the can by the prosecution provided the Court with a strong rationale for ordering a stay of proceedings).

131. See *Nixon* SCC, *supra* note 1 at para 42:

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 & Immigration) v. Tobiass*, and *R v. Regan*. 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 [references omitted].

See also David M Paciocco, “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991) 15:2 Crim LJ 315 at 350.

132. Marc Rosenberg, “Section 24(1) Remedies” (Presented at the CCLA-DCAO Criminal Law Conference 2011, Montebello, Quebec, 15–16 October 2011) [unpublished]. See also *O’Connor*, *supra* note 41, (where it was recognized that creativity is required of judges in crafting section 24(1) remedies, likening the exercise to a specialized craft; section 24(1) of the *Charter* has “put into judges’ hands a scalpel instead of an axe – a tool that may fashion [more careful remedies]” at para 69, L’Heureux-Dubé J).

133. Josh Bowers, “Punishing The Innocent” (2008) 156:5 U Pa L Rev 1117 at 1119.

wrongful convictions in Canada¹³⁴—a phenomenon that some have called the criminal justice system’s “dirty little secret”.¹³⁵ For example, in Ontario, the reckless and incompetent pathology reports of Dr. Charles Smith led to several wrongful convictions in which certain accused accepted a plea offer made by the Crown on the basis that it was “too good to turn down”, in some cases with their lawyer’s encouragement, even though the accused had insisted that they were innocent.¹³⁶

Ineffective counsel is often to blame for this problem, but there is no denying that self-represented, at-risk or vulnerable accused are far more affected by it.¹³⁷ Plea resolutions can mask systemic racism¹³⁸ and can be at odds with Aboriginal peoples’ understandings of “justice” or “guilt”, which emphasize “restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual family or family that is wronged”.¹³⁹ Justice Murray Sinclair, Manitoba’s first aboriginal judge, has suggested that because aboriginal peoples do not see punishment as “the ultimate focus of the process, those

134. See Christopher Sherrin, “Guilty Pleas From the Innocent” (2011) 30 Windsor Rev Legal Soc Issues 1; Joan Brockman, “An Offer You Can’t Refuse: Pleading Guilty When Innocent” (2010) 56:1 Crim LQ 116.

135. Kirk Makin, “Case Puts Focus on Justice System’s ‘Dirty Little Secret’”, *The Globe and Mail* (14 January 2009) A7; Kirk Makin, “Top Jurist Urges Review of Plea Bargaining System: Ontario’s Mr. Justice Marc Rosenberg Says ‘Coercive’ Practice that Tempts Innocent People to Plead Guilty Based on ‘A Big Lie’”, *The Globe and Mail* (8 March 2011) A14. See especially *R v Kumar*, 2011 ONCA 120, 268 CCC (3d) 369; *R v Brant*, 2011 ONCA 362 (available on QL); *R v Sherret-Robinson*, 2009 ONCA 886 (available on QL). See also *R v Hanemaayer*, 2008 ONCA 580, 234 CCC (3d) 3 (where the accused entered false guilty pleas to break and enter to commit an assault and assault while threatening to use a weapon charges; Paul Bernardo later confessed to being the “Scarborough rapist” and to the attempted sexual assault on the 15-year-old girl which had led to Hanemaayer’s wrongful conviction).

136. See *supra* note 135 (refer to case law only).

137. See especially Gail Kellough & Scot Wortley, “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42:1 Brit J Crim 186.

138. See especially Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at 205 (identifying that there is a deep distrust of plea bargaining among black and racialized Canadians).

139. The Honourable Murray Sinclair, “Aboriginal People, Justice and the Law” in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel’s Quest* (Saskatoon: Purich, 1994) 173 at 178.

accused of wrongdoing are more likely to admit having done something wrong”.¹⁴⁰ It has also been documented that battered women who kill may plead guilty to manslaughter, even when there is evidence of self-defence.¹⁴¹ By insulating Crown decisions to repudiate plea agreements from judicial review, *Nixon* simply exacerbates the already staggering power imbalance in these contexts.

Conclusion

“Sometimes, if deals seem too good to be true”, Watt J has quipped, “somebody upstairs probably thinks that they are, and there may be circumstances in which those deals will be vitiated by a higher authority”.¹⁴² After *Nixon*, no defence lawyer should regard a plea resolution agreement with the Crown as final until the client has formally entered a plea in court.

Although the Supreme Court in *Nixon* recognized that repudiation of plea agreements must remain rare, the decision does not equip the criminal justice system to ensure that outcome. The Court should have seized the opportunity to improve transparency, strengthen accountability and protect trial fairness within our criminal justice system. Failing to give due weight to these considerations against a broad Crown discretion to repudiate plea bargains disregards the potential for serious prejudice to the accused (particularly to those who are at-risk or vulnerable) and runs a serious risk of undermining the public’s confidence in the administration of justice.

140. *Ibid* at 182.

141. See Report submitted to the Minister of Justice and Solicitor General of Canada, *Self-Defence Review: Final Report* (Ottawa, 1997) (Chair: Lynn Ratushny).

142. “Eleven Important Appellate Decisions of 2011” (Remarks delivered at Celebrating the Practice of Law and Learning, 20 October 2011) [unpublished].

