Case Name:
R. v. Delchev

Between
Her Majesty the Queen, Respondent, and
Nikolai Delchev, Appellant

[2015] O.J. No. 2710

2015 ONCA 381

325 C.C.C. (3d) 447

126 O.R. (3d) 267

325 C.C.C. (3d) 447

123 W.C.B. (2d) 249

2015 CarswellOnt 7679

Docket: C56361

Ontario Court of Appeal

J.M. Simmons, P.S. Rouleau and M.H. Tulloch JJ.A.

Heard: October 15, 2014.
Judgment: May 28, 2015.

(87 paras.)

Criminal law -- Prosecution -- Prosecutorial discretion -- Appeal by accused from 16 convictions allowed and new trial ordered -- Crown made offer to resolve charges against accused by way of conditional sentence submission if accused admitted he gave false evidence at trial and that counsel knew about it -- Offer had potential to undermine relationship between accused and counsel -- Judge erred in dismissing abuse of process application where accused established this was rare and exceptional case where Crown's exercise of prosecutorial discretion reviewable.

Criminal law -- Procedure -- Trials -- Stay of proceedings -- Appeal by accused from 16 convictions allowed and new trial ordered -- Crown made offer to resolve charges against accused by way of conditional sentence submission if accused admitted he gave false evidence at trial and that counsel knew about it -- Offer had potential to undermine relationship between accused and counsel -- Judge erred in dismissing abuse of process application where accused established this was rare and exceptional case where Crown's exercise of prosecutorial discretion reviewable.

Appeal by Delchev from his convictions on 16 counts of firearms and drug-related offences. Delchev's defence was based on a claim he was forced to store the firearms found in his home by Ramsay, two whom Delchev owed a drug debt. He asserted that Ramsay was the confidential informant who had provided the police with information to obtain the warrant to search Delchev's home, and that the Crown knew that Ramsay had threatened him. Delchev's first attempt to have evidence excluded based on violations of his rights was dismissed. He subsequently applied to have the charges against him stayed based on an abuse of process by the Crown. He asserted that the Crown had made an improper resolution offer, promising to seek a conditional sentence on certain charges if Delchev admitted he had given false evidence and that his counsel knew it to be false. The judge found that resolution discussions between Delchev and the Crown were subject to settlement privilege, which was not waived by the Crown simply because the discussions took place in the presence of Delchev's father. The judge found no evidence that the Crown was threatening Delchev of suggesting that he do something unlawful, and rejected the notion that the offer amounted to an attempt to interfere with Delchev's relationship with his lawyer. His stay application dismissed, Delchev proceeded to trial where he was convicted on 16 counts.

HELD: Appeal allowed and new trial ordered. The judge erred in finding that no exception to settlement privilege applied. The evidence of the resolution discussion Delchev had with the Crown admissible for the purpose of his abuse of process application. Although the Crown's offer was unusual, it was not clear that it was not made with the goal of resolving the charges against Delchev. However, the offer, made directly to Delchev, had the potential to negatively affect his relationship with is lawyer, crucial to the proper administration of criminal justice. This was a rare and exceptional case in which the Crown was obliged to explain its exercise of prosecutorial discretion. A new trial was required to consider the abuse of process application.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 10(b)

Rules of Professional Conduct, s. 5.1-3, s. 7.2-6

Appeal From:

On appeal from the convictions entered by Justice Wailan Low of the Superior Court of Justice, sitting with a jury, on August 24, 2012.

Counsel:

Jill R. Presser and Andrew Menchynski, for the appellant.

Susan Magotiaux, for the respondent.

The judgment of the Court was delivered by

1 **M.H. TULLOCH J.A.**:-- The appellant, Nikolai Delchev appeals against his convictions on 16 counts of firearms and drug related offences, including one count of possession of cocaine for the purpose of trafficking, following a trial by judge and jury.

2 The appellant advances one primary ground of appeal, which is that the trial judge erred in failing to order a stay of proceedings for an abuse of process. The appellant's abuse of process application was made following a resolution discussion with the trial Crown in which the appellant alleges the trial Crown offered to recommend a conditional sentence sentencing position to the Crown-in-charge based on a guilty plea to certain charges if the appellant provided an induced statement indicating certain evidence he had given in pre-trial proceedings was false and his trial counsel knew it was false. The Crown asserted the discussion was privileged but agreed to respond to the application on the basis of a summary of the appellant's allegations concerning what had taken place.

3 The trial judge found that the discussion was privileged and that, in any event, there was no evidence that the conditional offer was made without foundation or in bad faith. She dismissed the appellant's application.

4 On appeal, the appellant seeks a stay of proceedings based on abuse of process, or in the alternative, an order for a new trial at which his abuse of process claim can be fully litigated.

A. FACTS

5 The appellant was charged with twenty-three drug and weapons related offences following a police search of two residences. The police obtained the search warrants for the residences as a result of information received from a confidential informant.

6 Trial was set for February 28, 2011. Part of the defence theory was that a man named Jason Ramsay had forced the appellant to store the guns by threatening him with physical harm. According to the defence, the appellant owed Ramsay a significant drug debt and Ramsay threatened the appellant with harm to himself and his father if he did not pay off his debt. The defence alleged that Ramsay issued the appellant an ultimatum: store the weapons, or Ramsay would tell "his guys" the appellant owed a significant debt.

7 The defence also alleged that Ramsay was the confidential informant who tipped off the police to the guns, and that the Crown knew the appellant only possessed the guns because Ramsay had threatened him. Based on this allegation and alleged breaches of the appellant's ss. 7, 8 and 10(b) *Charter* rights, at the outset of trial the defence brought an application to exclude the evidence from the searches of the residences and to stay the proceedings ("the first application").

8 The appellant testified on the first application to the alleged threats by Ramsay. Ramsay testified and contradicted the appellant's evidence. Although the trial judge found the appellant's s. 10(b) *Charter* rights were breached, she declined to exclude the evidence obtained on executing the search warrants. The appellant's first application was dismissed.

9 A new trial date was set for December 12, 2011. That morning, at the request of counsel, the trial judge stood the matter down to allow for a resolution discussion. Counsel returned, and told the trial judge the discussion was unsuccessful. They then selected a jury. Evidence was to be called the following day.

10 The next morning, the appellant advised he would be bringing another abuse of process application ("the second application"). The jury was discharged.

11 The second application was founded on the content of the offer made by the trial Crown the previous day. The Crown asserted privilege with respect to the content of the resolution discussion, but agreed to respond to the application on the basis of the following allegations:

> a) there was a settlement discussion on December 12, 2011, with [the trial Crown attorney, the officer in charge, the appellant's two trial counsel, the appellant and the appellant's father];
>
> b) the Crown indicated that if the [appellant] was to provide an induced statement in which he would admit that his evidence up to that point in the proceeding regarding duress was false, and that his counsel knew it to be false, the Crown would recommend a conditional sentence to the Crown Attorney for Scarborough as the Crown position on sentence upon the [appellant's] plea of guilty to certain charges;
>
> c) the Crown advised that the [appellant] should get independent legal advice regarding the settlement offer;
>
> d) the Crown advised that this settlement would be conditional on the approval of the Crown Attorney for Scarborough;
>
> e) the Crown advised the [appellant's] father that the resolution would save a lot of time and money and that the [appellant] should get independent legal advice regarding the offer;
>
> f) the offer was immediately rejected by the appellant; [and]
>
> g) due to the allegations made by the [appellant], [the trial Crown who made the offer would] not be conducting the trial of this matter [if it was heard on its merits].

12 The appellant obtained separate counsel to argue the second application.

Decision on the second application

13 The trial judge concluded that the resolution discussion between the appellant, his counsel and the Crown was subject to settlement privilege. She determined the Crown did not waive privilege simply because the discussion was conducted in the presence of the appellant's father.

14 The trial judge held that no exception to settlement privilege applied in this case. She stated that the notable exceptions to settlement privilege include when evidence of settlement discussions

is necessary to prove either that a settlement was reached or that the communications contained threats or illegal actions. No bargain was reached, and the appellant failed to provide extrinsic evidence of prosecutorial impropriety.

15 The trial judge relied on case law dealing with the review of the exercise of prosecutorial discretion -- the Supreme Court's decisions in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, and *R. v. Power*, [1994] 1 S.C.R. 601 -- to conclude that extrinsic evidence of impropriety beyond the communications themselves was required for the court to inquire into the reasons behind the exercise of Crown discretion. She appears to have reasoned that it was necessary for the appellant to meet this evidentiary threshold to enable her to inquire into whether there was prosecutorial impropriety such that an exception to settlement privilege would apply.

16 She held there was no evidence that Crown counsel was threatening the appellant or suggesting he should do something unlawful. She reasoned that the offer was similar to other offers of sentencing consideration in exchange for information about other persons. She rejected the proposition that solicitors should be immune from being targets of this type of plea bargain.

17 The trial judge rejected the appellant's argument that the offer amounted to an attempt to interfere in his relationship with his solicitor. She reasoned that if the offer had been accepted, there would have been a conflict -- but in that case, the appellant would not have had a trial on the merits. As the offer was rejected, there was no breach of the appellant's relationship with his counsel, who were to continue as counsel at any trial.

18 The trial judge concluded that because settlement privilege applied, and there was no extrinsic evidence supporting an exception based on prosecutorial impropriety, the evidence of the discussion was inadmissible. She dismissed the application for a stay.

The appellant's trial

19 The appellant proceeded to trial before a new jury. He testified again in support of his defence of duress, though the trial judge later declined to put duress to the jury. His original counsel represented him at trial. The jury found the appellant guilty on sixteen counts.

B. GROUNDS OF APPEAL

20 The appellant requests that this court enter a stay of proceedings, or in the alternative, order a new trial to enable him to have a full hearing of his abuse of process application. The appellant makes three main arguments for why the appeal should be allowed. They are as follows:

1. The trial judge erred in finding that the evidence of the settlement discussion was subject to settlement privilege and therefore inadmissible on the application;

2. The trial judge denied natural justice to the appellant by considering the propriety of the Crown's conduct without giving the appellant an opportunity to make oral submissions on the issue;

3. The trial judge erred in failing to find that the trial Crown's conduct was grossly improper such as to constitute an abuse of process warranting a stay of proceedings.

21 I agree with the appellant that the trial judge erred in finding the evidence of the resolution discussion could not be admitted as an exception to settlement privilege. On the abuse of process issue, I conclude the appellant met the evidentiary burden for an inquiry into the exercise of Crown discretion set out by the Supreme Court in *Nixon*. I would therefore allow the appeal and order a new trial. As a result, it is not necessary to address the appellant's argument that he was denied natural justice.

(1) Settlement Privilege

22 The appellant asks this court to find that the evidence of the plea bargaining discussion was admissible for the purpose of alleging abuse of process by the Crown. In my view, while the evidence of the discussion is subject to settlement privilege, I agree with the appellant that the trial judge erred in holding no exception to that privilege applied. The evidence of the discussion should have been admitted for the purpose of the appellant's abuse of process application.

(a) Standard of review

23 The question of whether evidence is privileged involves the identification of legal principles, and the application of those principles to the facts as drawn from the evidence. The trial judge's identification of the applicable legal principles will be assessed on a correctness standard, though deference is owed to her application of those principles to the facts: *Sable Offshore Energy v. Ameron International Corp.*, 2015 NSCA 8, 38 C.L.R. (4th) 1, at para. 43; see also *Thomson v. University of Alberta*, 2013 ABCA 391, 561 A.R. 391, at para. 11.

(b) Is the discussion protected, *prima facie*, by settlement privilege?

24 Settlement privilege is a class privilege, creating a "*prima facie* presumption of inadmissibility": *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 12. Settlement privilege applies only if the following conditions are met:

> (1) A litigious dispute must be in existence or within contemplation.
>
> (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.
>
> (3) The purpose of the communication must be to attempt to effect a settlement. [A.W. Bryant, S.N. Lederman & M.K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014), at p. 1039; citations omitted.]

25 The appellant takes issue with the third of these requirements. He argues the offer was not made for the purpose of achieving settlement or compromise, but rather "with some other object in view and from wrong motives": *Pirie v. Wyld* (1886), 11 O.R. 422 (H.C.).

26 While the Crown's offer was unusual, I am not prepared to infer that resolving the appellant's charges was not at least some part of the purpose of the offer. Settlement does not have to be the only purpose of a settlement negotiation in order for privilege to apply. It is not uncommon for a resolution offer to include an agreement that an accused will testify for the Crown in another matter. The resolution discussion here was arranged so that the Crown could make an offer of settlement,

albeit a highly unusual one. All the parties involved understood that a settlement discussion was occurring.

27 Settlement privilege applies to the discussion and the evidence from the discussion is *prima facie* inadmissible on the abuse of process motion. However, based on the circumstances of the discussion and the content of the offer, I would conclude the evidence is admissible as an exception to settlement privilege. I will explain.

(c) Does an exception to settlement privilege apply?

28 Exceptions to settlement privilege will be found when the justice of the case requires it: *Sable Offshore*, at para. 12. As the Supreme Court held in *Sable Offshore*, at para. 19, to justify an exception:

> a defendant must show that, on balance, "*a competing public interest outweighs the public interest in encouraging settlement*". These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence, and preventing a plaintiff from being overcompensated. [Citations omitted; emphasis added.]

29 Below, I first consider whether "the public interest in encouraging settlement" would be furthered by preventing admission of the discussion in this case. I then determine whether the appellant's allegation of prosecutorial misconduct constitutes a "competing public interest" that outweighs the public interest in encouraging settlement as applied to the facts of this case.

30 The public interest in and rationale behind settlement privilege was summarized by the Supreme Court in *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35, [2014] 1 S.C.R. 800, at para. 31:

> Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A.W. Bryant, S.N. Lederman and M.K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

31 In other words, settlement privilege is important because parties would be reluctant to engage in settlement discussions if those discussions could be admitted at trial as evidence of concessions. The exceptions to this general privilege are justified where evidence of the settlement or negotiations is intended for use other than illustrating the weaknesses of one party's case: see *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, at pp. 1044-1045; R.W. Hubbard, S. Magotiaux & S.M. Duncan, *The Law of Privilege in Canada*, vol. 2, loose-leaf (Toronto: Thomson Reuters Canada, 2014), at pp. 12-96.1 to 12-96.2 (September 2014). If a party is not seeking to admit the settlement offer or negotiations as evidence of a concession, an exception to settlement privilege would do little to detract from the "public interest in encouraging settlement".

32 In the instant case, the appellant was not attempting to adduce the Crown's settlement offer as evidence that the Crown had a weak case. While the respondent notes that the appellant did attempt to use the offer for such a purpose on his sentence appeal, the issue here is whether the contents of the settlement discussion are admissible to allege abuse of process. The allegation of abuse of process is unrelated to the merits of the Crown's case against the appellant. Admission of the settlement offer on the abuse of process motion would have a minimal effect, at most, on the goal of encouraging settlement.

33 I turn now to whether there is a "competing public interest" that militates in favour of an exception to settlement privilege. As stated above, these competing "interests have been found to include allegations of misrepresentation, fraud or undue influence, and preventing a plaintiff from being overcompensated": *Sable Offshore,* at para. 19. In my view, an allegation of prosecutorial misconduct constitutes an analogous countervailing interest.

34 An allegation of prosecutorial misconduct is analogous to the examples provided by the Supreme Court in *Sable Offshore* of misrepresentation, fraud and undue influence. These examples all suggest that one party has engaged in wrongdoing that may have led to an unjust settlement or that may have tainted the conduct of the litigation itself. It is in the interests of justice for a person who has been wronged to be able to present evidence of the alleged wrongdoing before the court.

35 This policy objective is amplified when the alleged wrongdoing is an abuse of process by the Crown. While the stakes may be high in many civil proceedings, in the criminal context, the risk that an accused person may be deprived of his or her liberty in circumstances amounting to an abuse of process is very serious indeed. As stated by L'Heureux-Dubé J., writing for the majority of the court in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 63:

> It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.

36 I would note that there is a distinction between whether the Crown must justify its exercise of discretion and whether an exception to settlement privilege applies such that the accused can put the statements made to him by the Crown before the court. An accused is permitted to give evidence of a settlement offer made by the Crown in order to argue that the settlement offer constituted an abuse of process; by contrast, the Crown will only exceptionally be required to justify that exercise of discretion.

37 In my view, the appellant has raised a countervailing public interest -- alleged prosecutorial misconduct amounting to an abuse of process -- that outweighs the public interest in promoting settlement in the circumstances of this case.

(d) Was extrinsic evidence of prosecutorial misconduct required to establish an exception to settlement privilege?

38 The trial judge erred by concluding the appellant was required to provide "extrinsic evidence" of prosecutorial misconduct in order to establish an exception to settlement privilege.

39 The Supreme Court did not give any indication in *Sable Offshore* that extrinsic evidence was required; the court indicated instead that "allegations" of misrepresentation, fraud or undue influence, for example, could suffice (at para. 19). In the case of fraud or undue influence, a party's wrongful conduct may have occurred entirely within the context of negotiations. An allegation that a party lied during negotiations may be difficult to substantiate absent evidence of the negotiations themselves. Similarly, such a requirement would make it impossible for an accused to argue the content of an offer itself was abusive. Where the content of an offer itself is alleged to be the abuse, there will necessarily be no or limited extrinsic evidence to support the allegation.

40 In my view, the trial judge in the present case erred in relying on *Nixon* and *Power* for the proposition that extrinsic evidence is a requirement to establish an exception to settlement privilege. As the appellant correctly points out, those cases do not deal with settlement privilege, but rather the review of prosecutorial discretion.

41 The trial judge erred in failing to admit the evidence of the resolution discussion. I now turn to the appellant's argument on abuse of process.

(2) Abuse of Process

42 The appellant's main argument is that the settlement offer made to him by Crown counsel constitutes an abuse of process which entitles him to a stay of proceedings.

43 While the trial judge dismissed the application on the basis of settlement privilege, due to the manner in which she addressed the applicability of an exception, she also commented on the merits of the application for a stay. She found that "[t]here must be an evidentiary basis of prosecutorial impropriety, consisting of evidence extrinsic to the settlement communications themselves" before the court will inquire into the reasons behind the settlement offer. She concluded the appellant had failed to provide the required extrinsic evidence.

44 In my view, the trial judge correctly stated that the appellant must overcome an evidentiary burden before the court will look behind the exercise of prosecutorial discretion. However, she erred in concluding that extrinsic evidence is required in order to meet that burden. For the reasons outlined below, I agree with the appellant that the evidentiary threshold for an inquiry into prosecutorial discretion was met on the allegations the Crown was prepared to respond to. The denial of the inquiry is an error and a new trial is necessary.

45 In explaining how I reach this conclusion, I first outline the approach to the review of prosecutorial discretion, including the threshold evidentiary burden that must be met by an accused person alleging an abuse of process based on the improper exercise of prosecutorial discretion. Second, I explain why the Crown's offer and the circumstances in which it was made constitute a rare and exceptional event, analogous to the Crown's decision to repudiate a plea agreement in *Nixon*. Finally, I go on to explain why the appropriate remedy in the circumstances is to send the matter back for a new trial where the issues of whether the appellant has proved an abuse of process and whether a stay is warranted can be pursued.

(a) How do courts approach the review of prosecutorial discretion?

46 Prosecutorial discretion is "an expansive term that covers all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it": *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 44 (citations and internal quotations omitted). The decision to

negotiate a plea agreement falls within the scope of prosecutorial discretion: *Anderson,* at para. 44. Neither party in the present case disputes that the settlement offer made to the appellant constituted an exercise of prosecutorial discretion.

47 In most cases, the exercise of prosecutorial discretion is not subject to review by the courts. The rationales for this principle include the doctrine of separation of powers, the efficiency of the criminal justice system, and the limited competence of courts to consider the factors involved in making decisions to prosecute: *Anderson*, at paras. 46-47.

48 Prosecutorial discretion is reviewable, however, for abuse of process, which must be established by the accused on a balance of probabilities: *Anderson*, at paras. 51-52.

49 An accused must meet a threshold evidentiary burden before the court will embark on an inquiry into the reasons behind the exercise of discretion: *Anderson*, at para. 55. Although the ultimate burden of establishing abuse of process lies on the accused, once an accused has established this evidentiary foundation, "the Crown may be required to provide reasons justifying its decision": *Anderson,* at para. 52. This evidentiary foundation is the main subject of dispute in this case.

50 The requirement for an accused to meet a threshold burden was explained by the Supreme Court in *Nixon*. *Nixon* dealt with the Crown's repudiation of a plea agreement. Justice Charron, writing for the court, commented at paras. 62-63:

> [T]here is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. For example, it would not suffice for an applicant to allege abuse of process based on the fact that the Crown decided to pursue the charges against him but withdrew similar charges against a co-accused. Without more, there would be no basis for the court to look behind the exercise of prosecutorial discretion.
>
> However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. As everyone agrees, it is of crucial importance to the proper and fair administration of criminal justice that plea agreements be honoured. The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process.

51 While it is clear from *Nixon* that a "bare allegation" on its own will not meet the requisite threshold, it does not follow that an accused must produce extrinsic evidence (i.e. evidence extrinsic from the settlement offer itself) in order to meet the burden. A requirement for extrinsic evidence would be irreconcilable with the Supreme Court's conclusion in *Nixon* that repudiation of a plea agreement in and of itself is not a bare allegation and meets the evidentiary burden. The impugned act of prosecutorial discretion may be sufficient on its own to meet the threshold burden.

52 Two avenues to meeting the threshold emerge from the Supreme Court's decisions in *Nixon* and *Anderson*. First, the threshold evidentiary burden will be met if the accused adduces evidence

that the prosecutor exercised its discretion in bad faith or for improper motives: see *Anderson*, at para. 55.

53 Second, as in *Nixon*, the threshold may also be met where a discretionary decision is so rare and exceptional in nature that it demands an explanation. *Nixon* provides the best example of this second type of case. In the passage quoted above, Charron J., writing for the court, concluded that the fact that a plea agreement had been repudiated alone was sufficient to meet the threshold evidentiary burden. Although no evidence of bad faith was provided, the Supreme Court of Canada found that the act of repudiating a plea agreement was "evidence that the Crown has gone back on its word". Because of the importance to the fair and proper administration of criminal justice of ensuring that plea bargains are honoured, repudiation of a plea bargain was a "rare and exceptional event" that demanded an explanation from the Crown. Ultimately, the explanation provided by the Crown satisfied the court that there was no abuse of process.

54 Justice Charron did not set out criteria for determining what else might qualify as a "rare and exceptional event". In my view, the sole criteria cannot be that the decision or type of decision is infrequently made, as unusual decisions may result simply from the nature of a particular prosecution. I would infer from *Nixon* that a Crown discretionary decision may qualify as a rare and exceptional event when the decision itself raises the court's concern about the Crown's exercise of discretion. As quoted above, Charron J. noted that repudiation of a plea agreement was more than a bare allegation because it was evidence that the Crown had gone back on its word. A second important aspect of a rare and exceptional event is, in my view, that the Crown's decision must implicate interests that are of "crucial importance to the proper and fair administration of justice". In *Nixon*, this interest was that plea agreements be honoured.

55 Meeting the threshold evidentiary burden is of course only the first step that an accused faces in proving an abuse of process. If the threshold burden is met, the Crown is given an opportunity to explain the reasons behind its exercise of discretion. If no explanation is forthcoming, an adverse inference may be made against the Crown. The burden remains on the accused to establish an abuse of process on a balance of probabilities. Even if an accused establishes an abuse of process, a stay will only be warranted in "the clearest of cases".

(b) Was the threshold evidentiary burden met in this case?

56 I would conclude the appellant has met the threshold evidentiary burden on the basis that the offer here was a "rare and exceptional event". The offer itself and the circumstances in which it was made are sufficient to raise the court's concern about the Crown's exercise of discretion. It constituted, in effect, an offer made directly to the accused and, given its nature, had the potential to negatively affect the relationship between the appellant and his lawyers. The proper functioning of the relationship between an accused and defence counsel is crucial to the proper administration of criminal justice.

57 Below, I first outline why the relationship between an accused and defence counsel is essential to the proper and fair operation of the criminal justice system. I also explain why due to the role of the Crown, the Crown should not lightly take steps that will interfere with that relationship. Second, I set out the problems with the offer here, and why these problems suggest this offer was a rare and exceptional event requiring an explanation from the Crown. It follows, in my view, that the appellant has met the requisite evidentiary threshold. I would leave the issue of whether any of the

circumstances complained of by the appellant constitute evidence of bad faith or could give rise to an inference of bad faith to be decided at a new hearing.

The relationship between the accused and defence counsel and the role of the Crown

58 The relationship between accused persons and their counsel is essential to the proper and fair administration of criminal justice. As Edward Greenspan, Q.C., said in his well-known address on the role of defence counsel:

> No person is required to stand alone against the awesome power of the government. Rather, every criminal defendant is guaranteed an advocate -- a "champion" against a "hostile world", the "single voice on which he must rely with confidence that his interest will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct."
>
> ...
>
> And the role of the defence counsel, the obligation the community places on him, is a societal role -- to defend the constitutional guarantees of the presumption of innocence and the requirement that in our democracy no one can lose freedom unless and until the state can prove guilt beyond a reasonable doubt. Our community can retain justice and freedom only as long as it gives standing to one person to take, within the limits of the law, the defendant's side in court and to remind society when the scales of justice are tilting in the wrong direction. [Edward Greenspan, Q.C., "The Role of the Defence Counsel in Canadian Society" (The 1987 Empire Club of Canada Foundation Address, 19 November 1987).]

59 It is essential that an accused person have confidence in his or her representation, and that defence counsel be free to further the accused's interests as much as possible. All lawyers have a duty to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law": The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto, LSUC, 2014, s. 5.1-1, commentary 1.

60 Defence counsel in particular are obliged, pursuant to s. 5.1-1, commentary 9:

> to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and *notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent*. [Emphasis added.]

61 Defence counsel is therefore permitted to argue a weak defence and call the accused to testify even if the lawyer's private opinion is that the client will be disbelieved. It is only where the lawyer *knows* the testimony to be false or fraudulent or believes it to be false by reason of an admission made by the accused that the lawyer may not offer the evidence.

62 If accused persons have reason to doubt the ability and faithfulness of their counsel, their defence is likely to suffer. If counsel has reason to hold back in the defence to protect their own interests, or even allows personal doubt about the merits to cloud their pursuit of the defence, the defence is also likely to suffer. Without a relationship of faith and confidence between an accused and his or her counsel, the obligations placed on defence counsel as set out by Greenspan -- to defend the guarantees of the presumption of innocence and the burden of proof beyond a reasonable doubt -- are put at risk.

63 Turning now to the role of the Crown, the function of the Crown is to be "assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party": *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25. As Rand J. explained in *Boucher*, at pp. 23-24:

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. 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 responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.

64 The importance of the Crown's dual role as both advocate and minister of justice was set out in the "Martin Report" (The Honourable G. Arthur Martin, O.C., O. Ont., Q.C., LL.D., Chair, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ministry of the Attorney General, Queen's Printer for Ontario, 1993)), at p. 33:

> Crown counsel's dual role as both advocate and minister of justice, fulfilled with the utmost integrity and sound judgment, is, like the complementary roles of defence counsel and the judge, essential to the administration of justice in Ontario.

65 The preamble to the Crown Policy Manual of the Ministry of the Attorney General of Ontario, 2005, echoes this view, at p. 2:

> The role of Crown counsel as an advocate has historically been characterized as more a "part of the court" than an ordinary advocate.
>
> A prosecutor's responsibilities are public in nature. As a prosecutor and public representative, Crown counsel's demeanor and actions should be fair, dispassionate and moderate; show no signs of partisanship; open to the possibility of the innocence of the accused person and avoid "tunnel vision." It is especially important that Crown counsel avoid personalizing their role in court. [Citations omitted.]

66 The Crown's duty to act fairly, dispassionately and with a sense of the justness and dignity of the proceedings requires the Crown to treat with respect the relationship between an accused and defence counsel. The *Rules of Professional Conduct* refer to this obligation: a prosecutor "should

not do anything that might prevent the accused from being represented by counsel or communicating with counsel": s. 5.1-3, commentary 1. As outlined above, the justness of a particular proceeding may depend on the strength of the relationship between the accused and counsel. An act on the part of the Crown tending to undermine the relationship could have serious consequences for the accused and in the case of deliberate acts, would, except in exceptional circumstances, likely be out of keeping with the Crown's obligation as a minister of justice.

67 As I explain below, one very foreseeable consequence of the offer here was that the appellant's relationship with his counsel could be undermined. In my view, because of the importance of the relationship between an accused and defence counsel and the Crown's special role, an offer made directly to the accused with this kind of foreseeable consequence raises the court's concern about the Crown's exercise of discretion. This offer constitutes a rare and exceptional event and it requires an explanation from the Crown.

The problems with the offer in this case

68 The offer made by the trial Crown in this case had the potential to undermine the appellant's relationship with his counsel in three ways: first, the offer itself created a potential conflict of interest between the appellant and his counsel because it required the appellant to make a statement implicating his counsel in suborning perjury; second, the offer was contingent on the approval of the trial Crown's supervisor; and third, it appears the Crown attempted to resolve the matter directly with the appellant, although he was represented by counsel.

69 Contrary to the respondent's submission, the problems with the offer do not require a presumption of bad faith on the part of the Crown. The concerns are apparent on the face of the offer itself, just as in *Nixon*, where the Crown's repudiation of a plea agreement on its face implicated the honour of the Crown without any need for a presumption of bad faith.

70 The offer created an instant potential conflict of interest between the accused and his lawyer that could have interfered with the solicitor-client relationship. The interests of the defence lawyers were suddenly pitted against those of their client, potentially undermining the appellant's ability to rely on his lawyers and leaving him in a vulnerable position.

71 The trial Crown alleged the appellant had perjured himself with the knowledge of his counsel in his testimony on duress, a defence he intended to advance, and was about to advance at trial. Regardless of whether the appellant accepted or rejected the offer, the potential for conflict or a negative impact on his relationship with counsel existed.

72 The contingent nature of the offer exacerbated the potential conflict between the appellant and his solicitors. If the appellant had obtained independent legal advice as suggested, and had considered or even accepted the offer, but the trial Crown was unable to get approval for the arrangement, the appellant's relationship with his counsel of choice would likely have been irreparably damaged. He could not have gone back to his counsel of choice, having agreed to or considered providing evidence that they had suborned perjury. It is also unlikely counsel could have believed the appellant had faith in their integrity and advice, knowing he had considered providing evidence that they had contravened their professional obligations.

73 In my view, the trial judge erred when she concluded there was essentially no harm in the offer because if the appellant had accepted, he would not have had a trial on the merits. The contingent nature of the offer created the possibility that the appellant, having accepted the offer, would

have had a trial on the merits without his counsel of choice. Even considering the offer could have undermined the appellant's relationship with counsel. It is important to bear in mind as well that the appellant's three-week jury trial was supposed to begin on the day the offer was made. Had the appellant considered or even accepted the offer, he could have lost his representation very quickly and would have been forced to search for new counsel for a three-week jury trial on serious charges.

74 Had the offer not been conditional on approval by the Crown's superior, the risk to the appellant's relationship with counsel would have been much less significant.

75 Finally, the trial Crown's conduct in making the offer appears to tread close to the ethical line drawn by s. 7.2-6 of the *Rules of Professional Conduct*. Section 7.2-6 provides that subject to the rules dealing with limited scope retainers and second opinions:

> if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner
>
> (a) approach or communicate or deal with the person on the matter; or
>
> (b) attempt to negotiate or compromise the matter directly with the person.

76 Plea negotiations fall within the scope of an "attempt to negotiate or compromise the matter". This rule precludes a Crown from negotiating directly with a represented accused. The Crown is required to negotiate "through or with the consent of" the accused's counsel. In the criminal context, the purpose of this rule is to preserve the accused's relationship with counsel, which could be seriously undermined by direct negotiations, and to protect the accused's best interests by requiring his or her advocate to be the exclusive channel for resolution discussions: see David Layton & Hon. Michel Proulx, *Ethics and Criminal Law*, 2d. ed. (Toronto: Irwin Law, 2015) at p. 659.

77 While the appellant's trial counsel were present at this resolution discussion, the trial Crown's conduct appears to tread close to the line in two respects: it seems the offer was not made to the appellant's counsel, but rather to the appellant himself, and the trial Crown appears to have advocated for the offer directly with the appellant's father.

78 The nature of the offer suggests the offer was made directly to the appellant. Although the appellant's lawyers were present, they would not have been able to advise him to accept the offer -- such advice would have conflicted with their own interest. This is borne out by the trial Crown's suggestion that the appellant obtain independent legal advice. If the trial Crown was negotiating directly with the appellant and ignoring the presence of counsel, this could have been in violation of s. 7.2-6.

79 Similarly, the trial Crown apparently suggested to the appellant's father that this offer would save time and money. To the extent that the suggestion by the trial Crown amounts to advocating in favour of the appellant accepting the offer and intended these comments to be communicated to the appellant through his father, rather than through counsel, s. 7.2-6 may also have been in play. Circumventing counsel by going through an accused's relative might be viewed to be just as contrary to the rule as speaking directly to an accused.

80 The concern that the trial Crown might be viewed as having negotiated directly with the appellant contributes to my conclusion that the offer was a rare and exceptional event. Section 7.2-6 plays an important role in protecting an accused's relationship with counsel and best interests. Con-

duct by the Crown suggesting a potential violation of the rule is a serious matter. Without an explanation, it raises the court's concern about the manner in which the trial Crown exercised his discretion.

81 For the reasons set out above, this offer could have had the effect of irreparably damaging the appellant's relationship with counsel. Conflict between the appellant and his counsel was a predictable outcome of the offer. Indeed, the offer invited it. The potential effects of the offer are sufficient to raise the court's concern about the Crown's exercise of discretion.

82 The respondent's argument that no harm was actually done to the relationship between the appellant and his trial counsel is not relevant at this stage of the analysis. The question here is not whether the fairness of the trial was compromised as a result of the offer, but rather, whether the Crown's exercise of discretion is a rare and exceptional event.

83 In my view, in light of the importance of protecting the relationship between an accused and defence counsel, and the problems inherent in the offer in this case, the appellant has met his threshold evidentiary burden. As in *Nixon*, the Crown is the only party who is privy to the reasons behind its decision to make this offer. While the ultimate burden of proving abuse of process remains on the appellant, the Crown must provide an explanation for its decision or risk an adverse inference against it.

(c) What is the appropriate remedy in the circumstances?

84 The appellant asks this court to set aside his convictions and enter a stay of proceedings, or in the alternative, to order a new trial. In my view, it would not be appropriate for this court to determine whether a stay of proceedings is warranted. A new trial is required.

85 Although the appellant has met the threshold evidentiary burden, he has not yet proved abuse of process on a balance of probabilities. The parties proceeded in the court below on the basis that the issue of settlement privilege would be argued and decided by the trial judge first, and only after her decision would they argue the abuse of process issue. The trial judge ruled the evidence of the resolution discussion was privileged and inadmissible. The matter did not proceed to the abuse of process stage. The parties therefore never led evidence or made submissions specifically on the abuse of process point. The Crown was not afforded an opportunity to provide the reasons behind the trial Crown's decision to make this offer.

86 In my view, a new trial is required at which, if the abuse of process application is pursued, a hearing can be held where the parties can lead evidence and the Crown will have an opportunity to explain the offer to the court. The issues of whether the appellant has made out an abuse of process and whether a stay is warranted in the circumstances should be decided on a full record. The Crown should not be penalized for the absence of an explanation given the way the matter proceeded in the court below. The Crown should be permitted to provide an explanation or risk an adverse inference against it.

C. CONCLUSION

87 For the reasons outlined above, I would allow the appeal and order a new trial.

M.H. TULLOCH J.A.
J.M. SIMMONS J.A.:-- I agree.
P.S. ROULEAU J.A.:-- I agree.