CITATION: *R. v. Nygard*, 2025 MBPC 43

THE PROVINCIAL COURT OF MANITOBA

BETWEEN:

His Majesty the King	)	Charles Murray
	)	for the Respondent
	)	
-and-	)	
	)	
	)	
Peter John Nygard,	)	Gerri Wiebe
	)	for the (Accused) Applicant
(Accused) Applicant,	)	
	)	
	)	
	)	
	)	Reasons for Decision
	)	Delivered: May 27, 2025

Pursuant to s. 486.4(1) of the Criminal Code of Canada, any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.

HARVIE, P.J.

INTRODUCTION

[1] Is it an abuse of process for an Attorney General to seek a "second opinion" after counsel in Prosecution Service concluded that there was "no reasonable likelihood of conviction" and therefore declined to authorize the laying of criminal charges? Must an Attorney General base a request for a "second opinion" on reasons which are articulable and transparent, or is it sufficient, given the role of the Attorney General, to do so in response to public concerns about a specific case,

without offending the rule of law? These are some of the issues raised in this application.

[2] The accused, Peter John Nygard, is facing one count of sexual assault and one count of forcible confinement with an offence date of November 18, 1993. Charges in this matter were not laid until June 2023. Nygard has filed an application seeking a declaration that his prosecution constitutes an abuse of process contrary to s. 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Pursuant to *Charter* s. 24(1) he seeks an order for a judicial stay of proceedings.

[3] There is virtually no information before the Court at this stage as to the facts underlying the allegations. Given the nature of this application, that is appropriate. What is clear from the Agreed Statement of Facts is that the handling of the allegations against Mr. Nygard by Manitoba Prosecution Service and their decision not to authorize charges attracted significant media attention. The complainants were disappointed, frustrated and confused by the decision not to proceed. These concerns were further exacerbated by the decisions in other provinces to proceed with charges against Nygard arising from allegations involving different complainants. They described the Manitoba Prosecution Service's decision as a "re-victimization" and one that demonstrated a "fundamental failure" of the justice system in Manitoba.

[4] Unfortunately, the extensive media coverage contained little in the way of explanation as to the test that Manitoba Prosecution Service legal counsel are ethically obliged to apply when considering whether to authorize charges. Nor was there any discussion regarding the formal relationship between the Manitoba Prosecution Service's legal counsel and the office of the Attorney General. Although the role of each of these players is well known to participants within the criminal justice system, it is likely less clear to members of the general public.

Therefore, to provide some context and clarity to the constitutionally mandated decision-making process, this decision will include a review of the roles and responsibilities of the Office of the Attorney General and their relationship with the Manitoba Prosecutions Branch, and a discussion of that relationship in the context of the proceedings in this case. This will be followed by a review of the case law and the applicable legal tests in an application of this nature, concluding with the application of the law to the specific facts of this case.

MANITOBA PROSECUTION SERVICE AND THE OFFICE OF THE ATTORNEY GENERAL

[5] Like many other jurisdictions, in Manitoba the government of the day appoints an elected official to the dual role of Minister of Justice and Attorney General. Although this is a dual portfolio, the roles and responsibilities differ depending on the issue being addressed. At the time of the Nygard allegations, Mr. Kelvin Goertzen held that dual portfolio. Both counsel agree that Mr. Goertzen was acting in his role as Attorney General when he addressed the issues respecting the Nygard prosecution.

[6] The duties of the Attorney General are set out in very general terms in *The Department of Justice Act*, CCSM c J35. It has long been recognized that the Attorney General occupies a position at the centre of the justice system, the "superintendent" of Public Prosecutions so to speak, and is accountable to the public, through the Legislature, for the exercise of power as set out in statute and common law.

[7] The position of Attorney General is rooted in British legal history and tradition, and while there are constitutional differences between the Canadian and British offices, the responsibilities of the office are much the same. In *Krieger v. Law Society of Alberta*, 2002 SCC 65 the Court made the following observations

when discussing the role of the Attorney General and the critical but challenging importance of maintaining independence from political pressures (at para 29):

> The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. See Edwards, *supra*, at pp. 174-76. Unlike the U.K., Cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.
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> Emphasis Added

[8] Recognizing the need to maintain independence and to assist in the execution of the duties of the office, the Attorney General appoints a Deputy Attorney General and an Assistant Deputy Attorney General. While those individuals report to and work with the Attorney General, their roles and responsibilities are notably different from that of the Attorney General.

[9] It is of critical importance that the integrity of the office of the Attorney General be maintained, recognizing that there is "a great potential for conflict of interest" (see The Report of the Law Reform Commission entitled "Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor" at page 1). In Manitoba, the roles of the various players have been set out in a series of Department of Justice Policy Directives. One such Policy Directive entitled "Role of the Attorney General" dated August 2017, (Guideline N: 1: RAG: 1) (the "AG Policy") specifically addresses the roles of the Attorney General and the Assistant Deputy Attorney General, reiterating the Constitutional Convention which governs the office, the division of powers within the office, the division of responsibilities between the Attorney General's office and the Prosecutions Branch, and specifically discusses the need for guidelines to prevent any perception of political

interference. The AG Policy adopts the Constitutional principles as set out by the Supreme Court of Canada in *Krieger v. The Law Society of Alberta* 2002 SCC 65, where the Court unanimously concluded that:

> It is a constitutional principle in this country that the Attorneys General must act independently of partisan concerns when exercising their delegated authority to initiate, continue or terminate prosecutions.

The AG Policy goes on to note:

> The Court explained in *Krieger* that this constitutional doctrine requires the Attorney General to make decisions in accordance with the rule of law since adherence to the rule of law is fundamental to our Constitution and the hallmark of a free society; Krieger at para. 32.
>
> The second principle of independence from Parliament and the legislature is very closely related to the first and is another means in which independence is preserved. It avoids political pressure being brought on the Attorney General by allowing the Attorney General to refuse to answer any questions in the House regarding a specific prosecution before the case is completed. The Attorney General may be called upon to explain a decision after a case is finally dealt with.
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> Emphasis added

As to the relationship between the Attorney General, The Assistant Deputy Attorney General and the Manitoba Prosecutions Branch, the AG Policy states:

> In order to avoid any semblance of political interference, all Attorneys General in Canada have instituted institutional safeguards to protect the integrity of prosecution decisions. While the Attorney General stands at the apex of the administration of justice, the daily exercise of prosecutorial discretion is carried out by Crown Attorneys. Crown Attorneys are required to exercise a quasi-judicial function and meet the obligations set out in "*The Crown Attorney's Act* CCSM C330. The Assistant Deputy Attorney General is charged with the administration of the Manitoba Prosecution Services and has independent authority for the conduct and supervision of all criminal prosecutions. Crown Attorneys are supervised through their management and the Attorney General usually chooses not to become involved in individual cases. However, if the Attorney General seeks to be briefed on a pending prosecution, that is his or her prerogative. The Attorney General would not be accompanied by any political staff during such briefing.
>
> The Attorney General usually chooses not to get involved in individual cases, the Attorney General's primary role and responsibility in criminal matters is to establish broad policy guidelines for Crown counsel to apply. These are

> generally supplemented by procedures and guidelines established by the department. Together such policies, procedures and guidelines make the exercise of prosecutorial discretion more transparent and just. They support consistent decision making which in turn furthers equal protection and equal benefit of the law.
>
> Emphasis added

[10] Although the Attorney General must act independently of pressure from elected colleagues, the position is nonetheless an appointed one and the Attorney General could be removed from the position by the Premier. In contrast, a lawyer working within the Manitoba Prosecution Service enjoys the hallmarks of independence from political pressure and is professionally bound to act ethically and make charging decisions consistent with the law and Manitoba Prosecution Service policies even when such decisions may be unpopular or contrary to public opinion.

[11] As noted, the actual prosecution of offences is conducted by agents of the Attorney General, or "Crown Attorneys" employed by Manitoba Prosecution Service, which has its own administrative structure and operates under the supervision of an Executive Director. Reporting to the Executive Director are a series of Directors who oversee various aspects of the prosecutorial process, such as Intake, Trials, and Appeals, amongst others. The Trial unit is further divided into specialized units, such as the gang unit, the youth unit and the domestic violence unit, the latter of which specializes in prosecuting sexual violence offences. At the time of the Nygard prosecution opinion, Ms. Jennifer Mann was the Director of Manitoba Prosecution Service Trial Unit.

[12] The Executive Director and the individual Directors are experienced lawyers, each with an extensive background in all aspects of the prosecutorial process. Complicated or high-profile cases are often the subject of discussion amongst Crown Attorneys and case conferences are often arranged where the cases

are reviewed. Although in many circumstances, with relatively straightforward matters, it is the police who lay charges against an accused, the decision to do so is sometimes left with members of Manitoba Prosecution Services. In such an event, it is accepted that the ultimate decision as to whether to authorize or proceed with charges in any matter lies with members of Manitoba Prosecution Service.

[13] The ethical responsibilities of individual prosecutors are well recognized and are specifically set out in a Policy Directive dated June 2017, (the "Crown Attorney Policy") which states:

> Crown attorneys shall continue to use the following two-fold test in the exercising their professional judgment to determine whether charges ought to be laid or proceeded upon:
>
> 1. Is there a reasonable likelihood of conviction; and
> 2. Is it in the public interest to proceed.

[14] The Crown Attorney Policy discusses each test and ends with the following commentary:

> Prosecutors are expected to exercise their professional judgment to consider their and other societal interest in determining whether a prosecution is in the public interest, recognizing that the more serious the offence and the more dangerous the offender the more likely that the value in prosecution will outweigh other public interests.

[15] It was within this administrative framework that, after an extensive investigation, the allegations against Nygard were forwarded by the Winnipeg Police Service ("WPS") to Manitoba Prosecution Service. It is an accepted fact that there was a thorough review of the allegations and that the senior members of Manitoba Prosecution Service met with the Attorney General's Office, ultimately providing the opinion that there was no reasonable likelihood of conviction. As noted, it is the ethical obligation of a Crown Attorney to decline to prosecute an accused if they are of the opinion that there is no reasonable likelihood of conviction or if it is contrary to the public interest to proceed.

[16] It is within the context of this administrative structure designed to protect the constitutionally mandated requirement that prosecutorial decisions be made independent of partisan concerns, thus respecting the Rule of Law, that the proceedings in this case must be assessed.

THE PROCEEDINGS

[17] Nygard was an internationally recognized fashion mogul and the head of a multimillion-dollar clothing empire with a corporate office in Winnipeg. He had been working from Winnipeg and other locations for many decades.

[18] On June 18, 2020, WPS members were contacted by a complainant who reported a historical sexual assault involving Nygard dating back to June 1993. On June 25, 2020, the complainant provided a video statement outlining the allegations against Nygard. These allegations sparked a comprehensive investigation that involved the taking of multiple statements, the execution of two search warrants, computer and open-source checks, and the review of hundreds of documents. Although the focus of this application is in respect of one specific complainant, it appears from the Agreed Statement of Facts that WPS members investigated complaints from numerous individuals. WPS members worked with Crown Attorneys from the Manitoba Prosecution Service, meeting with them to provide ongoing updates to the investigation.

[19] The evidence obtained during the investigation was ultimately referred to Manitoba Prosecution Service, who conducted their own review, including case conference meetings with multiple senior Crown Attorneys. On July 22, 2021, Manitoba Prosecution Service Director Jennifer Mann and Joanna Kostiuk met with WPS members and advised that Manitoba Prosecution Service would not be authorizing charges in the matter. Senior Crown Attorneys had reviewed the allegations involving this and other complainants and had concluded, as stated by Ms. Mann, that “after an extensive review of this very thorough police

investigation, I am of the view that there is no reasonable likelihood of conviction in relation to any of the allegations. This means no charges should be laid against Peter Nygard for these matters."

[20] On September 28, 2021, WPS members were advised that Ontario Justice had authorized six charges of sexual assault against Nygard in Toronto. These allegations involved different complainants than the Winnipeg complainants. The fact that charges were authorized in Toronto and not in Winnipeg was the subject of considerable publicity and criticism, including multiple newspaper articles written over many months, as well as a CBC television documentary by "The Fifth Estate" which ran on November 30, 2021, entitled "Why not in Winnipeg". While the documentary was not shown in court, the related material filed by agreement shows that during that documentary, four of the Winnipeg complainants were interviewed on camera and expressed their disappointment and frustration that charges were not laid in Manitoba. In response to inquiries, then WPS Chief Smythe pointed out that the ultimate decision respecting charges was not up to the WPS but added "we acknowledge and respect the decision made by justice officials…not to proceed with criminal proceedings." Manitoba Justice declined to provide a statement or give reasons for declining to proceed with charges.

[21] On December 3, 2021, CBC News reported that Manitoba Keewatinowi Okimakanak (MKO) was calling for an inquiry into "the failures of the justice system to charge Peter Nygard". On December 14, 2021, a protest was held in front of the Law Courts Building in Winnipeg denouncing the fact that criminal charges were not laid in Manitoba. Further calls for a public inquiry into why Nygard was not charged continued into June 2022.

[22] On November 28, 2022, 16 months after Manitoba Prosecutions Service rendered the decision not to authorize charges, Manitoba Liberal Party leader Dugald Lamont organized a press conference with four of the Winnipeg

complainants. On that same date, he raised the matter in the Manitoba Legislature during Question Period, calling upon the Progressive Conservative government to "call a public inquiry into the Winnipeg Police Service and Manitoba Justice for their handling of the Nygard investigations and prosecution".

[23] Pursuant to the Manitoba AG policy, the Assistant Deputy Attorney General is the individual who is "charged with the administration of the Manitoba Prosecution Service and has independent authority for the conduct and supervision of all criminal prosecutions." On November 29, 2022, the Assistant Deputy Attorney General briefed the Attorney General on the Nygard matter in the presence of the Deputy Attorney General. Manitoba Justice has asserted privilege over the contents of that briefing.

[24] On December 1, 2022, the Progressive Conservative government was questioned again in the Legislature about the lack of charges against Nygard and was asked if it would "reopen the investigation and call a public inquiry into the charges against Peter Nygard". On that date it was Attorney General Goertzen who responded as follows:

> Of course we – and I think all Manitobans – are very concerned and disturbed by the allegations against Peter Nygard and hearing the stories from those who have come forward to share them. I want to remind the Member, of course, that Prosecutions is independent. But I do believe that it is important to have a second opinion, and I have instructed the Department to seek a second opinion from Crown Attorneys outside the Province of Manitoba, to look to see whether or not that second opinion results in different result on charging.

[25] In a subsequent media interview on that same date Mr. Goertzen was quoted as saying, "I have no idea what the outcome is going to be. I just thought it was important for people's confidence in the justice system . . . I felt it important because I had concerns. It bothered me that we were seeing charges in other places, but there might be good reason." He went on to state that if the decision was not to lay charges it was his intention to provide some explanation without

running the risk of jeopardizing other investigations or trials: “I know that there are certain barriers we can’t cross . . . I think maybe sometimes we’re a little overly cautious.”

[26] On December 15, 2022, the WPS investigation was referred to Saskatchewan Public Prosecution Service for a second opinion on charging. The WPS investigation file that was forwarded to Saskatchewan Public Prosecution Service was the same as the one that was considered by Manitoba Prosecution Service. On December 17, 2022, CBC News reported that the Manitoba Justice Minister’s Press Secretary stated that Saskatchewan Public Prosecution Service had “been asked to provide an independent opinion on the Nygard matter”. In that same article, Senior Crown Attorney Jennifer Mann explained that:

> She conducted a careful and detailed review of the evidence and, as is usual for serious cases such as this, the Prosecution Service held an internal case conference. Several Crown Attorneys who have considerable expertise and experience in prosecuting sexual assault cases weighed in on her decision. It was determined that there was no reasonable likelihood of conviction for each of the allegations, so she did not authorize charges. Ms. Mann went on to note that she is “ethically bound not to authorize charges in circumstances where there is no reasonable likelihood of conviction.”

[27] On May 31, 2023, the Assistant Deputy Attorney General briefed Mr. Goertzen with respect to the Nygard matter after having received the legal opinion from the Saskatchewan Public Prosecution office. Manitoba Justice has also asserted privilege over the contents of that briefing.

[28] On June 6, 2023, Mr. Goertzen wrote a letter to the Assistant Deputy Attorney General acknowledging that Manitoba Prosecution Service had undertaken a “comprehensive and thorough review of the evidence” before concluding that charges ought not to be authorized. He expressed serious concern about “sexual assault and the exploitation of women” and noted that “If there is a viable path to prosecute Peter Nygard for the alleged sexual offences but no

prosecution occurs, this could undermine public confidence in the justice system." The letter notes that it was the opinion of Saskatchewan Public Prosecution Service that the prosecution standard was met with respect to one of the eight matters referred for a second opinion and therefore directed that independent counsel should proceed to initiate and conduct criminal proceedings against Mr. Nygard under s. 271 (sexual assault) and s. 279(2) (forcible confinement) of the *Criminal Code* concerning the allegations from that single complainant. On June 15, 2023, charges were authorized and on July 11, 2023, Nygard was arrested on these charges.

[29] On July 11, 2023, Mr. Goertzen issued a "Tweet" stating "in December I requested an independent opinion which determined that a prosecution of Peter Nygard is viable in respect of the allegations made by one complainant. The police have now arrested Mr. Nygard, and a prosecution will be initiated. It is inappropriate to comment further."

[30] On September 17, 2024, Mr. Goertzen issued another "Tweet" commenting on the actions he had taken while in the position of Attorney General, pointing out that "he had directed an outside review" be done on the decision not to charge Peter Nygard. He described this as an "unprecedented step that ultimately resulted in charges being laid."

THE LEGAL PRINCIPLES: *CHARTER* SECTION 7 AND ABUSE OF PROCESS

[31] *Charter* s. 7 states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[32] Both counsel largely agreed on the legal principles at play, although they dispute their application to the facts. It is accepted that the onus rests with the Applicant to establish on a balance of probabilities that his *Charter* s. 7 rights have been breached. There is no issue that maintaining the independence of the Office of the Attorney General is a fundamental principle of justice within *Charter* s. 7. It is also conceded that the rule of law is a fundamental principle of justice, and that the test to establish abuse of process is a stringent one but that the evidentiary burden may shift to the Crown to inform the Court of the circumstances and the reasons behind its decisions where the Crown is the only party privy to that information.

[33] There is a growing body of case law addressing the principle of abuse of process and prosecutorial discretion. Because there are multiple tests and sub-tests, it is helpful to proceed incrementally.

The Test for Abuse of Process

[34] In *R. v. O'Connor*, [1995] 4 SCR 411, the Supreme Court of Canada articulated two types of cases where a stay of proceedings was considered warranted for an abuse of process: 1) where state conduct compromised an accused person's right to a fair trial and 2) although there was no risk to trial fairness, the state conduct risked undermining the integrity of the judicial process. This second category has come to be known as the "residual category" of abuse of process.

[35] In *R. v. Nixon* 2011 SCC 34, the Court affirmed its decision in *O'Connor* respecting the two categories of abuse of process. Although the Applicant relies on the second, or residual category, it is helpful to consider the Court's comments respecting both tests (at paras. 40-41):

> the Court reiterated that the test for abuse of process was whether "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 the proceedings are "oppressive or vexatious" (pp. 658-59, quoting from *Jewitt*, at pp. 136-37). While the Court concluded that the Crown's exercise of discretion to proceed with a third trial did not constitute an abuse of process in the circumstances of the

> case, the Court held that the test could be made out in the absence of prosecutorial discretion. Wilson J. explained as follows (at p. 659):
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> > To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.
>
> Under the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Of course, in most cases, the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice.

[36] The Court went on to adopt the comment of L'Heureux-Dubé J. in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, who noted that the residual category "acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function." When assessing a claim of abuse of process under the residual category, prosecutorial misconduct, improper motive, bad faith and prejudice to the accused are not prerequisites, although the Court did note that, practically speaking, an accused would likely have to demonstrate some degree of prejudice flowing from the prosecutorial misconduct.

[37] Crown counsel submits that the applicable standard is one of "conspicuous and overwhelming" evidence before a Court can find that conduct complained of amounts to an abuse of process.

Two Legal Presumptions

[38] I note at the outset the following further legal principles. First, there is presumption of prosecutorial good faith: see *R. v. Kreiger* 2022 SCC 65 and *Nixon*. Secondly, the Attorney General "is entitled to a strong presumption that he

exercises prosecutorial discretion independently of other partisan concerns." See *R. v. Cawthorne,* 2016 SCC 32. Those presumptions will be factored in when the evidence in this case is assessed.

Threshold Determination

[39] A review of prosecutorial discretion can only be conducted by the Court in the context of an application for abuse of process and cannot proceed on bare allegations. The Court must make a "threshold determination" as to whether there is evidence to support the assertion that an "inquiry is warranted." (*Nixon* para 60). In doing so, 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" *(Nixon*). An improper motive may include political interference, bad faith or to accommodate a real or perceived political stance of the Minister of Justice (See *Nixon* para 66).

[40] It is accepted that, generally speaking, prosecutors are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motive (see *R. v. Anderson*, 2014 SCC 41). In *Nixon*, the Court pointed out that while the "ultimate burden" of proving abuse of process remains with the applicant and that "the test is a stringent one" there are circumstances when "to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision…" (para 63). This test was affirmed by the Court in *Anderson* (at para 52).

Available Remedies

[41] The remedy sought for an abuse of process is set out in *R. v. Regan* 2002 SCC 12 which confirmed that a stay of proceedings would only be appropriate 1) when 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 (see *Reagan* para 54 citing *O'Connor* para 75). In other words, as stated in *O'Connor* (at para 68) a stay of proceedings is only appropriate in "the clearest of cases".

ASSESSING THE EVIDENCE

Assessing the Evidentiary Threshold

[42] Arguing that the allegations of abuse of process are more than a "bare assertion" the applicant asserts the following:

1. Manitoba Prosecution Service has no policy for the reconsideration of a Crown opinion not to lay charges.
2. The Attorney General has not demonstrated a principled basis upon which he became involved in this case.
3. The Attorney General acted in a manner contrary to the existing Manitoba Prosecution Service policy on "the role of the Attorney General".
4. The decision of the Attorney General to seek a second opinion was, to use his own words, "unprecedented".

[43] Crown counsel rejects these assertions and argues that the evidence tendered by the applicant does not meet the threshold test. He contends that the Attorney General was within his right to ask for a second opinion as part of his decision-making authority. He further argues that the evidence presented, being a collection of newspaper articles supplemented by an Agreed Statement of Facts, falls far short of being the type of evidence that is required to satisfy the threshold, particularly given the legal presumptions of prosecutorial good faith and the Attorney General's independence of partisan influences. He argues that the attacks on prosecutorial discretion should fail at this stage.

[44] While recognizing that the Courts should not interfere with or instruct the Attorney General as to its decision-making process in specific cases and that there

is a high bar when assessing improper motive, I am satisfied that the evidentiary threshold is met, and the two legal presumptions have been rebutted for the following reasons.

[45] First, the decision to seek a second opinion was one described by the Attorney General himself as being an "unprecedented" one. In *Nixon,* Crown counsel repudiated a plea agreement, an action described by the Court as "rare and exceptional" and providing the "requisite evidentiary threshold to embark on a review of the decision for abuse of process." In this case, the "unprecedented" act must be considered contextually, recognizing that the "second opinion" was sought despite the Attorney General having received and been briefed on a thoroughly considered opinion from Manitoba Prosecution Service. I am satisfied that these circumstances provide the requisite threshold evidentiary foundation.

[46] I would add to these concerns the noteworthy lack of an articulated and principled basis for the Attorney General's actions. There is no policy in place addressing the circumstances when a "second opinion" can or should be sought. Further, privilege has been asserted over many of the communications that would have shed light on the reasons behind the request. Recognizing that this a "threshold" assessment of the evidence, I am satisfied that the facts, timing and circumstances of the Attorney General's decision have resulted in a shifting of the evidentiary burden. Without further evidence, even taking into account the two legal presumptions at play in applications of this nature, I am satisfied on the totality of the circumstances that the evidentiary threshold has been met.

THE TEST FOR ABUSE OF PROCESS

The "Residual Category" and Prosecutorial Discretion

[47] Conduct falling under the umbrella of prosecutorial discretion has received specific consideration by the courts. In *Anderson,* the Court adopted the language in *Kreiger* in giving both definition and parameters to the term "prosecutorial

discretion", noting the fine but important distinction between "prosecutorial discretion" and "prosecutorial duty":

> [44] In an effort to clarify, I think we should start by recognizing that the term "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" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R.v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the Code itself, including the decision in this case to tender the Notice.
>
> [45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligations of the Crown was made in *Krieger*, where the prosecutor's duty to disclose relevant evidence to the accused was at issue:
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> > In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]
> >
> > Manifestly, the Crown possesses no discretion to breach the Charter rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

[48] Prosecutorial discretion provides both the Attorney General and Crown attorneys wide authority but falls short of authorizing conduct which infringes an accused's constitutional rights. In *Anderson*, the Court reviewed the test for

determining whether an abuse of process was made out, noting that actions that "undermine the integrity of the judicial process" have been used to describe the type of conduct requiring sanction. As it relates to the residual category of the abuse of process test, the Court in *Nixon* suggested "an act tending to undermine society's expectations of fairness in the administration of justice" (at para 41).The test under the residual category is a notably different one than that applied under the first category and can include evidence of "improper motives" or flagrant impropriety. Regardless of the category, it is important to reiterate that prosecutorial discretion can only be reviewed in the context of an abuse of process application, and that the Courts are otherwise prohibited from "second-guessing" actions of the prosecution.

[49] Interestingly, the Applicant does not argue that an Attorney General is prohibited, under any circumstances, from seeking a "second opinion" on a decision made by Manitoba Prosecution Service Crown attorneys on whether to prosecute an accused. Rather, she argues that an Attorney General must act with transparency and further that such a decision must be made on a principled basis. In this case, she submits that the Attorney General's decision was one motivated by partisan concerns, based on bias against Nygard, without the guidance of an articulated policy governing such a request, and by inference, contrary to existing polices which govern the relationship between the Attorney General and the members of Manitoba Prosecution Service. As such, she argues that the Attorney General's actions offended the rule of law and amount to an abuse of process.

[50] Crown counsel agrees, as do I, that there is no blanket prohibition against an Attorney General seeking a second opinion, as that would represent far too narrow an interpretation of his responsibilities. However, given the unique role the Attorney General occupies within our system, which unlike the British counterpart includes a seat at the Cabinet table and given the well recognized "potential for

conflict of interest", special care must be taken when taking such an "unprecedented" step. Concerningly, this appears to be a case where such special care was not taken.

The Lack of a Policy Governing Second Opinions

[51] As noted earlier, there are a number of formal policies governing the relation between the Attorney General and Manitoba Prosecution Service. These policies are not the equivalent of law, but they do play a very important role in providing transparency to the decision-making process and providing a basis for protecting against allegations of conflict of interest. The AG Policy Statement on the "Role of the Attorney General" references the Supreme Court's decision in *Krieger*, noting that the Constitutional doctrine mandating an Attorney General to act independently "requires the Attorney General to make decisions in accordance with the rule of law since adherence to the rule of law is fundamental to our Constitution and the hallmark of a free society." After reviewing the roles of the respective parties, the document notes the following: "Given that the Attorney General chooses not to get involved in individual cases, the Attorney General's primary role and responsibility in criminal matters is to establish broad policy guidelines for Crown counsel to apply." Policies addressing the retention of Independent Counsel as well as the laying and staying of charges were filed as exhibits in this Application and serve as examples of policies which provide both guidance and transparency to the prosecutorial process.

[52] Even though public concerns were expressed over a period of 16 months leading up to the decision to seek a second opinion, there is no evidence that the Attorney General took any steps to establish a policy respecting when a second opinion could be sought. I recognize that the evidentiary onus in establishing an abuse of process rests with the Applicant. I also note, however, that because privilege has been claimed on the communications between the Attorney General

and his Deputy Minister and Assistant Deputy Minister, there is no evidence as to how long this course of action was even contemplated. Nor is there any evidence as to what principles, if any, were applied in concluding that a second opinion was warranted. This is very different from the situation in *Nixon.* Two aspects of that case are noteworthy. First, there was a process in place for the Minister's office to be made aware of circumstances in high profile cases. It was on the basis of that formal process that the plea bargain came to the attention of the Acting Assistant Deputy Minister. Secondly, after receiving information about the plea deal as part of the internal reporting process, the Acting Assistant Deputy Minister became concerned and initiated a number of inquiries. The Court noted that (at para 10),

> the ADM obtained additional legal opinions about the merits of the *Nixon* prosecution and about the repudiation of plea agreements. Based on the results of this research, the ADM concluded that Crown Counsel's assessment of the strength of this case was flawed as he failed to consider the totality of the evidence. A plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. The ADM also concluded that Ms. Nixon could be restored without prejudice to the position she had been in prior to entering into the plea agreement.

[53] It is clear from the facts in *Nixon* that the decision to repudiate the plea bargain, made by the Acting Assistant Deputy Minister, was based on a well-established process of case review and on principled concerns arising after extensive research was conducted. There is no evidence in this case that the Attorney General's office followed such a process or relied on research-based principles.

[54] In *R. v. Stobbe,* 2011 MBQB 280 extensive information was disclosed to both defence and the Court explaining a decision to seek an out-of-province opinion from British Columbia after two opinions from Alberta Prosecutions recommended that no charges be laid. Although there were concerns expressed about the failure to strictly adhere to the terms of the Manitoba Policy Directive on the appointment of independent counsel, the Court accepted that the spirit of the

policy had been met. I note as well that the Court had extensive evidence as to the communications between Manitoba's Assistant Deputy Minister and the British Columbia Crown's office, who had been asked to provide an independent opinion. Such evidence is not before the Court in this case, due to a claim of privilege. While I accept the argument advanced by Crown counsel that the absence of a policy is not determinative of the matter, it does raise questions in this case as to what legal principles, if any, governed the decision-making process.

[55] Crown counsel argues that the Court can glean the Minister's intentions from his comments to the media at the time the decision was made and from a letter that the Attorney General sent to the Assistant Deputy Attorney General dated June 6, 2023, approximately six months after the matter was referred to Saskatchewan Public Prosecution Service. Interestingly, privilege has also been claimed on the communications with Saskatchewan Public Prosecution Service and on their opinion supporting a conclusion that charges should be authorized. Therefore, there is no evidence before the Court as to what requests were made of Saskatchewan Public Prosecution Service.

[56] When speaking to the media Mr. Goertzen stated that if the opinion was that no charges should be laid, it was his intention to provide some "explanation" without running the risk of jeopardizing other investigations or trials. He then stated, "I know that there are certain barriers we can't cross…I think maybe sometimes we're a little overly cautious." Crown counsel argues that the reference to being "overly cautious" helps to inform the Attorney General's intentions at the time. Given the importance of evidence in an Application of this nature, I have difficulty accepting that these comments amount to an explanation for the Attorney General's intentions. Further, when assessing these comments, it is unclear to me whether the concerns about being "overly cautious" is in reference to the charging

process or to the fact that an explanation for the decisions on charging had not yet been provided to the public.

[57] With respect to the June 6, 2023, correspondence, the Attorney General correctly expresses concerns about the seriousness of sexual offences against women and the need to uphold public confidence in the justice system. Beyond that, the letter does not articulate the reason why the Manitoba Prosecution Service's opinion was in need of review. There is no evidence of any further legal research, as in *Nixon*, or a review and restatement of troublesome aspects of an investigation, such as in *Stobbe*. By all accounts, the WPS investigation was a thorough one, as was the review and opinion rendered by Manitoba Prosecution Service.

[58] Applicant's counsel also argues that the Attorney General's actions were contrary to existing policies, pointing out that the policy related to the appointment of independent counsel articulates the process of the appointment as well as the terms and conditions of such appointments. The policy also indicates "absent exceptional circumstances, the following should generally form a part of the term of reference," setting out a number of factors guiding the retainer and role of independent counsel, including:

> b) where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;
>
> c) the advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General which, which direction, if given, will forthwith be made public;
>
> (i) Periodic administrative meetings may be held between the Assistant Deputy Attorney General (or delegate) and independent counsel to ensure the referrals to independent counsel are being handled in a conscientious

> matter (in particular, that files are not being neglected). These administrative meetings are necessary and reasonable and do not diminish the independence of the prosecutor, as the ultimate decision-making authority remains with independent counsel.

[59] The foregoing are simply examples of the principles and attention to detail addressed when independent counsel is engaged to conduct a prosecution. Unfortunately, as it relates to the Nygard request, evidence of such attention to detail is absent.

Was the Decision to Seek a Second Opinion made for an Improper Purpose?

[60] Counsel for the Applicant argues that timing of the Attorney General's decision is an important factor when assessed in the context of the other, albeit circumstantial, evidence. She argues that the timing of the decision to seek a second opinion suggests an improper motive and resulted in actions contrary to the rule of law.

[61] As noted, approximately 16 months elapsed between the Manitoba Prosecution Service's opinion that the test for authorizing charges was not met and the decision to refer the matter out of province for a second opinion. During that time, the evidence demonstrates that there was considerable public interest and criticism over this conclusion. Courts have recognized that improper motives, such as those which are done for purely partisan purposes and therefore demonstratively compromise the independence of the Attorney General can amount to an abuse of process. In *R. v. Cawthorne* [2016] 1 SCR 983, the Court recognized that when assessing whether "purely partisan" motivations are made out, "partisan" concerns are not "broadly synonymous with "political". Noting that cases of this nature are highly fact based, the Court stated:

> Decisions to prosecute (or to not prosecute) can have broad social repercussions, and regard for those repercussions properly informs prosecutorial discretion: Sterling and Mackay, at p. 179; Rosenberg, at pp. 821-22, fn. 24. It is

> not open to a court to scrutinize this exercise of discretion, or to question a prosecutor's particular conception of the public interest. A government policy of strict prosecution of certain offences, if motivated by concerns for the public interest, does not offend s. 7. It is only when the considerations underlying a prosecution are partisan — that is, when a prosecutor acts not for the public good, but "for the good of the government of the day" — that a court's intervention is warranted: Sterling and Mackay, at p. 179, citing I. Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 *U.T.L.J.* 109, at p. 121.
>
> Emphasis Added

[62] Let me be clear. There is absolutely nothing wrong with the public showing interest in a particular prosecution and the Attorney General being sensitive to the concerns and questions that the public may have. But there is a fine line between the Attorney General's responsibility to maintain public confidence in the justice system and his acting in a manner which Applicant's counsel submits amounts to partisan interference in the prosecutorial discretion. What is significant in this case is the fact that the decision to seek a second opinion followed direct questioning of the Progressive Conservative government in the Legislature. During the November 28, 2022, session, Liberal Leader Dougald Lamont asked the government "On behalf of more than 40 Nygård survivors who are watching these proceedings, I ask: Will the PC government call a public inquiry into the police–Winnipeg Police Service and Manitoba Justice for their handling of the Nygård investigations and prosecutions?" Lamont pressed the point further stating, "On behalf of survivors, I ask the Premier (Mrs. Stefanson) and Justice minder again–minister again: Will you reopen and reassign the Nygård investigation and call a public inquiry into the Winnipeg Police Service and Manitoba Justice's handling of the Nygård cases?" Of note, these questions were put to the Premier and to the "Justice Minister" and not to the Attorney General. This is consistent with the constitutional principle that the Attorney General must "act independent of partisan concerns" (see *Krieger*). Responses came from other governmental Ministers, consistent with law and with

the AG Policy which allows the Attorney General to maintain independence by refusing "to answer any questions in the House regarding a specific prosecution before the case is complete."

[63] It was in response to the questions posed to the government and within a matter of days that Mr. Goertzen announced in the Legislature that he was seeking a second opinion on whether Nygard should be charged. That Mr. Goertzen, holding the dual position as Minister of Justice and Attorney General, chose to respond to questions about a case not yet completed is contrary to the AG Policy memo, which is essentially a restatement of the law, and is one which recognizes that to avoid "political pressure being brought on the Attorney General by allowing the Attorney General to refuse to answer any questions in the House regarding specific prosecution before the case is completed." In this, both counsel agree that Mr. Goertzen was acting in his role as Attorney General in his handling the Nygard file.

[64] By responding to questions in the Legislature, Mr. Goertzen's actions, as Attorney General, offended the Justice Department's own AG Policy, and went beyond addressing government policy respecting general types of offences. He publicly commented on a specific case, identifying a specific individual, in response to ongoing and mounting public pressure, prior to the case being completed. They are actions which appear to be "good for the government of the day," supporting the conclusion that the Attorney General was acting out of partisan concerns.

[65] A secondary concern arises from the Attorney General's decision to publicly announce his intention to seek a second opinion. I note again that it is conceded that had his decision been based on articulable principles and for reasons other than partisan ones, the Attorney General could have sought a second opinion, although I again note that there is no suggestion of impropriety, inadequacy, or incompetence

as it relates to the initial decision made by Manitoba Prosecution Service. Indeed, the evidence suggests that the review was a thorough one conducted by experienced prosecutors.

[66] In his public comments, the Attorney General expressed that his decision to seek a second opinion was rooted in a desire to maintain "public confidence" in the justice system. But part of the maintenance of public confidence is the maintenance of transparency in the decision-making process, if not at the time, then certainly at this stage of the proceedings. In this instance, a claim of privilege has been made on information that could have "enlightened the Court" for the reasons underpinning the rejection of the legal opinion of the Manitoba Prosecution Service Crown attorneys. The release of this information could also have assisted in addressing the perception that the Attorney General's actions were motivated by partisan concerns. Such was the course of action taken in *Nixon*, where the fact that there was research undertaken by the Assistant Deputy Attorney General which informed the decision to resile from the plea agreement was disclosed to the Court. The Court in *Nixon* applied the *Krieger* standard to the repudiation of plea agreements, noting that an abuse of process claim may be made out if "the repudiation was made arbitrarily, without inquiry into the circumstances leading to the plea agreement, and without regard to any prejudice to the accused." (at para 64). Similarly, in *Stobbe*, the applicant provided affidavit evidence containing "significant disclosure of records not usually seen or disclosed, demonstrating at least part of the behind-the-scenes goings-on in the investigation and particularly between investigators and the Crown" (at para 4). Information of that nature is conspicuously absent in this case, leaving the Court without any information as to what principles, if any, guided the decision-making process. Crown counsel points to the Attorney General's correspondence of June 6, 2023, to his Assistant Deputy Minister, written six months after the referral of this matter to Saskatchewan Public

Prosecution Service, as providing evidence of Mr. Goertzen's motivations. However, I note that the correspondence does not specifically articulate a basis to seek a second opinion beyond the "public interest" in seeing sexual offences prosecuted. And as already noted, the department is without a policy which would assist in identifying appropriate circumstances under which a second opinion could be sought.

[67] Along with the timing of his decision, the lack of clearly articulated principles and the lack of a guiding policy, Applicant's counsel also points to the media releases and the "Tweets" issued by the Attorney General, arguing that these are problematic for two reasons. First, they further demonstrate that the decision to seek a second opinion was very much a partisan one, made only after pressure was brought to bear in the Legislature, and made within days of the issue being raised during Question Period. Secondly, she raises a concern that by addressing this matter in Question Period, in the media and on Twitter, the Attorney General disregarded the presumption of innocence.

[68] The act of publicly announcing that a second opinion was being sought is troubling. It is trite to say that while all accused are cloaked with the presumption of innocence, some individual cases attract more attention than others. In those cases, care must be taken to ensure that the presumption of innocence is respected. In *R. v. Regan*, the accused, a former Premier of Nova Scotia, was accused of committing numerous sexual offences against women who had worked with or for him. A claim of abuse of process was raised respecting the way in which the Crown attorney handled the case, including "judge shopping" and pre-charge interviews of complainants. Although concluding that an abuse of process claim was not made out on the facts, the Court expressed concerns about police releasing Regan's name as a suspect prior to any charges being laid, in contravention of the police department's own policy. The Court commented that the policy was likely

adopted to protect the privacy interests of individuals not yet charged with an offence "and a breach of it should not be condoned" but concluded that the police action represented one "misstep" and greater caution was exercised going forward. What is significantly concerning in this case is that the Attorney General repeatedly identified Nygard by name, at a time when he had already received an opinion that the prosecution standard against Nygard was not met on the existing evidence. Although he commented that he has "no idea what the outcome" of the second opinion would be, that is beside the point. Given his position, he ought to have exercised far more discretion and refrained from commenting publicly prior to receiving the opinion from Saskatchewan Public Prosecution Service. I note as well that he also expressed concerns about "seeing charges in other places." Holding the very special position of Attorney General, he knew, or ought to have known, that his comments could have impact on the public's perception of the prosecution and, by extension, the presumption of innocence as it relates to this accused.

The Propensity Reasoning and the decision to seek a Second Opinion

[69] It is clear from his comments to the media that the Attorney General was influenced by the decision in Ontario to proceed with charges against Nygard, stating "It bothered me that we were seeing charges in other places, but there might be a good reason." Applicant's counsel argues that this amounts to "propensity" reasoning which should have no place in determining whether charges ought to be laid.

[70] In the criminal justice system, "propensity" reasoning occupies a narrow but important bandwidth, and is only accepted by the Court as being relevant after stringent tests are met through "similar fact" applications. However, there may be circumstances when "propensity" becomes important in assessing whether charges ought to be laid against an individual. The Attorney General knew, or ought to

have known, both the limitations to this evidence and its potential role in assessing whether the prosecutorial test was met: is there a reasonable likelihood of conviction? This is an example of a legal principle that could have formed the basis for a "second opinion". However, there is no evidence that the Attorney General based his request for a second opinion on the recognized principles governing "similar fact" evidence and their potential role in this case, nor is there evidence that the Saskatchewan Public Prosecution counsel were asked to consider this in their deliberations, as privilege has been asserted on those communications. As well, it is an agreed fact that Saskatchewan Public Prosecutions received the same information as was considered by Manitoba Prosecution Service, whose opinion was rendered months before charges were authorized in Ontario. While I agree that the Attorney General's comments are suggestive of "propensity" reasoning, there is no evidence that such reasoning actually played a role in the decision to seek a second opinion.

The Rule of Law - a Foundational Constitutional Principle

[71] The applicant has asserted that his rights pursuant to *Charter* s. 7 were violated when the Attorney General acted in a manner which was contrary to the rule of law. Simply put, the rule of law is a fundamental principle of our democratic society which essentially means that all laws apply to everyone equally, that governments must act in a manner which is transparent and that laws will be applied in a manner which is independent of improper influence. Applicant's counsel argues that by singling out Nygard for "unprecedented" treatment, in a manner which lacks transparency and was not based on articulated principles, the Attorney General offended the rule of law.

[72] In exercising his responsibilities as the "superintendent" of the Prosecutions Branch, the Attorney General walks a fine line. The position requires that the Attorney General be mindful of public confidence in the justice system while at the

same time refraining from succumbing to political or other pressures. While attacks in the media, in the Legislature, or from the public at large can prove challenging, an Attorney General can never act in a manner which crosses the line and offends the constitutional principles which govern the office.

[73] Counsel have filed, by agreement, media articles and Hansard outtakes which demonstrate examples of public pressure being brought to bear on the Attorney General involving the allegations made by this and other complainants against Nygard. As noted earlier, there is nothing wrong with members of the public showing interest in specific cases. But in order for the Attorney General to respect and maintain the rule of law, he cannot be swayed by media criticism, petitions, public demonstrations, or partisan concerns. At the end of the day every person, no matter how reviled, how notorious, how popular or unpopular, must receive equal treatment by the Attorney General and by the Justice system. As demonstrated by the evidence in this case, such respect for the rule of law was not extended to Nygard. He appears to have been singled out because of the notoriety of his case, not because of any articulated or principled reasons. The allegations against him were the subject of pre-charge comment. The decision to seek a second opinion after public pressure was brought to bear on the government and the Attorney General and was based on partisan concerns and amounts to an abuse of process.

[74] I have some final concerns relating to the adverse impact of proceeding in this manner in this case, which are relevant given the Attorney General's purported reliance on "public confidence in the justice system" as a principled reason for pursuing a second opinion. First is in relation to the public's perception of the Manitoba Prosecution Service and the ability of the Crown attorneys who work there to reliably review, assess and prosecute matters. It is a task they are called upon to do tens of thousands of times every year. The Manitoba Prosecution

Service counsel who assessed the evidence in this case were clearly aware of their ethical obligation to decline to authorize charges where they were of the view that there was "no reasonable likelihood of conviction." It is also clear that considerable time and effort was spent, and the input of experienced prosecutors was sought, before any conclusions were reached. As is evident from the many media articles filed in this matter, by proceeding in this manner and seeking a second opinion without an articulated basis, the Attorney General undermined public confidence in Manitoba Prosecution Service counsel, and by extension the justice system, rather than improving it.

[75] Finally, proceeding in the way chosen by the Attorney General, both pre and post-charge, has given rise to protracted litigation, which has delayed these proceedings. While I am mindful that these are historical allegations, it is beneficial for all parties involved to see a timely resolution of criminal charges. Although I have no evidence on this point, it is easy to conclude that the delay in these proceedings has been challenging for the complainant. The Attorney General has expressed concerns about victims of sexual violence, and it is accepted that victims of sexual violence have struggled with the court system. Unfortunately, having dealt with this prosecution in this manner, the Attorney General has risked adding to those concerns rather than alleviating them.

CONCLUSION AND REMEDY SOUGHT

[76] The Attorney General regularly receives briefings and opinions from members of Manitoba Prosecution Service. There may be occasions where he feels a second opinion is warranted. The Attorney General is entitled to seek such and obtain a second opinion when there is a clearly principled and transparent basis for doing so.

[77] In this case, the timing of the Attorney General's decision is very troubling and appears on the evidence before the Court to be one that was made abruptly and

only after questioning in the Legislature, despite having been in possession of the Manitoba Prosecution Service opinion for approximately 16 months. The reasoning behind the decision is shrouded in a claim of privilege. While I recognize that some of the evidence in this Application is circumstantial, it nonetheless leads to the conclusion that the course of action taken by the Attorney General was a partisan decision which was made contrary to the rule of law. Based on this and the other reasons I have articulated, I am satisfied on a balance of probabilities that the Attorney General's decision to obtain a second opinion amounts to an abuse of process. This is not a conclusion I have reached lightly, recognizing that the authorities suggest that Courts should be very cautious when analyzing allegations of this nature. It is one, however, that I am satisfied is supported by the evidence and the law.

REMEDY- CHARTER S. 24(1) - A STAY OF PROCEEDINGS ONLY IN "THE CLEAREST OF CASES"

[78] Determining an appropriate remedy in the case is a difficult process that requires a balancing of multiple tests and interests. The section itself is broadly worded and suggests that a considerable degree of latitude is conferred upon the trial judge:

> 24.(1) Anyone 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.

[79] Courts have established the parameters of available remedies under *Charter* s.24(1), but even within those articulated tests there remains some ambiguity and tension. In *Nixon*, the Court specifically discussed the test for granting a stay of proceedings, the remedy sought by the Applicant in this matter (at para 41):

> 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 and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391,

> and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. 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" (*Regan*, at para. 54, citing *O'Connor*, at para. 75).

[80] In the case at bar, the abuse of process complained of was a partisan-motivated request for a second opinion, which resulted in charges being laid against the Applicant. There is certainly an argument to suggest that the only way to prevent the abuse in question being "manifested, perpetuated or aggravated" is through a judicial stay of proceedings, as no other remedy would be capable of addressing the fact that the specific breach in this case has resulted in the prosecution of the Applicant.

[81] However, the Court in *Nixon* went on to reiterate the test first set out in *O'Connor:*

> Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. In *Conway*, *supra*, at p. 1667, for instance, I elaborated upon the essential balancing character of abuse of process in the following terms:
>
> [Abuse of process] acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]
>
> I see no reason why such balancing cannot be performed equally, if not more, effectively under the *Charter*, both in terms of defining violations and in terms of

> selecting the appropriate remedy to perceived violations. See, by analogy, *Morin*, *supra*.

[82] This test is more nuanced, with the Court suggesting an approach that considers the delicate balancing of the accused's interests against "the societal interest in the effective prosecution of criminal cases": the use of a "scalpel" rather than an "axe" when crafting an appropriate remedy.

[83] The test to determine whether a judicial stay of proceedings is an appropriate remedy was further refined by the Supreme Court in *R. v. Babos*, 2014 SCC 16 (at para 32):

> The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
> (2) There must be no alternative remedy capable of redressing the prejudice; and
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[84] Applying these tests, Applicant's counsel strongly urges the Court to direct a judicial stay of proceedings as a means of protecting the integrity of the justice system. While conceding the seriousness of the offence and society's challenging problem with prosecuting offences of sexual violence, counsel argues that under the third step of the *Babos* test the need to denounce the misconduct in this case outweighs society's interest in having the matter decided on its merits.

[85] Without conceding that an abuse of process occurred, Crown counsel argues that there are other remedies, short of a judicial stay of proceedings, that can address the concerns raised by this case. He adopts the comments of the Supreme Court in *Regan* (at page 361) when the Court specifically noted the "many societal interests engaged" by the prosecution against Regan, as it involved allegations of

sexual assaults against young women who were in a subordinate power relationship with the accused. The Court considered the charges to be very serious and that society had "a strong interest in having the matter adjudicated."

[86] Crown counsel argues, and I agree, that there are other factors which come into play when assessing the appropriate remedy in this case. He argues conduct of the Attorney General, after receiving the Saskatchewan opinion, is relevant. The opinion was that the charging test was made out with respect to one complainant only, and that the Attorney General directed that charges be laid with respect to that sole complainant only. To that end, he respected and followed the second opinion obtained from Saskatchewan Public Prosecution. He also argues that Applicant's counsel has not taken issue with the Saskatchewan Public Prosecution's opinion or with the integrity of those who reached the conclusion that the charging standard had been met respecting one complainant.

[87] Secondly, while the laying of charges against anyone is an extremely serious matter, I agree with Crown counsel that the accused still enjoys the presumption of innocence and all the *Charter* and procedure protections available throughout the trial process. These include any concerns that might be raised about the delay that has resulted in the timing of the request for a second opinion and any other aspects of the proceedings impacted by the Attorney General having proceeded in this fashion.

[88] Finally, Crown counsel argues that if there is a problem with the lack of "guardrails" in place to guide an Attorney General who wishes to seek a second opinion, the Court should construct a remedy that addresses that issue, without resorting to entering a judicial stay of proceedings.

[89] Taking into account all of the competing interests in this case, including the abuse of process which resulted in charges being laid versus the fact that the accused is facing a very serious allegation about which there is a high degree of

public interest in having adjudicated, I am not satisfied that this is one of those "clearest of cases" where a judicial stay of proceedings is warranted.

[90] That leaves the issue of what remedy is appropriate, for it is well recognized that there is little benefit in a right if there is no remedy for a breach of that right. To be clear, even though I do not consider a stay of proceedings, at this stage, to be an appropriate remedy, I do consider the breach to be a serious one. The position of Attorney General is one that is at the apex of the prosecutorial division of government, and because of that the actions of the Attorney General are rightly subject to scrutiny. In this case, the Attorney General's actions fell far short of the expected standards. I am aware that there are other motions pending with respect to various aspects of this case. Depending on the decisions reached on those matters, the conclusion reached in this motion will play a role in concluding what remedy, if any, is appropriate in those motions.

[91] And while it does not necessarily assist the accused in this case, I am satisfied that the appropriate message has been sent with respect to the actions of the Attorney General and the method of obtaining a second opinion. If any Attorney General seeks to proceed in the way Mr. Goertzen did in this case, being motivated by partisan considerations, by proceeding without the guidance of a policy or otherwise articulated and transparent principles, and in publicly speaking about a case prior to its final adjudication, I cannot imagine that the remedy would be the same as in this matter.

[92] The application for a judicial stay of proceedings is denied.

"Original Signed by:"

M.K. HARVIE, P.J.