Should Sentence Reductions Be Used As Remedies for Charter Breaches?

Should judges be allowed to reduce a criminal offender's sentence to remedy a breach of the offender's *Charter* rights? If so, what limitations, if any, are imposed on the use of sentence reductions to reduce *Charter* breaches? On May 20, 2009 these questions will be before the Supreme Court of Canada in the case of *R v Nasogaluak*.

Early in the morning of May 12, 2004, Lyle Nasogaluak led Leduc RCMP officers on a high-speed chase while driving intoxicated. After refusing to exit his vehicle, Nasogaluak was forcibly removed by the officers at which time Nasogaluak was punched in the head three times and twice in the ribs. The use of force was not reported by the officers. Nor did they provide medical treatment to Nasogaluak. After being released, Nasogaluak received emergency medical treatment for broken ribs and a punctured lung.[1]

Nasogaluak pleaded guilty to one count of impaired driving (*Criminal Code*, section 253(a)) and one count of flight from police (*Criminal Code*, section 249.1(1)). The sentencing judge found the force applied after the first two punches was excessive and constituted a breach of Nasogaluak's *Charter* rights under sections 7 (the right to life, liberty and security of person) and 11(d) (presumption of innocence). As a remedy for these*Charter* breaches, the sentencing judge reduced the sentence for both offences to a conditional discharge.[2]

Section 24(1) of the *Charter* provides that: "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances."[3] In *Doucet-Boudreau v Nova Scotia (Department of Education)*, the Supreme Court found that an "appropriate and just" remedy is one that meaningfully vindicates the rights of the claimant while employing means that are both judicial, and respect the separation of the judicial, legislative and executive branches of government. Furthermore, a section 24 remedy must be fair to the infringing party and be flexible and responsive to the individual circumstances of each case.[4]

On appeal from the Crown, the Alberta Court of Appeal upheld the trial judge's decision as an appropriate remedy under section 24(1) with the exception of the conditional discharge for impaired driving. The court substituted a conviction and

a $600 fine on the basis that the conditional discharge was less than the mandatory minimum sentence legislated by Parliament.[5]

The controversial use of sentence reductions as a section 24(1) *Charter* remedy has received mixed acceptance from Canadian courts. The Saskatchewan Court of Appeal[6] and the New Brunswick Court of Appeal[7] have both ruled that sentence reductions are a valid remedy. While upholding a sentence reduction, the British Columbia Court of Appeal stated that this remedy could not accurately "signify" societal disapproval for police conduct.[8]

The Ontario Court of Appeal has been the most reluctant to recognize sentence reductions as an appropriate remedy under section 24(1). In *R v Hamilton*, the court found that sentencing hearings were "not the forum in which to right perceived societal wrongs."[9] In *R v Glykis*, the court significantly limited the basis for which sentence reductions could be granted by ruling that they were only to be employed in cases where the breach mitigated the seriousness of the offence or imposed undue hardship on the offender.[10]

The Newfoundland Court of Appeal[11] and the Quebec Court of Appeal[12] have both stated that the issue of the use of sentence reductions as a *Charter* remedy is unresolved by Canadian courts of appeal.

In its appeal to the Supreme Court, the Crown in Nasogaluak has put forward three possible conclusions. First, sentence reductions are not appropriate under section 24(1). Second, sentence reductions may be used as a *Charter* remedy with few or no limitations. Finally, the Crown strongly leans in favour of making sentence reductions available, but limited so that the sentence would not fall outside the "appropriate range."[13]

Crown counsel argues that section-24(1) sentence reductions must adhere to the principles and purposes of sentencing legislated by Parliament in the *Criminal Code*, sections 718-718.2. Specifically, "[a] sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. This requirement is the fundamental principle of sentencing and it is a principle founded in notions of fairness and justice."[14] Furthermore, "sending a message to the police" might be done in better ways, such as through the RCMP complaint process, a request for an independent investigation or a civil suit.[15]

While admitting that sentence reductions may be appropriate under section 24(1), Crown counsel contends that Nasogaluak's conditional discharge for impaired driving is "demonstrably unfit" since it falls below the statutory minimum sentence. "Section 730(1) clearly provides that a conditional or absolute discharge may only be imposed for an offence 'other than an offence for which a

minimum punishment is proscribed by law.'"[16]

Responding to the Crown's argument, counsel for Nasogaluak claim that "it is not the *Charter* which must conform to the 'purpose of sentencing' provisions in the *Criminal Code*. Rather, it is the statutory provisions of Canadian law which must conform to the *Charter*."[17] Furthermore, a sentence reduction is a *Charter* remedy that will meaningfully vindicate an offender's rights, "giving 'teeth' to an accused's *Charter* rights."[18] Finally, limitations on reducing sentences should be rejected because "[a] sentence within the usual range is an empty remedy."[19]

Given that lower courts have accepted sentence reductions as an appropriate *Charter* remedy with some limitations, it appears likely that the Supreme Court will accept the compromise forwarded by the Crown that sentence reductions be limited to falling inside the "appropriate range" as set out in the *Criminal Code*.

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[1] "SCC Case Information – Summary" *Supreme Court of Canada* (undated).
[2] *Ibid*.
[3] *Constitution Act, 1982*, s 24(1).
[4] 2003 SCC 62, at paras 55-59.
[5] *R v Nasogaluak*, 2007 ABCA 339, at para 44.
[6] *R v Charles*, 61 Sask R 166 (C.A.).
[7] *R v Dennison*, (1990), 109 NBR (2d) 388 (CA).
[8] *R v Carpenter*, 2002 BCCA 301, at para 26.
[9] (2004), 72 OR (3d) 1 (CA), at para 2.
[10] (1995), 24 OR (3d) 803 (CA).
[11] *R. v. Collins*, [1999] 172 Nfld. & P.E.I.R. 1 (Nfld. C.A.).
[12] *Quebec (Procureur General) v Chabot*, [1992] RJQ 2102 (QC CA).
[13] Appellant's factum, at paras 64-65.
[14] *Ibid* at para 72.
[15] *Ibid* at para 91.
[16] *Ibid* at para 110.
[17] Respondent's factum, at para 52.
[18] *Ibid* at para 69.
[19] *Ibid* at para 74.