

# **The Criminal Law Quarterly**

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## **Editorial**

### **Sentencing and Charter Violations and Other Abuses of State Power**

The Supreme Court's decision in *R. v. Nasogaluak*, 2010 SCC 6, 251 C.C.C. (3d) 293, opens up the possibility for sentencing judges to consider a broad range of state abuses including Charter violations when sentencing offenders. At the same time, judges will have to filter concerns about remedying state abuses through sentencing laws. In particular, judges will have to respect any penalty mandated by statute as well as the fundamental principle that a sentence must be proportionate to the crime and the offender's responsibility for the crime.

The Court has affirmed a broad and flexible approach to sentencing by stating that a wide range of state abuses can be relevant to sentencing. These include the excessive force in making an arrest in this case (three punches to the head and the breaking of ribs), but also state conduct that falls short of entrapment, abuses in remand, and delay in proceedings that does not violate s. 11(b) of the Charter.

In affirming the relevance of state conduct to sentencing, the Court gave content to the reference in s. 718 of the Code for the need for sentencing to contribute to "respect for the law and the maintenance of a just, peaceful and safe society", something that might otherwise be seen as rhetorical fluff. Sentencing judges can consider the state's illegal behaviour as well as the offender's. What is sauce for the goose is sauce for the gander.

Although the Court warns that trial judges ordinarily will have to respect statutory minimums when reducing sentences for state misconduct, its approach to sentencing is a broad and flexible one that stands in stark contrast to the simplistic idea of sentencing as tied to the offence that seems to animate Parliament's increased use of mandatory sentences. The Court is effectively saying that the determinants of a just sentence are broad and can include how the offender has been treated by the state.

At the same time, there are some restrictions on what state conduct can be considered at sentencing. The Court stated that “Where the state misconduct does not relate to the circumstances of the offence or the offender, however, the accused must seek his or her remedy in another forum. Any inquiry into such unrelated circumstances falls outside the scope of the statutory sentencing regime and has no place in the sentence hearing.” *Ibid.*, at para. 4.

This raises the question of whether arbitrary detention or a violation of ss. 8 or 10(b) of the Charter that does not result in the exclusion of evidence can be said to relate to the circumstances of the offence or the offender. It is hoped that courts will interpret this connection requirement in a broad fashion that would include all state conduct that has played a role in bringing the offender to the courts.

Such a broad approach would be consistent with s. 24(2) jurisprudence, which allows evidence to be considered for exclusion so long as there is either a temporal or causal connection between the violation and the obtaining of the evidence. See for example *R. v. Wittwer*, [2008] 2 S.C.R. 235. It might not, however, be consistent with the restrictions articulated in cases such as *R. v. Glykis* (1996), 100 C.C.C. (3d) 97 at p. 103 (Ont. C.A.), which suggest that sentence reductions should only be used if the state conduct mitigates the seriousness of the offence or imposes punishment on the offender.

The sentence reductions in *Nasogaluak* respected the statutory minimum penalty for impaired driving, which interestingly enough only involved a fine and not prison. The Court, however, did not foreclose the possibility that a sentence reduction that went below a statutory minimum might be appropriate. Moreover, the Court indicated that s. 24(1) might be up to the task of fashioning a sentence reduction below the statutory minimum.

The Court seemed to hold open the possibility of a constitutional exemption under s. 24(1) when it stressed that because “the remedial power of the court under s. 24(1) is broad”, it did “not foreclose the possibility that, in some exceptional cases, a sentence reduction outside statutory limits may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender”. *Ibid.*, at para. 6. See also para. 64.

This part of *Nasogaluak* sits in tension to *R. v. Ferguson*, [2008] 1 S.C.R. 96, where the Court appeared to reject the availability of constitutional exemptions as a s. 24(1) remedy and seemed to hold that the only remedy available with respect to a mandatory sentence was invalidation under s. 52(1).

It is odd that the Court did not reflect on *Ferguson* when it held open the possibility of a sentence reduction under s. 24(1) that goes below a statutory minimum. Elsewhere in the judgment the Court noted *Ferguson* when it

mentioned that “absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the Code”. *Ibid.*, at para. 45.

Although the decision is a bit confusing, the recognition of the broad remedial powers of s. 24(1) is to be welcomed and is consistent with the Court’s statement in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3 at paras. 51 and 105 that neither statutes nor the common law can restrain the s. 24(1) remedial powers of a court of competent jurisdiction. Nevertheless, an accused who faces the increasing number of statutory minimums and seeks a sentence below that minimum would be well advised to challenge the statutory minimum under both s. 24(1) and s. 52(1).

In all other cases, however, *Nasogaluak* allows the accused to include Charter violations and other abuses of state power that do not violate the Charter as potential mitigating factors at sentencing. Trial judges in turn can consider such abuses so long as they relate to the offence or the offender and so long as the resulting sentence is fit and respects statutory minimums.

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