

# R. v. Nasogaluak: Criminal Sentence Reductions for Charter Breaches (2010)

In the 2010 case of [R. v. Nasogaluak](#), the Supreme Court of Canada considered whether reducing a criminal's sentence can be a remedy for a breach of [Charter](#) rights. In a unanimous judgment, the Court ruled that a sentencing judge may consider a *Charter* breach in reducing a sentence. However, the sentencing judge cannot normally reduce the sentence below a statutory minimum. The Court left open the possibility of reducing a sentence below a mandatory minimum only in exceptional cases where there has been "egregious" misconduct by police.[\[1\]](#)

The *Canadian Charter of Rights and Freedoms* empowers the courts to *enforce* rights and freedoms. Under section 24(1), when a person's rights or freedoms are "infringed or denied," a judge may order a remedy that is "appropriate and just in the circumstances." By contrast, the sentencing provisions of the *Criminal Code* do not refer directly to the possibility that a criminal offender's *Charter* rights may be violated on arrest. These provisions do, however, direct judges to increase or reduce a criminal sentence to reflect "aggravating or mitigating circumstances."[\[2\]](#) If police mistreat an offender, the legal result can be *both* a *Charter* breach and a "mitigating circumstance." Consequently, judges have had to consider two different legal procedures: reducing a criminal's sentence to reflect a mitigating circumstance, and ordering a remedy for a breach of the *Charter* by the police. The *Nasogaluak* decision considers how judges should decide on sentences in this complicated situation.

## **The Arrest, the Trial and the First Appeal**

In Leduc, Alberta on May 12, 2004, RCMP pursued an intoxicated driver, Lyle Nasogaluak. Nasogaluak did not comply with police commands to exit his vehicle. He was forcibly removed, wrestled to the ground, punched three times in the head, and pinned to the ground. When he refused to hold out his hands to be handcuffed, a second officer punched him twice in the back. These punches broke his ribs, which resulted in a punctured lung. The police made no report of the force used during the arrest and they did not try to ensure he received medical attention. Nasogaluak entered guilty pleas to the charges of impaired driving and flight from police.[\[3\]](#) He argued that the excessive force used by police, coupled with their failure to report his injuries or obtain medical assistance, breached his rights under sections 7, 11(d) and 12 of the *Charter*. Nasogaluak sought a reduced sentence to remedy the *Charter* breaches. At trial, the judge found that the police action violated sections 7 and 11(d) of the *Charter*, which guarantee "the right to life, liberty and security of the person" and the right "to be presumed innocent until proven guilty." As a remedy for these breaches, the trial judge gave Nasogaluak a reduced sentence: a twelve-month

conditional discharge on both counts and a one-year driving probation.<sup>[4]</sup> The Alberta Court of Appeal upheld the finding of a section 7 *Charter* breach. The court said that sentence reduction is available as a remedy to a *Charter* breach. However, a sentence cannot be reduced below a minimum mandated by statute. To reduce the sentence below the statutory minimum would be “an unlawful interference with the role of Parliament.”<sup>[5]</sup> As a result, the majority of the Court of Appeal set aside the conditional discharge and replaced it with the *Criminal Code* minimum fine for an impaired driving offence. The offence of flight from police does not require a minimum punishment, so the appeal court allowed the conditional discharge for that offence. The Crown appealed this decision to the Supreme Court of Canada, arguing that judges should not use sentence reductions as *Charter* remedies.<sup>[6]</sup>

### **Excessive Use of Force by Police**

The Supreme Court first considered whether the police behaviour during Nasogaluak’s arrest and detention were a violation of section 7 of the *Charter*. Police are justified in using force when making an arrest if they act on reasonable grounds and only use as much force as necessary.<sup>[7]</sup> The Court affirmed the trial decision that the police used excessive force<sup>[8]</sup> during the arrest and detention and that this constituted a “substantial interference with Nasogaluak’s physical and psychological integrity.”<sup>[9]</sup> This use of force brought the case well within the scope of section 7 of the *Charter*.<sup>[10]</sup> The Court did not say whether police have an obligation under section 7 to obtain medical assistance for “persons under their care”<sup>[11]</sup>

### **Sentencing Principles**

The Supreme Court went on to consider if sentence reductions are just and appropriate remedies for breaches of *Charter* rights. The principles of sentencing are set out in the *Criminal Code*.<sup>[12]</sup> Judges are to consider the fundamental purpose of sentencing, which involves a balance between crime prevention and “respect for the law and the maintenance of a just, peaceful and safe society.”<sup>[13]</sup> The Court said that sentencing judges have wide discretion under the *Criminal Code* to issue a sentence that is “tailored to the nature of the offence and the circumstances of the offender.”<sup>[14]</sup> Judges must weigh the objectives of sentencing to reflect the circumstances of the case, including the best combination of sentencing goals and aggravating or mitigating factors.<sup>[15]</sup> The Court emphasized that the sentencing judge’s discretion is limited by case law, which sets out general ranges of sentences for offences, and by statutes. Specifically, the sentencing judge is constrained by the *Criminal Code*, where Parliament has restricted the availability of certain sentences and enacted mandatory minimum sentences for particular offences.<sup>[16]</sup> The sentencing judge’s discretion does not “extend so far as to override [a] clear statement of legislative intent.”<sup>[17]</sup> Only if a sentencing judge exercises this discretion unreasonably will appellate courts interfere with the sentence granted.

### ***Charter* Breaches and Criminal Sentencing**

Section 24(1) of the *Charter* authorizes courts to award a just and appropriate remedy for

the breach of a *Charter* right. Early *Charter* decisions recognized that sentence reductions are available as remedies under section 24(1).<sup>[18]</sup> When an offender's *Charter* rights are breached, the offender can argue for a reduced sentence. As the Court observed, sentencing should reflect "society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society," as reflected in the *Charter*.<sup>[19]</sup> The question, therefore, is not the availability of sentence reduction as a *Charter* remedy, but rather the limits that a judge should follow in granting such a remedy. When a judge issues a reduced sentence as a remedy for a *Charter* breach, the sentence must respect the statutory minimum set by the *Criminal Code*.<sup>[20]</sup> The Court agreed with Alberta Court of Appeal and held that sentences should not fall below a statutorily mandated minimum. The Court called this principle the "general rule" for crimes that carry a minimum penalty in law.<sup>[21]</sup> However, the Court also considered the sentencing judge's options in exceptional cases that involve a "particularly egregious form of misconduct by state agents in relation to the offence and to the offender."<sup>[22]</sup> In these extreme cases, the "sole effective remedy"<sup>[23]</sup> available to the sentencing judge may be to issue a sentence outside of statutory limits, under section 24(1) of the *Charter*. Considering Nasogaluak's case, the Court found that the Alberta Court of Appeal delivered an appropriate sentence, even though it did not rely on section 24(1) of the *Charter* to do so. Nasogaluak's sentence was within the range prescribed by the *Criminal Code*. The *Charter* violations by the police were not so severe that they called for the exceptional use of section 24(1) to reduce Nasogaluak's sentence below the statutory minimum. The Court also observed that a convicted offender's sentence can be reduced for police misconduct even where the behaviour does not amount to a *Charter* breach.<sup>[24]</sup> This kind of sentence reduction is guided by the sentencing principles of the *Criminal Code*.<sup>[25]</sup> Sentencing judges consider the actions of both the offender and the police when they consider what would be an appropriate sentence for each case.<sup>[26]</sup> Offenders do not have to prove that the misconduct reached the level of a *Charter* breach. In these kinds of routine sentencing decisions, the sentencing judge can follow the sentencing principles in the *Criminal Code*, without turning to the *Charter* for a remedy.

Tracy Clark (May 4, 2010)

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<sup>[1]</sup> *R. v. Nasogaluak* refers to police as "state actors." State actors includes anyone with governmental authority. <sup>[2]</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.718.2. <sup>[3]</sup> *Ibid.* at s. 253(a), s 249.1 (1). <sup>[4]</sup> *R. v. Nasogaluak*, 2010 SCC 6 at paras. 17-18 <sup>[5]</sup> *Ibid.* at paras. 20-21. <sup>[6]</sup> *Ibid.* at para. 28. <sup>[7]</sup> *Supra* note 2 at s. 25. <sup>[8]</sup> *Supra* note 4 at para. 36. <sup>[9]</sup> *Ibid.* at para. 38. <sup>[10]</sup> *Ibid.* <sup>[11]</sup> *Ibid.* <sup>[12]</sup> *Supra* note 2 at ss. 718-718.2. <sup>[13]</sup> *Supra* note 4 at para. 39. <sup>[14]</sup> *Ibid.* at para. 43. <sup>[15]</sup> *Ibid.* <sup>[16]</sup> *Ibid.* at paras. 44-45. <sup>[17]</sup> *Ibid.* at para. 45. <sup>[18]</sup> *Supra* note 4 at para. 57, citing *Mills v. The Queen*, [1986] 1 S.C.R. 863. <sup>[19]</sup> *Supra* note 4 at para. 49. <sup>[20]</sup> *Ibid.* at para. 63. <sup>[21]</sup> *Ibid.* at paras. 55, 64. <sup>[22]</sup> *Ibid.* at para. 64. <sup>[23]</sup> *Ibid.* at para. 64. <sup>[24]</sup> *Ibid.* at para. 53. <sup>[25]</sup> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions

[26] *Ibid.* at para. 49.