

OACP 2010 Conference



R. v. Nasogaluak Sentence Reductions for Police Misconduct

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Revised June, 2010

Overview

➤ Before *Nasogaluak*:

- Sentence reductions only available to remedy *Charter* breaches that constituted a form of punishment;
- Sentencing hearing not an appropriate place to send a message to police.

➤ After *Nasogaluak*:

- Sentence reductions available to remedy any police misconduct connected to offence or offender;
- Sentencing judge to consider actions of offender and also those of police.



R. v. Glykis (1995), 24 O.R. (3d) 803 (C.A.)

- Trial judge erred in using sentence reduction as an alternative remedy after deciding exclusion of evidence not appropriate.
- Compensation for improper police action should not be a factor in sentencing.
- Purpose of criminal process is protection of society and imposition of sentence is to further that purpose.



R. v. Glykis (1995), 24 O.R. (3d) 803 (C.A.)

- Sentence may be reduced to address a *Charter* breach when:
 - The breach mitigates the seriousness of the offence; or
 - The breach constitutes a form of punishment.



R. v. Glykis (1995), 24 O.R. (3d) 803 (C.A.)

“In my respectful opinion, it is inappropriate to view sentencing proceedings as an avenue for sending a message to the law enforcement agencies.”

Dubin C.J.O. at para. 21.



R. v. Carpenter, [2002] B.C.J. No. 1037 (C.A.)

- Appeal court reviews diverging opinions:
- Courts:
 - B.C., Sask., N.B. – broad *Charter* remedies.
 - Ontario – limited sentence reductions.
- Academics:
 - Prof. A. Manson - Sentence reduction to send a message to “institutions of the community.”
 - Prof. K. Roach – Shouldn’t expect judges to find sentence fit for offender and offence and then reduce sentence for *Charter* breach.



R. v. Carpenter, [2002] B.C.J. No. 1037 (C.A.)

- S.718 of the *Code* doesn't mention remedies for police misconduct.
- S.718.1 says a sentence must be proportionate to gravity of offence and degree of responsibility of offender.
- Sentence reduction shifts focus from offence and offender to violations committed by authorities.



R. v. Carpenter, [2002] B.C.J. No. 1037 (C.A.)

“The sentencing judge was seeking to send a message to the offender and to society about the seriousness of the appellant’s crime, but that message would be substantially blunted by the sending of a competing message to those officials in respect of a ‘non-serious’ infringement of the appellant’s *Charter* rights.”

Newbury J.A. at para. 27.



R. v. Nasogaluak, [2010] S.C.C. 6

- Impaired driving and evading police.
- Abrupt stop after high speed chase.
- Ignores gunpoint demand to get out of car.
- Officer 1 punches N twice in head, pulls him out of car and wrestles N to ground.
- Resists, will not show hands. Officer 1 punches N in head.
- Officer 2 punches N twice in back before he could apply handcuffs.



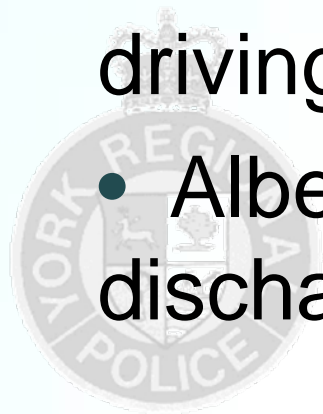
R. v. Nasogaluak, [2010] S.C.C. 6

- No notes / reports re: use of force during arrest or drawing of firearms.
- No videotape in either car or breath room cameras.
- N not given medical attention. Goes to hospital after release and needs surgery for two broken ribs and punctured lung.



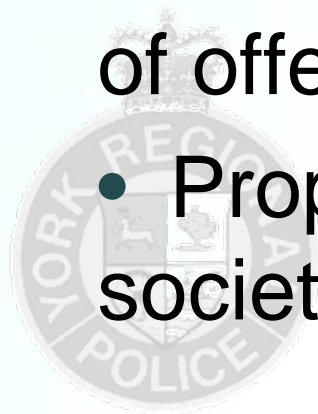
R. v. Nasogaluak, [2010] SCC 6

- Trial judge found punches to N while on the ground were unnecessary (no mention of s. 25 of *Code*).
- Stay not appropriate but sentence reduction granted as *Charter* remedy.
- Grants conditional discharge for impaired driving and evade police charges.
- Alberta Court of Appeal overturned discharge for impaired.



R. v. Nasogaluak, [2010] SCC 6

- SCC considers sentencing principles.
- Ss. 718-718.2 allow judges to consider the actions of the offender and those of “state actors.”
- *Charter* violation may be considered in sentencing if connected with circumstances of offence or offender.
- Proportionate sentence expresses society’s shared values and concerns.

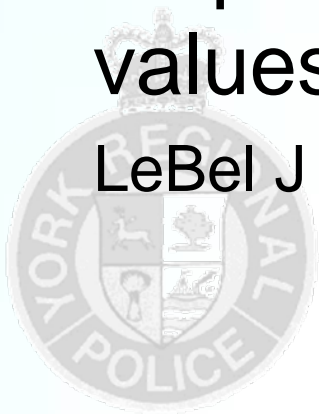


R. v. Nasogaluak, [2010] S.C.C. 6

- SCC adopts Prof. Manson's philosophy.

“The sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society.”

LeBel J at para. 49.



R. v. Nasogaluak, [2010] SCC 6

- Sentencing judge may take into account police violence or other state misconduct without *Charter* breach.
- Unsuccessful trial *Charter* challenge can be re-raised at sentencing.
- Generally, the court cannot reduce a sentence below a mandatory minimum, however...



R. v. Nasogaluak, [2010] SCC 6

“I do not foreclose...the possibility that, in some exceptional cases, 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 to the offender.”

LeBel J at para. 64.



Moral of the Story

- Sentencing = *Charter* consolation round.
- Sentencing = Officers on trial.
- When will misconduct = reduced sentence?
- No sentence reduction for:
 - Investigators keeping property too long;
 - Obtaining subscriber info without a warrant.
- Sentence reduced for:
 - Using A as pawn and enabling his addictions;
 - Shot while stabbing police dog.



Risk Management

- Officers must be prepared to defend their actions:
 - Notes, Reports;
 - Explaining use of force options, detentions, etc.
- Impact of *Charter* sentence reduction on subsequent lawsuit:
 - Side issue for Crown may be central to police civil liability;
 - Res judicata / issue estoppel.



Risk Management

- Does sentence reduction + civil damages = double recovery?
 - Injured persons should be compensated for full amount of loss, but no more.
 - Should a sentence reduction be factored into an award of damages?





Questions?



Thank you.



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