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Remedial Minimalism under Section 24(1) of the Charter: *Bjelland, Khadr and Nasogaluak*

Gerald Chan*

I. INTRODUCTION

The Supreme Court of Canada's decision in *R. v. Grant*¹ has dominated the attention of criminal and constitutional law enthusiasts this year. This is easily justifiable. The new framework set out by the Supreme Court for the remedy of exclusion of evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms*² will have a significant and immediate effect on the way that criminal trials are conducted in Canada. Hidden beneath this very visible jurisprudential shift, however, is a more subtle, though no less significant, revision of the Court's approach to the Charter's other remedial provision: section 24(1). In three decisions from the past year — *R. v. Bjelland*,³ *Canada (Prime Minister) v. Khadr*⁴ and *R. v. Nasogaluak*⁵ — the Supreme Court of Canada has agreed with the trial judge's finding of a breach of Charter rights but overturned the trial judge's choice of remedy under section 24(1) in order to grant a more limited remedy in its place. In doing so, the Court has retreated from the broad and generous manner in which it previously applied section 24(1) and shifted the analytical focus from the promotion of remedial efficacy toward the minimization of the burdens imposed by the remedy on government.

* Ruby & Shiller, Toronto. I extend my deepest gratitude to Professor Jamie Cameron for her very helpful feedback on an earlier draft of this paper. I also extend my thanks to Clayton C. Ruby for his constant support and to Yousuf Aftab and Nader R. Hasan for their thoughtful comments and suggestions throughout this drafting process.

¹ [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.) [hereinafter "*Grant*"].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

³ [2009] S.C.J. No. 38, [2009] 2 S.C.R. 651 (S.C.C.) [hereinafter "*Bjelland*"].

⁴ [2010] S.C.J. No. 3, 2010 SCC 3 (S.C.C.) [hereinafter "*Khadr*"].

⁵ [2010] S.C.J. No. 6, 2010 SCC 6 (S.C.C.) [hereinafter "*Nasogaluak*"]. I should note that I was co-counsel for the Criminal Lawyers' Association on their intervention in the Supreme Court of Canada in this case.

In *Bjelland*, for example, the trial judge found a violation of the accused's right to full answer and defence due to the Crown's disclosure of evidence on the eve of trial and ordered the evidence excluded. The Supreme Court of Canada overturned the trial judge's decision on remedy and held that an adjournment would suffice to remedy the breach. In doing so, the Court imposed a new test for the remedy of exclusion under section 24(1) that narrows the availability of the remedy to circumstances similar to those required for a stay of proceedings.⁶

In *Khadr*, the applications judge held that Canadian officials had violated Mr. Khadr's section 7 Charter rights by failing to protect him given that he was a minor, was subject to torture, was unable to legally challenge his detention or conditions of confinement, and was being detained with no family contact. The applications judge ordered that the Canadian government remedy this breach by requesting Mr. Khadr's repatriation from the United States.⁷ The Supreme Court of Canada agreed that there had been a section 7 Charter breach (although it characterized the breach differently) but held that a request for repatriation was inappropriate as a remedy because of the uncertain foreign policy implications, notwithstanding that a more intrusive remedy with respect to foreign relations had been granted in the earlier case of *United States of America v. Burns*.⁸ The Court granted a bare declaration in place of the request for repatriation ordered by the applications judge.

Finally, in *Nasogaluak*, the trial judge found that the arresting officers had violated the accused's section 7 Charter rights by using excessive force in his arrest for impaired driving. The trial judge refused to grant the requested remedy of a stay of proceedings, but chose instead to reduce the accused's sentence to a conditional discharge, which fell below the statutorily mandated minimum of a \$600 fine. The Supreme Court of Canada agreed that the police had used excessive force in arresting the accused, but held that the remedy of a sentence reduction under section 24(1) had to be constrained by the mandatory minimum sentences imposed by Parliament in all but "exceptional circumstances". The Court did not define "exceptional circumstances" but simply held that they did not exist in this case.

The common theme in each of these three judgments is the shifting of emphasis away from the efficacy of the Charter remedy toward a

⁶ *R. v. Bjelland*, *supra*, note 3, at paras. 10-12.

⁷ *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 462, 2009 FC 405, at paras. 70, 75, 91-92 (F.C.).

⁸ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) [hereinafter "*Burns*"].

minimization of the burdens imposed on government. From a rights-protection perspective, this trend is worrisome. A Charter claimant bears the onus of establishing a breach of his or her constitutional rights. Once he or she has done so, it remains open to the government to demonstrate that the breach is a reasonable limit in a free and democratic society under section 1 of the Charter, at which stage the courts ought quite properly to consider the broader societal interests pursued by the government. However, once one has moved past this stage and the Court has concluded that the Charter breach cannot be justified, a compelling argument can be made that the section 24(1) analysis should focus primarily on remedial efficacy. The Supreme Court of Canada's recent cases signal a move away from such an approach.

II. SECTION 24(1) OF THE CHARTER

The Supreme Court of Canada has historically described section 24(1) of the Charter in broad-sweeping terms. For instance, in *R. v. 974649 Ontario Inc.*, McLachlin C.J.C. wrote that section 24(1) is the “cornerstone upon which the rights and freedoms guaranteed by the Charter are founded” and a “critical means by which they are realized and preserved”.⁹ This effusive language can be attributed to two aspects of the provision: the breadth of the discretion it confers and the significance of its purpose.

Section 24(1) of the Charter provides:

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.* (emphasis added)

As McIntyre J. wrote in *R. v. Mills*, it is “difficult to imagine language which could give the court a wider and less fettered discretion”.¹⁰ As a result, this discretion cannot be reduced “to some sort of binding formula for general application in all cases” and “it is not for appellate courts to pre-empt or cut down this wide discretion”.¹¹

It is instructive to compare section 24(1) to the other remedial provisions in the Constitution. Section 52(1) of the *Constitution Act, 1982*

⁹ [2001] S.C.J. No. 79, [2001] 3 S.C.R. 575, at para. 20 (S.C.C.) [hereinafter “974649 Ontario Inc.”].

¹⁰ [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863, at para. 279 (S.C.C.) [hereinafter “Mills”].

¹¹ *Id.*, at para. 279.

provides that “(t)he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. Therefore, section 52(1) is aimed specifically at unconstitutional *laws* as opposed to unconstitutional *acts*, and it delineates fairly clear boundaries of application.¹² If a law is inconsistent with any provision of the Constitution, that law is invalid. The courts have introduced some flexibility at the borders by providing for the remedies of reading in and severance in addition to declarations of invalidity, but the overall exercise remains fairly clear: determine the extent of the law’s inconsistency with the Constitution and then decide how much of the law can be saved.¹³

Section 24 of the Charter, on the other hand, is aimed at government *acts*. Section 24(2), for instance, provides that where “evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”. This provision is aimed at a very specific subset of constitutional violations (*i.e.*, those occurring in the context of gathering evidence) and provides a very specific remedy (*i.e.*, the exclusion of evidence). Again, it delineates fairly clear boundaries of application.

In contrast to both section 52(1) and section 24(2), section 24(1) of the Charter does not identify a specific type or category of remedies. Instead, it simply provides that a court may award “such remedy as the court considers appropriate and just in the circumstances”. This broad language has made section 24(1) the provision of choice for a wide array of remedies for Charter breaches, including stays of proceeding,¹⁴ injunctions,¹⁵ return of evidence,¹⁶ costs¹⁷ and damages.¹⁸ Freed of the constraints imposed by the text of sections 52(1) and 24(2), the courts have taken advantage of the breadth of discretion conferred by section 24(1) to craft creative and meaningful remedies for the vindication of Charter rights.

¹² *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96, at paras. 59-60 (S.C.C.).

¹³ *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at paras. 25-42 (S.C.C.).

¹⁴ Kent Roach, *Constitutional Remedies in Canada* (Aurora, ON: Canada Law Book, 2008), at 9.50 [hereinafter “Roach, *Constitutional Remedies*”].

¹⁵ *Id.*, at 13.370.

¹⁶ *Id.*, at 9.700.

¹⁷ *Id.*, at 11.810.

¹⁸ *Id.*, at 11.480.

The courts have justified adopting a flexible and expansive approach to section 24(1) by reference to the significance of its purpose. As McLachlin C.J.C. wrote in *974649 Ontario Inc.*, “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach”.¹⁹ A remedy must, therefore, be “easily available and constitutional rights should not be ‘smothered in procedural delays and difficulties’”.²⁰ Remedial provisions have always been granted “large and liberal” interpretations when they are found in statutes; *a fortiori*, they ought to be interpreted broadly when they are found in the Constitution.²¹ In other words, a remedial analysis must remain flexible if it is to be responsive to the needs and interests of Charter claimants and such flexibility ought to be curtailed only where specifically mandated by the text of the Constitution.

This was not merely rhetoric. Perhaps the most telling example of the Supreme Court of Canada’s generous interpretation of the Charter’s broad remedial guarantee is its decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.²² In that case, section 24(1) was applied to remedy a breach of the appellants’ minority language rights under section 23 of the Charter. A majority of the Supreme Court upheld the trial judge’s decision to not only order the Province of Nova Scotia to use its “best efforts” to provide school facilities, but to also retain jurisdiction after the order to hear reports from the Province regarding the status of its efforts. Writing for the majority, Iacobucci and Arbour JJ. were undeterred by the dissenting justices’ arguments that such an order extended the Court’s jurisdiction beyond its proper role in breach of the separation of powers principle and in violation of the *functus officio* doctrine. Instead, the majority emphasized the need for flexibility and creativity in the application of section 24(1) so as to ensure that Charter rights are meaningfully and fully vindicated:

... it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be

¹⁹ *Supra*, note 9, at para. 20.

²⁰ *Id.*, at para. 20.

²¹ *Id.*, at para. 18.

²² [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.) [hereinafter “*Doucet-Boudreau*”].

barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsible to the needs of a given case.²³

Neither the rhetoric nor the reasoning of cases such as *Doucet-Boudreau* or *974649 Ontario Inc.* was anywhere to be found, however, in the Court's recent decisions in *Bjelland*, *Khadr* and *Nasogaluak*. Instead, the Court appeared to rebalance its priorities under section 24(1) such that the minimization of burdens imposed by the remedy on government has now attained greater importance in the remedial calculus than the creation of an effective and meaningful remedy to fully vindicate Charter rights.

III. *R. v. BJELLAND* — EXCLUSION OF EVIDENCE VERSUS ADJOURNMENT

In *Bjelland*, the appellant was arrested upon driving a motor vehicle across the border from the United States to Canada in December 2003 and charged with importing cocaine and possession for the purposes of trafficking contrary to the *Controlled Drugs and Substances Act*.²⁴ Various pre-hearing conferences subsequently took place and the Crown advised defence counsel that disclosure was substantially complete. The preliminary hearing was held over the course of three days in October 2004 and January 2005, and the appellant was committed for trial on both counts. The appellant pleaded not guilty and elected trial by judge and jury. A trial date was set for May 1, 2006.

On March 21, 2006, less than two months before the trial was scheduled to begin, the Crown advised defence counsel that disclosure of evidence concerning an alleged accomplice was forthcoming. On March 24, 2006, the appellant re-elected for trial by judge alone. On March 29, 2006, the Crown disclosed a transcript of a videotaped statement taken over a year before on December 16, 2004 from the alleged accomplice and indicated that he would be called as a witness at trial.

On April 19, 2006, less than two weeks before the trial was scheduled to begin, the Crown advised the defence that it was aware of information concerning one of the officers who took the alleged accomplice's statement that was potentially relevant to the officer's credibility,

²³ *Id.*, at para. 59.

²⁴ S.C. 1996, c. 19.

character and ability to perform his duties during his involvement in the investigation, and invited the appellant to bring a third party records application for access to this information. On the same day, the Crown disclosed to the defendant a five-page agreed statement of facts from another proceeding (*i.e.*, a guilty plea and sentencing hearing) signed by another alleged accomplice. The Crown advised that it intended to call this second alleged accomplice as a witness at trial as well. Further information was disclosed on April 22, 2006.

The defence responded to the Crown's ever-shifting case and last-minute disclosures by bringing a motion for a stay of proceedings on the ground that the appellant's right to make full answer and defence under section 7 of the Charter had been infringed. The appellant asked, in the alternative, that the evidence of the two alleged accomplices be excluded from the trial.

The trial judge refused to grant a stay of proceedings but agreed to exclude the evidence. The trial judge described the situation as follows: "... on the eve of trial, counsel for the accused is left to speculate on what will be provided to him by way of final disclosure and how to mount a defence against an ever moving prosecution".²⁵ The trial judge rejected the Crown's argument that the statement of one of the alleged accomplices could not have been disclosed earlier because of concerns about his safety and because he was being investigated by U.S. authorities. In doing so, the trial judge noted that the alleged accomplice was not in a witness protection program and had not sought security assistance, and that his statement had actually been released in British Columbia several weeks earlier.²⁶ The agreed statement of facts concerning the other alleged accomplice was not disclosed earlier due to Crown inadvertence.²⁷

In the trial judge's view, the process to which the accused was subjected was unfair and the proper remedy was exclusion of the late-disclosed evidence because it would "place both the accused and the Crown in the position they occupied before the Crown attempted to introduce this new evidence". An adjournment of the trial date would be insufficient because it would amount to "nothing more than a reward for the Crown's tardiness".²⁸

²⁵ *Bjelland, supra*, note 3, at para. 10.

²⁶ *R. v. Bjelland*, [2007] A.J. No. 1445, 2007 ABCA 425, at paras. 12, 18 (Alta. C.A.).

²⁷ *Id.*, at para. 18.

²⁸ *Bjelland, supra*, note 3, at paras. 11-12.

In a 2-1 decision, the Alberta Court of Appeal disagreed. The majority of the Court of Appeal held that the trial judge committed a reviewable error by failing to consider whether a less severe remedy than the exclusion of significant evidence could cure the harm done to the respondent by the late disclosure, while still preserving the integrity of the justice system. The majority stated that the trial judge overemphasized the respondent's rights while giving inadequate weight to society's interest in crime prevention.²⁹ Justice Booker dissented and, in doing so, cited the warning that the Supreme Court of Canada first gave in *Mills*: appellate courts must exercise caution to ensure they do not "pre-empt or cut down" the wide discretion given by section 24(1) to the trial judge.³⁰

A majority of the Supreme Court of Canada agreed with the majority of the Court of Appeal that the trial judge's decision on remedy could not stand. In a judgment written by Rothstein J., and joined by McLachlin C.J.C. and LeBel and Deschamps JJ., the majority held that the trial judge erred by "failing to consider whether the prejudice to the appellant could be remedied without excluding the evidence and the resulting distortion of the truth-seeking function of the criminal trial process".³¹ In the majority's view, the prejudice caused by the Crown's late disclosure in this case could have been remedied through a simple adjournment and disclosure order. The more drastic remedy of exclusion of evidence under section 24(1) should only be available in one or two instances: (1) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order; or (2) where exclusion is necessary to maintain the integrity of the justice system.³² This second exceptional circumstance is itself limited to "clear cases".³³ Thus, even in cases where an adjournment would have the effect of unreasonably delaying the trial of an in-custody accused or where there is evidence of deliberate Crown misconduct, the courts must balance such circumstances against society's interest in having all of the evidence presented at trial.³⁴ Where a "less intrusive remedy" can be fashioned, exclusion of evidence will not be available.³⁵

²⁹ *R. v. Bjelland*, *supra*, note 26, at para. 30.

³⁰ *Id.*, at para. 41.

³¹ *Bjelland*, *supra*, note 3, at para. 3.

³² *Id.*, at para. 24.

³³ *Id.*, at para. 27.

³⁴ *Id.*

³⁵ *Id.*, at para. 19.

This decision can be criticized on a number of bases, most of which were expressed by Fish J. in a scathing dissent written on behalf of Bin-nie and Abella JJ.

First, if the test adopted by the majority of the Supreme Court sounds familiar, that is because it is. It is strikingly similar to the test that the courts have long applied to the availability of the much more drastic remedy of a stay of proceedings, which of course was the remedy that the appellant originally asked for in this case and the trial judge refused. As L'Heureux-Dube J. wrote in the seminal case of *R. v. O'Connor*, a stay of proceedings will be available only in the "clearest of cases": (1) where the prejudice to the accused's right to make full answer and defence cannot be remedied; or (2) where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.³⁶ This is nearly identical to the test adopted by the majority in *Bjelland* for the remedy of exclusion of evidence under section 24(1), prompting Fish J. to point the following out in dissent:

At best, this fusion of the formerly distinct tests invites confusion regarding their application to the two distinct remedies. At worst, the fused test eliminates exclusion of evidence as a live option under s. 24(1).³⁷

If the latter is true, this would be an unfortunate development in the jurisprudence of section 24(1) of the Charter. The courts have properly characterized a stay of proceedings as a drastic remedy as it results in the absolute termination of the prosecution. Its severity lies in its finality. The alternative remedy of an adjournment, however, is often inadequate. Indeed, an adjournment may be the only Charter remedy that can actually increase prejudice to an accused by adding further delay to the proceedings. This is the case regardless of whether an accused is in custody and regardless of whether the delay has reached the point of "unreasonableness" within the meaning of section 11(b) of the Charter. Every day that an accused spends dealing with the "vexations and vicissitudes of a pending criminal prosecution" is a day filled with stigmatization, loss of privacy, and a tremendous amount of stress and anxiety.³⁸ An adjournment simply lengthens this process and exacerbates the resulting hardship.

³⁶ *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at para. 82 (S.C.C.) [hereinafter "*O'Connor*"].

³⁷ *Bjelland*, *supra*, note 3, at para. 45.

³⁸ *Mills*, *supra*, note 10, at para. 146.

Thus, the remedy of exclusion of evidence has been seen by academics³⁹ and previous members of the Supreme Court⁴⁰ as a useful intermediate option to remedy the late disclosure of evidence from the Crown in violation of an accused's constitutional right under section 7 of the Charter. As the trial judge noted, it puts the parties in the position they were in before the Charter breach. The majority's decision in *Bjelland* could well spell the end of this practical, common sense approach.

Second, the majority's decision in *Bjelland* ignores the Supreme Court's previous holding that subsections 24(1) and (2) of the Charter should be read together to create a harmonious interpretation.⁴¹ As Fish J. noted in dissent, the test adopted by the majority regulates the discretionary remedy of exclusion of evidence under section 24(1) more closely, and more intrusively, than the exact same remedy under section 24(2).⁴² The Supreme Court held in *Grant* that the courts should decide whether to exclude evidence under section 24(2) by engaging in a balancing of the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on its merits.⁴³ Under the majority's decision in *Bjelland*, however, the courts would not engage in an even-handed balancing of factors; rather, they would place the burden on the accused to demonstrate that exclusion is the least intrusive remedy. They would engage in a sort of "minimal impairment" analysis in reverse.⁴⁴

One can see the incongruity of such an approach by comparing the language of subsections 24(1) and (2) of the Charter:

³⁹ Roach, *Constitutional Remedies in Canada*, *supra*, note 14, at 9-20.12.

⁴⁰ *O'Connor*, *supra*, note 36, at para. 66, in which L'Heureux-Dubé J. cited the trial judge's exclusion of evidence under s. 24(1) in *R. v. Xenos*, [1991] J.Q. no 2200, 70 C.C.C. (3d) 362 (Que. C.A.) as an "excellent example ... of how courts are becoming increasingly bold and innovative in finding appropriate remedies in lieu of stays for abuses of process".

⁴¹ *974649 Ontario Inc.*, *supra*, note 9, at para. 21.

⁴² *Bjelland*, *supra*, note 3, at para. 47.

⁴³ *Grant*, *supra*, note 1, at para. 71.

⁴⁴ Whereas s. 1 of the Charter requires the government to demonstrate that its conduct minimally impairs an individual's Charter rights, once the government has failed to do so and a Charter breach has therefore been found, the majority's approach in *Bjelland* would effectively require the individual to demonstrate that the remedy he or she seeks minimally impairs the government's interests under s. 24(1).

Section 24(1)	Section 24(2)
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.	Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Not only is the language in section 24(1) considerably broader than the language in section 24(2), but the former appears to focus solely on the impact of the remedy on the individual Charter claimant, whereas the latter expressly requires that the “administration of justice be brought into disrepute” before the remedy of exclusion will be granted. As the Supreme Court held in *Grant*, the difference between the two provisions is, therefore, that the first provides for an “individual remedy”, whereas the second focuses on the “societal interest in maintaining public confidence in the administration of justice”.⁴⁵ Given this distinction, it is puzzling that the majority in *Bjelland* placed a greater emphasis on the societal interest in having all of the relevant evidence before the trier of fact in applying section 24(1) than did the unanimous Court in *Grant* in applying section 24(2). Even as the Court discussed this societal interest in *Grant*, the Court was careful to point out that the “short-term public clamour for a conviction in a particular case must not deafen the section 24(2) judge to the longer-term repute of the administration of justice”.⁴⁶ The majority’s judgment in *Bjelland* contains no similar refrain for the section 24(1) judge. Instead, it was left up to Fish J. in dissent to quote (then Chief Justice of Manitoba) Samuel Freedman’s well-known statement of the law:

The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and

⁴⁵ *Grant*, *supra*, note 1, at para. 201.

⁴⁶ *Id.*, at para. 84.

justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony ... [T]he law makes its choice between competing values and declares it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at unlimited cost. “Truth, like all good things, may be loved unwisely — may be pursued too keenly — may cost too much.”⁴⁷

Third, the majority’s judgment ignores perhaps the single most repeated and discernible principle in the Supreme Court’s previous section 24(1) cases: appellate courts should defer to the trial judge’s exercise of remedial discretion. Section 24(1) confers the “widest possible discretion”⁴⁸ on trial judges and reviewing courts must therefore show “considerable deference”⁴⁹ to the remedial choices of the trial judge. The majority in *Bjelland* did not exhibit any such restraint, although it is perhaps unfair to criticize it too harshly on this independent basis because its decision to interfere with the trial judge’s exercise of discretion is a direct consequence of its decision to delineate new parameters for the exercise of that discretion. As Fish J. wrote in dissent, “the trial judge’s exercise of discretion ... can properly be characterized as an error of law *only if we change the law*”.⁵⁰ That is precisely what the majority did in this case.

IV. CANADA (*PRIME MINISTER*) V. *KHADR* — REQUEST FOR REPATRIATION VERSUS DECLARATION

The Supreme Court of Canada continued its more restrictive approach to section 24(1) of the Charter in *Khadr*. The facts of this case are now well known. Omar Khadr, a Canadian citizen, was 15 years old when he was taken prisoner on July 27, 2002 by U.S. forces in Afghanistan. He was accused of throwing a grenade that killed an American soldier in battle. Approximately three months after his capture, he was transferred to Guantánamo Bay, where he was given no special status as

⁴⁷ *Bjelland*, *supra*, note 3, at para. 65, quoting from “Admissions and Confessions”, in R.E. Salhany & R.J. Carter, eds., *Studies in Canadian Criminal Evidence* (1972) 95, at 99, quoting *Pearse v. Pearse* (1846), 1 De G. & Sm. 12, 63 E.R. 950, at 957.

⁴⁸ *974649 Ontario Inc.*, *supra*, note 9, at para. 18.

⁴⁹ *Doucet-Boudreau*, *supra*, note 22, at para. 87.

⁵⁰ *Bjelland*, *supra*, note 3, at para. 52 (emphasis in original).

a minor and was held incommunicado until November 2004. Mr. Khadr was declared an “enemy combatant” and was charged with war crimes.⁵¹

In February and September 2003, while Mr. Khadr was still being detained without access to counsel, agents from the Canadian Security Intelligence Service (“CSIS”) and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade (“DFAIT”) went to Guantánamo Bay, questioned Mr. Khadr on matters connected to his charges and shared the fruits of these interviews with U.S. authorities. In March 2004, a DFAIT official attended Guantánamo Bay to interview Mr. Khadr again, this time with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique known as the “frequent flyer program”, which involved moving Mr. Khadr to a new location every three hours over a period of several weeks. The purpose of this torture was to make Mr. Khadr less resistant to interrogation. All of the interrogations conducted by the Canadian officials were conducted for intelligence and not evidence-gathering purposes. Nonetheless, they shared the fruits of the interrogations with U.S. officials and made no request that the U.S. officials limit their use of the information.⁵²

In 2006, Mr. Khadr brought an application for disclosure of all materials in the possession of the Canadian government relevant to his charges and the case ended up before the Supreme Court of Canada.⁵³ In deciding that the Charter applied to require disclosure of some of the requested materials, the Court held that the regime under which Mr. Khadr was being detained in Guantánamo Bay (and in which the Canadian government had participated) violated international human rights norms. In particular, the Court pointed to the U.S. Supreme Court’s decision in *Rasul v. Bush*⁵⁴ that detainees were being held without access to the statutory right of *habeas corpus* and in *Hamdan v. Rumsfeld*⁵⁵ that the military commission procedures under which detainees were proposed to be tried violated Common Article 3 of the Geneva Conventions.

⁵¹ *Khadr, supra*, note 4, at paras. 3-4 (S.C.C.); *Khadr v. Canada (Prime Minister)*, *supra*, note 7, at paras. 6-10 (F.C.).

⁵² *Khadr, supra*, note 4, at para. 5; *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 893, 2009 FCA 246, at paras. 16-17 (F.C.A.); *Khadr v. Canada (Prime Minister)*, *supra*, note 7, at paras. 11, 14-17.

⁵³ *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, [2008] 2 S.C.R. 125 (S.C.C.). I should note that I was co-counsel for Human Rights Watch and the University of Toronto, Faculty of Law – International Human Rights Clinic on their joint intervention in the Supreme Court of Canada in this case.

⁵⁴ 542 U.S. 466 (2004).

⁵⁵ 548 U.S. 557 (2006).

Accordingly, the Supreme Court ordered disclosure under section 7 of the Charter.⁵⁶

Armed with newfound information — namely, that Mr. Khadr had been subjected to the “frequent flyer program” — Mr. Khadr’s lawyers filed an application in Federal Court seeking to compel the Canadian government to request his repatriation from the U.S., which it had repeatedly refused to do. Justice O’Reilly granted this application. He concluded that, in the unique circumstances of this case, taking into account that Mr. Khadr was a minor, was subject to torture, was unable to legally challenge his detention or conditions of confinement, and was being detained with no family contact, section 7 of the Charter obliged the Canadian government to protect Mr. Khadr by ensuring that his treatment accorded with international human rights norms.⁵⁷ Justice O’Reilly thus ordered the Canadian government to request Mr. Khadr’s repatriation under section 7 of the Charter. Justice O’Reilly did not feel compelled to undertake a separate section 24(1) analysis.⁵⁸

A majority of the Federal Court of Appeal upheld O’Reilly J.’s decision, albeit on a narrower basis. The majority found a section 7 Charter breach but did not characterize it as the failure to fulfil a positive obligation. Rather, the majority grounded the breach on the Canadian officials’ knowing participation in a process that violated international human rights norms. In particular, the majority stressed that the Canadian government became implicated in the torture of Mr. Khadr when they interrogated him knowing that he had been subjected to sleep deprivation in order to induce him to talk.⁵⁹ The majority upheld the remedy of ordering the Canadian government to request Mr. Khadr’s repatriation but did so within the framework of section 24(1) of the Charter.⁶⁰

The matter went back up to the Supreme Court of Canada. In a unanimous decision, the Court agreed with both O’Reilly J. and the Federal Court of Appeal that the Canadian government had breached Mr. Khadr’s section 7 Charter rights and described the breach in the strongest of terms:

... Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew Mr. Khadr was being indefinitely

⁵⁶ *Canada (Justice) v. Khadr*, *supra*, note 53, at paras. 21-24.

⁵⁷ *Khadr v. Canada (Prime Minister)*, *supra*, note 7, at paras. 70, 75.

⁵⁸ *Id.*, at paras. 91-92.

⁵⁹ *Khadr v. Canada (Prime Minister)*, *supra*, note 52, at para. 49.

⁶⁰ *Id.*, at para. 74.

detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to “make [detainees] more compliant and break down their resistance to interrogation” (para. 4).

This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of youth, to elicit statements about the most serious criminal charges while detained in those conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, *offends the most basic Canadian standards* about the treatment of detained youth suspects.⁶¹

In addition, the Supreme Court characterized the breach of Mr. Khadr’s section 7 Charter rights as ongoing in two respects: (1) it has contributed and continues to contribute to Mr. Khadr’s current detention;⁶² and (2) the information obtained by Canadian officials in the interrogations may be used in the U.S. prosecution of Mr. Khadr.⁶³ Therefore, the effect of the breaches has not been spent.

Given these findings, one would have hoped that the effectiveness of the remedy granted by the Court would have been commensurate with the severity of the Charter violations. This, however, was not the case. Rather than ordering the Canadian government to request Mr. Khadr’s repatriation as both O’Reilly J. and the Federal Court of Appeal had done in the courts below, the Supreme Court granted a bare declaration that Mr. Khadr’s Charter rights had been breached and left it for the government to decide how best to respond.⁶⁴ This is a disappointing decision for a number of reasons.

First, not all declarations are created equal. The Supreme Court of Canada defended its choice of remedy by citing its previous statement in *R. v. Gamble* that a declaration can be “an effective and flexible remedy for the settlement of real disputes”.⁶⁵ In *Gamble*, the appellant argued that he had been incorrectly tried and punished under the law in effect at the time of his trial and not the law in effect at the time of the offence. He

⁶¹ *Khadr*, *supra*, note 4, at paras. 24-25 (emphasis added).

⁶² *Id.*, at para. 21.

⁶³ *Id.*, at para. 30.

⁶⁴ *Id.*, at para. 39.

⁶⁵ [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595, at para. 81 (S.C.C.).

was sentenced to life imprisonment without eligibility for parole for 25 years for first degree murder; had he been sentenced under the law in effect at the time of the offence, he could have been eligible for parole after no more than 20 years but no less than 10 years. Accordingly, after 10 years of imprisonment, the appellant brought an application for *habeas corpus* and sought a declaration that he was eligible for parole as a remedy for the breach of his section 7 Charter right. The Court granted this declaration.

The declaration granted in *Gamble* was a specific declaration that dictated a particular outcome with practical consequences. An equivalent remedy in *Khadr* would have been a declaration that Mr. Khadr was entitled to a request for repatriation. But Mr. Khadr did not receive that. Instead, all Mr. Khadr received was a bald declaration that his Charter rights had been violated. As the British Columbia Court of Appeal recently said, this type of declaration is “nothing more than a finding of fact” and “is not a remedy at all”.⁶⁶ As a practical matter, Mr. Khadr was left in the same position after the Court’s declaration as he was in prior to launching his application in Federal Court.

Second, even declarations of the nature that the Court granted in *Gamble* have been held to be inappropriate when there is evidence of government resistance to compliance with the Charter. In *Doucet-Boudreau*, the Court justified the trial judge’s remedy of injunctive relief on the basis that the law of section 23 of the Charter was now well settled and the government understood its obligations but had simply refused to comply with them.⁶⁷ In such a case, the Court held that a mere declaration of rights would not provide an effective and meaningful vindication of rights. The same is arguably true of Mr. Khadr’s case. When Mr. Khadr was first before the Supreme Court on his disclosure application, the Court had held that the Canadian government violated its international human rights obligations by interrogating him at Guantánamo Bay and sharing the fruits of that interrogation with U.S. officials.⁶⁸ Moreover, as the Court itself said in its second decision, the rights that the Canadian government violated represented “the most basic Canadian standards” about the treatment of detained youth suspects.⁶⁹ This was not a case dealing with a novel interpretation or

⁶⁶ *Ward v. Vancouver (City)*, [2009] B.C.J. No. 91, 2009 BCCA 23, at para. 63 (B.C.C.A.), *var*d [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.).

⁶⁷ *Doucet-Boudreau*, *supra*, note 22, at paras. 62-64.

⁶⁸ *Canada (Justice) v. Khadr*, *supra*, note 53, at para. 27.

⁶⁹ *Khadr*, *supra*, note 4, at para. 25.

application of a Charter right. Nonetheless, the government of Canada had repeatedly and consistently refused to seek Mr. Khadr's repatriation. This resistance should have militated in favour of a stronger remedy than a bare declaration.

Third, this was not a case in which there were a myriad different ways in which the government could have responded to the Court's ruling to effectively remedy the Charter violation.⁷⁰ The Court's conclusion that it was better to grant a declaration so that the government could decide how best to respond was overly deferential in light of the fact that the government did not propose a single alternative remedy to a request for repatriation in its submissions other than, of course, a declaration.⁷¹

The government has since decided to respond to the Court's declaration that it breached Mr. Khadr's rights by seeking assurances from the U.S. government that it will not use the evidence gathered from the Canadian officials' interviews of Mr. Khadr in their prosecution. Unfortunately, as Professor Sujit Choudhry pointed out upon this announcement, the government's response addresses only one aspect of the ongoing Charter violation that the Court identified in *Khadr*: namely, the potential use of the fruits of the interrogation in the prosecution of Mr. Khadr.⁷² It does not address the ongoing detention itself, for which the Court also held the Canadian government responsible.⁷³ As a result, Mr. Khadr's lawyers have commenced further litigation seeking judicial review of the government's decision.⁷⁴ How this will all turn out is not clear; but what is clear is that Mr. Khadr will continue to suffer the consequences of the Canadian government's breach of his Charter rights and will have to wait for yet another judge to render yet another decision before he can find out whether his

⁷⁰ See *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 95 (S.C.C.).

⁷¹ *Khadr*, *supra*, note 4, at para. 38; *Khadr v. Canada (Prime Minister)*, *supra*, note 7, at para. 78.

⁷² "Ottawa asks U.S. to omit evidence in Khadr case", *The Globe and Mail*, February 17, 2010, online: <<http://www.theglobeandmail.com/news/politics/ottawa-asks-us-to-omit-evidence-in-khadr-case/article1470621>>.

⁷³ *Id.*

⁷⁴ "Khadr's lawyers file new motion", CBC News, February 17, 2010, online: <<http://www.cbc.ca/canada/story/2010/02/17/khadr-emergency-motion.html>>. Justice Zinn of the Federal Court granted the application on July 5, 2010 and ordered the government to consider additional remedies to cure or ameliorate its breach of Mr. Khadr's rights: *Khadr v. Canada (Prime Minister)*, [2010] F.C.J. No. 818 (F.C.). Just a few weeks later, the Federal Court of Appeal stayed the enforcement of this judgment: *Khadr v. Canada (Prime Minister)*, [2010] F.C.J. No. 901 (Fed. C.A.). Most recently, the Federal Court of Appeal refused to expedite the government's appeal of Zinn J.'s decision: "Court refuses to expedite Khadr appeal", *The Globe and Mail*, September 28, 2010 online: <<http://www.theglobeandmail.com/news/politics/court-refuses-to-expedite-khadr-appeal/article1730796/>>. The litigation is still ongoing.

rights will be effectively vindicated. Notwithstanding the Supreme Court of Canada's previous admonitions in *Mills*, 974649 *Ontario Inc.* and *Doucet-Boudreau*, Mr. Khadr's Charter rights are being "smothered in procedural delays and difficulties".⁷⁵

The Supreme Court justified its decision to tread carefully in *Khadr* on the ground that it was being asked to step into a realm traditionally reserved for the executive branch: foreign relations.⁷⁶ This reticence might be more understandable if it were not for the Court's previous decision in *United States of America v. Burns*.⁷⁷ In *Burns*, a unanimous Court held that section 7 of the Charter prohibits the Canadian government from extraditing individuals to face trial in foreign countries without receiving assurances that the death penalty will not be sought in all but exceptional cases. This was a direct intrusion into the executive's discretion over foreign relations. Nonetheless, the Court rightly held that it was justified because all government power — including that of the executive — must be exercised in accordance with the Constitution. The same principle should have been, but was not, applied in *Khadr*.

In *Khadr*, the Court attempted to distinguish *Burns* by observing that, unlike the accused in *Burns*, Mr. Khadr is not in the control of the Canadian government and therefore the likelihood that the proposed remedy would succeed is unclear and the impact on Canadian foreign relations cannot be properly assessed.⁷⁸ This is unconvincing.

First, it is difficult to see how uncertainty as to a particular remedy's likelihood of success can justify the granting of an even less effective and more uncertain remedy in its place. If the Court was concerned with efficacy, surely the granting of a mere declaration was not the answer. And in any event, the government's claim that a request for repatriation would not have been effective was belied by the fact that the U.S. had complied with requests from all other Western countries for the return of their nationals from Guantánamo Bay.⁷⁹

Second, with respect to the impact on Canada's relations with the U.S., it is notable that the Canadian government did not adduce any evidence as to the harm that would be caused to such relations by a request

⁷⁵ *Mills*, *supra*, note 10, at para. 32; 974649 *Ontario Inc.*, *supra*, note 9, at para. 20; and *Doucet-Boudreau*, *supra*, note 22, at para. 55.

⁷⁶ *Khadr*, *supra*, note 4, at paras. 39, 46-47.

⁷⁷ *Burns*, *supra*, note 8.

⁷⁸ *Id.*, at para. 43.

⁷⁹ *Khadr v. Canada (Prime Minister)*, *supra*, note 52, at para. 69.

for repatriation.⁸⁰ The Court correctly noted the “inadequacy of the record” regarding the “range of considerations currently faced by the government in assessing Mr. Khadr’s request”, but incorrectly used this as a reason to deny Mr. Khadr the remedy he sought.⁸¹ In doing so, the Court placed the onus on the wrong party. Mr. Khadr cannot be faulted for failing to put before the Court evidence of Canada’s diplomatic concerns; such information lies within the exclusive knowledge and possession of the Canadian government; therefore, the absence of evidence should have given rise to an inference that the risk of harm was insignificant.

Indeed, the fact that Mr. Khadr was not in the control of the Canadian government suggests that foreign relations ought to have been less of a concern, and not more. A request for an assurance that the death penalty will not be sought in the extradition context is a much stronger imposition of Canada’s values on the U.S. than would be a request for repatriation, since the former is made in light of the government’s ability to frustrate the foreign prosecution by refusing to turn over the person in its control. By contrast, the remedy that Mr. Khadr sought was a modest one that would not have required the Canadian government to wield its power in such a muscular way. Therefore, if a request for an assurance that the death penalty will not be imposed was held to be necessary in *Burns*, *a fortiori* a request for repatriation should have been held to be necessary in *Khadr*. However, as it did in *Bjelland*, the Court retreated from the boldness of its earlier section 24(1) jurisprudence.

V. R. v. NASOGALUAK — SENTENCE REDUCTION AND MANDATORY MINIMUMS

The shift in focus from promoting remedial efficacy to minimizing government burdens continued in *Nasogaluak*. This is perhaps the least discouraging of the three cases reviewed in this paper, although it nonetheless fits comfortably within the Court’s recent trend of deferring to governmental interests not only at the section 1 justification stage, but also at the section 24(1) remedial stage.

In the early morning of May 12, 2004, the RCMP received a tip about an intoxicated driver. A high-speed chase ensued and Mr. Nasogaluak’s vehicle eventually came to an abrupt stop. Mr. Nasogaluak

⁸⁰ *Khadr v. Canada (Prime Minister)*, *supra*, note 7, at para. 84.

⁸¹ *Khadr*, *supra*, note 4, at para. 44.

opened the car door and swung his feet out of the vehicle, which prompted one of the officers to point his revolver and flashlight at Mr. Nasogaluak and order him to get out of the vehicle with his hands up. Mr. Nasogaluak did not comply and put his feet back inside the vehicle. One of the officers grabbed Mr. Nasogaluak as he was clutching onto the steering wheel and doorframe and punched him in the head. Mr. Nasogaluak let go of the steering wheel and reached out to the officer, who then punched Mr. Nasogaluak in the head a second time, pulled him out of the car and wrestled him onto the ground.⁸²

While on the ground, one of the officers gave Mr. Nasogaluak a third hard punch to the head. By this time, Mr. Nasogaluak was pinned face down on the pavement with the officer straddling his back. When Mr. Nasogaluak refused to offer his hands to be handcuffed, another officer punched him in the back twice. These blows were hard enough to break Mr. Nasogaluak's ribs, which later punctured one of his lungs.⁸³

Mr. Nasogaluak pleaded guilty to impaired driving and flight from the police. At his sentencing hearing, he requested a stay of proceedings on the grounds that the police used excessive force upon his arrest, failed to properly report his injuries and failed to obtain medical assistance for him in breach of his rights under sections 7, 11(d) and 12 of the Charter. In the alternative, Mr. Nasogaluak sought a reduced sentence as a Charter remedy.⁸⁴

The trial judge found the officers in breach of sections 7 and 11(d) of the Charter. Most importantly, the trial judge found that the third punch to Mr. Nasogaluak's head and the subsequent punches to Mr. Nasogaluak's back were unwarranted and therefore excessive. The trial judge refused to grant a stay of proceedings but instead granted Mr. Nasogaluak a sentence reduction under section 24(1) of the Charter. The trial judge noted that offences such as impaired driving and flight from the police would normally be punished by incarceration of 6 to 18 months. However, the trial judge said that he was satisfied that the need for deterrence was met by Mr. Nasogaluak's "life-altering experience" and that the Charter breaches were "so egregious as to justify taking Mr. Nasogaluak from the realm of cases that require incarceration". Accordingly, the trial judge granted Mr. Nasogaluak a conditional discharge on both counts.⁸⁵ With respect to the count of impaired driving, this sentence

⁸² *Nasogaluak*, *supra*, note 5, at para. 10.

⁸³ *Id.*, at para. 11.

⁸⁴ *Id.*, at para. 14.

⁸⁵ *Id.*, at paras. 15-17.

fell below the mandatory minimum of a \$600 fine for first offences under section 255(1)(a)(i) of the *Criminal Code*.⁸⁶

A majority of the Alberta Court of Appeal upheld the trial judge's decision to grant a sentence reduction to remedy the Charter breaches under section 24(1), but held that the trial judge could not go below the mandatory minimum provided by statute. Therefore, the majority set aside the trial judge's order for a conditional discharge in respect of the offence of impaired driving and imposed the mandatory minimum fine of \$600. The majority did not interfere with the conditional discharge granted for the offence of flight from the police. Justice Côté dissented and held that the trial judge applied the wrong test for determining whether a sentence reduction should be granted and that his reasons for the sentence were inadequate.⁸⁷

The question of whether a sentence reduction is an available remedy under section 24(1) and, if so, under what circumstances, came up before the Supreme Court of Canada. A number of conflicting authorities existed at the provincial appellate court level. In *R. v. Carpenter*,⁸⁸ the British Columbia Court of Appeal suggested that sentence reductions should never be granted as a remedy under section 24(1) of the Charter because this would inappropriately shift the focus of the sentencing process from the accused to the state, which in turn would send mixed messages to the community and further lengthen and complicate proceedings. In *R. v. Glykis*,⁸⁹ the Ontario Court of Appeal held that sentence reductions should be available, but only where the Charter breach either (a) mitigated the seriousness of the offence; or (b) imposed punishment or undue hardship on the offenders. In the Ontario Court of Appeal's view, this precluded sentence reduction as a remedy for a breach of the right to counsel. Meanwhile, other courts such as the New Brunswick Court of Appeal and Saskatchewan Court of Appeal did not feel the need to impose any constraints on the trial judge's discretion to grant sentence reductions under section 24(1). In *R. v. Dennison*,⁹⁰ the New Brunswick Court of Appeal granted a sentence reduction to remedy the breach of the accused's section 7 right to speak at his sentencing

⁸⁶ *Id.*, at para. 22. *Criminal Code*, R.S.C. 1985, c. C-46.

⁸⁷ *Id.*, at paras. 19-25.

⁸⁸ [2002] B.C.J. No. 1037, 2002 BCCA 301, at para. 26 (B.C.C.A.) [hereinafter "*Carpenter*"].

⁸⁹ [1995] O.J. No. 2212, 24 O.R. (3d) 803 (Ont. C.A.) [hereinafter "*Glykis*"].

⁹⁰ [1990] N.B.J. No. 856, 109 N.B.R. (2d) 388 (N.B.C.A.).

hearing. In *R. v. Stannard*,⁹¹ the Saskatchewan Court of Appeal granted a sentence reduction to remedy the violations of the accused's right to counsel and right to be secure from unreasonable search and seizure.

Interestingly, the Supreme Court of Canada did not choose between these varying approaches and instead charted its own course. In a unanimous judgment written by LeBel J., the Court held that the "intense debate" that had taken place among the provincial appellate courts regarding the availability of sentence reduction as a Charter remedy "reflects a misapprehension of the flexibility and contextual nature of the sentencing process in Canada".⁹² In the Court's view, the sentencing provisions in the *Criminal Code* on their own, without the need to resort to the Charter, can generally provide remedial protection to individuals whose rights have been infringed by state misconduct.⁹³

The Court's decision is encouraging in that it unequivocally rejects the British Columbia Court of Appeal's comments in *Carpenter* (which were relied on by various provincial attorneys general in their submissions before the Court) that state misconduct has no place in a sentencing hearing. In doing so, the Court rightly observed that state misconduct was considered to be a mitigating factor in sentencing long before the Charter was enacted; it would be absurd to say that it should stop being so considered simply because it now constitutes a constitutional violation.⁹⁴ Therefore, even when the state misconduct does not rise to the level of a Charter breach, the Court held that it can be considered a mitigating factor in sentencing.⁹⁵

The Court astutely observed that this is consistent with the communicative function of sentencing. Section 718 of the *Criminal Code* describes the fundamental purpose of sentencing as that of contributing to "respect for the law and the maintenance of a just, peaceful and safe society". This function must be understood, the Court held, in relation not only to the actions of the offender, but also to those of state actors. Everyone is subject to the law and the Constitution is the supreme law of the land. As the Court stated, a "sentence cannot be 'fit' if it does not respect the fundamental values enshrined in the Charter".⁹⁶

⁹¹ [1989] S.J. No. 582, 79 Sask. R. 257 (Sask. C.A.).

⁹² *Nasogaluak*, *supra*, note 5, at para. 56.

⁹³ *Id.*, at para. 56.

⁹⁴ *Id.*, at paras. 47, 54.

⁹⁵ *Id.*, at para. 53.

⁹⁶ *Id.*, at paras. 48-49.

The Court also appears to have rejected the restrictive criteria imposed by the Ontario Court of Appeal in *Glykis*: namely, that the state misconduct must have either mitigated the seriousness of the offence or imposed hardship or punishment on the offender. The former criterion was extracted from the old entrapment cases where the police were implicated in either creating or encouraging the commission of offences⁹⁷ and, therefore, has been of little relevance to sentencing ever since the Supreme Court of Canada held that entrapment warrants a stay of proceedings under section 24(1) of the Charter in *R. v. Mack*.⁹⁸ The latter criterion — that the Charter breach must impose hardship or punishment — was intended by the Ontario Court of Appeal to limit the Charter breaches that can be considered on sentencing to those of arbitrary detention or delay, although it is not clear why a denial of any constitutional right would not impose “hardship” or “punishment”. The Supreme Court rightly rejected an approach that would draw arbitrary distinctions between different Charter rights for the purposes of sentencing.

In place of the *Glykis* criteria, the Supreme Court imposed a requirement that the impugned state conduct must relate to the individual offender and the circumstances of the offence in order to be considered on sentencing.⁹⁹ The former seems obvious. If the offender is raising state misconduct as a mitigating factor on sentencing, the impugned conduct would almost certainly relate to him or her and it is difficult to see how the offender would have standing to raise it otherwise. The latter, however, is trickier. On its face, the phrase “circumstances of the offence” would appear to limit the types of state misconduct that can be considered on sentencing to actions related to the *commission* of the offence (*e.g.*, in the case of entrapment, where the police are involved in the actual commission of the offence and not simply its investigation). This would impose a significant restraint on the ability of sentencing judges to consider state misconduct and would essentially represent an endorsement of the restrictive *Glykis* approach.

This does not, however, appear to have been the Court’s intention. Throughout the Court’s decision, the Court gave examples of Charter breaches and lesser forms of state misconduct that have been legitimately considered in sentencing which do not relate to the commission of the offence: assault by prison guards, excessive force in arrest, delay, and

⁹⁷ *Glykis*, *supra*, note 89; *R. v. Kirzner*, [1976] O.J. No. 2364, 14 O.R. (2d) 665 (Ont. C.A.); *R. v. Ormerod*, [1969] O.J. No. 1317, [1969] 2 O.R. 230 (Ont. C.A.).

⁹⁸ [1988] S.C.J. No. 91, [1988] 2 S.C.R. 903, at para. 132 (S.C.C.).

⁹⁹ *Nasogaluak*, *supra*, note 5, at paras. 49, 63.

unreasonable search and seizure.¹⁰⁰ This suggests that what the Court meant by “circumstances of the offence” was anything related to the *commission, investigation or prosecution* of the offence. Viewed in this way, this constraint is not really much of a constraint at all. The Court’s affirmation of the breadth of a trial judge’s sentencing discretion in this regard is a welcome development.

Unfortunately, the Supreme Court’s decision does not end there. Instead, it goes on to impose two additional constraints on the ability of trial judges to take Charter breaches and lesser forms of state misconduct into account on sentencing: first, any sentences that a trial judge imposes must, even after consideration of the state misconduct, respect the principle of proportionality expressed in section 718.1 of the *Criminal Code*;¹⁰¹ second, trial judges cannot impose sentences that fall below the mandatory minimums provided for in the *Criminal Code*.¹⁰² Both of these constraints are a direct consequence of the Court’s decision to situate the inquiry within the statutory framework for sentencing in the *Criminal Code* rather than the constitutional framework for remedies under section 24(1). A compelling argument can be made that both these constraints operate to unjustifiably fetter the discretion of trial judges and impede their ability to offer meaningful and effective remedies for constitutional violations.

Dealing first with the constraint of proportionality, section 718.1 of the *Criminal Code* provides that a “sentence must be proportionate to the *gravity of the offence* and the *degree of responsibility of the offender*” (emphasis added). Where the goal is simply to provide an offender with the most appropriate and just sentence for his or her offence, this is undoubtedly a commendable principle. Where the goal is not only to sentence the offender but also to remedy a breach of Charter rights, however, it is questionable whether this constraint should still be imposed. State misconduct generally does not touch on either the gravity of the offence or the degree of responsibility of the offender. If a police officer unlawfully searches an individual’s home without a warrant and finds 10 kilograms of cocaine, for example, that individual is not less responsible for the possession of contraband for the purpose of trafficking, nor is the offence of possession for the purpose of trafficking any less serious due to the breach of the individual’s section 8 right to be secure from

¹⁰⁰ *Id.*, at paras. 50-53.

¹⁰¹ *Id.*, at paras. 40-41.

¹⁰² *Id.*, at para. 55.

unreasonable search and seizure. Therefore, if the individual's penalty must ultimately be proportionate to responsibility and gravity, there is not much room for the consideration of government wrongdoing to reduce the sentence. Since an individual's sentence must be proportionate to his or her level of responsibility and the gravity of his or her offence even absent a Charter breach, the danger is that the individual will not be receiving much of a remedy at all so long as his or her penalty must remain proportionate to responsibility and gravity. The imposing presence of these two polestars risks rendering the remedy of sentence reduction impotent.

It would, therefore, have been preferable for the Supreme Court to have adopted a two-stage analysis: first, what is the most appropriate and just sentence for the offender having regard to the gravity of the offence and the degree of responsibility of the offender; second, to what extent should this sentence be reduced to remedy the breaches of the offender's Charter rights under section 24(1) of the Charter. Under this framework, the question of remedy under section 24(1) would be separated from the question of proportionality in the sentencing process the same way that the question of remedy under section 24(2) is separated from the question of guilt or innocence in the trial process, with the effect being that the integrity of both inquiries is preserved. Indeed, the Alberta Court of Appeal appeared to endorse such an approach in its reasons in *Nasogaluak*:

Having regard to the principles set out in *Roberts* and *Prymak*, we agree with the Crown submission that the sentence imposed for the offence of evading the police is unfit having regard to the seriousness of the offence. We reaffirm the principles set out in those cases. However, that does not assist the Crown on this appeal, as the issue we must decide is not whether the sentence is fit, but whether the sentencing judge erred in granting the conditional discharge on the basis that the reduction in sentence was the just and appropriate remedy for the *Charter* breaches. The sentencing judge acknowledged that absent the *Charter* remedy issue, a lengthy term of imprisonment would have been required. He committed no error in law or principle in doing so, and this Court cannot interfere.¹⁰³

Unfortunately, the Supreme Court of Canada did not follow this approach. The consequences of the analytical framework adopted by the Supreme Court will not become clearer until the courts begin to interpret

¹⁰³ *R. v. Nasogaluak*, [2007] A.J. No. 1217, 2007 ABCA 339, at para. 52 (Alta. C.A.).

and apply *Nasogaluak*. If it turns out that individuals accused are not receiving much of a remedy at all for the breaches of their Charter rights on sentencing because the courts find their hands tied by section 718.1, the solution may be for counsel to pursue a formal section 24(1) Charter application. While the Supreme Court indicated a strong preference for the sentencing framework of sections 718 to 718.2 of the *Criminal Code*, the Court did not rule out resort to section 24(1) of the Charter for the remedy of sentence reduction. It simply said that, in most cases, section 24(1) is unnecessary and will not make a difference. Where counsel think it will make a difference, they should not hesitate to rely on section 24(1) directly and should cite the following passage from the Supreme Court's decision in doing so:

Like other legal processes, the sentencing system remains subject to the scrutiny of the *Charter* and its overarching values and principles. Although, as we have seen above, the proper interpretation and application of the sentencing process will allow courts to effectively address most of the situations where *Charter* breaches are alleged, there may be exceptions to this general rule.¹⁰⁴

Resort to section 24(1) of the Charter will also be necessary where the mandatory minimums in the *Criminal Code* prevent accused individuals from receiving effective and meaningful remedies for the breaches of their Charter rights. In *Nasogaluak*, the Court allowed for the possibility that accused individuals could apply under section 24(1) of the Charter in an attempt to reduce sentences below the mandatory minimums in the *Criminal Code* but held that this could only be done in "exceptional circumstances".¹⁰⁵ The Court did not, however, define "exceptional circumstances" (except to say that it was not this case) nor did it explain why a judge exercising his or her *constitutional* discretion could only reduce a sentence below a *statutory* minimum in exceptional circumstances.

The Court's refusal to address the more complex questions underlying this issue is disappointing. For instance, the Alberta Court of Appeal had held that reduction of a sentence below the mandatory minimums in the *Criminal Code* was not permitted due to its previous holding in *R. v. Ferguson* (subsequently affirmed by the Supreme Court of Canada),¹⁰⁶

¹⁰⁴ *Nasogaluak*, *supra*, note 5, at para. 64.

¹⁰⁵ *Id.*, at para. 63.

¹⁰⁶ [2006] A.J. No. 1150, 2006 ABCA 261 (Alta. C.A.), *aff'd* [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter "*Ferguson*"].

which said that constitutional exemptions cannot be granted for mandatory minimum sentences under section 24(1).¹⁰⁷ There are good arguments to be made that the Alberta Court of Appeal erred in applying *Ferguson* in this manner because both the Court of Appeal's and the Supreme Court of Canada's decisions in that case were distinguishable from *Nasogaluak*.¹⁰⁸ The Supreme Court presumably agreed with this view because it could not have concluded that a sentence can be reduced below a mandatory minimum if it thought otherwise. Unfortunately, the Court did not explain this conclusion or provide any analysis of *Ferguson* and its applicability to this case.

Once it is concluded that section 24(1) of the Charter permits sentences to be reduced below the mandatory minimums in the *Criminal Code*, it is difficult to understand why this should only be done in "exceptional circumstances". The question is whether a statutory provision can operate to constrain the constitutional discretion granted by section 24(1) of the Charter, which the Court had previously described as the "widest possible discretion".¹⁰⁹ This question had already been answered in *Doucet-Boudreau*:

The power of the superior courts under section 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law.¹¹⁰

And yet, in holding that section 24(1) only permits a sentence to be reduced below a legislated minimum in "exceptional circumstances", the Court concluded that the remedial power of section 24(1) can be limited by statute. Strangely, the Court did not refer to *Doucet-Boudreau* at all in *Nasogaluak*.

The Court's decision in *Nasogaluak* is also arguably inconsistent with its previous decision in *R. v. Wust*.¹¹¹ In *Wust*, the question was whether section 719(3) of the *Criminal Code* grants trial judges the dis-

¹⁰⁷ *R. v. Nasogaluak*, *supra*, note 103, at para. 44.

¹⁰⁸ The issue in *Ferguson* was whether resort could be had to an individual remedy under s. 24(1) of the Charter rather than a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* where the subject of the Charter breach is a law and not government action. By contrast, the subject of the Charter breach in *Nasogaluak* was a government action and the issue concerned the extent to which an individual remedy could be granted under s. 24(1), and not whether such a remedy could be granted at all. See *R. v. Ferguson*, *supra*, note 106, at para. 61.

¹⁰⁹ *974649 Ontario Inc.*, *supra*, note 9, at para. 18.

¹¹⁰ *Doucet-Boudreau*, *supra*, note 22, at para. 51.

¹¹¹ [2000] S.C.J. No. 19, [2000] 1 S.C.R. 455 (S.C.C.) [hereinafter "*Wust*"].

cretion to reduce a sentence below a mandatory minimum after taking into account any time spent in pre-sentencing custody. Section 719(3), as it was worded at the time, did not expressly confer any such discretion:

719(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.¹¹²

Nonetheless, the Court held that trial judges can reduce a sentence below the mandatory minimum after considering any time spent in pre-sentencing custody because to hold otherwise would be “offensive both to rationality and to justice”.¹¹³ The Court adopted the reasoning of the Ontario Court of Appeal in *R. v. McDonald*,¹¹⁴ in which Rosenberg J.A. cited several reasons for interpreting section 719(3) to permit the reduction of sentences below a statutorily prescribed mandatory minimum, including: (i) section 719(3) is not a mere codification of a principle of sentencing, but is a provision that gives a court the substantive power to relieve against what might otherwise be considered a harsh or unfair result;¹¹⁵ (ii) it would be unjust and unfair for a statutorily prescribed minimum sentence to set outer limits on a judge’s ability to give credit for time served in pre-sentencing custody;¹¹⁶ (iii) it is important for judges to be able to remedy the burden of pre-sentencing custody given that this burden falls more heavily on those choosing to exercise their constitutional right to assert their innocence and require the Crown to prove its case beyond a reasonable doubt at trial.¹¹⁷ Each of these reasons applies with even greater force where a Charter breach has been established and the purpose of the sentence reduction is to remedy such a breach.

Thus, it is difficult to square the Ontario Court of Appeal’s decision in *McDonald* and the Supreme Court of Canada’s endorsement of that decision in *Wust* with the Supreme Court’s decision in *Nasogaluak*. Just as the Court in *Khadr* allowed the executive branch to fetter the constitutional discretion of trial judges under section 24(1) despite a precedent to the contrary (*i.e.*, *Burns*), the Court in *Nasogaluak* allowed the legislative

¹¹² Section 719(3) has since been amended by the *Truth in Sentencing Act*, S.C. 2009, c. 29 to read: “In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.”

¹¹³ *Wust*, *supra*, note 111, at para. 33.

¹¹⁴ [1998] O.J. No. 2990, 40 O.R. (3d) 361 (Ont. C.A.) [hereinafter “*McDonald*”].

¹¹⁵ *Id.*, at paras. 23-24.

¹¹⁶ *Id.*, at para. 56.

¹¹⁷ *Id.*, at paras. 63-64.

branch to do the same despite the precedent of *Wust*. The courts are now left in the peculiar position of having the statutory discretion to reduce a sentence below the mandatory minimum under section 719(3) of the *Criminal Code*, but not having the constitutional discretion to do the same under section 24(1) of the Charter except in “exceptional circumstances”, which is as yet undefined.¹¹⁸

This sort of incongruity in the law can produce absurd results, which is perhaps best illustrated by the Ontario Court of Justice’s decision in *R. v. Padda*.¹¹⁹ In that case, the trial judge found the accused guilty of impaired driving and refusing to provide breath samples. He also found that the accused had his section 8 Charter right violated when he was strip searched by the police. In determining whether the accused’s sentence could be reduced as a Charter remedy under section 24(1), the trial judge felt that binding case law prohibited him from granting a sentence below the minimum prescribed by the *Criminal Code*, although he came to this conclusion reluctantly and only after urging a re-examination of the case law.¹²⁰

The trial judge struggled with the option of simply granting the defendant the minimum sentence because “(e)ven without any Charter violation, the defendant would probably be a candidate for the minimum fines” as this was “a case of a first offence without serious aggravating features”.¹²¹ Therefore, it would not have been much of a remedy to simply sentence the defendant to the minimum fine. The trial judge’s solution to this problem was to force himself into a completely technical and artificial analysis. The trial judge cited the fact that the defendant had spent 10 hours in pre-sentencing custody and relied on this fact to reduce the defendant’s sentence below the mandatory minimum, because section 719(3) of the *Criminal Code* could go where section 24(1) of the Charter apparently could not. The trial judge sentenced the accused to a fine of one dollar on each count.¹²²

The absurdity of the trial judge’s reasoning is, of course, no fault of his own. He was simply trying to reach a fair and just result while working within the irrational constraints of binding case law. Those

¹¹⁸ While the courts are now generally restricted under s. 719(3) to giving credit for time served in pre-sentencing custody on a 1-for-1 basis, the reasoning of *Wust* still applies to permit them to reduce sentences below a mandatory minimum subject to this constraint.

¹¹⁹ [2003] O.J. No. 5503, 6 Admin. L.R. (4th) 55 (Ont. C.J.).

¹²⁰ *Id.*, at para. 9.

¹²¹ *Id.*, at para. 13.

¹²² *Id.*, at para. 18.

constraints have since been relaxed slightly by the Supreme Court's decision in *Nasogaluak*, because the Court has at least recognized the possibility of reducing a sentence below a mandatory minimum to remedy a Charter breach under section 24(1). Nevertheless, the Court has not explained, and it is not apparent, why such reductions ought to be limited to an undefined set of "exceptional circumstances" given the Court's previous statement in *Doucet-Boudreau* that remedial power under section 24(1) cannot be limited by statute. Such a conclusion is consistent only with the Court's recent decisions in *Bjelland* and *Khadr*, in which the Court has shifted the focus away from remedial efficacy and toward greater deference to government.

VI. CONCLUSION

Section 24(1) of the Charter, perhaps more than any other provision in Canadian law, warrants a large and liberal interpretation. It is a remedial provision, it is in the Constitution, and it is textually broad in scope. Moreover, it has been the beneficiary of extremely generous language from the Supreme Court of Canada and has, up until this past year, been generally applied in a manner consistent with this rhetoric. The Court's decisions in *Bjelland*, *Khadr* and *Nasogaluak* represent a departure from this jurisprudence.

Just prior to the publication of this paper, the Court decided another section 24(1) case: *Ward v. Vancouver (City)*.¹²³ In that case, the central issue that split the British Columbia Court of Appeal was whether a plaintiff must be required to establish that the government acted in bad faith before being entitled to the remedy of damages under section 24(1) of the Charter. In that regard, the Court's unanimous decision is promising from a rights-protection perspective: in a thorough discussion of the availability of damages as a section 24(1) remedy, the Court did not once mention "bad faith" as a prerequisite.

As with *Nasogaluak*, however, the Court's reasons in *Ward* become more discouraging once the surface is peeled back. While a detailed discussion about the merits of the judgment is beyond the scope of this paper, one aspect of the case stands out as an unfortunate punctuation mark to the trend established by *Bjelland*, *Khadr* and *Nasogaluak* — namely, the quantum of damages awarded. The trial judge found that the police violated the plaintiff's section 8 Charter right when they mistak-

¹²³ [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.).

only identified him as the individual who attempted to throw a pie at then Prime Minister Jean Chrétien and, as a result, strip searched him at the police station. The Supreme Court described the plaintiff's injury as "serious" and the violation as "egregious", and rightly noted that strip searches are "inherently humiliating and degrading".¹²⁴ Nonetheless, the Court held that the paltry sum of \$5,000 was sufficient not only to compensate the plaintiff, but also to achieve the remedial objectives of vindication and deterrence.¹²⁵

It is difficult to see how any potential plaintiff would decide that an action for a breach of Charter rights is worth pursuing when even a victory would likely not offset the cost of legal fees.¹²⁶ Moreover, to the extent that such actions are pursued, it is difficult to imagine the government viewing a potential damages award as anything more than a licence fee to pursue state interests aggressively at the expense of individual Charter rights, should it already be so inclined.

Indeed, the least intrusive remedy will rarely be the most effective. Up until *Bjelland*, *Khadr* and *Nasogaluak* (and now perhaps *Ward*), the Court has laudably leaned toward the latter and not the former. That is no longer true. The Court has scaled back the scope of section 24(1) of the Charter in both its rhetoric and its application. Given the inextricable link between rights and remedies and the paramount importance of the Charter in our constitutional democracy, one can only hope that, in the long run, this set of cases will represent an anomalous outlier and not a turning point.

¹²⁴ *Id.*, at para. 64.

¹²⁵ *Id.*, at para. 73.

¹²⁶ It is, of course, rare that costs are granted on a full indemnity basis.

