Case Comment: R v Daybutch

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On May 29th, 2015 Justice Feldman of the Toronto Division of the Ontario Court of Justice delivered his oral and written reasons for *R v Daybutch*. The claimant, Erica Stacey Daybutch, was charged with impaired driving and was being sentenced pursuant to s. 255 of the *Criminal Code of Canada*.

DECISION

Ms. Daybutch challenged the unavailability of the option to apply for a curative discharge in Ontario, which is a result of the Ontario government not enacting it pursuant to its enabling statute, th*e Criminal Law Amendment Act*, *1985*. There is a mandatory minimum charge of $1000 for this offence.

Ms. Daybutch successfully obtained a declaration that her equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedom* were violated and the violation was not saved by s. 1. In this case, it was held that the decision not to enact the curative discharge subsection was unconstitutional, but it was not held to be of no force and effect.

The applicant was also successful in proving on a balance of probabilities that the distinction creates a disadvantage perpetuating prejudice or stereotyping by failing to take into account s. 718.2(e) of the *CriminalCode,* further perpetuating the pre-existing disadvantages Aboriginal people face in the justice system. The government's action of not enacting the provision was not saved under s. 1, resulting in a s. 24(1) remedy.

ARGUMENTS

The defense and Aboriginal Legal Services of Toronto, who acted as intervener, both argued that the government's decision to not enact the curative discharge provision was unconstitutional on the basis that Aboriginal peoples in other provinces had the availability of the curative discharge (seeking treatment for alcohol or drug use) on the offense of drinking and driving.

ALTERNATIVE SENTENCING APPROACHES

Feldman J held that Aboriginal people were part of such an "insular and discrete minority" whose interests were protected by s. 15(1).[2] The court held that the law created a distinction based on an enumerated or analogous ground because the province failed to proclaim into force s. 255(5), which had a differential impact on Aboriginal offenders. As a result, Aboriginal offenders are without the benefit of restorative justice sentencing approaches, which is codified under s. 718.2(e) of the *Criminal Code*, and interpreted by the Supreme Court of Canada in *R v Gladue*.[3]

Feldman J interpreted the principles of Gladue in deciding that alternatives to imprisonment should be available to Aboriginal offenders, even in cases

of impaired driving.[4] It is clear from his reasons for judgment that Feldman J took judicial notice of the unique circumstances and background factors of Aboriginal offenders. This is also evidenced in the alternative sentencing approach of this case. [5][6] This was done in order to help ameliorate the over-representation of Aboriginal people in the criminal justice system.[7]

THE EFFECT

This decision opens the door for Aboriginal offenders to apply for a curative discharge when charged with impaired driving under s. 253 of the *Criminal Code* in Ontario. Even though this was a decision at a trial court, the decision has wide-ranging effect to be applied to all Aboriginal offenders throughout the province. Such applications ensure that Aboriginal offenders have access to alternative sentencing options.

The effect of this rare successful section 15 claim addresses the importance of the judiciary in applying alternatives to sentencing for Aboriginal claimants. This was done in this case to assist in mitigating the over-representation of Aboriginal people in the criminal justice system and to counter-act the differential impact of inequitable laws. This case may assist with future cases when seeking to apply for a s.15 analysis to criminal law, when there are arguments that the law has a disproportionate impact on Aboriginal offenders.

The next sentencing hearing date for Ms. Daybutch is set for September 24, 2015 in Scarborough with Justice Feldman.

[1] **About the Author:** Christina Gray articled at Aboriginal Legal Services of Toronto where she worked on this case with Jonathan Rudin and Emily

Hill. Ms. Gray is called to the bar in Ontario, and is currently an Intern with the Canadian Bar Association's Supporting Access to Justice for Children and Youth in East Africa (SAJCEA) initiative.

[2] *Andrews v Law Society of British Columbia* (1989), 56 DLR (4th), para 37.

[3] *R v Gladue,* [1999] 1 SCR 688 (hereafter "Gladue").

[4] *R v Gladue,* at para 81.

[5] *Ibid* at para 88.

[6] *R v Ipeelee* , [2012] 1 SCR 433, at para 60 (hereafter "Ipeelee").

[7] *Ibid* at para 87.