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B.C. notaries on hook for massive Ponzi scheme

Appeal court rejects 'financial advisor' defence

JOHN SCHOFIELD

British Columbia's highest court has upheld a 2014 B.C. Supreme Court ruling that could effectively force the Society of Notaries Public of B.C. to partially compensate some of the more than 200 investors bilked in a $110 million Ponzi scheme that former Vancouver notary Rashida Samji ran for almost a decade.

"In the case at bar, I am persuaded that Ms. Samji's status as a notary and as a member of the defendant Society did play a significant role in her perpetration of the fraud," B.C. Appeal Court Justice Mary Newbury wrote for the three-judge panel in *Jer v. Society of Notaries Public of British Columbia* [2015] B.C.J. No. 1165. "This was not only a 'subjective' perception of the investors. It was an impression Ms. Samji worked to create."

Justice Mary Saunders and Justice John Savage concurred with the June 5 decision.

"The smart move now is for the society to step up and deal with it," said Vancouver lawyer Reidar Mogerman, co-counsel in a class action lawsuit launched against Samji, financial adviser Arvin Patel and several financial institutions by numerous victims of the scheme, including Lawrence Brian Jer, June Jer and Janette Scott. "If they fight too long, they put their profession at risk."

Mogerman said some of the defendants in the class action have already settled out of court, including the Royal Bank, Toronto-Dominion Bank, and

Coast Capital Savings Credit Union, Patel's employer during the relevant period. But the Society of Notaries Public of B.C. has "fought very hard to avoid responsibility," he said.

"It's a significant issue for the class because they are still out of pocket a considerable amount of money," said Mogerman, of Vancouver's Camp Fiorante Matthews Mogerman. "People have lost their life savings and are able to get some of it back through the settlements we have obtained, but they're still very much in financial pain and looking for compensation."

Between 2003 and 2012, Samji told more than 200 investors their funds would remain in trust in Canada and used as collateral to provide "letters of comfort" for then Vancouver-based beverage alcohol giant Mark Anthony Group to expand wineries into South Africa and South America. In fact, there was no connection at all with the Mark Anthony Group.

Samji told investors the company would pay fees of between six and 12 per cent a year for

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allowing their money to be used to back the letters, according to the decision. Instead, she paid those returns with money from new investors. The scheme was promoted by Patel. According to court documents, victims included dentists, doctors, teachers, and former Edmonton Oilers head coach Dallas Eakins and his wife.

In January, the B.C. Securities Commission fined Samji $33 million for running the massive Ponzi scheme and banned her for life from participating in the province's capital markets. She still faces criminal charges of fraud and theft laid by the RCMP in 2013.

In its appeal of B.C. Supreme Court Justice Laura Gerow's decision, the notaries' society argued that Samji was not fulfilling the functions of a notary as strictly defined in section 18 of the province's *Notaries Act*, and therefore the fraud victims should not be permitted to make claims against the society's compensation fund.

"She was acting as an investment adviser, which is not a function of a notary public," counsel for the appellant Brian Poston told *The Lawyers Weekly*. "We think the trial judge erred by including the subjective understanding of the investors in finding that Samji was acting in her capacity as a notary."

Poston said the society is considering its options, including whether to seek leave to appeal to the Supreme Court of Canada.

In her legal analysis, the trial judge relied most heavily on *Hellenic Import Co. (c.o.b. Dino's of Granville Island Public Market Hellenic Import Export Co.) v. Society of Notaries Public of British Columbia* [1993] B.C.J. No. 789, which also involved a notary approaching a client with an investment opportunity.

"Ultimately, the fact she (Samji) was a notary was interwoven with the scheme, so we always thought we had a strong case," said Mogerman.

As a result of the successful appeal, he added, claims by the class could conceivably exhaust the notaries society's $3 million compensation fund. Under the *Notaries Act*, members of the society will be required to replenish the fund after the payouts. But Mogerman said the legislation does not clearly specify if $3 million is the limit for a single set of claims. If not, members of the class could also make claims on the replenished fund.

"There could certainly be more litigation about that," he noted.

Robert Gordon, director of Simon Fraser University's applied legal studies program, which provides the educational program for professional notaries public in B.C., said the Society of Notaries Public will likely have to charge a special levy on its approximately 325 members to replenish its $3 million compensation fund.

He added that the decision has wider implications for a number of professional societies, and raises questions as to how far they should be expected to go to control rogue members.

"The B.C. Law Society will be watching this very carefully trying to determine where the cracks were in the notaries' regulatory regime," said Gordon. "This sends a clear message to regulatory professions saying the courts will have no sympathy if you're not looking over the shoulders of your practitioners all the time. It's a harsh decision in that way."

Last year, the B.C. Law Society finished paying out $38.4 million in claims to victims of a huge real estate fraud orchestrated in part by former lawyer Martin Wirick.

Notaries public in B.C. and Quebec have wider powers than their counterparts in other provinces and are governed by their own professional societies. Mogerman said the Appeal Court decision could influence current efforts by the B.C. Ministry of Justice to renew the province's *Legal Professions & Services Act* and bring lawyers and notaries public under one regulatory body.

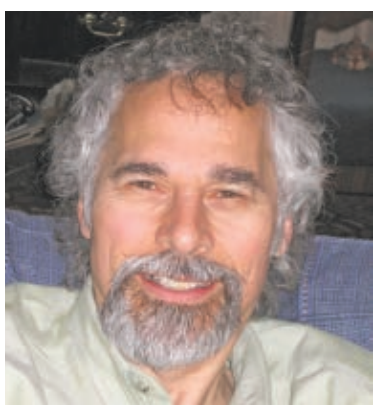
Ontario judge pushes for curative sentences, big questions in play

MICHAEL BENEDICT

An Ontario Court of Justice judge has urged the province to review a longstanding policy that denies the option of imposing a curative discharge instead of a mandatory minimum jail sentence.

Justice Lawrence Feldman's ruling May 29 in *R. v. Daybutch* [2015] O.J. No. 2777 notes a "serious" *Charter* violation that discriminates against Aboriginals in Ontario when it comes to drinking and driving offences, although as a provincially appointed judge he lacks the power to declare the situation unconstitutional.

Curative discharges, which entail a treatment program, exist in six provinces for offenders who suffer from an alcohol or drug dependency. If the program is



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completed successfully, the conviction is expunged.

Should Justice Feldman's ruling be appealed and upheld, it could make curative discharges potentially available to all Ontarians convicted of alcohol-related driving offences, not just Aboriginals.

In his ruling, Justice Feldman maintains that imposing a curative discharge is open to him, despite Ontario's four-decade old policy, because the *Criminal Code* provision requiring a province to opt in before availing itself of the curative-discharge alternative is unconstitutional on equality grounds.

"The province's failure to proclaim s. 255 (5) has had a differential impact on Aboriginal offenders," he wrote. "Sentencing judges are unable to meet their statutory duty to consider historical and sociological factors that have disadvantaged Aboriginal offenders across generations and consider the fullest range of sentencing options, including those of a restorative nature."

He added, "The unavailability of the curative discharge, where appropriate, for Aboriginal offenders on account of provincial policy is in these circumstances discriminatory and violates their s. 15 [equality] rights…I view the Charter violation in this case to be serious in adding to the already disadvantaged position of Indigenous persons in the sentencing process for offences of this nature."

Jonathan Rudin, program director for Aboriginal Legal Services of Toronto, termed *Daybutch* "ridiculously complicated," adding that "Justice Feldman is required to look for prison alternatives in sentencing, especially for Aboriginal people, but can't impose a specific alternative sentence that is available in other provinces."

Alberta, Manitoba, Saskatchewan, Nova Scotia, New Brunswick and P.E.I. allow curative discharges. Asked why Ontario has opted out as well as reaction to *Daybutch*, a spokesperson for the Attorney General in an e-mail replied: "As this matter remains before the Court, it would not be appropriate for the Ministry to provide any comment at this time."

Erica Daybutch, a Mississauga First Nation member with a troubled history, has pleaded guilty to several drinking and driving offences but asks for a curative discharge on the grounds that her *Charter* equality rights have been violated. Daybutch was raised in part by her alcoholic grandmother, who had been forced to attend a residential school, until she was seven when the grandmother died. Daybutch

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Appeal court tightens discretion on victim surcharge

JOHN SCHOFIELD

In a decision that further limits the discretion of trial judges in levying the federal victim surcharge, the Court of Appeal for Ontario has ruled that a trial judge erred by ordering the Crown to pay the surcharge through funds seized from a convicted drug dealer.

"A court cannot order a victim surcharge to be paid out of funds forfeited to the Crown as proceeds of crime," Appeal Court Justice James MacPherson wrote for the three-judge panel in its May 19 decision in *R. v. Shearer* [2015] O.J. No. 2512. "It is clear from the language of section 73791) (of the Criminal Code) that it is *the offender's* obligation to pay the surcharge. Funds forfeited to the Crown as proceeds of crime no longer belong to the offender."

The appeal stemmed from the April 2014 sentencing of Steven Shearer by St. Thomas, Ont., Judge Michael O'Dea of the Ontario Court of Justice, but focused specifically on the $200 victim surcharge fine imposed on him and the $170 in cash seized on his arrest.

Shearer was arrested in 2014 after an undercover officer, acting on suspicions of drug dealing, visited Shearer's home and used marked bills to purchase $20 worth of hydromorphone, a narcotic pain killer. The house was then raided and Shearer was arrested. Police seized hydromorphone pills, a syringe filled with the drug, other drug-related paraphernalia, and $170 in cash, including the marked $20. Shearer was later

convicted of trafficking in hydromorphone and sentenced to 14 months in prison.

Under section 737(1) of the *Criminal Code*, Shearer was required to pay a victim surcharge of $200, the amount stipulated for each indictable offence. Justice O'Dea granted one month to pay and ordered the Crown to pay the victim surcharge out of the money seized within 30 days. The federal government later appealed the decision.

"A review of the transcript suggests that the trial judge's goal may simply have been to ensure that, in this case, the victim surcharge made its way to the victims' assistance pool, on the theory that a bird in the hand is worth two in the bush," Justice O'Dea wrote for the three-judge panel which included Justices Robert Blair and Grant Huscroft. "However commendable this goal may have been, the trial judge in our respectful view did not have the authority to make the order he did regarding the manner in which the victim surcharge was to be paid."

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> **Michael Mandelcorn**
> Lawyer

The Appeal Court also ordered that the money seized from Shearer be returned to him, not including the $20 that police used to buy the hydromorphone.

"There was little, if any, evidence concerning the source of the additional $150," wrote Justice MacPherson. "Section 462.37 (2) sets a high threshold — satisfaction beyond a reasonable doubt — where the property in question is said to constitute the proceeds of crime."

Under legislation passed in 2013, the Conservative government made the victim surcharge mandatory in all cases and doubled the amount to $100 for summary conviction offences and $200 for indictable offences, or 30 per cent of any fine. Judicial discretion was removed and judges could no longer waive the fee in cases where they believed it would cause undue hardship.

Shearer sends a strong message from the highest court so far that "the provision is mandatory and it's an obligation on the offender to pay the surcharge — not the Crown and not the police, and certainly not out of the money that is seized," said Ghazala Zaman, a lawyer with the Public Prosecution Service of Canada who represented the federal government in the appeal.

"The forfeiture provisions of the code are intended to prevent criminals from profiting from ill-gotten gains, and not to allow them to leverage those gains to meet another obligation of the state," Zaman told *The Lawyers Weekly*.

But Kingston, Ont., criminal lawyer Michael Mandelcorn said the decision is of limited precedential value. "Clearly the real issue underlying the appeal is another case where the trial judge is not pleased with having his discretion fettered and is looking for ways to get around that."

Mandelcorn said a more significant decision on the mandatory victim surcharge could come if the Court of Appeal grants leave to appeal an April decision in *R. v. Tinker* [2015] O.J. No. 1758 by Superior Court Justice Bruce Glass of Cobourg, Ont., which overturned a decision last year that declared the victim surcharge provisions under s. 737 to be of no force and effect.

The Conservative government's toughening of the surcharge has polarized judges. In *R. v. Michael* [2014] O.J. No. 3609, Ottawa Justice David Paciocco ruled last year that the mandatory surcharge constitutes cruel and unusual punishment contrary to section 12 of the *Charter*. And in an interview with the *Globe and Mail* last year, Kitchener, Ont., Provincial Court Justice Colin Westman described the surcharge as a "tax on broken souls." But in *R. v. Javier* [2014] O.J. No. 3725, Justice Robert Wadden of Ottawa last year argued that section 737 of the code is valid legislation that obliged him to impose the surcharge.

"There have been some grumblings in the provincial courts about the application of this provision," Zaman conceded. "But there is still some opportunity to craft it for individual offenders."

To reduce the surcharge for indigent offenders, Zaman said some judges are imposing small fines, taking advantage of the provision that the victim surcharge may be equivalent to 30 per cent of the fine.

Steps that can be taken to deal with offenders who don't pay the surcharge are detailed in sections 734 to 736 of the code. Scofflaws can potentially face jail time, said Mandelcorn. But in *Javier* last year, Justice Wadden said courts cannot issue a warrant of committal for non-payment if the offender is truly unable to pay.

In some provinces, offenders who can't pay the surcharge can participate in a program that allows them to complete community service, but that option is not available in Ontario, B.C., and Newfoundland and Labrador.

Ripple effect: Curative discharges could apply to all Ontarians

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then lived with her mother, who also struggled with alcoholism.

Now in her early 30s, Daybutch began drinking as a teen and has twice gone into comas as a result. Also, she attempted suicide at 17, while drunk. However, Justice Feldman found that she has a good work record and now attends weekly sessions of Alcoholics Anonymous.

In his analysis, echoed just days afterwards by the Truth and Reconciliation Commission, Justice Feldman said, "The evidence supports the strong inference that Ms. Daybutch suffers from at minimum alcohol dependence concurrently with depression that is at least in part related to the intergenerational trauma of residential school experienced by her grandparents and mother that was manifested in their own abuse of alcohol and blighted lives."

Rudin praised Justice Feldman

for linking the high proportion of incarcerated Aboriginals for impaired driving to past government policies.

"The court's recognition that laws of general application can have a discriminatory impact on Aboriginal people is very significant," said Rudin.

Osgoode Hall Law School's Shin Imai also approves Justice Feldman's reliance on past Aboriginal experiences as justification for finding a different response to a crime with an otherwise mandated minimum sentence.

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>
> **Shin Imai**
> Osgoode Hall Law School

"The judge is arguing that he should have a wider palette in fashioning an appropriate sentence," said Imai, an Aboriginal Law expert.

Toronto criminal lawyer Jonathan Dawe, an adjunct at the University of Toronto Faculty of Law, pointed out that *Daybutch* could have wide-reaching applications if upheld on the grounds that Ontario's failure to offer curative discharges discriminates against Aboriginals.

"The general rule is that if a law is unconstitutional against some people, then it is unconstitutional for all people," said Dawe, of Dawe Dineen.

Sole practitioner Jonathan Rosenthal of Toronto said he would welcome such a development, although he would prefer the province avoid an appeal and instead take Justice Feldman's advice to review its anti-curative discharge stance.

"I hope this decision sends a wake-up call and the government applies the provision to all offenders," Rosenthal said.

Meanwhile, the Harper government has moved to end curative discharges. In mid-June, with no time to pass the proposed legislation before the Commons adjourned until after the October federal election, it introduced the *Dangerous Impaired Driving Act* that would overhaul existing impaired driving offences. Among its measures: instead of offering curative discharges, sentencing could be delayed for offenders who take a treatment program. If the program is successfully completed, a judge could then avoid the mandatory minimum sentence, but the offender would still have a conviction on his record.

"What a horrible approach," said Rosenthal. "The purpose of a curative discharge is to recognize the importance of rehabilitating an offender who is suffering from a medical condition. To needlessly burden such a person with a criminal record under the guise of deterrence is a huge step backwards in this day and age."