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Lost in Precedent: Preserving "the Rule of Law" Through the Minimization of Identity

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Case Commented On: *R v Blackplume*, 2021 ABCA 2 (CanLII)

Editor's Note

During Equity, Diversity and Inclusion (EDI) Week at the University of Calgary in February 2021, the Faculty of Law's EDI Committee held a research-a-thon where students undertook research on the law's treatment of equity, diversity and inclusion issues. We are publishing a series of ABlawg posts that are the product of this initiative. This post is the second in the series.

Introduction

The case of *R v Blackplume*, 2021 ABCA 2 (CanLII) involved consideration of whether the accused should be declared a dangerous offender and consequently subjected to an indeterminate sentence. The accused, Lucy Blackplume, survived a severely traumatic childhood, often witnessing domestic violence and drug and alcohol abuse. She was "repeatedly sexually assaulted by various relatives and others from a young age" (at para 8). In addition to having cognitive functions at the level of a 9- or 10-year-old, Ms. Blackplume suffers from various personality disorders, psychopathy, and Fetal Alcohol Spectrum Disorder. It is not possible for her to appreciate the consequences of her actions, "exercise self-control, or filter impulses" (at para 7).

The criminal record of Ms. Blackplume began in 2008 with a conviction for sexual assault, and she has spent almost 12 years in institutions. While institutionalized, she has spent "notable periods of time in segregation, isolation or observation," and over that time has been the target of threats because of, among other things, her gender expression (at para 11). Previous efforts to treat Blackplume's conditions, including through a fifteen-month high-intensity sex-offender treatment program, have been unsuccessful (at para 12).

At the dangerous offender hearing, Ms. Blackplume pleaded guilty to sexually assaulting a female at a party, where she threatened the victim and later stabbed her (at para 9). She then stabbed someone intervening to help, before fleeing. She was arrested later that day.

The decision of the Alberta Court of Appeal (Justices Marina Paperny, Frans Slatter, and Jolaine Antonio) held that the decision of Judge Anne Brown of the Alberta Provincial Court erred in finding cruel and unusual circumstances and consequently declining to apply section 753(4.1) of the *Criminal Code*, RSC 1985 c C-46. This section of the *Criminal Code* creates a presumption for an indeterminate sentence for those found to be dangerous offenders, unless there is a

"reasonable expectation that a lesser measure … will adequately protect the public against the commission by the offender of murder or a serious personal injury offence." Even though Judge Brown found that Ms. Blackplume qualified under law as a dangerous offender, she held that Ms. Blackplume's "specific circumstances set her case apart", and that section 12 of the *Canadian Charter of Rights and Freedoms* effectively provided a constitutional exemption (at paras 23-24). The *Charter* outlines under section 12 that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."

In her decision, Judge Brown attempted to allow for a humanizing of the black-letter law in the *Criminal Code* that the justice system as a whole normally insists on applying. In recognizing Ms. Blackplume as a person with intersecting and marginalizing aspects to her identity, Judge Brown attempted a *Charter* remedy when left with no other viable options within the law. As the rule of law so effectively marginalizes identities like those of Ms. Blackplume, Judge Brown was forced to depart from the normal functioning of the system in order to produce a judgment that responded to the lived experience of Ms. Blackplume. Without intervention, the criminal law would see to it that Ms. Blackplume be sentenced indeterminately without a contextualization of her individual and intersectional experience. After considering a number of factors, including *Gladue* sentencing principles for Indigenous offenders (see *R v Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688), Judge Brown imposed a determinate sentence of 10 years for the sexual assault and 6 years concurrent for assault causing bodily harm, followed by a 10-year long term supervision order (at para 4).

The Contrasting Reasoning of The Courts

The Court of Appeal found that in granting a section 12 exemption from an indeterminate sentence, the sentencing judge "[bought] flexibility at the cost of undermining the rule of law" (at para 28, quoting from *R v Ferguson*, 2008 SCC 6 (CanLII) at para 67). In applying the rationale from the section 12 decision in *Ferguson*, the Court outlined that, "[the] remedial scheme of the *Charter* does not support making individual exceptions to unconstitutional laws while leaving the laws 'on the books'" (at para 28). The Court was critical of Judge Brown's utilization of the *Charter* in an effort to override the demands of the *Criminal Code*, and its decision determines that the sentencing judge erred in considering an indeterminate sentence to be cruel and unusual punishment in the case of Ms. Blackplume. The sentencing judge had relied first on distinguishing factors, secondly on the prospect of an indeterminate sentence becoming a life sentence, and lastly on an aim to incentivize new resources in support of her characterization of the nature of this punishment. The Court of Appeal dealt with each of these reasons for decision in turn.

On the issue of distinguishing factors, Judge Brown found that Ms. Blackplume's individual characteristics set her apart from other cases where indeterminate sentences were not found to be cruel and unusual punishment. However, the Court of Appeal noted that the Crown cited several cases where the offenders had many of the same characteristics as Ms. Blackplume, "such as Indigeneity, severe cognitive limitations, substance addiction, antisocial personality disorder, and untreatable psychopathy" (at para 33). With all of these characteristics mirrored in the case at hand, Ms. Blackplume's personal characteristics were not recognized as unique upon appeal. The one characteristic that the Court did recognize as setting her apart from the offenders in the other

cases is that Ms. Blackplume is transgender. However, the Court noted, in dismissing this factor as relevant, that, "[there] was no evidence of Ms. Blackplume's wishes with respect to being housed in a female facility or of the practical effects of such a placement" (at para 35). The Court then went on to state that while the sentencing judge noted that the Correctional Service of Canada would place Ms. Blackplume in a male facility, she "provided no analysis of whether housing her in a female facility would rectify the sentence's purportedly cruel and unusual effect, over an indeterminate or finite term" (at para 35).

The Court next addressed the sentencing judge's consideration of an indeterminate sentence amounting to a life sentence. While Judge Brown cited this factor as contributing to the cruel and unusual punishment of imposing such a sentence upon Ms. Blackplume, the Court of Appeal rejected this finding by noting that "[the] prospect of life imprisonment is an inherent part of the dangerous offender scheme" (at para 36).

The Court noted in closing that the sentencing judge's reduction in Ms. Blackplume's sentence was in part an attempt to incentivize the Correctional Service of Canada to create "humane housing and treatment" and "humane secure facilities" (at para 38). This desire displayed by the sentencing judge to humanize the way in which the sentence would be served was characterized as misplaced and misguided. The Court outlined that "[it] is appropriate for judges to remain informed and alert to social conditions and potential injustice, but in making decisions judges must adhere to the boundaries set by Parliament, binding authority, and the role of the judiciary." According to the Court, "[t]o do otherwise risks undermining the rule of law" (at para 40).

With Ms. Blackplume's characteristics considered and having found that no basis existed on statutory or *Charter* grounds to reduce her sentence, the Court then imposed an indeterminate sentence.

Contextualizing the Ruling

The Court of Appeal decision reveals a dismissal of the sentencing judge's aims, where she attempted to exclude Ms. Blackplume from the harsh application of the criminal law in order to protect her from cruel and unusual punishment. The Court's judgment speaks to a judicial legacy of erasure within a system alleging to protect the public. This protection comes at the price of the systemic marginalization of identities like those of Ms. Blackplume, and is evidenced in the Court's failure to apply the *Gladue* factors, as well as a reliance on precedent without contextualization. To have Ms. Blackplume put away for what may amount to life is an exercise of the judicial system working as it is meant to, however, this ease of application should not be interpreted as evidence of a system without flaw.

In overturning the judgment of the sentencing judge, the holding of the Court of Appeal reveals many qualities of the law and the manner in which the law is applied in today's society. Of primary importance in this case is the existence, or lack thereof, of distinguishing characteristics of Ms. Blackplume as compared to other dangerous offenders. The Court's dismissal of any uniqueness of note presents two quite significant areas of importance, namely that the prevalence of precedent based on similar fact scenarios is far from apolitical, and that the largely silent response to Ms. Blackplume's being transgender speaks volumes.

The Court of Appeal's dismissal is allowed to be a normal occurrence as a result of the benefit served to those privileged by such an act. Due to the prevalence of and purpose served in exiling non-normative bodies to the controllable margins of society, an overlooking of Ms. Blackplume's transgender identity is inconsequential to the Court. In isolating bodies like Ms. Blackplume's and expediting their movement through the justice system, Canadian society is able to define what it considers to be normative and acceptable. The marginalizing of someone who is Indigenous, has intellectual disabilities, and is transgender, is justified in a society where we have defined normative identities as more deserving of participation within our world. The intersecting identities of Ms. Blackplume largely oppose our normative conceptions of persons who are representative of 'Canadian society' and thus, her life is assigned a low value and dismissed into a cell for what is, most probably, the rest of her life.

The sizable volume of cases "where the offenders have many of the same characteristics, such as Indigeneity, severe cognitive limitations, substance addiction, antisocial personality disorder, and untreatable psychopathy", is inseparably linked to this societal effort (at para 33). The willingness and readiness of the Court to rule in accordance with these cases without note of their relativity within the courts or society, extends the colonial erasure of Indigeneity. Far and wide within the Canadian criminal justice system, Indigenous offenders are grossly overrepresented. While "Indigenous people represent 4.3% of the total Canadian population, Indigenous adults accounted for 26% of admissions to provincial and territorial correctional services and 28% of admissions to federal correctional services [in] 2015/2016" (Elizabeth Fry Society of Calgary, *Women's Incarceration in Alberta*, 2019). As a result, relying on the undoubtedly plentiful case law with similar fact scenarios and failing to critically analyze why so many offenders who are Indigenous, cognitively impaired, violent, and present substance addiction have come before the courts, which the *Gladue* factors mandate, neglects to fully inform the law. The unquestioned application of dangerous offender precedent cases neglects to name why these precedents are so prevalent, and what social purpose they serve.

The Court recognized that the sentencing judge had drawn attention to the *Gladue* sentencing principles for Indigenous offenders, however, the Court did not account for these factors in its own treatment of Ms. Blackplume (at para 33). Importantly, "[if one's] sentence is to go to jail, the judge must keep in mind [their] *Gladue* rights to decide how long [they will] be in jail and [their] probation" (Aboriginal Legal Aid in BC, *Gladue Rights*). These factors were not mentioned by the Court in their own reasons for decision. While it was the role of the Court to decide whether or not the sentencing judge erred in her judgment, the appeal judgment spent ample time outlining the variety of cases in support of their decision without contextualizing them within Canada's colonial history, which *Gladue* attempts to address. *Gladue* is itself part of the law, as is section 12 of the *Charter*, but when precedent that fails to take account of this context builds, our judicial system threatens to become another tool with which erasure of Indigenous peoples impacted by our colonial history is enacted.

In response to Ms. Blackplume being transgender, the Court both disregarded the weight that should rightly be placed on this intersectional factor in looking for uniqueness of circumstances and dismissed the validity of Ms. Blackplume's identity. As stated above, in dismissing this factor as relevant enough to classify Ms. Blackplume as uniquely differentiated from existing

precedent, the Court claimed that both Ms. Blackplume and the sentencing judge failed to address how placing Ms. Blackplume in a female prison would be a more beneficial choice over her mandated placement in a male facility. In claiming that "[there] was no evidence of Ms. Blackplume's wishes with respect to being housed in a female facility or of the practical effects of such a placement" (at para 35), the Court imposed a disproportionate and problematic burden on Ms. Blackplume based on her gender identity. In identifying that trans people should necessarily outline their desire to be placed in the facility that suits their gender, the Court demanded that Ms. Blackplume prove her womanhood to the court. The Court would not have expected a cisgender offender to note their facility of choice. Furthermore, the Court concluded that the sentencing judge "provided no analysis of whether housing her in a female facility would rectify the sentence's purportedly cruel and unusual effect" (at para 35). In doing so, the Court chose to deny the implications made by the sentencing judge listing Ms. Blackplume's gender identity within the factors considered "in declining to impose an indeterminate sentence" (at para 16).

In failing to recognize Ms. Blackplume's transgender identity as a unique enough characteristic to set her apart from existing case law, the Court imposed a potential secondary life sentence. Jennifer Metcalfe, a lawyer who heads West Coast Prison Justice Society's legal-aid clinic that advocates for transgender inmates, recalls how she has had "a number of transgender women prisoner clients who have been held in men's prisons and who faced a lot of day-to-day discrimination, such as name calling and harassment from both correctional staff and other prisoners" ("B.C. transgender inmate wins right to change prisons", *Global News* (22 July 2017)). Further, Metcalfe notes that "transgender women living in men's prisons are also particularly vulnerable to sexual assault." The reality of placing Ms. Blackplume in a men's facility is a conscious exposure to violence, potentially daily, and as noted by the sentencing judge this assignment risks cruel and unusual punishment. This reality is simply dismissed by the Court of Appeal, and is a dangerous oversight. A life sentence may be commonplace and accepted when dealing with dangerous offenders. Whether we are prepared as a society to turn a blind eye to the risk of imposing an additional life sentence, specifically a potential loss of life due to increased risk of prison violence related to gender identity, is answered by silence in this court.

While Judge Brown may have erred in her application of the law as it exists "on the books", specifically by granting a constitutional exemption as a *Charter* remedy in light of *Ferguson*, the Court of Appeal had the authority to take all of the relevant considerations of Judge Brown into account and resentence Ms. Blackplume. Not only did they neglect to exercise their duty to consider *Gladue* and the *Charter* in any way, the Court failed to offer any solution to a system so clearly failing those caught within it. It may be that this case would have benefited from arguments under section 15 of the *Charter*, which guarantees equality rights to people in Canada. An exploration of section 15 arguments may have advantages over section 12 because while the latter is individually focused, section 15 permits the consideration of the impact of the criminal law on particular groups in society. Relevant here, is that this section necessarily includes Indigenous, disabled and transgender persons, as well as those for whom these identities intersect. In their failure to consider the complex and intersectional lived experience of Ms. Blackplume and other offenders who experience intersecting inequalities, the Court spoke

directly to the unwillingness of the justice system to prioritize the humanity of those who come before it.

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