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Charter Violations Inside Prisons: Irremediable in the Name of Protecting the Public?

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Case Commented On: *R v Blanchard*, 2017 ABQB 369 (CanLII)

The applicant in this case, Lance David Blanchard, is a nearly 60-year-old man who committed his first criminal offence (rape) in 1975. His other previous criminal convictions include multiple charges of unlawful confinement, assault (including with a weapon), and manslaughter. Most recently, he was convicted of aggravated assault, kidnapping, unlawful confinement, aggravated sexual assault, possession of a weapon, threatening to cause death or bodily harm, and breach of a recognizance. He has been designated a High Profile offender, and has been incarcerated at the Edmonton Remand Centre (ERC) since June 2014, in administrative segregation and protective custody. His most recent trial received attention from the media and the legal community because of the incarceration of the sexual assault complainant, "Angela Cardinal" (critiqued on ABlawg by Professor Alice Woolley here and here). Having been convicted in that trial, Mr. Blanchard then sought a stay or a sentence reduction because of the severely adverse conditions he experienced while awaiting trial at ERC.

Given his criminal record, it is admittedly difficult to be sympathetic to the litany of grievances he cited in his stay application. He complained that his *Charter* ss 7, 8, and 12 rights were violated by, for example, having his cell "F-bombed" with buckets of urine and feces (para 74) and hearing corrections officers (CPOs) share information about his sexual assault offences with other inmates (para 72). However, no matter how unsavory a character he may be, it would be a mistake to conclude that Mr. Blanchard deserves the mistreatment he experienced because of the severity of his crimes. Even those serving time for egregious crimes retain rights to life, liberty, and security of the person, security against unreasonable search and seizure, and freedom from cruel and unusual treatment or punishment. Their incarceration does not remove these rights, and those in positions of legal power ought not implicitly sanction abusive treatment of inmates by inmates and CPOs through implication that such treatment is deserved.

At paras 27-139 of the decision, more than a third of the total length, Justice Eric F. Macklin—also the trial judge in the case involving Angela Cardinal—described each of Mr. Blanchard's many complaints. They ranged from the banal (such as wanting new playing cards to replace his, which were bent, at para 42), to the revolting (such as being served food into which other inmates had ejaculated, at para 85). He alleged that he was provided with insufficient bedding and clothing (paras 44-48, 52-55), his phone calls were not private and he could not contact lawyers or government officials during business hours (paras 49-51), he was strip searched and had his cell searched very often for no apparent reason (paras 56-61), showers and bedding were very dirty (paras 66-68), he lacked access to legal resources (paras 112-115), and van rides between ERC and the court affected his sleep and physical health (paras 136-139).

Many of the above complaints qualify not as abuse but merely as inconvenience. However, more significantly (in Justice Macklin's eyes), Mr. Blanchard complained of severely limited physical recreational opportunities and mental stimulation in administrative segregation, inadequate food and lack of appropriate utensils, that medical services at ERC were insufficient, and that he experienced abuse and violations of privacy at the hands of CPOs and inmates (para 223). He experienced difficulty obtaining eyeglasses and hearing aids and, on one occasion, medication (para 223). In addition, as noted above, other inmates confirmed that CPOs had given them information about Mr. Blanchard's sexual offences, which exposed him to harassment within ERC (para 72). His complaints about adverse treatment were also not treated confidentially in every case (para 181). According to Mr. Blanchard's evidence and the evidence of other inmates, CPOs encouraged and incentivized inmates to bully Mr. Blanchard in a variety of repulsive ways, most of them involving human waste (see paras 74, 75, 78, 80, 84, 85).

Justice Macklin concluded, despite evidentiary inconsistencies and a lack of corroboration, that Mr. Blanchard had experienced "harsh conditions" and "improper treatment" at ERC at the hands of other inmates. Justice Macklin also accepted that CPOs had "witnessed and condoned, if not encouraged" this behaviour. However, he held that Mr. Blanchard had "greatly exaggerated the extent of the ill treatment to which he was subjected" (para 158). Indeed, Mr. Blanchard lacked convincing evidence to support many of his more startling claims. He repeatedly alleged that he was unable to walk and required a wheelchair, which, according to the trial judgment in the Angela Cardinal matter (2016 ABQB 706 (CanLII) at paras 65-75), is false. Nevertheless, Justice Macklin held that Mr. Blanchard's ss 7 and 12 *Charter* rights (to life, liberty and security of the person, and to be free from cruel and unusual treatment or punishment) were violated by this treatment, which was "grossly disproportionate and offensive to societal notions of fair play and decency" (para 223).

Even given the abuse Mr. Blanchard experienced, Justice Macklin declined to order a stay of the convictions, a stay of the upcoming dangerous offender hearing, a sentence reduction, or any other remedy under s 24(1) of the *Charter*. He wrote,

> Notwithstanding these findings, I recognize that a stay must only be granted in the clearest of cases. I am not persuaded that a stay is required to adequately remedy the state conduct in question. Further, although some of the conduct is egregious, the balance does not tip in favour of granting a stay in this case, given the nature and seriousness of the impugned conduct, the number of occurrences actually established on the evidence, Mr. Blanchard's circumstances, including his criminal record and the very serious charges of which he has been found guilty, and the interests of society in having those findings of guilt stand. (emphasis added) (at para 232)

The essence of Justice Macklin's reasoning seems to be that the public's interest in having Mr. Blanchard remain incarcerated outweighs Mr. Blanchard's interest in a remedy in the form of a stay for the violations of his *Charter* rights. Indeed, if Justice Macklin had granted the application for a stay, Mr. Blanchard would have been released, presenting too great of a risk to the public. While this reasoning is unfortunate for Mr. Blanchard, his criminal record is fairly convincing proof of his likelihood to reoffend. It is Justice Macklin's role to balance competing interests and prioritize those which should be paramount. In this case, he considered the third branch of the test for a stay, which required him to weigh "the circumstances of the accused

[and] the charges he faces", and understandably concluded that he could not remedy the breaches of Mr. Blanchard's *Charter* rights through a stay without unreasonably endangering the public (para 217).

However, even if a stay was inappropriate, surely Mr. Blanchard deserves a remedy that could mitigate the breaches of his rights without unduly endangering the public? Indeed, Justice Macklin held that the steps the ERC had taken to respond to Mr. Blanchard's complaints "do not form a complete remedy" (para 228). He expressed consternation that inmates in segregation units are not "provided with sufficient legitimate exercise time and stimulation for their physical and mental wellbeing" (para 230). He also noted that the ERC did not appear to have investigated the violations of Mr. Blanchard's privacy by CPOs who disclosed information about his sexual offences to other inmates, nor had the ERC investigated Mr. Blanchard's claims that CPOs encouraged other inmates to mistreat him (para 228). It should be "within the realm of the possible", he held, to ensure that Mr. Blanchard's complaint forms were also kept confidential (para 231).

Nevertheless, Justice Macklin made no order that the ERC remedy any of these failings, even though Mr. Blanchard sought, in addition to a stay or a sentence reduction, "any other remedy that may be appropriately considered under s. 24(1)" (para 225). At the least, Justice Macklin could have issued a declaration that the ERC had violated Mr. Blanchard's *Charter* rights. Declarations are a common remedy under section 24(1) of the *Charter*, and as noted in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII) at para 66, the "assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully." Justice Macklin held that Mr. Blanchard's convictions were too serious for a stay to be an appropriate remedy, acknowledged that the state had violated and perhaps continued to violate Mr. Blanchard's rights, but despite these conclusions, declined to order any alternative remedy.

However, counsel for Mr. Blanchard may still "make further submissions on remedy in the course of the sentencing hearing" (para 234). Justice Macklin thus left open the possibility that a sentence reduction might be an appropriate remedy for the s 7 and s 12 *Charter* breaches, pursuant to *R v Nasogaluak*, 2010 SCC 6 (CanLII) (para 234). Sentencing proceedings, which will include the Crown's dangerous offender application, will take place beginning in January 2018 (para 250). Until then, Mr. Blanchard will likely remain at ERC (para 196).

The severity of Mr. Blanchard's crimes prevented Justice Macklin from ordering a stay, but if Mr. Blanchard's *Charter* rights were violated (and probably will continue to be violated, if he is to remain at ERC until January 2018), he deserves to have those breaches remedied in a way that will not endanger the public. It would be unjust to not only refuse to grant a stay based on the severity of Mr. Blanchard's crimes, but also to prevent Mr. Blanchard from accessing any remedy at all for the breaches of his *Charter* rights because of the reprehensible nature of his offences. Prison inmates are notorious for targeting sex offenders for bullying and abuse, presumably because they consider sex crimes among the most despicable. The government and/or the courts should not, using the same logic, decline to protect prisoners' *Charter* rights and condone bullying in prison because of the severity of an inmate's offences.

It is much more difficult to sympathize with Mr. Blanchard's plight than that of his victim, who was not only imprisoned and shackled while testifying, but forced to ride in the same van to and

from ERC and court with the man who dragged her into his apartment, sexually assaulted her, stabbed her, and attempted to tie her up with electrical cords (2016 ABQB 706 (CanLII) at paras 231, 235, and 246-250). Both the trial decision and the stay application contain details about Mr. Blanchard's character that conclusively establish his moral bankruptcy and propensity for violence. However, the same is true for many incarcerated individuals: they are rarely paragons of virtue. Those in positions of legal power should nonetheless resist the urge to ascribe to the assumption that it is only the sympathetic or the unlikely to reoffend who deserve to have violations of their rights remedied. As evidenced by the chronic lack of programs for development and rehabilitation in prisons and the use of segregation, prisoners' rights are not a priority for the Canadian government. Perhaps the lack of public sympathy for prisoners' rights plays a role in this low prioritization. Indeed, it is more satisfying on a retributive level to know that prison inmates are suffering than that they are being rehabilitated. However, the purpose of the federal correctional system is, according to s 3 of the *Corrections and Conditional Release Act*, SC 1992, c 20:

> …to contribute to the maintenance of a just, peaceful and safe society by
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> **(a)** carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
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> **(b)** assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

The treatment Mr. Blanchard suffered and perhaps continues to suffer while in remand is hardly safe or humane, and he does not appear to have access to opportunities for rehabilitation or reintegration. While his criminal record establishes that a restriction on his liberty may be the only way to maintain a "just, peaceful and safe" society, allowing him to be abused by CPOs and inmates serves no legitimate correctional purpose. Mr. Blanchard, despite his offences, deserves a remedy that will effectively protect his rights: they are not extinguished when he passes through a prison door.

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