Journal of Criminology and Forensic Studies
ISSN: 2640-6578

Commentary *Volume 3 Issue 1*

Outrage of Injustice, Vaginas on Display: R V Barton

Jacobs B*

Department of Criminology, University of Windsor, Canada

***Corresponding author:** Beverley Jacobs, Professor of Criminology and at the University of Windsor and 401 Sunset Ave, Windsor, Ontario N9B 3P4 Canada, Tel: 519-253-3000; Email: beverly.jacobs@uwindsor.ca

Received Date: February 21, 2020; **Published Date:** February 26, 2020

Abbreviations: SCC: Supreme Court of Canada; ABCA: Alberta Court of Appeal; LEAF: Legal Education and Action Fund; IAAW: Institute for the Advancement of Aboriginal Women; CCC: Criminal Code of Canada; CAL: Crown Attorneys and lawyers

Commentary

The Supreme Court of Canada (SCC) heard one of the most vitriol murder cases against an Indigenous woman whose vagina was put on display at trial. What was most disturbing was that this issue was not the topic of appeal at the highest court in Canada. The murder victim's vagina was preserved since June 23, 2011 by the coroner, was presented on display at trial and will continue to be disgustingly held until the new trial that was ordered by the SCC has ended. This was the first time in the history of any court proceeding that a woman's most private parts were displayed as evidence in a public courtroom. The spirit of the murder victim cannot rest until this is over. Her family cannot rest until this is over. The purpose of this paper is about how the court in R v Barton perpetuated the lack of respect and continued the dehumanization of Indigenous women and how it set a precedent in future sexual assault cases against Indigenous women and all women. I also intend to review this case from the victim's perspective because there was no one in the court room who spoke on her behalf. And my question is: "Who speaks on behalf of an Indigenous murder victim when her vagina is spread out in a public courtroom?" [1-3].

This paper is to honour the spirit of the victim in this case. When I first became aware of this case, it literally made me so angry, I felt sick. I have made a decision to transform my anger into positive actions by bringing attention to disgusting cases, like this one to the public's attention and scream and yell the outrage of injustice towards Indigenous women. These cases and issues can no longer be silenced. As noted by my Cree Métis friends, Tracey Lindberg, Priscilla Campeau and Maria Campbell. Worse is that our spirits, spirituality, language, and cultures are unrecognized or unrecognizable when we read these cases. In assessing relevancy, we find Indigenous women's lives have become irrelevant, once by the people who harmed them, and again through their erasure by the judiciary. The messages should make us angry. We find they make us fearful and sad:

- Our homes, if we have them, can be invaded.
- Our bodies, without our consent-if we are even old enough to know what consent is not protected by Canadian law.
- Our bodies are disposable.
- Our bodies are vulnerable.
- Our experience with the Canadian justice system represents a layering of violence.
- Our experience as colonial oppressed goes unnoticed and unanalyzed.

Our communities and our support seem less important than the perpetrators' communities and their support systems. The Canadian legal system has a continued hatred towards Indigenous women. Thomas McMahon agree: Canadian legal system as a whole: the law-makers and their laws, the lawyers and the judges, the police and the jailers, have all demonstrated a raw hatred for indigenous women for longer than Canada has existed. That hatred continues today. I do not believe that the Canadian legal system can discriminate against indigenous women for 160 years and call it something less than hate, but other observers can call it by whatever name they think fits. This case, Barton, is proof of this hatred. The National Inquiry on Murdered and Missing Indigenous Women and Girls called it genocide [4-7]. I call it barbaric and medieval. How could anyone, the judge, the lawyers, the Crown - any one of them - allow a woman's vagina be viewed

on public display. I truly do not understand other than what has been described: a genocidal, barbaric and medieval legal system that hates Indigenous women.

Background

The murder victim was an Indigenous woman with links to her Cree and Métis communities. She grew up and lived on the homelands of the Métis and Treaty 8 and Treaty 6 territories. She was a daughter, a 36 year old mother of three daughters, a sister to three siblings, an auntie and a friend to many. Just after her murder, her daughter gave birth to a son. She did not get to know what it was like to be a grandmother and her grandchildren will not get to know her grandmother. Here is a true description of the victim: She was born in Athabasca, Alberta on July 23, 1974. She was the first-born child to her mother, Donna and father, Lawrence. When Cindy was 5 years old her parents were blessed with her brother Kevin. As many children are at that age, Cindy was not impressed with this. Two more siblings came along, her brother Jeff and sister Marilyn. They all lived in Calling Lake, Alberta and enjoyed their life there. On June 23rd, 1996 Cindy gave birth to her first daughter, Brianne. Then in 1999 on the 14th day of June she had another girl who she named Brandy. Her youngest daughter, Cheyanne, was born in 2001 on April 6th. Cindy loved her daughters more than anything, they came first in their life. Her daughters loved her more than anything as well. Cindy loved to cook, draw, listen to music, Facebook with her friends. She was a lot like you and I. She loved life, she had a family, dreams, emotions. She was kind, caring and funny. She was a beautiful woman inside and out and she was loved deeply [8].

She did have a life that was, I believe, a result of the impacts of colonization. I do not believe that she sought life as a sex worker or as an addict. In fact, she aspired to go to university "somewhere beautiful" [9,10]. Bradley Barton was a 45-year old white man and a truck driver from Mississauga, Ontario. He was charged with second degree murder on June 22, 2011. He was in a common-law relationship for ten years and had two sons from a previous marriage, whom did not live with him [11]. Barton was employed by his current employer for 17 years; however, his lawyer in 2015 said: his client lost his long-distance trucking job but then managed to find other work. According to Industry Canada records, Mr. Barton, 46, filed for bankruptcy in March of 2012, was responsible for monthly child-support payments and recently worked at a plywood company. A manager there said he is no longer an employee. He also no longer resides at the Mississauga address listed in his 2011 bail conditions, having moved from the rental unit a couple years ago, the property manager said" [12]. The details of the death of the victim are horrific as most murders of Indigenous women are. The painful details of her murder and the trial court's continued hatred and violence against her were provided by Dr. Julie Kaye as follows: On June 22, 2011, Cindy Gladue was found lifeless in a motel room. She was a mother, a friend, and an auntie. She was also a woman engaged in sex work and, at the time of her death, was found to have a blood alcohol level four times over the legal limit.

When the police initially told her family of her death, they reported it to them as seemingly of "natural causes." Days later, to the surprise of the family, Bradley Barton was arrested for her murder. Cindy Gladue bled to death as a result of a severe wound to her vaginal wall that was inflicted upon her by Barton. Yet, rather than delivering justice, the court responded to her assault with its own measure of violence. Relying on and reinforcing racist and sexist stereotypes about Indigenous women and particularly Indigenous women working in sex industries, the trial diluted Gladue's right to consent and perpetuated the myth that sexual histories are relevant considerations in cases of sexual assault. At the trial, the jury accepted the defense argument that Gladue had consented to "rough sex" and acquitted the man accused of her murder. And, in an act of complete dehumanization, her sexual organs were brought into the court, covered in a paper towel. They were projected onto a screen and referred to as a 'specimen' [13].

As further noted by Dr. Julie Kaye: A portion of a woman's body, a sacred, life-giving, indigenous woman's body was paraded through the Canadian criminal court system. The very system that dispossessed indigenous women from their land and that continues to criminalize their lives at staggering and every-increasing rates. At trial, the victim was referred to multiple times as a "prostitute," "Native girl" and "Native woman". As noted by the Alberta Court of Appeal (ABCA), the deceased was described by witnesses, defence counsel and Crown counsel as "Native" 26 times during the course of the trial. The ABCA noted that "the trial judge ought to have addressed the repeated references to the victim as a "Native" girl and "prostitute" to overcome the real risk of reasoning prejudice" thus the only caution given to the jury was a "limited generic one typically offered in every jury trial" [14-16].

As further noted by the ABCA: Those references implicitly invited the jury to bring to the fact-finding process discriminatory beliefs or biases about the sexual availability of Indigenous women and especially those who engage in sexual activity for payment. What was at play here, given the way in which the evidence unfolded, was the intersection of assumptions based on gender (woman), race (Aboriginal) and class (sex trade worker). We emphasize that we are not suggesting that counsel or the trial judge sought to insinuate improper thinking into the minds of this jury. Nevertheless, without a sufficient direction to the jury, the

risk that this jury might simply have assumed that Barton's money bought Gladue's consent to whatever he wanted to do was very real, indeed inescapable. Add to this the likely risk that because Gladue was labelled a "Native" prostitute – who was significantly intoxicated-the jury would believe she was even more likely to have consented to whatever Barton did and was even less worthy of the law's protection. This is the very type of thinking that s 276 [of the Criminal Code of Canada] was introduced to eradicate. I would argue that the lawyers and judge did "insinuate improper thinking into the minds of the jury" and that because the judge did not provide sufficient direction to the jury, there definitely was a high risk that they assumed "Barton's money bought" the victim's consent and that the racist comments and labels impacted the jury's decision. My colleague, Professor David Tanovich and I presented on a panel on this case recently at our law school at the University of Windsor and he noted the refusal to acknowledge that the trial was tainted by racism, of which I totally agreed [17,18].

The issue relating to s 276 of the Criminal Code (protecting the sexual history of sexual assault victims) became the focus of the appeals, which is rightly so and which was the focus from many intervenors at the ABCA and SCC; however, there was no comment other than the voir dire in the trial to admit the murdered victim's vagina as evidence. What was most disgusting about this was that it was the Crown Attorney that argued that it is admitted as evidence. As noted by Victoria Perrie, this should have become an ethical obligation by both the judge and the Crown in this case to not allow body parts of a victim, specifically her vagina, admitted as evidence [19,20]. This has never been done in the history of criminal law in Canada so why was it allowed in 2015? Tanovich noted the blatant misconduct of the Crown in his presentation, some of which I have already addressed:

- Failed to bring a challenge for cause application to screen jurors for anti-Indigenous bias
- Failed to seek a ruling before referring to the deceased as a "prostitute" and one who "struck a working relationship" with Barton
- Put the deceased's body on trial by bringing it into the courtroom for the jury to view
- Failed to object under section 276 to defence elicitation of prior sexual history evidence
- Failed to ask for limiting instructions based on race, sex-work and prior sexual history evidence
- Failed to recognize relevance of Barton's after-the-fact conduct to ultimate issue of his credibility
- Repeatedly referred to deceased as "Native" and a "prostitute"
- Failed to raise arguable and critical grounds of appeal to the Alberta Court of Appeal [21].

The Crown's unethical practice and blatant misconduct in this case highlights the dehumanization of the victim and allows for the continued systemic discrimination that has been perpetuated against Indigenous women victims within the criminal legal system. There is no real justice for Indigenous victims of murder, of sexual violence and of racial and sexual discrimination.

This was the reason that I made to be a member of a Case Review Committee of the Women's Legal Education and Action Fund (LEAF) in the Barton Appeals at the ABCA and SCC. I also had an opportunity to sit as legal counsel for two intervenors, Institute for the Advancement of Aboriginal Women (IAAW) and LEAF at the SCC. I entered the room with Muriel Stanley Venne who is a long-time activist and voice of Indigenous women in Alberta and founding President of IAAW. She advocated for the victim's mother, who was also in the room. It was the third time that she had to sit though long and disrespectful court proceedings about her murdered daughter and not have a voice. Upon waiting for the SCC's decision, Muriel Stanley Venne insisted. This is the most important case of my lifetime. As I sat in the Court, I could feel the cold indifference of this system that continues to persecute Indigenous women. The judge, the Crown, the defence, and the nine men and two women on the jury all sent the horrifying message that it's okay to continue killing Indigenous women with impunity. We want to be treated as human beings [22].

As noted earlier, the SCC's decision did not focus on the vagina on display but addressed the central error committed by the trial judge which was his failure to comply with the mandatory requirements set out in s 276 of the Criminal Code - the rape shield provision in Canadian law that establishes guidelines for admitting an alleged victim's prior sexual conduct into evidence. The majority found that "the new trial should be restricted to the offence of unlawful act manslaughter, not murder." The dissenting Supreme Court justices ordered a new trial on murder and manslaughter. They cited the fact that the rape shield law was not followed and led to major consequences, including the introduction into trial of prior sexual conduct that should not have been admissible.

Conclusion

The court actors, including judges, Crown Attorneys and lawyers in the criminal legal system must be included in any efforts of reconciliation! The SCC took note that everyone in the system "should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons and in particular Indigenous women and sex workers-head-on. Turning a blind eye to these biases, prejudices, and stereotypes is not an answer". As

noted by Julie Kaye. In particular, the [Indian Act] sought the erasure of Indigenous peoples through the dispossession of Indigenous women. The settler colonial state continues today, in many ways, to treat Indigenous women's bodies as empty of humanity. Just as the Indian Act and the formation of Canadian Criminal law cannot be separated from the intent through which it was formed, efforts at reconciliation necessitate solid grounding in the reality of ongoing colonial gender violence [23,24].

The SCC did not directly state that the actions taken by court actors in Barton were actions of blatant systemic racism, systemic sexism or systemic discrimination but that is what this is, instead, the SCC, in its final words in Barton stated: Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law's full protection and to be treated with dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest. But as these reasons show, the criminal justice system did not deliver on its promise to afford her the law's full protection, and as a result, it let her down-indeed, it let us all down [25].

As noted by myself and colleague Julie Kaye, in the Oped we wrote: [The criminal legal system did] "let us all down" by failing to uphold the dignity and humanity of Cindy Gladue, an Indigenous woman whose body faced barbaric treatment by Canada's legal system. A legal system that violated Indigenous laws while claiming to seek justice in prosecuting the man, Bradley Barton, responsible for her death. Indigenous people have been in a violent relationship with Canada for too long. When you are in an abusive relationship and the abuser continues to apologize, you cannot keep waiting for the abuser to change, you cannot wait for the abuser to recognize your worth. We cannot rely on a genocidal government to change its institutions. There is no reconciliation with an abusive state that continues to perform violently against Indigenous women, girls, trans and two-spirit persons [26]. Perrie also took exception to the blatant racism and discrimination in this case. She noted: Indigenous people living in what is now Canada are not strangers to having their legal interests, dignity, children, and way of life taken away from them and reshaped by State actors.

Indigenous women are even more accustomed to the violence perpetrated against them going unacknowledged and left without available resources to learn about spiritual healing. Often with disregard for the laws of Indigenous Nations, decisions have historically been and continue being made about Indigenous peoples, by non Indigenous peoples, without any consultation or consideration [27]. I would argue that this sets a dangerous and horrific precedent in the future regarding evidence in sexual assault cases wherein a woman's vagina will be required to be shown on display to prove reasonable doubt by the Crown. As further noted by Perrie: "Ms. Gladue had no voice in that court room, but the medical examiner, the Crown and the judge spoke volumes by denying an Indigenous woman her dignity". The Canadian criminal legal system continues to violate the rights of victims, even the rights of murdered Indigenous women victims. Hopefully, this case will set the standard for never allowing vaginas on display in criminal court proceedings ever again.

References

1. To respect the spirit of the Indigenous female victim in this case, I will not be including her name while I write about her in this article. Her name was thrown around with disrespect at all levels of the court. At times, her name will be reflected in court proceedings, quotes and references. I mean no disrespect to her or to her family.

2. Kathryn Blaze Carlson (2015) More than a tragic headline: Cindy Gladue dreamt of a happy Life. Globe and Mail Canada.

3. Barton RV (2015) ABQB 159 (CanLII) [Barton].

4. Lindberg T, Campeau P, Campbell M (2012) Indigenous Women and Sexual Assault in Canada. Sheehy E (Ed.), Sexual Assault in Canada, Ottawa Press, Ottawa University, Canada pp: 87-108.

5. Thomas McMahon (2017) former General Counsel, Truth and Reconciliation Commission of Canada (2009-2016); former Executive Secretary, Aboriginal Justice Inquiry of Manitoba (1988-1991); former Senior Counsel, Justice Canada (1992-2009); now retired.

6. Thomas L McMahon (2017) Canada's legal system hates indigenous women.

7. National Inquiry into Missing and Murdered Indigenous Women and Girls. A Legal Analysis of Genocide. Supplementary Report-Genocide pp: 1-46.

8. Institute for the Advancement of Aboriginal Women (2018) Our Breaking Point: Canada's Violation of Rights in Life and Death.

9. Reclaiming Power and Place. The Sex Industry, Sexual Exploitation, and Human Trafficking. pp: 656.

10. Adam Feibelman (2007) Equitable Subordination, Fraudulent Transfer, and Sovereign Debt. JSTOR 70(4): 171-191.

11. Benjamin HB (2008) Do Judges Systematically Favor the Interests of the Legal Profession?. 59(2): 253.

12. Carlson RR (2009) Citizen Employees. Louisiana Law Review 70(1): 1-77.

13. Kaye J (2016) Reconciliation in the context of settler-colonial gender violence: ''how do we reconcile with an abuser?'' Can Rev Sociol 53(4): 461-467.

14. Julie Kaye, in Our Breaking Point, supra note 7.

15. Lisa A S (2017) Unpacking R v Barton ABCA 216 (CanLII). pp: 1-9.

16. Ibid at para 127

17. Ibid at para 128.

18. David Tanovich (2020) "The Good, The Bad and The Ugly. A Settler's Reflections on the Supreme Court of Canada Decision in R v Barton" Presentation at "The Barton Panel Discussion" organized by The Shkawbewisag Student Law Society in collaboration with CLAW & SSAC at the University of Windsor, Faculty of Law.

19. Barton RV (2015) ABQB 159 (CanLII).

20. Victoria Perrie (2015) VAGINAS IN THE COURT ROOM: Considering the law and ethics of presenting vaginal tissue in open court RE: R v Barton", 2015 ABQB 159.

21. Tanovich, supra note 17.

22. LEAF and IAAW Press Release. IAAW and LEAF continue to seek justice for Cindy Gladue.

23. Barton RV (2019) Supreme Court of Canada On appeal from the Court of Appeal of Alberta Neutral citation: 2019 SCC 33.

24. Kaye DH (1980) Mathematical Models and Legal Realities: Some Comments on the Poisson Model of Jury Behavior. Penn State Law eLibrary.

25. Barton, SCC, supra note 23 at para 210.

26. Beverley Jacobs, Julie Kaye (2019) Indigenous people have been in a violent relationship with Canada for too long.

27. Perrie, supra note 20.