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Tracing the Likeness of Colten Boushie in the Law Classroom

By: Lisa A. Silver

On January 29, 2018, the nation's gaze was decidedly fixed on Battleford, Saskatchewan where the second-degree murder trial of Gerald Stanley was commencing. From that first day of jury selection to the present, there is a general sense of shock, outrage and disbelief from so many corners of our country. In the legal community, there is much debate on the legal issues arising from the trial as well as concerns with jury selection, the ethical duties of jurors, and the presence of discriminatory practices that are embedded in our justice system. Many voices are being heard that are challenging the traditional common law perspective. Several of these voices are from the Indigenous community who are speaking from their heart and from their own personal experiences. As part of this reaction, the legal community is debating these issues through a variety of lenses and from all sides. Like most everyone touched by this case, I have read these accounts with interest. As a lawyer who practiced criminal law and now teaches it, my initial reaction is typically lawyerly: to parse the charge to the jury for legal errors, to debate the efficacy of peremptory challenges and to call for change in our justice system. But the overwhelming message, and in my view, the message which needs to be presented in the law classroom is not just one promoting a legalistic analysis but one providing a broader more meaningful message framing this case and this verdict as part of an overarching theme or subtext, which can be traced in the law classroom.

As mentioned, there are many salient legal arguments to be made in wake of the acquittal of Stanley for the murder of Colten Boushie. Most of those arguments are legalistic involving the law of homicide and the *mens rea* requirements for unlawful act manslaughter, the legal significance of the so-called "defence" of accident, opinion and expert evidence, instructions to the jury, and jury selection. But overlaid onto these legal arguments is the brutal truth – that our criminal justice system is slow to embrace the kind of change needed to make it reflective of our Indigenous peoples. In fact, we have been meandering toward change in a very familiar and comfortable manner. To my case-law attuned mind comes the expression "incremental" change (i.e. *R v Salituro*, [1991] 3 SCR 654, 1991 CanLII 17 (SCC)) as a description of how the justice system has responded to the dire issues raised by the Indigenous voices attempting to awaken the system. I cannot pretend to speak on behalf of those voices nor do I have the right to do so but I can through my own personal perspective add to this much needed call for change. To trace the likeness of this issue though the law classroom is an important piece of the awareness or awakening which needs to happen in our legal profession. We are the defenders of the rule of law but also the framers of that law and we need the future of our profession to be mindful of this awesome duty to create sustainable and meaningful change through law.

The trail must start somewhere, and I will choose to start it with a case which resonated with me as a young law student and then lawyer and still catches in my throat today: the story of Donald Marshall Jr., a young Mi'kmaq man wrongfully convicted of murder. His story was an egregious

example of the miscarriage of justice our system could generate, and a shameful example of the discrimination and racism tolerated in that system. Out of that example came an acquittal, after years in prison, a royal commission advocating change, and a man who dedicated his life and voice to Indigenous rights. As inspirational as he is even a decade after his death in 2009, his example dates back to the 1980's, some 35 years ago. His fight for traditional fishing rights culminated in a decision by the Supreme Court of Canada in 1999 (*R v Marshall*, [1999] 3 SCR 456) in which he was vindicated yet again for breaches of the *Fisheries Act* but this time on behalf of his people. This story exemplifies the subtext that can be found within the borders of case law and between the words enunciated by a jury verdict.

But I do not need to go back that far to continue the trace or the shadow cast by the "long arm of the law." When I taught human rights and civil liberties to undergraduate criminal justice students as a sessional instructor in the 2000s, I was sure to discuss Burnt Church First Nation's struggle with fishing rights, the Neil Stonechild tragic and unnecessary death, and the treatment and incarceration of Indigenous peoples in the prison system as seen through Michael Jackson QC's perspective on prisoners' rights, the Arbour Report on the Prison for Women and the numerous reports from the Correctional Investigator of Canada. Added to this narrative is the Truth and Reconciliation Report and the calls to action for monumental change, not incremental change, needed to eradicate injustice in our system. This mountain of information is more than a discussion piece, it is the reality of our criminal justice system.

But the Stanley trial and the implications of the case shake me out of past legal narratives to the present and to the continuing issues we see within the criminal justice system. In the 1L classroom my criminal law colleagues and I implemented curriculum changes to include Aboriginal sentencing issues and a panel discussion to hear, understand and experience the human connection between *Gladue* reports (*R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC)) and the criminal court room. Again, an example of how the law almost two decades ago changed but the impact of that change has not been a fundamental one but a legalistic conversation which still haunts the criminal court room and the law classroom.

New cases emerge, adding to the memories of Donald Marshall and emphasizing the need to offer these examples as the contextual foreground in law classroom doctrinal learnings. *Gladue* comes easily to us as a paradigm of a discrete area of law involving clear statutory directions in s 718.2 of the *Criminal Code*, RSC 1985, c C-46, to include the Aboriginal perspective in sentencing. These newer examples are more difficult legally as they serve as counterpoints to the traditional trope of miscarriage of justice through the accused's perspective. We are comfortable in law dressing our outrage in the language of legal errors directed toward our most cherished values as embodied in the presumption of innocence. This is important as evidenced in the Donald Marshall case but what is not evident and what is harder to debate is the criminal justice system as a societal mirror of how we implement the rule of law on behalf of the entire nation. To push ourselves to view justice in a big picture way is counterintuitive to the lawyer who is trained to peer through the magnifying glass and find those lacunae, those minute errors which provide us with the "Aha" moment when we can decry a miscarriage of justice on behalf of the accused who must face the imbalance of state authority and power. But it behooves us all to take up the mantle of lasting change by widening the focus and emboldening a deeper conversation involving the entirety of the justice system. These cases sit at the edges of the law but also serve

as the reminders of what is at stake when the criminal justice system provides space for the stereotypical characterization of Cindy Gladue, the victim in *R v Barton*, 2017 ABCA 216 (CanLII) (see my previous post on the case) and the impassive resistance of the complainant in *R v Blanchard*, 2016 ABQB 706 (CanLII) (see Alice Woolley's excellent post on this case).

The subtext or context or trace of the likeness of Colten Boushie can and must be taken in the law classroom. We must approach the discriminatory and slow to change mechanisms of our criminal justice system not as a mere legal problem or as a simple teachable legal moment akin to an in-class case hypothetical but as a mindful approach to what the legal principles and case law really mean. These discussions are hard and debatable but that does not mean we do not do it. We should question and debate the role of law in our society – a society committed to diversity, change and tolerance as reflected in our laws and our application of those laws. Sometimes incremental change works but sometimes it merely pulls from behind and pushes forward the vestiges of our legal past. If we want real change we need to listen to the echoes of the past through the lens of today and that includes the black-letter law we teach in the classroom.

We have the tools of reconciliation, desire and willingness to change, but we need courage to do so. Our justice system is slow to embrace and integrate Indigenous learning and practices. It should not be a question of accommodating or conforming. It should be a question of inclusivity. We are a unique nation and we need to recognize injustice when we see it and welcome those voices into the law classroom.

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