DISCOURSE, DIFFERENCE AND CONFINING CIRCUMSTANCES
The Case of *R v Gladue* and the 'Proper Interpretation and Application' of s 718.2(e) of the *Criminal Code*[*]

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This article explores the consequences of hegemonic discursive practices for the treatment of Aboriginal offenders within the Canadian judicial system. The focus is on deficits in language, understanding and remedial action at the intersections of law and culture and on the challenge to build on *R v Gladue* (1999) to a more effectively healing legal hermeneutic. *R v Gladue* offers compelling evidence of both the Supreme Court of Canada's determination to address the disproportionate incarceration of Aboriginal peoples by attending to their exceptional circumstances and its persistent failure to do so effectively. While the court honours the past as culturally encoded, it remains confined by inherited categories that prevent it from seeing and acting on the full range of socio-cultural connections and causalities. By actively valuing the Indigenous cultural archive and the current Indigenous cultural renaissance, this article aims to rethink legal terms, categories and consequences.

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.[1]

Such shame. Such assault. That's what [residential school] was, refined under the rule of reading, writing, and arithmetic, and a god that had the eyes of a roving fly.[2]

It is not just violent behaviour that was picked up in residential schools, so was the ability to look the other way ... it is actually a consequence of colonialism.[3]

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1 *Criminal Code,* RSC, 1985, c C-46, ss 718.2(e).

2 Halfe (1994) *Bear Bones & Feathers*, p 105.

3 Monture-Angus (1999), p 25.

Discourse, Difference and Confining Circumstances

Groups exercise enormous social power, Pierre Bourdieu argues, by controlling the discursive practices and perceptual lenses through which realities are understood.[4] This article is particularly interested in the consequences of hegemonic discursive practices, and what they permit us to ask and think, for the treatment of Aboriginal offenders within the Canadian judicial system where Aboriginal men made up 72 per cent of those incarcerated in Saskatchewan in 1995–96 and where treaty Aboriginal women in the same province are 131 times more likely to be incarcerated than non-Aboriginal women.[5] The focus here is on deficits in language, understanding and remedial action at the intersections of law and culture and on the challenge to build on *R v Gladue* (1999) to a more effectively healing legal hermeneutic.[6]

R v Gladue clarifies the meaning and intent of section 718.2(e) of the Criminal Code: 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders'. The decision offers compelling evidence of the determination of the Supreme Court of Canada to address the disproportionate incarceration of Aboriginal peoples by attending to the exceptional circumstances of Aboriginal offenders, but also demonstrates its persistent failure to do so effectively. The judicial gaze as currently reconstituted proves both blind and omniscient. Seeing more does not necessarily mean seeing more clearly; knowing more does not necessarily mean interrogating the taken-for-granted or introducing innovative judicial decisions. While the court honours the past as culturally encoded, it remains confined by inherited categories that prevent it from seeing and acting on the full range and force of socio-cultural connections and consequences.

The court is unable to decolonise its own thinking or extricate itself from dominant discourses and taxonomies of difference that undervalue Aboriginal peoples and world views — except as the object of the expert gaze. This remains true despite a series of groundbreaking decisions including the 1996 *Van der Peet* decision acknowledging the failure of 'liberal enlightenment' thinking and the 1997 *Delgamuukw* decision urging an intercultural vantage respecting equally oral and written sources of evidence.[7] Knowledge that sustains a professional elite operating within dominant/dominating paradigms continues to obscure knowledge of the material conditions within which education, religion, and the law — what Aboriginal leader George Manuel has called 'the laboratory and production line of the colonial system' — actively produce differences of cultural identities.[8] This 'network of institutions'

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4 See, for example, Bourdieu (1984).

5 *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385 at para 58; Jackson (1988–89), citing *R v Gladue* at para 60.

6 *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385.

7 *R v Van der Peet* [1996] 2 SCR 507, 4 CNLR 177 at para 19; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1069. See Barsh and Henderson (1997); I Findlay (2000).

8 Cited in Canadian Government (1996a) vol 1, p 335.

ministered to the project of nation building by feeding 'industrial society's need for order, lawfulness, labour and security of property'.[9]

If Patricia Monture-Angus is right to reflect on the particular difficulties of identifying 'the behaviours that have helped [people] survive (even when they are dysfunctional)' and the even greater difficulties of letting them go, it is no less true of the survival strategies that have allowed the coloniser not only to persist but flourish.[10] The categories of knowledge are neither natural nor neutral yet, as John Ralston Saul argues, 'current ideologies' have a habit of using 'expert argument to turn almost any form of injustice into an inevitability'.[11] Keeping the expert gaze firmly focused on the Aboriginal 'problem' rather than on non-Aboriginal institutions and responsibilities has effectively placed the burden of responsibilities on Aboriginal shoulders, while sustaining strategies of domination/exculpation. Self-decolonisation cannot succeed as it should without the assistance and authority of the colonised other, that other most spectacularly present *and* absent from legal positivism's nineteenth-century colonial extravaganzas, such as the Berlin conference of 1884–85 which carved up Africa in the name of 'order, proper governance, and humanitarianism'.[12] Even the Supreme Court cannot use its autonomy to remake its residually colonial self and come more effectively to terms with the four-part combination of 'social facts' that Patrick Macklem identifies as 'The Indigenous Difference': 'Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal prior sovereignty, and Aboriginal participation in a treaty process'.[13]

The problem of over-incarceration generally, and the particular inequities experienced by Aboriginal peoples in the justice system, is pressing in North America because, though the United States has the highest rates in the world at 600 per 100 000, Canada too is a world leader in incarcerating its people at 130 per 100 000.[14] In a country faced with alarming suicide and school drop-out rates among Aboriginal youth and persistent poverty and disproportionately high unemployment statistics in the wider Aboriginal population, *R v Gladue* is instructive on how good intentions prove inadequate

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9 Canadian Government (1996a), p 334.

10 Monture-Angus (1999), p 25.

11 Saul (1994), p 3.

12 Anghie (1999), p 37.

13 Macklem (2001), p 4. Macklem's insistence that 'the spiritual histories and lived experiences of Aboriginal peoples have traditionally existed far beyond the borders of the Canadian constitutional imagination' (p 4) sits well with my own emphasis on legal-cultural hybridity, as does his refusal to reduce Indigenous difference to cultural difference (p 29). Macklem's insistence on the uniqueness of the relationship 'between Aboriginal people and the Canadian state' and his attentiveness to 'history and context' (pp 4, 10) lead him in directions similar to those pursued in Henderson et al (2000).

14 *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385 at para 52.

to the task of addressing systemic barriers to equal opportunities in a Canada ranked first by the United Nations Human Development Index.[15]

This article builds on research with Aboriginal and other scholars which stresses respectful, collaborative research as a necessary corrective to past paternalism that presumed to know best what would help Aboriginal peoples. By actively valuing the Indigenous cultural archive and the current Indigenous cultural renaissance, this article aims to rethink legal terms, categories and consequences.[16] Specific sources of Aboriginal intellectual authority, experiences and cultural understandings include the Report of the Royal Commission on Aboriginal Peoples (RCAP), as well as the work of Cree playwright and novelist Tomson Highway and the compelling story of *Stolen Life: The Journey of a Cree Woman* by Yvonne Johnson, who is currently serving a life sentence for first-degree murder.[17] These resources keep alive a past that the federal government of Canada would too often prefer to forget, and offer knowledge and authority, stories and circumstances that would complicate and enrich the court's understanding of relevant 'circumstances' and 'Aboriginal heritage'.

Drawing on such authorities, this article aims to offer a less-confining version of relevant 'circumstances' in the case of the nineteen-year-old Cree woman in *Gladue* and to unpack the ideological obstructions and reinscriptions within dominant legal discourses and decision-making. As Monture-Angus argues: 'There can be no full solution to the "problems" of "Indians" if the role that law has played in our oppression and colonization is immune from scrutiny and remedy.'[18] Such scrutiny needs to be supplemented by scrutiny of the ways that legal, religious and educational discourses intersect to produce Aboriginal difference and hence how the making of any concession becomes in effect the marring or misconstruing of Aboriginal social relations.[19]

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15 See United Nations website at www.undp.org/hdro/98hdi.htm

16 Building on the work of Smith (1999) and Battiste and Henderson (2000), among others, L Findlay (2000) urges that we 'always Indigenize!'.

17 Highway (1998); Wiebe and Johnson (1998). Many Aboriginal people work hard to ensure that the findings and recommendations of RCAP, the most extensive and expensive inquiry in Canadian history, are not allowed to languish and are implemented meaningfully. See, for example, the *Journal of Aboriginal Economic Development* which reserves a section in each issue for discussion of RCAP. For Monture-Angus (1999), pp 11–12, however, RCAP is 'a non-Aboriginal space' and 'construct of colonial power' overly constrained by its reliance on academics and professionals and by its deference to 'what the Canadian government would accept'. If RCAP is marred by colonial thinking, it is also a major resource and national treasure that, if read critically, can make a real difference for the future of all Canadians.

18 Monture-Angus (1999), p 30. Another strong influence on my thinking is Razack (1998). Her work stresses a contextualised understanding of difference and the role of colonialism and the complicity of scholarship in producing and reproducing inequalities.

19 The approach here is thus very different from that in Stenning and Roberts (2001). Stenning and Roberts challenge the assumptions of the Court in *R v Gladue* about

Opportunity for All

There is a particular urgency to these issues at a time when the Canadian Liberal government announced in its fall 2000 election platform, *Opportunity for All,* an almost irresistible promise to work toward 'A Healthy Future for Aboriginal People'. This is the title of a one-page segment addressing 'economic and social challenges facing Aboriginal people today' and proposing partnerships with other governments and the private sector 'to ensure that the next generation is able to take full advantage of the opportunities available' for 'prosperous economies in First Nations and Inuit communities'.[20]

Sidestepping the particular colonial histories of Aboriginal people on its way to electoral success for the third straight time, the Liberal government constructs an 'overwhelmingly young' community propelled into futurity by 'smart' school programming, 'prevention first' policies that 'will help them take action to prevent diseases and injuries and promote wellness' and language and cultural training 'in natural settings rather than exclusively in classrooms'. Thus the government will rely on 'the evolution of our relationship with Aboriginal peoples' for a stronger future.[21] There is no mention here of dispossession and the 'cartographies of violence' that map our literal and cognitive landscapes as if the boundaries between past and present, public and private, individual and collective, legitimate and illegitimate spaces were natural facts.[22] Nor is there any mention of Aboriginal land claims, self-

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(a) over-representation of Aboriginal people in Canada's prisons and (b) the efficacy of altered sentencing provisions in addressing any such problem, even though the court is itself clear that 'sentencing innovation' cannot alone remedy injustices against Aboriginal people in Canada (*R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385 at para 65). Stenning and Roberts' argument depends on counter-assumptions that in turn rely on mainstream research and academic authority, sever past and present, and selectively erase or exaggerate Aboriginal difference in order to propose an alternative model to cover all 'socially disadvantaged offenders' (p 137). More nuanced and useful is the argument in Haslip (2000). I agree with Haslip's argument that to rely exclusively on section 718.2(e) to reduce Aboriginal over-representation in Canadian penal institutions 'is equivalent to having both feet planted firmly in the air', though 'sentencing judges have an integral role to play in remedying the injustice that has been, and continues to be, wrought against Canada's Aboriginal peoples' (paras 6 and 11).

20 See the Liberal platform at the Liberal Party of Canada website at www.liberal.ca/lpc/pdf/platform_eng.pdf (p 18).

21 www.liberal.ca/lpc/pdf/platform_eng.pdf (p 18).

22 The phrase 'cartographies of violence' is used by Mona Oikawa in a compelling 'counter-mapping' of Canada that traces the material histories of white possession of the land sustained by a persistent pathologising of others such as Aboriginal people, people of colour and Japanese Canadians in order to segregate them spatially and 'to produce differing entitlements to power'. See Oikawa (2000), p 44.

government, natural resources, fishing and other rights, or lawsuits by residential school students.[23]

Nor are they mentioned in the Liberals' Throne Speech of 30 January 2001 which promises to meet 'basic needs' of Aboriginal peoples, while 'strengthening [First Nations] governance, including implementing more effective and transparent administrative practices.' [24] Perhaps those 'basic needs' are akin to the legislated 'moderate livelihood' limits to treaty rights in *R. v. Marshall* (1999).[25] In fact, in the House on 31 January 2001 Prime Minister Chretien was even more explicit about the need to turn from the past and to the future. In the process, simple oppositions are discursively reproduced between irresponsible and profligate Aboriginal peoples and a responsible and fiscally frugal government (chastened by charges of its own profligacy at Human Resources Development Canada):

> Quite frankly, I am concerned that, in the case of aboriginal peoples, we may be spending too much time, too much energy, and too much money on the past, and not nearly enough on what is necessary to ensure a bright future for the children of today and tomorrow. . . Our approach will be to focus on the future. And most important, on the needs of children.[26]

Similar discourse in the 1880s justified the expansion of residential schools. The 1886 report of the inspector for schools for the north-west licensed intervention to free Aboriginal peoples from their ignorance: 'it is to the young that we must look for a complete change of condition.'[27]

At the same time, Chretien claimed his government would cope with foetal alcohol syndrome and over-incarceration of Aboriginal peoples — all so carefully severed from a colonial past (and ongoing present).[28] Thus the government mediates its own power and tries to avoid its responsibilities while reinscribing old polarities, fragmenting knowledge and giving the public permission not to know, to forget the foundational irrationalities of colonial dispossession, oppression and exploitation sustained by the 'civilising' instruments of the church, education and the law whereby '"Native society" ... was rendered deviant, and the colonized rendered "presumptive criminals". Anything that resisted recreation in imperialism's own terms was denied or

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23 In a pair of columns in the *Globe and Mail*, William Johnson is similarly concerned about the government's framing of the issues in the Liberal election platform and in the 2001 Throne Speech so as to sever past and present and thus to avoid issues central to the status of Aboriginal peoples. See Johnson (2001a, 2001b).

24 Cited in Johnson (2001a).

25 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4^{th}) 513.

26 Cited in Johnson (2001a). By contrast, RCAP is clear that 'Our Children ... Our Future' cannot be severed from 'the impact of residential schools'. See Canadian Government (1996a), vol 3, p 10.

27 Cited in Canadian Government (1996a), vol 1, p 338.

28 Cited in Johnson (2001a).

suppressed.'[29] As William Johnson argues, the government's escape from the past is an indulgence beyond the reach of Aboriginal peoples:

> The past is seared into their memories, their sensibility, their self-image, their identity. Their past is their present fate. They cannot escape unless they choose to erase the past by assimilation. Their past is what makes them aboriginals. Their past haunts them, it is their curse and their promise.[30]

And, as Johnson has argued too, the courts are dealing more effectively with the past than federal and provincial governments that cling to a very partial view of that legacy: 'It has left us all with a sizeable debt to aboriginal peoples, and we prefer to pocket the legacy, but forget the obligations. Better to think of the future.'[31]

Residential Schools

Founded on 'selfless Christian duty and self-interested statecraft', the government-sponsored church-run residential schools were designed to eradicate 'the influence of the wigwam ... remove prejudice against labour' and supplant a spirituality represented as 'pagan superstition'.[32] That the residential schools never received the resources to match the public discourse of 'civil and spiritual duty' ensured the tragic record of this 'concerted attack by Church and State upon Aboriginal culture'.[33] That attack was itself 'shaped and sustained by representations of ... the character, circumstances and destiny of the nation's Aboriginal population'.[34] According to RCAP, as late as 1950, '40% of the teaching staff had no professional training' and some didn't even have a high school diploma. The result of massive under-funding, mismanagement, overcrowding, poor sanitation, overwork, brutality and widespread neglect was 'abuse and death of an incalculable number of children' and 'immeasurable damage to Aboriginal communities'.[35] The determined effort to educate 'to kill the Indian in the child' proved more lethal than liberating. Mary Carpenter has eloquently described her experience:

> After a lifetime of beatings, going hungry, standing in a corridor on one leg, and walking in the snow with no shoes for speaking Inuvialuktun, and having a heavy, stinging paste rubbed on my face, which they did to stop us from expressing our Eskimo custom of raising our eyebrows for "yes" and wrinkling our noses for "no", I soon lost the ability to speak

29 Cited in Green (1998), p 139.

30 Johnson (2001b).

31 Johson (2001b).

32 Canadian Government (1996a), vol 1, pp 335–340.

33 Milloy (1996).

34 Canadian Government (1996a), vol 1, p 337.

35 Canadian Government (1996a), pp 345–353.

> my mother tongue. When a language dies, the world it was generated from is broken down too.[36]

The effect of the schools was, according to Grand Chief Edward John, 'like a disease ripping through our communities'. And consultants for the Assembly of First Nations spoke in the 1990s of survivors of the schools struggling with 'lives shaped by the experiences in these schools', struggling with 'their identity after years of being taught to hate themselves and their culture' and failing to develop or transmit parenting skills from one generation to another. 'In residential schools they learned that adults often exert power and control through abuse. The lessons learned in childhood are often repeated in adulthood with the result that many survivors of the residential school system often inflict abuse on their own children. These children in turn use the same tools on their children.'[37] And there is significant evidence that, throughout the schools' histories, the 'Church–State partners were aware of these sorrowful circumstances' and 'that by the 1960s they understood the detrimental repercussions for Aboriginal children of the residential school experience'.[38]

R v Gladue

When the Supreme Court turns to legitimate authorities such as RCAP, it is doing more than the federal government that commissioned that report and is now intent on consigning it to an early and complete oblivion. The court is doing what the government will not, and hence is widely accused of judicial activism. Still, despite the court's best efforts to give the mandated 'fair, large and liberal construction and interpretation' of section 718.2(e) in the interests of remedial objectives,[39] the court's determined 'impartiality' ironically blinds it to persistent biases that read to confirm and not complicate beliefs about Aboriginal difference, relevant 'circumstances' and 'Aboriginal heritage'.

Like the Jean Chretien government, and despite its resort to RCAP, the court is unable to think outside inherited and intersecting discourses of sexism, racism and colonialism or legal discourse imbued with relations of power — and thus cannot comprehend the 'circumstances' that gave rise to the events in the life of Jamie Tanis Gladue, a nineteen-year-old Aboriginal woman sentenced to three years' imprisonment for manslaughter in the killing of her twenty-year-old common law husband. The trial judge had taken into consideration a number of mitigating factors: she was a young mother, had no criminal record, had a supportive family, was upgrading her education and taking alcohol abuse counselling. In addition, she had been provoked by the deceased, was suffering from a hyperthyroid condition, showed remorse and entered a guilty plea to manslaughter. However, the trial judge found that the appellant had intended harm, was not afraid of the deceased, and was the aggressor. What is more, according to the trial judge, Gladue's Aboriginal

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36 Canadian Government (1996a), pp 365, 372

37 Canadian Government (1996a), pp 376, 379.

38 Milloy (1996), p 5.

39 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4^{th}) 513 at para 32.

status was not relevant because she and the deceased were living in an urban area and not 'within the Aboriginal community as such'.[40] Though the British Columbia Court of Appeal found the trial judge in error in concluding that section 718.2(e) of the *Criminal Code* did not apply because they were not living on a reserve, it found no fault with 'the conclusion that there was no basis for giving special consideration to the appellant's Aboriginal background'.[41] The issue before the Supreme Court therefore was 'the proper interpretation and application to be given to s 718.2(e) of the Code'.[42]

The court shows receptivity and a determination 'to treat Aboriginal offenders fairly by taking into account their difference', endorses healing, sentencing circles and community-based approaches, and offers a strong interpretation of section 718.2(e), anticipating and countering effectively concerns about equality and special treatment and insisting on 'new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances'.[43] When it turns to the particular case, however, its interpretation is too narrowly and residually legal positivist in its assumptions about the meaning of a life, about identity, intentions and relevant circumstances to account for Aboriginal difference. The court fails to rethink legal terms and categories and take sufficient account of Aboriginal experience and understandings despite citing the voluminous work of RCAP and expressing the court's own determination to 'alter the method of analysis', give 'a fair, large and liberal construction and interpretation' to section 718.2(e), give its remedial role 'real force' and address 'Systemic and Background Factors'.[44] The result, as one study makes clear, is that 'prison has become for young native men, the promise of a just society which high school and college represent for the rest of us ... the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents'.[45]

Though the court determines to 'take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an Aboriginal person', it presumes to know an overly singular 'Aboriginal perspective' and an 'Aboriginal heritage' associated with a 'network of support and interaction'.[46] In the process, Jamie Gladue's life is both recorded and abstracted. We learn of family separation, the death of her mother in a car accident in 1990 when Jamie was twelve, her starting to live with Reuben Beaver when she was seventeen, her first child and her second pregnancy, physical abuse, Beaver's conviction for assaulting her, and the tragic events of the night of her nineteenth birthday when, five months pregnant — considered

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40 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at paras 15–18.

41 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at para 20.

42 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at para 24.

43 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at paras 87, 73–74 and 40.

44 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at paras 32–34 and 67–69.

45 Jackson (1988–89), para 60.

46 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at paras 81 and 92–93.

'a neutral factor' by the trial judge — and fearful Beaver was having an affair with her sister, she confronted the two who had gone off together during an evening's drinking.[47]

Still, Jamie Gladue's life is reduced to social symptoms (poverty, abuse, educational and economic disadvantage) severed from their historical sources just as individual experience is isolated from the collective, private from public, present from past circumstances. The court understands 'Aboriginal heritage' as a sustaining reality that somehow escapes or transcends a history of colonisation and considers domestic violence only in relation to 'the breach of the trust inherent in a spousal relationship'.[48] Domestic abuse is thus understood as distinct from the violent abuse and brutal realities of government-sponsored and church-run residential schools — and their violent legacies within Aboriginal communities.[49] Such cultural misrepresentation produces only too directly the tragic over-representation of Aboriginal peoples in the prison population. The result in this case is that, because of the gravity of the offence of a 'near murder' in the context of 'domestic violence' and 'a breach of the trust inherent in a spousal relationship', and the appellant's need to correct her 'problem' with alcohol, the British Columbia Court of Appeal decision is upheld, and the appeal is dismissed.[50]

Aboriginal Cultural Archive

What the court does not begin to comprehend is the experience of young Aboriginal women — and especially those who end up in federal prisons, 90 per cent of whom reported physical and 61 per cent of whom reported sexual abuse.[51] Yvonne Johnson recalls her 'first attack' when she was 'between two to three years old ... In prison most women understood my story; it's so much their own.'[52] Her poetry speaks to the profound violation, loss, and isolation that constitutes what she calls 'A Stolen Life':

> There's a hole left in my soul
> Where I fear to go
> There, once, a child should have lived.
>
> Instead anger and hatred moved in.
> They smothered the child
> with filth and guilt.[53]

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47 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at paras 1–15.

48 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at para 96.

49 On the need to understand sexual violence in the context of colonialism and persistent racism, see Razack (1998), pp 56-87.

50 *R v Gladue* [1999] SCJ No 55 (QL) 177 DLR (4th) 513 at paras 96–99.

51 *Elizabeth Fry Newsletter*, Fall/Winter 1993.

52 Wiebe and Johnson (1998), pp 334–338.

53 Wiebe and Johnson (1998), p 317.

For her, the police became symbols of abuse too with their 'Indian liquorice sticks': 'They slammed me over the trunk of a cop car ... and they clubbed [the Indians] into a heap on the pavement. ... I watched them beat my mother.'[54] The Manitoba Aboriginal Justice Inquiry registers the experience of Aboriginal women as marked by:

> indifference/arrogance of lawyers; long police response time; insensitive response of police to spousal abuse; humiliating questioning; failure of police to protect victims; failure of police to take spousal abuse as a serious crime ... difficulties obtaining protection or getting away from abusive partners in small communities.[55]

Nor is there a safe haven inside the Aboriginal community. 'Aboriginal heritage', in the wake of colonisation and residential school experience, offers no solace. Tomson Highway rails at what:

> Christianity has done to me personally, never mind what it has done to my race. It's been an act of monumental dishonesty, monumental two-facedness. To have it hammered into your head by so-called figures of authority (the priests and nuns and teachers) that sex and the human sex organs were disgusting and dirty instruments of the devil and then to turn that around and have ten-year-olds victimized by a priest who goes around diddling little boys.[56]

His novel, *Kiss of the Fur Queen*, records in the figures of Jeremiah and Gabriel Okimasis his own and his brother's experience of abuse at residential school and is a story that he has said 'came screaming out because this story needed desperately to be told ... We lanced the boil and cured the illness.'[57] When Gabriel is six, Jeremiah is awakened one night to discover that Gabriel is 'not alone':

> A dark, hulking figure hovered over him, like a crow. Visible only in silhouette, for all Jeremiah knew it might have been a bear devouring a honey-comb, or the Weetigo feasting on human flesh ...
>
> The bedspread was pulsating, rippling from the centre. No, Jeremiah wailed to himself, *please*. Not him again. He took two soundless steps forward, craned his neck.
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> When the beast reared its head, it came face to face, not four feet away, with that of Jeremiah Okimasis. The whites of the beast's eyes grew large, blinked once. Jeremiah stared. It *was* him. Again.

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54 Wiebe and Johnson (1998), p 159.

55 Manitoba (1991), p 284.

56 Highway (1992), p 26.

57 Cited in Methot (1998), pp 1–2.

> Jeremiah opened his mouth and moved his tongue, but his throat went dry. No sound came except a ringing in his ears. Had this really happened before? Or had it not? But some chamber deep inside his mind slammed permanently shut. It had happened to nobody. He had not seen what he was seeing.[58]

Phil Fontaine, former chief of the Assembly of First Nations, has reflected on similar experience in the residential schools which 'destroyed [his] sense of morality' and made him become 'an abusive person when it comes to women'.[59] If Lee Maracle is clear on the 'racism' that 'operates as sexism in [Aboriginal] community and often sexism operates as internalized racism', Yvonne Johnson brings the realities home to us:

> For me, North Main, Winnipeg, is skinner city, full of pathetic, feeble, sexless men with their conscience destroyed. They wait till women are passed out, either from booze or drugs, and then they brutalize and rob them, and sometimes it's done by a crowd of men daring each other on. Native men do this a lot, especially to Native women — a dreadful shame on our people, but they prey on each other's suffering ... to survive it you have to act adult before you know you're doing it. Becoming an adult in a beer bottle is small and limiting; you never have time to grow wiser, you never know better than to try and stay where things are familiar and you can somehow handle them because you've already had to.[60]

Circling Towards a Healing Hermeneutic

In the light of this testimony to Aboriginal experience, to characterise Jamie Gladue as a fearless aggressor with an alcohol problem is to seriously misconstrue the nature of her circumstances. The reality is that Aboriginal women are victimised inside and outside their communities and are often 'between a rock and a hard place, between either continued violence or double victimization and the harsh reality of being without community and family'.[61]

The case of *R v Gladue* demonstrates how 'circumstances' become a weak form of mitigation because of a very narrow interpretation that severs symptoms (poverty, abuse, educational and employment disadvantage) from sources and understands 'Aboriginal heritage' and domestic violence as respectively a romantic residue and a social universal distinct from the history of violent abuse in and as the colonial experience. Old standards of what counts for knowledge, old stories taken for granted, old habits of attending to experts with credentials from mainstream institutions rather than learning from and with the victims, the writers, the elders prove major roadblocks to new judicial thinking. It is not a matter of moving the mental furniture in limiting

58 Highway (1998), pp 79–80.

59 Fontaine (1995), pp 56–57.

60 Maracle (1994); Wiebe and Johnson (1998), p 165.

61 Razack (1998), p 66.

add-on fashion so much as furnishing mental movement with modes of exchange both respectful and rigorous. It is not, as Wendy Harcourt has argued in relation to gender, 'a question of adding gender to the world's cosmologies but rather of rewriting the latter at their very roots'.[62] It is a matter of fruitful hybridity revisiting lethal encounters to remake meanings to enrich who we are and would like to be. Reconstructing legal education and hence judicial practice is a critical part of what RCAP has called 'bridging the cultural divide' and reconstituting community and ensuring justice for all.[63]

In sharing their stories, the so-called survivors of residential schools are remembering, filling out the 'black holes made by the theft of [their] language, ... religious practices and traditions', recording 'the decades of torment ... spiritual, emotional, physical, and sexual abuse', the denials and silences as a result of 'family's fears, the community's pressure, and the church's power' that left them growing up 'believing that what [they] felt, heard, and saw was not real'. But they are also offering with each story 'a gift ... an act of resistance. An act of healing' — stories of remarkable resilience and power that have come out of the cycles of ridicule and blame, shame and abuse.[64] If words and symbols have done violence in the past, they can offer now 'medicine and gifts to console and repair our souls'.[65] In misunderstanding what constitutes circumstances, and the circle of connection and causality such circumstances support, the court effaces that 'source of life-long pain' within government-sponsored and church-run residential schools with their Eurocentric mission to rescue children from the 'savagery' of their Aboriginal culture.[66] Only when such cultural misrepresentation is ended and the Indigenous circle has its healing properties restored and recognised will we stop producing and reproducing the tragic over-representation of Aboriginal peoples in the prison population. What the federal government seeks consistently to uncouple (past and present, symptoms and sources) can best be countered by its most prestigious court practising something closer to the holism of Canada's Aboriginal peoples, whereby 'everything is in balance, everything is connected and nothing is without value'.[67] Only thus will the circle unfold as it should.[68]

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62 Cited in World Commission on Culture and Development (1996), p 28.

63 Canadian Government (1996b).

64 Jaine (1995), pp viii–x.

65 Key (1998); cited in Akiwenzie-Damm (2000).

66 Knockwood (1992), p 16.

67 Highway, cited in Methot (1998), p 1.

68 Battiste and Barman (1995).

References

Secondary Sources

K Akiwenzie-Damm (2000) Editorial 11 *Rampike* 3, Special Issue on Aboriginal Perspectives.

A Anghie (1999) 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' 40 *Harvard Law Review* 1.

R Barsh and J Henderson (1997) 'The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand' 42 *McGill Law Journal* 993.

M Battiste and J Barman (eds) (1995) *First Nations Education in Canada: The Circle Unfolds*, University of British Columbia Press.

M Battiste and J Henderson (2000) *Protecting Indigenous Knowledge*, Purich.

P Bourdieu (1984) *Distinction: A Social Critique of the Judgment of Taste* trans Richard Nice, Harvard University Press.

Canadian Government (1996a) *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back* vol 1; *Gathering Strength* vol 3, Minister of Supply and Services Canada.

Canadian Government (1996b) *Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* , The Commission.

Elizabeth Fry Newsletter, Fall/Winter 1993.

I Findlay (2000) 'Just Expression: Interdisciplining the Law and Literature' 63 *Saskatchewan Law Review* 49.

L Findlay (2000) 'Always Indigenize! The Radical Humanities in the Postcolonial Canadian University' 31 *Ariel: A Review of International English Literature* 308.

P Fontaine (1993) 'We Are All Born Innocent' in L Jaine (ed) *Residential Schools: The Stolen Years*, University Extension Press, University of Saskatchewan.

RG Green (1998) *Justice in Aboriginal Communities: Sentencing Alternatives*, Purich.

L Halfe (1994) *Bare Bones & Feathers*, Coteau Books.

S Haslip (2000) 'Aboriginal Sentencing Reform in Canada — Prospects for Success: Standing Tall with Both Feet Planted Firmly in the Air' 7 *E Law* (Murdoch University Electronic Journal of Law) www.murdoch.edu.au/elaw/issues/v7n1/haslip71_text.html

J Henderson et al (2000) *Aboriginal Tenure in the Constitution of Canada*.

T Highway (1992) Interview, 'Let Us Now Combine Mythologies: The Theatrical Art of Tomson Highway' *Border Crossings* 22.

T Highway (1998) *Kiss of the Fur Queen*, Doubleday Canada.

M Jackson (1988–89) 'Locking Up Natives in Canada' 23 *UBCLRev* 215.

L Jaine (1993) *Residential Schools: The Stolen Years*, University Extension Press, University of Saskatchewan.

W Johnson (2001a) 'Confronting Aboriginal Anguish', *Globe and Mail*, 21 February, p A7.

W Johnson (2001b) 'You Can't Ignore the Past', *Globe and Mail*, 28 February.

Journal of Aboriginal Economic Development published by Captus Press and Council for the Advancement of Native Development Officers.

I Knockwood (1992) *Out of the Depths: The Experiences of Mi'kmaw Children at the Indian Residential School at Shubenacadie, Nova Scotia*, Roseway Publishing.

Liberal Party of Canada website, www.liberal.ca/lpc/pdf/platform_eng.pdf

P Macklem (2001) *Indigenous Difference and the Constitution of Canada*, University of Toronto Press.

Manitoba (1991), *Public Inquiry into the Administration of Justice and Aboriginal People. Report — Vol 1: The Justice System and Aboriginal People*, Queen's Printer.

L Maracle (1994) 'Coming Out of the House: A Conversation with Lee Maracle' 25 *Ariel* 73.

S Methot (1998) 'The Universe of Tomson Highway' November *Quill & Quire* 1.

JS Milloy (1996) *'Suffer the Little Children ...': A History of the Residential School System, 1830–1992*. Submitted to the Royal Commission on Aboriginal Peoples, 25 April.

P Monture-Angus (1999) *Journeying Forward: Dreaming First Nations' Independence*, Fernwood.

M Oikawa (2000) 'Cartographies of Violence: Women, Memory, and the Subjects of the "Internment"' 15 *Canadian Journal of Law and Society* 39, special issue on Law, Race, and Space.

S Razack (1998) *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, University of Toronto Press.

J Saul, (1994) *The Doubter's Companion: A Dictionary of Aggressive Common Sense*, Penguin.

L Smith (1999) *Decolonizing Methodologies: Research and Indigenous Peoples*, Zed Books.

P Stenning and J Roberts (2001) 'Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders' 64 *Saskatchewan Law Review* 137.

United Nations website, www.undp.org/hdro/98hdi.htm

R Wiebe and Y Johnson (1998) *Stolen Life: The Journey of a Cree Woman*, Alfred A Knopf Canada.

World Commission on Culture and Development (1996) *Our Creative Diversity: Report of the World Commission on Culture and Development*, UNESCO.

Cases

Delgamuukw v British Columbia [1997] 3 SCR 1010.

R v Gladue [1999] 1SCR 688, 171 DLR (4th) 385.

R v Van der Peet [1996] 2 SCR 507, 4 CNLR 177.

Statutes

Acts to amend the Criminal Code (sentencing) and other Acts in consequence thereof, SC 1995, c 22

Criminal Code, RSC, 1985, c C-46, ss 718.2(e)