

Book Review

Canada's Indigenous Constitution. By John Borrows. University of Toronto Press, 2010. 416 pages.

Reviewed by Scott Duke*

What does the term “Aboriginal Law” mean? All law schools in Canada offer at least one course in Indigenous or Aboriginal Law; many lawyers claim it as a specialty of their practice. Might the goal of reconciling Crown sovereignty with Indigenous societies require us to reconsider what we mean by Indigenous law? Canadian courts have determined that the “project” of reconciliation is the essential spirit underlying the relationship between Indigenous Peoples and non-Indigenous settler communities in Canada,¹ including Canada’s colonial institutions. Does reconciliation mean that “Indigenous Law” sheds its common and civil law trappings and embraces Indigenous legal traditions? Can Canada evolve from a bijuridical state to a multijuridical one?

John Borrows,² in his book *Canada's Indigenous Constitution*, argues that Indigenous legal traditions should be recognized as a third order of Canadian law alongside common and civil law. Borrows, a legal scholar and storyteller, who is Anishinaabe/Ojibway and a member of the Chippewas of Nawash unceded First Nation in Ontario, has studied and written about the intersection between Indigenous and Canadian law for almost three decades. His thesis is that Canada’s common and civil law systems do not completely reflect Canada’s constitutional foundations, making them incapable of guaranteeing equality and security for Indigenous people:

While Canadians have much to celebrate because of our law, we simultaneously continue to suffer from conflicts rooted in long-standing disputes about the legitimacy of its origins and the justice of its contemporary application. The circumstances of Indigenous

peoples illustrate one such tension. Put simply, the continent's original inhabitants have never been convinced that the rule of law lies at the heart of their experiences with others in this land. In this respect, Canada's legal system is incomplete. (6)

Borrows opens by arguing that Indigenous laws are relevant to modern norms, and can be implemented via contemporary practices. While Indigenous legal traditions each have their own distinct development and application, Borrows believes that different legal traditions can exist within a single system. He rejects the notion that Indigenous legal traditions are inferior to common and civil law or are at the bottom of Canada's legal structure. He states that Canada's constitutional foundations must reflect Indigenous law, noting "colonization is not a strong place to rest the foundation of Canada's law" as it denies Indigenous legal systems as a source of law in Canada and "lies at the root of conflict between Indigenous people and the Crown" (14).

In chapters two and three, Borrows dispels the myth that all Indigenous laws are grounded in custom, a common misunderstanding that elides the complexities of Indigenous legal traditions, and he explains the various sources of law within Indigenous communities: sacred (creation myths, treaty relationships); natural (relationships between and within the natural world); deliberative (councils, feasts, dances, talking circles, stories); positivistic (proclamations, rules, codes, teachings); and customary (marriages and family relationships, land claim agreements, historical practices). He introduces a variety of Indigenous legal traditions from across Canada—Mi'kmaq, Haudenosaunee, Anishinaabe, Cree, Métis, Carrier, Nisga'a, and Inuit—and places each in a specific cultural, historical, and political context. Borrows dismisses the misconception that these practices are frozen in time or irrelevant to modern legal institutions and decision making.

Chapters four and five examine Canada's bijuridical legal system. Borrows cites the combination of common and civil law in Canada as a model of a state's ability to accommodate different legal systems within a single constitutional entity, suggesting that the "operation of multiple legal systems is a Canadian tradition" (125) in which Indigenous law has always operated alongside common law. Since the Royal Proclamation of 1763, there have been hundreds of treaties and similar agreements concluded between the Crown and Indigenous peoples, many drawing on some form of Indigenous legal tradition. Aboriginal laws, legal perspectives, and similar frameworks have informed the entire span of treaty making in Canada. Indigenous laws were recognized, adopted, and implemented by non-Indigenous settlers in a variety of ways: diplomacy, custom, dispute resolution, and family and trading relationships. Since 1982, treaty and Aboriginal rights have been recognized and affirmed in section 35³ of the *Constitution Act*,

1982, and the continuation of these rights entrenches the continued existence of Indigenous legal traditions in Canada. Borrows concludes chapter five by quoting Chief Justice McLachlin in *Mitchell v MNR*:

European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights ...⁴

Chapters six and seven explore the challenges and opportunities in recognizing Indigenous legal traditions and the role of governments and the courts in entrenching those traditions. Borrows suggests that governments more fully implement treaties, better understand the sources of Indigenous law traditions, and explicitly acknowledge that the common and civil law also gain their authority from culturally contingent factors. Achieving these goals will create the means to recognize Indigenous legal traditions. While section 35 provides an existing path to such recognition, Borrows believes section 35 alone will not be enough to guarantee the creation of a harmonious nation state that reflects Indigenous legal traditions, and he offers other ways in which Canadian governments can recognize and incorporate those traditions. In chapter nine, Borrows considers how public institutions might be better configured to take account of Indigenous law. Law societies could develop continuing legal education programs in Indigenous law and facilitate Indigenous participation in the wider legal community. Perhaps inevitably, Indigenous legal traditions may give rise to their own professional societies and communities of practice. Borrows ends the chapter by proposing a sample law school curriculum that focuses on Indigenous legal traditions.

Canada's Indigenous Constitution is of a piece with Peter Russell's recently published *Canada's Odyssey: A Country Based on Incomplete Conquests*.⁵ Russell's premise is that while three competing narratives of our country have vied for supremacy—English, French, and Indigenous—none have “conquered” the others such that Canada's narrative—or narratives—continue. He demonstrates that Canada is a nation of “incompleted conquests” rather than a homogenous nation state, both a multinational and multicultural state, and always evolving. Borrows argues that Canada should also be a multijuridical country that reflects common law, civil law, and Indigenous law. The project of reconciliation must include reconciling Crown and Indigenous constitutional and legal orders to ensure Indigenous peoples are full partners in Confederation.

Borrows concludes by acknowledging the many challenges that face the tasks he identifies, but insisting that all Canadians benefit when common, civil, and Indigenous laws are equally part of the country's constitutional fabric. He offers solutions, theoretical and practical, and the steps necessary to achieve a new constitutional order. One of Canada's enduring common law paradigms is Viscount Sankey's "living tree,"⁶ the theory that Canada's constitution is organic and must be read in a broad and purposive manner to adapt to changing times. Borrows shows us that tree will branch in ways and places we have never seen before; indeed, that living tree is not the only one rooted in our constitutional forest.

Notes

1. See, for example, *R v Van der Peet*, [1996] 2 SCR 507 at paras 26–43 and 263–65; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 81; *Tsilhqot'in Nation v British Columbia*, 2 SCR 257 at para 23.
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3. *Constitutional Act*, 1982, s 35(1) "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."
4. [2001] 1 SCR 911 at para 8
5. Peter Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).
6. *Edwards v Canada (Attorney-General)*, [1930] 1 DLR 98 at 106–107 (JCPC).

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