

John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press, 2002. Pp. xii, 312.

Neesh-wa-swi'ish-ko-day-kawn arose and said:

in the time of the Seventh Fire an Osh-ki-bi-ma-di-zeeg' (New People) will emerge. They will retrace their steps to find what was left by the trail.

The task of the new people will not be easy. If the new people remain strong in their quest, the Waterdrum of the Midewiwin Lodge will again sound its voice. There will be a ... rekindling of old flames. The Sacred Fire will again be lit.

It is at this time that the Light-skinned Race will be given a choice between two roads. If they choose the right road, then the Seventh Fire will light the Eighth and Final Fire—an eternal Fire of peace... If the Light-skinned Race makes the wrong choice of roads, then the destruction they brought with them in coming to this country will come back to them and cause much suffering ...

We might be able to deliver our society from the road to destruction. Could we make the two roads that today represent two clashing world views come together to form [a] mighty nation?

Are we the New People of the Seventh Fire?

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John Borrows² writes about Aboriginal legal issues and perspectives at a dynamic and, he suggests, critical time in the history of relations between Indigenous and non-

¹ *The Mishomis Book: The Voice of the Ojibway* (Hayward, Wis.: Indian Country Communications, 1988) at 93, cited in *Recovering Canada*.

² Professor and Law Foundation Chair in Aboriginal Justice at the University of Victoria. Professor Borrows is a member of the Anishinabe (Anishinabek) First Nation. The Anishinabe are also called Ojibway or Chippewa. The Anishinabe Nation is geographically situated in central North America, around the Great Lakes. The band to which Professor Borrows belongs is the Chippewas of the Nawash, which has as its heart (according to Borrows) the Cape Croker Indian Reservation, located on Lake Huron's Georgian Bay in present-day southern Ontario.

Indigenous people in Canada. Those relations have changed markedly in the past thirty years or so. In that time, Aboriginal peoples have seen significant advances in their legal, political, and economic powers. Yet, for Borrows, the changes have been too slow and peripheral. Aboriginal peoples continue to be “uncertain citizens” within their own country.³ What is urgently needed is a new socio-political contract between the Aboriginal and non-Aboriginal segments of Canadian society. The “Eighth Fire” must be lit and lit quickly. If it is, harmony and prosperity may be ours. If it is not, dire consequences will certainly ensue.

Recovering Canada draws largely from articles and chapters published by Borrows from 1996 to 2001. It is an attempt “to introduce a theme and unity not always present or apparent in earlier manifestations of [his] ideas” (vii). Some of Borrows’ nascent scholarly output, going back to 1992, is also referentially incorporated in *Recovering Canada*. The book is therefore a sleek and nimble distillation of a decade’s thought and writing on Aboriginal legal issues.

Recovering Canada, as the full title suggests, is about the resurgence of Indigenous law in contemporary Canada. Borrows sees Indigenous law as having ongoing and doubtlessly increasing relevance to Canadian society at large. Law, for Borrows, is a means of igniting the “Eighth Fire”. He wants to help with the lighting. Most of the book is dedicated to explaining and illustrating why he considers Indigenous law to be relevant and valuable today.

The first two chapters of the book focus on “the constructive use of Anishinabek laws in dispute resolution” (56). In chapter 1, “With or Without You: First Nations Law in Canada”, Borrows discusses the legitimacy and flexibility of Aboriginal laws, and explores how they might be received into Canadian law.⁴ According to Borrows, “First Nations legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law concerning Aboriginal communities” (27). Borrows argues that Canadian courts must do much more to apply First Nations legal sources in resolving Aboriginal issues. His message is blunt: Aboriginal systems of law will continue to operate “with or without the reception of their principles in Canadian courtrooms” (27), but Canadian society as a whole will be at a loss if such reception does not occur.

Borrows’ encouragement of the acceptance of Indigenous legal principles in Canadian law continues in chapter 2, “Living Between Water and Rocks: The Environment, First Nations, and Democracy”. In this chapter, Borrows goes to some length to explain how the application of Indigenous legal principles relating to environmental issues could benefit the manner in which non-Aboriginal society

³ The term “uncertain citizens” comes from Borrows’ article, “Uncertain Citizens: Aboriginal Peoples and The Supreme Court” (2001) 80 Can. Bar Rev. 15, parts of which are included in *Recovering Canada*.

⁴ Aboriginal law in the environmental arena is especially emphasized.

grapples with *its* environmental dilemmas. As in chapter 1, examples of actual Aboriginal law, contained in simple yet compelling stories, are included to facilitate reception of that law. Borrows argues that the creation of a veritable Canadian democracy requires the full legal and political participation of Aboriginal peoples. Their systemic exclusion from the environmental regulatory process, having no set mechanism by which to intervene at either the federal or provincial level, symbolizes the central failing of Canada's existing constitutional and legal order. Canada's Aboriginal peoples "live at the margins" (30), perennially forced to dwell on a narrow ledge between "the escarpment-like barriers and constraints of a racist and outdated Indian Act ... [and] the deep waters of provincial authority" (30).⁵

The middle two chapters of *Recovering Canada* use "[Anishinabek] traditions to criticize the common law's application to Aboriginal peoples" (56). Chapter 3, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster",⁶ comments on the Supreme Court of Canada's handling of Aboriginal rights claims and self-government assertions in the mid-1990's. The fourth chapter, "Nanabush Goes West: Title, Treaties, and the Trickster in British Columbia", focuses on how the Supreme Court has grappled with the idea of Aboriginal title, particularly in the context of *Delgamuukw v. British Columbia*.⁷ In these chapters Borrows repeatedly invokes his conception of Aboriginal sovereignty.⁸ Its counterpart, British Crown sovereignty, is

⁵ In addition, Borrows' concept of democracy in the realm of human settlement design involves the novel idea (at least from the non-Aboriginal perspective) that the environment *itself* should be a participant. The application of Indigenous customary law might result in "both the environment and Indigenous people [evolving] from passive objects within democracy to active agents in the creation of our settlements" (54).

⁶ The "Trickster" is a vehicle of intellectual expression for Aboriginal peoples that Borrows frequently uses in his writing. Borrows describes the Trickster, as follows:

The Elders teach [Anishinabek] laws through stories of a character known as Nanabush, the Trickster. The Trickster offers insights through encounters that are simultaneously altruistic and self-interested. ... In his adventures, Nanabush roams from place to place and fulfills his goals by using ostensibly contradictory behaviours such as charm and cunning, honesty and deception, kindness and mean tricks. ... Lessons are learned as the Trickster engages in actions which in some particulars are representative of the listener's behaviour while in others they are not (56).

⁷ [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

⁸ The concept of Aboriginal sovereignty, set up and historically substantiated by Borrows in his early work, serves as a platform for much of his later writing, including significant portions of *Recovering Canada*. Aboriginal sovereignty is anchored in the notion that, prior to European contact, Aboriginal peoples of North America comprised several "nations". They were culturally, geographically, and often linguistically distinct. Each had its own legal system—ostensibly responsive and effective. Aboriginal peoples were inextricably connected to the physical environments of their specific territories. And, intimately linked to their territoriality, these original North American nations were self-governing. They did not derive power and authority from any external source; their power and authority were self-sourced. They were *sovereign nations* within their respective territories.

labelled as no more than a legal fiction concocted to facilitate the political subjugation and much of the physical dispossession of Aboriginal peoples. Exhibiting consistency with his earlier writings, Borrows berates the Supreme Court for its “unreflective acceptance of the Crown’s assertion of sovereignty” (82).⁹

Borrows’ reasoning with respect to Aboriginal sovereignty is convincing. At the very least, it compels one to pause and reflect on his ultimate assertion that Crown sovereignty dwells largely in the realm of the political, not the legal. It is what the author does exceedingly well: he exposes his readers to new ideas and values from an Aboriginal perspective.

Chapter 5, “Questioning Canada’s Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism”, continues the assault on the Supreme Court’s treatment of Aboriginal assertions of self-determination and land entitlement. Borrows is relentless in this chapter, arguing that application by a truly independent judiciary of the principles of federalism, democracy, constitutionalism, and the rule of law, and exercising its legitimate range in reviewing sovereignty issues, mandates the recognition of Aboriginal sovereignty. With Aboriginal sovereignty comes, by definition, greatly expanded Aboriginal interests in land (far beyond those encapsulated in the *Delgamuukw* version of Aboriginal title).

In the final chapter, “‘Landed’ Citizenship: An Indigenous Declaration of Interdependence”, Borrows seems to take a step back, draw a deep breath, and commit to a modification of tactics. His reformulated approach has a political feel to it, but not in the cutting and direct way exhibited in chapter 5. Buzzwords such as “citizenship” and “democracy” begin to pop up with more frequency. At one point, Borrows states: “To preserve and extend our participation with the land, and our association with those who now live on it, it is time to talk of *Aboriginal control of Canadian affairs*” (140).¹⁰ He declares that “[v]arious sites of power in Canada must be permeated with Aboriginal people, institutions, and ideologies” (140). This is not a coup he’s proposing: it is the opening of a new front in the war against Aboriginal discrimination and injustice. To focus only on “Aboriginal control of Aboriginal affairs,” ignores issues of “cohesion, unity, and peace” (155). Borrows concludes that a critical way for Aboriginal people to avoid assimilation in Canadian society is for them to meld into it, at one level anyway, and attempt to redirect it.

My admiration for both the substance and style of John Borrows’ writing does not eliminate all scope for critical commentary. For one thing, he occasionally dwells in the abstract. The concept of Aboriginal sovereignty and all that flows from it, for

⁹ Borrows goes so far as to challenge the Supreme Court to develop “a (persuasive) explanation for how the assertion of Crown sovereignty ‘crystallized’ Aboriginal title” (98), and suggests that the Court’s failure to do so and to continue to shun Aboriginal sovereignty arguments is an “unjust and discriminatory doctrine ... [that] can no longer be accepted” (101).

¹⁰ [emphasis added].

instance, is convincingly constructed and argued. But Borrows' apparent petition for unquestioned acceptance of Aboriginal sovereignty is problematic. It is unrealistic to expect non-Aboriginal Canada to buy into a broadly-framed concept that will shift power and resources away from it. There is a fundamental dilemma here, of course, because at the heart of Borrows' writing is the notion that Aboriginal peoples neither want nor need their collective sense of self (and their aspirations to build on that sense of self) to be measured against or validated by traditional Canadian ideologies and institutions. For Aboriginals to have to seek from non-Aboriginals detailed approval of proposed relational changes is exactly the remnants of colonial mentality that Borrows voraciously argues must be obliterated. The propriety of his arguments is, in my estimation, difficult to refute. But getting from "here" to "there" will take a huge leap of faith on the part of non-Aboriginal Canada, and I am not convinced that a "just trust us" approach will ever be enough to cause that leap to occur. To better promote his inclusive vision of Canada, it seems Borrows may have to move away from abstraction and into specifics.

A further criticism of Borrows' writing is its general detachment from economics. It is, for example, fine to argue within an academic setting for Aboriginal sovereignty to trump Crown sovereignty. But the political, and more importantly, the economic ramifications of such a theory are enormous. At the end of the day, money matters: to ignore this is to risk wasting one's time and energy with ideas that may never do more than orbit the real world. In the final chapter of *Recovering Canada*, with its newfound focus on asserting "Aboriginal control of Canadian affairs", Borrows makes what I think is an important connection to Canadian economic reality. His encouragement of much greater Aboriginal participation in, and control of, economic aspects of Canadian society marks a critical refinement of Borrows' thinking. It is smart strategy to urge Aboriginal peoples to become entrepreneurs and business leaders within the mainstream. Economic empowerment of Aboriginal peoples can be harnessed to expedite political and social change. That type of empowerment and more "traditional" Aboriginal activism in the legal/political realms need not, as Borrows rightly points out, be mutually exclusive.

A final criticism of *Recovering Canada* is, once again, as much a comment on the subject area of Borrows' studies as on the work itself. It is also something Borrows starts to address, as with the other points I have raised, in the last chapter of the book.¹¹

¹¹ In this sense, it may be that my criticisms are somewhat unfounded. As explained at the beginning of this review, *Recovering Canada* is essentially a collection of previously published pieces spanning a period of several years. Borrows has done an admirable job of putting these together through a combination of reorganization and fresh writing to "connect the dots". The book is cohesive and Borrows has been successful in his stated objective of introducing "theme and unity" (vii). Yet there is no denying the evolutionary nature of *Recovering Canada*. As hard as Borrows has tried to close the circle, some of his early ideas lack the sophistication of his later ones. This, of course, is natural. And it is extremely interesting to see how the last chapter of *Recovering Canada* augments some of the

Aboriginal society within Canada is extraordinarily complex. It encompasses many individuals, groups, and communities with often divergent perspectives and aspirations. Borrows sometimes assumes too much homogeneity and speaks of the fictitious “Aboriginal person” (like the fictitious “reasonable person” in Anglo-Canadian law) as if there actually is such a person. Because of the great diversity of Canadian Aboriginal peoples it is necessary, if one wants to write about them at all, to extrapolate and generalize to some degree. Professor Borrows is well positioned to attempt this in a balanced and fair-minded way. He draws from his own experiences and his encounters with other Aboriginal peoples in different corners of the country, as well as from his research and studies. But any broad discussion of Aboriginal issues in Canada carries with it the inherent danger of misrepresenting the real viewpoints and positions of many Aboriginal individuals and groups.

While I have not presented all my thoughts on *Recovering Canada*, suffice it to say that I highly recommend this book. Readers will take away a keener appreciation of Indigenous ideas and points of view, and be convinced that a resurgence of Indigenous law is indeed underway. *Recovering Canada* accomplishes the difficult task of persuading the reader that genuine acceptance of Indigenous law can occupy a vital role in helping Aboriginal and non-Aboriginal Canada reconcile past differences and move forward in closer harmony.

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thinking and proposals of the preceding chapters. This is not to say that the early thinking and proposals are “wrong”, rather they are foundational. Borrows, I am sure, would be the first to admit that there is much to be said beyond *Recovering Canada*; his ideas will continue to develop and be refined. All this should, therefore, be borne in mind in reading *Recovering Canada*. The nature of the book and the way it concludes both nullify and highlight many potential criticisms.