Book Review

*Ferdinand Gemoh**

Review of John Borrows, *Law's Indigenous Ethics, (*University of Toronto Press, April 2019), 392 pp.

John Borrows' new book, *Law's Indigenous Ethics*, is an ambitious and provocative addition to the Indigenous rights literature and examines the important relationship between Indigenous law and the Canadian State. The main thrust of the book is an attempt to show that Indigenous peoples' own legal thought and practice contains potentially valuable legal principles that could help create better Indigenous-government relationships. Borrows' book serves as an introduction to Indigenous legal reasoning as well as a reminder that the nature and scope of Canadian jurisprudence cannot merely be identified with its "Western" legal frames. Borrows stresses that there is a strong case for the recognition of Indigenous legal orders based on section 35(1) of Canada's Constitution which proclaims that "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed".[1] He argues that Indigenous legal orders have even greater legal standing because the Supreme Court of Canada has interpreted section 35(1) to be inclusive of both Aboriginal and non-Aboriginal legal perspectives.

Borrows' arguments are developed within a specific Indigenous lens — an Anishinaabe lens. The Anishinaabe are one of the largest Indigenous nations in Canada. However, Borrows is careful to stress that this book does *not* intend to speak for all Indigenous legal traditions in Canada and makes no claims that Anishinaabe legal traditions have any priority over other Indigenous legal traditions. According to Borrows, his "ideas are presented from one group's perspective in order to open doors to alternative possibilities in Canadian law".[2] The Seven Grandmother/Grandfather Teachings of the Anishinaabe — love, truth, bravery, humility, wisdom, honesty and respect — form the cultural framework through which Borrows develops insights in Indigenous legal reasoning

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1 John Borrows, *Law's Indigenous Ethics* (Toronto, Ontario: University of Toronto Press, 2019) at 17.

2 Borrows, *ibid* at 15.

that can help us to shape the law in new ways and improve Indigenous peoples' relationship with the Canadian state.

The argument is set out in seven chapters. In each chapter, Borrows provides the context of the teaching in Anishinaabe law and sets firmly the case for the inclusion of each of these teachings in contemporary Canadian law. The introduction sets out the cultural context that informs the subsequent themes developed in the book in a method that is characteristic of Indigenous epistemology: storytelling. This method runs throughout the text and reflects the central place stories occupy in Indigenous societies. As Borrows observes, "instead of laws that are guidelines, our ancestors made up stories to guide us along on the right course".[3] The opening story ends with the presentation of the Seven Grandmother/Grandfather gifts. In Anishinaabe territory, these teachings are found in constitutions, by-laws, teacher guides, schools, and other places.[4]

The first chapter explores the role of love in Anishinaabe law and Canada's treaty history. A main point of the chapter is the idea that love featured prominently in Canada's treaty history and it is, therefore, reasonable to reinstate love as a legal principle in the interpretation of Aboriginal treaties. Borrows strongly argues that love, as a treaty principle in Canada, has significant potential for regulation and conflict resolution within Canadian law.

In the second chapter, Borrows explores the meaning of truth in Canadian law in relation to law's sources and force. Using Canada's and New Zealand's treaty history, Borrows argues that Canadian courts and Parliament cling to an idea of truth that is opposed to its Indigenous understanding. Borrows criticizes what he calls an "essentialized thinking" of treaties. This thinking is based solely on metaphysical first principles but devoid of historical context. The chapter cites cases such as the *Ktunaxa* case[5] and landmark treaty events to challenge the Crown's supremacy and default authority in the interpretation of treaties. For Borrows, treaty interpretation by the Crown is modelled after five principles of traditional metaphysics identified by the British philosopher Kit Fine. These principles are: aprioricity of methods, generality of subject-matter, transparency or non-opacity of concepts, eidicity or concern with the nature of things, and its role as foundation of what there is.[6] Against this approach, Borrows is of the view that legal interpretation should be guided by the differ-

3 *Ibid* at 5.

4 *Ibid* at 14.

5 *Ktunaxa Nation v British Columbia (Forests, Lands, and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa*].

6 Borrows, *supra* note 1 at 57.

ent sources of authority and understanding of the law that both the Crown and Indigenous peoples bring to the table. "A more contextualized understanding of the law," according to Borrows, "should challenge us to be more fully aware of law's metaphysics".[7] That is to say, any constructive approach to treaty interpretation must move beyond the limitations of traditional Western views of law and incorporate Indigenous perspectives.

The third chapter sees Borrows outlining the role of bravery in law in dealing with Aboriginal title in Canada. Examining the *Tsilhqot'in Nation v British Columbia* decision,[8] Borrows argues that the decision's attempt to reject *terra nullius* (the notion that no one owned the land prior to European declaration of sovereignty) is inconsistent with its continued affirmation of Crown title to all land in the province. If it is to provide a bold and brave new satisfactory framework for understanding indigenous rights, in Borrows' view, the *Tsilhqot'in* decision cannot deny *terra nullius,* and at the same time defend the view that "at the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province".[9] Accordingly, Indigenous peoples should approach the decision with scepticism.

The fourth chapter "explores the Constitution's potential for both protecting and attenuating so-called private interests in land in the face of a declaration of Aboriginal title"[10]. The chapter identifies potential obstacles between Aboriginal title and private property, an important question that the *Tsilhqot'in* decision did not address. Borrows demonstrates that both the common law and Indigenous law contain practices to address this relation. According to Borrows, humility and entanglement are two useful ideas to define Aboriginal title-private property relationship.

The fifth chapter examines the place of wisdom in Canadian legal reasoning in relation to land. It challenges present-day, classroom-based legal education and advocates for land-based education. The latter identifies opportunities for law schools to broaden students' experiences of the law and Indigenous societies.

In the sixth chapter, Borrows moves on to examine how honesty could assist in acknowledging the syncretic nature of Canadian law. The chapter con-

7 *Ibid* at 87.
8 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.
9 *Ibid* at 69.
10 Borrows, *supra* note 1 at 121.

tains suggestions for making sense of the mélange and provides ideas for the organization and teaching of Indigenous law.

The final chapter examines the role of respect and four views for and against addressing historic wrongdoings to Indigenous people — with a special focus to harms caused by residential schools. Borrows recognises that there are significant obstacles relating to scope, cost, fairness and relevant questions about the appropriateness of such programs. Borrows suggests that we can always find ways of building friendship. Concluding with what he calls "respectful responsibility",[11] Borrows presents Indigenous legal resources on how to deal with historical issues like residential schools. It is his view that humans make mistakes and should be bold to take responsibility for their errors. This includes responsibility for harms caused by residential schools.

Let it be said that this is another great work from John Borrows. However, there are, I think, certain tensions in his project, and I will mention some of these. My first worry has to do with the practicality of Borrows' project, which is, among other things, the search for a Canadian Constitution representative of Indigenous legal traditions. Is it really possible to produce a Canadian Constitution that is capable of encompassing the normative principles, values, and different epistemologies of the Indigenous laws of all Indigenous nations in Canada? The blending of long-established Indigenous cultural mores and legal traditions within the Canadian Constitution is probably a step that could make Indigenous people feel content to be part of the Canadian mosaic.

However, it is not clear how this can be realized, and Borrows is not unaware of the challenge. He admits, "there are still huge questions about how to best accomplish our task".[12] It is also reasonable to question the extent to which Indigenous peoples remain committed to their cultural norms and legal frameworks in today's Canada as long as Indigenous peoples continue to be raised in government educational systems. There are good grounds to suspect that an educational system founded and structured on Western values, devoid of Grandmother Teachings and the essence of Indigenous cultural traditions, can produce a people versed in their own historical traditions. I think that the lack of Indigenous worldview and thinking orientations in the Canadian educational system adds to the problems of teaching Indigenous law in law schools that Borrows identifies in chapter six.

11 *Ibid* at 235.
12 *Ibid* at 183.

Taken as a whole, Borrows' work comes closer to a natural law theory with respect to the relationship between Indigenous morality and the law. But any proposal for incorporation would require that proposed ideas be historically scrutinised for accuracy and pre-colonial understanding. Identifying pre-colonial moral traditions places another burden on Indigenous groups that requires a lot of historical digging; that is certainly no easy process. While it may be hard to see why some of the teachings should be incorporated into Canadian law, it must not be forgotten that Borrows' overall project is an effort for us to see law in a new light. The book is written in the belief that Indigenous legal traditions provide an alternative legal perspective. These traditions are important in Indigenous peoples' understandings of the law, and it is Borrows'belief that incorporating these Indigenous moral and legal traditions allows us to see, from a new vantage point, many of the issues and dilemmas that face our contemporary Canadian legal system.

Even though the central legal questions that Borrows deals with are complex and contextualized within the Canadian Indigenous cultures and societies, the book articulates the critical concerns of many Indigenous peoples around the world. It is therefore hoped that the book will have application not only in its Canadian context but equally in different national and cultural settings.