
Volume 54, Issue 3 (Spring 2017)
Special Issue: Law, Authority & History: A
Tribute to Douglas Hay

Article 11

8-4-2017

Freedom & Indigenous Constitutionalism, by John Borrows

Lillianne Cadieux-Shaw

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Law Commons](#)

Book Review



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Cadieux-Shaw, Lillianne. "Freedom & Indigenous Constitutionalism, by John Borrows." *Osgoode Hall Law Journal* 54.3 (2017) : 967-972.

DOI: <https://doi.org/10.60082/2817-5069.3165>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss3/11>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Freedom & Indigenous Constitutionalism, by John Borrows

Abstract

The metaphor of Justice McEachern - the trial judge in the famous Aboriginal title case *Delgamuukw*—and his “tin ear” is useful in describing the disconnect between settler law and Aboriginal ways of life. We have seen this tin ear time and again in our legal system, whether it’s the inability of Canadian evidentiary laws to accept oral Indigenous evidence or the difficulty judges have in applying Gladue principles to the sentencing of Aboriginal offenders. We have seen it in the reluctance of courts to recognize Aboriginal spirituality under the Charter and in the narrow framing of section 35 of the Constitution, a framing that has only reaffirmed the settler belief that Indigenous peoples are “once-upon-a-time’ groups that can only occupy a very narrow space in contemporary democracies.” John Borrows new book, *Freedom & Indigenous Constitutionalism*, explores the quest for freedom (*dibenindizowin*) and a good life (*mino-bimaadiziwin*) for Indigenous peoples in Canada, and what stands in the way of achieving it. As Borrows explains, freedom is not just the “absence of coercion or constraint.” It is the ability, alongside others, to “choose, create, resist, reject, and change laws and policies that affect your life.” Unsurprisingly, one of the main barriers is the law’s continued inability to attune itself to Indigenous values, wishes, and beliefs. At every turn, Canadian-European legal traditions have remained inattentive— and sometimes even indifferent—when Indigenous peoples have fought for freedom. We once again see the tin ear of the law. Borrows’ book is a careful call to arms; a thoughtful manifesto on how to resist, litigate, protest, and educate in search of a space where Indigenous peoples may live freely and pursue a good life most in line with their own dreams and aspirations.

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Book Review

***Freedom & Indigenous Constitutionalism,*
by John Borrows¹**LILLIANNE CADIEUX-SHAW²

Chief Justice Allan McEachern: I don't want to be skeptical, but to have witnesses singing songs in court is, in my respectful view, not the proper way to approach this problem.

Mr. Grant: Well, my Lord, with respect, the song is what one may refer to as a death song. It's a song which invokes the history of and the depth of the history of what she is telling.

McEachern: I have a tin ear, Mr. Grant, so it's not going to do any good to sing it to me.

*Transcript, Delgamuukw v The Queen, 1991.*³

THE METAPHOR OF JUSTICE MCEACHERN—the trial judge in the famous Aboriginal title case *Delgamuukw*—and his “tin ear” is useful in describing the disconnect between settler law and Aboriginal ways of life. We have seen this tin ear time and again in our legal system, whether it's the inability of Canadian evidentiary laws to accept oral Indigenous evidence or the difficulty judges

-
1. John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).
 2. JD 2017, Osgoode Hall Law School.
 3. John Sutton Lutz, *Makúk: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008) at 276. See also *Delgamuukw v British Columbia*, [1991] 5 CNLR 5, 79 DLR (4th) (BCSC).

have in applying *Gladio* principles to the sentencing of Aboriginal offenders.⁴ We have seen it in the reluctance of courts to recognize Aboriginal spirituality under the *Charter*⁵ and in the narrow framing of section 35 of the *Constitution*, a framing that has only reaffirmed the settler belief that Indigenous peoples are “‘once-upon-a-time’ groups that can only occupy a very narrow space in contemporary democracies.”⁶

John Borrows new book, *Freedom & Indigenous Constitutionalism*, explores the quest for freedom (*dibenindizowin*) and a good life (*mino-bimaadiziwin*) for Indigenous peoples in Canada, and what stands in the way of achieving it. As Borrows explains, freedom is not just the “absence of coercion or constraint.”⁷ It is the ability, alongside others, to “choose, create, resist, reject, and change laws and policies that affect your life.”⁸ Unsurprisingly, one of the main barriers is the law’s continued inability to attune itself to Indigenous values, wishes, and beliefs. At every turn, Canadian-European legal traditions have remained inattentive—and sometimes even indifferent—when Indigenous peoples have fought for freedom. We once again see the tin ear of the law. Borrows’ book is a careful call to arms; a thoughtful manifesto on how to resist, litigate, protest, and educate in search of a space where Indigenous peoples may live freely and pursue a good life most in line with their own dreams and aspirations.

Each chapter of Borrows’ book outlines a different path for carving out this space, and each path rests on Anishinaabe laws and stories to make the point. In exploring these paths for freedom and the quest for a good life, Borrows is careful to note the dangers these paths can lead to—he warns that, “like the trickster, freedom can wear many false faces.”⁹ Freedom is not the ability to do anything we want, nor is there one path to the good life that we should all force ourselves along. Freedom and the good life are a “living tradition” that we create on an ongoing basis, facilitated by Indigenous legal practices and relationships within a community. Freedom is resistance against that which confines Indigenous

4. For an exploration of the use of oral evidence in the courts, see Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2013). For a review of how Saskatchewan judges have been giving overly-harsh sentences for Aboriginal offenders, see James TD Scott, “Reforming Saskatchewan’s Biased Sentencing Regime” *Saskatoon Criminal Defence Lawyers Association* (2014), online: <spmlaw.ca/scdla/JimScott_sentencing_bias_2014.pdf>.

5. *Kunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352, 387 DLR (4th) 10.

6. Borrows, *supra* note 1 at 13.

7. *Ibid* at 12.

8. *Ibid*.

9. *Ibid* at 17.

peoples “within essentialized, authentic categories and frameworks.”¹⁰ With this in mind, Borrows explores a number of different paths that may get us there.

The first chapter, or path, explores the idea of mobility, an integral tenet in Indigenous peoples’ pursuit of freedom. This means both mobility in a physical sense, with the ability to move freely across the countries Indigenous groups have traditionally called home, and mobility in an intellectual sense, with the ability to move “across the broad world of ideas.”¹¹ Legal systems have often used mobility against Indigenous peoples: If they are too nomadic, the state will try to narrow and confine, or say that title has not been established through connection to a specific space. But if they are too static (in time, for instance), courts will limit rights and block Indigenous journeys through time, mired as they are in stereotypes of Indigenous groups as “past-tense peoples.”¹²

In this, I am reminded of Cherokee writer Thomas King’s hilarious discussion of authenticity, and how the Canadian state has taken upon itself the task of determining what is truly Indigenous and what is not. King writes:

For us Live Indians, being invisible is annoying enough, but being inauthentic is crushing. If it will help, I’m willing to apologize for the antenna on that house at Acoma. I’ve already shaved off my moustache, so that should no longer be an issue. If I didn’t live in the middle of a city, I’d have a horse. Maybe two. I sing with a drum group. I’ve been to sweats. I have friends on a number of reservations and reserves around North America. I’m diabetic. If you can think of something else I can do to help myself, let me know.¹³

Borrows picks up on this idea (and continues to do so throughout the book), writing that courts have often fallen for an “exceedingly narrow view of who constitutes an authoritative Indigenous person, and thus what qualifies as Indigenous tradition.”¹⁴ To prevent this essentializing, and to further freedom of mobility through time and physical space, Borrows urges us to “recognize and affirm Indigenous patterns of mobility,” so that courts, judges, and the public are aware of the stereotypical and limiting views of Indigenous mobility currently being perpetuated.¹⁵ Further, Borrows recommends first that Indigenous peoples be given the freedom to regulate their own communities and integrate others into it themselves; this would avoid “freez[ing] ideas about who is authentically

10. *Ibid* at 129.

11. *Ibid* at 13.

12. *Ibid* at 33.

13. Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Toronto: Doubleday Canada, 2012) at 64.

14. Borrows, *supra* note 1 at 34.

15. *Ibid* at 39.

Indigenous.”¹⁶ Second, he recommends that Indigenous and non-Indigenous laws be harmonized, spreading Indigenous legal traditions among Canadian society and broadening Indigenous paths of mobility.

A second path to freedom focuses on civil “(dis)obedience” (with the brackets reflecting that what you are disobeying is a matter of perspective; Indigenous disobedience to settler laws can just as easily be viewed as obedience to Indigenous legal traditions). In this chapter, Borrows reviews a number of Canadian examples of Indigenous groups using blockades and direct action to fight for their rights. Some examples show where civil disobedience has been an effective practice, achieving both short- and long-term success. Others show where civil disobedience was not successful in the short-term but did provide some long-term benefits. Still other examples show where civil disobedience has backfired, failing to “open up any meaningful democratic space, [and] thereby further eroding Indigenous freedom.”¹⁷ Borrows collects lessons to be learned from these examples for those who may wish to use civil disobedience as a tool for reform in the future.

A third path for reform is through resistance to and engagement with Canada’s constitution and its formation. Specifically, Canada’s constitutional formation is founded on the importance of a ‘free and democratic’ society and on the importance of the constitution as a “perpetual work in progress,” as emphasized by the living tree doctrine.¹⁸ But Indigenous peoples have been left out of this ongoing formation. The effects of colonialism are ever-present, even today. And the constitution has never been a welcoming document—constitutional entrenchment looked, to many Indigenous peoples at the time, as a shackle rather than a tool for freedom. Most legislation had been adverse to Indigenous aspirations, after all. Despite this, Indigenous peoples have been, and should continue to be, engaged in the constitutional formation of our country.

Branching off slightly from this path allows us to stumble upon a similar but distinct barrier to freedom: (Ab)originalism, a play on words referring to the courts’ use of originalism as an interpretive principle when it comes to interpreting Aboriginal rights.¹⁹ This reveals Canada’s “interpretive inconsistency”²⁰—that is to say, courts in Canada have vocally committed themselves to the living tree

16. *Ibid* at 42.

17. *Ibid* at 53.

18. *Ibid* at 105.

19. Borrows first explored this idea in an article written for Osgoode’s Constitutional Cases conference. See “(Ab)Originalism and Canada’s Constitution” (2012) 58 Sup Ct L Rev 351.

20. Borrows, *supra* note 1 at 15.

doctrine of constitutional interpretation, where our constitution is interpreted with a mind to the future change and growth of society ... except when it comes to Aboriginal rights. Section 35, in particular, has been interpreted in such a way as to freeze Aboriginal traditions in time, relying on an originalist interpretation that isn't used for any other kind of constitutional interpretation. Borrows explores the troubling line of section 35 jurisprudence highlighting this interpretation, arguing that it rests on the assumption that the rights protected in section 35 must belong to some "pre-existing historical essence."²¹ Borrows provides three key alternatives for the courts in interpreting Aboriginal rights. While this is an insightful chapter, it does not engage with originalism beyond the Aboriginal context, nor does it engage with other academic critiques highlighting where originalism has shown its face in other places.²² This doesn't fully contextualize originalism in the Canadian constitutional context. Still, Borrows provides compelling examples where Aboriginal rights have sometimes been unduly narrowed and framed by an originalist interpretation.

A fourth path to freedom is through legislation that can help advance Indigenous self-determination in Canada, though Borrows is quick to caution that this must be done carefully; legislation has historically been a dark cloud over the path to Indigenous peoples living free and good lives (the *Indian Act* being a prime example).²³ Borrows looks to the United States for some examples of legislation that gives more Indigenous control over services, that protects Indigenous cultures and communities, and that allows Indigenous control over natural resources and economic development.²⁴

Lastly, freedom and a good life must be sought through focused effort on addressing violence against Indigenous women. Specifically, Borrows returns to his concern about how section 35 has been framed. It has been overly focused on land and resource conflicts at the sacrifice of protecting human rights issues such as the shocking violence Indigenous women experience in Canada. Borrows recommends that section 35 be put to work, providing both constitutional protection of Indigenous peoples' bodies and a right to self-govern, so that

21. *Ibid* at 141.

22. See e.g. Leonid Sirota & Benjamin J Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (17 March 2016) Working Draft, online: <ssrn.com/abstract=2749224>. See also Kerri A Froc, "Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment" (2014) 19:2 *Rev Const Stud* 237.

23. For an overview of the origins and impact of the *Indian Act*, see generally, Ken Coates, "The Indian Act and the Future of Aboriginal Governance in Canada" (May 2008) *National Centre for First Nations Governance*, online: <fngovernance.org/ncfng_research/coates.pdf>.

24. *Supra* note 1 at 166.

Indigenous groups may properly address the violence in their own communities. Indigenous governments must be allowed responsibility for the “health, safety, and well-being of their members.”²⁵ This view stems from Borrows’ argument that violence against Indigenous women should particularly be addressed through a “jurisdictional perspective,” which would give Indigenous communities the constitutional power to deal with the inequalities exacerbating this violence.²⁶ It would have been interesting for Borrows to explore other mechanisms for addressing violence against Indigenous women, perhaps through a properly executed criminal law—this would focus more on enforcement rather than constitutionalism and jurisdiction. Borrows is quick to note, however, that this troubling issue is one that “must be confronted at all levels of society.”²⁷

It is hard to say where *Freedom and Indigenous Constitutionalism* fits within similar literature because Borrows has created such a unique book, simultaneously philosophical and practical, both a legal treatise in its own right and an ode to Anishinaabe traditions. It is a well-researched and thought-provoking critique of colonialism, but its greatest contribution is its thoughtful solutions for moving ahead, for carving out paths in the fresh snow so that others may follow, for suggesting ways to create a country that respects the freedom and quest for a good life that our country’s first peoples are fighting for.

In light of the Truth and Reconciliation Commission’s findings, we are all becoming more aware of the history of our country, a “history of broken promises. Of illness and death. The loss of land. The indignity of colonization.”²⁸ As such, Borrows’ book will be a powerful read for both Indigenous and non-Indigenous readers alike. It is for those interested in Borrows’ academic arguments about (ab)originalism or for those interested in the practical arguments about civil (dis)obedience, for those who want to find new tools to dismantle the master’s house or those looking for new uses of old tools. It is a book for those that may be frustrated by the law’s tin ear, and for those that want to play a role in attuning our country’s laws so that they may more fully listen, understand, and respond to Indigenous peoples in their quest for freedom and a good life. I encourage all to read it.

25. *Ibid* at 202.

26. *Ibid* at 204.

27. *Ibid*.

28. *R v Sledz*, 2017 ONCJ 151 at para 16, 2017 CarswellOnt 3692.