

Aboriginal Legal Issues

Cases, Materials & Commentary

Third Edition

John J. Borrows, FRSC
B.A., M.A., J.D., LL.M., Ph.D.
of the Ojibway/Anishinabe First Nation
Professor
Faculty of Law, University of Victoria

Leonard I. Rotman
B.A., LL.B., LL.M., S.J.D.
of the Ontario Bar
Professor
Faculty of Law, University of Windsor



LexisNexis®

Aboriginal Legal Issues: Cases, Materials & Commentary, 3rd edition

© LexisNexis Canada Inc. 2007

August 2007

All rights reserved. No part of this publication may be reproduced, stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the Copyright Act. Applications for the copyright holder's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorized act in relation to a copyrighted work may result in both a civil claim for damages and criminal prosecution.

Members of the LexisNexis Group worldwide

Canada	LexisNexis Canada Inc, 123 Commerce Valley Drive East, MARKHAM, Ontario
Argentina	Abeledo Perrot, Jurisprudencia Argentina and Depalma, BUENOS AIRES
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst und Verlag Orac, VIENNA
Chile	Publitecsa and Conosur Ltda, SANTIAGO DE CHILE
Czech Republic	Orac sro, PRAGUE
France	Éditions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A
USA	LexisNexis, DAYTON, Ohio

Library and Archives Canada Cataloguing in Publication

Borrows, John, 1963-

Aboriginal legal issues : cases, materials & commentary / John J. Borrows, Leonard I. Rotman. — 3rd ed.

Includes index.

ISBN 978-0-433-45328-4

1. Native peoples—Legal status, laws, etc.—Canada—Cases. I. Rotman, Leonard Ian II. Title.

KE7709.B67 2007

342.7108'72

C2007-903706-2

KF8205.B67 2007

Printed and bound in Canada.

TABLE OF CONTENTS

Preface	v
About the Authors	vii
Acknowledgements	ix
Table of Cases.....	xxv

Chapter 1: Governance

A. Introduction.....	1
B. Aboriginal Views on Governance	1
<i>Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship</i> , Vol. 2	1
C. The Court's View on Aboriginal Governance	8
<i>R. v. Sioui</i>	9
D. The Historical Recognition of Aboriginal Governance.....	12
Leonard I. Rotman, <i>Fiduciary Law</i>	12
1. The <i>Treaty of Albany</i>	14
Articles between Col. Cartwright and the New York Indians, 24 September 1664	14
2. The Covenant Chain	16
Leonard I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence"	17
3. The <i>Royal Proclamation of 1763</i>	19
Royal Proclamation of 7 October, 1763.....	20
Leonard I. Rotman, <i>Fiduciary Law</i>	22
John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government"	24
<i>Chippewas of Sarnia Band v. Canada (Attorney General)</i>	28
<i>Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship</i> , Vol. 2.....	32
E. The <i>Indian Act</i> 's Challenge to Aboriginal Governance.....	36
1. Haudenosaunee Governance and the Great Law: Before the <i>Indian Act</i>	36
2. Challenges to Haudenosaunee Governance:	
Introducing the <i>Indian Act</i>	39
<i>Logan v. Styres</i>	40
"The Last Speech of Des-ka-heh".....	45
3. The <i>Indian Act</i> and the General Challenge to Aboriginal Governance.....	48
4. Supplementing the <i>Indian Act</i> ?	52
(a) Leadership Selection Codes	52
(b) Administration of Government Codes.....	53

(c) Financial Management and Accountability Codes	53
F. Contemporary Cases: Litigating Governance.....	56
<i>R. v. Pamajewon</i>	57
Gisday Wa and Delgam Uukw, The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987	60
<i>Delgamuukw v. British Columbia</i>	62
G. Negotiating Governance Agreements	65
1. Nisga'a Law and the Nisga'a Agreement	66
<i>John Borrows, Indigenous Legal Traditions</i>	66
Chief Gosnell's Historic Speech to the British Columbia Legislature	71
Douglas Sanders, "We Intend to Live Here Forever: A Primer on the Nisga'a Treaty".....	76
<i>Campbell v. British Columbia (Attorney General)</i>	78
H. Conclusion.....	89

Chapter 2: Aboriginal Rights

A. Introduction.....	93
B. Aboriginal Peoples, Canada and the Constitution.....	94
1. Canadian Constitutional Sources	94
2. Constitutional Suspicions.....	94
3. Constitutional Discussions	95
4. Constitutional Amendment: Strategies and Debates.....	96
5. Constitutional Entrenchment.....	98
6. The Future	99
C. The Characterization of Aboriginal Rights by the Courts....	99
<i>R. v. Sparrow</i>	101
D. Aboriginal Rights: Inherent or Contingent Rights?	115
Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on <i>R. v. Sparrow</i> "	115
E. Post-Sparrow Considerations of Aboriginal Rights	120
<i>R. v. Van der Peet</i>	120
<i>R. v. Gladstone</i>	143
<i>Delgamuukw v. British Columbia</i>	149
<i>R. v. Adams</i>	154
<i>R. v. Côté</i>	159
<i>Mitchell v. M.N.R.</i>	165
<i>R. v. Sappier; R. v. Gray</i>	167
F. Conclusion.....	182

Chapter 3: Aboriginal Title

A. Introduction.....	185
----------------------	-----

B.	The Importance of Land to Aboriginal Cultures.....	185
	<i>The Justice System and Aboriginal People:</i>	
	<i>Report of the Aboriginal Justice Inquiry</i>	
	<i>of Manitoba, Vol. 1</i>	186
	<i>Chief John Snow, These Mountains Are Our Sacred</i>	
	<i>Places: The Story of the Stoney Indians</i>	187
	<i>John Borrows, Living Law on a Living Earth</i>	188
C.	The Doctrine of Aboriginal Title.....	193
1.	Aboriginal Title and the Law of Nations.....	194
	<i>The Justice System and Aboriginal People:</i>	
	<i>Report of the Aboriginal Justice Inquiry of</i>	
	<i>Manitoba, Vol. 1</i>	194
2.	The Use of Symbolic Acts.....	200
3.	The Doctrine of Discovery and Early Aboriginal Rights Jurisprudence.....	202
	<i>Worcester v. State of Georgia</i>	203
D.	The British Crown's Response	209
	<i>Opetchesah Indian Band v. Canada</i>	211
E.	Early Canadian Aboriginal Title Jurisprudence	214
	<i>St. Catherine's Milling & Lumber Co. v. R.</i>	214
	<i>Calder v. British Columbia (Attorney General)</i>	221
F.	The Beginnings of Modern Canadian Aboriginal Title Jurisprudence	241
	<i>Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)</i>	242
	<i>Guerin v. R.</i>	244
G.	More Recent Judicial Considerations of Aboriginal Title	248
	<i>Delgamuukw v. British Columbia</i>	249
	Kent McNeil, "The Onus of Proof of Aboriginal Title"...	264
	<i>R. v. Marshall; R. v. Bernard</i>	267
H.	Alternative to Aboriginal Title Litigation.....	287
	<i>Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Vol. 2</i>	287
I.	Conclusion.....	293

Chapter 4: Treaties

A.	Introduction.....	295
	<i>Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Vol. 1</i>	295
B.	The Process of Treaty-Making	298
C.	The Changing Face of Treaties.....	299
	D.N. Sprague, "Canada's Treaties with Aboriginal Peoples"	300
D.	Conceptualizing Crown-Native Treaties.....	302
	<i>Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Vol. 1</i>	302
	<i>R. v. Syliboy</i>	304

William Wicken, "The Mi'kmaq and Wuastukwiuk Treaties".....	310
Alexander Morris, <i>The Treaties with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto</i>	315
Treaty No. 3.....	321
<i>Paulette v. Registrar of Titles</i> (No. 2)	327
Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination"....	333
E. Modern Canadian Treaty Jurisprudence — Beginning a New Process of Interpretation	334
<i>R. v. White and Bob</i>	334
<i>Simon v. R.</i>	341
F. More Recent Judicial Considerations of Treaties	353
<i>Sioui v. Quebec (Attorney General)</i>	354
<i>R. v. Badger</i>	378
<i>R. v. Sundown</i>	385
G. Treaties, Treaty Interpretations, and the "Honour of the Crown".....	392
<i>R. v. Marshall ("Marshall No. 1")</i>	392
<i>R. v. Marshall; R. v. Bernard</i>	406
H. Treaties and Federalism.....	413
<i>R. v. Morris</i>	415
I. Conclusion.....	429
John Borrows, "Ground Rules: Indigenous Treaties and Legal Foundations"	430

Chapter 5: Crown Obligations

A. Introduction.....	435
John Borrows, <i>Let Obligations Be Done</i>	436
B. The Honour of the Crown	439
C. Fiduciary Law	441
Leonard I. Rotman: <i>Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada</i>	442
1. The Implications of Fiduciary Law	447
Leonard I. Rotman: "Fiduciary Doctrine: A Concept in Need of Understanding".....	447
2. Fiduciary Law versus Trust Law.....	456
<i>Pawis v. Canada</i>	456
3. The Triumph of Fiduciary Law over Trust Law	458
<i>Guerin v. R.</i>	458
4. The Scope of the Crown's Fiduciary Obligations.....	468
<i>R. v. Sparrow</i>	469
5. The Crown's Fiduciary Obligations and Conflict of Interest	470
<i>Osoyoos Indian Band v. Oliver (Town)</i>	471

<i>Wewaykum Indian Band v. Canada</i>	478
6. To Whom Do the Crown's Fiduciary Obligations Belong?.....	493
(a) The Provincial Crowns' Fiduciary Obligations	493
Leonard I. Rotman: <i>Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada</i>	493
Leonard I. Rotman, <i>Fiduciary Law</i>	496
(b) The British Crown's Obligations	499
7. Equitable and Statutory Bars to Breach of Fiduciary Duty Claims	500
<i>Wewaykum Indian Band v. Canada</i>	501
Leonard I. Rotman, <i>Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada</i>	505
D. The Duty to Consult	506
<i>Haida Nation v. British Columbia (Minister of Forests)</i>	506
<i>Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)</i>	519
<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i>	526
E. Conclusion.....	541

Chapter 6: Inuit Rights

A. Introduction.....	545
B. Inuit Background.....	545
Mariano Aupilaarjuk, Marie Tulimaaq, Emile Imaruittuq, Lucassie Nutaraaluk, Akisu Joamie, <i>Interviewing Inuit Elders, Volume 2: Perspectives on Traditional Law</i> , Jarich Oosten, Frédéric Laugrand and Wim Rasing, eds.	545
<i>Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back</i> , Vol. 1	547
C. Inuit as "Indians" under Section 91(24) of the <i>Constitution Act, 1867</i>	548
<i>Reference re Term "Indians"</i>	548
D. Inuit Land Claims and Self-Government Agreements	555
<i>Inuit Land Claims — A Chronology</i>	556
E. Inuit Traditional Law and the Creation of an Inuit-focused Jurisprudence	558
Mariano Aupilaarjuk, Marie Tulimaaq, Emile Imaruittuq, Lucassie Nutaraaluk, Akisu Joamie, <i>Interviewing Inuit Elders, Volume 2: Perspectives on Traditional Law</i> , Jarich Oosten, Frédéric Laugrand and Wim Rasing, eds.	561
<i>Kadlak v. Nunavut (Minister of Sustainable Development)</i>	563

<i>Nunavut Tunngavik Inc. v. Canada (Attorney General)</i>	570
<i>Thomas Berger, Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for the Second Planning Period</i>	580
F. Conclusion	583

Chapter 7: Métis Rights

A. Introduction.....	585
B. Métis Identity	585
<i>Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Vol. 4</i>	585
Larry Chartrand, "Metis Identity and Citizenship"	587
<i>Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Vol. 4</i>	590
<i>R. v. Blais</i>	593
C. Métis Land Rights.....	600
<i>Dumont v. Canada (Attorney General)</i>	601
Clem Chartier, "Aboriginal Rights and Land Issues: The Metis Perspective"	608
<i>The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1</i>	611
D. Métis Aboriginal Rights.....	612
<i>R. v. Van der Peet</i>	612
<i>R. v. Powley</i>	614
E. Conclusion.....	626

Chapter 8: Federalism/Constitutional Issues

A. Introduction.....	629
B. The Implications of the Division of Powers on Aboriginal Peoples	631
Leonard I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility"	631
<i>Cardinal v. Alberta (Attorney General)</i>	636
C. Section 88 of the Indian Act.....	647
<i>Dick v. R.</i>	648
Kerry Wilkins, "Still Crazy After All These Years: Section 88 of the Indian Act at Fifty"	656
<i>Delgamuukw v. British Columbia</i>	668
<i>Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)</i>	671
<i>R. v. Morris</i>	683
D. Abrogating or Derogating from Aboriginal and Treaty Rights	688

R. v. Sikyea.....	688
R. v. Horseman	695
R. v. Badger.....	708
E. The Charter and Aboriginal Peoples	715
<i>Lovelace v. Ontario</i>	715
F. Constitutional Amendment and Aboriginal Peoples	719
Draft Legal Text of Charlottetown Accord	719
G. Conclusion.....	726
Noel Lyon, "A Perspective on the Application of the <i>Criminal Code</i> to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in <i>R. v. Sparrow</i> "	727

Chapter 9: Aboriginal Women

A. Introduction.....	731
"Aboriginal Women"	731
<i>Stolen Sisters: Discrimination and Violence Against Indigenous Women in Canada: A Summary of Amnesty International's Concerns</i>	740
Aboriginal Women: A Profile from the 2001 Census	744
B. Matrimonial Property	745
<i>Derrickson v. Derrickson</i>	746
Mary-Ellen Turpel, "Home/Land"	752
C. Denial of Status under the <i>Indian Act</i>	759
<i>Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Vol. 4</i>	760
<i>Canada (Attorney General) v. Lavell</i>	766
<i>Lovelace v. Canada</i>	776
"Retrospective", Enough is Enough: Aboriginal Women Speak Out	781
D. Amendments to the <i>Indian Act</i> : Bill C-31 and Its Effects.....	785
<i>Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Vol. 4</i>	785
<i>Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Vol. 4</i>	787
<i>Sawridge Band v. Canada (T.D.)</i>	789
<i>Sawridge Band v. Canada (1997)</i>	799
<i>Sawridge Band v. Canada (2006)</i>	802
<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i>	804
E. Aboriginal Women's Organizations	810
<i>Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Vol. 4</i>	810
<i>Native Women's Assn. of Canada v. Canada</i>	813
F. Conclusion.....	823

Chapter 10: Child Welfare

A. Introduction.....	825
<i>Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3</i>	825
B. Historical Treatment	826
“Child Welfare”	826
C. Contemporary Realities	836
D. Best Interests of the Child.....	839
1. Best Interests of the Child and Judicial Interpretation ... <i>Racine v. Woods</i>	839
2. Best Interests of the Child and Bi-Cultural Descent	851
<i>H. (D.) v. M. (H.)</i>	851
Pine Tree Legal Assistance, <i>Wabanaki Legal News</i>	853
Adoptive Family Wins Custody of Native Boy: Supreme Court Will Not Deliver Written Reasons for Ruling.....	853
<i>S. (K.J.) v. T. (M.)</i>	855
E. Self-Government Initiatives	865
<i>S. (E.G.) v. Spallumcheen Band Council</i>	865
<i>Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3</i>	872
Sonia Harris-Short, “The Road Back from Hell? Self-Government and the Decolonisation of Aboriginal Child Welfare in Canada”	876
“Child Welfare”	880
F. Challenges of Aboriginal Control.....	881
<i>Wen’de: We Are Coming to the Light of Day</i>	882
<i>Jane Doe (Public Trustee of) v. Awasis Agency of Northern Manitoba</i>	884
<i>Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3</i>	887
G. Customary Child and Family Relations	888
<i>Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, Vol. 3</i>	888
<i>Casimel v. Insurance Corp. of British Columbia</i>	890
H. Conclusion.....	899

Chapter 11: Taxation

A. Introduction.....	901
B. History and Context	901
C. Sovereignty and the Customs and Excise Tax	903
<i>Francis v. Canada</i>	904
<i>Mitchell v. M.N.R.</i>	906
D. Personal Income Tax	919
Richard Bartlett, <i>Indians and Taxation in Canada</i> , 3rd ed.	919

<i>R. v. Nowegijick</i>	923
<i>Mitchell v. Peguis Indian Band</i>	926
<i>Williams v. Canada</i>	935
<i>Folster v. Canada</i>	944
<i>Recalma v. Canada</i>	947
<i>McDiarmid Lumber Ltd. v. God's Lake First Nation</i>	955
E. Sales Tax	964
<i>Union of New Brunswick Indians v. New Brunswick (Minister of Finance)</i>	964
Andre LeDressay, "A Brief Tax (on a me) of First Nations Taxation and Economic Development" in <i>Sharing the Harvest: The Road to Self Reliance, Report of the National Round Table on Aboriginal Economic Development and Resources</i>	972
F. Aboriginal Taxation Powers	976
<i>Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship</i> , Vol. 2	976
1. Inherent Aboriginal Taxation Powers	977
2. <i>Indian Act</i> Band Taxation.....	978
3. Negotiated Aboriginal Taxation Powers.....	982
G. Conclusion.....	984

Chapter 12: Aboriginal Peoples and Criminal Justice

A. Introduction.....	987
B. The Failure of Criminal Law for Aboriginal Peoples	988
1. Historical Realities.....	988
The Royal Commission on Aboriginal Peoples, <i>Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada</i>	988
<i>Report of the Cariboo-Chilcotin Justice Inquiry (British Columbia)</i>	989
<i>Report of the Osnaburgh/Windigo Tribal Justice Review Committee</i>	990
2. Contemporary Realities.....	990
(a) Donald Marshall Jr.	990
Excerpts from Summary of Findings of the Royal Commission on the Donald Marshall, Jr. Prosecution, Nova Scotia Judgments.....	991
<i>Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia</i>	992
3. Aboriginal Over-representation	996

The Royal Commission on Aboriginal People, <i>Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada</i>	996
Presentation to the Commission of First Nations and Métis People and Justice Reform (Correctional Service of Canada, May 2003) in Commission on First Nations and Métis Peoples and Justice Reform, <i>Final Report, Vol. II: Submissions to the Commission</i>	1001
4. Systemic Racism	1002
<i>R. v. Williams</i>	1003
Presentation to the Commission of First Nations and Métis People and Justice Reform (Correctional Service of Canada, May 2003) in Commission on First Nations and Métis Peoples and Justice Reform, <i>Final Report, Vol. I: Legacy of Hope: An Agenda for Change</i>	1013
C. Aboriginal Traditions and Justice	1015
Jarvis Papers Collection # 5 S-125, Volume B. 57	1016
<i>R. v. Machekequonabe</i>	1019
<i>R. v. Jacko</i>	1021
D. Reforming the Criminal Justice System.....	1027
The Royal Commission on Aboriginal Peoples, <i>Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada</i>	1028
<i>R. v. Moses</i>	1028
<i>R. v. Gladue</i>	1048
E. Aboriginal Justice Systems	1061
“The Argument for Aboriginal Justice Systems”	1061
Bryan Schwartz, “A Separate Aboriginal Justice System?”	1062
F. Conclusion.....	1066
<i>Index</i>	1069