

---

*Volume 57, Issue 1 (Summer 2020)*  
*Special Issue: A Right without a Rights-Holder Is*  
*Hollow*  
*Guest editor: Karen Drake*

---

Article 1

1-14-2021

## Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies

Gordon Christie  
*Peter Allard School of Law, University of British Columbia*

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

 Part of the [Law Commons](#)

Article



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

---

### Citation Information

Christie, Gordon. "Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies." *Osgoode Hall Law Journal* 57.1 (2021) : 1-36.

DOI: <https://doi.org/10.60082/2817-5069.3579>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss1/1>

This Article 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.

---

## Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies

### Abstract

When an Aboriginal right is asserted, questions arise about the nature of the “proper” rights-holder. Canadian jurisprudence has understood Aboriginal claims as culturally grounded (*R v Van der Peet*). This article tracks how this plays out, looking not just at rights-claims that directly fit the “integral to the distinct culture” test, but also at claims that might be possible should the Supreme Court allow for rights that need not be tied to specific “customs, practices and traditions” following its treatment of Aboriginal title (*R v Delgamuukw*). Next, this article focuses on Indigenous self-determination. This interpretive lens raises questions about why jurisprudence has been built the way it has, exploring an underlying principled approach (which treats Aboriginal rights as claims of groups accorded weight within the multicultural setting of modern liberal democracy). This analysis highlights why current jurisprudential approaches leave no room for robust forms of Indigenous self-determination. The endgame is predetermined; namely, the authority of Indigenous collectives is severely diminished. If identifying who proper rights-holders are is left to Canadian courts, we fail to engage with fundamentally important matters of Indigenous self-determination.

### 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/).

# Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies

GORDON CHRISTIE\*

When an Aboriginal right is asserted, questions arise about the nature of the “proper” rights-holder. Canadian jurisprudence has understood Aboriginal claims as culturally grounded (*R v Van der Peet*). This article tracks how this plays out, looking not just at rights-claims that directly fit the “integral to the distinct culture” test, but also at claims that might be possible should the Supreme Court allow for rights that need not be tied to specific “customs, practices and traditions” following its treatment of Aboriginal title (*R v Delgamuukw*). Next, this article focuses on Indigenous self-determination. This interpretive lens raises questions about why jurisprudence has been built the way it has, exploring an underlying principled approach (which treats Aboriginal rights as claims of groups accorded weight within the multicultural setting of modern liberal democracy). This analysis highlights why current jurisprudential approaches leave no room for robust forms of Indigenous self-determination. The endgame is predetermined; namely, the authority of Indigenous collectives is severely diminished. If identifying who proper rights-holders are is left to Canadian courts, we fail to engage with fundamentally important matters of Indigenous self-determination.

---

\* Professor and Director, Indigenous Legal Studies, Peter Allard School of Law, the University of British Columbia.

---

I.	SITUATIONS IN WHICH IDENTIFICATION OF THE RIGHTS-HOLDER MAY BE AN ISSUE .....	6
II.	PRECEDENT.....	10
III.	WHO COULD BE THE PROPER RIGHTS-HOLDERS? .....	12
IV.	WORKING WITH POSSIBLE RIGHT-CLAIMS WITHIN THE VAN DER PEET FRAMEWORK.....	14
V.	WORKING WITH BROADER FORMS OF SECTION 35 RIGHTS .....	21
VI.	THE SUPREME COURT OF CANADA'S PRINCIPLED APPROACH .....	27
VII.	CONCLUSION .....	35

---

**DETERMINING WHO THE PROPER** rights-holder is has increasingly emerged as a serious issue in disputes centred on Aboriginal rights and title. One development driving this discussion has been the shift in focus to matters of *duties to consult and accommodate*. Post-*Haida Nation*, the Crown has acknowledged that when it contemplates authorizing activity that may adversely affect Aboriginal rights and title, even when these rights are merely asserted, it will often be legally required to engage with those potentially affected.<sup>1</sup> Consequently, there has been a rise of such instruments as impact benefit agreements, means by which third-party proponents of projects impacting Aboriginal lands and waters can achieve their desired degree of certainty.<sup>2</sup> Who, though, are the proper Aboriginal rights and title-holders? Who should be consulted when the Crown contemplates authorizing activity on lands and waters over which Aboriginal rights and title can be asserted? Who can enter into negotiations around side agreements concerning projects that will seriously impact Aboriginal lands and waters?

This article looks at a matter that underlies these developments and the questions that swirl around them. Questions can arise as to which Aboriginal collective or representative should be approached, as often there are, quite simply, many diverse collectives that may be approached. Consider, for example, Crown–

- 
1. This all emerged from a trilogy of cases from the Supreme Court of Canada in 2004–2005. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.
  2. As companies seek authorization for their projects from the Crown, they can avoid getting caught up in long, complex, and opaque consultation processes by reaching mutually beneficial side-agreements with potentially affected Aboriginal communities.

industry–Indian<sup>3</sup> negotiations involving proposed resource development on lands over which rights may exist, rights that may include title. In almost all such situations, the Crown approaches local First Nations, where these are typically small communities living on reserves, which are governed under a band council system. Increasingly, challenges to these bodies are being launched from multiple directions. For example, members of these communities may argue their band councils: (a) do not speak for them as their legitimate governments (or legitimate representatives); and (b) have no authority outside that mandated in the *Indian Act*<sup>4</sup> (that is, beyond the limited powers delegated through the *Indian Act*, powers which are all limited to reserve lands). In these and other sorts of situations, other Indigenous bodies are being presented as legitimate rights and title-holders.<sup>5</sup>

To keep this discussion manageable, I focus on claims to site-specific Aboriginal rights.<sup>6</sup> These sorts of claims underlay many recent developments we witness, as they are most often claims to rights that connect to lands beyond the geographic boundaries of any particular reserve. If we think again of merely asserted rights, the degree to which the Crown is obligated to consult depends on the potential impact of the proposed activity on these rights (should they exist) and strength of claim, the ability of the Aboriginal community asserting the rights

- 
3. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5. This section holds that exclusive federal jurisdiction applies to “Indians and lands reserved for Indians.” See also *Constitution Act, 1982*, s 35(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. This states that “In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.” In the rest of this article, I use the term “Aboriginal,” but I am referring specifically to Indians as this term is used in section 35.
  4. RSC 1985, c I-5.
  5. See e.g. *Wesley v Canada*, 2017 FC 725 at para 4. Justice Barnes notes:

Yahaan [Donald Wesley, applicant for judicial review of processes tied to approval of the Pacific Northwest LNG project in northwestern British Columbia] purports to be the Head Chief or sm’oogit of the Gitwilgyoots. Gitwilgyoots is one of nine tribes that together constitute the Coast Tsimshian Nation. In his capacity as sm’oogit, Yahaan claims to be authorized to act on behalf of all members of the tribe for the purpose of asserting their unique and collective rights to consultation and accommodation. According to Yahaan, he succeeded to the position of sm’oogit upon the death of his maternal uncle, Harold Dudoward, in 2007. This status was confirmed by custom during a community feast held at Lax Kw’Alaams in 2008.

6. While assertions of Aboriginal title are increasingly commonplace, underscoring duties to consult and accommodate, there are still in Canada very few cases dealing specifically with Aboriginal title. Further, much of what is said here about who the rights-holders might be for site-specific Aboriginal rights-claims applies closely to what could be said about Aboriginal title claims.

to build a case that they are rights that ought to be seriously considered. Just over the reserve boundary of any particular First Nation it is not clear, however, that the band council for this community has any particular say in relation to these claimed rights.

This focus on site-specific Aboriginal rights claims is channeled through a second very specific lens. Indeed, this second analytical lens is what ultimately directs the investigation in this work. Too quickly, questions about proper rights-holders seem to find their place *within* Canadian courts, subject to the reasoning of a non-Indigenous institution, one that makes up a component of the triad of the modern state, while the fundamental matter concerns how independent Indigenous communities assert their identities in the face of Crown activities. Trying to make sense of this matter within Canadian courts—where arguably Indigenous self-determination will be left to one side—is extremely problematic, not simply because of the threat of narrow-minded reasoning, but because it may contribute to the diminishment of Indigenous self-determination in relation to fundamentally important matters. This article explores how questions about who might properly hold site-specific rights might be addressed within Canadian law, should Indigenous self-determination be taken seriously.

My primary objective in this article is to show how Canadian courts approach questions about proper rights-holders, and how they are likely to build on their current approach should they be directly faced with these matters. The outcome of this examination is the realization that not only is it very likely there will be little room for notions of Indigenous self-determination to play a role in the deliberations of Canadian courts, but it is also arguable that how the Supreme Court has built jurisprudence seems designed to prevent the authority of Indigenous peoples from playing a role in resolving these matters. Not only will Indigenous peoples not be able to assert that bodies they constitute hold rights and responsibilities in Canada in relation to their lands and waters, but Canadian courts will almost certainly answer questions about proper rights-holders by considering only those rights the courts will imagine and countenance—specifically, those limited to essentially cultural matters.

In this article, I consider how Canadian courts are likely to approach questions about proper rights-holders in a series of stages. First, I look into the matter of *precedent*, asking how much we can divine about how the Supreme Court of Canada will approach such questions should they principally make use of existing case law. This first stage is itself broken down into two parts, as I first explore how these questions will likely be approached within the *Van der Peet*

framework,<sup>7</sup> and then consider how the Supreme Court might push past this framework (using *Delgamuukw* as a guide).<sup>8</sup>

Finding there are gaps in the jurisprudence and novel issues to address, I turn in the second stage of analysis to what animates existing case law. We witness from *Sparrow* onward a certain form of understanding the Court has applied to the recognition and affirmation of the existing Aboriginal (and treaty) rights of the Aboriginal peoples of Canada,<sup>9</sup> a form of understanding that functions to both generate a sense of the nature of the problems Canadian courts must grapple with and then what the solutions might be.<sup>10</sup>

The stage is illuminating, as we see there are currently two strong forces at play, one within the reasoning of the high Court, the other dancing around its edges. On the one hand, we can see how the Court has been crafting a particular approach grounded in a liberal democratic sense of how different cultural groups can make claims to have their ways of living protected from state interference. The fact that this approach is predominant explains much of what we see and can expect to see within the jurisprudence of Canadian courts vis-à-vis Aboriginal claims.<sup>11</sup> On the other hand, we can see that one thing the Court is aware of, but cannot accommodate in any serious manner within a liberal democratic framework, is the push for self-determination by Indigenous peoples. One suggestion that emerges from this article's analysis is that it is arguable the Supreme Court hopes to defuse the radical nature of this push by taming what it may within Canadian law and policy. Dictating certain responses to who the proper rights-holders might be could go a long way to achieving this end.

At the end of all this, we are left with Indigenous self-determination, a matter whose serious content is seemingly neutralized in the case law by how the Court has built up decades of jurisprudence. Should one try to advance serious arguments within the framework of the Canadian system that the power of Indigenous self-determination should determine who proper rights-holders

---

7. *R v Van der Peet*, [1996] 2 SCR 507.

8. *Delgamuukw v British Columbia (AG)*, [1997] 3 SCR 1010.

9. See *Constitution Act, 1982*, *supra* note 3, s 35(1). This section states that "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed." See also *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]. This was the first case from the Supreme Court of Canada to explore the meaning and implications of this constitutional provision.

10. Where the nature of the solutions depends fundamentally on how the Court has determined what the problems are.

11. For an extended discussion, see Gordon Christie, *Canadian Law and Indigenous Self-Determination* (University of Toronto Press, 2019) chs 6-8.

might be, outcomes to be expected are predetermined and too narrow to be satisfactory. It is, if you will, a rigged game. The analysis in this article ends, then, with some discussion about where to go with all this. Is there some process that promises something other than the continued dissolution of Indigenous self-determination? Are there mechanisms or instruments that might be developed that move us away from the seemingly endless varieties of rigged games on tap?

## I. SITUATIONS IN WHICH IDENTIFICATION OF THE RIGHTS-HOLDER MAY BE AN ISSUE

While a wide range of possible situations arise in which questions can be raised about who holds and who can exercise rights recognized under section 35, I restrict my discussion to a single specific, though broad, sort of situation wherein Canadian courts may be called upon to determine which Aboriginal “community” holds rights that are defined by and protected within a specific area.

Before we begin, note I place “community” within scare-quotes to highlight my intent not to prejudge the nature of the collectives under discussion. These might be First Nations living entirely within the *Indian Act*, First Nations operating under the *Indian Act* but engaged in generations-long struggles to maintain a substantial measure of independence, larger collections of First Nations (sometimes grouped in visible associations such as Tribal Councils or the like, but sometimes amalgamated in ways less visible to the outside gaze), or those collectives—or components of those collectives—that understand themselves to be, and have been for a very long time, *Indigenous* nations (where nationhood itself is something the specific Indigenous collective gives meaning to).<sup>12</sup>

Our focus in the upcoming discussions falls heavily on the last kind of community, as when we engage with this entity, we enter into problems about proper rights-holders that cast the approach of the Canadian system into question. A people who retain a significant sense of themselves as constituting a nation or polity that emerges out of the original socio-political body inhabiting an area (before the arrival of and interference by colonial bodies) will have its own understandings of rights and responsibilities, its own understandings of how it organizes itself internally and in relation to others, and its own understandings of

---

12. With all Inuit now living within one or another modern treaty their matters of identity for the purposes of rights under section 35 are not subject to the problems we address in this article. The Métis, on the other hand, bring into this picture their own set of concerns, but on the most general level—asking about how the Supreme Court will bring in community-scale—the situations in which they might be wrapped up in are similar.



who might be proper decision-makers when it comes to deciding how lands and waters are approached by humans.

This is the complex landscape where questions about proper rights-holders fall. We narrow focus to when a site-specific Aboriginal right is at issue.<sup>13</sup> The general framework for establishing an Aboriginal right was set out in *R v Van der Peet*.<sup>14</sup> An Aboriginal community must show that at contact with Europeans, a practice, custom, or tradition being used today was integral to the distinctive culture of that people at that time (the integral to the distinctive culture test). An Aboriginal community claiming, for example, a right to hunt in a territory, a site-specific Aboriginal right, would need to establish that, at contact with Europeans, hunting in that area was an integral aspect of their distinctive culture. A site-specific rights-claim, then, is one in which a right to be established under the *Van der Peet* test is expected to be defined such that it is connected to a specific location or area, where a Canadian court may be called upon to probe the nature of the Aboriginal community that would hold this right.

In *R v Bernard*, Mr. Bernard, a member of the larger Mi'kmaq nation, had been charged with hunting within Mi'kmaq territory, albeit in an area at some remove from the specific Mi'kmaq community from which he had family roots. The Court of Appeal of New Brunswick held that the common law in Canada already determines that with site-specific Aboriginal rights there is a requirement of community continuity.<sup>15</sup> That is, if an Aboriginal community present at contact with Europeans satisfied the *Van der Peet* test for an Aboriginal right, a modern community must enjoy a measure of continuity with the historic community in order to assert the right at that site.

---

13. A second situation where the question of proper rights-holders can arise is when Aboriginal title is at issue. With Aboriginal title claims, the aim is to establish that at the time of the assertion of Crown sovereignty, an area was occupied in such a manner as to show exclusivity and "sufficient" occupation (defined as regular use). See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*]. In such circumstances a Canadian court may be called upon to inquire into the nature of the Aboriginal community that exclusively and sufficiently occupied the lands in question, particularly when there may be suspicion that the community making the claim is not the same as the historical community. Interestingly, the only two cases directly addressing title that reached the Court (*Delgamuukw*, *supra* note 8 and *Tsilhqot'in*) were by original and reconstituted traditional Indigenous polities. Arguably, this is how it should be, given that within Canadian law, non-reserve lands are not under the jurisdiction, and are in no way the property of, band councils (whose authority is mandated to extend only to reserve lands).

14. *Supra* note 7.

15. 2017 NBCA 48 [*Bernard*].

There are two troubling scenarios suggested by this hypothetical. First, it may be that Aboriginal communities in the area in which this location exists have shifted geographically since contact with Europeans, such that an Aboriginal community now inhabits and practices traditional activities in this location while a socio-culturally distinct Aboriginal community did so at contact. Second, it may be that there are varied registers of community, such that one could say a large-scale Aboriginal community inhabited at contact the larger area surrounding and including the specific site at issue in this case, while subunits within this larger community have moved around within this area over time. One might then find that something like the first scenario holds, where a subunit now practices traditional activities at the specific location at issue where historically a different subunit practiced such activities there, and where both subunits are components of the larger socio-cultural community). Both scenarios are troubling, but the second brings us closer to the problems on which I wish to focus.<sup>16</sup>

One might say the basic question before us *appears* to be about nothing but community-scale, and how this can affect whether a proper rights-holder is in place to make a claim. Clearly, there is already in Canadian law a community-continuity requirement, if by this is meant that *at some specific location* should a member of an Aboriginal community engage in an activity that *this person's community* hopes to argue is protected, *this* community would need to be the community that traditionally had this activity be an aspect of a custom, practice or tradition integral to its distinctive culture at this location. The only real challenge that seems to arise concerns whether the community identified here must be (or should be) a *local* community (that is, a people intimately tied to this specific area, both historically and contemporarily), or whether the holder of the right in question could be (or should be) that larger socio-cultural community (of which any local community has been traditionally a part).

Problems that actually arise, however, are about much more than just community-scale. Consider common contemporary situations, in which we usually find a First Nation assumed to be the Aboriginal rights-holder for the area immediately around that community, where such a local community is in fact

---

16. This is not to dismiss problems associated with the first—it also speaks to a range of troubling assumptions and principles at play in how Aboriginal rights are developed and function in contemporary Canada—however, time and space restrictions mean that this cannot be the place to engage with issues that arise due to the displacement of peoples through settler-colonial pressures. Most obvious, of course, is the fact that events propelled by the often-uncontrolled nature of settler expansion account for much of the displacement of peoples, with, for example, a steady westward push through the nineteenth century and early in the twentieth century.

the product of a generations-long process of attempted political dismemberment carried out by the federal government (part of an overall historical process on the part of the colonial state of cutting up and replacing larger socio-politically defined peoples). It may be, however, that within this contemporary body there are (sometimes cutting across a number of these units) more traditional entities, such as family-groups, clans, houses, et cetera, that could arguably be the bodies with legitimate claims to access and control resources made available through activities identified as Aboriginal rights.<sup>17</sup> This is just one way to complicate the narrative, and thinking it through opens the door wide to the larger set of issues that site-specific Aboriginal rights invites. When we addressed the way the Supreme Court has framed the matter, we discussed *socio-cultural* bodies, and yet when we think of attempts at dismembering larger pre-existing Indigenous polities, and the weakening the sub-units within such bodies may have endured, we cannot help but turn to matters of politics and of self-determination.

This is ultimately where attention must be drawn, as we come to see that deeper challenges have to do with the meeting of two different ways of thinking about the nature of Indigenous communities. The superficial manner introduced first sees the only relevant distinction being between a larger socio-cultural community and smaller subunits that historically would have comprised the larger body. Canadian law seems to frame any sort of situation like this as one in which a larger, and fairly amorphous, *socio-cultural* body, over the generations, has been divided into what we see today—First Nations, those small communities that are relatively fixed to local areas. The second possibility, however, is of larger socio-cultural-*political* bodies, comprised of all different kinds of possible smaller components—families, extended families, houses, clans, nations—where the larger socio-political body is most often ignored by the state, while these smaller

---

17. See *Delgamuukw*, *supra* note 8; *Tsilhqot'in*, *supra* note 13. These are British Columbia cases regarding claims to Aboriginal title that reached the Supreme Court of Canada. In both, the claimants were the original larger socio-cultural-political bodies, the nations from which First Nation bands had been carved by federal and provincial authorities over time. However, claims for title at present seem to be advanced by subunits, which appear to be segments of original larger socio-cultural-political bodies to which they were traditionally connected. The issue of community-scale can arise, as Canadian courts are likely to be called upon to determine which scale of community can hold title to an area. For example, on the northwest coast of Vancouver Island, the Nuchatlaht First Nation which is historically a component of the larger Nuu-chah-nult, has advanced a claim in spring of 2017 being provided with dates for trial. See e.g. Chad Pawson, "Vancouver Island's Nuchatlaht following Tsilhqot'in in Land, Title Claim," *CBC News* (20 January 2017), online: <[www.cbc.ca/news/canada/british-columbia/nuchatlaht-files-aboriginal-land-title-case-bc-supreme-court-1.3945593](http://www.cbc.ca/news/canada/british-columbia/nuchatlaht-files-aboriginal-land-title-case-bc-supreme-court-1.3945593)> [perma.cc/7FNW-8Q3K].

components find themselves buried under the imposition of the band council/reserve system.

When discussion opens up to this larger dimension, when we put into play Indigenous collectives as *polities*, a new range of questions arise. What kinds of rights could the larger socio-political body claim within Canadian law? Would the exercise of these rights impact the ability of subcommunities to exercise their Aboriginal rights?<sup>18</sup> Could the larger body, for example, hold rights to regulate activities in its traditional territory? Would such a right be limited to regulating the activity of the members of this group? Why would it not be that such a collective, having authority in relation to its territory, could exercise this authority over all activity taking place over the entirety of its lands and waters?

We begin, however, with these questions momentarily set aside. Our first task is to determine as best we can, with consideration to precedent, where the Supreme Court of Canada might go in addressing the sorts of questions to which current jurisprudence gives rise. As we progress through this analysis, we gradually introduce considerations that move us further and further toward having to bring in these other larger matters, as we ask whether we anticipate the Court will be able to find that original (or reconstituted) Indigenous polities are the rights-holders in relation to site-specific rights. This sort of question opens the door to deeper issues, as we can then wonder how Canadian law might respond to robust Indigenous legal and political authority, making claims to determine how activities take place on Indigenous territories.

## II. PRECEDENT

Before we jump into this analysis, we need to ensure we keep firmly in mind that our focus in this stage is on how *Canadian law* is likely to deal with matters. Much of this analysis is dependent on how legal instruments, and the conceptual

---

18. There are disputes that pit band council systems against traditional governance structures, though they have only recently appeared in common law. See *e.g.* Wesley, *supra* note 5; *Gitwangak Indian Band v Davis*, 2017 BCSC 744 [*Gitwangak*]; *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 [*Spookw*]. In *Gitwangak*, we find an Eviction Order, which “purports to speak for the Gitwangak Hereditary Chiefs, Gitwangak Huwlip members, Gitwangak Band members and Gitwangak community members” issued to the band council of the community, the core dispute arising around the dissolution of a funding agreement for the Gitwangak Education Society. Other disputes involve complex layers of community-fracturing. For example, in *Spookw*, we find hereditary chiefs aligned with some band council leadership in opposition to the continuing work of the Gitxsan treaty society, a body facilitating treaty negotiations for the Gitxsan First Nation but suffering an apparent loss of legitimacy in the eyes of many individuals and groups within the community.

structures within which they are embedded, have been created and structured in this domestic legal regime. Besides the presumption Canadian law makes that the issues are only and entirely about *socio-cultural* bodies, we also find discourse narrowed to the language of *rights*, where the nature of these sorts of instruments in the Crown–Aboriginal context has been set out in a string of cases beginning in the early 1990s. As the discussion unfolds, we will see, this choice of how to deal with matters reflects a specific understanding of the sorts of problems that must be dealt with. That is, from the perspective of Canadian law, even certain ways of thinking of what the problems might be—in particular those that reflect Indigenous perspectives—are simply not there to begin with.

But now, on to precedent in Canadian jurisprudence. It helps to begin by outlining the kinds of questions wrapped up in the set of possible situations that might arise. One way to do so is by separating questions that focus more directly on *who* the rights-holder might be, from questions about the *nature of the activity* being explored (which brings in questions about how to characterize the right), to questions about the specification of the *kind of right* that might be at issue. We will see it is difficult, if not impossible, to address these different sorts of questions in the relatively isolated form in which I set them out. That said, pulling things apart in this way helps us dig more deeply into how precedent may function in approaching scenarios in which a site-specific right is claimed.

The first kind of question poses matters in the way we have already touched upon: for a site-specific claim, is it a *requirement* that a local community be the rights-holder? If not, we could then ask whether precedent sets out factors a court should consider in deciding between a local community and a larger body, if a choice presents itself as to whether a local or larger-scale community should be seen to be the rights-holder.

The second kind of question is concerned with the ways rights-claims concerning site-specific matters may be characterized. Here we imagine the *Van der Peet* framework requires all rights-claims be of one kind (namely, a claim must concern practices, customs and traditions argued to be integral to the distinctive culture of the people making the claim). One can imagine multiple sorts of rights-claims fulfilling that requirement circling around the sort of situation we are investigating. For example, while a right to hunt in the specific area could be claimed, so could (potentially at least) a claim be made by the larger Aboriginal community that it enjoys an *Aboriginal right to regulate hunting*, either amongst its constituent subunits or more generally on its territory (including, then, hunting by the local Aboriginal community in the specific site in question).

Finally, the third sort of question looks to possible forms of rights that could be claimed. Here we imagine the *Van der Peet* framework could be broadened and ask about rights that could be found under section 35 that do not necessarily have to squeeze themselves into the integral to the distinctive culture mould.<sup>19</sup>

### III. WHO COULD BE THE PROPER RIGHTS-HOLDERS?

We begin with the set of questions focused directly on who the rights-holder might be, asking whether a local or a larger-scale community should be seen to be the rights-holder, or whether there is an approach to resolving this matter that should be adopted.<sup>20</sup> Leaving aside questions that normally intrude at this point—about, for example, what it means for an activity to be integral or distinctive, and whether the activity in question meets these amorphous requirements—we focus on the matter of the community or people claiming the right in question.

Leaving aside the fact that almost all cases have been brought by First Nations, can we find *precedent* emerging from existing cases that might help settle the question as to whether, with respect to site-specific claims, the local community should be seen to be the rights-holder (or precedent that more generally sets out rules about how to approach the question)? Besides the fact that the majority of cases have proceeded on the presumption that the local, reserve-based Aboriginal community is rightfully the properly-placed claimant, in *Bernard* the Court of Appeal of New Brunswick considered how remarks of the Court in *Powley*—in the context of Métis claims—should be seen to apply to First Nation-centered site-specific claims.<sup>21</sup> Noting that *Powley* was decided on the basis that it was necessary that the Métis establish (a) the presence of a historic community in

- 
19. A more general question is about whether some principled approach needs to be developed such that courts can work out in any given situation which sort of right should be the focus of their analysis and adjudication (though here we also have to begin to think about how the Court might construct an alternate test for different sorts of section 35 rights).
  20. If we put this in terms of whether a claimed-right is best conceptualized as holding over a narrowly defined area or over a larger expanse of lands (and possibly waters) we simply arrive back at the same sort of place in our analysis. Again, if the concern is simply that site-specific rights be linked to specific areas (and here we are dealing with a tautological matter!) there is no real dispute. But the question, with this language as our focus, would be about the extent of the area that serves as the site. Are all site-specific Aboriginal rights limited to local areas, or can some such rights be exercised over larger expanses of the territory of a larger socio-cultural community? Or, is there need for some set of rules that can be applied to specific disputes, when it might seem to be possible to say a claim could be applied to either a localized area or a larger expanse of territory?
  21. *Bernard*, *supra* note 15.

the area where the hunting took place, and (b) that the present community be reasonably contiguous with that community, the court in *Bernard* went on to say:

There would seem to be no rational basis for the claim the Métis peoples only get to exercise aboriginal rights that are grounded in the existence of a historic and present community, whereas other aboriginal peoples get to exercise the right regardless of whether it is so grounded. If that is to be the law, that is for the Supreme Court to determine. At present, *Powley* establishes that Aboriginal rights, as communal rights, may only be exercised by virtue of an individual's ancestrally based membership in a present community that is linked to the historic community.<sup>22</sup>

The key expression to focus upon is *linked to*. Mr. Bernard is a member of the Sipekne'katik First Nation, one First Nation within the larger Mi'kmaq community. There is no question that the local community in the area where the hunting took place is linked to the larger Mi'kmaq nation. As well, there is no question that the Sipekne'katik is linked to the historic (larger) community. This particular Mi'kmaq First Nation, however, is not geographically close to the area where Mr. Bernard was hunting. The trial judge found that whatever (other) local Mi'kmaq community had existed in the area where Mr. Bernard had been hunting, there was no evidence that *that* community was still a presence in the area, and it was clear Mr. Bernard was not a member of whatever Mi'kmaq community that might have been.

What we encounter in this reasoning, however, is an analogy that does not seem particularly strong, one that (as the NBCA presciently acknowledges) the Supreme Court of Canada will at some point have to address. Is the parallel between the larger Métis people and local Métis communities the same as what we might expect between the larger Mi'kmaq nation and local Mi'kmaq communities? Why, alternatively, would the analogy not track the structure of section 35, being then between (a) the larger Métis people and local Métis communities, and (b) the larger body of Indians and local Indigenous communities (*i.e.*, the Mi'kmaq)?

A reasonable suspicion is that the Court was concerned not with the presence or absence of links *per se*, but of organizational links, of something more political than cultural. As much as the Court of Appeal for New Brunswick may have noted it was not tasked with arguments about Indigenous self-determination,<sup>23</sup> this was arguably the matter with which it was grappling, though in an attempt to keep such considerations off the table. Even absent arguments about self-determination being made by counsel, reasoning applied by the Court seems to *presume* that at contact the Mi'kmaq exercised rights to hunt locally, and that

---

22. *Ibid* at para 63.

23. *Ibid* at para 34.

no larger political body existed that regulated hunting between local Mi'kmaq communities. The only alternative way to make sense of how it proceeds would be to imagine the Court *presumed* that any larger, historical Mi'kmaq community is *purely* socio-cultural in nature, such that now it makes sense (within the regime of rights the Supreme Court has constructed) to require site-specific rights be reserved to local instantiations of this larger cultural body. One of these presumptions must be made to make sense of the Court's requirement that *only* the local community that existed in this specific area at contact can enjoy the relevant form of continuity with the community making the claim today.

This, of course, leads to discussions concerning other sorts of questions that arise with respect to the proper rights-holder. Why would a Canadian court seem to presume there could be no matter of Mi'kmaq legal and political authority intruding upon how to think through this sort of dispute? These deeper discussions, however, should be put off until after we work our way through a more complete analysis of how precedent is likely to play out. We turn then to the second set of questions, focusing our attention to the characterization of the right being claimed; here we presume the framework for rights set out in *Van der Peet* is the only one available. In the section after this we explore how Canadian law might function if this presumption were lifted.

#### IV. WORKING WITH POSSIBLE RIGHT-CLAIMS WITHIN THE VAN DER PEET FRAMEWORK

The *Bernard* case once again provides an illustrative example. As noted, as the case advanced past the trial level new arguments were pressed. At the Court of Appeal for New Brunswick Mr. Bernard—a member of, and representing, the larger Mi'kmaq Nation—had hoped to argue about rights of self-determination, in particular how a Mi'kmaq right to self-determination would entail rights to determine how Mi'kmaq communities, within the larger nation, hunt in Mi'kmaq territory.

The Court of Appeal for New Brunswick, however, chose to focus on the rulings of the trial judge, noting that while Mr. Bernard asked the court “to consider broader questions, such as self-determination, these questions were not addressed by either the trial court or the Summary Conviction Appeal Court and lack a proper evidentiary foundation.”<sup>24</sup> It is illuminating, however, to consider how such arguments about these broader questions might have played out if they

---

24. *Ibid.*



had been properly advanced and supported at the lower courts. How might they have fared, given existing jurisprudence?

Mr. Bernard had hoped to explore, on appeal, the question “Does the Mi’kmaq right to hunt include the right to decide who can participate in the right to hunt?”<sup>25</sup> Here, however, we must note two complicating factors.

First, we have to attend to the invocation in *Van der Peet* that Aboriginal rights must be established independently, that each practice, custom and tradition must be shown on its own to be integral to the distinctive culture of the Aboriginal community in question. At the trial level in *Sparrow*, the Musqueam had argued a right to fish included a right to regulate fishing in their territory.<sup>26</sup> But in *Van der Peet*, the Supreme Court undercut such moves, holding that each sort of right must be claimed and established on its own, there would be no piggy-backing on Aboriginal rights.<sup>27</sup> Here, then, we would need the right of self-determination, argued to be an Aboriginal right, and the right to hunt in this area argued in the alternative. It would make sense to argue for these two sorts of Aboriginal rights in one action, as the larger-scale rights-claim—a right of the Mi’kmaq to regulate hunting by its membership over their entire territory—might fail. It is possible it might fail as a rights-claim, but it might very well be the case as well that, even if successful at that stage, the right to regulate might not succeed as a means of protecting Mr. Bernard’s exercise of his then-acknowledged Mi’kmaq right to hunt. This second sort of failure could come to be, for example, if the larger right to regulate hunting were found to have been extinguished, to be incompatible with Crown sovereignty, or to have been justifiably infringed.

Second, intimately tied to the first point, the argument proposed would actually change the nature of the dispute before the court, as it only makes sense that once a claim is being made by the larger community to regulate hunting that the right to hunt—at least within Canadian law—must also be one held by that collective. Advancing a right to regulate on the part of the Mi’kmaq would,

---

25. *Ibid* at para 31.

26. *Supra* note 9 at para 38. At the Supreme Court of Canada, this argument was transformed into an argument about discretionary power in relation to the entire matter of fishing, and the Court pushed that sort of argument aside in the space of a sentence or two.

27. *Supra* note 7 at para 70. The Court held that

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. ... Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

conceptually at least, preclude the possibility that site-specific rights can be held independently by subunits of the larger collective.

If we have two rights being claimed in the alternative, why could it not be that the one is held by the local community and the other by the larger Aboriginal collective? Leave aside for the moment the fact that in ordinary litigation we would not expect two different parties asserting two different sorts of rights while engaged in one dispute. The situation we are contemplating can be envisioned if we imagine an individual (like Mr. Bernard) engaged in an activity held to be the exercise of an Aboriginal right. One might suppose that someone in that position could argue in one set of arguments in court that he was exercising a right held by a local community (say, to hunt in this area around this community), while in another set of arguments in the same action he could argue his actions were countenanced under the exercise of another right held by a larger community (say, a right to decide how individuals and subunits of the larger community hunt over the larger territory, that here included a decision that members of the local community—of which he is a member—can hunt in this area). But for this person to argue the activity itself is only possible due to the exercise of a Mi'kmaq right to regulate hunting (which, when exercised, has authorized his hunting in this area), the right to hunt must become *dependent* on the other right's existence and deployment. These two forms of rights become inextricably tangled together.

One might try to preserve the sense in there being two entirely independent rights, one held locally and the other by the larger community, by thinking things through using just the test from *Van der Peet*. The way to do this would be to imagine that evidence has shown that the specific practice in question (such as hunting in an area) was integral to the distinctive culture of the local body at contact and is still such a practice today, while evidence about the practice of regulating hunting by the larger body shows, as well, that it was integral to the culture of this larger body, and remains a practice today. But things could work out this way only if things *just happened* to work out so, in terms of the practices. In other words, this would only be possible if in the intervening generations the larger body has not altered its decisions concerning acceptable patterns of hunting behavior, or that it had altered how hunting practices by subunits would be managed but (at least some of) the subunits had ceased respecting the authority of the larger body.

We cannot presuppose, however, the sort of harmonious and fortuitously coordinated set of relations contained in the first possibility, and once we imagine the sort of fracturing contained in the second possibility, we open the door to problematic situations. For instance, an individual might defend him/herself in

court, arguing s/he is exercising a right authorized under a decision making or regulatory power of a larger Aboriginal body (say, to hunt in a specific area), where a local community of which this individual is not a member—a community, furthermore, that was historically a part of the larger community—intervenes in the dispute to argue this person has no right to hunt here, as only the local community has an Aboriginal right to engage in this specific activity in this specific location.<sup>28</sup> Dueling rights seem to be, then, a distinct possibility. Could there be a proper rights-holder in such a situation? Might it be that both claims can be supported by sufficient evidence of the right kind in order to meet the *Van der Peet* test? How would a Canadian court deal with such a situation? Note once again that while we are restricting ourselves to how things function within the *Van der Peet*-enclosed world we inevitably arrive at matters that are essentially political and not cultural (as the subunits indirectly take on decision-making authority in relation to the hunting practices, as they disavow the authority of the larger Aboriginal body of which they have historically been a part).

The situation, as complex as it already appears to be, is in need of further unpacking. We need to think much more carefully about the odds the sort of right imagined held by the larger community can indeed be argued to exist in Canadian law, where the right claimed by the larger Indigenous community itself has two distinct ways of being framed: First, to regulate an activity in relation to its subunits and individual members; and, second, to regulate an activity (such as hunting) over the entirety (or bulk) of its territory. How might Canadian law approach claims of these kinds?

We have already seen that precedent does not seem capable of satisfactorily approaching the sorts of political matters that arise when we think through the local/larger dimension of the problem of proper rights-holders in the context of taking seriously Indigenous self-determination. What of the ability of precedents to satisfactorily account for Indigenous self-determination when we turn to thinking directly of such matters, of the larger Indigenous collective making arguments about rights that bring in matters of regulating conduct? It is tempting to focus on the weaker claim that the larger community has the right to regulate how its subunits and members hunt in the larger territory. However, given common understandings of stewardship and responsibilities to lands and waters, it is quite likely that this power vis-à-vis members is often seen from an Indigenous perspective as simply an instance of the exercise of the stronger right (to regulate activities on traditional territory simpliciter, regardless of parties being regulated).

---

28. Note, this could well have been the situation in *Bernard*, if a local Mi'kmaq community had felt it needed to protect its local hunting practices from intruders.

We focus, then, on the stronger claim, working our way through an overview of the likely treatment of such claims by Canadian jurisprudence.

The first challenge would be in meeting basic requirements set out in *Van der Peet* and elaborated upon in *Sappier*.<sup>29</sup> Would it be possible to build a case that at contact it was integral to the distinctive culture of the larger Indigenous community that it regulated conduct on its territory? There are several matters that cast this into doubt.<sup>30</sup>

Our one guide in this matter comes from *R v Pamajewon*, the only case that has directly engaged with a claimed right to regulate (described as a right to self-govern). In this case several First Nations attempted to defend the existence of provincially non-licensed bingo halls on their reserves by arguing they were exercising either an inherent right to self-govern or a right to self-regulate economic activities (or, a right to determine uses of reserve lands).<sup>31</sup> In applying *Van der Peet* to these sorts of claimed rights the Court reiterated what it had said in that earlier case about how Aboriginal rights must be narrowly defined—broad assertions of rights to govern and the like will be pared down by Canadian courts to more manageable claims *tied to specific activities*. In *Pamajewon*, the principal way of doing this was to address how the specific activity interacts with government law and regulation. The Court, bringing into the business of

---

29. *Supra* note 7 and *R v Sappier; R v Gray*, 2006 SCC 54 [*Sappier*].

30. See *Van der Peet*, *supra* note 7 at para 53. One concern is the matter of characterization or definition. I do not focus on this in the text, as it is not clear the approach the Supreme Court laid out has to be followed for claims that do not inherently exist in tension with Crown regulation. The Court in *Van der Peet* held that the right today is to be defined by thinking about three things—the nature of the practice, custom or tradition at contact, the nature of the activity engaged in today said to reflect that practice, custom or tradition, and the government regulation the present activity has impugned. Leaving aside the remote possibility of an action seeking a declaration, litigation almost always involves attempts on the part of an Aboriginal community to raise the defense of the exercise of an Aboriginal right (where the community is represented by the individual(s) facing state sanction for example, a charge following hunting in an area where authorities of the state hold hunting is not permitted). There would be, then, an impugned government regulation impacting on how this claimed right would be defined. How, then, would the matter of characterization work out? In the situation we are contemplating the impugned government regulation would be directed toward—and seemingly in conflict with—the very thing claimed to be a right, as the larger community and the state both assert the authority to determine how an activity is to be properly carried out in an area. But when we think of the activity at contact, we do not seem required to somehow picture this today interfacing with Crown regulation—the whole matter seems designed to fit with cases where in today's world an Aboriginal people run afoul of Crown legislation, and yet that seems an improper way to set up a test to determine how claims get translated into rights.

31. [1996] 2 SCR 821.

defining the right the way gambling was regulated by the province, characterized the right as “the right to participate in, and to regulate, high stakes gambling activities on the reservation [*sic*].”<sup>32</sup> Once characterized that way it was entirely unsurprising that no such right was found. For our purposes, the key takeaway is this reinforced requirement that the regulatory power be (somehow) framed in terms of specific activities.

On a conceptual level framing in this manner seems like an impossible task. It is not just that the regulatory conduct be directed toward specific activities, but that the right to regulate itself be nothing more than an activity. Given that the right is by definition more of a power than a right, it is hard to see how it could be conceived of in a way that it fits within these narrow confines. Let us leave this aside and press on, imagining that somehow something like a “right to regulate the practice of hunting over the territory of x” could be set out in a form with enough specificity such that the existence of this right was then at least a possibility to explore.

Bear in mind that how the right has been narrowed to an activity quite likely already leaves behind Indigenous self-determination—this narrowly-focused “right” would seem but an ineffectual shadow of the matter Indigenous communities would want to be pressing, namely a *broad right* to actively manage their lands and waters. We find ourselves now at a stage of analysis lying in between the matter of characterization and the business of showing the right. We first need to grapple with the fact the Supreme Court held that this test is focused on narrowly-defined *practices, customs, and traditions* that evince something known as “Aboriginality”—that is, on *activities* with which the community engaged in a particularly “*Aboriginal*” manner (in *Sappier* for example, the act of harvesting and using wood had to be found to evince a particular *Mi’kmaq* way of doing so—Aboriginal rights, the Court held in *Van der Peet*, exist to protect “Aboriginality”<sup>33</sup>). How would a community go about showing it was *integral* to its *Aboriginal* culture that it *regulated* certain activities?

We already noted that having the right be essentially an activity functions to move the claimed right away from Indigenous self-determination. The only avenue open by way of salvage would be to try to fit the claim into this requirement by narrowing focus to the *act* of regulation itself. Perhaps this might work as well when we focus on this requirement of “Aboriginality.” It might seem possible that many Aboriginal communities would be able to argue it has always been an

---

32. *Ibid* at para 26.

33. See *Sappier*, *supra* note 29 at paras 42-45.

important part of their cultural ways of living to regulate certain activities (for example, objectives of stewardship, common across Indigenous communities).

Even if we skip past this problem, assuming the *activity* of regulating enfolds within it or presupposes a *power*, in what way must an Aboriginal community, then, build an argument and muster evidence? How does it show that at contact the power of regulating activities on its land was integral to its distinct culture and of a nature that it is peculiarly “Aboriginal”? The larger Indigenous community would need to show not just that act(s) of regulating were integral to its distinctive culture, but that this all is, somehow, a culturally circumscribed matter. The Mi’kmaq, for example, would have needed to show in *Bernard* that the acts of regulating hunting amongst its members and subunits was something that was peculiarly *Mi’kmaq-ian* (and, on the other side of this coin, not something that now reflects too deeply a “European” influence<sup>34</sup>).

All this goes to show how challenging it would be—and what severe modifications an Indigenous community would need to make—to meet the requirements of the *Van der Peet* test in relation to strong claims to regulate or control conduct over Indigenous lands and waters. We end this overview, however, with yet one more problem that arises, as this last matter brings us even more directly face-to-face with the interface between Indigenous self-determination and questions about proper rights-holders in the area of claims of site-specific Aboriginal rights. Should it be possible to make sensible arguments within the Canadian context about rights to regulate certain activities, questions also arise concerning continuity.

We began our examination into the proper rights-holder question with the notion that a key distinction is between local and larger-scale communities, but the discussion in the last few pages has shown that this can be a secondary matter, as when we look to the larger community other questions intrude. The requirement of continuity brings these questions to the surface, as we ask about the nature of the larger community today, the nature of the corresponding community at contact, and the history that links these two. Earlier we noted that it seems Canadian courts are likely to presume larger communities are defined by shared language and customs, a delineation which limits their nature to essentially *socio-cultural* bodies. However, for these bodies to have historically regulated conduct on the larger traditional territory requires that they be more than culturally bounded—they *have* to be acknowledged to be *socio-political* bodies.

Once we invite in the notion of socio-political bodies at contact and trace their continuity with bodies that exist today which might make claims about

---

34. *Supra* note 15.

present-day regulatory powers, we come squarely face-to-face with the history of colonial law and policy. There are larger bodies today that are essentially amalgamations of Crown-generated First Nations, but there are also those politically-charged bodies that correspond—given generations of evolution—to Indigenous polities at contact.<sup>35</sup> For the most part it is these bodies who will struggle to overcome the requirement of continuity within the *Van der Peet* test, since it is these bodies whose authority has been consistently—and, during the darkest period of colonialism in Canada, violently—attacked by both federal and provincial Crowns. Are they not, however, the proper rights-holders, should regulatory powers somehow be translated into rights?

We could go further into our examination into how existing jurisprudence under the *Van der Peet* umbrella would likely treat claims to regulate made by larger Indigenous communities. The remaining points of discussion also come up should we try to deal with the difficult matters we have come across so far by imagining the tight strictures of the *Van der Peet* test could be loosened in the context of claims to Aboriginal governance. What we have determined to this point is that much of what needs to be worked out, should *Van der Peet* rule, is untested and that much of what would need to be addressed is such that existing jurisprudence offers little concrete guidance.

## V. WORKING WITH BROADER FORMS OF SECTION 35 RIGHTS

One way around these problems would be to imagine that Canadian law is more robust than we have allowed to this point in the analysis, that it has room within its current boundaries for rights that do not necessarily have to meet the restrictive requirements set out in the *Van der Peet* test. We test this by keeping our eyes on the very sort of right at issue in the preceding discussion, a right held by the larger Indigenous community to regulate an activity in relation to its territory, as well as opportunities that might exist to find a right protected by section 35 but not limited to the confines of *Van der Peet*.

Indications that there may be other paths forward come from related areas of law, like the jurisprudence on Aboriginal title. In *Delgamuukw* the Supreme Court struggled with fitting what it felt they needed to say about title into the

---

35. There are numerous examples across Canada of these bodies continuing to act as legal and political authorities, including that of the Mi'kmaq confederacy discussed indirectly in *Bernard*. See, for example, the Haudenosaunee Confederacy, and the hereditary systems of the Gitksan and the Wet'suwet'en.

narrow confines of *Van der Peet*.<sup>36</sup> In essence, the Court skirted the matter, simply asserting that it seems indisputable that an Aboriginal community's interests in their lands would be of central significance to the culture of the claimants, and that this satisfies the requirements of the land being integral to the distinctive culture of the title-holders.<sup>37</sup>

How, then, might a right to regulate be understood and framed within the larger umbrella of existing case law? There are two dimensions to explore: First, we can ask about what restrictions imposed by the *Van der Peet* test might be malleable (or capable of being removed), while, second, we can ask about what could be added in this context.

We saw above that *Delgamuukw* speaks to the ability of the common law to lift one major restriction, namely that claimed rights all be tightly tied to particular practices, customs and traditions. In shifting attention away from this requirement, the Supreme Court held that Aboriginal title protects *more* than just those specific practices, customs and traditions of central significance to the distinctive culture of the title-holder. Therefore, we can well imagine that a right to regulate or govern protects more than specific practices, customs and traditions that might have been regulated or controlled historically by this communal power. Just as title, while itself an Aboriginal right, is found to not have as its essence that it merely protects specific practices, customs and traditions, so too would the right to regulate, while itself an Aboriginal right, not be found, as its essence, to merely act to regulate specific practices, customs and traditions (that themselves could all meet the *Van der Peet* test).

This plays out interestingly in the governance context. One could well imagine, for example, a narrower understanding of *governance*, worked so that

---

36. *Delgamuukw*, *supra* note 8 at para 151. This is required given the architecture of the jurisprudence, with Aboriginal title held to be one form of an Aboriginal right, itself required given the fact section 35 only recognizes and acknowledges Aboriginal (and treaty) rights. See *R v Adams*, [1996] 3 SCR 101.

37. *Delgamuukw*, *supra* note 8 at para 151. The Court said there:

Although [the requirement that the right be “integral” and of central “significance” to the culture of the claimant] remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.



it might fit within the strictures of the *Van der Peet* test, such that it really only speaks to *patterns of regulation* that existed at contact (fitting the requirement of rights protecting only specific activities). A court tasked with acknowledging this narrow right would then be looking into particularized patterns of regulation at contact (such as specific forms of regulation of “high stakes gambling,” or specific forms of land use regulation). So, for example, a court would then be asking an Aboriginal community: how, at contact, were your determinations who could hunt where laid out on the landscape? Once this was set, the right today would have to mirror these practices, customs and traditions, acting to protect these patterns of activity (for example, this clan was held to have these abilities to do these activities in relation to these pieces of land, et cetera).

A broader form of governance, on the other hand, would escape this particular constraint of *Van der Peet* (and so, overrule *Pamajewon*). The most natural way to do this would be to acknowledge what seems already entirely sensible, that rights to governance must attach to *powers*.<sup>38</sup> Much as the test from *Delgamuukw* requires that a title-claimant show such things as possession and sufficient occupation, a test for rights to governance would require a claimant to show matters that illustrate the presence of a power to determine how lands and waters are approached by humans (that is, governing capacities, manifest in patterns of group-life attuned with determinations concerning how people should act). We return to this matter later, as it opens the door to the key underlying discussion in this context, the threat that Canadian law might follow this line of reasoning too far, imposing normative requirements on how such governing capacities actually do function in the world.

On, then, to what we might hope could be *added* to this form of an Aboriginal right, once again keeping ourselves as best possible within the limits of existing Canadian jurisprudence. Once again, *Delgamuukw* can be our guide. Besides the obvious thought that a robust right to governance would enhance the decision-making powers of the rights-holder, we might also hope such a right would have an inescapable economic component, and be said to arise in Canadian law at the assertion (or, better still, the effective exercise) of Crown sovereignty.<sup>39</sup>

All three of these make sense as elements of a more robust Aboriginal right to governance, but questions naturally arise. One might wonder, for example, about the extent to which these separate elements could come into the content

---

38. This would be akin to the fact that in *Delgamuukw*, Aboriginal title was found to be a *property right*, a right to land itself and not simply a bundle of site-specific Aboriginal rights.

39. *Delgamuukw*, *supra* note 8 at para 166.

of the right.<sup>40</sup> Would decision making extend to something like jurisdictional authority?<sup>41</sup> Could such authority extend not only to the activities of the members of the Aboriginal community holding the right, but also to all those engaged in activity on the lands and waters in question? Would we expect the economic component to be bounded, particularly in how it played out in relation to non-Aboriginal interests?<sup>42</sup> How would the presumed sovereignty of the Crown

- 
40. The question of timing is somewhat distinct, as one would expect a struggle around whether it makes sense to ground the right at the point of contact (in any particular place), or on the assertion/exercise of Crown sovereignty. It might seem to make more sense to focus on Crown sovereignty since, as with Aboriginal title, one could argue the right arises, as something to be integrated with Crown sovereignty, at the point Crown sovereignty comes into being. But, to shift the time-frame—as much as that might make sense—would seemingly radically alter what has been a relatively fixed framework in place for several decades. Back on the other side of the ledger, however, is the fact that the Court already made this sort of shift in relation to Métis rights (*the result being the odd fact that one people under section 35 show their rights came into being at the point the Crown exercised “effective control” in an area, while the other two peoples have to go further back, to the point of contact with Europeans*). See Powley, *supra* note 21 for this shift in relation to Métis rights.
41. See e.g. Gordon Christie, “Who Makes Decisions over Aboriginal Title Lands?” (2015) 48 UBC L Rev 743 (exploring these questions in the context of Aboriginal title).
42. To the extent a right to governance functioned to facilitate the growth of Aboriginal economies such things as “wealth-creation” could potentially fall outside its scope. One might reasonably expect the Supreme Court to limit governance rights to matters that enable the Aboriginal community to maintain a sustainable economy, one that generates something akin to “moderate livelihoods” for community members, following cases like *R v Gladstone* [1996] 2 SCR 723 [*Gladstone*] and *Lax Kw'alaams Indian Band v Canada (AG)*, 2011 SCC 56. In *Lax Kw'alaams*, Justice Binnie held that:

in the event that an Aboriginal right to trade *commercially* is found to exist, the court, *when delineating such a right* should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.* (*Ibid* at paras 46, quoting *Gladstone*, *supra* para 75 [first emphasis added].)

On the other side of things, an Aboriginal right to govern could also threaten to impede the possibilities of economic activities by others, functioning to put the brakes on exploitive industries. One might suspect that Canadian law might develop mechanisms within the right that limit its ability to be disruptive in this manner.

affect both the decision-making component of the right and the ability of the Crown of justifiably limit its exercise?

We do not need to get bogged down in details and arguments around these matters at this point. It is sufficient to note that at this point, precedents do not provide nearly enough guidance to know how these sorts of questions would play out in Canadian jurisprudence. Instead, the notion of going beyond the *Van der Peet* test reveals two other matters that require exploration at this juncture.

First, arguments about sovereign incompatibility are likely to arise at this point, as the Crown would almost certainly argue that specific forms of the Aboriginal right to governance could not survive the assertion of Crown sovereignty (with some forms at most now merged into Crown sovereignty), while, second, concerns about the racist core of Canadian jurisprudence may well (finally) have to be introduced and addressed, since at some point it seems the jurisprudence would need to take heed of underlying arguments about the nature of the political organization of Indigenous collectives, arguments that are likely to percolate up through the analysis.

We can leave sovereign incompatibility to one side in this discussion—while the doctrine is relatively settled in Canadian law, its application has not been discussed in any great detail by a court.<sup>43</sup> We can say that it is relatively certain that particular claims to governance will be found to conflict with the presence and exercise of Crown sovereignty, and other claims will most likely have no interaction with this doctrine; however, where things stand in the middle is unclear and unsettled.

The racism at the core of Canadian law is another matter. It is rarely touched upon by Canadian courts, though it is clear the Supreme Court is aware of the historical presence of a deep-seated set of racist beliefs that drove the common law for generations.<sup>44</sup> The challenge has to do with *persisting* forms of racism,

---

43. *Mitchell v MNR*, 2001 SCC 33.

44. The Court noted as such in both *Sparrow*, *supra* note 9 and *Van der Peet*, *supra* note 7. In *Sparrow*, for example, the Court stated that “[o]ur history has shown, unfortunately all too well, that Canada’s Aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests” (*ibid* at 1110). See also where the Court noted that:

The policy of negotiating treaties with the aboriginals was never formally abandoned. It was simply overridden, as the settlers, aided by administrations more concerned for shortterm solutions than the duty of the Crown toward the first peoples of the colony settled where they wished and allocated to the aboriginals what they deemed appropriate. This did not prevent the aboriginal peoples of British Columbia from persistently asserting their right to an honourable settlement of their ancestral rights—a settlement which most of them still await (*Van der Peet*, *supra* note 7 at 273).

forms that lie hidden but often determinative within the core of section 35 jurisprudence. We can see where they are likely to float closer to the surface, potentially to the point where they become obvious to any attentive observer, when we think of the notion that an Indigenous collective, one that regulated various activities on its traditional territory at contact with Europeans, might be able make a claim (under this stronger form of section 35 right) to regulate these activities in the present. When we juxtapose such a situation with what eventuated in the release of *Delgamuukw* we can see how matters might become interesting.

We noted earlier that *Delgamuukw* can lead the way to the development of a more robust form of an Aboriginal right to governance, as the Court there veered away from strict adherence to the confining test laid out in *Van der Peet*. The problem the Court faced with claims to Aboriginal title was that even within the usual sorts of arguments at play within the common law, Aboriginal peoples had more than mere use-rights in relation to their lands. It was, quite simply, racist to continue to hold that the most Aboriginal peoples could claim within the common law were rights to *use* lands in certain ways, as they clearly met basic indicia required to be property holders (as they had been arguing for many generations). The solution, recall, was to side-step *Van der Peet*, developing instead a more robust notion of Aboriginal property interests.

A similar move to a more robust form of a right to Aboriginal governance can track the same sorts of sentiments. At present, the Court faces claims to Aboriginal governance that should amount to valid claims by Indigenous collectives to be considered a source of authoritative determinations concerning how activities will be carried out in their traditional territories. In order to parallel developments leading to *Delgamuukw* we would here have to rise above the common law (as it has little conceptual space for notions of such things as independent jurisdictional authority potentially grounding claims by peoples within the state) and focus instead on the state of international law. Within modern forms of international law Indigenous peoples enjoy rights to self-determination that speak to powers akin to jurisdictional authority. Unless one clings to nineteenth century racist notions about who can be said fit to govern, how can it not be the case that Indigenous traditionally-grounded collectives enjoy these rights? Without clinging to racist beliefs (that Indigenous peoples were not and are not sufficiently advanced, or that their systems of governance are products of unenlightened, uncivilized associations of people), how can courts in Canada continue to block the development of robust “rights” to governance?

All this, however, is just to point to how immensely unsettled the law is around rights to govern and/or regulate. When we unpack the issue of who the

*proper* rights-holder may be in certain disputes, we come up against the need to work out how fairly straightforward rights to engage in certain activities in certain places interacts with other rights that can be claimed, where these other rights enfold within themselves site-specific, activity-focused rights. Whether we try to untangle this with *Van der Peet*-centered mechanisms or stretch section 35 jurisprudence to imagine a robust form of an Aboriginal right to governance, we find that the jurisprudence leaves many serious questions unanswered. At this point, our only hope within Canadian law is to begin working out how the Supreme Court has generally approached matters under section 35.

## VI. THE SUPREME COURT OF CANADA'S PRINCIPLED APPROACH

With gaps and novel problems plaguing domestic Canadian law as it might apply to questions concerning *proper* rights-holders we turn to how deeper elements of the law informing its structure might be used to address these matters. Behind rules and tests developed in the jurisprudence over the last three decades, one can detect sets of principles and values that drive the law as it incrementally changes over time. Here, we ask about what animates the Court's approach to issues that arise within the general field of Aboriginal rights. With this in hand, we can then reasonably expect that the Court would apply this general approach to these specific unresolved matters, if and when they are brought before it.

Time and space limitations restrict the degree of analysis with which we can engage. To tighten things up I propose to work with a postulation in hand, though one with a fair degree of exegetical support that can be found in the jurisprudence. This assumption is that the Supreme Court has developed jurisprudence on section 35 that fits with its general approach to all matters related to rights, an approach that reflects Canada's status as a liberal democracy. In the context of the recognition and affirmation of Aboriginal rights, this manifests as a project of translating all Indigenous claims into Aboriginal group rights. This is done in a manner that does not unduly stretch or break the conceptual limits on how peoples of liberal democracy are understood to live and prosper together in a multicultural setting.<sup>45</sup>

We can track how this approach emerged onto the legal landscape in the narrower context of section 35. The Court faced a clear choice in *Sparrow*: To directly address Canada's colonial history, or to attempt to tame Indigenous

---

45. I discuss this more in detail in Christie, *supra* note 11.

activism through the promise of the enhancement of rights.<sup>46</sup> The Court chose the latter, signalled by its invocation of the sanctity of Crown sovereignty.<sup>47</sup> How it would accomplish the task it now set itself—the taming of Indigenous claims within the apparatus of the state—was determined by and large in *Van der Peet*. There the Court held that all Aboriginal claims would be treated as framing *special* kinds of rights, those that protect “Aboriginality.”<sup>48</sup> This, in turn, was understood in fundamentally cultural terms, such that Aboriginal communities could argue that aspects of their cultures were due recognition and protection from Crown interference. How Crown interference that was allowable (justifiable) was to be assessed and managed had been set out in *Sparrow*, with that structure modified in *Gladstone*.<sup>49</sup>

This all fits with a more general principled approach to the matter of group rights in a liberal democracy. One might (somewhat crudely) say liberalism grew in power and reach over the last few centuries as a doctrine that elevated the individual, focusing attention on matters of autonomy, reason, and the will.<sup>50</sup> Pushing back in the Western world against systems of authority and oppression that had traditionally constrained the liberty and dignity of the individual, liberalism offered ways of structuring the larger elements of society so that individuals could direct their own lives, and thereby (within the normative vision propounded by liberalism) have the highest likelihood of flourishing.<sup>51</sup>

The history of the rise of classical liberalism is also intertwined, however, with a historical concern with the persecution of certain groups, tied to religious

---

46. Where, indeed, some sort of rights (particularly those relating to property) should have been protected all along, should Indigenous peoples have been treated as full citizens of Canada from its earliest instantiations.

47. *Sparrow*, *supra* note 9 at 1103.

48. *Van der Peet*, *supra* note 7 at paras 20, 44.

49. *Sparrow*, *supra* note 9 at 1109-11; *Gladstone*, *supra* note 42.

50. See for example, Will Kymlicka, *Liberalism, Community and Culture* (Oxford University Press, 1989); Isaiah Berlin, *Two Concepts of Liberty* (Oxford University Press, 1958); Andrea T Baumeister, *Liberalism and the “Politics of Difference”* (Edinburgh University Press, 2000).

51. See Jasnet Ajzenstat & Peter J Smith, eds, *Canada’s Origins: Liberal, Tory, or Republican?* (Carleton University Press, 1995). The authors developed arguments and explored the forces at play in struggles over Canada’s identity and future in the nineteenth and first half of the twentieth century. Was liberalism in Canada attacked principally from the right (with attacks by conservatives) or was there also a struggle with a vision of civic republicanism coming from the left? See also, Jean-François Constant & Michel Ducharme, eds, *Liberalism and Hegemony: Debating the Canadian Liberal Revolution* (University of Toronto Press, 2009). Here we find a focus on more recent Canadian history, and on the centrality of liberal doctrine to the development of contemporary Canadian identity and attendant institutions.

differences.<sup>52</sup> A solution crafted in the early centuries of liberalism's emergence was to foreground tolerance, such that *collectives* tied to religious groundings could both enjoy a certain degree of protection from state interference and be relatively secure against one another.<sup>53</sup> The attempt was to build societal structures and institutions that made it possible, for example, for Roman Catholics to live in the same state as Protestants, both relatively secure in the knowledge the state would not treat one or the other preferentially and would not pursue (or allow to be pursued) programs of persecution.

By the late twentieth century, much of this, within liberal doctrine, would spin around the notion of identity through acknowledgment of the force of identity in each person's life and life-plan. Liberalism speaks to the sense that each person—enjoying a degree of equality with each other person in a state—should be able to choose his or her own way of living his or her life. Ultimately, who one imagines oneself to be, how one in effect becomes a self, is a matter of individual craft, as we each function to build who we are in a project all our own. Liberalism also finds space, however, for the protection of groups to which individuals belong, as groups function to provide meaning for the lives of their members, to give individuals possible forms of identity, to do much of the work of ground-level identity construction that individuals can then respond to and work within.

One can see, however, a tension that runs through this model of how the state should be structured. On the one hand, the modern liberal state has evolved so that forms of group living, tied to forms of group identity, are tolerated, such that a certain degree of group autonomy is protected. Spheres of group life, originally those of religious life but subsequently expanded, are expected to enjoy such autonomy *as they need* to allow those within the group to continue to see themselves as (at least partially) constituted as the persons they are as members of this group. But, on the other hand, the origins of liberalism itself lay in a reaction against control of the individual by various collectives or larger societal structures (historically the Church and entrenched aristocracies). The limits of toleration

---

52. William A Galston, *The Practice of Liberal Pluralism* (Cambridge University Press, 2004).

53. See Rainer Forst, "Toleration" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (23 February 2007), online: <plato.stanford.edu/entries/toleration> [perma.cc/CAP4-EXAJ]. The entry on toleration provides a good overview of different theories of toleration, and in the middle and later sections looks at how some of the theories emerged from religious strife in Europe from the sixteenth century onward.

are approached when a group to which the state is expected to be tolerant is perceived to unduly limit the autonomy of its members.<sup>54</sup>

In *Van der Peet* and *Sappier*,<sup>55</sup> we see this model applied to Aboriginal rights. These rights are said to exist and function to protect distinct ways of living tied to matters of identity. Ways of living that are distinctly “Aboriginal,” that reflect collective choice to believe in certain values and ideals, to live in certain ways, to act in certain ways, are to be “recognized and affirmed” within the larger liberal state within which Indigenous peoples now find themselves. But, as with matters in a liberal democracy more generally, tension arises that must be managed, as Aboriginal collectives are accorded a degree of protection from state activity but viewed suspiciously in relation to the possible role any particular collective may play in unduly restricting or interfering with individual autonomy and so the flourishing of its members.

On the battlefield of social philosophy original lines of struggle between liberals and conservatives marked disagreement between those with deep concerns about conserving certain collectively-defined traditional values, beliefs, and ways of living and those who found fundamental value in according the individual the freedom to question and, if so choosing, to leave such traditions behind. Within the liberal world the thought will be that in protecting traditional ways of living of Aboriginal peoples (tied to matters of identity and, in some sense, chosen) Aboriginal rights must be nevertheless carefully controlled by the state, as they reflect ways of living at contact generated by liberal societies, the constant threat being, then, that they might function today to restrict or oppress members of Aboriginal collectives.

Furthermore—and crucially important in the context of both settler–Indigenous (societal) relations and Crown–Indigenous (political) relations—all of this is presumed to occur and exist within a single socio-political setting. That is, the liberal state is presumed to be the sole source of political and legal authority, vested with the task of working out how socio-culturally determined “Aboriginal peoples” are to be worked into the state, just as the liberal democratic society of Canada is presumed to set the normative limits of understanding regarding how Aboriginal peoples can conceive of themselves living and functioning in a single, given social world.

---

54. Both Galston and Kymlicka delve into where the limits might be in multicultural societies. See Galston, *supra* note 52 and Kymlicka, *supra* note 50. As well, Berlin provides one of the clearest articulations of the dangers of toleration. See Berlin, *supra* note 50.

55. *Van der Peet*, *supra* note 7; *Sappier*, *supra* note 29.



It is essential, then, that we bear in mind the larger vision of society within which the tension we are describing is embedded. The vision is of Aboriginal peoples as *already enfolded* within the one unitary polity, that of the liberal state, such that *whatever* their interests, values, beliefs or ways of living might be, they are all (both the peoples and their values, beliefs, et cetera) contained as material to be controlled by the larger liberal societal structures of this one polity (such as legislatures and judicial systems). Note one vitally important implication of this picture—there is *no room whatsoever* in this model for the *sense* that any Indigenous collective could have any *right* to make decisions about how *others* outside this collective could live (where this right might manifest either as specific decisions impacting on how others act in certain situations or as societal structures that then go about making decisions about how others might act).

This all, then, points to how we can reasonably expect the Supreme Court to deal with the sorts of questions that arose when we looked at existing precedent. We begin with the scenario in which questions around who the proper rights-holder might be as contained within the integral-to-the-distinctive-culture framework. This framework, we can now appreciate, was created to manage and limit Indigenous claims within the setting of a multicultural liberal democracy. The value of culture, within such a model, is value *to* individuals. While Aboriginal cultural structures and beliefs are protected, this measure of toleration is always subject to oversight, as the larger vision is of sets of culturally-bounded First Peoples whose ways of living need to be reconciled to the rest of Canadian society. To the extent these ways of living can fit within the one multicultural society that is Canada, they can be “recognized and affirmed,” but they do not reach out beyond being essentially cultural matters. That is, there can be no sense allowed that Aboriginal collectives can carve out worlds of legal and political authority within Canada that exist alongside the larger liberal state.

Faced with a dispute in which it might seem that both a local Aboriginal community is a proper rights-holder and that the larger Indigenous community (within which the smaller community has been historically embedded) can also make sensible claims to Aboriginal rights to regulate activities, we can reasonably expect the Supreme Court to refocus attention on the fact that Aboriginal rights are all culturally-grounded. Let us imagine a specific sort of dispute (not patterned on *Bernard*, but loosely similar): An Aboriginal individual has been charged with hunting in a place claimed by a local Aboriginal community to be an area over which *only they* have an Aboriginal right to hunt, where this individual is not a member of this local community. The individual, however, is a member of the larger Indigenous collective of which this local community

has traditionally been a part, and in which the larger community itself claims an Aboriginal right to determine how both its individual members and its subunits hunt within the larger traditional territory. This may be part of a stronger claim to be able to regulate this activity simpliciter on their territories. Presumably, within the world of Canadian law bounded by *Van der Peet*, the outcome would depend on the evidence that could be tendered to show, in either case, whether it was (and continues to be) integral to the distinctive culture of the two different Aboriginal communities that they engage in the relevant activity (a “practice, custom, or tradition”).<sup>56</sup>

Bearing in mind the principled approach underlying the jurisprudence, we can see, however, that the claim of the larger community would face particular—indeed, seemingly insurmountable—challenges. Whether an Aboriginal right to regulate is narrowly construed (as only capturing particular patterns of regulated activity) or more broadly defined (as a power to make determinations, whatever they might be), this right only exists to protect peculiarly *Aboriginal* activities. Further, digging down a bit more into the thinking behind this, the right only receives protection as a *source of meaning* for the *individuals* making up the larger group. When a Canadian court looks, then, at the larger collective it asks how the practice, custom, or tradition under investigation might enhance the identity of members of the group. When the activity in question runs up into state sanction a court will ask about whether state interference with the workings of the group (on its social institutions) impacts negatively on the ability of group members to continue to draw meaning as members of this group (as, for example, a Mi’kmaq, and not—as in *Bernard*—a member of the Sipekne’katik First Nation).

This points to the positive weight Canadian law might accord the activity in question (entirely grounded in the meaning it provides individuals), and it is unclear how much this might amount to. Consider the kind of claim Mr. Bernard wished to pursue at the Court of Appeal of New Brunswick: To what extent could the Mi’kmaq nation show it was and is central to their being as an Aboriginal collective that they engage in this specific sort of *activity* (an activity that must be identified as peculiarly Mi’kmaq-ian)? While undoubtedly there will be many Aboriginal communities who would argue that it is not just important but essential that they (the larger Indigenous collective) managed and continue to manage activities on their lands and waters, this is not how Canadian law determines the weight it accords such activities. It looks at the matter essentially divorced from the significance an Aboriginal group might attach to an activity, asking instead in an objective sense how central to the way of living of the

---

56. *Van der Peet*, *supra* note 7.

group—as a peculiarly *Aboriginal* way of living—the activity might have been and continue to be.<sup>57</sup> This objective determination then purportedly measures, indirectly, the value to individuals making up the collective. It is this latter value that ultimately a Canadian court would have its eyes upon.

On the negative side of the ledger matters become a bit clearer, but also much more troubling for the prospects of Indigenous self-determination. Even within the weaker form of the right we find practices, customs, or traditions that are instances of a collective determining how it manages the lives of individuals who make it up. Recall that within a multicultural liberal democracy it is these very matters that attract the scrutiny of state institutions. The limits of toleration lie in this region, and once crossed they require state action to protect the only interests that actually have value within a liberal social-polity, the interests of individuals. The activity of regulation at contact, note, would have taken place within an aliberal social environment, and so would be immediately suspect. To the extent the practice today continued to focus on the ability of the group to regulate the activity, regardless of the rights of the individuals making up the group, the greater the suspicion would grow.

Meanwhile, the stronger form of the right would encompass practices, customs and traditions that speak to control over how *all* who might interact with their territory do so. Here we find a disconnect between the grounding for rights under the *Van der Peet* test and the sort of claim being imagined. There are at least two points of disconnect. First, it is difficult to see how an Indigenous collective could argue that it is integral to their distinctive culture that they determine how *others* interact with lands to which they have connections. Second, all rights to governance under this test must still be essentially cultural in nature, their value lying in the contribution they might make to the meaning and identity individuals vest in their self-driven lives. We are imagining, however, a practice, custom, or tradition that reaches out into the lives of those who are not members of this collective. Together these matters point to the difficulty, if not impossibility, in seeing how rights grounded in this manner could include within them an ability to dictate how those outside the collective in question plan and live their lives. Beyond these problems with how the test functions, however, we find a further impediment. We noted earlier, as an implication of the model of rights underlying this principled approach, a seemingly insurmountable barrier, as the stronger form of right is not sensible within the liberal model of rights of cultural groups.

---

57. *Ibid* at para 52.

Let us move on, then, to the prospect of a more robust Aboriginal right to governance, one not tied to the strict requirements of the *Van der Peet* test. Here we imagine this right being essentially a power, where the claimant must demonstrate an ability to authoritatively determine how humans approach lands and waters on their territory. Unfortunately, as we noted in our introduction to this robust right, while precedent suggests it might be possible for Canadian law to find space, it is both unlikely to come into being and, if it were to appear, serious questions arise around how it would be defined and controlled by the state and its courts. Still, assuming it might come into being, how might we expect Canadian courts to answer some of the questions that would arise around it?

The most serious matter, of course, would have to do with the extent of the right and just how robust it might be. Here we focus on two dimensions: First, how much decision-making authority it might encompass (could it, for example, rise to a level commensurate with law-making, being, in essence, a right to jurisdictional authority?) and second, whether it could extend out over lands and waters and not just peoples (could it be a power in relation to a territory and not limited to power in relation to the members of the collective?).

The only way into such a right is through recognition on the part of Canadian courts that it is simply so within the world we all co-inhabit that Indigenous collectives within the larger Canadian society have the power to make determinations about how they live and act (about, that is, how members of each collective live and act). Canadian law would, in effect, have to align itself with international law. However, as we noted in the discussion of a *Van der Peet*-enclosed right of this kind, the focus on cultural bases for Aboriginal rights makes it seem impossible for such a right to extend out past the collective's members to others. When we turn to the more robust right, having the right not limited to grounding in cultural practices, we might think it possible to imagine this extended reach could be part of its nature, but the deeper approach taken by the Supreme Court—having Aboriginal rights fit with liberal sensibilities in a liberal democracy—pushes back against this possibility.

There are two sides to this: on the one hand, the principled approach blocks certain matters, as it is based on reasons and arguments that speak to what is unacceptable, or even not sensible, within the liberal world of normativity and governance. On the other hand, it also *advances* certain matters, setting out how certain issues should be, and will be, both *understood* and *dealt with*.

On the first front, Canadian courts cannot countenance the emergence of Aboriginal rights that bring into the landscape robust Indigenous socio-political bodies. Canadian social institutions are built on liberal architectural principles

and ideals, built so that as much as possible free and equal individuals can determine how to live their lives,<sup>58</sup> and can then freely and equally pursue lives thereby imagined. Indigenous socio-political bodies do not just introduce potential challenges to this unitary system, but also make possible other forms of social structure, built on other visions of what society is and can be.

What is possible, then, are forms of Indigenous legal and political authority that can be carefully circumscribed within the liberal state. What is possible is a world in which liberal institutions of the state make all determinations about what activities on Indigenous territories will be forbidden, countenanced or promoted, where Indigenous legal and political authorities are able to have an advisory voice in matters of deliberations. This is the model of Indigenous self-determination being constructed all around us in the modern Canadian context.

## VII. CONCLUSION

Where, then, do we find ourselves at this point in our analysis and discussion? We saw that there are numerous serious matters Canadian courts have not spoken to, which required that we consider how the underlying nature of existing jurisprudence might eventuate in resolutions to the questions we developed. We now see, however, that the jurisprudence is built on a set of principles and values that are meant to continue to push how Canada relates to Indigenous peoples away from any substantive engagement with matters of Indigenous self-determination. Should Indigenous communities accept and learn to live with the strong likelihood that Canadian law will at most allow for *domesticated* rights to say such things as “these members can engage in this activity in this place,” where constant state oversight and control further *tame* the powers of these communities?

Through the stages of analysis, we kept an eye on a deeper struggle that questions about proper rights-holders touch upon—the fact of competing legal and political authorities. Those bodies with roots in traditional systems exercise parallel and independent authority over not just community members but the community’s lands and waters. Limiting struggles between these bodies and local Aboriginal communities (state-generated band councils) to essentially cultural matters strips away these deeper layers of understanding, and seems designed to further entrench in the minds and actions of Indigenous peoples the sense that they can only hope for certain kinds of understandings of both problems and

---

58. These are determinations made in a subjective manner, with input from the nature of lives they find themselves living as members of groups.

solutions, those emanating from centuries of development of liberal democratic thought in the West.

We have touched upon the deepest level at which the clash between Indigenous communities and state is located, as the ground level of this layered clash brought to the surface is not just between potentially competing authorities but is rather between differently grounded political bodies. The clash is between theories of how society can and should be structured. Pushing back on how Canadian courts hope to tame Indigenous aspirations is vital, not just for the recognition of the true rights-holders, but to signal the continuing life of alternate understandings of how humans can live in the world.