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

Article 7

1-14-2021

Searching for “Superchief” and Other Fictional Indians: A Narrative and Case Comment on R v Bernard

Naiomi Metallic
Schulich School of Law, Dalhousie University; Burchells LLP

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



Part of the [Law Commons](#)

Article

Citation Information

Metallic, Naiomi. "Searching for “Superchief” and Other Fictional Indians: A Narrative and Case Comment on R v Bernard." *Osgoode Hall Law Journal* 57.1 () : 230-264.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss1/7>

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.

Searching for “Superchief” and Other Fictional Indians: A Narrative and Case Comment on R v Bernard

Abstract

In R v Bernard, 2017 NBCA 48, the New Brunswick Court of Appeal upheld the lower courts’ reasoning that a Migmaw man living in the traditional Migmaq hunting territory of St. John, New Brunswick could not exercise his Aboriginal rights to hunt because he could not prove he descended from the particular subgroup of Migmaq who were at St. John at the time of contact with Europeans. In deciding so, the Court of Appeal rejected the argument that the Migmaq, as a nation, are the appropriate rights holders and ought to be the body deciding who can exercise the Migmaw right to hunt in the province. This argument was rejected based on the evidence of an expert historian who testified that Migmaq could not be a “nation” because they had a decentralized form of government and lacked a “Super Chief.” The case also exhibits undertones of floodgate fears of over-hunting as a consequence of finding the Migmaq nation to be the right-holders. This, however, ignores the role Migmaq laws and protocols will play in responsibly regulating Migmaq hunting and avoiding overuse of resources (not to mention the Crown’s ability to address conservation issues through the Sparrow justification framework). This article tells the story of the Bernard case and provides critical commentary on it.

Searching for “Superchief” and Other Fictional Indians: A Narrative and Case Comment on *R v Bernard*

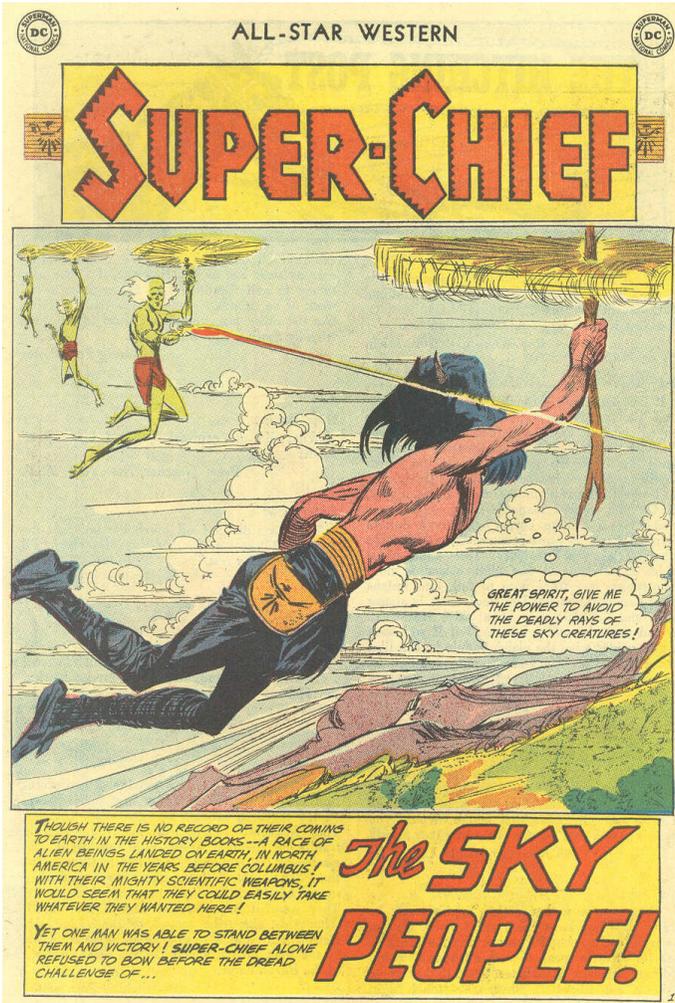
NAIOMI METALLIC*

In *R v Bernard*, 2017 NBCA 48, the New Brunswick Court of Appeal upheld the lower courts' reasoning that a Migmaw man living in the traditional Migmaq hunting territory of St. John, New Brunswick could not exercise his Aboriginal rights to hunt because he could not prove he descended from the particular subgroup of Migmaq who were at St. John at the time of contact with Europeans. In deciding so, the Court of Appeal rejected the argument that the Migmaq, as a nation, are the appropriate rights holders and ought to be the body deciding who can exercise the Migmaw right to hunt in the province. This argument was rejected based on the evidence of an expert historian who testified that Migmaq could not be a “nation” because they had a decentralized form of government and lacked a “Super Chief.” The case also exhibits undertones of floodgate fears of over-hunting as a consequence of finding the Migmaq nation to be the right-holders. This, however, ignores the role Migmaq laws and protocols will play in responsibly regulating Migmaq hunting and avoiding overuse of resources (not to mention the Crown's ability to address conservation issues through the *Sparrow* justification framework). This article tells the story of the *Bernard* case and provides critical commentary on it.

* Naiomi Sara Walqwan Metallic, a Migmaw woman from the Listuguj First Nation, is an Assistant Professor and Chancellor's Chair in Aboriginal Law and Policy at the Schulich School of Law at Dalhousie University, and counsel with Burchells LLP in Halifax, Nova Scotia.

I.	THE PROBLEM WITH THE COMMUNITY-CONTINUITY REQUIREMENT (“CCR”).....	234
II.	STEPHEN BERNARD.....	237
III.	THE TRIAL DECISION.....	241
IV.	OUR SUBMISSIONS TO THE COURT OF APPEAL.....	243
	A. Why the Application of CCR to Aboriginal Rights Claims by First Nations People Is Incorrect.....	244
	1. The CCR Is Inconsistent with how Migmaq Organized Themselves.....	244
	2. The CCR Confuses Reserves as “Traditional”.....	245
	3. The CCR Penalizes the off-Reserve Population.....	245
	4. The CCR Is Inconsistent with the Purpose of Section 35 and Reconciliation.....	246
	5. The Law Merely Requires Showing Continuity of a Practice—Not Peoples.....	247
	6. The CCR Turns the Aboriginal Rights Test into the Aboriginal Title Test.....	248
	7. The CCR Introduces the Possibility of Extinguishment of Rights by Abandonment Which there Is no Precedent for.....	250
	8. The CCR Inappropriately Imported Elements from Métis or Treaty Tests.....	250
	9. The Court Jurisprudence Suggests the Rights-Holder Is the Nation or People—not Sub-Groups.....	252
	B. The Better Alternative to the CCR Is Holding the Migmaq Nation as the Rights-Holder.....	253
	1. Migmaq Were Decentralized, but Nonetheless a Nation.....	253
	2. It Is not the Role of the Courts to Determine Individual Members / Rights-Holders.....	254
	3. The Right to Hunt Includes the Right to Regulate who can Hunt.....	254
V.	THE COURT OF APPEAL’S DECISION.....	256
VI.	OUR DECISION NOT TO SEEK LEAVE TO APPEAL TO THE SUPREME COURT OF CANADA.....	260
VII.	CONCLUSION: REFLECTIONS ON THE CASE.....	261

FIGURE 1: "SUPER-CHIEF"



SOURCE: Panel from All Star Western, vol #119, published July 1961 by DC Comics.¹

NOTE: "Super-Chief" is the name of several fictional characters, including three superheroes and one supervillain in the DC Comics universe.

1. Image is from All Star Western, vol. #119, published in July 1961.

MY CONTRIBUTION TO THIS SPECIAL ISSUE is the story of Stephen Bernard’s hunting rights case before the New Brunswick courts.² I acted as counsel for Mr. Bernard before the New Brunswick Court of Appeal.³ Mr. Bernard is a Mìgmaw⁴ man from Saint John, New Brunswick, who fought a 12-year legal battle mounting an Aboriginal rights defence to the charge of hunting deer for food without a licence. In order to win, Mr. Bernard had to meet the Aboriginal rights test set out in *R v Van der Peet*.⁵ This test requires the Aboriginal claimant to prove that the activity they engaged in was an element of a pre-contact practice, custom, or tradition that could be characterized as “integral to the distinctive culture of the Aboriginal group claiming the right.”⁶ Despite meeting all the elements of this onerous test, Mr. Bernard nonetheless lost. The reason? He could not prove that he descended from the *particular* sub-group of Mìgmaq who were in the Saint John area pre-contact (circa sixteen hundreds) and quit the area about a hundred years later for reasons unknown (probably colonial displacement), likely then joining other Mìgmaq elsewhere.

The lower courts who heard the case insisted that Mr. Bernard had to prove his connection to this particular sub-group of Mìgmaq and not the Mìgmaq people/nation more generally. Unfortunately, the New Brunswick Court of Appeal upheld the lower courts’ reasoning, despite arguments that this sub-group approach to Mìgmaq rights-holders is not only inconsistent with Mìgmaq socio-political organization, but also not in keeping with Supreme Court of Canada (SCC) jurisprudence and the purpose of section 35 of the *Constitution Act, 1982*, as well as meaningful reconciliation. It is this novel sub-group requirement (I refer to it below as the “community-continuity requirement” or the “CCR”) and its numerous problematic implications for the Mìgmaq nation that is the focus of this case comment.

My narrative of the *Bernard* appeal starts with unpacking problems with the community-continuity requirement from a Mìgmaq perspective. Following this, I attempt to humanize this case by talking about the Mìgmaw man at the center

2. See *R v Bernard*, 2010 NBPC 30 [*Bernard* NBPC], aff’d 2016 NBQB 21 [*Bernard* NBQB], aff’d 2017 NBCA 48 [*Bernard* NBCA].

3. I am writing this article with the full knowledge and consent of Stephen Bernard.

4. I am using the Metallic Orthography spelling of Mìgmaq except where another orthography appears in a quoted source. In this article, “Mìgmaq” is used to refer to the people; “Mìgmaw” to refer to a singular person. For more on the Metallic Orthography, see Emmanuel N Metallic, Danielle E Cyr & Alexandre Sévigny, *The Metallic Mìgmaq-English Reference Dictionary* (Les Presses de l’Université Laval, 2005).

5. [1996] 2 SCR 507 [*Van der Peet*].

6. *Ibid* at para 46.

of it, Stephen Bernard, and how the case has affected him. Next, I review the flawed reasoning in the lower courts and how we responded to this on appeal. The New Brunswick Court of Appeal's endorsement of this flawed reasoning is then discussed. Finally, I end with some reflections on the case, particularly its piecemeal, community-by-community approach to proving rights-holders.

I. THE PROBLEM WITH THE COMMUNITY-CONTINUITY REQUIREMENT ("CCR")

By adding the CCR to the Aboriginal rights test, the New Brunswick courts effectively turned the specific collectivity of Migmaq at Saint John into its own distinct nation separate from all other Migmaq. Accordingly, in order to win, Mr. Bernard had to prove how this specific community survived as a distinct group living in Saint John up to contemporary times *and* that he was a member of this distinct community. In the absence of a present-day "Mi'kmaq reserve in or near Saint John and no organized Mi'kmaq group here [in Saint John]," Mr. Bernard failed to prove these things and lost his case.⁷

The fact that Mr. Bernard was a status Indian under the *Indian Act*, RSC 1985 c I-5 and a member of the Sipekne'katik First Nation (a Migmaq community in Nova Scotia) did not help him. In fact, his membership in the Sipekne'katik First Nation worked against him. It was construed to mean that Mr. Bernard could not be a member of the rights-holding Saint John Migmaq community, even though he and his extended family lived their entire lives in Saint John going back four generations. The reasoning of the courts in *R v Bernard* effectively transforms a small sub-group of Migmaq (who are assumed by the courts to be a cohesive and complete unit) into an independent Indigenous "nation," unconnected from the larger cultural, linguistic, and political group (peoples) of which they form part. On this logic, because the fictional "Saint John Migmaq community" (read "nation") had left the area at some point after contact, they were taken to have "abandoned their rights," and no other Migmaq could exercise their hunting rights.⁸

The courts' CCR was influenced in large measure by the Crown's position that the Migmaq nation itself could not be the proper rights-holder, since Migmaq socio-political organization had historically been decentralized and lacked an overarching decision-making body or leader. In his oral submissions

7. *Bernard* NBPC, *supra* note 2 at para 109.

8. *Ibid* at paras 44, 53, 134-37.

to the Court of Appeal, the Crown counsel repeatedly emphasized the Mi'gmaq peoples "lacked a Superchief."

In taking this position, the Crown relied on the evidence of its expert witness, Doctor Stephen Patterson, who relied on the fact that the seventeenth century Peace and Friendship Treaties were signed with smaller collectives of Mi'gmaq (rather than the nation as a whole) to support the theory that Mi'gmaq could not be a true "nation," because they were decentralized and lacked a hierarchical government with a supreme leader. In particular, the Crown highlighted the following passage of his testimony in its written submissions:⁹

The treaties are with the people who lived there in the 18th century, same with all of the other groups. It came to the British eventually that you couldn't sign a treaty with the Mi'kmaq, you had to have many treaties or at least many different chiefs had to agree to the treaty because as they came to realize, every chief was autonomous ... they wouldn't take orders from the chief in the next community ... it's a very decentralized system and there was no superchief that the British could ever find.

There are several reasons to question Doctor Patterson's evidence as *the* authoritative source on how Mi'gmaq traditionally organized themselves. First, it is entirely informed from the perspective of British officials. I am not aware of any writings by the Mi'gmaq people who share this perspective. Sources like the report of the Royal Commission on Aboriginal Peoples (RCAP) paint a very different picture of Mi'gmaq socio-political organization as having a multi-level (*e.g.*, a federal) structure of governance.¹⁰

Second, the perceptions of the British and their motivations for executing treaties with Mi'gmaq as they did were likely influenced by a variety of factors; it is by no means certain that this was driven solely by how Mi'gmaq actually organized themselves. The perspective of the British, as outsiders to the Mi'gmaq culture, give reasons to question their conclusions. As noted by Jaime Battiste, an advisor to the Mawio'mi Grand Council ("Mawio'mi"), the British perception of local or individual treaty making with small collectives of Mi'gmaq "may be a Crown perspective, but it is not a shared understanding of the Mawio'mi. The Mawio'mi assert the core treaty is 1725–26 with the rest of the treaties ratifying or renewals of this treaty apply to all Mi'kmaq according to Mi'kmaq law."¹¹

9. *Bernard NBCA, supra* note 2 (Factum of the Respondent at para 12).

10. ¹⁰ *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Canada Communication Group, 1991) at 50-53 [*RCAP Volume One*].

11. Jaime Battiste, "Understanding the Progression of Mi'kmaq Law" (2008) 31 Dal LJ 311 at 332.

Finally, Doctor Patterson's observations come two hundred years after contact. For the purposes of the Aboriginal rights test, the SCC has said that the relevant time frame for assessing Aboriginal culture is pre-contact. The Migmaq socio-political organization might have changed significantly between the fifteenth and eighteenth century, especially in response to the arrival of the French and British. Therefore, Doctor Patterson's conclusions were both questionable and not particularly germane to the question of how Migmaq traditionally organized themselves.

Our submissions on appeal resisted the attempt to prove Aboriginal rights holders as if this is simply a question of historical or documentary proof. We insisted that the Migmaq nation was the rights holder as a matter of law and that questions such as "who are the members of the nation?" and "who may exercise rights belonging to the nation?" are internal matters for the nation to decide and not the courts. Such arguments were resisted in the lower courts. In particular, the trial judge implied floodgates concerns about the prospect of the Migmaq nation as the rights-holder. Dismissing this possibility, they asked:¹²

Can the Mi'gmaq nation qualify as the community?

If it can then it would at first blush appear that any status Indian who is a member of any Mi'gmaq band could exercise the [A]boriginal right to hunt for food in any traditional hunting territory of the Mi'gmaq people.

As counsel for Mr. Bernard, I argued this approach implicitly privileges the colonial constructs of *Indian Act* reserves, while failing to account for the damage *Indian Act* policy has caused the Migmaq people, including Mr. Bernard and his family. Furthermore, we argued that the Migmaq nation as the proper rights-holder and governing entity need not raise any "floodgates" concerns, because it has the responsibility to manage the right to hunt, allowing the Migmaq people to determine who can exercise such rights and on what conditions.

Before diving deeper into how the New Brunswick court addressed the law and our arguments, I want to first focus on the Migmaq person at the centre of this case, by considering his family history, and the impact this case had on him and his family. I believe it is important to remember that cases like this affect real Indigenous people—people who have been impacted by the legacy of colonialism. In the face of these impacts, Stephen, like so many other Indigenous people I know (myself included), have a deep yearning to reconnect with their culture—to learn and to practice things their ancestors did: hunt, fish, harvest, speak their language, dance, sing, drum, learn stories and protocols, make traditional items,

12. *Bernard NBPC*, *supra* note 2 at paras 112-13.

et cetera. When the Court talks about the purpose of section 35 being geared at reconciliation, this is what I hope they intend at the very least: That section 35 is a vehicle to facilitate Indigenous peoples preserving their culture.¹³ In *R v Sappier* and *R v Gray*, the Court confirmed that the purpose of Aboriginal rights is to give “protection [to] the distinctive cultures of [A]boriginal peoples” and to “provide cultural security and continuity for the particular [A]boriginal society.”¹⁴ Yet, my experience in the *R v Bernard* case has made me question whether the convoluted Aboriginal rights framework conceived in *Van der Peet*, which gives lower court judges so much leeway in interpreting its meaning, is even capable of achieving this minimum objective.

II. STEPHEN BERNARD

FIGURE 2: STEPHEN BERNARD AND HIS LEGAL TEAM AT THE NEW BRUNSWICK COURT OF APPEAL.



NOTE: From left to right: Roy Stewart, Naomi Metallic, Stephen Bernard, and Rosalie Francis.

13. In actual fact, I think that section 35 should do more than just this minimum, and subscribe to the view that the content of section 35 is as least as fulsome as the guarantees found in the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (entered into force 13 September 2007) [UNDRIP].
14. *R v Sappier; R v Gray*, 2006 SCC 54 at paras 22, 33 [*Sappier; Gray*].

Stephen was born in Saint John, New Brunswick and has lived there his entire life. Stephen's grandfather, Louis Edward Bernard, born 15 March 1905, grew up on the Indian Brook reserve (today called Sipekne'katik First Nation) and was a registered Indian under the *Indian Act*. In his early twenties, Louis Edward left the reserve and moved to Saint John to find work. There, he met and married Catherine Cory in 1929 and the couple had five children, including Stephen's father, Charles Herbert.

When Canada joined World War II, Louis Edward enlisted in the war effort. As a result of enlisting, Louis Edward became "enfranchised," involuntarily losing his registered Indian status under the *Indian Act* and as a member of the Sipekne'katik First Nation. This was a common practice of the Canadian government at the time.¹⁵ This had the effect of legally disentiing Louis Edward—as well as his wife, children, and grandchildren—from returning to live in the Sipekne'katik First Nation, as only registered Indian band members are entitled to live on reserve pursuant to the *Indian Act*.

In 1985, Canada amended the *Indian Act* in order to address some of the discrimination in its registration provisions. The amendments permitted many of those who had lost status, and their children, to be reinstated to Indian status and as members of the bands they had formerly belonged to.¹⁶ At this time, Stephen's grandfather and father had died, but Stephen, his siblings, living aunts, uncles, and cousins became eligible to register. Stephen applied for registration and received it in 1992. At the same time, he was reinstated to the Sipekne'katik First Nation, the band from which his grandfather had been removed.

While Stephen and his family have always maintained connections to the Sipekne'katik First Nation by visiting relatives and Stephen living there one summer as a teenager, his home has always been Saint John. To that end, Stephen has hunted in the Saint John area all of his life. After becoming registered under

15. *RCAP Volume One*, *supra* note 9 at 524.

16. Much has been written on the history of the *Indian Act* registration provisions. See e.g. Pamela D Palmater, *Beyond Blood – Rethinking Indigenous Identity* (Purich, 2011); Bonita Lawrence, "Real" Indians and Others: *Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (UBC Press, 2004); Sebastien Grammond, "Discrimination in the Rules of Indian Status and the McIvor Case" (2009) 35 *Queen's LJ* 421; Ian Peach, "Section 15 of the *Canadian Charter of Rights and Freedoms* and the Future of Federal Regulation of Indian Status" (2012) 45 *UBC L Rev* 103; Mary Eberts, "McIvor: Justice Delayed—Again" (2010) 9 *Indigenous LJ* 15; Val Napoleon, "Extinction By Number: Colonialism Made Easy" (2001) 16 *CJLS* 113; Martin J Cannon, "Revisiting Histories of Gender-Based Exclusion and the New Politics of Indian Identity" (2008) National Centre for First Nations Governance; Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18 *Hypatia* 3.

the *Indian Act*, he sought to hunt without a license on the basis of being Migmaw and having an Aboriginal right to do so. On previous occasions while hunting, carrying only his Indian status card, Stephen was told by Department of Natural Resources officials that he was able to hunt without a license so long as he stayed east of the Saint John River. Despite adhering to this direction, Stephen was charged on 16 November 2004, with unlawfully hunting deer without a license, contrary to New Brunswick's *Fish and Wildlife Act*.¹⁷ Mr. Bernard pled not guilty to the alleged offence based on an Aboriginal right to hunt for food in the Saint John area.

This was the start of Stephen's legal odyssey that would last for over twelve years. His case is remarkable for a number of reasons. First, Stephen was self-represented during his trial and for part of his first appeal to the New Brunswick Queen's Bench. This is no small feat for any non-lawyer, but particularly so for an Indigenous person mounting a complex Aboriginal rights defence. Stephen and his family are not of significant means (he works in waste disposal for the municipality). He would have preferred to have had a lawyer during the trial, but could not afford one. He reached out to his band, as well as a number of Aboriginal organizations for financial assistance with the case, but none was forthcoming. I first encountered Stephen when he was seeking representation before the Queen's Bench and I assisted him in making an application to New Brunswick Legal Aid for representation, which he had for part of his first appeal. This required Stephen to put a lien on his house, which was his only major asset. On his appeal to the New Brunswick Court of Appeal, with the support of the Migmaq leadership in the province, I agreed to represent Stephen pro bono. I was assisted on the case by a junior associate and an articling clerk, who were also Migmaq.

Second, although he was not able to secure legal counsel for the trial, Stephen was able to persuade a history professor at the University of New Brunswick, Doctor Greg Marquis, to be his expert witness on a pro bono basis. With Doctor Marquis' research, Stephen was able to disprove a long-held belief that Migmaq hunting territory did not expand into the Saint John River Watershed.¹⁸ This was also no small feat. The "Gagnon Line" theory had long operated as a bar to the recognition of Migmaq rights in the west of the province.¹⁹ The finding that

17. *Fish and Wildlife Act*, SNB 1980, c F-4.1, s 32(1)(b).

18. See Bernard NBPC, *supra* note 2 at para 101.

19. See Greg Marquis, "The Story of a Map: W.F. Ganong and Tribal Boundaries in New Brunswick" in Karl S Hele & Regna Darnell, eds, *Papers of the 39th Algonquian Conference* (University of Western Ontario, 2008) 479.

Migmaq hunting territory included parts of the Saint John River Watershed was not challenged on appeal and changed the law in New Brunswick.

Stephen's persistence in his desire to have his rights as a Migmaq person recognized is truly admirable. The trial hearing was delayed a number of times and it was only in 2010 that judgment was rendered. Stephen had a strong claim for officially induced error to the charge, but did not pursue it because he wanted to win on the basis of an Aboriginal right. Although Stephen was found guilty, the trial judge expressed significant reluctance to impose the mandatory minimum fine of two thousand dollars and the mandatory jail term of seven days on Stephen.²⁰ On the same day, by consent order, the trial judge's decision was stayed by the Court of Queen's Bench pending summary conviction appeal. Although the Queen's Bench judge on first appeal ultimately endorsed the trial judge's analysis, the judge also expressed regret at arriving at this result in the reasons, issuing a permanent stay to the fine of two thousand dollars and the minimum statutory sentence of seven days in jail.²¹ This was not appealed by the Crown. While Stephen would not face any penalty, he nonetheless wanted to pursue an appeal to the New Brunswick Court of Appeal to have his Aboriginal right recognized. On this appeal, we argued that the fact that both the lower court judges lamented the result strongly suggests that there was something wrong with the approach taken in the courts below.

I end this section by returning to the importance of this case to Stephen's cultural identity. He told me how much it hurt him during the trial when he had to listen to the Crown lawyer make submissions (based on the Crown's argument that the *Powley* identity test was applicable) that Stephen was not "Aboriginal" enough to meet this test, because he did not visit his relatives in Sipekne'katik enough or go to enough powwows.²² It also hurt Stephen deeply that he could

20. See *Bernard* NBQB, *supra* note 2 at para 35.

21. *Bernard* NBQB, *supra* note 2 at para 39.

22. *Bernard* NBCA is one of a recent number of cases from the Maritimes involving Aboriginal rights claims by off-reserve Migmaq people, both status and non-status. See *R v Acker*, 2004 NBPC 24; *R v Lavigne*, 2005 NBPC 8, *aff'd* 2007 NBQB 171; *R v Walker*, 2005 NSPC 1; *R v Hopper*, 2008 NBCA 42; *R v Chiasson*, 2012 NBPC 14; *R v Vienneau*, 2017 NBCA 20; *R v Keith Boucher*, 2015 NBPC 6; and *R v Lamb*, 2018 NBQB 213. In cases involving non-status Migmaq living off-reserve, we see lower courts in both provinces, in response to Crown submissions, adapting the *R v Powley*, 2003 SCC 43 [*Powley*] "communal acceptance" test to determine an individual's status as a rights-holder. It is beyond the scope of this article to analyze these cases, but they do suggest problems with having non-Indigenous Crown judges apply their own preconceptions about what constitutes communal acceptance and living an "Aboriginal lifestyle" especially for those who have lost status and/or were displaced from their communities.

not hunt during the duration of his legal ordeal and supply meat for family. For him, being able to hunt was one of the few ways he could connect with culture as an off-reserve Mi'gmaq person. He wrote about this in the last paragraph of his trial submissions:²³

The defendant is a registered Mi'kmaq Indian who has resided in Saint John, New Brunswick his entire life. He does not have cultural supports and community that those residing on reserves have and he will not be able to pass his status on to his children. He has a white mother and his children have a white mother. His Indian status ends with him. The only connection he has to his ancestors, who resided in this area for thousands of years, is that once a year for a few weeks he can hunt without having to acquire a licence. It was a source of pride that the province of New Brunswick recognized his Native heritage. The defendant could very easily have purchased a hunting license, but that would have been denying his father, his father's father and a line that stretches back thousands of years into the prehistory of this area. That would have meant saying he is not Mi'kmaq. And that he would not do.

III. THE TRIAL DECISION

As noted above, Mr. Bernard was successful in establishing all elements of the *Van der Peet* test. On the requirement of proving an integral practice or tradition, the trial judge found that "there was no dispute" that hunting was a significant practice to the Mi'gmaq people.²⁴ On the site-specific requirement,²⁵ after carefully considering the expert evidence over numerous pages of his decision, the trial judge concluded that there was compelling evidence to find that the lower Saint John River Valley and in particular, the Saint John area were traditional Mi'gmaq hunting grounds prior to contact.²⁶ The judge noted that the evidence demonstrated the existence of a Mi'gmaq village some hundred years after contact, which the judge found particularly indicative of a Mi'gmaq community.²⁷

It was at the final stage of the Aboriginal rights test on the question of whether "the claimed modern right has a reasonable degree of continuity with

23. *Bernard* NBPC, *supra* note 2 (Trial Brief of the Defendant).

24. See *Bernard* NBPC, *supra* note 2 at para 36.

25. See *R v Côté*, [1996] 3 SCR 139 at para 39 [*Côté*]; *R v Adams*, [1996] 3 SCR 101 at para 30 [*Adams*].

26. See *Bernard* NBPC, *supra* note 2 at paras 76-101; *Mitchell v MNR*, 2001 SCC 33 at para 56 [*Mitchell*].

27. *Bernard* NBPC, *supra* note 2 at para 101.

the ‘integral’ pre-contact practice,” where the trial judge’s reasoning went awry. This is where he invents a new continuity test:²⁸

[Test 1] In this case there is evidence of continuity of the nature of the practice that the Migmaq continued the same practice of hunting these animals for food post contact, the practice remained communal and continues in an evolved form.

[Test 2] However *there appears to be an argument that another test or requirement with respect to continuity* was set out in *Van der Peet*. While recognizing that an [A]boriginal right is specific to the site and the history of each community, and must be determined on a case by case basis, does *the applicant have to show continuity of the ‘contemporary community’* and its practices with the historic community and its practices?

The judge then appears to attribute this second test for continuity to comments made by Justice McLachlin (as she then was) in dissent in *Van der Peet* referencing a part of the Australian *Mabo v Queensland (No 2)*.²⁹ The quote from *Mabo* emphasized the importance of an Aboriginal group’s connection to territory or resources. Judge Brien then identifies a test set out by Justice McLachlin in dissent in *Van der Peet*, which he characterizes as³⁰

helpful for addressing a situation as found in this case: An [A]boriginal right is not lost by abandonment or cessation of exercise if a traditional connection with the land has been substantially maintained by observance of the custom tradition or practice, including a link to the resource in question.

A few paragraphs later, the trial judge cites paragraph 27 of the *Powley* decision as evidence of the majority of the Court’s approval of Justice McLachlin’s above-noted position in *Van der Peet*.³¹ After dismissing the possibility that the Migmaq nation itself could be the rights-holder (quoted in the introduction), the trial judge applied his new continuity test to the facts. The judge mused that the original group of Migmaq, since they left the vicinity and did not return, might have abandoned their rights. However, he states that it is not necessary to definitively determine this since Mr. Bernard failed to show any connection to this group in the first place.³²

In such a case then is there a point in time where abandonment can cause the loss of an [A]boriginal right. There may be, but that is not for this court to decide. For me the issue in this case now comes down to whether the community which left the

28. *Ibid* at paras 47-48 [emphasis added].

29. [1992] HCA 23 [*Mabo*].

30. *Bernard* NBPC, *supra* note 2 at para 53.

31. *Ibid* at paras 61-62.

32. *Ibid* at paras 137-38.

area and the exercise of the practice has substantially maintained a connection to the land, including the locus in quo. Such community can resume the exercise of its [A]boriginal right, but in order to resume something one must have had exercised the right in the first place.

The Defendant has neither shown the existence of nor his belonging to that community of Mi'kmaq in whom the right to resume the practice still rests. The mere movement of his grandfather to Saint John from Nova Scotia's Indian Brook Band, and nothing more does not establish the necessary connection. Similarly, the Defendant's own activity in hunting in the area without a licence, does not satisfy the connection mentioned. He only substantially maintains the connection if he can establish the original connection. He is but one individual, and one individual according to the McLaughlin [*sic*] test which I have adopted would have difficulty in proving the connection required.

On this ground alone, Mr. Bernard lost his Aboriginal rights defence. At the first appeal level, the New Brunswick Queen's Bench ultimately endorsed the trial judge's reasoning. The Queen's Bench also added to it by suggesting that the trial judge's reasoning was consistent with the Court's approach to treaty beneficiaries articulated in *Marshall (No 2)*,³³ which he characterized as "narrow[ing] the location for the exercise of [A]boriginal and treaty rights from broad words suggesting almost anywhere to 'the area traditionally used by the local community.'"³⁴

IV. OUR SUBMISSIONS TO THE COURT OF APPEAL

As summarized in section II, our submissions to the Court of Appeal were twofold. First, we argued that the lower court judges erred in introducing the CCR as part of the Aboriginal rights test. Second, we argued that a better alternative to the CCR was to identify the Migmaq nation as the rights holders and to have any floodgates concerns addressed by acknowledging that the Migmaq right to hunt includes the right to decide who can participate in the right to hunt.

In this section, I explain that the legal justification of our arguments is supported by the SCC. I do this in order to be able to later credibly critique the New Brunswick Court of Appeal's cursory dismissal of our submissions and affirmation of the lower courts' reasons.

33. *R v Marshall (No 2)*, [1999] 3 SCR 533 [*Marshall (No 2)*].

34. *Bernard* NBQB, *supra* note 2 at para 24.

A. WHY THE APPLICATION OF CCR TO ABORIGINAL RIGHTS CLAIMS BY FIRST NATIONS PEOPLE IS INCORRECT

1. THE CCR IS INCONSISTENT WITH HOW MÌGMAQ ORGANIZED THEMSELVES

First, by using the evidentiary record and passages from the RCAP, we emphasized that Migmaq were traditionally a group who practised transhumance (*i.e.*, they were migratory) and therefore, group composition varied according to season and several other factors.³⁵ By this, we were seeking to dispel the fiction that Migmaq lived in relatively independent, fixed, and sedentary communities (which the lower courts' perception of the Saint John Mìgmaq community seems to have been mired in). We emphasized that the Mìgmaq people traditionally organized themselves into sub-groups that were mobile and fissionable, who could divide into small units and recombine into larger units at different times.

Second, we emphasized that Migmaq land-use patterns were greatly affected by the arrival of Europeans, resulting in significant displacement. Here, we discussed assimilationist reserve policies in the colonies of New Brunswick and Nova Scotia,³⁶ centralization efforts in both provinces in the twentieth century,³⁷ and various *Indian Act* enfranchisement provisions that disentitled significant numbers of Migmaq from registration,³⁸ including Mr. Bernard's own grandfather. We were seeking to dispel what seemed to be another fiction underlying the reasoning of the lower courts: Current reserves are a natural reflection of (or had become the proxy for) how Mìgmaq traditionally lived

35. See *RCAP Volume One*, *supra* note 9 at 53.

36. For example, we noted the passing of legislation in both colonies enabling the unilateral sale of reserve lands to non-Indian squatters in New Brunswick and Nova Scotia. See *An Act to regulate the management and disposal of the Indian Reserves in this Province*, SNB 1844, c 47; *An Act to provide for the Instruction and Permanent Settlement of the Indians*, SNS 1842, c 16.

37. In the 1940s, attempting to centralize all the "Indians" in Nova Scotia and New Brunswick by relocating reserve populations to two central reserves in each province (Indian Brook and Eskasoni in Nova Scotia and Kingsclear and Big Cove in New Brunswick). The so-called "Centralization Policy" largely failed, but did succeed in dislocating some families. By way of illustration, the Migmaq community of Sipekne'katik consists of various families who historically lived in other districts. See *RCAP Volume One*, *supra* note 9 at 395; Daniel Paul, *We Were Not the Savages: A Mi'kmak Perspective on the Collision between European and Native American Civilizations* (Fernwood, 2000) at 257; Martha Walls, "Countering the 'Kingsclear Blunder': Maliseet Resistance to the Kingsclear Relocation Plan, 1945–1949" (2008) 37 *Acadiensis* 3; *Bernard NBPC*, *supra* note 2 (Provincial Court Transcript) VIV at 145.

38. *RCAP Volume One*, *supra* note 9 at 167, 257.

(which appears to have been based on assumptions that Mìgmaq lived in static village sites).

2. THE CCR CONFUSES RESERVES AS "TRADITIONAL"

We stressed that *Indian Act* reserves did not exist pre-contact and that they are a product of Canada's colonial past. They were never intended as places to preserve the culture, traditions, and composition of the peoples who were forced to live on them; rather, their object was to isolate and to segregate "Indians" so that they could be gradually assimilated into mainstream society, as well as to make way for settlement by colonizers. With this point, we stressed that an approach that appears to privilege reserves in determining rights-holders would be inconsistent with the purpose of section 35. We argued that, in pursuing reconciliation, governments and courts must tread carefully not to unwittingly perpetuate stereotypes about Aboriginal people or to prioritize colonial constructs.³⁹

More specifically on this point, we argued that it would be wrong to assume that the location and membership of today's reserve communities correspond to how the Mìgmaq people organized or situated themselves in the past.⁴⁰ Indeed, Mìgmaq had little to no say in the reserve system. Yet the judges in lower courts appeared to place great weight on: (1) the absence of a Mìgmaq reserve community at Saint John (interpreting this as an abandonment of rights and claims to the area); and (2) Mr. Bernard's connections to another Mìgmaq reserve, namely Sipekne'katik First Nation (assuming that any Aboriginal rights exercisable by Mr. Bernard existed only in or around Sipekne'katik First Nation).

3. THE CCR PENALIZES THE OFF-RESERVE POPULATION

We also argued that the lower court decisions, in effect, penalized First Nation individuals who leave their reserves to live elsewhere (and ignores whether they remain within traditional Mìgmaq territory as the Bernard family did). This fails to recognize that, in addition to having no say in what reserves they were

39. See *Sappier; Gray*, *supra* note 13 at paras 45–46.

40. See Battiste, *supra* note 10 at 339–40. Battiste observes that:

While the practice of aboriginal and treaty rights can be modernized, the Aboriginal sovereignty and territory that is the constitutional source of the rights cannot be substituted by federally or provincially created entities, such as the *Indian Act* bands or individual registered Indians. This is especially so when a continuing traditional sovereign and government, like the Mawio'mi, still exists... [The] continued use of the federal *Indian Act* in constitutional rights litigation is inconsistent with constitutional supremacy and the Mawio'mi rights, and as such the *Indian Act* should not have any place, force or effect in cases dealing with the context of [section] 35 rights (*ibid* at 339–40).

placed on, some Mìgmaq (*i.e.*, those who were enfranchised or relocated as part of centralization) had no choice in leaving (or had no ability to return in the case of Mr. Bernard's grandfather). While seemingly making a choice to leave, others might have done so in order to flee residential schools or the memories of them, or to seek better opportunities, or housing. In *Corbière v Canada (Minister of Indian and Northern Affairs)*, Justice L'Heureux-Dubé identified these as "choice[s] made reluctantly or at a high personal cost."⁴¹ These are not choices for which First Nations individuals should be penalized. Here, this choice to leave should not be taken as a decision by Mr. Bernard's late grandfather—or any of his descendants—to abandon their culture or renounce protection of that culture under section 35(1).

4. THE CCR IS INCONSISTENT WITH THE PURPOSE OF SECTION 35 AND RECONCILIATION

We also stressed the purpose of section 35(1), which was recently emphasized by the Court in *Sappier and Gray* that "[f]lexibility is important when engaging in the *Van der Peet* analysis because *the object is to provide cultural security and continuity for the particular [A]boriginal society.*"⁴² We argued that an approach that effectively denies the rights of off-reserve members of the Aboriginal society in question—arguably those most vulnerable to losing their connection to their culture (according to Justice L'Heureux-Dubé in *Corbière*)⁴³—does not appear to be in keeping with this guidance.

We further argued that the lower court placed an impossible evidentiary burden on Mr. Bernard to conclusively prove his connection to a specific sub-group throughout four centuries when no written records existed. The Court has signalled on several occasions that reconciliation means avoiding approaches that would entail impossible evidentiary burdens.⁴⁴ Requiring Mr. Bernard to prove direct descent of the sub-group of Mìgmaq at Saint John pre-contact renders any Aboriginal rights he may have as a Mìgmaq person illusory.

41. [1999] 2 SCR 203 at para 62 [*Corbière*].

42. *Sappier; Gray*, *supra* note 13 at para 33 [emphasis added].

43. *Corbière*, *supra* note 37 at paras 71-72.

44. See *Simon v R*, [1985] 2 SCR 387 at paras 39-41 [*Simon*]; *Van der Peet*, *supra* note 5 at para 62; *Mitchell*, *supra* note 24 at paras 27, 52.

5. THE LAW MERELY REQUIRES SHOWING CONTINUITY OF A PRACTICE—NOT PEOPLES

Next, we turned to the Court’s Aboriginal rights framework to show that the Court has never endorsed a CCR. Continuity as an element of the Aboriginal rights framework relates only to showing continuity of the practice alleged to be an Aboriginal right between pre-contact and modern times by the Aboriginal nation. In *Van der Peet*, where the continuity requirement was first introduced, it was framed as the following: “The practices, customs and traditions which constitute [A]boriginal rights are those which have continuity with the practices, customs and traditions that existed prior to the contact.”⁴⁵ The Court’s discussion of this requirement makes it clear that this requirement’s focus is specifically on the practices, customs, and traditions of an Aboriginal people or society and not on which members of that nation can exercise the right.⁴⁶

In *R v Gladstone*, the continuity requirement was described as “the requirement that a practice, custom or tradition which is integral to the [A]boriginal community now be shown to have continuity with the practices, customs or traditions which existed prior to contact.”⁴⁷ Continuity was established in *Gladstone* on the fact that prior to contact, Heiltsuk society was, in significant part, based on such trade, and this continued after contact. In *R v Adams*, involving a Mohawk fishing right on the Saint Lawrence River, continuity was found to be established based on evidence showing “the practice of fishing had been going on for years and years” and “that hunting and fishing have been practiced by the Mohawks since time immemorial, and that the practice of fishing has not been interrupted.”⁴⁸ In *R v Côté*, the Court described the continuity test as “part of the second stage of the *Van der Peet* analysis, there must also be ‘continuity’ between [A]boriginal practices, customs and traditions that existed prior to contact and a particular practice, custom or tradition that is integral to Aboriginal communities today.”⁴⁹ The requirement of continuity was found to be met in *Côté* by expert testimony, concluding that “fishing is a traditional activity that is continuing, is a traditional activity that has remained important.”⁵⁰

45. *Van der Peet*, *supra* note 5 at para 59 [emphasis removed].

46. *Ibid* at paras 60-67.

47. [1996] 2 SCR 723 at para 28 [*Gladstone*].

48. *Adams*, *supra* note 23 at para 47.

49. *Côté*, *supra* note 23 at para 69.

50. *Ibid* at para 70.

6. THE CCR TURNS THE ABORIGINAL RIGHTS TEST INTO THE ABORIGINAL TITLE TEST

None of the above SCC cases discuss or impose the CCR. We argued that such a requirement effectively converts the Aboriginal rights test into the test for Aboriginal title. Requiring community continuity at the site is really the same thing as requiring regular use and occupation—one of the main requirements for proving Aboriginal title.⁵¹ Such an approach runs contrary to the Court's clear guidance that site-specific Aboriginal rights can exist even if an Aboriginal group is not able to make out a title to a particular location. This was first emphasized in *Van der Peet*.⁵²

[A]boriginal rights and [A]boriginal title are related concepts; [A]boriginal title is a sub-category of [A]boriginal rights which deals solely with claims of rights to land. *The relationship between [A]boriginal title and [A]boriginal rights must not, however, confuse the analysis of what constitutes an [A]boriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of [A]boriginal peoples on that land.* In considering whether a claim to an [A]boriginal right has been made out, courts must look at both the relationship of an [A]boriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. *Courts must not focus so entirely on the relationship of [A]boriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of [A]boriginal rights.*

In *Adams*, the Court repeated a similar caution, this time raising the danger that overemphasizing connection to land would have the impact of depriving groups who were nomadic, or who were displaced from their land, of the benefit of section 35:⁵³

To understand why [A]boriginal rights cannot be inexorably linked to [A]boriginal title it is only necessary to recall that *some [A]boriginal peoples were nomadic*, varying the location of their settlements with the season and changing circumstances. *That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the customs, practices and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.* The [A]boriginal rights recognized and affirmed by s. 35(1) *should not be understood or defined in a manner which excludes some of those the provision was intended to protect.*

51. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 152-54 [*Delgamuukw*].

52. *Van der Peet*, *supra* note 5 at para 74 [emphases added].

53. *Adams*, *supra* note 23 paras 27-28 [emphasis added].

Moreover, some [A]boriginal peoples varied the location of their settlements both before and after contact. The Mohawks are one such people; the facts accepted by the trial judge in this case demonstrate that the Mohawks did not settle exclusively in one location either before or after contact with Europeans. That this is the case may (although I take no position on this point) preclude the establishment of [A]boriginal title to the lands on which they settled; however, it in no way subtracts from the fact that, wherever they were settled before or after contact, prior to contact the Mohawks engaged in practices, traditions or customs on the land which were integral to their distinctive culture.

Finally, in *Côté*, the Court again repeated a similar position:⁵⁴

We wish to reiterate the fact that there is no a priori reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land.

We stressed in our submissions that these principles had direct application in the case of the Miqmaq people, who traditionally had migratory land use patterns that were also greatly affected by the arrival of Europeans and the displacement that followed. It is more than likely that the Miqmaq people, who were at Saint John around the time of contact (and their descendants), did not disappear forever but moved (either voluntarily or by coercion) to other parts of Miqmaq territory in what is now New Brunswick and Nova Scotia. They were eventually made to settle on a reserve. Some may have started out on one reserve and were moved to another through centralization. Some of these original Miqmaq may have stayed in Saint John, but remained hidden to outsiders. Miqmaq who live in and around Saint John today should not be penalized for the displacement of earlier Miqmaq (or for the fact that a Miqmaq reserve was never established in Saint John) by being denied a constitutional right that allows them to participate in and to celebrate their culture within their own territory. The trial judge's preoccupation with the specific group of Miqmaq in Saint John pre-contact caused him to focus on the connection to land and to lose sight of the importance of hunting to Mr. Bernard and to the Miqmaq people generally. Furthermore, the trial judge did not consider the Miqmaq peoples' desire to preserve and to continue this practice in those areas where their ancestors used to hunt.

54. *Côté*, *supra* note 23 at para 38 [emphasis added].

7. THE CCR INTRODUCES THE POSSIBILITY OF EXTINGUISHMENT OF RIGHTS BY ABANDONMENT WHICH THERE IS NO PRECEDENT FOR

We attacked the concept of abandonment considered by the trial judge. This has never been a part of the test for Aboriginal rights. What the trial judge failed to appreciate is that Justice McLachlin's reference to the *Mabo* decision in *Van der Peet* was in the context of discussing how the common law continued to recognize the rights of Aboriginal peoples after European discovery and occupation of "new" territory.⁵⁵ *Mabo*—which recognized Aboriginal title in Australia—was presented as an example to illustrate this point. Justice McLachlin was not introducing a test for "abandonment" of rights in this passage. Therefore, the import of this passage was misconstrued by the trial judge. This becomes obvious later in *Van der Peet*, where Justice McLachlin summarizes how Aboriginal rights are to be established:⁵⁶

If an [A]boriginal people can establish that it *traditionally fished in a certain area, it continues to have a similar right to do so*, barring extinguishment or treaty. ... The [A]boriginal right to fish may be defined as *the right to continue to obtain from the river or the sea in question that which the particular [A]boriginal people have traditionally obtained* from the portion of the river or sea. *If the [A]boriginal people show that they traditionally sustained themselves from the river or sea, then they have a prima facie right to continue to do so, absent a treaty exchanging that right for other consideration.*

No mention here is made of abandonment. Further, in stating what is required to establish a prima facie Aboriginal right, Justice McLachlin only requires historical use of a site; not historical use coupled with continuous use of the site up to the present (which is what the trial judge interpreted the Justice to be suggesting). Not only does Justice McLachlin not propose an abandonment test, but the majority in *Van der Peet* specifically declined to take a position on the suggestion in *Mabo* that Aboriginal title or a right could be abandoned through disappearance.⁵⁷ Moreover, the Court has never returned to the subject of abandonment since *Van der Peet*.

8. THE CCR INAPPROPRIATELY IMPORTED ELEMENTS FROM MÉTIS OR TREATY TESTS

Next, we explained why it was wrong to attempt to import either requirement from the Métis rights or treaty rights test into the test for Aboriginal rights for

55. See *Van der Peet*, *supra* note 5 at paras 268-75.

56. *Ibid* at paras 277-78 [emphasis added].

57. *Ibid* at para 63.

First Nations people. The trial judge relied on paragraph 27 from *Powley* to show that a majority of the Court had adopted the "McLaughlin [*sic*] test" (*i.e.*, the "community-continuity test"). This paragraph, directly under the heading "Identification of the Contemporary rights-Bearing Community" in *Powley*, discusses the requirement on claimants to prove the existence of modern Métis communities.⁵⁸ We argued that these additions to the *Van der Peet* test are specific to the Métis rights test and do not apply when a claim involves Indian or First Nations peoples. First, the Court has never imposed this requirement in any decisions subsequent to *Powley* involving claims by Indian or First Nations peoples.⁵⁹

Second, we argued that the reason for this difference in approach is due to the fact that the Indians or First Nations were distinct societies *pre-existing* European contact and continued post-contact as recognizable societies, while the Métis have only come into existence through post-contact ethnogenesis.⁶⁰ Since the Métis are "new" societies (who often went "underground"),⁶¹ it is clear why they would be required to prove they are distinct societies protected by section 35. On the other hand, since the societies of Indian or First Nations, such as the Migmaq nation, were pre-existing societies that continue to be recognizable as distinct peoples, they need not prove they are an "Aboriginal people" within the meaning of section 35(1) in each Aboriginal rights case before the courts. Migmaq as an Aboriginal people is a notorious fact, of which the courts may take judicial notice.

On the treaty rights approach, we argued that distinct approaches are warranted because Aboriginal rights and treaty rights serve different purposes. Treaty rights are about honouring the solemn promises made by the Crown to the members of an Aboriginal group and their heirs. Treaty rights are in the nature of a contract and therefore, there is a more defensible argument within the context that only the heirs of the original signatories ought to exercise the rights enshrined in those agreements. On the other hand, the goal of Aboriginal rights is broader: to provide cultural security and continuity for the Aboriginal society claiming the right.⁶² Based on these different objectives, a different approach to beneficiaries and where they may exercise their rights could be justified. That

58. *Bernard NBPC*, *supra* note 2 at paras 54-62, citing *Powley*, *supra* note 20 at para 24.

59. This includes *Sappier*; *Gray*, *supra* note 13; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56.

60. See *Powley*, *supra* note 21 at paras 14, 36.

61. *Ibid* at para 27.

62. *Sappier*; *Gray*, *supra* note 13 at para 33.

said, we also pointed out that the *obiter* comments in *Marshall (No 2)* prioritizing “local communities” has been criticized as inconsistent with the Court decision in *Marshall (No 1)*.⁶³

9. THE COURT JURISPRUDENCE SUGGESTS THE RIGHTS-HOLDER IS THE NATION OR PEOPLE—NOT SUB-GROUPS

Finally, on the lower courts’ approach to the CCR, we emphasized that identifying the rights-holder here as a sub-group of the Miqmaq people was unduly narrow and not consistent with previous SCC decisions. While the Court has yet to provide explicit guidance on who the beneficiaries of an Aboriginal right are in a given case, the jurisprudence suggests a generous approach. The Court has used a variety of terms to describe the beneficiaries of Aboriginal rights. This includes the “group of [A]boriginal people,” “[A]boriginal community,”⁶⁴ “societies,” “peoples,”⁶⁵ and “[A]boriginal nation.”⁶⁶

On balance, the approach of the Court has been to favour descriptions of particular Aboriginal rights holders as the tribe or nation and not smaller band groupings, unless a sub-group identifies and understands *itself* as a distinct culture.⁶⁷ Cases that have spoken in terms of “peoples,” “tribes,” or “nations” include *Van der Peet* (e.g., “the Sto:lo,” which is a nation made up of a collection of bands),⁶⁸ *R v NTC Smokehouse Ltd* (which treated two tribes of the Nuu-chah-nulth identically given there was no difference in their cultures),⁶⁹ *R v Nikal* (e.g., “the We’suwet’en people” as opposed to the Moricetown band),⁷⁰ *Adams* (e.g., the “Mohawk” as opposed to Akwesasne band),⁷¹ *Côté* (e.g., the

63. *R v Marshall (No 1)*, [1999] 3 SCR 456 [*Marshall (No 1)*]; see also *Marshall (No 2)*, *supra* note 32 (it has been noted that had the Court applied its guidance on treaty beneficiaries stated in *Marshall (No 2)* to the facts of this case, Donald Marshall Jr would not have been successful in establishing a treaty right, as he was from the Cape Breton band of Membertou but was fishing eels in an area of the Afton band located on mainland Nova Scotia); Bruce H Wildsmith QC, “Vindicating Mi’kmaq Rights: The Struggle before, During and after Marshall” (2001) 19 Windsor YB Access Just 203 at 230-31; Battiste, “Understanding the Progression of Mi’kmaq Law,” *supra* note 10 at 332.

64. See *Van der Peet*, *supra* note 5 at para 69.

65. See *Côté*, *supra* note 23 at paras 38, 41.

66. See *Delgamuukw*, *supra* note 47 at para 115.

67. See *R v Sparrow*, [1990] 1 SCR 1075 at 1094-95 [*Sparrow*]; *Gladstone*, *supra* note 43 at para 26 (this appears to have been the case in some decisions involving some west coast groups).

68. See *Van der Peet*, *supra* note 5 at paras 2, 76, 80, 84-89, citing *Supreme Court of British Columbia* (1991) 58 BCLR (2d) 392 at para 8.

69. [1996] 2 SCR 672 at paras 23, 66.

70. [1996] 1 SCR 1013 at para 1.

71. *Adams*, *supra* note 23 at para 37.

“Algonquin” as opposed to the Desert River band),⁷² *Mitchell* (e.g., “the Mohawk nation” as opposed to the Akwesasne band),⁷³ *Sappier*, and *Polchies* (which speaks in terms of the distinctive culture and territories of “the Maliseet” and “the Mi’kmaq”).⁷⁴

B. THE BETTER ALTERNATIVE TO THE CCR IS HOLDING THE MÌGMAQ NATION AS THE RIGHTS-HOLDER

1. MÌGMAQ WERE DECENTRALIZED, BUT NONETHELESS A NATION

In addition to showing the flawed reasoning of the lower courts, we sought to introduce a better alternative. We argued here that it was obvious that the rights-holder had to be the Mìgmaq people as a whole. If this inspired fear of a free-for-all, we emphasized the Mìgmaq’s right to govern over hunting rights, including over deciding those who may exercise such rights. To counter the “lack of a Superchief” argument, we relied on the record and RCAP evidence once again to explain Mìgmaq’s socio-political organization. We acknowledge that although Mìgmaq generally travelled in smaller kinship groups, Mìgmaq saw themselves as forming part of a larger cultural, linguistic, and political group through the system of having district chiefs coming together through the Mawimi.⁷⁵ The RCAP report spoke about Mìgmaq having a sophisticated federal system:⁷⁶

Multi-level structures of governance are not new to First Nations. Many First Nations were traditionally organized in federations and confederacies. The Mi’kmaq Nation is an example of a federal-type association. According to the accounts of interveners, the most basic unit in the Mi’kmaq Nation was the family, which joined together with other families for economic purposes at the local or community level—the level of the extended family or clan—in Mi’kmaq, *wikamow*. At this level, decisions were made concerning internal relations, social and seasonal movements, and assignment of community tasks. Leadership was provided by an individual *sagamaw* who worked closely with a council of elders, generally composed of the heads of families.

The next tier of organization occurred at the district or regional level. The Mi’kmaq homeland of Mi’kma’ki comprised seven *sakamowti*, or districts, covering parts of present-day Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, St. Pierre and Miquelon, the Gaspé peninsula and the Magdalen Islands. The political organization at this level, which included district chiefs, made decisions

72. *Côté*, *supra* note 23 at para 6.

73. See *Mitchell*, *supra* note 24 at para 2.

74. *Sappier*; *Gray*, *supra* note 13 at paras 52-53.

75. *RCAP Volume One*, *supra* note 9 at 50-53.

76. *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Canada Communication Group, 1991) at 152.

regarding war and peace and also assigned hunting territories to the various families living in the district. The highest level of organization was the Mi'kmaq Nation.

We suggested that the Court could take judicial notice of historical evidence identified in the RCAP report.⁷⁷ We emphasized that there was no evidence presented by either the Crown or Defence to suggest that the groups who make up the different districts of Mìgmàgi constituted separate tribes with distinct cultures and languages. We raised the fact that previous decisions of the New Brunswick Court of Appeal and other courts have consistently treated Mìgmaq as one people or nation.⁷⁸

2. IT IS NOT THE ROLE OF THE COURTS TO DETERMINE INDIVIDUAL MEMBERS / RIGHTS-HOLDERS

We stressed that, although it may be tempting to do so, courts should resist defining with precision who among the Mìgmaq can exercise site-specific section 35 rights. The goal of Aboriginal rights is to provide cultural security and continuity for the Aboriginal society in question. In this regard, it is the Aboriginal society itself that is best situated to determine how Aboriginal rights should be managed in order to achieve these objectives. Population demands, cultural, subsistence, social needs, ceremonial needs, Mìgmaq laws, and customs may all inform this determination. As well, the priorities to achieve these goals may also change over time. Non-Aboriginal governments and courts are unlikely to be knowledgeable about the priorities and needs of Aboriginal societies vis-à-vis the exercise of their Aboriginal rights.

3. THE RIGHT TO HUNT INCLUDES THE RIGHT TO REGULATE WHO CAN HUNT

We argued that the Mìgmaq right to govern over their hunting rights derives from the fact that Aboriginal rights are communal rights.⁷⁹ In *Sappier and Gray*,

77. The courts may take judicial notice of Report of the Royal Commission on Aboriginal Peoples and other public reports like it. See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Final Report of the Truth and Reconciliation Commission of Canada*, (2015); David Stack, “The First Decade of RCAP’s Influence on Aboriginal Law” (2007) 70 Sask L Rev 123 at 140. Further, the Supreme Court of Canada has stated that it can take judicial notice of the facts of history whether past or contemporaneous: see *R v Sioui*, [1990] 1 SCR 1025 at para 60; *Nikal*, *supra* note 65 at para 26.

78. See *e.g. R v Bernard*, 2003 NBCA 55 at para 71.

79. See *Sparrow*, *supra* note 62 at 25; *Delgamuukw*, *supra* note 47 at para 115. See also *Campbell v British Columbia*, 2000 BCSC 1123 at paras 137-38, 141; Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (2007) National Centre for First Nations Governance at 16-17, online: <https://digitalcommons.osgoode.yorku.ca/all_papers/261>.

the Court suggested that the communal nature of Aboriginal rights implies an included right of the community to make decisions with regard to the exercise of that right:⁸⁰

The right to harvest wood for domestic uses is a communal one. Section 35 recognizes and affirms existing [A]boriginal and treaty rights in order to assist in ensuring the continued existence of these particular [A]boriginal societies. The exercise of the [A]boriginal right to harvest wood for domestic uses must be tied to this purpose. *The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the [A]boriginal community independently of the [A]boriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.*

Furthermore, in earlier SCC decisions, the Court signaled that hunting and fishing rights include “the particular manner in which that right is exercised.”⁸¹ In *Nikal*, the fishing right in question was found to include various “regulatory rights.”⁸² Included or incidental rights were also found in *Côté*,⁸³ *R v Simon*,⁸⁴ and *R v Sundown*.⁸⁵

In response to the anticipated floodgates concern, we emphasized that our position would not mean that all Miqmaq would descend on the Saint John area. Conservation considerations dictate that not all Miqmaq could exercise the right. Further, we cited the Miqmaq legal principle of *netukulimk*, which dictates that harvesters take no more than is needed,⁸⁶ and the Cape Breton annual moose hunt regulated by the Miqmaq Chiefs of Nova Scotia as an illustration of Miqmaq’s responsible resource management in action.⁸⁷ We emphasized that there is no evidence to suggest that the Miqmaq of New Brunswick would ignore conservation considerations or their own principle of *netukulimk*; indeed, the

80. *Sappier; Gray, supra* note 13 at para 26; see also Constance MacIntosh, “Developments in Aboriginal Law: The 2006-2007 Term” (2007) 38 SCLR (2d) 1 at 28-29, 35.

81. *Sparrow, supra* note 62 at 1112.

82. *Nikal, supra* note 65 at paras 88-89.

83. *Côté, supra* note 25 at para 56.

84. See *Simon, supra* note 40 at para 28.

85. [1999] 1 SCR 393 at paras 27-30.

86. See Russel Lawrence Barsh, “*Netukulimk* Past and Present: Miqmaq Ethics and the Atlantic Fishery” (2002) 37 J Can Stud 15; Kerry Prosper, L Jane McMillan & Anthony A Davis, “Returning to *Netukulimk*: Mi’kmaq culture and spiritual connections with the resource stewardship and self-governance” (2011) 2 Intl Indigenous Policy J, art 7.

87. See Assembly of Nova Scotia Mi’kmaq Chiefs, “Tia’muwe’l Netuklimkew’l Unama’ki Moose Harvesting According to *Netukulimk*” (2009), online: <mikmaqrights.com/uploads/MooseGuidelines.pdf>.

Court in *Sparrow* recognized that Aboriginal peoples generally have histories of conservation consciousness and interdependence with natural resources.⁸⁸

Finally, we acknowledged that a right to communal authority over the right to hunt is not an unqualified or absolute right. Indeed, Aboriginal and treaty rights are not absolute and may be justifiably infringed as long as the Crown satisfies the justification test set out in *Sparrow*.⁸⁹ This requires the Crown to establish not only a compelling and substantive legislative objective, but also to show that the Crown's actions are consistent with its fiduciary duty towards Aboriginal people, including whether the Aboriginal people in question have been consulted and there is as little infringement as possible.⁹⁰ However, no justification evidence was led by the Crown here.

V. THE COURT OF APPEAL'S DECISION

A panel of the Court of Appeal, composed of Justices Larlee and Quigg and Chief Justice Richard, issued a relatively short decision of sixty-six paragraphs. Most of it is dedicated to summarizing the lower court decisions. Our arguments about imposing an impossible evidentiary standard on claimants, reinforcing colonial constructs, and ignoring the rights of the off-reserve were not mentioned.

Our arguments regarding the right of the Migmaq people to govern over hunting rights were dismissed, with the Court stating that our broader arguments on self-determination lacked a proper evidentiary foundation and therefore, could not be considered.⁹¹ However, the Court did acknowledge that the nature of communal rights mandates the community to regulate the exercise of these rights by its individual members. But such a right was restricted to the local community and not to any broader collectivity of Migmaq.⁹²

In the Court of Appeal's view, there was only one real issue: whether the rights-holder could be a "tribe/nation."⁹³ The Court concluded in the negative on this point. It appears the Court gave the greatest weight to a particular passage in *Van der Peet*:⁹⁴

88. *Sparrow*, *supra* note 62 at 1119.

89. *Ibid* at 1113-15.

90. *Ibid* at 1113-21; see also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 81-82.

91. See *Bernard NBCA*, *supra* note 2 at para 34.

92. *Ibid* at para 58.

93. *Ibid* at para 45.

94. *Ibid* at para 47.

In *Van der Peet*, Lamer C.J., for the majority, frequently referred to Aboriginal societies or the Aboriginal group claiming the right and spoke of the Aboriginal community demonstrating that a practice, custom or tradition is an Aboriginal right. Under the heading that claims to Aboriginal rights must be adjudicated on a specific rather than general basis, he explains [at para 69]:

Courts considering a claim to the existence of an [A]boriginal right must focus specifically on the practices, customs and traditions *of the particular [A]boriginal group claiming the right*. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to [A]boriginal rights could be determined on a general basis. This position is correct; the existence of an [A]boriginal right will depend entirely on the practices, customs and traditions *of the particular [A]boriginal community claiming the right*. As has already been suggested, [A]boriginal rights are constitutional rights, but that does not negate the central fact that the interests [A]boriginal rights are *intended to protect relate to the specific history of the group claiming the right*. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. *The fact that one group of [A]boriginal people has an [A]boriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another [A]boriginal community has the same [A]boriginal right. The existence of the right will be specific to each [A]boriginal community.*

Beyond this, the Court of Appeal dismissed our arguments on the inappropriate mingling of concepts from the Métis, title, and treaty rights doctrines as "untenable,"⁹⁵ suggesting that all these concepts could be mingled to inform the interpretation of Aboriginal rights:⁹⁶

The use of the broader term "Aboriginal rights" and the specification that these include Métis rights, makes it clear the Supreme Court [in *Powley*] was elaborating principles applicable to Aboriginal rights in general. ... [I]t must be noted the Supreme Court in *Van der Peet* held that "[A]boriginal rights and [A]boriginal title are related concepts; [A]boriginal title is a sub-category of [A]boriginal rights" (para. 74). Thus, cases dealing with [A]boriginal title certainly are relevant in [A]boriginal rights cases. In addition, cases dealing with treaty rights can also be relevant where the Court has made general propositions that apply to all rights asserted under s. 35(1) of the *Constitution Act, 1982*.

The Court of Appeal explicitly disagreed with our contention that the "floodgates" concerns motivated the lower courts' decision-making, countering

95. *Ibid* at para 48.

96. *Ibid* at paras 48-49. The Court of Appeal also suggested at paragraph 63 that a different approach between Métis and other Aboriginal groups would be unfair: "There would seem to be no rational basis for the claim the Métis peoples only get to exercise [A]boriginal rights that are grounded in the existence of a historic and present community, whereas other [A]boriginal peoples get to exercise the right regardless of whether it is so grounded."

that “[t]he trial judge simply applied the law as he understood it in *Van der Peet* and other cases.”⁹⁷

Our argument that the new CCR converted Aboriginal rights to title, contrary to warnings in *Van der Peet*, *Côté*, and *Adams*, was not specifically addressed. In fact, after stating that concepts around title could inform the Aboriginal rights analysis, the Court of Appeal cited a passage from *Marshall* and *Bernard* (which is about the test for Aboriginal title) speaking of Aboriginal societies exercising control over village sites. The Court of Appeal took this as confirming that rights-holders are smaller communities: “[T]he fact that [the] Court equated Aboriginal societies with protection of their village sites indicates the communal rights to which s. 35(1) refers are specific to the smaller communities that exercised the rights at the site that is the subject of the proceeding.”⁹⁸ The Court of Appeal was oblivious to the fact that in doing so, it was again conflating the Aboriginal rights test with the test for Aboriginal title.

As to our argument that several SCC cases in fact suggest that the rights-holder is the broader nation or society, the Court of Appeal’s response left something to be desired. It circularly suggested that the rights-holder must necessarily be the local community simply because the Supreme Court described Aboriginal rights as “communal” in nature:⁹⁹

As all agree, s. 35(1) rights are communal rights. The approach of the courts has been to recognize that an Aboriginal person is a beneficiary of his/her community’s Aboriginal or treaty rights. These rights, whatever their specific content, are exercised through the community’s consent and authority. In *Delgamuukw*, Lamer C.J. in discussing [A]boriginal title, which is a subset of [A]boriginal rights, stated as follows [at para 115]:

A further dimension of [A]boriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual [A]boriginal persons; it is a collective right to land held by all members of an [A]boriginal nation. Decisions with respect to that land are also made by that community. This is another feature of [A]boriginal title which is *sui generis* and distinguishes it from normal property interests.

In response to our argument that viewing the nation as rights-holder is more consistent with the purpose of section 35 to provide cultural security and continuity, the Court of Appeal does suggest that in some cases this may be possible but that the Court has yet to recognize this:¹⁰⁰

97. See *Bernard* NBCA, *supra* note 2 at para 33.

98. *Ibid* at para 50, discussing *R v Marshall*; *R v Bernard* 2005 SCC 43.

99. *Ibid* at para 52 [emphasis in original].

100. *Ibid* at para 55.

In some cases, it may well be that evidence will show an entire tribe/nation is entitled to exercise certain Aboriginal rights that are distinctive to their culture in all of the territory the tribe/nation occupied pre-contact, but that is not what the Supreme Court has held to date.

However, no further guidance is given as to when such circumstances could materialize, but this concession seems entirely inconsistent with the tenor of the rest of the decision, at least when it comes to hunting, fishing, and harvesting rights.

The Court of Appeal ends its decision by citing deference to findings of fact on the social organization of the Mi'gmaq people, which it stresses were not challenged on the appeal:¹⁰¹

[T]he evidence accepted by the trial judge, to whom deference is owed regarding his assessment of either fact or credibility, was that the Mi'kmaq historically organized themselves as separate bands each with their own traditional hunting territories. While there was a common culture and social bonds amongst these individual communities, each community had its own chief, and the communities governed themselves independently. ... No evidence was presented at trial that would allow one to conclude that a modern-day Nation has become the contemporary community entitled to exercise all rights that had historically been exercised by local communities. While it may be that, in some cases, the evidence might reveal that certain communal rights belong to a tribe or nation, it was simply not the case in the matter under appeal.

In this final passage, the Court of Appeal seems to suggest that our failure was in not challenging the trial judge's finding of fact that Mi'gmaq historically organized themselves as separate bands according to Doctor Patterson's evidence. The Court of Appeal plays the question of "who is the rights-holder?" both ways here. For most of the decision, it appears to accept that this is a question of law alone (small geographic community versus nation), but in the end, switches gears to suggest that this is a question of the evidence. Although we maintained this finding was wrong in fact, our position before the court was clear: The question of "who is the rights-holder?" is a question of law alone. The answer to the question is that it is the nation or people, and this is to be based on perspectives of the group in question. On any subsequent questions such as "who is a member of the nation?" and "who can exercise rights belonging to the nation?" we argued that such are matters to be left to the nation and not the courts. In oral submission before the court, we stressed such an approach was consistent with Article 9 of the *United Nations Declarations of the Rights of Indigenous Peoples*, which states that

101. *Ibid* at paras 56, 62.

“Indigenous peoples and individuals have the right to belong to an [I]ndigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.”¹⁰² The article suggests that who is part of the nation is a matter for the nation alone.

VI. OUR DECISION NOT TO SEEK LEAVE TO APPEAL TO THE SUPREME COURT OF CANADA

Although we felt there were numerous errors in the reasons, several considerations informed our decision not to appeal to the SCC. One, of course, was the matter of costs—a SCC appeal would involve agent and filing fees, as well as travel fees to Ottawa that Mr. Bernard could not afford. Second, if the Court did not want to engage with our substantive arguments, particularly those on the Miqmaq right to manage hunting rights (I believe this is truly a legal issue more than a factual one), we felt that the Court might cite gaps in the evidentiary record as an easy excuse not to engage with such arguments (as we saw the Court of Appeal do). In this regard, the fact that the Miqmaq of New Brunswick had yet to exercise the right to regulate Miqmaq hunting may have been a disincentive for the Court to engage with this argument, as some judges may feel that finding such a governance right in a legal vacuum might invite the floodgates concern that seemed to have preoccupied the trial judge. We also thought it was probably better to be stuck with a bad (*i.e.*, poorly reasoned) Court of Appeal decision over a bad SCC decision.

Moreover, we saw a way to use the Court of Appeal’s finding—that the local community had the power to regulate hunting rights—for the benefit of the larger Miqmaq nation.¹⁰³ The holding in *Behn v Moulton Contracting Ltd* established that rights-holders may authorize an individual or an organization to represent them for the purpose of asserting their section 35 rights.¹⁰⁴ With this decision, it seemed to us that if the larger political organization of Miqmaq in New Brunswick (currently made up of the Chiefs of each First Nation) wanted to regulate Miqmaq hunting rights, the authority could be delegated to it by each local band or First Nation. It could also develop rules and processes to decide who can hunt and where within the Miqmaq territory in New Brunswick, including Mr. Bernard.

102. *UNDRIP*, *supra* note 12, art 9.

103. See *Bernard NBCA*, *supra* note 2 at para 58.

104. 2013 SCC 26 at para 30.

VII. CONCLUSION: REFLECTIONS ON THE CASE

Leading up to the Court of Appeal hearing and even after making submissions in this case, I was confident that our argument for the right of the Miqmaq people in the province to manage their own hunting rights had a reasonable chance of success. To me, this was a much neater and simpler approach to the question of whether the Miqmaq people living in Saint John can hunt, compared to the analytical gymnastics the lower courts engaged in to come to their result. The argument was for moving the law incrementally; it was not advancing a full-blown argument for self-government, but rather was proposing a modest expansion of the law in line with the incidental rights theory and what the Court had already said about the nature of communal rights.

While the Court of Appeal did accept that Miqmaq can regulate their hunting rights, they limited this right to the “local community.” I believe the Court of Appeal only had modern *Indian Act* reserve communities in mind, and not other communities. It is doubtful that they considered local communities of Miqmaq living in urban centres; otherwise, they might have considered Mr. Bernard and his large extended family (who had been in Saint John for four generations) as a “local community.”

The Court of Appeal adopted a very narrow understanding of “community” as a small, geographic community. However, the word “community” in fact bears several meanings, as can be seen from the Merriam-Webster Dictionary definition, which ascribes eight separate meanings to the term, of which sub-clause (d) aptly describes the Miqmaq as “a body of persons or nations having a common history or common social, economic and political interest.”¹⁰⁵ It is also clear that the Court of Appeal took it to be obvious that the SCC in *Van der Peet* intended “community” and “particular Aboriginal group” to also mean a small, geographic community. However, there is room to doubt this, especially when the Court used the word “community” and “Aboriginal group” interchangeably within the decision with words like “peoples,” “tribes,” and “nations” (as it has done so in several other Aboriginal rights cases as reviewed above).¹⁰⁶

105. Merriam-Webster, “Definition of Community,” online: <www.merriam-webster.com/dictionary/community>.

106. See *Van der Peet*, *supra* note 5 at paras 2, 76, 80, 84-89; see also Kent McNeil, “Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority” (2020) 57 *Osgoode Hall LJ*.

While it is true that the Court signalled in *Van der Peet*, especially at paragraph 69, that Aboriginal rights cannot exist on a general basis,¹⁰⁷ it does not follow from this that every single and separate geographical Aboriginal community in Canada would have to prove the same Aboriginal right, such as the right to hunt. Consider this in light of the fact there are over six hundred and thirty First Nations communities throughout Canada.¹⁰⁸ The Court of Appeal's approach would require six hundred and thirty court actions to permit each First Nation community to hunt for food alone.¹⁰⁹ Such an approach seems unnecessary and excessive when one appreciates that those six hundred and thirty First Nations belong to one of about fifty distinct Aboriginal nations.¹¹⁰ Each of these nations has their own distinct language, culture, and social-political structure. Therefore, the communities belonging to each nation would share the same distinctive and integral practices, customs, and traditions of the nation's culture that the *Van der Peet* test aims to protect. That being the case, why would section 35 require sub-groups of smaller communities from the same nation or culture to individually prove the elements of *Van der Peet* in a lengthy and expensive court battle? How would that achieve the stated purpose of section 35 to reconcile asserted Crown sovereignty with the pre-existence of Aboriginal peoples on these lands?

How did the judges miss this? My colleagues, Paul Chartrand and Gordon Christie, have advanced broader institutional arguments about how courts are not suited to make decisions on who the Aboriginal rights-holders are, because this should be left to government-to-government relations, or because judges are too entrenched in liberal ideology to seriously entertain questions of Indigenous self-determination.¹¹¹ Either may well be the case, but I search (perhaps in vain) for more immediate reasons.

One possible reason is that the Aboriginal rights test—including how it interacts with the treaty rights, Aboriginal title, and Métis rights tests—is overly

107. For a thoughtful and nuanced consideration on the case law on this issue, see Brian Slattery, "The Generative Structure of Aboriginal Rights" in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Purich, 2008) 20.

108. Government of Canada, "First Nations" (4 December 2017), online: *Crown-Indigenous Relations and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100013791/11535470872302>> [*First Nations*].

109. This example does not even factor in other communities, like the Inuit, Métis, off-reserve, or non-status communities.

110. *First Nations*, *supra* note 102.

111. Paul Chartrand, "Rethinking the Doctrine of Aboriginal Rights: The Métis Cases" (2020) 57 *Osgoode Hall LJ* 173; Gordon Christie, "Potential Aboriginal Rights-holders: Canada and Cultural Communities Versus Indigenous Peoples and Socio-Political Bodies" (2020) 57 *Osgoode Hall LJ* 1.

complex and confusing, especially for judges who likely did not study this area in law school or practice in this area. In this regard, the site-specificity requirement seemed particularly challenging for the judges hearing Mr. Bernard's case to apply. The judges could not accept that it would be sufficient for Migmaq to have previously frequented the site prior to contact, as this is clearly all that is required from *Van der Peet*, *Côté*, and *Adams*, as discussed above.¹¹² Instead, the judges hearing Mr. Bernard's case essentially added a requirement to prove that Migmaq had been continuously and currently using the site through CCR (a requirement that looks remarkably like the test for the Aboriginal title). Perhaps the Euro-Canadian, common-law-trained brain is hard-wired to recognize more sedentary or agricultural land-use patterns and is challenged to recognize otherwise? While the Court has repeatedly cautioned against falling into such traps, this is a mistake that lower courts continue to make.¹¹³ How could the Court of Appeal not realize it was making such a mistake, despite the several passages from the Court we referred them to?

In examining the lower courts' and Court of Appeal's decisions in this case, it becomes evident that all the judges were resistant to seriously engaging with the idea that the Migmaq nation could be the rights-holders. This proposition was dismissed out of hand by the trial judge and the Court of Appeal read an unduly narrow concept of "community" into SCC jurisprudence to avoid dealing with this submission. Instead, we get the fictitious "Saint John Migmaq community or nation" as the rights-holders and implicit acceptance of the "lack of a Superchief" theory. By this, the Court of Appeal engaged in just as much, if not more, legal gymnastics than the trial judge in order to side-step this issue, particularly when the lower court's errors were squarely raised before them.

Why were the judges so unwilling to seriously engage with the idea that the Migmaq nation was the rights-holder? Although the Court of Appeal explicitly disagreed with me on this, I think Mr. Bernard lost in the end, because of floodgate concerns. I am convinced that there was an underlying fear among the judges in this case, perhaps not even fully consciously realized, that a finding for Mr. Bernard would mean a result where any Migmaq person—from Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and Gaspé to Maine—could go hunt in Saint John and anywhere else in Migmàgi (the

112. Based on the Aboriginal rights test, the relevant time period is pre-contact use. It has been found that Migmaq are precluded from claiming rights over territories they used only after contact. See *Queen v Drew*, 2003 NLSCTD 105 at para 615.

113. See e.g. Karen Drake, "R v Hirsikorn: Are Métis Rights a Constitutional Myth?" (2013) 92 Can Bar Rev 149.

land of the Migmaq). I have already set out the numerous reasons why such a concern is unwarranted. I will only conclude by saying that the Migmaq nation is a reasonable and is of reasoning people, who ought to be given the space to conscientiously manage their hunting rights. By failing to have the courage to make this space, the law in New Brunswick now regressively ties the exercise of Aboriginal rights to *Indian Act* reserves, and imposes the onerous requirement that each band must individually prove their Aboriginal rights. This effectively deprives those Migmaq people like Mr. Bernard who are living off-reserve, but still within Migmàgi, the ability to exercise site-specific Aboriginal rights.