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A Right Without a Rights-Holder Is Hollow: Introduction to OHLJ's Special Issue on Identifying Rights-Bearing Aboriginal Peoples

Karen Drake
Osgoode Hall Law School of York University

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Introduction



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A Right Without a Rights-Holder Is Hollow: Introduction to OHLJ's Special Issue on Identifying Rights-Bearing Aboriginal Peoples

Abstract

The focus of this special issue of the *Osgoode Hall Law Journal* is on identifying holders of rights which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. While Canadian and provincial governments and industry proponents have assumed that *Indian Act* bands are section 35 rights-holders, Kent McNeil's analysis of the relevant jurisprudence reveals that this issue is to be resolved with reference to Aboriginal peoples' own laws. As such, the assumption that a section 35 rights-holder must possess an overarching governance structure is unwarranted if the relevant Aboriginal people's own laws are not grounded in positivism. Naomi Metallic's incisive critique demonstrates that the reasoning in *R v Bernard* was captured by precisely this type of positivist assumption when the court held that smaller Migmaq collectives—as opposed to the larger Migmaq nation—must be the rights-holder because the larger Migmaq nation lacked a 'Super Chief'. Gordon Christie identifies another form of capture within the section 35 jurisprudence: Aboriginal peoples are presumed to be socio-cultural bodies and not political bodies, and Aboriginal rights are presumed to be cultural activities and not governmental powers to exercise jurisdictional authority. Both presumptions are captured by liberalism and neither is supported by the text or by a purposive interpretation of section 35(1). Sara Mainville's article uncovers a conflict between Canadian and Indigenous law in the context of a *Kelly* order, which courts characterize as a practical solution to the dilemma of how to identify the rights-holder on an interlocutory motion. Mainville demonstrates that the adversarial effects of a *Kelly* order contravene the Anishinaabe legal principle of consensus-building. Perhaps unsurprisingly given these various conflicts between Canadian jurisprudence and Indigenous laws, Paul Chartrand argues that the identity of rights-holders should be decided through political negotiations between political actors, and not by the courts. Similarly, Jason Madden argues that the Supreme Court of Canada's jurisprudence entails a duty on Canadian and provincial governments to negotiate with an Aboriginal people to identify the proper rights-holder when a *prima facie* Aboriginal right exists. In these ways, the articles in this special issue make valuable contributions to ongoing discussions about identifying section 35 rights-holders.

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A Right Without a Rights-Holder Is Hollow: Introduction to OHLJ's Special Issue on Identifying Rights-Bearing Aboriginal Peoples

KAREN DRAKE*

The focus of this special issue of the *Osgoode Hall Law Journal* is on identifying holders of rights which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. While Canadian and provincial governments and industry proponents have assumed that *Indian Act* bands are section 35 rights-holders, Kent McNeil's analysis of the relevant jurisprudence reveals that this issue is to be resolved with reference to Aboriginal peoples' own laws. As such, the assumption that a section 35 rights-holder must possess an overarching governance structure is unwarranted if the relevant Aboriginal people's own laws are not grounded in positivism. Naomi Metallic's incisive critique demonstrates that the reasoning in *R v Bernard* was captured by precisely this type of positivist assumption when the court held that smaller Migmaq collectives—as opposed to the larger Migmaq nation—must be the rights-holder because the larger Migmaq nation lacked a 'Super Chief'. Gordon Christie identifies another form of capture within the section 35 jurisprudence: Aboriginal peoples are presumed to be socio-cultural bodies and not political bodies, and Aboriginal rights are presumed to be cultural activities and not governmental powers to exercise jurisdictional authority. Both presumptions are captured by liberalism and neither is supported by the text or by a purposive interpretation of section 35(1). Sara Mainville's article uncovers a conflict between Canadian and Indigenous law in the context of a *Kelly* order, which courts characterize as a practical solution to the dilemma of how to identify the rights-holder on an interlocutory motion. Mainville demonstrates that the adversarial effects of a *Kelly* order

* Associate Professor and Associate Dean (Students) at Osgoode Hall Law School at York University, and member of the Wabigoon Lake Ojibway Nation. I am very grateful to the authors of the articles included in this special issue and to the editors of the Osgoode Hall Law Journal for their feedback and suggestions on an earlier draft of this introduction. Any errors are my responsibility.

contravene the Anishinaabe legal principle of consensus-building. Perhaps unsurprisingly given these various conflicts between Canadian jurisprudence and Indigenous laws, Paul Chartrand argues that the identity of rights-holders should be decided through political negotiations between political actors, and not by the courts. Similarly, Jason Madden argues that the Supreme Court of Canada’s jurisprudence entails a duty on Canadian and provincial governments to negotiate with an Aboriginal people to identify the proper rights-holder when a *prima facie* Aboriginal right exists. In these ways, the articles in this special issue make valuable contributions to ongoing discussions about identifying section 35 rights-holders.

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I. WHO ARE “THE ABORIGINAL PEOPLES OF CANADA”?

SECTION 35(1) OF THE *Constitution Act, 1982*, recognizes and affirms the “existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada.”¹ The overarching question guiding this special issue is: Who are “the [A]boriginal peoples of Canada”?² Answering this question at a high level of generality is straightforward: Section 35(2) clarifies that the “[A]boriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.”³ Given that both provisions refer to “peoples” in the plural, it is unsurprising that the Supreme Court of Canada (“SCC”) consistently affirms the collective nature of section

1. *Constitution Act, 1982*, s 35(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

2. I generally use the term “Indigenous” except when “Aboriginal” is more accurate, such as when referring to rights and rights-holders pursuant to section 35.

3. *Constitution Act, 1982*, *supra* note 1.

35(1) rights.⁴ Generally speaking, the rights-holder is the relevant Aboriginal people, or in other words, the collective. Granted, the Court has left open the possibility that section 35(1) rights might have not only a collective but also an individual aspect, for example, insofar as an Aboriginal individual may have an entitlement to exercise an Aboriginal or treaty right.⁵ That being said, our focus in this issue is on delineating the relevant rights-holding collective.

Once we take up the more specific task of identifying particular Aboriginal peoples, our project becomes more complex. As John Borrows explains, Indigenous peoples' identities have been "fractured and reconfigured" by Canadian law and policy,⁶ most notably, for example, by the imposition of foreign governance structures—such as *Indian Act* bands, Inuit hamlets, and Métis settlements—over Indigenous peoples' own forms of governance.⁷ However, this imposition "has been partial and incomplete. Older Indigenous identities intermingle with imposed, invented or reformulated identities."⁸ As a result, the competing governance orders giving rise to an Indigenous people's identity may be diffuse, centralized, contested and ambiguous.⁹ Thus, processes of colonialism are at least partly responsible for the complexity of Indigenous peoples' identities. An equally important consideration is the sophistication and nuance of Indigenous peoples' own laws and governance. The political and governance systems of many Indigenous peoples are fluid and/or multi-leveled. As such, the manner of identifying the proper rights-holder can differ between different Indigenous peoples. Even within a single Indigenous people, the identity of the rights-holder can vary according to context and shift over time.

If an Indigenous people's legal and governance processes are assumed to be simplistic and one-dimensional, then complexity is encountered as

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4. *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 30, 33 [*Behn*]; *R v Sappier*; *R v Gray*, 2006 SCC 54 at paras 26, 31; *R v Marshall*, [1999] 3 SCR 533 at paras 17, 37 [*Marshall*]; *R v Sundown*, [1999] 1 SCR 393 at para 36; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115 [*Delgamuukw*]; *R v Sparrow*, [1990] 1 SCR 1075 at 1078, 1112 [*Sparrow*].
 5. *Behn*, *supra* note 4 at paras 33, 35.
 6. John Borrows, "Wise Practices in Indigenous Economic Development and Environmental Protection" in Robert Hamilton et al, eds, *Wise Practices: Exploring Indigenous Economic Justice and Self-Determination* (University of Toronto Press) [forthcoming in 2021], manuscript at 10 [Borrows, "Wise Practices"].
 7. *Ibid.*
 8. *Ibid.*
 9. *Ibid.* See also Gordon Christie, "Potential Aboriginal Rights-holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-political Bodies" (2020) 57 Osgoode Hall LJ 1 at 6 (describing the complexity amongst First Nations, bands, tribal councils, and Indigenous nations).

an unwarranted obstacle instead of as the norm, which is how complexity is experienced within Canadian governance generally.¹⁰ Borrows highlights the intricacy of Canada's governance system insofar as various political collectives are organized along at least three different scales: municipal, provincial/territorial, and federal.¹¹ Not surprisingly then, the identity of the Crown—the duty-holder who corresponds to a section 35(1) rights-holder—is also often contested.¹² Moreover, no one expects consensus or unanimity either across or within any of Canada's three scales of representation. Municipal, provincial/territorial, and federal governments routinely disagree with one another, as do various political parties, councilors, and other representatives within each level of government. Indigenous peoples should not be held to a higher standard of consensus, and certainly not to an impossible standard.¹³

That said, internal calls for consensus grounded in an Indigenous people's own laws are valuable in that they help to parse the layers of complexity and thus to facilitate the process of identifying an Aboriginal people. For example, Sara Mainville's contribution to this issue discusses the processes adopted by Grand Council Treaty Three for ensuring the Anishinaabe Nation of the Boundary Waters is "of one mind" in its decision making, as well as the ways in which these processes are grounded in *miinigoziwin*, the inherent authority given by the Creator to the Anishinaabe Nation of the Boundary Waters.¹⁴ At the same time, we must guard against a pan-Indigenous approach, which erroneously assumes all Indigenous peoples are a homogenous monolith. Not all Indigenous peoples use consensus-based decision making. Thus, some external critiques of an Aboriginal people's lack of unanimity may be grounded not in Indigenous peoples' own laws but in proponents' own desires for certainty in determining with whom to

10. See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (Otago University Press, 2012) at 77.

11. Borrows, "Wise Practices," *supra* note 6 at 11.

12. See e.g. Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v Salmon Arm (City)*" (2014) 47 UBC L Rev 293; Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35 Windsor YB Access Just 311.

13. Similarly, as Naomi Metallic notes in her article in this issue, the Supreme Court of Canada "has signalled on several occasions that reconciliation means avoiding approaches that would entail impossible evidentiary burdens." Naomi Metallic, "Searching for 'Superchief' and Other Fictional Indians: A Narrative and Case Comment on *R v Bernard*, 2017 NBCA 48" (2020) 57 Osgoode Hall LJ 230 at 247.

14. Sara Mainville, "Hunting Down a Lasting Relationship with Canada – Will UNDRIP Help?" (2020) 57 Osgoode Hall LJ 98 at 113-114, 122.

consult.¹⁵ We can consider whether such approaches apply stereotypes and erase the complexity of Indigenous laws and governance.

As Kent McNeil recognizes in his contribution to this issue, other than sections 35(1) and 35(2), the current provisions of the *Constitution Act, 1982* provide no further guidance on defining the section 35(1) rights-holder and so it has fallen to either the courts or the parties to craft a resolution through negotiations.¹⁶ Paul Chartrand, in this issue, reminds us that negotiation was initially the favoured approach.¹⁷ Sections 37 and 37.1 of the *Constitution Act, 1982* provided for constitutional conferences on the “identification and definition” of section 35 rights with representatives of Aboriginal peoples and federal, provincial, and territorial leaders.¹⁸ These conferences resulted in little agreement, and as Chartrand reports based on his participation in the conferences, the question of identifying section 35 rights-holders was generally ignored.¹⁹

Of course, the parties can still resolve this issue through negotiations. Jason Madden’s contribution to this special issue argues that the SCC’s section 35 jurisprudence entails a Crown duty to negotiate with an Indigenous people about how to identify the rights-holder.²⁰ This approach is consistent with reconciliation, the central purpose and “first principle”²¹ of section 35, as consistently affirmed by the SCC.²² Given the Court’s notoriously nebulous reconciliation jurisprudence, commentary abounds on what this term does or

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15. See e.g. Aidan Macnab, “Indigenous Law Experts Weigh in on the Wet’suwet’en Protests,” *Canadian Lawyer* (25 February 2020), online: <www.canadianlawyermag.com/practice-areas/indigenous/indigenous-law-experts-weigh-in-on-the-wetsuweten-protests/326702> [perma.cc/854C-2E2G] (particularly Roy Millen’s comments).
 16. Kent McNeil, “Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority” (2020) 57 *Osgoode Hall LJ* 127 at 128.
 17. Paul Chartrand, “Rethinking the Doctrine of Aboriginal Rights: The Métis Cases” (2020) 57 *Osgoode Hall LJ* 173 at 174.
 18. *Constitution Act, 1982*, *supra* note 1, ss 37, 37.1.
 19. Chartrand, *supra* note 17 at 174, n 4.
 20. Jason Madden, “The Re-Emergence of One of the Previously Slayed Métis Rights-Denial Dragons: A Comment on the Dangers and Duplicity in *Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta*,” (2020) 57 *Osgoode Hall LJ* 195 at 200-201.
 21. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 22, Karakatsanis J.
 22. *Lax Kw’alaams Indian Band v Canada (AG)*, 2011 SCC 56 at para 12; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1; *R v Van der Peet*, [1996] 2 SCR 507 at para 31 [*Van der Peet*].

should mean.²³ Whatever else “reconciliation” might mean, it arguably calls for a non-adversarial relationship between Indigenous peoples and the Crown. For example, the Court in *Tsilhqot’in Nation v British Columbia* explains that the “governing ethos” of section 35 “is not one of competing interests but of reconciliation.”²⁴ The inherently adversarial nature of our justice system means only a negotiated—rather than court-imposed—solution is consistent with reconciliation.²⁵

Mainville highlights the potential promise of the federal government’s recent litigation directive as a means of avoiding the pitfalls of litigating the issue of identifying section 35 rights-holders.²⁶ Litigation Guideline #15 of the document directs the federal government to take a “large and liberal approach ... to the question of who is the proper rights holder” and seems to recognize the value of a non-litigious approach: “Canada respects the right of Indigenous peoples and nations to define themselves and counsel’s pleadings and other submissions must respect the proper rights-bearing collective.”²⁷ And yet, litigation on the issue of identifying the rights-holder continues. The SCC has granted leave to appeal in *R v Desautel*.²⁸ Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes, which forms a part of the Sinixt people.²⁹ Sinixt traditional territory spans the Canada–US border, extending north into British Columbia

23. For discussions of the meaning of “reconciliation,” see Aimée Craft, “Neither Infringement nor Justification: The Supreme Court of Canada’s Mistaken Approach to Reconciliation” in Karen Drake & Brenda L. Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Wiyasiwewin Mikiwahp Native Law Centre, 2019) 59; Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (McGill-Queen’s University Press, 2015) [*TRC Final Report*]; Mark D. Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2008) 165.

24. *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 17 [*Tsilhqot’in Nation SCC*].

25. Felix Hoehn, “The Duty to Negotiate and the Ethos of Reconciliation” (2020) 83 Sask L Rev 1 at 2.

26. Mainville, *supra* note 14 at 106.

27. Canada, Department of Justice, *The Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples* (Her Majesty the Queen in Right of Canada, 2018), online: <www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html> [perma.cc/P848-WPH5].

28. *R v Desautel*, 2019 BCCA 151 [*Desautel CA*], leave to appeal to SCC granted, 38734 (24 October 2019) [*Desautel Leave to SCC Granted*]. Although the federal government is not a party in this case, it is an intervenor. This case is discussed by Kent McNeil in his contribution to this special issue. See *supra* note 16 at 163–167.

29. *Desautel CA*, *supra* note 28 at paras 4, 49.

and south into Washington State.³⁰ Mr. Desautel is neither a resident nor a citizen of Canada; he lives on the Colville Indian Reserve in Washington State.³¹ While hunting in the portion of Sinixt territory located in British Columbia, he shot an elk and was charged with hunting without a licence and without being a resident of British Columbia, in violation of British Columbia's *Wildlife Act*.³² Mr. Desautel argues his actions were protected by section 35(1). This case raises the issue of whether an Indigenous people who are no longer resident in Canada, and whose members are not Canadian citizens, can have section 35 Aboriginal rights.

The articles in this special issue provide guidance on all of these topics. Part II of this introduction, below, examines the current law on identifying a section 35 rights-holder. It summarizes Kent McNeil's contribution, which synthesizes the existing jurisprudence and concludes that the rights-holder is to be identified in accordance with an Indigenous people's own law. This section also analyzes the text of section 35 which indicates rights-holders are political entities with governmental powers such as jurisdiction and law-making authority. In contrast, as Gordon Christie's article illustrates, the SCC's jurisprudence conceptualizes section 35 rights-holders as mere socio-cultural bodies, in accordance with the commitments of liberalism. In other words, the Court's jurisprudence succumbs to constitutional capture. Aaron Mills explains constitutional capture as the violence that results when one legal order is understood not through the lens of its own lifeworld and constitutionalism, but rather is translated through the logic of a different constitutionalism.³³ The Court's jurisprudence filters Aboriginal rights through the lens of liberal constitutionalism. Part III discusses Naomi Metallic's article, which uncovers the errors within the courts' analyses in *R v Bernard*. Most significantly, Metallic shows that the lower courts misstate the SCC's Aboriginal rights test by inventing a community-occupation-continuity requirement. Given the concerns highlighted by Metallic, this newly invented requirement should not be adopted in *Desautel*. The analysis of the courts in *R v Bernard* is also captured by legal positivism. Next, Part IV examines potential challenges when identifying a rights-holder in accordance with Indigenous law. Sara Mainville's article illustrates the challenge that arises when a court and Crown litigants refuse to defer to Indigenous law. The result is an unnecessarily

30. *R v Desautel*, 2017 BCPC 84 at paras 20-21.

31. *Desautel CA*, *supra* note 28 at para 4.

32. *Ibid* at para 5.

33. Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] at 14, 24.

adversarial approach which obstructs reconciliation. Part V considers who should determine the identity of the rights-holder. Many contributors highlight the folly of judicializing this issue. Paul Chartrand advocates for an approach based on consent and negotiations between Indigenous peoples and the executive branch of the Canadian government. According to Jason Madden, the SCC's section 35 jurisprudence supports this approach; and yet, as Madden illustrates, the Alberta Court of Queen's Bench has failed to uphold this jurisprudence. Finally, the conclusion considers the need for mandatory education on Indigenous and Aboriginal legal issues within law school curricula, given the concerns raised by the contributions to this special issue. Although Adrien Habermacher's article was not part of the workshop that led to this special issue, it makes a valuable contribution to this discussion insofar as it reveals the rationales underlying some faculty members' resistance to including Indigenous and Aboriginal legal issues within law school curricula.

II. HOW TO IDENTIFY THE RIGHTS-HOLDER

Although the Supreme Court of Canada has not yet explicitly addressed the topic, lower courts have been contending with whether a larger Indigenous nation or smaller sub-entities within that nation are the rights-holders. As Gordon Christie explains, framing the question in this way as merely one of community scale can be superficial.³⁴ In some cases, the smaller entities at issue—such as family groups, clans, houses, and so on—are aspects of the Indigenous peoples' own political system.³⁵ In other cases, smaller entities—such as the *Indian Act* bands, Inuit hamlets, and Métis settlements discussed above—are state-imposed attempts to dismember and replace Indigenous political bodies.³⁶ Part II(A), below, critically examines the common assumption that *Indian Act* bands are rights-holders. Part II(B) outlines Kent McNeil's synthesis of the jurisprudence, which establishes that the identity of the rights-holder is determined in accordance with an Indigenous people's own laws about its collective identity. The third sub-section, Part II(C), examines the text of section 35, which identifies rights-holders as "peoples," a term commonly understood to denote political entities who are entitled to exercise governmental authority such as jurisdiction. The plain meaning of the text contrasts sharply with the SCC's jurisprudence which implicitly characterizes Aboriginal peoples as mere socio-cultural entities, as Christie reveals. Part II(D) undertakes a purposive analysis of section 35. It concludes that the purpose of

34. Christie, *supra* note 9 at 9-11.

35. *Ibid* at 9.

36. *Ibid* at 9.

section 35 is to reconcile Aboriginal peoples with Canada's de facto control of Aboriginal peoples' lands. This analysis is consistent with the plain text, according to which section 35 rights-holders are "peoples."

A. IS THE *INDIAN ACT* BAND THE PROPER RIGHTS-HOLDER?

Industry proponents, media outlets, members of the public, and even government representatives often assume state-imposed entities such as *Indian Act* bands are the proper rights-holders.³⁷ For example, government representatives and industry proponents often attempt to consult with band councils in order to fulfill their duty to consult and accommodate prior to carrying out projects that impact section 35 rights.³⁸ This issue recently entered public consciousness with Coastal GasLink's plan to put a pipeline through the territory of the Wet'suwet'en nation. Band councils of the Wet'suwet'en nation signed agreements with Coastal GasLink, while the hereditary chiefs of the Wet'suwet'en nation opposed the project.³⁹ Some commentary on traditional and social media assumed the band councils—and not the Wet'suwet'en hereditary chiefs—represented the proper rights-holders, and thus proponents and government representatives were only obligated to consult and accommodate band councils.⁴⁰ Commentators also assumed the band councils consented to the project given their agreements with Coastal GasLink, and thus Coastal GasLink's consultation must have been sufficient.⁴¹ Are any of these assumptions correct?

Before focusing on the question of identifying the rights-holder, we can examine the final assumption listed above, namely, that entering into an agreement with an industry proponent demonstrates the consent of the Indigenous signatory. In a careful study of impact benefit agreements, Dayna Nadine Scott exposes the faulty logic underlying this assumption.⁴² These agreements are executed in the

37. Dayna Nadine Scott, "Extraction Contracting: The Struggle for Control of Indigenous Lands" (2020) 119 *South Atlantic Q* 269 at 275.

38. Christie, *supra* note 9 at 3-4, 9.

39. Macnab, *supra* note 15.

40. See e.g. Stephen LeDrew, "Canada Should Enforce the Law with Wet'suwet'en Anti-pipeline Protests," *National Post* (11 February 2020), online: <nationalpost.com/opinion/stephen-ledrew-canada-should-enforce-the-law-with-wetsuweten-anti-pipeline-protests> [perma.cc/Z8T8-KAFS]. For opposing views, see Shiri Pasternack, "No, those who defend the Wet'suwet'en Territory are not criminals," *The Globe and Mail* (15 January 2020), online: <www.theglobeandmail.com/opinion/article-no-those-who-defend-the-wetsuweten-territory-are-not-criminals> [perma.cc/NRV6-Z4XU]; Kent McNeil, "Pipeline protests and the rule of law," *Vancouver Sun* (22 February 2020), online: <vancouver.sun.com/opinion/kent-mcneil-pipeline-protests-and-the-rule-of-law> [perma.cc/B22V-M9DV].

41. See e.g. LeDrew, *supra* note 40.

42. Scott, *supra* note 37 at 273.

shadow of the law, which in this context contains a structural power imbalance: Current Canadian doctrinal law on asserted but not yet established rights denies a veto to the Aboriginal rights-holder, but provides a veto to the state.⁴³ Scott documents the views of Indigenous leaders who do not consent to projects and yet they enter into impact benefit agreements. They point to their obligation to obtain some benefit for their community and their inability to stop the project.⁴⁴

Returning to our primary topic, an *Indian Act* band is not necessarily the proper rights-holder.⁴⁵ Bands and band councils are creatures of statute. Band councils are (tautologically) the proper rights-holders of the rights granted to band councils in the *Indian Act*. As Christie notes in this issue, the powers delegated to bands in the *Indian Act* are limited to their reserves.⁴⁶ The vast majority of resource development projects occur outside reserve boundaries but within an Indigenous people's traditional territory, as is the case with Coastal GasLink's proposal to put a pipeline through Wet'suwet'en territory. These projects impact an Indigenous people's inherent authority with respect to their traditional territory, as opposed to any rights created by the *Indian Act*. Similarly, we can imagine proposed activity on a reserve that impacts an Indigenous people's inherent authority without affecting the limited rights created by the *Indian Act*. This inherent authority is what section 35(1) protects.⁴⁷ Who is the proper rights-holder of these inherent rights? The next part considers the existing jurisprudence, according to which the rights-holder is determined by the Indigenous peoples' own laws. In some circumstances, the rights-holder can be coterminous with an *Indian Act* band, for example, as Metallic explains, if a band or other sub-group identifies and understands itself as a distinct people.⁴⁸ More often, the rights-holder is a larger nation encompassing multiple bands.

B. JURISPRUDENCE ON IDENTIFYING THE PROPER RIGHTS-HOLDER

In his contribution to this special issue, Kent McNeil provides a comprehensive synthesis of the jurisprudence on the proper rights-holder in Aboriginal title,

43. *Ibid* at 277, 279.

44. *Ibid* at 278-79.

45. *Kwicksutainek/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 77; *Kelly v Canada (AG)*, 2013 ONSC 1220 at para 58 [*Kelly* 2013], rev'd in part but aff'd on this issue 2014 ONCA 92 [*Kelly* CA].

46. Christie, *supra* note 9 at 3. See also *R v Lewis*, [1996] 1 SCR 921 at para 80 (holding that "Parliament's intention in enacting s. 81(1) as a whole [the provision detailing band councils' governance powers] ... was to provide a mechanism by which Band Councils could assume management over certain activities within the territorial limits of their constituencies").

47. *Van der Peet*, *supra* note 22 at para 40.

48. Metallic, *supra* note 13 at 253.

Aboriginal right, and duty to consult and accommodate cases involving First Nation claimants. He finds that many SCC decisions to date have left the issue unaddressed. Aboriginal rights have been raised typically by individuals as defences to regulatory prosecutions, and so identifying the rights-holding collective has been unnecessary.⁴⁹ And for the most part, the authority of claimants in duty to consult and accommodate cases decided by the SCC has not been questioned.⁵⁰ McNeil illustrates that Aboriginal title cases are more illuminating, and that the lower court decisions in *Tsilhqot'in Nation* in particular establish that courts are to resolve this issue by looking to Indigenous peoples' own laws, culture, and traditions.⁵¹ In other words, who is the proper rights-holder according to the Indigenous people's own laws? As McNeil notes, this is a question of fact which will depend on the evidence of the Indigenous people's laws about their collective identity; thus, the answer can differ for different Indigenous peoples.⁵²

In *Tsilhqot'in Nation*, the lower courts held the larger Tsilhqot'in Nation—and not the smaller *Indian Act* bands within the Tsilhqot'in Nation—was the proper holder of the claimed Aboriginal rights and title.⁵³ McNeil explains that the SCC's declaration of Aboriginal title for the Tsilhqot'in Nation implicitly affirms this conclusion.⁵⁴ In reaching his decision, the trial judge, Justice Vickers, applied the *Powley* factors—including shared customs, traditions, and collective identity—for identifying a historic rights-bearing community.⁵⁵ The evidence established that these factors existed at the level of the Tsilhqot'in people as a whole, and the rights of any Tsilhqot'in individual or sub-entity are derived from these nation-wide customs, or in other words, laws.⁵⁶ For example, Tsilhqot'in laws provided that, although one of the Tsilhqot'in bands—the Xeni Gwet'in—was currently the caretaker of the claimed territory, any Tsilhqot'in person could hunt or fish anywhere within Tsilhqot'in territory, including within the claimed territory.⁵⁷ Thus, the band structure did not alter their true identity as Tsilhqot'in

49. McNeil, *supra* note 16 at 168.

50. *Ibid.*

51. *Ibid.* at 168-69.

52. *Ibid.* at 168, citing *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 439 [*Tsilhqot'in Nation* BCSC]. See also *Ogichidaakwe v Ontario (Energy)*, 2014 ONSC 5492 at para 13.

53. McNeil, *supra* note 16.

54. *Ibid.*

55. *Tsilhqot'in Nation* BCSC, *supra* note 52 at para 442, citing *R v Powley*, 2003 SCC 43 at para 23 [*Powley*].

56. See McNeil, *supra* note 16 at 168, citing *Tsilhqot'in Nation* BCSC, *supra* note 52 at para 470.

57. McNeil, *supra* note 16 at 138, 168-69, citing *Tsilhqot'in Nation* BCSC, *supra* note 52 at paras 459, 468.

people and “is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot’in people.”⁵⁸

The *Powley* factors might be interpreted as essentially cultural markers insofar as they do not require a political system or decision-making authority at the level of the rights-holder.⁵⁹ Thus, the lack of an overarching pan-Tsilhqot’in governance structure was immaterial.⁶⁰ Even though “Tsilhqot’in decision-making and governance traditionally took place on a localized level” within smaller family or encampment groupings, the Court of Appeal affirmed Justice Vickers’s conclusion that the rights-holder is the larger Tsilhqot’in Nation.⁶¹ Both courts rejected British Columbia’s attempt to impose a governance structure requirement. British Columbia argued that to be a proper rights-holder, an entity must have traditionally exercised decision-making authority about the allocation of the rights at issue, and thus the lack of any traditional pan-Tsilhqot’in governance structure should be fatal to the claim that the Tsilhqot’in nation was the rights-holder.⁶² We can critically examine the assumptions underlying this argument.

As noted above, the Tsilhqot’in nation did in fact have customs at the national level about who could exercise hunting and fishing rights within Tsilhqot’in territory. And yet, British Columbia seemed to urge the courts to disregard the significance of these customs, merely because they did not emanate from a “pan-Tsilhqot’in governance structure.” If these customs were not the product of an overarching governance structure, where did they come from? One possibility is that they are customary laws,⁶³ which do not depend on a centralized authority for either their existence or their enforcement. Instead, customary laws are reflected in the practices which are widely accepted within a community as having normative force, which in turn rests on persuasive compliance.⁶⁴ The

58. McNeil, *supra* note 16 at 138, citing *Tsilhqot’in Nation* BCSC, *supra* note 52 at para 469.

59. *Powley*, *supra* note 55 at para 23, cited by *Tsilhqot’in Nation* BCSC, *supra* note 52 at para 442 (recognizing “that different groups of Métis have often lacked political structures” and affirming that a collective identity that exhibits “some degree of continuity and stability” is sufficient for establishing a rights-bearing community).

60. *Tsilhqot’in Nation v British Columbia*, 2012 BCCA 285 at paras 145-46 [*Tsilhqot’in Nation* CA].

61. *Ibid* at para 146.

62. *Ibid* at para 145.

63. I make this suggestion merely as a hypothetical and not as a description of actual Tsilhqot’in laws. I do not have the expertise to analyze Tsilhqot’in laws and I am not making a claim about Tsilhqot’in laws.

64. See John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press, 2010) at 51-52 [Borrows, *Indigenous Constitution*]; Mills, *supra* note 33 at 172.

traditional governance systems of many Indigenous peoples—though not all⁶⁵—are grounded in customary laws.⁶⁶

In contrast, the Canadian legal system is commonly thought to instantiate legal positivism,⁶⁷ which holds that all law is derived from, and enforced by, institutions specifically authorized to perform those tasks. According to legal positivism, customary laws are not laws. Instead, they are some lesser aspect of culture such as ethics, morals, or etiquette because they are neither produced nor enforced by institutions specifically authorized for those purposes.⁶⁸ With this explanation in mind, British Columbia's argument in *Tsilhqot'in Nation* is revealed as being steeped within positivism. It assigns no significance to customary laws merely because they were not produced by the particular type of decision-making structure endorsed by legal positivism. Justice Vickers rejects British Columbia's approach because it "is weighed down with superficial value judgments," insofar as using the norms of one society to assess the norms of another assumes the former is "civilized" while the latter is "without cohesion, laws or culture, in effect a subhuman species."⁶⁹ Likewise, the Court of Appeal rejected a positivist governance structure requirement because of the impossibility of tracing the smaller sub-entities to modern counterparts given the fluidity of the Tsilhqot'in political structure.⁷⁰ If a static, positivist governance structure requirement is imposed, then "no one would be able to claim Aboriginal rights on behalf of the

65. See Borrows, *Indigenous Constitution*, *supra* note 64 at ch 2, especially at 51-55 (explaining that Indigenous peoples are often characterized as possessing only customary law, but in fact their legal systems also encompass positivistic law, as well as sacred law, natural law, and deliberative law).

66. I use the phrase "customary law" given its prevalence within the literature, especially within discussions of the dichotomy between legal positivism and customary law. But Aaron Mills argues compellingly that Indigenous "law" is better conceptualized in terms of constitutionalism. See generally Mills, *supra* note 33.

67. For a naturalist analysis of the liberal positivism informing Canadian law regarding Aboriginal rights, see Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (University of Toronto Press, 2019) at ch 6.

68. See Borrows, *Indigenous Constitution*, *supra* note 64 at 12, citing John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995) at 176; Hamar Foster, "One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada" (2010) 37 *Adv Q* 66 (recounting the suggestion made by counsel for Canada in the *Tsilhqot'in* case that Tsilhqot'in "rules were more like elevator etiquette than law" at 80-81).

69. *Tsilhqot'in Nation* BCSC, *supra* note 52 at para 453, citing *Calder v British Columbia (AG)*, [1973] SCR 313 at 346, Hall J, dissenting (but not on this point) [*Calder*]; see also *Tsilhqot'in Nation* CA, *supra* note 60 at paras 145-46.

70. *Tsilhqot'in Nation* CA, *supra* note 60 at para 146.

Tsilhqot'in.⁷¹ A right without a rights-holder is hollow.⁷² In other words, using the conventions of one legal system (*e.g.*, legal positivism) to evaluate a society that instantiates a different legal system (*e.g.*, customary law), results in constitutional capture. For these reasons, the test for identifying a section 35 rights-holder does not require a positivist decision-making or governance structure at the level of the rights-holder.

Although the rights-holder can take different forms for different Indigenous peoples, in most cases, the rights-holder is a larger nation encompassing multiple bands as opposed to a single *Indian Act* band.⁷³ This is hardly surprising given that the band structure is viewed by many Indigenous peoples as an artificial imposition which does not correlate with their own laws and political system.⁷⁴ McNeil does identify a lower court decision where the proper rights-holders are the bands: *Abousaht Indian Band v Canada (Attorney General)*.⁷⁵ As McNeil notes, this conclusion in this case is not inconsistent with the trial judge's conclusion in *Tsilhqot'in Nation* because both are supported by the evidence of the respective Indigenous peoples' laws about their collective identity.⁷⁶ The Indigenous claimants in *Abousaht Indian Band* asserted that their five *Indian Act* bands were the rights-holders, and argued only in the alternative that the five bands formed a single Nuu-chah-nulth Nation, although they did not press the latter argument in final submissions.⁷⁷ Canada did not argue that either the larger nation or the bands were the rights-holders; it merely argued the five bands failed to satisfy the community continuity requirement,⁷⁸ discussed in Part IV, below. The trial judge agreed with the Aboriginal claimants that the five bands were the rights-holders.⁷⁹ The evidence established that each of the five claimants self-identified as an autonomous nation, despite sharing a common Nuu-chah-nulth language,

71. *Ibid* at para 146.

72. Karen Drake, "Who Are the Métis? The Role of Free, Prior and Informed Consent in Identifying a Métis Rights-Holder" in Dwight Newman & Ibironke Odumosu-Ayanu, eds, *Indigenous–Industry Agreements, Natural Resources, and the Law* (Routledge, 2020) [Drake, "Who are the Métis?"].

73. *Tsilhqot'in Nation* BCSC, *supra* note 52 at para 445. See also Metallic, *supra* note 13 at 253. For a list of decisions in which the nation—as opposed to a smaller sub-entity—is assumed or held to be the rights-holder, see *R v Bernard*, 2017 NBCA 48 at para 51 [*Bernard* CA].

74. Borrows, "Wise Practices," *supra* note 6 at 10.

75. McNeil, *supra* note 16 at 169-70, citing *Abousaht Indian Band v Canada (AG)*, 2009 BCSC 1494 [*Abousaht Indian Band*], rev'd in part on other grounds 2013 BCCA 300.

76. McNeil, *supra* note 16 at 169-70. See also *Abousaht Indian Band*, *supra* note 75 at para 8.

77. *Abousaht Indian Band*, *supra* note 75 at paras 1, 7-8.

78. *Ibid* at para 300.

79. *Ibid* at paras 323, 336, 344, 354, 365, 909.

culture, and history.⁸⁰ This case illustrates the importance of not imposing a pan-Indigenous approach; different Indigenous peoples organize themselves politically in different ways.

Thus, *Abousaht Indian Band* affirms the principle established in *Tsilhqot'in Nation* that the rights-holder is determined by the Indigenous peoples' own laws. In some circumstances, those laws establish the rights-holder is coterminous with an *Indian Act* band; in others, the rights-holder is a larger nation encompassing multiple bands.

C. IDENTIFYING THE RIGHTS-HOLDER BASED ON THE PLAIN MEANING OF THE TEXT

None of the courts in *Powley*, *Tsilhqot'in Nation*, or *Abousaht Indian Band* analyzed the rights-holder issue in the light of the text of section 35. This is puzzling, given the SCC's preoccupation with the text of treaties while claiming to recognize the significance of treaties' oral terms.⁸¹ Presumably, when the Court explicitly addresses the rights-holder issue, its analysis will begin with a consideration of the words of section 35. As is well known, section 35 must be given a purposive interpretation,⁸² which is discussed below. But a purposive interpretation is not an invitation to dispense with the text of a constitutional provision.⁸³ Constitutional interpretation begins with the language of the constitutional provision in question; this principle is not displaced by any other principle of constitutional interpretation.⁸⁴

The text of both sub-sections 35(1) and 35(2) describes the rights-holders as the "[A]boriginal *peoples* of Canada."⁸⁵ As Chartrand notes, the term "peoples" is commonly understood to be synonymous with "nations."⁸⁶ Yet as Metallic recognizes, courts—including the Supreme Court of Canada—do not confine themselves to the terms "peoples" or "nations" when referring to Aboriginal

80. *Ibid* at para 299.

81. See e.g. *R v Badger*, [1996] 1 SCR 771 at paras 39, 52, 55, 57, 101 (affirming the importance of the oral terms of a treaty but not giving effect to those oral terms in the actual holding of the decision).

82. *Van der Peet*, *supra* note 22 at paras 21-22, 26-31.

83. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53 [*Succession Reference*]; *Caron v Alberta*, 2015 SCC 56 at para 36 [*Caron*].

84. *Caron*, *supra* note 83 at para 37; *British Columbia (AG) v Canada (AG)*, [1994] 2 SCR 41 at 88.

85. *Constitution Act, 1982*, *supra* note 1 [emphasis added].

86. Chartrand, *supra* note 17 at 178. See also Larry Chartrand, "The Constitutional Determination of a Métis Rights-Bearing Community: Reorienting the *Powley* Test" in Karen & Brenda, *supra* note 23, 169 at 171 [Chartrand, "Métis Rights-Bearing Community"].

peoples.⁸⁷ In fact, the Court often defaults to the terms “communities” or “groups,” among others, instead of “peoples.”⁸⁸ The Court never explains or defends this equivocation, which seems unwarranted given the differences in meaning between “peoples” on the one hand, and “communities” or “groups” on the other.⁸⁹ Christie’s article in this issue provides a valuable framework for understanding the significance of these differences. He illustrates how the various propositions and requirements within the Court’s jurisprudence on site-specific Aboriginal rights result in (1) a conception of Aboriginal peoples as socio-cultural bodies as opposed to political bodies, and (2) a conception of Aboriginal rights as cultural activities as opposed to governmental powers to exercise jurisdictional authority or, in other words, engage in law-making.⁹⁰ The Court’s deeper rationale underlying these choices goes unstated throughout its jurisprudence, but Christie demonstrates how the philosophical tenets of liberalism provide a comprehensive explanation. A key premise of liberalism is that each individual is entitled to structure and live their life in accordance with their own values and norms.⁹¹ For some individuals in a multicultural context, their preferred values and norms can only be fully accessed through the group or community—such as a religious community, for example—which serves as the cultural repository of those values and norms.⁹² Within liberalism, these groups or communities are socio-cultural bodies, not political bodies; as Christie explains, “the liberal state is presumed to be the sole source of political and legal authority.”⁹³ Within the Court’s jurisprudence, Aboriginal peoples are akin to these socio-cultural bodies and Aboriginal rights are akin to the rights of members of the equity-seeking groups who make up the socio-cultural bodies. The Court’s commitment to liberalism leaves no conceptual space for an understanding of Aboriginal peoples

87. Metallic, *supra* note 13 at 250-51.

88. For a list of such decisions, see *Bernard CA*, *supra* note 73 at para 51. See also Chartrand, “Métis Rights-Bearing Community,” *supra* note 86 at 171.

89. The most pronounced instance of this equivocation occurs at para 12 of *Powley*, where the Court moves from a discussion of Métis “peoples” or “people” to a discussion of a Métis “community” with no justification for introducing the term “community,” which appears nowhere in the text of section 35. See *Powley*, *supra* note 55 at para 12. For critiques of this equivocation, see Karen Drake, “Who are the Métis?,” *supra* note 72 at 8; Chartrand, “Métis Rights-Bearing Community,” *supra* note 86 at 171-72.

90. Christie, *supra* note 9 at 9, 14-19.

91. *Ibid* at 29.

92. *Ibid* at 30. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995) at ch 5.

93. Christie, *supra* note 9 at 30.

as political entities,⁹⁴ nor for an Aboriginal right to exercise legal or political authority.⁹⁵ The Court's analysis is captured by liberalism.

The SCC's shift from "peoples" to "groups" and "communities" coheres seamlessly with this vision of Aboriginal rights as captured within liberalism. The term "peoples" is commonly understood to denote political entities as opposed to mere socio-cultural entities, given the various international law instruments affirming that peoples have the right of self-determination.⁹⁶ In contrast, the terms "group" and "community" typically describe equity-seeking groups who claim state protection for their cultural choices but make no claim to be entitled to exercise governmental powers such as jurisdiction and law-making authority. The problem is the complete lack of textual basis for replacing "peoples" with "groups" or "communities." Although principles of constitutional interpretation provide for a large and liberal interpretation, these principles "do not undermine the primacy of the written text of the Constitution."⁹⁷ As the SCC has recognized, the Constitution is not "an empty vessel to be filled with whatever meaning" the Court might choose.⁹⁸ The Constitutional text states the rights-holders are "peoples"; the jurisprudence should respect this text.

D. A PURPOSEFUL INTERPRETATION OF SECTION 35

As mentioned, section 35 must be given a purposive interpretation, which requires identifying the rationale underlying section 35 and then interpreting it in a way that gives effect to that rationale.⁹⁹ The overarching purpose of section 35 is reconciliation,¹⁰⁰ but identifying the exact two things that require

94. Shin Imai & Kathryn Gunn, "Indigenous Belonging: Membership and Identity in the UNDRIP: Articles 9, 33, 35, and 36" in Jessie Hohmann & Marc Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 213 at 234 (explaining that the Royal Commission on Aboriginal Peoples identifies Indigenous peoples as "political units, not ethnic enclaves") [Imai & Gunn, "Indigenous Belonging"].

95. Christie, *supra* note 9 at 31.

96. *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 1(2) (entered into force 24 October 1945); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 1 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 1, 3 [*UN Declaration*].

97. Caron, *supra* note 83 at para 36; *Secession Reference*, *supra* note 83 at para 53.

98. Caron, *supra* note 83 at para 36; *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 394.

99. *Van der Peet*, *supra* note 22 at paras 21-22.

100. *Van der Peet*, *supra* note 22 at para 31.

reconciling is far from straightforward. Aimée Craft provides a table summarizing the SCC's many statements on this topic.¹⁰¹ On one side of the reconciliation ledger, we have something related to Aboriginal peoples; this has been variously described by the Court as Aboriginal "peoples," "cultures," "rights," "societies," or "prior occupation," among others.¹⁰² On the other side, we have something related to Canada; this has been variously described by the Court as "the assertion of Crown sovereignty," "Canadian sovereignty," "non-Aboriginal peoples," "the arrival of Europeans,"¹⁰³ or "*de facto* control of land and resources that were formerly in the control of [an Aboriginal] people,"¹⁰⁴ among others. The wide variety among these descriptors could be used to support different articulations of the purpose of section 35 and hence different interpretations of "peoples."¹⁰⁵ For example, if one accepts that the purpose of section 35 is to reconcile Aboriginal *cultures* on the one hand, with Canadian *sovereignty* on the other, then one would be motivated to characterize Aboriginal peoples as mere socio-cultural *groups* or *communities* asserting cultural rights within a sovereign state, the legitimacy of which is unquestioned. The justification for these cultural rights comes from liberalism, in accordance with Christie's analysis.

In contrast, if the purpose of section 35 is to reconcile Aboriginal *peoples* with Canada's *de facto* control of Aboriginal peoples' lands, then Aboriginal peoples can be understood as *peoples* or *political entities* who are entitled to exercise governmental and law-making authority. The state's sovereignty is *de facto* and not *de jure*,¹⁰⁶ and thus the rationale underlying Indigenous governmental authority is not liberalism but rather the right of self-determination, or in other words, Indigenous peoples' own inherent authority. In this way, the indeterminacy of the current reconciliation jurisprudence supports multiple purposive interpretations of the section 35 rights-holder. To decide between these interpretations, we must evaluate the assumptions informing them. Is the

101. Craft, *supra* note 23 at 73.

102. *Ibid.*

103. *Ibid.*

104. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32.

105. Chief Justice Lamer seems to touch on this point in *Van der Peet*. Shortly after affirming that a purposive interpretation of section 35(1) will facilitate reconciliation, he acknowledges that "the notion of 'reconciliation' does not, in the abstract, mandate a particular content for aboriginal rights." See *Van der Peet*, *supra* note 22 at para 50.

106. For an analysis of Canada's sovereignty as *de facto* and not *de jure*, see Ryan Beaton, "De facto and de jure Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27 Const Forum Const 25; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Native Law Center, University of Saskatchewan, 2012) at 34-35; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433 at 437-38.

Canadian state's claim of sovereignty over Indigenous peoples and Indigenous territories legitimate (supporting the former interpretation) or illegitimate (supporting the latter interpretation)? A multitude of reports and legal and scholarly analyses demonstrate the illegitimacy of Canada's claim of sovereignty vis-à-vis Indigenous peoples.¹⁰⁷ Moreover, the latter interpretation coheres with the plain meaning of the text which, as discussed above, states that section 35 rights-holders are "peoples." The former interpretation, in contrast, directly contradicts the plain meaning of the text. Thus, the most coherent purposive interpretation provides that the purpose of section 35 is to reconcile Aboriginal *peoples* with Canada's de facto control of Aboriginal peoples' lands, and thus that section 35 rights-holders are peoples.

III. IDENTIFYING THE RIGHTS-HOLDER IN *R v BERNARD*

The issue of identifying the rights-holder recently arose in *R v Bernard*. In this case, Naomi Metallic served as counsel at the Court of Appeal for Stephen Bernard, a Migma member of the Sipekne'katik First Nation.¹⁰⁸ Her contribution to this special issue provides an incisive critical analysis of the courts' decisions in this case. Mr. Bernard was charged with hunting in the northern part of the City of Saint John, New Brunswick, without a licence, contrary to provincial legislation.¹⁰⁹ He argued he had a section 35(1) Aboriginal right to do so.¹¹⁰ The courts rejected Mr. Bernard's section 35(1) claim for two interrelated reasons. First, the courts held the smaller "communities," rather than the larger Migma nation, were the Aboriginal rights-holders.¹¹¹ The territory in New Brunswick where Mr. Bernard was hunting was part of the territory of the Migma nation, but not of Mr. Bernard's specific band, whose reserve is located in Nova Scotia.¹¹²

107. *TRC Final Report*, *supra* note 23 at 29; *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Supply and Services Canada, 1996) at 661; Larry Chartrand, "Indigenous Peoples: Caught in a Perpetual Human Rights Prison" (2016) 67 UNBLJ 167 at 169; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014) at 11; Hoehn, *supra* note 106; Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010); John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L Rev 498.

108. Metallic, *supra* note 13 at 233.

109. *Bernard CA*, *supra* note 73 at para 9.

110. *Ibid* at para 36.

111. *Ibid* at paras 45, 50, 62.

112. *Ibid* at paras 4-5, 19, 41.

Second, the courts introduced what I refer to as the community-occupation-continuity requirement. The courts held that Mr. Bernard failed to satisfy this requirement because the Migmaq sub-entity who traditionally occupied the territory where Mr. Bernard was hunting had left the area “a long time ago” and there was “no evidence of a contemporary community of Mi’kmaq in the area.”¹¹³ Part III(A), below, critically examines the courts’ first reason for rejecting Mr. Bernard’s claim. Part III(B) examines the second reason.

A. IS THE RIGHTS-HOLDER THE SMALLER OR THE LARGER ENTITY?

As Metallic explains, the courts accepted the Crown’s argument that the larger Migmaq nation could not be the proper rights-holder because it lacked an overarching decision-making authority, given its historically decentralized nature.¹¹⁴ This position is encapsulated most pointedly in the Crown’s repeated statement in oral submissions that the Migmaq nation “lacked a Super Chief.”¹¹⁵ The courts based this conclusion on the evidence of the Crown’s expert witness who testified that smaller collectives of Migmaq—rather than the Migmaq nation as a whole—signed the seventeenth-century Peace and Friendship Treaties.¹¹⁶ The Court of Appeal of New Brunswick acknowledged the common cultural and social bonds among the Migmaq nation as a whole, as well as the fact that the smaller sub-entities historically came together to form a Grand Council.¹¹⁷ This Grand Council, though, lacked a “grand chief,” and thus the Crown’s expert concluded that it was “a *cultural* entity, not one of *polity*.”¹¹⁸ The separate hunting territories of each of the sub-entities also influenced the courts’ conclusion.¹¹⁹ Finally, the Court of Appeal of New Brunswick relied on a passage in *Van der Peet* where the Court repeatedly used the terms “groups” and “communities” to refer to the rights-holders, as well as to a passage in *Delgamuukw* where the SCC described Aboriginal rights as “communal.”¹²⁰

Taking the last premise first, Metallic highlights the circularity of concluding that only the smaller communities—and not the larger community—can be the rights-holder merely because Aboriginal rights are “communal.”¹²¹ Moreover,

113. *Ibid* at para 60.

114. Metallic, *supra* note 13 at 234. See also *Bernard CA*, *supra* note 73 at paras 56-57.

115. Metallic, *supra* note 13 at 235.

116. *Ibid*. See also *Bernard CA*, *supra* note 73 at paras 53, 57.

117. *Ibid* at paras 56-57.

118. *Bernard CA*, *supra* note 73 at para 57, citing *R v Bernard*, 2010 NBPC 30 at 124 [emphasis added] [*Bernard PC*]. See also *ibid* at para 120.

119. *Bernard CA*, *supra* note 73 at paras 56-57.

120. Metallic, *supra* note 13 at 257-59, citing *Bernard CA* at paras 47, 52.

121. Metallic, *supra* note 13 at 258.

the analysis in Part II(C-D), above, provides a full answer to the SCC's use of the terms "groups" and "communities" in *Van der Peet*. Given the Court's lack of textual analysis of section 35 as required by principles of constitutional interpretation, and given the Court's lack of justification for ignoring the term "peoples" in section 35 and adopting the terms "groups" and "communities" instead, the Court's use of those terms cannot be considered part of the *ratio* in *Van der Peet*, and thus is not determinative of rights-holders' identities.

Moreover, the courts in *Bernard* succumbed to constitutional capture by using positivism as the criteria by which to identify the rights-holder. The courts assumed an overarching decision-making authority or Super Chief must exist at the level of the rights-holder but cite no authority in support of this positivist requirement.¹²² This approach was explicitly rejected by the two lower courts in *Tsilhqot'in Nation*, and that rejection was implicitly affirmed by the SCC when it accepted that Aboriginal title is held by the Tsilhqot'in Nation as a whole.¹²³

In contrast, if we consider the Migmaq Nation through the lens of its own constitutionalism, we can avoid constitutional capture. Metallic explains that Migmaq governance operates through a multi-level, federal structure; district chiefs come together at the level of the Migmawei Grand Council (Mawiomi), which is a political body.¹²⁴ The existence of separate hunting territories within other levels of this federal structure in no way detracts from the political nature of the Mawiomi. The salient facts are that governance occurs at the level of the Migmaq Nation through the Mawiomi, and that the Migmaq Nation understands itself to be the rights-holder. Simply because the local levels within the Migmaq Nation's federal structure more closely resemble the conventions of legal positivism or western exercises of jurisdiction, they cannot trump the Mawiomi as the representative of the rights-holder. If they did, we would have a prime example of constitutional capture.

What we need is a means of identifying the rights-holder that does not succumb to constitutional capture, including capture by liberalism or positivism. At first glance, the solution might appear to be to impose a requirement that the rights-holder must have a political structure which conforms to Indigenous constitutionalism. But Indigenous peoples are not a homogenous monolith.

122. The Court of Appeal relied on a statement from *R v Marshall*; *R v Bernard* about the exclusive occupation requirement within the test for Aboriginal title. See *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 62 [*Marshall*; *Bernard*]; *Bernard* CA, *supra* note 73 at para 50. Metallic rightly explains that in so doing, the Court of Appeal unjustifiably conflates the Aboriginal title test with the Aboriginal rights test. See Metallic, *supra* note 13 at 258.

123. See text accompanying notes 55 to 59.

124. Metallic, *supra* note 13 at 234, 253-55.

No one form of political structure will resonate within the constitutionalism of each Indigenous people.

The logical conclusion is to use each Indigenous people's own standard for identifying their rights-holder. This means not formulating an a priori standard of what constitutes a rights-holder and then measuring Indigenous peoples against it. Rather, it means deferring to each particular Aboriginal people about who their rights-holder is. In this way, we can identify a political entity without succumbing to constitutional capture, including pan-Indigenous constitutional capture. This approach is already well-supported by the jurisprudence. The Court of Appeal in *Tsilhqot'in Nation* affirmed the trial judge's conclusion that "the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself."¹²⁵ I noted above that the *Powley* factors might be characterized as cultural markers.¹²⁶ But we can now see that assumption itself is captured by positivism. A more accurate statement is that while the *Powley* factors do not require a positivist governmental structure, they direct courts to identify the political entity which constitutes the rights-holder according to the Indigenous people's own laws. The *Powley* factors include shared *customs*, *traditions*, and *collective identity*. In other words, courts should look to a people's laws (shared customs, traditions) in whatever form they take, including customary law, to determine who the rights-holder is according to their law (their collective identity). The value of the *Powley* factors is they avoid constitutional capture.

This principle—that the identity of the rights-holder is to be decided by an Aboriginal people themselves—is a common theme throughout the articles in this special issue.¹²⁷ It is also consistent with the right of self-determination, which as Christie notes is a right of peoples at international law,¹²⁸ and which is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.¹²⁹ Article 33 in particular affirms not only Indigenous peoples' right to determine their own membership but also the right to determine their own identity.¹³⁰ Shin

125. *Tsilhqot'in Nation* CA, *supra* note 60 at para 149; Kelly 2013, *supra* note 45 at para 59.

126. See text accompanying note 59.

127. Metallic, *supra* note 13 at 236-37, 18; McNeil, *supra* note 16 at 128, 32; Christie, *supra* note 9 at 6.

128. Christie, *supra* note 9 at 26.

129. *UN Declaration*, *supra* note 96, arts 1, 3.

130. *Ibid*, art 33. Article 33 of the *UN Declaration* states:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures (*ibid*).

Imai and Kathryn Gunn explain this “right to determine identity makes it clear that Indigenous people decide what to call themselves and how they identify the constituent groupings that make up the people as a whole.”¹³¹

To summarize, the reasoning in the *Bernard* decisions is circular, ignores the plain meaning of the text of section 35, and succumbs to constitutional capture. In contrast, the approach adopted by the lower courts in *Tsilhqot'in Nation*, and apparently approved by the SCC—including application of the *Powley* factors—provides a roadmap for avoiding constitutional capture.

B. MUST A SECTION 35 RIGHTS-HOLDER SATISFY A COMMUNITY-OCCUPATION-CONTINUITY REQUIREMENT?

This section examines the courts' second reason for rejecting Mr. Bernard's section 35 claim. As Metallic explains, the trial judge introduced a new community-occupation-continuity requirement, according to which the contemporary rights-holding Aboriginal people must maintain a presence in the area where the right was historically exercised.¹³² The Court of Appeal of New Brunswick in *Bernard* seems to affirm this requirement when it emphasizes the trial judge's finding that prior to contact, a Migmaq “community” hunted in the area where Mr. Bernard hunted, but this “community” left the area some time ago and there was no evidence of a contemporary Migmaq “community” in the area.¹³³ Resolving this issue is important because British Columbia is raising it in *Desautel*, which will be heard by the SCC.¹³⁴ British Columbia relies on the Court of Appeal of New Brunswick's decision in *Bernard*, arguing that Mr. Desautel cannot establish an Aboriginal right to hunt in British Columbia because the Lakes Tribe of the Colville Confederated Tribes—of which Mr. Desautel is a member—is now located not in British Columbia but in Washington state.¹³⁵

131. Imai & Gunn, “Indigenous Belonging,” *supra* note 94 at 231.

132. *Bernard* PC, *supra* note 118 at paras 109, 127, 137; Metallic, *supra* note 13 at 234. Metallic uses the term “community-continuity requirement” or “CCR” to refer to the Crown's proposed requirement. I use the term “community-occupation-continuity requirement” to highlight how it differs from the community continuity requirement discussed in *Powley*, but Metallic and I are both referring to the same thing, namely, the Crown's proposed requirement, which is much thicker than the actual doctrinal law established in *Van der Peet* and *Powley*, as discussed in this section.

133. *Bernard* CA, *supra* note 73 at para 60. See also *Bernard* PC, *supra* note 118 at paras 101, 126. I place the term “community” in quotation marks to indicate that although the Court of Appeal uses this term, it is not the correct term in this context given that “peoples”—the term employed within section 35—is not synonymous with “communities.”

134. *Desautel* Leave to SCC Granted, *supra* note 28.

135. See *Desautel* CA, *supra* note 28 at paras 40, 58; *R v Desautel*, SCC File No 38734, 29 January 2020 (*Factum of the Appellant, Her Majesty the Queen* at para 62).

Metallic's thorough critique of the courts' analysis in *Bernard* resonates with many of the British Columbia Court of Appeal's conclusions in *Desautel*. For example, Metallic shows that a community-occupation-continuity requirement assumes the Migmaq lived in static, fixed, sedentary village sites; thus, the requirement ignores the reality of Migmaq social organization, including sub-entities which were traditionally mobile and fissionable.¹³⁶ Similarly, the Court of Appeal in *Desautel* held that a community-occupation-continuity requirement ignores the Aboriginal perspective, contrary to the SCC's jurisprudence.¹³⁷

Moreover, both Metallic and the Court of Appeal in *Desautel* explain that a community-occupation-continuity requirement is not part of the current law.¹³⁸ It is not a component of the *Van der Peet* test for identifying Aboriginal rights,¹³⁹ nor is it introduced by the *Powley* decision.¹⁴⁰ The community continuity requirement explained in *Powley* is much thinner than the Crown's proposed community-occupation-continuity requirement. *Powley* only requires that the rights-holder continue to exist; it does not require that the rights-holder live or otherwise have some presence where the rights-holder historically lived or where the right is exercised.¹⁴¹ The thin requirement follows tautologically from the principle that the collective is the rights-holder.¹⁴² Since the rights-holder is the collective, the collective who holds the right must currently exist. The issue was raised in *Powley* only because the existence of a contemporary Métis rights-holder was contested. The Court described the contemporary Métis rights-holder as having gone "underground" for a period of time and acknowledged their "lack of visibility," but affirmed their continued existence.¹⁴³ As Metallic explains, the issue has not arisen and should not arise for First Nations—such as the Migmaq Nation—who have not gone "underground" and who obviously continue to exist.¹⁴⁴ When the SCC in *Powley* discusses the continued existence of the Métis rights-holder, it describes the Métis as being located "in and around Sault Ste. Marie."¹⁴⁵ Nowhere in *Powley* does the Court make the location of the rights-holder a requirement within the Aboriginal rights test. The area in and

136. Metallic, *supra* note 13 at 245.

137. *Desautel* CA, *supra* note 28 at para 62; *Van der Peet*, *supra* note 22 at paras 49-50.

138. Metallic, *supra* note 13 at 248; *Desautel* CA, *supra* note 28 at para 61.

139. *Ibid.*

140. *Ibid* at paras 58-59.

141. *Powley*, *supra* note 55 at paras 24-28; *Desautel* CA, *supra* note 28 at para 61.

142. See text accompanying note 4.

143. *Powley*, *supra* note 55 at para 27.

144. Metallic, *supra* note 13 at 251.

145. *Powley*, *supra* note 55 at paras 24, 25, 28.

around Sault Ste. Marie just happened to be where Steve and Rod Powley lived and so their location is described as such. In fact, as Jason Madden explains, the Métis rights-holder in *Powley* is explicitly *not* defined as being limited to the area “in and around Sault Ste. Marie.”¹⁴⁶ Rather, the trial judge rejected the Crown’s attempt to impose such a narrow definition.¹⁴⁷ Instead, the trial judge held the geographical scope of the Métis rights-holder “extended hundreds of kilometres to the east, north and west of Sault Ste. Marie, spanning almost 20,000 square kilometres on the Canadian side” and going into northern Michigan.¹⁴⁸ The SCC upheld these findings.¹⁴⁹

Metallic further critiques the community-occupation-continuity requirement on the ground that it conflates the Aboriginal rights test with the Aboriginal title test,¹⁵⁰ which does require the rights-holder to establish continuity of occupation, at least in certain circumstances.¹⁵¹ This latter qualification should be emphasized: Even within the Aboriginal title test, proving continuity of occupation is not a standalone requirement. As explained in *Delgamuukw* and affirmed in *Tsilhqot’in Nation*, continuity of occupation must be proved only when present occupation is relied on as proof of pre-sovereignty occupation.¹⁵² As long as the Aboriginal claimant has direct evidence of their pre-sovereignty occupation and does not rely on present occupation, there is no need to prove continuity.¹⁵³ Imposing continuity of occupation as a standalone requirement could result in the implicit extinguishment of Aboriginal title, due to either abandonment or executive acts dispossessing Aboriginal peoples of their land.¹⁵⁴ But as Kent McNeil explains, such implicit extinguishment is contrary to principles of both the common law and section 35.¹⁵⁵ As discussed, Aboriginal rights, including title, are collective or communal rights, “and it appears that communal rights cannot be waived

146. Madden, *supra* note 20 at 206.

147. *Ibid.*

148. *Ibid.*, citing *R v Powley*, [1998] OJ No 5310 (Ont Ct J) at paras 68, 70.

149. *Ibid.*, citing *Powley*, *supra* note 55 at paras 21, 26, 28.

150. Metallic, *supra* note 13 at 248.

151. *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at paras 45–46 [*Tsilhqot’in Nation* SCC].

152. *Delgamuukw*, *supra* note 4 at para 152; *Tsilhqot’in Nation* SCC at paras 45–46.

153. See Kent McNeil, “Continuity of Aboriginal Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich Publishing Ltd, 2004) 127 at 135–36, 138 [McNeil, “Continuity”]; Karen Drake & Adam Gaudry, “The lands ... belonged to them, once by the Indian title, twice for having defended them ... and thrice for having built and lived on them: The Law and Politics of Métis Title” (2016) 54 *Osgoode Hall LJ* 1 at 30 [Drake & Gaudry, “Métis Title”]. See also *Delgamuukw*, *supra* note 4 at para 152.

154. Drake & Gaudry, “Métis Title,” *supra* note 153 at 30.

155. McNeil, “Continuity,” *supra* note 153 at 137–38.

or abandoned, particularly where the interests of future generations would be jeopardized.”¹⁵⁶ Moreover, as a legal right, Aboriginal title cannot be extinguished by mere executive acts; Aboriginal title can only be extinguished by competent legislation prior to 17 April 1982.¹⁵⁷ As noted by both *Metallic* and the Court of Appeal in *Desautel*, a community-occupation-continuity requirement within the Aboriginal rights test would also allow for implicit extinguishment,¹⁵⁸ which would be just as contrary to the legal principles just discussed.

To summarize, the community-occupation-continuity requirement is not grounded in the Aboriginal rights jurisprudence and thus should not be adopted in subsequent decisions.

IV. POTENTIAL CHALLENGES IN APPLYING INDIGENOUS LAW TO IDENTIFY THE RIGHTS-HOLDER

This section discusses some potential challenges of using an Indigenous people’s laws to identify the rights-holder. A lack of consensus within an Indigenous people about the content of their law might pose one such challenge. We should not unnecessarily amplify this challenge for the reasons discussed in Part I. Canadian society lacks consensus on all manner of legal and political topics, including the issue of which level of government has jurisdiction in any given situation. Yet Canadian society continues to function without a foreign nation articulating and imposing on it a foreign standard for identifying our jurisdiction-holders. Thus, we can look to an Indigenous people’s own legal and political systems for resolving such disagreements. Sara Mainville undertakes this important work with respect to the Anishinaabe Nation of the Boundary Waters—now also known as the Anishinaabe Nation of Treaty Three—in her contribution to this special issue.¹⁵⁹ The cases she discusses involve not internal but rather external challenges—by the federal government and industry proponents—to the identity of the rights-holder. Mainville highlights the significance of an Indigenous people’s legal and political processes for developing consensus about how to respond to such external challenges. This points toward a second potential challenge, given Canadian governments’ attempts to undermine Indigenous legal

156. *Ibid* at 138.

157. *Calder*, *supra* note 69 at 316, Hall J; *Sparrow*, *supra* note 4 at 1098-1099 (citing, with approval, Hall J’s analysis of extinguishment in *Calder*); *Van der Peet*, *supra* note 22 at para 28.

158. *Metallic*, *supra* note 13 at 250; *Desautel CA*, *supra* note 28 at para 62.

159. Mainville, *supra* note 14 at 98.

and political processes discussed above.¹⁶⁰ The third challenge discussed in this section involves courts' lack of deference to Indigenous law.

Our focus thus far has been on non-treaty section 35(1) rights, namely, Aboriginal rights and title. The process for identifying a treaty rights-holder is somewhat different than that for identifying a non-treaty rights-holder. Put simply, the treaty rights-holder is the party to the treaty. We can ask: Who entered into the treaty with the Crown? As McNeil explains, the documents and records of the treaty provide evidence in answering this question.¹⁶¹ That said, just as disputes arise regarding the interpretation of substantive treaty provisions, disputes can arise regarding the interpretation of treaty evidence about the proper rights-holder. For example, who exactly is represented by the signatories to the treaty? In such a situation, the approach used in the non-treaty context—namely, applying an Indigenous people's own laws to identify the rights-holder—can provide guidance.

Mainville discusses the function of a Grand Council, which is a spiritual, legal, and political institution that provides processes for achieving consensus within an Anishinaabe nation.¹⁶² A Grand Council negotiated Treaty Three on behalf of the Anishinaabe Nation of the Boundary Waters.¹⁶³ Mainville explains Treaty Three is a nation-to-nation treaty.¹⁶⁴ The Queen's treaty commissioners insisted on dealing with the Anishinaabeg as a nation in the Treaty Three negotiations.¹⁶⁵ Thus, the treaty rights-holder is the Anishinaabe Nation of the Boundary Waters, not the many bands imposed on the Nation by the *Indian Act*. Later, colonial mechanisms—including various *Indian Act* provisions—were used to weaken the Grand Council, which was eventually forced to meet secretly.¹⁶⁶ Grand Council Treaty Three is the successor to the Grand Council who negotiated Treaty Three.¹⁶⁷

In her article, Mainville draws on knowledge gained through her role as past advisor to Grand Council Treaty Three, through her study of Treaty Three during law school and graduate studies, and through conversations with Treaty Three knowledge holders.¹⁶⁸ She explains *miinigoziwin*, which is one aspect of

160. See text accompanying note 6.

161. McNeil, *supra* note 16 at 153.

162. Mainville, *supra* note 14 at 103.

163. Kelly 2013, *supra* note 45 at para 29.

164. Mainville, *supra* note 14 at 123.

165. *Ibid* at 121.

166. *Ibid* at 108.

167. Kelly 2013, *supra* note 45 at para 29.

168. Mainville, *supra* note 14 at 101-02.

Anishinaabe *inakonigaawin* (Anishinaabe law) and which refers to the inherent authority of the Anishinaabeg given by the Creator.¹⁶⁹ A key concept related to *miinigoziwin* is that decision-making should be open to all and not done in secret, so that the Nation can be “of one mind” in its decisions.¹⁷⁰ Mainville explains two protocols recently adopted by the Grand Council to uphold *miinigoziwin* prior to initiating litigation regarding Treaty Three.¹⁷¹

The first protocol requires that a community seeking to initiate litigation to uphold its Treaty Three rights must obtain approval by the Grand Council.¹⁷² The second protocol ensures the transparency of Grand Council decisions.¹⁷³ It provides that during the first two days of the spring and fall Assemblies, “the Nation would convene as a National Assembly.” On the third and final day, the Chiefs in Assembly would meet “to make decisions to implement the Nation’s will.”¹⁷⁴ The first two days of the Assemblies give all members of the Nation an opportunity to participate and have a voice in the Grand Council’s decision-making. Implementing participatory democracy in this way is a means of upholding the Anishinaabe *inakonigaawin* principle about open decision making. We can contrast this approach with the band council governance model based on representative democracy.¹⁷⁵ These two protocols together support the goal of ensuring the nation is “of one mind” about Treaty Three litigation.¹⁷⁶

The Grand Council complied with these two processes in approving the “treaty right to education” case.¹⁷⁷ The Grand Council argued Treaty Three protects a right to education which the Crown breached, for example, by failing to provide adequate resources to support quality education and by failing to deliver culturally relevant education.¹⁷⁸ The Grand Council sought to bring a representative action and to have the Grand Chief of the Grand Council made the representative plaintiff on behalf of the Anishinaabe Nation of the Boundary Waters.¹⁷⁹ The Crown disagreed, arguing the proper rights-holder was not the Nation as a whole but rather the twenty-eight individual *Indian Act* bands which

169. *Ibid* at 121-22.

170. *Ibid* at 105, 122.

171. *Ibid* at 102.

172. *Ibid* at 111-12.

173. *Ibid* at 113.

174. *Ibid*.

175. See *ibid* at 112-13.

176. *Ibid* at 114.

177. *Ibid* at 177.

178. See *ibid* at 14; Kelly 2013, *supra* note 45 at paras 32-35.

179. *Ibid* at paras 4, 29.

have been imposed over the Anishinaabe Nation of the Boundary Waters.¹⁸⁰ The Ontario Court of Appeal upheld the motion judge's solution, which was to attempt to go between the horns of the dilemma by allowing the Grand Chief to serve as the representative plaintiff of the nation, but only if each of the twenty-eight bands passed band council resolutions authorizing the Grand Chief to do so.¹⁸¹ Any bands who refused would have to be joined as party defendants by the Grand Chief.¹⁸² The courts characterized this decision—which has come to be known as a “*Kelly* order”—as a practical solution to the dilemma of how to identify the rights-holder on an interlocutory motion when resolution of the issue requires a trial of the treaty claim.¹⁸³ A *Kelly* order is meant to ensure all putative rights-holders—both the Indigenous nation and the *Indian Act* bands—are parties to the action, avoiding the need to decide between them.¹⁸⁴ It should be noted, though, that none of the twenty-eight bands claimed to be the proper rights-holder; the issue was manufactured by the federal government. Moreover, as Mainville explains, a *Kelly* order is not a mere minor logistical speedbump. In the end, the Grand Council was unable to secure the twenty-eight band council resolutions.¹⁸⁵ Mainville identifies some potential reasons, none of which reflect an internal dispute about the identity of the proper rights-holder.¹⁸⁶ Although it was open to the Grand Council to continue the action by suing the bands who did not pass resolutions, Mainville explains the problem with this approach in the context of a second piece of litigation approved by the Grand Council where this same issue arose.

In the second case, the Grand Council sought judicial review of Ontario's decision to allow the sale of hydro dams.¹⁸⁷ Two intervenors in the case sought a *Kelly* order, which would force the Grand Council to sue any of its twenty-eight bands who failed to pass the requisite band council resolution.¹⁸⁸ As Mainville explains, the Grand Council argued *Kelly* orders are offensive as they contravene Anishinaabe custom, or in other words, laws.¹⁸⁹ Being required to sue a segment of

180. *Ibid* at para 5.

181. *Ibid* at para 121; *Kelly* CA, *supra* note 45 at para 21.

182. *Kelly* 2013, *supra* note 45 at para 121; *Kelly* CA, *supra* note 45 at para 21.

183. *Kelly* 2013, *supra* note 45 at paras 120-21; *Kelly* CA, *ibid* at para 20; *Kelly v Ontario (Minister of Energy)*, 2014 ONSC 5492 at paras 1, 3 [*Kelly* 2014].

184. *Kelly* 2014, *ibid* at para 38.

185. *Mainville*, *supra* note 14 at 120.

186. *Ibid* at 120-21.

187. *Ibid* at 118-19.

188. *Kelly* 2014, *supra* note 183 at paras 5, 9.

189. *Mainville*, *supra* note 14 at 118-19; *Kelly* 2014, *supra* note 183 at paras 8-9.

one's own citizens—forcing them into an adversarial process—is hardly conducive to generating consensus, upholding *miinigoziwin*, and working toward being of “one mind.” Recognizing this, the court acknowledged the perception that *Kelly* orders “could be used as a divide-and-conquer tactic in civil litigation against Aboriginal peoples.”¹⁹⁰ Despite this acknowledgement, the court granted the intervenors’ motion for a *Kelly* order.¹⁹¹ Two of the court’s reasons relate to the themes of this special issue.

First, according to the court, the Grand Council’s argument that the Anishinaabe Nation is the rights-holder pursuant to Anishinaabe custom or law is “no more than a self-serving assertion of something that the court may ultimately have to determine.”¹⁹² The court also stated the Grand Council and its representative, the Grand Chief, “are not correct simply because they say so.”¹⁹³ Here we encounter the third potential challenge to applying Indigenous law in identifying the rights-holders: a court’s refusal to defer to Indigenous law. This court’s lack of deference to the Anishinaabe Nation’s law about its own collective identity runs counter to the jurisprudence discussed above, which establishes that “the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself.”¹⁹⁴ In other words, the rights-holder is whoever the Indigenous people’s law says is the rights-holder. An Indigenous people might not be correct simply because they say so, but they are correct because their law says so. We also saw above that deference to Indigenous law is required to avoid constitutional capture. As such, it is not clear why the court expects to play such a significant role in adjudicating this issue. Granted, as discussed above, the identity of a treaty rights-holder will depend on the historical evidence of who entered into the treaty.¹⁹⁵ But evidence only has meaning within a normative framework, or in other words, within a constitutional order. And avoiding constitutional capture means interpreting evidence through the lens of an Indigenous people’s own constitutionalism. In reserving a significant role for itself, is the court here planning to engage in constitutional capture, assuming it will select an a priori standard and assess whether the Indigenous people’s political structure meets that standard? Or is the court assuming its expertise regarding Anishinaabe *inakonigaawin* exceeds that of

190. *Ibid* at para 9. See also Mainville, *supra* note 14 at 120.

191. *Kelly* 2014, *supra* note 183 at paras 10, 46.

192. *Ibid* at para 34.

193. *Ibid*.

194. *Tsilhqot'in Nation CA*, *supra* note 60 at para 149; see text accompanying note 125.

195. See text accompanying note 161.

the Anishinaabe Nation, such that the court is prepared to claim the Anishinaabe Nation's understanding of its own law is incorrect?¹⁹⁶ Both options are untenable. The court's labelling of the Grand Council's argument as "self-serving" is puzzling given the Grand Council's argument reflects current jurisprudence as well as the logical outcome of avoiding constitutional capture.

Let's consider the court's second reason for granting the intervenors' motion for a *Kelly* order. The court held the Anishinaabe Nation's argument that it is the rights-holder "has a Shakespearean 'the lady doth protest too much' aura to it."¹⁹⁷ The motion judge wrote:¹⁹⁸

I do not understand why the Applicants would object to having the 28 Indian Bands joined as parties to the Application. If it is true that in accordance with Aboriginal customary law that the [Anishinaabe Nation is] the rights holder, then the Indian Bands will stand down and not defend the Application but be bound by the outcome.

This reasoning is oblivious to the constitutional capture of *Indian Act* bands whose authority is statutory and who are bound by Canadian law, which often conflicts with Anishinaabe *inakonigaawin*. For example, the chief and council of an *Indian Act* band owe fiduciary duties to the members of their band,¹⁹⁹ and not to the nation as a whole. These fiduciary duties include a duty to manage the band's assets in the best interests of the band's members.²⁰⁰ In most contexts, one hopes a compelling argument could be formulated that using a band's assets to protect the Indigenous people's Aboriginal and treaty rights is in the best interest of the band's membership. That said, it is not difficult to imagine a band—struggling to provide basic public services and necessities to its members—who deems a test case too precarious under the Canadian legal system to risk its severely limited band assets on a possible costs award against it.

Mainville's paper is especially valuable because it highlights the adversarial nature of Canadian procedural law and the "divide and conquer strategy" used

196. For a discussion of courts' reluctance to defer to Indigenous law, especially as compared to courts' willingness to defer to foreign law, see Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Drake & Gunn, *supra* note 23, 281 at 302-304.

197. *Kelly* 2014, *supra* note 183 at para 36.

198. *Ibid* at para 37.

199. Jack Woodward, *Native Law* (Thomson Reuters Canada Limited, 2019) (loose-leaf revision 2020, release 3), ch 7 at para 740, citing *Williams Lake Indian Band v Abbey*, [1992] 4 CNLR 21 (BCSC) at para 14.

200. *Ibid*, ch 7 at para 741, citing *Louie v Louie*, 2015 BCCA 247; *Basil v Lower Nicola Indian Band*, 2009 FC 741 at para 95; *Moon v Campbell River Indian Band*, [1997] 1 CNLR 77 (Fed TD), affirmed (1999), 176 DLR (4th) 254 (Fed CA).

by the Crown and proponents.²⁰¹ This adversarial approach is in stark contrast to the goal of reconciliation, which at the very least denotes a non-adversarial relationship.²⁰² More importantly, the Crown's adversarial approach conflicts with Anishinaabe *inakonigaawin*. As Mainville explains, "Treaties are about relationships" and "they are not meant to create winners and losers."²⁰³ But the Treaty Three litigation discussed by Mainville "has created even deeper relations of animosity with the Crown."²⁰⁴

V. WHO SHOULD DECIDE THE IDENTITY OF THE RIGHTS-HOLDER?

A final theme of this special issue asks: Who should decide the identity of the rights-holder? The discussion thus far demonstrates the perils of leaving this issue to the courts. Christie's analysis reveals how the SCC's jurisprudence is captured by liberalism, which results in rights-holders being characterized as mere socio-cultural units instead of political entities. This outcome contradicts the plain language of section 35, which explicitly identifies rights-holders as "peoples," a term that denotes political entities. Similarly, Metallic's analysis reveals how the courts' reasoning in *R v Bernard* is captured by positivism. And Mainville argues Treaty Three is a nation-to-nation treaty that can be altered only through the negotiated agreement of the parties,²⁰⁵ and not by courts imposing their captured understandings onto the treaty and the parties.

In his contribution to this special issue, Paul Chartrand argues that the identity of a rights-holder is the prerogative of the executive as opposed to the judiciary.²⁰⁶ Like Christie, he is concerned with the trend toward judicialization of Aboriginal rights provoked by section 35.²⁰⁷ Chartrand is not defending a unilateral power of the executive to dictate the identity of rights-holders. Rather, he argues constitutional legitimacy depends on consent, and thus the identity of rights-holders should be decided through political negotiations between political actors, as in the case of historical and modern treaties.²⁰⁸ Chartrand highlights the *Métis Nation Accord*—a component of the 1992 *Charlottetown*

201. Mainville, *supra* note 14 at 122.

202. See text accompanying notes 21-24.

203. Mainville, *supra* note 14 at 121-22.

204. *Ibid* at 106.

205. *Ibid* at 26.

206. Chartrand, *supra* note 17 at 3.

207. *Ibid* at 177-79; Christie, *supra* note 9 at 4-5.

208. Chartrand, *supra* note 17 at 175-85.

Accord—which was the result of political negotiations and which included a definition of the Métis Nation. Although the *Charlottetown Accord* was defeated in a referendum, it had the consent of the federal government, all provincial governments, and the Métis Nation. More recently, the Métis Nation of Alberta, the Métis Nation-Saskatchewan, and the Métis Nation of Ontario each entered into a *Métis Government Recognition and Self-Government Agreement* with Canada. Pursuant to these agreements, Canada recognizes that each of the Métis government signatories is mandated to represent the Métis collectivity comprising its citizens.²⁰⁹

The federal government's Recognition and Implementation of Indigenous Rights Framework also envisions a role for the executive in identifying rights-holders. It proposes that the Minister of Crown-Indigenous Relations, on the advice of an advisory committee or institution, would make recommendations to the Governor in Council regarding the recognition of Indigenous rights-holders; the Governor in Council would then add the rights-holders to a schedule of legislation to be developed pursuant to the Framework.²¹⁰

Chartrand's argument is also influenced by courts' deference to state practice. The executive recognizes foreign states by entering into official relations with them, and courts defer to this recognition.²¹¹ Analogizing from states' recognition of each other, some argue Indigenous peoples' recognition of other Indigenous peoples is an essential element of the identification of Indigenous peoples.²¹² This approach has the benefit of ensuring Indigenous peoples are not dependent on the state for their recognition. It could also forestall the problem of non-Indigenous individuals forming organizations and falsely claiming to be an Indigenous people.²¹³ A recent example of recognition of Indigenous peoples by other Indigenous peoples is provided by the *Joint Declaration* executed on 16 January 2020 by the Métis Nation of Alberta, the Métis Nation-Saskatchewan,

209. See e.g. *Métis Government Recognition and Self-Government Agreement between Métis Nation of Ontario and Canada*, 17 June 2019, ss 2.02, 3.01, 1.01, online (pdf): *Métis Nation of Ontario* <www.metisnation.org/media/655331/2019-06-27-metis-government-recognition-and-self-government-agreement.pdf> [perma.cc/M24V-PQND].

210. "Overview of a Recognition and Implementation of Indigenous Rights Framework" (last modified 10 September 2018), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708> [perma.cc/H884-Q6LH].

211. Chartrand, *supra* note 206 at 182.

212. Joshua Castellino & Cathal Doyle, "Who Are 'Indigenous Peoples'? An Examination of Concepts Concerning Group Membership in the UNDRIP" in Hohmann & Weller, *supra* note 94, 7 at 19.

213. See Darryl Leroux, *Distorted Descent: White Claims to Indigenous Identity* (University of Manitoba Press, 2019).

and the Métis Nation of Ontario.²¹⁴ Each signatory of the Joint Declaration recognizes that the three Métis governments are “the *only* Métis-created and legitimate representative governments of rights-bearing Métis citizens in Alberta, Saskatchewan and Ontario.”²¹⁵

Jason Madden’s contribution to this special issue also highlights the significance of negotiations in identifying the rights-holder. As Madden explains, in *Powley*, the Supreme Court of Canada rejected Ontario’s argument that it was justified in denying Métis rights because identifying Métis rights-holders was too difficult.²¹⁶ In so doing, the Court slayed a dragon of Métis rights-denial, as Madden puts it.²¹⁷ And yet, this dragon has reared its head again in *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*.²¹⁸ Madden argues that the SCC’s conclusion in *Powley* entails a duty on Crown governments to negotiate with an Indigenous people to identify the proper rights-holder when a prima facie Aboriginal right exists.²¹⁹ The alternative is the illogical result from *Fort Chipewyan*, where a prima facie Aboriginal right exists, and yet there is no rights-holder, rendering the right hollow.²²⁰

VI. CONCLUSION

The papers in this collection demonstrate the need for compulsory Indigenous and Aboriginal law content within law school curricula. With respect to Aboriginal law, Metallic’s analysis reveals a wide discrepancy between well-established SCC jurisprudence and the lower courts’ reasoning in *R v Bernard*. As Metallic notes, “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 complex and confusing, especially for judges who likely did not study this area in law school or practice in this area.”²²¹ Similarly, as Christie’s article demonstrates, despite the Court’s commitment to giving equal weight to the

214. *Joint Declaration: Métis Nation of Alberta Provincial Council, Métis Nation-Saskatchewan Provincial Métis Council, Provisional Council of the Métis Nation of Ontario*, 16 January 2020, online (pdf): *Métis Nation of Ontario* <www.metisnation.org/media/655544/joint-declaration-mna-mns-mno.pdf> [perma.cc/22NA-9LS5] [*Joint Declaration*].

215. *Ibid* at 1 [emphasis in original].

216. Madden, *supra* note 20 at 200.

217. *Ibid*.

218. 2016 ABQB 713 [*Fort Chipewyan*].

219. Madden, *supra* note 20 at 226-27.

220. *Ibid* at 201.

221. Metallic, *supra* note 13 at 261.

“Aboriginal perspective,”²²² its section 35 jurisprudence is captured by liberalism insofar as it characterizes rights-holders as mere social-cultural entities instead of political entities. Turning to Indigenous law, McNeil explains that Indigenous peoples’ own law determines the identity of the rights-holder. And yet, as McNeil recognizes, “Canadian judges are generally unfamiliar with Indigenous law and cannot access it through conventional legal research.”²²³ And Mainville’s article illustrates how the “divide and conquer” approach adopted by the Crown and proponents, and upheld by the Court, generated not reconciliation but deep animosity within a treaty relationship. Mainville advocates for treaty councils as a form of dispute resolution; these Indigenous law institutions would help balance the relationship between Indigenous peoples and Crown governments.²²⁴ Although Adrien Habermacher’s article was not part of the workshop that generated this special issue, it makes a valuable contribution to the ongoing discussion about indigenizing Canadian law schools. It provides empirical data on the attitudes of individual faculty members at three Canadian law schools on three topics: (1) Territory acknowledgements; (2) Indigenous content in law school curricula including mandatory courses; and (3) Recruitment of Indigenous faculty members and students.²²⁵ Ascertaining the rationales underlying obstinacy toward these topics, especially the latter two, is key to addressing that obstinacy. As Senator Murray Sinclair, former Chair of the Truth and Reconciliation Commission, has said on many occasions, “education got us into this mess and education will get us out of it.”²²⁶

222. *Van der Peet*, *supra* note 22 at paras 49-50.

223. McNeil, *supra* note 16 at 172.

224. Mainville, *supra* note 14 at 122.

225. Adrien Habermacher, “Understanding the Ongoing Dialogues on Indigenous Issues in Canadian Legal Education Through the Lens of Institutional Cultures (Case Studies at UQAM, UAlberta, and UMoncton)” (2020) 57 *Osgoode Hall LJ* 37 at 37.

226. See *e.g.* “Reconciliation and NCCIE: Shining a Light on Education for Reconciliation,” (last visited 7 July 2020) online: *Indigenous Education: The National Centre for Collaboration* <www.nccie.ca/about-us/reconciliation-and-nccie> [perma.cc/QG5R-ZRVP].