LEFT OUT IN THE COLD: THE PROBLEM WITH ABORIGINAL TITLE UNDER SECTION 35(1) OF THE *CONSTITUTION ACT, 1982* FOR HISTORICALLY NOMADIC ABORIGINAL PEOPLES[©]

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In *R.* v. *Adams* and *Delgamuukw* v. *British Columbia*, the Supreme Court of Canada made statements to the effect that certain historically nomadic Aboriginal groups may be unable to make out a claim for Aboriginal title under section 35(1) of the *Constitution Act, 1982*. In light of the anthropological evidence relating to the close connection some of these groups enjoyed with the lands they occupied, a serious injustice may arise if these groups are indeed barred from an Aboriginal title claim. The author attempts to correct this potential injustice by demonstrating that at least some of these historically nomadic groups could meet the exclusive occupation test for Aboriginal title developed in *Delgamuukw*. As an alternative solution, the author proposes an additional test to facilitate proof of Aboriginal title for deserving historically nomadic groups that might otherwise be precluded from claiming such title.

Dans les décisions *R.* c. *Adams* et *Delgamuukw* c. *Colombie-britannique*, la Cour suprême du Canada a laissé entendre que certains groupes historiquement nomades seraient possiblement incapables de réclamer un titre aborigène en vertu du paragraphe 35(1) de la *Loi constitutionnelle de 1982*. À la lumière de preuves anthropologiques supposant des liens proches de ces groupes aux terres qu'ils occupaient, une grave injustice serait commise s'ils étaient incapables de faire une réclamation de titre aborigène. L'auteur tente de corriger cette injustice potentielle en démontrant qu'au moins quelques groupes historiquement nomades pourraient satisfaire au test d'occupation exclusive énoncé dans la décision *Delgamuukw* pour réclamer un titre aborigène. En alternative, l'auteur propose un test additionnel pour faciliter la preuve de titre aborigène pour les groupes historiquement nomades méritants qui seraient autrement empêchés de réclamer un tel titre.

I. INTRODUCTION

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I. INTRODUCTION

In a battery of decisions made in the latter half of the 1990s, the Supreme Court of Canada filled in much of the content of the "aboriginal rights" protected under section 35(1) of the

Constitution Act, 1982.[1] Two of the doctrines that have been more fully developed under this section's rubric are "site-specific Aboriginal rights" and "Aboriginal title." In brief, a site-specific Aboriginal right confers upon its holder the right to engage in—in the present day, upon a specific tract of land, and in its modern form—a practice, custom, or tradition that is proved to have been, at the time of European contact, integral to the distinctive culture of the claimant and that took place on the tract of land. By contrast, Aboriginal title consists of the right to present-day exclusive occupation of land that was exclusively occupied by the claimant group at the time the Crown asserted sovereignty over the land. In contradistinction to holders of site-specific Aboriginal rights, Aboriginal title holders enjoy the right to use the land for a variety of activities, not all of which need have been practices, customs, and traditions integral to the distinctive culture of the Aboriginal society in question. Indeed, the only limitation on the uses to which the land may be put appears to be something akin to the equitable waste doctrine of real property law.

The purpose of this article is three-fold, and I proceed in the following manner. First, I will demonstrate that although the Supreme Court of Canada places both within the general category of "aboriginal rights" under section 35(1) of the *Constitution Act, 1982*, the doctrines of Aboriginal title and site-specific Aboriginal rights are in fact quite different. The difference, I shall argue, is one of kind, not of degree, especially in terms of the content of the rights—site-specific rights conferring only a narrowly circumscribed use of land, as compared to the nearly unlimited uses available to claimants of Aboriginal title. Second, I will illustrate how this disparity in the content of the two doctrines may create a serious injustice for one class of Aboriginal peoples in particular; namely, certain historically nomadic Aboriginal groups. More specifically, I shall argue that, under the present doctrine, it is possible that certain historically nomadic groups will be unable to claim Aboriginal title over any part of the territories they frequented. If so, these groups will be confined to the exercise of a number of site-specific Aboriginal rights upon that

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[1] Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*]. Section 35(1) reads as follows: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

territory, provided they can meet the test for proof of such rights. This outcome may lead to a serious injustice since, assuming certain patterns of historical use and occupation, there is no justifiable reason to restrict historically nomadic peoples to the lesser entitlements of site-specific rights when their more sedentary counterparts, who did not necessarily enjoy a more intimate connection with the land, are afforded the opportunity to prove Aboriginal title. Finally, I will undertake a careful re-examination of the Aboriginal title doctrine as it should apply to certain historically nomadic Aboriginal groups, and attempt to refashion parts of the doctrine in order to rectify this potential injustice facing these groups.

II. THE DOCTRINES OF SITE-SPECIFIC ABORIGINAL RIGHTS AND ABORIGINAL TITLE UNDER SECTION 35(1) OF THE *CONSTITUTION ACT, 1982*

A. *Situating the Doctrines: The Delgamuukw "Spectrum" of Aboriginal Rights*

It will be useful, at the outset, to locate the doctrines of Aboriginal title and site-specific Aboriginal rights within the broader framework of the "aboriginal rights" recognized and affirmed under section 35(1) of the *Constitution Act, 1982*. The key formulation of this relationship was set out by Lamer C.J.C., writing for the majority of the Supreme Court of Canada, in *Delgamuukw* v. *British Columbia.*[2] In that case, Lamer C.J.C. held that the Aboriginal rights recognized and affirmed by section

[2] [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

35(1) comprise a spectrum in respect of their degree of connection with the land.

At one end of the spectrum are those Aboriginal rights whose exercise is not dependent upon any specific piece of land. We might term such rights "floating, culture-based Aboriginal rights"[3] to indicate this nature. An example would be the right of a successful claimant to carry a ceremonial weapon in a fashion that the criminal law would otherwise prohibit. In the middle of the spectrum are "site-specific Aboriginal rights," so named by the Supreme Court because their exercise is historically based and dependent upon a particular parcel of land. These rights enable the holder to enter onto the subject lands for the purpose of engaging in the specific custom, practice, or tradition comprising the right. An example might be the right to hunt beaver for sustenance on a certain tract of shoreline in Algonquin Provincial Park. At the other end of the spectrum is Aboriginal title, which gives its holders exclusive occupancy rights and the ability to use the land in nearly any fashion they desire. An example would be the right of a successful claimant to the exclusive occupation, and almost unlimited use, of a specific parcel of land in northern British Columbia.[4]

This manner of classifying the three types of Aboriginal rights—as points along a spectrum—seems to assume a gentle gradation of entitlements, beginning with floating, culture-based rights that have no connection with the land and ascending to Aboriginal title. A closer look, though, makes clear that there is more of a "leap" than a gradual ascension in terms of the benefits conferred by a finding of Aboriginal title as opposed to the other two rights. To demonstrate this, it is necessary to summarize the basic elements of the tests for, and contents of, site-specific Aboriginal rights and Aboriginal title.[5]

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[3] I have borrowed this term from Brian Slattery.

[4] The above statements are from *Delgamuukw*, *supra* note 2 at 1094-95. The examples provided are my own.

[5] It will be expedient to omit floating, culture-based rights from our main discussion, since these are unrelated to the main goal—demonstrating that if certain nomadic peoples are unable to claim Aboriginal title under the current doctrine, and are thereby restricted to proving entitlement only to one or more site-specific Aboriginal rights, an injustice will arise. As such, floating, culture- based Aboriginal rights will hereafter be treated only in

B. *Site-Specific Aboriginal Rights*

For the sake of clarity, the discussion of site-specific Aboriginal rights below has been divided into two parts: (1) the test for proof of the right; and (2) the content of the right.

1. The test for site-specific Aboriginal rights

In *R.* v. *Van der Peet*,[6] Lamer C.J.C. termed the test for proof of a site-specific Aboriginal right the "integral to the distinctive culture" test. To satisfy this test, the litigant must do more than demonstrate that the right claimed was an aspect of his or her Aboriginal society. He or she must go further and "demonstrate … that the practice, custom or tradition was one of the things which made the culture of the society distinctive—that it was one of the things that truly *made the society what it was*."[7]

Not all Aboriginal customs, practices, and traditions that took place on land, then, will constitute site-specific Aboriginal rights. Rather, only those that are "a defining feature of the culture in question" will qualify.[8] This might be termed the "distinctiveness" element. Chief Justice Lamer supplies as an example the Musqueam's claim to fish for food in the case of *R.* v. *Sparrow*.[9] He notes that "no aboriginal group in Canada could claim that its culture is 'distinct' or unique in fishing for food," for this is something common to all cultures throughout the world.[10] However, what the Musqueam claimed in *Sparrow* was that "it was fishing for food which, in part, made Musqueam culture what it is."[11] As such, "fishing for food was characteristic of Musqueam culture and, therefore, a *distinctive part* of that culture."[12]

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passing, when necessary to address them.

[6] [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

[7] *Ibid*. at 553 [emphasis in original].

[8] *Ibid*. at 554.

[9] [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

[10] *Van der Peet*, *supra* note 6 at 561.

[11] *Ibid.*

[12] *Ibid.* [emphasis in original].

Chief Justice Lamer also makes clear that, in order to qualify as an Aboriginal right, the custom, practice, or tradition must have been of "independent significance" or "integral" to the Aboriginal community in question; "[i]ncidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices … ."[13] What, precisely, does this mean? An example, in site-specific right terms, might help clarify the point. Suppose an Aboriginal group could prove that, at the relevant time (which will be discussed below), it hunted moose each summer upon a tract of woodland in northern Ontario in order to augment the group's winter food supply. This activity was proved to have been a distinctive part of its culture—it partly made the group "what it was." Further, assume that members of this group, over the years, developed a penchant for picking and consuming handfuls of blueberries while sojourning along the trails to the hunting ground. In this scenario, the group might be able to claim a site-specific right to hunt for moose upon the tract of land, as the hunting would be "integral"—in the parlance of logic, a necessary condition—to its distinctive practice of hunting moose. It would likely not, however, be able to claim a site-specific right to pick blueberries on the land, for this activity, in the example I have formulated, is surely incidental to the hunting of moose. In Lamer C.J.C.'s words, the picking of blueberries cannot piggyback on the integral practice of hunting and so become a site-specific Aboriginal right. The picking of blueberries would, therefore, have to be independently proved to have been integral to the group's distinctive culture in order to become a site-specific right.

The final element of the basic test for site-specific Aboriginal rights involves the issue of timing. That is, what point in time must the court look to in examining whether a particular custom, tradition, or practice was integral to the distinctive culture

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[13] *Ibid*. at 560. A narrow exception to this rule appears to have been developed in *R.* v. *Côté*, [1996] 3 S.C.R. 139 [hereinafter *Côté*]. There, the Supreme Court characterized the right claimed to be a right to fish for food, despite the fact that the actions of the appellant really involved teaching younger Aboriginal students the traditional Algonkian practices of fishing for food. The Supreme Court reasoned, *ibid.* at 176, that "a substantive aboriginal right will normally include the incidental right to teach a practice, custom and tradition to a younger generation."

of the group in question? Chief Justice Lamer, writing for the majority in *Van der Peet*, sets the time at "the period prior to contact between aboriginal and European societies."[14] The court must look at this pre-contact period for identifying Aboriginal rights, Lamer C.J.C. says, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1)."[15]

In sum, then, for a group to successfully claim a site-specific Aboriginal right it must prove that (1) prior to the period of contact, a practice, custom, or tradition taking place on a piece of land was (2) integral to (3) the distinctive culture of the group in question.

2. The content of site-specific Aboriginal rights

In *R.* v. *Côté*,[16] Lamer C.J.C., again writing for the majority of the Supreme Court, describes the nature of a site-specific Aboriginal right as "[a]n aboriginal practice, custom or tradition entitled to protection" and "limited to a specific territory or location."[17] The key point to note is that this is the only benefit that a site-specific right confers. In other words, the members of the group are not granted the right to use land in a manner that goes beyond the exercise, in modern form, of those customs, traditions, and practices proven to have been integral to their distinctive culture before the time of European contact. Returning to my example of the moose-hunting and berry-picking Aboriginal group, when on the land for the purpose of exercising its site-specific right to hunt moose, the group will not have the right to pick and eat the blueberries. Thus, if the land subject to the site-specific right is privately owned, the owner would be acting lawfully (albeit not generously) in making it known that members of the group may engage *only* in activities comprising the

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[14] *Van der Peet*, *supra* note 6 at 555.

[15] *Ibid*.

[16] *Supra* note 13.

[17] *Ibid*. at 167.

proven right upon the owner's land. If so, the members of the group could not, without committing an act of trespass, pick the blueberries. Indeed, in this scenario, group members could not engage in any activities aside from hunting moose and activities necessarily incidental to the practice of moose-hunting,[18] unless those activities were independently proven to have been integral parts of the group's distinctive culture prior to the time of European contact.[19]

It must also be understood that the exercise of a site-specific right is confined to the specific parcel of land upon which the custom, tradition, or activity was historically exercised. This is made clear by Lamer C.J.C. in *R.* v. *Adams*,[20] where he states that "if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then … the aboriginal right to hunt is … defined as, and limited to, the right to hunt *on the specific tract of land*."[21]

As will have become apparent, the doctrine of site-specific Aboriginal rights is quite narrow. The test involves an attempt to strip the right claimed to its essence, shaving off any part of those practices, customs, and traditions that cannot be proven to have been integral to the distinctive culture of the claimant group before European contact. The content of the right consists of what is left over by this procedure, albeit exercisable in modern form. These elements stand in high relief to the more generous doctrine of Aboriginal title, which is examined next.

C. *Aboriginal Title*

As with the above explication of the elements of site-specific rights, the following summary examines separately the

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[18] Activities necessarily incidental to the site-specific right to hunt moose on the land might include building tree-mounted hunting stands and erecting campsites.

[19] Of course, if the land subject to the site-specific right was, say, public park land, then the members of the group could engage in any other activities exercisable by the general public upon the land.

[20] [1996] 3 S.C.R. 101 [hereinafter *Adams*].

[21] *Ibid*. at 119 [emphasis added].

test for, and content of, the Aboriginal title doctrine formulated, in large part, in the *Delgamuukw* case.[22]

1. The test for Aboriginal title

The test for Aboriginal title can be briefly stated: the claimant group must establish that it occupied the subject land in an exclusive fashion at the time the Crown asserted sovereignty over the land. Each element of this general test demands further elaboration.

First, there is the issue of timing. In *Delgamuukw*, Lamer C.J.C. holds that the point at which the Crown asserted sovereignty over the land is the relevant time for proof of Aboriginal title, rejecting the "time of contact" approach used for site-specific Aboriginal rights. His stated rationale for this difference is that, since "[a]boriginal title is a burden on the Crown's underlying title," and since "the Crown did not gain this title until it asserted sovereignty over the land in question," it would "not make sense to speak of a burden on the underlying title before that title existed."[23] As such, he concludes, the time sovereignty was asserted over the land is the proper choice.

Next there is the issue of proof of occupancy. Chief Justice Lamer first notes that "the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land," including "their systems of law."[24] It follows that, "if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for

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[22] *Supra* note 2.

[23] *Ibid.* at 1098.

[24] *Ibid.* at 1099-1100.

aboriginal title."[25] On the other hand, the common law perspective must also be taken into account. According to that perspective, the fact of physical occupation will ground title to the land. Physical occupation may be established in a variety of ways, from the "construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting or fishing or otherwise exploiting its resources."[26] And, in considering whether there is sufficient occupation to ground title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed."[27]

It will be recalled that proof of a site-specific Aboriginal right requires a finding that the practice, custom, or tradition claimed was of central significance or integral to the claimant's distinctive culture. Does the doctrine of Aboriginal title also require the group to prove that its relationship with the land was distinctive to its culture—that it was one of the things that "made the society what it was"? At first, Lamer C.J.C. states that the same requirement of distinctiveness indeed operates for proof of Aboriginal title: "[A] claim to title is made out when a group can demonstrate 'that their connection with the piece of land … was of a central significance to their distinctive culture.'"[28] This would seem to import the "integral to the distinctive culture" test. However, he quickly retreats from this position:

> Although this [requirement that the group prove that its connection with the land was of central significance to its distinctive culture] remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, *I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim.* … [I]n the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of a central significance to the culture of the claimants. *As a result, I do not*

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[25] *Ibid.* at 1100.

[26] *Ibid*. at 1101.

[27] *Ibid*. Chief Justice Lamer adopts here a statement made in B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 758.

[28] *Delgamuukw*, *supra* note 2 at 1101.

> *think it is necessary to include explicitly this element as part of the test for aboriginal title.*[29]

The Supreme Court thus holds that occupation at the time the Crown asserted sovereignty over the land (if such occupation was exclusive, as will be discussed below) is a sufficient proxy for proving that the land was of central significance to the distinctive culture of the group in question.

The final part of the test for Aboriginal title is proof that the group's occupation of the land was, at the time sovereignty was asserted, exclusive. Once again, the concept of exclusivity must be grounded in both the common law and the Aboriginal perspective; it would not be fair to define exclusivity strictly in terms of the rights flowing from fee simple ownership. As such, the test "must take into account the context of the aboriginal society at the time of sovereignty."[30] Hence, a proved intention to retain exclusive control might be sufficient to meet the test, even if there was not *de facto* exclusivity in occupation.[31]

In sum, then, proof of Aboriginal title requires that the claimant group prove that (1) at the time the Crown asserted sovereignty over the land, the group (2) occupied the land in (3) an exclusive manner.

2. The content of Aboriginal title

It has long been established that, because of the *sui generis* nature of Aboriginal title, land held pursuant to such title is inalienable to any party except the Crown.[32] Aside from this point, what comprises the actual *content* of Aboriginal title? In *Delgamuukw*, Lamer C.J.C. states that the content of Aboriginal title may be summarized by two propositions: first, "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and

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[29] *Ibid*. at 1101-02 [emphasis added].

[30] *Ibid*. at 1104.

[31] *Ibid*.

[32] A recent expression of this principle can be found in *Delgamuukw*, *ibid.* at 1081-82.

traditions which are integral to distinctive aboriginal cultures;" and second, "those protected uses must not be irreconcilable with the nature of the group's attachment to that land."[33] Thus, subject to any uses irreconcilable with the attachment to the land—also described as "inherent limits"—a group holding Aboriginal title to land may do virtually *anything* upon it.[34]

What are these "inherent limits" upon the claimant group's otherwise *carte blanche* right to make such use of the land as it wishes? Although Lamer C.J.C. wavers on this issue to some degree, he appears to conclude that the inherent limits of Aboriginal title can be analogized to the concept of equitable waste. The rule against equitable waste is simply the restriction upon a life tenant not to commit "wanton or extravagant acts of destruction" on the land.[35]

In sum, Aboriginal title confers upon its holders the right to use the land in any manner they wish, subject to the inherent limits attached to that title. These inherent limits, though, are quite narrow. They appear to amount merely to the rule that a group holding Aboriginal title may not treat the land in such a fashion as to ruin its use for future generations.

D. *A Comparison of the Key Elements of the Two Doctrines, and a*

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[33] *Ibid*. at 1083.

[34] Chief Justice Lamer says in *Delgamuukw*, *ibid.* at 1091: "The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land." I say title-holders may do "virtually" anything upon the land, because Aboriginal title-holders' use of the land would also be constrained by some of the same laws governing non-Aboriginal title-holders' use of their land: nuisance laws, environmental protection legislation, et cetera.

[35] *Ibid*. at 1090. Chief Justice Lamer initially states, *ibid.* at 1089, that an Aboriginal group may not use Aboriginal title lands in a manner incompatible with the historical occupation proved, and then immediately thereafter, at 1090, posits the equitable waste analogy. That the latter, less restrictive rule is probably the proper explanation of the limit is made clear by his statement at 1090-91: "[T]he limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here." However, see W. Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw* v. *British Columbia*" (1998) 24 Queen's L.J. 279 at 313-14, for an argument that the doctrine of inherent limits on Aboriginal title formulated in *Delgamuukw* is muddled to the point of contradiction. For a more general argument that placing inherent limits on Aboriginal title contravenes principles of equality, see R.H. Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998) 61 Sask. L. Rev. 377.

Possible Explanation as to Why the Doctrines Differ So Greatly

From the foregoing summary, it is clear that the doctrines of site-specific Aboriginal rights and Aboriginal title are very different in nature. This section will compare some of the key elements of the two doctrines and suggest an explanation as to why the Supreme Court would formulate them in such a disparate fashion.

The most obvious difference between the two doctrines is how restrictive the doctrine of site-specific rights is when compared to the doctrine of Aboriginal title. Why would the Supreme Court formulate such a strict test, which confers so little? A possible answer is to be found in a statement made by Lamer C.J.C. in *Van der Peet*:

> Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.[36]

What does Chief Justice Lamer mean by this statement? A good argument can be made that he means that a court should not view section 35(1) of the *Constitution Act, 1982* as guaranteeing natural rights that enure to the benefit of all Aboriginal groups. The natural rights view (or at least one version of it) would be that, without having to examine the anthropological evidence surrounding a particular group's customs, practices, and traditions, practical reason can determine the rights that inhere in the group. A natural rights proponent would argue that once these inherent rights are identified, *they* should be the ones that section 35(1) recognizes and affirms.

The Supreme Court, though, rejects this view from the outset. This is not wholly surprising. As demonstrated by Lamer C.J.C.'s statement, courts are wary of explicitly making law by way of natural rights reasoning, preferring instead the more staid tools of precedent and argument by analogy. Further, the *Canadian*

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[36] *Van der Peet*, *supra* note 6 at 559.

Charter of Rights and Freedoms[37] can be seen as a document enshrining the basic natural rights of *all* Canadians; the universal "all" including, of course, Aboriginal peoples. As such, a relevant question would be: what would section 35(1) of the *Constitution Act*, *1982*—from a natural rights perspective—have to *add* to the rights already protected by the *Charter*?[38] For example, if we say that one natural right inhering in Aboriginal peoples is the freedom to engage in religious ceremonies, we are faced with the objection that rights to freedom of religion and freedom of expression are already countenanced, and enure to the benefit of all Canadians, under sections 2(a) and (b), respectively, of the *Charter*. The same might be said for many other natural rights.[39] In any event, regardless of the merits and demerits of adopting a natural rights view of the matter, this approach is rejected by the Supreme Court of Canada.

But if Aboriginal rights under section 35(1) are not to be determined "in the abstract," and if they must somehow be distinct from the basic rights guaranteed to all Canadians under the *Charter*, then there must be some means chosen to restrict and define their content. The Supreme Court accomplishes this objective by introducing the "integral to the distinctive culture" test. This test, which applies to both floating, culture-based rights and site-specific rights, essays to determine the "essence" of the Aboriginal group's culture, and to provide protection for only those practices, customs, and traditions that constitute this essence. It is in an attempt to arrive at this essence, too, that the Supreme Court sets the time for proving these Aboriginal rights at the point before European contact. This requirement works to

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[37] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[38] This very point is picked up by the Supreme Court in *Van der Peet*, *supra* note 6 at 534.

[39] A sophisticated version of a natural rights analysis could respond to such objections. It might *begin* by positing some rights applicable to all humans, and from these derive rights more particular to Aboriginals, focusing on their "Aboriginality." Such an analysis, however, is beyond the purview of this article. Readers interested in a thoughtful formulation of a natural rights position are encouraged to examine James Anaya's argument that self-determination is a natural right inhering in Aboriginal groups: see J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 75-77.

ensure that only "pure" Aboriginal customs, traditions, and practices—not those arising after European contact—are protected by section 35(1)'s floating, culture-based and site-specific rights doctrines.

The problems with such an approach are readily apparent. First, the question of what constitutes a thing's "essence" has eluded metaphysicians for centuries, if not millennia. Moreover, in the context of Aboriginal rights, attempting to carve out the essence of a group's many practices, customs, and traditions and confer only this excised piece as the right seems unduly restrictive. This point is made by L'Heureux-Dubé J. in her dissent in *Van der Peet*, where she states that this "strict construction of the constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of the *Constitution Act, 1982* advocated in *Sparrow*."[40]

The doctrine of Aboriginal title, by contrast, is not weighed down by the restrictive test and narrowly circumscribed benefit comprising the doctrine of site-specific Aboriginal rights. Why is this the case? That is, why are the two doctrines—both placed under the rubric of section 35(1)'s "aboriginal rights"—so disparate? I suggest that the difference is the result of a methodological difficulty that the Supreme Court faced when it came to fleshing out the meaning of Aboriginal title. Specifically, it would appear difficult to import the doctrines surrounding site-specific rights into the Aboriginal title analysis and still end up with the desired result; namely, that the successful Aboriginal title claimant be granted an almost unfettered use of the land.

This methodological difficulty is hinted at by Lamer C.J.C. in *Delgamuukw*.[41] There, he speaks of the argument urged upon

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[40] *Van der Peet*, *supra* note 6 at 592. For additional criticism of the "integral to the distinctive culture" test, see J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Const. Forum 27; L.I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilaterism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997) 8 Const. Forum 40 at 42-43; R.L. Barsh & J.Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 999-1002; and C. Bell, "New Directions in the Law of Aboriginal Rights" (1998) Can. Bar Rev. 36 at 47.

[41] *Supra* note 2.

the Supreme Court in *Adams*[42] that Aboriginal rights are "fragments of a broader claim to aboriginal title."[43] This, says Lamer C.J.C., would imply that "aboriginal rights must rest … in … *the unextinguished remnants of title*," and that "[t]aken to its logical extreme, this suggests that *aboriginal title is merely the sum of a set of individual aboriginal rights*, *and that it has no independent content.*"[44] This argument might aptly be termed the "bundle theory" of Aboriginal title, borrowing from L'Heureux-Dubé J.'s statement in *Van der Peet* that "aboriginal title exists when *the bundle of aboriginal rights is large enough to command the recognition of a* sui generis *proprietary interest to occupy and use the land.*"[45]

Chief Justice Lamer, however, writing for the majority in *Delgamuukw*, rejects the bundle theory in favour of a radically different notion of Aboriginal title. The reason for this seems clear. If Aboriginal title consisted, as the Crown argued, merely of "the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves,"[46] then it would be impossible to confer on Aboriginal title claimants a wide-ranging use of the land. That is, because the "integral to the distinctive culture" test for site-specific Aboriginal rights is so limiting, a group restricted to exercising only site-specific rights on the title land would be unable to function for any extended period of time. For example, if the group could prove, using the "integral to the distinctive culture" test, the right to fish, hunt, pick berries, and cook game on the land, and this became the substance of its Aboriginal title claim, what would occur when a member of the group wanted to wash him or herself in a river? Under this formulation, the title-holder would be unable to do so unless washing, too, could be proved to have been an integral part of the group's distinctive culture at the time before European contact. The same holds true for any number of

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[42] *Supra* note 20.

[43] *Delgamuukw*, *supra* note 2 at 1093.

[44] *Ibid*. [emphasis added].

[45] *Van der Peet*, *supra* note 6 at 580 [emphasis added].

[46] *Delgamuukw*, *supra* note 2 at 1080.

other activities, both the extravagant and the necessary: opening and running a restaurant, sleeping on the ground, and watching a video-cassette recording. The point is that it is impossible to take a number of site-specific Aboriginal rights, no matter how many, "add them up" in the literal sense, and arrive at the "any use except inherent limits" result reached by the Supreme Court in *Delgamuukw*. There would be too many gaps in the activities the Aboriginal group in question could undertake.

It seems that as a result of this methodological problem—that is, to avoid the existence of gaps in the title that would diminish the enjoyment of the claimant Aboriginal group—the Supreme Court found it necessary to reject the "integral to the distinctive culture" test in favour of the less restrictive "exclusive occupation" test for proof of Aboriginal title. And, when this latter test is adopted, there is no reason for the timing requirement to be set at European contact because, unlike under the doctrine of site-specific Aboriginal rights, there is no need to attempt to carve out the "essence" of the Aboriginal group's culture, which in turn requires the court to examine it in its "pure" (*i.e.*, pre-contact) form. Indeed, this search for essences would give rise to the exact methodological problem described above.

All of this points to the following conclusion: despite the fact that the Supreme Court describes site-specific Aboriginal rights and Aboriginal title as proximate points along a spectrum, they are, in actuality, very different doctrines. The purpose of this article is not, however, to undermine the doctrines of Aboriginal title and site-specific Aboriginal rights in their entirety. The Supreme Court's effort in this string of cases, spearheaded by Lamer C.J.C., constitutes a noble attempt to flesh out the content of section 35(1) in a manner that reconciles the rights of Aboriginal peoples with those of the rest of Canadian society. And the fact that the spectrum analogy is somewhat misleading is not, in itself, a fatal flaw in the section 35(1) jurisprudence; it merely underscores the methodological difficulties that the Supreme Court faced. Moreover, the radical difference in the nature of the benefit conferred by site-specific rights versus Aboriginal title will not necessarily work an injustice. For example, it is arguable that an Aboriginal group that infrequently exercised only a few

customs, traditions, or practices upon a certain tract of land should not be entitled to a declaration that it now "owns" the land and can perform almost any activity it wishes upon it. At the very least, it is clear that this group would be less deserving of such a declaration than a group that inhabited a piece of land for many decades, performing both its mundane and its sacred activities upon the soil. In such a scenario, restricting the former group to one or more site-specific rights seems like an equitable conferral.

Thus, so long as groups that *should* be able to claim Aboriginal title *can* claim Aboriginal title, the disparity between the doctrines will not create a problem. But if there are groups that, though deserving of Aboriginal title, are unable to make out such a claim under the doctrine developed by the Supreme Court, then the difference between the benefits conferred following a finding of Aboriginal title as compared to those following a finding of a site-specific right or rights creates a real problem. That is, because the benefits flowing from a site-specific right are so much more restrictive than those flowing from Aboriginal title, an injustice may arise if a group that should be entitled to a declaration of Aboriginal title cannot, because of a gap in that doctrine, claim under it. Is there such a gap in the doctrine of Aboriginal title? Are there groups that, despite being worthy claimants of Aboriginal title, will be restricted from proving it, and therefore unfairly left to claim only the dramatically-reduced entitlements flowing from site-specific rights? Certain statements by the Supreme Court concerning historically nomadic Aboriginal peoples indicate that these groups might fall into this category. It is to their situation that we shall now turn.

III. HOW THE POTENTIAL "GAP" IN THE DOCTRINE OF ABORIGINAL TITLE MAY CREATE AN INJUSTICE FOR CERTAIN HISTORICALLY NOMADIC GROUPS

This part of the article examines the potential difficulties that certain historically nomadic groups could face in proving a claim to Aboriginal title. I begin by examining some of the Supreme Court of Canada's pronouncements concerning Aboriginal title and nomadic peoples. Thereafter, the situation of

two different types of nomadic groups is addressed in light of the Supreme Court's comments.

A. *Pronouncements by the Supreme Court of Canada Regarding Nomadic Groups and Aboriginal Title*

In *Adams*,[47] Lamer C.J.C., writing for the majority of the Supreme Court, spends some time explaining the difference between Aboriginal title and site-specific Aboriginal rights. He makes clear that, in his formulation of these doctrines, the latter should not be perceived as being grounded in the former.[48] He underscores this point with the following statement:

> To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that *some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances*. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.[49]

This seems to be a clear suggestion that certain nomadic Aboriginal peoples—defined by Lamer C.J.C. as groups "varying the location of their settlements with the season and changing circumstances"—will not be able to make out a claim for Aboriginal title.

Immediately following this comment in *Adams*, Lamer C.J.C. makes another statement concerning a different kind of Aboriginal peoples:

> Moreover, some aboriginal peoples varied the location of their settlements both before and after contact. … That this is the case may (although I take no position on this point) preclude the establishment of aboriginal title to the lands on which they settled; however, it in no way subtracts from the fact that, wherever they were settled before or after contact, *prior to contact [they] engaged*

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[47] *Supra* note 20.

[48] Interestingly, this is the converse of Lamer C.J.C.'s earlier statement that Aboriginal title should not be seen as merely the sum of a set of Aboriginal rights (what I have termed the "bundle theory").

[49] *Adams*, *supra* note 20 at 118 [emphasis added].

> *in practices, customs or traditions on the land which were integral to their distinctive culture*.[50]

This comment casts doubt upon the ability of a different class of Aboriginal persons, albeit one that might also be fairly termed "nomadic," to claim Aboriginal title; namely, those groups that moved the location of their settlements at different points in time.

Anthropological evidence demonstrates that, historically, there existed Aboriginal groups fitting into both of these categories. The Micmac fit into what Lamer C.J.C. describes as a group varying the location of its settlement with the season and changing circumstances. The Algonkians of Central Ontario and the Iroquoians of what is now Quebec City fit into the second category: groups that moved their settlements infrequently, after a substantial period of sedentary living. The position of both types of groups will be examined next.

B. "*Infrequent Movers": The Algonkians and the Iroquoians*

Aboriginal groups falling into *Adams*'s second category—peoples that moved the locations of their settlements infrequently—are, for reasons that will be made clear, in less danger of being unable to prove Aboriginal title. Since they constitute the less contentious case, these groups will be treated first.

According to anthropologists, the Iroquoians of present-day Quebec City and the Algonkians of Central Ontario are prominent candidates for *Adams*'s second category. Mary Druke Becker, in her treatment of the Iroquoians in early

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[50] *Ibid*. [emphasis in original]. Chief Justice Lamer's reference to movement of the settlements before and after *contact*—not before and after Crown sovereignty was asserted—must be understood in light of the circumstances in which his statement was made. First, the point of this passage was to emphasize the importance of Aboriginal rights other than Aboriginal title (*i.e.*, site-specific and floating, culture-based rights). The period before contact is, of course, the relevant time for establishing these rights. Second, it must be recalled that when this passage was written *Delgamuukw* had not been decided. As such, it had not yet been established that it is the time of Crown sovereignty, not contact, that must be looked to in adjudicating the Aboriginal title claim. In light of *Delgamuukw*, though, it is clear that the issue to be considered is a group's movement of its settlement post-sovereignty, not post-contact. It is this issue, therefore, that I treat in this part of the article.

post-contact times, states that "[t]he Iroquoian-speaking peoples lived primarily in sedentary villages *that were moved every ten to twelve years* when conditions (*e.g.*, soil exhaustion) warranted."[51]

With respect to the Algonkians of Central Ontario, there has been a rather lively debate in the anthropological literature as to the land-possession patterns of Algonkian families in respect of what Frank Speck and Loren Eiseley originally termed "family hunting territories."[52] The accepted theory appears to be that, certainly post-contact and most probably pre-contact, Algonkian families owned (under Algonkian laws and customs) and occupied tracts of land over which they hunted. Of special importance to us is the relatively recent addition to the anthropological study of the Algonkian family hunting groups provided by Adrian Tanner. He points out that "recent data showed cases where [the family hunting] territories *appeared to "move" over a period of time …* onto unused adjacent land," with the result that "if maps of the territories of a single family are compared over time, a major shift may appear to have taken place."[53]

The issue for us, of course, is whether Aboriginal groups like the Algonkians and Iroquoians—groups whose settlements moved over time—would be precluded from claiming Aboriginal title as a result of post-sovereignty movement of their settlements. Before we can examine the effect of post-sovereignty settlement movements, though, a preliminary question must be addressed: could at least certain of the groups under consideration indeed establish exclusive occupation of their lands at the time Crown sovereignty was asserted? To answer this question, take, for example, a group with land-use patterns similar to the Iroquoians. Druke Becker's research establishes that the Iroquoians engaged

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[51] M. Druke Becker, "Iroquois and Iroquoian in Canada" in R.B. Morrison & C.R. Wilson, eds., *Native Peoples: The Canadian Experience*, 2d ed. (Toronto: McClelland & Stewart, 1995) 323 at 326 [emphasis added].

[52] F.G. Speck & L.C. Eiseley, "Significance of Hunting Territory Systems of the Algonkian in Social Theory" (1939) 41 American Anthropologist 269. See also J.M. Cooper, "Is the Algonquian Family Hunting Ground System Pre-Columbian?" (1939) 41 American Anthropologist 66.

[53] A. Tanner, "The Significance of Hunting Territories Today" in B.A. Cox, ed., *Native People, Native Lands: Canadian Indians, Inuit and Métis* (Ottawa: Carleton University Press, 1987) 60 at 63 [emphasis added].

in a sedentary lifestyle for substantial periods of time, establishing permanent village sites. This would probably suffice to establish the occupation component under the exclusive occupation test, since Lamer C.J.C. expressly mentions the construction of dwellings as one *indicia* of occupation. Assuming that the group's occupation of the land was exclusive, it seems that the group would indeed be able to establish exclusive occupation—and thus Aboriginal title—to the land at the time of Crown sovereignty.

Having addressed this preliminary point, we come to the central question: assuming that a certain group *could* establish exclusive occupation (and thus a right to Aboriginal title) at the time of sovereignty, would movement of the group's settlement post-sovereignty somehow abolish its Aboriginal title? To help visualize the situation, posit a hypothetical Aboriginal group that had its settlement at co-ordinates A, B at the time sovereignty was asserted (which we will call "Settlement 1"), and then moved its settlement post-sovereignty to co-ordinates C, D ("Settlement 2"). There are two possible scenarios to consider. First, Settlement 2 might be located *within* the Aboriginal group's territory.[54] Movement of a group's settlement post-sovereignty to another location within its own territory would clearly not affect its Aboriginal title, since at all times the group would remain within the title lands. The second scenario is the potentially problematic one. In this scenario, Settlement 2 is located *outside* the territory the group exclusively occupied at the time Crown sovereignty was asserted. Would movement to Settlement 2, under these circumstances, abolish the group's Aboriginal title to the land?

It will be recalled that, in *Adams*, Lamer C.J.C. states that while a group's movement of the location of its settlement before and after contact *may* preclude proof of Aboriginal title, he takes no position on the point.[55] In his later judgment in *Delgamuukw*, he makes the following comment with respect to post-sovereignty changes in the nature of occupation:

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[54] This would mean, of course, that the group's settlement was not co-extensive with its territory. More specifically, it means that the group's territory (the entirety of the lands the group occupied) was larger than its settlement (the group's village site). This seems to be an accepted usage of these terms.

[55] See note 50, *supra*, and accompanying text.

> I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained.[56]

This statement is somewhat cryptic, but it is at least arguable that by referring to a change in the "precise nature of occupation," Lamer C.J.C. is speaking of a post-sovereignty shift of a group's settlement to a location outside of its pre-sovereignty territory.[57] If this is a correct interpretation, then, according to Lamer C.J.C., such a shift would not act to preclude a claim for Aboriginal title.

A clearer statement in this regard is made by La Forest J. in *Delgamuukw* (with whom L'Heureux-Dubé J. concurred). His statement is highly relevant to our issue, and is worth quoting in full:

> [T]he aboriginal right of possession is based on the *continued* occupation and use of traditional tribal lands. The Chief Justice concludes that the relevant time period for the establishment of "aboriginal title" is the time at which the Crown asserted sovereignty over the affected land. I agree that in the context of generalized land claims, it is more appropriate, from a practical and theoretical standpoint, to consider the time of sovereignty as opposed to the time of first contact between an aboriginal society and Europeans. However, I am also of the view that the date of sovereignty may not be the only relevant moment to consider. For instance, there may have been aboriginal settlements in one area of the province but, after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained from the date of sovereignty until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of "aboriginal title" in that area merely because the relocation occurred post-sovereignty. In other words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another.[58]

This passage reflects a very sensible approach to the issue of post-sovereignty movement of an Aboriginal group's settlement. Indeed, any other approach would be manifestly unfair to Aboriginal groups that engaged in such movements.

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[56] *Delgamuukw*, *supra* note 2 at 1103.

[57] Another possible interpretation is that the chief justice is referring to the nature of an Aboriginal group's post-sovereignty occupation of the *same* parcel of land it occupied pre-sovereignty.

[58] *Delgamuukw*, *supra* note 2 at 1129-30 [emphasis in original].

One final point remains to be resolved. What land should comprise the Aboriginal title grant for a group whose settlement shifted over time—the pre-sovereignty territory, or the post-sovereignty territory? In the passage quoted above, La Forest J. implies that the post-sovereignty territory would constitute the title lands. This seems to be a good result, given that the present-day members of the group would probably have a closer connection to the post-sovereignty land. What if, however, the post-sovereignty land was either substantially larger or substantially smaller than the pre-sovereignty land? How might a fair solution be reached in these cases? I would suggest that, in this regard, La Forest J.'s general comments in *Delgamuukw* concerning the Aboriginal title territory to be granted are apposite:

> [T]he general boundaries of the occupied territory should be identified. I recognize, however, that when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between the aboriginal claimants and the government.[59]

Negotiation between the Aboriginal group claiming the title and the government would appear to be an appropriate way to define the territorial limits in these cases.

In sum, it is most probable, notwithstanding some earlier hints to the contrary in *Adams*, that Aboriginal groups whose settlements shifted post-sovereignty would not be barred from proving Aboriginal title to land. As a result, they likely do not fall into what I have called the gap in that doctrine. The situation with respect to groups in *Adams*'s first category of nomadic peoples, seasonally-nomadic groups,[60] may be quite different. In the next

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[59] *Ibid.* at 1129.

[60] It is to be understood that the term "seasonally-nomadic groups" may be employed in two different contexts in this article: (1) as the claimants of Aboriginal title—that is, the *descendants* of seasonally-nomadic peoples; and (2) as the ancestors of the claimants, at whom the court will look in analyzing the Aboriginal title claim. The descendants of such groups may no longer—indeed, probably do not—participate in a seasonally-nomadic style of living.

section, we shall see that they are perilously close to the edge of, if not certainly relegated to, this gap in Aboriginal title.

C. *Seasonally-Nomadic Groups: The Micmac of the Atlantic Provinces*

The other class of nomadic peoples described by Lamer C.J.C. in *Adams* are those groups that varied the location of their settlements with "the season and changing circumstances." A large number of anthropological works point to the Micmac as one such group. Leslie Upton claims that, in the early post-contact period, the Micmac "moved with the seasons in a regular cycle," based wholly on the need to satisfy their food requirements.[61] Both Allan McMillan and Virginia Miller describe a similar pattern of seasonal mobility during the early seventeenth century.[62] All of these anthropologists appear to agree that the movements of the Micmac were not arbitrary. Instead, the groups frequently returned to good camp sites year after year.[63]

The issue, again, is whether these groups would be precluded from establishing Aboriginal title as a result of their seasonal nomadism. In *Delgamuukw*, Lamer C.J.C. reaffirms his position in *Adams* on this matter. He says:

> Because aboriginal rights can vary with respect to their degree of connection with the land, *some aboriginal groups may be unable to make out a claim to title,* but will nevertheless possess … site-specific rights to engage in particular activities. As I explained in *Adams, this may occur in the case of nomadic peoples who varied "the location of their settlements with the season and changing circumstances." ...* The fact that aboriginal peoples were non-sedentary, however … does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices,

[61] L.F.S. Upton, *Micmacs and Colonists* (Vancouver: University of British Columbia Press, 1979) at 2-3.

[62] See A.D. McMillan, *Native Peoples and Cultures of Canada*, 2d ed. (Vancouver: Douglas & McIntyre, 1995) at 51-52; and V.P. Miller, "The Micmac: A Maritime Woodland Group" in Morrison & Wilson, eds., *supra* note 51, 347 at 349-54.

[63] See, for example, Miller, *supra* note 62 at 349.

> customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.[64]

This would appear to be a clear statement that non-sedentary Aboriginal groups may be barred from proving Aboriginal title. Indeed, this statement seems to imply that seasonally-nomadic Aboriginal groups may be the *paradigm* of a group unable to prove Aboriginal title.

Of course, the other point of Lamer C.J.C.'s statement is that while they may be restricted from a claim to Aboriginal title, seasonally-nomadic groups will not be precluded from proving one or more site-specific rights upon the land they historically frequented. This, however, is cold comfort. As has been repeatedly emphasized, site-specific rights are narrowly constructed, conferring only the right to exercise, upon a specific tract of land, the modern equivalent of a custom, practice, or tradition proven to have been an integral part of the distinctive culture of the group before the time of contact. A finding of Aboriginal title, on the other hand, gives the successful group the right to do virtually anything upon the land short of committing acts akin to equitable waste. The two rights, therefore, are miles apart in terms of their content.

But would barring seasonally-nomadic groups from claiming Aboriginal title constitute an *injustice*? This will depend upon two things: first, our definition of justice; second, our concept of what it is that makes a group deserving of a claim to Aboriginal title. One fairly conventional philosophical definition of justice is that posited by William Frankena: "[J]ustice is treating persons equally, except as unequal treatment is required by … principles of justice … of substantial weight in the circumstances."[65] If we accept this definition, we must then determine whether the unequal treatment of seasonally-nomadic groups—that is, excluding them from Aboriginal title, and restricting them to site-specific rights—is treatment that is required (or, perhaps, sanctioned) by principles of justice of substantial weight. The key to answering *this* question lies in

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[64] *Delgamuukw*, *supra* note 2 at 1095 [emphasis added].

[65] W.K. Frankena, "The Concept of Social Justice" in R. Brandt, ed., *Social Justice* (Englewood Cliffs, N.J.: Prentice-Hall, 1962) 1 at 10.

locating what I will term the Supreme Court's "theoretical rationale" for granting Aboriginal title to certain groups, but not others. By theoretical rationale I mean the justification underlying the granting of Aboriginal title; what a group must demonstrate in order to establish that it is *deserving* of the broad conferral flowing from a finding of title. If a group does not meet this theoretical rationale, it follows that barring the group from Aboriginal title—to paraphrase Frankena, treating the group differently or unequally from other Aboriginal groups—will be sanctioned by principles of justice of substantial weight (assuming, of course, that the theoretical rationale is defensible as a principle of justice), and hence will not be unjust.

What, then, is the Supreme Court's theoretical rationale underpinning the doctrine of Aboriginal title? A statement of what appears to be this rationale is found in the following passage from *Delgamuukw*: "[A]lthough aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because *it arises where the connection of a group with a piece of land 'was of a central significance to their distinctive culture ... .'*"[66]

From this passage, it is clear that the Supreme Court will grant Aboriginal title only to those groups for whom a piece of land was, historically, of central significance to their distinctive culture. Put negatively, the Supreme Court will deny Aboriginal title to those groups for whom a piece of land was not, historically, centrally significant. A piece of land being of central significance to the culture of the group in question, then, appears to be the theoretical rationale behind granting Aboriginal title. And, since the Supreme Court seems to use seasonally-nomadic peoples as the exemplar of a group that may not be able to claim Aboriginal title, it follows that the Supreme Court must believe that a piece of land for these peoples was not, historically, of central significance to their distinctive cultures.[67] That is, in the Supreme

[66] *Delgamuukw*, *supra* note 2 at 1094 [emphasis added]. Chief Justice Lamer is paraphrasing a longer passage from *Adams*, where he makes the same point: see *Adams*, *supra* note 20 at 117-18.

[67] Chief Justice Lamer's statement in *Delgamuukw* that certain *practices*, *customs*, *and traditions* may have been integral to the distinctive cultures of seasonally-nomadic peoples (for which they can claim site-specific rights) bears out this interpretation: see note 64,

Court's view these peoples do not meet the theoretical rationale underlying Aboriginal title.

But is it truly the case that, merely because an Aboriginal group moved its settlement with the seasons, it did not have a centrally significant relationship with a piece of land? The answer to this question will, of course, depend upon the group looked to. But if we recall the anthropological evidence relating to the Micmac, it is not at all evident that a piece of land was not of central significance to Micmac culture. Indeed, quite the opposite appears to be the case. The Micmac did not amble randomly from one location to the next. Instead, they returned time after time to the same seasonal camp sites. As such, the territory they traversed was not unlimited and forever changing, but was confined within more or less static boundaries. A relatively clearly circumscribed area of land, then, was *crucial* and *central* to the Micmac culture.

If this argument is accepted, then it would seem to follow that certain seasonally-nomadic groups *do* meet the theoretical rationale for granting Aboriginal title. And yet these groups might, because of their historical manner of living, be barred from proving such title. If so, they will be limited to proving entitlement to site-specific rights. But, again, site-specific rights give a claimant far less than a finding of Aboriginal title. Returning to our modified definition of justice, since seasonally-nomadic groups that enjoyed a close historical relationship with a piece of land may be treated differently or unequally from other Aboriginal groups (in that they seem to be barred from Aboriginal title and restricted to site-specific rights), and as there is no principle of justice of substantial weight to justify such differential treatment (since they, too, can meet the theoretical rationale behind Aboriginal title), it follows that the Supreme Court's doctrine of Aboriginal title does seem to treat certain seasonally-nomadic groups unjustly. These groups, that is, fall into a "gap" in the doctrine of Aboriginal title. It is towards finding a solution that closes this gap in the doctrine of Aboriginal title that we shall turn in the final part of this article.

IV. FILLING IN THE "GAP" IN THE DOCTRINE

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supra, and accompanying text. The implication is that a piece of *land* was *not* integral to the distinctive cultures of seasonally-nomadic groups.

OF ABORIGINAL TITLE

The final part of this article consists of an attempt to correct the injustice that certain seasonally-nomadic groups may face in trying to make out a claim for Aboriginal title. This may require some re-working of the doctrine of Aboriginal title. In particular, the test of exclusive occupation must be re-examined since it is this test that, on an operational level, has to be met for a group to establish an Aboriginal title claim. But since the doctrine of Aboriginal title, taken as a whole, is a fine piece of judicial creation, the goal is to correct the gap without destroying the doctrine in its entirety.

A. *Some Problems with the Exclusive Occupation Test*

Before commencing our re-examination of the doctrine of Aboriginal title, an important preliminary point must be addressed. Perhaps the Supreme Court's statement in *Delgamuukw* suggesting that seasonally-nomadic Aboriginal groups may be unable to prove title was a mere oversight, arising because the facts in that case did not lend themselves to clear meditation on the validity of that assertion. If it was a mere oversight, then there is no real "gap" in the doctrine—just a misunderstanding. And this misunderstanding can be cleared up by the courts when seasonally-nomadic Aboriginal groups come to litigate their claims.

If this was indeed a simple oversight on the part of the Supreme Court, then so much the better for seasonally-nomadic Aboriginal groups. I would suggest, though, that, for better or worse, statements made by Canada's highest court cannot be taken so lightly. Instead, they must be assumed to represent the Supreme Court's stance on the matter, and addressed squarely and openly on that footing.

Assuming, then, that the Supreme Court of Canada indeed believes that seasonally-nomadic Aboriginal groups may be unable to prove Aboriginal title, it would seem to follow that, since the test for Aboriginal title is proof of exclusive occupation, the Supreme Court must also believe that such groups cannot pass

this test. Although there has never been an express statement by the Supreme Court to this effect, this is not an unnatural conclusion given that, in *Delgamuukw*, the Supreme Court *both* establishes the test of exclusive occupation *and* suggests that seasonally-nomadic Aboriginals may be unable to make out a claim to Aboriginal title. In any event, for the reasons stated above, this rather undesirable conclusion must be squarely addressed.

Our first step, therefore, must be to analyze carefully the exclusive occupation test as it would apply to seasonally-nomadic groups. The question to be considered is whether it is truly the case that no seasonally-nomadic group would be able to meet the exclusive occupation test. The first element of this test is proof of physical occupation. It will be recalled that, in *Delgamuukw*, Lamer C.J.C. states that physical occupation can be established in a number of ways.[68] Four examples of occupation are supplied by him. The first three—the construction of dwellings, cultivation of the land, and the enclosure of fields—are more Western than Aboriginal in nature, their underpinnings located squarely in the common law tradition, and more distantly in the philosophical writings of John Locke.[69] The seasonally-nomadic Aboriginal group discussed earlier—the Micmac—would probably be unable to prove physical occupancy by these means; the group's historical lifestyle, as described in anthropological literature, makes this clear. The fourth example of proof of physical occupation provided by Lamer C.J.C.—the regular use of well-defined tracts of land for hunting, fishing, or otherwise exploiting the land's resources—is more promising. As the anthropological evidence demonstrates, some seasonally-nomadic Aboriginal groups indeed used fairly well-defined tracts of land for hunting and fishing. It would appear, therefore, that such groups should be able to meet the physical occupation branch of the exclusive occupation test.[70]

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[68] See *Delgamuukw*, *supra* note 2 at 1101.

[69] See, for instance, J. Locke, *Second Treatise of Government*, ed. by R.H. Cox (Arlington Heights, Ill.: Harlan Davidson, 1982), c. V, "Of Property."

[70] This conclusion is bolstered by other statements made by Lamer C.J.C. in *Delgamuukw*. It will be recalled that, in considering whether a group's occupation is sufficient to ground title, the court must take into account the group's size, manner of life, material resources and technological abilities, as well as the nature of the lands claimed.

The second part of the exclusive occupation test involves proof that the physical occupation was exclusive at the time Crown sovereignty was asserted. Chief Justice Lamer makes clear that both the common law and the Aboriginal perspective must be taken into account in this respect: "[T]he test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty."[71] As such, exclusive occupation can be made out even if other Aboriginal groups frequented the claimed lands: "Under those circumstances, exclusivity would be demonstrated by 'the intention and capacity to retain exclusive control.'"[72]

Applying this to the case of seasonally-nomadic Aboriginal groups, it would not be unreasonable to suppose that some of these groups could demonstrate exclusivity of occupation. Take, once again, the example of the Micmac. The anthropological evidence indicates that while the Micmac moved regularly with the seasons, their movements were not arbitrary; good camp-sites were returned to annually. It seems probable that the Micmac had exclusive occupation of these sites, at least during that part of the year in which the sites were occupied. While further anthropological evidence of the Micmac's intention and capacity to retain exclusive control of these sites would be required to definitively prove exclusive occupation, the point is that it seems quite possible that some seasonally-nomadic Aboriginal groups could demonstrate the requisite degree of exclusivity.

The foregoing "first principles" analysis makes clear that some seasonally-nomadic groups should be able to succeed at the exclusive occupation test. In *Common Law Aboriginal Title*—cited

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These elements would certainly assist seasonally-nomadic Aboriginal groups in proving physical occupation. Take, for example, the character of the lands claimed. It is quite possible that certain groups engaged in a seasonally-nomadic lifestyle because the nature of the land they inhabited was not conducive to sedentary living. If the food supply of these groups varied with the seasons, and each seasonal food item was to be found in a different location, then the groups would have little choice but to follow the food source. This strengthens the conclusion that meeting the physical occupation branch of the exclusive occupation test would not be an insuperable barrier for certain seasonally-nomadic Aboriginal groups.

[71] *Delgamuukw*, *supra* note 2 at 1104.

[72] *Ibid*. Chief Justice Lamer adopts here a statement made in K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 204 [hereinafter *Common Law Aboriginal Title*].

frequently by Lamer C.J.C. in *Delgamuukw*—Kent McNeil comes to the same conclusion with respect to nomadic hunter-gatherers.[73] In examining the issue of the sufficiency of occupation required to ground Aboriginal title to land, McNeil considers the case of a hypothetical group that "wandered indiscriminately in search of food, water, and other resources, without attachment to any particular area."[74] Referring extensively to the common law authorities on occupation, McNeil concludes that such a group "probably … could not be said to have been in occupation of any lands they passed over."[75] McNeil notes, though, that "modern anthropological research has revealed that few hunting and gathering groups are indiscriminate wanderers."[76] On the contrary, these groups tend to have attachments to defined areas. Moreover, territorial bounds are known both to the group's members and members of neighbouring groups, and permission for entry onto the group's territories is often required.[77] From these and other considerations, McNeil concludes as follows:

> Applying the criteria for occupation outlined above, there can be little doubt that a group of hunter-gatherers who habitually and exclusively ranged over a definite tract of land, visiting religious sites and exploiting natural resources in accordance with their own interests and way of life, would have been in occupation of that land.[78]

What is the extent of the land that such a hunter-gatherer group could be said to occupy? McNeil, citing numerous common law authorities, addresses this point in the following manner:

> As to the extent of their occupation, it would include not just land in actual use by them at any given moment, but all land within their habitual range, for

[73] *Common Law Aboriginal Title*, *supra* note 72 at 202-04. For a more recent restatement of McNeil's position that specifically addresses the Supreme Court's *obiter* statements that seasonally-nomadic Aboriginal groups may be unable to prove Aboriginal title, see K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. Rev. 117 at 127-28.

[74] *Common Law Aboriginal Title*, *supra* note 72 at 202.

[75] *Ibid.*

[76] *Ibid*. at 202-03. For an extensive and useful list of anthropological literature on the territorial divisions of hunting and gathering societies, see *ibid.* at 203, n. 35.

[77] *Ibid*. at 203.

[78] *Ibid*. at 203-04.

> occupation, once acquired, is not necessarily lost by temporary absence (*particularly if seasonal*), so long as the intention and capacity to retain exclusive control and return to the land continue, and no one occupies it in the mean time.[79]

These arguments make clear that there is no *a priori* reason why a seasonally-nomadic Aboriginal group could not meet the exclusive occupation test. Why, then, does the Supreme Court of Canada appear to believe that such groups cannot pass this test? Perhaps the problem lies in the Western-shaped conception of what "exclusive occupation" can mean. It does seem somewhat foreign to the Western mind, given its obsession with the efficient use of land,[80] that a group that moved seasonally could somehow "occupy" the whole of the land that made up its seasonal rounds. In other words, the concept of exclusive occupation can only be stretched so far—semantically and metaphysically—until, from the traditional Western view, it no longer signifies its original referent. While it might be objected that this is an esoteric point, it nevertheless resolves itself into the following practical question: how far can an Aboriginal group's historical land-use pattern actually stray from the Western conception of what "exclusive occupation" means, yet still resemble that concept sufficiently to lead a court to conclude that the group exclusively occupied the land under dispute? The answer to this question will depend, of course, upon how willing the court is to allow the Aboriginal perspective to modify its preconception of what the phrase "exclusive occupation" means. The Supreme Court's suggestion that Aboriginal groups that moved the locations of their settlements with the "seasons and changing circumstances" might be unable to make out a claim to Aboriginal title should sound a warning bell, though, that courts may not give the Aboriginal perspective sufficient weight in this respect.

It is to be hoped that, should a claim by a seasonally-nomadic group for Aboriginal title come before the

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[79] *Ibid*. at 204 [emphasis added].

[80] Consider the doctrine of adverse possession. One justification for this doctrine is that it promotes the efficient use of land through punishment for non-use: see B. Ziff, *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at 119-20. Ziff criticizes this rationale for the doctrine.

Supreme Court in the future, the Court will be open to the argument that, despite a seasonally-nomadic life-style, the group might have indeed occupied the subject lands in an exclusive manner. It is nonetheless possible, though, that the Court will not expand its conception of "exclusive occupation" to the degree necessary to accept that a seasonally-nomadic group could have exclusively occupied land. That is, it may be the case that a narrow view of the exclusive occupation test will deny seasonally-nomadic Aboriginal groups the opportunity to establish Aboriginal title. While this is an undesirable—and, I have argued, incorrect—result, the Supreme Court's statements in *Delgamuukw* regarding seasonally-nomadic groups and Aboriginal title force us to confront this possibility.

As has already been noted, though, exclusive occupation is merely the *test* for Aboriginal title. It functions only as a proxy for the theoretical rationale underpinning the granting of such title—a centrally significant relationship with a piece of land. Thus, if it can be demonstrated that certain Aboriginal groups do meet the theoretical rationale for Aboriginal title, but are unable to pass the test for that entitlement, then the test for Aboriginal title must be flawed, at least to the extent that it bars such groups from entitlement to the right. Since there appear to be some seasonally-nomadic groups that *are* able to prove (or at least raise a strong argument) that a piece of land was of central significance to their distinctive cultures, it follows that the exclusive occupation test *must be* flawed, at least to the extent that it may unjustly exclude deserving groups from a claim to Aboriginal title.

B. *A Possible Solution: Adoption of the Bundle Theory Test*

It is important to note that the problem is not with the exclusive occupation test *per se*, but rather its operation *vis-à-vis* seasonally-nomadic groups. But if the exclusive occupation test may not operate to enable seasonally-nomadic groups that enjoyed a very close connection with a piece of land to claim

Aboriginal title,[81] what solution can be found to remedy this problem? One promising solution would be the adoption of a second test for proving Aboriginal title—a test that does not require proof of exclusive occupation. More specifically, the solution might lie in the adoption of what I have termed, borrowing from L'Heureux-Dubé J.'s dissenting judgment in *Van der Peet*, the "bundle theory" test. This test, as formulated by L'Heureux Dubé J., maintains that "aboriginal title exists *when the bundle of aboriginal rights is large enough to command the recognition of a* sui generis *proprietary interest to occupy and use the land.*"[82] We might expand the bundle theory test as follows: if an Aboriginal group can prove a sufficient number of site-specific rights upon a reasonably circumscribed parcel of land, the group will be able to claim Aboriginal title over at least some of that land. It is crucial to note that, under my formulation of this test, the claimant group would not be restricted to exercising only those activities that are themselves site-specific Aboriginal rights upon the Aboriginal title land. Instead, upon meeting the bundle theory test, the group would receive a declaration that it is entitled to use the land in the same, almost unfettered, manner as a group proving Aboriginal title via the exclusive occupation test.[83] Under this new test it is quite possible that seasonally-nomadic groups that may be unable to succeed at the exclusive occupation test could, in the right circumstances, make out a claim for Aboriginal title.

The test has a number of ancillary strengths, too. Most important, the requirement that the group prove a sufficient number of site-specific rights over a defined territory works to ensure that a successful claimant group meets the theoretical

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[81] It must be re-emphasized that at least some seasonally-nomadic groups *should* be able to meet the exclusive occupation test. The rest of this article, though, works on the assumption that, for the reasons described above, a court will not expand its conception of "exclusive occupation" to the degree necessary to accept that a seasonally-nomadic group could have exclusively occupied land.

[82] *Van der Peet*, *supra* note 6 at 580 [emphasis added].

[83] It might appear strange that I am now advocating the adoption of the bundle theory test when, earlier, I suggested a number of explanations why the Supreme Court of Canada decided to reject the test in *Delgamuukw*. This seeming contradiction is explained below. For now, suffice it to say that I believe the problems the Supreme Court saw with the bundle theory test were more apparent than real.

rationale for Aboriginal title; *viz.* that a piece of land was centrally significant to its culture. This follows because if an Aboriginal group is able to demonstrate entitlement to a large number of site-specific rights over a certain territory, then surely it enjoyed a very intimate relationship with that land.

Further, it will be recalled that, in considering whether there was sufficient occupation to ground title under the exclusive occupation test, the court must take into account the group's size, its manner of life, material resources, and technological abilities, as well as the nature of the lands claimed. It has been argued that these considerations—which help import an Aboriginal element into the test of exclusive occupation—can only assist a claimant seasonally-nomadic group to a certain degree; specifically, to the degree that a court allows these considerations to expand its conception of what "exclusive occupation" can mean. The bundle theory test, on the other hand, provides a way of *ensuring* that the group's size, its style of living, and the nature of the land it inhabited are given meaningful consideration in a claim for Aboriginal title. In effect, each of these variables is automatically factored into the analysis of the geographic pattern and concentration of the site-specific rights that the group will attempt to prove in grounding its claim to Aboriginal title.

Finally, the adoption of the bundle theory test accords with an often-stated rule regarding the construction of the Aboriginal rights enshrined by section 35(1) of the *Constitution Act, 1982*: these rights are to be given a generous, large, and liberal interpretation.[84] Since the bundle theory test works to correct a possible injustice in the doctrine of Aboriginal title—the exclusion of certain worthy groups from the doctrine's purview—its adoption as a second test for Aboriginal title is in harmony with the purpose and scope of section 35(1).

C. *Possible Objections to, and Refinements of, the Bundle Theory Test*

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[84] For a recent expression of this rule, see Lamer C.J.C's comments in *Van der Peet*, *supra* note 6 at 536.

There are a number of objections that can be levelled against the adoption of the bundle theory as a test for Aboriginal title. It will be argued that none of these objections are insuperable. Further, the objections play a salutary role; they help refine the test into a more workable state.

Perhaps the most obvious objection to the adoption of the bundle theory test is the fact that the majority of the Supreme Court explicitly rejects it, in *Delgamuukw*, in favour of the exclusive occupation test. As I argued earlier, though, the bundle theory's rejection seemed to result from a perceived methodological problem; namely, that it is impossible to add up any sized bundle of site-specific Aboriginal rights (as those have been defined by the Supreme Court) and attain a sum that will confer an almost unlimited use of the land in the grant of Aboriginal title. There would always be unwanted "breaks" in the uses conferred under that title. It might seem surprising, then, that I am advocating the adoption of the bundle theory test. The reply to this, however, is that the methodological problem noted is more apparent than real. Indeed, the problem disappears once it is accepted that there is no need to *actually* arithmetically add up the various site-specific rights and have that sum constitute the entitlement. Instead, the bundle theory test would operate such that if a group could prove a sufficient number of site-specific rights concentrated in a reasonably circumscribed geographic area, the court would simply grant the same entitlement that would flow to a group proving Aboriginal title under the exclusive occupation test. This simple expedient eliminates the force of this objection to the test's adoption. While it might be argued that such a result is a "fiction," it is no more of a fiction than many other jurisprudential mechanisms used to attain a given result.

Another objection might be that, if the bundle theory test is accepted as part of the doctrine of Aboriginal title, almost any Aboriginal group, regardless of historical connection with the land, will be able to prove such an entitlement. The reply to this objection is obvious. As I have formulated the test, only those groups that can prove a *sufficient number* of site-specific rights upon a *reasonably circumscribed* parcel of land will be able to claim Aboriginal title. This excludes from Aboriginal title those groups that can prove only a handful of site-specific Aboriginal

rights upon a given territory, as well as those that can prove a large number of site-specific rights, but these over a vast, non-contiguous span of geography. These groups would, quite properly, be restricted to their site-specific rights—the correct result since their tenuous connection to any reasonably well-defined piece of land means (unless it is simply a problem of proof) that a specific piece of land was not of central significance to their culture.[85]

Admittedly, the requirement of proving a "sufficient number" of site-specific rights upon a "reasonably circumscribed" parcel of land needs some fine-tuning, but it is readily understandable. Moreover, fleshing out such terms as "sufficient" and "reasonable" is not a task foreign to the courts. On the contrary, determinations of this nature are made daily in diverse areas of the law. Additionally, the court can find guidance in interpreting what constitutes a "sufficient" number of site-specific rights over a "reasonably circumscribed" parcel of land by calling to mind the theoretical rationale underlying a grant of Aboriginal title: that a piece of land was of central significance to the claimant group's culture. Although reasoning this way might appear circular, the use of *any* test as a proxy to meet a broader, theoretical rationale will involve circularity. Calling to mind the theoretical rationale will, at the very least, help the court maintain its focus on what it is that the test is supposed to prove.

Another objection to this test involves the issue of timing, and might run as follows: the bundle theory test, as I have formulated it, requires the court to find a certain concentration of site-specific rights to ground Aboriginal title. The doctrine of site-specific rights, as developed by the Supreme Court, requires the court to look to the time before contact in identifying the right. Conversely, the doctrine of Aboriginal title mandates that the court look to the situation at the time Crown sovereignty was asserted over the land. Thus, since the bundle theory test looks to site-specific rights to prove Aboriginal title, there is an irresolvable confusion in the timing issue.

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[85] This is not to suggest that land itself was not of central significance to the cultures of such groups; clearly, it was. However, the Supreme Court's Aboriginal title doctrine demands that an Aboriginal group prove a close connection to a *specific piece* of land. It is from the viewpoint of this requirement that my suggestion is the "correct result."

This objection would appear to have some merit but, once the purpose of the differential in the timing requirements is understood, its force disappears. It will be recalled that Lamer C.J.C. provides two reasons in *Delgamuukw* for setting the timing requirement under Aboriginal title at the time the Crown asserted sovereignty over the land, as opposed to the period before contact approach used for site-specific Aboriginal rights. First, since "the Crown did not gain this title until it asserted sovereignty over the land," it "does not make sense to speak of a burden on the underlying title before that title existed."[86] Thus, the time sovereignty was asserted makes more sense from the point of view of logic. Second, and more importantly for our purposes, sovereignty is the proper time because "aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact."[87]

If we apply these two principles to the issue at hand, several things become clear. First, from a logical point of view, any test for Aboriginal title ought to regard the time at which Crown sovereignty was asserted over the land as the proper point to look to. Second, although the bundle theory test, as I have formulated it, involves proving site-specific rights upon the land in question, it does so only as a *proxy* for determining whether there was a sufficient connection between the claimant group and the land. It is a good proxy simply because it involves a doctrine already developed by the Supreme Court, and because it is a reliable way of ensuring that only those groups that had a strong historical connection with a piece of land are able to prove Aboriginal title. And it does not, it will be recalled, mean that the group will be restricted to exercising only those activities that are themselves site-specific Aboriginal rights upon the Aboriginal title land. But, if all this is true, then there is no need to set the time the court looks to in finding site-specific rights under the bundle theory test at the point immediately before European contact because, in the words of Lamer C.J.C., "aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal

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[86] *Delgamuukw*, *supra* note 2 at 1098.

[87] *Ibid*.

practices, customs, and traditions and those influenced or introduced by European contact."[88] That a custom, tradition, or practice taking place upon land was introduced after the arrival of the Europeans is therefore *irrelevant* when trying to prove Aboriginal title via the bundle theory test. Thus, under this test, although the court is to look for certain concentrations of site-specific rights, it can safely look to the point at which the Crown asserted sovereignty over the land in locating these rights. It follows that the timing requirement under the *Van der Peet* test for site-specific Aboriginal rights (*i.e.*, when a claimant is trying to prove those rights only) will be different from the timing requirement utilized by a group attempting to prove site-specific rights in order to ground Aboriginal title via the bundle theory test. As the foregoing explanation has made clear, this difference does not involve an inconsistency. Rather, it is dictated by common sense and the Supreme Court's own statements.

A further objection to the bundle theory test might be that it leaves uncertain what territory will be granted to a successful claimant of Aboriginal title by way of that test. Would a seasonally-nomadic group that could prove a sufficient number of site-specific rights over a certain parcel of land attain title to the whole of the land even though, historically, it occupied only a certain quadrant of the land each season? In this regard, La Forest J.'s suggestion in *Delgamuukw* that the drawing of exact territorial limits can be settled by negotiations between the Aboriginal group and the government seems appropriate.[89]

A final objection might be that the bundle theory test will complicate, or even ruin, the doctrine of Aboriginal title. The reply to this is that the bundle theory test would operate alongside, not in substitution of, the exclusive occupation test. The revised doctrine would operate precisely as it did before, except that the bundle theory test would provide an alternative route for a title claim to those groups (such as certain seasonally-nomadic peoples) that, despite meeting the theoretical rationale for Aboriginal title, may be unable to pass the exclusive occupation test. The bundle theory test thus corrects the potential injustice

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[88] *Ibid.*

[89] *Ibid.* at 1129.

arising under the current doctrine of Aboriginal title. In other words, it fills in the gap in that doctrine.

D. *A Recapitulation of the Bundle Theory Test*

A brief summation of the bundle theory test is in order, as the objections discussed above have shaped the test into a more sophisticated form. The test can be summarized as follows: An Aboriginal group that is able to prove a sufficient number of site-specific rights (looking for these rights at the time the Crown asserted sovereignty over the land, not at the point before European contact) upon a reasonably circumscribed geographic area is entitled to a finding of Aboriginal title. The uses allowed on the title lands would be the same, nearly unlimited, ones granted upon proof of title under the exclusive occupation test. The number of site-specific rights necessary to prove such title cannot be stated in the abstract, but will be a function of the concentration of those rights over the geographic area in question. The boundaries of the parcel of land to be conferred could be resolved through negotiations between the Aboriginal group in question and the various levels of government that stand to be affected by the declaration of title.

V. CONCLUSION

Certain statements made by the Supreme Court of Canada in *Adams* and *Delgamuukw* suggest that seasonally-nomadic Aboriginal groups may be unable to prove Aboriginal title. A careful examination of the exclusive occupation test as it would apply to seasonally-nomadic groups indicates, though, that some of these groups should indeed be able to establish exclusive occupation. Nonetheless, courts may be unwilling or unable to expand their preconception of what "exclusive occupation" can mean to the extent necessary to include within that concept's ambit the land-use patterns of seasonally-nomadic groups. This possibility must be squarely faced. If that is the case, then, under the present doctrine of Aboriginal title, these groups will be unable to prove title and will be left only with claims for

site-specific rights upon the lands over which they historically moved. But, despite the suggestion of a gentle ascension of entitlements inherent in the Supreme Court's "spectrum" analogy of the Aboriginal rights protected under section 35(1) of the *Constitution Act, 1982*, site-specific rights confer dramatically fewer benefits than does Aboriginal title. And there may be some seasonally-nomadic groups, such as the Micmac, that could meet the theoretical rationale underlying the doctrine of Aboriginal title; namely, that the land claimed was, historically, of central importance to their distinctive cultures. To restrict such groups to proving only site-specific rights when they deserve the broader entitlements flowing from a declaration of Aboriginal title creates an injustice. The bundle theory test aims to correct this injustice, or gap, in the doctrine of Aboriginal title. It functions as an additional test, conferring title upon those groups that can prove a sufficient number of site-specific rights on a reasonably circumscribed geographic area at the time the Crown asserted sovereignty over the land. The test ensures that, in accordance with the theoretical rationale underlying Aboriginal title, all Aboriginal groups that enjoyed a very strong relationship with a piece of land are entitled to a declaration of title. As such, the bundle theory test fills in the gap in Aboriginal title, making the doctrine more fair for all worthy Aboriginal claimants, regardless of their historical manner of living.