Archaeological Data as Evidence in Aboriginal Rights and Title Litigation in Canada

by

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Ethics Statement

The author, whose name appears on the title page of this work, has obtained, for the research described in this work, either:

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Abstract

Aboriginal rights and title acknowledge and affirm Indigenous peoples as the original occupants of Canada. Notwithstanding this acknowledgment, the legal tests to *prove* Aboriginal rights or title require pre-contact or pre-sovereignty evidence of land occupation and use. Archaeology's ability to challenge, substantiate, and add temporal dimensions to oral and documentary histories makes it an essential tool in the resolution of Aboriginal rights and title. Archaeologists, as ethics-bound stewards of the material past, need to understand how their data has been used in these claims. This dissertation examines the use and consideration of archaeological data as evidence in Aboriginal rights and title litigation in Canada. Using qualitative methods, I assess court decisions, expert witness reports, academic literature, and interviews with archaeologists and lawyers to understand how archaeological evidence has influenced the legal tests for Aboriginal rights and title. In particular, I consider the types of archaeological data considered for these tests and the standards data must meet to be considered in court. I frame these research questions in three different studies, each considering a different perspective: a broad overview of past litigation; an in-depth case study of the *Tsilhqot'in* (2014) decision; and an analysis of the experiences of expert witnesses and lawyers. My studies show that archaeological data can indicate pre-contact occupation and use of specific places within a territory. Evidence of occupation sites and lithic and faunal analyses fit within accepted definitions of occupation and meet the criteria for the tests for both Aboriginal rights and Aboriginal title. Archaeological data has been important evidence in multiple court decisions, including *Baker Lake* (1979), *Adams* (1996), and *Tsilhqot'in* (2014). Its ability to be tangible evidence of occupation and use may outweigh its limitations, including the inherent limits of the material record and the inability to indicate ethnicity. My investigation indicates that archaeological data have and will continue to be used as evidence in Aboriginal rights and title litigation, particularly to bolster oral histories and historical records.

Keywords: Archaeology; Aboriginal rights and title; Canada; Court evidence; Expert witnesses

Dedication

To my family—for the knowledge you've imparted, the love you've shared, and the future you've given me.

To Bean—may you find a Gloria to help me get through future academic endeavours.

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It may take a village to raise a child, but it takes a small army to help a graduate student complete their degree(s). I need to acknowledge a multitude of people for their help and support along the way.

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Foreword

In this dissertation I employ *The Chicago Manual of Style* for the majority of style decisions. I follow the style guide of *The Society for American Archaeology* for all references. I defer to *The Canadian Oxford Dictionary* for spelling and usage. I cite legal cases following the Allard Law Legal Citation Guide (http://guides.library.ubc.ca/legalcitation). The first mention of the case includes a full in-text citation with the neutral citation and a parallel citation (cases earlier than 1999 include two parallel citations), followed by a short name. Further mentions of the case cite the shortened case name and its date.

I use both aboriginal and indigenous to refer to the First Nations, Inuit, and Métis people of Canada. Although indigenous is the more internationally recognized term (United Nations General Assembly 2007), Canadian courts typically use aboriginal, per Section 35 of the *Canadian Constitution* (1982).

When we do research, that's a political act. Whether we're aware of it or not … we were committing political acts when we put trowels in the ground. Participant 4.

Chapter 1. Introduction

> *I think it is incumbent on professional archaeologists, particularly those who are training the next generation of archaeologists, to get that message across so that all students are exposed to the idea that their research, their work, their contribution, it's not just independent objective science for its own sake. It's a part of a social process that is deeply imbedded in colonial history and heavily influenced by separate biases that permeate the legal system but also every aspect of society. And so, part of our jobs, as educators, is to try and show that set of biases and how archaeology, among many other fields, can play a role in turning it around. And shifting it to something moving towards greater justice and equity and hopefully transforming the way we think of our history as British Columbians and Canadians.* Participant 9.

Aboriginal rights are collective rights which flow from Indigenous peoples' continued use and occupation of certain areas. They recognize Indigenous peoples as the original occupants of Canada (*Canadian Constitution* 1982:s. 35(1)). Inherent in this recognition is Indigenous peoples' special connection to the land (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019a:133). This connection is tied to cultural identity, connectivity, and continuity (Big-Canoe and Richmond 2014; Greenwood and de Leeuw 2007; Richmond et al. 2005; Schaepe et al. 2017:503–504). Without it, loss of sovereignty, disenfranchisement, and cultural loss are prevalent (BigFoot and Braden 2007; Brave Heart and DeBruyn 1998; Chandler and Lalonde 1998; Chandler and Proulx 2006).

Over the past 150-plus years, the colonial government of Canada has enforced a "racist, patriarchal, and controlling" system that sought to dispossess Indigenous peoples of their lands and cultures (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019a:252). Ever so slowly, aided by international policies and Indigenous-led activism (e.g., Barelli 2016; Belanger and Lackenbauer 2014; Foster 2007; Odello 2016), the federal, provincial, and territorial governments are recognizing Indigenous rights to land and, through claims commissions and litigation, are seeking to redress past wrongs (Erueti 2016; McHugh 2011). All recent Canadian government

inquiries point to the recognition of Indigenous peoples' inherent rights to the control and management of their cultures, languages, and lands (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019b:s. 2.1; Royal Commission on Aboriginal Peoples 1996:13; Truth and Reconciliation Commission of Canada 2015a:s. 45(iv)). The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) emphasizes that Indigenous peoples have the right to maintain and strengthen their relationship to their lands and that states shall grant legal recognition and protection to these lands (United Nations General Assembly 2007:Articles 25, 26).

What is at stake, then, for land claims processes in Canada, is the inherent right to land. In Canada, Indigenous peoples have been fighting for control of their traditional territories for over 150 years. Civil disobedience tactics like petitions, marches, and blockades (Belanger and Lackenbauer 2014; Idle No More 2019; Swain 2010), as well as more formal processes followed at treaty tables, government negotiations, and court rooms (Foster 2007; McNeil 1997; Miller 2009), have incrementally returned control over territories to some Indigenous peoples. These actions have helped shift government policy, increase public awareness, and further reconciliation (Royal Commission on Aboriginal Peoples 1996; Truth and Reconciliation Commission of Canada 2015a).

As a legal concept, Aboriginal rights and title is at the forefront of land claims litigation (Asch 1984; McHugh 2011; McNeil 1989). This body of jurisprudence[1] has provided key interpretations and definitions (*Delgamuukw v. British Columbia* [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) [*Delgamuukw*]; *R. v. Van der Peet* [1996] 2 SCR 507, 1996 CanLII 216 (SCC) [*Van der Peet*]), established tests to prove them (*Delgamuukw* 1997; *R. v. Marshall; R. v. Bernard* 2005 SCC 43, [2005] SCC 43 [*Marshall; Bernard*]; *R. v. Sparrow* [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) [*Sparrow*]; *R. v. Van der Peet* 1996),

[1] Jurisprudence, as defined by Black's Law Dictionary (1968:272), is the body of reported cases on a particular subject, such as Aboriginal rights and title.

and required the Crown[2] to consult and accommodate in situations where Aboriginal rights and title may exist (*Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 [2005] 3 SCR 550 [*Taku River*]) (see Appendix A for a brief description of each Canadian Aboriginal rights and title case I discuss within this dissertation). Since 1973, when the Supreme Court of Canada recognized Aboriginal title in the *Calder* decision (*Calder et al. v. Attorney-General of British Columbia* [1973] SCR 313, 1973 CanLII 4 (SCC)), Indigenous groups in Canada have gained Aboriginal rights to resource gathering activities, self-government, and Aboriginal title (e.g., *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in*]).

The legal tests to prove Aboriginal rights and title require proof of pre-contact or sovereignty land occupancy and use (e.g., *Delgamuukw* 1997; *Tsilhqot'in* 2014; *Van der Peet* 1996). To fulfill this requirement, diverse evidence including Indigenous testimonies and oral histories, as well as expert evidence from anthropology, archaeology, history, geography, and other disciplines, has been used to paint a broad picture of pre- and post-contact Indigenous society (Culhane 1998; Miller 2011; Ray 2011, 2015). Archaeologists, as interpreters of the material past, create data that can be essential in assessing Aboriginal rights and title (Kristmanson 2008; Leclair 2005; Warrick 2012). I broadly define archaeology as the study of the human past and behaviour through material culture.

I explore this important issue through one particular trajectory: the use of archaeological evidence in Aboriginal rights and title litigation in Canada. Through a three-part study, I examine 1) the roles archaeologists and their data have played in this important body of jurisprudence to understand how archaeological evidence has influenced the tests for Aboriginal rights and title, 2) the types of archaeological data considered for these tests, and 3) the standards archaeological data must meet to be

[2] In Canada, the government (both federal and provincial/territorial) is referred to as the Crown.

considered in court. My investigation indicates the strengths and limitations of archaeological evidence in court. It also suggests that archaeologists need to be aware of the political implications of their research, particularly as archaeology often oversees and arbitrates Indigenous heritage issues (Ferris 2003; Nicholas 2014, 2017a; Nicholas et al. 2015; Steeves 2015).

Archaeology Meets Ethical Concerns

Since the 1990s, archaeology has experienced profound changes in its theory and practice (Trigger 2006:456–478). Archaeologists are increasingly aware that their discipline and practice affects living people, including the descendant communities on whose lands and heritage they work (Atalay 2006, 2012; Colwell 2016; Ferris 2003). Indeed, archaeology has developed to embed the notion of collaborative Indigenous archaeology as a major component of the discipline, to the point where some would say that archaeology must be collaborative or it is nothing (Atalay 2012:7). However, although archaeologists are "transforming" their practices (Atalay et al. 2014:14), the majority of archaeological practice is still regulated by government legislation, which extends state bureaucratic control over heritage and ignores disciplinary sustainability (e.g., Askew 2010; Bendix et al. 2012; Klassen et al. 2009; Welch and Ferris 2014). This section explores the policies and ethical codes guiding today's archaeological practice, to examine if and why archaeologists have obligations to use their expertise in support of human rights.

Archaeology, as a discipline, is designed, built, and authorized to decode intricate-yet-powerful relationships between people, spaces, and stuff (Hogg et al. 2017:182). The application of archaeology in professional practice, however, is guided more by government legislation and resource development than by broad research goals (Allen 2011; Bendix et al. 2012; Coombe 2012; Ferris and Welch 2015, 2014; Hutchings and La Salle 2015; King 2009; Welch and Ferris 2014; Whittlesey and Reid 2004). In the Global North, including Canada, the majority of archaeology is part of the

cultural resource management (CRM) industry, as assessments and investigations are required before development projects and resource extraction (Altschul and Patterson 2010; Dent and Beaudoin 2015; Ferris 2002). Archaeological practice is mandated by government legislation and guided through ethical and local requirements (Dent 2017; Hogg et al. 2017).

For most of the history of heritage management in settler countries such as Canada, colonial ideology determined the significance of archaeological sites and objects, including Indigenous heritage (Silverman and Ruggles 2007; Smith et al. 2010). Legislation limited Indigenous control and consent over their own heritage and ignored Indigenous values (Dent 2016; Klassen et al. 2009; Meskell et al. 2015; Messenger and Smith 2010). Through Indigenous activism and archaeological re-awakening, heritage practitioners are starting to recognize the issues of working with Indigenous heritage and are trying to work ethically with Indigenous communities (e.g., Angelbeck and Grier 2014; Colwell 2016; Guilfoyle and Hogg 2015; Lyons 2013).

Indeed, archaeologists today might see heritage[3] as more of a human right, albeit one that modern states do not equally protect or manage (Nicholas 2017a, 2017b). The lack of Indigenous, or more generally descendant group, control and cooperation of their heritage is a worldwide issue for heritage management. International organizations have responded by issuing policy documents, including foremost the UNDRIP. The UNDRIP builds upon the 1948 *Universal Declaration of Human Rights* and the expressed interested of Indigenous peoples to differentiate themselves and receive recognition of such differences. It explicitly recognizes the rights of Indigenous peoples to "practice and revitalize their cultural traditions and customs … to manifest, practice, develop and teach their spiritual and religious traditions, customs

[3] Heritage can be defined as the values and meanings people ascribe to or associate with objects and places. Archaeology, on the other hand, is the study of human behaviour through material culture (Nicholas 2017b:227). Archaeology interacts with heritage when archaeologists recognize the spectrum of heritage values embedded in archaeological sites and artifacts (Ferris and Welch 2015:82).

and ceremonies, … the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains" (Articles 11, 12).

The UNDRIP is not unique in issuing calls for ethical heritage management. For the past 30 years, such international organizations as the International Committee on Monuments and Sites (ICOMOS) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) have effectively institutionalized cultural heritage and archaeological practice (Hogg et al. 2017; Jansen 2014; Soderland and Lilley 2015). Figure 1 depicts how international heritage policies have broadened the protection of heritage over time by encompassing and emphasizing a greater variety of heritage types and values including intangible (UNESCO 2003, 1989), underwater (UNESCO 2001; ICOMOS 1996), and landscape (ICOMOS 1990, 2008a). International heritage policies have grown to include the interpretation and significance of cultural heritage (ICOMOS 2013; Council of Europe 2005; ICOMOS 2008b), as well as different values for different communities (e.g., ICOMOS 2013).

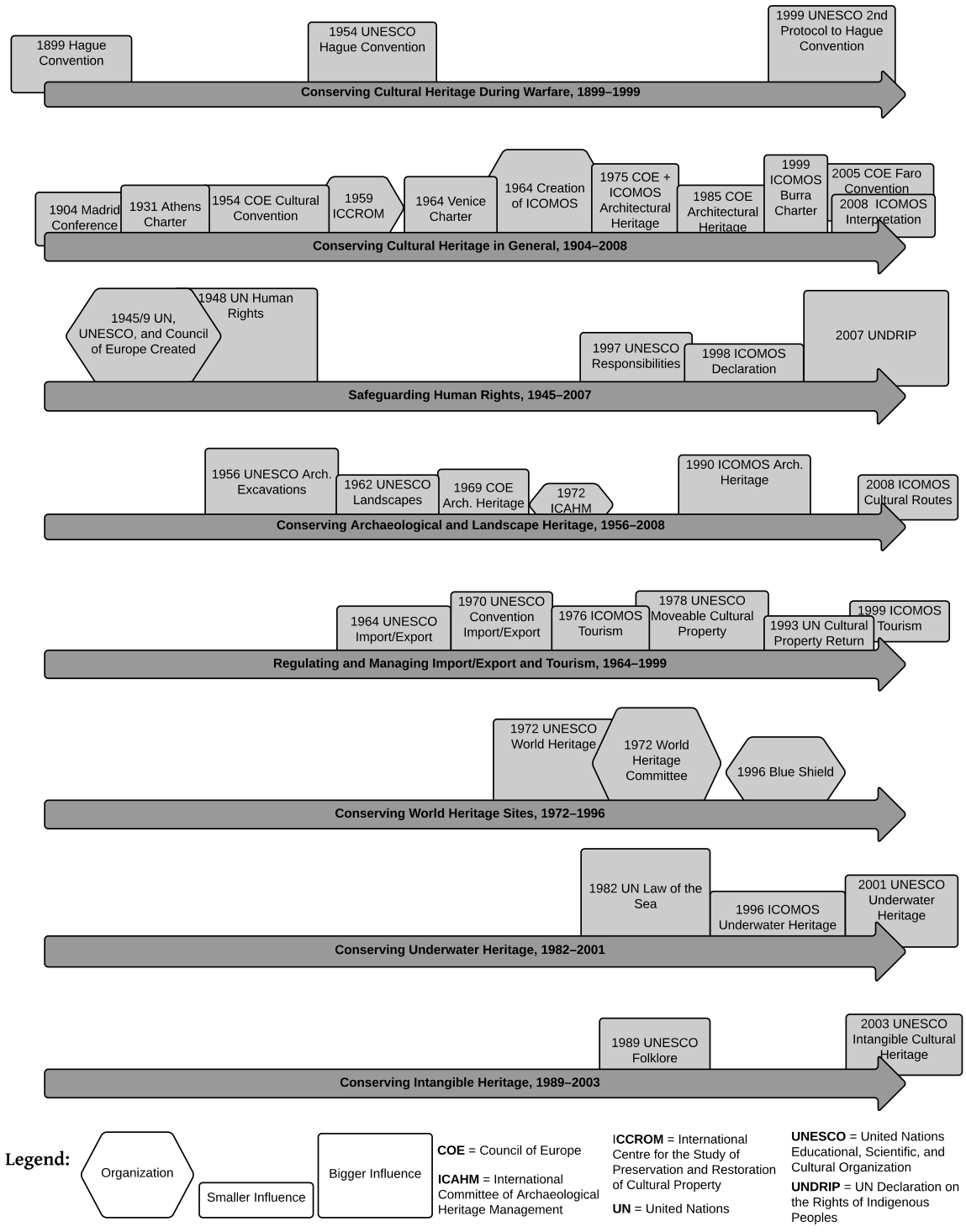

Figure 1. International heritage statutes organized by theme over time.
From Hogg et al. 2017:186.

Likewise, ethical codes created by archaeological organizations have attempted to forestall the pitfalls of practice and emphasize the importance of good fieldwork,

issues with the antiquities trade, and work with source or descendant communities (McGill et al. 2012). The Archaeological Ethics Database lists 79 Ethical Codes, from international organizations (e.g., World Archaeological Congress [WAC]), national organizations (e.g., Society for American Archaeology [SAA], Canadian Archaeological Association [CAA]), and regional organizations (e.g., British Columbia Association of Professional Archaeologists [BCAPA]) (Register of Professional Archaeologists and Chartered Institute for Archaeologists 2019). The number of ethical codes indicates that archaeologists realize the importance of their ethical responsibilities and believe that they are important enough to ensure that membership hinges on their adherence (although enforcement is generally informal or self-regulating). Although codes differ depending on the membership of the organization, they have all been expanded to incorporate a wider range of issues. For example, the Canadian Archaeological Association developed a code of ethics specific to working with Indigenous peoples (Canadian Archaeological Association 1997) and the World Archaeological Congress' first code of ethics is solely about the responsibilities of working with Indigenous peoples (World Archaeological Congress Council 1990).

Archaeological practice, particularly in settler countries, has been influenced by international heritage policies and ethical codes—as well as by a wealth of academic discourse—calling for ethical engagements with Indigenous communities (e.g., Atalay et al. 2014; Atalay 2012, 2006; Colwell-Chanthaphonh and Ferguson 2008; McNiven and Russell 2005; Supernant 2018). Sonya Atalay (2012:7) emphasizes that "archaeology's sustainability is linked to collaboration." The question of "why collaborate" is found within a context of a general movement towards a decolonized archaeology—a concept widely explored in settler countries for over two decades (Clarke 2001; Ferguson 1996; Hemming and Rigney 2010; Marshall 2002; Nicholas and Andrews 1997).[4]

[4] The goal of decolonizing the discipline of archaeology is to address imbalances between who makes decisions and who benefits.

Archaeologists are not unique in issuing and heeding calls to decolonize their discipline and work with Indigenous peoples and their heritage. Researchers across the social sciences have been making efforts to decolonize their methods and practices since the 1980s (e.g., Allen and Jobson 2016; Connell 2018; Fortier 2017; Harrison 2011; Shaw et al. 2006; Tuhiwai Smith 2012). Indeed, there is today a trend towards reconciliation within Canadian society.[5] The Truth and Reconciliation Commission of Canada's *94 Calls to Action* calls on all Canadians to take actions towards reconciliation (Truth and Reconciliation Commission of Canada 2015a). The federal government, as well as some provinces and territories, are attempting to adopt these calls to action, including endorsing the UNDRIP (Government of Canada 2016). More recently, the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* outlines 231 Calls for Justice that are legal imperatives for all Canadians to implement (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019a, 2019b). Movements such as Idle No More (2019) have pushed Indigenous activism into the Canadian consciousness yet again.

However, archaeologists are unique in that they work directly on the land and with the heritage of Indigenous peoples. As such, their research often directly relates to and is evidence of land claims and issues of Aboriginal rights and title (Kristmanson 2008; Leclair 2005; Warrick 2012). Both international policies and ethical codes call on archaeologists to create equitable relationships with Indigenous peoples and other descendant communities to allow control over their own heritage. Archaeologists should work responsibly and respectfully with Indigenous heritage owners, and as part of these responsibilities, should be aware that their research data have the potential to be used as evidence for rights or title claims. Although archaeologists may not have an

[5] I see reconciliation as a means for acknowledging and addressing past injustices and working towards better relationships between Indigenous and non-Indigenous peoples, based on the definition and principles of reconciliation outlined by the Truth and Reconciliation Commission of Canada (2015b:4, 113)

obligation, per se, to act as experts in court cases, they certainly need to be aware of the potential of their data and interpretations of it.

Aboriginal Rights and Title in Canada

To better illustrate the trajectory of my dissertation, it is important to understand the concept of Aboriginal rights. This section defines Aboriginal rights and title in settler countries and provides a brief history of their role in Canada.[6]

Aboriginal Rights in Other Settler Countries

Canada is not unique in its acknowledgement of Aboriginal title. Other colonial nations have taken steps to recognize and respect Indigenous land rights. In Australia, for example, *Mabo v. Queensland [No. 2]* (1992), 175 CLR 1 [*Mabo*] was foundational in recognizing native title and in response, the government passed the *Native Title Act* in 1993 (amended most recently in 2009) (Peterson 2010; Stelein 2009). Previous land agreements in Australian states have resulted in around 15 percent of Australia's land being returned to Aboriginal peoples (Erueti 2016:104). There are also agreements between Aboriginal peoples, government, and private companies for resource and infrastructure projects that set out land rights, compensation, and consultation protocols (Erueti 2016:104).

In New Zealand, Aboriginal title was first recognized in *R. v. Symonds* [1847] NZPCC 387 [*Symonds*], although most title was subsequently extinguished during colonization by British land seizures (Ruru 2010:187). However, the New Zealand government has a dedicated system of reparation through the Waitangi Tribunal, established in 1975. The Tribunal hears claims brought by Māori, with the goal of reaching a "fair and final settlement" with the government. These settlements typically

[6] These are countries founded in settler colonialism, where invasive settler societies sought to replace Indigenous populations and develop distinct identities and sovereignties (Lilley 2008:192).

include both “commercial … and cultural redress” such as property, access to land, participation in decision making, and place name changes (Erueti 2016:106).

In the United States, Aboriginal title was first recognized in the Marshall cases, a series of decisions issued by Chief Justice John Marshall in the early nineteenth century (Bragaw 2006; Riley 2014). With treaties, forced removals, and legislation, the United States government had seized approximately two million square miles of Native American land by the twentieth century (Linklater 2003; Spirling 2012; VanDevelder 2009). The Indian Claims Commission, started after the Second World War, attempted to make up for colonization by creating a process for Native American tribes to claim compensation for lost lands (Indian Claims Commission 1978; Ray 2010). In Alaska, the *Alaska Native Claims Settlement Act* (1971) extinguished all Aboriginal title in Alaska and created the Alaska Native Regional Corporations, owned by Alaska Native peoples (Marrs 2003; Worl 2003).

South American countries have differed on their treatment of Indigenous land rights. The majority have signed onto international policies on Indigenous rights, such as the *International Labor Organization Convention 169* (1989), which emphasized Indigenous land rights and the co-participation of Indigenous peoples in national society (Roldán Ortega 2004). Roque Roldán Ortega (2004) splits these countries into three groups: those that have made high-level commitments to Indigenous rights *and* followed through with concrete actions; those that have made high-level commitments to Indigenous rights but have not yet followed through with regulatory actions; and those that have not yet made any effort to recognize Indigenous rights. Seven countries fit his first category, including Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Peru (Roldán Ortega 2004:3).

Aboriginal Rights in Canada

Canada’s attempt to acknowledge Aboriginal land rights has a long history. Aboriginal rights were first recognized in the *Royal Proclamation of 1763*, which laid out

European settlement of Indigenous territories after Britain won the Seven Years War. Between 1701 and 1923, the Crown signed (and currently recognizes) 70 treaties with Indigenous groups (Government of Canada 2018). Although the treaty-making process potentially started with good faith between all parties, by the time of Confederation in 1867 the Crown's treaty-making policies were entrenched in assimilationist ideals and intentional land grabs for agriculture, settlement, and resource development (Miller 2009).

These assimilationist policies led Indigenous peoples, at the end of the nineteenth century, to petition for their rights abroad, including at the English Privy Council and the Vatican (Foster 2007:66–70). However, the *Indian Act* (first passed in 1876) ended these processes. In particular, the 1927 amendment to the *Indian Act* made it illegal for Indigenous peoples to raise funds or hire lawyers for land claims (Giokas 1995:50; Thom 2001:14). Not until 1951, when the *Indian Act* was revised, were Indigenous peoples able to take their land claims to court (Foster 2007:70; Giokas 1995:62–68).

The modern era of Aboriginal title and rights was ushered in with *Calder* (1973), in which the Supreme Court of Canada recognized Aboriginal title in Canada but could not agree if Nisga'a title had been extinguished. The Supreme Court's recognition of Aboriginal title triggered the federal government to restart their treaty-making process, abandoned in 1921. Indigenous peoples whose lands were not covered by historic treaties could enter into treaty negotiations with the federal government, and groups who took issue with aspects of their historic treaties could negotiate settlements with the government (now called Comprehensive and Specific Claims).

Starting with the *James Bay and Northern Quebec Agreement* in 1975, there have been 26 modern treaties signed in Canada (Land Claims Agreements Coalition 2017). In British Columbia, where there were few historic treaties, the British Columbia Treaty Commission is responsible for the land claims process (BC Treaty Commission 2018). Critics of the claim processes in Canada emphasize its slow process, the financial

burdens placed on Indigenous groups, and its limiting powers (e.g., Cassell and Samson 2016; Erueti 2016:105). Although many Indigenous nations have taken part in, or are currently in, the treaty process, many others seek alternative means of gaining control over their land, including litigation.

Beginning with *Calder* (1973), the Canadian judiciary has dealt with a steady stream of cases relating to Aboriginal rights and title. Furthermore, since 1982, when Aboriginal rights and title were affirmed in the *Canadian Constitution*,[7] the Supreme Court of Canada has provided definitions and parameters for the concepts, established tests to prove them, and determined that the Crown is obligated to consult and accommodate any time it should reasonably know that Aboriginal rights and title exist (e.g., *Delgamuukw* 1997; *Haida* 2004; *Sparrow* 1990; *Van der Peet* 1996).

Today, Aboriginal rights and title are understood as a "spectrum with respect to their degree of connection with the land" (*Delgamuukw* 1997:para. 138; *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700 at para. 1152, [2008] 1 CNLR 112 [*Tsilhqot'in*]). At one end of the spectrum are Aboriginal rights that are still integral to the claimant group but are not sufficiently supported by land use. In the middle are activities that are supported by land use and might be intimately related to a specific place. At the other end is Aboriginal title, which provides the right to the land itself (Figure 2).

[7] The federal government patriated and amended the Constitution, resulting in the 1982 *Constitution Act*. Indigenous peoples from across Canada lobbied to ensure that Aboriginal rights were included in the Constitution, resulting in Section 35. It states that "1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed; 2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis people of Canada" (1982:s. 35(1–2)).

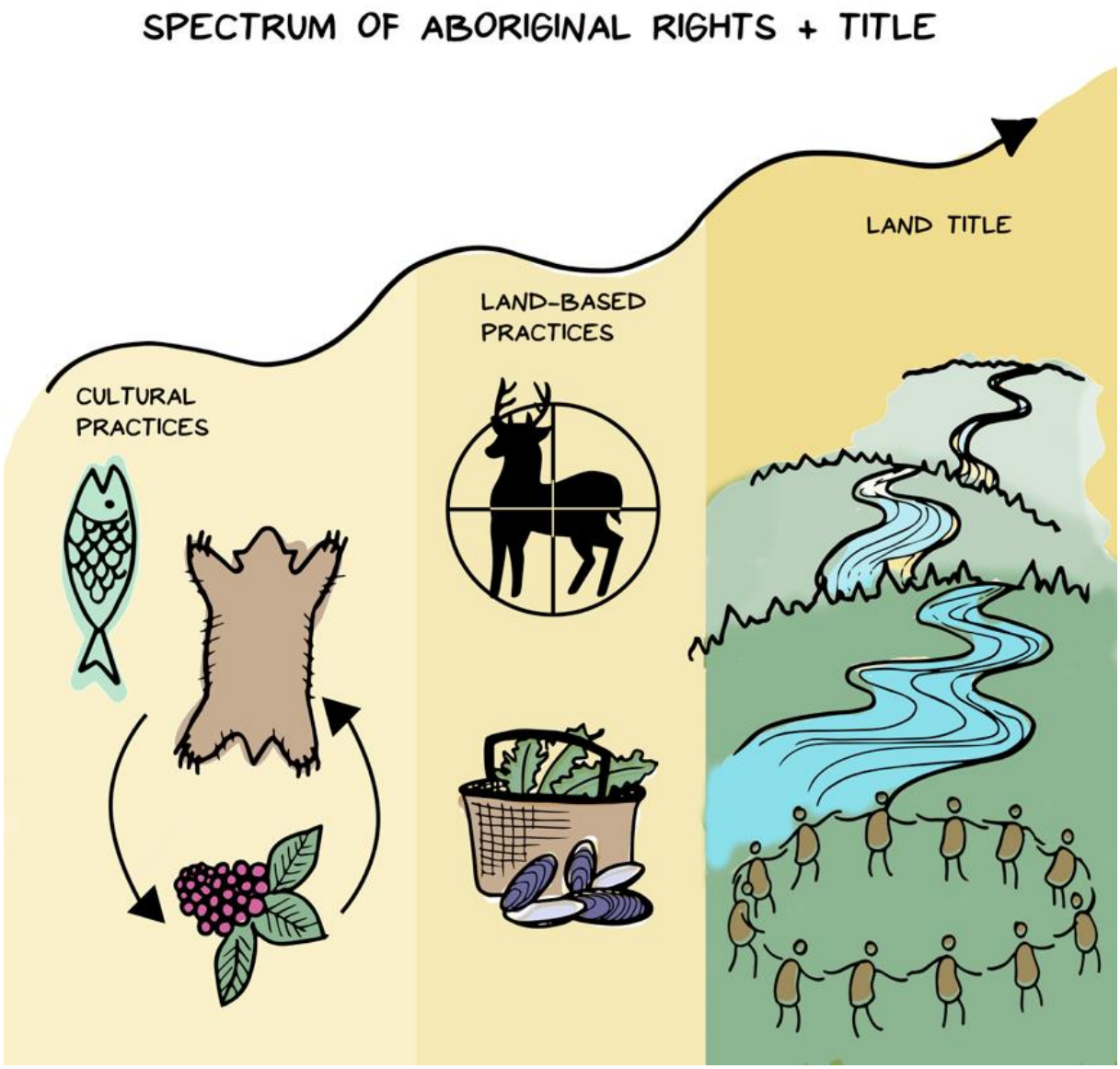

Figure 2. The spectrum of Aboriginal rights and title.
Image created by Tiaré Jung and licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.

From a Canadian legal perspective, the source of Aboriginal rights and title is the occupation of land prior to Crown sovereignty.[8] As the Supreme Court of Canada stated

[8] Sovereignty is "the supreme, absolute, and uncontrollable power by which any independent state is governed" (Black 1968:1568), the presumed authority that allows an independent state to exist. In the context of Aboriginal rights and title, sovereignty refers to the date that the Crown asserted authority over Canada (*Tsilhqot'in* 2007:paras. 585–602). This date differs depending on the province or territory. In British Columbia, the date of sovereignty, as agreed upon in *Delgamuukw* (1997) and *Tsilhqot'in* (2014), is 1846,

in the *Calder* decision (1973:328), the first time that a Canadian court recognized Aboriginal title, "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means." As such, Aboriginal rights and title are *sui generis* (unique) as they originated *before* Crown sovereignty, unlike other rights or title to land (such as fee simple ownership [the highest form of real estate ownership]) (e.g., *Delgamuukw* 1997; *Haida* 2004; *Sparrow* 1990). Because of this, the Crown has a fiduciary duty towards Aboriginal peoples with respect to rights and title, otherwise known as the *Honour of the Crown* (*Haida* 2004:paras. 16–19). Courts and governments at all levels increasingly concur in the view that the Crown can only infringe on those rights if it can pass a justification test and, then, completes consultations with Aboriginal groups claiming rights, title, or both to the lands at issue (Brown and McIvor 2012:10).[9]

Canadian courts have emphasized that dealing with issues of reconciliation, such as claims for Aboriginal rights or title, within the adversarial setting of the court is challenging. Courts are confined to the issues raised in the pleadings. Jurisprudence must reflect cognizance of a body of evidence as the basis for finding "a factual truth in an objective manner" (*Tsilhqot'in* 2007:paras. 1340, 1357, 1360). Unlike treaties and other negotiated processes, which can produce a win/win result, court decisions typically produce a win/lose result (*Tsilhqot'in* 2007:para. 1360). Many claims for Aboriginal rights or title are negotiated. But many do end up in court, often due at least in part to the initial reluctance of governments to acknowledge the profound and still-

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the year of the Oregon Boundary Treaty (*Tsilhqot'in* 2007:para. 601). Note that the test for Aboriginal *rights* requires proof of activities before *contact*, whereas the test for Aboriginal *title* requires proof of occupation before *sovereignty* (*Delgamuukw* 1997:para. 142).

[9] Aboriginal rights may be infringed upon if the Crown can prove that the infringement was justified, as outlined in *Sparrow* 1990. This process follows a two-step infringement/justification analysis where the claimant must first prove that their Aboriginal right was infringed upon. If the court determines that there was an infringement, the Crown must then prove that it was justified by: 1) indicating a legislative objective for infringing the right; and 2) proving that its actions uphold the honour of the Crown in dealing with Indigenous peoples (*Sparrow* 1990:paras. 70–78).

unfolding implications of Section 35 of the Constitution (1982; *Tsilhqot'in* 2007:para. 1340).

To prove an Aboriginal right (as opposed to title), the court must, solely on the basis of the evidence presented:

- characterize the Aboriginal right;
- determine if that right stems from pre-contact practices, customs, or traditions;
- decide if those pre-contact activities were integral to the distinctive culture of the claimant group; and
- establish if there is continuity between the claimed right and the pre-contact activities on which it is based (*R. v. Adams* [1996] 3 SCR 101, 1996 CanLII 169 [*Adams*]; *R. v. Côté* [1996] 3 SCR 139, 1996 CanLII 170 (SCC) [*Côté*]; *R. v. Powley* 2003 SCC 43, [2003] SCR 207 [*Powley*]; *Sparrow* 1990; *Van der Peet* 1996).

For Aboriginal rights to be protected by Section 35, the right must have existed in 1982 (when the *Constitution* was repatriated). The onus is on the Crown to prove otherwise (that the right was extinguished) (*Sparrow* 1990). Moreover, Aboriginal rights can also be infringed upon by the Crown. It is up to the claimant group to prove that the Crown infringed upon their right, and it is up to the Crown to justify that infringement (*Delgamuukw* 1997; *Powley* 2003; *R. v. Gladstone* [1996] 2 SCR 723, 1996 CanLII 160 (SCC) [*Gladstone*]; *Sparrow* 1990; *Tsilhqot'in* 2014).

The test to determine Aboriginal title, however, stems explicitly and exclusively from land use and occupancy. The onus is on the claimant group to establish that they occupied the claimed territory continuously, exclusively, and sufficiently (*Tsilhqot'in* 2014:paras. 24–37, 50; Figure 3). Although the three criteria for the test were established through scholarship and many court decisions (e.g., *Delgamuukw* 1997; *Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development)* [1979] 3 CNLR 17, 1979 CanLII 2560 (FC) [*Baker Lake*]; *Marshall; Bernard* 2005), *Tsilhqot'in* (2014)

was the first time that their application affirmed land title. In that decision, the Supreme Court defined the criteria for the test for Aboriginal title as follows:

- *Continuity* of occupation is only required if the claimant group relies on present occupation of the claimed territory as proof of pre-sovereignty occupation. In that case, the claimant group must prove that they occupied the territory before sovereignty (*Tsilhqot'in* 2014:paras. 45–46);
- *Exclusivity* of occupation requires proof of the "intention and capacity to retain exclusive control" over the territory, considering the characteristics of the claimant group, other neighbouring groups, and the claimed territory (*Tsilhqot'in* 2014:paras. 47–48); and
- *Sufficiency* of occupation requires a culturally sensitive approach to compare the practices, laws, and size of the claimant group, as well as the characteristics of the claimed territory, to the requirements of common law occupation (*Tsilhqot'in* 2014:paras. 45–46). Sufficient occupation can include evidence of settlement sites (such as villages) as well as "tracts of land" that were regularly used for resource gathering (such as hunting, fishing, or berry picking) at the time of sovereignty (*Tsilhqot'in* 2014:para. 50).

The Supreme Court emphasizes that these three criteria "provide useful lenses through which to view the question of Aboriginal title," but that the court must also consider the Aboriginal perspective and remember that the three criteria are "not ends in themselves, but inquiries that shed light on whether Aboriginal title is established" (*Tsilhqot'in* 2014:para. 32).

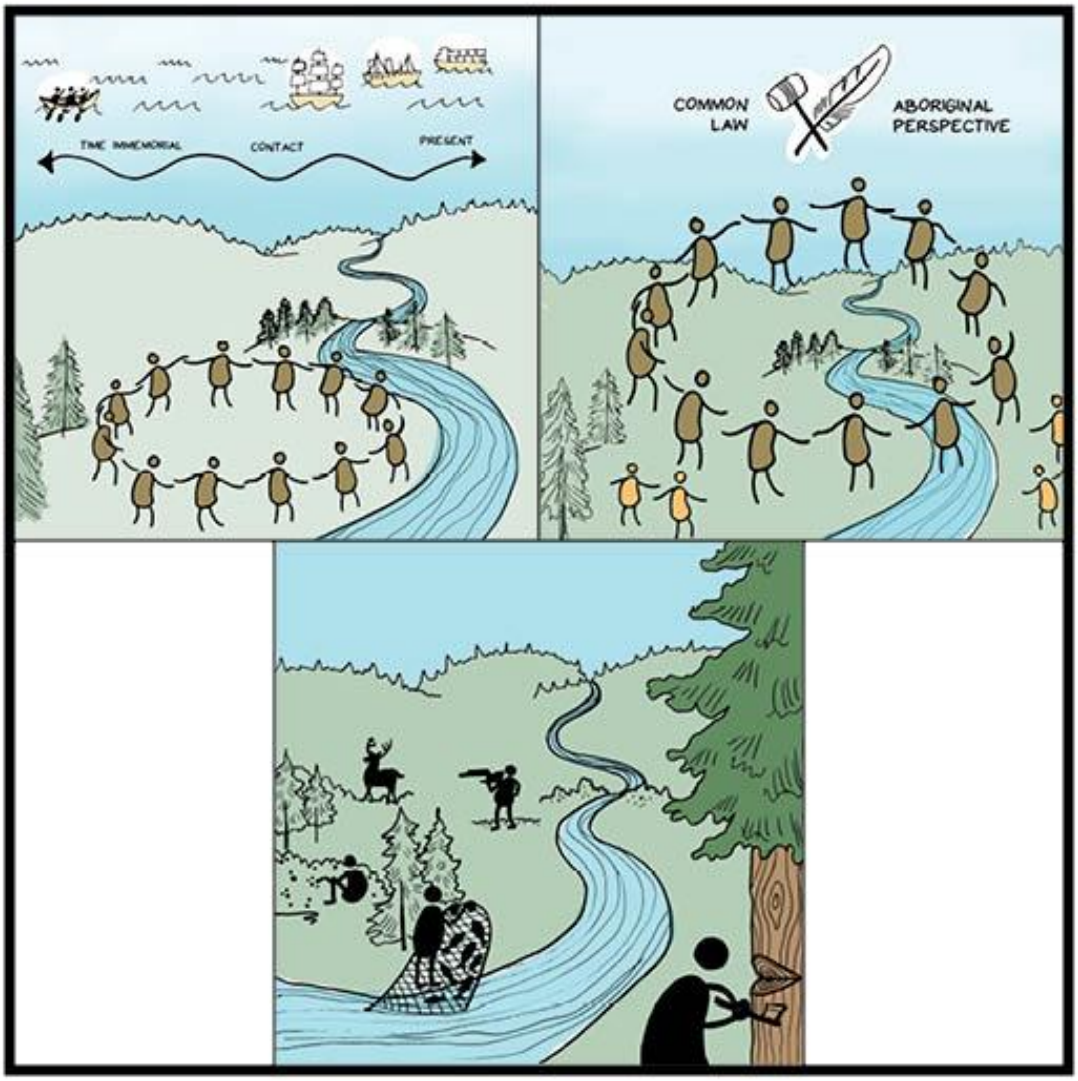


Figure 3. The three criteria for Aboriginal land title. Clockwise from top left: continuous occupation, exclusive occupation, and sufficient occupation.

Research Objectives and Dissertation Outline

Aboriginal rights and title, as understood from a Canadian legal perspective, acknowledge Indigenous peoples as the original occupants of Canada. As such, the legal tests required to prove rights and title hinge on pre-contact (or pre-sovereignty)

occupation and activities. Archaeology, as a discipline that studies and interprets the human experience through material remains, creates data—and interpretations of the data—that can help fulfill these tests. More importantly, archaeologists in Canada and other settler countries work directly on the land and with the heritage of Indigenous peoples. They follow international policies and ethical codes that suggest responsible, respectful, and equitable relationships when working with Indigenous heritage owners. This accountability suggests that archaeologists have a responsibility to at least be aware of how their research could be used for human rights issues, such as land claims, if not an obligation to use their expertise in support of these issues.

My dissertation asks, how have archaeological data been used as evidence in Aboriginal rights and title litigation in Canada? I answer this question through three objectives: 1) to understand the roles archaeology has played in the criteria for the tests for Aboriginal rights and title; 2) to determine the types of archaeological data considered in the criteria for these tests; and 3) to identify standards archaeological data must meet to be considered in court. My qualitative research design incorporates reviews of court decisions, expert witness reports, academic literature, and interviews with archaeologists and lawyers. I use textual analysis to evaluate these sources, identifying key themes and the internal and external relationships across datasets.[10]

My first objective was to understand the legal tests for Aboriginal rights and title and how archaeological data met the criteria for these tests. I fulfilled this objective through studying the history of Aboriginal rights and title jurisprudence in Canada. I sought to understand how the courts have dealt with these issues over time. I examined precedent-setting court decisions, government interventions, and academic literature to

[10] Textual analysis is a form of qualitative analysis that examines the content and meaning of texts (Lockyer 2012; McKee 2011:2). My text analysis is based in grounded theory. This method of inductive qualitative inquiry identifies categories and concepts that emerge from texts and links the concepts into substantive and formal theories (Charmaz and Bryant 2012). In this process I coded texts (court documents, expert witness reports, academic literature, and interview transcripts) at multiple levels—initially a very close coding to find out what is happening in the text, and secondly to identify patterns and commonalities between these codes.

understand how the legal tests for Aboriginal rights and title were created and adapted over time and the types of evidence courts consider for these tests. I first scanned court decisions for their descriptions and explanations of the legal tests and what academic sources they cited. I then referred to those sources to determine how their explanations and requirements compared and contrasted to the court decisions. I coded these documents for the types of criteria required for each test.[11]

My second objective was to determine the types of archaeological data considered in Aboriginal rights and title litigation. I analysed court decisions and expert witness reports to determine whether archaeological data were included, what types of data were presented, and where those data were most effective. I coded each document for the types of archaeological data discussed, the archaeologists mentioned, and the types of test criteria mentioned. To gain more detailed information and to have the benefit of understanding the personal experiences of key participants in litigation, I also interviewed archaeologists who had acted as expert witnesses and the lawyers for whom they worked. I coded these interview transcripts for the types of archaeological data discussed, their relation to the criteria for the tests for rights and title, and key themes that appeared throughout my coding process.[12]

My third objective was to determine the standards that archaeological data must meet to be considered by the courts. However, each one is unique—each case deals with a different claim area, cultural practices of the claimants, and types of available evidence. Thus, it is impossible to find specific methodological requirements for different types of data. However, it is possible to better understand the translation process between archaeological data and legal evidence. I thus looked at court decisions, expert witness reports, and the results of my interviews to determine how archaeological data are translated into legal evidence.

[11] Refer to Appendix B for my codebook for legal documents.

[12] Refer to Appendix C for my codebook for interview transcripts.

I consider these three research objectives from three different lenses: a broad overview, an in-depth case study, and an analysis of interview data. Each constitutes a separate study, allowing me to use a three-article model to frame my dissertation. The benefit of this model is three separate but integrated perspectives. As individual studies, these three perspectives allowed for a deeper analysis of my data, providing a more complete evaluation of archaeology's contribution to Aboriginal rights and title litigation. At the same time, the three studies remain integrated around the central research objectives and provide three different ways of looking at the same question.

Chapter 2, the first study, frames the history of Aboriginal rights and title jurisprudence through the use and consideration of archaeological evidence by Canadian courts. I first define Aboriginal rights and title as concepts and legal tests and provide an overview of the Canadian legal system. The focus of the chapter is a review of precedent-setting court decisions that indicates how archaeological evidence has been considered over time and in different types of cases. My examination indicates that archaeological data have been used as evidence of pre-contact occupation and use. However, challenges with archaeological data, including its ability to indicate continuous occupation and the inherent nature of the archaeological record, means that it is most often used in conjunction with other forms of data, such as ethnographies and historical documents.

Chapter 3, the second study, examines the archaeological data considered in the 2007 British Columbia Supreme Court *Tsilhqot'in* decision. I analyse the decision, Crown and Plaintiff arguments and replies, and expert witness reports to determine what archaeological data were entered as evidence. From that, I assess what data were considered favourably by the court. My assessment indicates that archaeological data were accepted as evidence of occupation on definite tracts of land at the time of sovereignty, meeting the legal tests for continuous and sufficient occupation. Archaeological evidence was used to bolster historic evidence of Tsilhqot'in villages, as well as oral histories and Tsilhqot'in testimony. As *Tsilhqot'in* (2014) is the latest

statement on Aboriginal title, and the first time that title was declared in Canada, the treatment and consideration of archaeological data in this decision could be an important precedent for future title cases.

Chapter 4, the third study, reviews interviews with archaeologists and lawyers to assess the role of expert witnesses and archaeological data in Aboriginal rights and title litigation. I interviewed 21 archaeologists who had acted as expert witnesses and nine lawyers with whom they worked to gain detailed data I could not access from legal documents. The results of my interviews provide insight into how experts are chosen and prepared for trial and the advantages and limitations of archaeological data from archaeological and legal perspectives. My analysis of the interviews indicates that both lawyers and archaeologists agree that archaeological data provide essential evidence of pre-contact use and occupation of a territory, but that challenges in identifying continuous occupation through time mean that archaeological data are most useful when considered in conjunction with other forms of evidence, such as ethnographies, historical documents, or oral histories.

In chapter 5 I synthesize and discuss the results of the three studies. I argue that archaeological data's ability to provide tangible evidence of pre-contact occupation and use of a territory may outweigh its limitations. However, these limitations do constrain the advantages of archaeological evidence, particularly in identifying ethnicity in the archaeological record, the perceived bias of archaeological experts, and the interpretation of archaeological evidence. The dissertation concludes with a discussion of the study's limitations and directions for future research. I suggest that the greatest implication of my research is that archaeologists must be accountable for their data and research outcomes. As any and all research could be considered in land claims cases, archaeologists need to ensure that their research products, including primary data like testing and excavation reports as well as final reports and articles, can be effectively understood and interpreted by non-experts. Archaeologists should follow rigorous and

objective research methods and practices, adhere to principles of plain and inclusive language, and include executive summaries for non-experts.

Chapter 2. A History of the Use of Archaeological Evidence in Aboriginal Rights and Title Litigation

Aboriginal rights and title acknowledge that Indigenous peoples are the original occupants of Canada (*Delgamuukw* 1997:para. 114). Along with this acknowledgment, however, come legal tests to prove both Aboriginal rights *and* Aboriginal title that require direct evidence of pre-contact (or pre-sovereignty) land occupation (*Van der Peet* 1996; *Tsilhqot'in* 2014). Archaeologists are privileged with not only technical training but also political license to access and interpret the material past and, as a result, are often the authorities and gatekeepers of much of the material record of pre-contact occupation in North America (Hogg et al. 2017). Accepting that North American archaeology is a political, land-based practice often overseeing and presuming to arbitrate Indigenous heritage issues, archaeologists need to pay attention to Indigenous land rights and, I argue, to the use of archaeological data as evidence in adjudicating rights and title claims.[13]

Archaeology can have a direct impact on legal decisions when archaeological evidence is used in litigation (Leclair 2005:110). However, the use of archaeological evidence in the courts has received less attention than it warrants (e.g., Kristmanson 2008; Riches 2004:110), especially in comparison to disciplines like anthropology and history (e.g., Cruikshank 1992; Culhane 1998; Miller 2011; Ray 2003, 2015, 2016). Through an analysis of major court decisions on Aboriginal rights and title, I show that archaeologists—and archaeological data—have been active participants in Aboriginal rights and title litigation since the beginning of modern jurisprudence on the subject (*Calder* 1973). To frame this investigation, I first provide key definitions for Aboriginal rights and title and then describe court processes, including the role of expert witnesses. The rest of the chapter offers an analysis of jurisprudence, organized by type of case,

[13] I define archaeology as the study of the human past through material remains, per the Society for American Archaeology's (2016) definition. As expert witnesses must be qualified as experts in their discipline, the archaeological evidence used in court typically fits under my definition of archaeology.

outlining archaeological contributions and archaeological data's strengths and weaknesses as evidence in litigation.

Defining Aboriginal Rights and Title

Aboriginal rights (legal actions) and title (legal territory) are recognized and affirmed by Section 35 of the *Canadian Constitution* (1982) and have been further defined by Canadian legal scholarship and jurisprudence (Borrows 2015a; *Calder* 1973; *Delgamuukw* 1997; McNeil 1989, 1997; Slattery 1996, 2006; *Tsilhqot'in* 2014; *Van der Peet* 1996). The definitions of Aboriginal rights and title, however, as well as the tests required to prove them, have changed throughout the past 150 years of jurisprudence. Archaeological evidence has played several key roles in these developments and changes. Before discussing that history, this section summarizes current understandings of Aboriginal rights and title.

In dealing with Aboriginal rights and title, "what is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society" (*Tsilhqot'in* 2014:para. 23). Since the first modern decision on Aboriginal rights and title (*Calder* 1973), the Supreme Court of Canada has established: that they exist; their unique status; the tests required to prove them, to extinguish them, and to justify their infringement; the Crown's role and fiduciary duty towards them; and the requirements for consulting with Indigenous peoples about them (Borrows 2015b:712).

As outlined in Chapter 1, Aboriginal rights and title exist on a spectrum based on the depth and breadth of connectivity to land (*Delgamuukw* 1997:para. 138; Figure 2; *Tsilhqot'in* 2007:para. 1152). They are known as *sui generis* (unique) rights as they originated before Crown sovereignty, unlike other land title (e.g., *Delgamuukw* 1997; *Haida* 2004; *Sparrow* 1990). What this means is that the Crown has a fiduciary duty, otherwise known as the *Honour of the Crown* (*Haida* 2004:paras. 16–19), with respect to rights and title. The Crown can infringe on known (or potential) rights or title only if it

can pass a justification test and consults with Indigenous groups claiming Aboriginal rights or title (Brown and McIvor 2012:10; *Haida* 2004; *Taku River* 2004).

To prove an Aboriginal right, the court must, based on the evidence presented: 1) characterize the right; 2) determine if that right stems from pre-contact activities; 3) decide if those activities were integral to the claimant group's culture; and 4) establish if there is continuity between the claimed right and the pre-contact activities on which it is based (*Adams* 1996; *Côté* 1996; *Powley* 2003; *Sparrow* 1990; *Van der Peet* 1996). To prove Aboriginal title, the claimant group must establish that they occupied the claimed territory continuously, exclusively, and sufficiently (*Tsilhqot'in* 2014:paras. 24–37, 50). Continuous use of land requires proof of occupation, without major interruption, beyond 1846 (*Tsilhqot'in* 2014:paras. 45–46); exclusive use of land requires proof of intention and capacity to control access to the claimed land using means consistent with group characteristics (*Tsilhqot'in* 2014:para. 49); and sufficient use of land requires proof of cultural activities across the territory (*Tsilhqot'in* 2014:para. 38).

The Court as a Cultural Enterprise

It is essential to recognise a "meta-issue" in the analysis of archaeological data as evidence in Canadian litigation before outlining the Canadian judicial system (Martindale 2014:402). The Canadian courts are themselves a culture enterprise, based on a Euro-Canadian legal system (Rosen 2006:23). Therefore, the court's ability to understand, interpret, and determine Aboriginal rights and title are based in this Euro-Canadian system and its inherent biases.

This becomes apparent in many aspects of Aboriginal rights and title, including the court's ability to understand different types of evidence, such as oral histories (discussed in detail later in the chapter and in chapter 5). However, the most critical issue is the standard by which Aboriginal rights are defined. The court's understanding of culture, and the logical standards by which rights are defined, are biased by the court's ethnocentrism and basis in English common law. Aboriginal rights and title are

based on cultural distinctiveness and their ability to correlate to Euro-Canadian concepts of practices and ownership. Rights are determined by cultural distinctiveness, which essentializes culture into items and arrangements, instead of understanding it as a system and process (Asch 2000:129). This forces evidence to meet Euro-Canadian standards of practice, instead of Indigenous political rights (Asch and Bell 1994:135).

Scholars have emphasized that the standards by which Aboriginal rights are defined challenge the ability for Indigenous nations to gain rights and title, as they are forced to comply with a legal system that abstracts their political rights into Euro-Canadian standards. Anthropologist Michael Asch and legal scholar Catherine Bell (1994:549) argue that the court's understanding of culture and ethnocentrism favour western culture over Indigenous cultures and that we must recognize that the legal process is value neutral. Michael Asch (2000) argues that the basis of cultural distinctiveness outlined in the test for Aboriginal rights utilizes antiquated logical that conflicts with contemporary anthropological conceptions of culture. This detracts from the political issues surrounding Crown sovereignty, in particular the concept of terra nullius (2000:135). Archaeologist Andrew Martindale (2014:405) suggests that the courts struggle to define culture in a manner that actually allows them to evaluate the nature of culture in the past.

The content and nature of archaeological evidence, therefore, must fit within this ethnocentric logic to be accepted by the court. Martindale (2014:404) emphasizes that this is not a political criticism of the Canadian legal practice, as the definition of rights and its jurisprudence must fit within "the cultural confines of the legal system, a de facto Euro-Canadian concept." However, it is important to recognize the different concepts of rights at play, as Indigenous and Western concepts intersect in the legal system. This problematizes the very assumptions of the court and asks whether the legal apparatus of the court can *actually* evaluate Indigenous cultural concepts (Asch 1990:95, 2000:135; Asch and Bell 1994:549; Martindale 2014:405).

Pertinent Structures of Canadian Courts

As discussed above, Aboriginal rights and title litigation are part of the Euro-Canadian legal system. Therefore, it is essential to understand the structure and substance of Canadian courts. This section briefly outlines: the judicial structure in Canada, including civil and criminal law; the rule of precedence; and the role of evidence and expert witnesses.

The Judicial Structure in Canada

There are two major levels of courts in Canada: federal courts and provincial/territorial courts. Federal courts include:

- the Supreme Court of Canada, the final court of appeal that hears appeals from the provinces/territories, and the Federal Court of Appeal (Department of Justice 2018a);
- the Federal Court, the national trial court that hears federal disputes against the Government of Canada and federal civil suits (Federal Court 2018);
- the Tax Court, which hears appeals from tax assessments; and
- the Federal Court of Appeal, which hears the appeals from the federal courts (Department of Justice 2018a).

Each province and territory (with the exception of Nunavut) has three levels of courts: provincial/territorial courts (lower courts); superior courts; and appeal courts (Department of Justice 2018a). The lower courts try most criminal offenses, family cases, and small civil cases. Superior courts hear serious criminal and civil cases, and appeal courts hear the appeals (Department of Justice 2018a).

The courts primarily deal with two types of law: criminal and civil. In criminal cases, the Crown prosecutes someone (the accused) under public law (such as the *Criminal Code*). Civil cases are private disputes or conflicts between individuals, businesses, or governments. Examples include contract disputes, divorces, and personal injury claims. The person who sues is called the plaintiff, whereas the person being sued

is called the defendant (Department of Justice 2018b; Justice Education Society 2018a, 2018b).

Both civil and criminal trial procedures require a party to present evidence against the other party. Either side can call witnesses, which the other side can cross-examine. The judge must determine that the evidence presented, and the questions asked, are relevant to the case. In civil trials, the judge must consider the evidence presented to make a decision based on what has been *proven to be the most probable*. In criminal trials, however, the accused's rights are protected by both the common law and the *Charter of Rights and Freedoms* (1982). As such, the prosecution must prove that the accused is guilty of the criminal charge *beyond a reasonable doubt* (Department of Justice 2018b; Justice Education Society 2018a, 2018b).

Jurisprudence and Precedence

For those uninitiated in the common law tradition of the majority of Canada, Quebec notwithstanding, judges are required to decide the case before them with both the facts of the case and the applicable law.[14] The law comes from multiple sources, one of which is jurisprudence. When approaching jurisprudence, the rules by which judges must abide include the principle that once a court has laid down a principle of law as applicable to certain facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. This is known as *stare decisis* (literally "to stand by decision," or a system of precedence). While oversimplifying, it can be broken down into three parts.

First, Canadian courts are bound by the rulings of the court above them. They must decide a case with the same facts in the same way. For example, the *Ahousaht*

[14] Unlike the rest of Canada, Quebec follows a civil law tradition. A civil code forms a comprehensive set of rules (or general principles) that deal with any dispute. Courts first look to this code, and then refer to previous decisions to see if they are consistent. The *Civil Code of Québec* (1991) is based on France's *Napoleonic Code* (Department of Justice 2017).

Indian Band and Nation v. Canada (Attorney General) 2011 BCCA 237, [2011] BCJ No 913 (QL) [*Ahousaht*] Aboriginal rights case was appealed to the Supreme Court of Canada, but the Court sent the case back to the British Columbia Court of Appeal (*Ahousaht Indian Band and Nation v. Canada* (Attorney General) 2013 BCCA 300, [2013] 364 DLR (4th) 26 [*Ahousaht*]) to be reconsidered in accordance with its recent *Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2011 SCC 56, [2011] SCR 535 [*Lax Kw'alaams*] decision, a similar Aboriginal rights case. Second, Canadian courts are often informed by courts of another jurisdiction, even outside of Canada. For example, many Aboriginal rights and title decisions (e.g., *Van der Peet* 1996:paras. 38–40) consider *Mabo* (1992), an Australian High Court decision that recognized Aboriginal rights and title in Australia. Finally, judges are strongly persuaded by prior decisions of their own court. For example, Justice Vickers, in *Tsilhqot'in* (2007:paras. 108–129), dealt with an issue regarding the reframing of the claim for Aboriginal title in the same way as Justice McEachern in *Delgamuukw v. British Columbia* [1991] 5 CNLR 5, 1991 CanLII 2373 (BCSC) [*Delgamuukw*].

Evidence in Aboriginal Rights and Title Cases

Many Canadian Aboriginal rights cases begin as criminal cases and attain relevance in relation to civil issues. Numerous Aboriginal peoples charged with criminal offences have mounted defences grounded in Aboriginal rights. For example, in *Van der Peet* (1996), Dorothy Van der Peet was charged with a contravention of the *British Columbia Fishery Regulations* and claimed an Aboriginal right to sell fish. Aboriginal title cases are often civil, where the plaintiff (either an individual on behalf of their nation or the entire nation) pleads for Aboriginal title and rights to a specific territory (e.g., *Tsilhqot'in* 2014). Although there are slightly different formats to how evidence is presented at civil versus criminal trials, civil law essentially follows the rules for criminal evidence.

Evidence for rights and title cases includes documents, such as reports, photographs, and maps, as well as lay and expert witness testimony (Brown and McIvor 2012:11; Department of Justice 2018b). Members of the claimant group will often be called as lay witnesses to provide oral history evidence.[15] Since *Delgamuukw* (1997), courts now recognize that rules for evidence must be applied flexibly in rights and title cases, including forms of evidence for pre-contact use of land, as well as the admissibility and weight given to oral history evidence (Brown and McIvor 2012:11; *Tsilhqot'in* 2014:paras. 19–23).[16]

At trial, witnesses testify on the facts of the case and do not provide their opinions (*Burgess Langille Inman v. Abbott and Haliburton* 2015 SCC 23 at para. 14, [2015] 2 SCR 182 [Burgess]; *Criminal Code* s. 657.3). The main exception to this rule is expert opinion evidence. As judges and juries cannot be expected to have the specialized knowledge or skills of every subject discussed during a trial, expert witnesses (on these subjects) are brought in to assist the court through demonstrations of rigorous means for rendering opinions grounded in complex clusters of facts. Experts are forbidden from advocating for any party, including the Crown (*Criminal Code* 657.3).

The Supreme Court has most recently addressed the concerns of impartiality and bias for experts in the *Burgess* decision (2015). The Court laid out that expert opinion evidence is admissible when four threshold requirements are met:

1. It must be necessary in assisting the trier of fact (i.e., the judge or jury);
2. It must be relevant;
3. It must be given by a properly qualified expert; and

[15] I use the terms oral histories and oral traditions interchangeably throughout this dissertation and define them, following Weisman (2014:5585–5586), as "cultural narratives such as origin stories, myths, and legends that are passed down from generation to generation orally as cultural knowledge."

[16] For a more detailed history of the use and issues with oral history in the courts, see Culhane (1998) and Miller (2011).

4. It must be without an exclusionary role (meaning that the judge can still exclude the evidence if they feel that its presentation was prejudiced) (*Burgess* 2015:para. 19; Paciocco and Stuesser 2008:192).

In addition to case law, provincial and federal regulations provide guidance on the duty of expert witnesses. For criminal cases, the duty of experts is outlined in section 657.3 of the *Criminal Code*. For civil cases, provincial and territorial regulations outline the duties and responsibilities of expert witnesses (e.g., in British Columbia, *Supreme Court Civil Rule* 11; in Ontario, *Rules of Civil Procedure* 53.03).

The role of an expert in a civil versus a criminal case is almost identical. The expert typically writes a report explaining their opinion (or a summary thereof), including factual assumptions on which the opinion is based and any research carried out to help in the formation of the opinion (e.g., *Criminal Code* 657.3(1); *Rules of Civil Procedure* 53.03(2.1); *Supreme Court Civil Rule* 11-6). The party must notify the other parties that they intend to call an expert witness and provide them with the expert's report (or summary). The expert's report is entered as evidence at trial, and the expert typically testifies and is cross-examined by the other party.

In Aboriginal rights and title cases, experts have provided opinions on many issues including: the scope of pre-contact practices; the continuation of those practices post-contact; the existence or organization of the pre-contact Aboriginal society; and the extent of their territory (Brown and McIvor 2012:10). For example, in *Tsilhqot'in* (2007), two archaeologists, R.G. Matson and Morley Eldridge, acted as expert witnesses. One discussed the correlation of known historical villages and archaeological sites, and the other discussed the evidence for pre-sovereignty Tsilhqot'in occupation (*Tsilhqot'in* 2007: Argument of the Plaintiff app. 1b). Experts are often called from a variety of disciplines such as anthropology, archaeology, biology, ecology, economics, ethnobotany, forestry, history, and linguistics (e.g., *Tsilhqot'in* 2007).

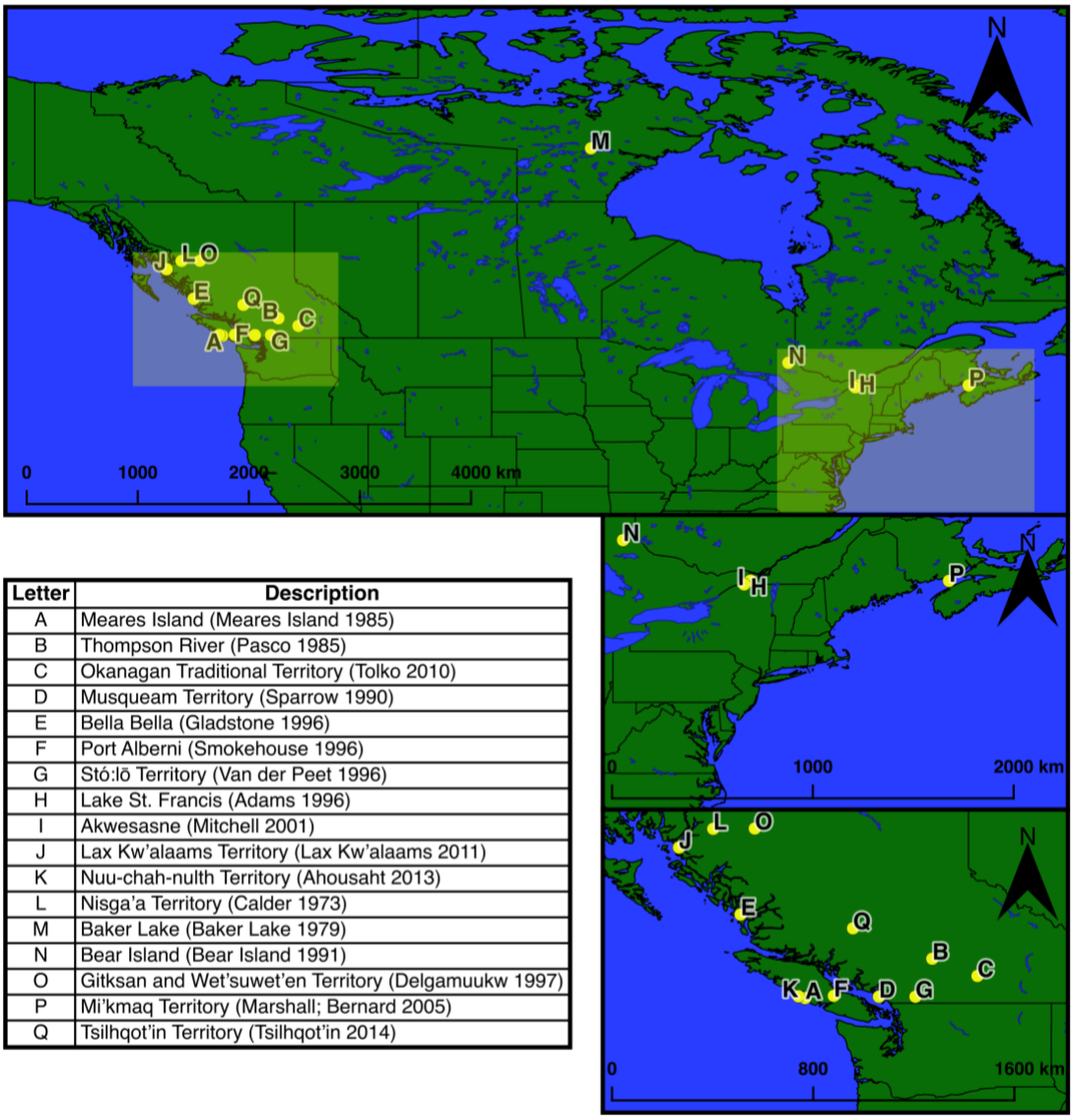
Aboriginal Rights and Title Jurisprudence from an Archaeological Perspective

Aboriginal rights and title have been recognized since the *Royal Proclamation of 1763*, with Canadian courts attempting to define them since *St. Catharines Milling and Lumber Co. v. R.* [1888] ULPC 70, 1888 CarswellOnt 22 [*St. Catharines*].[17] This section examines Aboriginal rights and title jurisprudence to assess archaeologists' roles in producing evidence. I assess 17 cases, organized in the following sections by type of case (injunctions, rights, and title cases) (Figure 4). Decisions are included if they reference archaeological data and set precedents.[18] The goal of this evaluation is to examine and assess the roles played by archaeological evidence in essential case law, to determine its strengths and weaknesses as evidence for the tests for Aboriginal rights and title (Table 1). Although many of these cases have important implications for other important aspects of Aboriginal rights and title, such as the duty to consult, I focus solely on archaeological contributions.

It is important to note that I assess the *court decisions* for these 17 cases, not the trial transcripts, expert witness reports, or other documents related to the case. Typically, once a case is complete most of the evidence is not retained and audiotapes are left un-transcribed. Although it is possible to order transcriptions of case testimony, it comes at a prohibitive cost. I was able to access additional documents from *Delgamuukw* (1991) and *Tsilhqot'in* (2007), but to maintain parallelism in my assessment, I chose to look at the court decisions only. This decision was necessary but does limit my ability to assess the archaeological data presented at trial, as court decisions typically do not discuss any form of evidence in great detail.

[17] For a review of the early history of Aboriginal rights and title in Canada, see Foster 2007.

[18] This includes all decisions appealed to the Supreme Court and those referenced in accepted legal texts on Aboriginal rights and title (e.g., Olthuis et al. 2008; Woodward 1989).



Letter	Description
A	Meares Island (Meares Island 1985)
B	Thompson River (Pasco 1985)
C	Okanagan Traditional Territory (Tolko 2010)
D	Musqueam Territory (Sparrow 1990)
E	Bella Bella (Gladstone 1996)
F	Port Alberni (Smokehouse 1996)
G	Stó:lō Territory (Van der Peet 1996)
H	Lake St. Francis (Adams 1996)
I	Akwesasne (Mitchell 2001)
J	Lax Kw'alaams Territory (Lax Kw'alaams 2011)
K	Nuu-chah-nulth Territory (Ahousaht 2013)
L	Nisga'a Territory (Calder 1973)
M	Baker Lake (Baker Lake 1979)
N	Bear Island (Bear Island 1991)
O	Gitksan and Wet'suwet'en Territory (Delgamuukw 1997)
P	Mi'kmaq Territory (Marshall; Bernard 2005)
Q	Tsilhqot'in Territory (Tsilhqot'in 2014)

Figure 4. Approximate locations of claimed Aboriginal rights or title in discussed litigation.

Map created by Erin Hogg with data from DataBC (2019) and Natural Earth (2019).

Table 1. Archaeological Evidence Used in Aboriginal Rights and Title Litigation, Listed in Chronological Order.

Decision	Archaeological Evidence	Intent of Archaeology
Calder (1973), BC	Nisga'a land use	To indicate pre-sovereignty occupation and use
Baker Lake (1979), NWT/ NU	Occupation and use, including extent of use, of claimed territory	To prove (limited) Aboriginal title
Meares Island (1985), BC	Culturally modified trees (CMTs) on Meares Island	To gain an injunction against MacMillan Bloedel
Pasco (1985), BC	Recorded archaeological, heritage, and sacred sites along twin-tracking route	To prevent twin tracking of the Thompson River
Sparrow (1990), BC	Salmon fishery	To show importance of salmon to Coast Salish culture
Bear Island (1991), ON	Continuous occupation in claimed territory	To prove continuous occupation (not successful)
Gladstone (1996), BC	Trade in herring spawn on kelp	To prove Aboriginal right to trade
Smokehouse (1996), BC	Significance of trade on BC coast	To show proof of trade (but not food trade)
Van der Peet (1996), BC	Trading practices of Coast Salish peoples	To show proof of trade (but not salmon trade)
Adams (1996), QC	Occupation and use of area, including hunting and fishing	To show fishing was a significant part of Mohawk life at contact
Delgamuukw (1997), BC	Early occupation throughout claimed territory	To prove pre-sovereignty occupation (but not necessarily of claimants' ancestors)
Mitchell (2001), QC	Trade routes, including chalcedony	To prove right to international trade (but defeated at the Supreme Court of Canada (SCC) due to minimal evidence)
Marshall; Bernard (2005), NB/NS	Sufficient and continuous use of claimed territory	To prove continuous occupation (but not sufficient enough to declare title)

Tolko (2010), BC	Archaeological sites in region, including CMT and lithic scatters	To prove occupation and use of area (although injunction attempt was unsuccessful, it did require mitigation of archaeological heritage)
Lax Kw'alaams (2011), BC	Seasonal round, rank, wealth goods, harvesting, conflict, and trade routes	To show evidence of trade (but not useful on its own)
Ahousaht (2013), BC	Fishing, including species of fish, and trade across Vancouver Island	To show evidence of fishing near shore and offshore
Tsilhqot'in (2014), BC	Sufficient and continuous use of claimed territory	To prove Aboriginal title

Archaeological Evidence in Injunctions

An injunction is a court order requiring someone to stop doing something (Department of Justice 2018b; Olthuis et al. 2008:634). Injunctions can be permanent or temporary. Temporary injunctions, sometimes referenced as interim or interlocutory, are generally ordered to halt actions claimed to be harmful by the plaintiff pending the result of a trial to hear the claim (Olthuis et al. 2008:634). Injunctions related to Indigenous issues have included:

- Indigenous peoples seeking an injunction to stop land alteration or resource extraction affecting their traditional territories,[19] such as attempted injunctions by the West Moberly First Nations to stop BC Hydro's Site C dam (CBC News 2018);
- Government efforts to remove blockades or pickets by Indigenous peoples, such as the injunctions granted to the municipality of Oka, QC during the Oka Crisis (Swain 2010); and
- Corporations seeking an injunction to stop blockades or protests that prevent them from doing business, such as that granted to Trans Mountain to prevent

[19] "Traditional territory" is the term most commonly used in Canada to describe the ancestral lands of an Indigenous group. I define this as the ancestral landscape utilized by an Indigenous group—where they lived and carried out their daily subsistence, cultural, and spiritual activities. In many cases traditional territories overlap with neighbouring Indigenous groups.

protesters from blocking access to its work sites (Olthuis et al. 2008:634–645; Townshend 1991; Trans Mountain 2018).

Although not all injunctions involving Indigenous peoples relate to rights and title, many do. Archaeological evidence has been used in injunctions where Indigenous claimants are attempting to prove Aboriginal rights or title to the area. Three cases are provided here to illustrate the application of archaeological evidence in establishing and lifting injunctions: *Meares Island* (1985), *Pasco* (1985), and *Tolko* (2010). These are not the only injunctions with archaeological evidence, but they do provide good examples of the use of archaeological evidence in injunctions.

Meares Island*: "this island must be viewed as a special place."*[20]

The *Meares Island* (1985) injunction came about from a high-profile conflict over logging on Meares Island, a small island off the west coast of Vancouver Island, near Tofino (Figure 4). MacMillan Bloedel, a logging company, sought an injunction to stop logging protestors from blocking the company's access to the island. The Clayoquot and Ahousaht Bands sought an injunction to prevent MacMillan Bloedel from logging the island, as they (the Nuu-Chah-Nulth Tribal Council) claimed Aboriginal title to it.

The archaeological evidence for the injunction was primarily a report by Arcas,[21,22] prepared on behalf of MacMillan Bloedel, on the "native uses of Meares Island trees" (*Meares Island* 1985:13). Although the study was restricted to a 10 km^2 area that was set aside to be logged, the justices found the report to be an "independent study and an impressive study," which indicated that many trees in the area were culturally modified trees (CMTs), including some that were partially completed canoes (*Meares Island* 1985:13; Stryd and Eldridge 1993:190).

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[20] *MacMillan Bloedel v. Mullin; Martin v. R. in right of BC* [1985] 61 BCLR 145, 1985 CanLII 154 (BCCA) at paragraph 130, Macfarlane J.A. [*Meares Island*].

[21] After the injunction, Arcas conducted a larger study of culturally modified trees (CMTs) on Meares Island for the Ahousaht and Tlay-o-quiaht First Nations for their title case, and the evidence helped adjourn the case (Stryd and Eldridge 1993:190).

[22] Arcas was accidentally misspelled as Areas throughout the decision.

Dendrochronology indicated that the trees were used from the fifteenth to twentieth centuries, including a tree from which bark had been stripped in 1642 (*Meares Island* 1985:14).[23] An affidavit of an anthropologist also indicated that logging would potentially destroy heritage sites throughout the island, including shell middens, fish traps, and canoe skids (*Meares Island* 1985:15).

The archaeological evidence presented in the trial helped the justices determine that "the evidence shows that the Indians still use Meares Island" (*Meares Island* 1985:15) and that:

> The forest that the Indians know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may be cut down, middens may be destroyed, fish traps damaged and canoe runs despoiled. Finally, the Island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided (*Meares Island* 1985:para. 71).

The injunction was heard at the British Columbia Court of Appeal, where the Clayoquot and Ahousaht Bands were granted a temporary injunction until their title case could go to court. However, the title case was adjourned by agreement from all parties (Nuu-Chah-Nulth, MacMillan Bloedel, British Columbia, and Canada). As of 2019, none of the parties have requested that the trial resumes, so the injunction remains in effect (Indigenous Corporate Training Inc. 2014). The *Meares Island* (1985) injunction is an excellent example of an injunction to prevent resource extraction that had the potential to infringe upon potential Aboriginal rights or title claims (Harris 2009:150). Archaeological evidence of CMTs provided key evidence of prior and current use of the Island's resources and helped produce the injunction in the First Nations' favour.

[23] For a detailed discussion of the CMT data, see Stryd and Eldridge 1993.

**Pasco*: "We cannot recount with much pride the treatment accorded to the native people of this country."*[24]

Pasco was an interim injunction involving the "Indian People" of Oregon Creek Indian Reserve, in southwest British Columbia. They sought to prevent the Canadian National Railway (CNR) from twin tracking along a 13 km stretch of the Thompson River between Spences Bridge and Ashcroft (Figure 4), and the CNR sought to restrain the "Indian People" from interfering with their construction (*Pasco* 1985:para. 1).

Evidence for the injunction, and for the earlier environmental assessment process for the project, included archaeological evidence collected by Gordon Mohs and others that recorded archaeological and other heritage sites as well as documented heritage concerns related to the twin-tracking project (Mohs 1987:1–2). Mohs presented the evidence to the environmental assessment panel hearings (Mohs 1987:1–2) and produced reports for the amended claim (Mohs 1990a, 1990b, 1990c).

The justice granted the injunction against the CNR, protecting the native fishery along the Thompson and Fraser Rivers. It is impossible to say what, if any, impact the archaeological evidence had on the claim. However, *Pasco* (1985) is an important example of an injunction granted to Indigenous peoples to protect Aboriginal rights and title. One can assume that the archaeological and ethnographical data collected for the claim had some importance in the decision.

After this injunction, 36 chiefs of Indian bands, acting on behalf of themselves and all other members of their bands, applied to amend the claim to include all members of the three nations (Nlaka'pamux, Secwepemc, and Stó:lō) who occupied lands along the Fraser and Thompson rivers (*Oregon Jack Creek Indian Band v. Canadian National Railway Co.* [1989] 2 SCR 1069, 1989 CarswellBC 748; *Oregon Jack Creek Indian Band Chief v. C.N.R.* [1988] 34 BCLR (2d) 344, 1989 CarswellBC 2). They claimed the rights to "use and rely on … the River System as a foundation of their economy, culture,

[24] *Pasco v. C.N.R. Co.* [1985] 69 BCLR 76, 1985 CanLII 320 (BCSC) at paragraph 9, Macdonald J. [*Pasco*]

and spiritual wellbeing," including the right to conservation measures for fishing practices (1988:para. 28). The appeal to amend the claim was allowed (1988; 1989), although the case has never gone to trial (McNeil 2016:3).

Tolko*: "Tolko's proposed harvest on these particular cut-blocks will likely destroy sensitive archaeological sites and artefacts and will cause irreparable harm."*[25]

This injunction concerned the rights to harvest timber in the Brown's Creek watershed (near the Okanagan Indian Reservation, British Columbia; Figure 4). Tolko, the logging company with the tree farm license to the area's cut blocks, sought an injunction against the Okanagan Nation Alliance to stop it from blocking access to the area. The Okanagan Nation Alliance sought an injunction restraining Tolko from logging (2010:paras. 2–4).

This injunction was related to litigation surrounding rights and title in the same area, resulting in British Columbia admitting an Aboriginal right to harvest timber in the Okanagan's traditional territory (*Tolko* 2010:para. 6). However, the Okanagan continued to collect evidence for their Aboriginal title claim, which included the Brown's Creek area in which Tolko wanted to log. The Okanagan claimed that if the area was logged, they would "suffer irreparable harm by interference with their assertion of Aboriginal rights and title," including "potentially permanent damage to their mapping and evidence collecting" for their ongoing title claim (*Tolko* 2010:para. 19).

As proof of this claim, the Okanagan provided evidence of archaeologist David Pokotylo's survey and accumulation of archaeological evidence (*Tolko* 2010:para. 56). His investigation discovered eight pre-1846 and 14 post-1846 sites, including lithic scatters and CMTs. One site was radiocarbon dated to 7,500 BP (*Tolko* 2010:para. 56). On this archaeological evidence alone, the justice was satisfied that the Okanagan "are likely to suffer irreparable harm if Tolko logs the proposed cut blocks without

[25] *Tolko Industries Ltd. v. Okanagan Indian Band* 2010 BCSC 24 at paragraph 55, B.J. Brown J. [2010] BCJ No 29 (QL) [*Tolko*]

restriction" (*Tolko* 2010:para. 58). However, the justice allowed Tolko's application to log, providing that the parties could agree on the necessary methods to preserve the archaeological evidence (*Tolko* 2010:para. 60).

Discussion

These three examples of injunction cases show how archaeological data, particularly CMTs, were used as evidence for pre-sovereignty territorial use and occupation. The Meares Island CMT studies documented pre-contact use of the territory and helped increase the study of CMTs in British Columbia archaeology (Eldridge 1997; Stryd and Eldridge 1993). Although it is unclear how much the archaeological evidence provided in *Pasco* (1985) influenced the decision, it was an extensive body of evidence on tradition use and sacred sites in the territory (Mohs 1987). Finally, archaeological evidence was the deciding factor in *Tolko* (2010). While the injunction didn't prevent logging in the area, it did preserve important evidence for the Okanagan title claim.

Archaeological Evidence in Aboriginal Rights Litigation

As noted above, many Aboriginal rights cases are criminal, in which the accused is charged with a violation of hunting or fishing laws and presents a defence based on an Aboriginal right to the charged activity. Aboriginal rights cases have involved the right to fish, to trade, to hunt, to log, and to self-government (Olthuis et al. 2008; Woodward 1989:135–136). In Aboriginal rights cases, archaeological evidence is mostly used to prove pre-contact activities and that these activities were integral to the distinctive culture of the claimant group (two criteria for the test for Aboriginal rights). In this section, I analyse the archaeological evidence presented in eight Aboriginal rights cases: seven relate to fishing and one to international trade (*Adams* 1996; *Ahousaht* 2013; *Gladstone* 1996; *Lax Kw'alaams* 2011; *Mitchell* 2001; *Smokehouse* 1996; *Sparrow* 1990; *Van der Peet* 1996). Although there are other important cases, these eight are the most explicit examples of the use of archaeological evidence.

**Sparrow*: "the phrase existing Aboriginal rights must be interpreted flexibly so as to permit their evolution over time."*[26]

Sparrow (1990) was the first major decision on the meaning of Section 35(1) of the *Constitution* (1982). Ronald Sparrow, a member of the Musqueam Nation (in southwest British Columbia; Figure 4), was charged with fishing with a gill net longer than permitted by the *Fisheries Act*. He defended his action as an existing Aboriginal right upon which the net-length restriction infringed.

At trial, Wayne Suttles testified as an anthropologist with expertise in Coast Salish ethnography. He described the prominence of the salmon fishery—an important source of food as well as an important part of the belief system (1986:para. 19). The justices at the British Columbia Court of Appeal stated that:

> Because the Aboriginal right asserted here is a relatively narrow one, the existence of which is not the subject of serious dispute, it is unnecessary to consider the anthropological facts at length. It is clear that the Musqueam have a history as an organized society going back long before the coming of the white man; and that the taking of salmon from the Fraser River was an integral part of their life and has continued to be so to this day (1986:para. 20).

This statement is important in light of anthropological and archaeological evidence. Less evidence is required when the Aboriginal right is obvious and uncontested.

The Supreme Court of Canada allowed Sparrow's appeal and sent the case back to trial, to be determined based on the criteria set out in the Supreme Court decision. These criteria are known as the Sparrow Test and determine whether an Aboriginal right exists and if so, how the government may be justified to infringe upon it. The *Sparrow* (1990) decision is an important milestone for Aboriginal rights in Canada, as it gives deeper meaning to Section 35(1) and is the first analysis of the meaning and infringements of Aboriginal rights.

[26] *Sparrow* (1990), at paragraph 27, Dickson C.J. and La Forest J.

Van der Peet Trilogy*: "Aboriginal rights lie in the practices, traditions and customs integral to the distinctive cultures of Aboriginal peoples."*[27]

The *Van der Peet* trilogy refers to three cases that further define Aboriginal rights as outlined in Section 35(1) (1982). *Gladstone* (1996), *R. v. N.T.C. Smokehouse Ltd.* [1996] 2 SCR 672, 1996 CanLII 159 [*Smokehouse*], and *Van der Peet* (1996) all have to do with selling and buying fish in British Columbia. At the time of the convictions, under the *British Columbia Fishery (General) Regulations* no one was allowed to sell (or attempt to sell) fish caught under an Indian fish food license. The accused in all three cases argued that the *Regulations* violated their Aboriginal rights as defined in Section 35(1) of the *Constitution* (1982).

In *Gladstone*, the accused, Donald and William Gladstone, members of the Heiltsuk band, shipped 1,905 kg of herring spawn from Bella Bella, British Columbia to Richmond, British Columbia and attempted to sell approximately 16 kg of it to a local fish store (Figure 4). The Gladstones had been under surveillance by fisheries officers. They were arrested upon leaving the store, and the herring spawn was seized. William Gladstone was in possession of an Indian food fish license, which allowed him to harvest approximately 227 kg of herring spawn on kelp. The Gladstones were charged under the *Fisheries Act* (1970) and the *Pacific Herring Fishery Regulations* for attempting to sell herring spawn without the correct license (*Gladstone* 1996:paras. 1–3). They did not dispute the facts of the case but argued that the regulations violated their Aboriginal rights (*Gladstone* 1996:para. 4).

In *Smokehouse*, the accused, N.T.C. Smokehouse Ltd. (which owned and operated a food processing plant near Port Alberni, British Columbia; Figure 4), bought salmon caught by members of the Sheshaht and Opetchesaht bands under issued Indian Fish Food licenses. The accused was caught selling this salmon to two different companies (*Smokehouse* 1996:paras. 2–4). N.T.C. Smokehouse Ltd. did not contest the

[27] *Van der Peet* (1996), at paragraph 48, Lamer C.J.

facts of the case but instead argued that the *Regulations* were in violation of Aboriginal rights (*Smokehouse* 1996:para. 5).

In *Van der Peet* (1996), Dorothy Van der Peet, a member of the Stó:lō Nation (in southwest British Columbia; Figure 4), was charged with selling fish caught with an Indian food fish license. The ten salmon were caught by Steven Jimmy and Charles Jimmy (her common-law spouse), and she sold them on September 11, 1987 (*Van der Peet* 1996:paras. 5–6). Van der Peet did not argue the facts of the case but stated that "she was exercising an existing Aboriginal right to sell fish" based on the argument that the *Regulations* were in violation of her Aboriginal rights (*Van der Peet* 1996:para. 6).

All three cases involved some form of archaeological evidence. In *Gladstone*, anthropologist Barbara Lane connected anthropological and historical evidence to indicate trade in herring spawn on kelp (*R. v. Gladstone* [1990] BCJ No. 2984, 1990 CarswellBC 1498 at para. 20 [*Gladstone*]). In *Smokehouse*, archaeologist Richard Inglis presented evidence on the significance of trade, emphasizing that archaeological work on the British Columbia coast has documented evidence of 4,000 years of trade (*R. v. N.T.C. Smokehouse Ltd.* [1990] BCWLD 704, 1990 CarswellBC 1709 at paras. 25–28 [*Smokehouse*]). In *Van der Peet*, archaeologists Arnoud Stryd and John Dewhirst each testified for the Crown, and Richard Daly, an anthropologist, testified for the Defense. The British Columbia Supreme Court decision emphasized all three of their testimonies on the basis of determining that the Stó:lō people were a band or tribal culture (*R. v. Van der Peet* [1991] 3 CNLR 161, 1991 CarswellBC 203 at para. 28 [*Van der Peet*]). This issue of a band or tribal culture made it all the way into the Supreme Court decision, which discusses that the specialization of labour only occurs in a tribal society, not a band, and therefore the lack of specialization of fishing indicates a lack of trade (*Van der Peet* 1996:para. 90).

Of the three cases, only *Gladstone* (1996) had a successful appeal at the Supreme Court, where the justices held that the Heiltsuk have an Aboriginal right to commercial trade in herring spawn on kelp. As such, these three cases emphasize some

of the challenges for archaeological evidence. Although Richard Inglis presented evidence of 4,000 years of trade on the coast, he also emphasized the challenge of finding archaeological evidence of *food* trade, which rarely leaves a presence in the material record (*Smokehouse* 1990:paras. 25–28). The Court stated from his testimony that the evidence for selling, trading, or bartering fish was "tenuous" (1990:para. 25). The British Columbia Supreme Court in *Van der Peet* stated that it felt that "no regularized trade in salmon existed in Aboriginal time" (1991:para. 28), even though the two archaeologists (and one anthropologist) emphasized trade for non-perishable items (1991:paras. 16, 17, 21, 25). Although the material record can provide excellent evidence of trade in non-perishable items, such as dentalia shells or obsidian, it can be challenging to find evidence of trade in perishable items.

Adams*: "The evidence presented clearly demonstrates that from that time fishing for food in the fishing area was a significant part of the Mohawk's life."*[28]

George Weldon Adams, a Mohawk from the Akwesasne Reserve, fished for perch in Lake St. Francis, Quebec during the spawning season and caught 136 kg (Figure 4). Adams was charged with catching fish without a license under the *Quebec Fishery Regulations*. At trial, Adams argued that he was fishing under an Aboriginal right and that the *Fishery Regulations* infringed upon this right and were in violation of Section 35(1) of the *Constitution* (1982) (*Adams* 1996:paras. 6–9).

Archaeologist Bruce Trigger was the "key expert witness" for *Adams* (1996:para. 40). He testified on the occupation and use of the area around Lake St. Francis before and at contact by the Mohawk people. He provided evidence indicating that the Mohawks used the area for hunting and fishing, which was acknowledged by other Indigenous nations. He stated that "on the basis of the evidence which is available, I have little difficulty in concluding that the St. Lawrence River between Montreal and

[28] *Adams* (1996), at paragraph 46, Lamer C.J.

Lake Ontario was controlled by the Iroquois and mostly by the Mohawks from the year 1603" (*Adams* 1996:para. 41).

The Supreme Court dismissed all charges against Mr. Adams, emphasizing that claims to land are "one manifestation of a broader-based conception of Aboriginal rights" (*Adams* 1996:para. 1). The Court stated that the evidence provided by Trigger satisfied the *Van der Peet* test for Aboriginal rights. His evidence indicated that fishing for food was a "significant part of the Mohawk's life" at and before contact, and that evidence from others, including Mohawk witnesses, indicated that fishing is still important at present (showing continuity between current and past practices) (1996:paras. 46–47). In this case, archaeological evidence was essential for proving part of the test for Aboriginal rights.

Mitchell*: "Evidence advanced in support of Aboriginal claims … can run the gamut of cogency from the highly compelling to the highly dubious."*[29]

Mitchell (2001) was the culmination of a claim from the Mohawks of Akwesasne, in Quebec, for an Aboriginal right to cross the border freely without paying duty on goods. Chief Mitchell of the Mohawk of Akwesasne crossed the border from the United States into Canada on March 22, 1988 (Figure 4). He asserted that he had Aboriginal and treaty rights that exempted him from paying duty on goods purchased in the United States. Canadian customs agents let him cross into Canada but informed Chief Mitchell that he would be charged $142.88 CAD in duty. In September 1989 "Chief Mitchell was served with a Notice of Ascertained Forfeiture claiming $361.64 CAD for unpaid duty, taxes and penalties" (*Mitchell* 2001:para. 2).

At trial, there were three expert witnesses for Chief Mitchell, including a cultural historian, a historian, and a research consultant on Aboriginal claims and Crown First Nation relations. The Crown had two expert witnesses, an archaeologist and a historian. Robert Venables, the cultural historian for the Plaintiff, discussed archaeological

[29] *Mitchell v. M.N.R.* 2001 SCC 33, [2001] 1 SCR 911 at paragraph 39, McLachlin C.J.

evidence to support pre-contact cross-border trade. He cited the work of William Ritchie, who documented evidence of trade to the Great Lakes for copper as early as 3,000 BC, as well as trade from central New York to Quebec for chalcedony (*Mitchell v. M.N.R.* [1997] 4 CNLR 103, 1997 CarswellNat 955 at para. 106 [*Mitchell*]). His report also discussed that archaeological investigations of Mohawk sites have shown European trade goods dating to as early as AD 1550 (*Mitchell* 1997:para. 102).

Alexander von Gernet,[30] the archaeologist for the Crown, stated in his report that he had not found any evidence of Mohawk presence in Ontario. This directly contradicted other work cited in his own report (*Mitchell* 1997:paras. 108–110). This in part allowed the justice to determine that he preferred evidence and opinion presented by the Plaintiff's two experts, whose reports stated that the Mohawks had participated in small-scale pre-contact trade and expanded their trading to include European goods by the early seventeenth century. The justice also preferred the Plaintiff's expert witnesses' evidence for cross-border trade, whose evidence aligned with the oral testimony of Chief Mitchell (*Mitchell* 1997:para. 131).

Archaeological evidence demonstrated that the Mohawks engaged in pre-contact trade, which extended into New York and up into Quebec (*Mitchell* 1997:para. 172), a statement with which the Federal Court of Appeal agreed (*Mitchell v. M.N.R.* [1999] 1 FC 375, 1998 CanLII 9104 (FCA) at para. 9 [*Mitchell*]). Both the Federal Trial Court and the Federal Court of Appeal held that the respondent did have the claimed Aboriginal right to duty-free travel across the border (*Mitchell* 2001:paras. 5–7).

However, the Supreme Court of Canada disagreed and stated that the Aboriginal right had not been established. The Court emphasized that the two pieces of archaeological evidence presented at trial did not live up to the claims presented by the lower courts (*Mitchell* 2001:para. 43).[31] First, although the book, *The Ordeal of the*

[30] For discussion of von Gernet and other Crown expert witnesses, see Banks (2008).

[31] These were *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Richter 1992) and *The Archaeology of New York State* (Ritchie 1980).

Longhouse (Richter 1992), demonstrated archaeological evidence of north-south trade, it also "refute[d] the direct involvement of the Mohawks in this trade" (*Mitchell* 2001:para. 46). Second, the only archaeological evidence of the north-south trade was "a single smoky chalcedony ceremonial (?) knife," which, according to the Supreme Court, could "hardly be called compelling" evidence (*Mitchell* 2001:para. 47). The Supreme Court emphasized that although appellate courts typically "grant considerable deference" to findings of fact made at trial, "the finding of a cross-border trading right in this case represents, in view of the paucity of evidence, a palpable and overriding error" (*Mitchell* 2001:n.p.).

Lax Kw'alaams*: "A pre-sovereignty Aboriginal practice cannot be transformed into a different modern right."*[32]

The trial and subsequent appeals involved a claim by the Lax Kw'alaams Nation[33] (in central British Columbia) to an Aboriginal right to the commercial harvesting and sale of all fish, and a lesser right to engage in a commercial fishery (*Lax Kw'alaams* 2011:para. 1; Figure 4). The fishery would extend between "the estuaries of the Nass and lower Skeena rivers" (in northern British Columbia) and would be under the protection of Section 35(1) of the *Constitution* (1982) (*Lax Kw'alaams* 2011:para. 1). This claim was part of a larger action for Aboriginal title, which had been "severed and ha[d] yet to go to trial" (*Lax Kw'alaams* 2001:para. 1).

George MacDonald and Steven Langdon acted as expert witnesses in archaeology for the Plaintiff, and Joan Lovisek acted as an archaeological expert witness for the Crown. The British Columbia Supreme Court decision also frequently cited Andrew Martindale's work (*Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2008 BCSC 447 at paras. 46, 127, 137, 148–160, 169, 178, 189–191, 199–203, 242, 256, 317–319, 333, 343, 351, 354–358, 360, 442, [2008] 3 CNLR 158 [*Lax Kw'alaams*]).

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[32] *Marshall; Bernard* (2005), paragraph 50, McLachlin C.J., cited in *Lax Kw'alaams* 2011, at paragraph 51, Binnie J.

[33] The claim also included the Ginaxangiik, Gitandoah, Gitwilgiots, Tit'tsiis, Gitandoiks, Gispaxloats, Gitlan, Gitzaxlaal, and Gitlutzau Tribes.

Archaeological evidence spoke to the seasonal round, rank, wealth goods, harvesting, types of fish harvested, conflict, and trade routes. Both MacDonald and Langdon concluded that the coast Tsimshian had an extensive pre-contact trading system (*Lax Kw'alaams* 2008:paras. 388, 437). Challenging this, Lovisek concluded that trade in fish and fish products was only as eulachon and at potlatches and emphasized that archaeological evidence cannot prove that fish was traded as opposed to exchanged (*Lax Kw'alaams* 2008:paras. 464–465).[34]

The trial judge could find evidence of trade in eulachon only, a conclusion that was also upheld by the British Columbia Court of Appeal. The Supreme Court dismissed the *Lax Kw'alaams* appeal, stating that a trade in eulachon grease did not translate into a modern right to fish commercially (*Lax Kw'alaams* 2011:para. 6).

Ahousaht*: "I conclude that the plaintiffs have established Aboriginal rights to fish … and to sell that fish"*[35]

The Plaintiff, the Ehattesaht, Mowachaht/Muchalaht, Hesquiaht, Ahousaht, and Tla-o-qui-aht Bands, claimed an Aboriginal right to fish on a commercial basis on the west coast of Vancouver Island, British Columbia (Figure 4). They stated that they "do not seek rights to fish free from government regulation but say such regulation must recognize their Aboriginal rights" (*Ahousaht* 2009:para. 1).

In the trial, the Plaintiff had four archaeological/anthropological expert witnesses: Barbara Lane, Richard Inglis, Alan McMillan, and Daniel Boxberger. The archaeological evidence included Yvonne Marshall's study on trade trails across Vancouver Island (*Ahousaht* 2009:para. 236; Marshall 1992). The justice stated that:

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[34] Andrew Martindale submitted a report (2015) detailing the errors in Lovesik's evidence. He detailed five principal errors: 1) misrepresentation of evidence; 2) omission of data; 3) illogical implications; 4) representation of data; 5) rhetorical devices that misdirect the reader and trier of fact. These errors speak both to the malleability of evidence and to larger disconnections between facts and evidence in law as opposed to social science, a topic I discuss in Chapters 4 and 5.

[35] *Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2009 BCSC 1494 at paragraph 489, Garson J., [2010] 1 CNLR 1 [*Ahousaht*].

> These trade trails are important evidence of trade between distant groups. While the existence of the trails does not prove that it was fish that was being traded, they are, nevertheless, evidence that trade was a well entrenched custom of the Nuu-chah-nulth. A conclusion that trade in fish occurred requires additional evidence over and above the existence of the trade trails themselves [2009:para. 237].

In fact, the justice did outline the features that she considered necessary to prove pre-contact trade in fish:

- exchanges of fish or shellfish for an economic purpose;
- exchanges of a significant quantity of such goods;
- exchanges as a regular feature of Nuu-chah-nulth society; and
- exchanges outside the local group or tribe (2009:para. 243).

Archaeological data provided evidence of trade in dentalia shells (2009:para. 281) and different species of fish that indicated a "pattern of reliance on fish caught close to shore and in protected waters" (2009:para. 377). Although the justice felt that there was not a lot of archaeological evidence, particularly of faunal remains of cod and halibut, she did find that "there is evidence that the Nuu-chah-nulth's traditional territories and fishing in those territories extended beyond the rivers and sounds to the offshore waters" (2009:para. 411).

This, and other evidence, led the British Columbia Supreme Court to determine that the Nuu-chah-nulth have an Aboriginal right to fish for any species of fish within their territory and to sell it. Canada appealed, and the British Columbia Court of Appeal dismissed most of the appeal in 2011. Canada appealed to the Supreme Court of Canada, but the Court sent the case back to the British Columbia Court of Appeal to be reconsidered in accordance with its recent *Lax Kw'alaams* (2011) decision. In the 2013 reconsideration, the British Columbia Court of Appeal agreed with the Nuu-chah-nulth that the 2009 trial decision used the correct approach in analysing an Aboriginal rights

claim. The 2013 decision affirmed the Nuu-chah-nulth's right to fish and determined that they have Aboriginal rights to fish and to sell fish, except for the geoduck fishery.[36]

Discussion

Seven of these eight cases indicate how archaeological data have provided evidence of pre- and post-contact resource use (such as fishing) and trade. Indeed, the British Columbia Supreme Court has stated that:

> In some ways archaeology may seem to be the most concrete form of evidence available to prehistoric times. Extracting tangible objects from archaeological survey sites can produce information about many aspects of the society that occupied the lands from which the objects are uncovered (*Lax Kw'alaams* 2008:para. 17).

In this way, archaeological data can provide crucial evidence for the test for Aboriginal rights. Data can be useful evidence of pre-contact activities and whether those activities were an integral aspect of the claimant group's culture.

For example, archaeological data presented in *Lax Kw'alaams* (2008) indicated pre-contact fishing, based on faunal analysis of the fish species found during excavation. In *Ahousaht* (2013), archaeological evidence included dentalia shells and other items found along documented trade trails (Marshall 1992) in an attempt to show pre-contact trade. In *Adams* (1996), Bruce Trigger outlined archaeological evidence of hunting and fishing in Mohawk territory to demonstrate pre-contact subsistence activities. In these cases, archaeological data were used as evidence for pre-contact activities and their importance to the claimant group.

[36] This case was taken back to court in 2015, after negotiations with Canada on how to accommodate the Nuu-chah-nulth's Aboriginal rights failed. The 2018 decision determined that Canada was not justified in their infringement of the Nuu-chah-nulth's Aboriginal rights and provided clarification on the fishing policy between Canada and the Nuu-chah-nulth (*Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2018 BCSC 633 at pp. 392–400, [2018] BCSC 633 (CanLII) [*Ahousaht*]).

Although archaeological data can be valuable evidence for the test for Aboriginal rights, they are rarely sufficient on their own as they are often incomplete and biased. As Justice Satanove explains in *Lax Kw'alaams* (2008):

> Archaeology alone, however, will not tell us how or when exotic material arrived at a site, only that it was transported from one place to another. To interpret their findings, archaeologists must rely on the ethnographic record and other data. Furthermore, archaeology is limited by the durability of the object in question. Organic, faunal material is not usually preserved in a manner that allows it to survive through long passages of time (paras. 17–18).

Below I briefly discuss examples of these issues, including the incompleteness of the archaeological record, the variability in archaeological investigations, and the limitations of archaeological data.

The archaeological record is inherently incomplete. Not all cultural material preserves through time, particularly organic materials. This fact can make it challenging to use archaeological data to indicate cultural activities, as the archaeological evidence for the activity may no longer exist. For example, in *Smokehouse* and *Van der Peet*, archaeologists emphasized trade of non-perishable items (1990:paras. 25–28; 1991:paras. 16, 17, 21, 25) to indicate that salmon was also likely a trade good. However, the British Columbia Supreme Court stated (for both cases) that "no regularized trade in *salmon* existed in Aboriginal time" (*Van der Peet* 1991:para. 28, emphasis added), indicating that without archaeological evidence of trade in salmon, the archaeological data was not sufficient to prove its trade.

In addition, archaeological investigations do not occur everywhere. Research interests, ease of access into the territory, and many other elements can influence where research is carried out, as well as the type, intensity, and frequency of such research. The discussed litigation indicates that archaeological evidence is most prominent in fishing cases, which deal with coastal regions, lakes, or river systems,

where archaeological investigations, particularly in British Columbia, are more likely to occur.

Finally, "archaeological evidence is useful, but too limited to support conclusions on its own" (*Lax Kw'alaams* 2008:para. 19). For example, in *Mitchell,* the Supreme Court emphasized that the archaeological evidence presented at trial was not sufficient to indicate north-south trade in Mohawk territory (2001:paras. 46–47). I argue that one type of data is rarely sufficient to act on its own, which is why counsel often presents a variety of types of evidence and expert witnesses. Experts from different fields can present a variety of data, such as ethnographic accounts, oral histories,[37] or historical documents. These different types of evidence buttress one another and show a broad picture of pre-contact society. Most of the cases discussed include different expert witnesses, typically both archaeologists and anthropologists (e.g., *Ahousaht* 2013; *Lax Kw'alaams* 2011; *Van der Peet* 1996). Additionally, counsel may introduce historical documents and additional primary and secondary sources. For example, in *Ahousaht* (2009), both parties provided a collection of "Explorer Records" created by early explorers and fur traders on the West Coast of Vancouver Island. These primary source documents provided a different perspective and aided the experts in explaining the ethnographic and archaeological data to the justice.

Archaeological Evidence in Aboriginal Title Litigation

As discussed earlier, most Aboriginal title cases fall under civil law, where the plaintiff (typically an individual on behalf of their nation or the entire nation) claims

[37] Archaeologists have long debated the contributions of oral history to archaeological interpretation. Following anthropologist Jan Vansina's work (1965), many realized that oral histories were cultural entities that could help archaeologists understand the relationship between the material record and the people who created it (Weisman 2014:5586). Archaeologists in North America saw oral histories, provided by the descendants of the material remains they studied, as strengthening their relationship with Indigenous peoples (Anyon et al. 1997; Echo-Hawk 2000; Whiteley 2002), although some argued that they needed to maintain the same testability as archaeological hypotheses (Mason 2000, 2006). Weisman (2014:5587) and others caution that archaeologists need to interpret oral histories through critical approaches, particularly when they contradict the archaeological record (and vice versa) (Beck and Somerville 2005).

Aboriginal title to a specific territory. Most Aboriginal title cases include Aboriginal rights as part of the claim. For example, the Plaintiff in *Tsilhqot'in* (2007) claimed both Aboriginal rights and title. Although the title claim was not granted until the final appeal at the Supreme Court of Canada (2014), they were granted Aboriginal rights to hunt, trap, and trade in skins and pelts in the trial decision (2007) and those rights were reaffirmed in the appeal *William v. British Columbia* 2012 BCCA 285, [2012] 3 CNLR 333 [*William*]. Title cases have often included archaeological data as evidence of sufficient occupation before and at sovereignty (one of the three criteria for the test for Aboriginal title). This section discusses the archaeological evidence put forward in six Aboriginal title cases: *Calder* (1973), *Baker Lake* (1979), *Bear Island* (1991), *Delgamuukw* (1997), *Marshall; Bernard* (2005), and *Tsilhqot'in* (2014).

**Calder*: "When the settlers came, the Indians were there."*[38]

Calder was the first modern land claims case, first heard at the British Columbia Supreme Court in 1969. Frank Calder and other members of Nisga'a sued the Attorney-General of British Columbia for a declaration of Aboriginal title for "1,000 square miles [1,600 km^2] in and around the Nass River Valley" (1973:318; Figure 4).

Calder, as well as the earlier *R. v. White and Bob* [1965] 52 DLR (2d) 481, 1965 CarswellBC 249 [*White and Bob*] (which determined that treaty rights took precedence over provincial laws), set the stage for future anthropological and archaeological expert witnesses (Thom 2001:14). In both cases, anthropologist Wilson Duff testified for the Indigenous claimants. In *Calder*, Duff was asked to define the extent of Nisga'a land use, which he did by indicating the land that was recognized by other tribes, land that was owned by family groups, common uses of lands, and extensive use of lands and waterways (Thom 2001:14).

Calder was the first time that land use and occupancy was used to provide evidence of Aboriginal title (Kinch 2015:9; Kristmanson 2008:52; MacLaren et al.

[38] *Calder* (1973), at page 328, Judson J.

2011:125). At the Supreme Court appeal (1973), the justices relied heavily on Duff's evidence, emphasizing the importance of anthropological evidence from the first Aboriginal title case onwards (Berger 1981:63). The justices were split on the question of whether the Nisga'a held title, but recognized Aboriginal title for the first time (MacLaren et al. 2011:125; McNeil 2000:3; Morse 2017). *Calder* was the beginning of the "modern era of Aboriginal law" (1973; *Tsilhqot'in* 2014:para. 10) that led the federal government to re-start treaty negotiations (Kinch 2015:9). Although Duff's evidence was mainly anthropological as opposed to archaeological, it was the first time that rights and title proceedings in Canada relied on expert witnesses from any discipline and it set the stage for later litigation (Kristmanson 2008:52; Thom 2001:14).

Baker Lake*: "That they and their ancestors were members of an organized society."*[39]

Calder (1973) opened the way for other land claims cases in Canada. *Baker Lake* (1979) is one of these. The Plaintiff, the Inuit of Baker Lake (in Nunavut), requested an order, based on Aboriginal title, to prevent the government from issuing land-use permits that would allow mining on their territory (Figure 4; McConnell 1996:109).

Two archaeologists testified at the trial—Elmer Harp Jr. and James Wright. Harp discussed his extensive archaeological reconnaissance of the area, including the discovery of 42 "sites of archaeological significance" and investigation of four previously known sites. He determined that occupation of the area started around 3,000 BC and that all occupation was sporadic and based on the summer hunting of caribou (*Baker Lake* 1979:paras. 20–21). Wright's evidence was admitted as rebuttal only, and he "did not cast any doubts on the validity of Dr. Harp's overview of the Inuit occupation of the North American Arctic generally, but, rather, dealt with the crucial question of the extent, if any, of Inuit occupation of the Baker Lake area prior to the historic period" (*Baker Lake* 1979:para. 15). Wright's work found evidence of Inuit occupation in the

[39] *Baker Lake* (1979), at paragraph 80, Mahoney J.

nineteenth and twentieth centuries and an Indian presence from 500 BC to the late eighteenth century (*Baker Lake* 1979:para. 24).

The Court found that the Plaintiff did pass the test for title, but that Aboriginal title only encompassed "the right to hunt and fish as their ancestors did" (1979:para. 83). However, *Baker Lake* is important because of its use of archaeological evidence and that it is "interdisciplinary in the best sense, for it synthesizes law, history, archaeology, and mineral exploitation, making use of the best recent research in each of these areas" (McConnell 1996:109). The archaeological evidence presented in *Baker Lake* is important for four reasons:

1. It closely matched the testimony of the Plaintiff;
2. The two archaeological experts agreed with one another;
3. The Court was impressed by the scientific and detailed nature of the archaeological evidence (*Baker Lake* 1979:para. 15); and
4. The Court preferred the archaeological evidence over the anthropological evidence (Culhane 1998:93–94).

The fact that archaeological evidence was used to prove occupation is important when considering the *Baker Lake* test—the test the Court applied to determine if the Baker Lake Inuit held Aboriginal title, and the first test for Aboriginal title in Canada (*Baker Lake* 1979:paras. 80, 91–95). The test included four criteria:

1. That they [the plaintiff] and their ancestors were members of an organized society;
2. That the organized society occupied the specific territory over which they assert the Aboriginal title;
3. That the occupation was to the exclusion of other organized societies; and
4. That the occupation was an established fact at the time sovereignty was asserted by England (1979:para. 80).

Although there were issues with the test, including that the organized society requirement ignores cultural relativity and returns to an evolutionary bias (Asch 1984:54; Bell and Asch 1997:56–57), it emphasized the essential elements of land occupation required to prove title. Moreover, the positive use of archaeological evidence suggests that archaeological data are an important line of evidence for Aboriginal title.

Bear Island*: "a small, dedicated and well meaning group of white people."*[40]

The Bear Island Foundation, on behalf of the Temagami Band of Indians of Ontario, was opposing attempts by that province to encourage resource and tourism development of their land (Figure 4). The Temagami argued that they had never given up title as their band had not been represented at the treaty negotiation.

Bear Island (1991) is important to this study of archaeology's role as the title claim was rejected in part because of the archaeological evidence. The Court ruled that the archaeological evidence could not prove continuity of occupation as it was not specific enough to trace the ancestry of Indigenous peoples before contact and that the archaeological (and other) experts were "in collusion with the defendants and acting as advocates rather than neutral expert witnesses" (Martindale 2014:400).

It is essential to discuss why the Court felt so strongly about the expert witnesses. This "collusion" was due to the types of evidence presented during the trial—a shortage of oral history evidence and an abundance of expert evidence. Justice Steele noted "how disappointed he was that there was so little evidence given by Indians themselves" (1985: para. 38). Only one member of the Temagami Band, Chief Potts, provided evidence of the band's oral history even though other band members, according to Chief Potts' testimony, could share the band's oral history (1985:paras. 38–39). Instead, the Bear Island Foundation relied on the evidence of expert witnesses,

[40] *Ontario (Attorney-General) v. Bear Island Foundation* [1985] 1 CNRL 1, 1984 CanLII 2136 (ONSC) at paragraph 48, Steele J. [*Bear Island*].

several of whom discussed oral history that had been told to them by band members (1985:paras. 38–43). Although Justice Steele was not concerned about the credibility of the expert witnesses, he felt that many of them did not present evidence that related directly to the Temagami Band but instead was based on analogy (1985:para. 45). Furthermore, the reliance on expert witnesses to give evidence on facts that could be provided by band members, such as current social organization, antiquity and lineal decent, and regional boundaries, made Justice Steele "doubt the credibility of the oral evidence introduced, and affects the weight to be given to the evidence of non-Indian witnesses" (1985:para. 48).

James Wright, William Noble, and Thor Conway testified on archaeological evidence (1985:para. 133). Wright provided evidence "of the general Indian way of life in the Canadian Shield" but did not specifically study the Temagami area (1985:para. 100). He discussed Algonquian culture before contact, including tool making, trading, and housing (1985:paras. 100–103). Wright stated that the cultural homogeneity of the Algonquian people made it impossible to identify individual bands archaeologically and, therefore, it was impossible to prove continuity of the Temagami Band with archaeological evidence (1985:para. 134). Noble provided a reply to Conway's evidence and provided a similar opinion to Wright, that it was impossible to show continuity of a specific band with material evidence such as pottery or lithics (1985:para. 136). Justice Steele found Conway "to be the most biased and unreliable witness called at trial" as he attempted to "subjectively interpret and distort his own findings to confirm what he was told [as oral history]" (1985:para. 109). As his conclusions were based on very few facts, Justice Steele "had concluded that his evidence was biased, confusing, inaccurate and unreliable, and that it should be given little or no weight" (1985:para. 109).

The trial judge found that the Temagami had no Aboriginal right to land, and if the right had existed, it had been extinguished by the treaty or subsequent adherence of the treaty. The Supreme Court agreed with the findings of the trial court (*Ontario*

(Attorney-General) v. Bear Island Foundation [1991] 2 SCR 570, 1991 CanLII 75 (SCC) [*Bear Island*]).

Delgamuukw*: "Aboriginal title encompasses the right to exclusive use and occupation of the land."*[41]

The major case for Aboriginal rights and title in the 1990s occurred when Gitksan and Wet'suwet'en hereditary chiefs, on behalf of their houses, "claimed separate portions of 58,000 km^2 in British Columbia" (*Delgamuukw* 1997:para. 7). The Claim Area was divided into 133 territories representing all Wet'suwet'en houses and all but 12 Gitksan houses. The Gitksan territory includes the Skeena, Nass, and Babine River watersheds, and the Wet'suwet'en, to the southeast, includes the Fraser-Nechako River system (1997:para. 8; Figure 4).

At trial (*Delgamuukw* 1991), Sylvia Albright, the archaeologist for the Plaintiff, detailed evidence of human habitation from 6,000 years ago at locations throughout the territory.[42] She discussed her own research, as well as research by Ken Ames and George MacDonald (*Delgamuukw* 1991:40). According to Justice McEachern's decision, Albright described "mostly undated findings at Gitanka'at, Hagwilget, Moricetown, Kisgegas, and Gitangasx" (sites along the Skeena and Bulkley rivers) as well as the "great fortress, Ta'otsip" dated to the 1700s (*Delgamuukw* 1991:153).

However, Justice McEachern did not have confidence in all of Albright's evidence, "as she seemed to base some of her archaeological opinions on flimsy evidence," (*Delgamuukw* 1991:41). Although McEachern did not further justify his use of the term "flimsy evidence," he did detail several reasons for the limitations of the evidence. First, there was no archaeological evidence of two important ancestral village sites, Temlaxam and Dizkle, which, in McEachern's opinion, is a notable gap in evidence and "cast doubt upon the authenticity of some of the adaawk and kungax [oral history]"

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[41] *Delgamuukw* (1997), at paragraph 117, Lamer C.J.

[42] The University of British Columbia's Library has digital copies of the trial transcript available to read online, including Sylvia Albright's testimony (UBC Open Collections 2013).

(*Delgamuukw* 1991:159). Second, there was "no evidence of any archaeological findings" in Gitksan or Wet'suwet'en territory away from the Skeena and Bulkley rivers, emphasizing to McEachern a lack of occupation *throughout* the claimed territory (*Delgamuukw* 1991:154). Finally, although some archaeological sites indicated occupation for at least 3,000 years, other sites were not dated or had more recent dates, suggesting, to McEachern, that "much of this evidence is highly equivocal with finding of white man's garbage mixed with possible archaeological features" (*Delgamuukw* 1991:158).

This reasoning, alongside the known mobility and migration of the Gitksan and Wet'suwet'en people, meant that Justice McEachern stated that archaeological evidence established early habitation at some sites within the claimed territory but "not necessarily occupation by Gitksan or Wet'suwet'en ancestors of the plaintiffs" (*Delgamuukw* 1991:158). From McEachern's perspective, the archaeological evidence could not be related to the present-day plaintiff—"any Aboriginal people could have made these remains" (*Delgamuukw* 1991:154).

The trial decision (*Delgamuukw* 1991) was highly contentious. Chief Justice McEachern completely rejected oral history, anthropological evidence, and the credibility of expert witnesses.[43] On appeal at the Supreme Court, the justices were unable to grant the Plaintiff Aboriginal title due to a "defect in the pleadings," as the case was not amended after the 51 Gitksan and Wet'suwet'en individual claims were amalgamated into two collective claims for Aboriginal title and self-government (1997:para. 77), but made essential rulings on the content and proof of Aboriginal title and oral history. The justices emphasized that "the laws of evidence must be adapted in order that this type of evidence [oral histories] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with"

[43] For a discussion of some of the issues at the British Columbia Supreme Court, refer to the special issue of *BC Studies* vol. 95, including Cruikshank (1992); Culhane (1992); Fisher (1992); Miller (1992); and Ridington (1992).

(*Delgamuukw* 1997:para. 87). Aboriginal title "is a right to the land itself" (*Delgamuukw* 1997:para. 140, underline in original) and the claimant group must prove pre-sovereignty exclusive occupation (*Delgamuukw* 1997:paras. 143–159). *Delgamuukw* represents a step forward for the consideration of different types of evidence for Aboriginal title and rights but also creates a dilemma for archaeological evidence because, according to the Court, although archaeology is one of the most unambiguous data sets on history, the history of Indigenous peoples can be beyond the reach of archaeological data (Martindale 2014:408).

Marshall; Bernard*: "the question is whether a degree of physical occupation or use equivalent to the common law title has been made out."*[44]

The Supreme Court delivered these two cases together. In *Marshall*, 35 Mi'kmaq (including Stephen Marshall) were charged with cutting timber on Crown lands in Nova Scotia. In *Bernard*, Joshua Bernard, a Mi'kmaq, was charged with unlawful possession of logs. The logs came from Crown lands in New Brunswick and were cut by another Mi'kmaq (Figure 4). In both cases, the accused argued that they did not need authorization to log as they had a treaty right to harvest timber or Aboriginal title to the logging sites (*Marshall; Bernard* 2005:paras. 2–3).

Archaeological evidence was used in the trials for both decisions. In *Marshall*, William Christianson, Curator of Archaeology at the Nova Scotia Museum, testified about archaeological sites on the Nova Scotia mainland and Cape Breton. There were 480 sites from the Ceramic Period, which were all considered to be Mi'kmaq (*R. v. Marshall* [2001] 2 CNLR 256, 2001 NSPC 2 (CanLII) at para. 9 [*Marshall*]). In *Bernard*, archaeological evidence included a historic winter Mi'kmaq camp situated around other sites and 15 kilometers away from a major site. For both decisions, the Courts did not question the continuity of occupation in the area but found that because there was no

[44] *Marshall; Bernard* (2005), at paragraph 66, McLachlin C.J.

archaeological evidence of use of the *exact* cutting sites, the evidence fell short of establishing title (Kristmanson 2008:128).

The main issue from the *Marshall; Bernard* (2005) decision was that of Aboriginal title for nomadic and semi-nomadic groups. Although the Supreme Court outlined that such groups can claim title if the "degree of physical occupation or use equivalent to common law title has been made out" (2005:para. 66), the fact that the Court determined that neither Plaintiff had Aboriginal title for the cutting sites indicated that it was extremely challenging for those types of groups to obtain title (*Marshall; Bernard* 2005: paras. 71–83; Rosenberg and Woodward 2015:953–954).

Tsilhqot'in*: "Aboriginal title is not confined to specific sites of settlement."*[45]

Tsilhqot'in (2014) was the first case where the Supreme Court declared title for a designated area of land. The Tsilhqot'in people claimed Aboriginal title to 4,380 km^2 of land in central British Columbia after years of disputing forest licenses issued in their traditional territory (Figure 4).

Archaeological data were an essential form of evidence in the trial decision.[46] Two archaeologists, Morley Eldridge (Crown) and R.G. Matson (Plaintiff), testified as expert witnesses (*Tsilhqot'in* 2007:para. 373). The archaeological data they presented indicated minimally 500 years of Tsilhqot'in occupation in the Claim Area and included habitation and resource gathering sites throughout parts of the Claim Area. Eldridge's report provided data on archaeological village sites that correlated to known Tsilhqot'in village sites documented in historical records, buttressing two different forms of evidence (Eldridge 2006).

At trial, the justice was unable to issue a declaration of title for procedural reasons, although he did lay out the territory in which he felt title existed. The case was

[45] *Tsilhqot'in* (2014), at paragraph 50, McLachlin C.J.

[46] The large amount of archaeological evidence and the positive title declaration warranted an in-depth analysis of the *Tsilhqot'in* decision, provided in Chapter 4.

appealed all the way to the Supreme Court, where the Court overturned the "postage stamp" approach to proving title and declared title in the areas laid out at trial (*Tsilhqot'in* 2007:para. 610). What is most important about the archaeological evidence in *Tsilhqot'in* (2007) is the extent to which it is referred in the decision. Justice Vickers describes specific details about sites, referenced by Borden number. He specifically discusses 14 archaeological sites throughout the claimed territory. These sites provide clear evidence of occupation and use before and at sovereignty that link to historical records, oral history, and Tsilhqot'in witnesses' testimonies.

Discussion

These six cases indicate that archaeological data can be relevant for Aboriginal title although not always to the extent to actually help *prove* title. Archaeological data, as concrete evidence of pre-sovereignty occupation and use, help fulfill the test for Aboriginal title (continuous, exclusive, and sufficient use). Moreover, archaeological data have been used as evidence since the beginning of modern land claims, and its relevance as evidence is unlikely to change.

In *Calder* (1973), *Baker Lake* (1979), and *Tsilhqot'in* (2014), archaeological data provided evidence of pre-sovereignty occupation that was considered positively by the court. These decisions are relevant for archaeologists not only for the types and consideration of archaeological data, but also for their role as precedent-setting cases. *Calder* (1973) was the first decision to recognize Aboriginal title in Canada, and *Baker Lake* (1979) outlined the first test for Aboriginal title. The test set out in *Baker Lake* (1979) emphasizes archaeological data's importance as evidence of land occupation before sovereignty. Especially at a time where oral histories were not recognized by the court, this early indication of pre-sovereignty occupation suggests that archaeological data may be the only form of evidence to answer this aspect of the test. *Tsilhqot'in* (2014) is the Supreme Court's latest decision on Aboriginal title and provides a clear definition for the territorial approach to Aboriginal title. Archaeological data, by nature, can show evidence of occupation and use throughout a territory (in various ways and

with different degrees of certainty of resolution), maintaining its role as relevant evidence in future title cases, but nonetheless still subject to the problems outlined in my discussion of Aboriginal rights.

The reliance on archaeological data to prove pre-sovereignty occupation and use is outlined in essential legal texts on Aboriginal title, including legal scholar Kent McNeil's *Common Law Aboriginal Title* (1989), a seminal work outlining the legal principles behind Aboriginal title. He writes that Indigenous land occupation includes:

> More or less permanent dwellings and other structures, and of any enclosed or cultivated fields. Definite tracts over which they herded domestic animals, and lands to which they restored on a regular basis to hunt, fish, or collect the natural products of the earth, should be included as well (1989:201–202).

This text, and this outline of proof of occupation, is cited in many key decisions, including *Delgamuukw* (1997:para. 149) and *Tsilhqot'in* (2007:paras. 544, 684; 2014:paras. 39, 47). What is important here is to remember that sufficiency of occupation for Aboriginal title requires a culturally sensitive approach that compares the culture and practices of the Indigenous group to the requirements of common law title (*Tsilhqot'in* 2014:para. 50). In this way, many different forms of "cultivated fields" could be included as evidence for occupation, including traditional berry picking areas, balsam-root gathering, and clam gardens. For example, Justice Vickers outlines in *Tsilhqot'in* (2007:para. 683) that although the Tsilhqot'in did not rely on fields "cultivated in the usual sense," the berry picking and root gathering sites "showed evidence of many generations of plant harvesting and management."

In this way, archaeological data are an obvious choice to fit McNeil's requirements for occupation, a truth echoed in the evidence presented in all of the decisions discussed above. For example, in *Baker Lake*, archaeological data indicated 46 sites of "archaeological significance" near caribou water crossings, including evidence of tool manufacture and caribou hunting, from 3,000 BC to near present (1979:paras. 19–21). In *Marshall* (2001:para. 9), archaeological evidence pointed to exclusive Mi'kmaq

occupation in Nova Scotia during the Ceramic Period (from 2,500 BP to European contact). There are 480 Ceramic Period sites in Nova Scotia that show Mi'kmaq occupation and use. In *Bernard*, archaeological evidence centred around a historic Mi'kmaq winter camp. Here, trial judge agreed that the archaeological evidence indicated traditional Mi'kmaq occupation and use but as the site was too far away from the location of the logging site, the evidence was irrelevant to the case (2000:para. 106). In *Tsilhqot'in* (2007), 14 archaeological sites in the Claim Area indicated 500 years of exclusive Tsilhqot'in occupation. Mainly located along the Tsilhqox River, the sites correlated to historical villages and Tsilhqot'in testimony.

These examples indicate that archaeological data can be evidence of sufficient and exclusive occupation. However, there are inherent challenges with archaeological data, particularly with the stringent requirements to meet the test of continuity. Archaeological evidence can seldom identify ethnicity, much less track ethnicity across millennia.[47] For example, in *Bear Island*, the archaeologists provided evidence of Algonquin culture before contact but stated that identifying individual bands archaeologically or showing the continuity of a specific band using material evidence such as pottery or lithics was impossible (1985:paras. 134–136). In *Delgamuukw*, the Court agreed that archaeological evidence established pre-sovereignty occupation of the claimed territory (1991:158). What the Court could not see in the archaeological evidence was proof of Gitksan versus Wet'suwet'en occupation, leading the Justice to state that "any Aboriginal people could have made these remains" (1991:154).

There are at least two ways to get around the issue of continuity. First, it is not necessary to show continuous occupation stretching back for thousands of years. In *Tsilhqot'in* (2014), archaeological data showed evidence of occupation for only 500 years. Technically, the bulk of proof needs to occur *at* the date of sovereignty assertion. Although the courts have not provided details on how far back in time occupation needs

[47] For a discussion of ethnicity in archaeology, see Chapter 5.

to be demonstrated, case law indicates that evidence of continuous occupation does not need to stretch too deeply into the past. Second, other forms of evidence can buttress archaeological data and help indicate continuous occupation. For example, in *Baker Lake* (1979), the archaeological evidence closely matched that of the Plaintiff (the Inuit of Baker Lake), helping make both lines of evidence stronger. Similarly, in *Tsilhqot'in* (2007), archaeological evidence of village sites matched historical records of those sites. As with proof of Aboriginal rights, archaeological evidence for Aboriginal title is best when used in conjunction with other lines of evidence.

These six cases indicate that archaeological evidence has been employed, to varying degrees, in precedent-setting Aboriginal title cases in Canada. Archaeological data have been considered as positive proof of sufficient occupation in *Baker Lake* (1979) and *Tsilhqot'in* (2014) and as continuous occupation in *Baker Lake* (1979), *Marshall; Bernard* (2005), and *Tsilhqot'in* (2014). Archaeological evidence certainly influenced the outcome of the trial in at least *Baker Lake* (1979) and *Tsilhqot'in* (2014). Although there are issues with archaeological data, particularly that it will likely never be sufficient proof of title on its own, it can be essential evidence for proof of sufficient and continuous pre-sovereignty occupation.

Conclusion: Archaeology in the Courts

This assessment of Aboriginal rights and title jurisprudence highlights archaeological data's role in major court decisions, ranging from serving as important evidence in *Baker Lake* (1979) and *Tsilhqot'in* (2014), to being of limited use in *Lax Kw'alaams* (2011) and *Marshall; Bernard* (2005), to being irrelevant in *Bear Island* (1991) and *Delgamuukw* (1997).

The strength of archaeological evidence lies with its ability to show evidence of pre-contact or pre-sovereignty occupation and use of land. For Aboriginal rights, this is evidence of pre-contact activities and their integrity within a culture. For Aboriginal title, this is evidence of continuous and sufficient occupation of a territory. Archaeological

evidence to indicate these functions has included summaries of past investigations in a claimed territory, including occupation sites, as well as lithic and faunal analysis. These types of data fit squarely within accepted definitions of occupation (e.g., McNeil 1989) and when accepted by the court, help prove rights and title (e.g., *Adams* 1996; *Ahousaht* 2011; *Baker Lake* 1979; *Gladstone* 1996; Meares Island 1984; *Tsilhqot'in* 2014).

Archaeological evidence's limitations, on the other hand, include inherent issues of the data source and issues presenting it in court. The material record is incomplete, and an absence of evidence does not equal evidence of absence. Archaeological data may not be able to indicate certain aspects of subsistence or economic systems (e.g., *Smokehouse* 1996; *Van der Peet* 1996). In addition, archaeological data struggle to show ethnic continuity through time in a way that the courts can interpret. Unless data can be triangulated with other forms of evidence (such as in *Tsilhqot'in* 2014 or *Baker Lake* 1979), courts may not be able to recognize that the evidence of past occupation is related to the current land occupants (e.g., *Bear Island* 1991; *Delgamuukw* 1997).

Archaeological data can be more acceptable to courts when it is presented in a persuasive manner rather than when it is merely logically robust. For example, in Lax Kw'alaams, the expert witness for the Crown relied on non-representative data to argue for broad historical trends as fact (Martindale 2015). Archaeologists do not always employ the necessary rigour required by legal standards of evidence in their own data collection and analysis. Without defining patterns, assessing sampling and confidence, employing taxonomic rigour, clarifying logical inferences, and testing assumptions and hypotheses, archaeologists cannot ensure that their data and analyses will meet the standards required by court and the adversarial nature of cross-examination.

My examination of the use of archaeological evidence in litigation emphasizes that archaeological data has and will continue to have a role as evidence for the criteria for Aboriginal rights and title. However, I caution archaeologists that without employing rigorous standards for their data collection, analyses, and reports, their research loses merit within the court. Lawyers and judges are not educated in archaeological methods

and theories, and without dutiful explanation of disciplinary norms and research methods, data quickly can be misunderstood or misinterpreted.

It is impossible to pinpoint the types of data most suited as criteria for Aboriginal rights and title. As this chapter details, each territory is unique, and the types of evidence for specific rights or pre-sovereignty occupation are unlikely to be the same across Canada. Therefore, what archaeologists need to take away from this examination is that the importance of their research for Aboriginal rights and title is not the types of data they collect. Instead, it is the rigour and objectivity they employ in their research methods and practices that will make the difference in a court of law. Employing high standards reduces bias and minimizes the potential for the court to misinterpret data and conclusions.

Chapter 3. Archaeological Evidence in the *Tsilhqot'in* Decision

The 2014 Supreme Court of Canada *Tsilhqot'in* decision (2014), is the most recent in a series of momentous rulings on Aboriginal rights and title.[48] It provides the first recognition of Aboriginal title for a designated area of land (Bell 2017; Borrows 2015b:701; McNeil 2015a). The Tsilhqot'in people claimed Aboriginal title to 4,380 km^2 of land after years of disputing forest licenses issued in their traditional territory. After a lengthy court process, the Supreme Court of Canada declared Aboriginal title for the first time in Canadian history.

The more than 60 citations of archaeological data in the *Tsilhqot'in* British Columbia Supreme Court decision (2007) confirms the value of archaeological data in contributing to Aboriginal title resolution. The information that archaeology provides on occupancy and use is uniquely equipped to help identify then decode intricate-yet-powerful relationships between people and material worlds (Hogg et al. 2017:189; Reid et al. 1975). Its singular ability to corroborate with and add time-depth to oral traditions and documentary histories make it an obvious, potent, and indispensable tool in the adjudication of Aboriginal rights and title claims (Kristmanson 2008:224–228). At the same time, because the rules of evidence in courtroom proceedings are so different from the customary standards archaeologists use to assess the strength of evidence and inference, archaeologists are well advised to pay close attention to how courts review and assess the results and presentation of archaeological studies.

Aboriginal title provides for "the exclusive use and occupation of the land … for a variety of purposes," not confined to traditional or distinctive uses (*Tsilhqot'in* 2014:para. 70). First acknowledged by the *Royal Proclamation of 1763*, and by Canada in Section 35(1) of the 1982 *Canadian Constitution*, Aboriginal rights and title exist on a

[48] Including *Calder* (1973), the first Aboriginal title case in Canada; *Delgamuukw* (1997), the Gitksan and Wet'suwet'en Aboriginal title case; and *Van der Peet* (1996), the often-cited Aboriginal rights case.

spectrum defined by cultural practices and evidenced by archaeology, documentary studies, and oral traditions (*Delgamuukw* 1997; Figure 2; Knafla and Westra 2010; McHugh 2011). Aboriginal title, at the far end of the spectrum, is held by the entire claimant group and authorizes occupation, possession, use, and economic benefits of the land (Swain and Baillie 2015a:268).

To prove Aboriginal title, the claimant group must establish that they occupied the claimed territory continuously, exclusively, and sufficiently (*Tsilhqot'in* 2014:para. 30). The standards required for these three criteria have evolved over time from precedent-setting cases, common law and Aboriginal law, and legal interpretations (McNeil 1989; Slattery 2006). Continuity requires proof of occupation, without major interruption, beyond the date of sovereignty assertion (*Tsilhqot'in* 2014:paras. 45–46). Exclusivity requires proof of intention and capacity to control access to the claimed land—using means consistent with the capacity of the Indigenous group (*Delgamuukw* 1997:para. 156; *Tsilhqot'in* 2014:para. 49). Sufficiency requires proof of cultural activities of the claimant group across the Claim Area, such as habitation sites and resource gathering (*Tsilhqot'in* 2014:para. 38).

Canadian courts have emphasized that, because of the adversarial setting of the court and the aims of reconciliation, Aboriginal rights and title claims are best negotiated outside of the court (*Tsilhqot'in* 2007:paras. 1340, 1357, 1360). Unlike a treaty (or other) negotiation process, court decisions produce a win/lose result and are confined to the issues raised in the pleadings. Even so, many claims, including *Tsilhqot'in*, do end up in court. As such, it is important for archaeologists, whose work could end up as evidence in these decisions, to understand how archaeological evidence is used and considered in these cases. This chapter analyses the use of archaeological evidence in the *Tsilhqot'in* case to illustrate how archaeological data were used to show evidence of sufficient and continuous land occupation and use. Although there are other cases that include archaeological evidence, including *Lax Kw'alaams* (2011), the *Tsilhqot'in* case is the latest decision on Aboriginal title in Canada, and therefore its

consideration of archaeological evidence is likely to have the largest implications moving forward. I first review the *Tsilhqot'in* decision, including the test for Aboriginal title and the differences between the "postage-stamp" and territorial approaches used to claim title. I then discuss the evidence used for the test and review the specific archaeological evidence that was excluded and included, emphasizing the types of archaeological evidence the court considered. My examination indicates that all archaeological research has the potential to be used as evidence in court, including archaeological reports filed with the Provincial Archaeological Report Library (British Columbia Archaeology Branch 2019a). Archaeologists should thus be aware of and prepared for this potential outcome when conducting research and in writing their results.

The Tsilhqot'in Decision: The First Title Declaration in Canada

Tsilhqot'in Nation v. British Columbia was the first decision to declare Aboriginal title on unceded land (Borrows 2015b:701). The Supreme Court of Canada rejected the restrictive test for Aboriginal title that British Columbia and Canada had imposed in *Delgamuukw* (1997), *Marshall; Bernard* (2005), *Tsilhqot'in* (2007), and *William* (2012), and issued the "first legally binding recognition" of Aboriginal title (Swain and Baillie 2015b:n.p.). Like *Delgamuukw*, *Tsilhqot'in* involved a lengthy trial at the British Columbia Supreme Court (2007), followed first by a British Columbia Court of Appeal decision in 2012 (*William*) and then by the Supreme Court of Canada decision in June of 2014.

As is true for virtually all cases that reach a Supreme Court, *Tsilhqot'in* (2014) has a long backstory, much of which has been previously discussed (Rosenberg and Woodward 2015). Briefly, the case is traceable to a dispute over forest licenses granted by the British Columbia Minister of Forests to Carrier Lumber to cut trees in Tsilhqot'in traditional territory (*Tsilhqot'in* 2007:para. 27). The Tsilhqot'in people resisted these actions and eventually filed for a declaration of Aboriginal title before the courts, claiming 4,380 km^2 of land under Section 35(1) of the *Canadian Constitution* (1982). The

case began in 2002, with a 339-day trial split between Victoria and Tsilhqot'in territory between November 18, 2002, and April 11, 2007. Although Justice Vickers (the trial judge) refused to issue a declaration of title for procedural reasons, he did lay out the territory in which he felt Aboriginal title existed. The defendants, Canada and British Columbia, and the Plaintiff (Tsilhqot'in) all appealed to the British Columbia Court of Appeal (*William* 2012). At the appeal, the Court stated that Aboriginal title, as discussed in *Delgamuukw* (1997) and *Marshall; Bernard* (2005), must be demonstrated by "intensive regular use of a well-defined area of land," instead of evidence of exclusive presence over an entire territory (2012:para. 210). The Plaintiff appealed to the Supreme Court of Canada, which overturned this "postage stamp" approach (*Tsilhqot'in* 2007:para. 610) and declared Aboriginal title (*Tsilhqot'in* 2014:para. 153).

The Supreme Court of Canada decision (*Tsilhqot'in* 2014) provided "further threads to an ever-developing legal tapestry" on the judicial interpretations of Aboriginal rights and title in Canada (Swain and Baillie 2015a:266). Legal scholar Brian Slattery (2015) states that Aboriginal title differs significantly from fee simple title, particularly in that it flows from a special (i.e., paternalistic) historical relationship between the Crown and Aboriginal peoples. In this sense, Aboriginal title is a form of public law, as it deals with the rights and powers of constitutional entities and is similar to provincial title. John Borrows (2015b:727), a legal scholar, stresses that although *Tsilhqot'in* is a step in the right direction, it still follows the doctrine of discovery (*terra nullius*).[49] This approach creates significant challenges for Indigenous peoples, as the Crown can infringe on Aboriginal title due to their "superior position" as underlying title holders. Legal scholar Catherine Bell (2017) emphasizes that *Tsilhqot'in* affects Indigenous cultural heritage management as it compels the Crown to more frequent consultation and accommodation and increases Indigenous negotiation power. Legal scholar Kent McNeil (2015b) articulates that the main issue post-*Tsilhqot'in* is the

[49] The doctrine of discovery, or *terra nullius*, is a legal principle to justify European sovereignty. Literally meaning "no man's land," it was (and is) used by settler nations to suggest that nobody owned the land prior to European assertion of sovereignty.

removal of interjurisdictional immunity for Aboriginal rights and title, meaning that provincial laws now apply to areas with potential rights and title and as such, it can be up to the provinces to consult and accommodate. Lawyers Bruce McIvor and Kate Gunn (2016) echo McNeil's critique of interjurisdictional immunity and emphasize that the provinces now have a larger potential to infringe upon Aboriginal and treaty rights, particularly as they are more involved with resource development than the federal government. Finally, legal scholar Gordon Christie (2015:789) analyses what Aboriginal title might look like post-*Tsilhqot'in*, arguing that affirming Aboriginal title acknowledges legal pluralism and "how two sets of powers claiming the ability to determine what values and principles will inform decision making over lands can come together to respectfully work out a mutually satisfactory power-sharing agreement."

The Test for Aboriginal Title in *Tsilhqot'in*

Aboriginal rights and title are, by nature, inherent and pre-existing rights based on Indigenous peoples' original occupation and relationship with the land before Crown sovereignty. The way these rights are understood differs between the Crown (and the courts) and Indigenous peoples in Canada. As Olthuis et al. (2008:33) emphasize:

> the basis of Aboriginal rights is not and cannot be properly regarded as how Canadian governments and courts alone view these rights, as such a view has been coloured by the historical development which became increasingly one of abuse, annihilation, and assimilation.

However, when analysing the tests to prove these rights, which have been defined and developed by Canadian courts, it is essential to understand the court's view of these rights, however historically skewed they may be.

In Canadian law, the group claiming Aboriginal title (or other Aboriginal rights) is responsible for providing the burden of proof (to that title or other right).[50] Determining

[50] Aboriginal rights and title disputes are often dealt with through the courts. Most title disputes are heard as civil cases, which function under different rules than criminal cases. In British Columbia, most Aboriginal title cases are tried at the British Columbia Supreme Court, where a judge hears evidence from the plaintiff

Aboriginal title requires the court to "identify how pre-sovereignty rights and interests can properly find expression in modern law terms" (*Tsilhqot'in* 2014:para. 50). In *Tsilhqot'in*, the Supreme Court held with *Delgamuukw* (1997) and *Marshall; Bernard* (2005) that Aboriginal title is proven using the following legal test:

1. Sufficient occupation of the land claimed;
2. Continuity of occupation (where present occupation is relied on); and
3. Exclusive historic occupation (*Tsilhqot'in* 2014:para. 50).

However, unlike previous decisions (*Delgamuukw* 1997; *Marshall; Bernard* 2005; *William* 2012), in *Tsilhqot'in* the Supreme Court determined that:

> Occupation sufficient to group Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing, or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty (2014:para. 50).[51]

This ruling allowed the Supreme Court to determine that Justice Vickers, at the British Columbia Supreme Court, was correct in examining the evidence brought forward at trial and declaring title. Indeed, the only thing holding Justice Vickers back from declaring title was a procedural issue relating to how the case was framed and how the evidence was presented. As the issue of a territorial versus site-specific approach was central to the resulting Supreme Court decision, a closer discussion follows.

Site-Specific vs. Territorial Approach to Aboriginal Title

At the trial, the Plaintiff had to prove Aboriginal title by establishing "a sufficient degree of physical occupation of the Claim Area by Tsilhqot'in people at the time of

(the claimant group) to prove the legal test for title. The defendants (typically the Province and Canada) can also provide evidence and cross-examine witnesses.

[51] What archaeologists may refer to as a land-use pattern.

sovereignty assertion" (*Tsilhqot'in* 2007:para. 102). The Plaintiff sought a declaration of Aboriginal title over two Claim Areas (Figure 5):

1. Tachelach'ed (Brittany Triangle);[52] and
2. Trapline Territory (divided into Eastern and Western).

Tachelach'ed refers to the land enclosed by the Tsilhqox and Dasiqox (Taseko River) with a southern boundary through Xeni (Nemiah Valley) (Figure 5; *Tsilhqot'in* 2007:para. 40). The Trapline Territory refers to the land within the boundary of Trapline License #0504T003, which is divided into the Eastern and Western Trapline Territories (Figure 5; *Tsilhqot'in* 2007:para. 45). The claimed areas do not include the Indian Reserves within them (*Tsilhqot'in* 2007:para. 44–45). The Xeni reserves are within Tsilhqot'in traditional territory (at the southern border of Tachelach'ed [Figure 5]). They were created in the early 1900s, later than other Tsilhqot'in reserves, "due to their remote location and the lack of an adequate transportation network" (*Tsilhqot'in* 2007:para. 338). The communities are still considered fairly remote today.

[52] I refer to place names within the Tsilhqot'in territory by their Tsilhqot'in names wherever possible, as per the 2007 British Columbia Supreme Court decision.

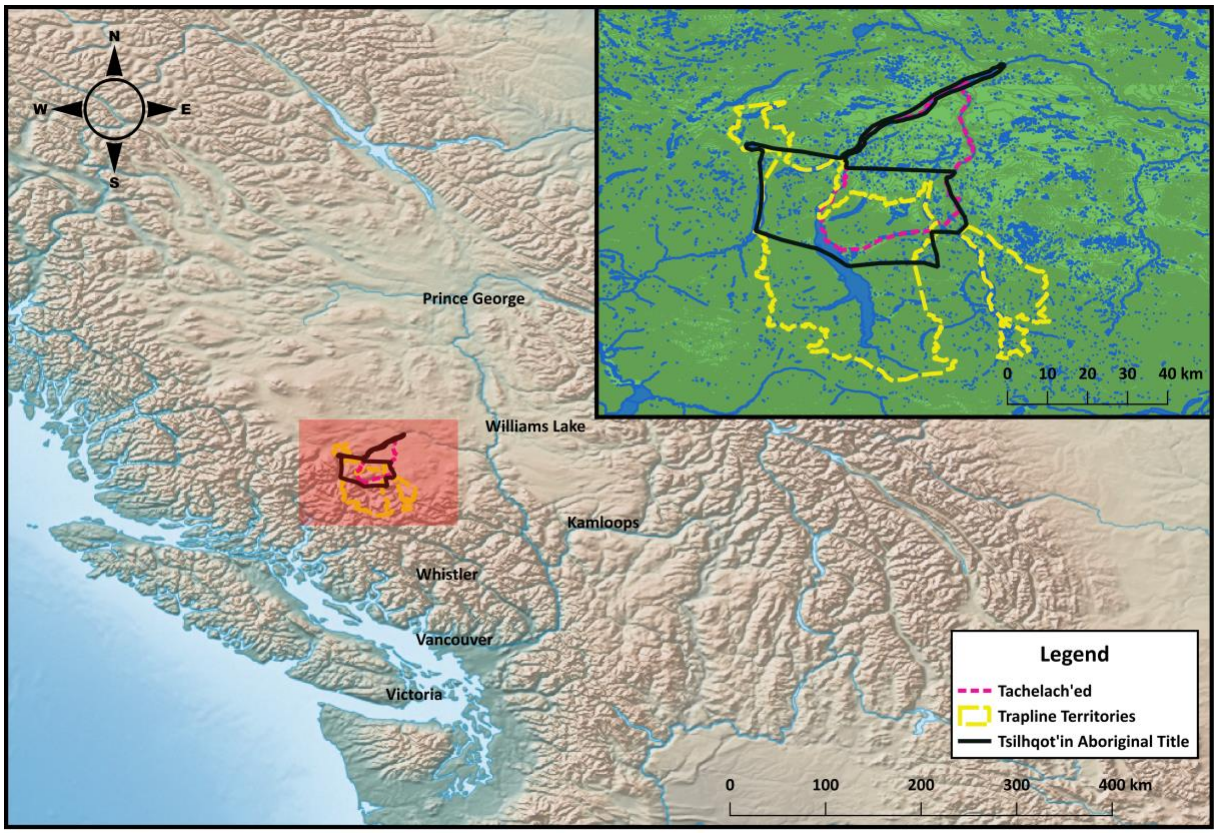

Figure 5. Tsilhqot'in Claim Area with declared Aboriginal title.
Outlined areas are approximate. Map created by Erin Hogg with data from DataBC (2019) and Natural Earth (2019).

To prove title, the Plaintiff organized the evidence for a title claim through a territorial approach. Instead of focusing on specific sites, the argument presented details on seasonal use and subsistence patterns *throughout* the Claim Area (*Tsilhqot'in* 2007:Argument of the Plaintiff, vol. 3, pp. 307–337). This territorial approach allowed the Plaintiff "to demonstrate regular use of all of the various geographical areas that compromise the Claim Area pursuant to an organized pattern of occupation" (*Tsilhqot'in* 2007:para. 104). British Columbia argued that this approach was not appropriate to prove Aboriginal title as set out by *Delgamuukw* (1997) and *Marshall; Bernard* (2005)—title must be proven at specific places (*Tsilhqot'in* 2007:paras. 105–106). To justify this complaint, the Plaintiff used part of their reply argument to reorganize the same body of evidence and present it as evidence of use and occupation at specific places throughout the Claim Area (*Tsilhqot'in* 2007: Plaintiff's Reply app. 1a, 1b).

British Columbia and Canada challenged this reframing, stating that as the claim was presented as an "all or nothing" claim,[53] the Plaintiff could not try to attempt to claim title to smaller definite tracts of land within the Claim Area (*Tsilhqot'in* 2007:para. 129). Although Justice Vickers appreciated both of the Plaintiff's approaches and used both in his decision (*Tsilhqot'in* 2007:para. 108), he ultimately agreed with British Columbia and Canada that he could not issue title to only part of the Claim Area without prejudicing the Crown defendants (*Tsilhqot'in* 2007:paras. 129, 957). The Plaintiff reorganized their evidence in a "late state attempt … to convert the pleaded definite tracts of land—Tachelach'ed and the Trapline Territory—into smaller definite tracts of land" (*Tsilhqot'in* 2007:para. 110) that were not part of the original pleadings.

Because of his view that Aboriginal title over the entire Claim Area was unproven, or unevenly proven, Justice Vickers refrained from a declaration of title. However, to enhance "a negotiated reconciliation of the claim," he outlined an almost 2,000 km^2 area that in his judgement met the requirements for Aboriginal title (Figure 5; Robbins and Woodward 2009:295; *Tsilhqot'in* 2007:para. 962). He also emphasized that if he was found to be wrong in his legal conclusions about his inability to declare title, then his conclusion of the proven title area was binding on all parties (Robbins and Woodward 2009:295). Justice Vickers' title declaration sheds light on the importance of archaeological (and other forms of) evidence, which I discuss later in this chapter.

The issue of a territorial versus site-specific approach to Aboriginal title also occurred in the British Columbia Court of Appeal (*William* 2012). There, the Court agreed with British Columbia and Canada that "the case law does not support the idea that title can be proven on a limited presence in a broad territory" (*William* 2012:para. 230). Instead, per the appeals Court ruling, Aboriginal title remained limited to definite and bounded tracts of land. The Court agreed that title had been proven for specific tracts of land and that Aboriginal rights to hunt and fish existed in larger areas within

[53] Meaning that title could only be awarded for the entire Trapline Territory and/or Tachelach'ed, or none of it.

the territory. Like Justice Vickers, the Court could not declare title on these areas as they had not been pleaded separately (*William* 2012:para. 241).

The Supreme Court, of course, had the last word in this debate. The 2014 decision stated that Justice Vickers had "made no legal error in how he examined the evidence" (2014:para. 63) and that the evidence supported Justice Vickers' conclusion of sufficient, exclusive, and continuous occupation (2014:para. 66). The Court used the title area outlined by Justice Vickers to declare Aboriginal title over much of the Claim Area. In sum, *Tsilhqot'in* (2014) emphasizes that Aboriginal title is not isolated to small occupation sites, but instead can stretch over territories of occupation and use, rendering evidence of land-use patterns, such as provided by archaeology, much more important to prove title.

Evidence Used to Prove Aboriginal Title

Tsilhqot'in confirms that questions regarding whether "the evidence in a particular case supports Aboriginal title is a fact for the trial judge" (2014:para. 52). This legal dictum directs all current and future examinations of evidence, and the standards for admission and weighing thereof, to the British Columbia Supreme Court decision (*Tsilhqot'in* 2007). This section reviews the expert witness evidence Justice Vickers examined and then scrutinizes in detail the archaeological evidence used in support of the title claim.

The Plaintiff claimed title to the "Claim Area": Tachelach'ed, the Western Trapline, and the Eastern Trapline (Figures 5–6). Justice Vickers subdivided this Claim Area into six regions and examined specific tracts of land within each. He considered the use and occupation of the Claim Area from three different perspectives:

1. Use and occupation of specific sites within the Claim Area, including sites with a measure of permanency that could be characterized as

village sites, dwelling sites, camping sites, cultivated fields,[54] and resource gathering sites;

2. Land-use analysis of the Claim Area, including evidence of a clear pattern of seasonal resource gathering in various locations; and

3. Post-sovereignty use and occupation of sites within the Claim Area, including evidence of a continuation of the seasonal round into the twentieth century (Tsilhqot'in 2007:paras. 946–949).

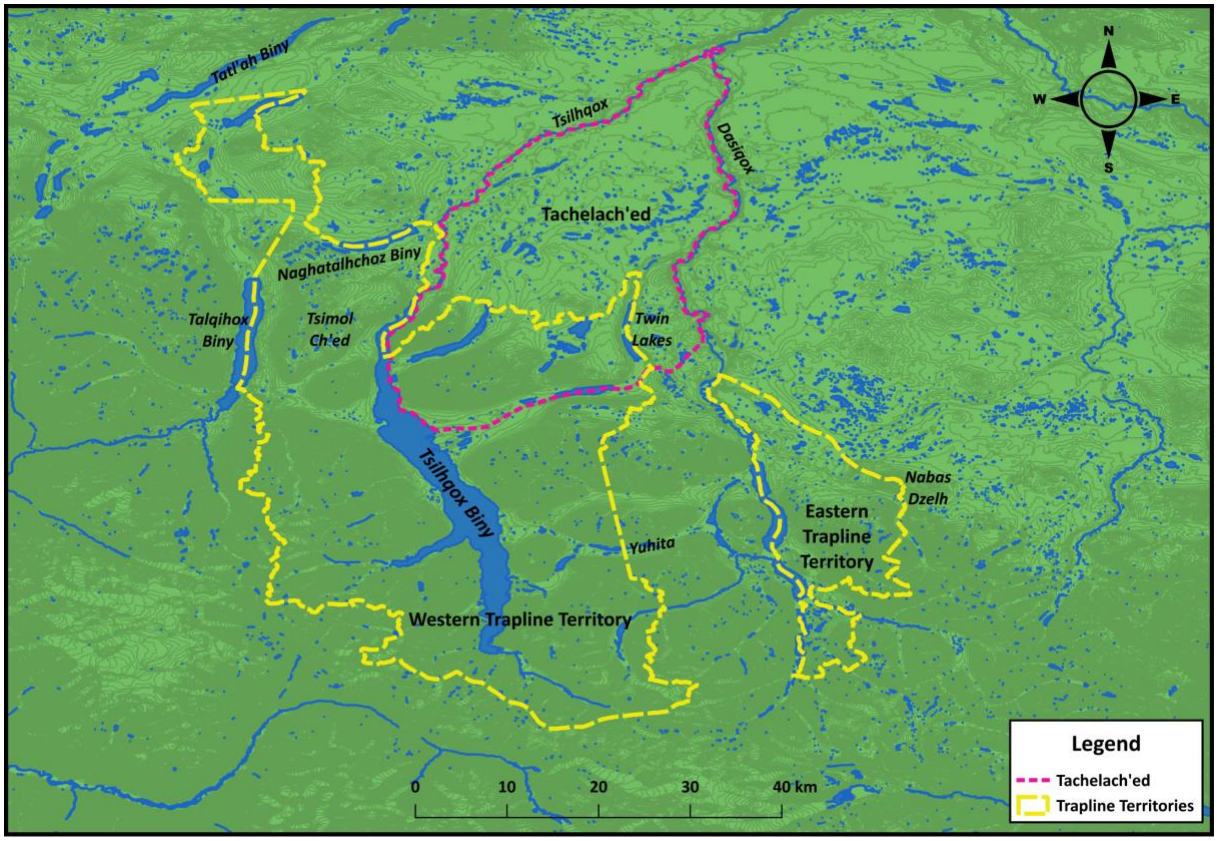

Figure 6. Tsilhqot'in Claim Area in detail.
Outlined areas are approximate. Map created by Erin Hogg with data from DataBC (2019), Natural Earth (2019), and *Tsilhqot'in* 2007 Map 3.

[54] The term "cultivated fields" comes from Kent McNeil's seminal work on Aboriginal title (1989:201–202). The Courts must consider sufficient occupation for Aboriginal title from a culturally sensitive perspective that compares the culture and practices of an Indigenous group to the requirements of common law title (*Tsilhqot'in* 2014:para. 50). In this way, many forms of "cultivated fields" can be included as evidence for occupation. Justice Vickers outlines that although the Tsilhqot'in did not rely on fields "cultivated in the usual sense," the berry picking and root gathering sites "showed evidence of many generations of plant harvesting and management" and in this sense are considered "cultivated fields" (2007:para. 683).

Justice Vickers laid out the evidence for occupation of the Claim Area "at the time of sovereignty assertion viewed, as best [he could], with an awareness of the Tsilhqot'in perspective" (*Tsilhqot'in* 2007:para. 649). The majority of the evidence was prepared from counsel's arguments, including expert witness reports and testimony. Vickers organized this evidence into four categories:

1. Oral Traditions (Legends and Landmarks) (paras. 653–671);
2. Time Depth (place names and local resources) (paras. 672, 675–678);
3. Trails, Hunting, Fishing, and Trapping (including mapping the trail network) (paras. 679–681); and
4. Regular Use of Definite Tracts of Land (Claim Area sites) (paras. 682–911).

Categories 1–3 are brief descriptions of the related evidence. Category 1 is self-explanatory. Category 2, *Time Depth*, consisted primarily of Tsilhqot'in place names (indicating a longevity of occupation) and connection to the local natural resources. Justice Vickers outlined Dr. Nancy Turner's (an ethnobotanist) opinion that due to the intensive management of local plants, the Tsilhqot'in people had occupied the Claim Area for at least 250 to 300 years, an opinion he accepted (2007:para 677–678). Category 3, *Trails, Hunting, Fishing, and Trapping*, outlined Ken Brealey (a historical geographer) and John Dewhirst's (an anthropologist) evidence of the trail network throughout Tsilhqot'in territory. Both experts were of the opinion that the trail network was used by Tsilhqot'in people since the date of sovereignty assertion (2007:para. 679). As British Columbia and Canada did not contest the Tsilhqot'in claim to an Aboriginal right to hunt, fish, and trap in the Claim Area, Justice Vickers did not need to closely discuss the evidence for these activities within this section (2007:paras. 680–681). Finally, category 4, *Regular Use of Definite Tracts of Land*, is where the bulk of the evidence for occupation was discussed. Justice Vickers used this category to discuss the "nature and extent of this [Tsilhqot'in] occupation" (2007:para. 682).

Counsel's evidence included oral testimony from Tsilhqot'in community members and expert witness reports and testimony. For the Plaintiff, 24 Tsilhqot'in witnesses testified and four additional witnesses provided affidavits (*Tsilhqot'in* 2007:Argument of the Plaintiff vol. 1, pp. 66). Nineteen expert witnesses[55] were called for the Plaintiff (Table 2). All but two expert witnesses testified, the majority for at least three days. There were also 604 exhibits entered as evidence, including over 1,000 core historical documents, over 150 historical maps, and over 3,000 forestry documents (*Tsilhqot'in* 2007:Argument of the Plaintiff vol. 1, p. 75).

Table 2. Expert Witnesses for the Plaintiff in *Tsilhqot'in* 2007.

Discipline	Name	Affiliation
Anthropology	Douglas Hudson, PhD	University of the Fraser Valley
Anthropology	David Dinwoodie, PhD	University of New Mexico
Anthropology	John Dewhirst, MA	Archaeo Research Ltd.
Archaeology	R.G. Matson, PhD	University of British Columbia
Ecological Community Modeling	Mathis Wackernagel, PhD	Global Footprint Network
Economics	Edwin Blewett, PhD	Various university positions
Ethnobotany	Nancy Turner, PhD	University of Victoria
Forestry	David Carson, RPF	Timberline Forest Inventory Consultants Ltd.
Forestry	John Fuller, RPF	Timberline Forest Inventory Consultants Ltd.
Forestry	James Hackett, MSc	Various forestry positions

[55] An expert witness is appointed by one or more parties (or by the court itself) to give their opinion to the court. An expert's duty is to assist the court, not to be an advocate for any party (*Supreme Court Civil Rules* 11-2). An expert typically writes a report outlining: 1) their qualifications and area(s) of expertise; 2) the instructions given to the expert about the case; 3) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates; 4) the expert's opinion on those issues, including any factual assumptions on which the opinion is based, any research carried out to help in forming that opinion; and 5) a list of documents relied on by the expert in forming their opinion. This report is tendered as evidence at trial, and the expert may be cross-examined.

Forestry	David Coster, RPF	Various forestry positions
Timber Valuation	Alex Pawliuk, RPF	Various forestry positions
History	Ken Coates, PhD	Various university positions
Historical Geography	Ken Brealey, PhD	University of the Fraser Valley
Hydrology	Brian Guy, PhD	University of British Columbia
Legal History	Hamar Foster, PhD	University of Victoria
Linguistics	Eung-Do Cook, PhD	University of Calgary
Wildlife Biology and Ecology	Mike Demarchi, MSc	Various government positions
Wildlife Ecology	Clayton Apps, MEDes	University of Calgary

Data from *Tsilhqot'in* 2007: Argument of the Plaintiff App. 1b, pp. 2–88.

Archaeological evidence was a small part of the overall body of evidence presented to the Court (by the Plaintiff). When compared to the number of other expert witnesses, the single archaeologist for the Plaintiff, R.G. Matson, (as well as Morley Eldridge for British Columbia) seems inconsequential when compared with the other expert witnesses, let alone the 28 Tsilhqot'in witnesses. However, archaeology is the only form of data that provides material evidence of pre-sovereignty use and occupation, which is required to prove title. It is not surprising the number of times that archaeological sites and evidence were cited throughout Justice Vickers' 2007 decision: "archaeology" 64 times, vs. "anthropology" (12 times), "ecology" (five times), "forestry" (68 times), "history" (177 times), and "wildlife" (26 times). Although the entire body of evidence was important, I use the rest of this chapter to examine the structure and influence of the archaeological evidence.

Archaeological Evidence Used in the Claim Area Sites

Justice Vickers looked at specific sites within the Claim Area where he was obligated by facts or argument to assess the strength of claim for Aboriginal title. Most

of the archaeological evidence he examined fits under the "sufficient and continuous occupation" criteria for the test for Aboriginal title (*Tsilhqot'in* 2007:para. 945). Although archaeological evidence could have been interpreted, used, and analyzed in different ways, what is relevant is what Justice Vickers learned, did, the standards he employed, the conclusions he reached, and the precedents set thereby.

The archaeological evidence primarily came from two expert witnesses: R.G. Matson for the Plaintiff and Morley Eldridge for British Columbia. Matson was qualified by the Court as an archaeologist "entitled to express opinions in his field, and in particular, opinions concerning the length of time that the Tsilhqot'in have been in the territory" (*Tsilhqot'in* 2007: Argument of the Plaintiff vol 1, p. 67). Matson presented an expert report and testified for three days in 2004. Eldridge "was qualified to express opinions in the field of archaeology" by the Court (*Tsilhqot'in* 2007:para. 373). He was asked by counsel to determine what archaeological sites could be villages, as described in the historical record (Eldridge 2006). He also testified before the Court.

Both Matson and Eldridge have long histories working in and near the Tsilhqot'in Claim Area. Matson was a principal investigator for the Eagle Lake Project, a Social Sciences and Humanities Research Council of Canada (SSHRC)-funded multi-year grant exploring the differences between Interior Salish and Athapaskan speakers in central British Columbia. The project concentrated on the archaeology of Tsilhqot'in sites at (Big) Eagle Lake (also called Choelquoit Lake or Naghatalhchoz Biny) with fieldwork conducted in 1979, 1983, 1984, and 1985 (Matson et al. 1979; Magne and Matson 1984). The Eagle Lake Project monograph (Matson and Magne 2007) provides a detailed model of North Athapaskan migrations. Eldridge has conducted archaeological research since 1969 and has worked in and around the Claim Area since the 1970s (Millenia Research 2018; Eldridge and Eldridge 1980). He is a leading researcher on archaeological potential modelling and culturally modified trees and was involved in the research on Meares Island that supported the title case in the 1980s (Stryd and Eldridge 1993).

Both Matson and Eldridge's expert reports, as well as their oral testimonies, are referred to in the decision (Eldridge 2006; Matson 2004). Vickers also referenced the seven maps Eldridge created of known archaeological sites within the Claim Area. Other archaeological evidence referred to in the decision includes documents used by Matson and Eldridge and entered as evidence. These include Matson's 1979 and 1984 Eagle Lake Reports, Robert Lane's (1953) thesis, and two reports from the 1997 field season in Tsilhqot'in territory (Arcas Consulting Archeologists Ltd 1998a, 1998b).

References to archaeological evidence are scattered throughout Justice Vickers' discussion of specific Claim Area sites. He adeptly summarizes information from past archaeological studies, including interpretations of cultural depressions and housepits (e.g., *Tsilhqot'in* 2007:para. 708). When discussing specific archaeological sites, he refers to them by Borden number[56] and provides a summary of the site based on the information provided by expert witnesses and counsels' arguments.

Archaeological Sites in the Six Claim Area Regions

Justice Vickers organized the Claim Area into six regions (Tsilhqox and the Historical Long Lake, Tsilhqox River Corridor, Xeni, Tachelach'ed, Western Trapline, and Eastern Trapline) and discussed specific sites in each (Figure 7; Table 3). Here I review these six regions to detail what Claim Area sites correspond to known archaeological sites, as referred to in the decision. As I discuss below, only two regions include archaeological sites.

[56] The Borden System is an archaeological numbering system used throughout Canada to provide each archaeological site with a unique identifier, known as a Borden Number (British Columbia Data Catalogue 2017).

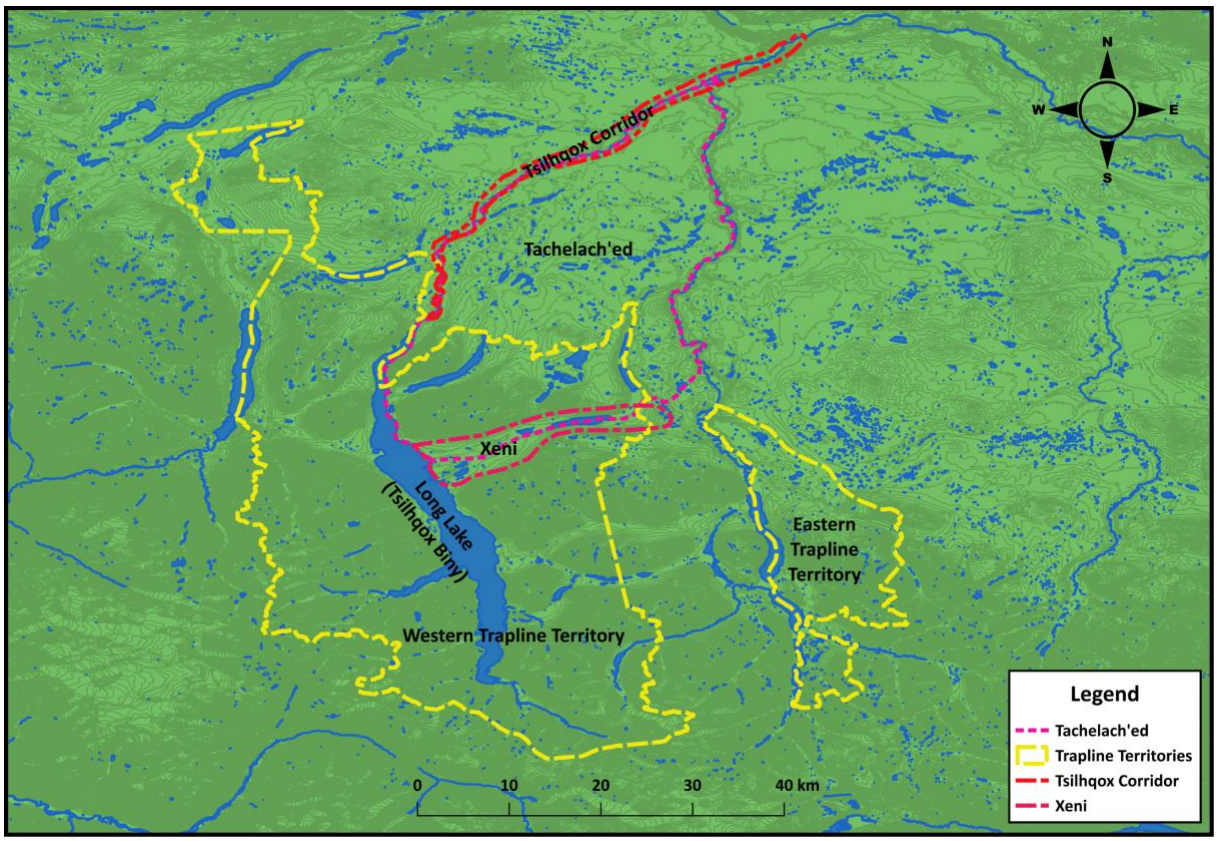

Figure 7. The six Claim Area regions in *Tsilhqot'in* 2007.
Outlined areas are approximate. Map created by Erin Hogg with data from Natural Earth (2019), DataBC (2019), and Tsilhqot'in 2007 Map 3.

Table 3. Claim Area Regions with Archaeological Evidence.

Claim Area Region	Claim Area Site	Borden Number	Types of Evidence
Tsilhqox	Gwetsilh	FaRv-1 FaRv-3	• Tsilhqot'in witness testimony: occupation site, fishing site • Historical records: Hudson's Bay Company (HBC) 1838 census • Archaeological research: important site, pithouses on either side of river
	Tl'egwated (Kigli Holes)	ElRw-4	• Tsilhqot'in witness testimony: occupation site until early twentieth century, gravesite • Historical records: HBC 1838 census, visit from Father Nobili (1845) • Archaeological research: pithouse village, surveyed during Eagle Lake Project, largest site in area
	Nusay Bighinlin	EkSa-33 EkSa-35 EkSa-85	• Tsilhqot'in witness testimony: occupation site with twentieth century cabin, fishing and hunting site, trail network • Archaeological research: pithouses, lithic scatter, Kavik point at EkSa-33
	Tsi T'is Gulin and Henry's Crossing	EkSa-124	• Tsilhqot'in witness testimony: occupation site, fishing site, modern gathering place • Archaeological research: cultural depressions, pithouses
	Biny Gwetsel	EkSa-97	• Tsilhqot'in witness testimony: visited with archaeologist Michael Klassen, occupation, fishing, and grave site • Archaeological research: pithouse village
	Biny Gwechugh (Canoe Crossing)	EjSa-5 EjSa-14	• Tsilhqot'in witness testimony: occupation site, fishing site • Historical records: HBC 1838 census, visit from Father Nobili (1845) • Archaeological research: cultural depressions, pithouse village, lithic scatter • Strong correlation between historical village site and archaeological record
W. Trapline	Naghatalhchoz Biny (Big Eagle Lake)	EkSa-36	• Tsilhqot'in witness testimony: associated with Naghatalhchoz Gwet'in people and Lulua family; occupation, fishing, hunting, and gathering site • Archaeological research: pithouses, home to Eagle Lake Arch Project, Athapaskan in origin

Gwedats'ish	EjSa-11	• Tsilhqot'in witness testimony: occupation, fishing, cremation, and burial site • Historical records: HBC 1838 census • Archaeological research: pithouses, cultural depressions (partially covered by Department of Fisheries and Oceans research station)
Talhiqox Biny (Tatlayoko Lake)	EjSc-1 EjSc-9	• Tsilhqot'in witness testimony: lake home to origin story of various features in territory • Historical records: sites correspond to nineteenth century journal entries • Archaeological research: pithouses

Data from *Tsilhqot'in* 2007 paras. 713–757, 842–876.

Tsilhqox and the Historical Long Lake

This region does not contain any specific Claim Area sites, but instead played a central role in resolving a disagreement between the Plaintiff and the Defense over the identity and location of "Long Lake," as referred to in the documentary record (*Tsilhqot'in* 2007:para. 688). The Plaintiff argued that Long Lake is Tsilhqox Biny, the largest lake in Tsilhqot'in territory; Canada argued that Long Lake is Tatl'ah Biny, a lake outside of the Claim Area (Figure 6). Canada made this point to argue that at the time of sovereignty assertion (1846), there were no Tsilhqot'in people occupying the Claim Area (*Tsilhqot'in* 2007:para. 688). However, many sources of evidence indicated differently, including: 1) linguistic evidence from expert Eung-Do Cook, emphasizing that the literal meaning of Tsilhqot'in is "people of the Tsilhqox" (*Tsilhqot'in* 2007:para. 689); 2) historical evidence from John Dewhirst showing journal entries from the 1800s referring to various places along the Tsilhqox (*Tsilhqot'in* 2007:paras. 692–704); 3) archaeological evidence from Morley Eldridge correlating an archaeological village site at the north end of Tsilhqox Biny to a village identified in historical documents (*Tsilhqot'in* 2007:para. 689); and 4) historical geography evidence from Ken Brealey pointing to "Long Lake" as an early contact period name for Tsilhqox Biny (Chilko Lake) (*Tsilhqot'in* 2007:para. 705). Justice Vickers, after examining this evidence, agreed that "Long Lake" is indeed Tsilhqox Biny.

Tsilhqox River Corridor

Justice Vickers discussed 14 Claim Area sites within the corridor, six of which correspond to known archaeological sites (Table 3); this is in part due to the fact that the Tsilhqox Corridor has seen the most archaeological investigations (*Tsilhqot'in* 2007:para. 708) and thus has the most recorded archaeological sites. However, the relevance of the archaeological record was disputed by the Crown because of the non-Tsilhqot'in origin of many of the archaeological sites.[57] British Columbia argued that this rendered the archaeological evidence useless as it was impossible to discern how many of the sites Tsilhqot'in people took over from earlier inhabitants. On this basis, British Columbia argued that the presence of archaeological material could not indicate a Tsilhqot'in occupation (*Tsilhqot'in* 2007:para. 712). However, Justice Vickers emphasized that historical documents from the nineteenth century indicated a solely Tsilhqot'in presence in the Claim Area. Moreover, Tsilhqot'in villages, as noted in those documents, correspond with known archaeological sites, a fact supported by Eldridge (2006:17; see *Tsilhqot'in* 2007:paras. 709, 712). Justice Vickers described multiple traits used to distinguish Athapaskan/Tsilhqot'in occupation from Plateau Pithouse (PPT) occupation throughout his decision, as shown in Table 4 below.

[57] Plateau Pithouse Tradition (PPT) populations occupied the Chilcotin Plateau between 2,000 and 500 years ago. The large circular pithouses located along the Tsilhqox are associated with this tradition. The Tsilhqot'in, an Athapaskan group, migrated into the territory 500 years ago (Matson 2004). In some cases they re-occupied the pithouses or the locations along the Tsilhqox and built smaller rectangular pithouses located near Naghatalhchoz Biny and elsewhere (*Tsilhqot'in* 2007:paras. 208–218, 365–368).

Table 4. Traits Used by Justice Vickers to Distinguish Plateau Pithouse and Athapaskan Occupation.

Trait	Plateau Pithouse (PPT)	Athapaskan/Tsilhqot'in
Date of Occupation	2,000 BP–600/500 BP	500 BP–present
Winter House Type	Lhiz qwen yex (elaborate circular pithouse) • Semi-subterranean structure • Found in large groups • Many were rebuilt and used by Tsilhqot'in people	Niyah qungh (rectangular lodge) • Not excavated • Smaller than lhiz qwen yex, isolated sites • Distinctive boat-shaped hearth
Lithic Assemblage		Kavik point • Projectile point dated between 2,000BP–contact

Data from *Tsilhqot'in* 2007.

Xeni, Nemiah Valley

Xeni is home to the Xeni Gwet'in Band and to several Indian Reserves that are not included in the Claim Area. Little archaeological work has been done in *Xeni*. Many of the Claim Area sites within *Xeni* have Tsilhqot'in names, but most of the evidence relates to twentieth-century activities (*Tsilhqot'in* 2007:para. 764). The only evidence of earlier occupation and use comes from oral history and housepit depressions, as testified by Tsilhqot'in witnesses (*Tsilhqot'in* 2007:para. 783). Justice Vickers was also convinced that *Xeni* is close to the head of the Tsilhqox Biny and thus affiliated with the nineteenth-century occupation (*Tsilhqot'in* 2007:para. 783).

Tachelach'ed, Brittany Triangle

Tachelach'ed is the area between the Tsilhqox and Dasiqox (Figure 7). Like *Xeni*, most of the evidence in *Tachelach'ed* corresponds to twentieth-century use and occupation (*Tsilhqot'in* 2007:para. 790). Justice Vickers emphasized that there is no doubt that the Tsilhqot'in have "derived subsistence from every quarter of" *Tachelach'ed* (*Tsilhqot'in* 2007:para. 792). However, he ruled that the entire area could

not qualify for Aboriginal title for want of evidence for the northern and central portions of the triangle (*Tsilhqot'in* 2007:para. 792). Justice Vickers did not reference any known archaeological sites within *Tachelach'ed*, although he did mention several Claim Area sites with housepit remains or burials. He emphasized that there is no archaeological or anthropological evidence to "tie these remains to Tsilhqot'in use at the time of sovereignty assertion. If the age of some of these remains were known, it might be easier to connect them to Tsilhqot'in use" (*Tsilhqot'in* 2007:para. 793).

Western Trapline Territory

The *Western Trapline Territory* partially overlaps with *Tachelach'ed* (Figure 7). Similar to *Tachelach'ed*, the entire area did not qualify for Aboriginal title. The southern area of the *Western* and *Eastern Trapline Territories* is mountainous, and explorers, missionaries, and early settlers seldom ventured there. Tsilhqot'in people use/used these mountainous areas for trapping, hunting, fishing, and gathering (*Tsilhqot'in* 2007:paras. 870–871). Three Claim Area sites within the *Western Trapline Territory* correspond to known archaeological sites (Table 3).

Eastern Trapline Territory

The *Eastern Trapline Territory* covers the southeast portion of the Claim Area (Figure 7). Justice Vickers emphasized that, although he was confident that the Tsilhqot'in people had been in the area before contact, he could not find any portion of the region that was occupied and used to an extent necessary to prove title (*Tsilhqot'in* 2007:para. 893). Justice Vickers discussed four Claim Area sites within the region. Only one of these, Textan Biny (Fish Lake), does have archaeological evidence. Ken Brealey, the historical geographer for the Plaintiff, stated that archaeological studies of the lake indicate 18 roasting pits in the area (*Tsilhqot'in* 2007:para. 899). However, the source for the information was an article that was not entered as evidence for the case and, therefore, could not be considered as evidence (*Tsilhqot'in* 2007:para. 899; Tyhurst 1994).

What Archaeological Evidence was Included?

Justice Vickers referenced 14 archaeological sites (Figure 8) in nine Claim Area sites within two regions of the Claim Area (Tsilhqox and Western Trapline, Tables 3, 5). Details on these 14 sites came from counsel's arguments, expert reports, testimony, and other documents were entered as evidence. However, these documents included more archaeological evidence than what was referenced in the decision. Understanding why Justice Vickers chose to include these 14 sites and exclude others gets to the central source of this chapter—these 14 sites must be the best examples of evidence of sufficient and continuous land occupation, at least from a judicial perspective. Therefore, the next two sections compare what archaeological evidence was included and excluded in *Tsilhqot'in* (2007) to shed light on the archaeological data types considered by the court to be best suited for tests of Aboriginal title.

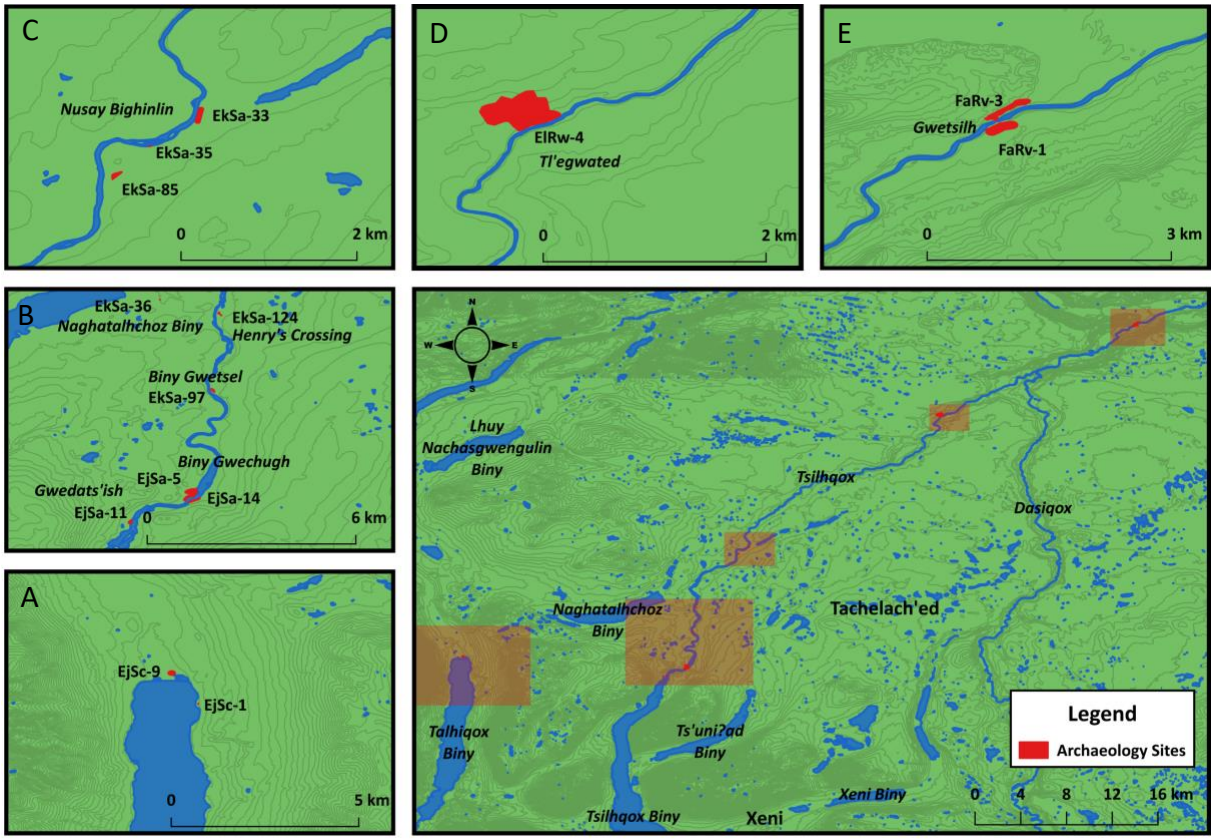

Figure 8. Archaeological sites referenced in Tsilhqot'in 2007, labelled A–E clockwise from bottom left.

Outlined areas are approximate. Map created by Erin Hogg with data from DataBC (2019), Natural Earth (2019), the Remote Access to Archaeological Data Application (RAAD) (British Columbia Archaeology Branch 2019b), and *Tsilhqot'in* 2007 Map 3.

Table 5. Archaeological Sites Referenced in *Tsilhqot'in* 2007.

Claim Area Region	Borden #	Link to Tsilhqot'in Testimony	Link to Historical Docs.	In Arch. Expert Report[1]	# of Housepits	Lithics or Cache Pits[2]	Other
Tsilhqox	FaRv-1	Yes	Yes	E	2 groups	L+C	
	FaRv-3	Yes	Yes	E	3	L	Bone and food harvesting
	ElRw-4	Yes	Yes	E+M	15–20	L+C	CMT + fishing station
	EkSa-33	Yes	No	M	1	L	
	EkSa-35	Yes	No	M	1	L+C	Faunal remains
	EkSa-85	Yes	No	E+M	5–10	C	
	EkSa-97	Yes	No	E+M	5–10	C	
	EkSa-124	Yes	No	E	4	L+C	
	EjSa-5	Yes	Yes	E+M	28	L+C	
	EjSa-14	Yes	Yes	E+M	19	L+C	Fire-broken rock
W. Trapline	EkSa-36	Yes	No	M	1	L	Trade goods
	EjSa-11	Yes	Yes	E+M	18	L+C	Subsurface bone
	EjSc-1	No	Yes	E	5		
	EjSa-9	No	Yes	E	0	L	

Data from individual site reports, Remote Access to Archaeological Data Application (RAAD), Eldridge 2006, Matson 2004, and Tsilhqot'in 2007. Where discrepancies in data occur, RAAD data is considered the most accurate. 1. E = Eldridge, M = Matson. 2. L = Lithics, C = Cache Pit.

Tsilhqox

FaRv-1 and FaRv-3 are located on either side of the Tsilhqox at Gwetsilh (Figure 8(E)). Gwetsilh is near the junction of the Tsilhqox and Dasiqox and "is an important archaeological site," according to Justice Vickers (*Tsilhqot'in* 2007:para. 714). Gwetsilh is identified in the Hudson's Bay Company 1838 census and was used into the twentieth century as a fishing and summer gathering site; fish drying racks are still maintained in the area (*Tsilhqot'in* 2007:para. 717). Both sites have multiple housepits and lithics, and FaRv-3 has bone and evidence of food harvesting (Table 5).

ElRw-4 is located farther south on the Tsilhqox at Tl'egwated (Figure 8(D)). It is the largest archaeological site in the region, both in number and size of features (Eldridge 2006:para. 38). It is a Plateau Pithouse Tradition site that was "partly occupied by Tsilhqot'in people prior to and at the time of sovereignty assertion" (*Tsilhqot'in* 2007:para. 721). It is also recorded in the Hudson's Bay Company 1838 census and described by multiple Tsilhqot'in witnesses as a winter and late summer village (*Tsilhqot'in* 2007:paras. 722–724). Missionary Father Nobili visited the village in 1845 and Tsilhqot'in people have erected a cross commemorating the visit (*Tsilhqot'in* 2007:para. 721). ElRw-4 was first recorded by archaeologist Michael Kew in 1956 and was revisited in 1971 by archaeologists Joy and Reg Whittaker, in 1979 by the Eagle Lake Project, and in 1997 by Arcas Consulting Archaeologists Ltd. (Arcas Consulting Archeologists Ltd 1998b; Kew 1956a; Matson et al. 1979; Whittaker and Whittaker 1971). The Whittakers (1971) stated that there were 15–20 housepits, including three at over 15 metres in diameter. The Eagle Lake Project mapped over 53 housepits and 116 cache pits, noting the same large housepits. The project also recovered 1,137 artifacts, including a basalt drill and four projectile points (Matson 1979). When Arcas re-surveyed the site in 1997, they noted that several cultural depressions had been missed (in 1979) and that the site location was off by more than one kilometer (Arcas Consulting Archeologists Ltd 1998b:41). They also noted that the site contained 15–20 housepits, which is most likely the correct number—not 53 (Arcas Consulting Archeologists Ltd 1998a:16). Arcas emphasizes that this is likely due to how features were identified

during previous surveys. The identification of the function of cultural depressions (either as housepits, roasting pits, or cache pits) was determined mainly by the size of the depression, as few were excavated. Arcas suggests that classifying depressions by size can be problematic, as the size of housepits, roasting pits, and cache pits can overlap (Arcas Consulting Archaeologists Ltd 1998a:16).

Farther south, EkSa-33, EkSa-35, and EkSa-85 are all located on the east side of the Tsilhqox near Nusay Bighinlin (Figure 8(C)). This locale was discussed by Tsilhqot'in witnesses as a spring fishing site, a fall hunting site, a berry picking site, and a crossing point in a network of trails (*Tsilhqot'in* 2007:para. 733). The three archaeological sites here were not connected to the historical record. EkSa-33 contains one housepit, as well as a lithic scatter and Kavik point—a distinctive projectile point type associated with Athapaskan culture and dated between 2,000 BP to contact (Carlson and Magne 2008:359). Justice Vickers cited Matson's Eagle Lake Project report, stating that the radiocarbon date for the site indicates a pre-Tsilhqot'in occupation (*Tsilhqot'in* 2007:para. 730). EkSa-35 is south of EkSa-33 and was also recorded during the Eagle Lake Project. It contains one housepit, as well as lithics. However, the two projectile points found at the site are associated with a Tsilhqot'in occupation, and the site was dated to 500 years BP (*Tsilhqot'in* 2007:para. 732). With this information, Justice Vickers inferred a Tsilhqot'in occupation at both EkSa-33 and EkSa-35 before sovereignty (*Tsilhqot'in* 2007:para. 732). EkSa-85 lies further south and was identified in Eldridge's report as having five or more housepits. Justice Vickers includes it as its site form "identifies the cultural affiliation for the site as Athapaskan Chilcotin [Tsilhqot'in]" (*Tsilhqot'in* 2007:para. 734).

EkSa-124 is located on the Tsilhqox at Henry's Crossing and Tsi T'is Gulin (Figure 8(B)). Tsilhqot'in witnesses marked different locations for this place, making it challenging for Justice Vickers to determine if it is within or outside the Claim Area (*Tsilhqot'in* 2007:para. 739). Tsilhqot'in witnesses identified the area as both a summer fishing site and a camping site, and that it is still used for an annual gathering. They also

testified to multiple housepits in the area. There are government records of Tsilhqot'in people living at the site in the late nineteenth and twentieth centuries (*Tsilhqot'in* 2007:paras. 742–746). EkSa-124 has four housepits, as well as lithics and cache pits (Table 5).

EkSa-97 is located further south on the Tsilhqox at Biny Gwetsel (Figure 8(B)). A Tsilhqot'in witness identified it as "the site of a pithouse village on the east side of the Tsilhqox that he visited with archaeologist Michael Klassen" (*Tsilhqot'in* 2007:para. 748). Tsilhqot'in witnesses identified the site as a steelhead salmon spawning and fishing spot and the location of a gravesite (*Tsilhqot'in* 2007:para. 749). EkSa-97 has between 5 and 10 housepits, as well as cache pits (Table 5). It was not linked to the historical record at the time of sovereignty assertion (*Tsilhqot'in* 2007:para. 750).

The last two sites in the *Tsilhqox River Corridor* are EjSa-5 and EjSa-14, located further south on the Tsilhqox at Biny Gwechugh (Canoe Crossing; Figure 8(B)). Tsilhqot'in witnesses identified Biny Gwechugh as a village site dating to the early nineteenth century and as a fishing site, respectively (*Tsilhqot'in* 2007:paras. 754–756). Biny Gwechugh "has the best correlation between historical records of village sites and the archaeological records" (*Tsilhqot'in* 2007:para. 753). It was visited by Hudson's Bay Company traders and Father Nobili in the nineteenth century. Father Nobili's journals record him "erecting a cross on a hill near the village," which, just as at Tl'egwated (ElRw-4), Tsilhqot'in people have re-erected (*Tsilhqot'in* 2007:paras. 758–759). EjSa-5 is the larger of the two archaeological sites, with 28 housepits, lithics, and 42 cache pits. It was first surveyed by Michael Kew in 1956 (Kew 1956b), revisited and rerecorded during the Eagle Lake Project (Matson et al. 1979:56), and again by Arcas in 1997 (Arcas Consulting Archeologists Ltd 1998b). EjSa-14 is across the Tsilhqox from EjSa-5 and contains 19 housepits, lithics, and 21 cache pits (Table 5). It was recorded by the Eagle Lake Project in 1979 (Eldridge 2006:para. 16).

Western Trapline Territory

Four archaeological sites are situated in the *Western Trapline Territory.* The first is EkSa-36, located near Naghatalhchoz Biny (Big Eagle Lake; Figure 8(B)). EkSa-36, the Bear Lake Site, was excavated during the 1983 field season of the Eagle Lake Project (Magne and Matson 1984). It contains one housepit, lithics, and trade goods (Table 5). The site was "particularly interesting for understanding early occupation of the Claim Area" (*Tsilhqot'in* 2007:para. 843) as, based on the site location, the pithouse form, the projectile point style, the lithic assemblage, and the lithic debitage pattern, the site is Athapaskan in origin instead of Plateau Pithouse Tradition (Magne and Matson 1984:170). Matson's testimony centred on this site and this issue (*Tsilhqot'in* 2007: Argument of the Plaintiff app. 1, paras. 3–8). Tsilhqot'in witnesses associated Naghatalhchoz Biny with the Lulua family and stated that "other individuals and families visited or used the area for hunting, fishing and gathering purposes into the twentieth century" (*Tsilhqot'in* 2007:para. 842). Tsilhqot'in witnesses also identified ancestral housepits around the lake (*Tsilhqot'in* 2007:para. 844). EkSa-36 is one of many archaeological sites around the lake but the only one specifically discussed by Justice Vickers. He stated that "while archaeological evidence suggests that Athapaskan habitation at certain sites in the Naghatalhchoz Biny area may date prior to the end of the eighteenth century, the historical literature only begins to record Tsilhqot'in use of and residence in the area in the 1860's" (*Tsilhqot'in* 2007:para. 846).

EjSa-11 is south of Biny Gwechugh on the Tsilhqox, at Gwedats'ish (Figure 8(B)). This site is also called the DFO site, due to a Department of Fisheries and Oceans (DFO) research station located on the site (*Tsilhqot'in* 2007:para. 860). Tsilhqot'in witnesses testified that Gwedats'ish was both a village site and a fishing site, as well as an ancient cremation site, and that the DFO research station covers part of the site (*Tsilhqot'in* 2007:paras. 861, 864). Gwedats'ish was recorded in the Hudson's Bay Company 1838 census (*Tsilhqot'in* 2007:para. 863). EjSa-11 contains 18 housepits, lithics, cache pits, and bone artifacts (Table 5). It was recorded by the Eagle Lake Project (Matson et al.

1979), re-inspected by Arcas in 1997 (Arcas Consulting Archeologists Ltd 1998a), and again by Michael Klassen in 2001 (Klassen 2002).

The final two archaeological sites are EjSc-1 and EjSc-9, located at the north end of Talhiqox Biny (Figure 8(A)). Tsilhqot'in witnesses did not testify to any "primary residence sites" in the area (*Tsilhqot'in* 2007:para. 876) but did state that they would stay in that area and use it for hunting and fishing. The lake is also home to ?Eniyud, the wife of Ts'il?os (Mount Tatlow), the largest mountain in Tsilhqot'in territory (*Tsilhqot'in* 2007:paras. 659–662). The north end of Talhiqox is referenced in historical documents from the 1860s and 1870s, including a map from 1863 (that shows a village at the north end of the lake connected to trails), the Chilcotin War Map from 1864 (that identifies a trail network through the region), expedition journal entries from 1862 and 1864 (that identify a trail and "habitation sites"), and a surveyor's journal from 1875 (that identify an "Indian Camp") (*Tsilhqot'in* 2007:paras. 873–879). Justice Vickers states that, with help from Eldridge's testimony, EjSc-1, with five housepits (Table 5), is likely the "habitations" documented during the 1864 expedition, and that EjSc-9, with no documented housepits, is likely the site documented in the 1862 journal (*Tsilhqot'in* 2007:para. 876).

Discussion

There are multiple explanations as to why Justice Vickers chose to include these 14 archaeological sites in his decision. One possible reason is his opinion that they correlate to village sites mentioned in historical documents from the nineteenth century. Eldridge was asked by British Columbia counsel to prepare a report linking known archaeological sites to Tsilhqot'in village sites documented in nineteenth-century records in order to assess occupation at the time of sovereignty assertion (Eldridge 2006). Of the 11 sites that Justice Vickers mentioned from Eldridge's report, three do not link to the historical record (Table 5). Of those, one (EkSa-85) comes from a figure in the report that marked sites with five or more housepits (Eldridge 2006:Figure 1). Two others (EkSa-97 and EkSa-124) are discussed in the report as large housepit sites, but

Eldridge discredited them from the historical record because of their location on the wrong side of the river (Eldridge 2006:para. 26).

Eldridge's report explained the strong correlation between the historical record and known archaeological sites—that was the aim of his expert report. However, the high degree of correlation between places identified by Tsilhqot'in witnesses and archaeological sites is also relevant. Every single Claim Area site with archaeological evidence was discussed in Tsilhqot'in witness testimony or oral history. Although two archaeological sites (EjSc-1 and EjSc-9) could not be linked to witness testimony, oral history and testimony from the trial speak directly to Tsilhqot'in occupation in the general area. Justice Vickers intentionally emphasized Tsilhqot'in testimony and references their experiences occupying and using the landscape throughout his decision.

Another reason for Vickers' reference to these sites in his 2007 decision was the site locations. Archaeological investigations in the Claim Area mainly focused on the area around the Tsilhqox south of Brittany Creek (Arcas Consulting Archeologists Ltd 1998a:16). Eldridge's expert report focused on village sites along the Tsilhqox (Eldridge 2006). There are only three sites outside of the Tsilhqox corridor—EjSc-1 and EjSc-9 near Talhiqox Biny and EkSa-36 near Naghatalhchoz Biny (Figure 8). EkSa-36 was excavated as part of the Eagle Lake Project in 1983, EjSc-1 was recorded as part of a park reserves survey in 1968, and EjSc-9 was recorded as part of an environmental assessment for a proposed hydroelectric project in 1982 (Eldridge 2006:paras. 6–7). Moreover, these three sites were likely included for their prominent roles in proof of pre- and at-sovereignty occupation. EkSa-36 is one of the best examples of pre-sovereignty Tsilhqot'in occupation, and Matson's testimony was centred on this site (*Tsilhqot'in* 2007:Argument of the Plaintiff app. 1, paras. 3–8). EjSc-1 and EjSc-9, according to Eldridge's testimony, are mentioned in several historical documents from the 1860s and 1870s, indicating Tsilhqot'in occupation of the area at sovereignty.

These 14 archaeological sites helped to prove occupation of the Claim Area by Tsilhqot'in people before and at sovereignty assertion. Sites like EkSa-36 indicate early

Tsilhqot'in migration and occupation of the Claim Area, whereas sites like EjSc-1, EjSc-9, EjSa-5, and EjSa-14 show connections between the historical and archaeological records. These sites are also relevant to the question of sufficient occupation. Thirteen of the sites contain at least one housepit, and of those, seven sites have five or more housepits (Table 5). In addition, the one site without a housepit (EjSc-9) is listed as a campsite and corresponds to an "Indian campsite" from an 1862 journal entry (Eldridge 2006:paras. 7–9; *Tsilhqot'in* 2007:para. 876), suggesting that it could be an occupation site.

Overall, these 14 sites emphasize that the archaeological evidence referenced in *Tsilhqot'in* are skewed towards evidence of occupation of regular tracts of land—villages. Half of the sites are larger occupations (village sites) and eight of the sites correspond to historical village sites, indicating known occupation at sovereignty assertion. These characteristics fit Justice Vickers' requirements for Aboriginal title—proof of occupation on definite tracts of land at sovereignty assertion (*Tsilhqot'in* 2007:para. 682). Although Justice Vickers did emphasize that the area in which he found title (outlined in black on Figure 5) did include village sites, cultivated fields (from the Tsilhqot'in perspective), and a well-defined network of trails and waterways (*Tsilhqot'in* 2007:para. 960), the archaeological evidence emphasizes sufficient occupation of village sites at sovereignty assertion.

What Archaeological Evidence was Excluded?

Two types of archaeological evidence were excluded from the decision: 1) information that was *included* in counsel's documents that Justice Vickers excluded from his decision, and 2) information that was *not included* in the case. These are discussed here.

Information Included in Counsel's Documents

There was more archaeological evidence in counsel's documents than was discussed in Justice Vickers' decision. This additional information can be divided into two categories: 1) evidence that was completely excluded from the decision; and 2)

evidence that was missing details. An example of this first category is information from Eldridge's expert report. There were additional archaeological sites in Eldridge's report that were not cited in the decision. As previously stated, 11 of the 14 archaeological sites in the decision came from Eldridge's report. However, three additional sites from his report were not referenced (EkSa-142, EkSa-145, and ElRw-9). EkSa-142 and EkSa-145 are large housepit sites recorded by Arcas in 1997 (Arcas Consulting Archeologists Ltd 1998b). Both sites are near Henry's Crossing (EjSa-5), but Eldridge ruled them out as candidates for Henry's Crossing as they are smaller than EjSa-5 (2006:para. 33). The third site, ElRw-9, is located across the river from ElRw-4 (Tl'egwated) and was also recorded by Arcas. ElRw-9 has fewer and smaller housepits than Tl'egwated (2006:para. 33). As these sites were not good candidates for historical villages because of their smaller sizes and locations, it is understandable why Justice Vickers did not reference them in his decision.

Another example of excluded information are places within the Claim Area where archaeological investigations had occurred (and were discussed in Counsel's documents) but were not mentioned in the decision. Yuhita (in the southern portion of the Western Trapline Territory, located in Figure 6) contains housepits and roasting pits that were considered evidence of winter occupation (*Tsilhqot'in* 2007:Argument of the Plaintiff app. 2, para. 171), but the decision did not reference archaeological evidence within the valley (*Tsilhqot'in* 2007:paras. 869–870). This may be because Justice Vickers did not think there was enough evidence to find title for the area. Additionally, several archaeological investigations had been undertaken at Tsimol Ch'ed (Potato Mountain), including work by Diana Alexander and R.G. Matson (Alexander and Matson 1987). The results of that work were summarized in several expert witness reports and testimonies but were not mentioned by Justice Vickers (*Tsilhqot'in* 2007:Plaintiff's Reply app. 1b, para. 190). Justice Vickers stated that Tsimol Ch'ed is the best evidence of "cultivated fields" used by Tsilhqot'in people (*Tsilhqot'in* 2007:para. 886). Although he must have considered this archaeological evidence, he perhaps did not reference it in his decision as it was one of many types of evidence to indicate sufficient use of Tsimol Ch'ed,

including oral history, Tsilhqot'in witness testimonies, ethnobotany, ecology, and historical evidence (*Tsilhqot'in* 2007:paras. 882–887). It is impossible to know if Justice Vickers thought the archaeological evidence at Tsimol Ch'ed was weaker than these other forms of evidence or just less relevant to the criteria for sufficient occupation.

An example of the second category, missing details, is the Bear Lake site (EkSa-36, Naghatalhchoz Biny). Matson's expert report, testimony, and the subsequent Plaintiff Argument emphasized the importance of the Bear Lake site as evidence of early Tsilhqot'in occupation in the Claim Area. Although Justice Vickers does discuss some details about the archaeological evidence at the site, he does not include much of the information detailed in the Plaintiff's argument, including rationale for the Athapaskan origin of the site, such as time depth, dwelling structure, projectile point form, and the lithic assemblage and debitage (*Tsilhqot'in* 2007:Argument of the Plaintiff app. 1, para. 6). It is likely that these details were too extensive to include in the decision. In addition, as Justice Vickers agreed with Matson about the Athapaskan origin of the site, he likely did not need to explain in detail in his decision why the site was considered to be Athapaskan.

One other example of missing details is Yanah Biny, near Nabas Dzelh (Anvil Mountain, Figure 6). The area surrounding this lake was surveyed for an archaeological investigation for a mine proposed in in the 1990s (*Tsilhqot'in* 2007:Argument of the Plaintiff app. 2, para. 182; *Tsilhqot'in* 2007:para. 904). This work is briefly mentioned in the decision, but Vickers stated that there was no known date for the archaeological evidence of Tsilhqot'in presence. With no ability to show Tsilhqot'in use or occupation before or at sovereignty assertion, it makes sense that this evidence was disregarded.

Information Excluded from the Case

These examples showed instances where information that was *included* in counsel's documents were either excluded completely from Vickers' decision or were included with missing details. However, there is also more known archaeological

evidence in the Claim Area than was mentioned by Counsel or cited in the decision. For example, 39 of the 57 places referenced in the decision have some type of housepit, as described by Tsilhqot'in witnesses (*Tsilhqot'in* 2007). Some of these housepit sites are recorded archaeological sites, others are not. Justice Vickers often stated that there was no known archaeological evidence or that there was no archaeological evidence for a pre-1846 occupation. This again emphasizes that if archaeological evidence could not indicate occupation at or near the date of sovereignty assertion, either by itself or correlated with another form of evidence, then it was not considered relevant to his decision.

Although Justice Vickers tended to reference only archaeological evidence that pointed to occupation at sovereignty assertion, one might assume that counsel would bring together all of the archaeological evidence for the entire Claim Area, especially pithouse sites (i.e., occupation sites). Although the Plaintiff did provide archaeological evidence from many sites within the Claim Area, and Eldridge provided evidence of known archaeological sites of many more (*Tsilhqot'in* 2007: Argument of the Plaintiff app. 2, para. 186), there were still archaeological sites that were excluded. This was mainly due to the later occupation of Tsilhqot'in people in the Claim Area. Many pithouse sites in the Claim Area are Plateau Pithouse Tradition (PPT) in origin (see Table 4 for description of PPT traits). If there was no archaeological (or other) evidence to indicate a Tsilhqot'in re-occupation of a site, then the site was considered irrelevant for the case.

Finally, many regions within the Claim Area have had little to no systematic archaeological survey, a point emphasized by Eldridge (*Tsilhqot'in* 2007: Argument of the Plaintiff app. 2, para. 4). For example, Tsilhqot'in witnesses and historical documents referred to large housepit sites near the outlet of Tsilhqox Biny, but no archaeological survey had occurred in the area (*Tsilhqot'in* 2007:para. 857). This is also the case for Xeni and many areas within the Trapline Territories. Arcas emphasized this point with their 1997 systematic survey of part of the Tsilhqox Corridor (Arcas Consulting

Archeologists Ltd 1998b). They found 32 sites in 10 randomly selected sampling units within the project parameters, with 15 of these sites including housepits, indicating that there were likely many more archaeological sites than currently recorded (Eldridge 2006:para. 33). There is evidence of occupation throughout the Claim Area, with housepit sites at most of the lakes, especially in *Tachelach'ed*. For example, there are two known sites (EjRw-1 and EjRw-2) near the Twin Lakes (?Elhghatish Biny and Nabi Tsi Biny), but according to Eldridge's testimony, there are many more sites that have not yet been recorded (*Tsilhqot'in* 2007: Argument of the Plaintiff app. 2, para. 186).

In summary, archaeological evidence was excluded by Vickers when it could not indicate Tsilhqot'in occupation before or at sovereignty assertion. This reflects his view that archaeological evidence served best to buttress other forms of evidence. Justice Vickers rarely referenced archaeological data in isolation—he did so only three times, all in reference to Tsilhqot'in pithouse structure. The archaeological evidence that Justice Vickers discussed concurred with Tsilhqot'in witness testimony, as well as historical documents and maps.

In future cases, archaeological evidence could do more. Archaeological data can indicate occupation and use over an entire landscape, as well as intentional use and exploitation of resources (e.g., Lepofsky and Armstrong 2018; Lepofsky et al. 2019; Morin et al. 2018; Reimer/Yumks 2018). However, archaeological evidence can be challenging. Without a known date of occupation, a site does not accurately provide evidence of occupation before or at sovereignty assertion. With more than one occupation, it can be difficult to determine what occupation corresponds to the claimant group, as is apparent in *Tsilhqot'in*.

Conclusion: The Strength of Archaeological Conclusions and the Court

My examination of the archaeological evidence considered in *Tsilhqot'in* emphasizes that Justice Vickers gave weight to archaeological data as unequivocal as

evidence of continuity of Tsilhqot'in occupation of their territory. This results in an emphasis on village sites dated to just before sovereignty (1846) that indicate, in conjunction with historical records, occupation and use throughout the *Tsilhqox River Corridor*. Although this evidence undeniably helped the Tsilhqot'in Nation gain Aboriginal title, court proceedings also reveal the inherent limits of archaeological data and Canadian courts in defining and assessing Indigenous ownership in the remote past.

Criteria to assess Aboriginal title are based on a common law understanding of occupation, possession, and ownership (McNeil 1989:196–198). Claimant groups must show proof of exclusive, continuous, and sufficient occupation of territory at sovereignty assertion, essentially claiming title by virtue of common law that applied at the moment of Crown sovereignty (McNeil 1989:241). Therefore, proof of title is based and assessed on use and occupancy of territory, criteria that can fit with archaeological data of the material past.

Aboriginal title is *also* based on the "customary laws [of Indigenous peoples] prior to the Crown's acquisition of sovereignty" and Indigenous claimants should be able to claim title based on their legal systems (that indicate property rights) (McNeil 1989:241). We know that many, if not all, Indigenous communities had legal systems that were both analogous to Canadian law and recognized land title (e.g., Borrows 2010:59–106). However, the Canadian courts have been unwilling to use this criterion in their determination of Aboriginal title (Asch 2000:135; McNeil 1989:276). Although legal scholar John Borrows (2019:100) argues that this is changing and suggests that Indigenous legal evidence was a key component of the *Tsilhqot'in* (2007) trial, to the point where "Aboriginal title could not have been recognized and affirmed in the case without Indigenous law and social organization," the expert evidence, including archaeological data, fit squarely within common law understandings of possession and occupation.

Two questions arise from these facts: 1) can archaeological data provide evidence in support of Aboriginal title that is *not* based on material remains; and 2)

could the court assess such evidence? From my assessment of the archaeological evidence considered in *Tsilhqot'in*, I would suggest that the answer is no. The Canadian legal system, as well as the discipline of archaeology, struggle to evaluate ownership without material evidence. This is not to say that archaeological evidence is not an important aspect of Aboriginal rights and title litigation. However, it is important to keep in mind that archaeological data has traditionally fit within the confines of the common law definition of land occupation. As the Supreme Court *Tsilhqot'in* decision (2014) holds the potential to expand the role of archaeological evidence in future litigation (Bell 2017:7), archaeologists should recognize what their data can and cannot do.

Chapter 4. Expert Witnesses' and Lawyers' Perspectives on the Use of Archaeological Data as Evidence in Aboriginal Rights and Title Litigation

The role of an expert witness in the courts is to provide an objective, informed opinion on a specialized body of knowledge (Lederman et al. 2014:784; Paciocco and Stuesser 2008:184). In order to perform this role, experts should take an objective informed outsiders' position, leaving their inherent biases behind, or at least make a reasonable effort to do so (Thom 2001:15; Valverde 1996:208). This position becomes especially important in Aboriginal rights and title cases, where the power dynamics of the Canadian legal system and the power inequities that are part of the legacy of colonialism clash with Indigenous law and cultural systems (Borrows 2016a:2; Napoleon 2013:139–144; Pasternak 2014:148–150). Anthropologists, in particular, have written about the challenges of presenting their opinions to the court (e.g., Cruikshank 1992; Culhane 1992, 1998; Fisher 1992; Thom 2001); however, archaeologists are often unaware of their discipline's role in these same cases.

In an era where many archaeologists and professional archaeological associations are emphasizing the ethical implications of studying Indigenous peoples (e.g., Canadian Archaeological Association 1997; Society for American Archaeology 1996; World Archaeological Congress Council 1990) and are attempting to establish collaborative, equitable, and respectful research relationships (e.g., Atalay 2012; Colwell-Chanthaphonh and Ferguson 2008; Ferris and Welch 2015; Nicholas 2006; Nicholas and Andrews 1997), it is even more important to understand how their research has been considered in the courts. Aboriginal rights and title, as affirmed by Section 35 of the *Canadian Constitution* (1982), acknowledge Indigenous peoples as the original occupants of Canada (*Delgamuukw* 1997:para. 114). The definitions of these rights, as well as the tests required to prove them in court, have changed through jurisprudence and scholarship. Currently, Aboriginal title requires proof of continuous, exclusive, and sufficient land occupation (*Tsilhqot'in* 2014), and an Aboriginal right must

stem from an integral pre-contact practice that continues to present day (*Van der Peet* 1996).

The aim of this chapter is to examine the role of archaeologists and archaeological evidence in Aboriginal rights and title litigation by analysing interviews with archaeologists who have acted as expert witnesses and the lawyers for whom they worked. I begin by reviewing the roles and issues with expert witnesses in Canada, including in Aboriginal rights and title litigation. The following sections focus on the results of my interviews with archaeologists and lawyers. I divide this discussion into two main sections. The first outlines the process of hiring and preparing an expert witness, from the perspective of both lawyers and the expert witnesses themselves. The second details what archaeological evidence can and cannot do for the tests for Aboriginal rights and title from both archaeological and legal perspectives. This provides clarity on archaeology's contribution to legal thought and the standards that archaeological data needs to meet to be considered by the courts, as well as emphasizing the involvement of archaeologists in this little-known facet of archaeology.

Expert Witnesses in the Canadian Courts

The role and duties of expert witnesses are based on the rules of evidence and court processes. Before detailing the experiences of archaeologists in the courts, it is important to understand the purpose of expert witnesses. Therefore, I introduce and discuss the roles of expert witnesses, including factors affecting their testimony specific to Aboriginal rights and title litigation.

Canadian courts use an adversarial model for resolving "factual controversies" (Paciocco and Stuesser 2008:1). At trial, parties produce evidence[58] that the trier of fact

[58] "Evidence," in a legal sense, is defined as "data that triers of fact use in performing the fact-finding function" (Paciocco and Stuesser 2008:1) and is subject to specific rules. In law, the same evidence can be interpreted in different ways (either supporting or negating facts). It is adjudicated and argued by opposing counsel and weighed by the trier of fact (Upshur 2001:7). In science or social science, on the other hand,

(a term referring to either a judge or jury) will use to make its decision. The trial process begins with the Crown (in criminal law) or the plaintiff (in civil law) presenting its evidence. Witnesses are called and are first examined in chief and then cross-examined by the opposing party.

In Aboriginal rights and title trials, evidence often includes documents (e.g., reports, photographs, and maps) and testimony of lay and expert witnesses (Brown and McIvor 2012:11; Department of Justice 2018b). Since *Delgamuukw* (1997), Canadian courts recognize that the rules for evidence must be applied flexibly to accommodate oral history, which, as proof of historical facts, is supposed to be given the same weight as other forms of documentary historical evidence (Lederman et al. 2014:321). Oral histories are "admissible where they are both useful and reasonably reliable, subject to exclusionary discretion of the trial judge" (Lederman et al. 2014:321).

The Role and Duty of Expert Witnesses

Expert witnesses are the only witnesses who are allowed to provide their opinion to the court. Opinion, in the law of evidence, means "an inference from observed fact" (Paciocco and Stuesser 2008:184). As the trier of fact determines what inferences to draw from fact, lay witnesses "may not give opinion evidence but testify only to facts within his knowledge, observation and experience" (Paciocco and Stuesser 2008:184). However, as the trier of fact cannot be expected to have specialized knowledge on every subject discussed during trial, expert witnesses (on these subjects) provide "assistance in knowing what to make of the facts" (Paciocco and Stuesser 2008:184).

An expert's duty is to assist the court (*Criminal Code* 657.3), and their opinions are admissible when: 1) the trier of fact is unable to make an inference or conclusion without the expert's opinions; and 2) the expert satisfies the common law and statutory requirements governing admissibility (Lederman et al. 2014:784). These requirements

evidence "is an observation, fact, or organized body of information offered to support or justify inferences or beliefs in the demonstration of some proposition or matter at issue" (Upshur 2001:8).

are in place in part because of the increased use of expert witnesses in the courts. As experts were providing testimony to assist one party against the other, courts became fearful that expert testimony could be biased (Lederman et al. 2014:783). The *Mohan* test (*R. v. Mohan* [1994] 2 SCR 9, 1991 CanLII 80 (SCC) [*Mohan*]), which was re-articulated in *Burgess* (2015), outlines the threshold requirement for expert opinion evidence:

1. It must be necessary in assisting the trier of fact;
2. It must be relevant;
3. It must be given by a properly qualified expert; and
4. It must be without an exclusionary role (meaning that the judge can still exclude the evidence if they feel that its presentation was prejudiced) (*Burgess* 2015:para. 19; Paciocco and Stuesser 2008:192).

Provincial statutes limit the number of experts per case—without special exemption from the judge—at approximately five per party (e.g., *British Columbia Supreme Court Civil Rule* 11; *Ontario Rules of Civil Procedure* 53.03). This limit saves the court time and acknowledges that a case is not won by the party that has the most experts; however, the judge can admit more experts if he or she deems it is necessary (Lederman et al. 2014:861). Experts can be hired by any party as well as by the judge. In that role, experts "inquire into and report on any question of fact or opinion relevant to an issue in the action" (Lederman et al. 2014:865).

In most jurisdictions, the expert writes a report that includes "the substance of the expert's proposed testimony" (Lederman et al. 2014:862). This report must be filed with the court before the trial commences and all parties have access to it. While testifying, experts can only diverge from the content of their reports if it is not prejudicial to the other party (Lederman et al. 2014:863). Experts are allowed to refer to other sources (such as articles or books) to support their opinions, which are typically also entered as evidence.

The court first approves expert witnesses and, at the beginning of a trial, each party further qualifies their experts. Experts must be prepared to discuss details of their Curricula Vitae and other aspects of their careers to show their credibility as experts in their discipline (Banks 2008:74). Archaeological expert witnesses typically have at least one graduate degree and professional experience in the applicable field. Once experts have been "qualified" by a court, they are likely to be asked to act as experts in the future as they are henceforth seen as credible.

At trial, an expert witness is first examined in chief, which through neutral questions, the expert presents the contents of his or her report to the trier of fact (Paciocco and Stuesser 2008:16). The opposing counsel can then cross-examine the expert, which can include questions on:

- The expert's credibility (i.e., adequacy of training or demonstration of knowledge through publications);
- The expert's reliability (i.e., issues with their hypotheses); and
- The expert's methodology (i.e., appropriateness of tests or methods used) (Lederman et al. 2014:859).

Cross-examination can attempt to undermine the expert's position or get at evidence that might help the opposing counsel's case.

Issues with the Use and Testimony of Expert Witnesses

Although precedence and statutory requirements set out high standards for expert witnesses, there are still issues with the use and testimony of experts, including how the trier of fact perceives expert evidence and how experts are chosen. Courts can seem unclear about scientific data, methods, and jargon, such as causation, probability, and statistical significance (Jasanoff 1995:205). Moreover, the peer review process of knowledge creation, where claims are argued by individuals within the same discipline, often struggle within a court, where facts are seen as right or wrong (Jasanoff 1995:205). As Déidre Dwyer, a legal scholar, explains:

> The knowledge that an expert possesses is therefore the product of social epistemology: the knowledge is to some extent justified by virtue of being accepted by the community. By extension, but in a weaker sense, we might say that if there is a range of opinions accepted by the expert community, then the courts should be more inclined to favour the opinion that is most widely accepted. We should also like to believe that it is also the product of a veritistic epistemology: the belief is justified because it is true (2008:179).

It can be challenging for the trier of fact to assess expert evidence, particularly as there are fundamental differences between how truth is conceived in legal versus academic spheres, let alone assumptions made about the subject (Dwyer 2008:12; Gold 2003:231; Jasanoff 1995:44, 205).

There are also issues with how experts are chosen and their perceived biases. As Mariana Valverde (Valverde 1996:208) notes, evidence "cannot appear before the courts on its own steam." Someone is first chosen to be an expert for a particular party, that person is then briefed on what is required and what to say, and finally those "desired bits are then turned into legal raw matter and processed through the legal system's existing mechanisms" (Valverde 1996:208). An assessment of expert witnesses in the United Kingdom, United States, France, Germany, and Italy suggests that the perceived bias of expert witnesses does not come from the attitude of the witnesses themselves, but instead from "the conduct of the litigants, in the way that experts are chosen" (Dwyer 2008:369).

Expert Witnesses in Aboriginal Rights and Title Litigation

Concerns with the use and testimony of expert witnesses are well known in Aboriginal rights and title litigation. Expert witnesses have been involved in Indigenous land claim processes since the Indian Claims Commission process in the United States (Price 1981). In that process, anthropologists dominated the proceedings, which filtered Indigenous perspectives "through current models or was invented from those models" (Ray 2003:256). Theoretical models, based sometimes on limited research, had great

sway in the courts; however, even as they became outdated in the academy, they continued to be used in litigation (Ray 2003:257).

In Canada, expert witnesses have participated in all modern Aboriginal rights and title litigation, starting with *Calder* (1973). Issues with the use and testimony of experts have followed along with these decisions. Below I briefly review several of these issues, including perceived expert bias/neutrality, the cultural background of the court, and opposing experts.

Perceived Biases

Courts have sometimes perceived experts, particularly anthropologists acting as experts on behalf of the Indigenous plaintiffs, as biased advocates as opposed to neutral scientists. For example, in *Bear Island* (1985:para. 48),[59] the trial judge felt that the Plaintiff's expert witnesses were "a small, dedicated and well meaning group of white people" acting as advocates as opposed to neutral experts. Although that justice did not have any issue with the credibility of the experts, the heavy use of experts and their inability to present evidence directly related to the Plaintiffs made him doubt their opinions (1985:paras. 45–48).[60] Sometimes different types of experts were perceived as more or less biased. For example, in *Baker Lake* (1979), Dara Culhane argues that the archaeologists' evidence was given more weight than the anthropologists', as it seemed "more scientific" (1998:96). Although it is challenging to discern from the decision if the justice felt that the archaeological evidence was more important, Justice Mahoney spent three pages discussing it, particularly as it was the only evidence of the "prehistoric period" discussed at trial (1979:paras. 15–24). Anthropological evidence, on

[59] Refer to Appendix A for descriptions of cases.

[60] The experts for the Plaintiff relied on analogy to present evidence that did not directly relate to the Temagami Band (1985:para. 45). Although archaeological expert witnesses discussed Algonquin culture before contact, they were unable to identify the Temagami Band in the archaeological record. Moreover, the trial judge, Justice Steele, was frustrated by the overuse of experts, especially when many of them presented facts that could have been presented by members of the Temagami Band (1985:paras. 38–43, 48).

the other hand, was discussed for less than a page, all in relation to an issue on expert evidence (1985:para. 68).

These issues came to a head in the contentious *Delgamuukw* trial decision (1991), in which Justice McEachern completely dismissed the opinions of the Plaintiff's anthropologists. Anthropological expert witnesses were used to provide context to help Justice McEachern understand the Gitksan and Wet'suwet'en oral histories. However, the justice dismissed their evidence as advocacy. Speaking about Dr. Richard Daly, the Plaintiffs' anthropologist, Justice McEachern emphasized that "it is always unfortunate when experts become too close to their clients, especially during litigation" (1991:130). After this critique of their discipline, anthropologists were quick to give a rebuttal, emphasizing their disciplinary norms and practices (e.g., Cruikshank 1992; Culhane 1998, 1992; Fisher 1992; Miller 1992; Ridington 1992; Wilson-Kenni 1992).

Anthropologist Brian Thom reviewed 14 Aboriginal rights and title cases with anthropological evidence and found that anthropologists had been rejected as advocates only four times. He suggested that the judiciary have not had the social science training that anthropologists take for granted, and that social science experts need to recognize the judiciary's lack of understanding and teach them basic concepts of the discipline, such as ethnocentrism (2001:13–15).

Cultural Background of the Court

This leads to the next concern for experts in Aboriginal rights and title cases—the cultural background of the court. This can be divided into two issues: first, the legal basis of Aboriginal rights and title; and second, the divergence between social science and legal thought. Aboriginal rights and title were practically a non-existent area of law before *Calder* (1973), and since that case the courts have had to quickly catch up, creating a succession of guidelines and legal tests.[61] Although these shifting guidelines

[61] Although there were formal land claims processes in the nineteenth and early twentieth centuries, a 1927 amendment to the *Indian Act* made it illegal for Indigenous peoples to raise funds or hire lawyers for land claims (Giokas 1995:50; Thom 2001:14) and a parliamentary joint committee determined that all Aboriginal

have "served to focus litigation-oriented research" (Ray 2003:263), they have often been based on outdated models or understandings of theories. One example is the test for Aboriginal rights, as articulated in *Van der Peet* (1996), which is based on the idea that culture can be broken down into distinctive elements, each of which can then be ranked according to its significance (Ray 2003:265–266). This test, according to Andrew Martindale (2014:398), "minimizes practice as behaviour while abstracting rights as conceptual frameworks." Indeed, legal scholars have argued that Aboriginal rights should be envisioned as emerging from Indigenous law (McNeil 1997; Slattery 1992). Kent McNeil (1989:241) suggested that Indigenous peoples should be able to establish land title in one of two ways: 1) prove they had property rights under their own legal system; or 2) prove that they had exclusive occupation at the time of sovereignty assertion. The Canadian legal system has focused on the latter test, requiring large volumes of evidence to satisfy the burden of proof, placing a substantial burden on the claimants and making it challenging for judges to weigh the massive amount of evidence presented (Elias 1993:235; Thom 2001:20–21).

The second issue is the challenge for the Canadian legal system to interpret evidence from outside their own culture (Asch and Bell 1994:505). As mentioned above, judges are not trained in social sciences and are often unfamiliar with the nature of Indigenous societies in Canada (Bell and Asch 1997:73; Thom 2001:14). Judges may use their own perspectives and perceptions instead of trying to understand social science evidence, which is what occurred at the *Delgamuukw* trial (1991). Justice McEachern was unable to understand the use of cultural relativism to place Gitksan and Wet'suwet'en cultural practices in contrast with the dominant western culture. This incomprehension led him to determine that the expert anthropologists were biased towards the Indigenous Plaintiffs (Asch and Bell 1994:545; *Delgamuukw* 1991:para. 251; Ridington 1992:16). Judy Banks (2008:72–73) outlines evidentiary challenges inherent in

title in British Columbia was extinguished (Foster 2007:70). It was not until 1951, when the *Indian Act* was revised, that Indigenous peoples were able to take their land claims to court (Giokas 1995:62–68; Foster 2007:70)

Aboriginal rights and title cases, stating that the Canadian courts are designed to deal with historical facts and this adversarial system is not set up to interpret social facts.

Opposing Experts

Finally, social science experts, including archaeologists, are often on different sides—as experts for the Crown and for the plaintiff. This is not unique to Aboriginal rights and title litigation, but it does add an extra challenge for these cases because of the types of evidence presented. Social science evidence, particularly anthropological and archaeological evidence, often requires close study of the claimed territory. Judy Banks (2008:70) suggests that experts for the plaintiff may offer opinions based on fieldwork and oral histories, whereas Crown experts' opinions may be based on criticizing the opposing expert's research or based on outdated models. An example is the Crown's expert anthropologist, Sheila Robinson, in *Delgamuukw* (1991) who picked material chosen to support the Crown's position (Culhane 1992). In my interviews with archaeologists, several spoke about dealing with Crown experts who were not trained in the disciplines in which they were supposed "experts" (e.g., Participant 5). This is not always the case, however, as in some cases Crown experts may be well qualified and share detailed, rigorous opinions from their own research. Brian Thom (2001:15) and others have outlined that "there are moral and intellectual burdens in doing work that will end up in litigation" and that providing credible research, no matter if you are acting for the claimant or the Crown, is essential (Dyck 1993; Foster and Grove 1993:232; Kew 1993:94–95). Many archaeologists have acted as experts for both the Crown and Indigenous plaintiffs, stating that it is often a case of "who asked first" (e.g., Participants 11, 29, 30). This can lead to challenging situations however, such as the Schiedam Flats case in Kamloops, British Columbia, where archaeologists for opposing sides were working next to each other in the same territory, unable to share research findings or discuss the case with one another (Participant 6).

This section has outlined the role and expectations of expert witnesses in Canadian courts, as well as common issues with experts in general and in Aboriginal

rights and title cases specifically. Unlike the academic process, the testimony of expert witnesses is not subject to peer review and can be "pushed to the limit of the interpretations that are currently acceptable" (Ray 2003:271). Even with these caveats, expert witnesses have played key roles in Aboriginal rights and title litigation in Canada.

I use the rest of this chapter to examine the experiences of archaeological expert witnesses and the lawyers with whom they worked. Others have explored the role of expert witnesses in archaeology and anthropology, including Judy Banks, whose MA thesis (2008) explored how oral knowledge is treated by Crown anthropological witnesses; Helen Kristmanson, whose PhD dissertation (2008) assessed the use of archaeological evidence in court, focusing on the Mi'kmaq claims in Newfoundland; Judy McLellan, whose BA Honours thesis (1995) focused on interviews with archaeological expert witnesses and their experiences in court; and anthropologist Bruce Miller, whose 2011 book examined the court's understanding of oral histories. However, my examination is unique in combining the perspectives of *both* archaeologists and lawyers to get a deeper perspective of the contributions of archaeologists and archaeological data in Aboriginal rights and title litigation.

Experiential Evidence: Interviews with Archaeologists and Lawyers

In order to gain clarity on archaeology's contribution to Aboriginal rights and title jurisprudence, I interviewed 21 archaeologists and nine lawyers between March and July 2018.[62] The archaeologists provided experiential data that could not be obtained from reading court decisions and expert reports, while the lawyers offered insights into the purpose of archaeological evidence from a legal perspective. Interviews were semi-structured, with open-ended questions gauging the process of acting as an expert

[62] Participants' identities are kept confidential throughout this chapter. For a list of participants who chose to share their identity, see Appendix D.

witness (for archaeologists) and the process of working with an archaeologist (for lawyers).

Participant Details

I contacted 28 archaeologists and received responses from 21, a response rate of 75 percent. All but two archaeologists lived in British Columbia at the time of the interview, and at least two participants had testified in trials outside of the province.[63] Six archaeologists held academic positions (at universities or colleges), and 15 worked in the cultural resource management (CRM) industry. Eighteen archaeologists had acted as expert witnesses, whereas three had only participated in the research collection process for particular cases, including interacting with lawyers, and therefore could comment on the research process and methodological standards. Five archaeologists had acted as experts for a single case, nine had acted as experts between two and five times, and four had acted as experts six or more times (Table 6).

Table 6. Details About Interviewed Archaeologists.

	***n* (%)**
Academic (work in university/college)	6 (29%)
CRM industry	15 (71%)
Expert witness	18 (86%)
Research collector	3 (14%)
Acted as expert once	5 (24%)
Acted as expert two to five times	9 (43%)
Acted as expert six or more times	4 (19%)

Data from interviews with archaeologists.

[63] Due to the confidential nature of the information participants shared with me, I did not ask participants to name specific cases, as many were ongoing and could not be shared. Cases discussed by name are done so with the permission of the participant.

Of the 21 archaeologists interviewed, 19 identified as men and two as women. This is a significant gender bias. Although this disparity likely is due to the gender inequity in senior ranks in the overall discipline (Speakman et al. 2018; Goldstein et al. 2019; Association Research, Inc. 2005), it does have implications for my results. It also raises implications about who is more likely to be called as an expert witness and how they are treated during cross-examination.[64] As expert witnesses are likely to be asked to participate in future litigation, this gender imbalance is unlikely to dissipate in the near future. However, it is also important to note that 71 percent of interviewed archaeologists worked in the cultural resource management industry, where gender disparity, in some regions, has dissipated or is quickly dissipating.[65] As the pool of female senior professional archaeologists increases, more female expert witnesses are likely to participate in litigation.

I contacted 19 lawyers and received responses from nine (47 percent response rate). Participants were selected if they had worked with an archaeological expert witness for an Aboriginal rights or title case. Some archaeologists provided me with the names of lawyers with whom they had worked, but I also contacted known Aboriginal rights and title litigators. All lawyers currently worked in British Columbia, but some had worked on cases in different provinces or at the Supreme Court of Canada. Six lawyers worked in private practices for the applicable cases, acting as legal counsel for First Nations. Three lawyers worked for the provincial or federal Crown. The following

[64] Legal research has indicated significant differences between the treatment and credibility of male and female expert witnesses. Overall, female experts are perceived as less confident and credible than male experts (Brodsky and Gutheil 2016:71; Larson and Brodsky 2010). However, the gender domain of the case makes a difference to the credibility of the expert (e.g., a male expert witness is seen as more credible for a case about a construction company, whereas a female expert witness is seen as more credible for a case about battered women) (McKimmie et al. 2004; Neal 2014). In addition, professional women are more likely to be demeaned or patronized on the witness stand than professional men (Larson and Brodsky 2010, 2014). Although I did not ask interviewed lawyers about gender, from this research one can assume that male archaeologists are more likely to be called as expert witnesses.

[65] The membership roster of the British Columbia Association of Professional Archaeologists (2019) lists 124 female members and 121 male members.

sections detail the process of choosing, hiring, and preparing an expert witness, from both lawyers' and archaeologists' perspectives.

Choosing an Expert

Before a litigation team hires expert witnesses, they must first decide if experts are actually required, and if so, from what fields. One lawyer (Participant 10) described this process as "you're trying to figure out how their skills complement each other." The list of required experts may change over time as a case evolves. In addition, experts may be chosen for different roles within the litigation process. One strategy is to have two teams of experts: the first to work directly with the litigation team for constant advice and strategy; and the second to testify at court, who are at an arm's length from the litigation team "so they are not compromised as an advocate" (Participant 10).

Experts, in general, are chosen for two reasons: 1) what is represented in their CVs; and 2) their ability to communicate. As all experts must be qualified as experts in order to testify, it is essential that their CVs reflect their supposed expertise. One lawyer (Participant 12) stated that it is "almost like a job interview type analysis. What's the person's educational background, how long have they been practicing." Lawyers will typically look for a PhD and "a track record of peer reviewed publications" (Participant 19). For archaeology, "a long history of being a consulting archaeologist repeatedly hired by a variety of parties" is also relevant (Participant 19).

Within the expert's CV, lawyers are looking for people who have worked in the Claim Area (Participant 23). Lawyers working for a First Nation might already have contacts for archaeologists who have a rapport with the nation or previous experience in their territory. Another strategy is to "roam around the literature about Group X and find out who has written about [them], and whether they're able to help" (Participant 19). In addition, once a lawyer has an established rapport with a specific expert, they might call on that expert again, even if the expert does not have experience in the Claim

Area. One lawyer (Participant 23) stated that they often ask the same archaeologist to work for them, as "his methodologies are good and he's very credible."

The second aspect of hiring an expert is their ability to communicate and provide their opinion to the court (Participants 18, 21). All of the lawyers I interviewed emphasized that they want "somebody who will actually be able to communicate the ideas from their field too, in a way that will be helpful to the court" (Participant 21). A well-polished CV is irrelevant if the expert is unable to communicate effectively. One way to ensure this "is to find people who already have experience testifying, as then they have a record of how credible they've been and how the court has dealt with their previous testimony" (Participant 10).

Lawyers' strategies for choosing expert witnesses closely match the experiences of the archaeologists I interviewed. The majority of archaeologists had been contacted directly by lawyers, who asked if they would act as an expert. They were typically chosen because they were recommended by other archaeologists who were already working in the Claim Area or were known by the legal firm. Six of the archaeologists had been asked to be experts as part of their work duties (either as an expert witness or to collect data for an expert) as they were already working directly for a First Nation, a CRM firm, or the government. The majority of participants who had acted as an expert more than once were asked to participate again because they were known to be a credible witness and/or had built a rapport with a lawyer.

Unwilling to Participate: Crown Experts

One specific issue for Aboriginal rights and title litigation is experts' sympathies towards First Nations and their perceived unwillingness to work for the Crown. Although many of the archaeologists that I interviewed had been experts for both First Nations and the Crown, the three Crown lawyers I interviewed all emphasized that it can be challenging to find experts to work for them. One lawyer provided two reasons for this: 1) the expert does not agree with the policy or approach that the Crown takes; and 2) if

the expert is typically hired by First Nations (for archaeological work), they might be unwilling to risk future employment by working for the Crown (Participant 22). Another lawyer stated that:

> Understandably, experts in fields like ethnohistory and ethnography and archaeology and anthropology, who have built their careers by working with First Nations are not keen to work for the Crown in litigation when that is an adversarial situation where the First Nations are our plaintiffs and the Crown is the defendant … they would often see it as, I don't know, perhaps a betrayal or perhaps they would just feel uncomfortable about it…. I think they reasonably fear it might make their working life difficult if they were seen as taking a position that was not fully supportive of First Nations (Participant 21).

This sentiment was echoed by an archaeologist who had acted as an expert for both First Nations and the Crown. His opinion was the following:

> I think there was always a question of trust. I think the First Nations, especially if you've known them and you've worked with them or you've worked in their area, there was an expectation that you would, if not side with them in the world of these things, that at least you wouldn't be actively involved in an action which they perceived as being contrary to their interests (Participant 29).

These sentiments can make it challenging for the Crown to find credible expert witnesses, forcing Crown lawyers to sometimes hire less-qualified experts (Participant 21) or rely on in-house expertise, such as researchers from the Attorney General's office (Participant 22). However, one lawyer also emphasized that the court typically appreciates experts who have worked for a variety of parties, because if they have only ever just worked for First Nations (or only for the Crown), then "their objectivity is open for questioning because the risk is that they have confused their objective role as researchers or scholars with their personal advocacy for the cause that they've been retained to support" (Participant 19).

Although some archaeologists and experts in other fields feel uncomfortable working for the Crown, all lawyers emphasized that expert neutrality is essential. Although experts are hired by one party, their role is to provide their *own* opinion to the

court. This statement was echoed by archaeologists who had worked for both the Crown and First Nations (Participants 11, 29, 30). One archaeologist (Participant 11) stated that, "I mean, our sympathies may be with the First Nations but we're there to provide facts and honest information and if the case is good, the First Nations are going to win it."

Preparing an Expert: Turning Data into Evidence

Once legal counsel has hired an expert, they typically sit down with the expert and have a conversation "to get a sense of the issues" (Participant 10). This face-to-face helps the lawyer find out what the expert knows and what their opinion might be (Participant 23). It can also help the lawyer refine questions for the expert to answer in their report (Participant 10). As lawyers most likely do not have a technical knowledge of archaeology, they often rely on experts to "tell us how they're going to assist us" (Participant 22).

When the legal team has a sense of what the expert's archaeological opinion might be, they will prepare a letter for the expert that lays out specific questions for the expert to answer and the rules of procedure for the expert witness (Participants 10, 18, 22, 23).[66] One lawyer (Participant 10) emphasized that these questions "are designed to structure the report and to focus the expert's work," to reduce costs to the client, as well as to help keep the expert on task. Several of the lawyers also emphasized that they try to deal with experts in a very neutral way, to uphold the rules of procedure for experts (Participant 23). Communication between legal counsel and an expert is privileged and confidential before a trial commences; however, once the expert report is entered in court, the "whole process of your communication becomes public" (Participant 20). Therefore, as one lawyer (Participant 20) stated:

[66] In British Columbia, working with an expert is a transparent process; that is, all working files, notes, emails, and their final report are provided to the other parties.

> If I write a letter to the witness saying please dig down ten feet, but don't go any further because we don't want to find anything down there that scares us, that letter will become part of the record … [and] that kind of letter would be shown in front of the court as a way to undermine the witness' evidence."

Archaeologists' experiences again echoed that of the lawyers. After sitting down with lawyers, archaeologists would be typically provided with "basic questions they wanted me to address" (Participant 9) and it would be up to the archaeologist to "marshal the archaeological evidence, in the best way that made sense with my professional knowledge, to answer the questions" (Participant 9). Depending on the case and the legal counsel, archaeologists might be provided with broader questions or very specific ones. Moreover, depending on the lawyer, the archaeologist might have to explain what types of questions archaeology *can* answer or might have to create their own questions to answer (Participant 28). The archaeologists interviewed were typically hired to work on a case that was already underway, but at least one archaeologist was hired to do long-term research on Aboriginal rights and title, with the expectation that the data collected would be used in a court case (Participant 29). Archaeologists typically worked on their own (or hired other archaeologists to help them), but in at least one case the archaeologist worked within a larger research team of experts from other disciplines who were each in charge of their own research (Participant 26).

Turning Data into Evidence

Both lawyers and archaeologists spoke about the process of turning archaeological data into legal evidence, both in the expert report and while testifying. Lawyers emphasized that it is essential to "ensure that the expert's opinion is based in fact and walked through how he [the expert] came to that opinion" (Participant 18). This process is obviously not unique to archaeologists but something legal counsel must do for all experts. However, one lawyer stated that:

> In some respects lawyers and social science experts are sometimes on different pages. So, on the one hand, we need evidence—clear, cogent evidence—that will support proof of historical facts. And when we're

> dealing with trying to prove pre-contact facts, or pre-sovereignty 1846 facts, it's pretty hard, but we still need clear, cogent evidence to do that. And sometimes I find, and I'm not naming names or anything here, that some social science experts will assert facts with very little foundation, and that can easily be picked apart when you dig into it. And on the other hand, they often look for more proof than is needed. And so we can't say for certain what happened before there were written records here. We can't say for certain what happened after there were written records. But in court, we operate on a balance of probabilities, and you need clear, cogent evidence to support that (Participant 23).

In sum, archaeologists and other social science experts sometimes assert facts with too little or too much data to back them up. Experts need to ensure that the facts they state are supported by clear, cogent evidence, which is indeed the definition of legal evidence—clear, cogent evidence that supports a balance of probabilities or proof beyond a reasonable doubt. Lawyers stated that in assisting experts to get to this level of fact, they often ask experts questions about their data. For example, one lawyer said that he asks experts about what the important pieces of data are, where the information gaps are, and how the expert is attempting to fill those gaps in their research and report (Participant 10).

This process is not lost on archaeologists. Experts, particularly those who had been experts several times, understood and spoke to this point. They emphasized two points: 1) the translation between archaeological research and a legal report capable of withstanding scrutiny in court; and 2) the integrity of the research process and the data collected.

A legal argument is different from an academic argument. One archaeologist (Participant 29) stated that his task was to "learn how lawyers think and talk. What is evidence? What's opinion? What's argument? What's fact? And how do they actually craft their arguments, how do they go about demonstrating that?" Another archaeologist emphasized that the largest difference between expert reports and academic articles is the actual data. Lawyers are not interested in the theoretical background or the expert's interpretation of the data. Instead, the court is "interested

in what the facts are … what is a fact and what is an opinion" and experts need to be careful not to conflate their opinions as facts (Participants 15, 16). However, "all facts come with points of view" and an archaeologist's theoretical perspective and interpretations can reveal potential biases (David Byrne, cited in Nicholas 2000:10).

Experts' opinions need to be grounded in defendable evidence, and experts need to be prepared, during cross-examination, to defend the integrity of their data (as well as their qualifications). For example, if an expert has radiocarbon dates for a site, they will most likely be asked why they only have that number of dates and why they did not take more samples (Participant 29). Experts need to remember that everything they write in their reports will be scrutinized by the opposing counsel:

> What could I assemble archaeological that would give this enough substance to withstand scholarly scrutiny? Because there could be what experts on the other side of the table saying, well, they didn't look here and they didn't look there, along that line so I think that's really important too, trying to plan what would be sufficient, in your professional opinion, which you could also vouch for (Participant 6).

Experts need to attempt to think rigorously and objectively about their research questions, data collection, and analysis. Arguably all research results, no matter who the intended audience, should be put through these processes, but research prepared for legal contexts will certainly be examined closely. As one archaeologist emphasized:

> In terms of objectivity, conciseness, rigour, what constitutes data, what constitutes evidence, when is enough enough, when is a hole a hole in your data. All those things apply almost anywhere and everywhere, it's just you're under more scrutiny and you're more likely to be called on in it a legal context (Participant 29).

Jargon

Most lawyers stated that although all disciplines have their own jargon, experts, including archaeological experts, were fairly good at ensuring that they limited jargon and defined it when necessary. One lawyer (Participant 10) stated that he ensured that

before the expert submitted his final report, he or a colleague would read through the report for logical sense, grammar, spelling, and style.

Archaeologists said that they try to exclude jargon from their reports, or at least ensure that they define terms. Several archaeologists (Participants 8, 9, 25, 26) stated that they try to write clearly no matter what type of paper they are writing but that they made an extra effort to qualify and define what they said in expert reports. One archaeologist (Participant 29) emphasized that "you don't want to make the court struggle. It has to be really clear. And your lawyer, if they're a good lawyer, will make sure of that."

Preparing an Expert: Testifying

Once the report is complete and entered in the trial, lawyers must prepare the expert for testifying at trial. All lawyers emphasized that they worked with experts to prepare them for cross-examination. Typically, this took place over at least one, if not several, meetings where they went over areas where the expert was likely to be challenged and worked through how to potentially approach those issues. The idea behind this strategy is that "you want your experts to not be surprised by what's coming" (Participant 10).

Lawyers also emphasized different strategies for helping experts understand their role during cross-examination. One lawyer (Participant 10) said that they always try to "make sure that they understand the purpose of their evidence," if their evidence is essential for the trial, more as a rebuttal for something the Crown said, or more of a background piece. This helps the expert "understand the role that they're playing as well because that leaves them better equipped to understand their evidence." Another lawyer (Participant 21) stressed that it is important to remind the expert of what their role is—"their job isn't to help me and/or try to anticipate where the person is going. It's just to answer the question, that's all." The expert is there to provide their opinion to

the court, not to have a conversation with opposing counsel or engage in academic discourse.

Lawyers spoke about how they prepared to cross-examine experts, often by attempting to become experts themselves. One lawyer stated that they try to remind experts that even though lawyers will have read up on their discipline, the expert is indeed the expert on their subject (Participant 18). One lawyer (Participant 21) shared a story of when he was cross-examining an expert, and she stated how impressed she was of his knowledge of her field, to which the judge replied, "yes, [expert], they all know a lot about whatever the topic is very briefly, and then, after the trial is over, they forget all about it."

Archaeologists' experiences were obviously very different from the lawyers' experiences. "Going to court can be a very vicious kind of experience" (Participant 26) and can be challenging for anyone, particularly first-time experts. Having to defend one's academic credentials and professional background can be a gruelling experience (as discussed below). Archaeologists were also quick to remind me that "testifying is very personal, and everyone will have different experiences" (Participant 29).

Although all of the lawyers I spoke to emphasized that they prepared their experts before they testified, archaeologists spoke to a spectrum of preparation strategies from the lawyers with whom they worked. Some were not prepared at all and were expected to figure it out on their own when they got to court (Participants 1, 28). At the other end of the spectrum, other archaeologists spent hours in practice sessions, rehearsing their testimony and "training you to be the most successful that you can be" (Participant 29). Different lawyers have different strategies to prepare their experts, and each case is unique, but certainly from the archaeologists' perspectives, having little to no preparation as a first-time expert made the process of testifying even more adversarial (Participant 1).

Archaeologists had varied experiences testifying depending on how they were treated under cross-examination and what they thought of the overall legal experience. One archaeologist (Participant 2) stated that as their sister is a lawyer, they basically knew what they were getting into. Another archaeologist (Participant 29) felt that the experience of testifying was largely based on personality—"I think a big factor there is how personally you take what happens." Experiences testifying are most certainly related to personality but also on how experts are treated by the judge and counsel. Several archaeologists found the experience worthwhile and felt that they were treated with respect and that their authority as an expert was respected (Participants 4, 6, 11, 29, 30). One archaeologist shared a story of when they realized that they could handle cross-examination:

> I think the whole key turning point, when I went, "oh phew I can do this" was when the Crown lawyer was really going away and said "you wrote this all yourself?" and I said "yes, I did" and she said, "well we've got a legal team, a whole team of researchers checking up," and she stopped, and sort of slumped, and said, "and most of them are your ex-students." So, I knew at that time she wasn't going to bait me too badly (Participant 4).

Other archaeologists found the experience to be adversarial and intimidating (Participants 1, 26, 28). Several shared experiences of feeling like they were being personally attacked. As experts must first be determined to actually be experts before they can testify, their first experience of cross-examination is often when the opposing counsel ensures that they are indeed qualified in their field. One archaeologist (Participant 1) stated that he was attacked for being unscientific as he had a degree in anthropology, not archaeology. To disprove this attack, he went over his CV and pointed out an article he had published in *Science*, saying, "*Science* is the most reputable scientific peer reviewed journal in the world, and you're asking whether I was a scientist or not." Another archaeologist (Participant 28) stated that "some judges were very, very polite and so forth but some of the other judges were fairly harsh," making testifying even more intimidating. Finally, one archaeologist shared that the only reason they

were able to get through cross-examination was to remember who else had gone before them:

> I had a lot of compassion for the chiefs who had been on the stand before me. That's what gave me the courage. I thought, I'm here, I did the research, I'm presenting the evidence on behalf of the chiefs and if they can sit up here and be cross-examined, then I can find the courage to do it as well (Participant 26).

As experiences differ depending on the person testifying, the evidence they are presenting, the lawyers cross-examining them, and the case itself, it is not possible to present any overall statement about archaeologists' experiences testifying. Law functions under an adversarial system in Canada that is very different to the peer review process archaeologists experience in the publication process or the style of discussion at their dissertation or thesis defenses. Although lawyers may feel like they have prepared an expert for any situation, testifying can be a harrowing experience depending on how an expert is treated on the stand.

Archaeological Evidence in Litigation

The basic premise of archaeology, the "material results of people living and dying and leaving their garbage in the ground, is critical [to Aboriginal rights and title]" (Participant 24). However, although archaeological evidence can indicate past use and occupation, it has varying success at providing fine-grained details that a court will accept. This section examines the advantages and limitations of archaeological evidence from archaeologists' and lawyers' perspectives.

Advantages of Archaeological Evidence

Both lawyers and archaeologists emphasized that archaeological data have a role to play as evidence for the tests for Aboriginal rights and title. Archaeological data can

be key evidence of occupation and use of a territory, such as in *Meares Island* (1985) and *Tsilhqot'in* (2014).[67,68] As one archaeologist emphasized:

> We're demonstrating where people were and over both the median term and the historic pre-contact, head back into pre-contact times that yeah, people are here, people are all over, they're using these resources, I think it's invaluable for that because it's easy for us to also lose sight of, well, we might not be able to answer which language or whatever people are speaking that left these tools, but on the other hand, you can be sure that, yeah, there was people here, it wasn't a blank empty wilderness and that's equally important (Participant 11).

Other archaeologists (Participants 1, 3, 5, 24, 29) echoed this statement, that archaeological data were essential evidence of continuous and sufficient occupation. For example, in *Tsilhqot'in* (2007), archaeological data were used to show 500 years of Tsilhqot'in occupation in the Claim Area and match archaeological sites to villages recorded in historical documents (Participant 1, 11, 24). In the *Meares Island* trial, culturally modified trees (CMTs) indicated continuous use of the island, breaking the conception that a maritime-based culture would not occupy or use inland areas (Participants 11, 29, 30).

Archaeological data can also be used to document specific practices, such as fishing. Several participants detailed the data they compiled to show evidence of fishing:

> I mean there are certain locations of sites and if they have good information from the site, like radiocarbon dates or styles of artifacts that show that there is a long continuous history at a particular site at a location that's a known fishing location even into today. Like it's looking at a sort of continuity from the present back into the past that provides, I think, the most valuable information, not only site locations but then kind of technology, so if you have certain archaeological types of technology, like fishing weirs or fish hooks or whatever that are recovered in those fishing

[67] The *Meares Island* (near Tofino, British Columbia) case started as an injunction (1985), which the Clayoquot and Ahousaht Bands won. The subsequent title case was adjourned by agreement from all parties (Nuu-chah-nulth, MacMillan Bloedel, British Columbia, and Canada) in part because of the archaeological evidence presented at trial (Stryd and Eldridge 1993:190).

[68] For a discussion of Aboriginal rights and title litigation where archaeological evidence was presented at trial, see Chapter 2.

> locations. And then also faunal remains of the different types of species that were utilized. That's really good data that shows that … those resources were important, and they were used, and they've been used for a very long time. And that there is very much a well-developed established technology through thousands of years of utilizing those resources (Participant 28).

Archaeological data can identify ancient fishing sites, fishing technology, and actual faunal remains of specific species of fish, providing detailed evidence of fishing. These forms of data are sometimes so telling that they are uncontested by the Crown (Participant 4).

Lawyers also spoke to archaeology's ability to provide evidence of occupation and use. To one lawyer (Participant 20), this is "the first and most significant contribution of archaeology to the legal framework." In his words:

> Archaeology is able to transform the Canadian imagination. From thinking of the wilderness as being an uninhabited place to being a place where, in fact, there has been continuous and intense Aboriginal occupation from before the time of Europeans, from long before. That insight that archaeology provides is fundamental to the legal and even the political support for the idea of Aboriginal rights and title (Participant 20).

The same lawyer spoke of his experience with the Meares Island and *Tsilhqot'in* (2007) cases, where archaeological evidence was used to show the extent of occupation and use of territories. In *Tsilhqot'in* (2007), archaeological evidence of pithouses indicated that although there was a very small population for the large territory, people "were everywhere." Likewise, archaeological evidence of CMTs on Meares Island indicated "that every square inch of the inland area was used thoroughly in a sustainable way over the centuries."

This sentiment was expressed by several other lawyers, emphasizing that the tests for sufficient and continuous occupancy "are going to engage archaeological work" (Participant 22). Archaeology "is important to show that there was human existence at this place, and dating it" (Participant 23). Archaeology can help establish time depth, to "paint a picture of the way of life of the people" (Participant 10). Archaeology is

"objective in that it is grounded in things that have an actual physical existence" that extends into prehistory (Participant 21). Finally, according to one lawyer (Participant 12), if archaeological evidence is available, "you just can't prove your argument" without it.

Lawyers also spoke to archaeology's ability to be tangible evidence. From their perspectives, a unique aspect of archaeology is the portable artifacts that can be presented in court. Two lawyers (Participants 18, 20) spoke about how they had presented artifacts as exhibits in court, so that the judge could actually see and touch the evidence—"when you've got the abrader in your hand, it makes people real" (Participant 18).

Finally, lawyers emphasized that they saw "no particular piece of evidence as being able to answer a question by itself" (Participant 10). In this sense, lawyers see archaeology as one of many puzzle pieces that can be helpful to address the tests for Aboriginal rights and title. However, archaeology's ability to be "physical evidence of antiquity on the land, is a fundamental pillar" of evidence (Participant 18). Although archaeology on its own might not be sufficient to prove Aboriginal title or rights, when combined with other forms of evidence it "can be a valuable tool in helping us put together the whole picture" (Participant 10).

Limitations of Archaeological Evidence

All participants interviewed spoke to the limitations of archaeological data. For many, the critical limitation of archaeological evidence is its ability to identify and track ethnicity through the material record (Participants 4, 6, 7, 8, 11, 25, 29).[69] Even when there is evidence that can pinpoint the claimant group or indicate a population replacement, based on changes to house type or toolkits, it can be challenging to explain these data to the court, particularly why such evidence indicates the group or a

[69] For a discussion of this issue, see Chapter 5.

replacement (Participants 8, 28). Although archaeologists may agree that a change in house shape is sufficient evidence to indicate a population change, it may be challenging to explain that fact to a court (Participant 8). As one archaeologist emphasized:

> We have to be able to stand up in court and say, this is why houses are important here and pottery is important there but pottery is not important here. And houses are irrelevant over there. We have to be having this kind of a conversation. What is important? What are the patterns? How do we know the pattern is real? Those are the things that I think archaeologists are less comfortable doing (Participant 8).

However, there are examples of when this was done successfully, such as in *Tsilhqot'in* (2007) where the judge agreed with much of the archaeologists' evidence for Tsilhqot'in, not Plateau Pithouse, occupation (see Chapter 3 for more information on this topic).

Lawyers also recognized this issue for archaeological evidence. One lawyer emphasized that while archaeological data may be able to show very deep Coast Salish roots in Greater Victoria, if you have to prove exclusive Songhees occupation, "the information is not helpful at that level" (Participant 10). Archaeological evidence *can* show occupation and use, but it often cannot show that the material culture left behind was made by the ancestors of the group currently claiming the territory (Participants 10, 18, 19, 20, 21, 22, 23). This is a major limitation of archaeological evidence, and one that is often challenged in court (Participant 19). However, lawyers were quick to add that when archaeological evidence is paired with other forms of evidence that *can* indicate ethnicity (such as ethnographic or historical evidence), archaeological evidence is still important "because it does show the extent of human existence" (Participant 23).

Some archaeologists stated that archaeological data can have a limited role as evidence for the tests for Aboriginal rights, as you have to be able to "find a material culture evidence for the practice of a right? And, can you demonstrate that material culture is associated with that right and not with something else?" (Participant 29).

Although archaeological data has often been used as evidence of fishing (as discussed above), it has challenges acting as evidence for other pre-contact activities.

For example, archaeological data may indicate that objects, such as dentalia shells or obsidian, were traded, but archaeological data often cannot indicate if the claimant group was carrying the trade good or in what direction they were travelling. Perishable trade items may not leave a trace in the archaeological record, making it challenging for archaeological evidence alone to prove the test for trading (Participant 4). Another archaeologist (Participant 29) noted that many pre-contact activities may not leave a material record, making archaeological data futile. However, other archaeologists were quick to point out that when archaeological data of the activity was considered in tangent with other forms of evidence, such as early explorers' accounts of trading with West Coast First Nations, it can help paint a broader picture of pre-contact activities (Participants 4, 15, 16).

Finally, many archaeologists emphasized the time and money involved in archaeological fieldwork. Archaeology is expensive and doing fieldwork is often time consuming (Participant 11). Archaeologists need to be upfront with legal counsel in emphasizing the amount of time and money it takes to collect the required data which, as one archaeologist (Participant 29) stated, is part of a good research design. One archaeologist (Participant 11) described fieldwork as a "two-edged sword"—if an expert decides to go out and do more fieldwork but doesn't find anything, the record of that work will be public and will most likely be brought up in court; however, if an expert chooses not to do the additional fieldwork, there will be less data that may or may not be enough evidence. This scenario arose in the *Delgamuukw* trial (1991), where archaeological fieldwork was not successful in finding an important village site that had been mentioned in oral history. The fact that the archaeologist could not find the village was brought up in court in an attempt to disprove the oral history; however, both the archaeologist and the lawyer involved stated that with more time and money, they would have found the village site (Participants 18, 26):

> If I had another $200,000 more, I would have had the archaeologists go around to many different places in that general location. Maybe it was a two-hectare size area and we chose one or two places where we thought it was likely there would be a site and there wasn't. But, if we'd been able to triple or quadruple the number of days, I'm confident we would have found something. But, I mean, these things are all vastly conditioned by the available resources you have to do the work. As you know, archaeology is very expensive work (Participant 18).

Lawyers recognized the cost of doing archaeological research but also found issue with the sometimes *lack* of archaeological evidence. Changing sea level, the lack of preservation over time, and the uneven scope of archaeological work all contribute to an incomplete archaeological record (Participants 10, 13, 21, 23). One obvious strategy to combat this issue is to not include archaeology as evidence. Several lawyers emphasized that you do not use evidence where it does not exist, and when archaeology does not add anything to your case you do not hire an archaeologist (Participants 10, 18). For example, in areas where "a lot of the occupation was very light on the ground" or the archaeological research "from a lawyer's point of view [is] nothing impressive," a litigation team would likely not include archaeological research (Participant 10). In this respect, archaeological evidence (in British Columbia) is most beneficial in coastal areas with large village sites, evidence of fishing, clam beds, and funerary evidence, but not as useful in areas with less material evidence (Participant 10). Therefore, cases that include archaeological evidence will include it for a good reason—a litigation team will not include irrelevant evidence.

Conclusion: Minimizing Misinterpretation of Archaeological Evidence

Expert witnesses function to provide objective informed opinions to aid the trier of fact in understanding a specialized body of knowledge, such as archaeology. My discussion of interviews with archaeologists and lawyers emphasizes that overall, archaeologists who have acted as expert witnesses understand their role as objective outsiders and stick to it, regardless of whether they are acting for an Indigenous claimant or the Crown. The archaeologists interviewed spoke to the duty to provide

informed opinions based on sound research, and the lawyers interviewed spoke to the importance of limiting potential biases for their experts.

The examination of my interviews speaks to the differences between social science disciplines, including archaeology, and law. Randy Kandel, an anthropologist and lawyer, emphasizes six differences between anthropology and law (1992). Most important for this discussion is the difference in the meaning of fact and truth. Legal causality is not scientific, and a fact in law is a finding made within a moral and normative context (Paciocco and Stuesser 2008:1). Scientists,—including archaeologists—on the other hand, assume that facts are raw data, and that the same data, analysed the same way, should yield the same results (Kandel 1992:3–4). This is not the case in law, where the role of the judge (i.e., the legal fact finder) "is decisional" and truth is an outcome between competing viewpoints (Kandel 1992:4; Miller 2011:38).

Evidence, considered within this context, is malleable. Archaeological data is considered within this moral and normative setting and weighed against opposing viewpoints. From past cases, we know that experts have pushed the trier of fact to assess incorrect evidence (e.g., *Ahousaht*) and archaeologists have had their research used in unforeseen ways, typically against the nation they worked with (e.g., *Lax Kw'alaams*; Martindale 2014). These concerns are unlikely to disappear in future litigation, as the assessment of evidence (and therefore, truth) will always be the outcome between competing opinions.

What can archaeologists do to prevent their research from such potential tampering? I suggest, on the basis of my interviews, that archaeologists must 1) be cognizant of the fact that their research will be evaluated through a legal framework; and 2) ensure that their research methods, analyses, and final products are based in rigorous and objective standards. As Randy Kandel (1992:4) emphasizes, "anthropologists [and I argue, archaeologists, must] understand that their expert

insights must be comprehensible to, and will inevitably evaluated within, the rational framework of the law."

Lawyers must work with archaeologists to translate archaeological data into legal evidence, ensuring that archaeologists' opinions are based on clear, cogent evidence. Experts have to be prepared to defend their research and to thoroughly explain their research methods and outcomes to judges, who often have limited knowledge of the discipline. Research "needs to have integrity and credibility" to hold up in court (Participant 19), and archaeologists need to know the limitations of their data and be able to either think of innovative ways around them or speak up to the limitations (Participant 18).

This is not unique to archaeologists, but something that expert witnesses from all disciplines must recognize. All experts must be able to explain their research to the court, deal with the adversarial nature of testifying, and be prepared to defend their academic credentials and professional standing. However, archaeologists, particularly those with working relationships with claimant Indigenous nations, must take strides to minimize the potential of their data being used against the people they work for or with, by ensuring that their data collection, analysis, and research outcomes are based in rigorous and objective standards that can be explained to non-experts.

Chapter 5. Archaeological Data as Evidence in Aboriginal Rights and Title Litigation in Canada

The goal of my dissertation was to understand the use and consideration of archaeological data as evidence in Aboriginal rights and title litigation in Canada. I undertook three studies in pursuit of this overall goal. My first study (Chapter 2) framed the history of Aboriginal rights and title jurisprudence through the use and consideration of archaeological evidence by Canadian courts. It indicated that archaeological data's ability to show evidence of pre-contact occupation and use of land has made it important in multiple court decisions, but its inability to indicate continuity or aspects of subsistence or economic systems can be major limitations to its utility as valuable evidence. My second study (Chapter 3) examined the archaeological data considered in the 2007 British Columbia Supreme Court *Tsilhqot'in* decision. My examination showed that archaeological evidence was an effective strategy to indicate occupation in the Claim Area at the time of sovereignty. My third study (Chapter 4) investigated interviews with archaeologists and lawyers to assess the role of expert witnesses and archaeological data in Aboriginal rights and title litigation. The results of my interviews suggest that archaeological data can be excellent evidence to indicate occupation and use, which is essential for the legal framework for Aboriginal rights and title. This concluding chapter outlines the results of my three studies, discusses the limitations of archaeological evidence, and outlines my study limitations and potential future directions.

Archaeological Data and the Tests for Aboriginal Rights and Title

The legal tests to prove Aboriginal rights and title first emerged in *Calder* (1973), when the Supreme Court first acknowledged Aboriginal title. The criteria to prove Aboriginal rights requires proof of distinctive pre-contact activities and continuity between the claimed right and those pre-contact practices (*Van der Peet* 1996). In comparison, the criteria for Aboriginal title stems from land use and occupancy and

requires proof of continuous, exclusive, and sufficient occupation (*Delgamuukw* 1997; *Marshall; Bernard* 2005; *Tsilhqot'in* 2014). Scholars have taken issues with the tests, particularly objecting to the peril that methods used to prove rights may fossilize Indigenous identity (Asch 2000; Barhs and Henderson 1997; Borrows 1997; Lambert 1998).

My three studies indicate that archaeological data can inherently fit within the test for Aboriginal title. This is particularly evident in *Baker Lake* (1979), where the first test for Aboriginal title was described. The positive consideration of archaeological evidence in the decision, and the emphasis on the test's requirement of pre-sovereignty occupation, suggests that the court recognized archaeology's potential as evidence. This is echoed in Kent McNeil's seminal work, *Common Law Aboriginal Title* (1989:201–202), in which he describes essential elements of land occupation, including permanent dwellings and resource gathering. Not only does his description illustrate potential archaeological data, but it is also cited in many key Aboriginal title decisions including *Delgamuukw* (1997:para. 149) and *Tsilhqot'in* (2007:paras. 544, 684). The test for Aboriginal title stems from principles of common law occupation and was not created with archaeology specifically in mind. However, archaeology's use as a source of evidence since the body of litigation suggests that it is inherently relevant to the assessment of Aboriginal title.

Archaeological data have been used as evidence in the tests for Aboriginal rights and title, particularly in conjunction with other data types. Chapter 2 outlined 17 cases in which archaeological data were considered. Of these 17, I suggest that archaeological evidence was influential in ten (Table 1). Archaeological data's strengths are its ability to show pre-contact or pre-sovereignty occupation and use of land. For the test for Aboriginal rights, this is evidence of pre-contact activities and their integrity within a culture. Archaeological evidence included basic faunal analyses (e.g., *Lax Kw'alaams* 2011), trade items such as dentalia shells (e.g., *Ahousaht* 2013), and evidence of hunting and fishing (e.g., *Adams* 1996). For Aboriginal title, this is evidence of continuous and

sufficient occupation of a territory. Archaeological evidence included evidence of seasonal and long-term dwellings throughout a Claim Area (e.g., *Baker Lake* 1979; *Marshall*; *Bernard* 2005; *Tsilhqot'in* 2014), as well as lithic and faunal analyses (e.g., *Baker Lake* 1979; *Tsilhqot'in* 2014). Chapter 3 indicated that housepit sites through the *Tsilhqox River Corridor* provided key evidence that helped extend Aboriginal title in the *Tsilhqot'in* trial (2007). Chapter 4 outlined that both archaeologists and lawyers see the benefit of archaeological data, in that it can indicate where people were living and what resources they were using (e.g., Participant 11). Indeed, the "insight that archaeology provides is fundamental to the legal and even the political support for the idea of Aboriginal rights and title" (Participant 20).

The Limitations of and Issues with Archaeological Evidence and Experts

Although archaeological data can be evidence of pre-contact (or pre-sovereignty) occupation and use of a territory, there are limits to its utility. Primarily, these limitations relate to the nature of the archaeological record. The material record is itself biased and incomplete. Archaeologists have recognized potential biases in their methods and analyses, both in presentation and interpretation, for decades (e.g., Beck and Jones 1989:244; Binford 1977; Burke et al. 1994:20; Hegmon 2003:224; Knapp 1996:152). Where archaeologists choose to conduct research, the sampling and analytical strategies they employ, and the types of data they collect all lead to various prejudices. Theoretical strategies, such as processual archaeology (Binford 1962, 1977; Clarke 1973), attempted to reduce bias through scientific and objective procedures. More recently, concepts from post-processual archaeology have encouraged archaeologists to be "critically aware" of their potential biases and implications of archaeological research (Hegmon 2003:224).

The archaeological record speaks directly and consistently to the fact that an absence of evidence does not equal evidence of absence. In addition to sampling biases that may restrict where archaeological investigations take place, not all cultural

materials preserve through time. Archaeological data are only useful where they exist and may not be able to indicate certain cultural activities, such as trade in perishable resources. This is borne out in the cases discussed. For example, in *Smokehouse* (1990), Richard Inglis presented archaeological evidence of 4,000 years of trade on the British Columbia coast. However, his inability to show evidence of *food* trade that met the standards of the court made his case for selling, trading, or bartering fish "tenuous" (1990:para. 25). In *Van der Peet* (1991), although two archaeologists emphasized trade of non-perishable items (1991:paras. 16, 17, 21, 25), their inability to again show *food* trade made the British Columbia Supreme Court state that "no regularized trade in salmon existed in Aboriginal time" (1991:para. 28). Although this limitation of the use of archaeological evidence in litigation is important, three other limitations deserve a deeper discussion: 1) the perceived biases of expert witnesses; 2) the interpretation of archaeological evidence; and 3) identifying ethnicity in the archaeological record. I discuss these three limitations below and suggest ways archaeologists can attempt to reduce them.

Perceived Biases of Expert Witnesses

The role of an expert witness is to provide an objective, informed opinion on specialised subjects to aid the court (*Criminal Code* 657.3; Paciocco and Stuesser 2008:184). Although the Supreme Court has outlined rules for expert witnesses to limit impartiality and bias (e.g., *Burgess* 2015; *Mohan* 1994), there are still issues with expert bias, particularly in Aboriginal rights and title litigation. These concerns include the education and training of the Canadian judiciary, issues with social science research methods, and working for the Crown.

Expert witnesses in Aboriginal rights and title litigation often have to perform double duty, as they must explain both their opinion to the court and their disciplinary norms and practices (Thom 2001:13–15). Unfortunately, Canadian judges are not likely to have a deep understanding of Indigenous cultures in Canada. They may need to be informed of basic facts, such as the absence of totem poles in the British Columbia

interior (Participant 11; Thom 2001:14). It is important for expert witnesses to recognize these educational limitations and assist judges in learning more (Lane 1988:11, cited in Thom 2001:14).

Canadian judges are not social scientists and do not have years of training to help them understand basic anthropological concepts like ethnocentrism or cultural relativism. Indeed, their misunderstandings of these concepts have led to misinterpretations of expert evidence (Ridington 1992:12; Thom 2014:14–15). For example, in *Bear Island*, Justice Steele's inability to understand the use of analogy in the social sciences made him "doubt the credibility" of the anthropological and archaeological evidence presented by expert witnesses (1985:paras. 45, 48). The most famous case of the misunderstanding of basic social science concepts is the *Delgamuukw* trial (1991), where Justice McEachern completely rejected anthropological evidence. He was unable to understand the use of cultural relativism to place Gitksan and Wet'suwet'en cultural practices in contrast with the dominant Western culture. This led him to conclude that the expert anthropologists were "more an advocate than a witness" (*Delgamuukw* 1991:para. 251) and were biased towards the Indigenous plaintiffs (Asch and Bell 1994:545; Cruikshank 1992; Culhane 1992, 1998 Thom 2001:14; Ridington 1992:16).

These issues can make it challenging for expert witnesses to be considered neutral and unbiased. My interviews with archaeologists and lawyers indicated another issue for archaeological expert witnesses—their perceived unwillingness to work for the Crown. Archaeologists who have built their careers by working with Indigenous groups may be unwilling to risk future employment by working for the Crown (Participant 22). These sentiments can make it challenging for the Crown to find credible expert witnesses. Crown counsel is sometimes forced to hire less-qualified experts (Participant 21) or rely on in-house expertise, such as researchers from the Attorney General's office (Participant 22). Several archaeologists spoke about dealing with Crown experts who

were not trained in the disciplines in which they were supposed "experts" (e.g., Participant 5).

However, this is a double-edged sword: the court typically appreciates experts who have worked for a variety of parties, because if they have just worked for First Nations (or for the Crown), then "their objectivity is open for questioning because the risk is that they have confused their objective role as researchers or scholars with their personal advocacy" (Participant 19). What should come first, for expert witnesses, is providing an honest and objective opinion based on credible research, no matter which party the expert is representing (Dyck 1993; Foster and Grove 1993:232; Kew 1993:94–95; Thom 2001:15).

How to Reduce Biases

Brian Thom (2001:14) suggests that to reduce the likelihood of bias, experts should present rigorous evidence and explain concepts to help the court understand their data. My studies emphasize this point. When archaeologists are considered to be objective researchers by the court, their evidence is more likely to be given weight. For example, Justice Vickers cited both archaeological expert witnesses' evidence throughout his discussion of the occupation of Claim Area sites (*Tsilhqot'in* 2007:227–292). The *Baker Lake* decision (1979:paras. 15–25) cites archaeological evidence as the primary example of pre-sovereignty occupation of the Claim Area. In *Adams*, archaeologist Bruce Trigger's evidence of pre-contact Mohawk hunting and fishing allowed the court to state that "fishing for food … was a significant part of the life of the Mohawks" (1996:para. 45) and was sufficient to satisfy the test for Aboriginal rights (1996:para. 46). Archaeological research "needs to have integrity and credibility" to hold up in court (Participant 19). I argue that archaeologists must present rigorous, scientifically sound evidence to the court to reduce perceived biases and help the court better understand their discipline, its inherent biases, and its unique strengths.

The Interpretation of Archaeological Evidence

Asch and Bell (1994:505) suggest that a major difficulty in Aboriginal rights and title litigation is that judges influenced by a "Canadian legal ideology" struggle to interpret evidence from outside of their own culture. Judges' reasonings may not be culturally relative and may place greater emphasis on the familiar, which can ignore non-traditional lines of evidence such as oral histories in favour of historical documents.

The Supreme Court has emphasized that oral history evidence must now be considered in equal weight to other forms of evidence (*Delgamuukw* 1997). It has also outlined that evidence of sufficient occupation must be considered using a culturally sensitive approach (*Tsilhqot'in* 2014:para. 50). However, some forms of evidence, such as oral histories or ethnographies, may still be confusing to the court. Experts must be careful to fully explain the norms of their discipline and illustrate their opinions in ways that non-experts can understand.

Law functions under a different system than social science disciplines, including archaeology (Kandel 1992). Scientific reasoning is positivistic, using hypothesis testing to turn the world into knowable concepts (Denzin and Lincoln 2011:10). Informed either deductively or inductively, scientific evidence is used to support or justify inferences (Upshur 2001:8). In comparison, legal evidence is data that the court uses to understand the facts of the case (Paciocco and Stuesser 2008:1). It is interpreted in different ways, parsed into its constituents, and argued over by opposing counsel. The inevitable result is court assignments of different weights to evidence, depending on their opinion of its validity. Judges make decisions based on the "force of law as a normative system of principles and rules" and determine "the legal norms that apply to the historical [and other] facts that have been ascertained by evidence" (McNeil 2014:201).

There can be challenges when these two different systems of reasoning meet. Legal scholars suggest that the fundamental differences between how truth is conceived in legal and academic spheres can be challenging for the trier of fact in assessing expert

evidence (Dwyer 2008:12; Gold 2003:231; Jasanoff 1995:44, 205; Kandel 1992:4). Legal truth is an outcome between competing viewpoints (Kandel 1992:4; Miller 2011:38) and can change depending on case. Evidence can be malleable as it is considered within this moral and normative setting and weighed against opposing viewpoints. During cross-examination, experts can be confronted with different opinions from within their own discipline and asked to explain why theirs is more correct. For example, one archaeologist I interviewed discussed a time when their colleague's work was used against them in court (Participant 4).

Judges may struggle to interpret expert evidence, as they often must decide between two opinions on the same body of knowledge (as experts from the same field may be representing opposing parties). For example, in *Tsilhqot'in* (2007), Justice Vickers had to assess the opinions of several anthropologists on the use and consideration of oral history. He rejected the opinion of the Crown's expert witness, stating that his approach "is not supported by the jurisprudence" (2007:para. 156) and that he would consider oral history from the Aboriginal perspective (Participant 30; Ray 2015; *Tsilhqot'in* 2007:para. 156).

Some scholars have suggested that a major issue with the legal use of social science evidence is that Aboriginal rights and title litigation takes place within a Euro-Canadian legal system (Asch and Bell 1994:549; Borrows 2015a:134; Kristmanson 2008:248; Martindale 2014). John Borrows (2017) furthers this statement by arguing that Aboriginal rights and title are conceptualized by history (pre-contact claims). He suggests that although expert evidence may be sound, the court's framework to assess this evidence is not, as it "builds on the Crown and the courts' narrow foundations … [and] reinforces a search for past examples or Aboriginal practices, rather than empowering present-day Indigenous claims" (2017:116). Canadian courts, through their fundamental understandings of Aboriginal rights and title, are forced to interpret expert evidence through narrow frameworks and colonial analogues of Aboriginal rights.

How to Reduce Misinterpretation of Evidence

Archaeologists, particularly when acting as expert witnesses, must keep two issues in mind: 1) Aboriginal rights and title, as understood by the Canadian courts, is framed within Euro-Canadian concepts of occupation, possession, and rights. Archaeological data is often framed to fit within these narrow categories and might disempower Indigenous understandings of land title. 2) Law and social science come from two different cultural systems. The way facts are evaluated in law can make evidence malleable in unforeseen ways.

It is not within archaeologists' power to change or challenge these fundamental issues as to how their data are considered by Canadian courts. Instead, they must attempt to minimize the malleability of their data. As I have articulated throughout my dissertation, this can be achieved most easily by helping the trier of fact interpret their data. Archaeologists should do this by 1) explaining their disciplinary norms; 2) ensuring that their research methods, analysis, and final products are based in rigorous and objective standards; and 3) outlining their opinions in ways that non-experts can understand.

Identifying Ethnicity in the Archaeological Record

Identifying and tracking ethnicity[70] through the material record has been a major aspect of the discipline of archaeology (Díaz-Andreu 2015:4817; Lucy 2005:86). Indeed, culture-historical archaeology grew out of the idea that ethnicity shaped human history (Trigger 2006:211). By the end of the nineteenth century, archaeologists throughout Europe were creating and identifying artifact assemblages connected to different ethnic groups or "archaeological cultures" (Trigger 2006:233). V. Gordon Childe (1929:v–vi) defined archaeological culture as "certain types of remains … constantly occurring

[70] Jones (1997:xiii) defines an ethnic group as "any group of people who set themselves apart and/or are set apart by others with whom they interact or co-exist on the basis of their perceptions of cultural differentiation and/or common descent." Ethnicity is "all those social and psychological phenomena associated with" group identify (1997:xiii).

together." Although diagnostic artifacts could be used to define or identify a culture, they were not sufficient enough to describe it (Trigger 2006:246). In North America, early culture-history identification schemes, such as the Basketmaker-Pueblo chronology and the Midwestern Taxonomic method, classified archaeological data as cultural units that were assumed to be the archaeological expression of an Indigenous group (Trigger 2006:282–284). Culture-historical archaeology, as argued by Siân Jones (1997:5), can be seen as the "empiricist extraction, description and classification of material remains within a spatial and temporal framework made up of units which are usually referred to as 'cultures' and often regarded as the product of discrete social entities in the past."

Processual, or New Archaeology, saw culture as a functioning system rather than a framework for a certain group of people and largely did not concern itself with the identification of ethnicity (Jones 1997:5; Lucy 2005:91). More recent movements, including the diverse disciplinary perspectives born out of post-processual archaeology, have provided a stage to critically explore archaeology's role in constructing ethnic identity (Curta 2014:2511–2512; Jones 1997:6). Archaeologists began to challenge the assumption that ethnic groups were characterised by a material assemblage and that change to that assemblage meant a change in ethnicity. Sam Lucy (2005:91–93) outlines multiple studies that have questioned the correlations between ethnic groups and material culture, language, and genetic data. Others have questioned the historical basis for identifying groups of people, indicating that artifact assemblages may not coincide with actual ethnic groups (e.g., Clarke 1968; Jones 1997:109; Shennan 1989). Archaeologists in North America have discussed the ability of material culture to indicate ethnicity through style. Some have argued that artifact style was intended to indicate group identity (Sackett 1977; Wobst 1977). Others have suggested that instead, archaeologists need to consider all stages of production, as the entire manufacture and use of the artifact can indicate ethnicity (Dietler and Herbich 1998; Edmonds 1990).

Jones (1997:6) connects the issues of ethnic identification in archaeology with Indigenous land claims. She suggests that "the use of archaeology in the construction and legitimation of national identities and territorial claims is far more extensive than generally assumed." Nationalistic claims use archaeological evidence to indicate a past homogenous ethnicity to which they can trace their origins. Other archaeologists use different approaches to identify diverse and fluid past identities, which can negate nationalistic claims (e.g., Barth 1994:30; Jones 1997:142). However, this idea of a fluidity of identities can also undermine Indigenous land claims. In these cases, Indigenous peoples:

> Often have to choose between an outright rejection of a culture-historical representation of their past, or a renegotiation of the ways in which their particular culture-historical trajectory has been interpreted by others. The former option would in most instances require a change in the legal definition of Indigenous land ownership, whereas in many cases the latter option will not satisfy a court of law which gives precedence to historical documents and archaeological facts (Jones 1997:142).

These issues are apparent in Aboriginal rights and title in Canada. Concepts of culture and ethnicity identified through time are embedded in the tests for Aboriginal rights and title. The criteria to prove Aboriginal rights requires evidence of continuity between the claimed right and the pre-contact practices on which it is based (*Van der Peet* 1996). The criteria for Aboriginal title requires evidence of continuity of occupation before and after sovereignty assertion (*Delgamuukw* 1997; *Marshall; Bernard* 2005; *Tsilhqot'in* 2014).

In court, archaeologists, by the nature of their research and the requirements of the tests for Aboriginal rights and title, attempt to provide data that indicate continuity (of the claimant group) over time. This has had varying levels of success, particularly in regions with overlapping territories. For example, in *Delgamuukw* (1991:158), archaeological evidence established early habitation at some sites within the claimed territory but "not necessarily by Gitksan or Wet'suwet'en ancestors of the plaintiffs." In *Tsilhqot'in* (2007), on the other hand, archaeological evidence indicated 500 years of

Tsilhqot'in occupation in the Claim Area and included markers specific to the Tsilhqot'in, such as housepit style and lithic types.

How to Reduce Issues with Ethnic Identification

Some scholars have suggested that the only way archaeologists can effectively study ethnicity is from a local level, using detailed analyses to understand discrete relationships between artifacts and spatial patterning (Curta 2014:2512; Lucy 2005:109). Jones (1997:144), however, argues that archaeologists:

> Need to examine, and take responsibility for, the way in which the modes of classification and interpretation used in archaeology have been involved in the constitution of power relations between groups, providing the basis for practical relationships and strategies, as well as the attribution of political legitimacy in the contemporary world.

As discussed in the introductory chapter, archaeologists and other heritage practitioners are recognizing the colonial basis of their discipline and are "transforming" their practices (Atalay et al. 2014) to work in more ethical collaborations with Indigenous peoples (e.g., Angelbeck and Grier 2014; Colwell 2016; Hammond 2009; Little 2013; Lyons 2013; Nicholas 2014; Welch et al. 2011). Likewise, international policies and ethical codes require archaeologists to recognize the responsibilities of working with Indigenous and other descendant communities (Hogg et al. 2017; McGill et al. 2012; Register of Professional Archaeologists and Chartered Institute for Archaeologists 2019).

As part of archaeologists' ethical responsibilities, they should be aware that their research data have the potential to be used as evidence in land claims. Research standards and recommended practices are one means to create guidelines for archaeologists to follow in developing and interpreting data that may be used as evidence. These should include recommendations for the types of classifications and interpretations employed in identifying Indigenous groups in the archaeological record. These are challenging issues for Canadian archaeologists, particularly for those working in British Columbia, where a lack of historical treaties and overlapping territories mean that many Indigenous nations have overlapping claims. Archaeologists, particularly

those working with or for Indigenous nations, may have to deal with the political consequences of interpreting ethnic boundaries (e.g., Supernant and Warrick 2014:567–573).

My assessment of the use of archaeological evidence in Aboriginal rights and title litigation suggests that identifying ethnicity in the archaeological record is a *major* limitation and one that archaeologists may not, and in some cases, cannot, work around. This is primarily due to two facts: 1) the discipline of archaeology is not always adept at defining patterns in space and time or testing its assumptions and hypotheses; 2) the court struggles to understand social science disciplinary norms and may not be able to effectively evaluate archaeological data. Therefore, archaeologists must work to reduce these two issues by ensuring that their research is based on rigorous and objective scientific standards and helping the trier of fact interpret their data. In some cases, the nature of the available data may assist archaeologists in indicating ethnic continuity, such as in *Tsilhqot'in* 2007 where Morley Eldridge was able to triangulate historical village sites with archaeological sites and R.G. Matson was able to adequately articulate his evidence for Tsilhqot'in occupation in a way that Justice Vickers could understand.

A Path Forward

My discussion of these three major limitations—perceived bias, interpretation of evidence, and identifying ethnicity—outline one path forward for archaeologists. Archaeologists need to be cognizant of the differences between the courts and their disciplinary peers. Facts, evidence, and truth are very different concepts in archaeology and law, and archaeologists should recognize that their data and evidence will be interpreted through the moral and normative context of the court. Hopefully, when acting as expert witnesses, lawyers will assist archaeologists in understanding these differences and prepare them to defend their opinions. To bring these two cultural systems closer together, archaeologists must aid the court in understanding their disciplinary norms, research methods, and outcomes. All archaeologists *must* ensure

that their research methods, analyses, and final products are based in rigorous and objective standards. As any research has the potential to end up as evidence in litigation, with or without permission from the researcher, it is essential that all archaeologists attempt to maintain rigorous research standards. This is the only way that archaeologists can minimize these limitations and ensure that their research outcomes are fairly interpreted and evaluated in litigation.

Study Limitations and Future Directions

My dissertation indicates that archaeological data can be important evidence in litigation. Archaeological data can indicate pre-contact occupation and use of specific places in a territory, meeting criteria for the tests for Aboriginal rights and title. Its limitations, and challenges in presenting it at court, can be partially remedied by ensuring robust research standards based on research standards and rigorous methodologies. However, there were intentional and unintentional limitations to my research. Here I discuss these limitations and suggest future directions for further research.

Intentional Limitations

My most pressing limitation was the types of data I was able to access. Court documents can be difficult to obtain. Although the courts have detailed policies on public access to court files (e.g., Supreme Court of British Columbia 2019), it can take time and money to access court records. Some court documents are retained for a certain timeframe and then may be destroyed (Personal communication with Sandy Lockhart, JD 2018). You must pay a fee just to view the file details for a British Columbia Supreme Court case (Ministry of Attorney General 2019). Publicly accessible transcripts of court proceedings are available via official court transcription companies, who are paid based on a per-page basis (J.C. WordAssist Ltd. 2019).

I was able to access additional court records for just two cases: *Delgamuukw* (1997) and *Tsilhqot'in* (2014). The *Delgamuukw* trial (1991) transcripts are available through the University of British Columbia Library (UBC Open Collections 2013). The lawyers for the Tsilhqot'in have made some of the Plaintiff's documents accessible via their website (woodwardandcompany.com). However, it was practically and financially impossible for me to access additional documents from other cases.

I knew that access to court records would be a problem from the beginning of my research process and, therefore, I came up with two strategies to resolve the problem. First, for my first study (Chapter 2) I chose to examine court decisions, which are publicly available. Although this strategy reduced the detail of my examination, it allowed me to examine a greater number of cases. If I had analysed court transcripts and additional documents, I would not have been able to study as many cases (due to both the cost of access and time to analyse). Second, I chose to undertake an additional study (Chapter 4), in which I interviewed archaeologists who had acted as expert witnesses and the lawyers with whom they worked. This additional data source, although likely not as rich as analysing trial transcripts, provided me with individual perspectives about the expert witness process and the use of archaeological evidence.

I agree with Helen Kristmanson's (2008:37) statement that the inaccessibility of legal documents, including opinion reports and transcripts, makes it challenging for archaeologists (and other scholars) to assess how archaeological evidence is presented and assessed in legal contexts. Having access to these documents would have allowed for a deeper analysis of court proceedings and their understanding of archaeological knowledge. For example, access to transcripts would have provided insight into dialogue between archaeological experts, legal counsel, and judges. I could have studied what types of archaeological data were most at issue in cross-examination and compared them between cases.

Another intentional limitation was who I chose to talk to and study. I considered the use of archaeological data solely from the perspective of archaeologists and the

Canadian legal system. This enabled me to narrow my topic and to focus on the issues at stake for practicing archaeologists. However, I intentionally cut out the Indigenous peoples who had been involved in legal proceedings. Although intentional, I am missing an important perspective.

It would have been valuable to include an Indigenous perspective for two reasons. First, I intentionally cut out the people who are at the heart of these court decisions. An Indigenous perspective would have made my study richer and brought a deeper perspective into my data. I could have considered how Indigenous nations involved in Aboriginal rights and title consider archaeological evidence—what are *their* perspectives on its use? Second, it would have been valuable to consider this topic from an Indigenous legal perspective, to understand how archaeological concepts of sufficient occupation and use translate into Indigenous legal systems. Indigenous law is an important topic for Canadian legal scholars (e.g., Asch et al. 2018; Borrows 2016a, 2016b, 2019; Friedland 2012; Napoleon 2013; Napoleon and Friedland 2014, 2016).[71] I could have considered what archaeological evidence relevant to Aboriginal rights and title would look like from an Indigenous legal perspective. How would Indigenous legal systems consider questions such as sufficient occupation and use? How would they compare to the Canadian legal requirements?

Unintentional Limitations

An unintentional limitation was the information I received during interviews with archaeologists who had acted as expert witnesses and the lawyers with whom they worked. These interviews provided me with an additional perspective that I would otherwise have lacked. I assumed that I would be able to use these interviews as an analogue to court transcripts—that archaeologists would remember verbatim what happened during their testimony. Of course, this was rarely the case. Many of the cases

[71] The University of Victoria Faculty of Law recently started a joint degree program in Canadian common law and Indigenous legal orders, in which students graduate with two degrees, a Juris Doctor (JD) and a Juris Indigenarum Doctor (JID) (University of Victoria Law 2019).

I discussed with archaeologists (and lawyers) had occurred over 20 years ago. Participants were unable to remember exact details from their research process or experiences testifying. In addition, archaeologists and lawyers sometimes discussed with me ongoing cases about which they were unable to share details. These two issues meant that I was not always able to obtain the detailed information I expected.

An additional unintentional limitation was my choice in dissertation style. Although I intentionally chose to write this dissertation as articles (my three studies), it had unintended consequences. A three-article model allowed me to frame my research questions from three different lenses, allowing for three separate but integrated perspectives. I intended that these three studies would already be published articles by the time of my defense. However, due to timing, this did not happen. Adjusting article drafts into three coherent chapters proved more challenging than expected. Published articles require strict adherence to word count and style, resulting in sometimes condensed writing. In addition, I had often explained the same concepts in each article, resulting in overlap and issues with consistency of terms. Finally, this was the first time my committee had dealt with a three-article framework for a dissertation, and it took time for all of us to work out the details. I would caution future scholars that it can be challenging to adapt social science writing to the three-article framework. If I were starting over, I likely would have chosen to write this dissertation using a more traditional model, which would have provided me with more flexibility in addressing my methods and research literature.

Future Directions

I studied the use of archaeological evidence in litigation from a very narrow perspective, focusing on court decisions and interviews. There are many other ways I could have addressed my research questions and many future directions in which to further study these issues. I suggest that promising future directions would include

ethnographic study of future trials, the analysis of court transcripts, and the consideration of Indigenous perspectives.

An ethnographic study of future Aboriginal rights and title trials would make for a detailed study of the use of archaeological evidence, as well as many other topics. Ethnography is not a new idea in the study of law and has been used to study legal behaviour, the conduct of litigants, and the legal and institutional history of courts (e.g., Conley and O'Barr 1988; Khorakiwala 2017; Nader et al. 1966). Related to Aboriginal rights and title, Robin Ridington (1992) discussed her observations as a witness to the *Delgamuukw* trial and Richard Daly (2005) provided his own ethnography of the *Delgamuukw* case, from his experience as the anthropological expert witness for the Gitksan and Wet'suwet'en plaintiffs. An ethnographic study of upcoming cases, including the Haida title case (Hudson 2018), would be a valuable study into the use of archaeological evidence, the interactions between legal participants, and the construction of the court process.

A detailed analysis of court transcripts would also provide valuable information about the use of archaeological data in litigation. Helen Kristmanson drew on court transcripts for part of her analysis of the history of Aboriginal rights and title in her 2008 dissertation. Judy Banks examined expert witness reports to assess the use of oral history by Crown expert witnesses in her 2008 Master's thesis. However, there has never been an in-depth study of court transcripts to assess how archaeological data are considered in the court process. An analysis of transcripts could study dialogue between archaeological expert witnesses, legal counsel, and judges. It could examine what types of archaeological data were most questioned during cross-examination and then compare them between different cases.

Examining the use of archaeological evidence in Aboriginal rights and title litigation from an Indigenous perspective would provide a much richer analysis of these issues. As Indigenous peoples are at the heart of land claims, including their perspectives would create a deeper evaluation. As discussed above, future research

could accomplish this in two ways. First, future studies could incorporate interviews with members of Indigenous nations who have been (or are currently) involved in rights and title litigation. How do they consider archaeological evidence and what are their perspectives on its use? Second, future studies could consider the use of archaeological data from an Indigenous legal perspective. How would Indigenous legal systems consider criteria for Aboriginal title? What archaeological data would be required to meet these concepts (or would it even be required)? The inclusion of Indigenous legal thought would provide a valuable perspective that would counter-balance the Canadian (colonial) legal system.

The Future Use of Archaeological Evidence

Government legislation and international policies have established archaeologists as primary authorities for interpreting and valuing much of the material record of pre-contact occupation (Hogg et al. 2017:189). Academic discourse and ethical codes emphasize ethical engagements with Indigenous communities (e.g., Atalay et al. 2014; McGill et al. 2012; Supernant 2018). I argue that archaeologists are unique in working directly on the land and with the heritage of Indigenous peoples and, therefore, their research products can have a direct contribution to issues related to Aboriginal rights and title. Although no one should be obligated to act as an expert in litigation, archaeologists do have a responsibility to be aware of how their research has been used and has the potential to be used as evidence in these cases.

My dissertation illustrates that archaeological research has a long history of acting as evidence in Aboriginal rights and title litigation. Archaeological evidence of occupation sites and lithic and faunal analyses fit squarely with accepted definitions of occupation (e.g., McNeil 1989). Indeed, the use of archaeological data to provide tangible evidence of occupation and use may outweigh its limitations, including the inherent limits of the material record and the inability to indicate ethnicity. My examination of the archaeological evidence considered in *Tsilhqot'in* (2007) outlines the

potential for the continued use of archaeological data in litigation, particularly in light of the Supreme Court's (2014) acceptance of a territorial approach to Aboriginal title. This approach would be consistent with archaeological land-use patterns and could allow for a greater variety of archaeological data as evidence.

Archaeological research will continue to be used as evidence in litigation, with or without the knowledge or consent of the originating researchers. How then do archaeologists ensure that their research is understood and interpreted effectively by non-experts? I suggest that archaeologists should ensure that their research products, including primary data such as testing and excavation reports, as well as final reports and articles, are written as clearly as possible. Reports should include executive summaries that can be understood by non-experts, and data, where possible, should be accessible. Archaeologists should adhere to principles of plain and inclusive language (Center for Plain Language 2019), no matter who the intended audience. Basic guidelines for reporting research outcomes (e.g., University of Bern 2009) can minimize the misinterpretation of research outcomes and help non-experts, such as lawyers and judges, understand the value of archaeological research.

In conclusion, I would draw the reader's attention to the quote at the beginning of Chapter 1. As my interview participant outlined, archaeology as a discipline is innately embedded in colonial history, as is the Canadian legal system. Practicing archaeologists need to be aware of their discipline's implicit biases and understand how these biases might impact their work. Borrowing from Kisha Supernant (2018:149), Canadian archaeologists need to work towards a future where "culturally-appropriate methods and approaches to archaeology, as defined by Indigenous peoples through their engagement with the discipline, are applied throughout the lands currently called Canada." The need for relationships, partnerships, and collaborations with Indigenous and descendant communities is not a new concept (e.g., Atalay 2006; Atalay et al. 2014; Colwell 2016; Guilfoyle and Hogg 2015; Klassen 2013; Klassen et al. 2009; Little and Shackel 2007; Lyons 2013; Nicholas and Andrews 1997; Welch et al. 2011; Zimmerman

2008). However, what also needs to be included are standards of practice that mandate rigorous research methodology while working within the protocols of Indigenous and international heritage policies (e.g., Stó:lō Nation Lalems ye Stó:lō Si:ya:m 2003; Union of British Columbia Indian Chiefs 2013; United Nations General Assembly 2007).

Some have argued that to truly reconcile Indigenous land issues in Canada, Aboriginal rights and title need to be adjudicated outside of the colonial (and adversarial) setting of the court (Kristmanson 2008:249, *Tsilhqot'in* 2007:para. 1340). Although I agree, my research indicates that archaeological research will continue to be used as evidence in land claims, in judicial or quasi-judicial settings, for years to come. To ensure that their research is understood and interpreted as intended, archaeologists should be aware of its potential implications, follow rigorous and objective research methods and practices, and ensure that their research outcomes are written as clearly as possible.

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Appendix A.

Table A. Brief Descriptions of Canadian Aboriginal Rights and Title Litigation Discussed within the Dissertation, in Alphabetical Order.

Case (cited at the highest court)	Description
Ahousaht Indian Band and Nation v. Canada (Attorney General) 2013 BCCA 300, [2013] 364 DLR (4th) 26	The Nuu-chah-nulth claimed an Aboriginal right to fish on a commercial basis on the west coast of Vancouver Island. The BCSC agreed, and Canada appealed to the BCCA, which dismissed most of the appeal. Canada appealed to the SCC, which sent the case back to the BCCA to be considered in accordance with its recent *Lax Kw'alaams* (2011) decision. The BCCA again determined Nuu-chah-nulth *have* an Aboriginal right to fish and sell fish, except for the geoduck industry.
Calder et al. v. Attorney-General of British Columbia [1973] SCR 313, 1973 CanLII 4 (SCC)	The Nisga'a Nation sued the BC Attorney General for Aboriginal title of Nisga'a traditional territory. Both the BCSC and the BCCA rejected their claim. The SCC split on Nisga'a title but recognized Aboriginal title for the first time, which re-opened treaty negotiations with the federal government.
Delgamuukw v. British Columbia [1997] 3 SCR 1010, 1997 CanLII 302 (SCC)	Gitksan and Wet'suwet'en claimed Aboriginal title to their traditional territory. The BCSC rejected their claim and the BCCA sent the case back to trial. However, they were granted leave to appeal to the SCC, which was unable to grant title due to a defect in the pleadings but stated that the laws of evidence must be adapted to accommodate oral history evidence.

Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73, [2004] 3 SCR 511	The Haida Nation brought an action against Weyerhaeuser and the Provincial Crown for failing to consult or gain consent before renewing a tree farm license on Haida Gwaii, in an area where the Haida Nation claimed Aboriginal title and a right to harvest red cedar. The BCSC found that the Crown has a moral, not legal, duty to consult. The BCCA reversed the decision and held that both the Crown and Weyerhaeuser have a duty to consult and accommodate. The SCC found that the Crown has a duty to consult and accommodate Indigenous peoples grounded in "the honour of the Crown," which applies even where title has not been proven.
Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development) [1979] 3 CNLR 17, 1979 CanLII 2560 (FC)	The Inuit of Baker Lake claimed Aboriginal title to prevent the government from issuing mining permits on their territory. The FC granted Aboriginal title, but it only encompassed the right to hunt and fish.
Lax Kw'alaams Indian Band v. Canada (Attorney General) 2011 SCC 56, [2011] SCR 535	Lax Kw'alaams Nation claimed an Aboriginal right to the commercial harvesting and sale of fish and a lesser right to engage in a commercial fishery in the Nass and Skeena river estuaries. The BCSC rejected the commercial fisheries claim, which was upheld at the BCCA. The SCC agreed and dismissed the appeal.
MacMillan Bloedel v. Mullin; Martin v. R. in right of BC [1985] 61 BCLR 145, 1985 CanLII 154 (BCCA)	MacMillan Bloedel sought an injunction to stop logging protestors from blocking access to Meares Island (near Tofino, BC) and the Clayoquot and Ahousaht Bands sought an injunction to prevent MacMillan Bloedel from logging Meares Island as they prepared an Aboriginal title case. The BCCA granted a temporary injunction to the bands, and the title case was later adjourned by all parties.
Mitchell v. M.N.R. 2001 SCC 33, [2001] 1 SCR 911	The Mohawks of Akwesasne claimed an Aboriginal right to cross the border freely without paying duty on goods. The FC and FCA both held that the claimant had a right to duty-free travel, but the SCC stated that the lack of evidence meant that the Aboriginal right had not been established.

Ontario (Attorney General) v. Bear Island Foundation [1991] 2 SCR 570, 1991 CanLII 75 (SCC)	The Bear Island Foundation, on behalf of the Temagami Band, claimed Aboriginal title to their traditional territory. The ONSC and ONCA found that the right to land did not exist. The SCC agreed and dismissed the appeal.
Oregon Jack Creek Indian Band v. Canadian National Railway Co. [1989] 2 SCR 1069, 1989 CarswellBC 748	After the successful *Pasco* injunction (see below), the chiefs of 36 Indian bands applied to amend their claim (to Aboriginal rights to the Thompson and Fraser River systems, including conservation measures for fishing practices) to include members of the Nlaka'pamux, Secwepemc, and Stó:lō Nations. The amendment was allowed, but the case has never gone to trial.
Pasco v. C.N.R. Co. [1985] 69 BCLR 76, 1985 CanLII 320 (BCSC)	The Oregon Creek band sought an injunction to prevent the Canadian National Railway from twin tracking an eight-mile stretch of the Thompson River. The court granted the injunction to protect the native fishery along the Thompson and Fraser Rivers.
R. v. Adams [1996] 3 SCR 101, 1996 CanLII 169	George Weldon Adams, a Mohawk from Akwesasne Reserve, was charged with catching fish without a license. He claimed an Aboriginal right to fish that was infringed on by the fishery regulations. The QCC disagreed and convicted Adams. The case was appealed to both the QCSC and the QCCA, which agreed with the conviction. The SCC found Aboriginal right and allowed Adam's appeal.
R. v. Côté [1996] 3 SCR 139, 1996 CanLII 170 (SCC)	Members of an Algonquin expedition to teach traditional fishing methods were convicted under Quebec regulations for entering a controlled harvest zone (that was located within their traditional territory) without paying for motor vehicle access and for fishing without a valid license. They claimed an Aboriginal and treaty right to fish on their ancestral lands. The QCC disagreed and convicted them. The case was appealed to both the QCSC and the QCAC affirmed the convictions. The SCC found an Aboriginal right and allowed the appeal.

R. v. Gladstone [1996] 2 SCR 723, 1996 CanLII 160 (SCC)	Donald and William Gladstone, members of the Heiltsuk Nation, were charged with attempting to sell herring spawn without the correct license. They argued that the regulations violated their Aboriginal rights. The BCPC found that although their Aboriginal rights were infringed on, the infringement was justified. The case was appealed all the way to the SCC. It held that the Heiltsuk have an Aboriginal right to commercial trade in herring spawn on kelp.
R. v. Marshall; R. v. Bernard 2005 SCC 43, [2005] SCC 43	The Supreme Court delivered these two cases together. In *Marshall*, 35 Mi'kmaq were charged with cutting timber on Crown lands in Nova Scotia. In *Bernard*, Joshua Bernard, a Mi'kmaq, was charged with unlawful possession of logs. In both cases, the accused claimed a treaty right to harvest timber or Aboriginal title to the logging sites. The SCC did not find Aboriginal title but outlined that it was possible for nomadic or semi-nomadic groups to claim title.
R. v. Powley 2003 SCC 43, [2003] SCR 207	Steve and Roddy Powley were charged with hunting without a license. They pleaded that as they were Métis, they had an Aboriginal right to hunt. The trial and ONCA agreed, and the Supreme Court upheld the decision and defined a ten-step test for Métis rights.
R. v. N.T.C. Smokehouse Ltd. 1996	N.T.C. Smokehouse was charged with selling salmon bought under Indian Fish Food licenses. It argued that the regulations were in violation of Aboriginal rights. After several appeals, the SCC held that the Aboriginal right did not exist.
R. v. Sparrow 1990	Ronald Sparrow, a member of the Musqueam Nation, was charged with fishing with a gill net longer than permitted by the *Fisheries Act*. He claimed that the restriction infringed upon his Aboriginal right to fish. After several appeals, the SCC allowed his appeal and sent the case back to trial to be considered according to the analysis it set out.

R. v. Van der Peet [1996] 2 SCR 507, 1996 CanLII 216 (SCC)	Dorothy Van der Peet, a member of the Stó:lō Nation, was charged with selling fish caught with an Indian food license. She argued that she was exercising an existing Aboriginal right to sell fish. After multiple appeals, the SCC rejected her appeal as she failed to demonstrate that the exchange of fish for money or other goods was integral to Stó:lō culture.
R. v. White and Bob [1965] 52 DLR (2d) 481, 1965 CarswellBC 249	Clifford White and David Bob, two First Nations men from Nanaimo, BC, were charged with hunting deer out of season. They claimed a treaty right to hunt based on a Douglas Treaty for Nanaimo. After several appeals, the SCC agreed and determined there was a treaty right to hunt.
St. Catharines Milling and Lumber Co. v. R. [1888] UKPC 70, 1888 CarswellOnt 22	Ontario challenged the right of the federal government to grant a logging license to the St. Catharine's Milling and Lumber Company. The federal government argued that they had the right to extinguish Aboriginal title to land and then sell or use that land, whereas Ontario argued that Aboriginal title did not exist. After several appeals, the Privy Council upheld Ontario's position but stated that Aboriginal title existed as a "personal and usufructuary right, dependent upon the goodwill of the sovereign."
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) 2004 SCC 74 [2005] 3 SCR 550 [*Taku River*]	A mining company had sought permission from the BC government to re-open an old mine. The Taku River Tlingit First Nation participated in the environmental assessment (EA) process but objected to the company's plan to build a road through their traditional territory. After BC granted project approval, the Taku River Tlingit First Nation petitioned to stop the decision based on administrative law and its Aboriginal rights and title. At trial, the court determined that BC had not sufficiently addressed Taku River's concerns. The BCCA upheld the decision and found that the Province had failed to meet its duty to consult and accommodate. The SCC found that the Province was required to consult and accommodate Taku River but that they had met their requirements during the EA process.

Tolko Industries Ltd. V. Okanagan Indian Band 2010 BCSC 24, [2010] BCJ No 29 (QL)	Tolko, a logging company with a tree farm license to land to which the Okanagan Indian Band claimed Aboriginal title, sought an injunction against the Okanagan Nation Alliance to stop it from blocking access to the area. The court granted the injunction, provided that the parties could agree on necessary methods to preserve archaeological evidence of occupation.
Tsilhqot'in Nation v. British Columbia 2014 SCC 44, [2014] 2 SCR 256	The Tsilhqot'in Nation claimed Aboriginal title to land in central British Columbia. The BCSC found Aboriginal title but could not grant it based on how the claim was laid out. The BCCA disagreed with the trial court's findings. The SCC agreed with the BCSC and granted Aboriginal title.

Abbreviations used in the table, in alphabetical order:
BCCA: British Columbia Court of Appeal;
BCSC: British Columbia Supreme Court;
EA: Environmental Assessment;
FC: Federal Court;
FCA: Federal Court of Appeal;
ONCA: Court of Appeal for Ontario;
ONSC: Ontario Superior Court of Justice;
QCC: Court of Quebec;
QCCA: Court of Appeal for Quebec;
QCSC: Superior Court of Quebec;
SCC: Supreme Court of Canada.

Appendix B.

Table A outlines the various terms I used to code decisions and other legal documents. Note that some codes (Arcas Report Sites, Archaeological Sites) are specific to *Tsilhqot'in* 2007 documents. My coding process was inductive, starting with larger themes and then narrowing into more specific themes.

Table A. Codebook for Legal Documents.

Name	Description	Files	References
Anthropology	Mentions anthropology	16	52
Arcas Report Sites	Mentions sites from Arcas report (only Tsilhqot'in documents)	1	1
• EjSa-25		1	1
• EkSa-116		1	1
• EkSa-122		1	1
• EkSa-135		1	1
• EkSa-136		1	1
• EkSa-137		1	1
• EkSa-138		1	1
• EkSa-139		1	1
• EkSa-140		1	1
• EkSa-141		1	1
• EkSa-142		2	4
• EkSa-143		1	1
• EkSa-144		1	1
• EkSa-145		2	4
• EkSa-146		1	1
• EkSa-147		1	1
• EkSa-148		1	1
• EkSb-42		1	1
• EkSb-43		1	1

• EkSb-44		1	1
• EkSb-45		1	1
• EkSb-46		1	1
• ElRw-9		1	2
Archaeological Sites (Tsilhoqt'in)	Mentions archaeological sites (only Tsilhqot'in documents)	5	45
• Eagle Lake Report	Mentions Eagle Lake Report	2	8
• EjSa-11	Former village site known as Gwedats'ish	2	7
• EjSa-14		2	2
• EjSa-5, 1483		2	5
• EjSc-9, 1		4	4
• EkSa-124		3	4
• EkSa-33		2	2
• EkSa-35		1	1
• EkSa-36		1	1
• EkSa-85		1	1
• EkSa-97		2	3
• FaRv-3,1	Gwetsilh	2	2
• Pit Houses	Discusses pithouses	2	25
• Tl'egwated (Kigli Holes)		2	6
Archaeology	Mentions archaeology	10	41
Cases	Mentions case	0	0
• Adams	Mentions Adams	1	1
• Adams and Cote	Mentions Adams or Cote	1	1
• Baker Lake	Mentions Baker Lake	4	9
• Calder	Mentions Calder	11	27
• Canadian Case Law	Mentions Canadian cases (for international documents)	6	14
• Delgamuukw (NOT SCC)	Mentions Delgamuukw trial or appeal	4	13

• Delgamuukw SCC	Mentions the Supreme Court Delgamuukw decision	2	15
• Guerin	Mentions Guerin	5	7
• Haida	Mentions Haida	1	1
• ICC (CAN)	Mentions the Canadian Indian Claims Commission	1	1
• ICC (US)	Mentions the United States Indian Claims Commission	2	2
• Kruger	Mentions Kruger	5	8
• Mabo	Mentions Mabo	3	3
• Marshall; Bernard SCC	Mentions the Supreme Court Marshall; Bernard decision	2	13
• Powley	Mentions Powley	1	1
• Re Southern Rhodesia	Mentions Re Southern Rhodesia	3	4
• Sioui	Mentions Sioui	1	1
• Sparrow	Mentions Sparrow	10	44
• St Catherine's Milling	Mentions St. Catharine’s Milling	7	15
• Taylor and Williams	Mentions Taylor and Williams	1	1
• US Case Law	Mentions United States case	8	36
• Van der Peet Trilogy	Mentions Gladstone, Smokehouse, or Van der Peet	4	7
Charter of Rights and Freedoms	Mentions the Canadian Charter of Rights and Freedoms	1	1
Consultation	Discusses consultation	1	3
Expert Witnesses	Discusses expert witnesses	16	44
Fiduciary duty	Discusses the fiduciary duty of the Crown (Honour of the Crown)	5	18
Good Quotes	Good exemplar quotes	9	18
Oral Histories	Discusses oral histories	7	39
People	Mentions specific person	0	0
• Dewhirst	Mentions John Dewhirst (mainly Tsilhqot’in documents)	1	1

• Dinwoodie	Mentions David Dinwoodie (mainly Tsilhqot'in documents)	1	1
• Eldridge	Mentions Morley Eldridge (Tsilhqot'in documents)	3	35
• Klassen	Mentions Michael Klassen (Tsilhqot'in documents)	1	1
• Matson	Mentions R.G. Matson (Tsilhqot'in documents)	3	15
• McNeil	Mentions Kent McNeil (legal scholar)	3	5
• Slattery	Mentions Brian Slattery (legal scholar)	4	12
• Turner	Mentions Nancy Turner (Tsilhqot'in documents)	1	3
Rights and Title	Discusses criteria, etc. for rights and title	18	265
• Comprehensive Claims	Discusses comprehensive claims process	1	2
• Defining Aboriginal Title	Defines Aboriginal title	12	93
• Extinguishment	Discusses extinguishment of Aboriginal rights and title	7	22
• Frozen rights	Discusses concept of frozen rights	5	20
• Integral culture test	Discusses the integral to culture test	2	16
• Land	Discusses land/territory	7	15
• Occupation	Discusses occupation (test for title)	9	63
○ Continuous	Discusses criteria for continuous occupation	7	24
○ Exclusive	Discusses criteria for exclusive occupation	7	21
○ Sufficient	Discusses criteria for sufficient occupation	5	13
• Rights Infringement	Discusses infringing upon Aboriginal rights	5	14

• Royal Proclamation	Discusses the Royal Proclamation	9	25
• Section 35(1)	Discusses Section 35 of the Canadian Constitution	7	65
• Sui Generis	Discusses the concept of sui generis	5	12

Appendix C.

Table A outlines the various terms I used to code my interviews with archaeologists and lawyers. My coding process was inductive, starting with larger themes and then narrowing into more specific themes.

Table A. Codebook for Interview Transcripts.

Name	Description	Files	References
Arch and Tests for R+T	Archaeological data and their contribution to the tests for rights and title	7	8
Arch Branch	Mentions the BC Archaeology Branch	1	1
Arch Data	Discusses different types of archaeological data	0	0
• CMTs	Mentions Culturally Modified Trees (CMTs)	3	6
• Coast v. Inland	Mentions archaeology in coastal versus inland sites	1	2
• Fish	Mentions archaeological data related to fish/fishing	1	1
• Trade	Mentions archaeological data for trading practices	1	3
Cases	Discusses rights and title cases	0	0
• Ahousaht	Mentions Ahousaht case	1	1
• Delgamuukw	Mentions Delgamuukw case	1	2
• Halpert	Mentions Halpert case	1	1
• Lax Kw'alaams	Mentions Lax Kw’alaams case	2	4
• Meares Island	Mentions Meares Island case	1	7
• Pasco	Mentions Pasco case	2	8
• Sinixt	Mentions Sinixt	1	1
• Tolko	Mentions Tolko case	1	2
• Tsilhqot'in	Mentions Tsilhqot’in case	3	13

Do archies know work is valuable	Discusses if archaeologists know their work is valuable for land claims issues	11	11
Expert Witnesses, Issues, Process	Mentions things to do with expert witness process/issues	0	0
• Become better archie	Discusses expert witness process helps be better researcher	1	1
• Culture in court	Issues with understanding culture as a concept in court	1	2
• Did archaeology make a difference	Mentions if archaeological data made difference in court case	5	7
○ Yes, Positive	Archaeological data made positive difference	1	1
• Educating lawyers	Discusses teaching lawyers about archaeology	2	3
• Experience Testifying	Discusses experience testifying	5	12
○ Attacked	Mentions feeling attacked by counsel	1	2
○ Preparation	Mentions preparation strategies	4	4
○ Upsetting, negative	Mentions negative experiences testifying	1	3
• How were you asked to be involved	Discusses how they were asked to be an expert witness	7	9
• Issue working for gov	Discusses issues working for Crown	1	1
• Report Prep	Discusses report-writing process	10	33
• Translating arch to legal evidence	Discusses translating archaeological data into legal evidence	4	9
• Writing is evidence	Discusses writing (publications, etc.) as potential evidence	2	2
FN + Arch	Discusses relationship and issues with First Nations and archaeologists	1	1
Good Quotes	Good exemplar quotes	8	12
Infrastructure Projects	Discusses infrastructure projects	2	3

Issues with Arch Data	Discusses issues with archaeological data	0	0
• Arch is political	Discusses that archaeology can be political	2	2
• CRM Issues	Discusses issues with Cultural Resource Management (CRM)	1	1
• Cultural heritage vs. arch sites	Discusses differences/issues between cultural heritage and archaeology	2	3
• Ethnic continuity	Discusses issues with identifying ethnicity in archaeological data	1	1
• Is arch best on own	Talks about archaeological data acting on its own	4	4
• Matching oral history to arch	Talks about using archaeological data in conjunction with oral histories	1	4
• No arch	Discusses issues of no or not enough archaeological data	1	1
• Solely arch v. mult. disc.	Discusses archaeology on its own versus using a multi-disciplinary approach	3	6
• Too much arch	Discusses too much archaeological data	1	1
• What can arch do well	Discusses what archaeological can do well	6	9
Rights + title vs. comp. claim	Discusses rights and title cases versus comprehensive claim process	1	5
What can Archies learn	Discusses what archaeologists can learn from expert witness process	11	13
• Collaborative Arch	Discusses collaborative approaches	1	1
• Do good archaeology	Discusses doing “good” work	2	2

Appendix D.

Table A. Interview Participants' Details.

Participant Number	Profession	Name
Participant 1	Archaeologist	R.G. Matson
Participant 2	Archaeologist	Andrew Mason
Participant 3	Archaeologist	Gordon Mohs
Participant 4	Archaeologist	Alan McMillan
Participant 5	Archaeologist	Jesse Morin
Participant 6	Archaeologist	David Pokotylo
Participant 7	Archaeologist	Geordie Howe
Participant 8	Archaeologist	Andrew Martindale
Participant 9	Archaeologist	Michael Blake
Participant 10	Lawyer	Robert Janes
Participant 11	Archaeologist	Morley Eldridge
Participant 12	Lawyer	Elizabeth Bulbrook
Participant 13	Archaeologist	Anonymous
Participant 14	Archaeologist	Kevin Twohig
Participant 15	Archaeologist	Richard Inglis
Participant 16	Archaeologist	Steven Acheson
Participant 17	Archaeologist	John Somogyi
Participant 18	Lawyer	Anonymous
Participant 19	Lawyer	Anonymous
Participant 20	Lawyer	Jack Woodward
Participant 21	Lawyer	Michael Doherty
Participant 22	Lawyer	Anonymous
Participant 23	Lawyer	Matthew Kirchner
Participant 24	Archaeologist	Martin Magne
Participant 25	Archaeologist	Bill Angelbeck
Participant 26	Archaeologist	Anonymous

Participant 27	Lawyer	Robert Morales
Participant 28	Archaeologist	Catherine Carlson
Participant 29	Archaeologist	Arnoud Stryd
Participant 30	Archaeologist	John Dewhirst