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THE CHALLENGES OF INDIGENOUS ORAL HISTORY SINCE *MITCHELL V MINISTER OF NATIONAL REVENUE*

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ABSTRACT

This article answers two questions: How has the Supreme Court of Canada's *Mitchell v Minister of National Revenue* decision been operationalized by trial-level courts? Based on these findings, does this decision make room for Aboriginal title and rights claimants to contest dominant understandings of Indigenous presence in the Canadian settler state? Examining the reasoning of six trial-level court decisions, this article finds that *Mitchell* was operationalized in four of the cases to exclude Indigenous oral history evidence. In its application by trial courts, this article argues that *Mitchell* does not create opportunities for Indigenous challenges to colonial spatial relationships.

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INTRODUCTION

As lawyers we don't have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are the civilized, comfortable, well-heeled carriers of no. We thrive on it. Other races die.[1]

Leslie Hall Pinder, Counsel in *Delgamuukw v British Columbia*

In the 1997 Supreme Court of Canada decision, *Delgamuukw v British Columbia*,[2] Chief Justice Lamer held that the laws of evidence are to be "adapted" to ensure that oral history is "accommodated and placed on an equal footing" with written forms of evidence in the context of Indigenous land and rights claims.[3] In 2001, the Supreme Court provided further instruction on the use of oral history evidence in its *Mitchell v Minister of National Revenue*[4] decision. Following the guidance provided by Canada's highest court in these two cases, recent scholarship suggests that lower courts continue to struggle with the admissibility and weighing of oral history evidence in the context of Indigenous land and rights litigation.[5]

The purpose of this article is to answer two research questions: How has the Supreme Court's *Mitchell* decision been operationalized by trial-level courts across Canada? And, based on these findings, does this decision make room for Aboriginal title and rights claimants to contest dominant understandings of Indigenous presence in the settler Canadian state? Drawing on critical legal geography scholarship, this article will ultimately argue that by offering Indigenous oral history evidence, claimants have the opportunity to challenge and resist colonial spatializations.

In answering the first question, this article tracks the reasoning of six trial-level court decisions: *Benoit v Canada*;[6] *Attorney General of Canada v Anishnabe of Wauzhushk Onigum Band et al*;[7] *Queen v Drew et al*;[8] *White Bear First Nations v Saskatchewan (Environment)*;[9] *Couchiching FN et al v AG Canada et al*;[10] and *R v Dickson*.[11] It finds that the direction provided by the

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1 Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 12.

2 [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

3 *Ibid* at para 87.

4 2001 SCC 33 [*Mitchell*].

5 See generally David Milward, "Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence" (2010) 14 Intl J Evidence & Proof 287 [Milward]; Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan, 2019) [Drake]; David Laidlaw, "The Challenges in Using Aboriginal Traditional Knowledge in the Courts" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019) 606; Drew Mildon, "A Bad Connection: First Nations Oral Histories in the Canadian Courts" in Renate Eigenbrod & Renée Hulan, eds, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Blackpoint, NS: Fernwood, 2008).

6 2002 FCT 243 [*Benoit*], rev'd *Canada v Benoit*, 2003 FCA 236 [*Benoit FCA*].

7 2002 CarswellOnt 3212 (WL Can) (Ont Sup Ct), rev'd on other grounds, 2003 CarswellOnt 4835 (WL Can) (ONCA) [*Anishnabe of Wauzhushk*].

8 2003 NLSCTD 105 [*Drew*], aff'd 2006 NLCA 53, leave to appeal to SCC refused, 31750 (3 May 2007).

9 2009 SKQB 151 [*White Bear First Nations*].

10 2014 ONSC 1076 [*Couchiching FN*].

11 2017 ABPC 315 [*Dickson*].

Supreme Court of Canada in *Mitchell* was operationalized in four out of the six cases to exclude, rather than include, Indigenous oral history evidence. This research provides insight into how the principles articulated in *Mitchell* have been applied in practice by trial-level courts. If deemed admissible and given equal and due weight, oral history has the ability to be "*expressions*"[12] of Indigenous presence and relationship to the land.

In answering the second question, this article engages in an exercise in what legal geography scholar, Antonia Layard, would call "reading law spatially."[13] "Reading law spatially" involves shifting the focus of analysis away from the "law first" and toward "a grounded perspective beginning in the site or event." It helps us to "understand how spatial and legal practices co-produce (for example) wildlife reserves, protests or homelessness,"[14] or, as in the case of this article, toward a focus on how the application of the law has *actual* spatial effects—whether by reinforcing existing spatial relationships or creating new ones.

Scholarship connecting law with geography posits that the "[l]aw is seen not as distinct, but as *enmeshed with space*."[15] Alternatively, "the law is a socially constructed institution, that is produced within space and helps to produce space."[16] Critical legal geography helps reveal the inner workings of power that are often rendered invisible by focusing on the location of the law's impact and the targets of its uneven effects.[17] Put simply, a legal geographical perspective illuminates how the law materially changes and often determines the meaning of the spaces that we inhabit. In the context of the kinds of Aboriginal rights and land claims to be explored in this article, judicial pronouncements may alter uses and ownership over particular lands having negative spatial implications for Indigenous peoples.

This article will begin with a general overview of the evidentiary challenges that arise when Indigenous communities present oral history evidence to courts. Next, it will discuss how Supreme Court of Canada case law addressing oral history evidence has evolved up until *Mitchell*. It will then analyze six trial-level court decisions involving Indigenous claimants seeking to adduce oral history evidence and the courts relying on *Mitchell* in their reasons to either include or exclude this evidence altogether. In a concluding section, this article will argue that by taking a more restrictive evidentiary approach in *Mitchell*, the Supreme Court

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12 Julie Cruickshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v B.C.*" (1992) 95 BC Studies 25 at 35 [emphasis in original].

13 Antonia Layard, "Reading Law Spatially" in Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, eds, *Routledge Handbook of Socio-Legal Theory and Methods* (New York: Routledge, 2020) 232.

14 *Ibid.*

15 Deborah G Martin, Alexander W Scherr & Christopher City, "Making Law, Making Place: Lawyers and the Production of Space" (2010) 34:2 Progress in Human Geography 175 at 177 [emphasis in original].

16 *Ibid* at 179.

17 See generally David Delaney, "Legal Geography II: Discerning Injustice" (2016) 40:2 Progress in Human Geography 267; Robyn Bartel et al, "Legal Geography: An Australian Perspective" (2013) 51:4 Geographical Research 339; Nicholas Blomley, "Making Space for Law" (1993) 14:1 Urban Geography 3; Irus Braverman, "Hidden in Plain View: Legal Geography from a Visual Perspective" (2011) 7:2 Law, Culture and the Humanities 173; Nicholas Blomley & Joel Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30:3 Osgoode Hall LJ 661.

has made it more difficult for Indigenous claimants to offer this kind of evidence. Drawing from various legal geography scholars, this article finds that, based on its application by trial court judges, the *Mitchell* decision does not create increased opportunities for Indigenous claimants to offer alternative understandings of Indigenous presence. Rather, trial court judges use portions of the judgment to reinforce existing colonial spatial relationships.

I. METHODOLOGY

A selective case study approach was adopted in this article to explore how trial-level courts have analyzed and applied the *Mitchell* decision. *Mitchell* has been cited in the case law over 200 times. To narrow the scope of this paper, cases were selected from trial-level courts that reference the *Mitchell* decision from 2002—2019 and particularly cite paragraph 39 of this judgment, which is set out in full below.

Each of these cases was then selected based on whether or not the issue in the case was about Indigenous land and/or treaty rights and whether there was a substantive discussion about oral history. The significant 2007 decision of the British Columbia Supreme Court, *Tsilhqot'in Nation v British Columbia*,[18] where the oral history of Tsilhqot'in First Nation was deemed admissible, is not included in the application section of this article. While this case does provide insight into how trial-level courts apply the *Delgamuukw* and *Mitchell* decisions, Justice Vickers did not specifically cite paragraph 39 of Chief Justice McLachlin's judgment in *Mitchell*. However, leading up to his 2007 *Tsilhqot'in* decision, Justice Vickers set out a framework for determining the admissibility of oral history evidence offered by the Tsilhqot'in Nation in *William et al v British Columbia et al*, which will be briefly discussed in Part V.

Given that this article focuses on trial-level court decisions only, this research is limited by the small sample of cases selected. Future research might explore how appellate level courts have considered and operationalized the *Mitchell* decision since its release in 2001.

II. DIFFICULTIES WITH INDIGENOUS ORAL HISTORY EVIDENCE

The oral character of Indigenous histories has proved to be an evidentiary challenge for Indigenous claimants trying to assert claims for land title and treaty rights in Canadian courts. These claimants are at a "disadvantage if a major source of their knowledge, transmitted orally, across time, and in a distinctive style, cannot meaningfully be entered as evidence."[19] Indigenous claimants asserting title and/or treaty rights must meet distinct legal tests in which they bear the burden of proof on a balance of probabilities. Proving these rights is a particularly onerous task because courts have been reluctant to admit and give equal weight to oral histories, which are the basis of Indigenous historical traditions.[20]

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18 2007 BCSC 1700 [*Tsilhqot'in*].

19 Bruce Granville Miller, "Introduction" in *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011) 1 at 2—3.

20 See Kent McNeil & Lori Ann Roness, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 J West 66 at 67.

Scholarship in this area has identified a variety of evidentiary difficulties for Indigenous claimants trying to adduce oral history, such as the "best evidence" rule and the parole evidence rule.[21] The primary reason why oral history evidence is different from other types of presumptively admissible evidence is because it violates the rule against hearsay. It is therefore presumptively *inadmissible*, subject to a number of exceptions.[22]

Put simply, hearsay is "'an out-of-court statement offered for the truth of its contents,"' where there is no opportunity to "*contemporaneously*" cross-examine the person who made the statement.[23] Indigenous oral histories, which are passed down over generations, are considered to be hearsay because they are offered to prove the truth of their contents and the person who originally made the statement is deceased and cannot testify in court.[24] Jan Vansina, an anthropologist and accepted expert in the *Tsilhqot'in* case, made the distinction between *oral histories*, which relate to accounts about events and situations which are contemporary and occurred within the witness' lifetime, and *oral traditions*, which are not contemporary to the witness' lifetime and are instead '"verbal messages from the past beyond the present generation."'[25] Despite these definitional differences, oral history and oral traditions have been used interchangeably by the Supreme Court of Canada and are subject to hearsay rules.[26] In this article, the term "oral history" is used because it aligns with much of the scholarship in this area.

Strict applications of the rule against hearsay have the effect of excluding oral history evidence, which impacts the ability of Indigenous communities to meet required legal tests and successfully assert their claims for treaty rights and land title. Despite these challenges, oral history evidence can be admitted by courts as an exception to the hearsay rule. Indigenous oral histories, unlike historical documents, are not a category of a recognized exception on their own under the law of evidence. Instead, these histories may be admitted if they fall into one of the existing exceptions (i.e. public and general rights) or if they meet the requirements of necessity and reliability.[27]

Even where oral history evidence is deemed admissible as an exception to the hearsay rule, it may not be given equal or any weight. The familiarity with and rationale underlying the rule against hearsay renders oral history "suspect" to trial judges when weighing this evidence.[28] Although the Supreme Court of Canada provided some guidance related to

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21 See Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30:4 Alta L Rev 1276 at 1281—83.

22 See Drake, *supra* note 5 at 285.

23 Hamish Stewart et al, *Evidence: A Canadian Casebook*, 4th ed (Toronto: Emond Montgomery, 2016) at 130; Drake, *supra* note 5 at 283 [emphasis in original].

24 See Drake, *supra* note 5 at 284.

25 Kristen Hausler, "Indigenous Perspectives in the Courtroom" (2012) 16:1 Intl JHR 51 at 60—61.

26 *Ibid* at 61. See also Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*" (2016) 29 Intl J Sem L 159 (a discussion problematizing the distinction between oral history and oral tradition).

27 See Drake, *supra* note 5 at 286.

28 See Michael Asch & Catherine Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19:2 Queen's LJ 503 at 533—34.

weight in *Delgamuukw* and *Mitchell*, trial judges may still find that the oral history evidence presented cannot be given more weight "than it can reasonably support" or find written forms of evidence to be more "reliable."[29]

Carving out a new exception for oral history evidence, similar to the existing one for historical documents, might enable access to justice for Indigenous claimants from an evidentiary perspective. More specifically, as Karen Drake argues, a recognized exception would result in oral history evidence being presumptively admissible, and therefore, less likely to be marked as suspicious.[30] However, while creating a recognized exception will ensure that oral history evidence is automatically admissible, it may not be viewed as unsuspicious by judges. Indeed, "no matter how thoughtfully oral tradition is performed, an appreciation of its messages anticipates–and requires–a receptive audience."[31]

Moreover, the rule against hearsay, like all other rules of evidence, was developed "in the shadow of the adversary system."[32] In this system, an impartial decision-maker decides on an issue after hearing the position of both parties. The underlying idea of the adversarial system is that individuals are self-interested and, by having each party present their side and then attack the other, the truth will emerge.[33] However, in a context where written forms of evidence are viewed as "objective" and "scientific," and therefore more trustworthy than oral forms of evidence, what counts as "the truth" favors one side over the other.[34]

In 1996, the historical traditions of Aboriginal peoples were described by the Royal Commission on Aboriginal Peoples as "neither linear nor steeped in the same notions of social progress and evolution" compared to "non-aboriginal" historical traditions.[35] The Commission further noted that Aboriginal oral histories are "subjective" because they include '"facts enmeshed in the stories of a lifetime."'[36] This description was cited by Chief Justice Lamer in *Delgamuukw*[37] and continues to pervade judicial understanding of oral history evidence offered by Indigenous claimants. It seems then that it is not simply the "oralness" of oral history evidence that leads judges to approach this type of evidence with skepticism. Rather, it is the oral character of the evidence, combined with Indigenous ways of storytelling, viewed as factually imprecise, that leads judges to reject this evidence at face value.

Even though there is a "tendency to dichotomize oral and documentary history," the differences between these types of evidence should not be overgeneralized.[38] Indeed, oral and written history evidence share many similarities; for example, they are both influenced

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29 Milward, *supra* note 5 at 288.

30 See Drake, *supra* note 5.

31 Cruickshank, *supra* note 12 at 34.

32 McLeod, *supra* note 21 at 1280—81.

33 *Ibid*.

34 See John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall LJ 1 at 15.

35 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 38.

36 *Ibid.*

37 *Delgamuukw, supra* note 2 at para 85.

38 Borrows, *supra* note 34 at 15.

by the life experiences and backgrounds of their creators.[39] Indigenous legal scholar John Borrows suggests using methods triangulation to scrutinize either of these types of historical evidence. This might involve testing oral history evidence, for example, against academic work, family histories, journals, Indian agency correspondence and notes, maps and government materials, among other sources to produce a detailed, cohesive account of the past.[40] However, judges continue to draw sharp distinctions between written and oral histories, favoring the former. Until the suggestions of scholars, such as Borrows and others,[41] on how judges should interact with oral histories are seriously taken up, judicial preference for documentary forms of evidence continues to be one barrier, among many,[42] for claimants of Aboriginal rights and/or title.

III. EVOLUTION OF CASE LAW ON INDIGENOUS ORAL HISTORY EVIDENCE

In the earlier jurisprudence of the Supreme Court of Canada, the Court recognized the evidentiary difficulties that Indigenous communities face. For example, in the 1985 decision *Simon v the Queen*, Chief Justice Dickson stated that since the Micmacs kept oral rather than written historical records, "impos[ing] an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty."[43] Since then, the Supreme Court has more explicitly stated that the rules of evidence must be adapted to accommodate Indigenous oral history evidence.

In *R v Van der Peet*, Chief Justice Lamer held that courts should approach evidentiary rules and "interpret" evidence:

> with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[44]

In *Delgamuukw*, a claim was first brought by Gitxsan and Wet'suwet'en hereditary chiefs in 1984 for historical ownership and use over 58,000 square kilometers of land in British Columbia.[45] At trial, Chief Justice McEachern of the British Columbia Supreme Court

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39 *Ibid* at 17.

40 *Ibid* at 19.

41 See e.g. Milward, *supra* note 5.

42 See Kirsten Anker, "Aboriginal Title and Alternative Cartographies" (2018) 11:1 Erasmus L Rev 14 (Meaningful participation by Indigenous peoples in legal proceedings is often frustrated by "multiple and entrenched factors," including trauma from "compounded injustices," and high levels of poverty and disease, as a result of historical and ongoing colonization at 18).

43 [1985] 2 SCR 387 at para 44, 24 DLR (4th) 390 [*Simon*].

44 [1996] 2 SCR 507 at para 68, 137 DLR (4th) 289 [*Van der Peet*].

45 *Delgamuukw*, *supra* note 2 at para 7.

admitted the Gitxsan *adaawk* and the Wet'suwet'en *kungax*—both forms of oral history—as evidence under the existing exception for public and general rights and "out of necessity," but ultimately rejected their claim for ownership and jurisdiction.[46] On appeal, the claim shifted from ownership and jurisdiction to Aboriginal title and self-government.[47]

At the Supreme Court of Canada, Chief Justice Lamer, writing for the majority, recognized the importance of "adapt[ing] the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts ... [since] those histories play a crucial role in the litigation of aboriginal rights."[48] Acknowledging the challenges with oral history evidence as proof of Aboriginal rights and title, the Chief Justice then went on to state that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents," on a case-by-case basis.[49] Applying this approach to the trial judge's decision, Chief Justice Lamer concluded that the trial judge erred in giving no independent weight to the oral histories and ordered a new trial, but did not make a determination regarding Aboriginal title.

In the 2001 Supreme Court of Canada *Mitchell* decision, the question before the Court was "whether the Mohawk Canadians of Akwesasne have the right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties."[50] Both the majority and the dissent found that the right was not established. Chief Justice McLachlin, writing for the majority, provided guidance about both the admissibility and weighing of oral history evidence. On admissibility, Chief Justice McLachlin stated that '[t]he flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum."'[51] She then went on to state that oral histories are admissible "when they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge."[52]

On the issue of weight, Chief Justice McLachlin began by quoting from the *Delgamuukw* decision that 'it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts."'[53] However, she then went on to provide the following caution, at paragraph 39 of her reasons, regarding the utility of oral histories:

> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague

46 Drake, *supra* note 5 at 286. See also *Delgamuukw*, *supra* note 2 at para 95.
47 See *Delgamuukw*, *supra* note 2 at para 73.
48 *Ibid* at para 84.
49 *Ibid* at para 87.
50 *Mitchell, supra* note 4 at para 1.
51 *Ibid* at para 30.
52 *Ibid* at para 31.
53 *Ibid* at para 37.

> sense of after-the-fact largesse." In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case", neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.[54]

This paragraph signalled a more restrictive approach to oral history evidence than that laid out by the Supreme Court in *Delgamuuk*w. Part IV of this article will track how paragraph 39 has been operationalized by trial-level courts.

IV. THE APPLICATION OF *MITCHELL* IN CANADIAN TRIAL COURTS

The six trial-level court decisions, presented in chronological order below, employ paragraph 39 of the *Mitchell* decision in determining the admissibility of oral history evidence offered by Indigenous claimants. The main finding from these cases is that *Mitchell* is more often used to exclude, rather than include, offers of Indigenous oral history evidence. Even in the cases where oral history evidence is included, it is often given little to no weight.

A. *Benoit v Canada*

In 1899, to open the Peace-Athabasca country for settlement, the Government of Canada secured an agreement with the Cree and Dene people for what is now Treaty 8.[55] At the time the treaty was negotiated, the Treaty Commissioners acting for Canada relayed to the government that "an assurance was made by them to Aboriginal People that the Treaty did not 'open the way to the imposition of any tax.'"[56] The Aboriginal party to the agreement believed that the assurance meant that they would not, at any time, have tax imposed on them. Given this, the Aboriginal plaintiffs in *Benoit v Canada*, a 2002 decision of the Federal Court of Canada, challenged the "constitutional applicability of Federal taxation provisions to beneficiaries of the Treaty."[57] A preliminary issue to be decided in this dispute was to find a "reasonable meaning" of the assurance made, at the time of negotiation, in the minds of both the Treaty Commissioners and the Aboriginal people. Justice Campbell not only admitted the oral history evidence offered by the Aboriginal plaintiffs, but heavily relied on it to make his determination as to the meaning of the assurance.

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54 *Ibid* at para 39 [citations omitted].

55 *Benoit*, *supra* note 6 at para 3.

56 *Ibid* at para 4.

57 *Ibid.*

In examining the oral evidence, including the testimony of three elders and transcript evidence taken from elders 30 years ago, Justice Campbell held that the assurance was understood as a tax exemption by the Aboriginal plaintiffs, and therefore was an enforceable treaty right.[58] As an example, one Elder, Joe Willier, provided the following oral history evidence when called at trial:

> My father and his generation of leaders told me they were being paid for the land. The Commissioner promised that we would never have to pay tax. He said: "You will always be free from tax because you have already paid through selling your land." My uncles, Chief Keenooshayoo, and Headman Moostoos, paid for those rights for us for the future when they sold the land. They paid for our taxes forever when they sold the land. It is my belief that is what is wrong with the GST (Goods and Services Tax).[59]

Though Justice Campbell commented that paragraph 39 of *Mitchell* should be read as a caution when dealing with oral history evidence,[60] he accepted the evidence provided by the Aboriginal plaintiffs, further stating that "if an Aboriginal person is considered qualified to give evidence of oral tradition, that person is entitled to have weight accorded to his or her evidence unless some certain reason exists for not doing so."[61]

However, this decision was reversed in 2003 by the Federal Court of Appeal, which held that the evidence adduced at trial could not support Justice Campbell's decision.[62] Specifically citing paragraph 39 of the *Mitchell* decision, the Court stated that "the Trial Judge crossed the boundary which McLachlin C.J. warned against in *Mitchell v. Minister of National Revenue.*"[63] Looking in particular at how Mr. Willier's evidence was treated by the trial judge, Justice Stone, writing for the Court, again relying on paragraph 39 of *Mitchell*, stated that:

> With respect, I fail to see how Mr. Willier's answer that he had not been told that he had to pay tax can be transformed into an answer that his people had received a treaty promise exempting them from taxation. In my view, this is exactly what McLachlin C.J. had in mind when she stated in *Mitchell*, *supra*, that oral history evidence should not be artificially strained to carry more weight that it can reasonably support. Whatever Mr. Willier had in mind in giving his answer, he certainly did not say, nor can he be taken to have said, that he had been told that his people understood that they had been exempted from taxation.[64]

Overall, the Federal Court of Appeal's 2003 decision, which relies on paragraph 39 of *Mitchell* to reverse the trial judge's 2002 decision, is an early example of how Chief Justice McLachlin's comments in *Mitchell* were used to approach oral history evidence in a cautious manner.

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58 *Ibid* at para 8.
59 *Ibid* at para 227.
60 *Ibid* at para 212.
61 *Ibid* at para 285.
62 See *Benoit FCA*, *supra* note 6.
63 *Ibid* at para 23.
64 *Ibid* at para 91.

B. *Attorney General of Canada v Anishnabe of Wauzhushk Onigum Band et al*

This 2002 Ontario Superior Court decision showcases the Court's favoritism towards documentary evidence. Here, the main question before the Court was, "[f]or which of the Respondent Indian Bands was the Agency One Reserve … set apart?"[65] Since 1908, the federal government treated the Rainy Lake Bands as the only bands having any interest in the reserve, but various land transactions had been carried out by third parties since that time. This led the Department of Indian Affairs and Northern Development to be concerned that these transactions may lead to disputes, prompting the Attorney General of Canada to submit this question to the Superior Court.[66]

In this case, oral history evidence was offered by way of an affidavit from the Rainy River and Rainy Lake Bands, though Justice Smith did not describe in any detail the contents of this evidence. After setting out the three-part test for admitting oral history evidence and referring to Chief Justice McLachlin's comments at paragraph 39 in *Mitchell*, Justice Smith stated: "[i]t is important to receive the Aboriginal perspective in deciding cases such as this. Oral history is of great assistance, however, it must not be blindly accepted nor should it be preferred over documentary evidence if the accuracy of the documentary evidence is established."[67] He went on to say, "[i]n the instant case the "oral evidence" while of some help, was vague and frequently not directly related to the issues before the court."[68] Ultimately, Justice Smith relied on documentary evidence from 1908 to 1976 of three land surrenders, which were "all uniform, consistent and signed by the same parties." Using only this evidence, Justice Smith came to the conclusion that the land was set aside for the Rainy Lake Bands, rather than an Order in Council and the accompanying oral history evidence offered.[69]

In this case, paragraph 39 of the *Mitchell* decision was operationalized to exclude the Indigenous oral history evidence offered by the claimants in this case. Justice Smith's comments provide further evidence of Borrows' point that, when confronted with oral history, judges have a tendency to "disregard" or "downplay" its use in favor of written evidence.[70]

C. *Queen v Drew et al*

Next, in this 2003 decision of the Newfoundland and Labrador Supreme Court, two central issues were to be decided. First, whether the Mi'kmaq of Conne River had Aboriginal hunting rights based on their presence on the Island of Newfoundland either before European contact or before the assertion of British sovereignty. Second, whether they could claim treaty rights based on treaties between the British and Mi'kmaq of Nova Scotia from the 18th century.[71]

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65 *Anishnabe of Wauzhushk, supra* note 7 at para 2.
66 *Ibid* at paras 28, 30.
67 *Ibid* at para 57.
68 *Ibid* at para 58.
69 *Ibid* at para 80.
70 Borrows, *supra* note 34 at 14.
71 See *Drew, supra* note 8 at para 1.

This action was commenced by the Province under Newfoundland's *Lands Act* for an order that the defendants be found wrongfully in possession of Crown lands and that their hunting cabins be removed from the Bay du Nord Wilderness Area.[72]

The defendants countered that the cabin removal notices should be "vacated" because they are Aboriginal people within the definition of "Indian" under the *Indian Act* and are on an "Indian reserve." Additionally, the Wilderness Area is made up of some territory that the Mi'kmaq have traditionally relied on for "subsistence" and to exercise their rights to fish, hunt and trap, which are constitutionally protected.[73] Ultimately, Justice Barry rejected these arguments, held that the defendant's did not adequately make out their claims for Aboriginal or treaty rights, and ordered that their cabins be removed from the Wilderness Area.

Much of the evidence offered by the defendants in this case was archaeological or documentary, rather than oral historical. One Elder though, John Nicholas Jeddore, testified that going on the country for food and furs '"was important, because that was our life. That's the way we lived. To us, there was no other way. To me and my father, there was no other way."'[74] However, his evidence only dated back to 1930 and was mainly biographical.[75] In refusing to give any weight to the limited oral history evidence offered by the defendants, which included the live testimony of Mi'kmaq elders, Justice Barry stated that "[t]he information provided by the Elders at Conne River, while reflecting the rich life of Mi'kmaq in the Province, did not refer back far enough to establish the time when Mi'kmaq presence in Newfoundland commenced."[76]

Justice Barry went on to say that, "[t]he *Mitchell* decision suggests that evidence that is tenuous and scanty," such as that provided by the defendant's in this case, "will be insufficient for the purposes of proving an aboriginal rights claim."[77] He followed this statement by quoting Chief Justice McLachlin's comments in paragraph 39 of *Mitchell* in full, demonstrating again that this particular passage is being used to put limits on the uses of oral history evidence in Aboriginal rights and land claims.

D. *White Bear First Nations v Saskatchewan (Environment)*

In this case, heard and decided in 2009 by the Saskatchewan Queen's Bench, the Minister of the Environment issued two permits to Harvest Operations Corporation allowing for oil and gas exploration in Moose Mountain Provincial Park.[78] The White Bear First Nation filed an application for judicial review to seek an order quashing the permits and requiring the Minister to consult with White Bear.[79] In support of their application, White Bear filed an affidavit from Chief Brian Standingready containing oral history evidence.[80] The Minister

72 *Ibid* at para 2.
73 *Ibid* at para 3.
74 *Ibid* at para 59.
75 *Ibid* at para 206.
76 *Ibid* at para 540.
77 *Ibid* at para 549.
78 See *White Bear First Nations, supra* note 9 at para 2.
79 *Ibid* at para 3.
80 *Ibid*.

objected to portions of this affidavit and applied to strike them out for being irrelevant and/or inadmissible as hearsay. Here, Justice Ball took a flexible approach to the rule against hearsay stating that:

> [e]xcluding demonstrably trustworthy evidence from affidavits based on an archaic, overly rigid application of "the rule against hearsay" would hinder the search for truth in many situations. In this case, it would operate to exclude virtually all properly grounded oral history evidence from the affidavit of Chief Standingready.[81]

Justice Ball then went on to state that the Supreme Court of Canada's jurisprudence, including the *Delgamuukw* and *Mitchell* decisions, requires oral history evidence to be given by "qualified" persons.[82] For the Supreme Court, an Aboriginal witness is qualified to give oral history evidence if they "represent a reasonably reliable source of the particular people's history."[83] In assessing whether a witness is "a reasonably reliable source" of oral history, courts in the past have inquired into the background of the witness (i.e. their Aboriginal ancestry, birth place, band membership, inability to speak English, etc.) and of their oral history sources (i.e. identity of the source, age of the witness at the "time of conveyance," and their reputation in the community, etc.).[84] Here, the claimants argued that Chief Standingready was properly qualified as he had been Chief of the White Bear First Nations intermittently for the last 32 years and it had been confirmed that his affidavit represented the perspective of the Nation.[85] However, Justice Ball did not provide much relevant description of the contents of the affidavit. Justice Ball ultimately concluded that the Chief's "qualifications" fell below the standard set out by the Supreme Court of Canada and much of the affidavit evidence was struck.[86]

In this case, Justice Ball used Supreme Court jurisprudence, including the *Mitchell* decision, to exclude the Indigenous oral history evidence offered, but did not rely on paragraph 39 of this judgment to do so. However, Justice Ball did go on to quote paragraph 39 of the *Mitchell* decision after stating that the Supreme Court in *Delgamuukw* held that the rules of evidence must be "adapted."[87] In doing so, Justice Ball demonstrates an awareness that a line must not be crossed in admitting oral history evidence and stretching the rules of evidence too far or abandoning them altogether.

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81 *Ibid* at para 26.

82 *Ibid* at paras 27—28.

83 *Ibid* at para 28, citing *Mitchell, supra* note 4 at para 33.

84 David M Robbins, "Aboriginal Witness Evidence and the Crown in Chief Roger William v. British Columbia and Canada" (2004) at 2.2.3—2.2.4, online (pdf): *Woodward & Company* < www.woodwardandcompany.com/wp-content/uploads/pdfs/witnessevidence_robbins.pdf> [perma.cc/45M3-KNAH].

85 See *White Bear First Nations, supra* note 9 at para 10.

86 *Ibid* at para 32.

87 *Ibid* at para 29.

E. *Couchiching FN et al v AG Canada et al*

In a 2014 decision of the Ontario Superior Court, the Couchiching First Nation called three elders to give oral history evidence regarding "Ojibway use and occupation of the Agency One Reserve site" prior to its formation in the 1870s.[88] The oral history evidence presented here was deemed admissible.

When reviewing the general principles regarding the assessment of oral history evidence in Aboriginal land and treaty claims from *Delgamuukw* and *Mitchell*, Justice Fregeau stated that Chief Justice McLachlin "cautioned that there is a boundary between a sensitive application and a complete abandonment of the rules of evidence that must not be crossed."[89] This is similar to the judicial interpretation and understanding of paragraph 39 of the *Mitchell* decision in the *Anishnabe of Wauzhushk* and *White Bear First Nations* decisions, among others mentioned above.

In this case, Justice Fregeau found the oral history evidence of one Elder, Fred Major, to be admissible.[90] Mr. Major provided insight into the use and occupation of the Reserve site prior to the signing of Treaty 3, which led to the creation of the Reserve, stating that '"our people" were "living there" before the "Europeans" arrived.'[91] Based on information relayed to him by his grandfather, Mr. Major also described where and how the Ojibway fished in the area, as well as explained that they used a nearby beach to build birch bark canoes.[92] Despite finding Mr. Major's evidence to be persuasive, and therefore entitled to equal and due treatment,[93] Justice Fregeau concluded that all of the evidence, including Mr. Major's, failed "to establish, on a balance of probabilities, that the site of the Agency One Reserve held any special significance to the Ojibway of the region in the historical period prior to the signing of Treaty #3."[94] This resulted in the dismissal of the plaintiffs' claim for a declaration that the strip of land adjacent to the Reserve forms part of that reserve, as was their claim for a declaration that any part of the strip included in the 1908 surrender was within the reserve prior to this surrender.[95]

Although Justice Fregeau found the oral history evidence to be given by one of the three elders to be admissible, the caution in his judgment demonstrates that he understands paragraph 39 of the *Mitchell* decision as providing a "warning" or caveat to the more "generous" approach to oral history evidence articulated in *Delgamuukw.*[96]

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88 *Couchiching FN, supra* note 10 at para 54.
89 *Ibid* at para 71.
90 *Ibid* at para 75.
91 *Ibid* at para 76.
92 *Ibid* at paras 77—78.
93 *Ibid* at para 81.
94 *Ibid* at para 464.
95 *Ibid* at paras 551—52.
96 Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 16/17:1 Indigenous LJ 21 at 31.

F. *R v Dickson*

Most recently, Justice Andreassen at the Provincial Court of Alberta in 2017 held that the oral history evidence of Elder and former Chief of the Mohawk of Kahnawake, Andrew Delisle, was admissible, but was given little weight as a result of its "limited reliability."[97] The applicant, Robbie Dickson, was earlier convicted under Alberta's *Tobacco Tax Act.* On the facts of this case, the applicant argued that his convictions were "inconsistent with an aboriginal right to trade in tobacco protected by section 35 of the *Constitution Act,* 1982."[98] The main questions to be decided by the Court then were whether the applicant, as a Mohawk of Kahnawake, actually had an Aboriginal right to trade in tobacco and if so, whether or not this right was unjustifiably infringed by provincial legislation. Ultimately, Justice Andreassen held that the applicant did not have the Aboriginal right to trade in tobacco on a commercial scale, and so was not protected under section 35 of the *Constitution*.[99] Further, even if the applicant established this right, he could not prove that it was infringed.

At the outset of the decision, Justice Andreassen acknowledged that "[n]o member of Mohawk society is personally familiar with practices before 1609 … or is alive to describe their culture. They did not keep written histories."[100] As a result, "[i]t would be difficult if not impossible to prove any aboriginal right if the strict rules of evidence were applied."[101] However, citing paragraphs 38, 39, and 51 of the *Mitchell* decision, Justice Andreassen concluded that this flexible and "more open" approach to the admissibility of evidence must not "be taken too far."[102] Specifically quoting paragraph 39 of *Mitchell*, Justice Andreassen stated that '"evidence should not "be artificially strained to carry more weight than it can reasonably support."'[103]

Mr. Delisle provided oral history evidence on a range of issues, including on how one becomes a chief,[104] the significance and uses of tobacco,[105] and information concerning the land where his ancestors lived in what is now known as eastern Canada.[106] He not only described how "like everything else, tobacco is a gift of the Creator," but also explained that the land his ancestors lived on was plentiful with flint, which was used to create knives, arrowheads and other tools, and was later traded.[107] While Justice Andreassen found that Mr. Delisle's evidence was important in that "it provided a needed perspective on the aboriginal right to trade in tobacco held by the Mohawk people of Kahnawake," and gave insight into important ancestral practices, it was unreliable as his testimony was evasive and often contradicted expert evidence.[108] For example, his assertion that the Mohawks originated in eastern Canada, rather than upstate New York, was proven to be false by both the archaeological and historical record

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97 *Dickson, supra* note 11 at para 61.
98 *Ibid* at para 1.
99 *Ibid* at para 417.
100 *Ibid* at para 25.
101 *Ibid.*
102 *Ibid* at para 28.
103 *Ibid.*
104 *Ibid* at para 40.
105 *Ibid* at paras 48—50.
106 *Ibid* at para 47.
107 *Ibid* at paras 47, 49.
108 *Ibid* at paras 56, 58.

and by expert evidence.[109] In addition, the applicant's own expert would not go so far as Mr. Delisle to say that the exchange of flint by the Mohawks was in fact trade.[110] Overall, though Mr. Delisle's evidence was deemed admissible, it was given little weight compared to the expert and other documentary and archaeological forms of evidence offered by both parties.

V. IMPLICATIONS OF *MITCHELL* FOR ABORIGINAL TITLE AND RIGHTS CLAIMS

The second question that this article seeks to answer is whether the *Mitchell* decision makes room for Aboriginal title and/or rights claimants to contest dominant understandings of Indigenous presence in the settler state of Canada based on its application by trial-level court judges. When deemed admissible and given equal and due weight, oral history evidence has the potential to challenge what are deemed to be fixed territorial boundaries. The case law analysis presented above shows that paragraph 39 of the *Mitchell* decision was used in four out of the six cases to exclude, rather than include, Indigenous oral history evidence. Chief Justice McLachlin's comments make it more difficult for Indigenous claimants to adduce oral history evidence. The remainder of this article will discuss the consequences that this finding has for Indigenous uses of and control over space in the settler state of Canada. However, before considering the impact of the *Mitchell* decision specifically, this article will address a few more general points about the relationship between law and space.

According to sociologist Pierre Bourdieu, the law '"brings into existence that which it utters,"'[111] often with spatial implications. In the context of disputes about Aboriginal title and rights, this means that judicial pronouncements and the application of legal rules may have the effect of displacing and/or dispossessing Indigenous peoples of their land, preventing them from defending and freely using it, including to exercise their constitutionally-protected rights. For example, in December 2019, Justice Church of the British Columbia Supreme Court extended an injunction against the Wet'suwet'en Nation after members of the Nation set up blockades to prevent the construction of a natural gas pipeline crossing Wet'suwet'en territory.[112] The Wet'suwet'en argue that this project is not only in violation of their law, but also of the Supreme Court of Canada's ruling in *Delgamuukw*, where the Court urged that Aboriginal title be found to exist over a portion of the land where the pipeline is to be built.[113] However, the claim for title is still outstanding.[114]

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109 *Ibid* at para 58.

110 *Ibid* at para 47.

111 Sarah Blandy & David Sibley, "Law, Boundaries and the Production of Space" (2010) 19:3 Soc & Leg Studies 275 at 278, citing Pierre Bourdieu, *Language and Symbolic Power* (Cambridge: Polity Press/ Oxford: Basil Blackwell, 1991) at 42.

112 See *Coastal GasLink Pipeline Ltd v Huson,* 2019 BCSC 2264.

113 *Ibid* at paras 51, 149. See also Jon Hernandez, "'We Still Have Title': How a Landmark B.C. Court Case Set the Stage for Wet'suwet'en Protests", *CBC News* (13 February 2020), online: <www.cbc.ca/news/canada/british-columbia/delgamuukw-court-ruling-significance-1.5461763> [perma.cc/5AM- H85L].

114 *Ibid* at para 149.

The law, by way of Justice Church's decision, operates to reinforce existing colonial spatial relationships in two ways. First, it unquestioningly accepts that the provincial Crown is still the owner of the land as the claim for Aboriginal title over the land is unresolved. As a result, the province can exercise its right to regulate access to that land and right to any benefits flowing from its resources. Effectively, the government of British Columbia can provide the necessary permits to the project proponent to construct the pipeline. Second, the law reinforces a colonial and exploitative relationship *toward* the land by prioritizing resource extraction and the eventual commodification over any other uses.

In this timely example, the law does not work alone in dispossessing Indigenous peoples. In February 2020, the Royal Canadian Mounted Police enforced the British Columbia Supreme Court's injunction and arrested many people from the Wet'suwet'en camp.[115] The law, in addition to geographical tools and technologies, such as maps and Geographic Information Systems, was used by police to facilitate the interrelated processes of colonization and dispossession. Indeed, in tracing back to the process of land dispossession in British Columbia during the 19th century, geographer Cole Harris concludes that:

> British Columbia could not have been reorganized into colonial space without something like the map. Maps enabled newcomers to locate themselves in this space and find their way around. More than this, maps conceptualized unfamiliar space in Eurocentric terms, situating it within a culture of vision, measurement, and management. Employing a detached vertical perspective, this cartography rendered space as a plan—as a surface.[116]

Further, according to Harris, "outsiders" or colonizers did not necessarily envision the land to be a *tabula rasa* in making these maps—they knew Indigenous peoples lived in these spaces—but instead they created a "geographical imaginary that ignored [I]ndigenous ways of knowing and recording space."[117] Maps, along with other bureaucratic tools such as data and statistics, were used to manage people and to parcel and divide up land. Simultaneously, the law worked to legitimize this reorganization of space and the physical removal of land from Indigenous control.[118]

Geographic tools were and continue to be relied on in legal disputes about Aboriginal rights and title by both the Canadian state, including the Crown, and Indigenous claimants. In her work on alternative Indigenous mapping, Kirsten Anker poses the question: "[c]an maps, as one of the master's tools, ever dismantle the house of colonialism?"[119] Her answer is both yes

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115 Brent Jang, "RCMP Enforce Court Injunction Against Opponents of Pipeline Construction on Wet'suwet'en Territory," *Globe and Mail* (6 February 2020), online: <www.theglobeandmail.com/canada/british-columbia/article-rcmp-enforce-court-injunction-against-opponents-of-pipeline/> [perma.cc/97K6-JWQ8].

116 Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire" (2004) 94:1 Annals of the Association of American Geographers 165 at 175.

117 *Ibid* at 175—76.

118 *Ibid* at 177. According to Harris, even though Indigenous peoples were subject to the violence of colonization and dispossession, they still exercised agency and engaged in acts of resistance, including moving fences, disrupting surveys, organizing petitions, and later launching and defending against legal challenges (at 179—80). All of these actions seek to confront oppressive spatial relationships.

119 Anker, *supra* note 42 at 14—15.

and no. On the one hand, alternative cartographies have been offered by Indigenous peoples to courts to counter dominant assumptions about ownership. On the other hand, there is a continuing risk that "Indigenous understandings of land [will be] reductively captured or misrepresented by this technology."[120] Though these understandings may appear to be neutral articulations of space, they are still deeply "implicated in the colonial project."[121]

Likewise, oral histories have the power to be alternative "*expressions*" of Indigenous presence and relationship to the land, and to bring to the forefront Indigenous peoples' "mistreatment at the hands of the British and Canadian legal systems," including their loss of land, rights and jurisdiction without their consent.[122] Oral history evidence may also be used to contest what are understood to be fixed territorial boundaries. For example, in *Delgamuukw*, the oral histories offered by the Gitxsan and Wet'suwet'en presented an alternative understanding of the land and its boundaries as fluid and changing, rather than as rigid and unchanging over space and time.[123] By offering oral history evidence to the courts, Indigenous peoples have the ability to challenge, supplement, and potentially subvert written forms of evidence and maps offered by the Canadian state that are often relied upon as authorities by judicial officials.

Some Indigenous and non-Indigenous scholars, similar to Anker, are skeptical of offering oral histories as evidence in Indigenous land and rights claims.[124] They argue that doing so takes these stories out of the control of the Indigenous peoples who created them and concedes them to the control of white, Canadian judges who distort their meaning and often diminish their value in interpreting them.[125] To these critics, co-opting oral histories and "translating" them into forms that are more readily recognizable to the Canadian colonial legal system allows judges to use them superficially as a way to incorporate an "aboriginal perspective." However, such uses often do not have the effect of leading to *substantive* outcomes for Indigenous peoples—that is, exercising full control and jurisdiction over their land.

At the same time, for land title and rights claims to be successful for Indigenous peoples, their lawyers must frame oral history evidence in a way that is cognizable to Canadian judges for it to be heard, despite the "evidentiary constraints" posed by the rule against hearsay.[126] Legal geography scholar Nicholas Blomley uses the term "bracketing" to define the work that goes into framing a legal claim.[127] For Blomley, bracketing "entails the attempt to stabilize and fix a boundary within which interactions take place more or less independently of their

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120 *Ibid* at 14.

121 *Ibid*.

122 Borrows, *supra* note 34 at 25.

123 See Sophie McCall, "'What the Map Cuts Up, the Story Cuts Across': Translating Oral Traditions and Aboriginal Land Title" in *First Person Plural: Aboriginal Storytelling and the Ethics of Collaborative Authorship* (Vancouver: UBC Press, 2011), 137.

124 See D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice" (2009) 40:2 Ottawa L Rev 225 at 239—45; Matthew Sparke, "A Map that Roared and an Original Atlas: Canada, Cartography, and the Narration of Nation" (1998) 88:3 Annals of the Association of American Geographers 463 at 470—71.

125 See Milward, *supra* note 5 at 302.

126 See Weir, *supra* note 26 at 161.

127 See Nicholas Blomley, "Disentangling Law: The Practice of Bracketing" (2014) 10 Annual Rev L & Soc Science 133.

surrounding context."[128] Moreover, "[f]or a legal transaction to occur, a space must be marked out within which a subject, object, and set of relations specified as legally consequential are bracketed, and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame."[129] A clear example of bracketing can be seen in the British Columbia Supreme Court's 2004 decision, *William et al v British Columbia et al*,[130] where Justice Vickers set out a framework to determine the admissibility of oral history evidence adduced by the Tsilhqot'in Nation in their ultimate claim for Aboriginal title over land in the Cariboo-Chilcotin region of British Columbia.[131] In this case, the lawyers for the Indigenous claimants had to ensure that the evidence fit within this frame in order to be considered by the court.[132]

By engaging in bracketing, lawyers for Indigenous claimants and judicial officials create circumstances in which oral histories may be misconstrued. Bracketing is problematic in the context of oral history specifically, because it forces lawyers to fit these evidentiary sources into judicially-created frameworks or categories to be seen as reliable, and therefore worthy of due consideration.[133] Sources that do not fit within these categories are discounted by judges as "legend" or as rooted in subjective belief, and therefore, are not admissible as evidence.[134]

Still, without offerings of oral history evidence, claims about Indigenous presence and land use as presented by the Canadian state go unchallenged in courts. By offering oral history evidence, Indigenous claimants can challenge existing colonial spatial relationships and allow for alternative "visualisations" of space and its uses to emerge. As argued by late Gitxsan leader, Medig'm Gyamk, even where a court case does not lead to a "win" for the Indigenous party, there are still benefits to bringing these kinds of claims:[135] the history of the claimants is now on the record, and they have directly challenged the legitimacy of the Canadian legal system, as well as the concentration of power in the settler state.[136]

Though all the trial-level decisions presented in Part IV can be read as acts of resistance by Indigenous peoples, the decision in *Couchiching FN* is a clear example of Indigenous contestation of dominant understandings of presence on the land using oral history evidence. In that case, Elder Fred Major's oral history evidence was used to challenge claims made to the land by the settler state through their expert. In *Couchiching FN*, Justice Fregeau broadly framed the issue as follows: "among the myriad issues and impediments confronting the Dominion government in accomplishing its goals of European settlement, development and

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128 *Ibid* at 135.

129 *Ibid* at 136.

130 2004 BCSC 148 [*William*].

131 See *Tsilhqot'in*, *supra* note 18.

132 Other courts have relied on Justice Vicker's framework to determine the admissibility of oral history evidence: see e.g. *White Bear First Nations, supra* note 9.

133 See Blomley, *supra* note 127 at 140—141 for a discussion of how legal categorization forms an important part of "bracketing-work."

134 See Weir, *supra* note 26 at 162 for a critique of Justice Vicker's decision in *Tsilhqot'in*.

135 Medig'm Gyamk (Neil Sterritt), "It Doesn't Matter What the Judge Said" in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v The Queen* (Lantzville, BC: Oolichan Books, 1992) 303 at 306.

136 *Ibid.*

a national transportation system, one was fundamental – what was now Canada encompassed the traditional homelands of Canada's Aboriginal peoples."[137] A way that this "impediment" was dealt with was through signing treaties between the Crown and Aboriginal peoples to allow for the Canadian government to secure land across the country and further enable colonial expansion. One of these treaties, Treaty 3, was at the center of the dispute between the First Nation and the Canadian government in *Couchiching FN*.

As mentioned previously, the issue in this case was whether a strip of land formed part of the Agency One Reserve as a reserve created pursuant to Treaty 3, and therefore belonging to the Couchiching First Nation rather than the Crown. Relying primarily on expert evidence from Canada, Justice Fregeau found that it was not. However, Elder Fred Major's oral history evidence was used, in part, to refute a government expert's assertion that none of the reports he reviewed showed that the strip of land, which included a shoreline, was used by the Ojibway. Accordingly, Justice Fregeau stated:

> The record establishes that this reserve site had been used historically by the Ojibway, on an occasional basis, as a camping ground utilized by them during their "seasonal rounds". In the course of doing so, it is obvious the Ojibway would have required the use of the shoreline at this site, just as they would have required the use of the shoreline at countless other locations where they camped within the region.
>
> The Ojibway travelled exclusively by water for at least six months of the year. Fishing was critical to their existence. I fail to see how they could effectively travel by water from one location to another, camp and fish without access to and use of the shoreline. This finding is consistent with the oral history evidence of Fred Major, found at paragraphs 76 to 79.[138]

Though not a consequential part of the decision, Mr. Major's oral history evidence works to refute claims to the land made by the settler state through their expert. It actively challenges dominant understandings of Ojibway presence on the land and presents a counter-visualization of the space to the one offered by the settler state. As Sarah Keenan argues, Indigenous claims to land reveal "cracks in [the] law" by unsettling and potentially subverting notions of whose land it is in the first place.[139] Despite this momentary recognition of Indigenous presence in *Couchiching FN*, Justice Fregeau's decision ultimately reinforces existing spatial relationships in finding that the strip of land was not part of the Agency One Reserve. Here, the law has clear material impacts on space, as Justice Fregeau's judicial pronouncement restricts Indigenous control over and use of the land, while re-asserting the control and jurisdiction of the Crown.

As seen in the preceding paragraphs, Indigenous claimants continue to resist colonial spatializations by offering oral history evidence regardless of whether it is deemed admissible and/or given any weight. However, bringing these kinds of claims is only one of many forms of resistance used by Indigenous peoples to challenge the Canadian state. Following the Supreme Court's decision in *Delgamuukw*, Medig'm Gyamk declared: "[w]e never ever saw

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137 *Couchiching FN, supra* note 10 at para 7.

138 *Ibid* at paras 531—32.

139 Sarah Keenan, "Subversive Property: Reshaping Malleable Spaces of Belonging" (2010) 19:4 Soc & Leg Studies 423 at 437.

it as the only thing we were ever going to do. Never. It was only one of the ways we sought to achieve justice in our territories. And it was important, if not more important, to pursue other avenues to resolve our issues."[140] Indigenous peoples were—and continue to be—engaging in a variety of acts of resistance without judicial invitation from the Supreme Court of Canada.

CONCLUSION

This article sought to answer two main questions. First, it aimed to understand how the Supreme Court of Canada's *Mitchell* decision has been operationalized by trial-level courts in the context of Aboriginal rights and title disputes where the claimants have sought to adduce oral history evidence. Second, it asked whether, based on its use by trial-level courts, this decision opened up space for Aboriginal title and rights claimants to contest dominant understandings of Indigenous presence. More specifically, it looked at how trial-level court decisions used paragraph 39 of *Mitchell* to determine the admissibility and/or weight of Indigenous oral history. The most significant finding of this article is that the *Mitchell* decision has been used to tighten the admission and uses of oral history evidence. In a concluding section, this article suggested that by taking a more restrictive approach in *Mitchell*, the Supreme Court has made it more difficult for Indigenous claimants to use oral history to counter dominant understandings of Indigenous presence and relationships to land.

140 Medig'm Gyamk, *supra* note 135 at 305.