

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Tribes v. Canada (Attorney General)*,
2021 BCSC 235

Date: 20210212
Docket: 14-1027
Registry: Victoria

Between:

**Cowichan Tribes
Squxulenuhw, also known as William C. Seymour Sr.,
Stz'uminus First Nation, Thòlmen, also known as John Elliott,
Penelakut Tribe, Suliisuluq, also known as Earl Jack, Halalt First Nation,
and Sulsimutstun, also known as James Thomas, on their own behalf and on
behalf of all other descendants of the Cowichan Nation**

Plaintiffs

And

**The Attorney General of Canada,
Her Majesty the Queen in right of the Province of British Columbia,
the City of Richmond, the Vancouver Fraser Port Authority,
the Musqueam Indian Band and the Tsawwassen First Nation**

Defendants

Before: The Honourable Madam Justice Young

Ruling on Document Objections to Plaintiffs' Historical Documents, USEE Documents, Tranches 12 and 13 Documents

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INTRODUCTION

[1] In this Aboriginal rights and title case the plaintiffs propose to enter numerous documents into evidence without the benefit of witness testimony at the close of their case. The documents the plaintiffs seek to enter fall into four categories set out below:

- a) Historical documents containing business records, public documents, correspondence between government officials, and others (the “Historical Documents”);
- b) Public documents related to the US Exploring Expedition (“USEE”) and the admissibility of the US Exploring Expedition Chart 77 (SC15134) containing an inset of the Fraser River. These include United States government documents, archival information from public institutions, and correspondence between government officials (the “USEE Documents”);
- c) Tranche 12 Documents, which consist of modern documents, one of which is tendered for hearsay purposes as a business record, 14 tendered for limited non-hearsay purposes; and
- d) Tranche 13 Documents, which consist of government or official correspondence and public records; business records concerning the Kuper Island Residential Industrial School; and documents tendered for non-hearsay purposes.

(collectively, the “Contested Documents”)

[2] The plaintiffs submit that the Contested Documents are relevant to the issues at trial. They submit that the Contested Documents should be admitted under an exception to the hearsay rule without requiring a witness to testify to their authenticity or reliability if certain criteria are met. They further submit that there is no authority stating that the only way to admit documents in an Aboriginal rights and title case is through the testimony of an expert. In any event, the plaintiffs submit that they have already tendered a significant amount of expert evidence relating to types of documents now before the Court which will satisfy the Court as to the reliability of

the documents. They submit that, on a document by document basis, each of the documents is admissible and that their admission does not prejudice the defendants because the defendants had proper notice of the documents and chose not to cross-examine the plaintiffs' experts using these documents.

[3] Tsawwassen First Nation ("TFN") consented to the admissibility of a number of documents but take issue with the admissibility of the Contested Documents. They submit that the plaintiffs have failed to establish necessity and reliability of the hearsay evidence they now seek to admit. The plaintiffs have tendered thousands of pages of expert evidence and were granted the extraordinary relief of being permitted to elicit extensive direct evidence regarding the reliability of historical documents referred to by their expert witnesses in their expert reports on the basis that such evidence was needed before decisions could be made regarding the admissibility of those documents. TFN submits that historical documents cannot be taken at face value without careful consideration of how they came to be produced. The plaintiffs' own expert, Dr. Kennedy, provided an outline of how she analysed the reliability of the documents she relied on in her report. TFN submits that based on the rulings of this Court, which I will summarize below, the evidence of an expert is required before historical documents may be admitted into evidence.

[4] Richmond supports the general objection of TFN. Richmond, Canada, British Columbia and Musqueam Indian Band ("Musqueam") object specifically to certain documents which I will outline below.

GENERAL PRINCIPLES OF ADMISSIBILITY

[5] In the course of this trial I have ruled on the admissibility of documents on numerous occasions. I will summarize below the principles that I have followed:

- a) Historical documents are hearsay evidence and presumptively inadmissible. Historical documents may be admissible under a traditional exception to the hearsay rule or the principled approach. While traditional exceptions may still be used, they have been augmented by the principled

approach: *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1922 (“*Turner Documents Ruling*”) at para. 76.

- b) The court will take a flexible approach to the rules of evidence regarding admission of historical documents: *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 29; *Turner Documents Ruling* at para. 67.
- c) The case-by-case analysis for the admissibility of an historical document as hearsay evidence requires that the document be authentic, relevant, necessary to assist the trier of fact and reliable at the threshold level. *Cowichan Tribes v. Canada (Attorney General)*, 2020 BCSC 1146 (“*Kennedy Documents Ruling*”) at para. 14.
- d) The test for threshold reliability in Aboriginal claims litigation is not high: *Mitchell v. M.N.R.*, 2001 SCC 33 at paras. 30-31; *Turner Documents Ruling* at para. 67.
- e) The court may rely on the evidence of experts to provide it with the information needed to assess threshold reliability: *Turner Documents Ruling* at para. 77.
- f) Expert witnesses may be examined in chief about the circumstances in which historical documents were created and stored in order for the court to assess whether the documents meet the standard for threshold reliability: *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1680 (“*Eldridge Examination in Chief Ruling*”) at para. 34.
- g) The court may also rely on the fact that an expert referred to a document in their report as evidence that the expert finds the document reliable: *Turner Documents Ruling* at para. 77.
- h) Threshold reliability is established when hearsay evidence is sufficiently reliable to overcome the dangers arising from the difficulty of testing it: *R. v. Khelawon*, 2006 SCC 57 at para 49; *Turner Documents Ruling* at para. 62. Threshold reliability of historical documents may be established based on an expert’s evidence about the context and the circumstances

surrounding the making of the document if the evidence is sufficient to allow the court to make that determination: *Turner Documents Ruling* at para. 89.

- i) The expert need not adopt in each case the entire or any of the contents of the document as truthful. If the document meets the threshold reliability test, the whole of the document may be admitted into evidence, where appropriate: *Turner Documents Ruling* at para. 104; *Kennedy Documents Ruling* at para. 14.
- j) The information that is relevant to an assessment of threshold reliability depends on the nature of the historical documents. Historical narrative accounts, like the explorer records (narrative accounts of events) in *The Ahousaht v. Canada (Attorney General)*, 2008 BCSC 768 (“*Ahousaht*”), required expert evidence so the trier of fact could determine the circumstances surrounding the creation of the document. This includes its contemporaneity with the events it describes, the role of the author in the events described, the position of the author, the nature of the publication, whether in publishing editorial changes have been made, and whether the document has been translated, and if so, the expertise of the translator: *Turner Documents Ruling* at para. 89. The explorer records at issue in *Ahousaht* were not free from suspicion and there were real and significant uncertainties about the reliability of the records: *Eldridge Examination in Chief Ruling* at para. 23.
- k) Documents authored by those responsible for the stewardship of government at its highest legislative and bureaucratic levels should be considered inherently reliable unless there is evidence to the contrary: *Canada (Minister of Citizenship & Immigration) v. Seifert*, 2006 FC 270 (“*Seifert*”) at para. 25; *Turner Documents Ruling* at para. 90.
- l) Historical documents may be admissible as business records under the common law or statutory exception to the hearsay rule. Under s. 30(1) of the *Canada Evidence Act*, R.S.C., 1985 c. C-5, “[w]here oral evidence in

respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible". A witness cannot draw a conclusion that a document was made in the ordinary course of business, but the court may hear evidence about how a document was made and what the ordinary course of business was to allow the court to determine whether the document is a business record. An expert witness may be asked those questions: *Turner Documents Ruling* at para. 94.

- m) When considering the admissibility of a map for the truth of its contents, assessment of the map-maker's knowledge will likely be the most important factor, going to both threshold reliability and probative value: *Kennedy Documents Ruling* at para. 46.

[6] The prior rulings of this Court relate to documents referred to by experts and the scope of allowable examination in chief about those documents. No protocol has been established for the admission of historical documents on a stand alone basis. Taken together, the principles set out in this Court's prior rulings do not establish an absolute rule that historical documents require expert evidence to be admitted into evidence. In my view, such a rule would be inconsistent with a flexible approach to the rules of evidence in Aboriginal claims cases (as such a rule would disproportionately impact these kinds of cases) and with the principled approach to the hearsay rule. However, as a practical matter, in this case the Court has required the assistance of experts to assess the threshold reliability of most historical documents.

[7] In Aboriginal rights and title cases, expert opinion evidence is required to understand and evaluate most historical documents because the historical record does not speak for itself. The court may – not must – rely on expert evidence to assess the threshold reliability of documents. Expert evidence may be required in order for the court to have sufficient information to reach a determination on threshold reliability and admit the documents.

[8] There may be instances where the threshold reliability of an historical document is apparent on its face, such as in the case of an historical public or government document.

[9] The court is not precluded from admitting historical documents that were not relied on or referred to by an expert provided they are admissible under an exception to the hearsay rule and the probative value of the evidence is not outweighed by its prejudicial effect.

[10] In the absence of expert evidence, the plaintiffs face significant hurdles in demonstrating the threshold reliability of the Contested Documents. Some documents, like the explorer records in *Ahousaht*, will require expert evidence to allow the court to assess their threshold reliability, and without such evidence, the documents will be inadmissible. However, some historical documents may fit squarely within the ancient documents exception (e.g. property deeds) or the exception for public and government documents, and have sufficient indicia of threshold reliability on their face or based on evidence that is already before the Court to be admissible.

[11] I have a general concern about the prejudicial effect of admitting stand alone documents at the end of the plaintiffs' case after all of their witnesses have testified and were not crossexamined on the documents. I understand the plaintiffs' submission that the documents had been disclosed or were publicly available and so the defendants could have cross-examined on them. That does not address the potential prejudice. If the document has not been referred to by the experts, nor entered as an exhibit, then it is unlikely that the defendants would see the need to cross-examine the expert on the document.

[12] The plaintiffs have prepared an affidavit of a legal assistant in support of their submission that the documents are authentic and meet the test for threshold reliability. Very little reference has been made to this affidavit by any of the parties in their submissions. I have only reviewed the passages that the parties specifically referred to in their submissions.

REVIEW OF THE SPECIFIC DOCUMENTS

[13] I will note that in this specific document review, I am for the most part relying on the headings used by the plaintiffs in their final document chart.

I. Historical Documents

a) Government Correspondence

SC00110 House Assembly Minutes March 31, 1862

[14] This is a two page excerpt of minutes of the House of Assembly dated March 31, 1862 wherein a resolution is passed for the extinguishment by His Excellency the Governor of the Indian title at Cowichan from the proceeds of land sales.

[15] This document appears to be admissible as a government document created by those responsible for the stewardship of government at the highest level. What is missing is an explanation of the context for this excerpted minutes from what I assume is the Colony of British Columbia House of Assembly. This document will not be admitted as it requires evidence to explain its meaning and its context.

SC00078 and SC00079 Letter from Douglas to Barclay

[16] The plaintiffs submit that the Douglas correspondence should be admitted because considerable expert opinion evidence has been given about who Douglas was, what he did at different times and his significance as an actor in the mid-1800s in relation to matters at issue in this case. In the *Turner Documents Ruling*, several Douglas letters were admitted as correspondence between persons responsible for the stewardship of government. In that ruling, I concluded that I did not need the assistance of an expert to come to the conclusion that Sir James Douglas was writing about his views.

[17] SC00079 is a handwritten excerpt of a letter dated December 22, 1850 from James Douglas to Archibald Barclay. I am aware from the testimony of Dr. Turner and Dr. Kennedy that James Douglas was the Hudson's Bay Company ("HBC") Chief Factor and Governor of the colony of British Columbia as of 1851 and Archibald Barclay was a secretary of HBC.

[18] In the letter Douglas identifies the “Cowetchin” as a tribe and indicates that they have lately manifested an unusual degree of ill-feeling towards the colony. The plaintiffs submit that the letter says that the settlers need protection from them.

[19] The letter is difficult to read but it is accompanied by a transcript at SC00078 prepared by an unknown author which includes the excerpt and a great deal of irrelevant information about mining in the colony. The transcript also contains footnotes by an unknown author which are inadmissible.

[20] The letter does state that, because of the ill-feeling, the settlers need protection from the “savage neighbour”. It is not clear whether Douglas is speaking of the Sanitch or the Cowichan. Given that Dr. Kennedy has provided evidence as to the reliability of correspondence from James Douglas, I will admit it subject to challenges to the accuracy of the transcript.

SC10891 April 16, 1851 Letter from Chief Factor James Douglas to Archibald Barclay (Published)

[21] The parties have admitted the authenticity of this letter but I question its relevance. The document is located in a publication of Hudson’s Bay records. It relates to the rising price of fur, the travel of the “Una” bound from Columbia River and the travels of another vessel called the “Tory”. There is a report of the farming in the area and employing one hundred Indians to clear brush and trees. I do not see the relevance of this document and will not admit it into evidence at this time.

SC00249 Letter dated January 20, 1853 from James Douglas to Barclay Archibald and Transcript at SC16529

[22] This document is another handwritten letter from James Douglas. It is difficult to read and I cannot determine its threshold reliability because of issues with legibility. However, the plaintiffs have recently submitted SC16529, which is a transcript of this letter.

[23] In the transcribed letter, Douglas describes anchoring off the mouth of the Cowegin River and dispatching messengers to Native Tribes who live on the banks

of that stream. It describes Douglas' journey to Cowegin and Nanaimo districts to demand the surrender of two Indians who murdered a servant of the HBC. It appears to be an official report from Chief Factor Douglas to the HBC Governor made in the course of Douglas' duties.

[24] Given that Dr. Kennedy has provided evidence as to the reliability of correspondence from James Douglas, I will admit it subject to challenges to the accuracy of the transcript.

SC15607 July 4, 1853 Letter from James Douglas to Archibald Barclay with Transcript at SC15608

[25] The plaintiffs claim that this document shows that Governor Douglas was at Fort Langley in 1853 and therefore travelled up the south arm of the Fraser River.

[26] The letter is written from Fort Langley but does not say how Governor Douglas got there. The letter speaks about the new Caledonian Thompson River brigades and the farm at Thompson River. The fact that Governor Douglas was writing from Fort Langley is of no probative value. This document is not admitted at this time.

SC10775 October 13, 1857 Letter from Governor James Douglas to Henry Labouchere Colonial Office in London

[27] This letter between two government officials in high legislative and bureaucratic positions makes reference to the state of profound tranquility in the colony of Vancouver's Island and that the native tribes are quiet and well disposed and that the harvest was good. The remainder of the letter addresses correspondence with the Governor of Washington Territory relative to outrages committed on citizens of the United States by native tribes. The plaintiffs submit that this communication is relevant to paragraph 14.1 of their fourth Amended Notice of Civil Claim which states that the Cowichan remained at peace with settlers further to Douglas' promise that the Crown would treat them with justice and humanity.

[28] At paragraph 62 of their submissions, the plaintiffs give evidence of the context of the letter which is the role of a witness. However, I have heard evidence from Drs. Kennedy, Turner and Brealey about these two officials and I am satisfied that this report was prepared by Governor Douglas who had a duty to report to the Colonial Office in London. The content has marginal relevance as it indicates that at least at that point in time the native tribes were at peace with the colony. I find that it meets the standard of threshold reliability and may be admitted into evidence.

SC08376 November 12, 1857 Letter from J. D. Pemberton, Colonial Surveyor to James Douglas, Governor of Vancouver Island

[29] The plaintiffs wish to admit this document as an exhibit because Pemberton reports on a trip through Cowichan Valley and in that report identifies the existence of the Somenos village. The document contains two copies of the same handwritten letter. The second manuscript appears to be a copy of the first and is much more legible. There is no indication of the author of the second manuscript. The relevant passage says “the valuable tract of country extending from the Sea to the Somenos village and Mount Prevost, you have yourself examined and will therefore not require description of from me.” There is then a description of the tracts of country eligible for settlement between the Somenos plains and the large lake. He notes that Indians occasionally hunt and fish on the border of the large lake.

[30] It is apparent from the document that Pemberton was acting as a public official tasked with the duty of conducting a survey (a function of government). Pemberton had a duty to record his observations with accuracy and is reporting back to the Governor who gave him those instructions. This duty of accuracy infers that the document is trustworthy.

[31] The only party who objects to its admission is TFN based on their global objection that all documents require the assistance of an expert witness to interpret them. This is one example where I disagree with that submission. I do not require expert assistance to assess the threshold reliability of Pemberton’s report. This document will be admitted as an exhibit. The second copy of the letter transcribed by

an unknown author is subject to challenge by the defendants in the event that they find it is an inaccurate transcription of the letter.

SC15610 Published Copy of November 12, 1857 Letter from Surveyor, J.D. Pemberton to Governor Douglas

[32] This is a typed transcript of the previous document but again there is no indication of who transcribed or published it. This is the third copy of the same letter. More information is required before this document can be entered as an exhibit. Given that there is already a legible handwritten transcript, I question the necessity of entering a third copy of the same document unless the publication is known to be a reliable source.

SC00083 May 25, 1859 Dispatch #18 from Governor Douglas to Lytton and the Transcript at SC00084

[33] In this letter Governor Douglas identifies Cowichan as having subgroups and refers to the Cowichan wish to retain possession of their land. Governor Douglas refers to the “Cowitchen Tribes” and the detailed survey of the “Cowitchen Valley”. He reports that there is “therefore a general belief among the “Cowitchens” that their lands are to be immediately sold and occupied by white settlers, an impression which it is difficult to remove and that gives rise to much contention amongst themselves about the disposal of their lands”.

[34] This correspondence is between two government officials: the Governor of the colony and the Secretary of State for the colony. The plaintiffs submit that it is relevant to the identity of the Cowichan and relevant to the Cowichan’s proprietary interest in land. This letter is cited by Dr. Dorothy Kennedy at 783, page 208 (e-page 222) of Exhibit 114. The Court has heard a great deal about the author Governor Douglas and the Colonial Secretary Lytton. Dr. Kennedy has given context to this letter in her report. I find it meets the requirement of threshold reliability as an official communication between public officials conducting a function of government.

SC00093 August 10, 1860 Letter from Special Constable Harris to Governor Douglas

[35] This is a letter between two government officials conducting the business of government. The plaintiffs submit that the letter is relevant as it identifies the Quamichan and Samona (or Lamona) up the river. I have been unable to identify the reference to Somenos. A transcript should be prepared. The letter does make reference to the impact of smallpox on the Indians at the lake. It is unclear whether this lake is Lake Cowichan.

[36] Dr. Kennedy does refer to this letter at e-page 438, footnote 1608 of Exhibit 114. She confirms that they are at the Cowichan Lake area, that the Indigenous people in that area were suffering from an outbreak of smallpox and some were going to fight the Klallams so that they might die more honourably than from disease. She says that it is not known whether the disease spread to the Cowichan River area.

[37] This letter has marginal relevance. The plaintiffs allege that the Quamichan and Somenos were local groups which, together with other local groups, formed part of the historic Cowichan Nation. Dr. Kennedy has given the letter some context. I find this sufficient for threshold reliability and will admit it.

SC00105 December 3, 1861 Letter from W. Young, Colonial Secretary to JD Pemberton, Surveyor General

[38] In this letter, Colonial Secretary Young asks Surveyor General Pemberton whether he gave assurances to the purchasers of land in the Cowichan Valley that the Indian title to those lands shall be extinguished within a few months. Pemberton responds in the next document. Dr. Kennedy provides the context in her report at Exhibit 114, page 332 (e-page 346) and references this letter at footnote 1234. I will admit this document as government correspondence between two known government officials on this issue of extinguishment of Aboriginal title.

SC00106 December 5, 1861 Letter in Response from J.D. Pemberton to W. Young

[39] This response will be admitted for the same reasons as the previous document was admitted.

SC00109 December 9, 1861 Letter from Colonial Secretary Young to Peers, Stamp, Grahame, Southgate & Fraser

[40] This correspondence from a government official to a list of petitioners makes reference to Indian Title in Cowichan District. In the letter, Colonial Secretary Young acknowledged receipt of their petition and advised them that the installments they owe for the purchase of the lands will be used to extinguish the Indian title in the Cowichan District. The plaintiffs seek to enter this document as an admission that Indian Title exists in the Cowichan Valley. This letter from the Colonial Secretary meets the test for threshold reliability as government communication from a known official and will be admitted.

SC12870 March 3, 1890 Letter from P. McTiernan to W.H. Lomas – Legible Version of Exhibit 284

[41] Exhibit 284 is illegible and this copy does not add any further information or enhanced legibility and is not required.

SC07534 August 5, 1946 Letter from D.M. Mackay, BC Indian Commissioner to R.H. Moore, Indian Agent

[42] The plaintiffs submit that this document is relevant because it precedes Exhibit 329 which is the response to this letter. It provides context to show what Exhibit 329 is responding to.

[43] I do not find this document necessary as Exhibit 329 is clear in its meaning.

b) Business Records

SC15473 February 20, 1845 Letter from Rodrick Finlayson to John McLoughlin and Transcript at SC15474

[44] This letter from two government officials, Rodrick Finlayson, Officer in Charge of Fort Victoria and Dr. John McLoughlin, Chief Factor of the Columbia District at HBC's Fort Vancouver, refers to a large party of Cowichan evidently on a slave kidnapping expedition. The plaintiffs submit that this is evidence of the Cowichan's capacity to control their territory. Evidence about the identity of Finlayson and McLoughlin is provided by Dr. Kennedy in Exhibit 114 at page 113-4 (e-pages 127-8). Dr. Kennedy also cites McLoughlin's letter to Finlayson in the Fort Victoria Correspondence Letterbook 1844-5 from the HBC Archives.

[45] This correspondence between two government officials conducting the business of government is admissible as is the transcript, the accuracy of which can be challenged by any party.

SC15475 March 26, 1845 Letter from Rodrick Finlayson to Dr. John McLoughlin with Transcript at SC15476

[46] This correspondence between the same two government officials references the relationship between the HBC and the Cowichan and references the 1845 and 1846 census which Finlayson is about to prepare. The census is discussed at length by both Dr. Kennedy and Dr. Brealey.

[47] This document is admissible as correspondence between two government officials conducting the business of government. The transcript is also admissible, the accuracy of which can be challenged by any party.

c) Ships' Logs

SC15616, SC15846 and Transcript at SC16447 Excerpt August 14, 1846 entry from HMS Herald log kept by H. Kellett

[48] The plaintiffs submit this document is relevant because Kellett records boarding the HBC Schooner Cadboro. This document comes from the UK National Archives Public Record Office which is entitled "Captain Kellett's Log HMS Herald

1845 – 1851”. The plaintiffs submit that this document provides context to Exhibit 958, “British Admiralty Chart 1917”. It establishes that Kellett boarded the ship captained by Scarborough.

[49] Dr. Kennedy testified that Kellett surveyed around Victoria and likely met Scarborough, Finlayson and other HBC officials around Victoria. She said that it was a reasonable inference considering the evidence at our disposal that Kellett’s map is based on information provided by HBC officers. She elaborated at page 64 of Exhibit 114 (e-page 78):

the Fort Victoria Journal shows Captain Kellett in the area between 27 June and 1 September 1846, and on shore at the Fort several times, including on 5 July when James Scarborough, HBC officer in charge of the *Cadboro*, was present prior to sailing for Fort Langley;

[50] In the *Kennedy Documents Ruling* at paras. 214 to 219, I concluded that SC06392, Exhibit XX British Admiralty Chart # 1917 was based on a compilation of information from various sources that included Kellett and possibly Scarborough.

[51] I agree with the submissions of Richmond that this is a document which Dr. Kennedy could have located. Had she done so, she could have testified about it and the defendants would have the benefit of cross-examining her on this document. Had the plaintiffs tried to put this document to Dr. Kennedy in re-examination they would not have been allowed to do so. I am not going to allow the admission of this document at this time. The plaintiffs are at liberty to rely on this document in cross-examination of future experts however.

SC15617 Excerpts from Ships’ Logs, Beaver (S.S.) May 22, 1850 to November 15, 1851 (excerpt from SC07561) and Transcript at SC15618

[52] The plaintiffs submit that this document is relevant because it makes reference to Cowitchine Gap.

[53] Musqueam submits that the references to Cowitchine Gap which is in the Gulf Islands and not in the claim area has minimal relevance to this case.

[54] I agree that this document is not relevant. Due to its limited use I will not admit it at this late date.

SC15619 Excerpts from Ships' Logs of the Mary Dare March 18-20, 1852 and March 27-29, 1852 and Transcript at SC15620

[55] This document contains references to anchoring a half mile above the Cowitchin village.

[56] Richmond objects to this document as it does not add anything to Dr. Kennedy's evidence that HBC vessels used these various spellings of the term Cowichan village as a navigational marker on the south arm of the Fraser River. The logs do not give any details beyond the term Cowitchin village. They do not describe the village, nor do they record the presence of any Indigenous person there.

[57] Richmond's submissions address the weight to be given to the document. A reference to the Cowitchin village is relevant and the ships' log meets the test for threshold reliability. I will admit this document.

SC15621 Excerpts from Ships' Logs, Beaver (S.S.) February 15 to April 4, 1852, Excerpted from SC07563 and Transcript at SC15622

[58] The plaintiffs seek to admit this document as an exhibit because the ship log makes reference to the Cowitchin village and Cowitchin Gap. It appears to be a reference to a Cowitchin village on Vancouver Island and not on the Fraser River. The ship's log meets the test for threshold reliability but is of such marginal relevance that I will not admit it.

SC15623 Transcription of Extract from Letter Book Correspondence between Joseph McKay and James Douglas August 24, 1852 to September 27, 1853

[59] The plaintiffs seek to enter this document because they submit it makes reference to the question of when HBC Chief Factor Douglas established the Nanaimo post which they submit is relevant to when the Nanaimoes stopped going to the Fraser River. Dr. Kennedy referred to the Nanaimoes getting out of the habit of frequenting the Fraser River after Fort Victoria was established in her report at

Exhibit 114 p. 463 (e- page 477). I note that Dr. Kennedy does not refer to this correspondence between McKay and Douglas in her discussion.

[60] The document refers to Cowechin Gap at e-pages 7, 8 and 10 and Cowitchen passage at e-page 8. There is a reference to two young Nanaimoes firing on a Cowechin in revenge for the murder committed last August. The balance of the correspondence concerns the mining of coal from the Nanaimo area and references other locations including Victoria and Bellingham Bay but does not mention the Fraser River.

[61] I do not find the contents of this document to be relevant to the issues in this case. The inference to be drawn from the document which the plaintiffs suggest in their submission is an inference that should be drawn by an expert. Accordingly, I will not admit this document.

SC15624 Ships' Log of the Mary Dare Excerpt September 13 through October 12, 1852 and Accompanying Transcript at SC15625

[62] The plaintiffs seek to enter this document because it also makes a reference to "Cowitchin Gapp". The document primarily discusses the weather and bringing in coal. The two references to Cowitchin Gapp are not enough to render this document relevant. I will not admit it for that limited purpose.

SC16443 Excerpt from Ships' Logs S.S. Otter 1852 to 1861, Excerpt of SC07499 and Transcript at SC16475

[63] The plaintiffs seek to enter this document because the ship log references the Cowitchin Gap and shows that Douglas' census information was based on firsthand knowledge because of the reference to the Governor being on board and getting off at Fort Langley.

[64] The passage at e-page 10 refers to the Governor being on board the Beaver and proceeding to Fort Langley. It refers also to "Mr. Douglas" proceeding up the river in a canoe. I do not know if Mr. Douglas is the Governor. The only relevant page of this log is e-page 10. I will allow the plaintiffs to extract it from the log and

enter it as an exhibit. It is not clear to me that this document supports the inference they have made about the census but it does place the Governor on the Fraser River on February 5-7, 1858.

SC15628 Ships' Log of the Mary Dare Excerpt February 22 to March 13, March 24 to 26, June 19 to September 15, 1853 with Accompanying Transcript at SC15629

[65] The plaintiffs seek to enter this log as an exhibit because of the ship log references to Chemainus village and Cowitchin Gap. The log details travel between Victoria and Nanaimo. There is no reference to the Fraser River. The mention of a Chemainus Village on Vancouver Island does not render this document relevant.

d) Other Contested Historical Documents

SC15637 Excerpts from SC07084 Notes and Letters of William Ralph, Surveyor from May – June 1864 (Survey of Part of the Chemainus District)

[66] This document is a collection of excerpts from the notes and letters of William Ralph, a surveyor, from his survey of part of the Chemainus District on Vancouver Island. The plaintiffs seek to enter this document because Ralph re-surveys Chemainus District and identifies Indian houses not identified by Wells in 1859.

[67] The relevance of this document is not apparent.

SC12958 Cowitchen Report of the Venerable Archdeacon Reece for 1869

[68] The plaintiffs submit that this document shows continuity of summer fishing practices.

[69] This excerpt is from the Eleventh Annual Report of the Columbia Mission. Extracts from W.H. Lomas' report in the same Annual Report have already been entered as exhibits in this trial at Exhibits 233 and 696. Archdeacon Reece is quoting from a report from W.H. Lomas. E-page 6 of the report states:

The extracts from Mr. Lomas's journal will point out some of the difficulties in the way of systematic mission work, one *great* obstacle being the migratory habits of the Indians during the summer months. It is a complete dispersion, so that it is hopeless to attempt to follow them with the idea of continuing

them under instruction. Until this obstacle is considerably modified or removed, I feel that much real and permanent good can scarcely be reasonably hoped for.

[70] This document is relevant and meets the requirement of threshold reliability.

SC15631 July 11, 1859 British Colonist Article entitled “Cowichan Lands Sold”

[71] The plaintiffs seek to enter this document as an exhibit because it is a list of purchasers in the Cowichan valley laid before the Assembly by Mr. Pemberton. Dr. Brealey refers to this document at Exhibit 652, page 104, footnote 481 when referring to Douglas reserving from sale the lands in the Cowichan Valley. I will allow this document to be admitted for the purpose of listing the Cowichan lands sold. The remainder of the document is only admitted for a non-hearsay purpose as it contains inadmissible opinions.

SC15632 Higher Resolution Copy of United States North West Boundary Survey Map Sheet (Exhibit 934)

[72] I will admit this better copy of a document that is already an exhibit.

SC00176 January 25, 1913 Letter from Simon Pierre to Prime Minister R.L. Borden

[73] In this letter the Cowichan and others demand a response to their petition. The plaintiffs seek to enter this document for the purpose of showing that the demand was received. Dr. Kennedy refers to numerous petitions in her main report but makes no reference to this petition or letter. This letter requires expert evidence to establish context and authenticity.

SC06698 Affidavit of Ernest Wesley Modeste dated September 10, 2007

[74] This affidavit was read into the record on day 75 of this trial.

[75] Richmond objects to paragraphs 23 and 28 as inadmissible opinion evidence or because it is speculative.

[76] In paragraph 23 Mr. Modeste speaks of the importance of oral history as teaching him about the Cowichan Tribes defending their turf from invasion. He said it

told him how powerful the Cowichan Tribes were and how willing his ancestors were to safeguard their lands resources and people. These are inferences that Mr. Modeste drew from the oral history that he received. I agree that this paragraph where Mr. Modeste states an opinion should be redacted. The previous paragraph sets out the facts that were told to him and will remain.

[77] I do agree that most of paragraph 28 is speculative because it starts with the statement that Mr. Modeste was not taught about the Cowichan Tribes harvesting cattails in the Fraser River delta. The first three sentences in paragraph 28 should be redacted.

e) Limited Purposes

SC15636 Excerpt of SC07067 Article Entitled “Indian Title” in the British Colonist Newspaper July 4, 1859

[78] The plaintiffs seek to enter this document for non-hearsay purposes and say that it is relevant because of its reference to unextinguished Cowichan title.

[79] This small passage in the British Colony newspaper is an opinion piece which is of no evidentiary value. It is inadmissible.

SC07117 Full Text of the July 4, 1906 Petition of Indians: Grievances Which Will Be Laid at Foot of Throne (clearer version of Exhibit 681)

[80] The plaintiffs seek to enter this document for non-hearsay purposes to establish that the petition was presented. The plaintiffs agree that the marginalia should be deleted before this petition is entered as an exhibit.

[81] This full text of the petition of Indians was entered as Exhibit 681. It is contained in two pages of the World newspaper, July 4, 1906 edition. The print is fairly faint and therefore I will allow the admission of a clearer copy of the petition as an exhibit.

SC03088 Fraser River Cowichan Fisheries Report 1990

[82] The plaintiffs seek to admit this document for non-hearsay purposes for the fact that it was provided to Canada in 1990.

[83] This is the attachment to a letter dated June 29, 1990 which has already been admitted as Exhibit 732. For that reason I will admit it.

II. US Exploring Expedition Documents

SC15612 1868 Extracted Correspondence from Publication, ‘The Northwest Boundary. Discussion of the Water Boundary Question: Geographical Memoir of the Islands in Dispute: and History of the Military Occupation of San Juan Island’ (p. 82-85)

[84] This extract, published by the Washington Government Printing Office in 1868, contains correspondence between George Bancroft, who was stationed in London as “United States Legation [diplomatic minister]”, and Lord Palmerston, British Foreign Office, Eaton Square [London].

[85] It is a public document and the plaintiffs submit that it will assist the Court in determining when the chart, (SC15134, Exhibit A-283) “Archipelago of Arro, Gulf of Georgia, Ringgolds Channel USEE 1841 Chart 77” was published. The correspondence refers to a copy of a survey of the waters of Puget’s Sound and those dividing Vancouver’s Island from Washington Territory but the enclosure is not included in the publication.

[86] The plaintiffs seek to admit archival information which identifies the charts which were referenced by Bancroft in his letter to Palmerston to support the conclusion they have arrived at that one of these charts was the Archipelago of Arro chart containing the inset of the Fraser River.

[87] Mr. Layland was extensively cross-examined on USEE charts by British Columbia and Canada but not on this version of the chart. Now the plaintiffs wish to bolster Mr. Layland’s evidence with further documents which he did not refer to and the defendants did not cross-examine him on.

[88] Richmond and Canada submit that this document does not establish the publication date but refers to a tracing of the Wilkes' chart of the Straits of Haro, which is not enclosed, leaving the reader to speculate. It appears Wilkes produced some kind of chart by November 1846 but it does not establish that it was the final chart. The unanswered questions without the benefit of expert testimony could lead the Court into error.

[89] The plaintiffs submit that this document was produced by the plaintiffs on October 22, 2019, and any defendant could have cross-examined Mr. Layland on this document but chose not to do so.

[90] Musqueam submits that the document makes reference to maps related to the Wilkes expedition but none of the references match the title of SC15134.

[91] On its own, this correspondence is of no assistance. I have considered the archival evidence in SC15633, SC15634 and SC15635 below and have concerns about the reliability of the archival statements that those maps were enclosed in this correspondence. I agree with Richmond's submissions that the admission of this correspondence and those maps without the benefit of expert testimony could lead the court in to error. I will not admit this correspondence.

SC15861 Wilkes Map of Oregon Territory

[92] The plaintiffs submit that this map shows that the Oregon Territory, that the USEE was duty bound to gather information about, encompassed the Fraser River as a river of commerce. It shows that the USEE was interested in territory north of the 49th parallel.

[93] Richmond objects to this document as not being relevant. Musqueam objects on grounds that the document is not legible.

[94] The table of contents in the map book says that the Map of the Oregon Territory "embraces the United States possessions west of the Rocky Mountains, between the parallels 42 degrees and 54 degrees 40' N., and also shows Fremont's

Pass though the Rocky Mountains”. This could be interpreted to mean that the USEE was interested in lands north of the 49th parallel. I conclude that the Map of the Oregon Territory is not relevant. I require expert evidence in order to substantiate the inference that the plaintiffs suggest that USEE was interested in lands north of the 49th parallel. This document will not be admitted on a stand alone basis.

SC15195 Excerpts Public Documents Printed by Order of the Senate of the United States First Session Twenty Ninth Congress 1846

[95] The plaintiffs submit that this public document contains a report of the Committee on the Library regarding the publication of works of the USEE. On e-page 4, the report contains information about the instructions that Commander Wilkes was to follow in overseeing the surveys. The plaintiffs submit this is relevant to the purpose of SC15134 and Wilkes’ motive to gather accurate information during his instructions. He was directed to:

make such accurate and particular examinations and surveys of various rivers, bays, ports, inlets, sounds, islands, and reefs as might be serviceable to vessels engaged in the whale fishery, and to our commerce generally.

[96] At e-page 5 the document states that “appended to this report will be found a list of all the separate surveys made during the cruise”. At e-page 22 the list includes the “Survey of Fraser River”.

[97] Musqueam submits that this report was submitted by Mr. Pearce in 1846 but there is no evidence about who he was or what his relationship was to the Wilkes Expedition. It appears from the text that he is a politician who worked on the joint committee on the library. His focus was on publishing additional copies of the charts and on the cost of the exploration and the publication of the works. The document contains errors. In the absence of expert evidence, Musqueam submits that this document should not be admitted.

[98] Richmond submits that the list is not proof that Wilkes surveyed the Fraser River. One does not know who wrote this chart or how they obtained the information.

One inference is that the author could just be listing all the places that show up on the charts.

[99] Canada has consented to some of the passages as relevant and admissible for hearsay purposes but submits that several passages stating opinions and expectations or irrelevant information should be redacted.

[100] I agree with Richmond and Musqueam's submissions that this document is not written by someone who had a personal connection to the Wilkes expedition and does not pass the test for threshold reliability. I cannot assess the threshold reliability of this document without expert evidence. I will not admit this document at this time.

SC15848 Map of Arro, Gulf of Georgia, Ringgold's Channel and Straits of Fuca, Oregon Territory

[101] The plaintiffs seek to admit this version of the Map of Arro in order to rely on the archival information on page two which comes from the National Archives of the UK. The plaintiffs submit that the archival information establishes the chart's publication date. They do not seek to admit the chart for the truth of its contents.

[102] Richmond and Musqueam object on the basis that the archival information is hearsay as the asserted publication date comes from an archive catalogue description at the bottom of the map itself. The document raises questions of who the archivist is and what the unidentified archivist relied on to conclude that this version of the Wilkes map was published in 1848.

[103] Mr. Layland found a better quality version of the Wilkes map than the one cited by Mr. Eldridge and Drs. Turner, Kennedy and Brealey, but not this particular version. He was extensively cross-examined on the Wilkes maps and did not make reference to this copy or the archival notes.

[104] I agree with the submissions of Richmond and Musqueam that the many questions which arise about this version of the map are topics for expert evidence and cross-examination. I will not admit this document or the website printouts below

at this time. The plaintiffs are at liberty to refer to them during the cross-examination of the defendants' experts.

SC16074 Chart of Admiralty Inlet, Puget Sound and Hoods Canal, Oregon Territory in USEE Atlas of Charts, Volume II

[105] The plaintiffs seek to admit this excerpt from the USEE Atlas of Charts for non-hearsay purposes. They submit that it demonstrates the appearance of the "Admiralty Inlet, Puget Sound" chart, which the UK National Archives indicates was enclosed in Bancroft's letter of November 1848. I have not admitted the Bancroft letter. I do not see the relevance of this document and will not admit it.

SC15190 NOAA – Our History

[106] The purpose of entering this document according to the plaintiffs is to establish that the National Ocean and Atmospheric Association ("NOAA") was established in 1970. They say this is relevant to the providence and publication date of Exhibit 954 (SC06386), the "Archipelago of Arro". The last paragraph of page 3 of the document may be admitted for the hearsay purpose of establishing the date the NOAA was established. The balance of the document is admitted for non-hearsay purposes.

SC15633, SC15634 and SC15635 Website Printouts UK National Archives Catalogue Description for the Archipelago of Arro

[107] The plaintiffs seek to enter these website printouts to show when the "Archipelago of Arro" chart was published. They submit they are relevant to a proper interpretation of Bancroft's letter in 1848. As noted, Bancroft's letter has not been admitted. I have concerns about the reliability of the archival statements stating which maps were enclosed in the Bancroft letter. The author of the archival information is not known, nor is the source of this information. I agree with Richmond's submissions that the admission of this archival information without the benefit of expert testimony could lead the court in to error. I will not admit this archival information at this time.

SC15866 Chart of Straits of Juan de Fuca, Oregon Territory from Surveys of the US Exploring Expedition and Spanish and English Authorities 1841

[108] The plaintiffs seek to admit e-page 2 of this document for the truth of the archival information. This document comes from the University of Victoria archives website and contains an image of the “Straits of Juan de Fuca” chart by the USEE. The archival information on the second page indicates the chart’s date as 1848 and describes it as being in “Mr. Bancroft’s letters of 3 Nov 1848. US Government”.

[109] As noted, Bancroft’s letter has not been admitted. I have concerns about the reliability of the archival statements stating which maps were enclosed in the Bancroft letter. The author of the archival information is not known, nor is the source of this information. I will not admit this archival information at this time.

SC15182 Excerpts - USEE During the Years 1838, 1839, 1840, 1841, 1842 under the Command of Charles Wilkes, USN, Atlas of Charts, Volume II

[110] The plaintiffs submit that e-pages 10 and 11 are tendered for the limited non-hearsay purpose of identifying the “Juan de Fuca” chart and SC15134 as contained in the Atlas of the USEE, volume II. They further submit e-pages 1 – 9 are tendered for non-hearsay purposes to demonstrate how the Columbia River was surveyed as compared to the Fraser River.

[111] The plaintiffs submit that the USEE had specific instructions with respect to the survey of the Columbia River which explains why it was surveyed in a manner different than the Fraser River. Mr. Layland was cross-examined by Canada on one of the Columbia River sheets (SC15184) and Canada seeks to enter that sheet as a numbered exhibit.

[112] I will admit e-pages 1 and 2 which are the title page and index to Volume II and e page 10 and 11 for the purpose of establishing that those charts, Juan de Fuca and Archipelago of Arro Gulf of Georgia Ringgolts Channel and Straight of Fuca Oregon Territory were contained in Volume II.

[113] I see no value in admitting e-pages 3-9 to establish that the Columbia River was surveyed using different techniques. That issue has been addressed in the cross-examination of Mr. Layland.

SC15189 NOAA Newsletter September 10, 1971

[114] The plaintiffs submit that this newsletter dated September 10, 1971 is admissible as a public document and state document. NOAA is a United States government agency. It is an official government publication identified as a "United States Department of Commerce Publication".

[115] The plaintiffs submit the relevant passage states that NOAA published its collection of engravings of the USEE charts of the Pacific Northwest. It states the charts were issued originally in the mid-1840s.

[116] There is no information about the author or sources for the article. The article refers to Wilkes as "Admiral" Charles Wilkes which was not his rank at the time of the USEE.

[117] Canada submits that the Newsletter is an informal collection of current news of interest to employees of NOAA and is not the type of government publication that would be considered inherently reliable.

[118] Mr. Layland attempted to give evidence regarding this publication in direct examination. The Court ruled that he was exceeding the permissible scope of direct examination in offering new opinion evidence. Now the plaintiffs are attempting to circumvent that ruling by tendering this document as a stand-alone document. This document does not meet the test for threshold reliability and will not be admitted.

III. Tranche 12

SC15851 Table of Contents to Binder enclosed with January 31, 2013 Letter of Cowichan Nation Alliance Chiefs to Crown Minister (enclosure to Exhibit 1039)

[119] Counsel for the plaintiffs have advised me that this document is no longer objected to. It was attached to the correspondence marked as Exhibit 1039 and will be admitted.

SC00074 The North American Indian Brotherhood Petition of the British Columbia Indian Peoples in Respect to the Indian Land Title Claim to the Province of British Columbia 1961

[120] The plaintiffs submit that this document is relevant to their defence to laches as it shows the Cowichan continued to complain and did not acquiesce. We heard evidence from Dr. Kennedy in her responding report to Dr. Binnema, which is Exhibit 323, that over time, the Cowichan's complaints evolved from individual grievances about places of cultural importance to their active and ongoing participation in provincial organizations focused on the recognition of Aboriginal title. The plaintiffs submit that this document is exactly such a petition.

[121] I am satisfied that Dr. Kennedy has given this petition adequate context and I will admit it.

SC00205 Submission, to the Prime Minister and Government of Canada by the Union of British Columbia Indian Chiefs, as to the Claim Based on Native Title to the Lands now Forming British Columbia and the Waters Contained Therein or Adjacent Thereto (December 1971)

[122] The plaintiffs seek to rely on this document for non-hearsay purposes to show that the Union of British Columbia Indian Chiefs petitioned the Prime Minister in December 1971. Again, this is relevant to their defence to laches and acquiescence.

[123] I will admit this document as an exhibit for non-hearsay purposes.

SC00419 (Exhibit A-336) An Archaeological Site Survey of Areas Affected by the Proposed Flood Control Program; Lulu Island and Westham Island, by B. Simonsen [Provincial Archaeologist] (February 18, 1974)

[124] The plaintiffs seek to enter this document for non-hearsay purposes to establish that it was in British Columbia's possession.

[125] The defendants withdrew their objection. I will allow it to be entered as an exhibit.

SC16444 36 Page Excerpt of SC15852 Living Treaties: Lasting Agreements - Report of the Task Force to Review Comprehensive Claims Policy to the Honourable David Crombie [Minister of Indian Affairs and Northern Development] (December 1985)

[126] This excerpt of a 143 page document contains a series of recommendations made by the Task Force to Review Comprehensive Claims Policy to the Minister of Northern Development. The plaintiffs quote portions of the recommendations which they wish to rely on. This document is not proof of the recommendations but merely proof that this advice was obtained

[127] The defendants Canada and Richmond object to this document because of its political or policy nature. The suggested policy changes are not relevant to this proceeding. I agree with the submissions of the defendants and I will not enter this document as an exhibit

SC06675 British Columbia Archaeological Site Inventory Form, with Site Map, Registered Archaeological Site Borden No. DgRs-17. Archaeology Branch, Government of British Columbia (April 16, 2009)

[128] This archaeological site inventory for DgRs-17 is a publicly accessible document relevant to the question of whether Canada, the Vancouver Fraser Port Authority and Richmond knew or ought to have known of the archaeological site and potential Cowichan village at the site. Dr. Brealey relies on this document in footnote 744 of his main report.

[129] I will admit this document.

SC06100, SC07396, SC07398, SC07399, SC06099, SC07400, and SC06103 (Correspondence between Richmond and Counsel for Cowichan Tribes, as well as between Counsel for Cowichan Tribes and the BC Government)

[130] The plaintiffs submit that these letters are a chain of correspondence which start with a request by Maureen Tommy of Cowichan Tribes to the City of Richmond requesting permission for Morley Eldridge to conduct a heritage investigation on lands held by Richmond, Lot E and Lot K. The end result is contained in a letter from Kirk Taylor on behalf of Richmond granting Mr. Eldridge permission to access Lot E with permission to dig, and to enter Lot K but not to dig.

[131] Richmond submits that the plaintiffs are attempting to bolster the report of Mr. Eldridge and undermine his cross-examination by suggesting that Richmond's refusal to grant him access to Lot K impacted his ability to find archaeological remains on the village site. Mr. Eldridge was examined about this in chief and made no such assertion.

[132] The admission of this correspondence in order to support speculation that, had he had access to Lot K, he would have found more archeological remains, is insufficient grounds to admit the documents into evidence. If this was an issue, it should have been raised by the plaintiffs when Mr. Eldridge was on the witness stand. I will not admit any of this series of documents at this time. The plaintiffs are at liberty to cross-examine Richmond's witnesses about this correspondence.

SC15868 News Release from Department of Justice Canada and SC15869 Webpage from Department of Justice Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples"

[133] These are aspirational policy statements by Justice Canada which are not relevant to these proceedings and should not be admitted into evidence.

IV. Tranche 13

a) **Documents the Plaintiffs Seek to Admit As Government or Official Correspondence and Public Records**

[134] The plaintiffs seek to admit the documents under this heading for hearsay purposes. They submit that the documents are government or official correspondence created by persons responsible for the stewardship of government at the highest level and should be considered inherently reliable as there is no evidence to the contrary. The plaintiffs rely on *Seifert*, the *Turner Documents Ruling* and the *Kennedy Documents Ruling*.

SC00447 Letter from W.H. Lomas [Indian Agent] to Thomas Mowat [Inspector of Fisheries] (January 17, 1889) with Transcript at SC16471

[135] This is a letter authored by W.H. Lomas written in his capacity as an Indian Agent and the Cowichan Agency to Thomas Mowat, Inspector of Fisheries, advising Mr. Mowat that the new fisheries regulation will impose hardship on the Cowichan Agency Indians' ability to feed themselves and make a living.

[136] Dr. Kennedy provided information about W.H. Lomas in her testimony and in her report at pages 152 – 3 (e-pages 66 – 7). There have been 18 other letters from or to Lomas entered as exhibits in these proceedings (Exhibits 227, 228, 230, 274, 275, 278, 282, 283, 285, 289, 294, 297, 302, 325, 326, 696, 1064 and 1452).

[137] I am satisfied that the Court has heard sufficient evidence to substantiate the threshold reliability of this document and I will admit it as an exhibit.

SC01850 Letter from W.H. Lomas (Indian Agent) to J. Moffat (Acting Indian Superintendent) August 23, 1889

[138] This document will be admitted as an exhibit for the same reason the previous document was.

**SC01851 Letter to John Tilton, Deputy Minister of Fisheries
September 1, 1889 Together with Transcript at SC16465**

[139] This is a reporting letter to John Tilton, Deputy Minister of Fisheries from a Department of Fisheries official. The author is not identified. The plaintiffs submit it is clear on the face of the document that the author is a government official writing to the Deputy Minister of Fisheries in his official capacity about the ordinary business of the Department of Fisheries. I cannot come to that conclusion without knowing who the author is. This document does not meet the test for threshold reliability and will not be admitted.

**SC01852 Annual Report of the Department of Indian Affairs for the
Year Ending December 31, 1890**

[140] The plaintiffs submit that the annual report is a business record created in the ordinary course of business for the Department of Indian Affairs with the intent that the facts reported therein are accurate. Dr. Kennedy relied on Lomas' letters. The report for the Cowichan agency is given by Lomas in his capacity as the Indian Agent. I will admit this document as a business record.

**SC05856 Letter from J. Moffatt (Acting Indian Superintendent) to
L. Vankoughnet (Deputy Superintendent General of Indian Affairs),
Department of Indian Affairs (February 2, 1892) with Transcript at
SC05857**

[141] This letter is authored by J. Moffat, Acting Indian Superintendent to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, enclosing letters from W.H. Lomas. The correspondence says that the letter from Lomas is a private letter. The plaintiffs submit the letter is clearly written by Mr. Moffat in his official capacity carrying out his official duties.

[142] Although the letter appears to be a business document, there is marginalia from an unidentified source. The plaintiffs have provided a transcription of the marginalia in SC50857. The transcript claims that the marginalia was written by Mr. Wright from the Department of Fisheries. I am not satisfied that is the case and I do not find this letter has met the test for threshold reliability.

SC04495 Letter from W. Smith (Deputy Minister of Marine and Fisheries) to L. Vankoughnet (Deputy Superintendent General of Indian Affairs), Department of Indian Affairs (April 28, 1892)

[143] The plaintiffs submit that this letter is authored by W. Smith, acting as Deputy Minister of Marine and Fisheries written on a Department of Fisheries Canada letterhead to L. Vankoughnet, Deputy Superintendent General of Indian Affairs. Smith is clearly acting in his official government capacity in writing this letter. It meets the test for threshold reliability.

SC05839 Letter from Jas Gaudin, Fisheries and Oceans Canada to William Smith (Deputy Minister), Fisheries and Oceans Canada (June 16, 1894) with Transcript at SC05840

[144] This letter is authored by Jas Gaudin, an officer of Fisheries and Oceans Canada on the official letterhead to W. Smith, Deputy Minister of Fisheries. It meets the test for threshold reliability as being official government correspondence. The transcript at SC05840 is also admitted subject to the defendants' submissions on its accuracy.

SC02225 Report of a Committee of the Honourable Executive Council, Approved by His Honour the Lieutenant Governor on Indian Fishing in British Columbia June 20, 1894

[145] This is a certified copy of a report of a committee of the Executive Council. The document is on the letterhead of the Province of British Columbia. It is signed by the clerk of the Executive Council. It meets the test for threshold reliability and is admitted.

SC02226 Letter from W.J. Thomas, Indian Agent and Fishery Guardian to John MacNab, Inspector of Fisheries re Impact of Fishing Regulations on Indians July 3, 1894

[146] This letter is authored by a government official working in the course of his official duties. It meets the test for threshold reliability and is admitted.

SC02227 Memo and Report to the Governor in Council in Relation to Fishing by Indians in British Columbia July 26, 1894

[147] The plaintiffs submit this document is a memorandum and report prepared by officials at the Department of Marine and Fisheries for the Minister to the Governor in Council. It is not clear who the author of this document is and it is not legible. I cannot assess its threshold reliability. It is not admitted.

SC02233 Letter from Hayter Reed, Deputy Superintendent General, Department of Indian Affairs Canada to Deputy Minister of Fisheries and Oceans Canada June 27, 1895

[148] Hayter Reed is writing on official letterhead of the Department of Indian Affairs in his official capacity. This document meets the threshold reliability test and is admitted.

SC01867 Annual Report of the Department of Indian Affairs for the year ending June 30, 1897

[149] This annual report is admissible as a business record. The report for the Cowichan Agency is given by W.H. Lomas in his official capacity as Indian Agent. The update on the work of the Indian Reserve Commission is given by P. O'Reilly in his official capacity as Indian Reserve Commissioner. Dr. Kennedy has given evidence about Lomas and P. O'Reilly. A number of exhibits authored by these two officials have already been entered as exhibits. This document meets the threshold reliability test and is admitted.

SC00497 Letter from W. Lemmens to W. R. Robertson writing at the Request of Chief Louis Andrew about the Indians Fishing License (August 24, 1907)

[150] This is a letter written by someone named W. Lemmens on Kuper Island Indian Industrial School letterhead. It was sent to someone named W. Robertson. I have heard no evidence about either of these authors. This letter does not meet the test for threshold reliability.

SC00174 Letter from A.E. Green [Inspector, BC Inspectorate] to J.D. McLean [Secretary of Department of Indian Affairs] (March 29, 1910)

[151] The plaintiffs submit that A.E. Green is an inspector for the BC Inspectorate. This evidence is not contained in the letter. The letter is addressed to J.D. McLean, Secretary of the Department of Indian Affairs. The letter appears to refer mostly to unrest of an Aboriginal group and the Naas River area. There has been no evidence led about these individuals and this letter does not meet the test for threshold reliability.

SC08388 Letter from Lord Crewe to Lord Grey re Submitting the Title of the Indians to the Lands in their Reserves for Definition by His Majesty in Counsel May 7, 1910

[152] This letter is addressed to “My Lord” from “Crewe”. It is not on any letterhead and states that it is a copy. There is marginalia which says “4 letters” on it. I am not satisfied that this document meets the test for threshold reliability. Although a document from Lord Crewe to Lord Gray was admitted into evidence as an exhibit and Dr. Kennedy does reference that document at page 343 (e-page 357), footnote 1272 of Exhibit 114, she provides no information about the author or recipient.

SC10831 File Note and Letter from Administrator (Ottawa) To Earl of Crewe June 13, 1910

[153] I have a concern about admitting a file note which appears to possibly be an unsigned file copy of a letter that may have been sent. It is not on any letterhead and there is no indication that it was sent or received. This document does not meet the test for threshold reliability.

SC10833 Letters with enclosure from R. Borden (Prime Minister of Canada) to Robert Rogers (Minister of the Interior of Canada) (1911)

[154] This document is a letter from the Prime Minister of Canada, R. Borden, signed and on letterhead sent to Robert Rogers in his capacity as Minister of the Interior of Canada. The enclosures are letters with signatures and most of them are on official letterhead except for the memorandum from the Deputy Superintendent General whose signature I cannot read. The letters all appear to be written by

government officials in the course of their official responsibilities. I find this letter with enclosures to meet the test for threshold reliability. It appears that the memorandum from the Deputy Superintendent General is the enclosure which the plaintiffs are relying on for the most part. The other letters are difficult to read but that memorandum is legible.

SC07170 Memorandum dated September 16, 1921 from the Acting Deputy Superintendent General

[155] This memorandum is not on letterhead and it is addressed to someone whose name is crossed out and another name, which is not legible, is written over top. There are other handwritten changes and no indication of whether this is the final letter that was sent or a draft letter which was amended. For that reason I do not find the test for threshold reliability is met.

SC00184 Memorandum from W.E. Ditchburn [Chief Inspector of Indian Agencies] to D. C. Scott [Deputy Superintendent General of Indian Affairs] (July 20, 1922)

[156] This memorandum for Mr. Scott is written on official letterhead, dated and signed by W.E. Ditchburn in his capacity as Chief Inspector of Indian Agencies. It appears that Ditchburn did draft this memorandum in his official capacity during the course of his official responsibilities. Dr. Kennedy identified W.H. Ditchburn as the Chief Inspector of Indian Agencies and relied on records created by him (Exhibit 323 at pages 21 – 22, Exhibit 320 and 321 and 1067).

[157] This document meets the test for threshold reliability.

b) Business Records

SC12858 Letter from G. Donckele [Principal of Kuper Industrial School to W.R. Robertson, Indian Agent, Duncan's Station May 30, 1906

[158] The plaintiffs submit that the letter is admissible as business records, and admissible under the principled approach to hearsay. The letters are necessary because the authors and recipients of the letters are deceased. The letters are reliable because they have been authored by those “responsible for the stewardship

of government at the highest level" and should be considered inherently reliable unless there is evidence to the contrary.

[159] As TFN pointed out in their submissions, the plaintiffs are relying on *Seifert* language to admit this document as a business record, although this letter is not authored by someone responsible for the stewardship of government at the highest level.

[160] Richmond challenges the relevance of this document. The plaintiffs say that the document is evidence of historical Crown actions of exclusion, disruption and assimilation. This letter is not from the Crown.

[161] The letter is dated May 30 without the year and is signed by G. Donckele "Principal". It is not on letterhead and does not say of what he is a principal of. This is the type of document that requires expert evidence to identify the author, his reputation, the source of the information and whether the individual was motivated by personal interest. This document does not speak for itself and will not be admitted at this time.

SC12863 Letter from G. Donckele to W.R. Robertson July 15, 1903

SC12864 Letter from G. Donckele to O'Connell August 8, 1906

[162] I will not admit these document for the same reason I did not admit the previous document.

SC12872 Kuper Island Student Conduct Book

[163] The plaintiffs seek to enter this document as a business record made in the usual and ordinary course of business. There is no evidence of how this document was made, who made it or when they did so. This document requires expert evidence.

SC12873 Letter from A. W. Vowell, Indian Superintendent British Columbia to Rev. G. Donckele, Principal, Kuper Island Industrial School January 7, 1891

[164] This is an unsigned copy of a circular, apparently from the British Columbia Indian Office to an unidentified person, although the bottom of the first page does have the name “Reverend G. Donckele Principal of Industrial School, K. I.” typed. There is insufficient supporting evidence that this is a letter that was actually sent to the principal of the industrial school or that this is an official business record.

SC15891 Kuper Island Industrial School Quarterly Reports

[165] The plaintiffs submit that this document is admissible for hearsay purposes under the business records exception to the rule against hearsay. There is no evidence to support that assertion. This document requires the evidence of an expert to explain who created it, how they created it, why they created it and to give some foundation for threshold reliability. This document will not be admitted.

SC15885 List of Pupils, Kuper Island Industrial School

[166] I will not admit this document for the same reason I did not admit the previous document.

c) Limited Non-Hearsay Purpose

[167] The plaintiffs submit that the documents in this category are relevant to Crown actions of exclusion, disruption, and assimilation and are therefore relevant to the plaintiffs’ Reply at paragraphs 1(b)(ii) where the plaintiffs assert that they have “maintained a substantial connection to the lands of Tl’uq̓tinus when considered in context of historical Crown actions of exclusion, disruption and assimilation, including... (ii) federal Crown regulation of Fraser River salmon fisheries, at times to the exclusion of Cowichan Nation members and descendants”. The plaintiffs further submit that many of the documents are related to the defendants’ defence of laches and acquiescence.

[168] The plaintiffs further submit that, because they are intending to rely on the documents for non-hearsay purposes, their reliability for the purpose of the test in

Ahousaht is not at issue. I do not agree with that statement. There still needs to be some proof of the reliability of the document before it is entered for any purpose. *R. v. Aitken*, 2009 BCSC 1909 para 8.

SC02166 Petition from Roderick Reid, Malcolm Reid, James O. Hook, Jacob Heck, John S. Clark and 280 others of Cowichan District to T. Mayne Daly (Superintendent General, Indian Affairs)

[169] This letter appears to be a petition signed by a group of members of the Cowichan District to the Superintendent General of Indian Affairs. It is unsigned and it is undated. I have no means of assessing the reliability of this document or whether it was in fact sent. It is not admitted.

SC01861 Letter from John McNab, Inspector, Department of Fisheries to W. Smith, Deputy Minister of Marine and Fisheries May 16, 1892

[170] This appears to be official correspondence between government officials created in the course of their government duties. It may be admitted.

SC07139 Petition dated May 27, 1907 from Chief Joe Capilano, Chief Charley Tsilhpaymilt, Chief Basil Bonaparte and Simon C. Pierre (Interpreter) to King Edward VII

[171] This document is a further petition on behalf of the Cowichan Chief following up on the 1906 petition and asking King Edward VII to take the petitions into consideration.

[172] There are a number of issues with the document. First, the handwritten document is cut off on the left side so that words are missing. On the right side there is a list of words: subjects... Do... Wish... Allegiance... That... etc. I have no idea what those words mean or who wrote them. This document will not be admitted in its current form.

SC07140 Petition from Multiple Chiefs and Simon Pierre, Interpreter, Katzie Indian Tribes to King Edward VII May 27, 1907

[173] This petition has similar issues. However there is an explanation at the top of the first page in handwriting that the P.R.O. could not copy of the inner margin of the

books. The missing material has been added by hand on the right side of the page. I will admit the document. The previous document should have the same notation to explain the words on the right column.

SC00165 Petition from Simon Pierre, Katsey Indian Tribe and various Chiefs to Wilfrid Laurier Prime Minister Canada June 11, 1908

[174] This document is a petition from various chiefs of the Cowichan, Musquiam, Katsey, Saanich, etc. to Wilfrid Laurier. The source, date, and authors of the document have been adequately established. I find there is sufficient reliability to admit the document for non-hearsay purposes.

SC01816 Cowichan Agency Transcript of Meeting with the Chemainus and Sickameen Bands, Royal Commission on Indian Affairs for the Province of British Columbia June 2, 1913

[175] The plaintiffs submit that this document is relevant because of Simon Pierre's statement to the Royal Commission that he would like permission to fish on the Fraser River during the close season, which he was being denied.

[176] The document appears to be an official transcript of the Royal Commission proceedings. It will be admitted.

SC03424 Letter from David Sillseemult [Cowichan Indians] to Royal Commission on Indian Affairs for the Province of British Columbia (March 31, 1914) Together with Transcript at SC16470

[177] The plaintiffs submit that this document is a complaint on behalf of the Cowichan Indians respecting the land question, fishing, and hunting. The letter states that white people have taken advantage of the Cowichan Indian's good faith in the reserve commission. The plaintiffs submit that this is directly relevant to para. 1(b) of the Plaintiffs' Reply, in that it goes to the context of historical Crown actions of exclusion, disruption, and assimilation. The plaintiffs further submit that this document is directly relevant to para. 5(b)(iv), which states, "[t]he historic Cowichan Nation and its successors have not delayed the institution or prosecution of this case, and have never accepted or acquiesced to the Crown grants of fee simple interest in the Lands of Tl'uqtnus made between 1871 and 1914, as referred

to in paragraphs 18 and 21-24 of the Amended Notice of Civil Claim (the “Crown Grants”). In particular, the historic Cowichan Nation and/or its successors ... complained about the existing Crown Grants specifically and generally: ... in 1913 to the resulting federal-provincial McKenna-McBride Indian Reserve Commission upon its visit to the Cowichan Valley, despite the geographic restrictions imposed on testimony”.

[178] The handwritten document has been transcribed by plaintiffs’ counsel. The original has marginalia on the top left corner of the first page of the document which has been partially transcribed.

[179] The two documents will be admitted as official documents from the Royal Commission. The defendants may challenge the accuracy of the transcript in closing submissions.

SC03731 Newspaper Clipping, Editorial from the Chiefs of Cowichan re Indian Chief Protest March 19, 1914

[180] The plaintiffs submit that, in this document, the Cowichan Chiefs protest the mismanagement and misuse of fisheries and the loss of their fishing rights. Canada objects to this document on the basis of the reliability of the document. The source date and author of the article are not identified and, accordingly, there is insufficient indicia of reliability.

[181] I do not find this document to be sufficiently reliable or legible to be entered as an exhibit at this time.

SC07169 Petition from the Cowichan Indians, Victoria Indians and Nanaimo Indians to Arthur Meaghan, Prime Minister of Canada March 1921

[182] In this petition a number First Nation groups, including the Cowichan, protest prosecutions for engaging in potlatches. The plaintiffs submit that this document is relevant to the pattern of disruptive Crown policies. Dr. Kennedy discusses the curtailment of ceremonial use of sockeye and other salmon including the prohibition of potlatch ceremony in her response report to Dr. Binnema.

[183] This document will be admitted for the purpose of establishing that the Indigenous groups made the petition to the highest level of government.

SC01953 Letter dated June 12, 1994, from Chief Peter Seymour (Chemainus) and Chief Joe Norris (Halalt) to Maryantonett Flumian, Assistant Deputy Minister, Department of Fisheries and Oceans, entitled: Failure of the Department of Fisheries and Oceans to Adequately Address the Food Social and Ceremonial Requirements of the Joint Chemainus/Halalt Management Board

[184] The plaintiffs submit that this document is relevant to their pleading of colonial disruption and exclusion. In this document the members of the plaintiff bands protest the Department of Fisheries denying them access to fishing on the Fraser River.

[185] This document will be admitted as evidence that the complaint was made.

"B. M. Young, J"

The Honourable Madam Justice Young