CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 1146

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2020 BCSC 1146 Cowichan Tribes v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cowichan Tribes v. Canada (Attorney General),

2020 BCSC 1146

Date: 20200804

Docket: 14-1027

Registry: Victoria

Between:

Cowichan Tribes

Squtxulenuhw, also known as William C. Seymour Sr.,

Stz'uminus First Nation, Thòlmen, also known as John Elliott,

Penelakut Tribe, Kwaliimtunaat, also known as Joan Brown,

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

Corrected Ruling: The text of the ruling was corrected

at paras. 29 and 30 on November 3, 2021.

Before: The Honourable Madam Justice Young

Ruling on Dr. Kennedy Document Objections

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Table of Contents

INTRODUCTION. 7

THE PARTIES' POSITIONS. 8

LEGAL ANALYSIS. 10

Hearsay Evidence Generally. 10

Opinions of Non-Witnesses. 12

Admissibility of Opinion of Non-Witnesses. 15

Admissibility of Maps and Charts. 18

ANALYSIS OF SPECIFIC DOCUMENTS. 22

Early Sources. 22

Exhibit A-128 (SC14057) Franz Boas, Zur Ethnologie Britisch-Kolumbiens (1887) 22

Exhibit A-83 (SC14121) Edward Curtis, "Salishan Tribes of the Coast" (1913) excerpts volume 9. 25

Ethnographers Field Notes. 27

Exhibit A-118 (SC13088) Wayne Suttles, Field Notes on Tsawwassen with Simon Pierre, (1949) 27

(SC06785) Wayne Suttles, The Penelakuts Village and Penelakuts Field Notes Relating to Subsistence. 27

(SC14864)Excerpt containing Exhibit 112 and A-103 Wilson Duff, "The Upper Stalo Indians of the Fraser Valley of B.C.: Anthropology in British Columbia, Memoir No. 1 (1952) 27

Exhibit A-131 (SC14206) Wilson Duff Miscellaneous Notes on Local Salish, (1953-1956) 27

Exhibit A-106 (SC06793) Wilson Duff, The Indian History of British Columbia: The Impact of the White Man: Anthropology in British Columbia, Memoir No. 5 (1965) 27

Ethnographers' Unpublished Work. 27

Exhibit A-88 (SC14078) Diamond Jenness, 1934-1936 The Saanich Indians of Vancouver Island, unpublished manuscript 27

Exhibit A-94 (SC00207) Compilation of draft works by Wilson Duff and Wayne Suttles. 28

Ethnographers' Published Work. 29

Exhibit A-93 (SC06597) Homer Barnett, "Coast Salish of Canada" (1938) 29

Exhibit A-105 (SC14087) Homer Barnett, "Coast Salish of British Columbia" (1955) 29

Exhibit A-104 (SC14086) Barbara Lane, Comparative and Analytic Study of Some Aspects of North West Coast Religion (1953) 30

Exhibit A-119 (SC14088) David Rozen, The Ethnogeography of the Cowichan River, British Columbia (1977) 31

Exhibit A-120 (SC14179) - David Rozen, Ethnozoology of the Cowichan Indian People (1978) 32

Exhibit A-121 (SC 14089) David Rozen, Place-Names of the Island Halkomelem Indian People, M.A. Thesis in the Department of Anthropology and Sociology, University of British Columbia, (1985) 33

Exhibit A-122 (SC14090) Wayne Suttles, Coast Salish Essays (1987 [1950-1960]) 34

Exhibit A-123 (SC14184) Wayne Suttles, Technical Alphabet (1990) 34

Exhibit A-124 (SC13098) Wayne Suttles, The Shed-Roof House (1991) 34

Exhibit A-125 (SC00220) Wayne Suttles, Musqueam Reference Grammar (2004) 34

Exhibit TT (SC00951) Fort Langley Journals 1827-30, edited by Morag Maclachlan, with appendices (With Contributions by Wayne Suttles) 35

Exhibit A-110 (SC 14102) Daniel Marshall, Those Who Fell From the Sky: A History of Cowichan Peoples (1999) 37

Biography. 38

Exhibit A-72 (SC07173) Francis, "Early Cowichan History IX: Bishop Demers and the Cowichans" (1928) 38

Exhibit A-76 (SC06595) Francis, "Our Cowichans and the Chinook" (1930) 38

Exhibit A-107 (SC07477) Barry Gough, Biography of Grant, Walter Colquhoun (1976) 38

Exhibit A-111 (SC06654) Margaret Ormsby, Biography of Moody, Richard Clement (2000) 38

Letters, Journals, Affidavits and Articles. 40

Exhibit A-113 (SC06616) - Eddie Edwards to "Dear Sir," 26 July 1963 Penelakut Tribe Submission No. 15. Indian and Northern Affairs. 40

Exhibit A-45 (SC14094) - Robert Brown, Journal, Volume 1 (1864) 41

Exhibit A-46 (SC14096) - Robert Brown, Journal, Volume 3 (1864) 41

Exhibit A-47 (SC14097) - Robert Brown, Journal, 1864, Winnifreda Macintosh Transcript (1968) 41

Exhibit A-116 (SC14092) - Robert Brown, Journal, 1864, John Hayman Transcript (1989) 41

Exhibit A-50 (SC06870) Brown, "The Last of the Chiefs", All the Year Round, Volume 3, from December 4, 1869 to May 28, 1870, entry for March 12, 1870. 44

Exhibit A-51 (SC13987) Robert Brown, The Races of Mankind, Volume I, (1873) 44

Exhibit A-56 (SC12984) Affidavit John A. Martin, Treasurer of Blaine (1895) 45

Exhibit A-60 (SC12982) Affidavit of A.E. Wadhams, Cannery Owner (1895) 45

Exhibit A-24 (SC06390) Letter from Demers to Monseigneur of Juliopolis, (1841) 47

Exhibit A-23 (SC06387) Letter from Francois Blanchet to Bishop of Quebec (1841) 48

Exhibit A-25 (SC14027) Letter from Bolduc (1844) 49

Exhibit A-85 (SC14071) Beryl Cryer, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island, (1933) edited by Chris Arnett (extract one) 50

Exhibit A-86 (SC14074) Beryl Cryer, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island, (1933) edited by Chris Arnett (extract two) 50

Exhibit SC14285 Beryl Cryer, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island, (1933) edited by Chris Arnett (extract three) 50

Exhibit A-129 (SC14129) - Thomas Kidd, History of Lulu Island and Occasional Poems (1927) 51

Maps. 52

Exhibit J (SC06386) United States Exploring Expedition chart entitled "Archipelago of Arro, Gulf of Georgia, Ringgolds Channel and Straits of Fuca Oregon Territory by the U.S.Ex.Ex., 1841" with Frasers River inset 52

Exhibit G (SC06381) British Admiralty Chart #1922 (1849) 56

Exhibit XX (SC06392) British Admiralty Chart #1917 (1849) 57

Exhibit A28 (SC00425) Arrowsmith Map (1849) 59

Exhibit A-29 (SC06396) Arrowsmith Map (1853) 59

Exhibit YY (SC06394) Alden Chart (1853) 59

Exhibit A-5 (SC06398) Alden Chart (1854) 59

Exhibit A-1 (SC06399) Pemberton Chart (1854) 61

Exhibit ZZ (SC14040) Dispatch from Douglas to Colonial Office dated February 27, 1854 enclosing Pemberton Chart (1854) 61

Exhibit A-11 (SC14045) James Prevost's Despatch No. 7 to Lord Clarendon dated December 7, 1857 enclosing George Richards Chart (1854) 62

Exhibit A-10 (SC06418) Richards Chart (1854) 62

Exhibit A-6 (SC06413) James Prevost's Despatch No. 4 to Lord Clarendon dated August 12, 1857. 63

Exhibit A-7 (SC06412) Prevost Chart (1857) 63

Exhibit A-8 (SC06411) Prevost Chart (1857) date stamped November 1857. 63

Exhibit A-73 (SC06526) Richards Chart (1865), 1900 version. 63

Exhibit A-74 (SC00037) Richards Chart (1865), 1932 version. 63

Exhibit A-30 (SC06478) Wyld Map (1861) 64

Exhibit A-20 (SC06539) United States North West Boundary Survey's Map Sheet No. 7 (1869) (lithographic) 65

Exhibit A-21 (SC06538) British North West Boundary Survey's Map Sheet No. 1 (1869) 65

Exhibit A-22 (SC06540) United States North West Boundary Survey Map Sheet No. 7 (1869) (lithographic) 66

Exhibit A-19 (SC12825) North West Boundary Survey Map (1868) 66

Exhibit A-150 (SC14222) Chart #1911 by Kellet 1849. 67

US Exploring Expedition Journals and Chart (1841) 67

Exhibit A-140 (SC14207) Porpoise journals. 67

Exhibit A-141 (SC14208) Porpoise journals. 67

Exhibit A-27 (SC10907) Kane's Portrait of Shashia. 68

Exhibit A-108 (SC14095) MacLaren, ed., Journal of Paul Kane's Western Travels. 68

Exhibit PP (SC14028) Documents Relative to Warre and Vavasour's Military Reconnaissance (1845 - 1846) 69

Exhibit A-17 (SC13993) Wilson's Diary of the Survey of the 49th Parallel edited by George Stanley. 70

Documents where Necessity is Challenged. 71

Exhibit A-80 (SC14065) - Indian Myths & Legends From the North Pacific Coast of America: A Translation of Franz Boas' 1895 Edition of Indianische Sagen von der Nord- Pacifischen Küste Amerikas, edited and annotated by Randy Bouchard and Dorothy Kennedy. 71

Exhibit A-81 (SC14066) Martha Douglas Harris, "Sowittan, or the Grumbler", History and Folklore of the Cowichan. 72

Exhibit A-3 (SC14093) Alexander Anderson, "Notes on the Indian Tribes of British North America, and the Northwest Coast" (1855) 72

Exhibit A-26 (SC14042) Sister Mary Theodore, Heralds of Christ the King: Missionary Record of the North Pacific 1837-1878 (1939) 74

CONCLUSION. 75

INTRODUCTION

[1] In this action the plaintiffs seek declarations related to aboriginal title to lands along the south shore of Lulu Island in the City of Richmond. The plaintiffs claim to be the historic rights holders to aboriginal title at the time of Crown assertion of sovereignty in 1846 and claim aboriginal fishing rights at the time of contact in the 1790s.

[2] This application concerns the admissibility of historical documents and ethnographic works relied on by the plaintiffs' expert anthropologist and ethnohistorian Dr. Dorothy Kennedy in her expert reports tendered in this litigation. I have already ruled that Dr. Kennedy's expert opinion is admissible, and that argument about the reliability of the sources she relies on goes to the weight of her report, and not its admissibility: Cowichan Tribes v. Canada (Attorney General), 2019 BCSC 1986.

[3] During their testimony, I permitted the plaintiffs' expert witnesses to testify about the reliability of documents referenced in their reports. The documents that the defendants objected to were marked for identification. Following the cross-examination of Dr. Turner, I ruled on the admissibility of the documents that Dr. Turner relied on in Cowichan Tribes v. Canada, 2019 BCSC 1922 (the "Turner Documents Ruling").

[4] Now, following the testimony of Dr. Kennedy, the plaintiffs seek to admit documents that Dr. Kennedy referred to in her reports as stand-alone exhibits for the truth of their contents. The defendants object to the admission of 73 documents that Dr. Kennedy referred to. The City of Richmond ("Richmond") makes the primary objection in relation to most of the documents, in some cases supported by the Province of British Columbia, the Attorney General of Canada, and/or Tsawwassen First Nation ("TFN"). Musqueam Indian Band and Vancouver Fraser Port Authority do not object to admission of the proposed exhibits.

[5] The contested documents include journals, ship logs, official correspondence, petitions, historical maps and charts, church records, ethnographic works and field notes, and academic publications. The defendants acknowledge that these documents may be used to scrutinize Dr. Kennedy's opinion, but argue that the documents are not admissible for the truth of their contents solely on the basis that Dr. Kennedy referred to them in her opinion. The documents are hearsay and therefore inadmissible unless an exception to the hearsay rule applies.

THE PARTIES' POSITIONS

[6] Richmond's principal objection is to documents that contain opinion evidence, sometimes from laypersons but more often from ethnographers and anthropologists, other than Dr. Kennedy. Richmond submits there are four reasons why the documents that Dr. Kennedy relied on in her reports that contain opinion evidence should not be admitted for the truth of their contents in this proceeding:

a) opinion evidence is inadmissible except when the procedural and substantive requirements for expert evidence (including attendance for cross-examination) are met;

b) the plaintiffs do not need any opinion evidence to be admitted for the truth of its contents to prove the primary facts on which Dr. Kennedy's opinion is based;

c) an expert is not permitted to outsource her analysis to others; and

d) most importantly, the defendants and the trial process would suffer irreparable prejudice if the plaintiffs were permitted to rely on additional opinion evidence.

[7] The defendants also object to admission of some documents on the basis that they contain at least one assertion of fact that lacks sufficient threshold reliability. The defendants further object to some documents on the basis that they are irrelevant, duplicative and unnecessary.

[8] The plaintiffs say that opinion evidence in relevant ethnographic works and scholarly texts is admissible, provided the requirements of relevance, necessity and threshold reliability are met. The plaintiffs submit that it is important to have these scholarly works in evidence in order to understand and evaluate those sources in light of the experts' testimony about them, along with any corroborating or conflicting evidence from other witnesses. The plaintiffs submit that the defendants' arguments conflate threshold reliability with ultimate reliability, and are more properly made when considering the weight to accord to the documents.

[9] Richmond also challenges the usefulness of many of the maps Dr. Kennedy referred to, arguing that the maps appear to be copies of earlier maps and add no new evidence about the claim area. Richmond's objections to the maps are based on a lack of threshold reliability, duplication, and the potential for prejudice outweighing their limited probative value.

[10] Richmond consented to admission of an early map by Hudson's Bay Company Captain Emilius Simpson dated July 1827 because Richmond accepts that it was based on personal observation. Dr. Kennedy refers to a number of maps made after that, which Richmond argues are simply copies of the 1827 Simpson map. There was a lot of activity in the general south coast area of British Columbia at the time, with exploration and surveying in the strait and around the Gulf Islands where the border dispute was localized. The focus of many of the maps was not the lower Fraser River, and so the Fraser River area of these maps appears to be copied. Richmond argues that there is a risk that the court may interpret these maps as being based on repeated first-hand observations of an indigenous village near the claim area every few years over the crucial time period between 1820 and 1870. Richmond submits that if I agree that the maps are copies of the 1827 Simpson map, the maps have no probative value.

[11] Richmond says there is no prejudice to the plaintiffs if these maps are not admitted through Dr. Kennedy. The plaintiffs can lead other evidence to try and establish that these maps are evidence of new observation. The current issue before the court is whether, at the time of Dr. Kennedy's testimony, the plaintiffs have led enough evidence to establish that either first-hand information or reliable second-hand information informs the creation of the successive maps.

[12] Richmond submits that these maps could be admitted for non-hearsay purposes but they do not provide useful evidence of the state of the Fraser River at the time they were created.

[13] The plaintiffs say that the maps are admissible because they are relevant, necessary and meet the standard of threshold reliability, which is low. In relation to some maps, the plaintiffs submit that the maps are not copies and point to differences between them. The plaintiffs also submit that some of the maps are probative because they tend to show what the Crown knew and recognized about the presence of the Cowichan and their village on the south arm of the Fraser River. The plaintiffs say that given the historical nature of the events

the court must consider, it is important for the court to have the full array of historical sources before it. Admission of the historical hearsay evidence tendered presents minimal danger, while its exclusion will impede accurate fact-finding.

LEGAL ANALYSIS

Hearsay Evidence Generally

[14] The Turner Documents Ruling reviews the law on admissibility of documents in Aboriginal rights and title cases. That legal analysis focused on journals, ships logs, official correspondence and petitions, and church records. I do not intend to repeat that review here. However, the main principles that apply to this application are set out at paras. 59-105 of that decision and may be summarized as follows:

- To be admitted into evidence, a document must be authentic, relevant, necessary to assist the trier of fact, and reliable at a threshold level.
- The court will take a flexible approach to admission of evidence in historic Aboriginal rights claims, without abandoning the rules of evidence. This flexible approach applies to historical documents as well as oral history.
- When it comes to historic documentary evidence in Aboriginal rights and title cases, necessity is usually met given that these cases rely heavily on ancient documents and hearsay evidence of the deceased.
- In Aboriginal rights and title cases, the court requires the assistance of experts to evaluate and understand historical documents. The court can rely on the evidence of experts to provide it with the information necessary to conduct a threshold reliability assessment.
- The test for threshold reliability should not, at least in Aboriginal claims litigation, be a high one: Mitchell v. M.N.R., [2001] 1 S.C.R. 911 ("Mitchell"); The Ahousaht v. Canada (Attorney General), 2008 BCSC 768 ("Ahousaht 2008").
- The standard for threshold reliability is set out in R. v Bradshaw, 2017 SCC 35 at para. 31 as follows:

a) Is the statement so reliable that cross-examination of the declarant would add little if anything to the process?

b) Has the statement been made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken?

c) Is the statement so reliable that it is unlikely to change under cross-examination?

d) Is there no real concern about whether the statement is true or not because of the circumstances in which it came about?

- The fact that an expert relies on a document does not automatically establish reliability of the document, but it is evidence that the expert finds the document reliable. The court may or may not be persuaded by the expert's reliance or may require more evidence before admitting the document.
- 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: Ahousaht 2008 at para. 40.

[15] As in the Turner Documents Ruling, these principles inform my approach to determining the admissibility of hearsay evidence in the form of historical documents.

Opinions of Non-Witnesses

[16] In the Turner Documents Ruling I addressed opinion evidence primarily contained in government correspondence, ship logs and journals and touched briefly on opinions in secondary literature. In this decision I will focus more on opinion evidence contained in academic publications and secondary works of ethnographers and anthropologists.

[17] The conventional approach to dealing with historical treatises and scholarly works is to permit the expert witness to refer to them and any portion of the text which the witness relies on is admissible into evidence.

[18] In the United States the courts have not limited the use of treatises as Canadian courts have done: see Mary Macaulay in Aboriginal & Treaty Rights Practice (Toronto: Thomson Reuters, 2000) (loose-leaf updated 2019, release 2) at 9.6. Macaulay notes that Wigmore argued for an exception for such treatises on the basis that the absence of the author creates no prejudice because the author was unbiased with respect to the particular case: Macaulay at 9.6 citing 6 Wigmore, Evidence (Chadbourn rev., 1979) at 2-5. Further, the author would have a strong motivation for accuracy since the author would know that the writing would be subject to academic scrutiny: Sopinka, Lederman and Bryant, Law of Evidence in Canada, 4th edition, at para. 12.232 citing Wigmore at 2-73. This is the approach the plaintiffs submit I should take.

[19] In Delgamuukw v. BC (1989), 38 B.C.L.R. (2d) 176 (S.C) ("Delgamuukw") at 186 -188, McEachern C.J.S.C. departed from the conventional rule that opinion evidence in scholarly works is admissible only if adopted by an expert at trial. McEachern C.J.S.C. held that learned treatises, including published and unpublished articles, Ph.D. theses and monographs, and the facts stated therein, were admissible by the court in their entirety as prima facie truth, irrespective of whether an expert at trial had adopted them as authoritative, subject to consideration of weight. He found that the court was always competent to reject any learned writing that did not appear to meet the test of trustworthiness: Delgamuukw at 187.

[20] The jurisprudence regarding admission of opinion evidence in authoritative literature has generally followed the conventional approach. In R. v. Marquard [1993] 4 S.C.R. 223 Justice McLachlin (as she then was) said the proper procedure in examining an expert on other expert opinions found in papers or books is to ask the expert if he knows the work. If the expert answers in the negative or denies the work's authority then that is the end of the matter. Counsel cannot read from the work. If the witness acknowledges the work's authority parts of it may then be read to the witness and to the extent they are confirmed they become evidence in the case.

[21] In Aboriginal title cases decided after Delgamuukw, this court has followed R. v. Marquard. In an oral evidentiary ruling in Lax Kw'alaams v. Canada (Attorney General) 2007 BCSC 166, Justice Satanove considered whether certain texts were admissible although the expert witness had not acknowledged the texts as authoritative. Justice Satanove decided not to follow Delgamuukw, noting that it was decided before R. v. Marquard and before a raft of other Aboriginal claims were tried using the usual rules of evidence. Justice Satanove concluded the texts were not admissible through cross-examination of an expert who did not acknowledge the texts as authoritative.

[22] In Ahousaht 2008, Justice Garson admitted explorer records referred to by experts, applying a broad, flexible and purposive application of the traditional rules of evidence endorsed by McLachlin C.J.C. in Mitchell when dealing with Aboriginal rights cases. She concluded that the records which form the basis of an expert's opinion must be provable in some manner in order to be relied upon by the experts. That is not to say the expert cannot base their opinion on knowledge generally acquired in their field that is part of their "intellectual equipment". She was not dealing with scholarly works and treatises in this evidentiary ruling.

[23] In reasons for judgment in Ahousaht v Canada (Attorney General), 2009 BCSC 1494 ("Ahousaht 2009"), Justice Garson distinguished between the primary and secondary evidence the experts relied on. Primary evidence is original evidence and first-hand descriptions of an observed event, like the explorer records she referred to in Ahousaht 2008. Even those records did not stand alone because they required the interpretive assistance of an expert. Secondary evidence is what she called commentary. She noted that all of the experts relied on scholarly works of other archaeologists, anthropologists, ethnographers, ethnohistorians and historians at least in part to support their opinions. They often disagreed with one another on interpretation. In considering the admissibility of opinion evidence contained in scholarly works, at para. 78 Justice Garson applied the conventional approach as set out in R. v. Marquard:

In accordance with R. v. Marquard, [1993] 4 S.C.R. 223, the opinions of scholars who did not testify only became evidence if they were adopted by the experts as authoritative and thereby read into the body of evidence, or were relied upon by the experts in their own opinions. In other words, these scholarly works were not admitted as stand-alone evidence. Where I refer in these Reasons to scholars who did not testify but whose work was relied upon, I will endeavour to indicate the particular expert(s) whose opinion incorporated the work of the non-witness scholar.

[24] Justice Garson also dealt with a third category of evidence, ethnographic evidence where the ethnographer collected his own evidence through interviews. The works of Gilbert Sproat fell into this category. Justice Garson heard the opinions of two experts on the reliability of his works and she concluded that he made his own observations and recorded them and she found his observations to be accurate and to have considerable time depth. These comments relate to the weight she applied to this evidence.

[25] Justice Garson applied a more liberal approach to primary evidence than secondary evidence. Secondary evidence, such as the opinions of scholars who did not testify, only became evidence if they were adopted by the experts as authoritative and thereby read into the body of the evidence or were relied upon by the experts in their own opinions. Scholarly works were not admitted as stand-alone evidence.

[26] A further limit on the admission of opinions from scholars who are not qualified as experts at trial is that expert opinion evidence must comply with the requirements in the Supreme Court Civil Rules ("Rules"). The Rules restrict the admissibility of expert opinion evidence to reduce the risk of error in the fact-finding process. Experts must be duly qualified by the court and certify to the court they have conformed to their duty of impartiality. They must also produce all of their sources and attend court for cross-examination. None of these safeguards are in place for opinions included in sources relied on by qualified experts.

Admissibility of Opinion of Non-Witnesses

[27] Expert witnesses may rely on hearsay evidence in forming their opinion. The weight of the expert opinion depends on the reliability of that hearsay. It is the duty of the trier of fact to address the reliability of the hearsay and to determine the weight of the opinion which relied on the hearsay: R. v. Lavallee, [1990] 1 S.C.R. 852 (S.C.C.) at 893; Mazur v. Lucas, 2010 BCCA 473 at para. 40.

[28] I agree with Richmond's submission that there is no hearsay exception permitting admissibility of a document for the truth of its contents merely because an expert has referred to it in his or her opinion.

[29] Richmond has illustrated the danger in relying on the evidence of authors who are not testifying at trial. In the Turner Documents Ruling I admitted an article written by W.C. Grant entitled "Description of Vancouver Island" including an excerpted map which was published in volume 27 of the Journal of Royal Geographical Society of London. Dr. Turner relied on this document. She was asked if she knew if W.C. Grant had travelled to the Fraser

River area and she did not know. She noted that the map included was very detailed which suggested that W.C. Grant had familiarity with the Fraser River area. Based on Dr. Turner's testimony, I accepted the threshold reliability of the document and admitted it has an exhibit.

[30] Dr. Kennedy later testified that W.C. Grant did not set foot on the mainland and so it is apparent after her testimony that W.C. Grant was relying on second-hand information when he drew a map of the Fraser River area. Dr. Kennedy's testimony has brought into question not only the weight to be placed on this exhibit but also its threshold reliability because the observations could not be based on first-hand observations.

[31] I find that the flexible approach is appropriate for first-hand observations of explorers and journals where there is no other source for the information. In these cases, the documents are relevant and necessary. The issue of whether threshold reliability is established depends in most cases on whether the expert has provided sufficient information to determine the circumstances surrounding its creation. If threshold reliability is established, the document is admissible. However, this flexible approach should not be extended to the opinions contained in treatises and scholarly works.

[32] Justice Garson's approach in Ahousaht 2009 to classifying evidence as primary evidence contained in explorer records and journals, and secondary evidence or commentary in opinions of scholars, is useful.

[33] In the Turner Documents Ruling I reviewed two different approaches taken by the court in Delgamuukw and Cambie Surgeries Corp. v. British Columbia (Medical Services Commission), 2016 BCSC 1739. I distinguished Cambie Surgeries because Justice Steeves was not dealing with observations made by now deceased historical figures where there was no other way to establish an historical fact. I found the experts could not adopt the observations contained in a treatise or narrative document as the expert could no longer make the same observation. This comment related to explorers' records or primary evidence which included personal impressions and conclusions.

[34] This decision focuses more on secondary evidence relied on and adopted by Dr. Kennedy as authoritative. I accept the approach taken by Justice Garson in Ahousaht 2009 at para. 78 where she found that the opinions of scholars who did not testify at trial only become evidence if they are adopted by an expert as authoritative and read into the evidence or relied on by an expert in their own opinion. The works and opinions of scholars do not "stand alone" because they can only be admitted if they are adopted by an expert at trial.

[35] It cannot be said that scholarly works and treatises are so inherently trustworthy as to establish substantive reliability or so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process: R. v. Khelawon, 2006 SCC 57 at para. 49; Bradshaw, at para. 31. The only way a court can evaluate the reliability of the opinion of the source is to rely on the evidence of the expert at trial. Although I found a flexible application of the rules of evidence may be necessary to ensure I have an historical record

to refer to at the end of the trial, I found in the Turner Documents Ruling that an assessment of reliability still needs to be made on a case-by-case basis.

[36] Another issue of concern is that while Dr. Kennedy is required under the Rules to produce all of her sources, the scholars on whose opinions she relies have no obligation to produce the sources that they relied upon to draw their inferences.

[37] I agree that the opinion evidence I should rely on is the opinion of the expert who testifies at trial and provides an opinion in compliance with the substantive and procedural rules governing the admission of expert evidence. That opinion may adopt the opinion of other experts. Therefore, the stand-alone opinions of others become unnecessary.

[38] Further, as in Ahousaht 2009, a third category of documents arises in this case in relation to the ethnographic material that Dr. Kennedy refers to, which contains a mix of information acquired through interviews and fieldwork, and opinion evidence. In my view, the opinion evidence of ethnographers who did not testify at trial is only admissible if it is adopted or relied by an expert at trial, in this case, Dr. Kennedy. However, the observations, field notes and factual statements of ethnographers are admissible, provided necessity and threshold reliability are established.

Admissibility of Maps and Charts

[39] Richmond objects to admission of maps that are copied from other historical maps on the basis that copies of maps lack probative value. Richmond says that admission of maps that are copies are prejudicial because there is a risk that the court may conclude that the maps are evidence of first-hand observation.

[40] The Supreme Court of Canada discussed the value of historical map evidence, and the concerns that may arise when relying on such evidence, in The King v. Price Brothers & Co. Ltd., [1926] S.C.R. 28, rev'd [1926] UKPC 47 ("Price Bros."). Price Bros. involved a grant made in 1693 by the Intendant of New France for the concession of one lake ("d'un lac") called Lake Métis near the St. Lawrence River. Early maps and documents suggested Lake Métis was a single lake with three sections; however, future maps more accurately depicted three separate lakes lying at different levels with connecting channels, referred to as Lac Métis, Lac à la Croix, and Lac d'Anguilles. The issue was whether the grant should be interpreted as including all three lakes, or just the upper section, Lac Métis. The majority of the court held that the grant included only Lac Métis. The Judicial Committee of the Privy Council reversed the decision on the basis that, geographic accuracy aside, the three bodies of water had an established repute for nearly two centuries, including when the grant was made, as forming one lake and bearing one name.

[41] In 1836, a surveyor named Ballantyne was hired by the proprietors of the land at issue to survey the lake(s). He produced a report and a plan which described one, single lake comprised of three connected bodies of water. His report also referenced the views of local hunters, old settlers, and "aborigines" who he reported to apply the name Lake Métis

collectively to all three bodies of water. Newcombe J. writing for the majority of the court referred to Ballantyne's report as a "misdescription" and noted at p. 41, "Unfortunately Ballantyne's survey and plan were permitted to find their way to the records of the Crown Lands office at Quebec, and, although the Government declined to accept or to act upon his report, and has never acquiesced in or become bound by it, it has nevertheless, as a document of reference, exercised a confounding influence upon the subsequent cartography and description."

[42] Newcombe J. discussed the map evidence tendered by the respondent at p. 44, noting "Maps are from their nature of very slight evidence. Geographers often lay them down upon incorrect surveys or information, copying the mistakes of one another". At p. 45, Newcombe J. noted the limited value that map evidence may offer absent "proof of reputation":

Maps, when they have no conventional or statutory significance, should be regarded merely as representing the opinions of the persons who constructed them, they furnish at best no adequate proof, and none when it appears that they are founded upon misleading or unreliable information or upon reasons which do not go to establish the theory or opinion represented, and when they have not the qualifications requisite to found proof of reputation.

[43] Building on this principle, Geoffrey S. Lester in "The Problem of Ancient Documents, Part II" (1998) 20:2 Adv Q 133 at pp. 166-167 suggests maps be treated as a species of reputation evidence, potentially admissible as declarations on matters of public and general interest:

A map is a declaration by the deceased cartographer of where that boundary lies or that a way is a public highway. It is a species of reputation evidence. Viewed in this light, the map must meet the tests for admissibility for declarations on matters of public and general interest. In addition to (1) the death of the map-maker and (2) that it was made ante litem motam the challenge will be to show that (3) the maker had competent knowledge. Without such knowledge the declaration is merely a statement of the maker's belief or of what was described to him, and so is caught by the opinion rule. This knowledge can be shown by evidence that the maker had actual knowledge, or through his connection with the district so as to make it probable that he had such knowledge, or because the map was made under a duty owed to a person who was interested in the question. (4) The map must be able to be characterized as being a declaration of the reputation itself, and not a particular fact from which the fact to be established by that reputation is to be inferred. For instance, the map must state on its face words to the effect "The Toronto-Montreal Road - Public Road". It is not enough if it merely sets out the Toronto- Montreal Road, with nothing to distinguish it from other roads, similarly set out, and proved not to be public roads. Again, (5) the declaration must be as to a public or general right, and not a merely private right, as is the case of a boundary between two private properties, for in that case the general public or a class of the public have no interest.

[44] Lester explains the "knowledge" requirement for declarations as to reputation on matters of public and general interest generally at pp. 160-161:

The declarant must be shown to be competent, that is, he must have been so situated as to the place in question, either by residence, duty, or other connection, that it may be concluded that he had both the means and the motive for giving a true account of the matter. In the case of public rights, all members of the public are theoretically competent by definition, as all persons are legally interested in them, and so there is no need to show competency. But even if admissible, a declaration by someone who had no real knowledge would be practically worthless, and so as a practical matter some means of knowledge ought to be shown. In the case of general rights, it must be shown that the declarant was in some way connected with the community or group to which the right pertained. It is not necessary, however, to show positively that the declarant had no interest or motive to misrepresent the true situation. [Emphasis added].

[45] In the context of claims relating to land and boundaries, reputation evidence is a traditional exception to the hearsay rule: Delgamuukw v. British Columbia (1988), 15 B.C.L.R. (2d) 326 (B.C.S.C.) at paras. 21-22; Silverton (Village) v. Hobbs (1985), 17 D.L.R. (4th) 518 (B.C.S.C.) at para. 11. The plaintiffs did not raise the exception to the hearsay rule for reputation evidence, and in my view, it has been largely overtaken by the principled exception to the hearsay rule as set out in R. v. Mapara, 2005 SCC 23 at para. 15. However, I find that the principles expressed by Lester are relevant to assessing the threshold reliability of maps.

[46] 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. Without "competent knowledge" of the information depicted in the map, the map merely represents the map-maker's opinion or belief. That said, lay person opinion evidence may still be admissible in appropriate circumstances: Cowichan Tribes v. Canada (Attorney General), 2019 BCSC 1922 at para. 97. However, even if admissible, a map created by "someone who had no real knowledge would be practically worthless".

[47] The bar for threshold reliability is low in Aboriginal rights cases. A flexible approach to evidence is necessary, taking into account the difficulties plaintiffs face in proving facts across a gulf of centuries using historical evidence. On this point, the historical context of the maps at issue is relevant: when the maps were created, the province was still being explored, documented, and mapped. This was not a task for one individual; rather, it was inherently a collaborative effort, with subsequent map-makers relying on or incorporating information from previous works as they saw fit. In my view, this alone does not render a subsequent map worthless. Maps of the time cannot reasonably be expected to be perfect, comprehensive, and original works. To suggest such would impose an impossible standard on the plaintiffs to produce evidence that does not exist. If the map-maker had some knowledge of the subject matter at issue and there are other indicia of the reliability of the map, then threshold reliability is met. However, a map's evidentiary value may be tempered or negated if it is substantially a copy of a previous work and provides nothing new to the court.

[48] The knowledge requirement of the map-maker may be fulfilled by residence or connection proximate to the area, inferring personal knowledge, or a duty from which the court can conclude the map-maker had the means and motive to be true and accurate.

[49] The fact that a map is a copy or tracing with added features does not render the map worthless if the original was reliable and the additions were made by someone with personal knowledge. The copy or tracing of an existing map without changes adds no additional evidence and should not be interpreted as a new observation of the feature absent evidence of actual observation.

[50] In assessing whether a map is admissible, the following questions are instructive to assess threshold reliability and relevance:

a) What is the purpose of the map and what does it include or exclude?

b) What is the source of the map-maker's information?

c) To what extent does the map rely on or incorporate previous maps, and how reliable are those works?

d) Is the map generally accurate, or does it contain errors?

e) Is there corroborating evidence to support the information depicted on the map?

ANALYSIS OF SPECIFIC DOCUMENTS

[51] I will now review the specific documents that the plaintiffs seek to enter as exhibits and the parties' positions in relation to each. There is no dispute as to the authenticity of the documents. Given the passage of time and the historical nature of the claim, necessity is met for most of the documents. Where the necessity of a document is in issue, I have indicated that in my analysis of the specific document.

Early Sources

Exhibit A-128 (SC14057) Franz Boas, Zur Ethnologie Britisch-Kolumbiens (1887)

[52] This is an article published by Boas in 1887. Richmond submits that Boas attempts to analyze Indigenous languages on Vancouver Island and group them into language families and dialects. Richmond submits that Boas makes conclusory statements about his language classification without explaining how he came to these conclusions. For example, Boas writes "the perception of propriety of all of these people in regard to their inhabited territory is remarkably vigorous". The reader can not know how Boas arrived at that conclusion.

[53] The plaintiffs submit that this document meets the test for relevance, necessity and threshold reliability. It is a treatise relied upon by Dr. Kennedy who testified that Boas is considered the father of North American anthropology. Richmond submits that the article is not reliable because Boas admits "that part of the information may be based on inquiry;

therefore, there may be inaccuracies". The plaintiffs submit that this quote must be read in context, that Boas speaks to the limitations and strengths of the information presented, and ultimately concludes that the main features of the map are accurate:

The attached map illustrates the results of observations of the distribution of the tribes. As it was impossible to visit all of the tribes due to time limitations, part of the information is based on inquiries; therefore, there may be inaccuracies. However, the main features of the map are accurate, as the information was verified by individuals of different tribes. Where there is uncertainty, the same is mentioned in the text. It should be added, that inland boundaries could not be ascertained with accuracy.

[54] Boas was referring to the map attached to the article. The map has already been entered as an exhibit tendered by the defendant TFN.

[55] Dr. Kennedy cites the article in her main report and says the ethnographic work of Franz Boas contributes substantially to her understanding of the Cowichan's presence on the lower Fraser River. Dr. Kennedy compared the translation of this article with the original document and confirms the translation is accurate for a number of propositions. She says that this article is based on Boas' week long stay among the Cowichan in November 1886. Boas indicated the Cowichan were reluctant storytellers, and Dr. Kennedy notes that it is possible that Boas' information on the Cowichan's movement between rivers and the Gulf Islands may have come from Indian agent and former Anglican minister W. H. Lomas. Dr. Kennedy notes that Lomas lived among the Cowichan for many years and his data directly associated the people of Penelakuts, Chemainus and Lyackson, with the Cowichan River.

[56] In the article, Boas discusses the language family of the Qauitschin (Coast Salish) which embraces the Salish languages that are spoken along the shores of the Gulf of Georgia. Boas writes that the dialects are exceptionally distinct and if they are to be integrated under one name it is necessary to include the languages of Puget Sound. He then reviews the dialects of Catloltch, Sischiatl, Pentlatsch, and Sqchomisch.

[57] At page 8 of 10, Boas discusses the dialect of the Qauitschin, analyzing 25 dialects.

[58] Following that list, Boas says that the list of tribes above the Seemac at Fraser River is presumably not exhaustive, as he did not visit the region himself and could only gather information in the river delta. He describes a constant state of warfare with the Lekwiltok who ambushed the Cowichan settlements frequently and murdered their inhabitants and carried them off as slaves. He writes that for many years, a subset of the group lived in the inland area of the Cowichan River where they were safe from the war canoes of the northern tribes.

[59] I see no relevance to the portion of the article where Boas reviews language family and dialect of the Bilchula, Kwakiutl and Lekwiltoq.

[60] I find pages 1-4 of this document provide context, and pages 7-10 are also relevant. I agree with the plaintiffs' submission that the article provides context for the map found at Exhibit 336. To the extent that the article and the map referred to the Qauitschin area and the Gulf Islands of Valdes, Cooper, Thetis, Penelakut and the Fraser River, I find this is relevant factual observation.

[61] I agree with Richmond's submission that interpreting this article requires linguistic expertise, judgment and inference.

[62] To the extent that Boas provides opinion evidence related to Indigenous understanding of property rights, I find this can only be accepted as evidence if it is adopted by Dr. Kennedy.

[63] In her testimony, Dr. Kennedy describes this article as Boas' first work where he is trying to grapple with the classification of languages and dialects in British Columbia. Dr. Kennedy says that Boas "hasn't quite got it down yet, what's a dialect and what's a language, but he comes up with a classification system." Dr. Kennedy testifies that he wrote the article for the purpose of making it available to the scientific community, and that it is a document that academics, historians, anthropologists and ethnohistorians rely on. Dr. Kennedy testified that she relies on Boas' classification in her report.

[64] When given an opportunity to adopt Boas' statement about the Cowichan perception of property, Dr. Kennedy does not do so.

[65] Accordingly, I find the relevant pages of this document are pages 1- 4 and 7-10. These pages are admissible for the truth of their contents, except to the extent they contain conclusions that Boas has reached. Those conclusions are admissible through Dr. Kennedy's testimony and report, to the extent that she has adopted them.

Exhibit A-83 (SC14121) Edward Curtis, "Salishan Tribes of the Coast" (1913) excerpts volume 9

[66] This is a 90-page extract which discusses a number of Indigenous groups including the Cowichan. Richmond says the extract includes countless assertions of fact that cannot be within Curtis's personal knowledge. I declined to admit the full text through Dr. Turner because cross-examination raised questions as to its reliability.

[67] Richmond submits that the plaintiffs have not overcome this concern through the testimony of Dr. Kennedy. Dr. Kennedy did not testify as to the authorship of the article.

[68] The article is replete with opinion.

[69] Dr. Kennedy references Curtis in numerous sections of her report. In her testimony, Dr. Kennedy described Edward Curtis as a portrait photographer from Seattle. She said that Curtis went along on an expedition to the Arctic with a group of scientists and became "engaged with the idea of speaking with Native people about their traditions as well as photographing them." In the early 1900s, with funding from prominent Americans including

J.P. Morgan, they decided on this publication venture that they would complement with Curtis's photographs. The original plan was to produce 20 volumes. Curtis had a team comprised of a newspaperman from Seattle, stenographers and other assistants, including a student of Meany, a well-known historian in the United States. Dr. Kennedy testified that the team travelled to various Native communities, and Curtis took regalia along with them and had people dress up in their more traditional clothing and photographed them to represent earlier times.

[70] Dr. Kennedy testified that Curtis was interested in what is known as salvage ethnography. Curtis talked to Indigenous people about what they had been doing in the past, as opposed to what they were doing at the time he saw them.

[71] Dr. Kennedy gave evidence that Curtis's photographs are meticulous. Dr. Kennedy's understanding was that the team of people who worked with Curtis paid attention to ethnographic detail. Dr. Kennedy testified that Curtis is one of the sources consulted by her and other anthropologists and historians. Sometimes Curtis's descriptions are timeless and she cannot discern what decade he is referencing. Dr. Kennedy said that it is always helpful to have a historical record to corroborate what Curtis says.

[72] I am still not satisfied that this is a reliable source which should be admitted for the truth of its contents. It appears Curtis's area of expertise is photography and not ethnography or history. Although he may have made personal observations about Indigenous people and their ways of life, it appears that this text is a collaboration, and there is no indication as to who wrote what passages, nor is there any way to test its accuracy. This exhibit is to be marked for non-hearsay purposes only.

Ethnographers Field Notes

Exhibit A-118 (SC13088) Wayne Suttles, Field Notes on Tsawwassen with Simon Pierre, (1949)

(SC06785) Wayne Suttles, The Penelakuts Village and Penelakuts Field Notes Relating to Subsistence

(SC14864)Excerpt containing Exhibit 112 and A-103 Wilson Duff, "The Upper Stalo Indians of the Fraser Valley of B.C.: Anthropology in British Columbia, Memoir No. 1 (1952)

Exhibit A-131 (SC14206) Wilson Duff Miscellaneous Notes on Local Salish, (1953-1956)

Exhibit A-106 (SC06793) Wilson Duff, The Indian History of British Columbia: The Impact of the White Man: Anthropology in British Columbia, Memoir No. 5 (1965)

[73] When dealing with ethnographers' field notes, Richmond submits that a distinction must be drawn between information the ethnographers gathered in the field and the interpretation and inferences they subsequently drew from that information. Richmond concedes that the former is fact evidence, but submits the latter is inadmissible opinion evidence. The parties have reached an agreement to enter the field notes of Jenness, Barnett, Duff and Suttles.

[74] The statements attributed to the ethnographer's sources are admitted for hearsay purposes, with the caveat that the interpretation, analysis, commentary and opinion contained within is not admitted. The opinion evidence is admissible through Dr. Kennedy's evidence, to the extent that she has adopted it. These documents will be marked as a numbered exhibits. In closing argument, the defendants can identify and object to those portions of the exhibit which contain commentary and should not be admitted for the truth of their contents.

Ethnographers' Unpublished Work

Exhibit A-88 (SC14078) Diamond Jenness, 1934-1936 The Saanich Indians of Vancouver Island, unpublished manuscript

[75] The plaintiffs have tendered several unpublished draft manuscripts. Generally, these documents include factual information compiled by ethnographers in the field, along with the author's interpretation and conclusions. Richmond submits that draft works should not be admitted for the truth of their contents. Richmond says that while published opinions should not be admissible, draft opinions are even more problematic because they are unfinished and an author could change his or her mind before finalizing a paper for publication. British Columbia also objects to admission of this document on the basis that it is a draft and contains opinions.

[76] Dr. Kennedy testified that Diamond Jenness was an ethnographer and cultural anthropologist who was one of Canada's most highly respected anthropologists and was a standard source for anthropologists and historians. This particular document is his compilation of notes into a more orderly fashion where he categorizes the information to include comparative data from other Coast Salish areas. Dr. Kennedy testified that this particular document is relied on by anthropologists, historians and ethnohistorians.

[77] The plaintiffs describe the manuscript as a compilation of Jenness' field notes, and note that Richmond does not object to the admissibility of the field notes themselves. Dr. Kennedy testified that Jenness was intending to write a book about Saanich Indians but never got to it.

[78] These draft notes do not meet the test for threshold reliability. It is unknown how many or which portions of the notes Jenness might have changed if he had finalized the manuscript and published a book. This document cannot stand on its own for the truth of its contents and will be marked as an exhibit for non-hearsay purposes. There are excerpts of the book which Dr. Kennedy relied on in forming her opinion and which she has testified about. That testimony is not lost because this document is only being marked for non-hearsay purposes.

Exhibit A-94 (SC00207) Compilation of draft works by Wilson Duff and Wayne Suttles

[79] This 63-page document is a compilation of drafts by Duff and Suttles. It is not a finished manuscript. There are some typed pages and some field notes but it is in very preliminary form. For the reasons above, I have concerns about entering a draft manuscript for the truth of its contents. I am able to rely on Dr. Kennedy's testimony about the contents of this document.

[80] Suttles' interview with Big Joe of Chemainus in 1952 is highly relevant to these proceedings, and Dr. Kennedy relies on it in her report. Suttles' original field notes are already admitted and many of Duff's field notes have also been marked as exhibits.

[81] This document is to be marked for non-hearsay purposes only. As a draft manuscript, it does not meet the test of threshold reliability, and the existence of the original field notes and Dr. Kennedy's interpretation of this document renders it unnecessary to admit this document for the truth of its contents.

Ethnographers' Published Work

Exhibit A-93 (SC06597) Homer Barnett, "Coast Salish of Canada" (1938)

Exhibit A-105 (SC14087) Homer Barnett, "Coast Salish of British Columbia" (1955)

[82] Dr. Kennedy testified that Homer Barnett studied the Coast Salish while he was a graduate student in California in the 1930s. She described Exhibit A-93 as a cultural overview of the Coast Salish of Canada based on Barnett's fieldwork as well as the literature. His writing is in the classical style of ethnography at the time. His citations are sparse. Dr. Kennedy testified that sometimes he misinterprets place names and for that reason when using Barnett's work it is important to use both the publication and the field notes.

[83] Dr. Kennedy cites from Barnett frequently in her report. She describes Barnett's work as one of the main sources for the Coast Salish. She considers his work reliable, and it is one of the sources that anthropologists and ethnohistorians consult.

[84] These works are compilations of field notes and personal observations together with Barnett's interpretation and opinion. I have some concern about the limitations Dr. Kennedy said these notes have, in that they should be read alongside Barnett's field notes. This leads me to conclude that I require an expert to interpret these publications. I find that this work meets the test for threshold reliability. It is primarily based on Barnett's personal observations. He addressed his intention to be accurate in the forward to Exhibit A-105. Exhibit A-93 was created for publication by the University of California and Exhibit A-105 was created for publication by the University of Oregon. To the extent Barnett makes observations, this document will be entered for hearsay purposes. Barnett's opinions are admissible through Dr. Kennedy's evidence, to the extent that she has adopted them. I will admit these documents for hearsay purposes subject to those limitations.

Exhibit A-104 (SC14086) Barbara Lane, Comparative and Analytic Study of Some Aspects of North West Coast Religion (1953)

[85] This document is Dr. Barbara Lane's PhD thesis which Dr. Kennedy relies on. Lane spent six months undertaking fieldwork with the Cowichan between 1949 and 1952. This document meets the requirement of threshold reliability. It is a published PhD thesis based on Lane's personal observations, and Lane clearly had an intention to be accurate.

[86] This document is based on Lane's fieldwork in the Cowichan area, interviewing a number of elders who participated in the religious life in the longhouse. Her PhD thesis is an authority that anthropologists and historians rely on.

[87] Richmond submits that Dr. Kennedy recites Lane's conclusions without providing analysis. In that regard, Richmond says that Dr. Kennedy is outsourcing her analysis to Lane.

[88] The plaintiffs say that Dr. Kennedy is not required to explicitly state why she relied on each source.

[89] Canada agrees to the admission of portions of this document referred to by Dr. Kennedy at e-pages 17, 18, 20, 25, 26, 48, 85-86, 87, 89-90, and 138. Canada objects to the remainder of the document on the basis that it is irrelevant and not relied on by Dr. Kennedy.

[90] The plaintiffs submit that Dr. Kennedy cites Lane's thesis largely for her fieldwork on issues such as: the movement of inhabitants of the Cowichan valley to permanent Gulf island villages (immediately after which Dr. Kennedy cites corroborating evidence from Lomas of social unity among the Cowichan); winter ceremony practices; a story from a Quamichan person regarding sockeye salmon and their presence in the Fraser River; the Cowichan practice of eating beaver meat and tails; the spiritual importance of elk to the Cowichan; the pre-contact practice of reef-net fishing; and Cowichan fishing at Point Roberts.

[91] The plaintiffs submit that the results of Lane's fieldwork among the Cowichan in 1949-1952 are thus invaluable evidence in the context of this claim. It is not possible to replicate that fieldwork today. The plaintiffs say that Dr. Kennedy is entitled to rely on a peer anthropologist's conclusions based on fieldwork, and that reliance can assist the court in determining the reliability of the evidence.

[92] Dr. Lane's observations contained in her fieldwork are admissible for hearsay purposes and the document will be admitted as an exhibit. Given my ruling on opinion evidence, I find that Dr. Lane's opinions are admissible through Dr. Kennedy's testimony and report where Dr. Kennedy has adopted them. The document is admitted subject to these limitations, which can be addressed in closing argument.

Exhibit A-119 (SC14088) David Rozen, The Ethnogeography of the Cowichan River, British Columbia (1977)

[93] Richmond objects to this document on the basis of Rozen's lack of credentials. Richmond says Rozen was an amateur anthropology enthusiast and points to his lack of a PhD. He conducted fieldwork and interviews and transcribed interviews done by Dr. Kennedy and Dr. Randy Bouchard. Richmond argues that Rozen's opinions are based in large part on Jenness, Barnett, Brown, Curtis and Hill-Tout's fieldwork rather than his own.

[94] Dr. Kennedy testified that between 1974 and 1976, Rozen worked for her and Dr. Bouchard on the B.C. Indian Language Project, transcribing their interviews, going through the literature of Jenness and Barnett, and classifying the information on index cards. Through their instruction, Rozen learned to write the Hul'qumi'num language. He started working with the Cowichan, recording place names and putting together the ethnogeogaphy, a study based on the place names known to the Indigenous elders and re-elicited from information in the literature. Rozen did a Master's thesis using this ethnogeographical information, the place names study, as his thesis.

[95] Exhibit A-119 provides linguistic transcriptions of 60 Native place names recorded on the Cowichan River on Vancouver Island. Rozen included some stories and information from contemporary elderly Cowichan people, including information he learned from Abraham Joe and Abel D. Joe who were respected Cowichan elders. The title of the document states "Researched and written by David L. Rozen in collaboration with Abraham Joe and Abel D. Joe."

[96] These documents appear to be field notes which contain the sources of the factual information provided. Further, Rozen worked under the supervision of Dr. Kennedy. Dr. Kennedy testified that she relied on his compilation of place names. Accordingly, I find this document meets the standard of threshold reliability and is admissible for hearsay purposes with the limitation that Rozen's opinions are only admissible if adopted by Dr. Kennedy.

Exhibit A-120 (SC14179) - David Rozen, Ethnozoology of the Cowichan Indian People (1978)

[97] Dr. Kennedy testified that she and Dr. Bouchard provided Rozen with copies of unpublished materials pertaining to Squamish ethnozoology. Dr. Kennedy said this was the basis of Rozen's elicitation of similar knowledge amongst some Cowichan people during tape-recorded interviews. Dr. Bouchard provided Rozen with unpublished Cowichan word lists, and Dr. Kennedy provided him some Halkomelem ethnography and linguistic bibliographies to point him to some of the literature that he could use for the study. Dr. Kennedy reviewed Rozen's draft study and pointed out areas of concern. She addressed some of those areas in her response report to Dr. Lovisek. Dr. Kennedy testified that Rozen's report is reliable in terms of fish identification and practices. There are a few comments that have become contentious and that she disagrees with. For the most part, she is of the view that it is a reliable study. Dr. Kennedy is of the view that Rozen left some questions unasked.

[98] Dr. Kennedy's evidence is not a ringing endorsement of the reliability of Rozen's report. It fails to satisfy me that this document meets the standard of threshold reliability in order to admit it for hearsay purposes. I will mark it for non-hearsay purposes and rely on Dr. Kennedy's analysis of the document in evidence rather than the document itself as stand-alone evidence.

Exhibit A-121 (SC 14089) David Rozen, Place-Names of the Island Halkomelem Indian People, M.A. Thesis in the Department of Anthropology and Sociology, University of British Columbia, (1985)

[99] This is David Rozen's Master's thesis. He started to obtain this information in 1976 and 1977 in his study of place names that focused on Vancouver Island and the Gulf Islands (Exhibit A-119). In his Master's thesis, he continues the methodology that Drs. Kennedy and Bouchard used for the Squamish. Dr. Kennedy thought this academic work was well done.

[100] For the reasons I found Exhibit A-119 admissible, I also find this document admissible. Rozen wrote the document for publication, with an intention to be accurate. Further, it was written under the supervision of Dr. Michael Kew with assistance from Drs. Kennedy, Bouchard and Suttles. As Rozen writes in the document, Cowichan elders Abraham Joe and Abel D. Joe oversaw the work to ensure that Rozen "got things right".

[101] While the Master's thesis meets the test for threshold reliability, it is 215 pages long. I intended to direct counsel to excerpt those portions of the thesis which are relied on by Dr. Kennedy. However, while writing this decision I have become aware that excerpts of this document were also relied on by counsel in cross-examining Dr. Brealey. Therefore, I direct counsel to provide a redacted version that includes the portions relied on by Dr. Kennedy and Dr. Brealey. Once redacted, this document will be marked as an exhibit for hearsay purposes with the same limitation that Rozen's opinions are only admissible where adopted by Dr. Kennedy or Dr. Brealey.

Exhibit A-122 (SC14090) Wayne Suttles, Coast Salish Essays (1987 [1950-1960])

Exhibit A-123 (SC14184) Wayne Suttles, Technical Alphabet (1990)

Exhibit A-124 (SC13098) Wayne Suttles, The Shed-Roof House (1991)

Exhibit A-125 (SC00220) Wayne Suttles, Musqueam Reference Grammar (2004)

[102] Richmond objects to these documents because Suttles expresses opinions on matters at the heart of these proceedings. Dr. Kennedy adopts Suttles' opinion on the basic residential units of central Coast Salish Society: the family, household, winter village, local group, and the unit commonly known as the tribe. Richmond says Dr. Kennedy recites Suttles' opinion without explanation.

[103] In her report, Dr. Kennedy describes Suttles' Coast Salish essays as providing the foundation for contemporary scholars' understanding in this region. She testified that Suttles' ideas are so prominent in the field of ethnohistory that his essays were compiled.

[104] Dr. Kennedy testified that the article "The Shed Roof House" is important because Suttles brings together information on the construction of the shed house used by the Central Coast Salish, as well as how the house functioned as a theatre, a food processing area and a place for ceremonialism.

[105] Dr. Kennedy relies on Suttles' work throughout her report and finds his work foundational in her field. She worked with Suttles and considers him one of her mentors. When Dr. Kennedy wrote papers, she would send him copies to review. He was not formally her teacher, but was a mentor in her career.

[106] These documents meet the standard for threshold reliability. In keeping with my decision on opinion evidence from non-witnesses, this document will be marked as an exhibit, and those portions which contain observations from Suttles' field notes are admitted for the truth of their contents. Suttles' interpretations and conclusions are admissible through Dr. Kennedy's evidence where she has adopted them.

Exhibit TT (SC00951) Fort Langley Journals 1827-30, edited by Morag Maclachlan, with appendices (With Contributions by Wayne Suttles)

[107] Richmond does not object to admission of the Fort Langley journals edited by Morag Maclachlan.

[108] Canada objects to the inclusion of pages 3-17 of the introduction (e-pages 8-16) as it is not clear that Dr. Kennedy relied on the introduction, and the introduction includes opinion evidence. Canada does not object to inclusion of pages 18-19 (e-page 16). The plaintiffs agree to excise pages 3-17 (e-pages 8-16) of the introduction. Pages 18 and 19 will remain in the exhibit.

[109] Richmond objects to Appendix A which the plaintiffs are not seeking to admit and so it will be redacted from the exhibit.

[110] None of the parties object to Appendix B, a report from James McMillan to the Hudson's Bay Company dated February 15, 1828. It will remain in the exhibit.

[111] Appendix C is a report from McDonald to Hudson's Bay Company dated February 25, 1830. Richmond does not object to this report but objects to the place names that Suttles inserted in square brackets which are his interpretation and opinion evidence. I agree that the place names in square brackets contained in the chart in Appendix C should be redacted as they were not part of the original report.

[112] The remainder of Appendix C will remain part of the exhibit.

[113] Richmond, Canada and British Columbia object to Appendix D. Appendix D is a biography of Shashia and Simon Plamondon. The parties agree that the biography of Simon Plamondon is not relevant and therefore will be redacted. The biography of Shashia is relevant, although perhaps not authoritative. Maclachlan relies on numerous sources and says that apart from the information Agnes and Abner Thorne supplied, the details in the biography come from the records left by white people. Mclachlan says "we can only guess at the extent to which their misconceptions about the structure of Coast Salish society affected their perceptions of the role of the Cowichan chief."

[114] I agree with Richmond's submission that Dr. Kennedy has provided her own opinion on the life and activities of Shashia and that is the evidence I should rely on. Appendix D will be redacted in its entirety.

[115] Appendix E is an article written by Suttles entitled "Names in the Fort Langley Journal". Richmond objects to admission of this essay on the ground that it contains Suttles' interpretation and opinion about various names in the journals. Dr. Kennedy relied on this article and considers it very helpful. Suttles provides a linguistic rationale for seeing six variations of the same term used in the journals. Suttles was not only an anthropologist but a linguist, and he talks about inconsistencies in the transcription and how one can narrow it down.

[116] Richmond says that to the extent Indigenous terms in the Fort Langley Journal require interpretation, it was Dr. Kennedy's job to provide it, and she cannot outsource that duty.

[117] I disagree. Dr. Kennedy relied on the opinions in Suttles' article to interpret the Fort Langley Journal and her evidence in this regard is before the court. Suttles' observations are admissible. His interpretations and conclusions are only admissible through Dr. Kennedy's evidence where she has adopted them.

[118] A redacted version of this exhibit containing the redactions to the introduction and Appendix C described above, plus all the journal entries and Appendices B and E will be marked as an exhibit for hearsay purposes with the limitation that Dr. Suttles opinions are only admitted to the extent that they were adopted by Dr. Kennedy.

Exhibit A-110 (SC 14102) Daniel Marshall, Those Who Fell From the Sky: A History of Cowichan Peoples (1999)

[119] This document is an extract of the book that was published on behalf of the Cowichan Tribes in 1999. Canada submits that because the work was prepared with the guidance of Cowichan Tribes, there is a risk that the document is biased. Canada says the document does not meet the threshold for reliability or necessity. The book relies on many of the same sources that Dr. Kennedy relies on in her report and it is not necessary to include Marshall's interpretation of those documents.

[120] Richmond has the same concerns as Canada. Richmond says that if there is any probative value in a book written for and approved by the plaintiffs, based on interviews with members of the plaintiff class that are not available for scrutiny, that probative value is outweighed by the risk of prejudice and error inherent in relying on such a document in the absence of any cross-examination.

[121] British Columbia says its main objection is that the document relies on opinion and conclusions and Marshall's analysis is irrelevant to Dr. Kennedy's opinion.

[122] The plaintiffs submit that all of the interviews Marshall conducted are referenced in the book. Dr. Kennedy relies on Marshall's book for its recorded oral history. The plaintiffs submit this is relevant and necessary evidence that is reasonably reliable. The fact that Cowichan Tribes published the book does not make it inadmissible, and any concerns about bias or inaccuracy go to weight. The plaintiffs note that some of the interviews may not have been possible if the book had not been prepared with the approval of Cowichan Tribes.

[123] I agree that any concern about bias in this book goes to weight and not to admissibility. However, I also find that the book contains Marshall's opinions and conclusions. Accordingly, the book is admitted for hearsay purposes, but to the extent it includes opinion evidence, I will only rely on that evidence if it is adopted by Dr. Kennedy.

Biography

Exhibit A-72 (SC07173) Francis, "Early Cowichan History IX: Bishop Demers and the Cowichans" (1928)

Exhibit A-76 (SC06595) Francis, "Our Cowichans and the Chinook" (1930)

[124] These articles were published by Father Francis in the BC Orphan's Friend which was dedicated to missionary work. Dr. Kennedy referred to them but acknowledged that one has to examine the articles for the bias of the priest. It is apparent that Father Francis is not writing from personal knowledge but is rather interpreting historical sources. In that regard, Richmond says it is unnecessary to have Father Francis' interpretation and opinion on the same sources that were available to Dr. Kennedy.

[125] The plaintiffs submit that much of the source material was not available to Dr. Kennedy and she had to rely on these articles. The presence of bias does not render the documents inadmissible but may reduce the weight attributed to them.

[126] On review, the documents appear to have little probative value. There are passages which were read into the record which form part of Dr. Kennedy's opinion. This document should not be admitted as an exhibit.

Exhibit A-107 (SC07477) Barry Gough, Biography of Grant, Walter Colquhoun (1976)

Exhibit A-111 (SC06654) Margaret Ormsby, Biography of Moody, Richard Clement (2000)

[127] Richmond submits that these biographies are compiled from published sources and as such are unnecessary. Canada submits that no information is provided about the authors and that neither document contains pinpoint citations. The bibliography for the Grant biography includes source material ranging from newspaper articles, magazines and various journals. Canada objects to the documents on the basis that they are irrelevant, and submits that Dr. Kennedy has not provided evidence to suggest the documents are reliable. British Columbia submits that the documents are not relevant.

[128] The plaintiffs submit that Dr. Kennedy identified Dr. Barry Gough as "probably Canada's best known maritime and naval historian." The biography is a historical sketch of W.C. Grant, a settler who lived in Sooke. The biography was published in the Dictionary of Canadian Biography, which Dr. Kennedy testified is a very reliable source used by academics. Although Gough relies on some secondary sources, the plaintiffs submit that should not render the biography inadmissible.

[129] In her report, Dr. Kennedy relied on Grant's study of the linguistic relationship of tribes of Vancouver Island and other observations he made about the Cowichan, and discusses the map he made.

[130] Dr. Kennedy was cross-examined on a map Grant produced in an article entitled "Description of Vancouver Island" in the Journal of the Royal Geographical Society of London in 1857. Her evidence was that Grant had never surveyed the Fraser River, and created the map by copying from a map John Arrowsmith had created in London and published in 1853, before Grant wrote the article. This evidence supports the defendants' objection that the biography of Grant is not relevant to these proceedings.

[131] The plaintiffs submit that the biography of Grant is relevant because it provides context about his life, and speaks to the reliability of his work as a surveyor and the linguistic and ethnographic notes which Dr. Kennedy relies on.

[132] Gough does not present Grant as a very reliable surveyor. In any event, the biography is not relevant to these proceedings and it is not admissible.

[133] The biography of Richard Clement Moody was written by Dr. Margaret Ormsby and published in the Dictionary of Canadian Biography. Ormsby was a history professor at the University of British Columbia and a well-regarded historian of B.C. history. Dr. Kennedy relies on this biography in support of her opinion with respect to the land speculation of Colonel Moody, which the plaintiffs plead was concealed fraud: Plaintiffs' Amended Reply, para. 8(a)(c) and (d). Dr. Kennedy relies on many biographical details from this document because she considers Ormsby to be reliable. I find there are many irrelevant details contained in this five-page biography which may be controversial. Ormsby draws conclusions from historical documents and her conclusions cannot be challenged through

cross-examination. Although Ormsby is apparently a respected historian on whom Dr. Kennedy relies, I will not admit this secondary source for the truth of its contents. It can be marked for non-hearsay purposes. The opinion evidence of Dr. Kennedy is available to the court.

Letters, Journals, Affidavits and Articles

Exhibit A-113 (SC06616) - Eddie Edwards to "Dear Sir," 26 July 1963 Penelakut Tribe Submission No. 15. Indian and Northern Affairs.

[134] This document is a copy of a letter written by Eddie Edwards in July 1963. The letter indicates that the author is writing a history of what was told to him by his grandmother. The identity of the author's grandmother is not identified. Canada submits that Dr. Kennedy has not provided any evidence about the author's grandmother or why her information should be considered reliable.

[135] The plaintiffs submit that Dr. Kennedy obtained the letter in a collection of documents the Penelakut tribe had submitted to the federal government in a specific claim submission. She cites this letter in her report regarding the Lamalcha fishing on the Fraser River, in the context of discussing Cowichan local groups who resided at the Cowichan village on Lulu Island. The plaintiffs say the concern Canada raises about threshold reliability is more properly dealt with as a matter of weight rather than admissibility.

[136] Dr. Kennedy testified that this is an Indian Affairs document, and that the researcher who put together the claim on behalf of the band had not done full referencing.

[137] I agree with Canada's objection to this document. To rely on this evidence, the court would need to know who Mr. Edwards' grandmother was and whether she was a reliable source. This document will be marked for non-hearsay purposes only.

Exhibit A-45 (SC14094) - Robert Brown, Journal, Volume 1 (1864)

Exhibit A-46 (SC14096) - Robert Brown, Journal, Volume 3 (1864)

Exhibit A-47 (SC14097) - Robert Brown, Journal, 1864, Winnifreda Macintosh Transcript (1968)

Exhibit A-116 (SC14092) - Robert Brown, Journal, 1864, John Hayman Transcript (1989)

[138] Commander Robert Brown was a botanist and explorer and was a leader of the Vancouver Island Exploring Expedition. The proposed extracts are 70 pages of handwritten notes, 25 typed pages of the Macintosh transcript and 67 typed pages of the Hayman transcript. Dr. Kennedy refers to Brown's 1864 journals twice in her report. She notes Brown provided a description of the Somenos village in 1864 and later she explains that Brown observed "20 to 30 scattered lodges on each side of the river at Quamichan." Dr. Kennedy does not provide a pinpoint citations.

[139] Richmond does not object to the admissibility of that sentence in Brown's 1864 journal if the plaintiffs can identify where it is located, although they are unclear as to the relevance of this entry.

[140] Richmond does object to the following entry from Brown's journal for June 9, 1864:

The great Chief of the Cowichan used to be Thosieten whose prowess as a warrior was sung along the sea board for many a long league and still lives in the memory of the neighbouring tribes whose terror he was.

[141] Richmond submits that this is Brown's opinion, conjecture and speculation. Richmond says Brown did not know what was in the minds or memories of neighbouring tribes. Richmond submits that the balance of Brown's journals are irrelevant.

[142] Dr. Kennedy testified that the Hayman transcript is the acceptable translation of Brown's journals. To the extent the journals are found to be admissible, the corresponding passages of the Hayman transcript should be admitted for ease of reading. The Macintosh transcript is duplicative, unnecessary and should not be admitted.

[143] The plaintiffs submit the journals are relevant and important. Brown travelled among the Cowichan in the mid-1860s and met Shashia. The excerpted journal entries establish the pattern and depth of Brown's contact with the Cowichan and his travel among their villages, including but not limited to Quamichan, Chemainus and Shashia's residence on Valdes Island.

[144] The plaintiffs say these entries regarding the Cowichan, their villages and residences, and Shashia and his residence, are directly relevant to the question of identity. Brown spent significant time travelling among the Cowichan, which the plaintiffs say increase the reliability and weight of his observations.

[145] In response to Richmond's submissions that it is not necessary to enter both transcripts, the plaintiffs submit that the transcripts are not identical. Of particular note is Brown's entry for August 5, 1864. Macintosh provides "Syeann" [Valdes Island] as the name of the island where "Thoseatan" [Shashia], "Chief of Taitka", lives, whereas Hayman provides no name and indicates the word is illegible. Reference to the original entry supports Macintosh's transcription over Hayman's and Dr. Kennedy explains the meaning of "Syeann" in her report.

[146] The plaintiffs only seek to enter 25 pages of Macintosh's 231- page transcription to keep any duplication to a reasonable minimum.

[147] Dr. Kennedy describes Brown as the leader of the Vancouver Island Exploring Expedition in 1861. This was a government-sponsored expedition. Brown was a botanist and explorer and had a team of explorers and scientists with him. He made four journals recording his trip and deposited them with the Colonial Secretary, and had true copies made by Robert Martin, which Brown signed off on as true copies. Dr. Kennedy testified that the originals of

volumes two, three and four have disappeared. She noted that at one point Brown commented that Martin did not know what he was talking about, and she gave evidence that there are some differences between the original of volume one and the copy.

[148] Dr. Kennedy gave evidence that Brown later prepared articles for publication about the geography of Vancouver Island, and intended to write a book at some point. She said that the observations in the journals were contemporaneous.

[149] Volume three only exists as a true copy and this is what Hayman relied on for his publication of the Brown journals. Dr. Kennedy testified that she relied on the Hayman version and thinks Hayman did a remarkable job editing the information.

[150] Winnifreda Macintosh was an employee of the British Columbia archives and her job was to make transcripts of manuscripts, including Robert Martin's transcripts of the Brown journals. In Macintosh's version there has been some editing, as there is in the Martin copies from when Brown went through them himself to make editorial changes. There are also some annotations in someone else's hand which Dr. Kennedy could not identify. Dr. Kennedy did rely on the document, and testified that anthropologist and ethnohistorians rely on the Macintosh transcript.

[151] It is my view that this series of documents are admissible as journals prepared by an explorer based on his personal observations. Brown had an obligation to report his observations to the Colonial Secretary and therefore did so under a duty to be accurate.

[152] This series of documents will be admitted as exhibits for hearsay purposes. There are excerpts of the document which contain lay opinion and conjecture which may reduce the weight of the document but that can be addressed during final submissions on the ultimate reliability of this series of journals. I compare these to other journals like the Fort Langley journals which would also contain opinion and conjecture. Although there is duplication between the two versions of the journals, they are not identical and therefore I will admit both.

Exhibit A-50 (SC06870) Brown, "The Last of the Chiefs", All the Year Round, Volume 3, from December 4, 1869 to May 28, 1870, entry for March 12, 1870

[153] This article was published by a (not the) Charles Dickens in London in a weekly journal that focused on literary matters and social commentary. Dr. Kennedy's view is that the true author was Robert Brown, because the content corresponds to Brown's journals. She testified that the article is Brown's eulogy to Shashia.

[154] Richmond says the article describes Shashia as practically omnipotent. The author says that the "hey-day of his grandeur was nearly past before I knew him, but in old times his prowess in war was sung along the coast for many a league, and still lives in the memory of the neighbouring tribes whose terror he was." Richmond submits that Brown had no way of knowing what Shashia was like before Brown knew him, and submits the article is romanticized and sensationalized.

[155] British Columbia objects on the basis that the authorship of the document is unclear and it is of questionable reliability.

[156] The plaintiffs submit that Richmond's concerns conflate threshold reliability with ultimately reliability. The other documents admitted and produced by Brown confirm that Brown travelled among the Cowichan in the mid-1860s and met Shashia. His travels increase the reliability and weight of his observations. He had direct interaction with Shashia and this may confirm that Shashia told him some of the stories about himself even if they were sensationalized.

[157] It is my view because of the sensationalized tenor of the document it cannot be admitted for the truth of its contents but may be admitted for non-hearsay purposes.

Exhibit A-51 (SC13987) Robert Brown, The Races of Mankind, Volume I, (1873)

[158] This document is a 15-page excerpt of the original 166-page document. Richmond submits it was published for a popular audience. Dr. Kennedy was candid about its limitations in her direct examination. She said it was written for the popular market and as such, Brown tends to embellish or sensationalize certain things. As an expert, she applied her judgment to the documents and found the underlying story and facts can be corroborated with other sources. Richmond submits this document cannot be admitted as independent freestanding evidence in this proceeding. Dr. Kennedy's report sets out what she has taken from it. To admit the document would permit the plaintiffs to rely on assertions of fact their own expert says are embellished or sensationalized.

[159] I agree with Richmond's submission. The proper person to compare this document to the journals is Dr. Kennedy and she has done so. I will admit not this document.

Exhibit A-56 (SC12984) Affidavit John A. Martin, Treasurer of Blaine (1895)

Exhibit A-60 (SC12982) Affidavit of A.E. Wadhams, Cannery Owner (1895)

[160] Of the five affidavits from 1895 that Dr. Kennedy relied on in her discussion of Cowichan fishing at Point Roberts, Richmond, Canada, British Columbia and TFN object only to the affidavits of John A. Martin (Treasurer of Blaine) and A.E. Wadhams (cannery owner).

[161] Dr. Kennedy referred to the Wadhams affidavit for the proposition that by 1895 there were about 26 canneries between New Westminster and the mouth of the Fraser River. The defendants do not object to that sentence being admitted as evidence. They submit that the balance of the six-page affidavit is irrelevant.

[162] The plaintiffs have produced a redacted version of this affidavit in SC14903. Pages 1 - 3 are included for context and background information as well as page 6, which shows it is a sworn affidavit. The statement Dr. Kennedy relied on is contained on pages 2 and 3.

[163] With respect to the Martin affidavit, the defendants object to the statement that a Lummi individual named Captain Jack told Martin "the reason he fished at Point Roberts was that he was a relative of the Cowichan Indians". Dr. Kennedy infers from that statement that the Cowichan had rights to the Point Roberts fishery apart from any they may have practised through their Saanich kin.

[164] In cross-examination, Dr. Kennedy said this statement implies that some Cowichan had rights to the Point Roberts fishery, rather than the Cowichan generally.

[165] Dr. Kennedy agreed that Captain Jack could not possibly have known why others had not expressly objected to him fishing at Point Roberts.

[166] Richmond submits that the Martin affidavit contains double hearsay from a non-Indigenous person, based on his memory of what a Lummi person, Captain Jack, told him. Captain Jack was speculating as to the thoughts of others, in particular the reasons for which other people had not expressly objected to him fishing at Point Roberts. In that regard, this evidence is not admissible for the truth of its contents.

[167] The plaintiffs submit that Martin is entitled to depose based on information and belief and this does not make the affidavit inadmissible. Martin described his relationship with Captain Jack and established their familiarity with each other which lends reliability to the statement. The plaintiffs submit that it is likely that a Lummi man fishing in the area would know why he had permission to fish there given Coast Salish laws of access. It is probable that this was within his direct knowledge.

[168] Richmond responds that the rules permitting a deponent's evidence based on information and belief apply to interim applications and not trials.

[169] I find that the statement made by Martin should only be admitted for non-hearsay purposes and not for the truth of its contents because it is speculation. I will need more evidence before I can draw the conclusions suggested by the plaintiffs in their submissions. The entire affidavit is admitted for non-hearsay purposes as the first two paragraphs provide some context to the statement Dr. Kennedy relied on.

[170] I will also admit the redacted Wadhams affidavit for non-hearsay purposes. The one line in the statement Dr. Kennedy relied on can be admitted for hearsay purposes.

Exhibit A-24 (SC06390) Letter from Demers to Monseigneur of Juliopolis, (1841)

[171] Father Demers was a missionary who travelled in 1841 from a Lummi village on Puget Sound to Fort Langley. In this letter, Demers says the "Kawitshin" inhabit the lower Fraser River. Dr. Kennedy agreed that Demers was recounting something he had been told and had not personally seen the lower Fraser River. This information had to be second-hand because Demers had travelled to Fort Langley overland.

[172] In the letter, Demers described the Yougletas, another name for the Lekwiltok, according to Dr. Kennedy, as "that very numerous nation, living at the ocean side near the mouth of the Fraser River." Dr. Kennedy agreed that this is inaccurate and the Lekwiltok did not live anywhere near the mouth of the Fraser River. The Lekwiltok came from the north end of Vancouver Island and in the 1840s were no further south than Quadra Island.

[173] Richmond submits that this letter does not have sufficient threshold reliability to become evidence given that some of it is second-hand information and some of it is wrong.

[174] The plaintiffs says Father Demers was writing to the Bishop of Québec about his first trip to the Fraser Valley and around Puget Sound as part of his missionary duty to report. Dr. Kennedy identified Demers as the first known priest to be among the lower Fraser River Indigenous people when he visited Fort Langley on the Fraser River in September 1841. Father Demers had been told prior to departure from the Squamish Village that the "Kawitshins" who inhabit the lower Fraser River "were bound to kill the priest as soon as they should meet him". While Demers was among the Lummi in northern Puget Sound, the Cowichan sent one of their chiefs to tell the priest that he would not be killed among their people and assured Demers of their good will towards him. Several Puget Sound chiefs then took Demers overland by way of the Birch Bay portage to the Fraser River in Fort Langley. There were as many as 3,000 Indigenous people from different tribes gathered around him before he returned south to Fort Nisqually. Dr. Kennedy concluded that some of these people were Cowichans.

[175] The plaintiffs suggest that the statement about the Lekwiltok was basically accurate because Quadra Island is relatively near the mouth of the Fraser River. I reject that submission. The plaintiffs further suggest that there is important information in the letter about the reputation of the Cowichan. The letter was written by a missionary who had a duty to report but some of it is not based on personal observation or information.

[176] It cannot be said that this letter would stand the test for threshold reliability set out in Bradshaw. The statement is not so reliable that cross-examination of the declarant would add little if anything to the process, and the statement would likely change under cross-examination.

[177] I will admit this letter for non-hearsay purposes only at this time.

Exhibit A-23 (SC06387) Letter from Francois Blanchet to Bishop of Quebec (1841)

[178] This is a 26-page document which includes a letter from Father Blanchet to the Bishop of Québec. The letter itself is 14 pages long and contains details of Father Blanchet's activities. Dr. Kennedy only refers to the following single sentence in the letter:

The Yougletas, a fierce and barbarous nation, live on the large Vancouver Island, and the Kawitchins on an island in the Fraser River.

[179] Richmond submits that the balance of the document is irrelevant. The statement itself is vague. Canada agrees to the admission of e-page 9 but objects to the remainder of the document on the basis that it is irrelevant. British Columbia does not object to e-pages 1-3 and 8-9 and objects to the balance of the document on the basis of relevance.

[180] The plaintiffs rely on Dr. Kennedy's statement that Blanchet's letter was prepared under his duty as a missionary in the field to report his works, successes and problems back to the Bishop of Québec. Dr. Kennedy describes the Oregon Historical Society as a well-respected historical society that published material for many years. The translation to English was done by Carl Landerholm who was involved with the Oregon Historical Society. Dr. Kennedy testified that the translated work is relied on by many people in the field.

[181] I find that the missionary letter meets the standard for threshold reliability. However, much of the document is irrelevant to these proceedings. I will admit e-pages 1 to 6 because they provide the publication information and the helpful letter from the translator who provides context for the documents, as well as e-page 9 which contains the passage relied on by Dr. Kennedy. These pages are admitted for hearsay purposes and the balance of the document should be redacted. I will consider what is meant by "an island in the Fraser River" when determining the ultimate reliability of this document.

Exhibit A-25 (SC14027) Letter from Bolduc (1844)

[182] This is an excerpt from the published letter of Catholic priest Father Jean-Baptiste Bolduc dated February 15, 1844, written from Cowlitz on the Columbia River. The letter was translated from French and published in the Oregon Historical Society's 1956 work Notices & Voyages of the Famed Quebec Mission to the Pacific Northwest, Being the correspondence, notices, etc. of Fathers Blanchet and Demers, together with those of Fathers Bolduc and Langlois. Dr. Kennedy testified that Bolduc was a missionary making the rounds in Puget Sound and Vancouver Island circa 1844 and his letter included his personal observations.

[183] Dr. Kennedy relied on the letter in her report. She notes that in the letter, Bolduc describes how he baptized over 500 Natives at their village in Cadboro Bay, outside Victoria Harbour. Bolduc was told that after Father Demers visited Fort Langley in 1841, those that were baptized of the Kwaitlens and the Kawitshins (on the Fraser River) died almost immediately. Then, on March 19, 1843 Bolduc noted Kawitshins were among the 1,200 Aboriginal persons gathered for his baptism.

[184] The defendant TFN objects to the letter on the basis that it is hearsay and the apparent circumstances of its creation do not satisfy the requirements of necessity and reliability. The recipient of the letter is not known. Dr. Kennedy testified that Bolduc is talking about his observations and information he has obtained from other missionaries. The purpose of the document is difficult to identify.

[185] I find this letter does not meet the requirements of threshold reliability. It is not necessarily the priest's personal observations and it is not clear that he is writing this letter to a superior or that he is under any obligation to be accurate. It will be admitted for non-hearsay purposes.

Exhibit A-85 (SC14071) Beryl Cryer, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island, (1933) edited by Chris Arnett (extract one)

Exhibit A-86 (SC14074) Beryl Cryer, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island, (1933) edited by Chris Arnett (extract two)

Exhibit SC14285 Beryl Cryer, Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island, (1933) edited by Chris Arnett (extract three)

[186] The book Two Houses Half Buried in Sand is a collection of stories published in the 1930s in the Colonist newspaper. The stories are written by Beryl Cryer, a resident of Chemainus. Dr. Kennedy describes her as "a well-to-do white lady who took an interest in the local natives". Cryer interviewed Mary Rice, a Penelakut woman, and 18 other Indigenous persons.

[187] This version of the book was edited by Chris Arnett, an anthropology PhD student. Dr. Kennedy testified that his editing was mostly limited to changing the transcription of the Indigenous terms.

[188] Both Arnett and Dr. Kennedy speak of Cryer's fallibility, either arising from her lack of cultural understanding, her Victorian views or inexplicable artistic license. A critical eye is needed to determine when Cryer is embellishing or sensationalizing certain aspects.

[189] Richmond, Canada, British Columbia and TFN object to the admissibility of these excerpts because a sufficient foundation has not been established for the reliability of Cryer's work. She is not an anthropologist or ethnographer. She has no academic training related to collecting recordings of Indigenous oral traditions. Her work has been criticized by Dr. Barbara Lane and Dr. Kennedy.

[190] On reviewing Dr. Kennedy's testimony, I agree that she relied on some of the excerpts but with a critical eye. It is Dr. Kennedy's analysis and interpretation of these documents that is useful to the court. For that reason, I will mark these excerpts for non-hearsay purposes only.

Exhibit A-129 (SC14129) - Thomas Kidd, History of Lulu Island and Occasional Poems (1927)

SC14841 Excerpt of Thomas Kidd, History of Lulu Island and Occasional Poems (1927)

[191] Richmond describes this document as an amateur history and collection of poems published in 1927 by a resident of Richmond. Dr. Kennedy testified that the portions of this document that record Kidd's personal knowledge of Lulu Island are reliable but she is cautious about portions in which Kidd repeats information he heard from others.

[192] Canada notes that Dr. Kennedy testified that where Kidd is talking outside of his personal experience, she viewed those statements with some skepticism and looked for corroboration.

[193] The plaintiffs created a new excerpt (SC14841) of the document, containing pages 4-5, 11, 17 and 28 as well as the introductory pages. The excerpt includes a biography of Kidd which the plaintiffs say should be included to respond to Canada's concern that there was not enough information about the author. In her report, Dr. Kennedy cites Kidd for his observations about the presence of game on Lulu Island, the presence of middens in the sloughs, and Kidd's observation of Cranberry Jack and where he lived.

[194] I reviewed the excerpt and it is still not possible to determine how much of the excerpt is based on Kidd's personal knowledge. This document can be admitted for non-hearsay purposes.

Maps

Exhibit J (SC06386) United States Exploring Expedition chart entitled "Archipelago of Arro, Gulf of Georgia, Ringgolds Channel and Straits of Fuca Oregon Territory by the U.S.Ex.Ex., 1841" with Frasers River inset

[195] In her report, Dr. Kennedy said that the United States Exploring Expedition (USEE) led by Captain Wilkes undertook its own survey of the Fraser River and the results of that reconnaissance work appear on the 1841 chart. The 1841 Wilkes chart depicts a "Cowitchen Village" on the inset of Fraser River, opposite Tilbury Island. The defendants' objections to the 1841 Wilkes chart primarily relate to a lack of evidence that the chart is based on firsthand observation.

[196] According to Wilkes' journal, he was preparing orders for the ship Porpoise to survey Port Townsend and then to proceed to Fraser's river, visiting Fort Langley. The Porpoise did set out with those orders but received countermanding orders to head to New Dungeness because one of the USEE ships, the Peacock, had sunk. The Porpoise rejoined Wilkes in Port Townsend on July 29, 1841.

[197] In her report, Dr. Kennedy infers that there was time to survey the Fraser River, and that the Porpoise had likely surveyed the Fraser River between July 25 and July 29, 1841. There is an anchorage shown on the Fraser River near Fort Langley that Dr. Kennedy says might have been the Porpoise anchoring. However, she notes the same anchorage appears on Simpson's 1827 map.

[198] Dr. Kennedy was cross-examined on this inference and acknowledged that there was no evidence that the Porpoise went into the Fraser River between July 25 and July 30, 1841. That being the case, Richmond submits that the information about the "Cowitchen Village" on the 1841 Wilkes chart must be second-hand information. Dr. Kennedy speculated that Captain Wilkes was given information from Captain Scarborough.

[199] In response, the plaintiffs say that there is evidence that between July 5 and 8, 1841, a USEE canoe traveled from the mouth of the Fraser River up to Fort Langley and returned. Counsel for British Columbia examined Dr. Kennedy on a text entitled Charles Wilkes and the Exploration of Inland Washington Waters: Journals from the Expedition of 1841. The text includes an entry from the journal of Master George T. Sinclair, the captain of the Porpoise. Dr. Kennedy was not familiar with the text. The following entry for July 1, 1841 makes reference to information received from Captain Scarborough and to the trip up to the fort:

Frasers river swims its way into the gulf, discolouring the water nearly halfway over to Vancouver Island.

How it was possible for Vancouver to overlook this river is more than I can imagine, the whole face of the country to the Ed indicates the passage of a river & quantity of fresh water discharged into the Gulf & the immense Bank off its mouth shows that the river must be both an extensive & a rapid stream.

We only surveyed the channel of this river thro the sand flat, to its [ ] open mouth. The channel is crooked but can be easily staked off and the vessel may carry three fathoms up outside the mouth at low water and I was informed by Captain Scarborough that the same depth might be carried up

to Fort Langley, one of the Companys Forts, which is thirty miles from its mouth. The current is so rapid, that we could barely stem it with our fast pulling whale boats. We did not put up a Tide staff but the banks which are perpendicular indicate a rise of six or eight feet. Altho there is regular rise & fall of the tide yet the current never ceases to run out altho it stacks upon the flood tide. This river discharges as much water into the ocean as the Columbia and Doctor McLaughlin the chief Trader of the Company on the coast goes so far as to say it discharges more.

We sent up to the fort today to try & get some vegetables [ ] for the crew but could not get any, the last years crop having been all used & that of present year being yet in the ground & not sufficiently matured.

[200] The plaintiffs say this is evidence that members of the Wilkes expedition had firsthand observation of any "Cowitchen Village". The plaintiffs also submit that this evidence is consistent with Dr. Kennedy's evidence that the Cadborough and other surviving HBC ship logs from journeys to and from Fort Langley during the 1940s identified well-known navigational landmarks, among them the Cowichan village.

[201] Richmond submits that there is no evidence that anyone from the Wilkes expedition entered the Fraser River beyond the mouth, and while there is evidence that Wilkes met Scarborough one afternoon, there is no evidence that Scarborough said anything to Wilkes about an Indigenous village on the south arm of the Fraser River.

[202] The plaintiffs submit that Master Scarborough met with USEE officers multiple times and provided them with information for navigating the Fraser River to Fort Langley. There is evidence in the above-quoted passage that Captain Scarborough did impart navigational information.

[203] Richmond also submits there are errors in the 1841 Wilkes chart which indicate that it is not based on firsthand information. Richmond says that Fort Langley burned down in 1839 and was rebuilt in a different location, yet the 1841 chart depicts Fort Langley at its original location. Also, Richmond says the map depicts a large mountain labelled "Cowitchen Peak" on the south shore of the south arm of the Fraser River East of Tilbury Island. That mountain does not exist.

[204] Regarding the location of Fort Langley, the plaintiffs submit that the old Fort Langley location did not burn down, and was a well-known landmark and navigational aid for HBC mariners in the 1840s and 1850s. The plaintiffs say it was the new Fort Langley that burned down after it moved upriver in 1839.

[205] Dr. Kennedy was cross-examined on how it was that the position of the new Fort Langley, established upriver in 1839 and re-established in 1840 after it burned down, did not appear on state charts prior to 1859. Dr. Kennedy testified that state charts, which were used for the purpose of correct nautical navigation, are to be accurate and pointed out the first state survey of the lower Fraser River at the new Fort Langley was not until the spring of 1859. For that reason, charts relied on the location of the old Fort Langley as a navigational aid

until the new Fort location was properly charted.

[206] Regarding the location of the "Cowitchen Peak", Dr. Kennedy suggested it was added to the map as a navigational aid, and was intended to represent the mountain in the distance, not where it is depicted. During cross-examination, Dr. Kennedy conceded that there is no peak where it is depicted on the chart.

[207] The plaintiffs submit that the "Cowitchen Peak" is the "remarkable peaked mountain inland" similar to that referenced by Captain Simpson in 1827. Dr. Kennedy testified this peak is likely Cheam Mountain near Chilliwack. The 1841 Wilkes chart lacks sightlines to the peak from a specific anchorage on the river. The plaintiffs submit the lay user may misinterpret the chart and think that the "Cowitchen Peak" was actually located beside the river, but the USEE chart was not published for the lay user. It was published for nautical navigators who do not need precise sightlines from someone else's former anchorage within the river channel in order to make use of the mountain as a navigational aid.

[208] British Columbia cross-examined Dr. Kennedy about the 1841 Wilkes chart and the location of the so-called "Cowitchen Peak". She testified that she believed it was the same peak that was marked on the Simpson map but noted that the sightlines were not there and there is no indication that it is inland. She testified that they just left the peak there relative to the "Cowitchen Village" and called it "Cowitchen Peak". Dr. Kennedy was asked if sightlines were necessary to use the peak as a navigational aid. She testified "I don't know that you need sight lines for a navigational aid. You just have to have the feature marked, and then when you're in position, then you can see Cowichan peak." She conceded in cross examination that without a sightline, one would have to know where the anchorage was at the mouth of the river in order to use the peak as a navigation aid.

[209] Dr. Kennedy's evidence is that the 1827 Simpson chart contains information that does not appear in the 1841 Wilkes chart, and the 1841 Wilkes chart contains information that does not appear on the Simpson chart. In her report she notes that the soundings on the channel just off the Cowichan village differ slightly, which she says indicate a new, independent observation of the village.

[210] On the evidence before me today it appears that the Fraser River portion of the 1841 Wilkes chart may be a copy of the 1827 Simpson map given the location of the "Cowitchen Peak" without sightlines and the incorrect location of Fort Langley. I understand there is an argument to the contrary but I am not satisfied that there is sufficient proof that the Fraser River was drawn from personal observation. It could be that the vegetable run up to Fort Langley was taken by somebody in a canoe or overland. At this stage, I am only prepared to mark the 1841 Wilkes chart for non-hearsay purposes. It is evidence of Wilkes' understanding in 1841, but it does not satisfy me that it was a map drawn of the Fraser River based on firsthand information from an explorer in 1841.

Exhibit G (SC06381) British Admiralty Chart #1922 (1849)

[211] The plaintiffs submit that this chart is British Admiralty Chart #1922. The title block of the map states "From a Drawing by Mr. Emelius Simpson in H.B.C. Schooner Cadbore, 1827". Richmond submits it is a copy of the 1827 Simpson map and has no probative value. The plaintiffs say that it is clearly based on Simpson's chart but it is not a copy. Dr. Kennedy indicated there are differences between the two charts. This chart omits material that appears on Simpson's chart, including the HBC vessel's track when ascending the river in 1827 and the tree symbols opposite Deas Island down river from the "Cowitchin Villages" depicted on the south arm. There are toponyms for "Colville Point" and "Westham Id" on the south arm, as well as "Roberts Bank" at the mouth thereof. The plaintiffs say this indicates the Hydrographic Office must have had at least one more contemporary source for Chart #1922.

[212] The HBC ship logs from vessels servicing Fort Langley during the period 1842-1849 noted by Dr. Kennedy provide corroborating firsthand observation of the "Cowitchin Villages" depicted on Chart #1922. There are several firsthand references to the Cowichan Village in the logbooks, including at June 26, 1847, July 13, 1848, July 24, 1848, September 20, 1848 and October 24, 1848.

[213] I agree with the plaintiffs' submissions that there are differences between this chart and the Simpson chart and that there is sufficient evidence that the authors of the ship's logs had firsthand observation of the Cowichan Village. The chart was authored by the British Admiralty's Hydrographic Office according to an Act of Parliament and was published for public use in navigation which is a declaration on a matter of public interest. While the map is based on Simpson's 1827 map, it has added features and additional detail, such that it cannot be said that it provides nothing new. I find this chart should be admitted for the truth of its contents as it meets the test of threshold reliability.

Exhibit XX (SC06392) British Admiralty Chart #1917 (1849)

[214] The plaintiffs submit that this chart is British Admiralty Chart #1917 entitled North America West Coast - Vancouver Island and the Gulf of Georgia, taken from surveys of Captain G. Vancouver, 1793, Captains Galiano and Valdes, 1792, and Captain Kellet, 1847. It was published by the Hydrographic Office of the Admiralty on February 28, 1849. It depicts "Villages" on the south arm of the Fraser River downriver from Fort Langley. Under the toponym "Frazer River" the chart reads "See Plan" which is a cross-reference to Exhibit G, British Admiralty Chart #1922. It is disclosed as a compilation from these various sources. Compilations are common in chart making.

[215] Chart #1917 is on a much smaller scale than Chart #1922.

[216] Richmond submits that Dr. Kennedy testified that Kellet surveyed around Victoria, Becher Bay and Sooke but did not go near the Fraser River. Dr. Kennedy wrote in her report that Kellet likely met Scarborough, Finlayson and other HBC officials around Victoria. She inferred that the chart likely included information he received from them, including information about the Cowichan village on the south arm of the Fraser River.

[217] Chart #1917 shows Fort Langley in its old location. Richmond submits that British Admiralty in 1849 likely had a copy of the 1841 Wilkes chart, which would explain the erroneous location of Fort Langley. As the 1841 Wilkes chart was based on the Simpson map, Richmond says Chart #1917 is also based on the Simpson map, and therefore lacks probative value.

[218] The Fraser River portion of Chart #1917 cross-references Chart #1922. I have found that Chart #1922 is not a direct copy of the Simpson map and I have admitted it for the truth of its contents and so accordingly I find that Chart#1917 is based on a reliable source.

[219] I conclude that this chart is compilation of information from various sources, including information from Captains Vancouver, Galiano, Valdez and Kellett and possibly Scarborough. The location of Fort Langley at its old site is not necessarily an error. The fact that a chart is a compilation does not necessarily make it inadmissible if the original map or chart traced was reliable and the additions are based on firsthand information or observation. Unlike Chart #1922 where I did find support from firsthand information was likely used, I cannot determine at this stage in the trial if Chart #1917 includes firsthand information or observation of the Fraser River. The evidence before me is insufficient to conclude that it does. Further, Kellet's focus was on Vancouver Island in creating this map. For those reasons, I will mark it for non-hearsay purposes, as evidence of how Kellet believed the Fraser River to appear in 1849.

Exhibit A28 (SC00425) Arrowsmith Map (1849)

Exhibit A-29 (SC06396) Arrowsmith Map (1853)

[220] John Arrowsmith and his nephew Aaron Arrowsmith were commercial map-makers and engravers in London. They never travelled to British Columbia. Richmond submits that these maps were copied from earlier maps. According to Dr. Kennedy, John Arrowsmith was working from the maps he had available to him in 1849; he did not have independent knowledge of British Columbia. It appeared to Dr. Kennedy that the main source for the Fraser River was likely the 1827 Simpson map.

[221] The plaintiffs agree that the Arrowsmiths drafted maps are based on secondary sources.

[222] Dr. Kennedy noted in her report that the depiction of the "Kawitchen Vil" on the map is based at least in part on the 1827 Simpson survey, and testified that Simpson's map is probably the basis for what is depicted on the Fraser River. Dr. Kennedy testified that John Arrowsmith was working from the same information about the Fraser River when he created the 1853 map.

[223] These maps are not a copy of any one map but are a compilation based on multiple sources. As they are not based on firsthand information, I will admit these maps for non-hearsay purposes to depict how John Arrowsmith believed the south Fraser River to appear in 1849 and 1853.

Exhibit YY (SC06394) Alden Chart (1853)

Exhibit A-5 (SC06398) Alden Chart (1854)

[224] James Alden was a United States Navy cartographer working under the command of Charles Wilkes during the U.S. Exploring Expedition to Puget Sound in 1841. The 1853 chart is entitled Sketch of Haro and Rosario Straits, and the Islands between the Main and Vancouver Island. Dr. Kennedy testified that the 1853 chart was created when the sovereignty of the islands in the Rosario and Haro straits was still disputed, to help the United States Navy understand where the boundary was. Alden concentrated his work in the area from Sidney and Henry Islands. The Fraser River is depicted and Dr. Kennedy testified that it shows the location of the Cowichan village. Gary Point is mislabelled Garvy Point.

[225] Dr. Kennedy agreed in cross-examination that Alden did not go up the Fraser River as far as where the village is depicted on the chart, and may not have gone up the Fraser River at all. Dr. Kennedy testified that the Fraser River section is based on Wilkes' expedition, Kellet's expedition, and information obtained from Hudson Bay Company officers, including James Douglas.

[226] The plaintiffs submit that the title block reflects that the Alden chart of 1853 is a compilation from a reconnaissance by the U.S. Coast Survey Steamer Active, the surveys of the USEE in 1841, of Captain Kellet in 1846, and from information furnished by the Hudson Bay Company and from the survey of George Davidson, Esq. Dr. Kennedy testified Alden stopped at Victoria to greet Governor Douglas and to obtain all contemporary information likely to assist with their operations. Dr. Kennedy gave evidence that information about the location of the Cowichan would have been relevant to the safety of the expedition, and that Douglas would have been in possession of that information.

[227] Richmond submits that the charts erroneously locate Fort Langley at its old site, and that it is unlikely that Alden met with HBC officers who informed him about an Indigenous village but not about Fort Langley. Richmond says the charts must be yet another copy of the 1827 Simpson chart, the 1841 Wilkes chart and/or the 1849 Kellett chart.

[228] I find that the Fraser River portion of the maps are not copies of the 1827 Simpson chart, but that they are drawn from various sources including the 1841 Wilkes chart and the 1849 Kellet chart which I did not admit for hearsay purposes. The focus of the map-maker was not on the Fraser River and it is therefore likely that the Fraser River details are not from firsthand information. These maps will be marked as an exhibit for non-hearsay purposes.

Exhibit A-1 (SC06399) Pemberton Chart (1854)

Exhibit ZZ (SC14040) Dispatch from Douglas to Colonial Office dated February 27, 1854 enclosing Pemberton Chart (1854)

[229] Exhibit A-1 duplicates the chart at the end of Exhibit ZZ. The chart was prepared by Joseph Pemberton, Surveyor General of Vancouver Island. Dr. Kennedy agreed that Pemberton did not go up the Fraser River and as Surveyor General of Vancouver Island, the mainland was not within his jurisdiction.

[230] The plaintiffs submit that Dr. Kennedy testified that the purpose of creating the map was to provide London a corrected chart of the Strait of Georgia and Haro Strait, because Britain and the United States were trying to work out the international boundary and Captain Vancouver's map from 1792 was known to be inaccurate.

[231] The plaintiffs submit that Pemberton's chart is not a copy of the 1827 Simpson chart or the 1841 Wilkes chart.

[232] Exhibit ZZ is an excerpt of a dispatch of February 27, 1854 from James Douglas (then Governor of Vancouver Island) to the Duke of Newcastle. The dispatch enclosed the chart marked as Exhibit A-1. Douglas was providing London with a chart correcting Captain Vancouver's 1792 map which was known to inaccurately depict the Strait of Georgia and Haro Strait. This corrected chart was to be used in the British North West Boundary Survey and the Fraser River was not its focus.

[233] The dispatch is admissible as a government record authored by Governor Douglas who was responsible for the stewardship of government. The dispatch itself focuses entirely on the boundary dispute between Britain and the United States and makes no reference to the Fraser River area.

[234] However, the Fraser River portion of the 1854 Pemberton chart is not a copy of the 1827 Simpson chart or the 1841 Wilkes chart. Dr. Kennedy testified that the 1854 Pemberton chart depicts the Cowichan village differently than did the earlier maps.

[235] Dr. Kennedy testified that James Douglas wore "two hats" as of 1851, as both HBC Chief Factor and Governor of Vancouver Island at Fort Victoria. On cross- examination Dr. Kennedy testified that Pemberton prepared charts with and for Douglas, and that while Pemberton did not travel up the Fraser River, Douglas did. Further, regarding the 1854 Pemberton chart, as it relates to the area of the Fraser River, the Cowichan village and Fort Langley, it is known that Douglas did travel up the Fraser River and so it is highly likely that

Pemberton obtained information from Douglas about the location of the Cowichan village.

[236] Given this high likelihood that Douglas imparted his knowledge of the Fraser River on Pemberton, and because the depiction of the Cowichan village is different than what is depicted in other maps, I will admit this map for hearsay purposes.

Exhibit A-11 (SC14045) James Prevost's Despatch No. 7 to Lord Clarendon dated December 7, 1857 enclosing George Richards Chart (1854)

Exhibit A-10 (SC06418) Richards Chart (1854)

[237] In the December 7, 1857 dispatch to Lord Clarendon, Captain James Prevost describes the enclosed chart prepared by Captain George Richards as a tracing taken from the United States coast survey chart. Richards prepared this chart by tracing the Alden 1854 chart (Exhibit A-5) with the exception of the lines drawn through the channel. He created the chart as part of his duty as a boundary commissioner. Richards did not actually survey the Fraser River and had no firsthand information about the Fraser River when he made this tracing.

[238] I have ruled that Exhibit A-5, the 1854 Alden chart, is admitted for non-hearsay purposes only. Exhibit A-10, the 1854 Richards chart, duplicates Exhibit A-5 and provides no additional evidence.

[239] The 1854 Richards chart will also be admitted for non-hearsay purposes as evidence of how Richards believed the south arm of the Fraser River area appeared in 1854. The dispatch can be admitted as a government record but should be excerpted to only include that portion referencing the enclosed chart.

Exhibit A-6 (SC06413) James Prevost's Despatch No. 4 to Lord Clarendon dated August 12, 1857

Exhibit A-7 (SC06412) Prevost Chart (1857)

[240] In her report, Dr. Kennedy opines that the chart enclosed in the dispatch to Lord Clarendon is a record of Prevost's personal observation of the Cowichan village on the south arm of the Fraser River. Prevost's orders were to survey and map the 49th parallel. The records indicate he surveyed around Point Roberts at Semiahmoo Bay. Dr. Kennedy explained that she inferred Prevost entered the Fraser River because the chart includes soundings of the river. In cross-examination she agreed the soundings were the same as in the 1854 Alden chart. She therefore conceded that there is no evidence that Prevost did enter the Fraser River.

[241] As there is no evidence that Prevost made personal observations of the Fraser River or that the map contains new observations, the map will be admitted for non-hearsay purposes only. The dispatch is admissible as a government record but should be excerpted to include only that portion referencing the enclosed chart.

Exhibit A-8 (SC06411) Prevost Chart (1857) date stamped November 1857

[242] Exhibit A-8 is an identical copy of Exhibit A-7. The only difference is the date stamp. For the reasons I set out in relation to Exhibit A-7, Exhibit A-8 is admitted for non-hearsay purposes.

Exhibit A-73 (SC06526) Richards Chart (1865), 1900 version

Exhibit A-74 (SC00037) Richards Chart (1865), 1932 version

[243] Captain G.H. Richards was second-in-command for the water portion of the North West Boundary Survey for the British contingent under Prevost. He oversaw the publication of Admiralty Chart #1917 in 1865. The 1865 version appears to be lost. Dr. Kennedy testified that Richards travelled up the lower Fraser River in 1859 as far as Fort Langley and returned to the Fraser River in 1860, 1861 and 1862.

[244] The 1866 Richards chart has been admitted in this trial as Exhibit 717. That chart does not contain a "Cowichan" notation but notes "Gravesend Reach" across from Tilbury Island on Lulu Island. The only notation of an Indian village is of Katzie village.

[245] Richards' private journals for 1860 and 1862 do not describe seeing an Indian village on the south arm of the Fraser River. On the 1900 and 1932 versions of the Richards chart there is a "Cowetchin" notation on the north shore of the south arm of the Fraser River. Immediately to the southwest is the notation "Gravesend Reach". The old Fort Langley location is erroneously labelled "Derby or New Langley", and the correct location is erroneously labelled "Old Langley". In other words, the labels are switched. In cross-examination, it was suggested to Dr. Kennedy that the 1866 version of the chart (which does not contain a "Cowetchin" notation) depicts what Richards saw when he visited the Fraser River.

[246] I agree with Richmond's submission that the notation for "Cowetchin" was made when the chart was corrected in 1890 or 1900, and the correction was not made by Richards who made his observations in 1859 and 1862. It is not known why the notation was added.

[247] The charts may be admitted for non-hearsay purposes only.

Exhibit A-30 (SC06478) Wyld Map (1861)

[248] James Wyld was a commercial mapmaker in London. The purpose of preparing this map was to show the location of the islands, rivers and coastal features in Haro Strait at the time of the boundary dispute. Dr. Kennedy did not know what sources Wyld used to create this map. It appears to be a copy of earlier maps and there does not appear to be new information on the lower Fraser River. The focus of the map is on a different area.

[249] The plaintiffs submit that the probative value of this map is what the Crown recognized or knew at the time about the Cowichan. This is clearly a non-hearsay purpose.

[250] This map should be admitted for non-hearsay purposes only.

Exhibit A-20 (SC06539) United States North West Boundary Survey's Map Sheet No. 7 (1869) (lithographic)

Exhibit A-21 (SC06538) British North West Boundary Survey's Map Sheet No. 1 (1869)

[251] These maps were copied from other North West Boundary Survey maps based on Gibbs' observations in 1858. Dr. Kennedy was not aware of any 1869 survey. Richmond has withdrawn its objection to the admissibility of Gibbs' 1858 field maps and the later 1869 published versions. Richmond says these maps are copies of Gibbs' maps and have no additional probative value.

[252] The plaintiffs submit that Map Sheet No. 7 had a scale of 1:120,000 and depicts "Cowitchin (Indian Village)" at the south arm of the Fraser River opposite Tilbury Island, marked with eight or nine rectangles in two rows being six symbols along the riverbank with two or three behind. It also depicts new Fort Langley on the Fraser River to the south of McMillan Island and upriver from the old Fort Langley site now identified as Derby. U.S. Commissioner Campbell observed these features himself in 1857 when the members of the U.S. North West Boundary Survey were on the lower Fraser River for the first time as indicated by the journal of his companion Dr. Caleb Kennerly.

[253] The plaintiffs submit that Dr. Kennedy does not agree that Map Sheet No. 7 was copied from other maps. She is of the opinion that Map Sheet No. 7 shows schematically the location of the Cowichan village on the south arm based on Gibbs' observations in 1858 in 1859. British Columbia put this contention to Dr. Kennedy in cross-examination. She testified that some of the information was copied from other boundary survey maps and that it did not differ from Map Sheet No. 1 (Exhibit A-21) in any significant way, as it was based on observations in 1858 in 1859.

[254] It appears to me that these maps are part of a series and that there are some differences between the map sheets. I will admit these maps as part of the series for the truth of their contents. They add some additional information which I take to be based on firsthand observation.

Exhibit A-22 (SC06540) United States North West Boundary Survey Map Sheet No. 7 (1869) (lithographic)

Exhibit A-19 (SC12825) North West Boundary Survey Map (1868)

[255] Exhibit A- 22 is the United States North West Boundary Survey Map Sheet No. 7 at a scale of 1:60,000. It depicts "Cowitchin (Indian Village)" at the south arm of the Fraser River opposite Tilbury Island using six rectangles along the riverfront and three above. It depicts Fort Langley on the Fraser River apparently to the south of McMillan Island. This map is not a copy of Exhibit A-20. It is a larger scale and certain areas on the river such as around

the Katzie Village and old Fort Langley do not appear. The larger scale brings into better focus a clear picture of the "Cowitchin (Indian Village)" at the south arm of the Fraser River. The symbols used to depict the village are different. The title block itself indicates that there are additional differences because, unlike Exhibit A-20, Exhibit A-22 is "showing monuments, cuts and other marks" created by the North West Boundary Survey. The cuts and marks along the 49th parallel are more definitive.

[256] I will admit Exhibit A-22 for hearsay purposes.

[257] Exhibit A-19 is an undated North West Boundary Survey Map entitled "Map Showing the line of Boundary between The United States & British Possessions From the point where the 49th Parallel of the North Latitude strikes the Western Coast of the Continent "to the middle of the channel which separates the Continent from Vancouver's Island and thence Southerly through the middle of said channel" &c. to Fuca's Straits, in accordance with Treaty of June 15th, 1846."

[258] Richmond submits that Exhibit A-19 is a copy of the 1858 field map of Gibbs, already in evidence (Exhibits A-14 and A-15). Richmond says this copy lacks additional probative value and is inadmissible.

[259] The plaintiffs submit that the map does not attribute its source to Gibbs and that it is not a copy of the 1858 Gibbs field map. Numerous officers from the United States North West Boundary Survey travelled up the Fraser River and observed the Cowichan village on the south arm including Caleb Kennerly, G. Clinton Gardner, P.V. Peabody and George Gibbs, as well as Commissioner Archibald Campbell. The plaintiffs submit the map has probative value as to the truth of its contents from at least the United States North West Boundary Survey's time on the river.

[260] I will admit this map for hearsay purposes as I find it is not a copy of previous maps and it contains some additional information presumably from members of the North West Boundary Survey exploration who travelled up the Fraser River.

Exhibit A-150 (SC14222) Chart #1911 by Kellet 1849

[261] British Columbia put this chart to Dr. Kennedy in cross-examination. She was cross-examined on how the position of HBC's new Fort Langley did not appear on state charts or their derivatives prior to 1859. Dr. Kennedy testified that state charts, which are used for the purpose of correct nautical navigation, are to be accurate and pointed out that the first state survey of the lower Fraser River is not conducted until 1859.

[262] This map does not depict the Fraser River nor anywhere north of Bellingham Bay. In my view, it is irrelevant and inadmissible.

US Exploring Expedition Journals and Chart (1841)

Exhibit A-140 (SC14207) Porpoise journals

Exhibit A-141 (SC14208) Porpoise journals

[263] These documents are excerpts from two day-to-day journals kept in 1841 by a USEE officer under the command of Lieutenant Charles Wilkes, U.S. Navy. The contents of these journals have been discussed at some length under the discussion about Exhibit J, above.

[264] Richmond objects to the admissibility of these two documents on the basis that they have no probative value. The plaintiffs submit that the documents relate to facts surrounding the USEE activity from July 5 - 8, 1841, which is highly relevant.

[265] These firsthand journals may shed light on whether any USEE officers personally observed the Fraser River. As journals kept by officers of the USEE, I find they meet the requirements for threshold reliability. The officers had an obligation to keep accurate logs and they are based on personal observation. I will admit both of these exhibits for hearsay purposes.

Exhibit A-27 (SC10907) Kane's Portrait of Shashia

[266] This document is a copy of the coloured painting of "Saw-see-a [Shashia], a Cowichan chief" produced by Paul Kane in April 1847. Paul Kane was a travelling artist who came west with the Hudson's Bay Company and travelled to Fort Victoria. He was one of Canada's best known portrait painters of this period, and Dr. Kennedy testified that Kane likely created this portrait of Shashia in person at Fort Victoria.

[267] Richmond objects to the relevance of a portrait of Shashia.

[268] I will admit this document for non-hearsay purposes as depicting Paul Kane's observations of the appearance of Shashia and his garment.

Exhibit A-108 (SC14095) MacLaren, ed., Journal of Paul Kane's Western Travels

[269] This document is an excerpt from an article entitled "Journal of Paul Kane's Western Travels" transcribed by I.S. MacLaren, as appearing in the 1989 publication The American Art Journal. Dr. Kennedy testified that MacLaren is the world's authority on the travels and paintings of Paul Kane. Dr. Kennedy merely used this excerpt to identify the painting and corroborate her identification of the painting.

[270] Given that I have admitted Exhibit A-27 depicting Paul Kane's observation of Shashia and his garment, Exhibit A-108 is unnecessary and inadmissible.

Exhibit PP (SC14028) Documents Relative to Warre and Vavasour's Military Reconnaissance (1845 - 1846)

[271] This document contains an excerpt from the published report of Lieutenants Henry J. Warre and Marvin Vavasour, British Military, dated October 26, 1845. The purpose of Warre and Vavasour's trip was to obtain accurate knowledge of the Oregon territory as may be needed for future military operations, including information on Indigenous tribes and their population. The document includes a census of the Indian tribes in the Oregon Territory.

[272] Richmond has withdrawn its objection to this document. British Columbia does not object to pages 1, 54-57 and 61-62 and says that the remainder of the document is irrelevant.

[273] I agree with British Columbia that much of the document deals with Warre and Vavasour's travel across the Oregon territory and their description of it. I see no relevance to those passages.

[274] At page 54 they describe the trip to Vancouver Island, including Fort Victoria and the farming and resources in that area.

[275] At page 55 they describe the salmon and sturgeon fisheries which are "inexhaustible", game of all description and timber. At page 56, they describe the "Indians of Puget's Sound and the Straits of de Fuca" and those further north who cultivate large quantities of potatoes for their own use and to barter with vessels frequenting the coast. On page 57, they write that "Indian Tribes do not remain upon the same ground during the whole year. In the summer they resort to the principal rivers and the sea coast, where they take and lay by large quantities of salmon etc., for their winter consumption, retiring to the smaller villages of the interior during the cold season." These passages between pages 54 and 57 are therefore of some relevance.

[276] At pages 61 to 62 they enclose a census which includes seven tribes of Cowichan. Those pages are relevant.

[277] I direct counsel to provide a new excerpt of this document that includes only pages 1, 54 - 57, and 61 - 62, admissible for hearsay purposes.

Exhibit A-17 (SC13993) Wilson's Diary of the Survey of the 49th Parallel edited by George Stanley

[278] This document is an excerpt from the published diary of Lieutenant Charles Wilson, Royal Engineers, Secretary of the land portion of the British North West Boundary Commission between 1858 and 1862. The excerpt relates to July 12, 1858 to June 11, 1860 when the branch of the British Commission under the command of Major J.S. Hawkins was in the region.

[279] The excerpt is 114 pages long. In her report, Dr. Kennedy only refers to one single page where Wilson says "the 'Cowitchan tribes' came to Victoria during the fishing season". Richmond does not object to that page but submits that the rest of the document is irrelevant.

[280] The plaintiffs say that Dr. Kennedy also relied on Stanley's introduction to Wilson's diary with respect to how the work of the British and American land boundary survey parties proceeded as of August 1858 and into 1859. Dr. Kennedy states that the records of the North West Boundary Survey are pertinent to the present report because charts, maps, journals and correspondence generated by the Survey's members provide firsthand evidence of the Cowichan village on the south arm of the Fraser River.

[281] The preface and introduction of the book are informative but full of interpretation and opinion. I will admit pages 10 to 31 for non-hearsay purposes. The balance of the excerpt contains Wilson's journal. I find that the relevant portions of the journal are admissible for hearsay purposes. I direct plaintiffs' counsel to provide an extract of the journal setting out only those passages which are relevant to issues in this trial.

Documents where Necessity is Challenged

Exhibit A-80 (SC14065) - Indian Myths & Legends From the North Pacific Coast of America: A Translation of Franz Boas' 1895 Edition of Indianische Sagen von der Nord- Pacifischen Küste Amerikas, edited and annotated by Randy Bouchard and Dorothy Kennedy

[282] This document is the source for the myths from Boas which Dr. Kennedy discusses in her report. Richmond submits that there is no evidence that it is necessary to receive evidence of Cowichan mythology through hearsay from Boas. Richmond says for this document to be admissible, the plaintiffs must establish that there are no Cowichan individuals alive today who know these stories and could testify to them.

[283] This document was edited and annotated by Drs. Kennedy and Bouchard in 2002. The plaintiffs say that Dr. Kennedy is therefore uniquely positioned to testify as to its reliability. Dr. Kennedy cites it several times in her main report. The introduction to the chapter provides helpful context. They explain that Boas spent a week among the Cowichan in November 1886 and "found a sincere and accomplished storyteller in Somenos" who related so well about the first people that Boas said he shall try, if at all possible, to stop here on his way back. Dr. Kennedy acknowledges that Boas may have used additional information from other persons unknown. With this proviso, Dr. Kennedy still relies on Boas' record of Cowichan mythology in her report.

[284] Given the difficulty in obtaining historical evidence, and because this is the result of fieldwork by a known and well-respected ethnographer who conducted fieldwork, I find this document to be necessary and to meet threshold reliability. Where Boas goes beyond personal observation to include interpretation or opinion, only those opinions which were adopted by Dr. Kennedy are admissible.

[285] I agree with the plaintiffs' submission that it is impractical and disproportionately burdensome on the plaintiffs to require them to interview every member of the Cowichan people to see if anyone has information about these first ancestor stories. It is of great value to have an account told by someone alive in 1886.

Exhibit A-81 (SC14066) Martha Douglas Harris, "Sowittan, or the Grumbler", History and Folklore of the Cowichan

[286] This is a reprint of the book originally published in 1901. Dr. Kennedy cites it for Cowichan mythology. Richmond says that it is not necessary to receive evidence of Cowichan mythology from hearsay from Harris. Again, Richmond says that the plaintiffs must establish there are no living Cowichan individuals who know these stories and can testify to them.

[287] Harris was the daughter of James Douglas. It is not known how she collected the stories. It is therefore difficult to know whether Harris understood the stories, took artistic license, filled in details, sensationalized or fabricated. Richmond submits that the document is not sufficiently reliable to be admitted.

[288] The plaintiffs submit that Dr. Barbara Lane indicated in her thesis that the Cowichan tales and Harris's book seem to be faithfully recorded. They say Dr. Kennedy draws on other sources which lend reliability to Harris's book because they use the same terms.

[289] This document will only be admitted for non-hearsay purposes because Harris does not cite her sources. There is no way to determine whether those sources are reliable.

Exhibit A-3 (SC14093) Alexander Anderson, "Notes on the Indian Tribes of British North America, and the Northwest Coast" (1855)

[290] This document is an excerpt of a publication of George Gibbs' notes entitled "Notes of the Indian Tribes of British North America, and the Northwest Coast, Communicated to Geo. Gibbs, Esq. by Alex C. Anderson, Esq., Late of the Hon. H.B.Co.". They are dated August 1855, and were read before the New York Historical Society in November 1862, and Gibbs published them in the March 1863 edition of Historical Magazine. The document includes subsequent annotations and editorial changes by Anderson himself, whom Dr. Kennedy describes as meticulous, and a respected author.

[291] Dr. Kennedy testified that Anderson was an HBC officer who had travelled extensively around British Columbia and was very interested in Indigenous people. She testified that Anderson was an HBC trader who was on the Fraser River in 1846-1847. The plaintiffs submit that the Fort Victoria journals confirm that Anderson was at Fort Langley and Fort Victoria in June 1848. Dr. Kennedy gave evidence that Anderson later became a Commissioner of the federal-provincial Joint Indian Reserve Commission in British Columbia between 1876 and 1878.

[292] Dr. Kennedy cites the document in her report as follows: "the 'Haitlins' [Kwantlen] are said to have seldom ventured to the mouth of the Fraser River on account of 'the Ca-witchans [Cowichan],' declared "a bolder tribe" who held sway both at the mouth of the Fraser and on the opposite shore of the Strait of Georgia on Vancouver Island."

[293] The defendant TFN objects to admission of the document on the basis that the apparent circumstances of its creation do not satisfy the requirements of necessity and reliability. Following the reading before the Historical Society, it appears the Historical Society transcribed the reading into a text. Anderson subsequently received a copy of the text and noted up some of his concerns.

[294] The defendant TFN submits that the document is rife with hearsay problems. There is no explanation about why the document was written. There are errors in the document noted both by Anderson and by Dr. Kennedy in cross-examination. Dr. Kennedy's evidence was that Anderson referred to the Kwantlen as the Haitlin and that was probably a typographical error. Anderson also states that the Cowichan and Ucaltas are of the same family. Dr. Kennedy acknowledges that is incorrect. There is also no indication of the source of the information that the Cowichan are a "bolder tribe" that "hold sway".

[295] I find that the requirement of necessity is met since this historical account covers a critical time period about which no live witnesses can testify. Although the author and his source had personal knowledge of the Fraser River and a particular interest in Indigenous people, the document is not a recording of Anderson's direct observations. I agree with TFN's submission that this document contains double or triple hearsay and has numerous errors in it. For that reason, I find this document does not reach the threshold reliability requirements and should only be admitted for non-hearsay purposes.

Exhibit A-26 (SC14042) Sister Mary Theodore, Heralds of Christ the King: Missionary Record of the North Pacific 1837-1878 (1939)

[296] This document is an excerpt from the report of Sister Mary Theodore. Dr. Kennedy testified that Theodore belonged to the Sisters of St. Ann's, who set up in the 1850s to teach and provide assistance to Catholic missionaries. Dr. Kennedy said that she believes that Theodore had access to the private records of the priest, and that she used those records to compile this history of missionary activity. She testified that the publication is recognized in her field, and allows glimpses into activity not contained in other records. Dr. Kennedy testified that Theodore's purpose in creating the document was to preserve the history of the missionaries.

[297] The defendant British Columbia objects to admission of the document on the basis that it is of questionable relevance and is hearsay. The document is based on secondary sources and does not contain Theodore's personal observations. The defendant TFN also objects to its admission on the grounds that the circumstances of its creation do not satisfy the requirements of necessity and reliability.

[298] The document does describe Bishop Demers' stay with the Cowichan on Vancouver Island in the spring of 1855 and as such has marginal relevance to these proceedings. The descriptions of the "Great Priest" are sensationalized by Theodore. She refers to the Great Priest as a "Christ-like man", a "dignitary of the Mother Church" and makes reference to him deserving "a heavenly crown". I agree with British Columbia and TFN's submission that the document does not satisfy the requirement of threshold reliability, is of only marginal relevance and is therefore inadmissible.

CONCLUSION

[299] Although I have admitted many of the documents that Dr. Kennedy relied on for hearsay purposes because they met the test for threshold reliability, I have not reached any conclusions about the ultimate weight of the documents that I have ruled on. While expert evidence may assist the court in assessing the threshold reliability of the documents, and in interpreting the historical record, it is my task to decide whether and to what extent the evidence can be relied upon in this case. Each document must be considered in the context of the broader evidentiary record, and the issue of whether or not the documents support the inferences that the parties say they do is a matter that I will determine at the end of trial.

"B. M. Young, J."

The Honourable Madam Justice Young

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