

COUR FÉDÉRALE
FEDERAL COURT
Cours de Justice
Court of Justice
Reçu / Received

Date DEC 14 2009 NO. T-1794-09
Greffier
Registrar

FEDERAL COURT

BETWEEN:

The COWICHAN

APPLICANT

AND:

**The MINISTER OF TRANSPORT, INFRASTRUCTURE, AND COMMUNITIES,
the GOVERNOR IN COUNCIL, the ATTORNEY GENERAL OF CANADA,
and the VANCOUVER FRASER PORT AUTHORITY**

RESPONDENTS

AFFIDAVIT

I, Barbara Lane, anthropologist, of 1505 Eric Road, Victoria, British Columbia, SOLEMNLY AFFIRM
AND SAY THAT:

I. Prior Affidavits

1. On 12 September 2007 I affirmed an affidavit, attached herein as **Exhibit "A"**, providing my qualifications and general opinion relating to the long term Cowichan Tribes use and occupation on the Fraser River delta.
2. In my prior affidavit attached as **Exhibit "A"** I state, at paragraph 5, that "the present day Cowichan Tribes are descendant of an aboriginal people . . ." That aboriginal people is the Cowichan.
3. On 29 October 2007 I affirmed a second affidavit, attached herein as **Exhibit "B"** (minus the exhibits), also relating to the long term Cowichan Tribes use and occupation on the Fraser River delta.
4. In my prior affidavit attached at **Exhibit "B"** I discuss, at paragraph 14, a map published in 1979 by Environment Canada, Lands Directorate, through the Minister of Supply and Services Canada, and entitled "*Vegetation of the Southern Fraser Lowland, 1858-1880.*" A true copy of this map in full size is attached as **Exhibit "C"** to my affidavit herein.

II. Historical Documents

5. I provide herein an abbreviated chronology and treatment of the historical documents that substantiate my opinion in my prior affidavits.
6. The maritime explorers from Spain and England (Captain George Vancouver) in 1790-92 provide the first reliable records documenting European entry into the waters encompassing the southern portion of Vancouver Island and Georgia Strait. The foremost concerns of the Spanish and English governments at this time were competing claims for territory (as between Spain and England) and the search for a possible northern water passage from the Atlantic to the Pacific. These explorers bestowed names on the places they visited, but usually referred to the people they met simply as "Indians" or "natives." Neither the Spaniards nor Vancouver identified any of the Natives they met as Cowichan; nor did either of them venture into the Fraser River, where Cowichan villages are identified in later records.
7. In 1808, Simon Fraser led an expedition of the first non-natives to descend the river that now bears his name. Fraser's expedition set out downriver at Fort George (now at Prince George) and completed its 36 day downriver journey to the coast on 2 July. Fraser made the upriver return trip to Fort George from 2 July to 6 August. An original copy of Fraser's own account of his 1808 journey in his handwriting does not survive today. What we have is a "fair copy" handwritten from an unidentified copyist, on which three publications have been based (in 1889, 1914, and 1960). Approaching the mouth of the river on 2 July 1808 Fraser descended the river's north arm, along which he visited a village identified to him as Misquiamé [Musqueam]. That same day Fraser and his party returned up the north arm and some distance upriver above the junction of the north and south arms. In my opinion, Simon Fraser very likely did not contact the Cowichan on this journey in 1808 on the river which is now known as the Fraser. Fraser did not travel the south arm of the river where Cowichan villages are identified in subsequent records.
8. On 18 November 1824, the Hudson's Bay Company (the "HBC") expedition led by Chief Trader James McMillan set out from Fort Vancouver on the Columbia River and proceeded northward in order to examine the river we now know as the Fraser River. Those accompanying McMillan included HBC clerks John Work and Francis Annance, both of whom kept journals of the trip. Work's journal holds the greatest detail and was first published in 1912, a true copy of which is attached as **Exhibit "D"**. Annance's journal was published in 1991, a true copy of which is attached as **Exhibit "E"**. McMillan's expedition was completed 30 December 1824 with McMillan and Work arriving back at Fort Vancouver.
9. On 7 December 1824, en route to the Fraser River the McMillan expedition took on three Native people to act as interpreters and guides (at least two of whom were identified as of

Governor Simpson's statement should be read to mean that the Cowichan occupied lands and waters of the south arm of the river.

14. On 8 August 1825 the HBC expedition led by Alexander McKenzie sailed the ship *William and Ann* into the Strait of Juan de Fuca en route to the Fraser River. A true copy of excerpts from McKenzie's handwritten journal now held at the HBC Archives is attached as **Exhibit "G"** to this my affidavit.
15. On 20 August 1825, anchored off Point Roberts on the *William and Ann*, McKenzie recorded that the expedition was approached by a large canoe of Cowichan men. The canoe party included chief Chaseaw and other men from the Cowichan residing on the Fraser River "a short distance from its entrance". In response the McKenzie expedition raised its boarding netting to prevent an unwanted visit on the vessel. The expedition's Native interpreter Waskelatche, a Snohomish trader, also apparently demonstrated uneasiness in meeting the Cowichan party and wished to avoid them.
16. On 21 August 1825 the McKenzie expedition remained anchored off Point Roberts. McKenzie entered in his journal that his expedition was visited by roughly 70 Cowichan. McKenzie recorded his tentative understanding that the Cowichan resided at the Fraser River during salmon season and returned to their residences on Vancouver Island. McKenzie's phrasing on this point reflects his care in expressing matters where he had no first hand observation and given difficulties in cultural and linguistic cross-communication. McKenzie also noted that the Cowichan supplied the expedition with beaver, salmon and berries. In my opinion these resources were not carried over from Vancouver Island but were harvested by the Cowichan locally on the lower Fraser River. Later historical accounts (ethnographic and scientific) testify as to the superabundance of these resources in the lower Fraser region in the vicinity of the Cowichan villages identified on 23 July 1827.
17. On 22 August 1825 McKenzie entered in his journal that Natives assembled about the *William and Ann* in the late afternoon. Chasea(w), the Cowichan chief first identified on 20 August 1825, boarded the ship and apprised McKenzie of a planned attack on the expedition. Grateful, McKenzie's party informed Chasea(w) that when they got closer to the Fraser River, as they expected to do shortly, they would like to pay him a visit at his village.
18. On 24 August 1825 the McKenzie expedition departed unexpectedly, at Captain Hanwell's insistence, from near the mouth of the Fraser River. The expedition did not as promised to Chasea(w) enter the river or travel to the Cowichan village.
19. In 1827, the HBC established Fort Langley on the Fraser River. Journals were kept for the first three years of the Fort, by George Barnston for the period 27 June 1827 to 17 February 1828, by James McMillan for the period 18 February 1828 to 8 October 1828, and by Archibald McDonald for the period 9 October 1828 to 30

July 1830. Though not without their limitations, the Fort Langley journals are an invaluable record in that they provide a day-by-day account of the what the journalists understood about Native life in the region at that period. These journals were published in historian Morag Maclachlan's 1998 edition "The Fort Langley Journals 1827-30", a true copy of which is attached as **Exhibit "H"** to this affidavit. This excellent volume contains useful commentary and discussion by Maclachlan and by anthropologist Wayne Suttles.

20. On 23 July 1827, of particular note, Captain Aemilius Simpson aboard the ship *Cadboro* recorded on his chart "Cowitchin Villages" at the south shore of Lulu Island upon entering and sailing upriver for the first time (see page 8 of "The Fort Langley Journals 1827-30"). Chief Trader George Barnston, also aboard the *Cadboro*, recorded in his journal for this day, "Monday 23d. ... At 3 P.M. sail was set on a Breeze springing up from the South west, and we passed the Cowitchen Villages Saumause [Somenos] Pinellahutz [Penalakuts] & Quomitzen [Quamichan].... The Population of the Cowitchen Villages may be at a rough guess nearly 1500 Souls."
21. The map at page 8 of "The Fort Langley Journals 1827-30" is a copy of sections of Captain Aemilius Simpson's 1827 chart of the Fraser River, from Garry Point at its mouth, upstream past the Cowichan villages and past Fort Langley to just above MacMillan Island. The Cowichan villages are shown on the map as three sets of six buildings each, 18 buildings in all. Each set of six structures is probably meant to represent one village. Three villages are identified, consistent with Barnston's journal entry of 23 July 1827. Each set shows four structures in a row parallel to the shore, with another two structures in a second row behind the first row. In my opinion, the 18 rectangular symbols are not intended to be an accurate rendition of the actual number of structures, but rather to show that there were two rows of permanent structures.
22. There are several reasons underlying this opinion. I note three of them here. First, the Work journal entry of 19 December 1824 notes the presence of more than 108 houses. Second, it seems unlikely to me that each of the three villages would contain exactly the same number of structures, arranged in exactly the same manner. Third, the population estimate of 1500 people suggests that over 80 people occupied each house, assuming a similar number of people in each house. This seems to me to be a rather large number of residents per house. I conclude that the rectangles labeled "Cowitchin Villages" on the 1827 Simpson map are meant to indicate the location of permanent structures in double rows along the shore, not an exact count of such buildings. Assuming the population estimates are reasonable, it

is my opinion that a much larger number of structures would be required to house them.

23. Before leaving the Fort Langley journals, it is important to reconsider a conjecture made by Wayne Suttles in his generally excellent discussion of the ethnographic significance of the Fort Langley journals (in Maclachlan 1998: 163-210). Under the heading of 'Seasonal Visitors' Suttles notes:

The Nanaimo and Cowichan were speakers of Island Halkomelem dialects whose home territories were across the Strait of Georgia, but they had large summer villages of permanent structures on the mainland, where they stayed during the summer and into early autumn and from which they made excursions upriver. ... Cowichans also crossed over from Vancouver Island to fish for sturgeon in April 1829, possibly not following a regular practice but to supplement their stores after a poor salmon run during the summer of 1828.

24. In the above-cited comments, Suttles defines the seasonal presence as extending from summer into early autumn. He suggests the April 1829 entry, reporting that Cowichans had crossed over from Vancouver Island to fish for sturgeon, was possibly not a regular practice, presumably because of its early date during the year. I find the supposition to be problematic for three reasons. First, the Fort Langley journals begin in June 1827 so there can be no record of Cowichan movements in April of 1827. Second, the journal entries of 8, 11, 13, 14, 19, 25, 27, and 28 of April 1828 and 1, 2, and 14 of May 1828 suggest to me that the sturgeon were expected, and Cowichan sturgeon fishing started, at the same time in 1828 as it did in 1829. Third, the journal records for 11 and 12 of April 1830 and 4, 5 and 6 of May 1830 indicate a Cowichan presence on the lower Fraser River and the arrival of eulachons (oolichans).
25. This brings me back to my affidavit attached as Exhibit "A" where, at paragraph 10, I stated "[t]he Cowichan Tribes had permanent summer villages on what is now named Lulu Island along the Fraser River's main (and southern) arm." These permanent Cowichan villages included those of the Somenos and Quamichan local groups of the present day Cowichan Tribes. These villages were "summer" villages only in the sense that this is when there was an influx or swelling of the Cowichan population that travelled to and based itself at the villages on Lulu Island. In my view, the Fort Langley journals indicate a multi-seasonal Cowichan presence at their villages on the south arm of the Fraser River – spring, summer, and autumn. In my opinion, this pattern of occupation and use by the Cowichan on the Fraser

downstream from the “Indian Village” notation, namely the riverfront of sections 26 and 27 up to section 34, is covered with the words “1st rate grass prairie”. This description suggests that this upland would have been suitable for Indian residence. If the “Indian Village” at the time extended along the shoreline from section 23 through sections 26 and 27 up to section 34, this would be consistent with the prior historical record discussed herein regarding the Cowichan village(s), with the trail network as depicted on the 16 April 1875 Crown Grant No. 1522 for section 23, and with the archaeological record for site DgRs-17 which I discuss later in this affidavit.

33. In 1861, R. d’Heureuse, C.E.,² published a *Map of Cowichan Valley and Chemainus* compiled from the official surveys of land by the Colony of Vancouver Island. A true copy of this map is attached as **Exhibit “O”** to my affidavit. The map confirms the several villages of Cowichan local groups, including the Quamichan village, found on the 1859 Cowichan District map lithographed by of the Topographical Depot of the War Office (see **Exhibit “M”**). The map published by d’Heureuse also depicts the village of the Somenos local group of the Cowichan people, shown on the Cowichan River in the Quamichan District of land. The Somenos are one of the local groups identified on 23 July 1827 by Barnston as one of the “Cowitchen Villages” on Lulu Island. The Somenos are part of the present day Cowichan Tribes.
34. On 25 September 1865, the British Admiralty in London published a map, under the superintendence of Captain G.H. Richards of the Royal Navy, entitled “*North America – West Coast, Vancouver Island and Adjacent Shores of British Columbia.*” The map is based on information from the survey of the region led by Captain Richards during the period of 1859-65 and prior British and American surveys. A true copy of the map is attached as **Exhibit “P”** to this affidavit. The map identifies “*Cowetchin*”, with village markings at the south shore of Lulu Island opposite “*Tilbury I.*”
35. On 7 May 1869, J.L. Hawkins, Colonel R. Eng., H.R.M., Commissioner, as a representative of Britain, and Archibald Campbell, Commissioner, as a representative of the United States, signed two maps as part of the work of the British-American Northwest Boundary Commission. The first map, labeled “Sheet No. 1”, and the second map, labeled “Northwest Boundary Sheet No. 7”, both show the location of “*COWITCHEN (Indian Village)*” on the north shore of the south channel of the Fraser River. True copies of these two maps are attached as **Exhibits “Q” and “R”**, respectively, to this affidavit.
36. On 16 April 1875, the Province of British Columbia purported to finalize the alienation in fee simple of lands in Section 23, Block 4 North, Range 5 West, of the New Westminster District of land. A true copy of Crown grant No. 1522 of Section 23 is attached as **Exhibit “S”** to my affidavit. Joseph W. Trutch, then Lieutenant Governor of the Province of

² In the 1860s “C.E.” (Civil Engineer) was used to designate surveyors.

British Columbia, witnessed the Crown grant. The recipients were Thomas Lett Wood and Robert Burnaby. The grant refers to “the map or plan hereunto annexed”, which largely shows the Indian trail system identified by John Trutch’s 1859 Colonial survey materials, including the trail along the riverfront.

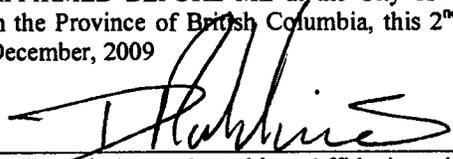
37. At the time, the 16 April 1875 Crown grant mentioned above was part of British Columbia’s post-Confederation general alienation of fee simple interests with respect to the lands of Block 4 North, Range 5 West. For example, the Province likewise alienated sections 26 and 27 in the early 1870s. A true copy of excerpts from the original British Columbia land register for Block 4 North, Range 5 West of the New Westminster District of land is attached as **Exhibit “T”** to my affidavit.
38. On 20 January 1878, Gilbert Malcolm Sproat, Commissioner for both the federal and provincial governments of the joint federal-provincial Indian Reserve Commission, wrote a memorandum to the governments regarding “the Indians at Cowichan [Valley]... , who are important from their number alone,” Attached as **Exhibit “U”** to my affidavit is a true copy of the Sproat Memorandum. In it Commissioner Sproat recorded five Cowichan grievances, including “(No 5) They complained that they had heard that white men had bought the fishing station on the Lower Fraser River, where they had always been accustomed to get their winter food.” At a later place, Sproat wrote, “. . . it is stated to be true that the old fishery station on the Fraser known as the “Cowichan Fishery” and annually used by them from time immemorial in getting fish for winter food, has been sold many years ago. The owner being an absentee, there has been no trouble about the land as yet. About one thousand Indians encamped there last season.”
39. On 26 January 1892, W. H. Lomas, Indian Agent for the Cowichan Agency of the federal Department of Indian Affairs, wrote the federal Department of Fisheries seeking that it allocate salmon fishing licenses on the Fraser River to the Cowichan. Unsuccessful, on 31 March 1892 Indian Agent Lomas repeated his request and stated “for generations past these Indians have been in the habit of following the runs of salmon on the Fraser River; on the opening of canneries, (on payment of the license fee) licenses were at once granted them which were continued from year to year until lately when they were told that none but Fraser River Indians could obtain a license.” This second request was likewise denied. A true copy of these two letters, along with the available related correspondence of 29 February 1892 and 21 April 1892, is ordered chronologically and attached as **Exhibit “V”** to this my affidavit.

III. Archaeology

40. In 1993, archaeologists Morley Eldridge and Alexander Mackie described what they considered to be the location of the villages at Tlekinas on the south shore of Lulu Island. True copies of the relevant excerpts from their 1993 report entitled “Fraser River Intertidal

24, all Sections being within Block 4 North, Range 5 West, New Westminster District of land.

AFFIRMED BEFORE ME at the City of Victoria,)
in the Province of British Columbia, this 2nd day of)
December, 2009)



A Commissioner for taking Affidavits within the)
Province of British Columbia)



BARBARA LANE