Smithers, B.C.
June 25th, 1987

(PROCEEDINGS RECONVENED PURSUANT TO AN ADJOURNMENT)

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this 25th day of June, 1987, Delgamuukw and others and Her Majesty the Queen.
THE COURT: Mr. Rush, a small matter. I don't think the video tape that was shown on Tuesday was marked as an exhibit.
MR. RUSH: It wasn't.
THE COURT: Should it be marked?
MR. RUSH: It should be, and what I'm going to ask your lordship to do is to grant me leave to have it copied. It was the only copy that I have, but I've been carrying it around with me for a few days to have it marked.
THE COURT: All right.
MR. RUSH: But I would like permission to have it released for the purpose of copying.
THE COURT: That will be the next exhibit number, Madam Registrar.
THE REGISTRAR: Sixty-seven.

(EXHIBIT 67: VIDEO TAPE)

THE COURT: I'm sure your friends don't object to having it copied, do you, gentlemen?
MR. GOLDIE: No objection.
MR. MACAULAY: No, my lord.
THE COURT: All right. Thank you. Mr. Grant.
MR. GRANT: Yes, my lord. Towards the end of yesterday, when we were dealing with the question of place of trial, you said that -- you indicated at the end that you think that if counsel need to know, your present ruling is that we will reconvene in September in Vancouver, "and I'll be glad to hear counsel at any time as to special circumstances that should lead me to change that decision." I'd like to raise special circumstances at this time for your consideration with respect to that decision.

My lord, the court's ruling that the trial reconvene in September in Vancouver has critical implications for the Plaintiffs.
THE COURT: Well, just a minute, Mr. Grant. Before you embark on that subject again, may I state my understanding and recollection of the facts, which were that when

1 Mr. Rush persuaded me to open this trial in Smithers,
2 which is not a place where the court regularly sits, I
3 indicated that the court would at his request allow
4 the Plaintiffs to open their case in Smithers and take
5 some of the local witnesses, and I made it abundantly
6 clear, and I'm sure there is a transcript of the
7 proceedings -- I shouldn't say I'm sure -- there is a
8 transcript of some of the proceedings, but I'm sure
9 that I made it abundantly clear that the court would
10 not be sitting in Smithers for the whole trial and
11 that it would be for the trial judge to decide how
12 long the trial would continue in Smithers.
13 I recall again the matter coming up at several
14 pre-trial conferences, and I recall again specifically
15 stating that it was not the intention of the court to
16 sit for any prolonged period of time in Smithers, and
17 I think that I made it abundantly clear, and counsel
18 can correct me if I'm wrong, but I made it clear that
19 the purpose of opening the trial in Smithers was to
20 have the case opened here and to hear some local
21 witnesses, if it was convenient to do that, but that
22 it was always made expressly clear that the time that
23 the court would spend sitting in Smithers would be
24 limited.
25 Now, those are the facts as I understand them.
26 Now, if we're at cross-purposes in that connection, I
27 think that should be resolved in the first instance.
28 Now, if anyone disagrees with that very brief
29 recapitulation of my recollection of the
30 circumstances, I'd be glad to hear from them.
31 I must say, Mr. Grant, it comes as a surprise to me
32 that it seems to have been taken as a matter of
33 surprise to counsel, and obviously to your clients,
34 that the trial would now be moving to Vancouver, where
35 it regularly sits, and I hope that the Plaintiffs have
36 been informed of that history.
37 MR. GRANT: My lord, I do agree, and counsel for the Plaintiffs
38 do agree that comments with respect to the place of
39 trial were made at the pre-trial and there was
40 comments that the -- that the trial judge may move the
41 trial. It was never suggested, my lord, with respect,
42 that the evidence of the Indian witnesses would be
43 required to be given in Vancouver. It was never --
44 and that's the first point.
45 THE COURT: I'm sorry, Mr. Grant, but I simply don't agree with
46 you on that.
47 MR. GRANT: Well, it certainly -- we were very alert to the fact

that there was suggestions made, as I believe by Mr. Goldie at some points, that when it came to expert evidence, when it came to evidence of the Defendants, that it would move, and there was no suggestion as to when. The second point is that it was never suggested that the trial in Smithers would be limited to five weeks. There was no time ever set on it.

Also, my lord, with respect to yesterday's comments, it was my understanding that what you had raised concerning the location of the trial in September was with respect to the place of the trial in the month of September. That was my understanding. And I opened my remarks by saying that whatever method of organization would occur, it appeared to me that there would be Indian witnesses in September, and we would still be in the Plaintiff's case in September no matter what process was developed. Those two -- and -- and I dealt --

THE COURT: No doubt about that.

MR. GRANT: I dealt expressly with the trial in September yesterday. The court at the end of yesterday, as I have indicated, stated that you would be glad to hear counsel at any time as to special circumstances that should lead you to change your decision. We took that as an invitation by you to consider the matter with further submissions.

THE COURT: Oh, I have no hesitation at all to hear your further submissions, Mr. Grant, but what I am troubled by is the apparent surprise being shown by your clients and their supporters of the fact that the trial is being moved to Vancouver. I don't find it tenable that they should be surprised by that.

MR. GRANT: Well, my lord, with respect, as counsel for the Plaintiffs, we're surprised that you made the ruling yesterday -- in light of the statements made by all counsel that you made the ruling yesterday that it would move -- be moved to Vancouver in September. I fully expected that you would be raising this matter at some time, but given where we are in the trial and the -- the witnesses that we have heard, I must advise the court that I did not anticipate that in light of the circumstances that have occurred over the last five weeks that you would make that ruling in September. I -- I do agree and counsel -- and there is no question that the question that at some time the trial be moved to Vancouver was mooted, was raised, and we understood that at some point we would have to

1 deal with that, but we also understood that at that
2 point we would be able to raise our submissions.
3 THE COURT: Well, it would have been better if counsel had
4 raised the matter earlier then because I have never
5 had any doubts in my mind that six weeks was a proper
6 and appropriate time for the court to sit here. I
7 wish we'd heard more witnesses. I've said that
8 several times. Probably you're sick to death of me
9 saying it. But the way you've chosen to put your case
10 in, which is entirely your responsibility, has not
11 made that possible, and that's a matter of some
12 regret, but the fact remains that the period of six
13 weeks seemed to me to be such an obvious cut-off point
14 that I never thought for a minute that there would be
15 any doubt about the matter, but no one said anything
16 about it, so finally I thought that I should do so,
17 and I must say that I am frankly most surprised and
18 disappointed at the reaction.
19 MR. GRANT: Well, I would like to make submissions as --
20 THE COURT: Yes, by all means.
21 MR. GRANT: -- as to the place of the trial in Vancouver in
22 September.
23 THE COURT: By all means.
24 MR. GRANT: As I commence -- and I just want to say one further
25 thing, my lord, which is that at the beginning of my
26 submission yesterday I commented on the fact that when
27 you very early on proposed a scheduling for the fall,
28 I -- that you had not said anything in that scheduling
29 about the place of the trial. It wasn't on the
30 schedule, and I -- I just want to raise that as well.
31 And that's -- that's another factor we had in mind.
32 Your ruling, with respect, my lord, that the trial
33 reconvene in September in Vancouver has very critical
34 implications for the Plaintiffs. As I've said, the
35 ruling concluded with a comment that if there were
36 special circumstances that should lead your lordship
37 to change that decision, you would hear further from
38 counsel, and it's our submission that there are
39 special circumstances, which strike at the integrity
40 of the trial process and at the very foundation of the
41 Plaintiffs' ability to continue with the presentation
42 of their case, which compel us to raise this issue
43 with the court today for reconsideration.
44 I'd like to deal firstly, my lord, with the
45 prejudice to the integrity of the process. It is a
46 fundamental precept, my lord, of the common law that
47 the court process be subject to public scrutiny. This

is the touchstone of the legitimacy of this process. Equally, my lord, as you have heard in the evidence, it is a fundamental precept of the Gitksan and Wet'suwet'en law that statements regarding the rights and titles of the hereditary chiefs, their assertions of ownership of territory, of crests and of histories be publicly witnessed in order that those rights and titles be legitimated, authenticated and validated. Mrs. MacKenzie gave evidence of how that process occurred in the Feast hall. Both Mrs. MacKenzie and Mrs. Ryan described the importance of the Gitksan witnesses present -- who are present in court while they gave evidence.

My lord, with respect, when you look at these two principles, both legal systems, therefore, are ad idem on the central importance of public validation. This then is an area not of conflict of laws, but one in which the common law and the law governing the Gitksan and Wet'suwet'en people can operate with mutual respect.

We submit that while significant Indian evidence remains to be given, moving the trial to Vancouver will render the court process illegitimate under both the common law and the Gitksan and Wet'suwet'en law. The Indian community, whose asserted rights are before the court, will not be able to observe the process. Non-Indian local residents, who will also be directly affected by any adjudication of the issues before the court, will not be able to observe what happens in the courtroom. By moving the trial to Vancouver, the process will be fatally flawed both from the perspective of the common law and the Gitksan and Wet'suwet'en law.

My lord, it is of a special significance to the Plaintiffs that the elders be able to observe the court process. Many of these people are not in the best of health. Even the sojourn in Smithers put strains on them, involving, as it does, the daily journey from Hagwilget, Kispiox, Gitanmaax, Gitwangak and Kitsegukla. But here, at least, they have the support of their families, their close friends and their preferred health professionals. Here, my lord, there is a network to support, to safeguard their best interests. We are advised that moving the trial to Vancouver will preclude the participation of many of the Gitksan and Wet'suwet'en elders.

My lord, one of the affidavits which I filed this

afternoon is an affidavit which I'd ask the court to refer to of Sowiis, or Adeline Holland. And in her affidavit she states, "I am a community health representative working with the Moricetown ... Band," in paragraph one, and then she states that she swears the affidavit is personal knowledge and information and belief. She has been employed in the field of long-term health care as a homemaker since 1978. Paragraph 3,

"My present job is to attend to those people, mostly elders, who are sick or who require ongoing attention because of either their age or medical problems who live on the Moricetown Indian Reserve. I go to the homes of these people to see if they need advice concerning medical care. I check in on many elders regularly, making sure that their environment is healthy and that they are cared for. Many of these elders are Chiefs and Plaintiffs in this action.

The elders of Moricetown are cared for within a framework of community services, of which I am but one part. There is generally transportation provided to them in order that they may go into town either for groceries or to doctors. A home-maker service provides for meals to be cooked in their homes and light housekeeping tasks to be performed. Because the home-makers visit the elders on a daily basis, it is often through their contact with our offices that we learn if an elder may require a visit from us. A doctor comes to the community once every two weeks and performs medical services over and above those which may be required by the elders from their own personal physicians. Of greatest importance, is the support that the elders receive from each other and from others in their family who are close at hand and who assist on a day to day basis.

I have worked with elders who have had to travel to Vancouver. It is my experience that prior to a trip the health of the elder may worsen. It is my experience that the elders experience great anxiety in having to move themselves from their families and from their homes. It is also my experience that these elders and chiefs have little, if no, independent financial means to travel and live in Vancouver.

1 It is my opinion that should the trial move
2 to Vancouver, many, if not all of the elders within
3 this community would not be able to attend at
4 trial. The trip would be uprooting. It is a
5 different way of life in the city than at home and
6 even those who are healthy, in my opinion will find
7 the trip disorienting. For those who are not
8 healthy, it would be impossible to provide the
9 support which presently we do to assist them in
10 their lives in Vancouver; further in my opinion,
11 their families would suffer by this absence. They
12 would choose not to travel; nor could they, make
13 that trip."
14
15 My lord, there is another affidavit of Mr. Ralph
16 Michell, which is an unsworn affidavit. Mr.
17 Michell -- this was reviewed over with him by counsel,
18 and he -- everything was correct on it, but he
19 misunderstood and left before the affidavit could be
20 finally sworn. And he is on his way back, and we'll
21 file a sworn copy of this affidavit.
22
23 "I, Wii Seeks, Ralph Michell ... make oath and
24 say:
25 I am a community organizer, employed by the
26 Gitksan Wet'suwet'en Tribal Council,"
27
28 and then he deposes that he has personal knowledge of
29 the matters set forth.
30
31 "I have been assigned the job of courtroom marshall.
32 I attend outside the courtroom prior to the
33 commencement of court each day and I assist in the
34 seating of the Gitksan and the Wet'suwet'en. I
35 give seating priority to the Plaintiffs and to the
36 members of the witnesses families. After those
37 people have been seated, I ensure that others who
38 wish to view the trial may then be seated. On the
39 days when there are more people wishing seats then
40 those seats which are available in the court, I
41 assist in rotating some of the seats.
42 I maintain an attendance sheet of those who
43 have come to witness the court process,"
44
45 and he attaches that sheet as appendix A.
46
47 "For two days, Friday, June 12, 1987 and Tuesday,

1 June 16, 1987 I did not record all the people who
2 wished to be seated in the courtroom. I believe
3 that the attendance was higher than the numbers
4 reflected for those dates in Exhibit 'A'."
5
6 And those dates had lower numbers than on the other
7 days.
8
9 "In addition to my responsibilities as courtroom
10 marshall, I also assisted in the transporting of
11 Gitksan and Wet'suwet'en who wished to attend court
12 but who were unable to do so due to transportation
13 and accommodation problems. I organized three
14 vans to travel to Smithers. One van left from
15 Kispiox and picked up people at Gitanmaax and
16 Hagwilget. For many of the weeks of court a second
17 van travelled from Kitwanga. A third van travelled
18 from Moricetown.
19 I assisted in finding accommodations in
20 Smithers for the elders. In so doing I have had
21 personal contact with many of the elders both who
22 attended court and those who could not attend court
23 because of health problems.
24 Many of the elders had specific problems
25 which I addressed. For example, some of the elders
26 who did attend court could not ride in a pick-up
27 truck or van but required a car with low clearance
28 because of their physical handicaps."
29
30 And as an aside, my lord, that applies to two of the
31 four witnesses, Mrs. Ryan and Mrs. Johnson.
32
33 "Many of the elders expressed to me that they did
34 not have the stamina to spend the day in Smithers,
35 and these people were taken to hotels. Other
36 elders were concerned about their husbands or wives
37 who required their care and attention, and
38 arrangements were not for short-term care" --
39
40 "Were made," I believe that should be.
41
42 -- "made for short-term care of their spouses while
43 they attended in court."
44
45 And that applies to witnesses that we intend to call,
46 and we have provided a list of such as Mrs. Alfred,
47 whose husband is seriously ill in Moricetown.

1 Going back to my submission, my lord, the
2 Plaintiffs have for the last century suffered from the
3 effects of having their rights adversely affected by
4 long distance. It is part of the case of the
5 Province -- and I will be alluding to the other
6 affidavits in due course -- it is part of the
7 Province's case, to which Mr. Goldie specifically
8 alluded in his opening remarks, that laws made and
9 agreements reached in Ottawa and Victoria have had the
10 effect of either nullifying the rights of the
11 Plaintiffs or of shifting responsibility for their
12 settlement to the Federal Crown. My lord, the
13 Plaintiffs cannot submit to a process in which their
14 rights are adjudicated out of their sight.
15 The second of our concerns is the prejudice to the
16 Plaintiffs' ability to continue with their case. This
17 is a case in which the collective rights of the
18 Gitksan and Wet'suwet'en are at stake. The
19 preparation of witnesses by counsel proceeds upon that
20 fundamental premise. In preparing witnesses, counsel
21 has had the benefit not only of the witness, but also
22 other important members of the House, translators and
23 experts. All of these persons are integral to the
24 process. Counsel have also relied upon the essential
25 services of the Gitksan-Wet'suwet'en Tribal Council,
26 and, in particular, the library resources in which
27 voluminous documentation to assist the trial is lodged
28 and which has been used as a basis to provide
29 documents on very short -- document requests by the
30 other side on very short notice.
31 The part played by translators in this case is of
32 particular importance. They have provided an
33 essential service in preparing a list of Gitksan and
34 Wet'suwet'en words and place names for the benefit of
35 counsel, the court and the court reporters. They have
36 provided essential services to the Plaintiffs' counsel
37 in the preparation of witnesses. You have only seen
38 two interpreters in court at any one time, but the
39 reality of the matter is that there is a team of 13
40 interpreters working across the street, without whose
41 assistance Plaintiffs' counsel cannot function.
42 We are advised that it is financially impossible
43 within the budgetary constraints of the Plaintiffs,
44 particularly in light of a cut back by the Federal
45 Government in the allocations of monies for the trial,
46 to move the nucleus of people which are required for
47 the effective presentation of the Plaintiffs' case to

1 Vancouver.
2 And I would refer you to the affidavit of Allan
3 McCreary filed today. He is an associate in the firm
4 of Phillips & Edmison, Chartered Accountants. He's
5 from Smithers, and he has been the accountant for the
6 Tribal Council for seven years. And he deposes that
7 he is -- and he swears that the information is true.
8
9 "I have been involved in the preparation of budget
10 proposals to the Test Case Funding Branch of the
11 Department of Indian Affairs and Northern
12 Development of the Government of Canada with
13 respect to this litigation for several years.
14 The Government of Canada retained
15 independent legal counsel from Vancouver to review
16 the budget proposal with legal counsel for the
17 Plaintiffs. Independent counsel recommended a
18 budget for approval on July 7th, 1986.
19 From previous experience with earlier
20 budgets, and from comments by senior personnel in
21 charge of the Test Case Funding Branch, the Tribal
22 Council operated on the basis of the budget
23 approved by independent counsel, from July 1986
24 until May 29th, 1987.
25 On May 29th, 1987 the Government of Canada
26 advised the Tribal Council of major cutbacks in the
27 processed budget, which had been recommended for
28 approval in July 1986.
29 On this basis, the Plaintiffs' funding for
30 this litigation has been seriously jeopardized. I
31 have been involved in the preparation of a new
32 budget covering the needs for the continuation of
33 the trial after June, 1987."
34
35 He goes on,
36
37 "Notwithstanding the cutbacks in the budget, the
38 Plaintiffs have been able to maintain the
39 prosecution of this case, primarily through the
40 support by Bands and other community associations
41 and individuals who have provided support through
42 the feasts within the Gitksan and Wet'suwet'en
43 territory.
44 Most of the support from the Bands and other
45 associations has been on a credit basis rather than
46 on a cash basis. This has been possible because of
47 the long-term credit relationship that the

Plaintiffs and the Tribal Council have within the community of Smithers.

I am familiar with the development of the credit system with the local businesses and the Plaintiffs and the Tribal Council have no credit rating in Vancouver.

I was requested by counsel for the Plaintiffs early this morning to review the estimated cost of the trial if the trial is moved to Vancouver while the Indian witnesses are still giving evidence.

I have not had an opportunity to make a detailed analysis of those costs. However, based on the needs of counsel, the experience of the requirement of the utilization of interpreters, the library facilities within the Smithers office, and transportation costs, I estimate that the case will require very large additional costs.

Unlike the circumstance of continuing the trial in Smithers where the Tribal Council has a credit rating which can allow it to operate on a deficit basis, it is not possible to establish any credit rating to provide the necessary infrastructure in Vancouver. In making these estimates, I have taken into account that some of the facilities presently being provided in Smithers would be provided through the law offices of legal counsel in Vancouver.

I am seriously concerned that all of the additional costs of moving witnesses, including travel and accommodation, would not be funded through Test Case Funding. The major cuts made by the Government of Canada at the end of May, 1987 was the cancellation of any aspects of the budget which involved the cost of transportation and accommodation of witnesses, and persons involved in the preparation of those witnesses, other than lawyers.

After reviewing the expenditures with Don Ryan, the Executive Director of the Tribal Council, I verily believe that it is possible for this trial to continue in September in Smithers. This possibility is based on the ability of the Tribal Council to provide an infrastructure without cash.

In view of the requirement that any move of this case and the minimum necessary support systems for this case to Vancouver would require a major

1 cash disbursement immediately, it is my opinion
2 that it is not financially possible for the
3 Plaintiffs to proceed with this case in Vancouver
4 in September, 1987.
5 If it was necessary for this case to be
6 moved to Vancouver to hear further evidence of the
7 Plaintiffs, it is my opinion, based on my
8 experience with the budgets of the Tribal Council
9 and the present financial circumstances of the
10 Tribal Council, that there is no way that I can
11 determine when the case could proceed financially
12 in Vancouver.
13 I have been informed by Neil Sterritt that
14 on June 24th,"
15
16 yesterday,
17
18 "he met with the Minister of Indian and Northern
19 Affairs and Northern Development with respect to
20 our proposed budget to carry the case from June,
21 1987 until completion of trial. I have been
22 informed by Neil Sterritt that the Minister of
23 Indian Affairs and Northern Development advised
24 that he would investigate whether or not further
25 monies could be provided, but has made no
26 commitment and has provided no timetable as to when
27 a commitment could be made.
28 The proposed budget which was prepared after
29 the decision on May 29th, 1987, was based on the
30 assumption that the evidence of the Indian
31 witnesses could be heard in Smithers. It will be
32 extremely difficult financially for the Plaintiffs
33 to move any phase of the trial to Vancouver, but in
34 the present financial circumstances, it is
35 impossible for the evidence of the Indian witnesses
36 to be heard in Vancouver."
37
38 My lord, on that ground, in sum, the court's ruling
39 to change the venue of the trial from Smithers in
40 September will have the effect of torpedoing the
41 Plaintiffs' ability to advance their case.
42 The third area I'd like to approach -- I'd like to
43 refer you to the affidavit of Ms. Mandell, one of the
44 counsel for the Plaintiffs. It goes along with Mr.
45 McCreary's. After deposing that she's one of the
46 counsel for the Plaintiffs, she states,
47

"I was present in court on June 24th and heard the judgment of Chief Justice McEachern regarding the change of venue of the trial from Smithers to Vancouver. One factor taken into account by him was that 11 of 12 counsel and two out of two court reporters at the trial are all located in Greater Vancouver. Counsel for the Plaintiffs all prefer the location of the trial to be in Smithers. Three of the four Plaintiffs' counsel either rent or own residence in this area.

The impact of moving the case to Vancouver will force the Plaintiffs' lawyers to divide themselves between two locations throughout the duration of the trial. Under the lawyers' present plan, the Plaintiffs' lawyers will be in Smithers throughout the summer, preparing for the trial in the fall. Not all the witness preparation will be finished within that time period. The result of the trial moving to Vancouver would require that at least one lawyer remain in the Smithers area preparing witnesses while others of the Plaintiffs' lawyers would be in court in Vancouver. As new witnesses take the stand, the Plaintiffs' lawyers will be forced to switch locations with the lawyer who had been preparing witnesses in Smithers now moving to Vancouver to introduce that evidence, while the lawyers who had been in the courtroom would move to Smithers to prepare new witnesses. The impact to the Plaintiffs' legal team would be that there would be no continuity of counsel in court; nor any reasonable way by which counsel can maintain consultation with each other throughout the duration of the trial.

The consequence to the Plaintiffs in terms of office backup and administration are tremendous. It would be necessary to maintain some office capability in Smithers to prepare for the witness's evidence. The law offices in Vancouver are presently incapable of handling the many aspects of the administration of this case. For example, we would require additional facilities to maintain the library which currently services the documents for the trial. We would also require additional facilities to provide working space for the interpreters and to administer the Plaintiffs' needs while in Vancouver. I have been advised by Allan McCreary,accountant for the Tribal Council,

that there are no funds available to establish needed facilities in Vancouver.

I was present in court when Chief Justice McEachern suggested that affidavits be provided by each and every informant to Neil Sterritt or Alfred Joseph indicating the Gitksan and Wet'suwet'en place name throughout the territory. This task would require the taking of between eighty to one hundred affidavits from people who live both within and outside the claimed area. Some of the informants live in Vancouver; others in Prince George. Many of the informants are elderly and bedridden. Others will be either fishing or working away from home throughout the summer. Most if not all of the affiants will be living at locations other than where the lawyers' offices will be located, and at least two separate interviews will be needed to do these affidavits. Interpreters will be needed. It is my opinion that the task of preparing such affidavits will be administratively unworkable and onerous to the Plaintiffs."

And I may say that, of course, the majority of those informants are within the north in the territory.

THE COURT: Of course, I didn't make that suggestion, with all respect to Ms. Mandell, Mr. Grant. I merely said that if your proposal was to be workable, that's what would be required. I think Ms. Mandell would agree with that.

MR. GRANT: Your lordship made specific reference in your reasons yesterday to the fact that there are 11 out of 12 counsel, two out of two court reporters and yourself who are from Vancouver. The Plaintiffs' counsel, as Ms. Mandell attests, are not suggesting that this poses intolerable inconveniences or burdens on them. The Federal legal team has not advised your lordship of any intolerable burdens upon them either. The Province has alluded to inclement weather and the difficulty of perceiving Smithers through snowflakes. We can advise both the court and Mr. Goldie that September and October are not months in which the weather in Smithers takes us outside the pale of civilized transportation and communication.

MR. GOLDIE: I'm quite aware of that.

MR. GRANT: I'm glad Mr. Goldie is aware of that.

Notwithstanding this, it is our submission that the

1 question of the proper forum for the adjudication of
2 this case should not be determined by the principal
3 residences of counsel or the trial judge. To the
4 extent there is a question here of balance of
5 convenience, this court should take into account the
6 fact that it is within the financial means of both
7 Defendants to participate in this trial to the full
8 extent necessary in the Town of Smithers. It is not
9 possible for the Plaintiffs to participate in a like
10 manner in Vancouver. That fact, my lord, must
11 overshadow all others.
12 The rule the court -- the rule that applies is, of
13 course, Rule 39 (7), which states that,
14
15 "The Court may order that the place of trial be
16 changed or that the trial be heard partly in one
17 place and partly in another."
18
19 That case -- that rule was considered by Judge
20 Kirke Smith in the case of McPhatter and Thorimbert, a
21 copy of which I have. And it's a brief case, and I
22 would set out the facts of that case starting at the
23 beginning.
24
25 "In this action, commenced by writ of summons
26 issued out of the Courtenay registry on May 19,
27 1965, four plaintiffs resident at Campbell River
28 are seeking damages for personal injuries against
29 the defendant, a resident of Trail. The action
30 arises out of a motor- vehicle accident which
31 occurred near Trail in July, 1964."
32
33 THE COURT: Mr. Grant, this authority, which is well-known,
34 really has little application, has it? You've got a
35 case there of personal injuries. You're probably
36 talking of a one or two day trial.
37 MR. GRANT: Well, my lord, it is my submission --
38 THE COURT: You've had six weeks here.
39 MR. GRANT: -- that the case sets out the two fundamental terms,
40 the two fundamental principles upon which a change of
41 venue is relied upon, and I would submit that it's --
42 that those principles should apply to this case. The
43 Plaintiffs, my lord, are only seeking that the same
44 principles apply to them as would apply to any other
45 Plaintiffs.
46 THE COURT: The Plaintiffs came and requested a concession that
47 the trial open in Smithers. Smithers is not a

1 location where the court sits. And that concession
2 was granted. We've been here six weeks. Isn't that a
3 factor that brings into question the authority of that
4 decision by Mr. Justice Kirke Smith?
5 MR. GRANT: Well, my lord, with respect, of course, there is
6 assizes in Smithers, and there have been civil assizes
7 in Smithers before this case.
8 THE COURT: On special cases where the length of trial is
9 manageable and there is good reason. But we've been
10 here for six weeks or nearly six weeks. And I just
11 wonder what would have happened if -- as might well
12 have happened -- if I had said in the first instance
13 no, a trial of this magnitude will have to be in
14 Vancouver. That would have been the end of the
15 matter. And that's why I'm so surprised at the
16 submission that I'm now receiving.
17 MR. GRANT: Well, my lord, there was a hidden -- there was --
18 there was certainly the comment of -- the trial could
19 be moved, but there was always -- there was -- there
20 was -- it is -- it is my submission that it was never
21 expressed by any counsel or by the Court that the
22 trial of the Indian evidence, the Gitksan and
23 Wet'suwet'en witnesses, would be required to be in
24 Vancouver.
25 THE COURT: It wasn't expressed that we were going to take six
26 weeks to hear three and a quarter witnesses here.
27 MR. GRANT: But it was expressed that the Plaintiffs' case would
28 take a substantial amount of time. And it was also
29 expressed --
30 THE COURT: Oh, yes.
31 MR. GRANT: -- that the majority of the Plaintiffs' witnesses
32 would be Indian witnesses.
33 THE COURT: Well, I'm not sure that's right, is it? I thought I
34 was told you were going to have 22 lay witnesses and
35 some 20 odd expert witnesses.
36 MR. GRANT: We had estimated -- we'd estimated 45 witnesses.
37 THE COURT: Oh, 45.
38 MR. GRANT: Twenty expert witnesses.
39 THE COURT: I may be wrong.
40 MR. GRANT: And 25 lay witnesses.
41 THE COURT: All right.
42 MR. GRANT: And, of course, as part of my proposal yesterday,
43 which we can -- we are trying to deal with the
44 question of the expert witnesses as a component of
45 dealing with some of the matters.
46 My lord, in this case the -- the court refers to,
47 at the bottom of that first page, the two grounds for

1 ordering the change in venue on the interests of
2 justice and the preponderance of convenience, and then
3 he refers on the next page to the Armstrong decision
4 of Mr. Justice Macdonald of the Court of Appeal, where
5 that judge said at page 246,
6
7 "There is a preponderance of convenience in favour
8 of a change of venue, but nothing short of a great
9 or considerable preponderance of convenience and
10 expense would justify the taking from the
11 respondent,"
12
13 the Plaintiff in that case,
14
15 "the right which the law has given him to select
16 his own place of trial."
17
18 And then he refers to Charman, where the Court,
19 Judge Boyd, says,
20
21 "The plaintiff, as dominus litis, has the right to
22 control the course of litigation. He has the
23 absolute right, unless in cases covered by the
24 Rule, to choose the place of trial, subject to its
25 being changed by the defendant for sufficient
26 cause. The burden is on the defendant to make it
27 appear that serious prejudice is likely to arise to
28 him if it is not changed. Usually the question
29 turns on the balance of convenience, based on
30 number of witnesses, distance from the place of
31 trial, and expenses of attendance. It then becomes
32 a question of degree of less or more, and the test
33 is variously expressed as to whether there is a
34 great, or very great, or overwhelming preponderance
35 of convenience shown by the defendant which ousts
36 the right of the plaintiff."
37
38 Now, that principle is the one which I assumed,
39 rightly or wrongly, that Mr. Goldie referred to during
40 pre-trials when he said he would have something to say
41 about where the Defendant's evidence, that is the
42 witnesses for the Defendant, would give evidence. But
43 that's not what we're dealing with at this point.
44 The court goes on in the McPhatter case to say,
45
46 "That current Ontario practice still requires that
47 an overwhelming preponderance of convenience be

1 established appears clear from such decisions as
2 that in Allan v. Dynes ... In this province I take
3 it that the test of a great preponderance
4 enunciated in the Armstrong case ... is the guide
5 to be adopted at the first instance in
6 applications of this type."
7
8 On the last page of the case the court says -- the
9 court refers to the fact that,
10
11 "The defendant says that two or more witnesses, in
12 addition to the plaintiffs themselves, live at
13 Campbell River on Vancouver Island, that medical
14 examinations of all four plaintiffs will be
15 required which could be more conveniently and less
16 expensively conducted on the island at Nanaimo or
17 Victoria, that the medical examiners will be
18 required to attend at trial, and that convenience
19 and the saving of expense dictate that the action
20 be tried in Victoria."
21
22 The court goes on to say, and this is in 1966,
23
24 "In this day of fast and relatively inexpensive
25 transportation, I do not conceive that I can
26 regard the short distance between Vancouver and
27 Victoria as constituting anything more than a
28 minor inconvenience to litigants or their
29 witnesses. I would, I think, have somewhat more
30 of a problem if the application were for a change
31 of venue to Trail, where the accident had
32 occurred. Expense and some inconvenience to
33 certain of the individuals involved in one
34 capacity or another is inevitable whether the
35 trial is held in Vancouver or in Victoria, and I
36 would not be justified on the evidence as I see it
37 in taking from the plaintiffs their prima facie
38 right 'to control the course of litigation.'"
39
40 That's a quote within the -- within the quote from the
41 other decision.
42 As you know, the rule under Rule 39 (7) is that the
43 place of trial shall be the place named in the
44 Statement of Claim but the court may order the place
45 of trial be changed or the trial be heard partly in
46 one place and partly in another. So the presumption
47 is the trial is where the place of trial is scheduled,

1 and that, of course, is what was set down when this --
2 the original trial record was filed in this case two
3 years ago.
4 THE COURT: But it was set for a location where the court
5 doesn't sit as a regular course. I don't suggest
6 there was anything improper in doing that; I suggest
7 it was legally ineffective and raises or brings into
8 question the authority of the cases you have sited.
9 MR. GRANT: But, my lord, with respect, the court -- this is a
10 place of assizes of the Supreme Court of this
11 Province.
12 THE COURT: It can be, yes.
13 MR. GRANT: It has been in criminal assizes for some time, and,
14 in fact, in recent years it has been a place of civil
15 assizes.
16 THE COURT: For short trials, yes. If it's convenient for short
17 trials, yes; but not for cases of this magnitude. I
18 mean, what troubles me, Mr. Grant, is there seems to
19 be no recognition of the fact that sitting here for
20 six weeks was a concession, and now it's being turned
21 around as if it gave rise to an entitlement. And it
22 seems to me that that puts a different complexion on
23 the matter.
24 MR. GRANT: Well, with respect, my lord, I -- it's -- with
25 respect, I would submit that in the circumstances of
26 this case and in the -- in the manner in which the
27 case was set down that it is an entitlement that the
28 Plaintiffs have the trial where they can be present.
29 THE COURT: Well, your legal logic escapes me, Mr. Grant. I'm
30 sorry, I don't follow that at all.
31 MR. GRANT: I would like to raise one final point. There is a
32 final consideration which you should consider, my
33 lord, that the direction that the trial be moved to
34 Vancouver in September should be placed in the context
35 of the historical experience of the Gitksan and
36 Wet'suwet'en people. You have heard evidence that
37 efforts have been made in the past to move them off
38 their territories onto reserves.
39 THE COURT: This doesn't sound like a legal argument, Mr. Grant.
40 MR. GRANT: My lord, with respect -- with respect, the
41 importance to the Plaintiffs of being able to be
42 present for a trial which -- and I misstated
43 yesterday -- which I said will affect them for
44 decades; it will affect them for hundreds of years,
45 the effect of this, and the concern that they have
46 should be a factor that -- the -- the reason why the
47 Plaintiffs have a concern is something that I submit

as counsel is important that you understand.
THE COURT: Well --
MR. GRANT: In the context of the evidence you've heard.
THE COURT: You do me an injustice, Mr. Grant, if you don't think I understand that. But what I do find difficult to follow is your reliance upon that subjective fact as a legal ground. You've made the point subjectively, but is it tenable to argue that that gives rise to legal rights at this stage and in connection with the place of trial? Certainly in argument --
MR. GRANT: Well, in consideration of your discretion I think the fact --
THE COURT: You've made that point subjectively, haven't you?
MR. GRANT: I would submit, my lord, that you have to take these factors into account in the consideration and -- when you asked us to -- if there are serious considerations to take into account.
THE COURT: Yes, that was your first point. Now you're going on and saying that -- in addition to that you're saying that because they have this strong feeling, your clients you say have this strong feeling, and I have no doubt they do, that that gives rise to a legal right arising from the fact that they feel abused by what's happened to others in the past. With respect, I question whether that's a legal argument.
MR. GRANT: My lord, the first ground I raised was with respect to the two legal systems that are at interplay here and how -- there may be areas ----
THE COURT: There is only one legal system in operation in this courtroom. There is only one legal system here.
MR. GRANT: But you've heard evidence of the Plaintiffs of their laws. And I'm -- what I raised was that -- and you've made the point yourself, my lord, when -- to some witnesses, that -- that you had your rules to apply in this court. And -- and the Plaintiffs and the witnesses, I would submit they -- they have -- they understand that. But this -- what -- the first point I was making was that there are areas where there is no conflict, and this is one area where there isn't a conflict, between the common law and the Gitksan and Wet'suwet'en in terms of those principles. But, my lord, the Plaintiffs have come to this court because their presence in the negotiating forum for the resolution of their title, either in Smithers, Hazelton or Victoria, has been repudiated by the provincial Defendant?

1 THE COURT: I have nothing do with that, Mr. Grant, surely.
2 MR. GRANT: I know, but it's an -- I'm saying I understand that,
3 my lord, but that is -- they -- the Plaintiffs have
4 been compelled to come to this court as the court of
5 last resort. Your ruling that the case move to
6 Vancouver in the midst of the presentation of critical
7 Gitksan and Wet'suwet'en evidence raises serious
8 questions for the Plaintiffs as to whether this court
9 forum is the place in which they can expect the full
10 hearing of their claims, a full and fair hearing. My
11 lord, they wish to be present when their chiefs speak.
12 You have heard this from the mouths of the witnesses.
13 You have heard why. You have heard the laws. That is
14 what they are asking you to -- to recognize. It's not
15 to confront the laws or the rules that you must adopt;
16 it's just to recognize their respect within their
17 system. And I would ask that you reconsider your
18 decision and that you rule that the case can continue
19 in September in Smithers. Those are my submissions.
20 THE COURT: Thank you. Mr. Goldie, Mr. Macaulay.
21 MR. GOLDIE: I have nothing to add to what I said yesterday, my
22 lord.
23 MR. MACAULAY: I have no further submissions to make, my lord.
24 THE COURT: Okay. Well, I think that I will take this under
25 consideration. I'm not going to decide it today. I'm
26 not sure I'm even going to decide it here today or
27 tomorrow. I think that Mr. Grant has made some
28 submissions, some submissions, that deserve some
29 careful consideration. I am troubled by the inter-
30 mingling of legal and subjective arguments, and I want
31 to sort those out. I am troubled also by the position
32 that Mr. Grant's arguments create where the court
33 seems to be drawn into a conflict with the Plaintiffs,
34 which I frankly think is most unfortunate, and at the
35 moment I think it's unfair to be put in that position.
36 I might change my mind about that. But I thought from
37 the beginning that I was making a concession by having
38 this trial opened here. I thought it was a concession
39 that we were here as long as six weeks. And I want to
40 dispassionately consider whether that has anything
41 whatsoever to do with the legal questions that arise.
42 It may have nothing to do with it at all. But I do
43 want to take some time to reflect on it. We won't be
44 sitting after tomorrow anyway, and for that reason I
45 think it's best that I take the opportunity to give it
46 some detached consideration, so I'll reserve on your
47 request for reconsideration, Mr. Grant, and you will

1 hear from me I hope sometime next week. All right.
2 Thank you. Do you wish to proceed with, Mr. Joseph,
3 Mr. Rush?
4 MR. RUSH: The proposal I would make regarding his examination
5 continuing a day and a bit in trial is this, that his
6 examination be adjourned now for continuation when the
7 trial continues for two reasons. Obviously one that
8 was mentioned yesterday, his cross-examination is not
9 going to finish; but secondly, on reflection on some
10 of the rulings of your lordship and what we may have
11 to prove in terms of the link between evidence
12 provided to him by other elders and chiefs and his
13 evidence, that there may be more evidence that I wish
14 to call from him. And it's particularly -- it has
15 struck me particularly that there may be other
16 evidence that -- not prepared by me as yet -- that I
17 will want to call. I can see the consequences of what
18 your lordship has been advising us in the last few
19 days, and I think there will be more evidence from
20 him.
21 Now, just on that point, we also have been
22 considering your lordship's rulings on the -- the
23 question of the hearsay rule and its application to
24 various components of the Plaintiffs' evidence, and we
25 think that if -- we think we would like to address you
26 further regarding your draft reasons. And we have
27 again given consideration to your lordship's comments
28 in the last few days, and we feel that you would be --
29 your views on the subject of the application of the
30 hearsay principles would be enhanced if we were to
31 make further submissions to you on it, and so for this
32 reason we were going to suggest to you that we -- we
33 break now to reconvene at two o'clock tomorrow to hear
34 us further on the question of the application of
35 the -- of the hearsay rule. Of course, for our
36 purposes the advantage of this is that there is at the
37 moment some obvious uncertainty as to potential
38 proposed methods of proceeding with the trial at the
39 time of its recommencement, and we think one of the
40 areas for clarification must be the -- the breadth or
41 reach of the hearsay principles and how these might
42 well apply to the suggested alternative ways of
43 proceeding, and I think we would certainly be edified
44 by your lordship's consideration of our further
45 arguments on that subject, and it may well help us to
46 determine how to determine to put forward our
47 proposals regarding the ones already advanced. So

1 this is what we're saying, that we'd like the case to
2 be adjourned now until two tomorrow with the idea in
3 mind that we will make an argument, a further argument
4 upon your lordship's invitation on the issue of the
5 hearsay and its applicability.
6 THE COURT: Mr. Goldie.
7 MR. GOLDIE: Well, my lord, I was hoping that we could complete
8 Mr. Joseph's evidence in chief. As I said yesterday,
9 I had -- I certainly wouldn't require him to be placed
10 under any ban of communication if we were able to get
11 started on the cross-examination. Be that as it may,
12 I think that adjourning until two o'clock tomorrow
13 afternoon is, with all respect to my friend, too long.
14 We have a number of things to cover. We have my
15 motion with respect to enlargement of time with
16 respect to experts.
17 THE COURT: Well, I made that order yesterday, but perhaps --
18 MR. GOLDIE: Well, I understood that Mr. Rush wished to make
19 some submissions with regard to that.
20 MR. RUSH: Yes, that's so. I didn't take your lordship's
21 comments as an order.
22 THE COURT: All right.
23 MR. RUSH: I do have something to say about that.
24 THE COURT: All right.
25 MR. GOLDIE: That's one of the things we have to deal with. I
26 understood that it -- we should have some further
27 discussion of the trial organization. There is -- as
28 my friend says, he wishes to make a submission on --
29 with respect to your draft rulings, and we're quite
30 ready to contribute to that. All of those things
31 indicate to me that leaving it until two o'clock
32 tomorrow afternoon would be running things a little
33 fine.
34 THE COURT: Well, again, are you mixing two things up? One is
35 the continued examination of Mr. Joseph; and secondly,
36 there is these legal questions.
37 MR. GOLDIE: I did run them together. I had hoped that the
38 priority would be given to finishing Mr. Joseph's
39 evidence, and that's still a priority. But I say,
40 with respect, if we're going to deal with these other
41 things, that there is very little time to do that, and
42 if your lordship is disposed to granting my friend's
43 request, that there be an adjournment of the evidence
44 now.
45 THE COURT: All right. Mr. Macaulay.
46 MR. MACAULAY: My lord, I have another matter to bring up, and
47 that's the question of the delivery of documents that

1 were relied on by the Plaintiffs' experts. It's a
2 matter I referred to yesterday. But insofar as using
3 up the time of the court, we've had -- if we hear no
4 further evidence, we will have had only three days of
5 evidence in a five day week, which isn't a
6 particularly economical use of time. I expect that
7 after a long adjournment the Plaintiffs will want to
8 lead some further evidence. That's to be expected,
9 and we certainly wouldn't object to that, but there is
10 some evidence -- I noticed in a summary that my
11 friends were kind enough to provide for us concerning
12 this witness there is some evidence that has nothing
13 to do with the hearsay rule, doesn't appear to anyhow,
14 other matters that he could finish perhaps in another
15 hour or two.
16 THE COURT: All right. Well, I'm going to take the afternoon
17 adjournment. My preference, Mr. Rush, and I don't say
18 that this is necessarily a high priority preference,
19 would be that you carry on with Mr. Joseph for the
20 rest of the day and that we start the arguments in the
21 morning so we'll be sure to have lots of time. You
22 think about that over the adjournment, and I'll hear
23 you further when we come back.
24 THE REGISTRAR: Order in court.
25
26 (PROCEEDINGS ADJOURNED PURSUANT TO THE AFTERNOON
27 ADJOURNMENT)
28
29 I hereby certify the foregoing to be
30 a true and accurate transcript of the
31 proceedings herein to the best of my
32 skill and ability.
33
34
35
36 Leanna Lynn
37 Official Reporter
38 United Reporting Service Ltd.
39
40
41
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43
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45
46
47 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

ALFRED JOSEPH, Previously sworn:

THE REGISTRAR: Witness, I remind you you are still under oath.
THE COURT: Would it be convenient if we went to 4:30?
MR. RUSH: Yes, it would be.
THE COURT: Well, if you find a place where it's convenient to go to, let me know.
MR. RUSH: I apologize for the late start. Mr. Joseph was attending to his defunct car.
THE COURT: Sounds like a matter of monumental importance. I hope everything came out all right.
MR. RUSH: It was to him.
THE COURT: Does your car go, Mr. Joseph?
A No.
THE COURT: Not yet. Well, that's counsel's responsibility to keep the clients and its witnesses mobile. Go ahead, Mr. Rush.

EXAMINATION IN CHIEF BY MR. RUSH (Continued):
Q Mr. Joseph, yesterday you told us about the Smoke Feast, and you had also given us your evidence concerning the Headstone Feast. Are there other types of Wet'suwet'en Feasts?
A Yes.
Q And is there a Feast which occurs after the Smoke Feast?
A Yes.
Q And what is that Feast?
A It is a Funeral Feast.
Q Okay. And you said that the Smoke Feast among the Wet'suwet'en occurs shortly after the passing on of a Wet'suwet'en chief. When does the Funeral Feast occur?
A Usually right after a funeral.
Q And how soon is that after the Smoke Feast?
A About two to three days.
Q Okay. And is that Feast a Feast which occurs in the Feast hall of Moricetown or Hagwilget in the manner that you have described earlier about the other Feasts?
A Yes.
Q Are there other types of Feasts which occur among Wet'suwet'en people apart from the three that you've mentioned?
A Yes.
Q What are they?

A Usually the pole raising and a chief will call a Feast when there is something has happened to him or any -- any of the other chiefs in the House.
Q And is it in that situation up to the chief to determine when the Feast will be called for?
A Yes.
Q And what the Feast will deal with?
A Yes.
Q Okay. Is there also a Feast known as a Shame Feast?
A Yes. That is one of them.
Q That's an example of one, is it?
A Yes.
Q Okay. Are there any other types of Feasts among the Wet'suwet'en people?
A Sometimes a chief is -- gets -- chooses a successor in his lifetime and wishes to step aside and he will have a Feast and choose a younger person to take his place and then he puts -- sometimes puts conditions on those. One of them is he will remain in his seat, but his successor will be sitting elsewhere. Or else he will remove himself from the seat and put the younger person in his place.
Q And is that a type of Feast that occurs during the lifetime of the existing chief?
A Yes.
Q Are there any other types of Feast that come to mind?
A If the chief is injured or someone has to come to his aid, like if he is hurt and is bleeding and someone will come to his aid, then he has to throw a Feast.
Q All right. Does that have a name that you can attach to that type of Feast?
A Yes.
Q What kind of Feast is that?
A K'ayee nee tatl'iil.
MR. RUSH: I wonder if you could help us with that, Mr. Mitchell?
A K'ayee nee tatl'iil.
THE TRANSLATOR: K'ayee nee tatl'iil. K-'-a-y-e-e n-e-e t-a-t-l-'-i-i underline l.
THE COURT: After the -- I am sorry, I didn't get it. I am not sure I got it right. m-e-e -- what was next?
A n-e-e.
THE COURT: n-e-e.
THE TRANSLATOR: t-a-t-l-'-i-i underline l.
THE COURT: All right. Thank you.
MR. RUSH:
Q Now, Mr. Joseph, is there witnessing --

THE COURT: I am sorry, is there an English equivalent of any kind for that?
MR. RUSH: Yes. All right.
Q How would that be translated?
A It would be a Feast where he'll wipe out the shame.
THE COURT: Thank you.
MR. RUSH: All right.
Q Are there guests invited to the types of Feasts which you've described?
A Yes.
Q And do these -- are these guests invited for the purposes of witnessing the events at those Feasts?
A Yes.
Q And why is it important to do that at those Feasts?
A It is important to have witnesses at a Feast. If you are in a place where all the people are of one clan, that is you cannot invite that clan to come in, your own clan to come in as witnesses, it has to be of another clan. All the guests that you have have to be of another clan and that is why it is important to have witnesses.
Q Why could you not have witnesses from the Gitdumden clan?
A It is -- it's something like to me you buy a glue in the store and one is -- one -- just one of a kind, can't mix, so that is the reason for this. You have to have witnesses from another clan to be -- due to -- to be in a Feast. And that's what makes -- makes this stronger. To have people there that are not related to you, and those people say that what happened is correct. What happened is according to our laws, and that is why you have to have witnesses from different clans.
Q Okay. I wanted to ask you, Mr. Joseph, about one of the laws that you've made reference to in your testimony and that is the law of trespass or against trespass.
A Yes.
Q Is the law against trespass, is that common among Wet'suwet'en people?
A Yes.
Q In the old days what was the consequence if the law against trespass was broken?
A It was death.
Q And how was this known to you? How is this, the serious consequences of death known to you?
A To be reminded of the laws is much like the non-Indian

1 laws. You are reminded of incidents that have
2 happened in the past. This is the way -- this is --
3 this is the way we handle tress -- people that
4 trespass and they tell you -- give you an example of
5 any way that trespass has been dealt with.
6 Q And were examples given to you of the consequence of
7 trespass?
8 A Yes.
9 Q And does one come to mind?
10 A One that I remember very well is that there was --
11 they give the man's name as Hooliits.
12 Q Hooliits?
13 A Yes. He went out to visit --
14 THE COURT: Excuse me, is this something you know about
15 personally or did somebody tell you about it?
16 A It was something that I was told to remind me of
17 the -- what happens to a person when he trespasses.
18 MR. RUSH: I am leading it for the purpose of the foundation
19 for his belief about the law and not necessarily for
20 the truth of the event. But the basis for why Mr.
21 Joseph has his understanding about the consequence of
22 this law against trespass.
23 THE COURT: Isn't it sufficient for him to say this is my belief
24 and I reach that belief because of a lot of things
25 that a lot of people told me or some things that
26 people told me? Do I have to have the details?
27 MR. RUSH: Well, I think the details round out for you why it is
28 people believe things. If your lordship is satisfied
29 that evidence about the statement of his belief is
30 sufficient --
31 THE COURT: Well, the grounds of admissibility are highly
32 tenuous, and it seems to me that it doesn't add much
33 to his belief, if such is his belief, that in the
34 early days the consequence of trespass was death and
35 he learned that, I presume, from his elders who gave
36 him examples. Does it go any further than that?
37 MR. RUSH: No. I think the example would, of course, assist
38 your lordship, but I'm happy to lead a bit more
39 foundation here of this evidence.
40 THE COURT: All right.
41 MR. RUSH:
42 Q Mr. Joseph, about this law against trespass, who among
43 your people told you of this law, both people who have
44 passed on and others?
45 A Well, the -- when you are young you are told of what
46 to stay away from, what laws that you have to respect,
47 and you are given examples of what will happen to a

1 person if they break a law.
2 Q Okay. Were these examples given to you by your
3 grandparents?
4 A Yes.
5 Q And your parents?
6 A Yes.
7 Q Were they given to you by other members of your House?
8 A Yes.
9 Q And you have made mention of Thomas George and Mary
10 George?
11 A Yes.
12 Q Does it come from them as well?
13 A Yes.
14 Q Is it -- is what you say in terms of how you came by
15 your knowledge about Wet'suwet'en laws, is it --
16 particularly the law against trespass, is this so with
17 regard to other Wet'suwet'en laws?
18 A Yes.
19 Q Now, are there consequences today in respect of
20 trespass on the territory of Wet'suwet'en chiefs?
21 A Yes.
22 Q And what are they?
23 A If a person is using a territory that is -- does not
24 belong to him or the House, they are always reminded
25 by the owners. If it's not the House chief that
26 reminds them, it's the members of that House that know
27 this man or a person that is using another territory
28 without their permission and he is -- that person is
29 reminded of it very often.
30 Q Okay. And is it -- is there an indication of what
31 would happen to that person in the event of continued
32 use or how is continued violation dealt with?
33 A If it's continued, that person will have to -- is
34 invited to a Feast and it is taken up at that -- in
35 that place.
36 Q And if raised in a Feast, what would be the
37 consequences to the individual? What would happen to
38 that person?
39 A It would be -- it's just -- the person would be there,
40 but then the chief would say why the Feast is held and
41 he would be told that he is -- he or she is not
42 supposed to be at a certain place, not supposed to be
43 taking food out of -- or food or any animals off that
44 territory in front of witnesses.
45 Q Okay. Now, there are non-Indian people on the
46 territories, on a portion of the territories of some
47 of the chiefs, are there, to your knowledge?

A Yes. Yes.
Q And are these -- what is the consequences for non-Indian people in respect of their being on parts of Wet'suwet'en chief's territory?
A Well, our people would tell them to -- would tolerate them, but the -- when our people go there to do their hunting or trapping, they are told to leave by these people and there is -- and if any arguments are made at that time, they are reported and told that they would be prosecuted and oftentimes are.
Q What have the chiefs done in respect of the non-Indian community, people who are on the Wet'suwet'en chiefs or portions of the Wet'suwet'en chief's territories?
A They go to their -- it is reported again to the people, and it is always brought up that oftentimes their territory are given to someone else and when they try to protect those places, they are always -- the chief oftentimes is ignored if he goes to the authorities, that someone is using his territory. Not too often is there any action taken against someone that's trespassing.
Q You've told us that, Mr. Joseph, about some of the impacts on Gisdaywa's territory of other users of that territory?
A Yes.
Q And do you have knowledge from your own observations of the impacts on other of the Wet'suwet'en territories?
A Yes.
Q I want to ask you if you have knowledge of the territory of Knedebeas.
A Yes.
Q And I am speaking here of the Knedebeas territory to the south of that -- of Gisdaywa.
A Yes.
Q And have you been in that territory in the last five years?
A Yes.
Q And have you made any observation about what has happened on that territory?
A Yes.
Q And what sorts of things have you seen?
A I've seen in Knedebeas territory that it's all -- there is no trees in areas that I've visited.
Q All right. And is that as a result of logging?
A Yes.
Q All right. And what part of the territory can you say

that you were -- you had visited? And perhaps you've told us that Bii wenii Ben is in the southern portion of Gisdaywa's territory?
A Yes.
Q And where in relation to that, if you can say, was the logging that you observed?
A Yes. It's -- it is a road going southeast of Bii wenii Ben.
Q If you would just pause there for a moment. Yes. A road south of Bii wenii Ben?
A Yes.
Q All right.
A And it crosses into Knedebeas territory.
Q Yes.
A And it runs southeast towards Vance Lake and that area I went -- drove in there and it was all clear cut for miles.
Q Okay. Is that off the road?
A It's right up to the road.
Q Okay. And could you say about what distance from the road it was?
A There is no timber on both sides of the road. It's -- there is no -- there is quite a big area where you drive through the middle of it, of this clear cut.
Q Okay. Is this to the south of the boundary of the Gisdaywa territory?
A Yes.
Q And are you able to tell us about what distance it is along that road that you made those observations?
A About two miles south of Gisdaywa boundary.
Q Okay. Now, I want to ask you about another territory and that's the territory of Namox. You told us that you are over to Sam Goosley Lake?
A Yes.
Q And this lake was located in the territory of Namox?
A Yes.
Q And was there a mine around that lake?
A Yes. There is a mine about two miles east of Sam Goosley Lake.
Q Do you know the name of that mine?
A I read the signs on the building. It says Equity Silver.
Q All right. So based on your knowledge of the sign, you understand that to be Equity Silver, is that right?
A Yes.
THE COURT: I am sorry, did you say there used to be a mine or

there is --
A There is a mine.
THE COURT: There is a mine. Yes. I thought so.
MR. RUSH:
Q When were you there? I don't recall from your evidence yesterday, but I think you told us you were there in the last five years?
A Yes. I was there sometime in '82 or '83. First time I was in there and the mine was there and I took -- well, I took pictures of the -- it's -- I think it's an open pit mine, and there is a waste pile just south of this mine and it's -- it was very big. It was -- it looked like one of the mountains that was there. And I went back again last month and it is -- the waste pile I am talking about is a lot bigger than the last time I seen it.
Q Okay. And you say that the mine site is an open pit, is that right?
A Yes.
Q Okay. And did you actually see the pit?
A You can see all on the side of the hill.
Q Okay. Can you say what kind of a -- what area that the pit covers?
A It's a mountain just east of Sam Goosley Lake.
Q Do you have an idea of -- could you estimate from where you were located about how wide the pit itself was?
A The pit itself may -- it's about a mile flying in.
Q Okay. Could you make any estimate about the width or circumference of the small mountain or the hill that was being built up?
A It's very -- it's a good size hill right now.
Q When you were into that territory of Namox, Mr. Joseph, did you make any other observations apart from the observations about the mine and the open pit concerning the use of that territory or the impact of use on that territory?
A Well, just north of the mine itself there is -- seem to be a small lake and I wasn't too familiar with mines. First time I saw it. So I asked the person that I was with what's the name of this lake? And he said there was no name for it. He said that was the -- that was the water that was coming from the mine. And it's all different coloured. I don't know. Sort of greenish colour.
Q That was the observation you made about this lake, was it?

A Yes.
Q Were you there with Dan Michell?
A Yes. He's the one that I asked about the lake that was there.
Q All right. Now, yesterday, Mr. Joseph, I think you told us that you were up the Kitsegukla Valley with Bazil Michell?
A Yes.
Q And on that trip up the Kitsegukla Valley with Bazil, did you make any observations about the territory that he took you through?
A Yes, I did.
Q All right. Can you tell us about what you saw?
A There is lots of logging down in there and you can see the logging going on throughout the whole valley wherever there is no -- there is farms in there, but there is lots of logging going on in there.
Q Okay. There is a road into the valley?
A Yes.
Q And where does the road go to?
A The road comes in from the east from a place called Doughty. That's the first station east of Moricetown. And the road comes in from there and down west through the valley.
Q And how far west does the road run?
A About I'd say ten or eleven miles.
Q And you made mention in your testimony yesterday about Kitsegukla Lake?
A Yes.
Q Does it run out that far?
A Yes. It goes past --
THE COURT: Could I have the spelling, please, for Doughty.
MR. RUSH:
Q There is an English Doughty?
A Yes.
Q I know it as D-o-u-g-h-t-y. Is that the same?
A Yes. Yes.
THE TRANSLATOR: Yes.
MR. RUSH:
Q So the road runs out to Kitsegukla Lake?
A Yes.
Q And can you tell his lordship about the place of the logging along that road, if you could to the best of your recollection?
A Well, I drove in there by myself after that and I found the road to -- at that time just about wasn't much separating that logging area from the west, the

logging area and the western side of Kitsegukla Valley, and the roads are just about -- from what I hear now they have joined the roads together.

Q You mean there is a road coming from --

A From the west.

Q From -- coming in from the west?

A From Kitsegukla Valley. From the west.

Q Now, the observations that you made, did you see logging, evidence of logging on both --

A Both.

Q -- sides of the road as you drove --

A Yes.

Q -- in to Kitsegukla Lake?

A Yes.

Q And was there any logging that you observed around Kitsegukla Lake?

A Yes.

Q And was this logging in the valley itself?

A Yes.

Q Was there any -- did you see any evidence of mining?

A Not on the east side, but I know there is mining going on the west a few years back.

Q Have you seen -- do you know from your own knowledge of the existence of a mine and made observation of a mine in that area?

A Not in the valley. It's up on the mountains, there is mines on the west side.

Q I see. And do you know the name of any of those mines or just know of their existence?

A Yes. There is, I remember, two mines and one of them was Red Rose up from Kitsegukla and the other one was Western Uranium.

THE COURT: That's the name out of the past?

MR. RUSH: Yes. Both. Both are.

Q Red Rose and Western Uranium, they were located up on the mountains?

A Up on the mountains, yes.

Q Mr. Joseph, did you -- have you been into the Dennis Lake, the Keel weniits, I think you called it?

A Yes.

Q Dennis Lake. And McDonell Lake area in the last five years?

A Yes.

Q And when you were in that area, did you make any personal observation about the condition of the forest?

A It is -- it's all been logged out.

1 Q When you say all has been logged out, in what areas
2 are you making reference to?
3 A Well, there is logging all the way into McDonell Lake.
4 Q Is this in patches or is it in --
5 A In patches.
6 Q Okay. And is it along the road?
7 A Yes.
8 THE COURT: I am sorry, is there a connection between Dennis
9 Lake and McDonell Lake?
10 A Yes. They are in the -- McDonell Lake is on the west
11 side and Dennis Lake is a few miles east of McDonell
12 Lake.
13 THE COURT: Oh, I see.
14 MR. RUSH:
15 Q The Keel weniits area I think you said was Wah Tah
16 Kwets' territory?
17 A Yes.
18 Q You said that yesterday. That's 69, my lord. And
19 Dennis Lake is in behind Hudson's Bay Mountain?
20 A Yes.
21 Q And as you go farther west, you come to McDonell Lake?
22 A Yes.
23 Q Is that right? Was there any mining activity that you
24 made note of in your travels along that road?
25 A There is a -- there has always been a mine up in there
26 in the east -- south slope of Hudson Bay Mountain.
27 Q Do you know the name of that mine?
28 A Duthie Mine.
29 Q Duthie?
30 A Duthie Mine.
31 Q Duthie?
32 A Yes.
33 Q That's not a Wet'suwet'en word?
34 A No.
35 Q Any other mining in there?
36 A That's the only one that I know of.
37 THE COURT: How do you spell that, Madam Reporter?
38 MR. RUSH:
39 Q Is my best, D-u-t-h-i-e.
40 A Yes.
41 MR. GOLDIE: Mr. Duthie.
42 MR. RUSH:
43 Q That was the silver mine, was it?
44 A I don't remember.
45 Q In your evidence yesterday, Mr. Joseph, you told us
46 about the area of Skin Dyee?
47 A Yes.

Q Do you recall that?
A Yes.
Q And you told us that you had been out there on at least one occasion?
A Yes.
Q And could you tell us in the -- you were out to Ootsa Lake on that occasion?
A Yes.
Q And was that the same occasion you were to Francois Lake or was that on a different --
A Same time.
Q Same time. And I think you said that was in the fall or, no, the spring of '82?
A Yes.
Q Okay. Did you at that time make any observations about the condition of the territory around Ootsa Lake?
A Yes. It was -- there was some sort of a logging going on at that time.
Q Where was that located?
A In the Ootsa Lake.
Q Can you tell us what part of Ootsa Lake. Can you give us a directional point?
A Right -- right in the water.
Q There was logging in the water?
A Yes.
Q Was there logs in the water?
A Yes. There was trees in the water.
Q Okay. Can you tell us do you know how that came to be?
A It was from the flooding of Ootsa Lake.
Q All right. Had you seen that area prior to the flooding?
A Yes.
Q Are you able to say how much the flooding impacted on the land area that was existed prior to the flooding?
A Yes. I was -- I was there in 1940 and I was in residential school, and the principal had to take some children back to Ootsa Lake and I went with him. And when we got to Ootsa Lake, it was very -- to me at that time it was a very small lake compared to Fraser Lake and that's the way I had pictured it in my mind from that -- from what I saw then and there was meadows all around the lake and the people were living right in that shore of Ootsa Lake and nice flat area where they were living.
Q And you went there in 1982?

A Yes. I went back in 1982 and saw and it was altogether different. There was spillway there and the water -- the lake was right up to -- right up to the hills and there was no meadow there. It was just a big lake and there was dead trees sticking out of the water all along the shore. So it was quite -- quite a difference from what I've seen in the '40s.
Q Were you able to -- are you able to make an estimate about how high the water had risen?
A The area it covered it could be about 200 feet.
Q All right.
A From what I saw. It's just quite a few years since I went back and saw a huge lake there where a small lake used to be.
THE COURT: You are talking about 200 feet of vertical difference in level?
A Yes.
THE COURT: Or 200 feet from the shore?
A Difference in the level.
MR. RUSH:
Q I think you told us yesterday that this was in Goohlaht's territory as well?
A Yes.
THE INTERPRETER: Number 12.
THE COURT: Sorry?
MR. RUSH: That's number 12.
THE INTERPRETER: Number 12 of the plaintiffs' list.
MR. RUSH:
Q Now, Mr. Joseph, you told us yesterday as well that you had made a helicopter flight of the -- I think you said part of the territory to the north of Smithers. You mentioned Cronin Mountains and Hanee C'et gghexw I think you said, Debencher Peak?
A Yes.
Q And you told us that there was a pass-over flight from there and in the course of that flight certain landmarks were pointed out to you?
A Yes.
Q And do you remember seeing in the course of that flight over the territory any of the impacts of logging or otherwise in that area?
A Yes. I was -- when we flew over a ridge and I talked to the people that lived or trapped in there and they were telling me where two little lakes were, one of them was on the -- at the foot of Hadat'enee, which I said was lots'wenii yesterday.
Q Hadat'enee?

A The mountain was Hadat'enee, but the lake was lots'wenii.
Q All right.
A And --
Q I am not sure we got that from you yesterday. Did we get a spelling from you yesterday on that? I don't think wet did.
A Lots'wenii.
Q Yes. Lots'wenii. That's right.
THE INTERPRETER: 245.
THE COURT: That's the lake -- I don't know if Madam Reporter got the name of the mountain.
THE INTERPRETER: Hanee C'et gghexw, 242.
MR. RUSH: No. That was Hadat'enee.
THE INTERPRETER: 243.
THE COURT: And the lake number again, please?
MR. RUSH: The lake number, Victor?
THE INTERPRETER: Lots'wenii. 245.
THE COURT: Thank you.
A And they also told me of a lake north of this -- of lots'wenii and they told me that it was all timber. That's where they used to trap, they were telling me. And they were telling me there is nobody out there, so --
MR. GOLDIE: Excuse me for a minute, Mr. Joseph. My lord, I take it the same observation with respect to the identification of territories also applies to the impact on logging or whatever it is.
THE COURT: Well, I took it -- I took this evidence still relating to helicopter flights, which is the subject we started out on some time the day before yesterday which was with -- I take it that this evidence is within that general area where what I am receiving now is hearsay and inadmissible and proof of nothing unless it's authenticated in the way we discussed.
MR. RUSH: Yes.
THE COURT: Thank you.
MR. RUSH:
Q Well, Mr. Joseph, in terms of this helicopter flight, I'm -- if you could tell us what you saw, and I appreciate what others might have said --
A Yes.
Q -- about the same area. But just in terms of your own observations, can you tell us when you were flying over if you made any observations about the logging or the condition of the forest or mines that you have mentioned?

A Yes. On our way out from the last place we landed, there was -- there is logging going on at the time.
Q You could see the logging --
A Yes.
Q -- activities itself?
A Yes.
Q Could you place a reference point for us as to where this was happening?
A Yes. It's a lake that we call Mesdzii del mooh.
Q Mesdzii del mooh.
THE INTERPRETER: 244.
MR. RUSH:
Q And where in reference to that lake was the logging going on?
A It was logging all around that small lake.
Q Did you make any other observations in that trip about the condition of the territories over which you flew?
A There has been logging all the way back to Moricetown. We went back to Moricetown from there and it was all clear cut a big area.
THE COURT: I am sorry, was that 244?
THE TRANSLATOR: 244.
THE COURT: Well, that's the Debencher Peak.
THE TRANSLATOR: 244.
THE COURT: Pardon me?
THE TRANSLATOR: 244. Mesdzii del mooh.
A Mesdzii del mooh.
MR. RUSH: Yes. It's 244.
MR. GOLDIE: Both 244 and 245 are lakes, are they, one north and south of Suskwa River, is that what are to be identified?
MR. RUSH: Yes, I think so.
Q The one that --
A Suskwa.
Q Is that Mesdzii del mooh?
A Yes. Mesdzii del mooh.
Q Yes. Mesdzii del mooh.
THE COURT: And do we know whose claim of territory that is?
MR. RUSH: Yes.
Q I think you recall the territory in which that's located?
A Yes.
Q And what's that?
A That's Smogelgem.
THE INTERPRETER: 60.
MR. RUSH:
Q Just answer the other queries raised by Mr. Goldie.

Lots'wenii?
A Pardon?
Q Lots'wenii?
A Yes. Lots'wenii.
Q That was a lake as well?
A That was a lake.
Q And was that located in an area that was close to the lake that you have just mentioned a moment ago?
A Yes. It's a cross-over a ridge.
Q Okay. Were there any other observations that you made on that flight, Mr. Joseph, that told you about the condition of the forest or if you noted any other logging or mining on that particular flight?
A No. It was all logging.
Q Mr. Joseph, I wanted to ask you if you made any observations about the heli-flight that you took on the day before. This is the heli-flight that we showed on the video?
A Yes.
Q In the course of that trip, did you make any observations about mining or logging?
A There was logging all the way up the Telkwa River but there is also --
Q Was this -- when you say all the way up --
A Yes. All the way through the -- through the territory there was powerline running through there and also I think it was gas, gas line through the territory.
Q Is there some way that you could tell that by what you --
A There was signs.
Q And was there a strip or a swath of --
A A strip, yes.
Q And could you say where that was in relation to where you were? I think you mentioned on that time you made four landings on that occasion?
A Yes. It's on the north side of the Telkwa River.
Q And again, in reference to the logging that you noted on -- I think you said both sides of the Telkwa River?
A Yes.
Q Were these patches or was it a continuous --
A There were patches.
Q Okay.
THE COURT: Can you tell me whose territory this is, please?
A Skokumwasaas.
MR. RUSH:
Q Skokumwasaas?
A Yes.

THE INTERPRETER: 233.
THE COURT: Thank you.
MR. RUSH:
Q Now, perhaps I am doing this somewhat in reverse order, but there was yet a heli-flight that occurred the day before the one on the video. I think it was the 23rd of August, 1983?
A Yes.
Q And did you make any observations during the course of that heli-flight that --
A Yes. There was -- you can -- on the east -- the mountains east of Nanika Lake there is roads all the way up the side of the mountains.
Q You could see these roads?
A You could see these roads and there is a lot of mining activity in there.
Q And was that ongoing when you --
A Yes.
Q You could see the activity going on?
A Yes.
Q And from where you -- were you in flight at the time or were you in a stationary point?
A In flight.
Q Okay. Were you able to determine on whose territory that mining activity was going on?
A That was still on Caspit's territory.
Q And Caspit's in?
A Goohlaht's House.
Q All right. Mr. Joseph, you -- I want to back you up a bit. You indicated that you had observed flooding at Ootsa Lake. Do you have knowledge about how that flooding occurred, what was the cause of the flooding?
A Well, I know that there was a dam that -- west of Tahtsa.
Q West of Tahtsa?
A West of Tahtsa Lake, yes.
Q Okay. Have you seen this dam?
A Yes.
Q Do you know the name of the dam?
A It's -- I know it's the Alcan Aluminum Company, but I forget the name of it. Kemano, I think it is.
Q And have you flown over that area?
A Yes.
Q And is the water backed up behind that dam?
A Yes.
Q And that's your understanding as to why the water was backed up at Ootsa?

A Yes.
Q All right.
Q Mr. Joseph, I want to ask you about another area in your evidence and again pertains to the laws of the Wet'suwet'en people and relation to the question of the travel by Wet'suwet'en people over the territory of other chiefs. And to your knowledge was -- were Wet'suwet'en chiefs permitted to travel over the territory of other chiefs?
A Yes.
Q Okay. And were there trails that led from the communities to campsites?
A Yes.
Q Okay. And were there -- were there laws relating to the right to travel across another chief's territory?
A Yes.
Q Okay. And what were they?
A They travelled on other territories and they have -- their timing is made so that when they -- at each other's territories they have a visit or camp in the owner's territory and keep moving. But if it happens that they are travelling over his territory and if they need food, they could get their food while travelling through that territory either by shooting grouse, rabbit, any small animals that they see on the trail.
Q Were they able to -- beyond that, were they permitted to take anything else on another chief's territory?
A No.
Q And in terms of the use of the trail, were other chiefs required to maintain the trail or stay on the trail?
A If they are going through a territory, one -- one of the things that they have to watch is if they come across a trap that they don't go near that trap. They make a detour around it.
Q All right. Now, in respect of the application of this law today, are chiefs permitted to travel across the territory of other chiefs to get to their own?
A Yes.
Q Okay. And in respect of the laws regarding the use of other's traps, does that apply today as well in respect of what you have just said about not using -- not trapping on someone else's territory?
A Yes.
MR. RUSH: Okay. Well, I am about ready to break into another whole area, my lord.

THE COURT: All right.
MR. RUSH: I would ask that we adjourn now and insofar as the timing for tomorrow, I'd propose that rather than 10 o'clock as suggested by my learned friends that it be eleven that we meet. Frankly, that will give the plaintiffs a little more time in the morning --
THE COURT: Yes.
MR. RUSH: -- to put together what we want to say.
THE COURT: Is that satisfactory, Mr. Goldie?
MR. GOLDIE: Well, I am just concerned about getting through, my lord. I wonder if my friend could indicate how long his submission might be.
MR. RUSH: I don't think it will be overly long. I should think it would be less than an hour. Probably less than half an hour.
THE COURT: This is a hearsay --
MR. RUSH: Yes.
MR. GOLDIE: Are we going to deal with the trial reorganization tomorrow? I understood that your lordship had invited us to come back after considering the matter.
THE COURT: Well, I would be happy to discuss that with counsel. I have some further ideas, nothing very original or creative.
MR. RUSH: Of course it's our concern as well that we are interested in hearing if the Province has instructions on this.
MR. GOLDIE: Well, I am interested in hearing if there is a specific proposal --
MR. RUSH: There has been --
MR. GOLDIE: -- to grapple with.
MR. RUSH: There has been a propose passed. We are hoping that the Province --
MR. GOLDIE: It's so tenuous it can't be dealt with beyond what was said the other day.
THE COURT: The problem with proposals is, of course, hearsay -- and maybe these two things are tied together, but do I -- well, let me ask you is it your intention, Mr. Grant, that we would only deal with these legal problems tomorrow and we couldn't take evidence?
MR. RUSH: Yes. That's my proposal.
THE COURT: All right. Well, keeping in mind that Mr. Rush needs some time for preparation, I would think that if we started at eleven, that we would have time in the remainder of the morning and the afternoon to deal with the legal problems that are outstanding. And that being so, I think we will reconvene at eleven o'clock.

I will throw out just for consideration the further thought that possibly the wishes of the plaintiff as expressed by Mr. Grant to call their witnesses for the purpose of some parts of their evidence at least might be accommodated by a mixture of both an affidavit of formal matters that might not be controvertial and viva voce evidence in chief on matters that counsel would prefer to have the witness state directly. What I am really suggesting is hybrid type of examination in chief. I have spoken to several court reporters. They think that it would take about half of the time or occupy almost half the time in making sure that we have Indian names correctly spelled and correctly identified. That's a composite. Someone said higher than that and some said lower. But I have noticed, for example, that as one would expect, Mr. Rush has a pretty good idea of what this witness is going to say and I would be surprised if he didn't. I suspect that there is a great deal of what this witness has said relating to, for example, the question of Feasts and the question of locations that might not be cross-examined on at all, or if they are cross-examined on would not be for the purpose of contradiction but for the purpose of some explanation or putting a different shade of meaning on the evidence. If those kinds of things were put in affidavit, yet the witness still called to viva voce orally say the important things that either the witness wants to say here, counsel want to say, it seems to me we might still save at least half or at least a substantial part of the time taken for evidence in chief. And I suspect we would save a considerable amount of time in cross-examination. And it has occurred to me, and I merely pass this on to counsel for their consideration, that the solution to our problem of the apparent or threatened longevity of this trial could be ameliorated in some respects by what I have just suggested or by a combination of that with other things that counsel may be able to propose.

I say with the greatest of respect that I do not think modern litigation can afford treating the court like a sponge that has to soak up everything that wants to put before the court. There are other ways of getting evidence into the record that counsel may think they want to have there for purposes of argument or for purposes of appeal, and I think that the threatened length of this trial requires us to seek

1 ways of insuring that the record is complete without
2 the kind of time consumption that we have experienced
3 in the past five and a half weeks or so at this trial.
4 I'll be very happy to discuss those matters with
5 counsel tomorrow. Eleven clock. Thank you.
6
7 (PROCEEDINGS ADJOURNED UNTIL JUNE 26, 1987 AT 11
8 O'CLOCK)
9
10
11 I hereby certify the foregoing to be
12 a true and accurate transcript of the
13 proceedings herein to the best of my
14 skill and ability.
15
16
17 Laara Yardley,
18 Official Reporter,
19 United Reporting Service Ltd.
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