Smithers, B. C.

December 1, 1988.

THE COURT: Mr. Grant?

MR. GRANT: Yes, my lord, this witness is Johnny David, Chief Maxlaxlex. First of all, I believe that Mr. George, Mr. Marvin George has sat counsel table, with leave earlier with Ms. Mandell, on a couple of matters. He has been introduced.

A couple of matters, one is that the position we take with respect to Mr. David is different than with respect to the other witnesses, because Mr. David was commissioned between September, 1985 and April 29th, 1986, over the course of that period, for eight days. He was cross-examined for several of those days. Now, I wish to say that Mr. David, even at that time, did not generally last a full day. And he indicated he may get tired and things like that today. But I would object to my friends cross-examination at large in light of that. But I do understand that my friends wish to -- of course the affidavit is new and they can cross-examine on that and we don't object to that. They also received notes of interviews with Mr. David and they also received some documents from an appeal that was actually heard in the County Court, ultimately, relating to a trapline. Those are the areas they wish to go into but I don't wish them to re-raise things that have already been canvassed. I say this now but I don't really want to interrupt by objecting over and over again. I wanted that settled.

THE COURT: Well, I am not sure I can rule in a vacuum.

MR. GRANT: I appreciate that, but I just wanted to set out our position so that my friends can be guided by it, or at least give the court warning if she is going to venture into the area.

THE COURT: I am sure she is not, but we will see.

MR. GRANT: I have also strongly urged upon my -- my friend indicated to me that the transcript of this hearing was something that she was going to be reviewing with the witness, as well as the hearing before the County Court, as well as some other material. I want to advise that although I received, there was no way I could review it with the witness because he just would have been too exausted to give evidence today. The other matter, my friend had requested, I believe it was last week, an exhibit which was Exhibit 1 in the County Court and Exhibit 22 in the other hearing,

which was a map. And I provided them with a copy of a map which was, together with a memo of April 29, 1986, received, Exhibit 1. But both my friends and I agree that this is probably not -- this is not the map that was actually at the hearing. I have canvassed all possible sources, and I can't locate the map. And so I think my friend wished me to agree and put on the record that we agree there was another map and it's not available. Of course, if it becomes available, I will let my friend know as soon as I find it. But I ran out of sources.

And finally, I believe Mr. Mackenzie had some motions but I asked him to put them off because Mr. David generally is feeling better in the morning than the afternoon and I also urged on my friend to endeavour to complete Mr. David today, because sometimes he fades, and I hope he can be completed before the afternoon and we can deal with the motions this afternoon.

THE COURT: Thank you. Has the witness been sworn? I suppose he has to be sworn again, does he?

MR. GRANT: He was sworn in this hearing already.

THE COURT: I suppose he should be sworn again. All right.

MR. GRANT: He will need full-time translation.

THE COURT: Just remind him, please, Mr. Holland, that he is still under oath.

JOHN DAVID, Resumed:

THE COURT: And you, of course, Mr. Holland, you're under oath as well.

MS. SIGURDSON: Perhaps I can say first that we do know that Mr. David was commissioned and we do not intend to re-canvass, but there has been disclosure on a number of points since those times that we could not reasonably have known at that time and there may be some minor overlaps to set the scene for other questions.

THE COURT: We will deal with that when the time comes.

CROSS-EXAMINATION BY MS. SIGURDSON:

MS. SIGURDSON:

Q Mr. David, you have sworn an affidavit?

A Yes.

Q Describing territories of Smogelgem?

A Yes.

1 Q Hagwilnegh and Namox?
2 A Yes, I have spoke on that many occasions.
3 Q I am showing you Exhibit 665, could you say if this is
4 your mark on the affidavit?
5 A Yes, that's mine.
6 MS. SIGURDSON: My lord, do you have a copy of Exhibit 665?
7 THE COURT: Yes, I do, thank you.
8 MS. SIGURDSON:
9 Q And the affidavit was sworn on the 13th of July, 1988
10 as it says?
11 A Yes, it's about that time.
12 Q Was the affidavit read to you and translated to you?
13 A Yes.
14 MS. SIGURDSON: My lord, we do not have the affidavit of
15 translation. My friends may want to take care of that
16 at some point.
17 MR. GRANT: Yes, in fact I believe it was Mr. Victor Jim who
18 swore it, for the record, and I had anticipated having
19 the affidavit ready this morning but this other search
20 precluded that.
21 THE COURT: Fine.
22 MS. SIGURDSON: Do you have a copy of the affidavit, Mr.
23 Holland?
24 Q Mr. David, in paragraph 31 of your affidavit -- pardon
25 me, paragraph 32 -- you say that the affidavit of
26 Elizabeth Jack sworn on July 18th, 1988 was read to
27 you; is that true?
28 A Yes, I heard it.
29 Q Well, I am a little confused. I am not sure on the
30 13th of July you could have an affidavit six days
31 later read to you, did you see Mrs. Jack's affidavit
32 read to you?
33 A I don't know how it came about but I do know I put my
34 mark, an X, on there.
35 MR. GRANT: I am not sure if my friend wants some clarification
36 from -- if she wants to examine the witness on it, I
37 don't want to interfere, but if she wants
38 clarification I probably can provide it.
39 MS. SIGURDSON: I don't think the Mr. David can assist the
40 court. It's our position that I don't know what was
41 read to Mr. David from the affidavit.
42 THE COURT: Elizabeth Jack has sworn a territorial affidavit.
43 MR. GRANT: Yes, Elizabeth Jack's affidavit is Exhibit 666 in
44 fact. And I wasn't the lawyer swearing. My
45 instructions are that the affidavit of Elizabeth Jack
46 subsequently sworn on July 19, 1988 was subsequently
47 read to this witness, those are my instructions, and I

1 wasn't present. It was apparently prepared and read
2 for her to sign and anticipated, as you can see from
3 the correction, that she would have sworn it before.
4 She wasn't available.
5 THE COURT: Well --
6 MR. GRANT: So it is the affidavit, Exhibit 666.
7 THE COURT: I would think the way it stands I would have to
8 disregard that sentence of this affidavit but that's
9 as far as it would take us.
10 MS. SIGURDSON:
11 Q Mr. David, did you swear this affidavit in Moricetown?
12 A Yes, I signed it in my house in Moricetown.
13 Q Who brought the affidavit to you?
14 A I forgot the person's name.
15 Q The lawyers name was Ms. Meldrum, is that one of the
16 people?
17 A Yes, it was a woman.
18 Q And the translator, Victor Jim?
19 A Yes, it was Victor, he was the one that translated for
20 me.
21 Q Did Marvin George come?
22 A Yes, him also.
23 Q Leonard George?
24 A No.
25 Q Alfred Joseph?
26 A They come to my place and talked to me.
27 Q And that is at the time that you signed your
28 affidavit?
29 A It was that woman and another person, that is when --
30 were there when I signed this with an X.
31 Q Were they the only two people that were there when you
32 signed your affidavit?
33 A The last time they brought these before me, they were
34 the only ones.
35 THE COURT: I am sorry, the two were just a woman and --
36 MR. GRANT: Another person. The witness already described
37 Victor Jim, he was asked by Victor Jim and Marvin
38 George.
39 THE COURT: I got those names.
40 MR. GRANT: I should advise the court, the witness was examined
41 on his commission all the time and there were many
42 people that came back and forth.
43 MS. SIGURDSON:
44 Q When the affidavit was brought to you, Mr. David, was
45 Richard Overstall there?
46 A He may have been there but I can't recognize faces.
47 Sometimes I forget easy.

1 Q In paragraph 31 of your affidavit, you say that you do
2 not know all of the English names, directions or
3 mileages which appear in brackets after the
4 Wet'suwet'en names in this affidavit; is that true?
5 A Yes, that's right, I can't see the writing on the
6 paper.
7 Q Those names, directions and mileages were placed in
8 the affidavit on your lawyer's advice and with the
9 assistance of Marvin George?
10 A Yes, they are the ones -- yes, they are the ones that
11 put it on paper under my directions and them are my
12 words.
13 Q I see. Well, let me go back to this then. In your
14 affidavit you say: "I do not know all the English
15 names, directions and mileages..."; is that true?
16 MR. GRANT: Well, read the whole sentence.
17 MS. SIGURDSON: "...which appear in brackets after the
18 Wet'suwet'en names in this affidavit."
19 A Yes, this is right.
20 Q So you do not know -- so you had to get the
21 information or someone else had to provide the
22 information for some of the mileages and English names
23 and directions, is that true?
24 A I was told about the miles and the English names but
25 what I have on this paper here is what I knew and I
26 cannot change that.
27 Q In your affidavit, there are many references to miles
28 and distance; how did you know that those were true,
29 did someone tell you that those were true?
30 A Yes, I told them the place names and landmarks and
31 they in turn told me the miles, approximate miles. I
32 told them about the landmarks where I had been on the
33 territory.
34 Q Did someone explain to you that this affidavit
35 corresponded with what you had told them about the
36 landmarks and the place names?
37 A I instructed them and informed them of the landmarks
38 and they plotted that on the paper, under my
39 instructions, and then further to that I had been up
40 in a helicopter and I also gave them instructions as
41 to landmarks.
42 Q When were you on a helicopter, please?
43 A I don't know. I forget what year it was.
44 Q When you say they plotted your words on paper, was
45 that on a map?
46 A It was -- all my words were put on this paper.
47 MR. GRANT: Indicating the affidavit.

1 THE COURT: Yes.
2 MS. SIGURDSON:
3 Q All your words were put on this paper so there was no
4 map?
5 A I spoke the truth when I put my -- I instructed them
6 on this and I did not lie about it when these words
7 were put down and they also compared it with maps that
8 they had.
9 Q When you say they compared, is that Marvin George?
10 A Yes, those people that make maps are the ones that
11 done that.
12 Q Can you read maps, Mr. David?
13 A No. I can't read it when I can't see it.
14 Q I would like to change the subject now. Mr. David,
15 you are a chief in the house of Hagwilnegh?
16 A Yes. We are as one.
17 Q You are a member of the Laksilyu or Small Frog Clan?
18 A Yes, Laksilyu.
19 Q And there are two other houses in the Laksilyu clan;
20 is that right?
21 A Yes, there is two other ones.
22 Q And those are Wah tah Kwets and Wah tah K'eght?
23 A Yes, they are in different houses.
24 Q And each house of the Laksilyu clan has its own
25 territories?
26 MR. GRANT: Just a moment. If my friend is only introducing --
27 I am not going to press it, but this was canvassed on
28 commission, the house membership, he was examined on
29 direct as to the territories, the Laksilyu clan and
30 other areas.
31 MS. SIGURDSON: It is just by way of introduction.
32 THE COURT: All right.
33 MS. SIGURDSON:
34 Q I am sorry, Mr. David, I missed your answer, is it
35 true that each house of the Laksilyu clan has its own
36 territory?
37 A Yes, they all have -- each house has separate
38 territories and those members that come from each
39 house, they all live together or live under this one
40 house.
41 Q I am afraid I didn't understand that. Do all members
42 of the clan live in one house or does each house of
43 the clan have a separate house?
44 A All the members of one house live under one house.
45 Q In your affidavit, in section C., you describe the
46 territory of Keel Weniits? That's at page six, my
47 lord.

1 THE INTERPRETER: What was that question again?
2 MS. SIGURDSON:
3 Q In your affidavit you describe the territory of Keel
4 Weniits, at section C., page six.
5 A Yes. I talked on this territory as it belongs to us
6 as a company, but at this time I am the only one alive
7 so I spoke on this myself.
8 Q What company is that, please?
9 A It's my company, my clan, and referring to the clans,
10 also your company, it's your clan.
11 Q Who decides who uses the Keel Weniits territory?
12 A Whoever is the head of or boss of that clan gives
13 approval and then he may go along with him when they
14 go out hunting.
15 MS. SIGURDSON: I would like to pass up an extract of the
16 commission.
17 Q Did you get the territory at Keel Weniits when you got
18 the name Maxlaxlex?
19 A Traditionally, the way it was a long time ago, this
20 territory belongs to me and when the previous
21 Maxlaxlex passed on, that is when I received this
22 name. And that's the way it always has been in the
23 past.
24 Q So, am I correct to say that the territory at Keel
25 Weniits is the territory of Maxlaxlex of the House of
26 Hagwilnegh?
27 A It's a long time ago, Hagwilnegh and them were as a
28 company, took care of that territory. And then I am
29 a -- I am a caretaker and I look after it now as a
30 successor to the deceased people.
31 Q As you are a caretaker of that territory, does that
32 mean that other houses are not caretakers of that
33 territory?
34 A No, at this time I am just like a boss in that
35 territory when I look after it. Because all the other
36 caretakers have passed on.
37 Q Who will take the territory after you, Mr. David?
38 A If I should pass on, there is a designated successor,
39 now who is Pat Namox. He will be looking after that
40 area after I pass on.
41 And referring to your translator, you and Pat
42 Namox, you as supporter will be talking about my
43 passing, will take care of business when I pass on.
44 Q Pat Namox is the brother of John Namox?
45 A Yes.
46 Q And John Namox is the head chief of Wah tah Kwets?
47 A Yes, that's right.

1 Q And Pat Namox is also a member of the House of Wah tah
2 Kwets?
3 A He belongs in that house with John Namox but he, as a
4 successor to me, will look after Keel Weniits.
5 Q I suggest to you that the territory around McDonell
6 Lake and Dennis Lake is owned by the House of Wah tah
7 Kwets, do you agree?
8 A From McDonell Lake on down the other way, belongs to a
9 person by the name of Big John from Gitsegukla, and
10 from there to Beaver Creek is where Wah tah Kwets
11 holds that territory. There is only one creek called
12 Beaver Creek. And that's where John Namox is.
13 Q What is the name of that creek, please?
14 THE COURT: I think he said Beaver Creek.
15 MS. SIGURDSON: Beaver Creek?
16 Q You say John Namox only owns the area of the creek
17 itself?
18 A Yes, he owns the area around the creek and there is a
19 mountain range on there that belongs to Gitsegukla
20 people, it's called Lagh Logh. That area from the
21 mountain Lagh Logh belongs to the Gitksan people and
22 from this side, the area this side of the mountain
23 belongs to us. And that creek where they trap beaver,
24 that belongs to Wah tah Kwets.
25 Q Mr. David, who owns Dennis lake?
26 MR. GRANT: My lord, sometime ago my friend indicated she was
27 introducing -- this evidence was canvassed with this
28 witness on direct on October 17, 18 and 19th of 1985.
29 It went on for several pages and then he was
30 cross-examined.
31 THE COURT: Is Dennis Lake mentioned in the affidavit?
32 MR. GRANT: I am sorry, is Dennis Lake mentioned in the
33 affidavit?
34 MS. SIGURDSON: Yes.
35 MR. GRANT: Yes, Dennis Lake is one of the places mentioned in
36 the affidavit.
37 THE COURT: I am not going to stop Miss Sigurdson. A new
38 context could arise by reason of the affidavit. If it
39 becomes totally repetition, I will be glad to hear
40 from you again.
41 MS. SIGURDSON: I trust it won't, my lord. I should point out
42 when we cross-examined, and Mr. Grant examined Mr.
43 David, we had no internal boundaries map. Anything
44 beyond that is in context.
45 Q Mr. David, who owns Dennis Lake?
46 A It belongs to the Keel Weniits people. That belongs
47 to us.

1 Q Does it belong to Maxlaxlex or Wah tah Kwets?
2 A It belongs to Maxlaxlex and company.
3 Q I would like to take this time to mark these excerpts
4 from the affidavit of John Namox, Wah tah Kwets, and a
5 map. One of the maps attached to it.
6 THE COURT: What is this map, please?
7 MS. SIGURDSON: This is one of the maps attached to the
8 affidavit of John Namox or interrogatories of John
9 Namox, also known as Wah tah Kwets. The affidavit
10 attached to the interrogatories was sworn July 31st,
11 1986 and I have passed up the affidavit as well as
12 questions 58, 59-C, 62 and 63. And that is because
13 with this set of interrogatories the map was referred
14 to in question 63.
15 THE COURT: I have been given two copies. You're tendering this
16 as an original exhibit at the trial?
17 THE REGISTRAR: 828, my lord.
18 MR. GRANT: No objection.
19 THE COURT: All right. The affidavit and response, looks like
20 58, 59-C, 62 and 63, will be 828 and the map will be
21 828-A.
22
23 (EXHIBIT 828: INTERROGATORIES AND AFFIDAVIT OF JOHN
24 NAMOX DATED JULY 31, 1986)
25
26 (EXHIBIT 828-A: MAP)
27
28 MS. SIGURDSON: Thank you, my lord. Yes, my lord, Mr. Mackenzie
29 just pointed out there were two maps filed with Mr.
30 Namox's affidavit or interrogatory responses and the
31 label on the copy I have tendered says part two of two
32 maps. Perhaps that could be identified.
33 THE COURT: All right. This is part two of two maps. Shall I
34 look at the map?
35 MS. SIGURDSON: No, my lord, it's not necessary.
36 THE COURT: All right.
37 MS. SIGURDSON:
38 Q Mr. David, you say you have spoken to Alfred Joseph
39 about the Keel Weniits territory?
40 A Yes.
41 Q On Tuesday, November 29th, we received copies of notes
42 of some of your conversations with Mr. Joseph. And I
43 have passed to his lordship and to Mr. Interpreter an
44 interview dated June 15, 1983. On page four of the
45 notes, about halfway down, Mr. Joseph apparently asked
46 the question: "Did you go up the Telkwa River?" And
47 the response in the notes is "Telkwa River is my clan

1 territory." Was that true?
2 A Yes.
3 Q And then Mr. Joseph asked: "I have been told that
4 C'enduu Yeez Kwe..." and I suggest that's Pine Creek,
5 which is referred to in the affidavit, my lord, the
6 first creek listed. I will start that again. "I have
7 been told that C'enduu Yeez Kwe is the boundary, is
8 that correct?" And could you translate that, Mr.
9 Holland?
10 A C'enduu Yeez Kwe to Blue Lake is the territory that
11 Mabel Sam, Khay Lah, their territory. And also
12 Maxlaxlex, the name that I hold, the previous
13 Maxlaxlex also used that territory.
14 Q Your answer to Mr. Joseph, as noted here, was "farther
15 down river, two miles towards Telkwa is the boundary
16 then up towards Hudson's Bay it runs to Four Mile
17 Creek. If I am there I can tell you more. I can't
18 tell you too much on the map." Did you say that to
19 Mr. Joseph?
20 A What I know of the old traditional boundary line was
21 about a mile or two miles down river, that was the old
22 traditional boundary line.
23 Q Is that still the boundary line?
24 A The line is still there, to this day, as it has been
25 in the past and we can not change that line. That
26 line goes up to the foot of the hill on the ski jump
27 area. On the other side of that belongs to Big
28 Seymour.
29 Q Weren't you telling --
30 MR. GRANT: Excuse me, I wonder if the witness was finished?
31 MS. SIGURDSON:
32 Q Weren't you telling Mr. Joseph that the boundary was
33 two miles east from Pine Creek, towards Telkwa?
34 A Yes, it's further down river a bit.
35 Q Down the Telkwa River?
36 A Yes, it's a little further down the Telkwa River.
37 THE COURT: Down from where?
38 MS. SIGURDSON: Telkwa River, I suppose, is east-west flowing,
39 west of Telkwa, Pine Creek --
40 THE COURT: Doesn't the Telkwa River originate in the Telkwa
41 Range, or does it?
42 MS. SIGURDSON: Yes.
43 THE COURT: It flows from east to west.
44 MS. SIGURDSON: West to east -- sorry into the Bulkley. Pine
45 Creek flows south, I assume, into the Telkwa.
46 Q So if the boundary is east of Pine Creek, it is
47 incorrect to say that the boundary is at Pine Creek?

1 A The boundary is just a little further down from
2 C'enduu Yeez Kwe.
3 Q Down from Pine Creek?
4 A Yes, it's a little ways down. That's the way Old Sam
5 related to it a long time ago, the person that held
6 the name Maxlaxlex.
7 Q Do you wish to change your affidavit then in paragraph
8 19 you say the boundary then runs north along the west
9 bank of Pine Creek, you say now that the boundary is
10 not there?
11 A What's going to happen if I change it?
12 Q I am just wondering where you say the boundary is.
13 MR. GRANT: Reasonable question.
14 MS. SIGURDSON:
15 Q Perhaps I can ask you this: Where do you say the
16 boundary is, do you say the boundary is not on Pine
17 Creek but is closer to Telkwa?
18 A They use Pine Creek as a boundary line these days but
19 the traditional boundary line is just a bit down
20 river, a long time ago. A long time ago that peak
21 wasn't the boundary, there is a place called Four Mile
22 Hill up and Old Sam, long time ago, told me not to go
23 beyond that and because I trapped in there a long time
24 ago is when he told me that. And that's where the
25 line goes.
26 Q Thank you, Mr. David. Do you know Miller Creek?
27 A Willow creek?
28 Q Miller, M-I-L-L-E-R.
29 A No.
30 THE COURT: Where do you say it is?
31 MR. GRANT: It's referred to in the affidavit.
32 MS. SIGURDSON: No, it's a creek that flows south into Pine
33 Creek, just east of Aldrich Lake. If Mr. David
34 doesn't know, that's fine. I won't pursue that.
35 A Long time ago there was a white man standing on the
36 shore of a creek and that's who they named it after.
37 That's where you got that name from.
38 Q I would like to change the subject now.
39 THE COURT: Well, I think, Miss Sigurdson, if that's the case,
40 perhaps we should take the morning adjournment.
41
42 (PROCEEDINGS ADJOURNED AND RESUMED FOLLOWING RECESS)
43
44 THE COURT: Mr. Grant?
45 MR. GRANT: Yes, my lord. I requested my friend, Miss
46 Sigurdson, how long she will be. The witness -- I
47 would recommend, if there is no problem with your

1 schedule, if we can go a little longer, I find it with
2 this witness after lunch he gets very, very tired.
3 But he indicates to the interpreter that he wishes to
4 finish today.
5 THE COURT: I am with him on that one.
6 MR. GRANT: And, of course, you appreciate that if he is
7 finished today, that we didn't have a witness
8 scheduled for tomorrow.
9 THE COURT: Can we safely tell Judge Singh that he will probably
10 be able to use this courtroom tomorrow?
11 MR. GRANT: It's more in my friend's hands, Ms. Koenigsberg has
12 been demure about this.
13 THE COURT: She is always demure.
14 MS. KOENIGSBERG: Probably a first, my lord.
15 MR. GRANT: I don't know, she indicates she may not cross-
16 examine him. So it's really in Ms. Sigurdson's hands.
17 MS. SIGURDSON: I will do the best I can.
18 Before I carry on, I would like to tender the notes
19 of the interview of Johnny David as the next exhibit.
20 MR. GRANT: Of course, the witness hasn't identified them. We
21 have provided the notes, but they are notes, they are
22 a summary. I don't know what else can be said about
23 them.
24 THE COURT: Well, they -- are they not disclosed by you as a
25 document being what they purport to be?
26 MR. GRANT: A summary of an interview.
27 THE COURT: Yes. Summary of an interview.
28 MR. GRANT: A summary of an interview. Summary notes made by
29 Mr. Joseph of this interview.
30 THE COURT: I think they can be admitted as a summary of an
31 interview, except to the extent that the witness may
32 adopt them or otherwise as being more than that.
33 MS. SIGURDSON: This is the first I have heard that it's a
34 summary. I thought it was a transcript by the text.
35 If there is another source of information going along
36 with this, we would love to see it.
37 MR. GRANT: When I say summary, it says summary right on the top
38 of the first page. It's not necessarily a word for
39 word transcription of every word that was said.
40 THE COURT: I am sure it's not. Like the sort of thing the
41 police officer produces after he has conducted a six
42 hour interview and then he produces a four page
43 sentence. They never say that the accused didn't do
44 it.
45
46 (EXHIBIT 829: SUMMARY OF NOTES OF INTERVIEW)
47

1 MS. SIGURDSON:
2 Q Mr. David, your father held the chief's name
3 Smogelgem?
4 A Yes.
5 Q And that is the name of a Laksamshu or Fireweed Clan?
6 A Yes, he was a real Laksamshu, he was a head man.
7 Q You talked about the territory of Smogelgem at Perow
8 during your commission, do you recall that?
9 A Yes, I know.
10 Q And you explained that your father wanted you to stay
11 on the land?
12 A Yes, I said that.
13 Q And the land you were referring to was the territory
14 of Smogelgem?
15 A Yes, that was Smogelgem's territory.
16 Q Your father wanted you to stay on the territory
17 because you had helped him more than other relatives
18 and house members?
19 A Yes, that's right.
20 Q Then when your father died you paid for his burial and
21 the headstone?
22 A Yes, that's right. It's a long time ago, the way the
23 law was, is that if the children bury or pay for the
24 headstone, and I was the one that spent all the money
25 for the headstone, right to this day them stones are
26 still standing up in Hagwilget.
27 Q And that is what you said. You carried on to say,
28 "Since no one had helped me to pay for the expenses
29 the land became mine according to our old laws."
30 That's volume four, page 545, my lord.
31 A At that time, his brother, McKenzie, is the one that I
32 gave the money to and he paid for the fencing around
33 the grave but the gravestone I paid for myself.
34 Q You said that the land became yours according to your
35 old laws, is the land still yours according to the old
36 laws?
37 A According to old laws, it was -- I was the caretaker
38 and that also is called Neg'edeld'es.
39 Q You were caretaker for the territory you described on
40 the commission. Who will take the land after you?
41 A Yes, after I pass on, it will go back but when my son
42 was alive he took care of the place when I was too
43 weak to go out there and also Peter David, his son,
44 went out with him.
45 MR. GRANT: My lord, it's obvious in the commission evidence,
46 just for your lordship's information, when he refers
47 to his son he is referring to Moses David and Peter

1 David is Moses David's son. That's in evidence.
2 THE COURT: All right.
3 MS. SIGURDSON: Thank you.
4 Q And Moses is of the Gilseyhu clan?
5 A Yes.
6 Q And your grandson Peter is Gitdumden?
7 A Yes, Gitdumden.
8 Q I would like to go back, you said after you pass on
9 the land will go back; who will the land go back to?
10 A What I know, according to old laws, that it goes back
11 to whoever, referring to as the straight man. It does
12 not go back to anybody that is crooked.
13 Q Who will be the straight man who will take over your
14 territory?
15 A It will go back to whoever the person that lives right
16 and whoever is successor to the name will get that
17 territory.
18 Q Successor to what name, please?
19 A Also whoever is taking care of that territory, will
20 also use things that they take out of the territory in
21 the potlatch system.
22 Q You said the land will go back to whoever is the
23 successor, did you mean the successor to a chief's
24 name?
25 A It will go back to the Laksamshu. But if I am still
26 able to, this summer, there are four candidates and I
27 know which one of the four candidates I am going to
28 pick out and whom I will put in as a successor.
29 Q I see. So you choose the successor to the chief in
30 Laksamshu?
31 A Yes, I will speak to who the successor is going to be
32 amongst the Laksamshu people.
33 Q Can you tell us the candidates?
34 A I will speak about this at a feast. I know the person
35 that I am going to pick but I cannot name him here.
36 It is not in the feast hall. His name will be
37 mentioned and I will talk about him when there is a
38 gathering in the feast hall.
39 Q Leonard George wants the trapping area, does he not?
40 A According to old laws, whoever is successor to that
41 territory they together will go out there and utilize
42 the territory.
43 Q Leonard George holds the chief's name Smogelgem now?
44 A Leonard George is Smogelgem and also I don't agree
45 with him taking the territory, but he can utilize it,
46 but there is also one other person who has a wife that
47 can use the territory is Andrew George. Leonard

1 George advised me that he is involved in another sort
2 of work so he would be unable to go out there and they
3 have been talking about it amongst themselves and that
4 is why he designated his brother, Andy, Andy George,
5 to utilize this territory. And they are going to talk
6 on this further, later on, like we are talking here in
7 court.
8 Q Okay. You registered a trapline in the Perow area,
9 did you not?
10 A Yes, you already know about that.
11 Q You registered the line in 1928?
12 A I don't know what year, what day it was registered,
13 came into existence, and a person by the name of
14 Fairburn is the one that gave me papers that time.
15 Q That's right, when you first registered the trapline
16 you showed game warden Fairburn the boundaries of
17 Smogelgem's territory; is that right?
18 A I was the one that instructed him about the territory
19 and the boundaries, that's when he gave me the papers
20 and I have been on that territory for 75 years. I
21 told him.
22 Q I am instructed that in 1935 --
23 MR. GRANT: Just a moment. My lord, I have to object to this.
24 This was canvassed in fact starting at volume six,
25 February 24th and 25th, in cross-examination by Mr.
26 Milne, who was the agent for the provincial defendant,
27 and they were asked about having a licensed trapline
28 and he said yes and he describes about six and then
29 they go on for a number of pages, about five pages
30 about his traplines, about the traplines registered to
31 the government. If my friend is concerned about the
32 applications for the registration of the Johnny David
33 or of those traplines, that is documents that were
34 filed in the appeal, I am -- I have got no difficulty
35 with advising that we would take the position we have
36 taken with a number of other trapline registrations
37 and we would admit those for authenticity. They have
38 examined -- they had the documents, they examined Mr.
39 David on those documents, and I think that we are
40 going into an area that is double cross-examination in
41 the same case. And I think it's unfair.
42 THE COURT: That has a pejorative connotation.
43 MR. GRANT: What else could I say? In fact they are covering
44 the same area, not what I led, but that they cross-
45 examined on.
46 THE COURT: Why do you have to go over it again, Miss Sigurdson?
47 MS. SIGURDSON: I am laying background for a series of questions

1 for information we didn't know until we got the
2 affidavit. We also got received that information two
3 weeks ago, some transcripts of some hearings.
4 THE COURT: If you can assure me and your friend that you're not
5 "double-crossing", you can go ahead. But I think
6 economy is a highly desirable commodity today and I
7 hope you will be as brief as you can.
8 MS. SIGURDSON: Yes, I will. And I thank my friend for the
9 offer to admit the trapline documents for
10 authenticity. I don't have them with me but I will
11 tender them at a later date.
12 MR. GRANT: These are the applications, my friends know what our
13 position has been on that.
14 THE COURT: All right.
15 MS. SIGURDSON:
16 Q I am instructed that in 1935, or thereabouts, the
17 boundaries of your registered trapline were changed;
18 is that correct?
19 THE COURT: I am sorry, I think it's 1935.
20 A 1935. No, I didn't know about that.
21 MS. SIGURDSON:
22 Q You do not agree that the way the trapline
23 registration boundaries are now are correct; is that
24 correct?
25 A The trapline registries that are put in place today
26 are not right but the one that Andy Fairburn made was
27 right one.
28 Q And you went to the games or the government people,
29 conservation officer, because you wanted the
30 boundaries on your registered trapline changed?
31 A The original boundaries that were put in place is the
32 territory that I hold. I never asked them to change
33 it at all.
34 Q Did you not make an application under the Wildlife Act
35 to have your trapline boundaries amended?
36 A I have been into the wildlife or game warden's office
37 many times. I never mentioned that to them. The only
38 one that I talked about was the Telkwa River area
39 where there was going to be change in registered
40 owners.
41 Q Do you recall a hearing before Mr. Turner on January
42 26th, 1982?
43 A I can't remember at this time.
44 Q Well, let me see if I can refresh your memory. My
45 understanding is there was a hearing before Doug
46 Turner and Mr. Grant was there?
47 A Was that involving Pete Baggerman?

Q Yes.
A Yes, I remember that.
Q And in that hearing, you said Peter Baggerman, his trapline registration was in your territory?
A Yes. At that time there was a game warden by the name of -- he calls him Chuck -- Mr. Cox, he took sides with Baggerman and they -- he took sides with Baggerman and they went against me that time.
Q And what you had asked them to do was to change the boundaries on your registered trapline so that it included all the territory of your father?
A I didn't ask them to change boundaries, but I asked them to include the old traditional Smogelgem territory along Swan Lake.
Q And at that hearing you gave evidence?
A Yes, at that time I was in the same spot here.
Q And Mabel Critch gave evidence?
A No, she didn't speak to it. I was alone that time.

MS. SIGURDSON: Well, my lord, I don't need to pursue that but for the sake of time, perhaps Mr. Grant, as counsel, can confirm that Johnny David gave evidence, Mabel Critch, Doug Tait, Richard Overstall, Rita George appeared at that hearing.

MR. GRANT: Well, I think the witness is confused. Actually there was an appeal to the County Court. I don't recall if Mabel Critch gave evidence here, but certainly he gave evidence at the trial de nova appeal, my lord. But I am prepared to admit that Thomas Tait, Richard Overstall, Johnny David, Mabel Critch, Rita George, Moses David, now deceased, Mary Joseph, gave evidence at that hearing.

THE COURT: Thank you.

MR. GRANT: Yes, my friend said Doug Tait. Doug Tait did not give evidence.

MS. SIGURDSON: Pardon me. Thomas Tait.

Q And you appealed the decision before His Honour Judge Cowan, do you recall that?
A Yes.
Q You described the boundary of Smogelgem's territory to Mr. Turner at the hearing, did you not?
A Yes.
Q Did you describe the same boundary at the appeal before Mr. -- sorry, His Honour Judge Cowan?
A Yes, I told him the same thing at that time, I didn't tell him anything different.
Q And did you describe the same boundary as Smogelgem's territory at your commission?

1 A Yes, I spoke on the same boundary line.
2 MS. SIGURDSON: My lord, I would like to pass up a government
3 map. I don't want to tender it as an exhibit. We
4 don't have a map for 9B for the Wet'suwet'en territory
5 but it may be of some assistance for you to follow.
6 THE COURT: Thank you.
7 MS. SIGURDSON: My lord, I have highlighted in yellow some of
8 the places that will be referred to.
9 Q In your commission, Mr. David, you said that you were
10 going to describe the traditional boundary and the
11 landmarks and where you started was from China Nose
12 and I believe that's mountain, is that correct, is
13 that the -- is that on the boundary of Smogelgem's
14 territory?
15 A That is where the boundary would start. If there
16 is -- my mind is just like a map and that is how we
17 went about it. Sometimes there may be some
18 discrepancy in maps but my mind is one that I use for
19 a map and that is accurate.
20 MS. SIGURDSON: Does your lordship have China Nose Mountain?
21 THE COURT: Yes, thank you.
22 MS. SIGURDSON:
23 Q On the east side of the territory is McKilligan Lake;
24 is that correct?
25 A Yes.
26 Q McKilligan Lake I understand is at the end of
27 McKilligan Creek, not shown on the 1:250,000 map.
28 THE COURT: It's east of China Nose Mountain?
29 MS. SIGURDSON: It's west of China Nose Mountain. Just south of
30 Nacolt.
31 Q Do you still say that Smogelgem claims China Nose
32 Mountain and McKilligan Lake?
33 A The line goes along there, along China Nose Mountain,
34 Tsee Zuul.
35 Q And that is a line between Smogelgem and another
36 house?
37 A On the outside of the boundary are two different areas
38 that belong to somebody else and one belonging to --
39 one belonging to Namox and then there is a lake there
40 called Deet'sinegh, which belongs to Moose Skin
41 Johnny. The white people call it Hatter Lake.
42 Q Pardon me?
43 A Hatter Lake. There was a person by the name of Jim
44 Hatter took up land and every time the white man
45 stands on a piece of land, they take that land and
46 name it after him.
47 Q Does Smogelgem still claim McKilligan lake?

1 A Does not belong to him, it's just a little ways after.
2 Q Smogelgem's boundary is just to the east of McKilligan
3 Lake?
4 A Yes. It goes up from there.
5 Q The area between China Nose Mountain and McKilligan
6 Lake belongs to Smogelgem, not to Hagwilnegh; is that
7 correct?
8 A Yes, belongs to Smogelgem.
9 Q I refer your lordship to section B of Mr. David's
10 affidavit, page four. But will not -- at this time I
11 will not pursue that with the witness. I'd like to go
12 to a new topic now, Mr. David.
13 Do you recall telling people when you were being
14 commissioned that you had pre-empted land in the
15 Bulkley River area?
16 A Yes, there is a creek there that's named after me
17 also.
18 Q Johnny David Creek?
19 A John Creek.
20 Q And you said that that land you pre-empted was in your
21 father's territory; is that correct?
22 A Yes.
23 Q Is it still in Smogelgem's territory?
24 A Yes, it was right on the corner of Smogelgem's
25 territory.
26 Q It is -- my lord, the lot Mr. David pre-empted was lot
27 3327.
28 MR. GRANT: This has all been exhibited in the commission
29 evidence. The pre-emption documents were put to the
30 witness and where it was located. I object to further
31 questioning on it.
32 MS. SIGURDSON: My lord, I have a point that arises out of the
33 affidavit.
34 THE COURT: All right.
35 MS. SIGURDSON:
36 Q I suggest to you that that land was not in Smogelgem's
37 territory was Goohlaht territory, do you agree with
38 that?
39 A It was within K'hay Lah's territory.
40 Q Could you repeat that? I didn't hear.
41 A It was within K'hay Lah's territory.
42 Q That name is now held by Mabel Critch?
43 A Yes, it was Mabel Sam.
44 Q She is a chief in the House of Hagwilnegh?
45 A Yes. She is one of the chiefs, K'hay Lah, and it was
46 within her territory.
47 Q So that you do not agree that the land you pre-empted

1 was in Goohlaht's territory?
2 A No, no, I don't -- it was quite far away from there.
3 How did you get this, come about this name? I would
4 like to know who put that name on, Goohlaht.
5 MS. SIGURDSON: I don't think I can help you with that question,
6 Mr. David.
7 A If you don't know, I don't know either.
8 THE COURT: I don't either.
9 A If somebody questions some of the questions that you
10 are asking with regard to that are not always right
11 and things you write down are not always right and
12 even your maps aren't always right because when we
13 were on the territory we used our minds as maps and
14 they are quite accurate.
15 MS. SIGURDSON: Those are all my questions. Thank you, Mr.
16 David.
17 MS. KOENIGSBERG: I have no questions.
18 THE COURT: Mr. Grant?
19 MR. GRANT: My lord, I just need, I won't have very much to
20 cover. I wonder if I could have a moment with Mr.
21 Rush. It won't be very long.
22 THE COURT: Excuse me, can we tell Judge Singh that he can have
23 this courtroom tomorrow?
24 MR. GRANT: Yes.
25
26 (PROCEEDINGS ADJOURNED AND RESUMED FOLLOWING RECESS)
27
28 THE COURT: Mr. Grant?
29
30 RE-EXAMINATION BY MR. GRANT:
31
32 MR. GRANT:
33 Q Mr. David, I just want to ask you a few questions
34 arising out of my friend's questions. On the day that
35 the woman lawyer, Ms. Meldrum --
36 THE COURT: He didn't say it was Ms. Meldrum. It was suggested
37 to him but he he said he didn't know.
38 MR. GRANT:
39 Q The day that the woman lawyer came to your house to
40 sign the affidavit with Victor Jim who translated, do
41 you remember one other affidavit being read to you
42 besides yours?
43 A Yes, I remember that.
44 Q Do you know a woman named Elizabeth Jack?
45 A Yes, I know her.
46 Q Was it her affidavit which was read to you?
47 A Yes.

1 Q You mentioned about the -- your father, when your
2 father died and you said that -- my note was McKenzie
3 took the land. What was McKenzie's chief's name?
4 A My father was Smogelgem and he was also Dyee, and when
5 he passed on he took the name Smogelgem.
6 Q Now --
7 THE COURT: I am sorry, I don't understand that.
8 MR. GRANT: When he --
9 THE COURT: McKenzie became Smogelgem?
10 MR. GRANT:
11 Q You said he took the name Smogelgem, who took the name
12 Smogelgem?
13 A His brother, McKenzie. The older brother McKenzie
14 took the name Smogelgem.
15 Q You were asked by Ms. Sigurdson about Pine Creek, if
16 if I am on the side of Pine Creek, furthest away from
17 Telkwa, on that land, upstream from Telkwa, whose
18 territory am I standing on?
19 A The way it would be is that I would be standing in
20 Goohlaht's territory and the creek belongs to K'hay
21 Lah.
22 THE COURT: I haven't a spelling for that.
23 MR. GRANT: For K'hay Lah?
24 THE COURT: Yes.
25 THE TRANSLATOR: G-'-H-A-Y, L-A-Y.
26 THE COURT: Thank you.
27 A Yes, the Telkwa, up the Telkwa River area belongs to
28 G'hay Lay.
29 MR. GRANT:
30 Q If I cross over Pine Creek and I am still on the north
31 side of the Telkwa River but I cross over Pine Creek
32 towards Telkwa or downstream, whose territory am I on?
33 MS. SIGURDSON: Excuse me, Mr. Holland. I object to this
34 question. I say this is the exactly the subject
35 matter of the examination in chief, the equivalent
36 here, which is the affidavit.
37 THE COURT: Is this covered in the affidavit?
38 MR. GRANT: Pine Creek is referred to in the affidavit on page
39 eight and it's referred to as a boundary in paragraph
40 19, but the first question, the first question, yes,
41 may have -- my friend may have -- didn't raise an
42 objection but didn't then, because it was at the area
43 upstream. I am now asking him about the area
44 upstream, that is if you cross over Pine Creek, which
45 is not, in my recollection, described in this
46 affidavit.
47 THE COURT: I think before Mr. Holland forgets the answer, I

1 should take the answer, subject to objection.
2 A If I was standing downstream towards Telkwa, I would
3 be in our own territory.
4 THE COURT: Our own territory, what does he mean by that,
5 Smogelgem?
6 MR. GRANT:
7 Q Which territory, when he says "our own territory",
8 whose territory is he talking about?
9 A Old Sam also used to hold that territory, that's his
10 name that I hold now.
11 THE COURT: What name is that, please?
12 THE COURT: Does he mean Maxlaxlex?
13 A Maxlaxlex.
14 THE COURT: All right. I think I will reserve on your
15 objection. I think you can raise it in argument or
16 some other time. I don't think there is any profit in
17 pursuing it at this point.
18 MR. GRANT: I am not going to pursue it, that area.
19 Q You were asked about -- asked to describe announcing,
20 you will announce in the feast about candidates for
21 the territory, the Laksamshu territory, are you one of
22 the oldest living chiefs of the Wet'suwet'en?
23 A Yes.
24 Q And --
25 A Yes, I am -- when there is a very important
26 announcement to be made, it will be made at a feast,
27 and that's when I will speak. I will not speak here.
28 Q I am not going to ask you to speak about that
29 announcement, but do other Wet'suwet'en chiefs of
30 other houses and clans consult you when they are
31 choosing successors?
32 A Yes. Yes, when there is some major decisions to be
33 made, they come and consult me because I have
34 knowledge of many things in the past and they also
35 consult other elderly chiefs and when they -- when
36 they consult with them, and that is when the decisions
37 are made, and they don't just come out of the blue and
38 make decisions. It's much the same as here, somebody
39 doesn't just come in from outside and start talking
40 about business in here.
41 Q Who owns the territory, which chief or which house
42 owns the territory that surrounds the creek known or
43 the river known as Tsee Zuul Ts'anlii?
44 MS. SIGURDSON: I object, my lord. That's in the affidavit.
45 MR. GRANT: There is a reference to it in the affidavit and
46 the -- this is exactly the area she examined him on.
47 It also was described and he gave evidence of

1 McKilligan Lake in his -- and China Nose in his
2 commission. I will ask another question to lead into,
3 which I think is --
4 Q You were asked about whether Smogelgem owns the area
5 between McKilligan Lake and China Nose Mountain by Ms.
6 Sigurdson?
7 MS. SIGURDSON: I object. The owners are described in the
8 affidavit.
9 MR. GRANT: I haven't asked a question yet.
10 MS. SIGURDSON: You're right.
11 MR. GRANT:
12 Q When you gave your answer, you told her that it was
13 Smogelgem's today, were you talking about the trapline
14 or the traditional territory or both?
15 MS. SIGURDSON: I object, my lord. He has answered that. Well,
16 I wish my friend would point out the confusion or the
17 ambiguity in the cross-examination answer.
18 THE COURT: What do you say he answered to Ms. Sigurdson?
19 MS. SIGURDSON: I say that on a few occasions that he described
20 Smogelgem's traditional territory, the traditional
21 territory of his father.
22 MR. GRANT: The witness -- Ms. Sigurdson put to the witness
23 about this hearing about the Baggerman trapline, which
24 deals with this area, and about an appeal of the
25 registered trapline and questioned him extensively
26 about or questioned him -- I should't say
27 extensively -- but questioned him about the trapline
28 boundary being changed encompassing that area. She
29 then switched horses and said who owns around China
30 Nose and McKilligan Lake? And I am trying to clear up
31 whether the witness, when he answered that, whether he
32 was talking about the trapline or the traditional
33 territory, and I don't think my friend put that to the
34 witness, whether he was talking about the trapline or
35 traditional territory or both.
36 THE COURT: Well, I have this evidence about the game warden,
37 Mr. Cox, taking sides with Mr. Baggerman, and there
38 was evidence about who gave evidence and then there
39 was an appeal to Judge Cowan, and he said that he gave
40 the same description there as now. And then it seems
41 to me that the subject was changed, he was asked about
42 his commission where he described China Nose Mountain
43 and McKilligan Creek as a boundary and he said "they
44 are in my territory. McKilligan Lake is not mine, my
45 boundary is just east of McKilligan Lake" and we went
46 on from there.
47 MR. GRANT: He was asked if he described the same boundary in

1 his commission and he was cross-examined in his
2 commission about his trapline as well. And then
3 the -- this answer, standing on its face, it's
4 unclear, because he is asked about his traplines and
5 he gives the answers here about that and he is put
6 into the framework of the Cowan decision or the
7 Baggerman appeal, and his appeal of the Baggerman
8 line, that's what he is talking about. Then he says
9 "I am going to talk about your commission, I am going
10 to talk about your boundary." And he did talk about
11 it then. Then my friend says, does he still own --
12 Smogelgem own that territory? And leading into this
13 area you are talking about the traditional territory
14 or both. Because it's unclear on the evidence as we
15 have got it thusfar.
16 THE COURT: Ms. Sigurdson, is there any possibility in your
17 submission of there being any confusion about this,
18 that is whether he is talking about traditional
19 territories or traplines with particular reference to
20 this area between China Nose Creek and McKilligan
21 Lake?
22 MS. SIGURDSON: In my submission, there isn't, my lord. I asked
23 if he described the territory of Smogelgem to Mr.
24 Turner, if he described the traditional grounds, I --
25 in my submission, my recollection in looking at the
26 notes, I don't think there is an ambiguity.
27 THE COURT: Well, I think I have to take the coward's way out,
28 Miss Sigurdson, I think I have to hear the evidence,
29 subject to that objection, and upon reading the
30 transcript if it appears there is any ambiguity, and
31 then only then would I treat the re-examination as
32 being valid.
33 MR. GRANT: And of course you would take into account the
34 commission evidence.
35 THE COURT: I suppose I would have to read them both together.
36 MR. GRANT: Yes.
37 THE COURT: I think you better put the question again, Mr.
38 Grant.
39 MR. GRANT:
40 Q You were asked just a few moments ago here, by Ms.
41 Sigurdson, if Smogelgem still owns the territory
42 between McKilligan Lake and China Nose Mountain. And
43 you said that that was Smogelgem's territory. Were
44 you talking about Smogelgem's registered -- were you
45 talking about the registered trapline or the
46 traditional territory?
47 A What I was talking about is, as a child I travelled

with my father, hunted and trapped in there with my father to Smogelgem and his father and his father also trapped in that area and also it was a long time ago, it was Gilseyhu in there.

Q Which clan did your father's father belong to?

A He was of the Laksilyu clan. He was Gitumskanees, which in the Hazelton language means mountain man. Willie Sims is Gitumskanees.

Q By Hazelton language you mean Gitksan?

A It's in Gitksan language and Gitumskanees is mountain man.

THE COURT: Thank you. Mr. David, how old are you, please, sir?

A It's hard to say, I -- I may be over 90. Somewhere in there.

MR. GRANT: The evidence, my lord, at an earlier time when he was -- when he was -- he was born in 1896.

THE COURT: All right. Then I think he is entitled to be excused, as we all are.

All right. Then you will be ready to proceed in court on Monday at 10 o'clock?

MR. GRANT: That's correct, my lord.

THE COURT: Thank you.

MR. MACKENZIE: I have two motions which -- would your lordship like to continue with those after the luncheon break?

THE COURT: Whatever you say.

MR. GRANT: Just a moment. I am not dealing with all of them. Yes, that may be best.

THE COURT: All right. At, say, 2:30?

MR. GRANT: Fine.

THE COURT: Or do you want to be back sooner than that?

MR. GRANT: Makes no difference than that.

THE COURT: Will we be rushed this afternoon?

MR. GRANT: No.

THE COURT: All right. 2:30 then.

(PROCEEDINGS ADJOURNED FOR LUNCH AND RESUMED AT 2:30 P.M.)

THE COURT: You have a motion, Mr. Mackenzie?

MR. MACKENZIE: Yes, my lord.

My lord, this is an application for leave to reopen two cross-examinations which have been completed, the cross-examination of Thomas K. Morris, completed on Monday afternoon.

THE COURT: That's the 28th?

MR. MACKENZIE: Yes, my lord. Cross-examination of Mary Skin, completed Wednesday afternoon, the 30th, November 30th.

My lord, as a preliminary to getting into the substance and the reasons for the application, one of the alternatives we are going to suggest is that we send written questions to plaintiffs' counsel relating to the matters which have arisen. We would also apply for leave to cross-examine the two witnesses on the written answers, if necessary, if leave were granted.

The reason for this application, in summary, we have just had an opportunity to review carefully interview transcripts handed to us in court Tuesday morning, November 29. Six transcripts were provided, four -- and in the letter of enclosure, covering letter, four were said to relate to interviews with Johnny David in '83 and 1984. One was said to relate to David Green in 1981, the last was said to relate to Lucy Bazil in 1983. The interview transcripts have titles which reflect the description in the covering letter. And the -- one of the interviews was entitled "Interview with Johnny David, June 21, 1983." And it was so described in the covering letter. It consisted of 15 pages of handwritten notes which are not -- which are handwritten notes and have been photocopied. Unidentified in the letter and in the title are two other interviews which are contained in that transcript to which I just referred dealing with other people. At page 11 is an interview with Mr. Michell, M-I-C-H-E-L-L, Charlie, C-H-A-R-L-I-E, at Ootsa Lake. There is no separate date given for that interview. Appearing at -- Mr. Charlie's interview and the responses relate to territory in Mary Skin's affidavit, his answers appear to contradict the evidence in Mary Skin's affidavit. At page 13 is another interview with Thomas K. Morris dated June 23 at Tatalrose.

THE COURT: What year?

MR. MACKENZIE: There is no year given, my lord. And in Mr. Morris's interview, reference is made to the boundaries of the territory described in his affidavit, reference is made, in my submission, to a prior interview between Thomas Morris, Alfred Joseph and Leonard George, for which the province has not received a transcript. And reference is also made to a territory which will be the subject of Elizabeth Jack's cross-examination tomorrow. So that is not a subject of concern now. It should be said parenthetically that Elizabeth Jack was scheduled to be cross-examined on Tuesday.

So, my lord, our position is this: As we have said in court, as Mr. Goldie and as I have said in court to your lordship and to the plaintiffs, and in correspondence on several occasions, we can not complete or close the cross-examination of Wet'suwet'en witnesses upon whose testimony and affidavits Marvin George's expert testimony will be based, if there was a prospect of subsequent production of material which would be relevant to the cross-examination. That's the case in this situation, my lord, and we hope to minimize any potential inconvenience by taking the written question route, should we decide after reading the transcript and considering the matter, to actually insist on continuing with the cross-examination. We thought it was important to raise the subject here and get leave to reopen those cross-examinations on the basis of that new evidence.

THE COURT: Thank you. Mr. Rush?

SUBMISSIONS BY MR. RUSH:

MR. RUSH: The interview notes of Mr. Johnny David as described, dated June 21st, 1983, begin and end with Mr. Johnny David and it wasn't clear, it wasn't known to us at the time these notes were delivered that there contained within it and interspersed with interviews with Mr. Johnny David, that there were other comments made by two people during the course of the interview. All of these notes were done on June 21st, 1983 and apparently were done at a time when Mr. Alfred Joseph was with Mr. Johnny David and two of the other gentlemen, Mr. --

THE COURT: Michell Charlie.

MR. RUSH: Michell Charlie, it looks like, and Mr. Keom Morris. So that's the first point that I want to make. I think you have to treat my friend's application in two parts, and I will deal with the second part first, and that's the one in reference to Mary Skin. Because in fact these notes had been delivered prior to the cross-examination of Mary Skin and was available to my learned friends to review and to make an assessment about the notes as to whether or not they wanted to put any of the information to Mary Skin in her cross-examination.

THE COURT: But if they were sufficiently disguised to keep their presence unknown from you for as long as you had

1 them, why should they have discovered it in 24 hours?
2 MR. RUSH: Well --
3 THE COURT: When they are preparing for Mary Skin's cross they
4 are not going to be reading interviews with other
5 people.
6 MR. RUSH: Presumably, my lord, they were reading them for
7 Johnny David's cross-examination this morning, if you
8 follow your lordship's logic. And in my submission,
9 this matter of Keom -- with reference to Keom Morris
10 was raised with me yesterday, and the portion of this
11 transcript that deals with Keom Morris was at a time
12 when the cross-examination had occurred with regard to
13 Mr. Morris, and I cannot recall whether it was before
14 or after or during the time of the cross-examination
15 with Mary Skin.
16 MR. MACKENZIE: If my friend, it was before Mary Skin, I didn't
17 discover the Mary Skin matter until this morning so
18 that's why I didn't mention it to my friend yesterday.
19 MR. RUSH: My point is, my lord, that both of these witnesses,
20 it's not like these witnesses come from Moricetown,
21 these witnesses have come from --
22 THE COURT: The deep south?
23 MR. RUSH: Francois Lake I believe in one case and Tatalrose in
24 the other. It would be of tremendous inconvenience
25 for us to bring these witnesses back for the re-
26 opening of the cross-examination in these
27 circumstances. It is -- I should point out, my lord,
28 that in addition to the fact -- that it is true that
29 these were not delivered until Monday of this week.
30 MR. MACKENZIE: Tuesday.
31 MR. RUSH: Well, I can't remember, I will accept what you say if
32 it was Tuesday, that assists me. What I say is --
33 MS. KOENIGSBERG: 9:30 a. m. November 29th, in the courtroom.
34 MR. RUSH: Well, thank you so much. It's so good to be precise.
35 My lord, my point is that had this matter been of
36 concern to my learned friends they could have put the
37 comments to Johnny David on the witness stand today.
38 And they could have, in my submission, in the
39 cross-examination of Mr. Johnny David, who was present
40 at the time, asked him about these notes, and we would
41 have been saved the inconvenience to the witnesses and
42 to counsel, of this application. And I say in the
43 circumstances of that, that your lordship ought not to
44 accede to this request.
45 Now, of course, my friend hangs out the carrot that
46 well, we will just write up our questions and you
47 answer them. But it's not quite so easy when we are

trying to keep to a tight schedule of cross-examinations of our witnesses, where these witnesses, living in a far afield locations, will require counsel to go to them, obviously will require those answers to be prepared at that time, and still we would be in the position that if our friends aren't satisfied with the answers, of having to have the witnesses come before the court and to be cross-examined. And I say at this point, given the circumstances around the availability to my friends to cross-examine Mary Skin, in one case, and Mr. Johnny David in the other, on the information that's contained in these notes, that you should not accede to the application.

THE COURT: Well, it's not my job to negotiate, but what about a compromise of just putting the transcript or that part of the transcript in as evidence in the case?

MR. MACKENZIE: Well, my lord, I was -- I would like to consider that as an alternative.

THE COURT: That leaves you with a bald statement that may have some explanation, Mr. Rush.

MR. RUSH: Exactly. I don't know what the situation is with the witnesses and what they might say to it. We have the statements that are contained in their cross-examination and as well in respect of their affidavits that have been filed. I mean, I think at this point, I couldn't say that that would be a convenient way of dealing with this because, my lord, the witnesses -- if there is some qualification or whatever they wish to say in respect of these statements, if those are their statements they have to advise counsel.

THE COURT: Well I think -- any reply, Mr. Mackenzie?

MR. MACKENZIE: No my lord, I think I have covered the matter fully in my examination -- I mean in my opening comments. And the in the press of preparing for each witness, of course, the person who looked over these didn't catch the references until I was able to look at them carefully this morning, other than Thomas Morris, which we brought to my friend's attention immediately.

THE COURT: Well, I can't overlook the reality that these transcript notes were delivered very late, nor can I overlook the serious inconvenience that would arise from re-opening the cross-examination. And I think the solution that's been proposed of having written, reasonable written questions, both in the sense of being brief and being precise, and there being not too many of them, is the best solution. I think that I

ought to see, however, the documents, that is the transcript, the evidence that is said to be in conflict, and the questions proposed, and we have a discussion about it again at that time when we see whether or not it's a workable alternative. I would not, at this stage, commit myself to saying that there could or that there could not be further cross-examination of the answers. I think there should be some finality to this and I think that we ought to make a reasonable effort. I understand Mr. Mackenzie's concern is to prepare himself fully for the cross-examination of Mr. George. That's not going to take place until sometime in the new year, is it? He is not going to be examined while we are here?

MR. MACKENZIE: Sorry, my lord, you're speaking of --

THE COURT: Marvin George.

MR. MACKENZIE: No, we don't know when he is going to be cross-examined.

THE COURT: So we are not under a time pressure to have this particular matter resolved immediately and I think I would be -- I would like counsel to prepare a brief written proposal setting out the original answer and the transcript answer, or the transcript and a list of the questions that these witnesses should answer in response and when both -- when Mr. Rush has had a chance to respond to that and point out the unreasonableness of the questions or too many of them or something of that kind, I will deal with it expeditiously and the matter can be carried on from there.

Do you have other applications, Mr. McKenzie?

MR. MACKENZIE: No, my lord.

MR. RUSH: I have a matter I would like to raise, my lord.

THE COURT: Thank you.

MR. RUSH: This pertains to the cross-examination and redirect of the evidence of Mary Skin, where counsel for the federal defendant had posed a number of questions to --

MS. KOENIGSBERG: Excuse me, my friends didn't let us know they were planning to do this and I was not the federal defendant lawyer who was present and it was Ms. Russell. If my friend would like to stand this matter down for -- it was Mr. Macaulay and if he is still in the building I could perhaps have him come down.

THE COURT: All right.

(PROCEEDINGS ADJOURNED FOR SHORT RECESS)

MR. RUSH: I will just defer to the principals.

MS. MANDELL: My lord, I have just gowned to be told I am not needed to be.

My lord this is with respect to an objection taken on redirect, and if I -- I hope that my friend will interject if I recite my rendition of it badly. None of us have the benefit of a transcript so if I could characterize the proceedings in this way: The evidence was taken of Elsie Quaw, and only the affidavit there was tendered in direct. There was, I believe, a correction that she made but basically that was her evidence. Cross-examination took the form of, among other things, questioning Ms. Quaw about those others, both Indians and non-Indian people who were using the territory which was the subject of the affidavit. And there was the -- if I can characterize it as such -- the usual line of questioning around those who held or used traplines and farmers that were in the area and other Indians or non-Indians that were either using or living there. On redirect, I addressed the first question to Ms. Quaw relating to the Indians who were present in the territory, and there are a number of Indian reserves that had been established and the Cheslatta people are living on them and I was attempting to elicit from Ms. Quaw that fact, that is, that the Indians that were on the territory were living on the Indian reserves which had been established by the Department of Indian Affairs there approximately 1953 after the flooding by Alcan. Now, I was stopped in these questions, I had only asked one, and I wanted to establish that the Indians that were present there had been put there by the Department of Indian Affairs and the circumstances of that and to establish the consent of the Indians, as she knew it, that setting aside of their location there.

Now, I don't propose that Ms. Quaw, if your lordship accedes that this is a proper line of redirect, I don't propose to recall Ms. Quaw. She is one of those that lives near Francois Lake and it's an inconvenience for all of us beyond which I would like to subject anybody to bring her back. Following the hearing of argument, it's our view that if your lordship feels that that line of questioning, and there was only two questions, ought to be pursued with her, and it is proper re-direct, we propose to do it with respect to an exchange of letters, in the same

way your lordship has directed on the first motion.

THE COURT: Thank you.

MS. RUSSELL: My lord, I took the time to go to the court reporters and read off the screen some of this material so that I have, I hope, the appropriate sections of the transcript that I copied off the scene. We couldn't print a hard copy.

THE COURT: This is the purported redirect or the cross-examination?

MS. RUSSELL: What I have done, my lord, is record the questions in direct, which I believe relate to Ms. Mandell's, as I characterize it, improper question in redirect, because I thought that was only fair to her.

I asked this question:

"There are a number of people, both Indian and non-Indian, who are not members of Goohlaht's House who live in the Uncha Ben territory, that's correct, isn't it?

A Yes.

Q And among those people there are a number who have traplines in that Uncha Ben territory; is that correct?

A Yes."

At that time I went through a list of trapline holders, with her agreeing to some of them and not agreeing to some of the others.

I also asked her a question, which Ms. Mandell didn't mention, but again giving her the benefit of the doubt, about Veronica Morris, who lived on land in the Uncha Ben territory, and the answer that I was given -- I will read the question first:

"Q Your stepmother, Veronica, lived in the Uncha Ben territory, didn't she?

A Yes.

Q And she lived on territory that was purchased for the band with money she received as compensation for the Alcan flooding; is that correct?

A I believe it was exchanged land because she never received any money, none that I know of. The only place I know she is -- she lived on that land where she got exchange from the Alcan for her territory, where she came from Cheslatta. Well, she got this land. That's where she lived and died."

I think that's all. Oh, there is one. In redirect, Ms. Mandell then asked the following questions:

"Now, you mentioned that there are some Indian people that are living in the Goohlaht territory, there is some Indian reserves there and the Cheslatta people are now on those reserves; is that correct?

A They exchanged land from Alcan.

Q And are you aware that those reserves were set up by the Department of Indian Affairs around 1952?

A Yes.

Q And do you have -- do you know whether or not the Cheslatta had any say over whether they got lands there or anywhere else?

MS. RUSSELL: I am going to object. That did not come out of my cross-examination. I didn't ask her about reserves and I don't think that that's correct re-examination.

MS. MANDELL: Off the record.

MS. RUSSELL: No, on the record.

MS. MANDELL: When you asked her about the others that are living in the area, the other Indians and non-Indians.

MS. RUSSELL: I asked her only that and she said that there were other Indian people not in Goohlaht's house in the area. I did not ask her about reserves.

MS. MANDELL: Well, those are Indian reserves.

MS. RUSSELL: Well, maybe this is one for the Chief Justice to settle. That's not proper re-examination.

Now, my lord, I objected on the ground that the issue of formation of the reserve did not arise out of my cross-examination and on the re-reading the transcript, I object as well to the form of the question that was put. It was leading in the extreme, I believe, and it was attempting to elicit from the witness the evidence about the reasons for the formation of those reserves. I should add as well that there are other reserves in that area which existed before the Cheslatta reserves were established. I think Ms. Mandell could have asked why some of those people were living in that territory on reserves and that that may have been permissible. But that is not how she chose to ask the question. Therefore, I objected.

THE COURT: Thank you. Ms. Mandell?

MS. MANDELL: I haven't anything to say that I don't believe

it's a question of reserves but how the people came to be there. And it's relevant, in our submission, how the -- both Indian people and non-Indian people have come into the area. I know my friends have all made issue of the fact that there is going to be an authority question argued, that people are in Goohlaht's territory without her authority and that's going to give rise to arguments of some form of acquiesence, as I best understand it, and to the extent that the federal defendant here is objecting, I say that -- I repeat that it's relevant how the Indian people came to be there, particularly, and it's either going to be a reply or it will end up being part of the plaintiffs' case on that point.

MS. RUSSELL: My lord, I would just say it may indeed be relevant to the plaintiffs' case, however it was not a question that arose out of my cross-examination and was not included in the affidavit that we were discussing.

THE COURT: Thank you.

When the witness was asked in cross-examination about other persons living on the territories, I think it became open to Ms. Mandell, in redirect, to establish any special circumstances relating to those who were living on the territory presumably not being members of the house claiming the territory. Without redirect, it would be, without redirect in that connection, it would be open to argue that the chiefs did not have exclusive or some quality of control or management of the territory that might otherwise be the case. I think the special circumstances that they were on reserves or not on reserves, is a distinction that could bear on this question. I think it's also appropriate in this investigation to know when those Indians, if such they were, arrived on the property, and it would even be relevant, I think, to establish in redirect that they arrived or were settled on Indian reserves established at that time. But I do not think it would be relevant, and I think this is what gave rise to the objection, to go into the question of the consent of those people to their reserves. It would certainly be relevant to know the state of mind of the plaintiff claiming the territory, that is whether he or she consented to the establishment of the reserves. But with regard to the Cheslatta people, for example, I do not think that it would be relevant to this case to know whether they

consented or did not consent to the establishment of these particular reserves. I think that Ms. Mandell is entitled to re-examine on the status of or particular circumstances of those other persons living on the territory which came up in the cross-examination but not to explore the state of mind or consent or non-consent of the persons living there.

I have already mentioned what I think about the question of the consent of the owner, but I am not sure that the witness being examined is a person who can speak to the state of mind of the owner anyway. But I think that to that extent Ms. Mandell is entitled to re-examine.

The question is a little different from that one I dealt with before, because I am going to approve the form of the questions and if I am minded so to do, then they will have to be answered. It's a little different when Ms. Mandell is seen to re-examine her own witness. I think the thing to do would be to -- would be for Ms. Mandell to prepare a brief summary of what she understand the redirect evidence would be, in this connection, and to show it to opposing counsel and, if they agree, I suppose it should be put in the form of a sworn statement of some kind, an affidavit or statutory declaration, and if that can suffice, we have solved our problem. If it can't, I see no alternative but to have the re-examination continued vive voce.

MS. RUSSELL: My lord, if I might just assist momentarily. Ms. Mandell did ask in the question that I read, "Now, you mentioned there are some Indian people in the Goohlaht territory, there is some Indian reserves there and the Cheslatta people are now on those reserves; isn't that correct?" And she got the answer, "They exchanged land from Alcan." And she also asked, "And are you aware that those reserves were set up by the Department of Indian Affairs around 1952?" So those are matters that are already in evidence. It was the following question about consent that I took objection to.

THE COURT: Yes, well, I think I am with you on the question of their consent to the rereservations but I can't assume Ms. Mandell had completed her redirect examination. She might want to say, for example, how many, that would be a perfectly acceptable and reasonable and perhaps useful question, and whether the population is increasing or decreasing or something of that kind.

There may well be relevant information of that kind that relates to the presence and the particular circumstances of the Cheslatta people and for that reason I think that counsel should see if they can agree on a statement of what the redirect evidence would be within the relatively narrow confines that I have mentioned, and if that doesn't suffice, I am afraid there isn't much alternative.

MS. MANDELL: My lord, I certainly accept your decision and don't mean to be argumentative, but if I may take the liberty of putting the fact to your lordship that you may not know and, if so, so be it, but where you say that it may be relevant, the state of mind of the plaintiff, but not the Cheslatta, I wanted to draw to your a lordship's attention that many of those Cheslatta were Wet'suwet'en, as was the witness that was presently before the court. Her father was Wet'suwet'en and her mother Cheslatta, so in fact her house moved into the Cheslatta clan system. But a good many of those other people, the family line doesn't break down in quite that way, that many of them in fact are Wet'suwet'en people living with the Cheslatta on those reserves and to the extent -- this is as I understand it, and if it's relevant, the state of mind of the plaintiff, that is what is her consent or feelings with respect to this establishment, it seems to me that it may, if your lordship appreciates the distinction, may be equally relevant with respect to, for example, this witness, whose father line is Wet'suwet'en and who is certainly part of the system to that extent.

THE COURT: Well, this witness isn't a person who was resettled on these reserves, is she?

MS. MANDELL Yes.

THE COURT: She is?

MS. MANDELL: Yes.

THE COURT: Well, I still don't think it's of any great significance to know in a contest between Goohlaht and the two crowns, whether this witness consented or didn't consent. She is there, it's a fact that goes -- if it goes on any issue at all, it goes to the the issue of the title of Goohlaht and whether that title has been displaced. And I don't think that it -- the title is any more secure or any more displaced if those people are there as squatters or as unwilling internees, as it were. And I think in the contest with Goohlaht and the Crown that's a

relatively insignificant factor. If Goohlaht didn't want them there, perhaps he or she might have done something about it. If they didn't want to be there, they might have left. The fact is they are there and I think that's what's relevant in the contest that we are litigating today so therefore I wouldn't change what I said before.

MS. RUSSELL: This is not on the same topic at all, my lord, but I am sure Ms. Mandell and I can agree on the statement of the evidence. At this time I would like to apply then to re-open on a very small question. After the cross-examination and redirect were concluded, the provincial Crown and I compared a document which had been supplied to -- each of us by the plaintiffs, and noticed a discrepancy that I would like to address one short question to the witness about. And perhaps I could --

THE COURT: Is she still here.

MS. RUSSELL: No, I would be prepared to that in writing, if that's permissable.

THE COURT: Do you know what this is about?

MS. MANDELL: I asked my friend and she said we would see the documents when the motion was argued, which is today. I have no idea what it's about.

MS. RUSSELL: It's a very small matter but I would prefer it to be addressed to the witness directly.

THE COURT: See what your friend says and if you can't agree we can speak to it next week.

MS. RUSSELL: Thank you, my lord.

THE COURT: Are you going to be examining witnesses tomorrow?

MR. RUSH: No.

MS. MANDELL: Out of court.

(Discussion re schedule)

(Proceedings adjourned)

I hereby certify the foregoing to be a true and accurate transcript of the proceedings herein to the best of my skill and ability.

Wilf Roy
Official Reporter