Vancouver, B.C.
4 July 1988

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this Monday, July 4, 1988. Calling Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Mr. Goldie.

MR. GOLDIE: My lord, there is one matter that I'd advised my friends I wished to speak to this morning and that has to do with the Band Council resolutions and documents. Unless there is some other matter to be dealt with, I propose proceeding with that.

THE COURT: All right.

MR. GOLDIE: My lord, this originated in a Notice of Motion which was spoken to on May 5. The Notice of Motion called for production of Band Council resolutions and other documents in the possession or control of the named Band Councils, relating to the B.C. Special Fund and Resource Management within and outside reserves in the land claims area including fisheries, traplines, logging and forestry. The disposition made by your lordship at that time is found in transcript volume 92, page 5836, beginning at line 47 and this I should say relates to the B.C. Special Fund. At line 47, your lordship said this:

> "Well, I am going to make an order for production, under the B.C. Special, category of this application, but I am going to follow the practice that used to prevail in the Provincial Court".

And I needn't go into that, it was to withhold the Order, and the purpose of that was to see whether there were admissions that the plaintiffs would be prepared to make. And then at 5840, lines 33 to 40, with respect to the second branch which is the documents relating to resource exploitation, your lordship says at lines 33 to 40:

> "I think that's what I would like to do. I think the defendant Province is entitled to some assistance in this regard, but I think Mr. Grant's concerns have to be recognized. And I hope that that can be done by narrowing

the scope of the inquiry and, again, counsel can raise the matter again at any time on reasonable notice to the other side. Is it useful to suggest that it be spoken to a week Monday?"

Now, if I may interject there, the recognition of Mr. Grant's concern was that without some clarification of what was required, the search would be too extensive or would be -- might be time consuming and extensive. Now, it wasn't however until May 27 that I was able to write to Mr. Grant with respect to that matter and perhaps I should hand up to your lordship a copy of my letter, May 27, and I started off by saying:

"I said that I would try to provide you with an indication of the documents that should be produced by the various Bands.

All documents relating to the B.C. Special Fund, of course, have been referred to and I ask for their production in respect of all Bands."

That was the first part of the Order.

"With respect to resource management the Order is for production of documents relating to resource management within and outside reserves in the Land Claim Area including fisheries, traplines and logging and forestry."

Now, my lord, I say, "the Order". I should not have used that word. It's -- your lordship made a certain interim direction --

THE COURT: Indication.

MR. GOLDIE: An indication. And then I go on to say:

"An example of the particularity that I have in mind with respect to fisheries would include all applications for and correspondence in respect to food fishing permits, fishing by-laws, issuance of permits by Bands thereunder, disallowance of fishing by-laws and correspondence with respect to the same. Of course, any Band Council resolutions

1 referring to fishery resources are producible.
2 With respect to traplines, in addition to
3 resolutions relating to registration and
4 transfer, I would expect production of all
5 correspondence and documents relating to
6 trapline disputes including correspondence
7 with other Bands or members of other Tribal
8 groups.
9 With respect to logging, I would expect
10 production of applications for and
11 correspondence with respect to woodlot
12 licences, whether on or off-reserve, including
13 any internal decisions with respect to which
14 members of the Band would be responsible for
15 Exploiting the rights. I would expect to see
16 production of any correspondence or records
17 relating to claims of the hereditary chiefs
18 with respect to woodlot licences or
19 utilization of forest resources."
20
21 My friend, Mr. Grant's, reply to that is dated
22 June 3, and I hand up to your lordship that. Mr.
23 Grant said:
24
25 "In response to your letter of May 27th, 1988,
26 I wish to advise that this letter was received
27 in my office by telefax at 5:15 on Friday, May
28 27th..."
29
30 and so on and so forth.
31
32 "In your third paragraph..."
33
34 and so on. Mr. Grants says:
35
36 "I am unaware that any Order has been made. I
37 was under the impression that this matter had
38 been adjourned generally in order for you to
39 provide us with more particularity."
40
41 Then he goes on to say that a copy had not been sent
42 to Mr. Rush's office and:
43
44 "He and I shall be discussing it and shall get
45 back to you with respect to your proposal in
46 due course".
47

And so far as I am aware, my lord, that is the extent of my friend's reply.

Now, he was written -- further letter was sent on June 29 by Ms. Sigurdson who said:

> "I refer to Mr. Goldie's letter of May 27. We have not received a response to the proposals made and stating we wish to raise the matter at the conclusion of Mr. Sterritt's evidence."

I did draft an Order with respect to the production of Band Council -- I am sorry, with respect to resolutions relating to the B.C. Special Fund, and of course that Order has not been presented for entry having regard to your lordship's directions. I have received no proposal with respect to either branch of the motion, no suggestion with respect to what admissions could be made on the Special Fund and no response to my letter of the particularity of the documents that we seek. And my submission, my lord, is that the Order with respect to the Band Council resolutions in these terms, that the plaintiffs produce documents within the possession and control of the named Bands and Band Councils relating to the B.C. Special Fund, and that an Order go with respect to the second branch in the terms of my letter of May 27th. That is my submission, my lord.

THE COURT: Mr. Grant, perhaps I should hear from Mr. Macaulay first.

MR. GRANT: Yes.

MR. MACAULAY: My lord, we made submission regarding the fishing by-laws and correspondence regarding that submission that those were irrelevant to the issues before your lordship having regard to the stated pleadings in this action, the issues they raised by them, and we repeat that submission. At the time your lordship did not make an Order. It would have the effect of preventing the plaintiffs from using some of that correspondence, this is by-law correspondence, in their examination of the witness. That's Mr. Glen Williams, I believe. But, in fact, to my delight and perhaps to the satisfaction of the court, that material wasn't used and I don't think the plaintiffs are in any worse position for not having used it. I have to oppose any order that would compel the plaintiffs to produce that irrelevant

1 material which is the subject of other litigation.
2 I believe my learned friend, Mr. Goldie's, firm is
3 acting on that other litigation and must have other
4 means of obtaining any correspondence regarding the
5 by-law that he may want to have for whatever
6 purposes. We do not act in that action -- that is
7 any of the plaintiff's correspondence.
8 Your lordship indicated though -- I thought your
9 lordship had indicated that your lordship agreed in
10 general with my submission, that it had nothing much
11 to do with this action. I don't think an Order
12 should be made dealing with that. There may be an
13 enormous amount of correspondence of practically no
14 value to this action, unless my learned friend knows
15 something about the correspondence that I don't.
16 THE COURT: You are talking now about the by-laws?
17 MR. MACAULAY: Yes.
18 THE COURT: Just the by-laws?
19 MR. MACAULAY: Yes, I am.
20 THE COURT: Not the food fishing licences, and things of that --
21 MR. MACAULAY: I take no position on that. We have produced
22 many, many food fishing licences and all the ones we
23 can find.
24 THE COURT: Yes.
25 MR. MACAULAY: The licence themselves, I don't recall whether we
26 produced correspondence to produce fishing licences.
27 I think we have. If we had some, we produced them.
28 So my only submission on this application is to the
29 extent that it affects these fishing by-laws, no
30 Order should be made in that regard.
31 THE COURT: Well, is there a distinction, Mr. Macaulay, to be
32 made between documents relating to fishing by-laws
33 prior to the commencement of the action?
34 MR. MACAULAY: I am not aware of any correspondence about
35 fishing by-laws before the action commenced. If
36 there is, it's still -- oh, yes, I am sorry, some of
37 it is before the action. It still addresses an
38 issue that I can't imagine would be relevant to this
39 litigation. There is various Bands tried to -- or
40 the Tribal Council on behalf of Bands tried to get
41 various drafts of by-laws approved by the -- these
42 are by-laws made pursuant to -- under the Indian
43 Act, approved by the Minister, and it appears from
44 the evidence that was given by the witness that none
45 of that succeeded until quite recently, 1985.
46 THE COURT: But does activities in relation to fishing by-laws
47 prior to the commencement of the action not bear on

the issue raised by the plaintiffs regarding management and conservation of resources from the time presently up to the time the action relates?

MR. MACAULAY: It relates to the management of one resource and that resource is under Federal jurisdiction and that resource -- the issues relating to that resource and the statutes and the schemes don't -- aren't raised in this action.

THE COURT: But surely, if native people were managing the resource -- managing resources, it might not be a matter of any moment or concern to them whether they were either Federal or Provincial jurisdiction. That's a white man's distinction that they wouldn't necessarily regard with importance and might therefore bear on the plaintiff's allegation in their case against the Province.

MR. MACAULAY: Well, we have the evidence of what they were doing. I didn't object to the evidence generally. It was the minutia, all the letters back and forth that I objected to as simply being not relevant, not of any assistance to the court. And we have the evidence of what the Tribal Council and/or the Bands were doing. They were trying to obtain control of the fishing in and near -- in the reserves or around the reserves, using the Indian Act regulatory scheme. That's evidence the plaintiffs led in chief. My concern again is it's opening the flood gates kind of argument, I suppose. I suspect there is a tremendous amount of correspondence.

THE COURT: Well, we have to be very cautious.

MR. MACAULAY: I understand that that may be -- your lordship may draw one inference or another from the fact that the Bands or Tribal Council were busy in doing that, but you heard that evidence. They say this is what we were doing.

MR. GOLDIE: My lord, I wonder if I might, before Mr. Grant speaks to the matter, I should say first the fact that my firm is acting in another matter is quite irrelevant. I don't think it would be proper for me to accept that as an avenue of communication.

THE COURT: You think that's a herring rather --

MR. GOLDIE: That's -- not only a herring, it is one that is ripened to a red colour. The more important point is my friend's concern that the wording of my letter is aimed at the particular by-law that was the subject of so much correspondence and now litigation. Actually, this matter really arose, so

1 far as I am concerned, with Mr. Michell's evidence
2 of a by-law passed by the -- or resolution perhaps
3 passed by the Band which purported to control
4 fishing, and I don't recall -- I mean, he mentioned
5 a series of them and, of course, the last was the
6 one that was the subject matter of disallowance, but
7 there was at least one in which the Band, the
8 Moricetown Band, was purporting to deal with a
9 fishing resource.
10 Now, Mr. Macaulay says that's a Federal matter.
11 Regulation is with the proprietory right and the
12 fish is a Provincial matter, and I am quite happy to
13 say what I am interested in is anything purporting
14 to relate to supervision or exploitation or
15 regulation, if you want to put that word in, of the
16 fishery resource up to October 23, 1984. The rest
17 of the evidence has been given but that's not really
18 my concern, and I hope that might clarify the extent
19 of my interest.
20 THE COURT: Thank you. Mr. Grant?
21 MR. GOLDIE: Excuse me. The reference that I had in mind was
22 Mr. Michell's evidence in chief in volume 61, page
23 3701, and my friend, Mr. Rush, was leading the
24 witness, and he referred to a by-law for the
25 preservation, management, conservation and use of
26 fish on reserves and traditional lands, rivers and
27 waterways of the Moricetown Band dated February 28,
28 1983. That was introduced in chief.
29 THE COURT: Was that by-law produced?
30 MR. GOLDIE: Yes.
31 THE COURT: So what you are specifically looking for is
32 surrounding or related documents?
33 MR. GOLDIE: Yes, and from other Bands as well as from the
34 Moricetown Band.
35 THE COURT: Thank you. Mr. Grant?
36 MR. GRANT: I'd like to deal firstly with the number of matters
37 here, my lord, involved and canvassed before you
38 today and previously.
39 First of all, my reading of the transcript and
40 the Order that my friend drafted from May 5 refers
41 to the B.C. Special, but he sort of put a hold on
42 it, and I have endorsed that Order and forwarded it
43 to the Federal Crown that the B.C. Special documents
44 have been referred to. In order for the plaintiffs
45 to properly be able to canvas where they can locate
46 these, we must have production of the list from the
47 Federal defendants and that list -- we asked for

that by Order last week and they advised us they would produce such a list by the end of last week, and the Provincial defendant said they would like to review that list before they could respond. That list hasn't been produced and so I would ask today that there be an Order as sought last Monday to the Federal defendants for disclosure of all documents relating to the B.C. Special

MR. MACAULAY: I don't think that's necessary. I recall reviewing a list and signing it. If it hasn't reached my friend, I don't know what the reason is.

THE COURT: You say it is in the mail?

MR. MACAULAY: The Province -- my friends representing the Province say they received it Thursday.

MR. GRANT: Their mail system, I guess, is better than ours. But we haven't received it, neither me or Mr. Rush.

MR. MACAULAY: I don't think any Order is needed. It is out there. I will get another copy this morning.

THE COURT: Thank you.

MR. GRANT: Now, I mean, with respect to that, the B.C. Special, my lord, is that I have no difficulty and have commenced the investigation with the Bands for the disclosure of those documents and will respond. Now --

THE COURT: That's with respect to the Specials only?

MR. GRANT: That's the Special Fund. Now, regarding the particularity that my friend raised. First of all, I would suggest that regarding these other documents that this --

THE COURT: Can't we get rid of the Special Fund? In view of the fact that your investigations are underway and Mr. Macaulay says that the list that might be of some use to you as an index or otherwise is in the mail, should I not get rid of that problem by now making the Order which has to be on a best efforts basis anyway that --

MR. GRANT: But, my lord, basically my question is this: The question that comes to my mind is this, is that if Mr. -- a week ago Mr. Goldie says we are making our best efforts; today and a week ago Mr. Macaulay said we are making our bets efforts, and I am saying we are making our best efforts. There is no need for an Order against the plaintiffs on that. We are making those inquiries. We have already disclosed all documents relating to Moricetown, Hagwilget and Gitwangak.

THE COURT: On the Special?

MR. GRANT: On the B.C. Special, on the other Bands we are making the inquiries of. There is no necessity for an Order against the plaintiffs because we are in the same position against the Provincial and Federal defendants.

MR. GOLDIE: Excuse me, my lord. I thought my friend said he had endorsed the Order and sent it to the Federal Crown.

MR. GRANT: Well, yes.

MR. GOLDIE: If that's so, the Order is a very simple one and the last paragraph said it may not be entered until May 16. Well, that's gone by the board. But so far as I am aware, the matter is now mute if my friend has endorsed the Order.

MR. GRANT: Well, the position I take, my lord, is given that was prior to the circumstances of last week and of this week is that basically I am saying it is not necessary to make the Order against the plaintiffs when -- because we are in exactly the same position as the defendants. I mean, we have sought the same Order against the defendants. They say we are making our best efforts and it is adjourned and we are going to deal with that. We have actually made better disclosure on the B.C. Special than either defendants up to date and now we are going to other Bands up to date.

THE COURT: I take it you didn't find any particular difficulty with Mr. Goldie's Order and your endorsement. The only question is whether it is still to be in that Provincial court practice state that it is being held for the time being?

MR. GRANT: Yes, and I have no problem if it is held for the time being because we are making our efforts and I don't think the Order effectively will be necessary. So I ask that that matter be extended -- the May 16 deadline be extended.

THE COURT: All right.

MR. GRANT: Now, relating to the other documents, and my friend really relates to three resource areas in his letter; fisheries, traplines and the logging/forestry, I take it, is one category.

With respect to applications in respect of food fishing permits, my lord, the evidence of the application for food fishing permits has been disclosed or is in the process of being disclosed by the Federal defendant. They have one office in Hazelton which deals with all of the bands in the

1 district. It is much easier for them to deal with
2 that type of disclosure than for the defendant --
3 the plaintiffs to deal with it through eight offices
4 or seven offices. And so I ask that the Order not
5 be made with respect to applications for
6 correspondence respecting food fishing permits. And
7 I should say at the outset, my lord, I am going to
8 ask that the court, as you say, that there be some
9 extension of any Order that's made because I am in
10 the process on these areas -- certain of these areas
11 of making inquiries as well, but the area of the
12 food fishing permits, I would say that any Order
13 should be directed to the Federal defendant. They
14 are the ones in correspondence with the Band and
15 that's come out amply in evidence and in their list
16 of documents.
17 With respect to the fishing by-laws, that
18 material is in the public domain and it is as easily
19 available to the Provincial defendant. It is not
20 just a matter of Mr. Goldie going to his colleague
21 in the office. It is in the appeal books in the
22 Court Of appeal in the H.A.B.C. versus Wale of which
23 Mr. Harvey was counsel and -- but it is in the
24 public domain and I ask there not be an Order of
25 disclosure to that. It is as readily available to
26 the Provincial defendant as it is to the plaintiffs
27 or any other party.
28 THE COURT: Well, is there some level of confidence that what is
29 in the appeal books in the Wale case is all there
30 is?
31 MR. GRANT: Well, those appeal books deal with the history of
32 the four Bands that have by-laws and they deal with
33 the history going back and the case of Moricetown
34 which is the only Band -- it wasn't a Band Council
35 resolution, it was a by-law.
36 THE COURT: But the appeal book would only contain the documents
37 that found their way into evidence. The list of
38 documents in that case may be larger than the number
39 of documents that were actually used at trial.
40 MR. GRANT: Well, that was an interlocutory injunction
41 application. There has been no list of documents
42 and it is before the Supreme Court of Canada. There
43 is extensive affidavits dealing with the history of
44 those four Bands and the correspondence both back
45 and forth between the Federal and Provincial
46 defendant.
47 THE COURT: Is that W-a-l-e or W-a-h-l-e?

MR. GRANT: W-a-l-e.
THE COURT: Thank you.
MR. GRANT: Now, the issuance of permits by Bands thereunder -- I presume that this is with respect to the fisheries by-laws. Now, as you know from the evidence and you have heard from the evidence, my lord, the passage of by-laws, except for the Moricetown by-law of 1964 I believe it is, the other by-laws was all in 1986, and I would say that the issuance of permits by Bands thereunder is not relevant given the comments that you made a week ago, and it is known there should be no necessity to disclose those.

With respect to the Moricetown Band by-law which was extended I should say before 1984, I have no difficulty in inquiring with respect to any permits being issued under that by-law. And I would make such an inquiry and ask the court not to make an Order. I agree that that would come within the category.

The correspondence relating to the disallowance of fish by-laws. Again, that is -- and correspondence with respect to the same, that is all within the H.A.B.C. v. Wale material, and that's extensive. That's of course what the issue was. Not only in the H.A.B.C. v. Wale case but there were earlier cases the factums which are in H.A.B.C. v. Wale dealing with earlier disallowances.

With respect to Band Council resolutions referring to fisheries resources, I have no difficulty with making inquiries with respect to those, and I would ask that an Order is not necessary.

As I -- just so that you can appreciate, my lord, as I indicated in my correspondence to Mr. Goldie that he referred you to, I did receive this letter. There was some crossover of my coming down and Mr. Rush and I were dealing with Mr. Sterritt's evidence, and that's why there was a delay in responding so I have not yet delivered this correspondence to our clients or I should say to the Bands.

THE COURT: These Band Council resolutions relate to fish?
MR. GRANT: Well, I will be quite honest. I don't think there are any but there might be. I am going to have to make inquiries. My friend says at the bottom of the first page:

"Of course, any Band Council resolutions referring to fishery resources are producible."

I have no difficulty with making such inquiries as to Band Council resolutions. Now, Band Council resolutions and fisheries by-laws are two different things, and I understand what my friend is saying what is Band Council resolutions and I will make inquiries with respect to those. My recollection is this is with respect to the seven Bands and does not include Kitwancool?

MR. GOLDIE: That's right.

MR. GRANT: Now, going to the secondary that Mr. Goldie raises and that's regarding traplines. My lord, a week ago -- no, last Wednesday, we received correspondence from the Provincial defendant disclosing a number of trapline files from the Hazelton office of Fish and Wildlife branch. These have been ongoing since the beginning of the trial and, as I say, only a few days ago we received a list that they had not yet known of its existence. Any resolutions relating to registration and transfer of traplines would be delivered to the Provincial defendant through the Fish and Wildlife branch and those would be in their -- they are the ones who could properly disclose those, and I would ask that, on the terms of any Orders that they make, a full disclosure now of the balance of the trapline files, rather than having this piecemeal approach that we have had. This may be their problem that they are unable to get the files, I don't know what their problem is, but all of the resolutions relating to registration of transfer of traplines or copy to the Provincial defendant that's become obvious through the evidence.

The second arm of what Mr. Goldie asks is internal correspondence -- I am sorry, all correspondence relating to trapline disputes including correspondence with other Bands or members of other Tribal groups. Now, this category, it appears to me, may not conveniently -- may not be within the Provincial trapline files; in other words, they may not have possession of it, and I do not oppose making inquiries about that and if there is any such correspondence to disclose it.

The third category is the category of logging and

1 forestry and, once again, the first area sought by
2 the Provincial defendant is production of
3 applications for/and correspondence with respect to
4 woodlot licences. Now, again, my lord -- and
5 whether on or off reserve. With respect to on
6 reserve woodlot licence, those would be in the
7 possession of the Federal defendant under the Indian
8 Act Timber Reserve Regulations as I recall and the
9 Federal defendant would have all of those. However,
10 and I would ask that if the court put any terms that
11 thought this was relevant that they would seek
12 direct to the Federal defendant as well to make
13 disclosure of those. With respect to woodlot
14 licences off reserve, any applications and
15 correspondence regarding woodlot licences would be
16 in the hands of the Provincial defendant because
17 through the Ministry of Forests, by the very
18 definition of woodlot licences, I am interpreting
19 that to mean what my friend is talking about the
20 whole gambit of licensing -- the licensing regime
21 carried on by the Provincial defendant, and I would
22 say that it would be better handled within the
23 Provincial regime than to disclose those that --
24 those documents are in their custody and for us to
25 go to eight offices would be difficult, onerous and
26 unnecessary. The secondary is any internal
27 decisions regarding members of the Band would be
28 responsible for exploiting rights.
29 Now, in this category, my lord, I question the
30 relevance and I say is it in this way: At first
31 face, it may be relevant but what does it mean to
32 have a Band Council say Joe Smith is going to cut
33 trees on our reserve or Joe Smith is going to have
34 the logging contract to fall outside of here? I
35 raise that question but I am not raising that to
36 oppose it but say that I will investigate that to
37 see if there are any documents that are relevant in
38 that category. Now --
39 MR. GOLDIE: I am sorry, I didn't -- would you repeat that,
40 please? I didn't follow that.
41 MR. GRANT: I raise the question of relevance with respect to
42 that but I am not saying that I would not make those
43 inquiries. I will make the inquiries.
44 THE COURT: Isn't irrelevant. As I said before, you have
45 pleaded that from time immemorial, your clients have
46 managed and conserved and preserved resources.
47 MR. GRANT: Mm-hmm. Well, on the global side, that's right. I

1 am saying the minutia, whether Joe Smith does the
2 falling or John Smith does the falling, does this
3 really matter?
4 THE COURT: Legal truth is only found in the details.
5 MR. GRANT: Well, as I say, I am not opposed to making
6 investigations on it and there may be something
7 that's greatly relevant.
8 Now, with respect to any production of
9 correspondence or records relating to the claim of
10 hereditary chiefs regarding woodlot licence or
11 utilization of forest resources, I don't oppose an
12 investigation of that area and I would make such an
13 investigation.
14 Now, my lord, what I would say regarding forestry
15 is that any Order to be made should also respond to
16 the demand by the plaintiffs of the defendants for
17 production of documents regarding -- and I
18 paraphrase from my friend's last paragraph,
19 regarding any internal decisions with respect to
20 which the defendant is responsible for exploiting
21 the forest resources. In other words, if this is
22 relevant, the administration by the plaintiffs and
23 the management and conservation of the resources by
24 the plaintiffs which the plaintiffs plead, it is
25 equally relevant that the defendants plead the
26 management and conservation of the same resources
27 and the administration of the same resources and on
28 the same basis those documents will be relevant and,
29 in particular, the one they have notice of is that
30 area of the territory which is now referred to as
31 Sustut Takla, and which has had numeral
32 administrations made about it not only post 1984 but
33 pre 1984. I would ask that that Order which I
34 sought a week ago be part of this Order.
35 Now, I also asked for an Order for disclosure by
36 the Province of all trapline files and, again, this
37 would aid in terms of any request they make of the
38 plaintiffs. But the area I see where they may have
39 difficulty is this correspondence between the Bands
40 and third parties not with the Provincial defendant
41 but, my lord, we are on a very, very serious paper
42 chase over the next few months if we are going to
43 dig up exactly what is either through the fisheries'
44 files, in the hands of the Federal defendant, or in
45 the traplines to the Provincial defendant. I expect
46 and urge upon you it would be much more worth while
47 if the focus of this was narrowed to those areas

where it is not reasonable that the Provincial defendant has access to the documents and in those areas I have no difficulty with making the inquiries and the investigations. And again, I would ask that there be some time frame for the implementation for the Order on these areas because, as I have said, I am not objecting to making the inquiries and I should have an opportunity to make them before any Order is made. And I say it is not through -- it is the question of making those inquiries is something that I was intending to deal with subsequent to today, but -- so those are my submissions on those points, my lord, and I would ask that you firstly, consider adjourning the application so we can make the inquiries; secondly, narrowing it to the areas as I have defined and, if you see fit that you should make an Order, that there be an Order -- a parallel Order on the areas of logging and trapping against the Provincial defendant and in the area of fishery with respect to Federal defendant. It is only in that way, and I have already asked there be an extension of the B.C. Special Order so I can properly respond to my friends, because we are not refusing to respond to that Order.

THE COURT: Thank you. Mr. Goldie?

MR. GOLDIE: My lord, we are here because I wrote a letter on May 27 to which I have received no reply and, if my friend says he intended to respond to it, he's had over a month to consider it.

As I understand it, there is no issue with respect to the B.C. Special Fund. It has been suspended in its operations since May 5. It has been endorsed by the plaintiff and the Order I propose entering as endorsed.

With respect to the others, my lord, the food fishing -- first I should say that these applications arise out of the introduction in the evidence in chief of matters relating to Band Councils. The fishery by-law that I referred to was introduced in chief and I have already said that I am anxious to know whether any other Band has done the same thing as was done with the Moricetown Band. I don't understand my friend to say that he refuses to use that. There really is no point in relying upon other sources unless my friends are prepared to admit the authenticity of documents provided from other sources which on their face disclose the fact

that they have been sent to the defendants. What we are asking for is documents in the possession of the Band Councils, the Band Councils having been identified by the plaintiffs as the agents of the hereditary chiefs. I have said with respect to the fishing by-law in the Wale matter, that was disallowed after the beginning of this action, and what I am looking for are comparable by-laws passed by other Bands to that which my friend introduced in chief and in Mr. Michell's evidence. Now --

MR. GRANT: Well, I can resolve that, my lord. I know if my friend is focusing on the 1963 or '64 Moricetown by-law, that, through a search that I have done, including of the Federal regulations which deals with the listing of by-laws which is a matter of public record, that is the only by-law relating to the fisheries that was passed by any of the seven Bands prior to October of '84; that is, I shouldn't say was passed, was allowed and was -- had the form of a by-law under the Indian Act, was not disallowed. If that's what my friend is concerned about, that is the only one.

MR. GOLDIE: I don't know what I am concerned with except in general terms and, if that's going to be the list prepared by my friend, so be it. But we are not -- I am being told here today that, oh, that's the only one that's been passed. The proper way to respond to it is to respond with a list.

Now, my lord, my friend referred to traplines and he referred to the fact that we have found discarded -- additional discarded files and we are -- we are disclosing those. What I am looking for are documents in the possession of the plaintiff's agents. Your lordship well knows the difficulty we have had in introducing trapline documents and the fact that they are in the possession of the Bands is of equal significance with respect to trapline documents. Now, Mr. Grant said he would make inquiries with respect to trapline disputes. Well, once again, we find through the evidence of the plaintiffs, maybe perhaps not characterized as disputes, but matters are resolved internally. They introduce that and they make reference to the Band Councils. With respect to -- and my friend acknowledges that he is prepared to make inquiry. I can't understand why these inquiries weren't made upon receipt of my

1 letter, May 27, but be that as it may.
2 The question of the relevance, now turning to
3 logging, Mr. Grant said that he could not see what
4 significance internal documents were. Once again
5 that was introduced --
6 MR. GRANT: That's not what I said. I said that I could not see
7 the relevance of who was authorized to cut a
8 piece -- a tree or which member of the Band was
9 authorized to cut a tree. I was not saying, and I
10 wish to correct if my friend misunderstood, I did
11 say that any internal documents relating to claims
12 hereditary chiefs should be investigated and I will
13 do so, and I would also investigate the other area.
14 MR. GOLDIE: I point out that this arose in the examination in
15 chief of Mr. Michell who said, well, we are cutting
16 wood for the sawmill on Weiget's territory and he
17 gave permission for that. Well, that's -- and
18 that's the Band Council which is doing this. So
19 that's how this sort of thing arose, not by virtue
20 of anything that the Province has introduced.
21 Now, my friend now says he is prepared to make
22 those inquiries. I can see no reason why the Order
23 should not go in the terms that have now been put
24 before your lordship which is substantially the
25 terms of my letter of May 27.
26 Mr. Grant makes reference to parallel Orders.
27 There is no application to your lordship for any
28 parallel Order and, if he is going to wish to have
29 his motion with respect to the Sustut adjourned into
30 open court, I will be prepared to debate that but,
31 on the pleadings, on the pleadings, there is no
32 relevance of that. But the pleadings are that the
33 plaintiffs have exercised ownership and jurisdiction
34 that the Band Councils are their agents and that the
35 Band Councils have been involved in this kind of
36 thing. Now, that's the simple fact of the matter
37 and your lordship stated on May 5 that you wished to
38 provide some sort of direction but the matter was
39 left over so that I could provide some
40 particularity.
41 In my submission that has been done and in my
42 submission my friend has not really challenged the
43 particularity of my letter of May 27, with the
44 exception, and I am quite prepared to clarify this,
45 with the exception of the disallowance of the by-law
46 which is the subject matter of the Wale action.
47 That disallowance occurred after this action was

commenced and I am not interested in that. But that was not the subject matter of the by-law that was introduced in chief in Mr. Michell's evidence.

MR. GRANT: Just one point, a clarification, and that is with respect to my friend's categorization of the Band Council as with the agents of the plaintiffs. I cannot sit and be quiet on that. I don't agree that this is it. I think that the Band Councils operated in that capacity with respect to certain matters. For example, when he says that Mr. Michell referred to them getting permission from Weiget, clearly, the Band Council was acting not as Mr. -- as Weiget's agent, the chief Weiget's agent, but was acting as a Band Council and dealing with the hereditary chiefs of the -- and with respect to those types of internal decisions. I am not opposed to making the -- any further inquiries regarding to that -- regarding that. Weiget in that case was a Gitksan chief, and Moricetown is a Wet'suwet'en Band. I am only asking, my lord, when I say not to make the Order now, I am only asking to have the same basic understanding as was dealt with with respect to the Federal -- that the Federal Crown says and with respect to the B.C. Special and the Provincial defendant said with the B.C. Special. We are making our investigations, we are doing our best, and we are going to make the inquiries, and I have said that and I've put it on the record, and that's what we intend to do.

MR. MACAULAY: May I make a submission, my lord?

THE COURT: Yes, Mr. Macaulay.

MR. MACAULAY: This may be drawn in, although application for an Order that we produce anything. First, the food fish permits and alike. We have so many documents that we have to adopt systems, and one of the systems involves names. For instance, many of the Federal files are listed under individual names as genealogies appear. Then we have a whole lot of names that we can do searches on. But if we don't know that Mr. John Jones is a Gitksan or Wet'suwet'en, then it's a little more difficult to search out the relevant documents.

Second, so far as relevant fishing documents are concerned, we have listed everything we have found and we thought was relevant. Same with trapline files, and the same with woodlot licence on reserves. But in no case has either of the other

parties had to resort to seeking an Order against us. The plaintiffs recently told us that they wanted us to produce statements of policy by the government regarding land claims and recognizing that there is a big difference between a document in their possession than a document in our possession, a distinction that's been drawn by Mr. Goldie. We are responding. They don't need an Order. The same with the B.C. Special and the Province has asked us to produce documents from time to time and we responded willingly, but I point out that the sooner we get the balance of the genealogies, the sooner we will be able to complete the task that we have. We don't -- it's not -- these files aren't necessarily organized on a territorial basis, but rather on an Indian basis and a Band basis, on any basis.

I might add this: That excellent map your lordship had for sometime shows a yellow area over here. Now, that had been excluded in May 11, 1987 from the claim area and so we didn't produce documents concerning that area, trapline files particularly. Now it is back in just recently and we are looking for the necessary files. So it's never complete, won't be complete until we get the last map and last genealogy. That's my submission, my lord.

THE COURT: Thank you.

MR. GRANT: Just one point, and that is on the food fishing permit, my lord. If food fishing permit system is a system that applies to Indians. If my friends disclose all food fishing permits that are issued out of the Hazelton District Office which covers in its entirety the area within the claim, that is not all the claim area but the Hazelton area office covers pretty well all of its area within there. I suspect that without the aid of genealogies, they would be able to be pretty sure that 95 and 99 percent of them are the Gitksan and Wet'suwet'en. They have a different problem out of the Smithers office but not out of the Hazelton office.

THE COURT: I have the sense that we are trying to categorize grains of sand by size and that this is another example of how this kind of litigation fits so badly into the usual processes of the court. I think a lot of the problems do arise because there are differences of treatment of documents in the possession of one party as compared to the treatment

of that same document in the possession of another party. And it is true as Mr. Goldie has said this morning that the fact that he has a document isn't necessarily the end of the story because it is far more significant to him if the same document is in the possession of the other side, then he can do something with it and doesn't have the same evidentiary problems that arise if he only has certainty within the rules that it is in his possession. I have the feeling that many of the things we are debating probably won't be of very much significance in this case and that we might get along pretty well if we did nothing further from this point forward in this connection, but that's not the rules of the game and I have no authority to suspend the rules and to try and play the game in some less formal or less structured way. I am almost reminded of the famous Australian rugby story when the ball being kicked exploded in mid air and, when it landed, one of the players said, never mind the blank ball, let's get on with the game. And they probably did fine without the ball. But I can't proceed quite that way and I have to try and ensure that the traditional or customary structure is maintained.

I think on the Special Fund, I think that I should fix the time when the Order that's apparently all been -- has apparently been processed so that there will be some certainty. I think that Mr. Goldie should be free to enter that Order after the end of this week unless the matter is spoken to again and some reason is shown why it should not be entered.

With regard to food fishing permits, the documents are said to be all in the -- or substantially in the office of the Federal department at Hazelton but, as I have said, that doesn't do Mr. Goldie much good as against the plaintiffs, yet, I think there is an advantage arising out of that fact if we take character to build on that reality. I don't think that I am going to make an Order on food fishing permits right now but I think that the extent of the documentation on the food fishing permits should be disclosed by the Federal Crown to the Province and to the plaintiffs and the plaintiffs should then seek an admission from the defendants and, if that isn't

forthcoming, then a fairly firm Order will have to be made. I would have to have an indication from Mr. Macaulay when that disclosure would be made. How soon can that be done, Mr. Macaulay?

MR. MACAULAY: It was done a year ago approximately, my lord. We have listed hundreds and hundreds of food fishing permits. We have the copies, we have the carbons, the originals are in the hand of the permitees, and I doubt very much if a permitee keeps them, individual persons, and not necessarily Gitksan. We have gone through -- we took a lot of trouble with that, gone through the list of names. What we have to have is individual names and, when we get individual names through genealogies or through evidence, then we can go through the lists. They are not always in Hazelton; there are some in Prince Rupert. They are all over the place and we have done that and we continue to do that. I can't think of anything more in that particular category we can do. I believe that when we were on the last application, my friend Mr. Grant's application concerning documents, I understood him to complain about the prolixity of our food fishing permit list because there were so many, individually listed by name. And we have never heard from the Province that they didn't have enough disclosure -- or from the plaintiffs that we didn't have enough disclosure on that. If we find another source, we will list it. I can't think of what we can do right now that we haven't done.

THE COURT: All right. Well, I am going to adjourn this party application to some date towards the end of July when the matter could be spoken again and, Mr. Goldie, I think you can take immediate steps, based on what Mr. Macaulay has said and if you haven't got what you think you need from the plaintiffs by that time, then I may have to make an Order that I would prefer not to make.

On the fishing by-laws, I think we have reached the point in this trial where we recognize, at least I do and I hope counsel do, that what has happened since the commencement of the action is not going to generally be relevant and I am going to Order that within 14 days the plaintiffs make -- furnish a list of pre-writ fishing by-law documents that relate to fishing by-laws by any of the Bands within the Gitksan or Wet'suwet'en people. Mr. Grant says that

1 will only be one, that is Moricetown by-law, and
2 therefore I think that that list should be furnished
3 by the 14 days from today and that will put that
4 matter out of the way.
5 MR. GRANT: My lord, can I have clarification on that?
6 THE COURT: Yes.
7 MR. GRANT: Can I try and be clear in what I said? The fishing
8 by-law process as you know, it is passed by the Band
9 and it's got 40 days; if not disallowed, it becomes
10 law. I just wanted to be sure as to what you are
11 saying with respect to the fishing by-laws that have
12 gone through that 40 day process and have not been
13 disallowed.
14 THE COURT: Yes. I think you must make a list of all those
15 by-laws.
16 MR. GRANT: Which have not been disallowed?
17 THE COURT: And documents relating to them.
18 MR. GOLDIE: Whether they have been disallowed is irrelevant.
19 THE COURT: I think whether allowed or --
20 MR. GRANT: Pre October 1984 I understand.
21 THE COURT: Yes, that's right. Next subject I have mentioned
22 was permits under by-laws, and Mr. Grant has said
23 that those will all be disclosed. I am disposed to
24 make that Order but I won't this morning. I will
25 probably make it on the presumption of the matter I
26 mentioned a moment ago on some day towards the end
27 of July when these matters can be spoken to again.
28 I think Mr. Grant's indicated willingness to
29 disclose. That makes that into an issue which is
30 not particularly adversarial and I hope that can be
31 resolved, but I think keeping in mind the structure
32 to which I referred to a moment ago, I think I
33 should make that Order if it isn't otherwise
34 resolved. I do not think it is sufficient to refer
35 except possibly by reference in a formal list to
36 documents in the Wale's action, if that's a
37 convenient way to describe documents, then I see no
38 reason why it shouldn't be done. But I think there
39 must be a separate disclosure in this action as
40 compared with some other action.
41 Now, the next item was the Band Council
42 resolutions. Mr. Grant said there was no difficulty
43 regarding fish and he would make inquiries of the
44 seven Bands not including the Kitwancool Band, and
45 seems to me that there should be a list furnished,
46 and I hope that that can be done by July 31. If
47 not, the matter may be spoken to then.

With regard to traplines, Mr. Grant says the registration of all traplines is in Provincial Government offices but that raises the question of the proof I mentioned a moment ago and admissions, and I think that there has to be some resolution between counsel as to how that can be done. I think that the province is entitled to have the security of knowing that it may adduce in evidence the documents in its possession relating to traplines or if need not. Before the plaintiff -- before the Provincial Crown can use those documents, it must of course have disclosed them. I am assuming therefore that those documents have been disclosed by the Province by way of list or by way of supplementary list yet to be produced and, with the matter of how the province is to prove those documents not resolved by the end of this month, then I will have to try and fashion an Order that will solve that problem. I want to avoid if I can requiring endless searches but there may be no alternative.

Mr. Grant said that there was no difficulty with respect to Band resolution of disputes, and I think that the end of July will be an appropriate time for the disclosure of documents relating to that matter and, while I will make no Order now, I will say that I think I should take advantage of Mr. Grant's assurance that there will be no problem in that connection and say that I will probably make that Order in the end of July if that matter is not otherwise resolved.

In logging and forestry, Mr. Grant says that woodlot licences for logging on reserves are all in the possession of the Federal Crown and woodlot licences for logging off reserve are in the possession of the Provincial Crown and that is probably true but raises the same problem again as how are these documents to be proven. I think the same disposition should be made as what I have said previously. I think that should be resolved between counsel and can be spoken to again on the 28th of -- I am sorry, not the 28th of July, at some date at the end of July.

Internal documents relating to logging is a subject Mr. Grant said that he would investigate. I think with respect that it may be relevant if a Band Council has passed on the right of a member of the Band to undertake cutting or logging operations

either within the reserve or within the area of a hereditary chief, Mr. Grant has said he will investigate that and I will leave it to him to do so, giving leave to the Provincial Crown to raise the matter again later this month if it is necessary so to do.

Mr. Grant has asked for permission or for disclosure by the Provincial Crown of pre 1984 or pre-writ documents relating to the Sustut Takla area and also disclosure of all Provincial Government trapline files. At first blush it appears to me that Mr. Grant is entitled to that, the plaintiffs are entitled to that, but there is no application before me and, if there is a continuing problem between counsel, then it seems to me that it should be brought on when the other matters are spoken to in July -- later in July and it can be resolved. I would hope that Crown would not have to engage in an endless search of documents relating to an area as large as the Sustut Takla area and that the matter could be brought into some more narrow compass and I think that Mr. Grant should formulate his specific request in that area; that is, an area and those documents for that area quite shortly so that the issue will be more precisely joined if it has to be argued later this month. I think that concludes everything that's been spoken about this morning. I have however to adjourn now to attend to another brief matter and I will be glad to hear from counsel in matters I have discussed when we resume in a few minutes. Thank you.

THE REGISTRAR: Order in court.

THE COURT: Counsel may also think of a date later in July that might be convenient.

(PROCEEDINGS ADJOURNED AND RESUMED PURSUANT TO AN ADJOURNMENT)

THE REGISTRAR: Order in court. Ready to proceed, my lord.

MR. MACAULAY: May it please your lordship, I have a copy of the -- of the admissions regarding the photographs -- all those photographs.

THE COURT: Oh, yes.

MR. MACAULAY: A number have been reserved for the Attorney General of Canada's notice. The Province's admissions have been marked and I ask that -- it's 659 was reserved for ours.

MR. RUSH: I'd be grateful for an opportunity to review this before --
THE COURT: All right. Yes, I have 659 noted reserved for Mr. Macaulay's admission.
MR. MACAULAY: Perhaps I can hand it to the Registrar and if there is some objection made then.
THE REGISTRAR: I will make some copies.
THE COURT: We will hold marking it for the moment. Unless we hear otherwise from Mr. Rush, it will eventually be 659.
MR. MACAULAY: I just handed a copy to my friend.
THE COURT: Thank you. Mr. Grant?
MR. GRANT: Yes, my lord. I raised one matter in terms of the time-tabling of your Order and that is, I am not in a position to know exactly how this will work out but I am concerned with your time-tabling of this over the month of July. I do know the practice in a number of Bands that the Band Administration takes one month off, either July or August, so it's quite feasible and I would say even probable at least in some of the Band situations that, with the time-tabling that you have set, that the people that would be able to best assist in this process will be gone the entire time between now and the time that you have asked for a return. I am not suggesting that I would delay in my requests and follow up on those inquiries, but I would ask that this matter in terms of speaking to it be dealt with in the later part of August -- in the last half of August, but I am not saying that I don't want the court or anyone to assume that that's because there will be a delay in the demand request but only that I am concerned that it is not going to be possible if the Band manager or administrator, or whoever deals with these matters -- sometimes it will be different people -- are not available, which is generally the case in the summer months. So if I had 'til late August, then I would be able to deal with it. I am not suggesting that necessarily deals with all the matters that you raised but at least with respect to my matters to the Bands and I understood that that was the terms of the request, a request to the Bands, and I would ask for that in terms of time table.
THE COURT: Well, Mr. Grant, I think I will leave it as I said a while ago. While you make your inquiries and if you are still of the view at that time that the end of

1 July is unrealistic, then I will be glad to hear
2 from you again about that. I would think that you
3 and your friends could have a discussion about it
4 and, if you are unable to agree, then I will be glad
5 to hear you sometime in July if it should be put off
6 further. I hope that you could agree -- I would
7 hope that you could get it done by the end of July
8 so that there wouldn't be serious further delay but
9 if you find that's not possible, I will be glad to
10 hear from you further in due course.
11 MR. GRANT: Yes. I am just not sure of the scope of the job
12 that it entails.
13 THE COURT: I think it is appropriate you should bring it to our
14 attention now rather than later. Thank you.
15 MR. GOLDIE: Your lordship asked about dates. The last working
16 day in July, I believe, is the 28th, and when Mr.
17 Grant spoke to me about his difficulties, I was
18 going to suggest that a week after that would be the
19 3rd or 4th of August which -- either of which would
20 be satisfactory to the Provincial defendants.
21 THE COURT: Friday, the 29th of July is the holiday.
22 MR. GOLDIE: No. I think it is the 1st of August that's a
23 holiday.
24 THE COURT: That's a Monday.
25 MR. GOLDIE: I am sorry, I said the 28th was the last working
26 day, I meant the 29th.
27 THE COURT: Well, as far as I know, that's convenient to me, but
28 I'll -- any reason why I shouldn't fix that
29 tentatively?
30 MR. RUSH: None. Convenient to us.
31 THE COURT: All right. July 29th, thank you. All right. Are
32 we ready to proceed?
33 MR. GRANT: Yes, my lord. If I may, I am going to excuse
34 myself?
35 THE COURT: Thank you, Mr. Grant. Have a pleasant month.
36 MR. GRANT: Yes. You have a pleasant vacation as well, my lord.
37 THE COURT: And perhaps madam registrar mentioned that I don't
38 think we need to gown for the further viewing of the
39 video after this morning's session.
40 MR. PLANT: My lord, one matter that perhaps I should raise that
41 doesn't have to do with the video. Some time ago
42 your lordship referred to a paper by Murray Smith on
43 the -- well, it's called, "When Does The Previous
44 Statement Of The Witness Become An Exhibit". I have
45 had an opportunity to obtain a copy of this paper
46 from Mr. Peck who had it, and I don't think it
47 advances the discussion much beyond the principles

which were the basis of the submissions addressed to your lordship at the time that we discussed the question of whether or not that affidavit of Glen Williams ought to be marked as an exhibit. But that's something that in some sense is outstanding and I thought I should indicate to your lordship my view that the paper doesn't alter the principles that were the basis of earlier discussion. In effect, your lordship has a discretion as to whether or not the statement should be marked, and that discretion having been exercised is probably an end of the matter there, but I didn't want to leave the thing hanging after your lordship's reference to that paper and your suggestion that we ought to go and have a look at it.

THE COURT: Have you any submission to make, Mr. Grant?

MR. GRANT: Yes. I have reviewed the paper as well and I think that the only -- there was a reference to the paper, where a witness has signed the statement, that statement can go in as evidence. And of course this was a sworn affidavit and he had signed it. I think that that is the only -- to that extent that the paper can go in. But I do take a point that when my friend raised it, if I cross-examined or, I am sorry, re-examined Mr. Williams as to what else he had said in the paper, I may have introduced the facts -- the content of the paper independently.

THE COURT: Well, I would think that would still apply to what else he said in connection with the same subject matter surely.

MR. GRANT: Oh, yes. Not generally, but the fact that he would have said --

THE COURT: Yes. Well, I am not persuaded that cross-examination on a long affidavit -- cross-examination on one paragraph of a long affidavit makes the balance of the document admissible as proof of the truth of what it states. I think that the parts that were cross-examined upon and those that are sort of closely related to it should be part -- should on the application be marked as evidence but not beyond that, and I think I would not change the ruling in view of what counsel said of what I made earlier. I don't know what that requires.

MR. GRANT: I interpret what you have now just said which is what I think probably is the only -- I concede that that's the only scope it could go in. I will review

1 the affidavit and correspondence with Mr. Plant or
2 he can review and correspond with me and deal --
3 consider which parts of the affidavit we can try to
4 work out. What parts of the affidavit, if any, are
5 so connected to what he cross-examined that they
6 should be part of it. I think referred to two or
7 three paragraphs.
8 MR. PLANT: I can assist your lordship and my friend. There are
9 no other parts of the affidavit in my submission
10 which are not interconnected with those parts that I
11 referred to that they have to be marked. In any
12 event, they could not be marked for any other
13 purpose than to go to the credibility of the maker
14 of the statement. They cannot be -- at least on my
15 view of the opinions expressed by Mr. Smith, they
16 cannot be marked as evidence of the truth of their
17 contents. They merely support the other --
18 THE COURT: Unless they have been adopted.
19 MR. PLANT: Yes.
20 MR. GRANT: Well, I want to review the affidavit. I appreciate
21 my friend's efforts to assist but I'd like to review
22 it and we can deal with it at the end of July.
23 THE COURT: All right, thank you. Are we going to proceed with
24 the video now?
25 MR. RUSH: I think that's the next order of the --
26 THE COURT: Do counsel agree with the previous practice of not
27 having these video sessions reported by madam
28 reporter?
29 MR. RUSH: Yes.
30 THE COURT: You are excused then. Thank you, madam reporter.
31
32 (REPORTER EXCUSED)
33
34 I hereby certify the foregoing to
35 be a true and accurate transcript
36 of the proceedings herein,
37 transcribed to the best of my
38 skill and ability.
39
40
41
42
43
44 _____
45 TANNIS DEFOE, Official Reporter
46 United Reporting Service Ltd.
47