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To: UBCIC Executive

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From: Ardith Walkem

Subject: Declaring BCRs Invalid - Informal
Access to Information Access to Information Process

Date: November 16, 2015

Background

First Nations provide a Band Council Resolution (BCR) that authorizes the UBCIC Specific Claims Research Program (UBCIC Research) to carry out research on its behalf and to access documents from various repositories. UBCIC Research relies on “multi-year” BCRs with a future expiry date of usually 3 to 5 years, which clearly state that they can be “renewed or rescinded” at the direction of the First Nation. Multi-year authorizations avoid interruptions in work due to delays in obtaining renewed BCRs. Many active documents required for specific claims research are still in the possession of Indigenous and Northern Affairs Canada (INAC). An “Informals” process allows INAC records required for land rights research to be accessed quickly without going through the lengthy and onerous Access to Information process.

Issue

BC Informals has started to deny UBCIC Research access to records where the Chief and Council of a First Nation changed since a BCR granting access for specific claims research purposes was issued. BC Informals considers a BCR to be an “invalid BCR” after a new Council is elected. BC Informals expressed their opinion that “there is no national policy on what makes a BCR valid or invalid” and noted their

policy to “protect First Nations records and ensure that only authorized individuals/organizations are accessing these records” as follows:¹

When a BCR is created, that document is dated and signed by a proper quorum of active band council members. The BCR cannot be used to request access to departmental records past any expiry date provided for on that BCR, nor can it be used if there has been an election and the BCR has not been signed by a quorum of active council members.

It is the responsibility of the IM Services staff responding to a research request to check the quorum and when an election is going to occur. This can be done quickly and easily by visiting the First Nations Profile pages at <http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/index.aspx?lang=eng>.

If the BCR provided to IM Services does not meet the criteria noted above, it is a requirement that IM staff request a replacement BCR that does meet the criteria.

If a BCR simply makes reference to an organization or to a person but does not specifically indicate the researcher as being a person who can view the files we then will require an additional letter of employment (Retainer Letter) from the organization/person indicated in the BCR to confirm that the researcher does have the necessary authority.

...[T]his is to protect the records in our holdings to make sure that only authorized individuals have access to them.

(the “Invalid BCR Policy”)

Correspondence with other specific claims researchers shows that the procedure used in BC has started to be imposed sporadically in other parts of Canada, though there is no uniform practice. UBCIC Research has also heard that other repositories, which hold materials necessary to Specific Claims Research, are beginning to impose this policy, including Library and Archives Canada.

The questions addressed here are:

1. Are BCRs made by a Band Council that has since changed “invalid”?
2. What are the repercussions of requiring UBCIC Research and Bands who seek to access records for specific claims to file a new BCR every time Council changes?

Analysis

1. Are BCRs made by a Band Council that has since changed “invalid”?

The structure and governance of Band Councils are set out in the *Indian Act*:

¹ Written correspondence from Barry Dion (INAC – Manager, Information Services) to UBCIC Research.

The Act expressly confers a number of powers on Band Councils. The courts have made it clear that, as an autonomous elected body, a Council is entitled to make decisions as it sees fit on the matters falling within the scope of its powers, provided that the decisions are informed and are reached by majority vote at duly convened meetings. [...] It is now generally accepted that a Council holds not only all of these express powers, but also all additional powers necessary to effectively carry out its statutory responsibilities, [...] It would therefore appear that the Band is bound by the decisions of its elected Council unless they act in bad faith.²

Section 2(3) of the *Indian Act* discusses powers of Band Councils to make decisions at duly convened meetings of Council (“a power conferred on the Council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened”), and outlines requirements for notice, quorum and quantum of support required for decisions. The *Indian Band Council Procedure Regulations*, C.R.C., c. 950 (Regulations) set out further rules for the conduct of meetings.

BCRs are a Council’s way of reflecting its decisions, which must be made according to the requirements of the *Indian Act* and Regulations. BCRs reflect and record a broad variety of administrative and broader decisions, including in the areas of: land surrenders; authorizations to enter contracts; financial and banking matters including authorizations to borrow money; and, human resources and employment. Decisions made at a duly convened Band Council meeting, and reflected in a BCR, are not those of the *individuals* on Council but rather their decisions made in a representative capacity.

How can a BCR be invalid?

There are several ways in which decisions reflected in a BCR may be cancelled or otherwise invalid:

1. The Band Council can rescind or revoke an earlier BCR: “since BCRs simply record decisions, they may be superseded or revoked by subsequent BCRs”³;
2. The BCR may contain an expiration on its face, such as those used by the UBCIC Research, which state that they are valid for a prescribed purpose or period of time; or
3. The validity of BCRs can be challenged on the basis that the process that a Band Council followed in making the decision reflected in the BCR was invalid. First Nation councils are delegated, federal legislative bodies, authorized under the *Indian Act*: “a band council is, for purposes of section 18 of the *Federal Courts Act*, ‘a federal board, commission or other tribunal.’ ... Therefore, resolutions of a band council are considered decisions under the *Federal Courts*

² *Assu v. Chickite*, 1998 CanLII 3974 (BCSC).

³ *Understanding the Regulatory Environment for On-Reserve Lending: Frequently Asked Questions* (January 2005). Published under the authority of the Minister of Indian Affairs and Northern Development Ottawa, 2005:

Act and may be subject to judicial review.”⁴

The *Indian Act* and Regulations contain no expiration provision (stale-dating decisions made by a Band Council) stating that they become invalid upon a change in the composition of Council. There are legal processes and mechanisms to cancel or invalidate decisions reflected in a BCR (revocation or replacement; expiry of the time or subject matter of the BCR on its face; or, a legal challenge to the validity of the decision reflected in the BCR).

2. What are the repercussions of requiring UBCIC Research and Bands who seek to access records for specific claims to file a new BCR every time Council changes?

There are significant repercussions to the Invalid BCR Policy:

1. The Invalid BCR Policy suggests bad faith and casts doubt on the Honour of the Crown in its dealing with Bands seeking to research and pursue Specific Claims. Rather than working together in a joint attempt to resolve Specific Claims, the Policy creates a significant additional administrative burden and real barriers to researching and forwarding Specific Claims.
 - a. Significant time is lost seeking renewed BCRs. During that time, research lays dormant, documents cannot be ordered, and legal work cannot be conducted. When claims linger for a long time, the Research Funding branch of INAC considers pulling their funding.
 - b. By making the process of researching and forwarding Specific Claims more onerous, the Invalid BCR Policy suggests that INAC is more interested in putting up barriers rather than building bridges to a mutual resolution. This appearance of bad faith exacerbates an already difficult situation that resulted when an Access to Information Request filed by the UBCIC indicated that the Director General of the Specific Claims Branch ordered documents destroyed from 2001 – 2007.
2. The Invalid BCR Policy assumes the stale-dating of BCRs upon the election of a new Council. This conclusion would throw the operation of Band governments into disarray, assuming a vacuum of decision-making and governance. Decisions reflected in a BCR to surrender portions of reserve land, to authorize borrowing of money from financial institutions, or to hire an

⁴ *Vollant v. Sioui*, 2006 FC 487 (CanLII) (para. 25, citations removed).

employee are not invalid upon the change of Council; neither should a decision to allow access to records for Specific Claims research be.

3. BCRs reflect decisions duly made by Band Councils. Those decisions do not lapse when the Band Council changes. The decisions (as do decisions made by other levels and types of governments) continue. The process followed here claims that the decisions made by Band Councils are “less than” the decisions made by other levels of government. Application of the Invalid BCR Policy reflects an attempt to usurp the ability to decide when and whether a BCR is valid. This shows a tremendous disrespect and disregard for Band governance.

Summary

The Specific Claims process is the mechanism through which longstanding grievances resulting from Canada’s failure to protect reserve lands and assets from alienation are addressed, and should reflect a commitment to mutual respect and reconciliation. The *Specific Claims Tribunal Act*, S.C. 2008, c. 22, preamble recognizes the importance of resolving Specific Claims, noting that:

- it is in the interests of all Canadians that the specific claims of First Nations be addressed;
- resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations;
- there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner.

Access to information is integral to ensuring fair, timely, and just resolution of outstanding specific claims. The Invalid BCR Policy unduly adds time and expense to the Specific Claims research process creating additional barriers to resolving these long standing claims. Most disturbingly, the Invalid BCR Policy casts doubt on the validity and durability of decisions made by band governments by suggesting that all BCRs must be re-issued when a new Chief and Council is elected – clearly an unreasonable and untenable outcome, not supported by the law.