

# UNION OF BRITISH COLUMBIA INDIAN CHIEFS

## POSITION PAPER

*Regarding  
The Province of BC's Obligation to waive Fees for First Nations Access to Lands-related  
Information*

### POSITION

The Union of British Columbia Indian Chiefs (UBCIC) believes that it is illegal as well as morally and ethically unacceptable for the Province of British Columbia to charge BC First Nations any fees for basic information about their lands. The highest court in the land has affirmed the co-existence of both aboriginal and crown title in British Columbia. Access to data about lands in the lands-related ministries is essential if First Nations are to function on a fair and level playing field in the numerous and necessary lands and resource consultation and negotiation processes currently taking place in this province.

In the December 1997 Delgamuuk'w decision, the Supreme Court of Canada clearly directed the federal and provincial crowns to resolve any outstanding land issues involving First Nations through meaningful consultation and good faith negotiations. The Union of British Columbia Indian Chiefs holds the position that First Nations communities are entitled to access basic information about their communities at no cost. Information requests relating to unresolved and outstanding First Nations land claims, disputes and grievances are clearly and unmistakably in the public interest, and therefore must be exempt from fees.

### PRECEDENT

The UBCIC has made some two dozen Freedom of Information (FOI) requests relating to on-reserve road issues to the Ministry of Transportation and Highways (MOTH) since the current Freedom of Information Act came into effect. The UBCIC Research Program is a non-profit umbrella organization that conducts research on behalf of individual BC First Nations and is engaged in research education and advocacy on behalf of the broader aboriginal research community. The requests the UBCIC makes to MOTH on behalf of First Nations are very detailed and focused, and deal exclusively with on-reserve road issues. All requests made to date were formal information requests that stipulated that any fees should be waived, as the information was in the public interest. The UBCIC was not charged any fees for the copies that it requested or received during the first five years or so that the legislation was in effect.

MOTH has, however, responded to our most recent Freedom of Information requests by furnishing us with "fee estimates" ranging from the hundreds to the thousands of dollars, and the Ministry is now refusing (despite its own lengthy and significant precedent) to waive the fees. Some half-dozen research projects the UBCIC is currently conducting on behalf of individual First Nations are now stalled. In all instances, the bands involved intend to use the UBCIC research in support of their ongoing dialogue and negotiations with the province over their on-reserve road issues.

The Union of British Columbia Indian Chiefs considers MOTH's reversal of its own precedent to be an expression of bad faith, as well as a denial of the clear instructions that have emerged from the courts.

#### SPIRIT & INTENT OF THE LEGISLATION

The goal of the provincial Freedom of Information Act is to make it easier for British Columbians to obtain information relating specifically to themselves. The legislation states that fees will not be charged to individuals who are requesting their own personal information. A First Nation or Indian Band is a unique and legally recognized collective of individuals (as the federal access to information process acknowledges). The Union of BC Indian Chiefs believes the charging of fees for the accessing of basic information that is specifically about First Nations lands goes against the spirit and intent of the legislation.

#### UNIQUENESS OF THE INFORMATION REQUESTED

The information that the UBCIC is requesting from MOTH on behalf of particular BC First Nations exists only at the provincial Ministry of Transportation & Highways, and nowhere else. MOTH files contain specific, essential and unique information about the creation, history and status of roads on reserves. The Ministry recently pulled back a large volume of records consisting of some 329 reels of microfilm (GR 1585, Department of Highways 1910-1970) that had been transferred to the BC Archives for preservation and research purposes; these records must now be requested from the Ministry using the FOI legislation. By levying fees, the government of BC is effectively denying access to BC First Nations. The facts about on-reserve roads issues cannot be established without access to MOTH records, and these facts are essential for proper analysis by the affected First Nations parties.

#### THE "PUBLIC INTEREST"

Section 25 (1) of the Act says that information must be disclosed if it is clearly in the public interest. Section 75(5)(b) of the Freedom of Information Act says that applicants may be excused from paying fees when the information requested relates to a matter of "public interest". The UBCIC believes it is in the public interest for the Government of British Columbia to resolve all outstanding land tenure and land use issues with First Nations, including roads-related issues. The Government of BC clearly believes that resolving outstanding land issues is in the public interest, because since 1991 it has been endorsing and encouraging First Nations' participation in the BC Treaty and other processes geared to achieving successful and lasting treaties and land and resource-sharing agreements.

Furthermore, MOTH has acknowledged to the UBCIC that it is aware of at least 500 outstanding on-reserve road trespass and compensation issues. First Nations are in no position to identify or quantify these provincial breaches of law without access to MOTH records. It is clearly in the Government of BC's interest – and the greater public interest – for these trespass, compensation

and other irregularities to be identified through research as a first step towards their being rectified in some way. If First Nations are unable to access MOTH information relating to roads on their reserve lands, they will not be in a position to identify problems or possible options for their resolution. By effectively denying First Nations access to the facts about the history and status of roads on their reserve lands, the province is encouraging an imbalance and climate of frustration that has the potential to lead to tremendous public inconvenience.

The precedent established by MOTH (of waiving fees on the basis of the public interest), and its own correspondence with the UBCIC, confirm that the recent attempt to introduce fees is purely a blanket policy decision geared at cost-recovery. MOTH correspondence states the policy is being implemented, where deemed warranted, on the basis of the volume of records that must be searched or copied. A policy cannot outweigh or override the legislation, which is based on the idea that public interest is paramount; nor can it override Canadian case law. The courts, through judgements such as the Delgamuuk'w decision, have helped to clarify what the "public interest" is in respect to First Nations.

The Union of British Columbia Indian Chiefs vigorously asserts the position that the documentation of Indian people's long-standing land grievances, as a necessary preliminary to their ultimate and desired resolution, clearly falls within a category of information requests that is in the public interest. Therefore, under existing legislation, any fees connected to either informal or formal FOI requests should be waived.

#### BC'S FIDUCIARY DUTY TO FIRST NATIONS

The BC Supreme Court decision in June, 1997 regarding Halfway River First Nation versus BC (Ministry of Forests) found that the Ministry has a fiduciary duty to the First Nation to consult with the First Nation prior to making decisions which may affect treaty or aboriginal rights. Furthermore, the judgment found that the Ministry had failed to fully inform itself with respect to aboriginal and treaty rights, and had failed to provide the First Nation with information. "In order for the Crown to consult reasonably, it must fully inform itself of the practices and of the views of the Nation affected. In so doing, it must ensure that the group affected is provided with full information..."

It is worth noting that the federal government recognizes and accepts the argument that the disclosure of information will assist in the researching or validating of the claims, disputes or grievances of aboriginal people; researchers working on behalf of First Nations are not charged for photocopies, even when the volume of materials provided is extensive.

#### EVOLVING CASE LAW & DELGAMUUK'W

In addition to reinforcing the idea that it is in the public interest to reconcile aboriginal and crown title in British Columbia, court decisions like Delgamuuk'w are stressing the necessity for meaningful consultation as a prelude to good faith negotiations. "Good faith bargaining" requires

the crown(s) to fully disclose all relevant information to First Nations. The waiving of fees for informal information requests as well as formal Freedom of Information requests in this very specific context clearly falls in line with the duty of governments, as clarified by Delgamuuk'w, to bargain in good faith.

#### NDP GOVERNMENT PROMISE BREACHED

The NDP government, which introduced this legislation, has gone on public record as pledging that "fees will not be a barrier to access". The Union of British Columbia Indian Chiefs observes that it appears to be a conflict for a government that has championed and encouraged First Nations participation in a modern-day treaty-making process to deny – on the basis of cost - basic information required for community planning, meaningful consultation, good faith negotiations, informed decision-making and consent as well as the implementation of comprehensive agreements.

#### DISCRIMINATION/HUMAN RIGHTS VIOLATION

Currently, a significant number of First Nations in British Columbia are exercising their legitimate and democratic right to self-determination by declining to participate in, and seeking a more appropriate alternative to, the BC Treaty Commission process. The Union of British Columbia Indian Chiefs has been advised that the BC Treaty Commission process "includes a records disclosure process that would facilitate access to government records without going through the Freedom of Information (FOI) process." It appears the Union of British Columbia Indian Chiefs is being penalized for not supporting the current BC Treaty Process and that more generous access to government records is being provided to supporters of the process. This is unfair, illegal and totally unacceptable.

#### WAIVING OF FEES

Section 75 (5) (a) of the Act says that fees can be waived when it is fair to excuse payment. The Union of BC Indian Chiefs Freedom of Information requests to MOFH amply satisfy all of the conditions that the Act sets out regarding the waiving of fees. Furthermore, the UBCIC information requests also satisfy the following criteria established by the Office of the Information and Privacy Commissioner for assessing the waiving of fees:

The information in dispute has been the subject of recent debate. On-reserve roads issues are frequently in the news. At the moment a road issue in the Okanagan-Similkameen is making headlines. The more the applicant First Nation is denied the basic information about its on-reserve roads that would allow it to identify and pursue the most timely and efficient path to resolution, the greater the likelihood that a larger proportion of the public will be affected, and that the issue will become the object of wider public debate. Land tenure and land use disputes in BC are of great public interest for the present and foreseeable future.

The subject matter requested is directly related to the environment, public health or safety. In our

considerable experience, virtually all First Nations with on-reserve roads have concerns about public safety (ie. speed limits, pedestrian crossings, etc.). Many major roads and highways bisect BC Indian reserves. The historical research reports that the UBCIC Research Program provides to First Nations include, where relevant, details about environmental, safety and public health issues. This roads-related information is only available from MOTH records.

There would be a public benefit in disseminating the records. First Nations require the requested information in order to identify unresolved road issues, engage in meaningful consultation, informed decision-making and good faith negotiations towards their ultimate resolution. Legal standards require the Ministry of Transportation & Highways to share relevant information with affected First Nations. The identification and resolution of outstanding provincial breaches with regard to on-reserve roads are clearly in the Government of BC and the broader public's interest.

The applicant's primary purpose is to disseminate information in a way that could reasonably be expected to benefit the public. The UBCIC Research Program is a non-profit aboriginal umbrella organization whose primary purpose is to conduct specific types of research for BC First Nations. It conducts research on behalf any First Nation in BC that requests its assistance, and research priorities are established and driven by the individual First Nation in question. In many cases, the UBCIC Program is the only resource available to First Nations who wish to have the history of their roads documented for the purposes of community planning and to serve as a basis for negotiations or other avenues of dispute resolution regarding on-reserve road issues.

The impact of the information will be immediate and significant.

Until First Nations are in possession of their own roads-specific information from MOTH, they are not operating "on a level playing field", nor are they properly equipped for good faith negotiations with the Ministry. The accessing of this information, as provided under the Act and reinforced by case law, will enable First Nations to make informed decisions about how best to proceed towards the resolution of their legitimate and outstanding grievances with MOTH.

The issue is specific and definable. The applicant, the UBCIC Research Program, is staffed by professional researchers who routinely use the federal and provincial access to information legislation, and have expertise in making detailed and focused information requests. In the case that the UBCIC has appealed to the Office of the Information and Privacy Commissioner, the information requested was indeed specific and definable; it related to a single road across a single reserve.

#### ABILITY TO PAY

Section 75 (5) (a) of the Act says that fees can be waived when, in the Ministry's opinion, the applicant cannot afford the payment.

The UBCIC Research Program is a non-profit research, education and advocacy organization working on behalf of First Nations in British Columbia. The MOTH information it requests is on

behalf of, and at the direction of, individual First Nations. Under the UBCIC Research Program, all documentation collected and research products produced are considered the property of the First Nation. The economically disadvantaged condition of Canada's First Nations people (which is recognized regionally, nationally and internationally as stemming from infringements to their lands- and resource-base) is well documented in United Nations and government publications such as the Reports of the Royal Commission on Aboriginal Peoples.

The Union of British Columbia Indian Chiefs feels that due to the very real barriers aboriginal people have historically faced in their attempts to document their grievances, and due to a lack of resources stemming from the outstanding and unresolved obligations in question, it is highly appropriate that any fees pertaining to BC aboriginal communities' informal or formal Freedom of Information requests be waived.

### GOOD FAITH NEGOTIATIONS

The road rights-of-way and other lands research that the UBCIC conducts on behalf of First Nations is used by those Indian governments as a basis for their dealings and negotiations with MOH and other ministries. The waiving of fees for access to information requests would eliminate a considerable obstacle facing BC's aboriginal communities. The Union of British Columbia Indian Chiefs takes the position that the elimination of fees for access to lands-related information would be a concrete and timely demonstration of good faith on the part of the Provincial Government.

### PROCEDURAL FAIRNESS

The Ministry of Transportation & Highways has indicated that one way to get around the issue of fees would be for the applicant First Nation to be provided with a research report prepared by Ministry or Aboriginal Relations staff ("our Aboriginal Relations Branch has expressed a willingness in certain circumstances, to share the results of their research with relevant First Nations"); that is to say, the Province of BC is only prepared to share "selected" information at no cost to "selected" First Nations. This "solution" presumes the parties are not on an equal footing despite the court finding that aboriginal and crown title co-exist; furthermore, it discourages First Nations self-sufficiency. The Union of British Columbia Indian Chiefs maintains that BC First Nations and Indian governments are entitled to do their own fact-finding and research as a prelude to discussions, negotiations or other avenues for the resolution of outstanding issues. And as previously mentioned, it is unfair for the Province of BC to charge BC First Nations any fees at all for basic information about themselves, let alone discriminate by selectively charging only those BC First Nations (and organizations) which have resisted involvement with the BC Treaty Process.

### FIRST NATIONS CAPACITY-BUILDING

The levying of fees impedes access to the basic lands-related information that First Nations are

entitled to. By effectively "chilling" access to the full range of relevant research materials housed with a Ministry such as MOTH, the Government of BC is undermining good social science research methodology and discouraging the development of research capacity in First Nations communities and governance structures. The Union of BC Indian Chiefs believes that the Government of British Columbia's stated commitment to First Nations capacity-building should extend to, and include, the encouragement of First Nations research capacity development. Research capacity is part of the overall capacity required to negotiate and implement a comprehensive treaty.

#### SUMMARY

In order to participate on an equal footing with the federal and provincial governments at the various consultation and negotiations tables and in the various processes currently underway in British Columbia, it is critical for BC's aboriginal communities to have access to any and all relevant information pertaining to their reserve lands as well as larger traditional territories. Since the provincial government itself has identified the so-called "Indian Land Question" to be a priority, the researching of the grievances of BC's aboriginal people should therefore be considered to be in the public interest.

The issue of photocopy fees is important for all First Nations involved in research, consultations and negotiations. When people are gathering government documents about themselves in order to present that information back to the government as substantiation of a claim or negotiating position, it seems unwarranted and unreasonable to present them with a large bill for photocopies. If the existing FOI legislation is not sufficient to guarantee First Nations access to this information without charge (and it is the UBCIC's contention that it is), the Delgamuuk'w decision should make the provincial government's obligations clear.