



To: Squamish Nation Membership

From: Squamish Nation Chiefs and Council

Date: September 19, 2011

**RE: COUNCIL VACANCIES
SQUAMISH NATION CUSTOM**

On behalf of Squamish Nation Chiefs and Council, the Co-chairs are providing an update regarding the vacancy on the Squamish Council. On June 27, 2011 Pamela Baker resigned from Squamish Nation Council, leaving one vacancy on the 16-person Council. In keeping with the previous custom and practice of the Squamish Nation, Council will be not filling this vacancy with a by-election or otherwise. As has been done in the past, the position will remain vacant until the next general election in 2013. This document explains the reason for this approach within the context of the history of the Squamish Nation Council.

History of the Squamish Nation Council

The Council of the Squamish Nation was established through the Amalgamation of several Bands comprised of Squamish people. There were sixteen Hereditary Chiefs that participated in the Amalgamation and, from 1923 to 1981, the Squamish Nation Council was comprised of the 16 Hereditary Chiefs or their designate. There were no elections to Council during this time. Vacancies on Council that were created by the passing of a member of Council or by the resignation of a Councillor were filled by the appropriate family through a family-based process.

In the 1970s, a community process reviewed the hereditary method choosing Councillors and a decision was reached by community consensus to move to an elected Council. This change was formally made in 1981. As a result of this change, all 16 members of the Squamish Nation Council are elected in an at-large election in which each Squamish Nation member may vote for up to 16 Council candidates.

The Squamish Nation Election Regulations

As part of the process to move to an elected Council, the Squamish Nation membership adopted a written custom election code, which is now called the *Squamish Nation Election Regulations*. The *Election Regulations* govern the election of the 16 members of Council.

There are no provisions in the *Election Regulations* that explain what is to happen in the event of a vacancy on Council. The courts have held that where a custom election code does not specifically address a matter that has arisen in respect of the selection of its Council, the customs and practices of the band govern.

Thus, in considering how to deal with the vacancy on Council left by Pamela Baker's resignation, Council must follow the unwritten customs and practices of the Squamish Nation since adopting the *Election Regulations* in 1981. Resignations that pre-date 1981 do not help to deal with the present vacancy because there were no elections prior to 1981 and vacancies would have been filled through the hereditary system.

(Continued over)



Council Vacancies Since 1981

Since 1981, there have been two vacancies on Council, both created by the passing of a sitting member of the Council:

- Joe Antone passed away on May 18, 1992 while serving on Council. The vacancy left by his passing was not filled and the position remained vacant until the next general election in 1993.
- Chief Joe Mathias passed away on March 10, 2000. As with Joe Antone, the vacancy left by Chief Joe Mathias' passing was not filled until the 2001 election.

Thus, the customs and practices followed by the Squamish Nation since moving to an elected Council in 1981 has been to allow a vacated position on Council to remain open until the next general election. There is no custom or practice of filling the vacancy by way of a by-election or by moving the person who placed 17th in the 2009 election into the vacant spot.

Procedure to Change Customs

In order to change the customs of the band, courts require there to be a "broad consensus" of the band membership supporting any such change. In practice, this would likely require the support of at least 50% plus 1 of the eligible voters of the Squamish Nation or at least be approved in a process that gives all Squamish voting members a fair and reasonable chance to have a say in the proposed change to customs. It is not sufficient to simply vote to change a customs at a general membership meeting attended by only a minority of Squamish Nation voting members. A broad consensus of the entire Membership through a proper process is required.

The Current Vacancy

In keeping with the customs and practices of the Squamish Nation, the Council will leave the seat vacated by Pamela Baker open until the next election in 2013. A quorum of 8 Councillors is required to conduct the business of the Squamish Nation and that will not change with this vacancy.

This decision is consistent with the customs and practices of the Squamish Nation and with legal advice that Council obtained in respect of this matter.

Sincerely,
SQUAMISH NATION

Krisandra Jacobs



Council Co-chair

SQUAMISH NATION

Byron Joseph



Council Co-chair



RATCLIFF & COMPANY LLP
Lawyers

MEMORANDUM

TO: SQUAMISH NATION CHIEFS AND COUNCIL
FROM: JOHN R. RICH AND F. MATTHEW KIRCHNER
DATE: AUGUST 29, 2011
FILE: 02-1315
RE: VACANCY ON COUNCIL

INTRODUCTION AND SUMMARY

This memorandum confirms John Rich's advice, given on July 11, 2011 at the Squamish Nation Chiefs and Council meeting, that Chiefs and Council need not fill the vacancy left on Council by the resignation of Pamela Baker. In fact, filling the vacancy would be contrary to the custom of the Squamish Nation. We elaborate on that advice in this memorandum.

The memorandum also advises on whether Vern Baker, who placed 17th in the 2009 election, has any entitlement to fill the vacancy. This matter has come up since the July 11, 2011 meeting and thus was not addressed in that meeting. Our opinion is that appointing Vern Baker would be contrary to Squamish Nation custom and thus would likely be struck down by a judge. Further, there is almost no precedent in other democratic governments for filling a vacancy in this manner and the practice is viewed by pro-democracy groups as being undemocratic.

VACANCIES UNDER THE SQUAMISH NATION ELECTION REGULATIONS

As you know, Squamish Nation elections are held pursuant to the *Squamish Nation Election Regulations* which were adopted in 1981. The *Election Regulations* provide for a 16-member Council that is to be elected in at-large elections held every four years. All members of the Squamish Nation who are 18 years or older are entitled to cast a ballot and vote for up to 16 candidates.

The *Election Regulations* contain no provisions dealing with a vacancy on Council. Thus, there is nothing in the *Election Regulations* that explains what is to happen when a member of Council resigns before the end of his or her term on Council.

The courts have held that where an Indian Band's written custom election regulations do not cover a matter that has arisen in respect of the selection of Council, regard should be

given to any unwritten customs or practices of the band relating to the matter. For example, in *Samson Indian Band v. Bruno*, 2006 FCA 249, the Federal Court said at para. 39 that “evidence of prevailing election practice and custom may be relevant in resolving ambiguities or filling gaps in the Election Law”. In another case, *Lafond v. Muskeg Lake Cree Nation*, 2008 F.C. 726 at para. 10 the court said that customary powers remain intact when band legislation does not “cover the field”.

SQUAMISH CUSTOM RESPECTING VACANCIES

Following the direction of the courts, it is necessary to consider the Squamish customs and practices regarding filling vacancies on Council. In doing so, practices and customs since 1981 (when Squamish moved to an elected Council) are relevant. Practices and customs before 1981 provide no guidance because vacancies were filled under the heredity system by the family members of the Councillor whose position was vacated. The current at-large election system is an entirely different system.

We are aware of only two vacancies that have come open since 1981 prior to the end of the 4-year term of the Council. These are vacancies left by Joe Antone’s passing in May 18, 1992 and Chief Joe Mathias’ passing on March 10, 2000. In both cases, the positions left vacant by these passings were not filled until the next general election. Thus, the only custom of the Squamish Nation has been to leave such vacancies open until the next general election.

We note that if further vacancies were to come open, such that it would be difficult to meet quorum and govern the Nation, it may then be appropriate then to consider filling those vacancies through a by-election. However, the custom, with respect to a single vacancy, indicates that the seat should be left vacant until the next general election in December 2013.

The custom of an Indian Band in relation to elections may only be changed if the proposed change has the support of a “broad consensus” of the band membership. This means a broad consensus of all members of the band and not just those members who show up at a general meeting. In practice, this would likely require the support of at least 50% plus 1 of the eligible voters of the Squamish Nation or at least be approved in a process that gives all Squamish voting members a fair and reasonable chance to have a say in the proposed change to custom. Thus, it would not be acceptable to simply change the custom by a vote at a general band meeting attended by only a minority of Squamish Nation voting members, even if those in attendance approve the change. A broad consensus of the entire voting membership is required.

FILLING THE VACANCY BY APPOINTING VERN BAKER

We are not aware of any practice or custom of the Squamish Nation that would support Vern Baker’s suggestion that he, as the 17th place finisher in the 2009 election, should be moved up to fill the vacancy left by Pamela Baker. As noted above, the only custom or practice of the Nation relating to such vacancies is to leave the position vacant until the next general election. To follow Vern Baker’s suggestion of appointing him to fill the

vacancy would constitute a very significant departure from the Squamish Nation's custom and would likely be set aside by a court.

In view of Vern Baker's suggestion, we researched the general legal principles (outside of Squamish custom) relating to filling a vacancy on a governing body by appointing the runner-up in the last previous general election. We found no legal principles supporting the practice and certainly no legal principle that would impose this as a method to fill a vacancy. In fact, the practice is seen by pro-democracy groups as being anti-democratic.

In our research, we found only one government in Canada – the Thunder Bay City Council – which has adopted this practice. In that case, the Ontario *Municipal Act* specifically allows municipalities to decide how they wish to handle vacancies and this is a practice that Thunder Bay, in its discretion, has specifically adopted.

We also found that the Hong Kong government tried to adopt this practice for its government this summer but the move was met with massive protests by pro-democracy groups and the Hong Kong government has suspended implementation of the plan.

CONCLUSION

Since the *Squamish Nation Election Regulations* do not deal with vacancies on Council, resort must be had to the Squamish Nation practice and custom, which has been to leave a vacancy open until the next general election. Thus, Council has no obligation to call a byelection to fill the vacancy left by Pamela Baker's resignation and, in fact, is likely required not to fill the vacancy in keeping with existing practice.