

## Specific Claim Negotiation Costs Funding Guidelines & Research Funding Guidelines – Analysis

This document analyzes the Specific Claim Negotiation Costs Funding Guidelines (*Negotiation Guidelines*) and the Research Funding Guidelines (*Research Guidelines*). This analysis compares the two sets of Guidelines to find points of crossover and to assess potential implications for First Nations.

### Executive Summary

Canada provides funding to First Nations to support the research and development of specific claims as well as the negotiation of specific claims. The Negotiation Support Directorate (NSD) administers funding for these purposes. The *Negotiation Guidelines*, which set out the process for First Nations to receive loan funding to support the negotiation of their claims, were substantively and unilaterally revised in 2020. The *Research Guidelines* were imposed on First Nations in the same year.

Currently, the NSD is engaged in a review of both Guidelines and intends to publish them in June 2021. Together, the Guidelines fail to respond to the needs and priorities of First Nations. Moreover, the Guidelines entrench the SCB's control over key aspects of the specific claims process. As Canada seeks to meet its commitments and obligations under international law by establishing a fully independent process, the Guidelines represent a step backwards.

The *Negotiation Guidelines*, which apply to specific claims that Canada has accepted for negotiation, set out the process for First Nations to receive loan funding from Canada to participate in specific claims negotiations. Previously, loan funding was not available for claims that the SCB deemed to be of small value. In response to First Nations' concerns, the *Negotiation Guidelines* were amended to allow First Nations to receive loan funding for small value claims. While this was a positive development, significant financial risk remains for First Nations whose claims are deemed to be of small value. These First Nations may inadvertently take on negotiation loan funding that exceeds the value of the settlement agreement. This risk is amplified by the continued lack of transparency in relation to the valuation of specific claims by Canada. Changes made to the *Negotiation Guidelines* since April 1<sup>st</sup>, 2020 were superficial and did not address these concerns.

Canada also provides grant funding to First Nations to support the research and development of specific claims. Previously, this type of funding was available to Claims Research Units (CRUs) and individual First Nations who were aware of the application process through word of mouth or inquiries to the NSD. The NSD has stated that it intends to transition away from this approach and instead inform all First Nations of the application process. First Nations and CRUs have identified several issues with the *Research Guidelines*. These issues include an arbitrary five-year limit on research funding, competition over funding, arbitrariness, lack of transparency, and the entrenchment of the SCB's decision-making role in key aspects of the specific claims process. Additionally, the *Research Guidelines* inappropriately include negotiation activities.

The credibility of the SCB and NSD depends on their ability to provide clear, logical, and fair guidelines and policies that are consistent with domestic and international law. The NSD has failed to ensure the *Negotiation Guidelines* and *Research Guidelines* are fair and respectful to the interests of First Nations and consistent with the minimum standards under international law. This failure could contribute to the

erosion of trust in the current specific claims process. Moreover, First Nations will continue to be adversely impacted and barred from access to justice until both Guidelines are properly revised.

## **Background**

Canada provides funding to First Nations to support the research and development of specific claims as well as the negotiation of specific claims. The Negotiation Support Directorate (NSD) administers funding for these purposes through the *Negotiation Guidelines* and the *Research Guidelines*. Currently, the NSD is engaged in a review of the Guidelines and intends to publish them in June 2021. Until now, this type of funding was available to CRUs and individual First Nations who were aware of the application process through word of mouth or inquiries to the NSD. The NSD intends to transition away from this approach and instead inform all First Nations of the application process.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) sets out the minimum standards in international law applicable to the specific claims process. Article 27 of the UN Declaration on the Rights of Indigenous Peoples provides that:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.<sup>1</sup>

This obligation applies to Canada as a state and to bureaucratic actors such as the SCB and NSD. Moreover, public servants are obliged to act honourably in their dealing with Indigenous Peoples. Accordingly, at a minimum, the SCB and NSD must ensure that the Guidelines are fair, independent, impartial, open, and transparent.

## **Negotiation Guidelines**

The *Negotiation Guidelines*, which apply to specific claims that Canada has accepted for negotiation, set out the process for First Nations to receive loan funding from Canada to participate in specific claims negotiations. The *Negotiation Guidelines* describe how a reasonable portion of negotiation costs may be added to the final settlement and how First Nations can receive loan funding to cover negotiation costs.

### **Caution Concerning Loan Funding and Costs Component of Final Settlement**

The *Negotiation Guidelines* include a caution related to the interaction between loan funding and the costs component of the final settlement. The *Negotiation Guidelines* state that the costs component of the settlement will generally include the amount of negotiation loans funding. Further, the *Negotiation Guidelines* specify that the "reasonable portion of the costs of negotiation should not exceed the total value of the compensation, except in extraordinary circumstances". This caution is directed at First Nations whose claims are deemed to be of low value. The risk is that a First Nation could take on loan funding that exceeds the value of the settlement.

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<sup>1</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 at Article 27 [emphasis added].

## Financial Risk for First Nations with Small Value Claims

The *Negotiation Guidelines* state that,

“As Canada’s loan funding officers do not know the potential compensation of the claim, and Canada’s negotiators do not know the amount of loan funding, the First Nation must be responsible for ensuring that negotiation loans are reasonable and less than the compensation amount”.<sup>2</sup>

This creates an unpalatable situation for First Nations whose claims are deemed to be of small value. These First Nations are faced with the following choices:

1. Engage fully in negotiations while incurring all necessary costs; or
2. Ensure that negotiation costs are kept lower than the compensation amount.

Under the first option, First Nations may face significant financial liabilities. Under the second option, First Nations may be unable to meaningfully and substantively engage in negotiations. It is inimical to reconciliation and inconsistent with the honour of the Crown to demand that First Nations take on significant financial risk in order to advance their specific claims.

Discriminating against small value claims is a barrier to justice for First Nations. Moreover, states are obliged to resolve their past wrongdoings against Indigenous Peoples in a fair and impartial manner. This obligation exists regardless of the size or value of the claim.

## Canada’s Conflict of Interest

Canada may benefit from assigning lower valuations to specific claims. Specifically, First Nations whose claims are deemed to be of small value may be reluctant to apply for negotiation loan funding. This could contribute to an uneven playing field in specific claims negotiations. There is no indication that First Nations are able to provide input on the valuation of claims or to challenge arbitrary valuations by Canada.

## **Research Guidelines**

The *Research Guidelines* set out the process for the administration of funding to First Nations for the research and development of specific claims. First Nations and CRUs have identified concerns with the unilateral process through which the NSD developed these Guidelines. Additionally, First Nations and CRUs have identified significant issues with the substance of the *Research Guidelines* in their current form. Firstly, the objectives in the *Research Guidelines* are inconsistent with the objectives expressed by First Nations. In particular, the emphasis on joint activities throughout the guidelines is not a priority articulated by First Nations. Secondly, the *Research Guidelines* contain an arbitrary and unreasonable five-year limit on funding per claim. Finally, the *Research Guidelines* are tainted by competition over funding, arbitrariness, lack of transparency, and entrenchment of the SCB’s decision-making role.

## **Negotiation Activities & the Research Guidelines**

The *Research Guidelines* inappropriately include activities related to negotiation. Particularly, the *Research Guidelines* state that funding may be provided for “joint activities during the course of

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<sup>2</sup> Emphasis added.

negotiations (such as mediation on specific aspects of the claim) to come to a common understanding of the claim and promote resolution”. This mirrors the tendency of the NSD in recent years to use funding dedicated to claim research and development for unrelated activities such as consultation, mediation, and the AFN’s policy reform work. This may adversely impact First Nations by preventing them from receiving adequate funding for the research and development of their claims.

### **Research Guidelines and Negotiation Costs Guidelines**

The Guidelines share a number of common features. These include:

- unnecessary privileging of joint activities
- competition between First Nations for limited funding,
- lack of transparency,
- vagueness,
- the potential for arbitrariness, and
- entrenchment of the SCB’s decision-making role.

### **Privileging of Joint Activities**

The Guidelines position joint activities as a central priority. This emphasis appears to be driven by factors internal to Canada rather than based on the stated needs and priorities of First Nations. Moreover, in some circumstances, joint activities may be inappropriate and harmful to the interests of First Nations.

A practical effect of the privileging of joint activities may be seen in the *Negotiation Guidelines’* treatment of joint and independent studies. The *Negotiation Guidelines* state that:

As studies are meant to be joint in a negotiation process, proposals for independent studies must specify the reasons why a joint study is not feasible and how the independent study relates to the shared objective of reaching a negotiated settlement. Proposals for independent studies will be considered on a case-by-case basis.

Moreover, the *Negotiation Guidelines* state that “In general, a maximum amount of \$50,000 annually will apply to independent studies and reports (cumulative amount for all independent studies and reports).”

Together, the Guidelines serve as obstacles to First Nations who wish to undertake independent activities. This is inconsistent with the needs and priorities articulated by First Nations and may have an adverse impact on First Nations’ interests.

### **Competition for Funding**

At its heart, the issue of funding is one of fairness. Canada has extraordinary resources at its disposal to defend itself against specific claims. Meanwhile, First Nations and CRUs are forced to compete for limited amounts of funding to advance their specific claims. In a fair process, First Nations would have access to funding sufficient to enable the research and development of specific claims and the resolution of their specific claim through adjudication, mediation, or negotiation.

The *Negotiation Guidelines* state that negotiation loan funding is subject to budget availability. If this budget is too low or if demand for negotiation loan funding is particularly high, First Nations may not be able to receive sufficient funding. This could impede meaningful and substantive participation in negotiations. Similarly, the *Research Guidelines* limit funding to First Nations based on budgetary restraints. This is exacerbated by the NSD returning significant surpluses to the Department in recent years. Funding will likely be stretched even thinner if the NSD informs all CRUs and First Nations of the funding application process, as is planned. Funding must be provided fairly so that First Nations have adequate resources to resolve their specific claims. In their current form, the Guidelines do not ensure adequate funding for First Nations.

### **Lack of Transparency**

At a minimum, the Guidelines must be open and transparent. Both Guidelines, however, lack transparency in key areas.

The risk to First Nations with small value claims in the *Negotiation Guidelines* is amplified by the lack of transparency on how valuation and funding decisions are made. After complying with the minimum standard requirement, specific claims are referred to the Valuation and Mandating Unit of the Specific Claims Branch. At this stage, the SCB sets a preliminary value for the claim. It is not clear how the valuation takes place, whether it is disclosed to the First Nation, or whether there is any oversight of the SCB's valuation unit. Transparency on how valuation of specific claims takes place is necessary for First Nations to decide to pursue negotiation loan funding. This is especially the case for First Nations with lower value claims.

There is also a lack of transparency in the *Research Guidelines*. For example, the NSD has increased the annual per claim funding amount from \$25,000 to \$40,000. The methodology for determining the amount of funding, however, is not transparent. The NSD has not provided a clear and consistent methodology for the determination of funding amounts. Without this transparency, First Nations and CRUs may encounter significant difficulties anticipating funding levels.

### **Vagueness**

To meet the requirement of openness and transparency, the Guidelines must avoid vagueness. Vagueness in the Guidelines prevent First Nations from fully understanding the potential implications of the Guidelines.

The *Negotiation Guidelines* rely on vague statements in a number of important areas. For example, the *Negotiation Guidelines* state that,

reasonable portion of the costs of negotiation should not exceed the total value of the compensation, except in extraordinary circumstances.

It is not clear what these extraordinary circumstances are. In the absence of transparency on these circumstances, First Nations may need to engage in guesswork and take on significant financial risk when incurring negotiation costs. A process that requires First Nations to take on this degree of risk is not consistent with the honour of the Crown. Similarly, the *Negotiation Guidelines* state that,

Only in exceptional circumstances will smaller value claims see costs added to settlement compensation which exceed the total value of the settlement.

Again, it is unclear what these exceptional circumstances could be. The *Guidelines* should expand on this issue and provide examples of exceptional circumstances. More fundamentally, it is unjust to discriminate against certain claims simply because they are deemed to be of small value.

Additionally, the *Negotiation Guidelines* state that,

In general, a maximum amount of \$50,000 annually will apply to independent studies and reports (cumulative amount for all independent studies and reports).

The circumstances in which this general rule will not apply are not clear. The *Negotiation Guidelines* should provide guidance on this issue. To meet the minimum standard of openness and transparency, instances of vagueness must be clarified in both Guidelines.

### **Arbitrariness**

The minimum standards under international law require that the process for funding specific claims be fair. To meet this requirement, the NSD must ensure that its funding Guidelines do not contain arbitrary limits on funding. In their current form, both Guidelines contain unfair, arbitrary funding restrictions.

The *Research Guidelines* contain an arbitrary and unreasonable five-year funding limit per claim. This raises the possibility that First Nations will be left with inadequate funding. This limit is arbitrary and fails to take into consideration the reasons why specific claims may take longer than five years to research and develop. Specific claims may be complex, can be delayed by leadership turnover, and may face bureaucratic delays. In some cases, these delays may be completely outside of the First Nation's control. In fact, delays are often caused by Canada's conduct. In these circumstances, it is especially unjust to impose an arbitrary funding limit on First Nations.

The *Negotiation Guidelines* contain a similar arbitrary limit. This limit states that:

In general, a maximum amount of \$50,000 annually will apply to independent studies and reports (cumulative amount for all independent studies and reports).

This limit is arbitrary and may be designed to encourage joint activities between Canada and First Nations.

### **Entrenchment of the SCB's Decision-making Role**

To meet its public commitments and obligations under international law, Canada must ensure that the specific claims process is fully independent. This will require the elimination of all forms of conflict of interest in the specific claims process. The Guidelines, in their current form, entrench the SCB's authority over key funding decisions and further Canada's conflict of interest.

In the *Research Guidelines*, the SCB is given some decision-making authority over funding decisions. For example, the SCB can grant or deny approval for specific funding requests associated with some activities. Similarly, in the *Negotiation Guidelines*, variations from the maximum amounts can be considered on a case-by-case basis by the Specific Claims Branch.

Enabling the SCB to have decision-making authority over funding is a clear conflict of interest since the SCB assesses the validity of claims filed against Canada. Additionally, First Nations' specific claims may include legal advice or other confidential information. The SCB, as a party to specific claims, must not be able to view work plans or make funding decisions. Finally, the decision-making role of the SCB in funding decisions may prevent First Nations and CRUs from vigorously advocating for changes to the specific claims process, due to the possibility of punitive measures from the SCB. First Nations may be participating in discussions or negotiations with Canada outside of the claims process. They must be protected from the possibility of retaliation by the SCB.

### **Conclusion**

The SCB and NSD must balance their program objectives with Canada's commitments and obligations. This will require the NSD to revise the Guidelines to ensure that they are fair, independent, impartial, open and transparent. Moreover, as Canada seeks to implement a fully independent specific claims process, it must avoid entrenching the SCB's authority in key areas. These revisions could enable the Guidelines to be an important tool to ensure that First Nations have adequate funding to resolve their specific claims.