

Review of Specific Claims Research Program Contribution Funding Budget and Expenditures

This document analyzes several documents provided by NSD and obtained through access to information requests related to specific claims research program funding and expenditures.

Executive Summary

Canada provides funding to First Nations to support the research and development of specific claims. Canada is obliged to provide this funding in a “fair, independent, impartial, open and transparent” manner.¹ The 2019 federal budget proposed that \$40 million would be provided over five years, starting in 2019, to support First Nations research and develop specific claims. The 2020 summer Specific Claims Bulletin built on this commitment, stating “Budget 2019 increased the funding for First Nations to research and develop their claims to \$12 million per year for five years”.

Several documents were obtained through an access to information request in 2021. A review of these documents reveals concerning information. Primarily, significant expenditures have been made that appear unrelated to the research and development of specific claims.

Additionally, in the last two fiscal years, significant surpluses have been returned to the Department. Failure to properly provide research funding jeopardizes the ability of First Nations to adequately research and develop their specific claims and impedes access to justice for these historical wrongdoings.

Possible next steps include submitting additional access to information requests to clarify information contained in the obtained documents. Additionally, or alternatively, a series of questions could be posed directly to the NSD to clarify its research funding expenditures. Finally, work could be done to set out First Nations expectations of Canada in relation to research funding expenditures.

Background

Canada provides funding to First Nations to support the research and development of specific claims. The Negotiation Support Directorate (NSD) administers this funding. Article 27 of the UN Declaration on the Rights of Indigenous Peoples sets out the minimum standards applicable to the provision of funding in this context:

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

¹ 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.

owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.²

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In 2020, the specific claims research community became aware that the total annual amount allocated to Claims Research Units (CRUs) and First Nations was considerably less than the allotted \$12 million. The NSD advised that some of the funding was provided to the AFN to support policy work on specific claims and the effort to fundamentally reform the specific claims process. Since then, information provided by NSD and access to information requests have revealed additional detail about specific claims research program expenditures.

Documents Analyzed

1. 2021-03-31 Release Package – “Functional Area/Fund Center Actuals”.
2. Allocation Table Specific Claims – 2017-2022.
3. NSD-SCR 2017-2021 Specific Claims Research Expenditures Summary.

Analysis

First Nations require adequate resources in order to research and develop their specific claims. Canada has an obligation to provide this funding in a fair, independent, impartial, open and transparent manner.³ Failure to provide sufficient funding to First Nations jeopardizes their ability to achieve just resolution of their specific claims. Moreover, inadequate funding puts First Nations at a significant disadvantage relative to Canada. Canada can rely on ample resources to defend itself against specific claims and control the distribution of resources to First Nations to pursue specific claims.

These documents reveal significant expenditures that appear unrelated to the research and development of specific claims. These expenditures, described below, include funding for the AFN, the Specific Claims Tribunal, negotiation, mediation, and consultation. Additionally, in the last two fiscal years, significant surpluses have been returned to the Department.

First Nations are forced to compete for limited amounts of funding made available for research and development. This competition is heightened by the NSD’s use of research and development funding for activities unrelated to research and development. The return of surpluses by the NSD to the Department increases this competition further. Moving forward,

² *Ibid* [emphasis added].

³ 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.

the NSD should ensure that research and development funding is spent on research and development. Additionally, the NSD should dedicate funding to capacity development and training, where appropriate. Funds not used during a fiscal year should be returned to research and re-profiled to the subsequent fiscal year.

Expenditures Unrelated to Research and Development

- \$1,068,620 was used to support “Specific Claims Tribunal funding requests pressures” in FY 2019-2020. In FY 2020-2021, \$464,434 was used for this category of expenditure.
- \$1,500,000 was used to support “AFN Joint Working Group for Specific Claims Policy Engagement” in FY 2019-2020. In FY 2020-2021, there was no similar expenditure.
- \$300,000 in FY 2019-2020 and \$67,500 in FY 2020-2021 were used to “support AFN Specific Claims Policy work”.
- Several additional expenditures appear unrelated to the research and development of specific claims, including “negotiation support funding requests pressures”, mediation related to agricultural benefits, consultations related to section 35, and “consultations for a Quebec First Nation”.

Surpluses Returned to Department

In 2019-2020, a \$1,600,909 surplus was returned to the Department. In 2020-2021, a \$1,352,771 surplus was returned to the Department. It is not clear whether the NSD took sufficient steps to first determine whether First Nations had received adequate funding for research and development of their specific claims before returning the surplus. Additionally, the NSD failed to commit to funding CRU capacity building or training initiatives before returning the surpluses. Finally, it is unclear what the returned funds were used for. In the absence of clarity on these points, First Nations cannot be confident that the NSD is meeting its obligations to distribute funding in a fair, independent, impartial, open, and transparent manner.

Questions for the NSD

1. What are “Specific Claims Tribunal funding requests pressures”? Why are these pressures being addressed through funds dedicated to the research and development of specific claims?
2. Why is funding for research and development of specific claims being used to support the “AFN Joint Working Group for Specific Claims Policy Engagement”?
3. Why is funding for research and development of specific claims being used to support “AFN Specific Claims Policy work”?

4. What are “negotiation support funding requests pressures”? Why are these pressures being addressed through funds dedicated to the research and development of specific claims?
5. Why is funding for research and development of specific claims being used to support mediation related to agricultural benefits, consultations related to section 35, and “consultations for a Quebec First Nation”?
6. Did the NSD receive direction to provide funding from the research and claim development budget to issues unrelated to research and claim development?
7. What steps did the NSD take to ensure that all First Nations had adequate resources to research and develop their claims before returning the surplus to the Department? What options were available to the NSD to deal with the surplus? What options were communicated to CRUs and First Nations to deal with the surplus?
8. Before returning the surplus to the Department, did the NSD consider funding CRU capacity building or training initiatives?

Potential ATI Requests

2021-03-31 Release Package – “Functional Area/Fund Center Actuals” was released pursuant to an access to information request. This document contains codes and abbreviations that are unintelligible without further clarification. An access to information request may be useful in gathering more useful information about these expenditures.

An access to information request to obtain information on internal directives to NSD/SCB to provide funding from the research and claim development budget to issues unrelated to research and claim development.

First Nations Expectations

The NSD must balance its program objectives with Canada’s commitments and legal obligations. The SCB should ensure that the NSD is accomplishing this objective. First Nations and CRUs may benefit from clearly communicating to the NSD their expectations in relation to funding administration. A preliminary set of expectations could include the following:

- The NSD and its employees are expected to act honourably in all dealings with First Nations.
- The NSD is expected to follow through on public and private commitments to First Nations in relation to funding.
- The NSD is expected to administer its funding in a manner that is consistent with applicable domestic and international legal principles.

Next Steps

Possible next steps include submitting additional access to information requests to clarify information contained in the obtained documents. Additionally, or in the alternative, a series of questions could be posed to Canada to clarify its research funding expenditures. Finally, work could be done to set out First Nations' expectations of the NSD in relation to research funding expenditures. If these tactics do not succeed in addressing issues with the NSD's research program expenditures, more assertive advocacy may be required.