CONCERNS REGARDING NEGOTIATION TABLES
Summary of Preliminary Review and Discussions to Date

May 17, 2021

1. **Lack of preparation**: Canada's negotiators are showing up to tables without having read the claim and are asking for copies of documents that have already been submitted, wasting First Nations' time and limited resources.
    - **Example 1:** Negotiator had not read either the claim or latest jurisprudence. (When asked, the negotiator confirmed that they had read neither.) "The Chief had a few words to say."
    - **Example 2:** Canada misunderstood which lands were reserved and which had been lost – they had the figures backwards. Much time was wasted trying to figure out the source of the problem and correct the error.
    - **Example 3:** Canada's negotiators asked for extensive supplemental documentation, all of which had been included with the original claim.

2. **Despite promises, Canada has no clear or systematic way to review, in relation to new policy and case law, claims previously rejected (or partially accepted):** First Nations have been asking Canada to review (previously rejected or partially accepted) claims in light of new case law, such as that arising from SCC decision in *Williams Lake*. These requests have gone unanswered for a substantial period of time.
    - This is contrary to the SCB Director General's comments that he wants to hear from Nations and work together.
    - The onus is on First Nations, as Canada insists that new evidence must be provided in order to discuss changing the terms of acceptance. Canada has no systematic approach.
    - Respondents stated that Harper-era claims in particular should be looked at with fresh perspective, without the need for further evidence (given how Canada was partially accepting and rejecting claims in that period).

3. **New barriers and lack of consistency/continuity during stays of proceedings at the Tribunal (when Canada and the Nation take time away from the SCT to negotiate**):
    - Different DOJ lawyers are assigned to the negotiations, creating inconsistency, needless retreading of facts, and discrepancies in tenor and approach.
    - First Nations have to use scarce resources to apply for negotiation funding during a stay at the SCT.
        - "It's been extremely difficult, especially since you can't use your spec claims funding to help out at all. This has been an area of huge contention for us. Our community…[doesn't] have the resources to fund this process so they have to depend on the department for funding."
        - "This is an example of how the whole process is designed to make things easier for Canada and not the First Nation."
    - First Nations have to work with new negotiation loan funding guidelines that have been developed without any consultation with them.

4. **Nations are having to juggle multiple funding applications, budgets, and reporting requirements to NSD for a single claim in situations where (a) they have had to apply for**

research funding; (b) the claim has been rejected and they have taken claims to the SCT; and (c) there is a stay of proceedings and they must apply for negotiation loan funding.
Respondents said:

- "It's forcing a community with limited resources to have to spend more time and money to do separate budgets, separate reports and audit more agreements when it could be simplified."
- "Claims should be funded until resolution."

5. **First Nations are reporting a lack of clarity, transparency, and communication regarding preliminary funding to support activities upon receipt of a letter from Canada agreeing to negotiate or discuss the claim:**
    - The Negotiation Loan Funding Guidelines state that "All new claims accepted for negotiation are eligible for a one time loan funding of up to $15,000 for preliminary discussions on the terms of Canada's acceptance, the planning of negotiations and the preparation of a workplan and funding proposal. The $15,000 will be in addition to any further loan funding in the other three categories (basic, studies and reports, ratification)." However, Nations are reporting receiving contribution funding in this amount (and sometimes higher) to support research activities in response to requests from Canada to supply additional evidence to support of particular allegations. This research is distinct from valuation studies set out in the guidelines. It is not clear how this funding is being communicated to Nations.
    - There seems to be no transparent process or methodology for applying for or receiving this funding. The CRU side of the CRU-NSD working group on research funding recently received draft claim research and development funding guidelines which included provisions for Nations to apply for research funding to cover preliminary activities post-assessment.
    - Recent access to information requests have also shown that research (contribution) funding is being allocated by NSD to support post-assessment activities, including mediation, joint studies, and to make up Tribunal funding shortfalls.

6. **Some First Nations are being denied (without justification) the full $15K in preliminary negotiations as set out in the new guidelines**: The guidelines state that all claims accepted for negotiation are eligible for one-time loan funding of up to $15,000" for preliminary discussions, planning, and the creation of a workplan and funding proposal. However, Nations reported that they did not receive the full $15k, with little or no explanation as to why.
    - There is no scale or rationale in the guidelines, so once again, the decision about how much preliminary funding a First Nation will receive is made unilaterally with no transparency, accountability, or proper consultation.

7. **Restrictions on Experts Resulting in Protracted Delays and Questions of Fairness:** The new guidelines restrict experts to those working 'jointly' and will fund First Nations to hire their own expert only in rare circumstances (which are not set out). However, Nations are reporting that the process for developing joint Terms of Reference for experts is rife with delay (close to a year in some cases) and unfairness as Canada's experts at Public Works draft Terms of Reference through a narrow lens and First Nations' own experts must work to get them to align with Nations' knowledge and experience. The prospect of developing a common understanding is

difficult and may deter First Nations experts from participating if they assert that the integrity of their work is being compromised.

8. **Despite NSD assurances that First Nations have flexibility with their budgets and can move items around as they need, Nations are being subjected to an increased level of scrutiny ("inquisitorial") and micro-justification when submitting loan funding applications**: **Examples**:

    - Being asked to justify honoraria to Chiefs, having to justify a small budget line for an Elders Committee.
    - The tenor of these discussions is that the First Nation is lying or trying to do a run-around the guidelines creating a general level of disrespect that permeates these conversations and email exchanges.
    - First Nations are being put in ridiculous Catch-22s; budget items for appraisers are being flagged/rejected due to lack of detail and specificity, but these details can only become known once funding is secured and First Nations have the ability to hire appraisers and draft terms of reference.
    - The new negotiation guidelines prevent FNs from adding salaried members of FNs to budgets for negotiation funding activities.
    - FN are having to endure seemingly endless correspondence in which they are being asked to account for basic elements of negotiations. Addressing the correspondence creates a considerable drain on resources and requires funding

    New percentage caps on budgetary costs are making it difficult for Nations to engage and could cause problems in audits (for example, setting strict limits on 'First Nations costs' versus 'Legal and Professional costs'.

9. **Canada clearly lacks capacity to meet Nations' expectations for meaningful and purposeful negotiations:** Canada is opening more negotiation tables post-assessment (either in explicit recognition that it owes a lawful obligation or that it is willing to discuss the allegations in the interests of reconciliation although it does not recognize and outstanding lawful obligation). However, Nations report that this process is extremely slow and are being told there is a lack of capacity at Canada's end. In general, we are hearing from Nations that Canada is overstretched and unwilling/unable to resource its own commitments.

10. **Negotiations are slow and difficult and Nations are facing many barriers**: The pattern (systemic bias, conflict of interest) becomes clear when these barriers are examined more systematically. Quotes from respondents:
    - "I feel like Canada's negotiator isn't really offering any solutions or ideas. It feels like [they are] going out of the way to listen to what our community is saying but isn't actually hearing it."
    - "It doesn't feel like we're making substantial progress"
    - Inconsistencies remain in the process: "Positions that Canada would agree to a few years ago suddenly are no longer acceptable, and no justification given."
    - **Conflict of interest**:
        - "With Canada also being in charge of the negotiation funding/loands it really doesn't feel like a level playing field."
        - "Process continues to suffer from problems related to inequality and conflict of interest on the part of Canada."