

# National Claims Research Directors

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Sent via email: shelie.laforest@canada.ca

July 21, 2021

## **RE: CIRNAC Engagement with Claims Research Directors - Draft Research Funding Guidelines**

Dear Shelie Laforest,

The National Claims Research Directors (NCRD) writes in response to new policy guidelines related to the administration of specific claims research and development funding (“Funding Application Guidelines – Contributions for the Research, Development and Submission of Specific Claims”). The guidelines were developed and applied unilaterally by the Negotiation Support Directorate (NSD) of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and overseen by the Specific Claims Branch (SCB). They were created without having worked in full partnership with First Nations from the outset of the policy development process in order to obtain their free, prior and informed consent as required under Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) and in contravention of Canada’s duty to uphold the honour of the Crown in fulfilling its obligations to First Nations.

The NCRD met on Monday, July 19<sup>th</sup>, 2021 to review the latest draft of the guidelines (dated July 16, 2021) provided to Research Directors by NSD. While NSD has accepted certain recommendations made by Research Directors in response to previous iterations of the research funding guidelines, a significant number of concerns remain. The NCRD has identified the following issues that require further substantive discussion between Canada, First Nations, and their representative organizations:

1. Establishing the core funding available to support Claims Research activities (Section 2). We note that in response to our recommendation for a commitment to ensure the availability of \$12 million annually for the research and development of claims, particularly in light of CIRNAC’s stated intention to publicize the funding application process, NSD will only commit to one-third of the current funding available (\$4 million) after the 2023-24 fiscal year. All First Nations must have secure, sufficient, and equitable access to research funding necessary to substantiate their claims against Canada.
2. Regarding eligible activities and expenditures (Section 5), we acknowledge the removal of “joint activities” pending further discussion. However, “meetings with Canada in the development of claims” is also a term that lacks transparency and requires further explication and consideration regarding its meaning and implications. These activities, as far as they are deemed eligible expenditures, must be clearly identified and the process for initiating and participating in them must be developed in full partnership with First Nations.
3. There continues to be a lack of clarity and transparency regarding eligible research activities post-claim submission and prior to final assessment by SCB (Section 5). While First Nations must be afforded every

opportunity to provide information to substantiate their claims and be provided the resources to support this work, it is imperative that dedicated funding is secured, clear processes be established in full partnership with First Nations to ensure clarity, accurate characterization of the nature of research activities contemplated, and transparency, and that these activities in no way negatively impact access to funding for the research and development of claims prior to submission to SCB.

4. The failure to remove the Specific Claims Branch from a role in evaluating or approving proposals for research funding to support the post-submission activities covered above. Specific Claims Branch, as the assessor of claims, must have no involvement in the evaluation or approval of research work plans at any stage where research is required (Section 5). Work plans submitted by Claims Research Units or First Nations are confidential. Until a fully independent specific claims process exists, every effort must be made to minimize Canada's conflict of interest by ensuring SCB is uninvolved in any funding decisions.
5. Issues regarding maximum amounts of funding (Section 7) and funding stacking (Section 8) remain outstanding. First Nations must be integral to further discussions and decision-making on these issues.
6. Any policy development regarding intellectual property and ownership requirements (Section 11) requires comprehensive engagement between First Nations and their representative organizations throughout the development process. Canada's public commitments and legal obligations make this necessary.

Research Directors expressed considerable frustration with the process undertaken by NSD and SCB in the development of the funding guidelines, which was undertaken without having worked in full partnership with First Nations through their representative organizations from the start to obtain their free, prior, and informed consent as required under Article 19 of the UN Declaration. We are very concerned that, contrary to Article 19, CIRNAC intends to proceed with a final approval process for implementing the guidelines without first resolving the outstanding issues identified above to the satisfaction of First Nations. Research Directors have made it clear that this is unacceptable and constitutes a failure by Canada to fulfill its public commitments, legal obligations and uphold the honour of the Crown.

On June 21, 2021, Bill C-15, *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples* received Royal Assent and is now law, meaning that Canada must take all necessary measures to ensure Canadian laws are consistent with the UN Declaration and must take all measures to ensure the UN Declaration's objectives are met. Article 19 of the UN Declaration requires that:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

In this instance, Canada's conduct falls far short of the minimum standard set out in Article 19. Claims Research Directors first learned of changes to administrative funding procedures in December 2019 and January 2020, via NSD's annual "call for proposals" process, where new conditions for research funding were embedded in technical forms and instructions which were applied without notice. This prompted the NCRD to call on Canada to reconvene a joint technical body – the Claims Research Unit (CRU)-NSD Working Group on Research Funding – to discuss a series of research funding related challenges in accordance with principles of fairness, equality, full collaboration, and transparency. NSD agreed and introduced the CRU side of this working group to new, unilaterally drafted research funding guidelines at the first meeting on August 11, 2020. At this meeting CRUs were told that the guidelines were already being applied and would be released publicly and although already drafted, the guidelines were open for comment and could be changed.

The NCRD, through the CRU side of the working group, emphasized the lack of proper consultation, contrary to Canada's public commitment to work in full partnership with First Nations and Canada's

obligations under the UN Declaration, which requires transparency, due process, and full enactment of government-to-government approaches. The process of inviting First Nations to comment after the fact fails to fulfill these obligations.

Research Directors reviewed several iterations of the draft guidelines over the course of almost a year, the latest being the July 16, 2021 version discussed above. In each meeting and upon each review of updated drafts, Research Directors expressed serious concerns with the funding guidelines and the process for developing them. Each draft of the guidelines also contained new, unilaterally introduced provisions, introduced without discussion, that required renewed scrutiny. Due to these concerns, we repeatedly issued pointed recommendations and requested that Canada not finalize the guidelines before the issues could be adequately addressed to the satisfaction of First Nations and further recommended that an alternative announcement regarding access to research funding be distributed to all Nations by NSD.

Research Directors were clear that Canada's response has been to minimize First Nations' concerns, tinker with wording, and assert inflexible bottom-line positions by insisting that internal federal government directives and deadlines from within and outside CIRNAC supersede obtaining First Nations' free, prior, and informed consent in matters of research funding policy. While Canada has agreed to temporarily remove some of the more contentious provisions of the new guidelines and continue discussions to seek First Nations' input at a later date, this is insufficient and falls far short of the minimum standards for state conduct articulated in the UN Declaration. These are not designed to adhere to outcomes of an 'after the fact' process; rather, the principles of partnership, transparency, due process, and equality must be built into all processes for policy development and decision-making from the very beginning. In short, Research Directors maintain that the guidelines should have been developed collaboratively from the outset.

Specific claims arise due to Canada's unlawful and dishonourable conduct. Canada has publicly acknowledged many times over that the fair and just resolution of specific claims – addressing its lawful obligations to First Nations - is integral to achieving reconciliation between the Crown and Indigenous peoples. As such, the honour of the Crown must substantially inform how Canada proceeds with addressing its obligations, a principle affirmed strenuously by the courts. To fully address its dishonourable historical failures which gave rise to specific claims, Canada must conduct itself with honour throughout all processes for resolving them, including administrative and technical processes that determine access to justice and shape outcomes for First Nations. This duty is incumbent upon all federal government representatives and employees.

The specific claims research funding guidelines are an administrative measure that directly impacts First Nations and therefore must be developed in full compliance with Article 19 of the UN Declaration. As Bill C-15 is now law in Canada, CIRNAC must postpone implementing the guidelines and take immediate steps to ensure that First Nations provide their free, prior and informed consent through substantive engagement with them and their representative organizations.

Sincerely,

National Claims Research Directors

CC/

Stefan Matiation, Director General, Specific Claims Branch, CIRNAC  
Martin Reiher, Assistant Deputy Minister, Resolution and Partnerships, CIRNAC  
AFN National Chief RoseAnne Archibald  
AFN Chiefs Committee on Lands Territories and Resources  
BC Specific Claims Working Group