

9 tips to improve the First Nation per capita distribution (PCD) process

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Per capita distributions, or PCDs, are a common way for First Nation governments to administer large settlements. But common doesn't mean simple or easy. From the recent \$10 billion settlement of the Robinson Huron Treaty annuity claim (and the anticipated upcoming settlement of the corresponding Robinson Superior Treaty claim), to the settlement of specific claims (think treaty land entitlement claims, boundary claims, and unlawful surrenders), to payments under various revenue sharing agreements (think exploration agreements, impact benefit agreements, partnerships, and joint ventures), Indigenous governments are regularly faced with making complex and difficult decisions for what, on its face, might appear to be a fairly straightforward payment process.

Here are nine tips to help make per capita distribution-related decisions easier for First Nations Councils.

1. **Ensure Council makes the final decisions.** Because Chief and Council have the ultimate ability to make decisions to bind the Nation and its members, they have increased legal and ethical duties and obligations towards them. This special relationship is called a **fiduciary relationship**. An important feature of this relationship is that Council remains the ultimate decision-maker; they cannot delegate their fiduciary duties to others, including the membership or finance department. While community engagement is often a crucial component of the per capita distribution decision-making process, the ultimate responsibility for making decisions always rests with Council.
2. **Start planning early.** There are several matters that Council may want to consider at the outset of PCD planning, including:
 - a. **Evaluate your internal capacity.** It's a good idea to start the process by evaluating the internal capacity of the First Nation to administer the per capita distribution, including the finance and membership departments. These departments will be making administrative decisions on the PCDs, for example, what forms will be required and how banking information will be collected, even though they can't make key decisions about the PCD itself. If additional training or human resources are required to effectively administer the PCD, provide this before moving any further with the process.

- b. **Enlist the help of advisors.** Having financial, legal and community advisors engaged from the outset of the decision-making process can reduce administrative issues down the road. Financial advisors can help set up appropriate processes to ensure funds flow smoothly. Legal advisors can spot potential risks and ensure the entire process is **undertaking in line with Council's fiduciary obligations. Community advisors, such as Elders or a committee made up of diverse members of the Nation, can help ensure the decisions are aligned with the Nations' own laws and traditions and provide an opportunity for engagement and feedback on a more regular basis.**
- 3. **Engage the community.** Council has a duty to keep membership informed of all relevant information that could affect their interests. Keeping membership involved along the way benefits everyone: it can help Council refine and revise their decisions on the per capita distribution based on feedback received and can provide an opportunity for membership to feel involved and a part of the decision-making process. **In many cases, it is memberships' individual hardships that are part of the basis of the claim and so they must necessarily be involved and kept up to date.**
- 4. **Determine who will receive a payment.** The question of who is entitled to receive a per capita distribution is often more complicated than anticipated. What cut-off date will you use for entitlement? Whose membership list (Canada vs. the First Nation) determines membership? What will you do about individuals whose **membership isn't finalized due to factors beyond their control, such as children in care or those dealing with administrative processing delays?** Will there be a grace period to maximize member entitlement?
- 5. **Think about holdbacks.** Tied to the membership question, there are likely situations where Council must make per capita distributions to more people than originally anticipated. Where will the funds to cover these payments will come from? What amount will be held back? On the flip side, what will happen to funds **that aren't used or claimed?**
- 6. **Make time for trusts.** It takes time to establish the trusts required to hold the funds for per capita distributions. Even a simple trust designed to pay out PCDs or to hold funds for minors until they turn 18 can take weeks to finalize once a law firm and trustee are selected.
- 7. **Consider debt set-off.** Per capita distributions present an opportunity for Councils to recover debts owing to the First Nation by offering the recipients the ability to repay their debt from their PCD and/or bring outstanding payments into good standing. Because there are restrictions on how this can be done, legal advice should be sought before proceeding.
- 8. **Draft a custom release.** A clear, well-drafted release can help protect the Nation and Council from future claims by recipients. There is no one-size-fits-all release; every release should be tailored to fit the purpose of the settlement and the per capita distribution.
- 9. **Ensure the community is prepared.** Is the community ready to receive a large sum of money all at once? How can Council put protections in place for more vulnerable parts of their membership, such as Elders?

BLG regularly advises Indigenous clients on matters relating to the administration of per capita distributions for First Nations, including the creation of trusts and ensuring decisions are in line with fiduciary obligations. If you have any questions about this topic, please reach out to any of the key contacts below.

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