Top 10 issues for First Nation councils when considering per capita distribution (PCD) processes

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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, and there are legal issues that every Chief and Council should consider in advance. 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 all other payments under various revenue sharing agreements (think exploration agreements, impact benefit agreements, etc.), Indigenous governments are regularly faced with the decision on how to manage this process and not expose the First Nation Council to future liability.

These are complex and difficult decisions for what, on its face, might appear to be a fairly straightforward payment process.

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

1. **Ensure Council makes the final decisions.** Chief and Council have increased legal and ethical duties and obligations to ensure decisions are made in the best interests of the Community for which they have been elected to represent. This special relationship is called a **fiduciary relationship.** An important feature of this relationship is that Council remains the ultimate decision-maker; it cannot fully delegate its fiduciary duties to others, including the finance department or a committee. 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.** The size of the litigation settlement and the scale of PCDs typically outweigh that of the First Nation's regular operations. The complexity of handling, and then disbursing, these funds requires enhanced financial controls and increased coordination between internal teams. It's a good idea to map the

detailed steps and hand-offs, from intake of members' release forms to the disbursement of funds. An experienced finance and operations consultant can lend immediate support to First Nation leaders.

   a. **Support Council decision-making.** Create tailored analysis tools to help Chief and Council make informed decisions, ensuring all relevant data is considered.
   b. **System and personnel preparation.** Prepare systems and personnel to handle the intake of release forms and ensure a controlled and efficient disbursement of per capita distributions.

3. **Enlist the help of advisors.** Having legal and community advisors engaged from the outset of the decision-making process can reduce administrative issues down the road. Legal advisors can create tailored analysis tools to identify and spot potential risks, and ensure the entire process is undertaken in line with Council's fiduciary obligations. Having an ad hoc committee comprised of Community advisors can help ensure the decisions are aligned with the Nation's own laws and traditions and provide an opportunity for engagement and feedback on a more regular basis.
4. **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 its 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 members' individual hardships that are part of the basis of the claim, and so they must necessarily be involved and kept up to date.
5. **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?
6. **Think about a contingency fund.** Where entitlement is tied to membership, plan for contingencies. Membership entitlement is a question of legal application and Councils need to be inclusive and not exclusionary when deciding on entitlement to PCDs. There is case law on this topic to be followed to ensure that members are treated fairly and equitably in these processes. On the flip side, for all unused contingency funds, Councils will need to decide on the use of unclaimed funds in a fair and transparent manner.
7. **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.
8. **Consider debt set-off.** Per capita distributions present an opportunity for Councils to recover outstanding debts owing by membership by offering 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.
9. **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.

10. **Ensure the community is prepared.** Are community members ready to receive a large sum of money all at once? Consider the role of Council in ensuring that vulnerable members, such as Elders or incapacitated individuals, are provided any needed support.

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

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