

**United Nations Human Rights Council
Expert Mechanism on the Rights of Indigenous Peoples 15th Session**

Agenda item 3: Study on "Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.

British Columbia Treaty Commission Intervention

Firstly, thank you to the Expert Mechanism for this important study and for the opportunity to contribute to the final report.

We recommend the following additions to this report:

To share additional examples of good practices to support the balance of power in negotiations, the Treaty Commission recommends including a best practice of effective funding mechanisms such as independent funding bodies.

In Canada, funding to support treaty negotiations was provided for many years on a loan basis, and indigenous nations were required to repay those loans after the conclusion of the treaty. In 2019 Canada as a measure of good faith and political will to improve the negotiations environment in Canada, the federal government eliminated any outstanding loan debts associated with comprehensive claims negotiations, and repayed loans that had already been paid by self-governing Indigenous nations. All negotiation funding for treaty negotiations are now supported with contribution-only, non-loan funding to support effective negotiations.

In addition to para 72, we recommend inclusion of the recent policy in BC, Canada as another good practice.

In British Columbia, Canada, a new Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia (RRR Policy), was completed in collaboration with First Nations in 2019. The Policy makes clear that treaty negotiations are to be based on the recognition of indigenous title and rights, self-determination, and that the Declaration is the foundation and guide for treaty negotiations. Also, importantly the Policy makes clear that treaties are to be able to evolve over time, as a commitment to address treaty related issues between the governments and indigenous nations as the relationship evolves over time.

At end of para. 37, a suggested the addition:

Section 35(3) of the Constitution of Canada, by providing that modern treaties / land claims agreements are constitutionally recognized and protected, and when combined with self-government provisions, reflect a sharing of power and jurisdictions, and a sharing of sovereignty, between Indigenous nations and the state.

(see: BC Treaty Commission legal opinion from the late constitutional legal expert, Peter Hogg, C.C., Q.C., and Roy Millen *Treaties and the Sharing of Sovereignty in Canada* (<http://www.bctreaty.ca/sites/default/files/LegalOpinionHoggMillenTreatiesandShareSovereignty>

yCanada.pdf)

British Columbia Treaty Commission request for corrections and clarifications for accuracy from its original submission

Firstly, thank you to the Expert Mechanism for this important study and for the opportunity to contribute to the final report. We are requesting the following corrections for accuracy:

Para. 37. The last sentence at the end of para. 37 references the BC Treaty Commission submission. The sentence reads, "The interpretation of Section 35 continues in courts of law, and it is not clear whether other treaties and agreements, even if comprehensive, will receive the same constitutional protection and recognition as the treaties that are specifically listed therein."

- First edit, correction: deletion of "treaties and"
- Second edit, deletion and additions for further clarification: deletion of "the" and "listed therein", and the addition of ", land claims agreements," and "recognized in Section 35(3) of the Constitution of Canada."

For greater clarity please see the following with edits highlighted:

Para 37 "The interpretation of Section 35 continues in courts of law, and it is not clear whether other ~~treaties and~~ agreements, even if comprehensive, will receive the same constitutional protection and recognition as ~~the~~ future treaties, land claims agreements, that are specifically ~~listed therein~~ recognized in Section 35(3) of the Constitution of Canada."

Rationale for first correction:

The EMRIP report para 37, last sentence cites the BC Treaty Commission submission, and we respectfully request the deletion of "treaties" because it inaccurate and completely changes the context raised in our submission.

It is important to note that future treaties (technically referred to as "land claims agreements", which are the same as future, modern treaties.) do indeed receive constitutional protection, by virtue of s.35(3) of the Constitution:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The BC Treaty Commission submission, which EMRIP refers to, is on submission page 1, last paragraph, 5th sentence, as follows:

“It is also not clear whether other agreements, even if comprehensive, will receive the same constitutional protection and recognition as treaties, which are specifically listed in s. 35(3) of the Constitution of Canada.”

Rationale for second correction:

What was intended was raising awareness to whether other agreements will receive the same constitutional protection and recognition as treaties.

The recommended additions will further clarify that new and future treaties, land claims agreements will receive constitutional protection by virtue of s.35(3) of the Constitution. The wording in the draft EMRIP reports currently reads, as though specific treaties are listed, which they are not.

