Bulletin No.9

The First Nations of Maa-nulth Treaty Society

Huu-ay-aht First Nations | Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations
Toquaht Nation | Uchucklesaht Tribe | Ucluelet First Nation

PO Box 453 Port Alberni, BC, V9Y 7M9 ♦ Phone: (250) 724-1802 ♦ Toll Free: 1-877-876-3122 ♦ Fax: (250) 724-1852
Email: info@maanulth.ca ♦ Web: www.maanulth.ca

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# Explanation of Certain General Provisions and Legal Concepts of the Maa-nulth Treaty


## IN THIS BULLETIN YOU WILL READ THAT:

- Our rights apply throughout our traditional territories
- We will own and control our own lands
- Maa-nulth "fee simple" differs from fee simple elsewhere in BC in a number of ways
- Our treaty rights are protected under section 35 of the Canadian Constitution
- We will continue to have access to existing and new programs
- The treaty defines the constitutional relationship of Maa-nulth First Nations with the governments of Canada and British Columbia
- Maa-nulth First Nation governments are unique in Canada
- The treaty is a "living document", not frozen in time

# EXPLANATION OF CERTAIN GENERAL PROVISIONS AND LEGAL CONCEPTS OF THE MAA-NULTH TREATY

As citizens of the five Maa-nulth communities become better informed about the contents of the Maa-nulth Final Agreement, they raise questions that require more precise answers. This is a very good thing. It indicates the involvement of the citizens and an informed interest in what Treaty is all about.

This discussion document will attempt to identify some of these questions and provide responses.

## 1. How does the Treaty address the question of First Nation land rights?

The Treaty defines land rights in two different ways:

- it identifies the geographic area over which treaty rights apply, and
- it defines the legal nature and extent of land rights.

### *a) Where do treaty rights apply?*

Geographically, the Maa-nulth Treaty identifies First Nation rights throughout the entire traditional territories of each Maa-nulth First Nation.

### *b) What is the legal nature of Treaty land rights?*

In regard to the legal nature of Treaty land rights, each First Nation will own its treaty settlement lands in what is known as "fee simple". The lands will not be owned by the Provincial or Federal Crown.

The character of "Maa-nulth fee simple" lands however differs from fee simple lands elsewhere in BC. The Final Agreement states that the fee simple estate in Maa-nulth First Nation Lands "is not subject to any condition, proviso, restriction, exception or reservation, under the *Land Act* (Final Agreement paragraph 2.3.1). Some significant differences with Maa-nulth First Nation Lands include:

Law-making authority over Treaty Lands: The Maa-nulth Treaty has the effect of removing the federal and provincial governments as the governing bodies over treaty lands. Each Maa-nulth First Nation government will have the constitutionally protected authority to pass laws over treaty settlement lands. No other fee simple landholder in Canada has such constitutional authority.

Subsurface resources: Maa-nulth First Nations will own the subsurface resources under the land (grant of fee simple by the provincial crown throughout the rest of BC does not include grant of subsurface resources)

Protection under the Constitution of Canada: The fee simple interest of Maa-nulth First Nations under Treaty has far more legal protection than ordinary fee simple interests in Canadian law. Maa-nulth rights to Treaty Lands are protected under section 35 of the Constitution of Canada (this protection is not afforded to any other Canadians)

Limited expropriation: Maa-nulth fee simple land rights cannot be expropriated by either the federal or provincial governments except as provided for in the Treaty. Not only are the opportunities for expropriation limited, but where expropriation does take place, governments must provide other lands as compensation.

Fee simple is the highest form of ownership known in Canadian the law. It is the absolute ownership of the surface and the subsurface of lands and excludes the possibility of anyone else owning those lands. As such, it is "exclusive". (Grants of fee simple lands elsewhere in the Province almost always exclude grant of the subsurface resources.)

## *How does this relate to aboriginal title and what are our rights outside Treaty Lands?*

This is very different from an aboriginal title interest in land which the courts have said "coexists" with the interest of the federal or provincial governments. An aboriginal title interest in land is said to be a "burden" on the interest of the Crown. Moreover, the courts have held that the federal and provincial governments are capable of infringing upon and extinguishing aboriginal title if there has been appropriate consultation and accommodation.

The entire traditional territory of each Maa-nulth First Nation is outlined on maps in the appendices to this constitutionally protected document. The treaty defines the rights that each Maa-nulth First Nation will continue to be able to exercise throughout its respective traditional territory lands. That includes rights such as hunting, fishing or cultural activities and will be entitled to a share of the wealth generated on these lands through a resource revenue sharing agreement.

## *How is this different from our current situation on Indian Reserves?*

This is also very different from the current legal interest that Indian bands hold in Indian reserves. Indian reserves are not, in fact, "owned" by the bands. Under Canadian law, Indian Bands merely have the right to use and occupy reserve lands. These lands are owned by the Federal Crown and the power to make laws in regard to these lands rests with the government of Canada.

## 2. Does the Treaty extinguish First Nation aboriginal rights?

Aboriginal rights currently exist and are protected by section 35 of the Constitution Act of 1982.

Section 35 also protects Treaty rights.

As a consequence, both aboriginal and treaty rights have the same legal force and effect.

In defining Maa-nulth constitutionally protected rights, the Treaty transfers or "modifies" aboriginal rights into treaty rights. Since treaty rights are equally protected by the Constitution of Canada there is, in fact, no extinguishment.

This view is reinforced by section 1.3.1 of the General Provisions Chapter which states "This Agreement does not alter the Constitution of Canada". Arguably, any extinguishment would alter the Constitution of Canada and would therefore violate the provisions of the Treaty.

## 3. Is the Treaty the only place that Maa-nulth citizens have rights as aboriginal people?

In addition to all of the rights described in the Treaty, the citizens of the Maa-nulth First Nations will continue to have all of the rights of all other aboriginal people in Canada and British Columbia in relation to accessing existing programs and services.

This would include all existing programs in relation to matters such as health care, education and financial assistance programs.

This ability to participate in, and to benefit from, existing federal and provincial programs also extends to Maa-nulth First Nation governments, public institutions and corporations.

## 4. What does it mean to say that the Treaty is a "full and final settlement of aboriginal rights" and that the Treaty exhaustively sets out Maa-nulth section 35 rights?

These provisions of the Treaty mean that the five Maa-nulth First Nations have negotiated definitions and quantities for their constitutionally protected rights and have negotiated the constitutional relationship that will exist between the Maa-nulth First Nation governments and the governments of Canada and British Columbia.

Maa-nulth aboriginal rights that, up to this point, had been undefined and the subject of historic abuses by governments and considerable conflict are now defined as constitutionally protected treaty rights.

Maa-nulth rights and powers as self-governing peoples, which historically had been denied by Canada and British Columbia, are now acknowledged and protected by the Constitution of Canada and placed beyond the reach of federal or provincial legislation.

In effect, the Treaty describes the constitutional relationship that the Maa-nulth First Nations have in Canada.

This means that the Maa-nulth First Nations will have legal certainty about their rights in the future and assurances that these rights cannot be taken away by other governments.

If there is a conflict in the future about rights, powers or the relationship, this Treaty will guide the parties and the courts in resolving such conflicts.

## 5. Does full and final settlement mean that the relationship between Maa-nulth First Nations and the federal and provincial governments is frozen in time?

The Maa-nulth negotiators were always very concerned that this Treaty would be viewed as a document that was only relevant to the time at which it was negotiated.

It was always the position of the Maa-nulth First Nations that the Treaty had to be made in to a "living" agreement; one that permitted the parties to grow into new relationships over time; one that permitted the parties to be sure that the objectives of the Treaty were being met into the future.

To accomplish this, the treaty calls for what is known as a "Periodic Review". As a result of these provisions, the parties will conduct a review of the Treaty every 15 years to ensure that it is working to the benefit of all parties.

## 6. What is the legal status of Maa-nulth First Nation governments?

Maa-nulth First Nation governments are unique in Canada.

They are constitutionally protected in a manner similar to federal and provincial governments.

Unlike municipalities and Indian band governments, Maa-nulth First Nation governments are not created by another government. Maa-nulth First Nation governments are neither municipalities nor Indian bands.

Nor are the powers and jurisdictions of Maa-nulth governments delegated to them by another government.

The authorities of Maa-nulth First Nation governments cannot be contradicted or overridden by another government unless the Treaty specifically provides for that possibility and then only in a very limited way.