

Council Meeting
Wednesday March 29th, 2023
Video Conference
ADDITION TO AGENDA

1) ADDITIONS

- a) Request for Decision
 - i) s. 87 Exemption Extension Maa-nulth Treaty amendment for consideration
 - (1) Written Motion of Council
 - (2) BN from Brent Lehmann
 - (3) Signed Maa-Nulth First Nations Final Agreement Amending Process Agreement

Additions/deletions

- Adjourn meeting



For ease of reference, this motion may be referred to as:

Motion Regarding the Maa-nulth Treaty Section 87 Tax Exemption Extension

Whereas:

- a) Toquaht Nation has the inherent right to self-determination and to govern ourselves in accordance with our nuučaahuł values and as recognized in the Maa-nulth Treaty.
- b) As provided in Chapter 19 Taxation of the Maa-nulth Treaty, Toquaht Nation has the jurisdiction to tax and should have the flexibility to tax only when and how it chooses to do so.
- c) The Maa-nulth Treaty needs to be amended to allow that flexibility, both Canada and British Columbia have indicated their willingness to consent to such an amendment and, in accordance with 1.14.5 and 1.14.6 of the Maa-nulth Treaty, a special resolution approved by two-thirds of the members of the Toquaht Nation Council is required to give Toquaht Nation’s consent to such an amendment.

Be it resolved as a special resolution that Council hereby:

- 1) Gives its consent on behalf of the Toquaht Nation to the amendments to the Maa-nulth First Nations Final Agreement set out in English in Schedule 1 and in French in Schedule 2 attached to the *Maa-nulth First Nations Final Agreement Amendment Process Agreement* dated for reference March 6, 2023, included in the Briefing Note to the Council regarding the Maa-nulth Treaty Section 87 Tax Exemption Extension dated March 28, 2023.
- 2) Directs the Law Clerk to provide by April 7, 2023, a certified copy of these resolutions to Legal Counsel for the Maa-nulth Treaty Society, R. Brent Lehmann of Ratcliff LLP, for him to deliver to Canada, British Columbia and the other Maa-nulth First Nations.

Appendices attached to Motion:

Briefing note prepared by R. Brent Lehmann, Legal Counsel, Maa-nulth Treaty Society.

The following documents:

- *Maa-nulth First Nations Final Agreement Amendment Process Agreement* dated March 6, 2023.

Introduced by:

MEMBER OF COUNCIL

Date:

DATE OF MEETING



TO: TOQUAHT NATION GOVERNMENT
FROM: R. BRENT LEHMANN
DATE: MARCH 28, 2023
FILE: 11-0713-115

Maa-nulth Treaty Amendment for S. 87 Extension

INTRODUCTION

In July 2022, the Minister of Crown–Indigenous Relations and Northern Affairs, Marc Miller, announced Canada has changed its approach to phasing out the Indian Act section 87 tax exemption (“**s. 87 Exemption**”) as a requirement for modern treaties. Currently under 19.5.1(b) of the Maa-nulth Treaty, the s. 87 Exemption expires on December 31, 2023. With this change in federal policy, Modern Treaty Nations will have the option to maintain the s. 87 Exemption as long as they want, or end the s. 87 Exemption and take up direct tax powers on their own timeline. To allow this flexibility for Toquaht Nation, the Maa-nulth First Nations Final Agreement (“**Maa-nulth Treaty**”) must be amended, and that amendment must be consented to by Canada, British Columbia and each of the five Maa-nulth First Nations through their legislative bodies by special resolution.

BACKGROUND & DISCUSSION

Modern Treaty Nations possess a unique space within the constitutional fabric of Canada. Modern Treaties are the ultimate recognition and expression of Indigenous rights protected and affirmed by section 35 of the *Constitution Act, 1982* (“**s. 35**”). Canadian courts have consistently ruled that treaties must not be interpreted as being frozen in time at the date of agreement; they must be interpreted within the modern context. Therefore, the signing of a modern Treaty is only the starting point to inform the ever-evolving relationship between Canada and Indigenous peoples. It is in the best interests of Modern Treaty Nations to consider and take advantage of these ever-evolving shifts in Crown-Indigenous relations. The s. 87 Exemption extension is one example of this shift in government policy that will benefit Toquaht Nation.

A principled approach to Treaty amendments is for Modern Treaty Nations to approach every proposed Treaty amendment asking the question “Is it of benefit to us, does it expand our jurisdiction in a positive way, does it enhance our rights and interest?” Proposed amendments must further these objectives, moving the Modern Treaty Nation forward, not backward. A Modern Treaty Nation should consider whether the right or interest will be enhanced by being protected by section 35. The advantage of having a right addressed in the Maa-nulth Treaty is that the right becomes cloaked with that constitutional protection. Once a right is included in a Treaty, it is highly unlikely it will ever be removed. To remove a Treaty right would require a subsequent Treaty amendment consented to by all Parties, meaning the right could not be removed unless the Maa-nulth First Nations agreed to it.

The text to be added to the Maa-nulth Treaty is set out in English in Schedule 1 and in French in Schedule 2 attached to the Maa-nulth First Nations Final Agreement Amendment Process Agreement dated for reference March 6, 2023, included with this Briefing Note. Legal Counsel for the Maa-nulth Treaty Society, the author of this Briefing Note, has negotiated this agreement and approves its contents.

OPTIONS & IMPLICATIONS

Toquaht Nation leadership, along with other Modern Treaty Nations' leadership across Canada, have long sought this s. 87 Exemption extension. Canada and British Columbia have each indicated they will consent to these amendments. We believe these amendments should be consented to because:

- Toquaht Nation's citizens with status (if they qualify) will continue to benefit from certain tax exemptions if the proposed amendments are consented to by all Parties to the Maa-nulth Treaty;
- Having the flexibility to choose when to end the s. 87 Exemption and draw down taxation authority is a key component of self-determination, rather than having it imposed by an arbitrary deadline;
- This flexibility will allow Toquaht Nation to choose when to draw down its taxation authority and have more time to prepare the necessary communications and administrative systems well in advance of exercising that authority, making it a smoother transition process and likely more politically acceptable to citizens;
- The s. 87 Exemption under the Maa-nulth Treaty expires the end of this year, causing some enrollees to unenroll and in turn creating challenges for some Maa-nulth First Nations;
- Without Toquaht Nation approving the amendment, the exemption will expire and all Maa-nulth First Nations' members will become taxable;
- Without Toquaht Nation approving the amendment, it may be more challenging or impossible to make a similar amendment at a later date if the federal or provincial governments change their views on the s. 87 Exemption; and
- Even if the exemption were to be re-established at a later date, this would both create a greater administrative burden on all governments, as the tax status of individuals would change twice instead of not change at all, as well as create more confusion amongst citizens.

RECOMMENDATIONS

It is recommended that Toquaht Nation give its consent to the amendments to the Maa-nulth First Nations Final Agreement set out in English in Schedule 1 and in French in Schedule 2 attached to the Maa-nulth First Nations Final Agreement Amendment Process Agreement dated for reference March 6, 2023, included with this Briefing Note.

**MAA-NULTH FIRST NATIONS FINAL AGREEMENT
AMENDING PROCESS AGREEMENT (No. 2023-1)**

THIS AMENDING PROCESS AGREEMENT 2023-1 (this “Amending Agreement”) is dated for reference March 6, 2023

AMONG:

**HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the
Minister of Crown-Indigenous Relations**

(“Canada”)

AND

**HIS MAJESTY THE KING IN RIGHT OF BRITISH COLUMBIA, as
represented by the Minister of Indigenous Relations and Reconciliation**

(“British Columbia”)

AND

**MAA-NULTH FIRST NATIONS, as represented by the First Nations of the
Maa-nulth Treaty Society**

(“Maa-nulth First Nations”)

WHEREAS:

- A. On April 1, 2011, the Maa-nulth First Nations Final Agreement came into effect;
- B. The Maa-nulth First Nations Final Agreement provides for its amendment and specifies requirements for the amendment of various of its provisions;
- C. The Parties have previously agreed to amendments to the Maa-nulth First Nations Final Agreement;
- D. The Parties agree to propose further amendments to the Maa-nulth First Nations Final Agreement set out in Schedules 1 and 2 of this Amending Agreement;
- E. The Parties have determined that the processes set out in 1.14.1, 1.14.2, 1.14.3, and 1.14.5 to 1.14.8 of Chapter 1 – General Provisions apply to the proposed amendments set out in Schedules 1 and 2 of this Amending Agreement;

NOW THEREFORE the Parties agree as follows:

PART I – DEFINITIONS AND INTERPRETATION

1. In this Amending Agreement:

“Maa-nulth First Nations Final Agreement” means the Maa-nulth First Nations Final Agreement entered into among the Maa-nulth First Nations, Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of British Columbia, effective April 1, 2011, as amended.

2. A reference to a Chapter by number and name is a reference to the chapter of that number and name in the Maa-nulth First Nations Final Agreement.
3. Words and expressions appearing in this Amending Agreement that are not defined in this Amending Agreement but are defined in the Maa-nulth First Nations Final Agreement have the meanings ascribed to them in the Maa-nulth First Nations Final Agreement.

PART II – PROPOSED AMENDMENTS

4. The proposed amendments in English to the Maa-nulth First Nations Final Agreement are set out in Schedule 1.
5. The proposed amendments in French to the Maa-nulth First Nations Final Agreement are set out in Schedule 2.
6. Pursuant to 1.14.8 of Chapter 1- General Provisions of the Maa-nulth First Nations Final Agreement, the proposed amendments set out in Schedules 1 and 2 will take effect on the date the last Party required to consent to the amendment provides its consent.

PART III – PROCEDURES

7. This Agreement may be executed by electronic signature, which will be considered as an original signature for all purposes and will have the same force and effect as an original signature on paper. Without limitation, “electronic signature” will include electronically scanned and transmitted versions (e.g., via pdf) of an original signature.
8. This Agreement may be signed in identical counterparts, each of which constitutes an original, and such counterparts taken together will constitute one agreement. The signatures of the Parties need not appear on the same counterpart, and executed counterparts may be delivered in electronically scanned form by electronic mail.

[Remainder of Page Intentionally Left Blank]

**FOR HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the
Minister of Crown-Indigenous Relations, signed this _____ day of**

_____.

Authorized Signatory

Dionne Savill

Printed Name

**FOR HIS MAJESTY THE KING IN RIGHT OF BRITISH COLUMBIA, as
represented by the Minister of Indigenous Relations and Reconciliation, signed this
12 day of March**



The Honourable Murray Rankin
Minister of Indigenous Relations and
Reconciliation

FOR MAA-NULTH FIRST NATIONS, as represented by the First Nations of the Maa-nulth Treaty Society, signed this 14th day of March, 2023.



Charlie Cootes
President
Maa-nulth Treaty Society

Schedule 1

The Maa-nulth First Nations Final Agreement is amended as follows:

1. Chapter 19 – Taxation is amended to add the following numbered provisions immediately after each of 19.5.1, 19.5.2, 19.5.3 and 19.5.4 respectively:
 - 19.5.1.1 Despite 19.5.1 and subject to 19.5.3.1, as of the day this provision comes into effect, section 87 of the *Indian Act* applies to a Maa-nulth-aht who is an Indian.
 - 19.5.2.1 Despite 19.5.1 and subject to 19.1.1a, 19.5.3.1, 19.5.3.2 and 19.5.4.1, as of the day this provision comes into effect, section 87 of the *Indian Act* applies on Maa-nulth First Nation Lands that were an Indian Reserve or Surrendered Lands on the day before the Effective Date as if those lands were an Indian Reserve.
 - 19.5.3.1 19.5.1.1 and 19.5.2.1 only apply so long as section 87 of the *Indian Act* itself remains in force.
 - 19.5.3.2 19.5.2.1 only applies to an Indian during a period that section 87 of the *Indian Act* applies to the Indian.
 - 19.5.4.1 A Maa-nulth First Nation may enter into a tax agreement with Canada or British Columbia that limits the application of 19.5.2.1 to the extent specified in that tax agreement.

Schedule 2

L'Accord définitif des premières nations maa-nulthes est modifié comme il suit :

1. Le chapitre 19 intitulé « Fiscalité » est modifié par l'ajout des dispositions numérotées suivantes immédiatement après chacun des articles 19.5.1, 19.5.2, 19.5.3 et 19.5.4, respectivement :
 - 19.5.1.1 Malgré l'article 19.5.1 et sous réserve de l'article 19.5.3.1, à compter du jour de l'entrée en vigueur du présent article, l'article 87 de la *Loi sur les Indiens* s'applique à un *Maa-nulth-aht* qui est un *Indien*.
 - 19.5.2.1 Malgré l'article 19.5.1 et sous réserve de l'alinéa 19.1.1a et des articles 19.5.3.1, 19.5.3.2 et 19.5.4.1, à compter du jour de l'entrée en vigueur du présent article, l'article 87 de la *Loi sur les Indiens* s'applique sur les *terres de première nation maa-nulthe* qui étaient une *réserve indienne* ou des *terres cédées* la veille de la *date d'entrée en vigueur* tout comme si ces terres étaient une *réserve indienne*.
 - 19.5.3.1 Les articles 19.5.1.1 et 19.5.2.1 ne s'appliquent que pendant que l'article 87 de la *Loi sur les Indiens* demeure lui-même en vigueur.
 - 19.5.3.2 L'article 19.5.2.1 ne s'applique à un *Indien* que durant la période pendant laquelle l'article 87 de la *Loi sur les Indiens* s'applique à cet *Indien*.
 - 19.5.4.1 Une *première nation maa-nulthe* peut conclure avec le *Canada* ou la *Colombie-Britannique* un accord fiscal qui limite l'application de l'article 19.5.2.1 dans la mesure précisée dans cet accord fiscal.