



**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION
(BRITISH COLUMBIA BRANCH)**

**TO THE
BC MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE
OPERATIONS AND RURAL DEVELOPMENT**

REGARDING

**POLICY INTENT DISCUSSION PAPER: GRIZZLY BEAR TROPHY HUNT
BAN**

AND

**POLICY DISCUSSION INTENT PAPER: STOPPING ALL HUNTING OF
GRIZZLY BEAR IN THE GREAT BEAR RAINFOREST**

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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;
- Promote fair justice systems and practical and effective law reform; and
- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 36,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. The CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

The CBABC Aboriginal Law Section Vancouver is comprised of members of the CBABC who deal with aboriginal issues for First Nations, industry and all levels of government, including self-governments. The CBABC Aboriginal Law Section Vancouver’s (the “Section”) submissions reflect the views of some members of the Section only and, not necessarily reflect the views of the CBABC as a whole.

SUBMISSIONS

The Section is pleased to respond to the request for submissions from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the “Ministry”) regarding the Ministry’s [Policy Intent Discussion Paper: Grizzly Bear Trophy Hunt Ban](#) (the “Trophy Hunting Discussion Paper”) and the [Policy Discussion Intent Paper: Stopping All Hunting of Grizzly Bear in the Great Bear Rainforest](#) (the “Great Bear Rainforest Discussion Paper”).

The Discussion Papers

The goal of the Trophy Hunting Discussion Paper is on the key issues on ending the grizzly bear trophy hunt in British Columbia. Further, the Trophy Hunting Discussion Paper states:

First Nations will continue to be able to harvest grizzly bears and possess all parts of the grizzly bear (including the “trophy parts”) when the harvest is done within traditionally used areas pursuant to Aboriginal or treaty rights (i.e. for food, social or ceremonial reasons).¹

The Great Bear Rainforest Discussion Paper’s goal is to set out the rationale for the stopping of hunting of grizzlies in the Great Bear Rainforest. Like the Trophy Hunting Discussion Paper, the Great Bear Rainforest Discussion Paper states:

Closing the grizzly bear hunt in the Great Bear Rainforest means that no licensed hunting of grizzly bears will be permitted within the Great Bear Rainforest, however First Nations will still be able to harvest grizzly bears pursuant to aboriginal rights for food, social or ceremonial purposes, or treaty rights.²

¹ Page 1.

² Page 1.

Some members of the Section are concerned that for First Nations to be able continue to harvest grizzly bears there first needs to be meaningful consultation with First Nations by the government of BC.

Neither the Trophy Hunting Discussion Paper nor the Great Bear Rainforest Discussion Paper makes mention of consultation with First Nations. In his [August 14, 2017 press release](#), the Honourable Doug Donaldson, the Minister of Forests, Lands, Natural Resource Operations and Rural Development mentions consultation:

During the fall months, Donaldson said that government will consult with First Nations and stakeholder groups to determine next steps and mechanisms as B.C. moves toward ending the trophy hunt. Additionally, government will be moving forward with a broader consultation process on a renewed wildlife management strategy for the province. “The key elements of that strategy will include dedicated funding for wildlife and habitat conservation and a collaborative process in developing short and long-term plans for wildlife resources,” Donaldson said.

Auditor General for British Columbia Grizzly Management Report

On October 24, 2017, the Auditor General for British Columbia released her report: [An Independent Audit Of Grizzly Bear Management](#) (the “Auditor General’s Report”). The Auditor General made 10 recommendations, but none of them were specific to meaningful consultation with First Nations by the BC government.

Government’s Response to the Auditor General’s Report

In their [October 24, 2017 press release](#), the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (MFLNRO) and the Ministry of Environment and Climate Change Strategy (MoE) stated they would act in response to the Auditor General’s 10 recommendations, including information about consultation

with First Nations and other stakeholders. Their press release did not provide specific details about consulting with First Nations.

Neither the MFLNRO's website nor the MoE's website has detailed information about consulting with First Nations regarding grizzly bear management.³ In the Auditor General's Report, the Auditor General found that "MoE and MFLNRO are not being transparent about their management of grizzly bears" and also found "that government's website contains information that is incomplete".⁴

Required Consultation with First Nations by the BC Government

The required process and procedure for the BC government to consult with First Nations is mandated by decisions of the Supreme Court of Canada, the BC Court of Appeal, the BC Supreme Court and other superior and appellate courts in Canada.

Members of the Section are concerned that the BC government is not clear, not transparent and not following this legally mandated consulting process and procedure in the process contemplated by the Trophy Hunting Discussion Paper and the Great Bear Rainforest Discussion Paper.

The Crown must initiate consultation early in the process per *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005 BCCA 128 \(CanLII\)](#) at para. 95. It is unclear from the Trophy Hunting Discussion Paper, the Great Bear Rainforest Discussion Paper and the information noted above, that MoE and MFLNRO have initiated consultation with First Nations early enough in the process of banning hunting of grizzly bears.

³ See <http://www.env.gov.bc.ca/fw/> and <http://bit.ly/2zWD3Fb>

⁴ Page 60.

Further, as set out in *Tsilhqot'in Nation v. British Columbia*, [2007 BCSC 1700 \(CanLII\)](#) at para. 1068 (affirmed in *William v. British Columbia*, [2012 BCCA 285 \(CanLII\)](#) at para. 315):

Land use planning that contemplates the removal of an asset attached to the land, without recognition of the true owner of that asset, denies to the holders of Aboriginal title the means of exercising and enjoying the benefits of such title.

Some members of the Section are concerned that the government removing hunting of grizzly bears by November 30, 2017 may deny First Nations their aboriginal title regarding grizzly bear harvesting.

Timing is also a concern for some members of the Section. The British Columbia Supreme Court in *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, [2014 BCSC 991 \(CanLII\)](#) held that:

[214] The Crown may not conclude a consultation process in consideration of external timing pressures when there are outstanding issues to be discussed: *Dene Tha' First Nation v. Canada (Minister of Environment)* at para. 116; *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al*, [2005 BCSC 283 \(CanLII\)](#) at para. 108. As Jack Woodward says in *Native Law* (looseleaf 2014 - release 1), (Toronto: Carswell, 1994), at 5.2040:

The Crown must give the Aboriginal group a reasonable amount of time to respond to a referral and to engage in consultation. The Crown must be prepared to let consultation run its course; it cannot abort the consultation process because of other time pressures where the Aboriginal group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussions. [Emphasis added, footnotes omitted.]

Finally, the Supreme Court of Canada has provided practical guidance for governments on consulting with First Nations in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, [1997 CanLII 302](#) (SCC):

186 Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place”. Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

Recommended Consultation Process with First Nations on Grizzly Bear Hunting

In light of the legal principles noted above, some members of the Section recommend that the BC government follow these principles regarding grizzly bear hunting in BC.

First Nations need to have the BC government fund them so they have capacity to participate in a meaningful way in the grizzly hunting consultations. To have meaningful consultations requires First Nations to retain scientific experts, lawyers and other professionals to prove First Nations’ traditional use of grizzly bear harvesting or their legal rights to harvest grizzly bears for food, social or ceremonial purposes, or treaty rights. First Nations may have to complete studies and surveys, complete mapping or consult with other First Nations in order to have a meaningful consultation as required by Canadian Courts.

The Auditor General's Report highlighted the importance of grizzly bears for First Nations:

Grizzly bears have a cultural and spiritual importance for various First Nations who may see grizzly bears as healers, teachers or guides. Grizzly bears are featured in ceremonies, stories, dances and cultural traditions.

Some First Nations communities have grizzly bear houses or clans where the grizzly bear is revered.

In the Auditor General's Report, the Auditor General also noted a lack of government funding for grizzly bear management in the Province. Some members of the Section recommend that the BC government increase funding for First Nation's consultations, including for this grizzly bear hunting consultation.

Some members of the Section recommend that the BC government should give First Nations at least 4 months time in order to apply for BC government funding for consultation purposes. That lead time is reasonable and time needed for First Nations to consider applying for funding and if so, to complete the funding application.

Similarly, some members of the Section recommend that the BC government give First Nations at least 8 months after First Nations receive funding for consultation in order for First Nations to complete the necessary work in order to participate in the consultation. This 8-month time frame should be renewed and extended. If the work is not completed within this timeframe, First Nations should have the opportunity to extend this period, particularly if working on wildlife studies. For example, if, for 5 to 7 of the 8 months, the grizzly bears are in hibernation, studying them will be difficult. Another example is not being able to access the backcountry because of inclement weather.

CONCLUSION

As a Section, we would be pleased to discuss our submissions further with the Ministry, either in person or in writing, in order to provide any clarification or additional information that may be of assistance to the Ministry.

All of which is respectfully submitted.

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