SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH)

TO THE

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

REGARDING

WILDLIFE AND HABITAT ENGAGEMENT

Issued By:

Canadian Bar Association
British Columbia Branch
Aboriginal Law Section Vancouver
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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 do 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 Wildlife And Habitat Engagement. This Engagement is designed to open a discussion among Indigenous peoples, rural communities, wildlife organizations, natural resource development industry stakeholders, and the public to identify and consider ideas and improve ways to manage wildlife and their habitat.

On its website, the Ministry has posted 8 challenges for consideration:

- Challenge 1: Advancing Reconciliation with Indigenous peoples;
- Challenge 2: Increasing Involvement and Shared Stewardship;
- Challenge 3: Declining Wildlife Populations;
- Challenge 4: Increasing Human Activity;
- Challenge 5: Wildfires and Extreme Weather;
- Challenge 6: Better Information;
- Challenge 7: Human-Wildlife Conflicts; and
- Challenge 8: Funding.[1]

For Challenge 1, advancing reconciliation with Indigenous peoples, in our Section's view, the law on the duty to consult is clear that the Crown must provide First Nations with genuine opportunities to meaningfully participate in decision-making processes that affect their constitutionally-protected rights. In brief, we invite the Minister to consider the following principles:

[1] See https://engage.gov.bc.ca/wildlifeandhabitat/

1. The Crown must initiate consultation early in the process.

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management 2005 BCCA 128 (CanLII) at para. 95;[2] *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al,* 2004 BCSC 1320 (CanLII) at para. 74;[3]

2. 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.

Squamish Nation v. British Columbia (Community, Sport and Cultural Development), 2014 BCSC 991 (CanLII) at para. 214 (emphasis in original).[4]

Prior to the opportunity for the public to comment on the issues, affected First Nations should have an opportunity to comment. As the Supreme Court of Canada reinforced, a public forum is no substitute for formal consultation: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 SCR 388, 2005 SCC 69 (CanLII) at para. 64.[5]

Further, there cannot be simply an ambiguous, open format where a number of Indigenous participants are invited to comment. The process must be meaningful, not

[2] http://canlii.ca/t/1jwjn

[3] http://canlii.ca/t/1j0hw

[4] http://canlii.ca/t/g77xw

[5] http://canlii.ca/t/1m1zn

merely available: *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations),* 2015 BCCA 345 (CanLII) at para. 77.[6]

Not all Indigenous nations are the same. They do not hold the same rights or interests. They do not hold the same territory and share all the same concerns. There are several nations and several nuanced positions. There is no substitute for the specific, deliberate and direct consultation with Aboriginal Rights holders. As set out in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (CanLII) at para. 1068[7] (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.[8]

First Nations should be provided access to funding specifically to enable their meaningful participation. Any application processes for funding must not unduly burden First Nations' already overburdened human resources. Too often, they do and opportunities are missed due to short deadlines and inaccessible procedures. This government tradition does not contemplate meaningful participation, let alone reconciliation.

For Challenge 8 regarding funding, funding must be made available well in advance of the close of the comment period. In order to meaningfully participate in the consultation process, it is often necessary for First Nations to retain external experts. This is not a simple and straightforward process because there are very few non-industry-aligned, external experts available. Consequently, those few that may be available are over-subscribed and require some lead time.

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[6] http://canlii.ca/t/gkdbd

[7] http://canlii.ca/t/1whct

[8] http://canlii.ca/t/frt8m

In summary, the timing and format of the consultation must be adequate to fulfil the Crown's constitutional duties.

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.

KENJI TOKAWA

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