

INTRODUCTION TO THE JOINT WORKING GROUP ON FIRST NATIONS HERITAGE CONSERVATION

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The B.C. Assembly of First Nations (BC AFN), First Nations Summit (FNS) and Union of B.C. Indian Chiefs (UBCIC), working together as the First Nations Leadership Council (FNLC), have passed resolutions mandating that B.C. First Nations representatives work together with the Province via the Joint Working Group on First Nations Heritage Conservation (JWGFNHC). The members of the JWGFNHC work to explore options and provide recommendations for consideration by B.C. First Nations for improvements in policy and legislation that will adequately address First Nation interests with respect to the protection and conservation of our heritage sites, sacred sites and archaeological heritage objects. Neither the FNLC, nor the JWGFNHC purport to speak for any First Nation on this important issue, but rather seek to provide Nations with access to tools in order to address their respective heritage work, including through establishment of their own Heritage Memorandum of Understanding (MOUs), Protocols, Position Papers, etc.

First Nations representatives on the JWGFNHC form the Internal Working Group (IWG), which is composed of volunteers and does not receive any core funding for its activities. The purpose of the Internal Working Group is to work with provincial representatives to improve the protection and conservation of First Nations culture and heritage sites in the spirit of *The New Relationship and Transformative Change Accord*. The membership of the IWG generally strives to have legal representation, political representation, practical experience and technical support. Currently the IWG is composed of Chair Judith Sayers (Hupacasath First Nation); Dan Smith (First Nations Summit Task Group/ FNLC Lead); Murray Browne (Woodward & Company); Andrea Glickman (UBCIC/ FNLC); and Shannon Cameron (UBCIC). Former Chief Vern Jack from the Tseycum First Nation was previously part of the IWG.

This article provides an introduction to the JWGFNHC, the IWG and our work plan which includes drafting the First Nations Heritage Action Plan (“Action

Plan”), an Archaeology Branch Policy Review and developing the framework for a pilot project geared towards implementing section 4 of the *Heritage Conservation Act*.

Background of Issues

British Columbia’s current heritage legislation does not afford a meaningful role for First Nations in provincial heritage conservation. The current legislative management regime in B.C. is premised on the provincial government as the sole steward of First Nations heritage and cultural resources and is not reflective of a government-to-government relationship between First Nations and the Province of B.C. The B.C. provincial *Heritage Conservation Act (HCA)* assumes provincial

Figure 1. Over 150 delegates from BC First Nations attended the First Nations Heritage Forum in February 2011 and participated in the opportunity to directly prioritize both the work of the JWGFNHC and the content of the Heritage Action Plan. (Photo: UBCIC, February 22, 2011)

jurisdiction over First Nations heritage and cultural sites and allows the Archaeology Branch to issue permits to alter or destroy those sites. The *HCA* and associated policies and management regime fail to adequately protect First Nations culture and heritage resources or provide for the protection of our sacred and spiritual sites, the sanctity of our artifacts and the remains of our ancestors and other archaeological resources in accordance with First Nations' individual laws and customs.

At the root of it, the *HCA* and associated policies and management regime do not adequately recognize Aboriginal Title and Rights, and are insufficient in protecting that which is important to First Nations. The lack of meaningful measures, legislative tools or policies to protect heritage resources has increased frustration within First Nations communities as they continue to be impacted by development activities. Despite the increasing frustration, no structured way forward has previously existed for B.C. First Nations concerning the conservation and protection of our cultural heritage resources, ancestral remains, and sacred and spiritual sites.

The core issues have remained static for many years. An example of this can be seen from records from a meeting between the Archaeological Sites Advisory Board and representatives from the Union of B.C. Indian Chiefs that took place thirty-eight years ago, in October of 1973. In a corresponding document titled "Recommendations to the Archaeological Sites Advisory Board by the Union of B.C. Indian Chiefs," one can see that UBCIC recommended raising penalties for violations of the Archaeological and Historic Sites Protection Act; the need for increased policing of archaeological sites; and the need for archaeologists to hire First Nations field representatives. In addition, UBCIC stressed the need for legislation to be changed so "artifacts of prehistoric origin are recognized as belonging to the Indian people of the area, and that artifacts held by researchers, universities, museums, or any other person or institution be recognized as 'being held in trust' for Indian people."

These issues of insufficient penalties for contravention, lack of enforcement, lack of sufficient First Nations representation in the field, lack of acknowledge-

ment of Aboriginal Title and Rights and ownership of artifacts, and the need for First Nations stewardship of First Nations heritage and cultural resources are still being discussed in JWGFNHC meetings today. Significant reform is still needed in current legislation and policies to ensure the protection and conservation of First Nations heritage sites, sacred sites, cultural property and human remains. The amount of work that needs to be done to update the *HCA* is extensive and costly, yet human and financial resources are very limited within First Nations communities and at the provincial government level.

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First Nations Heritage Action Plan Background

Throughout late 2010 and 2011, the FNLC has been developing a First Nations Heritage Action Plan ("Action Plan") with feedback from Chiefs, technicians and community representatives involved in heritage conservation management. The process included the two-day Heritage Forum (discussed below). The First Nations Leadership Council proposes this community driven and Nation based Action Plan as a way forward in developing interim measures to ensure that individual First Nations are able to manage their own cultural heritage resources in the short term, while they continue to feed into longer-term strategies which can be developed and implemented at the provincial level.

The Action Plan, which is broken into two main parts, is intended as a means for collective advocacy on these important issues. The context section provides a background to First Nations' outstanding need for protection of their cultural heritage resources, and details the current

legislative and political frameworks which leave little room for the incorporation of cultural laws and protocols specific to each First Nation. In response to the urgent need to establish a flexible range of policies that reflect the specific concerns of each community, the second section of the Action Plan contains a collective Vision, Goals, and Action Items, as well as a description of necessary long-term projects and a discussion on implementation.

Due to the current fiscal context and lack of core funding for the work of the JWGFNHC or the IWG, there are necessary limitations which have been placed on the scope of the Action Plan and it has been streamlined in order to reflect the mandate and capacity of the FNLC, the JWGFNHC and the IWG and emphasize the most pressing priorities of B.C. First Nations. Action Items have been prioritized in a table that identifies the lead, potential partners, resources identified and resources required. The Action Plan does not address First Nation languages, culturally important plants, medicinal plants and minerals, and those areas where these items are traditionally gathered and harvested. All of these issues fall outside of the mandate of the JWGFNHC and the scope of the Action Plan.

First Nations Heritage Forum

The draft First Nations Heritage Action Plan was originally circulated to all First Nations for feedback in February 2011 prior to the First Nations Heritage Forum. As part of our mandate to ensure First Nations input into the process and direction of the work of the JWGFNHC, the IWG organized a two-day facilitated First Nations Heritage Forum held on February 22nd and 23rd, 2011. The Forum was hosted under the FNLC by the JWGFNHC and Nesika Cultural and Heritage Society. We invited all First Nations and sought funding to assist in covering the costs of one political or technical representative from each B.C. First Nation, Tribal Council and First Nation political organization to attend and provide direction on prioritizing our work. Through the forum we sought to integrate further feedback into the Action Plan and gather information on cultural heritage issues; facilitate constructive dialogue on current legislation, policies and practices within the Archaeology Branch, municipalities and local governments; showcase

successful collaborative heritage conservation projects; promote networking between communities; and increase awareness of the work of the JWGFNHC. Forum participants engaged in plenary sessions on cultural laws and protocols and legal issues; contraventions and enforcement; Archaeology Branch policies and procedures; local governments; forestry and the work of the JWGFNHC, including the Heritage Action Plan and Pilot Project. Several case studies were also presented for consideration, including the inspiring work around culture and heritage from Bands and Nations such as the Hul'qumi'num Treaty Group; the Haida Nation, the Laich-Kwil-Tach Treaty Society, the Chehalis Indian Band, the Upper Nicola Band, the Lillooet Tribal Council, the Stó:lō Nation and Esh-kn-am CRM Services.

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Throughout the Heritage Forum, the Heritage Action Plan was revised and re-circulated, with appendices including the compiled feedback and direction from forum participants. After the Heritage Forum, an amended version of the Action Plan was circulated in March 2011, and another round of input was collected and integrated. The IWG then streamlined the Action Plan for implementation, and circulated a third version to First Nations for final input in late July 2011. Following this final round of input, the IWG will bring the Action Plan to the BC AFN, FNS and UBCIC for ratification at their respective meetings.

Policy Review

The JWGFNHC has been seeking revisions to several policies currently in place at the Archaeology Branch that First Nations have repeatedly expressed concern

about. The IWG has determined through community-driven feedback which policies give rise to frequent issues in relation to the protection of archaeology sites and sacred sites. Policy sections currently under review include the Archaeological Impact Assessment Guidelines, Local Governments, Heritage Permits, Enforcement of the *HCA* and Found Human Remains. Archaeology Branch Information Bulletins under review include Recording Post-1846 CMTs, Revised Interim Permit Reporting Procedures, Permits and Archaeological Site Boundaries, and Site Alteration Permit Reports.

Pilot Project Initiative on Section 4 Agreements

The JWGFNHC has also been spearheading a parallel initiative to secure provincial approval for a pilot project with a B.C. First Nation. The aim of the pilot project is to develop a Schedule for a section 4 (s.4) agreement, with the intention of working towards a full s.4 agreement. The use of s.4 agreements is something that B.C. Bands have repeatedly indicated is a high priority in their cultural heritage management.

As a quick background on s.4 agreements, in 1993 the B.C. Court of Appeal rejected in a split decision the appeal by the Gitksan and Wet'suwet'en in the Delgamuukw case, but ruled that the provincial government did not have the constitutional authority to extinguish aboriginal Title². This led to extensive negotiations between provincial and First Nations representatives, which spawned a number of initiatives including the proposed amendment to include s.4 in the *HCA*. Section 4 of the *HCA* enables the Province to "enter into a formal agreement with a first nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people who are represented by that first nation."³ During the second reading of the Bill to support the inclusion of s.4, the Minister responsible for the *HCA* stated "the bill reflects our government's commitment to create a responsible, fair and appropriate framework for the conservation of heritage resources by the province, by local governments and by First Nations."⁴ He continued, "[the bill] further enables the province to enter into formal agreements with First Nations on a government-to-

government basis regarding protection and stewardship of cultural heritage sites and resources valued by First Nations."⁵ The *HCA* was amended in 1996 to include s.4 as a direct result of the Delgamuukw/Gisday'wa ruling and continual pressure from B.C. First Nations.

Though heritage sites of cultural value can be protected through an agreement between the province and a First Nation under s.4 of the *HCA* and approved by Order in Council (OIC), no such agreements have been developed and s.4 has not been properly implemented. B.C. has a legal opinion that says parts of s.4 are not legally valid: as a result, no agreements under this section have ever been realized. The legal opinion has been questioned by a number of lawyers and the IWG has requested a second opinion or an independent review.

A full s.4 agreement could enable First Nations to issue permits. Even a modest s.4 agreement may be a good start as First Nations could identify specific spiritual, ceremonial and cultural site types for protection beyond what is currently automatically "protected" in the *HCA*. Section 4 agreements could also enable First Nations to set policies for decisions on permits relating to cultural sites. Many B.C. First Nations and the members of the IWG hope to see fully implemented s.4 agreements within B.C.

To this end, the JWGFNHC continues to work toward a Pilot Project for a First Nation that is willing to develop a Schedule to an s.4 agreement that lists cultural sites that are important to them. The First Nation would work with B.C. to determine protective mechanisms for these sites, define what would constitute desecration, and determine confidentiality parameters for the Schedule. Concurrently, the JWGFNHC will continue to support development of a framework for a full s.4 agreement that will ultimately guide the First Nation in negotiating such an agreement with the province once the Schedule is completed. The Minister of Forests, Lands and Natural Resource Operations has already approved a Pilot Project, but is seeking approval from related Ministries to ensure complete provincial cooperation. If approval is granted, the JWGFNHC will issue a call to First Nations for participation, and subsequently begin working with the selected First Nation on the Pilot Project.

Long Term Goals

Policy revisions, pilot projects and implementing section 4 of the *HCA* are just short-term steps. The *HCA* has major problems that will not be fixed by tinkering with policies and pilot projects. The *HCA* is premised on the assumption that First Nations do not have aboriginal rights or title and that the Crown and "fee simple" owners are the true owners who only share "stewardship responsibilities" for lands and associated resources with First Nations, provided that issues of ownership are not challenged.

Ultimately, we aim to amend provincial legislation to recognize and respect Aboriginal Title and Rights, cultural laws, and the *United Nations Declaration on the Rights of Indigenous Peoples*.

We are hopeful that with the support of First Nations and the archaeology

community we will be able to accomplish the short and long term goals. This is a significant test of the commitments made by the provincial government to recognize Aboriginal Title and Rights and honour both the *New Relationship* and the *United Nations Declaration on the Rights of Indigenous Peoples*. As is the case with many things, time will tell, but our sincere hope is that these same issues are not still on the table thirty-eight years from now.

This article has been compiled by the First Nations representatives/Internal Working Group (IWG) members of the JWGFNHC. The IWG is composed of volunteers Judith Sayers (Hupacasath First Nation); Dan Smith (First Nations Summit Task Group/FNLC Lead); Murray Browne (Woodward & Company); Andrea Glickman (UBCIC/FNLC); and Shannon Cameron (UBCIC).

Notes

1. *Nesika*. October, 1973, pg 7.
2. *Delgamuukw v. British Columbia* (1993), 30 B.C.A.C. 1, [1993] 5 C.N.L.R. 1.
3. See http://www.bclaws.ca/EPLi-braries/bclaws_new/document/ID/freeside/00_96187_01#section4
4. Hansard, Monday, April 18, 1994, Afternoon Sitting, Volume 14, Number 7 (emphasis added). Bill 21, predecessor to the *Heritage Conservation Statutes Amendment Act*, 1994.
5. Hansard, Monday, April 18, 1994, Afternoon Sitting, Volume 14, Number 7 (emphasis added).

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ASBC Executive