

First Nations, the Heritage Conservation Act, and the Ethics of Heritage Stewardship

Michael A. Klassen

Since the 1970s, First Nations in British Columbia have lobbied actively for the protection of their archaeological and cultural heritage. They have frequently called for greater Aboriginal participation in heritage stewardship and for heritage laws that better reflect their values and concerns. Many First Nations are strong advocates of the *Heritage Conservation Act* (HCA), and recognize its potential for protecting Aboriginal heritage. In recent years, however, First Nations have increasingly criticized the provisions and implementation of the law, and in some cases have questioned the fundamental legal and ethical foundations of the HCA.

Archaeologists and First Nations in British Columbia share many concerns over provincial heritage legislation. This common ground provides an opportunity to work together on improving laws, developing new strategies for collaborative stewardship, and supporting Aboriginal communities in the stewardship of their heritage. This paper reviews the role of First Nations in the development of the HCA, and their subsequent reactions and criticisms to the law, in the context of the emerging debate in archaeology over the ethics of heritage stewardship. Understanding historical and contemporary First Nations perspectives to the HCA may hint at the future shape of heritage legislation in the province.

First Nations and Heritage Legislation in B.C.

Several generations of laws and regulations protecting heritage have appeared in British Columbia since the 1860s, with early laws protecting a limited range of sites and objects (see Table 1). These laws were not developed in consultation with First Nations, and they considered Aboriginal heritage the property of the Crown. The *Archaeological and Historical Sites Protection Act* (AHSPA), enacted in 1960, represented the first comprehensive legislation protecting archaeological sites in British Columbia (Apland 1993). The AHSPA created the Archaeological Sites Advisory Board (ASAB) to coordinate archaeological activity in the province, administer the heritage legislation, and advise the government on archaeological matters.

The 1960s and early 1970s was an era of increasing political organization and influence of Aboriginal communities in B.C. (Tennant 1990), leading to greater demands for input into all aspects of government, including archaeological practice (Archaeological Society of British Columbia 1973; Carlson 1979; Yellowhorn 1996). In 1973, the ASAB attempted to accommodate these interests by appointing two Aboriginal representatives to the Board (Carlson 1979). Shortly thereafter, the newly formed Union of B.C. Indian Chiefs presented the ASAB with sixteen recommendations pertaining to archaeology, the majority of

Table 1: Historical Development of Heritage Legislation affecting British Columbia

| Statute | Jurisdiction | Comments |
|---|------------------------------|---|
| <i>Indian Graves Ordinance, 1865</i> [repealed and replaced 1867; repealed 1886] | Colony of British Columbia | Prohibited the collection of Aboriginal human remains and associated articles, and declared them property of the Crown (see Aplan 1993; Yellowhorn 1996, 1999a). |
| <i>Historic Objects Preservation Act</i> [1925; amended 1948] | Province of British Columbia | Provided for the designation and protection of rock art, structures, and objects as "historic objects" (see Aplan 1993; Burley 1994; Spurling 1986; Yellowhorn 1999a). |
| <i>Indian Act</i> [1927, s. 109; with amendments to 1985, s. 91] | Government of Canada | Prevents the removal or disturbance of any Indian grave house, carved grave pole, totem pole, carved house post, or rock embellished with paintings or carvings on Indian reserves, except by permission of the Minister (see Burley 1994; Spurling 1986; Yellowhorn 1999b). |
| <i>Archaeological and Historical Sites Protection Act</i> [1960; amended 1972] | Province of British Columbia | Required a permit to conduct archaeological work, and incorporated a list of "automatically" protected site types, as well as a "catch-all" category of "other archaeological remains". Only applied to provincial Crown land. Limited administrative capability for implementation and enforcement (see Aplan 1993; Carlson 1970; De Paoli 1999; Spurling 1986). |
| <i>Heritage Conservation Act</i> [1977; amended 1979] | Province of British Columbia | Extended legislative authority to private land, but removed the catch-all category, greatly diminishing the range of protected archaeological heritage. Enforcement hampered by statute of limitations restrictions, and by limited provision for penalties (see Aplan 1993; De Paoli 1999). |
| <i>Heritage Conservation Act</i> [1994; 1996] | Province of British Columbia | See body of article. |

CHAP. 66.

An Ordinance to prevent the violation of Indian Graves.

A.D. 1867.

[5th March, 1867.]

WHEREAS it is expedient, for the preservation of the public peace, to make special provision for the protection of Indian Graves and articles deposited thereon, and to assimilate the law affecting such matters in all parts of the Colony of British Columbia: Preamble.

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:—

1. The "Indian Graves Ordinance, 1865," is hereby repealed: Repeal of existing Ordinance, with proviso.
Provided, however, that all liabilities and penalties imposed and accruing due under the said repealed Ordinance, and all remedies and punishments for recovering and enforcing the same, shall still, notwithstanding such repeal, remain in full force and effect, and be capable of being enforced and inflicted, as if such Ordinance were still in force, but not further or otherwise.

A.D. 1867.

Imposes a penalty of \$100 for removing anything from Indian graves.

2. From and after the passing of this Ordinance, if any person or persons shall steal, or shall, without the sanction of the Government, cut, break, destroy, damage, or remove any image, bones, article or thing deposited on, in, or near any Indian grave in this Colony, or induce or incite any other person or persons so to do, or purchase any such article or thing after the same shall have been so stolen, or cut, broken, destroyed, or damaged, knowing the same to have been so acquired or dealt with; every such offender, being convicted thereof before a Justice of the Peace in a summary manner, shall for every such offence be liable to be fined a sum not exceeding one hundred dollars, with or without imprisonment for any term not exceeding three calendar months, for the first offence, in the discretion of the Magistrate convicting.

Forms of indictment.

3. In any indictment or other proceeding under this Ordinance, it shall be sufficient for all purposes to state that such grave, image, bones, article or thing is the property of the Crown.

Second offence liable to six months imprisonment with hard labour.

4. If any person or persons, so convicted as aforesaid, shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender, for such second or subsequent offence, should the convicting Magistrate in his discretion so deem meet, in addition to suffering the aforesaid fine, be committed to the common gaol, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting Justice may think fit.

Short Title.

5. The short title of this Ordinance is the "Indian Graves Ordinance, 1867."

The colonial-era *Indian Graves Ordinance* (1865; amended 1867) was the first legislation that declared Aboriginal material heritage as

which were approved (Carlson 1979). The most significant policy required permission from relevant Aboriginal communities before permits were issued (apparently already a "working policy" of the Board). Another policy acknowledged that all recovered artifacts were held in trust for First Nations, albeit without resolving the question of ownership.

The Heritage Conservation Act of 1977

By the early 1970s, the cultural resource management (CRM) concept had been thoroughly embraced by bureaucrats and archaeologists in British Columbia. Following significant amendments to the AHSPA in 1972, the provincial government established a Provincial Archaeologist's Office (PAO) to plan and

implement the archaeological impact assessment process (Apland 1993; Fladmark 1981). However, the regulatory requirements of CRM demanded new legislation, and in response the *Heritage Conservation Act* replaced the AHSPA in 1977 (De Paoli 1999; Spurling 1986). The new *Act* replaced the PAO with the Heritage Conservation Branch, and the ASAB with the Provincial Heritage Advisory Board. As a result, the First Nation policies of the ASAB were rescinded (Mohs 1994).

Fiscal restraint in the early 1980s greatly reduced the capacity of the Heritage Conservation Branch, leading to the adoption of the "proponent pays" model, whereby developers directly contracted impact assessments to private consultants. With this change came a shift away from government and university di-



Under the Historic Objects Preservation Act (1925), rock art was explicitly protected, but only if a notice was erected in the "vicinity" of the site. (Photo by author).



A key First Nation criticism of the current Heritage Conservation Act is that it does not "automatically" regulate a wide range of post-1846 Aboriginal heritage sites, such as knotted trees used to mark trails. (Photo by author).

rected CRM projects, and a rapid increase in the number of consulting archaeologists and consulting archaeology firms (Apland 1993; Fladmark 1993). Influenced by CRM developments in the United States, the Branch drafted impact assessment guidelines in 1982 in order to standardize the assessment process for the growing ranks of consultants.

First Nations were not involved in drafting the 1977 legislation or the 1982 guidelines, while consultation with Aboriginal communities was left to the discretion of the archaeologists (De Paoli 1999; Mohs 1994). As CRM rose in prominence in the 1970s and 1980s, contact between archaeologists and Aboriginal communities declined, even as the latter insisted on greater levels of consultation (Apland 1993). At the same time, Native leaders began to demand recognition and protection for a broader range of Aboriginal heritage sites, including culturally modified trees, traditional resource gathering locales, and spiritual sites (Apland 1993; Mohs 1994; Stryd and Eldridge 1993; Wickwire 1992).

In the mid 1980s, archaeological and heritage issues became a major factor in a number of high profile conflicts between Aboriginal communities and the province over Aboriginal title and rights (Klassen et al. 2009; see also Blomley 1996). Conflicts involving Meares Island, CN Rail twin tracking in the Fraser Canyon, the Stein valley, and the Vallican site in the Slocan valley all revolved around the impact of proposed development activities on archaeological and heritage sites. As a result of these events, archaeologists and regulators recognized that greater formal Aboriginal involvement in archaeology, heritage legislation, and the impact assessment process was necessary (Apland 1993; Burley 1994; Mohs 1994; Spurling 1988; see also Yellowhorn 1996).

Project Pride and the Amended HCA

Throughout the late 1970s and early 1980s, both the ASAB and the Heritage Conservation Branch recommended changes to the HCA (Spurling 1986), but these proposals went unheeded until after the 1986 provincial election (Apland 1993). In 1987, the "Project Pride" review of the HCA was launched, and First Nation input on provincial heritage legislation was sought for the first time (Apland 1993; De Paoli 1999; Klassen et al. 2009). A preliminary discussion paper was mailed to Aboriginal communities and tribal councils throughout the province, provoking a strong response supporting greater Aboriginal involvement in archaeological management (Apland 1993).

A considerable number of recommendations arising from Project Pride addressed First Nation issues (Project Pride Task Force 1987). A subsequent discussion paper summarized Aboriginal concerns with the limitations of existing legislation:

Of more fundamental concern to the Native community is that the existing system is geared more towards protecting sites and objects as archaeological resources—sites and specimens for the scientific study of past cultures—rather than as the cultural legacy of a living people. Increasingly, the Native people in British Columbia are demanding stewardship responsibility for their heritage and culture (British Columbia 1991b:1).

To address issues raised by Aboriginal communities, several "White Papers" and draft bills included provisions for: protection for all "pre-contact" sites; protection of landmarks and natural features; consideration of the views, interests and cultural values of Aboriginal communities as part of management decisions; recognition of other heritage values in addition to archaeologi-

cal values; creation of an advisory committee with participation from Aboriginal communities, and; recognition of First Nation ownership of Aboriginal human remains and grave goods (British Columbia 1990, 1991a). Even with these suggested changes, Aboriginal communities questioned the province's commitment to joint stewardship and disputed the ongoing assertion of Crown ownership of heritage sites and objects (Mason and Bain 2003).

When the Heritage Conservation Act was eventually amended in 1994, it did include a number of significant improvements. For example, the legislation expanded the statutory protection of archaeological sites, incorporated provisions for stewardship agreements with Aboriginal communities, and prevailed over other legislation. However, the amended HCA failed to include most of the changes recommended by First Nations. The amended HCA only extended automatic protection to physical sites older than 1846 (with some exceptions), thereby significantly limiting the range of regulated heritage. Moreover, the amendments did not include any specific requirements for meaningful consultation with Aboriginal communities prior to permit issuance, archaeological research, impact assessments, or management actions. Overall, the new legislation did not give Aboriginal communities a greater role in archaeological stewardship, nor did it recognize Aboriginal ownership of heritage objects or even ancestral remains (Mason and Bain 2003; McLay 2007).

In the end, the amended HCA continued to facilitate the "management" of a non-renewable "resource" primarily from the perspective of its scientific value. The HCA defines heritage as any objects or sites with "heritage value" to a community or an Aboriginal people (where heritage values consist of the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object).¹ However, the operational guidelines refer exclusively to "archaeological resources" and identify one of the primary objectives of "archaeological resource management" as preserving "representative samples of the province's archaeological resources for the scientific and educational benefit of present and future generations" (Apland and Kenny 1998; emphasis added). As implemented, the HCA does not protect heritage (or rights to heritage) primarily for the benefit of the community or Aboriginal people that values it, but instead places the interests of archaeologists and the public at large above those of First Nations (Bryce 2008; Klassen et al. 2009).

The First Nation Critique

In some respects, the current HCA is a relatively strong piece of legislation—notably its equal authority on public and private land, the "automatic" protection of specific archaeological site types, and its potential for substantial penalties. The HCA also has provisions for designating specific "heritage sites" (potentially including "traditional use," ceremonial, or sacred sites) under section 9, while "section 4 agreements" with a First Nation may be used to establish a schedule of protected heritage sites and heritage objects of particular cultural value to Aboriginal people.² Despite these apparent strengths, Aboriginal communities (and archaeologists) have frequently criticized the limitations of the HCA and the province's failure to effectively implement it (Angelbeck 2008; Barney and Klassen 2009; Bell 2001; Bell et al. 2008a, 2008b; Bryce 2008; Budhwa 2005; Dady 2008; De Paoli 1999; Guujaw

1996; Klassen et al. 2009; Klimko and Wright 2000; Mason 2006; Mason and Bain 2003; McLay 2007; McLay et al. 2008; Nicholas and Markey 2002; Ormerod 2004; Schaepe 2007; Union of B.C. Indian Chiefs 2005).

Key criticisms of the HCA include: the limited range of automatically protected heritage (including the arbitrary age limit, and the separation of tangible and intangible cultural heritage); the inability for managing and protecting culturally significant landforms and landscapes; the silence on ownership and title (particularly for ancestral remains); the lack of provisions preventing the buying and selling of artifacts; the absence of mandatory impact assessment requirements (as in the *Environmental Assessment Act*); the lack of delegated investigation and enforcement powers, and; the lack of a meaningful decision-making role for First Nations. In terms of implementation (in policy and practice), major criticisms include: the lack of integration with the provincial consultation process; the reticence to negotiate section 4 agreements; inconsistent implementation of the assessment process among different ministries and sectors; the absence of compliance monitoring (both in terms of archaeological permits and management recommendations); and, the lack of effective enforcement.

Some First Nations feel that the province must ultimately acknowledge that Aboriginal title remains a burden on the Crown that the province cannot remove by legislation. From this perspective, implementing or amending the HCA is a moot point, as the real issue is the Aboriginal right to exercise authority and jurisdiction over archaeological heritage. To a large degree, the limitations of the existing legislation have motivated First Nations to demand greater participation in, and assert more active control over, the archaeological assessment process. Many First Nations believe that their heritage deserves better care and protection, and feel that customary ways and laws offer a more appropriate and respectful basis for heritage stewardship (see Bell and Napoleon 2008).

The First Nation Response

Aboriginal communities in British Columbia have responded in a variety of ways to issues and concerns with the HCA and the archaeological assessment process (Angelbeck 2008; Bell et al. 2008c; Budhwa 2005; Carr-Locke 2004; De Paoli 1999; Klassen et al. 2009; Mason 2006; Nicholas 2006; Schaepe 2007). While some responses have involved direct actions and legal injunctions, others have been proactive and collaborative. Some Aboriginal communities have developed heritage policies and processes to mitigate, if not circumvent, the limitations of the HCA and the assessment guidelines. Others have negotiated heritage protocols with industry, municipalities, and ministries, or participated in higher-level provincial land use planning, which operate to some degree outside the parameters of the HCA. Direct responses to the specific limitations of the HCA have included legal actions (court challenges and charges), agreements and treaty chapters with the province, and demands for changes to the legislation.

Beginning almost immediately after enactment of the HCA in 1994, the provisions and applicability of the legislation have been challenged in the courts by Aboriginal communities (see

THE ST'ÁT'IMC PERSPECTIVE

A recent research project involving Northern St'át'imc communities serves to emphasize common Aboriginal concerns with the HCA. The six Northern St'át'imc communities (represented by the Lillooet Tribal Council) are situated along the Fraser River and Seton Lake in the Lillooet area. These communities have been vocal critics of the archaeological assessment process. Since 1994, the Lillooet Tribal Council has been directly and actively engaged in heritage stewardship. More than twenty members of St'át'imc communities who are actively involved in heritage issues were interviewed to solicit their perspectives on archaeology and stewardship.³ One of the themes that emerged from these discussions was the strengths and weaknesses of the HCA.

Although many of the participants recognized the benefits of provincial heritage legislation, they also identified flaws that limit its effectiveness. The St'át'imc recognize that the Archaeology Branch does not have enough capacity to effectively implement this legislation or the mandate to enforce it. Their issue is not with the Archaeology Branch itself, but rather the lack of provincial support for effective implementation and enforcement of the HCA.⁴ The St'át'imc participants feel that provincial legislation should address their concerns, and the St'át'imc should have a role in writing this legislation. From their perspective, the province has enacted heritage legislation primarily to protect its own interests, and this legislation fails to address the full range of heritage important to the St'át'imc.

St'át'imc Comments on the Heritage Conservation Act

Consultation

- Involves very limited community involvement or input

A.D. 1846 cut-off date

- Arbitrary and irrelevant date (both archaeologically and culturally)
- Represents a colonial declaration of sovereignty that is not recognized
- Recent St'át'imc archaeological sites (e.g., trails, trail markers, and culturally modified trees) are not protected
- All archaeological sites are part of St'át'imc heritage, regardless of their age

Emphasis on physical evidence

- Does not protect heritage places with intangible evidence, such as resource gathering areas, spiritual places, and medicinal plant areas
- Human activities are represented by more than just "things left behind"
- Prevents the St'át'imc from protecting significant aspects of their heritage
- Misses the link between people and sites

Site-specific Management

- Traditional use of the land and the "cultural landscape" are just as significant
- Appears to be geared to benefit industry and corporations
- Allows development to go ahead within the landscape context of sites
- Facilitates development, as it can be used to authorize the destruction of sites
- Assessments are restricted to specific development areas, and do not produce a cumulative picture of impacts

Implementation

- Lack of consistency among provincial ministries in terms of implementation
- Industry is not always familiar with requirements due to a lack of education and awareness
- Lack of provincial support for effective implementation
- Overview assessments are limited in scope, and based on models that are not specific to the area
- Assessment fieldwork is variable in extent and quality and not audited

Enforcement

- Unregulated industrial development facilitates the "blatant destruction" of heritage sites
- Looting and other damaging activities go unmonitored and unpunished
- Potential fines are not used to compensate affected communities
- The HCA is "toothless," in the sense that its provisions are not adequately enforced

St'át'imc views of archaeology, cultural heritage and the land often differ from the prevailing regulatory regime. The St'át'imc see the protection of their "ancestral footprints" as central to their identity and survival. As stated in the St'át'imc Land Use Plan, "taking care of our ancestral footprints means protecting St'át'imc culture, heritage, and ecology of the land," and they insist that heritage stewardship must take into account St'át'imc laws (St'át'imc Land and Resource Authority 2004). Moreover, some St'át'imc feel that the province must ultimately acknowledge Aboriginal title over heritage. A number of participants pointed out that the St'át'imc Nation does not recognize provincial jurisdiction over lands and resources, including cultural heritage. Indeed, one participant expressed amazement at the "audacity" of the province's claim to exercise jurisdiction over St'át'imc heritage. Given the limitations of the existing system, many St'át'imc wonder how well archaeology and the HCA can help to protect what remains on the land of their heritage.

Table 2: First Nation Legal Challenges to Provisions and Application of the HCA

| Court Case | Decision | Comments |
|---|--|--|
| <i>Nanoose Indian Band et al. v. British Columbia and Intrust et al.</i> No. 94 3420 Victoria Registry [1994]; decision upheld by the BC Court of Appeal [V02523 Victoria Registry 1995]. | <ul style="list-style-type: none"> — Quashed a 1994 heritage inspection permit because the province failed in its duty of procedural fairness by not notifying the Band and giving it an opportunity to be heard. — Asserted the HCA is a law of general application and does not infringe upon constitutional rights. — Determined that the Cemeteries and Funeral Services Act does not apply to ancient human remains. | Since January of 1995, Aboriginal communities with an interest in an area are notified prior to issuance of permits. Aboriginal communities consider the notification requirements to be inadequate (De Paoli 1999). |
| <i>Kitkatla Band v. British Columbia</i> (Minister of Small Business, Tourism and Culture), [2002] 2 S.C.R. 146, 2002 SCC 31 | <ul style="list-style-type: none"> — Overturned a 1998 site alteration permit for CMTs, because the province failed to consider all relevant issues and had violated fiduciary obligations. — Upheld the constitutionality of the HCA, as a law of general application, to deal with provincial archaeological matters. | The Kitkatla argued that the HCA is unconstitutional, as Aboriginal heritage objects and sites go to the core of "Indianness" and should fall under exclusive federal jurisdiction (Bell 2001:255). |
| <i>Lax Kw'alaams Indian Band v. British Columbia</i> (Minister of Sustainable Resource Management) 2002 BCSC 1075 [and subsequent appeals] | <ul style="list-style-type: none"> — Upheld a 2002 site alteration permit for CMTs, and denied that there was a failure by the Archaeology Branch to determine if it might infringe on an Aboriginal right. — The court accepted that there was a duty to consult and accommodate, but ruled this obligation only falls upon the Minister authorizing the infringement, which in this case was the Minister of Forests. | On the basis of this decision, the Archaeology Branch is generally exempt from the consultation requirements of the Provincial Policy for Consultation with First Nations (2002). |

Table 2). These legal actions have met with only limited success, although some have influenced the permitting and consultation process. In addition, Aboriginal communities have often called for charges to be laid under the HCA. However, convincing police forces to investigate infractions and persuading Crown Counsel to lay charges have proven difficult. To date, only two prosecutions have been successful, with both occurring in 2007. In both cases, Aboriginal communities were instrumental in bringing infractions to the attention of police, and providing sufficient evidence to Crown Counsel to warrant charges (Hul'qumi'num Treaty Group 2005; Steele 2007; Watts 2007). These cases are significant to Aboriginal communities in terms of signalling that the HCA can be successfully enforced. Nonetheless, the fines were well below the maximum allowable and may be ineffective as a deterrent in the context of large-scale developments (Angelbeck 2007).

An alternative strategy involves reaching agreements with the province that are intended to improve implementation of the existing legislation and policies. For example, the Hul'qumi'num Treaty Group and the Ktunaxa Nation Council have negotiated Memoranda of Understanding (MOU) with the province (Hul'qumi'num Treaty Group 2007; Ktunaxa Nation 2004). MOUs of this nature are intended to improve communication and cooperation with the province, address some of the shortcomings in the administration and operation of existing provincial legislation, and strengthen the role of Aboriginal communities in the management process. Likewise, for Aboriginal communities in the treaty process, culture and heritage chapters may have provisions to replace the HCA on settlement lands, and may include enhanced measures for the management and protection of heritage sites on non-settlement lands within the affected traditional territory, as is the case with the Nisga'a Agreement and the Tsawwassen and Maa-nulth Final Agreements. However, MOUs and treaty agreements do not tackle the larger issues inherent in the HCA.

Amending the HCA

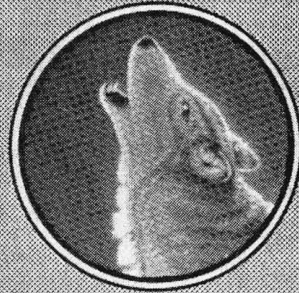
Many Aboriginal communities see amending the HCA as one option for addressing problems with the existing legislation, and they expect the province to undertake meaningful consultation in any future discussions concerning amendments (Mason and Bain 2003; McLay et al. 2008; Union of B.C. Indian Chiefs 2005; First Nations Leadership Council 2008). While the current provincial government's previous efforts to amend the HCA did not involve meaningful consultation with First Nations,⁵ Aboriginal politicians saw Premier Campbell's recent "New Relationship" initiative as an opportunity to seek improvements to heritage protection laws (see sidebar). Given the priorities of the current government, it appears that amendments to the HCA are not imminent. Nonetheless, when this time comes, the province has committed to undertaking full consultation with all interested parties before considering future amendments to legislation (Klassen 2008).

Whither the HCA?

Some of the fundamental issues with the HCA identified by First Nations question the theoretical underpinnings of heritage stewardship. Indeed, the First Nation critique of management, ownership, authority, and jurisdiction parallels the emerging debate within the discipline of archaeology on the ethics of heritage stewardship. Since the inception of CRM in the 1970s, the shift to a conservation ethic within the discipline and in government (as espoused by Lipe [1974]) has contributed to the inclination of archaeologists and bureaucrats to appoint themselves stewards of archaeological heritage (Ferris 2003; Smith 2004, 2006; Watkins 2000:172; Wylie 2005:55; Zimmerman 1995). This attitude has become ingrained in archaeological bureaucracies, and influences the administration of heritage legislation throughout the world (Smith 2004, 2006:278).

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Wolf Howls Page 34

Crackdown on archeology

The Tsilhqot'in National Government has cracked down on archeologists messing around in its territory without its consent.

Since the Forest Practices Code has made it legally necessary to conduct archeology and traditional use studies of First Nations traditional territories, the Chilcotin has been overrun with archeologists doing quickie studies for big fees.

The Tsilhqot'in have no control of what they do, what they find, and what they do with artifacts unearthed.

Despite not approving of the whole process, Tsilhqot'ins have, up to now, watched these intruders routinely dig up and desecrate many sacred and spiritual sites.

The issue came to a head at the recent TNG Strategy session where the Chiefs and Deputy National Chief Ray Hance decided to call the archeologists to a meeting at the TNG office to lay down strict guidelines for working in Tsilhqot'in territory.

They will apply to the forest industry companies

The Tsilhqot'in Nation is totally fed up with the free roll that archeologists have had in our traditional territory. They have worked for forest companies, government agencies, and universities without Tsilhqot'in control. That game is about to end.

as well as government agencies.

The Council of Chiefs will put teeth into their guidelines by black listing archeological firms and forest companies from entering Tsilhqot'in territory if their work does not comply with Tsilhqot'in Nation terms.

The issue of traditional use studies is a worse mess than archeology.

The Tsilhqot'in Nation will define this term and use its own researchers to do the field work. If some anthropology guidance is necessary, it will come from a TNG employed fully accredited cultural anthropologist. Archeologists are bidding for heritage work.

The letter was sent to these archeology outfits: Arcus, Antiquus, Arlene Yip, Wayne McCrory, Wayne Choquette, I.R. Wilson, Cindy English, and Millennia Research.

A letter of warning to archeologists

Archeology is being conducted in Tsilhqot'in territory without the permission, consent nor even knowledge of the Tsilhqot'in people. This must stop. This is reminiscent of the survey work attempted without approval of the Tsilhqot'in nation that led to the Chilcotin War.

Archeologists and Anthropologists, of all academics, should have an appreciation of the significance of linking past to present and have a high regard and sensitivity for our traditional ways, beliefs and culture. You are invited to attend a meeting on Wednesday, May 15, 1996 at 10:00 a.m. in the TNG Boardroom [at your expense] to discuss this matter and present your views. We will present our position on this in certain terms so that our position is abundantly clear. If you are not present and you represent one of the archeology firms that have been doing work in our territory without our consent you could end up blacklisted.

Ray Hance, TNG Deputy National Chief
CC: TNG Council of Chiefs

First Nations have criticized the current Heritage Conservation Act since its inception, and have questioned its authority over Aboriginal heritage. Reprinted with the permission of the Tsilhqot'in National Government.

**JOINT WORKING GROUP ON
FIRST NATIONS HERITAGE CONSERVATION**

Recently, the First Nations Leadership Council (comprised of representatives from Union of B.C. Indian Chiefs, First Nation Summit, and Assembly of First Nations-BC) established a joint working group with the Ministry of Aboriginal Relations and Reconciliation and the Archaeology Branch to identify heritage issues and concerns, and create a meaningful role for First Nations in provincial heritage stewardship. A primary purpose of the working group is to work with the province to "improve the protection and conservation of First Nations heritage sites, cultural property, ancient human remains and sacred and spiritual sites" (First Nations Leadership Council 2008). Goals include making recommendations concerning potential amendments to the HCA, and identifying "culture and heritage site management possibilities within the existing legislative regime" (First Nations Leadership Council 2008). However, the province has indicated that new legislation will not be tabled before the next provincial election in May 2009, and likely not before 2010 (Klassen 2008). As a consequence, the working group has focused their efforts on developing a process for implementing section 4 agreements with First Nations. The effort to clarify and implement section 4 is clearly a positive step for heritage stewardship in B.C., both for Aboriginal communities and archaeologists.

During the last decades, however, there has been growing recognition within the discipline that archaeologists are accountable to other interest groups, and these groups also warrant a role in heritage stewardship (Ferris 2003; Smith 2006; Watkins 2000, 2005; Watkins et al. 1995). In particular, growing recognition of archaeology's accountability to Aboriginal peoples has influenced codes of ethics adopted by many archaeological societies and professional associations since the mid-1990s (Lilley 2000; Rosenwig 1997; Watkins 2000, 2005), including the Canadian Archaeological Association (1997) and the B.C. Association of Professional Consulting Archaeologists (1998). The principles adopted by archaeologists are small and tentative steps towards a goal of collaborative stewardship.

As yet, however, the "sea change" in archaeological ethics has not influenced the legislation and regulations governing archaeology in British Columbia. The current HCA, through section 4, acknowledges that Aboriginal people may have a cultural relationship to particular heritage sites and objects, and leaves room for some limited form of co-management over these sites. However, it does not define a clear role for Aboriginal communities in terms of co-management or collaborative stewardship, nor does it provide a process for meaningful consultation or address the question of ownership (particularly in the case of human remains and burials). Nonetheless, the debate within the discipline over heritage stewardship ethics has potential implications for the future shape of legislation. In British Columbia, the nature of this debate is also inextricably entangled within legal arguments over Aboriginal title, and consequent implications for ownership and jurisdiction over heritage.

Future heritage legislation in British Columbia will undoubtedly need to take into account the shifting ethical position of the discipline, from one informed by conservation archaeology to one of collaborative stewardship. This shift in perspective questions the role of archaeologists and the province as privileged stewards of archaeological heritage, and it challenges their authority to make decisions on how to best "manage" this heritage. In this environment, when amendments to the HCA are eventually considered, Aboriginal communities will undoubtedly expect that their concerns be addressed in a meaningful way, despite the legal uncertainties of Aboriginal title and ownership.

Even so, making amendments to provincial legislation may be irrelevant for some First Nations, as they do not recognize provincial jurisdiction over their heritage. Although the Gitksana (Kitkatla) were unsuccessful in challenging the constitutionality of the HCA, a legal (and ethical) basis for future constitutional challenges may still exist (Asch 1997; Bell 2001; Ferris 2003). As Bell (2001:255) argues, Aboriginal heritage objects and sites go to the very core of "Indianness" as defined by the Canadian constitution. Another aspect of Aboriginal society that is more fundamentally tied to the concept of title is difficult to conceive. While some Aboriginal communities will address this jurisdictional issue through the treaty process, others will continue to press for legal recognition of title and rights over heritage throughout their traditional territory.

First Nations and archaeologists share many aspirations for effective heritage legislation and respectful heritage stewardship in British Columbia. Archaeologists will certainly retain a major role in heritage stewardship, as they have specialized knowledge and skills that will continue to be valued by Aboriginal communities and the public (Ferris 2003; Welch et al. 2007; Wylie 2005; Yellowhorn 1996). Nonetheless, resolving the respective heritage stewardship roles of the province and First Nations remains elusive. Ultimately, it seems plausible that shifting ethics and authority will lead to a province-wide scheme of legislated collaborative heritage stewardship, or a series of self-regulating First Nation territorial jurisdictions.

Michael A. Klassen is a Ph.D. candidate, Department of Archaeology, Simon Fraser University, and a heritage consultant. Since 1995, he has worked on many projects with Northern St'át'imc communities and other interior First Nations.

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Notes

¹ Despite this broad definition, only land and objects of an archaeological nature are automatically protected and regulated by the HCA.

² Some have argued that section 4 and section 9 provisions of the HCA are sufficient to protect the full range of heritage sites that are of concern to Aboriginal communities, and the real issue is not changing the act but implementing these provisions (Mackie and Dady 2008). Critics, however, have noted that section 4 provisions for agreements with First Nations have never been implemented (De Paoli 1999; Budhwa 2005; Klassen 2008; Mason 2006; Mason and Bain 2003; McLay et al. 2008). This may signify reluctance on the part of the province to engage in this form of co-management; indeed, the Archaeology Branch has apparently received legal opinions throwing into doubt the viability of some aspects of this section (Mackie and Dady 2008). Moreover, the complex process for designating heritage sites is far more difficult to implement than the "automatic" protection offered to the specific site types listed under section 13. Moreover, it puts the onus (and financial burden) on Aboriginal communities to identify and document heritage sites and advocate for their designation, a time-consuming and costly process.

³ My forthcoming Ph.D. dissertation (SFU Department of Archaeology) will present complete results of this study.

⁴ It should be noted that the Archaeology Branch has made a number of significant efforts over the years to encourage the assessment and management of impacts to archaeological sites prior to development, notably the Protocol Agreement with the Ministry of Forests (1996), the Protocol Agreement, Ministry of Sustainable Resource Management and the Oil and Gas Commission (2004), and the Local Government Initiative (2007). The Archaeology Branch also developed a 1996 policy guiding its participation in project reviews under the provincial Environmental Assessment Act.

⁵ In the fall of 2001, the province held preliminary discussions with stakeholders concerning potential amendments to the HCA intended to "improve the balance" between site protection and private property rights, with the repeal of section 4 one of the potential outcomes. Subsequently, in 2003 the province unilaterally amended the HCA by repealing Part 3, pertaining to the British Columbia Heritage Trust. This amendment was made without the input of stakeholders, throwing into doubt the commitment of the province to consult with Aboriginal communities prior to amending legislation (Mason and Bain 2003).

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