



# **Protecting Indigenous Cultural Heritage Resources on Private Land**

## **Potential Strategies and Tools for Nations Recommendations for Provincial and Local Government Reform**

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Note that this discussion document is not intended to speak for or reflect the positions, priorities or aspirations of the T̓silhqot'in National Government or any of the Nations that participated in the document's creation.

**Cover Image:** Farwell Canyon (Photo courtesy of the T̓silhqot'in National Government)

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# CAVEAT

This publication is a preliminary document designed for discussion, and as a resource for Nations considering heritage protection options. We describe many of the actions BC Nations are taking to protect Indigenous cultural heritage – and discuss reforms that could advance that cause. However, this publication is not a complete and definitive inventory of such actions and reforms.

This publication is not authoritative and may contain inadvertent errors and omissions. While it provides legal information, it is not legal advice and should not be relied upon as such. We encourage Nations to contact legal counsel before taking any actions. The Environmental Law Centre, not the Nations that contributed to this project, takes responsibility for errors and omissions,

Some of the tools discussed may not be appropriate for a particular community or situation – and final choice of tools will require further research and analysis by each Nation. Ultimately, every Nation is different, and has an inherent right to choose how best to protect and preserve their cultural heritage resources based on their own laws and culture.

[Finally, note that this publication does not address protecting and preserving Indigenous cultural resources on “federal Crown” land or on reserves under the *Indian Act*.<sup>1</sup> In addition, we do not address the important issues of repatriation of cultural heritage resources and objects, or language/ knowledge preservation and celebration.]

A complete [Glossary of Terms and Acronyms](#) used in this publication is found [here](#).

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<sup>1</sup> *Indian Act*, RSC 1985, c I-5.

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Image 1: Bull Canyon cliffs (Photo courtesy of the T̓silhqot̓'in National Government)

## PREFACE

*I believe that it is the duty of Canada and its provinces to support the preservation of Indigenous oral histories, sacred spaces and historical artifacts, to make sure that the evidence of who we are exists into the future...*

*As T̓silhqot̓'in people, the evidence left on the land is like words in a book for us. It tells us not only of the past, but informs our future actions based on the legend or story that the land tells. It is our sacred responsibility to care for our ancestors' homes, teachings, and belongings...Most settlers to Canada have trouble understanding what it means when we say that our creation stories are laid out on the land. To us, the places from our oldest stories are like our holy lands — it is our church. The stone tools we still find there are our sacred relics.*

*These artifacts belong with us, not in repositories in the Lower Mainland or in museums in far-off places. Our people must be able to freely walk in the footsteps of our ancestors — to visit the same places time and time again to pray, reflect and be grounded. We need these places to heal and to survive as a people...*

*Let's hope we can sustain this momentum to ensure local Indigenous governments are supported in developing heritage management systems that work.*

*Chief Joe Alphonse, T̓silhqot'ín National Government*

In recent years, Indigenous Nations in British Columbia have made great progress in providing better management and protection for cultural heritage resources – for such things as artifacts, spiritual sites, initiation sites, transformation sites, burial grounds, cultural practice sites, ceremonial bathing sites, and culturally significant landscapes. In this report we attempt to describe a number of legal strategies and tools that Nations have used – or could potentially use – to advance protection of Indigenous cultural heritage resources on private lands.<sup>2</sup> While our focus is on private lands, in the course of our discussion we also discuss tools used on “Crown” lands.<sup>3</sup>

We attempt to share best practices and raise awareness about the innovative tools other BC Nations are using to maintain and protect cultural heritage. At the same time, we discuss some analogous efforts taking place in other jurisdictions. Based on what we have learned, we recommend reforms that BC and local governments should implement to enhance the tool kit for Indigenous management and protection of cultural heritage.

We trust this research will contribute to the important conversation Nations are now leading on cultural heritage issues. We hope the existing Indigenous strategies described here will help other Nations develop – or build on – their own heritage regimes. And we hope that our general law/policy reform recommendations will help “ensure local Indigenous governments are supported in developing heritage management systems that work.”

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<sup>2</sup> “Private land” (a.k.a. “fee simple” land) is a term in common use and in provincial statutes to define land held by private persons or entities in distinction to public Crown land. In reality, much of this so-called private land is actually unceded Indigenous land for which Aboriginal title issues have not yet been resolved or reconciled. Similarly, much of so-called Crown land is actually unceded Indigenous land for which Aboriginal title issues have not yet been resolved or reconciled.

<sup>3</sup>Indeed, a number of the tools discussed here are also usable on so-called “Crown” lands. [Appendix A](#) of this report includes a number of strategies Nations have used on Crown lands.





*Image 2: Tsiyi Healing Ceremony (Photo courtesy of the T̓silhqot'in National Government)*

## Background

Cultural heritage resources are of the highest importance to Indigenous Peoples. Ancient artifacts, burial grounds, spiritual sites, cultural practice sites, initiation sites, transformation sites, ceremonial bathing sites, and culturally significant landscapes are centrally important to Indigenous peoples. Indeed, such heritage resources are crucial to an Indigenous Nation's:

- identity;
- oral history;
- traditional teachings and language;
- laws; and
- community well-being.

Yet, Indigenous cultural heritage resources are not adequately protected in BC – on either private or so-called “Crown” land.<sup>4</sup> Cultural heritage resources are routinely desecrated or compromised by resource development, construction, urbanization, tourism, theft and vandalism.<sup>5</sup> The heedless destruction and desecration of Indigenous heritage is a striking example of ongoing colonial injustice, and it must cease.

First Nations have demonstrated leadership and asserted jurisdiction to protect and preserve these vital resources. However, the common law’s prioritization of “private property rights,” the Eurocentric focus of the *Heritage Conservation Act*, and other shortcomings in provincial law and policy have frequently led to the destruction of cultural heritage.<sup>6</sup>

The Environmental Law Centre (ELC) has researched many of the tools Indigenous groups use to manage and protect cultural heritage resources on private lands – in BC and elsewhere. You will see that BC Nations have developed a remarkable array of best practices to protect cultural heritage resources on both private land and Crown land.<sup>7</sup> This report builds on the ground-breaking work already implemented by a number of First Nations and allied researchers.<sup>8</sup> It compiles specific measures Nations have used to protect cultural heritage resources – along with broader law/policy reform measures needed to enhance such Indigenous protection of heritage resources.

With the help of several experts and knowledge-keepers, the ELC now makes this report available to any interested Nation dealing with cultural heritage issues. By doing so, we aim to contribute to the Action Item in the *First Nations Heritage Conservation Action Plan*:

*Establish a digitized resource library, including showcasing heritage MOUs and protocols; forest stewardship plans; position papers; relevant court cases and legal opinions.*<sup>9</sup>

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<sup>4</sup> “Crown land” is the term in common use and in provincial statutes to define public land held by Her Majesty the Queen in Right of British Columbia. In reality, much of this so-called Crown land is actually unceded Indigenous land for which Aboriginal title issues have not yet been resolved or reconciled. Note that this publication focuses on such resources located on private lands, with some consideration of resources on provincial Crown lands. Resources on federal Crown lands are beyond the scope of this publication.

<sup>5</sup> For discussion of the wide range of threats to heritage resources, see Karen Aird *et al*, “Policy Paper Recognizing and Including Indigenous Cultural Heritage in B.C.” (First Peoples’ Cultural Council: 2019) at 20.

<sup>6</sup> Interview of Dr. David Schaepe, Director and Senior Archaeologist, SRRMC, by Calvin Sandborn and Emmaline English (8 February 2021).

<sup>7</sup> While this report does not distinguish further, such land is often also unceded Aboriginal title land. The discussion of land in this report as private or “Crown” land should not be taken to supersede any other understandings of the nature of that land’s title, especially where that title is contested.

<sup>8</sup> This report builds on the recommendations and findings from the following reports:

- First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012).
- David M. Schaepe *et al*, “Recommendations for Decolonizing British Columbia’s Heritage-Related Processes and Legislation” (First Peoples’ Cultural Council: December 2020).
- Karen Aird *et al*, “Policy Paper Recognizing and Including Indigenous Cultural Heritage in B.C.” (First Peoples’ Cultural Council: 2019).
- Kekinusuqs, Judith Sayers, “Research from Around the Globe Regarding Mechanisms for Protecting Sacred Sites, Areas and Landscape and Burial Sites of Indigenous Nations on Private Land” (First Nations Joint Working Group on First Nations Heritage Conservation: November 2018).

<sup>9</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012), p. 10.

Hopefully, the information below will help Nations respond to the BC Government's *Declaration on the Rights of Indigenous Peoples Act Action Plan*, which sets:

- the **goal** that “Indigenous Peoples in B.C. fully enjoy and exercise their distinct rights to maintain, develop, protect and transmit their cultural heritage, traditional knowledge...”
- the **objective** that “Respect for Indigenous cultures is tangibly demonstrated through Indigenous maintenance, control, protection and development of their cultural heritage resources, intellectual property, art, spiritual traditions, knowledge systems ... spiritual and sacred sites.”
- The **specific action item** to “work with First Nations to reform the Heritage Conservation Act to align with the UN Declaration, including shared decision-making and the protection of First Nations cultural, spiritual, and heritage sites and objects.”<sup>10</sup>

## Report Layout

**Part I** provides **recommendations for consideration by Nations** who seek to assert jurisdiction and protect cultural heritage resources on *private* land. To a large extent, these recommended actions, tools and best practices emerge from the innovative work of Indigenous communities in BC and elsewhere.

Part I also provides related law reform and policy **recommendations to the Government of BC** and **recommendations to local governments** – to enhance the management and protection of Indigenous cultural heritage through Indigenous co-governance.<sup>11</sup>

For example, the province should reform the *Heritage Conservation Act*, *Community Charter*, *Local Government Act*, *Land Title Act*, *Cremation, Interment and Funeral Services Act* and other laws. It also needs to revise policies, such as subdivision approval guidelines and Archaeological Impact Assessment Guidelines. Among other things, the province needs to:

- implement legislation, policy and agreements to provide for fulsome heritage protection, and Indigenous self-determination over Indigenous heritage resources;
- guarantee Indigenous access and use of cultural sites; and
- devote part of the property transfer tax to establish an Indigenous Heritage Trust Fund – to assist Nations to re-acquire key cultural sites.

Similarly, local governments need to collaborate closely with Nations to change current local bylaws/regulation to systematically protect Indigenous cultural heritage. Ultimately, local governments need to ensure that cultural heritage sites are protected; establish Indigenous Cultural Heritage

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<sup>10</sup> See Government of British Columbia, *2022-2027 Declaration on the Rights of Indigenous Peoples Act Action Plan*, (March 2022), online (pdf): <[https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration\\_act\\_action\\_plan.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf)> [<https://perma.cc/4HBP-VU2T>], at pages 22, 23, and 27; see specifically action item 4.35 of same.

<sup>11</sup> These recommendations come from discussions with Nations and experts, and it is our hope they will inform implementation of the *Declaration on the Rights of Indigenous Peoples Act Action Plan*.

Development Permit Areas/Indigenous Cultural Heritage Management Plans; and implement incentives and other measures.

**Part II** provides more detailed discussion of a wide variety of key **tools Nations in BC have used or could use** – to protect these valuable resources. The ground-breaking work of the Stó:lō Nation, Haida Nation, Sts'ailes Nation and others is highlighted.

Such tools are diverse. For example, tools range:

- from Nations establishing their own cultural heritage policies and permitting systems – to establishing their own archaeological experts as decision makers;
- from purchasing land to protect cultural heritage sites – to registering covenants on private land to secure Indigenous access to heritage;
- from proactively reviewing all permits and referral requests – to invoking specific law enforcement and the *Heritage Conservation Act* when resources are threatened;
- from proactive communication with individual landowners – to collaborating with local governments to legislate heritage protection across the community; and
- from forging broad co-governance agreements with the province – to mobilizing officials to protect heritage every time a simple subdivision takes place.

Part II also includes further discussion of the rationale for specific recommendations for Provincial and local government law/policy reforms.

**Appendix A** discusses several mechanisms to protect cultural heritage resources on “Crown” lands. During research, we became aware of important initiatives on Crown land that may be useful to consider. Innovative approaches Nations have developed on Crown land may sometimes be transferable to the private land context. Therefore, **Appendix A** discusses:

- Indigenous Protected and Conserved Areas, which are usually established on Crown land – but have also included private lands;
- How the Sts'ailes have used forest practices legislation to protect spirit poles and regalia on “Crown” forests;
- Land Use Orders and GAR Orders that protect cultural heritage resources in Crown forests in certain areas;
- Strategic Land Use Plans that designate zones restricting cultural heritage impacts of forestry mining exploration, hydro, *etc.*;
- Kitasoo Xai'xais establishment of cultural heritage zones within provincial conservancies – and the precedent-setting empowerment of their Guardian Watchmen to enforce provincial laws;
- The shared decision-making structures that the Council of the Haida Nation has negotiated to better protect and manage cultural heritage and other resources; and
- A variety of other government-to-government agreements regarding Crown land that may have broader relevance.



*Image 3: Slesse Peak (Photo courtesy of Dave Schaepe, Stó:lō Nation)*



Image 4: Elder Edna Lulua (Photo courtesy of the T̓silhqot̓'in National Government)

## PART I: PROPOSED RECOMMENDATIONS

### Recommendations for Indigenous Nations to consider<sup>12</sup>

#### **Recommendation #1. Develop a cultural heritage resources policy**

Nations can develop policies to protect, preserve and maintain cultural heritage resources on Crown and private land in their territories. A First Nation's policies can be included in a comprehensive Policy Manual and can include the following features:

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<sup>12</sup> The authors recognize the following recommendations are dependent on the Nation's capacity.

- A working definition, conceptualization or set of terms in the language of the Nation for what is actually considered a “cultural heritage resource,” including sites, objects, activities and knowledge;
- Research: Nation-guided archaeology, and work done with Elders and knowledge-keepers to identify cultural heritage resources and sites;
- A Cultural Heritage Site/Features Inventory requirement.<sup>13</sup> Such a requirement, along with the Nation’s *Heritage Policy Manual* informs technicians and archaeologists who survey the land – and shapes requirements for referral, permit or approval of proposed developments;
- A permitting system where permit provisions make policies legally enforceable, under contract law;<sup>14</sup>
- A process for impact assessments of proposed projects; and
- Establishment of an auditor or other mechanism to ensure third party compliance with the Nation’s laws and policies.

**Recommendation #2. Develop and maintain a permitting system**

Heritage protection can be enhanced if Nations develop their own permitting system to regulate cultural heritage investigations, archaeological studies, or alteration of cultural heritage sites.<sup>15</sup> The Stó:lō, Sts’ailes, Tsleil-Waututh, Musqueam, Shishalh and Katzie Nations have all developed permitting systems.

There are legal and technical challenges to overcome. There is uncertainty as to whether private landowners, corporate entities and other governments will respect and follow Nation permitting requirements without a provincial law or formal agreement in place. (See recommendation #4 below.) Some Nations initially create systems on Reserve lands or forest tenures or parks in which they have an interest or leverage and expand from there.<sup>16</sup> If permitting can be implemented, it can lead to significantly more control and a source of revenue for Nations to assist with further protection.

**Recommendation #3. Foster internal capacity**

It is important to foster internal capacity to run permitting systems, conduct impact assessments and make critical decisions. Any archeologist who is conducting an impact assessment or action requiring a permit on a Nation’s territory should ideally be from the Nation, employed by the Nation, or on a

<sup>13</sup> This inventory is sometimes referred to as a Cultural Features Overview Assessment.

<sup>14</sup> This is the experience of the Stó:lō Nation.

<sup>15</sup> Some permitting systems also include academic research.

<sup>16</sup> For example, see: Microsoft Word - sh.sh.lh Nation Heritage Policy 18-01-06.doc (shishalh.com) <<https://shishalh.com/wp-content/uploads/2019/01/sh%C3%ADsh%C3%A1lh-Nation-Heritage-Policy.pdf>> and the other Indigenous permitting regimes discussed below.

Nation-approved list, and can also be accompanied by a monitor from the Nation. This should be specified in a cultural heritage resources policy – and is a key way to integrate and incorporate Indigenous knowledge into decision making.

**Recommendation #4. Negotiate and establish statutory co-governance of cultural heritage with the Government of BC**

Under section 4 of the *Heritage Conservation Act* and section 7 of the *Declaration on the Rights of Indigenous Peoples Act*, Nations may be able to negotiate agreements for more fulsome co-governance of Cultural Heritage resources. (See recommendations #13 and 22 below for actions the province should take to improve the framework of those agreements.)

The province has been reluctant to engage in these types of agreements, but in July 2022 the Stó:lō and the province finalized an important new s. 4 “shared decision making” agreement.<sup>17</sup> Other types of agreements (*e.g.*, Strategic Engagement Agreements and agreements modeled on the Haida Gwaii Management agreements) can also be used.<sup>18</sup>

**Recommendation #5. Adopt a proactive communication approach with private landowners, proponents and local governments**

Proactive communication with private landowners and local governments can be helpful in relation to cultural heritage resources found on private property. Nations can develop a strategy to inform private landowners in areas of significant cultural heritage of their new legal duty to report a discovery of a site or object with heritage significance.<sup>19</sup> Working with local governments, Nations can communicate to landowners the mechanisms for how and when they should notify the Nation of cultural heritage resources and potential impacts on resources. Nations can also collaborate with landowners/proponents to complete cultural heritage surveys. Although the burden should not fall to Nations, in appropriate circumstances, a Nation may wish to contribute to sharing resources for such surveys.

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<sup>17</sup> See discussion in Part II under “Negotiating Enhanced Cultural Heritage Powers Through Statutory Agreements” and “The *Heritage Conservation Act* Option– the Stó:lō s. 4 Agreement Pilot.”

<sup>18</sup> See Appendix A for a discussion of Strategic Engagement Agreements and the Haida agreements.

<sup>19</sup> As per the 2019 amendments to the *Heritage Conservation Act*, RSBC 1996, c 187, s 8.2:

(1) A person who discovers a prescribed site or object that may have heritage value must report the discovery to the minister within a prescribed time period...

Section 8.2 has been approved by the legislature and will come into force by regulation.



**Recommendation #6. Where possible, review and respond to all external referrals and permit requests for development**

Many Nations are flooded with standard form referrals from governments, industry and developers. If possible, Nations should review and respond to every referral and permit application that triggers consultation – to ensure that potential cultural heritage resources will not be impacted by a proposed development or activity. However, this requires government and industry to provide adequate funding/resourcing for such a proactive review system – and may also require facilitative agreements with industry proponents

**Recommendation #7. Negotiate agreements with the Provincial Government for Guardian Watchmen to enforce the *Heritage Conservation Act* and other cultural heritage laws**

Following the precedent of the recent MOU that authorizes Kitsoo/Xai'xais Guardian Watchmen to enforce various provincial statutes in their territory's protected areas,<sup>20</sup> Nations may wish to negotiate with the BC Government to authorize their own Guardians to fully enforce the *HCA*.

**Recommendation #8. Consider unique options for private lands – such as land purchase or acquiring legal covenants for heritage protection and Indigenous access**

Nations can sometimes protect cultural heritage and Indigenous access on private property by acquiring the property or acquiring legal covenants on the property. Some Nations have protected cultural heritage on private properties by simply purchasing the private land – or receiving it as a donation. Others have acquired and registered covenants on private land that still remains private property – but the covenants provide heritage protection and Indigenous access. As we discuss below, funding from governments, land trusts and other funders has sometimes made this possible.<sup>21</sup>

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<sup>20</sup> See [Appendix A](#) of this report for a description of the landmark Memorandum of Understanding between the Kitsoo Xai'xais and BC Government, authorizing Guardian Watchmen to enforce a number of provincial laws. See [Appendix B](#) for an excerpt from that MOU that describes the provincial legislation now enforceable by the Guardians.

<sup>21</sup> Other possibilities include First Nation land purchase-subdivision-and-resale, after permanently protecting key cultural heritage sites or working with landholders on designated set-aside or protected areas.

Note that it is possible for a Nation to acquire sole title to the private land or hold it in partnership with donating governments and conservation groups, *e.g.*, as an *Indigenous Protected and Conserved Area*. (See Appendix A of this report for a discussion of Indigenous Protected and Conserved Areas.)

**Recommendation #9. Establish Heritage Trusts to protect places of cultural significance**

Nations may consider establishment of a Heritage Trust in order to hold land for the protection of cultural heritage sites and resources. For example, this technique has been adopted by the Stó:lō Nation with the Stó:lō Heritage Trust Society. While the Stó:lō model is similar to a land trust in that it is registered under the *Societies Act* and holds land, its objectives are oriented towards heritage preservation.<sup>22</sup>

**Recommendation #10. Systematically explore the opportunity to protect cultural heritage every time a subdivision of private land is considered**

When subdivision of land is being considered, the provincial government can impose restrictive covenants to protect archaeological sites.<sup>23</sup> This mechanism could protect much cultural heritage in developing areas.

**Recommendation #11. Work with local governments to ensure that they use their powers to better protect Indigenous cultural heritage resources and places.**

Local governments could play a critically important role in protecting Indigenous cultural heritage. Nations can advocate that their local municipalities and regional districts use their land use and regulatory powers to better maintain, protect and preserve cultural heritage resources and places. Nations can also call on the province to amend legislation to enhance local government authority and mandate to work with Nations to comprehensively protect and repatriate Indigenous heritage. (See recommendations 17 and 24 below for details.)

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<sup>22</sup> *Societies Act*, SBC 2015, c 18.

<sup>23</sup> Pursuant to section 219 of the *Land Title Act*. See Government of British Columbia, “Archaeology Bulletins,” online: <<https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/bulletins-policies?keyword=covenant>> [<https://perma.cc/2A95-GA5D>].

Note that Indigenous peoples in other jurisdictions have benefited from novel local government mechanisms that may be instructive. For example, in 2008, the Kānaka Maoli community on the Hawaiian island of Moloka'i created an overlay tool of traditional cultural landscapes to guide municipal planning and permitting.



Image 5: Rangers looking at T̓šilhqot'in rock paintings (Photo courtesy of the T̓šilhqot'in National Government)

## Related Recommendations for the BC Government: Law and Policy Reforms<sup>24</sup>

### Recommendation #12. Reform the *Cremation, Interment and Funeral Services Act*, in concert with First Nations

The *Cremation, Interment and Funeral Services Act*<sup>25</sup> currently discriminates against Indigenous burial sites. Nations have cited a basic injustice: “First Nation ancestral remains and burial places do not receive the same protection and respect as registered cemeteries.”<sup>26</sup> Aboriginal burial sites and related sacred sites should be protected, not just non-aboriginal settler cemeteries. The *Act* should be amended

<sup>24</sup> For clarity, in addition to working with First Nations, the Government of BC should engage with the Métis Nation of British Columbia on policy and legislative reforms.

<sup>25</sup> *Cremation, Interment and Funeral Services Act*, SBC 2004 c 35.

<sup>26</sup> *Heritage Conservation Act Transformation Project: Background for Phase 1 Stakeholder Engagement*, August 23, 2022, p. 20

to provide equal protection to Indigenous remains, including human remains, items that ancestors were buried with, and grave markers. Reform of the *Cremation, Interment and Funeral Services Act* (and related legislation and policy) must be done in full collaboration with Nations.<sup>27</sup>

Note that the Ontario *Funeral, Burial and Cremation Services Act* recognizes Indigenous burial grounds, and includes a process when one is uncovered.<sup>28</sup> Note also that there are a variety of strong tools to protect iwi kūpuna (ancestral bones) in Hawai'i, found [here](#),<sup>29</sup> a primer on the Hawaiian legal framework to protect ancestral bones.

### Recommendation #13. Amend the *Heritage Conservation Act* (HCA) and related policies<sup>30</sup>

Our overarching recommendations:

- The structure, administration and implementation of the *HCA*, including its relevant policies, should be overhauled to enable the meaningful participation of Indigenous Nations in the management of their cultural heritage – and the integration of Indigenous knowledge, laws, worldviews and governance/jurisdiction.<sup>31</sup>
- The *HCA* must be reformed in collaboration with Indigenous Nations to align with the standards, principles and articles of the *United Nations Declaration on the Rights of Indigenous Peoples*, as the BC Government has promised.<sup>32</sup>

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<sup>27</sup> This recommendation follows a comprehensive project outlined in the First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 18 to “work with the province to develop and implement legislation that protects First Nation burial sites.”

<sup>28</sup> *Funeral, Burial and Cremation Services Act*, SO 2002, c 33.

<sup>29</sup> Interview of Kānaka Maoli lawyer and law professor Malia Akutagawa by Calvin Sandborn and Emmaline English (15 March 2021). See Natasha Baldauf & Malia Akutagawa, *Ho’i Hou I Ka Iwikuamo’o: A Legal Primer for the Protection of Iwi Kūpuna in Hawai’i Nei*, online: *Ka Huli Ao, Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai’i at Ma’noa*

<<https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/Programs%2CClinics%2CInstitutes/Iwi%20Primer%20FI%20NAL.pdf>> [<https://perma.cc/MQ9K-832C>].

<sup>30</sup> This recommendation supports the implementation of several Action Items from the First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012), including:

“[e]ngage the Province in discussions relating to their legal understandings on s. 4 Agreements and the delegation of authority to First Nations. Develop a process to amend and update provincial legislation to ensure the full implementation of s. 4 and its application to all heritage interests. This could include developing a position paper and pursuing a potential legal challenge.

Ensure that the Archaeology Branch permitting process and standards for archaeologists include the expectation of detailed knowledge of the cultural heritage values held by the Nation(s) in whose territories they are working.

Develop policy options aimed at enabling First Nations to access financial resources for cultural heritage resource programs and the referral process, as well as undertaking emergency cultural heritage assessments.”

<sup>31</sup> *Heritage Conservation Act*, RSBC 1996, c 187.

<sup>32</sup> This aligns with the BC Government’s commitment in action item 4.35 of the *Declaration on the Rights of Indigenous Peoples Act Action Plan* to reform the *HCA* with Nations; Kekinusuqs, Judith Sayers, “Research from Around the Globe Regarding Mechanisms for Protecting Sacred Sites, Areas and Landscape and Burial Sites of Indigenous Nations on Private Land” (First Nations Joint Working Group on First Nations Heritage Conservation: November 2018); *United Nations Declaration on the*

- Government must reform their legislation, policies and internal directives to ensure that agreements under section 4 of the *HCA* are available to Nations and expand the sphere of Indigenous decision-making authority facilitated under section 4. Among other things, this could include shared decision making on:
  - permits sought by landowners, proponents and others;
  - articulating *definitions* of cultural heritage resources to reflect Indigenous worldviews;
  - investigations into potential violations of the *HCA*; and
  - the ability to change the schedule of protected resources.

(See discussion below.)

Specific recommendations:

- The *HCA* should recognize the critical importance of cultural heritage resources, and the specific relationship Nations have to their territories, places, cultural heritage resources, knowledge systems, cultures and traditions. The *Act* should:
  - stress the importance of preserving, protecting and maintaining cultural heritage resources and places for present and future generations;
  - stress the principle of “minimal impairment” or “least possible alteration, damage or loss” of cultural heritage resources; and
  - recognize that Indigenous Nations’ values, knowledge, laws and jurisdiction must fully inform management of cultural heritage in BC.<sup>33</sup>
- The provincial government should expand the definition of “sites” and “objects” under the *HCA* to be more inclusive of Nation-specific understandings of cultural heritage resources and places. Specifically, the Government of BC should adopt the typology proposed by the section 4 *HCA* Stó:lō pilot project, or something similar. This would enable Nations to incorporate their own working definitions of “cultural heritage resources” as it pertains to their laws and worldviews.
  - This broad typology should include:
    - Sites (spiritual, gravesites);
    - cultural places;
    - objects;
    - trees;
    - ground;
    - practices of heritage (i.e., crafts, food gathering and preparation, dance, song, story telling);

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*Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61<sup>st</sup> Sess, Supp No 49, UN Doc A/RES/61/295; Government of British Columbia, BC Ministry of Indigenous Relations and Reconciliation “Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027” (2022), online: <[https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration\\_act\\_action\\_plan.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf)> [<https://perma.cc/4HBP-VU2T>] (“Work with First Nations to reform the *Heritage Conservation Act* to align with the UN Declaration, including shared decision-making and the protection of First Nations cultural, spiritual, and heritage sites and objects.”)

<sup>33</sup> Such principles guide New Zealand Pouhere Taonga (Heritage New Zealand). Heritage New Zealand is an autonomous Crown entity that has authority to maintain, preserve and protect Aotearoa cultural heritage and sites.

- knowledge structures (i.e., stories and oral histories, teachings, wisdom traditions, memories, dreams);
  - protocols;
  - place names;
  - living forms of heritage;
  - ancestral landscape and features considered persons; and
  - fossils.<sup>34</sup>
- The *HCA* should include a definition provided by Nations on what desecration/ disturbance includes, and what actions constitute destroying or impairing cultural or sacred sites.<sup>35</sup> Note that New Zealand provides one example of a broader recognition of what is considered “heritage.”<sup>36</sup>
  - The current “Site Significance” scale should be reconfigured in consultation with Nations to reflect their own heritage values linked to a more inclusive typology, as recommended above.<sup>37</sup>
  - The *HCA* should include protective mechanisms for resources and places.<sup>38</sup>
  - The Government of BC should be flexible and adopt a strict data sharing proposal similar to the section 4 *HCA* Stó:lō pilot project, if a Nation requests it. If this scheme is used, only the general category or type of cultural resource will be shared with the government, and data will not be for general public consumption.<sup>39</sup>
  - Nations should have the flexibility to propose a change to the schedule of heritage sites and objects listed under the *Heritage Conservation Act* at any time – to respect ongoing exploration and understanding of sites or resources.<sup>40</sup>

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<sup>34</sup> Given the limited understandings of “site” and “object” in the *HCA*, the province does not currently provide comprehensive protection. For example, while the provincial government will provide protection for each feature of a burial mound, it will not protect the space *between* each mound. In addition, the province does not recognize or protect transformation sites.<sup>34</sup> In 1991, when *X̱á:ytem ytem*, or Hatzic Rock sacred site to the Stó:lō people, was threatened by developers, the province only stepped in because the site was surrounded by physical artifacts. Dave Schaepe attributes this approach by the province to their narrow interpretation of the *HCA* and what things it actually protects.

<sup>35</sup> Kekinusuqs, Judith Sayers, “Research from Around the Globe Regarding Mechanisms for Protecting Sacred Sites, Areas and Landscape and Burial Sites of Indigenous Nations on Private Land” (First Nations Joint Working Group on First Nations Heritage Conservation: November 2018) at 6.

<sup>36</sup> In Aotearoa New Zealand, a wider variety of Indigenous (Māori) cultural heritage resources are protected, including sacred sites, places of ancestral significance, and treasured possessions. See: *Heritage New Zealand Pouhere Taonga Act 2014*, 2014 No 26.

<sup>37</sup> This recommendation incorporates elements from a comprehensive project referenced in the First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 19 to create a First Nations-specific “Site Significance scale”.

<sup>38</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 19.

<sup>39</sup> This proposal to limit data sharing is not a novel legal concept in BC As described below, section 5(4) of the *Government Actions Regulation* stipulates that orders made under this regulation can include measures to prevent disclosure of the location of a resource feature and sets up a variety of protections to this effect.

<sup>40</sup> Note that section 4 of the *HCA* states:

(1)The Province may 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...(4)Without limiting subsection (1), an agreement made under this section may include one or more of the following:

(a) a schedule of heritage sites and heritage objects that are of particular spiritual, ceremonial or other cultural value to the aboriginal people for the purpose of protection under section 12.1 (2) (h);

- Nations should “hold an active and meaningful role from beginning to end” in Archaeological Overview Assessments (“AOAs”) – and have the authority to determine which archaeologists are sufficiently knowledgeable and respectful of their culture to work with them. Models informing AOAs should be informed by the expanded definition above and Indigenous knowledge, information, values and perspectives, and should be reviewed annually by Nations and experts.<sup>41</sup>
- Indigenous authority available under section 4 of the *HCA* should be expanded to include authority under the following *HCA* provisions:
  - Section 3 (Provincial heritage register);
  - Section 7 (Provincial heritage policies);
    - Under this section, similar to the Haida Nation, any policy established by a Nation should receive protection under section 7(1).
  - Section 9 (Heritage designation);
  - Section 10 (Designation procedure);
  - Section 11 (Compensation for heritage designation);
  - *Parts of Section 12 not already accounted for, including:*
    - Section 12.3 (Heritage inspection and heritage investigation by ministerial order);
    - Section 12.5 (Permit requirements, specifications, conditions);
    - Section 12.6 (Amending, suspending or cancelling permits – New information available to the Minister);
    - Section 12.7 (Amending, suspending or cancelling permits – enforcement); and
    - Section 12.8 (Subsequent amendment, suspension or cancellation of permit); and
  - Sections 15, 15.1, 15.2, 15.3, and 16.1 (Administration and Enforcement) on both “Crown land” and private property.
  - Section 34 (ability to apply to court for civil remedies including injunctions or restoration/compliance orders)
- The paramountcy of the *HCA* over other provincial legislation as set out in section 6 should be extended beyond just section 12.1(2) of the *HCA*.
- The date of 1846 used to determine whether cultural heritage resources merit protection (section 12.1(2)(d)) should be repealed from the *HCA*. The provincial government should fulsomely engage with Nations on whether a date is appropriate and, if so, what it should be.<sup>42</sup>
- Any permits for approval under *HCA* section 12 (Heritage Inspection Permits, Heritage Investigation Permits and Site Alteration Permits) should require the consent and signature of

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(b) a schedule of heritage sites and heritage objects of cultural value to the aboriginal people that are not included in a schedule under paragraph (a)...

See the changes to section 4 proposed below.

<sup>41</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 18.

<sup>42</sup> This arbitrary date is frustrating for Nations, as it is an artificial date wrongly imported from court decisions on Aboriginal title. For example, the Haida Nation identifies 1920 as a significant marker between pre-industry and industrial times on Haida Gwaii. Therefore, the Nation strives to protect cultural heritage resources from 1846 to 1920, even though they cannot be registered under the *HCA*.



impacted Nation(s) and the provincial government. No permit should be approved without the free, prior and informed consent of Nations, in line with article 32 of the *UNDRIP*.<sup>43</sup>

- Nations should have sufficient time to review each permit – with the applicable time period for review decided in consultation with Nations.<sup>44</sup> Government and industry must properly assume their responsibility to adequately fund the processing of referrals.
- In order to ensure compliance, the Government of BC should support private landowners with heritage inspection and heritage investigation fees (section 12.2(2)).
- The Government of BC should implement regulations and develop a policy to implement the 2019 *HCA* amendment establishing a general legal duty to report discovery of cultural heritage resources.<sup>45</sup> This is an important self-enforcing mechanism that can help to preserve cultural heritage resources at minimal expense to Nations. In developing this policy, the government should launch a broad educational campaign to ensure that all British Columbians are aware of the duty to report discoveries. The BC Government should work hand-in-hand with Nations to ensure Nations are involved in the reporting process – including a requirement that a Nation must be contacted when someone makes an alleged discovery in their traditional territories.
- An updated *HCA* should mandate the necessity of including Indigenous archaeologists and field personnel, or archaeologists and field personnel approved by the affected Nations, where possible in assessments and decision making.<sup>46</sup>
- The *Heritage Conservation Act Permitting Process Policy Guide* should be amended so that Nations must be consulted in the development of any permit – and permits should not be considered until this has been completed.<sup>47</sup> The extent and quality of consultation required should be developed with Nations and should include an option for co-development with interested Nations.
- The BC Government should build on and work with First Nations to frequently update the Remote Access to Archaeological Data (“RAAD”) system – and make aspects of it open to proponents, private landowners and other interests for development planning purposes. It would also serve as an additional tool to inform the creation of Indigenous cultural heritage management plans (see below). An interesting model of collaboration in forming an Indigenous heritage data base is found in implementation of the Whitefish Lake Agreement in Alberta.<sup>48</sup>

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<sup>43</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61<sup>st</sup> Sess, Supp No 49, UN Doc A/RES/61/295.

<sup>44</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 18.

<sup>45</sup> See the 2019 amendments to the *Heritage Conservation Act*, RSBC 1996, c 187, s 8.2:

“(1) A person who discovers a prescribed site or object that may have heritage value must report the discovery to the minister within a prescribed time period...” Section 8.2 has been approved by the legislature and will come into force by regulation.

<sup>46</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 18.

<sup>47</sup> BC Government, Archaeology Branch, “Heritage Conservation Act Permitting Process Policy Guide,” (17 April 2020), online: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca\\_permitting\\_process\\_policy\\_guide.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca_permitting_process_policy_guide.pdf)> [<https://perma.cc/D2KS-LD9A>].

<sup>48</sup> Catherine Bell, Graham Statt, Michael Solowan, Allyson Jeffs, and Emily Snyder, “First Nations Cultural Heritage: A Selected Survey of Issues and Initiatives” in Catherine Bell and Val Napoleon, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver, BC: UBC Press, 2008) 367 at 392-393 (Whitefish Lake First Nation has a consensus-based cooperative management agreement with the Government of Alberta, which enables the community to play a role in government land-use decisions on its traditional territory. This includes decisions that impact heritage resources. As part of this structure, the Nation and the provincial government have developed a cultural inventory of burial sites. Sites are either

- Nations should have the capacity to add places based on their definitions of cultural heritage resources. This should include both tangible and intangible aspects of heritage sites and cultural places, as per the New Zealand Heritage List/ Rārangī Kōrero (see below). The system must include local knowledge, and respect confidentiality concerns of Nations.
- As *per* recommendation #23 below, the BC Government should work to harmonize BC’s Forest Range and Evaluation Program Dashboard and the RAAD system so there is equal protection for monitoring cultural heritage resources – and so that this information can be found on one system.
- There is general dissatisfaction with how the ARCH Branch works with Nations. The Government of BC should seriously consider reforms that have been proposed by various Nations, such as:
  - relocating the ARCH Branch out of the Ministry of Forests and into the Ministry of Indigenous Relations and Reconciliation (“MIRR”);
  - decentralizing the ARCH Branch and establishing regional offices; or
  - given that MIRR and FLNRORD do not have comparable levels of resources, the ARCH Branch could be restructured and better resourced.
- The Government of BC should enter into agreements with Nations so that Guardians can enforce the *HCA* on their traditional territories, including ticketing violators of the Act. Nations should also have the opportunity to be fully involved in any investigations and any decisions about whether to lay charges.

**Recommendation #14. Amend the BC Archaeological Impact Assessment Guidelines**

Amend the BC Archaeological Impact Assessment Guidelines, with meaningful participation of Indigenous Nations. These outdated guidelines were last revised in 1998. An amended version should stipulate a requirement of working with Indigenous Nations when an assessment is carried out in a Nation(s)’s traditional territory – and the need to be respectful and integrate Indigenous knowledge, laws, and worldviews.

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designated with a protective notation (“PNT”) or consultative notation (“CNT”) in the Alberta Sustainable Resource Development Management dataset. The former “show[s] allowable uses, and may give management guidelines for integrating different uses on the land.” The latter “are used to alert developers and others to the interests of a particular group.” Local knowledge (i.e., wildlife patterns and habitat) has been documented and is protected under the PNTs and CNTs. This information, as well as traditional place names, has been integrated into a GIS program so developers can do an overlay of sites with their plans).

### **Recommendation #15. Amend the *Land Title Act***

- First Nations should be recognized as legal entities capable of holding title so they do not have to use corporations or trusts to hold title or covenants in the provincial system.<sup>49</sup>
- “First Nation” should be added to section 219(3) to allow for First Nations to be designated as covenantees in order to protect, preserve or maintain heritage and cultural amenities on property (section 219(4)(b)).
- First Nations should be empowered to be issued conservation covenants under section 219.
- First Nations should be considered bodies that can apply for designation under section 218(1) (statutory right-of-way).

### **Recommendation #16. Amend the process for creating restrictive Cultural Heritage covenants during the subdivision approval process.**

- Overhaul the Ministry of Transportation and Infrastructure (“MOTI”) and ARCH Branch’s guidelines for establishing cultural heritage restrictive covenants during the subdivision process – and engage meaningfully with Nations to create and implement new guidelines to better protect Indigenous Cultural Heritage. Appropriate funding and support should be provided to Nations to ensure their participation.
- Increase protection by expanding the focus beyond “archaeological sites” to include expanded conceptions of cultural heritage resources and places consistent with that of Nations. (As discussed above in recommendation 13.)
- Collaborate with Nations to create guidelines defining when restrictive covenants *must* be filed to protect Indigenous cultural heritage before subdivision approval.

### **Recommendation #17. Amend laws to mandate local governments to collaborate with Nations to create “Indigenous Cultural Heritage Management Plans”**

The provincial government should amend the *Vancouver Charter*, the *Community Charter* and the *Local Government Act* to mandate that all municipalities and regional districts create Indigenous cultural

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<sup>49</sup> Currently the BC Land Title Office only recognizes Treaty First Nations as legal entities. They point to the 'Uukw' case which ruled that aboriginal title interests cannot be registered. See *Uukw v. British Columbia* (1987), [1987 CanLII 2630 \(BC CA\)](#), 16 B.C.L.R. (2d) 145.

heritage management plans that would be co-developed and co-authored with Nations on whose traditional territories the municipality and regional district resides.

Specifically:

- These plans should be informed by the recommended updated RAAD system, as well as local First Nations' heritage inventories, and include identification of existing sites and areas with heritage resources (*e.g.*, regalia in forests). In addition, similar to the Hawaiian island of Moloka'i and the Whitefish Lake First Nation agreement with the Government of Alberta, an overlay tool should be created to identify areas that must be preserved.<sup>50</sup>
- These plans should enable an ongoing relationship between Nations and municipalities so that whenever a development is proposed that could impact a site or an area with heritage resources, Nations are fully engaged.<sup>51</sup>
- These plans should include a process for referrals and reviews by which to address the discovery of a new site or area with a cultural heritage value.
- These plans should be integrated with official community plans.
- To fund the development and implementation of the plans, the province and municipalities could use various funds, such as the taxes collected under the *Property Transfer Tax Act*<sup>52</sup> or, in Vancouver, development cost levies under the *Vancouver Charter*.

Recommendation: The provincial government should work with municipalities and regional districts to harmonize policies, laws, bylaws and plans to ensure consistency and clarity.<sup>53</sup>

Recommendation: The provincial government should amend section 488 of the *Local Government Act* to add "protection of Indigenous cultural heritage sites or resources" to the list of purposes for which an official community plan may designate a development permit area. This change will empower local governments to amend Official Community Plan, zoning and development permit regimes to protect and conserve Indigenous heritage as agreed to by local Indigenous groups.

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<sup>50</sup> Catherine Bell, Graham Statt, Michael Solowan, Allyson Jeffs, and Emily Snyder, "First Nations Cultural Heritage: A Selected Survey of Issues and Initiatives" in Catherine Bell and Val Napoleon, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver, BC: UBC Press, 2008) 367 at 392-393 (Whitefish Lake First Nation has a consensus-based cooperative management agreement with the Government of Alberta, which enables the community to play a role in government land-use decisions on its traditional territory. This includes decisions that impact heritage resources. As part of this structure, the Nation and the provincial government have developed a cultural inventory of burial sites. Sites are either designated with a protective notation ("PNT") or consultative notation ("CNT") in the Alberta Sustainable Resource Development Management dataset. The former "show[s] allowable uses, and may give management guidelines for integrating different uses on the land." The latter "are used to alert developers and others to the interests of a particular group." Local knowledge (i.e., wildlife patterns and habitat) has been documented and is protected under the PNTs and CNTs. This information, as well as traditional place names, has been integrated into a GIS program so developers can do an overlay of sites with their plans.)

<sup>51</sup> Kekinusqs, Judith Sayers, "Research from Around the Globe Regarding Mechanisms for Protecting Sacred Sites, Areas and Landscape and Burial Sites of Indigenous Nations on Private Land" (First Nations Joint Working Group on First Nations Heritage Conservation: November 2018) at 6.

<sup>52</sup> *Property Transfer Tax Act*, RSBC 1996, c 378.

<sup>53</sup> David M. Schaepe, George Nicholas and Kiersten Dolata, "Recommendations for Decolonizing British Columbia's Heritage-Related Processes and Legislation" (2020) at 50, online (pdf): *First Peoples' Cultural Council* <<https://fpcc.ca/wp-content/uploads/2020/12/FPCC-Decolonizing-Heritage-Processes-and-Legislation.pdf>> [<https://perma.cc/WRU4-WBHG>].

Recommendation: The provincial government should amend sections 25 and 225 of the *Community Charter*, sections 391 and 392 of the *Local Government Act*, and sections 396 and 396A of the *Vancouver Charter* to create a statutory tax exemption from municipal property taxes for any property where Indigenous heritage sites, resources or burial sites are located and protected consistent with Indigenous interests. This tax exemption could be a full or partial exemption. The definition of “Indigenous heritage sites or resources” should be made consistent with the recommended expanded definition under the *HCA*. (Also see recommendation 24 to local governments.)

### **Recommendation #18. Create access for Nations on private property**

The Government of BC should create a system to enable Nations to access cultural heritage resources and places on private property, as is done in some jurisdictions. For example, Hawaiian Indigenous laws and the rights of Indigenous Hawaiians in their traditional tenure system are protected under the state’s constitution and have been incorporated into state common law. This includes the legal ability of Indigenous Hawaiians to access private property in order to exercise their rights and practice cultural actions for subsistence, including hunting and gathering firewood.<sup>54</sup> Notably, Indigenous burial sites in Hawaii are not owned by private property owners, and Indigenous Hawaiians are the beneficiaries of a public trust in the burial site land.<sup>55</sup> Similarly, in Australia’s Northern Territory Indigenous people are allowed to access their sacred sites, even if the sites are located on private property.<sup>56</sup>

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<sup>54</sup> Interview of Kānaka Maoli lawyer and law professor Malia Akutagawa by Calvin Sandborn and Emmaline English (15 March 2021) (This structure exists from the state’s adoption of the Kingdom of Hawai’i’s *Judiciary Act* (Hawaii Kingdom 1892) when it was admitted into the United States in 1959. The *Judiciary Act* instructs courts to look to the common law, except where it conflicts with Hawaiian judicial precedent and Kānaka Maoli (Indigenous Hawaiians’) custom and usage of land. Kānaka Maoli custom and usage of land is described in different sources, including the *Kuleana Act*, 1851 (Hawai’i Kingdom 1892). This act affirms Indigenous peoples’ right to gather firewood, aho cord, thatic, and ki leaf. It also guarantees the right to have drinking water, running water, and to travel along the roads in order to access the resources they need. To note, access to private property is subject to state regulation.); In *State v Palama*, 364 P.3d 25,1, the Supreme Court held that the constitution protects the rights of Kānaka Maoli tenants, including exercising the customary right to hunt in their own valley; *Ka Pa’akai O Ka’Aina v. Land Use Com’n, State of Hawai’i*, 94 Hawai’i 7 P.3d 1068 confirmed the state’s obligation under the Hawai’i Constitution to affirmatively protect traditional and customary Hawaiian rights.

<sup>55</sup> Interview of Kānaka Maoli lawyer and law professor Malia Akutagawa by Calvin Sandborn and Emmaline English (15 March 2021) Section 5(f) of the *An Act to Provide for the Admission of the State of Hawai’i into the Union*, Pub L No 86-3, § 5(f), 73 Stat 4 (1959) created this trust responsibility. Hawaiian legal experts, including Professor Akutagawa, have invoked this line of reasoning in customary practice legal cases to argue that as the trust has to benefit Kānaka Maoli, customary and religious practices have to be recognized. This public trust doctrine is reflected in the Hawai’i Constitution and applies to private property. Burial sites are considered part of the public trust, and thus a landowner who owns land that contains a burial site does not own the burial site.

<sup>56</sup> Under the *Northern Territory Aboriginal Sacred Sites Act* (NT), no 29, 1989, an independent board consisting of predominantly Indigenous “custodians” has authority to enforce the *Sacred Sites Act*, which includes prosecution of offences. The act also allows for Indigenous peoples to access sacred sites, even if they are located on private property; National Museum Australia, “Aboriginal Land Rights Act,” online: <<https://www.nma.gov.au/defining-moments/resources/aboriginal-land-rights-act>> [<https://perma.cc/Y4KS-9GU2>]; An email from Dr. Ambelin Kwaymullina to Calvin Sandborn (4 June 2021).

Indeed, it is arguable that Aboriginal title already provides for legal access to cultural heritage sites on private land in BC.<sup>57</sup> Note also that there is precedent for granting access onto private land – BC free miners have long had the legislated right to enter private property to explore for minerals.<sup>58</sup>

### Recommendation #19. Create protected area zones for cultural heritage resources

To protect culturally significant places and resources, the Government of BC should create protected area zones, similar to the systems established for riparian areas under the *Riparian Areas Protection Act*<sup>59</sup> and agricultural land reserves under the *Agricultural Land Commission Act*.<sup>60</sup> This recommendation could help address the gap in protection in the current interpretation of the *HCA*, whereby the BC government will only protect ‘sites’ or ‘objects’, and not the space between or around cultural heritage resources or places. Riparian areas and agricultural land reserves are two legislative tools the BC government currently employs to protect and restrict activities on broad zones across identified parcels of land. These cultural heritage protected area zones might take on a form similar to the cultural zones in the conservancies in the Kitasoo/Xai'xais territory.<sup>61</sup>

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<sup>57</sup> The existence of important Indigenous Cultural Heritage sites on private lands raises issues about the relationship between Aboriginal title and private property that await resolution. Dr. John Borrows' 2015 article, [Aboriginal Title and Private Property](#)<sup>57</sup> [Borrows, John. "Aboriginal Title and Private Property." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015).] provides helpful insight in how private property and Aboriginal title can co-exist. Borrows wrote this piece following the 2014 declaration by the Supreme Court of Canada ("SCC") of Aboriginal title over a portion of T̓silhqot'in traditional territory. [*T̓silhqot'in Nation v British Columbia*, 2014 SCC 44 [2014] 2 SCR 257.] Borrows argues that private property on title land could be protected through Aboriginal legal and governance systems, and "owe its existence to both Indigenous law and the common law." Borrows reminds us that Aboriginal title is a "prior and senior right," and constitutionally recognized Aboriginal rights, including title rights, should prevail over private property interests. In this system, he contends that private land could still be alienable, and proposes new avenues for co-existence, including a "sui generis condominium-like form of organization," or "sui generis leasehold interest for 'private' parties." [Borrows, John. "Aboriginal Title and Private Property." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015) at pp. 116, 117 and 131.] For the portion of traditional territory with recognized Aboriginal title and other areas where Aboriginal title will be recognized by the courts or the Canadian government in the future, this "first principles" argument might be employed to protect cultural heritage resources and access to them.

<sup>58</sup> *Mineral Tenure Act*, RSBC 1996, c 292, ss 8 and 11 (grants those holding a Free Miner certificate the right to enter private property).

<sup>59</sup> *Riparian Areas Protection Act*, SBC 1997, c 21; *Riparian Areas Protection Regulation*, BC Reg 99/2020.

<sup>60</sup> *Agricultural Land Commission Act*, SBC 2002, c 36; *Agricultural Land Reserve Use Regulation*, BC Reg 30/29.

<sup>61</sup> See the discussion of the Kitasoo Xai'xais cultural zones in [Appendix A](#) of this report.

## Recommendation #20. Cultural Heritage Education

- The Government of BC should amend the public education curriculum to include information about the value and importance of Indigenous cultural heritage sites, which should be tailored to specific public-school boards.<sup>62</sup>
- The Government of BC should work with Nations to establish relevant parallel cultural heritage certification/accreditation/recognition programs for Indigenous people. For example, this could include a parallel program to the Resources Information Standards Committee Archaeological and Culturally Modified Tree ("CMT") Inventory Training – that would provide specific specialized training for Indigenous peoples working with Indigenous cultural heritage resources and places.<sup>63</sup>

## Recommendation #21. Use property transfer taxes to support Indigenous heritage conservation efforts

The province should use a portion of the provincial property transfer tax to create a substantial Indigenous Heritage Trust Fund, to be co-managed with Nations. The fund can be used to purchase private or fee simple lands, or interests in them, in order to protect key cultural resources and sites.<sup>64</sup> The Trust could fund other heritage initiatives, such as supporting private landowners with heritage inspection and fees – and creating and implementing Indigenous cultural heritage management plans. Criteria for this Trust fund should be co-developed by Nations and the Province.

No one can reasonably dispute a proposal to take a small portion of the accelerated increase in value of the land taken from Indigenous people – and use that money to restore land and cultural sites to the original owners.

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<sup>62</sup> First Nations Leadership Council, "First Nations Heritage Conservation Action Plan" (2012) at 1; Government of British Columbia, BC Ministry of Indigenous Relations and Reconciliation "Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027" (2022), online: <[https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration\\_act\\_action\\_plan.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf)> [<https://perma.cc/4HBP-VU2T>] ("Co-develop a K-12 First Nations Language Policy and associated implementation plan for the public education system with the First Nations Education Steering Committee, including ensuring that the language and culture of the local First Nation(s) on whose territory(ies) a board of education operates schools are the ones primarily reflected in any First Nations language and culture programs and services of the board.")

<sup>63</sup> First Nations Leadership Council, "First Nations Heritage Conservation Action Plan" (2012) at 13.

<sup>64</sup> See First Nations Leadership Council, "First Nations Heritage Conservation Action Plan" (2012) discussion of a Heritage Trust funded by a portion of Property Transfer Tax. See also: Kekinusuqs, Judith Sayers, "Research from Around the Globe Regarding Mechanisms for Protecting Sacred Sites, Areas and Landscape and Burial Sites of Indigenous Nations on Private Land" (First Nations Joint Working Group on First Nations Heritage Conservation: November 2018) at 6.

**Recommendation #22. Negotiate and enter into agreements under section 7 of the *Declaration on the Rights of Indigenous Peoples Act***

In addition to using section 4 of the *HCA* to provide for joint decision making and enabling a Nation's authority, the province must co-develop legislation, policies and directives to enable and encourage joint agreements under section 7 of the *DRIPA*.<sup>65</sup> Agreements under section 7 could be more broadly based to deal with land and resource decision making, and should include similar elements to the ones proposed above for expanding authority under a section 4 *HCA* agreement.

**Recommendation #23. Harmonize provincial statutory and operational requirements**

Statutory and operational requirements and systems should be harmonized *across provincial agencies* to ensure equal protection for cultural heritage resources – including the ARCH and Heritage Branches of FLNRORD, as well as all activities under the *HCA* and the *FRPA*.

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<sup>65</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.





Image 6: Members of the T̓silhqot̓'in Tsiqi Dechen Jedilhtan drum at Tsiyi (Photo courtesy of the T̓silhqot̓'in National Government)

## Recommendations for Local Governments

**Recommendation #24 Collaborate with Indigenous Nations on cultural heritage resource protection**

Local governments should:

- Amend their existing bylaws to better protect Indigenous cultural heritage. They should amend their Official Community Plans, zoning, and heritage conservation area regimes to protect and conserve Indigenous heritage as led by local Indigenous groups. (This collaborative work can map the areas where development should be prohibited or restricted – and outline the specific requirements for consent in areas where development will require additional cultural heritage protection considerations.)
- Call on the province to reform the *Community Charter*, the *Local Government Act*, and the *Vancouver Charter* to enhance local government protection of Indigenous Cultural Heritage.

Provincial law should mandate and empower local governments to collaborate with Nations to create “Indigenous Cultural Heritage Management Plans,” as proposed above.

- Petition the provincial government to specifically amend section 488 of the *Local Government Act* to add “protection of Indigenous cultural heritage sites or resources” to the list of purposes for which an official community plan may designate a development permit area. After section 488 of the LGA is amended, local governments should collaborate with Nations to establish Development Permit Areas to comprehensively protect Indigenous cultural heritage resources across the community
- Create effective property tax and other incentives to enhance protection of Indigenous cultural heritage, consistent with Indigenous interests.
- Fully implement the call from the First Nations Leadership Council to:
  - “Advocate for the incorporation of Nations’ ... values and heritage areas into official community plans, development permit areas and other bylaws and processes.”
  - “Improve the consultation and accommodation process in regards to cultural heritage issues with the aim of establishing and implementing sustainable cultural law and protocol agreements.”
  - “Work with local Nations and become actively involved in the care of ancestral remains and respect for cultural laws and protocols, including addressing the lack of funding for reburial ceremonies, lack of storage space for reburials and lack of available land for reburials.”<sup>66</sup>

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<sup>66</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012).



Image 7: Danya Douglas - S'ólh Téméxw Guardian, S'ólh Téméxw Stewardship Alliance. Monitoring a Culturally Modified Tree near Bridal Falls while working as an Indigenous Monitor on the Trans Mountain Expansion Project. (Photo courtesy of Stó:lō Research and Resource Management Centre)

## **PART II DISCUSSION: TOOLS AND STRATEGIES NATIONS CAN USE TO PROTECT, PRESERVE AND MAINTAIN CULTURAL HERITAGE RESOURCES ON PRIVATE LAND**

The following are initiatives that Nations have adopted – or could adopt – to maintain cultural heritage resources.

### **DEVELOP CULTURAL HERITAGE POLICIES**

**Recommendation: Nations should consider developing their own policies to protect, preserve and maintain cultural heritage resources on both Crown and private lands in their territories.**

As a key mechanism to protect cultural heritage, many Nations have developed a comprehensive *policy* to articulate their expectations and strategies related to preservation of resources and places within their territory. A good example of such a policy is found in the Stó:lō Heritage Policy Manual (Stó:lō Manual”).<sup>67</sup> Policies can help convey consistent messaging to businesses, landowners, and external archaeologists about the Nation’s specific expectations for heritage conservation in their territory – including how these expectations differ from, or align with, the *Heritage Conservation Act*. Many existing heritage policies define cultural heritage resources according to the Nation’s worldview, set out the Nation’s cultural values and laws, and provide their mandate for heritage conservation.

Policies also include guidelines for how to engage with cultural heritage resources/places – and what is considered appropriate engagement with the Nation. For example, the Stó:lō Manual sets out principles of appropriate behaviour, and provides a spectrum of how to be respectful based on the inherent cultural value associated with the type of resource. This spectrum ranges from a prohibition of *any* disturbance of significant places such as transformation sites – to resources such as cultural objects that may be altered with a justified proposal.

As described below, some policies also establish processes for issuing *permits* that the Nation requires of external parties who wish to alter sites or conduct archaeologist studies and academic research. Finally, some policies explicitly set out how proposed development in the territory will be considered. For example, the shíshálh Nation Heritage Policy (k’ úlhut-tsut ?elh kwiyás) (“shíshálh policy”) describes:

*Developments which may impact upon shíshálh heritage properties must be assessed on an individual case by case basis. However, we will not allow certain heritage properties to be impacted regardless of the needs of proponents. These heritage properties include but are not limited to: Graves of our ancestors, Sacred and Spiritual Places, House sites, Battle areas, Wood and stone fish traps, Works of art, etc.*

## DEVELOP A NATION PERMITTING SYSTEM

**Recommendation: Heritage protection can be enhanced if Nations develop their own permitting system to regulate cultural heritage investigations, archaeological studies, or alteration of cultural heritage sites.**

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<sup>67</sup> See Stó:lō Heritage Policy Manual (May 2003), online:

<<http://www.srrmcentre.com/files/File/Stolo%20Heritage%20Policy%20Manual%20-%20May%202003%20-%20v1.2.pdf>>

[<https://perma.cc/6JA7-2V42>]; Sts’ailles, *Cultural Heritage Resources Policy* (May 2010), online:

<<https://static1.squarespace.com/static/55d3a02de4b070510b27c3e7/t/5b47a1bd88251bde0f29d6b4/1531421122472/stsailes-cultural-heritage-resources-policy-2.pdf>> [<https://perma.cc/BR85-F6CE>]; and shíshálh Nation, *shíshálh Nation Heritage Policy*,

online: <<https://shishalh.com/wp-content/uploads/2019/01/sh%C3%ADsh%C3%A1lh-Nation-Heritage-Policy.pdf>>

[<https://perma.cc/PUA3-26KH>].

A critical component of cultural heritage policies is the inclusion of permitting systems for investigations relating to cultural heritage and/or archaeological sites. This was a key Action Item from the 2012 *First Nations Heritage Conservation Action Plan*, which called for support of:

*...the development of First Nation cultural heritage permitting systems, which include recognition of First Nation jurisdiction for cultural management in the protection of sites.*<sup>68</sup>

There are legal and technical challenges to overcome. For example, there can be uncertainty as to whether private landowners, corporate entities and other governments will respect and follow Nation permitting requirements without a law or agreement in place. Note that some Nations initially create systems on Reserve lands or forest tenures or parks in which they have an interest or leverage – and then expand from there. Experience has shown that if permitting can be implemented, it can lead to significantly more control – and a source of revenue for Nations to assist with further protection. Below is a discussion of some permitting systems.

## Stó:lō permits

The Stó:lō Research and Resource Management Centre (SRRMC) issues Stó:lō permits primarily to archeologists and heritage stewards looking to do investigations relating to cultural heritage or archeological studies within S'ólh Téméxw (Stó:lō territory). The permits are a key mechanism from the Stó:lō Heritage Policy Manual (2002v1.3). According to David Schaepe, Director and Senior Archaeologist of the SRRMC, with the permitting system and the Stó:lō Heritage Policy Manual, the Stó:lō are “occupying the field” – and asserting jurisdiction on the basis of Stó:lō inherent rights and title. Schaepe strongly endorses that other Nations develop similar structures, reflecting their worldviews and laws.

The vast majority of permits issued are for investigative purposes. In general, the SRRMC does not tend to issue *alteration* permits – as it aims to avoid disturbing cultural heritage resources as a primary stewardship objective. However, the SRRMC will issue such permits when needed, provided there is a clear rationale that states avoidance cannot be achieved – and there is a link to the engagement, consultation and accommodation processes.

This permitting structure runs parallel to the provincial government Heritage Investigation Permit, which is issued under section 12.2 of the *Heritage Conservation Act*.<sup>69</sup> The SRRMC coordinates with the provincial ARCH Branch by providing a copy of the Stó:lō permit as the consultative step to the corresponding *HCA* permit application. The SRRMC also comments on the issuance of *HCA* site investigation and alteration permits.

## Process

Investigators looking to conduct archeological or cultural heritage management-related investigations on Stó:lō territory can apply for a permit through the Stó:lō Heritage Investigation Permit Application

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<sup>68</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 17.

<sup>69</sup> *Heritage Conservation Act*, RSBC 1996, c 187.

Form, which has a processing fee of \$350. The form requires the applicant, or the investigator, to provide the type of heritage project (including site alteration) it wants to undertake, and the nature of the investigation. It also requires the applicant to list other permits that have been obtained, and attach any applicable *HCA* permit applications. If there are no *HCA* applications, a detailed project description and methodology must be provided. The form also sets out terms and conditions – including that the investigator must be familiar with the Stó:lō Manual, and that the permit holder will hire a Stó:lō community member, with the assistance of the SRRMC. A trained member from the Nation working with the permit holder helps with identifying cultural sites and objects that may not be easily recognized or understood by others or external archaeologists. This process serves to promote standards across consultants and provides employment and ongoing job training and experience for community members and SRRMC staff. Finally, the form explains what to do if human remains are found.

From there, SRRMC archaeological staff review the permit application, and may request revisions. Once the application is approved, the Senior Archeologist will issue the Stó:lō Heritage Investigation Permit. Once activities are complete, permit holders are required to file final reports with the SRRMC, and provide a digital copy of any updated or new BC Archaeological Site Inventory Forms. The permit holder must also complete a Heritage Investigation Project Summary Form.<sup>70</sup>

## Compliance

According to Dave Schaepe, there is a high level of compliance with the permitting system. The SRRMC currently issues approximately 400 permits a year. According to Schaepe, archaeologists – the users of the application – are now familiar with the permitting requirements, which helps to ensure a smooth process. Schaepe notes that, in comparison to 20 years ago when permitting began, relationships between the Stó:lō and external archeologists are much improved.

The Stó:lō rely on a few tools to ensure compliance. First, the Nation relies on contract law. A legal opinion was provided to the Nation that the application and the permit form a legally binding contract. Second, the Stó:lō Heritage Policy sets out that failure to obtain a permit or to comply with the permit's conditions is a violation of Stó:lō Policy. A transgression can be recorded on the party's internal SRRMC record – and potentially result in the researcher being unable to acquire future permits.

Note that there have been some issues of non-compliance with permit terms. For example, in the context of the Trans Mountain Pipeline, the SRRMC, authorized by the *Stó:lō Heritage Investigation Policy Manual*, issued a stop-work order to a permit holder who had a field crew with insufficient expertise. The SRRMC issued the order for four months, during time which the permit holder's crew underwent re-organization and thorough training before they were allowed to resume activities.

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<sup>70</sup> Appendix III of the Stó:lō Manual.

## Other First Nation Permitting Systems

After the creation of the Stó:lō permitting system, many First Nations created their own structures to mirror the Stó:lō model.<sup>71</sup> Sts'ailes, Tsleil-Waututh Nation, Musqueam Nation, and Katzie First Nation have developed their own permitting systems.

### Sts'ailes permits

Sts'ailes issues three different permits: academic research, heritage investigations and site alteration. Academic research permits ensure that research conducted on Sts'ailes traditional territory is carried out in a “professional, ethical, respectful and beneficial manner.”<sup>72</sup> This permit enables the Nation to track and monitor research happening on its territory.<sup>73</sup>

Heritage investigation permits allow investigators and proponents to carry out Archaeological Impact Assessments on the territory. The Sts'ailes Cultural Heritage Policy specifically stipulates that *archeologists must adopt a broader understanding of “heritage resource” than stipulated in the Heritage Conservation Act*. The Nation also coordinates these assessments with the provincial ARCH Branch.<sup>74</sup>

### shíshálh permits

The shíshálh Nation Heritage Policy provides detailed requirements for permitting within the shíshálh *swiya* (territory or world).<sup>75</sup> The policy recognizes seven types of investigations: “(1) preliminary field reconnaissance (no permit required), (2) archaeological impact assessments, (3) archaeological inventory, (4) mitigative excavation, (5) archaeological monitoring (6) traditional use assessment and (7) scientific investigation.”<sup>76</sup> Importantly, the policy states that the Nation does not recognize archaeological overview assessments.<sup>77</sup>

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<sup>71</sup> Interview of Dr. David Schaepe, Director and Senior Archaeologist, SRRMC, by Calvin Sandborn and Emmaline English (8 February 2021).

<sup>72</sup> Sts'ailes, *Cultural Heritage Resources Policy* (May 2010), online: <<https://static1.squarespace.com/static/55d3a02de4b070510b27c3e7/t/5b47a1bd88251bde0f29d6b4/1531421122472/stsaile-s-cultural-heritage-resources-policy-2.pdf>> [<https://perma.cc/BR85-F6CE>].

<sup>73</sup> See pages 13-16 of the Sts'ailes Cultural Heritage Policy for further information on this type of permit, including required conduct of academic researchers and processes for conducting research on Sts'ailes territory.

<sup>74</sup> See pages 16-19 of the Sts'ailes Cultural Heritage Policy for more information on this type of permit.

<sup>75</sup> shíshálh Nation, *shíshálh Nation Heritage Policy*, online: <<https://shishalh.com/wp-content/uploads/2019/01/sh%C3%ADsh%C3%A1lh-Nation-Heritage-Policy.pdf>> [<https://perma.cc/PUA3-26KH>].

<sup>76</sup> shíshálh Nation, *shíshálh Nation Heritage Policy*, online: <<https://shishalh.com/wp-content/uploads/2019/01/sh%C3%ADsh%C3%A1lh-Nation-Heritage-Policy.pdf>> [<https://perma.cc/PUA3-26KH>].

<sup>77</sup> shíshálh Nation, *shíshálh Nation Heritage Policy*, online: <<https://shishalh.com/wp-content/uploads/2019/01/sh%C3%ADsh%C3%A1lh-Nation-Heritage-Policy.pdf>> [<https://perma.cc/PUA3-26KH>].

## KEY POLICY: REQUIRE COMPLETION OF CULTURAL FEATURES INVENTORY BEFORE DEVELOPMENT

**Recommendation: A Nation’s cultural heritage policies can require completion of a cultural heritage site/features inventory.<sup>78</sup> The inventory along with the Nation’s *Heritage Policy Manual* can inform technicians and archaeologists who survey the land – and shape requirements for referral, permit or approval of any proposed developments.**

Another potential component to include in a cultural heritage policy is a requirement for a cultural feature inventory (“CFI”) to be completed on a proposed site or cutblock before any permits or certificates are issued to proponents or developers. For example, this is a mechanism used by the Haida Nation. The Nation employs eight technicians to carry out CFIs, who are supported by two individuals who serve as camp cooks and coordinators. Technicians and coordinators are Haida citizens who have training and various levels of experience. A CFI manual informs their work. As well as doing CFIs on “Crown” land, the Haida team also contributes to assessments on private land.

## POTENTIAL KEY POLICY/ROLE: CULTURAL HERITAGE AUDITOR

**Recommendation: Nations may choose to integrate the role of an auditor into the management of their cultural heritage resources, to ensure third party compliance with their laws and policies.**

Another Haida Nation precedent that could be included in a cultural heritage policy is to establish an “auditor” to ensure compliance.<sup>79</sup> Haida CFI technicians are supported by the Haida auditor who ensures that all cultural heritage resources, including culturally modified trees, are accounted for in Cultural Feature Inventories. This is reportedly the only position of its kind in BC. The objective for the 2021 season was to have the auditor review 30% of cutblocks randomly selected for the audit process. Guided by the CFI manual, this auditor acts like an enforcement and compliance officer. If a CFI Survey fails an audit, the person who conducted the survey can be granted an opportunity to address the deficiencies or demonstrate that the work has happened. However, if the CFI Survey has several violations, certification can be suspended or revoked. Furthermore, if the report finds that the licensee committed

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<sup>78</sup> Sometimes called a Cultural Heritage Overview Assessment.

<sup>79</sup> To note, the BC Government has established a provincial monitoring system for how activities under the *Forest and Range Practices Act* impact cultural heritage values.



a serious violation, such as cutting a culturally modified tree, the licensee could face a fine under the *Heritage Conservation Act*.

Within the next five years, the Haida Nation is looking to establish a pilot program whereby they will be doing these Cultural Features Inventory surveys on behalf of industry, which the proponent will pay for.

## DEVELOP INTERNAL CAPACITY TO DEAL COMPREHENSIVELY WITH CULTURAL HERITAGE RESOURCES

**Recommendation: Nations can consider developing *internal capacity* to deal with cultural heritage resources; implement cultural heritage policies; implement and enforce permitting systems; conduct impact assessments; and make critical decisions.**

**Any archeologist conducting an impact assessment or action requiring a permit on a Nation's territory should ideally be from the Nation, employed by the Nation, or on a Nation-approved list. This can be specified in a cultural heritage policy – and is a key way to incorporate Indigenous knowledge into decision making.**

An important way to implement a cultural heritage policy and assert jurisdiction is to have *internal capacity* to run permitting systems and carry out heritage impact assessments according to the Nation's worldview. Nations cite the challenge of dealing with external archaeologists hired by companies that propose development in the territory. These archaeologists are often not versed in the Nation's worldviews, heritage values, and laws – and that can lead to inappropriate recommendations. Developing internal capacity – and ensuring that assessments done on traditional territory are carried out by archaeologists from, or approved by, the Nation – can help avoid this difficulty. Increasingly, Nations have professional archaeologists on-staff that can carry out all heritage assessments necessary for developments – and ensure compliance with both Nation-specific and *HCA* policies. This can make an enormous difference.

Nations have adopted different models to enhance internal capacity. For example, the SRRMC has built up sufficient internal capacity to conduct their own heritage impact assessments and assist with permitting. The SRRMC now has more than a dozen archeologists on staff, who receive feedback from leadership, and respect cultural protocols and fundamental Stó:lō principles to ensure they are doing the work in a good way. Sts'ailes also employs a small number of archeologists, and has a crew of three people from the Nation – who are their eyes and ears during walk-throughs with forestry companies during initial assessments of planned cutblocks. The Haida Nation is looking to increase its internal capacity, as they have also experienced the challenges with external technicians hired by industry.

Other Nations have created separate development corporations or firms to manage archeology and assessments. Katzie First Nation owns and operates the Katzie Development Limited Partnership (KDLP),

an economic development firm that operates an archaeological consulting company. KDLP employs both traditional resource specialists, archeologists and field technicians, and it serves private, public and First Nations clients with various archeological needs. On the territory, the consulting wing of KDLP is recommended as the preferred firm. However, according to Professor Brian Thom, there are compliance issues with this model, as there is no mechanism to ensure private landowners actually employ their firm.

Inlailawatash Limited Partnership is owned by Tseil-Waututh First Nation, and offers a variety of services, including archaeology. The firm provides field programs, monitoring, education and training programs, and large and small-scale desktop studies.

Note that the need to use appropriate experts for such work is widely recognized. For example, the *Heritage New Zealand Pouhere Taonga Act*<sup>80</sup> mandates that archeologists working on a Māori site have “the requisite competencies for recognising and respecting Māori values... and [have] access to appropriate cultural support.”<sup>81</sup>

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<sup>80</sup> *Heritage New Zealand Pouhere Taonga Act*, 2014 No 26.

<sup>81</sup> *Heritage New Zealand Pouhere Taonga Act 2014*, 2014 No 26.



Image 8: Cheam Range – HCA s4 Landmark Feature (Photo courtesy of Dave Schaepe, Stó:lō Nation)

## Negotiating Enhanced Cultural Heritage Powers Through Statutory Agreements

**Recommendation: Nations can consider negotiating a formal agreement to enhance their powers to protect cultural heritage (including protection of cultural heritage on private lands) under either the *Heritage Conservation Act* or the *British Columbia Declaration on the Rights of Indigenous Peoples Act*.**

### ***The Heritage Conservation Act Option: the Stó:lō s. 4 Agreement Pilot***

Section 4 of the *HCA* could be used to enhance a Nation's ability to preserve cultural heritage in a number of ways. Section 4 stipulates that the province may enter into a formal *agreement* with a First Nation to preserve cultural heritage, which can include one or more of the following:

- “(a) a schedule of heritage sites and heritage objects that are of particular spiritual, ceremonial or other cultural value to the aboriginal people for the purpose of protection under section 12.1 (2) (h);
- (b) a schedule of heritage sites and heritage objects of cultural value to the aboriginal people that are not included in a schedule under paragraph (a);
- (c) circumstances under which the requirements of sections 12.1 (1) and (2) and 12.2 (1) do not apply with respect to heritage sites and heritage objects, or to types of heritage sites and heritage objects, for which the first nation administers its own heritage protection;
- (d) policies or procedures that will apply to the issuance of or refusal to issue a permit under section 12.2 or 12.4 with respect to
- (i) sites and objects identified in a schedule under paragraph (a) or (b), or
  - (ii) other sites and objects or types of sites and objects identified in the agreement;
- (e) provisions with regard to the delegation of ministerial authority under section 20.1;
- (f) any other provisions the parties agree on.”<sup>82</sup>

Up until 2016, the province had not engaged with Nations on a section 4 agreement. However, as discussed above, the Stó:lō Research and Resource Management Centre (SRRMC) has been assertive in protecting Stó:lō cultural heritage. In 2016, the SRRMC (on behalf of the collective Stó:lō organization known as the S’ólh Téméxw Stewardship Alliance [STSA]) was successful in its bid for an *HCA* section 4 pilot with the provincial government. The Stó:lō pilot was to be negotiated within a year, and then implemented for a year. Following that time period, the parties were to evaluate the pilot to determine whether it should continue or be amended. However, that was delayed. Negotiations on the pilot finally concluded after six years – and the STSA-BC Heritage Conservation Act s.4 Agreement was approved by BC.

Cabinet and given Royal Assent in July 2022. The pilot is currently being implemented. See the final Agreement in [Appendix C](#).

The pilot’s main components are the following. First, it will only apply to provincial Crown land, and incorporate 45 cultural heritage sites that the SRRMC has mapped out. There has been significant back and forth with the provincial government on overlapped territory and assessment of provincially allocated interests (licences, leases, tenures).

Second, the SRRMC has created a categorization of four types of cultural heritage resources under an umbrella framework of Stó:lō Indigenous Heritage Landscape Features:

1. Landmarks (e.g., culturally significant physical features of the landscape; ‘transformation places’);
2. Cemeteries (regardless if physical material is recognized);
3. Belongings (e.g., regalia, regardless of age); and
4. Places, including water, land, elements and landscapes (which incorporates spiritual elements, and places of cultural practice such as spiritual bathing).

This categorization is much broader than the use of “site” and “object” in the *HCA*. Given how broad the framework is, it is Schaepe’s hope that other Nations will be able to use this broader categorization to protect many more places and apply Nations’ particular worldviews and laws.

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<sup>82</sup> *Heritage Conservation Act*, RSBC 1996, c 187, s.4(4).

Finally, the pilot includes a “shared decision-making” structure between the STSA and BC for permits associated with any of the 45 protected sites/places. The Agreement’s enhanced “shared decision-making” framework offers opportunities for the Nation to advance beyond the status quo of current provincial engagement and consultation processes.

The final Agreement also includes important measures to protect sensitive cultural heritage information. The Stó:lō will provide the province with limited information on specific sites. They will inform the province about what general category the cultural resource fits into, and a general spatial reference under the aforementioned framework. Access to information to those outside government is limited.

Unexpectedly, the Ministry of Energy and Mines Chief Gold Commissioner also established ‘No Mining Reserve’ restrictions for buffered areas including and surrounding all 45 s.4-protected site/places. This restricts any new mining applications within those areas, and adds another layer of protection to these sacred places. It may be possible these restrictions apply to other culturally significant places not currently included in the s.4 Agreement.

In terms of expanding the pilot in future years, the Stó:lō are looking to add additional sites and protections to the list. The Government of BC initially only wanted to include a final list of sites, but Schaepe believes their position has shifted. In addition, the Stó:lō would like to expand coverage to private properties owned by Stó:lō members that have significant cultural heritage value. For example, they would like to include the 18-acre property in Mission owned by the Stó:lō Heritage Trust (Xá:ytem) and the Lightning Rock site in Abbotsford. If possible, Schaepe would like to see these registered on the title in order to bind future landowners.

See our recommendations to the BC government to reform the *Heritage Conservation Act* (above) for ways in which the province should improve the s. 4 agreement regime.

### **An Alternative: Negotiating Agreements pursuant to the *Declaration on the Rights of Indigenous Peoples Act***

The slow progress in recognizing First Nation jurisdiction and key role in protecting their own heritage conservation has created significant frustration. One major problem has been the Government of BC’s refusal to negotiate section 4 *HCA* agreements – and the painfully slow progress on the Stó:lō Section 4, *HCA* pilot. The Joint Working Group on First Nations Heritage Conservation (“JWG”) has requested more discussion on potential agreements entered into under section 7 of the *DRIPA* as a mechanism to recognize First Nations jurisdiction over heritage conservation.<sup>83</sup> In January, 2021, the First Nations

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<sup>83</sup> Section 7 reads:

**“Decision-making agreements**

7 (1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

- (a) the exercise of a statutory power of decision jointly by
- (i) the Indigenous governing body, and
- (ii) the government or another decision-maker;

(b) the consent of the Indigenous governing body before the exercise of a statutory power of decision.

Leadership Council (“FNLC”) sent a letter to Minister Conroy seeking clarity on whether the provincial government will negotiate section 7 agreements with First Nations on the protection, preservation and management of cultural heritage sites.<sup>84</sup>

The provincial government needs to work with Nations to clearly define just how section 7 agreements will work – and then collaborate with interested Nations to create a reasonable and timely process for their negotiation and implementation. A tool that nominally provides for joint decision-making consistent with UNDRIP is of little use if the provincial government restricts, controls and delays access to the tool.

Section 7 agreements have the mixed blessing of requiring provincial cabinet approval for a mandate to negotiate – but not needing cabinet approval for the final agreement. Ideally, the provincial government and Nations will co-develop a document that clearly sets out the process and timelines for any interested Nations to negotiate a section 7 agreement. For section 7 agreements relating to protection, preservation and management of cultural heritage sites, it should be possible to have a general Cabinet mandate to negotiate agreements with individual Nations – perhaps in accordance with criteria/factors developed jointly by the provincial government and the FNLC, the JWG or other Indigenous groups and Nations.

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(2)A member authorized under subsection (1) to negotiate an agreement may enter into the agreement without further authorization from the Lieutenant Governor in Council unless the Lieutenant Governor in Council restricts the initial authorization to only the negotiation of the agreement.

(3)Within 15 days after the Lieutenant Governor in Council authorizes the member to negotiate an agreement under subsection (1), the member must make public a summary of the local governments and other persons the member intends to consult before or during the negotiation.

(4)An agreement entered into under subsection (1)

(a)must be published in the Gazette, and

(b)is not effective until the agreement is published in the Gazette or a later date specified in the agreement.”

<sup>84</sup> See the January, 2021 letter from the First Nations Leadership Council to Honourable Katrine Conroy, Minister of Forests, Lands, Natural Resource Operations and Rural Development, “Re: Minister’s Authority to enter into s.7 Decision-Making Agreements.” Among other things, the letter briefly recaps the work of the Joint Working Group on First Nations Heritage and Culture (JWGFNHC) on this issue.



*Image 9: Gerry Morigeau, CFI Team Coordinator and Stads K'un/Northern Goshawk specialist (Photo courtesy of the Council of the Haida Nation)*

## Additional Proactive Measures Nations can consider

Nations can consider a broad spectrum of proactive actions to protect cultural heritage resources, including:

- Educating landowners/proponents about the new *HCA* requirement to report the discovery of cultural heritage sites and objects<sup>85</sup>;
- Proactive collaboration with landowners/proponents to identify cultural heritage resources on private land;
- Proactive review of all referrals and permit applications;
- Working with external archaeologists, to guide them through the Nation’s permitting process;<sup>86</sup> and
- Making progressive agreements with proponents.

### Proactively Educate Landowners about the Duty to Report the Discovery of Heritage Resources

**Recommendation: Nations can develop a strategy to inform private property holders in areas of significant cultural heritage resources about the new legal duty to report a discovery of a site or object with heritage significance.<sup>87</sup>**

**Recommendation to the Government of BC: The Government of BC should implement regulations and develop a policy to implement the new *HCA* requirement to report discovery. In developing this policy, the government should work hand-in-hand with Nations to ensure they are involved in the reporting process – and that they are always contacted when someone makes an alleged discovery in their traditional territories.**

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<sup>85</sup> See the 2019 amendments to the *Heritage Conservation Act*, RSBC 1996, c 187, s 8.2:

“(1) A person who discovers a prescribed site or object that may have heritage value must report the discovery to the minister within a prescribed time period...” Section 8.2 has been approved by the legislature and will come into force by regulation.

<sup>86</sup> See the SRRMC discussion above.

<sup>87</sup> See the 2019 amendments to the *Heritage Conservation Act*, RSBC 1996, c 187, s 8.2:

“(1) A person who discovers a prescribed site or object that may have heritage value must report the discovery to the minister within a prescribed time period...” Section 8.2 has been approved by the legislature and will come into force by regulation.



Nations can capitalize on legislation that creates a strong duty to report the discovery of heritage sites and objects. In 2019, the *HCA* was amended to mandate that individuals have a legal duty to report the discovery of objects or sites that may have heritage significance.<sup>88</sup> While this is a positive step in protecting cultural heritage resources, to date the province has not enacted a regulation to support this requirement,<sup>89</sup> nor is there a policy in place. The current online guidelines do not include any role for Nations, and do not outline any responsibility of the individual who makes the discovery to inform the local Nation.<sup>90</sup>

In the face of inadequate implementation or direction from the BC government, Nations could adopt a strategy to inform landowners/proponents in areas of heritage significance<sup>91</sup> of their new *HCA* legal responsibilities. Nations could ensure landowners have contact information of individuals at the Nation to handle these notifications, and information on how and when the Nation should be notified of cultural heritage resources and potential impacts on them.

The Haida Nation has adopted this approach.

Nations are working to foster relationships with landowners and to proactively communicate when privately-owned land has significant cultural value. For example, the Haida Nation is working to provide letters to private landowners through local governments – to notify the landowners of culturally significant sites on their lands and ask them to contact the Nation before development. The Nation uses established publications and channels, including Band newsletters, the *Haida Gwaii Trader*, the *Haida Journal*, their social media accounts and their public calendar, to draw awareness to private landowners. The Nation also has a local contact list of licensees, which they use to distribute notices, and are looking to hold annual all-licensee and public meetings.

A number of Nations have strategies to remind local governments and private property owners in areas of significant cultural heritage about the legal duty to report a discovery of a heritage site or object.<sup>92</sup>

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<sup>88</sup> British Columbia Government News, Forest, Lands, Natural Resource Operations and Rural Development, “Changes to act will enhance heritage conservation in B.C.,” (2019), online: <<https://news.gov.bc.ca/releases/2019FLNR0022-000326>> [<https://perma.cc/7CGH-Y5FP>]. See the wording of s. 8.2 of the new legislation in the footnotes above.

<sup>89</sup> The updated Heritage Conservation Act Permitting Process Policy Guide (2020) prepared by the ARCH Branch stated that regulations were currently under development. See <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/E3tlc96187> for the current status of the s. 8.2 *HCA* requirement.

<sup>90</sup> British Columbia Government, “Report finding an archaeological artifact or human remains” (2021), online: <<https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/report-a-find>> [<https://perma.cc/DLP9-GRHJ>].

<sup>91</sup> Including areas where there have been discoveries in the past of human remains, sites or objects.

<sup>92</sup> As per the 2019 amendments to the *HCA*, s. 8.2 discussed above.

## Proactive Collaboration to Identify Heritage Resources on Private Land

**Recommendation: Nations can consider collaborating with landowners to identify cultural heritage resources on private land.**

Private landowners do engage with the Haida Nation to do cultural identification on their property before they pursue development. While the Nation does not normally have the capacity to do archaeological impact assessments, they assist with identifying certain cultural features before an external archaeology firm is brought in.

In one proactive initiative, the Haida Nation is launching a pilot project to pay for surveying fees for private landowners by having their own staff do the surveying. It is estimated that costs are approximately \$14,000 per 0.8 acre. However, the Nation believes this will be a way to address problematic reporting done by surveyors and archaeologists that are hired by private landowners.<sup>93</sup>

## Proactive review of all referrals and permit requests

**Recommendation: Nations can consider the example of Nations that work to conduct proactive review of all development in their territory. Where possible, Nations should review and respond to all external referrals and permit requests for development. Progressive funding agreements with government and industry will be necessary to provide Nations with the requisite capacity.**

Many Nations are flooded with standard form referrals from governments, industry and developers. If possible, Nations should review and respond to every referral and permit application that triggers consultation – to ensure that potential heritage cultural resources will not be impacted by a proposed development or activity. A review of all referrals and permit applications that trigger consultation for impacts provides the Nation with the opportunity to respond – and to potentially stop or mitigate development impacts on heritage resources.

The Sts'ailes Xwilétmet (Rights & Title) Department conducts this type of comprehensive review of referrals and permits, which ensures that archeology is considered in all development happening within their territory. When the Nation is alerted to a new development through a permitting application or referral, Xwilétmet staff will contact the landowner and arrange to informally visit the site to assess the

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<sup>93</sup> Interview of Kung K\_ayangus/Marlene Liddle, Haida Member of the Solutions table, by Calvin Sandborn and Emmaline English (16 February 2021). Note that this is an expensive option, and charging such fees can provide an important source of revenue to a Nation.

significance and potential impacts of the proposed development. This visit provides an opportunity to promote Sts'ailes' archaeological heritage, provide education, and draw property holders into becoming allies in heritage conservation. Xwilétmet also offer strategies for avoiding archaeologically sensitive areas on the property.

Sts'ailes' Heritage Research Archaeologist Morgan Ritchie explains that by doing this work, Sts'ailes provides more protection for cultural sites and resources on private land than the province can. Under the *HCA*, the ARCH Branch is only involved if a development or land subdivision is proposed – and lacks jurisdiction to be proactive unless a site is registered, or the property is adjacent to a registered (protected) heritage resource. In contrast, the Xwilétmet Department will read *every referral* – and can proactively approach a potential developer/ landowner before development begins, and strongly suggest they take heritage into consideration.

*Enhancing Funding and Capacity for referrals.* Of course, capacity and funding are challenges for any Nation trying to proactively respond to all government and industry referrals on proposed development.<sup>94</sup> Many Nations impose a referral processing fee to offset expenses – although this is still resisted by some governments and companies. Some Nations have negotiated with the provincial government to fund referral reviews by Nations.<sup>95</sup> For example, see the example of the the Nānwakolas Clearinghouse system of funding referrals described in the footnote below.<sup>96</sup> In order to properly protect cultural heritage resources, both government and industry must properly assume their responsibility for funding the processing of these referrals, which are necessitated by industry and government initiatives. Progressive funding agreements with government and industry will be necessary.

## **Proactively Establish Relationships/Agreements with Industry Proponents**

Establishing relationships with industry proponents can sometimes be used to enhance cultural heritage resource protection. The Haida Nation has negotiated agreements with proponents to stop certain development until their Aboriginal title case is complete. For example, the Nation has entered into an agreement with Island Timber, which holds a licence in a sensitive watershed. The Nation has also worked with the company to have cultural feature surveys done. In addition, BC Timber Sales, Husby Forest Products and O'Brien and Fuerst Logging have all participated in the Haida land use orders (see

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<sup>94</sup> Currently, governments and industry tend to flood First Nations with referrals while providing no funding for Nations to manage the paper flow. Often, referrals are poorly drafted or incomplete. It can take many hours or days of analysis and requests for further information to determine exactly what is being proposed, where it is located and what impacts it may have.

<sup>95</sup> Individual *Indian Act* bands may have to work with others through a larger grouping or Nation to have access to this funding.

<sup>96</sup> The Nānwakolas Clearinghouse has staff funded through an agreement with the provincial government and provides a streamlined referral process for member Nations. The Nānwakolas Council Referrals Office was incorporated in 2007 to help its member Nations respond to provincial referrals and other land and resource management and planning issues. Nānwakolas means “the place where agreement is made.” The referral office does not make decisions on the content of the response, but it ensures member Nations have best available information to make decisions; develops the response to reflect the member Nation’s decision; and assists member Nations in communication with the referral applicant referral staff. The office has specialized knowledge in referrals, Aboriginal rights and title, GIS technology and environmental issues; Nānwakolas Council, “Referrals,” online: <<https://nanwakolas.com/referrals/>> [<https://perma.cc/P69S-6FYR>] (The Nānwakolas Council has a number of summaries and resources on their website --including their referral process, and materials/resources relating to archaeological and cultural resources).

below). [Note that while this cooperation exists, the Haida Nation has difficulty with archaeologists hired by industry. similar to the SRRMC's experience described above. See footnote below.<sup>97</sup>]

Other Nations have negotiated Impact Benefit Agreements or referral arrangements with forestry, mining, hydro and other industries. These agreements require that the proponent fund the Nation's Aboriginal title or referral response department – or at least pay fees for the processing of referrals.

## Ensuring Compliance and Enforcement

In addition to proactively promoting information, education, incentives and agreements, Nations have employed compliance and enforcement techniques to prevent destruction to cultural heritage resources.

Actively *patrolling* traditional territory can help to mitigate impacts on cultural heritage resources. For example, Sts'ailes carries out this kind of patrolling, and monitors development on privately held land that may impact sites.<sup>98</sup> Sts'ailes, also make use of the public Report All Poachers and Polluters 24-hour hotline to report violations or issues under the *HCA*.

As mentioned, the SRRMC has issued stop work orders in the past. Nations have also resorted to threatening landowners and developers with fines under the *HCA*,<sup>99</sup> invoking relevant case law, and demanding action by the provincial government and the RCMP.

However, the province has failed to respond adequately too many times. For example, in October 2002, it was reported by First Nations that a recorded site of a 4,000 – 5,000-year-old Coast Salish village and burial site on South Pender Island had been damaged during the expansion of the Poets Cove Resort.<sup>100</sup> Robert Morales, Chief Negotiator of the Hul'qumi'num Treaty Group ("HTG") and others initially investigated the site after being notified by an Elder who had heard that a midden, or an ancient refuse heap, had been disturbed.<sup>101</sup> When they arrived at the site, they could see human bones in the material that had been removed.<sup>102</sup> The developer alleged that they did not know it was an archaeological site and applied for a site alteration permit for minor alterations.<sup>103</sup> However, in 2003 it was discovered that at least 1,500 cubic metres of archaeological material had been excavated.<sup>104</sup> After two years of the HTG, member Nations and other communities demanding action by the provincial government, Crown

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<sup>97</sup> The Nation has a hit-and-miss relationship with some archaeological firms that work with industry on Haida Gwaii. Industry, and their hired archaeologists seemingly tend to not respect the Haida Nation as the authority on cultural features or the Haida Gwaii Land Use Objectives Orders.

<sup>98</sup> To note, Sts'ailes traditional territory is over 3,500 km<sup>2</sup>.

<sup>99</sup> Section 36 of the *HCA* outlines offences and penalties.

<sup>100</sup> Eric McLay, "Archaeological Heritage of the Southern Gulf Islands" (2005) 36: 3/4 *The Midden* at 13.

<sup>101</sup> Glenn Bohn, "Resort in Court Over Burial Site," *Vancouver Sun* (11 February 2005), online (pdf): [http://www.hulquminum.bc.ca/pubs/sun\\_resort\\_in\\_court\\_11feb05.pdf](http://www.hulquminum.bc.ca/pubs/sun_resort_in_court_11feb05.pdf) [<https://perma.cc/9DHY-Z5EB>].

<sup>102</sup> Glenn Bohn, "Resort in Court Over Burial Site," *Vancouver Sun* (11 February 2005), online (pdf): [http://www.hulquminum.bc.ca/pubs/sun\\_resort\\_in\\_court\\_11feb05.pdf](http://www.hulquminum.bc.ca/pubs/sun_resort_in_court_11feb05.pdf) [<https://perma.cc/9DHY-Z5EB>].

<sup>103</sup> Eric McLay, "Archaeological Heritage of the Southern Gulf Islands" (2005) 36: 3/4 *The Midden* at 13.

<sup>104</sup> Eric McLay, "Archaeological Heritage of the Southern Gulf Islands" (2005) 36: 3/4 *The Midden* at 13.

Counsel and the RCMP finally charged Poets Cove in 2005. Two years later, the Resort pled guilty to violating the *HCA*, and was fined a mere \$50,000 – and it was too late to protect the lost heritage.<sup>105</sup>

**Recommendation: Nations can negotiate agreements with the Provincial Government for Guardians to enforce the *Heritage Conservation Act* and other cultural heritage laws.**

Following the precedent of the recent Memorandum of Understanding authorizing Kitasoo/Xai'xais Guardian Watchmen to enforce various provincial statutes in their territory's protected areas,<sup>106</sup> Nations may wish to negotiate with the BC Government to authorize their own Guardians to fully enforce the *Heritage Conservation Act* on their traditional territories.<sup>107</sup>

This may help to address the BK ARCH Branch's Eurocentric interpretation of the *HCA* and ensure that the Nation's cultural heritage features and places are adequately protected. See the ELC report, *The Case for a Guardian Network Initiative*<sup>108</sup> for reasons why Nations should have the capacity to enforce both provincial and Indigenous laws.

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<sup>105</sup> CBC News, "First Nations remains to be reburied on Gulf Island," *CBC News* (18 March 2008), online: <<https://www.cbc.ca/news/canada/british-columbia/first-nations-remains-to-be-reburied-on-gulf-island-1.704457>> [<https://perma.cc/F5EF-BGNW>].

<sup>106</sup> See Appendix A of this report for a description of the landmark Memorandum of Understanding between the Kitasoo Xai'xais and BC Government, authorizing Guardian Watchmen to enforce a number of provincial laws. See Appendix B for an excerpt from that MOU that describes the provincial legislation now enforceable by the Guardians.

<sup>107</sup> And ticket individuals violating the Act

<sup>108</sup> <<https://elc.uvic.ca/indigenous-guardian-programs/>> [<https://perma.cc/KGB4-WX44>]



Image 10: Photo courtesy of the T̓silhqot̓'in National Government

## Acquiring Private Land and Private Property Rights to protect Cultural Heritage

**Recommendation: Nations can protect cultural heritage and Indigenous access to heritage sites on private lands by purchasing land – or acquiring legal covenants for heritage protection and access. Governments and land trusts may be able to assist.**

In some cases, Nations have purchased heritage sites on private property, using their own funds, or funds from governments, land trusts and other funders. In other cases, Nations have acquired covenants on land that remains private, but the covenants protect heritage and Indigenous access.<sup>109</sup>

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<sup>109</sup> Other possibilities include a First Nation purchasing land, subdividing it, and reselling it -- after permanently protecting key cultural heritage sites with covenants, designated set-asides or protected areas.

## NATIONS PURCHASING LAND

Some Nations have resorted to buying land to protect cultural features or burial sites. For example, in 2013, Musqueam purchased a two-acre plot of land in Vancouver for \$10 million. The land was an ancestral burial ground.<sup>110</sup> In the transaction, the province provided \$5.3 million to the property owner for development costs.<sup>111</sup>

## GOVERNMENT PURCHASE OF LAND FOR CULTURAL HERITAGE PURPOSES

### The Example of Grace Islet

The provincial government has occasionally bought land when there is a conflict over development of a site that holds significant cultural importance for a Nation. For example, in 2015 the province paid \$5.45 million to buy *shmkw'elu*, or Grace Islet, in Salt Spring Island's Ganges Harbour. The island is the site of a Coast Salish burial ground. In the agreement, the Nature Conservancy of Canada holds title, and is working with nine local First Nations to remediate and manage the site.<sup>112</sup>

### The Example of Qat'muk Glacier

The federal government contributed money towards purchasing private land and other interests to protect cultural values at Qat'muk (Jumbo Glacier). In 2020, the Ktunaxa Nation declared BC's Jumbo Valley, also known as Qat'muk, to be an Indigenous Protected and Conserved Area. This came after the federal government and a number of private organizations purchased the tenures and interests – including private lands – held by Glacier Resort Ltd.<sup>113</sup> The company had previously proposed to develop the profoundly culturally significant land into a 6,000-acre ski resort.<sup>114</sup> Through this purchase, the

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<sup>110</sup> Andrea Wood, "Musqueam use building plot to celebrate First Nations," *The Globe and Mail* (2 October 2013), online: <<https://www.theglobeandmail.com/news/british-columbia/real-estate-deal-preserves-sacred-musqueam-site-in-marpole-area/article14657263/>> [<https://perma.cc/YES9-K9HA>].

<sup>111</sup> Andrea Wood, "Musqueam use building plot to celebrate First Nations," *The Globe and Mail* (2 October 2013), online: <<https://www.theglobeandmail.com/news/british-columbia/real-estate-deal-preserves-sacred-musqueam-site-in-marpole-area/article14657263/>> [<https://perma.cc/YES9-K9HA>]. Note that one challenge with buying land can be the costly burden of property taxes.

<sup>112</sup> Nature Conservancy, "A Graceful Resolution: NCC joins forces with the BC Government and First Nations to Protect Grace Islet," online: <<https://www.natureconservancy.ca/en/where-we-work/british-columbia/featured-projects/salish-sea/grace-islet.html>> [<https://perma.cc/FT5G-H3C2>].

<sup>113</sup> Megan Michelson, "The Controversial Ski Resort That Will Never Exist" (21 January 2022) *Outside*, online: <<https://www.outsideonline.com/adventure-travel/destinations/north-america/jumbo-glacier-ski-resort-canada/>> [<https://perma.cc/A6KV-FMGA>]; The federal government invested \$16.2 million, and \$5 million of additional funding came from Patagonia, the Wyss Foundation, the Wilburforce Foundation, Donner Canadian Foundation, and the Columbia Basin Trust.

<sup>114</sup> Judith Lavoie, "Democracy Interrupted: How Jumbo Glacier Resort Became a Municipality With No Residents" *The Narwhal* (1 October 2014), online: <<https://thenarwhal.ca/democracy-interrupted-how-jumbo-glacier-resort-became-municipality-no-residents/>> [<https://perma.cc/SR65-5957>] (Glacier Resorts Ltd. had ownership of 104 hectares of land purchased for the ski resort village, and had access to thousands of acres of "Controlled Recreational Area" on Crown land).

Ktunaxa Nation will be able to protect Qat'muk in perpetuity.<sup>115</sup> Note that former private lands are now protected along with Crown lands in the new Indigenous Protected and Conserved Area – under the partnership of the Ktunaxa Nation, Government of Canada and the Nature Conservancy of Canada.<sup>116</sup>

In Stó:lō territory, the province has stepped in to buy land on four different occasions: at Hatzic Rock in 1991, at a site along the Rosedale highway, the Winona Road Burial site in Chilliwack and the Lighting Rock site.<sup>117</sup>

Thus, Nations seeking to protect heritage resources should consider whether government will fund such a purchase in their case. Note, however, this is not a regular occurrence. When the Grace Islet was purchased, it was estimated that the province had only purchased 12 different parcels of land in order to settle disputes of this nature.<sup>118</sup>

## LAND TRUSTS BUYING LANDS FOR NATIONS

### SISØENEM Halibut Island

SISØENEM, also known as Halibut Island, is a small island east of Sidney Island where culturally important medicines and foods are collected and harvested. The Land Conservancy of British Columbia (“TLC”) is a land trust dedicated to conservation efforts. In a notable initiative, TLC recently purchased Halibut Island and transferred ownership to the W̱SÁNEĆ Leadership Council.<sup>119</sup> TLC purchased the land with the help of a major donor after learning of its cultural and ecological significance, with the intention of then voluntarily transferring it to the Leadership Council.<sup>120</sup>

Now that the W̱SÁNEĆ people have regained their land (through the common law), the land trust and the Leadership Council are committing to shared management of the area, including a co-management plan, a conservation covenant, and the inclusion of Indigenous land management principles. This transfer restores W̱SÁNEĆ access to the island, and maintains the island for “cultural, educational,

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<sup>115</sup> Trevor Crawley, “Jumbo Valley to be protected, ending decades-long dispute over proposed ski resort” *Nelson Star* (18 January 2020), online: <<https://www.nelsonstar.com/news/jumbo-valley-to-be-protected-ending-decades-long-dispute-over-proposed-ski-resort/>> [<https://perma.cc/EG4E-QKA9>].

<sup>116</sup> See the discussion of Indigenous Protected and Conserved Areas in Appendix A of this report.

<sup>117</sup> Interview of Dr. David Schaepe, Director and Senior Archaeologist, SRRMC, by Calvin Sandborn and Emmaline English (8 February 2021).

<sup>118</sup> Wendy Stueck, “British Columbia pays \$5.45-million for Grace Islet,” *The Globe and Mail* (16 February 2015), online: <<https://www.theglobeandmail.com/news/british-columbia/british-columbia-pays-545-million-for-grace-islet/article23022593/>> [<https://perma.cc/WR9Q-U94C>].

<sup>119</sup> CHEK News, “SISØENEM (Halibut Island) Island given back to First Nations in historic first” (26 February 2021) online: <<https://www.cheknews.ca/sis%C8%BCenem-halibut-island-island-handed-over-to-first-nations-in-historic-first-748011/>> [<https://perma.cc/SCC6-EKHU>].

<sup>120</sup> Wolf Depner, “SISØENEM (Halibut Island) transfers to W̱SÁNEĆ Leadership Council under historic agreement” *Victoria News* (26 February 2021), online: <<https://www.vicnews.com/news/sisenem-halibut-island-transfers-to-wsne-leadership-council-under-historic-agreement/>> [<https://perma.cc/X6AH-8XU8>].



research and monitoring purposes.”<sup>121</sup> This unique arrangement opens up the possibility for land trusts to further support Nations to reclaim their rightful lands.

## INDIGENOUS TRUSTS

### Kluskap Cave and the Sespit'e'mnej Kmitkinu Conservancy

In 2019, the Federal Government announced funding for a network of protected areas across Nova Scotia. The Unama'ki Institute of Natural Resources, representing the five Mi'kmaq communities in Cape Breton, identified Kluskap Cave as a sacred site that is central to Mi'kmaq culture and considered by many Mi'kmaq as the centre of the universe.<sup>122</sup> Using the allocated funding, an Indigenous Protected and Conserved Area grounded in Mi'kmaq law and oral history is being developed there – in order to conserve the land and recognize the Nation's title and rights.

The Mi'kmaq Nation and the Assembly of Nova Scotia Mi'kmaq Chiefs have created a land trust, the Sespit'e'mnej Kmitkinu Conservancy, to secure additional land through purchases, donations, and acquisition of easements (covenants).<sup>123</sup> Mi'kmaq organizations have already secured private lands through purchase,<sup>124</sup> and plan to expand the protected areas by negotiating with other landowners to purchase more land or create conservation easements.<sup>125</sup> Through the land purchase, the creation of a Mi'kmaq land trust, a number of agreements, conservation easements, and co-governance arrangements, future generations will be able to care for the land and maintain their culture in perpetuity.<sup>126</sup>

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<sup>121</sup> WSÁNEĆ Leadership Council, “TLC To transfer SISŹENEM (Halibut Island) to WSÁNEĆ Leadership Council” (26 February 2021), online: <<https://wsanec.com/tlc-to-transfer-sis%c8%bcenem-halibut-island-to-w%cc%b1sanec-leadership-council/>> [<https://perma.cc/HC8N-CRK8>].

<sup>122</sup> Trish Nash, “Indigenous Protected and Conserved Areas (IPCAs)” (1 July 2021) *Nova Scotia Environmental Network*, online: <<https://www.nsenvironmentalnetwork.com/blog/indigenous-protected-and-conserved-areas-ipcacs>> [<https://perma.cc/4K4F-C7SE>].

<sup>123</sup> The conservancy's name translates as “let us protect our territory/homeland”. See: Anastasia Papadopoulos, “Exploring Governance Mechanisms and Mi'kmaq Values and Aspirations for Indigenous Protected and Conserved Areas (IPCAs) in Nova Scotia” (June 2021) Dalhousie University, Master of Environmental Studies thesis, online: <<https://dalspace.library.dal.ca/bitstream/handle/10222/80568/AnastasiaPapadopoulos2021.pdf?sequence=3&isAllowed=y>> [<https://perma.cc/BH4T-CMNN>].

<sup>124</sup> Anastasia Papadopoulos, “Exploring Governance Mechanisms and Mi'kmaq Values and Aspirations for Indigenous Protected and Conserved Areas (IPCAs) in Nova Scotia” (June 2021) Dalhousie University, Master of Environmental Studies thesis at 85, online: <<https://dalspace.library.dal.ca/bitstream/handle/10222/80568/AnastasiaPapadopoulos2021.pdf?sequence=3&isAllowed=y>> [<https://perma.cc/BH4T-CMNN>].

<sup>125</sup> Ardelle Reynolds, “Indigenous-led project purchases land to protect popular Cape Breton hiking spot” *Saltwire* (17 June 2021), online: <<https://www.saltwire.com/atlantic-canada/news/video-indigenous-led-project-purchases-land-to-protect-popular-cape-breton-hiking-spot-100601292/>> [<https://perma.cc/K4LC-PQZA>].

<sup>126</sup> Trish Nash, “Indigenous Protected and Conserved Areas (IPCAs)” *Nova Scotia Environmental Network* (1 July 2021), online: <<https://www.nsenvironmentalnetwork.com/blog/indigenous-protected-and-conserved-areas-ipcacs>> [<https://perma.cc/4K4F-C7SE>].

## Stó:lō Heritage Trust Society

**Recommendation: Nations may wish to establish a Heritage Trust in order to hold land for the protection of their cultural heritage resources and places. This technique has been adopted by the Stó:lō Nation with the Stó:lō Heritage Trust Society. While the Stó:lō model is similar to a land trust in that it is registered under the *Societies Act* and holds land, its objectives are oriented towards heritage preservation.<sup>127</sup>**

The Stó:lō have adopted a novel approach to hold land for the protection of cultural heritage through the creation of the Stó:lō Heritage Trust Society.<sup>128</sup> The Society was created in 1992 as the Stó:lō Nation fought to protect *Xá:ytem ytem*, or Hatzic Rock.<sup>129</sup> *Xá:ytem* is a sacred place to the Nation as it is a transformer stone.<sup>130</sup> This body operates like a land trust, in that it is incorporated as a society under the *Societies Act* and is governed by an independent board of directors.<sup>131</sup> It also owns the 18-acre property that encompasses *Xá:ytem*.<sup>132</sup> However, unlike most land trusts, its objectives are oriented towards cultural heritage protection.

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<sup>127</sup> *Societies Act*, SBC 2015, c 18.

<sup>128</sup> Madeline Rose Knickerbocker, “What We’ve Said Can be Proven in the Ground”: Stó:lō Sovereignty and Historical Narratives at *Xá:ytem*, 1990-2006” (2013) 24:1 J of the Canadian Historical Association 297.

<sup>129</sup> Madeline Rose Knickerbocker, “What We’ve Said Can be Proven in the Ground”: Stó:lō Sovereignty and Historical Narratives at *Xá:ytem*, 1990-2006” (2013) 24:1 J of the Canadian Historical Association 297 at 307 (The Trust was created by two chiefs who wanted to “ensure that, regardless of political differences, Stó:lō cultural heritage would be looked after by a collaborative board of hereditary chiefs, political leaders and elders”).

<sup>130</sup> Madeline Rose Knickerbocker, “What We’ve Said Can be Proven in the Ground”: Stó:lō Sovereignty and Historical Narratives at *Xá:ytem*, 1990-2006” (2013) 24:1 J of the Canadian Historical Association 297 at 298.

<sup>131</sup> *Societies Act*, SBC 2015, c 18.

<sup>132</sup> District of Mission, “Statement of Significance *Xá:ytem* Longhouse,” online (pdf): <<https://www.mission.ca/wp-content/uploads/SOS-Xaytem.pdf>> [<https://perma.cc/Y6LQ-U2UW>]; Madeline Rose Knickerbocker, “What We’ve Said Can be Proven in the Ground”: Stó:lō Sovereignty and Historical Narratives at *Xá:ytem*, 1990-2006” (2013) 24:1 J of the Canadian Historical Association 297.



Image 11: Dion Weisbrod - S'ólh Téméxw Guardian, S'ólh Téméxw Stewardship Alliance. Monitoring an archaeological site near Abbotsford (Photo courtesy of Stó:lō Research and Resource Management Centre)

## Acquiring Partial Property Rights and Access Rights

Short of actually purchasing title to private lands, First Nations may be able to purchase or otherwise acquire *partial property rights* in private land – in order to obtain Indigenous access, to conserve the heritage resource, and/or to implement a management plan over the heritage resources.

### RIGHTS-OF-WAY AND EASEMENTS TO ALLOW ACCESS TO LAND

**Recommendation to the Government of BC: Section 218 of the *Land Title Act* should be amended to specifically define Nations as bodies eligible to hold statutory rights-of-way, and provincial policies should facilitate that for Nations that so choose.**

In some circumstances a Nation may be able to obtain a statutory right-of-way or common law easement to freely access heritage resources on private land. Section 218 of the *Land Titles Act* (“LTA”) recognizes that persons delegated by the Minister<sup>133</sup> can register an enforceable statutory right-of-way over land. Similar common law access easements can be obtained by property owners that are

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<sup>133</sup> Or the Surveyor General.

immediately adjacent to the private land with heritage resources.<sup>134</sup> Nations seeking access to private lands may wish to consider these tools, which may be obtainable through purchase, donation or otherwise. However, s. 218 should be amended to clarify that Nations are bodies eligible to hold statutory rights-of-way – and provincial policies should facilitate that for Nations that so choose.

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<sup>134</sup> See Jay Lancaster and Joanna Track, Young Anderson, “Land Title Search & Rescue: An Overview of Charges, Liens and Interests in Land” (27 November 2015), online: <[https://www.younganderson.ca/assets/seminar\\_papers/2015/Land-Title-Search-and-Rescue.pdf](https://www.younganderson.ca/assets/seminar_papers/2015/Land-Title-Search-and-Rescue.pdf)> [<https://perma.cc/L788-NGFW>].



Image 12: Carmacks, Yukon (Photo: Holly Pattison, Environmental Law Centre)

## Conservation Covenants/Easements

**Recommendation to the Government of BC: Amend the *Land Title Act*:**

- “First Nation” should be added to section 219(3) to allow for First Nations to be designated as covenantees in order to protect, preserve or maintain heritage and cultural amenities on property (section 219(4)(b)).
- First Nations should be empowered to be issued conservation covenants under section 219.
- The province should establish a fund to be co-managed with Nations so Nations can buy private property when necessary to protect cultural resources and sites.<sup>135</sup>

Registering conservation covenants (also known as conservation easements) on the title of private land can be used to broadly protect cultural heritage resources. Conservation covenants restrict uses of land in order to protect natural, cultural, and other important features in perpetuity. They are formed through voluntary agreements between private landowners and qualified conservation organizations/land trusts. While the landowner retains ownership and most property rights, the holder of the covenant can enforce conservation management of the land.

Conservation covenants normally allow the holder of the covenant *access* to the private property – and can also prescribe a detailed management regime for the land.<sup>136</sup> The covenant agreement is registered on land title – and the protective agreement and management plan to control use of the land can be enforceable in perpetuity.

Currently, in BC, under section 219 of the *LTA*, conservation covenants can be acquired and registered on private property by organizations designated by the Minister of the Environment.<sup>137</sup> The current wording of section 219 does not specifically list First Nations as bodies that can hold conservation covenants. Nations can apply for such status – or establish a separate Indigenous land trust to do so –

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<sup>135</sup> This recommendation reflects the comprehensive project identified in the First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) to “[l]obby for a Heritage Trust to be built up... by considering funding through government sharing a portion of Property Transfer Tax.”

<sup>136</sup> Ben van Drimmelen, “Greening Your Title: A Guide to Best Practices for Conservation Covenants,” 3<sup>rd</sup> ed (2013) at 59, online: [West Coast Environmental Law <https://www.wcel.org/publication/greening-your-title-guide-best-practices-conservation-covenant-3rd-edition>](https://www.wcel.org/publication/greening-your-title-guide-best-practices-conservation-covenant-3rd-edition) [<https://perma.cc/23BU-RJQ9>] at 13 (In BC, conservation covenants usually include a statutory right-of-way that permits the organization to access the land. As per section 218 of the *LTA*. Importantly, a covenant registered under section 219 can create either positive or negative obligations on the land. The former entails requiring a property owner do something on their land, such as preserving the existing state of a landscape feature, or managing the land in a certain way. The latter restricts or prohibits a property owner from doing something on the covenanted land - for example, prohibiting development, clearing, construction, paving, etc.).

<sup>137</sup> A section 219 covenant can protect, preserve or maintain an “amenity” on the private property. An amenity includes “any natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant.” Section 219 sets out that the holder of a covenant can be a Crown or Crown Corporation Agency, a municipality, regional district, or “any person designated by the minister on terms and conditions he or she thinks proper”. Note that this section has been applied to bodies connected with the Nisga’a Final Agreement; Jay Lancaster and Joanna Track, Young Anderson, “Land Title Search & Rescue: An Overview of Charges, Liens and Interests in Land” (27 November 2015), online: [https://www.younganderson.ca/assets/seminar\\_papers/2015/Land-Title-Search-and-Rescue.pdf](https://www.younganderson.ca/assets/seminar_papers/2015/Land-Title-Search-and-Rescue.pdf) [<https://perma.cc/L788-NGFW>].

but we recommend that the province make the above amendments to section 219 of the *LTA* in order to clarify and ensure that Nations can easily use this significant conservation tool if they wish.<sup>138</sup>

It is worth noting that this tool has been used very effectively outside of BC to protect cultural heritage and enable Indigenous use:

## AMAH MUTSUN TRIBAL BAND CONSERVATION EASEMENT

The Amah Mutsun Tribal Band has long occupied lands near Monterey Bay and south of San Francisco Bay, California.<sup>139</sup> The Tribe uses conservation easements (covenants) as one method of regaining access to and protecting their land. In 2013, the community created the Amah Mutsun Land Trust to empower Mutsun authority on their ancestral land.<sup>140</sup> Working with a conservation fund and the American Land Trust, the tribe's land trust purchased a 96-acre easement (covenant) on the Costanoa Lodge private property. This easement has allowed them to ensure protection of the land – and to reinstitute tribal practices on the land.<sup>141</sup>

In 2017, the Amah Mutsun Tribal Band acquired a 36-acre cultural conservation easement (covenant) from the Midpeninsula Regional Open Space District over sacred mountain land that is central to their creation story.<sup>142</sup> The conservation easement allows for the restoration of a deep cultural relationship with the land.<sup>143</sup> The easement also has a “special emphasis on protecting the land’s cultural resources.”<sup>144</sup>

Under the easement (covenant) agreement, the Open Space District continues to hold title to the land – but the Tribe now has permanent rights to engage in cultural relearning, conservation, and more atop Mount Umunhum.<sup>145</sup> In exchange, the Tribe has agreed to advise the District and the public to deepen their understanding of the area’s history,<sup>146</sup> and to share traditional native land-management

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<sup>138</sup> Similar amendments should specify that Nations can hold statutory rights-of-way under s. 218 of the *Land Title Act* as well.

<sup>139</sup> Amah Mutsun, “Amah Mutsun Land Trust,” online:

<<https://parks.berkeley.edu/sites/parks.berkeley.edu/files/Amah%20Mutsun%20Tribal%20Band%20Info%20Sheet%209%273%2719.pdf>> [<https://perma.cc/3HVB-PMNE>].

<sup>140</sup> Mary Ellen Hannibal, “Rekindling The Old Ways” (6 April 2016), online: <<https://baynature.org/article/rekindling-old-ways/>> [<https://perma.cc/H8AP-WW2H>].

<sup>141</sup> Mary Ellen Hannibal, “Rekindling The Old Ways” (6 April 2016), online: <<https://baynature.org/article/rekindling-old-ways/>> [<https://perma.cc/H8AP-WW2H>].

<sup>142</sup> Midpeninsula Regional Open Space, “Cultural Conservation Easement,” online: <<https://www.openspace.org/cultural-conservation-easement>> [<https://perma.cc/U8KD-GD9P>].

<sup>143</sup> Amah Mutsun Land Trust, “Midpen approves agreement with Amah Mutsun Tribal Band for natural resource and cultural conservation at Mount Umunhum,” online: <<https://www.amahmutsunlandtrust.org/press-release-mt-um-conservation-agreement>> [<https://perma.cc/AH5E-ZPD7>].

<sup>144</sup> Midpeninsula Regional Open Space, “Cultural Conservation Easement,” online: <<https://www.openspace.org/cultural-conservation-easement>> [<https://perma.cc/U8KD-GD9P>].

<sup>145</sup> Conservation Partners, “Restoring Tribal Access to Land: A Menu of Options to Reestablish Cultural Access Rights,” online: <<https://www.conservationpartners.com/restoring-tribal-access-to-land-a-menu-of-options-to-reestablish-cultural-access-rights/>> [<https://perma.cc/BT9Q-THG2>].

<sup>146</sup> Amah Mutsun Land Trust, “Midpen approves agreement with Amah Mutsun Tribal Band for natural resource and cultural conservation at Mount Umunhum,” online: <<https://www.amahmutsunlandtrust.org/press-release-mt-um-conservation-agreement>> [<https://perma.cc/AH5E-ZPD7>].

techniques to restore and care for the property.<sup>147</sup> Activities are being coordinated with the District, and could include “the creation of a native plant garden, use of Indigenous plant management techniques, tribal ceremonies and public education.”<sup>148</sup> Furthermore, the easement prohibits any commercial development.<sup>149</sup>

## TSNUNGWE COUNCIL CONSERVATION EASEMENT

The Tsnungwe Council in Humboldt County, California, have also used conservation easements (covenants) to re-access and perpetually protect their ancestral land.<sup>150</sup> In 2020, they acquired a conservation easement over six acres of land that was once their ancestral village. This easement was granted to preserve the cultural resources and prevent them from being altered by the adjacent commercial agricultural operation. Under the easement, the Tsnungwe Council are now also able to perform ceremonies and gather important traditional plants and medicines that are found on the land.<sup>151</sup>

Clearly, in the right circumstances, it could be useful for BC Nations to register covenants under the *Land Title Act* to protect a cultural heritage feature on private land. Therefore, our proposed recommendations to the provincial government seek to enhance the *LTA* in order to make it a more viable tool. The statute should clearly empower Nations to use conservation covenants to protect cultural heritage – and government should facilitate its use by Nations who wish to use covenants.

[Note: Nations may also want to explore the way that *government agencies* might be able to form covenants with private landowners to protect Indigenous cultural heritage on those private lands – as is done in New Zealand and the Yukon. See footnote below for details.<sup>152</sup>]

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<sup>147</sup> Val, “Amah Mutsun Tribe Acquires Conservation Easement” (22 August 2013) *Amah Mutsun Tribal Band*, online: <<https://amahmutsun.org/archives/795>> [<https://perma.cc/3LB8-8YGG>].

<sup>148</sup> Amah Mutsun Land Trust, “Midpen approves agreement with Amah Mutsun Tribal Band for natural resource and cultural conservation at Mount Umunhum,” online: <<https://www.amahmutsunlandtrust.org/press-release-mt-um-conservation-agreement>> [<https://perma.cc/AH5E-ZPD7>].

<sup>149</sup> Amah Mutsun Land Trust, “Midpen approves agreement with Amah Mutsun Tribal Band for natural resource and cultural conservation at Mount Umunhum,” online: <<https://www.amahmutsunlandtrust.org/press-release-mt-um-conservation-agreement>> [<https://perma.cc/AH5E-ZPD7>].

<sup>150</sup> Sacramento County Bar Association, “Utilizing Conservation Easements to Protect Land and Create Access to Native American Cultural and Ceremonial Gathering Sites” (2021), online: <[https://issuu.com/milenkovlais/docs/sacramento\\_lawyer\\_magazine\\_summer\\_2021/s/13014458](https://issuu.com/milenkovlais/docs/sacramento_lawyer_magazine_summer_2021/s/13014458)> [<https://perma.cc/XSR7-HH4R>].

<sup>151</sup> Conservation Partners, “Utilizing Conservation Easements to Protect Land and Create Access to Native American Cultural and Ceremonial Gathering Sites,” online: <<https://www.conservationpartners.com/tsnungwe-tribe-cultural-easement/>> [<https://perma.cc/X7UU-5HP7>]; *Conservation Easement Enabling Act* § 815.3€ , added by Stats 2004, c. 905 (S.B.18), § 2 (It should be noted that the above two examples are of conservation easements established in California, where “federally recognized and unrecognized tribes” are explicitly stated as entities that can hold conservation easements under the *Conservation Easement Enabling Act*); In BC, there is no such explicit recognition in legislation of First Nations as holders of easements.

<sup>152</sup> For example, consider Heritage Covenants under Heritage New Zealand: Heritage Covenants and Yukon Historic Resource Agreements. In New Zealand, New Zealand Pouhere Taonga (Heritage New Zealand), an autonomous Crown entity created under the *Heritage New Zealand Pouhere Taonga Act 2014*, 2014 No 26 has “statutory functions and powers relating to the identification, protection, preservation and conservation of the historic and cultural heritage of New Zealand” (Kelly Buchanan,



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“Protection of Indigenous Heritage in Selected Jurisdictions: New Zealand,” at 69-84, online: *Library of Congress* <<https://tile.loc.gov/storage-services/service/l1/lglrd/2019668147/2019668147.pdf>> [<https://perma.cc/73WS-L26W>]); Importantly, Heritage New Zealand has statutory power to form heritage covenants with private land owners to “provide for the protection, conservation, and maintenance of the place, area, wāhi tupuna [significant landscapes and places], wāhi tapu [sacred site], or wāhi tapu area.” (Kelly Buchanan, “Protection of Indigenous Heritage in Selected Jurisdictions: New Zealand,” at 69-84, online: *Library of Congress* <<https://tile.loc.gov/storage-services/service/l1/lglrd/2019668147/2019668147.pdf>> [<https://perma.cc/73WS-L26W>]); The covenant will run with the land and bind future landowners. Statutory provisions which allow for the cancellation or modification of easements and covenants by court order, do not apply to a heritage covenant registered under the *HNZPTA*. However, a covenant can be varied or cancelled by agreement between the parties (New Zealand *Property Law Act 2007* (NZ), no 91, 2007, s 316 – 318).

Under Yukon’s *Historic Resources Act*, covenants in the form of a historic resource agreement can be signed between the Minister (or other person) and the owner of the site, forming a covenant that will run with the land (Bruce Ziff and Melodie Hope, “Unsitely: The Eclectic Regimes that Protect Aboriginal Cultural Places in Canada,” in Catherine Bell and Robert K. Paterson, *Protection of First Nations Cultural Heritage Laws, Policy, and Reform* (Vancouver: UBC Press, 2009) 181 at 186-187; *Historic Resources Act*, RSY 2002 c 109.) The agreement “provides for the maintenance, preservation or protection of a site and the historic resources or human remains at that site.” (*Historic Resources Act*, RSY 2002 c 109, s 9). It is important to note that if there is a disagreement on the modification or cancellation of the agreement, the Minister (regardless of whether they are party to the agreement) can order its modification or cancellation.



Image 13: T̓s̓'iqi T̓ši Šelin, 'where the woman turned to stone.' T̓šilhqot'in heritage site. (Photo courtesy of the T̓šilhqot'in National Government.)

## Creating restrictive covenants to protect heritage during subdivision approval

**Recommendation: Nations can explore the opportunity to better protect cultural heritage every time that subdivision of private lands is considered.**

### **Recommendation to the Government of BC:**

- Overhaul the Ministry of Transportation and Infrastructure and ARCH Branch guidelines for establishing protective cultural heritage restrictive covenants during the subdivision process.**
- Engage meaningfully with Nations to create and implement new guidelines. Provide appropriate funding and support to Nations to ensure their participation.**
- Broaden heritage protection by expanding the current focus beyond “archaeological sites” and objects to enlarged conceptions of cultural heritage resources and places according to Nations, as discussed in recommendation #13.**
- Collaborate with Nations to create guidelines defining when restrictive covenants *must* be filed to protect Indigenous cultural heritage before subdivision approval.**

When private land is being subdivided, a key opportunity may arise to protect heritage resources. The provincial government can impose restrictive covenants under section 219 of the *LTA* to protect archaeological sites during subdivision approval processes.<sup>153</sup> If the Ministry of Transportation and Infrastructure identifies a protected archaeological site within a proposed area,<sup>154</sup> a restrictive covenant may be required in order to secure subdivision approval. The landowner must then prepare a covenant, aligned with the Guidelines prepared by the ARCH Branch and the Ministry of Transportation and Infrastructure.<sup>155</sup> Under the process, an archaeologist is engaged, to establish that boundaries and restrictions set out in the covenant will protect the site.<sup>156</sup> The ARCH Branch also registers Notices of Heritage Status on Land Title under section 32 of the *HCA*.<sup>157</sup> In this process, once land is designated as a provincial heritage site under section 9, the Minister must file a written notice to the land title office, which is then recorded on the title by the registrar at the Land Title Office.<sup>158</sup>

Nations should consider the possibilities under s. 219 whenever subdivision occurs. However, note that there are shortcomings with the current process that need to be addressed. First, there is apparently no requirement in the current ARCH Branch – MOTI guidelines for engagement with the relevant Nation on

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<sup>153</sup> Government of British Columbia, “Archaeology Bulletins,” online: <<https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/bulletins-policies?keyword=covenant>> [<https://perma.cc/2A95-GA5D>].

<sup>154</sup> MOTI uses the RAAD system to identify potential sites.

<sup>155</sup> A copy of the guidelines can be found here: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/restrictive\\_covenants.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/restrictive_covenants.pdf)> [<https://perma.cc/4LFX-2EP8>].

<sup>156</sup> Depending on the nature of the site, the ARCH Branch may require additional terms or conditions to the covenant in order to adequately protect it. The provincial government will then review the proposed covenant. See Government of British Columbia, “Archaeology Bulletins,” online: <<https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/bulletins-policies?keyword=covenant>> [<https://perma.cc/2A95-GA5D>].

<sup>157</sup> Email from Jessica Ruskin, Director of Strategic Initiatives, Archaeology Branch to Emmaline English (17 March 2022) (According to Ruskin, this tool is occasionally used, and often employed during the subdivision approval process “when the nature and precise extent of heritage value on the subject property is less clearly understood and the landowner has no immediate intention to alter or develop the land.”)

<sup>158</sup> *Heritage Conservation Act*, RSBC 1996, c 187.

whose territory the archaeological site was discovered, nor a requirement that the archaeologist involved be aware of the Nation's cultural heritage resources and/or places or worldviews. Second, these restrictive covenants only protect archaeological sites as understood by the Archaeology Branch – they do not capture the broader Indigenous (non-Eurocentric) understandings of cultural heritage features or places. Third, there is no clarification provided – nor transparency – about when a restriction covenant must be required to obtain subdivision approval. Finally, this mechanism is infrequently used – the ARCH Branch registers less than a dozen restricted covenants every year.<sup>159</sup>

This mechanism needs to be reformed as recommended, and better implemented. But properly implemented, it could protect many cultural heritage resources.

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<sup>159</sup> Email from Jessica Ruskin, Director of Strategic Initiatives, Archaeology Branch to Emmaline English (17 March 2022).



Image 14: Photo courtesy of the T̓silhqot̓'in National Government

## Working with local governments to protect Indigenous cultural heritage

**Recommendation: Nations can advocate that local governments use their powers to better protect local Indigenous cultural heritage. Nations can collaborate in drafting better local government laws to protect cultural heritage.**

**Recommendation to local governments: Collaborate with Indigenous Nations on cultural heritage resource protection**

Specifically:

- Local governments should amend their existing bylaws to better protect Indigenous cultural heritage. For example, they should amend their Official Community Plans, zoning, and heritage conservation area regimes to protect and conserve Indigenous heritage as led by local Indigenous groups. This collaborative work can map the areas where development should be prohibited or restricted – and outline the specific requirements for consent in areas where development will require additional cultural heritage protection considerations
- Local governments should call on the province to reform the *Community Charter*, the *Local Government Act*, and the *Vancouver Charter* to enhance local government protection of Indigenous Cultural Heritage. Provincial law should mandate and empower local governments to collaborate with Nations to create “Indigenous Cultural Heritage Management Plans”.
- Local governments should specifically call on the provincial government to amend section 488 of the *Local Government Act* to add “protection of Indigenous cultural heritage sites or resources” to the list of purposes for which an official community plan may designate a development permit area. After section 488 of the *LGA* is amended, local governments should collaborate with Nations to establish Development Permit Areas to comprehensively protect Indigenous cultural heritage resources across the community
- Local governments should create effective property tax and other incentives to enhance protection of Indigenous cultural heritage, consistent with Indigenous interests.<sup>160</sup>
- Local governments should heed the call from the First Nations Leadership Council to:
  - “Improve the consultation and accommodation process in regards to cultural heritage issues with the aim of establishing and implementing sustainable cultural law and protocol agreements.
  - Work with local Nations and become actively involved in the care of ancestral remains and respect for cultural laws and protocols, including addressing the lack of funding for reburial ceremonies, lack of storage space for reburials and lack of available land for reburials.
  - Advocate for the incorporation of Nations’ ... values and heritage areas into official community plans, development permit areas and other bylaws and processes.”<sup>161</sup>

Nations can call on local governments to exercise their current powers to protect Indigenous cultural heritage on private lands – and support legal reforms to *enhance* local government powers to protect Indigenous Heritage. (See the recommendations above.)

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<sup>160</sup> As discussed above, the provincial government should amend sections 25 and 225 of the *Community Charter*, sections 391 and 392 of the *Local Government Act*, and sections 396 and 396A of the *Vancouver Charter* to create a statutory tax exemption from municipal property taxes for any property where Indigenous heritage sites, resources or burial sites are located and protected, consistent with Indigenous interests. This tax structure could be a full or partial exemption. The definition of “Indigenous heritage sites or resources” should be consistent with the recommended expanded definition under the *HCA*.

<sup>161</sup> First Nations Leadership Council, “First Nations Heritage Conservation Action Plan” (2012) at 17-18.

Given local governments' broad jurisdiction over private lands and the many legal tools available to local governments, local government action can be important in protecting/managing heritage resources on private lands.<sup>162</sup>

Different Nations have worked to strengthen relationships with local governments to protect resources. For example, the Haida Nation has strong relationships with municipalities on Haida Gwaii and has signed protocol memoranda of understanding. As mentioned, the Haida Nation is hoping to work with the municipalities on Haida Gwaii to send out notifications to private property landowners.<sup>163</sup> In 2019, Tk'emlúps te Secwépemc First Nation signed a Cultural Heritage Letter of Understanding with the City of Kamloops to protect and promote areas of cultural heritage significance to the First Nation. The city stated they will follow the *HCA*.<sup>164</sup>

One recent example where Indigenous values and objectives have been baked into official land use plans is the 2022 Cordova Bay Local Area plan,<sup>165</sup> which was passed into law by the District of Saanich. The Cordova Bay Local Area plan identifies the lack of understanding of the archaeology of Cordova Bay as a serious gap, and developed several key policy objectives to help address this gap.<sup>166</sup> The priorities from this local area plan work spurred a government-to-government agreement between W̱SÁNEĆ Leadership Council and Saanich, enshrined in an historic MOU<sup>167</sup> that provides direction for the parties to work together on a wide range of issues to do with the understanding and protection of

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<sup>162</sup> Local governments have wide powers to regulate land use. See Stewardship Centre of BC, *Green Bylaws Toolkit* for a discussion of these broad powers. Note that Part 15 of the *Local Government Act* includes several provisions that relate to cultural heritage protection and promotion. Section 588 allows municipalities and some regional districts to preserve heritage for certain types of heritage sites.

A local government can either protect real property or designate an area as a heritage conservation area. Under section 611, a local government can bring forward a bylaw to protect *real property* if it has heritage value or "is necessary or desirable for the conservation of a protected heritage property." This protection can apply to landscape features. The bylaw can also create policies "regarding the provision of financial or other support for the conservation of heritage property" and alterations that are permitted without a heritage alteration permit.

Alternatively, section 614 allows for a local government to designate an *area* as a heritage conservation area in the official community plan. The plan can include a schedule of "buildings, other structures land or features... that are to be protected heritage property under this Act" or include "features or characteristics that contribute to the heritage value or heritage character of the area". [LGA, at ss. 614(3)]

Sections 604-609 of the *Local Government Act* permit a local government to temporarily protect a cultural site, including on private property. Sections 604-605 enable a local government to issue a bylaw to withhold the issuance of any approval that may alter the protected heritage property. A local government can also issue temporary protection by a continuing protection bylaw (section 607). A local government can also declare a heritage control period over an area for up to one year from the date of adoption of the bylaw (section 608). Section 609 specifies the types of activities that are prohibited while a protection order is in place.

<sup>163</sup> Discussion with Kung K\_ayangus/Marlene Liddle, Haida Member of the Solutions table, Calvin Sandborn and Emmaline English (16 February 2021).

<sup>164</sup> Jill Sperling, "Tk'emlups, City sign Cultural Heritage Letter of Understanding," *CFJC Today* (26 February 2019), online: <<https://cfjctoday.com/2019/02/26/tkemplups-city-sign-cultural-heritage-letter-of-understanding/>> [<https://perma.cc/L8ZS-ETMWJ>]; For a list of joint First Nations and local initiatives see: <<https://civicinfo.bc.ca/first-nation-relationship-resources?query=heritage>> [<https://perma.cc/L7SX-HHCD>].

<sup>165</sup> Cordova Bay Local Area Plan, online: <<https://www.saanich.ca/assets/Community/Documents/Planning/LAP~Updates/LAP-Cordova-Bay-proposed-plan-web2.pdf>>

<sup>166</sup> See in particular Policies 5.1.5, 7.2, 8.3.3, 8.3.4, 8.3.5.

<sup>167</sup> ATOL,NEUEL ("Respecting One Another") MEMORANDUM OF UNDERSTANDING, online: <[https://www.saanich.ca/assets/News~and~Events/Documents/%C3%81TOL,NEUEL MOU.pdf](https://www.saanich.ca/assets/News~and~Events/Documents/%C3%81TOL,NEUEL%20MOU.pdf)>.

ancestral sites.<sup>168</sup> All of this has been going on in the context of repeated historic and contemporary impact to Indigenous burial<sup>169</sup> and archaeological sites<sup>170</sup> in the Cordova Bay neighbourhood, and a general acknowledgement that the archaeological record is still poorly understood.<sup>171</sup>

## Useful International Precedents for Comprehensive Heritage Protection

Useful precedents exist for effective, comprehensive local government protection of Indigenous cultural heritage. For example, the community plan for the island of Moloka'i in Hawaii formally incorporates an overlay map of traditional cultural landscapes to protect these areas and prevent development. This overlay tool was developed by the Kānaka Maoli community (Indigenous community) and guides local government planning and permitting.<sup>172</sup>

In New Zealand, all district plans must include a heritage schedule, which includes the places on the New Zealand Heritage List/ Rārangī Kōrero (registry of significant cultural heritage sites).<sup>173</sup> These local plans “control proposed changes to heritage places and sites listed in their heritage schedules,” and provide for how property can be altered.<sup>174</sup> Heritage New Zealand makes recommendations to local authorities regarding the presence of sacred sites in local districts. In turn, local authorities have a duty to consider these recommendations.<sup>175</sup>

## BC LOCAL GOVERNMENT INCENTIVES FOR INDIGENOUS CULTURAL HERITAGE PROTECTION

Local governments should collaborate with Nations to examine how they can better incentivize protection of Indigenous cultural heritage. For example, local governments can grant tax exemptions to properties that are protected for heritage purposes.<sup>176</sup> In return for providing a tax break to the owner

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<sup>168</sup> See page 4.

<sup>169</sup> Saanich ancestral human remains discovery reminder of culture dug up and displaced (Mar 2, 2021) *Saanich News*, online: <<https://www.saanichnews.com/news/saanich-ancestral-human-remains-discovery-reminder-of-culture-dug-up-and-displaced/>>.

<sup>170</sup> Save the history that is being unearthed (Jul 29, 2018) *Times Colonist*, online:

<<https://www.timescolonist.com/opinion/letters/save-the-history-that-is-being-unearthed-4664453>>.

<sup>171</sup> Information in this paragraph provided by Brian Thom, Associate Professor of Anthropology, University of Victoria.

<sup>172</sup> The information provided in this section is from an interview of Kānaka Maoli lawyer and law professor Malia Akutagawa by Calvin Sandborn and Emmaline English (15 March 2021).

<sup>173</sup> Quality Planning, “Historic Heritage,” online: *Ministry of the Environment* <<https://www.qualityplanning.org.nz/node/746>> [<https://perma.cc/4LNW-F5XS>].

<sup>174</sup> If needed, Heritage New Zealand, a statutory body empowered to preserve and protect cultural heritage resource and places, can get involved. Heritage New Zealand *Pouhere Taonga*, “About the List Rārangī Kōrero,” online: <<https://www.heritage.org.nz/the-list/about-the-list>> [<https://perma.cc/9DMX-F7JD>]. Note that certain districts in New Zealand have also included mandatory considerations regarding cultural heritage resources when making development decisions. For example, the Region of Northland identifies responsibilities of its regional council to engage with the developer and the Tangata Whenua (people of the land) in considering the management of resources, including wāhi tapu. Wāhi tapu are places sacred to the Maori. Kekiusuqs, Judith Sayers, “Research from Around the Globe Regarding Mechanisms for Protecting Sacred Sites, Areas and Landscape and Burial Sites of Indigenous Nations on Private Land” (First Nations Joint Working Group on First Nations Heritage Conservation: November 2018) at 38.

<sup>175</sup> *Heritage New Zealand Pouhere Taonga Act 2014*, 2014 No 26.

<sup>176</sup> Section 225 of the *Community Charter* and s. 392 of the *Local Government Act*.



of land with heritage resources, a municipality can permanently protect the heritage feature by placing an enforceable protective covenant on the property. The *Community Charter*<sup>177</sup> allows for a municipal government to *require* that an eligible tax-exempted property be subject to an enforceable protective covenant in favour of the municipality.<sup>178</sup> In some circumstances, municipalities can provide grants for those supporting heritage protection.<sup>179</sup>

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<sup>177</sup> Section 225(6)(a).

<sup>178</sup> Note that local governments may be obliged to compensate an owner of a property it designates as heritage for reduction in the market value of the property. See section 613, *Local Government Act*.

<sup>179</sup> British Columbia, Ministry of Tourism, Sport and the Arts Heritage Branch, *Heritage Conservation: A Community Guide*, online: <[https://heritagebc.ca/wp-content/uploads/2017/10/heritage\\_conservation\\_community\\_guide-1.pdf](https://heritagebc.ca/wp-content/uploads/2017/10/heritage_conservation_community_guide-1.pdf)> [<https://perma.cc/33TK-RFH3>].

# GLOSSARY OF TERMS AND ACRONYMS

<b>AMB</b>	Archipelago Management Board
<b>AOA</b>	Archaeological Overview Assessment
<b>ARCH Branch</b>	Archaeology Branch, Ministry of Forests, Lands, Natural Resource Operations and Rural Development, Government of British Columbia
<b>BC</b>	British Columbia
<b>CFI</b>	Cultural Feature Inventory
<b>CHN</b>	Council of the Haida Nation
<b>CMT</b>	Culturally Modified Tree
<b>CNT</b>	consultative notation
<b>Crown land</b>	This is the term in common use and in provincial statutes to define public land or land held by Her Majesty the Queen in Right of British Columbia. In reality, much of this so-called Crown land is actually unceded Indigenous land for which Aboriginal title issues have not yet been resolved or reconciled.
<b>Cultural Heritage Resources</b>	This is intended to be a broad term to cover burial sites, sacred sites, spiritual sites, transformation sites, middens, archaeological sites, origin sites, the remains and items from those sites, intangible resources (teachings or stories), and anything else a Nation believes is part of its cultural heritage. Many Nations have terms in their own language to describe or define cultural heritage resources.
<b>DRIPA</b>	<i>Declaration on the Rights of Indigenous Peoples Act</i>
<b>ELC</b>	Environmental Law Centre, University of Victoria
<b>FLNRORD</b>	(Ministry of) Forests, Lands, Natural Resources Operations and Rural Development, Government of British Columbia
<b>FNLC</b>	First Nations Leadership Council
<b>FPPR</b>	<i>Forest Planning and Practices Regulation</i>
<b>FREP</b>	Forest and Range Evaluation Program
<b>FRPA</b>	<i>Forest and Range Practices Act</i>
<b>GAR</b>	<i>Government Actions Regulation</i>
<b>GIS</b>	Geographic Information System(s)
<b>HCA</b>	<i>Heritage Conservation Act</i>
<b>HGMC</b>	Haida Gwaii Management Council

<b>HNZPTA</b>	<i>Heritage New Zealand Pouhere Taonga Act</i>
<b>HTG</b>	Hul'qumi'num Treaty Group
<b>IPCA</b>	Indigenous protected and conserved area
<b>JWG</b>	Joint Working Group on First Nations Heritage Conservation
<b>K&amp;K Agreement</b>	Kunst'aa guu/Kunst'aayah Reconciliation Protocol Agreement
<b>LGA</b>	<i>Local Government Act</i>
<b>LTA</b>	<i>Land Titles Act</i>
<b>MIRR</b>	Ministry of Indigenous Relations and Reconciliation, Government of British Columbia
<b>MOTI</b>	Ministry of Transportation and Infrastructure, Government of British Columbia
<b>MOU</b>	memorandum of understanding
<b>MPA</b>	Marine Protected Area
<b>PNT</b>	protective notation
<b>Private land</b>	The term in common use and in provincial statutes to define land held by private citizens or entities in distinction to public land Crown land. Also called 'Fee Simple' land. In reality, much of this so-called private or fee simple land is actually unceded Indigenous land for which Aboriginal title issues have not yet been resolved or reconciled.
<b>RAAD</b>	Remote Access to Archaeological Data (system)
<b>RCMP</b>	Royal Canadian Mounted Police
<b>SEA</b>	Strategic Engagement Agreement
<b>SRRMC</b>	Stó:lō Research and Resource Management Centre
<b>TLC</b>	The Land Conservancy of British Columbia
<b>TNG</b>	T̓silhqot̓'in National Government
<b>UNDRIP</b>	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>

# APPENDIX A: SELECTED MECHANISMS FOR PROTECTING AND MANAGING CULTURAL HERITAGE RESOURCES ON “CROWN” LAND

In the course of researching measures Nations might take to manage and protect Cultural Heritage on private lands, we became aware of numerous analogous measures being used to protect Cultural Heritage on provincial Crown lands. Below is a cursory discussion of some of those tools.

## *Forest & Range Practices Act*

Where cultural heritage resources occur in Crown forests, provincial forest practices legislation can provide protection.<sup>180</sup> The *FRPA*<sup>181</sup> empowers provincial cabinet to make regulations prescribing “objectives” for cultural heritage resources – and section 10 of the *Forest Planning and Practices Regulations* (“*FPPR*”) states:

The objective set by government for cultural heritage resources is to conserve, or, if necessary, protect cultural heritage resources that are

- (a) the focus of a traditional use by an aboriginal people that is of continuing importance to that people, and
- (b) not regulated under the *Heritage Conservation Act*.

At times, the *FPPR* can provide greater protection to cultural resources in cutting blocks than that provided by the *HCA*. To implement section 10, forest managers must propose strategies that meet this heritage conservation objective. Section 4 of Schedule 1 of the *FPPR* states several factors that must be considered in a result or strategy under section 10:

- (a) the relative value or importance of a particular cultural heritage resource to a traditional use by an aboriginal people;
- (b) the relative abundance or scarcity of a cultural heritage resource that is the focus of a traditional use by an aboriginal people;
- (c) the historical extent of a traditional use by an aboriginal people of a cultural heritage resource;
- (d) the impact on government granted timber harvesting rights of conserving or protecting a cultural heritage resource that is the focus of a traditional use by an aboriginal people
- (e) options for mitigating the impact that a forest practice might have on a cultural heritage resource that is the focus of a traditional use by an aboriginal people.

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<sup>180</sup> *Forest Planning and Practices Regulation*, BC Reg 11/2021; Government of British Columbia, “Forest & Range Evaluation Program Cultural Heritage Monitoring”, online: <<https://www2.gov.bc.ca/gov/content/industry/forestry/managing-our-forest-resources/integrated-resource-monitoring/forest-range-evaluation-program/frep-monitoring-protocols/cultural-heritage>> [<https://perma.cc/C26Y-RD2X>]; The *FPPR* only applies to Crown land.

<sup>181</sup> *Forest Range and Practices Act*, SBC 2002, c 69, s 149.

## ***Protecting Spirit Poles and Culturally Modified Trees under Forest Practices Law***

Sts'ailes has significant experience dealing with this regulation because of the presence of spirit-poles and Culturally Modified Trees (“CMTs”) in their forests. According to Sts'ailes Archeologist Morgan Ritchie, regalia from the winter ceremonial dances, spirit-poles, are some of the most significant cultural resources to the Nation. As part of the ceremony, the locations of the individual spirit-poles are not disclosed to anyone. The risk to heritage resources arises where the spirit-poles are located in cutblock areas designated for logging.

Ritchie notes that because the language of the *FPPR* and the *FRPA* are sufficiently broad, regalia is recognized as protected cultural heritage under the forestry laws. Furthermore, those Culturally Modified Trees not protected under the *HCA* because they post-date 1846, are protected under the forestry laws.

In order to protect these significant cultural objects, Sts'ailes is regularly in contact with forestry companies who are planning new logging on their territory. The Nation will prohibit any logging that will impact regalia -- and has made it clear to companies that they will not be able to carry on the work unless the regalia are protected.

In terms of compliance, according to Ritchie, established forestry companies are generally respectful and protect regalia and CMTs in their territory. Effectively, neither companies nor their archeologists are allowed to do field work on the territory unless Sts'ailes is involved. Companies understand the necessity of working with Sts'ailes in order to be able to log. Ritchie credits this high level of compliance to the work of the Sts'ailes leadership ten years ago, when they took the time to explain to industry the significant value of the spirit-poles and CMTs -- as well as the strong relationships that have developed since then. In addition, companies are aware that disrespectful behaviour or actions towards the Nation or the regalia would be detrimental to any future work they may want to do in the area.

This record of compliance is made possible through strong processes that Sts'ailes has established with the forestry companies. First, companies provide annual plans in advance, and Sts'ailes Xwilétmet department recommend which areas to not cut, based on field studies and Sts'ailes traditional use information. Second, forestry companies who understand the significance of the CMTs and regalia will now recognize these resources -- and deliberately work around them and exclude them from cutblocks. Third, every new proposed cutblock and plan from a forest company is fully vetted by a Sts'ailes representative, coordinated through Xwilétmet. This involves a walk-through to ensure no regalia or other archaeological features/materials are in the proposed cut area. Ritchie reviews all the technical reports and associated maps after the Xwilétmet crew completes their assessment, and prepares recommendations based on the findings. Companies pay for the fieldwork, reporting, and project management fees associated with the investigations.<sup>182</sup>

If regalia is found in a proposed area, the cutblock will be redesigned to ensure any activity happens away from the regalia. The protected vicinity around the regalia will depend on numerous factors,

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<sup>182</sup> This is specified on page 26 of the Sts'ailes *Cultural Heritage Resources Policy* (May 2010), online: <<https://static1.squarespace.com/static/55d3a02de4b070510b27c3e7/t/5b47a1bd88251bde0f29d6b4/1531421122472/stsailes-cultural-heritage-resources-policy-2.pdf>> [<https://perma.cc/BR85-F6CE>].

including the terrain, whether the area is secluded, and whether there is a buffer to protect the spirit-pole. The Xwilémet department looks to ensure each spirit-pole is left in a pristine environment, and is out of view from the roads and harvested areas.

Finally, Sts'ailes has recently been conducting follow up investigations to ensure that companies are abiding by the guidelines Sts'ailes has provided them.

## USING GAR ORDERS TO PROTECT HERITAGE<sup>183</sup>

Under the *Forest and Range Practices Act*, the Minister can establish land designations for Indigenous cultural heritage resources -- and prescribe stewardship measures for those resources.<sup>184</sup> The *Government Actions Regulation*<sup>185</sup> specifically empowers the Minister to issue a *GAR* Order that a cultural heritage resource will have special management.<sup>186</sup>

For example, the *GAR* Order for Kweh-Kwuch-Hum (Mount Woodside) in Sts'ailes traditional territory identifies two zones of cultural significance.<sup>187</sup> In the red zone, or the "High Cultural Features and Use Area", the *GAR* Order mandates that resource activities, other than traditional uses, are not allowed. In the yellow zone, resource management activities are possible, provided they do not impact any cultural resource.

Other examples of *GAR* Orders that have been used to protect cultural heritage sites include Thunder Mountain and Wap Creek.<sup>188</sup>

Another important aspect of *GAR* Orders is that there are provisions for not disclosing the location of the feature – which is important if the Nation is concerned that public knowledge of the heritage feature may imperil it. If the Minister believes that disclosure of the location of the resource feature will lead to damage, government must not disclose the location, and can order tenure holders to not disclose the location as well.<sup>189</sup> The Minister can also attach conditions to the order so that those holders of agreements (*e.g.*, forest companies) will not disclose the location.

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<sup>183</sup> *Government Actions Regulation*, BC Reg 582/2004.

<sup>184</sup> *Government Action Regulations*, BC Reg 582/2004 (Section 5(1) of the *Government Action Regulations* mandates that a *GAR* order can apply to "a cultural heritage resource that is the focus of a traditional use by an aboriginal people that is not regulated by the *HCA*").

<sup>185</sup> *Government Actions Regulation*, BC Reg 582/2004, s 5(2).

<sup>186</sup> As long as there is no protection offered by another act or *GAR* Order.

<sup>187</sup> Government of British Columbia, "Government Actions Regulation Order: Order to identify a Cultural Heritage Resource – Resource Feature at Thunder Mountain for the South Island Nature Resource District," online: <<https://www2.gov.bc.ca/assets/gov/environment/natural-resource-policy-legislation/legislation-regulation/gar-ministerial-orders/gar20order.pdf>> [<https://perma.cc/AL6A-T7AK>].

<sup>188</sup> For example, see Government of British Columbia, "Government Actions Regulation Order: Order to identify a Cultural Heritage Resource – Resource Feature at Thunder Mountain for the South Island Nature Resource District," online: <<https://www2.gov.bc.ca/assets/gov/environment/natural-resource-policy-legislation/legislation-regulation/gar-ministerial-orders/gar20order.pdf>> [<https://perma.cc/AL6A-T7AK>].

<sup>189</sup> See section 5(4) of the *Government Action Regulations*, BC Reg 582/2004.

## LAND USE ORDERS AND PLANS

Nations can propose creation of Land Use Orders to protect cultural heritage resources on Crown land where forestry, road construction and other activities take place. Land use orders are established under the *Land Act*,<sup>190</sup> and establish formal land use objectives for the use and management of Crown land or resources for the purposes of the *Forest and Range Practices Act*.

### Haida Nation Land Use Order

The Haida Nation has made extensive use of the Land Use Order mechanism to protect areas and resources of cultural significance. The 2010 Land Use Objective Order (the “Haida Land Use Order”) was established by the Haida Gwaii Management Council following the signing of the 2007 Strategic Land Use Agreement with the Government of BC.<sup>191</sup>

In addition to protecting specific areas, the 2010 Order sets out objectives that will inform ecosystem-based management and protect traditional heritage features. The Order requires that a field assessment to identify cultural heritage resources<sup>192</sup> must be completed by a person certified by the Council of the Haida Nation before timber harvesting or road construction.<sup>193</sup>

The Haida Land Use Order sets out different protections for different “classes” of heritage features. For example, the Order sets a protected reserve zone of at least 500 metres wide around Class 1 features (e.g., burial sites), and a 100-metre reserve zone around Class 2 features (e.g., middens).<sup>194</sup>

The land use order also provides clear protections for culturally modified trees and monumental cedar. For example, monumental cedars greater than 120 centimetres diameter at breast height must be protected.<sup>195</sup>

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<sup>190</sup> *Land Act*, RSBC 1996, c 245, section 93.4.

<sup>191</sup> Note that in 2011, a background and intention document was created to guide all parties to ensure that the requirements of the Order would be met. This document was requested by the Haida Nation to prevent scope creeping. While not legally binding, both the Haida and the BC government have agreed to its contents. It was last updated in 2019. The Background and Intent Document for the Haida Gwaii Land Use Objectives Order can be found here: Haida Gwaii Management Council, “Background and Intent Document for the Haida Gwaii Land Use Objectives Order,” (2019), online: <[http://www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2020/11/20190205\\_HGLUOO-Background-and-Intent-Document-2019.01.23clean\\_final.pdf](http://www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2020/11/20190205_HGLUOO-Background-and-Intent-Document-2019.01.23clean_final.pdf)> [<https://perma.cc/6DMC-7UFK>].

<sup>192</sup> Such as traditional heritage features, traditional forest features and culturally modified trees and monumental cedar.

<sup>193</sup> Council of the Haida Nation and the Government of British Columbia, “Haida Gwaii Land Use Objectives Order Consolidated Version” (2010), online (pdf): <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haidagwaii\\_slua\\_luor\\_8may2014consolidated.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haidagwaii_slua_luor_8may2014consolidated.pdf)> [<https://perma.cc/XE8G-LCDW>].

<sup>194</sup> Council of the Haida Nation and the Government of British Columbia “Haida Gwaii Land Use Objectives Order Consolidated Version” (2010), online (pdf): <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haidagwaii\\_slua\\_luor\\_8may2014consolidated.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haidagwaii_slua_luor_8may2014consolidated.pdf)> [<https://perma.cc/XE8G-LCDW>].

<sup>195</sup> As per section 9(3), Council of the Haida Nation and the Government of British Columbia, “Haida Gwaii Land Use Objectives Order Consolidated Version” (2010), online (pdf): <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haidagwaii\\_slua\\_luor\\_8may2014consolidated.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haidagwaii_slua_luor_8may2014consolidated.pdf)> [<https://perma.cc/XE8G-LCDW>].

As Kung K\_ayangas has pointed out, this negotiated agreement has drastically reduced logging and increased the level of protection for land and resource features -- only 25% or less of the Timber Harvestable Land Base is now harvestable.<sup>196</sup>

Part 2, Central and North Coast, of the Great Bear Rainforest Order sets out a similar structure of defining different classes of heritage features – with varying degrees of protected reserve and management zones around the heritage features.<sup>197</sup>

Note that some Nations have achieved protections for cultural heritage resources through strategic Land Use Plans developed in collaboration with the BC Government. For example, the Wóoshtin wudidáa Atlin Taku Land Use Plan sets out three designated zones, which are areas of cultural significance for the Taku River Tlingit First Nation. Each zone has a different level of cultural significance, and the Land Use Plan specifies the types of development activities that are permitted in each zone. The types of activities that are covered include forestry and hydro, land tenures, mineral exploration and development, and recreation.<sup>198</sup>

## Agreements with the Crown

This section provides an overview of various types of agreements Nations have entered into with the provincial and/or federal Crowns that set out provisions to protect cultural heritage resources.

### CONSERVANCIES

Conservancies are land designations under the *Park Act*<sup>199</sup> that are formed through agreement between the Nation and the Government of BC. These arrangements allow for the continuation of traditional Indigenous uses on specified territory, and are designed to “explicitly recognize the importance of an area to First Nations for social, ceremonial and cultural uses.”<sup>200</sup> They can provide for a wide range of low-impact, compatible economic opportunities. Importantly, industrial logging, mining, and

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<sup>196</sup> In the early 1980s, industry was allowed to harvest 2.7 million cubic metres annually, before the Order. Now, Kung K\_ayangas notes that industry is lucky to get 700,000 cubic metres per year. Note that the CHN also created a moratorium on further selling of any Crown land.

<sup>197</sup> However, unlike under the Haida Land Use Order, the identification and management of specific cultural features is determined through engagement with applicable First Nations, and enabled through strategic engagement agreements such as the CFN/GBI – BC Engagement Framework, which the Kitasoo Xai’xais is a part of. For more information, see: Government of British Columbia, “Great Bear Rainforest Order” (2016), online (pdf): <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/timber-pricing/coast-timber-pricing/maps-and-graphics/great\\_bear\\_rainforest\\_order\\_-\\_jan\\_21\\_2016.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/timber-pricing/coast-timber-pricing/maps-and-graphics/great_bear_rainforest_order_-_jan_21_2016.pdf)> [<https://perma.cc/2H6P-C2W2>].

<sup>198</sup> See: Wóoshtin wudidáa Atlin Taku Land Use Plan between Taku River Tlingit First Nation and British Columbia, (19 July 2011), online (pdf): Province of British Columbia <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/skeena-region/atlintaku-slua/atlin\\_taku\\_lup.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/skeena-region/atlintaku-slua/atlin_taku_lup.pdf)> [<https://perma.cc/JGN4-3KPS>].

<sup>199</sup> *Park Act*, RSBC 1996, c 344.

<sup>200</sup> Tahltan Central Government, British Columbia Government, Skeena Resources, Nature Conservancy of Canada, BC Parks Foundation, “Tahltan land to be protected in partnership with conservation organizations, Industry and the Province” (8 April 2021), online: <https://news.gov.bc.ca/releases/2021ENV0025-000657>> [<https://perma.cc/LSF6-XQAE>].



hydroelectric generation are generally prohibited. There are 157 conservancies in BC, which range in size from 11 to 322,200 hectares.<sup>201</sup>

## Kitasoo Xai'xais: Cultural Zones in Conservancies

The Kitasoo Xai'xais Nation has established cultural zones within its conservancies to further protect cultural heritage resources. The Nation has twelve conservancies across their traditional territory. Management plans have been established for three of these areas, which specify six cultural zones. These zones are large spatial areas where there are numerous cultural heritage features or places, and they require enhanced protection and additional management initiatives. For example, the Nation has negotiated that special conditions be inserted in park use permits -- such as restricted entry into a specific zone, or entry only with special or specific permission by the Nation (e.g. specific dates and/or only with a guide).<sup>202</sup> Importantly, the Nation and BC Parks have established a Collaborative Management Board to discuss and make consensus recommendations to their respective leadership on all management planning, permitting requests and any other proposed activity on the conservancies. Therefore, the Nation has a significant level of influence over whether special conditions have been met and permits should be approved. (However, note that it is not true consensus decision-making -- as ultimately the provincial government has the final say.)

Since the conservancies fall under the BC *Parks Act*, the cultural zones allow for the Kitasoo Xai'xais to establish protection and management measures beyond the requirements of the *HCA*. By protecting large areas around many known cultural heritage features, such broad zoning provides more protection than government's narrow interpretation of the *HCA* – an interpretation that fails to protect the space between two objects or sites.

## Kitasoo Xai'xais Guardian Watchmen

In June 2022, the Kitasoo Xai'xais Nation and the Nuxalk Nation and the Government of BC signed a Memorandum of Understanding on A Shared Compliance and Enforcement Pilot Program for parks and protected areas.<sup>203</sup> This includes an initiative whereby the Nation's Guardian Watchmen assume the authorities and responsibilities of a BC park ranger under the *Park Act*. (This arrangement is made

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<sup>201</sup> Tahltan Central Government, British Columbia Government, Skeena Resources, Nature Conservancy of Canada, BC Parks Foundation, "Tahltan land to be protected in partnership with conservation organizations, Industry and the Province" (8 April 2021), online: <<https://news.gov.bc.ca/releases/2021ENV0025-000657>> [<https://perma.cc/LSF6-XQAE>]; On April 8, 2021, the Tahltan Central Government, Skeena Resources, the Nature Conservancy of Canada, and the BC Parks Foundation announced the creation of a new conservancy to protect Mount Edziza and the surrounding area, which is of significance for the Tahltan people.<sup>201</sup> The Haida Nation has also established conservancies to protect important parcels of land. For example, to prevent further logging to district lots 413 and 418 and to protect fish-bearing streams, the Nation and the Nature Conservancy purchased the land and established a conservancy and have continued a partnership to restore the impacted district lots.

<sup>202</sup> Park use permits are issued for extensive use of the territory, such as eco-tourism. Given the classification of the conservancy land under the *Park Act*, no industrial activity is permitted. In addition, no infrastructure can be built.

<sup>203</sup> For a fulsome list of the existing Park Ranger powers and authorities the Guardian Watchmen will assume under this agreement, refer to [Appendix B](#); Parks and protected areas include "all provincial parks, conservancies, recreation areas and ecological reserves established or continued under the *Park Act*, the *Ecological Reserve Act*, or the *Protected Areas of British Columbia Act*, and protected areas established under provisions of the *Environmental and Land Use Act*."

possible under section 4(2) of the *Act*, which stipulates that a class of people can be designated as park rangers.) By virtue of the Guardian Watchmen becoming park rangers, they will also enforce other laws such as the *Ecological Reserve Act* and the *Environmental Management Act*.<sup>204</sup> It is important to note that the Guardians will be direct employees of the Nation – and yet will be responsible for compliance and enforcement of both colonial law and Kitasoo Xai'xais law.<sup>205</sup> See [Appendix B](#) for a list of the fulsome powers that the Guardians will exercise.

## HAIDA NATION: SHARED DECISION-MAKING ON CULTURAL HERITAGE RESOURCE PROTECTION AND A WIDE RANGE OF OTHER RESOURCES

Nations wanting more say in protecting heritage may propose establishment of shared decision-making structures with settler governments. As discussed above, shared decision making agreements are possible under section 4 of the *Heritage Conservation Act* or section 7 of *DRIPA*.<sup>206</sup> See above for a discussion of the Stó:lō section 4 process.<sup>207</sup>

Those seeking to establish shared decision making should consider that the Council of the Haida Nation has negotiated extremely sophisticated shared decision-making structures with settler governments -- that govern cultural heritage and a wide range of other resources.<sup>208</sup> The Haida examples are worth considering carefully:

### The Haida Gwaii Strategic Land Use Agreement and the Haida Gwaii Management Council

The 2009 Kunst'aa guu/Kunsta'aayah Reconciliation Protocol ("K&K Agreement") between the CHN and the Government of BC sets out a joint decision-making process regarding the management of lands and natural resources on Haida Gwaii.<sup>209</sup>

The Agreement establishes the Haida Gwaii Management Council ("HGMC"), which is composed of two members from the Haida Nation, and two members from the provincial government. Both parties jointly appoint the chair. The HGMC is responsible for:

- "The implementation and amendment of the Haida Gwaii Strategic Land Use Agreement;

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<sup>204</sup> *Ecological Reserve Act*, RSBC 1996, c 103; *Environmental Management Act*, SBC 2003, c 53.

<sup>205</sup> For a fulsome list of the existing Park Ranger powers and authorities the Guardian Watchmen will assume under this agreement, refer to [Appendix B](#).

<sup>206</sup> Although it remains to be seen whether the BC Government will agree to implement these two types of agreements.

<sup>207</sup> And see also the Collaborative Management Board between the Kitasoo/ Xai'xais Nation and BC Parks for another example of collaborative decision-making between a Nation and the Government of BC.

<sup>208</sup> While the Haida Gwaii rights and Title case is underway. Note that while understood to be shared decision-making processes, in practice the province has overridden the Haida on certain issues.

<sup>209</sup> The 2009 agreement also required that legislation be passed in the provincial legislature to enable the statutory framework, and by the Haida Nation to provide legal authority. The provincial government enacted the *Haida Gwaii Reconciliation Act*, SBC 2010 c 17; Haida Nation and the Government of British Columbia, "Kunst'aa guu – Kunsta'aayah Reconciliation Protocol," (2009), online: <[https://www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu\\_Kunstaayah\\_Agreement.pdf](https://www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf)> [<https://perma.cc/B9AJ-PN4P>].

- the establishment, implementation and amendment of Land Use Objectives for forest practices;
- determination and approval of the allowable annual cut for Haida Gwaii;
- approval of management plans for protected areas;
- **developing policies and standards for the identification and conservation of heritage sites**
- other strategic level management matters; and
- monitoring the effectiveness of the Solutions Table.”<sup>210</sup>

[emphasis added]

According to the K&K Agreement, decisions made by the HGMC are to be made by consensus. The agreement sets out that if there is no consensus, each member will vote, and then, if necessary, the Chair will vote.

### Solutions Table

The K&K agreement also gave direction to form a joint CHN and Provincial Table -- the Solutions Table -- which provides technical review on all matters before any decision is made regarding industrial activity on Haida Gwaii. The Solutions Table is composed of two members from the Haida Nation and two members from the provincial government. Importantly, it oversees applications under a range of provincial acts, including the *Heritage Conservation Act*. While the Solutions Table currently has scope over sections 9,12 and 14 of the *HCA*, the Haida Nation is currently negotiating with the provincial government to include all provisions of the *HCA* under its mandate. The Solutions Table process is also supported by the Heritage and Natural Resources Committee. After reviewing the technical information from the Solutions Table, this Committee will make a recommendation to the CHN decision maker, on whether or not to accept the application.<sup>211</sup> For a fulsome overview of the scope of the Solutions Table, contact the Haida Nation.

### Practical implications

While in theory this process provides for “shared decision-making”, in practice it falls short of truly meaningful, equal participation of the Haida Nation. At times, the province has overridden the joint management structure and contravened the land use orders. Kung K\_ayangus/Marlene Liddle, a Haida Member of the Solutions Table, describes how on non-consensus files, industry interests and the amount of money a licensee has invested, will often sway the province into unilaterally approving the project.<sup>212</sup> For example, the province signed off on an application by Husby Forestry to log four cedar-

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<sup>210</sup> Haida Nation and the Government of British Columbia, “Kunst’aa guu – Kunsta’aayah Reconciliation Protocol,” (2009), online: <[https://www.haidanation.ca/wp-content/uploads/2017/03/Kunsta-guu\\_Kunstaayah\\_Agreement.pdf](https://www.haidanation.ca/wp-content/uploads/2017/03/Kunsta-guu_Kunstaayah_Agreement.pdf)> [<https://perma.cc/B9AJ-PN4P>].

<sup>211</sup> Based on the technical review.

<sup>212</sup> Interview of Kung K\_ayangus/Marlene Liddle, Haida Member of the Solutions table, by Calvin Sandborn and Emmaline English (16 February 2021).

leading cutblocks at Collision Point/ St’alaa Kun in 2018 without the approval of the Nation.<sup>213</sup> The province also unilaterally approved logging in the Tlaga Gaawtlaas Blue Jackets area in 2016.<sup>214</sup> This area is culturally significant, with heritage and archeological sites. The Haida Nation was also denied a request for a stop work order from the ARCH Branch.<sup>215</sup>

Unfortunately, there are no consequences when the province overrides this process, nor are there set requirements that must be satisfied before a veto can occur. The *Haida Gwaii Reconciliation Agreement* and the K&K Agreement do not include processes for dispute resolution.<sup>216</sup> Kung K\_ayangas notes the problems around non-consensus issues and the need for better integration between Haida stewardship laws and provincial laws.<sup>217</sup> The 2018 HGMC report reflected on these challenges, noting the “difference in expectations and philosophy between Haida and provincial laws in regard to land and resource development and use.”<sup>218</sup> This report confirmed that discussions are continuing at the various tables to better understand non-consensus issues.<sup>219</sup>

## Protecting Cultural Heritage in Haida Gwaii Marine Protected Areas

Following the K&K Agreement, CHN also entered into agreements with the provincial and federal governments to protect and manage marine areas, and establish Marine Protected Areas (“MPA”). These agreements are guided by the Towards a Marine Use Plan for Haida Gwaii (2007), and include the 2016 Haida Gwaii Marine Plan Implementation Agreement. CHN also has a MPA agreement with the Government of Canada to protect the SGaan Kinghlas-Bowie Seamount and the surrounding area, including the Hodgkins and Davidson seamounts. According to Haida oral tradition, the seamount is the home of SGaan Kinghlas, a supernatural being.<sup>220</sup> The CHN and the Government of Canada signed a memorandum of understanding (“MOU”) in 2007 setting out a cooperative governance framework, and

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<sup>213</sup>Andrew Hudson, “Court Rejects CHN Call To Pause Logging at Collision Point/ St’alaa Kun” (10 July 2018), *BC Local News*, online: <<https://www.bclocalnews.com/news/court-rejects-chn-call-to-pause-logging-at-collison-point-stalaa-kun/>> [<https://perma.cc/299C-9TAV>].

<sup>214</sup>Alex Kurial, “Logging Moves Forward as Court Rules Against Haida Gwaii Protesters,” *Haida Gwaii Observer* (10 October 2019), online: <<https://www.haidagwaiiobserver.com/news/logging-moves-forward-as-court-rules-against-haida-gwaii-protesters/>> [<https://perma.cc/4Q2H-7W83>].

<sup>215</sup> Alex Kurial, “Logging Moves Forward as Court Rules Against Haida Gwaii Protesters,” *Haida Gwaii Observer* (10 October 2019), online: <<https://www.haidagwaiiobserver.com/news/logging-moves-forward-as-court-rules-against-haida-gwaii-protesters/>> [<https://perma.cc/4Q2H-7W83>].

<sup>216</sup> To note, the terms and conditions for the HGMC are not available online. They may provide further information on dispute resolution processes.

<sup>217</sup> Haida Gwaii Management Council, “Quarterly Meeting Minutes February 5-7, 2019”, online: <[http://www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2019/11/18.19Q4-HGMC.Minutes.Feb\\_5-7.19\\_Final.pdf](http://www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2019/11/18.19Q4-HGMC.Minutes.Feb_5-7.19_Final.pdf)> [<https://perma.cc/AJ3P-X6K8>].

<sup>218</sup> Haida Gwaii Management Council, “2017-2018 Annual Report”, online: <<http://www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2019/03/2018AnnualReport.pdf>> [<https://perma.cc/B3N4-P22C>].

<sup>219</sup> Haida Gwaii Management Council, “2017-2018 Annual Report”, online: <<http://www.haidagwaiimanagementcouncil.ca/wp-content/uploads/2019/03/2018AnnualReport.pdf>> [<https://perma.cc/B3N4-P22C>]. Note that another challenge associated with this process is that it is often difficult for the Haida Nation to fill both positions on the Solutions Table.

<sup>220</sup> Council of the Haida Nation and Fisheries and Oceans Canada, “SGaan Kinghlas-Bowie Seamount 2019 Marine Protected Area Management Plan Gin Siigee Tl’a Damaan Kinggangs Gin K’Aalaagang” (2019), online (pdf): <[https://www.haidanation.ca/wp-content/uploads/2019/07/CHN\\_DFO\\_SK-BS\\_Plan\\_EN\\_WEB.pdf](https://www.haidanation.ca/wp-content/uploads/2019/07/CHN_DFO_SK-BS_Plan_EN_WEB.pdf)> [<https://perma.cc/K7FZ-57VG>].

concluded a Marine Protected Area Management Plan in 2019.<sup>221</sup> Both parties are represented by two representatives and operate on a consensus-based decision-making model. Approval is then made by the CHN and the Minister of Fisheries, Oceans and the Canadian Coast Guard.<sup>222</sup>

## Gwaii Haanas

Gwaii Haanas was designated as a Heritage Site by the Haida Nation in 1985. In 1993, the Gwaii Haanas Agreement recognized this site in Canadian law, and established the Archipelago Management Board (“AMB”) to manage Gwaii Haanas and South Moresby.<sup>223</sup> This co-governance structure is composed of three members from the federal government (two representatives from Parks Canada and one representative from Fisheries and Oceans Canada) and three members from CHN. The AMB operates on a consensus-based decision-making model. In 2010, the Gwaii Haanas Marine Agreement was finalized, and in 2018, the Gina ‘Waadluxan Kilguhlgā Land-Sea-People Management Plan was approved, which covers both terrestrial and marine protected land use. It is important to note that the agreements and management of the area are informed by Haida law.<sup>224</sup>

## INDIGENOUS PROTECTED AND CONSERVED AREAS

Indigenous Protected and Conserved Areas (IPCAs) are an increasingly important mechanism used by Nations to govern parts of their territory, including key cultural heritage areas. The Indigenous Circle of Experts have described IPCAs in the following way:

*IPCA” is the term chosen...to describe a variety of land protection initiatives.... Examples include Tribal Parks, Indigenous Cultural Landscapes, Indigenous Protected Areas, and Indigenous conserved areas. IPCAs are lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance*

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<sup>221</sup> Council of the Haida Nation and Fisheries and Oceans Canada, “SGaan K̓inghlas-Bowie Seamount 2019 Marine Protected Area Management Plan Gin Siigee Tl’a Damaan K̓inggangs Gin K’Aalaagangs” (2019), online (pdf): <[https://www.haidanation.ca/wp-content/uploads/2019/07/CHN\\_DFO\\_SK-BS\\_Plan\\_EN\\_WEB.pdf](https://www.haidanation.ca/wp-content/uploads/2019/07/CHN_DFO_SK-BS_Plan_EN_WEB.pdf)> [<https://perma.cc/K7FZ-57VG>].

<sup>222</sup> Council of the Haida Nation and Fisheries and Oceans Canada, “SGaan K̓inghlas-Bowie Seamount 2019 Marine Protected Area Management Plan Gin Siigee Tl’a Damaan K̓inggangs Gin K’Aalaagangs” (2019), online (pdf): <[https://www.haidanation.ca/wp-content/uploads/2019/07/CHN\\_DFO\\_SK-BS\\_Plan\\_EN\\_WEB.pdf](https://www.haidanation.ca/wp-content/uploads/2019/07/CHN_DFO_SK-BS_Plan_EN_WEB.pdf)> [<https://perma.cc/K7FZ-57VG>].

<sup>223</sup> West Coast Environmental Law, “Literature Review & Analysis of Shared Indigenous and Crown Governance in Marine Protected Areas” (November 2019), at 53, online: <<https://www.wcel.org/publication/literature-review-analysis-shared-indigenous-and-crown-governance-in-marine-protected>> [<https://perma.cc/4FS2-UL7B>].

<sup>224</sup> West Coast Environmental Law, “Literature Review & Analysis of Shared Indigenous and Crown Governance in Marine Protected Areas” (November 2019), at 22, online: <<https://www.wcel.org/publication/literature-review-analysis-shared-indigenous-and-crown-governance-in-marine-protected>> [<https://perma.cc/4FS2-UL7B>].

*and knowledge systems. Culture and language are the heart and soul of an IPCA.*<sup>225</sup>

While there are a variety of forms of IPCAs, they all are designed in a way that prioritizes and benefits Indigenous communities. This is illustrated by the following three elements, which all IPCAs share<sup>226</sup>:

1. They are Indigenous led.
2. They represent a long-term commitment to conservation.
3. They elevate Indigenous rights and responsibilities.

IPCAs recognize that for millennia, Indigenous worldviews and traditional laws have been used to protect the land and maintain balance within ecosystems.

Some IPCAs are created by assertions of Indigenous jurisdiction without recognition by settler governments. Other IPCAs are formed through collaborative agreements with provincial, territorial and/or federal governments.

Tribal parks are IPCAs that are not necessarily recognized by the federal or provincial government -- but are expressions of Nations that have asserted their inherent right to governance over the Tribal Park.<sup>227</sup> Several tribal park systems have been established by Nations in BC, including Dasiqox Tribal Park in T̓silhqot'in territory, K'ih tsaat̓ze Tribal Park near Doig River First Nation, and the Tla-o-qui-aht First Nations Tribal Park.<sup>228</sup>

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<sup>225</sup> Indigenous Circle of Experts, "We Rise Together: Achieving Pathway to Canada Target 1, Indigenous Circle of Experts' Report and Recommendations, Catalogue No R62-548/2018E-PDF (Ottawa: Government of Canada, 2018) online (pdf): <https://publications.gc.ca/site/eng/9.852966/publication.html> [ICE Report] at 5; The Indigenous Circle of Experts is a working group of Indigenous and non-Indigenous individuals tasked with providing recommendations on the protection of terrestrial areas and inland waters.

<sup>226</sup> Conservation through Reconciliation Project, "Indigenous Protected and Conserved Areas" online: <https://conservation-reconciliation.ca/about-ipcacs> [<https://perma.cc/Z9B7-4RCS>]; See Larry Innes *et al*, "Indigenous Laws in the Context of Conservation" (Olthuis Kleer Townshend, West Coast Environmental Law, Conservation Through Reconciliation Partnership, 2021), online:

<https://static1.squarespace.com/static/5d3f1e8262d8ed00013cdf1/t/60cb38cdf63bea0402196c8d/1623931091227/indigenous-laws-in-the-context-of-conservation-mar2021-final-web.pdf> [<https://perma.cc/S9T7-XCAL>].

<sup>227</sup> West Coast Environmental Law, "IPCAs", online: <https://www.wcel.org/ipcas> [<https://perma.cc/4M7D-MFVT>]; Dasiqox Tribal Park, "Who We Are," online: <https://dasiqox.org/about-us/who-we-are/> [<https://perma.cc/4WKW-U22C>].

<sup>228</sup> West Coast Environmental Law, "Literature Review & Analysis of Shared Indigenous and Crown Governance in Marine Protected Areas" (November 2019), 22, online: <https://www.wcel.org/publication/literature-review-analysis-shared-indigenous-and-crown-governance-in-marine-protected> [<https://perma.cc/4FS2-UL7B>]. To note, while Doig River First Nation is looking for provincial recognition through negotiating co-governance of the park, both Dasiqox Tribal Park and Tla-o-qui-aht First Nations have not sought Crown involvement. The Tla-o-qui-aht First Nations Tribal Park was established to protect wanačis ḥihuuʔis (Meares Island) from clear-cut logging in 1984 and includes four parks covering more than 20, 000 hectares within the Tla-o-qui-aht system. The four parks include Wah-nuh-jus – Hilt-hoo-is (Meares Island); Ha'uukmin (Kennedy Lake Watershed); Tranquil Tribal Park; and Esowista Tribal Park; Wilderness Committee, "Tla-o-qui-aht Tribal Parks" (2013), online: [https://www.wildernesscommittee.org/sites/all/files/publications/2013\\_tla-o-qui-aht\\_Paper-Web-2.pdf](https://www.wildernesscommittee.org/sites/all/files/publications/2013_tla-o-qui-aht_Paper-Web-2.pdf) [<https://perma.cc/N694-SLHB>]; David Suzuki Foundation, "Tribal Parks and Indigenous Protected and Conserved Areas Lessons Learned From B.C. Examples" (August 2018), online: <https://david Suzuki.org/wp-content/uploads/2018/08/SUMMARY-tribal-parks-indigenous-protected-conserved-areas-lessons-b-c-examples.pdf> [<https://perma.cc/4MRZ-4DPC>].

Nations have employed a variety of tools to protect these tribal parks, including negotiations with proponents, direct action, the courts, and the potential of Aboriginal rights and title litigation.<sup>229</sup> For example, Doig River First Nation has worked with companies operating on the park on logging deferrals.<sup>230</sup>

## IPCA's Established with Crown Recognition

A number of Indigenous Protected and Conserved Areas have received recognition by the Crown or were created in partnership with the provincial, territorial and/or federal governments. The federal government is increasingly open to collaborating with Nations to establish IPCA's.

The federal government has committed to conserving 30% of Canada's land and 30% of Canada's oceans by 2030,<sup>231</sup> and has expressed significant support for Nations wanting to establish IPCA's on their lands. It is becoming widely accepted that traditional knowledge is a vital aspect of land protection, and that investing in IPCA's is a key part of achieving both climate goals and reconciliation.

The Federal government has allocated significant funds for projects that will move Canada towards conservation goals.<sup>232</sup> Since the targets were set, the federal government has committed to provide funding for 62 protected area projects in Canada -- of which over half involve establishing an Indigenous Protected and Conserved Area.<sup>233</sup>

The federal government has provided funding for a number of IPCA's in British Columbia:

- The Qat'muk IPCA is developing a protected area in the central Purcell Mountains, led by the Ktunaxa Nation in a partnership with the Government of Canada, Nature Conservancy of Canada and other organizations.<sup>234</sup> British Columbia has also shown considerable support for this IPCA,<sup>235</sup> and agreed to prevent any new applications for leases or licenses in the area

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<sup>229</sup> West Coast Environmental Law, "Literature Review & Analysis of Shared Indigenous and Crown Governance in Marine Protected Areas" (November 2019), 22 at 53 online: <<https://www.wcel.org/publication/literature-review-analysis-shared-indigenous-and-crown-governance-in-marine-protected>> [<https://perma.cc/4FS2-UL7B>].

<sup>230</sup> David Suzuki Foundation, "Tribal Parks and Indigenous Protected and Conserved Areas Lessons Learned From B.C. Examples" (August 2018), online: <<https://david Suzuki.org/wp-content/uploads/2018/08/SUMMARY-tribal-parks-indigenous-protected-conserved-areas-lessons-b-c-examples.pdf>> [<https://perma.cc/4MRZ-4DPC>].

<sup>231</sup> This "30/30 by 2030" goal mirrors the goal of 25% of land and 25% of ocean protected by 2025. Both goals are set out in Environment and Climate Change Canada (2022) *Canadian Environmental Sustainability Indicators: Canada's conserved areas*, at 6, Consulted on September 16, 2022, online (pdf):

<<https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/canada-conserved-areas/2022/conserved-areas.pdf>> [<https://perma.cc/KP9D-6CHN>].

<sup>232</sup> Government of Canada, Environment and Climate Change Canada, "Canada Target 1 Challenge", online: <<https://www.canada.ca/en/environment-climate-change/services/nature-legacy/canada-target-one-challenge.html#events>> [<https://perma.cc/L7DC-WTKW>].

<sup>233</sup> Indigenous Circle of Experts, "We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation" (March 2018), online (pdf): <[https://publications.gc.ca/collections/collection\\_2018/pc/R62-548-2018-eng.pdf](https://publications.gc.ca/collections/collection_2018/pc/R62-548-2018-eng.pdf)> [<https://perma.cc/Q2A4-Q8RP>].

<sup>234</sup> Government of Canada, Environment and Climate Change Canada, "BC's Central Purcell Mountains part of Canada's largest investment in nature in Canadian history" (18 January 2020), online: <<https://www.canada.ca/en/environment-climate-change/news/2020/01/bcs-central-purcell-mountains-part-of-canadas-largest-investment-in-nature-in-canadian-history.html>> [<https://perma.cc/3BUS-9QED>].

<sup>235</sup> Government of Canada, Environment and Climate Change Canada, "BC's Central Purcell Mountains part of Canada's largest investment in nature in Canadian history" (18 January 2020), online: <<https://www.canada.ca/en/environment-climate->

encompassed by the protected area.<sup>236</sup> The IPCA covers a region that includes an area of extremely high cultural significance to the Ktunaxa people -- the spiritual home of the grizzly bear. Since the 1990s, the area had been under threat from a proposed ski resort development, which the Nation fought all the way up to the Supreme Court of Canada.<sup>237</sup> The IPCA will now protect the Jumbo Valley and 700 square kilometres around the area.<sup>238</sup> See the discussion above, under “Nations Purchasing Land,”

- The federal government has also provided the Tahltan Nation with funding to establish an IPCA through the Tahltan Nation Land Use Planning Process.
- Preliminary work to establish a federally funded IPCA is currently being done with the Taku River Tlingit First Nation<sup>239</sup> and the Kaska Nation.<sup>240</sup>
- In the Northwest Territories, the Thaidëné Nene IPCA in Dënesųłiné Yati was funded by private donors and the federal government. Different parts of the protected territory have been designated as territorial protected areas, national park reserves, and wildlife conservation areas.<sup>241</sup>

Increasingly, Nations are simply asserting their authority to simply declare IPCAs and working collaboratively with others to establish IPCAs. For example:

- In November 2021, the Mamalilikulla First Nation declared the establishment of the Gwaxdlala/Nalaxdlala (Lull Bay/Hoeya Sound) Indigenous Protected and Conserved Area on the Central Coast, approximately 350 km north of Vancouver. The Nation asserted its intention to take a primary role in the planning, use, management and restoration of the IPCA’s land and water. “This declaration has been acknowledged by federal and provincial officials, but it remains to be seen whether and to what extent those governments might relinquish authority. The province has established a working group to discuss management plans with the Nation.” The Nation has already established its own management plan for the area’s lands and waters.<sup>242</sup>

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[change/news/2020/01/bcs-central-purcell-mountains-part-of-canadas-largest-investment-in-nature-in-canadian-history.html](https://www.bccanada.ca/2020/01/bcs-central-purcell-mountains-part-of-canadas-largest-investment-in-nature-in-canadian-history.html)> [<https://perma.cc/3BUS-9QED>]. (Michelle Mungall, BC Minister of Energy, Mines and Petroleum Resources: “working towards an Indigenous Protected and Conserved Area is reconciliation in action and it is the right thing to do.”)

<sup>236</sup> Nature Conservancy Canada, “An Indigenous-led conservation effort succeeds in southeastern BC”, online: <<https://www.natureconservancy.ca/en/where-we-work/british-columbia/stories/jumbo-valley-qatmuk.html>> [<https://perma.cc/WA6S-U5KF>].

<sup>237</sup> Devon Page, “How the Qat’muk Indigenous Protected and Conserved Area will protect Jumbo Valley for good” *EcoJustice* (22 January 2020), online: <<https://ecojustice.ca/how-the-qatmuk-indigenous-protected-and-conserved-area-will-protect-jumbo-valley-for-good/>> [<https://perma.cc/FYK2-JZDV>].

<sup>238</sup> Devon Page, “How the Qat’muk Indigenous Protected and Conserved Area will protect Jumbo Valley for good” *EcoJustice* (22 January 2020), online: <<https://ecojustice.ca/how-the-qatmuk-indigenous-protected-and-conserved-area-will-protect-jumbo-valley-for-good/>> [<https://perma.cc/FYK2-JZDV>].

<sup>239</sup> Known as the Tlatsini “The Places That Make Us Strong” Indigenous Protected and Conserved Area.

<sup>240</sup> Government of Canada, Environment and Climate Change Canada, “Canada Target 1 Challenge” online: <<https://www.canada.ca/en/environment-climate-change/services/nature-legacy/canada-target-one-challenge.html#events>> [<https://perma.cc/L7DC-WTKW>].

<sup>241</sup> Thaidëné Nene, “Thaidëné Nene About,” online: <<http://www.landoftheancestors.ca/about.html>> [<https://perma.cc/K9EE-DFVD>].

<sup>242</sup> Erica Gies, “First Nation reclaims territory by declaring Indigenous protected area in Canada,” online: <<https://news.mongabay.com/2022/06/first-nation-reclaims-territory-by-declaring-indigenous-protected-area-in-canada/>> [<https://perma.cc/7EW3-HQRJ>].



- In August 2021, Gitanyow hereditary chiefs gathered at the Lax An Zok fish camp on the banks of the Meziadin River in northwest BC to sign a unilateral declaration of the Wilp Wii Litsxw Meziadin Indigenous Protected Area. The declaration provided for the immediate protection of 54,000 hectares of land and water, including large portions of the Kitwanga and Nass River watersheds and significant sections of the upper Kispiox River, a tributary of the Skeena River. At the time of the declaration, the Gitanyow chiefs released a draft management plan for the new protected area, outlining a vision for the area and detailing permitted and prohibited activities. Underpinning every aspect is a simple concept: *gwelx ye’erst*, which is the “right and responsibility to pass on the territory in a sustainable manner from one generation to the next.”<sup>243</sup>
- Recently, the SC’IA/NEW First Nation, Pearson College UWC, the District of Metchosin and the Habitat Acquisition Trust announced an agreement stating the intent to create an IPCA on a 136-acre of land known as the Mary Hill lands.<sup>244</sup> It is expected that this parcel of land will be transferred from the Department of National Defence (who currently owns the land) to the SC’IA/NEW First Nation in the context of the Te’mexw Treaty Association treaty negotiations.<sup>245</sup> In addition, Pearson College has committed to donate 14 acres of its land to the IPCA.<sup>246</sup>

For more detailed background on IPCAs and their potential to protect environmental and heritage values, see the reports in our footnotes, including:

- Indigenous Circle of Experts, “We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation” online (pdf): <[https://publications.gc.ca/collections/collection\\_2018/pc/R62-548-2018-eng.pdf](https://publications.gc.ca/collections/collection_2018/pc/R62-548-2018-eng.pdf)> [<https://perma.cc/Q2A4-Q8RP>].
- West Coast Environmental Law, *nʔaysnúlaʔxʷ* (Ashnola) Indigenous Protected and Conserved Area: Legal Backgrounder, online: <<https://www.wcel.org/publication/naysnulaxw-ashnola-indigenous-protected-and-conserved-area-legal-backgrounder>> [<https://perma.cc/GC8D-QM2N>].
- *Good for the Land, Good for the People, Good for the Economy: A Call to Action to Recognize, Support and Implement Indigenous Protected and Conserved Areas and Indigenous Guardians in British Columbia*, online: <<https://www.wcel.org/publication/good-land-good-people-good-economy-call-action-recognize-support-and-implement>> [<https://perma.cc/FPT4-2TDR>].

The Government of Canada has recognized that IPCAs meet their definition of “protected areas” – and declared that “Protected areas include national/provincial/territorial parks, *Indigenous protected areas*,

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<sup>243</sup> Matt Simmons, “Done waiting on B.C., Gitanyow declare new protected area: ‘this is all our land’”, *The Narwhal* (26 September 2021), online: <<https://thenarwhal.ca/gitanyow-ipca-bc-government/>> [<https://perma.cc/AVD4-RPWU>].

<sup>244</sup> Shalu Mehta, “Historic land agreement ‘will bring our people home,’ says SC’IA/NEW Chief”, *Indigenews* (23 March 2022), online: <<https://indigenews.com/cowichan-valley/historic-land-agreement-reached-in-scia%E2%81%84new-first-nation>> [<https://perma.cc/93GP-LR3W>].

<sup>245</sup> Shalu Mehta, “Historic land agreement ‘will bring our people home,’ says SC’IA/NEW Chief”, *Indigenews* (23 March 2022), online: <<https://indigenews.com/cowichan-valley/historic-land-agreement-reached-in-scia%E2%81%84new-first-nation>> [<https://perma.cc/93GP-LR3W>].

<sup>246</sup> Shalu Mehta, “Historic land agreement ‘will bring our people home,’ says SC’IA/NEW Chief”, *Indigenews* (23 March 2022), online: <<https://indigenews.com/cowichan-valley/historic-land-agreement-reached-in-scia%E2%81%84new-first-nation>> [<https://perma.cc/93GP-LR3W>].

national wildlife areas migratory bird sanctuaries and marine protected areas.”<sup>247</sup> Canada has further recognized that IPCAs meet the International Union for Conservation of Nature’s definition of a protected area: “a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.”<sup>248</sup> Canada’s acknowledgement that IPCAs meet the definition of protected areas opens up space outside of the colonial legal framework for Indigenous peoples to protect their land – while creating incentive for the Canadian state to formally acknowledge those IPCAs in order to reach Canada’s 30/30 by 2030 goal.<sup>249</sup>

## MEMORANDA OF UNDERSTANDING

**Nations looking to enhance cultural heritage conservation in their territories may want to examine the MOUs, land claims agreements, treaties and Strategic Engagement Agreements that other Nations have negotiated. Below are some provisions that may be of interest.**

### HTG MOU

The Hul’qumi’num First Nations, Hul’qumi’num Treaty Group, and the Government of BC signed an MOU in 2007 to protect heritage sites on Hul’qumi’num territory.<sup>250</sup> The MOU commits the parties to work together on processes already outlined in the *HCA*, specifically:

- “Greater public education among general public, private property owners (2.0)...”;
- the creation of an archeological potential model, in order to identifying areas of the landscape with the potential to contain archaeological sites protected under the *HCA* (3.0);

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<sup>247</sup> Environment and Climate Change Canada (2022) *Canadian Environmental Sustainability Indicators: Canada's conserved areas*, at 5, Consulted on September 16, 2022, online (pdf):

<<https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/canada-conserved-areas/2022/conserved-areas.pdf>> [<https://perma.cc/KP9D-6CHN>].

<sup>248</sup> See Indigenous Circle of Experts, “We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation” (March 2018) at 104 online (pdf): <[https://publications.gc.ca/collections/collection\\_2018/pc/R62-548-2018-eng.pdf](https://publications.gc.ca/collections/collection_2018/pc/R62-548-2018-eng.pdf)> [<https://perma.cc/Q2A4-Q8RP>]; See also Environment and Climate Change Canada (2022) *Canadian Environmental Sustainability Indicators: Canada's conserved areas*, at 5, Consulted on September 16, 2022, online (pdf):

<<https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/canada-conserved-areas/2022/conserved-areas.pdf>> [<https://perma.cc/KP9D-6CHN>].

<sup>249</sup> The Federal government has committed to conserving 25% of Canada’s land and 25% of Canada’s oceans by 2025, and 30% of each by 2030, see Environment and Climate Change Canada (2022) *Canadian Environmental Sustainability Indicators: Canada's conserved areas*, at 6, Consulted on September 16, 2022, online (pdf):

<<https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/canada-conserved-areas/2022/conserved-areas.pdf>> [<https://perma.cc/KP9D-6CHN>].

<sup>250</sup> Hul’qumi’num Treaty Group and the Government of British Columbia, “Memorandum of Understanding: First Nation Heritage Site Conservation in Hul’qumi’num Tumuhw” (4 June 2007), online (pdf):

<[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hulquminum\\_treaty\\_group\\_mou.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hulquminum_treaty_group_mou.pdf)> [<https://perma.cc/LD92-ZMDB>].

- encouraging local governments and other provincial ministries to use the Remote Access to Archeological Data application to identify potential conflicts between development applications and recorded and potential sites (4.0);
- notifying in writing all other parties to the agreement, upon receipt of information that a “recorded or unrecorded First Nation archaeological heritage site, ancient human remains or heritage object in Hul’qumi’num tumuhw has been altered without a permit or outside the scope of the issued permit” (5.0);
- if sites have been altered, the Archaeology Branch will “ensure that the property owner or developer is aware of the provisions of the Act and the heritage resource measures that must be completed prior to any further land altering activity” and “consider the views of the Hul’qumi’num Treaty Group and Hul’qumi’num member First Nations on the significance of any non-compliance with the legislation and the different enforcement options within the Act” (5.0)
- The Archaeology Branch will have to communicate the outcome of any process involving the alteration of a site with HTG and member First Nations (5.0);
- HTG and member First Nations will be allowed to comment on permits, together or separately and in making a decision, the ARCH Branch will address the views of the HTG and members (6.0); and
- HTG and member First Nations will be able to comment on the final reports (7.0).<sup>251</sup>

## Treaty 8 MOU

Doig River First Nation, Prophet River First Nation and West Moberly First Nations (“Treaty 8 First Nations”) entered into a MOU with the Government of BC in May 2010 on heritage conservation.<sup>252</sup> The MOU is similar to that of the HTG MOU, and commits to:

- “Greater public education among general public and private property owners (3.0);
- identifying areas of MOU Zones that contain archeological sites and share information on known archeological sites, applications for site alteration permits and statistics on applications and denials of permits (4.0);
- encouraging local governments and other provincial ministries to use the Remote Access to Archeological Data application to identify potential conflicts between development applications and recorded and potential sites (5.0);
- notification by all parties and to all parties of any site (recorded or unrecorded) where ancient human remains, or heritage objects have been altered without a permit or outside the scope of the issued permit within the MOU Zones (6.0);

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<sup>251</sup> Hul’qumi’num Treaty Group and the Government of British Columbia, “Memorandum of Understanding: First Nation Heritage Site Conservation in Hul’qumi’num Tumuhw” (4 June 2007), online (pdf):

<[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hulquminum\\_treaty\\_group\\_mou.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hulquminum_treaty_group_mou.pdf)> [<https://perma.cc/LD92-ZMDB>].

<sup>252</sup> Government of British Columbia, *Heritage Conservation Memorandum of Understanding: Between British Columbia and the Treaty 8 First Nations*, (20 May 2010), online (pdf): *Government of British Columbia*

<[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/heritage\\_conservation\\_mou\\_treaty\\_8\\_first\\_nations.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/heritage_conservation_mou_treaty_8_first_nations.pdf)> [<https://perma.cc/QM4J-62PC>].

- Treaty 8 First Nations will be allowed to comment on permits, together or separately and in making a decision, the ARCH Branch will address the views of the Treaty 8 First Nations (7.0); and
- Treaty 8 First Nations will be able to comment on the final reports (7.0).<sup>253</sup>

## MODERN TREATY AND LAND CLAIMS AGREEMENTS

Several modern treaties and/or land claims agreements include provisions related to the protection and preservation of cultural heritage resources on lands specified in the agreement. This section outlines some selected relevant provisions but does not go into detail on their implementation and effectiveness. Further research on these provisions -- and on implementation and effectiveness -- is needed:

### Maa-nulth First Nations Final Agreement

Section 21.2.1 of the Maa-nulth First Nations Final Agreement recognizes that each First Nation may make laws applicable on Maa-nulth First Nations lands according to:

- “the conservation, protection and management of the Heritage Sites of the applicable Maa-nulth First Nation;
- public access to the Heritage Sites of the applicable Maa-nulth First Nation;
- the conservation, protection and management of the Maa-nulth First Nation Artifacts of the applicable Maa-nulth First Nation;
- preservation, promotion and development of the Nuu-chah-nulth language and Nuu-chah-nulth culture; and
- the cremation or entombment of Maa-nulth First Nation Archeological Human Remains of the applicable Maa-nulth First Nation that:
  - are found on Maa-nulth First Nation Lands and are determined, based on the evidence available, to be of that Maa-nulth First Nation ancestry; or
  - are returned to the applicable Maa-nulth First Nation by Canada, British Columbia or any other person.”<sup>254</sup>

Chapter 21 allows for negotiation of cultural heritage management in specific areas. For example, Section 21.4.1 recognizes that the provincial government and the Toquaht Nation can negotiate an agreement regarding:

- “Measures to protect cultural, recreational and environmental values on the Stopper Islands; and
- Toquaht Nation’s participation in the management planning of the Stopper Islands.”

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<sup>253</sup> Government of British Columbia, *Heritage Conservation Memorandum of Understanding: Between British Columbia and the Treaty 8 First Nations*, (20 May 2010), online (pdf): [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/heritage\\_conservation\\_mou\\_treaty\\_8\\_first\\_nations.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/heritage_conservation_mou_treaty_8_first_nations.pdf) [https://perma.cc/QM4J-62PC].

<sup>254</sup> Maa-nulth First Nations Final Agreement, April - July 2009, online (pdf): [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/mna\\_fa\\_mnafa\\_1335899212893\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/mna_fa_mnafa_1335899212893_eng.pdf) [https://perma.cc/N6R9-NPY3].

## Nisga'a Final Agreement

At the time of the Nisga'a Final Agreement, the Agreement set out that the province would designate five sites of cultural and historic significance outside of Nisga'a Lands as provincial heritage sites.<sup>255</sup>

Sections 36 and 37 of Chapter 17, *Cultural Artifacts and Heritage*, describe how heritage sites will be managed on Nisga'a Lands. Section 36 states that the Nisga'a Government will "develop processes to manage heritage sites on Nisga'a Lands in order to preserve the heritage values associated with those sites from proposed land and resource activities that may affect those sites."<sup>256</sup>

Section 37 specifies that the province "will develop or continue processes to manage heritage sites in order to preserve the heritage values associated with those sites from proposed land and resource activities that may affect those sites."<sup>257</sup>

## Tsawwassen First Nation Final Agreement

Chapter 14 of the Tsawwassen First Nation Final Agreement applies to culture and heritage.<sup>258</sup> Clause 2 sets out the power of the First Nation to make laws regarding:

- a. "the preservation, promotion and development of the culture of Tsawwassen First Nation and the Hun'qum'i'num language on Tsawwassen Lands;
- b. the conservation and protection of and access to Heritage Resources on Tsawwassen Lands;
- c. archaeological sites on Tsawwassen Lands and archaeological material found after the Effective Date on Tsawwassen Lands;
- d. Tsawwassen Artifacts owned by Tsawwassen First Nation;
- e. Archaeological Human Remains found after the Effective Date on Tsawwassen Lands and any Archaeological Human Remains that come into the possession of Tsawwassen First Nation from Canada or British Columbia after the Effective Date; and
- f. the devolution of Cultural Property of a Tsawwassen Member who dies without a valid will."<sup>259</sup>

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<sup>255</sup> See Appendix F-1 of the Nisga'a Final Agreement, April 1999, online (pdf): <<https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF>> [<https://perma.cc/CZ2Y-3PCD>]; Crown-Indigenous Relations and Northern Affairs Canada, "Appendices- Nisga'a Final Agreement," online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100031339/1542999965806#FFFF>> [<https://perma.cc/V754-89P2>].

<sup>256</sup> Nisga'a Final Agreement, April 1999, online (pdf): <[https://www.nisgaanation.ca/sites/default/files/Nisga%27a Final Agreement - Effective Date.PDF](https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF)> [<https://perma.cc/CZ2Y-3PCD>].

<sup>257</sup> Nisga'a Nation, *Nisga'a Final Agreement*, April 1999, online (pdf): <[https://www.nisgaanation.ca/sites/default/files/Nisga%27a Final Agreement - Effective Date.PDF](https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF)> [<https://perma.cc/CZ2Y-3PCD>].

<sup>258</sup> Tsawwassen First Nation, *Tsawwassen First Nation Final Agreement*, December 2007, online: <[https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/tfnfa\\_1100100022707\\_eng.pdf](https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/tfnfa_1100100022707_eng.pdf)> [<https://perma.cc/X8VB-YV3E>].

<sup>259</sup> Tsawwassen First Nation, *Tsawwassen First Nation Final Agreement*, December 2007, at clause 2, online: <[https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1\\_Tsawwassen\\_First\\_Nation\\_Final\\_Agreement.pdf](https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf)> [<https://perma.cc/VH83-X6DZ>].

Clause 3 clarifies that laws made under clause 2 will prevail over provincial and/or federal law.<sup>260</sup> Clause 18 specifies that before the Effective Date, the First Nation and BC could negotiate an agreement on the “meaningful participation of Tsawwassen First Nation in the identification, conservation, interpretation, management and protection of heritage sites.”<sup>261</sup> Clause 9 notes that as of the Effective Date, the provincial government would not “permit any activity under the *Heritage Conservation Act*” as it pertains to the Beach Grove Parcels.<sup>262</sup>

Tsawwassen First Nation has also passed a *Culture and Heritage Act*, which enables the Executive Council to make regulations regarding: “the conservation and protection of, and access to, heritage resources on Tsawwassen Lands including archeological sites, traditional use sites, culturally modified trees, trails and routes, burial or other funeral sites, structural features and cultural landscapes.”<sup>263</sup>

## STRATEGIC ENGAGEMENT AGREEMENTS

Several Nations have entered into Strategic Engagement Agreements with the Government of BC that define the scope of engagement and consultation required on their territories for different activities and applications that impact their Aboriginal rights/ and or title and interests.<sup>264</sup> This is important in the context of consultation on cultural heritage resources. Without such an agreement in place, the current policy is that when permit applications are submitted to the government, the government will send out a referral to the First Nation, requesting comments back within thirty days.<sup>265</sup> While the province “must consider all comments from First Nations,” ultimately it claims the final say in determining whether the application impacts the Aboriginal right(s) and/or title of the First Nation(s).<sup>266</sup>

In contrast, a SEA sets out the level of consultation required for the type of expected impact the application or activity will have. For example, the Ktunaxa Nation’s 2019 SEA with the Government of BC includes a typology of various levels of engagement, depending on the impact of the proposed

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<sup>260</sup> Tsawwassen First Nation, *Tsawwassen First Nation Final Agreement*, December 2007, at clause 3, online: <[https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1\\_Tsawwassen\\_First\\_Nation\\_Final\\_Agreement.pdf](https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf)> [<https://perma.cc/VH83-X6DZ>]

<sup>261</sup> Tsawwassen First Nation, *Tsawwassen First Nation Final Agreement*, December 2007, at clause 18, online: <[https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1\\_Tsawwassen\\_First\\_Nation\\_Final\\_Agreement.pdf](https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf)> [<https://perma.cc/VH83-X6DZ>]

<sup>262</sup> Tsawwassen First Nation, *Tsawwassen First Nation Final Agreement*, December 2007, at clause 9, online: <[https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1\\_Tsawwassen\\_First\\_Nation\\_Final\\_Agreement.pdf](https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf)> [<https://perma.cc/VH83-X6DZ>]

<sup>263</sup> Tsawwassen First Nation, *Culture and Heritage Act* (3 April 2009), online (pdf): <[http://tsawwassenfirstnation.com/wp-content/uploads/2019/07/Culture\\_and\\_Heritage\\_Act\\_WEB\\_29\\_Jun\\_2017.pdf](http://tsawwassenfirstnation.com/wp-content/uploads/2019/07/Culture_and_Heritage_Act_WEB_29_Jun_2017.pdf)> [<https://perma.cc/9HML-NLCZ>].

<sup>264</sup> To note, Reconciliation Agreements can include similar provisions.

<sup>265</sup> Government of British Columbia, Archaeology Branch, “Heritage Conservation Act Permitting Process Policy Guide,” (17 April 2020), at 9, online: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca\\_permitting\\_process\\_policy\\_guide.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca_permitting_process_policy_guide.pdf)> [<https://perma.cc/D2KS-LD9A>] (This timeline can be extended on a case-by-case basis upon request by the First Nation).

<sup>266</sup> Government of British Columbia, Archaeology Branch, “Heritage Conservation Act Permitting Process Policy Guide,” (17 April 2020), at 10, online: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca\\_permitting\\_process\\_policy\\_guide.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca_permitting_process_policy_guide.pdf)> [<https://perma.cc/D2KS-LD9A>]

application on the Nation's Aboriginal rights or other known Ktunaxa Interests.<sup>267</sup> It then explains what engagement must involve, depending on the level of engagement identified. The province assigns the engagement level, and the Ktunaxa Land Sector must review and confirm it. This process is designed to ensure that the Ktunaxa Nation will play an active role in reviewing applications with a significant potential impact on the identified area.<sup>268</sup> It also provides certainty and clarity to business interests that want to operate in the territory.

Another significant benefit of a SEA is that requirements for engagement by the Government of BC can cover more than Aboriginal rights/ and or title. As per the above, the provincial government's policy on consultation under the *HCA* only extends to Aboriginal rights/and or title.<sup>269</sup> However, the Ktunaxa SEA sets out engagement requirements for Ktunaxa Aboriginal rights and/or title and Ktunaxa Interests. Section 3(1) of the Ktunaxa Agreement defines Ktunaxa Interests, which include "identifying, protecting and managing past, present and future cultural resources, areas and landscapes that contain values significant to the Ktunaxa Nation."<sup>270</sup>

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<sup>267</sup> Ktunaxa Nation and the Government of British Columbia, "Strategic Engagement Agreement Between the Province of British Columbia and the Ktunaxa Nation," (April 1, 2019), online: <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ktunaxa\\_bc\\_sea2019\\_kt\\_msf\\_signed\\_final.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ktunaxa_bc_sea2019_kt_msf_signed_final.pdf)> [<https://perma.cc/MQ8Z-GECN>].

<sup>268</sup> The area of their traditional territory identified in Appendix A of the agreement

<sup>269</sup> Government of British Columbia, Archaeology Branch, "Heritage Conservation Act Permitting Process Policy Guide," (17 April 2020), at 9, online: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca\\_permitting\\_process\\_policy\\_guide.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/hca_permitting_process_policy_guide.pdf)> [<https://perma.cc/D2KS-LD9A>].

<sup>270</sup> Ktunaxa Nation and the Government of British Columbia, "Strategic Engagement Agreement Between the Province of British Columbia and the Ktunaxa Nation," (April 1, 2019), at 6, online: <[https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ktunaxa\\_bc\\_sea2019\\_kt\\_msf\\_signed\\_final.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ktunaxa_bc_sea2019_kt_msf_signed_final.pdf)> [<https://perma.cc/MQ8Z-GECN>]; For more agreements, see: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/strategic-engagement-agreements/>> [<https://perma.cc/2AA6-5RKG>].

# APPENDIX B: EXISTING PARK RANGER POWERS AND AUTHORITIES ASSUMED BY GUARDIAN WATCHMEN UNDER THE KITASOO XAI' XAIS NATION AND NUXALK NATION AND GOVERNMENT OF BC MOU

<b>Park Ranger Powers &amp; Authorities</b>
Park Rangers are appointed by Minister by virtue of: <ul style="list-style-type: none"> <li>• Park Act Definition of Park Ranger</li> <li>• Sec. 4(2) <i>Park Act</i></li> </ul>
Park Ranger are Peace Officers by virtue of: <ul style="list-style-type: none"> <li>• Sec. 22 <i>Park, Conservancy &amp; Recreation Area Regulation</i></li> <li>• Sec. 2 <i>Canadian Criminal Code</i></li> <li>• Sec. 29 <i>Interpretation Act</i>, RSBC</li> </ul>
Park Rangers are Enforcement Officers by virtue of: <ul style="list-style-type: none"> <li>• Sec. 132 <i>Offence Act</i>, Schedule 1, Items 7A&amp;B of the <i>Violation Ticket Administration and Fines Regulation</i></li> </ul>
Park Ranger are Wildlife Officers by virtue of: <ul style="list-style-type: none"> <li>• Sec. 1(1) <i>Wildlife Act</i> Definitions ...A Park Ranger appointed under the <i>Park Act</i>.</li> </ul>
<b><i>Park Act</i></b> <b><i>Park, Conservancy &amp; Recreation Area Regulation</i></b> <b>Division 9 – Park Rangers Responsibilities</b> <b>Section 56</b>
(a) regulations under the <i>Ecological Reserve Act</i> ;
(b) sections 12 and 13 of the <i>Environmental Management Act</i> ;
(c) section 9 of the <i>Firearm Act</i> ;
(d) <i>Liquor Control and Licensing Act</i> ;
(d.1) <i>Cannabis Control and Licensing Act</i> ;
(e) <i>Motor Vehicle Act</i> and regulations under that Act;
(f) <i>Off-Road Vehicle Act</i> and regulations under that Act;
(g) sections 2, 4, 5 and 6 of the <i>Trespass Act</i> .
<b><i>Canada Shipping Act, 2001</i></b>
Part 10 of the Act (Pleasure Craft)
<i>Vessel Operation Restriction Regulations</i>



# **APPENDIX C: S'ÓLH TÉMÉXW STEWARDSHIP ALLIANCE AND BRITISH COLUMBIA'S HERITAGE CONSERVATION ACT SECTION 4 AGREEMENT**

**PROVINCE OF BRITISH COLUMBIA**  
**ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL**

Order in Council No. 408

, Approved and Ordered July 11, 2022

  
Lieutenant Governor

**Executive Council Chambers, Victoria**

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the S'ólh Téméxw Stewardship Alliance and British Columbia's Heritage Conservation Act Section 4 Agreement, substantially in the form attached, is approved.

  
Minister of Forests

  
Presiding Member of the Executive Council

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*(This part is for administrative purposes only and is not part of the Order.)*

**Authority under which Order is made:**

Act and section: Heritage Conservation Act, R.S.B.C. 1996, c. 187, s. 4

Other: \_\_\_\_\_

page 1 with attachments (25 pages total)

Q10608018



**S'ólh Téméxw Stewardship Alliance and British Columbia's  
Heritage Conservation Act Section 4 Agreement**

Dated for reference this \_\_\_\_ day of \_\_\_\_\_, 2022

**BETWEEN:**

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by the Minister of Forests (the "Province")

**AND**

Chawathil First Nation, Cheam First Nation, Kwaw'Kwaw'Apilt First Nation, Scowlitz First Nation, Seabird Island Band, Skawahlook First Nation, Skwah First Nation, Sumas First Nation, Yale First Nation

And

Aitchelitz First Nation, Shxwhá:y Village, Skowkale First Nation, Soowahlie First Nation, Squiala First Nation, Tzeachten First Nation, and Yakweakwioose First Nation, legally defined for the purposes of this Agreement as Ts'elxwéyeqw Tribe Limited Partnership (the "Ts'elxwéyeqw Tribe")

(collectively referred to as the "S'ólh Téméxw Stewardship Alliance" or "STSA").

**WHEREAS**

- A. Stó:lō Indigenous people of S'ólh Téméxw in the lower Fraser River watershed of British Columbia, have a shared language, traditions, beliefs, customary laws, and history;

- B. Stó:lō Indigenous people have Stó:lō rights, including a unique relationship with the land, the waters and the resources within the lower Fraser River watershed of British Columbia;
- C. The Province recognizes that the relationship of Stó:lō Indigenous people to the land and Stó:lō Indigenous Heritage Landscape Features is important to their culture and maintenance of their community, governance, spirituality, health and economy;
- D. In the spirit of the *United Nations Declaration on the Rights of Indigenous Peoples*, the findings of the *Truth and Reconciliation Commission*, and the Province's *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, the Province and the S'ólh Téméxw Stewardship Alliance have undertaken a shared commitment to strengthening relationships on a government-to-government basis, providing effective recognition, protection and conservation of Stó:lō Indigenous Heritage Landscape Features;
- E. The S'ólh Téméxw Stewardship Alliance is interested in developing a process for effectively and comprehensively identifying and informing the Stó:lō Indigenous governments and the Province of potential impacts to Stó:lō Indigenous Heritage Landscape Features;
- F. The S'ólh Téméxw Stewardship Alliance and the Province seek to establish effective, well organized, long-lasting collaborative relations among themselves to increase the efficiency and effectiveness of their engagement, specifically with regard to decisions potentially affecting Stó:lō Indigenous Heritage Landscape Features as can be facilitated using the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187;
- G. The S'ólh Téméxw Stewardship Alliance aims to ensure the health and well-being of their communities now and for the future generations, in accordance with their system of values, through respectful management of their Stó:lō Indigenous Heritage Landscape Features;
- H. The Parties acknowledge their shared interests in upholding and implementing the purpose of the *Heritage Conservation Act* to encourage and facilitate the protection and conservation of heritage property in British Columbia;
- I. Section 4 of the *Heritage Conservation Act* enables the Province to enter into a formal agreement with First Nations with respect to conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people who are represented by those First Nations;
- J. For the regulation of oil and gas activities and related activities, the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36, provides the Oil and Gas Commission all the

powers relating to a discretion, function or duty of the Minister referred to in sections 12.4 to 12.8 of the *Heritage Conservation Act*, and these powers are not altered by this Agreement;

- K. Consistent with *United Nations Declaration on the Rights of Indigenous Peoples*, recognition, protection and conservation of the S'ólh Téméxw Stewardship Alliance's heritage should be based on their inherent knowledge and understanding of their own heritage, as guided by their own customary laws, principles and policies;
- L. It is important as a common imperative to recognize, respect, preserve and maintain the cultural knowledge and traditional cultural expressions of the Stó:lō Indigenous people, and to promote recognition, understanding, and respectful treatment of Stó:lō Indigenous Heritage Landscape Features;
- M. The Stó:lō Indigenous people recognize a broader scope of heritage, both throughout S'ólh Téméxw and also within the Pilot Project Area, than is included in this Agreement; and,
- N. The Parties strive for consensus in decision-making.

NOW THEREFORE the Parties agree as follows:

## **1.0 INTERPRETATION**

### **1.1. Definitions.**

In this Agreement:

**"Act"** means the *Heritage Conservation Act*, R.S.B.C 1996, c. 187 (HCA), and any amendments to it;

**"Agreement"** means this agreement and the Schedules to this Agreement;

**"Confidential Information"** means any information provided by either party to the other party under this Agreement, which the party providing the information denotes in writing as "Confidential";

**"Desecration"** means, for the purposes of this Agreement only, an action that intentionally and without authorization under the Act, damages, excavates, digs in, alters, covers, moves, removes or detracts from the heritage value or sacred character of a Stó:lō Indigenous Heritage Landscape Feature;

**“Effective Date”** means the date the last Party signed this Agreement, and will be the date inserted on the first page of this Agreement, for reference;

**“Emergency”** means a present or imminent event or circumstance that:

- a) is caused by accident, fire, explosion, technical failure or the forces of nature, and
- b) requires prompt coordination of action or special regulation of persons or property, to protect the health, safety or welfare of a person or to limit damage to property;

**“Minister”** means the Minister responsible for the Act;

**“Operational Implementation Plan”** means a plan agreed upon by the Parties which sets out the practical aspects of how this Agreement is to be implemented by the Parties;

**“Parties”** means the Province and the S'ólh Téméxw Stewardship Alliance and includes each STSA First Nation;

**“People of the River Referrals Office” or “PRRO”** means an office designated by the STSA as authorized to receive and respond to referrals on behalf of the STSA in accordance with this Agreement;

**“Pilot Project Area”** means the area of land identified on the map attached as Schedule I which contains the Stó:lō Indigenous Heritage Landscape Features included in Schedule II;

**“Shared Decision-Making Process”** means the steps set out in Schedule III of the Agreement that the Parties will follow when the Province receives an application for a permit or amendment to a permit issued under s. 12.2 or s. 12.4 of the Act:

- in respect of a Stó:lō Indigenous Heritage Landscape Feature;
- involving lands within the scope of this Agreement; and,
- based on a co-developed decision-making framework supporting Shared Decision-Making;

**“Stó:lō Indigenous Heritage Landscape Feature”** means those Stó:lō heritage objects and Stó:lō heritage sites that are listed in Schedule II which include the following four types of features:

- **Belonging** – a heritage object of particular spiritual, ceremonial or other cultural value, of any age, curated or located on the land.
- **Cemetery** – a place of the dead, with or without tangible elements, including features, markers, or ancestral remains.

- **Landmark** – a locality or feature of the landscape that marks an event of cultural importance, including the transformative embodiment of an entity or object, with no necessary evidence of human modification.
- **Place** – a locality in the landscape, including land and water, directly associated with a particular spiritual, ceremonial or cultural practice, or a traditionally recognized spiritual entity, with no necessary evidence of human modification.

“**STSA First Nation**” means any of the Chawathil First Nation, Cheam First Nation, Kwaw’Kwaw’Apilt First Nation, Scowlitz First Nation, Seabird Island Band, Skawahlook First Nation, Skwah First Nation, Sumas First Nation; and Aitchelitz First Nation, Shxwhá:y Village, Skowkale First Nation, Soowahlie First Nation, Squiala First Nation, Tzeachten First Nation, Yakweakwoose First Nation and Yale First Nation.

1.2. **Interpretation.** For the purposes of this Agreement:

- a) the recitals and headings within this document are for convenience only, do not form a part of this Agreement and in no way define, limit, alter or enlarge the scope or meaning of any provision of this Agreement;
- b) a reference to a statute includes every amendment to it, every regulation made under it, every amendment made to a regulation made under it and any law enacted in substitution for, or in replacement of it;
- c) words in the singular include the plural, and words in the plural include the singular unless the context or any specific definition otherwise requires;
- d) in the calculation of time under this Agreement, all references to “days” are to calendar days, unless otherwise specified; and
- e) there will be no presumption that doubtful expressions, terms or provisions in this Agreement are to be resolved in favour of any Party.

1.3. **Schedules.** The following are schedules to this Agreement and form part of this Agreement:

<b>Schedule I</b>	<b>Pilot Project Area</b>
<b>Schedule II</b>	<b>Stó:lō Indigenous Heritage Landscape Features</b>
<b>Schedule III</b>	<b>Shared Decision-Making Process</b>

**2.0 PURPOSE AND SCOPE**

- 2.1. Purpose: In the spirit and intent of reconciliation of the relationship between the Province and Stó:lō Indigenous people, with the aim of living together in a good

way, the purposes of this Agreement, as a pilot project between the Parties, are to:

- a) identify the Stó:lō Indigenous Heritage Landscape Features that are of particular spiritual, ceremonial or other cultural value to the S'ólh Téméxw Stewardship Alliance;
- b) recognize and protect the identified features under s. 4(4)(a) and s. 12.1(2)(h) of the Act;
- c) establish policies and procedures that will apply to the issuance of or refusal of a permit or amendment to a permit under section 12.2 or 12.4 of the Act, regarding the Stó:lō Indigenous Heritage Landscape Features; and
- d) establish an effective and efficient process for carrying out due diligence and engagement, aiding in the avoidance or mitigation of actual or potential impacts to sites and objects recognized and protected under s. 4(4)(a) and s. 12.1(2)(h) of the Act.

## 2.2. Scope of Agreement

The Parties agree:

- a) decisions of the Minister to authorize an action referred to in section 12.1(2)(a) to (g) or 12.1(2)(i) of the Act are subject to consultation and accommodation in accordance with provincial policies and other engagement agreements, and in the event of overlap with a Stó:lō Indigenous Heritage Landscape Feature, the decisions will be subject to the Shared Decision-Making Process;
- b) the Shared Decision-Making Process applies only to decisions relating to Stó:lō Indigenous Heritage Landscape Features listed in Schedule II, subject to (c) and (d);
- c) the Shared Decision-Making Process does not apply to decisions of the Oil and Gas Commission pursuant to section 8 of the *Oil and Gas Activities Act*; and,
- d) the Shared Decision-Making Process does not apply to decisions relating to lands outside of the Pilot Project Area or to lands within the Pilot Project Area that are:
  - i. not owned by the Province;
  - ii. owned by the Province and leased to the federal government; or



- iii. highways (as defined by the *Transportation Act*), or the area of any other road, right-of-way, easement or licence over Crown land that is used for transportation or public utility purposes.

### **3.0 TERM**

- 3.1. This Agreement is not effective until all Parties have completed the ratification of the Agreement.
- 3.2. This Agreement will be in effect for a term of one year commencing on the Effective Date.
- 3.3. Prior to the end of the term, the Parties will put forward recommendations as to whether the term of the Agreement should be extended and seek the necessary approvals if it is to be extended.

### **4.0 SITES TO BE INCLUDED UNDER SECTION 4 OF THE HERITAGE CONSERVATION ACT**

- 4.1. The Province recognizes the spiritual, ceremonial and cultural value to the S'ólh Téméxw Stewardship Alliance of Stó:lō Indigenous Heritage Landscape Features.
- 4.2. The Parties agree the Stó:lō Indigenous Heritage Landscape Features within the Pilot Project Area and as of the Effective Date are protected pursuant to section 4(4)(a) and 12.1(2)(h) of the Act.

### **5.0 PROCEDURES FOR ISSUING PERMITS OR AMENDING A PERMIT UNDER SECTION 12.2 OR 12.4 OF THE ACT**

- 5.1. In considering an application for a permit or an amendment to a permit under s. 12.2 or 12.4 of the Act, the Parties agree to follow the Shared Decision-Making Process.
- 5.2. For matters within the scope of this Agreement the Minister will exercise their discretion to make decisions on permits in accordance with the Shared Decision-Making Process, their legal obligations to other Indigenous Peoples and the requirements of administrative law.
- 5.3. While this Agreement is in effect and subject to section 5.4., any reported real or potential Desecration of a Stó:lō Indigenous Heritage Landscape Feature will be investigated by the Parties, including STSA First Nation representatives, on a case-by-case basis to determine if Desecration has occurred or is likely to occur. Significant weight and consideration must be given to the information, perspectives, and knowledge of the Stó:lō peoples in determining if Desecration has occurred or is likely to occur.

- 5.4. The Parties agree the following actions do not constitute a Desecration of a Stó:lō Heritage Landscape Feature:
- a) the exercise of rights protected by section 35 of the *Constitution Act, 1982*;
  - b) actions taken in relation to an Emergency by any person;
  - c) actions taken in compliance with a permit issued under the Shared Decision-Making Process;
  - d) actions taken that have been otherwise identified and agreed to by the Parties; and
  - e) actions related to applications that have been filed but not yet approved prior to the effective date of the Agreement.

#### **6.0 JUDICIAL REVIEW**

- 6.1. If any Party is served with an application under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, respecting a matter subject to the Shared Decision-Making Process, the Party will immediately notify the other Parties and provide a copy of the application.
- 6.2. Each STSA First Nation has the option of being a party to a proceeding in accordance with section 15 of the *Judicial Review Procedure Act*.
- 6.3. The Parties agree that a record of the proceedings under the Shared Decision-Making Process will be filed in court if a proceeding is subject to judicial review under the *Judicial Review Procedure Act*.

#### **7.0 INFORMATION SHARING AND CONFIDENTIALITY**

- 7.1. **Information Sharing and Access.** The Parties shall make best efforts to share or provide access to information and knowledge that is relevant to this Agreement and shall, at the time of disclosure:
- a) assist the other Parties in interpreting the information, determining the current and future use of the information and the terms under which it may be shared, in whole or in part, with any other person; and
  - b) make best efforts to maintain the confidentiality of the information provided by the other Parties, including Confidential Information, and prevent its disclosure to the public.
- 7.2. **Freedom of Information.** If the Province receives a request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ("FOIPPA") or is otherwise required by law to disclose the information received from the

STSA, the Province will provide the STSA with notice of the request for disclosure and will provide the STSA with an opportunity to meet and discuss the request. Further to section 18.1 of FOIPPA, the Province must not disclose information to a third party if the disclosure could reasonably be expected to harm the rights of the STSA to maintain, control, protect or develop any of the following:

- a) cultural heritage;
- b) traditional knowledge;
- c) traditional cultural expressions;
- d) manifestations of sciences, technologies or cultures.

7.3. **Additional Conditions.** The Parties acknowledge that:

- a) section 7.1 does not apply to information that is already in the public domain or in the Remote Access to Archaeological Data (RAAD) database; and
- b) the disclosure of Confidential Information may be restricted under provincial law or subject to additional conditions on disclosure.

7.4. **Mechanisms for Promoting Effective Due Diligence, Recognition and Protection.** The Parties agree to the following responsibilities:

- a) as soon as reasonably practicable after the Effective Date, the Province will enter a digital spatial representation of the Stó:lō Heritage Landscape Features to the Province's Remote Access to Archaeological Data database as needed for providing protection;
- b) the S'ólh Téméxw Stewardship Alliance will be responsible for maintaining all digital site-specific or object-specific data regarding the Stó:lō Heritage Landscape Features within their own data systems; and
- c) the S'ólh Téméxw Stewardship Alliance and the Province will work collaboratively to establish and maintain effective due diligence processes for the sharing of information, which may include access to information or data systems of the Parties, to meet the purpose of this Agreement.

## 8.0 PILOT IMPLEMENTATION AND MONITORING

8.1. **Implementation Plan.** Prior to the Effective Date, the Parties will make every reasonable effort to finalize an Operational Implementation Plan for this Agreement.

8.2. **Evaluation.** Prior to the Effective Date, the Parties will make every reasonable effort to agree upon an evaluation process for this Agreement. The Parties aim to identify and make continuous improvements to the Agreement, as may be

possible, during implementation. As a result of this evaluation, the Parties may develop recommendations to inform any possible proposals for amendment to the Agreement.

#### **9.0 AMENDMENTS TO BE IN WRITING**

- 9.1. No modification of this Agreement is effective unless it is in writing, has the necessary approvals, and is duly ratified.

#### **10.0 DISPUTE RESOLUTION**

- 10.1. **Dispute Resolution.** The Parties recognize that the success of this Agreement will depend on their ability and willingness to recognize, explore, and resolve differences which may arise between them, and that they will endeavour to resolve such differences in a manner that fosters an improved, ongoing and respectful government-to-government relationship.

#### **11.0 RATIFICATION OF AGREEMENT**

- 11.1. Ratification of this Agreement by the S'ólh Téméxw Stewardship Alliance requires:
- a) each STSA First Nation to:
    - i. pass a band council resolution approving this Agreement,
    - ii. authorize a representative to sign this Agreement, and
    - iii. authorize the People of the River Referrals Office to act on their behalf for the purposes of this Agreement; and
  - b) this Agreement to be signed by the representative of each STSA First Nation.
- 11.2. **Ratification by Province.** The ratification of this Agreement by the Province requires:
- a) This Agreement be signed by the Minister responsible for the Act;
  - b) An Order in Council approving this Agreement under section 4 of the Act to come into force, and
  - c) This Agreement to be published in the gazette.

#### **12.0 REPRESENTATIONS AND WARRANTIES**

- 12.1. **STSA First Nation Representations.** The STSA First Nations represent and warrant to the Province, with the intent and understanding that the representations and warranties will be relied on by the Province in entering into this Agreement, that

- a) each STSA First Nation is a “band” within the meaning of the *Indian Act* and has the legal power, capacity, and authority to enter into this Agreement on its own behalf and on behalf of its members;
- b) each STSA First Nation has taken all the necessary actions and has obtained all necessary approvals to enter into this Agreement for and on behalf of its members, including authorizing the Ts’elxwéyeqw Tribe to provide its approval of the Agreement on behalf of each of its member Bands;
- c) the People of the River Referrals Office is an administrative office and its staff are authorized to act on behalf of the STSA First Nations and on behalf of its members as provided for in this Agreement;
- d) any representation to the Province by the staff of the People of the River Referrals Office, that it is authorized to act on behalf of a STSA First Nation in respect of a proposed activity, is binding upon the STSA First Nation and its members to the same extent as if the STSA First Nation had made the representation itself; and
- e) this Agreement has been legally and properly executed by or on its behalf and is legally binding and enforceable in accordance with its terms.

12.2. **Province’s Representations.** The Province represents and warrants to the S’ólh Téméxw Stewardship Alliance, with the intent and understanding that the representation will be relied on by S’ólh Téméxw Stewardship Alliance in entering into this Agreement, that it has the authority to enter into this Agreement, and that this Agreement is a valid and binding obligation of the Province on the Effective Date.

### **13.0 TERMINATION.**

13.1. This Agreement may be terminated in writing:

- a) By STSA or the Province on ninety (90) days’ notice to the other or on a date mutually agreed upon by STSA and the Province; or
- b) By STSA or the Province on thirty (30) days’ notice to the other or on a date mutually agreed upon by STSA and the Province if either is in breach of any term or condition of this Agreement.

### **14.0 RESOLUTION OF TERMINATION**

14.1. In recognition of the enduring value of a government-to-government relationship, STSA and the Province will:

- a) on notice of termination, provide each other with the reasons for termination; and
  - b) within the period prior to the termination of this Agreement taking effect, attempt Dispute Resolution as described in section 9.1 of this Agreement to resolve the basis for termination.
- 14.2. If STSA and the Province resolve the basis for termination prior to the termination of this Agreement taking effect, they shall confirm the resolution in writing and the termination shall not take effect.
- 14.3. A STSA First Nation may withdraw from this Agreement by providing the other Parties thirty (30) days' written notice, inclusive of reasons, of its intention to withdraw.
- 14.4. The withdrawal by a STSA First Nation does not affect a decision made under Schedule III prior to the effective date of its withdrawal.
- 14.5. The withdrawal by one or more STSA First Nations does not terminate the Agreement and the Agreement will remain in force as between the Province and the remaining STSA First Nations. For greater certainty, if one of the bands that is part of the Ts'elxwéyeqw Tribe withdraws from the Agreement, the Ts'elxwéyeqw Tribe will continue as a Party and the withdrawing band will no longer be a Party to the Agreement despite still being a member of the Ts'elxwéyeqw Tribe.
- 14.6. The Parties will attempt Dispute Resolution to resolve the basis for withdrawal and if the Parties resolve the basis for withdrawal prior to the withdrawal taking effect, they will confirm this in writing and the withdrawal will not take effect.

**15.0 TERMINATION AND DATA MANAGEMENT**

- 15.1. Within thirty (30) days of the termination of this Agreement, the Province will remove any information about any Stó:lō Heritage Landscape Features, including all Stó:lō Heritage Sites and Stó:lō Heritage Objects in Schedule II, from the Provincial Heritage Register as established under s. 3 of the Act, unless the information is otherwise required to be registered pursuant to section 3(1) of the Act.

**16.0 INDEMNITY**

- 16.1. Each STSA First Nation will indemnify and save harmless the Province and its employees and agents from any losses, claims, damages, actions, causes of action, costs and expenses that the Province or any of its employees or agents may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, which are based upon, arise out of or occur, directly or indirectly, by reason of any breach by the STSA First Nation of this Agreement or its agents, employees, officers, directors, or subcontractors.

16.2. The Province will indemnify and save harmless each STSA First Nation and their employees and agents from any losses, claims, damages, actions, causes of action, costs and expenses that the STSA First Nation or any of their employees or agents may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, which are based upon, arise out of or occur, directly or indirectly, by reason of any breach of this Agreement by the Province or by any of its agents or employees.

#### **17.0 NOTICE AND DELIVERY**

17.1. **Notices.** For any notice contemplated under this Agreement to be effective, it must be in writing, and will be deemed validly given to and received by the other Parties:

- a) if served personally or if delivered by mail, on the date of personal service or mail delivery at the addressee's address set out below, or
- b) if by e-mail, upon receipt, to the addressee's email set out below, or
- c) if by facsimile copier, upon receipt, to the addressee's facsimile number set out below.

If to the Province:

Honourable Katrine Conroy  
Minister of Forests  
PO Box 9049 Stn Prov Govt  
Victoria, BC V8W 9E2  
Fax: 250 387-1040  
Email: FLNR.Minister@gov.bc.ca

If to the STSA First Nations:

Dr. David Schaepe  
General Manager / Chair, S'ólh Téméxw Stewardship Alliance  
Building 10 - 7201 Vedder Road  
Chilliwack, BC V2R 4G5  
Fax: 604-824-0278  
Email: dave.schaepe@stolonation.bc.ca

17.2. **Change of Address.** Any Party may give notice to the other Parties of a change of address, email or facsimile number of the Party giving such notice and after the giving of such notice, the new address, email or facsimile number given will supersede any previous address, email or facsimile number for the Party giving the notice.

#### **18.0 GENERAL**

- 18.1. **Not a Treaty.** This Agreement does not:
- a) constitute a treaty or land claims agreement within the meaning of section 25 or 35 of the *Constitution Act, 1982* (Canada); or
  - b) abrogate or derogate from any aboriginal or treaty rights.
- 18.2. **Entire Agreement.** This Agreement and any amendments to it constitute the entire Agreement between the Parties with respect to the subject matter of this Agreement.
- 18.3. **Validity of Agreement.** If any part of this Agreement is void or unenforceable at law:
- a) the invalidity of that part will not affect the validity of the remainder, which will continue in full force and effect and be construed as if this Agreement had been executed without the invalid part; and
  - b) the Parties will negotiate and attempt to reach agreement on a replacement for the part declared or held invalid with a view to achieving the intent of the Parties as expressed in this Agreement.
- 18.4. **Further Acts and Assurances.** Each of the Parties will, upon the reasonable request of the other, make, do, execute or cause to be made, done or executed all further and other lawful acts, deeds, things, devices, documents, instruments and assurances whatever for the better and absolute performance of the terms and conditions of this Agreement.
- 18.5. **No Implied Waiver.** For any waiver of:
- a) a provision of this Agreement;
  - b) the performance by a Party of an obligation under this Agreement; or
  - c) a default by a Party of an obligation under this Agreement,
- to be effective, notice of the waiver must be provided in writing and signed by the Party giving the waiver and will not be interpreted as a waiver of any other provision, obligation or subsequent default.
- 18.6. **Assignment.** The STSA First Nations and the Ts'elxwéyeqw Tribe will not assign, either directly or indirectly, this Agreement or any right of the STSA First Nations and the Ts'elxwéyeqw Tribe under this Agreement.
- 18.7. **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of British Columbia.



18.8. **Execution in Counterpart.** This Agreement may be entered into by each Party signing a separate copy of this Agreement (including a photocopy or facsimile copy) and delivering it to the other Party, including by email. Each signed counterpart will constitute an original document and all those original documents together will constitute one and the same document.

18.9. **Effective Date:** The Effective Date shall be the date the last Party signed this Agreement, and will be the date inserted on the first page as dated for reference.

IN WITNESS WHEREOF, the S'ólh Téméxw Stewardship Alliance and the Province of British Columbia have duly executed this Agreement under section 4 of the Act as set out below:

**Signed on behalf of Her Majesty the Queen in Right of the Province of British Columbia** as represented by the Minister of Forests this \_\_\_ day of \_\_\_\_\_ 2022

_____ )	_____
Per Minister of Forests, Honourable	Witness
Katrine Conroy	_____
	Printed Name
<b>Signed on behalf of the Chawathil First Nation</b> this ___ day of _____ 2022 )	
)	
)	
)	
_____ )	_____
)	Witness
)	_____
Printed Name )	Printed Name

**Signed on behalf of the Cheam First Nation** this \_\_\_ day of \_\_\_\_\_ 2022 )

\_\_\_\_\_ )

Printed Name )

\_\_\_\_\_ )  
Witness

\_\_\_\_\_ )  
Printed Name

**Signed on behalf of the Kwaw'Kwaw'Apilt First Nation** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_

Printed Name

**Signed on behalf of the Scowlitz First Nation** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_

Printed Name

\_\_\_\_\_ )  
Witness

\_\_\_\_\_ )  
Printed Name

\_\_\_\_\_ )  
Witness

\_\_\_\_\_ )  
Printed Name

**Signed on behalf of the Seabird Island Band** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_

Printed Name

**Signed on behalf of the Skawahlook First Nation** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_

Printed Name

\_\_\_\_\_ )  
Witness

\_\_\_\_\_ )  
Printed Name

\_\_\_\_\_ )  
Witness

\_\_\_\_\_ )  
Printed Name

**Signed on behalf of the Skwah First Nation** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Witness  
\_\_\_\_\_  
Printed Name

**Signed on behalf of the Sumas First Nation** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Witness  
\_\_\_\_\_  
Printed Name

**Signed on behalf of the Yale First Nation** this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_  
Printed Name

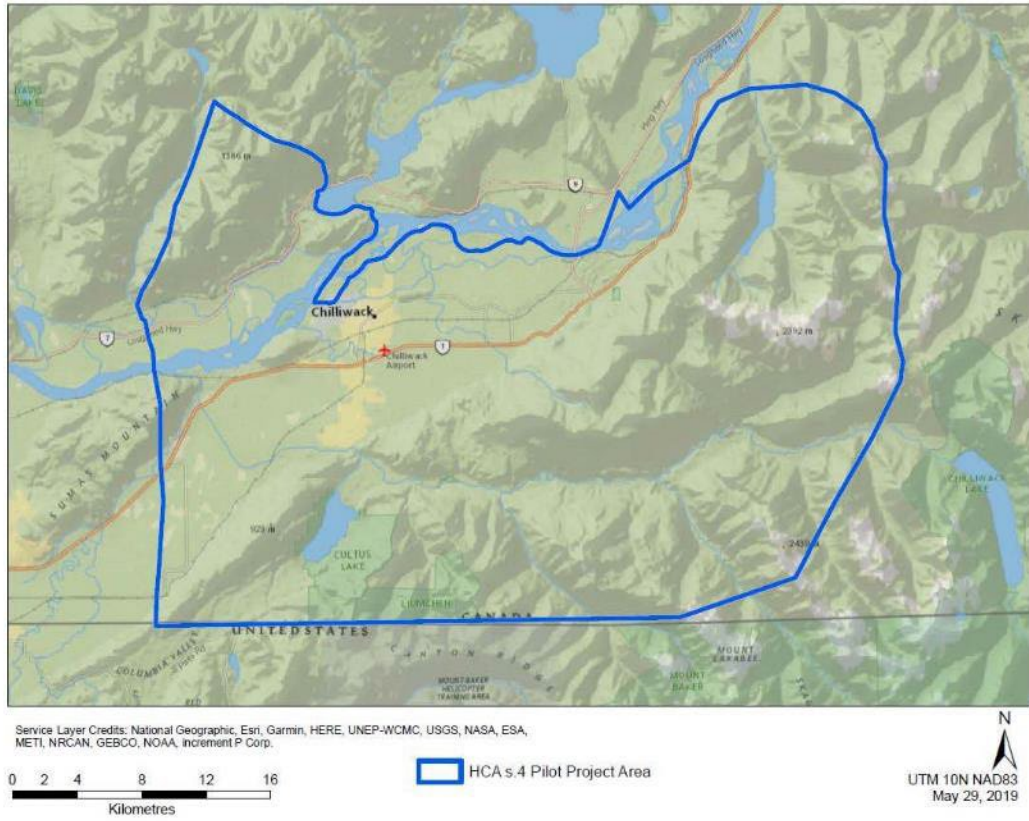
\_\_\_\_\_  
Witness  
\_\_\_\_\_  
Printed Name

Signed on behalf of the  
Aitchelitz First Nation, Shxwhá:y Village,  
Skowkale First Nation, Soowahlie First  
Nation, Squiala First Nation, Tzeachten  
First Nation, and Yakweakwioose First  
Nation, legally defined for the purposes  
of this Agreement as Ts'elxwéyeqw  
Tribe Limited Partnership  
(the "Ts'elxwéyeqw Tribe")  
this \_\_\_ day of \_\_\_\_\_ 2022

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Witness  
\_\_\_\_\_  
Printed Name

Schedule I – Pilot Project Area



**Schedule II - Stó:lō Indigenous Heritage Landscape Features**

Site No.	Site ID	Stó:lō Indigenous Landscape Feature Type	Stó:lō Site Name
1	2004i51s1	Place / Site	
2	2004i52s3	Place/ Site	
3	2012i47s10	Place/ Site	Támiyehó:y
4	2012i47s100	Landmark / Site	Oló:xwelwet /Ts'simeteló:t/Xemothiyetel
5	2012i47s17	Cemetery / Site	Támiyehó:y
6	2012i47s18	Landmark / Site	Támiyehó:y
7	2012i47s3	Landmark / Site	Lhilheqey
8	2012i47s32	Landmark / Site	Skw'ikw'ets'tel
9	2012i47s78	Landmark / Site	Sqwemá:y
10	2012i47s8	Landmark / Site	Támiyehó:y
11	2012i47s82	Landmark / Site	Oló:xwelwet /Ts'simeteló:t/Xemothiyetel
12	2012i47s83	Landmark / Site	Oló:xwelwet /Ts'simeteló:t/Xemothiyetel - name to be confirmed
13	2012i47s85	Landmark / Site	Oló:xwelwet /Ts'simeteló:t/Xemothiyetel
14	2012i47s86	Landmark / Site	Xomó:th'iya
15	2012i47s87	Landmark / Site	Séyewót
16	2012i47s88	Landmark / Site	Oyéwot
17	2012i47s9	Landmark / Site	Selisi/Selóysi
18	2012i47s99	Landmark / Site	Oló:xwelwet /Ts'simeteló:t/Xemothiyetel
19	2013i164s1	Place / Site	
20	2013i164s3	Place/ Site	
21	2013i164s4	Belonging / Object	
22	2013i48s1	Belonging / Object	
23	2013i48s2	Place / Site	
24	2013i48s3	Place / Site	
25	2013i50s1	Place / Site	
26	2013i50s11	Place / Site	
27	2013i50s12	Place / Site	
28	2013i50s13	Place / Site	
29	2013i50s16	Place / Site	
30	2013i50s17	Place / Site	
31	2013i50s2	Place / Site	
32	2013i50s20	Place / Site	
33	2013i50s26	Place / Site	
34	2013i50s27	Place / Site	
35	2013i50s28	Place / Site	

Site No.	Site ID	Stó:lō Indigenous Landscape Feature Type	Stó:lō Site Name
36	2013i50s3	Place / Site	
37	2013i50s30	Place / Site	
38	2013i50s31	Place / Site	
39	2013i50s4	Place / Site	
40	2013i50s5	Place / Site	
41	2013i50s6	Belonging / Object	
42	2013i50s7	Place / Site	
43	2013i54s3	Place / Site	
44	2013i54s4	Place / Site	
45	2012i47s165	Cemetery / Site	

**Schedule III - Shared Decision-Making Process**

STEPS	
1.0	<p>1.1 <b>Initial Referral.</b> When the Province receives an application for a permit, or an amendment to a permit, under section 12.2 or 12.4 of the Act in respect of a Stó:lō Indigenous Heritage Landscape Feature, the Province will:</p> <ul style="list-style-type: none"> <li>a) prepare a package which includes the application document, any materials for amendment, renewal or replacement approvals, and all supporting materials (the "Referral Package");</li> <li>b) submit the Referral Package to the PRRO at the following address: <ul style="list-style-type: none"> <li>i. Email: <a href="mailto:referrals@peopleoftheriver.com">referrals@peopleoftheriver.com</a>, and</li> </ul> </li> <li>c) copy the General Manager of the PRRO at the following address: <ul style="list-style-type: none"> <li>i. Email: <a href="mailto:Dave.Schaepe@stolonation.bc.ca">Dave.Schaepe@stolonation.bc.ca</a></li> </ul> </li> </ul>
2.0	<p>2.1 <b>Incomplete Referral Package.</b> If the Referral Package sent to the PRRO is incomplete, and the PRRO notifies the Province of the omission within 5 calendar days of receiving the Referral Package, the timelines set out below will not commence until all of the information specified under step 1.1(a) is received by the PRRO.</p> <p>2.2 <b>Complete Referral Package.</b> Once the PRRO receives a complete Referral Package, the PRRO will commence a 30 calendar day review period, and will publish the package to a secure web portal whereby referrals are distributed, viewed, shared and administered.</p> <p>2.3 <b>Response to Referral Package.</b> The PRRO will provide a response to the Archaeology Branch of the Province within 30 calendar days of receipt of the complete Referral Package. The response will include a statement specifying whether or not there is objection to the application, and if there is objection, the reasons for the objection.</p> <p>2.4 <b>No Objection to Application.</b> If there is no objection to the application, the PRRO will confirm, in writing, approval for permit issuance;</p> <p>2.5 <b>Objection to Application.</b></p> <ul style="list-style-type: none"> <li>a) If there is objection to the application, representatives of the Province, PRRO and the STSA will discuss, within 5 business days of the Province receiving the objection, the reasons for objection and whether there are any measures that may reduce or eliminate any</li> </ul>

	<p>anticipated damage, desecration or alteration of the Stó:lō Indigenous Heritage Landscape Feature. Significant weight and consideration must be given to the information, perspectives, and knowledge of the Stó:lō peoples in determining if Desecration has occurred or is likely to occur.</p> <p>b) Following discussions, the Province will engage with the applicant, as appropriate, within 5 business days, regarding the nature of the objection and any potential mitigative or accommodation measures proposed, and provide an opportunity for the applicant to revise and resubmit their application.</p> <p>c) Following communication between the Parties, including the sharing of a revised application or confirmation that the applicant will not revise their application, the STSA, if it still objects to the application, the STSA will provide a second response to the Province, within 5 business days, either affirming or revising its initial response.</p> <p>d) After consideration of the application package, including but not limited to all measures taken by the proponent to minimize or eliminate impacts to the potentially impacted site(s) as needed to avoid Desecration:</p> <ul style="list-style-type: none"> <li>i. if the STSA revises its response to indicate there is no objection to the application, the Parties will confirm, in writing, approval of permit issuance including the addition of reasonable and appropriate conditions, if applicable.</li> <li>ii. if the STSA determines that, in its view, desecration will not be avoided and affirms the objection to the application, the Province will advise the applicant of the objection with reasons for declining the current application, and provide a final opportunity for the applicant to revise and resubmit their application. The applicant must be advised that the application may not be granted if Desecration is anticipated to occur.</li> </ul> <p>The Province will consider the final application package, including but not limited to all measures taken by the applicant to minimize or eliminate impacts to the sites such that desecration is avoided, the nature of STSA's final comments, the addition of reasonable and appropriate permit conditions, if applicable, and make a decision with respect to the issuance or rejection of the application in accordance with the spirit and intent of section 4 of the Act.</p>
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3.0	<p>3.1 <b>Request for an Alternate Response Time – Province.</b> If the Province notifies the PRRO with a request for a shortened review period, usually 15 calendar days, the PRRO will provide one of the following responses:</p> <ul style="list-style-type: none"> <li>a) approval to the request, in which case the timelines for providing a final response will be adjusted accordingly; or</li> <li>b) rejection of the request, in which case the standard 30 calendar days timeline will remain in effect.</li> </ul>
4.0	<p>4.1 <b>Request for an Alternate Response Time – PRRO.</b> If a final response cannot be provided within the 30 calendar days, the PRRO may request an extension of time, which request the Minister will consider and not unreasonably deny.</p>
5.0	<p>5.1 <b>No final response from PRRO within agreed upon timeframe.</b> If PRRO has not provided final response to the Province on the Referral Package within the agreed upon timeframe under sections 2, 3 or 4 above, the Province may proceed to make a decision with respect to the application.</p>
6.0	<p>6.1 <b>Notice to STSA First Nations.</b> The Province will notify the PRRO of the decision regarding the application and the PRRO will notify the STSA First Nations of that decision.</p>
7.0	<p>7.1 <b>Exceptions.</b> Exceptions to the processes established in 1.0-6.0 include:</p> <ul style="list-style-type: none"> <li>7.1.1 <b>Direct Issuance of a <i>Heritage Conservation Act</i> Permit.</b> When the Province receives an application with letters of support from STSA First Nations, then the Minister may proceed to make a decision without any need of further engagement under this Agreement, subject to consultation outside of this process with other affected First Nations.</li> <li>7.1.2 <b>Specific Amendment Requests for Previously Issued <i>Heritage Conservation Act</i> permits.</b> <ul style="list-style-type: none"> <li>a) Amendment requests received by the Province to: <ul style="list-style-type: none"> <li>i. extend a previously issued <i>Heritage Conservation Act</i> permit expiry date, or</li> <li>ii. transfer a previously issued <i>Heritage Conservation Act</i> permit to someone within the same company who employed the previous permit holder,</li> </ul> </li> </ul> </li> </ul>

	<p>will be forwarded to the PRRO as a method of notification and information sharing, but there will be no further engagement following the processes laid out in Schedule III, steps 1-6.</p> <p>b) All other amendment requests for previously issued <i>Heritage Conservation Act</i> permits will be forwarded to the PRRO for review and response, following the processes laid out in Schedule III, steps 1-6.</p>
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**PROVINCE OF BRITISH COLUMBIA**  
**REGULATION OF THE CHIEF GOLD COMMISSIONER**

*Mineral Tenure Act*

I, Mark Messmer, Chief Gold Commissioner, Ministry of Energy, Mines and Low Carbon Innovation, order that the Mineral Land Reserve (No Mineral Claim Registrations) Regulation, B.C. Reg. 71/2010, is amended by adding the following site to the Table:


COLUMN 1 Site Number and Site Name		COLUMN 2 Mining Division and Land District
1006930	STSA HCA Pilot Agreement	New Westminster Mining Division New Westminster and Yale Divisions of Yale Land District

**DEPOSITED**

June 6, 2022

B.C. REG. 127/2022

Date June 6<sup>th</sup>, 2022

  
 Chief Gold Commissioner  
 Ministry of Energy, Mines and Low Carbon Innovation

(This part is for administrative purposes only and is not part of the Order.)

**Authority under which Order is made:**

Act and section: Mineral Tenure Act, R.S.B.C. 1996, c. 292, s. 22

Other: \_\_\_\_\_

