

2011

First Nations Heritage Conservation Action Plan

The First Nations Leadership Council



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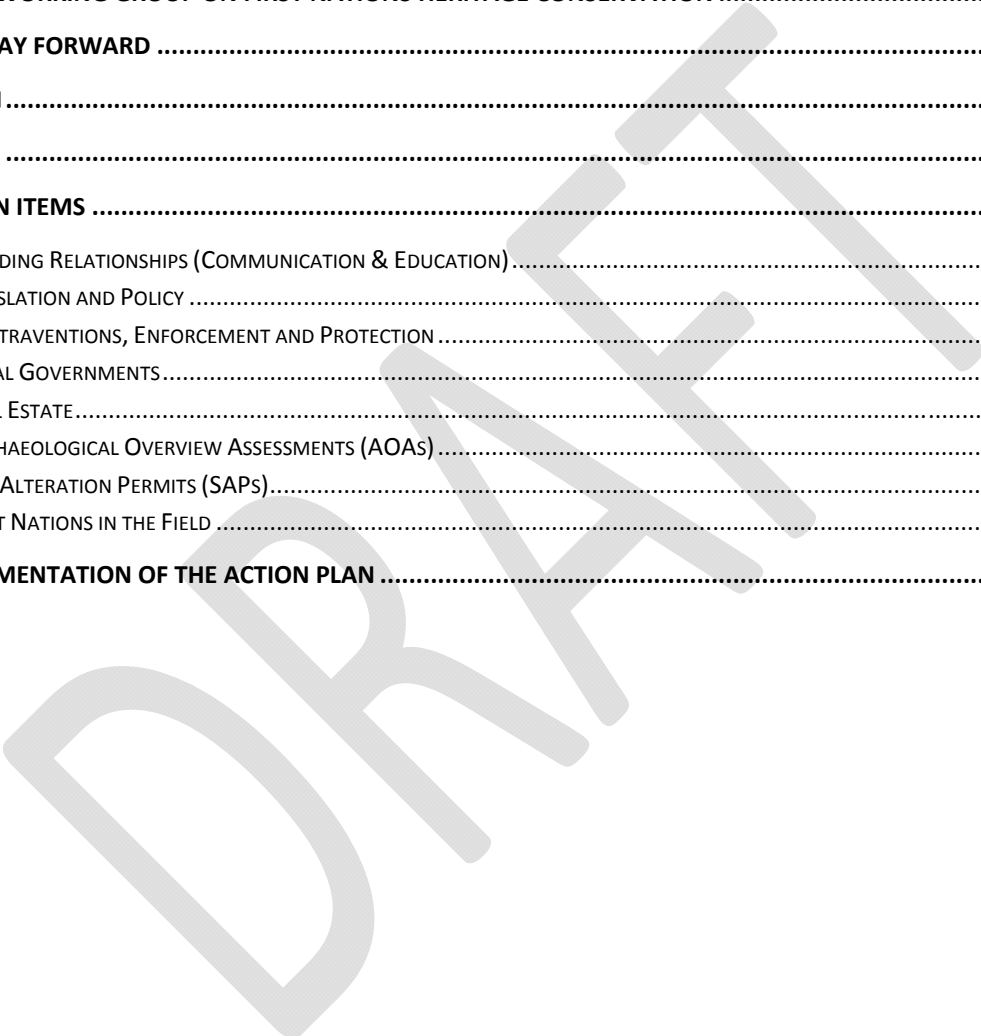
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EXECUTIVE SUMMARY

No Action Plan, or structured way forward, currently exists for BC First Nations concerning the conservation and protection of our heritage resources, ancestral remains, and sacred and spiritual sites. The current legislative management regime is premised on the provincial government as the sole steward of cultural heritage resources and is not reflective of a government-to-government relationship between First Nations and the Province of BC. The *New Relationship* document affirms “we are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities.”¹ However these commitments have not found their way into practice and operational policies within the Archaeology Branch and relevant Ministries have yet to be adopted in a manner that incorporates the spirit of the *New Relationship*.

As a result, communities have had little reassurance that their cultural heritage resources will be protected for future generations. The current legislation and policies frameworks leave little room for the incorporation of cultural laws and protocols specific to each First Nation, which results in an urgency to establish a flexible range of policies that respond to the specific concerns of each community. First Nations are frustrated by the lack of local mechanisms to address their concerns and resolve immediate operational conflicts. Interim measures must be developed to ensure that First Nations are able to manage their cultural heritage resources in the short term while longer-term strategies can be developed and implemented at the provincial level.

First Nations political organizations must be able to engage their constituents at the community level to gather information on the relevant issues and priorities which affect communities in order to ensure that the relationship between higher-level policy discussions and local matters is strong and grounded.

This Heritage Action Plan is a draft document which has been prepared to facilitate discussion and draw together feedback from Chiefs, technicians and community representatives involved in heritage conservation management. It will be circulated to all First Nations through the three provincial organizations and through email and fax communications for a review period of one (1) month. After being reviewed, it will be submitted again to the three organizations for endorsement. It does not currently constitute a finalized document, and is intended as a means for collective advocacy of these important issues.

INTRODUCTION

The BC provincial *Heritage Conservation Act* (HCA) and associated policies and management regime fail to adequately protect our culture and heritage resources. The HCA also fails to adequately provide for the protection of our sacred and spiritual sites, the sanctity of our

¹ Available online at: http://www.newrelationship.gov.bc.ca/shared/downloads/new_relationship.pdf

artifacts and the remains of our ancestors and other archaeological resources in accordance with our laws and customs. The lack of meaningful measures, legislative tools or policies to protect our heritage resources, has increased frustration within First Nations communities as they continue to be impacted by development activities.

Current heritage legislation within BC does not afford a meaningful role for First Nations in provincial heritage conservation. The HCA and associated policies and management regime do not adequately recognize aboriginal Title and Rights, and are insufficient in protecting that which is important to First Nations. The HCA assumes provincial ownership and jurisdiction over First Nations heritage and cultural sites and allows the Archaeology Branch to issue permits to alter or destroy those sites. Significant reform is needed in current legislation and policies to ensure the protection and conservation of First Nations heritage sites, cultural property and human remains. The amount of work that needs to be done to update the HCA is extensive and costly, yet human and financial resources are very limited within First Nations communities, and at the provincial government level.

LEGISLATIVE CONTEXT

Legislation to protect archaeology sites in BC dates back to 1925, with the *Historic Objects Preservation Act* (HOPA). HOPA provided minimal legal protection to easily identifiable archaeology sites such as petroglyphs and pictographs². Following HOPA, the *Archaeological and Historic Sites Protection Act* (AHSPA) was enacted in 1960. The AHSPA provided protection for archaeological sites on Crown land, and where designated, on private land, and acknowledged a level of responsibility for developers to conduct salvage work. In 1977, the AHSPA was replaced with the *Heritage Conservation Act* (HCA), which extended legislated protection of archaeology sites to both public and private land without the need for formal designation³. The HCA is meant to ensure that no archaeological sites are destroyed unless the work is conducted under permit, with established fieldwork and reporting guidelines and an assessment of site significance.

In 1993 the BC Court of Appeal rejected in a split decision the appeal by the Gitksan and Wet'suwet'en in the *Delgamuukw* case, but ruled that the provincial government did not have the constitutional authority to extinguish aboriginal Title⁴. This led to extensive negotiations between provincial and First Nation representatives, which spawned a number of initiatives including the proposed amendment to include section 4 (s. 4) in the HCA. Section 4 of the HCA provides guidance on how "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."⁵ During the second reading of Bill to support the inclusion of s. 4, the Minister

² Pokotylo & Mason, 2010-Archaeological Heritage Resource Protection in Canada

³ http://www.tti.gov.bc.ca/archaeology/legislation_agreements_policies_guidelines_bulletins/legislation.htm;
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96187_01

⁴ *Delgamuukw v. British Columbia* (1993), 30 B.C.A.C. 1, [1993] 5 C.N.L.R. 1.

⁵ See http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96187_01#section4

responsible for the HCA stated “the bill reflects our government's commitment to create a responsible, fair and appropriate framework for the conservation of heritage resources by the province, by local governments and by First Nations.”⁶ He continued, “[the bill] further enables the province to enter into formal agreements with First Nations on a government-to-government basis regarding protection and stewardship of cultural heritage sites and resources valued by First Nations.”⁷ The HCA was amended in 1996 to include s. 4 as a direct result of the *Delgamuukw/ Gisday’wa* ruling and pressure from First Nations.

Unfortunately the HCA also indicates that ownership of Crown and fee simple lands belonged to the Province, whom must be willing to share ‘stewardship responsibilities’ for lands and associated resources with First Nations, provided that issues of ownership were not challenged.⁸ Though heritage sites of cultural value can be protected through an agreement between the province and a First Nation under s. 4 of the HCA and approved by Order in Council (OIC), no such agreements have been developed and s.4 has not been properly implemented.

In 2001 the Province engaged in preliminary discussions regarding further potential amendments to the HCA. The discussions attempted to create common ground between conserving archaeological sites, protecting the rights of private property owners and allowing for development opportunities. In late 2002, new case law was incorporated into the existing Provincial Consultation Guidelines regarding the duty to engage in consultation with First Nations. These guidelines are applicable to local governments and industry and are relevant to issues of cultural heritage resource management as it pertains to development activities and potential impacts to Aboriginal interests.

The slow rate of change to heritage policy and management, to the lack of full implementation of s. 4, and the resulting impacts on heritage sites as development activities have increased over time has resulted in a dramatic increase in the loss of heritage resources to First Nations peoples. The HCA provides automatic “protection” for archaeological sites older than 1846, but does not automatically protect heritage sites and objects with cultural heritage value (defined as spiritual, ceremonial and other cultural values), which are of particular interest to First Nations. Under the HCA, sites and objects are protected on paper but can be altered or destroyed as long as a developer applies for the proper permits from the Archaeology Branch.

As a result, there has been increasing advocacy by the First Nations Leadership Council (FNLC), as directed by BC First Nations, to begin developing templates to implement s. 4 agreements. The Archaeology Branch has stated that a legal opinion from within the BC Attorney General’s office prevents them from implementing s.4. Various lawyers from outside of government find the legal opinion to be deeply flawed but the Ministry has continued to rely on it. Despite these challenges, it is hoped that recent court decisions and the prospect of provincial policy

⁶ *Hansard*, Monday, April 18, 1994, Afternoon Sitting, Volume 14, Number 7 (emphasis added). Bill 21, predecessor to the *Heritage Conservation Statutes Amendment Act, 1994*.

⁷ *Hansard*, Monday, April 18, 1994, Afternoon Sitting, Volume 14, Number 7 (emphasis added).

⁸ UBCIC, 1992

changes will open the door for First Nations to become more fully engaged in cultural heritage resource management activities.

POLITICAL CONTEXT

In March 2005, the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs signed the *Leadership Accord*. The *Accord* committed the three political organizations to share information and work together to develop common positions and strategies on issues of mutual importance. It also created the collective known as the First Nations Leadership Council (FNLC). Through the *Accord*, the three political bodies agreed to establish working groups to politically advance issues of mutual concern or priority.

In particular, the *New Relationship* which was agreed to in March 2005 between representatives of the BC Assembly of First Nations, the First Nations Summit, the Union of BC Indian Chiefs and the Provincial Government committed the development of new approaches to consultation and accommodation and a vision for working with First Nations in an open and collaborative way. The Province and First Nations leaders developed a document outlining the vision and principles of the *New Relationship*. Through this shared document, the parties agreed to a government-to-government relationship with First Nations, including:

New “processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title ‘in its full form’, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35⁹.”

On 13 September 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples¹⁰ (UNDRIP) as a standard of achievement to be pursued in the spirit of partnership and mutual respect. Specifically, UNDRIP declares that Indigenous peoples have the right not to be subjected to forced destruction of their culture (Article 8), as well as the right to maintain, protect and develop manifestations of their culture, such as archaeological and historical sites, artifacts and ceremonies (Article 11). Article 11 also indicates that “states shall provide redress through effective mechanisms, which may include restitution developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”. In addition UNDRIP declares that Indigenous peoples have the right to “maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains” (Article 12). Article 31 of UNDRIP also declares that Indigenous peoples have the right to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as their

⁹ “The New Relationship, Statement of Vision”, p. 1 as found at:

http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

¹⁰ <http://www.un.org/esa/socdev/unpfii/en/drip.html>

intellectual property.” To this end, UNDRIP declares that Indigenous peoples have the right to both maintain access to, and have repatriation of, their ceremonial objects and human remains, through “transparent and effective mechanisms developed in conjunction with indigenous peoples concerned”¹¹. On November 10, 2010 Canada formally endorsed the UNDRIP.

On November 28 2007, the Inter-American Court of Human Rights issued its decision on Suriname, indicating that “large scale interventions that may affect indigenous and tribal peoples’ lands and natural resources require their free, prior and informed consent in accordance with their customs and traditions”¹². Free, Prior and Informed Consent (FPIC) is a series of principles established to ensure that development activities which may affect the land or resources of indigenous peoples will only proceed with their consent, which has been given in a fully informed manner, free of any coercion or manipulation, in the earliest planning stages of a proposed development activity. It is the responsibility of government to ensure that development projects have given proper consideration to the principles of free, prior and informed consent before projects move forward to the approval stage.

JOINT WORKING GROUP ON FIRST NATIONS HERITAGE CONSERVATION

The BC Assembly of First Nations, First Nations Summit and Union of BC Indian Chiefs each passed resolutions mandating BC First Nations representatives to work together with the Province via the Joint Working Group on First Nations Heritage Conservation (JWGFNHC). In 2007, the JWGFNHC was formed to “explore options and provide recommendations to improve the protection, management and conservation of First Nations cultural and heritage sites, in the spirit of the *New Relationship* and the *Transformative Change Accord*”. During the JWGFNHC process, the Provincial Ministry and Archaeology Branch representatives have indicated a willingness to work towards implementing some aspects of s. 4.

In December of 2009, the former Ministry of Tourism, Culture and the Arts became the lead Ministry on the JWGFNHC, represented primarily by the Archaeology Branch. By September of 2010, the JWGFNHC determined that a pilot project would be the most effective means of determining the essential parameters of a formal s. 4 agreement. In October of 2010, the Archaeology Branch was transferred to the Ministry of Natural Resource Operations (MNRO). Currently, the MNRO, the Ministry of Aboriginal Relations and Reconciliation (MARR), the Archaeology Branch and the FNLC are represented at the table of the JWGFNHC.

To build on this foundation, a First Nations forum on Culture and Heritage was held on February 22 & 23 2011. The purpose of this forum was to enable First Nations to inform the draft Action Plan for First Nations Heritage Conservation.

¹¹ <http://www.un.org/esa/socdev/unpfii/en/drip.html>

¹² Saramaka People v. Suriname, Inter-American Court of Human Rights, Judgment of 28 November 2007. Ser C No. 172.

This draft Action Plan has been created with the intent to develop a consensus statement from which all First Nations can move forward with our collective strength to open up space for each First Nation to do what is right in its own territory.

THE WAY FORWARD

Cultural heritage resources¹³ have been a part of First Nations life for many generations, and ownership and management of these resources by First Nations is a necessity. The *First Nations Heritage Action Plan* will be a viable tool to engage the provincial government and other relevant parties in working directly with First Nations communities to ensure that the relationship between First Nations and their own cultural heritage resources is maintained and protected.

The implementation of this *Action Plan* has the potential to alter the current ineffective mechanisms of the HCA and associated policies, and ensure positive relationships for First Nations people, governments, industry and British Columbians in general by ensuring a future for First Nations in managing their own cultural heritage resources in British Columbia.

VISION

As Indigenous Peoples, we know who we are and where we come from. We are the stewards of our heritage resources, the remains of our ancestors, our languages, and sacred/spiritual sites. We have our own laws that have been in place for thousands of years. Our ancestors entrusted these treasures to us and it is our responsibility to protect and to pass them onto our children, grandchildren and descendants. As stewards of these treasures it is our right, and responsibility, to make decisions to ensure the protection of our heritage resources.

GOALS

- 1) Assertion of First Nation laws, Title and Rights and international human rights standards, in relation to heritage property, sites and values, including sacred and spiritual sites and ensure that Federal and Provincial governments recognize them
- 2) In the short-term, advocate for provincial and local government policies and procedures changes that recognize and incorporate First Nation laws, ownership, and heritage management regimes, that are reflective of traditional and contemporary knowledge, values and governance systems.

¹³ The term “cultural heritage resources” is used in this document to include, but is not limited to, archaeological/heritage sites and objects, cultural/heritage landscapes, sacred/spiritual sites, and sites with culture values. It encompasses sites and objects regardless of age.

- 3) Develop mechanisms to ensure enforcement of provincial and First Nations laws relating to heritage conservation and protection.
- 4) Identify mechanisms to ensure the protection of cultural heritage resources through community-driven input.
- 5) Facilitate the protection of heritage sites, including spiritual and sacred sites and their cultural values.
- 6) Ensure recognition of the ongoing relationships, and continuing practices, First Nations have with their cultural heritage resources and the need for cultural and spiritual integrity and the preservation and protection of these resources for future generations.
- 7) Facilitate cooperation and foster positive working relationships at all levels, between First Nations communities, Tribal Councils and all levels of government (First Nations, municipalities, provincial, federal) on cultural heritage related issues.
- 8) Build a strong united voice to promote positive policy changes aimed at educating and improving relationships with governments, developers, citizens and realtors.

ACTION ITEMS

The following Action Items have been prepared based on input and feedback provided by First Nations representatives in various participatory processes conducted over the past several years including the First Nations Heritage Forum held in February 2011.

Building Relationships (Communication & Education)

- Build working relationships and enter into protocols with local and provincial governments, industry (including forestry and developers) to discuss and develop positive ways to move forward to ensure the protection of cultural resources.
- Develop a communications strategy to:
 - Ensure a transparent process for ongoing communication, including obtaining input from, and reporting out to, First Nations, including organizing an annual forum to facilitate internal discussion and report out on progress.
 - Educate the non-First Nations population (school children, university students, home owners, realtors, municipalities and local governments, etc) on the value and importance of cultural heritage sites to First Nations and the consequences of contravention.
 - Inform and solicit support from all levels of government to advocate for policy and legislative changes.

- Ensure that First Nations are up-to-date on current and emerging case law and protection initiatives.
- Work with First Nations organizations to establish a digitized resource library, including: heritage MOUs and protocols; forest stewardship plans; position papers; relevant court cases and legal opinions¹⁴.
- Identify knowledge gaps and coordinate pilot projects that address cultural heritage research issues, with a focus on how First Nations have successfully dealt with issues and furthered their involvement in cultural heritage resource management.
- Encourage opportunities for partnerships with academic institutions and students interested in furthering academic studies through analysis of heritage sites through
 - Joint field schools;
 - Directed Theses;
 - Training of local First Nations youth.

Legislation and Policy

- Conduct an analysis of existing legislation and policies within the Archaeology Branch and identify short and long-term goals for revising issues of concern.
- Engage the Province in discussions relating to their legal understandings on s. 4 Agreements, the delegation of authority to First Nations and develop a process to amend and update provincial legislation to ensure the full implementation of s. 4 and its application to all heritage interests.
- Work with the FNLC and other First Nations political forums to ensure broader First Nations participation and shared input into decision-making at the policy level and to improve the consultation and referrals processes.
- Work with the Province to develop and implement legislation that protects First Nation burial sites, and sites of important historical significance.
- Support the development of First Nation cultural heritage permitting systems, which includes recognition of First Nation jurisdiction for cultural management and in the protection of sites
- Develop mechanisms to work with all government agencies to ensure First Nations are meaningfully involved in all legislative and policy process which affect their cultural heritage. This includes Forest and Range; Oil and Gas; Mining, Energy and Petroleum Resources; Coroners Act, Parks (BC and Canada); Transportation; Land Act, Cemetery and Funeral Services Act, Heritage Conservation Act, etc.

¹⁴ BC First Nations Web Portal is one potential option

- Develop policy options aimed at enabling First Nations to access financial resources for cultural heritage resource programs and the referral process, such as building referral fees into each application for relevant First Nations to help build capacity.

Contraventions, Enforcement and Protection

- Engage the Province and local governments to develop viable province-wide and local contraventions and enforcement arrangements through Archaeology Branch staff, RCMP, local governments, etc.
- Work with the Archaeology Branch to ensure that reported violations of culturally significant sites are fully investigated and that investigations are supported by the RCMP.
- Work with RCMP liaisons to educate the RCMP on the importance of heritage resource to First Nations, to ensure they pursue investigations and report back to First Nations. Have RCMP recommend to Crown Counsel that First Nations provide victim impact statements.
- Work with Crown Counsel to ensure fines for lost heritage resources are of a sufficiently serious nature to deter contraventions and determine appropriate compensation avenues. Promote the redirection of fines to the relevant First Nation(s) to supplement their cultural heritage resource programs and/or restore and rehabilitate affected sites.
- Ensure public accountability for developers or industry who has contravened an offense under the HCA, via a listing available to the public.
- Work with the Province to develop protective mechanisms for cultural heritage resources that:
 - Ensure buffers and other mechanisms are established to reduce the impact that erosion, floods, pine beetles, wind storms and other disasters may have
 - take into effect the cumulative effects of the area
 - acknowledge evidence for spiritual/sacred sites which may not be physical in nature (ex. oral evidence and ongoing use of sites)

Local Governments

Work with local government & municipality representatives 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 First Nation 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 First Nation laws, values and heritage areas into official community plans, development permit areas and other bylaws and processes.

Real Estate

- Explore mechanisms for First Nations to ensure that proper processes have been observed in terms of disclosure, permitting and hiring of archaeologists in regards to property sales or development activities.
- Identify processes and material to ensure adequate education and communication occurs between property owners, realtors and potential home buyers.

Archaeological Overview Assessments (AOAs)

- Develop protocols that ensure First Nations hold an active, and meaningful, role from beginning to end in the AOA process.
- Ensure that AOA models and site information for known and recorded archaeological sites are reviewed by qualified archaeologists who are knowledgeable in the limitations of existing site form information and AOA models.
- Ensure that field testing of AOA models continues to occur throughout BC, with feedback from archaeologists in the field used to provide yearly updates on existing AOA models.
- Create and develop First Nations archaeology standards and advocate for the inclusion of these standards into the AOA model.

Site Alteration Permits (SAPs)

- Engage in discussion to determine a more reasonable review period of SAPs for First Nations.
- Seek transparency for First Nations to have access to information on the yearly approval rate of SAPs.
- Amend the legislation so that certain types of cultural heritage resources cannot be altered.

First Nations in the Field

- Engage in discussions on creating stronger standards for a First Nations presence on archaeological field crews.
- Support and encourage training opportunities for First Nations youth in cultural heritage resource management.
- Work with Province and/or educational institutions to develop a First Nations certificate program that certifies our members to work with archaeologists in the field. Model it after the language teacher training course. Work with the Archaeology Branch to accept certifications.

IMPLEMENTATION OF THE ACTION PLAN

Following endorsement of the Action Plan by First Nations, the First Nations members of the JWGFNHC shall be responsible for exploring mechanisms to facilitate the implementation of the above Action Items. The JWGFNHC will work towards the implementation of the action item by:

- Developing an organizational structure which identifies roles and responsibilities for the group and is guided by a clear terms of reference.
- Advocating for the recognition of First Nations laws, Title and Rights in relation to heritage conservation, while supporting and not interfering with the autonomy and decision making authority of individual First Nations.
- Working with First Nations to develop innovative mechanisms, tools and/or methods to manage and protect sites.
- Working with provincial government representatives to monitor, evaluate and amend heritage-related legislation, policy, programs and practices as derived from community driven feedback.
- Developing a communication and information-sharing strategy, including internal, external, media relations and public awareness which promotes the use of innovative communication tools, such as webinars and blogging.
- Advocating improvements to the legislative framework surrounding cultural heritage in British Columbia, including improving the provincial protection and conservation of First Nations burial sites, sacred sites and heritage sites in the spirit of the *New Relationship and Transformative Change Accord*.
- Determining novel ways of fundraising for proper heritage conservation to reduce the reliance on government funding sources.