

Indigenous cultural heritage policies as a pathway for Indigenous sovereignty: an example with K'ómoks First Nation, British Columbia

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Introduction

The Xwe'etay/Lasqueti Archaeology Project (XLAP) is a multidisciplinary endeavor that aims to increase community awareness, care, and protection of Indigenous cultural heritage (ICH) throughout the Salish Sea (<https://www.sfu.ca/rem/lasqueti/archaeology.html>). We focus on Lasqueti Island in BC as a case study of heritage management as it has extensive heritage value to many (at least 14) Indigenous communities with ancestral ties to the island. Xwe'etay, which translates to Yew Tree, is the Northern Coast Salish name for Lasqueti Island.

This report provides a summary of our explorations of ICH on how one of the XLAP partners—K'ómoks First Nation (K'ómoks), manages their cultural heritage within their (traditional) territory (Figure 1). In particular, we explore the history and context of the development of the K'ómoks Cultural Heritage Policy (CHP) and how the implementation of the Policy interfaces with local and regional governing bodies. We focus especially on K'ómoks' work to protect their archaeological heritage through the development of their Cultural Heritage Investigation Permit (CHIP) system for archaeological work (<https://komoks.ca/wp-content/uploads/2021/05/KFN-Cultural-Heritage-Policy-2020.pdf>).

By demonstrating the potential for and efficacy of ICH protection that is Indigenous-led, K'ómoks heritage initiatives serve as an example to other communities whose heritage is also threatened by private developments and are looking to create similar policies. The study also acts as an example of the opportunities and challenges associated with local government alignment with Indigenous heritage policies regarding land use, with implications for reconciliation that may be of interest to other local governments (and similar local, regional governance agencies)

The findings reveal that local-level implementation of Indigenous cultural heritage policies may help ensure that ICH protection strategies are place-based, effective, and appropriate. This implementation can simultaneously assist in fostering relationships and enhancing cross-cultural knowledge and respect. However, given the lack of regulatory (and capacity) support, planners must engage in extra-regulatory activities to fully realize the potential of Nation-led cultural heritage policies.



K'ómoks First Nation Territory. Photo: Mary Kelly

Colonial Management of ICH

In BC, the Archaeology Branch is the provincial governing body responsible for the management of archaeological heritage; other forms of tangible and intangible heritage often fall through legislative cracks. Through the Provincial HCA, the Archaeology Branch is responsible for protecting archaeological heritage older than 1846 (Heritage Conservation Act, 1996)—the colonially relevant date of the Oregon Treaty establishing British sovereignty over BC. Burials and rock art sites are, however, protected regardless of their age. The Archaeology Branch's main responsibilities include managing the site registry and overseeing the permit system. The latter involves coordinating evaluations of how proposed developments may impact archaeological sites, and most often the issuance of permits for archaeological investigations designed to mitigate the destruction or alteration resulting from development. However, the HCA fails to protect unregistered archaeological sites and sites postdating 1846 (except for burials, rock art, and ship wrecks) (Heritage Conservation Act, 1996).

Local planners in BC operate at the intersection between provincial governments and community members to coordinate the delivery of services, manage development, and engage community members to determine needs. The tools available to local planners are mostly regulatory by nature, including permits, zoning, bylaws, community plans, and other development control regulations. Although local governments may “recognize the heritage value or heritage character of a heritage property, an area or some other aspect of the community’s heritage,” according to the Local Government Act [599(1)], this only applies to built structures on the landscape rather than archaeological heritage. The distinction between “heritage” and “archaeology” in both the HCA and the Local Government Act means that the provincial government considers Indigenous-built structures (e.g., shell middens, clam gardens, fish traps, house platforms, etc.) to be elements of archaeology, while settler colonial structures (i.e., heritage buildings, heritage towns) are considered “heritage.” This means that the formal powers granted to local governments to protect heritage under the Local Government Act only apply to colonial heritage.

This creates a double standard where higher heritage value is placed on non-Indigenous than Indigenous heritage at the local level. For example, you are not allowed to destroy a heritage house or signage, or even modify it in a way that detracts from its character. By comparison, once granted an archaeological permit 95% of an Indigenous heritage site may be altered or destroyed, depending on the assessment.

In several ways, the current system does not serve the heritage needs of First Nations. In the absence of local control, Indigenous heritage sites on public and private land are being destroyed by development, resource extraction, urbanization, and theft (English et al., 2023; Nicholas, 2021; Hutchings, 2017). The failure of the current system and ongoing destruction of millennia-old heritage is a form of violence against Indigenous Peoples (Nicholas and Smith, 2020). More specifically, Canada is undergoing significant population growth (coupled with a lack of housing due to decades of infrastructure neglect), and a range of recent provincial and federal policies have been enacted to expedite development by limiting municipal approval processes. These trends will further endanger ICH and limit local planners' abilities to mitigate impacts.



Xwe'etay / Lasqueti Island Fish Trap. Photo: Dana Lepofsky

Managing Indigenous Cultural Heritage in British Columbia

Indigenous communities are increasingly navigating the inadequacies of colonial heritage protection(s) by exerting their right to ICH through laws, protocols, and policies. Initiatives are varied and community-specific, but all are grounded in responsibility to the land, communities, Ancestors, and future generations (Hammond, 2009). In British Columbia (BC), some Nations have their own heritage policies and have also developed permitting systems to protect culturally important lands, including those where both registered and unregistered archaeological sites are present (e.g., Stó:lo̓ Nation Lalems ye Stó:lo̓ Si:ya:m, 2003; Simpcw First Nation, 2015; Squamish Nation, 2021; LNIB, 2017; Lake Babine Nation, 2019; KFN, 2020; Okanagan Indian Band, 2023; Tsleil-Waututh Nation, 2010; Musqueam, 2023). In contrast to top-down, state-driven colonial laws, these initiatives reflect community values, and as such are well-situated to protect each community's holistic view of ICH and avoid pan-Indigeneity (Schaepe et al., 2020; Nicholas, 2021). Importantly, they also fill gaps in heritage protection under the provincial Heritage Conservation Act (HCA).

Despite increasing exertion and recognition of Indigenous territorial rights and title, Canadian law does not require that project proponents, private property owners, or government officials follow Indigenous-led heritage stewardship outside of treaty or reserve lands. This disconnect often leaves local planners, who are responsible for planning and regulating municipal and regional land use, in a difficult position. Local governments may make non-binding statements about valuing ICH and support the self-determination efforts of Nations regarding the stewardship of their ICH resources; however, they lack formal jurisdiction over archaeological sites—and may be presented with situations where they are jurisdictionally mandated to approve development applications that may negatively impact ICH.

K'ómoks First Nation Cultural Heritage Policy & Permit

K'ómoks First Nation is made up of about 380 members who primarily self-identify as K'ómoks, Pentlatch (Northern Coast Salish ethnolinguistic groups) or Kwakwaka'wakw (speakers of Kwak'wala, formerly Kwakiutl). K'ómoks was created through the amalgamation of the Pentlatch-speaking Pentlatch, ayajuthem speaking K'ómoks, and Eiksan, and later the Kwakwala-speaking Hahamatsees (Kennedy and Bouchard, 1990). K'ómoks Territory today represents the combined traditional territories of the K'ómoks and Pentlatch peoples (Figure 1; Kennedy and Bouchard, 1990). K'ómoks has four reserves; only KFN IR 1, at the mouth of the Courtenay River, is developed and is where about 150 K'ómoks members live. This reserve/community is situated between the City of Courtenay and the Town of Comox in the Comox Valley region. This broader region is home to more than 72,000 residents (City of Courtenay, 2022).

The Comox Valley is within the local planning jurisdiction of the Comox Valley Regional District (CVRD), City of Courtenay, Town of Comox, Village of Cumberland, and the Islands Trust (Figure 1). The local governments obtain powers as defined by the Local Government Act, each within their municipal or electoral boundaries. Regarding ICH, there are some avenues for local government protection measures, e.g. through Official Community Plans, to guide advocacy of ICH protection but there is no regulatory requirement, nor are there enforceable management strategies (MacLean et al., 2022). Regulating land-use decisions within municipal limits through by-laws and development permits is one area of opportunity for protection; however, this authority is still limited by the Local Government Act and municipal jurisdiction.

As with many Indigenous groups in BC, K'ómoks has experienced a long history of frustration with the Provincial Archaeology Branch, local governments, and the development sector concerning the protection of archaeological heritage in their Territory. As a result, the Nation is proactively protecting their cultural heritage in ways that are appropriate for them. This involves intercommunity education, working with local elected officials, and public outreach. It is within this context that K'ómoks created their CHP.



K'ómoks First Nation disturbed midden site. Photo: Jesse Morin

Development of the K'ómoks Cultural Heritage Policy

Prior to developing the CHP, K'ómoks' heritage concerns such as impacts to burial sites and major pre-contact settlements were treated on a case-to-case ad hoc basis. This involved drafting response letters to the Archaeology Branch regarding permits allowing impacts to archaeological sites in K'ómoks Territory. Since 2015, the Comox Valley area has been undergoing rapid urbanization and development, as people from other parts of British Columbia and Canada move to Vancouver Island. Consequently, the coastline has been rapidly infilled with new large houses and suburban development. These highly desirable water-front lots are precisely the places where K'ómoks Ancestors lived for thousands of years and thus are major archaeological sites with great cultural significance. As a result, there has been a corresponding rapid increase in the volume of archaeology permit applications as well as HCA contraventions associated with these developments.

In developing the K'ómoks CHP, K'ómoks formalized an explicit set of management expectations and procedures for all activities that have the potential to have an impact on archaeological sites or Belongings. The policy is intended to be used by developers, archaeologists, and various levels of government to design projects in accordance with K'ómoks expectations. In short, K'ómoks withholds consent for all projects with the potential to impact their cultural heritage unless these expectations are met.

Two core principles guide K'ómoks ICH management: “taking care of the ancestors and the ancestors looking out for you” (KFN, 2020, p. 6). The CHP applies to all K'ómoks Territory² (Figure 1), including private, crown, K'ómoks lands, intertidal areas, and submerged lands. The Policy states K'ómoks authority over their cultural heritage is derived from several legal systems, including Indigenous law, UNDRIP, DRIPA, Section 35 of the Canadian Constitution Act, 1983, and the KFN 2016 Land Code. K'ómoks Indigenous law is based on K'ómoks and Pentlatch teachings and their authority over decision-making comes from K'ómoks unextinguished Indigenous title to their Territory (KFN, 2020, p. 4).

K'ómoks laws specify their responsibility to steward their lands for future generations and the requirement to respect and protect their Ancestors and their cultural heritage (KFN, 2020). The Policy states the measures required for protecting K'ómoks cultural heritage and that any impacts will require K'ómoks consent, including clear steps for obtaining K'ómoks consent. The range of archaeological sites protected under the K'ómoks CHP are described therein (KFN, 2020, p. 10–13).

K'ómoks Cultural Heritage Investigation Permit (CHIP)

K'ómoks developed the Cultural Heritage Investigation Permit (CHIP) as the primary mechanism for enacting the Nation's CHP. The development of the CHIP to conduct archaeological investigations is a significant part of the process of K'ómoks managing their own archaeological heritage and a need to address critical issues within the HCA and Archaeology Branch processes. The CHIP system is a straightforward process for obtaining K'ómoks consent for a development project within already recorded sites and areas of high archaeological potential. The KFN area of high archaeological potential is defined by a 200m buffer around recorded archaeological sites, the marine and lacustrine shorelines, rivers, and major streams (see Figure 1). A proponent will not be issued a CHIP unless their proposed archaeological methodologies are in accordance with the K'ómoks CHP, and all projects lacking a K'ómoks CHIP are considered to lack K'ómoks consent. The K'ómoks CHIP application has recently been revamped to increase usability for proponents, municipalities, and archaeologists.

The CHIP allows proponents and archaeologists to develop their projects in alignment with K'ómoks expectations in advance of applying for HCA permits or K'ómoks permits. If necessary, K'ómoks communicates with proponents to modify their projects to bring them into alignment with the K'ómoks CHIP. The Policy is designed to make clear to proponents that the effort and cost required to mitigate proposed impacts to archaeological sites almost always far outweigh the costs associated with project redesign to minimize impacts.

Additionally, because the K'ómoks CHP requires investigations of areas of high archaeological potential, and not just registered sites—something not required under the HCA—it provides far greater certainty that developments in high potential areas avoid and/or mitigate impacts to unregistered archaeological sites. In such areas of high archaeological potential, a preliminary field reconnaissance of the property is required to assess whether additional archaeological investigation is warranted.

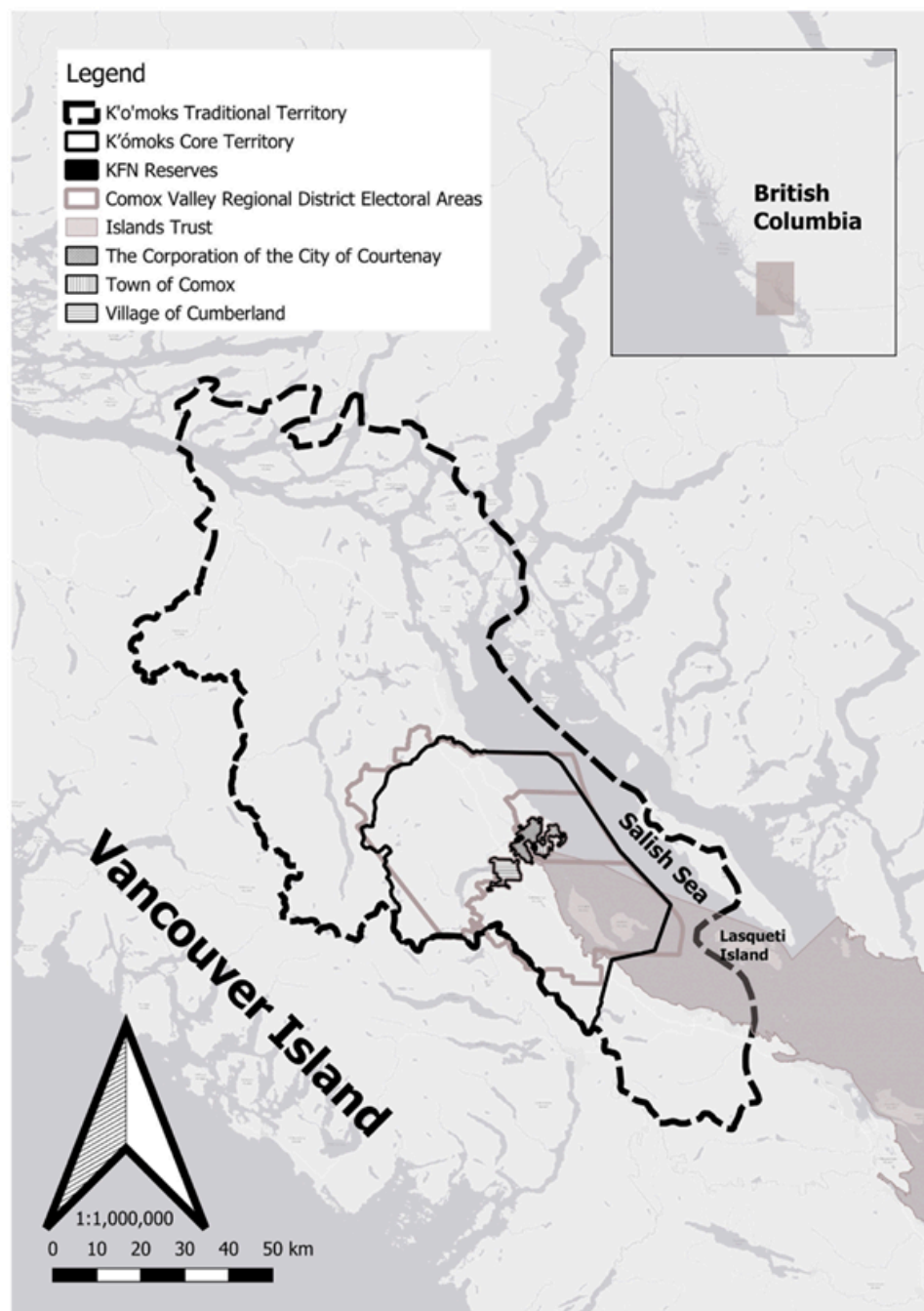


Figure 1: K'ómoks First Nation Territory and its relationship to local governing bodies (Map credit: Raini Bevilacqua).

Furthermore, since there is often a significant delay (often years) in including newly recorded sites into the Provincial database (RAAD), newly registered sites are often not identified in a query of RAAD and thus are not flagged for provincial protection. The Archaeology Branch faces a backlog of site information because of the expansion of archaeological investigation across the province— primarily associated with resource extraction and infrastructure development. However, since K'ómoks archaeologists are now involved with the identification and registration of new sites under the CHIP system, they can identify recently discovered sites during the CHIP application process that would not otherwise be identified or protected by the province— and they can and require archaeological work accordingly.

While the CHIP is still a new, evolving process, it has created internal consistency for K'ómoks. Importantly, the CHIP application fee helps to fund the K'ómoks Archaeology & Referrals staff to oversee, mitigate, and prevent impacts to archaeological sites in K'ómoks core Territory. This added capacity is important for communicating and enforcing K'ómoks CHIP requirements and values.



Ancestral KFN (Pentlatch) village site excavated during construction without any archaeological documentation. Photo: Lia Tarle

Local government adoption of and commitment to the CHIP

The close physical proximity of K'ómoks and the local governments combined with the relative insularity of the Comox Valley creates a unique dynamic for developing working relationships. All local governments express commitment to collaborative relationships with K'ómoks, and all have made formal commitments to supporting UNDRIP. The Cultural Heritage Policy was formally adopted by K'ómoks in October 2020, and was presented to local governments as an articulation of UNDRIP in relation to K'ómoks protection of archaeological sites in their Territory. As local governments had already endorsed UNDRIP, K'ómoks requested that they formally follow the CHIP for all developments under their jurisdictions. In response, and with varying consistency, local governments have been referring municipal, regional, and private developers to the K'ómoks CHIP. Unfortunately, only the Islands Trust will withhold or delay development permits until a project has been issued a K'ómoks CHIP. Statements of support are far easier than operational changes and testing the boundaries of municipal legislation to protect ICH. High-level support for K'ómoks' CHP has unfortunately not universally translated into meaningful and consistent policy or operational changes on the ground.

To effectively implement the CHIP model, local governments must commit to notifying, educating, and ensuring that those seeking a development permit apply for the CHIP in advance of ground alteration. All applications for the construction or alteration of buildings, structures, and/or land are made through the local governments and thus the governments are aware of proposed land alterations that may impact ICH within municipal limits. This includes both developers/proponents and municipal infrastructure itself. The permit application process also establishes a communication stream between the local government planners and private property owners that is not initially available to K'ómoks until the applicant is in contact with K'ómoks directly.

To date, there has been variable uptake by local developers. Interviewees suggest that building and maintaining positive relationships within the Comox Valley and “doing the right thing” were motivating larger developers to apply for the CHIP. In addition to building relationships through corporate responsibility, interview participants explained how the CHIP encouraged compliance by improving certainty of the development timeline and cost reduction. Reasons why applying for a CHIP benefits the proponent are made clear at the time of application.

Challenges to the CHIP process

While the CHIP does not require extensive additional work or change of practices at the local government level, there are ongoing capacity issues experienced by K’ómoks as they respond to the rapid pace of development taking place in their Territory. Currently, there is no funding from the Archaeology Branch to support the K’ómoks CHIP system, but CHIP permit fees fund the K’ómoks staff Archaeologist positions. Large archaeological projects and increased compliance with the K’ómoks CHIP process will undoubtedly further increase demands on K’ómoks staff archaeologists.

Another challenge to the CHIP is that landowners who are unfamiliar with development procedures have been more likely to be hesitant of the CHIP than developers. Planners described that this is partly because many landowners are applying for development permits for the first time vs. developers with experience applying for permits and are aware of changing regulations. The uncertainty about when and if an archaeological assessment will be required (also an issue with the HCA process), instills fear in project proponents regarding cost and delays of their project. Interview participants from local governments describe how local planners are responsible for mediating frustrations experienced from project proponents throughout the development process—including navigating archaeological assessments. Part of the planner’s role in the development permit arena is to coach landowners and developers through the process and provide realistic timelines. They also note that anxiety and fear can lead to non-compliance.

Interview participants did express hope that any future changes to the Local Government Act and HCA facilitated by DRIPA could change the regulatory requirements and clarity for local governments concerning ICH and archaeology. While such amendments hold promise for change, it doesn't solve K'ómoks' current ICH concerns during a period of extensive development growth. K'ómoks also face a capacity burden of being the de facto source of archaeology information for the Comox Valley, given the barriers to the general public to access information from the Archaeology Branch in a timely manner.



K'ómoks First Nation Territory. Photo: Mary Kelly

Recommendations

Supporting ICH policies: Funding should be provided from the Province to support the development of ICH policies. Local governments should work with local First Nations to support the implementation of their ICH policies and protocols.

Foster community relationships: Local governments, specifically regional districts, should work on nurturing and building relationships between local governments and First Nations. This included applying for funding and hosting educational meetings to learn from and support local ICH initiatives.

Existing policy amendments: Existing heritage policies at the provincial level should be amended according to Indigenous calls for action so that they reflect the needs of descendant communities. These policies should support the implementation of regulations by First Nations and local governments.

Shared decision making: Authority over ICH should be transferred from the Province to a shared-decision making framework with First Nations. Approximately 40% of First Nations in BC have their own formal process of ICH management (Archaeology Branch, 2022) that should be respected, upheld, and followed by the Archaeology Branch and local governments.

Local Ally-ship: New bylaws should be created at the local level. This will require advocacy for ICH conservation through community education and new regulations. Planners should apply an “unsettling” lens to their practice and apply the third space/row model to planning activities.

Concluding Thoughts

Committing to enacting Indigenous heritage policies such as the CHP is a concrete first step to supporting Indigenous rights to manage their own heritage. In the case of the Comox Valley, the K'omoks have presented a pathway for reconciliation and relationship building that is open to governments and planners. A reconsideration of the private property regime and notions of land ownership (and access) are critical to unsettling planning processes and ideologies by challenging dominant forces (Barry et al., 2018; Blomley, 2017). With upcoming policy opportunities to influence legislation reform in alignment with UNDRIP, planners and local governments must actively advocate for the introduction of locally-enacted ICH protection mechanisms (e.g., granting planners the ability to delay or deny development permits based on archaeological concerns). This conclusion holds true as much for the K'omoks as it does for other Indigenous Peoples globally who are asserting their rights to manage their heritage in the face of on-going industrial development on private and public lands.

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Contact

web. <https://www.sfu.ca/rem/lasqueti.html>

