

# TO PRESERVE AND PROTECT THE ARCHAEOLOGICAL HERITAGE OF THE SOUTHERN GULF ISLANDS

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*Poets Cove, February 10th, 2003 Cowichan Elder Angus Smith and Wayne Paige atop monumental pile of midden (E.McLay)*

The southern Gulf Islands of British Columbia are nationally treasured for their unique natural heritage, their endangered ecosystems and their rare species at risk. In recognition of the fragile ecological significance of this archipelago, British Columbia first enacted the *Islands Trust Act* in 1974 to establish a special regional government with the principled mandate to ‘preserve and protect the trust area and its unique amenities and environment’ for the long-term public benefit of British Columbia. More recently, Canada and British Columbia announced the creation of the new *Gulf Islands National Park Reserve* under the Pacific Marine Heritage Legacy project – a joint federal-provincial parkland initiative to help preserve the unique heritage of the Gulf Islands on Canada’s Pacific Coast.

In comparison to this extraordinary-level of federal, provincial and local government effort to conserve the islands’ environment, the rich, threatened archaeological heritage of the southern Gulf Islands has unfortunately received much less

public recognition and national concern. Intensified private land rezoning, high-density residential subdivisions, and large-scale commercial building developments increasingly threaten the conservation of our archaeological heritage in this key cultural region on the Pacific Northwest Coast. In the last two years, a boom in economic real estate development in the Gulf Islands has resulted in an unprecedented-level of destruction for archaeological sites. In at least two instances, the Hul’qumi’num Treaty Group and local Gulf Island residents have instigated official RCMP investigations against private developers to enforce alleged violations of the *Heritage Conservation Act [RSBC 1996]*. In another significant case, Elders from the Penelakut Tribe have filed a court challenge to review whether the Crown and developer may have unjustly infringed upon their *Constitutionally*-protected aboriginal rights in the disturbance of ancient human remains and burial ground on private land.

These controversial land use conflicts in the southern Gulf Islands highlight key gaps that currently exist in the provincial management of our archaeological heritage in British Columbia. In the following article, I provide three examples of these current land-use conflicts to illustrate different directions for necessary change and, more importantly, advocate the urgent need for British Columbia to build regional partnership roles with First Nations and local government to ensure the responsible stewardship over our nationally-threatened archaeological heritage.

### **Poets Cove at Bedwell Harbour Ltd. (DeRt-004), South Pender Island**

The DeRt-004 site is a large, deep coastal shell midden situated in the shelter of Bedwell Harbour, South Pender Island. This ancient settlement site is located directly across the harbour from Pender Canal (DeRt-001 and 002), where large-scale archaeological investigations by Simon Fraser University in the 1980's explored the richness of First Nation history in the southern Gulf Islands over the last 5000 years.

The DeRt-004 site, while less well-documented, has long been known to archaeologists and local residents, having been first recorded in 1955 by Wilson Duff from the Provincial Museum. In 1990, a professional Archaeological Impact Assessment (AIA) for the commercially-zoned hotel property identified that archaeological deposits at DeRt-004 may reach up to 4 meters in depth and potentially date over 4000 to 5000 years old.

In October 2002, it was first reported to the Ministry of Sustainable Resource Management by First Nations that recorded archaeological site, DeRt-004, had suffered minor disturbance by unregulated development activity for a luxury resort and spa on South Pender Island. The new Calgary-based property owner, Poets Cove at Bedwell Harbour Ltd., asserted that before it began construction of its estimated \$40 million dollar luxury resort development it had received all necessary permits from provincial and local governments, including a development permit from the Pender Islands Trust Committee and a building permit from the Capital Regional District. In the process of applying for these local government permits, Poets Cove reportedly had not been made aware of the presence of this recorded archaeological site, been notified of the previous AIA study, nor informed of their corporation's responsibilities to protect this site under the *Heritage Conservation Act*.

After subsequent notification by the Ministry, Poets Cove contracted an archaeological consulting company to prepare a Site Alteration Permit application. After receipt of the permit that allowed only minor site alterations, however, it was learned that Poets Cove had been conducting large-scale excavations at DeRt-004 without archaeological monitoring. During an on-site meeting between the Ministry, First Nations, Poets Cove and their archaeological consultant in early February 2003, it was discovered that at least 1500 cubic meters of archaeological shell midden deposits had been excavated to bedrock and removed for the installation of a swimming pool. Three monumental piles of archaeological shell deposits containing exposed artifacts and human bones were observed dumped in the resort's tennis courts, parking lot and forested edge of the adjacent First Nation reserve. The assembled representatives of nine Coast Salish



*Poets Cove, February 10th, 2003. View of Construction site for Poets Cove Resort and Spa (Photo courtesy of E.McLay)*

First Nations jointly demanded the RCMP investigate Poets Cove for its destruction of these archaeological deposits outside the conditions of the site alteration permit in contravention of the *Heritage Conservation Act*. First Nations further insisted that a recovery project be immediately directed to screen all of their Ancestors' bones and belongings from the construction backfill. It is reported that this project still in progress has since recovered the ancient human remains of at least 36 individuals and thousands of stone, bone and antler artifacts from less than half the construction fill.

After nearly two years, however, Crown Counsel has yet to enforce provincial law and lay charges against the developer. This is despite wide-spread recognition that Poets Cove is the site of one of the worst documented violations of the *Heritage Conservation Act* in recent history. Poets Cove public relations and advertising campaign has been so successful in quelling news coverage and debate over this controversy that during the grand opening of Poets Cove Resort and Spa, the Chair of the Islands Trust Council publicly lauded Poets Cove as a "model, a text-book case" of responsible development. "The developers have done it with a great deal of sensitivity" (Vancouver Sun, Page D03, May 18, 2004).

### **Walkers Hook (DfRu-002), Salt Spring Island**

DfRu-002 is a prominent archaeological shell midden located on a low-lying coastal sand spit at Walkers Hook, Salt Spring Island. The DfRu-002 site is situated immediately across the channel from the archaeological site of Montague Harbour (DfRu-013) on Galiano Island, where Donald Mitchell's excavations in the 1960's first placed the culture history of the Gulf of Georgia into a regional archaeological context. No archaeological excavations have been ever directed at DfRu-002, although it is documented in the provincial registry as the fifth largest shell midden area recorded in the southern Gulf Islands. Protected under the Agricultural Land Reserve, the private property has been held as a pioneer family farm



*Walkers Hook, August 12th, 2003. Rally by First Nations and local residents at Walkers Hook, Salt Spring Island (E. McLay)*

over the last century. Local residents of Salt Spring Island have equally valued the site over the years as a recreational beach and ecologically-sensitive coastal habitat. Walkers Hook has long been designated on Salt Spring Island's Official Community Plan as a potential property to acquire for public parkland.

In January 2003, the property owner applied for a subdivision lease of the sand spit at DfRu-002 to a commercial aquaculture company, Sablefin Hatcheries Ltd., who proposed to build a land-based fish hatchery atop Walkers Hook. In this instance, the property owner and company were fully aware of the recorded archaeological site at DfRu-002. To avoid large-scale mitigation of archaeological deposits, the aquaculture company relocated its buildings off-site, but chose to retain its design to place its wells and utility pipes through the midden area as a natural filter for its industrial effluent into the marine environment.

Sablefin Hatcheries Ltd. applied for and received a building permit from the Capital Regional District and began construction of the hatchery buildings prior to any provincial decision on the proposed subdivision application atop DfRu-002, or permit from the Ministry of Sustainable Resource Management. The company at this time also applied for a waste management act approval under the Ministry of Water, Land and Air Protection to discharge its effluent directly into the midden. These provincial and local government permits were applied for by Sablefin Hatcheries Ltd. without the requirement of first preparing a preliminary Archaeological Impact Assessment study, which would evaluate the best practices to conserve archaeological values at this site of potentially high scientific,

cultural and public significance on Salt Spring Island.

At this late stage in the land-use planning process, local residents of Salt Spring Island informed local First Nations of the development activity in-progress at Walkers Hook. The Hul'qumi'num Treaty Group immediately notified the developer, Salt Spring Islands Trust Committee and the Ministry of Transportation that the proposed subdivision application did not address the protection of recorded archaeological heritage sites at Walkers Hook and that a professional AIA study should be directly prior to any land-use decision or further development activity. Instead, Sablefin Hatcheries Ltd. contracted an archaeological consulting company to expediently apply for a Site Alteration Permit. The alteration permit proposed that the installation of all utility pipes and wells by a backhoe excavator would be archaeologically monitored and all cultural materials raked from the backfill. The Ministry of Sustainable Resource Management approved the site alteration permit and subsequently over the course of the backhoe trenching over 250 metres of archaeological shell midden deposits, the ancient human remains of a minimum of 13 individuals were excavated and removed from the DfRu-002 site.

In January 2004, the Penelakut Elders, Salt Spring Island Residents for Responsible Land Use and Canadian Sablefish Association separately took the Ministry of Water, Land and Air Protection and Sablefin Hatcheries Ltd. to court to quash the approval which allowed the company to discharge its industrial waste into this culturally-significant and environmentally-sensitive location. Penelakut Elders' court

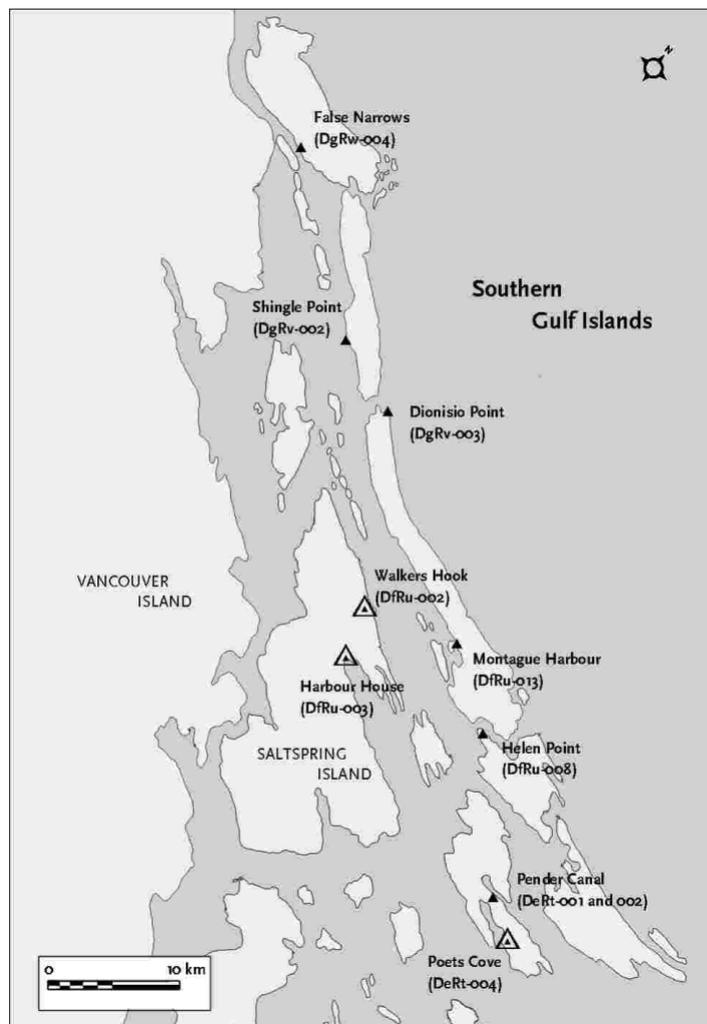
action at the Environmental Appeal Board asserts that the protection of their Ancestors' bones and cemeteries are an integral part of their Coast Salish cultural beliefs, traditions and customary laws, and that the infringement of these Constitutionally-protected aboriginal rights at Walkers Hook are not justified. Salt Spring Islanders and commercial fishers protested the Crown and Sablefin Hatcheries Ltd. had been negligent in their duty to protect public interests in the environment, archaeological heritage and aboriginal rights at Walkers Hook. Several public rallies between First Nations and Salt Spring Islanders have been held and the support of local residents in gaining media attention on this important issue has been successful not to be overshadowed by corporate interests. Yet, despite wide-spread public and legal opposition to this controversial land-use issue, Sablefin Hatcheries Ltd. has recently applied for a permanent waste permit to expand their well systems atop the DfRu-002 site at Walkers Hook. The decision from the Environmental Appeal Board is still pending.

### Harbour House (DfRu-003), Salt Spring Island

DfRu-003, also known as the Harbour House site, is a major archaeological shell midden located in downtown Ganges, Salt Spring Island. Large-scale archaeological investigations at DfRu-003 were conducted in 1993 to mitigate a right-of-way through the property for the Ministry of Transportation and Highways. These excavations revealed the antiquity of this ancient settlement to date over 2000 years ago. In May 2003, Springbay Developments Inc. applied for a local government development permit to construct 15 luxury townhouse units atop the DfRu-003 property. Aware of this recorded archaeological site and First Nations concerns at Walkers Hook, the Salt Spring Islands Trust Committee stipulated in a unique condition that as a part of their development permit, Springbay Developments Inc. pro-actively consult the Hul'qumi'num Treaty Group and acquire written consent for any archaeological permit.

Rather than consult First Nations, however, Springbay Developments Inc. prepared a site alteration permit in order to monitor the removal some of the last remnant archaeological deposits at DfRu-003 for the purpose of installing sewer trenches and utility lines. In response, the Hul'qumi'num Treaty Group requested that the Ministry of Sustainable Resource Management defer Springbay Developments Inc.'s site alteration permit prior to further consultation and accommodation of their First Nations' interests. It was proposed that, rather than allow the incremental destruction of the site, all trenches be re-routed to avoid further impacts, and a heritage management plan be developed in advance to ensure the long-term stewardship of this important archaeological heritage site in downtown Ganges.

The Salt Spring Islands Trust Committee supported the First Nations's stand and refused to issue their development permit until Springbay Development Inc. had meaningfully consulted and accommodated their interests in heritage conservation. Unfortunately, Springbay Developments Inc. threatened to launch a lawsuit against Islands Trust for acting outside their jurisdiction and proceeded to begin construction activity without receipt of a development permit. Concurrently, during inspection of the construction site in-progress,



Map of Southern Gulf Island Sites

the Hul'qumi'num Treaty Group notified the Ministry and Salt Spring Islands Trust that archaeological shell deposits had been impacted by the installation of building foundations and utility pipes at DfRu-003 without archaeological monitoring outside the conditions of their received site alteration permit. In violation of the *Heritage Conservation Act*, Springbay Developments Inc. was forced to halt all development activity. After finally accepting to consult First Nations, it was agreed that a recovery project be initiated to immediately screen any ancient human remains and artifacts disturbed from the construction backfill and an archaeologist would be on-site to monitor all further land-altering activity. In principle of more longer-term stewardship, it was further agreed that a heritage management plan for the DfRu-003 site be developed in cooperation with First Nations, a restrictive covenant be placed on the remainder of the archaeological site, and a public monument be commissioned to commemorate this heritage site and provide greater educational awareness of First Nations' heritage on Salt Spring Island.

### Directions for Social Change

In a place like the southern Gulf Islands where there exists such a unique environmental mandate for local government, the public support of such a vocal, socially-active community and the vigilance of local First Nations, it is difficult to understand

how the destruction of our finite archaeological heritage has occurred in the past so frequently without public call for greater government action. On Salt Spring Island, there is an emergent sense of cooperative action on behalf of First Nations, many local residents and the Islands Trust to assist the province to uphold heritage conservation standards in their own community. In the above examples, three major gaps are exposed in our provincial heritage management system, which necessitate moving toward greater community-based change:

- 1) Upholding provincial stewardship principles and the *Heritage Conservation Act*;
- 2) Reconciling First Nations' aboriginal rights; and
- 3) Integrating a local government role in provincial heritage management.

### **1) Upholding Provincial Stewardship Principles and the Heritage Conservation Act**

In 1974-1975, the southern Gulf Islands was the first regional archaeological survey directed by the Archaeological Sites Advisory Board – a timely provincial government stewardship initiative to develop the baseline information for heritage site management across British Columbia. Since the early 1980's, however, British Columbia has re-interpreted its stewardship role in heritage conservation to be strictly limited to regulating permits and administering the provincial site registry under the *Heritage Conservation Act*. In 2004, provincial cutbacks to the Ministry have left four project officers in charge of regulating over 22,000 recorded archaeological sites in British Columbia. The Ministry's capacity to review land-use referrals and issue permits is operating at crisis management levels. At the same time, there is a greater need than ever for monitoring issued permits on the ground and monitoring and enforcing increased unregulated land use activity by developers in violation of the *Heritage Conservation Act*.

In the case of Poets Cove, it is perceived that the Crown lacks the political will to enforce developers' issued permit conditions and uphold the *Heritage Conservation Act*. Few charges have ever been historically laid under provincial heritage laws in British Columbia, with only one successful prosecution. The Ministry currently does not have the legislative authority to employ conservation officers to lay direct charges against violations of the provincial law. It is at the discretion of the RCMP to halt land development, conduct a police investigation and forward a report to Crown Counsel, neither of whom may be very familiar with the *Heritage Conservation Act*. After nearly two years since Poets Cove, it is feared that if this clear violation of the Act is not taken seriously by Crown Counsel, then no contravention of the Act will ever be enforced, leaving all archaeological sites vulnerable to increasing land development pressures in British Columbia.

### **2) Reconciling First Nations Aboriginal Rights**

The Royal Commission on Aboriginal Peoples (1996) recommends the Federal, Provincial and territorial governments enact legislation to establish a process aimed at recognizing : (2:4:58):

- i) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territory;
- ii) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual, and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands;
- iii) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations);
- iv) Aboriginal people as being entitled to issue permits and levy the fees charged for access to, or use of, such sites.

In the 21<sup>st</sup> Century, First Nations in British Columbia continue to be marginalized by the practices of provincial government heritage site management. The *Heritage Conservation Act* does not specifically address aboriginal rights. Neither does the Ministry of Sustainable Resource Management follow the *Provincial Guidelines for First Nations Consultation*. Only in the last ten years since *Nanoose Band vs. British Columbia* at Craig Bay have First Nations have had any official role in providing comment on archaeological permits. On a practical level, many First Nations people continue to say they have no meaningful voice in the process of how their Ancestors' places and their cultural property should be protected in accordance with their cultural traditions, beliefs and customary laws.

### **3) Integrating Local Government into the Provincial Heritage Management System**

Despite British Columbia's awareness during the formative years of the *Islands Trust Act* that the southern Gulf Islands represents one of the most publicly well-known and densest concentrations of recorded archaeological sites known in the province, the conservation of archaeological heritage has never been a part of the Islands Trust's unique stewardship mandate. The *Local Government Act* [RSBC 1996] does provide for legislative measures for the protection of designated heritage sites and heritage conservation areas, but these designations are not generally applied by local governments to archaeological sites. The registry and management of archaeological sites has always been exclusively held as a duty of the provincial government, as recently defended in *Kitkatla vs. Regina* [2000] B.C.J. No.86).

Heritage conservation is best addressed at the earliest stages of development and at the highest level of strategic land-use planning. However, most local government Official Community Plans and Land-Use Bylaws contain no policies or zoning arrangements for the protection of archaeological heritage sites. Based on the lack of local government jurisdictional role and policy development afforded by the province, there exists a hierarchy of provincial approvals and local permit applications that are regularly reviewed by local governments for consistency with their community land-use plans, but are not checked for their potential impact on archaeological sites. Each step in the land-use development planning process – from

rezoning and subdivision approvals to development and building permits – has a progressively greater negative impact on the archaeological record if left unregulated. Many of these provincial rezoning and subdivision approvals and local government permits for land development planning are also not reviewed by the Ministry of Sustainable Resource Management. The most evident of these systemic gaps in provincial regulation is in building permits – one of the leading cause of damage to archaeological sites on private lands and perhaps the most difficult to monitor and enforce at the provincial level. At the other end of the scale, when local government is made aware of archaeological concerns through the public referral process, such as at Ganges Harbour, local government finds it has little jurisdictional power to help address public interests in heritage conservation.

### **Emergent Interests in Community-Based Stewardship**

There is an urgent need for greater provincial-level partnership initiatives to provide community-based stewardship of our archaeological heritage in British Columbia. To reduce conflicts with archaeological sites on private property, there must be a cooperative effort on behalf of the province, local government, First Nations and private property owners to ensure that heritage conservation is addressed at the earliest stage of land-use development planning.

British Columbia must take the lead at the provincial level to register archaeological sites on land titles, provide incentives for heritage conservation on private property, and inform property owners of the importance of heritage conservation and their responsibilities under provincial law. First Nations, local government, community residents and private property owners must assert an active stewardship and management role over our archaeological heritage. Community-based stewardship may fill many important gaps in current provincial management, including monitoring, preparing inventories, developing heritage management strategies and plans, implementing site conservation measures and providing public education.

There also exist new legal frameworks for all government decision-makers to respect aboriginal rights. Recent court decisions, such as *Haida Nation vs. British Columbia*, specify the Crown and third parties have a legal duty to avoid unjust infringement upon *Constitutionally*-protected (under s.35) aboriginal rights. The Penelakut Elders case at Walkers Hook is an important case attempting to apply these aboriginal rights to protect their ancestral burial ground on Salt Spring Island.

Toward directions for change, technical working groups have been established in the treaty process between the Hul'qumi'num Treaty Group, British Columbia and representatives from three regional governments to explore existing tools and processes for local government to assist in heritage conservation, and if necessary recommend new directions for legislative change. Existing tools and processes to be explored include the designation of key heritage sites and heritage conservation areas under the *Local Government Act*, developing policies and zoning arrangements under Official Community Plans, improving the consultation process with First

Nations in provincial and local government land-use referrals, information-sharing, integrating archaeological issues into the inspection process for building permits, and public education.

### **Conclusion**

In the recent meeting of the Islands Trust Council, a broad spectrum of local residents have publicly called for the Islands Trust to declare a 'moratorium' on development and announce a 'renewal' of its 'preserve and protect' mandate. The Salt Spring Island Justice and Reconciliation Society specifically petitioned the Island Trust Council to find solutions to integrate First Nation heritage conservation under the mandate of the Islands Trust. The society also petitioned the Islands Trust to support local First Nations treaty rights to achieve their aboriginal interests in the ownership, jurisdiction, management and access to their archaeological heritage as their cultural property in British Columbia.

This emergent sense of community-based partnerships between First Nations, local residents and local government in the southern Gulf Islands to protect archeological heritage may be somewhat unique in British Columbia. What is common between these groups is that each holds their own deep commitment for preserving and protecting these islands where they live, and each shares an active commitment for positive social change in their communities. At a local level, they witness there is a lack of provincial stewardship to protect their valued archaeological heritage against development in their community, and perceive there exist many injustices afforded to First Nations to have any meaningful say in how their ancestral heritage, lands and even cemeteries are managed. Only recently have these different groups recognized their common interests in community-based stewardship and have sought cooperative solutions to specific developments projects through partnerships. It is a shared hope, however, that in working together one day the rich threatened archaeological heritage of the southern Gulf Islands will not only be valued at a local community level, but valued as a national part of Canadian heritage. In this modern era of reconciliation, there is a need to foster such emergent partnerships across British Columbia.

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