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HERITAGE CONSERVATION: THE ACT AND MORE

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I. INTRODUCTION

Sometimes local governments wish they had more authority to achieve important policy objectives, including objectives promoted by the Province, which of course is the source of all local government authority in the first place. Sometimes (and by "sometimes" we mean "often") the Province would like local governments to assist the Province in achieving provincial policy objectives (like protecting farm land or fish habitat, or increasing the supply of housing). When it comes to heritage conservation, local governments need look no further than Part 15 of the *Local Government Act*. Part 15 offers a comprehensive suite of powers local governments can rely on to identify, and protect, heritage properties, in some cases including undeveloped land, within their boundaries. And to be clear it leaves it up to local governments in most cases to decide what property is worth preserving in the first place. Yet local governments and the Province seem quick to look beyond Part 15 for heritage conservation opportunities, and even obligations. Therefore, before turning to Part 15, this paper will first review the *Heritage Conservation Act* and the role of local governments in that universe, and then consider heritage conservation moments in the broader context of other local government development approvals. We'll then attempt to convince readers that Part 15 should be the first, not the last, place to look in any search for heritage conservation authority.

II. THE *HERITAGE CONSERVATION ACT* UPDATE

The *Heritage Conservation Act*, RSBC 1996, c 187 (the "HCA") is meant to protect recorded and unrecorded heritage sites and objects throughout the province. It is also undergoing what has been described as its first substantial update since 1996: the Heritage Conservation Act Transformation Project (the "Update"). Among other goals, the Update is meant to bring the HCA in line with the UN Declaration of the Rights of Indigenous Peoples ("UNDRIP") and to improve how the HCA is implemented to benefit all British Columbians. The Update has five goals[1].

- Making permitting faster and easier, to avoid waiting for multiple permits and navigating unclear rules and processes;
- Helping people and communities rebuild quicker after disasters such as wildfires and floods;
- Protecting heritage more effectively, reducing the risk of accidental damage to sacred or other significant sites;
- Strengthening the role of First Nations in decision-making about their own heritage and ancestors, in alignment with the Declaration Act; and

[1] https://engage.gov.bc.ca/heritageconservationact/

- Increasing transparency and access to information (including making it easier to find out if there is a protected site on your property) to support planning and development decisions.

Two phases of engagement have been completed as of November 2025. The first phase of consultation took place in 2022 and the second in 2023. Both have been summarised in reports published on the Province's Update website. The third phase of engagement began in 2025 but was paused/extended in response to a UBCM request for more meaningful consultation with local governments. As of the writing of this paper, there is limited public information on what will happen next. It seems changes are inevitable but for now we are left with the current legislation, which we turn to next.

III. THE *HERITAGE CONSERVATION ACT*

The stated purpose of the *Heritage Conservation Act* is to encourage and facilitate the protection and conservation of heritage property ("heritage property" is not a defined term in the HCA, but seems to include heritage sites, objects and other designated property) in British Columbia.[2] The primary mechanism by which the HCA achieves this purpose to prohibit anyone from altering, destroying, or moving certain heritage property without a permit (from the Archaeology Branch (currently under the Ministry of Forests)). Anyone familiar with the federal *Fish Protection Act* (not to be confused with the provincial *Riparian Areas Protection Act*), which prohibits damage to fish habitat without a permit, will recognize this approach.

A. Heritage Property and Protection

To begin with, it is important to identify what sites and objects are protected by the HCA, and how. Section 12.1(2) of the HCA provides a list of prohibited acts:

- Damage, desecrate or alter a Provincial heritage site or a Provincial heritage object or remove from a Provincial heritage site or Provincial heritage object any heritage object or material that constitutes part of the site or object;

- Damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value;

- Damage, alter, cover or move an aboriginal rock painting or aboriginal rock carving that has historical or archaeological value;

- Damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846;

[2] Section 2 of the *Heritage Conservation Act*, RSBC 1996, c 187.

- Damage or alter a heritage wreck or remove any heritage object from a heritage wreck;

- Damage, excavate, dig in or alter, or remove any heritage object from, an archaeological site not otherwise protected under this section for which identification standards have been established by regulation;

- Damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of unknown origin if the site may be protected under paragraphs (b) to (f);

- Damage, desecrate or alter a site or object that is identified in a schedule under section 4 (4) (a); and

- Damage, excavate or alter, or remove any heritage object from, a property that is subject to an order under section 12.3 (1) or 16.1.

This list contains a mixture of property left undefined by the HCA, and other types of property which have specific meaning under the HCA. Those types of property largely left undefined will generally speak for themselves (or at least that must be the intention as we understand it in statutory interpretation circles). These include burial places that have historical or archaeological value, aboriginal rock paintings or carvings, and heritage objects (a defined term) from a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846. The prohibition and protection apply regardless of whether the property in question has been registered or recorded, so it's buyer beware, as understood in chance find protocols or procedures, which are not specifically mentioned in the HCA but are well-known to those in the heritage conservation world. Anyone who uncovers, or believes they may have uncovered protected heritage property during a project must, generally speaking: (1) stop work that may endanger the site or object, and (2) retain the services of an archaeologist.

The other broad category of property is identified through mechanisms found in the HCA: designation, and agreements with First Nations. The HCA creates a framework for the identification of specific heritage property, for example through designation of Provincial heritage sites or objects under ss. 9 and 11.1, following notice to affected parties, registration and in some cases compensation. The following definitions from the HCA are key to the provincial designation scheme:

> "heritage value" means the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object;
>
> "heritage object" means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people;

> "heritage site" means, whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people;
>
> "Provincial heritage object" means a heritage object designated under section 9;
>
> "Provincial heritage site" means a heritage site designated under section 9 or a Provincial heritage property designated under section 11.1.

The other major category of protected heritage property under the HCA comprises sites or objects identified in a schedule under section 4(4)(a), having particular spiritual, ceremonial, or other cultural value to First Nations who have entered into a formal agreement with the Province respecting the conservation and protection of sites and objects representative of their cultural heritage.

B. Heritage Conservation Act Permits

As noted previously, the HCA protects heritage property by prohibiting activity which may damage, alter, or destroy heritage property. The HCA's permitting regime has three types of permits, allowing for inspection, investigation, and alteration.

The heritage inspection permit (an "inspection permit") is conceptionally often the first permit issued in relation to heritage property as it allows an initial investigation to identify whether a site is an archaeological site. It does not allow an activity prohibited under 12.1(2) but instead allows excavation or alteration for the purposes of archaeological research or searching for artifacts of aboriginal origin. The investigation permit requires an archaeologist to prepare the application and once issued the archaeologist may undertake an investigation of the site, including a subsurface excavation.

The heritage investigation permit (an "investigation permit") is required for more substantial investigations than the inspection permit, and is used to support GIS-based Archaeological Overview Assessments, in response to a natural disaster or climate change initiative, academic research, Indigenous-led research, or extensive studies of a known archaeological site to advance cultural and scientific knowledge. It is also used to gather more information to mitigate the effects that development may have on a heritage property. As such, it might be the second permit issued in relation to a heritage property, once the site is confirmed to contain heritage value.

The final permit contemplated by the HCA is an alteration permit. This permit can be issued to authorize any of the prohibited actions under 12.1(2), and may be denied where the minister considers that the action to be authorized under the permit would unreasonably compromise the heritage protection of the property, or if there is insufficient information to determine whether the proposed action would unreasonably compromise the heritage protection of the property. While the language of the HCA permits the minister to refuse to issue a permit on

this basis, it does not require the minister to withhold such a permit, nor does it state that the proposed action cannot desecrate or damage heritage property.

IV. WHAT IS THE ROLE OF LOCAL GOVERNMENTS?

The *Heritage Conservation Act* is a provincial statute, so what is the role of local governments, if any, in its administration and operation? Unlike the *Riparian Areas Protection Act*, the HCA does not deputize local governments to protect heritage property in accordance with a provincial directive, and the HCA is only enforceable by the Province. However, local governments may have a role as property owner and developer, and as a regulatory body.

A. As Property Owners

As property owners, local governments often use and develop land, including land that may be heritage property: they build and improve parks, roads and other works and services; public buildings like community centres, fire halls, municipal offices, and libraries; and perhaps even residential, commercial and industrial buildings. As owners and developers of land, local governments are subject to the HCA just like all other land owners in the province.

As a rule of thumb, there are two primary considerations for assessing whether a permit under the HCA will be necessary. The type of work being undertaken and the location of that work. Works that do not disturb the soil are less likely to require a permit, as they are unlikely to damage, desecrate, or alter a heritage site (at least when the work is unrelated to the heritage site/object). On the other end of the spectrum, works that include substantial ground disturbance or alteration are more likely to require a permit. The other major factor is the location of the work. Work being undertaken within a known archaeological site is likely to require a permit, as is work that is taking place near a known site or where an Archaeological Overview Assessment has taken place. On the other hand, work undertaken far from any known archaeological site is less likely to require a permit. When these two factors are overlayed, they provide some degree of guidance on the likelihood that any given property owner should be obtaining a permit prior to undertaking a project on their land. No ground disturbance on land that is nowhere near a known archaeological site is unlikely to require a permit, whereas work that involves substantial ground alteration on or near known archaeological sites is likely to require one.

B. As a Regulatory Body

Local governments are also land use and development regulators, and as such it is often asked what role they may have in relation to other regulatory regimes. Specifically, it is not difficult to image a situation where the local government knows that proposed development may endanger a heritage site or object. Does that local government have a legal duty to deny a development application such as rezoning or a building permit without some reassurance that the work will not destroy the heritage value in that site?

In the case of the HCA, there are no explicit obligations on a local government to deny the development application until an HCA permit is obtained. Again, by way of comparison, the HCA is unlike the provincial scheme for identifying and remediating contaminated sites, which relies on local governments to receive and forward site disclosure statements (formerly site profiles) and imposes a freeze on subdivision and development approvals until one of a number of instruments is issued by the Province. Specifically, section 557(2)(b)(ii) of the *Local Government Act* states that a local government must not approve certain zoning, development permit, or building permit applications until required steps under the *Environmental Management Act* have been fulfilled. There is no parallel local government role in the provincial scheme for identifying and protecting heritage property.

Unlike the municipal councils who appoint them, subdivision approving officers have the statutory authority to deny subdivision applications on the basis of heritage conservation: under section 86(1)(c)(iv) of the *Land Title Act*, after due consideration of available planning studies, an approving officer may refuse a subdivision if the anticipated development of the subdivision would adversely affect the conservation of heritage property to an unacceptable level. Additionally, an approving officer may refuse to approve a subdivision plan if the approving officer considers that the deposit of the plan is against the public interest which would likely include the public interest in conserving heritage property, broadly defined, especially where heritage conservation is an established principle in an official community plan.[3]

C. Through development permitting processes

We have thus far commented on a local government's obligation, or lack thereof, to enforce or adhere to the HCA's heritage conservation regime, but what if a local government wishes to integrate heritage conservation into its own development approval process despite not having an obligation to do so? In particular, we consider a local government's authority to deny a development application or to require archaeological studies in connection with rezoning development permit and building permit applications.

Rezoning is a legislative decision by the council of a municipality or the board of a regional district. In other words (at least outside transit-oriented areas) there is a broad discretion to refuse and therefore ample room to impose conditions for approval. Still, the discretion is not limitless and the decision of the local government (council or board) must not be unlawfully fettered, for example by blindly following a stated policy and, in doing so, failing to exercise discretion at all. The general rule is that a local government is "entitled to adopt a policy with respect to the exercise of its discretion provided it [is] willing to consider individual applications for variance or exemption [on their merits]."[4]

[3] *Burns v. Dale*, 1997 CanLII 816 (BC SC) paragraph 10, citing *Cole v. Campbell River* (1995), 27 M.P.L.R. (2d) 56 (C.A.).
[4] *Davison v. Maple Ridge (District of)*, 1991 CanLII 427 (BC CA)

The discretion to refuse development permits and building permits is more tightly constrained and therefore presents less room for insisting on heritage conservation measures or that HCA permits have been issued for the proposed work. With development permits, not only is the discretion to issue constrained by previously established guidelines, the purposes for which a DPA can be designated under section 488(1) of the *Local Government Act* do not include heritage conservation.

Building permits are similar to development permits, in that their issuance is an act by local governments with little discretion left to the decision-maker. The authority of a board or council to exercise its building regulatory powers are limited to the following reasons:

- The provision of access to a building or other structure, or to part of a building or other structure, for a person with disabilities;
- The conservation of energy or water;
- The reduction of greenhouse gas emissions; and
- The health, safety or protection of persons or property.

Given this limited scope, it seems unlikely a building permit can be refused or that the building permitting authority can be used to obtain archaeological studies or achieve other heritage conservation objectives, except where supported by a specific exercise of authority under Part 15 of the *Local Government Act*.

V. PART 15: THE FORGOTTEN CHILD?

The thesis of this paper is that local governments interested in heritage conservation should turn first, and in some cases last, to Part 15 of the *Local Government Act*. We say this because, again, Part 15 offers specific authority to identify and protect heritage property, and special enforcement powers to be exercised against scofflaws. Regional districts must adopt a bylaw to establish and operate a heritage conservation service before availing themselves of the Part 15 powers and are not local governments for the purpose of Part 15 unless they have done so.

Certain limits in relation to the use of Part 15 powers, set out in sections 588 and 589 of the *Local Government Act*, actually reinforce the broad reach of their scope. Section 588(1) says Part 15 must not be used to conserve natural landscapes or undeveloped land except:

- To the extent that the exercise of power under this Part in respect of natural landscape or undeveloped land is, in the opinion of the local government, necessary for the conservation of adjacent or proximate real property that is protected heritage property;
- With respect to a site that has heritage value or heritage character related to human occupation or use; or

- With respect to individual landmarks and other natural features that have cultural or historical value.

The term "natural landscapes or undeveloped land" probably does not include lawns, gardens and other human-altered landscapes, so those would not be excluded in the first place. Under (a) a grassy meadow surrounding an old house could probably be protected along with the house itself; under (b) a First Nation's clam garden might be a candidate for protection or conservation; under (c) a rocky bluff or windswept headland used for surveillance to warn of marauding ships or tribes would seem to be within scope.

Another "limit", under s. 589, is on compensation that might otherwise be claimed where the good faith performance of any duty or exercise of any power under Part 15 caused loss or damage or a reduction in property value. This limit is similar to the "no compensation" rule in section 456 of the *Local Government Act*, which protects against claims for loss of value in relation to the exercise of Part 14 powers. That protection is available except in the case of "public use" zoning. The exceptions under s. 589 are for heritage inspections and heritage designation bylaws, both of which do give property owners a right to compensation for damage or reduction in property value. The significance of this distinction – between decisions triggering a right to compensation versus those that don't – was central to a dispute that ended with a BC Court of Appeal in 2019 (*Wu v. Vancouver (City)*, 2019 BCCA 23). After receiving an application to demolish a house with heritage merit but no formal heritage protection, the City of Vancouver embarked on what the trial judge characterized as a circuitous course of delay, before ultimately designating a heritage conservation area that included the property. This designation, instead of an individual, property-specific designation bylaw that is one of the exceptions to the no compensation rule, allowed the City to conserve without compensation, much to the chagrin of the owner. The City prevailed, including because the Court wasn't convinced the original demolition application was "complete" in the first place, but for the purpose of this paper the lesson for local governments is simply that heritage conservation can, in some cases, be achieved without requiring the payment of compensation to owners for reduction in market value. The lower court's decision, ultimately overturned on appeal, reads a bit like a scathing report from the Ombudperson, following the kind of investigation specifically contemplated under s. 591 of the *Local Government Act*, which says "the Ombudsperson … may investigate complaints about decisions made by a local government under this Part or about procedures used by a local government under this Part." Ultimately, a recommendation can lead to a cabinet order, binding on the local government.

Before taking dramatic and permanent regulatory action local governments may consider some of the more tentative or preliminary steps outlined in Division 3 (Heritage Review) of Part 15: establishing or designating a community heritage commission under s. 597; creating "a community heritage register that identifies real property that is considered by the local government to be heritage property" by resolution under s. 598, and recognizing "heritage value or heritage character of a heritage property, an area or some other aspect of the community's heritage" under s. 599. With an owner's permission the local government can

have a plaque or other marker installed (since the owner's permission is required, it's not clear what authority the statute really offers here).

Next, a local government can take the slightly more invasive step of ordering a heritage inspection, which gives authority to enter land or premises at any reasonable time, after making a reasonable attempt to notify the owner, or to seek an entry warrant. A person carrying out a heritage inspection:

> "… may perform tests and remove material samples that are necessary for the purposes of the heritage inspection, but must do this in such a manner that any alterations are as minor and inconspicuous as reasonably possible given the requirements of the heritage inspection."

Regardless of which preliminary steps a local government takes, the main events in Part 15 fall under the temporary and continuing protection rubrics. Temporary protection measures allow local governments or their delegates to withhold approvals for actions that would alter a range of heritage property, in some cases to allow consideration and implementation of continuing protection. Temporary protection can be by order under s. 606, or by bylaw to establish a heritage control period under s. 608. It is automatic for 120 days following first reading of a bylaw to designate a heritage conservation area or 60 days for a property-specific heritage designation bylaw. (The *Vancouver Charter* versions of many of these sections were at issue in the *Wu v. Vancouver* decision mentioned earlier.) While property is subject to temporary protection, alterations and structural changes are proscribed.

Finally, Part 15 offers three forms of "continuing protection" for heritage property, including, subject to the limits mentioned above, natural landscapes and undeveloped land. An official community plan can designate a "heritage conservation area". Like a development permit area, the OCP must "describe the special features or characteristics that justify the designation [and] state the objectives of the designation". The OCP or a zoning bylaw must also "specify guidelines respecting the manner by which the objectives are to be achieved". Once a heritage conservation area is designated, a heritage alteration permit is required for subdivision, construction, and alteration of buildings and structures, or alteration of a feature that is protected heritage property. Examples of heritage conservation areas in the lower mainland include Vancouver's "First Shaugnessy", Lower Caulfeild in West Vancouver, and the Queen's Park Neighbourhood in New Westminster.

A more targeted approach, "heritage designation protection", is available under s. 611, which allows local governments, unilaterally, by bylaw, to "designate real property … as protected". Like an OCP amendment, notice and a public hearing are required, and the local government must also have a report prepared including information respecting the matters set out in 612(5):

- The heritage value or heritage character of the property;

- The compatibility of conservation with the official community plan and any other community planning objectives in the area in which the property is located;
- The compatibility of conservation with lawful uses of the property and adjoining lands;
- The condition and economic viability of the property;
- The possible need for financial or other support to enable appropriate conservation.

Not surprisingly, the statute requires what the common law of procedural fairness would almost certainly dictate: the report must be available for public inspection in advance of the public hearing. After adoption of a heritage designation bylaw the local government must give notice to the land title office and to the heritage minister. Failure to give notice to the land title office can sow the seeds of a future negligence claim (*Tri-Crest Invt. Corp. v. Davidson & Co.,* 1988 CanLII 3021).

The heavy hand of a heritage designation bylaw is somewhat lightened by the obligation to compensate owners for any reduction in market value caused by the designation, in an amount agreed on or determined by binding arbitration, as long as the owner applies within a year of bylaw adoption (or prior to adoption).

A common approach to avoiding the compensation obligation attached to heritage designation by bylaw under s. 611 is through a heritage revitalization agreement ("HRA") under s. 610. Aside from the critical distinction of having explicit statutory authority, the HRA scheme is similar in many respects to local governments "selling zoning" in exchange for community amenity contributions, in some cases secured by covenant: a local government can grant relief from strict compliance with zoning and other bylaw rules in exchange for heritage conservation. For example, a local government might allow extra density or create additional subdivision potential if an owner preserves, enhances, and agrees to maintain a heritage building or landscape features. Again, a bylaw is required, and if use, density or residential rental tenure rules are to be varied a public hearing is also mandatory. The local government must file notice on title and, like land use permits and housing agreements, the HRA becomes binding on future owners (aka "all persons who acquire an interest in the land affected by the agreement").

In another parallel to the development permit scheme, Part 15 also allows relief from strict compliance with any of the continuing protection designations, with a heritage alteration permit ("HAP") that a local government or its delegate can issue under s. 617, on the application of an owner of land. An HAP cannot vary use or density, but according to the BC Court of Appeal in a case involving the issuance of an HAP by the Township of Langley, courts must defer to a local government on the question of what amounts to "density" (a finding that also applies to the prohibition on varying density with land use permits).

Another significant and often-overlooked power in Part 15 is found in s. 616, which allows local governments to establish minimum standards for the maintenance of properties within a heritage conservation area, or protected by a section 612 designation bylaw. Maintenance obligations also appear to be well within the scope of matters addressed in a heritage revitalization agreement.

Last but not least, Part 15 provides tools for enforcement against contraventions of validly-enacted temporary or continuing protection measures. In an unreported BC Supreme Court decision from 2017, following a half-day hearing, West Vancouver obtained an order for the removal of a security gate constructed without permission in a heritage conservation area. The required permission probably would not have been given, as the relevant guidelines for the area specifically discouraged the type of structure the owners had installed.

Unlike the scant guidance for courts when enforcing against development permit are contraventions, section 619 is explicit as regards the kinds of orders available to remedy heritage conservation misdeeds:

- A requirement that, on terms and conditions the court specifies, the person restore the property to which the matter relates to its condition before the contravention;
- A requirement that the person undertake compensatory conservation work as the court considers appropriate on the property that was affected or on other property, or that conservation work be performed by others at the expense of that person;
- A requirement that the person comply with a direction under section 591 (4) or with the requirements and conditions of a heritage alteration permit;
- A requirement that the person carry out measures specified by the court to ameliorate the effects of the contravention or non-compliance;
- An authorization that the local government may, by its employees or others at the expense of the owner, perform work regarding a matter referred to in this subsection;
- Any other requirement the court considers advisable.

If nothing else in this paper, or Part 15, convinces you to at least consider using Part 15 to scratch any heritage conservation itches, the clear and comprehensive code for enforcement should be enough. It provides a full answer to any question about the court's jurisdiction to require restoration, compensation, and amelioration work, at the expense of the owner, even if carried out by the local government.

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