

GRATL & COMPANY

BARRISTERS AND SOLICITORS

April 26, 2021

Via Electronic Mail

Baseline Archaeological Services Ltd.
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Hornby Island Resort Ltd.
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105-2100 Guthrie Road
Hornby Island, BC
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Attn: Owen Grant and Jack Hornstein

Dear Sir:

**Re: Construction/Excavation at Ch'atayich (DjSe-4)
Cease and Desist**

I have been retained by K'ómoks First Nation to address the unlawful construction/excavation and cultural desecration at the K'ómoks' historical village, Clack da oo, on Hornby Island (Cha'atayich). As you know, ancestral remains of three K'ómoks people, including the remains of one infant child, have been disturbed by construction and excavation activity.

I write to demand on behalf of K'ómoks First Nation that all construction and excavation work at Clack da oo immediately cease and desist until a lawful process of consultation and accommodation has concluded.

Background

Clack da oo has been designated DjSe-4 by the Archeology Branch of the Ministry of Forests, Lands, Natural Resource Operations and Rural Development ("Arch Branch") and is a protected site under the *Heritage Conservation Act*. Clack da oo is recognized as having high cultural and archaeological significance to K'ómoks First Nation and other people within British Columbia.

Clack da oo more or less comprises a geographic area known as Shingle Spit by many of the residents of Hornby Island. A portion of Clack da oo, at the civic address of 4305 Shingle Spit Road, is designated under the *Land Titles Act* as "remainder of Lot B, Section 4-1, Nanaimo District, Plan 24915, Except Part in Plan 2638 R.W, PID 000-538-060" (the "LTA

Parcel”). The LTA Parcel is assigned in fee simple to Hornby Island Resort Ltd. (“Resort Ltd.”), which is incorporated in British Columbia under the *Business Corporations Act* and appears to be owned by Jack Hornstein. Mr. Hornstein appears to be directing the construction/excavation activities conducted by Resort Ltd.

The Hornby Islands Trust approved Resort Ltd. to excavate the portion of Clack da oo within the LTA Parcel and to construct a townhouse complex and a pub building intended for the sale of liquor with four motel-style apartments above (the “Pub/Townhouse Complex”).

In December 2019, prior to making any permit application under the *Heritage Conservation Act*, Resort Ltd. and Jack Hornstein caused an archaeological disruption at Clack da oo while digging a trench for a septic field. An investigation was conducted and Arch Branch concluded that Resort Ltd. and Jack Hornstein had breached the *Heritage Conservation Act*, but the Attorney General of British Columbia declined to prosecute. Resort Ltd. and Jack Hornstein were directed to apply for an inspection permit and alteration permit under the Act.

Arch Branch Inspection Permit

On May 7, 2020, Paula Thorogood, Manager of Archaeological Operations for Arch Branch, issued Inspection Permit 2020-0125 the Minister of Forests, Land, Natural Resource Operations and Rural Development (the “Inspection Permit”). The Inspection Permit is to allow an archaeological impact assessment of the proposed construction/excavation on the LTA Parcel.

The Inspection Permit requires Baseline Archaeological Services Ltd. (“Baseline”) to consult individuals and organizations with knowledge of location, distribution and significance of archaeological resources in the study area.

Baseline and Resort Ltd. met with representatives of K’ómoks First Nation but they were reluctant to implement K’ómoks First Nation’s standards for archaeological work set out in the Cultural Heritage Policy. At the time, Jack Hornstein commented that he would rather build his project on stilts than incur increased cost for archaeological work that complied with K’ómoks’ archaeological standards.

The Inspection Permit includes the terms set out in the Inspection Permit application filed with Arch Branch by Resorts Ltd. Part 6 of the Inspection Permit application provides as follows:

When partial or complete ancestral remains, grave goods, and/or burial features (e.g. cairns and mounds) are identified in the field, all nearby ground disturbance will cease. Affected First Nations, the Branch, and other concerned parties will be immediately informed, and next steps will be determined.

Archeologists will consult with First Nations prior to fieldwork to determine protocols in the event ancestral remains are anticipated.

The Inspection Permit specifically requires that all ground disturbance must cease at this time. K’ómoks First Nation demands that Baseline and Resort Ltd. comply with this condition. The

burial sites are not to be disturbed until next steps are determined by K'ómoks First Nation and Arch Branch.

K'ómoks First Nation believes that there is a significant likelihood that the condition to immediately cease all ground disturbance upon identification of ancestral remains was breached by Resort Ltd. and/or Baseline. Work should have ceased immediately upon discovery of the first K'ómoks ancestor, and should not have continued and disturbed two more ancestors until and unless a full consultation process was completed.

Section 12.1(2) of the *Heritage Conservation Act* provides as follows:

12.1(2) Except as authorized by a permit issued under section 12.2 or 12.4 or an order issued under section 12.3, a person must not do any of the following:

(b) 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;

Nothing in the Inspection Permit allows Baseline or Resort Ltd. to desecrate or alter a burial place of the K'ómoks people.

Section 36(2) of the *Heritage Conservation Act* provides that a person who commits an offence under s.12.1(2) is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than 6 months or to both.

It is the position of K'ómoks First Nation that s.12.1(2) of the *Heritage Conservation Act* has been breached by Baseline, Resort Ltd. and Jack Hornstein, under whose direction the s.12.1 was breached, and that Baseline, Resort Ltd. and Jack Hornstein have breached Conditions 5 and the Part 6 condition of the Inspection Permit.

Arch Branch Alteration Permit

On May 7, 2020, Paula Thorogood, Manager of Archaeological Operations for Arch Branch, also issued Alteration Permit 2020-0126 on behalf of the Minister of Forests, Land, Natural Resource Operations and Rural Development (the "Alteration Permit").

K'ómoks First Nation takes the position that it was unlawful and unreasonable for the Minister to issue the Alteration Permit before the archaeological assessment was prepared pursuant to the Inspection Permit. As the purpose of the *Heritage Conservation Act* is to preserve and protect cultural resources, approving the alteration of a cultural resource before knowing the nature and significance of that cultural resource is unreasonable, irrational, irresponsible and arbitrary. Issuing investigation permits and alteration permits at the same time is an administrative shortcut without statutory foundation.

K'ómoks First Nation considers the Alteration Permit to be a nullity, and of no force and effect. Alternatively, and this is to give the Alteration Permit a more charitable interpretation than the terms on the face of the document would allow, the Alteration Permit is to be

interpreted as coming into effect only after the archaeological assessment under the Inspection Permit is completed and submitted to the Ministry and the affected First Nations, including K'ómoks First Nation, and each of them have an opportunity to review the archaeological assessment, and for consultation and accommodation of their interests.

The interpretation that the Inspection Permit is to be concluded prior to any reliance on the Alteration Permit is supported by the following reference to the Inspection Permit application in the Application for s.12.4 Alteration Permit filed by Resort Ltd., under the heading “1.3 Related Permits”:

Describe the relationship between the HCA permits: The 2010-0007 study was conducted in anticipation of a different design of the same development outlined in this application.

Application 20A0### has been applied for concurrently with this application to allow for: the evaluation of previously unrecorded archeological remains; to process and archeological materials recovered; and to allow for excavation/SDR.

The Alteration Permit application anticipates the existence of “previously unrecorded archaeological remains” and acknowledges the priority of the Inspection Permit to the Alteration Permit.

The Inspection Permit application states that the purpose of the Inspection Permit is to conduct an “impact assessment of DjSe-4... for proposed renovations and new construction later in 2020”, reinforcing that the impact assessment will be concluded before any renovations or construction occurs. Furthermore, under heading “1.3 Goals and Objectives”, the Inspection Permit application lists the following goals and objectives:

- Identify and evaluate protected archeological resources within the proposed development area subject to assessment; ...
- Assess site significance;
- Identify the nature and magnitude of direct and indirect impacts that future proposed development may have on protected archeological sites;
- Formulate management options for avoiding or mitigating the impacts to protected sites, which may include systemic data recovery;

The Inspection Permit application expressly states, “this permit will allow for the evaluation of unanticipated intact deposits not previously identified”. Read together, it is clear from the Inspection Permit and Alteration Permit that assessment of site significance, identification of direction and indirect impacts of proposed development and formulation of options for avoiding or mitigating impacts to protected sites to occur prior to construction activities that will destroy cultural heritage. K'ómoks' interpretation of the conditional status of the Alteration Permit was confirmed by the following warning issued by Eric Forgens of the Arch Branch to Baseline and Resort Ltd. on February 18, 2021:

In this case, as we've discussed, the intent [of the permits] was to conduct the post-impact assessment of areas that were damaged prior to permit issuance, then locate

intact midden deposits in the project area, evaluate them so we know their condition, and then draft a plan to mitigate any intact deposits that can't be completely avoided. The alteration permit can not be generally considered active until these tasks have been completed and approved.

The conclusion that the Alteration Permit is of no force and effect at this time is reinforced by the fact that the proponent's shifting design plans and reliance during the permit application process on previous archaeological studies based on different proposed construction siting choices. The shifting designs proposed by Resort Ltd. are hallmarks of a poorly planned construction venture in respect of which the project proponent is aware of a high risk that construction will be prevented by the discovery of burial sites or culturally significant artefacts. The project proponent knew the risks that inspection of the site would unearth burial sites and acknowledges those risks in his permit applications.

As the archaeological assessment process under the Inspection Permit has not been completed, the K'ómoks First Nation takes the position that the Alteration Permit is of no force and effect at this time.

Even if this interpretation is incorrect and the Alteration Permit is of some force and effect, the express terms of the Alteration Permit prohibit any further excavation or construction work. Condition 9 of the Alteration Permit provides as follows:

9. In the event that human remains are encountered, all work must cease in the vicinity of the remains and the Archeology Branch and affected indigenous communities must be contacted for direction, unless otherwise provided for in the permit application.

Furthermore, the Application for s.12.4 Alteration Permit filed by Resort Ltd., provides that:

If articulated human remains cannot be avoided *in situ* and consultation between the Branch, First Nations and other concerned parties is the most appropriate option, human remains will be respectfully recovered by an archaeologist with osteological expertise and placed in secure storage until ready for final disposition.

(the "Consultation Condition")

The Consultation Condition forms part of the Alteration Permit.

Read together, the Alteration Permit and Consultation Condition require that if human remains are encountered, consultation between the Branch, First Nations and other concerned parties regarding the most appropriate option will be triggered. This consultation has not occurred.

Violations of Heritage Conservation Act

K'ómoks First Nation believes there is a significant likelihood that Baseline, Resort Ltd. and Jack Hornstein have violated the *Heritage Conservation Act* by disturbing a K'ómoks burial site in the course of exceeding and breaching the terms of the Inspection Permit.

The first breach is in respect of the type of excavation conducted. The Inspection Permit contemplates exploratory test holes dug every five metres in the areas proposed for construction. Instead, deep construction excavation with heavy machinery appears to have commenced prior the preparation of the archaeological report under the Investigation Permit. The volume and manner of removal indicates that Resort Ltd. and Jack Hornstein have dramatically exceeded the type of disruption contemplated by the Inspection Permit.

The second breach is in respect of continued excavation after discovery of the first K'ómoks ancestor. K'ómoks First Nation believes that excavation using heavy equipment may well have occurred and ceased only after multiple bodies were disturbed. The use of heavy equipment before the reporting and consultation required by the Inspection Permit concludes is unlawful and breaches the *Heritage Conservation Act*.

K'ómoks First Nation is conducting a formal investigation. I ask that Baseline provide my office with all records dealing with the type of excavation undertaken pursuant to the Inspection Permit, the type of equipment used, all archaeological records made in the course of excavation, and, in particular, all records dealing with the time and sequence of disruption of the K'ómoks First Nation ancestors.

Consultation Required by Law

A process of consultation and accommodation is required by law. The Supreme Court of Canada has repeatedly affirmed the Crown's duty to consult and accommodate when Crown action may affect aboriginal rights: *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

Given the discovery of a K'ómoks burial site, meaningful consultation must include an archaeological impact assessment of the larger area comprising Clack da oo (DjSe-4). The *Heritage Conservation Act* must be read to comport with Aboriginal rights at common law. Section 8 of the *Heritage Conservation Act* provides that no provision of that Act and no provision in an agreement entered into under section 4 of the *HCA* abrogates or derogates from the Aboriginal and treaty rights of a First Nation or of any Aboriginal peoples.

A meaningful archaeological assessment of the Clack da oo site is necessary to understand the cultural significance of the proposed development area within the Parcel. Property boundaries under the *Land Titles Act* are irrelevant to K'ómoks First Nation and are irrelevant to the administration of the *Heritage Conservation Act*. Section 6 of the *Heritage Conservation Act* provides that the *Heritage Conservation Act* prevails with respect to any matter affecting the conservation of a heritage site or heritage object referred to in s.12.1(2).

In this context, consultation must be oriented to the question of whether the particular townhouse construction proposed by Resort Ltd. and Mr. Hornstein should proceed on the basis of the current siting and design choices made by Resort Ltd., and whether construction is feasible at all. A full archaeological assessment is necessary to determine whether there are alternative siting and design choices that do not desecrate sacred burial sites of K'ómoks First


Nation and its people, and whether any culturally appropriate alternative burial sites are available and appropriate.

The consultation and accommodation process should be informed by Article 11 of the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), which provides that “Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites...”. The consultation process should also comport with Article 25 of *UNDRIP*, which provides that “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned and otherwise occupied lands [and] territories”. Section 2 of the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c.44, confirms the application of *UNDRIP* to the laws of British Columbia.

I am informed that consultation by Her Majesty the Queen in right of the Province of British Columbia prior to commencing work at Clack da oo has been woefully inadequate. Although preliminary discussions with the Honourable Minister Conroy are scheduled to commence on May 14, 2021, appropriate consultation should have occurred with my client before the Inspection Permit and certainly before any Alteration Permit was contemplated. Previous breach of the duty to consult necessitates compliance with a more stringent standard following the breach.

On behalf of the K'ómoks First Nation, I formally notify Baseline, Resort Ltd. and Jack Hornstein that if work does not immediately cease at Clack da oo, I am instructed to commence litigation without further notice.

Sincerely,



Jason Gratl

Copy: Minister of Forests, Lands, Natural Resource Operations and Rural Development
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