

5.0 JURISDICTION OVER ARCHAEOLOGICAL RESOURCES

In terms of direct conservation and protection, the lead provincial government role has been filled by the Minister of Culture. The Minister is responsible for encouraging the sharing of cultural heritage and for determining policies, priorities and programs for the conservation, protection and preservation of the heritage of Ontario (Cuming 1985). Under the *Ontario Heritage Act*, a process is defined that ensures that “once a property is designated of archaeological or historical significance and is likely to be adversely affected by commercial, industrial, agricultural, residential, or other development,” the appropriate measures are taken. In order to maintain a professional standard of archaeological research and consultation, the Minister is responsible for issuing licenses to qualified individuals, without which archaeological activities involving exploration, survey or field work are illegal. All reports submitted to the Ministry, as a condition of an archaeological license are reviewed by Ministry staff to ensure that the activities conducted under a license meet current technical guidelines, resource conservation standards, and the regulations of the *Ontario Heritage Act*. The regulation of archaeological activities carried out within the development context requires that all approval authorities must integrate the requirements of the *Ontario Heritage Act* within their land use planning process.

The rationale for a greater sharing of responsibilities between provincial and local governments for all types of heritage including archaeological resources was explained most effectively in a document entitled *A Strategy for Conserving Ontario’s Heritage* (Ontario Heritage Policy Review 1990). This document suggested a re-allocation of roles, in which the provincial government would maintain an advisory function and the municipal governments would assume the day-to-day responsibility for monitoring those archaeological features in their jurisdiction.

5.1 Provincial Legislation

The specific provincial legislation governing planning decisions is complex, but provides for a number of opportunities for the integration of archaeological conservation. The two principal pieces of legislation are the *Planning Act* (2005) and the *Environmental Assessment Act* (1997). Despite the on-going provincial transfer of review responsibilities, well over 1000 formal development applications throughout the province, under both Environmental Assessment and Planning Act processes, are reviewed annually by the Ministry of Tourism and Culture. Consequently, approximately 500 to 800 archaeological sites have been documented annually in southern Ontario since 1990 as a result of planning mechanisms.

5.1.1 *The Ontario Planning Act (2005) and the Provincial Policy Statement (2005)*

With respect to archaeological resources, the most recent Provincial Policy Statement, which came into effect March 1, 2005, states that:

Development and site alteration shall only be permitted on lands containing archaeological resources or areas of archaeological potential if the significant archaeological resources have been conserved by removal⁴ and documentation, or by preservation on site. Where significant archaeological resources must be preserved on site, only development and site alteration which maintain the heritage integrity of the site will be permitted (Section 2.6, Cultural Heritage and Archaeology).

⁴ “Removal” of an archaeological resource is accomplished through mitigative documentation and/or excavation.



For the above policy statement, significant archaeological resources are defined as those “that are valued for the important contribution they make to our understanding of the history of a place, an event, or a people.” The identification and evaluation of such resources are based upon archaeological fieldwork undertaken in accordance with the *Ontario Heritage Act*”.

Provincial interests in land use planning are also detailed in the Provincial Policy Statement provided in Section 3(1) of the *Planning Act*, as amended by the *Strong Communities Act* (2004), whereby:

a decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter, “**shall be consistent**” with this policy statement.

Thus all decisions made during the development process, regardless of the identity of the development proponent or the relevant approval agency, must address potential heritage resource impacts. Given the provincial interest, any planning activity referred to in the *Planning Act*, including the preparation of Official Plans or any planning application, should have regard for matters of provincial interest. The statements in the Act are sufficient for a municipality to require that an archaeological assessment be completed prior to the approval of a planning application.

It should be noted that an archaeological assessment must now be completed and submitted with an application for approval of a plan of subdivision. Section 51 (17) of the *Planning Act*, Part VI Subdivision of Land, now delineates under Schedule 1 the information and material to be provided by an applicant for approval of a plan of subdivision (O. Reg. 544/06, s. 2). This section states the applicant shall provide the approval authority with the following prescribed information and material:

23. Whether the subject land contains any areas of archaeological potential.
24. If the plan would permit development on land that contains known archaeological resources or areas of archaeological potential,
 - a) an archaeological assessment prepared by a person who holds a license that is effective with respect to the subject land, issued under Part VI (Conservation of Resources of Archaeological Value) of the *Ontario Heritage Act*; and
 - b) a conservation plan for any archaeological resources identified in the assessment.

Note that the PPS defines "archaeological resources" as "includes artifacts, archaeological sites and marine archaeological sites" (see Section 1.1 above).

In the case of a zoning by-law, the *Planning Act* allows a municipality to use the option of attaching a holding “H” symbol to a zoning by-law and require that as a condition of removing the holding symbol, and before development can proceed, an archaeological assessment or other matter be completed. Archaeological zoning by-laws may also be developed by a municipality under Section 34 of the *Planning Act* to protect significant archaeological resources and sites. The municipality must have due regard to matters of provincial interest, which means that archaeological assessments must be undertaken in support of development applications where identified as necessary.



In regard to municipal projects, the *Planning Act* states that where there is an Official Plan in effect, no public work shall be undertaken that does not conform to the Plan.

The Act also permits municipalities to pass zoning by-laws: “for prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land that is the site of a significant archaeological resource”.

In summary, a municipality is obligated, within the existing legislative framework, to require archaeological concerns be addressed in connection with any planning application and is able to pass zoning by-law(s) regulating the use of land that is the site of a significant archaeological resource. Moreover, a municipality is prevented from undertaking any public work that does not comply with its Official Plan. Heritage protection policies are appropriate in Official Plans, if developed and incorporated properly. If a municipality has a sound basis in its policies (Official Plan), it is possible to ensure that applications conform to heritage requirements.

The Programs and Services Branch of the Ministry of Tourism and Culture has the primary responsibility under the *Ontario Planning Act* and *Ontario Heritage Act* for matters relating to cultural heritage including archaeological resources. This branch has developed an “Ontario Heritage Tool Kit” that includes guides for interpreting the Ontario Heritage Act as well as InfoSheets on applying the cultural heritage and archaeology provincial policies. One of their primary responsibilities is to oversee the Municipal Plans Review process. The first component of this process is the determination of the potential for a development application to impact archaeological resources, based on a range of environmental and historic criteria. Should it be determined that there is potential for impacts to archaeological resources resulting from the approval of the development application, then the second component is the requirement that the development proponent undertake an archaeological assessment, the results of which are subject to Ministry of Tourism and Culture review and acceptance. Such assessments may be required for official plan amendments or plans of subdivision, and may also be required for smaller-scale developments reviewed under consent and zoning by-law amendment applications. In all of those cases where potential is identified on all or a portion of a subject property, a standard archaeological condition is attached to the development application.

The current condition recommended by the Ministry of Tourism and Culture reads:

The proponent shall carry out an archaeological assessment of the subject property and mitigate, through preservation or resource removal and documentation, adverse impacts to any significant archaeological resources found. No grading or other soil disturbances shall take place on the subject property prior to the City of Vaughan and the Ministry of Tourism and Culture confirming that all archaeological resource concerns have met licensing and resource conservation requirements.

While a generic primer has been developed by the Ministry of Culture (1997) for informing municipal planners about evaluating archaeological potential, those municipalities that have undertaken detailed archaeological potential studies or master plans have access to much more detailed information, that provides more effective and accurate means of determining archaeological potential and whether or not an assessment will be required. The review of site specific development applications, for the purpose of determining if archaeological resources or areas of archaeological potential are present within any particular subject plan, may now be made directly by the City of Vaughan through the use of this archaeological master plan, consisting of potential mapping, explanatory text, and suggested procedures for implementation of the study’s conclusions. Review of the resulting archaeological investigations, in order to determine that *Ontario Heritage Act* requirements have been satisfied, remains the responsibility



of the Ministry of Tourism and Culture, which provides notification to the consulting archaeologist of the results of their review. The Ministry of Tourism and Culture may notify the approval authority and development proponent of their review. That Ministry also administers all matters related to the management of the resources documented, mitigation strategies proposed, and any disputes arising from the conservation of archaeological resources under the land use planning process.

5.1.2 The Ontario Environmental Assessment Act (1997)

The *Environmental Assessment Act* (1997) applies to public sector projects and designated private sector projects. Private sector projects that are designated by the Province as subject to the Act are usually major projects such as landfills. The purpose of the Act is “the betterment of the people ... by providing for the protection, conservation and wise management in Ontario of the environment” (Section 2). Environment is very broadly defined to include “the social, economic and cultural conditions that influence the life of man or a community” [Section 1(c) (iii)] and “any building, structure ... made by man” [Section 1(c) (iv)]. Thus, environment is broadly interpreted to include heritage artifacts, structures or events.

The *Environmental Assessment Act* requires the preparation of an environmental assessment document, containing inventories, alternatives, evaluations and mitigation. It is subject to formal government review and public scrutiny and, potentially, to a tribunal hearing. Heritage studies of these major undertakings are a common component. There are also Municipal Engineers Association (MEA) Class environmental assessments for municipal projects that require similar considerations, but entail a simplified review and approval process.

Various provincial ministries are establishing protocols related to activities subject to the environmental assessment process, in order to ensure that heritage concerns in their respective jurisdictions are addressed. The Ontario Ministry of Transportation (2004), for example, ensures that archaeological surveys are undertaken in advance of all new road construction in order to ensure that no archaeological sites will be unknowingly damaged or destroyed, and the Ontario Ministry of Natural Resources prepared a set of guidelines on the conservation of heritage features as part of the Timber Management Planning Process (1991).

5.1.3 The Ontario Heritage Act

The *Ontario Heritage Act* (Ontario Regulation 170/04) defines “archaeological site” as “any property that contains an artifact or any other physical evidence of past human use or activity that is of cultural heritage value or interest”; “artifact” as “any object, material or substance that is made, modified, used, deposited or affected by human action and is of cultural heritage value or interest”. As such, archaeological sites are both highly fragile and non-renewable.

The Ministry of Tourism and Culture⁵ is charged under Section 2 of the *Ontario Heritage Act* with the responsibility to “determine policies, priorities and programs for the conservation, protection and preservation of the heritage of Ontario” and so fills the lead provincial government role in terms of direct conservation and protection of cultural resources. The Minister is responsible for encouraging the sharing of cultural heritage and for determining policies, priorities and programs for the conservation, protection

⁵ Provincial management of cultural resources has been carried out by operations units attached variously to the Ministry of Citizenship, Culture and Recreation (1993-1998), the Ministry of Tourism, Culture and Recreation (1998-2002) and the Ministry of Culture (2002-present).



and preservation of the heritage of Ontario (Cuming 1985). These goals are generally accomplished through other legislated processes, such as those required by the *Planning Act* and *Environmental Assessment Act*, rather than directly through the *Ontario Heritage Act* itself.

The *Ontario Heritage Act* does, however, govern the general practice of archaeology in the province. In order to maintain a professional standard of archaeological research and consultation, the Minister is responsible for issuing licenses to qualified individuals. In 2005, changes to the *Ontario Heritage Act* in Subsection 48(1), made it illegal for any person or agency to knowingly alter an archaeological site without a license (see Section 1.1 for definition of archaeological site). “Alteration” of an archaeological site is deemed to include any form of unsanctioned disturbance or destruction of an archaeological resource brought about by any means (i.e., either archaeological excavation, site looting, or development). This in effect offers automatic protection to all archaeological sites and the City should exercise due diligence in all planning contexts to ensure that archaeological features are protected from disturbance of any nature. Under Subsections 69(1-3) of the *Ontario Heritage Act*, an individual or a director of a corporation found in violation of the Act or the regulations is liable to a fine of up to \$50,000 or imprisonment for up to one year or both. A corporation found in violation of the Act or the regulations is liable to a fine of up to \$250,000, and more specifically, if a person or director or officer of a corporation is convicted of knowingly contravening Subsection 48(1), the maximum fine that may be imposed is \$1,000,000.00.

All reports submitted to the Ministry, as a condition of an archaeological license are reviewed by Ministry staff to ensure that the activities conducted under a license meet current technical guidelines, resource conservation standards, and the regulations of the *Ontario Heritage Act*. The regulation of archaeological activities carried out within the development context requires that all approval authorities must integrate the requirements of the *Ontario Heritage Act* within their land use planning process.

5.1.4 Other Provincial Legislation

Other land use legislation in the province provides opportunities for archaeological resource protection. The *Aggregate Resources Act*, governing approval of pits and quarries and administered by the Ministry of Natural Resources, recognizes the potential impact quarrying activities may have on cultural features such as archaeological resources. Furthermore, the development of a pit or quarry will often require an official plan amendment or zoning by-law amendment, and thus would require involvement by the municipality at either the upper or lower tier level. The process for addressing archaeological concerns is similar to that outlined for *Planning Act* related projects. A background study, field survey and detailed archaeological investigations are all identified as required Technical Reports under Part 2.2 of the Provincial Standards for Bill 53 under the *Aggregate Resources Act*.

The *Cemeteries Act* also addresses the need to protect human burials, both marked and unmarked, which is yet another valuable link to the past. Burial locations uncovered on archaeological sites constitute “unregistered cemeteries” that are, in essence, in violation of the *Cemeteries Act*. The discovery of such burials will require further investigation in order to define the extent and number of interments, and either the registration of the burial location as a cemetery, or the removal of the remains for re-interment in an established cemetery. The actual workings of this process are complex and vary depending upon whether the burial(s) are an isolated occurrence, or part of a more formal cemetery, and whether the remains in question are Aboriginal or Euro-Canadian. In all cases, the success of the process is dependent upon the co-operation of the landowner, the next of kin (whether biological or prescribed), and the Cemeteries Registrar (Ministry of Consumer and Business Services). The Ministry of Tourism and Culture’s role in



the process is to assist in co-ordinating contact and negotiation between the various parties, and ensuring that archaeological investigations of such burial sites meet provincial standards.

Various provincial ministries are establishing protocols related to activities subject to the environmental assessment process, in order to ensure that heritage concerns in their respective jurisdictions are addressed. The Ontario Ministry of Transportation (2004), for example, ensures that archaeological surveys are undertaken in advance of all new road construction in order to ensure that no archaeological sites will be unknowingly damaged or destroyed, and the Ontario Ministry of Natural Resources prepared a set of guidelines on the conservation of heritage features as part of the Timber Management Planning Process (MNR 1991).

With this legislative planning context, success in protecting heritage features depends on sufficient resource information, sound policies, the capability to implement requirements, and participation by both local and provincial heritage planners in the process.

5.2 City of Vaughan Official Plan Policies - Existing

The City of Vaughan recognizes the conservation of resources of archaeological value as an integral part of an effective and comprehensive heritage conservation program and that there was value in investigating and conserving heritage resources with respect to their contribution to the interpretation of the origins of the community. The City's particular archaeological heritage is founded on pre-contact occupancy by native peoples of lands which are now included within the corporation boundaries, and the age of historic settlement. It was the intent of the Plan to provide for the recognition, investigation and preservation of the City's archaeological resources. To this end, the City undertook an Archaeological Master Plan Study in the late 1980s which was intended to form the basis for detailed archaeological conservation policies and result in the development of policies, guidelines, and a plan of action for the development and protection of archaeological resources and facilities in the City. In the current Official Plan, the City supports the principles of archaeological conservation and that cultural heritage resources should be protected from the adverse effects of development and incompatible land uses and activities. In an attempt to plan for cultural heritage conservation, the City requires that a comprehensive Cultural Heritage Resource Assessment, which includes an archaeological resource assessment, be prepared by a qualified heritage consultant as supporting material for Block Plans. Such assessments may also be required for development applications and for Agricultural Heritage Resource Assessments. In reviewing applications for approval of draft plans of subdivision, Council shall encourage the retention and preservation of any buildings, structures, sites, landscapes, areas, and environments identified as significant in a Cultural Heritage Resource Assessment.

5.2.1 Summary and Draft Official Plan Policies

With all of these planning requirements, success in protecting heritage features depends on sufficient resource information, sound policies, the capability to implement requirements, and participation by all City staff in the process. These objectives are also being realized, in the case of archaeological resources, through the inclusion of policies in the Official Plan of the City of Vaughan. Heritage protection policies are appropriate in Official Plans, if developed and incorporated properly, if only to draw attention to the fragility of archaeological sites. Moreover, as the Official Plan is implemented through zoning by-laws regulating building form and planning agreements, it is possible to reinforce provincial, federal and local interests by requiring certain information to be supplied, conditions to be satisfied or actions to be taken.



Appendix A presents a draft of these policies.

6.0 ENGAGING ABORIGINAL COMMUNITIES WITH RESPECT TO ARCHAEOLOGICAL RESOURCES

A series of recent events related to First Nations concerns with the prevailing development process in southern Ontario, have important implications for the City of Vaughan. Most notable among these are the ongoing controversies over a proposed residential development within the Town of Caledonia and the status of Six Nations claims regarding past treaty processes and land disposition within the Haldimand Tract, as well as the Ipperwash Inquiry. In York and Durham regions, there have also been a number of Environmental Assessment Act related projects that have highlighted the need to engage Aboriginal communities and have resulted in protocols for First Nations consultation.

The sources of the tensions that have arisen with regards to potential development impacts on First Nations rights are longstanding and complex and continue to be debated in the Federal and Provincial courts. In 2004, for instance, the Supreme Court of Canada released its decisions in the *Haida Nation v. B.C. and Weyerhaeuser* and *Taku River Tlingit First Nation v. B.C.* cases. These rulings have set out more clearly than ever the scope and extent of the Crown's duty to consult and, where appropriate, accommodate First Nations prior to development of Crown Lands. These rulings, which are applicable across Canada, noted that third parties, which include local governments, do not owe a duty to consult or accommodate First Nations peoples, as these duties rest solely with the Crown (Federal and Provincial governments). There has not yet been any decision as to whether local governments, as regulators exercising delegated Provincial powers, may also assume any portion of the Province's duty to consult. This must await future decisions; however, with the current trend towards "downloading" responsibilities from upper levels of government, municipalities will have a duty to enquire whether there has been adequate consultation.

Likewise, there is, as yet, no decision concerning municipally-owned or privately-owned lands. Nevertheless, it is clear that local governments should exercise caution in making any decision that could affect a First Nation and should take steps to consult with and fully inform itself of the practices and views of that First Nation. Indeed, in his recent letter of March 2009, the Deputy Premier George Smitherman strongly encouraged municipalities in their Growth Plan conformity work, to engage with Aboriginal communities to ensure they have an opportunity to participate in the process.

In the meantime, three relatively recent initiatives have helped to resolve the past problems of inadequate consideration of First Nations concerns with respect to land use planning and may be of direct relevance to future development planning in Vaughan.

The first of these was the consultation process developed for the Oak Ridges Moraine/Seaton Class EA. The consultation process was designed to involve the participation of all formal First Nation groups that are—or may potentially be—concerned with that Class EA process. A major positive outcome of the Seaton initiative, despite perceptions that some First Nations had not been consulted adequately, was that it provided an opportunity for the Wendat, Haudenasaunee and the Anishnaubeg Nations to come together and formalize their united interests in their archaeological and cultural heritage.

It is often assumed that the First Nation that is geographically closest to a given project is the most suitable group with whom to consult, particularly when the issues at stake are those of archaeological resources and human remains. However, the complex histories of the First Nations of southern Ontario, both before and after European contact and settlement, means that such assumptions can be simplistic and detrimental to the success of the entire consultation process. Often the archaeological sites that are to be