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Decolonizing Indigenous Heritage in Ontario

A Critical Review of the Standards and Guidelines for Consultant Archaeologists, The Ontario Heritage Act, and the Provincial Policy Statement

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EXECUTIVE SUMMARY

In 2020, Archaeological Research Associates Ltd. carried out a comprehensive review of the current *Standards and Guidelines for Consultant Archaeologists* (S&Gs) (MTC 2011a) on behalf of Anishinabek Nation. The goal was to ascertain the extent to which Anishinabek perspectives and interests were being represented in Ontario policy and legislation concerning archaeology, heritage, and burial matters. This review was conducted in advance of anticipated consultation between the Ministry of Heritage, Sport, Tourism and Culture Industries (MTCS) and the Anishinabek Nation.

Early in the process, it became clear that restricting the conversation to the S&Gs distracted from an important wider discussion that needs to occur about how Indigenous heritage is being managed in the province. Simply put, it is impossible to discuss heritage policy in Ontario without acknowledging its *deeply* Colonial nature. Simply put:

In the current system by which Indigenous heritage is managed in Ontario, the provincial government has arrogated the following rights to itself:

- The right to management of the totality of Ontario's archaeological and historical past
- The right to determine who is qualified to explore the archaeological past (through a licensing system)
- The right to determine how that archaeological past should be explored (through the Standards and Guidelines for Consultant Archaeologists or "S&Gs")
- The right to determine which archaeological finds have *cultural heritage value or interest* (CHVI) and which do not
- The right to determine how the artifacts and documentation from each archaeological site is curated/stored
- The right to determine when Indigenous communities should be consulted about matters related to their archaeological heritage (currently set at the end of Stage 3 in a 4-stage research process)

Individually, each of these asserted rights is problematic. Working together, they operate in textbook Colonial fashion to ensure that Indigenous peoples are alienated from the management of their own heritage.

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GLOSSARY OF ABBREVIATIONS

AN – Anishinabek Nation
ARA – Archaeological Research Associates Ltd.
CHVI – Cultural Heritage Value or Interest
MHSTCI – Ministry of Heritage, Sport, Tourism and Culture Industries
MTCS – Ministry of Tourism, Culture and Sport
MTC – Ministry of Tourism and Culture
OASD – Ontario Archaeological Site Database
OHA – Ontario Heritage Act
PIF – Project Information Form
PPS – Provincial Policy Statement
S&Gs – Standards and Guidelines for Consultant Archaeologists
UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

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1.0 INTRODUCTION

In 2020, Archaeological Research Associates Ltd. carried out a comprehensive review of the current Standards and Guidelines for Consultant Archaeologists (S&Gs) (MTC 2011a) on behalf of Anishinabek Nation. The goal was to ascertain the extent to which Anishinabek perspectives and interests were being represented in Ontario policy and legislation concerning archaeology, heritage, and burial matters. This review was conducted in advance of anticipated consultation between the Ministry of Heritage, Sport, Tourism and Culture Industries (MTCS) and the Anishinabek Nation.

Early in the process, it became clear that confining the discussion to the S&Gs prevented necessary and wider discussions about "how archaeology works" …or indeed doesn't, for the Indigenous peoples of Ontario. Under the Ontario Heritage Act (R.S.O. 1990, CHAPTER O.18), known more colloquially as the OHA, the province of Ontario has claimed the right to "…determine policies, priorities and programs for the conservation, protection and preservation of the heritage of Ontario." The heritage referred to in the legislation includes over 11,500 years of exclusively Indigenous history that pre-dates the arrival of Settlers - and some 500 years of shared heritage that followed. In neither case, however, was the right to maintain, protect and develop[1] that heritage ceded to Colonial authorities. Indeed, it could not be. Historically, Canadians have rightly condemned situations in which occupying or Colonial powers have attempted to use their authority to destroy the cultural and historical legacy of occupied, Colonized, or minority peoples. However, most Canadians are unaware of the scope of the destruction of Indigenous heritage here at home.

Under the OHA, which serves as so-called "enabling legislation" to manage the archaeological heritage in Ontario, the provincial government has arrogated the following rights to itself:

- The right to management of the totality of Ontario's archaeological and historical past
- The right to determine who is qualified to explore the archaeological past (through a licensing system)
- The right to determine how that archaeological past should be explored (through the Standards and Guidelines for Consultant Archaeologists[2] or "S&Gs")
- The right to determine which archaeological finds have *cultural heritage value or interest* (CHVI) and which do not
- The right to determine how the artifacts and documentation from each archaeological site is curated/stored
- The right to determine when Indigenous communities should be consulted about matters related to their archaeological heritage (currently set at the end of Stage 3 in a 4-stage research process)

Individually, each of these asserted rights is problematic. Let us consider them in detail:

[1] Per Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples. See: https://undocs.org/A/RES/61/295

[2] See http://www.mtc.gov.on.ca/en/publications/SG_2010.pdf

1) The right to manage the totality of Ontario's archaeological and historical past through the Ontario Heritage Act (OHA).

The Indigenous history of the province of Ontario stretches back over 12,000 years. Europeans arrived at the beginning of the 17th Century. To put that into perspective: If the history of the province were represented by a white pine some 30 metres tall, then only the top metre would include any Settler presence. Canada since Confederation would comprise just the top 38 cm of the tree. Even so, under the OHA, Settlers have granted themselves the right to make management and conservation decisions for the heritage of peoples that they have displaced, disadvantaged, and continue to marginalize. This is a textbook example of Colonialism[3].

2) The right to determine who is qualified to explore the archaeological past (through a licensing system)

The system by which individuals are licensed to perform archaeological fieldwork is administered by the MTCS. There are three grades of license within the system. They are described as follows:

a) A Professional (P) licence which allows the holder to do business as a consultant archaeologist
b) An Applied Research (R) licence which allows the holder to act as a field director for a consultant archaeologist
c) An Avocational (A) licence which allows the holder to monitor, survey or explore archaeological sites but not excavate them

While A licences are typically issued to archaeological hobbyists and enthusiasts, P and R class licences are central to the archaeological consulting industry in the province. According to the MTCS, as of March 2020 the Ministry had issued 323 P licences and 484 R licences since 2003 (when the current licensing regime was created). Yet to their knowledge[4], at that time only 2 Indigenous persons were known to hold a Professional licence while just one Indigenous person held an R licence. A fourth individual held an R licence which has since expired. This means that, over the past 17 years, only 0.5% of archaeological licences have been issued to Indigenous practitioners – even though approximately 2.8% of the population of Ontario is Indigenous according to the 2016 census[5]. These figures suggest that the licensing regime or its requirements may have elements which present a systemic barrier to full Indigenous participation in archaeological resource management. As noted previously, 97% of the history of Ontario is Indigenous. Any system or regime which, by accident or design, alienates the descendants of those peoples from full participation in the exploration of their own pasts cannot but appear to have a Colonial problem.

[3] The term Colonialism has been notoriously difficult to define. The best definition in a Canadian context can be understood as follows: Colonialism is the institutionalized system that is oriented towards taking land and resources away from Indigenous peoples, marginalizing them legally, scrubbing away their language and culture, and then vilifying them as a group to justify their position as being somehow their own fault

[4] Applicants are not asked for ethic or background information in the application process. As such, these figures are based on persons who have taken steps to self-identify as Indigenous in that process.

[5] See https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=9&LANG=Eng&GK=PR&GC=35

3) The right to determine how that archaeological past should be explored (through the "S&Gs")

The Standards and Guidelines for Consultant Archaeologists (S&Gs) were released on January 1, 2011. They essentially form the "recipe book" by which all terrestrial archaeology is done in the Province of Ontario. This 168-page long document replaced the Archaeological Assessment Technical Guidelines (MTCR 1993), a much shorter (16 page) document that both lacked detail and left much to the individual judgement of consultant archaeologists. Compliance with the S&Gs is mandatory as a licence condition for all consultants who carry out archaeology in Ontario.

The document appears to have been written with the best of intentions. That said, however, it is unclear as to whether the standards in the document were developed with any sort of input from Indigenous communities. Furthermore, and upon close reading, it is difficult to discern within the document what, exactly, the province is hoping to achieve. Many of the standards appear to be arbitrary. Some are clearly aimed at saving money in the archaeological assessment process, while others (puzzlingly) seem to require more work than one might have thought necessary. In short, they seem to form a system that was meant to please everyone and, in doing so, achieved only the opposite.

4) The right to determine which archaeological finds have cultural heritage value or interest (CHVI) *and which do not.*

Within the Standards and Guidelines, a 4-stage process is outlined for the exploration of any potentially significant archaeological resource. These include:

i) Stage 1: Background Study and Optional Property Inspection
ii) Stage 2: Property Assessment
iii) Stage 3: Site Specific Assessment
iv) Stage 4: Mitigation of Development Impacts

At the end of each stage of inquiry, the document offers criteria for determining whether further work is required. Once again, however, it is simply not clear whose interests are being served by the criteria listed. There is no evidence that the criteria employed were developed in coordination with any Indigenous communities. This is significant because the heritage interests of Indigenous communities, as descendant groups, can be assumed to be different than those of other stakeholders such as archaeologists, bureaucrats, and developers. The criteria by which an archaeologist could decide an object or place is significant might be entirely different than those used by an Indigenous community with access to Traditional Knowledge. The symbolic and associational meanings of most heritage is almost always inaccessible to outsiders. Even so, the MTCS has been given the ability to determine which archaeological sites and objects are significant – and which are not – based on *their* understanding of what is significant. Deciding what is worthy of preservation, and what can be safely destroyed, while ignoring Indigenous perspectives, is deeply Colonial. In practice, this means that many archaeological sites fail to meet the criteria for significance (and are destroyed) long before any Indigenous input is sought in the consultation process.

5) The right to determine how the artifacts and documentation from each archaeological site is curated/stored.

Since the advent of the archaeological consulting industry in the 1970's, the artifacts recovered from archaeological sites have been entrusted to the keeping of archaeologists themselves. It is not clear if these archaeological collections (which number more than 6,656 as of 2020) have been properly curated under appropriate conditions. Standards for the storage of these cultural items have only been in place since 2011 and the degree to which the standards are enforced remains uncertain. Furthermore, there are no rules for what happens when an archaeologist retires, ceases to do consulting archaeology anymore, or dies. As of 2020, only 16 of these collections have been transferred back to Indigenous communities; principally because the rules for transferring artifact collections favour institutions such as museums (which typically have no room for them) over Indigenous communities (who lack capacity funding to construct facilities to receive them). The net effect of this system is that an unknown number of Indigenous archaeological collections are now sitting in the custody of archaeologists who may be both unable to curate them properly and administratively barred from transferring them to an Indigenous community which would.

6) The right to determine when Indigenous communities should be consulted about matters related to their archaeological heritage (currently set at the end of Stage 3 in a 4-stage research process)

Currently the S&G's do not require Indigenous consultation until the end of Stage 3. This means that many archaeological finds, deemed lacking in *cultural heritage value or interest* (based on archaeologists' professional judgement and MTCS guidelines), are written off or allowed to be destroyed before any Indigenous community has been informed of their existence. For three quarters of the assessment process, only Settler/Provincial criteria are employed to determine whether a site has value. This is far short of the "gold standard" for consultation set by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007 – to which Canada is a signatory) and well short of the Duty to Consult and Accommodate that the Supreme Court of Canada has identified as flowing from Section 35 treaty rights (Haida Nation v. B.C. (Minister of Forests) 2004). It is disappointing that, even decades after those rights were established, they have yet to have receive much uptake in the provincial legislation and regulations that govern development in the province.

Ultimately there is a bargain; an unfair one but a bargain nonetheless, that sits at the heart of the Colonial system. It is one in which the Settler authorities say "Trust us. We will take care of you. We will take care of your water, your land, your air, and your children. We will make sure that your history and archaeology are protected and preserved." But the Colonial narrative is completely infused with the idea that Indigenous cultures are inferior to that of the Settler Society. It is riddled with stereotypes that justify the mistreatment of the First Nations. Accordingly, it seems naive to expect that the Crown – the same Crown behind broken treaties, residential schools, and the so-called "Sixties Scoop" – could be trusted to protect the cultural and heritage interests of those same Indigenous peoples whose cultures they have treated as inferior for the past five centuries.

Since the dawn of the Colonial era, it is clear that untold thousands of Indigenous archaeological sites have been destroyed by the Settler Society – many during the past few decades in which there was, ostensibly, a system in place that was designed to "conserve" them (see above). Indeed, there does not seem to be a clear answer as to whether the current system is actually preserving that heritage, or merely creating a veneer of legitimacy as that heritage is systematically removed from the landscape.

2.0 HISTORY: THE UNION OF ONTARIO INDIANS AND THE ANISHINABEK NATION

The Anishinabek Nation refers to the territories (fire, water, earth, and wind of the inherent, traditional, treaty and unceded lands) and First Nations who have proclaimed and signed the Anishinaabe Chi-Naaknigewin, which is the written constitution of the Anishinabek Nation (UOI 2018). The Anishinabek Nation represents 39 First Nations throughout the Province of Ontario, through four regional areas: Southwest, Southeast, Lake Huron, and northern Superior, with each region represented by a Regional Deputy Grand Council Chief (UOI 2019a). The Anishinabek Nation is the oldest political organization in Ontario, tracing its roots back to the Confederacy of Three Fires, to be discussed below. As a political organization, the Anishinabek Nation works with federal and provincial governments in order to protect and advocate for the interest of its members. Each of the 39 First Nations maintains their own governance structure, with each Nation having its own Chief (as part of the Chiefs-in-Assembly), who elect the four Regional Deputy Grand Council Chiefs. The Grand Council Chief and Regional Deputy Grand Council Chiefs are then directed by the mandates provided by the Chiefs-in-Assembly. The nations which are a part of the Anishinabek Nation are as follows: 9 nations in the Northern Superior Region, all of which are Ojibway; 18 nations in the Lake Huron Region, of which 15 are Ojibway, 1 is Potawatomi, 1 is Mississauga, and 1 is Odawa; 8 nations in the Southeast Region, of which 1 is Ojibway, 3 are Mississauga, 1 is Algonquin, 1 is Odawa, and 1 is Chippewa; and 4 nations in the Southwest Region, of which 1 is Ojibway, 2 are Chippewa, and 1 is Delaware (AN 2020).

The Union of Ontario Indians (UOI) was established by the Anishinabek Nation as a secretariat in 1949 (UOI 2019a). Prior to the establishment of the UOI, the Anishinabek Nation did not have a legal entity with which to enter into legally binding agreements. The UOI was established to replace the Grand General Indian Council, which was established in 1870 in order to review the Indian Act. When the UOI was first established, its objectives were mainly political, and meant to encourage the election of First Nations people to parliament, and promotion of respect for treaty rights. Issues such as hunting and fishing rights, medical services, education and lands issues were the focus of the UOI. By 1972, the UOI had reorganized in order to reflect the wider scope of First Nations politics across the province, and worked closely with other provincial territorial organizations, including The Association of Iroquois and Allied Indians, Nishnawbe Aski Nation, and Grand Council Treaty 3 (UOI 2019a). The goal of having the UOI as a corporate entity for legally binding agreements, and the Anishinabek Nation for other purposes are to reinforce the existence of the Anishinabek Nation and to create greater unity among all the Anishinabek First Nations (UOI 2019a).

The Anishinabek Nation Government is guided by the principles and way of life of the seven sacred gifts given to Anishinaabe, namely: Love, Truth, Respect, Wisdom, Humility, Honesty and Bravery. The Anishinabek Nation has the inherent right bestowed by the Creator to enact any laws necessary in order to protect and preserve Anishinaabe culture, languages, customs, traditions and practices for the betterment of the Anishinabek. The Grand Council enact Rules of Procedure to govern the Grand Council and the Anishinabek Nation Government administers the rules. The Anishinabek Nation/UOI is supported by three Nation Building Councils: the Kwe-Wuk Advisory Council, Getzidjig Advisory Council, and the Eshekenijig Advisory Council. These Councils meet from time to time as individual groups or collectively, to discuss areas of concern, review and provide advice on UOI program initiatives and engage in Nation Building activities (UOI 2018, 2019b). The Anishinabek First Nations include people known as the Algonquin, Chippewa, Ojibwe, Mississauga, Potawatomi, and Ottawa, or Odawa people. These labels reflect imposed European categories of political organization such as a band, or tribe (Bohaker 2006b), although these groups are all bound by a common Anishinaabe language, and form part of the patrilineal kinship network at the heart of the *wawashkesh odoodemwaan*, or Anishinaabe identity (Kevin Restoule: personal communication).

3.0 ONTARIO ARCHAEOLOGY IN 2020: BY THE NUMBERS

It is impossible to improve a system when one does not have a complete sense of how it works. With that idea in mind, ARA Ltd. submitted a series of questions to the MTCS in order to better discern the nature of archaeology in the province and to provide information that would help guide and inform this review. A summary of the discussion can be described as follows:

3.1 Who can do Archaeology in Ontario?

As mentioned previously, the OHA delegates the MTCS with the authority to determine who is qualified to perform archaeological fieldwork. There are three classes of land-based licenses, Professional (P License), Research (R License) and Avocational (A License), as well as Marine licenses (although these are project-specific, as opposed to being person-specific).

A "P" license is required for any individual wishing to act as a consultant archaeologist (MTCS 2017). It allows a holder to enter into agreements with clients to monitor, survey, explore, assess and excavate archaeological sites, to recover artifacts, to act as a field director, to carry out or supervise fieldwork on behalf of the client, to produce reports, and to provide technical advice to a client (Government of Ontario 2011). In order to obtain a professional archaeological license from the Province of Ontario, a person must demonstrate that they hold the following qualifications and experience (MTCS 2017):

- A completed Master's degree or Doctorate in an area of archaeology, including completion of a thesis or major research project.
- Two references from archaeologists who have direct knowledge of their fieldwork experience

- Current membership, in good standing, of an archaeological organization with a code of ethics or a code of conduct.
- A minimum of 260 days (52 weeks) of experience in practical work situations (exclusive of lab experience), including experience at each stage of assessment (e.g., Stages 1-4).
- A minimum of 130 days (26 weeks) of this experience must be in Ontario or geographically and culturally similar jurisdictions.
- A minimum of 130 days (26 weeks) of direct experience in managing archaeological fieldwork through supervising or assisting in the supervision of archaeological fieldwork
- Experience analyzing fieldwork data and managing artifacts
- Demonstrated proficiency in written communication as shown through the authorship of at least four substantive documents dealing with primary archaeological research.

An Applied Research or "R" License does not permit the license holder to act as a consultant archaeologist, but rather, allows the licensee to search for, explore, and assess archaeological sites, to act as a field director working under the supervision of a professional licensee, and to carry out archaeological fieldwork for research purposes, such as academic research (MTCS 2017). In order to obtain an applied research license from the Province of Ontario, a person must demonstrate that they hold the following qualifications and experience (MTCS 2017):

- A four-year Bachelor's degree in an area of archaeology **OR** an avocational licence held for five years, whether consecutively or non-consecutively.
- A reference from a professional archaeologist who has direct knowledge of their fieldwork.
- Membership, in good standing, of an archaeological organization with a code of ethics or a code of conduct.
- A minimum of 150 days (30 weeks) of direct experience in applying archaeological theory to the practical work situation, (exclusive of lab experience), including experience at each stage of assessment (e.g., Stages 1-4).
- A minimum of 75 days (15 weeks) of this experience must be in Ontario or geographically and culturally similar jurisdictions.
- Direct experience in managing archaeological fieldwork including supervising or assisting in the supervision of archaeological fieldwork.
- Experience analyzing archaeological fieldwork data and managing artifacts; and,
- Proficiency in written communication as demonstrated through the authorship of at least one substantive document dealing with primary archaeological research.

An Avocational or "A" license is oriented towards the needs of archaeological hobbyists and enthusiasts. It allows the license holder to monitor, survey, and explore archaeological sites and recover artifacts, but does not allow the license holder to assess or excavate archaeological sites, to act as a field director, or to carry out or perform fieldwork as a consultant archaeologist (MTCS 2017). In order to obtain an avocational license from the Province of Ontario, a person must enter into an agreement with a mentor who holds a professional or applied research license, or someone who has education or experience equivalent to that of a professional or applied research license holder, and must provide at least one reference from an archaeologist who has direct knowledge of the applicant's field experience (MTCS 2017). There is no minimum requirement for previous

experience in archaeological fieldwork to apply for an avocational license. Licenses are subject to renewal between 1 and 3 years from the date of issue.

According to correspondence with the MTCS, 323 Professional licenses, 484 R license, and 98 A licenses have been issued since 2003. Of these, 231 "P" licenses, 234 "R" licenses, and 17 "A" licenses remain active. While the MTCS does not collect ethnic data during the application process, they were able to confirm that 2 individuals who identify as Indigenous currently hold P licenses, and that 2 individuals who identify as Indigenous have held R licenses (although one has since expired). According to the MTCS, there are another 2 individuals who are currently working through the application process who identify as Indigenous, but whose applications have not yet been received.

The MTCS evaluates every applicant's knowledge and experience in order to determine eligibility for new licenses or license renewals. Although there have been no licenses revoked under the current licensing regime, 6 P licenses and 6 R license applications have been refused; largely because of lack of appropriate experience. Additionally, 1 license renewal was refused under the current licensing system. While for other license renewals where there have been compliance concerns, the MTCS has used reduced license terms and additional conditions in order to improve compliance.

What this data indicates is that less than 0.5% of the archaeological licenses issued in the province have been issued to people of known Indigenous descent. If we look at the licensing requirements, it is clear that some of the criteria may pose systemic barriers to full Indigenous participation in archaeological consulting.

For Avocational licenses, the requirements do not represent as much of a systemic barrier to Indigenous participation as the other license levels, although they assume that an R licensee or professional archaeologist will have been able to spend enough time with the individual to provide a fulsome reference for their experience. It also assumes that an individual would be able to find a licensed archaeologist who would be willing to enter into a mentoring agreement throughout the term of the license. This may be easier for Indigenous people who live in communities where Indigenous engagement on archaeological projects is a common practice, such as in southwestern Ontario, but for remote communities, or communities where engagement is sporadic, it may be difficult to make those connections with an archaeologist, and to develop relationships that lead to reference letters or mentorship agreements.

The eligibility criteria for an Applied Research or 'R" license present more of a serious barrier to Indigenous participation in archaeology in Ontario. The requirement of a university degree is particularly problematic since, as according to the 2016 census, only 13% of Aboriginal people in the province of Ontario aged 25-64 had obtained a university degree at or above bachelor level, in comparison to 32% of total Ontarians aged 25-64 with a bachelor's degree or higher (Statistics Canada 2018a). This disparity in numbers means that Indigenous people are, as a demographic, far less likely to qualify to obtain an "R" licenses based on the academic requirement.

It is noteworthy that the university requirement for an "R" license requires a 4-year BA in an "area" of archaeology – but that said area need not involve Ontario. For would-be Indigenous

archaeologists without a university degree, holding an "A" license for 5 years or more is the only possible path to an "R" license. These two facts have led to the peculiar situation in which there are some dozens of Indigenous people employed as archaeological field workers in the province – in some cases with several years of experience each - who find themselves supervised by Settlers with 4 year BAs, little to no education in Ontario archaeology, and only one field season of field experience.

These same issues arise when one examines the requirements for obtaining a "P" license, though they are amplified further since a Professional licensee is expected to have completed an MA or a PhD with a defended thesis, or major research project. Based on the 2016 Census, 25% sample, in the age range of 25-64, less than 4% of people who identified as 'Aboriginal' have obtained a "university certificate, diploma or degree above bachelor level" (this class includes the following categories: University certificate or diploma above bachelor level,' 'Degree in medicine, dentistry, veterinary medicine or optometry,' 'Master's degree' and 'Earned doctorate') (Statistics Canada 2018b). Additionally, less than 2% of Aboriginal individuals with post-secondary degrees had studied in the social sciences, the category into which anthropology and archaeology is grouped (Statistics Canada 2018b).

These numbers show the clear disadvantage that Indigenous people find themselves in if they are interested in pursuing a professional career in archaeology. In short, the current licensing system privileges titles (BA, MA) over both practical knowledge and experience. It is one of the only licensing regimes the authors have encountered in which skills testing is not required. A person may not be trusted to drive a boat or car, fish, hunt, or purchase a firearm without first being tested, but s/he can be given the power to excavate the cultural legacy of Indigenous peoples without the license issuer having a specific understanding of their skillsets.

3.2 When is archaeology done in Ontario?

An individual with a "P" license wishing to carry out an archaeological assessment must file a PIF or *Project Information Form* with the MTCS for each archaeological project that they undertake. One piece of vital information which must be entered into each PIF form is the identity of the approval authority for the project. An approval authority is "an entity, such as a municipality, responsible for reviewing and approving development project applications and identifying and managing areas of archaeological potential and archaeological sites under its jurisdiction. It approves those applications where development proponents have met all local by-laws, other legislated requirements, and public concerns such as whether land to be developed may contain archaeological sites that merit an archaeological assessment" (MTCS 2017).

In Ontario, there are 444 Municipalities, and 17 Planning Boards who can act as approval authorities under the *Planning Act*. Ostensibly, planning decisions are required to be consistent with the Planning Act and the Provincial Policy Statement (MMAH 2020). Where provincial plans are in effect, planning decisions are required to conform, or at least not conflict, with them. The Province is then responsible for reviewing and approving Official Plans for single and upper tier municipalities (MTCS correspondence). The province does not appear to track which of those 444 jurisdictions have Official Plans which conform to the PPS with respect to archaeological assessments and Indigenous engagement. Of the 17 Planning boards, 11 reference at least some

form of archaeological assessment requirement, or reference archaeological sites or potential on their Consent Application Forms, and 8 Official Plans or Consent Application forms reference at least some form of engagement or consideration of Indigenous communities' interests. If adherence to the archaeological and engagement sections of the PPS amongst planning boards reflects province-wide situation among municipalities, the numbers are not encouraging. In absence of publicly available metrics, however, we simply do not know.

Currently the OHA, the Planning Act, and the PPS are supposed to work together to establish a seamless framework for policies and programs to conserve Ontario's heritage. The Planning Act states that the "conservation of features of significant architectural, cultural, historical, archaeological or scientific interest" is a "matter of provincial interest" (Government of Ontario 2019b), while the PPS states that "development and site alteration shall not be permitted on lands containing archaeological resources or areas of archaeological potential unless significant archaeological resources have been conserved" (MMAH 2020: 31), however, neither legislates what should occur if these standards are not adhered to. The OHA is the only legislation that specifies what the enforcement measures are that can be used against planning authorities or proponents that refuse to require archaeology to be done. Under the OHA (Section 69) any director or officer of a corporation who knowingly concurs in furnishing false information, failure, or contravention of the act is guilty of an offence and is liable to a fine of not more than $50,000 or imprisonment for a term of no more than one year or both (Government of Ontario 2019a). If a corporation is convicted of an offence under the act, the maximum penalty that may be imposed is $250,000. Despite these 2 sections, if a person is convicted of contravening parts of the act or if a director or officer of a corporation is convicted of knowingly concurring to an act by the corporation, then the maximum fine that can be imposed is $1,000,000 (Government of Ontario 2019a). While charges have been laid under Section 27 of the OHA regarding the demolition of a heritage-listed accessory building in London, Ontario (City of London 2020), ARA is not aware of any charges or fines that have been imposed on any corporation or organization who has not conducted archaeological assessments in accordance with the OHA, Planning Act or the PPS. Furthermore, the MTCS does not collect information regarding how many of the approval authorities require developers and proponents to carry out archaeological assessments prior to proposed land use changes.

In sum, the Ministry responsible for protecting and conserving Indigenous heritage appears to have no information as to whether or not its planning policies regarding archaeological assessments are being consistently followed, or even followed at all. With no tracking of this information, and no apparent penalties for breeches of the rules, the extent to which Indigenous archaeology has suffered remains an open question.

3.3 Where is archaeological site information kept?

If a site is identified during assessment and meets the requirements for registration[6], then the site is documented in the *Ontario Archaeological Sites Database* (OASD) and given a Borden number. Table 3 below illustrates the number of PIFs that were taken out per year from 2010 (a year before

[6] NB: Also called Bordenization – a name referring to the Borden System, a geospatial organizing system for archaeologists which was designed by Charles Edwards Borden from UBC in 1952.

the S&Gs were officially adopted) and the number of Borden numbers that were issued in the same year.

Table 1: Historical PIF and Borden # Data
(MTCS correspondence, see Appendix B)

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total PIF #s	2478	2390	2330	2272	2173	2097	2365	2678	2468	2474
Total Borden #s	309	1951	2097	505	149	7700	3130	4070	1798	1729

The data shows that, between 2010 and 2019, 23,438 sites were registered as a result of 23,725 PIFs filed: producing *a not-terribly-informative* mean suggesting that 98.8% of projects result in the discovery of at least one archaeological site. In practice, however, many assessments find none, and some result in the location of many.

As of February 12, 2020, Past Portal (PastPort) (the ministry's archaeology and heritage portal) contained records for 33,730 archaeological sites, 140 site leads and 102 non-diagnostic findspots (which do not meet the criteria for Bordenization). It is not clear how many of those sites represent the Indigenous cultural legacy. Additionally, the Ministry does not have a fulsome record of which of these sites still exist, which were Bordenized but eventually deemed lacking in heritage value, and which were excavated by archaeologists and removed from the landscape. Many of the sites in the OASD, simply no longer exist. Further, the MTCS-set criteria by which archaeological sites are deemed significant enough for registration mean that many smaller or more ephemeral sites never make it into the database (or qualify for any sort of site protections). The MTCS keeps no data to track how many archaeological sites fall into this category.

In the absence of metric from the MTCS, and to get a notion of the size of the problem, ARA has reviewed its own database for the period from 2011-2019 to see if any useful patterns might be discernable. Table 4 below provides an overview of ARA site data regarding Indigenous Sites (where no Euro-Canadian artifacts were present), Multicomponent sites (where both Indigenous and Euro-Canadian artifacts were present), and Euro-Canadian sites (where no Indigenous artifacts were present) from 2011-2019.

Table 2: ARA Site Data from 2011-2019

Site Type	Findspots (Stage 2: do not meet Borden Requirements)	Stage 2 Bordenized sites	Sites/Findspots Found at Stage 2 Recommended for Stage 3
Indigenous	245	571	329
Multicomponent	6	44	31
Euro-Canadian	32	103	75
Total	**283**	**718**	**435**

The total number (*n*) of archaeological sites found over the period was 1001. Of these, 86.5% of the artifact-producing locations (ie. sites or findspots) identified during Stage 2 fieldwork have at

least one Indigenous component. However, 25.1% of the Indigenous sites located during Stage 2 work do not meet the criteria for registration/Bordenization, while only 57% of the remainder are considered worthy of Stage 3 assessment. Given that the S&Gs do not require consultation with Indigenous communities until after Stage 3 assessment, this means that, in ARA alone (where we have both a statistically-significant number of sites AND are considered good corporate actors), 60% of the Indigenous archaeological sites we find are "written off" by the end of Stage 2 and before a First Nation or Indigenous community has any notion that they even existed. Intriguingly, our internal numbers also suggest that a recommendation for Stage 3 work is statistically more likely to occur on Euro-Canadian (72.8%) sites than on Indigenous ones (57.6%).

In sum, the application of the MTCS's criteria for site significance yields a result in which:

1) Most Indigenous sites are deemed to lack cultural heritage value or interest
2) As a result of Point 1, Indigenous archaeological sites are more likely to be destroyed by development
3) Settler sites, despite lacking the 12,000-year time depth of Indigenous ones, are more likely to meet significance criteria and be recommended for further work.

3.4 Where do archaeological reports go?

Following fieldwork, P licensees are required to submit reports to the MTCS for review to ensure that they are compliant with the S&Gs. When Indigenous engagement occurs, information regarding the engagement is to be submitted in supporting or supplementary documentation (SD). According to the MTCS an average of 2781 reports are submitted annually, and an average of 24% require revisions. There have been 44 reports in total deemed 'incomplete', although in recent years this number has not gone above 7 per year. Additionally, there have been 79 'In Register Non-Compliant reports' in total, with 33 occurring in 2013 and improving to 0 in 2019. There have also been 12 'Not in Register Non-Compliant' reports total, but there have been no such reports since 2017 (MTCS correspondence). As noted in Section 3.1, it is intriguing that no archaeologist has ever had their license revoked.

Of these 2781 reports per annum, the MTCS does not track how many are submitted to Indigenous communities, nor was ARA provided information regarding how many revision requests relate to site strategy or Indigenous engagement. It has been expressed to ARA on numerous occasions that Indigenous communities wish to receive archaeological reports for work conducted in their traditional and treaty territories, regardless of whether engagement took place. The notion that nations and communities should have a right to exert stewardship over their own cultural heritage does not seem to be a particularly radical idea.

3.5 Where do the artifacts go?

As mentioned earlier, P licensees act as 'stewards' of artifacts for the people of Ontario. According to the OHA, "The Minister may direct that any artifact taken under the authority of a licence or a permit be deposited in such public institution as the Minister may determine, to be held in trust for the people of Ontario" (Government of Ontario 2019). The terms and conditions for P licensees

also stipulates that the licensee shall hold in safekeeping all artifacts and records of archaeological fieldwork carried out under this licence, except where those artifacts and records are transferred by the licensee to Her Majesty the Queen in right of Ontario or the licensee is directed to deposit them in a public institution in accordance with subsection 66 (1) of the Act (MTCS 2017). Only skeletal remains and associated funerary artifacts found in-situ are the property of living descendants or the closest Indigenous community (Funeral, Burial and Cremation Services Act 2002). Skeletal remains and artifacts that are in museums or private collections that were obtained prior to the OHA in 1974 remain the property of the museum or individual (Ferris 2003). In order to transfer artifacts to a public institution, a P licensee must submit a *Licensee Request for Minister's Direction to Deposit an Archaeological Collection* to the MTCS. A public institution may include museums, archaeological repositories, Indigenous cultural centres, Ministries of the province, or academic institutions. The Ministry uses the following 7 criteria to determine if the proposed institution is a 'public institution' (MTCS 2018: 3-4):

1. The institution is located in Ontario (certain exceptions may be permitted).
2. The institution is willing to enter into a Deposit Agreement and assume full responsibility for the archaeological collection(s).
3. The institution is non-profit, and partially or entirely publicly funded.
4. The institution and collections are accessible to the public, researchers and descendent communities.
5. The institution has facilities, staff and policies dedicated to collections conservation and management, including the ethical use and exhibition of collections.
6. The institution has policies and physical facilities that will ensure the security of collections, including controlled access.
7. The institution is able to preserve and manage archaeological collections for the people of Ontario in perpetuity or until the Minister directs through written request that they be deposited with the province or another public institution.

According to correspondence with the MTCS, as of 2020 there were 6,656 sites with artifact collections, and a total of 18,025 artifact boxes. However, this data included the caveat that the information provided by licensees over time has not always been accurate, and that these numbers do not include accurate information for legacy collections (i.e. those that date before the introduction of archaeological licencing). As cultural affiliation has also not been recorded consistently in PastPort, there is a gap in the records for determining how many of these collections represent Indigenous cultural heritage.

As of 2020, there have been 16 instances (0.2%) of artifact collections being deposited with Indigenous communities by licensees through section 66 of the OHA. Additionally, the MTCS has transferred collections stored by the Ministry from at least 19 sites (0.28%) to Indigenous communities. Taking the Ministry at its word that 6,656 is an underestimate of the number of Indigenous collections that have been amassed over the years, that means that the proportion of the Indigenous archaeological legacy that is actually housed in Indigenous Communities is almost nothing. Accordingly, the 7 criteria for determining which institutions can be considered public institutions can be a barrier to artifacts being repatriated to their descendant communities. Once again, any system which, by accident or design, alienates a community from access to their archaeological past must be understood to be deeply Colonial.

3.6 Indigenous Input When the *S&Gs* Were Drafted

The MTCS was unable to produce any information as to what kind of engagement with Indigenous communities was undertaken when the S&Gs were being developed. It seems likely that, had such input been earnestly sought, it would have been clearly documented at the time.

3.7 Summary: The Shape of Archaeology in Ontario

If the information supplied by the MTCS is correct, there are certain conclusions that can be drawn about the present state of archaeology in Ontario. They include:

1) That, by accident or design, the current archaeological licensing system privileges Settlers over Indigenous peoples.
2) That the Province has no idea as to whether all planning authorities are fulfilling their obligation to protect Indigenous or Settler archaeological sites.
3) That many Indigenous archaeological sites are "written off" in the development process before Indigenous communities are even aware of them.
4) That archaeologists who do poor work can feel safe that they will not lose their licences.
5) That Indigenous communities are effectively barred from taking ownership of their own archaeological heritage.
6) That the current system was designed with little to no input from Indigenous communities.

Taken together, these points paint an unpleasant picture of the state of Ontario archaeology – not only from an Indigenous perspective, but from the perspective of anyone who values a system which is organized and effective, and is supposed to put archaeology and cultural heritage first.

4.0 REVIEW OF THE STANDARDS AND GUIDELINES FOR CONSULTANT ARCHAEOLOGISTS

The Standards and Guidelines for Consultant Archaeologists (S&Gs) were released by the MTC on January 1, 2011. They essentially form the "recipe book" by which all terrestrial archaeology is done in the Province of Ontario. This 168-page long document replaced the Archaeological Assessment Technical Guidelines (MCTR 1993), a much shorter (16 page) document that both lacked detail and left much to the individual judgement of consultant archaeologists. Compliance with the Standards and Guidelines is mandatory as a licence condition for all consultants who carry out archaeology in Ontario. The S&Gs are broken down into 10 Sections: an introduction to the Standards and Guidelines for Consultant Archaeologists; Archaeology in the Context of Land Use Planning and Development; Stage 1: Background Study and Optional Property Inspection; Stage 2: Property Assessment; Stage 3: Site-specific Assessment; Stage 4: Mitigation of Development Impacts; Using the Global Positioning System (GPS); Artifact Documentation and Analysis; Reporting Archaeological Fieldwork; and a Glossary.

The document appears to have been written with the best of intentions. However, upon close reading, it is difficult to discern within the document what, exactly, the province is hoping to

achieve. Many of the standards appear to be arbitrary. Some are clearly aimed at saving money in the archaeological assessment process, while others (puzzlingly) seem to require more work than one might have thought necessary. In short, they seem to form a system that was meant to please everyone and, in doing so, achieved only the opposite. Consider:

4.1 Stage 1

Within the *Standards & Guidelines for Consultant Archaeologists* (2011), archaeological fieldwork is broken out into four Stages. *Stage 1: Background Study and Optional property Inspection* has no standards which describe aboriginal engagement or aboriginal resources and has two guidelines that mention aboriginal engagement. *Section 1.1 Background Study* has one guideline which stipulates that the background study may also include research from "aboriginal communities, for information on possible traditional use areas and sacred and other sites on or around the property" (MTC 2011: 14). The Anishinabek Nation considers it one of their responsibilities to "Identify and know the Sacred Sites, the oral histories behind them, why they are sacred, and the specific language that must be used there" and want to share that knowledge so that those sites can continue to be protected by the Nation (AN 2019: 6), however, they are also careful when it comes to identifying sites, as they do not want to attract people to the sites or have them disrespected. Without requiring engagement as a Standard, how can these sites be identified and avoided at Stage 1 or Stage 2? Given that many archaeological assessments, particularly in northern Ontario, are completed without finding any archaeological materials, the lack of "space" for traditional knowledge until Stage 3 means that many properties with intangible or ephemeral heritage attributes are being lost to development.

Section 1.4 Stage 2 recommendations under special conditions, subsection *1.4.1 Recommending reduction of Stage 2 test pit survey coverage* also has a guideline that states that "when making recommendations to exempt from further assessment areas that meet the criteria for low archaeological potential, the consultant archaeologist may wish to engage with Aboriginal communities to ensure there are no unaddressed Aboriginal cultural heritage interests" (MTC 2011: 20). This guideline assumes that a proponent is willing to engage with Indigenous communities at Stage 1, when it is not strictly required under the S&Gs.

Although Indigenous communities almost always express an interest in participating in archaeological projects, they often do not have the capacity to do so. This has typically resulted in little information being received from Indigenous communities that can be incorporated into Stage 1 reports. This should not be mistaken for the idea that communities do not want to provide the information but stands as a consequence of requested timelines that are too short, a lack of staff or capacity to review the report, or both. There are numerous First Nations whose consultation protocols state that Crown and private sector parties looking to conduct activities within their traditional territory should do so only with their *free, prior and informed consent* (AFN 2015, CLFN 2013, TFN 2014, FWFN 2019 etc.). Curve Lake specifically requires that they be engaged "at Stage 1 of the archaeological assessment to allow for Curve Lake First Nation to provide their traditional knowledge as part of the assessment" (CLFN 2016: 6). Based on AN policies and values, engagement with Aboriginal communities should be considered a Standard at Stage 1 rather than a guideline. Should no information be provided by Indigenous communities during the Stage 1 phase of the archaeological project, and Stage 2 be recommended, an opportunity to review

the Stage 1 report should be provided prior to the commencement of Stage 2 in order to identify any additional areas of archaeological potential that may be of importance to the engaged First Nations.

4.2 Stage 2

Stage 2: Property Assessment has one Standard and one Guideline which address either Aboriginal artifacts or Aboriginal engagement. Both are found in *Section 2.2 Analysis: Determining the requirement for Stage 3 Assessment.* Additionally, there is a small section which discusses how Aboriginal communities "may have an interest in the identification of *all* Aboriginal archaeological sites that may be affected" and that early engagement is *strongly recommended* if the site is clearly of further CHVI (emphasis added) (MTC 2011:40), however, this is listed as neither a standard or a guideline, but appears in the criteria to help archaeologists to determine if a site identified at Stage 2 should proceed to Stage 3 site-specific assessment.

Standard 1 outlines the criteria for determining which artifacts, groups of artifacts, or archaeological sites will require Stage 3 site-specific assessment. This Standard (Standard 1, MTC 2011:40) includes the following criteria:

1) *Pre-contact diagnostic artifacts or a concentration of artifacts (or both):*
   a) *Within a 10 m by 10 m pedestrian survey area:*
      i) *At least one diagnostic artifact or fire cracked rock in addition to two or more non-diagnostic artifacts*
      ii) *In areas east or north of the Niagara Escarpment, at least 5 non-diagnostic artifacts*
      iii) *In areas on or west of the Niagara Escarpment, at least 10 non-diagnostic artifacts*
   b) *Within a 10 m x 10 m test pit survey area:*
      i) *At least 1 diagnostic artifact from combined test pit and test unit excavations*
      ii) *At least five non-diagnostic artifacts from combined test pit and test unit excavations*
2) *Single examples of artifacts of special interest:*
   a) *Aboriginal ceramics*
   b) *Exotic or period-specific cherts*
   c) *An isolated Paleo-Indian or early archaic diagnostic artifact*
3) *Post-contact archaeological sites containing at least 20 artifacts that date the period of use to before 1900*
4) *Twentieth century archaeological sites, where background documentation or archaeological features indicate possible cultural heritage value or interest (CHVI)*
5) *The presence of human remains*

The criteria listed above *may,* arguably, represent best practices from a Settler archaeological perspective. However, it is a certainty that they are effectively arbitrary and clearly do not consider Indigenous perspectives. They give the appearance of having been designed by a committee that sought to plot a middle course between business interests and "good archaeology" and managed to satisfy neither. That a site greater than 10 m x10 m with a certain number of artifacts on it might be less valuable than a smaller site with the same number of artifacts on it is puzzling; as is the

notion that its value might be affected by what side of the Niagara Escarpment it is located on. The Anishinabek Nation considers archaeology important as it is "a physical record that provides evidence of jurisdiction, land use, and teachings of cultural knowledge" (AN 2019: 6) and makes no distinction between type of site, or number of artifacts recovered and their importance.

It is noteworthy that Standard 1.d. addresses 20th century sites where background research indicates possible CHVI, but there is no Standard that addresses what some First Nations might consider 'Sacred Sites'. Such sites may not meet any of the requirements listed above. CLFN clearly states in their archaeological protocol that "it is expected that Archaeologists will not make a unilateral decision as to what is a Sacred Site to Curve Lake First Nation and will support Curve Lake First Nation in the identification and protection of Sacred Sites" (CLFN 2013: 6). Overall, a Settler archaeologist simply has no tools to decide if a site is sacred or significant without consulting the Indigenous communities whose histories are intertwined with that of the site.

Section 2.1.5 *Alternative strategies for special survey conditions: Test pit survey in northern Ontario and on Canadian Shield terrain* also seems puzzling. In this section, the following standards apply (MTC 2011a: 35):

1) *Where the identified feature of archaeological potential is a modern water source, test pitting is required between 0 and 50 m from the feature. Space test pits at maximum intervals of 5 m. Survey is not required beyond 50 m.*
2) *For features of archaeological potential other than modern water sources (e.g., historic water sources such as glacial shorelines), test pitting is required as follows:*
    a) *Space test pits at maximum intervals of 5 m between 0 and 50 m from the feature of archaeological potential*
    b) *Space test pits at maximum intervals of 10 m between 50 and 150 m from the feature of archaeological potential*
    c) *Survey is not required beyond 150 m*
3) *While maintaining standard survey grids as closely as possible, the consultant archaeologist may vary from standard survey grids as necessary, based on professional judgement. Document and explain the rationale for all variations in the Stage 2 report.*

It appears to propose that, because Northern Ontario features challenging terrain and is less well understood than the south, archaeologists should be able to reduce the intensity with which they look for sites. If properties in the north are surveyed less intensively than lands in the south, it would seem unsurprising if archaeologists were to find fewer sites. That they might do so, however, would seem more a result of the reduction of survey intensity than a reflection of any actual archaeological patterns. If there is sound data to refute this notion, the authors would be delighted to receive it.

In terms of burials, requirements and protocols may vary from nation to nation. The Anishinabek First Nation Community Heritage & Burials Consultation Protocol Template (2019) clearly states that heritage and burials consultation protocols are an assertion of the Anishinabek Nation jurisdiction over their Ancestors, Sacred Sites, and Sacred items (AN 2019: 6), and that the community should identify the site where Ancestors and Sacred items will be returned (AN 2019: 7). Given that the S&G's are superseded in the matter of burials by the Funeral, Burial and

Cremation Services Act (2002), and that Indigenous communities have primacy in determining the disposition of ancestral burials, the jurisdiction of the S&Gs over the discovery of human remains seems questionable.

The Curve Lake Archaeological protocol specifies a preferred order for sites containing ancestors (human remains). The first preference, would be for the ancestor to be reinterred at the location that was excavated, if not possible, then the ancestor should be reinterred at a location close to the site, as chosen by CLFN, and as a last resort, the ancestor should be reinterred at a First Nation cemetery or other suitable location, such as the Serpent Mounds (CLFN 2016: 5). The Thessalon First Nation External Consultation and Duty to Consult protocol specifies that "human remains shall be disturbed as little as possible to determine their identity and cause of death, and shall remain where they were buried, together with any objects buried with the people (TFN 2014: 59). If archaeologists were to follow this protocol, then Stage 3 work would likely not be undertaken.

When a burial, heritage, archaeological, or any other cultural site is identified, the Anishinabek Nation Grand Council Assembly Resolution No. 2010/31 explicitly states that "the nearest Anishinabek First Nation to these named sites in Ontario shall be consulted" and that "the nearest Anishinabek First Nation to a burial, heritage, archaeological sites or any other cultural site shall have input into the decisions in determining what other parties, if any become involved in consultation regarding these sites" (ANGCA 2010: 2). Additionally, the Anishinabek First Nation Community Heritage & Burials Consultation Protocol Template (2019) states that consultation with First Nations "will be triggered where the Crown or proponent plans or becomes aware of any decision or action that may have an impact on the First Nation's rights and interests for our Ancestors, Sacred Sites, and Sacred Items" (AN 2019: 12). As can be seen from this resolution, it is Anishinabek Policy that the Anishinabek Nation be contacted and consulted regarding what should occur with those sites, which should make engagement once a site has been found through Stage 2 a Standard, rather than a Guideline.

Section 2.2, *Guideline 1* states that "the consultant archaeologist may engage with relevant Aboriginal communities to determine their interest (general or site-specific) in the Aboriginal archaeological resources found during Stage 2 and to ensure there are no unaddressed Aboriginal archaeological interests connected with the land surveyed or sites identified" (MTC 2011: 40). This guideline is problematic from an Anishinabek viewpoint since, as a guideline, and not a standard, it is not considered a requirement to conduct fieldwork or make recommendations regarding any sites identified during Stage 2 fieldwork. As stated above, engagement and consultation should be undertaken by archaeologists and proponents, before, during, and after Stage 2 archaeological assessment. The CLFN Archaeological Protocol, for example, requires that any Stage 2-4 work undertaken within CLFN shared territory be done with a trained, approved Liaison from CLFN (CLFN 2016: 6). Thessalon First Nation considers the purpose of undertaking archaeological assessments early in the development process to be to ensure that the project can be relocated if it encounters archaeologically significant sites (TFN 2014: 56). If TFN is not consulted during or after Stage 2, then information regarding the sites cannot be passed on to the nation for them to determine the significance of the archaeological resources to the nation. They are not the only members of AN which require engagement *prior to* and *during* Stage 2 assessment, not after Stage 2 assessment has been completed (e.g. CRFN 2019, FWFN 2019, RRIB 2019, CLFN 2016, AFN 2015, AAFN 2010a, AMoS 2009).

4.3 Stage 3

Stage 3: Site-Specific Assessment has 3 Standards and one Guideline which address either Aboriginal artifacts or Aboriginal engagement. The first Standard is found in *Section 3.1: Historical Documentation*, the second Standard is found in *Section 3.4 Analysis: Determining whether an archaeological site requires mitigation of development impacts*, and the third Standard, and single Guideline in this stage of assessment are found in *Section 3.5: Formulation of Stage 4 Strategies.* Additionally, this section includes *Table 3.2: Indicators showing cultural heritage value or interest*, which is used by archaeologists to assess the cultural heritage value or interest of an archaeological site and which makes reference to Indigenous values. This table will be discussed in further detail below. It is interesting (and disappointing) to note that none of the Standards and Guidelines that reference Indigenous engagement have to do with the actual site assessment and the methods for doing so, and instead only occur in sections of Stage 3 *after* the archaeological assessment has already been completed.

Section 3.1, Standard 1 outlines the research and information sources that must be consulted to supplement the Stage 1 background research and determine a detailed documentation of the land use and occupation history specific to the archaeological site. The following information sources are to be consulted "when available and relevant to the archaeological site" when conducting Stage 3 research (MTC 2011: 46-47):

a. *Features or information identifying an archaeological site as sacred to Aboriginal communities*
b. *Individuals or communities with oral or written information about the archaeological site (e.g., Aboriginal communities, the proponent, professional and avocational archaeologists, local residents)*
c. *Historic settlement maps*
d. *Land titles or records, land registry documents*
e. *Historical land use and ownership records (e.g., assessment rolls, census records, Aboriginal land use records, commercial directories)*
f. *Primary historical document sources (e.g., diaries, manuscripts)*
g. *Secondary historical document sources (e.g., local and regional histories, academic research)*

This standard is problematic in that it does not require consultation with Aboriginal communities *in advance* of the Stage 3 site-specific assessment. If First Nations were not consulted during Stage 1 or 2, how is an archaeologist to know if the site is considered sacred or significant by local First Nations communities? Information from Standard 1a., 1b., and 1e. could be crucial in determining an appropriate strategy for Stage 3 excavation and assessment. However, if this information is only sought after the fieldwork is completed, then it is possible that valuable archaeological and cultural information might be lost.

When determining whether a site that has been subject to Stage 3 site-specific assessment requires mitigation of development impacts, Standard 2 in Section 3.4 states that "Aboriginal communities must be engaged when assessing the cultural heritage value or interest of an Aboriginal archaeological site that is known to have or appears to have sacred or spiritual importance, or is

associated with traditional land uses or geographic features of cultural heritage interest, or is the subject of Aboriginal oral histories" MTC 2011a: 57). Again however, without a requirement to consult with Indigenous communities and knowledge keepers early in the process, there is no way for an archaeologist to ascertain this information. Understanding what is sacred and what is not requires someone who has a deep understanding of cultural context. Sacred Sites lie at the heart of the Anishinabek identity (AN 2019: 6), which should automatically infer CHVI upon any sites deemed to be Sacred by the Anishinabek Nation. Based on the Anishinabek protocol, it is up to First Nations to determine the origin or significance of a Sacred Site, *not archaeologists* (AN 2019: 13-14). The Chippewas of Rama First Nation's consultation and accommodation protocol states that when a site is found, the "person in charge of the archaeological, construction, or other means will immediately contact RFN to advise of the finding, the location, and any information available" and following that, "RFN will visit the location to determine the origin or significance" of archaeological sites (CRFN 2019: 6).

When determining whether a site is of further cultural heritage value or interest (CHVI), archaeologists must consult *Table 3.2: Indicators showing cultural heritage value or interest* in the S&Gs (MTC 2011: 60-61, see below). The criteria for determining site significance include: information value (where the archaeological site contributes to local, regional, provincial or national archaeological history), value to a community (where the archaeological site has intrinsic value to a particular community, Aboriginal community or group), and value as a public resource (where the archaeological site contributes to enhancing the public's understanding and appreciation of Ontario's past) into criteria and indicators within those criteria that could indicate that a site is of further CHVI.

Table 3: MTC Table 3.2 - Indicators showing cultural heritage value or interest
(MTC 2011a)

Information Value the site contributes to local, regional, provincial, or national archaeological history	
Criteria	**Indicators**
Cultural Historical Value	Information from the archaeological site advances our understanding of: • Cultural history – locally, regionally, provincially, or nationally • Past human social organization at the family, household, or community level • Past material culture – manufacture, trade, use, and disposal
Historical Value	The archaeological site is associated with: • Oral histories of a community, Aboriginal community, or specific group or family • Early exploration, settlement, land use, or other aspect of Ontario's history • The life or activities of a significant historical figure, group, organization or institution • A significant historical event (cultural, economic, military, religious, social or political)
Scientific Value	The archaeological site contains important evidence that contributes to: • Paleo-environmental studies • Testing of experimental archaeological techniques
Rarity or Frequency	The archaeological site is: Unique – locally, regionally, provincially or nationally Useful for comparison with similar archaeological sites in other areas A type that has not been studied, or has rarely been studied, and is therefore under-represented in archaeological research
Productivity	The archaeological site contains: • Large quantities of artifacts, especially diagnostic artifacts • Exotic or rare artifacts demonstrating trade or other exchange patterns
Integrity	The archaeological site is well preserved and retains a large degree of original material.
Value to a community The archaeological site has intrinsic value to a particular community, Aboriginal community, or group.	
Criteria	**Indicators**
The archaeological site has traditional, social or religious value	The archaeological site: • Contains human remains • Is identified as a sacred site • Is associated with a traditional recurring event in the community, Aboriginal community or group (e.g., an annual celebration) • Is a known landmark
Value as a public resource The archaeological site contributes to enhancing the public's understanding and appreciation of Ontario's past.	
Criteria	**Indicators**
The archaeological site has potential for public use for education, recreation or tourism	The archaeological site: • Is or can be made accessible to tourists, local residents, or school groups • Is or can be incorporated into local education, recreation or tourism strategies and initiatives

The word 'Aboriginal' is only mentioned twice within these indicators of CHVI. The first instance falls under information value, within the 'historical value' criteria, with the indicator being that the archaeological site is associated with "oral histories of a community, Aboriginal community, or specific group or family" (MTCS 23011: 60). The second indicator of CHVI where the word 'Aboriginal' is mentioned falls into the 'value to a community' category, where the archaeological site has traditional social or religious value. In either case, if an archaeologist does not consider the site to be 'important' to First Nations communities, then no engagement will likely have taken place up to this point of the assessment. If no engagement has occurred, then how will the archaeologist know for certain if a site can be associated with oral histories from, or have value to, Indigenous communities? As mentioned previously, the Anishinabek Nation holds that heritage and burials consultation protocols are an assertion of the Anishinabek Nation jurisdiction over their Ancestors, Sacred Sites, and Sacred items (AN 2019: 6), and that the community should identify the site where Ancestors and Sacred items will be returned (AN 2019: 7).

According to Standard 1 in *Section 3.5: Formulation of Stage 4 strategies* in the S&Gs, (MTC 2011: 62-63) "*Aboriginal communities must be engaged when formulating Stage 4 mitigation strategies for the following types of Aboriginal archaeological sites:*

a. Rare Aboriginal archaeological sites
b. Sites identified as sacred or known to contain human remains
c. Woodland aboriginal sites
d. Aboriginal archaeological sites where topsoil stripping is being contemplated
e. Undisturbed Aboriginal sites
f. Sites previously identified as being of interest to an Aboriginal community"

Once again, however, it is impossible for an archaeologist to determine if criteria such as "sacred" have been met absent talking to Indigenous communities first. A lack of previous engagement also means that it would be comically difficult, if not impossible to determine if Standard 1f. applies.

4.4 Stage 4

There are three Standards and several sections which relate to Indigenous artifacts or engagement for *Stage 4: Mitigation of Developmental Impacts*. The first Standard is found in *Section 4.1 Approach 1: Avoidance and protection*, the second Standard is found in *Section 4.4 Collecting Soil Samples for Analysis,* and the third Standard relating to Stage 4 is found in *Section 6: Artifact Documentation and Analysis.* Engagement is also mentioned specifically in the descriptions, but not Standards, in *Section 4.2.9: Site-specific requirements: Undisturbed archaeological sites* and *Section 4.2.10 Site-specific requirements: Rare archaeological sites*

In *Section 4.1 Approach 1: Avoidance and protection*, Standard 2 (MTC 2011: 68) specifies that the area to be protected and avoided must include the entire archaeological site and, in addition:

- *A 20 m buffer zone for Aboriginal village sites, or*
- *A 10 m buffer zone for other sites*

- *A reduced buffer zone where permanent physical constraints of a natural form (e.g., river edge, cliff edge) or cultural form (e.g., roads, buildings) are in existence within the width that would otherwise be required*

As was the case with determining the CHVI of sites found during Stage 2 assessment, these buffers seem both arbitrary and to suppose that archaeological sites have distinct and discernable limits to them – both of which are rarely the case.

In *Section 4.4: Collecting soil samples for Analysis*, Standard 3 (MTC 2011: 88) states that archaeologists must do the following when collecting soil samples:

1. *Paleo-Indian and Archaic sites: collect soil samples from all cultural features*
2. *Aboriginal village sites: collection soil samples from:*
   - *All ash pits and hearths*
   - *All cultural strata in middens, living floors, and semi-subterranean sweat lodges*
   - *10% of all other cultural features in each longhouse and from the area outside each longhouse*
3. *Aboriginal sites other than villages; collect soil samples from:*
   - *All cultural features or strata rich in organic remains or containing diagnostic artifacts*
   - *5% of all other cultural features*

In *Section 6*, *Artifact Documentation and Analysis,* Standard 8 states that "Sampling is acceptable only when analyzing certain types of artifacts, under certain conditions. Table 6.1 provides standards (full count) and guidelines (including sampling guidelines) for Aboriginal artifacts" MTC 2011: 99-103).

It is not clear in these cases if the sampling proposed is based on sound archaeological practice or if it is merely a way to expedite fieldwork. Accordingly, a rationale or explanation of the current sampling standards should be provided to the Anishinabek Nation for review and comment, so that they may offer suggestions as to whether this strategy follows Anishinaabe teachings.

In *Section 4.2.9: Site-specific requirements: Undisturbed archaeological sites* and *Section 4.2.10 Site-specific requirements: Rare archaeological sites*, the S&Gs explicitly state that any recommendation to excavate these two types of sites must have been made "in consideration of feedback from engagement with Aboriginal communities and a careful review of the viability of preservation options" (MTC 2011: 83-84). This statement clearly aligns with Anishinabek preferred practice of engaging with their communities *prior* to archaeological fieldwork being conducted (AN 2019, CLFN 2016).

4.5 Reporting on Results of Archaeological Assessments

Several standards of interest to Indigenous communities can be found within *Section 7: Reporting archaeological fieldwork* in the S&Gs. When reporting on archaeological fieldwork, the project report is a summary of the fieldwork that has been carried out. It must include information on

community engagement, including engagement with Aboriginal communities (MTC 2011: 116). When those communities have been engaged on a project, the report should only include critical information from the communities that affected fieldwork decisions, documentation, recommendations, or the licensee's ability to comply with the conditions of the licence (e.g., with regard to the care of collections) (MTC 2011: 130). Additionally, any description of the process of engagement, and documentation arising from documentation must be included in the supplementary documentation (MTC 2011: 130), and the licensee must "ensure that any confidential information gathered from them is either excluded from the report or reported separately (in the cover letter or in supplementary documentation)" (MHSTICI 2011: 118). When engagement with Aboriginal Communities takes place, the following standard related to supplementary documentation must be implemented:

Standard 2. Any information the Aboriginal community identifies as private or sensitive (e.g., information related to burials, secret or sacred sites, personal information) is not to be included in the project report. Sensitive information must be provided separately with other supplementary documentation (MTC 2011: 131).

This standard is in line with Anishinabek policies, as the Anishinabek First Nation Community Heritage & Burials Consultation Protocol Template (2019) states that if sacred information is shared with archaeologists "they must report on it in the supplemental documentation in the public registry" (AN 2019: 7). This standard does not mean that the specific location of burials or sacred sites must be included in the supplementary documentation, which can also help protect the sacred locations from vandalism, looting, or actions of a disrespectful nature.

Section 7.9 deals with Stage 3 project reports. In subsection *7.9.4 Recommendations for Stage 4,* there are two reporting standards which relate to Indigenous engagement. According to Standard 1a., when it has been concluded that the archaeological site is of further CHVI, then recommendations "must be informed by input from Aboriginal communities for the types of Aboriginal archaeological sites specified in 3.5 *Formulation of Stage 4 Strategies*" (MTC 2011: 145). Furthermore, Standard 2 specifies that where a site has been found to be of further CHVI, the standard approach is avoidance and protection. Where this is the case, the "report must include a summary of the advice provided to the proponent regarding protection and avoidance, including the results of engagement with Aboriginal and other communities" (MTC 2011: 146). If a site has been recommended for partial clearance, then the report must include the following requirements (MTC 2011: 147):

- *Buffer zones around Aboriginal Woodland village sites must be a minimum of 20 m.*
- *Buffer zones around all other archaeological sites must be a minimum of 10 m.*
- *For all other matters, apply the requirements stated for Stage 2 partial clearance and for Stage 4 avoidance.*

As discussed in Section 4.4, these particular numbers for buffer sizes seem both arbitrary and puzzling.

5.0 REVIEW OF THE DRAFT BULLETIN: ENGAGING ABORIGINAL COMMUNITIES IN ARCHAEOLOGY

The MTCS published a supplemental bulletin in 2011 titled *Engaging Aboriginal Communities in Archaeology: A Draft Technical Bulletin for Consultant Archaeologists in Ontario.* This bulletin was a companion piece to the S&Gs, and "intended to help the licensed consultant archaeologist engage Aboriginal communities in archaeology as effectively as possible" (MTC 2011b: 1).

Section 1 discusses when to engage Aboriginal communities during fieldwork and reiterates that the Standards in the S&Gs are a *mandatory* basic requirement for all consultant archaeologists in Ontario. The guidelines in the S&Gs regarding Aboriginal engagement describe "best practices that will increase the likelihood of successful engagement and reduce the chances of delays" (MTC 2011b: 2). *Sections 2* and *3* discuss whom to engage and how, how to manage input from Aboriginal communities, and how to report back to the communities and the MTCS. *Section 4* gives an overview of other roles and responsibilities in the archaeological assessment process, *Section 5* provides resources for archaeologists to identify Aboriginal communities that may have interest in the assessment, *Section 6* provides a bibliography regarding Aboriginal communities, and *Section 7* is a glossary of terms related to Aboriginal Engagement.

5.1 Standards and Guidelines for Engaging Aboriginal Communities in Archaeology

As discussed above, there are only 2 Standards in the current S&Gs where it is stated that archaeologists *must* engage Aboriginal communities. Aboriginal communities must be engaged at the end of Stage 3, when assessing the CHVI of an archaeological site (when it is known to have or appears to have sacred or spiritual importance, or is associated with traditional land uses or geographic features of cultural heritage interest, or is the subject of Aboriginal oral histories). They must also be engaged at the end of Stage 3, when formulating a strategy to mitigate the impacts of certain types of Aboriginal sites (rare, sacred or containing human remains, woodland sites, sites where topsoil stripping is contemplated, undisturbed aboriginal sites, or sites previously identified as of interest to the community). Archaeologists are *encouraged* to follow the 'wise practice' of engaging Aboriginal communities at the Stage 1, Stage 2, or Stage 3 level using one of the 4 Guidelines which mention Aboriginal engagement (MTC 2011b:2). This section reiterates that if something unexpected is discovered at *Stage 4* (emphasis added) that would change the interpretation of an archaeological site, then relevant Aboriginal communities should be contacted. It also reminds archaeologists that if human remains are found *at any stage of work* (emphasis added), then fieldwork must cease and the discovery be reported to the police or coroner. This section is also used to remind archaeologists that if Aboriginal engagement occurs on a project, then a description of the engagement and any documentation arising from the process must be submitted to the MTCS as part of the supplementary documentation.

5.2 Developing Effective Approaches to Engaging Aboriginal Communities in Archaeology

Section 2 in the draft bulletin is meant to help CRM companies determine how to effectively engage with Indigenous communities. It encourages archaeologists to remember that each community is unique, and that the communities themselves should be asked "how best to engage and collaborate" on an archaeological project (MTC 2011b: 5). When determining whom to engage, the bulletin states that the goal is to "identify Aboriginal people who can speak to the cultural heritage of an area and represent the interests of relevant communities" (MTC 2011b: 5). In order to identify communities with a potential interest in a project, the bulletin recommends looking at the geographical location of the archaeological project, and how it relates to the present-day communities and their traditional territories, considering whether more than one Aboriginal culture has inhabited the area over time, looking at whether the project falls within an established treaty area, and whether cultural affiliation can be inferred for the archaeological site(s) in question (MTC 2011b: 6). Once the communities with a potential interest in the project have been identified, the bulletin suggest identifying individual contacts within a community to reach out to, and that once contacted, "the community will determine how best to engage with you" (MTC 2011b: 7).

There are several things in this section of the bulletin which are supported by Anishinabek Nation or member nations existing policies and procedures. This section discusses how "meaningful engagement goes beyond public notification…" and seeks to "build a mutual understanding of issues, expectations, and opportunities for solution and partnership" (MTC 2011b: 5). This statement, as well as the discussion of how it is the Indigenous communities that should be asked and who will determine how engagement should proceed is an important part of the Anishinabek Nation *Community Heritage & Burials Consultation Protocol Template* document (AN 2019b). The Consultation Protocol Template document explicitly states that "consultation between the parties will be more than just an information sharing process but will be a means towards developing relationships and trusts between the parties" (AN 2019b: 12). Several Anishinabek member nations archaeological or consultation protocols include clauses or sections which describe how there should be a discussion between the engaged community and the archaeologist regarding strategy and the CHVI of an archaeological site (CRFN 2019; CLFN 2016; AFN 2015). This section also discusses how it is possible that more than one Indigenous community may have inhabited a particular area over time. This is very true, as the Huron-Wendat people, for example, although no longer generally residing in Ontario were occupants of much of the province for a long period of time, and still have an interest in archaeology that occurs in their traditional territories.

While the Ministry and the Anishinabek Nation are generally in agreement with many of suggestions stated in this section, there are a few things that should be pointed out that could be improved to better reflect Anishinaabe ways of thinking, and Anishinabek policies and procedures. The main issue within this section is the language used. For example, as mentioned above, the goal of engagement is to "identify Aboriginal people who can speak to the cultural heritage of an area and represent the interests of relevant communities" (MTC 2011b: 5). The way that this sentence is worded could lead to some confusion for the consultant archaeologist, and it could be interpreted as only needing to find a few people who can represent the interests of more than one community. If the project lands fall within the traditional or treaty territories of more than one community, then all communities should be engaged in some form or another. If not every community wishes to have a representative present for the assessment, or if several communities wish to have a shared

representative on-site, then it should be up to the communities, not the proponent or the archaeologist to determine this.

The issue of language in the S&Gs and this accompanying bulletin was a topic of discussion for sessions organized by the Anishinabek Nation when discussing the heritage and burial protocol. The members felt words such as 'advisable', 'opportunities to synchronize', 'engagement' (as opposed to consultation), 'good idea to ask' were anemic, lacked teeth, and was weak when discussing First Nation agency (LHR 2019: 9-10). By using language such as 'engagement', an archaeologist has no duty to consult. Even words such as 'Aboriginal' and 'community' could have an impact on who is consulted from an Anishinabek point of view. The word Aboriginal does not necessarily have the same ability to convey a strong tie of belonging to a particular place, while the word 'community' is often interchanged with the word 'nation' which is quite restrictive for the more powerful concept of Nationhood (LHR 2018: 7). The Anishinabek Nation has, in both past and present, always utilized the concept of Nationhood to link its various members together; the Anishinaabe people are not simply a community, but a nation.

5.3 How to Proceed with Engagement

This section of the bulletin discusses how to prepare, initiate and sustain engagement, incorporate input from Indigenous communities, and report back to the communities and to the MTCS. Preparation for engagement can include gathering all available information about the site to be able to share it with Indigenous groups at the beginning of a project. It can also include gathering information about Indigenous communities, such as their cultural affiliations, history, and current community organization (MTC 2011b: 8). This section does importantly reiterate that "the legacy of historical relationships between Aboriginal and non-Aboriginal peoples in Canada has had a significant effect upon Aboriginal communities" (MTC 2011b: 8), but does not elaborate on how this can affect preparation for Indigenous engagement. In terms of initiating and sustaining engagement, the bulletin offers several suggestions to archaeologists for 'effective practices', such as showing respect for traditional and seasonal community events, discussing opportunities to involve the community in the archaeological assessment, and asking the community if they would be willing to share any information regarding areas of cultural or spiritual significance within their traditional territory (MTC 2011b). The bulletin also suggest that engagement should be a collaborative process, with open communication and with the community priorities in mind. Input from the communities are required when recommending avoidance and protection for certain sites, however "The standards and guidelines do not require you to negotiate agreements between the Aboriginal community and your client" (MTC 2011b: 10). This section suggests gathering information in the language of the Indigenous communities who have been engaged, working Indigenous ceremonies into the fieldwork process, and including concerns of Indigenous communities in the recommendations to the MTCS. When Indigenous communities are engaged in the archaeological process, the summary of the archaeological project should be provided to the communities, as well as the final report. The MTCS then also needs to be made aware of who participated in the archaeological project, what the engagement procedures were, and how community input was incorporated into the fieldwork and the report. While this section of the bulletin makes several strong points about *what* to do when engaging Indigenous communities, including Indigenous knowledge in the archaeological process that mirror some of the suggestions that were made to the Anishinabek Nation during their discussions on the heritage and burial toolkit

(e.g., inclusion of Indigenous language, respect for ceremonies and elders, being informed well in advance of a project proceeding) (LHR 2019), it does not provide guidance about *how* to do so. While it is all well and good to discuss what should be done, much of what is discussed in this section of the bulletin is not a requirement and is therefore not followed by all licenced archaeologists.

5.4 Roles of Non-Archaeologists

This section discusses the roles of non-archaeologists: proponents, approval authorities, and the Ministry of Tourism and Culture (now the Ministry of Heritage, Sport, Tourism and Culture Industries). Of importance to note in this section is that "Proponent's engagement on the development project as a whole cannot replace engagement on archaeology" (MTC 2011b:13). In other words, if a proponent (aka archaeological client) has engaged Indigenous communities on a larger project, such as an Environmental Assessment, for example, engagement in the archaeological component would still require an archaeologist's expertise and a dialogue with Indigenous communities. Some approval authorities require proponents to consult with Indigenous communities to discuss project impacts on Indigenous rights, but this is not true in every case. As mentioned earlier, there are over 400 municipal approval authorities in the Province of Ontario, which can make it more difficult for Indigenous communities to determine what conditions approval authorities require during development regarding engagement. The MTCS (formerly the MTC) is responsible for licensing archaeologists in the province of Ontario and establishes the terms and conditions under which archaeologists work (S&Gs and associated documents). According to the bulletin, Archaeology Review Officers are available to assist with "wise practices for engagement" (MTC 2011b: 14). This is somewhat problematic as we have mentioned earlier, as it should be up to Indigenous communities and not the licensed archaeologist to determine what engagement looks like.

5.5 Resources and Bibliography

Although the Ministry has stated that they are committed to continual review of the technical bulletin, this bulletin has not been a living document, and nowhere is that more apparent than in the resources and bibliography section. Given the governmental restructuring regarding Indigenous Affairs, many of the links in these sections need to be updated. There are several links or resources which do not exist anymore (e.g., Federal Aboriginal Canada Portal), and others, such as the Aboriginal and Treaty Rights Information System (ATRIS), which are not listed in these sections. The bibliography also has not been updated over time, as all references pre-date 2009, and there have been several books and numerous articles written on Indigenous collaboration and engagement and the decolonization of archaeology that should be included. This document would be best as a living document, that could be updated by the MTCS and Indigenous communities alike in real time. Community political or social affiliations can change over time, and a document on engaging Aboriginal communities should be able to reflect those changes. Of a positive note, the ministry does mention that although some Aboriginal communities do not reside in Ontario anymore, they may still have interest in archaeological projects/sites within their traditional territories.

5.6 Glossary

While the glossary contains definitions of some terms which are not found in the S&Gs, many of the terms are defined by wording used in the OHA, or by the Ontario Ministry of Aboriginal Affairs Glossary. Given the discussion of the use of language described above, care should be taken in this section to decolonize the language used to define archaeological terms. There are several terms which are commonly used in Indigenous Engagement that are not included in the existing glossary, most notably 'Indigenous', 'Treaty', and words such as 'burial', 'sacred', or 'ancestors'. Many of the definitions should be revised to include updated definitions and references, as the Provincial Policy Statement, the OHA, and the Ministry's name have changed since the original publication date of this document. Some of the glossary definitions are also problematic, most notably that of 'Aboriginal Monitors' and 'Archaeological project'. The definition of an 'Archaeological project' is currently "all aspects of the archaeological assessment (Stages 1-4), including background study, property survey, archaeological site assessment, mitigation, and reporting" (MTC 2011b: 22). The issue with this definition is that it does not include research projects, or projects that are undertaken by Indigenous communities to learn more about their cultural heritage that do not necessarily follow the 4 'Stages' of commercial archaeology. This definition also does not include engagement with Indigenous communities, which is an important part of the archaeological process. The definition of 'Aboriginal monitors' is currently "Aboriginal person(s) hired by the proponent, consultant archaeologist or the Aboriginal community to represent Aboriginal interests during the fieldwork component of an archaeological assessment" (MTC 2011b: 22). This definition and use of the word monitor can be seen to promote the idea of an Indigenous 'watcher', one who is outside of the assessment, rather than an individual who is engaged and participating in the archaeological project, and exerting their jurisdiction over their cultural heritage. The definitions found in the glossary should be reviewed and updated to include Indigenous perspectives and ensure that the definitions provided are not colonial at their core.

According to this bulletin "The Ministry of Tourism and Culture is committed to continual review of the technical bulletin with Aboriginal communities and archaeology stakeholders and will update the bulletin as needed to ensure that it is useful, effective, and current. The ministry welcomes feedback from Aboriginal communities and archaeologists" (MTC 2011b:1). The Anishinabek Nation is very interested in participating in a review of this bulletin, as there should be mandatory involvement of First Nations over every step of the process (LHR 2019), from policy creation to repatriation and collections management. As can be seen from the various points made above, it is clear that the MTCS has not fulfilled this commitment. Not only are many of the resource links out of date or broken, the language used shows a strong bias towards an 'efficient' archaeological assessment, rather than one that truly engages with and encourages participation of Anishinabek Nation members.

6.0 CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Indigenous peoples have an inherent right to sovereignty over their own heritage. That right is beyond dispute – and any system for managing Indigenous heritage which does not take it into account cannot be said to be "just." This assertion rests on the following assumptions, themselves rooted in modern ethics and Canadian and international law. Specifically:

1) In Canada, the identity of First Nations, Inuit, and Métis peoples is based on shared history. Archaeological sites are a material manifestation of that history and an important connection to it.
2) The right of Indigenous peoples to manage the manifestations of their own heritage is inherent. Worldwide, *any* situation in which an occupying or Colonial power assigns itself the right to manage the heritage of any Indigenous community is widely understood to be both immoral and legally suspect.
3) Western governments (including Canada) worldwide have condemned instances in which occupying powers have used the destruction of heritage sites as a tool for cultural genocide.

Here in Ontario, the system by which Indigenous heritage is managed was developed without Indigenous input. It assigns to the Provincial Crown the right to decide who may explore the Indigenous archaeological past, how they are to do it, which manifestations of that past are worth protecting – and which may be destroyed. It creates no space for Indigenous input until three quarters of the way through the process and after at least 3 "sorts" in which Indigenous archaeological sites may have been consigned to destruction based on criteria set down by the province. As a consequence, the overwhelming majority of Indigenous archaeological sites are destroyed; either by the bulldozer, or by archaeologists themselves looking to "get them out of the way." With such a result almost a foregone conclusion in the case of most archaeological sites, it is difficult to believe that the current system was designed to protect or conserve Indigenous heritage. Indigenous peoples in Ontario could be forgiven for thinking that the purpose of the system was to give the appearance of thoughtful heritage management, while ensuring that development proceed unhindered by the expense and/or delays of fulsome engagement.

This is all of a piece with one of the most problematic features of the land-use management system in Ontario; namely that, despite Section 35 of the Constitution Act and the Duty to Consult and Accommodate that flows from it, the province has steadfastly resisted any attempt to integrate those constitutional obligations into Provincial planning legislation. In other words, the province has essentially arrogated to itself the right to ignore the Canadian Constitution when it comes to Indigenous traditional and treaty rights. Rhetorically, the Province appears to contend that the First Nations and the Duty to Consult and Accommodate are the responsibility of the Federal Crown, even though *most* of the projects that tend to affect Indigenous traditional and treaty rights (energy, transportation, resource extraction, and housing and development) all fall within provincial jurisdiction. Interestingly, Section 4.3 of Ontario's most recent Provincial Policy Statement (PPS, 2020), states:

> *"This Provincial Policy Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982"* (see https://files.ontario.ca/mmah-provincial-policy-statement-2020-accessible-final-en-2020-02-14.pdf)

The location of this statement at the end of a document in which the court-established Constitutional rights of Indigenous peoples have been misinterpreted and comprehensively ignored gives it a somewhat *Orwellian* quality. Given that Section 35 of the Constitution Act was passed in 1982, and that the Duty to Consult and Accommodate on matters affecting Indigenous traditional and treaty rights was explicitly affirmed in 2004 (see Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73), it is puzzling to find the province effectively giving itself a "pass" on acknowledging those rights. It can only be assumed that the challenge to *business as usual* presented by such an acknowledgement is considered too great of a risk and that the province would rather have a remedy imposed on them by the courts rather than suggest one proactively. Given the systemic lack of resources experienced by many Indigenous communities, one can see the rationale for such a calculation. The fact that the Haida decision was released 18 years ago, and that it has produced no serious challenges to established development practice in Ontario is a testament to the power of legal and administrative delay; a Settler government practice which the First Nations are routinely forced to endure.

6.2 Recommendations

The system by which Indigenous heritage is managed is Colonial to its very roots. At its base, it assumes that Indigenous cultures are inferior and that Indigenous interests are secondary to those of the Settler Society. On such a foundation, mere tweaks to the current regime are not enough to correct its manifest ethical and legal shortcomings. Nothing of short of complete decolonization of the system will suffice, though the challenges of such a goal are many and varied. Thankfully however, the vehicle for change has already been identified under Canadian and international law: the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP consists of 46 articles which address a broad range of individual and collective rights that represent the "minimum standard for the survival, dignity and well-being of Indigenous peoples around the world" (www.justice.gc.ca/eng/declaration/themes.html). The most salient of these for heritage policy include:

- Acknowledgement of rights to self-determination, self-government and the recognition of treaties (Articles 3, 4 and 37).
- Acknowledgement of traditional institutions and decision-making rights (including rights to consultation and free, prior, and informed consent or FPIC) (Articles 5, 18, 19, 34)
- Rights over cultural, religious, and linguistic matters including redress for historical wrongs committed (Articles 8, 11, 12, 13, 25, and 31)

On June 1, 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and became part of Canadian law. The Act was designed to set Canada on a path to reconciliation by implementing UNDRIP throughout its institutions. In keeping with this aim, and

in anticipation that it is both necessary and inevitable, the system by which Indigenous heritage is managed in Ontario must be directed toward the following goal without delay:

> ***The inherent right of First Nations to manage past manifestation of their cultures must be acknowledged and implemented in practice.***

Indigenous identities are inextricably rooted in a shared past; in their connection to ancestors and to the land. They harken to a time before the arrival of Europeans and the trauma of Colonialism. The notion that an occupying or Colonial power should have the ability to make existential (i.e. *preserve or destroy*) decisions about the heritage of peoples whom they have historically oppressed is both ethically fraught and, as of 2021, legally unacceptable.

It is understood that Indigenous interests with respect to their cultural heritage intersect with the development interests of the Settler Society and that the latter must be able to perform an administrative and regulatory role over the development process (in keeping with the province's mandate and jurisdictions). However, a sovereign space where Indigenous interests can be exercised must clearly form part of any new system. At minimum, the following is recommended:

> **Recommendation 1: That the Duty to Consult and Accommodate and/or Free, Prior, and Informed Consent (FPIC) be integrated into heritage management.**
> First Nations and Indigenous communities must be engaged at the beginning of the development process. *Free, prior and informed consent* must be obtained for any activities that presume an impact on treaty and traditional territories and/or the cultural manifestations found within them.
>
> **Recommendation 2: That Indigenous heritage be managed by Indigenous communities.**
> First Nations and Indigenous Communities must be allowed to determine who is empowered to explore their history, how it is to be done, which manifestations of that history are significant, and where any materials recovered should reside at the end of the process.
>
> **Recommendation 3: That the financial burden of any system to manage impacts to Indigenous heritage not be borne by First Nations and Indigenous communities.**
> The participation of First Nations and Indigenous communities in the development process must be sustainably financed through outside charges.

Given the potential for collisions between the management of Indigenous heritage and Settler governments' plans for development, a decolonized system must create a space where those collisions can be managed in a thoughtful and procedurally fair manner. The intent is not to thwart development, nor to add costs that would collapse the system, but to create a regime that is just and respects the legal covenants made by Settler governments in the Treaty Era. There are doubtless countless operational details to be considered, but the overall project could be implemented in a manner that would mitigate any shocks to the system. Specifically:

Recommendation 1: That the Duty to Consult and Accommodate and/or Free, Prior, and Informed Consent (FPIC) be integrated into heritage management.

The right to the free, prior, and informed consent of First Nations for projects that have the potential to impact their traditional and treaty rights already exists, despite its fundamental absence from planning law in Ontario. Archaeologists, as a matter of best practice, have been encouraging Indigenous participation in archaeological projects for nearly two decades. More recently, in 2017, the Ontario Archaeological Society (OAS), adopted FPIC as part of their Statement of Ethical Principles (SEP). Members of the OAS are now required, as a condition of their membership, to make *all reasonable effort* to obtain FPIC prior to any archaeological investigation of Indigenous archaeological sites.

It hardly needs to be noted that Indigenous heritage, which stretches back to time immemorial, is found quite literally everywhere across the province. As such, it is impossible to untangle FPIC in the archaeological assessment process from wider implications for the development industry. Archaeological sites deemed significant by Indigenous communities could well spell the end of some projects. "Business as usual" may be impacted. That said, the integration of the *Duty to Consult and Accommodate* into the development process should have taken place soon after the Haida Decision. It is a change that is now decades past due. Fortunately, numerous sectors have already amassed considerable experience with consultation and accommodation. The resource and energy sectors in the province have made considerable strides in this direction – and neither of those industries could be said to be in peril.

Recommendation 2: That Indigenous heritage be managed by Indigenous communities.

The move towards acknowledging Indigenous rights in the management of their own heritage is already well underway. Several First Nations in Ontario[7] have taken steps to implement their own archaeological protocols, many of which represent a "building on" of the provincial Standards and Guidelines for Consultant Archaeologists (S&Gs). In some cases, they address weaknesses in the S&Gs that have become manifest over time. In others, they seek to incorporate Indigenous values into a system which has ostentatiously ignored them to date. Regardless, the Indigenous community and Provincial protocols seem capable of functioning in parallel: one to satisfy the interested First Nation, the other to meet provincial regulatory requirements. Thus far, the trajectory towards greater Indigenous stewardship over the archaeological past has done nothing but make archaeology "better" – which is to say, it has; increased the quality of the work, made the process more thoughtful and deliberate, and gone some way into bringing archaeologists and the First Nations into a more harmonious relationship.

The ability to control "*who*" is allowed to investigate Indigenous heritage *must* be central to the full exercise of the right to manage that heritage. The MTCS's enforcement of its own rules has been lamentable. No one has been charged for looting or destroying an archaeological site since the 1980's. Within the consulting archaeological profession itself, the MTCS has been risk averse

[7] As of this writing, these include: Alderville First Nation, Chippewas of the Thames, Curve Lake First Nation, Hiawatha First Nation, Mississaugas of the Credit First Nation, Metis Nation of Ontario, Six Nations of the Grand River Elected Council, Saugeen Ojibway Nation, Taykwa Tagamou Nation, and Walpole Island First Nation

in confronting bad actors with archaeological licences. As a result, a culture of impunity has grown up around the destruction of Indigenous archaeological sites. First Nations and Indigenous communities must have the ability, using their own decision-making institutions, to be decide who they can trust to examine the precious and imperilled thing that their identity rests on. In the Settler Society, citizens are routinely allowed to make choices about who they transact business with; where they shop, who fixes their car, which electrician they hire, and so on. They select politicians to act on their behalf in matters of policy. Surely First Nations and Indigenous communities could be extended that same level of choice on matters that affect the thing that bonds them together; their shared cultural legacy.

Recommendation 3: That the financial burden of any system to manage impacts to Indigenous heritage not be borne by First Nations and Indigenous communities.

Currently a number of First Nations and Indigenous communities participate in the management of their archaeological heritage by sending community representatives to observe archaeological work in progress. The funds generated by this redound to the community and serve as a significant and welcome source of income. However, the system operates in such a way that, as is the case with archaeologists themselves, the excavation of sites is incentivized – rather than their protection. It is almost always in the financial interest of planning authorities, developers, and archaeologists to excavate Indigenous archaeological sites. First Nations and Indigenous communities are an important counterbalance to those interests. Accordingly, if Indigenous communities – which are notorious for their lack of capacity funding and resources - are to protect their own archaeological sites, the system must allow for a dispassionate assessment of the significance of those sites. The community must be compensated for their stewardship role and that role must be decoupled from excavation if archaeological sites are to be meaningfully conserved.

This issue intersects with the Duty to Consult and Accommodate. Currently, most developers and proponents feel that this duty has been discharged if they agree to the expense of having Indigenous community representatives present during archaeological fieldwork. This ignores, however, the material loss to First Nations when traditional and treaty territories are lost to development. Lands that have been urbanized, turned into industrial parks, used for energy and transportation corridors, or otherwise developed are lands that may no longer be used for hunting, fishing, gathering, or traditional ceremonies – rights that are perpetually guaranteed under the terms of many treaties. As such, fair compensation for loss of treaty rights, which represent a serious and long-term economic loss to First Nations and Indigenous communities, seems a more appropriate source of capacity funding than the current model. Whether that compensation comes from the Crown or from developers and proponents is a matter for the Settler Society to decide.

6.3 A Last Word…

Critics might argue that acknowledging Indigenous sovereignty over their own cultural properties would "racialize" the system by which heritage is managed in the province; creating one type of regime for the past of Settlers and another one for that of First Nations and Indigenous communities. Based on experiences in other sectors (eg. law, education, child welfare), it seems

clear that complementary Settler and Indigenous systems can operate quite well together. Indeed, one could argue that the current system is racialized in the sense that Settlers and Settler institutions have been granted the privilege to manage their own archaeological past, while Indigenous peoples have not. Furthermore, the MTCS's singular and continuing focus on how to deal with "Euro-Canadian" versus Indigenous archaeological sites serves to erase a considerable richness in the archaeological record; one that includes formerly-enslaved peoples, African and Asian Canadians, and Metis peoples – each of whom, along with Indigenous people, have contributed more to the history of the province than is credited to them. The discernment of "who left what behind" is challenging at the best of times. European and Euro-Canadian goods dominate on most archaeological sites after AD 1800 – regardless of the ethnicity of the people who used those goods. Given their experience with Settler Colonialism, First Nations and Indigenous Communities are uniquely positioned to understand that *everyone's* history is worth celebrating – and protecting.

7.0 MAPS

Map 1: Anishinabek Member Nations
(Produced under licence using ArcGIS® software by Esri, © Esri)

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