

# Respecting and Protecting the Sacred

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## I. UNDERSTANDING SACREDNESS FROM AN INTERCULTURAL PERSPECTIVE

### INTRODUCTION

In Canada, many citizens are justifiably proud of our country's commitment to multiculturalism and respect for diversity. Cultural variations in language, art, law, and religion are not only tolerated but also celebrated. There is a growing appreciation that as human beings we share common, fundamental categories of experience, but that those experiences are mediated by and need to be understood in terms of our particular cultural contexts. As sociologist Charles Geisler writes:

Over the past century, culture has come to mean a people's cumulative way of life, both material and nonmaterial. It comprises morals, art, custom, language, religion, law, and other institutions, including property rights. Thus, culture bounds the land in diverse ways and makes place out of space. Culture marks the corners and edges of place; it selects which places will be sacred and which will be sacrificed; it yields maps of place and bestows place names; it defines tenure

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\* Opinions expressed are those of the author and do not necessarily reflect those of the Ipperwash Inquiry or the Commissioner.

and imbues ownership types with social distinction; and it decides the aesthetics and ethics of the land.<sup>1</sup>

Just as different cultures have different approaches to land and property, so too do traditions of sacredness vary. But respect for such variations, particularly as between Aboriginal peoples and newcomers to Canada, has hardly been the norm. Understanding traditions within their own frame of reference is key to establishing a respectful relationship. The following discussion will draw upon oral traditions, archival history, and linguistics in an effort to promote intercultural understanding of the relationship between the Anishnaabeg and their sacred lands.

## **ORIGIN STORIES AND SACRED LANDSCAPES**

Origin stories say a great deal about how people understand their place in the universe and their relationship to other living things. Creation stories are the means by which cultural communities ground their identity in particular narratives and particular landscapes. According to historian and anthropologist Jan Vansina, “every community in the world has a representation of the origin of the world, the creation of mankind, and the appearance of their own particular society and community.”<sup>2</sup> These traditions reveal the cosmology of the community, organizing and explaining the relationship between humans and their environment. Vansina, who has studied origin traditions from Africa and North America, notes:

Often, logical constructs are used, in many cases put in a genealogical form. A first being appears and then gives birth to others who pair and produce more offspring. The paradigm allows the expression of the relations between different groups of people, between different taxa of animals, plants, and spirits and their relationships to people in a single creation.

These traditions are geographically grounded and the landscapes associated with the first beings are venerated.

## **AN ANISHNAABEG ORIGIN STORY**

The Anishnaabeg peoples indigenous to the Great Lakes have their own creation story. The centre of Anishnaabeg creation is Michilimakinac, an island in the strait which separates Lake Huron from Lake Michigan. The earliest written version of this story is found in the memoirs of Nicolas Perrot, a French colonial official who travelled throughout the Great Lakes region in the late 1600s.<sup>3</sup> Perrot was fluent in

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<sup>1</sup> Charles C. Geisler, “Estates of Mind: Culture’s Many Paths to Land” (2000) 13 *Society and Natural Resources* 51–60 at p. 53.

<sup>2</sup> Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at p. 21.

<sup>3</sup> His *Memoire* was completed in 1718 but was not translated and published in English until 1911. See E.H. Blair in *The Indian Tribes of the Upper Mississippi and the Region of the Great Lakes* (Cleveland: The Arthur H. Clark Company, 1911).

Anishnaabemowin and heard this story first-hand from his Anishnaabeg hosts. It is not a story about the creation of the world, but about the creation of particular groups of people. In this story, the earth and all living beings already exist with the exception of human beings. However, the earth has been flooded and needs to be recreated:

...They believe that before the world was created there was nothing but water; that upon this vast extent of water floated a great wooden raft, upon which were all the animals, of various kinds, which exist on earth; and the chief of these, they say, was the Great Hare. He looked about for some spot of solid ground where they could land; but as nothing could be seen on the water save swans and other river-birds, he began to be discouraged. He saw no other hope than to induce the beaver to dive, in order to bring up a little soil from the bottom of the water; and he assured the beaver, in the name of all the animals, that if he returned with even one grain of soil, he would produce from it land sufficiently spacious to contain and feed all of them. But the beaver tried to excuse himself from this undertaking, giving as his reason that he had already dived in the neighborhood of the raft without finding there any indication of a bottom. Nevertheless, he was so urgently pressed to attempt again this great enterprise that he took the risk of it and dived. He remained so long without coming to the surface that those who had entreated him to go believed that he was drowned; but finally he was seen appearing, almost dead, and motionless. Then all the other animals, seeing that he was in no condition to climb upon the raft, immediately exerted themselves to drag him up on it; and after they had carefully examined his claws and tail they found nothing thereon.

Their slight remaining hope of being able to save their lives induced them to address the otter, and entreat him to make another effort to search for a little soil at the bottom of the water. They represented to him that he would go down quite as much for his own welfare as for theirs; the otter yielded to their just expostulations. He remained at the bottom longer than the beaver had done, and returned to them in the same condition as the latter, and with as little result.

The impossibility of finding a dwelling-place where they could maintain themselves left them nothing more to hope for; when the muskrat proposed that, if they wished, he should go to try to find a bottom, and said that he also believed that he could bring up some sand from it. The animals did not depend much on this undertaking, since the beaver and the otter, who were far stronger than he, had not been able to carry it out; however, they encouraged him to go, and even promised that he should be ruler over the whole country if he succeeded in accomplishing his plan. The muskrat then jumped into the water, and boldly dived; and, after he remained there for nearly twenty-four hours he made his appearance at the edge of the raft, his belly uppermost, motionless, and his four feet tightly clenched. The other animals took hold of him, and carefully drew him up on the raft. They unclosed one of his paws, then a second, then a third, and finally the fourth one, in which there was between the claws a little grain of sand.

The Great Hare, who had promised to form a broad and spacious land, took this grain of sand, and let it fall upon the raft, when it began to increase; then he took a part of it, and scattered this about, which caused the mass of soil to grow larger and larger. When it had reached the size of a mountain, he started to walk around it, and it steadily increased in size to the extent of his path. As soon as he thought it was large enough, he ordered the fox to go to inspect his work, with power to enlarge it still more; and the latter obeyed. The fox, when he ascertained that it was sufficiently extensive for him to secure easily his own prey, returned to the Great Hare to inform him that the land was able to contain and support all the animals. At this report, the Great Hare made a tour throughout his creation and found that it was incomplete. Since then, he has not been willing to trust any of the other animals, and continues always to increase what he has made, by moving without cessation around the earth. This idea causes [them] to say, when they hear loud noises in the hollows of the mountains, that the Great Hare is still enlarging the earth; they pay honours to him, and regard him as the deity who created it. Such is the information which those peoples give us regarding the creation of the world, which they believe to be always borne upon that raft. As for the sea and firmament, they assert that these have existed for all time.<sup>4</sup>

This first chapter says much about Anishnaabeg notions of leadership and land. The Great Hare may be chief among the animals, but he is not despotic. His authority depends upon persuasion, not coercion. The dilemma of the landless animals is shared and resolved by co-operation and bravery. The point of creating land is for mutual sustenance, not personal gain. Creation is the continuing act of the Great Hare. The Anishnaabeg honour him as a living, creative force.

At this stage in the origin story, listeners understand that they are indebted to the Great Hare and the other animals for the creation of a terrestrial environment in which humans could survive. But their indebtedness to these other-than-human beings goes much deeper:

After the creation of the earth, all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey. When the first ones died, the Great Hare caused the birth of men from their corpses, as also from those of the fishes that were found along the shores of the rivers which he had formed in creating the land. Accordingly, some of [them] derive their origins from a bear, others from a moose, and others similarly from various kinds of animals; and before they had intercourse with the Europeans they firmly believed this, persuaded that they had their being from those kinds of creatures whose origin was as above explained. Even today the notion passes among them for undoubted truth, and if there are any of them at this time who are weaned from believing this dream, it has been only by dint of laughing at them for so ridiculous a belief. You will hear them say that their villages each bear the

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<sup>4</sup> *Ibid.*, pp. 31–36.

name of the animal which has given its people their being—as that of the crane, or the bear, or of other animals.<sup>5</sup>

There is great explanatory force here in understanding the Anishnaabeg worldview in terms of the relationship between humans and animals. The Anishnaabeg that Perrot encountered understood themselves as descended from the first animals who participated with the Great Hare in the act of creating the land above the waters. Each of the animal progenitors helped to shape the landscape of their countries for the sustenance of their animal and human descendants.

This origin story, which reaches back to the beginning of human history in the Great Lakes region, is brought forward and connected to the living descendants:

...The Nepissings (otherwise called the Nipissiniens), Amikoüas, and all their allies assert that the Amikoüas, which term means descendants of the beaver, had their origin from the corpse of the Great Beaver, whence issued the first man of that tribe; and that this beaver left Lake Huron, and entered the stream which is called the French River. They say that as the water grew too low for him, he made some dams, which are now rapids and portages. When he reached the river which has its rise in [Lake] Nepissing, he crossed it, and followed [the course of] many other small streams which he passed. He then made a small dike of earth; but, seeing that the flood of the waters penetrated it at the sides, he was obliged to build dams at intervals, in order that he might have sufficient water for his passage. Then he came to the river which flows from Outenulkamé, where he again applied himself to building dams in places where he did not find enough water—where there are at the present time shoals and rapids, around which one is obliged to make portages. Having thus spent several years in his travels, he chose to fill the country with the children whom he left there, and who had multiplied wherever he had passed, laboriously engaged in the little streams which he had discovered along his route; and at last he arrived below the Calumets. There he made some dams for the last time, and, retracing his steps, he saw that he had formed a fine lake; and there he died. They believe that he is buried to the north of this lake toward the place where the mountain appears to have the shape of a beaver, and that his tomb is there; this is the reason why they call the place where he lies “the slain beaver.” When those peoples pass by that place, they invoke him and blow [tobacco] smoke into the air in order to honor his memory, and to entreat him to be favorable to them in the journey they have to make.<sup>6</sup>

For the Anishnaabeg, the Great Lakes region is more than geography. It is a spiritual landscape formed by and embedded with the regenerative potential of the First Ones who gave it form and to whom they owe their existence. And landmarks in this creation story hold special significance, particularly those sites that are at once places of burial of progenitors and of the birth of peoples. The connection between the First Ones and their descendants was maintained and strengthened by the burial practices of the Anishnaabeg.

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<sup>5</sup> *Ibid.*, p. 37.

<sup>6</sup> *Ibid.*, pp. 62–63.

## BURIAL GROUNDS AS SACRED SITES<sup>7</sup>

In Anishnaabeg culture, there is an ongoing relationship between the Dead and the Living; between ancestors and descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful continuity.

Champlain was the first European to write about this relationship between the Living and the Dead. In 1608, he noted that “they believe in the immortality of souls, and say that the dead enjoy happiness in other lands with their relatives and friends who have died.” And yet he observed a continuing attachment to burial sites: “In the case of chiefs, or others having influence, they hold a banquet three times a year and sing and dance upon their grave.”<sup>8</sup> Feasting the Dead is an obligation that continues to be observed in many Anishnaabeg communities.

In 1613, Champlain recorded the first description of an Anishnaabeg cemetery on Tessouat’s Island in the Ottawa River:

Now, as I looked about the island, I noticed their cemeteries, and was filled with wonder at the sight of the tombs, in the form of shrines, made of pieces of wood, crossed at the top, and fixed upright in the ground three feet apart or thereabouts. Above the cross-pieces they place a large piece of wood, and in front another standing upright, on which is carved rudely (as one might expect) the face of him or her who is there buried. If it is a man they put up a shield, a sword with a handle such as they use, a club, a bow and arrows; if it is a chief, he will have a bunch of feathers on his head and some other ornament or embellishment; if a child, they give him a bow and arrow; if a woman or girl, a kettle, an earthen pot, a wooden spoon, and a paddle. The largest tomb is six or seven feet long and four wide; the others smaller. They are painted yellow and red, with various decorations as fine as the carving.<sup>9</sup>

This description of grave houses bears a striking resemblance to nineteenth-century accounts and drawings of Anishnaabeg cemeteries. It is important to note that these are not random burials but well-marked and well-tended cemeteries.

The Jesuits also paid attention to Aboriginal burial practices. They were struck by the importance attached to burial in one’s native country. The permanence of the connection between body and soul was grounded in a particular landscape. In recounting his work

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<sup>7</sup> This portion of the paper is reproduced from Professor Johnston’s *Expert Witness Report* to Part 1 of the Ipperwash Inquiry, dated July 2004.

<sup>8</sup> *Works*, Volume 2, p. 50.

<sup>9</sup> *Works*, Volume 3, pp. 279–280. Biggar’s translation leaves something to be desired. In the original, Champlain refers to “la figure” not “la visage” of the deceased. The former is consistent with later representations of totemic images on Anishnaabeg grave posts.

among the Algonquian-speaking peoples of the Atlantic region, in a publication entitled *Jesuit Relations*, Fr. Baird notes the attachment that people exhibit toward the Dead:

Some time afterward, the father of the young man fell sick, and wished to be also brought to us, where after being received into our hut and even into the bed of the one the Fathers, he piously departed this life; and, what was novel and displeasing to the savages, he was buried among Christian people: for they themselves are very reluctant to be separated from the tombs of their ancestors.<sup>10</sup>

The second volume of *Jesuit Relations* contains an account of the funeral of a warrior “who had died in the land of the Etechemins.” The funeral occurred on the coast near Port Royal, making it clear that his body had been transported a considerable distance eastward across the River Saint Croix.<sup>11</sup> Burying the dead where they fell was simply not an option.

In 1636, Anishnaabeg from Lake Nipissing over-wintered with their Wendat allies on southern Georgian Bay. Although seventy of them died there from diseases, they were not interred. *Jesuit Relations* reports that “[o]n the 19th [April], the Bissiriniens, seeing the ice broken and the lake open, embarked to return to their own country, and carried away in seven canoes seventy of those who had died while they wintered among the Hurons.”<sup>12</sup>

People who had relocated due to war were often keen to return to the lands where their ancestors were buried. Father Jerome Lalemant, writing in 1646, names various Algonquian-speaking nations who had formerly dwelt at Montreal but withdrew fearing Iroquois aggression. With a French military presence on the Island, many resolved “to recover it as their country.”<sup>13</sup> Among those who resettled at Montreal was an octogenarian whom Lalemant does not name but whose tradition he records: “‘Here,’ said he, ‘is my country. My mother told me that while we were young, the Hurons making war on us, drove us from this Island; as for me, I wish to be buried in it, near my ancestors.’”<sup>14</sup>

The importance of burial in one’s native country persisted throughout the French Regime. In his memoirs, published in 1781, Pouchot noted:

When an Indian is dead, we hear no cry nor plaint in the cabin, but they come to make their farewell visit. They bury them with all their finest garments, their arms, and a keg of brandy to help them on their journey. They raise over the grave a kind of cabin made of poles in the form of a monument, and by its side another great post on which are fixed the family arms. They mark thereon some characters

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<sup>10</sup> *Jesuit Relations*, Volume 1, p. 215.

<sup>11</sup> *Jesuit Relations*, Volume 2, pp. 133–135.

<sup>12</sup> *Jesuit Relations*, Volume 14, p. 37.

<sup>13</sup> “The Onontchataronons, whose ancestors formerly inhabited the Island of Montreal, and who seem to have some desire to recover it as their country, remained firm, and after their example, the Mataouchkairiniwek.” *Jesuit Relations*, Volume 29, p. 147.

<sup>14</sup> *Jesuit Relations*, Volume 29, p. 173.

representing the number of scalps and prisoners they have taken. Some nations have the custom of sending the women during the first eight days, to build a little fire near the grave, and to sit upon their heels, remaining there immovable for a quarter to half an hour at a time. If he dies while hunting, even if it has been three or four months they will disinter him and carry him in their canoes to bury him in their villages. They do the same in regard to their children.<sup>15</sup>

There is a strong continuity of tradition between Champlain's account in the early 1600s and Pouchots account in the late 1700's. Later accounts also attest to the persistence of burial traditions.

The Jesuits were mystified by the care and attention that Aboriginal people showed toward their Dead. In the Christian tradition, the unitary soul separates from the body at death and the body, devoid of spirit, is presumed to return to dust. It became clear to the Jesuits, however, that for Aboriginal people, the remains of their Dead retain a spiritual essence that requires ongoing respect.

Father Brebeuf was the first Jesuit to fully grasp that Aboriginal burial practices arose from their understanding of a diversity of souls within the human body. He writes:

It is amusing to hear them speak of their souls,—or rather, I should say, it is a thing quite worthy of compassion to see reasonable men, with sentiments so low concerning an essence so noble and bearing so distinct marks of Divinity. They give it different names according to its different conditions or different operations. In so far as it merely animates the body and gives life, they call it khiondhecwi; in so far as it is possessed of reason, oki andaérandi; “like a demon, counterfeiting a demon;” in so far as it thinks and deliberates on anything, they call it endionrra; and gonennoncwal, in so far as it bears affection to any object; whence it happens that they often say ondayee ihaton onennoncwat, “That is what my heart says to me, that is what my appetite desires.” Then if it is separated from the body they call it esken, and even the bones of the dead, atisken,—in my opinion, on the false persuasion entertained by them that the soul remains in some way attached to them for some time after death, at least that it is not far removed from them; they think of the soul as divisible, and you would have all the difficulty in the world to make them believe that our soul is entire in all parts of the body.<sup>16</sup>

Although Brebeuf was dismissive of the Huron beliefs, he was anxious to understand more about the souls of the bones of the dead:

Returning from this feast [of the Dead] with a Captain who is very intelligent, and who will some day be very influential in the affairs of the Country, I asked him why they called the bones of the dead Atisken. He gave me the best explanation he could, and I gathered from his conversation that many think we have two souls,

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<sup>15</sup> *Memoires sur la derniere Guerre de l'Amerique Septentrionale, entre la France et l'Angleterre* (Yverdon: 1781), Volume II, translated and edited by Franklin Hough, printed by W. Elliot Woodward, 1866.

<sup>16</sup> *Jesuit Relations*, Volume 10, pp. 141–143.

both of them being divisible and material, and yet both reasonable; the one separates itself from the body at death, yet remains in the Cemetery until the feast of the Dead,—after which it either changes into a Turtledove, or, according to the most common belief, it goes away to the village of souls. The other is, as it were, bound to the body, and informs, so to speak, the corpse; it remains in the grave of the dead after the feast, and never leaves it, unless some one bears it again as a child. He pointed out to me, as a proof of this metempsychosis, the perfect resemblance some have to persons deceased. A fine Philosophy, indeed. Such as it is, it shows why they call the bones of the dead, Atisken, “the souls.”<sup>17</sup>

This notion of the souls of bones is key to understanding both the reverence with which human remains are treated after death and the abhorrence of grave disturbance that persists among the Anishnaabeg.<sup>18</sup> Many Euro-Canadians miss the redundancy in the expression “sacred Indian burial ground.” How could burial grounds not be sacred if they contain the Body-Souls of one’s ancestors?

This belief in the diversity of human souls was shared by the Algonkian-speaking peoples. Relying upon his experience among the Montagnais, Father LeJeune wrote the following passage in his 1639 relation:

They distinguish several souls in one and the same body. An old man told us some time ago that some Savages have as many as two or three souls; that his own had left him more than two years before, to go away with his dead relatives,—that he no longer had any but the soul of his own body, which would go down into the grave with him. One learns from this that they imagine the body has a soul of its own, which some call the soul of their Nation; and that, in addition to this, others come, which leave it sooner or later, according to their fancy.<sup>19</sup>

This reference to “the soul of their Nation” can be understood as connected to Anishnaabeg origin traditions. The remains of the First Animals contained a powerful spiritual essence that gave birth to the First Humans. Human remains return to the earth with their spiritual essence intact, continuing the spiritual cycle of birth and rebirth.

In order to assure the continuity of this cycle, the interred souls require care and protection, which includes feasting. In 1635, Father LeJeune provided his readers with an account of such a feast:

On the twenty-eighth [of September], Father Buteux and I found a band of Savages who were having a feast near the graves of their deceased relatives; they gave them the best part of the banquet, which they threw into the fire; and, when

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<sup>17</sup> *Ibid.*, at p. 287.

<sup>18</sup> The belief that a spiritual essence remains bound to the body after death was shared with Professor Johnston by Elders during an eight-day vigil that we kept on an unceded burial ground within the city limits of Owen Sound back in 1992. The vigil resulted in federal recognition of the burial ground’s reserve status under Treaty 82.

<sup>19</sup> *Jesuit Relations*, Volume 16, pp. 191–193.

they were about to go away, a woman broke some twigs and branches from the trees, with which she covered the graves. I asked her why she did this, and she answered that she was sheltering the souls of her dead friends from the heat of the Sun, which has been very great this Autumn. They reason about the souls of men and their necessities as they do about the body; according to their doctrine, they suppose that our souls have the same needs as our bodies. We told her repeatedly that the souls of reasonable beings descended into hell or went up to Heaven; but, without giving us any answer, she continued to follow the old custom of her ancestors.<sup>20</sup>

Indeed, many Anishnaabeg communities continue to follow these ancestral customs.<sup>21</sup> Apart from the burial grounds of ancestors, including the First Ones, the Anishnaabeg recognize other lands as sacred by virtue of the presence of other spiritual beings.

## **MANITOUS AND THEIR ABODES**

The Anishnaabeg understand the world to be inhabited by spiritual beings known as Manitous. These spirits are not divinities in the Western sense of the term. They do not exist in some ethereal realm. Rather, they are associated with particular places and seasons and are intimately engaged in the worldly existence of the Anishnaabeg. Gabriel Sagard, a Récollet missionary was one of the earliest European visitors to the Great Lakes region. During his journey to Huronia in 1623, Sagard noticed the geographic specificity of these Manitous:

They believe also that there are certain spirits which bear rule over one place, and others over another, some over rivers, others over journeying, trading, warfare, feasts and diseases, and many other matters. Sometimes they offer tobacco and make some kind of prayer and ritual observance to obtain from them what they desire. They also showed me many mighty rocks on the way to Quebec, in which they believed a spirit lived and ruled, and among others they showed me one, a hundred and fifty leagues from there which had something like a head and two upraised arms, and in the belly or middle of this mighty rock there was a deep cavern very difficult to approach. They tried to persuade me and make me believe absolutely, as they did, that this rock had been a mortal man like ourselves and that while lifting up his arms and hands he had been transformed into this stone, and in the course of time had become a mighty rock, to which they pay respect and offer tobacco when passing in their canoes, not always, but when they are in doubt of a successful issue to their journey. And as they offer the tobacco, which they throw into the water against the rock itself, they say to it, “Here, take courage, and let us have a good journey”, together with some other speech that I did not understand.<sup>22</sup>

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<sup>20</sup> *Jesuit Relations*, Volume 8, pp. 21–23.

<sup>21</sup> Professor Johnston has attended Feasts for the Dead hosted by Elders in her community. And she has been taught by Elders to burn food in order to feed deceased relatives.

<sup>22</sup> Gabriel Sagard, *The Long Journey to the Country of the Hurons*, Edited by George M. Wrong, translated by H.H. Langton (Toronto: Champlain Society, 1939) at p. 171.

Travel through particular spaces, and activities conducted within those spaces, were understood to depend upon the benevolence of the resident Manitou. As Sagard observed:

In order to get good fishing they also sometimes burn tobacco, uttering certain words which I did not understand. With the same object they also throw some into the water for certain spirits which they suppose have authority there, or rather for the soul of the water (for they believe everything material and destitute of life has a soul which comprehends), and they pray to it in their customary way to be of good courage and make them catch plenty of fish.<sup>23</sup>

Sagard was typical of his Christian compatriots in assuming that only humans had souls and treating all other elements of the natural world as devoid of spirit.

Although all living things have souls, not every ensouled being has the status of a Manitou in Anishnaabeg cosmology. Moreover, in the Anishnaabeg world not every locale is inhabited by Manitou. Some places are more powerful and more venerated than others. The presence of Manitou is often signalled by remarkable landscape features. On his first voyage to the Ottawa River in 1613, Champlain's Aboriginal guides stopped at the Chaudière Falls to pay homage to its Manitou. Champlain described the power of this locale:

At one place the water falls with such violence upon a rock that, in the course of time, there has been hollowed out in it a wide and deep basin, so that the water flows round and round there and makes, in the middle, great whirlpools. Hence the [people] call it Asticou, which means Kettle. This waterfall makes such a noise in this basin that it can be heard more than two leagues off.<sup>24</sup>

In describing the ceremony, Champlain writes:

...after having carried their canoes below the falls, they get together in one place, where one of them, with a wooden plate, takes up a collection, and each one puts into this plate a piece of tobacco. The collection made, the plate is put into the middle of the band, and all dance around it, singing in their fashion; then one of the chiefs makes a speech, showing that for a long time they have been accustomed to make such an offering, and that by this means they are guaranteed against their enemies; that otherwise misfortune would befall them, as the devil has persuaded them; and they live in this superstition, as in several others, as we have said elsewhere. That done, the speaker takes the plate and goes and throws

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<sup>23</sup> *Ibid.*, at p. 189.

<sup>24</sup> *The Voyages and Explorations of Samuel de Champlain (1604-1616) Narrated by Himself*, Volume II, translated by Annie Littleton Bourne, edited by Edward Gaylord Bourne (Toronto: The Courier Press Limited, 1911), p. 12.

the tobacco into the middle of the cauldron, and they raise a great cry all together.<sup>25</sup>

Although Champlain does not speak in terms of the spirit of the falls and whirlpools, it is clear that the speeches, dances, and offerings are being made to one capable of hearing, seeing, receiving, and protecting.<sup>26</sup>

Not every Manitou is tied to a particular locale but may instead be associated with particular seasons, directions, or undertakings. The Jesuit missionary Paul Ragueneau attempted to explain this to his readers in 1649:

The Ondataouaouat, who are of Algonquin race, are in the habit of invoking at almost always in their feasts him who has created the Sky,—asking him for health and a long life; for success in their wars, in the chase, in fishing, and in all their trading; and with that object they offer him the meats that are eaten at the feast. To the same end they also throw tobacco in the fire, offering it by name to the Genie who has created the Sky, whom they believe is different from the one who has created the Earth. And they add that there is a special Genie who has made winter, and that he dwells in the North, whence he sends forth snow and the cold; and that there in another who has dominion over the waters, and who causes storms and shipwrecks. They say that the winds are produced by seven other Genii who dwell in the air beneath the Sky, and who blow the seven winds that prevail in these countries.<sup>27</sup>

Ragueneau was one of the few missionaries capable of translating the term “Manitou” without a connotation of evil. While most of his contemporaries referred to Manitous as demons or devils, Ragueneau chose the term Genie, drawing on the classical notion of spirits that preside over persons and places. In Roman cosmology, the Genius was “a higher power which creates and maintains life, assists at the begetting and birth of every individual man, determines his character, tries to influence his destiny for good, accompanies him through life as his tutelary spirit, and lives on in the Lares (household gods) after his death.”<sup>28</sup> Places were also protected by spirits known as Genius Loci.

The anonymous author of one of the earliest French–Algonquin dictionaries also uses genie, as well as dieu (god) as an apt translation for Manitou.<sup>29</sup> This manuscript provides the names of a number of Manitous:

*Kapinounketch*

*Le dieu de l'hyver*

The god of winter

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<sup>25</sup> *Ibid.*, p. 39.

<sup>26</sup> Champlain would participate in many Aboriginal feasts and ceremonies, yet he was incapable of seeing their spirituality. He characterized them as “savages who live without faith, without law, with no knowledge of the true God.” *Ibid.*, Volume I at p. 9.

<sup>27</sup> R.G. Thwaites, ed., *The Jesuit Relations and Allied Documents*, Volume 33. (Cleveland: The Burrows Brothers, 1898), p. 227.

<sup>28</sup> Harry Thurston Peck, *Harper's Dictionary of Classical Antiquities* (1898).

<sup>29</sup> *Dictionnaire Algonquin-Français* 1661, Original in Séminaire de Montreal, les Prêtres de Saint-Sulpice.

<i>Kigikoukeg</i>	<i>genie de l'air ou Jupiter</i>	spirit/genius of the air or Jupiter
<i>Manitou</i>	<i>esprit</i>	spirit/soul/genius
<i>Michabous</i>	<i>dieu, genie des Bois</i>	god/spirit/genius of the Forest
<i>Misabik</i>	<i>dieu, genie des Roches</i>	god/spirit/genius of the Rocks
<i>Ouisaketchar</i>	<i>dieu, genie des Animeaux</i>	god/spirit/genius of the Animals. <sup>30</sup>

This dictionary also illustrates that people could have a personal relationship with Manitous by using the possessive form *ni'manitoum* or “my manitou.”<sup>31</sup>

The Jesuit Claude Allouez also saw an analogy between Genii of antiquity and the Manitous of the Anishnaabeg, but his account was far more scathing:

There is here a false and abominable religion, resembling in many respects the beliefs of some of the ancient Pagans. The [peoples] of these regions recognize no sovereign master of Heaven and Earth, but believe there are many spirits—some of whom are beneficent, as the Sun, the Moon, the Lake, Rivers, and Woods; others malevolent, as the adder, the dragon, cold, and storms. And, in general, whatever seems to them either helpful or hurtful they call a Manitou, and pay it the worship and veneration which we render only to the true God.<sup>32</sup>

Allouez did not heed Ragueneau’s admonition “that one must be very careful before condemning a thousand things among their customs, which greatly offend minds brought up and nourished in another world.”<sup>33</sup>

There are other cultural traditions that understand natural landscape features as the embodiments of or associated with spirits. Buddhists and Hindus have sacred landscapes, particularly rivers, lakes, forests, and mountains, as do the indigenous peoples of Africa, Australia, the Americas, and New Zealand.<sup>34</sup> In the Judeo-Christian and Islamic

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<sup>30</sup> *Ibid.* The manuscript uses the archaic symbol “8” for the «w» sound, represented above as «ou».

<sup>31</sup> This point, however, the author translates more judgmentally as *mon Idole* or my Idol.

<sup>32</sup> *Jesuit Relations*, Volume 50, p. 285.

<sup>33</sup> *Jesuit Relations*, Volume 33, p. 145.

<sup>34</sup> See for example, P.S. Ramakrishnan, “The Sacred Ganga River-based Cultural Landscape” (2003) 55 *Museum International* 7–17; G. Chouin, “Sacred Groves in History: Pathways to the Social Shaping of Forest Landscapes in Coastal Ghana” (2002) 33 *IDS Bulletin* 47–54; R.L. Wadely and C.J.P. Colfer, “Sacred Forest, Hunting and Conservation in West Kalimantan, Indonesia” (2004) 32 *Human Ecology* 313–338; H. Kawanabe, “Cultural Associations in an Ancient Lake: Gods of Water in Lake Biwa and the River Yodo Basin Japan” (2003) 500 *Hydrobiologica* 213–216; Cathy Robinson, Richard Baker, and Lynette Liddle, “Journeys through an Australia Sacred Landscape” (2003) 55 *Museum International* 74–77; Jacinta Ruru, “Indigenous Peoples’ Ownership and Management of Mountains: The Aotearoa/New Zealand Experience” (2004) 3 *Indigenous Law Journal* 111–138.

traditions, sites of interaction between the human and the divine are venerated.<sup>35</sup> For more than a thousand years, European Christians have made pilgrimages to the “Holy Land.” However, when they travelled to the so-called New World, they were not open to the possibility of encountering a sacred landscape.

## THE EURO-CANADIAN CREATION TRADITION

The dominant creation story of the Europeans who migrated to North America is found in the Book of Genesis, chapter 1:

27. So God created man in his *own* image, in the image of God created he him; male and female created he them.

28. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.<sup>36</sup>

In contrast to the interconnectedness of humans and other-than-human beings in the Anishnaabeg tradition, here man is contrasted from animals as having been created in God’s own image. As the pinnacle of creation, man is intended to have dominion over all living things. In chapter 2, verse 7, the special status of man is confirmed by the manner of his creation: “And the LORD God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul.” This genesis from the breath of God gives man both a physical and a spiritual nature. No other part of creation is invested with a living soul.

Man, however, does not remain long in God’s company in the garden of Eden. Tellingly, it is an animal, the serpent, and man’s companion, woman, who bring about his expulsion from the garden. All three are punished for this first sin:

14 And the LORD God said unto the serpent, Because thou hast done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go, and dust shalt thou eat all the days of thy life:

15 And I will put enmity between thee and the woman, and between thy seed and her seed; it shall bruise that head, and thou shalt bruise his heel.

16 Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee.

17 And unto Adam he said, Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life;

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<sup>35</sup> J. Peter Burgess, “The Sacred Site in Civil Space: Meaning and Status of the Temple Mount/al-Haram al-Sharif” (2004) 10 *Social Identities* 311–323.

<sup>36</sup> There are slight but interesting variations in the Catholic and Protestant versions of the Book of Genesis. This excerpt is taken from the King James Version of *The Holy Bible* (1611).

18 Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field;

19 In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.<sup>37</sup>

As a result of man's sin, the earth is cursed. But man has not lost his unique status:

22 And the LORD God said, Behold, the man is become as one of us, to know good and evil: and now, lest he put forth his hand, and take also of the tree of life, and eat and live forever:

23 Therefore the LORD God sent him forth from the garden of Eden, to till the ground from whence he was taken.<sup>38</sup>

By the time he leaves the garden, man is doubly distinguishable from animals: he has both a soul and the ability to know good and evil. In this cosmology, only humans are capable of moral action and possessed of a spiritual essence. From this perspective it becomes clear that, apart from the locations of human encounters with the divine, no places in the terrestrial landscape could be sacred.

Although man leaves the garden, he continues to have a close relationship with God. During the second generation, however, murder enters the world. Cain, the eldest son of Adam and Eve, murders his younger brother Abel. His punishment is to be removed from God's presence: "And Cain went our from the presence of the LORD, and dwelt in the land of Nod, on the east of Eden."

The first recorded European voyage to North America was made by Jacques Cartier in 1534. His reaction to the coast of Labrador reveals the extent to which the biblical approach to landscape dominated the perspective of newcomers:

...it is not to be called The new Land, but rather stones and wild craggess, and a place fit for wilde beastes, for in all the North Iland I did not see a Cart-load of good earth: yet went I on shoare in many places, and in the Iland of White Sand, there is nothing else but mosse and small thornes scattered here and there, withered and dry. To be short, I believe that this was the land that God allotted to Caine.<sup>39</sup>

Later missionaries would go so far as to equate the "New World" with the Kingdom of Satan.

In his relation of 1633, Paul LeJeune referred to New France as "a land abandoned since the birth of the world."<sup>40</sup> A few years later, he would write:

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> "The First Relation of Jaques Carthier of S. Malo, 1534," as reproduced in H.S. Burrage, *Early English and French Voyages chiefly from Hakluyt 1534-1608* (New York: Barnes & Noble Inc., 1967) at p. 8.

<sup>40</sup> *Jesuit Relations*, Volume 6, p. 229.

Considering from anear as well as from afar this country of the Hurons, and other neighboring peoples, it has always seemed to me one of the principal fortresses and, as it were, a donjon of the demons. And, in fact, I do not think there is any person who—having considered or seen the difficulties of reaching it and of subsisting here, as well as the sovereign Power of the security with which the Demons have ruled here during so many centuries—could form any other opinion of it.<sup>41</sup>

LeJeune was not alone in seeing the landscape as an evil wilderness and in condemning Aboriginal reverence for special places as a form of idolatry. Very early in the encounter period, the French missionaries engaged in a campaign to interfere with sites that were sacred to Aboriginal peoples.

### **PATTERNS OF DISRESPECT AND DESECRATION**

When the missionaries left their home countries, torn by generations of war over religion, they encountered Aboriginal societies where religious tolerance flourished. Rather than embracing this indigenous ideal of respect and non-interference, however, they viewed it as a challenge to be overcome. The Récollet missionary, Joseph Le Caron, who accompanied Champlain on his first trip to the shores of Lake Huron in 1615, lamented the tolerance he encountered in New France:

Another obstacle [to their conversion], which you may conjecture from what I have said, is the opinion they have that you must never contradict any one, and that every one must be left to his own way of thinking. They will believe all you please, or, at least, will not contradict you; and they will let you, too, believe what you will. It is a profound insensibility and indifference, especially in religious matters, for which they don't care. No one must come here in hopes of suffering martyrdom, if we take the word in its strict theological sense, for we are not in a country where savages put Christians to death on account of their religion. They leave every one in his own belief; they even like our ceremonies externally, and this barbarism makes war only for the interests of the nations. They kill people only in private quarrels, from intoxication, brutality, vengeance, a dream or extravagant vision; they are incapable of doing it in hatred of the Faith.<sup>42</sup>

Within a few years, the Récollets gave up on missionization in New France. But the Jesuits and the Sulpicians were much more persistent. They found no difficulty in hating the faith of Aboriginal peoples. For these missionaries, no place could be sacred unless it had been consecrated to their God alone.

Even Aboriginal burial places were not considered by the missionaries to be sacred. The Jesuits insisted that those who died in their faith had to be buried in Catholic cemeteries

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<sup>41</sup> *Jesuit Relations*, Volume 27, pp. 113–115.

<sup>42</sup> Reproduced in Christian Le Clerq, *First Establishment of the Faith in New France*, Volume I, translated with notes by John Gilmary Shea (New York: John G. Shea, 1881) at p. 31.

and not in ancestral burial grounds. They would go so far as to disinter converts from their family cemeteries. In the winter of 1636, two boys who were relatives died and were buried together in the same grave.<sup>43</sup> Only one of the boys, André, had been baptized. When Father Buteux discovered this, he begged André's grandmother to have his body removed to the Catholic cemetery. The Grandmother refused to respond to his request. So Father Buteux approached the mother of the unbaptized boy for permission to open the grave and remove André's body. She likewise "answers not a word."<sup>44</sup> A chief who is present suggests a compromise:

"Oh well," says he, "the two bodies belong to thee, take them with you to the French; but do not separate them, for they are fond of each other." "Yet they are quite distant from each other," said the Father; "the one has been baptized and the other has not, and consequently the one is happy and the other groans in flames." "If that is all it depends upon to be together and to be happy," said the Savage, "thou hast no sense; take up the one who has not been baptized, and throw as much water on this head as thou wishest, and then bury them in the same grave." The Father smiled, and gave them to understand that that would avail nothing. This Barbarian finally acquiesced; and our Fathers took little André from the profane grave, and placed him in holy ground. Unus assumetur, et alter relinquetur. (One accepted and the other abandoned). After the burial, the mother of the one who died without Baptism, seeing her son had been discarded like the body of a lost soul, shed bitter tears.<sup>45</sup>

If these missionaries were prepared to disturb the resting places of beings acknowledged to have souls, then the abodes of the Manitous were even more at risk.

The Sulpician missionaries Casson and Galinée were the first Europeans to record and map their navigation of the northern coasts of Lake Ontario, Lake Erie, and the eastern coast of Lake Huron. Their journey began in 1669 but they were forced to over-winter on the shore of Lake Erie. In the spring, just three days after resuming their journey, a storm swept away nearly all their belongings, including their altar service. In spite of this, they continued their journey with true missionary zeal. Galinée writes in his narrative:

We pursued our journey accordingly toward the west, and after making about 100 leagues on Lake Erie arrived at the place where the Lake of the Hurons, otherwise called the Fresh Water Sea of the Hurons, or Michigan, discharges into this Lake. This outlet is perhaps half a league in width and turns sharp to the north-east, so that we were almost retracing our path. At the end of six leagues we discovered a place that is very remarkable, and held in great veneration by all the Indians of these countries, because of a stone idol that nature has formed there. To it they say they owe their good luck in sailing on Lake Erie, when they cross it without accident, and they propitiate it by sacrifices, presents of skins, provisions etc.,

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<sup>43</sup> *Jesuit Relations*, Volume 8, 1634–1636, p. 253.

<sup>44</sup> *Ibid.*, p. 255. The translation "lost soul" takes the judgmental edge off of "d'une ame damnée" (soul of the damned).

<sup>45</sup> *Ibid.*, p. 225.

when they wish to embark on it. The place was full of camps of those who had come to pay their homage to this stone, which had no other resemblance to the figure of a man than what the imagination was pleased to give it. However it was all painted, and a sort of face had been formed for it with vermilion. I leave you to imagine whether we avenged upon this idol, which the Iroquois had strongly recommended us to honor, the loss of our chapel. We attributed to it even the dearth of provisions from which we had hitherto suffered. In short, there was nobody whose hatred it had not incurred. I consecrated one of my axes to break this god of stone, and then having yoked our canoes together we carried the largest piece to the middle of the river, and threw all the rest into the water, in order that it might never be heard of again. God rewarded us immediately for this good action, for we killed a roe-buck and a bear that very day.<sup>46</sup>

It is not surprising that, as a result of such deliberate desecration, Aboriginal peoples of the Great Lakes became reluctant to reveal their sacred places to the newcomers.

Sometimes, however, the Manitou would leave their dwellings of their own accord, in order to avoid desecration. In 1666, Claude Allouez commented on the reputed disappearance of a Manitou from Lake Superior:

For some time, there had been seen a sort of great rock, all of copper, the point of which projected from the water; this gave passers-by the opportunity to go and cut pieces from it. When, however, I passed that spot, nothing more was seen of it; and I think that the storms—which here are frequent, and like those at Sea—have covered the rock with sand. [The people] tried to persuade me that it was a divinity, who had disappeared for some reason which they do not state.<sup>47</sup>

It is not unlikely that the people attributed the Manitou's disappearance to changes wrought by newcomers.

Peter Jones, the first Anishnabeg convert to become a Methodist missionary, recorded an example of the departing Manitou:

The caverns, or hollow rocks, in the mountains which surround Burlington Bay, were once noted as being the abodes of gods, and especially when explosions were said to take place. Before the country was settled in the vicinity of the mountain which extends round the head waters of Lake Ontario, explosions were frequently heard, which the superstitious Indians attributed to the breathing or blowing of the munedoo, but which no doubt were caused by the bursting of sulphurous gas from the rocks. The poor Indians now say that the munedoods have such an abhorrence to the white people coming near their abodes, that, like the red

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<sup>46</sup> *Exploration of the Great Lakes 1669–1670 by Dollier de Casson and De Bréhant de Galinée, Galinée's Narrative and Map*, translated and edited by James H. Coyne (Toronto: Ontario Historical Society, 1903) as reproduced in *The Windsor Border Region: Canada's Southernmost Frontier: A Collection of Documents*, edited by E.J. Lajeunesse (Toronto: The Champlain Society, 1960), pp. 7–8.

<sup>47</sup> *Jesuit Relations*, Volume 55, p. 267.

men of the forest, they leave their once consecrated retreats unprofaned by the presence of the pale faces, and retire back into the interior. Near the Credit village, at the foot of a pointed hill, is a deep hole in the water, which is said to be the abode of one of the water-gods, where he was frequently heard to sing and beat his drum. When the white people began to frequent this place for the purpose of taking salmon, this munedoo took his departure during a tremendous flood caused by his power, and went down the river into Lake Ontario.<sup>48</sup>

Not long after the Manitou left, the Atlantic salmon fishery of the Credit River collapsed due to overfishing by settlers. This loss of sustenance was one of the factors that forced the people to surrender their lands at the Credit and relocate to the shore of Lake Erie.

Peter Jones also tells of a settler's deliberate desecration of a sacred tree:

On the west side of the Grand River, in the township of Waterloo, formerly stood a lofty pine-tree, with a large spreading closely matted top, which had a most imposing appearance from the distant hills, as this tree was taller than any others within view. On the top of this tree the eagles for many generations were wont to build their nests and rear their young, so that other lofty trees, towering rocks, and declivities, might become inhabited by the representatives of the "thunder-god." Old Jack, the Indian, whose hunting-grounds lay within the shadow of this remarkable tree, thought that he must have a god to worship, and therefore dreamed or fancied that this tree was his munedoo, or god, who would grant him and his family long life and success in hunting. He and they made periodical visits to it, bringing with them the best of the game they had taken, and offering the same at the foot of the tree. The offering was made in the usual manner, namely, by boiling the game, and burning part of it as a burnt offering, and the remainder being eaten by the invited guests, or by portions of the family. But old Jack would not taste a mouthful of it himself, as he intended that it should be a whole sacrifice.... When passing through that part of the country, I have repeatedly gazed upon and admired old Jack's tree. I have recently heard that the white man has been so daring and profane, as to fell to the ground the poor Indian's god, which no doubt was drawn to the saw-mill, and then made into lumber to build the white man's wigwam. How would the descendants of Jack, with the eagles that nestled on the branches of this tree, wail and lament to see that their father's god has fallen to rise no more?

For Jones, the fate of "Old Jack's Pine-tree god" is emblematic of the fate of the Anishnaabeg: "The white man comes, and as he advances the trees vanish before him; thus the poor Indian disappears, as if crushed by the falling of the immense forests."<sup>49</sup>

Sacred trees were not the only casualties of non-Native settlement. Many Anishnaabeg cemeteries also disappeared. The Anishnaabeg reverence for burials was not shared by

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<sup>48</sup> Peter Jones, *History of the Ojebway Indians; with especial reference to their conversion to Christianity* (London: A.W. Bennett, 1861) at p. 255.

<sup>49</sup> *Ibid.*, p.255.

English settlers. As early as 1797, colonial officials were forced to take steps to prevent grave robbing. A Proclamation was issued to warn settlers that their depredations upon burial places would be treated “with the utmost severity.”<sup>50</sup> A year earlier, the same officials had refused to investigate the murder of a Mississauga Chief by a drunken soldier because his relatives refused to allow the coroner to disturb his grave.<sup>51</sup> The government did take action against at least one grave robber. In 1832, a medical officer was investigated for having disinterred Indians buried near Penetanguishene for the purposes of dissection. His possession of jewellery buried with the deceased provided some of the strongest evidence against him. As a result of the proceedings, he was forced to resign his position.<sup>52</sup> On at least one occasion in the nineteenth century, the Anishnaabeg were required to use force to protect the burial grounds of their ancestors.

## **PATTERNS OF PERSISTENCE**

In the 1840s, when the Jesuits attempted to establish a mission at Walpole Island, they were met with sustained resistance. In an 1844 letter, Father Chazelle writes:

...But, those of Walpole Island stand apart and are trying to establish themselves as a Nation. They are indignant that practically all the natives are coming more or less close to civilization and Christianity. They look upon themselves as a noble remnant, as a type and model of the red-skinned race.... Every chief is a sorcerer and just as in earlier times and in other climes, power was connected with the priesthood. Authority comes from the Great Spirit. This dogma is firmly rooted in the mind of the people and it has a special influence on the superstitious practices of our islanders. They have their feasts, their sacrifices, their religious and national ceremonies. That is where they find their pride as a nation. It is sovereign and invincible. This explains their amazing antipathy towards Christianity. Do they know what they are saying, what they are doing? I really believe that they are the almost passive instruments of a multitude of Evil Spirits—Manitous—whose prince reigns without any opposition on this island, as if in his last and strongest entrenchment.<sup>53</sup>

Chazelle’s characterization of Manitous as evil spirits in the service of Satan shows that after two centuries the Jesuits had utterly failed to understand and respect the beliefs of the Anishnaabeg.

Whether or not it was their intention to spite these Manitous, the Jesuits exercised poor judgment in selecting an ancestral burial ground as the site for their church. Before the building was completed, they were apprised of their mistake. At a special council meeting held in July of 1844, the orator Ojaouanon spoke on behalf of the Chiefs:

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<sup>50</sup> E.A. Cruikshank, *The Correspondence of the Honourable Peter Russell*, Volume 2 (Toronto: Historical Society, 1935) at p. 41.

<sup>51</sup> NAC, RG10, Volume 9, p. 91883–9189.

<sup>52</sup> NAC, RG10, Volume 52, p. 56900–56911.

<sup>53</sup> Lorenzo Cadieux, S.J., *Letters from the New Canada Mission, 1843-1852*, Part 1: Letters #1 to #44, translated by William Lonc, S.J., and George Topp, S.J. (Hamilton: William Lonc and Steve Catlin, 2001) at pp. 249–250.

Man with a hat, Black Robe, what have you done? You have defiled the most beautiful part of this island that belongs to us. You have cut down old trees that we had respected. What do you want to do with them? To build a large Prayer cabin?... You come to ridicule the practices of our nation, right on our own land. You are coming audaciously, you come to trample under foot—by your insults—ground that is the sacred resting place of our ancestors. You make fun of the bones of our forefathers. We cannot put up with this. We shall not tolerate you any longer. Leave and leave quickly, leave our Island!<sup>54</sup>

The Jesuits failed to heed Ojaouanon's warning and continued to build the church on sacred land. A few years later, both the church and the missionaries' house was burnt to the ground and the Jesuits relocated to Manitoulin Island.<sup>55</sup>

Despite efforts at demonization and desecration by outsiders, recognition of the presence of Manitous in the Great Lakes land and waterscapes has continued. Even after generations of Christianization, many Anishnaabeg have retained their understanding of the sacred and their connections to sacred sites. In some cases, the retention of reserves, those lands that the people refused to surrender, was determined by the power and sacredness of the locale.

The Chippewas of Nawash reserve, Neyaashiinigmiing (Cape Croker), is an example of the connection between reserves and sacred lands. It was described in the 1854 surrender of the Saugeen (Bruce) Peninsula as being bounded on the southwest side by "Nochemowenaing Bay."<sup>56</sup> "Nochemowenaing" translates from Anishnaabemowin as "place of healing." Among the Anishnaabeg, healing is a deeply spiritual process. Although the Crown surveyor changed the name from Nochemowenaing to Hope Bay, local Anishnaabeg knowledge of its healing power has survived. Irene Akiwenzie, a granddaughter of the Chief who reserved the place of healing, recounted the following story in 1981:

Indians used to come from as far away as Lake Superior to bring their sick there and in the middle of Hope Bay. Uncle Josh, [Irene's brother], used to tell me that he used to go over with Father and they used to gather Indian medicine over there and there were a lot of stakes and crosses on the shore and up towards in the bush. It's all overgrown now.

And I said "What did they do there?" and he said "They used to bring their sick there and they would offer them up to the Great Spirit." And in the middle of Hope Bay there was a sort of a swirling whirlpool and they would go to the shore and they would offer their sick to the Great Spirit and if the Great Spirit would give their sick back to them they would put them into a canoe and push them out to the whirlpool and if they went around in the whirlpool and were washed away

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<sup>54</sup> *Ibid.*, pp. 254–255.

<sup>55</sup> *Ibid.*, Part II, p. 93.

<sup>56</sup> Treaty 72 dated October 13, 1854.

from the whirling water in the middle they would recover. But if it was the will of the Great Spirit, well, the whirlpool would come and with such force that the canoe would upset and the person would drown. Well, that was the will of the Great Spirit. And they would bring a lot of their sick from as far away as Lake Superior.<sup>57</sup>

Irene's father, Charles Kegedonce Jones, lived all his one hundred years on the land which his father, Peter Kegedonce Jones, had reserved for his people. He practised Methodism in a way that complemented his Anishnaabeg culture and traditions. He taught his children and grandchildren to gather medicines at this special place, and even into his later years, he would fast and pray on the shores of Nochemowenaing.<sup>58</sup>

Similar oral traditions likely exist on other reserves. According to Anishnaabeg protocol, however, they are not to be told without permission.<sup>59</sup> When the author visited Aazhoodena (Stoney Point) in the course of preparing this paper, she were graced with the generosity of Elder Clifford George<sup>60</sup> who shared his oral tradition concerning the connection between Manitou, medicine and the Anishnaabeg:

I was born here [at Aazhoodena]. I was overseas [fighting with the Canadian Army in World War II] when they [the federal government] took this land over.... It was desecrated when I came home. [Details regarding the Army base treatment of the reserve's cemeteries.] My father taught me that everywhere you see an apple tree people lived there at one time, died and were buried there.

At Aazhoodena there is a bottomless lake, which is cone shaped, and empties into Lake Huron. I know this lake is connected with Lake Huron because I as a boy I saw a loon dive under and come out on the other lake. Michi-Ginebik [the Great Serpent] used to come into the lake and visit the people. He was friendly and brought medicine to the Anishnaabeg. When the serpent surfaced in the lake, he circled and created a whirlpool. Then he would come up on shore and begin sunning himself. There he talked to the people. Wherever he twitched, there was medicine to pick and people were cured.

But the channel is plugged up now, filled with nerve gas canisters that the Army dumped in there.<sup>61</sup>

Clifford George worried about the contamination affecting the medicines and keeping the serpent away. He passed on his understanding that the Anishnaabeg have a continuing obligation to care for the land and the spirits: "There are little spirits—little people—living here. I've seen them here before. They need to be fed. We're not the only ones that have them."

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<sup>57</sup> Notes from an audio-taped interview.

<sup>58</sup> Charles Kegedonce Jones is Professor Johnston's great-grandfather and these traditions have been passed on to her.

<sup>59</sup> All other material relied upon by the authors has been published and is in the public domain.

<sup>60</sup> Elder Clifford George passed away in his 86th year on September 30, 2005.

<sup>61</sup> Author's notes from consultation meeting held at Aazhoodena on February 25, 2004.

The next sections of this paper explore the various legal regimes currently in force in Ontario and their capacity for protecting Aboriginal burial grounds and other sacred sites. In particular, the federal and provincial statutes will be scrutinized from the Aboriginal imperatives of respect, protection, and non-disturbance.

## **II. THE CURRENT REGIME FOR PROTECTING SACRED PLACES IN ONTARIO**

In Canada, power to control what happens to lands depends on a combination of ownership and jurisdiction. Aboriginal power to protect burial grounds and sacred sites has been impacted by loss of ownership of lands and interference with jurisdiction. Although Aboriginal laws prescribing conduct and obligations with respect to burial grounds and other sacred places have been passed down from generation to generation, the geographic scope of their application has been drastically reduced. To understand limitations of the current regime for protecting sacred places, it is necessary to trace briefly the process that led to the present distribution of land ownership and jurisdiction in Ontario.

### **THE TRANSITION FOR ABORIGINAL LANDS TO CROWN LANDS**

By the terms of the Royal Proclamation 1763, King George III acknowledged that, unless Aboriginal lands had been ceded to or purchased by the Crown, they were reserved to the Indian Nations who were not to be “molested or disturbed” in their possession of such lands. However, if at any time the Indian Nations “should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name, at some Public Meeting.”<sup>62</sup> In instituting a consensual purchase regime, the British Crown recognized Aboriginal ownership of land as a pre-existing interest that coexisted with the assertion of Crown “Sovereignty, Protection, and Dominion.”<sup>63</sup> In creating a royal monopoly on the purchase of Aboriginal lands, the Crown intended to prevent “great Frauds and Abuses” and to convince the Indian Nations “of Our Justice and determined Resolution to remove all reasonable Cause of Discontent.”<sup>64</sup> As a result, the Crown assumed a fiduciary obligation to protect Indian lands in the context, with an obligation “to deal with the lands for the benefit of the Indians.”<sup>65</sup>

It is important to understand that the Royal Proclamation was issued at a time when Aboriginal peoples held the balance of power in the Great Lakes region. Anishnaabeg, formerly allied with the French, expected that the British would respect existing diplomatic protocols. British refusal to match French generosity in trade and their failure

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<sup>62</sup> *Royal Proclamation 1763* R.S.C. 1985, App.II, No. 1, p. 1-7 at p.6.

<sup>63</sup> *Ibid*, p. 5.

<sup>64</sup> *Ibid*,p. 6.

<sup>65</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 376.

to compensate for Aboriginal war losses precipitated Pontiac's War in 1763.<sup>66</sup> And it was the force of this destabilizing conflict that prompted the King to be more attentive to Aboriginal land rights.

It is also important to recognize that the Royal Proclamation was directed to all of King George's loving subjects. It would not have the desired effect of securing peace in the Great Lakes region, however, unless it was accepted by the Anishnaabeg. Sir William Johnson was charged with the task of securing an alliance. In July of 1764 he met with more than 1,500 Anishnaabeg Chiefs and warriors at Niagara Falls. After several days of meetings, the British and the Anishnaabeg joined their hands in friendship. The alliance was sealed by the delivery of two magnificent wampum belts.<sup>67</sup>

Sir William Johnson offered the great Covenant Chain Belt to the Anishnaabeg (see Belt No.1 below). He assured them that he was not interested in stealing their lands.

My children, I clothe your land, you see that Wampum before me, the body of my words, in this the spirit of my words shall remain, it shall never be removed, this will be your Mat the eastern Corner of which I myself will occupy, the Indians being my adopted children their life shall never sink in poverty.<sup>68</sup>

In the metaphorical usage of the Anishnaabeg, the Mat refers to their country. The British required only the eastern corner of the Great Lakes region and the Anishnaabeg would flourish with them as allies.



FIG. 25, Belt No. 1



FIG. 26, Belt No. 2

<sup>66</sup> See Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650* (Cambridge University Press, 1991), Chapter 6, "The Clash of Empires," and Chapter 7, "Pontiac and the Restoration of the Middle Ground."

<sup>67</sup> The belts have not been seen for several decades and are presumed by many to have been lost in a fire. A sketch of the belts was made from the originals in the 1850s. The last known belt-carriers lived on Manitoulin Island. At least two readings of the belts were committed to writing, one by J.B. Assikinawk in 1851 (NAC, RG10, Volume 613, pp. 440–442), the other by Chiefs from Mitchikiwotonong in 1862 (NAC, RG10, Volume 292, pp. 195659–195682).

<sup>68</sup> NAC, RG 10, Volume 613, p. 441.

A second belt, the Twenty-four Nations Belt, was also offered by the British and accepted by the Anishnaabeg. The twenty-four human figures represent the Anishnaabek Nations drawing a British vessel laden with presents from across the Atlantic and anchoring it to North America. This belt contained the following promise:

My children, see, this is my Canoe floating on the other side of the Great Waters, it shall never be exhausted but always full of the necessaries of life for you my Children as long as the world shall last.

Should it happen anytime after this that you find the strength of your life reduced, your Indian Tribes must take hold of the Vessel and pull, it shall be all in your power to pull towards you this my Canoe, and where you have brought it over to this Land on which you stand, I will open my hand as it were, and you will find yourselves supplied with plenty.<sup>69</sup>

In accepting the Twenty-four Nations belt, the Anishnaabeg bound the British Crown to a perpetual promise that their alliance would be live-giving and sustaining, not impoverishing. These two belts, and the promises embedded in them, form the foundation of the British-Anishnaabeg Treaty Alliance.

In the customary law of the Anishnaabeg, once a promise is confirmed by the delivery of a wampum belt, it becomes sacred and inviolable. Sir Francis Bond Head, Lieutenant Governor of Upper Canada in 1836, understood this. In a Memorandum to Lord Glenelg, Secretary of State for the Colonies, Bond Head writes:

An Indian's word, when formally pledged, is one of the strongest moral securities on earth—like the rainbow it beams unbroken, when all beneath is threatened with annihilation. The most solemn form in which an Indian pledges his word, is by the delivery of a wampum belt of shells—and when the purport of this symbol is once declared, it is remembered and handed down from father to son, with an accuracy and retention of meaning which is quite extraordinary.<sup>70</sup>

Although Sir William Johnson had promised that the English only needed the eastern corner of the Great Lakes region, their demand for land soon increased, especially following the American Revolution.

Faced with the influx of Loyalists, the British Indian Department assumed the lead in developing a purchase regime to accommodate non-Native settlement. The Royal Proclamation's surrender requirement was incorporated into the royal instructions issued to colonial officials and was given statutory formulation in 1850.<sup>71</sup> In creating and

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<sup>69</sup> *Ibid.*

<sup>70</sup> Sir Francis Bond Head, *Communications and Despatches relating to recent negotiations with the Indians*, printed by order of the House of Assembly (Toronto: s.n., 1837) as reproduced by CIHM No. 91609.

<sup>71</sup> Cite Lord Dorchester's instructions from 1794; *An Act for the Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by them from Trespass and Injury*, 1850, cap.73.

maintaining a monopoly with respect to the disposition of Indian lands, the Crown has been found to assume a judicially enforceable fiduciary duty. According to Justice Dickson's decision in *R. v. Guerin*, "the purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."<sup>72</sup> As it turned out, however, the surrender requirement did not preserve Aboriginal lands in Ontario.

Initially, finite tracts were surrendered, with the First Nations retaining the lion's share of their traditional territory. Within a few decades, however, surrenders came to encompass the majority of Aboriginal lands with only a small portion being retained as reserves. As a result of the sustained and intensive land surrender process undertaken by the Crown, First Nations in Ontario have retained less than 1 percent of their traditional territories as Indian reserve land.<sup>73</sup>

By definition, the reserve creation policy was intended by colonial officials to concentrate Aboriginal land use and settlement patterns in order to open up vast tracts of land for non-Native settlement.<sup>74</sup> Early efforts to remove First Nations from areas deemed desirable for settlement to hinterlands thought unfit for farming met with uniform resistance.<sup>75</sup> In spite of government promises associated with the removal projects, First Nations refused to quit their traditional territories. Maintaining proximity to ancestral burial grounds proved to be one of the strongest territorial attachments.<sup>76</sup> As a result, reserves were typically retained in the vicinity of established villages, fishing grounds, and burial grounds.

While maintaining a toehold within the boundaries of their traditional territories, however, First Nations in Ontario were prevailed upon to surrender 99 percent of their lands. Village lands and sacred places did not always coincide. The huge disparity between retained and surrendered lands meant that not all sacred sites could be protected by reserve status.<sup>77</sup> Perhaps the Chiefs who signed the treaties believed that their people could continue to be custodians of the surrendered sacred lands. If so, they would be sorely disappointed by post-Confederation encroachments upon their authority.

## LAND OWNERSHIP AND JURISDICTION AFTER CONFEDERATION

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<sup>72</sup> *Guerin, supra*, note 63.

<sup>73</sup> As of 1991, there were 189 reserves in Ontario, comprising 709,985.8 hectares, or 0.7 percent of land area of the province. See *Mineral Potential Indian Reserve Lands: Ontario Region* dated October 1991, online at: [http://www.ainc-inac.gc.ca/ntr/ont\\_e.html](http://www.ainc-inac.gc.ca/ntr/ont_e.html).

<sup>74</sup> See Pennefather report, 1858.

<sup>75</sup> Efforts to move Sarnia Indians to Stoney Point; Bond Head's Manitoulin Island removal plan; plan for the Saugeen territory as a general reserve.

<sup>76</sup> When Rama Chiefs were asked to relocate to the Saugeen Peninsula in 1854, they replied, "This is our home, it was the home of our fathers around these waters and on these Islands are the Graves of our fathers & Children and when we die we wish to be buried by the side of them." NAC, RG 10, Volume 541 at pp. 105–106.

<sup>77</sup> When Nawash reserve was surrendered in 1857, three burial grounds were reserved, see Treaty 82; all were disturbed/destroyed by non-Native development. Few other surrenders excepted burial grounds: see keyword search of digital version of Indian Treaties and Surrenders.

First Nations were not involved in the negotiations leading up to Confederation in 1867. They were not consulted on the appropriateness of the decision to allocate exclusive legislative jurisdiction over “Indians, and Lands reserved for Indians” to the federal government.<sup>78</sup> On its least intrusive reading, section 91(24) can be understood as treating the relationship between First Nations and settlers as a matter of national, not local, concern. These relations were to be regulated by the well-established treaty process for which the federal government assumed responsibility. Viewed primarily as a matter of inter-nation relations, the federal legislative authority did not necessarily trump Aboriginal governance structures.

The first legislative initiative under section 91(24) support the characterization of Indian–Crown relations as matters of state. “An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands” was passed by Parliament in 1868.<sup>79</sup> By this Act, the position of Secretary of State for Canada was created, and this official was given charge of State correspondence and was to keep all State records “not specially transferred to other Departments.”<sup>80</sup> In addition to becoming the Registrar General of Canada, with responsibility to register all instruments issued under the Great Seal, the Secretary of State also became the Superintendent General of Indian Affairs.<sup>81</sup>

By this Act, Parliament acknowledged that “all lands reserved for Indians or for any Tribe” before Confederation continued to be reserved for the same purposes. Echoing the terms of the Royal Proclamation, this federal statute prohibited the sale or leasing of Indian lands until they had been surrendered to the Crown. In framing the surrender requirement as a matter of federal law, the act reinforced the consensual and public nature of treaties and the authority of chiefs in relation to tribal territories. To ensure the validity of land surrenders, section 8(1) provided:

Such release or surrender shall be assented to by the chief, or if there be more than one chief, by a majority of the chiefs of the tribe, band or body summoned for that purpose according to their rules and entitled under this Act to vote thereat, and held in the presence of the Secretary of State or of an officer duly authorized to attend such council by the Governor in Council or by the Secretary of State; provided that no Chief or Indian shall be entitled to vote or be present at such council unless he habitually resides on the lands in question.<sup>82</sup>

Until such time as their traditional lands were surrendered to the Crown, Chiefs retained their customary authority over the full extent of their territory and were in a position to protect their sacred sites and burial grounds. Once traditional lands were surrendered, however, they became “Indian lands” within the meaning of this statute and fell under the

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<sup>78</sup> *British North America Act, 1867*, section 91(24).

<sup>79</sup> Statutes of Canada, Chapter 42.

<sup>80</sup> *Ibid.*, section 3.

<sup>81</sup> *Ibid.*, sections 4 and 5.

<sup>82</sup> *Ibid.*, emphasis added.

authority of the Secretary of State in his capacity as Superintendent General of Indian Affairs.

The Secretary of State, vested with responsibility for negotiating Indian treaties and for keeping State records, was well positioned to enforce the treaties according to their spirit and intent. His concurrent responsibility for the management of surrendered “Indian lands” coincided with the Aboriginal understanding that their lands were being surrendered to Her Majesty and would remain under federal auspices until the terms of the treaties had been fulfilled. Given the strength of the treaty relationship between the Queen’s federal representatives and the tribes, land surrenders did not initially represent a radical disjuncture between Aboriginal people and their lands.

For the first two decades following Confederation, all parties (the federal and provincial governments and First Nations) assumed that lands surrendered by treaty to the federal government would belong to the federal government, to be managed for the benefit of the First Nations in accordance with the terms of treaty. Once purchasers of surrendered lands paid for them in full and completed the required settlement duties, federal patents were issued. Once patented, surrendered lands became privately held lands and were no longer the responsibility of the Indian Department. After most of the Aboriginal lands in Ontario had been surrendered, however, the province decided to challenge the status quo.

### *ST. CATHERINE’S MILLING V. THE QUEEN*

In the case of *St. Catherine’s Milling v. The Queen*, Ontario questioned Canada’s right to issue logging licences for lands surrendered in northwestern Ontario.<sup>83</sup> In 1873, federal representatives had concluded Treaty 3 on behalf of Her Majesty the Queen with the Saulteaux Tribe of Ojibeway Indians. The meeting that finalized the surrender of some 55,000 square miles of land ended with the following exchange:

Chief Mawedopenais: “Now you see me stand before you all; what has been done here to-day has been done openly before the Great Spirit, and before the nation, and I hope that I may never hear any one say that this treaty has been done secretly; and now, in closing this Council, I take off my glove, and in giving you my hand, I deliver over my birth-right and lands; and in taking your hand, I hold fast all the promises you have made, and I hope they will last as long as the sun goes round and the water flows, as you have said.”

The Governor (of the Northwest Territories, Alexander Morris) then took his hand and said: “I accept your hand and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and the white man together as friends for ever.”<sup>84</sup>

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<sup>83</sup> (1888), 14 A.C. 46. The British House of Lords Judicial Committee of the Privy Council was the final court of appeal for cases originating in Canada until 1947.

<sup>84</sup> *The treaties of Canada with the Indians of Manitoba and the North-West Territories, including the negotiations on which they were based, and other information relating thereto* by The Hon. Alexander

The Chief would have been shocked by the suggestion that his people did not own the lands that were surrendered to the Queen's federal representative.<sup>85</sup> And yet, in 1888, lawyers for Ontario had the audacity to argue that "both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians.... Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense ... a mere licence terminable at the will of the Crown."<sup>86</sup>

Although Ontario's position was completely at odds with the established treaty practice and the legislative regime governing Indian lands, it was adopted by the Privy Council. Lord Watson adopted a view of Indian title that was radically inconsistent with Aboriginal-Crown customs and usage and made a mockery of the treaty process. In spite of the fact that the Royal Proclamation explicitly required the Crown to purchase Indian lands, the Privy Council held that the Crown already owned the land, even before land surrender treaties were negotiated. According to Lord Watson, Indians were only permitted to live on Crown lands by the good graces of the British monarch and they could be deprived of this privilege at any time.<sup>87</sup> The effect of land surrender treaties was not to transfer land from the Indians to the Crown but simply to extinguish their very tenuous claim.<sup>88</sup> To make matters worse, Lord Watson held that the Province of Ontario, not the federal government, owned the lands before they were surrendered.<sup>89</sup> Although

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Morris, P.C., *Late Lieutenant-Governor of Manitoba, The North-West Territories and Kee-wa-tin* (Toronto: Belfords, Clarke & Company Publishers, 1880) at p. 75.

<sup>85</sup> On the day the treaty was signed, Chief Mawedopenais had resumed the negotiations by saying: "We think it a great thing to meet you here. What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understood you as a representative of the Queen. All this is our property where you have come. We have understood you yesterday that Her Majesty has given you the same power and authority *she* has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands. This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow— us Indians—He has given us rules that we should follow to govern us rightly...."

<sup>86</sup> *Per* Mowat QC, and Blake QC, *St. Catherine's Milling*, *supra*, note 81 at 46.

<sup>87</sup> "Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."

<sup>88</sup> "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

<sup>89</sup> "Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario v. Mercer* (1) 8 App. Cas. 767. might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest.

only the federal government could negotiate such a surrender, the Province enjoyed legislative control and the entire proprietary interest in lands after they were surrendered.

The Privy Council's decision in *St. Catherine's Milling* completely destabilized the treaty-fulfilling capacity of the federal government in Ontario. Not only did the federal government lose control of surrendered Indian lands, but the ownership of Indian reserve lands was also put into question. It required decades of negotiations to get Ontario to agree that Indian reserves were vested in Her Majesty the Queen in right of Canada for the use and benefit of the First Nations for whom they were set apart.<sup>90</sup> Although this articulation of federal trusteeship of reserve lands does not comport with First Nations' understanding of their ownership rights, it does serve as a barrier to provincial legislative interference.

However, the sphere of federally protected space in Ontario is quite limited. By 1923, with the negotiation of the Williams Treaty, all Aboriginal lands within the boundaries of Ontario (with the exception of the Ottawa River Valley<sup>91</sup>), had been surrendered. First Nations were left with a land base of 7,100 square kilometres, representing less than 0.7 percent of the provincial total.<sup>92</sup> Other federally owned lands, including over 2,000 square kilometres of National Park lands, comprise only 0.4 percent of Ontario.<sup>93</sup> Government anticipation of settlement demands, however, appears to have been overstated. Today, the vast majority of surrendered lands have yet to be patented to private owners. Instead, 87 percent of lands in Ontario, some 937,000 square kilometres, remain within the public domain, as Ontario Crown lands. The remaining 12 percent of lands in Ontario are privately held.

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The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed."

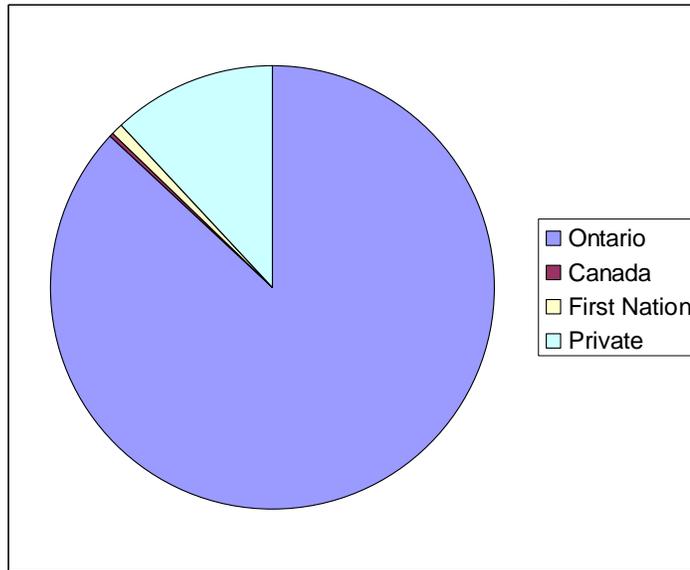
<sup>90</sup> See Canada-Ontario Indian Lands Agreement 1924 and section 2 of the *Indian Act*.

<sup>91</sup> Reference land claim by Algonquins of Golden Lake.

<sup>92</sup> *Supra*, note 71.

<sup>93</sup> For a directory of federally owned lands see [www.tbs-sct.gc.ca/dfrp-rbif/home-accueil.asp?Language=EN](http://www.tbs-sct.gc.ca/dfrp-rbif/home-accueil.asp?Language=EN). For a listing of National Parks in Ontario see [www.pc.gc.ca/docs/v-g/nation/nation103\\_e.asp](http://www.pc.gc.ca/docs/v-g/nation/nation103_e.asp). For information on Crown lands in Ontario see [www.mnr.gov.on.ca/MNR/crownland](http://www.mnr.gov.on.ca/MNR/crownland). See Figure 1 for a graphic representation of this distribution.

**Figure 1: Distribution of Land Ownership in Ontario**



A graphic representation of the distribution of land ownership in Ontario demonstrates the shocking correspondence between what First Nations have lost and what the Crown has gained. Rather than serving as an intermediary between First Nations and settlers, the Crown in right of Ontario has become the chief beneficiary of the land surrender process.

The distribution of lands as between First Nations, Canada, Ontario, and private owners has important jurisdictional consequences. As a very general rule of thumb, federal lands, including National Parks and Indian reserves, are subject to management and control under federal law, while Ontario Crown lands and private lands are governed by provincial legislation.

### **SACRED PLACES AND FIRST NATIONS JURISDICTION IN ONTARIO**

Within reserve boundaries, the federal government has not presumed to interfere with Aboriginal law governing the protection of sacred places. As a result, it can be assumed that burial grounds and other sacred sites located on reserves are not at risk. But what of those sacred places located off-reserve on private and Crown lands? Although First Nations do not accept the constraints of the divisions of powers under the *British North America Act* as limiting their authority to protect burial grounds and other sacred sites located off-reserve, the provincial government has yet to acknowledge such jurisdiction.

For its part, in 1995, the federal government recognized the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*.<sup>94</sup> The inherent rights policy does acknowledge that “the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and

<sup>94</sup> *The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa, 1995).

institutions, and with respect to their special relationship to their land and their resources.” The protection of sacred sites falls easily into the category of matters integral to Aboriginal culture and flowing from special relationships to lands. Regrettably, however, attempts during the last decade to conclude self-government agreements in Ontario have yet to yield fruit.<sup>95</sup>

In 1998, however, negotiations in British Columbia, between Canada, the province, and the Nisga’a Nation, did result in a landmark agreement. Under the Nisga’a Treaty, the traditional laws and practices of the Nisga’a Nation are recognized. Heritage sites are defined as including “archaeological, burial, historical, and sacred sites.” Federal and provincial laws apply to Nisga’a lands, but in the event of an inconsistency between the Treaty and such laws, the Treaty will prevail. Before the Treaty was ratified, however, its recognition of the inherent right to self-government was challenged by the provincial leader of the opposition, Gordon Campbell, and two other sitting members. They argued that “the Treaty violates the Constitution because parts of it purport to bestow upon the governing body of the Nisga’a Nation legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the Provinces by Sections 91 and 92 of the Constitution Act, 1867.”<sup>96</sup>

Justice Williamson of the British Columbia Supreme Court, however, did not agree. He found that sections 91 and 92 did not exhaust the legislative authority of First Nations. Relying upon recent Supreme Court of Canada jurisprudence, including the *Guerin* decision, Justice Williamson concluded:

A consideration of these various observations by the Supreme Court of Canada supports the submission that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten “underlying values” of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division “internal” to the Crown.<sup>97</sup>

As a consequence of this finding, Justice Williamson dismissed the claim and upheld the constitutional validity of the Nisga’a Treaty and its recognition of a limited right of self-government.<sup>98</sup>

Although framed in the context of the British Columbia treaty process, Justice Williamson’s finding that the *British North America Act* did not extinguish Aboriginal powers of self-government is equally relevant to Ontario. In the absence of a negotiated

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<sup>95</sup> Agreements in principle were reached with the leaders of four First Nations (Curve Lake, Beausoleil, Hiawatha, and Moosedeer Point) in December 2004 but none survived the ratification votes held in August 2005.

<sup>96</sup> *Campbell v. British Columbia (Attorney General)* 2000 BCSC 1123 at para. 12.

<sup>97</sup> *Ibid.*, at para. 81.

<sup>98</sup> Although an appeal was filed in B.C. Court of Appeal, it was dropped after Campbell was elected provincial premier in August 2001.

agreement, however, other avenues for ensuring First Nations' custody over sacred sites in Ontario must be considered.<sup>99</sup>

One possibility, recommended by the Royal Commission on Aboriginal Peoples (RCAP), was to increase the land base of First Nations by returning surrendered and expropriated lands to reserve status.<sup>100</sup> In particular, the return of lands containing sacred sites would be treated as a priority. Recommendation 2.4.58 provides as follows:

- Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing
- (a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;
  - (b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);
  - (c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and
  - (d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

RCAP realized that land redistribution would involve complex and time-consuming negotiations at many levels. In order to provide more immediate protection for sacred sites, RCAP recommended collaborative efforts to inventory sacred sites and to legislate urgent remedies for preventing damage to threatened sites.<sup>101</sup> The following two sections of this paper will examine the extent to which the federal and provincial governments have responded to RCAP's recommendations.

## **SACRED PLACES AND FEDERAL JURISDICTION IN ONTARIO**

As a result of the Privy Council's decision in *St. Catherine's Milling*, the federal government has no proprietary interest in, nor legislative authority over, the vast bulk of surrendered Indians lands that remain in the public domain. As the unintended beneficiary of the land surrender process, Ontario holds 87 percent of the province as Crown lands. Federally owned lands, excluding Indian reserves, account for less than 1 percent of the Ontario land base. In addition to airports and harbours, the federal government owns and controls over 2,000 square kilometres of National Park lands.<sup>102</sup>

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<sup>99</sup> See Part III, below.

<sup>100</sup> *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship, Part 2, Chapter 4: "Lands and Resources," Section 7.1, "Interim Steps: Expanding the First Nations Land Base."*

<sup>101</sup> *Ibid.*, Recommendations 3.6.1 and 3.6.2.

<sup>102</sup> *Supra*, note 91.

Although the sphere of federal jurisdiction is dwarfed in comparison to that of the province, Canada has shown some leadership in protecting Aboriginal heritage interests in Ontario. In recent amendments to the *National Parks Act*, Parliament included a non-derogation clause. Section 2(2) provides that “nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.”<sup>103</sup> More concretely, section 16(1)(w) empowers the Governor in Council to make regulations respecting “the authorization of the use of park lands, and the use or removal of flora and other natural objects, by aboriginal people for traditional spiritual and ceremonial purposes.”

Prior to these amendments, in 1998, a Panel on Ecological Integrity was commissioned to review Canada’s National Parks system. The Panel report, released in March 2000, dedicated a chapter to the relationship between Aboriginal peoples and National Parks.<sup>104</sup> It acknowledged that Canadians have something to learn from Aboriginal peoples and their attachments to sacred lands:

Even as they maintained bonds and relationships with the land, aboriginal peoples have traditionally held certain places as sacred. Thus, they recognize a hierarchy of places and spaces through time. Today, as Canadians seek to manage national parks in ways that will ensure ecological integrity forever, Canadians can join with Aboriginal peoples in a common objective to protect these sacred places.<sup>105</sup>

In order to meet these shared objectives, however, the Panel recognized that Parks Canada would have to be proactive in seeking to develop relationships based on trust and respect. In 1999, however, even before the Panel had reported, Parks Canada established an Aboriginal Affairs Secretariat to foster trust and cooperation.<sup>106</sup>

The Panel paid particular attention to the protection of sacred sites. Recommendation 7.4 reads as follows:

We recommend that Parks Canada ensure protection of the current cultural sites, sacred areas and artifacts that are under the auspices of Parks Canada.

As part of this process, Parks Canada will:

- return to First Nations all sacred artifacts and human remains currently in Parks Canada’s possession, using proper ceremonies and rites;
- negotiate agreements for the use of Aboriginal artifacts in education and interpretive programs;

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<sup>103</sup> S.C. 2000, chapter 32, proclaimed February 19, 2001.

<sup>104</sup> *Report of the Panel on the Ecological Integrity of Canada’s National Parks: Unimpaired for Future Generations?* Volume II: *Setting a New Direction for Canada’s National Parks*, Chapter 7: “Working with Aboriginal Peoples.”

<sup>105</sup> *Ibid.*, at .7–3.

<sup>106</sup> *Progress Report on Implementation of the Recommendations of the Panel on the Ecological Integrity of Canada’s National Parks*, online at: [http://www.pc.gc.ca/docs/pn-np/ie-ei/prior/mesures-actions/mesures-actions7a\\_E.asp](http://www.pc.gc.ca/docs/pn-np/ie-ei/prior/mesures-actions/mesures-actions7a_E.asp).

- work with Aboriginal peoples to create a secure and private inventory of sacred areas, so that they can be better protected;
- facilitate the execution of ceremonies and rites that Aboriginal peoples believe necessary for their culture.

Although these recommendations do not go so far as RCAP did in calling for Aboriginal ownership of sacred sites, they are at least geared toward providing protection and access. Moreover, Parks Canada has committed to implementing these recommendations and has recently developed a new directive for “Repatriation of Moveable Cultural Resources of Aboriginal Affiliation.”<sup>107</sup> Imagine how far-reaching this commitment would be if surrendered Indian lands in Ontario had remained within federal ownership and control.

## SACRED PLACES AND PROVINCIAL LEGISLATION

### INTRODUCTION

A review of Ontario statutes reveals that Aboriginal norms concerning the protection of sacred places have not found legislative expression. Until very recently, the term “sacred” was entirely missing from the legislative vocabulary. In 2005, a legal definition of “sacred place,” as a place of worship and any ancillary or accessory facilities, was introduced in amendments to the *Marriage Act* in connection with the Legislature’s recognition of same-sex marriage.<sup>108</sup> From an Aboriginal perspective, this lone statutory reference does not even begin to address the legislative vacuum regarding the protection of sacred places. Ontario is not alone in its failure to recognize and protect places that are sacred to Aboriginal peoples. Only two provinces, Quebec and British Columbia, have statutes pertaining to sacred sites, and these do so by virtue of agreements negotiated with First Nations.<sup>109</sup> Given the lack of specific legislative protection for places sacred to

<sup>107</sup> *Ibid.* The text of the directive, however, is not available online.

<sup>108</sup> Section 20 of the *Marriage Act* (R.S.O. 1990, Chapter M.3) was amended by *An Act to amend various statutes in respect of spousal relationships*, 2005, Chapter 5. Subsection (6) now provides that religious officials are not required “to allow a sacred place to be used for solemnizing a marriage ... if to do so would be contrary to, (a) the person’s religious beliefs or (2) the doctrines, rites, usages or customs of the religious body to which the person belongs.” The *Ontario Human Rights Code*, (R.S.O. 1990, Chapter, H.19) was also amended by the same act and includes the same definition of “sacred place.” Section 18.1(1) of the Code now provides: “The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the *Marriage Act* refuses ... to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of the marriage ... if to ... allow the sacred place to be used or otherwise assist would be contrary to, (a) the person’s religious beliefs; or (2) the doctrines, rites, usages or customs of the religious body to which the person belongs.”

<sup>109</sup> An Act to ensure the implementation of the Agreement Concerning a New Relationship Between le Gouvernement du Québec and the Crees of Québec (2002, c. 25; after consolidation: R.S.Q., c. M-35.1.2). Section 3.9 of the agreement dealing with “Sites of special interest to the Cree” provides for the protection of identified and mapped sites from forest management activities.” Section 3.9.2(c) defines sites of interest as including “traditional, cultural and sacred sites.” The *Nisga’a Final Agreement Act* SBC 1999, Chapter 2, recognizes the Nisga’a agreement as a treaty for the purposes of sections 25 and 35 of the *Constitution Act, 1982* and declares it to have the force of law. The agreement defines “heritage sites” as including “archaeological, burial, historical, and sacred sites.” Chapter 17 of the agreement pertains to cultural artifacts and heritage. According to section 36, the Nisga’a Government “will develop processes on Nisga’a Lands in order to preserve the heritage values associated with those sites from proposed land and resources

Aboriginal peoples in Ontario, protection must be found within the general heritage protection framework.

## **ABORIGINAL HERITAGE PROTECTION IN ONTARIO**

Humans have occupied Ontario for at least 11,000 years. The European presence in Ontario is relatively recent, dating back about 400 years. Proportionately speaking, the post-contact period represents less than 4 percent of the time depth of human history here. For this reason, Ontario's archaeological heritage is overwhelmingly Aboriginal. The Government of Ontario, through the Ministry of Culture, has recognized that archaeology "is uniquely important in documenting the vast majority of Ontario's past, and in emphasizing the significance and antiquity of the role Aboriginal communities have played in shaping Ontario's heritage."<sup>110</sup>

There is more to heritage, however, than archaeology, and Aboriginal heritage is no exception. Cultural landscapes and heritage features continue to give meaning to Aboriginal peoples. In spite of the importance of heritage protection to the continued vitality of First Nations, there is very little recognition of or protection for Aboriginal heritage in Ontario. In assessing the protection of heritage in Ontario, it is important to distinguish between publicly owned Crown land and privately owned land. Different regulatory regimes come into play depending upon whether the land is public or private.

Recall that prior to treaties, all lands in Ontario were Aboriginal title lands. According to the Royal Proclamation and the Treaty of Niagara, no colonial settlement could occur on lands in Ontario prior to the negotiation of treaties between the Crown and First Nations. It was only through the treaty process that lands became available to the Crown for distribution to settlers. Once land is formally granted by the Crown to an individual or corporation, it ceases to be regulated as public land and it is governed by a complicated regime of general and regionally specific legislation. This section will summarize both the public and the private spheres, examining legislative roles and responsibilities and scope for protection of Aboriginal heritage in Ontario.

## **ABORIGINAL HERITAGE AND CROWN LANDS**

### ***Public Lands Act***

The ownership and distribution of Crown lands in Ontario is governed by the *Public Lands Act*.<sup>111</sup> Under this Act, the Minister of Natural Resources is given "charge of the

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activities that may affect those sites." By section 37, the government of British Columbia makes a reciprocal commitment. Although there is no Alberta legislation dealing with sacred places, there is statutory recognition of an agreement with the Blackfoot Nation concerning sacred objects held by the Glenbow museum: see *First Nations Sacred Ceremonial Objects Repatriation Act*, R.S.A. 2000, c.F-14 and Alberta Regulation 96/2004, Blackfoot First Nations Sacred Ceremonial Objects Repatriation Regulation.

<sup>110</sup> *Conserving a Future for our Past: Archaeology, Land Use Planning & Development in Ontario. An Educational Primer and Comprehensive Guide for Non-Specialists* (Ministry of Culture, 1998), p. 1.

<sup>111</sup> R.S.O. 1990, chapter P.43.

management, sale and disposition of the public lands and forests.”<sup>112</sup> The sale and lease of Crown lands is governed by regulations made under the authority of section 15 of the Act. The sale of Crown lands does not represent the only threat to Aboriginal heritage under the *Public Lands Act*. Crown lands can be occupied and developed while still remaining in the public domain.<sup>113</sup>

Neither the Act nor the regulations make provision for the protection of Aboriginal heritage sites in the use and disposition of Crown lands. A recent policy development, however, is relevant. Public Land Management Directive PL 4.02.01, entitled *Application Review and Land Disposition Process*, was issued by the Ministry of Natural Resources on June 7, 2005.<sup>114</sup> It contains the following “Guiding Principle”:

When disposing of right to use public land (e.g. land use permit or licence of occupation) or interests in public lands (e.g. easement, Crown lease, or sale), MNR will consult with aboriginal communities where a requested disposition may result in the infringement of an existing aboriginal or treaty right, or where a disposition involves lands that are subject to an aboriginal land claim.

Although the policy does not specifically reference Aboriginal heritage sites, the obligation to consult with First Nations concerning impacts on Aboriginal and treaty rights creates at least the possibility for dialogue on heritage protection.

The Public Land Management Directives are not the only constraints on the Ministry of Natural Resources’ (MNR) power to grant Crown lands. The *Public Lands Act* does not exist in a vacuum. Its administration is influenced by both the *Environmental Assessment Act* and the *Planning Act*. Moreover, there is a specialized legislative regime for Crown lands that have been designated as provincial parks.

### ***Provincial Parks Act***

Not all public lands in Ontario are destined for sale. Under section 11(1) of the *Public Lands Act*, “Lieutenant Governor in Council may set apart areas of public lands for any purpose that will benefit research in, and the management, utilization and administration of, the public lands and forests.” The exercise of this power has led to the creation of provincial parks that are governed by the *Provincial Parks Act*.<sup>115</sup>

To date, more than 300 parks have been established and the number continues to grow. Remarkably, more land has been set aside for provincial parks in Ontario than has been reserved for First Nations. Approximately 9.5 million hectares of Crown land are currently designated as provincial parks and protected areas. This allocation of 10 percent

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<sup>112</sup> Section 2(1).

<sup>113</sup> By virtue of section 20 the Minister may grant licences of occupation; section 21 provides for the granting of easements; section 42 provides for the sale of water powers or privileges; and, sections 71–75 provide for the construction of dams.

<sup>114</sup> Online at: <http://www.mnr.gov.on.ca/MNR/crownland/directives.html#disposition>.

<sup>115</sup> *Provincial Parks Act* R.S.O. 1990, Chapter P.34.

of Ontario's land base represents more than 10 times the percentage of lands reserved for First Nations.

As with Crown lands generally, provincial parks are managed by the Ministry of Natural Resources. Recently, the Legislative Assembly passed the *Provincial Parks and Conservation Reserves Act, 2006*.<sup>116</sup> Once proclaimed in force, it will repeal the existing legislation. Under this new regime, provincial parks and conservation reserves will no longer be subject to the *Public Lands Act*<sup>117</sup> and the power of the Minister to dispose of these lands will be severely limited.<sup>118</sup> In addition, the new Act prohibits commercial timber harvest, electricity generation, mining, aggregate extraction, and other industrial uses within provincial parks and conservation reserves.<sup>119</sup>

The new legislation provides a strong statement of purpose that offers considerable scope for heritage protection:

The purpose of this Act is to permanently protect a system of provincial parks and conservation reserves that includes ecosystems that are representative of all of Ontario's natural regions, protects environmentally significant elements of Ontario's natural and cultural heritage, maintains biodiversity and provide opportunities for compatible, ecologically sustainable recreation.<sup>120</sup>

Section 8(1) sets out a new classification system for provincial parks, including "Cultural Heritage Class Parks." The objective of cultural heritage class parks is "to protect elements of Ontario's distinctive cultural heritage in open space settings for their intrinsic value and to support interpretation, education and research."<sup>121</sup>

As with Crown lands generally, provincial parks are governed by the requirements of the *Environmental Assessment Act*.

### **Crown Lands and the *Environmental Assessment Act***

The stated purpose of the *Environmental Assessment Act* (EAA) is "the betterment of the people of the whole or any part of Ontario by providing protection, conservation and wise management in Ontario of the environment."<sup>122</sup> The statutory definition of "environment" is expansive and integrative:

"environment" means,  
(a) air, land or water,  
(b) plant and animal life, including human life,

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<sup>116</sup> S.O. 2006, Chapter 12.

<sup>117</sup> *Ibid.*, section 56.

<sup>118</sup> Under section 9, any disposition greater than the lesser of 50 hectares or 1 percent of the total area of the park or reserve will require endorsement by the Legislative Assembly.

<sup>119</sup> Section 16. Pre-existing uses and contractual rights, however, are protected by section 18.

<sup>120</sup> Section 1.

<sup>121</sup> Section 8(4).

<sup>122</sup> R.S.O. 1990, Chapter E.18, Section 2.

- (c) the social, economic and cultural conditions that influence the life of humans or a community,
  - (d) any building, structure, machine or other device or thing made by humans,
  - (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
  - (f) any part or combination of the foregoing and the interrelationships between any two or more of them,
- in or of Ontario.

Although not specifically mentioned, heritage is captured by both “the cultural conditions that influence the life of humans” and “things made by humans.”

Under Section 4, the EAA is explicitly made binding on the Crown in right of Ontario. Section 5 requires that “every proponent who wishes to proceed with an undertaking shall apply to the Minister [of the Environment] for approval to do so.” In order to get such approval, the proponent must prepare an assessment of the potential environmental impacts of the undertaking that is subject to review by the Ministry and by the public. Undertakings subject to the EAA cannot proceed until such approval has been granted.<sup>123</sup>

The EAA does not necessarily require a separate assessment for each individual undertaking. Some groups of projects, if approved by a “Class EA,” are not required to satisfy the full requirements of an individual EA. Classes are defined under the EAA by reference to a shared “attribute, quality or characteristic.”<sup>124</sup> Section 13 allows for ministerial approval of classes of undertakings subject to class environmental assessments, which includes an obligation on the proponent to consult “with such persons as may be interested.” Class EA documents prepared by proponents must include, among other things, a description of the expected range of environmental effects, a description of measures that could be taken to mitigate against adverse environmental effect, and a description of the consultation process used by the proponent in relation to persons who may be affected by the undertaking.<sup>125</sup> In approving Class EAs, the Minister of the Environment may impose conditions upon the proponent that must be satisfied before the Class EA comes into effect.<sup>126</sup>

The Class EA process is particularly relevant to the protection of Aboriginal heritage on Crown lands. MNR activities, including the disposition of Crown lands and the management of provincial parks and Crown forests, are subject to Class EAs.

### **Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (Class EA-RSFD)**

This Class EA, approved in 2002, covers a very wide range of projects undertaken by MNR in the management of public lands, many of which could negatively impact

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<sup>123</sup> *Ibid.*, Section 5(3).

<sup>124</sup> *Ibid.*, Section 1(3).

<sup>125</sup> *Ibid.*, Section 14(2).

<sup>126</sup> *Ibid.*, Section 15.2(2).

Aboriginal heritage.<sup>127</sup> Examples of projects include the construction of access roads, docks, dams, and dykes on Crown lands. Most importantly, it applies to disposition of Crown lands, including work permits, leases, and sales.<sup>128</sup>

Projects are categorized according to potential negative environmental impact, with Categories A and B capturing low- to medium-impact projects and Category C capturing medium- to high-impact projects. If a project doesn't fall within Categories A, B, or C, then it is assigned to Category D and a full environmental assessment is required.

In order to assign projects to the appropriate category, MNR staff apply the screening criteria set out in the Class EA document. These criteria are divided into four broad categories: Natural Environment Considerations; Land Use, Resource Management Considerations; Social, Cultural, and Economic Considerations; and Aboriginal Considerations.<sup>129</sup> If a potential negative effect is identified in relation to a particular screening criterion, MNR staff assign a rating of either high, medium, or low. If a project is assigned to Category A, then it may be implemented with appropriate conditions. If a project is assigned to Category B or C, then further evaluation and consultation in accordance with section 4 of the Class EA document is required.

For Category B (low- to medium-impact) projects, MNR provides a notice at the beginning of the process that includes a summary description of the project and any proposed mitigation measures, as well as a notice of completion. These notices must be advertised, in addition to being posted on the *Environmental Bill of Rights* (EBR) Registry.

For Category C (medium- to high-impact) projects, MNR or the disposition applicant is required to prepare a Draft Environmental Study Report (ESR). The Draft ESR must describe the purpose and rationale of the project and identify alternatives. Both the proposal and its alternatives are assessed using the prescribed screening criteria. Where potential adverse environmental effects are identified, avoidance or mitigation measures should be recommended. The Draft ESR is subject to public notice and consultation prior to its completion. Notice is also required once the Final ESR is completed. Again, notice requirements include postings on the EBR Registry.

Aboriginal heritage impacts can be assessed as a Cultural Consideration if the site falls into the category of "Cultural heritage resources," which is defined to include "archaeological sites, built heritage, and cultural landscapes."<sup>130</sup> The Glossary contained in Appendix 1 provides a much more comprehensive definition of Cultural Heritage Resource:

Any resource or feature of archaeological, historical, cultural, or traditional use significance. This may include archaeological resources, built heritage or cultural

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<sup>127</sup> Approved December 11, 2002. See [http://ontarioparks.com/english/planning\\_pdf/class\\_ea.pdf](http://ontarioparks.com/english/planning_pdf/class_ea.pdf).

<sup>128</sup> Prior to the approval of this Class EA, dispositions by MNR were not subject to the EAA by virtue of an Exemption Order 26/7.

<sup>129</sup> See Table 3.1: Screening Criteria.

<sup>130</sup> *Ibid.*, p. 22.

heritage landscapes. Heritage resources and features are usually identified by federal or provincial agencies, municipalities, local architectural conservation advisory committees or other equivalent heritage groups, and local and regional band councils. Some heritage resources and features are legally “designated”, and can be found in official sources. Some may only be inventoried or listed, either officially, or by interested stakeholders. Others have never been identified, although this does not necessarily diminish their cultural significance.<sup>131</sup>

Examples of Cultural Heritage Resources are also defined in the glossary including:

**Traditional Use Site:** a geographically defined area supporting current or past human use as a gathering area, spiritual site, place of worship or cemetery.

**Cultural Heritage Landscape:** a geographic area of heritage significance, which has been modified by human activities. Such an area is valued by a community and is of significance to the understanding of the history of a people or place.

Places sacred to Aboriginal peoples could fall within one or both of these categories. If the screening process results in the identification of such sites, and the assessment of potential adverse impacts, then avoidance or mitigation is required. According to the Class EA document, “it is MNR practice to discourage development in areas of known cultural heritage significance, and to encourage further study in areas expected to have potential for cultural resources.”<sup>132</sup>

In addition to the general Cultural Considerations criteria, sacred lands might be identified and protected using the Aboriginal-specific criteria. The following “Aboriginal Considerations” appear in the table of screening criteria:

- First Nation reserves or communities
- Spiritual, ceremonial, or cultural sites
- traditional land or resources used for harvesting activities
- Aboriginal values
- Lands subject to land claims

The explicit recognition of Aboriginal spiritual and ceremonial sites is a first in Ontario’s regulatory history. The protective potential of “Aboriginal values” remains unclear because the term is not defined in the text or the appendix.

The approval of the MNR Stewardship Class EA was made conditional upon the subsequent development and approval of *Technical Guidelines for Cultural Heritage Resources*. These guidelines, approved on June 28, 2006, are designed to address (a) how cultural heritage resources should be identified; (b) how to assess the significance of

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<sup>131</sup> *Ibid.*, p. 46.

<sup>132</sup> *Ibid.*, p. 35.

identified cultural heritage resources; and (c) how to develop mitigation techniques regarding identified cultural heritage resources.<sup>133</sup>

The approval notice posted on the EBR notes: “Cultural heritage resource type-Traditional Use Sites was dropped and consolidated into the definitions for the remaining three Cultural Heritage Resource (CHR) types. This was done to avoid confusion.”<sup>134</sup> It is not clear, however, that the range of sites contemplated by the Traditional Use category will be captured by the Archaeological or Cultural Landscape categories. The former category is potentially limited to past uses and the latter category may prove to have a higher threshold for the complex of features required to constitute a landscape. For example, if a site has been and continues to be used by Aboriginal peoples for gathering medicines, without having otherwise been physically altered, it is not clear that it would be protected from adverse impacts by the operation of these guidelines.

The Technical Guidelines also fail to shed any light on the “Aboriginal Values” screening criteria, which illustrates the danger of separating out “Aboriginal Considerations” in the Class EA process. Nevertheless, the policy development concerning Aboriginal heritage on Crown lands greatly exceeds that being achieved on private lands.

#### **Class Environmental Assessment for Provincial Parks and Conservation Reserves (Class EA-PPCR)**

This Class EA, approved September 23, 2004, largely mirrors the MNR Class EA-RSFD.<sup>135</sup> Although the class of undertakings differ, they share the same structure. This Class EA governs the following projects:

- establishing, amending and rescinding boundary regulations for a new or existing provincial park or conservation reserves
- acquiring and disposing of land for a new or existing provincial park or conservation reserve
- managing existing and recommended provincial parks or conservation reserves.<sup>136</sup>

The screening criteria are arranged according to the same four clusters of Considerations, including Aboriginal Considerations. However, the Social Cultural Considerations include “Sacred or traditional use sites.”<sup>137</sup> The glossary does not define “Sacred sites” but the same definition of Traditional Use appears as was used in the Class EA-RSFD. Neither document defines what is meant by the criterion “Aboriginal Values.”

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<sup>133</sup> *A Technical Guideline for Cultural Heritage Resources for Projects Planned Under the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects and the Class Environmental Assessment for Provincial Parks and Conservation Reserves.* Online at: [http://www.mnr.gov.on.ca/MNR/EBR/cult\\_heritage/guideline.pdf](http://www.mnr.gov.on.ca/MNR/EBR/cult_heritage/guideline.pdf).

<sup>134</sup> EBR Registry Number PB06E6015.

<sup>135</sup> Approved September 23, 2004. Online at: [http://www.ontarioparks.com/ENGLISH/planning\\_pdf/class\\_ea.pdf](http://www.ontarioparks.com/ENGLISH/planning_pdf/class_ea.pdf).

<sup>136</sup> *Ibid.*, p. 9.

<sup>137</sup> Table 4.1 at p. 26.

Like the Class EA-RSFD, the approval of the Provincial Parks Class EA was conditional on the development of technical guidelines in consultation with the Ministry of Culture. In fact, the same guidelines apply to the implementation of both Class EAs. Therefore, the same concerns about collapsing traditional use sites into either archaeological resources or cultural landscapes apply, as does the concern that “Aboriginal Values” have remained undefined.

### **Crown Forests in Ontario**

Forests represent by far the largest proportion of Crown lands in Ontario. According to MNR, 66 percent of Ontario (70.4 million hectares) is forested and approximately 90 percent of these forests belong to Ontario.<sup>138</sup> Once again, the land base of First Nations in Ontario is dwarfed in comparison to the extent of forested Crown lands. As with provincial parks, Crown forests are managed by MNR and have been made subject to a Class Environmental Assessment that was approved in 2003.<sup>139</sup> Its approval was also made conditional upon the preparation of a Forest Management Planning Manual. In particular, it specified that the Manual “shall contain requirements for the preparation, during the development of the Forest Management Plan, of an Aboriginal Background Information Report, and a preliminary and final report on the Protection of Identified Aboriginal Values , and shall contain requirements for consultation with Aboriginal communities in the preparation of these reports.”<sup>140</sup>

In response to these conditions, MNR prepared and posted a “Draft Forest Management Guide for Cultural Heritage Values” in July 2005.<sup>141</sup> As of December 2006, this Guide has not yet been finalized. Even in draft form, however, this document provides a much needed discussion of Aboriginal Values. Rather than being cast as the fourth class of “Considerations,” treated separately from “Cultural Considerations” in the screening process, the Guide treats Aboriginal Values as a type of Cultural Heritage Values.

Aboriginal Values are defined generally as those “values of importance to the participating community including sites of local archaeological, historical, religious and cultural heritage significance, including Aboriginal cemeteries, spiritual sites and burials sites.”<sup>142</sup> However, the guide acknowledges that “the actual strategy for values identification must be established with each of the participating Aboriginal communities.”<sup>143</sup> Furthermore, it acknowledges that protocols must be developed for ensuring the security of sensitive data.

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<sup>138</sup> *Ontario’s Forests: Sustainability for Today & Tomorrow* (Queen’s Printer, 2003), p. 2. Online at: <http://ontariosforests.mnr.gov.on.ca>.

<sup>139</sup> Declaration Order regarding MNR’s Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario, approved June 25, 2003. EBR Registry Number: RA03E0004. A Notice of Amendment to this Declaration Order was posted on October 31, 2006; see EBR Registry Number: RA06E0012.

<sup>140</sup> See Section 6(d) and 7(c).

<sup>141</sup> EBR Registry Number: PB05E7005. Draft version dated June 15, 2005.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*, p. 19.

As defined, Aboriginal Cultural Heritage Values can be protected on sites that would not otherwise be classified as Archaeological sites or Cultural Landscapes. By being recognized as cultural heritage values in their own right, Aboriginal values are not prejudiced by their lack of visibility. The Draft Guide discusses the visibility of values in the following terms:

An important consideration in planning for cultural heritage values protection is the concept of visibility. The visibility of a value is related to how readily an individual could identify traces of the past occupation or activity undertaken at the site. For most archaeological sites, visibility increases with the abundance of material. Visibility, in terms of the number of objects present, may stand as a measure of archaeological significance, but for many Aboriginal values, significant cultural activities may have left limited physical traces.<sup>144</sup>

This departure from a strictly physical, material approach to culture is crucial if Aboriginal sacred sites apart from cemeteries are to receive adequate protection. The Draft Guide reiterates that its protective potential will not be limited to material culture: “Values which have a geographic component and which can be primarily described as holding cultural significance to the Aboriginal community will be considered in planning under the terms of this Guide, regardless of whether there are physical remains.”<sup>145</sup> It is holding out the promise that spiritual sites not altered by man and totally dependent on oral tradition for their identification, such as the abodes of Manitous, could be protected with sensitivity and discretion.

### **Crown Lands and Mining**

Although the scope for protection of Aboriginal heritage sites on public lands has been enhanced as a result of policy development under the auspices of the *Environmental Assessment Act*, the same cannot be said for public lands subject to mining activity.<sup>146</sup>

In 1985, responsibility for mines and minerals was transferred from the Ministry of Natural Resources to a separate ministry now known as Northern Development and Mines (MNDM). Until that time, dispositions (leases, licences, grants) involving mines and minerals had been the responsibility of the Ministry of Natural Resources and, like other dispositions, these were exempt from the EAA as a result of Declaration Order MNR-71. As discussed above, MNR dispositions of Crown lands are now governed by the Class EA-RSFD and Class EA-PPCR. Mineral dispositions, however, are not captured by the Class EA designation. Instead, the MNDM has continued to operate under an Exemption Order which, in June 2006, was extended for another three years.<sup>147</sup>

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<sup>144</sup> *Ibid.*, p. 14.

<sup>145</sup> *Ibid.*, p. 18.

<sup>146</sup> The *Mining Act*, R.S.O. 1990, Chapter M.14, contains the following definition: “‘Crown land’ does not include, (a) land, the surface rights, mining rights or the mining and surface rights of which are under lease or licence of occupation from the Crown.”

<sup>147</sup> Declaration Order 3/3. The recent extension approval decision does not appear to have been posted. For the previous extension see EBR Number: RA03E0015.

This means that Aboriginal heritage resources are not protected by the *Environmental Assessment Act* from the potential negative effects of mining activities on public lands.

### **SUMMARY: ABORIGINAL HERITAGE PROTECTION ON CROWN LANDS**

For First Nations located in Northern Ontario, the vast majority of their off-reserve heritage resources are located on Crown lands. To the extent that such lands are subject to the *Environmental Assessment Act*, there is an emerging regulatory regime that offers protection for sites that are sacred to Aboriginal peoples.

### **Aboriginal Heritage Protection on Crown Lands**

For First Nations situated in Southern Ontario, protection of their off-reserve heritage resources often falls within the planning regime applicable to private lands. The main statutes in this regard are the *Planning Act* and the *Ontario Heritage Act*. At first glance, it is not clear exactly who is protecting Aboriginal heritage from the potentially adverse effects of private development in Ontario. In fact, the mandate of the Ministry of Culture under *Ontario Heritage Act* to conserve and protect archaeological resources has largely been usurped by amendments to the *Planning Act*, which have delegated provincial development approval authority to local municipalities.

### ***Ontario Heritage Act***

Given its title, one might expect the *Ontario Heritage Act* to make explicit provisions for the protection of Aboriginal heritage resources in consultation with Aboriginal peoples. Regrettably, the Act contains references to neither. Although the Minister of Culture has the power to “determine policies, priorities and programs for the conservation, protection and preservation of heritage in Ontario,” this power is permissive, not mandatory.<sup>148</sup>

Over the past decade, operational priorities of the Ministry of Culture have changed considerably. Its former role as a provincial review agency for development applications enabled the Ministry’s archaeologists to participate directly in the conservation and management of heritage resources. In 1996, when this responsibility was off-loaded to non-specialists at the municipal level, the Ministry’s role became one of managing the archaeological consulting industry rather than protecting the province’s archaeological resources.<sup>149</sup>

This shift in focus is reflected in the Ministry’s “Archaeology Customer Service Project,” which has resulted in the development of a new licensing framework, as well as draft Standards and Guidelines for Consultant Archaeologists. As a result of this policy initiative, the *Heritage Act* was recently amended to update and clarify the licensing

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<sup>148</sup> R.S.O. 1990, Chapter O.18, section 2. “The Minister *may*...”

<sup>149</sup> See discussion, *supra*, at note 151.

regime for archaeologists.<sup>150</sup> Part VI of the Act deals with the Conservation of Resources of Archaeological Value. Section 48(1) specifically prohibits unlicensed archaeological fieldwork. The licensing regime, however, is geared toward ensuring archaeological competence, not to site-specific reviews of the appropriateness of excavation. According to Regional Heritage Planner Neal Ferris, “the Ministry’s core mandate under Heritage Act is to license archaeologists, not to determine extent and manner of protection for archaeological resources.”<sup>151</sup>

The Ministry of Culture licenses archaeologists, and maintains a database of archaeological sites and archaeological fieldwork reports, but it is not the approval authority in relation to planning developments that could negatively impact heritage resources. Once licensed, archaeologists can be hired by private landowners to alter sites and remove artifacts without requiring the prior approval of the Ministry, provided the property has not been designated under Part VI of the Act.<sup>152</sup> The Ministry of Culture will become involved in a site-specific review only if a private development requires an Official Plan amendment or a plan of subdivision, and if the local approval authority has imposed a condition requiring an archaeological assessment. The *Planning Act*, not the *Ontario Heritage Act*, governs the Ministry’s presently constrained role.

### **Heritage Protection and the *Planning Act***

The first planning legislation in Ontario, introduced in 1946, applied only to cities and surrounding areas.<sup>153</sup> By the 1970s, planning authority was being exercised in most municipalities throughout the province. Concern for consistency in policy and planning increased with growth and development. In 1983, the *Planning Act* was amended to provide for the integration of “matters of provincial interest in provincial and municipal planning decisions.”<sup>154</sup> The newly designated “provincial interests” included “the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest.”<sup>155</sup> Aboriginal heritage resources could be characterized as “cultural, historical, archaeological” features, assuming the “significant interest” threshold could be met, but the question remains, to what extent and in what manner are such features protected? Regrettably, this is not clear on the face of the *Planning Act*.

Much of the protective potential of the *Planning Act* is to be found in documents that exist outside the Act, in a hybrid regulatory form known as a Provincial Policy Statement (PPS). Section 3 of the Act authorizes the Minister of Municipal Affairs and Housing,

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<sup>150</sup> See Ontario Regulation 8/06 “Licences under Part VI of the Act—Excluding Marine Archaeological Sites.”

<sup>151</sup> Telephone conversation, December 21, 2006.

<sup>152</sup> To date, only five sites have been designated under Part VI of the Act. See *Ontario Heritage Act*, R.R.O., Regulation 857, “Archaeological Sites.” Once designated, such sites can only be excavated or altered with a permit from the Minister. See section 56.

<sup>153</sup> G. Penfold, “Planning Act Reforms and Initiatives in Ontario, Canada,” in *The Cornerstone of Development: Integrating Environmental, Social, and Economic Policies*, edited by J. Schnurr and S. Holtz (Ottawa: International Development Research Centre, 1998) at p.149.

<sup>154</sup> *Planning Act*, R.S.O. 1990, c.P.13, Section 1.1

<sup>155</sup> *Ibid.*, section 2(d).

together with other Ministers of the Crown, to issue policy statements with Cabinet approval on matters of “provincial interest.” Once issued, these policy statements are intended to influence both provincial and municipal planning decisions.<sup>156</sup>

The degree to which planning approval authorities are bound by the PPS has changed several times in the past decade. Initially the standard was set quite low, requiring that planning authorities shall “have regard to” the PPS in their decision making.<sup>157</sup> In 1994, this standard was increased, requiring decisions to be “consistent with” the PPS.<sup>158</sup> This higher “consistency” standard however, was short-lived. In 1996, an amendment restored the “shall have regard to” standard.<sup>159</sup> In 2004 the consistency standard was again restored.<sup>160</sup> The current Act states that, decisions “in respect of the exercise of any authority that affects a planning matter, shall be consistent with policy statements.”<sup>161</sup>

Since 1996, many planning decisions formerly made by provincial ministries have been delegated to municipalities. Section 3(5) requires that all planning “decisions,” whether made by a provincial or municipal authority, must meet the consistency standard. Even where the approval authority has been delegated from the province to a municipal body, provincial responsibility for consistency with the PPS remains with respect to provision of “comments, submissions or advice affecting a planning matter.”<sup>162</sup>

In order to assess the strength of protection for Aboriginal heritage contained in the *Planning Act*, it is necessary to look outside the legislation to the Provincial Policy Statement.

### **Provincial Policy Statement 2005**

The current PPS, which came into effect in March 2005, contains the following policy with respect to Cultural Heritage and Archaeology:

**2.6.1** Significant built heritage resources and significant cultural heritage landscapes shall be conserved.

**2.6.2** Development and site alteration shall only be permitted on lands containing archaeological resources or areas of archaeological potential if the significant

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<sup>156</sup> Approval authorities include municipalities, planning boards, Ministries of the Crown, boards, commissions, agencies of government, including the Ontario Municipal Board.

<sup>157</sup> *Planning Act*, R.S.O. 1990, Chapter P.13, s.3(5).

<sup>158</sup> *Planning and Municipal Statute Law Amendment Act, 1994*, c.23, s.6(2).

<sup>159</sup> *Land Use Planning and Protection Act, 1996*, c.4, s.3.

<sup>160</sup> *Strong Communities (Planning Amendment) Act, 2004*, c.18, s.2.

<sup>161</sup> *Ibid.* The *Planning Act* has recently been amended by the *Planning and Conservation Land Statute Amendment Act, 2006*, c.23. Once proclaimed, s.3(5) will read: “A decision of the council of a municipality, local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter, (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision, and (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.”

<sup>162</sup> *Planning Act*, R.S.O. 1990, chapter P.13, s.3(6).

archaeological resources have been conserved by removal and documentation, or by preservation on site. Where significant archaeological resources must be preserved on site, only development and site alteration which maintain the heritage integrity of the site may be permitted.

**2.6.3** Development and site alteration may be permitted on adjacent lands to protected heritage property where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved.

Mitigative measures and/or alternative development approaches may be required in order to conserve the heritage attributes of the protected heritage property affected by the adjacent development or site alteration.<sup>163</sup>

Under this policy, places sacred to Aboriginal peoples could be conserved if they reach the threshold of “significant cultural heritage landscapes,” which are defined as follows:

...a defined geographical area of heritage significance which has been modified by human activities and is valued by a community. It involves a grouping(s) of individual heritage features such as structures, spaces, archaeological sites and natural elements, which together form a significant type of heritage form, distinctive from that of its constituent elements or parts. Examples may include, but are not limited to, heritage conservation districts designated under the Ontario Heritage Act; and villages, parks, gardens, battlefields, mainstreets and neighbourhoods, cemeteries, railways and industrial complexes of cultural heritage value.

Conservation of significant Cultural Heritage Landscapes is mandatory. The policy defines conserved as meaning “the identification, protection, use and/or management of cultural heritage and archaeological resources in such a way that their heritage values, attributes and integrity are retained.”

Section 2.6.2 contemplates two forms of conservation: collection and removal of archaeological resources (excavation) or preservation on site (avoidance). If sacred places are treated simply as collections of archaeological resources, the policy could allow for removal and documentation of the associated “artifacts.” However, the policy requires that “heritage values, attributes and integrity” be retained. From an Aboriginal perspective, the heritage integrity of sacred places could only be conserved by preservation of the land together with the associated cultural material. To remove ceremonial items from their ritual landscape would be to destroy the spiritual connection that brought them there in the first place.

The Cultural Heritage provisions of the PPS, if applied with appropriate sensitivity, have great scope for protecting Aboriginal heritage from the negative impacts of development.

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<sup>163</sup> Accessed online at: [http://www.mah.gov.on.ca/userfiles/HTML/nts\\_1\\_23137\\_1.html#2.6](http://www.mah.gov.on.ca/userfiles/HTML/nts_1_23137_1.html#2.6). The text in *italics* are terms defined by the PPS.

The *Planning Act* requires all planning decisions to be consistent with the mandatory conservation policy. But the question remains, who are the decision-makers that are bound by this conservation mandate? The responsibility for heritage protection is in fact very diffuse and does not always correspond with expertise and resources.

### **Land Use Planning and Heritage Protection**

Prior to amendments to the *Planning Act* in 1996, the Ministry of Culture played a direct role in reviewing land use planning applications including site plans, subdivisions, zoning changes, and official plan amendments. The Ministry was not designated as an approval authority within the terms of the *Planning Act* or the *Heritage Act*. But as a matter of policy, municipalities were required to circulate applications to the Ministry for comment and review by Regional Heritage Planners who were trained archaeologists. If the Ministry determined that a proposed development could negatively impact known or potential archaeological resources, the Ministry imposed conditions requiring archaeological assessment and mitigation. These condition(s) could be removed only after all provincial heritage concerns had been met (by excavation or avoidance). A development could not obtain final approval to proceed until the conditions were removed.

The 1996 amendments to the *Planning Act* delegated many planning approval functions from provincial authorities to local municipalities.<sup>164</sup> Once approval authority has been delegated, the process is known as “Municipal Plan Review” and “the province does not review or provide guidance on planning applications unless specifically requested to do so by the approval authority.”<sup>165</sup> This delegation is an ongoing process with counties and regions being the first to assume approval authority, followed by cities, towns, and municipalities.<sup>166</sup>

Critics of the devolution have challenged “the willingness and ability of these approval authorities to effectively address archaeological concerns.”<sup>167</sup> Very few, if any, of the approval authorities have archaeologists on staff. As a result, persons lacking specialized training are required to make the crucial determination of whether lands slotted for development possess high archaeological potential. Non-specialists are required to assess

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<sup>164</sup> *Supra*, note 151.

<sup>165</sup> Dennis H. Wood, *The Planning Act: A Sourcebook*, 4th ed. (Toronto: Carswell Thomson Professional Publishing, 1999) at p. 851.

<sup>166</sup> For extent of delegation to date, see Planning Act Approval Authority in Ontario, November 2006.

Online at:

[http://www.mah.gov.on.ca/userfiles/page\\_attachments/Library/1/2391159\\_Plng\\_Act\\_Approval\\_Authority\\_November\\_2006.pdf](http://www.mah.gov.on.ca/userfiles/page_attachments/Library/1/2391159_Plng_Act_Approval_Authority_November_2006.pdf).

<sup>167</sup> Neal Ferris, “‘I don’t think we’re in Kansas anymore...’: The Rise of the Archaeological Consulting Industry in Ontario,” in *Bringing Back the Past: Historical Perspectives on Canadian Archaeology*, edited by P. Smith and D. Mitchell, Mercury Series Paper 158 (Ottawa: Museum of Civilization, Archaeological Survey of Canada, 1998).

“Archaeological Potential” based on screening criteria developed by the Ministry of Culture.<sup>168</sup>

### **Determination of Archaeological Potential by Non-Specialists**

The Archaeological Potential Criteria identified by the Ministry of Culture include the following:

1. existence of a known archaeological site on or within 250 metres of the proposed development lands;
2. water source on or adjacent to the development property;
3. development property situated within an area of elevated topography;
4. development property on well-drained, sandy soil;
5. development property associated with distinctive or unusual land formations;
6. development property associated with a particular resource-specific feature that would have attracted past subsistence or extractive uses;
7. development in an area of initial, Non-Aboriginal settlement;
8. development property associated with an early historic transportation route, such as a trail, pass, road, portage route or canal;
9. development contains a property designated under the Ontario Heritage Act.
10. evidence from documentary sources, local knowledge or Aboriginal oral history, associating the property with historic events, activities or occupations, has been brought to the reviewer’s attention;
11. development property or study area has been subjected to extensive, intensive land disturbances.<sup>169</sup>

If the site satisfies any of criteria 1, 2, or 10, then its archaeological potential is confirmed. If it satisfies two or more of criteria 3–9, then archaeological potential is also confirmed. Only if criteria 1 to 10 are lacking and criteria 11 is satisfied can a determination of Low Archaeological Potential be confirmed.<sup>170</sup>

In assessing the first criteria, municipalities may access the Ministry of Culture’s database of registered archaeological sites in Ontario. Currently, there are about 16,000 sites registered.<sup>171</sup> However, the Ministry estimates that this represents only from 10 to 15 percent of all archaeological sites in the province.<sup>172</sup> In most cases, therefore, there will be sites not registered within the development property, and non-specialists will be required to assess the physiographic and historic cultural features in order to determine archaeological potential. The larger the development area, the more extensive the assessment required. If municipal planning staff do not physically inspect the development property, and rely instead on maps and surveys, features such as secondary

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<sup>168</sup> *Conserving a Future for our Past: Archaeology, Land Use Planning & Development in Ontario. An Educational Primer and Comprehensive Guide for Non-Specialists* (Ministry of Culture, 1998). Hereinafter *Guide for Non-Specialists*.

<sup>169</sup> *Ibid.*, pp. 12–15.

<sup>170</sup> *Ibid.*, p. 42, Checklist for determining Archaeological Potential.

<sup>171</sup> See <http://www.culture.gov.on.ca/english/culdiv/heritage/archsite.htm>.

<sup>172</sup> *Conserving a Future for our Past*, *supra*, note 110 at p. 1.

and ancient water sources, elevated topography, and unusual land formations may go undetected. This “desk-top” approach to the screening of archaeological potential increases the risk for a “false negative” potential determination.

The Ministry has been quite explicit about the risks associated with this devolution to non-specialists:

It is critical to note that when [the Ministry of Culture] makes a potential determination, it is made by staff archaeologists with the training and expertise necessary to critically evaluate applicable geographic and cultural-historic features. But when potential is to be determined by non-specialist staff, such as under the transferred plans review process conducted by municipal approval authorities, these criteria are strictly intended to identify those development applications which will need archaeological assessment. Thus, where lacking technical expertise or a developed archaeological master plan, *these criteria must be used without modification to be at all effective.*<sup>173</sup>

If the municipal review determines that the development property can be designated as having Low Archaeological Potential, then the Municipality may approve the development without requiring a field assessment by a licensed archaeologist. The Ministry of Culture has no opportunity to review the sufficiency of the negative determination of potential and has no way of tracking how many development applications proceed without field assessment.<sup>174</sup> In the absence of any centralized monitoring, how can the provincial interest in the conservation of archaeological resources be enforced?

Where a positive determination of archaeological potential is made, the approval authority attaches an Archaeological Condition to the application, which typically states:

The proponent shall carry out an archaeological assessment of the subject property and mitigate, through preservation or resource removal and documentation, adverse impacts to any significant archaeological resources found. No grading or other soil disturbances shall take place on the subject property prior to the approval authority and the Ministry of Culture confirming that all archaeological resource concerns have met licensing and resource conservation requirements.<sup>175</sup>

Formally, there is no direct liaison between the approval authority and the Ministry of Culture, either before or after a positive determination of archaeological potential. Rather, it is the responsibility of the licensed archaeologist retained by the developer to deal with

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<sup>173</sup> *Ibid.*, p. 11. Emphasis in original.

<sup>174</sup> Prior to 1996, Ministry staff reviewed all planning applications and kept records of the number of cases where studies were and were not required. See Ferris, *supra*, note 64. Figure 4 indicates that in 1995, roughly 275 applications required archaeological assessment, compared to 225 applications requiring no archaeological assessment. There is no way to know whether the proportion has increased or decreased since devolution to municipal authorities.

<sup>175</sup> As reproduced at: [www.archaeologicalservices.on.ca/prov\\_leg.htm](http://www.archaeologicalservices.on.ca/prov_leg.htm).

the Ministry of Culture. Before undertaking any fieldwork, the archaeologist must submit a Project Information Form (PIF) to the Ministry of Culture. A file is opened with a specific PIF number that serves a tracking function, allowing the Ministry to know that an archaeological assessment is being done on a site that will eventually be subject to Ministry review.<sup>176</sup>

### **Determining Significance of Archaeological Resources**

Recall that section 2.6.2 of the Provincial Policy Statement regarding Cultural Heritage and Archaeology provides:

*Development and site alteration shall only be permitted on lands containing archaeological resources or areas of archaeological potential if the significant archaeological resources have been conserved by removal and documentation, or by preservation on site. Where significant archaeological resources must be preserved on site, only development and site alteration which maintain the heritage integrity of the site may be permitted*

What this means, in effect, is that there is no obligation to conserve archaeological resources that do not meet the “significance” threshold. In order to be characterized as “significant” under the PPS, archaeological resources must be “valued for the important contribution they make to our understanding of the history of a place, an event, or a people.”

Since most archaeological sites in Ontario will be of Aboriginal origin, one might expect that determinations of significance would require Aboriginal participation. Regrettably, there is currently no statutory requirement under the *Ontario Heritage Act* or the *Planning Act* requiring consultation with First Nations in this regard. In fact, it appears that decisions are made by the consulting archaeologist and the developer, with a very limited review function being exercised by the Ministry of Culture.

In its development of Standards and Guidelines for Consultant Archaeologists, however, the Ministry of Culture has identified several categories of sites deemed to be of high heritage value. These include:

1. Paleo-Indian archaeological sites (shows the earliest human occupation of the province), regardless of size or artifact yield
2. large, dense lithic scatters
3. Woodland period archaeological sites
4. Post-contact archaeological sites pre-dating 1830

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<sup>176</sup> For a summary of PIFs submitted in 2005, see Appendix A, provided by the Ministry of Culture. The total number of PIFs submitted in 2005 was 1,499, compared to 1,422 in 2004. Although this represents a 5 percent increase over 2004, some regions experienced decreases. Overall, it appears that some counties are more attentive to archaeological concerns than others.

5. sacred and burial archaeological sites. For burial sites, the preferred recommendation is avoidance and protection. Recommendations for excavation must be in compliance with the Cemeteries Act
6. twentieth century archaeological site where background documentation (either from Pre-assessment Reconnaissance Study or Stage 1—Background Study) or archaeological features indicate heritage value.<sup>177</sup>

It is encouraging that the Ministry of Culture has classified sacred sites as having high heritage value. However, the guidelines suggest that excavation is a mitigation option for sacred sites without mandating consultation with the First Nations for whom the site is sacred.

### **Conservation: Excavation or Avoidance?**

If an archaeological assessment identifies significant archaeological resources on a development property, then the Provincial Policy Statement requires that such resources be conserved. It is important to realize that conservation does not necessarily mean non-disturbance of an archaeological site. It is still possible to develop lands that contain significant archaeological resources provided the site is documented and the artifacts are salvaged by excavation. It is more accurate to speak of such measures as mitigation (of the damage done by development) rather than the conservation of heritage resources.

Stage 4 excavation is also known as Site Removal. According to the Ministry of Culture, “this work is done when a site of heritage value has been found and cannot be protected from development impacts.”<sup>178</sup> There is no indication of how it is determined that a site cannot be protected or who makes this determination. In fact, the developer and the consulting archaeologist can undertake site removal without any authorization from the Ministry of Culture or the local planning authority, let alone any input from the First Nations whose heritage is at stake.

Stage 4 excavation is really the terminal stage for the existence of the site in context. In cases where the decision has been made not to protect the site’s integrity, “the consultant will remove the site through the controlled excavation and recovery of artifacts through hand excavations, occasionally aided through the use of heavy machinery.” What this really means is that heritage resources at or near the surface will be salvaged but deeply buried material will be destroyed by bulldozers. By equating the site with its component artifacts, the Ministry presents site removal as being non-destructive of the resource: “Once this work is completed, the site, in effect, has been removed and converted into collections, maps and a report, and the locale can then be developed without fear of destroying an important heritage resource.”

From an Aboriginal perspective, the ancestral relationship with the locale is lost when our material culture is separated from the earth in which it has been embedded for centuries.

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<sup>177</sup> Draft Standards and Guidelines, Archaeological Fieldwork, July 2004, p. 38.

<sup>178</sup> Ministry of Culture, Archaeological Licencing Office, 2002.

Since it is not possible to excavate the spiritual essence of a sacred site, archaeological techniques are not capable of protecting it from “development impacts.” Not everything that humans value is capable of conversion into “collections, maps and a report.” There is little consolation in the preservation of artifacts, especially when the vast majority of them will remain in the custody of the consulting archaeologist.

The alternative to excavation is preservation on site. This measure is also referred to as avoidance. Developers often choose avoidance as it is cheaper than excavation. However, the avoidance measures taken by the developer may not provide for long-term protection of the heritage resources. At its most basic level, avoidance simply means that the site will not be excavated in the course of the development. This may not prevent the site from being covered by fill, or roadways, or ending up in somebody’s back yard. Unless the developer and municipality take steps to protect the site by special zoning or documentation on title, sacred sites could be destroyed by subsequent alterations to the landscape.<sup>179</sup> Absent such protection, the non-excavation actually allows the developer to avoid the costs and the responsibility of heritage protection who may pass the burden onto the individual purchasers without their knowledge. It is for this reason that heritage protection advocates have recommended that the province impose a development tax for protection of archaeological resources.<sup>180</sup>

Appendix C contains a chart provided by the Ministry of Culture that graphically represents the annual increases in the number of excavations conducted since 1996. Again, there has been a phenomenal growth rate, approaching a 500 percent increase. In 2005, approximately 900 field surveys resulted in more than 300 excavations. However, without knowing the number of surveyed sites determined to be significant, it is not possible to know the relative excavation–avoidance proportion. Even if this proportion were known, it would not necessarily translate into a straightforward assessment of conservation outcomes. After all, where excavation has taken place, the site itself will have been destroyed by development. Avoidance, although providing short-term protection, does not guarantee that the site will be conserved into the future.

### **Review versus Approval**

Since devolution, there has been a virtual explosion in the archaeological consulting industry. The number of PIFs filed annually has increased by more than 300 percent.<sup>181</sup> During this period of exponential growth, the Ministry of Culture has interpreted its mandate in an increasingly narrow fashion. At the outset of devolution to local planning authorities, the Ministry of Culture acknowledged its continuing responsibility for review of archaeological investigations in the context of private development: “This ministry also administers all matters related to the management of resources documented,

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<sup>179</sup> Part V of the *Planning Act* provides municipalities with mechanisms for land use control, including zoning bylaws. Pursuant to s.34.(3.3), zoning bylaws can be passed “for prohibiting any use of land and the erecting, locating or using any class or classes of buildings or structures on land that is the site of a significant archaeological resource.”

<sup>180</sup> December 8, 2005, workshop sponsored by the Ipperwash Inquiry, presentation by David Donnelly.

<sup>181</sup> See Appendix B, provided by the Ministry of Culture, for Annual PIFs submitted 1996–2005. The figure for 1996 was 364, compared to 1,499 in 2005.

mitigation strategies proposed, and any disputes arising from the conservation of archaeological resources under the land use planning process.”<sup>182</sup>

The flow chart published in the Ministry’s Guide for Non-Specialists in 1998 indicates that the Approval Authority cannot clear the archaeological condition on a development application until after the Ministry of Culture “advises the Approval Authority that Ontario Heritage Act-based archaeological conservation and licensing requirements have been met.”<sup>183</sup> This approval rendered by a letter from the Ministry to the Approval Authority is typically referred to as a “clearance” letter. The clearance letter ties the Ministry’s review function directly into the chain of authority.

The Ministry of Culture has attempted in its 2006 Draft Policy on Report Review Process “to clarify the relationship between the ministry, licence-holder and other stakeholders.” Apparently, this operational goal is to be accomplished by Ministry staff “communicating with the licence-holder, not the proponent or approval authority.”<sup>184</sup> This distancing of the Ministry of Culture from the local approval authority obscures the provincial responsibility for conserving heritage resources. In a related document, “Standards and Guidelines for Consultant Archaeologists,” the role of the Ministry of Culture’s review function is described in the following terms:

Ministry reviewers use the standards and guidelines to ensure that licensees have met the terms and conditions for holding an archaeological licence. The development of approval authority often takes the ministry’s review of the fieldwork report as an indication that the provincial interest has been addressed, as required under their particular land use planning and development process.<sup>185</sup>

These policy documents suggest that the provincial responsibility for the protection of heritage resources will be further obfuscated in this new era of the Archaeological Customer Service Project. The customers, presumably, are developers and their archaeological consultants. According to a recently published information sheet on the Provincial Policy Statement, “the licensed professional archaeologist can advise a development proponent or approval authority on the appropriate measures needed to conserve an archaeological resource.”<sup>186</sup> The role of the Ministry of Culture is presented as being limited to the development of technical guides and manuals.<sup>187</sup>

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<sup>182</sup> *Supra*, note 20 at p. 5.

<sup>183</sup> *Ibid.*, p. 10.

<sup>184</sup> Draft Standards and Guidelines for Consultant Archaeologists: Standards and Guidelines for Artifact Documentation and Analysis, Standards and Guidelines for Reporting Archaeological Fieldwork, Ministry of Culture Review Process, August 2006. Posted on the Environmental Registry, EBR Number P105E2005.

<sup>185</sup> Archaeology in Ontario: Draft Standards for Consultant Archaeologists: Archaeological Fieldwork, August 2006. See [http://www.culture.gov.on.ca/english/culdiv/heritage/discussion\\_draft\\_fieldwork-e.pdf](http://www.culture.gov.on.ca/english/culdiv/heritage/discussion_draft_fieldwork-e.pdf). The flow chart, reproduced below at Appendix D, suggests that the approval authority clears the archaeological condition following Stage 4 mitigation measures without any input from the Ministry of Culture.

<sup>186</sup> Heritage Resources in the Land Use Planning Process: Cultural Heritage and Archaeology Policies of the Ontario Provincial Policy Statement, 2005. Published by the Ministry of Culture (Toronto: Queen’s Printer for Ontario, 2006), InfoSheet #3, p. 3.

<sup>187</sup> *Ibid.*, p. 4.

The Ministry's efforts to downplay its review and de facto approval functions have important implications for the notice and consultation responsibilities that may be imposed under the *Environmental Bill of Rights*. Moreover, by denying responsibility for decisions that can result in the destruction of Aboriginal heritage resources, the Ministry may also be avoiding its constitutional responsibility for consultation with First Nations.

This trend toward diminishing oversight and protection is at odds with the increasing protection being afforded to heritage resources on Crown lands. In the public domain, much progress has been made as a result of the requirements of the *Environmental Assessment Act*. Although the assessment procedures provided in the EAA do not generally apply to developments on private lands, the overall purpose and objectives should be brought to bear equally on private and public lands.<sup>188</sup>

### **Heritage as Environment**

The purpose of the EAA, once again, is “the betterment of the people of the whole or any part of the Ontario by providing for the protection, conservation and wise management in Ontario of the environment.” The EAA has been instrumental in fostering a holistic conception of “environment,” which includes the “cultural conditions that influence the life of humans or a community” and “any thing made by humans.” This understanding, that as human beings we do not exist in isolation from our environments, is integral to the Aboriginal worldview. By enfolding heritage conservation within an expanded vision of environment protection, Ontario has created the potential for reconciliation with the Aboriginal perspective.

The ability of the public to participate in environmental protection was dramatically augmented in 1993 by the enactment of the *Environmental Bill of Rights*.<sup>189</sup>

The Preamble of the EBR articulates its founding principles:

The people of Ontario recognize the inherent value of the natural environment.

The people of Ontario have a right to a healthful environment.

The people of Ontario have as a common goal, the protection, conservation and restoration of the natural environment for the benefit of the present and future generations.

While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

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<sup>188</sup> Only “major commercial or business” enterprises or activities are characterized as “undertakings” under the EAA.

<sup>189</sup> S.O. 1993, Chapter 28, proclaimed in February 1994.

The stated purpose of the EBR is “to protect, conserve and, where reasonable, restore the integrity of the environment.”<sup>190</sup> It is designed to provide “means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario,”<sup>191</sup> as well as to provide “increased accountability of the Government of Ontario for its environmental decision-making.”<sup>192</sup> Part II of the EBR sets out “minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.”<sup>193</sup>

## The Environmental Registry

Under the EBR, the key to “increased accountability of the Government of Ontario for its environmental decision-making” is the operation of the Environmental Registry. Designated Ministries are required for purposes of notice, comment, and appeal to submit electronic postings of specified policies, regulations, and instruments. Some Ministries are subject to greater scrutiny than others. Fourteen Ministries, including the Ministry of Culture, are required to comply with section 15 of the EBR and give at least 30 days public notice of proposals for policies and acts that could “have a significant impact on the environment.”<sup>194</sup>

The Ministry of Culture is not among the five Ministries subject to the more detailed public notice regime under sections 19 to 26 of the EBR in relation to “instruments.”<sup>195</sup> The Act defines instruments as “any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act.”<sup>196</sup> Currently, the role played by the Ministry of Culture in protecting heritage resources does not generate any “instruments” under the *Planning Act* or the *Ontario Heritage Act*. It should be statutorily acknowledged that the clearance letters issued by the Ministry of Culture do have legal effect. The clearance letters allow archaeological conditions imposed by the local planning authority to be removed and permit the development to proceed. In effect, clearance letters authorize or approve development on sites with identified archaeological potential. Yet, they do not trigger public notice requirements.

This gap in the coverage of the EBR arises primarily because the crucial role played by Heritage Planners at the Ministry of Culture is governed by policy not legislation. There is no statutory regime for the issuance of the clearance letters, or any documents that

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<sup>190</sup> *Ibid.*, section 2(1)(a).

<sup>191</sup> *Ibid.*, section 2(3)(a).

<sup>192</sup> *Ibid.*, section 2(3)(b).

<sup>193</sup> *Ibid.*, section 3(1).

<sup>194</sup> Ontario Regulation 73/94.

<sup>195</sup> Designated Ministries are Environment, Natural Resources, Northern Development & Mining, Municipal Affairs & Housing, and Consumer & Business Services. See O.Reg. 73/94

<sup>196</sup> EBR, section 1(1). Regulations are not included in the definition of instrument. Section 16 deals with regulations. The notice requirements for proposed regulations are designated on the basis of the statutes involved, not by Ministry. Presently, proposed regulations under the *Ontario Heritage Act* are not subject to public notice, although regulations under the *Planning Act* are required to be posted. See O. Reg. 73/94, section 3(1).

could be classified as instruments. Since 1994, the Ministry of Culture has posted only six notices of policy and statutory proposals on the Environmental Registry.<sup>197</sup> Four of these postings occurred in 2005.

By contrast, the Ministry of the Environment has an operational structure that generates instruments subject to the Environmental Registry. Since 1994, the Ministry of the Environment has been responsible for posting nearly 17,000 instruments on the Environment Registry.<sup>198</sup> Many pertain to small-scale private enterprises, such as authorizing the operation of automotive spray paint booths for local car dealerships.<sup>199</sup> If the destruction of significant archaeological sites required the issuance of certificates of approval by the Ministry of Culture, then there would be a basis upon which to trigger an instrument posting on the Environmental Registry.

When the EBR was first enacted in 1993, fewer than 50 archaeological excavations were conducted in Ontario. In 2005, more than 300 excavations were undertaken to facilitate development. This ever-increasing development pressure on heritage resources should be subject to the instrument review function of the Environmental Registry. In cases where the archaeological assessment has identified significant archaeological resources, the decision to excavate or avoid must, by definition, have a significant impact on the environment. For this reason, the *Ontario Heritage Act* should be amended so that the Ministry of Culture is explicitly required to issue permits or approvals for excavation and avoidance measures undertaken in relation to significant archaeological resources.

### **From Values to Outcomes**

All Ministries designated under the EBR are required to prepare a draft Statement of Environmental Values (SEV) that “explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the ministry.”<sup>200</sup> The first SEV drafted by the Ministry of Culture in 1994 did not adequately acknowledge Ministry responsibility for the protection of heritage resources. The Ministry’s role in the land use planning process was described simply as “providing information to proponents and approval authorities on cultural heritage resources.”<sup>201</sup>

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<sup>197</sup> EBR Number P105E0505, dated 5/27/1998 re Proposed amendments to policies and procedures regarding licensing and reporting under the Archaeology Customer Service Project; EBR Number P105E00010, dated 10/23/1998 re Proposed amendments to the Ontario Heritage Act: Bill 60; EBR Number P105E00010, date 4/6/2005 re Proposed Amendments to the Ontario Heritage Act: Bill 60; EBR Number P105E0505, dated 8/16/2005 re Proposed amendments to policies and procedures regarding archaeological licensing and reporting under Archaeology Customer Service Project; EBR Number P105E2005, dated 8/30/2005 re Draft Standards and Guidelines for Consultant Archaeologists: Standards and Guidelines for Artifact Documentation and Analysis, Standards and Guidelines for Reporting Archaeological Fieldwork, Ministry of Culture Review Process; EBR Number P105E0504, dated 11/1/2005 re Three proposed regulations under the Ontario Heritage Act.

<sup>198</sup> Search conducted 2/3/2006.

<sup>199</sup> See EBR Number IA06E1224, dated 02/10/2006.

<sup>200</sup> EBR, section 7(a).

<sup>201</sup> Accessed at: [http://www.ene.gov.on.ca/envision/env\\_reg/ebr/english/SEVs/mcocr.htm](http://www.ene.gov.on.ca/envision/env_reg/ebr/english/SEVs/mcocr.htm).

This passive description continues to form part of the Ministry's Statement of Environmental Values.<sup>202</sup>

The Ministry of Culture is currently in the process of revising its Statement of Environmental Values. The 2005 draft SEV marks a considerable improvement over its predecessor. It begins by recognizing that "cultural heritage resources are part of the environment," that they are "non-renewable and irreplaceable," and that "government has a role to play as trustee in their protection and preservation."<sup>203</sup> Section 6 contains a commitment to consultation:

The Ministry of Culture believes in being accountable for its environmental decision-making. The Ministry of Culture believes that open consultation is vital to sound environmental decision-making. The Ministry will provide opportunities for the people of Ontario to participate in the making of environmentally significant decisions by the Ministry.

Section 7 is entitled "Consideration of First Nations":

The Ministry of Culture recognizes the value that Aboriginal people place on the environment. When making decisions that might significantly affect the environment, the ministry will provide opportunities for involvement of Aboriginal people whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered.

Among the most environmentally significant decisions that the Ministry of Culture makes are those in relation to excavation and avoidance of archaeological resources in a development context. If the Ministry of Culture is truly committed to accountability, then its decision to "sign off" on the adequacy of excavation or avoidance measures of a development should be preceded by an opportunity for public notice and comment. Where the resources in question pertain to Aboriginal heritage, there should be targeted consultation consistent with the government's constitutional obligations. This result can only be achieved if the review mandate of the Ministry of Culture is accurately characterized as decision making and generates instruments that must be posted on the Environmental Registry.

### **III. PROTECTING ABORIGINAL CEMETERIES IN ONTARIO**

#### **HISTORICAL INTRODUCTION**

Prior to the arrival of Europeans in Canada, Aboriginal cemeteries were protected by widely shared norms of respect and non-disturbance. The French colonial enterprise, commencing in the early seventeenth century, was officially premised on the goal of missionization:

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<sup>202</sup> Revised Statement of Environmental Values posted on EBR Registry Number PI8E0001.

<sup>203</sup> 2005 Draft SEV.

The king, being desirous now, as the late king Henry the Great, his father, heretofore was, of causing to be sought out and discovered in the lands, regions and countries of New France, called Canada, some fit and proper place for the establishment of a colony, for the purpose, with divine assistance, of introduction to the people who inhabit the same, the knowledge of the Only God, cause them to be civilized and instructed in the Catholic, Apostolic and Roman Religion and Faith...

Conversion practices soon brought Catholic and Aboriginal burial customs into conflict. Under Canon law, lands had to be consecrated prior to their use as burying grounds. Once consecrated, only Catholics could be buried within the limits of the cemetery. The French insistence that all baptized persons be buried in Catholic cemeteries meant that Aboriginal converts could not be buried with their ancestors. Moreover, since Catholic tradition prohibited the burial of non-baptized persons in consecrated ground, families and friends were often separated in death. On one occasion, missionaries actually disinterred a common burial to separate a child convert from his best friend.<sup>204</sup> Because French colonial settlement was limited mainly to the St. Lawrence River valley, Aboriginal cemeteries in the Great Lakes region were not directly threatened until the American Revolution caused the Loyalist migration northward.

By virtue of the *Constitution Act, 1791*, the Church of England became the established religion of the colony. As such, it was guaranteed a fixed portion (one-seventh) of Crown lands, known as the Clergy Reserves, for church purposes, which included burying grounds.<sup>205</sup> Adherents to other Protestant denominations had to rely upon private donors to set aside lands for burial purposes. Regardless of the status of the lands, however, all Protestant cemeteries were considered sacred by their congregations and burials therein were restricted to members of those congregations.

Sadly, it appears that Aboriginal cemeteries within the limits of the colony of Upper Canada were not accorded the same respect. In 1797, the colonial government was required to issue a Proclamation in response to “many heavy and grievous complaints ... made by the Mississauga Indians, of depredations committed by some of His Majesty’s subjects and others upon their ... burial places ... in violation of decency and good order.”<sup>206</sup> Pursuant to the Proclamation, those who interfered with the burying grounds of the Mississaugas were to be “proceeded against with the utmost severity.”<sup>207</sup> It is not known, however, whether any prosecutions were initiated under this Proclamation.

## **THE SECULARIZATION OF CEMETERIES**

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<sup>204</sup> *Jesuit Relations*, Volume 8, p. 255.

<sup>205</sup> *Constitution Act, 1791*. 31 Geo. III, c.31 (U.K.).

<sup>206</sup> E.A. Cruikshank, ed. *The Correspondence of the Honourable Peter Russell*, Volume 2 (Toronto: Historical Society, 1935) at p.41.

<sup>207</sup> *Ibid.*

The exclusionary rules that governed Protestant and Catholic cemeteries created problems for the burial of persons not affiliated with particular Christian denominations. These difficulties were exacerbated by the increasing immigration into the colony, particularly in cities such as York (now Toronto). As a result, it became necessary to create public, non-sectarian cemeteries. This was a cumbersome process that required a special act of the Legislative Council to establish public or general burying grounds.<sup>208</sup>

The first *Municipal Act*, passed in 1849, provided more generally for the creation and regulation of public cemeteries.<sup>209</sup> Municipalities (including cities, towns, townships, and villages) were given authority “for laying out, improving and regulating any Public Cemetery for the burial of the dead ... and for making such other regulations for the improvement, ornament and protection of such Cemetery as they may think necessary and proper.”<sup>210</sup> The legislature contemplated that such cemeteries would be of a permanent nature. Once land had been appropriated for cemetery purposes, it was beyond the power of the municipality “to make or suffer to be made any other use of the property so obtained or accepted than for the purpose of such Cemetery.”<sup>211</sup>

At the same time, it was becoming popular to establish public cemeteries just beyond town and city limits and thus outside their jurisdiction. The formation of private companies for public, non-municipal cemeteries also required a special Act of the Legislature and was expensive and time-consuming. In 1850, in response to the demand for such cemeteries, a statute was passed entitled “An Act to authorize the formation of Companies for the establishment and management of Cemeteries in Upper Canada.”<sup>212</sup> Although a corporate format including the raising of stocks and election of directors was used, the enterprise was not a commercial one. The companies were not permitted to make profit. As such, all proceeds from the sale of burial plots were applied to the purchase cost and maintenance expenses for the cemeteries. Lands appropriated by cemetery companies had to be used exclusively for cemetery purposes. To ensure their permanence, cemetery lands were not liable to seizure and sale.<sup>213</sup> In return for tax-exempt status of cemetery lands, the companies were required to furnish graves “for strangers and the poor of all denominations free of charge.”<sup>214</sup> The legislation required that cemeteries be enclosed by walls or fences and specified minimum distances between burials and walls and buildings. In addition, the companies were required to make

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<sup>208</sup> See, for example, *An act to authorize certain persons therein named, and their successors, to hold certain lands for the purpose therein mentioned*. VII Geo. IV, c.21 (1826). This statute was passed in response to a petition by inhabitants of the town of York for lands for “a general burying ground, as well as for strangers as for the inhabitants of the town, of whatever sect or denomination they may be.”

<sup>209</sup> *An Act to provide, by one general law, for the erection of Municipal Corporations ... in Upper Canada*. 12 Vic., c.81. (1849).

<sup>210</sup> *Ibid.*, section 50(16).

<sup>211</sup> *Ibid.*, section 141.

<sup>212</sup> 13 & 14 Vic. c.76 (1850). In townships where the inhabitants desired non-denominational cemeteries but were not interested in forming joint stock companies, a companion statute permitted the conveyance of land in trust for burial purposes. See 13 & 14 Vic. c.77 (1850) *An Act to permit lands in Upper Canada to be conveyed to Trustees For Burial Places*. Lands conveyed for cemeteries under this statute could not exceed 10 acres in any one township.

<sup>213</sup> *Ibid.*, sections 6 and 8.

<sup>214</sup> *Ibid.*, section 7.

regulations “for ensuring that all burials within its Cemetery are conducted in a decent and solemn manner.”

## STATUTORY PROTECTION OF CEMETERIES

The 1850 legislation provided the first statutory protection for burials, making it an offence to “willfully destroy, mutilate, deface, injure or remove any tomb, monument, grave-stone or other structure placed in any Cemetery ... or to cut, break or injure any tree, shrub or plant, within the limits of any Cemetery.”<sup>215</sup> It was also an offence to “play at any game or sport, or discharge fire arms (save at a military funeral)” or “to willfully disturb” burial services or to commit “any nuisance in any such Cemetery.” Further, cemetery companies were empowered to bring actions in trespass, with damages payable to the directors for “reparation and reconstruction of the property destroyed.” In providing for the establishment, management, care, and protection of public cemeteries, this legislation is the precursor of the current statutory regime.

By Confederation, there were several classes of cemeteries coexisting in what would become Ontario:

1. Aboriginal cemeteries, governed by customary law;
2. denominational cemeteries, governed by church law;
3. municipal cemeteries, governed by the *Municipal Act* and bylaws;
4. and public cemeteries, governed by cemeteries legislation.

As noted earlier in this paper, the thoroughgoing nature of the surrender process in Ontario meant that many Aboriginal cemeteries came to be located on Crown lands and under the jurisdiction of the provincial government.<sup>216</sup> A narrow reading of the nineteenth-century cemeteries legislation would limit its application to those cemeteries established and maintained by municipalities, trustees, and cemetery companies. Published accounts of the excavation of Aboriginal cemeteries suggest a widespread practice of grave disturbances.<sup>217</sup> There is no corresponding record of prosecutions suggesting that the protective potential of the cemeteries legislation was not exercised in relation to Aboriginal cemeteries.

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<sup>215</sup> *Ibid.*, section 9. Punishment consisted of a fine of not less than £1 and not more than £10, according to the nature of the offence.

<sup>216</sup> See *infra*, note 75 and accompanying text.

<sup>217</sup> See, for example, A.F. Hunter, *Notes of Sites of Huron Villages in the Township of Tiny (Simcoe County)* at p.8 where he notes “twenty-four bonepits [ossuaries, communal graves] have all been dug out, often by farmers or young people in the neighborhood.” The first attempted prosecution dates from 1976: “The Union of Ontario Indians performed a citizen’s arrest of archeologist Walter Kenyon, who was excavating a Neutral Indian grave. They charged him with failing to comply with the provisions of the Cemeteries Act, and committing an indignity to human remains. Eventually it was agreed that the human remains would be reburied and the materials removed from the graves were divided between the Royal Ontario Museum and the Woodland Indian Museum, a Native-run cultural center.” See “Reflections of A Native Repatriator” by Richard Hill Sr. in *Mending the Circle: A Native American Repatriation Guide* (New York: American Indian Ritual Object Repatriation Foundation, 1996).

A purposive reading of the statute would have included Aboriginal burial grounds within its scope, if only such burials had been recognized by provincial officials as cemeteries and not treated as curiosities or archaeological sites.<sup>218</sup> In ensuring the permanence and sanctity of cemeteries, the nineteenth-century legislation was, at least, consistent with Aboriginal norms of respect and non-disturbance. This complementarity, however, was lost early in the twentieth century.

## STATUTORY POWER TO CLOSE AND REMOVE CEMETERIES

In the modern cemeteries context, closure can have two meanings. In one sense, it simply means that a cemetery is closed to further burials, but it still retains its protected status as a cemetery. However, cemetery “closings” can involve the disinterment of remains, for reburial in other cemeteries. When this happens, the original cemetery is not only closed, but it ceases to exist. The practice of removing remains from what was supposed to be their final resting place is a serious violation of the Aboriginal norms of respect and non-disturbance.

In the past century, it has become easier and more common to remove cemeteries in Ontario. Prior to 1913, if a congregation or a municipality wanted to relocate a cemetery, a private act of the Legislature was required.<sup>219</sup> In 1913, however, this authority was delegated to the Lieutenant-Governor in Council.<sup>220</sup> A closing could be justified either on the basis of public health concerns or as a matter of pure expediency.<sup>221</sup> The removal of all remains from a cemetery had to be certified by a County or District Judge. This certificate was then registered against the title to the subject land. The Act provided that “such land shall not be deemed a cemetery within the meaning of this Act but may be sold, leased, or otherwise disposed of and dealt with by the owner as if it had not been a cemetery.”<sup>222</sup>

In 1989, with the passage of the *Cemeteries Act (Revised)*, the closing power was delegated from the Lieutenant-Governor in Council to the Registrar of Cemeteries.<sup>223</sup> The power of the Registrar, however, is constrained by the requirement that “the closing is in

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<sup>218</sup> Still not seen as cemeteries; burial sites until declared cemeteries by Registrar.

<sup>219</sup> See Appendix E for chart showing private acts concerning cemeteries in Ontario. Source: [http://www.e-laws.gov.on.ca/dblaws/Tables/Private%20Statutes/Table\\_Private\\_Statutes.htm](http://www.e-laws.gov.on.ca/dblaws/Tables/Private%20Statutes/Table_Private_Statutes.htm).

<sup>220</sup> *An Act respecting Cemeteries and the Interment of the Dead*, (1913) 3-4 Geo. Chapter 56. Assented to May 6, 1913.

<sup>221</sup> *Ibid.*, section 32 provided as follows: “Where the Provincial Board (of Health) reports in writing that a cemetery is so situated that owing to the want of proper facilities for drainage or from any other cause that the same has become or is likely to become dangerous to the health of the inhabitants of the locality, the Lieutenant-Governor in Council may by proclamation declare the cemetery shall be closed and that no further interments shall take place therein.” However, even without a closing order for health reasons, section 3(1) provided that “wherever the owner of a cemetery establishes to the satisfaction of the Lieutenant-Governor in Council that it is expedient that the bodies therein should be removed therefrom the Lieutenant-Governor in Council may direct such removal in the manner and according to the procedure provided by this section.”

<sup>222</sup> *Ibid.*, section 33(8).

<sup>223</sup> *An Act to Revise the Cemeteries Act*, S.O. 1989, Chapter 50. Proclaimed in force on April 1, 1992. Now R.S.O. 1990, Chapter C.4.

the public interest.”<sup>224</sup> Closing orders can be appealed by interested parties to the Licence Appeal Tribunal.<sup>225</sup> The public interest standard has been applied quite rigourously by the Tribunal.

In the case of *Re Ontario Historical Society*,<sup>226</sup> a 1995 order by the Registrar closing the Clendennen Cemetery in Markham was challenged by the Ontario Historical Society and the Ontario Genealogical Society under section 10 of the *Cemeteries Act*. The Tribunal agreed that the closing of the Clendennen Cemetery was not in the public interest. In so doing, it provided the following interpretation of “public interest”:

In determining what is in the public interest with respect to closing a cemetery, therefore, one element of the public interest is compliance with the Act, particularly, respecting disinterment and reinterments. In addition, the Act identifies a number of values which are elements of the public interest. These values may be generally categorized under three general headings: maintenance of a cemetery, including its markers and features; safety of the public; and preservation of the dignity, quiet and good order of a cemetery.<sup>227</sup>

One aspect of the public interest considered by the Tribunal was the requirement to show respect for the original choice that had been made by the Clendennen family in choosing the site of cemetery.<sup>228</sup> In 2003, the Tribunal set aside the Registrar’s partial closing order for St. Alban’s Cemetery in Palgrave, also on the grounds that the closing was not in the public interest.<sup>229</sup>

The concepts at work in the “public interest standard,” especially preservation of dignity and respect for the interment choices of the deceased, are highly compatible with Aboriginal burial norms regarding non-disturbance. Unfortunately, when the *Cemeteries Act* was revised in 1989 to provide explicit protection for Aboriginal burial grounds, a separate regime for removals was created.

## **WHEN A CEMETERY ISN’T A CEMETERY**

Under the *Revised Cemeteries Act*, Aboriginal burial grounds are not automatically treated as cemeteries. They are initially categorized as “burial sites.” This designation protects them from unauthorized disturbance.<sup>230</sup> It does not, however, protect Aboriginal burials from being disinterred to accommodate the interest of private landowners.

Persons who discover or have knowledge of an unmarked burial site are required to immediately notify the police or coroner.<sup>231</sup> If the burial is of no forensic interest, then the site is reported to the Registrar of Cemeteries, who orders an archaeological

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<sup>224</sup> *Ibid.*, s.8(2).

<sup>225</sup> *Ibid.*, s.10. Formerly known as the Ontario Commercial Registration Appeal Tribunal.

<sup>226</sup> [1999] O.C.R.A.T.D. No.38.

<sup>227</sup> *Ibid.*, para. 466.

<sup>228</sup> *Ibid.*, para. 490.

<sup>229</sup> Decision dated March 5, 2003. See <http://www.lat.gov.on.ca/english/decisions/2002/LAT2002.pdf>.

<sup>230</sup> *Supra*, note 20, section 68.

<sup>231</sup> *Ibid.*, s.69.

investigation to determine the origin of the site.<sup>232</sup> Under the *Burial Sites* regulation, the owner of the land on which a burial site is discovered is required to “take whatever steps are necessary to preserve the site, the human remains and any artifacts *until a final disposition is made in accordance with the Act and regulations.*”<sup>233</sup>

If the burial site is determined to be of Aboriginal origin, the Registrar may categorize it either as “an unapproved aboriginal peoples cemetery” or as “an irregular burial site.”<sup>234</sup> Under the Act, an irregular burial site is “a burial site that was not set aside with the apparent intention of interring therein human remains.”<sup>235</sup> In plain language, this category contemplates situations in which human remains were not intentionally interred but, over the course of time and by natural processes, came to be buried. In contrast, an unapproved Aboriginal peoples cemetery is defined as “land set aside with the apparent intention of interring therein, in accordance with cultural affinities, human remains and containing human remains identified as those of persons who were one of the aboriginal peoples of Canada.”<sup>236</sup> This distinction has crucial implications for the manner in which removal decisions can be made.

If the burial site is declared to be “irregular,” then the removal decision is completely at the discretion of the landowner on whose property the burial is situated.<sup>237</sup> The landowner can leave the burial in its original location, remove it to another part of their property, or remove it to a municipal cemetery. There is no obligation upon either the Registrar or the landowner to provide any public notice of the declaration or the removal decision. As a result, “irregular burials” are not accorded the same protection as cemeteries under the Act. There is no requirement that the removal be in the public interest and there is no avenue for appeal.

If the burial site is declared to be “an unapproved aboriginal peoples cemetery,” then the Registrar is required to provide notice to “the nearest First Nations Government or other community of aboriginal people which is willing to act as a representative and whose members have a close cultural affinity to the interred person.”<sup>238</sup> Once a burial site acquires the status of an unapproved cemetery, the remains cannot be removed or subject to scientific testing without the consent of the representative First Nation.<sup>239</sup> On its face, this consent requirement would appear to provide greater protection against removals than the public interest standard under section 8(2) of the Act.

There are, however, non-consensual aspects in the statutory regime. Pursuant to section 72(2) of the Act, the representative First Nation is required to enter into negotiations with the landowner “with a view to entering into a site disposition agreement.” As part of the site disposition agreement, the parties must agree either that “the remains will be left

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<sup>232</sup> *Ibid.*, s.70.

<sup>233</sup> Ontario Regulation 133/92, *Burial Sites*, s.3. Emphasis added.

<sup>234</sup> *Ibid.*, s.71(1)(a) and (c).

<sup>235</sup> *Ibid.*, s.71(2).

<sup>236</sup> *Ibid.*, s.71(4).

<sup>237</sup> *Ibid.*, s.74. See also Ontario Regulation 133/92, *Burial Sites*, s.4.

<sup>238</sup> *Ibid.*, s.1.

<sup>239</sup> *Ibid.*, s.8.

where they are interred”<sup>240</sup> or that they will be “disinterred and reinterred.”<sup>241</sup> If the First Nation and the landowner cannot agree, then the Registrar is obliged under the Act to refer the matter to binding arbitration.<sup>242</sup>

To date, there have been only two arbitration orders made under the *Cemeteries Act*. In 1999, in the first arbitration, the Poplar Point Ojibway Nation and the Ministry of Natural Resources had been able to agree that the unapproved Aboriginal peoples cemetery would not be removed, but they disagreed on the boundaries of the cemetery.<sup>243</sup> A recent arbitration, however, has ordered the removal of burials without the consent of the representative First Nation.

The arbitration award is entitled “In the matter of an arbitration under the Cemeteries act (revised) with respect to the disposition of Aboriginal Burials found in the Dorchester Iroquoian Village Site.”<sup>244</sup> The reference to “disposition” obscures the fact that the dispute involves the appropriateness of the removal of certain unapproved Aboriginal peoples cemeteries. If this dispute had arisen in the context of an “approved” cemetery, a closing order would be required and reviewable according to the public interest standard.<sup>245</sup>

Although section 8 of the *Burial Sites* regulation states that removals cannot occur without the consent of the representative First Nation, the Dorchester arbitration resulted in the disinterment of 13 out of 25 burials situated on the development site. During the arbitration hearing the Oneida Nation Council of Chiefs maintained that “ancient burials should not be disturbed unless absolutely necessary.”<sup>246</sup> By their standards, there was no justification for removal of the cemeteries:

In this situation, the village sites were well known, the likelihood of graves being present was also known to the developer, the plan of subdivision has not been approved, no compelling public interest exists for the removal of the cemeteries, and the only reason put forward to justify the removal of two cemeteries, containing the graves of over thirty people, is the developer’s desire for profit.<sup>247</sup>

In reaching his decision, the arbitrator considered the “public interest” as only one factor, along with “the perspective of the Oneida that the burials remain undisturbed” and “the interest of the landowner that the property be utilized efficiently for development as a

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<sup>240</sup> *Ibid.*, s.14(1).

<sup>241</sup> *Ibid.*, s.14(2).

<sup>242</sup> *Cemeteries Act (Revised)*, *supra*, note 223, section 72(4).

<sup>243</sup> Arbitration Award dated 14 June 1999. Thomas Logan Arbitrator.

<sup>244</sup> Arbitration Award dated 13 June 2006. Brian A. Crane, Q.C., Arbitrator.

<sup>245</sup> Section 71(5) of the *Cemeteries Act* defines “unapproved” as meaning “not approved in accordance with this Act or a predecessor of this Act.” By definition, therefore, Aboriginal cemeteries established before the nineteenth century are necessarily unapproved. I refer to cemeteries established under the Ontario statutory regime as “approved cemeteries.”

<sup>246</sup> *Ibid.*, p. 30.

<sup>247</sup> *Ibid.*, p. 36.

subdivision.”<sup>248</sup> Notice how the arbitrator characterizes the position of the Oneida as a “perspective” in contrast to the developer’s “interest.”

The arbitrator did not consider, as the Licence Appeal Tribunal had done in the Clendennen Cemetery case, “the preservation of the dignity, quiet and good order of a cemetery.” There was evidence that grading of the proposed roadways occurred before the site had been cleared and that previously identified burials had been re-exposed and damaged by the heavy equipment. In the face of such utter disregard for the dignity of the cemeteries, the Oneida representatives urged that no further interference be permitted:

This is, in the end, a matter of respect. It is a matter of respect for the dead, for the people who put them back into Mother Earth, and for the people who are the descendents of the dead and who continue to honour their memory....

The Arbitrator should decide that the cemeteries should not be moved and that the dead should be allowed to rest in peace, properly protected against future interference.<sup>249</sup>

In the end, however, profitability prevailed over dignity as the arbitrator ordered half of the burials to be disinterred and reinterred in locations that would maximize the lands available for development.

The power of arbitrators to order the removal of unapproved Aboriginal peoples cemeteries is not explicitly acknowledged in the *Cemeteries Act* or the *Burial Sites* regulation. When exercised, as in the Dorchester arbitration, this power is equivalent to the Registrar’s power to close approved cemeteries. Yet it is not subject to appellate review based on the public interest standard. As a result, Aboriginal peoples cemeteries are still not being afforded the full protection of law in Ontario.

## **AN OPPORTUNITY FOR RECONCILIATION**

In 2002, an Act was passed to merge and consolidate the provisions of the *Cemeteries Act* and the *Funeral Directors and Establishments Act*. The new legislation, entitled the *Funeral, Burial and Cremation Services Act, 2002* received Royal Assent on December 13, 2002, but it has yet to be proclaimed.<sup>250</sup> The sections of the *Cemeteries Act* pertaining to burial sites have been incorporated into the new legislation virtually unchanged.

It is expected that, as a result of ongoing consultations with stakeholders, a number of amendments will be made before the new Act is proclaimed. However, the Ministry of Government Services has advised several First Nations and Aboriginal organizations that it is “waiting until the conclusion of the Ipperwash Inquiry and the recommendations that may arise before considering any substantive policy issues.”<sup>251</sup>

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<sup>248</sup> *Ibid.*, p. 38.

<sup>249</sup> *Ibid.*, p. 36.

<sup>250</sup> S.O. 2002, chapter 33.

<sup>251</sup> Letter from Robert G. Dowler, Assistant Deputy Minister, dated March 13, 2006.

During an Ipperwash Inquiry consultation meeting concerning Aboriginal burial grounds and sacred sites held on December 8, 2005, representatives of the Ministry of Government Services heard from participants that use of the term “unapproved” in relation to Aboriginal peoples cemeteries was “problematic.” As a result, the Ministry has undertaken to remove the term.<sup>252</sup> Unfortunately, the proposed amendment only reinforces the statutory distinction between Aboriginal cemeteries and “approved” cemeteries under the Act. Under the newly proposed amendments, “burial site” means land containing human remains “that is not a cemetery as defined under this Act.” And a burial site that is determined to be of Aboriginal origin will be declared to be “an aboriginal peoples burial ground.”<sup>253</sup> As such, there can be no expectation that the sections governing the closing of cemeteries could be used to protect Aboriginal burials from disinterment.

The Ministry’s willingness to defer substantive amendments to the new Act until the Ipperwash Inquiry has issued its recommendations represents an opportunity for reconciliation with Aboriginal burial traditions. The most respectful outcome would be to recognize the paramountcy of section 8 of the *Burial Sites* regulation, which prohibits removal of remains from an Aboriginal peoples cemetery without consent of the representative First Nation. This would mean that communities that continue to observe the norms of non-disturbance will not be forced to participate in an arbitration process that has the potential to violate their customary law.

It is unlikely that reinforcing the principle of consent would bring private development in Ontario to a grinding halt. Between 1992 and 2005, only 48 aboriginal burial sites were investigated under the *Cemeteries Act*.<sup>254</sup> Of these, 39 were declared to be unapproved Aboriginal peoples cemeteries. Compared with the more than 10,000 archaeological assessments that have been done during the same period, the likelihood of developers encountering Aboriginal burials is extremely low. Of course, the potential increases dramatically if a developer purchases property knowing that it contains a substantial Aboriginal village site, as was the case in the Dorchester arbitration.

Although the number of declarations issued under the Act has been quite low, site disposition agreements have proven very difficult to negotiate. To date only 14 site disposition agreements have been concluded between landowners and representative First Nations.<sup>255</sup> In 8 cases, there was agreement to protect the remains at or near their original burial sites. This represents a removal rate of more than 40 percent of the unapproved Aboriginal peoples cemeteries. It should not be assumed that these removal decisions

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<sup>252</sup> *Ibid.*

<sup>253</sup> Proposed revision to section 97(1).

<sup>254</sup> Letter from Michael D’Mello, Registrar of Cemeteries, dated June 1, 2005.

<sup>255</sup> According to the Office of the Registrar of Cemeteries, as of June 29, 2006, site disposition agreements had been reached for the following unapproved Aboriginal peoples cemeteries: Midland Wendat (Huron) Ossuary, Walkington II, Roffelson Site, Rewa Site, Summerstown Station, Staines Road Site Brock Street Burials, Miriam-Kains Road, Morrow Site, Clayton Site, Dunn Site, Horseshoe Valley Site, Steele Village Site, Providence Bay Site.

were entirely consensual because the spectre of binding arbitration, and its associated costs, may leave First Nations with little choice in the matter.

Meanwhile, there are at least 25 unapproved Aboriginal peoples cemeteries that are still the subject of ongoing “disposition” negotiations. For many First Nations engaged in the process, “disposition” is just a polite word for “desecration.” If the consent principle is not reasserted and more communities are forced into binding arbitration to protect their Dead, the opportunity for reconciliation may be irretrievably lost.

## **WHERE DO WE GO FROM HERE?**

It’s 1669 and the first Europeans arrive at a “place held in great veneration by all the Indians of these countries.” They have been encouraged by their Aboriginal hosts to pay their respects at this sacred place because the stone Manitou who resides there can bless them with safe water travel. Instead the missionaries give vent to their hatred of all things revered by Aboriginal peoples:

I consecrated one of my axes to break this god of stone, and then having yoked our canoes together we carried the largest piece to the middle of the river, and threw all the rest into the water, in order that it might never be heard of again.<sup>256</sup>

They report that their God rewards them for “this good action” by giving them success in their hunting.

It’s 1796 and the Mississauga people at the Credit River are bereft. Their Chief, Wabbakenais, has just been killed by a British soldier. They want to see justice done. But they are told by colonial officials that no criminal proceedings can take place without an autopsy, which would require disinterment. In their grief, they are forced to choose between dignity and justice. According to their law, once buried the deceased cannot be disturbed. They explain to Peter Russell:

Father, the dead man is in the ground. We would not wish to have the body dug out of it. He is now in the ground. He will never rise again or lift his knife. The Great Spirit above has placed him in the ground. He might be displeased were he removed.”<sup>257</sup>

And so the murder goes unpunished.

It’s 1832 and the Chippewas at Penetanguishene are traumatized when they discover that the Indian Department Surgeon, Paul Darling, has disinterred several of their graves for the purposes of dissection. One leader, Big Shilling, recounts his reaction:

On hearing this my heart was very sore and I wished my Head Chief to be at home to relieve my distress.... I thought of sending to inform our Father (the

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<sup>256</sup> *Supra*, note 46.

<sup>257</sup> NAC, RG 10, Volume 9, pp. 91883–91890.

Lieutenant Governor) at York. I appointed Thomas Shilling and Peter Cut Nose and I told them to say, tell us Father, for what reason the white people have dug up our dead and what should we do to have our hearts made content?<sup>258</sup>

The surgeon is forced to resign his position but he is not prosecuted.

It's 1861 and the Mississauga missionary, Peter Jones, provides a litany of Manitou who have abandoned their abodes among his people because of encroachments and desecrations perpetrated by non-Aboriginal settlers. He recounts the "daring and profane" act of those settlers who cut down a lofty pine tree on the banks of the Grand River, which had been a favourite nesting place for thunder-beings. This sacred tree was known as Old Jack's tree because it towered over his hunting grounds. Old Jack did not live to see the sacred tree destroyed. But Jones asks his readers to consider "how would the descendants of Jack, with the eagles that nestled on the branches of this tree, wail and lament to see that their father's god has fallen to rise no more?"<sup>259</sup>

It's 2004 and I'm listening to Aazhoodena Elder, Clifford George, tell me that, during his lifetime, a Manitou that protected his people has been driven away by outsiders:

At Aazhoodena there is a bottomless lake, which is cone shaped, and empties into Lake Huron. I know this lake is connected with Lake Huron because I as a boy I saw a loon dive under and come out on the other lake. Michi-Ginebik [the Great Serpent] used to come into the lake and visit the people. He was friendly and brought medicine to the Anishnaabeg. When the serpent surfaced in the lake, he circled and created a whirlpool. Then he would come up on shore and begin sunning himself. There he talked to the people. Wherever he twitched, there was medicine to pick and people were cured.

But the channel is plugged up now, filled with nerve gas canisters that the Army dumped in there.<sup>260</sup>

Clifford George is gone now. But before he passed, he knew that children were again living at Aazhoodena and he hoped that Michi-Ginebik might one day return to talk with the people and provide them with medicine.

Elders like Clifford George give us hope. They remind us that our norms and values as Aboriginal people have persisted, even in the face of centuries of disrespect. Our understanding of sacredness is beginning to be shared by our non-Aboriginal neighbours. However, it has yet to find expression in Ontario's legislative regime. For the time being, Aboriginal peoples efforts to protect their Dead from disturbance are undermined by a statutory distinction between "approved" and "unapproved" cemeteries. As for sacred lands that do not include burials, protection must be found in statutes relating to heritage, land use planning, and environmental protection. These statutory regimes may prove

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<sup>258</sup> NAC, RG 10, Volume 52, pp. 56900–56911.

<sup>259</sup> *Supra*, note 48.

<sup>260</sup> *Supra*, note 61.

capable of promoting the Aboriginal norms of respect, protection, and non-disturbance, but only if the government insists on strict enforcement and provides much needed measures for accountability.

**APPENDIX A**

**2005 PIFs Submitted by Staff Review Area and Region/Municipality**

**Total: 1499 (1421)—5% Increase From Last Year’s Total**

Note: Bold number in brackets represent the 2004 PIFs assigned to the reviewer; figures in second bracket provides the PIFs assigned for the counties of the reconfigured region in 2004.

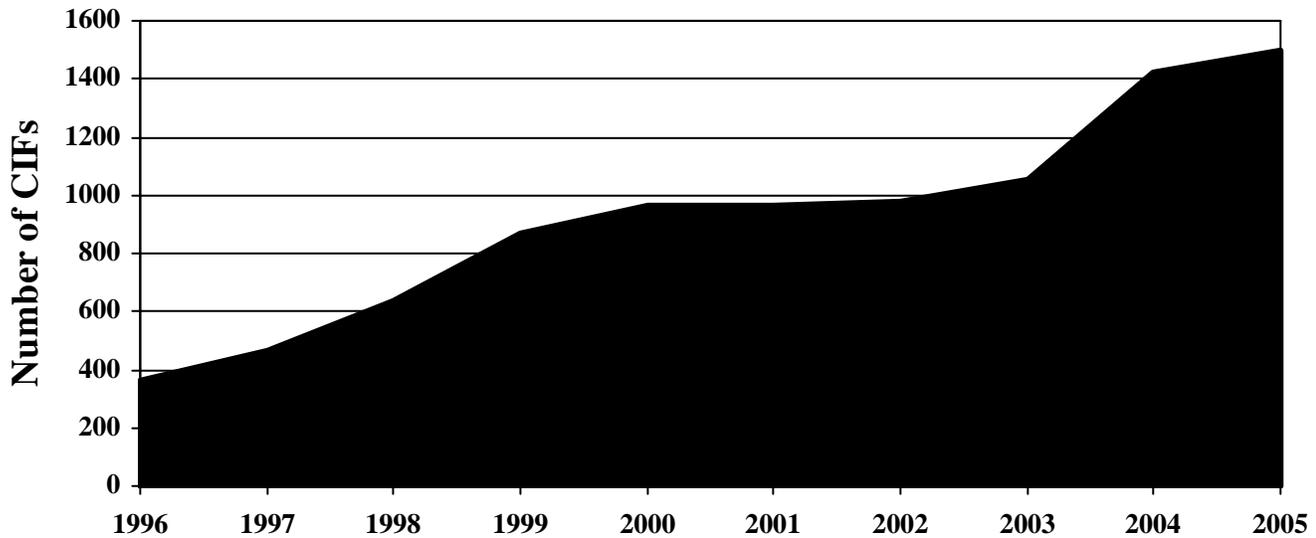
Note: Regional increases/decreases also reflect the fact that in 2005 some redistribution of counties occurred to alleviate staff workload.

<b>Northern 155 (135 = 15% increase in assigned PIFs) – 10% (11%; #157) of all PIFs Received in 2005</b>					
Algoma – 14 (13)	Cochrane – 8 (7)	Haliburton – 4 (4)	Kenora – 16 (21)	Manitoulin – 3 (6)	Muskoka – 8 (7)
Nippissing – 20 (23)	Parry Sound – 13 (15)	Rainy River – 0 (1)	Renfrew – 21 (18)	Sudbury – 13 (6)	Thunder Bay – 20 (18)
Timiskaming – 15 (18)					
<b>Eastern 176 (194 = 9% decrease in assigned PIFs) – 12% (9%; #135) of all PIFs Received in 2005</b>					
Frontenac – 40 (22)	Hastings – 17 (10)	Lanark – 11 (11)	Leeds Grenville – 5 (4)	Lennox Add – 7 (4)	Northumberld – 26 (15)
Ottawa-Carl. – 57 (57)	Prescott- Russell – 8 (4)	Prince Edward – 4 (4)	Storm. Dundas Glengarry – 1 (4)		
<b>Central/East – A 92 (144 = 36% decrease in assigned PIFs) – 6% (11%; #89) of all PIFs Received in 2005</b>					
Durham – 67 (76)	Kawartha Lakes – 25 (13)				
<b>Central/East – B 250 (451 = 44% decrease in assigned PIFs) – 17% (19%; #277) of all PIFs Received in 2005</b>					
Peterborough – 23 (24)	Toronto – 34 (29)	York – 193 (224)			
<b>Central/West 282 (na, new assignment) – 19% (19%; #266) of all PIFs Received in 2005</b>					
Halton – 93 (68)	Peel – 105 (130)	Simcoe – 84 (68)			
<b>Southwest 544 (497 = 9% increase in assigned PIFs) – 36% (35%; #497) of all PIFs Received in 2005</b>					
Brant – 26 (17)	Bruce – 20 (28)	Dufferin – 9 (7)	Elgin – 20 (20)	Essex – 13 (19)	Grey – 14 (15)
Hald-Norf – 29 (12)	Hamilton – 93 (86)	Huron – 6 (7)	Chatham Kent – 4 (8)	Lambton – 33 (24)	Middlesex – 50 (73)
Niagara – 121	Oxford – 29	Perth – 1 (4)	Waterloo – 58	Wellington –	

(87)	(18)		(51)	18 (21)	
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## APPENDIX B

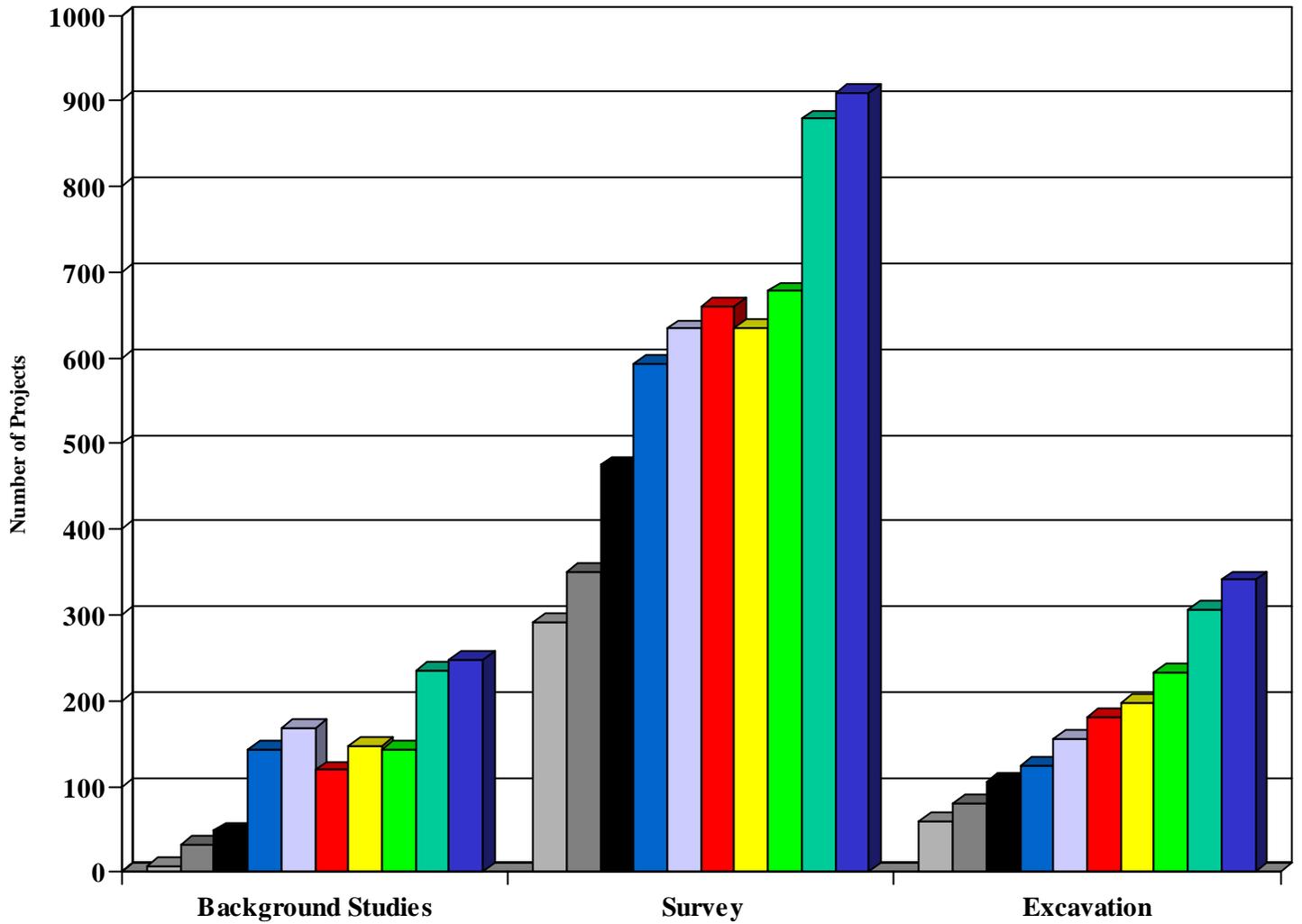
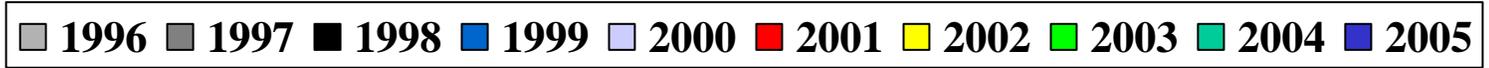
### Annual Project Information Forms (PIFs) Submitted for Consultant Company Activities



**1996 Project Total - 364**  
**1997 Project Total - 466**  
**1998 Project Total - 635**  
**1999 Project Total - 865**  
**2000 Project Total - 964**  
**2001 Project Total - 962**  
**2002 Project Total - 979**  
**2003 Project Total - 1055**  
**2004 Project Total - 1421**  
**2005 Project Total - 1499**

## APPENDIX C

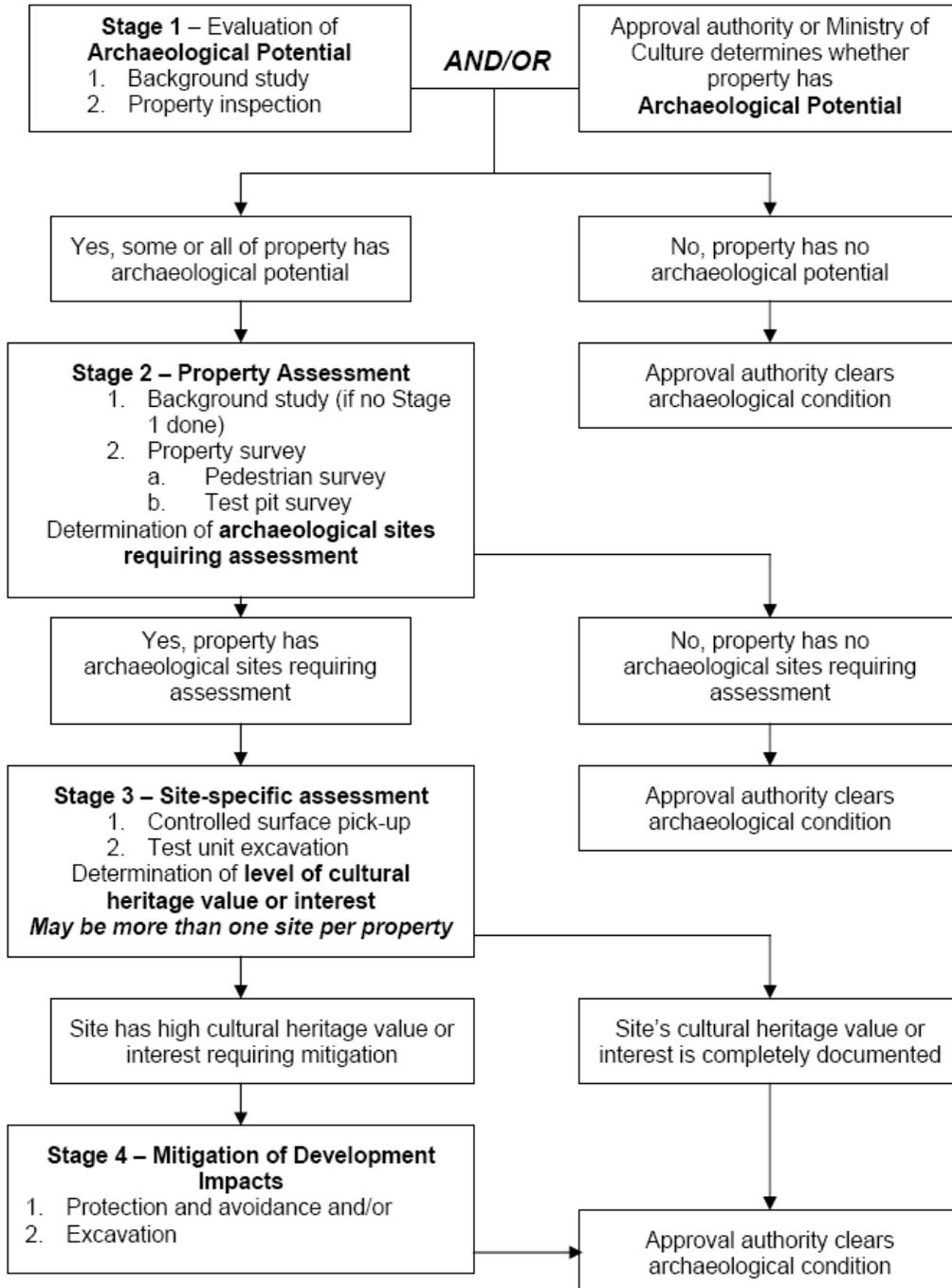
### Project Information Forms (PIFs) by Major Activity



## APPENDIX D

*Standards and Guidelines for Consultant Archaeologists final draft  
Unit 1A – Introduction  
August, 2006*

### The Archaeological Fieldwork Process in Land Use Planning and Development



## APPENDIX E

### Table of Private Statutes, Cemeteries

Name	Year and Chapter
Ancaster, St. John's Church Cemetery	1909,c.153
Aurora, Methodist Church Cemetery	1888,c.84
Ayr, Knox Church Cemetery	1887,c.93
Beaverton, Presbyterian Church Cemetery	1927,c.142
Bentinck, St. George's Cemetery	1907,c.121
Brantford, Mount Hope Cemetery	1895,c.61
Chatham, St. Andrews Church Cemetery	1890,c.143
Cobourg, Cobourg Cemetery Company	1869,c.50
Colborne, Lakeport Cemetery Company	1904,c.102
Darlington, St. Andrew's Church Cemetery	1889,c.94
Dresden, Dresden Cemetery Ground	1874,1st Sess.c.96
Erin, Erin Fifth Line Union Cemetery	1957,c.133
Guelph, Presbyterian Cemetery	1889,c.92
Hamilton, Burkholder Cemetery	1954,c.112
Hamilton, Christ Church Cemetery	1890,c.138; 1901,c.100
Ingersoll, Church of England Cemetery	1905,c.120
London, Gore Cemetery	1960,c.153
London, Methodist Cemetery	1879,c.93
London, St. Paul's Cemetery	1880,c.80; 1885,c.95
Orillia, Presbyterian Church Cemetery	1877,c.57
Osgoode, Presbyterian Burial Ground	1870-1,c.85; 1899,c.116
Ottawa, Beechwood Cemetery Company	1873,c.149; 1894,c.95; 1914,c.127; 1921,c.136; 1928,c.111; 1956,c.95; 1962-63,c.148

Ottawa, Roman Catholic Episcopal Corporation of Ottawa	1917,c.100
Picton, First Methodist Church Burial Ground	1906,c.143
Picton, Glenwood Cemetery	1870-1,c.96
Port Arthur, Riverside Cemetery Company	1886,c.82; 1953,c.128
St. Thomas, Curtis Cemetery	1874,2nd Sess.c.89
St. Thomas, St. Thomas Cemetery Company	1874,1st Sess.c.95; 1901,c.97; 1910,c.159
Sarnia, 'Old Cemetery' and Methodist Church Cemetery	1890,c.137
Sarnia, Church of England Cemetery	1903,c.127
Shelbourne, St. Paul's Church Burying Ground	1901,c.101
South Dorchester, Necropolis Burying Ground	1903,c.128
Strathroy, Public Cemetery	1884,c.58
Thorold, Land for Cemetery Purposes	1887,c.69
Toronto, Davenport Methodist Church Burying Ground	1900,c.133
Toronto, Knox Church Burying Ground	1909,c.154
Toronto, Mount Pleasant Cemetery	1946,c.142
Toronto, St. Michael's Cemetery	1925,c.133
Toronto, Toronto General Burying Ground, Trustees of	1870-1,c.95; 1874,2nd Sess.c.90; 1875-6,c.66; 1888,c.88; 1910,c.160; 1925,c.132; 1968,c.178; 1977,c.110; 1989,c.50,s.88
Upper Canada	1871-2,c.116
Vankleek Hill, Presbyterian Church Cemetery	1889,c.98
Windsor, Assumption Church Cemetery	1979,c.116
Windsor, Windsor Grove Cemetery	1911,c.152; 1979,c.143
Woodstock, Methodist Church Cemetery	1885,c.97
Woodstock, Presbyterian Church Burying Ground	1868,c.71

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