

ABORIGINAL BURIAL AND HERITAGE SITES

Burial practices touch the fundamental personal, cultural, religious, and philosophical ideas and beliefs of both Aboriginal and non-Aboriginal peoples.

Two of the most prominent Aboriginal occupations in recent history, Oka and Ipperwash, have to differing degrees involved Aboriginal burial sites. These incidents have also been the most violent: Sûreté du Québec Corporal Marcel Lemay died at Oka and Dudley George died at Ipperwash. This is not to suggest that protests about Aboriginal burial sites are necessarily more violent than other kinds of Aboriginal protests. However, the violence at these incidents underscores the importance of this issue to Aboriginal peoples and its relevance to my mandate to “make recommendations to prevent violence in similar circumstances.”

The legal regime governing Aboriginal burial sites is more complex than most Ontarians probably realize: Any analysis of the legal protections for these sites must also consider the relationship between the laws protecting the sites themselves and the laws governing planning, development, and the environment generally. The roles of the provincial, federal, and municipal governments, planning agencies, private developers, and archaeologists must also be considered. Finally, different issues related to Aboriginal burial sites arise depending on whether the site is located on public or private land or whether it is on a First Nation reserve or within the First Nations’ traditional territory.

As is the case with many other issues, Aboriginal burial and heritage sites seem to raise intractable conflicts between the Aboriginal and non-Aboriginal world-views, and between the value accorded to history and the more practical or economic demands of contemporary society. Nevertheless, First Nations, provincial policy-makers, municipalities, and private developers have achieved important precedents and understandings about how best to balance competing interests.

It appears that pressure related to this issue may be building. More confrontations are foreseeable if we do not act quickly and thoughtfully. In my view, the best way to avoid Aboriginal occupations regarding Aboriginal burial and heritage sites is to engage Aboriginal peoples in the decision-making process. This kind of participation is consistent with the honour of the Crown and with the general themes of this report. It will also help promote economic development in this province by reducing the possibility that public and private projects will be disrupted by occupations or protests.

Aboriginal consultation and participation in decision-making is key.¹ But

meaningful, constructive participation necessarily depends on accountability and transparency in decision-making. The laws and policies governing Aboriginal burial and heritage sites must acknowledge the uniqueness of these sites, ensure that First Nations are aware of decisions affecting them, and promote First Nations participation in decision-making.

Clearer rules and expectations regarding how to address Aboriginal burial and heritage sites will benefit all Ontarians, not First Nations only. The Ontario Home Builders' Association, for example, advised the Inquiry that its members are looking for clarity, fairness, and equity in the process related to archaeological, burial, and other sacred sites.² The association recommended that the provincial government take the lead role in designing a process that balances the desire to protect and preserve archaeological and cultural heritage with the rights of landowners to develop their property.

6.1 The History of Aboriginal Burial and Heritage Sites

An understanding of history, origin stories, and the unique connection Aboriginal peoples have to the land and to the burial sites of their ancestors is key to understanding why Aboriginal people are willing to take to the barricades in order to protect these sites.

Professor Darlene Johnston discussed the relationship between the living and the dead in Anishnaabeg culture in her background paper for the Inquiry:³

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.⁴

...

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 which persists among the Anishnaabeg. 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?⁵

This view of the ongoing relationship between the living and the dead was echoed by the Chippewas of Nawash Unceded First Nation in their report for the Inquiry:

It is important to understand how First Nation peoples view burial grounds. To us, our ancestors are alive and they come and sit with us when we drum and sing. We did not bury them in coffins, so they became inseparable from the soil. They are literally and spiritually, part of the earth that is so a part of us. That is one reason why we have such a strong feeling for the land of our traditional territories—our ancestors are everywhere. It is a sacrilege to disturb even the soil of a burial ground. It is an outrage to disturb, in any way, actual remains.⁶

Professor Johnston also described the importance to the Anishnaabeg of *Manitous* and their dwelling places.⁷ As recounted in her paper, Elder Clifford George shared his oral tradition concerning the connection between *Manitous*, medicine, and the Anishnaabeg at a community meeting organized by the Inquiry:

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 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.⁸

Professor Johnston wrote that “patterns of disrespect and desecration” began as soon as European missionaries arrived in the New World. They disturbed the burial sites of Aboriginal peoples, desecrated sacred sites, and destroyed out-

right the dwelling places of *Manitous*. Professor Johnston concluded: “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.”⁹

As the years went on and more and more European settlers arrived in the New World, the Crown and First Nations entered into treaties. These treaties created Indian reserves, and Aboriginal peoples lost effective control of huge tracts of their traditional lands. As Professor Johnston pointed out, however, maintaining proximity to ancestral burial grounds proved to be one of the strongest territorial attachments. As a result, the reserves retained were typically in the vicinity of established villages, fishing grounds, and burial grounds. Nevertheless, Aboriginal peoples could not, through the treaty-making process, protect all of the sites that today we call Aboriginal heritage sites:

While maintaining a toehold within the boundaries of their traditional territories, however, First Nations in Ontario were prevailed upon to surrender 99% 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. 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.¹⁰

6.2 Why Aboriginal Burial and Heritage Sites Become Flashpoints

Aboriginal heritage and burial sites become flashpoints for an occupation or protest when Aboriginal peoples believe that they must occupy a site to protect it from further desecration. This often happens when a public or private landowner or developer refuses to acknowledge an Aboriginal burial place or heritage site or refuses to consult with Aboriginal peoples about the disposition of the site. This is what happened at Oka.

Many of the parties to the Inquiry commented on the burial sites issue in their final submissions, including the Estate of Dudley George and George Family Group, the Residents of Aazhoodena, Aazhoodena and George Family Group, and the Chiefs of Ontario.

The following excerpt is from the submission by the Estate of Dudley George and George Family Group:

The Anishnaabeg belief is that the souls of their departed ancestors are attached to their bones. As such, Anishnaabeg treat the bones of their

ancestors with great reverence, and abhor the disturbance of graves. This has been their way since time immemorial, and will be their way evermore. This explains why the Chief and Council made a point of asking that the burial ground in Ipperwash Park be fenced off and preserved when it was discovered in 1937. It is also half the reason why the Stony Pointers occupied the Park in September 1995 — to reclaim the burial grounds of their ancestors that had been desecrated.¹¹

Robert Antone summarized the view of many Aboriginal witnesses about the importance of the burial site at Ipperwash Provincial Park:

Society doesn't have much respect for ... our people who are living, let alone our people who have died ... and are buried ... I mean, the whole incident in Oka, they were planning on bulldozing the graveyard there ... and extending their golf course—that's what the whole incident was about ... They wanted to turn the grave yard into a golf course ... [and] when you have a society that has that much disrespect for our people ... what do you expect? ... I know that the area [Ipperwash Provincial Park] was always viewed as a burial ground and ... a sacred area. So, it didn't surprise me ... when they did occupy it.¹²

The events at Oka, Quebec in 1990 are perhaps the best-known example of what can happen when an Aboriginal burial or heritage site is threatened. The municipality of Oka planned to expand a golf course into the traditional territory of the Mohawks of Kanasatake. The land involved in the expansion was the site of an Aboriginal burial ground. The Mohawks occupied the Pines, part of the Kanasatake forest site slated for the golf course development. The occupation lasted seventy-eight days. Sûreté du Québec Corporal Marcel Lemay died during a failed attempt by police to remove the blockade.

In 1997, the federal government purchased the land at the centre of the 1990 Oka occupation and turned it over to the Mohawks for expansion of their burial ground. While this piece of land was but a small part of the Mohawks' much larger land claim, it nevertheless had both practical and symbolic importance.¹³

Oka and Ipperwash are by no means the only examples of controversies over Aboriginal burial sites: In 1992, the Chippewas of Nawash Unceded First Nation occupied unceded land within the city limits of Owen Sound to protest the desecration of an ancestral burial site located there. This land had been set aside as a reserve in the Treaty of 1857. The federal Crown or government held title to this land for the use and benefit of the Chippewas of Nawash. However, successive governments, federal and municipal, ignored the reserve nature of the land and the

presence of the burial ground. Many years later, a private developer built two houses on the site. The Chippewas of Nawash occupied the site peacefully for a week. A settlement was concluded quickly once the parties began to negotiate. The federal government eventually compensated the homeowners, the houses were removed from the burial site, and the site was re-consecrated. Even though it occurred more than a decade ago, the pain this incident caused the Chippewas of Nawash community is still evident today.¹⁴

Oka and Ipperwash are the two most prominent examples involving Aboriginal burial or heritage sites. There have been many others in Ontario: Milroy, Seaton, Teston Road, Staines Road, Boyd Park, Hunters' Point, the Red Hill Creek Expressway, Dreamers' Rock, Skandatut, Mantle site, Archie Little 2 site, Tabor Hill, the Huron-Wendat site in Town of Midland, Petroglyphs Provincial Park, and Serpent Mounds.¹⁵

6.3 Location and Nature of Aboriginal Burial Sites

People have lived in what is now Ontario for at least 11,000 years. The European presence is relatively recent, dating back about 400 years. Thus, the “post-contact” period represents less than 4% of the human history of this province. Aboriginal peoples lived throughout the region for many thousands of years prior to European contact, and so the archaeological heritage of Ontario is overwhelmingly Aboriginal.

Today, the provincial government owns approximately 87% of the land in Ontario. Approximately 12% is privately owned. First Nations reserve land and federally owned lands such as national parks make up the remaining 1%.¹⁶ Not surprisingly, most Aboriginal burial and heritage sites are located on lands outside reserve boundaries.

Unlike most Christian cemeteries, Aboriginal burial sites and practices take countless forms, depending on the culture and history of the First Nation, the practices associated with particular eras, and the geography of the region. Moreover, there are “often very few visible clues that signal” an Aboriginal burial or sacred site.¹⁷ This means that Aboriginal burial sites are often discovered (at least by non-Aboriginals) during development or construction projects. For example, one particularly important form of Aboriginal burial site in Ontario is the ossuary. This form of burial practice appears to have become common among many Aboriginal peoples in the Ontario region in the period after A.D. 700. The Founding First Nations Circle advised the Inquiry regarding these sites:

Ossuaries are essentially invisible in the modern landscape. Most of the

ossuaries known to archaeologists were first discovered as a result of land clearance in the nineteenth century. The locations of these sites may or may not be well-documented. Modern discoveries of ossuaries are generally accidental results of large-scale earth moving or other construction activities.¹⁸

Burial sites may be found in settlements or in isolated locations.

It is even more difficult to identify other kinds of sites that are sacred to Aboriginal peoples. All peoples assign special meaning to the burial sites of their ancestors, but what is considered “sacred” beyond that varies considerably between cultures. There is no universal definition of sacredness. The Chiefs of Ontario advised the Inquiry that for First Nations, sacredness involves more than burial sites:

Our relationship to the land defines who we are; we are the caretakers of Mother Earth. What is sacred then is more than a single burial location. The location of medicines, ceremonies, stories, burial sites, traditional harvesting and hunting grounds, villages and trading areas are all locations that are “sacred”. The locations of these sites are living; they are not “artefacts” relegated to antiquity. As well, instruments created to celebrate stories and ceremonies, protect medicines and honour our ancestors are sacred.¹⁹

The Chiefs of Ontario further advised the Inquiry that simple or general definitions of sacred sites were inappropriate because “the definition of what is ‘sacred’ is determined by the First Nation community itself and [is] reflective of the community’s values of what is sacred.”²⁰ The Chiefs of Ontario also rejected

the creation of an “inventory” of sacred sites. Any attempt to do so would in our view, not only serve to draw attention to areas that ought not be exposed and brought to the attention of the larger public and thereby put these areas at real risk of exploitation, but may have the illusory affect of placing limits on the number of areas to be included in such an inventory.²¹

This is not to say that Aboriginal burial and heritage sites cannot be identified. Nor it is to say that sites can only be identified after construction or developments have disturbed them. On the contrary, experience has shown that Aboriginal burial and heritage sites can be identified in the appropriate circumstances if

First Nations are actively and meaningfully involved in the planning or development process. Traditional knowledge is the most important source of information about the location or nature of Aboriginal burial and heritage sites currently used or used in living memory. For older sites, archaeology is an important supplement to traditional beliefs and understandings.²²

6.4 Destruction and Protection of Aboriginal Burial and Heritage Sites

At our December 9, 2005 consultation, Professor Ron Williamson, principal of Archaeological Services Inc., the largest archaeological firm in Ontario, commented on the protection of heritage sites:

The provincial archaeological conservation legislative mandate has been one of an unqualified success at destroying these valuable heritage legacies through excavation, and an unqualified disaster at protecting them.²³

It is possible that 8,000 heritage sites were destroyed in the Regional Municipalities of Halton, Durham, Peel, and York between 1951 and 1991, most of them before 1971. It has been reported that approximately 25% of these sites represented significant archaeological resources, which merited some degree of archaeological investigation because they could have contributed meaningfully to our understanding of the past, or warranted outright protection because they were culturally significant places for the First Nation descendants of the people who created them.²⁴

A particularly significant instance of the desecration of an Aboriginal burial site occurred at what is now known as the Staines Road ossuary. In 2001, the remains of about 308 Aboriginal people were discovered on land slated for a subdivision development in Toronto. Tests on the human remains dated them to between A.D. 1030 and 1270. An investigation determined that the human remains were from an ossuary. From the marks on the remains, it appeared that they had been damaged by heavy machinery. The remains had been buried in a pile of soil fill and garbage. The police investigated, but no charges were laid. The remains were eventually reburied on the Staines Road property where they were originally discovered.

There has been a “marked reduction” in the rate of destruction of archeological sites throughout much of the province. Certain municipalities have adopted “progressive planning policies” concerning the conservation of archeological sites. Yet the potential for loss in the future remains great because of “continued

growth and development” particularly in Southern Ontario, where there is the most development.²⁵

During the Inquiry, I learned of many positive developments in the protection of Aboriginal burial and heritage sites. For example, archaeological studies are now routine on many development projects in Ontario. In 2004, licensed archaeologists undertook over 1,400 archaeological projects in the province and reported over 800 archaeological sites.²⁶

I have also learned of many constructive efforts by provincial and local officials to work with First Nations and private developers to protect sites. An important example of these efforts was presented at the Inquiry’s December 8, 2005 consultation on this issue.

Fred Flood, the chief administrative officer of the Town of Midland, explained that in 2003, town workers accidentally disturbed an Aboriginal ossuary in the course of enlarging a recreation centre.

Upon the discovery of the human remains, the town ceased work immediately and contacted the Coroner, the police, the Registrar of Cemeteries, and the closest First Nation. The town followed the direction of an Elder, who provided guidance and training to those involved. The town hired security guards to protect the site and archeologists to assess the site. The town paid to have the remains removed and stored until the site could be stabilized. The Registrar of Cemeteries declared the site an Aboriginal peoples’ cemetery.

Throughout this process, the town worked closely with a number of First Nations, including the Huron-Wendat, known to have been prominent in Southern Ontario but now living in Quebec, whose ancestors were buried at the site.

In the fall of 2003, the town supported the First Nations in the reburial ceremony. In consultation with the First Nations, the town landscaped the area and erected a commemorative stone.

Another positive example is the protection of what is now called the Teston Road ossuary. A Huron-Wendat ossuary in the York Region of Ontario was disturbed in 2005 during the widening of Teston Road. Archaeologists estimated that the human remains found were 300 to 700 years old. Over 200 people had been buried in this ossuary. After consultation with the Huron-Wendat and other First Nations communities, York Region agreed to alter the planned course of the road to avoid disturbing the ossuary further.

These examples, and others, highlight the principles I discuss in this chapter, including respect for Aboriginal values and meaningful consultation with Aboriginal communities. They also prove that Aboriginal burial and heritage site issues can be addressed in a peaceful, cooperative, and constructive manner if parties work together.

It is also important to keep in mind the scope of this issue. Notwithstanding the examples discussed so far, it is rare for a property owner to uncover an Aboriginal burial site. Between 1992 and 2005, only forty-eight Aboriginal burial sites were reported and investigated under the *Cemeteries Act*. Compared with the more than 10,000 archaeological assessments carried out during the same period, the likelihood that a developer will encounter an Aboriginal burial site is extremely low.²⁷ That said, the rarity of uncovering these sites does not diminish the emotional impact on the people whose ancestors are buried on the property.

6.5 Provincial Legislation

There are several provincial statutes that directly or indirectly affect Aboriginal archeological sites, including Aboriginal burial and heritage sites. My analysis of the laws, policies, and guidelines governing these sites has led me to several observations:

- The provincial government has made important progress on incorporating Aboriginal values and protecting Aboriginal burial and heritage sites in several areas. Nevertheless, I believe that Aboriginal burial and heritage sites on Crown lands can and should be protected still more effectively.
- There have been many constructive efforts to define the scope of the provincial duty to consult with Aboriginal peoples on these issues, but there remains a need for greater clarity and consistency.
- Accountability and transparency for decisions affecting Aboriginal burial and heritage sites needs to be improved, particularly in the case of private lands.

Perhaps not surprisingly, these observations are consistent with my earlier observations about land claims and natural resource issues. Indeed, the benefits of improved clarity, consultation, and transparency and accountability are just as important in this context as in others.

Consultation with and participation in decision-making by Aboriginal peoples should be encouraged early and often to ensure that issues regarding Aboriginal burial and heritage sites are addressed constructively and peacefully.

As a first step, I recommend that the provincial government work with First Nations and Aboriginal organizations in Ontario to develop policies which acknowledge the uniqueness of Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and

policies should eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate. This would promote respect and understanding of these issues throughout the provincial government. It would also promote consistency and conformity in their application.

The importance of thorough and meaningful consultation is illustrated by what has happened with the Seaton lands. The Seaton lands consist of about 1,270 hectares of publicly owned land in Pickering, Ontario. These lands were likely the hunting, gathering, and fishing grounds of numerous First Nations peoples, and Aboriginal burial and heritage sites are found there.

The Ontario Ministry of Municipal Affairs and Housing and the Ontario Realty Corporation (ORC) worked together to prepare the Seaton lands for sale to private developers. The ORC conducted an environmental assessment of the Seaton lands as part of this work. The environmental assessment included consultations with First Nation communities in the area of the Seaton lands on behalf of the provincial government. The ORC issued a Notice of Completion for the environmental assessment in January 2006.

In the summer of 2006, seven First Nation communities in Ontario filed a judicial review application against the Ontario Ministry of the Environment, the ORC, and the Huron-Wendat Nation.²⁸ The application requested that the court quash the Notice of Completion of the environmental assessment. The applicants alleged that they had an inherent and direct cultural interest in the Seaton lands. The applicants maintained that the province, through its agent the ORC, failed to meet its consultation obligations. The judicial review application was heard in November 2006. A decision is expected in early 2007.

6.5.1 *The Cemeteries Act and the Funeral, Burial and Cremation Services Act, 2002*

The Ministry of Government Services has consolidated two laws, the *Cemeteries Act* and the *Funeral Directors and Establishment Act*, into the *Funeral, Burial and Cremation Services Act, 2002* (the “new Act”). The government is currently consulting interested groups and developing draft regulations. The new Act has not been proclaimed.

The main purpose of the *Cemeteries Act* and the new Act is to regulate the establishment, operations, and closing of cemeteries, and to protect consumers in their dealings with cemetery and crematorium operators. Aboriginal burial sites, with their historical and spiritual significance, do not fit comfortably within consumer protection legislation:

The Chiefs of Ontario take the position that the very term ‘cemetery’ and various provisions within the *Cemeteries Act* (such as commissioning and decommissioning) illustrate the profound difference between our understanding of our relationship with our ancestors and that of the dominant Euro-Canadian culture. This legislation in our view is wholly inadequate and cannot be relied upon as the instrument to protect a territory we would describe as ‘sacred.’²⁹

The “Burial Sites” sections of the *Cemeteries Act* and the new Act and regulations set out the procedures for dealing with Aboriginal cemeteries and burial grounds. The process relating to Aboriginal burial sites remains largely unchanged in the new Act. The *Cemeteries Act* and the new Act also outline the steps a landowner must take if a burial site is uncovered on his or her property.

A number of concerns were raised about the *Cemeteries Act* during the Inquiry. One concern was that the Registrar of Cemeteries usually contacts the First Nation community located closest to a burial site when a site is discovered. Given the history of Aboriginal peoples in what is now Ontario, the closest community is not necessarily culturally affiliated with the burial site. The Midland site mentioned above is an example. It is my understanding that the new Act or regulations will clarify that the proper representative should be the First Nation with the closest cultural affiliation to the person or persons whose remains are found on a site.

Another concern was raised about the registrar’s authority under the *Cemeteries Act* to declare that a burial site is an “unapproved aboriginal peoples cemetery” or “an irregular burial site.” The Inquiry heard that Aboriginal people consider the terms “unapproved” or “irregular” to be offensive. The provincial government has responded to this concern and proposes to use the term “aboriginal peoples burial ground” in the new Act.

A third issue involves the manner in which the *Cemeteries Act* and new Act address “approved” versus “unapproved” cemeteries. Both laws specify that an approved cemetery can only be closed (and the burials removed) by order of the registrar. The registrar may only close a cemetery if it is in the “public interest” to do so.³⁰ Closing orders can be appealed to the Licence Appeal Tribunal.³¹ However, the “public interest” test and appeal provisions do not apply to sites likely to contain Aboriginal remains.³² There is no apparent reason why persons wanting to protect Aboriginal cemeteries should not have access to the same appeal mechanisms as applies to non-Aboriginal cemeteries. The appeal process should apply to all types of cemeteries and burials, not only to “approved” cemeteries and burials.

Finally, the Inquiry heard that the *Cemeteries Act* and the new Act do not include a consideration of Aboriginal values. As a result, Aboriginal communities are often forced into the untenable position of having to prove that an area is a burial ground by disturbing the burial. Including a duty to consult with Aboriginal peoples in the legal and policy rules governing Aboriginal burial sites and a consideration of Aboriginal values would likely address this issue.

6.5.2 Provincial Legislation and Aboriginal Heritage Sites

The provincial government has made some important progress in recent years with respect to protecting Aboriginal heritage sites located on public lands. There is a nascent regulatory regime that is quite promising in its potential protection of Aboriginal heritage sites. This is an important development that offers the potential to improve the regulation of these sites and reduce the risk of confrontations. The same cannot be said of the regulatory regime governing Aboriginal heritage sites located on private lands in Ontario.

6.5.3 Aboriginal Heritage and Public Lands in Ontario

Two main laws apply to Aboriginal heritage sites uncovered on public lands: the *Public Lands Act* and the *Environmental Assessment Act*.

6.5.3.1 The Public Lands Act

The *Public Lands Act (PLA)*, administered by the Ministry of Natural Resources (MNR), governs the management, sale, and disposition of the public lands and forests in Ontario.³³

There is no mention of Aboriginal burial or heritage sites, Aboriginal values, or consultation with Aboriginal peoples in the *PLA* or its regulations. However, a Public Land Management Directive issued by MNR includes a guiding principle to the effect that, when disposing of public lands in any way, MNR must consult with Aboriginal communities where the disposition might infringe upon an existing Aboriginal or treaty right, or where the disposition involves lands that are subject to a land claim.³⁴ While it appears that MNR makes a unilateral decision about whether a disposition of land might infringe upon an Aboriginal or treaty right, this is nevertheless a positive development, since it would presumably include consultation and dialogue with Aboriginal peoples about any heritage sites on the land in question.

In addition to the Public Land Management Directive, there are other constraints on the MNR power to dispose of public lands, including the *Environmental*

Assessment Act and the *Planning Act*. There are also special laws that apply to public lands which are also provincial parks.³⁵

6.5.3.2 *The Environmental Assessment Act*

The purpose of the *Environmental Assessment Act (EAA)* is the betterment of the people of Ontario by providing protection, conservation, and wise management of the environment.³⁶ The *EAA* is administered by the Ministry of the Environment. It applies to public and designated private sector projects.

The term “environment” is defined very broadly in the *EAA*. It includes “the social, economic and cultural conditions that influence the life of humans or a community,” and “any building, structure, machine or other device or thing made by humans.”³⁷ This definition would capture Aboriginal heritage sites and artifacts.

The *EAA* requires that “every proponent who wishes to proceed with an undertaking shall apply to the Minister for approval to do so.”³⁸ The application must include the proposed terms of reference and the environmental assessment, and the proponent must consult with interested persons in the preparation of these documents.³⁹

Heritage studies are routine during the environmental assessments of major undertakings. If the heritage in question is Aboriginal, then the proponent would have to consult with Aboriginal peoples about the undertaking.⁴⁰

The *EAA* permits some groups of undertakings which share an “attribute, quality or characteristic” to be approved as a “Class Environmental Assessment” (Class EA).⁴¹ The Class EA process is relevant to the protection of Aboriginal heritage on public lands because the sale and management of these lands is subject to Class EA processes.

Professor Johnston discussed a number of recent Class EA documents and other guidelines in detail.⁴² She was impressed with the number and diversity of Class EA documents and other guidelines and policies which incorporate a consideration of Aboriginal values and consultation with Aboriginal peoples in the disposition and management of public lands.

The major concern about these documents is that they often do not include definitions or explanations of what “Aboriginal values” means in the context of the public land in question. The exception is the Draft Forest Management Guide for Cultural Heritage Values, released for discussion in July 2005, which includes a constructive definition of “Aboriginal Cultural Heritage Values.”

The provincial government, in consultation with First Nations and Aboriginal organizations, should clarify the meaning of “Aboriginal values” in all Class EA documents and other guidelines and policies applicable to public lands.

Finally, the *EAA* is subject to the *Environmental Bill of Rights (EBR)*.⁴³ This means that certain types of environmental information must be posted on the Environmental Registry, including public notice of proposals, decisions, and events that could affect the environment. The public then has an opportunity to comment on proposals and projects before the government makes any final decisions. The government must take any comments from the public into consideration when deciding whether to accept the assessment and approve the undertaking. This requirement is an important part of public consultation about the environment. It is also an important accountability mechanism. It helps to ensure that government decision-making in many environmental matters, including those potentially affecting Aboriginal burial and heritage sites on public lands, is transparent.

6.5.4 Aboriginal Heritage and Private Lands in Ontario

The *Planning Act* and the *Ontario Heritage Act* are the two main laws applicable to Aboriginal heritage sites on private lands. As I have mentioned, Aboriginal heritage sites uncovered on private land in Ontario do not have the same level of protection as Aboriginal heritage sites uncovered on public lands do, and they are not subject to the same level of Aboriginal involvement and consultation.

6.5.4.1 The Ontario Heritage Act

As Professor Johnston pointed out in her paper, “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.”⁴⁴ Instead, the *Ontario Heritage Act (OHA)* is largely directed at regulating the archaeological profession, not at protecting heritage sites and evaluating the appropriateness of plans to excavate them.

The legislative and regulatory regime governing the approval of alterations of heritage sites on private land is complex. The provincial Ministry of Culture administers the *OHA*. However, the ministry does not officially approve site alterations. Rather, it effectively “signs off” on the adequacy of an excavation through a process of issuing “clearance letters” to other planning authorities, particularly municipalities.

In practice, neither Aboriginal peoples nor any other members of the public generally have an opportunity to review and comment on plans to excavate an Aboriginal heritage site on private lands.

The Environmental Registry is a potential means of providing public notice of these activities. The Ministry of Culture is one of the fourteen ministries to which the *EBR* applies, subject to certain exceptions.⁴⁵ These exceptions include

the review and approval process for heritage sites. Therefore, the Ministry of Culture is under no obligation to post “instruments” or decisions on the Environmental Registry which allow excavation of archaeological sites.⁴⁶ As a result, these decisions are rarely subject to public scrutiny or comment. The ministry has occasionally posted “information” about new heritage policies on the registry. Unfortunately, it has only done so six times since 1995. In contrast, the Ministry of the Environment has posted nearly 17,000 “instruments” since 1994.⁴⁷

In my view, plans to excavate Aboriginal burial and heritage sites on private lands should be made more transparent. First Nations, Aboriginal peoples, and the public at large should have an opportunity to be notified of potential decisions affecting these sites. Posting notices or instruments on the Environmental Registry and allowing the public to comment before a final decision is made is one option. I recommend, therefore, that the provincial government, in consultation with First Nations and Aboriginal organizations, determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites in Ontario.

6.5.4.2 *The Planning Act*

The *Planning Act (PA)*, administered by the Ministry of Municipal Affairs and Housing, sets out the rules for development in Ontario.⁴⁸ These rules apply to the development of both public and private lands.

Any individual or body with responsibilities under the *PA*, such the minister, a municipality, a local board, a planning board, or the Ontario Municipal Board, “shall have regard to” the multitude of provincial interests set out in s.2 of the *PA*. These interests include “the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest.”

The government may issue policy statements on matters of provincial interest relating to municipal planning.⁴⁹ All decisions about planning matters “shall be consistent with” the policy statements.⁵⁰

The Provincial Policy Statement (PPS), revised in March 2005, includes direction about cultural heritage and archaeology. On lands containing archaeological resources, development is only permitted if the 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.⁵¹

The PPS includes a definition of “significant” with regard to cultural heritage and archaeology: “resources that are valued for the important contribution they make to our understanding of the history of a place, an event, or a people.”⁵² In Professor Johnston’s view, the heritage provisions of the PPS have the potential to protect Aboriginal heritage:

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. 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? It turns out that the responsibility for heritage protection is very diffuse and does not always correspond with expertise and resources.⁵³

In the past, the Ministry of Culture was much more involved in reviewing development applications under the *PA* to determine whether the property might contain heritage sites. If the possibility of a heritage site existed, the ministry attached conditions requiring an archaeological assessment and a plan to mitigate damage to the site.⁵⁴ In 1996, the *PA* was amended and many planning approval functions devolved from the ministry to municipalities. Professor Johnston explained the problems with this change in responsibility:

Critics of the devolution have challenged ‘the willingness and ability of these approval authorities to effectively address archaeological concerns.’ 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 “Archaeological Potential” based on screening criteria developed by the Ministry of Culture.⁵⁵

In my view, the Ministry of Culture should again assume a greater role in reviewing and approving decisions about Aboriginal heritage sites, in consultation with the appropriate Aboriginal peoples.

6.6 Archaeological Master Plans

One way to create inventories of known and potential archaeological sites is for cities, towns, and regions to develop archaeological master plans. These plans try to predict where archaeological sites might be located. Municipalities can

then call for archaeological studies prior to any development of the sites identified in the master plan. In 2005, only about ten of the 445 municipalities in Ontario had draft or final archaeological master plans. The municipalities with plans in place include the cities of Toronto and Windsor, the town of Richmond Hill, and the Region of Waterloo.⁵⁶

Archaeological master plans are only effective if they are available and they are used actively. The provincial government should therefore encourage municipalities to develop and use archaeological master plans across the province.

6.7 Public Education

There is a need for public education to support efforts to protect Aboriginal burial and heritage sites. This education should be directed at the general public, heritage enthusiasts, private landowners, and public officials whose activities may involve Aboriginal burial and heritage sites. The provincial government should prepare plain language public education materials to meet this need.

6.8 Aboriginal Burial and Heritage Site Advisory Committee

The priorities of consultation and participation outlined in this chapter highlight the need for an Aboriginal burial and heritage site advisory committee in Ontario. This committee would provide advice to the provincial government about broad issues related to Aboriginal heritage and burial sites.

The Chiefs of Ontario proposed a First Nations Burial Ground Archaeological Sites Committee. I am also aware of the Founding First Nations Circle and the work they have done as part of the plans for the Seaton lands and for Teston Road. First Nations and Aboriginal organizations should work with the provincial government to develop an appropriate committee.

Recommendations

22. The provincial government should work with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness of Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and policies should eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate.

23. The provincial government should ensure that the *Funeral, Burial and Cremation Services Act, 2002* includes the same appeal process for all types of cemeteries and burials and an obligation to consider Aboriginal values if a burial site is determined to be Aboriginal.
24. The provincial government, in consultation with First Nations and Aboriginal organizations, should clarify the meaning of “Aboriginal values” in all Class EA documents and other guidelines and policies applicable to public lands.
25. The provincial government, in consultation with First Nations and Aboriginal organizations, should determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites.
26. The provincial government should encourage municipalities to develop and use archaeological master plans across the province.
27. The provincial government should prepare plain language public education materials regarding Aboriginal burial and heritage sites.
28. The provincial government should work with First Nations and Aboriginal organizations to develop an Aboriginal burial and heritage site advisory committee.

Endnotes

- 1 My approach to this issue is somewhat different from that of previous reports. The Royal Commission on Aboriginal Peoples (RCAP), for example, recommended that governments return sacred lands to Aboriginal ownership. RCAP also recommended an inventory of historical and sacred sites, legislation to ensure that Aboriginal peoples can prevent or arrest damage to these sites, and a review of legislation affecting the conservation and display of cultural artifacts to ensure that Aboriginal peoples are involved. See Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), ch. 4, “Lands and Resources,” recommendations 2.4.58, 3.6.1, and 3.6.
- 2 Comment by a representative of the Ontario Home Builders’ Association who attended the Inquiry’s December 8, 2005 consultation (on Inquiry DVD). The Ontario Home Builders’ Association represents about 4,000 residential builders, who produce over 80% of the housing stock in Ontario. See <<http://www.homesontario.com>>.
- 3 Darlene Johnston, “Respecting and Protecting the Sacred” (Inquiry research paper): “Anishnaabeg” is the term for people who speak Anishinaabemowin, so it would include Odawa, Potawatomi, Ojibway, Mississauga, and some other tribes in the United States.”
- 4 *Ibid.*, pp. 4-5.
- 5 *Ibid.*, p. 7.
- 6 The Chippewas of Nawash Unceded First Nation, “Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash” (Inquiry project), p. 21.
- 7 Johnston, p. 8. 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 an ethereal realm. Rather, they are associated with particular places and seasons and they are intimately engaged in the worldly existence of the Anishnaabeg.
- 8 *Ibid.*, p. 19-29.
- 9 *Ibid.*, p. 15.
- 10 *Ibid.*, p. 24.
- 11 The Estate of Dudley George and Members of Dudley George’s Family submission, p. 46.
- 12 Robert Antone testimony, March 10, 2005, Transcript p. 61.
- 13 See Geoffrey York and Loreen Pindera, *People of the Pines* (Toronto: McArthur & Company, 1991) for more information about the 1990 Oka crisis.
- 14 The Chippewas of Nawash Unceded First Nation, pp 21-34.
- 15 Archie Little 2 is a fourteenth-century Iroquoian settlement located in the Rouge River watershed in Scarborough. The Boyd Park site is located in the City of Vaughan and includes a large Iroquoian village site from 1450-1550. Dreamer’s Rock is an Aboriginal spiritual site located on Birch Island in Lake Huron, near Manitoulin Island. Nochemowenaing (Hunter’s Point) is site located on Georgian Bay at Jackson’s Cove. The site is sacred to the Chippewas of Nawash Unceded First Nation and contains Aboriginal archaeological and burial sites. Mantle is an Iroquoian site from the sixteenth century located in Whitchurch-Stouffville, just north of Toronto. The site includes many longhouses. Milroy is a 170-acre parcel of land in Markham that includes the remains of a large Huron-Wendat village site and possible burial grounds. Moatfield is an ossuary and village site uncovered in North York in 1997. It is likely Iroquoian in origin. Petroglyphs Provincial Park, located northeast of Peterborough, is sacred to Aboriginal peoples. It contains the largest known concentration of Aboriginal rock carvings in Canada. The Red Hill Creek area includes Aboriginal archaeological sites in the Red Hill Creek valley area in the City of Hamilton. These sites

- date from between 9000 B.C. and A.D. 1300. Serpent Mounds Park is located southeast of Peterborough on Rice Lake. It includes ancient Aboriginal burial sites.
- 16 Johnston, p. 27.
 - 17 The Founding First Nations Circle (FFNC), “Aboriginal Burial and other Sacred Sites in Ontario,” p. 1 (on file with the Inquiry). The impetus for establishing the Founding First Nations Circle was the Seaton land development. The Founding First Nations Circle is an informal group of people, from various First Nations that were or still are prominent in Southern Ontario, including the Huron-Wendat, Six Nations of the Grand River, and various Ojibwa First Nations of the north shore of Lake Ontario. The purpose of the Circle is to coordinate input into developments that may have an impact on Aboriginal heritage and burial sites. The Circle does not formally represent any of these First Nations or any of the Aboriginal organizations in Ontario such as the Chiefs of Ontario.
 - 18 *Ibid.*, p. 11. The Founding First Nations Circle advised the Inquiry that the term “ossuary” has been applied in a number of different ways to the mortuary customs of various northeastern North American Aboriginal groups. The term tends to be interchanged with burial pit, mixed graves, and mass burials.
 - 19 Chiefs of Ontario Part 2 submission, para. 76.
 - 20 *Ibid.*, para. 76.
 - 21 *Ibid.*, para. 77.
 - 22 The Founding First Nations Circle, p. 1.
 - 23 Ron Williamson, comments at Inquiry’s December 9, 2005 consultation (on Inquiry DVD).
 - 24 Archaeological Services Inc., “Legislation,” <<http://www.archaeologicalservices.on.ca/legislation.htm>> (accessed January 24, 2007). These figures include but are not limited to Aboriginal heritage sites.
 - 25 The Founding First Nations Circle, p. 4.
 - 26 This data is based on information provided by the Ontario Ministry of Culture at the Inquiry’s December 8, 2005 consultation (on file with the Inquiry).
 - 27 Johnston, pp. 62-3.
 - 28 Hiawatha First Nation, Mississaugas of Alderville First Nation, Beausoleil First Nation, Chippewas of Georgina Island First Nation, Mnjikaning First Nation, Curve Lake First Nation, and Mississaugas of Scugog Island First Nation.
 - 29 Chiefs of Ontario Part 2 submission, para. 85.
 - 30 *Cemeteries Act*, s. 8(2) CA; s. 88(6) of the new Act.
 - 31 *Cemeteries Act* s. 10 CA; s. 89 of the new Act.
 - 32 These are defined as “unapproved cemeteries” and “unapproved aboriginal peoples cemeteries” in the *Cemeteries Act*, and as “burial ground” and “aboriginal peoples burial ground” in the new Act.
 - 33 R.S.O. 1990, chapter P.43, s. 2(1).
 - 34 Ontario. Ministry of Natural Resources. Public Land Management Directive PL 4.02.01, “Application Review and Land Disposition Process,” June 7, 2005. The directive 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.

- 35 For a discussion of public lands designated as provincial parks, see Johnston, pp. 34-5. The new *Provincial Parks and Conservation Reserves Act*, 2006 S.O.2006, Chapter 12, once proclaimed, will include considerable scope for heritage protection in the “purposes” section of the *Act*.
- 36 R.S.O. 1990, Chapter E.18, s. 2.
- 37 *Ibid.*, s. 1(1).
- 38 *Ibid.*, s. 5(1).
- 39 *Ibid.*, ss.5(2) and s. 5.1.
- 40 See for example *R. v. Ontario Realty Corporation*, Ontario Court of Justice, May 17, 2004 (unreported). The Ontario Realty Corporation sold about 170 acres of land in Markham, Ontario (the “Milroy site”) to the Catholic Cemeteries—Archdiocese Toronto. The Milroy site contained a 500-year-old Aboriginal village site. The Catholic Church had plans to construct a 50,000-plot cemetery on the land. The sale occurred without any consultation with Aboriginal peoples. A private prosecution was launched and the Ontario Realty Corporation was found guilty of failing to conduct a proper environmental assessment before disposing of the property, contrary to s.38 of the *Environmental Assessment Act*.
- 41 *Environmental Assessment Act*, ss.1(2) and s.13.
- 42 Including: Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (Class EA-RSFD), approved December 11, 2002; Class Environmental Assessment for Provincial Parks and Conservation Reserves (Class EA-PPCR) approved September 23, 2004; Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario, approved June 25, 2003; and Draft Forest Management Guide for Cultural Heritage Values, released in July 2005.
- 43 S.O. 1993, Chapter 28, proclaimed in February 1994.
- 44 Johnston, p. 41.
- 45 O.Reg.73/94. Sections 15 and 19 to 26 are not applicable to the Ministry of Culture.
- 46 *Environmental Assessment Act*, s.1(1). 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.”
- 47 See note 2.
- 48 The *Planning Act* R.S.O. Chapter P.13.
- 49 *bid.*, s. 3.
- 50 *Ibid.*, s. 3(5)(a).
- 51 Provincial Policy Statement (2005), s. 2.6.2 (on file with the Inquiry).
- 52 *Ibid.*, s. 6.0.
- 53 Johnston, p. 44.
- 54 *Ibid.*, p. 44.
- 55 *Ibid.*, p. 45: “I don’t think we’re in Kansas anymore,” quoting Neal Ferris, “The Rise of the Archaeological Consulting Industry in Ontario” in P. Smith and D. Mitchell, eds., *Bringing Back the Past: Historical*

Perspectives on Canadian Archaeology. Mercury Series Paper 158 (Ottawa: Museum of Civilization, Archaeological Survey of Canada, 1998).

- 56 Ontario. Ministry of Culture, *Strengthening Ontario's Heritage: An introductory guide to identifying, protecting and promoting the heritage of our communities* (Queen's Printer for Ontario, 2005), p. 22.

