



New aboriginal consultation requirements for archaeological assessments

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On Monday November 1, 2010 the Ontario Ministry of Tourism and Culture released new *Standards and Guidelines for Consultant Archaeologists* as well as a new technical bulletin entitled *Engaging Aboriginal Communities in Archaeology*. Together, these documents create requirements for consultation with Aboriginal communities during the Archaeological Assessment process regulated by the Ministry.



This development is important for the energy and other industries as any activity that requires archaeological assessment will now potentially have Aboriginal consultation requirements. While many energy developers are already undertaking Aboriginal consultation as part of regulatory processes, such as Environmental Assessment or Renewable Energy Approvals, the new archaeological assessment requirements codify Aboriginal consultation in this area.

Once compliance with these new requirements becomes mandatory on January 1, 2011, archaeologists will need to conduct consultation with Aboriginal communities as part of Stage 3 and Stage 4 archaeological assessments. While many consultant archaeologists already include Aboriginal consultation in their archaeological assessments as a regular practice, these new documents impose this as a requirement. Further, by imposing this requirement on consultant archaeologists, developers contracting for their services will be unable to scope Aboriginal consultation out of the work to be done by archaeologists on their behalf.

The Ministry is referring to the technical document *Engaging Aboriginal Communities in Archaeology*, as a “living” document. As such, the Ministry is indicating that it will continue to review the document as it engages with Aboriginal communities in order to ensure that it remains useful and effective and continues to reflect emerging best practices and accepted principles.

Following on the development of a growing line of court cases, the Duty to Consult with Aboriginal communities continues to become a part of the normal course of doing business. While the Duty to Consult is owed by the Crown, elements of the Duty are increasingly being delegated to developers and other non-Crown proponents of activities that could impact on the rights of Aboriginal Communities and their members. The changes discussed in this bulletin are but the most recent example of this trend towards imposing responsibilities related to the Duty to Consult on non-Crown entities.

Developers, be they are active in the energy, infrastructure, housing or other sectors need to ensure they are aware of, and comply with, the growing number of situations that may see Aboriginal consultation requirements imposed on them.

SOME DETAILS OF THE NEW STANDARDS AND GUIDELINES INCLUDE:

The standards and guidelines are for consultant archaeologists conducting land-based archaeology in Ontario. Consultant archaeologists undertake archaeological work for clients who are required to address archaeological considerations as part of the land use planning and development process. Under the *Ontario Heritage Act*, anyone wishing to carry out archaeological fieldwork in Ontario must meet the following criteria. They must:

- have a licence from the Ministry of Tourism and Culture
- file a report with the Ministry containing details of the fieldwork that has been done for each project and any other information that the Ministry requires

Following standards and guidelines set out by the Ministry is a condition of a licence to conduct archaeological fieldwork in Ontario.

Purpose of the Standards and Guidelines

Standards set out are the basic technical, process and reporting requirements for conducting archaeological fieldwork. They are practices that Ontario's community of consultant archaeologists have agreed should be followed for every project and will be the standards to which licensees will be held by the Ministry.

Guidelines give guidance or advice on good practice beyond the requirements of the standards or, under certain circumstances, provide an acceptable alternative to the standards when stated conditions are met. Following the guidelines is considered to be a matter of professional judgment on the part of the licensee.

Together, these standards and guidelines give consultants:

- a benchmark for carrying out and documenting archaeological fieldwork in the land use development context, with the goal of ensuring that archaeological conservation in Ontario is carried out at a consistent and appropriate level
- additional guidance for carrying out and documenting certain aspects of archaeological fieldwork and optional practices considered acceptable under special conditions
- flexibility to exercise professional judgment, based on experience and research, to work beyond the minimum standards or respond to local conditions specific to a particular project
- a clear understanding of the Ministry's expectations, which will help to ensure that the review process is transparent, efficient, and timely

SOME DETAILS OF THE NEW TECHNICAL BULLETIN ON ENGAGING ABORIGINAL COMMUNITIES INCLUDE:

The Technical Bulletin is intended to help licensed consultant archaeologists engage Aboriginal communities in archaeology as effectively as possible.

It summarizes the direction on Aboriginal engagement set out in the *Standards and Guidelines for Consultant Archaeologists* and provides information and resources to assist consultant archaeologists in successfully following the standards and guidelines. In this context, engagement means involving Aboriginal communities in each stage of an archaeological project, to the extent and in the manner that best suits their interests and the needs of the project.

Archaeology is particularly relevant to Aboriginal communities because it can help to document Aboriginal histories and peoples and to identify sacred sites and ancestral remains. Engaging Aboriginal communities in archaeology is intended to improve understanding of an archaeological project and enrich the archaeological record. The process demonstrates respect for Aboriginal interests and heritage, recognizes Aboriginal peoples' connection to the land, and allows everyone to benefit from their knowledge.

Engagement considers the interest of Aboriginal communities in the archaeological assessment, the protection of Aboriginal archaeological sites, and the disposition of Aboriginal artifacts and ancestral remains. It also seeks to build relationships with Aboriginal communities that will facilitate their engagement in future projects. Effective engagement requires good planning and begins early in the project.

The Ministry states in the Technical Bulletin that it is committed to continual review of the document with Aboriginal communities and archaeology stakeholders and will update the bulletin as needed to ensure that it is useful, effective and current. The Ministry is encouraging feedback from Aboriginal communities and archaeologists.

WHEN ENGAGING ABORIGINAL COMMUNITIES IN ARCHAEOLOGY IS REQUIRED OR ENCOURAGED

If an archaeological project is in Ontario the consultant archaeologist *must* engage Aboriginal communities at the following stages:

1. In Stage 3, when assessing the cultural heritage value or interest of an Aboriginal archaeological site that is known to have or appears to have sacred or spiritual importance, or is associated with traditional land uses or geographic features of cultural heritage interest, or is the subject of Aboriginal oral histories.
2. At the end of Stage 3, when formulating a strategy to mitigate the impacts on the following types of Aboriginal archaeological sites through avoidance and protection or excavation of:
 - a. rare Aboriginal archaeological sites
 - b. sites identified as sacred or known to contain human remains
 - c. woodland Aboriginal sites
 - d. aboriginal archaeological sites where topsoil stripping is contemplated
 - e. undisturbed Aboriginal sites or
 - f. sites previously identified as of interest to an Aboriginal community

When Aboriginal communities have been engaged as part of an archaeological project, a description of the engagement and a copy of any documentation arising from the process must be provided to the Ministry.

In the event that something unexpected is discovered during a Stage 4 that would change the interpretation of the archaeological site, the relevant Aboriginal communities should be contacted.

Engaging Aboriginal communities at the following additional stages constitutes wise practice, which consultant archaeologists are encouraged to follow. Aboriginal communities should be engaged:

In Stage 1, when conducting the Background Study, in order to identify information sources in local Aboriginal communities (e.g. for information on traditional use areas, sacred sites, and other sites when available and relevant to the property).

In Stage 1, when evaluating archaeological potential and making recommendations to exempt areas meeting the criteria for low archaeological potential from further assessment, in order to ensure there are no unaddressed Aboriginal cultural heritage interests.

In Stage 2, when assessing a property and determining archaeological sites that require Stage 3 fieldwork, in order to determine interest (general and site-specific) in the Aboriginal archaeological sites and ensure that there are no unaddressed Aboriginal archaeological interests connected with the land surveyed or sites identified.

In Stage 3, when making recommendations regarding the excavation or preservation of Aboriginal archaeological sites of cultural heritage value or interest (other than those identified in the standards), in order to review the recommendations with the relevant, interested Aboriginal communities.

If human remains are uncovered at any stage in the fieldwork process you must cease fieldwork and report the discovery to the police or coroner. This is a mandatory requirement of the *Cemeteries Act*.

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