

# mcmillan

## **Watch Your Step... Archaeology and Project Development in BC**

Joint presentation with:





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 Stantec

# Take Away #1 – Know the law

- Archaeology (and related heritage and cultural) issues are addressed under *numerous* acts.
- They all differ and you need to ensure you (or your consultants) know them all.
- There is often a disconnect between the law and practice and knowing the law can help discipline regulatory processes.

# Heritage Conservation Act

- Must not alter a site or undertake archaeological investigations without a permit.
- Protects over 40,000 known sites and also unknown sites.
- Does not include a blanket requirement to “clear” a site before building.

# Heritage Conservation Act (con't)

## Section 13

(2) Except as authorized by a permit ...a person must not do any of the following:

..

(b) damage, desecrate or alter a burial place that has historical or archaeological value...

(c) damage, alter, cover or move an aboriginal rock painting or aboriginal rock carving that has historical or archaeological value;

(d) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846...

# Heritage Conservation Act (con't)

## Section 14

(1) A person must not excavate or otherwise alter land for the purpose of archaeological research or searching for artifacts of aboriginal origin except under a permit or order issued under this section.

(2) The minister may, by permit, authorize a heritage inspection or heritage investigation of any property...

(4) The minister may order that a heritage inspection or heritage investigation be conducted if the minister considers that any one or more of the following apply...

# BC Environmental Assessment Act

- Process to determine if a major project will have significant adverse environmental, economic, social, heritage or health effects.
- Process typically includes substantial consideration of archaeology but no legislated tests or standards.
- At the end of the process, two ministers decide whether project can move into permitting.
- Even if significant adverse effect, ministers may consider project “justified”.

# Canadian Environmental Assessment Act, 2012

– Similar in many respects to BC legislation:

5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are....

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on...

(ii) physical and cultural heritage...

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.



# Mines Act

...As part of the application for the permit, there must be filed with an inspector a plan outlining... a program for the conservation of **cultural heritage resources** and for the protection and reclamation of.. **cultural heritage resources** affected by the mine.... (s. 10(1))

**"cultural heritage resource"** means an object, a site or the location of a traditional societal practice that is of historical, cultural or archaeological significance to British Columbia, a community or an aboriginal people;

# Duty to consult Aboriginal peoples

- Applies in respect of asserted aboriginal rights and title.
- Aboriginal right is a custom, practice or tradition integral to a distinctive culture.
- Archaeology issues may in some cases engage rights and title issues but are not synonymous with them.
- Not every aboriginal interest qualifies and in any case Crown can make balanced decisions if duty is met (*Ktunaxa Nation Council v. (British Columbia) Forests, Lands and Natural Resource Operations*, 2013 BCSC 1921).

# Take Away #2 – Knowing the law is not enough



## Take Away #3 – Understand the terms and don't be afraid to ask questions

- Common terms include:
  - PFR (preliminary field reconnaissance)
  - AOA (archaeological overview assessment)
  - AIA (archaeological impact assessment)
- None has a specific basis in law.
- Can be useful in practice but don't use blindly.



# Take Away #4 – Know the Arch Branch

- Archaeology Branch resides in FLRNO.
- Often deals with consulting archaeologists (not the proponent).
- Permits typically not issued in proponent's name.
- Serves as permitting agency and referral agency.
- Tremendous amount of discretion.

# Take Away #5 – There is policy – but...

## BC Archaeological Impact Assessment Guidelines - Preface

...A particularly important characteristic of these guidelines is **their flexibility**. They are **not intended to be used as a "cookbook"** approach to all development projects. Although certain categories of information are needed for decision-making, each archaeological study **must be tailored to meet specific project characteristics and needs**. It is recognized that the extent of work, particularly in the preliminary stages of project planning, needs to be coordinated with the proponent's level of commitment to the project.

Therefore, representatives of the Archaeology Branch (hereinafter the Branch) will meet directly with the proponent to provide **project-specific clarification and interpretation of the guidelines** where necessary. Depending upon the project, **considerable flexibility can be expected** in the staging of impact assessment and management studies, the level of detail at which the studies are undertaken, and the reporting requirements.

Archaeological assessment and review procedures **are under continual review and are subject to change....**

# Take Away #6 – Understand the role of consulting archaeologists

- Very important role in project success (or not).
- BC Association of Professional Archaeologists established under the *Society Act*.
- Not based in self-governing legislation, unlike:
  - College of Biology Act
  - Engineers and Geoscientists Act
  - BC Agrologists Act

# Take Away #7 – Focus on effective First Nations engagement

- Includes but is not limited to the “duty to consult”.
- Opportunities exist for involvement in archaeology programs as monitors, field workers (but clarity is essential).
- Recognize that preferred relationships with archaeologists can have pros and cons.
- No legal basis for First Nation archaeology permit fees, so decision whether to pay is a business one.



# Take Away #8 – You *do* have the right to challenge

- Administrative challenge
- Office of the Ombudsperson
- Judicial review
- Civil litigation
  - Mackay v British Columbia, 2013 BCSC 945

# Heritage Conservation Act

*“The purpose of this Act is to encourage and facilitate the protection and conservation of heritage property in British Columbia.”*

“(2) **Except as authorized by a permit issued under section 12 or 14**, or an order issued under section 14, a person **must not** do any of the following:

- (a) damage, desecrate or alter a Provincial heritage site or a Provincial heritage object or remove from a Provincial heritage site or Provincial heritage object any heritage object or material that constitutes part of the site or object;
  - (b) damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value;
  - (c) damage, alter, cover or move an aboriginal rock painting or aboriginal rock carving that has historical or archaeological value;
- .....”

In essence, and in practice, the Act does not prohibit development nor impacts to archaeological sites.

the expectation is that there is an appropriate

**“compensation for the unavoidable loss of resource values”**

# What is really required?

Scope and methods are a combination of Regulatory requirements and the judgement of the archaeologist who prepares the permit application

## – Certain (examples)

### – **Inspection**

- Procedures for found human remains
- Areas evaluated to contain **potential** for archaeological sites will be tested at 5 m or less
- CMT recording
- Rock Art recording
- Fire Altered Rock
  
- Reporting

## – Subjective (examples)

### – **Inspection**

- Survey transects will be determined based on anticipated **potential**
- Areas evaluated to contain **potential** for archaeological sites will be tested at.....

### – **Analyses**

- Lithic artifacts will be subject to the **highest possible degree** of analysis
- **All** artifact assemblages will be analyzed with the intent of providing site function, use areas and temporal parameters

# Subjectivity of Archaeological Potential

**Archaeological potential will be evaluated based on the presence or absence of (check all that apply):**

- **Geological, terrain, or micro-topographical features**
- Proximity to potable water
- Slope
- Aspect
- Elevation
- Forest cover
- Soil drainage
- Proximity to sheltered areas (from wind or rain);
- Proximity to areas of potential cultural significance
- Old-growth timber for CMT sites
- Coast lines
- Proximity to cultural resources (e.g., trails; berry patches; fishing sites; travel corridors)
- Any of the above conditions that existed in the past that are not present today (e.g., paleoshores; landforms obscured by agricultural practices)
- Previously recorded archaeological or heritage sites
- Areas identified by interested parties
- Significant disturbance:
- Other (provide detail):

# Subjectivity of studies

“There are a number of different methodologies which may be utilized in conducting inventory studies. The proponent and/or his archaeological consultant must develop an appropriate study plan for the proposed inventory. The Branch will review and comment upon the proposed methodological approach prior to implementation”

# Changing Environment

1990

- First Nation representatives on archaeological projects
- First Nations staff professional archaeologists
- 30 day referral period
- First Nation Environmental Resource Companies
- First Nation Heritage Permits
- First Nation Heritage Policies
- Purchasing sensitive cultural heritage property

- Sequence of Bulletins outlining changing requirements (25)
  - Reporting requirements
  - Recording requirements
  - Qualifications
  - Notice to conduct fieldwork
- Increased requirements for analysis and recording
- MOU with First Nations
- Landmark decisions
  - Marpole (permit amended)
  - Grace Islet

2015

# Starting on the right foot

Early engagement of a registered professional archaeologist and First Nations at the project planning stage

## The Standard Process

### – 3 stages to the process:

1. Archaeological Overview Assessment (AOA)
2. Archaeological Impact Assessment (AIA) Section 14 inspection/investigation
3. Alteration Permit Section 12

### – AOA:

1. Identify conflicts
  2. Identify resource potential
  3. Outline scope and methods for subsequent work
  4. Assessment of anticipated impacts
- Effective tool for planning early enough in the project

# Starting on the right foot

Early engagement of a registered professional archaeologist and First Nations at the project planning stage

## Pre-assessing Risk: Managing Heritage

Is this a good project from a heritage perspective?

- Is there some flexibility in:
  - Design
  - Schedule
  - Cost
- Risk tolerance of the project/company
- Probability of encountering significant finds
  - Human remains
  - Rare finds
- Culturally sensitive area
- What is the social and political environment?
- Expectations for assessment/recording
  - Precedents on other projects
  - First Nation Heritage Policies
  - First Nation involvement/input



# Questions?

**Robin Junger**

Co-Chair, Aboriginal, Environmental, Co-Chair,  
B.C., Oil and Gas

Vancouver t: 778.329.7523  
robin.junger@mcmillan.ca

**Rob Commisso**

Associate, Technical Lead Archaeology

Burnaby t: 604.412.0263  
rob.commisso@stantec.com