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A Canadian Perspective On Legislation and the Role of the Private Sector in Archaeology

ABSTRACT

This paper deals with two aspects of archaeology in Canada: federal and provincial legislation and its effect on the role of the private sector.

In order to look at the existing and proposed legislation at the federal and provincial level the *Recommendation on International Principles Applicable to Archaeological Excavations Adopted by the General Conference at its Ninth Session, New Delhi, 5 December 1956*, prepared under the auspices of UNESCO, is used as a standard against which the legislation of the federal government of Canada and the provincial governments of Alberta, British Columbia, Ontario, and Quebec are examined. In order to discuss the role of the private sector in archaeology, the paper will deal with the manner in which professional archaeologists and private industry are allowed or required to be involved either through legislation or policy by the two levels of government.

In order to appreciate the type and quality of archaeological legislation in Canada, it is necessary to point out that the country does not enjoy the privilege of having its own constitution. At the present time all legislation is derived from the British North America (BNA) Act which was passed by the British Parliament in 1867 when Canada became a nation (Canada 1867). Under the BNA Act the provinces were given exclusive power to legislate laws on specific matters such as "property."

Since all archaeological sites are located on property and all objects are property, the Provinces have considerable power to pass and enforce legislation dealing with archaeology. However this is not to say that there is no federal legislation on this matter.

Since the federal government does have power to pass legislation concerning Crown Land, that is, federally owned land which in fact comprises 45% of the country, there are

several important aspects of archaeology that do occur at the federal level. In addition there are certain privately owned lands, such as railway lands, which are exempt from provincial statutes and are under federal jurisdiction.

The National Parks Act passed in 1930 (Canada 1930) enjoins "the Governor in Council to preserve any historic landmark or any object of historic, prehistoric or scientific interest of national importance". There are now over 100 National Historic Sites and Parks under federal control. At least 20 of the sites are archaeological sites or contain significant archaeological resources.

The Historic Sites and Monuments Act of 1953 (Canada 1953) enjoins the Minister to commemorate sites and structures which are related to the history of Canada or "illustrate effectively the culture of a prehistoric people, or shall be associated with important archaeological discoveries which have affected ideas and concepts to a major degree." Of the 700 designations made under this act, approximately 50 have been archaeological sites.

Both of these programs come under the jurisdiction of Parks Canada which is part of the Department of Indian and Northern Affairs. While the Minister has selected numerous sites for designation because of their national importance, this in no way constitutes a complete inventory of archaeological prehistoric or historic sites within the jurisdiction of the National Parks or all the land north of the sixtieth parallel which is under the jurisdiction of the Department. That survey is yet to be carried out.

The Museum of Man which is part of the National Museums of Canada Corporation is the other major federal agency which is concerned with archaeology. In addition to its functions of research, storage, and display, the Museum is responsible for the National Inventory of Prehistoric Archaeological Sites. This Program which is being carried out in conjunction with the provinces has inventoried over 40,000 sites. This will grow by another 20,000 in the next few years. The

Museum of Man provides the coordination for the computerization of the material. While this is a useful resource tool, the responsibility and authority for selecting sites for designation and protection belongs to the province within its borders and to the federal government on all federal crown land.

The final area of federal government involvement that I would like to discuss deals with legislation to control the illicit export of cultural property.

The New Delhi Recommendation suggests that: "In the higher interests of the common archaeological heritage, each Member State should consider the adoption of regulations to govern the trade in antiquities so as to ensure that this trade does not encourage smuggling of archaeological material or affect adversely the protection of sites and the collecting of material for public exhibit" (UNESCO 1956).

The Cultural Property Export and Import Act (Canada 1976) which was passed by Parliament, although it has not been given Royal Assent, is patterned after British law. In addition to a clause which will allow Canada to sign the *Convention on Illicit Export and Import of Cultural Property*, the bill provides control over the export of cultural objects from Canada. This includes all objects which are retrieved from the soil and waters of Canada.

The export of all archaeological objects is subject to a permit. The permit is given by the Province from which the object came. In addition to the question of age and value, the provincial examiner will be concerned with determining if the object came from a protected site, in which case it would be illegal to own or sell the object. In the case of objects of exceptional value, determination would be made on whether it may leave the country. If the Province denies an export permit to the owner, an appeal may be made to a panel of experts established by the federal government. Where objects of exceptional cultural value are involved, and the export permit appeal is denied by the Federal Board of Ex-

aminers, the federal government may provide funds to the province for purchase.

It should be noted at this point that Quebec has controlled the export of cultural property by not allowing "Recognized property to be transported outside Quebec without permission of the Minister." (Quebec 1972). The question has been raised of whether such a provision is beyond the jurisdiction of a province to enact.

As indicated at the beginning of this paper, the provinces have a primary responsibility for the protection of archaeological sites within their jurisdiction. It is necessary to begin with a discussion of the provincial legislation which has been passed to identify and classify archaeological property. The New Delhi Recommendation says: "Each Member State should ensure the protection of its archaeological heritage, taking fully into account problems arising in connexion with excavations and in conformity with the provisions of the present Recommendations" (UNESCO 1956).

Although all 10 provinces have legislation which deals with archaeological property either in its own right, as a historic site or as cultural property, there are only four provinces where legislation is well enough defined that it can be analyzed in a comprehensive manner.

The British Columbia *Archaeological and Historic Sites Protection Act* (British Columbia 1971) is interesting on two counts. Unlike the acts in the other provinces, this legislation was written primarily for the protection of prehistoric archaeological property rather than structures or historic sites. The legislation is also the most general of the four acts which will be discussed. However, it has been enforced more rigorously and every nuance has been used to provide protection for prehistoric sites in the face of massive development of the land.

The Ontario *Heritage Protection Act* (Ontario 1974) deals with archaeology under the broad term of heritage. While the act shows a

strong bias toward architectural heritage the legislation does ultimately contain many of the elements found in the New Delhi Recommendation. The most interesting aspect of the law, however, is the extraordinary amount of attention that is given to the application for a license to survey or excavate. The law, which is 37 pages long, devotes 10 pages to granting licenses, appeals, and reviews for individuals whose licenses are withheld or withdrawn.

The Alberta *Historical Resources Act* (Alberta 1973) and the Québec *Cultural Property Act* (Quebec 1972) are the two best pieces of legislation in the country. Both provinces deal with archaeology in its broadest sense. In Alberta sites are considered historical resources while in Quebec they are classified as cultural property.

The New Delhi Recommendation suggests that the State should: "Define the legal status of the archaeological subsoil and, where State ownership of the said sub-soil is recognized, specifically mention the fact in the legislation" (UNESCO 1956). All of the provinces discussed in this study define the legal status of archaeological subsoil in a broad fashion. In Alberta, archaeological sites and objects are included in: ". . . any historic site containing historical resources which are buried or partially buried on land or submerged or partially submerged beneath the surface of any watercourse or permanent body of water" (Alberta 1973).

The only other two provinces which are presently protecting underwater sites are the provinces of Newfoundland and British Columbia.

In Quebec, archaeological property is "any moveable or immovable property indicating prehistoric or historic occupation that is considered to be cultural property." (Quebec 1972).

When considering the classification or designation of archaeological sites and objects, it should be noted that the recommendation maintains that the state should consider classifying as historical monuments the essential

elements of its archaeological heritage. This is perhaps the key element in the preservation of archaeological cultural property. Once a site or an object has been classified or designated, then the state is able to take further action according to its legislation. Classification or designation is a central feature in the legislation of all of the provinces under consideration.

In Quebec: "All cultural property, including any property in the public domain, may be recognized or classified in whole or in part by the Minister in accordance with this division" (Quebec 1972).

Since classification of property often involves sites or objects in private ownership, each of the provinces does include a clause in its legislation which allows for compensation to the owner. In British Columbia the owner may be compensated if "it is shown that the value of the land is diminished by reason of designation."

In Alberta: "The Minister may authorize the payment of compensation in accordance with the regulations to any person who has suffered loss as the result of the application of any provisions of this Act or the regulations" (Alberta 1973).

Along with the compensations all of the provinces impose penalties for the infringement of the regulations. In British Columbia a contravention of the act makes the offender liable to a fine not exceeding \$1,000 or imprisonment for more than six months. In Quebec, the fine cannot exceed \$5,000. Where classified cultural property is changed, altered, deteriorated, or destroyed without permission of the minister, he may charge all work done to restore the property to its former condition to the owner. In Ontario the Minister may take the same action to restore property. In addition an individual is liable to a fine of not more than \$10,000 and a corporation is liable to a fine of \$50,000. In Alberta everyone who contravenes the act is liable to a fine of up to \$50,000 and imprisonment of up to one year. In addition an altered or destroyed

Classified Historic Site may be restored by the Crown at the owner's expense.

Many of the New Delhi Recommendations refer to the role that is played by the archaeologist. This concern is also displayed in the provincial legislation that deals with licences, supervision, maintenance of sites, disposition of objects, and the preparation of reports.

The International Principles recommend that each member state: "Make archaeological explorations and excavations subject to prior authorization by the competent authority". (UNESCO 1956).

In Alberta no person "may make excavations on any land for the purpose of seeking heritage objects or resources without holding a valid and subsisting research permit." The same holds true for Quebec. In Ontario a permit or license is required to carry out an archaeological survey or excavation, alter a property, or remove an object only on designated sites. No permit is required for undesignated land.

In order to apply for a permit, an application must be prepared. In Ontario the application is reviewed by the Archaeology Committee of Ontario Heritage Foundation for the Minister. There are no explicit rules concerning credentials, thus it is possible for amateurs as well as trained archaeologists to receive a permit.

In Quebec the Minister is advised by a committee whose membership includes several staff archaeologists from the Ministry of Culture and from four to five individuals who are called upon from a pool of a trained archaeologists in the private sector. Archaeologists from the private sector must have a masters degree to sit on the committee. Although there are precise credentials required to obtain a license, amateurs are not allowed to survey or excavate; semi-professionals may receive a permit to carry out a survey, and professionals will be considered for survey and excavation permits.

In Alberta regional staff archaeologists review applications for their areas. They submit a recommendation to the Chief Provincial Ar-

chaeologist who makes the final recommendation to the Minister. The minimum standard for anyone who receives a permit to survey or excavate is a master's degree in archaeology or anthropology, previous experience in a cultural or geographical area similar to the proposed site, and demonstrated experience with a wide range of activities. The first time an individual applies for a permit he must submit a vita and letters of recommendation.

In 1976 Alberta gave no permits for underwater archaeology, 2 permits for survey of historic archaeological sites, 50 permits for the survey of prehistoric sites, and 18 permits for excavation of prehistoric sites.

In Quebec where less survey work is being carried out in conjunction with development planning, 4 permits were given out for historic sites and 13 permits were given out for prehistoric sites. Of the 17 permits which were issued, only 5 were for full scale excavation.

In most cases after the licensee receives the permit, there is very little supervision from the provincial staff until the report is prepared. In most provinces the staff generally makes no inspection trips to the site except in a few rare cases where there is some concern about the permit holder.

Looking more specifically at the New Delhi Recommendation and provincial legislation as they pertain to the disposition of archaeological sites and objects it can be seen that in dealing with the assignment of finds, the New Delhi Recommendation suggests that: "Each member state should clearly define the principles which hold good on its territory in regard to the disposal of finds from excavations" (UNESCO 1956).

In Ontario: "The Minister may direct that any object taken under the authority of a license or permit be deposited in such public institutions as he may determine to be held in trust for the people of Ontario" (Ontario 1974).

In Alberta, the permit holder is required to: ". . . deliver possession of all heritage objects recovered while excavating, pursuant to the research permit, to any public institution

which the Minister may designate” (Alberta 1973).

In order to ensure that the state is advised of all cultural property that is found, the New Delhi Recommendation would: “. . . oblige any person finding archaeological remains to declare them at the earliest possible date to the competent authority” (UNESCO 1956).

In Ontario an individual has to inform the Minister of archaeological property only when he is required by the Minister. In Quebec the law is more stringent: “Whoever discovers an archaeological property or site must inform the Minister of it not later than 15 days from its discovery (Quebec 1972).

When archaeological property is discovered during ordinary excavation or construction, the Minister must be notified immediately.

In order to ensure that all objects will be declared, the recommendation suggests that: “any undeclared object should be subject to confiscation.” The only province to deal with this issue is Ontario. The act states that: “Any object that is taken by a person who is not a licensee in contravention of his licence . . . may be seized . . . and deposited in such public institution as the Minister may determine” (Ontario 1974).

In order to provide control over the separation of objects from their site, which diminishes the integrity of both, the New Delhi Recommendation suggests that: “Prior approval should be obtained from the competent authority for the removal of any monuments which ought to be preserved *in situ*” (UNESCO 1956).

British Columbia and Alberta have passed legislation to ensure this integrity by prohibiting any person or agency from removing an object from a designated site without the permission of the Minister.

So far the discussion has dealt with legislation which deals with identification and ownership of archaeological property. Now the problem of conservation of sites and objects will be examined.

The New Delhi Recommendation suggests

that: “Careful supervision should be exercised by each member state over the restoration of archaeological remains and objects discovered” (UNESCO 1956).

While none of the provinces have passed legislation which requires that objects be conserved, there seems to be a general agreement among the profession that the objects should be conserved. It would seem that this is honored more in principle than in fact.

The greatest cause for alarm relates to the matter of the conservation of sites and the objects which are left *in situ*. The New Delhi Recommendation suggests that:

The deed of concession should define the obligation of the excavator during and on completion of his work. The deed should, in particular, provide for guarding, maintenance and restoration of the site together with conservation, during and on completion of his work, of objects and monuments uncovered (UNESCO 1956).

None of the provinces deal with this contentious matter in their legislation. Alberta requires a permit holder to restore the site to its normal condition after the completion of the excavation; in other words to restore the contours of the land. There is no legislation which requires the archaeologist to conserve the site or the objects which are left *in situ*.

This is perhaps one of the most serious problems that faces the archaeological community which places great emphasis on obtaining data and retrieving objects, some emphasis on the conservation of objects but virtually no concern for the conservation of the site itself or the architectural remains so that they may be examined by future generations, developed for the education and appreciation of the public or maintained as a cultural resource.

The matter of preparing reports is clearly addressed in the New Delhi Recommendation. It states that

The conceding State should require the excavator to publish the results of his work within the period stipulated in the deed, or, failing such stipulation, within a reasonable period. This period should not exceed two years for the preliminary report (UNESCO 1956).

Each of the provinces requires the holder of an archaeological research permit to make a report of the field work. Quebec and Ontario publish regulations which outline precisely what is to be included in the report. In Alberta the format that is suggested is the same format that is used for its publication; however, its use is not required.

In each province the completed reports remain with the Ministry. In Quebec, where a complete documentation centre has been established for all cultural property, the reports are deposited with that section of the ministry.

On yet another topic, that of the need for inventories of archaeological sites, it is interesting to note that the New Delhi Recommendation does not call for the State to carry out an inventory of all known archaeological property. This is perhaps the most serious deficiency of the document. The Recommendation does suggest that each member state should consider: "Maintaining untouched, partially or totally, a certain number of archaeological sites of different periods in order that their excavation may benefit from improved techniques and more advanced archaeological knowledge" (UNESCO 1956).

While this is a most important aspect of the preservation of archaeological resources, it does require a good deal of information about the scope of the resource. Unless inventories are made it is impossible to establish standards or priorities for the selection of sites to be preserved.

While there is the National Inventory, most of the provincial legislation does not call for an inventory program. The exception is Quebec where the Cultural Property Act does state that: "The Minister Shall make an inventory of cultural property that might be recognized or classified" (Canada 1976).

The practice in provinces such as British Columbia, Alberta, and Quebec, however, is to put great emphasis on archaeological surveys. In these provinces where land and resource development is a major factor, the government agencies or private companies are

being required to carry out surveys of archaeological sites as part of their planning process. The importance which is being attached to this work is seen in Quebec where a revision to the *Cultural Property Act* is being considered which would require all agencies who carry out land development to set aside 1% of project budget for archaeological survey and exploration.

This shift in emphasis has had a profound impact not only on the business community within the private sector but also on the archaeological community. In Alberta 50 out of the 70 permits issued for 1976 were given for surveys. Since $\frac{2}{3}$ of the total field program in Alberta is carried out by the private sector, it is obvious that the traditional excavation program has been superseded in part by the need to carry out inventories of archaeological sites.

When considering that only 3200 sites in Ontario and 1500 sites in Quebec have been inventoried while in Alberta, 9000-10,000 sites have been listed because a program of surveying has been carried out since 1973 in order to meet the demands of land development, it is easy to begin to see the scale of involvement for the business community and the archaeologist.

It is interesting to note that the manner in which individual provinces make funds available to the archaeologist in the private sector is related to its interests in surveys and salvage archaeology. In Ontario where much of the archaeology still tends to be devoted to the traditional excavation of individual sites, the work is carried out with grants from the Ontario Heritage Foundation. In Quebec where 95% of the work is salvage archaeology, the private archaeologist is hired on contract. In Alberta, with its emphasis on surveys, there are no funds for grants. Archaeologists are hired to carry out specific projects for the province or private companies.

It would seem that in those areas of Canada where land development is being carried out, whether it is for new roads, construction, or

the exploitation of natural resources, the provincial government, the business community, and the archaeologist each has a role to identify archaeological resources and to determine how they should be preserved for future generations.

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