



## Protecting Indigenous cultural sites: Some tools from Canadian law your community can use

A developer has proposed a project that will threaten the integrity of a place that is important to your community. What tools are available from Canadian law to help to protect the site?

This is a common problem mostly because European colonization took place in a way that failed to take account of the ways that the land was, and continues to be important to Indigenous people. Most often, colonial governments never bothered to ask Indigenous communities where the places most important to their ceremonies were. Canadian law still does not do a great job of recognizing the jurisdiction of Indigenous communities over the places that have been important to them for generations.

We've prepared this brief guide to give you a sense of the tools in Canadian law that could be available to help in your situation. Depending on the facts of your case, you may be able to use these tools to bring Crown governments and proponents to the table to help them do the right thing.

### Is it an archaeological site?

Provincial laws protect archaeological sites from destruction by development projects. In Ontario, the relevant law is the *Ontario Heritage Act*. If anyone finds an artifact on the land, this law makes it illegal for them to remove or disturb it. An artifact is defined broadly as an "object, [...] made, modified, used, deposited or affected by human action and is of cultural heritage value or interest".

The *Ontario Heritage Act* says that only archaeologists who are licenced by the provincial government are allowed to remove those artifacts, and only after an investigation. If a developer disturbs an archaeological site without employing a licensed archaeologist, they might be subject to fines or even jail time.

Archaeologists in Ontario are governed by *Standards and Guidelines* that are published by the Ontario government. In order for archaeologists to keep their licences, they have to comply with those *Standards and Guidelines*. One of the most important requirements of these *Standards and Guidelines* is that archaeologists must involve Indigenous communities into their investigations, with the goal of doing their research in a way that is respectful of Indigenous laws.

Often, the most respectful thing that can be done with a historical artifact is leaving it alone on the ground. In negotiations with developers and archaeologists, it will often be possible for your community to convince them to do the right thing by leaving the archaeological site alone.

### Does it involve a burial site?

A burial site will often also be an archaeological site. In that case, all of the protections that apply to archaeological sites, as discussed above, also apply to burial sites.

Other protections also apply. There are provincial laws that protect human remains and burial grounds. In Ontario, the *Funeral, Burial*

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*and Cremation Services Act 2002* prohibits disturbing, or ordering someone to disturb a burial site. The federal *Criminal Code* also makes it a crime to disturb human remains. Breaking these laws could lead to fines or jail time as well.

In Ontario, the law as it currently stands asks for the developer and the Indigenous community closest to the burial ground to try to come to an agreement about what should happen to those burials. Depending on the situation, the community may want to insist on protecting the burials where they currently rest, or they can agree to move them to another location.

### **Is it a place important to ceremonies?**

If a place is important for ceremonial reasons, it may also be possible to use various constitutional rights to protect it.

The *Charter of Rights and Freedoms* protects the freedom of religion. Another part of the Canadian constitution also protects the rights of Indigenous people to continue in their traditional practices, especially if these practices take place on a specific site. In some cases it may be possible to argue that the site should be protected by Aboriginal title, so that the community would be allowed to exclude anyone else from it.

Although sometimes it may be necessary to go to court to get recognition of these rights, often times just reminding the project proponent and the Crown that you have these rights under the constitution are enough to get them to do the right thing and stop disturbing your sites.

### **Are there other organizations your would be willing to work with?**

Depending on the nature of the place, it may be possible to work together with other organizations toward a plan to protect the site.

In the past, organizations such as the Ontario Heritage Trust, Parks Canada, Parks Ontario or other conservation body have worked with Indigenous communities to help protect sites important to them. Sometimes these organizations may even be able to contribute funding toward buying the threatened land from the current landowner, and then protecting the site.

### **Long term protection options**

Other than protecting the site as a provincial or national park, or national historic site, it is also possible to secure a more “low-key” set of protections. These tools can structure a landowner’s obligations under Canadian law in a way that is respectful of the community’s requirements under Indigenous law.

One of the options that are available is something called a “conservation easement”. This is where a landowner agrees to protect a part of her property from disturbance, agrees to register a condition on her title that requires anyone who buys the land to similarly protect the land. This kind of tool can also be used to preserve the rights of communities to access those lands for ceremonial purposes in the future as well.



**By Senwung Luk**

Partner, OKT LLP

416.981.9443

sluk@oktlaw.com

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