

# Indigenous Consultation Themes - Summary of Feedback and Considerations

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## Introduction

Schedule 7 of the *Protect Ontario by Unleashing our Economy Act, 2025* made legislative amendments to the Ontario Heritage Act (OHA) that focus on Part VI of the Act which deals with the conservation of archaeological resources. These changes introduced a new exemption tool to advance provincial priorities and also updated enforcement and compliance measures.

The new exemption tool, once in force, and subject to the regulation, will enable the Lieutenant Governor in Council (LGIC) to exempt a property from most archaeology requirements under the OHA and other statutes that require archaeological assessments.

- The purpose of this exemption is to enable properties on which provincial priority projects would be carried out to be exempted from most of the requirements of Part VI of the OHA to support identified provincial priorities.
- If established exemption criteria are met the LGIC may issue an Order in Council (OIC) allowing the project to be exempt from archaeological assessment and licensing requirements, where doing so could potentially advance an identified provincial priority.
- Conditions to the exemption could also be set out in the OIC, which could be informed by comments from Indigenous communities on the individual exemption requests.

Note that all proposed exemption criteria and any processes and criteria established by the Ministry would need to be met in order for the LGIC to consider granting an exemption. The LGIC would still retain final discretion to not grant an exemption request, even where all criteria are satisfied.

## Draft Regulation

The Ministry is committed to acting in a manner consistent with its obligations under section 35 of the Constitution Act, 1982, including the duty to consult.

Through ongoing consultation with Indigenous communities, the ministry has been receiving and considering thoughtful feedback on the draft policy intent for the proposed exemption process. The draft proposed regulation shared represents a snapshot in time of the proposed regulation, and it may continue to evolve as consultation progresses. MCM is seeking feedback on the draft regulation, which sets out criteria that must be met for a property to be eligible for an exemption. The draft regulation sets out requirements for restricted areas and the definition of "significant known archaeological site".

The draft regulation is being provided as part of an ongoing consultation process to assist the public and Indigenous communities to understand and provide informed comments on the proposals as they exist to date. The feedback received from all consultations and engagements will be considered and MCM may make further adjustments to the draft regulation as it is finalized. In addition, where relevant and appropriate, feedback provided will also be considered as part of the MCM's Heritage Framework Transformation consultations.

### **Proposed Operational Policy**

MCM is considering further options, to be set out in operational policy, to assess the necessity of the project for which the exemption is being sought and determine the process for the exemption and screening criteria used to inform whether an exemption should be granted.

### **Heritage Framework Transformation Proposals and Ongoing Consultations**

MCM will also be consulting with Indigenous communities on proposals for the Heritage Framework Transformation (HFT) this fall, including an examination of the current provincial Standards and Guidelines for Consultant Archaeologists, related process timelines and reporting requirements and compliance frameworks, including licensing and permit models. Comments from Indigenous communities regarding the role of Indigenous communities in the archaeology assessment process, the Standards and Guidelines for Consultant Archaeologists, and capacity funding for Indigenous monitors, have been documented for consideration as part of the upcoming HFT consultation process.

## **Consultation Themes and Considerations for Draft Regulation**

MCM has carefully considered feedback from Indigenous communities provided during consultations to date. Below is an overview of the consultation feedback which identifies how feedback provided so far is reflected in the proposed draft regulation, where feedback may continue to be considered in the context of the final regulation, proposed operational policy or Heritage Framework Transformation proposals, and where feedback is not under consideration.

### **1. CONSULTATION FEEDBACK: Consultation with Indigenous Communities**

Consultation discussions and feedback from Indigenous communities emphasized the importance of consultation on individual exemption requests as well as consideration of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free, Prior and Informed Consent (FPIC). While references to consultation and UNDRIP have not been

included in draft regulation, the Ministry is committed to acting in a manner consistent with its obligations under section 35 of the *Constitution Act, 1982*, including the duty to consult.

## **PROPOSED ACTIONS:**

Draft Regulation: The proposed draft regulation would set out that notification of the recommendation for an exemption is required for all Indigenous communities that have or may have Aboriginal or treaty rights that may be adversely impacted prior to the request for exemption being made to the LGIC.

Proposed Operational Policy: MCM is considering the development of operational policy that may set out further requirements to be eligible for an exemption; for example, that the sponsoring ministry provide written confirmation that a consultation plan has been developed.

Heritage Framework Transformation (HFT) Proposals: HFT consultations will include discussions on the *Standards and Guidelines for Consultant Archaeologists* and the role of Indigenous communities in the archaeological assessment process.

## **2. CONSULTATION FEEDBACK: Necessity for Exemption**

Consultation discussions and feedback from Indigenous communities emphasized a desire for greater clarity around qualifying provincial priorities, economic importance and urgency for exemptions.

## **PROPOSED ACTIONS:**

Draft Regulation: The draft regulation would require the ministry of the sponsoring minister to identify that activities on a property being proposed will be economically significant or strategically important to the Ontario economy.

Proposed Operational Policy: MCM is considering the development of further requirements in operational policy for example, requiring the sponsoring ministry to detail how the exemption advances one of the identified provincial priorities of: transit, housing, health and long-term care or other infrastructure, or other priorities that may be prescribed in regulation.

Proposals for operational policy under consideration also include requiring the sponsoring ministry to provide clear description of outcomes of the project and material benefits province-wide or regionally.

### 3. CONSULTATION FEEDBACK: Protection of Archaeological Resources

Consultation discussions and feedback from Indigenous communities emphasized the importance of incorporating Indigenous knowledge, input and perspectives to ensure the protection of archaeological sites and Indigenous sacred sites. Indigenous communities raised concerns that the definition of Significant Known Archaeological Site did not include sites known to Indigenous communities or incorporate traditional knowledge. Additionally, feedback was provided on the proposed screening criteria.

#### PROPOSED ACTIONS:

Draft Regulation: The draft regulation identifies properties which may not be granted an exemption, and/or that an exemption is granted, it would only be granted subject to conditions.

Properties identified in the draft regulation relate to known or potential burials, which would include former Indian Residential School sites, cemeteries and known burials

Additionally, some properties that contain known archaeological sites and that are subject to some form of legal protection would also be excluded from exemptions. For example:

- Properties protected under other parts of the OHA, such as those that are designated by the municipality or Minister, or subject to an easement
- Properties that contain a "significant known archaeological site", including a significant known archaeological site to which Part III.1 of the Act applies.

The draft regulation would define the term Significant Known Archaeological Site to support the proposed exemption criteria. To respond to feedback heard during consultation with Indigenous communities, the proposed definition includes that significant archaeological sites identified by Indigenous communities as having cultural heritage value or interest are considered.

The draft regulation would also require that a sponsoring ministry must consider the archaeological potential of the property by applying the processes and criteria established by MCM.

The draft regulation does not incorporate the requirement set out in the criteria provided at the beginning of consultations that excluded properties which have had archaeology assessments initiated and there are recommendations for further assessment. This proposal may unduly limit the ability of government to make decisions that would promote

economic growth in the province, consistent with the objectives of the *Protect Ontario by Unleashing our Economy Act, 2025*.

Proposed Operational Policy: MCM is considering setting out further guidance in operational policy in relation to a screening process to determine a property's archaeological potential (i.e., likelihood previously unknown resources may be found).

This screening process could potentially include:

- Consideration of an existing municipal or regional archaeological management plan (AMP) that shows the property to be within an area of archaeological potential.
- If no AMP is in place, MCM would apply archaeological potential screening criteria and make a recommendation on the exemption request. Examples of screening criteria could include:
  - Known archaeological sites within 300 metres of the property or project area,
  - Past or present water sources within 300 metres of the property or project area,
  - Indigenous or local knowledge of archaeological sites on or within 300 metres of the property or project area,
  - Indigenous knowledge or historically documented evidence of past Indigenous use on or within 300 metres of property or project area.
  - Known burial site or cemetery on the property or adjacent to the property or project area.
  - evidence of an early settlement and/or early transportation routes on the property or project area.

Heritage Framework Transformation: Comments heard during consultation on screening criteria have been noted for consideration through HFT.

#### **4. CONSULTATION FEEDBACK: Exemption Conditions**

Consultation discussions and feedback emphasized the importance of archaeological resources to Indigenous communities, and the need to mitigate the loss of archaeological sites by enhancing the role of Indigenous communities in the process. The need for funding, capacity building and training for Indigenous communities to support their participation in consultations and joint decision-making was also raised during consultations.

#### **PROPOSED ACTIONS:**

Draft Regulation: The OHA already allows for the LGIC to place conditions on an exemption. These conditions would be set out in the Order in Council granting the exemption. The draft regulation also clarifies that the Minister's authority to require an archaeological

assessment, and conduct investigations and/or inspections will not be exempt. Put another way, even if an exemption has been granted, the Minister will continue to have the power to take actions to conserve archaeological resources.

Proposed Operational Policy: MCM is considering operational policy that could provide examples of potential conditions. This may include conditions which:

- Could limit extent of the exemption to a portion of property or certain properties within the project area.
- Could allow the exemption to be revoked where a significant archaeological site is subsequently discovered during construction
- Where the proponent indicates that they will take accommodation or mitigation measures as part of their proposal, a condition to guarantee those steps/actions could be included.
- Further conditions may be applied reflecting the unique location of the property or nature of the provincial priority project, as deemed necessary by the LGIC.

Heritage Framework Transformation: Consultation feedback about the role of Indigenous communities within the archaeological assessment process, including building capacity for Indigenous monitors, have been noted for consideration as part of HFT consultations.

## **5. CONSULTATION FEEDBACK: Other Feedback that Remains Under Consideration:**

We received feedback that, while not reflected in the draft regulation, will continue to be considered further:

- How the boundaries of former Indian Residential School sites should be defined within the proposed draft regulation.
- How and whether Indigenous sacred sites are captured under the screening criteria that may be applied through the operational policy.
- Including requirement for consultation plans as part of exemption process.

We received feedback from Indigenous communities that falls outside of the scope of the draft regulation, but that will continue to be considered in the context of consultations on HFT. This feedback includes:

- The need for funding, capacity building and training for Indigenous communities to support their participation in the archaeological assessment process.
- Potential changes to the *Standards and Guidelines for Consultant Archaeologists*, including the role of Indigenous communities.
- Opportunities to enhance province-wide mapping and data on archaeological sites to include data from Indigenous communities, municipalities and provincial heritage databases.

## 6. CONSULTATION FEEDBACK: Feedback Not Reflected in the Current Draft Regulation

While the Ministry is continuing to gather feedback to further understand varying perspectives, some feedback is not reflected in the current draft regulation after careful consideration.

We received feedback that Indigenous communities should have a decision-making role with respect to exemptions. The Ministry will consider the perspectives of Indigenous communities through consultation on individual exemption requests, consistent with s. 35 of the *Constitution Act*, 1982, and through requests from Indigenous communities identifying a significant known archaeological site.

### Next Steps

Ontario is committed to acting in a manner consistent with its obligations under section 35 of the *Constitution Act*, 1982, including the duty to consult. The draft regulation is being provided as part of an ongoing consultation process to assist Indigenous communities and the public and to understand and provide informed comments on the proposals as they exist to date.

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The feedback received from consultation continue to be considered and MCM will consider making further adjustments to the draft regulation based on feedback going forward. In addition, where relevant and appropriate, feedback provided will also be considered as part of proposed operational policy and MCM's Heritage Framework Transformation process.