



Informational Briefing Note

October 28, 2025

Taking Action to Stop Bill 5 and Protect Indigenous Cultural Sovereignty:

Responding to Ontario's Proposed Regulation to Exempt Sites from Archaeological Assessment

Issue

Ontario is moving ahead with implementing Bill 5, and unless a [newly proposed regulation](#) that would allow sites to be developed and construction to occur, absent any archaeological assessment being withdrawn or substantially amended, the protection of cultural heritage and Indigenous cultural sovereignty will be jeopardized.

The deadline to provide comments on the draft regulation via the Environmental Registry of Ontario (ERO) is **November 16, 2025, at 11:59 pm EST**. We strongly encourage you to share your views with the province via the ERO ([ERO No. 025-1081](#)) and invite you to draw on our recommendations, detailed below.

Background

On October 2, 2025, the Ministry of Citizenship and Multiculturalism released the proposed Archaeology Exemption Criteria Regulation. This proposed regulation operationalizes the amendments to the *Ontario Heritage Act* ushered in by Schedule 7 of the omnibus Bill 5, *Protect Ontario by Unleashing our Economy Act, 2025*. If passed, it grants sweeping powers to the province to exempt properties from requirements to conserve and protect [resources of archaeological value](#) (e.g., artifacts and archaeological sites that may have cultural heritage value or interest, such as those associated with beliefs or activities that are significant to a community).

One of the key ways by which resources of archaeological value are protected is through [archaeological assessments](#). Archaeological assessments are conducted prior to land development and as part of environmental assessments to review the property for the presence of resources of archaeological value and to ensure that mitigation strategies can be in place to protect the resources.

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The proposed regulation sets out the criteria under which a property may be exempted from archaeological assessments. These criteria - all of which grant broad and undefined authority to the government - must be satisfied for a property to be exempt from having an archaeological assessment.

The proposed regulation contemplates exemptions when:

- 1) Indigenous communities have been identified and notified when an exemption has been recommended that may adversely impact their rights;
- 2) Activities are or will take place on the property that, in the government's opinion, are "economically significant" or "strategically important to the Ontario economy";
- 3) The property does not include a "significant known archaeological site", burial site, cemetery, "aboriginal peoples' burial ground", or a site of a former Indian residential school; and
- 4) The property does not include a site of cultural heritage value or interest that has been identified by an Indigenous community (which would make it a "significant known archaeological site" and therefore not eligible for exemption), based on information that the government considers "appropriate and sufficient".

These criteria provide little to no clarity on how the government will determine if an activity is "economically significant" or of "strategic importance" or know - without having first conducted an archaeological assessment - whether the site is of "cultural heritage value or interest". The regulation does not provide any quality assurance or guarantee of adequate oversight to ensure that archaeological resources are not harmed, destroyed, or missed altogether in the course of developing a site.

What's more, the government is relying on yet-to-be-developed policy guidance to detail conditions it might place on exemptions or screening criteria it may rely on when determining whether a site has "archaeological potential".¹

Removing requirements for archaeological assessments is the province's attempt to evade constitutional obligations to consult Indigenous peoples (risking infringement of rights), because it is often archaeological assessments themselves that trigger the duty to consult, when artifacts or sacred sites are identified.²

¹ Section 2(1)(i) of the draft regulation states that the Minister must "[consider] the archaeological potential of the property by applying the processes and criteria established by the Ministry".

² The Supreme Court of Canada in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 41 [Mikisew] at [para 46](#) stated that "it may not be consistent with s. 35 [of the *Constitution Act, 1982*] to legislate in a way that effectively removes future Crown conduct which would otherwise trigger the duty to consult." The Yukon Court of Appeal in *Ross River Dena Council v Yukon*, [2012 YKCA 15](#) at para 37 has held that "[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist". This has also been spoken to in the context of environmental assessments by Grand Chief Joel Abram in *Association of Iroquois and Allied Indians v. Ontario*, 2022 ONSC 5161 at [para 94](#), who stated that "[w]ithout any environmental assessment being triggered, consultation and accommodation obligations are not triggered either and First Nations constitutionally protected rights are thus more likely to be infringed."

LAND's Position

LAND strongly opposes this proposal and continues to call for the repeal of Bill 5³.

Our review of this proposed regulation confirms that the government is continuing down a path that would allow them to evade their constitutionally required duty to consult, and undermine their commitment to reconciliation by disrespecting Indigenous cultural sovereignty, the Truth and Reconciliation Commission's (TRC) [Calls to Action](#), and the rights and principles enshrined in the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP).

Archaeological assessments are essential to conserving archaeological items which hold cultural heritage and spiritual value. Moving forward with development without first completing an archaeological assessment means Indigenous sacred sites and ceremonial objects are at risk of remaining unidentified, with the potential to be disturbed or destroyed.

Accordingly, we recommend that the draft regulation, alongside Schedule 7 of Bill 5, be withdrawn in full.

Summary of Recommendations

Our recommendations reflect the principles and minimum actions we feel are necessary to safeguard and advance Indigenous cultural sovereignty. We provide these recommendations without prejudice to our continued stance that Bill 5 ought to be repealed.

Each of the following recommendations are detailed below:

- 1) The draft regulation must clarify key questions regarding how unknown archaeological resources, including Indigenous sacred sites, will be identified and protected;
- 2) The discretion of the Minister and Lieutenant Governor in Council to exempt properties from processes intended to conserve archaeological resources must be restrained by including transparency and accountability mechanisms in the draft regulation;
- 3) Indigenous cultural sovereignty, which includes rights to control and protect cultural heritage, must be respected in keeping with Articles 11(1), 12(1), and 31(1) of UNDRIP⁴ and the TRC Calls to Action #75 and #76; and

³ For a more detailed analysis of the impacts of Schedule 7 of Bill 5, see pages 7-9 of our legal briefing [here](#).

⁴ Indigenous peoples have the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological sites and artifacts (Art 11(1)); manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies (Art 12(1)); maintain, protect and have access in privacy to their religious and cultural sites (Art 12(1)); use and control their ceremonial objects (Art 12(1)); and maintain, control, protect and develop their cultural heritage (Art 31(1)).

- 4) Ensure that the draft regulation contains appeal and dispute resolution mechanisms for Indigenous communities, in alignment with Article 11(2) of *UNDRIP*.⁵

Detailed Recommendations

1. The draft regulation must clarify how unknown archaeological resources, including Indigenous sacred sites, will be identified and protected

The regulation does not answer key questions, such as:

- What is a proponent required to do if they discover, within a property that is exempted from the requirement to conduct an archaeological assessment, previously undocumented archaeological resources or sites of significant cultural heritage value or interest?
- What makes an archaeological site or resource “significant”?
- What are the criteria for considering the “archaeological potential” of the property?
- How will Indigenous sacred sites be identified and protected for properties exempted from archaeological assessment requirements?
- How can the public participate in the exemption process, given that exemption decisions may have significant environmental and cultural impacts?

These questions must be answered before the regulation moves ahead. This is especially important given that most Indigenous ancestral burial sites are not already recorded or ‘known’, because the primary means of discovering these sites is through archaeological assessments.⁶

2. The government’s discretion to exempt properties must be restrained

The draft regulation grants significant and problematic discretion to the government to decide, based on their opinion:

- Whether activities taking place on the property are or will be “economically significant” or “strategically important” (neither of which is clearly defined), and therefore require an exemption order;
- Whether a property has “archaeological potential” (also an undefined term); and
- Whether information provided by Indigenous communities about a site having cultural heritage value or interest (which would make it a “significant known archaeological site” and therefore not eligible for exemption) is “appropriate and sufficient”.

⁵ Article 11(2) of *UNDRIP* requires states to provide redress through effective mechanisms, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

⁶ Chiefs of Ontario’s [Written Submission](#) to the Standing Committee on the Interior regarding Bill 5, *Protect Ontario by Unleashing Our Economy Act* (May 26, 2025).

We have many concerns about this approach that instills unfettered discretion into decision-making, because:

1. Determining whether a site identified by Indigenous communities as having cultural heritage value or interest (which would make it a “significant known archaeological site” and therefore not eligible for exemption) is based on information that is “appropriate and sufficient” allows the government to unilaterally reject Indigenous communities’ identification of sacred sites by claiming that the information provided is insufficient or not appropriate.
2. The government has demonstrated its intention to prioritize economic growth over the conservation of cultural heritage by allowing properties - that have undergone archaeological assessments and been recommended for *further* assessment - to be eligible for exemption. This means that even in instances where there is reasonable concern that the area is of archaeological significance, these lands can still be exempt from the very processes that would enable the conservation and protection of resources of archaeological value. The government contends this override power is necessary because without it, it would “unduly limit the ability of the government to make decisions that would promote economic growth”.⁷
3. There is no clear criteria for how “economic significance”, “strategic importance” and “archaeological potential” are defined, measured, or tracked. This allows the government to proceed absent oversight and transparency, both of which are key to accountability.
4. The permissive language in the proposed regulation grants the government essentially unrestricted powers to issue exemption orders. For instance, in addition to being able to exempt properties for activities that will be “economically significant” or “strategically important” to Ontario’s economy, the government can issue exemption orders if they are of the opinion that the exemption could “potentially advance” provincial priorities. Such priorities include transit, housing, health and long-term care, other infrastructure, and the open-ended category of “such other priorities as may be prescribed”. The broad nature of these categories, coupled with the fact that the determination is subject to the government’s opinion without any guaranteed public consultation opportunities, grants the government essentially unrestricted powers to issue exemption orders.
5. The draft regulation does not set out any mechanisms for public participation or transparency. The exemption process must be transparent and uphold the public’s right to participate in decision-making by including a public consultation period and requiring that decisions be posted publicly with justification.

⁷ See the government’s [summary of feedback](#) from consultation with Indigenous communities.

3. Indigenous cultural sovereignty, which includes rights to control and protect cultural heritage, must be respected

Respecting indigenous cultural sovereignty includes upholding rights to maintain, protect and practice Indigenous culture. This means protecting artifacts and sites, through practices like archaeological assessment, which can lead to their identification, repatriation (returning them to their place of origin), and protection.

In the government's [summary of feedback](#)⁸ from consultation with Indigenous communities, they explicitly rejected the idea of Indigenous communities having a decision-making role with respect to exemptions, stating that "Indigenous perspectives will be considered". This does not suffice if Indigenous peoples' rights, including their rights to maintain, protect and have access in privacy to their religious and cultural sites, to use and control their ceremonial objects and to maintain, control, protect and develop their cultural heritage, are to be respected.⁹ This conclusion is further supported by the government's decision not to reference *UNDRIP* and Free, Prior and Informed Consent, contrary to the feedback provided by Indigenous communities.

Additionally, the draft regulation does not provide for adequate Indigenous engagement and involvement, because:

- The proposal fails to address the stated need for funding, capacity building and training for Indigenous people to participate in the archaeological assessment process;
- It remains unclear how Indigenous communities that "have or may have Aboriginal or treaty rights that may be adversely impacted" by an exemption order are identified, or processes by which Indigenous communities can express that their rights may be adversely impacted; and
- The government has only committed to *notifying* Indigenous communities of a recommended exemption order, which is insufficient to meet the duty to consult, especially as there is no guaranteed opportunity to have their concerns heard and addressed.

The Ministry must incorporate the feedback it has received from First Nations and Indigenous people and commit to not moving ahead until there is, at a minimum:

- A commitment to enhancing province-wide mapping and data on archaeological sites to include data from Indigenous communities. The availability of data that would assist the government in identifying archaeological sites, which, in addition to respecting Article 11 of *UNDRIP*

⁸ In referencing this document, we are not suggesting that the Ministry's 'consultation' was sufficient to discharge the constitutional duty to consult.

⁹ See Articles 11(1), 12(1), and 31(1) of *UNDRIP*.

(Indigenous peoples' right to maintain and protect archaeological and historical sites), would help minimize costs and site impacts;

- Clarity regarding a screening process to identify potential Indigenous sacred sites (including how confidential Indigenous knowledge will be respected), and how the boundaries of former residential schools should be defined; and
- Follow through on a commitment to modify the definition of “significant known archaeological site” to include “Indigenous knowledge”. Instead of explicitly referencing Indigenous knowledge, the draft regulation would only allow Indigenous communities to provide “information” about a site having cultural heritage value or (which would make it a “significant known archaeological site” and therefore not eligible for exemption), but whether this information is considered is dependent on whether the government believes that the information is “appropriate and sufficient”. Indigenous knowledge regarding sacred sites should always be considered appropriate and sufficient.

The government must also act in accordance with the TRC’s Calls to Action, which require:

- **Call to Action #75:** Working with different levels of governments, Indigenous communities, former residential school students, and current landowners to develop and implement strategies and procedures for the ongoing identification, documentation, maintenance, commemoration and protection of residential school cemeteries or other sites at which residential school children were buried.
- **Call to Action #76:** Ensuring that said strategies and procedures are adopted in accordance with the following principles:
 - The Indigenous community most affected shall lead the development of such strategies;
 - Information shall be sought from residential school survivors and other knowledge keepers in the development of such strategies;
 - Indigenous protocols shall be respected before any potentially invasive inspection or investigation of a potential burial site.

4. Ensure appeal and dispute resolution mechanisms are in place for Indigenous communities

We strongly recommend that the government work with Indigenous communities to develop effective mechanisms for redress, including to resolve disputes and ensure an accessible mechanism to appeal exemption orders. This aligns with Article 11(2) of *UNDRIP*, which requires states to provide redress through effective mechanisms, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Decisions that ought to be subject to review include the government's determinations that:

- 1) Indigenous communities who may be adversely affected have been identified;
- 2) Indigenous communities who may be adversely affected have been notified of a recommended exemption order;
- 3) An Indigenous community who has identified a site of having cultural heritage value or interest, including sacred sites, did not provide "appropriate and sufficient" information to support their claim; and
- 4) The property subject to the exemption order is not on a site of a former Indian residential school (as the government has declined to clarify how the boundaries of these sites will be defined).

Questions?

You are welcome to reach out to us.

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