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**NIAGARA**  
OFFICIAL PLAN

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# NEW NIAGARA OFFICIAL PLAN

**Niagara Region Archaeological Management Plan:**  
Phase II Research and Background Report

Niagara Region  
7 November 2019

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VIBRANT REGION



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## Executive Summary

The archaeological sites that are the physical remains of Niagara Region's 13,000-year settlement history represent a fragile and non-renewable cultural heritage resource that must be conserved and protected. This document is a background research report that constitutes the following:

- a review and summary of all relevant provincial policy and legislation with respect to jurisdiction over and management of archaeological resources;
- a review of relevant non-municipal, public agency policies and practice with respect to archaeological planning, assessment, mitigation, and conservation issues;
- a review of current regional and local municipal practices and policies with respect to archaeological planning, assessment, mitigation and conservation issues; and,
- a consideration of policies and practices related to consultation and engagement with Indigenous communities in the context of land-use planning especially as it relates to archaeological heritage management.

The document also presents recommended best practices in archaeological resource planning through development of an Archaeological Management Plan and implementation of consistent development planning review processes at the regional and local municipal level. With a Regional AMP in hand, the Region and local municipalities can more easily identify where archaeological assessments should be required and manage archaeological resources within its jurisdiction and ensure that they are in compliance with the requirements of the Provincial Policy Statement (2014) and the revised Ontario Heritage Act (2005).

## 1.0 Introduction

The principal objective of Niagara Region's Archaeological Management Plan (AMP) will be to judiciously and uniformly apply an archaeological potential model across the Region within the municipal development review and approvals process.

An AMP will represent best practices in municipal archaeological resource management and comes with a number of benefits, including the following:

- It will ensure sound archaeological resource management practice consistent with the 2014 Provincial Policy Statement under the *Planning Act*, leading to an overall reduction of risk to the Region and local municipalities in terms of compliance with applicable laws.
- It will clearly define for planning staff when and where archaeological assessments are, and are not, required, establishing consistency in the planning process and a greater degree of predictability for proponents across the Region as a whole.
- It will provide clarity to municipal staff in terms of archaeological resource management during the development review and approvals process.
- It will reduce the risk of unfortunate surprises and resulting delays occurring during development (such as disturbing an Indigenous burial site or a nineteenth-century building foundation). This risk will not necessarily be eliminated, but it will be reduced exponentially.
- It will provide opportunities for citizens to know their community's history better; careful planning for the conservation and interpretation of archaeological resources offers opportunities for improving local quality of life through knowledge mobilization.
- Finally, in all AMPs carried out to date, the process has led to more strategic and supportive identification of areas of archaeological potential when compared to generic criteria stipulated by the Ministry of Heritage, Sport, Tourism and Culture Industries (MHSTCI) that the Region, and all but two of the local municipalities, currently rely on.

## 2.0 Archaeological Resource Management in Ontario: Historical Context and Legislative Framework

In the 1970s, requirements to address archaeological resources during the development process were first incorporated in the *Planning Act* and the *Environmental Assessment Act*, as it was at this time that it was realized that land development poses the most serious threat to the archaeological record. As the pace of development increased during the 1980s this became even more of an issue and several municipalities began to develop archaeological "master plans" and similar inventories of archaeological resources within their boundaries at this time (e.g., Waterloo, Markham, Richmond Hill, Vaughan). The *Planning Act* and its accompanying *Provincial Policy Statement (2014)*, provide the basis for land use planning decisions and approvals and is relevant to a broad range of public and private undertakings. The *Environmental Assessment Act* applies to public sector infrastructure projects and designated private sector projects, such as landfills. These acts remain the principal legislation governing the assessment of lands prior to their development.

Until the 1990s, the Province essentially acted as the approval authority in terms of archaeological resource management decisions. In the 1990s, however, the Province suggested a re-allocation of roles, in which the provincial government would maintain an advisory function and municipal governments would assume the day-to-day responsibility for reviewing planning applications for Provincial interests.

The rationale for this approach was that planning and land-use control are predominantly local municipal government responsibilities and that the impact of municipal land-use decisions on existing natural and cultural resources is significant, especially since locally approved developments constitute the majority of land-disturbing activities in the Province. It was thought that with adequate screening at the municipal level, protection of archaeological resources would be ensured. The Province's view was, and continues to be, that Archaeological Management Plans are the most effective means by which municipalities can carry out this screening.<sup>1</sup>

In 1996, as part of the re-allocation of development review responsibilities (i.e. transfer of Municipal Plan Review), the role of identifying requirements for archaeological assessments as conditions of approval was transferred to the Niagara Region, as it was for all other upper tier municipalities in the province.

Today, the *Planning Act* and *Environmental Assessment Act* remain the principal pieces of legislation pertaining to archaeological resource management. They are complemented by the *Ontario Heritage Act*, which regulates archaeological practice to maintain a professional standard of archaeological research and consultation.

Several other acts contain provisions, requirements, or direction for archaeological resource management under various circumstances that are relevant to the municipal development approval process, including:

- the Renewable Energy Approvals (REA) regulation (O. Reg. 359/09), issued under the *Environmental Protection Act*;
- the *Aggregate Resources Act*;
- the *Funeral, Burial and Cremation Services Act*; and

Particular geographic areas, which may transcend municipal boundaries are also subject to specific pieces of land use planning legislation. Of particular relevance in this regard is the Niagara Escarpment Plan (1994).

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<sup>1</sup>The 2014 Provincial Policy Statement contains the most recent expression of this position: "Planning authorities should consider and promote archaeological management plans and cultural plans in conserving cultural heritage and archaeological resources" (PPS 2014:2.6.4).

## 2.1 Niagara Escarpment Planning and Development Act, the Niagara Escarpment Plan and the Niagara Escarpment Parks and Open Space System (NEPOSS)

The *Niagara Escarpment Planning and Development Act* (through the Niagara Escarpment Plan) has a specific process related to development applications within the Niagara Escarpment Planning Area which is distinct from Regional or local municipal land use and development planning approvals processes. The Niagara Escarpment Plan (2017) emerged from the Niagara Escarpment Planning and Development Act and is the principal provincial planning document for the Niagara Escarpment. As the Niagara Escarpment Commission (NEC) is the implementing authority for the Niagara Escarpment Plan, the NEC is the approval body for any development applications, amendments, or permits within the Niagara Escarpment Plan area. Niagara Region, local municipalities, and the Niagara Peninsula Conservation Authority serve as commenting agencies on circulated development permit applications. In this regard, the Niagara Escarpment Plan utilizes a development permit system for development and land use approvals as an instrument for implementation of its policy planning document rather than the use of municipal zoning. Any development proposals within the Niagara Escarpment Planning Area must be considered through the NEC development permit process.

When a new development application is submitted within the Niagara Escarpment Plan area, staff at the NEC evaluate the application against various criteria, including archaeological potential. At present, the NEC evaluates the potential risk to cultural heritage features against Provincial archaeological sites data, internal records, as well as Provincial criteria outlined in the 2015 MHSTCI *Criteria for Evaluating Archaeological Potential: A Checklist for the Non-Specialist* (hereafter MHSTCI Criteria). Based on these criteria, it is then under the discretion of NEC staff to decide whether an archaeological assessment is required as part of the development permit application process. While the Region and local municipalities act as a commenting agency on these applications, they cannot require an archaeological assessment as a precondition.

## 3.0 Current Niagara Region Development Planning Review Process Specific to Archaeological Resource Management

In Niagara region each of the 12 local area municipalities has its own Official Plan and, while all of these plans have cultural heritage (archaeology) policies, there is variability in terms of their consistency with Provincial and Regional policies and in the manner in which they are implemented when it comes to the development review process.

Under the terms of a Memorandum of Understanding (MOU) between Niagara Region and the local area municipalities first entered into in 2007, and recently updated in 2019, Niagara Region is the approval authority for area municipal comprehensive official plans, non-site-specific local official plan amendments, and secondary plans (except where deemed exempt from Regional approval) for all local municipalities. Lower-tier municipalities are the Approval Authorities for zoning bylaws and amendments, draft plans of subdivision, plans of condominium, site plan control applications, consents and minor variances with Niagara Region and the Niagara Peninsula Conservation Authority acting as commenting agencies.

The towns of Fort Erie and Niagara-on-the-Lake have developed their own AMPs with detailed archaeological potential mapping based on rigorous site potential modelling. The City of Niagara Falls relies on potential mapping incorporated in their Heritage Master Plan and the Town of Pelham uses potential mapping developed for its Cultural Heritage Master Plan. These potential maps are based largely on MHSTCI Criteria.

The remaining municipalities, and the Region itself, rely on the MHSTCI Criteria when reviewing applications for archaeological assessment requirements, without the aid of any mapping specifically developed for that purpose. The Region also has access to the Ontario Archaeological Sites Database (OASD) maintained by MHSTCI.

Currently, the lead role in determining any archaeological assessment requirements falls to the Region in accordance with the transfer of Municipal Plan Review responsibilities. This determination is made during the pre-consultation phase for a development application, based on the MHSTCI Criteria, the OASD and local municipality AMP mapping, where available. In the latter cases, the decision is made jointly with local municipal staff. Where it is determined that the application will affect a property that has archaeological potential, the local municipality will place a condition on the application requiring that a Stage 1 or combined Stage 1-2 archaeological assessment, be carried out. Once completed these Stage 1-2 reports and any Stage 3 assessment and Stage 4 mitigation reports that may be required must be submitted to the Region and local municipality as part of the complete development application and/or as a condition of approval. Typically, these reports are submitted to MHSTCI at the time.

The archaeological condition is removed by the approval authority, and the development is permitted to proceed when the report(s) have been accepted by MHSTCI and this acceptance has been communicated to the Region and the local municipality.<sup>2</sup>

The Region is not necessarily circulated all applications made to local municipal approval authorities as provided in the MOU where through pre-consultation the Region has determined that the development proposal is exempt from further circulation and review, such as when the Region has determined that the proposal has no implications to Provincial or Regional interests in matters such as archaeological resource conservation.

In those municipalities that do not have archaeological potential mapping, in particular, there is a risk that some applications are not being appropriately screened (or screened at all in the case of consents and minor variances that are not reviewed by the Region). This is, at least in part, due to the nature of the tools, in the form of the generic MHSTCI Criteria, available to local municipal planners in the absence of an AMP. The MHSTCI Criteria require consultation with a variety of other documentary sources and records that are not necessarily easily available and are easily misinterpreted. The potential for an inappropriate decision to be made with respect to a particular proposal is therefore heightened. Properties that have archaeological potential may be cleared of concern during the screening process. Conversely a condition for an assessment may be applied to properties that do not have potential.

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<sup>2</sup> The letter issued by MHSTCI, while often referred to as the “clearance” letter, is simply an acknowledgement that the assessment report satisfies archaeological licensing conditions under the Ontario Heritage Act.

## 4.0 Review of Comparator Upper-Tier Municipalities and the Delegated Review Function Specific to Archaeology

Five regional municipalities, or equivalent, in Ontario have implemented AMPs: Waterloo (1989), Muskoka (1994), Halton (1998), Ottawa-Carleton (1999)<sup>3</sup>, York (2013). Simcoe County is in the final stages of its AMP development process.

There is considerable variability in terms of approval authority roles and responsibilities, as summarized in Table 1.

**Table 1: Summary of Regional AMPs**

Region/District	Summary
<b>Waterloo</b>	<ul style="list-style-type: none"> <li>• Regional and local municipal OPs reference and provide guidance for implementation of AMP objectives.</li> <li>• The Region is the approval authority for most development applications with the exception of Site Plans and those located in the City of Kitchener.</li> <li>• RMW planning staff work closely with local municipal planners to review and assess archaeological potential of development applications.</li> <li>• Archaeological potential mapping available to regional planners through GIS platform; currently seeking to provide access to local municipal planners.</li> </ul>
<b>York</b>	<ul style="list-style-type: none"> <li>• Regional and local municipal OPs reference and provide guidance for implementation of the AMP objectives (or support the concept of developing an AMP in the case of OPs that predate implementation).</li> <li>• One local municipality (Richmond Hill) had its own AMP prior to the implementation of the Regional AMP.</li> <li>• The Region is a commenting agency for most development applications; local municipalities are the approval authorities.</li> <li>• The Region provides electronic access to the archaeological potential layer of the AMP GIS to all local municipalities.</li> <li>• Local municipalities who may want access to additional layers (e.g., archaeological sites) must have their own data sharing agreements with MHSTCI.</li> </ul>
<b>Muskoka</b>	<ul style="list-style-type: none"> <li>• District OP references and provides guidance for implementation of the AMP objectives (and support the concept of updating the AMP). Local municipal OPs are variable in referencing the AMP and in terms of implementing its objectives.</li> </ul>

<sup>3</sup> Amalgamated as the City of Ottawa in 2001 and is not further considered in the context of this review.

**Table 1: Summary of Regional AMPs**

Region/District	Summary
	<ul style="list-style-type: none"> <li>• The area municipalities are the approval authorities for the majority of development applications with District having a review/comment role in some instances.</li> <li>• Archaeological potential mapping is shared as a Schedule map to the District OP.</li> </ul>
<b>Halton</b>	<ul style="list-style-type: none"> <li>• Regional OP references and provides guidance for implementation of the AMP objectives, but not in a clear manner. Local municipal OPs variable in referencing the AMP but generally conform to its objectives. The Burlington OP explicitly identifies the Region's role in maintaining and implementing the AMP.</li> <li>• Local municipalities are the approval authorities for most development applications with the Region as commenting agency.</li> <li>• Region responsible for determining need for archaeological assessment and communicating this to the local municipality during pre-consultation.</li> <li>• Region uses a GIS platform containing site data and archaeological potential for internal review.</li> </ul>
<b>Simcoe</b>	<ul style="list-style-type: none"> <li>• County OP to reference and provide guidance for implementation of the AMP objectives.</li> <li>• Once a new County official plan is adopted, local municipal official plans will need to be brought into consistency and conformity with provincial and County policies.</li> <li>• As separated cities, Barrie and Orillia may choose to adopt the County Archaeological Management Plan and related official plan policies but are not obligated to do so.</li> <li>• The County is the approval authority for regional projects (e.g., County roads, waste management, County transit, County-owned greenlands and forests, paramedic stations, and growth management).</li> <li>• Local municipalities are the approval authorities for zoning bylaws and amendments, site plan control applications, consents and minor variances, with the County as a commenting agency.</li> <li>• For the townships of Severn, Springwater, and Tiny, the County is the approval authority for subdivisions and condominiums.</li> <li>• The County will provide electronic access to the archaeological potential layer of the AMP GIS to all local municipalities through the County mapping portal.</li> </ul>

The variability in how AMPs have been operationalized by these upper tier municipalities reflects their individual needs, priorities, and relationships with their lower tier municipalities. It also reflects the fact that AMPs and their implementation have evolved over the last 30 years, during which technological innovations such as geographical information systems (GIS) and the internet have revolutionized both development and implementation of AMPs. York Region is a noteworthy analogue for Niagara Region, as both regions have lower tier municipalities that had already undertaken their own AMPs before the regional AMP was initiated, demonstrating a range of need and capacity to undertake an AMP amongst the local municipalities. It is also one of the more recent AMPs, so the technological opportunities for implementation are likely to be similar. The way that York Region shares its archaeological potential mapping through an electronic GIS portal is particularly useful, as this facilitates updating of the AMP GIS in real time without the need to update static digital or analog mapping or OP schedules. Other upper tier municipalities are either implementing a similar system (e.g., Simcoe) or are planning to do so (e.g., Waterloo). This is particularly important given the fact that most of these upper tier municipalities have delegated approval authority for most planning applications to their local municipalities, so ensuring process quality and consistency is a common concern both within these regions and across the province.

## 5.0 Best Practice with respect to Municipal Roles and Responsibilities in the Development Planning Review Process

The Memorandum of Understanding for Planning Function and Services in Niagara currently lays out the responsibilities of the Region and area municipalities around the development review process (Table 2). The implementation of a regional AMP will then become a tool available to the relevant approval authority in determining archaeological potential and the need to conduct an archaeological assessment as part of development approval.

**Table 2: Approval Authority Delegation**

<b>Application Type</b>	<b>Condition Applied/Lifted by:</b>
Zoning By-law Amendments	Local Municipality
Minor Variances	Local Municipality
Plans of Subdivision	Local Municipality
Plans of Condominium	Local Municipality
Consent Applications (that create 2 or more new lots and where development and/or site alteration is proposed or expected).	Local Municipality
Site Plans	Local Municipality
NEC Applications	Niagara Escarpment Commission

Using the Archaeological Potential Planning Layer that that will form part of the Regionally approved AMP, all municipal planners will be equipped to determine whether or not an archaeological assessment is required for any given development application which is within their review and approvals mandate.

This will provide a degree of greater autonomy to local municipalities and relieve the Region of the responsibility for reviewing applications for or providing advice on archaeological requirements, thus streamlining the entire development review process while maintaining consistency across the entire Region. This basic process and allocation of responsibilities is the same as that which exists in the regional municipalities of Halton and York and soon will be implemented in the County of Simcoe.

The approval authority review of a planning application for determining if archaeological resources may be present or is within areas of archaeological potential can be made by the planner using the Archaeological Potential Planning Layer. This layer will provide a “yes or no” answer.

If it is determined that a property (or any portion of a property) has archaeological potential, the approval authority will advise the development proponent to retain a consultant archaeologist to carry out an archaeological assessment on all lands under consideration before any soil disturbance, development, and/or site alteration occurs.

While the Region and local municipalities provide comment on NEC Development Permit applications, it is ultimately at the discretion of the NEC as to whether an archaeological assessment is required as part of the Development Permit in Niagara Escarpment Plan areas. Given this, it is in the best interest of both the NEC and commenting agencies that the determination of archaeological potential is consistent between the Region, local municipalities, and the Niagara Escarpment Commission.

The approval authority must receive copies of all archaeological assessment reports and MHSTCI letters of acceptance, prior to soil disturbance, development, and/or site alteration on the property in question. Submission of assessment reports is best undertaken by the consultant archaeologist at the time of submission to the approval authority or immediately upon their receipt of the MHSTCI letter(s) of acceptance.

In that the Region will be responsible for maintaining the AMP Archaeological Potential Planning Layer, copies of every assessment report and MHSTCI letter of acceptance must be provided to the Region to allow for timely updating of data.

The Region should update the data layers related to archaeological sites and pre-development assessments, revise the AMP archaeological potential mapping, and notify local municipalities with GIS capabilities of these updates at a minimum bi-annually. All new, and **only** new, archaeological sites with their Borden number should be added to the site inventory layer.<sup>4</sup> All properties that have been subject to archaeological assessment and cleared of further archaeological concern should be added to the archaeological assessments layer. These properties should then be removed from the archaeological potential layer. In the absence of a development application circulation, the Region will need to develop a system to track archaeological assessments to maintain the data as part of its commitment to regular

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<sup>4</sup> MHSTCI's site database contains numerous errors in terms of site location data. Where possible these errors will have been corrected as part of the AMP research process. These errors should not be reintroduced to the Region's AMP site inventory during any update.

scheduled updates. Local municipalities will need to provide the Region with all archaeological assessments conducted as part of the development application process, including detailed site mapping where relevant and MHSTCI clearance letters.

Where archaeological sites are protected permanently, only the balance of the assessed property in which the site was found should be removed from the archaeological assessments layer as the site and its avoidance and protection area retain their archaeological potential. Additionally, the approval authority (e.g., local municipality) can make use of a holding symbol for this archaeological site or for the parcel in question under Section 36 of the *Planning Act* (Holding provision by-law) to ensure that no soil disturbance, development, and/or site alteration shall take place on the property until necessary by-law amendments are in place.

## 6.0 Jurisdictional Scan of Aboriginal Engagement and Consultation Protocols

Section 17 of the *Planning Act* requires that the Chief of every First Nation Council on a Reserve within one kilometre of proposed official plan or official plan amendments is circulated on notices for those applications, as part of the public notice process (O. Reg. 543/06, s. 3 (9); O. Reg. 467/09, ss. 2, 3). While there are no First Nations Reserves within the Region or within one kilometre of its boundaries, planning authorities in the Region are currently encouraged to engage with those Indigenous groups with an interest and rights in Niagara in the planning approvals process. This is affirmed in the *Provincial Policy Statement* (PPS, 2014), which states that:

The Province recognizes the importance of consulting with Aboriginal communities on planning matters that may affect their rights and interests (Part IV, Vision for Ontario's Land Use Planning System, 4).

The PPS (2014) also states the following:

Planning authorities are encouraged to coordinate planning matters with Aboriginal communities (Policy 1.2.2, Section 1.2, Coordination, 12);

This *Provincial Policy Statement* shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in Section 35 of the *Constitution Act, 1982* (Policy 4.3, Section 4.0, Implementation and Interpretation, 33).

With respect to archaeological resources, the PPS (2014) states that:

Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources (Policy 2.6.5, Section 2.6, Cultural Heritage and Archaeology, 29).

The Ministry of Municipal Affairs and Housing is currently undertaking a review of the PPS and is requesting feedback on proposed changes by October 21, 2019. The proposed update to the Provincial Policy Statement shows some strengthening in the language around engagement. Where the PPS (2014) provided policies which encouraged engagement with Indigenous communities, the draft PPS (2019) now states that municipalities shall engage with Indigenous communities and coordinate on planning matters that may affect their rights and interests. Similarly, the draft PPS (2019) now states that planning authorities shall engage with Indigenous communities and consider their interests when identifying, protecting and managing cultural heritage and archaeological resources. However, the draft PPS (2019) does not define what constitutes meaningful engagement with Indigenous communities and what role the Province will take in fulfilling this responsibility.

Also, the MHSTCI produced a guidance document, in 2011, for consultant archaeologists entitled *Engaging Aboriginal Communities in Archaeology: a Draft Technical Bulletin for Consultant Archaeologists*. This document outlines the Ministry's requirements (e.g., "Standards") for engagement with Indigenous communities through the archaeological assessment process, as outlined in the *Standards and Guidelines for Consultant Archaeologists*, and describes best practices for meaningful engagement which may exceed some of the standards for engagement (e.g., "Guidelines"). This bulletin represents the Province's direction on engagement with Indigenous communities as part of the archaeological assessment process, and the current MHSTCI standard is that engagement with Indigenous communities must take place:

- In Stage 3, when assessing the cultural heritage value or interest of an Indigenous archaeological site that is known to have or appears to have sacred or spiritual importance or is associated with traditional land uses or geographic features of cultural heritage interest or is the subject of Indigenous oral histories. [*Standards and Guidelines for Consultant Archaeologists (S&G)* Section 3.4]
- At the end of Stage 3, when formulating a strategy to mitigate the impacts on the following types of Indigenous archaeological sites through avoidance and protection or excavation [*S&G* Sections 3.4 and 3.5];
  - When investigating rare Indigenous archaeological sites;
  - When dealing with sites identified as sacred or known to contain human remains;
  - When working with Woodland period Indigenous sites;
  - When working with Indigenous archaeological sites where topsoil stripping is contemplated;
  - When working with undisturbed Indigenous sites; and
  - When working with sites previously identified as of interest to an Indigenous community.

However, the document also provides several suggestions for increased engagement with Indigenous communities that consultant archaeologists are *encouraged* to follow. Within these guidelines, the MHSTCI suggests that consultant archaeologists should engage with Indigenous communities:

- In Stage 1, when conducting the Background Study, in order to identify information sources in local Aboriginal communities (e.g., for information on traditional use areas, sacred sites, and other sites) when available and relevant to the property). [S&G Section 1.1]
- In Stage 1, when evaluating archaeological potential and making recommendations to exempt areas meeting the criteria for low archaeological potential from further assessment, in order to ensure there are no unaddressed Aboriginal cultural heritage interests. [S&G Section 1.4]
- In Stage 2, when assessing a property and determining archaeological sites that require Stage 3 fieldwork, in order to determine interest (general and site-specific) in the Aboriginal archaeological sites and ensure that there are no unaddressed Aboriginal archaeological interests connected with the land surveyed or sites identified. [S&G Section 2.2]
- In Stage 3, when making recommendations regarding the excavation or preservation of Aboriginal archaeological sites of cultural heritage value or interest (other than those identified in the standards), in order to review the recommendations with the relevant, interested Aboriginal communities. [S&G Section 3.5]

While this draft bulletin outlines the general process for Indigenous engagement within the context of an archaeological assessment, several changes to the practice of engagement have occurred since the bulletin was enacted in 2011. Over the last decade, the approach that has gained the most widespread acceptance has been the training and inclusion of Indigenous practitioners, variously referred to as liaisons, monitors, or field liaison representatives (FLRs), to work alongside consultant archaeologists in the field. With costs for these workers underwritten by development proponents, Indigenous communities gain both capacity funding, allowing them to participate in the engagement process, and first-hand knowledge of the archaeological fieldwork dealing with their cultural patrimony. Working with Indigenous liaisons, often from more than one Indigenous community with overlapping treaty lands or traditional territories, has become routine practice for archaeological heritage management firms. Typically, this is done during Stage 3 or Stage 4 archaeological assessments where an indigenous archaeological site has been registered. However, it should be noted that many Indigenous communities would like to assign field liaisons or monitors to Stage 2 archaeological fieldwork as well, prior to the identification of an Indigenous archaeological site on a property. While it is the licensed archaeologist and not the development proponent or approval authority who bears this statutory obligation for engagement, it is often to the proponent's and approval authority's benefit to support the engagement process in the interest of developing and maintaining positive relations with interested Indigenous communities. By including liaisons or monitors in the archaeological assessment process, the community will have the capacity and knowledge to effectively comment on the project in a timely fashion.

Similarly, it should be highlighted that municipalities do not hold an independent duty to consult and do not have statutory obligations for engagement in archaeology. Currently, the responsibility of governmental and regulatory bodies created by the Crown (e.g., municipalities and certain other regulatory bodies such as Conservation Authorities) is not well defined in government policy or case law. This lack of clarity and due process presents obvious challenges to these governmental agencies and to the Indigenous peoples and third parties who work with them. On April 10, 2019 the Association of Municipalities Ontario (AMO) released a discussion paper titled "Municipal Governments and the

Crown's Duty to Consult: Towards a Process that Works for Local Communities." This discussion paper highlights the challenges faced by municipal governments when the duty to consult has been delegated by the Crown without appropriate support or guidance and provides recommendations to address these issues. It is AMO's position that municipalities are not the Crown and therefore do not have an independent duty to consult. While municipal governments often undertake engagement with Indigenous communities related to specific projects or directives, it is AMOs position that municipalities in Ontario do not have the knowledge, capacity, and resources to fulfill Crown duties in the same manner as the provincial and federal governments.

For areas under the jurisdiction of the Niagara Escarpment Plan, it should be noted that the Niagara Escarpment Commission, as a Crown agency, has an independent duty to consult Indigenous communities. Typically, the NEC will engage with Indigenous communities with rights and interests in the Region for any NEPOSS park master or management plan and will circulate Plan Amendment and Development Permit applications to Indigenous communities.

## 6.1 Existing Municipal Indigenous Engagement Protocols

Several municipalities in Ontario have drafted guidelines for engagement with Indigenous communities with identified rights or interests related to municipal projects in order to assist municipal staff with understanding the process of indigenous engagement and ensuring consistency across municipal projects. This includes:

- *Draft City of Hamilton First Nations Consultation and Engagement Protocol*, dated June 2012;
- *Draft York Region Aboriginal Consultation Protocol*, dated June 2013;
- *City of Toronto's Draft Best Practice Protocol For Consultation with First Nations and Métis in Planning Contexts*, dated January 2016; and,
- *Simcoe County's Draft Best Practice Protocol for Consultation with First Nations and Métis in Planning Contexts*, 2018.

While these protocols were each drafted as part of an archaeological management plan process, they generally also provide corporate guidance across departments regarding the roles and responsibilities of the municipality in engagement activities. This includes the types of applications which may warrant engagement, how to determine which communities to contact and how to assess the level of impact of a proposed project, as well as the general process that should be followed. Typically, these protocols recommend engagement with Indigenous communities for those applications which have the greatest potential for major effects on the eventual use of the land and provide the potential for input to influence the development of plans. This includes Official Plan reviews as well as Secondary Plans (also Area Specific Policies), Plans of Subdivision, Consent Applications, Site Plan Applications and Zoning By-law Amendments undertaken in *greenfield* contexts as well as any others where an Indigenous archaeological site is or has been identified and site mitigation is contemplated. These protocols often also list Environmental Assessments, planning projects for large tracts of land, and any projects where

the municipality is both the proponent and approval authority (e.g., projects where the municipality/City are the landowner).

These municipal indigenous engagement protocols are consistent in their goals to establish a consistent approach to Indigenous engagement across all municipal projects determined to require engagement with Indigenous communities and to provide guidance and historical context in terms of relevant legislation, Crown guidance documents, and recommendations made by Indigenous communities in relevant contexts. While the City of Hamilton and County of Simcoe engagement protocols provide a recommendation for the communities to be contacted for certain applications or areas, the York and Toronto engagement protocols simply state that engagement must be undertaken with all interested communities. Generally, the engagement protocols listed above affirm the view that productive and respectful engagement with Indigenous communities must occur as early in the process as possible. These documents generally outline a process of initial notification of a project which may affect an individual First Nation or Métis community's Aboriginal or Treaty rights, followed by the opportunity to meet with the municipality to discuss, the circulation of all relevant or requested documents, and the process by which dispute resolution can follow. Ultimately, the process outlined in these documents recommend regular communication with Indigenous communities throughout a given project. These documents should not be considered as recognition of any statutory municipal responsibility around Indigenous consultation, but rather a recognition that a consistent and transparent process will help all parties involved in complex planning projects.

These documents provide a practical guide for municipal staff for building positive working relationships between municipalities and Indigenous parties by maintaining clear communication and by establishing an effective mechanism for dispute resolution. The goal of any engagement program is to create an open dialogue based on mutual respect, understanding and cooperation, while recognizing cultural and territorial interest. No guidance document can effectively anticipate all issues that may arise through the engagement process or new areas of interest in the future. Instead, these protocols are a starting point in the development of a productive working relationship between municipalities and Indigenous communities.

While not specifically related to, nor identified within, the listed Indigenous engagement protocols, the City of Toronto has since established an Indigenous Affairs office and the City of Hamilton have established a staff position to develop an Urban Indigenous Strategy in order to provide support to City departments in Indigenous engagement program design and implementation. However, it should be noted that in the City of Toronto, Indigenous engagement related to archaeological assessments and sites is currently the responsibility of the heritage planner responsible for archaeology rather than the Indigenous Affairs office.

## 6.2 Indigenous Community Engagement Protocols

Additionally, there are four consultation protocols established by rights-bearing First Nations with identified territory in Niagara Region. This includes the Haudenosaunee Confederacy Chiefs Council's Haudenosaunee Development Institute's policies document (2010), the Métis Nation of Ontario Consultation Protocol for Region 9 (2011), the Six Nations of the Grand River Consultation and

Accommodation Policy (2013), and a formal Consultation Protocol Agreement, signed by the Mississaugas of the Credit First Nation and the Federal Government (2018). Often the archaeological sites that are to be the focus of the engagement are of such antiquity that no conclusive identification of cultural affiliation to modern communities is possible, for example, sites older than AD 1000. Under circumstances of this sort, there should be an effort to identify all groups that are appropriate (on cultural-historical grounds) to act as the designated descendants of those who occupied the project area in the past, and who are willing to participate and ensure that cultural heritage remains are treated in an appropriate manner. This identification process is best achieved through negotiation with all the communities with identified interest in Niagara Region in order that they may themselves arrive at the final decision.

### 6.2.1 Haudenosaunee Confederacy Chiefs Council

The [Haudenosaunee Confederacy Chiefs Council](https://www.haudenosauneeconfederacy.com/departments/haudenosaunee-development-institute/policies/) ('HCCC') (<https://www.haudenosauneeconfederacy.com/departments/haudenosaunee-development-institute/policies/>) has legislated the Haudenosaunee Development Institute ('HDI') to represent HCCC interests in the development of lands within areas of Haudenosaunee jurisdiction. In collaboration with the HCCC, the HDI has developed comprehensive policies dealing with matters close to the Haudenosaunee people. This policies document, as adopted in Council on June 5, 2010 provides direction to proponents and the Crown regarding archaeology, energy, environment, hydro and lands development projects and should be read in combination with protocols and applications available on the HCCC's website. The policies outlined in this document, and in particular the consultation policy, identifies that the HCCC via the HDI shall be contacted as early as possible to notify the Confederacy of any project which may affect their enshrined rights or territory. This document provides general directions for the process of consultation with the HCCC but indicates that any consultation agreement or terms of reference can only be considered valid if approved by the Council of the Chiefs. The archaeological policies outlined in this document are largely related to the treatment of the remains of Haudenosaunee ancestors, as well as to unfettered access to and the delivery of all artifacts associated with Haudenosaunee land use. Furthermore, the document states that all archaeological work will "meet or exceed standards set pursuant to the Ontario Heritage Act and its Regulations, and those set in Ontario Ministry of Culture guidelines and permits concerning archaeological methodology and analysis. The archaeological work will be conducted in a way that respects Haudenosaunee law and customs" (Haudenosaunee Development Institute 2010:37). Furthermore, archaeology policy 7 in the document states that any archaeological project within Haudenosaunee territory shall include the hiring of at least one archaeological monitor representing the Confederacy and shall include costs for additional site monitoring and supervision.

### 6.2.2 Métis Nation of Ontario

The 2011 [Métis Nation of Ontario – Consultation Protocol for Region 9](http://www.metisnation.org/media/507405/mno%20consultation%20protocol%20-%20region%209.pdf) (<http://www.metisnation.org/media/507405/mno%20consultation%20protocol%20-%20region%209.pdf>) represents the expectations by the Nation for consultation within the traditional

territory of the Grand River Community Métis Council, the Windsor-Essex Métis Council, the Niagara Region Métis Council, and the Hamilton-Wentworth Métis Council. The purpose of the protocol is to ensure Métis citizens residing in Region 9 have the opportunity to be made aware of and engage in consultation processes occurring within the traditional territory of their home Métis community. The document provides an outline of a typical consultation process, including how to develop an appropriate consultation workplan, communication protocols, and dispute resolution process. There are no specific policies in this document related to archaeology or cultural heritage resources.

### 6.2.3 Mississaugas of the Credit First Nation

On September 6, 2018, Canada's Minister of Crown-Indigenous Relations and the Chief of the Mississaugas of the Credit First Nation signed a [Consultation Protocol Agreement](http://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/DocumentContentViewer.aspx?id=05AD69115C4941E096340996313310E8) ([http://sidait-atris.aadnc-aandc.gc.ca/atris\\_online/Content/DocumentContentViewer.aspx?id=05AD69115C4941E096340996313310E8](http://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/DocumentContentViewer.aspx?id=05AD69115C4941E096340996313310E8)). The protocol sets out a clear process for fulfilling Canada's duty to consult the Mississaugas of the Credit First Nation and establishes the parties' respective obligations. The protocol, which evolved from the parties' broader Recognition of Indigenous Rights and Self-Determination discussions, is designed to promote more effective and efficient engagement and improve the nation-to-nation relationship (Government of Canada 2018). This protocol provides clarification to the relationship between the Nation, the Crown, and third parties and how projects are reviewed.

There are no specific policies in this document related to archaeology or cultural heritage resources, however, the Mississaugas of the Credit First Nation has also produced their own [Standards and Guidelines for Archaeology \(2018\)](http://mncfn.ca/wp-content/uploads/2018/04/MNCFN-SGs-for-Archaeology.pdf) (<http://mncfn.ca/wp-content/uploads/2018/04/MNCFN-SGs-for-Archaeology.pdf>), to be used in conjunction with the Ministry of Heritage, Sport, Tourism and Culture Industries' (formerly the Ministry of Tourism, Culture and Sport) 2011 *Standards and Guidelines for Consultant Archaeologists*. This document identifies the nation's expectations *vis a vis* archaeological assessment practices and how these expectations differ from relevant archaeological statutes and regulations of the *Ontario Heritage Act*, as well as the Ministry of Heritage, Sport, Tourism and Culture Industries' *Standards and Guidelines for Consultant Archaeologists and Engaging Aboriginal Communities in Archaeology* Draft Technical Bulletin. While the Province requires archaeologists to engage with Indigenous communities by the time a Stage 3 archaeological assessment is undertaken (see Section 6.1), the document identifies that it is the expectation of the Nation that the proponent or approval authority begins discussions with the Nation at the initial stage of archaeological assessment (typically, Stage 1-2). This document also includes the Nation's expectation for involvement of at least one Field Liaison Representative (e.g., archaeological monitor) in any archaeological fieldwork, including Stage 1 property inspections and Stage 2 archaeological assessment. The Mississaugas of the Credit First Nation also expects to be involved in other aspects of the archaeological assessment process beyond the archaeological fieldwork, such as background research, recommendations, and report review. While costs associated with Nation involvement in a project are not outlined in the document, these are typically underwritten by the development proponent through discussions with the Nation's Department of Consultation and Accommodation.

#### 6.2.4 Six Nations Elected Council

The 2013 [Six Nations of the Grand River Consultation & Accommodation Policy](http://www.sixnations.ca/LRConsultationPolicySept2413.pdf) (<http://www.sixnations.ca/LRConsultationPolicySept2413.pdf>) represents the expectations of the Six Nations of the Grand River community for consultation matters, as represented by the Six Nations Elected Council. The purpose of the Policy is to lay out the expectations of Six Nations Elected Council to proponents, municipalities, and the Crown when conducting projects within the Six Nations of the Grand River territory. This policy is guided by the United Nations Declaration on the Rights of Indigenous Peoples and is underpinned by the idea that proponents and the Crown must seek “free, prior, and informed consent” by the Six Nations of the Grand River prior to the commencement of a project. The Policy also outlines how a typical consultation process would be undertaken depending on the level of impact to Six Nations lands or rights, including the provision of capacity funds. There are no specific policies in this document related to archaeology or cultural heritage resources. In practice, Six Nations Elected Council generally provides archaeological monitors for any project within Six Nations territory, providing that it is agreed to by the development proponent. It should also be noted that while Six Nations Elected Council is the Crown-designated representative of the Six Nations of the Grand River community, the Haudenosaunee Confederacy Chiefs Council via the Haudenosaunee Development Institute are also designated by the Six Nations community to represent their interests. For this reason, any archeological assessment project within Six Nations territory will often include the hiring of archaeological monitors from both organizations, as well as liaisons from any other Indigenous community with rights or interests in a particular project.

### 6.3 An Indigenous Engagement Protocol for Niagara Region: Recommendations

Ontario municipalities are looking to build and maintain strong relationships with neighbouring Indigenous governments. While municipal governments do not have an independent Duty to Consult, uncertainty about the municipal role in the Crown’s constitutional Duty to Consult remains a challenge for municipal and Indigenous governments. A transparent and consistent approach to Indigenous engagement is particularly important in the context of the lack of clear direction from the Province in terms of how municipalities should undertake engagement with Indigenous communities and what their responsibilities are.

Where the Region or, more broadly, area municipalities undertake engagement activities, it is critical that the process followed is consistent across the Region and works towards building relationships between municipal and regional staff and Indigenous communities.

It is therefore recommended that the Region adopt a corporate administrative process for engagement with relevant Indigenous communities in order to provide staff with a functional guidance document with which to engage Indigenous communities. A corporate protocol should take into account existing protocols produced by other municipalities as well as those produced by the Indigenous communities with rights and interest in the Region. Extensive consultation with relevant stakeholders, legal services, and internal departments which specialize in intergovernmental relations will be central to the process.

While Indigenous engagement around cultural heritage resources may form a part of this larger corporate plan, it is critical that any Indigenous engagement protocol exists at a level which applies to all municipal projects, such as an Official Plan.

This recommendation comes out of a jurisdictional scan of Regional municipalities and is a suggested best practice.

## 7.0 Recommendations for Visual Depictions of the Archaeological Model

The final Archaeological Potential mapping should be posted and publicly accessible on the Region's *Niagara Navigator* platform.<sup>5</sup> This will provide transparency to both development proponents and the general public as to where archaeological assessments are required in the event of land use change. This will also provide municipal staff, who may not have GIS capabilities, with ready access to the potential mapping in their review of development applications, in order to determine whether or not a condition for an archaeological assessment is required. GIS mapping, referenced in the official plan through the AMP guidance document, will be the most versatile approach to implementing, maintaining, and sharing the archaeological potential mapping.

While the archaeological potential mapping may also be incorporated in Regional and local Official Plans in the form of a schedule (e.g. Muskoka), this type of static mapping is less useful since it would require an official plan amendment to revise. If static mapping is preferred, it is suggested that it be attached to the OP as an appendix subject to revision at appropriate intervals.

It is recommended that all of the data layers used to create the Archaeological Potential mapping be stored in the Region's geospatial database. The archaeological site inventory layer contains sensitive information and access must be restricted, as required by the Ontario Ministry of Heritage, Sport, Tourism and Culture Industries. The other intermediate and base datasets used to create this final archaeological potential layer also may contain sensitive data. Access to these individual layers should be granted only by permission of the Region.

Those local municipalities with GIS capabilities may elect to maintain the archaeological potential mapping in digital format, however this will require co-ordination with the Region in terms of updates, etc. Similarly, a system of data transfer between local municipalities and the Region will be necessary in order to track all archaeological assessments conducted as part of the development approvals process in order to ensure that these lands are updated during updates to the Regional Archaeological Management Plan.

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<sup>5</sup> The City of Toronto's publicly accessible Toronto Map v2 web site includes archaeological potential as a data layer as does the City of Ottawa through [maps.ottawa.ca/geoOttawa/](https://maps.ottawa.ca/geoOttawa/). Simcoe County intends to make the composite archaeological potential layer publicly accessible through [maps.simcoe.ca](https://maps.simcoe.ca). The Regional Municipality of Waterloo intends to develop a web-based GIS portal for local municipal planners.