

## A Comparison of the Cultural Heritage Laws in the State of New York and Province of Ontario

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### **Introduction**

Prehistoric populations were not separated by current political or legal differences that currently separate national, state, or provincial laws, especially those regarding cultural and archaeological heritage. Indeed, the Iroquois nations, for instance, maintained a presence on both shores of Lake Ontario, and beyond, in what are today the State of New York and the Province of Ontario. The Iroquois were not the first in the region. Other prehistoric cultures maintained settlements and camps through out the region, some extending even farther.

Since the period of contact with Europeans, these lands were claimed by various polities. By the time of the American Revolution in 1775, both were colonies under the British Crown. After 1781, Canada continued to be ruled by the British Crown, and the thirteen colonies to the south went their separate ways to become the United States of America. July 1, 1867, Canada was granted home rule.

The object of this research is a comparison of the legal treatment of cultural and archaeological heritage in Ontario and New York state, focusing on: a) legal black letter law differences, b) case law differences, and c) behavioral differences. This project has three parts: a) compile the Federal United States, State of New York, Federal Canada, and Province of Ontario laws and regulations as they pertain to the Management of Cultural resources, b) examine precedent cases, and c) interview Cultural Resource Management (CRM) practitioners about how they behave under the laws.

## **Federal Laws Governing Archaeological and Cultural Heritage Sites**

### *The United States of America*

According to Fowler (2000:1), the history of archaeology and the law in the United States has been long and intertwined. He cites three reasons for this relationship. First, archaeological sites represent physical evidence of people and their activities in times past. Because such sites are on land, and are considered part of the land, they are subject to property laws. Second, archaeological sites are valued by different groups of people in different ways: i.e. ancestral heritage or shared heritage of humanity. Third, artifacts have value, both economic and symbolic. The symbolic value of an artifact can be that they are part of a group's ancestral heritage, or artifacts can have value as containers of scientific information. Economically, artifacts can be seen as moveable property that has value in various markets because they are "rare," "old," "authentic," etc.

There are four major statutes that govern archaeological and cultural heritage sites on federal land in the United States: the Antiquities Act of 1906<sup>1</sup>, the National Historic Preservation Act of 1966<sup>2</sup>, the Archaeological and Historic Preservation Act of 1974<sup>3</sup>, and the Archaeological Resources Protection Act of 1979<sup>4</sup>. These acts govern the disposition of cultural and archaeological resources.

The Antiquities Act has three basic parts. The first part deals with national monuments, reservation of lands, and the relinquishment of private claims. It gives the President of the United States authority "to declare by public proclamation historic landmarks, historic and

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<sup>1</sup> *United States Code* 16 (2005) §431-433.

<sup>2</sup> *U. S. Code* 16 (2000) §470-a-2.

<sup>3</sup> *U. S. Code* 16 (2005) §469-c-2.

<sup>4</sup> *U. S. Code* 16 (2005) §470aa-mm.

prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects protected.” When such objects are situated on privately owned land, the tract, or a portion necessary for the proper care and management of the object may be relinquished to the Government, with the Secretary of the Interior being authorized to accept the relinquished tract on behalf of the United States Government<sup>5</sup>.

The second section of the Antiquities Act deals with permits for the examination of ruins, excavations, the gathering of objects, and regulations. This section of the act states that permits for the examination of ruins, excavation of archaeological sites, and the gathering of objects of antiquity upon federal lands may be granted by the Secretary of the Interior, Secretary of Agriculture, or Secretary of the Army (or War *c.* 1906 – 1947), depending upon which jurisdiction the lands reside in. Such permits may be granted to institutions which are considered properly qualified to conduct such examinations, excavations, or gathering, and these permits will be subject to the rules and regulations which the secretaries of these departments make and publish from time to time for the purpose of carrying out this act. The permits for such undertakings are issued for the benefit of “reputable museums, universities, colleges, and other recognized scientific or educational institutions” in order to increase the knowledge of such objects, in addition to their being made available for permanent preservation in public museums<sup>6</sup>.

The third part of the Antiquities Act describes how an individual or individuals who,

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<sup>5</sup> *U. S. Code* 16 (2005) §431.

<sup>6</sup> *U. S. Code* 16 (2005) §432.

without permission, appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity that is situated on lands owned or controlled by the Government of the United States may be sanctioned. Upon conviction, such individuals are fined a sum of not more than \$5000 or imprisoned for a period of not more than ninety days, or both, at the discretion of the court<sup>7</sup>.

The National Historic Preservation Act established a program for “the Preservation of Additional Historic Properties throughout the Nation and for Other Purposes. The various portions of this act deal with the policy of the the Federal Government, the expansion and maintenance of the National Register of Historic Places, state historic preservation programs, certification of local governments, the establishment of programs and regulations to assist Indian tribes, and grants to states. Also covered in this act are the prohibition of compensating interveners, guidelines for Federal agency responsibilities, and preservation standards for federally owned properties. Guidelines are for the development and implementation of a comprehensive preservation and education program are laid out, as are grant and loan requirements<sup>8</sup>.

The Archaeological and Historic Preservation Act<sup>9</sup> has as its purpose to further the policy set forth in the “Act to provide the preservation of historic American sites, buildings objects and antiquities of national significance and for other purposes” of 1935<sup>10</sup> by providing for the preservation of historical and archaeological data that might be lost or destroyed as a result of flooding, building access roads, erection of worker’s communities, the relocation of railroads

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<sup>7</sup> *U. S. Code* 16 (2005) §433

<sup>8</sup> *U. S. Code* 16 (2005) §470 et seq.

<sup>9</sup> *U. S. Code* 16 (2005) §469-469c-1

<sup>10</sup> *U. S. Code* 16 (205) §461-467.

and highways, and the alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any agency of the United States. It also provides for any alteration of the terrain caused as a result of any such Federal project or federally licensed activity.

The purpose of the Archaeological Resources Protection Act is to secure protection for archaeological resources and sites that are on public and Indian lands for the present and future benefit of the American people. It also serves to foster increased cooperation and exchange of information between government authorities, professional archaeologists, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this act. Covered in this act are the excavation and removal of archaeological resources, custody of those resources, prohibited acts and criminal penalties, civil penalties, rewards and forfeitures, confidentiality, intergovernmental coordination of regulations, cooperation with private individuals, savings provisions, and reports<sup>11</sup>. Such regulations would include “Preservation of Historical and Archaeological Data”<sup>12</sup>, “Archeology and Historic Preservation; Secretary of the Interior’s Standards and Guidelines”<sup>13</sup>, “Curation of Federally-Owned and Administered Archaeological Collections”<sup>14</sup>, and “Protection of Archaeological Resources: Uniform Regulations”<sup>15</sup>

*Federal Canada*

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<sup>11</sup> *U. S. Code* 16 (2005) §469 et seq.

<sup>12</sup> *Federal Register* 50, no. 43587.

<sup>13</sup> *Federal Register* 48, no. 44716.

<sup>14</sup> *Code of Federal Regulations* 36, no. 79

<sup>15</sup> *Code of Federal Regulations* 32, no. 229

In this research, one major difference between the treatments of cultural and archaeological resources under the laws of the United States and Canada became apparent: the Federal laws in the United States are more extensive with various states drawing from Federal law for their state laws. Canada's Federal laws are less extensive, giving more power to provinces such as Ontario. There are three major acts that are used to govern and protect cultural and archaeological resources on Federal land in Canada. The first is the Historic Sites and Monuments Act<sup>16</sup>, which establishes the Historic Sites and Monuments Board which is empowered to commemorate historic places, make agreements with persons for the marking and commemorating of historic places, and to provide for administration, preservation and maintenance of any historic places acquired or historic museums established under this act. It also has the power to make regulations in order to carry out its responsibilities.

Another act that is important to the protection of cultural and archaeological resources is the Canadian Environmental Assessment Act<sup>17</sup>. Any project carried out on Federal land in Canada, requires an environmental assessment, which includes an assessment of archaeological resources<sup>18</sup>. Part of the Parks Canada Agency Act<sup>19</sup> is responsible for programs related to the grave sites of former Prime Ministers, federal heritage buildings, heritage railway stations, heritage rivers, federal archaeology, and the United Nations Educational Scientific and Cultural Organization's (UNESCO) Man and the Biosphere Initiative.

### **State and Provincial Statutes**

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<sup>16</sup> *Revised Statutes of Canada* 1985, c. H-4.

<sup>17</sup> *RSC* 1992, c. 37.

<sup>18</sup> *ibid.* s.2.

<sup>19</sup> *RSC* 1998 c.31. s.2

### *New York State*

Cultural and archaeological resource law in the State of New York is dealt with under the Historic Preservation section of the Parks, Recreation, and Historic Preservation law<sup>20</sup>. This law is to promote “the use, reuse, and conservation of such properties for the education, inspiration, welfare, recreation, prosperity and enrichment of the public.” It also serves to advance and encourage the protection, enhancement, and perpetuation of historic, archaeological, architectural and cultural heritage properties. It is also designed to assist municipalities in undertaking preservation programs and activities. The law also has an objective of fostering civic pride in the beauty and accomplishments of the past through cooperation with municipal and local organizations. Finally, this laws attempts to preserve and enhance the state’s attraction to tourists and visitors. In addition, there are laws for historic preservation<sup>21</sup>, the protection and management of historic and cultural properties<sup>22</sup>, and the protection of heritage areas<sup>23</sup>. Under these laws the *Cultural Resource Standards Handbook* (NYAC 2000) was published, which covers New York States standards for cultural resource investigations.

### *Province of Ontario*

Researching the laws dealing with Cultural and Archaeological resources in the Province of Ontario was complicated by the fact that this year Ontario enacted new legislation for the protection of said resources. There are three pieces of legislation that govern the treatment of cultural and archaeological resources in the Province of Ontario. The first is the Ontario

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<sup>20</sup> *NY CLS PRHPL* § 14.01-14.09 (2004).

<sup>21</sup> *Local historic preservation programs, NY CLS Gen Mun* §5-K, s. 119-dd (2004).

<sup>22</sup> *Protection and management of state historic and cultural properties NY CLS Pub B* §4-B, s. 63 (2004).

<sup>23</sup> *Heritage Areas, NY CLS PRHPL*§31-35.07

Heritage Act<sup>24</sup>. The second is the Ontario Environmental Protection Act<sup>25</sup>. The third is the Ontario Planning Act<sup>26</sup>.

The purpose of the Ontario Heritage Act is to regulate archaeology and protect archaeological sites, and gives automatic protection to archaeological sites. Should an individual seek to alter land with an archaeological site, such an individual requires a permit. If an individual wants to develop land that might have archaeological sites on it, the developer needs to have an archaeological assessment done. Should a developer fail to do so, or ignore the report from the archaeological assessment, he is subject to a \$1,000,000 fine and possible jail time. Other elements of the act allow for the licensing of archaeologists. Archaeologists are subject to technical review<sup>27</sup>. The Ontario Environmental Protection Act calls for the conservation of man made heritage<sup>28</sup>. According to Ron Williamson (personal communication 2005), it is estimated that 90% of heritage sites are covered by the Environmental Protection Act.

The Ontario Planning Act dictates the ways in which private land is developed for public use. This act applies to any project that requires a planning permit and serves as the primary piece of legislation that tells the people of Ontario how to plan. In the Ontario Planning Act is a section called the Provincial Interest Statement, which lays out what the provincial interests are for all planners. In Ontario's Provincial Interest Statement, it is stated that the conservation of build heritage feature, cultural landscapes, and archaeological sites is in Ontario's interest. Local municipalities use the Provincial Interest Statement to shape their planning processes. This allows them to call for an archaeological assessment in advance of development for anything

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<sup>24</sup> *Revised Statute of Ontario* 1990, §O. 18.

<sup>25</sup> *RSO* 1990, §E. 18.

<sup>26</sup> *RSO* 1990, §P. 13.

<sup>27</sup> *RSO* 1990, §O. 18.

<sup>28</sup> *RSO* 1990, §E. 18.

over the size of one or two lots<sup>29</sup>.

### **Differences in the Protection of Cultural and Archaeological Resources**

In comparing how the State of New York and Province of Ontario protect their respective cultural and archaeological resources, it should come as no surprise that there were differences. In the course of this research several people were interviewed in order to better ascertain these differences. Some of the people interviewed felt their answers might prove sensitive, while others gave permission to be quoted. The questions asked were as follows:

1. *In my research in the CRM laws of New York State and Ontario (and by extension the United States and Canada) I noticed that the United States has several statutes (Antiquities Act, Archaeological Resources Protection Act, and National historic Preservation Act) that the state of New York draws upon, where as the Canadian Statutes are not so extensive, giving more autonomy to the provinces. What advantages and disadvantages do you feel this hierarchical difference gives the respective CRM firms and what advantages could these differences give to the preservation of archaeological resources?*

From people interviewed in New York, it has been pointed out that when you have Federal laws, it makes things equal across the a large area, providing consistency only on Federal land. For example, the archaeology done on Federal land in Maine will be the same as that done in California. When you have additional state laws, dealing with state lands, that vary from state to state, this provides a lack of consistency. Also, when there are multiple laws dealing with the same things, “but not exactly”, this provides a greater opportunity for confusion and misunderstanding. Douglas Mackey (personal communication 2005) of the New York State Historic Preservation Organization (NY SHPO) felt that in New York State, the SHPO get to

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<sup>29</sup> RSO 1990, §P. 13.

look at more projects than their counterparts in other states. This is because many states do not have state level laws. However, most agree that New York's SHPO lacks the ability to enforce their laws. The protection of local lands will depend on local municipalities.

For Ontario, Dana Hall (personal communication 2005) of Ontario's Ministry of culture feels that professionals in Ontario benefit from a greater clarity of responsibility in that they only need to deal with jurisdiction. While this greater emphasis on provincial autonomy in Canada leads to variability between the provinces, all the provinces have some form of heritage preservation. Under the Ontario Planning Act<sup>30</sup>, provinces delegate responsibility to the municipalities, and the Planning Act defines when and where archeology is to be done. This means that the process of applying for a building permit can trigger an archaeological assessment.

2. *In comparing cases, the application of the Ontario Heritage Act and Historic Preservation Law (Article 14) appear to mostly be applied to the protections of Architectural structures, and I have yet to see a case where the law has been applied to an archaeological site, especially to prehistoric sites. In New York State, I only found one—State of New York et. al. vs Richard Michael Gramly, et al (Amato 2002). In the United States Federal Cases, there are numerous examples of US Federal laws being applied to historic and prehistoric sites. (I found no similar examples in Canadian Cases.) How would you account for this?*

One reason mentioned for this is that New York is an older state, and when people think of cultural resources they think of old buildings, which are much more visible than archaeological sites. Also, there are generally more spectacular sites outside New York State. Archaeological resources can be considered common. The other part of the problem is that New

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<sup>30</sup> RSO 1990, §P. 13

York State laws are very weak. New York SHPO is an advisory body rather than an enforcement body. Therefore, SHPO avoids litigation in favor of consultation, leaving legal matters to other Federal and State agencies.

Ontario faced a problem that there was no clear cut language in the Ontario Heritage Act<sup>31</sup> that protected heritage resources until the last decade. There was a case c. 1991 where a museum in London Ontario was charged with conducting an unlicensed excavation when it destroyed an archaeological site during construction. The crown lost the case because there was no definition in the Act for “archaeological excavation” (The Ontario Archaeological Society Inc. 1991). After this, the Ministry of Culture was unwilling to test this legislation again in court. The act has since been amended twice in 2002 and 2005, clarifying the language and making the Act more enforceable. According to Dana Hall (personal communication 2005) the addenda to the Ontario Heritage Act came into affect April 28, 2005.

New York

*1. In examining Part VI of the Ontario Heritage Act (RSO 1990 O. 18), Ontario has a licensing processe for people who wish to conduct archaeological fieldwork. There is no such requirement for the the United States in general or the State of New York in particular. Do you think the quality of excavations conducted in the State of New York would benefit from having a licensing requirement?*

Reaction to a licensing requirement were generally cautiously positive, assuming the process were rigorous enough. In New York State, the only requirements that must be met to conduct excavations is that an individual meets the basic standards set up by the Secretary of Interior: you must have an advanced degree to show you can under take research. According to

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<sup>31</sup> RSO 1990, §O. 18.

Douglas Mackey (personal communication 2005) it would be useful to identify those people who are better equipped to perform certain tasks. It would also give NY SHPO leverage in dealing with archaeologists who do not follow the rules.

The one type of leveling mechanism that New York State does have is the work that CRM firms do is important in terms of development. A client putting in a million dollar facility will not be kindly disposed to shoddy work being brought to their attention by the newspapers after one of their bulldozers finds a site.

2. *Should an individual's actions, through ignorance or intentional disregard for the law, damage or destroy archaeological resources, is there an enforcement arm empowered to either to sanction that individual or otherwise correct the situation, and what may such an enforcement body do to correct a situation where a CRM firm, through negligence or greed, damages or allows archaeological resources to be damaged, through action or omission of action?*

There is only one state agency in New York state with substantial enforcement powers: the Department of Environmental Conservation (DEC), however they are rarely called upon to sanction individuals who violate their regulations. In New York (and other States) it is a consultation process where an agency asks for a recommendation, and SHPO provides it. The agency then decides whether or not to follow the recommendation. According to Douglas Mackey (personal communication 2005) most agencies do follow there recommendations, since failure to do so could delay the process of getting a permit. Should a CRM firm do poor work, the only recourse now is that eventually clients will stop using them and they will eventually fold. Unfortunately, by then, the damage is done.

4. *The case of the State of New York, Seneca Nation of Indians, and Tonawanda Seneca*

*Nation v. Richard Michael Gramly, Great Lakes Artifacts Repository, and Canisius College*<sup>32</sup> was a case where an individual (one Mr. Gramly) under the auspices of Canisius College, conducted a field excavation at the Kleis Site, which was a burial ground (Amato 2002) . The Attorney General and the Seneca Nation filed suite in federal district court in 1999. Under the terms of the settlement, Gramly agreed to cease excavations at the Kleis Site, repatriate to the Seneca Nation all cultural items removed from the site, and in the future comply with Native American Graves Protection and Repatriation Act<sup>33</sup> (NAGPRA) and New York Archaeological Council (NYAC) Burial Resolution. Do you think this case has the potential to improve the protection of archaeological sites in New York State?

The consensus is that this case will have little impact on the preservation of cultural and archaeological resources. First, this case involved indian graves, and the Seneca Nations were instrumental in bringing the suite to bear. Without the charged issue of Indian burials, it would not have gotten that far. The case at least will make people aware that there will be consequences for disturbing Indian graves. Another problem with this case is that the NAGPRA is limited to Federal lands, projects with Federal funds, and known sites of great importance (even on private land) as in the case cited.

Canadian Federal

1. *In the Historic sites and Monuments Act*<sup>34</sup>, the duties of the Historic Sites, and Monuments Board are to “receive and consider recommendations respecting the marking or commemoration of historic places, the establishment of historic museums, and the administration, preservation and maintenance of historic places and historic museums, and shall

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<sup>32</sup> New York v. Gramly, No. 99 Civ. 1045 (W. D. N. Y, filed Dec 28, 1999).

<sup>33</sup> U. S. Code 25, §3001 et seq.

<sup>34</sup> Revised Statutes of Canada 1985, c. H-4

*advise the Minister in carrying out his powers under this act. Does the Board's power extend to prehistoric sites? Do the Board and Minister have protective or enforcement powers to preserve historic and/or prehistoric sites?*

Here there has been a change. The Board and Ministers did have protective and enforcement powers but that has been taken over by the Material Heritage Trust (Ron Williamson, personal communication 2005).

Ontario

1. *In examining Part VI of the Ontario Heritage Act (RSO 1990 O. 18), Ontario has a licensing process for people who wish to conduct archaeological fieldwork. There is no such requirement for the United States in general or the State of New York in particular. Do you think the quality of excavations conducted in the Province of Ontario benefit from having such a requirement?*

The licensing process in Ontario is considered a positive force in Ontario and tightening the process has general support. Archaeologists, both professional and avocational are required to demonstrate they are of a certain caliber, and the process provides guidelines that everyone has to work with.

2. *What is the Province of Ontario's enforcement arm for the preservation and protection of archaeological resources?*

It has been recognized that enforcement of the Ontario Heritage Act was difficult due to the weakness of the old Act, and enforcement policies and protocols have not been developed up to now. The Ontario Heritage Act allows the Ministry of Culture to refuse, suspend or revoke a licence, based on past conduct or incompetence or non-compliance with the Act. The Archaeology Customer Service Project (ACSP) has worked on clarifying definitions to allow this

to be enforced and we are drafting a licensing regulation under the Act to set it out clearly. With the latest amendments, the Ministry has the ability to conduct inspections of fieldwork as part of monitoring licence-holders for compliance with their licence and the Act, and we will be developing a monitoring program in the future. Other infractions by non-licensed individuals (such as looting or destruction of sites) are considered criminal activity and will be dealt with by the Ontario Provincial Police.

3. *Should an individual's actions, through ignorance or intentional disregard for the law, damage or destroy archaeological resources, what is that enforcement arm empowered to do in order to either sanction that individual or otherwise correct the situation?*

In Ontario, they have just begun considering this for non-licensed individuals, as the amendments that will allow the Ministry to start thinking about an enforcement strategy are just coming into effect.

4. *What may such an enforcement body do to correct a situation where a CRM firm, through negligence or greed, damages or allows archaeological resources to be damaged, through action or omission of action?*

The Ministry of Culture does not deal with firms, but with licensed archaeologists, and most firms are run by license-holders. With the new licensing system, the Ministry is developing a compliance monitoring program to address issues such as license-holders damaging archaeological resources. The Ministry may take action by refusing to renew, suspending or revoking a license, as outlined in the *Ontario Heritage Act*<sup>35</sup>. The Act also outlines the process to a request a review of the decision by the Conservation Review Board.

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<sup>35</sup> RSO 1990, §O. 18.

### **Conclusion**

The State of New York and Province of Ontario—and by extension, the United States of America and Canada—are divided by political and legal boundaries that have been in place since before 1775. These boundaries did not exist in prehistory, and other such divisions that may have been in place were vastly different. Yet, the fate of their remains in the archaeological record are being influenced by the boundaries of the twenty-first century.

The first major difference between New York and Ontario is the legal hierarchy that governs cultural and archaeological resources for both areas. New York draws upon its heritage laws from Federal statutes, while Ontario has a greater degree of autonomy. Another major difference is the existence of the licensing system in Ontario. This gives Ontario's Ministry of Culture some leverage in how archaeological fieldwork is done. A third difference is that in New York, the lands that require archaeological assessment are projects on Federal or State lands, or projects using Federal or State funds. Private land is generally at the mercy of the local municipalities as to whether or not such an assessment is required for the issuance of a permit to develop the land. In Ontario, the Ontario Planning Act<sup>36</sup> and the Provincial Statement of Interest have clear guidelines of what is expected from municipalities regarding cultural and archaeological resources.

Interestingly, both the State of New York and Province of Ontario have had difficulties enforcing statutes. With the recent legislation in Ontario, it is hoped that greater clarification of heritage law will allow for more effective enforcement. The New York SHPO on the other hand maintains an advisory role only with no power of enforcement. For now, New York relies on increasing the awareness and appreciation of the importance of cultural and archaeological

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<sup>36</sup> *RSO* 1990, §P. 13.

heritage, especially in regards to education and tourism.

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