Batten, Justine FLNR:EX

From:	Eades, Jonathan JAG:EX
Sent:	Thursday, May 30, 2013 12:49 PM
To:	Batten, Justine FLNR:EX; Houston, Gordon JAG:EX; Kay, Shirley JAG:EX; Moyse, Geoff JAG:EX
Cc:	Fyfe, Richard J JAG:EX; Chalke, Jay JAG:EX; Richter, Connie JAG:EX; Lieberman, Audrey JAG:EX; Mulholland, Lauren GCPE:EX; Bargen, Cory JAG:EX; Hay, Charlene JAG:EX; Wood, Anne JAG:EX; Hilmy, Marjukka JAG:EX
Subject:	MacKay v. MFLNRO (Heritage Conservation Branch) ("Willows Beach"), Appeal Decision of J. Gerow

Dear All:

Madame Justice Gerow issued her decision this morning in the appeal on two questions of law arising from an arbitral award in the above-captioned case. There has been media interest in this case.

While the decision will need to be reviewed more closely, we make the following comments on first read of the appeal decision, attached below.

Background Summary

A property owner applied to the Heritage Conservation Branch for a Heritage Conservation Act permit (a s. 12 permit) to allow her to develop her property. The property had heritage artifacts in the soil of unknown quantity and distribution. The Branch said that it could not determine whether the development permit could be issued or on what conditions until a site inspection and investigation was carried out. The inspection and investigation required a further permit (a s. 14 permit) under the Act. The property owner applied for the further permit, carried out the inspection and investigation at her expense.

She did so under protest, maintaining that the Branch did not have the authority to require a s. 14 permit inspection and investigation as a precondition to granting a s. 12 application. The property owner brought claims in arbitration against the Branch in nuisance, negligence and misfeasance in public office. The Branch successfully defended all claims. No damage determination was made, but the arbitral award appears to accept that the homeowner expended several hundred thousand dollars inspecting and investigating the property for heritage artifacts.

The Questions on Appeal

The property owner sought leave to appeal on two questions of law, concerning nuisance and the defence of statutory authority. Leave was denied at first instance but then reversed by the Court of Appeal.

The two questions on appeal were:

1) whether the Arbitrator erred in his application of the test of nuisance; and

2) whether the Heritage Conservation Branch had the statutory authority to decline to rule on a s. 12 application until a s. 14 permit was granted and then carried out by the property owner.

Justice Gerow's Ruling

With respect to question 1, Justice Gerow has ruled that the Arbitrator failed to apply the correct test in nuisance and did not determine whether the interference was unreasonable.

With respect to question 2, Justice Gerow has ruled at para. 88 that "it is inappropriate to infer that the ability of the Branch to impose conditions or refuse a permit under s. 12 meant that the Branch officials could require the petitioner to undertake a thorough investigation or heritage inspection at her own expense as a precondition to the permit." (para 88)

Justice Gerow did not expressly address the issue of relief, but her reasons are consistent with the relief sought by the property owner: remittal of the the Award back to the Arbitrator for a new Award insofar as these questions of law are concerned.

Justice Gerow additionally ruled that a corollary application for judicial review was an abuse of process and duplicated the arguments made on review of the arbitral award.

The property owner was awarded costs for the appeal; the Branch was awarded costs for the judicial review.

Implications of Today's Ruling

s.13,s.14

Jonathan Eades / Cory Bargen

Jonathan Eades
Barrister & Solicitor
Ministry of Justice
Legal Services Branch

1001 Douglas Street
PO Box 9280 Stn Prov Govt
Victoria, BC
Canada
V8W 9J7
(250) 387-2789 (telephone)

ADVICE TO MINISTER

CONFIDENTIAL ISSUES NOTE **Ministry of Forests, Lands and Natural Resource Operations** **Date: May 10, 2012 Updated June 4, 2013** **Minister Responsible: Hon. Steve Thomson**	**Willows Beach (Oak Bay) Development Site – Court Decision**

ADVICE AND RECOMMENDED RESPONSE:

- **The Province is currently reviewing the Court's decision and we are considering our options.**
- **I cannot comment further at this time.**

General:

- **This government is committed to the protection of First Nations heritage resources.**
- **The permitting process administered by the Archaeology Branch is the same for all landowners.**
- **The principle of "developer pays" is long established in B.C. and is similar to other Canadian jurisdictions.**

KEY FACTS REGARDING THE ISSUE:

On May 30, 2013 the BC Supreme Court issued its decision to Wendi MacKay's appeal of a decision under the Commercial Arbitration Act. MacKay owns property along Willows Beach in Victoria that is of significant archaeological interest to the Songhees First Nations.

The Court ruled 1) that the Arbitrator failed to apply the test for nuisance correctly and in fact the situation did qualify for a finding of nuisance, and 2) that the Archaeology Branch did not have authority under the Heritage Conservation Act to require the property owner be responsible for all costs associated with a heritage investigation and heritage inspection as a pre-condition to obtaining the site alteration permit. Site alteration permits are required to ensure that any disturbance of an archaeological site is done in a manner that mitigates the proposed damage to the site.

The Court did not expressly address the issue of relief or reimbursement of the plaintiff's archaeological related costs, but the Court's reasons are consistent with the relief sought by the property owner: remittal of the Award back to the Arbitrator for a new Award, so far as the appeal questions are concerned.

The property owner was awarded costs for the appeal; the Archaeology Branch was awarded costs for the judicial review where Wendi Mackay alleged an Archaeology Branch staff member provided incorrect information to a potential buyer. s.22

s.22 MacKay also repeated her claim that the decision made by the Branch was beyond the scope of its authority. The judge found this an abuse of process as Ms. Mackay was already pursuing this matter in her appeal of the Arbitrator's decision and the action was dismissed without consideration.

Implications of the Court's ruling:

s.13,s.14

Timeline of Litigation:

- Arbitration hearing (under Commercial Arbitration Act) on property owner's claim of $600,000 related to archaeological costs and damages– Nov. 25-27, 2009
- Arbitration Award granted Jan. 13, 2010 in favour of the Province
- Owner sought leave to appeal this award to the BC Supreme Court in March 2010 and was refused on Feb 15, 2011
- Owner sought leave to appeal to the Court of Appeal on March 2011 and was granted leave on Nov.16, 2011
- Appeal before the BC Supreme Court - Heard on March 2013
- BC Supreme Court decision on the Appeal – May 30, 2013

Communications Contact:	Heidi Zilkie	250-387-9580
Program Area Contact:	Justine Batten	250 953-3355

Program Area	Comm. Director	ADM	Minister's Office
JB		GT	

Batten, Justine FLNR:EX

From: Eades, Jonathan JAG:EX
Sent: Wednesday, June 5, 2013 12:31 PM
To: Batten, Justine FLNR:EX
Cc: Bargen, Cory JAG:EX; McKenzie, Tarynn JAG:EX
Subject: Willows Beach; Draft Issue Note summary

Justine:

As requested, I include the text of the Issue Note that we are presently preparing within Justice. We have not completed the note and, as such, have not circulated it to our superiors for approval of our recommendations. Nonetheless, this working draft summarizes recommendations that we have discussed with you in several calls in recent day; it may prove of some assistance for your meeting with your Deputy this afternoon.

s.13,s.14

Page 07 to/à Page 15

Withheld pursuant to/removed as

s.14;s.13

Page 16 to/à Page 18

Withheld pursuant to/removed as

s.14;s.13;s.17

Page 19 to/à Page 25

Withheld pursuant to/removed as

DUPLICATE

Page 26 to/à Page 29

Withheld pursuant to/removed as

s.14;s.13

Batten, Justine FLNR:EX

From: Eades, Jonathan JAG:EX
Sent: Wednesday, June 12, 2013 9:02 AM
To: 'Brian J. Wallace'
Cc: 'Debbie Lovett'; 'Geneviève Lyons'; Penner, Jonathan G JAG:EX; Bargen, Cory JAG:EX
Subject: s.13,s.14

Brian:

Thank you for your recent correspondence.

We are seeking directions from the Ministry with respect to same.

Yours truly,

Jonathan Eades

Jonathan Eades
Barrister & Solicitor
Ministry of Justice
Legal Services Branch

1001 Douglas Street
PO Box 9280 Stn Prov Govt
Victoria, BC
Canada
V8W 9J7
(250) 387-2789 (telephone)
(250) 356-8653 (facsimile)
jonathan.eades@gov.bc.ca

Batten, Justine FLNR:EX

From: Townsend, Gary FLNR:EX
Sent: Thursday, June 27, 2013 1:35 PM
To: Wheler, Francesca M FLNR:EX; Batten, Justine FLNR:EX
Subject: FW: Approved BN attached.

Francesca, Justine: Below FYI. Minister approved filing notice of appeal. s.13
s.13

Gary

From: Townsend, Gary FLNR:EX
Sent: Thursday, June 27, 2013 10:59 AM
To: Eades, Jonathan JAG:EX
Subject: Approved BN attached.

Jonathan, good to go. Thanks for your help.

Gary

20130627090420_

MINISTRY OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS
DECISION NOTE

Date: June 26, 2013
Date of previous note: June 18, 2013
File: 350-20/macka
CLIFF/tracking #198653:

PREPARED FOR: Minister Steve Thomson

ISSUE: Decision to file notice of appeal or not required by June 28, 2013 concerning the decision of Justice. Gerow in Mackay v. MFLNRO ("Willows Beach"),

BACKGROUND:

- In 2007, a private property owner, Mrs. Mackay, wished to re-develop her property and applied for a site alteration permit under the *Heritage Conservation Act* (the Act). The Archaeology Branch (Branch) lacked sufficient information to determine if the alteration plan would destroy or alter heritage property located in the soil. The Branch informed Mrs. Mackay that an archaeological inspection of the land would be required in order to determine if the alteration plan could be granted and, if so, on what conditions.
- The property owner made the required permit applications and funded the archaeological inspection. Near the end of the investigation, she claimed duress and denied that the Branch had authority to link a site alteration permit with an investigation permit.
- She then commenced an arbitration challenging this requirement after having built her house.
- In January, 2010 an arbitrator held the property owner had failed to prove any liability on the part of the Crown.
- The property owner sought leave to appeal this finding to the BC Supreme Court; leave was denied. Leave to appeal was then granted by the Court of Appeal who sent the appeal back to BC Supreme Court.
- May 30, 2013 a different BC Supreme Court judge ruled that the Province did not have the legislative authority to require an applicant for a site alteration permit to pay for an archaeological inspection. The judge also ruled that the arbitrator had failed to balance the interest of the private owner in the use and enjoyment of her land versus the public interest in preservation of heritage property as required in nuisance. The judge remitted the case to the Arbitrator to carry out that balancing exercise.
- The property owner is claiming in excess of $800,000 although these damages have not yet been reviewed by a court and actual archaeological costs are believed to be more in the amount of $100,000 to $150,000.
- The "developer pays" principle has been the standard in the Province since the mid-1980s and it is a national standard adopted by other provinces having similar legislation.

- On June 25th, legal counsel for Mrs. Mackay filed notice of appeal concerning a concurrent decision by the BC Supreme Court that a Judicial Review of the arbitrator's decision was an abuse of process and costs subsequently awarded to the Province.

DISCUSSION:

s.13

OPTIONS:

Option 1: File notice of appeal

s.13

s.13

Option 2: Do not file notice to appeal the decision
s.13

RECOMMENDATION:

Option 1: File notice of intent to appeal

Steve Thomson Option 1 — June 26/2013

DECISION & SIGNATURE — **DATE SIGNED**

Honourable Steve Thomson
Minister of Forests, Lands and Natural Resource Operations

Contact:
ADM: Gary Townsend
Div: IROD
Phone: 250.953.3473

Reviewed by	Initials	Date
DM	DP	26/06/13
DMO		
ADM	GMT	26/06/13

Page 36 to/à Page 40

Withheld pursuant to/removed as

s.3

Batten, Justine FLNR:EX

From: Thomas, Vivian P GCPE:EX
Sent: Tuesday, July 2, 2013 7:12 AM
To: Townsend, Gary FLNR:EX; Wheler, Francesca M FLNR:EX; Batten, Justine FLNR:EX
Cc: Zilkie, Heidi GCPE:EX; Dean, Sharon GCPE:EX
Subject: Fw: TNO: Victoria's approach on heritage property dispute is draconian - Ian Mulgrew - Vancouver Sun

We'll need to pull together some points this morning (in prep for QP) on why we're appealing. I'll ask Heidi to work with Justine.

s.3

Page 42

Withheld pursuant to/removed as

s.3

MINISTRY OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS
DECISION NOTE

Date: October 11, 2013
Date of previous notes: September 25, 2013 and June 18, 2013
File: 350-20/macka
CLIFF/tracking #: 199454

PREPARED FOR: Minister Steve Thomson

ISSUE: BC Supreme Court Decision in the matter of *Mackay v. British Columbia*, and its impact on the Archaeology Branch ability to issue permits under the *Heritage Conservation Act* (HCA).

BACKGROUND

In 2007, a private property owner who wanted to re-develop her property was required by the Archaeology Branch (the Branch) to fund an archaeological inspection of the land as it was known to contain a significant archaeological site. This process was necessary to inform the site alteration permit she would require to build her house.

After building her house, the property owner alleged that the Province had no right to require her to fund the study and commenced a court action challenging this requirement.

In January 2010, an arbitrator held the property owner had failed to prove any liability on the part of the Crown.

The property owner unsuccessfully sought leave to appeal this finding to the BC Supreme Court. The Court of Appeal reversed and permitted the appeal of the arbitrator's decision to proceed in BC Supreme Court.

On May 30, 2013, the BC Supreme Court ruled that the authority to require property owners to pay for archaeological inspections (s.14) as a precondition of obtaining a site alteration permit (s.12) was limited and rested with the Minister. The ruling stopped short of deciding the Province's actions constituted a nuisance in law but signaled to the arbitrator that nuisance should be found.

The property owner is claiming in excess of $800,000 although these damages have not yet been reviewed by a court s.13,s.17
s.13,s.17

In June 2013, the Province filed a notice of appeal against the BC Supreme Court decision.

s.13,s.17

DISCUSSION:

The "developer pays" principal has been the standard in the Province since the mid-1980s and is used to varying degrees by other provinces having similar legislation. (*See Schedule B for information acquired from other jurisdictions as of July 2013).*

Under Sections 14(4) and (7) of the HCA, the Minister can make an order requiring the property owner to complete and pay for an archaeological inspection (i.e. archaeological impact assessment or AIA) in specified circumstances such as, "the extraction or harvesting of resources from" or "changes in use or development of land" among others.

In the case of *Mackay v. British Columbia*, the BC Supreme Court found that the circumstances defined within the HCA did not apply. Furthermore, the court found the authority to require this is not delegated to the Branch level. s.13

s.13

s.13

The court believed it was not reasonable to require the land owner to "pay more than her fair share" of the archaeological costs as the findings of such studies are a public benefit.

The court also found that the value of the land was reduced significantly due to the need to obtain site alteration permits for any future land altering work on the property.

s.13,s.17

Page 45 to/à Page 47

Withheld pursuant to/removed as

s.13;s.17

RECOMMENDED APPROACH

s.13,s.17

DECISION & SIGNATURE
Honourable Steve Thomson

DATE SIGNED

Attachments:

s.13,s.17

Schedule B Status of the "developer pays" standard across Canada

Contact:
Gary Townsend, ADM
Integrated Resource Operations
250 953-3473

Alternate Contact:
Francesca Wheler, Ex Dir
Integrated Resource Operations
250 387-3745

Reviewed by	Initials	Date
DM		
DMO		
ADM		
Ex Dir		

Page 50

Withheld pursuant to/removed as

s.13;s.17

Schedule B

Northwest Territories	Largely, these situations are rare. Has a '**developer pays**' policy that is applied across the board. However, since there are no resident archaeological contractors in the NWT, they work collaboratively with Municipal governments (which are all very small, with populations ranging from less than 100 to just over 3000) to arrange for a permitted archaeologist already working in the region to undertake assessments. This helps cut costs for property owners.
Saskatchewan	In accordance with the legislation **developers** developing subdivisions, mines, cut blocks, oil wells, etc. have all been **on the hook for paying for archaeological assessment.** Whether the land is Crown or private property, the act applies. They tend to draw the line between commercial developments, where the developer anticipates making money from the development, and individual projects where someone is trying to make some improvements to a property they already own. Their office tries to deal with individual concerns as they recognize costs for an individual can be onerous, and in turn this can raise political implications. Much of the in-house work focuses on survey and avoidance of features, or protection through a legal covenant (this goes on the title for greater protection than the Act itself). Rarely do they have to deal with any level of site excavation as mitigation. E.g. currently dealing with a farmer who has bought eight quarter-sections of native prairie from the Crown, and now intends to put them into cultivation. Province will survey the land to record any sites and work with the farmer to avoid the sites, or mitigate the sites if need be. They expect largely stone feature sites with tipi rings, etc. and low artifact densities within these areas, so mitigation is largely a matter of mapping and testing.
Yukon	**Responsibilities** 1. The developer shall be responsible for the conduct of sufficiently detailed studies in the planning stage to enable the preparation of an historic resource impact assessment report, and for the production of such a report. 2. The Heritage Resources Unit of the Department of Tourism and Culture will be responsible for the technical and professional review of historical resource impact assessments and the preparation of review statements concurring with, rejecting or requesting a modification to such recommendations relative to historic resource sites which cannot be avoided by the development because of technical or economic limitations. 3. The developer is responsible for the conduct of all mitigative measures deemed appropriate at historical resource sites which cannot be avoided by the development because of technical or economic limitations. 4. Where the Heritage Resources Unit and the developer cannot agree on appropriate mitigative measures (as above), the Minister of Tourism and Culture will be responsible for the final decision as to appropriate mitigative measures to be undertaken in situations where historical resource sites cannot be avoided by a development because of technical or economic limitations. 5. The responsibilities of the developer will be the same for both government and private agencies.
Nova Scotia	If there is a recorded archaeological site on private property and there is possibility of disturbance, **the landowner pays for the archaeological assessment work** and possibly mitigation if avoidance of the archaeological resource is not possible. There

Schedule B

	is one area of exception. Last summer the Grand Pre cultural landscape became a UNESCO world heritage site. This is a landscape that is of high potential for Acadian, Planter and First Nation archaeological resources. To support the archaeological strategy developed for the designated area, the provincial government established a fund to help defer costs associated with archaeology that the private landowners may encounter. In general in Nova Scotia on provincial lands, the proponent, developer, or the department – **whoever needs to hire an archaeologist in order to get clearance** to move forward with a project – **pays.** Currently Nova Scotia Power Inc. is the biggest employer/funder in archaeology. There are a number of dams and spillways that need refurbishment or repair in order to meet national safety standards.. Many sites are being recorded or mitigated because the dam structures are on key watercourses and systems critical to pre-contact and historic Mi''kmaq lifeways and practices.
Ontario	Ontario's regulations are the same as Nova Scotia's regarding archaeological assessments and mitigation on public and Crown land: **developer pays.** **If human remains are discovered, the developer can argue a hardship case** with the provincial Registrar of Cemeteries, who may decide to pay for analysis, exhumation or reburial at his discretion. He usually hires or directs an archaeological firm to do the work. In a few high-profile situations, Ontario has paid for archaeological work to provide clarity about what's on the property as evidence for legal proceedings.
Manitoba	Manitoba's heritage legislation (*Heritage Resources Act*) has not been changed since **1986 when the 'developer pays' sections became law**. There is no distinction made for landownership as legislation is designed to apply equally to developments on provincial Crown, municipal or private lands. Only time when province will pay is for the investigation, and if necessary, the removal of found human remains on private or Crown lands, but this is on a case by case basis and Manitoba Historic Resources Branch has sole jurisdiction over this type of work (examination, exhumation, custody, consultation and repatriation) and it is rarely handed over to consulting archaeologists. There are however precedents for developers to contribute to these costs, depending on the situation.
Alberta	The basic answer is that **developers pay for Historic Resources Impact Assessment** if their projects will impact known archaeological sites or sites with high potential to contain archaeological resources.

Page 53 to/à Page 62

Withheld pursuant to/removed as

s.13