



## ASSOCIATION OF PROFESSIONAL ARCHAEOLOGISTS

*Working to Promote Professionalism in Ontario Archaeology*

Peter Armstrong,  
Director, Programs and Services Branch  
Ministry of Tourism, Culture and Sport  
400 Bay St, Suite 1700  
Toronto, ON M7A 0A7

[peter.armstrong@ontario.ca](mailto:peter.armstrong@ontario.ca)

March 21, 2016

Dear Peter,

**Re: Licensing policy in conflict with Ontario Heritage Act, Section 50(2)(a).**

The Licence Renewal Fact Sheet (dated 2015-03-05), outlines the policy and process for archaeological licence renewals and appears to include direction that is contrary to the Ontario Heritage Act (OHA). Specifically, by requiring that a licensee either accept added conditions that they might otherwise appeal, or be considered to have withdrawn their application denies the applicant access to the process set out in the OHA Section 50(2)(a).

We ask that this policy be rescinded and replaced by policy that conforms to the Act. Specifically, we ask that a Director's reconsideration of added conditions imposed on an archaeological licence be allowed.

As you may recall, this has been viewed by the Office of the Ombudsman as a legitimate and important part of the licence renewal process.

As set out in the OHA, for all classes of licence an application for renewal by an individual results in the licence being 'deemed to continue' until a decision has been made by the minister. When the decision made by the minister is to refuse to renew a licence, this decision can be challenged at the Conservation Review Board (CRB) by the applicant.

The Act also permits the minister to determine the terms and conditions of each licence issued. While the mechanism for determining which licences will have added conditions applied is obscure to those of us outside of the ministry, recent decisions by the minister to apply added conditions is consistent with the Act. From this, we are clear that restricted licences do not differ substantially from, or form a separate class of licence from the majority of archaeological licences issued.

Adding conditions and reducing the renewal term of licences is purportedly for the purpose of providing additional scrutiny and assure the minister that the licensee is fulfilling their duty in a manner supportive of the public interest in the archaeological resource (what we might term the 'good archaeology')

provision in the OHA Section 48(8)). However, we must note that the underlying rationale for issuing restricted licences is derived from archaeological assessment report review, not active investigation of ‘bad archaeology’ practice.

Restricted licences, those with additional conditions applied, are issued for a set period, as with any archaeological licence. At the end of this period, the licensee can apply for renewal. The ministry, following its prerogative under the Act, reviews the application and past conduct of the applicant to determine if licence renewal can be supported. Under the Act, if the ministry proposes to refuse licence renewal, the applicant is notified of the decision. At this point an appeal is allowed, during which time the licence is ‘deemed to continue’.

As many of our members have noted to us, the mechanism for moving from a restricted licence back to a licence with only the usual terms and conditions remains as unclear and arbitrary as the process for falling into this category.

In addition to the absence of publicly stated criteria for moving to and returning from a restricted licence status, the Fact Sheet indicates that additional, previously unidentified and unfair conditions also apply to a restricted licence. It is this policy surprise that appears to contravene the Ontario Heritage Act. Specifically, the policy found in the factsheet states:

**What happens if my licence is renewed with a limited term or added conditions?**

Once your renewal application has been approved by the ministry, you will be asked in PastPort to agree or disagree with the terms and conditions attached to your licence. Please read them carefully. Non-standard conditions are listed at the top. If you agree to them, the licence is then immediately issued to you. If you disagree and decline to be licensed under the terms and conditions, your licence is expired and not “deemed to continue”.

*There is no formal appeal process* when a licence has been renewed for less than the maximum term or with specific conditions. You will be provided with a summary of the reasons for the ministry’s decision. (Italics added)

In the absence of clear policy that conforms to the Act, we feel that the practice of refusing to renew a restricted licence without recourse to some form of appeal process is not in keeping with the public interest basis for the Act.

In our reading of the Licence Renewal Fact Sheet, the ministry has created a paradox: A licensee who may wish to contest some or all of the added conditions imposed, must agree to these added conditions in order to remain licensed (and through this, employed). However, by agreeing to the added conditions imposed on the licence (to maintain their livelihood), the right to dispute either the nature of the sanction, or the basis for imposing the sanction is deemed to have been waived. We view the added conditions as constituting a sanction against a licensee, and this has been confirmed by ministry staff. Yet, contesting this sanction is prohibited, with no formal avenue provided for contesting, or even for seeking clarification of the added conditions if they are disputed.

This constructs the unfortunate paradox wherein the licensee either suffers a greater sanction by refusing the licence, or a lesser sanction by accepting the licence with added conditions. The greater sanction removes the ability to appeal either sanction, as not accepting the licence on offer is deemed a decision of the applicant, not an action of the ministry. The lesser sanction also removes the ability to appeal against

the contested added conditions, as their acceptance has been registered. Apart from the ‘summary of the reasons for the ministry’s decision’, there is no formal exchange over the sanction.

Simply, there is no avenue for avoiding sanction or contesting the imposed sanction.

We must note here that in terms of using licensing sanctions to drive ‘good archaeology’ the policy set out in the Fact Sheet may actually prevent some good archaeologists from continuing to practice, while archaeologists who may actually require sanctioning – but may be disputing their licence status at the CRB – will yet be ‘deemed to continue’ and carry on with the sort of work the ministry is apparently intent on opposing.

It is the position of our membership that in regard to the policy set out in the Fact Sheet:

The policy is unfair and contrary to the language and spirit of the Ontario Heritage Act,  
That ministry has assumed a unilateral right to impose policy that is contrary to the Act, and;  
The policy denies licence holders a fundamental right to due process in relation to a sanction imposed.

Therefore, we request that;

The opportunity to appeal or for a Director’s reconsideration of added conditions be allowed, that the process for a Director’s reconsideration be open and transparent, and that during this reconsideration period the licence is ‘deemed to continue’.

Please note that the APA strongly supports constructive initiatives to ensure that archaeological practice under licence makes a positive contribution to the archaeological record and the protection of the archaeological resource in the province. We feel, in this case, that refusing a fair hearing over added conditions is not constructive.

We look forward to learning your response to this concern at your earliest convenience. To contact us, you may email me, [andrewhinshelwood@hotmail.ca](mailto:andrewhinshelwood@hotmail.ca), or the APA directly at [info@apaontario.ca](mailto:info@apaontario.ca).

We look forward to working with you in resolving this matter to the benefit of our membership.

Kind regards,



Andrew Hinshelwood  
Vice-President, APA

cc: K. Finnerty, ADM Culture Division