

## IMPLEMENTING DELGAMUUK'W

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Biography of Dave Schaepe  
Sto:lo Nation Archaeologist

Dave Schaepe currently acts as archaeologist in Sto:lo Nation's Department of Aboriginal Rights and Title. Some of his primary responsibilities include administering Sto:lo Nation's heritage policy, archaeological permitting system, and artifact repository, conducting archaeological research and development related assessments of all types; facilitating university-run archaeological field school programs; and maintaining involvement in cross-cultural public education and Sto:lo interpretive programming, such as the Xa:ytem ("HAY-TEM") Interpretive Center. Dave received his M.A. in archaeology from Simon Fraser University. His research interests lay in the 'household archaeology' of the Northwest Coast; precontact warfare and political structure among the Coast Salish, and the 'culture history' of the Chilliwack River Valley.

Good day. It is a pleasure to be here and presenting to you all this afternoon. I'd like to thank Eldon [Yellowhorn] for providing the detailed background on archeological policy and processes that are presently engaged in British Columbia.

My presentation is going to be somewhat more informal. I'd just like to start by providing a brief background on the some of the archeological policy that affects First Nations, that First Nations have to deal with on a regular basis, and then move into a bit of about the impact of the Delgamuuk'w decision and in what ways that decision, or aspects of that decision, have affected the practice of archeology in the province.

To begin with, archeological policy, as Eldon said, is solely governed by the province: the Archeology Branch and their administration of the Heritage Conservation Act, as last amended in 1996. Under the Heritage Conservation Act there's a number of different sections that relate to the requirements for archeological permitting, they relate to legislation regarding the protection of archaeological resources, and penalties for violations of the Act in regard to unpermitted disturbance of archeological resources. Let's see, what else? That's basically it: you've got permits and protective legislation. One of the big drawbacks that I see with the Heritage Conservation Act and the way it is administered is that the Archeological Branch themselves are not responsible for the enforcement of the Act which, in my practice and, I think, many others recently have found that to be a bit of a stumbling block in terms of how the Heritage Conservation Act, how effective it is in terms of actually protecting archeological resources. But I'll get into that in a little bit more detail, perhaps. So overall, though, there is a pretty limited spectrum of archeological sites that are governed and protected by this Act that the province holds. Speaking, basically, from my experience with the Sto:lo Nation -- as many other of the First Nations probably have some of the same concerns I have and we have -- I find that a lot of the concern that we deal with comes with the fact that the Heritage Conservation Act is designed really only to deal with physical evidence, physical remains associated with past human activity. It's a pretty standard, pretty basic definition of archeology and archeological remains. Looking at it in that regard and that perspective, it cuts out any sort of ethno-archeology, it cuts out the fact that there are contemporary aboriginal peoples living in British Columbia today who continue to use landscape and continue to leave material traces of their activities on the landscape. And the Act just doesn't deal well with those things at all, any sort of recent modification or use associated with traditional activities. It has a pretty narrow application to protecting sites prior to 1846, the time of Crown sovereignty and the establishment of Oregon Boundary Treaty. So by cutting out this ethno-archeological approach to practicing and protecting archeological sites, you're cutting out any kind of symbolic or spiritual significance that the landscape, and portions of the landscape, have to contemporary people. The Archeological Branch and the province simply cannot do anything to protect those aspects of the landscape which are still significant to aboriginal people but which may not leave, for one, material traces and, two, which aren't qualified just by age or disqualified primarily due to the way the legislation is set up. They won't qualify by age to be protected. I find that these failures, so to speak -- whatever you want to call them, failures or not -- these gaps in the legislation, I think, are largely responsible for a lot of the tensions and a lot of the misunderstandings, a lot of the misgivings in the archeology community and associations with the First Nations people. That is my overview of policy and some of the inherent problems associated with the Heritage Conservation Act.

In terms of concerns associated with the practice and administration of archeology, at Sto:lo Nation we've got a number of these concerns and, as I say, they are probably shared by a number of First Nations groups. I've broken this down into two basic areas, two subsets: one is resource management and the other is research. Now when I speak of resource management, it is along the lines of what Eldon was talking about, in that it's archeology that is developmentally-related, it's a development-related practice of archeology with the intention of identifying impacts to cultural resources from proposed developments that are supposed to occur. Research in this regard is an academic, or problem-oriented, practice of archeology, practiced as a subset of anthropology and one of the main goals, anyway, is the investigation of human behavior.

So there are two very different aspects of archeology and how they involve First Nations groups around the province: resource management, research.

Under resource management some of the basic problems that I encounter pretty regularly are to do with consultation, the idea of permitting and permission, and the idea of protection. Again, the consultation process as it is set up now between First Nations groups and the province, between First Nations groups and developers, and the inclusion of First Nations groups in the involvement of planning -- just any involvement in relation to archeological permitting -- it's pretty shaky at this point. Just generally, consultation is one of the problems. Again, permitting and permission, a lot of First Nations groups have archeological permitting systems that are set up to compensate, or try to compensate, for some of the negative aspects associated with the Heritage Conservation Act. How those permits are dealt with by the province at this point is often times frustrating in that there is a lack of First Nations permitting legality, so to speak. In this regard, First Nations permits aren't at an equal level as the provincial permitting system and they're basically not legally required by practicing archeologists to include these, or even to apply for and receive First Nations permits. It's often done out of, basically, a professional ethical standard only. So, again, that's a bit of a concern and a problem that is facing First Nations these days. The protection of cultural sites, particularly those that fall outside the narrow definitions of the provincial legislation, how does one go about protecting significant cultural sites when the province doesn't fulfill that obligation? So those are some of the basic concerns that are dealt with the under the resource management section of archeology.

Under research it's generally a little broader: what kind of research is being conducted, by whom, and for whose benefit? Is there any practical application for the data that is being collected by academics, field schools, anybody conducting archeology in First Nations territories? How can that be used to First Nations' benefit? How can it be steered in a direction that is useful on a number of levels outside of just academic pursuits of investigating human behavior? So that is a bit of background about concerns and about the present state of archeology and processes of archeology. I will leave this open to questions, I'm sure you'll have many. I am not covering all the bases here, but there will be plenty of time for questions afterwards.

Just going to jump into Delgamuuk'w then, and some of the elements of the decision that I think are applicable to archeology and how these areas are practiced these days. There are four elements of the ruling that I see as being particularly applicable to archeology on First Nations' behalf. One is the statement that aboriginal title is the right to the land itself. It's not just the right to traditional practices on the land, it's actually the right to the land itself. This right is protected under Section 35 of the Constitution Act of 1982, so it's embedded in the Constitution; it's pretty solid. The definition of title according to Delgamuuk'w is that title is communal. The right to the land is held by all members of an aboriginal nation. Decisions about land use must be made at the community or nation level, therefore, as such land use is governed by internal laws of that nation. As such, this provides a legal support for development of aboriginal land laws governing the use and developments on aboriginal land or within areas to which aboriginal people have title. This provides the opportunity to embed heritage policy in archeological permitting systems into the set of land laws. The communal nature of title has a bearing on how First Nations policies, archeological permit systems, and so on are administered. At Sto:lo Nation, we've made some adjustments since the Delgamuuk'w decision about how we approach our permitting system and who actually deals with it and, going with the communal approach, we've pretty much centralized things at a nation level, as we feel it is the strongest level of communal organization. As the archeologist, I deal with the permitting system on behalf of all the other member bands, basically reviewing permit applications for their methodological content and for their ability, or whatever, in relation to what the development is, and therefore we can address aboriginal concerns -- Sto:lo Nation concerns -- in relation to archeological permitting on any number of levels, beyond just methods, but in relation also to alienation of lands. If projects that are being proposed, archeologists proposing to do impact assessment for, are in some way not supported by the nation or felt to alienate unjustifiable portions of the territory, then we can take the stance against that and we have the options to not proceed with permitting those particular projects on, as I say, any number of levels, whether it's methodology or infringements on aboriginal rights and title.

I think one of the other benefits of dealing with that centralized national level is we try to provide a trained staff of support archeologists who, as one of the conditions in our permitting, we recommend often -- and people forget about this -- using a Sto:lo Nation member to act as a field assistant. It's not just employment opportunity, it actually is a way of providing insight into some of the spiritual uses of the landscapes, things that archeologist may not be aware of. Somebody with this kind of traditional knowledge to accompany consulting archeologists into the landscape and to conduct their impact assessments and doing it at a nation level, you can provide a group of trained staff to act as a helpful assistant to projects rather than just what sometimes is a tag-a-long and is just an employment opportunity. We feel that it expands on that

quite well. So embedding heritage policy and archeological permitting system into aboriginal land laws, I think, is one thing that is important as an outcome of Delgamuuk'w.

Second, the Crown has a fiduciary duty that requires consultation. The ruling says that consultation must be in good faith and with the intention of addressing the concern of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation. So Crown consultation provides an opportunity to apply First Nations' heritage policies and archeological permitting systems, which are embedded in the land law as a way of addressing cultural heritage concerns. The legal obligations of the Crown to recognize First Nations legislation is still, I feel, somewhat ambiguous, as the Crown still justify infringement; however, this cannot be done without compensation. That is a strong point, though, in that the Crown has the fiduciary obligation to consult, and that consultation provides the opportunity to apply tribal law and aboriginal land law. Archeological and cultural site information can also then be incorporated into development-related referral processes, if they exist, and they should exist based on this requirement. Again, this is an opportunity to apply archeological data and other cultural data to the referral process and to development-related planning to assess proposed development on the landscape, to see if there is any infringement involved and what level, whether it has to do with heritage, whether it has to do with wildlife, whether it has to do with water, with whatever, and then coming up with the appropriate compensation if there is permission allowed for the development to proceed.

Third, aboriginal title is provided by fulfilling a three part test. Number one, the land must have been occupied prior to Crown sovereignty, that is 1846. "The physical occupation" -- this is quotes from the ruling -- "may be established in a variety of ways, ranging from construction of dwellings through cultivation and enclosure of fields, to regular use of definite tracts of land for hunting, fishing, or otherwise exploiting the resources. The second test is that there must be continuity between present and pre-sovereign occupation. The third test is that, at sovereignty, occupation must have been exclusive," and that is the aboriginal group must have held the ability to exclude others from that area. There is an option here that allows for the argument of shared exclusivity. In regard to this three part test for proving title, archeology, I think, is an important element of that, particularly with regard to showing occupation in relation to dwellings, village sites, camp sites, things like that. The material remains of settlements, that is one area where archeology can contribute significantly to this title test. As well, I think that, in looking at answering these three questions, so to speak, incorporating archeology with other disciplines in creating a multi-disciplinary approach to produce a holistic perspective on the aboriginal attachment to the land -- basically, you're looking at settlement systems outside one discipline, this archeological discipline. When you mesh that with archeology, with ethno-botany, with ethno-history, with anthropology, with oral history, basically the spectrum of sciences and studies that apply to human behavior and to aboriginal groups, you're going to be able to get at proving this title through these tests much, much better than simply looking at it with one field at a time. I think that incorporating multi-disciplinary approach is pretty critical and I think that, on an academic level, it's very exciting, because I think it allows people to get at and use archeology, in this case, in ways that maybe it hasn't been used before to get at questions, which really you can get at, that are at the heart of human behavior and why people do what they do and all that. So I think that there is a lot of opportunity there to express the science and to apply the science. The court allows an opportunity to be innovative in providing evidence for occupation. Just looking at the ruling, they suggest rather than define applicable types of evidence. I think it's worth taking a look at that and being innovative in terms of what kind of data is out there, what kind of research can you do, archeologically, to get at this standard of occupation. Archeological research can be steered towards developing a useful database in this regard. So that is how research end of things applies to this primarily. You can apply a development-related impact assessment, results of information from those types of studies to this, but I think research itself is more suitable.

Lastly, the courts must respect oral history. It brings up a question -- it's a huge thing -- but it brings up a question: just how well will oral historical evidence be judged by the court system, how will it be judged for validity? You need, I think, to help provide a basis for understanding oral history, for providing a basis for the judges, a context for them to look at it. I think archeology may be used to ground truth elements of oral history in cases where oral testimony indicates village locations, campsites, and so on. So using archeology to ground truth elements of oral history, to verify it for the courts' sake, and to bring it forth to a realm of validity, as the court sees it, is important. I see this as a way of strengthening or validating oral history in the eyes of the court, basically. I think all of this boils down to, from an archeological perspective, from somebody who is engaged in archaeology profession, it brings the archeology into the realm of applied sciences, and I think it quite fascinating in that regard. It actually is meaningful, in what archeologist can do and actually applying to peoples' everyday lives and having a significant impact there. So that's it for me.