

**Burial Site Discovery: Frequently Asked Questions (FAQs) for Archaeologists (2021)**

**Table of Contents**

- Burial Sites: Legislation, Regulations, and Authority..... 3**
  - 1. What are the main sections under the *Funeral, Burial and Cremation Services Act, 2002* (FBCSA) that pertain to burial sites? ..... 3
  - 2. How is jurisdiction allocated between the Bereavement Authority of Ontario and the Ministry of Public and Business Service Delivery Registrar for the FBCSA when it comes to burial sites? ..... 3
- Discovery of Human Remains and Initiating the Burial Site Investigation ..... 3**
  - 3. What do I do when human remains are found on an archaeological site that I’m working on? ..... 3
  - 4. What are my responsibilities when human remains are found on an archaeological site that I’m working on? ..... 4
  - 5. Is a burial site investigation always needed? How does the Registrar determine if a burial site investigation is needed? ..... 5
  - 6. What if a land owner tells me that they think there’s a burial site or a cemetery on their property, and wants me to investigate, but no remains have been found yet? Who do I call about this? ..... 5
  - 7. What’s the difference between a cemetery and a burial site? ..... 6
- Indigenous Engagement and Burial Sites ..... 7**
  - 8. How do I approach Indigenous engagement around burial sites that have been discovered that I am tasked with investigating? ..... 7
  - 9. When do I need to engage with Indigenous communities if human remains are found on an archaeological site? ..... 7
- Burial Site Investigations: Process and Requirements ..... 8**
  - 10. How long does the burial site process take? ..... 8
  - 11. What if a burial site that I’m investigating extends beyond the study area for the development project that I’m working on? Should I just continue the investigation onto the adjacent property? ..... 8

12. What do I do if I can't complete my burial site investigation due to unavoidable circumstances, such as inclement weather or the winter season setting in?.....	8
13. In order to produce a complete technical report on a burial site, I think I need to include photos. What if the representatives, Indigenous or otherwise, do not want photos taken of the remains? What do I do?.....	8
14. What do I need to include in my burial site report? .....	9
15. How will my burial site report be used by the Registrar?.....	9
16. What do I do about human remains or artifacts associated with human remains that I excavated as part of a burial site investigation that I have in my care now, but the land owner and/or representative(s) hasn't taken any action to have the remains and/or artifacts reburied? Do I have to keep them? Can I just give them to people who say they are their descendants? .....	10
<b>The Site Disposition Agreement and managing the disposition of Irregular Burial Sites</b> .....	<b>10</b>
17. How does the Registrar determine who the representatives (of the deceased) are? .....	10
18. What's contained in a site disposition agreement? How can I help the land owner to develop a site disposition agreement? .....	11
19. What if I know that the Indigenous communities want something different to happen with the remains than what the land owner/proponent wants to do? What if their site disposition agreement negotiations stall or if the parties find themselves at an impasse? What's my role in this negotiation?.....	12
20. What happens with irregular burial sites since no site disposition agreement is necessary? Can the land owner just do whatever they want with the remains?.....	12
<b>Additional Questions? Contact the Registrar. ....</b>	<b>13</b>

## **Burial Sites: Legislation, Regulations, and Authority**

### **1. What are the main sections under the *Funeral, Burial and Cremation Services Act, 2002* (FBCSA) that pertain to burial sites?**

The main provisions specifically dealing with the discovery, investigation, classification and disposition of burial sites are set out in sections 1 and 94-100 of the [Funeral, Burial and Cremation Services Act, 2002](#) (FBCSA). Associated regulatory provisions are set out in sections 145 and 174-184 of [Ontario Regulation \(O. Reg.\) 30/11](#). You should familiarize yourself with these provisions in order to effectively carry out burial site investigations on behalf of land owners. Please contact the [Registrar](#) for clarification on how to proceed in a burial site investigation.

### **2. How is jurisdiction allocated between the Bereavement Authority of Ontario and the Ministry of Public and Business Service Delivery Registrar for the FBCSA when it comes to burial sites?**

On January 16, 2016, responsibility for cemetery and crematoria licensing and enforcement was delegated to the [Bereavement Authority of Ontario](#) (BAO). The [Ministry of Public and Business Service Delivery](#) (MGCS) retained responsibility for administering the war grave, cemetery abandonment, cemetery closure, and burial site provisions under the FBCSA. In general, the BAO is not involved with burial sites until it is decided that the site or nearby land will be established as a cemetery. If a cemetery is established, the land owner, or another person consented to by the land owner, must be licensed as the operator of the new cemetery. If a new cemetery is not established, the remains must be reinterred in an existing cemetery. For questions about burial permit requirements, please contact the BAO.

A [burial site](#) means land containing human remains that is not a cemetery. The MGCS Registrar is responsible for ensuring that the FBCSA provisions related to burial sites are followed.

## **Discovery of Human Remains and Initiating the Burial Site Investigation**

### **3. What do I do when human remains are found on an archaeological site that I'm working on?**

When you discover human remains at an archaeological site, [section 95 of the Funeral, Burial and Cremation Services Act, 2002](#) (FBCSA) requires you to immediately notify the police (local detachment or OPP, as applicable) or coroner. It is an offence under the FBCSA to disturb or order the disturbance of a burial site or artifacts associated with the human remains unless:

- the coroner instructs you to do so

- your activities are part of the execution of a site disposition agreement
- the disturbance is carried out according to the regulations (see [O. Reg. 30/11](#), sections 145 and 174-184 for the main burial site provisions).

You may be charged with an offence for failing to comply with the FBCSA if you do not report the discovery. If the police attend the site first, they will secure it and notify the coroner. Typically, the coroner will either attend the site or the police will send pictures of the human remains to the forensic anthropologist at the provincial coroner's office. The coroner or forensic anthropologist on behalf of the coroner will determine whether the remains are of forensic interest (i.e. whether foul play is suspected in relation to the human remains). The coroner's investigative powers are set out under the [Coroners Act](#), which is administered by the [Ministry of the Solicitor General](#).

If the coroner determines that the remains are not of forensic interest the coroner is required to ensure the MGCS Registrar is notified about the burial site. The land owner must take whatever steps are necessary to preserve the site, the human remains and any artifacts until a final disposition is made in accordance with the FBCSA and its regulations. If the coroner declares that foul play is suspected in relation to the discovered human remains, the land ceases to be a burial site.

#### **4. What are my responsibilities when human remains are found on an archaeological site that I'm working on?**

Your first responsibilities are to stop work immediately, protect the remains and any associated artifacts from further disturbance or destruction, and contact the police or coroner.

If the remains are determined not to be of forensic interest, notify [MGCS' Registrar for the FBCSA](#) of the discovery. Do not rely on the coroner's office to notify the Registrar as this can create delays in the process. When asked, provide the Registrar with information that will help the Registrar to notify the land owner of the discovery and to determine if a burial site investigation is needed. [O. Reg. 30/11, subsection 175\(1\)](#) specifies that it is the land owner's responsibility to take whatever steps are necessary to preserve the site, the human remains and any artifacts until the final disposition of the remains is made in keeping with the requirements under the FBCSA. You may be asked by the land owner to help or to act on behalf of the land owner.

If the Registrar orders the land owner to get a burial site investigation to determine the origin of the site, the land owner may ask you to do that investigation if you have a professional licence under the [Ontario Heritage Act](#). The prohibition under [section 94 of the FBCSA](#) against disturbing a burial site etc. does not apply to an archaeologist who is disturbing the site in the course of a burial site investigation ordered by the Registrar. However, the person conducting a burial site investigation must do so with the minimum disturbance to the site that is reasonable in the circumstances. That person also has certain reporting requirements under

the FBCSA. For example, within five days after beginning the investigation, the archaeologist conducting the investigation must advise the Registrar of the possible cultural origins of the human remains. Other reporting requirements are described in [FAQ #14](#) below.

You cannot remove or conduct scientific analysis of the remains or associated artifacts from a burial ground or an Indigenous peoples burial ground (“Aboriginal peoples burial ground” under the FBCSA section 97) without the consent of a representative of a person whose remains are interred in that site.

## **5. Is a burial site investigation always needed? How does the Registrar determine if a burial site investigation is needed?**

Depending on the circumstances, the Registrar may or may not order a burial site investigation to be undertaken to determine the origin of a site [see [subsection 96\(1\) of the FBCSA](#)]. In some cases, the origin is clear. The Registrar will consider the information that you provide regarding the circumstances of the discovery of the human remains, among other relevant information, when determining the need for an investigation, so make sure to provide the best and most complete information available. This may include contextual information such as:

- Type of site
- Location of the site
- Level of disturbance
- Location and orientation within the site/feature
- Indigenous communities’ input (if they have been engaged on the project).

If the Registrar is of the opinion that a burial site investigation would impose an undue financial burden on the land owner, the Registrar must undertake the investigation.

## **6. What if a land owner tells me that they think there’s a burial site or a cemetery on their property, and wants me to investigate, but no remains have been found yet? Who do I call about this?**

The first thing to do is to contact the [Bereavement Authority of Ontario \(BAO\)](#) to determine whether or not there is an existing cemetery on the property. Even if a cemetery in that location is not known to the BAO, if, through researching the property, there is evidence that suggests that a cemetery is present, please contact the BAO before you complete an archaeological assessment in that area that may physically disturb the site.

For the definition of “cemetery” under the FBCSA, see [section 1 of the FBCSA and subsection 145\(2\) of O. Reg. 30/11](#) (or see the [response to Question 7 in this document](#)).

If, through your assessment of land that is not a cemetery, you encounter human remains, work must stop and the police or coroner must be contacted. When human remains are found

outside of a cemetery that are not of forensic interest, the MGCS Registrar for the FBCSA will be contacted and may order a burial site investigation.

## 7. What's the difference between a cemetery and a burial site?

Under the FBCSA, a burial site means land containing human remains that is not a cemetery. Human remains means a dead human body or the remains of a cremated human body. In practice, we don't know the location of burial sites until they are discovered through ground disturbing activities.

A cemetery means,

- a) land that has been established as a cemetery under the FBCSA, a private Act or a predecessor of one of them that related to cemeteries, or
- b) land that was recognized by the registrar as a cemetery under a predecessor of the FBCSA that related to cemeteries, and includes,
- c) land that, in the prescribed circumstances, has been otherwise set aside for the interment of human remains, and
- d) a mausoleum or columbarium intended for the interment of human remains.

A cemetery includes land that,

- is known to contain human remains,
- was set aside to be used for the interment of human remains,
- was and continues to be set aside for the interment of human remains, and
- was and remains readily identifiable as land containing human remains.

A cemetery may be known to:

- the land owner on whose property the cemetery is located
- relatives or descendants of the deceased
- members of the community in which the cemetery is located
- the [Bereavement Authority of Ontario \(BAO\)](#), which licenses cemetery operators and maintains a public register of cemeteries in the province.

There may also be historical records indicating that there once was or may have been a cemetery located on the property. The BAO should be contacted before fieldwork is initiated in a cemetery or a potential cemetery.

Human remains may be found in land that was a cemetery that was closed. Historically, when cemeteries were closed the remains in them were supposed to be moved to another cemetery. That said, it's not uncommon to find that not all the remains were moved. If you think you are dealing with a site like that please contact the [MGCS Registrar for the FBCSA](#).

## Indigenous Engagement and Burial Sites

### 8. How do I approach Indigenous engagement around burial sites that have been discovered that I am tasked with investigating?

When in doubt, the best thing to do is to engage.

Keep in mind that:

1. You may already be engaging Indigenous communities if you are working on a known Indigenous archaeological site. Reach out to your liaisons, monitors, or their supervisors if you are unsure.
2. Your proponent or approval authority may already be engaging or consulting with Indigenous communities as part of a broader development project. They may be able to identify the communities that have already been providing input on the project and who should be notified.
3. You may ask the Registrar which communities may have an interest in the burial site. Often, Indigenous communities reach out directly to the Registrar when burial sites are discovered, and the Registrar may be able to provide you with information that will help you to engage.
4. The [Ministry of Heritage, Sport, Tourism and Culture Industries \(MHSTCI\)](#) has guidance regarding Indigenous engagement for consultant archaeologists.
5. Upon being advised of the possible cultural origins of the human remains at a burial site, the Registrar is required under the FBCSA to advise those persons who the registrar has reason to believe may be representatives of the person whose remains are interred of the existence of the burial site and the possible cultural origins of the human remains.
  - Under the FBCSA, “representative”, when used in connection with a person whose remains are interred, means, in the case of an aboriginal peoples burial ground, (i) the nearest First Nations Government, or (ii) another community of aboriginal peoples that is willing to act as a representative and whose members have a close cultural affinity to the interred person.

### 9. When do I need to engage with Indigenous communities if human remains are found on an archaeological site?

The FBCSA does not set out Indigenous engagement requirements for archaeologists. Whether as otherwise required or as a best practice, archaeologists should allow for input from Indigenous communities regarding how the burial site and remains are investigated, handled, protected, and cared for during the investigation.

It is best to engage Indigenous communities as early as possible in the burial site investigation process to give them an opportunity to provide meaningful input on the process. If there are

monitors or field liaisons on site with you, ensure that they are aware of the burial site discovery and that their communities' input is sought on how to approach the investigation before it begins or, if that is not possible, as close to the start of it as possible. If community representatives are not on site with you, ensure that they are notified of the discovery so that they have the opportunity to participate in the process should they wish to do so.

## **Burial Site Investigations: Process and Requirements**

### **10. How long does the burial site process take?**

The length of time between the initial burial site discovery and the reburial of the remains in an established cemetery or the establishment of a new cemetery varies greatly. Be prepared for the process to take months to complete, as it can be challenging to arrive at an agreement as to how the burial site is to be investigated and reported on, who the representatives are, and what the ultimate disposition of the remains will be.

### **11. What if a burial site that I'm investigating extends beyond the study area for the development project that I'm working on? Should I just continue the investigation onto the adjacent property?**

If you have reason to believe that the burial site extends onto an adjacent property, please notify the [Registrar](#) immediately. Do not extend your investigation onto an adjacent property without the permission of the land owner of that property and the Registrar.

### **12. What do I do if I can't complete my burial site investigation due to unavoidable circumstances, such as inclement weather or the winter season setting in?**

If you are unable to complete your burial site investigation due to unavoidable circumstances, please contact the [Registrar](#) to provide notification. The Registrar will ask you to submit a Preliminary Update, which summarizes your work to date, the relevant parties with interest in the investigation, and preliminary findings based on your work. Submitting this update will provide the Registrar with the information needed in order to effectively and efficiently track the progress of the investigation.

### **13. In order to produce a complete technical report on a burial site, I think I need to include photos. What if the representatives, Indigenous or otherwise, do not want photos taken of the remains? What do I do?**

It can sometimes be tricky to balance reporting requirements with the wishes of descendants or other potential representatives. In this situation, in lieu of photos consider creating technical drawings of the remains or burial feature. These will help to support your opinion regarding the style and manner of burial that is critical to a burial site report.



Photos may be available from the police who attended the scene when the discovery was made, as they often use these photos to document the scene and obtain an opinion from the coroner's office as to whether the remains are of forensic interest.

These photos can be included in the report to the Registrar if they help to clarify context or interpretation.

## **14. What do I need to include in my burial site report?**

[O. Reg. 30/11 subsection 174\(2\)](#) sets out the written information that must be provided to the Registrar by a person who conducts a burial site investigation.

### **Burial site investigation**

174.(2) A person who conducts an investigation of a burial site shall report to the registrar in writing on the origin of the site, and include the following information:

1. A determination of the probable cultural origin or religious affiliation of the persons whose remains are interred and the basis upon which it is made.
2. A description of the boundaries of the burial site.
3. Details of the style and manner in which the human remains are interred.
4. A description of any artifacts that, in the opinion of the investigator, form part of the burial site.
5. An opinion as to whether the burial site was set aside with the apparent intention of interring human remains in accordance with cultural affinities and the basis upon which the opinion is made.
6. Information relevant to the preparation of a site disposition agreement. O. Reg. 30/11, s. 174 (2).

This list is not exhaustive. The Registrar may ask for additional information or documentation to facilitate the preparation of a site disposition agreement or to understand the origin of the site. Please follow the instructions provided to you by the Registrar in order to produce a report that provides all necessary information.

## **15. How will my burial site report be used by the Registrar?**

The report that you produce on the investigation that you completed is extremely important to the burial site process. The Registrar will use your report as a tool for decision making in this process. Your report will help the Registrar to create a Declaration for the site, in which the Registrar describes the characteristics of the burial site and determines whether the site is an:

- Indigenous ("Aboriginal", under the Act) peoples burial ground;

- burial ground; or
- irregular burial site

For the definitions of these terms, see [FBCSA, s. 97](#).

Your report will also be used to help the Registrar to identify who the representatives of the deceased are, if any. For the definition of “representative,” see [O. Reg. 30/11, s. 145\(1\)](#). These representatives, or, as applicable, persons who would be the representatives in certain circumstances, along with the land owner, will receive notice of the Declaration. The land owner and the representatives of an Indigenous peoples burial ground or a burial ground will be required to negotiate a site disposition agreement.

**16. What do I do about human remains or artifacts associated with human remains that I excavated as part of a burial site investigation that I have in my care now, but the land owner and/or representative(s) hasn’t taken any action to have the remains and/or artifacts reburied? Do I have to keep them? Can I just give them to people who say they are their descendants?**

If you have human remains or artifacts associated with human remains in your care from a burial site investigation that were supposed to be reburied, please contact the [Registrar](#). If a site disposition agreement was reached, this should provide direction as to what is to happen with the remains. If the burial site was declared to be an irregular burial site (a burial site that was not set aside with the apparent intention of interring human remains in it), or if it was declared to be a burial ground and no person has agreed to be identified as a representative, the land owner must ensure that the burial site or land in close proximity is established as a cemetery, or that the remains are reinterred in a nearby cemetery ([O. Reg. 30/11, section 178](#)).

Please notify the [Registrar](#) if you are contemplating handing over remains or artifacts from burial sites to another party. Failure to comply with requirements or agreements under the FBCSA may result in legal action.

## **The Site Disposition Agreement and managing the disposition of Irregular Burial Sites**

**17. How does the Registrar determine who the representatives (of the deceased) are?**

The Registrar takes an evidence-based approach to determining the representatives of interred persons as defined in [subsection 145\(1\) of O. Reg. 30/11](#). The Registrar will consider, as applicable:

1. Asserted or established Indigenous interests in relation to the burial site;
2. Expressions of interest in being involved as representatives, including whether or which groups or communities have been involved in the burial site investigation; and
3. Information that you provide in your burial site report, including your opinion as to probable cultural origin or religious affiliation and the evidence used to arrive at that opinion.

This can be a complex process, so it is important that you provide the Registrar with the most complete and accurate information possible, based on your knowledge as a professional licensed archaeologist.

## **18. What's contained in a site disposition agreement? How can I help the land owner to develop a site disposition agreement?**

[O. Reg. 30/11 section 184](#) identifies the required contents of a site disposition agreement.

**184.** A site disposition agreement respecting an aboriginal peoples burial ground or a burial ground shall contain,

- (a) a legal description of the location of the burial site in which the human remains are interred and, if applicable, a statement that the remains will be left where they are interred and the site established as a cemetery;
- (b) the style and manner in which the human remains are to be disinterred and reinterred, if applicable;
- (c) the time within which the disinterment and reinterment are to take place, if applicable;
- (d) the provisions being made for the future maintenance of the cemetery in which the human remains are to be located;
- (e) the allocation of the costs of carrying out the agreement;
- (f) all other matters that the parties to the agreement agree upon; and
- (g) in the case of an arbitration, all other matters that the arbitration board or arbitrator considers necessary. O. Reg. 30/11, s. 184.

The site disposition agreement is a legally binding document, so the land owner may wish to seek legal counsel in its negotiation and drafting. If you are not also a legal professional authorized to provide private legal advice you should not give or attempt to give such advice.

The information in your burial site report is intended to supply some of the information that must be in the site disposition agreement. If you are expected to disinter and/or reinter the human remains, you may be asked for advice or information on how that may be done. You may also be asked to assist with negotiations, especially if you have been the main conduit between Indigenous groups and the land owner. Please contact the [Registrar](#) for a sample site

disposition agreement that the land owner and representatives can use to help them to develop their own agreement. However, the sample agreement is not a substitute for legal advice.

**19. What if I know that the Indigenous communities want something different to happen with the remains than what the land owner/proponent wants to do? What if their site disposition agreement negotiations stall or if the parties find themselves at an impasse? What's my role in this negotiation?**

[Subsection 181\(1\) of O. Reg. 30/11](#) sets out the prescribed time (30 days from the date the Registrar gives notice of the Declaration) for the site disposition agreement to be reached before the Registrar must refer the matter to arbitration under [subsection 99\(3\) of the FBCSA](#). In reality, this process can take much longer, and the Registrar may defer referring the matter to arbitration if, in the Registrar's opinion, there appears to be a reasonable prospect of an agreement being reached, for so long as that is the case [[FBCSA, subsection 99\(4\)](#)].

If the Registrar refers the matter to arbitration, an arbitrator or arbitration board, as applicable, will be responsible for holding a hearing to determine the outstanding matters pertaining to the agreement [[O. Reg. 30/11, sections 181-82](#)]. The arbitrator or arbitration board may appoint experts to inspect the remains or artifacts and report back, may inspect the site, and may award costs of the arbitration as between the parties, who are the land owner and the representatives [[O. Reg. 30/11, subsection 183\(1\)](#)]. But the arbitrator or arbitration board must not order the removal of human remains and associated artifacts from the burial site for scientific study [[O. Reg. 30/11, subsection 183\(2\)](#)].

The arbitration award must deal with matters that may be the subject of a site disposition agreement to the extent not already dealt with by the parties, and the arbitration award and any other provisions agreed to by the parties constitutes a site disposition agreement [[O. Reg. 30/11, subsection 183\(3\)](#)]. The persons named in an arbitrated settlement who have been given the opportunity to fully participate in the arbitration process are bound by the settlement whether they chose to participate or not [[FBCSA, subsection 99\(5\)](#)].

The archaeologist does not have a prescribed role in the arbitration process. That said, the archaeologist may be asked or required to provide evidence as part of the arbitration process.

**20. What happens with irregular burial sites since no site disposition agreement is necessary? Can the land owner just do whatever they want with the remains?**

No, the land owner cannot do whatever they want with the remains from an irregular burial site. The land owner must ensure that the remains are interred in a cemetery [[FBCSA subsection](#)

[100\(1\)](#)]. When a site is declared to be an irregular burial site, the Registrar must serve notice of the Declaration on those persons who would have been representatives of the deceased had the burial site been declared to be a burial ground or an Indigenous peoples burial ground.

In the case of irregular burial sites, the FBCSA does not specifically direct the land owner to enter into a site disposition agreement with persons who would be representatives. In practice, though, the land owner may, and typically does, consult with those persons in order to identify a final resting place for the remains.

## **Additional Questions? Contact the Registrar.**

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