







Widow loses court challenge in fight over heritage status of property

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A British Columbia woman who spent more than a half-million dollars on archeological tests because her property turned out to be sitting on an unregistered aboriginal site has lost a court challenge, even though the judge in the case said she had "great sympathy" for what the widow has been through.

Wendy Mackay bought the property in Oak Bay, near Victoria, from her parents in 2006, and intended to build a home for herself and her husband, who has since died.

It turned out the site was once an aboriginal midden – essentially a refuse site – and hundreds of artifacts had been recovered there in the early 1970s and 80s.

There was nothing on the land title to indicate the property had any archeological significance and it wasn't registered as a heritage site. When her parents built their home on the site in 1985, Ms. Mackay said they didn't run into any problems and were never alerted about the property's heritage status, although the archeologist that originally excavated the site found 50 more artifacts at the time.

Despite the fact that there were no records indicating the heritage status, when Ms. Mackay's architect checked with the provincial government, he was told the lot was a protected site.

The province's archaeology branch then required Ms. Mackay to hire archeologists to conduct a series of extensive tests, which she said in court documents delayed the construction of her home by nearly a year and cost her between \$500,000 and \$600,000.

Ms. Mackay, whose husband died in 2007, launched a legal challenge that ended up in arbitration, and the arbitrator ruled last year that the province had done nothing wrong.

She then appealed the arbitrator's decision, but Madam Justice Shelley Fitzpatrick of the B.C. Supreme Court said the arbitrator correctly applied the law, leaving her with no choice but to uphold the decision.

"I must say that I have great sympathy for the position in which Ms. Mackay finds herself," Judge Fitzpatrick said in a transcript of her ruling, which was posted to the court's website this week.

"She and her late husband bought this property without any knowledge of its history and the potential impact of the Heritage Conservation Act on the property and her rights to develop a home on the property. ... Nevertheless, the parties chose to resolve this dispute by arbitration and, having done so, they expressly agreed to limit any rights of appeal from that decision."

Ms. Mackay had argued in her original lawsuit that the archaeology branch incorrectly applied the Heritage Conservation Act, requiring far more extensive archaeological testing than necessary. She also argued the dispute constituted a nuisance – a legal claim that someone has interfered with the use and enjoyment of another's property.

The arbitrator, John Horn, concluded the law allowed – at least implicitly – for the province to impose the testing requirements that it did. He also rejected the nuisance complaint.

Judge Fitzpatrick noted the law limits when an arbitrator's decisions can be overturned, restricting such appeals to cases in which there are significant errors in applying the law. This case, Judge Fitzpatrick said, did not meet that standard.







Ms. Mackay, her lawyer and the province's archaeology branch could not be reached for comment.

In court documents connected to the appeal, Ms. Mackay's lawyer said unbeknownst to his client, the property is "the best-documented site in one of the longest- and best-known archaeological zones on southern Vancouver Island."







An academic paper posted to the University of Victoria's website notes the property sits on a midden that was first identified by the province in the 1950s, but was not excavated until 1971.

Excavations uncovered hundreds of artifacts, such as flaked-stone arrowheads and harpoon points, animal bones and fishing hooks. Those artifacts were linked to numerous occupations in the surrounding areas spanning the past 2,600 years, says the paper, prepared in 2007 as a master's thesis by Ila Moana Willerton.

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