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Homeowners no longer face bills for archeological excavations

Louise Dickson / Times Colonist

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Wendi Mackay battled B.C.'s Archaeology Branch. Photograph By BRUCE STOTESBURY, Times Colonist

B.C.'s Archaeology Branch can no longer force homeowners to pay for archeological research on their properties.

The province has abandoned its appeal of a 2013 B.C. Supreme Court ruling that found the Archaeology Branch acted improperly in forcing Wendi Mackay of Oak Bay to pay for archeological research on her property.

In her judgment, Justice Laura Gerow ruled that the Archaeology Branch's treatment of Mackay, who lives at 2072 Esplanade on Willows Beach, constituted a nuisance.

"This is significant," said Brian Wallace, Mackay's lawyer. "I think Justice Gerow's decision, and the government's acceptance of it by abandoning its appeal, is important for any property owner in B.C."

A statement from the Ministry of Forests, Lands and Natural Resource Operations said that although the province initially filed a notice of intent to appeal, a review determined that it would not be in the public interest to pursue it. Both sides agreed to drop appeals and pursued a negotiated settlement instead, said the statement.

The case began in 2006 when Mackay and her late husband bought property from her parents and planned to build a new house. The province told her she had to conduct an archeological investigation because the property was a heritage site, although it did not have an official designation.

Mackay found out later that archeological digs had taken place on the property in 1971. About 850 artifacts were removed and a report was filed with the Archaeology Branch.

Despite this earlier work, an architect hired by the Mackays was told by the branch that a site-alteration permit would be required. To obtain the permit, the Mackays had to hire an archeologist for a heritage inspection and file a report for the branch.

The inspection cost Mackay close to \$6,000. It indicated an excavation would be required. Mackay hired an archeologist to obtain the permits and to do the necessary work for \$51,000.

“There were very significant delays in her construction project as a result. So she was left with a piece of property that couldn’t be used for anything for a year until almost all the hurdles had been met,” Wallace said. “And this was at a time when construction costs were going up very quickly. Her construction costs were considerably more than they would have been. And she had to find somewhere else to live.”

In all, Mackay estimated the archeological work, construction delays, loss of property value and legal fees have cost her \$750,000.

Her claim against the province for compensation was rejected at various levels, but in May 2013, Gerow ruled in Mackay’s favour, saying the province had no authority to make her pay for an archeological survey of her own property.

Wallace said he wasn’t authorized to say how much the government paid Mackay in the final settlement, but it was less than her costs.

No one is contesting that it’s important to preserve important First Nations sites, Wallace said.

“The question is, if it’s important to society, shouldn’t society pay for it, not the person who finds themselves in this position without any knowledge of it whatsoever?”

The Gerow decision is now the law in B.C., Mackay said. “The court’s decision should assist any homeowners who are faced with permitting requirements under the Heritage Conservation Act. In essence, the court has said that private property owners should not be required to pay the costs of archeological research undertaken in the public interest, particularly when the government has not registered its interest in private land on title,” Mackay said.

“My hope is that other homeowners do not have to pay similar costs or face similar delays and that the Archaeology Branch will take a more reasoned and balanced approach in setting and administering its permitting conditions.”

[ldickson@timescolonist.com \(mailto:ldickson@timescolonist.com\)](mailto:ldickson@timescolonist.com)

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