



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

# Spirit of the Land



## The Toolkit

FNMPC Technical and Policy Toolkit for Assessing and Seeking Restitution for Project-Specific and Cumulative Effects on Indigenous Cultural Rights

# Spirit of the Land



**The Indigenous Cultural Rights and Interests Toolkit** has been co-developed by the First Nations Major Projects Coalition (FNMPC) and its First Nation partners, the Anishinabek Nation, and Stelat'en First Nation, Nadleh Whut'en First Nation, Saik'uz First Nation, and Cheslatta Carrier Nation ("Carrier First Nations").

Cover artwork is created by Indigenous artist, Johnny Ketlo III who is a member Nadleh Whut'en located in north central BC. The Nadleh Whut'en community is a member of the FNMPC.



The Indigenous Cultural Rights and Interests Toolkit (“ICRIT”, or the “Toolkit”) represents a series of integrated policy and technical guidance (“Tools”) for characterizing and exploring compensation for project-specific and cumulative effects on Indigenous cultural rights, in support of consent-based decision making on major projects and the protection and promotion of Indigenous cultural rights.

Recognizing the existing gap surrounding cultural rights assessment in Environmental Assessment (EA) policy and law, the Toolkit is designed to provide support to Indigenous Groups that are engaging with project proponents and the Crown in discussions about offsetting residual cumulative effects affecting cultural rights and values within their territories. As a technical support, the Toolkit will be particularly useful in situations where a proposed project poses serious, long-term, or irreversible, impacts to an Indigenous Group’s cultural rights. By providing a framework for evaluating and responding to adverse effects, this Toolkit seeks to empower Indigenous Groups in the assessment of potential impacts to their way of life. The Toolkit may also benefit Proponents seeking greater clarity and certainty around what Indigenous cultural rights are and how they can be assessed and mitigated in collaboration with impacted First Nations, and governments that are charged with the task of appropriately assessing the cumulative risks and impacts of major projects on First Nations.

While collaborative implementation with Proponents/Government and Indigenous groups, coupled with capacity support, is an option to help foster relationships, this Toolkit should not be unilaterally applied by Industry or Government. This Toolkit is first and foremost an Indigenous-led process, grounded in a community’s principles and leadership.

## The Toolkit is comprised of five distinct tools:



### **Tool #1: (page 12)**

How to undertake an inventory of cultural rights (including areas, important cultural landscapes, areas of preferred use, etc.) within a First Nation's territory deemed to be at risk in relation to a proposed major project.

### **Tool #2: (page 30)**

How to characterize the cumulative effects, or historical context, related to cultural rights within which the potential impacts of new proposed projects may occur.

### **Tool #3: (page 38)**

How to identify impact pathways, conduct effects characterization and evaluate the severity of potential impacts. This includes weighting historical context, considering potential future impacts, implementing community-focussed criteria, and drawing on community-focussed thresholds in such determinations.

### **Tool #4: (page 49)**

How to analyze and determine the extent to which impacts can be accommodated (i.e., forms of compensation), as well as for addressing "non-compensable impacts" to cultural rights and values.

### **Tool #5: (page 69)**

Considerations for when financial compensation for impacts to cultural rights and values (including community values, community, and Indigenous Knowledge, etc.) adversely impacted by likely effects on cultural rights associated with proposed major projects, is desired.

Given the critical role that Indigenous Knowledge of the culture holders themselves must play in any meaningful cultural impact assessment, proponents and the Crown should not attempt to use these Tools themselves without collaboration or preferably a lead role for the impacted First Nations themselves.

# Understanding Indigenous Cultural Rights



It is important to note that the objective of the toolkit is not to characterize the legal dimensions of cultural rights. Canadian law does not provide an understanding of cultural rights grounded in First Nations perspectives, and so this Toolkit looks to each individual Nation to articulate their own understanding of their cultural rights. As such, there are as many possible definitions for culture as there are distinctive cultures themselves. As a result of the varying systems of knowledge, values, beliefs, and behaviour underlying cultural rights, the content of cultural rights will also vary from Nation to Nation. As a result of both the self-definition and variability inherent to cultural rights, providing a concrete definition of cultural rights is inherently challenging. Rather than implementing a reductionist approach, it is our intention to develop a framework that relies on a generic and malleable formulation of cultural rights. This generic understanding of cultural rights has been derived from common attributes of cultural rights defined by Indigenous peoples and including consideration of definitions put forward by governing and legislative bodies:

“[Culture] includes the way of life, the system of knowledge, values, beliefs, and behaviour, all of which is passed down between generations. Culture is reflected and embedded in practice, the built and natural environment, and the relationships between people and their natural environment”.<sup>1</sup>

This definition includes both the tangible and intangible facets of culture. Culture is more than *physical*, or *tangible*,<sup>2</sup> manifestations such as art, buildings, heritage sites, and documents. The concept must be understood as including elements such as *non-physical*, or *intangible*, manifestations such as relationships, stories, knowledge, and ways of life. Furthermore, Indigenous culture is not static, but temporally fluid, evolving, passed down, and adapting over time.

This Toolkit therefore defines the *right to culture*:<sup>3</sup> as **the right to protect, practise, transmit, revitalize, and access in any preferred means both the tangible and intangible elements of culture**. The right to protect, teach, learn, and speak one’s own language is an example of a cultural right. Other cultural rights include the right to protect and transmit knowledge, sense of identity and place, a worldview, and a way of life. In the context of a major project, this may include but would not be limited to the right to protect certain places or landscapes that hold special cultural significance and are integral to practicing a cultural right. Cultural rights are rooted in cultural values, and they may often involve practices, stories, and beliefs that are attached to specific geographic locations.

<sup>1</sup> Gibson, “Survey of the Field,” 8, emphasis added. This definition also draws on conceptualizations such as those put forth by the UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage on its activities (2001) and the UN’s independent expert in the field of cultural rights, Shaheed, “Cultural Rights: What Are These and Why Are They Important for Women’s Right to Development?,” Conference Proceedings (Asia Pacific Regional Consultation with UN Special Procedures: Women’s Right to Development, Phnom Penh: 2011).

<sup>2</sup> The terms “physical” culture and “tangible” culture are used interchangeably to refer to cultural structures, items, and locations that can be touched, visited, and/or mapped (e.g., physical structures, settlements, encampments, burial sites, etc.). Similarly, the terms “non-physical” and “intangible” culture are used to refer to the elements of culture which are more difficult to define and quantify and cannot necessarily be touched or situated on a map (e.g., beliefs, spiritual significance, traditions, identity, sense of place, etc.).

<sup>3</sup> The Toolkit’s definition of a right to culture is further grounded in the principles articulated in the United Nation’s Declaration on the Rights of Indigenous Peoples (2007), which sets out a series of principles designed to protect the distinct identity and cultural integrity of Indigenous peoples. For further information on how the concept of cultural rights was defined, please see the Toolkit Backgrounder (pages 2-5).

Some examples of Indigenous cultural rights include or apply to:

- » Hunting, trapping, and fishing practices and locations;
- » Food plants and medicine gathering locations and practices, including the location and act of collecting plants and natural materials for cultural activities;
- » Ancestral cultural locations (e.g., archaeological sites);
- » Camps and important sites;
- » Intergenerational knowledge transfer;
- » Aspects of cultural identity associated with place and territory;
- » Sense of place;
- » The right to practice culture, including language, customs and ceremonies, traditional land-based and water-based harvesting activities, etc.;
- » The right to revive cultural practices and sustain them into the future;
- » The right to access, use, protect, and conserve special cultural/spiritual locations;
- » Stories and songs related to place, both present and historical (i.e., ancient, or mythical time);
- » Cultural landscapes associated with stories, songs, and language; and
- » Areas of historical and cultural significance (e.g., associated with historical or myth-time events of the Nation).

A key element of cultural rights includes the ability to access all the spaces, places, activities, resources, etc. necessary to engage in, transmit, and perpetuate cultural practices. This includes cultural activities that are currently practiced, as well as those that will be practiced in the future. A central tenet of the right to cultural continuity is the ability and assurance that culture will live on and be meaningfully practicable for subsequent generations. There are two primary forms of impacts on cultural rights: those arising as a result of changes to the environment (e.g., changes to hunting as a result of deforestation and removal of vegetation), and those arising from changes in socio-economic conditions (e.g., outside worker influx in the area, changes to the local economy and income flow, rotational work, etc.). The right to cultural continuity emphasizes factors such as kinship and practices integral to a certain way of life.

A second foundational element of cultural rights relate to locations of cultural importance. Cultural rights include the right to protect and enjoy these sites of importance, and the rights cannot be extinguished even if the locations are not currently accessible due to various developments, relocations, or additional factors. Often, these sites will have great importance culturally, spiritually, and/or traditionally. For example, cultural sites of importance may be locations tied to creation stories or a Nation's history. While continued access to these sites may no longer be available, they still retain their value and importance.

It is important to note that the cultural rights discussed in this toolkit represent a non-exhaustive list. These categories of cultural rights are artificial constructs used throughout this Toolkit to aid in facilitating discussion and help ensure a robust approach to understanding and protecting cultural rights. In reality, culture holders may not distinguish between such categories, and it is their right to insist that culture and impacts on culture be assessed in a holistic way through the lens of Indigenous understanding.

## Toolkit Methodology

This Toolkit has been collaboratively developed by the First Nations Major Projects Coalition and our partner First Nations: the Anishinabek Nation, and Stellat'en First Nation, Nadleh Whut'en First Nation, Saik'uz First Nation, and Cheslatta Carrier Nation (collectively the "Carrier First Nation"). Referred to as the *Spirit of the Land Project* by the Anishinabek Nation, this Toolkit was developed through extensive back and forth communications, research, and literary review. This process has helped ensure that the Toolkit provides applicable policy and technical guidance options for characterizing, evaluating, and where desired, determining restitution for project-specific and cumulative effects on Indigenous cultural rights.

It is readily recognized that Environmental Assessment (EA)<sup>4</sup> is a predominantly western process, which has historically excluded and failed to meaningfully include Indigenous peoples, Indigenous Knowledge, protocols, and ways of knowing/being. EA has commonly alienated Indigenous communities and peoples from the state-run process of assessing proposed projects, neglecting to find space for Indigenous ways of knowing and disregarding the importance of Indigenous Knowledge to understanding how a project might impact the environment and the people who live in it.

We acknowledge that First Nations have always assessed the impacts of human activity on their values and relied upon Indigenous systems of law and governance to decide how to address those impacts. The failure of EA processes to integrate Indigenous decision making is part of challenge of assessing project impacts to cultural rights. The revitalization and recognition of Indigenous legal systems is therefore necessary to achieve true partnership and collaboration. We recognize that, while this Toolkit acknowledges that the evolution of cultural rights protections is deficient, it fails to challenge the relative distribution of power between First Nations and other jurisdictions. However, in presenting options throughout the Tools, this Toolkit seeks to provide a technical capacity enhancement to support First Nations exercising self-determination.



<sup>4</sup> For the sake of this Toolkit, the term Environmental Assessment should be understood as being inclusive of Canadian Impact Assessment (IA).

To address this gap, we have sought to ground the Toolkit in concepts such as Two-Eyed Seeing and Walking on Two Legs. To do so, we have approached the Toolkit and Tools development from an Indigenous perspective, emphasizing feedback and practices gathered through our engagement with our partner First Nations. The Tools provide a variety of options available to First Nations when engaging in EA processes. We have worked to provide options that are grounded in Indigenous Knowledge and practice and emphasize those which ensure First Nations maintain control over the use and interpretation of the provided information. The Toolkit also prioritizes and emphasizes the need to operate within community processes. This means that community-based deliberation and determination processes form the basis on which EA process engagement is built. Lastly, the Toolkit takes a distinctions-based approach to reflect the diverse and distinct interests and values of individual First Nations.

## Etuaptmumk (Two-Eyed Seeing)

Mi'kmaq Elder Albert Marshall introduced *Etuaptmumk*, or Two-Eyed Seeing,<sup>5</sup> as a means of utilizing both Indigenous Knowledges and Western knowledges, without either dominating or overpowering the other.<sup>6</sup> Two-Eyed Seeing refers to the power of looking at the world from two world views: Indigenous and Western. The goal of Two-Eyed Seeing is “learning to see from one eye with the strengths of Indigenous Knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing and to using both of these eyes together.”<sup>7</sup> By bringing together different ways of knowing, Two-Eyed Seeing allows for a greater understanding of the world, where Indigenous Knowledge is respected as a distinct and whole knowledge system alongside, and equal to, Western science.<sup>8</sup>

To integrate this approach into the Toolkit development, we brought together environmental impact assessment professionals alongside Indigenous Knowledge holders to develop Tools which uphold both Indigenous and Western ways of knowing. These Tools seek to meaningfully integrate Indigenous ways of conceptualizing cultural rights into Canadian EA systems while ensuring that Indigenous Knowledge is not taken out of context or misconstrued.

## Walking on Two Legs

Articulated by Secwépemc Elder Ronald E. Ignace, Walking on Two Legs represents the balancing of western science with Indigenous Knowledge to uphold the principles of respect, reciprocity, and responsibility. Similar to Two-Eyed Seeing, Walking on Two Legs is “practice and action-oriented, with the joint walking – guided by an Indigenous mind – compelling movement forward”.<sup>9</sup> In this way, Walking on Two Legs requires a shift away from the incorporation of Indigenous Knowledge into Western practices, but rather requires the revisioning of such practices as being inclusive of, and grounded in, Indigenous stewardship and governance systems.

---

<sup>5</sup> Albert Marshall, “Learning to See with Both Eyes (The Green Interview)” (Canada, 2018), <https://www.mcintyre-ca.proxy.library.carleton.ca/carletonu3/code/PT0105>.

<sup>6</sup> Annamarie Hatcher et al., “Two-Eyed Seeing: A Cross-Cultural Science Journey,” *Green Teacher*, no. 86 (Fall 2009): 5.

<sup>7</sup> Cheryl Bartlett, Murdena Marshall, and Albert Marshall, “Two-Eyed Seeing and Other Lessons Learned within a Co-Learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing,” *Journal of Environmental Studies and Sciences* 2, no. 4 (November 2012): 335, <https://doi.org/10.1007/s13412-012-0086-8>.

<sup>8</sup> Bartlett, Marshall, and Marshall, “Two-Eyed Seeing,” 336

<sup>9</sup> Sarah Dickson-Hoyle et al., “Walking on Two Legs: A Pathway of Indigenous Restoration and Reconciliation in Fire-adapted Landscapes,” *Restoration Ecology* 30, no. 4 (2022): 1, <https://doi.org/10.1111/rec.13566>.

## Distinctions-Based Approach

It is important to recognize the vast array of histories and circumstances faced by First Nations across Canada. The Toolkit is meant to be flexible to allow the general concepts it presents to be integrated into the existing governance systems, policies, and/or laws of the relevant Nation. For example, a Nation may have existing policies or laws pertaining to:

- » Indigenous-defined impact pathways between the biophysical environment and culture (i.e., connections between the health of the environment and Indigenous cultural vitality).
- » Indigenous-defined benchmarks or thresholds for the health/abundance of the biophysical environment that are directly or indirectly related to the ability to practice cultural rights (i.e., standards of territorial and ecological “intactness” and “sufficiency” to support the practice of cultural rights).
- » Indigenous-defined protection measures directly or indirectly related to cultural rights.

These existing procedural tools can, and should, be used to supplement and refine the tools contained within this Toolkit in order to best meet the First Nation’s needs.



# Purpose of the Toolkit

At the broadest sense, this Toolkit is proposed as a means of driving community conversation about what elements of Indigenous culture are most important to protect and promote, the current state of cultural rights, the desired state of cultural rights, and how to get there. As such, this Toolkit is designed to present practical options to First Nations to understand, assess, and respond to project impacts on cultural rights and interests. It is important to note that this Toolkit is not designed to define the individual rights of First Nations.

This Toolkit provides a series of Tools useful for both preparation beforehand and applicable during the assessment of project effects on Indigenous cultural rights. As a preparatory tool, this Toolkit can help a First Nation identify and characterize cultural rights within their territory, as well as flag which cultural rights are more sensitive to change and/or are already impacted as a result of past and present cumulative effects. The Toolkit can also assist a First Nation in pre-determining what cultural rights and values are “non-compensable” (i.e., cannot be impacted under any circumstances) as well as desired programs or initiatives that may be prioritized in discussions around compensation. In doing so, this Toolkit can help contribute to a Nation’s internal capacity and help prepare First Nations for EA processes before they begin.

The Toolkit can also be directly applied to either a proposed or ongoing major project within a Nation’s territory. Through this application, the Toolkit is designed to help a First Nation advocate for and ensure the protection of cultural rights, and where necessary, secure restitution for residual impacts to cultural rights. It can also be applied retroactively to determine how cultural rights have been impacted over time and through specific projects. This information may help a First Nation prepare for future proposed projects, and better understand the cultural needs and desires of the community. Overarchingly, this Toolkit seeks to advance the assessment of, and restitution for, cultural impacts in the EA process. To do so, the Toolkit is designed to create space for Indigenous ways of knowing and ensure Indigenous Knowledge is meaningfully included in assessing how a project might impact the environment and the people who depend on it.

Furthermore, this Toolkit has been designed with the intent to support collaboration by providing a foundation for problem solving discussions. While this Toolkit is designed for implementation by First Nations, it can provide value to proponents and governments seeking to build well-informed and mutually beneficial relationships. By supporting First Nations in understanding, assessing, and responding to anticipated project impacts, the opportunities for building positive relationships will be enhanced.

## Confidentiality and OCAP®

This Toolkit has been developed to reflect and implement the principles of confidentiality contained within *The First Nations Principles of OCAP®*. Standing for ownership, control, access, and possession, OCAP ensures that “First Nations have control over data collection processes, and that they own and control how this information can be used”.<sup>10</sup> This Toolkit recognizes the principles of OCAP and calls for their application throughout all instances where a CIA is being conducted. These principles are:

- » **Ownership:** A First Nation owns information collectively in the same way that an individual owns his or her personal information.
- » **Control:** First Nations, their communities, and representative bodies are within their rights to seek control over all aspects of research and information management processes that impact them.
- » **Access:** First Nations must have access to information and data about themselves and their communities regardless of where it is held.
- » **Possession:** First Nations retain physical control of data to ensure that ownership can be asserted and protected.<sup>11</sup>

---

<sup>10</sup> First Nations Information Governance Centre, “The First Nations Principles of OCAP®,” The First Nations Information Governance Centre, accessed September 24, 2021, <https://fnigc.ca/ocap-training/>.

<sup>11</sup> First Nations Information Governance Centre, “The First Nations Principles of OCAP®”.

*Tool 1*

# Inventory of Cultural Rights

Step 1 of Undertaking an Assessment  
of Impacts to Cultural Rights and Values



THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

*Spirit of the Land*

# Purpose

The first step in assessing the potential cultural impacts of a proposed major project is to develop an inventory of cultural rights. By identifying and documenting what matters most to the community, including cultural rights that are most at risk and priorities for revitalization, a First Nation can best allocate time and resources towards their protection and resurgence. The process of determining at-risk rights and community priorities includes looking at potential impacts from the new project as well as combined effects of multiple developments that have occurred, are occurring, or are likely in the future to occur<sup>12</sup> within the same culturally important areas.

This Tool is designed to bring Indigenous voices, stories, knowledge, and experiences to the forefront to help understand the value and use of the potentially impacted territory from the perspective of the cultural rights holders. Within an Environmental Assessment (EA) process, this Tool seeks to inform the government and/or Proponent about what is important and what is at stake from an Indigenous lens.

## Terminology

The following terminology is used throughout this Tool. Definitions for each term are provided below.

- » **Cultural Landscape:** large areas that are culturally known and connected to cultural use in ways passed down between generations; also known as the lived landscape.
- » **Cultural Keystone Places:** areas of exceptional high cultural importance, often associated with areas of regional biodiversity.
- » **Cultural Keystone Species:** species that “shape in a major way the cultural identity of a people, as reflected in the fundamental roles these species have in diet, materials, medicine, and/or spiritual practices”<sup>13</sup>.

<sup>12</sup> These non-project specific effects are called “cumulative effects”.

<sup>13</sup> Garibaldi and Turner, “Cultural Keystone Species,” 4.

# Principles

In the development of its *Guidance Appendices to the Major Projects Assessment Standard (2020)*, the First Nations Major Projects Coalition (FNMPC) identifies some key principles associated with the practice of cultural impact assessment in relation to Indigenous peoples during major project assessment. These principles include:

- » Recognition that Indigenous cultures have different ways of knowing and communicating that should be incorporated into the cultural impact assessment.
- » Cultural knowledge and information is the property of culture holders and must be protected and respected.
- » Recognition that cultural impacts can only be understood in context – from the perspective of the culture holders themselves.
- » Recognition of culture as multi-dimensional, and that impacts can occur on a variety of cultural resources

Building on these principles, some further considerations for conducting an inventory of cultural rights may include:

- » The identification of cultural rights should be done by the Nation and led by the Nation's Knowledge holders.
- » The identification of cultural rights should include both past and present considerations (for example, some cultural spaces may no longer be accessible, yet should still be considered in this assessment).
- » The identification of cultural rights should include the spaces, areas, activities, resources, environments, plants, animals, etc., that are important and currently located or practiced within the Nation's territory, as well as those that may no longer be accessible or practicable.
- » When identifying cultural rights, both tangible (material) and intangible (immaterial) rights should be identified. Tangible cultural rights are typically understood as physical and may include things such as burial sites, important harvesting grounds, and hunting camps. Intangible cultural rights and values are generally considered non-physical and may include things such as sense of place, spirituality, way of life, stories, and cultural identity.
- » When identifying cultural rights, take into consideration the geographic extent of the right. Some cultural rights may not be as geographically situated as others (e.g., a specific site necessary for ceremony as opposed to a building necessary for ceremony that can be relocated). Some cultural rights may be less tied to or dependent upon continued access to, or the integrity of a specific geographic setting, but could still be impacted by a major project (e.g., a fishery may be a necessary location for cultural practice and knowledge transmission, but the specific location of the fishery is less important).

# Example Approaches to Identify and Inventory Cultural Rights



The following list represents a selection of example approaches available to First Nations to aid in identifying and inventorying cultural rights. These approaches can be used on their own, or in combination with one. Selection of the approach should be grounded in a First Nation's needs. Contextual factors should inform the selection of an appropriate approach, such as the extent to which access and use to a Nation's traditional territory has been constrained by existing development or settlement (i.e., it is "fenced off" from use), the existing extent of cumulative effects, and the type and location of the project. For example, First Nations that have had significant alterations to their ability to access traditional territories may derive substantive value from a Traditional and Current Use Study which illustrates how their ability to engage in cultural practices has changed over time. Other key factors to consider when selecting an approach to identifying and inventorying cultural rights include staffing capacity (e.g., the number of individuals able to participate in the approach), available funding, and the capacity of the community to engage in discussions and meetings.

It is important to note that the approaches to identifying and inventorying cultural rights presented below do not need to be implemented in isolation. A method of triangulation, where multiple methods of identifying cultural rights are applied, can be a useful tool. Triangulation allows for multiple findings to be compared. Where there is agreement on the findings, triangulation can serve as a way of "confirming" the study results and increases the confidence in effects assessment. Comparatively, if the findings disagree, this can initiate a transparent examination of the sources of difference. If differences cannot be reconciled, the confidence in the predictions will be reduced and a more precautionary approach is required. In general, it is always preferable to implement a triangulation approach so that data from multiple sources can be brought together to increase confidence in study results.

# Direct Community Engagement Sessions and Surveys



Direct community engagement is a useful way to collect data with community members. This approach includes methods like interviews, focus groups, and surveys, and you may choose one or more methods to address an issue. Interviews work well for detailed conversations with individual members about a topic and can be flexible depending on the person and the context. Focus groups are appropriate when discussion about a topic with a group of members would provide helpful information. Surveys are useful tools for reaching higher percentages of community membership to answer a fixed set of questions. All direct engagement methods are useful because they allow for community members' Knowledge, thoughts, and opinions to be communicated.

The principles of Free, Prior, and Informed Consent (FPIC) and ensuring anonymity are key components of ethical community engagement. FPIC ensures that community members have the right to understand and consent to their participation in research, empowering them as active participants in the process. Similarly, anonymity protects the privacy and confidentiality of participants, allowing for honest and open communication without fear of reprisal.

Benefits of direct community engagement include the ability to gather rich and detailed insights directly from community members, tailor approaches to specific community needs, empower community involvement in decision-making, and foster a sense of ownership and inclusion. It also fosters trust and transparency between community members and researchers as well as facilitates the identification of unique community strengths and resources. Potential drawbacks include resource intensiveness (e.g., time and money), potential bias in data collection, and difficulties in ensuring representation.

## **All of these engagement methods follow a general process:**

1. Plan the method: choose the method and design the questions to be asked
2. Plan the engagement: create a list of members for potential participation, contact them to see if they are interested, and make a participant list of people who say yes
3. Obtain consent: describe the process to participants and obtain their consent before proceeding
4. Conduct the engagement: proceed with the method and document the results (audio / video recording, note-taking, survey collection)
5. Manage information: process and store the data properly after the engagement (transcription, editing, survey cleaning)

6. Analyze data: conduct thematic analysis of the data based on the questions you are trying to answer
7. Communicate the results: this can be a written report, a map, a video, whatever is the best way to communicate with the intended audience

The following table summarizes some key strengths and limitations of the direct community engagement/survey approach:

## Strengths

- » Directly engages with community members and Knowledge holders, allowing for the collection of detailed and specific information
- » Engagement sessions and surveys can be modified based on community needs to provide specific information
- » Empowers community members to have their voices heard on what matters most to them

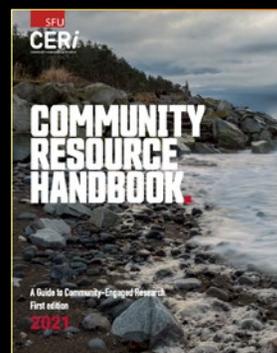
## Limitations

- » Collected information is often highly diverse and will need some form of coding/compilation
- » Engagement sessions can be time-intensive and expensive
- » There can be difficulty ensuring robust representation of diverse identity groups within a First Nation

**Some resources providing further information on direct community engagement/survey approaches include:**

[Community Resource Handbook 2021: A Guide to Community Engaged Research](#)

[Indigenous Community Engagement Methods](#)



# Use and Occupancy Studies



Use and Occupancy Studies are often included as an aspect of Impact Assessment. Other names for this type of study include Knowledge and Use Study, Traditional Use Study (TUS), Traditional Land Use (TLU) Study, Traditional Land Use and Occupancy Study (TLUOS), Traditional Knowledge and Use Study (TKUS). These studies refer to a category of research that uses mapping interviews to document where and how community members practice their rights and culture throughout their territory. The intention of such studies is to document knowledge and experience from members within their living memory. This includes knowledge that has been passed down to them by previous generations and can also include historical and ethnographic data.

The process for this type of study centers on interviews with members in which they map their use, occupancy, and rights-practice including tangible, bio-physical elements and activities, as well as more intangible aspects like knowledge transmission and connection to place. Use and occupancy data is valuable for demonstrating ongoing practice of rights and culture as well as documenting change over time in rights practice (cumulative effects) and anticipated impacts in the future (project-specific impact assessment).

Traditional and current use studies are the most common form of study conducted by and with First Nations in relation to a proposed project. This means that in some cases there is already readily available traditional and current use studies information for that First Nation in the proposed project-affected area. Great caution and deference to Nation requirements is critical to the choice of whether and how to use existing study data rather than conduct a new study, however. While using existing data can reduce consultation fatigue amongst community members, it is also possible that older data may have changed over time due to changing conditions and new community members engaging in cultural practices. Older studies may not appropriately match the geographic area of focus for a new project. And relying on older data may also remove the ability to engage community members on the critical question of how the new proposed project is likely to impact on their cultural rights. In the end, it is critical for First Nations to decide whether and how to use the results of older studies and whether new studies are required.

In addition, it is never appropriate to use traditional and current use data from one First Nation as a proxy/stand-in for another Nation, as use and occupancy and values differ from one group to another.

The following table summarizes some key strengths and limitations of the traditional and current use studies approach:

## Strengths

- » Draws on a variety of knowledge sources, including oral histories, input from Knowledge holders, and archival review
- » Captures Indigenous perspectives and Indigenous Knowledge, fostering cultural revitalization and community empowerment
- » Illustrates both past and present conditions, identifying changes over time
- » Existing information and studies can sometimes decrease the engagement burden on communities
- » Can provide detailed and relatively up to date Indigenous use and occupancy data for the Project-affected area

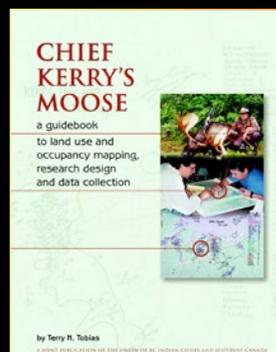
## Limitations

- » Where past information is not available, extensive community engagement is required which can contribute to consultation fatigue
- » Traditional/past use may be difficult to assess and under-reported due to loss of knowledge and access to culturally important locations, resources, and practices
- » Only a portion of the population is likely to be involved in any such study. Again, absence of recorded value is not to be confused for absence of value
- » Use of the data needs to have community-endorsed confidentiality provisions in place

### Some resources providing further information on Traditional Use and Knowledge Study approaches include:

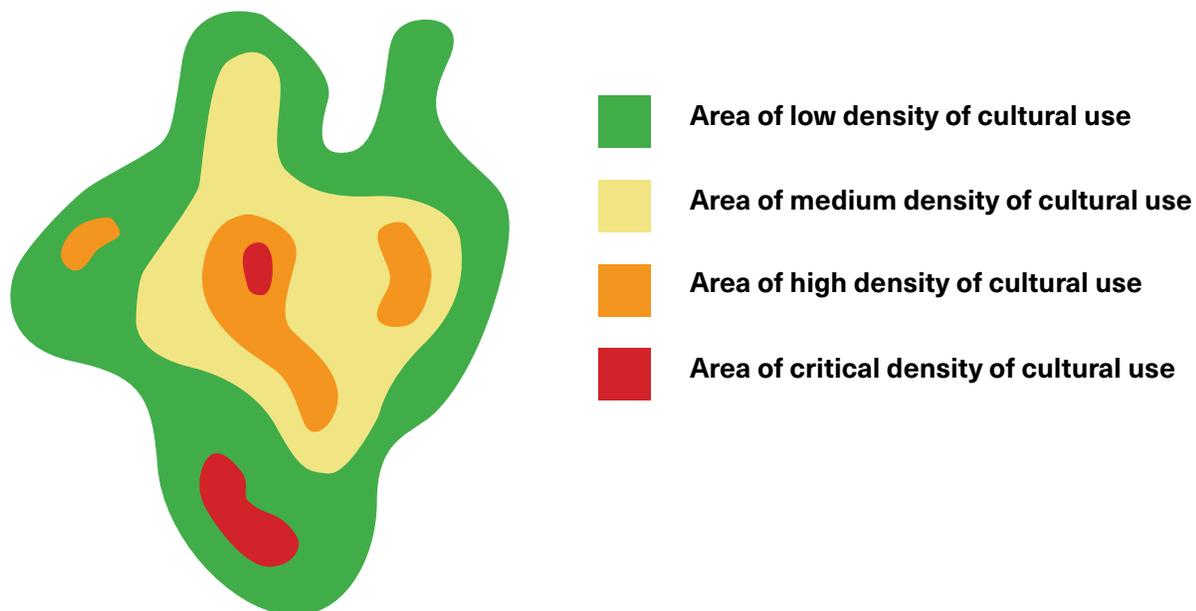
[Chief Kerry's Moose: A Guidebook to Land Use and Occupancy Mapping, Research Design, and Data Collection](#)

[Living Proof by Tobias and Associates](#)



# Density of Use Maps and Mapping of High Priority Areas

Developing maps that depict traditional use areas, occupancy on the land, spiritual, learning and gathering sites, cultural landscape values, and travel routes, etc., can produce a visual representation of cultural rights. A density use map shows how different places are used and how crowded they are. They can show us things like where people most frequently use the land, areas that people are avoiding, and can locate areas where people have noticed a lot of negative environmental impacts from industry. These maps are useful because they help us understand how land is being used (or not used) and help to make decisions about things like where to avoid putting a road.



Density use maps are especially useful during cumulative effect assessments because they provide spatial data on land uses and activities. By overlaying these maps with other datasets like habitat maps and pollution sources, researchers can identify areas vulnerable to cumulative impacts.

There are, however, some important limitations of this mapping process:

- » While mapping can represent both tangible and intangible cultural rights and values, the process relies heavily on cultural values that can be identified on a map. This means that some cultural rights and values which are not tied to a specific geographic location may not be identified in the mapping process.

- » Culture holders may be reluctant to share sensitive information about important places and spaces. In addition, only a subset of culture holders will be involved in any such data collection exercise. As a result, any lack of data should not be taken to reflect absence of value. With mapping processes there is always the chance that data may be misrepresented. Confidentiality is critical and must be assured through the methods used to collect, analyze, and represent cultural information.
- » Cultural values mapping can be converted to show areas with higher density of reported cultural use and values. That said, they tend to be focused on quantity of reported uses and values; it is much harder to map quality of use and values, which may be of equal or greater importance depending on the valued embodied in the location.

The following table summarizes some key strengths and limitations of the cultural values density mapping approach:

## Strengths

- » Provides a visual representation of areas of higher reported cultural values
- » Allow for the representation of raw data (e.g., number of moose) and also rates and ratios (e.g., how often something happens in one place compared to another place)
- » Serves as a method for compiling and organizing diverse data
- » Community members may feel at home physically and visually representing how and where their rights are practiced, allowing them to share knowledge in a way that is valuable to them

## Limitations

- » Requires extensive community engagement and surveying
- » Can be costly and resource intensive
- » Heavily reliant on geographic locations and may exclude cultural rights and values that are not tied to a specific place
- » Lack of data appears as “non-importance” meaning that some locations are undervalued when in fact absence of evidence is not “evidence of absence” of value
- » Communities may not want to share either areas of higher value, or distinguish between higher and lower value areas, which suggests some areas are “open”



**Some resources providing further information on cultural values density mapping approaches include:**

[Density Mapping with GIS](#)  
[Dot Density Maps](#)

# Identification of Cultural Landscapes



The identification of cultural landscapes represents another method for identifying and inventorying cultural rights and values. Defined as “any geographical area that has been modified, influenced, or given special cultural meaning by people”<sup>14</sup>, cultural landscapes represent the intersection of landscape with the impressions, beliefs, and rituals (culture) associated with the place. The significance of cultural landscapes is determined by the “spiritual, cultural, economic, social and environmental aspects of the group’s association with the identified place, including continuity and traditions”<sup>15</sup>. The identification of cultural landscapes therefore represents a unique way of protecting cultural rights and values that are tied to the land.

This method can be used as a management tool for efforts such as cultural heritage preservation/revitalization, environmental impact assessment, land use planning, cumulative effects management, monitoring programs, decision-making processes, and others. Methodologies used to delineate cultural landscapes may be diverse and rooted in the values and worldviews of local Indigenous people; approaches often require working with Indigenous Knowledge Holders, land users and community members to:

1. Define the ICL through multiple lenses and multi-faceted values, including environmental, economic, ecological, physical, social, cultural, spiritual, historical and/or other key ways of understanding the importance of the landscape;
2. Characterizing relationships with the land, including the interface between the landscape and the traditional way of life on the land; and
3. Articulating the Indigenous rights and responsibilities associated with stewardship of the land.

Delineation of cultural landscapes may also involve further documentation and characterization of the landscape in the form of mapping, photography/video, archival research, collection of traditional stories and oral histories, and/or supplemental gathering of place-based Indigenous Knowledge regarding key areas within the landscape. Using these methods to identify, recognize and safeguard Indigenous Cultural Landscapes (ICLs) can help protect Indigenous cultural heritage for generations to come while also contributing to decolonization, reconciliation, self-determination and revitalization of Indigenous governments and Nations.

A number of organizations have implemented the concept of cultural landscapes to support the protection of ecological areas. For example, the Northwest Territories’ Protect Areas Strategy (PAS) has implemented the use of cultural landscapes to “protect special natural and cultural areas,” and “protect core representative areas within each ecoregion”. This PAS further works to reinforce the leadership role of communities, regional organizations and/or land claim bodies in land and water use management<sup>16</sup>. To determine the boundaries of a distinct cultural landscape, the PAS requires a series

---

<sup>14</sup> Parks Canada, “Parks Canada Guiding Principles and Operational Policies,” 119.

<sup>15</sup> Susan Buggay, “An Approach to Aboriginal Cultural Landscapes” (Historic Sites and Monuments Board of Canada, March 1999), 32.

<sup>16</sup> The Northwest Territories Protected Areas Strategy Advisory Committee, “Northwest Territories Protected Areas Strategy,” September 27, 1999, 3, [https://www.gov.nt.ca/sites/ecc/files/resources/pas\\_1999.pdf](https://www.gov.nt.ca/sites/ecc/files/resources/pas_1999.pdf).

of studies including ecological and socio-cultural studies, the examination of place names, on-territory. Boundary delineation, and the examination of historical records and harvesting patterns. These studies are conducted in a community-driven setting where there is an Indigenous community that is the “sponsor” of the area subject to cultural landscape delineation.

Similarly, the identification of Tribal Parks, such as the K’ih Tsaa’dze Tribal Park in British Columbia is a way to protect and manage cultural landscapes under using ecosystem-based conservation planning methods for the purpose of maintain Indigenous traditional and contemporary cultural uses while restoring and maintaining ecological integrity and biological diversity<sup>17</sup>.

It is worth noting that cultural landscape delineation is only applicable to geographically situated cultural sites. This means that cultural landscapes are generally “mappable” and have boundaries that are clearly definable. However, as previously noted, many cultural rights are intangible and may not be connected to a single definable location. In these situations, cultural landscape delineation may fail to accurately identify a Nation’s breadth of cultural rights.

The following table summarizes some key strengths and limitations of the cultural landscape delineation approach:

## Strengths

- » Can lead to physical recognition and associated protection of an important landscape (e.g., Tribal Park, cultural landscape under the Historic Sites and Monuments Board of Canada, or other delineation)
- » Identifies culturally important locations – including both tangible and intangible factors

## Limitations

- » Because it is based on identified geography, there must be clearly identified boundaries
- » Only represents cultural rights and values tied to specific locations
- » Can take an extensive amount of time and resources



### **Some resources providing further information on Cultural Landscape approaches include:**

[Doig River First Nation Cultural Spaces Plan](#)

[Indigenous Cultural Landscapes Final Report by The Wahkohtowin Development Group Inc.](#)

[A cultural landscape approach to community-based conservation in Solomon Islands by Richard K. Walter and Richard J. Hamilton.](#)

<sup>17</sup> K’ih Tsaa’dze Tribal Park,” Doig River First Nation, accessed June 29, 2022, <https://doigriverfn.com/our-lands/kiht-saadze-tribal-park/>.

# Indigenous Knowledge and Ecological Studies, and the Identification of Cultural Keystone Places/Species



By combining Indigenous Knowledge with Western scientific ecological studies, places, species, and resources of cultural importance can be identified. Ecological studies that identify habitat suitability data and the distribution of biophysical resources can provide an initial layer of information regarding the relative value and productivity of certain areas and species to the exercise of rights. When appropriately combined with Indigenous Knowledge, the cultural importance of these areas and species can be identified.

Because Indigenous Knowledge is developed through long-term observation of natural phenomena and relationships within specific environments over time, there are many ways in which this Knowledge can be incorporated into Environmental Assessments. For example:

- » Indigenous Knowledge can provide insight into biodiversity, local ecosystems, ecological processes, and ecological health that may otherwise not be documented through western science knowledge. This may include distributions and populations of species, habitat preferences, animal health, and information on migration corridors and seasonal movements. This can also include changes in species population numbers and fluctuations in the abundance of keystone species.
- » Indigenous Knowledge can contribute to the gathering of critically important information on changing climate systems, including changes to weather and climate patterns and associated impacts on wildlife movements and behaviours.
- » Indigenous Knowledge may provide information on threshold levels related to animal, fish, plant, and other resource harvesting (i.e., to identify boundaries between acceptable and unacceptable levels of impact or change), which can inform monitoring strategies.
- » Indigenous Knowledge may provide information on important cultural and social values including traditional stories and oral histories, ceremonies, medicinal practices, sacred-sites, cultural heritage and traditional practices, archaeological sites, travel routes, traditional camps, timelines, identity, sense of place and other land-based social, cultural, or spiritual practices or historical information.

One way to incorporate Indigenous Knowledge into EA processes is through the identification of Cultural Keystone Places and Species.

Defined as “particular places of high cultural importance – places that are also generally high in regional biological diversity”<sup>18</sup>, Cultural Keystone Places (CKPs) are one method of identifying “places

---

<sup>18</sup> Cuerrier et al., “Cultural Keystone Places: Conservation and Restoration in Cultural Landscapes,” 430.

of exceptional and cultural value so that the depth of their roles in a people's cultural fabric can be more widely appreciated"<sup>19</sup>. Similarly, Cultural Keystone Species (CKSs) represent species that "shape in a major way the cultural identity of a people, as reflected in the fundamental roles these species have in diet, materials, medicine, and/or spiritual practices"<sup>20</sup>. CKPs and CKSs therefore represent another means of identifying cultural rights and values.

There are a variety of ways in which a cultural keystone place can be identified. The following questions can be used to help guide the identification of a cultural keystone place:<sup>21</sup>

1. Is there agreement within a cultural group about the importance of the place?
2. Does this place occur in language and discourse (i.e., does the place have a particular name or associated vocabulary)?
3. To what degree and extent is the place visited, occupied, or involved in cultural activities?
4. What types of cultural activities are carried out at the place?
5. How is the place reflected in archaeological resources, in cultural narratives, origin stories, songs and/or ceremonies, etc.?
6. To what extent is the landscape, habitats, or plant and animal species managed or tended at a place?
7. To what extent is the given place unique in its role of supporting cultural identity and survival?
8. What is the degree of diversity (of both species and habitats) represented at the place?
9. Is the place important as a meeting location where groups come together for economic and social exchange?
10. What role does the place play in cultural protocols?

Similarly, the following elements can be considered when identifying a cultural keystone species<sup>22</sup>:

1. The intensity, type, and various forms of use of the species;
2. The naming and terminology of the species in a language;
3. The role of the species in narratives, ceremonies, or symbolism;
4. The persistence and memory of use of the species in relationship to cultural change;
5. The level of unique position the species has in culture;
6. The extent to which the species provides opportunities for resources acquisition from beyond the territory.

By asking these questions and engaging directly with community members to determine which places and species they feel are key to their identity and survival, cultural keystone places and species represent methods of identifying cultural rights which may allow for the identification of more intangible elements of cultural rights and may better include cultural rights that are not easily delineated geographically.

---

<sup>19</sup> Cuerrier et al., "Cultural Keystone Places: Conservation and Restoration in Cultural Landscapes," 440.

<sup>20</sup> Garibaldi and Turner, "Cultural Keystone Species," 4.

<sup>21</sup> Based on the ten general indicators for assessing the overall importance of a place as provided by Cuerrier et al., "Cultural Keystone Places", 432.

<sup>22</sup> Ann Garibaldi and Nancy Turner, "Cultural Keystone Species: Implications for Ecological Conservation and Restoration," *Ecology and Society* 9, no. 3 (2004): 5, <https://doi.org/10.5751/ES-00669-090301>.

The following table summarizes some key strengths and limitations of joint Indigenous Knowledge/ Ecological Studies approaches:

## Strengths

- » Helps to identify areas and species of cultural and ecological importance
- » Uses “two eyed seeing”, combining Western scientific data and Indigenous Knowledge, adding the temporal depth and location-specific knowledge of Indigenous Knowledge holders to the quantitative data of scientists

## Limitations

- » Focuses on “pinpointing” key species, resources, and areas, and may fail to represent the holistic nature of culture and the environment
- » Requires extensive community engagement
- » The focus on ecological study means that some cultural values may be missed if they do not have a tangible “use value” (i.e., use as a food source, as medicine, as a resource, etc.)
- » There are potential risks of Indigenous Knowledge component being “tokenized” in comparison to Western science



### **Some resources providing further information on Joint Indigenous Knowledge/ Ecological approaches include:**

[Enacting and Operationalizing Ethical Space and Two-Eyed Seeing in Indigenous Protected and Conserved Areas and Crown Protected and Conserved Areas by Danika Littlechild and Colin Sutherland.](#)

[Decolonizing Research Paradigms in the Context of Settler Colonialism: An Unsettling, Mutual, and Collaborative Effort by Mirjam B.E. Held](#)

# Codification of Laws and Norms



Many of the Nation's laws and norms represent both cultural values and intangible cultural resources. These laws and norms can therefore be used as guide to identify cultural rights and what may be considered an adverse impact on those cultural rights.

For example, the enactment of the water management regime by the Yinka Dene 'Uza'hné from Nadleh Whut'en, Stelat'en and later Saik'uz First Nation (including both the *Yinka Dene 'Uza'hné Surface Water Management Policy* and *Yinka Dene 'Uza'hné Guide to Surface Water Quality Standards*) represents an expression of living governance and laws. The Policy and Standards are designed to recognize that importance of surface waters and water quality in Aboriginal title and rights. In doing so, the Policy and Standards highlight the centrality of water as a cultural right and value. By codifying existing laws and norms held by the Nation, important cultural rights and values can be identified and inventoried.

In addition, if laws and norms are codified, they may actually be used as a foundation or "lens" for the assessment of effects from a project on culture and other Indigenous values.

It is important to note that the "translation" of Indigenous laws and norms into forms that can be compared and applied to Western legal and policy traditions has been critiqued as trivializing Indigenous lifeworlds<sup>23</sup> and governance<sup>24</sup>. By codifying laws and norms, there is a potential risk of "open[ing] up Indigenous legal orders to further colonization"<sup>25</sup>, as this codification may mold, or reshape, Indigenous legal traditions into forms which are unable to accurately reflect the complex and holistic nature of Indigenous ways of life. To avoid such risks, one possible approach could be working to make Indigenous laws "accessible" to non-Indigenous others, while simultaneously ensuring that these laws remain grounded solely within the Nation's way of knowing. Such a process may help ensure Indigenous laws and norms are not generalized and are not seen as static and either aligned with, or contrary to, Western legal traditions. One way to help make Indigenous laws accessible is draw on community processes and procedures to illustrate how legitimate collective decisions have been reached for specific issues.<sup>26</sup> Overarchingly, individual Indigenous Nations will need to assess what works best for them and how they wish to operationalize their systems in relation to western systems of EA. Some examples of First Nations that have used some aspect of their laws and norms as lenses through which to assess the acceptability of effects of specific projects include the Okanagan Indian Band (Revelstoke Unit 6 Generating Station) and Tsleil-Waututh Nation (Trans Mountain Expansion (TMX) tanker and pipeline project).

<sup>23</sup> Aaron Mills describes a lifeworld as the nature, origin, and way of knowing that defines an Indigenous way of life, "which situate us in creation and thus allow us to orient ourselves in all our relationships in a good way" (Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today," *McGill Law Journal* 61, no. 4 (December 22, 2016): 852, <https://doi.org/10.7202/1038490ar>).

<sup>24</sup> Mills, "The Lifeworlds of Law," 847-84.

<sup>25</sup> Mills, "The Lifeworlds of Law," 883.

<sup>26</sup> Hadley Friedland, "Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions," in *Environment in the Courtroom*. Allan Ingelson (Calgary: University of Calgary Press, 2019), 82-91.

The following table summarizes some key strengths and limitations of the codification of laws and norms approach:

## Strengths

- » Draws on existing Nation-specific laws and norms
- » Ties cultural rights and values to broader Nation sovereignty and rights
- » Can be used to attribute value to both tangible and intangible cultural rights and values, including both practices and identity
- » Can provide an Indigenous “lens” through which effects of a project may be assessed

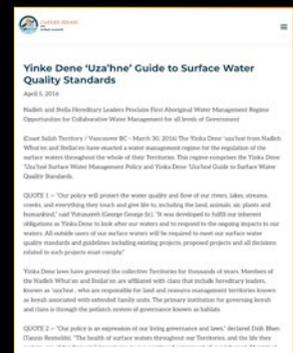
## Limitations

- » Limited by the availability of laws and norms; if laws and norms are not already codified, this can take many years to complete
- » May require the sharing of sensitive information
- » Must be under the control of the First Nation when converting laws and norms into any sort of assessment “lens”; this cannot be done by any outside party

### Some resources providing further information on the Codification of Laws and Norms approaches include:

[Yinka Dene 'Uza'hné Surface Water Management Policy](#)

[Yinka Dene 'Uza'hné Guide to Surface Water Quality Standards](#)



## Summary

Tool #1 is designed to help identify inventory cultural rights and the related cultural resources necessary to uphold those rights, within a First Nations' territory. The identification of these rights should be grounded in the voices, stories, knowledge, and experiences of community members. The information collected through this Tool may be used to inform the government and/or Proponent about what is important to the Nation, and what is at stake. This identification and inventorying may also take into consideration past and present conditions (e.g., spaces and resources that are currently practiced as well as those that are no longer accessible), both tangible and intangible cultural rights, and the geographic extent of the right. There are a variety of different ways to identify and inventory cultural rights, each with their own strengths and weaknesses. These methods include direct community engagement, density of use and heat maps, traditional and current use studies, the identification of Cultural Landscapes, Indigenous Knowledge/Ecological studies and the identification of cultural keystone places/species, the codification of laws and norms, and the important role that “triangulation” of results from multiple sources and approaches to the inventorying of cultural rights can have in the confidence we have that cultural rights have been properly inventoried.

*Tool 2*

# Characterizing Existing Cumulative Effects on Indigenous Cultural Rights

Step 2 of Undertaking an Assessment  
of Impacts to Cultural Rights



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

*Spirit of the Land*

From FNMPCC's perspective, cumulative effects assessment should be a core element of any major project assessment. Cumulative impacts are those which arise from the combined total effects from past, present, and likely future human actions, and the way in which potential project-specific effects may interact with these accumulated effects. Characterizing cumulative effects will assist in illustrating the ways that cultural rights have already been and still are being impacted by multiple cumulative stressors on the environment and people.

## Purpose

By better understanding past and ongoing changes on cultural rights, a more detailed and accurate assessment of potential project impacts on cultural rights can be made. This characterization of cumulative effects is especially important when a First Nation has already faced significant cultural change through processes such as displacement and development within ancestral territories. As a result of past and ongoing existing cumulative effects and additional stressors, cultural rights may be more vulnerable to project impacts. For example, cutting down one of the last two trees in an area is more significant than cutting down one of the last two hundred trees. Cumulative effects analysis allows for diminished opportunities due to historical cumulative effects to be assessed. If the cumulative effects context is not understood, the extent of this vulnerability cannot be properly understood.



## Terminology

The following terminology is used throughout this Tool. Definitions for each term are provided below.

- » **Cumulative Effects:** Changes to environment, rights, culture, and/or society that are caused by the combined effects of past, present, and future actions.
- » **Cumulative Effects Assessment:** The examination of how all past, present and likely future activities combine to impact an area or specific values (such as moose or salmon).
- » **Induced Effects:** “Knock on” or “spin off” effects caused as a result of the direct and indirect effects of a major Project (i.e., increased exploration and other industrial activities after the building of a new road into a previously secluded area)
- » **Temporal:** The scope of time considered, which may include past, present and future changes
- » **Vulnerability:** The lessened ability to withstand the effects of a harm or disturbance due to adverse effects suffered in the pre-Project circumstance

# Cultural Cumulative Effects Assessment Principles

The First Nations Major Projects Coalition (FNMPC) provides guidance for major project assessment of cumulative effects in Principle 8 of its *Major Project Assessment Standard*. Designed to be read by Proponents and Government, these requirements provide a framework for an overall assessment of cumulative effects. Drawn from this work, the following principles reflect a consideration of cumulative effects assessment through a cultural rights lens and represent a series of principles that may be considered.

- » Cultural cumulative effects assessment should consider impacts to cultural rights across a large landscape and across the full extent of a Nation's traditional territory. This area may cross jurisdictional borders and boundaries, and some of this area may no longer be accessible. Cultural cumulative effects should therefore include the consideration of more than just "local" impacts.
- » Cultural cumulative effects assessment should consider a time frame which extends into the recent and distant past, as well as the likely (i.e., predictable) future. This means that known likely future projects – sometimes called "reasonably foreseeable future developments" - and other human caused changes such as climate change should be integrated into cultural cumulative effects assessment. Similarly, cultural cumulative effects assessment should take into consideration how cultural practices have changed over several generations.
- » Cultural cumulative effects assessment should encompass both human and natural drivers of change and evaluate trends of change in order to meaningfully capture how impacts have accumulated over time, to accurately assess current vulnerabilities, and to anticipate the potential future condition of cultural rights and values according to the assessed trajectory of change. Considering how specific effects interact with specific aspects of cultural rights can strengthen a cumulative effects assessment by meaningfully grounding it in concrete details.
- » The significance of cultural cumulative effects should be compared to past or lesser disturbed conditions (e.g., during pre-contact or pre-industrial periods) as opposed to current conditions which may already represent accumulated impacts and therefore serve as a flawed baseline against which to assess project-specific impacts.
- » Additionally, thresholds of acceptable change, identified by First Nations themselves, should be incorporated into cultural cumulative effects assessments in order to better understand discrepancies, where they exist, between the current condition of a given cultural right and the appropriate baseline against which those conditions can be evaluated. This can also point to ways in which the practicability of a cultural right may be ameliorated or diminished.

# Approaches to Characterize Cumulative Effects on Indigenous Cultural Rights



**Often, cumulative effects are determined through three steps:**

1. Characterization of current conditions (*see Tool #1: Identifying and inventorying cultural rights*).
2. “Backcasting” or the establishment of historical context and change over time from a point in the past to the current conditions. It is important to keep in mind that backcasting is a challenging process requiring the collection of large amounts of information that is not always readily available or easily accessed; an extensive backcasting effort may require substantial time and resources.
3. Determination of potential project-specific impacts to cultural rights, including consideration of likely future impacts and changes (*see Tool #3 Identifying Impact Pathways, Conducting Effects Characterization, and Evaluating the Severity of Potential Impacts*).

The following list represents a selection of common approaches and methods available to First Nations to aid in the characterization of cumulative effects on cultural rights. These approaches can be used on their own or, preferably, in combination with one another (*see the description of triangulation in Tool #1*). The selection of an approach should be grounded in a First Nation’s worldview, community processes, needs, and available capacity and time. Contextual factors such as the Nation’s degree of alienation from the land and the type and location of the project should inform the selection of an appropriate approach. For example, while on-territory data collection may be an effective means of collecting information on past cumulative effects to cultural rights, if a community is alienated from their territory, such on-territory data collection may not be possible. Instead, a desktop-based exercise, such as a review of compiled community data and records may be more useful.

# Direct Community Engagement Sessions and Surveys

Historical context and changes over time can be determined by engaging directly with Knowledge Holders, Elders, and community members. Through the inclusion of oral histories and stories, past practices, resources, values, and way of life, etc., can be determined. This can be done purely qualitatively through the collection of narratives/oral history. In addition, in some cases First Nations may choose to canvas members about how the quality and quantity of resources and experiences related to cultural rights have changed over time, overall and/or in specific culturally important locations. This can be accomplished, for example, using structured surveys where community members compare the quality and quantity of resources over time (e.g., “out of 10, where 10 is excellent, how was access to good moose habitat in the 1960s”, with the same question posed to participants for subsequent decades).

## On-Territory Data Collection

On-territory data collection, conducted in collaboration with Indigenous community members, offers a unique opportunity to draw out firsthand observations, values, and changes over time. By traversing the territory together, community members can share their intimate knowledge of the land, revealing valuable insights into its significance, usage, and evolving dynamics. This approach fosters a deeper understanding of the community’s connection to their territory and ensures that their perspectives and experiences are accurately represented in research and decision-making processes.

On-territory data collection can take the form of a map. Unlike digital mapping methods, this approach uses paper maps, GPS devices, or smartphones/tables for mapping, rather than relying solely on digital tools such as Google Earth or ArcGIS. During the interviews, participants survey the area and discuss important cultural or environmental features, past and present community uses, oral histories associated with particular sites, and potential future uses of the area. Additionally, these interviews are typically recorded, and participants may collect additional media such as photos or videos to add to the database.

## Compiled Community Data and Records

Community data and records may be useful in the establishment of historical context and changes over time. Reviewing records of things such as traditional territories, camping sites, trapping lines and hunting grounds supports the determination of whether and how these cultural practices have changed over time and as a result of past developments.

# Ethnographic Data and Oral History

Ethnographic data refers to qualitative information collected through ethnographic research methods (e.g., field notes, interviews, observations, photographs, videos, artifacts, etc.). Oral histories are traditional narratives and stories that preserve cultural knowledge, traditions, and histories that are passed down through generations within communities. They provide rich narratives and cultural insights that highlight the historical and contemporary significance of the lands and waters that Indigenous peoples occupy. By documenting traditional practices, land uses, and knowledge transmission over time, this information enables researchers to identify things such as cumulative effects on the territory, for example changes in biodiversity, cultural landscapes, or resource availability.

## Past Project Data and Records

As major project impact assessment requires the determination of baseline conditions, past project assessments may provide insight to how baseline conditions have changed over time as a result of project construction, operation, and decommissioning. It is important to note that many of these reports rely heavily on biophysical indicators (such as fish populations, toxicology, water flows, etc.) and have rarely included intangible cultural values (such as sense of place, identity, knowledge transmission, etc.).

## Ecological Stock and Trend Data

Stock and trend data may be available both qualitatively from First Nation members through recall, and from scientific studies that have been conducted over time. Understanding if the amount of fish and wildlife in the First Nation's traditional territory has gone up, down or stayed in similar population numbers over time is important, as is understanding factors influencing changes in these stocks over time.

## Mapping Data Showing Changes over Time in Land Use

The compilation of cartographic and other data about land cover and use are valuable in establishing changes in habitat availability and suitability over time, and both areal and linear disturbance levels where industrial, municipal, agricultural or infrastructure developments have been introduced to a First Nation's territory. The calculation of the amount of territory that is still available for "quiet enjoyment" of the natural environment can be critical to understanding the degree to which cultural rights are still practicable. And the presentation of these changes is inherently a visual exercise, allowing the First Nation members and other decision makers to see what has been lost and what remains in a way that the written word struggles to convey.

## Summary

Cumulative effects assessment includes the consideration of impacts that arise from incremental and/or combined effects from past, present, and future human actions. This Tool can help develop an understanding and contextualization of a proposed project with respect to past changes, developments, challenges, etc. This may result in a more detailed assessment of potential project impacts to culture.

For further information, some examples of successful Indigenous cumulative effects studies include the resources listed below. While these cumulative effects assessment are not specific to cultural rights, the approaches may be applied to a cultural context:

- » [\*\*Samson Cree Nation Cumulative Effects Assessment:\*\*](#) Updated Analysis for Selected Valued Components Specific to the Edson Mainline Expansion Project
- » [\*\*Ktunaxa Nation Title, Rights and Interests:\*\*](#) Revelstoke Generating Station Unit 6 Project Environmental Assessment Certificate Application (see in Part C)
- » [\*\*Cumulative Effects on the Aboriginal Rights and Interests of Samson Cree Nation:\*\*](#) A preliminary desktop analysis of Valued Components in the project affected area of NOVA Gas Transmission Ltd. (NGTL) – 2021 System Expansion Project
- » [\*\*Okanagan National Alliance Title, Rights and Interests Submission to the Revelstoke Generating Unit 6 Project Environmental Assessment Certificate Application:\*\*](#) A study that implements a cumulative-effects lens to holistically assess project effects on the rights and interests of the Okanagan Nation

# Tool 3

## Identifying Impact Pathways, Conducting an Effects Characterization, and Evaluating the Severity of Potential Impacts

Step 3 of Undertaking an Assessment of Impacts to Cultural Rights and Values



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

# Spirit of the Land

Following the identification and documentation of cultural rights, and the establishment of the degree of cumulative effects on those cultural rights to date, the next step in undertaking an assessment of a major project's potential effects on cultural rights are:

1. To establish valid impact pathways whereby the project in question has the potential to interact, both positively and negatively, with the exercise of cultural rights.
2. Conduct an assessment of committed-to project mitigation measures to see if and how they will reduce potential project impacts to cultural rights. This will result in the determination of residual impacts to the cultural rights.
3. Conduct an effects characterization using an approach acceptable to the First Nation. In this characterization, each potential residual impact on cultural rights from the proposed project can be assessed according to characterization criteria such as likelihood, magnitude, and scale, among others. This will allow for a determination of severity of impacts.

While conducting an effects characterization and determining the severity of impacts, and any time thereafter, First Nations reserve the right to identify additional conditions to avoid, reduce, or compensate for residual impacts on cultural rights that need to be applied over and above those already committed to by the proponent or applied by the Crown.

## Purpose

Identifying impact pathways is necessary for evaluating the potential effectiveness of committed-to mitigation measures: it allows for an accurate assessment of how mitigation measures will potentially intersect with impact pathways to reduce project impacts on cultural rights, whether residual impacts will remain after the application of mitigation measures, and what the implications of those residual impacts will be for cultural rights.

Subsequently, a clear and thorough assessment of residual effects through and effects characterization will help a First Nation engaging in an Environmental Assessment to determine the acceptability of residual impacts and identify specific areas where additional avoidance, mitigation, and restitution measures are required. While avoidance is generally the preferred option, it is not always possible and impact minimization through mitigation measures must be applied. Restitution may be needed if avoidance and minimizations are not possible or sufficiently effective, and adverse effects on cultural rights remain after mitigation (*see Tool #4: Accommodating Potential Impacts and Cumulative Effects Through Restitution*). It is also important to note that avoidance/mitigation and restitution are not mutually exclusive approaches. In fact, it is rare for a project's mitigation measures to fully reduce all impacts, even where mitigation measures are robust, and First Nations have had input. An effects characterization will allow a Nation to determine ways that avoidance, mitigation, and restitution can be used in unison to address residual impacts to cultural rights.

## Terminology

The following terminology is used throughout this Tool. Definitions for each term are provided below.

- » **Avoidance:** Avoidance is the most preferred approach of dealing with potential project impacts as it would see an impact not occur at all. Avoidance can also be the most difficult type of measure to apply because it often requires the project to be substantially modified or expensive and/or time-consuming measures adopted.
- » **Cultural Indicators:** Cultural indicators are measurable or otherwise observable parameters used to measure and report on the status and trends of Indigenous culture. Cultural indicators are used to provide qualitative and quantitative data to support evaluating the significance of potential impacts of major projects on culture.
- » **Effects:** changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes
- » **Mitigation:** Mitigation is any action that is designed to avoid, reduce the severity of, or offset/compensate for a potential project effect. This can be done in many different ways, from modifying the project design or moving the location of project components, to improving environmental management systems, among many other options. Monitoring is not considered mitigation.
- » **Residual Effects:** the adverse effects of a project on a Valued Component or Right likely to remain after committed-to mitigation measures are applied; effectively the effects of a project that are unlikely to be fully mitigated with committed-to measures in place
- » **Resilience:** The ability to be insulated from or recover from a harm or a disturbance. A person, community, or environment with low resilience is more likely to be seriously adversely affected by a development than one with higher resilience.
- » **Restitution:** Restitution involves financial compensation for impacts, the restoration/protection of the impacted cultural right, or another form of offsetting that is meaningful compensation for and adverse impact on (in this case) a cultural right.
- » **Risk Perception:** The judgements that people make about the characteristics and severity of a risk. Risk perception can be influenced by the historical, social, religious, cultural, political, and economic factors associated with those at risk and their understanding of the physical works and activities that create the risk, and therefore varies among different population sub-groups and individuals.
- » **Valued Component:** cultural, environmental, economic, health, social, and other elements of the natural and human environment that is identified as having scientific, social, cultural, economic, historical, archaeological, or aesthetic importance.<sup>27</sup>
- » **Vulnerability:** The lessened ability to withstand the effects of a harm or disturbance due to adverse effects suffered in the pre-Project circumstance. Related to the concept of resilience. Typically (but not universally), high vulnerability is correlated with low resilience and low vulnerability is correlated with high resilience.

---

<sup>27</sup> Impact Assessment Agency of Canada, "Technical Guidance for Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012," guidance - legislative, March 5, 2018, <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/assessing-cumulative-environmental-effects-ceaa2012.html>.

# Principles

Drawing off of, and building on, the guidance principles contained in the FNMP's *Major Project Assessment Standard (2019)* and *Guidance Appendices to the Major Projects Assessment Standard (2020)*, The following principles that may be relevant when identifying impact pathways, conducting an effects assessment, and evaluating the severity of potential impacts on cultural rights.

- » The identification of impact pathways and the characterization of effects and determination of severity should be grounded in the First Nation's legal system and should take into consideration any policies, laws, and norms that are applicable.
- » Impacts on cultural rights, and on the effective exercise of those rights, have complex pathways and outcomes; adequate time and care must be taken to meaningfully assess impact pathways in a way that acknowledges and addresses this complexity.
- » First Nations can call for a "Key Line of Inquiry" approach, where greater time, funding and focus are placed on priority concerns identified by affected First Nations.
- » Impacts to both tangible and intangible cultural values should be considered.
- » The approach to identifying project pathways and conducting an effects assessment should prioritize and emphasize community-identified concerns related to potential project effects on their cultural rights. Emphasis should be placed on the protection of those groups who will be most affected by project impacts and those most vulnerable to impacts.
- » The metrics (e.g., likelihood, magnitude, etc.) applied in the effects characterization should be selected based on the First Nation's preferences and guided by the First Nation's specific concerns. By developing a community-focussed approach for evaluating the potential impacts of major projects, including relevant historical context, community-focused criteria, and community-focused thresholds, communities will be more effective in defining cultural impacts in their own terms.
- » The characterization of various potential project impacts should be assessed in a consistent and methodological fashion, using a schema developed by the impacted Indigenous group.
- » Impacts must be interpreted through the filter of culture holders, as the severity of impacts on cultural resources is culturally defined.
- » Each Nation may approach the evaluation of severity differently. In some cases, Nations may choose not to determine severity of impacts to each separate category of right and may instead emphasize the severity of the project as a whole and seek solutions that best defend their cultural rights in face of the project.
- » Thresholds of severity may be designed by the community in and may reflect impacts to spiritual practice, traditional use, and subjective community-defined ways of living.
- » The assessment of the severity of potential adverse and beneficial cultural effects arising from a proposed project must be given the same effort and prioritization as biophysical and socio-economic effects.

# Recommended Approaches to Identifying Impact Pathways, Conducting an Effects Characterization, and Evaluating the Severity of Potential Impacts



The following list represents a selection of best practice approaches available to First Nations to aid in identifying impact pathways, conducting effects characterisation, and evaluating the severity of potential impacts on cultural rights.

First, identifying project-specific impact pathways will support a clear picture of how anticipated project impacts will affect relevant cultural rights and practices by mapping the direct and indirect relationships between them. This step also helps visualize the complex relationships between impacts and the diverse aspects (access, availability, preference, etc.) of cultural rights and practices. Once these pathways have been established, they can then be used to determine how, how effectively, and to what extent committed-to mitigations measures will interact with pathway components and relationships to address potential project impacts. Subsequently, residual impacts, i.e., those impacts which remain after taking mitigations measures into account, can be evaluated for severity by conducting an effects characterisation.

These approaches can be used on their own, or in combination with one another. Selection of the approach should be grounded in a First Nation's worldview and needs. Contextual factors used to ground the identification of impact pathways, effects characterization, and evaluation of severity may include, but are not limited to, the Group's values and policies concerning such things as:

- » The vulnerability of cultural rights and practices
- » Existing threats to cultural rights and practices
- » The current geographic scope of cultural rights and practices
- » The size, type, and location of the proposed project
- » The Group's prior experience with similar or related projects
- » Existing community policies and plans
- » Cumulative changes being experienced by the Nation

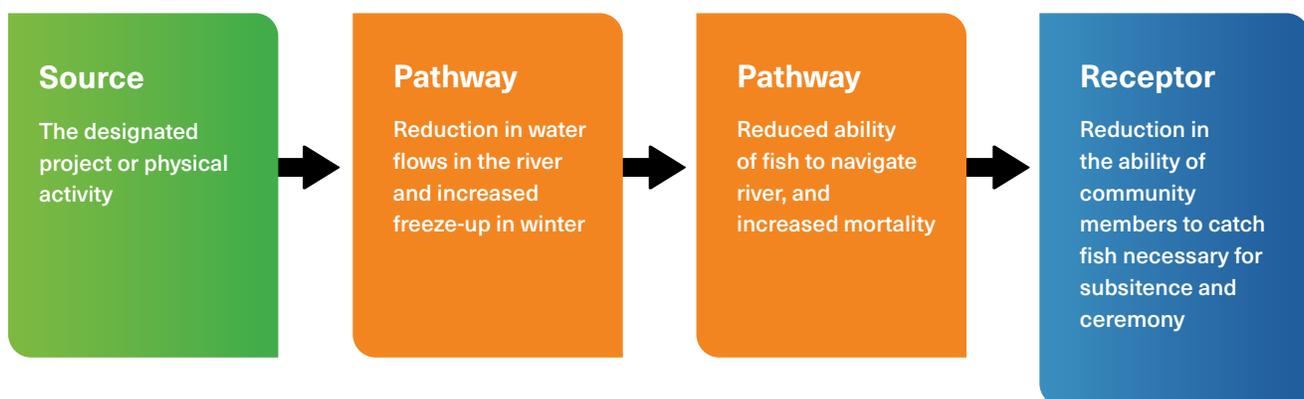
Grounding in an Indigenous group’s worldview is important as impact pathways, effects characterization, and determinations of severity may not be conceptualized by a First Nation in the same way as typically understood by proponents and the Crown in EA. As a result, impacts and their resulting severity, as understood by a First Nation, may not be assessable using traditional EA processes and instead must be assessed through community deliberation.

## Identifying Impact Pathways

The structure provided below outlines a generalized methodology for identifying impact pathways, as used in EA processes<sup>28</sup>. First Nations may also wish to develop an entirely different way of approaching impact pathways or modify what is offered below.



In an impact pathway, the source is the activity or event that threatens a cultural right. The source may be the project as a whole, or a specific project element (e.g., a specific project facility or an influx of project works in the area). The source reaches the receptor, the cultural right(s) that will be affected, through a pathway. The pathway is the mechanisms through which a change to a cultural right occurs and may be more than one step. An example of an impact pathway is provided below.



<sup>28</sup> Drawn from Canada, "Technical Guidance for Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012."

# Considering Mitigations and Their Effectiveness

After an impact pathway has been established, mitigation measures can be assessed to see if they will reduce impacts on receptors, or cultural rights. Mitigation measures generally focus on either changing the factors or triggers that lead to adverse impacts (i.e., change the pathway). Alternatively, mitigation measures can strengthen the Nation's own cultural pathways that nurture and strengthen cultural rights and values. For a mitigation measure to be considered effective, it should:

- » Consider all possible alternatives
- » Include culture holders as partners in the identification of appropriate mitigation, implementation, monitoring, and feedback
- » Be transparent and specific
- » Be adequately funded, resourced, and staffed
- » Be precautionary
- » Deal with impacts regardless of where they may be located
- » Have outcomes that are measurable against goals

After taking into consideration mitigations and their effectiveness, residual impacts to rights can be determined through an effects characterization and severity determination.

# Conducting Effects Characterization and Determining Severity



## Standard EA Significance Criteria

One of the key factors used to determine the acceptability of a proposed project is consideration of the severity its potential adverse effects. EA has developed more or less standard methods to evaluate significance, but it may be more appropriate to develop community-specific metrics. The box below summarizes standard EA criteria and presents several options for developing community-specific metrics.

### Standard EA significance criteria

- » **Context:** The current and future vulnerability and resilience of the value to change (e.g. rarity of similar values in the territory, past industrial effects and change over time).
- » **Magnitude:** The expected scale and/or severity of the effect (e.g. intensity of community concern, perceived risk, extent of change in use).
- » **Extent:** The spatial area over which the effect is expected to occur (e.g. extent of affected water courses, movement patterns of wildlife and land users, boundaries of traditional/family use areas, zone of avoidance)
- » **Duration:** The length of time the effect persists (e.g. generational effects, knowledge transmission, time to repair and re-establish relationships between people, animals).
- » **Frequency:** How often the residual effect occurs (e.g. timing with respect to important seasons, animal movements, and cultural activities).
- » **Reversibility:** Whether the residual effect on the VC can be reversed (e.g. permanent loss of Indigenous Knowledge for effects lasting longer than one generation).
- » **Affected Populations:** The distribution of the effect amongst the population of affected people. Effects may be evenly distributed or be disproportionately experienced by certain subpopulations.

---

### Criteria used by the Mackenzie Valley Environmental Impact Review Board (MVEIRB)

- » The **magnitude**, or degree, of change of the impacts that might be caused
- » The **geographical area** that the impact might affect
- » The **duration** that the impact might have, i.e., how long will the effect occur
- » The **reversibility** of the impact that might occur
- » The **nature of the impact**, i.e., how important is the component that the impact will affect?
- » The **possibility** that the impact could occur

## Options for community-specific metrics

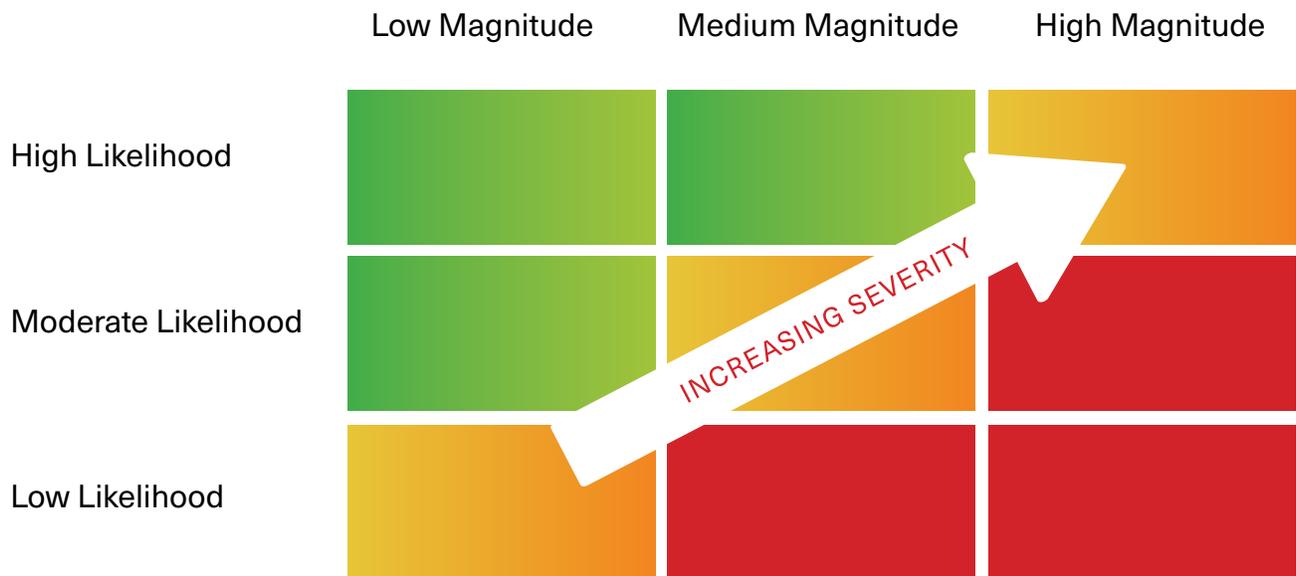
1. **The “Reasonable Person” Approach:** Setting thresholds for what is considered significant by asking whether a reasonable person would consider the change to be significant. For example — would a reasonable person consider a 20% drop in yearly fish catch significant? If yes, then that is significant.
2. **The “Qualitative, Value-Specific” Approach:** Adopting defined, yet still largely qualitative, significance thresholds. Each threshold has the benefit of a narrative and measurability specific to the value. For example:
  1. Water – a water management regime that lacks adherence to Indigenous water values and norms and does not support a pre-contact range of fish and fish habitat and other resource values.
  2. Fish – high level of reduction in the distribution, abundance, and population health of a culturally important fish species; reduction in habitat for critical life stages of any culturally important fish species.
3. **The “Deference to Most Sensitive Receptors” Approach:** This approach suggests that if affected Indigenous groups (the most sensitive receptors in the human environment) themselves deem the likely outcome significant, it is therefore significant. This relies heavily on subjective inputs of the most affected parties.
4. **The “Unacceptable Risk” Approach:** This approach holds that where there is a lack of confidence in predictions and/or the potential for extremely high magnitude outcomes is present, that a likelihood lower than 50% (in other words, where the impact outcome is less likely to occur than not occur) may still be an unacceptable risk, and likelihood greater than 50% is not critical to determining whether the effect is significant. This is particularly important for extremely high magnitude outcomes like loss of the use of a river or a critical cultural site due to project effects.
5. **The “Indigenous Laws and Norms” Approach:** This approach holds that changes to any value, and all values in combination, from a project and associated cumulative effects, may impact on the ability to adhere to the laws and norms of Indigenous peoples. If, for example, a natural law is that water should be allowed to run its natural course unimpeded, any changes to the hydrological regime through activities such as dams and impoundment of rivers, may be deemed significant, because the law is being “broken.”
6. **The “Sufficiency of Resources” Approach:** This approach holds that the full practice of Indigenous rights reasonably includes access to sufficient lands, aquatic environments, and resources in which the rights can be exercised. “Sufficient” refers not only to quantity but quality and is evaluated from the perspective of what is required to fulfill not only subsistence requirements, but also cultural needs, of the First Nation now and into the future.
7. **The “Contribution to Reconciliation” Approach:** This is a new approach suggesting that given the amount of existing, often Crown-caused, damage to Indigenous lives, lands, culture and resources, Crown decisions to approve
8. **The “Rights Infringement” Approach:** This approach would identify significant effects where a project caused (or added additional effects to already existing) infringements of asserted or recognized rights.

# Heat Mapping

Similar to the mapping processes identified as potential options for Tool #1 (Density of Use Maps and Mapping of High Priority Areas), Heat Mapping represents a visual expression of where areas that may be impacted by a proposed project overlap with spaces and places of heightened Indigenous cultural value. Cultural heat maps can illustrate geographic locations where project impacts are likely to occur in proximity to or in direct overlap with areas that have greater reported cultural rights practice and value. While useful as a flagging tool, it is important to note that heat mapping fails to accurately represent cultural rights which are not tied to a specific geographic location. If areas of heightened overlay between project effects and cultural values are identified, more detailed, community-led qualitative analysis, including on-territory mapping among other activities, may be necessary to fully flesh out the severity of impacts.

# Risk Matrix

A risk matrix is a visual depiction that draws on standard EA significance criteria. By cross comparing the likelihood of an impact occurring to the magnitude of predictable impact, the resulting risk and severity can be determined.



## Summary

This Tool provides some options and guidance for the identification of impact pathways and the characterization of effects and determination of severity. While some standard approaches are provided, it is important to note that each First Nation may wish to approach the identification of impact pathways and the characterization of effects in a different way. For example, when determining the severity of residual effects, it may be beneficial to emphasize the severity of the project as a whole in some cases. In others, it may be better to determine the severity of impact to the category of right, or to individual cultural rights. This process of characterizing project effects and determining impact severity can help a First Nation to define cultural impacts in their own terms. It is therefore important that the identification of impact pathways and the characterization of residual effects are grounded in a community's historical context (as determined in Tool #2). This will allow for the consideration of cumulative effects and varying thresholds of change.

*Tool 4*

# Addressing Residual Impacts to Cultural Rights

Step 4 of Undertaking an Assessment  
of Impacts to Cultural Rights and Values



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

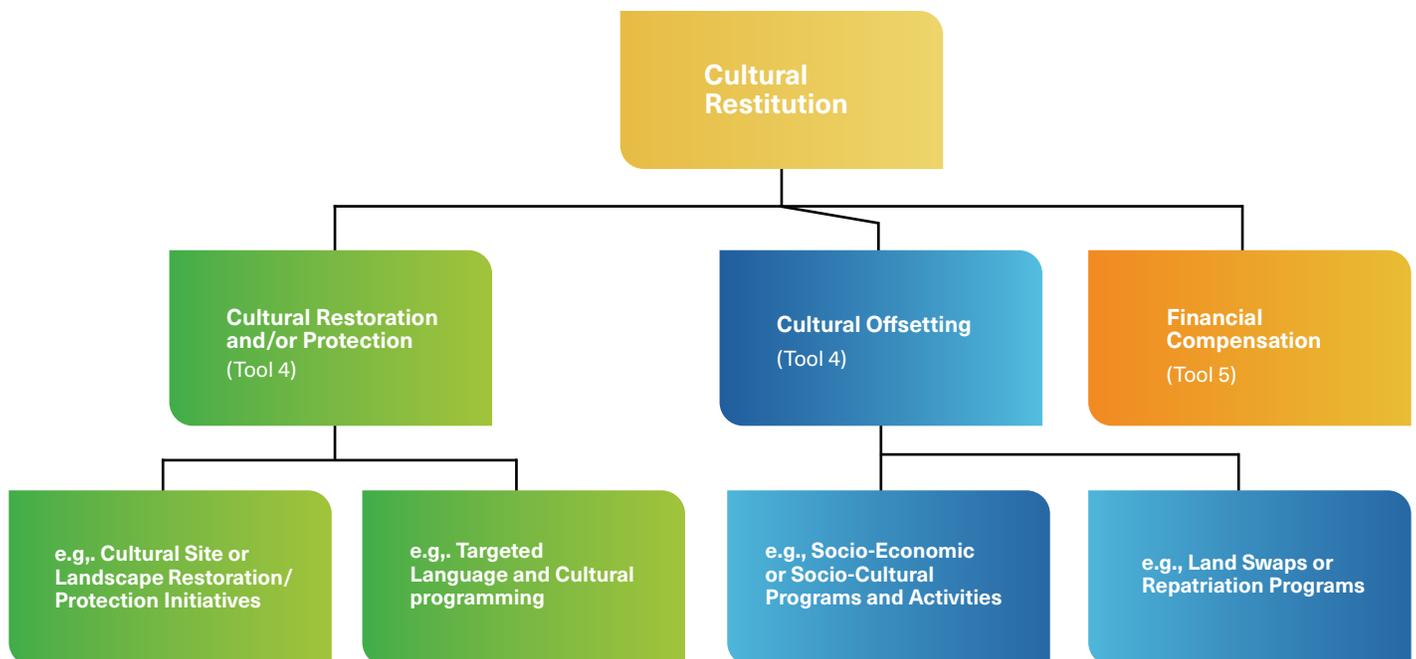
*Spirit of the Land*

Once residual effects of a project are determined through an effects characterization and severity determination, they must be addressed. First Nation systems should serve as the vehicles for assessing the decisions presented in the context of responding to impacts. This is done by assessing whether certain impacts of a project can be avoided, and if so, how; whether mitigation measures can be implemented to reduce impacts; or whether restitution is required for impacts that can't be mitigated. In some cases, where potential impacts are unacceptable, the conclusion of this analysis may be to seek the termination of the project. The FNMPC recognizes that the EA system is a flawed and evolving set of regulations and processes. We seek, however, to provide transparent information that Nations can use at their discretion to make their own determinations about consent, mitigation, and compensation.

In general, avoidance of potential residual impacts is preferred option. However, this is not always possible and impact minimization must be applied through mitigation measures. Restitution may be needed if avoidance and minimization are not possible or sufficiently effective and adverse effects on cultural rights remain. It is important to note that mitigation and restitution are not mutually exclusive approaches. In fact, it is rare for a project's mitigation measures to fully reduce all impacts, even where mitigation measures are robust and First Nations have been incorporated into their design and review. In these cases, mitigation and restitution measures can be taken in unison. Each Nation can determine the focus of efforts in this regard and choose which measures to pursue.

The decision to seek restitution should be taken only after careful consideration, as it may impact the Nation's position in other realms. For example, if a Nation seeks to protect its cultural rights in a Canadian court, previous acceptance of restitution may prejudice their legal position. However, in cases where litigation is not being considered, restitution can be a way for a Nation to receive compensation if the project proponent is unable or unwilling (alone and in combination with Crown conditions or measures) to sufficiently reduce project impacts to the Nation's cultural rights.

There are a variety of forms of restitution. This Tool identifies three primary forms of restitution for impacts to cultural rights: cultural restoration, cultural offsetting, and financial compensation. The following diagram illustrates these three options for restitution.



This diagram illustrates three primary means of restitution: restoration, offsetting, or compensation. Assessing compensation for residual impacts to cultural rights is the subject of Tool #5.<sup>29</sup>

*Cultural Restoration* is any action that works to *directly* restore or return an impacted cultural right, or aspects of the cultural right, back to a desired condition. Unlike offsetting, restoration involves actions or investments that are directly targeted at restoring the same specific cultural values (e.g., a sacred site, or degree of language use in a community) that have been impacted. Cultural restoration may be directed at both a geographically situated set of cultural values, such as a cultural landscape, or at a less geographically situated set of cultural values, such as language retention.

## Restoration

### ***Restoration of a geographically situated set of cultural values***

When, in response to a loss or degradation of a geographically situated set of cultural values, environmental and/or structural restoration investments are made to assist recovery of values important to the retention or practice of cultural rights in the same geographic vicinity, matters most to them

### ***Restoration of lost or infringed cultural right that is not necessarily geographically situated***

When cultural loss is restored through programs, developments, projects, policies, etc. that seek to restore the same aspect of culture, e.g., language programs to address anticipated adverse effects on language transmission.

In contrast, the Tool defines *Cultural Offsetting* as a form of restitution that is **not** directly linked to the specific geographic location or specific kind of cultural value being impacted. In this Tool, the term of “offsetting” is used more generally than how the concept of habitat offsetting is used in biophysical Environmental Assessment. Rather, it is defined as an action that works *indirectly* to address the lost or diminished opportunity to receive benefit from, or to exercise, a cultural right.

<sup>29</sup> For the purposes of this tool, compensation is defined as providing financial compensation based on an assigned monetary value, preferably as defined by the affected First Nation, for the lost or diminished opportunity to exercise a cultural right.

# Offsetting

## ***Offsetting for a lost or infringed cultural right that is may or may not be geographically situated***

When a cultural loss is restituted through restoration investments, developments, programs, policies, etc. that are NOT directly tied to the impacted cultural right, e.g., development of a language centre as a form of offsetting loss of a trapline.

That is, here the concept of an offset is an action that is different in nature and extent from the dimension of culture that is being impacted. For example, project impacts to a fishing site may be “offset” by the establishment of protected area in a different part of the Nation’s territory to support for other cultural values or activities, e.g., hunting and trapping. In this hypothetical case, while the protected area has a different kind of value from the fishing site, and while the protected area doesn’t “restore” the impacts on the fishing site, it is deemed by the impacted Nation to provide an acceptable degree of restitution.

Hence, the main distinction between how the concepts of *restoration* and *offsetting* are used in this Tool is that restoration is directly focussed on restoring the specific cultural right that is being impacted, with “like for like”, while offsetting provides a more general form of non-monetary restitution that while deemed generally equivalent in compensatory value to what is being lost, it provides a different kind of cultural value or benefit from the cultural right being impacted.

It is important to note that in the area of intangible culture, there may be similar types of programs and activities to address both restoration/protection and offsetting initiatives (e.g., culture camps or language immersion). In one case they may be needed to address an immediate risk or impact posed by a specific project (restoration/protection initiatives). In other cases, it may not be directly related to the project but viewed as a preferred form of offsetting by a Nation.



## Terminology

The following terminology is used throughout this Tool. Definitions for each term are provided below.

- » **Cultural Offsetting:** a form of non-monetary restitution that is **not** directly linked to the specific geographic location or specific kind of cultural value being impacted. These initiatives work *indirectly* to address the lost or diminished opportunity to receive benefit from, or to exercise, a cultural right.
- » **Cultural Repatriation:** processes that return lost cultural property (often tangible cultural heritage) to the rightful owners.
- » **Cultural Restitution:** processes that address residual adverse impacts on a cultural right or rights, including restoring the practicability of a cultural right to its original state, offsets of equal or greater value to cultural losses, or financial compensation for cultural losses.
- » **Cultural Restoration/Protection:** any action that works to *directly* restore or return an impacted cultural right, or aspects of the cultural right, back to a desired condition. These initiatives may be connected to either a specific geographic location or cultural right being impacted by a project and focuses on the protection and restoration/revitalization of **specific** cultural rights such as language, tangible cultural heritage, etc.



# Principles

## **The following principles may be considered when addressing residual cultural impacts:**

- » There should be a focus on cultural impact avoidance as a priority, with adequate minimization and compensation measures demonstrably employed where impact avoidance cannot be assured.
- » Indigenous Nations should be included, or allowed to lead, the development and implementation of avoidance, mitigation, and restitution measures to ensure that they meet their needs and requirements.
- » Where avoidance of cultural impacts cannot be achieved, Indigenous communities should be involved in verifying the nature and magnitude of all residual adverse effects on culture prior to a determination being made on what accommodation measures (i.e., offsets, compensation) are required.
- » Addressing residual cultural impacts should include the consideration of reconciliation, namely the possibility and opportunity for potential beneficial impacts to culture arising from a project. A project should do more than “not harm” an Indigenous community; it should bring about a net benefit.

## **The following principles may be considered when pursuing avoidance of residual cultural impacts:**

- » Indigenous Nations should be able to determine contexts in which impacts to cultural rights are non-negotiable and must be avoided at all costs. For example, there may be some locations so valued and sensitive that it is not possible to mitigate adverse effects to them through any means other than outright avoidance.
- » High-value cultural sites/cultural landscapes should be avoided and maintained intact with appropriately sized protective buffers placed around them, as determined by affected Indigenous Nations.

## **The following principle may be considered when pursuing mitigations for residual cultural impacts:**

- » Cultural monitoring plans and their implementation must be agreed to and preferably conducted by the First Nation themselves. However, it must also be kept in mind that monitoring does not constitute a form of mitigation and should not be treated as such.

## **The following principles may be considered when pursuing restitution for residual cultural impacts:**

- » Restitution can take many forms, including, but not limited to, offsetting, restoration, and financial compensation.

- » Negotiations about restoration, offsetting and compensation measures must be culturally sensitive and trauma-informed. It is important to observe cultural protocols when engaging in these negotiations.
- » The trade-offs between likely adverse impacts on a nation or community's cultural rights and beneficial impacts in other areas of value to the same group must be:
  - Understood (i.e., well characterized with a relatively high degree of confidence in the predicted outcome, relatively free from uncertainty);
  - Shared with the First Nation in an acceptable format, and
  - Acceptable to the First Nation, with the appropriate formal consent processes set out by the Indigenous Nation.
- » Restitution practices, such as restoration of a cultural site, should be led - planned, managed, and implemented - by the affected First Nations themselves.
- » Wherever possible, restitution mechanisms should do more than simply reduce negative impacts, they should also ensure and promote benefits for the community.
- » When the impacted First Nation requests it, all reasonable efforts shall be given by all parties to find non-monetary restitution measures to protect or restore practicability of cultural rights, before considering financial compensation.
- » In determining the nature and extent of overall restitution owed to an impacted community, cumulative effects must be taken into consideration. Crown agencies may be required to get involved, including in the identification of **complementary measures** to protect and promote Indigenous cultural rights that the Crown will support over and above proponent commitments and Crown conditions on the proponent.
- » Indigenous communities should be able to identify their preferred means of restitution in accordance with their own institutions and governance systems.
- » In order to allow Indigenous communities to identify their preferred means of restitution, they must be provided with the time, funds, and resources necessary to make these assessments. This includes conducting relevant studies, engaging with leadership and community members, determining what works best for the Nation, and funds for engagement with the proponent and consultation with the Crown to ensure that measures are adopted.

# Recommended Approaches for Addressing Residual Impacts to Indigenous Cultural Rights



The selection of an approach to address residual impacts to cultural rights must be grounded in an Indigenous Group's context, history, and legal systems, as well as existing policies, protocols, norms, and laws. As previously identified, avoidance is the most commonly preferred form of addressing residual cultural impacts. In the event that avoidance is not possible, mitigation and/or restitution mechanisms can be implemented.

## Mitigation Measures

As noted above, mitigation measures are often developed through collaboration and engagement with the proponent and/or relevant government agencies. While the focus of this Tool centres on determining opportunities for restitution, it is important to note that, at a minimum, mitigation measures should focus on either changing the actors or triggers that can lead to adverse impacts; or alternatively, strengthening the Nation's cultural resilience by supporting conditions that nurture and strengthen cultural rights.

In accordance with general EA policy, for mitigation measures to be considered effective, they should:

- » Consider all possible alternatives
- » Include culture holders as partners in the identification of appropriate mitigation, implementation, monitoring, and feedback
- » Be transparent and specific
- » Be adequately funded, resourced, and staffed
- » Be precautionary
- » Deal with impacts regardless of where they may be located
- » Have outcomes that are measurable against goals
- » Be adaptable



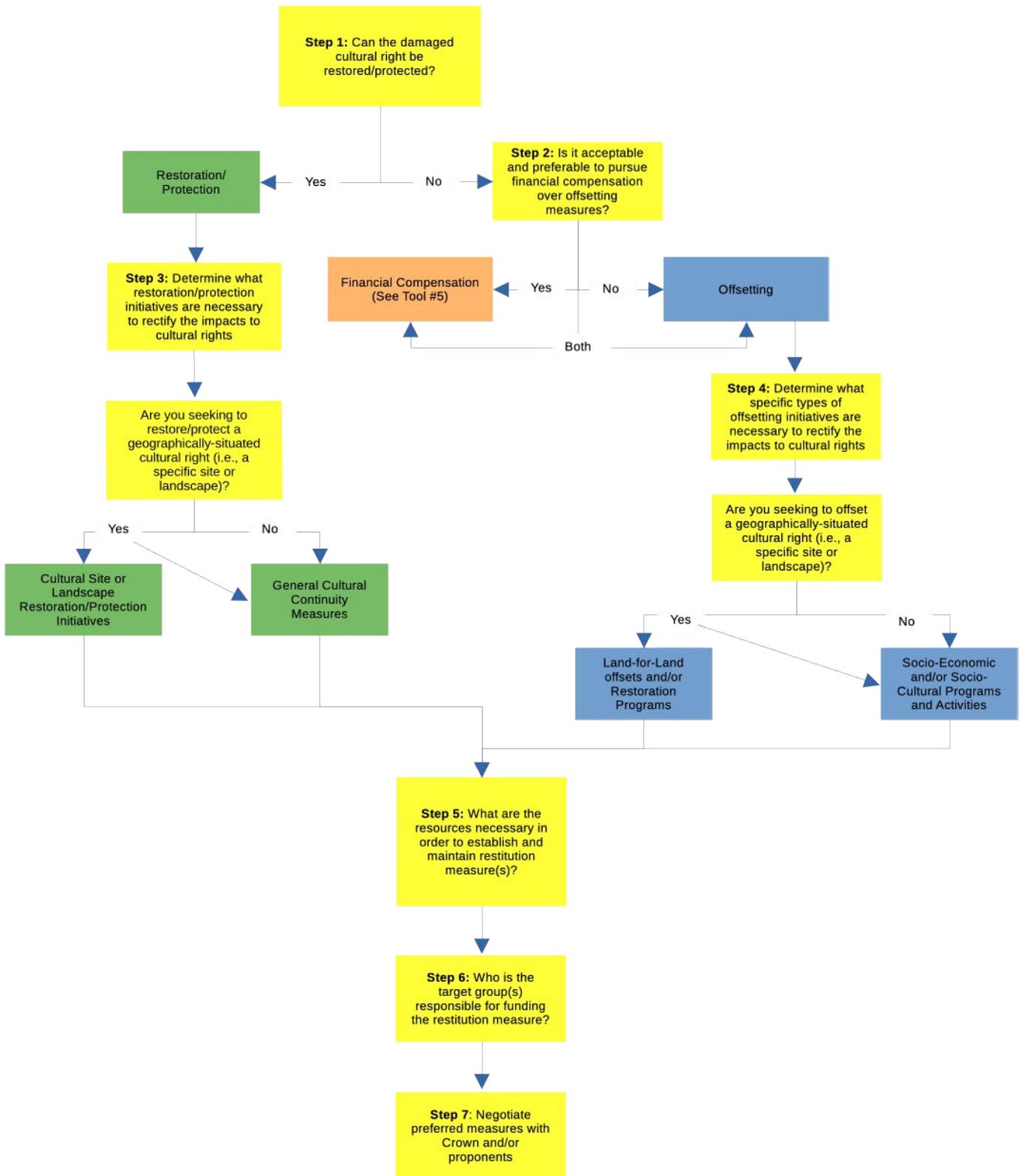
## Restitution Measure

In general, the deliberation and decision-making about potentially appropriate and preferred restitution measures should be conducted internally within the First Nation, prior to engagement with the Proponent and/or government. For the sake of this Tool, we have identified three forms of restitution: cultural restoration, cultural offsetting, and financial compensation. These forms of restitution can overlap and the desired measure for restitution may be a combination of all three.

While each Nation will have different requirements for the purposes of restitution, informed by its own unique needs and priorities, the act of determining the Nation's preferred path to restitution might take will likely involve some or all of the following steps. The following decision tree (*Figure 1*) illustrates the key steps in one approach to determining a desirable restitution mechanism or mechanisms. The steps are described in further detail in Figure 1.



Figure 1: Form of Restitution Decision Tree



## Step 1:

### Can the damaged cultural right be restored/protected? Yes/No

**Yes** – Restoration (see Step 3)

**No** – Offsetting or Financial Compensation (see Step 2)

Determine whether restoration and/or protection opportunities are feasible. The severity of potential impacts of the proposed major project on the cultural right(s) will be a factor in this determination. Restoration opportunities within the impacted area may not be feasible or practical in all contexts, and if so, offsetting may offer the best options for effective means of restitution. Where there is an opportunity to invest in the recovery and/or renewal of a cultural area or place, or a non-geographically situated cultural right, the Nation's own policies and laws can give direction. For example, where a project has the potential to adversely effects an area that a Nation has identified in its land-use plan for important cultural use, restoration and/or protection measures should be prioritized.

## Step 2:

If it's not feasible to restore a cultural area, **is it acceptable and preferable to pursue financial compensation over offsetting measures?** A Nation's policies and laws in this area can serve as guidance in making this decision.

**Yes** – Financial Compensation (see Tool #5)

**No** – Offsetting (see Step 4)

Determine whether financial compensation is possible and/or desired by the community. Financial compensation may be difficult to calculate for intangible cultural values and is not always applicable. In some instances, offsetting mechanisms may provide a greater benefit to the preservation and protection of cultural values than financial compensation. Further information on the complexities and limitations of financial compensation is provided in *Tool #5: A Model for Evaluating the Economic Value of Cultural Rights*.

## Step 3:

### Are you seeking to restore/protect a geographically-situated cultural right (i.e., a specific site or landscape)?

**Yes** – Determine preferred geographically situated restoration measure(s) (e.g., cultural site or landscape restoration/protection initiatives), then **continue to Step 5**

**No** – Determine preferred non-geographically situated restoration measure(s) (e.g., general cultural continuity measures), then **continue to Step 5**

Determine what specific restoration and protection initiatives (e.g., fish habitat restoration project, establishment of a cultural centre) are necessary to rectify the impacts to cultural rights. General examples of restoration and protection initiatives are provided below, and a listing of example initiatives undertaken by Nations across Canada are included in **Appendix A**.

*Some examples of geographically situated restoration measures (e.g., Cultural Site or Landscape Restoration/Protection Initiatives) include:*

- » Revitalization of natural landscapes, local vegetation, and native fauna within the project-affected area with the same cultural values that support the continued or enhanced exercise of the same cultural right being impacted;
- » Restoring the project area to a certain quality following project-closure; and
- » Targeted cultural programs and activities within the project area, such as language programs and culture camps, aimed and designed at supporting and/or restoring resilience in cultural dimensions that may be adversely affected.

*Some examples of non-geographically situated restoration and protection initiatives include:*

- » Enhancing or protecting key cultural areas outside of the project affected area that are used for the exercise of the cultural right being impacted; and
- » Targeted cultural programs and activities outside of the project area, such as language programs and culture camps, aimed and designed at supporting and/or restoring resilience in cultural dimensions that may be adversely affected.

## Step 4:

### Are you seeking to offset a geographically-situated cultural right (i.e., a specific site or landscape)?

**Yes** – Determine preferred geographically situated offsetting measure(s) (e.g., land-for-land offsets and/or restoration programs), then **continue to Step 5**

**No** – Determine preferred non-geographically situated offsetting measure(s) (e.g., socio-economic and/or socio-cultural programs and activities), then **continue to Step 5**

Determine what specific types of offsetting initiatives (e.g., activity/program, land swap) are necessary to rectify the impacts to cultural rights and bring the community back into balance. General examples of offsetting initiatives are provided below, and a listing of initiatives undertaken by Nations across Canada are included in **Appendix B**.

*Some examples of geographically situated offsetting measures, such as Land-for-Land Offsets and Restoration Programs include:*

- » Legal administrative, land transfer and/or land-purchase financing to support preservation of an area/landscape/location within the project area with different cultural values that support the continued or enhanced exercise of cultural rights;
- » Providing long-term funding to support ecological restoration and stewardship programs for areas that support different cultural rights; and
- » Return of (off-reserve) lands to community control and jurisdiction.

*Some examples of non-geographically situated offsetting programs and activities, such as Socio-Economic and/or Socio-Cultural Programs and Activities include:*

- » Funding community project and initiatives (including long-term funding to support programs such as cultural camps for elders and youth);
- » Repatriation of cultural legacy objects and belongings;
- » Long-term supports for language revitalization programs;
- » Long-term supports for revitalization of cultural activities; and
- » Establishing a cultural “trust”.
- » Providing socio-economic benefits to a community;
- » Housing development and programs;
- » Training and education programs;
- » Establishment of mental health supports and infrastructure; and
- » Construction of permanent infrastructure such as offices, medical sites, schools, etc.

## Step 5:

Seek to answer the question, **what resources are necessary in order to establish and maintain the restitution measure?** Then proceed to **Step 6**.

Once the desired form of restoration/protection or offsetting is determined, the Nation can determine the resources necessary in order to establish and maintain the program or activity. The resources required will be dependent on the form of restitution chosen, as well as the existing context of the Nation (i.e., existing resources, infrastructure, personnel, etc.). Some key factors to consider when determining the resources necessary for restitution mechanisms are provided below, subdivided the type of measure chosen.

### *Restoration Measures*

1. Geographically situated restoration/protection measures:
  - Size: What is the size of the land to be protected/restored? Does this factor in cumulative effects and current and future context?
  - Quality: What is the existing quality of the site or landscape?
  - Degree of protection: What is being protected (i.e., a patch of land, a species, an ecosystem, etc.)? What is the degree of protection? What are the consequences for continued impacts to the protected area?
  - What are the criteria for determining whether restoration/protection objectives have been achieved?
2. Non-geographically situated restoration/protection measures:
  - Duration: Is the initiative a one-off event (i.e., the construction of a school), or a long-term program? If it is a long-term program, how long will the initiative take place? (i.e., months, years, in perpetuity, etc.)
  - Target community group: Who is the restitution activity engaging with? (i.e., youth, elders, women, etc.)
  - Staffing: What sort of staffing is required? (i.e., maintenance staff, administration, honoraria, etc.)
  - Space/location: Where will the restitution activity or program take place? Is a new location required? Are there existing places that can be utilized?
  - Trajectory of program: Will the program or activity remain the same size for its duration? Is this a pilot program that will be developed and will grow with time?
  - What are the criteria for determining whether restoration/protection objectives have been achieved?

## *Offsetting Mechanisms*

### 1. Geographically situated offsetting measures:

- Size: What is the size of the land to be offset? Does this factor in cumulative effects and current and future context?
- Quality: In the case of a land swap or return, what is the quality of the new land in comparison to that which was lost?
- What are the criteria for determining whether restoration/protection objectives have been achieved?

### 2. Non-geographically situated offsetting measures:

- Duration: Is the initiative a one-off event (i.e., the construction of a school), or a long-term program? If it is a long-term program, how long will the initiative take place? (i.e., months, years, in perpetuity, etc.)
- Target community group: Is the initiative engaging with a specific community demographic? (i.e., youth, elders, women, etc.)?
- Staffing/Employment: What sort of staffing needs will the offsetting activity require? (i.e., maintenance staff, administration, honoraria, etc.). Will there be a construction component (i.e., for infrastructure developments) that community members can participate in?
- Space/location: Where initiative take place? Is a new location/new infrastructure required? Are there existing places that can be utilized?
- What are the criteria for determining whether restoration or offsetting objectives have been achieved?

Once the resources required for a restitution initiative are determined, the total cost of the initiative can be determined and communicated to the proponent/government.

## Step 6:

Seek to answer the question, **who is the target group(s) responsible for funding the restitution measure(s)?** Then proceed to **Step 7**

Determine how funding for the restoration/offsetting measure will be provided. Indigenous Groups may wish full control over how cultural restitution activities and projects are planned and implemented.

## Step 7:

**Negotiate the desired restitution measure(s) with the proponent and/or Crown.**

The First Nation may issue its own consent conditions or other requirements for measures associated with impacts on cultural right. However, in the Canadian EA system, this does not guarantee that those measures will be adopted. As such, they may need to be negotiated with the proponent and/ or Crown who will put forward their own expectations and limitations. To help in these negotiations, it is encouraged that the Nation draw on the past identification of priority cultural rights and the results of the effects characterization to clearly articulate their desired forms of restitution.

## Summary

It is important to note that the decision to seek restitutions should only be taken after careful consideration as it may impact the Nation's position in other realms (e.g., seeking protection of cultural rights in the Canadian court system). This Tool identified three primary options for restitution:

1. Restoration: any act that works to *directly* restore or return an impacted cultural right (or aspects of the cultural right) back to a desired condition (i.e., rebuilding a sacred site that has been destroyed).
2. Offsetting: an action that works *indirectly* to address the lost or diminished opportunity to receive benefit from, or to exercise, a cultural right (e.g., offsetting impacts to a sacred area by transferring lands located elsewhere in the Nation's territory to the control of the Nation).
3. Compensation (discussed further in Tool #5)

These forms of restitution or not mutually exclusive and can be used in combination to best support the protection and promotion of the Nation's cultural rights and related interests.

This Tool provides a decision tree to help Indigenous Groups determine a desirable restitution mechanism or mechanisms for project-specific and cumulative effects on cultural rights identified in Tools 1 to 3.

Once the desired form of restoration or offsetting is determined, this Tool provides some guiding questions to help Indigenous Groups determine the resources necessary in order to establish and maintain the program or activity. The Nation may then determine how funding for the measure will be provided. This will help set up the First Nation to negotiate the desired form of restitution with the proponent/Crown.

# Appendix A: Restoration/Protection Initiatives

The following examples of restoration/protection initiatives have been implemented by Indigenous Groups across Canada. While each program would be specifically designed to address a Nation's key requirements and cultural context, the following examples may serve as a starting point for the determination of possible restitution initiatives a Nation may wish to establish:

- » Syilx Okanagan Nation, **Bringing the Salmon Home! Columbia River Salmon Restoration Initiative (CRSRI)**: A program that reintroduces salmon, a species of profound importance for Syilx Okanagan Nation, into their historical spawning grounds in the Canadian portion of the Columbia River. Part of an agreement to integrate Indigenous voices and needs into the existing Columbia River Treaty, the program addresses impacts to salmon populations due to hydroelectric dams, development, and habitat disruption. In recent years, the program has resulted in the return of annual runs of hundreds of thousands of sockeye salmon and has contributed to the restoration of the Nations' relationships with salmon.
- » West Moberly First Nations and Saluteau First Nations, **Klinse-Za Mountain Caribou Protection Partnership Agreement**: A co-management program involving the direct participation of Nation members in the stewardship of the Klinse-Za caribou herd in the South Peace region of BC, where industrial development and other human activities have resulted in a drastic decline in caribou numbers over the past 50 years. The program protects a range of Klinse-Za caribou habitat and provides funding to the Nations to begin restoring habitat in the region and buying out private resource tenures in the designated area. Part of a partnership agreement between the First Nations, BC, and Canada, the program has resulted in an increase in the Klinse-Za caribou herd from a low of 38 individuals in 2013 to 114 individuals today. The program is actively working to restore the Nations' ability to hunt caribou as they previously had for thousands of years.
- » Kaska First Nations, **Dene K'éh Kusān Protected Area**: A large Indigenous Protected and Conserved Area (IPCA) in the core of Kaska traditional territory designed to act as a buffer against climate change and biodiversity loss. The plan includes the development of relationships with land users currently operating in the proposed area. The Kaska Land Guardians will co-manage the protected area, creating jobs grounded in Kaska culture, legal principles, and value systems. The plan is part of ongoing co-management and planning agreements Kaska First Nations have with the BC government. It is designed to protect against further losses to land and culture for Kaska First Nations, to revive caribou populations, and to provide economic opportunities for Indigenous communities. The Dene K'éh Kusān plan will restore Kaska stewardship over traditional lands and empower communities to manage their territories.

- » Coastal First Nations, **Coastal Guardian Watchmen Support:** A guardian program whereby the Watchmen uphold and enforce traditional and contemporary Indigenous laws passed down over countless generations, and work together to monitor, protect, and restore the cultural and natural resources of coastal territories. The Watchmen facilitate monthly conference calls and organize annual gatherings and learning exchanges that bring Guardians together to build relationships and share information and experiences. Although Coastal Guardian Watchmen programs provide ongoing monitoring across the Central and North Coasts and Haida Gwaii, each Nation is responsible for its own specific territory. The Coastal Guardian Watchmen network safeguards Coastal Nations' territories by gathering and sharing detailed regional knowledge about lands and waters, animal populations and habitats, and impacts from human activities. This knowledge can then be used to inform Nations' decision-making regarding uses of lands and waters. NOTE: *while monitoring is not typically considered mitigation, the development of - or increased investment in an existing - evergreen, well-funded, strongly mandated monitoring program, can be considered mitigation, in part because it empowers the Indigenous Group above and beyond simply monitoring the project.*

## Appendix B: Offsetting Initiatives

The following examples of offsetting initiatives have been implemented by Indigenous Groups across Canada. While each program will be specifically designed to address a Nation's key requirements and cultural context, the following examples may serve as a starting point for the determination of possible restitution initiatives a Nation may wish to establish:

- » Inuit Tapiriit Kanatami, **ITK IilikKuset-Ilingannet! Culture Connect!:** Connecting youth and adult role models in order to facilitate knowledge transfer on hunting, trapping, sewing, art, carving, snowshoe making, music and wild food preparation. A pilot program took place in three communities in Nunatsiavut, Labrador, where the mental health of community members was found to be negatively affected by climate change and associated changes to wildlife, ice cover, and precipitation. By pairing youth with Elders to share knowledge about traditional activities, the program increased generational knowledge transfer, improved participants' mental health, and built pride in Inuit identity.
- » Haida Gwaii First Nation, **Haida Rediscovery Camp:** A youth-based culture camp on the islands of Swan Bay and Mount Moresby, that reconnect youth to their culture. Young people gain a set of skills based in traditional values that will support them through their lives. The program bridges gaps created by family disruption and other effects of colonialism that have caused a loss in young people's ability to connect with their culture. Rediscovery Camps were founded in the 1970s and have since spread throughout Canada and the world.
- » Tłjcho, **Jmbè Program:** An intensive cultural land-based learning program for senior high and post-secondary students that connects young people with Elders to help ensure that Tłjcho language and culture are passed onto future generations. Participants share and learn traditional skills such as fishing and fish preparation, sewing and beading, plant gathering, language learning, and storytelling. The program addresses the loss of culture due to youth departure for schooling and has been shown to improve participants' level of cultural knowledge, self-esteem, and sense of cultural identity.

- » Singaqmiut, **Culture Committee:** A culture committee that engages the community with cultural/ traditional activities and practices including ice fishing, seal hunting, polar bear hunting, whaling, harvesting wild onions, berries, etc., cooking traditional foods, cultural history lessons, skin sewing, storage of subsistence foods, et building and root gathering. There are several culture committees like this one across Nunavik, each of which is specific to the community it serves. The committees seek to strengthen Inuit culture and ensure Inuit traditions are maintained.
  
- » Dehcho First Nations, **The Aboriginal Language Nest Program:** A program where Dene children (ages 0 to 5) are immersed in their traditional language to support language acquisition and generational transfer. Initiated as part of the Northwest Territories Aboriginal Languages Plan in 2010, the program aims to revitalize the Dene language, which has been declining in use over the past several decades. This early childhood program is based on the Maori language nest model. Funding is provided by the Northwest Territories government but is managed by Dehcho First Nations.
  
- » Cheslatta Carrier Nation, **Cheslatta Carrier Nation and British Columbia Settlement Agreement:** Designed as a means of restitution for the impacts of the flooding of Cheslatta Territory and associated eviction of the Cheslatta t'en from their territory for the construction of the Nechako Reservoir. It was determined that 10,000 ha of Crown land would be transferred as Land Parcels to the Cheslatta Carrier Nation. Cheslatta had the opportunity to identify Crown lands within the Cheslatta Territory or Area of Interest for protection or for transfer as a tenure. This example is unique in that it involved restitution for past impacts, illustrating how the tools outlined above can be used in a variety of contexts. The Carrier Nation is a partner in the development of this Toolkit and their success in the Nechako Reservoir case demonstrates what can be achieved with such tools.

# Tool 5

## Considering Financial Compensation for Residual Effects to Cultural Rights

Step 5 of Undertaking an Assessment of Impacts to Cultural Rights



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

*Spirit of the Land*

Prior to any discussion about compensation for residual effects to cultural rights, it is important to note that the intention of the Tool is not to provide a definable economic value for a cultural right, but rather explore possible systems that can be used in situations where compensation for an effect on a cultural right is required or desired. Therefore, the Tool does not seek to quantify the economic value of the cultural right, but rather explore various ways in which financial compensation (likely alongside other restitution and mitigation measures) for the loss of some portion of that cultural right, can be fairly calculated. As such, this Tool serves as a discussion on opportunities for the compensation of cultural impacts, as opposed to presenting a method for the calculation of an economic value.

It is also important to note that, as identified in *Tool #4: Addressing Residual Impacts to Cultural Rights*, the three identified forms of restitution are not mutually exclusive. For example, some forms of financial compensation could be involved in cultural offsetting (e.g., funding that will be used to develop a cultural centre may be deemed to be part of an overall offsetting package that is needed to counterbalance the loss of an on-the-land teaching site). Hence, financial compensation can be viewed by different Nations as either a vehicle to achieve greater control over cultural restitution efforts, or a slippery slope that could pave the way for industry and government to gain “permission” to proceed with projects that will harm cultural rights.

On a practical level, financial compensation can offer an impacted Nation greater flexibility and control over the final form that restitution assumes, for example by having full control over funds rather than having to jointly administer program funding that is provided by either the proponent or government. Indigenous Groups can apply financial compensation to initiatives of their own choosing, such as the purchase of lands, or ongoing cultural or language revitalization programs, among many other options. On the other hand, assigning a monetary value to impacts to cultural rights may be an ethically challenging, if not impossible way, to achieve a Nation’s restitution objectives. Trying to protect intangible cultural interests challenges conventional approaches to the assignment of monetary values to cultural impacts, and therefore requires more complex, collaborative evaluation and negotiation models that prioritize the perspectives and objectives of Indigenous Groups. However, even with better conceptual models, some Nations may still deem impacts to their cultural rights to be “non-compensable” and therefore defy monetary evaluation. Hence, to achieve fair and just outcomes for addressing cultural impacts, some Nations may prefer to focus on offsetting and restoration approaches instead of financial compensation

Tool 5 is relevant to an Indigenous Group’s approach to restitution of impacts to cultural rights if the following three conditions are met:

1. The cultural impact assessment (undertaken in Tools 1-3) predicts a major project will result in residual impacts on cultural rights that cannot be avoided/fully mitigated;
2. The Indigenous Group recognizes that the major project may proceed in spite of potential residual impacts on cultural rights (with or without the Indigenous Group’s Free, Prior and Informed Consent, and the Indigenous Group has determined to seek restitution for the residual impacts to cultural rights; and
3. The conclusion of Tool 4 is that the preferred approach (or one of the preferred approaches) to restitution for residual impacts on cultural rights is *financial compensation*.

For the sake of this Tool, we identify two primary approaches to determining financial compensation for impacts to cultural rights:

1. A market-based approach where a value is assigned to a cultural right based on what that right would cost “on the market” (e.g., the loss of knowledge could be compared to how much it costs for an individual to attend school for a certain number of years); or
2. A community-based values approach, where the community that may suffer (or have already suffered and will continue to suffer) the impacts on its collective cultural rights are asked to determine a hypothetical financial value for such losses (e.g., a community is asked to assign a monetary value to a cultural right based on what the right means to them in terms of quality of life, psycho-social well-being, and socio-cultural well-being).<sup>30</sup>



<sup>30</sup> For more information on market-based approaches and community-based values approaches, see the works by Timothy L. McDaniels and William Trousdale, “Resource Compensation and Negotiation Support in an Aboriginal Context: Using Community-Based Multi-Attribute Analysis to Evaluate Non-Market Losses,” *Ecological Economics* 55, no. 2 (November 1, 2005): 173–86, <https://doi.org/10.1016/j.ecolecon.2005.07.027>; Robin Gregory and William Trousdale, “Compensating Aboriginal Cultural Losses: An Alternative Approach to Assessing Environmental Damages,” *Journal of Environmental Management* 90, no. 8 (June 2009): 2469–79, <https://doi.org/10.1016/j.jenvman.2008.12.019>; Philippe Hanna et al., “The Importance of Cultural Aspects in Impact Assessment and Project Development: Reflections from a Case Study of a Hydroelectric Dam in Brazil,” *Impact Assessment and Project Appraisal* 34, no. 4 (October 1, 2016): 306–18, <https://doi.org/10.1080/14615517.2016.1184501>; Tobias Plieninger et al., “Assessing, Mapping, and Quantifying Cultural Ecosystem Services at Community Level,” *Land Use Policy* 33 (July 1, 2013): 118–29, <https://doi.org/10.1016/j.landusepol.2012.12.013>; Robin Gregory et al., “Compensating Indigenous Social and Cultural Losses: A Community-Based Multiple-Attribute Approach,” *Ecology and Society* 25, no. 4 (2020): 1–13, <https://doi.org/10.5751/ES-12038-250404>.

# Market-Based Approaches to Financial Compensation for Cultural Rights



The consideration of cultural rights in the determination of financial compensation for project impacts remains incredibly limited. However, Australia and New Zealand have developed policies and legislation that takes into consideration cultural losses when dealing with the uptake of Indigenous lands by the Crown. While the case studies below rely on a market-based approach, where cultural elements and losses are connected to a comparative market-based value, they represent steps forward for the consideration of cultural (and notably intangible culture) in determining compensation for impacts.

## Australia

In 2022, the Australian government developed the *Policy for Compensation for Cultural Loss Arising from Compulsory Acquisition*. The policy states:<sup>31</sup>

Cultural loss is perhaps best approached by understanding the cultural value of country and what connection to the particular country impacted by the compensable activity means from a cultural perspective. A proper understanding of the laws and customs of the compensable group and how they are connected to country by those laws and customs is crucial to this.

An appreciation of the cultural value of country and the cultural value of the particular parcel of land can then turn to the question of how the compensable activities have impacted on or would impact on that cultural value. That impact may take many different forms and may

---

<sup>31</sup> Valuer General NSW, "Compensation for Cultural Loss Arising from Compulsory Acquisition" (NSW Government, 2022), 1.

include feelings of spiritual and emotional loss or distress as well as such impacts as the ability to learn and teach cultural knowledge on country or damage to sites of significance.

The Policy outlines categories of cultural loss including access, residence, activities, practices, ecology, sites, trauma, and progressive impairment which are used to derive a market-based means of evaluating financial compensation. The Policy includes novel principles for determining financial compensation, including:<sup>32</sup>

- » Compensation must reflect that losses will be felt by future generations. Compensation must therefore include not only loss at a single moment of time, but also the perpetuity of the loss (i.e. cultural losses are not frozen in time).
- » Compensation must consider the extent to which related and connected areas have been impacted (i.e., compensation must consider cumulative effects).
- » The significance of the cultural losses must be identified through engagement with those suffering loss (i.e., Indigenous communities must be allowed to identify the loss and determine its significance).

While still limited and failing to address the controversial basis of compulsory land acquisition,<sup>33</sup> the Policy explicitly indicates that cultural losses are compensable and represents a more inclusive process for considering cultural rights when determining financial compensation.

## New Zealand

In New Zealand, a series of settlements called the Waitangi Claims of Whakatōhea have been either signed or in the process of being actively negotiated. These settlements provide redress for the losses suffered by the Whakatōhea as a result of Crown confiscation and seizure of lands prior to 1992. The seven most recent settlement packages (since 2021) include elements such as a Crown acknowledgement and apology, and financial, cultural, and commercial restitution. Of note, restitution/redress is “intended to recognise the cultural, historical and traditional associations of Whakatōhea within their area of interest”<sup>34</sup> and includes elements such as:

- » the funding for cultural purposes (including education and revitalization funds),
- » the transfer of land, natural resource arrangements, and
- » geographic name changes.

The settlements include clear compensation for *cultural damages and losses* occurred as a result of the Crown breaching Māori rights and title. Unfortunately, the settlements provide no explanation as to how the compensation figures were calculated. It is assumed, based on past historical settlements, that the Government of New Zealand has continued to employ a market-based approach to calculating cultural compensation amounts whereby the redress is based on a historical assessment of past value and equivalent present financial value of land.

---

<sup>32</sup> Valuer General NSW, 6–7.

<sup>33</sup> Compulsory acquisition is criticized as being fundamentally at odds with the right of Indigenous peoples to Free, Prior, and Informed Consent (Mia Stone, Dr Lisa Strelein, and Kieren Murray, “AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition,” n.d., 19.)

<sup>34</sup> New Zealand Government, “Deed of Settlement between the Crown and Whakatōhea,” January 2022, 2.

The Supreme Court of Canada's decision in the *Southwind v. Canada 2021* case represents the most recent reference to cultural impacts arising from the expropriation, or take-up, of reserve lands. The case determined that "equitable compensation must reflect the "highest value" of the land taken – including:

- » the land's value to any public project they were used for,
- » the land's value from the Indigenous people's perspective, and
- » costs for impacts on the community.

This court ruling therefore supports the notion that compensation for reserve lands must include a "cultural component linked to the land's significance in the exercise of the culture."<sup>35</sup> *Southwind*, therefore, provides a legal model for compensation for impacts to Indigenous lands, taking into account cultural losses that are attached to the land. While the model does not deal specifically with cultural losses, it may point in a direction for restitution where a project's impacts to Indigenous lands are accompanied by impacts to Indigenous culture. It is also important to note that while this positive decision has the possibility to be applied generally and support negotiations for impacts to cultural rights arising from major projects, the legal precedent created by the decision is specific to reserve lands. Some strengths and weaknesses of a market-based values approach are provided below.

## Strengths

- » Draws on readily available and pre-determined comparative market values.
- » Has been adopted in policy and legislation and is therefore represents a defensible and "tested" approach.

## Limitations

- » Intangible cultural losses are difficult to measure and compare to a market-based equivalent.
- » Doesn't take into consideration associated factors such as spirituality and well-being.

<sup>35</sup> Williams, "The Right to Compensation for Cultural Damage," 2.

# Community-Based Approaches to Financial Compensation for Cultural Rights



As illustrated above, market-based approaches are the predominant method for determining financial compensation for cultural losses in Australia and New Zealand. Similarly, while *Southwind* represents a possible future avenue for the consideration of impacts to cultural rights, Canada has yet to fully implement a mechanism for compensating for cultural losses.

Conversations with our partner First Nations readily identified the importance of First Nations take a, if not the, leading role in determining when, how, and how much compensation should be determined for impacts to their culture. In a community-based values approach, the values, beliefs, and experiences of those impacted by the loss are a central consideration. This approach can therefore be a more holistic, and arguably more accurate, method of costing cultural rights than that offered by a “market-based values” model. A community-based values approach allows a First Nation to apply their own values and forms of measurement when determining what constitutes a substitute of comparable cultural value. For example, an Indigenous Group may determine that adequate compensation for loss of access to a preferred fishing site is the cost amount needed to acquire alternative waterfront land for a new fishing site of equal or higher cultural value. A community-based approach is catered to a specific Indigenous Group’s needs and grounded in a Nation’s existing values, laws, and rights. As a result, each approach taken by a First Nation will be unique and will directly reflect what matters most to the community.

When Indigenous communities can implement their own method for determining the financial value of a cultural right, intangible cultural elements that are commonly excluded from financial compensation approaches may be included. Such approaches do not rely on an ever changing “market value” which does not consider the complexities associated with culture. Therefore, the use of a community-based values approach allows a First Nation to take control of this compensation process and determine a value that accurately encompasses the cultural. Such an approach also allows for the consideration of both cultural impacts as well as related biophysical and non-cultural impacts if desired, though the Nation may choose to assess these separately.

Some strengths and limitations of a community-based values approach are provided below:

## Strengths

- » Draws on community Knowledge and experience to develop a robust understanding of the value of cultural rights.
- » Results in a flexible and personalized approach to evaluating cultural losses that is grounded in the unique context of the Nation.
- » Can allow for the joint consideration of cultural, biophysical, spiritual, social, and other impacts.

## Limitations

- » Has yet to be formalized in Canadian law and practice and may not be accepted by proponents and/or the government.
- » Requires extensive community engagement, time, and resources.
- » Assigning a financial value to cultural rights may be a traumatic and difficult process for community members.



# Principles



As opposed to the other Tools in this Toolkit, this Tool does not include a list of methods and options a Nation can implement to determine a financial value to compensate for impacts to cultural rights. This is purposeful for two reasons. First, a satisfactory method for determining financial compensation for impacts to cultural rights, has yet to be developed. As indicated above, examples of financial compensation for cultural losses based on the take-up of Indigenous lands in Canada, Australia, and New Zealand all rely on a market-based values approach. Second, our partner First Nations expressed a rejection with the idea of developing a method for assigning a financial value to impacts to cultural rights, stating that “you can’t put a price tag on the sacred”.

However, we recognize the reality and prominence of financial compensation as an existing means of compensating for project impacts, often used by proponents and government. As such, we provide below a robust list of principles that may be considered by a First Nation wishing to develop a model for evaluating the financial value of cultural rights adversely impacted by a major project. These principles may also apply when a Nation is seeking to determine and negotiate a financial value for cultural restoration and/or cultural offsetting programs.

- » The assessment of compensation for cultural loss should be conducted by the Indigenous community itself, or on the advice and direction of the Indigenous community.
- » Indigenous communities should be compensated for the time it takes to negotiate compensation.
- » All Knowledge holders, land users, and Elders engaged in negotiation and data gathering related processes should be appropriately compensated.
- » Indigenous communities should be provided with adequate time and resources (including capacity supports) to properly engage in the compensation negotiation process.
- » Compensation negotiations should be culturally sensitive and trauma-informed, considering relevant context and cultural sensitivities.
- » Compensation negotiations should account for the holistic nature of cultural losses.
- » Compensation values should be renegotiable as situations change with time, and subject to inflation calculations where they are paid out over time.
- » The method used to calculate compensation should follow a clear and logical process and should be transparent, repeatable, and meaningful.
- » Both tangible and intangible values should be included in the assessment of compensation. Impacts such as mental distress and psychological strain should be considered alongside effects such as the disruption of traditional practices.
- » While the determination of compensation should include expert information and documentation, the process should prioritize written and oral information sources that acknowledge the direct experiences of the community

## Summary

Financial compensation for cultural losses is an inherently complex process, and one that many Nations may not wish to pursue. While financial compensation may serve as a vehicle to achieve greater control over cultural restitution efforts, it may also serve as a slippery slope that may serve as a “quick fix” used by industry and government for projects that harm cultural rights. Furthermore, a Nation may deem impacts to their cultural rights to be “non-compensable” and therefore defy monetary evaluation. Instead, the Nation may prefer to focus on offsetting and restoration approaches instead of financial compensation.

However, for First Nations who wish to pursue financial compensation for impacts to cultural rights, a community-based values approach may allow for a more thorough, robust, and holistic approach for determining a financial value for cultural losses. By grounding the determination of financial compensation for cultural losses in a Nation’s context, values, rights, and laws, a more accurate economic figure can be developed.

## DISCLAIMER

This Toolkit has been developed from the perspective of the First Nations Major Projects Coalition (FNMPC) and does not represent the perspectives of the federal government, provincial governments, and territories, or industry. Although it represents a general First Nations perspective, it does not represent the specific perspective any First Nation as every First Nation will have its own distinct perspective.

The Toolkit is designed to provide support to First Nations that are engaging with project proponents in discussions about offsetting residual cumulative effects affecting cultural rights and values within their territories. The Toolkit is not to be viewed as prescriptive on how to assess impacts on cultural rights and each First Nation should determine its own method and process for assessing impacts on its cultural rights in accordance with its laws, methodologies, protocols, and processes. A First Nation that chooses to engage with a project proponent or the Crown in discussions regarding impacts on cultural rights may want to obtain legal advice prior to using this Toolkit in those discussions.

The Toolkit has not been agreed to or endorsed by the federal government, provincial or territorial governments, or by industry. Therefore, if a First Nation chooses to use any of the methodologies or processes in the Toolkit to assess impacts of a major project on its cultural rights, the results of the assessment are not legally binding on the other levels of government or project proponent. The First Nation will need to seek agreement with other levels of government and/or a project proponent on how to apply the results of the First Nation's assessment.

The Toolkit is designed to be a collaborative and led by Indigenous Groups. While collaborative implementation, coupled with capacity support, is an option to help foster relationships between proponents/government and Indigenous Nations, this Toolkit should not be unilaterally applied by industry or government. First and foremost, this Toolkit must be understood to be an Indigenous-led process, grounded in a community's principles and leadership.

Cultural rights and values must be viewed as sensitive information. The principles of First Nations ownership, control, access, and possession (OCAP) is included in the Toolkit, but we wish to make clear that this concept is not recognized as law or policy by other levels of government. A First Nation may take the position that OCAP protects their sensitive cultural information from public disclosure, but any information shared with the federal government and provincial or territorial governments may not remain confidential due to federal and provincial privacy laws and procedural fairness in regulatory processes. Therefore, a First Nation must continue to exercise caution when sharing information in such processes.

*Spirit of the Land*



f X in @fnmpc



FIRST NATIONS  
MAJOR PROJECTS  
COALITION