



FIRST NATIONS  
MAJOR PROJECTS  
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

# Spirit of the Land



## Backgrounder

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 Stellat'en First Nation, Nadleh Whut'en First Nation, Saik'uz First Nation, and Cheslatta Carrier Nation ("Carrier First Nations").



This design 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.

This piece of artwork as a Dakelh First Nation artist involves the creation of a captivating Owl image using visual arts. This artwork holds profound significance as it pays homage to my Father Clan, symbolizing wisdom, intuition, and protection. My Mother Clan is Frog, also pictured here as a Water Guardian. Crafted with care, the Owl image is positioned majestically on the shores of our family Keyoh, the traditional hunting grounds passed down from our ancestors.

Nestled overlooking the tranquil lake, this art piece becomes a symbolic guardian, representing the watchful eye of the Owl over our cherished lands. Traditionally the Owl is a symbol of change and a messenger. The Keyoh holds immense cultural importance, serving as a nexus for spiritual connection and a reminder of ancestral ties as well as a food basket.

The artwork centered around the Owl image at our Keyoh by the lake holds significant importance for the Nadleh Whut'en community, also known as "Where the Salmon Return." The Salmon is also featured in this art as another prominent figure and a symbol of economic prosperity because it is the food and life blood of the rivers and oceans. It is a staple of food to the Nadleh people and fills our smokehouses every year. Nadleh Whut'en is a First Nations community nestled within the traditional territories of the Dakelh (Carrier) people in British Columbia, Canada. The Yinka Dene. The community's rich cultural heritage, deeply tied to the land and its resources, makes this artwork a powerful representation of their identity and connection to their ancestral lands.

Furthermore, the Owl image and its placement on the Keyoh will resonate with a broader audience. This engagement has the potential to foster cross-cultural understanding, strengthen inter-community relationships, and create a shared platform for the preservation of indigenous heritage. By integrating the Owl image with the Frog, and Salmon overlooking the Keyoh, the art weaves together historical significance, cultural heritage, and artistic expression, serving as a beacon of unity and a reminder of the enduring spirit of the indigenous peoples in the region.

**Cultural Significance:** The choice of the Owl and Frog image and its representation of the artist's Father and Mother Clan is an acknowledgment of the community's kinship systems and ancestral ties. As well as representing the Balhats system, formerly outlawed, it helps healing the circle and strengthening the bond of the Clans. By selecting a culturally meaningful symbol, the artwork celebrates Indigenous identity and heritage.

# Table of Contents

<b>Introduction</b> .....	6
<b>Part 1: Defining Indigenous Cultural Rights and Frameworks for the Protection of Indigenous Culture</b> .....	8
Indigenous Culture .....	8
Cultural Rights.....	9
Cultural Heritage.....	10
Legal Measures for the Protection of Cultural Rights in Canada.....	11
Cultural Rights and Impact Assessment/Environmental Impact Assessment.....	12
<b>Part 2: Existing Frameworks for Identifying and Documenting Cultural Rights</b> .....	14
Identifying and Inventorying Cultural Rights.....	14
Cultural Landscape Delineation .....	15
Cultural Keystone Places/Species.....	16
Spiritual Significance/ Indigenous Protected and Conserved Areas.....	18
“Reactive” vs. “Proactive” Identification of Cultural Values.....	20
Identifying and Documenting Cultural Rights .....	20
Challenges Facing Common Approaches to identifying Cultural Rights .....	21
<b>Part 3: Existing Frameworks and Methods for Conducting Cultural Rights Impact Assessment</b> .....	22
Defining Cultural Impact Assessment.....	22
Cultural Impact Assessment in Canada.....	23
Cultural Impact Assessment and Cumulative Effects.....	23
Key Principles for Effective CIA.....	24
<b>Part 4: Approaches to Restitution (or Redress) of Residual Impacts to Cultural Rights</b> .....	25
Approaches for Addressing Potential Impacts to Cultural Rights .....	25
Forms of Cultural Impact Restitution .....	27
Cultural Restoration.....	27
Cultural Offsetting.....	27
Financial Compensation .....	29
Legal Approaches to Financial Compensation for Cultural Impacts in Canada.....	30
Non-Legal Approaches to Financial Restitution for Indigenous Cultural Rights.....	31
<b>Conclusion</b> .....	33

## Acronyms and Abbreviations

<b>BCEAA</b>	BC Environmental Assessment Act
<b>CIA</b>	Cultural Impact Assessment
<b>CKP</b>	Cultural Keystone Places
<b>CKS</b>	Cultural Keystone Species
<b>EA</b>	Environmental Assessment
<b>FNMPC</b>	First Nations Major Projects Coalition
<b>IAA</b>	Impact Assessment Act
<b>ICRIT</b>	Indigenous Cultural Rights Impacts Toolkit
<b>MPAS</b>	Major Project Assessment Standard
<b>MVEIRB</b>	Mackenzie Valley Environmental Impact Review Board
<b>MVRMA</b>	Mackenzie Valley Resource Management Act
<b>PAS</b>	Northwest Territories' Protected Areas Strategy
<b>The Agency</b>	The Impact Assessment Agency of Canada
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>UNDRIPA</b>	United Nations Declaration on the Rights of Indigenous Peoples Act
<b>VC</b>	Valued Component
<b>YESAA</b>	Yukon Environmental and Socio-Economic Assessment Act



# Introduction

This backgrounder is intended to provide an overview of key concepts, ideas, challenges, and possibilities for assessing project-specific and cumulative effects on Indigenous cultural rights and values (“cultural rights”). The backgrounder also presents options for negotiating restitution measures, which can be sought alongside mitigation measures or in place of them in cases where residual effects<sup>1</sup> are unavoidable.

This document is designed to be read alongside the Indigenous Cultural Rights and Interests Toolkit<sup>2</sup> which has been co-developed by the First Nations Major Projects Coalition (FNMPC) and its First Nation partners, the Anishinabek Nation, and Stellat’en First Nation, Nadleh Whut’en First Nation, Saik’uz First Nation, and Cheslatta Carrier Nation (“Carrier First Nations”). The Toolkit is designed to provide a series of integrated policy and technical guidance (“Tools”) for characterizing, evaluating, and where desired, determining restitution 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.

**The five Tools provided within the Toolkit can be grouped into two stages or steps:**

1. Tools for Cultural Rights Impact Assessment (Tools 1-3)
2. Tools for Determining how to Accommodate Potential Residual Impacts and Cumulative Effects through Restitution (Tools 4-5)

**There are three key steps for conducting a Cultural Rights Impact Assessment:**

- a. Undertaking an inventory of cultural rights;
- b. Assessing the historical context of past impacts; and
- c. Assessing project-specific impacts and determining which impacts are likely to result in residual effects, taking into consideration past, present, and reasonably foreseeable future development within the region where the Project is proposed.

Subsequently, there are two steps for addressing potential residual project effects and cumulative effects on Indigenous cultural rights:

- a. Determining which residual impacts should be avoided, offset and/or undergo a process of restitution;<sup>3</sup> and

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<sup>1</sup> Residual effects are those effects likely to occur even after mitigation measures committed to by the proponent or required as a condition of approval are applied to reduce or otherwise manage the effect.

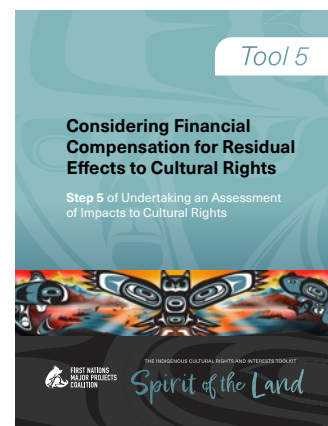
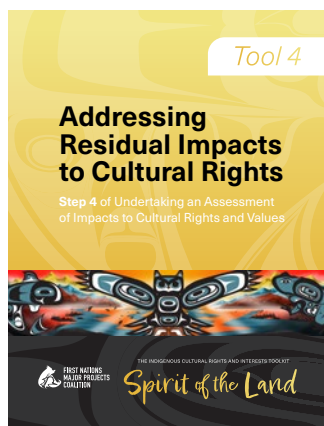
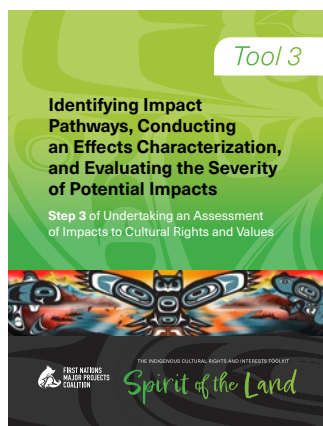
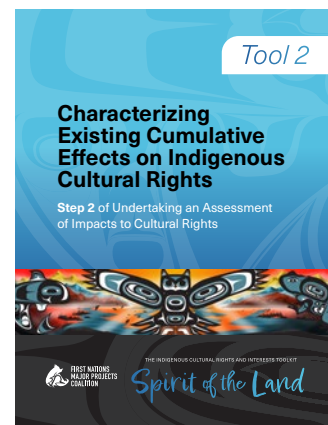
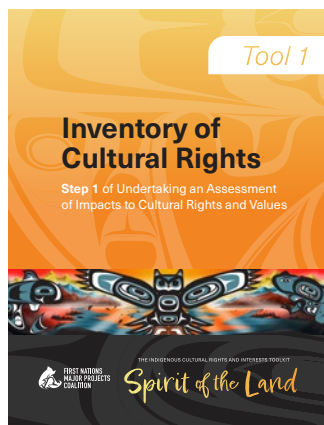
<sup>2</sup> Accessible through the FNMPCs website under the ‘Environmental Resources’ page, <https://fnmpc.ca/tools-and-resources/environmental-tools/>.

<sup>3</sup> In general, the following represents a declining order of preference: i. Avoidance; ii. Mitigation/impact reduction; and iii. Restitution (including offsetting, restoration, and other forms of compensation/accommodation)

- b. Determination of options for restitution mechanism(s) for potential project impacts that cannot be avoided.<sup>4</sup> Note that restitution measures can be negotiated even with mitigation measures in place.

This backgrounder represents a summary of literature pertaining to cultural rights, cultural impact assessment, and ways in which restitution measures can be applied to residual cultural impacts. While not exhaustive, the information contained within this backgrounder forms the foundational body of knowledge on which the Toolkit has been developed.

This backgrounder represents a summary of literature pertaining to cultural rights, cultural impact assessment, and ways in which restitution measures can be applied to residual cultural impacts. While not exhaustive, the information contained within this backgrounder forms the foundational body of knowledge on which the Toolkit has been developed. To support the contextualization of the Toolkit, the backgrounder provides a brief overview of key terms and concepts associated with cultural rights effects assessment and the compensation for project-specific and cumulative effects on Indigenous culture. In addition, this document highlights gaps and deficiencies in existing policies, laws, and approaches to compensating for cultural losses. In doing so, it identifies opportunities for the development of Indigenous-led tools and protocols, such as those included in the ICRIIT.



<sup>4</sup> For the sake of this toolkit, we've identified three primary forms of restitution for impacts to cultural rights: cultural restoration, cultural offsetting, and financial compensation.

# Part 1: Defining Indigenous Cultural Rights and Frameworks for the Protection of Indigenous Culture



## Indigenous Culture

There are as many possible definitions for culture as there are cultures themselves. Drawing on general attributes, Indigenous cultures are commonly defined as being land-based and wholistic in nature. Gibson (2017) describes Indigenous culture as,

...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>5</sup>

This definition includes both the tangible and intangible elements of culture. Culture is more than *physical*<sup>6</sup> manifestations such as art, buildings, heritage sites, and documents. Culture must also be understood as including elements such as *non-physical* relationships, stories, knowledge, and ways of life<sup>7</sup>. Furthermore, Indigenous culture is not static, but temporally fluid, evolving, passed down, and adapting over time.

<sup>5</sup> Ginger Gibson, "Culture and Rights Impact Assessment: A Survey of the Field" (Vancouver, B.C.: The Firelight Group, May 2017), 8, emphasis added.

<sup>6</sup> The terms "physical" culture and "tangible" culture are used interchangeably. 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, such as beliefs, traditions, identity, sense of place, etc. It is important to remember that for the culture holders themselves, such boundaries may not be recognized.

<sup>7</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO) describes intangible cultural heritage as the "practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. (United Nations Educational, Scientific and Cultural Organization, "The Convention for Safeguarding of the Intangible Cultural Heritage," (17 October 2003))



## Cultural Rights

Cultural rights have frequently been addressed through international legislation, with the most prominent example being the release of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or “the Declaration”). The Declaration calls for States to “recognize and respect indigenous distinct culture, history, language and way of life” and to “ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and practise their languages”<sup>8</sup>. In doing so, the Declaration seeks to protect the distinct identity and cultural integrity of Indigenous peoples through a variety of principles.<sup>9</sup> The Declaration sets out several critical elements of Indigenous cultural rights and values including the right to “practice and revitalize [their] cultural traditions and customs”<sup>10</sup>, and guaranteeing a right to a “traditional way of life,” complete with distinct “cultural identity, social structure, economic system, customs, beliefs and traditions”<sup>11</sup>.

The Impact Assessment Agency of Canada articulates the importance of culture to understanding Indigenous rights as follows: [The] **cultural dimension of a right of Indigenous peoples** cannot be treated as an add-on; rather, **it is foundational to assessing potential impacts to that right**. Many Indigenous rights are based on, tied to and inextricable from a unique relationship to the landscape that cannot be replicated elsewhere.<sup>12</sup>

Over the past 70 years, several categories of cultural rights have been created and defined. These categories include, but are not limited to:

- » Cultural Heritage (*described in more detail on next page*)
- » Language
- » Artistic Production
- » Indigenous Knowledge
- » Education
- » Traditions and Practices
- » Spirituality and Beliefs
- » Identity
- » Sacred Spaces/Locations



<sup>8</sup> United Nations, “The United Nations Declaration on the Rights of Indigenous Peoples” (New York, N.Y: United Nations, 2007), 14.

<sup>9</sup> Such principles include “the right to maintain and strengthen their distinct cultural institutions”; “the right to belong to an Indigenous community or nation in accordance with the customs of the community or nation concerned”; “the right to practice, revitalize and transmit their cultural traditions and customs”; “the right to control their education systems and institution providing education in their own languages; the right to promote, develop, and maintain their institutional structures, customs, spirituality, traditions, and judicial systems”; “the right to maintain, control, and develop their cultural heritage and traditional knowledge; and the right not to be subjected to forced assimilation or destruction of their culture.” United Nations, “Rights of Indigenous Peoples”, 13.

<sup>10</sup> United Nations, “Rights of Indigenous Peoples” 14, emphasis added.

<sup>11</sup> United Nations, “Rights of Indigenous Peoples”, 11, emphasis added.

<sup>12</sup> Impact Assessment Agency of Canada, “Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples,” April 2022, 24, emphasis added.

## Cultural Heritage

Cultural heritage represents one of the most prevalent and commonly understood categories of cultural rights, both within Canada and abroad. Early definitions of cultural heritage emphasized materialistic aspects of heritage, primarily focused on archaeological sites (including burial grounds) and artistic products. This approach has been heavily criticized by Indigenous groups as excluding intangible elements of culture and presenting culture as historic and frozen<sup>13</sup> in time rather than contemporary, vibrant, and evolving. Despite this critique, this narrow definition has frequently been embraced in federal and provincial Canadian legislation and policy<sup>14</sup> as a way to protect tangible cultural expressions such as “the arts”, “national battlefields”, “state ceremonial and Canadian symbols”, “cultural property”, and “national museums, archives and libraries”<sup>15</sup>. Unfortunately, this undoubtedly important layer of protection for physical manifestations of culture has led to the exclusion of less tangible elements of Indigenous culture from state-required protection and even assessment in some cases. To meet today’s standards of the Declaration, a more expansive definition of Cultural Heritage is required to incorporate intangible cultural elements that constitute central dimensions of Indigenous cultural heritage.



<sup>13</sup> Federico Lenzerini, “Intangible Cultural Heritage: The Living Culture of Peoples,” *European Journal of International Law* 22, no. 1 (February 1, 2011): 101–20, <https://doi.org/10.1093/ejil/chr006>.

<sup>14</sup> See for example, *The Ontario Heritage Act 1990, the Funeral, Burial and Cremation Services Act 2002 and the Department of Canadian Heritage Act 1995*.

<sup>15</sup> Government of Canada, “Department of Canadian Heritage Act,” c.11 § (1995), <https://laws-lois.justice.gc.ca/eng/acts/C-17.3/page-1.html#h-69704>.

# Legal Measures for the Protection of Cultural Rights in Canada

Indigenous cultural rights mitigation is approached differently by federal, territorial, and provincial legislations in Canada, which can lead to complexities and additional workload for the Nations trying to understand their cultural rights from a legal perspective. Examples of guidance for the assessment of cultural impacts provided by various governmental bodies below illustrate the uneven nature of provisions requiring the consideration of impacts to culture in Environmental Assessment (EA)<sup>16</sup>. However, Indigenous cultural rights have recently found some degree of uniform expression and protection in Canadian courts through the lens of Section 35 rights<sup>17</sup>, including the right to a way of life. This right to a way of life was first linked to section 35 rights in *Delgamuukw v. British Columbia* 1997 and later referenced in the “*Van der Peet*” cases (culminating in *R. v. Van der Peet* 1996). In 2021, *Yahey v. British Columbia* illustrated a direct connection between Indigenous culture and continuous practice, determining that the written language in Treaty 8 – and by extension potentially similar language included in other numbered treaties between the Crown and Indigenous peoples – should be interpreted as the Crown’s promise to protect the right to continue a “way of life”.

The recent royal assent (2021) of the federal United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIPA) represents a unique opportunity for the formalization of the protection of cultural rights into Canadian law. To help achieve the objectives of the Declaration, UNDRIPA requires an Action Plan which “outlines a whole of government roadmap for advancing reconciliation with indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, cooperation, and partnership as the foundation for transformative change”<sup>18</sup>. This Action Plan represents a starting point for consultation and cooperation with Indigenous peoples on the implementation of the Declaration. The federal government has committed to further engagement with Indigenous Groups to facilitate the implementation of the Action Plan and participate in monitoring and oversight processes. Indigenous-designed tools, such as the ICRIT may help further the objectives of the Action Plan and align the federal impact assessment process towards the meaningful protection of Indigenous cultural rights.



<sup>16</sup> Throughout this background, the term Environmental Assessment (EA) will be used to describe the provincial, territorial, and federal processes for assessing potential impacts of a proposed major project.

<sup>17</sup> For example, *R v. Sparrow* (1990) affirmed the Crown’s legal duty to consult and accommodate potential impacts on the cultural dimensions of Aboriginal and Treaty Rights.

<sup>18</sup> Department of Justice Canada, “United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan,” 2023, 20, <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf>.

# Cultural Rights and Impact Assessment/Environmental Impact Assessment

Environmental impact assessment requirements pertaining to Indigenous culture exist at the levels of federal, provincial, territorial, and Indigenous governments. For example, the federal Impact Assessment Act (2019 - IAA or “the Act”) requires the inclusion of “considerations related to Indigenous cultures raised with respect to the designated project”<sup>19</sup>. The IAA currently provides no guidance on how to include considerations of Indigenous cultures, illustrating the need to develop complementary tools for the identification and protection of Indigenous cultural rights such as the ICRIT.

IAA 2019 includes requirements for assessing potential effects on “physical and cultural heritage” and “current use of lands and resources for traditional purposes” for Indigenous peoples. The Impact Assessment Agency of Canada’s (“the Agency”) guidance for assessing effects of major projects on Indigenous cultural heritage explicitly includes the requirement to consider *intangible culture* and includes the category of Indigenous cultural landscapes. Similarly, other IAA 2019 requirements that promote greater cultural considerations include that impact assessments<sup>20</sup>:

- » Must provide official “jurisdiction” status to an Indigenous governing body or co-management body established under a land claim agreement;
- » Can allow for formal collaboration agreements and other sharing of responsibilities between the Agency and any Indigenous governing body;
- » Must assess the impact of a project on any Indigenous community and any adverse impact on Indigenous rights;
- » Must include Indigenous Knowledge related to the project, its effects, or in support of Indigenous concerns or rights assessments;
- » Must include considerations related to Indigenous cultures with respect to the project under review;
- » Must include any assessment of effects of the project provided by an Indigenous governing body;
- » Must include any regional study or plan conducted or prepared by an Indigenous governing body, as it relates to the project; and
- » Must account for impacts to Indigenous peoples’ social, health and economic conditions, even where these impacts are not caused by a physical change to the environment.

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<sup>19</sup> Government of Canada, “Impact Assessment Act,” c. 28 s.1 § (2019), sec. 22(l), <https://laws.justice.gc.ca/PDF/I-2.75.pdf>.

<sup>20</sup> List compiled from Mikisew Cree First Nation, “Methodology for Assessing Potential Impacts to the exercise of Aboriginal and Treaty Rights of the Proposed Frontier Oil Sands Mine Project,” submitted to the Canadian Environmental Assessment Agency, 2018, <https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3746480>.



Provincially and territorially, the BC Environmental Assessment Act (BCEAA; 2018), Yukon Environmental and Socio-Economic Assessment Act (YESAA; 2003), and the Northwest Territory's Mackenzie Valley Resource Management Act (MVRMA; 1998) all contain provisions which require the assessment of potential project effects on Indigenous culture. While guidance remains limited on *how* to include Indigenous Knowledge and evaluate cultural factors in the assessment process, the requirement for considering and including Indigenous culture and Indigenous Knowledge in major project Impact Assessment represents a possible avenue for the assertion of Indigenous cultural rights.



## Part 2: Existing Frameworks for Identifying and Documenting Cultural Rights



### Identifying and Inventorying Cultural Rights

The identification and inventorying of cultural rights is the first crucial step to be undertaken when identifying how cultural rights may be impacted by a proposed project. The FNMPC, as an Indigenous organization, recognizes, appreciates, and shares the discomfort that Indigenous culture holders may have with the idea that the richness of culture and cultural rights of Indigenous individuals and groups can somehow be “inventoried”. For some Indigenous people, this may be reminiscent of colonial practices that sought to example, critique, and erode Indigenous cultures and assimilate Indigenous peoples. The frameworks discussed herein, and the Toolkit as a whole, are meant to be used under the direct control of Indigenous peoples themselves, as part of retrenching Indigenous governance and stewardship lost to these past damaging practices. The purpose of gathering this information is to make sure that the First Nation has adequate data available to support the protection of its cultural rights. This must be coupled with Indigenous control and provisions for confidentiality of information, which should be a priority focus of dialogue with the proponent and agents of the Crown.

There are a variety of approaches that a Nation can take to identify existing cultural rights. These approaches include the assessment of anthropological evidence (including written, physical, and oral depictions), conducting culture and rights studies, drawing from oral and written Indigenous laws and norms, among others. In the review of available literature, three methods to aid in the identification of cultural rights were readily identified. These methods, commonly employed by EA practitioners and technical experts, are grounded in biophysical elements and geographically situated sites. As such the delineation of cultural landscapes, the identification of cultural keystone places/species, and the articulation of spiritual significance represent three commonly implemented, though limited, approaches to help in the identification of cultural rights.



# Cultural Landscape Delineation

The concept of cultural landscapes emerged in 1992 under the World Heritage Convention, as “places of outstanding universal value”<sup>21</sup>. Drawing on this definition, Parks Canada defined cultural landscapes as “any geographical area that has been modified, influenced, or given special cultural meaning by people”<sup>22</sup>. Cultural landscapes are visual and physical aspects of distinct landscapes that encompass stories, values, or relationships<sup>23</sup>. Numerous cultural landscapes<sup>24</sup> are now designated and documented through the Canadian Register of Historic Places, embodying the intersection of a tangible geographic location (landscape) and the impressions, beliefs, and rituals (culture) associated with the place<sup>25</sup>. Organizations such as The Forest Stewardship Council of Canada have advanced the concept of cultural landscape to define *Indigenous Cultural Landscapes* as “living landscapes to which Indigenous Peoples attribute environmental, social, cultural, and economic value through long-term interactions based on land-care knowledge, and adaptive livelihood practices.”<sup>26</sup>

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>27</sup>. To determine the boundaries of a distinct cultural landscape, the PAS requires a series 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 one 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>28</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.

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<sup>21</sup> United Nations Educational, Scientific and Cultural Organization, “Operational Guidelines for the Implementation of the World Heritage Convention,” September 2023, 11, <https://whc.unesco.org/document/203803>; see also Thomas D. Andrews and Susan Buggie, “Canadian Aboriginal Cultural Landscapes in Praxis,” in *Managing Cultural Landscapes*, by Ken Taylor and Jane Lennon (Oxfordshire, England: Routledge, 2012), 253.

<sup>22</sup> Parks Canada, “Parks Canada Guiding Principles and Operational Policies,” (Ottawa, ON: Supply and Services Canada, 1994), 119, [http://www.pc.gc.ca/docs/pc/poli/principindex\\_e.asp](http://www.pc.gc.ca/docs/pc/poli/principindex_e.asp).

<sup>23</sup> Gibson, “Survey of the Field”.

<sup>24</sup> Alain Cuerrier et al., (2015) identifies ten core criteria for the identification of a cultural landscape: (1) agreement within a cultural group about the importance of a place; (2) “occurrence in language and discourse”; (3) “intensity and frequency of use”; (4) “diversity of use”; (5) “antiquity of use”; (6) “extent of traditional resource management undertaken”; (7) “uniqueness”; (8) “ecological diversity”; (9) “role and trade in cultural exchange;” and (10) “the role in cultural protocols” (Alain Cuerrier et al., in “Cultural Keystone Places: Conservation and Restoration in Cultural Landscapes” *Journal of Ethnobiology*, 35, no. 3 (2015): 432).

<sup>25</sup> Parks Canada, “Canada’s Cultural Landscapes,” *Canada’s Historic Places: A Federal, Provincial and Territorial Collaboration*, accessed June 27, 2022, [https://www.historicplaces.ca/en/pages/9\\_cultural\\_landscapes-paysages\\_culturels.aspx](https://www.historicplaces.ca/en/pages/9_cultural_landscapes-paysages_culturels.aspx).

<sup>26</sup> Forest Stewardship Council Canada, “FSC National Forest Stewardship Standard of Canada,” 2018, 7, <https://ca.fsc.org/ca-en/forest-management>.

<sup>27</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).

<sup>28</sup> “K’ih Tsaa?Dze Tribal Park,” Doig River First Nation, accessed June 29, 2022, <https://doigriverfn.com/our-lands/kiht-saadze-tribal-park/>.

## Cultural Keystone Places/Species

Emerging from the ecological sciences and building on the concept of cultural landscapes, the idea of Cultural Keystone Places (CKPs) and Cultural Keystone Species (CKSs) represent a unique approach to quantifying and classifying culturally important environments. These CKPs are used to “signify particular places of high cultural importance – places that are also generally high in regional biological diversity”<sup>29</sup>. As such, CKPs can be used to “portra[y] places of strong cultural attachment that need particular consideration in any proposed development activities”<sup>30</sup>, and thereby provide “a metaphorical designation or places of exceptional and cultural value so that the depth of their roles in a people’s cultural fabric can be more widely appreciated”<sup>31</sup>. Cultural keystone places may therefore include tangible or intangible cultural components<sup>32</sup>.

There are a variety of ways in which a cultural keystone place can be identified. Drawing on the ten general indicators for assessing the overall importance of a place presented by Cuerrier et al., the following questions can be used to help guide the identification of a cultural keystone place:<sup>33</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?

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<sup>29</sup> Cuerrier et al., “Cultural Keystone Places”, 430.

<sup>30</sup> Cuerrier et al., “Cultural Keystone Places”, 428.

<sup>31</sup> Cuerrier et al., “Cultural Keystone Places”, 440.

<sup>32</sup> Mikisew Cree First Nation, “Methodology for Assessing Potential Impacts,” 15.

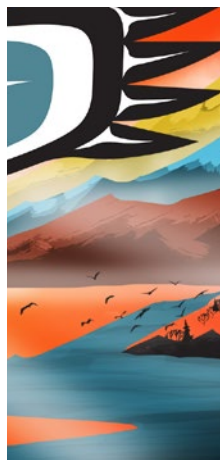
<sup>33</sup> Based on the ten general indicators for assessing the overall importance of a place as provided by Cuerrier et al., “Cultural Keystone Places”, 432.



Similarly, Gabraldi and Turner identify six elements that should be considered when identifying a cultural keystone species<sup>34</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>34</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>.

## Spiritual Significance/ Indigenous Protected and Conserved Areas

This approach emphasizes that an inventory of cultural rights and values must extend beyond the common identification of tangible cultural heritage sites to include intangible aspects of the contemporary world, including sacred sites and places include storied places, places associated with supernatural events or beings, sites related to relaying knowledge and guidance, named places, hereditary territories, burials, and other teaching places. The consideration of sites of spiritual significance has been included in IAA 2019 which requires the assessment of “Sacred Sites of particular importance” alongside physical heritage areas, harvesting areas, and cultural landscapes.<sup>35</sup> While the IAA provides no guidance as to how these sites should be assessed or considered, some First Nations have successfully argued for the protection of areas within their territories due to spiritual significance.

In response to the proposed Jumbo Glacier Mountain Resort by Glacier Resorts Ltd. In 1991, the Ktunaxa Nation engaged in a rigorous EA and judicial process in order to designate the project site, Qat’muk, as an Indigenous Protected and Conserved Area (IPCA) based on the spiritual importance of the location to Ktunaxa culture.<sup>36</sup> The designation of Qat’muk as an IPCA stemmed from the Qat’muk Declaration (2010) which affirmed, emphasized, and insisted that Qat’muk is “a place to celebrate, protect and honour Grizzly Bear Spirit”<sup>37</sup> and thereby establishes a buffer area to ensure that “the Grizzly Bear Spirit, as well as grizzly bears, can thrive within and around Qat’muk.”<sup>38</sup> This Declaration was coupled with extensive judicial engagement and repeated appeals to the BC Supreme Court and Supreme Court of Canada in order to explain the significance and importance of Qat’muk to the Ktunaxa people. This involved the sharing of confidential and private information with the Minister over the course of seven months.

In general, IPCAs are understood as areas where Indigenous governments are the primarily responsible party for protecting and conserving ecosystems, often done through the lens of Indigenous laws and governance.<sup>39</sup> While IPCAs will vary in geographic extent, scope, importance, identification, and management, they tend to share the following core elements<sup>40</sup>:

1. IPCAs are Indigenous-led;
2. IPCAs represent a long-term commitment to conservation; and
3. IPCAs elevate Indigenous rights and responsibilities.

Furthermore, while diverse in interpretation, the following characteristics can be used to help identify IPCAs:<sup>41</sup>

- » IPCAs should promote respect for Indigenous Knowledge systems;
- » IPCAs should respect protocols and ceremony;

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<sup>35</sup> Impact Assessment Agency of Canada, “Assessment of Potential Impacts”.

<sup>36</sup> Ktunaxa Nation, “Qat’muk,” Ktunaxa Nation, accessed February 13, 2024, <https://www.ktunaxa.org/qatmuk/>.

<sup>37</sup> Ktunaxa Nation, “Qat’muk Declaration,” November 15, 2010, 1, <https://www.ktunaxa.org/who-we-are/qatmuk-declaration/>.

<sup>38</sup> Ktunaxa Nation, “Qat’muk Declaration,” 1.

<sup>39</sup> The Indigenous Circle of Experts, “We Rise Together: Achieving Pathway to Canada Target 1 through the Creation of Indigenous Protected and Conserved Areas in the Spirit and Practice of Reconciliation,” March 2018, 35.

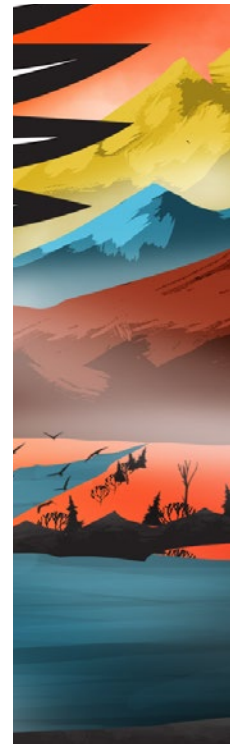
<sup>40</sup> The Indigenous Circle of Experts, 36.

<sup>41</sup> The Indigenous Circle of Experts, 38–41.



- » IPCAs should support the revitalization of Indigenous languages;
- » IPACs can seed conservation economies;
- » IPCAs should conserve cultural keystone species and protect food security; and
- » IPCAs should adopt integrated, holistic approaches to governance and planning.

At present, guidance for designating areas as an IPCA is minimal, but can include pathways such as self-declaration (for example, Tribal Parks), legislated agreements, or through the development of new IPCA legislation.<sup>42</sup>



<sup>42</sup> The Indigenous Circle of Experts, 44.

## “Reactive” vs. “Proactive” Identification of Cultural Values

The identification and documentation of cultural values can be either “reactive” or “proactive”. “Reactive” actions occur when First Nations are forced to identify and assert their cultural rights and values within the context of an ongoing impact assessment process. This is often conducted within the dominant framework of a major project impact assessment which prioritizes physical/tangible cultural heritage.

In comparison, “proactive” steps to identify and inventory cultural rights and values allow First Nations to pre-determine what is important and must be included in an impact assessment. There is a strong need to develop processes for “proactive” identification and inventory of cultural rights and values, establishing protective mechanisms in *advance* of future proposed projects. The *mapping of cultural landscapes* and *identifying candidate protected areas through land use planning* represent two examples of ways to proactively assert cultural rights and practices.

## Identifying and Documenting Cultural Rights

While federal environmental legislation and policy in Canada is limited in terms of the identification and protection of cultural rights, some provincial/territorial governmental bodies (such as the Mackenzie Valley Environmental Impact Review Board; MVEIRB) have implemented standards and procedures that can lead to more robust assessments of cultural factors.

The MVEIRB, based in the Northwest Territories requires the consideration of impacts of a proposed development on the biophysical, socio-economic, and cultural environment. Included in this mandate is the requirement to fully consider any “traditional knowledge brought forward”<sup>43</sup> and to identify any locations that could be identified as one of four culturally-sensitive classifications: “physical heritage areas, harvesting areas, sacred sites, and cultural landscapes”<sup>44</sup>.

The Yukon Environmental and Socio-Economic Assessment Board (YESAB), drawing on the YESAA, has taken a similar approach to the MVEIRB. In its policy, YESAB refers to an expanded definition of “heritage resources” that includes intangible elements such as “place names, heritage routes and stories”<sup>45</sup>. In certain decisions, YESAB has also referenced a “sense of place”<sup>46</sup> which has been defined as “a person’s relationship to a landscape that is built on knowledge, history, emotion and identity”<sup>47</sup>. While this inclusion has been applied only occasionally to date, it represents a notable step forward for the identification of cultural rights.

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<sup>43</sup> Mackenzie Valley Environmental Impact Review Board (MVEIRB), “Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment,” July 2005, 4.

<sup>44</sup> Alan Ehrlich, “Dealing with Culturally Sensitive Areas in Industrial Project Design,” *The International Indigenous Policy Journal* 3, no. 2 (August 9, 2012): 6, <https://doi.org/10.18584/iipj.2012.3.2.3>.

<sup>45</sup> Yukon Environmental and Socio-economic Assessment Board (YESAB), “Designated Office Evaluation Report: Placer Mine - Eldorado Creek - Chief Gulch” (Dawson City, YT: YESAB, 2022), 23.

<sup>46</sup> See the White River Assessment (YESAB, “Designated Office Evaluation Report: White River – Quartz Exploration Project,” (Dawson City, YT: YESAB, 2012).

<sup>47</sup> Gibson, “A Survey of the Field,” 17; see also YESAB, “White River- Quartz Exploration Project”.



# Challenges Facing Common Approaches to identifying Cultural Rights

Existing federal environmental legislation and policy in Canada predominantly focuses on tangible culture such as archaeology and burial sites. While some provincial/territorial governmental bodies and non-governmental organizations have implemented or begun implementing standards and procedures which lead to a more robust assessment of cultural factors, the assessment of cultural impacts remains largely centred on physical heritage resources such as archaeological and paleontological materials. Tangible factors such as archaeology and physical signs of prior occupation are important. However, intangible elements such as social relationships, land-based relationships and knowledge, and spirit relationships and practices are also foundational aspects of culture, and critically they are the foundations of any current cultural practice. It is therefore important to consider all forms of cultural expression, including both tangible and intangible cultural rights when engaging in cultural impact assessment.<sup>48</sup>

Within impact assessment processes, Indigenous culture is often perceived as “historic,” “traditional,” or “frozen in time”<sup>49</sup>. For example, Indigenous cultural practices such as hunting, may be dismissed as being a “non-traditional” practice if “modern technology” such as guns are used. However, court cases such as *R v Sparrow* (1990), *R v Marshall* (1999), and *R v Van der Peet* (1996) have determined that “distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal society as these societies exist in the aboriginal world”<sup>50</sup>.

Beyond the continuous focus on tangible and historical culture, cultural rights themselves are inherently complex. For example, the size of a project is not necessarily directly correlated to its potential cultural impact;<sup>51</sup> the importance of the place and its attributes to the culture group must be heavily weighted in this determination as well. In addition, borders form a key challenge to the identification of culturally sensitive areas, as “contemporary geographic boundaries do not necessarily match culturally sensitive areas”<sup>52</sup>. Such challenges can act as barriers towards the recognition and implementation of cultural rights in policy and industry.



<sup>48</sup> See Thomas D. Andrews and Susan Buggiey, “Authenticity in Aboriginal Cultural Landscapes,” *Journal of Preservation Technology* 39, no. 2–3 (2008): 63–71.

<sup>49</sup> See Andrews and Buggiey, “Authenticity”.

<sup>50</sup> *R. v. Van der Peet*, No. 2 SCR 507 (Supreme Court of Canada August 21, 1996).

<sup>51</sup> Gibson, “A Survey of the Field.”

<sup>52</sup> Ehrlich, “Industrial Project Design,” 7.

## Part 3: Existing Frameworks and Methods for Conducting Cultural Rights Impact Assessment



### Defining Cultural Impact Assessment

Cultural Impact Assessment (CIA) can be defined as:

A process of identifying, predicting, evaluating, and communicating the probable effects of a current or proposed development policy or action on the cultural life, institutions and resources of communities, then integrating the findings and conclusions into the planning and decision-making process, with a view to mitigating adverse impacts and enhancing positive outcomes.<sup>53</sup>

This definition focuses on potential effects on “cultural life” and therefore requires the assessment of both tangible and intangible cultural values. By integrating these findings into planning processes, CIA works to mitigate adverse impacts and ensures the project works towards a maximum benefit. Cultural impact assessments are, therefore, an important aspect of reconciliation through understanding and improving efforts to protect and preserve Indigenous culture.<sup>54</sup>

<sup>53</sup> Gibson, “A Survey of the Field.”

<sup>54</sup> Mikisew Cree First Nation, “Methodology for Assessing Potential Impacts,” 2.

# Cultural Impact Assessment in Canada

In Canada, cultural impact assessment is predominantly included under broader environmental or socio-economic assessments as opposed to operating as a distinct process. For example, there is no federally regulated or mandated CIA process in Canada separate from federal impact assessment (IA). Instead, the federal IA process legislated under the 2019 Impact Assessment Act (IAA) requires the consideration of “potential environmental, health, social and economic impacts of proposed projects, including benefits”<sup>55</sup>. The only concrete reference to culture in the IAA is under the list of “factors”, under Subsection 22(l) that requires “considerations related to Indigenous cultures” to be part of each federal impact assessment. Similarly, while some provincial and territorial jurisdictions, such as British Columbia and the Northwest Territories, have taken steps to further legislate and develop formal CIA requirements within their overall environmental impact assessment processes, there are no concrete provincial or territorial CIA requirements set out in policy or guidance at this time.

## Cultural Impact Assessment and Cumulative Effects

Section 22(1)(ii) of IAA 2019 requires the assessment of any cumulative effects arising as a result of interactions between the proposed project and past, present, and future developments in the area. Therefore, a cumulative effects assessment is triggered within a cultural rights impact assessment when a project-specific assessment determines that the project is likely to cause residual adverse impacts to a cultural right. This assessment will then consider cultural values such as cultural transmission, landscapes, identity, etc., in tandem with characteristics of past, present, and future projects.



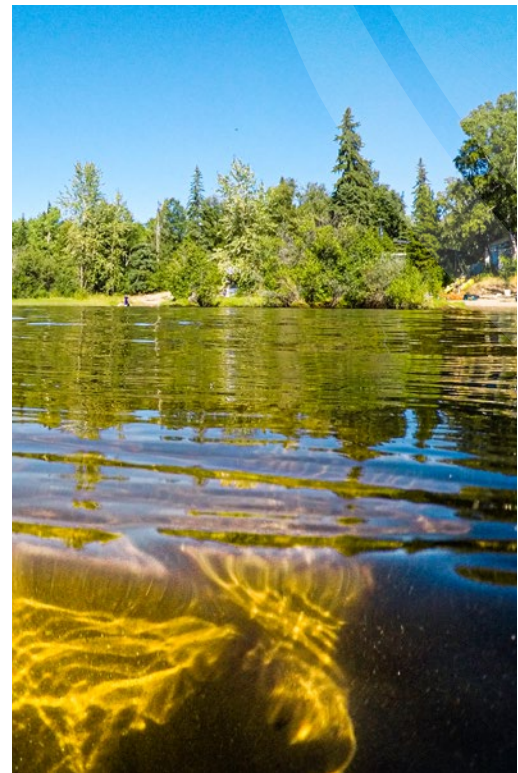
<sup>55</sup> Impact Assessment Agency of Canada, “Impact Assessment Process Overview,” November 8, 2021, <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview.html>.



## Key Principles for Effective CIA

While no environmental impact assessment agency in Canada has adopted formal cultural impact assessment guidelines, some Indigenous organizations and Nations have developed their own best practices. For example, in 2019, the First Nations Major Projects Coalition developed and issued its *Major Project Assessment Standard (MPAS)* for use by Indigenous peoples as a suite of options or standards that any Proponent or government proposing a new project must apply in an environmental impact assessment.

The MPAS includes a series of principles for cultural impact assessment, designed to “raise the bar for meaningful inclusion of Canadian First Nations in major project assessment”<sup>56</sup>. These guidelines illustrate a series of elements vital to the conduct of cultural impact assessment. Firstly, Indigenous communities must be engaged early in the major project proposal review process. This will allow the communities to lead independent studies, supplying information on the important cultural values in the area, and highlighting potential impacts to cultural rights. Such detailed and necessary engagement will require adequate funding and resources. In allowing communities to provide their own definitions of what is and is not important, CIAs will be able to accurately identify cultural values and rights most at risk and plan avoidance, mitigation, and compensation mechanisms appropriately (more information, please see the FNMPCC’s Major Projects Assessment Standard CIA principles).<sup>57</sup>



<sup>56</sup> First Nations Major Project Coalition, “Major Project Assessment Standard: Member-Developed Principles, Criteria, and Expectations to Guide Major Project Environmental Assessments,” April 2019, 7.

<sup>57</sup> Accessible through the FNMPCC’s website under the ‘Environmental Resources’ page, <https://fnmpc.ca/tools-and-resources/environmental-tools/>.



## Part 4: Approaches to Restitution (or Redress) of Residual Impacts to Cultural Rights



### Approaches for Addressing Potential Impacts to Cultural Rights

During a cultural impact assessment, various levels of mitigation measures are applied to address the residual impacts of a project on Indigenous culture. In general, the mitigation structure includes three types of measures, in order of declining preference:

1. **Avoidance;**
2. **Minimization/reduction;** and
3. **Restitution** (including offsetting, restoration, and forms of compensation).

Avoidance is always the preferred option. Where avoidance is not possible, impact minimization/reduction measures are applied. Restitution, generally the *option of lowest preference*, is required where avoidance and minimization are not possible. Restitution may also be needed even when mitigation/minimization measures are in place if adverse effects on cultural rights are likely to remain after mitigation. Compensation for project impacts to rights and title may be sought even if no appreciable adverse effects on cultural rights are present.

It is important to note that cultural effects **monitoring** may be an important mechanism to confirm the existence, magnitude and causes of cultural effects but is not considered a mitigation measure in and of itself. Impacted First Nations need to be involved in the development, implementation, analysis of, and acting on the results of, cultural effects monitoring programs.

Examples of mitigation measures that can be applied to help protect and promote Indigenous cultural rights include:<sup>58</sup>

- » Avoidance of areas of heightened cultural significance by altering the location of physical works and activities.
- » Alterations to the size, nature, time frame, timing (e.g., seasonal activity avoidance), and other aspects of the Project to respect cultural norms or impacts on rights-based activities.
- » Physical heritage resource protection (this is one area where existing archaeological regulations provide strong protections to this element of culture).
- » Opportunities to conduct ceremonies at and around proposed Projects, before and during Project activities.
- » Opportunities for pre-Project resource harvesting in areas that are to be subject to damage during construction and operations.
- » Provision of funds for development and implementation of cultural protection and promotion programs at the Indigenous community level (e.g., culture camps, language programs, etc.).
- » Imposition of cross-cultural awareness training programs for Project employees, management, and contractors.
- » Assistance to harvesters to monitor changes in animal movements and harvesting success and, if necessary, to compensate for lost subsistence opportunities.
- » Development of co-governance and co-approval measures at a Nation-to-Nation or Nation-to-Proponent level (protective of governance and stewardship rights).

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<sup>58</sup> List compiled from Mikisew Cree First Nation, "Methodology for Assessing Potential Impacts," 24.

## Forms of Cultural Impact Restitution

It is important to note that the implementation of mitigation measures do not mean that there will be no impacts to cultural rights. Even with the implementation of mitigation measures, restitution may be desired and sought. It is important to note as well that seeking restitution does not mean that the First Nation is endorsing the activities that create the adverse cultural impact, and it does not mean that the Nation is “trading” its cultural rights for benefits. The FNMPC respects the right of all First Nations to seek or not seek restitution for cultural impacts on their members and territories, depending on factors to be defined by those groups themselves.

Restitution can take several forms. For the sake of this toolkit, we identify three primary forms of restitution for impacts to cultural rights: **cultural restoration**, **cultural offsetting**, and **financial compensation**.

### Cultural Restoration

In general, 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. For example, if a location-specific set of cultural values is lost or degraded, a form of restoration would be the provision of environmental and/or structural restoration investments to assist recovery of the same geographic vicinity. If a cultural right that is not location-specific is lost or degraded, a form of restoration could be the development of programs, projects, policies, etc. that seek to restore the same aspect of culture (e.g., language) to address anticipated adverse effects.

Some examples of cultural restoration programs include, but are not limited to:

- » Cultural site or landscape restoration/protection initiatives;
- » Restoring the project area to a certain quality acceptable to the impacted Nation following project-closure;
- » Targeted language and cultural programming; and
- » Enhancing or protecting key cultural areas outside of the project affected area that are used for the exercise of the cultural right being impacted.

### Cultural Offsetting

In general, cultural offsetting is a form of restitution that is **not** linked to a specific geographic location, or a specific kind of cultural value being impacted. Rather, it is an action that works indirectly to address the lost or diminished opportunity to receive benefit from, or to exercise, a cultural right. For example, unavoidable project impacts to a sacred area may be “offset” by the transfer of lands located in a different part of the First Nation’s territory to the Nation to provide supports for cultural rights, values, or activities to be practiced in that other location (e.g., fish habitat).

Some examples of cultural offsetting programs include, but are not limited to:

- » Socio-economic or socio-cultural programs and activities;
- » Land-for-land or repatriation programs;
- » Land-purchase financing to support preservation of an area/landscape/location within the project area;
- » Long-term funding to support ecological restoration and stewardship programs;
- » Long-term supports for revitalization of cultural activities; and
- » Establishing a cultural “trust.”

One example of a cultural offsetting program is the “iit’l gudaad – We Remember Haida Heritage Plaza” project was announced in 2022 with funding from the Government of Canada.

The iit’l gudaad – We Remember Haida Heritage Plaza will commemorate the Haida people and their history, celebrate Haida art and language, and serve as a gathering place for generations to come. This site will act as a space for healing and a space to honour those who have passed on. The space will also host workshops and gatherings aimed at the inclusion and revitalization of traditional Haida ways of being. The site’s design will integrate Haida principles, including respect for Indigenous girls, women, and 2SLGBTQQA+ people.<sup>59</sup>

While this project is part of the Federal Pathway to Address Missing and Murdered Indigenous Women, Girls and 2SLGBTQQA+ People<sup>60</sup> and is not specific to a major project, such cultural offsetting initiatives may be an option available to First Nations engaging in the IA process.

For the sake of this toolkit, the main distinction between *restoration* and *offsetting* is that restoration is directly focused on restoring the specific cultural right that is being impacted (“like for like”), while offsetting provides a more general form of non-monetary restitution which provides a different kind of cultural value or benefit from the cultural right being impacted (“strengthening here to offset losses there”).

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<sup>59</sup> Crown-Indigenous Relations and Northern Affairs Canada, “Canada and the Old Massett Village Council partner to launch the iit’l gudaad – We Remember Haida Heritage Plaza project,” 2022, <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2022/09/canada-and-the-old-masset-village-council-partner-to-launch-the-iitl-gudaad-we-remember-haida-heritage-plaza-project0.html>.

<sup>60</sup> As part of the Government of Canada’s contribution to the Missing and Murdered Indigenous Women, Girls, and 2SLGBTQQA+ People National Action Plan.



## Financial Compensation

Developing mechanisms and programs for cultural compensation remains a significant challenge for First Nations engaging in cultural impact assessment. First, there is often a strong aversion to accepting compensation for inevitable cultural losses, in Indigenous communities that would prefer avoidance (i.e., the project not proceeding and creating the impact in the first place, or major changes to the project to avoid the cultural loss). Accepting money in exchange for impacts on culture can be seen as disrespectful or contrary to meeting one's duty to protect and promote Indigenous culture for future generations. Second, to work towards compensation, it is essential to understand the significance of the impacts, which often require some form of ranking and/or quantification. This can be viewed as a reductionist approach, since impacts to cultural rights' impacts are more qualitative and narrative-based, rather than quantitative.<sup>61</sup>

Often, both offsetting and restoration programs are themselves financially-driven means of compensating for adverse impacts to Indigenous culture insofar that the Proponent or respective government will provide funding for the establishment of the offsetting or restoration initiative. For the sake of this toolkit, however, financial compensation refers to the provision of funds to a First Nation not tied to a specific restoration or offsetting initiative, as a form of compensation for an impact or impacts on cultural rights. As a result of this, financial compensation may be viewed by different First Nations as either a vehicle to achieve greater control over cultural offsetting 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 in exchange for an economic benefit to the Nation.

On a very practical level, financial compensation can offer an impacted First Nation greater flexibility and control over the final form that restitution assumes (i.e., rather than having to jointly administer program funding that is provided by either the proponent or government). First Nations can apply financial compensation to initiatives of their own choosing, such as the purchase of lands, or ongoing cultural or language revitalization programs, etc. On the other hand, assigning a monetary value to cultural rights, (i.e., to "put a price tag on the sacred") may be an ethically challenging, and in some cases inconceivable way to achieve a Nation's restitution objectives. The inherent intangibility of impacts on cultural rights requires complex, collaborative evaluation rather than a conventional monetary approach in order to prioritize the perspectives and objectives of First Nations.

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<sup>61</sup> Justin Page, "Indigenous Cultural Impact Assessment: Addressing the Challenges," Conference Proceedings (International Association for Impact Assessment Conference, Montreal, Ontario: IAIA, 2017), 7.

# Legal Approaches to Financial Compensation for Cultural Impacts in Canada

Financial restitution for harm to persons and/or property is frequently referred to as “damages” in Canadian common law. The idea of financial compensation for *cultural* losses, however, has remained largely unacknowledged in the Canadian court system. The general approach to calculating restitution for impacts to First Nations has been a reliance on compensation for the “economic loss of use”. In the few instances where compensation for cultural losses has been included in legal settlement agreements, the compensation for *cultural* losses was treated as an incidental aspect to compensation for impacts on an Aboriginal right, i.e., by “linking aboriginal rights closely to a people’s distinctive culture”<sup>62</sup>.

The 2021 Supreme Court of Canada decision in the *Southwind v. Canada* case has changed that by making Indigenous perspectives, specifically the valuation of lands through an Indigenous cultural lens, a central criterion for assessing the value of compensation for breaches in fiduciary obligations by the Crown with respect to the expropriation of reserve lands<sup>63</sup>. 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 land must include compensation for a unique “cultural component” of aboriginal land, linked to the land’s significance in the exercise of the culture,” and that “losses of culture that are a consequence of the loss of land – loss of linguistic or ceremonial knowledge, for example – that is a separate matter for compensation”<sup>64</sup>. *Southwind* provided 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<sup>65</sup> where a project’s impacts to Indigenous lands are accompanied by impacts to Indigenous culture.



<sup>62</sup> Paul Williams, “The Right to Compensation for Cultural Damage,” (New Brunswick: Tobique First Nation, November 4, 2019), 31.

<sup>63</sup> This positive decision has the possibility to be applied generally and support negotiations, but it is important to note that the legal precedent created by the decision is specific to reserve lands.

<sup>64</sup> Williams, “The Right to Compensation for Cultural Damage,” 2, emphasis added.

## Non-Legal Approaches to Financial Restitution for Indigenous Cultural Rights

While the question of restitution for cultural impacts on Indigenous peoples has remained largely underdeveloped within the Canadian court system, non-governmental institutions/organizations, both within and outside of Canada, have begun proposing various approaches to the implementation of financial compensation for cultural impacts. There are two predominant approaches to estimating the economic value of cultural losses: a **market-based approach** (where a value is assigned to a cultural right based on what that right would cost “on the market”), or a **community-based values approach** (where the individuals who will suffer the cultural loss are asked to determine a hypothetical value for the cultural right lost).

Both approaches assign financial value to “cultural resources”<sup>65</sup>. In doing so, these approaches emphasize “tangible economic, health, and environmental changes that are more easily quantified and measured in terms of monetary equivalents”<sup>66</sup>. A community-based values approach, however, considers the values, beliefs, and experiences of those impacted by the loss. This can therefore represent a more accurate and holistic method of costing cultural rights, as opposed to a primarily market-based approach.

Market-based approaches for restitution are heavily critiqued as being outdated and failing to estimate cultural losses in an accurate and defensible manner<sup>67</sup>. Losses deemed by some as less “tangible”, such as sacred relations to land, cultural and lifestyle losses, health losses, losses of identity, losses of self-determination and influence, emotional and psychological losses, losses of order in the world, knowledge losses, and indirect economic losses and lost opportunities<sup>68</sup> are difficult to quantify in financial terms and therefore are often omitted in the calculation of financial compensation in market-based approaches.

Emerging community-based values approaches, while still grounded in financial compensation, draw upon the experiences, perceptions, and opinions of those impacted by the cultural loss, and therefore represent more accurate forms of financial compensation, above and beyond a pre-determined “market” value. The development of new approaches that can more accurately identify and value cultural and intangible loss is essential to ensuring Indigenous communities receive proper compensation when project impacts cannot be mitigated or avoided.

One example of a community-based values approach is the implementation of multiple social and cultural compensation categories. Developed by Gregory et al., this mechanism was applied retroactively to a case study involving two Dene Nations in North-Central Canada<sup>69</sup>. Gregory et al. determined principal categories of losses<sup>70</sup> based on interviews and discussion forums with community members. Following the identification of the categories, they were ranked and weighed according to information collected from community interviews, ethnographic literature, and analytic

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<sup>65</sup> 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>.

<sup>66</sup> Gregory et al., “Compensating,” 1.

<sup>67</sup> See 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>.

<sup>68</sup> Adam Dunstan, “What Was Damaged?: Taking Sacred Ecology into Account in Environmental Impact Assessment,” *Indigenous Policy Journal* XXII, no. 4 (Spring 2012): 1–8.

<sup>69</sup> Gregory et al., “Compensating Indigenous Social and Cultural Losses.”

<sup>70</sup> Categories may include, but are not limited to: the loss of subsistence, loss of spirituality, loss of knowledge, loss of ceremony, etc.

methods from the social sciences. Each category, based on its rank and weight, was then assigned a financial dollar value. Such a method of calculating compensation would help ensure the values held by the impacted communities are properly weighed and included in the evaluation process. Gregory et al. (2020) further presents a series of guidelines and principles that, he claims, should underpin the calculation of compensation for cultural and intangible losses<sup>71</sup>:

- » Follow a clear and logical process, so that the method is transparent, repeatable, and meaningful;
- » Recognize the limitations that stem from the monetization of Indigenous values, especially intangible values;
- » Ensure that both tangible and intangible values are included in the assessment of compensation. Impacts such as mental distress, and psychological strain must be considered alongside effects such as the disruption of traditional practices;
- » When engaging with past losses, ensure that compensation is commensurable with current losses; and
- » While the determination of compensation must include expert information and documentation, the process must also prioritize written and oral information sources which acknowledge the direct experiences of the community.

Gregory et al. states these principles are vital to the development of wholistic and accurate compensation models. These guidelines represent a series of points already highlighted throughout this report, such as:

- » The need to include intangible elements and losses, when calculating compensation;
- » Ensuring compensation for past effects reflects the present value of loss, and factors in loss extending to future generations;
- » The inclusion of cumulative effects; and
- » The importance of starting with community engagement.

Such elements are directly tied the accuracy of compensation calculations and the preservation of cultural rights and values and may help to produce a more accurate and holistic method of determining financial compensation for impacts to cultural rights.

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<sup>71</sup> Gregory et al., "Compensating Indigenous Social and Cultural Losses," 2.



## Conclusion

Indigenous culture is a complex, holistic concept consisting of both tangible (village or settlement sites, harvesting complexes and site, burial sites, etc.) and intangible (relationships, stories, knowledge, ways of life, etc.) elements and expressions. International law such as the UN Declaration and federal and provincial UN Declaration-based legislation<sup>72</sup> seeks to protect Indigenous cultural rights through guaranteeing a right to a “traditional way of life,” complete with distinct “cultural identity, social structure, economic systems, customs, beliefs and traditions”<sup>73</sup>. In Canada, Indigenous cultural rights have commonly been asserted through the lens of Section 35 rights, including the right to a way of life. The recent ratification of the federal UNDRIPA, however, represents a unique opportunity for the formalization of the protection of cultural rights in Canada through legislation.

Consideration of cultural rights have been enshrined in the federal IAA and provincial environmental assessment acts such as the BCEAA (2018), the YESAA (2003), the MVRMA (1998), as well as in the recent UNDA Action Plan (2023). While impact assessment laws and federal guidance remains limited on *how* to include considerations of Indigenous cultures and Indigenous Knowledge in major project impact assessment, they represent a possible avenue for increased attention on and protection of Indigenous cultural rights.

To assert control over cultural rights, many First Nations are self-identifying cultural values. Despite this effort however, existing federal, provincial, and operation/institutional policies remain predominantly focused on physically tangible elements of culture such as archaeological and burial sites. In addition, impact assessment processes typically depict Indigenous culture as “historic,” “traditional,” or “frozen in time”. These challenges continue to restrict the assessment and protection of Indigenous cultural rights.

In addition, as federal, provincial, or territorial impact assessment processes often lack a distinct category for assessing cultural impacts, which are commonly lumped in with broader environmental or socio-economic assessments where they are considered at all. It is essential to “raise the bar for meaningful inclusion of Canadian First Nations in major project assessment”<sup>74</sup> by engaging Indigenous communities early in the major project proposal review process, allowing communities to lead independent studies, and provide their own definitions of what is and what is not important. This will allow cultural impact assessments to accurately identify cultural values and rights most at risk and plan avoidance, mitigation, and compensation mechanisms appropriately.

When it comes to addressing potential impacts to cultural rights, avoidance is always the preferred option. Where avoidance is not possible, impact minimization/mitigation should be applied, with restitution used as the *option of last resort*. In the Canadian court system, *Southwind v. Canada* has determined that restitution for land “must include compensation for a unique “cultural

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<sup>72</sup> Including the federal United Nations Declaration Act (UNDA) and the Government of British Columbia's Declaration on the Rights of Indigenous Peoples Act (DRIPA).

<sup>73</sup> Government of Canada, “Implementing the United Nations Declaration on the Rights of Indigenous People Act,” 11, emphasis added.

<sup>74</sup> First Nations Major Project Coalition, “Major Project Assessment Standard,” 7.

component” of aboriginal land, linked to the land’s significance in the exercise of the culture”<sup>75</sup>. This mechanism remains underdeveloped, however, with the intangible cultural losses arising from a proposed project rarely meaningfully included in either the assessment or the conditions applied to projects that do proceed. Emerging community-based values approaches, however, draw on the experiences, perceptions, and opinions of those impacted by the cultural loss and have the potential to provide a more accurate and holistic method for costing cultural rights.

In general, there is the need to advance methods for assessing historic, present, and future cultural loss as a result of major projects; the need to include cumulative effects and multiple forms of value into the determination of restitution for cultural losses; and the need to ensure Indigenous communities are able to self-identify impacted values as well as assign significance to each. To address cultural losses, methods of restitution which are not financially based (such as offsetting and restoration programs) must be further explored. This Indigenous Cultural Rights Impacts Toolkit is an initial attempt in the direction of addressing these concerns.

Despite its complexity, Indigenous culture constitutes a vital right that, when adversely impacted, should be appropriately accommodated through means of restitution of each First Nation’s choosing. This Indigenous Cultural Rights Impacts Toolkit represents one step towards developing more effective forms of cultural impact assessment and equitable modes of restitution that support holistic Indigenous perspectives.



<sup>75</sup> Williams, "The Right to Compensation for Cultural Damage," 2.

## 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.

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