FIRST NATIONS
MAJOR PROJECTS
COALITION

# Spirit of the Land

# Introduction

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").

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.

**FIRST NATIONS MAJOR PROJECTS COALITION**

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

This definition includes both the tangible and intangible facets of culture. Culture is more than *physical*, or *tangible,*[2] 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*:[3] 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.

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[1]   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).

[2]   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.).

[3]   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)[4] 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.

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4   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 reflects the diverse and distinct interests and values of individual First Nations.

## Etuaptmumk (Two-Eyed Seeing)

Mi'kmaq Elder Albert Marshal introduced *Etuaptmumk*, or Two-Eyed Seeing,[5] as a means of utilizing both Indigenous Knowledges and Western knowledges, without either dominating or overpowering the other.[6] 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."[7] 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.[8]

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".[9] 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.

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[5]  Albert Marshall, "Learning to See with Both Eyes (The Green Interview)" (Canada, 2018), https://www-mcintyre-ca.proxy.library.carleton.ca/carletonu3/code/PT0105.

[6]  Annamarie Hatcher et al., "Two-Eyed Seeing: A Cross-Cultural Science Journey," *Green Teacher*, no. 86 (Fall 2009): 5.

[7]  Cheryl Bartlett, Murdena Marshall, and Albert Marshall, "Two-Eyed Seeing and Other Lessons Learned within a Co-Learning Journey of Bringing Together Indigenous and [7] 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]

[8]  Bartlett, Marshall, and Marshall, "Two-Eyed Seeing," 336

[9]  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 present 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".[10] 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.[11]

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[10] 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/.

[11] First Nations Information Governance Centre, "The First Nations Principles of OCAP®".

**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