

Tool 5

Considering Financial Compensation for Residual Effects to Cultural Rights

Step 5 of Undertaking an Assessment of Impacts to Cultural Rights



FIRST NATIONS
MAJOR PROJECTS
COALITION

THE INDIGENOUS CULTURAL RIGHTS AND INTERESTS TOOLKIT

Spirit of the Land

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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.

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

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

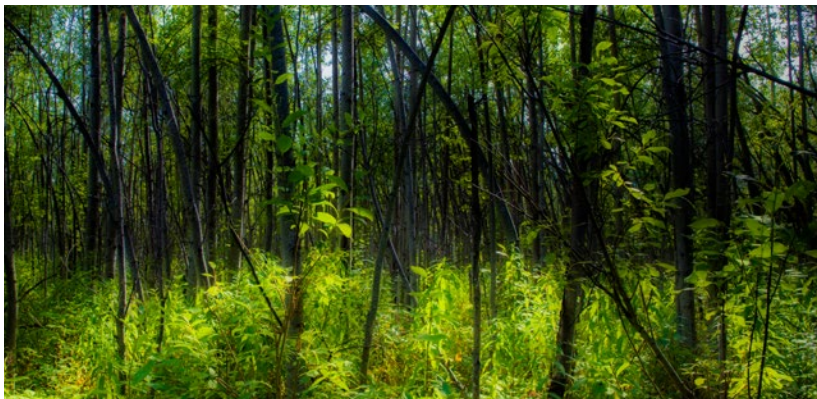
On a practical level, financial compensation can offer an impacted Nation greater flexibility and control over the final form that restitution assumes, for example by having full control over funds rather than having to jointly administer program funding that is provided by either the proponent or government.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

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

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

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

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



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

Market-Based Approaches to Financial Compensation for Cultural Rights



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

Australia

In 2022, the Australian government developed the *Policy for Compensation for Cultural Loss Arising from Compulsory Acquisition*. The policy states:²

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

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

² Valuer General NSW, "Compensation for Cultural Loss Arising from Compulsory Acquisition" (NSW Government, 2022), 1.

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

The Policy outlines categories of cultural loss including access, residence, activities, practices, ecology, sites, trauma, and progressive impairment which are used to derive a market-based means of evaluating financial compensation. The Policy includes novel principles for determining financial compensation, including:³

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

While still limited and failing to address the controversial basis of compulsory land acquisition,⁴ the Policy explicitly indicates that cultural losses are compensable and represents a more inclusive process for considering cultural rights when determining financial compensation.

New Zealand

In New Zealand, a series of settlements called the Waitangi Claims of Whakatōhea have been either signed or in the process of being actively negotiated. These settlements provide redress for the losses suffered by the Whakatōhea as a result of Crown confiscation and seizure of lands prior to 1992. The seven most recent settlement packages (since 2021) include elements such as a Crown acknowledgement and apology, and financial, cultural, and commercial restitution. Of note, restitution/redress is “intended to recognise the cultural, historical and traditional associations of Whakatōhea within their area of interest”⁵ and includes elements such as:

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

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

³ Valuer General NSW, 6–7.

⁴ Compulsory acquisition is criticized as being fundamentally at odds with the right of Indigenous peoples to Free, Prior, and Informed Consent (Mia Stone, Dr Lisa Strelein, and Kieren Murray, “AIATSIS Submission: Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition,” n.d., 19.)

⁵ New Zealand Government, “Deed of Settlement between the Crown and Whakatōhea,” January 2022, 2.

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

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

This court ruling therefore supports the notion that compensation for reserve lands must include a "cultural component linked to the land's significance in the exercise of the culture."⁶ *Southwind*, therefore, provides a legal model for compensation for impacts to Indigenous lands, taking into account cultural losses that are attached to the land. While the model does not deal specifically with cultural losses, it may point in a direction for restitution where a project's impacts to Indigenous lands are accompanied by impacts to Indigenous culture. It is also important to note that while this positive decision has the possibility to be applied generally and support negotiations for impacts to cultural rights arising from major projects, the legal precedent created by the decision is specific to reserve lands. Some strengths and weaknesses of a market-based values approach are provided below.

Strengths

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

Limitations

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

⁶ Williams, "The Right to Compensation for Cultural Damage," 2.

Community-Based Approaches to Financial Compensation for Cultural Rights



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

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

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

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

Strengths

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

Limitations

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



Principles



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

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

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

Summary

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

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

DISCLAIMER

This Toolkit has been developed from the perspective of the First Nations Major Projects Coalition (FNMPC) and does not represent the perspectives of the federal government, provincial governments, and territories, or industry. Although it represents a general First Nations perspective, it does not represent the specific perspective any First Nation as every First Nation will have its own distinct perspective. The Toolkit is designed to provide support to First Nations that are engaging with project proponents in discussions about offsetting residual cumulative effects affecting cultural rights and values within their territories. The Toolkit is not to be viewed as prescriptive on how to assess impacts on cultural rights and each First Nation should determine its own method and process for assessing impacts on its cultural rights in accordance with its laws, methodologies, protocols, and processes. A First Nation that chooses to engage with a project proponent or the Crown in discussions regarding impacts on cultural rights may want to obtain legal advice prior to using this Toolkit in those discussions.

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

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

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

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