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Dealing with Culturally Sensitive Areas in Industrial Project Design

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Abstract

Potential cultural impacts from proposed industrial developments can affect culturally sensitive areas that are important to Aboriginal peoples. These cultural impacts are important for legal, political, and moral reasons and can have a major influence on project approval or rejection during environmental impact assessment. It is in the interest of developers to identify and consider potential impacts on culturally sensitive areas early in the project proposal process in order to design projects that minimize or avoid these impacts. A key strategy is to engage communities effectively in the process. Different types of mitigation measures, including off-site cultural mitigation, may be appropriate for different types of culturally sensitive areas, but avoidance may be the only option for certain non-negotiable areas.

Keywords

culturally sensitive areas, cultural impacts, Aboriginal peoples, environmental impact assessment, EIA, project design, impact mitigation, off-site mitigation, Aboriginal community engagement, Mackenzie Valley

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Dealing with Culturally Sensitive Areas in Industrial Project Design

Major projects in Canada are typically required to undergo some form of environmental impact assessment (EIA) prior to regulatory approvals. Virtually all the regulatory authorizations focus on managing a proposed project's potential impacts on biophysical elements, such as on water, land, fish, and wildlife. Few, if any, regulatory authorizations deal as directly with potential impacts on people. However, for many Aboriginal groups, the impacts of a proposed economic development on people may be at least as important as the biophysical impacts. Impacts on people can be grouped into various categories that relate to people's wellness, such as social impacts, economic impacts, and cultural impacts. This paper focuses on addressing a particular subset of impacts that have proven to be both very important and challenging: impacts on culturally sensitive areas, specifically areas that are culturally important to Aboriginal peoples.¹

This paper is structured to provide an overview of issues and solutions based on the author's experiences at the Mackenzie Valley Environmental Impact Review Board (MVEIRB; referred to below as the *Review Board*). In the Review Board's experience, developers are often prepared to identify and deal with biophysical matters, but struggle more when dealing with potential impacts on culturally sensitive areas. At the same time, these are often the most important issues to local Aboriginal communities² and to EIA decisions about project approval. This paper will examine why industry should recognize that this is an important consideration. It will examine different types of culturally sensitive areas and identify different approaches to project design that are appropriate for each. It will also discuss various ways of reducing or avoiding these cultural impacts.

About the Review Board

The Review Board is a federally legislated quasi-judicial tribunal that conducts EIA in Canada's Northwest Territories. It is authorized by the Mackenzie Valley Resource Management Act (MVRMA), which supersedes Canada's national EIA legislation (Government of Canada, 1998). The Review Board is the primary agent for EIA in the Mackenzie Valley, which includes most of the Northwest Territories. In area, it is comparable to Germany, Great Britain, and Japan combined. The Review Board is an independent co-management body that arose as a result of Aboriginal land claims, and it includes equal numbers of members nominated by Aboriginal organizations as it does members nominated jointly by the federal and territorial governments.

The Review Board is required to consider the impacts of proposed developments on the biophysical, socio-economic, and cultural environment. This includes both direct and indirect impacts on people (MVEIRB, 2003). The statutory framework under which the Review Board operates gives it a clear authority to consider impacts to culturally sensitive areas. Section 115(b) of the MVRMA states that the Review Board is required to consider the social and cultural well-being of the residents and communities of the Mackenzie Valley (Government of Canada, 1998). Subsection 115(c) states that the Review Board is required to consider "the importance of conservation to the well-being and way of life" of Aboriginal peoples (p. 24). Further, the Review Board's *Guidelines for Incorporating Traditional Knowledge in EIA* explicitly refer to the consideration of Aboriginal cultures and values, specifying that "(i)n order to ensure that aboriginal cultures, values, and knowledge play an appropriate role in its determinations, the Review Board is committed to fully consider any traditional knowledge brought forward in its proceedings" (MVEIRB, 2005, p. 4). This authority has resulted in the Review Board deliberating on issues related to culturally sensitive areas in several EIAs.

¹ In this paper, the term "culturally sensitive area" is used interchangeably with "culturally important area." The term "Aboriginal peoples" is used to include First Nation and Métis groups, and is interchangeable with the term "Indigenous peoples" as it is applied in the international context.

² The term "Aboriginal communities" here applies generally to communities with primarily Aboriginal residents. In the Mackenzie Valley, this includes Dene First Nations and Métis groups.

The Review Board's Process in International Context

To provide a context for international readers, certain strengths and weaknesses of the Review Board's EIA process may be compared to those of other countries and jurisdictions as follows:

- The Review Board considers alternatives to a proposed project and alternatives within a proposed project (MVEIRB, 2003), but does not typically consider alternatives to the proposed project in the same depth as the National Environmental Protection Act requires in the United States (U.S. CEQ, 1970).
- The Review Board's process has a stronger focus on early participatory scoping of the issues (Ehrlich, 2011); in contrast with the approach of the European Union (European Union, 2011, Article 5(1)(a)) where this is optional and often not done.
- Unlike the approach followed in much of Europe (European Union, 2001), the Review Board's process does not include strategic environmental assessments of policies, plans, and programmes. In contrast, the Review Board is limited to project-specific environmental assessments and the consideration of regional issues only within cumulative impact assessments.
- The Review Board's inclusion of both direct and indirect impacts on people (MVEIRB, 2003) extends beyond the social and cultural requirements of the Canadian Environmental Assessment Act, which requires consideration of only the indirect impacts on people that arise from a change to the biophysical environment (Government of Canada, 1992, s2(1)).

Overall, the Review Board's process provides a thorough project-specific impact assessment that includes, in an integrated way, the broad inclusion of impacts on the environment and on people.

The Fundamental Importance of Culturally Sensitive Areas

It can be challenging for industrial developers, who may lack understanding of the relationship between Aboriginal peoples and the land, to internalize the fundamental importance of culturally sensitive places. The importance is examined here in the legal, moral, political, and practical contexts.

Legal and Moral Importance

The importance of culturally sensitive areas to Aboriginal peoples has been described by the courts in the *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* decision (Ontario Superior Court of Justice, 2006). In this decision, the Ontario Superior Court stated:

It is critical to consider the nature of the potential loss from an aboriginal perspective. The relationship that aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and often arise from this relationship to the land. (p. 80)

The subject carries an implicit moral importance because of the pressing threats facing Aboriginal cultures worldwide. Language use is a powerful indicator because of its close ties to culture. Approximately half of the world's languages are maintained by only 0.2 percent of the world's population and are in imminent danger of disappearing (Davis, 2009). This is an indicator of the current crisis of extinction facing Aboriginal cultures worldwide. Part of keeping Indigenous cultures alive, particularly those with close ties to the land, is to avoid harming their most important places. This has been reflected in the Review Board's hearings when Aboriginal leaders have framed impacts on spiritually sensitive areas as "a matter of cultural survival" (Łutsël K'e Dene First Nation, 2010).

To Aboriginal peoples, culture matters as much as the biophysical environment. A loss of identity, of that which makes you who you are, is a loss of profound importance. This is the exact threat that Aboriginal

peoples recognize when development threatens the areas that are culturally vital to them. The Review Board has heard this many times from Aboriginal parties in hearings describing how changes in certain culturally important areas would affect them. The opportunity to pass their culture on to future generations through youth in the experientially authentic setting is gone, and the incremental loss of identity results (e.g., MVEIRB, 2004, 2008a, 2008b, 2008c, 2010b).

Impacts to cultural areas can be of further legal importance because of the legal weight of Crown consultation obligations associated with potential infringements on Aboriginal rights in these areas. In Canada, section 35 of Canada's Constitution describes a legal duty of meaningful consultation and accommodation with respect to potential infringements on Aboriginal rights (Government of Canada, 1982). Practically, it is in culturally important areas where such potential infringements are more likely to actually happen on the ground because these areas are often where traditional hunting, fishing, trapping, other harvesting, and travelling take place and are most vulnerable. This brings important legal implications that require consideration of potential impacts on culturally sensitive areas and accommodation in order to mitigate associated impacts. This is emphasized when one considers that, as a constitutionally enshrined right, section 35 consultation and accommodation rights supersede any law of Canada.

Political Importance

There can also be powerful political reasons why developers need to recognize the importance of culturally sensitive areas. This has been recently illustrated in a neighbouring jurisdiction by the enormous demonstrations related to the Enbridge Northern Gateway pipeline, which has been opposed by over 130 different First Nations in British Columbia (B.C.), Canada (West Coast Environmental Law, 2011). As Kitimat Village Chief, Dolores Pollard, described it: "We have a sacred bond with the land that demands that we be unrelenting in this protection" (Dogwood Initiative, 2010). The hearings, which are underway at the time of writing, include over 200 formal intervenors plus over 4000 individuals each providing oral statements at the Joint Review Panel hearings (National Energy Board, 2012). Neither industry nor regulators could have likely anticipated the degree of political relevance of the culturally sensitive areas in question.

Implications for Project Approval

Another practical reason why potential impacts on culturally sensitive areas should be important to developers is that they can be showstoppers that lead to project rejection, one of the potential outcomes of EIA. It is noteworthy that, where the Review Board has recommended the rejection of proposed developments, it has been exclusively due to unacceptable impacts on culturally sensitive areas (MVEIRB, 2004, 2008a, 2008b, 2008c). Experiences in other parts of Canada suggest a similar importance to EIA decision makers. For example, a joint federal-provincial review panel in British Columbia identified impacts on spiritual values in culturally sensitive areas as an important factor in the 2007 rejection of the Kemess Copper-Gold Mine in B.C. (Kemess North Mine Joint Review Panel, 2007). Another example from British Columbia is the 2010 rejection of the Prosperity Gold-Copper Mine by a federal Review Panel. The report of the panel cited impacts on a particular lake that is "integral to Tsilhqot'in culture... A place of spiritual power and healing for the Tsilhqot'in" as a reason for rejection (Canadian Environmental Assessment Agency, 2010, p. iii). These experiences suggest that it is in the developer's interest to be particularly mindful when dealing with potential impacts on culturally sensitive areas.

Even though all rejections recommended by the Review Board were on the basis of impacts on culturally sensitive areas, it has been the Review Board's experience that developers are usually more thorough in predicting and mitigating biophysical impacts than cultural ones. For example, of the 11,000 page De Beers Canada (2010) *Developer's Assessment Report* for the Gahcho Kue Diamond Project, 20 pages deal directly with potential impacts to culturally sensitive areas. The project is upstream of a site that was the subject of cultural concern in a previous environmental assessment. The panel's Terms of Reference identified cultural effects as

part of a Key Line of Inquiry (Gahcho Kue Panel, 2007). The review of the Gahcho Kue Diamond Mine was not complete at the time of writing.

One may speculate on various reasons why developers pay more attention to biophysical matters despite the cultural basis for rejections. This may be partially due to the structure of the regulatory environment. Once a project is approved by the Review Board, there are many regulatory agencies that will issue authorizations with strict conditions about land, water, fish, and so on. There are, however, no equivalent agencies or authorizations to deal with social or cultural impacts. In addition, predicting and mitigating physical impacts is simpler in some ways because it depends less directly on the cooperation of Aboriginal parties and can be done by environmental consultants independently. Properly assessing cultural impacts, on the other hand, requires the potentially challenging engagement of those likely to be affected. Whatever the underlying cause, in the Review Board's experience developers have not made the assessment and mitigation of cultural impacts their main focus, despite this being the major cause of rejections of proposed developments.

Different Kinds of Culturally Sensitive Areas

In the Review Board's EIAs, Aboriginal parties have described a variety of different types of culturally sensitive areas. In many cases, the type of cultural setting may make the difference between local Aboriginal support or opposition, and it has a direct bearing on the most appropriate project design to reduce or avoid impacts.

The different types of culturally sensitive sites include the following:

- **Physical heritage areas** include places with certain tangible resources, such as notable densities of archaeological sites or burial grounds.
- **Harvesting areas** are those where traditional lifestyles are practiced through activities, such as hunting, trapping, fishing, and harvesting.
- **Sacred sites** are areas of particular spiritual importance.
- **Cultural landscapes** are areas of interconnected heritage sites, including the travel routes and spaces between them.

These types of areas are not mutually exclusive. For example, a particularly good harvesting area may have a high density of archaeological sites because it has been used for a long time. A burial ground can be of particular spiritual importance even though it includes physical heritage. Similarly, a cultural landscape may contain all of the above, in a recognized relationship with one another.

It is noteworthy that the above include tangible and intangible elements. For example, Andrews and Buggiey (2008) note that memory, history, and shared knowledge may be embedded, non-physical elements in a cultural landscape. Spiritual elements may be the most important part of a sacred site. In the cultural assessments that the Review Board has considered, there is a tendency for developers to focus on archaeological sites, the "bones and stones" that can be documented by archaeological field work. However, the non-physical values of an area can be what matter most to an Aboriginal group (Ehrlich, 2010). Both are important considerations when examining potential cultural impacts.

Principles for Project Design

Two principles described in an earlier paper by the author are relevant considerations with respect to designing projects in the vicinity of culturally sensitive areas. First, some of the most challenging and complex EIAs conducted by the Review Board have not always been for the biggest projects. With respect to cultural impacts, the project setting can be much more important than the scale of the project. What matters is the scale of the issues, not the scale of the development (Ehrlich, 2010). Some EIAs of large projects have been relatively easy, but even small projects in culturally sensitive areas can be complex and fraught with

challenging issues. Location is very important: a small sliver is usually not a serious matter, but the same sliver can be very important if it is in your eye.

Second, developers often propose mitigation measures to reduce or avoid undesirable impacts. These measures are typically physical in nature, such as a change to project timing, noise suppression, or improved water treatment. However, in culturally sensitive areas, such as spiritual sites, intangible values may be of primary importance. Physical mitigations can be poorly suited to addressing a cultural impact of a spiritual nature (Ehrlich, 2010).

Identifying Culturally Sensitive Areas

An important first step in designing projects to avoid impacts on culturally sensitive areas is to identify where these areas are. Many factors make this more challenging than it may seem. One issue is that contemporary geographic boundaries do not necessarily match culturally sensitive areas. For example, the provincial boundary between the province of Alberta and the Northwest Territories is based on latitude and does not reflect the limits of Aboriginal land use or culturally sensitive areas. From this perspective, it is simply a political line on a map. Further, Aboriginal communities may be located great distances from their traditional territories and culturally sensitive areas. This can be due to historical seasonal travel patterns followed when hunting wide-ranging wildlife, to community relocation in response to historical epidemics, or even to forced relocation. Distance from a community does not necessarily indicate the cultural importance of an area to that community.

More useful indicators of culturally sensitive areas reflect the factors affecting traditional practices. Traditional travel routes can be indicators of culturally sensitive areas, as can watershed boundaries. Migration routes and ranges of culturally important species can indicate historical use patterns that relate to culturally important areas. Any other areas of historical use may also be culturally important.

Land use plans are another useful resource to help developers identify possible culturally sensitive areas when designing projects. Part 2 of the MVRMA provides for land use planning. It specifies as a guiding principle of land use planning that “(s)pecial attention shall be devoted to... protecting and promoting (First Nations) social, cultural and economic well-being and to the lands used by them for wildlife harvesting and other resource uses” (Government of Canada, 1998, s.35 (b)). In the Review Board’s EIAs most conflicts between development and cultural areas have occurred in regions without settled land claims and land use plans. These plans are the product of dozens or even hundreds of meetings in communities and are a credible way to recognize the most culturally important areas to the Aboriginal communities involved.

Preparing land use plans and getting them approved is a lengthy and often difficult process for Aboriginal groups and government. The MVRMA was enacted over fourteen years ago, and the majority of the Mackenzie Valley remains without finalized land use plans. However, land use planning is a vital component of providing industry with greater certainty in the development process. Even where land use plans are not finalized and legally binding, draft land use plans should still reflect extensive community involvement and should be treated as strong indicators of where culturally important areas are located. In some cases, where there is no legal structure for formal land use plans, communities have designed and released their own plans to promote protection of areas they care about most deeply. Because of the importance of recognizing culturally sensitive areas in project design, and the value of land use plans in doing so, it is in industry’s best interest to actively encourage government to complete land use planning as a way of increasing certainty.

Past EIAs are another source of information that can help developers identify culturally sensitive areas when they are designing projects. EIAs have publically available, often readily searchable, public registries. Aboriginal participation in EIAs results in public registries that may contain maps and descriptions of the areas that are culturally important. Developers should also talk with people familiar with past EIAs in the

vicinity of proposed project locations to find out if there were any issues involving areas of cultural sensitivity.

Engaging Communities Early

Although the above may provide helpful clues, the single most effective way to identify areas of cultural sensitivity is by engaging Aboriginal community members directly. The people that hold the culture and value the area are also the best judges of how they may be affected by a proposed development. Developers should engage communities at an early point in the project planning process. When fewer major decisions have been made, project design alternatives are plentiful and changes are easier and less expensive.

Engagement of Aboriginal communities by industrial developers is not a simple affair. Developers engaging Aboriginal communities should remember that they are involved in a cross-cultural process. One of the most productive approaches is to have the communities themselves define the most culturally appropriate way to engage them. By doing this early in the project planning process, developers should be able to engage communities at a pace that works for the community and give the community members and leadership time to process and discuss proposed developments amongst themselves. Developers should also allow for seasonal variability, particularly for communities that practice traditional subsistence activities. Planning meetings at times of the year when many traditional land users are trapping muskrat or hunting caribou harms the relationships between developers and Aboriginal communities.

Communities may be able and willing to provide Traditional Knowledge (TK) maps showing historical usage or other cultural features. Traditional knowledge about the relationship between people and the environment is rarely shared with outsiders or revealed in a written document to be circulated outside the community (Huntington & Fernandez-Gimenez, 1999). Fear that this traditional knowledge information will be taken out of its meaningful context, misunderstood, or misused is common among Aboriginal groups (Ehrlich & Sian, 2004). As a result, TK submissions may require confidential handling, and agreements can be made to specify how they may be used. Like any other types of experts, some TK holders may be more knowledgeable about certain aspects of TK than about others. Developers should ask community members which people (usually Elders) are particularly knowledgeable about culturally sensitive areas to be sure that they are talking to the right people (Ehrlich & O'Neil, 2004).

Archeological Records

Archaeological records are often kept by governments and are another source of information that can help indicate the location of culturally sensitive areas. Although the specific locations of archaeological sites may be confidential to prevent disturbance, developers can find out from the government if general areas around a proposed project have particularly high densities of archeological sites. This can be a useful indicator, but developers should be careful not to read too much into the archaeological records. Although areas with many archaeological sites are more likely to be culturally sensitive, not all culturally sensitive areas necessarily have physical heritage. The presence of many documented heritage sites, therefore, suggests a culturally sensitive site, but the absence does not necessarily mean the opposite. Further, archaeological field research in the Northwest Territories is largely driven by development applications and is, therefore, focussed on the areas where industrial activities have already been proposed. This means that there are no "recorded" archaeological sites in large areas where there have not been development proposals, but this obviously does not mean that there are no archaeological sites in those areas. The same may be true in other regions.

Mitigating Impacts in Culturally Sensitive Areas

Just as there are several types of culturally sensitive areas, there are also several strategies for mitigating the impacts on them. The right strategy to use depends on the type of area and its cultural use. Some types of

culturally sensitive areas may be more valuable than others; accordingly, some areas may be negotiable, while others are not.

Physical Mitigations

For areas that are particularly important because of traditional practices, such as hunting, fishing, trapping, or harvesting, the concern may relate to physical disturbance, such as noise scaring away wildlife, pollution affecting fish, or increased access leading to greater competition for resources by non-Aboriginal people. In these cases, physical mitigations, such as measures to reduce sensory disturbance or limit or avoid the creation of new access, may be enough to mitigate potential impacts. For example, to prevent increased access in one such area the Review Board has recommended that developers be permitted to access the sites by helicopter only (MVEIRB, 2007d).

For areas that are especially important because of physical heritage, careful studies on the ground, accompanied by cautious buffer zones around sites, may be enough to mitigate impacts, particularly if the Aboriginal group in question is meaningfully involved. An example of this can be found in the Review Board's recommendations for a diamond exploration activity, which was proposed in an area with a high density of heritage sites (MVEIRB, 2004). The Review Board concluded that the project could proceed only after a detailed archaeological study conducted with the developers, their archaeologist, an Aboriginal Elder, and a translator. In the same EIA, the Review Board recommended using a buffer zone around any identified heritage sites three times larger than required by law.

Non-Negotiables

For sacred sites, where impacts are primarily intangible, any industrial activities in the area may be entirely non-negotiable. For such sites, Aboriginal groups may have no interest in further discussion, and there may be no room for mutual concession, financial or otherwise. In some cases, avoidance of the area or other major project changes may be the only viable options. An example of this in the Review Board's practice led to a measure preventing an aerial transmission line from crossing a sacred site (MVEIRB, 2010a) with the developer later identifying an alternative route around that site with submarine cable to further reduce the potential for disturbance.

Off-Site Cultural Impact Mitigation

Avoidance of a culturally sensitive area is always the approach with the least chance of causing significant and undesirable impacts to the culturally sensitive area. However, in some cases, avoidance is not achievable because of the nature of the project. In these cases, assuming the area is not one of those described above as being non-negotiable, then off-site mitigation may be a way to avoid a significant net cultural impact. This involves offsetting a cultural impact with a greater cultural benefit.

The principle of off-site mitigation is a familiar one in the management of impacts on fish habitat, described in Chapter Five of the Department of Fisheries and Ocean's No Net Loss policy (Department of Fisheries and Oceans Canada, 1986). The same principle may be applied to deal with certain cultural impacts in sensitive areas. For example, if Elders are passing away faster than TK is being transmitted across generations, a developer could investigate compensating for certain impacts on culturally sensitive sites by funding the capture of TK through Elder interviews or by funding a certain number of youth and Elder camps on the land for each year the project is operating.

If off-site cultural mitigation is being considered, it should be done in close discussion with the Aboriginal community to ensure that:

- The impact is not on a non-negotiable;
- The cultural benefit of the mitigation measure is being accurately evaluated;

- The mitigation is of true cultural value to the community;
- It can be practically done by both developer and community; and
- No other forms of mitigation are practically feasible.

Developers should clearly describe the off-site mitigations in their EIA submissions. This will enable decision makers to consider and weigh the beneficial and undesirable cultural impacts in their deliberations.

The above examples describe providing a cultural benefit for an impact on some types of culturally sensitive sites. This should not be confused with a cash settlement. Trade-offs are only effective mitigation within the same category of impact (Morrison-Saunders & Pope, in press). It is not reasonable to expect that an economic benefit would mitigate a serious cultural impact. In some cases, the suggestion may only further emphasize to Aboriginal community members involved how different the developer's worldview is from their own. On a practical basis, as Gibson (2006) noted, it can be very difficult to reasonably evaluate trade-offs between social impacts and economic benefits. With respect to many culturally sensitive areas, it is easy to foresee how this could well be the case.

Conclusion

The challenges of mitigating impacts to culturally sensitive areas and the meaningful community engagement it entails may seem daunting to a prospective developer. However, developers should remember that mitigations are not just commitments in the project application phase for the purpose of securing project approval in the EIA. Working together with potentially affected communities to identify the right mitigations that deal with impacts to culturally sensitive areas and reporting back to the community on their progress and implementation can serve as a foundation for building a relationship with an Aboriginal community for the long term. This can result in the broad social acceptance that forms the social license to operate (Lassonde, 2003). This acceptance can help a project through its operating life and can offer developers major benefits with respect to future renewals and applications.

In summary, this paper has presented several lessons for developers regarding culturally sensitive areas. Although these impacts are not subject to the regulatory authorizations of biophysical impacts, they may be the impacts that matter most to Aboriginal stakeholders; that is the people that may be most directly affected. It is crucial to consider potential effects on culturally sensitive areas early in the development process, while changes in project design are relatively inexpensive and plentiful, to avoid potentially major procedural, legal, political, and moral issues. A variety of different mitigation measures exist to deal with impacts on different types of cultural areas. Done wrong, this can poison a developer's relationship with those closest to the project. Done right, this can lay the foundation for a mutually beneficial relationship between Aboriginal communities and industry.

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