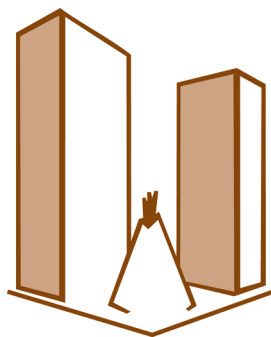


The Government's Duty to Consult Urban Aboriginal People



**NATIONAL
ASSOCIATION OF
FRIENDSHIP
CENTRES**

National Association of Friendship Centres

The purpose of the National Association of Friendship Centres (NAFC) is to improve the quality of life for Aboriginal peoples living in an urban environment.

The NAFC speaks to, and promotes, the concerns of Aboriginal Peoples living in urban centres of all sizes.

The NAFC acts as a central unifying body for the Friendship Centre Movement across Canada which now includes 118 Friendship Centres. The NAFC represents the needs of local Friendship Centres across the country to the federal government and to the public in general.

The Friendship Centre Movement provides many services to urban Aboriginal people across Canada and is a vital communication link to reaching urban Aboriginal people. Services are provided in many areas: Culture, Family, Youth, Sports and Recreation, Language, Justice, Housing, Health, Education, Employment, Economic Development and projects ranging from social activities to community building initiatives and special events.

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Aboriginal Participation in Government Decision-making

If someone is a citizen of a First Nation, an Inuit settlement region or a Metis nation, their Aboriginal and Treaty rights can be affected by Government decisions of various kinds. This information document explains Government duties to inform Aboriginal people and seek their views before making decisions that can affect Aboriginal and Treaty rights. The Government should consult urban Aboriginal people before making decisions about Aboriginal programs and services as well as Aboriginal and Treaty rights.

Government approvals for development projects like mines or forestry can affect Aboriginal or Treaty rights. This is an area where Government must “consult” the Aboriginal people affected before making a decision (to approve development or not). Proposals for new federal laws affecting a person's rights as an Aboriginal person is another example.

Even when the law does not create a legal duty to talk with Aboriginal people, Governments sometimes carry out “consultation” or “engagement” activities before making decisions about changing a law, policy or program that affects Aboriginal rights. Governments may do this to ensure they are properly informed about the possible results of a decision on Aboriginal rights.

Collective Rights of Aboriginal Peoples

Under Canadian law and international law, Aboriginal peoples have collective political, economic, social and cultural rights based on their pre-existing use and occupation of lands and resources. Aboriginal peoples as individuals can assert and exercise these collective rights as a member of an Aboriginal nation.

There are many diverse Aboriginal peoples across Canada. Each people or nation has their own collective rights – self-government, ceremonial rights, hunting, fishing, gathering and other land rights. Most Aboriginal peoples also have Treaty rights. Under the Constitution of Canada, modern land claims agreements are also called “treaties”.

The specific nature of Aboriginal and Treaty rights is shaped by the culture of a specific Aboriginal people, the location of their rights or territory and the history of their relationship with “the Crown” (federal and provincial governments together).

Aboriginal people who are living in urban areas away from their nation's territory still have collective interests and rights in their nation's territory. (However, under some land claims agreements people living for a long time outside the settlement region, may have fewer rights while living away.)

While individuals can exercise a collective right like hunting, it is the Aboriginal people who are members/citizens of a distinct nation or people who hold it collectively. This means that Government duties to consult are owed to Aboriginal people collectively not to individuals but the Government still must make sure that it has plans to reach the different places where Aboriginal people may live. This paper talks about what the Governments should do to ensure that Aboriginal people living in urban centres are included in consultation processes and raises some additional issues for further exploration.

Duty to Consult: A Summary Of Legal Developments In Canadian And International Law

There is now a significant body of case law describing Crown obligations to consult with Aboriginal Peoples prior to governments taking decisions that may negatively affect Aboriginal and treaty rights. This case law is part of the larger body of constitutional law interpreting s. 35 of the *Constitution Act, 1982* and how it protects Aboriginal, treaty and inherent rights of Aboriginal Peoples.

The summary below of key aspects of Canadian common law regarding the Crown's duty to consult is for information purposes only and is not a legal opinion:

- The source of the Crown's duty to consult and accommodate is grounded in the 'honour of the Crown'.
- The Crown must uphold its 'honour' by engaging in a good faith process, not engage in sharp dealing and represent itself with integrity.
- The duty of the Crown is triggered when it has knowledge, real or constructive, of Aboriginal or treaty rights and is contemplating an action, a project, policy or legislative objective that has the potential to impact/infringe those rights.
- When the government is contemplating an action, project, policy or legislation it must notify the Aboriginal peoples that may be impacted. The Crown must make a concerted effort to notify and inform - a simple letter is not enough.
- In cases where Aboriginal rights or title have been asserted but not yet proven, the Aboriginal interest is insufficiently specific to give rise to a fiduciary duty on the part of the Crown. Nevertheless, even in the case

of asserted but unproven Aboriginal rights or title, there may be a duty to consult and accommodate Aboriginal and treaty rights and interests proportionate to the strength of the claim to an Aboriginal right or to Aboriginal title and the seriousness of the potential impact on it. (quote from *Haida Nation*)

- *The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.* (quote from *Haida Nation*)
- The Crown's duty to consult cannot be delegated to third parties. Legal responsibility for meeting any duty to consult with Aboriginal peoples will always rest with the Crown. Third parties, such as the Friendship Centres, may carry out procedural aspects of the duty to consult (such as facilitating meetings and providing information to urban Aboriginal peoples) but the ultimate responsibility remains with the Crown. (*Taku River Tlingit First Nation*)
- In cases of established Aboriginal title and other cases where the Crown has assumed discretionary control over established specific Aboriginal interests, not only is the honour of the Crown implicated, but a fiduciary duty may be in play that will shape the scope and content of the Crown's duty to consult. (*Delgamuukw, Haida Nation*).
- In *Delgamuukw*, the Supreme Court of Canada said that where unextinguished Aboriginal title has been established, a fiduciary duty may arise on the part of the Crown that can shape the scope and content of the duty to consult. The Court said the exclusive nature of Aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. If the Crown's fiduciary duty requires that Aboriginal title be given priority, then what is required is that the government demonstrate that both the process by which it allocated the resource and the actual allocation of the resource resulting from the process reflect the prior interest of the holders of Aboriginal title to land (paragraph 167). Other aspects of Aboriginal title may require a different manner of discharging the Crown's fiduciary duty than the notion of priority of interests because in contrast to Aboriginal fishing rights, Aboriginal title encompasses within it, a right to choose to what ends a piece of land can be put. The Court went on to say that: *This aspect of Aboriginal title suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether*

the infringement of Aboriginal title is justified, in the same way that the Crown's failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. (paragraph 168)

- The *Guerin* decision treats the interest of First Nations in their reserve lands the same as unextinguished Aboriginal title lands.
- *The Court in Delgamuukw said there is a spectrum of different ways in which the Crown may meet a duty to consult depending on the nature of the right and the seriousness of the threat to it: The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Even in the rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands. (paragraph 168) In Haida Nation, the Court said "these words apply as much to unresolved claims as to intrusions on settled claims".*
- In *Haida Nation*, the Court said: *Section 35 represents a promise of rights recognition and '[I]t is always assumed that the Crown intends to fulfill its promises'. (paragraph 20)*
- On the meaning of reconciliation, the Court in *Haida Nation* said: *the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people. As stated in Mitchell v. M.N.R., [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation . . . (quote from Haida case)*

Mr. Justice Finch of the B.C. Court of Appeal has concisely summed up in very general terms what the duty to consult involves for the Crown and First Nation parties: *The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interest and concerns, and to ensure that their representations are seriously considered and, wherever*

possible demonstrably integrated into the proposed plan of action.....There is a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions....

(quote from *Halfway River First Nation v British Columbia*)

International Human Rights Law and Government Obligations to Consult

From a First Nation perspective, treaties are premised on the notion of free, prior and informed consent and are international in character.

Beyond, treaty law, the most recent and most significant development in international human rights law for indigenous peoples is the adoption in 2007 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("The Declaration"). The Declaration recognizes many important rights of indigenous peoples including the right to self-determination.

There are many articles in the main body of the *United Nations Declaration on the Rights of Indigenous Peoples* that set out various government obligations to consult with indigenous peoples – 8, 10, 12.2, 14.3, 15.2, 17.2, 19, 20, 22.2, 23, 25, 26, 27, 28.2, 29.2, 30.2, 31.2, 32, 36.2, 38, 39, 40, 41. Several provisions explicitly state requirements that governments seek their free, prior and informed consent to certain proposed government decisions or actions

Some of the key articles of the *United Nations Declaration on the Rights of Indigenous Peoples* that relate to consultation are quoted below:

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their land or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 38

States in consultation and cooperation with indigenous people shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Living in Urban Areas - Aboriginal and Treaty Rights

Some Aboriginal and Treaty rights (like hunting rights) are tied to the traditional territory of an Aboriginal people. Other rights can be carried with an Aboriginal person when they live away from their home territory. There are sometimes different opinions about which Aboriginal and Treaty rights can be carried with a person outside of their nation's territory (which are 'portable') and which are not.

One right that can be carried with an Aboriginal person wherever they are is the right to be consulted when a Government (federal or provincial) is thinking about taking a decision that can affect one's Aboriginal or Treaty rights.

Governments must correctly identify which Aboriginal peoples are affected by a proposed decision including Aboriginal people living in the urban areas. However Governments are obliged only to make reasonable efforts in designing consultation processes to ensure these reach as many of the Aboriginal people affected as possible. This paper encourages Aboriginal people to think about and say what the Federal, Provincial and Aboriginal Governments should do to ensure urban Aboriginal people can participate in Government consultation activities about issues affecting Aboriginal and Treaty rights and other subjects like programs and services.

Government Duties to Protect Aboriginal Rights by Involving Them in Decisions

The Aboriginal and Treaty rights of Aboriginal peoples are protected by the highest law of the land (the Constitution) and by international law. This means that Governments (federal and provincial) have legal duties to respect and protect the rights of Aboriginal peoples.

There are several steps the Government must take to properly discuss with Aboriginal peoples how to protect Aboriginal and Treaty Rights:

- **Notify** the Aboriginal people affected about the decision being considered that might affect rights
- **Inform** Aboriginal people and answer questions about the proposed project or decision
- **Include** Aboriginal people in the design of the consultation process

- **Fund** Aboriginal participation in the consultation process
- **Allow time** for Aboriginal people to study the issue and prepare a response
- **Receive** the information and views of Aboriginal people about how the government should decide the matter in a way that protects Aboriginal and treaty rights
- **Treat Aboriginal views and rights seriously** in deciding an issue and this sometimes means seeking consensus or consent.

Above all, the Government must listen to Aboriginal peoples and correctly identify which specific Aboriginal or Treaty rights may be affected by a proposed government decision and make any adjustments necessary to “accommodate” these rights.

Under the Constitution of Canada, this government obligation to Aboriginal peoples is called “the duty to consult and accommodate.”

In several important court decisions, judges have described when this duty exists and what the Government must do to meet this duty when it arises. The first court decision mentioning the Government’s duty to consult Aboriginal peoples was the 1982 *Sparrow* decision. Since then, there have been many others. Two of the most important legal cases about the Government’s duty to consult were decided in 2004 by the Supreme Court of Canada - *Haida Nation* and *Taku River First Nation*.

Government’s Duty to Consult & Accommodate Aboriginal & Treaty Rights

The **Duty to Consult** is a legal obligation of the Crown (Government) to notify Aboriginal people and to listen to, and seriously consider the views of Aboriginal peoples before making a decision that could affect Aboriginal or Treaty rights.

A **Duty to Accommodate Aboriginal and Treaty Rights** exists when the law says the government is obliged to change its plans based on what it hears from Aboriginal peoples in a consultation process.

There are many types of government decisions that can have negative effects on Aboriginal and Treaty rights. Governments also must seek out the opinion of Aboriginal people, and listen to them, Aboriginal peoples about what they think their rights are, and what needs to be done to protect those rights before a decision is made that might negatively affect those rights.

Depending on the circumstances, the government can be legally obliged to act on what Aboriginal peoples have said by changing its original plans. In some situations, the consent of the Aboriginal peoples affected must be obtained for the proposed government decision or action.

The courts have said that Aboriginal peoples cannot frustrate government efforts to consult by refusing to participate. If this happens, then the Aboriginal people refusing to participate cannot complain afterwards that a decision was taken that did not take into account their views about their rights.

A two-way flow of information is needed for a successful consultation process aimed at protecting Aboriginal and Treaty rights. The Government must provide all the relevant information about the proposed decision to the Aboriginal people in a timely manner. The Government must allow provide enough time for the Aboriginal people to discuss the matter in their own decision-making processes and to prepare a response. An Aboriginal response to a Government invitation to consult about potential impacts on Aboriginal and Treaty rights might include information about:

- What type of rights (fishing, hunting, spiritual, cultural) would be affected by the proposed decision
- Where the rights are located (in what region of the territory are the rights exercised)
- What changes to Government plans would minimize or eliminate potential negative impacts on rights
- Whether the negotiation of an agreement with a developer on benefits to Aboriginal people would assist in ensuring Aboriginal people benefit from development consistent with their rights.

The Courts have said that the Government cannot pass its consultation obligations to other organizations like a developer or a national or regional Aboriginal organization. However, the Government can use developers or Aboriginal organizations to assist carrying out consultation. At the end of a consultation process however, the Government always remains responsible for ensuring that meaningful consultation with all the Aboriginal peoples affected has taken place and that rights have been protected in accordance with the law.

Sometimes Governments pass laws giving themselves specific legal duties to consult with Aboriginal peoples. The federal *Species At Risk Act* is an example. This Act protects animals that are threatened with extinction. Under this Act the federal government has created bodies and committees for Aboriginal representatives to provide advice to the government about which animals need protection.

An international human rights document called the *United Nations Declaration on the Rights of Indigenous Peoples* requires governments in many situations to get the “free, prior and informed consent” of Aboriginal peoples before making decisions that affect indigenous peoples.

Government decisions about lands and resources

Everyday federal and provincial governments make decisions about approving development projects like mines or forestry. First Nations are typically the people most often directly affected by government decisions that allowing business interests to exploit natural resources on Crown lands (lands that are not privately owned). First Nations have a unique set of rights and perspectives to bring to such decisions. The Constitution of Canada allows First Nations to demand a share of decision-making power about development projects, to share in the benefits of development projects and to participate in decisions about how to limit negative impacts of development on the land and environment.

Federal laws aimed at Aboriginal people

Only the federal government can make laws, like the *Indian Act*, aimed specifically at First Nations people. There are other federal laws that specifically apply only to First Nations people like the *First Nations Land Management Act*.

The federal government wants to pass more laws affecting First Nations rights. There is a draft law before the federal Parliament that would describe the rights of spouses on reserves to the family home when a marriage or common law relationship breaks down.

Whenever the federal government is considering legislation that would apply only to Aboriginal people, Aboriginal peoples say that they must be consulted before a law is passed. Urban Aboriginal people must be included in consultation processes about federal legislation applying to Aboriginal people.

Consultation and Policies, Programs and Services aimed at Aboriginal Peoples

Even where there is no legal duty requiring the Government to consult, there are many issues where the Government should talk with Aboriginal peoples anyway before making a decision.

Many Government programs and services and many social issues affect the quality of life for urban Aboriginal people. Governments cannot make informed decisions about programs and services without discussing these issues with urban Aboriginal people and seriously listening to their views.

Friendship Centres are actively involved in delivering many programs and services to urban Aboriginal people and understand the needs and the issues affecting people living in the city. The knowledge and the experience of Friendship Centres in reaching out to urban Aboriginal people, distributing information and gathering views is an important resource that all governments - federal, provincial/territorial and Aboriginal - could use in developing successful consultation processes.

Federal Government is asking: "How do you want to be consulted?"

There are a growing number of important court decisions on the Government's duty to consult with Aboriginal peoples. This has caused several provincial and territorial governments to make policies describing how they have organized themselves to ensure their duties to consult and accommodate are met properly (like British Columbia, Saskatchewan, and Alberta). Some governments have started writing a consultation policy but haven't finished yet (like Ontario and Manitoba).

The federal government said it began discussing with Aboriginal peoples how it should develop a consultation policy in 2004 after the *Haida Nation* and *Taku River First Nation* decisions. However, there is not yet a policy adopted by Canada on this subject. In December 2007, the federal government announced various activities to develop a public policy and set of practices to guide federal officials in meeting the federal government's duties to consult. The federal government is now discussing what a federal policy on the duty to consult and accommodate should say. In February 2008, as part of this process, the federal government released draft *Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult and Accommodate*.

The federal government has invited Aboriginal peoples to discuss consultation issues again. The federal government now is developing a 'policy' (its own rules and procedures) for consulting with Aboriginal people. Before finishing its work the federal government is asking Aboriginal People themselves, "How do you want to be consulted?"

Government Must Include Urban Aboriginal People in Consultation Activities

Urban Aboriginal people have a right to be included in discussions about their Aboriginal and Treaty rights and other rights they have as Aboriginal people that can be affected by Government decisions. The numbers of Aboriginal people living in urban areas continues to increase. In 2006, 54% of Aboriginal people lived in an urban centre, an increase from 50% in 1996. A large proportion of this population is youth who must be engaged in decisions about their future.

Breaking this number down, 59% of urban Aboriginal population in 2006 lived in a metropolitan area (a large city), compared with 80% of non-Aboriginal people. The remaining 41% of the urban Aboriginal population lived in smaller urban centres. Aboriginal peoples also tend to represent a larger proportion of the total population in these smaller urban centres compared to large cities.

It can be challenging sometimes for federal, provincial, and even Aboriginal governments, to reach urban Aboriginal people on important issues. Aboriginal organizations can assist in getting information flowing between Governments and Aboriginal people about decisions that may affect the rights of Aboriginal peoples. Friendship Centres can play a role in assisting information flow between Governments and urban Aboriginal peoples while respecting the different consultation responsibilities of federal, provincial/territorial and Aboriginal governments.

The fact that members of an Aboriginal people affected by a consultation are living in urban areas does not relieve the Government of its obligation to carry out a meaningful consultation process that includes urban Aboriginal people. This may mean that urban Aboriginal service partners like the Friendship Centres need to be involved in order to facilitate consultation processes by facilitating communications and the flow of information.

Principles for including Urban Aboriginal Peoples in Consultations and Decision-making

1. Urban Aboriginal people continue to have interests in their traditional territory even when they are not living on reserves or in the territory of their people. The Supreme Court of Canada said this in the *Corbiere* decision. (This is why the Supreme Court said band members living off reserve must have the right to vote in band council elections under the *Indian Act*.)
2. Urban Aboriginal people have a right to be included in discussions about their Aboriginal and Treaty rights and in discussions about other rights and interests they have as Aboriginal people that can be affected by Government decisions.
3. Government consultation policies and practices must recognize the need to reach Aboriginal people, regardless of whether they live in urban centres, reserves or other locations.
4. Urban youth have a right to be included in decisions about their future. Consultation processes should always include plans on the best means to include urban youth. The needs of urban Aboriginal women and Elders must also be considered in developing consultation plans.
5. Everyday federal and provincial governments make decisions about approving development projects that use natural resources (like mines or forestry). Urban Aboriginal people are entitled to be part of the decision-making process about development in their home territories, to share in the benefits of development projects and to participate in decisions about how to limit negative impacts of development on the land and environment.
6. Federal, provincial/territorial governments and Aboriginal governments must work together to ensure that the growing population of urban Aboriginal people, especially youth, is included in consultations on development, legislation, policies, programs and services. The NAFC and its member organizations can play an important role in ensuring that urban Aboriginal people are included in decision-making of all kinds.
7. The NAFC should be recognized as a valuable partner, with the capacity and willingness to work with all Governments to develop ways to include urban Aboriginal people in consultation processes.

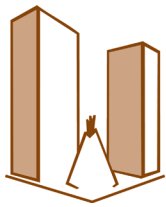
Next Steps

All governments, federal, provincial and Aboriginal are still in the process of developing their consultation and accommodation laws, policies, rules or procedures. Aboriginal people living in urban areas should take their own steps to voice their views and opinions to all governments about how they want to be included in consultation and accommodation activity.

The Friendship Centre movement, as a whole, should also collect the views of urban Aboriginal people to address questions and issues about how, when and where urban Aboriginal people should be included in consultation and accommodation activity by all governments. The National Association of Friendship Centres will be establishing a dialogue with all governments to make them aware that urban Aboriginal people have to be included in consultation and accommodation activity and that with proper financial resources and inclusion in the various processes that Friendship Centres can play an effective and efficient facilitating role.

Three essential questions require further discussion:

1. What approval mechanisms should be put in place when seeking to accommodate the rights of urban First Nation citizens? How would approvals be sought? What percentage of all the total membership be needed to agree to proposed accommodation?
2. What other rights might be open for accommodation? To date most thinking on this issue has been focused on resource issues. However, if the source the right being violated is found in Section 35, then many other potential areas exist for deliberation.
3. Could urban Aboriginal communities be right bearing communities distinct from First Nation or Metis communities? What unique rights exist, and how could they be accommodated?



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