

# 加拿大原居民法 **Aboriginal Law in Canada**

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# Legal Framework - 法律框架

- The Constitution of Canada amended in April 1982.
- Section 35, *Constitution Act, 1982*.
  - (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
  - (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
  - (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
  - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
- 1982年4月《加拿大宪法修正案》
- 《1982年加拿大宪法》，第35条
  - (1) 承认并肯定加拿大原居民的现有的原居民和条约权力。
  - (2) 在本法中，“加拿大原居民”包括加拿大的印第安人、因纽特人和梅提斯人。
  - (3) 在此，进一步明确说明第一条“条约权”包括的权力为通过土地要求条约和以此获得的现有权力。
  - (4) 无论本法有任何其它规定，在此保障男女平等享有第（一）条中所指的原居民和条约权。

# Legal Framework - 法律框架

## Aboriginal Rights

- Right to exercise traditional activities, e.g. fishing, hunting, trapping, gathering
- Food, ceremonial or commercial purposes
- Not necessarily tied to a particular parcel of land
- Aboriginal rights are not absolute: they may be infringed
- Crown must justify infringements – two part justification test:
  - 1) infringement must be consistent with special relationship between Crown and aboriginal peoples
  - 2) infringement must be in furtherance of a compelling and substantial legislative objective (e.g. development of forestry, mining, hydroelectric power, the building of infrastructure)

## 原居民权

- 有权从事传统习俗的权力,例如捕鱼,狩猎权
- 进行以礼俗或商业为目的的食物采集活动
- 居住点并非限于某个特定的地块
- 原居民权并非是绝对的: 这些权力有可能受到侵犯
- 针对原居民权力的侵犯, 官方必须从两个方面提供理由:
  - 1) 侵权行为必须符合官方同原居民之间的特殊关系
  - 2) 该侵权行为必须有助于到达令人无法拒绝且具有实质法律意义的目的(如, 发展林业, 矿业, 兴建水电, 基础设施)。

# Legal Framework - 法律框架

## Aboriginal Title

- Subcategory of aboriginal rights - right to the land itself
- Unique land interest - held communally and inalienable (except to the Crown)
- Lands must have been occupied at the time of European occupation
- Particularly relevant in British Columbia

## 原居民所有权

- 原居民权力分类 - 土地所有权
- 独特的土地所有权：族群共有不可剥夺（官方除外）。
- 这些土地在欧洲人进驻时为原居民所占有。
- 这点对不列颠哥伦比亚省优有关联

# Legal Framework 法律框架

## Treaty Rights

- Rights set out in agreements between the Crown and aboriginal peoples
  - Historic treaties – 1700's to early 1900's
  - Modern treaties and land claims agreements – 1970's to present

## 条约权

- 官方同原居民在协定中规定的权力
  - 历史条约- 18世纪到20世纪期间制定的条约
  - 现代条约和土地要求协定 – 鉴定于20世纪70年代至今之间

## Five Supreme Court of Canada Decisions – Duty to Consult 加拿大最高法院关于咨询责任的五宗判决

- *Haida Nation v. British Columbia (Minister of Forests)* – 2004;  
– 2004年，海达民族诉不列颠哥伦比亚省（林业部长）一案
- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* – 2004;  
– 2004年，第一民族Taku River Tlingit 诉不列颠哥伦比亚省（项目评估主任）一案
- *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* – 2005;  
– 2005年，第一民族 Mikisew Cree 诉加拿大（加拿大遗产部长）一案
- *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* – 2010;  
– 2010年，力拓加铝公司诉Carrier Sekani部落理事会一案
- *Beckman v. Little Salmon/Carmacks First Nation* – 2010;  
– 2010年，贝克曼诉利特Little Salmon / Carmacks 第一民族 一案

# Crown's Duty to Consult Aboriginal Peoples

## 官方咨询原居民的责任

- Crown's duty to consult – duty not owed by third parties
- Crown has a duty to consult and, where appropriate, accommodate aboriginal peoples where the interests of aboriginal peoples may be affected by a Crown action or decision
- Proven rights are not required to trigger the duty
- “Interest” is a possible aboriginal right supported by evidence
- Crown also bound to balance broader societal interests with those of aboriginal peoples
- There is no aboriginal veto
- Crown may not always meet aboriginal expectations
- 该责任不为第三方所有
- 当原居民的权益受到官方的决定和行为的影响时，官方有责任咨询原居民，并在合适的情况下，兼顾他们的权益
- 官方在行使经证实拥有的权力时无需咨询
- 在有证据支持的情况下，“产权”可能属于原居民权
- 官方有责任平衡社会大众的利益和原居民利益
- 不存在原居民的否决权
- 官方无需总是满足原居民的期望

# Crown's Duty to Consult Aboriginal Peoples

## 官方咨询原居民的责任

- It takes relatively little to trigger the duty to consult
- Aboriginal groups must show *direct causal relationship* between Crown conduct and potential for adverse impacts
- What will NOT give rise to duty: underlying infringement, continued breach, lack of past consultation, or potential to affect negotiating position.
- Duty to consult restricted to specific Crown proposal at issue.
- 相对而言，履行此责任不需太多的原因
- 原居民族群须表明官方的行为与潜在的有害影响之间的因果关系
- 不致履行咨询责任的状况：隐含的侵权行为，持续的违规做法，过去缺少咨询，或有可能影响谈判立场
- 限于审议中的具体官方议案的咨询责任

# Role of Aboriginal Peoples in Consultation

## 原居民在咨询中的作用

- ↪ Aboriginal peoples are required to participate in consultation process and should not thwart Crown's good faith efforts to consult. Duty to exercise "good faith" is reciprocal (see *R. v. Douglas*, 2008 BCSC 1098, para. 51)
- ↪ *Brokenhead Ojibway Nation et al. v. A.G. (Can.)*, 2009 FC 484, para. 42
- ↪ 要求原居民参与咨询过程，并对官方富有诚意的尽力咨询不予阻扰。履行“诚意”责任时，对方应以诚相待（参考 *R. v. Douglas*, 2008 BCSC 1098, para. 51 一案，第51段）
- ↪ 下面引述2009年，*Brokenhead Ojibway Nation et al. v. A.G. (Can.)*, 2009 FC 484, para. 42 一案，第42段：

“To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate. ... This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.”

“原居民社区可随时根据管理程序就它们对此类似的开发项目提出它们所关心的问题，既然如此，运用这些程序就是一种责任。当第一民族本身不以合理的途径寻求解决之道时它就不该抱怨官方没做咨询。...之所以如此是因为咨询过程是相互的，任何一方都不得以拒绝相见或参与加以阻扰。诚然，能如此的前提是所采用的管制过程即易于参与又充分，并为第一民族提供一种有意义的参与机会。”

# Accommodation at law and in practice

## 法律和实践上的内容

- Mitigation; minimized effects; or avoidance
- There is no “substantive right” of accommodation
- Courts will be focused on ensuring that whatever outcomes result from consultation that they be within a range of what is “reasonable”. There was no evidence that the Director made a “palpable error” of fact in his conclusion
- Little express reference in case law to “economic” accommodation
- Benefits agreements can mitigate the risks of potential threats of or actual litigation, direct action and negative publicity – sometimes framed as “accommodation”
- Sound consultation processes can frame the negotiations positively
- 缓和；将作用缩减到最低，或回避；
- 缓和并没有“实质权”
- 法庭将把重点置于保证咨询所得出的结果是在“合理”的范围之内。在其结论上，没有证据显示管理者在所给出的事实上犯有“明显的错误”
- 案例法几乎没有明示“经济”包容
- 利益协议可减少出现潜在的诉讼，直接作用和负面新闻威胁的危险 - 有时被称为“包容”
- 有效的咨询过程可构筑积极的谈判框架

# Best Practices – 最佳实践

- Funding and relationship building
  - To date, no case law requiring private third parties to fund aboriginal consultation efforts
  - If financial resources are provided to aboriginal groups to assist them in participating in project approval processes, such financial consideration should be expressly acknowledged in the decision-making process/agreement and not subject to confidentiality provisions
  - Benefits of offering or providing funding include limiting the ability of aboriginal groups to claim they did not have adequate resources to participate reasonably on the decision-making process
  - Relationships and legal requirements – focusing solely on relationships without covering the legal requirements of consultation can leave a project vulnerable (both in terms of the decision-maker but also in terms of negotiating with aboriginal groups)
- 资金提供和关系的建立
  - 至今，案例法上没有要求私人第三方为对原居民所进行的咨询提供资金
  - 如有为原居民部族提供资金以帮助他们参与项目批准过程，该资金投入在决策和协助资金签订过程应予以明确，而且不受保密规定的制约
  - 提出或提供资金的益处包括限制了原居民部族声言不具备足够的资源合理地参与决策过程的能力
  - 关系与法律要求 – 只注重建立关系而忽略了进行咨询的法律要求会使项目益于受损（不仅是就决策而言，而且在同原居民的谈判方面也是如此）

# Role of Proponents in Consultation

## 咨询中提议方的作用

- Delegation of “procedural” aspects of consultation
- Express delegation not required based on existing case law
- Clearly set out expectations for proponents and aboriginal groups
- Take guidance from federal and provincial decision makers
- Proactive, sophisticated and coordinated sophisticated approach recommended
- Statutory and regulatory obligations to consult can also be imposed on proponents
- 咨询“程序”方面的代表
- 基于现行案例法，不需要有明确的代表
- 对于提议方和原居民族群有明确的要求
- 服从联邦和省决策人的指导
- 建议采取主动，复杂和相同复杂的方式
- 咨询的法律和规定责任也可施加于提议方

# LNG Issues - 液化天然气问题

- Pipelines, ports, water crossings, access roads, transmission lines, etc. likely trigger the Crown's duty to consult
- British Columbia – likely issues focused on claims of aboriginal rights and title
- Alberta – likely issues focused on treaty rights
- Agreements have been concluded with a number of First Nations regarding LNG facilities in Kitimat, and on Vancouver Island, etc.
- 管道，港口，水路关口，通道，传送线路等很可能导致官方履行咨询责任的义务咨询
- 不列颠哥伦比亚省 – 可能出现的问题集中于原居民权和所有权的权力要求
- 阿尔伯达省 - 可能出现的问题集中于条约权
- 对有关在基蒂马特(Kitimat)和温哥华岛等地的液化天然气设施问题来说，已经完成了同几个第一民族群的协议签订

# Key Issues - 关键问题

- Consultation with aboriginal peoples is a significant component for LNG and other projects in Canada;
- While the law continues to evolve, there is a legal certainty in Canada in this area;
- Projects are being developed – relationships and agreements with aboriginal peoples are becoming an important and valuable tool for industry to ensure project certainty and to manage and mitigate project related risk
- 对于在加拿大进行液化天然气和其它项目而言，同原居民的协商是一个重要组成部分
- 尽管法律在不断的变化，但加拿大在该领域的法律则具有确定性
- 目前，正在开发的项目 – 与对于保障项目的确定性和管理和减少与项目相关的风险而言，同原居民的关系和协议正在成为项目开发方的重要且有价值的工具

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Tom Isaac is a partner in the Vancouver office of McCarthy Tétrault and National Practice Group Leader of the firm's Aboriginal Law Group. He advises industry and government clients across Canada on aboriginal, energy, natural resource and environmental assessment matters and regularly acts as a negotiator for industry and governments dealing with aboriginal groups. He has appeared before the Supreme Court of Canada, British Columbia Court of Appeal and Supreme Court, Northwest Territories Supreme Court and British Columbia Environmental Appeal Board dealing with aboriginal legal matters.

He was a Chief Treaty Negotiator for the Province of British Columbia and prior to that was Assistant Deputy Minister for the Government of the Northwest Territories responsible for establishing Nunavut. He also served in a senior capacity with the Government of Saskatchewan.

肖盟是麦启泰律师事务所温哥华分所的合伙人，并任我们全国原居民法业务部的负责人。他的执业领域主要着重于原居民法，能源法，自然资源和环保评估法律范围。就原居民法律领域范围内，他经常为其行业和政府部门的客户提供法律服务。他为众多客户在加拿大最高法院、不列颠哥伦比亚省上诉法庭、不列颠哥伦比亚省级最高法庭、西北地区最高法庭院上诉委员会和不列颠哥伦比亚省环境上诉委员会出庭辩护。

他曾前任加拿大不列颠哥伦比亚省政府首席条约交涉人，在此之前，他曾任西北地区政府建立努勒维特地区担任助理副部长。肖先生还曾在加拿大萨斯喀彻温省政府担任高级职位。

# Tom Isaac – 肖盟

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He is the author of *Aboriginal Law: Commentary, Cases and Materials* (3 editions, 4<sup>th</sup> ed. forthcoming), and *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond*, along with six other books and numerous articles on aboriginal legal matters. Mr. Isaac's published work on aboriginal law has been cited with approval by courts across Canada, including the Supreme Court of Canada and the Federal Court of Appeal.

Mr. Isaac appears in the 2011 *Canadian Legal Lexpert Directory* as a leading practitioner in aboriginal law. He is also recognized in the 2011 edition of *The Best Lawyers in Canada* in the area of aboriginal law. Mr. Isaac is a member of the law societies of British Columbia, Alberta, the Northwest Territories, Nunavut and Yukon (formerly a member of the Law Society of New Brunswick).

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肖先生编写了《原居民法律：述评和论坛，案例和资料》(第三版，第四版，即将出版)一书和《加拿大历史条约的条约权力及位于沿海 诸省的土著居民的条约权力：马歇尔决策与超越》一书，以及其它六卷书籍、通讯杂志的文章和学术论坛作品。肖先生所发表的这些作品和案例分析，均列举在全加拿大各个法庭案例法中并获准引用，包括加拿大最高级法庭和联邦上诉法庭。

肖先生在《2011年版加拿大最佳律师》指南中称他为加拿大最佳原居民律师。同时，他还以最佳土著居民律师名誉列为《2011年版加拿大律师精英名录》指南中。肖先生是加拿大不列颠哥伦比亚省律师公会和阿尔伯达省律师公会成员，他还是西北地区、努纳武特地区和育空地区律师公会会员(曾前任新不伦瑞克省律师公会会员)。

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  - 在过去的五年里，麦启泰律师事务所曾为加拿大100家最大企业中的83家企业和加拿大头20家外商掌控的企业中的17家企业提供了法律服务。
  - 七个办事处：我们除了在加拿大的各个主要商业地区设有办事处以外，同时，也在英国伦敦设有办事处。
  - 在《2011年版环球律师事务所》评比名录中，麦启泰律师事务所比任何其它律师事务所的律师名录都多，在《加拿大最佳律师》指南中，我们的律师也以高分夺魁。
  - 麦启泰律师事务所除了为客户提供综合性的法律服务，同时还为商业法，诉讼法，劳工和就业法，税务法和房地产及计划法等五项主要业务领域提供法律服务。

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