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# DEVELOPMENTS IN ABORIGINAL AND INDIGENOUS LAW 2020

Co-Chaired by

**Karey Brooks**  
JFK Law Corporation

**Robert J. M. Janes, Q.C.**  
JFK Law Corporation

October 27<sup>th</sup> & 28<sup>th</sup>, 2020 • Attend via Live Webinar



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## CO-CHAIRS



**Karey Brooks**, Principal, JFK Law Corporation, Vancouver, BC. Karey practises civil litigation with a focus on Aboriginal, constitutional and administrative law. She has appeared at all levels of court, including in British Columbia, Alberta and Ontario. Karey primarily acts for First Nations and First

Nations organizations in court and negotiations with government and industry on matters relating to Aboriginal rights and title, consultation, regulatory matters (including environmental assessments) and general governance matters, including status and membership issues. Karey also has experience in other public law related work, including with respect to Charter rights litigation and public inquiries. Karey was co-counsel to the Aseniwuche Winewak Nation in *Daniels v. Canada*. In 2016, Karey was awarded the UBC Law School Outstanding Young Alumnus Award and in 2015, she was recognized as one of *Canada's Legal Rising Stars* by Lexpert.



**Robert J. M. Janes, Q.C.**, Principal, JFK Law Corporation, Victoria, BC. Mr. Janes is a litigator with extensive experience in Aboriginal law. Recognized by Lexpert for many years as a leading lawyer in Aboriginal law, he has appeared at all levels of court in British Columbia, Ontario and Alberta acting for Aboriginal

people. He has also appeared many times at the Supreme Court of Canada, the Federal Court and the Federal Court of Appeals. In addition to his litigation work, Mr. Janes advises nations involved in the BC Treaty Process.

## WHO SHOULD ATTEND?

- Lawyers practising in the areas of Aboriginal law, administrative law, and business law
- Aboriginal leaders, officials, councillors, elders, negotiators, administrators, and advisors
- Owners, managers and representatives of resource development companies and companies operating on Crown land
- Federal, provincial and municipal government officials and policy advisors
- Consultants, accountants, financial planners, and others assisting First Nations with financial matters and business operations

## DEVELOPMENTS IN ABORIGINAL AND INDIGENOUS LAW 2020

The state of Aboriginal law in Canada is constantly evolving, and for those working in this dynamic area, including those who advise First Nations or governments, it is essential to remain current on the latest developments. Staying abreast of the changing landscape is fundamental for advisors to practise effectively, and for First Nations to exercise their rights to their greatest benefit. This program assembles leaders in the field of Aboriginal law to provide delegates with in-depth information and practical insights, to ensure that they are prepared to effectively address current challenges and to take proactive steps to avoid common pitfalls. For those who wish to remain current and informed, this program should not be missed.

### KEY AREAS ADDRESSED:

- Indigenous law in the courts
- Injunctions, advanced costs, use of evidence and other litigation strategies
- Recent caselaw on major projects, including the Trans Mountain Expansion
- The BC treaty process
- Conflicting and overlapping s.35 claims
- Indigenous initiatives at the Federal Court of Canada
- The duty to consult
- Treaty annuities
- The standard of review

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## FACULTY



**Kate Blomfield**, Partner, Ratcliff & Company LLP, Vancouver, BC. Kate has been acting for First Nations since 2003 when she joined Ratcliff & Company LLP after clerking with the Nunavut Court of Justice. Her practice focuses on litigation, negotiations and governance matters for First Nations clients in BC and the Yukon. Kate has appeared before every level of court in Canada, as well as the Specific Claims Tribunal. Kate also represents First Nations in multi-party negotiations and assists First Nations with internal governance matters. Kate engages with communities; structures and undertakes negotiations; and drafts agreements, laws and policies for First Nations relating to lands, resources, and governance. Kate is called to the Bars of British Columbia and Yukon, and in 2009 completed her LL.M in Law & Governance at Queen's University, Belfast, on a Commonwealth Scholarship.



**Dani Bryant**, Partner, Fasken Martineau DuMoulin LLP, Vancouver, BC. Dani Bryant is a litigation and dispute resolution lawyer primarily focusing on Indigenous, environmental and regulatory law. She is also a member of the firm's Global Energy and Mining Groups advising clients on natural resource development and corporate social responsibility issues. As part of a team providing strategic advice on the development of major projects throughout British Columbia and the North, Dani advises clients regarding project permits and approvals, environmental assessments and compliance with environmental laws and regulations. Dani represents clients on judicial review matters related to permitting, environmental assessment, and Indigenous consultation in the British Columbia Supreme Court, British Columbia Court of Appeal and Federal Court. She also represents clients in injunction proceedings.



**Rochelle Collette**, Associate, Blake Cassels & Graydon LLP, Vancouver, BC. Rochelle is a litigation and dispute resolution lawyer with a focus on environmental and Indigenous law matters, and complex commercial litigation. Rochelle provides strategic advice to clients in the development of natural resources projects, advising on project permits and approvals, compliance with regulatory requirements, and environmental assessments. She assists clients in building relationships, resolving disputes, and negotiating arrangements and agreements with Indigenous communities. Rochelle's experience includes work in a wide range of industries, including the energy, mining, manufacturing, and aquaculture sectors.



**Robert C. Freedman**, Principal, JFK Law Corporation, Vancouver, BC. Mr. Freedman works with Indigenous groups, with a focus on advising clients in complex negotiations with a particular focus on IBA negotiations and treaty/land claim negotiations. In addition, his practice focuses on advising First Nations and First Nation organizations on a variety of matters including environmental assessments, treaty and Aboriginal rights, oil and gas related matters, hydro-electric matters, and water rights. He has particular expertise assisting First Nations in their consultations with federal and provincial governments and industry, and in negotiating consultation/accommodation agreements. Mr. Freedman has appeared at all levels of court in Canada, including the Supreme Court of Canada. Since 2008, he has been recognized by *Expert* as a leading lawyer in Canada in the field of Aboriginal law.



**Maegen Giltrow**, Partner, Ratcliff & Company LLP, North Vancouver, BC. Maegen works in litigation, negotiation and law & policy development. She is lead counsel for the plaintiffs in *Blueberry River First Nations v. HMTQ (BC)*, currently before the BC Supreme Court, the first case to go to trial alleging breach of treaty rights arising from the cumulative impacts of development. She clerked at the BC Court of Appeal in 2003 for Justices Rowles and Southin, and has appeared as counsel and co-counsel before every level of court in Canada.



**Kate Gower**, Lawyer, Gower Modern Law, Surrey, BC. Kate works in all areas of Aboriginal Law, specializing in Aboriginal consultation and litigation. She was part of the team that represented West Moberly First Nation and other Treaty No. 8 First Nations in their successful court challenge that gave the province of British Columbia a new Western Boundary for Treaty No. 8. She has represented First Nations, Métis and Indigenous groups in Aboriginal and Treaty rights litigation, consultation, governance and employment matters. Kate is the lawyer who successfully built and ran Victoria B.C.'s first Electronic Trial (E-Trial).



**Mary Macaulay**, Partner, Mandell Pinder LLP, Vancouver, BC. For more than 20 years Mary has acted as counsel for Indigenous peoples in Aboriginal title and rights related litigation, as well as in commercial and personal injury cases. She has appeared in BC and Ontario Supreme Courts, Federal Court and before the Courts of Appeal. Throughout her career Mary has taken part in the practical and academic development of the law on Aboriginal litigation issues, and is the author of the litigation handbook *Aboriginal & Treaty Rights Practice* (Carswell, published 2000). She has acted both as chair and presenter at legal conferences, as well as serving as co-chair of the Canadian Bar Association- Ontario, Aboriginal Law Section. For several years she was an instructor for CLE's Annual Advocacy Skills Workshop. In addition to arts and law degrees, she holds a Master of Laws focusing in Alternative Dispute Resolution from Osgoode Hall Law School.



**Dr. Bruce McIvor**, Lawyer and Historian, Principal, First Peoples Law Corporation, Vancouver, BC. Dr. Bruce McIvor is principal of First Peoples Law Corporation, a law firm dedicated to defending and advancing Aboriginal title, Aboriginal rights and Treaty rights. His work includes both litigation and negotiation on behalf of Indigenous Peoples across Canada. Bruce is dedicated to public education. He recently published the third edition of his collection of essays entitled *First Peoples Law: Essays in Canadian Law and Decolonization*. He is also an Adjunct Professor at the University of British Columbia's Allard School

of Law where he teaches the constitutional law of Aboriginal and Treaty rights. Bruce is a proud Métis from the Red River in Manitoba. He holds a law degree, a Ph.D. in Aboriginal and environmental history and is a Fulbright Scholar. Bruce, a member of the bar in British Columbia and Ontario, is recognized nationally and internationally as a leading practitioner of Aboriginal law in Canada.



**Roy Millen**, Partner, Blake, Cassels & Graydon LLP, Vancouver, BC. Roy carries on a diverse practice, with particular experience in Aboriginal law, commercial litigation, and international trade. In Aboriginal law, Roy advises private-sector clients across Canada on the development of energy, mining and other major projects. He negotiates commercial agreements, impact benefit agreements, consultation protocols and other arrangements with First Nations. He also assists clients in navigating the regulatory processes necessary to secure project approval and defends proponents from litigation challenges brought by Aboriginal groups and individuals.



**Kevin O'Callaghan**, Partner, Fasken Martineau DuMoulin LLP, Vancouver, BC. Kevin is leader of his firm's Indigenous Law group, and provides strategic advice on managing projects through environmental assessment and consultation with Indigenous peoples, including advice on negotiations and agreements. However, if unavoidable conflicts arise during project development, Kevin appears before courts, tribunals and arbitration panels to assist his forestry, mining, and oil and gas clients on challenges to licenses (including judicial review and title litigation) by local communities, non-governmental organizations and Indigenous communities, as well as related injunction proceedings. Kevin has appeared as counsel for industry stakeholders in a number of critical Aboriginal cases at the Supreme Court of Canada. He is recognized in the area of Aboriginal law by Chambers Canada, and was named Benchmark Canada's 2017 "Litigation Star" for Aboriginal Law in BC.



**Harley Schachter**, Partner, Duboff Edwards Haight & Schachter Law Corporation, Winnipeg, MB. Harley Schachter is one of the founding partners of the Winnipeg law firm of Duboff Edwards Haight & Schachter. His practice focuses on all types of litigation and alternate dispute resolution, including Aboriginal law, constitutional law, insurance law and civil litigation. Practising for close to 30 years, Harley appears in all levels of courts, and has significant experience in the superior courts in several provinces, including Manitoba, Ontario and British Columbia, the Federal Courts and in the Supreme Court of Canada. In addition to being legal counsel representing Aboriginal groups in a number of precedent-setting Aboriginal and Treaty rights cases and judicial review cases, Harley has negotiated numerous multi-million dollar out-of-court settlements, including a number of major Hydro settlements.



**Paul Seaman**, Partner, Gowling WLG, Vancouver, BC. A member of the firm's Indigenous and Environmental Law groups, Paul advises a variety of clients on a broad range of legal problems, with an emphasis on complex commercial, regulatory and constitutional matters. He regularly advises Indigenous communities, industry groups and government on projects and transactions where the Crown's duty to consult Indigenous Peoples is engaged, and on the negotiation of agreements between Indigenous communities, industry and government in those circumstances. He represents clients before all levels of court in Canada, including the Supreme Court of Canada, as well as before tribunals in regulatory matters. He currently acts as counsel to the Tsleil-Waututh Nation before the National Energy Board, the lead applicant that was successful before the Federal Court of Appeal in its recent decision in connection with the Trans Mountain Expansion Project. His academic articles on Indigenous business and legal issues have been published in Canada and internationally. Paul is a proud citizen of the Manitoba Métis Federation and an active member of the Métis community. He carried the torch in the 2010 Olympic torch relay on behalf of the Métis Nation of British Columbia.



**Scott A. Smith**, Partner, Gowling WLG, Vancouver, BC. Scott regularly advises Indigenous peoples and companies across Canada on Indigenous, environmental assessment, regulatory and constitutional issues for major energy and natural resource projects. Scott has extensive experience advising clients on the Crown's duty to consult and accommodate Indigenous peoples. He also negotiates and drafts agreements between Indigenous peoples and companies. He works closely with Indigenous clients to develop innovative legal strategies to help them leverage their rights and title to achieve their goals - whether to successfully oppose projects or secure direct economic benefits from them. Scott's Indigenous and environmental advocacy practice includes representing Indigenous peoples in regulatory hearings, judicial reviews and appeals of administrative decisions (such as the Crown's failure to consult Indigenous peoples), multi-party civil litigation in respect of contaminated sites, and complex tort litigation. Scott is currently representing Indigenous clients in environmental assessment and regulatory hearings for a number of proposed major oil and natural gas pipelines, including Enbridge's Line 9B Project, Kinder Morgan's Trans Mountain Expansion Project, TransCanada's Energy East Pipeline Project and natural gas pipelines in B.C.



**Mark Stevenson**, Lawyer, Mark L. Stevenson & Associates, Vancouver, BC. Mark is a Métis lawyer whose family originates from the historic Métis community of Lac St Anne, Alberta. Mark's career began in 1982 at the Privy Council in Ottawa working on Indigenous constitutional matters. He then worked as Legal Counsel for the Ontario Native Affairs Secretariat from 1987 to 1991, and as a Chief Treaty Negotiator with the Government of British Columbia from 1991 to 1998, when he entered private practice to work with First Nations in the British Columbia Treaty Process. In addition to his work in treaty negotiations, Mark has negotiated a wide variety of agreements on behalf of Indigenous People including Oil, Gas and Mineral Revenue Sharing Agreements, Pipeline Agreements, Forestry Agreements, and Impact Benefit Agreements linked with Hydro mega projects. He was also instrumental in the development of the *First Nations Financial Management Act*, the settlement legislation for the Tsawwassen Final Agreement.

# Developments in Aboriginal and Indigenous Law 2020

OCTOBER 27<sup>TH</sup>, 2020 (DAY ONE)

**9:00** Welcome and Introduction by PBLI

**9:05** Chair's Welcome and Introduction

**Robert J. M. Janes, Q.C.**  
JFK Law Corporation

**9:10** Indigenous Law in the Courts

**Robert J. M. Janes, Q.C.**  
JFK Law Corporation

- Recent cases
- Judicial approaches
- Upcoming issues

**10:00** Questions and Discussion

**10:10** Morning Break

**10:25** Recognition and Renewal in the Treaty Process

**Robert C. Freedman**  
JFK Law Corporation

**Mark Stevenson**

Mark L. Stevenson & Associates

- The BC Treaty Process's new approach to certainty
- Review and renewal of modern treaties
- Expanded approach to consultation in modern treaties
- Abandoning modification and surrender

**11:15** Questions and Discussion

**11:25** Update on the Trans Mountain Expansion Project

**Paul Seaman & Scott A. Smith**  
Gowling WLG

- Recent developments in the litigation

**12:15** Questions and Discussion

**12:25** Lunch Break

**1:30** BC's Implementation of UNDRIP

**Rochelle Collette & Roy Millen**  
Blake Cassels & Graydon LLP

- The road to implementation
- Opportunities and challenges for government, Indigenous nations and proponents

**2:10** Questions and Discussion

**2:30** Afternoon Break

**2:45** Injunctions and Indigenous Law

**Dani Bryant & Kevin O'Callaghan**  
Fasken Martineau DuMoulin LLP

- Recent successful and unsuccessful injunction applications
- When to bring an injunction
- Evidence in injunction applications

**3:35** Questions and Discussion

**3:45** Dealing with Conflicting Claims in s. 35 Litigation

**Mary Macaulay**  
Mandell Pinder LLP

- Overlapping claims and disputes between Indigenous groups
- Notice and adding proper parties

**4:35** Questions and Discussion

**4:45** Chair's Closing Remarks

**4:50** Forum Concludes for Day One

# Developments in Aboriginal and Indigenous Law 2020

OCTOBER 28<sup>TH</sup>, 2020 (DAY TWO)

## 9:00 Welcome & Reflections on Day One

**Karey Brooks**  
JFK Law Corporation

## 9:10 The Federal Court of Canada's Indigenous Law Initiatives

**Federal Court Judge**  
Federal Court of Canada

- The Practice Guidelines for Aboriginal Law Proceedings
- Indigenous initiatives and issues at the Court

## 10:00 Questions and Discussion

## 10:10 Morning Break

## 10:25 Is There a Future for the Duty to Consult?

**Dr. Bruce McIvor**  
First Peoples Law Corporation

- The duty to consult: past, present and possible future
- The duty to consult in a consent-based framework: UNDRIP, FPIC and the future of consultation and accommodation

## 11:15 Questions and Discussion

## 11:25 Applications for Advanced Costs

**Karey Brooks**  
JFK Law Corporation

- Traditional approach to costs
- When advance costs can be awarded
- Examples of awards
- When to apply for advance costs

## 12:15 Questions and Discussion

## 12:25 Lunch Break

## 1:30 Use of Evidence in Rights and Title Litigation

**Maegen Giltrow**  
Ratcliff & Company LLP

**Kate Gower**  
Gower Modern Law

- Relevance, disclosure and admissibility in infringement & justification trials
- Rules for expert reports in infringement cases
- Disturbance mapping
- Standards for historical documents
- Presenting electronic evidence in e-trials: pros and cons
- Recent examples of e-trials in Canada
- Brief introduction to e-trial and e-evidence presentation programs being used right now

## 2:20 Questions and Discussion

## 2:30 Afternoon Break

## 2:45 The Robinson Treaties Annuity Litigation

**Harley Schachter**  
Duboff Edwards Haight & Schachter Law Corporation

- An overview of the Robinson Treaties annuity litigation
- The role of the Honour of the Crown

## 3:35 Questions and Discussion

## 3:45 New Developments in the Standard of Review

**Kate Blomfield**  
Ratcliff & Company LLP

- The Supreme Court of Canada's overhaul of the standard of review in *Vavilov* and *Bell*
- Impacts on Aboriginal and Indigenous law cases

## 4:35 Questions and Discussion

## 4:45 Chair's Closing Remarks For Day Two

## 4:50 Forum Concludes

## INFORMATION

### Four Ways to Register:

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**Payment:** You may pay by VISA, MasterCard or cheque. Cheques should be made payable to the Pacific Business & Law Institute. Registration fees must be paid prior to the program.

**When and Where:** Check-in begins at 8:30 a.m. The program starts at **9:00 a.m. (PDT)**. Attend via Live Webinar: All you need is a computer with a good internet connection and external plug-in speakers or good headphones for optimal audio and volume.

**Materials:** The faculty will prepare papers and/or other materials explaining many of the points raised during this program. Please contact us at [registrations@pbli.com](mailto:registrations@pbli.com) if you are unable to attend the program and wish to purchase a set of materials.

**Your Privacy:** We will keep all information that you provide to us in strict confidence, other than to prepare a delegate list containing your name, title, firm and city for our faculty and the program delegates. We do not share our mailing lists with any non-affiliated organization.

**Cancellations:** Full refunds will be given for cancellations (less a \$60.00 administration fee) if notice is received in writing five full business days prior to the program (**October 20<sup>th</sup>, 2020**). After that time we are unable to refund registration fees. Substitutions will be permitted. We reserve the right to cancel, change or revise the date, faculty, content, availability of webinar or venue for this event.

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## Developments in Aboriginal and Indigenous Law 2020

October 27<sup>th</sup> & 28<sup>th</sup>, 2020

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