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# Consultation and Accommodation

Chaired by

**Maxime Faille**  
Gowling WLG

February 28<sup>th</sup> & March 1<sup>st</sup>, 2019 • UBC Robson Square • Vancouver, BC

*Live Webinar also available!*



## CHAIR



**Maxime Faille**, Partner, Gowling WLG, Vancouver, BC. Named Benchmark Canada's Aboriginal Law Litigator of the Year for 2016, Max Faille served until recently as national leader of the Indigenous Law Group at Gowling WLG, which was honoured by *Best Lawyers in Canada* as "Aboriginal Law Firm of the Year" for 2018-2019. Max's clients consist of Indigenous governments, businesses and entrepreneurs across Canada, as well as private sector interests and other governments seeking to work with Indigenous communities. In addition to legal representation in the courts and in negotiations, Max regularly provides advice on matters of Aboriginal and treaty rights, First Nation taxation, self-government, Aboriginal consultation and accommodation, Impact and Benefit Agreements, and Indigenous economic development. Among numerous recognitions and awards for his work in Aboriginal law, Max is recognized as a leading lawyer in Aboriginal Law in *Best Lawyers in Canada*, *Chambers Canada*, *Expert's Leading Canadian Lawyers in Energy*, and *Leading Canadian Lawyers in Global Mining*.

## CONSULTATION AND ACCOMMODATION

The duty to consult and accommodate is a cornerstone in reconciling the relationship between the Crown and Indigenous peoples. The law of consultation and accommodation remains in a state of flux, especially in light of recent advancements towards the Canadian implementation of the United Nations Declaration on the Rights of Indigenous Peoples. To effectively carry out consultation and accommodation, clarification on the expectations and obligations of all stakeholders is required. For people working directly or indirectly in this area, keeping abreast of changes and developments is essential; and a better understanding of current issues, strategies, perspectives and remedies will positively enable actions in the direction of reconciliation.

### ISSUES TO BE DISCUSSED:

- Current case law and the impact of recent decisions
- The relationship between consultation and accommodation
- The role of private industry in the consultation and accommodation process
- Addressing overlapping claims and shared territories
- How consultation and accommodation is evolving into co-management
- The Trans Mountain Expansion case study – a look at the Federal Court of Appeal decision

### WHO SHOULD ATTEND?

- Aboriginal leaders, officials, councillors and elders
- Federal, provincial and municipal officials, managers and lawyers
- Lawyers practising in the areas of Aboriginal, environmental, natural resources or constitutional law
- Project managers, executives and others working in Aboriginal governance, finance or business development
- Negotiators, mediators and consultants
- Business and land developers
- Industry executives and in-house counsel

This two-day conference will provide you with an overview and analysis of key recent developments and their practical implications, from a variety of relevant and practical perspectives. Our expert faculty will provide clarity with respect to stakeholders' duties and will discuss current issues, strategies and remedies, as well as practical examples from recent experience.

### YOUTH SPONSORSHIP PROGRAM

We are pleased to offer our successful sponsorship program for First Nation, Métis and Inuit youth to attend forums offered by Pacific Business & Law Institute. For further information about applying to attend this or other programs, please go to [www.pbli.com/aboriginal-youth-mentorship](http://www.pbli.com/aboriginal-youth-mentorship).

## FACULTY



**Karey Brooks**, Principal, JFK Law Corporation, Vancouver, BC. Karey practises civil litigation with a focus on Aboriginal, constitutional and administrative law. She has appeared in 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.



**Aaron Bruce (Kelts'-Tkinem)**, Partner, Ratcliff & Company LLP, North Vancouver, BC. Aaron is member of the Squamish Nation and is passionate about working with First Nations to balance economic development opportunities with the protection of Aboriginal rights and title interests and environmental conservation. He advises on land and resource issues, Aboriginal rights and title, matters under the *Indian Act*, First Nation governance issues, economic development opportunities, and acts as general counsel for First Nations governments. Aaron specializes in the negotiation of impact benefit agreements, accommodation agreements with the Crown, and other interim agreements concerning land and natural resources.



**Raf De Guevara**, Manager, Intergovernmental Affairs/Title and Rights, Westbank First Nation, Kelowna, BC. Raf De Guevara is a member of Westbank First Nation (WFN) and has lived in the community for more than 25 years. A former elected councilor, Raf was instrumental in negotiating a Community Forest License representing a land base of over 47,000 hectares. He was also involved in revitalizing the Aboriginal Education Agreement with the local school district which resulted in solidifying First Nations' place at the table. For a 14 year period, Westbank negotiated a Self-Government Agreement with the federal government and underwent an extensive consultation process with the community. The last three years of the process was focused on lobbying with all levels of senior government and Raf was part of the team that saw this through to completion. As Manager of Intergovernmental Affairs/Title and Rights with WFN, Raf's primary role is to implement all aspects of the Self-Government Agreement, to negotiate, strengthen and maintain relationships with government of all levels, and to respond and negotiate Third Party interests and agreements within Westbank First Nation territory.



**Sandra A. Gogal**, Partner, Miller Thomson LLP, Toronto, ON. Sandra Gogal has been nationally recognized as one of the Best Lawyers in Canada for Aboriginal and Environmental Law, as well as Lexpert Leading Lawyers for Aboriginal and Global Mining. Her practice focuses on natural resource development, primarily in the mining and hydro sectors, providing both strategic business and legal advice to clients in developing projects on treaty and aboriginal claimed lands. Sandra has negotiated many agreements with Aboriginal peoples to facilitate development, including impact and benefit agreements and partnerships between industry and aboriginal peoples across North America. She has acted as counsel for industry in litigation matters involving aboriginal and treaty rights and has successfully negotiated many settlements with First Nations in excess of \$100 million.



**Jennifer Griffith**, Lawyer, Donovan & Company, Vancouver, BC. Jennifer has been a member of Donovan & Company since 2000. She holds a Bachelors of Science degree in Aquatic Biology from Brown University and worked as an environmental consultant prior to receiving her law degree from McGill University. Jennifer was called to the bar in British Columbia in 1994. Jennifer advises her First Nation clients on various matters including consultation and accommodation issues, impact benefit agreements, government-to-government discussions, and specific claims (legal opinions and negotiations).



**Erin Hanson**, Policy Advisor, Tsleil-Waututh Nation, North Vancouver, BC. Erin works as a Policy Advisor at the Tsleil-Waututh Nation with a particular focus on issues relating to Indigenous laws, jurisdiction, rights and title. She has over ten years' experience managing consultation and accommodation processes for several Coast Salish communities. Erin recently graduated with her Masters in Anthropology at the University of British Columbia. Her research examines the impacts and implications of Crown-First Nations consultation processes, in particular how Indigenous nations assert and enact their own laws and jurisdiction over their lands, waters, and resources in response to resource development in their territories.



**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.



**F. Matthew Kirchner**, Partner, Ratcliff & Company LLP, North Vancouver, BC. Mr. Kirchner practises in the areas of Aboriginal rights, land and resource issues, rights under the *Indian Act*, specific claims, fiduciary duties and general litigation for aboriginal clients. He also practises in the areas of civil litigation, administrative law and environmental law. Mr. Kirchner has appeared before administrative tribunals, all levels of court in B.C. and the Supreme Court of

Canada, particularly on First Nations issues. He was recently counsel for the plaintiffs in *Ahousahit et al. v. Canada* where the Nuu-chah-nulth plaintiffs successfully established Aboriginal rights to harvest any species of fish from their territories and sell that fish into the commercial marketplace.



**Rosanne Kyle**, Partner, Mandell Pinder LLP, Vancouver, BC. Ms. Kyle has practised Aboriginal law for over 20 years. Her practice focuses on litigation, regulatory processes for resource development projects, consultation issues, and negotiations. She has appeared as litigation counsel in British Columbia, Alberta and Ontario courts, as well as the Supreme Court of Canada. She has also been counsel to First Nations before regulatory bodies such as the National Energy Board and environmental assessment panels. For the last several years, she has been recognized as one of the leading lawyers in the aboriginal law field in the Canadian Lexpert Directory and is also listed in Best Lawyers in Canada.



**Dr. Bruce McIvor**, Lawyer and Historian, Principal, First Peoples Law, Vancouver, BC and Toronto, ON. Bruce represents First Nations across Canada. His recent and ongoing work includes litigation involving treaty rights, the duty to consult and Aboriginal title. He also works with numerous clients across Canada to negotiate agreements based on consent and recognition of their Indigenous laws and jurisdiction. Bruce is recognized nationally and internationally as a leading practitioner of Aboriginal law in Canada (*Canadian Legal Expert Directory* and *Chambers Canada*). 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.



**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.



**Mark Smith**, General Counsel & Director of Process, BC Treaty Commission, Vancouver, BC. Mark joined the Treaty Commission in 2001. He manages the advisors and is directly responsible for process and communications initiatives. Mark provides legal, political, and strategic policy advice on a wide-range of treaty-related and Aboriginal rights issues. Mark leads complex facilitations on overlapping and shared territory discussions and is involved in dispute resolution processes. He works directly with First Nations to find Nation-led resolutions, and consults on governance-related matters. Mark assisted the Treaty Commission with its submission to the United Nations, which was endorsed in Final Report of the 15th session of the Permanent Forum on Indigenous Issues. A graduate from the University of Alberta Law School, Mark was called to Alberta Bar, and is currently a member of the Law Society in British Columbia. Mark has focused his career on Aboriginal law and First Nations issues. Mark previously was a sole-practitioner, and has practiced Aboriginal and environmental law with the firm of Blake, Cassels & Graydon LLP. He is completing a Master of Laws at the University of British Columbia focusing on First Nations legal issues.



**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.



**Jean Teillet**, IPC, Senior Counsel, Pape Salter Teillet LLP, Vancouver, BC. Jean specializes in Indigenous rights law and has long been engaged in negotiations and litigation with provincial and federal governments concerning Métis and First Nation land rights, harvesting rights, commercial harvesting and self-government. She is currently the chief negotiator for the Sto:lo Xwexwilmexw in the BC treaty process and was part of the legal team on the Tlicho Land Claims and Self-Government Agreement negotiations. Jean has served as counsel before all levels of court, including lead counsel before the Supreme Court of Canada. She was the first recipient of the Law Society of Upper Canada's Lincoln Alexander Award and, in 2011, was awarded the title "Indigenous Peoples Counsel" by the Indigenous Bar Association. In 2012, she was awarded the Queen Elizabeth II Diamond Jubilee Medal. She has been awarded two honorary doctorates: Guelph University (2014); Law Society of Upper Canada (2015). Jean is the great grand niece of Louis Riel.

# CONSULTATION AND ACCOMMODATION

FEBRUARY 28<sup>TH</sup>, 2019 (DAY ONE)

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

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

Maxime Faille  
Gowling WLG

**9:10** Recent Caselaw Developments in Consultation and Accommodation

F. Matthew Kirchner  
Ratcliff & Company LLP

- A review of recent decisions in Canadian courts

**10:10** Questions and Discussion

**10:20** Refreshment Adjournment

**10:35** *Tsleil-Waututh/The Trans Mountain Expansion FCA Decision*

Paul Seaman & Scott A. Smith  
Gowling WLG

- "Meaningful consultation" re-emphasized
- What comes next?

**11:25** Questions and Discussion

**11:35** Consultation on Legislation: The SCC decision in *Mikisew Cree*

Karey Brooks  
JFK Law Corporation

- What are the events that gave rise to the case?
- What were the positions of the parties?
- Why did the Court find no duty to consult during the law making process?
- How did the Court split in its decision?
- Does the honour of the Crown impose obligations during the law making process?
- What remedies are available for a breach of the duty to consult?
- What are the practical implications of the decision?

**12:20** Questions and Discussion

**12:30** Networking Lunch

**1:30** The Role of Proponents in Consultation

Sandra A. Gogal  
Miller Thomson LLP

- *Eabametoong*: how proponents' statements shape consultation process
- *Taseko*: the duty of fairness to proponents

**2:20** Questions and Discussion

**2:30** Refreshment Adjournment

**2:45** Accommodation in Practice

Aaron Bruce  
Ratcliff & Company LLP

- Economic accommodation: payment, equity, employment, contracting
- Beyond financial benefits: other types of accommodation

**3:35** Questions and Discussion

**3:45** Building Indigenous Capacity for Consultation

Raf De Guevara  
Westbank First Nation

Erin Hanson  
Tseil-Waututh Nation

- Systems and protocols for handling referrals
- Deciding when and how to engage

**4:35** Questions and Discussion

**4:45** Chair's Closing Remarks for Day One

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

# CONSULTATION AND ACCOMMODATION

MARCH 1<sup>ST</sup>, 2019 (DAY TWO)

## 9:00 Welcome & Reflections on Day One

**Maxime Faille**  
Gowling WLG

## 12:25 Questions and Discussion

## 12:35 Networking Lunch

## 9:10 Strategic Infringement Claims

**Dr. Bruce McIvor**  
First Peoples Law

- When consultation fails

## 10:10 Questions and Discussion

## 10:20 Refreshment Adjournment

## 10:35 Intra-Indigenous Issues

**Mark Smith**  
BC Treaty Commission  
**Jean Teillet**  
Pape Salter Teillet LLP

- Overlapping claims
- Indigenous support for large-scale projects: operationalizing “free, prior and informed consent”
- First Nations and Métis interests

## 11:25 Questions and Discussion

## 11:35 Consultation and the Regulatory Approval Process

**Jennifer Griffith**  
Donovan & Company  
**Rosanne Kyle**  
Mandell Pinder LLP

- The role of regulatory bodies in the consultation process
- How the SCC decisions in *Clyde River* and *Chippewas* have been applied in the regulatory context and recent court decisions

## 1:35 Consultation on Cumulative Effects

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

- Can consultation on a single project account for cumulative effects?
- What is the test for infringement and what is its relationship to cumulative effects?
- *Clyde River* and the importance of cumulative effects
- *Beaver Lake v Alberta, Carry the Kettle v Saskatchewan, Yahey v British Columbia* and the “tipping point” of development
- Better ways to address cumulative effects

## 2:25 Questions and Discussion

## 2:35 Refreshment Adjournment

## 2:50 Beyond Consultation: Towards Co-management

**Maxime Faille**  
Gowling WLG

- How proponents and Indigenous groups can move beyond consultation
- Effective examples of co-management
- Implementing UNDRIP and “free, prior and informed consent”

## 3:40 Questions and Discussion

## 3:50 Chair’s Closing Remarks

## 3:55 Forum Concludes

## INFORMATION

### Four Ways to Register:

1. Telephone us: 604-730-2500 or toll free 877-730-2555
2. Fax us: 604-730-5085 or toll free 866-730-5085
3. Mail your registration form with payment
4. Register at [www.pbli.com/1485](http://www.pbli.com/1485)

**Registration:** The registration fee is \$1,195.00 plus GST of \$59.75 totalling **\$1254.75** covering your attendance at the program, materials, a light breakfast, a networking lunch and refreshments on each day. In-person attendees have the option to receive their materials electronically in advance of the program, or in a hard copy binder on the day of the program. If an in-person attendee requests both hard copy and electronic materials, an additional \$50 charge will apply with applicable taxes. Webinar attendees will always receive their materials electronically.

**Early Bird Discount:** Register by January 28<sup>th</sup>, 2019 and receive a \$200 discount on registration fee (\$995.00 plus GST).

**Group Discount:** Register four persons from the same organization at the same time and you are entitled to a complimentary fifth registration. Early Bird and Group Discount cannot be combined.

**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.** UBC Robson Square is located at the basement level of 800 Robson Street in Vancouver, BC. Please visit <http://www.robsonsquare.ubc.ca/find-us/> for directions.

**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 (**February 21<sup>st</sup>, 2019**). 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.

**Course Accreditation:** Attendance at this course can be listed for up to **11.5 hours** of continuing professional development with the Law Societies of BC and Ontario. For Alberta lawyers, consider including this course as a CPD learning activity in your mandatory annual Continuing Professional Development Plan as required by the Law Society of Alberta.

## Registration Form

### Pacific Business & Law Institute

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## Consultation and Accommodation

February 28<sup>th</sup> & March 1<sup>st</sup>, 2019  
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