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# DEVELOPMENTS IN ABORIGINAL AND INDIGENOUS LAW 2022

Co-Chaired by

**Karey Brooks, Q.C.**  
JFK Law Corporation

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

October 13<sup>th</sup> & 14<sup>th</sup>, 2022 • UBC Robson Square (800 Robson Street) • Vancouver, BC  
*Live Webinar also available!*



## CO-CHAIRS



**Karey Brooks, Q.C.**, 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.



**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 2022

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 practice 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 representation in positions of influence and the recognition of Indigenous laws
- New developments in the caselaw on the Honour of the Crown
- Private party liability
- An update from the BC Ministry of the Attorney General
- The latest on advanced costs and equitable damages
- Overlap issues in title claims
- Evidence and expert reports in rights and titles claims
- *DRIPA's* impact on litigation
- First Nations businesses

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## FACULTY



**Christopher Devlin**, Director, DGW Law Corporation, Victoria, BC. Christopher's practice focuses on Aboriginal and Treaty law on behalf of First Nations, tribal councils, Métis groups and other Indigenous organizations. Christopher works with Indigenous peoples throughout Western Canada, as a litigator, negotiator, and strategic advisor. He has appeared as counsel at all levels of court, including the Supreme Court of Canada, as well as before administrative tribunals and regulatory panels. He has negotiated multi-party agreements on behalf of Indigenous clients, including specific claim settlements, consultation process agreements and Impact Benefit Agreements. Christopher is regularly recognized as a leading lawyer in the area of Aboriginal Law in the Canadian Legal Expert Directory, and was recognized by Best Lawyers as the 2020 Aboriginal Law "Lawyer of the Year" for Vancouver Island.



**Maegen Giltrow, Q.C.**, Partner, Ratcliff 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.



**Christina Gray**, Associate, JFK Law Corporation, Prince Rupert, BC. Christina is a Ts'msyen citizen from Lax Kw'alaams in northern British Columbia and Dene from Treaty 8 in the Northwest Territories. She works remotely in Prince Rupert and is part of JFK's Victoria and Vancouver offices. Christina's practice focuses on advocating for the advancement of Indigenous Peoples' inherent and constitutional rights. Her practice also includes complex negotiations with governments. Negotiations include ongoing federal Recognition of Indigenous Rights and Self-Determination negotiations.



**Jason Madden**, Co-Managing Partner, Pape Salter Teillet LLP, Toronto, ON. A graduate of Osgoode Hall Law School, Jason is called to the bar in Ontario, Manitoba, Alberta, the Yukon and the Northwest Territories. His practice exclusively focuses litigation and negotiations related to Indigenous lands, rights and self-governments, including, the negotiation and implementation of modern day treaties. He has represented Indigenous clients before the Supreme Court of Canada twelve times and has appeared before every level of court from Ontario westward. Jason is also recognized as being at the forefront of the development of Métis rights law in Canada. He has acted as counsel the majority of cases addressing Métis rights, as well as in the negotiations leading to Métis harvesting agreements being reached in Ontario, Manitoba and Alberta, the interim reconciliation plan reached between Canada and the Manitoba Métis Federation in September 2018 in response to the Supreme Court of Canada's 2013 decision bearing the Federation's name as well as the self-government agreements Canada signed with the Métis Nation of Alberta and the Métis Nation of Ontario in June 2019.



**Brock Roe**, Counsel, JFK Law Corporation, Victoria, BC. Brock is a solicitor that practises corporate/commercial and Aboriginal law, focusing on land matters, economic development, and modern Treaties. As a solicitor, Brock helps First Nation clients with their governance and economic development needs. He has acted for First Nations in a variety of industries related to commercial leasing, natural resource development (oil sands, mining, oil and gas, renewables), utilities, hotels and tourism, and fishing. Brock also helps First Nations deal with complex transactions and related land matters under the Indian Act, First Nations Land Management Act, and modern Treaties. Brock was born and raised in Treaty No. 8 territory in Fort St. John, British Columbia, and is a member of the Bigstone Cree Nation.



**Kelly Russ**, Principal, Kelly Harvey Russ Personal Law Corporation, Bencher, Law Society of British Columbia, West Vancouver, BC. Kelly Russ was born in Old Massett, Haida Gwaii and raised in Prince Rupert. He has a JD from UVic and a LL.M from UBC. Called to the bar in 1994, Kelly works in the areas of family law, child protection, immigration and human rights. First elected a Bencher of the Law Soci-

ety of British Columbia for 2022, Kelly is a member of the Credentials Committee and Truth and Reconciliation Advisory Committee. In recent years, he has represented clients before the Immigration Refugee Board and Refugee Appeal Board. He was a member of the Canadian Human Rights Commission and worked on the repeal of s. 67 of the Canadian Human Rights Act (1998-2007).



**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.



**Kendra Shupe**, Associate, Mandell Pinder LLP, Vancouver, BC. Kendra joined Mandell Pinder in 2016 and assists clients with complex litigation matters. She sees the past as inextricably linked to the present, particularly as it relates to redress for Canada's colonial structure and understanding its effects today. Kendra strives to ensure her clients' respective Indigenous laws, cultures, and perspectives are respected by the Canadian legal system. She specializes in Aboriginal rights and title litigation and appellate advocacy, delving into complex legal and historical issues and collaborating with colleagues to develop effective strategies and approaches.



**Elin Sigurdson**, Associate, Mandell Pinder LLP, Vancouver, BC. Elin's practice focuses on aboriginal and constitutional litigation and dispute resolution. She is committed to finding the most effective long-term solutions for her clients, and has throughout her practice been involved in complex matters of significant importance to her clients and to the public. Elin's interest in the law is grounded in her commitment to finding legal solutions for people and groups seeking social justice. She has been honoured to work with First Nations to achieve their goals including recognition and protection of their rights, securing economic benefits, and achieving greater self-governance.



**Gavin Smith**, Staff Lawyer, West Coast Environmental Law, Smithers, BC. Gavin joined West Coast Environmental Law in 2013 to lead the organization's efforts to stop the Enbridge Northern Gateway pipelines and tankers proposal. His work focused on supporting Indigenous Nations that had applied their own laws to prohibit the project in their territories, and included acting as counsel in a successful legal challenge to the federal government's approval of Northern Gateway. Since then, Gavin has worked on an array of issues at West Coast, including securing the federal *Oil Tanker Moratorium Act* for the north coast of BC, passage and implementation of BC's new *Environmental Assessment Act*, advancing mineral tenure reform, and supporting the work of a number of Indigenous Nations revitalizing their own laws through the RELAW program. Along with Lisa Fong, QC, Gavin acts as co-counsel in the Gitxaala Nation's ongoing judicial review of provincial mineral claims, which *inter alia* seeks relief under the *Declaration on the Rights of Indigenous Peoples Act*.



**Paul Yearwood**, Supervisor, Natural Resources, Transportation and Indigenous Legal Group, Ministry of Attorney General, Victoria, BC. Paul was called to the BC Bar in 1993 and has practised exclusively for the Province of British Columbia in the area of Aboriginal law and litigation since 2000. He is currently the Supervisor of the Natural Resources, Transportation and Indigenous Legal Group in the Ministry of the Attorney General. Paul has been fortunate to be counsel on a number of the decisions on Aboriginal law at all levels of court.

# Developments in Aboriginal and Indigenous Law 2022

OCTOBER 13<sup>TH</sup>, 2022 (DAY ONE)

## 9:00 Welcome and Introduction by PBLI

## 9:05 Chairs' Welcome and Introduction

Karey Brooks, Q.C. & Robert J. M. Janes, Q.C.  
JFK Law Corporation

## 9:10 The Importance of Indigenous Representation in Informing the Bar

Kelly Russ  
Law Society Bencher  
Kelly Harvey Russ Personal Law Corporation

- Indigenous representation within the Law Society and the bench

## 10:00 Questions and Discussion

## 10:10 Refreshment Adjournment

## 10:25 The Honour of the Crown: Recent Developments and Emerging Issues

Jason Madden  
Pape Salter Teillet LLP

- The Honour of the Crown and the duty to negotiate
  - Does a distinct duty exist? When is its triggered? What does it require?
  - *Reference on the Act respecting First Nations, Inuit and Métis children, youth and families* (Court of Appeal of Quebec, 2022)
  - *Métis Nation of Alberta v. Alberta* (Alberta Court of Queen's Bench, 2022)
- The Honour of the Crown and the interpretation and implementation of accommodations
  - What does the honour of the Crown require downstream from consultation?
  - *Manitoba Métis Federation v. Canadian Energy Regulator* (Federal Court of Appeal)

## 11:15 Questions and Discussion

## 11:25 Indigenous Rights and Private Party Liability

Maegen Giltrow, Q.C.  
Ratcliff LLP

- *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* (BCSC 2022)

- Nuisance, trespass and infringement of s.35 rights
- Positive obligations on Crown to protect s.35 rights from private party impacts

## 12:15 Questions and Discussion

## 12:25 Catered Lunch

## 1:15 Do the Attorney General's Litigation Directives Mark a New Era in British Columbia?

Paul Yearwood  
BC Ministry of Attorney General

- The *Directive on Civil Litigation involving Indigenous Peoples* and what it means for upcoming litigation

## 2:05 Questions and Discussion

## 2:15 Refreshment Adjournment

## 2:30 Advanced Costs: *Anderson v Alberta* (SCC 2022)

Karey Brooks, Q.C.  
JFK Law Corporation

- Qualifying for advanced costs
- How the SCC developed the test with respect to impecuniosity
- Evidence for First Nations to establish impecuniosity
- The future of advanced costs

## 3:20 Questions and Discussion

## 3:30 The Current State of Equitable Damages

Elin Sigurdson & Kendra Shupe  
Mandell Pinder LLP

- *Southwind v. Canada*, 2021 SCC 28

## 4:20 Questions and Discussion

## 4:30 Chairs' Closing Remarks

## 4:35 Forum Concludes for Day One

# Developments in Aboriginal and Indigenous Law 2022

OCTOBER 14<sup>TH</sup>, 2022 (DAY TWO)

## 9:00 Welcome and Reflections on Day One

Karey Brooks, Q.C. & Robert J. M. Janes, Q.C.  
JFK Law Corporation

## 9:10 Resolving Issues Around Shared Territories and Overlaps

Paul Seaman  
Gowling WLG

- Lessons learned from the Nisga'a Treaty litigation

## 10:00 Questions and Discussion

## 10:10 Refreshment Adjournment

## 10:25 Evidence Issues in the Trial of Section 35 Cases

Christopher Devlin  
DGW Law Corporation

- Admissibility of historic documents
- Document agreements
- Expert reports
- Evidence rulings in the Cowichan case

## 11:15 Questions and Discussion

## 11:25 The Federal Court, Indigenous Self-Government and Indigenous Law

Christina Gray  
JFK Law Corporation

- Indigenous self-government and Indigenous laws

## 12:15 Questions and Discussion

## 12:25 Catered Lunch

## 1:15 Impact of the *Declaration on the Rights of Indigenous Peoples Act* on Litigation

Gavin Smith

West Coast Environmental Law

- Justiciability of the legislative requirement to "take all measures" to align laws with UNDRIP
- Can the UNDRIP legislation be used to challenge specific laws?
- Can the UNDRIP legislation be used in challenges to Crown decision-making?

## 2:05 Questions and Discussion

## 2:15 Refreshment Adjournment

## 2:30 Structuring First Nations Land Based Businesses On and Off Reserve

Brock Roe

JFK Law Corporation

- Pros and cons of LPs versus corporations
- Managing the First Nation's role in management
- Different approaches to the tax exemption

## 3:20 Questions and Discussion

## 3:30 The Honour of the Crown and Managing Procedural Issues

Robert J. M. Janes, Q.C.

JFK Law Corporation

- Does the honour of the Crown affect/apply to court proceedings?
- How does the honour of the Crown affect court proceedings?
- What are the limits on how the Honour of the Crown will affect court proceedings?

## 4:20 Questions and Discussion

## 4:30 Chairs' Closing Remarks

## 4:35 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
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**Registration:** The registration fee for in-person attendance is \$1,295.00 plus GST of \$64.75 totalling **\$1,359.75**. The registration fee for webinar attendance is \$1,095.00 plus GST of \$54.75 totalling **\$1,149.75**. Registration fee covers your attendance at the program, electronic materials, a boxed lunch and refreshments throughout each day.

**Early Bird Discount:** For in-person attendance, register by September 13<sup>th</sup>, 2022 and receive a \$200 discount on the registration fee (\$1,095.00 plus GST). Early Bird Discount does not apply to webinar attendees. Discounts cannot be combined.

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

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**When and Where:** Check-in begins at 8:30 a.m. The program starts at **9:00 a.m. (PDT)** each day. UBC Robson Square is located at the basement level of 800 Robson Street in Vancouver, BC. Please visit <https://robsonsquare.ubc.ca/contact-directions/> 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 electronic 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.

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## Developments in Aboriginal and Indigenous Law 2022

October 13<sup>th</sup> & 14<sup>th</sup>, 2022  
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