

2021 in Review: Major Cases & Legal Updates

December 10, 2021

9:30 a.m. – 3:30 p.m.

Seminar Agenda

9:30 Welcome and Introduction

9:45 **Protecting Aboriginal Rights from Cumulative Impacts: *Yahey v. British Columbia***
Maegen Giltrow

A review of the precedent setting case from the BC Supreme Court this year about: protection of indigenous way of life under Treaty 8, the Crown's obligation to implement enforceable measures to protect lands and treaty rights & manage the cumulative impacts of development, and the impacts of the Court's order preventing further unjustified infringement through development.

10:15 **What is Reconciliation?**
Brent Lehmann

What is reconciliation? The Courts require it. Government leaders talk endlessly about it. Lawyers try to define it. But what is it, really, in practical, on the ground, rubber hits the road, kind of terms? What can it be? What should it be? What do Indigenous communities believe it to be? Having a clear idea of what reconciliation means is the first step to actually achieving it. This overview will look at how some Indigenous communities have defined what reconciliation means to them, and what they are doing to find it.

10:45 Break

11:00 ***Ahousaht Indian Band v. Canada: The Road to Recognizing Aboriginal Commercial Fishing Rights***
Lisa Glowacki

In April, 2021, the BC Court of Appeal released the latest and last decision in the precedent setting Nuu-chah-nulth fisheries litigation. The Court of Appeal not only affirmed the constitutionally-protected commercial fishing rights of five First Nations, but made numerous important statements about how commercial rights must be respected, emphasizing viability, economic importance, priority, and co-management. This decision will be of interest to First Nations pursuing protection for and expansion of economic fishing opportunities for their communities.

11:30 **Indigenous Forestry in BC: Year in Review**
Nathan Hume & Jeremy Shelford

A discussion of major developments in forestry law and business from 2021: transactions, legislation, policy changes, and more.

12:00 Break

12:30 Indigenous Child & Family Services: Self-determination & Enforcing a Prevention-Based Approach

Maegen Giltrow & Guest Speaker, Kim Baird, Kwuntiltunaat

A review of the legal and policy principles underlying a prevention-based approach to child & family service delivery, including jurisdictional opportunities for First Nations. The discussion will include a range of updates & experiences, including front-line advocacy for First Nations and families, policy-based approaches and jurisdictional options.

1:00 Using Tort Law to Enforce Aboriginal Interests against Private Parties

Melinda Skeels & Natalia Sudeyko

This summer, Ratcliff wrapped up a nearly 200-day trial in the matter of *Thomas and others v. Rio Tinto Alcan and others*. The claim was brought on behalf of the Saik'uz and Stellat'en First Nations against Rio Tinto Alcan in relation to the damage caused by the company's diversion of vast quantities of water that would otherwise flow into the Nechako River and consequent damage to the river and, in particular, to the fish that live, rear and breed in it. The case is precedent-setting, being the first time First Nations have brought a claim in tort against a private party on the basis of their Aboriginal rights and title interests. Counsel will discuss the case and its potential implications for First Nations seeking to protect and enforce their interests against parties other than the Crown.

1:30 Specific Claims – Village Sites, Logging Roads and Colonial Indian Reserves

Michelle Ellison

In recent years, specific claims have become a much more effective tool for First Nations to resolve historic, reserve-based grievances with Canada. Recent decisions of the courts and the Specific Claims Tribunal have clarified the standards which Colonial and Canadian officials had to abide by to comply with their fiduciary duty to First Nations in a wider array of circumstances than ever before. I will provide an overview of some of these cases and discuss funding opportunities to assist your First Nation to achieve your goals.

2:00 Break

2:15 Mandatory Vaccination Policies – Striking the Balance Between Employer Obligations, Employee Rights and Community Expectations

Brenda McLuhan

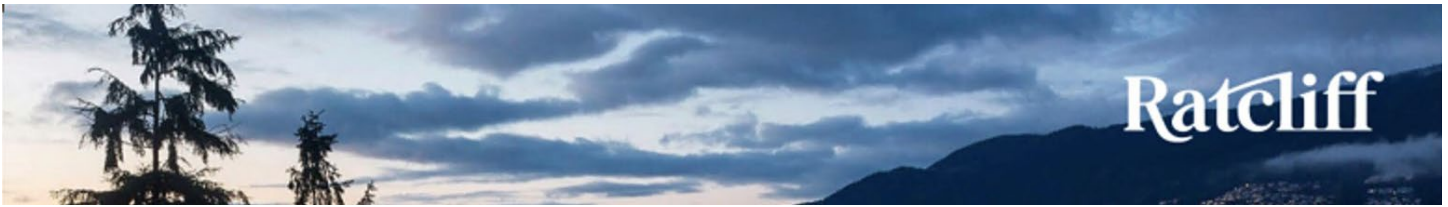
This presentation will include a review of the legal duties of First Nations employers as regards health and safety, human rights issues that are relevant to COVID-19 policies, and the balancing of rights that is involved in the drafting of a COVID-19 policy to make it resistant to human rights challenges. We will also review the limited case law that exists where COVID-19 vaccination policies have been challenged.

2:45 The Interplay of Collective Indigenous Rights and Individual Charter rights in *Dickson v. Vuntut Gwitchin First Nation*

Jeff Nicholls & Kate Blomfield

The Yukon Court of Appeal released its decision in *Dickson v. Vuntut Gwitchin First Nation* in July 2021 which addresses s.25 of the Charter and the interplay between collective Indigenous rights and individual Charter rights. A discussion of the Court of Appeal's decision, and of the questions that may be heard by the Supreme Court of Canada in 2022, will be of interest to First Nations who are navigating issues of collective and individual rights in either their implementation of or work towards self-government.

3:15 Concluding Remarks



About the Speakers

Guest Speaker: Kim Baird, Kwuntiltunaat

Kim offers First Nation related and strategic advice to industry, government and First Nations. While Chief of the Tsawwassen First Nation for over thirteen years, her most notable achievement was when she negotiated and implemented British Columbia's first urban treaty, replacing the Indian Act with self-governance for her community. Her work in recent years includes in-depth community engagement and advising on indigenous child services and jurisdiction. Kim is a member of both the Order of British Columbia and the Order of Canada and holds an Institute of Corporate Director's designation.

Kate Blomfield, Partner

Kate advises First Nations in BC and the Yukon on matters relating to the exercise and implementation of self-government, territorial stewardship, and addressing historical wrongs. Kate's practice includes litigation, negotiations, and assessment and regulatory processes. Kate was lead counsel for the intervenor Teslin Tlingit Council in *Dickson v. VGFN* case before the Yukon Court of Appeal.

Michelle Ellison, Partner

Michelle has worked on major Aboriginal litigation and negotiation files on behalf of First Nation clients. Her practice is focused on preparing and negotiating specific claims.

Maegen Giltrow, Partner

Maegen was lead counsel in *Yahey v. British Columbia*, and counsel on *Saikuz et al. v. Rio Tinto Alcan* at trial in 2021, stepping in when Kirchner J. was appointed to the BC Supreme Court. Maegen has also litigated in defending the rights of Indigenous parents and First Nations, including on important points of precedent around *parens patriae* and protecting the maternal/infant bond. She also works in negotiation and law & policy development.

Lisa Glowacki, Partner

Lisa advises and represents First Nations and others on environmental, natural resources, regulatory, constitutional (Charter and jurisdictional), consultation, administrative law, social justice, self-governance, election, employment and human rights matters. Lisa was lead counsel for the plaintiffs in the *Ahousaht Indian Band v. Canada* case.

Nathan Hume, Partner

Nathan's practice focuses on major projects and complex regulatory regimes, with a particular emphasis on environmental protection and the energy industry. He has extensive experience in negotiation, litigation, and federal and provincial regulatory processes.

Brent Lehmann, Partner

Brent's legal practice includes providing advice on Indigenous self-determination and governance, such as treaty negotiation and implementation, lawmaking, including membership, election, referendum and land codes, and enforcement, as well as corporate and commercial matters, with an emphasis on First Nations economic and business development.

Brenda McLuhan, Partner

Brenda provides advice to First Nations from across the province on every aspect of employment law, including contract and policy drafting, workplace investigations, disciplinary matters and day to day advice on how to limit the legal risks that arise in the workplace. She has also assisted clients in defending Canada Labour Code complaints, human rights complaints, and wrongful dismissal claims.

Jeff Nicholls, Associate

Jeff works primarily in litigation, negotiation and law & policy development. Jeff advises on land and resource issues, Aboriginal rights and title, matters under the Indian Act, First Nation governance issues, and Indigenous legal traditions. Jeff is a proud member of the Lax Kw'alaams First Nation.

Jeremy Shelford, Partner

Prior to entering law school, Jeremy worked throughout BC as a forest engineer and he now brings his knowledge of that industry to his law practice. In addition, he has experience assisting clients with many types of corporate commercial transactions and normal-course business operations, both in the natural resource and other sectors.

Melinda Skeels, Partner

Melinda's practice focuses on assisting First Nations with governance, litigation, consultation with industry and government, economic development and regulatory matters. She has extensive experience in treaty implementation—including drafting legislation, policy development and negotiation with industry—as well as drafting legislation for Bands under the Indian Act and other federal legislation.

Natalia Sudeyko, Associate

Natalia works in Ratcliff's litigation group, primarily in Aboriginal law. She has provided support on a wide range of files that have come before the courts in British Columbia, the Federal Courts, the SCC and administrative tribunals such as the National Energy Board.