

## Keith B. Bergner

Keith advises private sector, public sector and government clients on Aboriginal law and regulatory matters. He has appeared as counsel before numerous regulatory tribunals and all levels of Superior and Appellate Courts (both Federal and Provincial), including the Supreme Court of Canada. He has acted for clients in a number of natural resource industries including hydro-electric generation and transmission, oil and gas, mining, aquaculture, forestry, transportation and independent power projects. His practice extends throughout Western Canada and the North (Northwest Territories, Nunavut and Yukon).

In the area of Aboriginal law, Keith advises governments, Crown corporations and private sector clients on the extent of the duty to consult and, if necessary, accommodate, in respect of potential adverse effects to Aboriginal rights or title by major industrial projects. He advises on the development of consultation programs and has negotiated several dozen impact-benefit agreements with First Nations. Keith acts as hearing counsel for proponents seeking regulatory permits and approvals. He also represents project proponents and governments in appeals and judicial reviews challenging project approvals.

In the area of regulatory/energy law, Keith acts as counsel for proponents and users of energy, mining and other natural resource projects. He appears regularly before administrative tribunals, including the National Energy Board and the British Columbia Utilities Commission. He also appears as counsel on appeals or applications seeking judicial review of decisions by administrative boards and tribunals.

Recently, Keith has been involved in three separate matters before the Supreme Court of Canada—all of which involved the interplay of Aboriginal law and administrative law:

- Represented successful Appellant (BC Hydro) in leading case regarding the Crown's duty to consult Aboriginal people in respect of alleged past infringements (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; on appeal from the British Columbia Court of Appeal). [Click here for summary.](#)
- Represented Appellant (Government of Yukon) in a case establishing that the government had successfully fulfilled the Crown's duty to consult Aboriginal people in the context of a modern treaty (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; on appeal from the Yukon Court of Appeal). In January 2012, this case was recognized as one of *Lexpert's Top 10 Business Decisions of 2011*.
- Represented successful Respondent (Canadian Association of Petroleum Producers) resisting a leave to appeal application in a case regarding the Crown's duty to consult Aboriginal people in the context of a number of major pipeline projects in Western Canada (*Standing Buffalo Dakota First Nation et al. v. Enbridge Pipelines Inc. et al.*, 2010 CanLII 70737; on appeal from the Federal Court of Appeal). [Click here for summary.](#)



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**Practices**

- Aboriginal Law
- Administrative, Constitutional and Public Law
- Energy
- Environmental
- Litigation & Dispute Resolution
- Project Permitting
- Public Utility and Regulatory
- Regulatory Compliance

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### Recognition And Ranking

- *Benchmark Canada: The Guide to Canada's Leading Litigation Firms and Attorneys 2012*: recognized for Aboriginal and energy litigation in British Columbia
- *Best Lawyers in Canada*: recognized for Aboriginal Law
- Canadian Legal Lexpert Directory: repeatedly recommended as a Leading Practitioner for Aboriginal Law
- 2011 Premier's Collaboration Award (NWT) for work on the Mackenzie Gas Project
- 2010 Lexpert Zenith Award (Gold) *for pro bono work* - Civil Liberties category
- Tory Tory DesLauriers & Binnington award for writing and scholarship

### Professional Activities

- Canadian Bar Association, Member of Aboriginal, Administrative and Civil Litigation Sections
- Law Society of the Northwest Territories, Member of Admissions and Discipline Committees

### Bar Admissions

- British Columbia (1997)
- Northwest Territories (2000)
- Nunavut (2000)
- Yukon Territory (2010)

### Education

- McGill University (B.A. Honours, 1990)
- McGill University (LL.B., 1996)

### Languages

- French

### Experience

Keith's experience includes:

**Supreme Court of Canada** Recently, Keith has been involved in three separate matters before the Supreme Court of Canada—all of which involved the interplay of Aboriginal law and administrative law:

- Represented successful Appellant (BC Hydro) in leading case regarding the Crown's duty to consult Aboriginal people in respect of alleged past infringements (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; on appeal from the British Columbia Court of Appeal).
- Represented Appellant (Government of Yukon) in a case establishing that the government had successfully fulfilled the Crown's duty to consult Aboriginal people in the context of a modern treaty (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; on appeal from the Yukon Court of Appeal). In January 2012, this case was recognized as one of *Lexpert's Top 10 Business Decisions of 2011*.
- Represented successful Respondent (Canadian Association of Petroleum Producers) resisting a leave to appeal application in a case regarding the Crown's duty to consult Aboriginal people in the context of a number of major pipeline projects in Western Canada (*Standing Buffalo Dakota First Nation et al. v. Enbridge Pipelines Inc. et al.*, 2010 CanLII 70737; on appeal from the Federal Court of Appeal).

In addition, Keith represented a successful Intervener (BC Civil Liberties Association) before the Supreme Court of Canada in an appeal considering *Charter* and administrative law issues around the powers of a



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School Board to restrict the use of certain children's books in public schools. (*Chamberlain v. Surrey School District No. 36*, 2002 SCC 86.)

#### **Federal Court of Appeal**

- Represented Respondent (Canadian Association of Petroleum Producers) in successfully defending a series of four appeals brought by First Nations challenging three separate decisions from the National Energy Board that issued Certificates of Public Convenience and Necessity for the construction of three major pipeline projects in Western Canada (the Keystone Pipeline Project, the Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project). (*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308; leave to appeal to Supreme Court of Canada denied.)
- Represented Respondent (Government of the Northwest Territories) in an appeal from a decision of the National Energy Board regarding the NEB's jurisdiction over the Mackenzie Gathering System—part of the \$16.6 billion proposed Mackenzie Gas Project. (*Anadarko Canada Corporation v. National Energy Board*, 2008 FCA 146.) The issue was ultimately resolved following an amendment to federal legislation - the *Canada Oil and Gas Operations Act*.

#### **British Columbia Court of Appeal**

- Represented Respondent (Grieg Seafood BC Ltd., an aquaculture company) in defending against judicial review proceedings seeking to challenge aquaculture licences, tenures and other authorizations *Ehattesaht First Nation v. British Columbia (Agriculture and Lands) and Grieg Seafood BC Ltd.*, 2011 BCSC 658, leave to appeal denied 2011 BCCA 325.)
- Represented Respondent (BC Hydro) in an appeal arising from a decision of the BC Utilities Commission which examined the role of the Commission in assessing the Crown's duty to consult Aboriginal peoples. (*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (successfully appealed to Supreme Court of Canada *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.)
- Represented Respondent (BC Hydro) in an appeal arising from a decision of the BC Utilities Commission which examined the role of the Commission in assessing the Crown's duty to consult Aboriginal peoples. (*Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208; and 2009 BCCA 68.)
- Represented Intervener (BC Civil Liberties Association) in an appeal considering *Charter* and administrative law issues around the powers of a School Board to restrict the use certain of children's books in public schools. (*Chamberlain v. Surrey School District No. 36*, 2000 BCCA 519, successfully appealed to Supreme Court of Canada 2002 SCC 86.)
- Represented Appellant (Alcan Aluminum Limited) in an appeal considering issues of alleged trespass to an Indian Reserve and the applicability of various limitation statutes. (*Stoney Creek Indian Band et al. v. Alcan Aluminum Limited*, 1999 BCCA 139, 1999 BCCA 293 and 1999 BCCA 527.)

#### **Regulatory Tribunals**

In addition to the above experience as appellate counsel, Keith's experience includes numerous appearances before regulatory and administrative tribunals, including the National Energy Board and the British Columbia Utilities Commission. Recent hearings include:

- *Mackenzie Gas Project* – a \$16.6 billion proposed natural gas pipeline from the Mackenzie Delta, across the Northwest Territories to the existing pipeline system in Alberta.



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- Represented the Government of the Northwest Territories in regulatory hearings before the National Energy Board, which lasted over five years and involved hearing sessions on 47 days in 15 communities in the Northwest Territories. The Board issued a Certificate of Public Convenience and Necessity in December 2010, and the federal Cabinet gave its approval in March 2011.
- *The Interior to Lower Mainland Project* – a \$700 million proposed electrical 500 kv (high voltage) transmission line running from the interior of British Columbia to the Lower Mainland. The ILM Project is the largest electrical transmission project in British Columbia in the last thirty years and involves consultation with 60 First Nations and 7 Tribal Councils.
  - Represented BC Hydro in regulatory hearings before the British Columbia Utilities Commission, which lasted over a year and a half and involved a three-week oral hearing. The proceeding was focused on the question of the adequacy of consultation and accommodation with First Nations and involved numerous interveners representing over twenty-five First Nations. The Commission accepted the submissions of BC Hydro on the vast majority of the numerous legal and factual issues contested during the hearing. The Commission's decision was released in February 2011.
- *The Alaska Pipeline Project* – a proposed natural gas pipeline from the north slope of Alaska, which would cross the Yukon and northeast B.C. before connecting with the existing pipeline system in Alberta
  - Appeared as an expert witness called by the State of Alaska Senate Judiciary Committee before a Special Joint Session of the Alaska House Special Subcommittee and Senate Special Committee on Energy (July 2008). Presentation was focused on the Crown duty to consult First Nations in Canada with respect to major industrial projects.
- *The TransMountain Pipeline* – an oil pipeline running from Edmonton to Burnaby, British Columbia with connections to Washington State.
  - Represented Chevron Canada Limited (a refinery operator) and Chevron Canada Resources (a producer and pipeline shipper) in respect of numerous pipeline transmission toll and tariff hearings before the National Energy Board, including:
    - Firm Service Application (Hearing Order RH-2-2011) – a highly contested application regarding allocation of pipeline capacity culminating in a five-day oral hearing before the National Energy Board in August 2011
    - Capacity Allocation Procedure (a series of four NEB decisions between March 2006 and August 2007) to determine allocation of pipeline capacity on the TransMountain pipeline system (including the Westridge Dock
    - Anchor Loop CPCN Application (October 2006) – pipeline expansion
    - Priority Destination Application (2005)
- *BC Hydro 2006 Integrated Electricity Plan (IEP) and Long-Term Acquisition Plan (LTAP)* – the IEP is a long-term plan that analyzes and describes how BC Hydro could meet customer electricity needs over a 20-year planning horizon and the LTAP is an action plan, which itemizes the actions BC Hydro proposed to take in the next ten years to meet that demand
  - Represented the Applicant, BC Hydro, in regulatory hearings before the BC Utilities Commission, which lasted over a year and involved an oral hearing session that ran from November 22, 2006 to January 12, 2007. In May 2007, the Commission issued all of the specific determinations requested by BC Hydro in its final argument.

**Lower Courts (Superior Courts and Federal Court of Canada)**



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- Represented Respondent (Grieg Seafood BC Ltd., an aquaculture company) in defending against judicial review proceedings (in both federal and superior court) seeking to challenge aquaculture licences, tenures and other authorizations *Ehattesaht First Nation v. British Columbia (Agriculture and Lands) and Grieg Seafood BC Ltd.*, 2011 BCSC 658, leave to appeal denied 2011 BCCA 325; (*Ehattesaht First Nation v. Minister of Fisheries and Oceans and Grieg Seafood BC Ltd.*, Federal Court Docket: T-1243-11)
- Represented Respondent (BC Hydro) in defending against judicial review proceedings seeking to challenge the Environmental Assessment Certificate issued for the Revelstoke 5 Project. (*Shuswap Indian Band et al. v. Minister of the Environment and BC Hydro*; BCSC Docket No.: S077565 Vancouver.)
- Represented Respondent (Grieg Seafood BC Ltd., an aquaculture company) in defending against judicial review proceedings (in both federal and superior court) seeking to challenge aquaculture licences, tenures and other authorizations (*Mowachaht/Muchalaht First Nation v. Minister of Fisheries and Oceans and Grieg Seafood BC Ltd.*, Federal Court Docket: T-1042-05; BCSC Docket No.: 04 0303 Victoria)
- Represented Defendant (natural gas producer) in a claim to recover approximately \$1.8 million for natural gas supplied pursuant to a regulated tariff (*Pacific Northern Gas (N.E.) Ltd. v. Samson Canada, Ltd.*, 2005 BCSC 1213.)
- Represented Applicant (engineering company) in a judicial review successfully challenging an order of the regulatory body for the practice of professional engineering in the Northwest Territories (*Camillus Engineering v. Association of Professional Engineers*, 2000 NWTSC 70.)
- Represented Defendant (Diavik Diamond Mines Inc.) in respect of judicial review of development approvals arising out of the Diavik open-pit diamond mining operation at Lac de Gras in the Northwest Territories. (*Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.*, Federal Court Docket T-2127-99.)
- Represented Defendant (Canadian Pacific Ltd.) in successfully obtaining an order from the Workers' Compensation Board of BC (Appeal Division) staying litigation in the BC Supreme Court. (*Hickerson v. Canadian Pacific Ltd.*, WCB (Appeal Division) #99-0409; BCSC Vernon Registry No. 17972)
- Represented Defendant in constitutional challenge based on the *Charter of Rights* to provisions of federal legislation under which they had been charged. (Subject to publication restriction)
- Represented Defendant (Daewoo Heavy Industries America Corporation) in successfully resisting attempt by the Plaintiff to vacate an order staying litigation in favour of a contractual provision requiring arbitration. (*Trainer Bros. Equipment Services Ltd. v. Daewoo Heavy Industries America Corporation*, unreported, BCSC, November 9, 1999)

### **Consultation and Negotiation Work**

The Constitution and rulings of the courts require very careful attention to identifying Aboriginal peoples' rights and establishing processes for meaningful dialogue, discussion and negotiation. These requirements arise particularly in the area of land use and resource development and are essential to successful projects in the mining, oil and gas, pipeline, hydroelectric power generation, electrical transmission, transportation, and forestry industries. In recent years this work has included advising on consultation programs to support permit issuance by regulators and negotiating dozens of agreements annually with Aboriginal groups to obtain their support for projects. Current and recent work includes:

- Advising BC Hydro in connection with its consultation process and in the negotiation of Impact Benefits Agreements with numerous First Nations in respect of numerous electrical transmission and generation projects, including, *inter alia*:



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- the *Interior to Lower Mainland Transmission Project (ILM) Project*. The \$700 million ILM Project is a proposed electrical 500 kv (high voltage) transmission line running from the interior of British Columbia to the Lower Mainland. The ILM Project is the largest electrical transmission project in British Columbia in the last thirty years and involves consultation with 60 First Nations and 7 Tribal Councils;
  - the *John Hart Project*. This \$1.35 billion proposed generation project involves refurbishment of the John Hart Generating Station—in operation since 1947—to address several concerns including seismic concerns, risks to fish and fish habitat, and long-term power reliability. The proposed project entails replacement of existing six-unit, 126 MW generating station and involves consultation and negotiation with several First Nations and Tribal Councils;
  - the *Ruskin Project*. This \$850 million proposed generation project involves refurbishment of the Ruskin Dam and Generating Station—in operation since the 1930's—to address to improve seismic performance, protect fish and wildlife and upgrade the powerhouse. The project involves consultation and negotiation with a number of First Nations;
  - the *Revelstoke 5 and Mica 5/6 generation projects* (3 x 500 MW). The Revelstoke and Mica projects are the largest generation increases in electrical capacity in the province in thirty years and involved consultation with numerous First Nations and Tribal Councils. The capital cost of the Revelstoke 5 project is approximately \$280 million and the unit is already operational. The capital cost of the Mica 5/6 projects is estimated to be between \$900 million and \$1.3 billion and the units are expected to be in-service by 2014 for Mica 5 and 2015 for Mica 6; and
  - the *Aberfeldie Project*. This project involved the \$95-million redevelopment of the Aberfeldie Generating Station, located on the Bull River, 35 kilometres east of Cranbrook. Construction was completed in June 2009. The project involved consultation and negotiation with a number of First Nations.
- Advising Tamerlane Ventures Inc. in connection with its consultation process and negotiations of with numerous First Nations and Metis groups in respect of its Pine Point exploration/mining project in the Northwest Territories on the site of the historic Pine Point mine. The original Pine Point mine (1964-1987) was the largest and most profitable base metal mine in Canadian history.
  - Negotiating Impact Benefit Agreements between a major aquaculture company and various First Nations regarding aquaculture (salmon farming) operations in a variety of locations along the British Columbia coast.
  - Negotiating and advising on Impact Benefit Agreements between numerous mining companies and various Aboriginal groups regarding major mining and/or exploration projects in British Columbia, Northwest Territories, Nunavut, Yukon, Quebec and other jurisdictions.

### Transaction Work

In addition to the above experience, Keith also advises commercial parties in respect of Aboriginal issue arising in commercial transactions. Recent examples include:

- Advising bclMC and PSP Investments in respect of their acquisition of Timberwest Forest Corp. for \$1.03 billion (April 2011);
- Advising BC Hydro in respect of its acquisition of a 1/3 interest in the Waneta Dam for \$825 million (February 2010).

### Conferences

Keith is a regular speaker at conferences and seminars on Aboriginal and regulatory law, including the Rocky Mountain Mineral Law Foundation, the Council of Canadian Administrative Tribunals (International), Canadian Energy Law Forum, the BC Law Society's Continuing Legal Education and others. Keith has also been a guest lecturer at the law school of the University of British Columbia on Oil and Gas law and Aboriginal law.



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- "The Latest Word from the Courts and the Aftermath of Court Judgments", (March 6-7, 2012)
- "First Nations and Project Approvals", (January 25-26, 2012)
- "Recent Decisions at the SCC and the Implications", (June 3, 2011)
- "Aboriginal Consultation for the CEPA Aboriginal Relations Working Group Members", (May 17, 2011)
- "Cases Recently Issued by or Currently Awaiting Decision by the Supreme Court of Canada", (March 28-29, 2011)
- "The Crown's Duty to Consult Aboriginal Peoples", (May 30 - June 1, 2010)
- "The Duty to Consult and Accommodate and the Role of Administrative Tribunals", (March 2010)
- 6th Annual B.C. Power Summit, (March 2009)
- Project Approval North of 60 -- the Crown's Duty to Consult Aboriginal Groups, Calgary, Alberta, (April 2008)
- CLEBC conference on Aboriginal Law: Tsilhqot'in v. BC, Vancouver, BC, (January 2008)
- Aboriginal Land and Resource Management, Vancouver, BC, (October 2007)
- 53rd Annual Rocky Mountain Mineral Law Institute conference, Vancouver, BC, (July 2007)
- Aboriginal Consultation for Industry, Canadian Institute, Vancouver, BC, (June 2007)
- 3rd Annual Western Canada Aboriginal Law Forum, Insight, Vancouver, BC, (May 2007)
- Land and Water Regulation North of the 60th Parallel, Edmonton, AB, (April 2007)
- 4th Annual B.C. Power Summit, Insight, Vancouver, BC, (March 2007)
- "Deconstructing the "Duty to Consult": What Does It Really Mean for Industry, Government and Aboriginal Stakeholders?", (February 13-14, 2007)
- Oil and Gas Summit, Canadian Institute, Calgary, AB, (January 2007)
- Best Practices in Aboriginal Consultation and Accommodation, Canadian Institute, Vancouver, BC, (December 2006)
- Advanced Administrative Law and Practice, Canadian Institute, Ottawa, Ontario, (October 2006)
- Aboriginal Consultation, Canadian Institute, Vancouver, BC, (June 1, 2006)
- 2nd Annual Western Canada Aboriginal Law Forum, Insight, Vancouver, BC, (May 2006)
- Aboriginal Oil and Gas, Insight, Edmonton, Alberta, (April 2006)
- Advanced Administrative Law and Practice, Canadian Institute, Ottawa, Ontario, (October 2005)

#### News / Publications

- Keith Bergner quoted in The Daily Oil Bulletin, (April 26, 2012)
- Keith Bergner quoted in The Financial Post, (March 6, 2012), Interview
- Supreme Court of Yukon Considers Duty to Consult and "Free Entry" Mining System, (December 9, 2011), Co-author
- Keith Bergner quoted in The Vancouver Sun, (November 12, 2011)
- The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty, *Alberta Law Review*, [pending], (Fall 2011), Co-author with Chris W. Sanderson, Q.C. and Michelle S. Jones
- Keith Bergner quoted in Daily Oil Bulletin, (August 31, 2011)
- Keith Bergner quoted in Lexpert Magazine, (June 17, 2011), Interview
- Chris Sanderson and Keith Bergner Receive the Premier's Collaboration Award (NWT), (May 18, 2011)



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- Keith Bergner interviewed by Business in Vancouver, (March 8, 2011)
- Keith Bergner appears on CBC Radio's BC Almanac, (February 17, 2011), Interview
- Keith Bergner interviewed by The Vancouver Sun, (February 17, 2011), Interview
- Supreme Court of Canada and Federal Court of Appeal Decisions in Standing Buffalo Dakota First Nations v. Enbridge Pipelines Inc., 2009 FCA 308, (December 6, 2010)
- Keith Bergner interviewed by CBC North, (November 16, 2010)
- Supreme Court of Canada Clarifies (some of) the Limits of the Duty to Consult, (October 29, 2010)
- Lawson Lundell wins Lexpert Zenith Award for Pro Bono Contributions, (October 5, 2010)
- Lawson Lundell represents BC Hydro in the \$825 million purchase of a 1/3 interest in the 493 megawatt Waneta Dam from Teck Metals Ltd., (March 22, 2010)
- The Duty to Consult: What Does it Really Mean for Industry?, *Obtaining Project Approvals North of 60° Conference, Insight Information*, (April 16, 2008)
- A Regulatory Roadmap: Successfully Navigating Oil and Gas Licensing Regimes in the North, (January 23, 2007)
- The Crown's Duty to Consult and Accommodate, *The Canadian Institute's 2nd Annual Conference on Aboriginal Consultation: Best Practices and Leading Edge Strategies for Managing Aboriginal Consultations*, (June 30, 2006)
- Implications of the Recent Supreme Court of Canada Decision in: R. v. Marshall; R. v. Bernard, (May 19, 2006)
- Consultation Requirements in the Post-Treaty Context, (May 14, 2006)
- Consultation Requirements in the Post-Treaty Context, (November 1, 2005), Co-written with Keith B. Bergner
- The Crown's Duty to Consult and Accommodate, (October 21, 2005)
- Update on Land Claims and Devolution in the Yukon and the Northwest Territories, (October 1, 2002)

