

ABlawg: Year in Review 2021

By: Admin

ABlawg is pleased to provide this compilation of highlights from 2021, consisting of some statistics and synthesis of our bloggers' contributions in substantive areas of law.

The Numbers

ABlawg published a total of 80 posts in 2021. The number of hits recorded on ABlawg continues to rise each year, with a significant increase in 2021. The post that generated the most hits by a large margin this year was “[“Textbook Climate Denialism”: A Submission to the Public Inquiry into Anti-Alberta Energy Campaigns](#)” by Martin Olszynski (9203 hits). The runners up were “[Alberta’s Vaccine Passport System: The Good, the Bad, and the Ugly](#)” by Lorian Hardcastle and Shaun Fluker (4787 hits), “[Conflating Dissent with Disloyalty, Allan Inquiry sets a Dangerous Precedent](#)” by Martin Olszynski (4656 hits), “[What Are the Implications of Reinstating the 1976 Coal Development Policy?](#)” by Nigel Bankes (4569 hits), and “[Kananaskis Conservation Pass](#)” by Shaun Fluker (3958 hits). This year, ABlawg also passed the 3000 followers mark on Twitter.

Nigel Bankes once again had the most output on ABlawg this year, authoring 19 posts, followed by Drew Yewchuk with 15 posts, Martin Olszynski and Shaun Fluker with 9 each, and Jennifer Koshan with 5.

In the Courts

The [CanLII](#) database shows ABlawg posts mentioned in three court decisions during the year. Joshua Sealy-Harrington and Ashton Menuz’s post “[Keep It To Yourself: The Private Use Exception for Child Pornography Offences](#)” was referred to in *R c Tremblay*, [2021 QCCQ 3480 \(CanLII\)](#) for its commentary on the challenges posed by evolving technologies for the law on child pornography. *DGN EQUITIES LP v Marshall*, [2021 ABQB 348 \(CanLII\)](#) referred to “[Fundamental Breach and Repudiatory Breach of Contract](#)” by Jassmine Girgis to help explain the difference between a fundamental breach and a repudiatory breach in contract law. Finally, Michael Nesbitt’s post, “[Observations on the Fact/Opinion Distinction in Expert Opinion Evidence](#)”, was referred to in *O’Kane v Lillqvist-O’Kane*, [2021 ABQB 925 \(CanLII\)](#) for its commentary on the criteria used by courts in determining whether to allow lay witnesses to give opinion evidence.

In the Scholarship

The [HeinOnline](#) legal scholarship database indicates that ABlawg articles were cited by Canadian and international authors 20 times this year. Some highlights are “[The Expansion of Unconscionability – The Supreme Court’s Uber Reach](#)” by Jassmine Girgis cited in "Contract Law - Unconscionability Doctrine - Supreme Court of Canada Targets Standard Form Contracts - Uber Technologies Inc. v. Heller, 2020 SCC 16, 447 D.L.R. 4th 179 (Can.)" (2021) 134:7 Harv L Rev 2598 at 2603; [Boulachanis v Canada: Transgender Inmate Moved to Women’s Prison](#) by Amy Matychuk is cited in Stephanie Saran Rudolph, "A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom" (2021) 35:1 Emory Intl L Rev 95 at 117; and “[The Supreme Court of Canada’s Approach to the Charter’s Equality Guarantee in its Pay Equity Decisions](#)” by Jonnette Watson Hamilton and Jennifer Koshan is cited in Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The Charter's Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17 JL & Equality 1 at 36.

In the Legislature

ABlawg posts were also mentioned in debates in the Alberta Legislature this year. Marlin Schmidt, the MLA for Edmonton-Gold Bar referenced “[Proposed Amendments to the Public Health Act Confirm \(Retroactively?\) the Validity of the Chief Medical Officer of Health’s COVID-19 Legislation](#)” by Shaun Fluker and Lorian Hardcastle during the second reading of Bill 66- the proposed Public Health Amendment Act, 2021 (2nd reading, *Alberta Hansard*, 30-2, (21 April 2021) [at 4779](#)). Kathleen Ganley, the MLA for Calgary-Mountain View referenced Shaun Fluker and David Mayhood’s “[Alberta Heads the Wrong Direction with Bill 79 – the Proposed Trails Act](#)” during the second reading of Bill 79 – the proposed Trails Act (2nd reading, *Alberta Hansard*, 30-2, (15 November 2021) [at 6107](#)).

Area-Specific Posts in 2021

Oil and Gas Liabilities

ABlawg continued to monitor how Alberta addresses its massive unfunded liabilities problem in the oil and gas sector, and in particular Alberta Energy and the Alberta Energy Regulator’s slow and halting attempts to reform Alberta’s environmental liability management systems. For the liability management system for conventional oil and gas assets, see Shaun Fluker and Drew Yewchuk’s [The AER is Seeking Public Input on its Proposed Regulatory Solution for the Growing Orphan Well and Other Unfunded Liabilities Problem in Alberta’s Oil and Gas Sector](#), and Drew Yewchuk’s two blogs on the new Mandatory Closure Spend Targets: [The AER Announces Some Details of the Mandatory Closure Spend Targets](#) and [The AER’s Mandatory Closure Spend Targets are Deficient](#). Drew Yewchuk also covered the problem with the proposed liens to collect municipal taxes from oil and gas companies with [Bill 77, Unpaid Municipal Taxes, and the Connection to the Inactive and Orphan Wells Problem](#).

Drew Yewchuk also wrote two blogs describing how the system for collecting security from oilsands and coal mines not only remains ineffective but arguably was weakened further in

2021: [Responding to Concerns that Alberta Does Not Collect Enough Security for Environmental Remediation the AER Chooses to Collect Less Security](#) and [Another Year Gone Under the Mine Financial Security Program](#).

Energy Law

ABlawg continued to monitor developments on a legal framework for carbon capture and storage projects in Alberta with a series of three posts by Nigel Bankes on [May 28](#), [September 23](#) and [December 7](#). ABlawg also provided commentary on developments in energy and utility law in Alberta. For example, Nigel Bankes posted on a compliance decision of the Alberta Utilities Commission involving [a party engaging in self supply for a bitcoin operation](#) as well provided posts on AUC decisions dealing with [consumer contributions](#) and [district energy systems](#). Ahmed Seline contributed a post on Alberta's efforts (principally through the Alberta Electric System Operator (AESO)) to develop an appropriate [regulatory regime for energy storage resources](#), and Kristen van de Biezenbos commented on a decision of the Alberta Court of Appeal that provided guidance on operationalizing the Honour of the Crown in the context of [utility disposition decisions involving joint ventures with First Nations](#).

While ABlawg provided extensive legal commentary on coal developments in Alberta during this past year, there was very little commentary on traditional oil and gas issues other than a comment by Bankes on a [decision of the Court of Appeal \(England\)](#) involving the relationship between an operating agreement and a farmout agreement, and another post on a decision of the Saskatchewan Court of Appeal dealing with the [effect of a registrar's caveat](#) in the context of freehold mineral titles.

The Alberta coal posts included the following: [Part One: the Coal Policy and Its Legal Status](#); the special edition: [What Are the Implications of Reinstating the 1976 Coal Development Policy?](#); [Part Two: The Rules for Acquiring Coal Rights and the Royalty Regime](#); [Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?](#); [Part Four: The Regulation of Coal Exploration](#) [Part Five: What is the Role of the Federal Government in Relation to Alberta Coal Mines?](#); and Part 6 dealing with the [terms of reference for the coal policy consultation committee](#) established by Minister Savage in March 2021.

Civil Protests

Jennifer Koshan, Lisa Silver, and Jonnette Watson Hamilton – whose [2020 post](#) reviewed the constitutionality of Alberta's anti-protest *Critical Infrastructure Defence Act* (CIDA) – continue to monitor the progress of CIDA through the courts and in 2021 added [this post](#) examining the Alberta Union of Public Employees (AUPE)'s constitutional challenge to the legislation. Watch for analysis of the Alberta Court of Appeal's [recent decision](#) striking AUPE's challenge to CIDA, coming to ABlawg in 2022. Shaun Fluker noted in [Alberta Adds Health Care Facilities to the Scope of Anti-Protest Legislation](#) that the Lieutenant Governor in Council enacted a regulation under CIDA in late September to include health care facilities as 'essential infrastructure' where protests are prohibited, in response to the emergence of anti-vaccine protests at hospitals in 2021. Lara Yeung also wrote on federal anti-protest legislation in [The Silence of the Turkeys: What Does the Agriculture Industry Have to Hide?](#) and commented on the rise of 'ag-gag' laws enacted across

North America to protect the farmed animal industry from public disclosure and transparency on the treatment of animals in slaughter facilities.

Environmental journalism concerning resource disputes was prominent in the news during 2021, as RCMP arrested journalists reporting on the [Coastal GasLink pipeline civil protests](#) and restricted media access to the [Fairy Creek logging blockades](#). In [Considering the Court's Reputation: Injunctions and Civil Disobedience](#) Daniella Marchand commented on *Teal Cedar Products Ltd. v Rainforest Flying Squad*, [2021 BCSC 1903 \(CanLII\)](#), wherein Justice Douglas Thompson refused to extend an injunction granted against interference with logging activity in Fairy Creek, citing concern for state authorities who appear to prefer to base their enforcement action on court orders rather than legislated rules.

Equity, Diversity, and Inclusion / Internet Law

Emily Laidlaw, Jennifer Koshan, and a number of UCalgary law students contributed two posts emanating from a research and blog-a-thon to mark Equity, Diversity, and Inclusion (EDI) week. These posts examined [online hate speech](#) and the [sentencing of a transgender Indigenous person](#). The Faculty's EDI Committee is planning a similar initiative in 2022. Emily also published a post with 3L student Darryl Carmichael [explaining and critiquing](#) the federal government's proposal to address online harms.

Domestic Violence Law

Jennifer Koshan contributed three posts this year that explored different aspects of the law related to domestic violence. A [post in early 2021](#) reviewed the latest annual report of Alberta's Family Violence Death Review Committee and made the case that the province's work towards a Family Violence Action Plan should include attention to legal responses to domestic violence. Jennifer's [Family Violence Prevention Month post](#) focused on amendments to family legislation in Alberta that would better protect survivors and children from family violence, or alternatively, arguments for the robust interpretation of family law. Her [final post of 2021](#), co-authored with Deanne Sowter and cross-posted to [Slaw](#), made recommendations for judicial practices and guidelines in family violence cases. Jennifer's research on family violence is supported by a grant from the Social Sciences and Humanities Research Council.

Environmental Law

In addition to the apparent resurgence of interest in coal mining that had particular relevance for people in Alberta, ABlawg hosted a series of posts in environmental law and policy of regional, national and international importance. Nigel Bankes, Andrew Leach and Martin Olszynski posted a three-blog series on the Supreme Court of Canada's opinion in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11](#), wherein a majority upheld the federal carbon pricing regime as a valid exercise of Parliament's POGG power: [Part I](#) (the majority opinion), [Part II](#) (the dissents), and [Part III](#) (commentary). Sharon Mascher and Martin Olszynski provided an overview and analysis of the major federal parties' environmental platforms – [beyond carbon pricing](#) – in the lead up to the 46th federal election. Speaking of climate change, David Wright kicked off the year with a post on the [social cost of carbon](#) and then wrapped up the year with a couple of posts

summarizing and analyzing outcomes from the 2021 United Nations Climate Change Conference (COP26): [Part I](#) and [Part II](#).

Shaun Fluker continued his line of posts regarding the *Species at Risk Act*, including [woodland caribou](#) and [western slope cutthroat trout](#) (in the context of the Grassy Mountain Coal Mine Joint Review Panel’s report), while also writing about the new [Kananaskis Conservation Pass](#). Land use planning along the eastern slopes was the focus for Shaun Fluker and David Mayhood in their critique on Bill 79 with [Alberta Heads the Wrong Direction with Bill 79 – the Proposed Trails Act](#), which is now the *Trails Act*, [SA 2021, c T-6.2](#) and comes into force on proclamation. Martin Olszynski continued the Faculty of Law’s critical commentary on the so-called “Public Inquiry into Anti-Alberta Energy Campaigns,” also known as the Allan Inquiry, with his [submission to the Inquiry as a participant for commentary](#) and a concluding post on the [troubling precedent](#) set by this fundamentally undemocratic attempt to suppress dissenting voices in and outside of the province. Robert Hamilton and Nick Ettinger contributed two posts on *Yahey v British Columbia*, [2021 BCSC 1287 \(CanLII\)](#), [first](#) looking at the significance of the decision with respect to cumulative effects of industrial development and unjustifiable infringement of treaty rights, and [then](#) diving into more detail on doctrinal aspects of infringement. Finally, in a two-part series of posts that are as much administrative law as environmental, Martin Olszynski and ABlawg newcomer Mark Mancini discussed [a new approach to the judicial review of regulations](#) in the wake of the Supreme Court of Canada’s decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#).

In [The Court of Appeal Rebukes the Environmental Appeal Board and the Director for an Erroneously Narrow Interpretation, and Unreasonable Application, of the phrase “Directly Affected” in the Environmental Protection and Enhancement Act](#) Kirk Lambrecht, Q.C. explains that the Court of Appeal’s decision in *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, [2020 ABCA 456 \(CanLII\)](#), should result in a more expansive approach to standing before Alberta’s [Environmental Appeals Board](#) to challenge environmental decisions made by Alberta Environment. This case was successfully argued by the Faculty’s [Public Interest Law Clinic](#).

COVID-19

The hope of widespread voluntary compliance with COVID-19 public health orders was extinguished during the third wave of the pandemic with loud disregard for restrictions exhibited in events such as the ['anti-lockdown rodeo'](#) held in central Alberta in May 2021. This type of disobedience pushed Alberta to more vigorously exercise its enforcement power, as Shaun Fluker explained in [COVID-19 and Enforcement of Public Health Orders](#). Public health strategy in Alberta then shifted away from restrictions to administering COVID-19 vaccinations, and Premier Kenney announced 2021 would be [the best summer ever](#). Instead, Alberta was hit with a devastating fourth wave of COVID-19 during the summer, and the NDP Opposition continues to [press for accountability](#) from the UCP government for how the pandemic was governed in 2021. Premier Kenney also initially spoke [against a vaccine passport](#), but the Alberta government eventually did follow the lead of other Canadian jurisdictions and implemented a requirement that persons show proof of vaccination to access goods and services – a system which Lorian

Hardcastle and Shaun Fluker described in [Alberta’s Vaccine Passport System: The Good, the Bad, and the Ugly](#).

Corporate/Commercial

Jasmine Girgis contributed three posts on equitable doctrines applied in the context of corporate law and insolvency law. The [first](#) explored whether creditors seeking to obtain complainant status under the corporate oppression remedy must be in a position ‘analogous to a minority shareholder’. The [second](#) and [third](#) posts examined how courts are interpreting the generalized duty of good faith in insolvency legislation, which came into force pursuant to Bill C-97 in November 2019. The first post, which commented on the Laurentian University restructuring, considered the duty in relation to setting aside a disclaimer under the *Companies’ Creditors Arrangement Act*, [RSC 1985, c C-36](#). The second post considered the (identical) duty in the *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#). Additionally, Jasmine [blogged](#) on the rule in *Foss v Harbottle* [[\(1843\), 2 Hare 461, 67 ER 189 \(UK Ch\)](#)] and derivative actions in relation to limited partnerships.

Concluding Thoughts

We would like to congratulate our most prolific blogger – Emeritus Professor Nigel Bankes – for being elected in 2021 as a [Fellow of the Royal Society of Canada](#). Congratulations Nigel for this prestigious and well-deserved honour! We are pleased to report that, despite his retirement from the Faculty, Nigel plans to continue blogging on ABlawg.

Thanks to all our followers for reading ABlawg. In a time when evidence-based, clear-headed analysis is more important than ever, it is encouraging to see high engagement with ABlawg commentary, and it is our pleasure to continue pursuing the goal of providing a basis for informed public discourse. See you in 2022.

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