

ABlawg Year in Review 2022

By: Admin

ABlawg is pleased to provide this compilation of highlights from 2022, consisting of some statistics, some examples of ABlawg's impact, and a synthesis of our bloggers' contributions in substantive areas of law.

The Numbers

ABlawg published a total of 72 posts in 2022, which brought over 300,000 visitors to the site over the course of the year. The post that generated the most hits this year was "[The Alberta Sovereignty Act and the Rule of Law](#)" by Martin Olszynski, Jonnette Watson Hamilton and Shaun Fluker (20 144 hits), followed by "[Red Flags with Bill 15 – Education \(Reforming Teacher Profession Discipline\) Amendment Act](#)" by Shaun Fluker (13 197 hits), "[An Example of How Government Delays Access to Information Requests: Pretending to not Understand Them](#)" by Drew Yewchuk (5 044 hits), "[Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the Impact Assessment Act is Unconstitutional](#)" by Martin Olszynski (4 803 hits), and "[For the Record: Who Makes COVID-19 Public Health Orders in Alberta?](#)" by Shaun Fluker and Lorian Hardcastle (4 018 hits).

Nigel Banks and Drew Yewchuk tied this year for the greatest number of blog posts, each authoring 13 posts, with Shaun Fluker, Martin Olszynski and Jonnette Watson Hamilton all tying for second place, with 8 posts each.

Jonnette Watson Hamilton's placement in the top 5, and as co-author to the most widely read post for this year, are reflective of her outstanding contributions to ABlawg since being a key part of its creation 14 years ago. It is fitting that, in the year she is retiring from the Faculty of Law, Jonnette hit the 200 mark for ABlawg posts authored or co-authored since 2007. Her ABlawg publication record includes over 30 posts on residential tenancy issues, which collectively provide an accessible and invaluable resource for tenants, landlords, decisionmakers, and policymakers in this province (see the list of posts with links attached [here](#)). One of these posts, on the abatement of rent, has had 15,429 views since it was published in 2014, which rivals some of the most-viewed posts in ABlawg's history. We wish Jonnette well in her retirement and hope she will continue writing for ABlawg into the future.

In the Courts

ABlawg posts continue to be cited by Canadian courts, with seven citations this year (doubling last year's tally). Lisa Silver's "[Who is Responsible for Extreme Intoxication?](#)" was cited by the Supreme Court of Canada in *R v Brown*, [2022 SCC 18 \(CanLII\)](#), while her post "[Placing Parity in](#)

[Perspective](#)” was cited by the British Columbia Supreme Court in *R v Grantham*, [2022 BCSC 1827 \(CanLII\)](#). Mark Mancini and Martin Olszynski’s post, “[Reviewing Regulations Post-Vavilov: Ecology Action Centre v Canada \(Part II\)](#),” was cited three times, twice by the Alberta Court of Appeal (*Auer v Auer*, [2022 ABCA 375 \(CanLII\)](#)) and *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, [2022 ABCA 381 \(CanLII\)](#)) and once by the Federal Court of Appeal: *Innovative Medicines Canada v Canada (Attorney General)*, [2022 FCA 210 \(CanLII\)](#). Jennifer Koshan’s post “[#Don’tDisbelieveHer: Towards Recognition of Myths and Stereotypes about Intimate Partner Violence at the Supreme Court of Canada](#)” was cited by the Alberta Provincial Court in *R v MacDonald*, [2022 ABPC 255 \(CanLII\)](#) and Jassmine Girgis’ post, “[Must Creditors be “Analogous to Minority Shareholders” to Obtain Standing for Oppression?](#)” was cited by the Alberta Court of King’s Bench in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, [2022 ABQB 592 \(CanLII\)](#).

In the Legislature

Martin and Nigel’s post on the *Alberta Sovereignty Act* was referenced several times in the debates on that Bill (see [Hansard](#) for December 6 and December 7, 2022). Stella Varvis – a regular guest blogger from the Alberta Law Reform Institute (ALRI) – also saw her [ABlawg post](#) on ALRI’s [Adverse Possession and Lasting Improvements to Wrong Land, Report for Discussion No 33 \(July 2019\)](#) referred to in the Legislature on December 6, 2022. During the previous session, members of the Legislative Assembly cited Jennifer Koshan’s [Twitter thread](#)-turned-ABlawg post “[A Comment on Bill 14, The Provincial Court \(Sexual Awareness Training\) Amendment Act, 2022](#)” during the debates on Bill 14 (see [Hansard](#) for April 20 and May 4, 2022).

In the Scholarship

There are too many references to ABlawg in the academic and policy sphere to mention fully here, but in 2022 over 100 ABlawg posts were cited in a range of publications, including journal articles, books, reports and briefs of law reform commissions and civil society organizations, submissions to the United Nations, court facta, news articles, and other blogs.

Area-Specific Posts in 2022

Constitutional Law

Constitutional posts, dealing with both division of powers and *Charter* issues, dominated ABlawg this past year, both in terms of the number of posts, and especially the number of hits on those posts. This speaks to the importance of the cases or statutes commented on, as well as the strong feelings those decisions or statutes have engendered.

The first big constitutional decision to attract an ABlawg division of powers commentary was the Alberta Court of Appeal’s opinion in *Reference re Impact Assessment Act*, [2022 ABCA 165 \(CanLII\)](#). Martin Olszynski [summarized that opinion](#), noting that it was in many (mostly problematic) ways reminiscent to the Court of Appeal’s prior opinion in *Reference re Greenhouse Gas Pollution Pricing Act*, [2020 ABCA 74 \(CanLII\)](#), which was overturned by the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#). Nigel

Bankes and Andrew Leach [argued](#) that the Court of Appeal adopted an untenable view of the exclusivity of provincial law-making powers under ss 92 and 92A of the *Constitution Act, 1867*. As with the *GGPPA*, the Court of Appeal's opinion in the *Reference re Impact Assessment Act* is heading to the Supreme Court of Canada; several members of the Faculty of Law and the Public Interest Law Clinic have filed factums in support of the validity of the federal Act.

The end of the year saw both the Saskatchewan and Alberta governments introduce unprecedented and fundamentally unconstitutional bills in an attempt to bolster each province's constitutional position. These bills were foreshadowed in the United Conservative Party's spring leadership contest and then-leadership hopeful Danielle Smith's campaign promise to enact a sovereignty act, which was the subject of a [post](#) by Martin Olszynski, Jonnette Watson Hamilton, and Shaun Fluker, ABlawg's most read post this year.

For Saskatchewan this was [Bill 88: An Act to Assert Saskatchewan's Exclusive Legislative Jurisdiction and to Confirm the Autonomy of Saskatchewan](#) (short title *The Saskatchewan First Act*) and for Alberta it was [Bill 1 – Alberta Sovereignty Within a United Canada Act](#) (*ASWUCA* or the *Alberta Sovereignty Act*). Of course, this framing is intended to draw attention to the principal challenge that must face any such effort: while an amendment of the Constitution of Canada can change the relative balance of power between the different orders of government, this is not something that one order of government can do on its own. Nigel Bankes, Andrew Leach, and Martin Olszynski offered a lengthy critique ([here](#)) of the *Saskatchewan First Act*, while Martin Olszynski and Nigel Bankes offered [an equally detailed critique](#) of the *Alberta Sovereignty Act*. The Olszynski/Bankes post identified three principal concerns with Bill 1: a division of powers concern, a separation of powers concern (as supported by s 96 of the *Constitution Act, 1867*), and a concern as to the excessive delegation (or Henry VIII) provisions of the Bill. While the Smith government did introduce [amendments](#) to limit the delegation provisions of the Bill, Olszynski and Bankes in [a follow-up post](#) argue that Bill 1 remains vulnerable on both separation of powers and division of powers arguments.

The *Canadian Charter of Rights and Freedoms* also figured prominently on ABlawg this year. Some of those posts dealt with rights and freedoms that were potentially engaged by the COVID-19 pandemic and are referenced in the paragraph below. Other coverage of *Charter* issues included Jennifer Koshan, Lisa Silver, and Jonnette Watson Hamilton's post on the Alberta Union of Public Employees (AUPE)'s unsuccessful efforts to challenge the *Critical Infrastructure Defence Act, SA 2020, c C-32.7 (CIDA)* in "[Frost on the Constitutional Windshield: Challenge to Critical Infrastructure Defence Act Struck by Alberta Court of Appeal](#)." Although AUPE's challenge will go no further after the [Supreme Court denied leave to appeal](#), the authors will be watching as the courts consider another challenge to *CIDA* by a person charged under the Act in relation to the [Coutts blockade](#) in February 2022. Jonnette and Jennifer also contributed "[Women's Charter Equality before the Supreme Court of Canada: Where Do We Stand as of International Women's Day 2022?](#)" which critically reviewed 30 years of women's equality rights jurisprudence at the Supreme Court of Canada. And as part of her usual blogging on criminal law decisions, Lisa Silver wrote "[Does the Punishment Fit the Crime?](#)", analyzing a trilogy of Alberta cases involving the constitutionality of sentencing laws that were heard by the Supreme Court of Canada in fall 2022.

COVID-19 Law, Policy, and Protests

COVID-19 related law and policy was another key focus area on ABlawg this year. Since the beginning of the pandemic, there have been questions about the legal authority of the Chief Medical Officer of Health (CMOH) and the legal status of public health orders in Alberta. These legal questions were finally addressed in a 2022 case, in which children affected by the CMOH's lifting of mandatory masking in schools claimed that this decision was unreasonable and violated their *Charter* rights. The CMOH and Cabinet attempted to deflect by pointing fingers at each other as to who was the responsible decision-maker, while the Minister of Education was directing schools on public health measures. Shaun Fluker and Lorian Hardcastle commented on a series of decisions made in *CM v Alberta*, [2022 ABQB 462 \(CanLII\)](#), *CM v Alberta*, [2022 ABQB 357 \(CanLII\)](#), and *CM v Alberta*, [2022 ABKB 716 \(CanLII\)](#). In "[For the Record: Who Makes COVID-19 Public Health Orders in Alberta?](#)", they explained how the Court of King's Bench rejected claims of Cabinet privilege over materials related to the masking decision and ordered the CMOH to produce a better Record of Decision. As discussed in "[Confirmed in Law: The Decision-Maker for COVID-19 Public Health Orders in Alberta is the Chief Medical Officer of Health](#)", this transparency helped to confirm that under the *Public Health Act*, [RSA 2000, c P-37](#) legal authority to make public health orders rests with the CMOH and that there is a legal process that must be followed in order to override that authority.

The failure of the Executive branch across Canada to adhere to legal basics such as due process and transparency in COVID-19 decision-making, and the failure of Legislatures to hold the Executive to account, has undoubtedly contributed to the crisis in democracy, federalism, constitutionalism, and the rule of law that has begun to consume our legal and political systems. Shaun Fluker's "[COVID-19 and the Emergencies Act \(Canada\) Redux](#)" examined the declaration of a federal public order emergency in February 2022 and asked whether this would restore some faith in democracy, the rule of law and legitimacy in government. Public [hearings](#) on the exercise of this extraordinary power were held this Fall, and Honourable Commissioner Paul Rouleau's Report (to be tabled in February 2023) will be the first of many important accountability measures produced in relation to powers exercised in response to COVID-19.

Commenting on what has recently been voted Canada's [news story of the year](#), David Wright and Martin Olszynski wrote "[Rigs in a Parlour: The Freedom Convoy and the Law of Private Nuisance](#)" – which might be the cleverest title on ABlawg this year. Following news that a class action claim had been initiated against the Freedom Convoy by downtown Ottawa residents, that post discussed the basic elements and principles of private nuisance in that context, noting the role of the common law and concluding that the plaintiffs' prospects for success were very good.

To close off the year of COVID-related legal analysis, Jennifer Koshan and Jonnette Watson Hamilton examined Danielle Smith's leadership promise that she would amend the *Alberta Human Rights Act*, [RSA 2000, c A-25.5 \(AHRA\)](#) to add vaccination status as a prohibited ground of discrimination. Their post "[Grounding the Alberta Human Rights Act and the Proposal to Protect Vaccination Status](#)" makes the case that this addition would be contrary to the purposes of human rights legislation and that there is no legitimate basis for protection of vaccination status under the *AHRA*. Although the government decided not to pursue this amendment, Premier Smith's

[alternative plan](#) – to contact organizations directly to urge them not to impose vaccine mandates – raises similar rule of law concerns to the sovereignty legislation analyzed on ABlawg this year.

Aboriginal and Indigenous Law

In one of its last hearings of 2022, the Supreme Court heard oral arguments in the appeal from the [Quebec Court of Appeal's reference decision](#) on the constitutionality of the federal *Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#). This is significant legislation that recognizes Indigenous law-making authority in respect of the provision of services to Indigenous children and families. It also recognizes the inherent right of self-government as an Aboriginal right under s 35 of the *Constitution Act, 1982*. The Quebec Court of Appeal recognized the inherent right of self-government in relation to child and family services, but it also placed some limits on how far the federal government can go in giving effect to Indigenous jurisdiction. The Supreme Court's decision may be the most significant decision interpreting Aboriginal rights under s 35 and the scope of federal authority under s 91(24) that we have seen in many years. In anticipation of the Supreme Court hearings, we published a series of [pieces](#) from academics and practitioners exploring key questions that will be before the Court, which was led by Robert Hamilton.

Oil and Gas and Energy Law

As in previous years, we continue to see a decline in the number of oil and gas cases. In part this is likely due to the decline in conventional oil and gas production, but perhaps also due to the increased use of arbitration, which seems to be prevalent in the broader energy field. ABlawg did however provide commentary on a few oil and gas cases. Perhaps the most significant decision was *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, [2022 ABKB 807 \(CanLII\)](#) dealing with a complex oil and gas accounting issue. Nigel Bankes commented on this decision [here](#), building on previous posts [here](#) and [here](#) commenting on earlier trial and appellate decisions. Nigel also continued his commentary on decisions of the Alberta Energy Regulator, dealing with competition for the use of geological pore space for disposal purposes with a [comment](#) on [2022 ABAER 004](#), Pure Environmental Waste Management Ltd.

ABlawg's coverage of unfunded liability problems also continued during 2022. Drew Yewchuk and Chris Wray covered details of the orphan fund levy in "[How is the Orphan Fund Levy Set? Alberta's Oil and Gas Clean-up Costs in 2022](#)". Drew Yewchuk also wrote on the conflict between well cleanup and municipal taxes in "[Abandonment and Reclamation Obligations, Builders Liens, and Municipal Taxes in Oil and Gas Bankruptcy Proceedings](#)" and then provided an update on the situation in "[Alberta's Orphan and Unreclaimed Oil and Gas Assets in July 2022](#)". Nigel Bankes wrote on a decision about the orphan well problem in Ontario in "[Well Abandonment and Reclamation in Ontario](#)".

Environmental Law

Perhaps not surprisingly, many of the posts listed in the section on constitutional law could also be listed here: environmental and natural resources laws have often been at the heart of federalism disputes in Canada. Aside from those, however, ABlawg saw several posts related to

the ongoing coal mining controversy and related challenges in land-use planning. Drew Yewchuk [wrote about the Coal Policy Committee’s Final Report](#), which very much emphasized the importance of land-use planning, while Nigel Bankes, Sharon Mascher, and Martin Olszynski took the opportunity [to lament the sad state of planning in the province](#). The sad state of affairs was further confirmed by a three-part series of posts about the Lower Athabasca Regional Plan (LARP) by David Laidlaw (see [here](#), [here](#), and [here](#)). Finally, Anna-Maria Hubert’s International Environmental Law class contributed an important and timely post on [climate racism in Canada](#), which explored the implications of a recent U.N. Human Rights Commission decision from Australia for Indigenous peoples facing climate dislocation in Canada.

Freedom of Information

In addition to his contributions in the area of oil and gas, energy, and environmental law, Drew Yewchuk wrote on the sorry state of access to information law in Alberta in “[Procedural Fairness When Challenging Timeline Extensions for Freedom of Information Requests](#)” and “[An Example of How Government Delays Access to Information Requests: Pretending to not Understand Them](#)”.

Residential Tenancies

ABlawg continued to monitor legislative, judicial, and administrative decision-making in residential tenancy matters this year. This area has been a consistent focus for ABlawg since its inception, and 2022 was no exception, with Jonnette Watson Hamilton contributing four posts. “[The Chilling Effect of Costs on Appeals from Residential Tenancy Dispute Resolution Service Orders](#)” looked at the threat of adverse litigation costs facing tenants who seek to appeal decisions made by the Residential Tenancies Dispute Resolution Service (RTDRS) to the Court of King’s Bench. “[Residential Tenancies, Mental Disabilities, and Evictions](#)” critically examined an Alberta Human Rights Commission dismissal of a claim for discrimination based on mental disability, arising from an eviction. In “[The Importance of Move-In Inspection Reports to the Return of Security Deposits in Residential Tenancies](#)” Jonnette explained the importance to a landlord of completing a move-in inspection report at the outset of a tenancy, from an evidentiary viewpoint, where there is a claim for damages to the premises later on. The evidentiary onus in a claim for damages was also the focus of “[Who is Responsible for Damage to Rental Premises Caused by Mouse Infestations – and Why?](#)”, with particular attention to cases where either the tenant or the landlord chooses to pursue the claim in the Provincial Court rather than the RTDRS (an option available under section 54.2 of the *Residential Tenancies Act*, [SA 2004, c R-17.1](#)).

Finally, a good opportunity was missed in 2022 to address procedural fairness and access to justice problems in the landlord-tenant dispute resolution service administered by the RTDRS. In “[Alberta Extends the Residential Tenancy Dispute Resolution Service Regulation for Another 5 Years](#)”, Shaun Fluker noted that the Lieutenant Governor in Council extended the *Residential Tenancy Dispute Resolution Service Regulation*, [Alta Reg 98/2006](#), for another 5 years without engaging in consultation or any apparent public review process.

Gender-Based Violence

Jennifer Koshan contributed three posts in 2022 related to legal responses to gender-based violence, emphasizing the need for education of judges, lawyers, and other legal professionals on the social context surrounding domestic and sexual violence. In “[#Don’tDisbelieveHer: Towards Recognition of Myths and Stereotypes about Intimate Partner Violence at the Supreme Court of Canada](#)”, Jennifer synthesized the misconceptions that can taint domestic violence decisions in the criminal and family law areas, and anticipated the Supreme Court of Canada’s decision in *Barendregt v Grebliunas*, [2022 SCC 22 \(CanLII\)](#), in the spring of 2022. “[Choice vs Coercive Control: The Alberta Court of Appeal Decision in R v Naslund](#)” further explored domestic violence myths and stereotypes, analyzing the now notorious case of Helen Naslund, who was recently [granted day parole](#) after originally having been sentenced to 18 years in prison for killing her abusive husband. In “[A Comment on Bill 14, The Provincial Court \(Sexual Awareness Training\) Amendment Act, 2022](#)”, Jennifer reviewed the Alberta government’s effort to legislatively mandate judicial education on sexual violence, noting a few key gaps in the legislation and arguing that this initiative should be extended to domestic violence as well. Alberta [officially endorsed](#) the National Action Plan to End Gender-Based Violence in November 2022, and Professor Koshan will continue to monitor developments in this area.

Conclusion

As always, ABlawg is grateful to its contributors and subscribers for reading our posts, sharing and discussing them on social media, and otherwise supporting this initiative. We also want to thank our student editors this year, Robert Bilak and Athina Pantazopoulos, for their hard work in ensuring the ABlawg train runs on track and on time. We wish everyone a safe and healthy 2023 and look forward to continued conversations about the issues we discuss on this site.

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