

## ABlawg: Year in Review 2023

By: Admin

### The Numbers

ABlawg had another very prolific year, publishing 81 posts in 2023. Our site had a total of 838,001 visits from 222,372 visitors this year. We saw a particularly busy fall with 13 posts in November, 12 posts in October, and 8 posts in September, averaging out to just over 1 post every three days. Remarkably, in the period from the last week of September to the first week of December, ABlawg published a post on 32 out of a potential 50 days!

Our most-viewed post this year was Nigel Bankes and Martin Olszynski's critique of the UCP government's pause on approvals for renewable projects, [An Incredibly Ill-Advised and Unnecessary Decision](#) (4,855 views). The next most read post was also written by Nigel and Martin, joined by Jennifer Koshan, in [Ethics Commissioner Confirms that Premier Danielle Smith Breached the Conflicts of Interest Act – and a Fundamental Principle of Our Democracy](#) (3,428 views). Close behind was Nigel's [Conflict in Paradise](#), exploring the potential conflict between solar farms and subsurface oil and gas rights (3,266 views). Rounding out our top five was Michael Ilg's [Thumbs Up, Bruh – Informality and the New Art of Contract Formation](#), examining the use of emojis in contracts (3,057 views) and the post by Nigel, Martin, and David V. Wright, [Wait, What!? What the Supreme Court Actually Said in the IAA Reference](#) (2,811 views).

Our top authors this year were [Nigel Bankes](#) with 22 posts, [Drew Yewchuk](#) with 12 posts, [Jennifer Koshan](#) with 10 posts, [David V. Wright](#) with 9 posts, and [Shaun Fluker](#) and [Martin Olszynski](#) with 8 posts each.

### ABlawg Impact

ABlawg posts continue to be widely cited in academic writing and in news articles and other popular media. We are grateful for the comment of David Climenhaga on [Alberta Politics](#) that ABlawg "is essential reading for any Albertan who wishes to follow provincial politics...."

One ABlawg post had a particular impact on politics this year: Lorian Hardcastle and Shaun Fluker's [Haste Makes Waste: Amending the Public Health Act](#), was quoted extensively in the legislative debates on [Bill 6](#), the *Public Health Amendment Act, 2023* (see [Hansard](#), November 30, 2023 at 458-460).

ABlawg posts were also cited in a number of government publications this year. A report of the [Mi'kmaq Tripartite Forum Justice Committee](#), authored by Naomi Metallic and Roy Stewart,

cited ABlawg posts by [Nigel Bankes and Jennifer Koshan](#) and by guest blogger [Kent McNeil](#). The Northwest Territories Legislative Assembly Standing Committee on Government Operations referred to a [post](#) by Linda McKay Panos in its [report on ombuds legislation](#). And one of Jennifer Koshan's [posts](#) on the need for family violence law reform was cited by the federal Department of Justice in its report on the [Experiences of Indigenous families in the family justice system](#).

We now turn to a synthesis of ABlawg's impact in a number of thematic areas, followed by some closing thoughts.

## **Aboriginal/Indigenous Law**

It is an unfortunate reality that Indigenous-Crown relationships continue to generate significant litigation and other forms of dispute settlement, including arbitration. ABlawg covered some of these developments over this last year, including a post from Martin Olszynski revisiting an important decision from 2021, *Yahey v British Columbia*, [2021 BCSC 1287 \(CanLII\)](#): see [Counting Straws: Yahey v British Columbia and the Future of Cumulative Effects Management in Canada](#).

Perhaps the most significant decision of the calendar year in this area (albeit only at the trial level) was that of the Supreme Court of British Columbia in *Gitxaala v British Columbia (Chief Gold Commissioner)*, [2023 BCSC 1680 \(CanLII\)](#), dealing with the validity of the province's historic free entry mining system in light of the Crown's duty to consult and accommodate. ABlawg responded with two posts, beginning with one from Nigel Bankes emphasising the parts of the judgment dealing with BC's legislation "implementing" the United Nations Declaration of the Rights of Indigenous Peoples, namely the *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019, c 44](#): see [The Legal Status of UNDRIP in British Columbia](#). David V. Wright followed this with a post dealing with [the duty to consult](#), and its implications for BC's mining legislation. David also commented on the duty to consult and the honour of the Crown in a Yukon case dealing with [Project Assessment, and Land-Use Planning in a Modern Treaty Context](#).

ABlawg had two other posts dealing with modern treaties over this last year. Nigel Bankes contributed a post on the [First Arbitration Award under the Nunavut Agreement](#) and David V. Wright commented on [Canada's Collaborative Modern Treaty Implementation Policy](#).

ABlawg contributed to the debate on mandatory Indigenous Cultural Competency Training for lawyers by publishing a guest column from colleagues at the U of A and beyond, [Law Society of Alberta to Hold a Special Meeting to Debate its Power to Mandate Indigenous Cultural Competency Training](#). Drew Yewchuk followed this up with a post on the results of that meeting: [Fighting Over History at a Special Meeting of the Law Society of Alberta](#).

Finally, Robert Hamilton contributed to ABlawg's series on *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#), in which he suggested that the Supreme Court [Missed An Opportunity for Guidance on Important Issues Pertaining to Indigenous Peoples](#).

## **Administrative Law**



In 2023, ABlawg continued to follow the influence of *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(Can LII\)](#), on standard of review jurisprudence in Canada. In [Judicial Review on the Vires of Subordinate Legislation: Full Vavilov, Partial Vavilov or No Vavilov?](#), Shaun Fluker commented on two decisions issued concurrently by the Alberta Court of Appeal in late 2022, which held that a *Vavilov* standard of review analysis does not apply to a *vires* determination of regulations (the Supreme Court of Canada recently granted leave to hear an [appeal](#) of these decisions, and the hearing is tentatively scheduled for April 2024). In [Stores Block Meets Vavilov: The Status of Pre-Vavilov ABCA Decisions](#), Nigel Bankes questioned another ruling by the Alberta Court of Appeal that its pre-*Vavilov* standard of review decisions remain presumptively binding in post-*Vavilov* cases, despite the wholesale changes to the standard of review framework implemented by the Supreme Court in *Vavilov*. Shifting away from judicial review and towards tribunal decisions themselves, in [Annotations of NRCB Review Decisions Under the Agricultural Operations Practices Act](#), Mike Wenig highlighted some inter-agency jurisdictional issues that arise in review decisions issued by the Natural Resources Conservation Board concerning intensive livestock operations regulated under the *Agricultural Operation Practices Act*, [RSA 2000, c A-7](#).

## Bankruptcy and Insolvency

Environmental obligations in corporate bankruptcies continue to be at the forefront of bankruptcy law. Jassmine Girgis addressed the application of these issues to a private dispute outside insolvency proceedings in [Environmental Obligations Enforced Between Private Parties: The Extension of Redwater](#). Jassmine also addressed lenders' exposure when they make risk assessments based on whether particular assets are likely to become encumbered by environmental reclamation obligations in [What Are "Unrelated Assets" When It Comes to Environmental Reclamation Obligations? The Lending Industry Needs to Know](#).

## Conflicts of Interest, Ethics, and Constitutional Conventions / Norms

Nigel Bankes, Jennifer Koshan, and Martin Olszynski contributed to a series of posts examining the implications of Premier Danielle Smith's intervention in the prosecution of Artur Pawlowski, one of the leaders of the February 2021 COVID-19 protests in Coutts, Alberta. [Premier Danielle Smith and the \(Non\) Observance of Constitutional Conventions](#), published in April 2023, examined the Premier's breach of several constitutional conventions in her interactions with the Department of Justice relating to this and similar prosecutions. It later came out that the Premier had contacted the Attorney General directly about the Pawlowski prosecution, and the Ethics Commissioner's report into this matter was discussed in May 2023 in [Ethics Commissioner Confirms that Premier Danielle Smith Breached the Conflicts of Interest Act – and a Fundamental Principle of Our Democracy](#). The recommendation for sanctions called for in [Commissioner Trussler Should Recommend Sanctions Against Premier Smith](#), published in June 2023, did not transpire. When Commissioner Trussler's report was tabled in the Legislature in October, 2023, Speaker Nathan Cooper ruled that it did not need to be debated, because she had not recommended sanctions against the Premier (see [Alberta Hansard](#) (31 October 2023) at 23, and see s 28(3) of the *Conflicts of Interest Act*, [RSA 2000, c C-23](#)).



The Smith government also has a propensity to dismiss governance boards in public institutions with limited justification, and replace them with an individual who reports directly to the political executive. In [Democratic Accountability and the Banff Centre](#), Shaun Fluker examined the most recent illustration of this: removal of the board of governors for the Banff Centre for Arts and Creativity in late October.

## Contract Law

There were several contract law issues that were the subject of commentary on ABlawg this past year. In one post, Jassmine Girgis discussed the interaction between criminal and contract law, specifically, how the potential illegality of a contract can and should influence its enforceability in a civil context in [Can the Failure to Pay for Sexual Services Form the Basis of a Contractual Claim?](#)

The contractual duties of good faith and honest performance also continue to raise questions. In [There is No Presumption of Loss Flowing from a Breach of the Contractual Duty of Honest Performance](#), Jassmine Girgis addressed whether there is a legal presumption of loss once a court finds a breach of the contractual duty of good faith. She also wrote on the issue of [Interpreting Restrictive Covenants in Commercial and Employment Agreements](#).

Michael Ilg contributed to the discussion of contract law with a post considering the use of emojis to signify acceptance of a contract offer and a signature in [Thumbs Up, Bruh – Informality and the New Art of Contract Formation](#).

## Corporate Law/Directors' Liability

When directors strip assets from the corporation, causing the company to defeat its creditors, claimants must choose how to raise these issues in litigation. In [Lifting the Corporate Veil v Personal Liability Under the Oppression Remedy: When Directors Behave Badly, When is Each Remedy Appropriate](#), Jassmine Girgis discussed both remedies.

## Energy Law: Oil, Gas and Renewables

ABlawg's coverage of unfunded liability problems rolled on in 2023. In March, Drew Yewchuk, Shaun Fluker, and Martin Olszynski summarized the Auditor General's damning report on the conventional field situation in [Polluter Pays Principle at Risk: Auditor General Finds Alberta's Oil and Gas Liability Regime Still Badly Deficient](#). Drew Yewchuk also covered [problems with the funding of the orphan well association](#) and [problems with the new mandatory spend obligations](#). In September, Drew Yewchuk and Martin Olszynski provided an update on the oilsands closure problems in [Now 40% Worse: The Mine Financial Security Program in 2023](#). Outside of ABlawg, Drew Yewchuk, Shaun Fluker, and Martin Olszynski published a report on the [liability problems in the conventional field](#) and Martin Olszynski, Andrew Leach, Drew Yewchuk published a report on the [liability problems with the oil sands mines](#).

In a related matter, ABlawg also provided commentary on the status of the transaction between Shell and Pieridae with respect to the sale of Shell's legacy foothills sour gas assets to Pieridae. The sale closed some years ago but Shell remains the licensee of record with the Alberta Energy



Regulator (AER) for these assets. In a post entitled [What is the Status of the Shell /Pieridae Deal and What is the AER Doing?](#) Nigel Bankes argued that this continued separation between ownership and licensee responsibility is unlawful.

ABlawg also covered several traditional oil and gas contractual disputes with a post by Nigel Bankes on [The Legal Status of a Gross Overriding Royalty Carved out of a Crown Lease](#) as well as posts by Nigel on rights of first refusal (see [Total Claims that its ROFR Rights Were Violated in the Sale of Teck's Interest in the Fort Hills Project](#)) and another royalty characterization case (see [Sometimes it is Completely Irrelevant Whether or not a Royalty Interest Amounts to an Interest in Land](#)). Nigel also teamed up with Drew Yewchuk to write a post on [Worrying About Reclamation and Abandonment Obligations in the Context of Property Assignment Consents](#).

Coal related issues were relatively quiet in 2023, with only one post from Nigel Bankes: [The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit](#).

On the renewable energy side, Nigel Bankes and Martin Olszynski wrote about Alberta's pause on approvals for new renewable electricity generation projects in [An Incredibly Ill-Advised and Unnecessary Decision](#). ABlawg also published two of the many submissions to the first phase of the Alberta Utility Commission (AUC)'s pause inquiry: one by Martin Olszynski entitled [Building a Reclamation Security Regime for Electricity Generation: Transparent, Constrained, Fair, and Credible](#), and the other by Mike Wenig on [How Land Use Issues Factor into Alberta Utilities Commission Reviews of Renewable Energy Power Plants](#). Nigel Bankes also contributed a post entitled [Conflict in Paradise](#), referencing an AUC decision dealing with the potential conflict between solar farms and the owners of subsurface oil and gas rights.

The changing energy mix within Alberta's electricity market will pose challenges for Alberta's electricity regulators, including the Department of Energy and Minerals as well as the AUC and the Alberta Electric System Operator (AESO). In a post early in the year, Nigel Bankes raised the question of whether [We Need a Forum Within Which to Discuss Issues of Electricity Law and Policy in Alberta?](#) and followed this up at the end of the year with a post on [Transmission Policy in Alberta](#).

Alberta also continues to grapple with the challenges of putting in place a complete legal and regulatory framework for carbon capture and storage (CCS) projects. While Alberta got off to a good start on this project more than a decade ago, recent efforts seem increasingly ad hoc and opportunistic and raise questions about competition for pore space. Nigel Bankes commented on some of these developments in two posts: [Alberta Rolls Out Yet Another Form of Sequestration Agreement](#) and [The Crown Pore Space Lease and Pore Space Unit Agreement](#). A third post with two titles dealt with [\(1\) The Current Status of Monitoring, Measurement and Verification Requirements for Carbon Capture and Storage Projects in Alberta](#) and also asked [\(2\) When Does a Ministerial Order Have to be Published?](#)

## Environmental Law



ABlawg continues to provide detailed coverage of relevant developments in Canadian and Alberta environmental law. As of writing, it published five posts on the Supreme Court of Canada’s controversial decision in *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#), wherein a 5:2 majority concluded that the federal government’s impact assessment regime was unconstitutional. Martin Olszynski, Nigel Bankes, and David V. Wright kicked things off by setting out what the Court did – and did not – decide in [Wait, What!? What the Supreme Court Actually Said in the IAA Reference](#), which was then followed by Nigel Bankes and Andrew Leach in [The Word “Exclusive” Does Not Confer a Constitutional Monopoly, Nor a Right to Develop Provincial Resource Projects](#), followed by a post by Robert Hamilton on the largely unexplored scope of Parliament’s legislative authority with respect to Indigenous peoples and lands reserved for them, [The IAA Reference: A Missed Opportunity for Guidance on Important Issues Pertaining to Indigenous Peoples](#), and finally a post by David V. Wright focusing on the decision’s climate dimensions, [Not Plenary, but Not Nothing Either: Greenhouse Gas Emissions in the Supreme Court Opinion on the \(un\)Constitutionality of the Federal Impact Assessment Regime](#).

All of this was preceded by a warm-up post prior to the decision’s release by David V. Wright, [Supreme Court of Canada Will Soon Rule on the Constitutionality of the Federal Impact Assessment Act. Here’s What to Watch for...](#), who also recently involved his Environmental Impact Assessment (EIA) Law class in EIA law reform in the province of Nova Scotia: [EIA Law Class Recommendations for Reforming Provincial Environmental Assessment](#).

Other environmental law posts include two by Jassmine Girgis referenced above, discussing ongoing developments in the overlapping space between bankruptcy law and reclamation obligations since the Supreme Court’s *Redwater* decision: [Environmental Obligations Enforced Between Private Parties: The Extension of Redwater](#) and [What Are “Unrelated Assets” When It Comes to Environmental Reclamation Obligations? The Lending Industry Needs to Know](#).

Shaun Fluker reminded ABlawg readers of the very short timeline to raise environmental concerns about water projects in [Public Participation under the Water Act \(Alberta\): A Very Short Window of Opportunity](#), and he also blogged on new federal policy in relation to biodiversity offsets in [Biodiversity Offsets and the Species at Risk Act \(Canada\)](#). David V. Wright kicked off the year back in January with a post in relation to litigation involving British Columbia’s Climate Accountability Law: [BC Climate Accountability Law is Justiciable \(But Weak Climate Plan is Reasonable\)](#), and a post discussing the contested notion of “just transition” in the Alberta context: [Just Transition Friction Needs Interest-Based Negotiation](#).

## Family and Gender-Based Violence

Jennifer Koshan’s ongoing research on family and gender-based violence led to several posts this year. Jennifer wrote a series exploring the use of tort law to address the harms of family violence and harassment (see [Mind the Gap: A New Tort of Harassment in Alberta](#); [Torts and Family Violence: \*Ahluwalia v Ahluwalia\*](#) (with Deanne Sowter); and [Family Violence Torts and Their Limits in Alberta](#)). In October, Jennifer and colleagues Janet Mosher, Shushanna Harris, and Wanda Wiegers made a submission to the federal Department of Justice in relation to its study on the criminalization of coercive control, and published the [executive summary](#) of that submission on ABlawg. One of the cases discussed in the submission was the subject of its own ABlawg post:



[The Myth of False Allegations of Intimate Partner Violence](#), following up on Jennifer's [earlier post](#) on myths and stereotypes about domestic violence. Lastly, Jennifer reviewed the impact of government laws and policies restricting the use of chosen names and pronouns by trans youth at school, and the connection of these government actions to family violence, in [Gender-Affirming Names and Pronouns, Parental Control, and Family Violence](#).

## Public Health Law

Since the beginning of the COVID-19 pandemic, there have been numerous ABlawg posts on public health law, with a particular focus on the legal authority of the Chief Medical Officer of Health (CMOH) to manage public health emergencies. In [E. coli and the Public Health Act \(Alberta\)](#), Shaun Fluker and Lorian Hardcastle wrote about the government's problematic lack of clarity on public health governance, which had started during COVID-19 and carried over to their communications during a devastating *E. coli* outbreak in Alberta daycares. The importance of legal clarity was further underscored by the Alberta Court of King's Bench in *Ingram v Alberta (Chief Medical Officer of Health)*, [2023 ABKB 453 \(CanLII\)](#), which Lorian Hardcastle blogged about in [The Next Chapter in the Role of Alberta's Chief Medical Officer of Health](#). In this decision, the Court found that the COVID-19 public health orders were the product of improper delegation of legal authority from the CMOH to Cabinet. In November, the UCP government responded to the Court's ruling by introducing legislation (Bill 6) that shifts decision-making power from the CMOH to Cabinet during a public health emergency. Lorian Hardcastle and Shaun Fluker commented on these legal changes in [Haste Makes Waste: Amending the Public Health Act](#), arguing that they were a missed opportunity to ensure that Alberta's legislation reflects basic principles of democratic governance. As noted above, this post was referenced extensively in legislative debate over Bill 6 (November 30 [Alberta Hansard](#), 31<sup>st</sup> Leg, 1<sup>st</sup> sess at pages 457 – 464).

## Human Rights Law, Freedom of Expression, and Freedom of Religion

Rights and freedoms – as well as constitutional principles such as democracy – underlie many of the contributions to ABlawg in 2023, but there are four posts dealing with developments concerning rights and freedoms more directly. In [Webber Academy II: Balancing Religious Discrimination and Freedom from Religion in the Provision of Educational Services](#), Howard Kislowicz and Jennifer Koshan unpacked the Alberta Court of Appeal's latest decision in a human rights matter that has been ongoing for some years. Although the Court found that Webber Academy's denial of a request for prayer space engaged human rights legislation, and that the *Charter* freedoms of the Academy and its community were properly considered, the decision reveals some interesting gaps in the case law. Howard discussed another freedom of religion case, this time involving a Sikh man who challenged the oath of allegiance to the Queen that members of the Law Society of Alberta are required to take, in [Religious Freedom and the Oath to the Sovereign](#). Also on the subject of professional societies and *Charter* freedoms is Michael Ilg's contribution [It's Not Easy Being Mean](#), which argues (in a comment on the Jordan Peterson case) that the regulation of expression by these societies should be considered disciplinary actions that may have a chilling effect on dissent. Rounding out the posts in this area is Amy Matychuk's analysis of the Alberta Human Rights Tribunal's decision in [John v Edmonton Police Service](#),



which found that the EPS discriminated against several Black complainants on the basis of race, colour, ancestry, and place of origin.

### **Closing Thanks**

ABlawg's editors and bloggers thank all of our readers for your continued interest in and support of our work. We also send a big shout out to our student editor Athina Pantazopoulos, who provides timely and trustworthy editorial assistance and manages to keep her cool even during our busiest times. Athina pulled together all of the statistics and citations noted in this post, and we are grateful for her work.

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