

A Pioneer for Environmental Protection:

Linda Duncan, Wilderness Defender

By Ian Urquhart

“I couldn’t help but become an environmental lawyer.” With these words Linda Duncan opened her Martha Kostuch lecture “Law and Order for the Environment.” Over the years many Kostuch lecturers have alluded to the importance of the “growing up” years, of family and friends, to their subsequent commitment to look out for and defend nature. Those influences were instrumental to setting Linda on her path.

As a child she spent a great deal of time at Lake Wabamun, west of Edmonton. In the summers, she hiked there; in the winters she skied. Darcy Duncan, Linda’s father, was a partner in Duncan Craig – an Edmonton law firm with roots predating Alberta’s birth as a province. His success enabled the family to live for a time on 40 acres near Devon where their home overlooked a massive marsh. It’s easy for me to imagine the bird songs that would have filled the air on the acreage in the spring. Living there also helped nature seduce Linda into devoting her professional life to trying to strengthen environmental protections.

From the very beginning of her career Linda wanted to work with Indigenous peoples, support their rights, and protect the environment. Alberta was an important incubator for developing these perspectives. “We have had the worst of the worst

struggles in our wonderful province of Alberta,” she said. Growing up in a province dominated by petroleum encouraged Linda to adopt two fundamental positions. First, citizens need to be able to participate effectively in decision-making. Second, people need to have the legal power to hold government accountable.

The importance of these positions was affirmed early in her career during an oil

McMurray during a snowstorm to offer her legal advice to STOP. The situation she described to us in her lecture bordered on the macabre. There she was, one public interest lawyer, representing upwards of 80 interveners who had concerns about Imperial’s ambitions. This was a contest the underdogs couldn’t win.

The stress Linda places on citizen participation and citizen accountability via the



courts arguably reflects the failures and weaknesses of electoral and legislative politics. Majority governments are notorious for the deafness they can show towards the public during their tenure. The courts then might be regarded as a counterweight to conventional politics, as an alternative means to increasing the citizen participation and accountability that should be central to democratic government.

But, it’s also clear from what she said to us that we would be mistaken to regard the law and courts as a panacea. Her pioneering interest in securing an environmental bill of rights and

sands hearing involving Imperial Oil. Unbeknownst to her, STOP (Save Tomorrow Oppose Pollution), perhaps the first environmental group to oppose tar sands mining, told the hearing that Linda and Alex Pringle were the group’s lawyers. Linda piled into her old ramshackle car and drove to Fort

in directly representing individuals in regulatory hearings are proof of this. In the late 1970s, Linda worked with David Kilgour on drafting an Alberta version of an Environmental Bill of Rights. This was done under the auspices of the Canadian Bar Association. “Sadly and typically,” Linda said, “the

energy bar of Calgary vetoed that bill.”

One reason the label “pioneer” fits Linda so well is because she established Alberta’s Environmental Law Centre. Her initiative was inspired in part by her experience with STOP. She secured a grant and used the money to write a report on the need for interveners in energy hearings to be able to secure their costs from government. She used the report as the basis to approach the Alberta Law Foundation for funding to establish the Environmental Law Centre. The Foundation accepted her proposal and the Centre opened its doors in 1982.

In its early days the Law Centre represented individuals such as farmers in regulatory hearings. This was in addition to the research and education work the Centre did then and continues to do so well today. As was the case with the draft Bill of Rights, this profile offended some in the energy industry. After one intervention where the Centre was particularly effective in asserting the rights of a landowner the affected company approached the Law Foundation. It complained that the Centre was competing unfairly with private law firms. The Law Foundation responded to the complaint by telling the Centre that, if it didn’t stop representing individuals, the Foundation would withdraw its funding. That was the end of the Environmental Law Centre’s efforts to represent people directly in hearings.

Another first for Linda was when, with Brian Staszewski – another pillar of Alberta’s environmental movement – she formed the Canadian and Alberta Environmental Networks. (*Time* named Brian a “Hero of the Planet” in 2000 for his environmental activism.) These organizations also were animated by Linda’s belief that environmentalists had a right to be heard and needed to be more proactive.

It is the importance Linda attaches to the need for strong environmental laws and strong enforcement of those laws that let her be enticed to work for the Mulroney government in 1987. Environment Canada invited her to come to Ottawa through an Executive Interchange to lead a newly established enforcement unit in the department. She

left her mark as an environmental pioneer abroad as well. Her career took her to Jamaica, Indonesia, and Bangladesh. In all three countries she helped to create and establish environmental law enforcement systems. She mentioned that she found her experience in Indonesia both “an incredible opportunity” and “a little intimidating” – none of her experiences in Canada prepared her very well for conversing with the military officers who ran the country’s environmental offices then.

As one might expect from someone as committed to the importance of the law and judicial review as Linda, she shared her views on two of her favourite court decisions: *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] in the Supreme Court of Canada and *Adam v. Canada (Environment)* [2011] in the Federal Court of Canada. AWA played a role in both of those cases. We intervened in *Friends of the Oldman River Society* and with the Pembina Institute and three First Nations we were applicants in *Adam v. Canada*.

Friends of the Oldman River Society was a groundbreaking decision in Canadian environmental law. The ruling stipulated that the federal department of Transport was bound by the *Environmental Assessment and Review Process Guidelines Order (EARP)* to conduct an environmental assessment of the Oldman River dam. The Minister of Transport had declined to do so before approving the Alberta government project. Linda had argued previously that although EARP used the term “guidelines” it was in fact “law” and therefore demanded the type of assessment EARP prescribed. The Supreme Court also ruled that provincial government projects were subject to EARP if the project touched an area of federal jurisdiction. In its 1992 report, the Oldman River Dam Environmental Assessment Panel recommended that the dam, completed by that point in time, be decommissioned. Its lower diversion tunnels, the recommendation said, should be opened to allow the river to run unimpeded.

The second case Linda chose was *Adam v. Canada*. In this case First Nations and environmental applicants went to the Federal

Court of Canada to ask the court to order the federal Minister of Environment to issue an emergency order. That order, the applicants argued, was needed to protect the habitat of seven caribou herds in northeastern Alberta. The Minister declined to recommend an emergency protection order because he believed “there are no imminent threats to the national survival or recovery of boreal caribou in Canada.”

Justice Crampton set aside the Minister’s decision not to issue an emergency protection order and sent the matter back to him to reconsider in light of his reasons. What impressed Linda about this decision was the importance the justice accorded to First Nation Treaty rights in his reasons. When Minister Prentice decided not to recommend an emergency protection order his decision stated that the impact of the decline of caribou on Treaty rights and on the Crown’s constitutional duty to act honourably when dealing with Aboriginal peoples were “not relevant” to deciding if there were imminent threats to caribou. Justice Crampton concluded “the Minister clearly erred in reaching this decision by failing to take into account the First Nations Applicants’ Treaty Rights and the honour of the Crown in interpreting his mandate...The Decision therefore warrants being set aside on that basis alone...”

One of the many “firsts” Linda is associated with came through her involvement with the Clean Air Strategic Alliance (CASA). She joined CASA in order to fight coal-fired electricity production in Alberta. One of her greatest victories there was securing the agreement of those electricity producers to capture mercury. Alberta was the only jurisdiction to require this.

Perhaps the second-to-last chapter in Linda’s environmental activism career came through her time in Ottawa as the NDP Member of Parliament for Edmonton-Strathcona. She says it was “a moment of absolute insanity” that led her to run for office. As her constituent for the nearly 11-years she served the people of Edmonton-Strathcona I appreciated her momentary madness. More seriously, she ran because of what she

feared the Stephen Harper Conservatives would do to environmental laws. She ran for office based on her “suspicion that if Stephen Harper ever got a majority government he would shred every environmental law we worked so hard to create.” That fear was confirmed in 2012 when the Harper government used an omnibus budget bill to weaken seriously the provisions of the *Canadian Environmental Assessment Act*, the *Fisheries Act*, the *Species at Risk Act*, and other legislation with the gall to regulate activities in the name of nature.

In Ottawa Linda distinguished herself on many fronts. One of her major environmental contributions was her sponsorship of private member’s bills that would establish an environmental bill of rights. On four separate occasions Linda drew the attention of Canadians to the important contribution an environmental bill of rights could make to environmental law and order in this country. The rights to access information, to guaran-

tee public participation, and to have access to the courts figure importantly in her bill.

In reflecting on what this bill of rights could deliver I suspect it could deliver broader, more complete protections for the environment than even her most favourite court cases were able to realize. Despite their significance, *Friends of the Oldman River Society* and *Adam v. Canada* delivered limited victories. The federal government wasn’t required to decommission the Oldman River dam as recommended by the environmental assessment review panel. Similarly, *Adam v. Canada* forced the federal Environment Minister to reconsider his caribou decision in the light of treaty rights and the honour of the Crown. It didn’t demand that the Minister recommend an emergency protection order to the cabinet.

But, if Linda’s environmental bill of rights was part of Canada’s legal regime, the government may have had to go further in both cases. This is because her bill established

the paramouncy of existing and emerging principles of environmental law: the precautionary principle, the polluter-pays principle, the principle of sustainable development, the principle of intergenerational equity, and the principle of environmental justice. If such principles were paramount and if they were interpreted generously by the courts, then Linda likely would be able to celebrate even greater environmental victories in the courts. It certainly would limit the ability of future governments to shred environmental protections.

I suggested second-to-last chapter above because now that Linda has retired from federal politics she shows no sign of retiring from environmental activism. At home in Edmonton she’s now taking on City Hall on behalf of the North Saskatchewan River Valley and pushing for the creation of an urban National Park in that valley. Once she accomplishes these goals I wonder what epilogue she plans to write. 🌱