

Remembering Martha Kostuch: The Private Prosecution and the Oldman River Dam

By Shaun Fluker

Cases Considered:

Kostuch (Informant) v. WA Stephenson Construction (Western) (1990), 75 Alta. L.R.. (2d) 110 (Alta. Prov. Ct.);

Kostuch (Informant) v. W.A. Stephenson (Western) (1991), 78 Alta. L.R. (2d) 131 (Alta. Prov. Ct.);

Kostuch (Informant) v. W.A. Stephenson Construction (Western) Ltd., [1991] AJ No. 659 (Alta. Q.B.) (QL);

R. v. W.A. Stephenson Construction (Western) Ltd., [1992] AJ No. 316 (Alta. C.A.) (QL);

R. v. W.A. Stephenson Construction (Western) Ltd., [1992] AJ No. 233 (Alta. Prov. Ct.) (QL);

W.A. Stephenson Construction (Western) Ltd. v. Kostuch, [1992] AJ No. 1262 (Alta. Q.B.) (QL);

Kostuch v. W.A. Stephenson Construction (Western) Ltd., [1993] A.J. No. 52 (Alta. C.A.) (QL);

Kostuch v. Alberta (Attorney General), [1995] A.J. No. 866 (Alta. C.A.), aff'g [1993] A.J. No. 635 (Alta. Q.B.) (QL)

I knew of Martha Kostuch primarily by her reputation as a leader in Alberta environmental advocacy. My personal dealings with Martha were limited to brief discussions at the annual roundtable meeting that she organized between the (then) Alberta Energy and Utilities Board and several environmental non-governmental organizations. My sense of loss for Alberta environmentalism with Martha's passing in April 2008 inspired me to investigate her contribution to Alberta environmental law. This post reflects on a portion of my findings.

It seems that Martha Kostuch's most significant legal confrontation arose in relation to challenging the construction of the Oldman River dam in the late 1980s (for a comprehensive account of the battles over the Oldman River dam, see Jack Glenn, *Once upon an Oldman* (Vancouver: UBC Press, 1999)). Kostuch led a coalition of opposition to the southern Alberta dam, organized as the Friends of the Oldman River Society. Her legal battle was fought primarily on two fronts: (1) asserting non-compliance with federal environmental assessment rules on the issuance of a requisite license by the federal Minister of Transportation under section 5 of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22; and (2) prosecuting the Alberta government for committing a statutory offence under federal fisheries legislation when the river flow was diverted to facilitate dam construction.

The environmental assessment challenge was ultimately successful with the Supreme Court of Canada's 1992 ruling in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. However, by the time this judgment was rendered the Oldman River dam was fully operational. The subsequent environmental assessment report recommended the federal government decommission the dam. This recommendation was obviously not followed. And while the environmental assessment challenge was significant in leading towards the enactment of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, Martha Kostuch's attempt to prosecute the Alberta government was in my view her finest legal moment; albeit a moment that lasted approximately 7 years!

My search produced 9 judgments in relation to the Martha Kostuch private prosecution. Collectively these judgments interconnect environmentalism, the rule of law and judicial independence. Kostuch's private prosecution was thwarted several times by the Alberta Attorney General and, as well, she was not successful in preserving an uninterrupted flow of the Oldman River; but notwithstanding these setbacks her legal efforts contributed to Alberta law by questioning the legitimacy of Alberta government policy to take control of prosecutions, particularly in cases such as this (and other environmental prosecutions) where the government is the accused. Her applications also tested views on the independence of the judiciary and the appropriate scope of judicial supervision over the decisions of government executives - matters of continual interest to legal scholars.

In August 1988 Martha Kostuch swore an Information alleging that the Alberta government, along with several other companies involved in the construction of the dam, had committed an offence by violating section 35(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14, which reads: "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat." Section 40(1)(a) of the *Fisheries Act* makes it a summary conviction offence to violate section 35(1). The substance of the charge was: (i) the *Fisheries Act* applied to the Oldman River; (ii) the Alberta government was carrying on work in constructing the dam; (iii) that work resulted in the harmful alteration, disruption or destruction of fish habitat.

The Alberta government responded there was no section 35(1) violation because the dam construction work was authorized under section 35(2) of the *Fisheries Act* which reads: "No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act." This was a seemingly straightforward defense but for the fact that no federal Ministerial authorization was issued; rather, the Alberta government insisted that the power to issue section 35(2) authorizations had been transferred or delegated by the federal Minister to Alberta in a 1987 agreement. And accordingly, the Alberta government had issued itself a section 35(2) authorization.

Process was issued on this initial Kostuch Information to summon the accused to speak to the charges, but shortly thereafter the Alberta Attorney General intervened by entering a stay of proceedings in late August 1988. The Attorney General's intervention was made on the basis of its blanket policy that the Attorney General takes conduct of all criminal prosecutions in Alberta

(other than those conducted by the federal Attorney General) and that such prosecutions are based on an investigation conducted by the appropriate government agency. Martha Kostuch was so advised to file a complaint with provincial wildlife officials.

At roughly the same time, the federal Attorney General, who steadfastly refused to prosecute the Alberta government (likely on political grounds if one recalls the constitutional wrangling in the late 1980s), requested an RCMP investigation into the allegations. The RCMP investigation ultimately concluded against a section 35(1) prosecution on the basis of the purported section 35(2) authorization. The prosecution was thus stalled and nothing further really transpired until Martha Kostuch swore another Information with similar allegations against the Alberta government in February 1990.

This time Martha Kostuch took direct aim at the Attorney General's blanket policy of intervention to take conduct of all prosecutions, arguing the policy was contrary to law. The Attorney General, in response, relied on the codified definition of 'prosecutor' in section 2 of the *Criminal Code*, R.S.C. 1985, c. C-46: "Prosecutor means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them." The dispute was heard by Harvie J. in Provincial Court, who characterized the Attorney General's blanket intervention policy as a discretionary decision and in June 1990 held that he could only interfere with the exercise of such discretion in cases of 'flagrant impropriety'. Not finding evidence to support 'flagrant impropriety' here, Harvie J. ruled the conduct of the prosecution to be with the *Attorney General (Kostuch (Informant) v. W.A. Stephenson Construction (Western)* (1990), 75 Alta. L.R. (2d) 110). The ruling attracted the commentary of my colleague Professor Pat Knoll, who at the time published the following annotation questioning the Alberta policy of blanket intervention:

The [common law] right of the ordinary citizen to lay informations and bring prosecutions is maintained as a valuable safeguard against inertia or partiality on the part of the authorities. ... When English law came to Canada the ordinary citizen was provided the right to conduct private prosecutions. ... The tendency of our courts, since that time, has been to subordinate the rights of the private prosecutor to those of the public authority. ... However, there has not been any legislative change in Canadian law which provides that the law officers of the Crown exercise an exclusive jurisdiction concerning the conduct of prosecutions (75 Alta. L.R. (2d) 111).

Shortly after assuming conduct of the prosecution the Alberta Attorney General stayed proceedings. As well, the federal Attorney General announced it too would not be conducting a prosecution, after considering information provided to it by the RCMP regarding the section 35(2) authorization (noted above) and taking into account what the federal Attorney General referred to as Alberta's attempts to mitigate the environmental consequences of the dam.

Martha Kostuch swore yet another Information on July 24, 1990, the same day the Court of Queen's Bench denied her appeal of Harvie J.'s ruling. Tensions were rising between the parties. The Alberta Attorney General and dam construction companies responded with a Court of Queen's Bench application for dismissal of Kostuch's Information citing it as an abuse of

process, together with a request for an order that the Alberta Provincial Court lacked jurisdiction to hear the abuse of process application. Following the Court of Queen's Bench affirmation of Provincial Court jurisdiction to decide the matter, Fradsham J. heard the abuse of process application in Provincial Court. The claim for abuse of process was two-fold: (1) that the most recent Kostuch Information was simply repetitive of previous processes which had been stayed by the Attorney General; and (2) that the prosecution was not in the public interest given the federal Attorney General's decision not to prosecute.

In early January 1991, Fradsham J. denied the abuse of process application with a passionate judgment that focused on what had become the core issues in this saga: judicial independence and the rule of law (*Kostuch (Informant) v. W.A. Stephenson (Western)* (1991), 78 Alta. L.R. (2d) 131). As an aside, by 1991 any attempt to prevent the Oldman River dam was futile as construction was largely complete. Fradsham J. began his ruling by asserting Provincial Court jurisdiction:

Though it should not need stating, let it be known that the Provincial Court of Alberta has control, to the same extent enjoyed by other courts of record, over its process. . . . The Provincial Court of Alberta, like all other courts in the administration of justice hierarchy, is an independent court charged with the responsibility and privilege of controlling its own process (at 139).

Next Fradsham J. held that abuse of process does not necessarily follow from the fact that the Attorney General had stayed on two prior occasions and, similar to Professor Pat Knoll's earlier annotation, upheld the common law right to a private prosecution as essential to a functional rule of law:

[T]he law in this jurisdiction is that while the Attorney-General has the right to direct a stay of proceedings of any charge the prosecution of which he has conduct, the Court has the authority to permit a private prosecution in the face of the actions of the Attorney-General if there is sufficient support for the suggestion that the Attorney-General is attempting to thwart a proper prosecution. . . . The Attorney-General enjoys a special place in the administration of justice but even he is ultimately subject, as are we all, to the supremacy of law (at 144-145).

Nor did abuse of process follow from the fact the federal Attorney General held the prosecution would not serve the public interest. In this aspect of his judgment, Fradsham J. bluntly rejects the federal Attorney General's position as being without sufficient reasons. Moreover, Fradsham J. took issue with the notion of mitigating factors having any relevance towards the question of whether an offence was committed:

[T]he Dominion Attorney-General thought prosecution was not necessary because the consequences of the alleged violations were being minimized and would be subject to public comment. That seems a theory of the administration of justice which encourages violations of the law so long as the adverse effects of the violation can be minimized (at 149).

Ultimately, Fradsham J. supported Martha Kostuch's use of process. He held that both the common law and applicable legislation supported Kostuch's prosecution of an offence allegedly committed by the Alberta government and others. An appeal by the dam construction companies to quash Fradsham J.'s decision (an application that was supported by the Alberta Attorney General as an intervenor) was subsequently denied by the Court of Queen's Bench and thereafter by the Alberta Court of Appeal (*R. v. W.A. Stephenson Construction (Western) Ltd.*, [1992] AJ No. 316 (Alta. C.A.), aff'g [1991] AJ No. 659 (Alta. Q.B.)(QL)).

Despite having defended herself from allegations of abuse of process, Martha Kostuch's prosecution was not yet in the clear. In September 1991 she was denied the issuance of process, and accordingly she was back in front of Fradsham J. requesting a mandamus order directing that process be issued on her latest sworn Informations. Fradsham J. granted this request in March 1992 (*R. v. W.A. Stephenson Construction (Western) Ltd.*, [1992] AJ No. 233 (QL)). An appeal by the dam construction companies to quash Judge Fradsham's ruling on the issuance of process was subsequently denied at Court of Queen's Bench and the Alberta Court of Appeal *Kostuch v. W.A. Stephenson Construction (Western) Ltd.*, [1993] A.J. No. 52 (Alta. C.A.), aff'g [1992] AJ No. 1262 (Alta. Q.B.) (QL)).

A preliminary hearing on the Kostuch prosecutions finally commenced on March 22, 1993, nearly 5 years after she swore her initial Information (she swore 8 Informations in total from 1988 to 1990) and 2 years subsequent to the completion of the Oldman River dam. However process was once again halted as the Alberta Attorney General intervened and directed the Court to enter a stay of proceedings. Martha Kostuch responded with her final challenge, asserting the intervention and stay of proceedings violated section 7 of the *Canadian Charter of Rights and Freedoms*. Her *Charter* challenge was denied by the Court of Queen's Bench and subsequently as well at the Alberta Court of Appeal, with a ruling that the liberty of a citizen to initiate a private prosecution is not protected under the *Charter* (*Kostuch v. Alberta (Attorney General)*, [1995] A.J. No. 866 (Alta. C.A.), aff'g [1993] A.J. No. 635 (Alta. Q.B.) (QL)). The Alberta Court of Appeal also confirmed that the decision by the Attorney General to take conduct of a private prosecution will only be judicially reviewed in the rare case of 'flagrant impropriety'. The Court of Appeal reasoned that to hold otherwise is to risk unacceptable overlap between the functions of the judiciary and government executive. The Supreme Court of Canada denied leave to appeal.

The Attorney General's decisions to stay proceedings and challenge the Kostuch private prosecution was seemingly based on the premise that the Alberta government's work on the Oldman River dam was properly authorized pursuant to section 35(2) of the *Fisheries Act*. Unfortunately the legality of this authorization was never confirmed, allowing for the alternate view that the Attorney General's actions intended to shield the Alberta government from legal consequences for non-compliance with environmental law. This is a sad chapter in Alberta's legal history if indeed the latter view was the rationale for staying the Martha Kostuch private prosecution over the Oldman River dam.