

# BOOK REVIEW

## Dams of Contention: The Rafferty-Alameda Story and the Birth of Canadian Environmental Law by Bill Redekop

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The modern generation of environmental interest groups, activists and lawyers relies heavily on statutory environmental review processes to ensure that environmental factors are taken into account for projects which may have major environmental impacts. While the opportunities presented by binding environmental review processes are often attributed to the Supreme Court of Canada's [SCC] decision in the *Oldman River* case,<sup>1</sup> one of Bill Redekop's aims in *Dams of Contention: The Rafferty-Alameda Story and the Birth of Canadian Environmental Law* is to dispel that mistaken belief.<sup>2</sup> While it is clear in a reading of *Oldman River* that the SCC hung its hat on the decision of the Federal Court Trial Division (affirmed by the Federal Court of Appeal) in *Canadian Wildlife Federation Inc v Canada (Minister of the Environment)*,<sup>3</sup> the pivotal importance of *Canadian Wildlife 1* is often overlooked and has not received nearly the attention that it deserves. In *Dams of Contention*, Redekop walks the reader through the political, judicial, environmental and human

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<sup>1</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 [Oldman River].

<sup>2</sup> Bill Redekop, *Dams of Contention* (Winnipeg: Heartland, 2012).

<sup>3</sup> *Canadian Wildlife Federation Inc v Canada (Minister of the Environment)*, [1989] 3 FC 309 (TD), aff'd (1989), 99 NR 72 (FCA) [Canadian Wildlife 1].

stories which surrounded the construction of the Rafferty and Alameda dams in southeastern Saskatchewan starting in the mid-1980s.

Redekop's research is thorough, aided by legal and environmental scholars, and this information is presented through an engaging narrative.<sup>4</sup> This also gives rise to one of the struggles that Redekop faces throughout the book – his attempt to achieve too many things at once creates something of an identity crisis for the book. *Dams of Contention* is a story of political corruption and grassroots resistance, a legal drama, a geopolitical and environmental textbook, an editorial, a Rafferty-Alameda reference book and a newspaper article, all at the same time. The book achieves all of these things to a greater or lesser extent, but perhaps not enough to appeal to all of the audiences it attempts to access. The casual reader may be exhausted by Redekop's attention to minute technical details (although these are easily skimmed), the student or academic may find herself sifting through story lines and rhetoric to find crucial information (without the help of an index or a useful table of contents), and the activist or lawyer may wish for more substantive (and accurate) legal content to help understand the reasoning employed by the various courts. This is not necessarily a bad thing; *Dams of Contention* is an enjoyable and interesting read, but the potential reader must consider what she hopes to take from it and how the book can serve those intentions.

As much as it is a story about the development of mandatory environmental assessment processes, *Dams of Contention* exposes the construction of the Rafferty and Alameda dams in southeastern Saskatchewan as a politically motivated vanity project lacking environmental foresight, consideration for private citizens' land interests, public disclosure, and any respect for due process. Redekop serves up the narrative of the book with a host of antagonists, often caricaturized beyond what is reasonable for a serious expository work. Saskatchewan Deputy Premier Eric Berntson is cast as the autocratic mastermind of the project, squarely in the pocket of the Government of North Dakota and happy to waste taxpayer dollars to fund a mega-project (the Alameda Dam) in his riding. Saskatchewan's Progressive Conservative Premier Grant Devine serves as the smarmy face of the party, Berntson's media-friendly

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<sup>4</sup> On a stylistic note, the book could have used further editing, as it suffers from a host of spelling and grammatical errors.

puppet who is portrayed as selfish, short-sighted and ignorant despite his impressive academic credentials. Devine also benefits from a mega-project (the Rafferty Dam) in his riding. Also included among the book's antagonists are George Hood, the boorish and heavy-handed CEO of the Souris Basin Development Agency ['SBDA'], Brian Mulroney and federal Environment Minister Tom McMillan making deals behind the closed doors of Ottawa's back rooms, and a slew of American politicians looking to shift their own political problems across their northern border. While Redekop's personal antipathy towards these characters is clear, he is, at the very least, honest about it.

*Dams of Contention* also has its heroes. Foremost among the protagonists are Ed and Harold Tetzlaff, a pair of salt-of-the-earth, bachelor brothers so permanently caked in soil that they are practically inseparable from the land. When their ability to continue farming on their land is threatened by the Alameda reservoir, the Tetzlaffs seek recourse through the judiciary to take on the massive political machinery pushing the ill-conceived project. Assisting the Tetzlaffs in this formidable challenge are various lawyers including Weyburn-based lawyer Rod MacDonald and Winnipeg-based lawyer Alan Scarth, whose arguments are given the judicial nod by Federal Court justices Bud Cullen and Francis Muldoon. In an area of law which was nonexistent in Canada at the time, these jurists tested the limits of the law and between them developed what is now a crucial tool for people and groups wishing to demand environmental accountability for large-scale projects. Another ally to the environmental movement is Elizabeth May, now the leader of the Green Party of Canada, and given perhaps the most interesting profile in the book. Formerly the senior advisor to federal Environment Minister Tom McMillan, May was left with no choice but to resign from her prestigious, well-paying job in June 1988, when she learned that the Rafferty-Alameda project would receive an obligatory *International River Improvements Act* [IRIA] license without an environmental assessment as part of a political deal. Three months later, after going public about the reason for her resignation, attacks on May and her credibility came from every angle. Redekop's account of the public and political lashing inflicted on May reveals the personal price that some people were willing to pay for a meaningful environmental review process, and Redekop convincingly argues for the veracity of her story.

*Dams of Contention* opens with the catastrophic flooding of Minot, North Dakota in the spring of 2011. The city's main source of flood protection, two dams and reservoirs located upstream at Rafferty, Saskatchewan and Alameda, Saskatchewan, were already full at the time of the flood, unable to provide any further protection to the American city downstream. Redekop uses this contemporary issue as a springboard for the rest of the book which traces the political and legal development of the Rafferty-Alameda project, in support of Redekop's argument that the project was a half-baked political solution from its conception. In tracing the development of the project, Redekop also identifies and elucidates the origins of Canada's environmental review processes. Profiles of the major players in the story are interspersed throughout the narrative of the book, with those of particular interest including those of Grant Devine (Chapter 4), Ed and Harold Tetzlaff (Chapter 6), Eric Berntson (Chapter 10) and Elizabeth May (parts of Chapters 10 and 11).

Redekop moves on to consider the political motivations behind the Rafferty-Alameda project. While the Rafferty Dam was at least somewhat justifiable from a Canadian standpoint (and provided Devine with a mega-project in his riding) the Alameda Dam provides no benefit beyond flood protection for Minot. Redekop aptly refers to the Alameda reservoir as "Lake America", serving purely American interests and controlled to suit American needs. The dams also posed major environmental risks through the destruction of habitat (wetlands and river valleys) and impacts on water chemistry. The Alameda Dam served Eric Berntson's interest in bringing a mega-project into his riding, and the interests of American landowners who had successfully lobbied against more effective flood protection within the state of North Dakota following a major flood in 1969. Most of the cost for Rafferty-Alameda was borne by Saskatchewan taxpayers; the American flat-rate contribution turned out to be miniscule in light of predictable cost overruns, the result of reckless negotiation. Redekop makes some bold assertions against the major political players in this story, leaving a few unanswered questions: What was the public reaction to a project as suspect as Alameda? Was there vocal opposition from the general public? Is there more than circumstantial proof that Berntson and Devine were acting purely in the interests of themselves or their friends? These questions arose early in the book but were never fully answered.

A detailed synopsis of the ensuing political and personal story is not necessary here, but there are two government decisions which warrant special attention since Redekop identifies them as being at the heart of the subsequent litigation surrounding Rafferty-Alameda. The first of those decisions was the approval of the Rafferty-Alameda project by Saskatchewan Environment Minister Herb Swan. This decision was based upon the recommendation of an inquiry which lacked any expertise on dams or environmental science; the qualification of the panel to make a recommendation about whether the project should be approved was dubious at best. Furthermore, that inquiry's decision was based largely on a shambolic environmental impact statement compiled by the SBDA, which was completed hastily and was found by several experts to be of poor quality, incomplete, largely unsubstantiated and limited in scope. Both processes were flawed, lacking adequate consideration of environmental impacts and alternatives or fair public consultation. Redekop's review of the environmental impact statement as well as the activities of the inquiry is detailed and well organized, revealing the full breadth of the environmental assessment process. This overview also serves him well later in the book as it highlights the importance of the procedural victory that environmentalists would later obtain through the courts.

The litigation which arose in response to this ministerial decision was initiated by a coalition called "Stop Construction on Rafferty Alameda Projects Inc." [SCRAP]. SCRAP consisted of a group of landowners (including the Tetzlaffs) in the area which would be swallowed by the reservoirs created by the dams, as well as users of those areas. The coalition also included the Saskatchewan Wildlife Federation, which took interest in the case when it learned that 45 000 acres of wetlands risked being drained if the Rafferty reservoir took too long to fill. SCRAP's sole aim was to get the government to conduct a proper environmental impact assessment which included a cost-benefit analysis of the project. The issue faced by the coalition, however, was whether it would be able to achieve standing to challenge the minister's decision. Establishing public interest standing had been a notoriously difficult task, and so the question was whether this coalition of both public and private interests would be able to achieve standing.

Redekop provides an overview of the resultant case, *Association of Stop Construction of Rafferty Alameda Project Inc v Saskatchewan (Minister of*

*Environment and Public Safety*) and *Souris Basin Authority* (“*Association*”),<sup>5</sup> which is concise and relatively accurate, although it is not pitched to a legal audience (see pages 106-112). He summarizes the positions of each of the parties, the Court’s findings on each of the issues, and the basic reasoning employed by the Court. Indeed, the Court held that because some members of the coalition had a direct personal interest in the improper approval, SCRAP had standing to bring the action. Redekop correctly identifies this decision as precedent-setting for future environmental law; it is now common practice for environmental interest groups to graft their public interest concerns to the private interests of individuals directly affected by government decision making. Although SCRAP did not succeed in its goal to force the government back to the assessment process, this was a significant procedural victory. This section of the book may be of utility to lawyers and activists wishing to pursue litigation in the public interest, environmental or otherwise.

A disconcerting aspect of Redekop’s treatment of *Association* is that he omits legally significant details that do not serve his rhetorical aims in his discussion of costs awarded. In fact, he largely misrepresents the allocation of costs in an effort to victimize the environmental coalition. Redekop writes that the Court’s decision to award costs to the Crown “seemed indicative of how courts viewed environmental challenges at the time”. Redekop does not mention that in *Association*, costs were also awarded against the SBDA;<sup>6</sup> that would be inconsistent with his portrayal of SCRAP as a near-total victim. He also fails to mention that the costs assessed against SCRAP were awarded because SCRAP failed to follow the necessary process for seeking damages against the Crown, and improperly sued Herb Swan in his personal capacity; these were certainly solid grounds for costs.<sup>7</sup> When an author asks us to trust that his version of events is true, he must be forthcoming with information, even if it hurts his rhetorical goals. No reader is well served by this type of omission.

The other governmental decision at the heart of *Dams of Contention* is the aforementioned federal granting of the IRIA license by Canadian

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<sup>5</sup> *Association of Stop Construction of Rafferty Alameda Project Inc v Saskatchewan (Minister of Environment and Public Safety) and Souris Basin Authority*, (1988), 68 Sask R 52, 3 CELR (NS) 236 (QB) [SCRAP].

<sup>6</sup> *Ibid* at para 99.

<sup>7</sup> *Ibid* at para 103.

Environment Minister Tom McMillan, at the behest Brian Mulroney. Following SCRAP's failure to secure an injunction against Saskatchewan's Environment Minister, the only review process left to be challenged was federal. The IRIA license was given to Saskatchewan without any environmental review, in exchange for provincial concessions regarding French language rights (at the behest of Mulroney) and Grasslands National Park (at the behest of McMillan). At the time, federal officials thought that the legislation which set out guidelines for assessing projects, the Environmental Assessment Review Process Guidelines Order ("EARPGO")], was merely a discretionary instrument. The Trudeau government had strengthened the EARPGO in 1984 however, and this proved invaluable to environmentalists embroiled in the Rafferty-Alameda controversy. In this case, a different group, the Canadian Wildlife Federation, brought an application for *certiorari* and *mandamus* which, if successful, would revoke the IRIA license and halt construction on the dams until a proper, independent assessment had been conducted.

The issue before the court in this case, *Canadian Wildlife 1*,<sup>8</sup> was whether the EARPGO had the force of law, or was just a description of policy which the government was entitled to ignore. Redekop provides a good overview of the issues and arguments presented in the case, as well as the Court's reasoning. The Court ultimately found that the federal review process was triggered by Rafferty-Alameda's environmental impact on about 4000 acres of federal Crown land, as well as cross-border impacts in Manitoba and North Dakota. The use of the word "shall" in the guidelines indicates an intention for the guidelines to be binding. EARPGO was therefore not merely a policy, but the binding environmental protection law of Canada. An order of *certiorari* and *mandamus* was granted, requiring the federal government to perform an environmental assessment of effects that had not been considered in Saskatchewan's environmental impact statement (namely effects in Manitoba and North Dakota). Redekop's overview of *Canadian Wildlife 1* is much more accurate than his treatment of SCRAP, and all of the major points from the case are included without any major omissions. It is this case which was so foundational to Canadian environmental law,

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<sup>8</sup> *Canadian Wildlife 1*, *supra* note 3.

...the first case enjoining a government project of any kind on environmental grounds. It emboldened a broad band of citizen groups to think that the government, too, would have to answer to the law and that the courts would back them up.<sup>9</sup>

Following *Canadian Wildlife 1* (which was comfortably affirmed by the Federal Court of Appeal),<sup>10</sup> opponents of the Rafferty-Alameda project found themselves still seeking relief through the courts as politicians continued to drag their heels through the review process. A successful action was brought against the new Federal Environment Minister, Lucien Bouchard, seeking a full inquiry due to significant environmental impacts: see *Canadian Wildlife Federation Inc. et al v Canada (Minister of Environment) and Saskatchewan Water Corporation*<sup>11</sup> (Chapter 16). Another action was brought by the Federal Government against the Province of Saskatchewan, claiming that Saskatchewan had breached an agreement to halt construction until an environmental assessment panel had reviewed the project: see *Canada (AG) v Sask Water Corp*<sup>12</sup> (Chapter 21). Chief Justice Donald MacPherson refused the injunction application and allowed construction to continue. This decision was later overruled by the Saskatchewan Court of Appeal, although the appellate federal government did not enforce the new decision.<sup>13</sup>

The last legal battlefield remaining was an appeal by the Tetzlaff brothers from *Canadian Wildlife 2*. Although the plaintiffs in that case had been largely successful, Federal Court Justice Francis Muldoon had allowed Saskatchewan to maintain its IRIA license on the condition that a review panel was appointed within 30 days. This allowed Saskatchewan to continue work on the dams while the review panel conducted its assessment. The Tetzlaffs sought to halt construction until the report

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<sup>9</sup> Oliver Houck in Redekop, *supra* note 2 at 271.

<sup>10</sup> See *Canadian Wildlife Federation Inc. et al v Canada (Minister of Environment) and Saskatchewan Water Corporation*, [1990] 2 WWR 69, (1989), 99 NR 72 (FCA) ['*Canadian Wildlife 2*'].

<sup>11</sup> *Canadian Wildlife Federation Inc. et al v Canada (Minister of Environment) and Saskatchewan Water Corporation*, (1989), 99 N.R. 72 (FCA), *aff'd* (1989), 31 FTR 1 (TD).

<sup>12</sup> *Canada (AG) v Saskatchewan Water Corporation and Souris Basin Development Authority* [1991] 1 WWR 426, 88 Sask R 13 (Sask QB).

<sup>13</sup> *Canada (AG) v Saskatchewan Water Corporation and Souris Basin Development Authority*, [1992] 4 WWR 712, *rev'd* [1991] 1 WWR 426 (SKCA).

could be considered by the minister. The appeal was dismissed; see: *Canadian Wildlife Federation Inc. et al v Canada (Minister of Environment) and Saskatchewan Water Corp*<sup>14</sup> (Chapter 22).

As a final comment on Redekop's treatment of case law, I am concerned by Redekop's portrayal of the role of the judiciary in settling environmental disputes. In each of the cases where the court decides contrary to what Redekop would have liked to see, Redekop expresses indignation towards the judges personally, casting them as backwards and indifferent to environmental concerns. He implies that judicial decisions are purely the result of personal political leanings, and that it was open to the judges to side with environmental interests. For instance, he writes that MacPherson J could "smell the goal line", as though the Saskatchewan Queen's Bench justice simply could not wait to see the dams built.<sup>15</sup> More worrisome, however, is where Redekop accuses Federal Court Chief Justice Iacobucci (as he then was) of actively seeking "loopholes" to absolve the government of environmental responsibilities. Redekop explicitly says that Iacobucci finished the job that Bertson, Devine and Hood started.

I have to admit that I was stunned by Redekop's belligerence towards Chief Justice Iacobucci (as he then was). In the judicial context, these criticisms are not to be taken lightly. Accusing a judge of partisanship or judicial activism says that she has failed to serve her role with the honour and the impartiality that justice requires. In fact, even in cases where Redekop was satisfied with the result, he inadvertently insults the judges by saying that their decisions were the result of concern for the environment and forward thinking. I am not sure if Redekop himself is aware of the magnitude of his allegations. Iacobucci's decision in *Canadian Wildlife 3* is carefully thought out and purely legal, interpreting the law as it was at the time. Iacobucci's final decision was the result not of his own animosity towards environmentalists, but environmental legislation which was not as strong as it is today (or as Redekop would have liked to see). While judicial activism is certainly a subject warranting vigorous debate, Redekop offers nothing in the way of legal analysis of these decisions or ways they may have been decided differently within the confines of the law

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<sup>14</sup> *Canadian Wildlife Federation Inc et al v Canada (Minister of Environment) and Saskatchewan Water Corp*, 121 NR 385, (1990), 6 CELR (NS) 89 (FCA) [*'Canadian Wildlife 3'*].

<sup>15</sup> Redekop, *supra* note 2 at 216.

at the time. Instead, he hurls uninformed pot-shots that say more about him than the judges he targets.

In the end, the Rafferty-Alameda project went through, but not without its own political costs. Devine's government was unequivocally rejected in the next provincial election, and the new NDP government was left with little choice but to see the dams through to their completion. Despite this result, the project gave rise to the first case enjoining the government on environmental grounds, now an important tool for environmental lawyers and activists.

*Dams of Contention* traces the Rafferty-Alameda story in an interesting and accessible way, and although it is not a sophisticated legal work, it may still have a lot to offer to its various audiences. As a narrative, the book is an excellent source of information on the development of the Rafferty-Alameda project, which will be of use to those with an interest in politics, public administration, environmentalism and public law. It does not lend itself to use as a reference book for those looking for specific details on characters, political developments, the Rafferty or Alameda dams or the legal cases arising throughout the story. It is not fatal to the book that it has a rhetorical purpose and is replete with opinion, but the reader must be vigilant for times when facts are presented to serve those rhetorical aims, and opinion is presented as fact. That having been said, I can understand the indignation which Redekop expresses throughout the book; he has formed an intense personal connection with his subjects and truly internalizes their struggle. The result is a work which illuminates the human stories behind otherwise disinterested law.