

HOW LEGAL DESIGN MAY CONSTRAIN THE POWER OF LAW TO IMPLEMENT ENVIRONMENTAL NORMS: THE CASE OF ECOLOGICAL INTEGRITY IN CANADA'S NATIONAL PARKS

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INTRODUCTION

The struggle between advocates of ‘parks for people’ and ‘parks for preservation’ defines the modern history of Canada’s national parks.¹ Historians and other scholars generally agree that Parliament designated Canada’s early national parks to fulfill the public policy objective of nation-building and to generate economic returns. At the forefront of any identifiable parks purpose was the satisfaction of recreational, economic or spiritual interests of Canadians.² Since the late 1960s preservationists have battled this ‘parks for people’ ideology governing Canada’s national parks, applying pressure on Parliament to assert the preservation of nature *for its own sake* as the primary purpose in the parks. This pressure, in conjunction with various government studies conducted during the 1980s and 1990s, led to the enactment of new federal national parks legislation in 2001 which categorically mandates the maintenance or restoration of ecological integrity as the first priority in the national parks. This legislative priority for ecological preservation in national parks decision-making has curiously not produced any discernible change from the ‘parks for people’ ideology. Indeed recent evidence suggests economic and recreational interests are actually becoming more rather than less influential in management decisions for certain parks.³

The objective of this paper is twofold. First, the paper sets out doctrinal analysis of applicable case law to support the view that the 2001 ecological integrity amendments to national parks legislation have had little impact on the ‘parks for people’ ideology governing national parks. In a series of decisions interpreting this legislation, the Federal Court has repeatedly emphasized that maintaining ecological integrity is simply one of many factors for parks decision-makers to consider in their mandate. Second, the paper offers a critical reading of these Federal Court decisions to support the hypothesis that there is a problem of legal design here that constrains the power of law to implement the ecological integrity preservation norm.

¹ See generally Claire Campbell, *A Century of Parks Canada* (Calgary: University of Calgary Press, 2011).

² The literature on Canada’s national parks is vast. The most recent publication is Campbell, *ibid.* See also WL Lothian, *A History of Canada’s National Parks* (Ottawa: Minister of Indian Affairs and Northern Development, 1976); Sid Marty, *A Grand and Fabulous Notion: The First Century of Canada’s Parks* (Toronto: NC Press Limited, 1984); Leslie Bella, *Parks for Profit* (Montreal: Harvest House, 1987); Rick Searle, *Phantom Parks: The Struggle to Save Canada’s National Parks* (Toronto: Key Porter Books, 2000); Alan MacEachern, *Natural Selections: National Parks in Atlantic Canada, 1935-1970* (Montreal: McGill-Queen’s University Press, 2001); Paul Kopas, *Taking the Air: Ideas and Change in Canada’s National Parks* (Vancouver: UBC Press, 2007); IS MacLaren, *Culturing Wilderness in Jasper National Park: Studies in Two Centuries of Human History in the Upper Athabasca River Watershed* (Edmonton: University of Alberta Press, 2007).

³ Jeff Gailus, “All Sizzle, No Stake” (23 December 2011) *Alternative Journal*, online: *Alternatives Journal* <<http://www.alternativesjournal.ca/articles/all-sizzle-no-stake>>. See also Jeff Gailus, *The Grizzly Manifesto* (Vancouver: Rocky Mountain Books, 2010).

THE NORM OF ECOLOGICAL INTEGRITY

Introduction

Ecological integrity has a long association with North American environmental discourse dating back to Aldo Leopold's 1949 *Land Ethic*: "A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise."⁴ With these words, Aldo Leopold gave ecological integrity popular recognition as a norm to guide human activity in relation to the rest of the biotic community. The last several decades of the twentieth century saw extensive growth in the literature describing the meaning of ecological integrity and how to measure for it. Most commentators associate ecological integrity with an ecological state free of any human disturbance. On this view, human activity necessarily impairs ecological integrity and thus paradigm ecological integrity is found in ecosystems protected from human disturbance. These commentators tend to advocate for the preservation of core protected areas wherein humans have little or no presence.⁵

Ecological Integrity as a Priority in Legislation and Policy

Ecological integrity was first expressed in Canadian national parks policy in 1979, and several years later Parliament amended the *National Parks Act* to state the maintenance of ecological integrity is the first priority in national park zoning and visitor use management.⁶ While this statutory provision was subsequently cited in several judicial decisions, it was not the focus of litigation and its meaning was never thoroughly considered.⁷ While not having much legal significance, this enactment did symbolize a strengthening of the ecological integrity mandate in national parks decision-making.

In 1998 the Minister of Canadian Heritage appointed a panel of scientists to assess the ecological integrity of the national parks. In 2000 the panel provided the Minister with its conclusion that the ecological integrity of most national parks was in peril. The panel set out various recommendations on actions to enhance the ecological integrity of the parks.⁸

⁴ Aldo Leopold, *A Sand County Almanac and sketches here and there* (New York: Oxford University Press, 1949) at 224-225.

⁵ I canvass the literature in detail in Shaun Fluker, "Ecological Integrity in Canada's National Parks: The False Promise of Law" (2010) 29 Windsor Rev Legal Soc Issues 89 at 90-99.

⁶ *National Parks Act*, RSC 1985, c N-14, s 5(1.2).

⁷ See e.g. *Sunshine Village Corp v Canada (Minister of Environment and Minister of Canadian Heritage)* (1996), 44 Admin LR (2d) 201, 202 NR 132.

⁸ Panel on the Ecological Integrity of Canada's National Parks, "*Unimpaired for Future Generations?*" *Conserving Ecological Integrity with Canada's National Parks*, vol 1 (Ottawa: Parks Canada Agency, 2000); Panel on the Ecological Integrity of Canada's National Parks, "*Unimpaired for Future Generations?*" *Conserving Ecological Integrity with Canada's National Parks*, vol 2 (Ottawa: Parks Canada Agency, 2000) [Ecological Integrity Panel Report].

One such recommendation was for legislative amendments to ensure the maintenance or restoration of ecological integrity is the *overriding* priority in national parks management.⁹ The consensus among panel members was that a stronger legal mandate was necessary to provide authority for Parks Canada to say ‘no’ to excessive human activity in the parks, because the panel had concluded from its field visits that human activity was largely responsible for the ecological decline in the parks.¹⁰

Parliament responded in February 2001 by legislating an expanded ecological integrity mandate in the *Canada National Parks Act* with the following additions to sections 2 and 8 in the legislation:

“Section 2(1) – Definitions

‘ecological integrity’ means, with respect to a park, a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes;

Section 8(2) – Ecological Integrity

Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.”¹¹

These ecological integrity provisions were enacted by Parliament alongside the existing subsection 4(1) which dedicates the parks to the use and enjoyment of Canadians:

“Section 4(1) – Parks dedicated to public

The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.”¹²

The categorical priority in subsection 8(2) afforded to the maintenance or restoration of ecological integrity in the national parks combined with the emphasis on natural conditions and native species in the legislated definition make a convincing case that these legislative provisions require national parks to be managed as places where the preservation of nature for its own sake is the first priority with human interest of secondary concern. In its literal terms, subsection 8(2) requires that national parks be managed as core preservation areas with little human presence or influence.

⁹ Ecological Integrity Panel Report, *ibid* at Appendix C.

¹⁰ Ecological Integrity Panel Report, *ibid* at 1-11 to 1-17.

¹¹ *Canada National Parks Act*, SC 2000, c 32, ss 2(1), 8(2).

¹² *Ibid*, s 4(1).

THE APPLICATION OF ECOLOGICAL INTEGRITY IN LAW

The Federal Court of Canada has directly considered subsection 8(2) in two cases, and has referred to the section in several others. All judicial consideration has resulted from an application for judicial review of a Parks Canada decision concerning parks management. The first consideration of subsection 8(2) was provided by Justice Gibson of the Federal Court Trial Division in a 2001 judicial review of the Parks Canada decision to approve the construction of a road in Wood Buffalo National Park.¹³ In 2003, Justice Gibson's interpretation of subsection 8(2) was upheld by Justice Evans in the Federal Court of Appeal.¹⁴ These two decisions remain the leading authority on the meaning and scope of the subsection 8(2) ecological integrity mandate for Parks Canada.

Wood Buffalo National Park straddles the northeast corner of Alberta and southern edge of the Northwest Territories, covering approximately 45,000 kilometres.¹⁵ Parliament established the park in 1922 to protect the declining population of wood buffalo.¹⁶ In 1983 the park received international recognition as a United Nations World Heritage Site as habitat for threatened wood buffalo and whooping crane species, as well as being recognized for protecting one of the world's largest inland freshwater deltas.¹⁷

In 1998 the municipality of Fort Smith, located on the northern boundary of the park in the Northwest Territories, submitted an application to Parks Canada seeking approval to construct and operate a road crossing the park from east to west along the Peace River. Parks Canada commissioned an environmental assessment which concluded that a new road would have some environmental impact on the park, but taking into account mitigation measures this impact was not likely to be significant. In May 2001 Parks Canada (as the Minister's delegate) approved construction of the road.

The Canadian Parks and Wilderness Society (CPAWS) viewed these facts as the ideal case to test the new ecological integrity provisions which had recently been enacted by Parliament in the *Canada National Parks Act*.¹⁸ CPAWS has a long history in national parks issues dating back to the early 1960s, and was an active contributor to the policy work that led to the 2001 ecological integrity legislative amendments. Parks Canada acknowledged on the record that the road did not serve a park purpose. The environmental assessment provided evidence that construction of the road and its

¹³ *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2001 FCT 1123 [CPAWS Trial Division].

¹⁴ *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 [CPAWS Court of Appeal].

¹⁵ Wood Buffalo National Park, online: Parks Canada <<http://www.pc.gc.ca/eng/pn-np/nt/woodbuffalo/natcul.aspx>> [Parks Canada].

¹⁶ Janet Foster, *Working for Wildlife: The Beginnings of Preservation in Canada* (Toronto: University of Toronto Press, 1978) at 104-116.

¹⁷ Parks Canada, *supra* note 15.

¹⁸ Taken from interview notes on file with the author.

subsequent use would disturb the ecology in a national park known internationally for protecting endangered species. Parks Canada had failed to even mention ecological integrity in its May 2001 written approval of the road construction. CPAWS applied to the Federal Court in June 2001 seeking judicial review of the road approval on the basis that these facts made for a clear violation of the new ecological integrity rule in the *Canada National Parks Act*.

Justice Gibson rules that Parks Canada had the statutory authority to approve the road, and he is not swayed by the evidence on environmental impacts or the fact that Parks Canada failed to mention ecological integrity in its decision.¹⁹ In dismissing the CPAWS application, Justice Gibson references the new statutory provisions as non-substantial changes to the legislation and provides a remarkable interpretation of the subsection 8(2) ecological mandate and its relationship to subsection 4(1):

“Further, I agree with counsel for the respondents that the record, when read in its totality, is consistent with the Minister and her delegates according first priority to ecological integrity in arriving at the decision under review. That the decision is clearly not consistent with treating ecological integrity as the Minister’s sole priority is clear. However, that is not the test. I reiterate: subsection 4(1) of the new *Act* requires a delicate balancing of conflicting interests which include the benefit and enjoyment of those living in, and in close proximity to, Wood Buffalo National Park. This is particularly so when that Park is as remote from services and facilities as is in fact the case and as is likely to remain the case for some time. In the circumstances, while Wood Buffalo National Park, like other National Parks, is dedicated to the people of Canada as a whole, it is not unreasonable to give special consideration to the limited number of people of Canada who are by far most directly affected by management or development decisions affecting the Park. I am satisfied that it was reasonably open to the Minister and her delegates to conclude that the interests of those people overrode the first priority given to ecological integrity where impairment of such integrity can be minimized to a degree that the Minister concludes is consistent with the maintenance of the Park for the enjoyment of future generations.

... Subsection 8(2) of the *Act* does not require that ecological integrity be the ‘determinative factor’ in a decision such as that under review. Rather, it simply requires that ecological integrity be the Minister’s ‘first’ priority and, as indicated immediately above, I am satisfied on the totality of the evidence before the Court that it was her first priority in reaching the decision here under review. I acknowledge that the record before me does not disclose that the Minister and her delegates used the phrase “ecological integrity” in their decision making process, or, in fact, in the decision that is under review itself. That reality does not lead inexorably to a conclusion that ecological integrity was not considered or was not given a first priority. I am satisfied on the record that it is clear that ecological integrity was taken into account by the Minister and her delegates. I am further satisfied that it was, as well, given first priority notwithstanding that it was not found to be the determinative factor in all of the circumstances.”²⁰

Justice Gibson provides an interpretation of subsection 8(2) that differs significantly from the literal wording of the provision. Not only does he employ utilitarian logic to read

¹⁹ *CPAWS Trial Division, supra* note 13 at para 47.

²⁰ *Ibid* at paras 52-53 (emphasis in original).

down the ecological integrity priority as just another factor for Parks Canada to weigh in carrying out its subsection 4(1) mandate to balance use with preservation, he concludes that a parks decision can promote the interests of people over the maintenance of ecological integrity and still comply with subsection 8(2).

CPAWS arguably fares worse at the Federal Court of Appeal. Justice Evans confirms the Court owes significant deference to Parks Canada in the exercise of its statutory authority to manage the national parks, and accordingly he rules the Court will not revisit how Parks Canada weighs ecological integrity and other factors in its management decisions.²¹ Moreover, in dismissing the CPAWS appeal Justice Evans places the onus on CPAWS to establish what components of restoring or maintaining ecological integrity were missing in the Parks Canada approval or, alternatively, to submit evidence on how the road construction would impair the park's ecological integrity.²² Justice Evans not only reads down subsection 8(2), he places a new evidentiary burden on CPAWS as the applicant seeking to challenge Parks Canada under subsection 8(2).

These two decisions in the case of the Wood Buffalo National Park road approval provide Parks Canada with the legal authority to consider the maintenance or restoration of ecological integrity as just another factor in parks decision-making; moreover, ecological integrity is a factor which can be overridden by human commercial or economic interests.²³ The doctrinal analysis here demonstrates that judicial interpretation of subsection 8(2) has significantly undermined the normative influence of the ecological integrity rule on parks management. Another effect of these decisions has been to intimidate public interest environmental groups away from using the law to challenge Parks Canada decision-making in the national parks.

The Mikisew Cree First Nation also applied to the Federal Court for judicial review of the Parks Canada road approval in Wood Buffalo National Park, filing their application in June 2001 just one week after the CPAWS application was filed with the Court. The Mikisew application asserted the decision by Parks Canada was an unlawful infringement of aboriginal rights under section 35 of the *Constitution Act*.²⁴

Madam Justice Hansen rules the road approval infringed upon Mikisew section 35 rights to hunt and carry on their traditional lifestyle in Wood Buffalo National Park, and as such she sets aside the Parks Canada decision.²⁵ The reasoning provided by Justice Hansen to

²¹ *CPAWS Court of Appeal, supra* note 14 at paras 68-99.

²² *Ibid* at paras 89, 101-105.

²³ This conclusion is reinforced by the second case involving the consideration of s 8(2) wherein the Federal Court dismissed an application by the Mountain Parks Watershed Association for judicial review of a Parks Canada water permit renewal issued to Chateau Lake Louise (*Mountain Parks Watershed Assn v Canada (Minister of Canadian Heritage)*, 2004 FC 1222).

²⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11.

²⁵ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 [*Mikisew Trial Division*].

support her ruling offers an interesting contrast to that of Justice Gibson and Justice Evans in the CPAWS application.

Justice Hansen finds the infringement on Mikisew aboriginal rights partially on the evidence of adverse environmental impacts from the proposed road, including habitat fragmentation, adverse impacts to wildlife that rely on undisturbed wilderness for sustainable populations, and loss of vegetation.²⁶ Justice Hansen concludes:

“Subsistence hunting and trapping by traditional users of the Park’s resources has been in decline for many years. Opening up this remote wilderness to vehicle traffic could potentially exacerbate the challenges facing First Nations struggling to maintain their culture. For example, if the moose population is adversely affected by increased poaching or predation pressures caused by the road, Mikisew will be forced to change their hunting strategies. This may simply be one more incentive to abandon a traditional lifestyle and turn to other modes of living. Further, Mikisew argues that keeping the land around the reserve in its natural condition and maintaining their hunting and trapping traditions is important to their ability to pass their skills on to the next generation of Mikisew.”²⁷

The decision was ultimately heard at the Supreme Court of Canada, and it is noteworthy for present purposes that a unanimous Supreme Court agreed with Justice Hansen that the Mikisew aboriginal rights were infringed by the adverse environmental impacts of the proposed road.²⁸

Also noteworthy in the Mikisew application is the fact that Parks Canada led evidence on environmental impacts to oppose the Mikisew application. It is hard to miss the irony of Parks Canada asserting that hunting is incompatible with maintaining the ecological integrity of Wood Buffalo National Park, while at the same time asserting the road will have no adverse impact on ecological integrity in the CPAWS application. Justice Hansen has little difficulty in rejecting this argument by giving significant weight to the evidence on the proposed road’s environmental impacts and emphasizing that aboriginal hunting is intertwined with the ecology of the park.²⁹

The ecological integrity of Wood Buffalo National Park is given priority in Justice Hansen’s reasoning that is nowhere to be found in the Court’s reasons for dismissing the CPAWS application. The remoteness and wild nature of Wood Buffalo National Park informs her analysis on the lawfulness of the proposed road and its impact on both the Mikisew Cree First Nation and the ecology of the park.

²⁶ *Ibid* at paras 87-98. This evidence came from both the environmental assessment report and cross-examination of the Wood Buffalo National Park Superintendent who admitted that the road construction would adversely impact wildlife habitat in the Park.

²⁷ *Ibid* at para 98.

²⁸ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 at para 44.

²⁹ *Mikisew Trial Division*, *supra* note 25 at paras 67-74, 87-98.

A PROBLEM OF INSTITUTIONAL DESIGN

The foregoing analysis provides for a couple of observations. The first observation is that judicial interpretation of the ecological integrity rule in subsection 8(2) of the *Canada National Parks Act* has significantly read down the priority for ecological integrity in parks management. The Federal Court has effectively ruled that ecological integrity is simply one of many factors for Parks Canada to consider in exercising its legal power to manage the national parks, despite how poorly this reading fits with the literal terms of subsection 8(2).

The second observation is the distinction in legal reasoning evident in a comparison between the CPAWS decisions and the Mikisew decision concerning the impacts of the road on the ecology of Wood Buffalo National Park. Ironically, the Mikisew decision gives ecological integrity the priority called for in the *Canada National Parks Act*, notwithstanding that the parks legislation is not at issue in the Mikisew application.

The most compelling explanation for these observations might rest in the statutory nature of the ecological integrity rule in the *Canada National Parks Act*. Many legal scholars have noted a strong correlation between utilitarian ethics and statutory rules.³⁰ The general argument is that an application of statutory rules is predisposed towards the balancing of competing interests and polycentric considerations. The categorical or deontological nature of certain environmental norms, such as the norm of preserving ecological integrity, is perhaps too rigid to be operationalized as a statutory rule. The reason might simply be that a categorical assertion of authority in legislation is inextricably linked to the policy debates underlying its enactment, and thus a statutory rule is especially vulnerable to being read down to accommodate competing interests. Or perhaps worse, the rule may be completely flipped on its head when necessary to satisfy these competing interests. I have previously suggested this is exactly what Justice Gibson does in the CPAWS decision: The human-wilderness dualism underlying the meaning of ecological integrity whereby park wilderness is idealized over human interests in the literal wording of subsection 8(2) is untenable to Justice Gibson who simply flips the dualism in his application of subsection 8(2) to assert human interests over park wilderness.³¹ There are exceptional cases where a deontological statutory rule on environmental preservation prevails against competing interests and the Court expressly refuses to engage in utilitarian reasoning, but these really are exceptions.³²

³⁰ See e.g. Sean Coyle & Karen Morrow, *The Philosophical Foundations of Environmental Law* (Portland: Hart Publishing, 2004).

³¹ Fluker, *supra* note 5 at 121-122.

³² The paradigm example of deontological over utilitarian reasoning in the application of statutory environmental law is perhaps the 1978 decision of the United States Supreme Court in *Tennessee Valley Authority v Hill*, 437 US 153 (1978).

The statutory nature of the ecological integrity rule also seems to dictate that legal reasoning will be predominately concerned with principles of statutory interpretation and judicial review. These principles inject a formalism into legal argument and legal reasoning that negates the creativity and imagination in legal thought required to develop and implement complex and difficult norms. Legal reasoning in the CPAWS decisions concerning ecological integrity, and presumably the arguments of the parties before the Court, focuses on dissecting the wording of subsection 8(2) and adjudicating the lines of authority between the judiciary, legislature, and the executive. The Court never seriously engages with the norm of ecological integrity preservation and what it means for national park management. The contrast between how the CPAWS decisions and the Mikisew decision assess the impact of the proposed road on the ecological integrity of Wood Buffalo National Park demonstrates how constraining this formalism can be.