

2008

# Ecological integrity and the law: The view from Canada's National Parks

Fluker, Shaun

---

Fluker, S. "Ecological integrity and the law: The view from Canada's National Parks."

Contributed paper for the Canadian Parks for Tomorrow: 40th Anniversary Conference, May 8 to 11, 2008, University of Calgary, Calgary, AB.

<http://hdl.handle.net/1880/46890>

*Downloaded from PRISM Repository, University of Calgary*

## **Ecological integrity and the law: The view from Canada's National Parks**

**Shaun Fluker**

### **Introduction**

In 2001 the federal government legislated the maintenance of ecological integrity as the first priority in the Canadian national parks. The debate over the purpose of parks was seemingly over, with preservation trumping recreation. In light of subsequent events, however, it seems that Parks Canada and the judiciary interpret ecological integrity not as the priority, but rather as just one factor among many to be considered in parks management. My objective here is to provide some explanation for this unexpected outcome.

### **Ecological integrity in the *Canada National Parks Act***

The term “ecological integrity” first entered parks legislation in 1988 with amendments that stated the maintenance of ecological integrity was the first priority in park zoning and visitor use management.<sup>1</sup> This provision was judicially cited in several cases, but was not the primary focus in parks litigation.<sup>2</sup> The ecological integrity provisions added to the *Canada National Parks Act*<sup>3</sup> in 2001 included a definition and an operative provision setting the maintenance or restoration of ecological integrity as the first priority in parks management generally:

#### **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**

---

<sup>1</sup> *National Parks Act*, R.S.C. 1985, c. N-14, s. 5(1.2).

<sup>2</sup> See e.g., *Sunshine Village Corp. v. Canada (Minister of Environment and Minister of Canadian Heritage)*, [1996] F.C.J. 1118 (FCA)(QL).

<sup>3</sup> S.C. 2000, c. 32.

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.

These ecological integrity provisions sit alongside the general purpose statement in section 4(1):

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.

In recognition of the importance of the 2001 amendments, section 8(2) of the *Canada National Parks Act* was the primary focus in two Federal Court judgments issued shortly after its enactment.

In May 2001 the Minister of Canadian Heritage, via Parks Canada as her delegate, approved construction of a winter road through Wood Buffalo National Park. The Canadian Parks and Wilderness Society (CPAWS) sought judicial review of the Minister's decision in the Federal Court of Canada arguing, in part, that the Minister failed to adhere to her statutory obligation in section 8(2) of the *Canada National Parks Act*. In rejecting CPAWS' application, Gibson J. provided a remarkable interpretation of the section 8(2) ecological integrity mandate and its relationship to section 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. . . . 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 interest 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 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.<sup>4</sup>

Gibson J. expresses the need to balance competing interests in parks decision-making: the preservationist national interests represented by ecological integrity against the socio-economic local interests of those living in or near a national park. He went so far as to state the possibility that human interests override the maintenance or restoration of ecological integrity where impairment is minimized to ensure the park can be enjoyed by future generations. I am particularly troubled by Gibson J.'s clumsy attempt to distinguish first priority from sole priority or determinative factor in his *Wood Buffalo Road* judgment, and his chosen words inspired me to investigate the reluctance to apply section 8(2) as written.

In March 2002, Parks Canada renewed a water permit issued to Chateau Lake Louise pursuant to section 18(1) of the *National Parks General Regulations*<sup>5</sup> authorizing the withdrawal of water from Lake Louise in Banff National Park. The Mountain Parks Watershed Association sought to have the water permit quashed by the Federal Court of Canada on the basis that its issuance was contrary to section 8(2) of the *Canada National Parks Act*. The Association argued the water withdrawal from Lake Louise would impair the ecological integrity of Banff National Park. Parks Canada had come to the opposite conclusion based on an environmental assessment report and various planning documents, including the 1997 Banff National Park Management Plan. In denying the Association's application, Federal Court Justice Rouleau interpreted sections 4(1) and

---

<sup>4</sup> *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1123 at paras. 52,53 [*Wood Buffalo Road*], aff'd 2003 FCA 197.

<sup>5</sup> SOR /78-213.

8(2) together as requiring parks decision-making to strike a balance between sustainable human use and preserving ecological integrity, similar to the stated purposes of the park management plan.<sup>6</sup>

The *Wood Buffalo Road* and *Chateau Lake Louise* judgments interpret the maintenance or restoration of ecological integrity as but one factor in national park decision-making, despite the wording of section 8(2) which situates ecological integrity as the “first priority”. Simply put: business as usual in the national parks.

### **The inertia of National Parks history**

Many reasons have been suggested for why Canada has national parks; indeed, the purpose of the parks is continually subject to debate. The casual observer might be surprised to learn how few believe wilderness preservation initiated the national parks system. A review of the literature reveals three distinct eras based on the predominating reason for parks.

The primary role for the early national parks was colonial. The Cave and Basin hot springs, in what is now known as Banff National Park, initiated the national parks movement largely at the request of the Canadian Pacific Railway in the 1880s.<sup>7</sup> For the company, the mountain park and Banff townsite were a scenic destination to encourage wealthy easterners to travel on its new railway. The federal government was happy to facilitate the success of the railway, as it was central in efforts to move the settler colony across the prairies and unite a fledgling nation from east to west. This nation-building role of national parks is perhaps best demonstrated by the geographic distribution of subsequent parks designated on the heels of the initial park in 1887. By 1930 a total of fourteen parks were designated: eleven national parks were located in the western provinces, and the remaining three were located in Ontario and covered a mere fifty square kilometres.<sup>8</sup>

---

<sup>6</sup> *Mountain Parks Watershed Assn. v. Chateau Lake Louise*, 2004 FC 1222 at paras. 19-23 [*Chateau Lake Louise*].

<sup>7</sup> Leslie Bella, *Parks for Profit* (Montreal: Harvest House, 1987).

<sup>8</sup> Parks Canada, *State of the Parks: 1997 Report*, (Ottawa: Minister of Public Works and Government Services, 1998) at 12 [1997 State of the Parks Report].

The second era, the tourism era in the parks, began under J. B. Harkin, the first Parks Commissioner, whose preservation vision remained strictly utilitarian: a means towards promoting tourism and recreation.<sup>9</sup> Harkin's utilitarian vision of preservation was codified in the 1930 *National Parks Act*, the first dedicated national parks legislation in Canada.<sup>10</sup> The parks were dedicated to the use and enjoyment by Canadians, both present and future:

The Parks are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to the provisions of this Act and Regulations, and such Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.<sup>11</sup>

In adding reference to “unimpaired”, the 1930 legislation seemingly called for preservation combined with human use. This provision is now widely regarded as the dual “use without abuse” mandate for parks governance, and it is repeated in section 4(1) of the current *Canada National Parks Act*.

In the mountain parks, ski resorts developed in the late 1950s and early 1960s became flash points for controversy between use and preservation.<sup>12</sup> Gone were days of benign tourism. Recreationalists and preservationists could no longer agree over acceptable land use in national parks. By the early 1960s, opposition to tourism in the national parks became organized into the National and Provincial Parks Association of Canada.<sup>13</sup>

The federal government responded in 1964 with the enactment of its first national parks policy wherein it emphasized preservation in the administration of the *National Parks Act*.<sup>14</sup> The 1964 policy was loyal to utilitarian preservation codified in the 1930

---

<sup>9</sup> *Parks for Profit*, *supra* note 7 at 58.

<sup>10</sup> *National Parks Act*, S.C. 1930, c. 33. Prior to this legislation, national parks were referred to as ‘dominion parks’ and governed by certain provisions of the *Dominion Forest Reserves and Parks Act*, R.S.C. 1927, c. 78.

<sup>11</sup> *National Parks Act*, *ibid.*, s. 4.

<sup>12</sup> *Parks for Profit*, *supra* note 7 at 121-127.

<sup>13</sup> The National and Provincial Parks Association of Canada is now known as the Canadian Parks and Wilderness Society.

<sup>14</sup> Canada, *National Parks Policy* (Ottawa: Department of Northern Affairs and National Resources, 1964)

legislation, and the policy did little to appease the growing opposition to recreation in the parks.

The third era, the preservation era, began in 1979 with amendments to national parks policy and the entrance of ecological integrity into parks policy discourse: “Ecological and historical integrity are Parks Canada’s first considerations and must be regarded as prerequisites to use.”<sup>15</sup> The 1979 policy amendments carried forward into the 1988 legislative amendments which asserted the maintenance of ecological integrity as the first priority in park zoning and visitor use management.

On the ground however, preservation policy was having little impact in eroding the dominance of the “parks for people” ideology. Sid Marty offers a compelling narrative of these competing visions from his perspective as a park warden during the 1970s in his book *Men for the Mountains*.<sup>16</sup> Writer Rick Searle also worked for Parks Canada during the 1970s, and his experiences as a park interpreter led him to study why use seemed to trump preservation despite policy direction that favoured the latter. In the late 1990s, Searle visited twenty-seven national parks to investigate the overall consensus, both within Parks Canada and the public generally, that despite several decades of preservationist policy direction and the 1988 legislative amendments, the parks were in ecological peril from over-use.<sup>17</sup>

In 1998 the Minister of Canadian Heritage appointed a panel of scientists to assess the strengths and weaknesses in Parks Canada’s management for ecological integrity in the national parks, and to provide the Minister with recommendations towards facilitating the ability of Parks Canada to meet its ecological integrity policy objective.<sup>18</sup> Among many recommendations intended to reinforce the preservationist direction for the national parks, the Ecological Integrity Panel Report called for legislative amendments to ensure

---

<sup>15</sup> Canada, *Parks Canada Policy* (Ottawa: Minister of Indian Affairs and Northern Development, 1979), 12.

<sup>16</sup> Sid Marty, *Men for the Mountains* (Toronto: McLelland & Stewart, 1978).

<sup>17</sup> Rick Searle, *Phantom Parks: The Struggle to Save Canada’s National Parks* (Toronto: Key Porter Books, 2000).

<sup>18</sup> Parks Canada, “*Unimpaired for Future Generations*” ? *Conserving Ecological Integrity with Canada’s National Parks*, 2 volumes, (Ottawa: Minister of Public Works and Government Services, 2000) [Ecological Integrity Panel Report].

the maintenance or restoration of ecological integrity be the *overriding* priority in all parks management.<sup>19</sup> The consensus among panel members was that a stronger legal mandate was necessary to remedy the noted ecological decline in the parks. The federal government responded with the ecological integrity provisions in the *Canada National Parks Act*.

Parliament was seemingly ambivalent towards changing our national parks vision when it responded to the Ecological Integrity Panel Report. By adding section 8(2) without amending or repealing section 4(1) in the *Canada National Parks Act*, Parliament rendered ecological integrity vulnerable to the longstanding utilitarian approach to preservation codified in 1930 amendments to the legislation. This history and perspective is entrenched within both Parks Canada and the judiciary, who accordingly interpret the ecological integrity mandate as one factor among several that need to be reconciled in a park management decision.

### **National parks as wilderness**

Dr. Stephen Woodley is closely associated with ecological integrity and Canada's national parks. His 1993 doctoral thesis constructs a framework for assessing the level of ecological integrity exhibited by a protected area and applies the framework to Fundy National Park.<sup>20</sup> Woodley provides a definition of ecological integrity, constructed from ecosystem science and applied in the context of a protected area:

Ecological integrity is defined as a state of ecosystem development that is optimized for its geographic location. For parks and protected areas this optimal state has been referred to by such terms as natural, naturally evolving, pristine and untouched. It implies that ecosystem structures and functions are unimpaired by human-caused stresses, that native species are present at viable population levels and, within successional limits, that the system is likely to persist. Ecosystems with integrity do not exhibit the trends associated with stressed ecosystems. Parks and protected areas are part of larger ecosystems and determinations of integrity in national parks must consider these larger ecosystems.<sup>21</sup>

---

<sup>19</sup> *Ibid.* at Appendix C.

<sup>20</sup> Stephen Jerome Woodley, "Assessing and Monitoring Ecological Integrity in Parks and Protected Areas" (PhD diss., University of Waterloo, 1993).

<sup>21</sup> *Ibid.* at 6.

Woodley identifies ecological integrity criteria from several branches of ecosystem science, defends his selections, and applies them to assess the level of ecological integrity in Fundy National Park. His ecological integrity measures include: human disturbance; species richness; size of organisms; species reproduction; nutrient retention; landscape fragmentation; and native species population viability. For Woodley there is an inverse correlation between levels of ecological integrity in a national park and the extent of human activity therein.

Woodley's ecological integrity research is reflected in Parks Canada policy. In its 1997 State of the Parks Report, Parks Canada described a detailed monitoring program for ecological integrity, noting indicators such as species biodiversity, ecosystem function, and human stressors, as primary measurement factors.<sup>22</sup> The 1997 State of the Parks Report similarly associates high ecological integrity with the relative absence of human presence in the ecosystem.<sup>23</sup> Similar to Woodley's finding and using the same examples, the 1997 State of the Parks Report suggests highest levels of ecological integrity in the remote, recently established northern parks, and increasingly impaired in the more populated, southern parks:

Certainly large northern parks continue to have high levels of ecological integrity. They have a full complement of native species, with very little development and few visitors. A good example of a park that is as close to pristine as possible on our planet is Vuntut in the northern Yukon Territory. At the other end of the spectrum is a small park like Point Pelee in Southern Ontario. . . Point Pelee still contains many elements of that former ecosystem but cannot be said to be pristine, and the integrity of the larger surrounding ecosystem is severely impaired.<sup>24</sup>

The findings set out in the 2000 Ecological Integrity Panel Report, with respect to the meaning of ecological integrity and the current ecological condition of the parks, substantially mirror observations set out in the 1997 State of the Parks Report. The

---

<sup>22</sup> 1997 State of the Parks Report, *supra* note 8 at 23-47.

<sup>23</sup> *Ibid.* at 23.

<sup>24</sup> *Ibid.* at 46.

Ecological Integrity Panel Report similarly associates ecological integrity with reduced human influence.<sup>25</sup> To affirm the ecological integrity mandate as a *first* priority that trumps human use, the Ecological Integrity Panel Report unequivocally states its intention that the 2001 legislative amendments provide legal authority for Parks Canada to say “no” to human activity in parks.<sup>26</sup>

The *Canada National Parks Act* definition of ecological integrity is thus a sophisticated model of the late nineteenth century socially constructed wilderness combined with late twentieth century ecosystem science. Wilderness is the realm of the non-human: that which is *wild* is not human.<sup>27</sup> Consistent with romantic accounts of wilderness, national park landscapes with ecological integrity are deemed superior to humans, whose activities generally taint otherwise pristine nature.<sup>28</sup> Most human activity is deemed to be incompatible with ecological integrity: humans and ecological integrity are opposites along a linear continuum. This human-nature dualism is both troublesome and convenient for parks decision-makers. It is troublesome in that ecological integrity has little or nothing to say about managing humans in the parks, but convenient in that decision-makers can employ the binary to disregard ecological integrity to serve their own preferences.

Many park management issues are, in fact, human management issues. Because the section 8(2) ecological integrity mandate has little to say about humans, decision-makers employ section 4(1) to decide on human use in the parks. The binary opposition of humans and nature underlying section 8(2) allows decision-makers, such as Gibson J. in the *Wood Buffalo Road* decision, to subvert the recommendation of the Ecological Integrity Panel Report by flipping the wilderness dualism to assert human interests over ecological integrity.

---

<sup>25</sup> Ecological Integrity Panel Report, *supra* note 18 at 1-15.

<sup>26</sup> *Ibid.* at 1-17.

<sup>27</sup> Roderick Nash, *Wilderness and the American Mind*, 4<sup>th</sup> ed. (New Haven: Yale University Press, 2001).

<sup>28</sup> Bruce Morito, “Examining Ecosystem Integrity as a Primary Mode of Recognizing the Autonomy of Nature,” *Environmental Ethics* 21 (1999): 66.

## **Conclusion**

Parks history suggests that preservation has long been valued as a means towards serving commercial and hedonistic human interests. And many Canadians have asserted the need to balance preservation and use in the national parks. When ecological integrity entered parks discourse it simply took the place of 'preservation' in this balancing act. Hence, the inertia of history provides one explanation for the why the legislated ecological integrity mandate is read down.

There are also various perspectives on the meaning of ecological integrity, and the version codified in the *Canada National Parks Act* defines ecological integrity as wilderness. The ecological integrity mandate defines national parks in opposition to humans: they represent the wildness that humans are not. Hence, a second explanation for the why the legislated ecological integrity mandate is read down is that most park decisions involve managing humans, and the wilderness perspective of ecological integrity has little to say about human use. The debate over the purpose of Canada's national parks will continue, despite the legislated first priority for ecological integrity.