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Chronicles of the Canadian High Court of Environmental Justice: *Canadian Parks and Wilderness Society v Maligne Tours*

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Case Commented On: *Canadian Parks and Wilderness Society v Maligne Tours*, 2016 FC 148

In a decision issued February 8, 2016, the Honourable Mr Justice James Russell denied an application by the Canadian Parks and Wilderness Society and the Jasper Environmental Association for judicial review of a decision made by the Superintendent of Jasper National Park to approve in concept a new accommodation facility for the shores of Maligne Lake. The Applicants argued that the Superintendent acted unlawfully by making this decision outside of his authority and in contravention of the park management plan, and moreover that the decision is contrary to the overall first priority of maintaining or restoring ecological integrity in Canada's national parks. The legality of the Superintendent's decision in this matter rests on two determinations: (1) the legal status of the 2010 Jasper National Park Management Plan; and (2) whether the decision is in accordance with the legislated first priority of ecological integrity for the park.

This comment reviews the decision by Justice Russell in an imagined space. In a stunning political move, the Trudeau government has amended the *Federal Courts Act*, RSC 1985, c F-7 to establish the High Court of Environmental Justice. The mandate of this new Court is to hear *de novo* appeals from decisions by the Federal Court of Canada on environmental law issues. The *Supreme Court Act*, RSC 1985, c S-26 was also amended to remove any appellate jurisdiction by the Supreme Court of Canada over the High Court of Environmental Justice, with the exception of environmental cases where a constitutional issue is raised by a party. In announcing the creation of this new Court, the Minister of Justice and the Minister of Environment and Climate Change stated that ABlawg has been selected as the Court's official reporter.

THE COURT:

The Canadian Parks and Wilderness Society (CPAWS) and the Jasper Environmental Association (JEA) seek to have this Court quash the decision made by the Superintendent of Jasper National Park to approve in concept a new accommodation facility for the shores of Maligne Lake and prohibit the Superintendent from any further consideration of the proposal. The proponent of this new facility is Maligne Tours, a registered Alberta corporation with an existing lease on the shores of Maligne Lake to operate a day lodge, gift shop, and boat tours on the lake. In 2013 the Superintendent invited Maligne Tours to file a conceptual proposal for new facilities to enhance the visitor experience at Maligne Lake. The proposed new facilities included a 66 room hotel to be built on lands covered by the existing lease and a group of rustic tent cabins located on lands outside the existing lease. This latter fact is relevant to the legal dispute here. Parks Canada solicited public comment on this proposal, and received 1842 submissions. Only 19 of these submissions were in support of the new accommodation facilities.

In July 2014 the Superintendent issued a decision that rejected the hotel proposal and approved the tent cabin proposal in concept. The Superintendent rejected the hotel proposal on the basis that it was inconsistent with the ecological objectives for the region set out in the 2010 Jasper National Park Management Plan and would contravene guidelines that prohibit the construction of new overnight commercial accommodation in the park. Similar concerns were identified by the Superintendent in relation to the tent cabin proposal, however, the cabins were approved for further consideration because the scale of physical development and intensity of use was much lighter than with respect to the hotel. However a key aspect of this decision is that the tent cabin proposal, if approved, would require Parks Canada to release new lands to Maligne Tours.

The primary issue raised by the parties in this matter is that the 2010 Jasper National Park Management Plan (the Plan) expressly prohibits the release of any new land for overnight commercial accommodation outside of the town of Jasper. Section 4.7.1 of the Plan states that "[n]o new land will be released for overnight commercial accommodation outside the community." CPAWS and the JEA argue that this section of the Plan is binding direction on the Superintendent such that he is unable to approve a conceptual proposal he knows the Plan does not allow to be constructed. CPAWS and the JEA moreover argue that by making his decision contingent on a possible future amendment to the Plan which would allow for construction, the Superintendent acted unlawfully by effectively usurping the statutory authority of the Minister to amend the Plan and table such amendments before Parliament. The Superintendent acknowledges that the Plan must be amended in order for shovels to hit the ground with respect to the tent cabins, but nonetheless he argues that (1) the July 2014 decision is not the final approval and only a decision to give the tent cabin proposal further consideration and subject it to an environmental impact assessment; and (2) the Plan is simply guidance and not binding on the Superintendent. In either or both ways, the Superintendent argues his July 2014 decision is not unlawful.

Justice Russell agreed with both of the Superintendent's arguments concerning the Plan. He found that the Superintendent's July 2014 decision does not approve the tent cabin proposal but rather is merely a decision to give the proposal further consideration, and accordingly there is no decision to release new lands contrary to section 4.7.1 of the Plan (2016 FC 148 at paras 76-78, 87). The *ratio decidendi* of Justice Russell's judgment is that prohibitions in the Plan do not apply to these so-called preliminary or contingent decisions to give further consideration to a land-use proposal in a national park. Justice Russell states the law does not preclude Parks Canada or a parks superintendent from considering a proposal that does not comply with a park management plan (at para 92).

Justice Russell also throws a bucket of cold water on the Applicants' position that a park management plan constitutes a legally binding document as subordinate legislation (at paras 88-91). While this aspect of Justice Russell's ruling seems like *obiter dicta* and perhaps not worthy of close scrutiny, his reasoning is nonetheless problematic. Justice Russel does not apply the Supreme Court of Canada authority on the test for determining when a plan or policy document in form is legally binding subordinate legislation in substance (See *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at paras 50-66). Justice Russell also seems to contradict himself by, on the one hand, acknowledging in several places of his judgment (see e.g. at paras 77 and 87) that the Plan will have to be amended and thus by implication does set out binding rules on the Superintendent, while on the other hand questioning the binding nature of the Plan itself.

In the opinion of this Court, these arguments and findings on the legal character of the Plan are fascinating legal fodder but they obscure the real problem here which is that the Superintendent failed to meet his burden to demonstrate that any consideration of this tent cabin proposal is consistent with the legislated duty in section 8(2) of the *Canada National Parks Act*, SC 2000 c 32 that maintenance or restoration of ecological integrity be his first priority when considering all aspects of the management of parks (emphasis added). In order to fully understand what this duty or obligation requires of the Superintendent and to illustrate why his decision is unreasonable, it is necessary to set out some context.

Maligne Lake was known as *Chaba Imne* by the Stoney and Cree peoples before it was given its colonial name in 1908 (Pearlann Reichwein and Lisa McDermott, "Opening the Secret Garden" in Ian Maclaren, ed, *Culturing Wilderness in Jasper National Park* (University of Alberta Press, 2007) at 155). The euro-american discovery of Maligne Lake is credited to Mary Schäffer, a wilderness romantic from the eastern United States who travelled west to escape the shackles of eastern civilization in her mid to late 40s by exploring in the Canadian Rocky Mountains. Schäffer documented her explorations and search for this elusive lake over the summer months of 1907 and 1908 in *Old Indian Trails of the Canadian Rockies*, a book published in 1911 as she was preparing to conduct an official survey of Maligne Lake for the Geological Survey of Canada. Schäffer found the lake using a hand drawn map provided to her by Sampson Beaver, a Stoney hunter from Morley ("Opening the Secret Garden" at 160-161). Some of the peaks surrounding this majestic glacial lake are named after members of Schäffer's exploration party in 1908, including Mts Unwin and Warren, and Sampson's Peak is named after the fellow whose sketch she followed in her 1908 expedition.

There is considerable irony in this story. Mary Schäffer was determined to find an undisturbed and wild Maligne Lake ahead of the railroad's arrival and the extensive human development which would accompany these steel veins of progress, yet the publication of her explorations and her official survey of Maligne Lake almost certainly helped pave the way for the commercial tourism that arrived at the lake during the 1920s (See Gabrielle Zezulka-Mailloux, "Laying the Tracks for Tourism" in *Culturing Wilderness in Jasper National Park* at 233). The law and policy framework enacted over the following decades embraced a 'parks for people' ideology that would not be challenged until the rise of an ecocentric vision for protected areas in late stages of the twentieth century that called for non-human nature to be protected *for its own sake* and the realization that the western mountain parks are the last stand for some of North America's most symbolic species including the grizzly bear.

Preservationists such as the Applicants in this case thought the tide had finally turned in their favour when Parliament enacted section 8(2) of the *Canada National Parks Act* in early 2001. Section 8(2) reads as follows:

> 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.

This enactment followed on the heels of a two year study commissioned by the federal Minister responsible for parks in 1998 to make recommendations on how to strengthen an environmental protection mandate for Canada's national parks. The panel expressly recommended that the *Canada National Parks Act* be amended to ensure the maintenance or restoration of ecological integrity be the overriding priority in all parks management. The panel found that a stronger legislative mandate was needed to give Parks Canada the authority to say 'no' to development in

the parks. Section 8(2) was Parliament's response.

To say that section 8(2) has not lived up to this promise is an understatement (see Shaun Fluker, "Ecological Integrity in Canada's National Parks: The False Promise of Law" (2010) 29 Windsor Rev Legal Soc Issues 89. A shorter and earlier version of this piece is available on SSRN). Environmental groups have been unsuccessful at every turn in having a parks decision overturned in judicial review on the ecological integrity mandate. The Federal Court has always deferred to how the Minister or a parks superintendent reads his or her mandate, which has oscillated between asserting ecological integrity and promoting commercial tourism over the years. In recent times, the balance has tipped heavily in favour of new commercial development to attract tourism in the western mountain parks. This so-called balancing act is more or less the same approach to governance that has existed in Canada's national parks since inception in 1885, which is fine except that today this approach requires that the Minister and Parks Canada completely disregard the legislated ecological integrity mandate.

This of course raises a problem for the Federal Court, which had to find a way to defer to a Minister or government agency who disregards its legislated instruction from Parliament. The Federal Court established its method early on with its first ecological integrity case, where the Minister completely disregarded ecological integrity in her decision to approve a new road in Wood Buffalo National Park. The Federal Court held that the words 'first priority' in section 8(2) do not mean only or sole priority or even a determinative factor in parks decision-making (see *Canadian Parks and Wilderness Society v Copps*, 2001 FCT 1123 at paras 52, 53). This reading of the legislation lives to this day, and indeed in the present case the Superintendent once again provided Justice Russell with this tortured interpretation: "The Superintendent's granting of first priority to the consideration of ecological integrity means that there are other priorities to be considered in the administration and management of national parks" (2016 FCA 148 at para 64). This Court fails to see how this reading of section 8(2) gives any meaning to the phrase "first priority".

This Court agrees with the Applicants that the maintenance or restoration of ecological integrity as the first priority in the Maligne Lake region today means protecting the area as critical habitat for the Southern Mountain Caribou population that lives there. The caribou herd is protected as a threatened species under the federal *Species at Risk Act*, SC 2002 c 29 and Parks Canada itself acknowledges that maintaining what is left of the herd is one of the most pressing management challenges facing Jasper National Park. The evidence before this Court demonstrates that road mortality is already a problem for the caribou population at Maligne Lake in the absence of enhanced accommodation facilities which are likely to only exacerbate this issue. But the most persuasive evidence that the Superintendent did not give ecological integrity first priority in deciding to give further consideration to the tent cabin proposal is that the tent cabins would be constructed on lands which are presently being considered for designation as critical habitat for the Maligne herd in the Southern Mountain Caribou Recovery Strategy.

This Court finds that the Superintendent failed to demonstrate that ecological integrity was his first priority in approving the tent cabin proposal. The Court notes that the text in section 8(2) clearly indicates the provision applies to all aspects of parks management – interim or final decisions. The Superintendent's approval of the tent cabin proposal in concept is hereby quashed. The Court also orders that the Superintendent is prohibited from any further

consideration of the tent cabin proposal unless and until the Southern Mountain Caribou are no longer listed as threatened or endangered under the *Species at Risk Act*. In addition to seeking relief in relation to the tent cabin proposal decision, the Applicants have also asked this Court for a declaration on the ecological integrity mandate. The Court hereby declares that section 8(2) of the *Canada National Parks Ac*t requires that the Minister and her delegates (Parks Canada, the Superintendent or otherwise) make the maintenance or restoration of ecological integrity the determinative factor in parks management decisions. The intention of Parliament in enacting this provision was to ensure that ecological integrity trumps all other considerations in Canada's national parks.