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## Kananaskis Conservation Pass

By: Shaun Fluker

**Ministerial Order Commented On:** Ministerial Order [51/2021](#) (Environment and Parks)

On May 27, the Minister of Environment and Parks (Jason Nixon) issued Ministerial Order [51/2021](#) to impose a fee to access Kananaskis Country. This new access fee applies to many popular parks and recreational areas in Kananaskis Country such as West Bragg Creek, Barrier Lake, Elbow Falls, Evans Thomas Creek, Spray Lakes, and Highwood Pass. Payment of the fee provides the purchaser with a Kananaskis Conservation Pass. The geographic scope of the fee requirement is curiously both over and under inclusive in relation to its name. The boundary map on the Alberta parks website (and attached to Ministerial Order 51/2021) indicates the access fee applies to areas outside of what is commonly known as Kananaskis Country (e.g. portions of the Bow Valley Wildland Park east of Canmore, including Grotto Canyon and Mount Yamnuska) and – as was pointed out by Nathan Schmidt (JD 2021) [here](#) – the fee does not apply to the McLean Creek area which is clearly within Kananaskis Country. This post critically examines the legislative changes made to implement the Kananaskis Conservation Pass requirement.

### What is Kananaskis Country?

Kananaskis Country was [established](#) by the Alberta government in 1978 as a multiple use planning area covering approximately 4000 km<sup>2</sup> in the foothills and mountains west of Calgary. While commonly thought of as a protected area, the region is actually a complicated tapestry of land uses and designations. Kananaskis Country consists of a mixture of protected area designations, public land use zones, various commercial and resource dispositions (including forestry, grazing, oil and gas, and water), power generation facilities (i.e., dams), residential areas, and a small urban village. The idea for Kananaskis Country is attributed to the late Honourable Premier Peter Lougheed, and [Peter Lougheed Provincial Park](#) located in the heart of Kananaskis Country is named in his honour.

Kananaskis is also a microcosm for observing the outcome of Alberta's multiple use policy for public lands: a policy which gives public officials discretion, with very few (if any) constraints, to authorize commercial and recreational dispositions, informed by the false premise that it is possible to allow for large amounts of human activity on the landscape and regulate that activity to ensure adequate habitat for wildlife is preserved and the overall ecological integrity of the region is maintained. Not only is this multiple use policy often unconvincing on a single project-by-project basis, it has proven to be a total failure on addressing cumulative effects and is facilitating an environmental 'death by a thousand cuts'. Steven Kennett and Monique Ross summarized these shortcomings and challenges in their paper "[In Search of Public Land Law in Alberta](#)" (Canadian Institute of Resources Law, 1998). Even worse, the overwhelming majority of land use decisions in Kananaskis are made with little or no meaningful public scrutiny or input. A recent example of

this was the approval granted by Alberta Environment to Fortress Mountain for [the taking of water from Kananaskis Country](#) (see [here](#) for more information on this).

Perhaps the best source of land use guidelines and related information in relation to Kananaskis Country remains the 1986 [Kananaskis Country Sub-Regional Integrated Resource Plan](#). Page 6 provides a good map of the region's boundaries, and pages 7 to 13 give an overview of the various resource exploration and development dispositions in the area. The boundaries of the Kananaskis planning region are essentially the same as those for the [Kananaskis Improvement District No 5](#) (see map [here](#)). Another map of Kananaskis Country is set out on page 7 of the 1999 [Kananaskis Recreation Policy](#).

## **Kananaskis Access Fee**

The Alberta government website for the [Kananaskis Conservation Pass](#) states that the access fee applies to all personal and commercial vehicles stopping in parks and public lands in Kananaskis Country and designated portions of the Bow Valley corridor. The boundary map for where the fee applies is [here](#). You can see from this map the areas of the Bow Valley corridor (east of Canmore and north of the Trans-Canada Highway) which are not actually in the Kananaskis Country planning region, but are nonetheless included in the range of the fee requirement. Similarly, this map shows that the access fee does not apply in the McLean Creek Off-Highway Vehicle (OHV) area west of Bragg Creek, which is within Kananaskis Country.

In late April, the Minister [announced](#) that a new Kananaskis access fee was forthcoming, citing the need for additional funds to cover maintenance and related expenses associated with an increasing number of people recreating in the area. The timing of this announcement was just prior to a suspension of the current legislative session at the peak of the third wave of COVID-19 infections, and thus debate in the legislative assembly didn't occur until later in May. This debate was held during the second reading for [Bill 64, Public Lands Amendment Act, 2nd Sess, 30th Leg, Alberta, 2021](#), a bill which actually says nothing specific about the Kananaskis fee; rather, this Bill amended section 9.1 of the *Public Lands Act*, [RSA 2000, c P-40](#) to give the Minister power to prescribe a fee for the occupation of public land (Bill 64 came into force with royal assent on May 27).

During this legislative debate (the Hansard transcripts are found [here](#)), members of the Opposition challenged various aspects of the Kananaskis fee including its disproportionate impact on access for low-income Albertans, the lack of oversight or accountability on whether the funds generated by the fee will actually be spent as promised (protecting wildlife habitat, public safety, and recreational services), the fact that these new revenues will merely replace cuts to the parks budget implemented by the government over the past couple years, the exclusion of OHV users in McLean Creek, and vague references to a public consultation in the Fall of 2020 that seems to have been directed more towards the public lands [random camping fee](#) which Bill 64 gives the Minister authority to implement.

The Minister responded to these concerns by noting that the fee is supported by the Kananaskis Country Improvement District and the [Friends of Kananaskis Country](#), that there are controls in place within the Treasury Board to ensure dedicated revenue goes to its stated objectives, and that

OHV users are not excluded from paying new fees (the random camping fee). As per usual, MLAs often talked past each other in the debate.

What caught my attention in particular was a back-and-forth in the [evening of May 25](#) between several members of the Opposition and the Minister. Accusations concerning the exclusion of McLean Creek and privileged access of OHV users to policy development appear to have touched a nerve with the Minister, as reflected in these remarks in the Assembly that evening:

**Mr. Jason Nixon:** Well, thank you, Mr. Speaker, and thank you to the Member for Calgary-Mountain View for her comments, though I would appreciate it if, the next time she comes to the Chamber, she may take the time to actually read the bill. She spent most of her time talking about the Provincial Parks Act. This legislation has nothing to do with provincial parks, nothing at all. In fact, provincial parks are governed underneath a different act. Now, I do appreciate that she may want to talk about provincial parks like Kananaskis, but the reality is that this legislation has nothing to do with provincial parks, showing yet again that the member and her party won't take anything seriously. They just come to the Chamber to give a speech, complaining about something and not even actually talking about the legislation that's in front of them.

She gave herself away in her opening remarks when she talked, Mr. Speaker, about reservations. When you're dealing with random camping on Crown land, there are no reservations. If she would like to learn a little bit about the world outside of the city, I would welcome her to come to Rocky Mountain House any time and see what random camping is. She clearly has never been exposed to random camping, and that's fine. Clearly, with that comment, she has not. Instead, she focused her attention on the Provincial Parks Act, which is not before this Chamber. (2<sup>nd</sup> reading, Alberta Hansard, 30-2, at 4866)

While the Minister observes that Opposition members were debating a topic (the Kananaskis fee) which was not explicitly addressed in Bill 64, the Minister also incorrectly refers to Kananaskis as a provincial park. Indeed, much of the debate in the legislative assembly on this topic suggests there is some uncertainty amongst MLAs on the legal status of lands in Kananaskis Country which, as noted above, is a complex mixture of park, recreational areas, and other public land designations.

Contrary to the Minister's bluster in the Assembly, Bill 64 is applicable to the Kananaskis fee in relation to the public land use zones (PLUZ) within Kananaskis Country which actually make up a large portion of the entire region: the Kananaskis Country PLUZ, Sibbald Snow Vehicle PLUZ, and Cataract Creek Snow Vehicle PLUZ. For example, a person who enters Kananaskis Country driving from Calgary via highway 68 (Sibbald Flats) enters via the Kananaskis Country PLUZ – and a [PLUZ](#) is definitely not a park or any other form of protected area in Alberta governed by parks legislation. So, if there is going to be an access fee for driving past the Kananaskis Country boundary along highway 68 (and other entrance spots where the road enters Kananaskis via a PLUZ instead of a park or recreation area), there will need to be legislation (other than parks legislation) giving authority to impose the fee. Bill 64 seems to provide for this, along with the new section 33.1 in the *Public Lands Administration Regulation*, [Alta Reg 187/2011](#) (added by [Order in Council 154/2021](#) (May 27, 2021)).

And while the Minister was dismissive of comments from the Opposition during debate on Bill 64 by suggesting their concerns were more properly matters under the *Provincial Parks Act*, [RSA 2000, c P-35](#), just two days later (and outside of the legislative assembly) the Minister did in fact exercise powers under parks legislation with respect to the Kananaskis access fee. Section 12(2) of the *Provincial Parks Act* provides the Minister with discretion to make regulations concerning the management and use of provincial parks and recreation areas. On May 27, the Minister issued Ministerial Order [47/2021](#) (Environment and Parks) amending the *Provincial Parks (General) Regulation*, [Alta Reg 102/1985](#) by adding sections 43.1 to 43.4, giving the Minister authority to impose an access fee for provincial parks.

### **Ministerial Order 51/2021**

On May 27, the Minister issued Ministerial Order 51/2021 which specifically imposes the Kananaskis access fee requirement (and the Minister references the above-mentioned new legislation as authority for imposing the fee). The Order establishes the requirement to pay either a daily or annual fee to operate a motor vehicle (as defined in the *Traffic Safety Act*, [RSA 2000, c T-6](#)) in the prescribed area. The fee is paid with respect to a designated vehicle and the Kananaskis pass attaches to a license plate number. The Order sets the fee payable for private and commercial vehicles (for private vehicles the fee is \$15 daily or \$90 annually) and states that the fee must be paid no later than 11:59 pm on the date of the visit. The Order also sets out exemptions from the fee requirement, including a vehicle owned by a person who resides in the Kananaskis Improvement District in accordance with the residence policy of the District, a vehicle driven to conduct activities in relation to a commercial disposition (e.g., the trucks taking water from Fortress Mountain), and a vehicle owned by an AISH (Assured Income for Severely Handicapped) recipient.

Section 3 of the Order states a person must not operate a vehicle in Kananaskis unless they have obtained the Kananaskis pass and registered the vehicle's license plate number. The word "operate" would have its ordinary meaning of drive in this context, however the Order adds to this by defining the word "operate" to include having "care and control of a vehicle parked within the Pass Area." This definition, along the manner in which section 3 is drafted, creates some uncertainty on exactly what the rule is here.

The [Kananaskis Conservation Pass](#) website explicitly states that the pass requirement applies to a vehicle, not the passengers, and that compliance will be administered by scanning a license plate for a parked vehicle in the fee region. However, a literal reading of section 3 suggests the driver themselves must have obtained a Kananaskis pass, or anyone else with "care and control" of the parked vehicle. This reference to "care and control" generates further uncertainty on who, other than the driver, is meant to be captured here. The phrase has been judicially considered extensively in the context of impaired driving cases (see *The Queen v Toews*, [1985] 2 SCR 119, [1985 CanLII 46 \(SCC\)](#)) to mean something other than actually driving. The scope of "care and control" is left uncertain in the Order, and I would expect car rental companies in Alberta are seeking legal advice on whether this phrase captures them in the case of a rental car which is ticketed for not paying the access fee.

There will also be plenty of instances where the driver of a vehicle has not themselves obtained a Kananaskis pass, but non-compliance with a literal reading of section 3 is not captured by an enforcement officer because the owner of the vehicle (who isn't driving) purchased the Kananaskis pass and the scanned license plate number is displayed as registered. So perhaps the phrase "care and control" was meant to capture the owner of a vehicle, but one wonders why the Order doesn't just explicitly state the requirement as such. Accordingly, while the language in section 3 literally states a person must obtain a pass to drive a vehicle in Kananaskis Country, a purposive reading would suggest this isn't actually the rule and section 3 should instead be written more along the lines of: "a person must not operate a vehicle in Kananaskis unless the Kananaskis Pass has been obtained for the vehicle and the license plate is registered." In other words, perhaps section 3 of the Order should be amended to more precisely attach the fee requirement to the vehicle.

Another quibble is that the exemptions from the fee requirement set out in Part 3 of the Order do not match exactly what is stated on the [Kananaskis Conservation Pass](#) website. For example, the website mentions "free days" when the access fee requirement will not apply. These days are listed as: June 21 – Indigenous People's Day; July 17 – Parks Day; September 22 – Kananaskis Country's birthday; November 11 – Remembrance Day; December 21 – First day of winter; and a somewhat odd reference to 'Wilderness Wednesdays' - the first Wednesday of every month. The Order makes no mention of these free days. And similar to the problem with drafting noted above, there are sections in Part 3 which exempt a person from the fee requirement instead of a vehicle.

The one section in the Order which stands apart from the rest is section 5: "In order to obtain a Conservation Pass, a person must acknowledge they willingly accept the risks associated with their entry into and use and occupation of the lands within the Pass Area." This liability provision is similar to a provision in Bill 64, which added section 71.5 to the *Public Lands Act*:

71.5 Notwithstanding the *Occupiers' Liability Act*, a person who accesses public land for a recreational purpose, with or without the permission of the owner or occupier of the public land, is deemed to have willingly assumed all risks related to the recreational purpose for which the public land was accessed except risks created by the wilful or reckless conduct of the owner or occupier of the public land.

It would seem that both of these provisions might be intended to address one legal implication of the Crown receiving a fee for entry onto recreational trails, which is that the receipt of a fee negates the application of sections 6.1 and 12 in the *Occupiers' Liability Act*, [RSA 2000, c O-4](#). These sections deem a person using a recreational trail to be a trespasser to whom the occupier of a premises (like the Crown for public lands) does not owe a duty of care. The words used in section 5 of Ministerial Order 51/2021 also seem directed at engaging the application of section 7 in the *Occupiers' Liability Act* which states: "An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor." The duty of care in question is set out in section 5 of the *Occupiers' Liability Act*: "An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there."



The extent to which section 5 in the Order will allow the Crown to have its cake (collect the fee for accessing recreational trails in Kananaskis) and eat it too (retain an immunity from liability for mishaps) remains to be seen, but it is nonetheless a curious provision in a Ministerial Order which is otherwise directed at imposing an access fee to generate revenue for protecting wildlife habitat, public safety, and recreational services. And as with the above commentary, there is an absurdity lurking here because the access fee requirement applies to a vehicle and not a person. There will be situations where only the driver of a vehicle has made the acknowledgement and acceptance of risk under section 5 of the Order, but others in the vehicle performing the same recreational activity with the driver, have not.

## Conclusion

As it turns out, the Opposition was quite correct to call out the Minister for the absence of a participatory, transparent and deliberative process in the establishment of the Kananaskis access fee. The Minister was dismissive of any debate over the fee in the legislative assembly, and then just days later the Minister amended parks regulations to give the Minister unilateral authority to impose a fee to access any provincial park and moreover, on that very same day that the regulations were amended, the Minister issued Ministerial Order 51/2021 to establish the access fee requirement for Kananaskis Country. The power to decide whether and how much it will cost Albertans to access public lands which are dedicated to them for recreation, education, environmental preservation and other purposes, should not be left to the Minister's own fiefdom.

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