

[Indexed as: **Canadian Parks & Wilderness Society v. Canada  
(Minister of Canadian Heritage)**]

Canadian Parks and Wilderness Society, Appellant and Sheila Copps,  
Minister of Canadian Heritage and The Thebacha Road Society,  
Respondents

Federal Court of Appeal

Rothstein, Evans, Malone JJ.A.

Heard: February 6, 2003

Judgment: April 30, 2003

Docket: A-658-01, 2003 FCA 197

*Brian A. Crane, Q.C.*, and *Timothy J. Howard*, for appellant

*Trina Kondro*, for respondent Thebacha Road Society

*Kirk Lambrecht, Q.C.*, for respondent Sheila Copps, Minister of Canadian  
Heritage

**Administrative law — Review for lack or excess of jurisdiction — Ultra vires —** Minister of Canadian Heritage approved proposal to construct winter snow road to connect two remote communities in national park — Following receipt of initial environmental screening assessment report, Minister determined that it was not likely that construction of road would cause significant adverse environmental effects — National non-profit organization's application for judicial review of Minister's decision was dismissed — Review judge held that approval of road fell within discretion conferred on Minister by s. 8(1) of Canada National Parks Act for administration, management, and control of parks, including public lands within parks — Judge further held that approval of road was not inconsistent with statutory duty in s. 8(2) of Act to give priority to maintenance of ecological integrity of park — Organization appealed — Appeal dismissed — Inclusion of particular subject matter in regulation-making power under s. 16(1) did not impliedly preclude Minister from exercising broad managerial and administrative discretion under s. 8(1) — Minister did not commit reviewable error in failing to refer specifically to need to ensure that maintenance of ecological integrity be first priority when exercising power to approve road under s. 8(1) — It was not unreasonable for Minister to approve scheme designed principally to alleviate isolation of members of aboriginal communities living in park — Decision of Minister revealed that she was alert, alive, and sensitive to maintenance of ecological integrity of park and it was not patently unreasonable.

**Environmental law — Statutory protection of environment — Approvals, licences and orders — Miscellaneous issues —** Minister of Canadian Heritage approved proposal to construct winter snow road to connect two remote communities in national park — Following receipt of initial environmental screening assessment report, Minister determined that it was not likely that construction of road would cause significant adverse environmental effects — National non-profit organization's application for judicial review of Minister's decision was dismissed — Review judge held that approval of road fell within discretion conferred on Minister by s. 8(1) of Canada National Parks Act for administration, management, and control of parks, including public lands within parks —

Judge further held that, although road was not intended to be for management of park, once decision was taken to approve road pursuant to powers implied by s. 8(1), approval itself expanded park management purposes to include whatever was necessary to implement decision — Organization appealed — Appeal dismissed — Concept of “park management” was broad enough to include provision of means of transportation for individuals living on public lands in remote and isolated communities within park — Because Minister had power to approve road pursuant to s. 8(1), terms on which permits had been granted constituted part of legal structure regulating construction of road by mitigating any possible adverse environmental effects — Permits were issued for management of park.

#### Cases considered by *Evans J.A.*:

- Assn. of Architects (Ontario) v. Assn. of Architectural Technologists (Ontario)*, 2002 FCA 218, 2002 CarswellNat 1231, 2002 CAF 218, 2002 CarswellNat 2257, 291 N.R. 61, 215 D.L.R. (4th) 550, (sub nom. *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*) 19 C.P.R. (4th) 417, (sub nom. *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*) [2003] 1 F.C. 331, [2002] F.C.J. No. 813 (Fed. C.A.) — referred to
- Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, [2001] F.C.J. No. 18 (Fed. C.A.) — referred to
- Canadian Pasta Manufacturers' Assn. v. Aurora Importing & Distributing Ltd.*, 208 N.R. 329, 1997 CarswellNat 117, [1997] F.C.J. No. 115 (Fed. C.A.) — referred to
- Hawthorne v. Canada (Minister of Citizenship & Immigration)*, 2002 FCA 475, 2002 CarswellNat 3444, 24 Imm. L.R. (3d) 34, 2002 CAF 475, 2002 CarswellNat 4276, 297 N.R. 187, 222 D.L.R. (4th) 265, [2002] F.C.J. No. 1687 (Fed. C.A.) — considered
- Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] S.C.J. No. 31 (S.C.C.) — referred to
- Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 44 N.R. 354, 137 D.L.R. (3d) 558, 1982 CarswellNat 484, 1982 CarswellNat 484F (S.C.C.) — considered
- Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1426, 2001 CarswellNat 2902, [2002] 1 C.N.L.R. 169, 214 F.T.R. 48, 2001 CFPI 1426, 2001 CarswellNat 3747, [2001] F.C.J. No. 187 (Fed. T.D.) — referred to
- Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re*) 302 N.R. 34, (sub nom. *Dr. Q., Re*) 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re*) 295 W.A.C. 170, [2003] S.C.J. No. 18 (S.C.C.) — considered
- Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3 (S.C.C.) — considered

#### Statutes considered:

- Canada National Parks Act*, S.C. 2000, c. 32  
Generally — considered

- s. 2(1) “ecological integrity” — considered
- s. 4(1) — considered
- s. 8(1) — considered
- s. 8(2) — considered
- s. 13 — considered
- s. 13(a) — considered
- s. 13(b) — considered
- s. 15 — referred to
- s. 15(1) — considered
- s. 15(1)(a) — considered
- s. 15(1)(b) — considered
- s. 15(1)(c) — considered
- s. 16(1) — referred to
- s. 16(1)(a) — considered
- s. 16(1)(j) — considered
- s. 16(1)(k) — considered

*Canadian Environmental Assessment Act*, S.C. 1992, c. 37

- s. 18 — referred to
- s. 20(1)(a) — referred to

*Federal Court Act*, R.S.C. 1985, c. F-7

- s. 18.1(4)(d) [en. 1990, c. 8, s. 5] — referred to

*National Parks Act*, R.S.C. 1985, c. N-14

- Generally — referred to
- s. 5(1) — referred to
- s. 5(1.2) [en. R.S.C. 1985, c. 39 (4th Supp.), s. 3(1)] — referred to
- s. 6(1) — referred to

**Regulations considered:**

*Canada National Parks Act*, S.C. 2000, c. 32

*National Parks General Regulations*, SOR/78-213

- Generally
- s. 2 “flora”
- s. 2 “natural objects”
- s. 3
- s. 10
- s. 11(1)
- s. 12
- s. 12(1)

APPEAL from judgment reported at 2001 CarswellNat 2282, 2001 CarswellNat 3704, [2001] F.C.J. No. 1543, 2001 FCT 1123, 40 C.E.L.R. (N.S.) 273, 212 F.T.R. 1, 2001 CFPI 1123 (Fed. T.D.), dismissing application for judicial review of Minister of Canadian Heritage’s decision to approve road construction project in national park.

**The judgment of the court was delivered by Evans J.A.:**

**A. Introduction**

- 1 Wood Buffalo National Park is the biggest national park in Canada and one of the world's largest. Situated mainly in northern Alberta and partly in the Northwest Territories, the Park measures nearly 45,000 square kilometres. It was established in 1922 especially to protect the resident bison and today remains home to the largest herd of free-roaming bison in the world. The Park also contains the last known nesting area of the endangered whooping crane, the finest example of gypsum karst landforms in North America, and vast undisturbed boreal forests. In recognition of its ecological importance, Wood Buffalo National Park was declared a UNESCO world heritage site in 1987.
- 2 These proceedings arise from the approval of a proposal to establish a winter road in the Park. The road would occupy less than 1% of the park's total area. The Canadian Parks and Wilderness Society ("CPAWS") applied for judicial review of the approval of the road by the Minister of Canadian Heritage, acting through her delegate, the Director General, Western and Northern, Parks Canada Agency. The Minister made the decision to approve the road after considering an environmental screening assessment report and concluding that the proposed road was "not likely to cause significant adverse environmental effects."
- 3 In a decision rendered on October 16, 2001, and reported as *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)*, 212 F.T.R. 1, 2001 FCT 1123 (Fed. T.D.), Gibson J. dismissed CPAWS' application for judicial review. This is an appeal by CPAWS from that decision. It advances three principal grounds on which Gibson J.'s decision should be set aside and the approval of the road quashed.
- 4 First, the Minister has no power to approve the construction of a road for non-park purposes. Since such a power would be incompatible with the statutory scheme governing national parks, it cannot be inferred from the Minister's responsibility for the management of national parks, including the administration of public lands in the parks, that was conferred by subs. 8(1) of the *Canada National Parks Act*, S.C. 2000, c. 32 ("CNPA"), which came into force in February 2001.
- 5 Second, in approving the construction of the road, the Minister failed to discharge the statutory duty imposed by subs. 8(2) of the CNPA to make the "maintenance or restoration of ecological integrity . . . the first priority of the Minister when considering all aspects of the management of parks." In her reasons for decision, the Minister did not expressly take into account the maintenance of ecological integrity as the first priority, but referred only to the absence of significant adverse environmental effects. The Minister thus erred in law in the exercise of her discretion by failing to take into consideration a relevant factor or, in the alternative, the decision was unreasonable in light of the material before her.

- 6 Third, subs. 12(1) of the *National Parks General Regulations*, SOR/78-213 (“Regulations”), authorizes the issue of permits for the destruction of any flora or natural objects in a park “for purposes of Park management.” However, since the proposed road will not serve park purposes, the superintendent has no power to issue a permit to authorize the destruction of flora necessary to construct the road.
- 7 Having described briefly the principal arguments of the appellant, I turn now to the facts.

## **B. Factual Background**

### *The Parties*

- 8 The applicant for judicial review and appellant in this proceeding, CPAWS, is a national environmental group with a sizeable membership across Canada. It is active in the promotion and protection of parks and wilderness areas in Canada and has opposed the proposal to construct a road in Wood Buffalo National Park by participating in the public consultative processes held in connection with it.
- 9 The Minister of Canadian Heritage is a respondent to the application. The Minister is responsible for the direction of the Parks Canada Agency and for the management of national parks. The other respondent is the Thebacha Road Society. The Society is a non-profit group established by residents in and adjacent to the Park to promote the development of the road. Its members include the town of Fort Smith (population 2,500), which is located just outside the Park, Fort Smith Métis, the Salt River First Nation, who live in Fort Smith, Smith’s Landing First Nation, and the Little Red River Cree. If the road goes ahead, the Society, not Parks Canada, will be responsible for financing, constructing and maintaining it.

### *The Proposed Road*

- 10 The construction of a road along the route of a previous winter road, which was built in 1958 and abandoned in 1960, has been contemplated since the early 1980s, and was accepted in principle in 1984 by the Wood Buffalo National Park Management Plan. The present road proposal emerged from meetings in 1999 at Fort Smith between the Minister and supporters of a road.
- 11 The road will be for winter use only and is unlikely to be open for more than about four months each year. It will be constructed mostly of compacted snow and ice and, except for two one-lane bailey bridges, ice bridges will be constructed to take the road across rivers in the Park. The road will be 118 kilometres in length, with a right-of-way of 10 metres in width. The road itself will be 8.4 metres wide, which will allow two vehicles to pass and snow to be stored on each side of the road.

- 12 The road will join the communities at Garden River (population 360), in the southwest quadrant of the Park, and Peace Point, which is located on a First Nation reserve in the centre of the Park and comprises only 7 or 8 cabins. An existing all-season road runs northeast from Peace Point to Fort Smith, and a winter snow road links Peace Point and Fort Chipewyan to the south.
- 13 With the exception of a short diversion around the Peace Point Reserve, the road will travel along the route of the abandoned winter road, which had required a cut 30 metres wide. Although the bush has regrown in the forty or so years since the trees were cleared to accommodate the original road, parts of it are still accessible by snowmobile and all-terrain vehicles. Construction of the proposed road will thus result in the destruction of less vegetation than if it were an entirely new road and will leave little permanent trace.
- 14 Traffic on the road is expected to be very light, about twenty vehicles daily, and posted maximum speeds will vary from 10 to 40 kilometres per hour. Commercial vehicles will not be permitted to use the road. It is anticipated that the road will be used principally to connect residents of existing and projected small communities of Aboriginal peoples in and adjacent to the Park. These communities are extremely isolated and have access to only very basic services. The road will also provide people in Fort Smith with a shorter route in the winter to Edmonton, southern Alberta, and beyond.

### *The Concerns*

- 15 The road proposal has proved to be very controversial. Opposition has come from environmental groups and some local residents, including Aboriginal people who are concerned that the road may adversely affect their traplines in the Park. Indeed, the Mikisew Cree First Nation, some of whose members live on the Peace Point Reserve, has successfully challenged the approval of the road on the ground that, in the absence of adequate consultation, the decision will unjustifiably interfere with their treaty rights to trap and hunt in the Park: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 214 F.T.R. 48, 2001 FCT 1426 (Fed. T.D.). This decision is currently under appeal. Other individuals, however, both in and outside the Park, including residents of Peace Point and other Aboriginal people, support the road for the economic and social benefits that it is expected to bring to their isolated communities.
- 16 CPAWS' objections to the road are pitched at different levels. First is what I would term the "in principle" objection to any development in a national park that is not demonstrably required either for reasons of sound ecological management or for increasing public access to the wilderness without endangering it. In CPAWS' view, the proposal to construct a road does not meet these criteria because it is not required for any of the purposes for which the Park was created, but is merely a means of satisfying a perceived regional transportation need.
- 17 Second, CPAWS' opposition to the road is driven by a fear that incremental degradation poses a major threat to the integrity of the ecology of Canada's

parks. That is, while an individual project may in itself cause no great environmental damage, the approval of one project makes others more difficult to resist. A park may thus be more vulnerable to death from a thousand small blows than from a single lethal attack.

- 18 In the context of the present case, there is a concern that if the winter road is built it will be more difficult to prevent the construction of an all-season road. Such a road would bring much more traffic into the Park, require a more invasive form of construction and maintenance, and permanently scar the wilderness. Indeed, Fort Smith has already proposed the construction of an all-season road. While the Minister has stated that this proposal will not be approved, CPAWS believes that, once the winter road is operational, pressure to convert the winter snow road into an all-season road will inevitably increase and be difficult to resist.
- 19 Third, CPAWS objects to the road because of both the specific damage that it is likely to cause to the ecology of the Park and the absence of any quantified offsetting "park-related" benefits. For instance, it is said that creating a clearing for the road will threaten the bison, the Park's "signature" natural phenomenon. Bison will be attracted to the road, to the peril of both bison and road users. The presence of the road will also enable bison to wander beyond the Park boundaries where they are liable to be shot by ranchers who fear that their cattle will be infected with the diseases common in bison. Poaching of bison is also likely to increase. In addition, construction of the road is said to pose threats to the Park's populations of caribou and fur-bearing animals.
- 20 Nor, in CPAWS' view, are the threats posed by the road confined to the Park's mammals. Clearing a route for the road will also result in the loss of the pine trees that have grown over the route of the original road, and the use of the road by vehicles from other areas will introduce "foreign invasive plant species" (weeds, in other words) which are liable to spread and disturb the Park's ecology. Weeds are likely to be detrimental to indigenous forms of plant life and to result in the reduction of the supply of food available for migrating songbirds, which may consequently disappear from the Park. Changes in habitat and human use of the road may also endanger the nesting grounds of whooping cranes and peregrine falcons. Removal of the top vegetation will increase the soil erosion caused by bison "wallowing."
- 21 While proponents of the road point out that the human residents of and adjacent to the Park are themselves an important part of the Park's ecology, CPAWS complains that no socio-economic studies have been undertaken to identify and measure any such benefits which might justify the ecological hazards posed by the road. Further, since these benefits are not related to the purposes for which national parks are created, they should be given little or no weight when balanced against the maintenance of the ecological integrity of the Park.

### *The Decision-making Process*

- 22 In accordance with the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 18 (“CEAA”), Parks Canada developed terms of reference for independent consultants to subject the road proposal to an environmental screening assessment. In addition, Parks Canada initiated public hearings, surveys and workshops to consider the proposal. Reports from the screening assessment process became available in April and August 2000. They indicated that, because it was proposed to construct a narrow road mostly within the route of the previous road, little clearance would be required. Thus, re-establishing a winter road would cause minimal loss of habitat and fragmentation of the existing boreal forest. CPAWS no longer challenges the validity of the environmental assessment process.
- 23 On the basis of these reports, the Minister’s approval of the winter road was announced on May 25, 2001. The decision stated that any adverse environmental impact of the road would be insignificant, both because of its design and limited use and because of the measures that would be taken to monitor and mitigate any unforeseen problems through “adaptive management” techniques.
- 24 The concept of “adaptive management” responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge. It counters the potentially paralysing effects of the precautionary principle on otherwise socially and economically useful projects. The precautionary principle states that a project should not be undertaken if it *may* have serious adverse environmental consequences, even if it is not possible to prove with any degree of certainty that these consequences will in fact materialise. Adaptive management techniques and the precautionary principle are important tools for maintaining ecological integrity.
- 25 The decision to approve the road was purportedly made pursuant to subs. 8(1) of the CNPA, which confers on the Minister responsibility for the administration, management and control of the Park, including the administration of the public lands within it. Approval of the road has no discrete legal significance. It is not, for instance, a statutory precondition of some other administrative action. In fact, however, the approval was of considerable practical significance because it opened the way for the advancement of the project and led to the conclusion of an agreement for the construction and operation of the road. It was common ground before us that, although it had no legal effects, the Minister’s decision to approve the road was subject to judicial review. The decision to approve the road also operates as an approval under para. 20(1)(a) of the CEAA.
- 26 On July 3, 2001, Parks Canada and the Thebacha Road Society concluded a construction and operating agreement, which contains detailed specifications designed to minimize any adverse environmental effects resulting from the construction of the road. Monitoring and mitigative provisions in the agreement also govern the maintenance and operation of the road, as well as its closing at the end of each winter operating season and its opening at the beginning of the next.



The agreement provides that non-compliance by Thebacha with these terms may lead either to the suspension of the operation of the road while the default is remedied or, if necessary, to closure of the road. In addition, the agreement permits Thebacha to use and occupy Parklands in order to construct and maintain the road. Various permits and permissions will be issued by Parks Canada under the relevant regulations to implement the agreement (including permits for the destruction of flora) and to provide mechanisms to ensure compliance with the mitigative measures.

27 One other component of the administrative process should also be mentioned. In 1998, the Minister established a Panel on Ecological Integrity to advise on the development of new legislation, which ultimately became the CNPA. After the Act was passed, the Panel was disbanded. Before its demise, the Panel listed the road as one of the environmental stressors on national parks that it had visited.

28 The Panel's particular achievement with respect to the CNPA appears to have been securing the expansion of the application of the principle of ecological integrity in subs. 8(2) of the Act, a provision that assumes considerable importance in this litigation. Under subs. 5(1.2) of the previous statute, the *National Parks Act*, R.S.C. 1985, c. N-14 ("NPA"), "the maintenance of ecological integrity" was "the first priority . . . when considering park zoning and visitor use in a management plan." The Panel was of the view that the scope of this provision was too narrow and that Parks Canada had not always been sufficiently committed to implementing a policy of maintaining and restoring ecological integrity. In an attempt to ensure the necessary change in the Agency's culture, subs. 8(2) was added to the CNPA and provides that the maintenance or restoration of ecological integrity shall be the first priority of the Minister when considering "all aspects of the management of parks."

### C. The Decision of the Trial Division

29 CPAWS advanced a battery of arguments before Gibson J. in an attempt to persuade him that the Minister's approval of the road and the decisions associated with it were unlawful, but he rejected them all. It is necessary to deal briefly with only those aspects of his reasons that are challenged in this appeal.

30 First, Gibson J. held that the broad responsibility for the administration, management and control of parks, including the administration of public lands within the parks, conferred on the Minister by subs. 8(1) of the CNPA, provided the legal authority necessary to approve the construction of the road. He rejected the argument that subs. 8(1) should be construed more narrowly by virtue of the change in the wording from its predecessor, subs. 5(1.2) of the NPA. Nor was he persuaded that the express power conferred by subs. 16(1) of the CNPA on the Governor in Council to make regulations with respect to, among other things, the establishment and maintenance of roads, precluded implying in subs. 8(1) a

power in the Minister to approve the construction and maintenance of a road in a park.

- 31 Second, Gibson J. held that the approval of the road was not inconsistent with the duty imposed on the Minister by subs. 8(2) of the CNPA to give “the first priority” to the “maintenance or restoration of ecological integrity” of the Park “when considering all aspects of the management of parks.” He observed (at para. 52) that ecological integrity is not the only statutory priority of the Minister and that the Minister is required to engage in a “delicate balancing of conflicting interests” identified in the purposes provisions in subs. 4(1) of the CNPA.
- 32 Third, Gibson J. rejected the argument that, because the Minister could only issue permits under subs. 12(1) of the Regulations to destroy flora or natural objects in a Park “for purposes of Park management,” she could not issue permits that would enable the road to be constructed because the road was not intended to be used for park management purposes. Gibson J. held that the approval of the road by the Minister in the discharge of her responsibility for park management in and of itself rendered the destruction of flora in the course of the construction of the road “for purposes of Park management.”

#### D. Legislative Framework

- 33 The following provisions of the now repealed *National Parks Act* were relied upon by CPAWS to indicate the nature of the changes made by the new statute, *Canada National Parks Act*, which is applicable to the case before us.

*National Parks Act*, R.S.C. 1985, c. N-14

5.(1) Subject to section 8.2, the administration, management and control of the parks shall be under the direction of the Minister.

.....

(1.2) Maintenance of ecological integrity through the protection of natural resources shall be the first priority when considering park zoning and visitor use in a management plan.

.....

5.(1) Sous réserve de l'article 8.2, les parcs sont placés sous l'autorité du ministre.

.....

(1.2) En ce qui concerne le zonage du parc et l'utilisation par les visiteurs, il importe en premier lieu de préserver l'intégrité écologique et, à cette fin, de protéger les ressources naturelles.

- 34 The following provisions of the *Canada National Parks Act* are most directly relevant to this appeal.

*Canada National Parks Act*, S.C. 2000, c. 32

2.(1)

.....  
“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.

.....  
4.(1) 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.

.....  
8.(1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands.

(2) 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.

.....  
13. Except as permitted by this Act or the regulations,

(a) no public lands or right or interest in public lands in a park may be disposed of; and

(b) no person shall use or occupy public lands in a park.

.....  
15.(1) The Minister may

(a) enter into leases of, and easements or servitudes over, public lands in a park that are used for

(i) the right-of-way of an existing railway line or the site of a railway station,

(ii) the right-of-way of an existing oil or gas pipeline or the site of a tank, reservoir, pump, rack, loading facility or other installation connected with such a pipeline, or

(iii) the right-of-way of an existing telecommunication or electrical transmission line or the site of an exchange, office, substation or other installation connected with such a transmission line;

(b) enter into leases of, and easements or servitudes over, public lands in a park that are required for any alteration to or deviation from a right-of-way referred to in paragraph (a) or for the relocation of any station or installation referred to in that paragraph; or

(c) enter into leases or licences of occupation of, and easements or servitudes over, public lands in a park for the installation and operation of radio and television repeater stations, microwave towers,

weather and telemetry stations and cosmic ray and other scientific monitoring stations.

.....

16.(1) The Governor in Council may make regulations respecting

.....

(j) the establishment, maintenance, administration and use of roads, streets, highways, parking areas, sidewalks, streetworks, trails, wharves, docks, bridges and other improvements, and the circumstances under which they must be open or may be closed to public traffic or use; . . .

.....

2.(1)

.....

« intégrité écologique » L'état d'un parc jugé caractéristique de la région naturelle dont il fait partie et qui sera vraisemblablement maintenu, notamment les éléments abiotiques, la composition et l'abondance des espèces indigènes et des communautés biologiques ainsi que le rythme des changements et le maintien des processus écologiques.

.....

4.(1) Les parcs sont créés à l'intention du peuple canadien pour son agrément et l'enrichissement de ses connaissances; ils doivent être entretenus et utilisés conformément à la présente loi et aux règlements de façon à rester intacts pour les générations futures.

.....

8.(1) Les parcs, y compris les terres domaniales qui y sont situées, sont placés sous l'autorité du ministre; celui-ci peut, dans l'exercice de cette autorité, utiliser et occuper les terres domaniales situées dans les parcs.

(2) La préservation ou le rétablissement de l'intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

.....

13. Sauf dans la mesure permise par les autres dispositions de la présente loi ou ses règlements, il est interdit d'aliéner les terres domaniales situées dans un parc, de concéder un droit réel ou un intérêt sur celles-ci, de les utiliser ou de les occuper.

.....

15.(1) Le ministre peut :

a) louer ou assujettir à des servitudes des terres domaniales situées dans un parc qui servent déjà :

(i) soit d'emprise aux voies ferrées ou d'emplacement pour des gares ferroviaires,

- (ii) soit d'emprise à un oléoduc ou un gazoduc ou d'emplacement pour des citernes, réservoirs, pompes, montures, installations de chargement ou autres s'y rapportant,
- (iii) soit d'emprise à des lignes de télécommunication ou de transport d'électricité ou d'emplacement pour tout central, bureau, sous-station ou autre installation s'y rattachant;

b) louer ou assujettir à des servitudes des terres domaniales situées dans un parc qui sont nécessaires à la modification des emprises, gares ou autres installations existantes ou pour le changement de tracé de ces emprises ou le déplacement de ces installations;

c) louer des terres domaniales situées dans un parc – ou délivrer des permis d'occupation de celles-ci ou des servitudes à leur égard – pour l'installation et l'exploitation de stations d'amplification des ondes de télévision ou de radio, de tours à hyperfréquences, de stations météorologiques ou télémétriques, de stations d'observation des rayons cosmiques ou d'autres stations scientifiques.

.....

16.(1) Le gouverneur en conseil peut prendre des règlements concernant :

.....

j) la mise sur pied, l'entretien, la gestion ainsi que l'usage des voies routières et autres infrastructures, y compris les trottoirs, sentiers, aires de stationnement, quais, docks et ponts, et les circonstances dans lesquelles elles doivent être ouvertes ou peuvent être fermées au public, sans que cela ait pour effet d'exclure des terres d'un parc;

...

35 Also relevant are the following provisions of the *National Parks General Regulations*.

*National Parks General Regulations, SOR/78-213*

10. No person shall remove, deface, damage or destroy any flora or natural objects in a Park except in accordance with a permit issued under subsection 11(1) or 12(1).

.....

12.(1) The superintendent may issue a permit to any person authorizing the person to remove, deface, damage or destroy any flora or natural objects in a Park for purposes of Park management.

(2) A permit issued by the superintendent under subsection (1) shall specify the kind and amount of and the location from which flora or natural objects may be removed, defaced, damaged or destroyed and the conditions applicable to the permit.

.....

10. Sauf sur permis, nul ne peut enlever, mutiler, endommager ou détruire les matières naturelles ou la flore, même s'il s'agit de plantes mortes.

.....

12.(1) Le directeur du parc peut délivrer un permis pour l'enlèvement, la mutilation, l'endommagement ou la destruction de la flore et de matières naturelles aux fins de la gestion du parc.

(2) Ce permis indique le genre, la quantité et l'emplacement de la flore ou des matières naturelles pouvant être enlevées, mutilées, endommagées ou détruites et autres conditions applicables.

### E. Issues and Analysis

#### *Issue 1: Does the Minister have the power to approve a road for non-park purposes under subs. 8(1) of the CNPA?*

##### *The Case for an Implied Power To Approve a Road*

36 The Minister relies on subs. 8(1) of the CNPA as conferring the legal authority necessary to approve the construction of the road. The parties agreed, appropriately in my view, that the Minister's interpretation of subs. 8(1) was reviewable on a standard of correctness: compare *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 (Fed. C.A.), at para. 55 (Parks Canada's interpretation of the CEAA).

37 For ease of reference, I set out subs. 8(1) again here.

8.(1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands.

.....

8.(1) Les parcs, y compris les terres domaniales qui y sont situées, sont placés sous l'autorité du ministre; celui-ci peut, dans l'exercice de cette autorité, utiliser et occuper les terres domaniales situées dans les parcs.

38 This provision contains two elements. First, it details matters for which the Minister is responsible: "the administration, management and control of parks, including the administration of public lands in parks." Second, it confers power on the Minister by providing that the Minister "may use and occupy" public lands in parks for the purpose of administering them.

39 In my opinion, the Minister's power to "use and occupy" park land does not authorise her to approve the road at issue in this case. The road is to be constructed by the Thebacha Road Society and used principally by people living in or adjacent to the Park. Accordingly, insofar as these activities constitute the use and occupation of public land in the Park, the users and occupiers will be Thebacha and members of the public, not the Minister. Their use and occupation will not be on behalf of the Minister, whose role in connection with the road is only to regulate and supervise the use and occupation of parkland by others for their own purposes.

40 Thus, if the Minister has the power to approve the construction and maintenance of the road, as well as its use, it must be derived from the responsibility

conferred on the Minister for the administration and management of parks, including the administration of public lands in parks. Responsibility is not power. However, it will often be ineffective to confer responsibility without also granting the power necessary to discharge it. Responsibility for the administration, management and control of parks, including the administration of public lands in parks, without the power to do anything would, in my opinion, deprive the statutory conferral of responsibility of much practical utility.

- 41 Parliament is generally taken to intend to confer the powers necessary to give efficacy to the administrative schemes that it creates. One of the best-known modern judicial statements of this approach to the interpretation of legislation is found in the reasons of McIntyre J., when writing for the Court in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.), at 7:

In construing statutes . . . which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved.

- 42 Accordingly, I would conclude that the power to approve the creation of a road in a park is implied in the conferral of the broad responsibilities on the Minister by subs. 8(1) subject to any indications to the contrary elsewhere in the statute, to which CPAWS' other arguments are directed. In my opinion, the Minister's responsibility for the administration, management and control of parks includes meeting the transportation needs of the residents of the isolated communities in the Park and implies the powers necessary for so doing.

- 43 In addition, I see no reason necessarily to limit the implied power to the approval of roads, or other projects, that are needed for implementing the purposes for which national parks are created, as set out in subs. 4(1). These do not constitute the only purposes for which statutory powers are conferred on the Minister. However, this is not to say that the general management and administrative powers impliedly granted to the Minister with respect to the parks and parklands are untrammelled. Far from it. In particular, the powers are subject to two important limitations that are as general in nature as the powers themselves.

- 44 First, any powers conferred by the Act must be exercised in a manner that is consistent with the duty imposed by subs. 4(1) of ensuring that parks are "maintained and made use of so as to leave them unimpaired for the enjoyment of future generations." Second, and somewhat more specifically, subs. 8(2) provides:

8(2) 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.

.....

8(2) La préservation ou le rétablissement de l'intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

- 45 However, in reviewing the exercise of an implied management or administrative power by the Minister, acting through the Parks Canada Agency, the Court would afford considerable deference to the view of park officials that particular action was not inconsistent with the due discharge of the broad statutory duties to leave parks unimpaired and to give the first priority to ecological integrity. The standard of review applicable to determining whether the Minister has discharged this latter duty is a matter that I consider in connection with the second issue in this appeal.

*Arguments against an Implied Power To Approve a Road*

- 46 I turn now to consider the arguments advanced on behalf of CPAWS to establish that the approach to the interpretation of regulatory legislation described in *Maple Lodge Farms* is inapplicable to the CNPA in general and to subs. 8(1) in particular.

- 47 However, before examining the specific arguments advanced on behalf of CPAWS respecting the interpretation of subs. 8(1), I should note a more general observation that counsel made. Parliament has always exercised close supervision over Canada's national parks. It would be inconsistent with the history of legislative oversight of the parks to construe the general power in subs. 8(1) as authorizing the Minister, acting through her delegate, to make decisions, such as approving the construction of a road, that would have potentially serious adverse effects on a park.

- 48 This submission was advanced as part of the background against which specific provisions of the Act should be interpreted, rather than as an independent ground for rejecting the Minister's interpretation of subs. 8(1).

**(i) Comparison with the NPA**

- 49 CPAWS argued below that differences between the wording of subs. 8(1) and its predecessor, subs. 5(1) of the NPA, evidence a legislative intention to narrow the grant of any implied discretion in subs. 8(1). I agree with Gibson J.'s analysis on this point: CPAWS was seeking to read too much significance into relatively small textual changes. Since counsel did not press this argument before us, I need consider it no further.



**(ii) The Disposal and Occupation of Lands**

50 Counsel argued that ss. 13 and 15 of the CNPA deal specifically with the disposal of parkland and do not authorize the approval by the Minister of the road under consideration here.

13. Except as permitted by this Act or the regulations,

(a) no public lands or right or interest in public lands in a park may be disposed of; and

(b) no person shall use or occupy public lands in a park.

.....

15.(1) The Minister may

(a) enter into leases of, and easements or servitudes over, public lands in a park that are used for

(i) the right-of-way of an existing railway line or the site of a railway station,

(ii) the right-of-way of an existing oil or gas pipeline or the site of a tank, reservoir, pump, rack, loading facility or other installation connected with such a pipeline, or

(iii) the right-of-way of an existing telecommunication or electrical transmission line or the site of an exchange, office, substation or other installation connected with such a transmission line;

(b) enter into leases of, and easements or servitudes over, public lands in a park that are required for any alteration to or deviation from a right-of-way referred to in paragraph (a) or for the relocation of any station or installation referred to in that paragraph; or

(c) enter into leases or licences of occupation of, and easements or servitudes over, public lands in a park for the installation and operation of radio and television repeater stations, microwave towers, weather and telemetry stations and cosmic ray and other scientific monitoring stations.

.....

13. Sauf dans la mesure permise par les autres dispositions de la présente loi ou ses règlements, il est interdit d'aliéner les terres domaniales situées dans un parc, de concéder un droit réel ou un intérêt sur celles-ci, de les utiliser ou de les occuper.

.....

15.(1) Le ministre peut :

a) louer ou assujettir à des servitudes des terres domaniales situées dans un parc qui servent déjà :

(i) soit d'emprise aux voies ferrées ou d'emplacement pour des gares ferroviaires,

(ii) soit d'emprise à un oléoduc ou un gazoduc ou d'emplacement pour des citernes, réservoirs, pompes, montures, installations de chargement ou autres s'y rapportant,  
(iii) soit d'emprise à des lignes de télécommunication ou de transport d'électricité ou d'emplacement pour tout central, bureau, sous-station ou autre installation s'y rattachant;

b) louer ou assujettir à des servitudes des terres domaniales situées dans un parc qui sont nécessaires à la modification des emprises, gares ou autres installations existantes ou pour le changement de tracé de ces emprises ou le déplacement de ces installations;

c) louer des terres domaniales situées dans un parc – ou délivrer des permis d'occupation de celles-ci ou des servitudes à leur égard – pour l'installation et l'exploitation de stations d'amplification des ondes de télévision ou de radio, de tours à hyperfréquences, de stations météorologiques ou télémétriques, de stations d'observation des rayons cosmiques ou d'autres stations scientifiques.

51 Counsel for CPAWS submitted that para. 13(a) prohibits the disposal of any land or interest in land in a park, except as permitted by the Act or regulations. Paragraphs 15(1)(a) and (b) set out the purposes for which the Minister may lease parklands or create easements or servitudes over them. None of those purposes includes the construction of roads in a park.

52 This is true but, in my opinion, irrelevant to the present inquiry. Implementation of the road proposal simply does not entail the Minister's entering into leases, easements or servitudes with respect to parklands, or disposing of any right or interest in parkland.

53 More to the point is para. 13(b), which prohibits any person from the use or occupation of land in a park, again except as is permitted by the Act or regulations. Paragraph 15(1)(c) authorizes the Minister to enter into, among other things, licences of occupation of public lands in a park. The construction of roads in a park is not one of the specific purposes for which the powers conferred by this paragraph are exercisable.

54 The argument advanced on behalf of CPAWS is that the existence of an express and very restricted grant of power to enter into licences of occupation precludes interpreting subs. 8(1) as conferring, by implication, a much broader power in the Minister to permit others to occupy land in a park. A short answer to this argument would be that, when the Minister approved the construction of the road, she did not thereby enter into a licence of use and occupation. However, the approval of the road envisaged the making of an agreement between the Minister and Thebacha to implement the approval. Indeed, the operating agreement with Thebacha permits it to use and occupy parkland for the purpose of the construction and maintenance of the road. It is therefore appropriate to deal with this argument.

55. Counsel for CPAWS acknowledged that para. 13(b) provides that a person may use or occupy parkland “as permitted by this Act or the regulations.” However, he submitted, this does not enable the Minister to rely on any power implied in subs. 8(1) to permit Thebacha to occupy the land for the construction of the road. This is because s. 13 of the CNPA provides that permission to use or occupy parklands must be given *by* the Act, and not by a decision made *under* the Act. Counsel supported his position by contrasting the narrow wording of s. 13 of the CNPA with the more generous wording of the predecessor provision, subs. 6(1) of the NPA, which provided that no person shall occupy public lands in a park “except *under* the authority of this Act or regulations.”

56. I agree that there is a difference between permission granted *by*, as opposed to *under*, the Act. However, s. 13 also provides that a person may occupy land if permitted by the regulations. Section 3 of the Regulations provides as follows:

3. *A person may use or occupy public lands or other public property within a Park if that person does so in accordance with the Act, the regulations made thereunder and any agreement made between the Government of Canada and the government of the province within which the Park is situated.*

.....

3. *Les emplacements et les installations des parcs nationaux peuvent être utilisés à la condition que l'occupant se conforme à Loi sur les parcs nationaux, à ses règlements et aux accords conclus entre le gouvernement fédéral et ceux des provinces concernées.*

57. Use or occupation of parkland is thus permitted by the regulations, and the only question is whether the permission granted by the Minister to Thebacha to occupy Parkland to construct and maintain the road was “in accordance with the Act or regulations.” Nothing in the Act or regulations prohibits the construction of the road, and the Minister’s implied powers under subs. 8(1) authorize her to approve the road. I am therefore of the view that Thebacha’s use and occupation of the land will be “in accordance with the Act,” provided that the use and occupation do not infringe any express restriction in the legislation and comply with the conditions imposed by the Minister in the exercise of her powers under subs. 8(1).

### (iii) The Regulation-making Power

58. Counsel for CPAWS noted that subs. 16(1) of the CNPA confers power on the Governor in Council to enact regulations respecting the “establishment, . . . maintenance, administration and use of roads” (para. (f)), and “the control of traffic . . . including the regulation of the speed, operation and parking of vehicles” (para. (k)). The argument is that the existence of an explicit power to make regulations respecting the establishment of roads is incompatible with the implication of a power in the Minister under subs. 8(1) to approve the construction of roads. Counsel submitted that Parliament required the enactment of a regulation to authorize the establishment of a road, rather than merely a decision by the

Minister or her delegates, in order to ensure the greater degree of political accountability required by Parliament with respect to Canada's national parks.

59 I cannot accept this argument. I am not persuaded that the inclusion of a subject matter in subs. 16(1) impliedly precludes the Minister from exercising her broad managerial and administrative discretion under subs. 8(1) with respect to the same subject matter. Rather, I would read the power in subs. 16(1) to make regulations and the implied power in subs. 8(1) as complementary, not mutually exclusive. Moreover, the making of regulations under subs. 16(1) is permissive, not obligatory. However, when a regulation is made on a topic, I would think that the Minister could not exercise her discretion under subs. 8(1) in a manner that is inconsistent with that regulation.

60 An examination of the wide range of matters on which regulations may be made under subs. 16(1) shows that CPAWS' interpretation would seriously impede the ability of the Minister, acting through the Parks Canada Agency, to discharge the responsibilities conferred by subs. 8(1). Indeed, para. 16(1)(a) provides that regulations may be made respecting "the preservation, *control* and *management* of parks." If CPAWS were correct, the Minister would have no power, in the absence of regulations, to do anything under subs. 8(1) to enable her to discharge her responsibility for the management and control of parks.

61 I should emphasize that CPAWS' argument is not limited to the situation where there is a conflict between a regulation made under subs. 16(1) and the exercise of discretion under subs. 8(1). We were not advised of any regulation made under para. 16(1)(f) respecting the establishment of roads in national parks. Rather, the argument is that the mere existence of an unexercised regulation-making power on a given topic is sufficient to withdraw that topic from subs. 8(1). As I have indicated, I cannot ascribe to Parliament an intention that would so hamper the effective administration, management and control of parks.

#### (iv) National Parks Policy

62 While counsel could not suggest that the Minister's approval of the road in question here was inconsistent with any applicable regulation, he did submit that it was not in compliance with Parks Canada's National Parks Policy. Paragraph 4.4.4 of the non-statutory document *Parks Canada Guiding Principles and Operational Policies* provides:

Roads and trails may be constructed if their primary function is to serve park purposes, they have been approved under the park management plan and they meet the full requirements of the Federal Environmental Assessment and Review Process. New roads and trails that constitute through routes to serve other than park purposes will not be considered.

63 Whether or not failure to comply with this policy could constitute a ground for setting aside the Minister's decision, the approval of the road is not in breach of para. 4.4.4. First, it is a reasonable inference from the second sentence of the extract from the National Parks Policy quoted above that both sentences apply

only to the construction of *new* roads. And since the proposed road largely follows the route of an abandoned road, the Minister could reasonably conclude that the road in question is not a “new” road.

- 64 Second, it would not be unreasonable to regard the “primary function” of the road as being “to serve park purposes,” because it will primarily be for the benefit of those living in small isolated communities in the Park. The limited months of operation of the road, the speed restrictions, the exclusion of commercial vehicles from it, and its narrow width, do not make it suitable for meeting the need for a regional transportation route through the Park. Hence, even if the proposed road were a “new road,” or the first sentence of para. 4.4.4 applied to the construction of all roads, both “new” and “non-new,” the Minister’s approval could not be said to be unreasonable on the ground that it was inconsistent with National Parks Policy.

(v) Conclusion

- 65 Accordingly, I conclude that the Minister was authorized by subs. 8(1) to approve the road.

***Issue 2: Was the Minister’s approval of the road in breach of the statutory requirement that “ecological integrity” shall be the “first priority” of the Minister when considering all aspects of park management?***

- 66 The duty in question is contained in subs. 8(2) of the CNPA, which, for convenience, I set out again.

8(2) 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.

.....

8(2) La préservation ou le rétablissement de l’intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

- 67 Also relevant is the definition of “ecological integrity” provided in subs. 2(1), which reads as follows:

“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.

.....

« intégrité écologique » L’état d’un parc jugé caractéristique de la région naturelle dont il fait partie et qui sera vraisemblablement maintenu, notamment les éléments abiotiques, la composition et l’abondance des espèces indigènes et des communautés biologiques ainsi que le rythme des changements et le maintien des processus écologiques.

*The Standard of Review*

- 68 The first question to be decided is the standard of review that the Court should apply to determining if the Minister complied with subs. 8(2). As Gibson J. noted (at para. 53), since subs. 8(2) provides that ecological integrity is the first priority, there must be other priorities to which the Minister may also have regard when considering the administration and management of the parks.
- 69 Hence, if the Minister has had regard to ecological integrity, her decision to approve the road is reviewable on the ground that she failed to treat ecological integrity as the first priority. However, it is not the function of a reviewing court to determine whether, giving the maintenance of ecological integrity the first priority, it would have approved the road. That would be to subject the Minister's exercise of discretion with respect to competing priorities to a standard of correctness which, counsel agreed, was not the appropriate standard of review. Whether the relevant standard of review is patent unreasonableness or simple unreasonableness is the question. A pragmatic or functional analysis leads me to conclude that patent unreasonableness is the applicable standard of review.
- 70 The exercise of discretion involved in this case is properly characterized as bearing on issues of a polycentric nature: weighing competing and conflicting interests, and determining the public interest from among the claims and perspectives of different groups and individuals, on the understanding that first priority must be given to restoring or maintaining ecological integrity. This is not a zero sum game.
- 71 Thus, on the one hand, residents in the Park believe that a winter road will reduce the isolation, which is particularly burdensome in the long northern winters, by enabling them to visit, and be visited by, family and friends who live in or near the Park. Others support the road because it will significantly shorten the travelling time to destinations south of the Park region.
- 72 On the other hand, the road comes at a price: the difficult-to-quantify risks that it poses to wildlife and vegetation in the Park and the integrity of the Park's ecology, as well as to the livelihoods of those whose traditional traplines, may be adversely affected by the road.
- 73 In addition, the fact that Parliament has conferred on the Minister broad responsibility for the administration, management and control of national parks, along with the powers necessary for its discharge, is another indication of a legislative intent that the standard of review should be at the most deferential end of the range. The duty of the Minister to justify her conduct to Parliament is the primary mechanism for holding the Minister accountable for the way that she balances competing interests and claims with respect to the use of park lands. While political accountability is often dismissed as an inadequate check on the abuse of power, in my opinion, this view is not compelling in the context of the present case for at least three reasons.

- 74 First, as counsel for CPAWS argued, Parliament has always taken a close interest in the creation and protection of Canada's national parks. The establishment of a winter road in Canada's largest national park, a scheme that has been the subject of a vigorous public debate, is therefore very likely to register on the political radar.
- 75 Second, the political accountability of ministers to the public, both through Parliament and more directly, tends to be more effective when a minister's action engages with competing public interests than when it primarily concerns the interests of an individual.
- 76 Third, the decision-making processes employed in the consideration of the road proposal and its approval by the Minister render the decision transparent, in the sense that the bases of the decision and the countervailing arguments and evidence are part of the public record. This, too, is a factor that tends to enhance ministerial accountability through the political process.
- 77 Finally, reviewing the reasonableness of the Minister's exercise of discretion in the light of the applicable statutory criterion is, to an extent, fact-oriented. Thus, insofar as this application for judicial review involves the Minister's findings of fact about the environmental impacts of the road, the standard of review is that contained in para. 18.1(4)(d) of the *Federal Court Act*, R.S.C. 1985, c. F-7. Further, it has been held, determining whether an erroneous finding of fact has been made by the decision-maker in a perverse or capricious manner or without regard for the material before her is the practical equivalent of determining whether the finding was patently unreasonable: *Canadian Pasta Manufacturers' Assn. v. Aurora Importing & Distributing Ltd.* (1997), 208 N.R. 329 (Fed. C.A.), *Assn. of Architects (Ontario) v. Assn. of Architectural Technologists (Ontario)*, [2003] 1 F.C. 331, 2002 FCA 218 (Fed. C.A.), at para. 31.
- 78 Thus, in reviewing the Minister's approval of the road on the ground that it was in breach of her duty under subs. 8(2), the Court must ask whether, on the basis of both the factors that the Minister had to consider and the material before her, it was patently unreasonable to have concluded that the road proposal was incompatible with maintaining as the first priority the ecological integrity of the Park through the protection of natural resources and natural processes.
- 79 I should also note that counsel for the respondents argued that, on the basis of the ordinary principles of appellate review set out in *Housen v. Nikolaisen*, 211 D.L.R. (4th) 577, 2002 SCC 33 (S.C.C.), this Court should only disturb Gibson J.'s decision if satisfied that, in determining that the Minister's approval of the road was consistent with her duty under subs. 8(2), the Judge committed a palpable and overriding error.
- 80 The Supreme Court of Canada has recently held that, in an appeal from the decision of a judge who has decided either an application for judicial review or an appeal of a decision of an administrative tribunal, the appellate court must apply "the normal rules of appellate review of lower courts as articulated in

*Housen*": *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19 (S.C.C.), at para. 43. Accordingly, the Court held that the intermediate appellate court should have asked whether the judge below had applied the correct test for reviewing the decision of the administrative tribunal. Since this is a question of law, the intermediate appellate court should have determined it on a standard of correctness.

- 81 In the present appeal, however, Gibson J. made no clear finding of the standard of review applicable to reviewing whether the Minister's approval of the road was consistent with her duty to afford the first priority to the maintenance or restoration of the ecological integrity of the Park. Hence, it is the role of this Court on appeal to determine, not only the appropriate standard of review to be applied to the Minister's decision, but also, on the facts of this case at least, the correct application of that standard.

#### *Failure To Consider a Relevant Consideration*

- 82 Counsel for CPAWS submitted that, in exercising her discretion, the Minister failed to take into account a relevant consideration. The reasons for decision do not state that, in deciding whether to approve the road, the Minister had as her first priority the restoration or maintenance of the ecological integrity of the Park. The only reference in the Minister's decision to a statutory standard is in the penultimate paragraph, which states:

It is determined that, taking into account the implementation of the Thebacha Road Society's mitigation measures, the project (construction, maintenance and operation of a winter snow road) is not likely to cause significant adverse environmental effects.

- 83 CPAWS says that "significant adverse environmental effects" is the test contained in para. 20(1)(a) of the CEAA and is not the same as that prescribed in subs. 8(2) of the CNPA. I agree that the Minister ought to have referred explicitly to the "ecological integrity" test, which had become applicable to decisions made under subs. 8(1) only three months before the date of the decision and after the preparation of the environmental screening assessment report on which the decision relied.

- 84 The failure of a decision-maker to consider a factor that she or he was required in law to consider in the exercise of discretion is an indication that the decision was patently unreasonable: *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.), at paras. 37-38. However, I am not persuaded that the Minister committed a reviewable error when she failed to refer specifically to the need to ensure that the maintenance of ecological integrity was the first priority when exercising her power to approve the road under subs. 8(1).

- 85 That a decision-maker does not expressly mention a relevant consideration in the reasons for decision does not necessarily mean that it was not in fact considered. For example, in *Hawthorne v. Canada (Minister of Citizenship &*



*Immigration*), 297 N.R. 187, 2002 FCA 475 (Fed. C.A.), Décaré J.A. said (at para. 3):

... to insist as a matter of law that an immigration officer spell out expressly that she had considered the best interests of the child before examining the degree of hardship to which the child would be subject, is to elevate form above substance.

86 In the present case, it is difficult to believe that both the Minister and Parks Canada had overlooked the very recent and much heralded enactment of the expanded duty to ensure as the first priority in all aspects of decision-making relating to national parks the restoration or maintenance of the ecological integrity of the Park.

87 Indeed, the environmental assessment report, on which the Minister relied in making her decision, quoted as follows from the report of the Panel on Ecological Integrity:

The overriding objective behind every recommendation in our report is to firmly and unequivocally establish ecological integrity as the core of Parks Canada's mandate.

The environmental assessment report went on to observe:

although it is not yet clear how, and to what extent, Parks Canada will implement the panel's recommendation, it is likely that the panel's findings will significantly influence Parks Canada's approach to future human development within the national parks.

88 In addition, the Minister acknowledged the receipt of a letter from the Chair of the Panel raising the issue of ecological integrity prior to the screening process. By the time that the Minister made her decision, of course, the Panel's recommendation respecting the pre-eminence of the principle of ecological integrity in decision-making had received the enthusiastic support of the Minister and had become law. And even before subs. 8(2) was added to the legislation, para. 3.1.2 of *Parks Canada Guiding Principles and Operational Policies* stated:

Human activities within a national park that threatens the integrity of park ecosystems will not be permitted.

89 Moreover, counsel for CPAWS was unable to identify items that would be pertinent to the restoration or maintenance of ecological integrity through the protection of natural resources and natural processes that were not considered in the Minister's reasons for decision or in the environmental screening assessment report prepared by independent consultants that the Minister had before her when deciding to approve the road. Rather, his argument was that the "restoration or maintenance of ecological integrity" was a higher standard than "significant adverse environmental effects." However, he could not explain in what respects, or by how much, the standard was higher.

90 Since, in this case, the same facts are relevant to both statutory standards, and the standards seem not call for very different kinds of assessment, the Court

can review the Minister's exercise of discretion by asking whether the material before her was sufficient in law to support her decision. On the basis of the statutory definition in subs. 2(1) of the CNPA, failure to maintain the "ecological integrity" of a park seems to be simply a subset of "significant adverse environmental effects," but one to which first priority must be given in the making of decisions.

91 Moreover, as explained below, I am satisfied that, on the material before her, the Minister's carefully considered and fully reasoned decision was not patently unreasonable. Indeed, in my opinion it would also survive review on the more demanding standard of reasonableness *simpliciter*.

*Was the Minister's decision patently unreasonable on the material before her?*

92 Counsel for CPAWS submits that the decision to approve the road is patently unreasonable in view of the Minister's duty to afford the first priority to ecological integrity and to ensure that the Park is "made use of so as to leave it unimpaired for the enjoyment of future generations" as required by subs. 4(1) of the CNPA.

93 CPAWS' argument on this issue has two elements: the irrelevance of the road to the purposes of the Park and the damage that it will cause to the ecological integrity of the Park. I shall deal with each in turn.

**(i) Park Purposes**

94 CPAWS submits that national parks are created for the "benefit, education and enjoyment" of the people of Canada (subs. 4(1) of the CNPA) and that the satisfaction of local and regional transportation needs is irrelevant to the attainment of these statutory objects. Hence, since the road proposed for Wood Buffalo National Park is intended to provide improved road transportation for people living in and adjacent to the Park, it does not further the purposes that subs. 4(1) declares that national parks serve. There was thus no competing priority against which the Minister could legitimately balance the restoration and maintenance of ecological integrity.

95 Despite the attractiveness with which counsel advanced this position, I am not persuaded that it is correct. In my opinion, subs. 4(1) does not provide a comprehensive statement of the purposes for which the Minister may exercise her powers of management of national parks, including the administration of public lands situated within them. This would be unduly restricting. Indeed, subs. 4(1) is not worded as a statutory objects or purposes clause: it merely states for what purposes parks are created. It is not necessary that every action taken by the Minister advances one or more of the purposes for which parks were established, namely, "the benefit, education and enjoyment" of the people of Canada.

96 More significant in this regard, however, is the legislative directive in subs. 4(1) that "parks shall be maintained and made use of so as to leave them

unimpaired for the enjoyment of future generations.” This is an important limitation on the exercise of the Minister’s powers. CPAWS did not argue that the construction of the road and the duty to leave the Park unimpaired for the enjoyment of future generations were necessarily incompatible. This depends on the evidence of the likely environmental impact of the road, which I consider later.

97 In my opinion, the relevant question is whether the Minister’s approval of the road pursuant to subs. 8(1) is justifiable as a decision made pursuant to her responsibility for the administration, management and control of the Park, including the administration of public lands within it. For reasons already given when considering Issue 1, I have concluded that it is.

98 Accordingly, in principle the Minister could approve the road proposal, even though it was not required for the operation of the Park or for the benefit, education and enjoyment of the people of Canada as a whole. Hence, it was not patently unreasonable for the Minister to approve a scheme designed principally to alleviate the isolation of the members of the mainly Aboriginal communities living in the Park, even though it does not advance any of the reasons for which national parks are created as set out in subs. 4(1).

99 Having concluded that it was open to the Minister to consider the road proposal by having regard to the social and economic needs of the communities living in the Park, it is not the role of a reviewing court to consider whether, given the Minister’s statutory duty to afford the first priority to ecological integrity, she assigned too much weight to the social and economic factors and too little to the ecological. Reviewing the exercise of discretion for unreasonableness, patent or simple, does not entitle the court to reweigh the factors considered by the decision-maker: *Suresh*, at paras. 37-38.

100 However, on judicial review the Court is required to examine the reasons for the Minister’s decision and the material before her in order to ensure that she was “alert, alive and sensitive” to the maintenance of ecological integrity and was not dismissive of it (*Hawthorne*, at para. 10), and that her decision had support in the evidence (*Suresh*, at para. 39). It is to the evidence and the reasons for decision that I now turn.

#### (ii) Damage to the Park’s Ecological Integrity

101 CPAWS’ argument is that the material before the Minister identified a variety of environmental harms that the construction of the road might cause and that, given her duty under subs. 8(2), her approval of the road was unreasonable. In my opinion, however, there was a rational basis for the Minister’s conclusion that, when combined with mitigative measures and adaptive management techniques designed to identify and deal with unforeseen effects, any adverse environmental effects were unlikely to be significant. Indeed, the evidence was such that the Minister’s decision would withstand the somewhat probing examination required by the simple unreasonableness standard of review, even when her duty to give the first priority to ecological integrity is factored in.

- 102 The weakness of this part of CPAWS' case is indicated by the fact that its memorandum of fact and law does not specify in what respects the ecological integrity of the Park would be degraded if the road were built. In oral argument, however, counsel relied, among other things, on the following items of possible damage.
- 103 He referred the Court to a reference to the proposed road in the report of the Panel on Ecological Integrity. However, the report only mentions the "forthcoming winter road" in a catalogue of ecological stressors identified by the Panel in the parks that its members visited. This does not seem to me to advance CPAWS' case to any appreciable degree.
- 104 Counsel also drew the Court's attention to particular adverse environmental effects that the road may cause, including possible harm to bison, caribou and fur-bearing animals, as well as the infestation of weeds and the destruction of trees. He also noted knowledge gaps in connection with several of these issues.
- 105 I do not find it necessary to address these items in detail here. Suffice it to say that, for the most part, the environmental screening assessment report ranked each of the risks as low, with the exception of the weed problem, although the report also noted that information was somewhat sparse. These concerns are nearly all addressed in the Minister's decision. In addition, the construction and maintenance agreement between the Parks Canada Agency and Thebacha provides for extensive mitigation measures and adaptive management techniques, together with enforcement provisions. Similar conditions will also be attached to the various permits and permissions that the agreement requires Thebacha to obtain. Finally, the project has a high degree of reversibility in the event that unforeseen events were to trigger the closure of the road by the Minister.
- 106 In conclusion, even though the Minister did not specifically state that she had applied her mind to the concept of ecological integrity itself and to her duty to afford it the first priority, the material before her and the analysis of it in the reasons for decision amply demonstrate that the Minister's approval of the road was not unreasonable, either patently or simply. She cannot be said to have been dismissive of ecological integrity, nor to have treated the evidence pertaining to it in a summary manner.
- 107 In other words, a person who had given the first priority to the ecological integrity of the Park could reasonably have found that whatever possible environmental harm might result from the road was likely to be of limited significance and would be adequately controlled by the measures put in place to mitigate it, particularly when the high degree of reversibility of the project is borne in mind. These measures will also enable any other problems that may arise to be identified and controlled. The fact that some have expressed the view that the road would impair the ecological integrity of the Park does not demonstrate the unreasonableness of the decision.

*Issue 3: Is the road being established “for purposes of Park management” so as to authorize the issue of permits to destroy flora pursuant to subs. 12(1) of the Regulations?*

- 108 The clearance of the bush that will be needed for the construction of the road will inevitably involve the destruction of flora in the Park. Water will also be drawn from streams to help freeze the snow from which the road will be made. Subsection 11(1) of the Regulations enables the director-general to issue a permit authorizing a person to “take flora or natural objects for scientific purposes from a Park or to remove natural objects for construction purposes.” Subsection 12(1) enables the superintendent to issue a permit “to remove, deface, damage or destroy any flora or natural objects for purposes of Park management.” Without a permit issued under either of these provisions, the destruction of flora is forbidden: s. 10 of the Regulations.
- 109 In my opinion, subs. 11(1) does not apply to our case. It only authorizes the destruction of flora or natural objects for scientific purposes, which do not include the construction of a road. Natural objects can be removed for construction purposes, but the definition of “natural objects” in s. 2 excludes flora. Nonetheless, to the extent that the use of water to help freeze the snow constitutes “removal,” a permit may be granted under this provision for that purpose.
- 110 CPAWS argues that subs. 12(1) does not apply either, because the construction of the road is not for the purposes of Park management, but to facilitate winter travel for people living in and adjacent to the Park for purposes that have nothing to do with the management of the Park. Consequently, the Minister has no power to issue permits for the destruction of flora in the course of constructing the road. “Flora” is defined very broadly in s. 2 to mean “any plant matter, living or dead . . . .”
- 111 Gibson J. held (at para. 56) that, while the road was not for the purposes of Park management, once a decision was taken to approve the road pursuant to the powers implied in the Minister’s statutory responsibility for the administration, management and control of national parks in subs. 8(1), park management purposes are expanded by the decision itself so as to include whatever is necessary to implement that decision.
- 112 I agree with Gibson J.’s conclusion on this issue for the following two reasons. First, “park management” is a broad concept; it is broader than, for example, “park operations.” I see no reason why it cannot include the provision of the means of transportation for those living in the remote and isolated communities in Wood Buffalo National Park. Second, if, as I have held, subs. 8(1) enables the Minister to approve the road, the terms on which permits are granted constitute part of the legal structure regulating its construction by mitigating any possible adverse environmental effects. In this sense, the permits are issued for the purposes of “park management.”

**F. Conclusion**

113 For these reasons, I would dismiss the appeal and award the Thebacha Road Society its costs as against CPAWS. The Minister did not seek costs and none are awarded.

*Appeal dismissed.*

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[Indexed as: **C.J.A. v. British Columbia Provincial Council of Carpenters**]

United Brotherhood of Carpenters and Joiners of America, Douglas J. McCarron, James E. Smith, Wayne Cox, Michael Autzen and David Wright on their own behalf as members of United Brotherhood of Carpenters and Joiners of America and on behalf of and representing all members of United Brotherhood of Carpenters and Joiners of America, Plaintiffs and British Columbia Provincial Council of Carpenters, Lennox Embree, David Flynn, G.R. & S. Holdings Ltd. and On The Level Publishers Ltd., Defendants

British Columbia Supreme Court

Brown J.

Heard: October 15-18, 21-25, 28-31, November 1, 4, 2002

Judgment: March 20, 2003

Docket: Vancouver S003443, 2003 BCSC 432

*R. Hordo Q.C.*, and *D. Fetterly*, for plaintiffs

*A. McDonell, Q.C.*, and *M.T. Ghikas*, for defendants

**Labour law — Jurisdictional disputes between unions — Miscellaneous issues —** Provincial council was subordinate body of international union — President of union issued directive to council to produce its books and records for examination pursuant to provisions of governing constitution — Council refused union's request — Union brought action against council and its affiliated organizations for order for production of council's financial records — Council counterclaimed against union for breach of contract — Action dismissed — Counterclaim dismissed — Union had issued directive to obtain political advantage in ongoing political skirmish between council and itself — Union exercised its discretion for purposes extraneous or collateral to constitutional contract between council and itself — Council was not entitled to damages for breach of contract — Court was not satisfied that issuance of directive was actionable breach of contract — Council did not establish damages arising from alleged breach.

**Cases considered by Brown J.:**

*Allen v. Townsend* (1977), 16 A.L.R. 301, 31 F.L.R. 431 (Australia Fed. Ct.) — referred to