THE NEED TO REFORM THE ONTARIO PROVINCIAL PARKS ACT

A Submission to the Provincial Parks Council

1. INTRODUCTION

The Canadian Environmental Law Association is a non-profit coalition of lawyers, scientists and lay people formed for the purpose of researching the law as it relates to environmental matters, suggesting and working for improved laws and urging better enforcement of legal protections presently available.

Since its establishment approximately five years ago, CELA has frequently been called upon by individuals and other environmental groups to assist them in preventing the destruction of parkland and green space. We have prepared opinions on the legality of a recreational complex in a National Park at Lake Louise and the flooding of a game reserve leased by an Ontario Conservation Authority. We successfully fought the expansion of a polluting paint factory into the last sizeable area of green space in London, Ontario before the Ontario Municipal Board. We have taken action in the Courts to prevent the destruction of irreplaceable sand dunes on the borders of Sandbanks Provincial Park and to prevent the County of Wellington from building a highway bridge over the deepest and most scenic part of the Elora Gorge on land owned by a Conservation Authority. We have written about the use of snowmobiles and all-terrain vehicles on public lands, and our handbook of environmental law for lay people, Environment on Trial: A Citizen's Guide to Ontario Environmental Law, contains a chapter on Provincial Parks.

We appreciate the opportunity to suggest to the Parks Council some methods of preventing destruction of parkland. Our experience indicates a need for this in Ontario.

2. THE NATURE OF THE PROBLEM

Parkland is perhaps more vulnerable to destruction than any other land. With population growth and a philosophy of continual economic expansion, land in Ontario is subject to continual and increasing pressure for development and resource exploitation. Because of the high cost of acquisition or expropriation, privately owned lands are less susceptible to development pressure by public bodies than publicly owned lands. In other words, when municipal, provincial and federal governments and their agencies and offshoots require land for schools, hospitals, power generating stations, transmission lines, or other public purposes in conflict with recreation and conservation, they look to public land, particularly parkland.

Publicly owned parkland is also under constant development and resource exploitation pressure from the private sector. (Privately owned green space is under even greater pressure. Taxation rates for privately held vacant land, together with the high market value of such land, make it difficult for private owners to hold any sizeable piece of land in its natural state for any purpose but speculation or development.) The pressure for destruction of parkland arises from a prevailing view that land in its natural state is unproductive, unprofitable, unnecessary, and easily replaceable.

While it is difficult to resist pressure for development and exploitation of parkland, it is necessary to do so because it is ever more difficult to acquire new parkland to replace what is lost. Suitable land is scarce. The cost of acquiring the land that is available is often prohibitive. For example, the Ontario government owns lands on the edge of Sandbanks Provincial Park containing unique sand dunes which should be incorporated into the park, but economics have prevented the government from expropriating its own lease of these lands to a private owner even though it promised to do so in 1973.

The federal government has admitted for decades that duck hunting should be prohibited in Point Pelee National Park, but it has been unsuccessful in purchasing other lands for the local hunters because of the high cost. Even in the north, where land which is suitable for parks is owned by the Crown, the loss of revenue from timber rights, mining rights, and other private exploitation of the land, together with the need to spend public money to expropriate or buy back such rights from private ownership make use of public lands for park purposes, politically and economically, and unfeasible in many cases.

In addition, the concept of parkland includes a number of potential uses which frequently conflict with each other. Where preservation and recreation conflict, enjoyment of the land by increasing numbers of the public may destroy the qualities which brought the people to the land. Here again, utilization pressures exert a stronger force than conservation pressures. If we are serious about protecting parkland, the following changes in our treatment of parks are necessary:

(1) The principles to which the managers of parkland are committed must be clearly articulated and available to the public.

(2) To be effective in creating effective countervailing pressure to destructive pressures, these principles must be reduced to a form which will have a high degree of moral suasion and permanence.

(3) Decisions affecting the planning and management of parkland or its loss must be subjected as a matter of right to public participation and scrutiny.

(4) The onus of proving the necessity of their actions must be shifted from those who wish to preserve parkland to those who wish to destroy it.

(5) Those public bodies charged with holding and managing parkland must have a duty to preserve it.

(6) This duty must be enforceable by any member of the public.

All of the listed matters imply that important decisions respecting parkland which are now made on the basis of internal guidelines, policies, regulations and other mechanisms with a high degree of informality and a low degree of accountability to the general public should be made through procedures set out in the Provincial Parks Act itself.

Statute law articulates principles and rules in a concise, precise manner which is accessible to the public. The making and amending of statutes is a public process which gives stability and weight to its product. It entails the possibility of debate in a public forum -- the legislature -- by opposed interests through their elected representatives where there are differences of opinion. The results often represent a high degree of consensus or compromise. The results of this process therefore have a degree of legitimacy, moral suasion, and permanency lacking in decisions made by other means.

In some circumstances, great flexibility is desirable. But where the goal is to protect non-renewable resources, a degree of permanence or inflexibility is desirable. Statutes provide stronger resistance to unwarranted change than other methods of embodying policies, even where these other methods, such as regulations are preceded by some form of public participation. Parks boundaries, for example, are probably too susceptible to pressure to be regulated by regulations. This does not mean that statutory rights and obligations are so inflexible that they can never be changed in appropriate circumstances.

If the parks system is constantly subjected to such pressures for long enough without a strong countervailing pressure, it will gradually be eroded as individual decisions against protection are made on the basis of expediency.

3. THE CASE FOR STATUTORY RIGHTS AND DUTIES

To create this countervailing pressure means more than developing management policies and making piecemeal decisions on the basis of these policies. Policies alone are too easily susceptible to change and cannot withstand constant political and economic pressure.

If we begin to treat the protection of public resources as rights which citizens are entitled to maintain at law, this does not mean that development of all parkland must remain frozen for all times "without another tree cut, another stream dammed or another road built" as Prof. Joseph Sax says in defending the environment:

> "Just as a landowner or first home builder in a neighbourhood may not enjoin all subsequent home building just because it would impair his unrestricted view of the scenery outside of his living room window, the public, as a holder of rights, has no absolute claim against developments which will affect that right. The public right to public resources, like private rights, must be subject to the reasonable demands of other users. Whether they be factories, power companies, or residential developers."[1]

Creating public rights merely establishes that those who wish to destroy parkland must justify the need in a public forum, the legislature.

Where controversies over the meaning, extent, or application of the public right do arise, there must be some means of resolving the conflict other than leaving it to civil servants and lobbyists where a public or private body may be breaking the law, an impartial body with no vested interests would adjudicate. The courts are then one form which the poor and powerless may approach on an equal footing with the rich and powerful. While no one likes litigation, there is little possibility that allowing the courts to resolve disputes as a last resort will lead to any overuse or abuse of the courts. Litigation is costly, time consuming, and unpleasant. The loser may pay a substantial portion of legal expenses of the winner as well as his own lawyer. The public spirited citizen has nothing to gain financially and everything to lose by using the courts to protect parkland, and he is unlikely to take this step unless he has tried every other method of enforcing the law.

4. SOME NECESSARY CHANGES

Changes in parks legislation and philosophy should have three major thrusts:

(1) To give priority to the preservation of parkland and its natural features over private or non-park uses and to protect parkland from overuse by the public engaged in recreation activites.

(2) To create a "public trust" for a right to the preservation of public resources for the benefit of the general public which is enforceable by a citizen in his capacity as a member of the public.

(3) To ensure public participation in all decisions significantly affecting parkland.

(1) Preservation of Parkland must be Paramount

Experience has shown that unless a policy is articulated that preservation of parkland is paramount and must be given priority over any other use, public or private, and is enforceable by members of the public, government will not be able to withstand pressures to destroy parkland in the long run.

This policy has been articulated in both the United States and Britain. In Ontario, however, such a policy has been implemented only by an independent environmental organization and not by the Ontario government.

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1. Sax, Joseph L.: Defending the Environment, Random House, New York, 1970, page 162.

The United States has declared a national policy that special effort should be made to preserve historic sites and parkland.[2]

The U.S. Department of Transportation Act requires the Secretary of Transportation to refuse approval to any programme or project which would use any land (including parkland) "from an historic site of national, State or local significance" unless there is no feasible alternative and unless all possible planning is done to minimize harm to the land.[3]

In a case involving the protection of parklands, the U.S. Supreme Court has stated that protection of parkland is to be given "parmount importance" and parklands are not to be lost unless "there were truly unusual factors present in a particular case".[4]

In Britain, a joint circular from the Department of the Environment and the Welsh Office stated that conservation of Britain's national parks will be given greater priority than public enjoyment of them where the two statutory purposes are in conflict.

The circular, which was published in response to the 1974 report of the government-appointed National Parks Policy Review Committee under the chairmanship of Lord Sandford, said that national parks had become so popular that "people have begun to destroy the very qualities they have come to enjoy". The Countryside Commission responded to the circular by urging the government to give statutory force to the conservation priority.[5]

In the legislation under which the British National Parks were established, conservation and enjoyment were given equal weight as objectives with little sense of the possibility that they might conflict.[6] The Sandford report went further than the circular in recommending that statutory expression should be given to the principle that where there is conflict, enjoyment today should not be of a kind which threatens enjoyment tomorrow.

In Ontario, on the other hand, it has been left to a private group to take the necessary action to put conservation before use of parks where the two conflict. The Federation of Ontario Naturalists embodied the principle when it announced on April 12, 1976 that it will eliminate its traditional birding weekends at Point Pelee National Park because they may contribute to overuse which is causing deterioration of the natural habitat.

Neither the Federal National Parks Act in Canada nor the Ontario Provincial Parks Act make any reference in their purpose sections to preservation or conservation. The stated purpose of the Provincial Parks Act is the "healthful enjoyment and education" of the people of Ontario and others who may use the parks. The national parks are dedicated to the people of Canada for their "benefit, education and enjoyment". There is language in both Acts from which a Court might infer a preservation purpose which overrides economic or recreational exploitation. The Provincial Parks Act states that the parks "shall be maintained for the benefit of future generations in accordance with this Act and the regulations". The federal Act states that the national parks "shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations".

In neither case is it clear that conservation is a purpose of the parks or that it overrides destructive uses. The scheme and wording of the federal statute give a judge who is conservation-minded much more scope to infer such a priority than the Provincial Act. Unlike the Provincial Act, the federal statute provides that the parks must be left "unimpaired". Further, according to the Act itself, parks are established and changes in their boundaries may only be made by amendments to the Act -- not by regulations made in secret. Any proposed change must be submitted to Parliament, where its significance may be scrutinized by the Opposition and the public.

This fundamental difference -- that an Act of parliament is required to alter the boundaries of a national park -- might be sufficient to enable a court to find that the purpose section imposes a duty on the federal government to give conservation priority over use.

Further reinforcing this view is the fact that the federal government's power to make regulations, particularly regulations to allow non-park uses of parkland is much more limited under the National Parks Act than the province's power under the Provincial Parks Act. Any hope that a judge might infer such a priority from the wording of the Provincial Parks Act is an empty one in light of the decision of Mr. Justice Lerner in the Sandbanks case, which will be discussed below. The question of the relationship between conservation of parkland and exploitive uses, including railways, transmission lines, pipelines, mining or industrial operations in parks, and destructive recreational uses has never been directly confronted in Ontario legislation. The ambiguities created by piecemeal provision for specified commercial, industrial, and recreational uses of parklands over the years in revisions of the Provincial Parks Act and regulations, together with the vagueness of the phrases in the purpose section of the Act do not clearly face the crucial question of which of many incompatible goals should prevail.

Although difficult questions inevitably will arise over the implementation, there should be no difficulty in accepting the principle. The Federation of Ontario Naturalists has clearly accepted this important principle and offered an example to government in cancelling its annual bird watching expedition to Point Pelee National Park this year to discourage overuse of the park.

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2. The Department of Transport Act, Pub. L. No. 89-670, 80 Stat. 931, s. 2(b)2.
3. Ibid, s. 4(f)
4. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971)
5. The Times, Tuesday, January 13, 1976
6. National Parks and Access to the Countryside Act, U.K. statute 1949, George VI, ch. 97, s. 1.

CELA's conclusion, therefore, is that the principle should be given clear statutory expression that conservation of parkland is its paramount purpose, and that where this purpose conflicts with other purposes, it shall prevail.

(2) Statutory Right to Preservation of Public Resources which is Enforceable by any Citizen in His Capacity as a Member of the Public or "A Public Trust"

The idea of public rights to the preservation of common property resources such as clean air and water and public lands dates back to the days of the Roman Empire. Roman law had a legal theory known as the doctrine of the public trust, founded on the idea that certain common properties, such as rivers, the seashore, and the air, were held by government in trusteeship for the free and unimpeded use of the general public.

This doctrine was imported into English and American common law where it was applied in a very limited form to only a few kinds of public property such as shoreland in Britain and shoreland and parks in the United States.

According to Sax,

> "The idea of a public trusteeship rests upon three related principles. First, that certain interests -- like the air and the sea -- have such importance to the citizenry as a whole, that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from public uses to restricted private benefit."[7]

Here Sax states that the essence of a public trust problem is the reallocation of public property to private use or private ownership without some compensating public benefit. There is no objection to the government subsidizing particular elements of society when this is done in such a way that the public interest is not threatened and there is an observable public benefit from the subsidy such as the provision of decent housing for the poor or the protection of declining local economy or a fragile industry. But, says Sax, "A judge can hardly avoid curiosity about the benefits thought to be achieved when valuable shore land is conveyed to private purveyors of luxury housing at a fraction of its market value or where public fisheries are destroyed by an industrial dumping ground."

Neither can the public avoid wondering about its right when the provincial government leases land originally intended to be incorporated into a provincial park to a cement company in perpetuity for one dollar a year to remove the towering sand dunes, leaving mosquito-breeding swamp in their place.

Sandbanks and "Public Trust"

In 1972, a private citizen brought a civil action in the Supreme Court against the province of Ontario claiming that section 2 of the Provincial Parks Act provides that:

> "All provincial parks are dedicated to the people of the province of Ontario and others who may use them for their healthful enjoyment and education and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and regulations."

imposed a statutory trust on the government to preserve the parkland.[9]

The decision of the Supreme Court pointed out two major weaknesses in Ontario law relating to green space and pollution in general and in the Provincial Parks Act in particular. First, the Provincial Parks Act creates no duty on the government preserve the parks and no right in the Ontario public to park preservation. Secondly, even if the law did impose a duty to protect the parks and gave the general public a right to preservation, no member of the public would have the right to enforce his rights in the Courts, because his right would not be any greater than that of the rest of the citizenry. Only the government, which in this case would have a conflict in interest, would have the right to enforce the Act.

The reason that the public could not enforce the Provincial Parks Act is that in Canada, even where the government or its agencies or other public bodies have duties imposed on them by legislation and where public rights are granted by statute, no person may use the Courts to enforce the law unless he can show some special interest or injury beyond that of the general public. This doctrine, known as "standing", "status", or "locus standi" for decades has provided an insurmountable barrier to protection of environmental and other public rights by members of the public. Because this doctrine allows laws to be broken with impunity with no recourse by members of the public whom they are designed to protect, they have been described as "irrational", "paradoxical", "capricious", "illogical", "anachronistic", and "bizarre" by legal writers, judges, and the press. However, the doctrine continues to prevent citizens from enforcing the law. In a case like protection of public parks, where it is impossible for one member of the public to show an interest any different from the interest of most members of the public, only the government can take action.

In the Sandbanks case, Mr. Justice Lerner held that s. 2 creates no statutory trust, because it must be read in the light of other provisions of the Act which allow park boundaries to be changed, or in his opinion, allow parks to be closed down, by regulations.

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7. op. cit. footnote 1, p 165
8. Ibid. p. 165
9. Green v. Ontario et al (1973) 2 OR 396, 2 CELN 4

He noted that according to the Act, it is the jurisdiction of the Cabinet, and the Cabinet alone, to make decisions about uses of parks. Such decisions, which may be inconsistent with the principle of healthful enjoyment of parks, are thus never scrutinized in parliament or by the public. In his opinion, the powers of the provincial government are "so complete as to make the power of the province in the whole concept of parkland absolute".

It seems unlikely that Ontario courts will ever impose a public trust on the government by themselves, without specific legislation clearly imposing a duty on the government to act in the interests of the general public. Canadian legal theory, as opposed to some branches of American legal theory holds that all power is invested in the Crown from which it has been delegated. Under no circumstances is power deemed to be vested in the people and delegated to political institutions as in the United States.[10]

It is not enough to assume that the government represents the people and will always act in the interests of the general public rather than special interests in the absence of a duty to conserve or to consult with all segments of the public, and if individual members of the public have no enforceable rights.

The absence of the statutory protections which CELA suggests results in situations like destruction of the sand dunes at Sandbanks and destruction of recreational uses at Inverhuron by a nuclear power plant. When CELA published Environment on Trial in 1974 there was evidence that the odour of hydrogen sulphide from the nearby Bruce nuclear power development was driving the public away from the park. The government's "solution" was to close down the polluted parkland rather than relocate the polluter. Today, we understand that Inverhuron has been closed to overnight camping because of danger from the nuclear plant. Officials of the Parks Branch of the Ministry of Natural Resources have banned overnight camping because of the difficulty of evacuating the park in case of an accident.[11]

Without statutory protections and a firm commitment by the Ontario government to preservation over recreation and exploitation of parkland, CELA would be opposed to any suggestion that national parks in Ontario be turned over to the province. If this suggestion of the Minister of Natural Resources to the federal Minister in charge of national parks[12] were carried out, our present national parks would be stripped of protections which they have under the federal Act and federal policies and put in as much jeopardy as the provincial parks system. The Ontario government demonstrated that it does not want to see natural resources locked into preservation. Its policy is to make them available for exploitation. Also, the Ontario provincial parks system is not planned and managed, as is the national parks system, according to a plan intended to ensure a system of parks which will present in true proportion, a representative, outstanding and unique sampling of landscape and natural phenomena. The Ontario government is not committed, as is the federal government, to a methodology for such a plan based on the natural sciences, and relatively free of political and social influences.[13] Under these circumstances, any move to turn over national parks to the province would be regressive.

In the absence of any political or common law doctrine that the government is responsible to the public other than through the ballot box for its use of public resources, we conclude that the most effective method of protection is to declare parkland to be a public trust and to state explicitly in legislation that government is the trustee and the public are the beneficiaries of the trust. Then, applying traditional rules for trusts, the trustee would be responsible to any of the beneficiaries in the Courts for any breach of trust. The rules governing the trustee-beneficiary relationship have traditionally proven quite effective in preventing trustees from depriving beneficiaries of the benefits of the property the trustee administers, and there is no reason to believe that a statutory trust would not be effective in preserving parkland. The legislation should state explicitly that any member of the public may take legal action to enforce the duty or trust; and indeed, to enforce any provision of the Act or regulations.

(3) Public Participation in all Decisions which Significantly Affect Parkland

Public hearings should be held as an integral part of the process of determining the use of parks in the province. Traditionally, the classification and reclassification of parks has been a rather invisible process effectively in the hands of a fairly anonymous group of senior civil servants. Although in recent years the government has voluntarily begun to consult the public about park uses, they are under no duty to do so and could change this policy at any time.

The problem is that the Provincial Parks Act, like many other provincial statutes is a mere skeleton to be fleshed out by regulations. As mentioned above, the Supreme Court has held that the all-embracing powers of cabinet to make almost every major decision affecting the use or boundaries of parks through regulations prevent the Courts from reviewing government decisions. These powers also ensure that the government can make its decisions without bringing them before the legislature. Effectively insulated from public scrutiny by the courts or the legislature, the government can make decisions to destroy parkland without any effective public scrutiny.

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10. See Denhez, Marc, "Ratepayers' Locus Standi", 1973, unpublished paper
11. Parks Branch of the Ministry of Natural Resources intends to replace camping facilities at Inverhuron with facilities at a park near MacGregor, Ontario, about ten miles away from Inverhuron. the change being made at the request of the Atomic Energy Control Board, which has made it known that in its opinion there is a very slight danger of an accident from the heavy water plant. This plant uses hydrogen sulphide, which gives off a foul odour in concentrations considered to low to be harmful, but is undetectable by the senses in higher concentrations which may be dangerous to human health over a short period of time. Conversation with Terri Green, National and Provincial Parks Association, April 22, 1976 and April 25, 1976.
12. Letter of March 12, 1976 from Leo Bernier to Judd Buchanan, released by James Auld of Ontario's Management Board
13. "National Parks System Planning Manual", National and Historic Parks Branch, Parks Canada, Department of Indian and Northern Affairs, 2nd edition, 2nd printing, September 1974, page 3.

Only in Quebec where some statutes provide that the provincial government shall give the public 60 days to make submissions about regulations before they are finalized, is there any public right to scrutinize regulations before they are made. Under the Provincial Parks Act, the public need not learn of a new regulation or a change in an existing regulation until it is already in effect.

We conclude, therefore, that where decisions under the Provincial Parks Act are to be implemented by regulation, rather than as amendments to the statute, the Ontario government should give at least 60 days notice to the general public of its intention to make a regulation and hold public hearings before the regulation is made.

Legal descriptions of park boundaries should be a part of the statute itself, as they are under the National Parks Act, rather than regulations.

5. PRE-ACQUISITION REFORMS

Most of this brief addresses itself primarily to considerations after the Ontario government has acquired or made the decision to acquire land for parks purposes. Some tentative suggestions might be made about ways to facilitate bringing further land into the provincial parks system. There appears to be a need for a systematic process of identifying and inventorying ecologically significant and sensitive landscapes which would be suitable for provincial parks purposes, particularly, those landscapes which contain rare, endangered or otherwise significant flora, fauna and natural features, and where development and use should be excluded or severely constrained. This identification and inventorying in itself would provide a positive incentive to preservation. Having identified such lands, it will be necessary to develop effective methods of preserving the amenities of this land from destruction while it remains in private ownership where funds are not available for acquisition. Atikaki is an example of a tract of land which has been identified as a high priority for preservation through some form of public ownership in a state of ecosystem preservation. However, government bodies do not have the money at present to buy out timber rights and mining rights so that it may be set aside as a wilderness park. Although further research may be necessary to confirm this, it would appear that present legislation does not provide an effective mechanism to put a "hold" on areas which we might want to designate as park land in future to prevent its degradation in the interim. It is suggested that the Provincial Parks Council might consider recommending to the Ontario government some such mechanism.

SUMMARY

Parkland, especially in southern Ontario, is a scarce commodity. Unless immediate steps are taken to acquire thousands of acres of land, Ontario will be facing an outdoor recreational crisis which will destroy the amenities of existing parkland through over use.

For a variety of reasons, some kinds of parkland are basically non-renewable resources, particularly large tracts of land, nature reserves, wilderness areas, and waterways. Once such areas are destroyed, they will be almost impossible to replace. The sooner this is realized, the sooner preservation will be given a paramount position over all other considerations.

The public should be allowed into all processes dealing with park planning and management -- such as classification, licencing of commercial operations, new park proposals, future park requirements and changes of park boundaries.

Recent court decisions, like the one involving the Sandbanks Provincial Park and the Elora Gorge case dealing with preservation of a unique natural feature of a conservation area, point to the urgent need for a complete rewriting of the Provincial Parks Act and other conservation statutes to reflect the fundamental changes needed in the philosophy, management, and planning of our provincial parks and other greenspace.

New legislation should provide for public hearings other forms of public participation in parks decision at the earliest possible stag of the decision-making process. Among these forms of public participation should be access to legislative debate before major changes in parks policies, planning, operation and management, public participation in the making and amendment of regulations, a form of public trust which involves the citizenry as beneficiaries, and standing for individuals and groups to use the courts to uphold the legislation in their capacity as concerned members of the public.

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