

ENVIRONMENTAL PROTECTION IN NATIONAL MARINE PARKS

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Introduction

The idea of creating national parks began in 1872 with the establishment of Yellowstone Park in the United States. Canada was the second country¹ to adopt this American initiative, creating Banff National Park in 1885, by way of an Order-in-Council.² Other nations began to follow suit as the idea gained popularity. In 1962, the first world conference on national parks was held and it was here that the notion of developing marine parks, in addition to the existing system of terrestrial parks, was first advanced.³

While other countries launched into marine parks development with great enthusiasm,⁴ Canada has been slow to respond. As of 1990, Canada has only two partially established national marine parks⁵ and one aquatic national park;⁶ the latter park is inland rather than oceanic.

At first glance it seems odd that Canada would be at the forefront of terrestrial parks development yet, despite its status as one of the largest coastal states in the world, fail to achieve much progress in the development of marine parks. Thus, one of the goals of this study was to identify and explore the legal

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¹Australia (formerly New South Wales) was the first with Royal National Park, created April 26, 1879: C. Allin, *International Handbook of National Parks and Nature Reserves* (New York: Greenwood Press, 1990). For a history of Canada's national parks, see: S. Marty, *A Grand and Fabulous Nation* (Toronto: N.C. Press, 1984); W. Lothian, *A History of Canada's National Parks* (Ottawa: Parks Canada, 1976).

²P.C. 1885, C. Gaz. 1885.I.2197. Later actual legislation was passed: *The Rocky Mountain Parks Act* (U.K.), 50 & 51 Vict., c. 32. H.I. Rounthwaite, "The National Parks of Canada: An Endangered Species?" (1981-82) 46 Sask. L. Rev. 43 at 46.

³C. Mondor, "An Historical Overview of the National Marine Park Concept in Canada" in J. Lien and R. Graham, eds, *Marine Parks and Conservation: Challenge and Promise*, vol. 1 (St. John's: National and Provincial Parks Association, 1985) 9 at 10; S. Silverstone, "Canadian Parks Systems As Open Space: How Much Protection?" (1974) 22:9 Chitty's L. J. 324 at 324.

⁴For example, by 1984 Japan had created 23 marine parks. J.S. Marsh, "Japan's Marine Parks" in Lien & Graham, eds, vol. 2, *ibid.* 29 at 35.

⁵These are at South Moresby and Saguenay Fjord. J. Lien, "The Tragic Tale of Two Marine Parks" (1991) 2:3 *Borealis* 42 at 42.

⁶*ibid.* Fathom Five in Lake Huron is the freshwater area surrounding the western Georgian Bay Islands (part of an existing national park), offshore of Bruce Peninsula (proposed as a national park). Fathom Five is a former provincial aquatic park which has been transferred to the federal government, by agreement dated July 20, 1987; it has not yet been proclaimed as a national marine park.

and political obstacles that have hindered national marine parks creation in this country. The article begins with a review of the development of the existing national parks system in Canada and examines the reasons why the establishment of any new national park, terrestrial or marine, has become a difficult proposition. Next, the history of marine parks proposals is reviewed; what emerges is an additional set of ecological, economic and jurisdictional problems that are superadded to the inherent difficulties of national parks creation and management. Each of these additional problems is then examined in turn.

It is in the discussion of the special difficulties encountered in marine parks creation and management that an interesting "chicken and egg" dilemma is discovered. The avowed purpose of establishing national marine parks and, generally, expanding the national parks system is to preserve and protect Canada's natural heritage, biodiversity, landscapes and wildlife habitat. Despite a chequered history in which preservation was not always its primary goal, it is now clear that the national park system is intended to protect significant natural areas of Canada in perpetuity. Yet, as we shall see, to overcome the particular problems that arise in the initial establishment of marine parks, the federal government has concluded that an alternative model of parks management is necessary, in which preservation has been discarded in favour of "conservation" and multiple resource use. This leads to the following dilemma: if we cannot establish marine parks without eroding the primary goal of preservation, how can we expand our parks system in a way that achieves that very objective?

The second aim of this study, therefore, was to examine whether the alternative parks management model, as proposed, would still permit the federal government to achieve its goal of preserving Canada's natural heritage. Thus, the article goes on to describe the implications of the proposed management model for marine parks, with particular emphasis on two areas: pollution control and wildlife preservation. The result of this analysis raises a number of troubling doubts about our ability to preserve Canada's marine heritage using the proposed model; the article concludes, therefore, with some thoughts about future directions for marine parks development in Canada.

A Brief History of Parks Acquisition in Canada

Control over the national parks in Canada is presently vested in the Canadian Parks Service, a branch of the federal environment ministry.⁷ The governing legislation is the *National Parks Act*,⁸ by virtue of which all aspects of park management are regulated. Federal regulations under that Act control matters as

⁷The Minister of the Environment was designated as the Minister for the purposes of *The National Parks Act* by SI/84-176.

⁸*The National Parks Act*, R.S.C. 1985, c. N-14.

diverse as fire protection, cemetery establishment, townsites, fishing, timber extraction and ice removal. This exercise of plenary jurisdiction is, constitutionally, based on s. 91(1A) of the *Constitution Act, 1867*.⁹ This is the federal legislative jurisdiction over the "public debt and property"; the exercise of federal legislative authority is, therefore, based on ownership of the property within park boundaries.¹⁰ The federal Crown must acquire clear title to park property to obtain exclusive control of park lands.¹¹

In the early days of parks creation the federal government owned the natural resources in the prairie provinces; the Canadian Pacific Railway also had extensive landholdings in the Rocky Mountains. Provincially and privately owned lands were fairly readily available for parks acquisition as the tourist and resource potential of the mountain areas was exploited by towns and railways.¹² "Dominion" parks were created first by Orders-in-Council and later by way of Cabinet proclamation pursuant to the *Dominion Forest Reserves and Parks Act*.¹³ Western parks created during this time included Banff (1885), Yoho (1886), Glacier (1886), Waterton Lakes (1895), Elk Island (1906), Jasper (1907) and Mount Revelstoke (1914). Parks in eastern Canada were more scarce, reflecting the smaller federal landholdings available for park purposes. For example, St. Lawrence Islands National Park was created in 1904 from Indian land held in trust by the federal government; it is only 6 square kilometres in size.¹⁴ Point Pelee, created in 1918, was largely established on federal admiralty lands and is only 16 square kilometres in size.¹⁵

Negotiations directed toward the transfer of federal lands to the prairie provinces in the 1920s, which culminated in the natural resources transfer agreements of 1930, were paralleled by development of the first *National Parks*

⁹*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

¹⁰N.D. Banks, "Constitutional Problems Related to the Creation and Administration of Canada's National Parks" in J.O. Saunders, ed., *Managing Resources in a Federal State* (Toronto: Carswell, 1986) 212 at 214-15.

¹¹Despite primary federal legislative jurisdiction, valid and generally applicable provincial laws may still apply within park boundaries. However, parks created pursuant to the 1930 Natural Resources Transfer Agreements may be in a somewhat different position, as the federal government by the terms of those agreements obtained "exclusive legislative jurisdiction" over those parks. *Ibid.* at 217-18.

¹²L. Bella, *Parks for Profit* (Montreal: Harvest House, 1987) c. 1.

¹³(1911), 1 & 2 Geo., c. 10. Rounthwaite, *supra*, note 2 at 46-50; Marty, *supra*, note 1 at 89. When this Act was passed in 1911 it brought Banff under the same legislation, and the reserves at Yoho, Glacier, Jasper and Waterton also became Dominion Parks. The first administrative bureau was also created, the Dominion Parks Service.

¹⁴Environment Canada, *State of the Parks: 1990 Profiles* (Ottawa: Supply and Services, 1991) at 102. See also Bella, *supra*, note 12 at 165-66.

¹⁵Bella, *ibid.* at 166; Environment Canada, *ibid.* at 104.

Act.¹⁶ While these negotiations were ongoing, further national parks were carved out of the prairies: Wood Buffalo (1922), Prince Albert (1927) and Riding Mountain (1929). Kootenay was also created in British Columbia in 1920 when the provincial government agreed to a land transfer in return for highway construction.¹⁷ The only eastern park developed during this time was Georgian Bay Islands (1929), again from a small (25 square kilometre) area of Indian trust land.¹⁸

Following the natural resources transfer agreements of 1930¹⁹ the only remaining large federal landholdings in Canada were in the Yukon and Northwest Territories. Now that provincial governments had control over natural resources from coast to coast the ability of the federal government to convert land to parks decreased. Lacking the clear-cut constitutional authority to expropriate land for a general public purpose,²⁰ Parks Canada became entwined in a complicated federal-provincial negotiating process²¹ in which provincial governments must agree to purchase or expropriate private landholdings and then subsequently to transfer those lands (or other provincially-owned lands) to the federal government

¹⁶(1930), 20 & 21 Geo 5, c. 33. At this point Dominion Parks were renamed National Parks. Marty, *supra*, note 1 at 99.

¹⁷Bella, *supra*, note 12 at 166.

¹⁸Environment Canada, *supra*, note 14 at 118; see also Bella, *ibid*.

¹⁹*Constitution Act, 1930* (U.K.), 20 & 21 Geo. 5, c. 26.

²⁰Banks, *supra*, note 10 at 215.

²¹Described in detail in R.E. Nation, "The Acquisition of National Parkland: A Challenge for the Future" (1983) 7:3 *Dalhousie L. J.* 260 at 261. Briefly, the steps are as follows: 1. identification of areas of interest; 2. informal federal-provincial discussion; 3. federal and provincial ministerial consent; 4. negotiation of a memorandum of intention; 5. public consultation; 6. formal agreement to create a park; 7. acquisition of title by the provincial government; 8. transfer of title to the federal government; 9. legal inclusion in the national parks system, making the land subject to *The National Parks Act*. This last step can be accomplished in two ways: (a) A proclamation can be made by the federal Cabinet, so that Schedule I of the Act is amended and the legal description of the land added. See: *National Parks Act, supra*, note 8, s. 3. Parks for which such proclamation is still pending include Gros Morne, Pukaskwa, Grasslands, South Moresby, Pacific Rim, Bruce Peninsula, Saguenay Marine, Fathom Five Marine and South Moresby Marine; or (b) For lands subject to native land claims, the federal government developed the concept of creating a national park Reserve. Once given Reserve status, *The National Parks Act* applies to the land even though the Cabinet has not issued a proclamation so as to amend Schedule I. This process was established by the 1974 amendments to *The National Parks Act*, S.C. 1974, c. 11. Three park areas, Auyuittuq, Nahanni and Kluane, were provided for in the 1974 amendments and have since been proclaimed as Reserves: see SOR/76-256. In 1984, a separate enactment was used to establish Mingan Archipelago as a national park Reserve: S.C. 1984, c. 34. In 1988, during further amendments to *The National Parks Act*, Ellesmere Island Reserve was also established: S.C. 1988, c. 48, ss 12-14. Once land claims are settled, these Reserves will be proclaimed as full National Parks and added to Schedule I of *The National Parks Act*.

for their eventual proclamation as a national park or national park Reserve.²² There has been little incentive to do so, however:

Preoccupation with economic development led most provinces to prefer parks for profit rather than preservation. They supported resource exploration and tried to avoid locking resources into national parks. Provincial parks have been created instead, where resource extraction coexists with tourism.²³

In consequence, between 1930 and 1968 only four new national parks were created: Cape Breton Island (1936), Prince Edward Island (1937), Fundy (1948) and Terra Nova (1957). Notably, these parks were all developed in the economically depressed Maritime region of Canada in an attempt to stimulate tourism.²⁴

In 1962 the first international conference on national parks was held, and in 1964, Canada's first formal national parks policy was developed.²⁵ A marked shift occurred in policy development; the new federal policy expressly emphasized preservation of national heritage rather than continuing to promote the earlier "resort" image of the national parks as tourist attractions. When the Trudeau government first came to power in 1968 the Minister responsible, Jean Chretien, took hold of the idea of further expanding Canada's national parks system. Combined with public support from the first wave of the environmental movement in the late 1960s and early 1970s, terrestrial parks acquisition began again in earnest. Simultaneously the federal government commissioned a feasibility study relating to national marine parks, and in 1971 established an Interdepartmental Task Force on National Marine Parks.²⁶

By the time of the second international conference on national parks in 1972, Canada had created several more terrestrial national parks. Four of these had boundaries which extended offshore.²⁷ While these offshore areas were not full-fledged "National Marine Parks," this was the first attempt by Canada to include ocean areas within park management boundaries.

This rather tentative testing of the marine waters was not well received, however. In Kouchibouguac Park (1969) disputes with commercial fishers resulted in the occupation of the Park office, until such time as fishing privileges were

²²For the distinction between a national park and a national park Reserve, see *ibid.*

²³Bella, *supra*, note 12 at 2. See also Nation, *supra*, note 21 at 264.

²⁴Bella, *ibid* at 167-69.

²⁵Rounthwaite, *supra*, note 2 at 51.

²⁶Mondor, *supra*, note 3 at 10.

²⁷These are Kouchibouguac, Pacific Rim, Forillon and Auyuituq. *Ibid.* at 12.

reinstated by moving the park boundaries inshore.²⁸ Expropriation of private lands for the terrestrial portions of the park also resulted in a series of disputes, spawning extensive litigation.²⁹

Pacific Rim (1970) involved the federal government in a four-way dispute with the provincial government, logging companies and the local fishing industry. Forillon (1970) was created on a 99-year lease, as the Quebec government refused to transfer permanent title to the land to the federal government due to sovereignty concerns.³⁰ Auyuittuq Reserve (1974),³¹ which also includes some marine areas, is not fully established pending settlement of native land claims. Traditional native lifestyles continue in the interim, including such activities as sealing and whaling.³²

As Auyuittuq illustrates, the recent explosion of native land claims has introduced a new element into national parks creation in Canada, particularly in the north where the federal government would otherwise have the proprietary jurisdiction necessary to establish legislative control over new parks.³³ Kluane Reserve (1974), Nahanni Reserve (1974) and Ellesmere Island Reserve (1988) are all awaiting full establishment, pending the outcome of land claims settlements.

²⁸Mondor, *supra*, note 3 at 14; Bella, *supra*, note 12 at 135.

²⁹Bella, *supra*, note 12 at 135 and 169.

³⁰For a discussion of the legality of this agreement, see Bankes, *supra*, note 10 at 225.

³¹Establishment dates for parks quoted in the literature are variable. This is because the date cited is sometimes the date of federal-provincial agreement in principle, sometimes the date a formal federal-provincial contract is signed and sometimes the date of proclamation of the park or Reserve. Thus, for example, agreement was reached to establish Auyuittuq in 1972, legislation to provide for its Reserve status was enacted in 1974 and it was proclaimed as a Reserve in 1976; all three "establishment" dates appear in the literature; see *supra*, note 21. This author has used the following system: (a) for fully established parks listed in Schedule I, their proclamation date under *The National Parks Act* or previous legislation; (b) for parks for which such proclamation is pending, the date of the federal-provincial contract; (c) for Reserves, the date of passage of legislation permitting the proclamation of that Reserve; and (d) for any park for which such details were not available, the establishment date listed in Environment Canada, *supra*, note 14.

³²Bella, *supra*, note 12 at 169-71; Mondor, *supra*, note 3 at 14.

³³For example, Kluane Reserve falls within the agreement in principle reached with the Council for Yukon Indians. See: *Comprehensive Land Claim Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, 31 March 1990, at 123. Nahanni Reserve and a proposed park on Great Slave Lake are subject to the Dene/Metis claim: see *Dene/Metis Comprehensive Land Claim Agreement in Principle* (not concluded), September, 1988, at 97. The Nunavut Agreement in Principle, *infra*, note 53, impacts several parks proposals. See also, *infra*, notes 52 and 54. For a more detailed discussion of the special problems with northern parks creation, see B. Sadler, "National Parks, Wilderness Preservation, and Native Peoples in Northern Canada" (1989) 29 Nat. Res. J. 185.

Only Northern Yukon (1984), where the Inuvialuit final settlement was reached,³⁴ has achieved full legal status as a national park.³⁵

Fully terrestrial parks in southern Canada have slowly continued to be established. La Mauricie (1970) was established in Jean Chretien's riding due to support from his constituents. Kejimikujik (1974) was established, at provincial request, to preserve a popular hunting and fishing area. Gros Morne (1973), Pukaskwa (1978), Grasslands (1981), and Mingan Archipelago Reserve (1984) are not yet fully established as national parks. Mingan is also subject to a native land claim.³⁶ Since 1985, only two more terrestrial parks have been negotiated, in South Moresby and Bruce Peninsula.³⁷ However, the federal government seems committed to pursuing the expansion of the national parks system and have announced their intention to establish at least five new parks by 1996, and negotiate agreements for 13 more terrestrial parks by 2000.³⁸

Interim management of land that will become a national park is usually conducted by the provincial governments.³⁹ For those portions of the land actually transferred to the federal Crown, interim management is done by the Canadian Parks Service pursuant to the Public Lands Grants Act or, if the land is proclaimed as a Reserve, pursuant to the *National Parks Act* itself.⁴⁰ Land can remain in the legal limbo of a potential national park or park Reserve (without full park status) for years; for example, agreement was reached on Gros Morne park in 1970, and as of 1991 it has still not been proclaimed as a full national park.

³⁴Indian Affairs and Northern Development, *The Western Arctic Claim: The Inuvialuit Final Agreement* (Ottawa: Supply and Services Canada, 1984); see also the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24.

³⁵Sadler, *supra*, note 33 at 192; Schedule I, *The National Parks Act*, *supra*, note 8.

³⁶Bella, *supra*, note 12 at 170-73.

³⁷South Moresby, which is also subject to a native land claim, will have an adjacent national marine park, *infra*, note 52. Bruce Peninsula is the mainland area adjacent to the western part of Georgian Bay Islands National Park; the adjacent waters are to become Fathom Five national marine park. See J. Lien, "Eau Canada! A New Marine-Parks System" in M. Hummel, ed., *Endangered Spaces: The Future For Canada's Wilderness* (Toronto: Key Porter Books, 1989) 107 at 115; R.M. Day, "Georgian Bay Islands National Park" in Lien & Graham, vol. 2, *supra*, note 3 179 at 180-81.

³⁸*Canada's Green Plan* (Ottawa: Supply and Services Canada, 1990) at 80-81. Potential areas under consideration include Bluenose Lake, Northern Banks Island, Great Slave Lake, Northern Baffin Island, Wager Bay, Churchill and Torngat Mountains. Notably, the majority of these sites, five of seven, are in northern Canada, where land need not be acquired from a provincial government, but where aboriginal land claims impact upon parks creation and management. See also Environment Canada, *State of the Parks: 1990 Report* (Ottawa: Supply and Services, 1991).

³⁹In some cases, such as South Moresby, the federal-provincial agreement provides for federal management even while the province still owns the land. Environment Canada, *supra*, note 14 at 228.

⁴⁰Nation, *supra*, note 21 at 278-79.

Proposals for National Marine Parks

Proposals for national marine parks have been even slower to develop than proposals for new terrestrial parks. In 1970, the federal government hired a consultant to investigate marine parks programs in other countries and to examine the feasibility of the concept in Canada.⁴¹ The resulting "Paish Report"⁴² was submitted to government and discussed at the 1970 National Underwater Park Symposium. Subsequently, in 1971, federal Cabinet approval was sought for the basic concept of marine parks development in Canada. The government responded by establishing an Interdepartmental Task Force on National Marine Parks which involved participation by the federal departments of Fisheries and Oceans, and Energy, Mines and Resources, as well as Parks Canada.⁴³ While both the Paish Report and the Task Force study⁴⁴ recommended the development of a national marine parks program, no immediate result was achieved. However, as noted above, four of the terrestrial parks created during the 1969 to 1972 period included offshore areas within park boundaries.⁴⁵

Mondor⁴⁶ speculates that there were several factors which contributed to the relative inaction in the area of national marine parks development. First, both the Paish and Task Force Reports concluded that the terrestrial parks policy of preservation would need to be rethought in the marine parks context, in favour of a multiple resource-use policy. Second, the nature of marine parks was seen as involving a nearly overwhelming set of jurisdictional, social and economic issues. Aspects of such issues not canvassed by the reports included public participation needs, provincial government concerns, and an emerging conflict between Environment Canada (Parks) and Fisheries and Oceans Canada relating to the primary responsibility for marine parks management. As mentioned previously, Quebec's sovereignty concerns and the need to recognize aboriginal rights now also complicate any efforts at parks establishment.

In the 1970s, the first attempts to actually develop a marine parks program were made; preliminary proposals were made for marine parks at Race Rocks,

⁴¹Mondor, *supra*, note 3 at 10.

⁴²H. Paish *et al.*, *The Canadian Marine Environment as a National Park Theme: a Reconnaissance Study* (Ottawa: National Parks Branch, 1970) as cited in Mondor, *supra*, note 3 at 18.

⁴³Mondor, *supra*, note 3 at 11.

⁴⁴Interdepartmental Task Force on National Marine Parks, *National Marine Parks of Georgia and Juan de Fuca* (Ottawa: Parks Canada, 1971) as cited in Mondor, *ibid.*

⁴⁵*Supra*, note 27.

⁴⁶Mondor, *supra*, note 3 at 12.

British Columbia and Ship Harbour and Cape LeHave, Nova Scotia.⁴⁷ Although these proposals were eventually abandoned work was finally underway. In 1975, a major initiative was begun to develop a national marine park in the Bay of Fundy. The West Isles area of New Brunswick was selected; as of 1991 the park is not yet in existence. Numerous studies have been done, and proposals made,⁴⁸ and the West Isles area is still actively being considered as a "potential" marine park. Unfortunately, the proposal seems to have foundered due to a lack of public participation during the planning stages, and there is now intense local opposition to the parks proposal.⁴⁹

The failed attempts to establish marine parks in the 1970's led the federal government to begin developing a formal National Marine Parks Policy. A draft policy was circulated in 1983 and finalized in 1985. The two major stumbling blocks to marine parks creation using a terrestrial parks model were identified as the "natural imperatives" and "administrative realities" of the marine environment;⁵⁰ the National Marine Parks Policy⁵¹ sought to overcome those obstacles. Parks management concepts have been adapted to the unique character of marine ecology, which is strikingly different from terrestrial ecology, and to deal with the perceived need to reconcile parks development with the historical activities in offshore areas, including fishing and navigation.

With the West Isles proposal temporarily stalled, the government in the 1980s focused its attention on alternative sites for marine parks development. In 1988, the federal and Quebec governments agreed on an Action Plan for environmental restoration in the St. Lawrence River. Part of the proposal, finalized in 1990, includes agreement on a national marine park at the Saguenay Fjord estuary. Also in 1988, agreement was reached on establishment of a national park in South Moresby; this agreement includes the establishment of a national marine park, subject to the resolution of a native land claim, and boundary disputes after

⁴⁷*Ibid.* at 14-15.

⁴⁸For example, see Parks Canada/Tourism New Brunswick, *National Marine Park Concept: West Isles New Brunswick Pilot Study* (summary document), 1983; Parks Canada/Tourism New Brunswick, *West Isles Feasibility Study: Phase 1 Report*, 1985.

⁴⁹Lien, *supra*, note 37 at 115; Lien, *supra*, note 5 at 42. The *West Isles Feasibility Study*, *supra*, note 48 at 32-35, lists the following major areas of public concern: 1. lack of confidence in the government's ability to work cooperatively; 2. potential impacts on commercial fisheries; 3. impact of park visitors on local lifestyle; and 4. expropriation and additional land use controls.

⁵⁰Mondor, *supra*, note 3 at 15 (quoting the Paish report, *supra*, note 42).

⁵¹Environment Canada, Parks, *National Marine Parks Policy* (Ottawa: Supply and Services, 1987).

assessment of offshore oil and gas potential.⁵² Another potential site which is being investigated is Lancaster Sound, a marine area in the Arctic adjacent to the proposed national park on Northern Baffin Island. Negotiations here are complicated by both offshore oil and gas development and an outstanding native land claim.⁵³ Efforts are also continuing to convert the area offshore of Pacific Rim National Park into a national marine park. The federal government has announced that its goal is to have at least six national marine parks established by the year 2000⁵⁴ and to complete the marine parks system by 2010.⁵⁵

In addition to the five marine areas discussed above, one freshwater aquatic area was set aside in 1987 as a national marine park. This is Fathom Five, in Lake Huron, which was formerly a provincial aquatic park offshore of the Bruce Peninsula. Islands within the park boundaries are currently protected as part of Georgian Bay Islands National Park,⁵⁶ pending proclamation of Fathom Five and the adjacent Bruce Peninsula as fully established parks under the *National Parks Act*.⁵⁷

Over 100 years have passed since Canada created its first national park, yet we are still struggling to completely establish a single national marine park. A formal marine parks policy has been in place only since 1985, and it was not until 1988 that amendments to the *National Parks Act* made any specific mention of national marine parks.⁵⁸ New legislation specifically governing marine parks was not yet

⁵²South Moresby and its Marine park will probably be established as Reserves, not proclaimed under *The National Parks Act* immediately: Environment Canada, *supra*, note 14 at 228. Due to the oil and gas dispute, establishment of the marine park Reserve may be delayed until at least 1993: Lien, *supra*, note 37 at 118. This entire area, known as Gwaii Haanas by the Haida Nation, is also subject to an outstanding land claim. A cooperative management agreement with the Council of the Haida Nation is under negotiation. Environment Canada, *supra*, note 14 at 228.

⁵³Lien, *ibid.* at 118. This proposed park, along with Ellesmere Reserve, Auyuittuq Reserve, the proposed park in Wager Bay and the proposed park in Bluenose Lake, are all within the Tungavik Federation of Nunavut claim area. See, *Agreement in Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada*, 1990 at 107.

⁵⁴*Canada's Green Plan*, *supra*, note 38 at 80. The Pacific Rim marine park proposal is affected by the outstanding Nuu-Chah-Nulth land claim. Environment Canada, *supra*, note 38 at 69.

⁵⁵D. Bueckert, "Urgent action needed to save parks, study says" *The Edmonton Journal* (19 September 1991) A3.

⁵⁶These are the western Georgian Bay Islands; there is a second set of islands in the existing national park further to the east.

⁵⁷Lien, *supra*, note 37 at 114-15.

⁵⁸By contrast, in the United States, a *Marine Protection, Research and Sanctuaries Act* was passed in 1972, and was used to create 7 marine sanctuaries between 1975 and 1985. See N.M. Foster & J.H. Archer, "The National Marine Sanctuary Program - Policy, Education and Research" (1988) 31:1 *Oceanus* 5 at 5 and 13.

at the drafting stage by 1989.⁵⁹ What has made the establishment of marine parks so difficult?

As the preceding brief history of national parks development illustrated, there are currently a number of barriers to the creation of *any* new national parks in Canada. Foremost among these is the need for the federal Crown to obtain clear title to the subject property before it can exercise legislative jurisdiction. Lacking the ability to expropriate the land, the federal government must negotiate with the provinces to obtain the desired property.⁶⁰ The provinces are reluctant to do so because natural resources become locked within park boundaries and resistance to any expropriation is usually directed at provincial politicians.⁶¹ Complicating the land acquisition process are Quebec's interests in maintaining sovereignty and aboriginal rights including native land claims.

When development of marine parks is considered, two additional complicating factors are involved. First is the special nature of marine ecology; second are the existing economic uses of marine areas and associated jurisdictional issues. Each of these issues will be examined in further detail, as each has implications for the proposed method of achieving environmental protection within marine park boundaries.

Ecological Issues

The general purpose of national parks, as set out in s. 4 of the *National Parks Act*,⁶² is this:

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 National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations* [emphasis added].

In the early days of terrestrial park establishment the emphasis was on development of the tourist and recreational potential of the national parks areas. Throughout this period resource exploitation such as mining and forestry either continued in the parks or was accommodated by carefully excluding from park boundaries areas with significant economic potential.⁶³ In later years,

⁵⁹Personal communication, D. Yurick, Environment Canada, Canadian Parks Service, 22 June 1989.

⁶⁰Such negotiations may last over 20 years due to provincial resistance. Nation, *supra*, note 21 at 265.

⁶¹Newer park transfer agreements involve acquisition of parklands by purchase, rather than expropriation. Banks, *supra*, note 10 at 226.

⁶²*Supra*, note 8.

⁶³Bella, *supra*, note 12 at 2. See generally Silverstone, *supra*, note 3.

preservation received greater emphasis⁶⁴ as resource exploitation was explicitly prohibited within park boundaries. However, development pressures still exist primarily from tourism and recreational industries.⁶⁵

Present national parks policy⁶⁶ attempts to balance a strong preservation role with tourism and recreational use, while accommodating other needs such as traditional native land use and scientific research. The basic technique for doing so, incorporated in the formal park policy, is to use a zoning system to identify areas within parks in which development prevails and other areas in which preservation prevails:

... zones are identified within each park which reflect the degree of resource protection required and the type and intensity of visitor use that is appropriate. In this way, a balance can be achieved between visitor use and wilderness preservation within each national park.⁶⁷

The current zoning system involves five zones: (1) Special Preservation, protecting unique, rare, endangered or best examples of natural features; (2) Wilderness, to be maintained in a natural state; (3) Natural Environment, being areas that can withstand low-density outdoor recreation; (4) Outdoor Recreation; and (5) Park Services.⁶⁸

From a preservation perspective, national parks are intended to maintain the physical environment (land and water) in "as natural a state as possible."⁶⁹ This preservation extends to not only the "land and water environments," but also to "their associated species" of flora and fauna.⁷⁰ A management plan is developed for each park, and by statute "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."⁷¹ Under the 1988 amendments

⁶⁴Sadler, *supra*, note 33 at 191.

⁶⁵Bella, *supra*, note 12 at 127; Rounthwaite, *supra*, note 2 at 70. There are still some areas in which resource extraction is being carried out, such as Wood Buffalo National Park where there are some subsisting timber licences. See *infra*, note 90.

⁶⁶Parks Canada, *Parks Canada Policy* (Ottawa: Parks Canada, 1979). This document is currently under review.

⁶⁷*Ibid.* at 27.

⁶⁸Wilderness zones may, since 1988, be declared as such by the federal Cabinet pursuant to ss 5(8)-(9) of *The National Parks Act*, *supra*, note 8, and are thus given statutory protection rather than merely being circumscribed in policy documents.

⁶⁹*Parks Canada Policy*, *supra*, note 66 at 31.

⁷⁰*Ibid.*

⁷¹*The National Parks Act*, *supra*, note 8 at s. 5(1.2). For a summary of the state of management planning, see Environment Canada, *supra*, note 38 at 82-83.

to the *National Parks Act*, Cabinet is also empowered to make regulations to protect the soil, natural features and air quality, manage traditional native resource harvesting and control toxic substances.⁷² These powers are in addition to the regulatory authority exercised prior to 1988 over fisheries, pollution of waterways, grazing, logging, garbage removal, sewage, public utilities and public health.⁷³ New powers to prevent poaching of threatened and protected species were also added in 1988.⁷⁴ As well, the Act now contains a pollution prevention clause:

Where any substance capable of degrading the natural environment, injuring the flora or fauna or endangering human health is discharged or deposited within a park, any person who has charge or control of the substance shall take reasonable measures to prevent any degradation of the environment and any danger to the flora or fauna or to persons resulting therefrom.⁷⁵

If this duty is not fulfilled, the Crown may conduct the "measures" and recover the cost of so doing from the person who controlled the pollutant.⁷⁶

Federal legislative jurisdiction over these diverse aspects of environmental protection within the parks is, of course, possible due to federal Crown ownership of the land, thus eliminating any potential constitutional conflict with provincial governments. Administrative control is vested within a single federal government department – Environment Canada – through the Canadian Parks Service, which also eliminates potential inter-departmental conflict. The legislative and policy measures thus implemented have, to date, worked reasonably well in achieving the primary goal of preservation.

Unfortunately, this preservation model is not thought to be fully transferrable to the marine parks context. Rice⁷⁷ has summarized four major differences between marine and terrestrial ecosystems which will affect parks management. First, the ability of the park to protect wildlife habitat must be considered. In a terrestrial park, "fencing off" a fixed area of habitat in order to conserve and protect plant and animal species is quite feasible. In a marine park, the most important habitat is the water itself, and "... water masses do not 'belong' to the park, and do not respect park boundaries. Crucial fluxes of nutrients and temperature and salinity regimes depend on current patterns and events distant from the parks..."⁷⁸ The only real exception may be the ability to protect the

⁷²*National Parks Act*, *supra*, note 8 at s. 7.

⁷³*Ibid.*

⁷⁴*Ibid.* at ss 8(1.1)-(1.2) and Schedule II.

⁷⁵*Ibid.* at s. 8(1.4).

⁷⁶*Ibid.* at s. 8(1.5)-(1.7).

⁷⁷J. Rice, "New Ecosystems Present New Challenges" in Lien & Graham, vol. 1, *supra*, note 3 at 45.

⁷⁸*Ibid.* at 46.

seabed habitat of some sedentary species.

A second factor to consider is the ability of marine parks to protect particular species. In a terrestrial park it may be possible to set aside a large enough land area to permit protected species to live their entire lives within park boundaries. Marine ecosystems, on the other hand, are much larger and more complex, and marine organisms often travel great distances throughout the ocean, either regularly (e.g. during migration) or during one stage in their life cycle.⁷⁹ As Brown⁸⁰ points out, marine parks "... will not contain within their boundaries entire ecosystems, species' range or complete life histories as can be the case in terrestrial parks."⁸¹

Third, one must consider the actual variation in the numbers of organisms which the park is designed to protect. The number of birds and mammals in a terrestrial park is, for example, much smaller and less variable than the number of birds, fish and other organisms one might wish to protect in an aquatic environment. With marine resources the management problem is "... as if terrestrial ecologists had to quantify the insects in their ecosystems..."⁸²

Finally, our parks strike to achieve a balance between preservation and some use and enjoyment of park areas by tourists and others. Underwater access to and appreciation of marine park features will be difficult.

These differences between terrestrial and marine national parks resulted in the perceived need to develop a separate government policy for the management of marine parks. This National Marine Parks Policy⁸³ includes two major strategies for adapting the terrestrial parks model to the marine setting: (1) variation in the zoning concept; and (2) a shift from a "preservation" model to a "conservation" model. These two strategies interrelate.

According to this view, the marine parks are intended to provide a means of helping to conserve and manage species, rather than to preserve species and their entire habitats, which seems ecologically infeasible. Thus, rather than prohibiting

⁷⁹*Ibid.* at 47; C. Mondor, "Resource Protection in National Marine Parks" in Lien & Graham, vol. 1, *supra*, note 3, 55 at 56.

⁸⁰K. Brown, "The Role of Protected Areas in the Conservation of Coastal and Marine Resources" in Lien & Graham, vol. 1, *supra*, note 3, 51 at 53.

⁸¹It may, however, be possible to protect some portion of the habitat critical to one or more stages in some species' lifecycle. See generally K. Brown, *Commercial Fishing and National Marine Parks*, vol. 2 (Ottawa: Parks Canada, 1982).

⁸²Rice, *supra*, note 77 at 48.

⁸³*Supra*, note 51.

“resource extraction” as in terrestrial parks,⁸⁴ “sustainable harvesting” of resources will be permitted within park boundaries, as will other “traditional marine activities which are consistent with the conservation objective,”⁸⁵ such as navigation. Control over these activities will be achieved, in part, by adaptations to the zoning system.

The marine parks policy⁸⁶ creates a system of five zones with both temporal and vertical variations. Zone 1 is a Preservation zone equivalent to the terrestrial Special Preservation zone. No resource harvesting will be permitted. There is no equivalent marine zone to the terrestrial Wilderness zone. Zone 2 in the marine parks system is the equivalent to Zone 3 in terrestrial parks: Natural Environment, where low-density recreational use is permitted. In marine parks resource harvesting will be “minimized” in Natural Environment areas. Zone 3 in marine parks (which has no equivalent in terrestrial parks) is Conservation where a broad range of activities, including fishing, will be permitted. Zone 4 (Outdoor Recreation in terrestrial parks, General Use in marine parks) will include in the marine system both fishing and navigation. Zone 5 (both systems) is for Park Services.

In the marine parks the Natural Environment, Conservation and General Use zones may be subject to “temporal zoning.” This is a method of restricting use of the area during certain time periods, such as particular seasons or times of day. Similarly, Preservation zones may be reclassified to less-protected status during some times. These variations are intended to make the zoning system more flexible, to take into account the variable nature of marine ecosystems. “Vertical zoning” is also provided for, so that various marine areas (surface, water column, seabed and subsoil) may have a different zoning classification than other marine areas directly above or below them. Thus, for example, one could have a surface zone which is normally a Natural Environment area, that is seasonally reclassified as a Conservation area, above a seabed area which is zoned as Preservation.

There are two obvious issues raised by the changes to the zoning system in national marine parks. First, due to the nature of the marine park environment, zoning, no matter how rigorous, cannot insulate the park from “downstream” effects of pollutants and development projects occurring outside park boundaries even to the same degree that terrestrial parks can be protected from such impacts

⁸⁴Exceptions are made for certain traditional native harvesting.

⁸⁵*Marine Parks Policy, supra*, note 51 at 15.

⁸⁶*Supra*, note 51.

by zoning.⁸⁷ This problem will be discussed in more detail shortly. Second, the decision to conserve, rather than preserve, marine park areas leads to the justification of policies permitting multiple resource use within national parks, with all their associated economic and jurisdictional conflicts.

Multiple Resource Use

In terrestrial national parks, modern management policy seeks to preserve the park in as natural a state as is possible. Apart from small high-intensity use zones and some traditional hunting and fishing by native Canadians in a few parks, every effort is being made to restrict development and to prohibit natural resource extraction. Hunting and commercial fishing are prohibited⁸⁸ and “commercial exploration, extraction or development of natural resources will not be permitted.”⁸⁹ While there are some exceptions, largely due to the inability of the federal government to purchase some private property interests within parks, there has been a longstanding effort to gradually phase out such interests.⁹⁰

In marine parks, the management of natural resources, both living and non-living, is beset by a different set of problems. These arise by virtue of two factors: (1) the nature of federal ownership of marine park areas; and (2) the decision to “conserve” rather than “preserve” living resources, the justification for which was discussed above.

(a) Federal Ownership of Marine Park Areas

It was previously noted that one of the major obstacles to the creation of new terrestrial parks was the need for the federal government to obtain ownership of the land in order to obtain the plenary constitutional jurisdiction (under s. 91(1A) of the *Constitution Act, 1867*) to regulate all aspects of park management. For any shoreline or island terrestrial areas that form part of a national marine park this

⁸⁷For a general discussion of the protection of terrestrial park wildlife from external impacts, see G.C. Coggins, “Protecting the Wildlife Resources of National Parks From External Threats” (1987) 22:1 Land & Water L. Rev. 1. Terrestrial parks are under ever-increasing pressure from such threats, including acid rain and pulp mill effluent. Bueckert, *supra*, note 55; Environment Canada, *supra*, note 14.

⁸⁸Regulated sport fishing is permitted. *Parks Canada Policy*, *supra*, note 66 at para. 3.2.11.

⁸⁹*Ibid.* at para. 3.2.10.

⁹⁰There are some unextinguished timber licences and mineral leases in some of the parks. For example, commercial timber leases still exist in Wood Buffalo Park, and are presently being logged. See É. Struzik, “Ottawa Helpless to Stop Logging” *The Edmonton Journal* (12 December 1990) A1. The CPR also retains mineral rights and timber rights in Banff Park’s Cascade valley: Bella, *supra*, note 12 at 32 and 38. One barrier to eliminating these interests is the need for provincial cooperation to expropriate private rights. Banks, *supra*, note 10 at 231. Another barrier is “renewal-in-perpetuity” clauses inserted in many older leases. Rounthwaite, *supra*, note 2 at 55.

will still be the case.⁹¹

From the low water mark seaward the situation is somewhat different. As a general rule the boundaries of the provinces end at the low water mark and the property rights and legislative jurisdiction of the provinces end at that point.⁹² Only if a province can show that prior to Confederation were adjacent waters and seabed areas part of the Colony could this normal assumption be displaced.⁹³ There are two ways in which this could be done: (1) if the boundaries of the colony were expressly or overtly extended beyond the low water mark;⁹⁴ and (2) if at common law the waters were "within the realm," which included bays or estuaries *inter fauces terrae*.⁹⁵ There are few such provincial areas clearly established in Canada, the most noted of which involves the ocean area between Vancouver Island and mainland British Columbia.⁹⁶ Due to historical circumstances, the seabed of this marine area – the Georgia Strait – is part of the province of British Columbia, and thus is provincially owned land.⁹⁷

What is the extent of federal ownership and jurisdiction below the low water mark? Within the territorial sea (12 miles offshore) the federal government owns the seabed.⁹⁸ Legislative jurisdiction here is plenary pursuant to either s. 91(1A) (public property), or the s. 91 preamble (peace, order and good government power) of the *Constitution Act, 1867*. The extent of the territorial sea is established by the *Territorial Sea and Fishing Zones Act*⁹⁹ and begins either at the

⁹¹It is not mandatory that marine parks include such areas. However, provision of park services, including those for visitors, will in most cases require the federal government to include some terrestrial areas. Failure to do so will also make environmental protection in marine parks areas significantly more difficult, as discussed, *infra*, note 118 and accompanying text.

⁹²*Reference Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86.

⁹³*Re Ownership of the Bed of the Strait of Georgia*, [1984] 1 S.C.R. 388 [hereinafter *Re Strait of Georgia*]. For an analysis of this decision see: G. Marston, "The Strait of Georgia Reference" (1985) 23 Can. Y.B. Int'l L. 34.

⁹⁴*Re Strait of Georgia*, *ibid*.

⁹⁵*Ibid*. The term *inter fauces terrae* means 'within the jaws of the land,' and the legal test for determining what waters fall within that term is discussed extensively by the dissenting justices in *Re Strait of Georgia*.

⁹⁶Two other examples are the Bay of Fundy, where the provincial border between New Brunswick and Nova Scotia divides the bay, and the Bay des Chaleurs, divided by the Quebec-New Brunswick boundary. G.V. La Forest, *Water Law in Canada* (Ottawa: Information Canada, 1973) at 464.

⁹⁷*Re Strait of Georgia*, *supra*, note 93. Marston, *supra*, note 93, notes the Court equates the 'property rights of the province in offshore areas with common law property rights i.e., fee simple ownership.

⁹⁸Jurisdiction is discussed in the *BC Offshore Reference*, *supra*, note 92.

⁹⁹R.S.C. 1985, c. T-8.

low water mark or at “baselines” connecting the mouths of coastal indentations such as bays and estuaries. The territorial sea does not include “internal” marine waters, which may include estuaries, historic waters, bays and fjords, all of which are normally shoreward of the territorial sea baseline but seaward from the mainland.¹⁰⁰ As noted above, in the absence of express inclusion of such internal waters within a province, and unless the internal waters were inland waters at common law (*inter fauces terrae*)¹⁰¹ it seems that those waters between the low water mark and the beginning of the territorial sea are federal property, within federal legislative jurisdiction.¹⁰² Subject to those exceptions, in any marine park within the internal waters or territorial sea of Canada the federal government owns the seabed and its subsoil and can exercise plenary legislative jurisdiction over this area.¹⁰³ However, establishment of marine parks in any ocean inlets or bays which were *inter fauces terrae* at common law would require the federal government to purchase the seabed from the provincial Crown.¹⁰⁴

Ownership of the seabed does not, apparently, give automatic ownership of the superadjacent waters and living resources within those waters. Under Canadian common law, in freshwater areas neither water nor fish are subject to fee simple absolute ownership unless captured. Instead, the owner of the bed of a watercourse obtains riparian rights in the superadjacent water including certain rights of use and exclusive profit à prendre rights to fish.¹⁰⁵ There is case law suggesting federal ownership of the bed of public harbours includes property rights to fisheries in the superadjacent waters,¹⁰⁶ presumably these same rules apply in “internal” offshore areas where the federal government owns the seabed.¹⁰⁷ However, in tidal waters, including the sea, there is also a public right of fishing

¹⁰⁰For a general discussion, see S.A. Williams and A.L.C. de Mestral, *An Introduction to International Law*, 2d ed. (Toronto: Butterworths, 1987) at 210-20.

¹⁰¹Marston, *supra*, note 93, notes that the dissenting justices in *Re Strait of Georgia* equate inland waters with waters *inter fauces terrae*, while the majority justices do not decide the issue.

¹⁰²*Re Strait of Georgia*, *supra*, note 93. Marston, *ibid.*, notes that the Court takes the view that either legislative or executive acts can extend federal common law ownership offshore in internal waters.

¹⁰³Within the Great Lakes, the provinces own the lake bed.

¹⁰⁴Beyond the territorial sea, actual ownership of the seabed is not contemplated in law. International agreement gives nation states jurisdiction over the exploitation of non-living resources and sedentary species on the continental shelf, and jurisdiction over the management of living resources and pollution control within a 200 mile Exclusive Economic Zone. Jurisdiction over these aspects of the offshore is presumptively federal, pursuant to the peace, order and good government power, and other relevant federal heads of power such as fisheries and navigation.

¹⁰⁵La Forest, *supra* note 96 at c. 10.

¹⁰⁶*Ibid.* at 25.

¹⁰⁷See P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 592-93 for a general discussion of the right to fish.

and there is some authority that the Crown *as owner* does not have the ability to grant exclusive fishing rights in a public fishery.¹⁰⁸ Similarly, in navigable waters there is a public right of navigation.¹⁰⁹

In the territorial sea the federal Crown is the "owner" of the seabed, but the nature and extent of the property rights and legislative jurisdiction is defined by international, not common law.¹¹⁰ Here, therefore, the federal Crown is in a position to acquire those property rights recognized by international law; these are generally full rights of sovereignty over the territory, but there are some limits, such as an international right of innocent passage by ships, that cannot be abrogated.¹¹¹

One might expect this rather complicated situation regarding proprietary rights and associated legislation pursuant to s. 91(1A) to create some regulatory difficulties, particularly when managing a "multiple resource-use" scheme. In fact, all that is seemingly required to solve these problems is for the federal government to exercise its legislative jurisdiction under alternative federal heads of power. These powers are exercisable even within provincially-owned areas of the seabed. Thus, for example, navigation is regulated pursuant to the federal power under s. 91(10) of the *Constitution Act, 1867* (navigation and shipping); fisheries are regulated by legislation enacted pursuant to s. 91(12) (sea coast and inland fisheries).

Unfortunately, this solution potentially creates more problems than it solves because different federal government departments have administrative authority pursuant to the various federal enactments: Fisheries and Oceans Canada administers fisheries, Transport Canada administers navigation and shipping and Energy, Mines and Resources administers offshore oil and gas development. To further complicate matters, in some offshore areas there are federal-provincial agreements which subject certain areas to a shared management regime.¹¹²

When a marine park is created, there is a resulting inter-agency jurisdictional overlap relating to the management of resources within the park. Instead of Environment Canada (Parks) obtaining exclusive management authority, as it

¹⁰⁸La Forest, *supra*, note 96 at c. 8.

¹⁰⁹*Ibid.*

¹¹⁰BC *Offshore Reference*, *supra*, note 92.

¹¹¹Williams, *supra*, note 100 at 215. For a general overview of international law relevant to marine sanctuaries, see J.W. Kindt, *Marine Pollution and the Law of the Sea* (Buffalo: William S. Hein, 1986) at c. 23.

¹¹²For example, the *Atlantic Accord* establishes a joint management board with jurisdiction over, *inter alia*, emergency actions to repair, remedy or mitigate impacts of oil spills. See para. 24(e).

would in a terrestrial park, there is strong pressure from other government departments to retain their traditional jurisdiction (and budget allocations).¹¹³ There may also be federal-provincial jurisdictional conflicts arising from existing or desired resource-sharing agreements.¹¹⁴

Pollution protection is one specific area in which one might expect Environment Canada to have the lead role. Ocean pollution, even within provincially owned areas, is a matter of federal legislative jurisdiction pursuant to the peace, order and good government power.¹¹⁵ In relation to ocean dumping i.e., the intentional disposal of wastes into the ocean, Environment Canada has the management role pursuant to Part VI of the *Canadian Environmental Protection Act*.¹¹⁶ However, in relation to pollution from vessels, including spills, Transport Canada has the lead role pursuant to the *Canada Shipping Act*.¹¹⁷ Worse yet, the *primary* source of marine pollutants are all situate on land and include such sources as sewage outfalls, freshwater river pollution flowing into the ocean and airborne pollutants. To attain control over such pollutants entering marine parks the federal government will need cooperative pollution management with the provinces, municipalities and private landholders and ideally should have a fairly extensive landholding on shore adjacent to the marine park to act as a "buffer" zone.¹¹⁸ This returns the government to the usual problems of property acquisition of terrestrial parklands discussed previously.¹¹⁹

(b) Conservation or Preservation?

The decision to conserve, rather than preserve, living resources within marine parks reinforces the potential for interagency jurisdictional conflicts discussed above. In such a context it is unclear that the decision to continue activities such as commercial fishing was solely based on the ecological justifications suggested

¹¹³This is a seemingly perpetual jurisdictional issue in environmental and natural resource management. E.L. Hughes, "Government Response to Environmental Issues: Institutional Inadequacies and Capacity for Change" (1990) 1:1 J.E.L.P. 51.

¹¹⁴Such as the outstanding issue of the boundaries of the South Moresby marine park, pending investigation of offshore mineral potential. See, *supra*, note 52 and accompanying text.

¹¹⁵*R. v. Crown Zellerbach*, [1988] 3 W.W.R. 385 (S.C.C.).

¹¹⁶R.S.C. 1985, c. 16 (4th supp.).

¹¹⁷R.S.C. 1985, c. S-9.

¹¹⁸The usefulness of "buffer" zones in a terrestrial park context is discussed in Coggins, *supra*, note 87 at 12-13; in a marine park context see Brown, *supra* note 80 at 25.

¹¹⁹An additional concern in Arctic areas is the difficulty in separating land and marine areas, which may be "virtually indistinguishable due to ice and snow cover" yet which are managed under two different policies and legal regimes. Environment Canada, *North Baffin/Lancaster Sound Park Proposal* (Ottawa: Environment Canada, Parks, 1987) at 2.

by government biologists, or whether it was also based on factors such as interdepartmental jurisdictional and administrative pressure. Another motivating factor which suggests itself is the force of public resistance to parks development when fishing and other commercial activities are curtailed, such as the extensive disputes surrounding the offshore area of Kouchibouguac Park.¹²⁰ In this, as in many other areas, Canadian policy also seems to "mimic" American policy, which moved to a multiple resource use model for marine sanctuaries in 1984.¹²¹

All these pressures seem to have led, inexorably, to the proposal by the federal government to go with a "shared management" model for marine parks. Thus, fisheries will be managed on the basis of formal fisheries management plans between Environment Canada and Fisheries and Oceans Canada, with regulation taking place under the *Fisheries Act* not the *National Parks Act*.¹²² Control over navigation and other marine transportation will rest with Transport Canada and will be regulated under the *Canada Shipping Act*, subject to consultation with Environment Canada.¹²³ While mineral extraction and ocean dumping will be prohibited within the park,¹²⁴ other developments are subject to less clear rules. For example, pipeline construction and submarine telecommunication cables will be permitted subject to the outcome of a federal Environmental Assessment and Review.¹²⁵

An examination of the preliminary interdepartmental agreements regarding navigation and fisheries in the proposed Fathom Five National Marine Park in Lake Huron reveals the nature of the jurisdictional divisions that are being contemplated. In relation to fisheries a "Preliminary Park Fisheries Management Plan" has been developed.¹²⁶ Fisheries in Ontario are currently managed by the provincial Ministry of Natural Resources exercising the delegated authority of the

¹²⁰*Supra*, notes 28 and 29, and accompanying text. Interestingly in Japan, which has the largest number of marine parks in the world, this resistance was avoided by creating very small marine parks within which fishing is allowed and later reaching agreement with fishers to avoid park areas. Marsh, *supra* note 4 at 37.

¹²¹Foster, *supra* note 58 at 8; D.B. Yurick, "International Networking of Marine Sanctuaries" (1988) 31:1 *Oceanus* 82 at 87 also notes "... Canada has profited from observing the benefits of the United States' cooperative management program..." and "... officials are confident it will succeed because they have observed successful cooperative management in the United States National Marine Sanctuaries Program."

¹²²Marine Parks Policy, *supra* note 51 at para. 2.3.1 and 2.3.2.

¹²³*Ibid.* at para. 2.4.

¹²⁴*Ibid.* at para. 2.2.7 and 2.2.8.

¹²⁵*Ibid.* at para. 2.2.9 and 2.2.10.

¹²⁶Environment Canada/Ontario Ministry of Natural Resources, *A Preliminary Park Fisheries Management Plan for Fathom Five National Marine Park* (August, 1988).

federal Department of Fisheries and Oceans under the *Fisheries Act*. There are also provincial fisheries regulations and two major management plans applicable in the Fathom Five area.¹²⁷ Under the *Preliminary Park Plan* the provincial Ministry will continue to be “responsible for all aspects of managing the commercial and recreational fisheries” within the park.¹²⁸ A process is established for the cooperative development of a more detailed management program within the park. Fisheries are to be managed on a “sustainable yield” basis, subject to the need to protect the ecosystem, to maintain viable stocks of “other” (presumably indigenous non-commercial and non-sport) species of fish and to achieve park objectives. If adverse effects on marine ecosystems due to fishing are shown then “management studies” will be initiated.¹²⁹ Apart from these rather vague provisions, only two potential problem areas are specifically addressed. First, habitat manipulation and “enhancement” are permitted under one of the regional fisheries plans currently in effect.¹³⁰ This will not be permitted within Fathom Five.¹³¹ Second, the Ontario government presently adds sport fish to the lake. Under the *Preliminary Park Plan*, Environment Canada will “monitor the impact” of this stocking program.¹³² The major role contemplated for the federal Environment personnel seems to be that of keeping “the local community informed,” endeavors to “minimize any conflict” between fisheries and park operations and to “develop management solutions” acceptable to all resource user groups, including the fishing industry.¹³³ In sum, Environment Canada will cooperate while the provincial fishery carries on much as usual. Hopefully, the more detailed fisheries management plans of the future will have some additional concrete protections for park fisheries.

A memorandum of understanding has also been signed to deal with interjurisdictional aspects of marine transportation within the national marine park.¹³⁴ Under this agreement, primary responsibility for control of navigation and shipping will continue to rest with the Transport Canada Coast Guard

¹²⁷These are the *Lake Huron Strategic Fisheries Management Plan*, and the *Owen Sound District Fisheries Management Plan 1986-2000*, as referred to in the *Preliminary Park Plan*, *ibid.*

¹²⁸*Preliminary Park Plan*, *supra*, note 126 at 2.

¹²⁹*Ibid.* at 3-4.

¹³⁰This is the *Owen Sound Plan*, *supra*, note 127.

¹³¹*Preliminary Park Plan*, *supra*, note 126 at 4.

¹³²*Ibid.*

¹³³*Ibid.* at 4-5.

¹³⁴Department of the Environment/Department of Transport, *A Memorandum of Understanding Between Department of the Environment and Department of Transport Regarding The Administration of Marine Transportation Responsibilities Within Fathom Five National Marine Park* (August, 1988).

pursuant to the *Canada Shipping Act* and the *Navigable Waters Protection Act*.¹³⁵ Navigational aids delimiting park boundaries and zones are the responsibility of the park personnel; all other navigational aids will continue to be the responsibility of the Coast Guard. Boating activities will continue to be regulated under the *Boating Restriction Regulations* and *Small Vessel Regulations* of the *Canada Shipping Act* under Coast Guard authority. As long as no restrictions are imposed on shipping lanes, and the applicability of the *Canada Shipping Act* and *NWP Act* are not limited, additional regulations (e.g. for diving) may be developed under the *National Parks Act*.¹³⁶ Joint approval of Environment Canada and the Department of Transport will be required before construction of works may be permitted pursuant to the *NWP Act*.¹³⁷ In addition, parks staff will be trained to assist the Coast Guard in search and rescue or pollution emergency response efforts.¹³⁸

Despite the broad nature of the subjects addressed in this memorandum of understanding little specific protection of the park seems contemplated. For example, boating seems to be relatively unaffected by the creation of the park (although the Coast Guard will assess requests by parks staff to control boating in the park in the "interests of public safety").¹³⁹ Shipping seems to take priority; for example parks staff, before requesting control of vessels, must consult with the Coast Guard to determine whether restrictions would "constitute an interference with marine navigation."¹⁴⁰ The memorandum does not contain an actual contingency response plan in the event of a spill and makes no specific provisions for ensuring dangerous goods, including oil, are not transported through park boundaries.¹⁴¹

One may question the efficacy of such shared jurisdictional arrangement in protecting marine park areas. One commentator, discussing the American attempts to rely on inter-agency efforts to protect their national parks from external threats to park wildlife, noted:

History, however, demonstrates that the prospects for preventing and abating

¹³⁵R.S.C. 1985, c. N-22 [hereinafter *NWP Act*].

¹³⁶*Memorandum, supra*, note 134 at 4.

¹³⁷*Ibid.*

¹³⁸*Ibid.* at 5-6.

¹³⁹*Ibid.* at 3.

¹⁴⁰*Ibid.* at 3.

¹⁴¹For an interesting overview of the legal and ecological consequences of a freighter accident in an American marine sanctuary, see "The M/V Wellwood Grounding: A Sanctuary Case Study" (1988) 31:1 *Oceanus* 36, including S. Gittings and T. Bright, "The Science" at 36, W. Harrigan, "Management: Coping With Disaster" at 42, and J. Bondareff, "The Legal Issues" at 44.

threats through intergovernmental cooperation alone are bleak. The activity posing the threat will also contribute to the local economy, and economic development is seldom taken for granted as parks usually are. Political feelings, especially in the rural West, often rage against land use control and especially against any federal regulation. Further, the Park Service lacks the power over areas outside park boundaries to make its threats credible.¹⁴²

The situation in Canada may not be much different. In the past, conflicts have occurred in environmental matters because different agencies have very different mandates, priorities, objectives and budgets.¹⁴³ Despite the genuine efforts of individual personnel within each department conflicts often arise due to shortages of resources, overlapping or unclear jurisdiction, confusion of responsibilities, delay, duplication and other institutional inadequacies. While one hopes that the interagency agreements contemplated by the Marine Parks Policy will minimize these problems, one can expect that legal and political accountability for any difficulties will be obscure.¹⁴⁴ It remains to be seen how these agencies will work together if a marine park is faced with a conflict which involves the prospect of a major economic cost, such as complete closure of a fishery or the need to reroute tanker traffic. Public concerns over employment prospects are also a major stumbling block.¹⁴⁵

Environmental Protection

The preceding discussion has served to identify some of the administrative, jurisdictional, constitutional, political and economic barriers to marine parks creation in Canada. It has also highlighted how these myriad legal-political problems, shored up by scientific considerations, contributed to the development of a marine parks policy that is based on resource conservation – not ecosystem preservation – as a philosophy, combined with a multiple resource use shared management scheme. In this regulatory context, however, one must return to the issue of whether the proposed regime is adequate, given the avowed goal of national parks: preservation of our natural heritage. To illustrate the potential difficulties inherent in the marine parks policy as a means of environmental preservation, it is useful to examine its application to the problems of pollution control and wildlife preservation.

¹⁴²Coggins, *supra*, note 87 at 19.

¹⁴³Hughes, *supra*, note 113 at 53.

¹⁴⁴Mondor, *supra*, note 3 at 17, reports that the strongest opposition to the multi-agency approach when the Marine Parks Policy was drafted came “internally” from Parks Canada.

¹⁴⁵For example, public protests against a marine park in the West Isles area of New Brunswick have centred on potential adverse effects on the local fishing industry. See, *supra*, note 49.

(a) Pollution Control

There are a number of aspects of marine pollution control which will be important to the preservation of the ecological integrity of marine park areas. These include operational discharges from vessels, spills, litter, deliberate ocean "dumping" of wastes, problems resulting from offshore oil and gas operations and input of both freshwater and airborne pollutants from land-based sources. Many pollutants which reach marine areas from all these sources have particularly severe impacts in Arctic areas.¹⁴⁶ One major hurdle for marine park managers seeking to control such pollutants and their adverse impacts within marine parks is that not only pollutants discharged within park boundaries are of concern. Due to the nature of the marine environment pollutants discharged into adjacent waters – or even waters considerable distances away – can easily be transported into the park by ocean currents. In such a context, the zoning concept becomes virtually meaningless as a way of protecting sensitive and unique areas of the marine environment, or endangered species within that habitat.

After an agreement to establish a park is reached, but prior to designated parklands being fully established as national parks or national park Reserves under the *National Parks Act*, parkland management is difficult to achieve. First, land not already federally owned is acquired by the province. There is no direct federal control over the land at this point, so the federal government must rely on the provinces' goodwill to see that Parks Canada policy is followed and provincial legislation enforced appropriately if necessary (or possible).¹⁴⁷ Second, once landholdings become the property of the federal government, those lands that are not officially designated as park Reserves (and thus subject to the *National Parks Act*) are administered under the *Public Lands Grants Act*, which does not provide parks managers with any regulatory powers. As a result, enforcement of park rules and the granting of any rights of use lack a specific legal framework.¹⁴⁸ During interim park management, therefore, control over the land, including potential pollution control, is complicated by "a totally inadequate legislative framework within which to exercise administrative powers."¹⁴⁹

Once lands are proclaimed (or Reserved) under the *National Parks Act*, that legislation and its regulations will be applicable. The Act itself authorizes the federal Cabinet to make regulations regarding such matters as protection of plants,

¹⁴⁶See H. Mills, "Arctic Marine Conservation" in Lien & Graham, vol. 1, *supra*, note 3 at 95; also note the provisions of Fisheries and Oceans Canada, *Canadian Arctic Marine Conservation Strategy* (discussion paper)(December, 1987).

¹⁴⁷Nation, *supra*, note 21 at 278.

¹⁴⁸*Ibid.* at 279.

¹⁴⁹*Ibid.* at 280.

animals and fish, pollution of waterways, air quality, the use of pesticides and toxic substances, the preservation of public health and the prevention of nuisances.¹⁵⁰ Any breach of the Act or its regulations is an offence.¹⁵¹ While this scheme – also applicable in marine parks – seems fairly comprehensive, in fact no regulations relating to pollution problems of the type now under discussion have ever been passed. The Act does also contain a general duty on persons discharging pollutants to mitigate the potential resulting damage.¹⁵² This is the only real pollution-prevention provision in the legislation.

The bulk of attention paid to environmental protection issues in marine parks is contained in the Marine Parks Policy. In relation to pollution, the following provisions are of greatest relevance:

2.2.5 Cooperative arrangements will be sought ... to mitigate the effects of any external activity which could threaten marine park resources and impair the quality of the region's aquatic environment.

2.2.7 Ocean dumping within marine parks will not be permitted.

2.2.8 Commercial exploration, extraction or development of non-renewable resources will not be permitted.

2.2.13 No activity in a marine park will be permitted to threaten the continued existence of indigenous flora and fauna.

2.4.4 Vessel access to and movement within marine parks will be managed ... in such a manner as to:

(i) furnish protection to threatened or endangered species and habitats...

As mentioned before, the primary protection measures within the park revolve around the establishment of a zoning system.

Laudable as these provisions may seem, they all suffer from one major flaw: they are mere policy statements and, as such, are both malleable and completely unenforceable. Nevertheless, some of these policies will be easily implemented; for example, ocean dumping is already regulated by Environment Canada under the *Canadian Environmental Protection Act* and thus no other agency need be consulted. That Act also provides strong enforcement measures which can be taken against persons who dump wastes in the ocean without a permit.¹⁵³

¹⁵⁰*The National Parks Act, supra*, note 8 at s. 7(1), especially ss (a), (b), (c), (d), (j), (r), (x), (gg).

¹⁵¹*Ibid.* at s. 8(1).

¹⁵²*Ibid.* at s. 8(1.4). Described *supra* at 13.

¹⁵³*Supra*, note 116.

Mandatory compliance with other portions of the policy may be harder to achieve, however, such as controls on vessels (which are circumscribed by Transport, not Environment) or the ban on any activities which threaten endangered species.

Most enforcement of park policy in relation to pollution control will need to take place under legislation other than the *National Parks Act*. This legislation, happily, applies to activities *outside* of park boundaries as well as within the park. It can also be applied to reserve and potential park lands not yet scheduled under the *National Parks Act*, usually even while the lands are provincially owned. The most useful aspect of this legislation is that which is also within Environment Canada's bailiwick, including the water pollution and fish habitat protections of the *Fisheries Act*¹⁵⁴ and the toxic substances and ocean dumping controls of the *Canadian Environmental Protection Act*.¹⁵⁵ In other instances the cooperation of other federal agencies will be required, such as use of the water pollution provisions of the *Arctic Waters Pollution Prevention Act* (Transport, Indian Affairs and Northern Development and Energy, Mines and Resources),¹⁵⁶ the vessel source pollution provisions of the *Canada Shipping Act* (Transport)¹⁵⁷ or the offshore oil and gas pollution prevention provisions of the *Oil and Gas Production and Conservation Act* (Indian Affairs or Energy).¹⁵⁸ The efficacy of these enactments in protecting national marine parks will be dependant on the usefulness of the legislation itself and the extent to which it is routinely administered and enforced. For example, the Canadian contingency response plans following an oil spill from a tanker have fallen under a great deal of criticism.¹⁵⁹ An additional problem, since such enactments are not based on federal land ownership, is the possibility of provincial challenges to the *vires* of federal legislation, particularly for legislation such as the *Canadian Environmental Protection Act* which is *prima facie* based on the rather unclear jurisdiction of the "Peace, Order and Good Government power."¹⁶⁰

The greatest area of concern – land-based sources of marine pollution – will require land-based controls. Here provincial environmental protection measures will be critical. Until adequate control over land-based problems such as

¹⁵⁴R.S.C. 1985, c. F-14. While most of the Act is the responsibility of Fisheries and Oceans Canada, by interdepartmental agreement the pollution control provisions in ss 34 to 42 are administered by Environment Canada.

¹⁵⁵*Supra*, note 116.

¹⁵⁶R.S.C. 1985, c. A-12.

¹⁵⁷*Supra*, note 117.

¹⁵⁸R.S.C. 1985, c. 0-7.

¹⁵⁹A recent example involved an oil spill offshore from Pacific Rim National Park in December, 1988.

¹⁶⁰*Supra*, note 9, s. 91 (preamble).

agricultural runoff, sewage discharges and air pollution can be attained throughout the country, all “downstream” areas, including marine parks, will be at risk. Federal-provincial cooperative agreements may provide some assistance to park managers. So would the existence of an adjacent shoreline area in which detrimental development could be controlled allowing the creation of a buffer zone between the marine park and land-based activities. Nevertheless, the task of pollution prevention within national marine parks seems daunting.

(b) Wildlife Protection

In addition to the protection of the marine environment from pollution, there is also a need to protect park flora and fauna from direct threats, such as hunting and fishing. Some species which inhabit marine parks are sedentary, such as sponges, anemones, clams and similar organisms. Others are not only mobile, but may even be highly migratory, such as fish, whales, seals and seabirds. As noted previously, many marine species will inhabit the park on only a transient basis or only during a portion of a lifecycle. Thus, prohibitions on hunting within a marine national park will at best only lend partial protection to many species; to truly ensure marine species conservation it will be necessary to adopt much broader-ranging protective schemes which also apply outside the park. As with pollution control, therefore, much of the legal protection of park wildlife will arise by virtue of legislation other than the *National Parks Act*.

The *National Parks Act* itself will be applicable within the marine park, however, and its hunting and poaching provisions could serve a useful role in providing species additional protections while they inhabit the park. The primary provisions in the Act are contained in s. 8. Section 8(1.1) makes it an offence in a park to hunt, disturb, confine or be in possession of wildlife listed in Part I of Schedule II; s. 8(1.2) contains similar provisions in relation to species listed in Part II of that Schedule. The two Parts of the Schedule set out a number of threatened or protected species, respectively. Penalties for poaching threatened species (Part I) are as high as \$150,000 plus six months imprisonment while poaching of protected species (Part II) is punishable by up to \$10,000 plus six months imprisonment. Possession of such wildlife, inside or outside of the park, if it was killed or captured in the park is also an offence.¹⁶¹ “Wildlife” by definition includes eggs or parts of the species. Hunting is defined so as to include not only killing, but also injuring, trapping or capturing of wildlife, or any attempt to do so or stalking with a weapon.¹⁶²

The only two aquatic species presently listed in the Schedule are polar bears

¹⁶¹*Supra*, note 8 at s. 8(1.1) and (1.2).

¹⁶²*Ibid.* at s. 8(1.3).

(threatened) and Atlantic salmon (protected). However, other endangered species in Canada could be added to this Schedule as marine parks are established in areas critical to their protection. For example, one of the primary reasons for the establishment of a marine park at Saguenay Fjord is to protect the St. Lawrence population of beluga whales.¹⁶³ Other endangered, threatened or vulnerable marine species in Canada include bowhead, right, blue, fin, beaked and humpback whales, sea otters, harbour porpoises, several species of gulls and terns and a number of fish species, including freshwater species in the Great Lakes.¹⁶⁴

The major provisions in the Marine Parks Policy relevant to wildlife protection are:

2.1.2 When a marine species spends part of its natural life cycle in a marine park but is adversely affected by human activities outside the park, Environment Canada will monitor the situation and will cooperate ... to promote the conservation of that species throughout its range...

2.2.12 Sport hunting will not be permitted.

2.2.13 No activity in a marine park will be permitted to threaten the continued existence of indigenous flora and fauna.

2.2.11 Fishing will be permitted in national marine parks, as set out in s. 2.3. Certain other traditional extractive activities will be permitted in the following circumstances:

- i) ...traditional subsistence resource uses... (when) an essential part of the local way of life and when no alternatives exist outside the park boundaries...
- ii) Selected activities which are of cultural value in portraying to visitors traditional relationships between man and the marine environment may be permitted.
- iii) The treaty rights of Indian people ... will be honoured...

2.3.4 Environment Canada will work cooperatively with the Department of Fisheries and Oceans and fishermen to provide additional protection to threatened species and critical habitats in marine parks...

Notably, the term "fish" as used in the Policy document is intended to be synonymous with the term fish as defined in the *Fisheries Act*,¹⁶⁵ which includes invertebrates and marine mammals. Marine plants are also regulated under the

¹⁶³Lien, *supra*, note 37 at 117.

¹⁶⁴See World Wildlife Fund, *Canadian Endangered Species (1990)*. At present, sealing and whaling continue in Auyuittuq, commercial fishing for crab and salmon continue in Pacific Rim, lobster fishing continues in Forillon, and fishing privileges for gaspérou, smelt and eel were reinstated in Kouchibouguac. Mondor, *supra*, note 3 at 14.

¹⁶⁵*Supra*, note 51 at 10.

Fisheries Act and seem to be included as "fish" in the Marine Parks Policy.¹⁶⁶ As noted before, the *Fisheries Act* will be the principal governing legislation, under the management of Fisheries and Oceans, not Environment Canada. Thus, while hunting will be banned, "fishing" for marine plants and animals will be regulated in the same manner within parks as it is elsewhere in Canada.¹⁶⁷ It may, therefore, be useful at this stage to briefly summarize the state of fisheries protection in Canada for both "real" fish and "statutory" fish (marine invertebrates, mammals and plants).

Marine mammal protection in Canada is primarily, but not exclusively, regulated under the *Fisheries Act*. *Seal Protection Regulations*¹⁶⁸ prohibit the hunting of seals except in accordance with the regulations, which permit food hunting, scientific study, sport hunting with a licence and specified levels of commercial hunting of bearded, grey, harbour, harp and hooded seals. Pelagic sealing is also prohibited in northern Canada except by natives using traditional methods, pursuant to regulations enacted under the *Pacific Fur Seals Convention Act*.¹⁶⁹ *Walrus Protection Regulations*¹⁷⁰ also exist under the *Fisheries Act* to restrict the hunting of walrus. Aboriginal food hunting, other food hunting with a licence and scientific kills with a licence are permitted. Both walrus and fur seal parts are subject to some trade restrictions under the *Export and Import Permits Act*.¹⁷¹

Whale and dolphin hunting are also controlled by way of *Fisheries Act* regulations. The *Cetacean Protection Regulations*¹⁷² prohibit the hunting of whales and dolphins in Canadian waters without a permit, except for native hunting of right whales and the hunting of beluga and narwhal. Hunting of the latter two species is controlled by the *Beluga Protection Regulations*¹⁷³ and the *Narwhal Protection Regulations*.¹⁷⁴

¹⁶⁶*Ibid.* at 10 states: "The term fish is used as in the *Fisheries Act*, to mean fish, invertebrates, marine mammals and marine plants."

¹⁶⁷In the offshore regions of Auyuittuq National Park, traditional native sealing and whaling is presently permitted. Mondor, *supra*, note 3 at 14.

¹⁶⁸C.R.C. 1978, c. 833.

¹⁶⁹R.S.C. 1985, c. F-33. This Act applies in the Pacific Ocean north of 30 degrees North Latitude, including the Bering, Okhotsk and Japan seas.

¹⁷⁰SOR/80-338 and 83-520.

¹⁷¹R.S.C. 1985, c. E-19.

¹⁷²SOR/82-614 and 87-691.

¹⁷³SOR/80-376.

¹⁷⁴CRC 1978, c. 820.

The hunting of polar bears is subject to somewhat different rules. They are not a "statutory" fish. Further, as they are a scheduled species under the *National Parks Act*, their hunting will be completely prohibited within park boundaries.

The *Fisheries Act* also contains prohibitions on the harvesting of marine plants, including algae and phytoplankton, except with a licence and in accordance with the regulations.¹⁷⁵ There are also controls on the fishing of marine invertebrates. Generally speaking invertebrates are treated as "real" fish and subjected to the same regulatory regime.

The capture of "real" fish by Canadian fishers is extensively regulated under the *Fisheries Act*. In some cases the control is federal; in other instances the regulations delegate control over the fishing industry to provincial governments. The licensing regime is complex, controlling such matters as the species of fish which may be harvested, the size of the catch, the time of year in which the season is open, the equipment that can be used and even the acceptable type of boat. Another statute, the *Coastal Fisheries Protection Act*,¹⁷⁶ is used to control foreign fishing vessels in Canadian waters within two hundred miles of the shore. For some species in relation to which Canada has international fisheries management responsibilities, additional legislation may be applicable.¹⁷⁷ Despite its complexity, fisheries regulation in Canada has been beset by difficulties. Suffice it to say that fisheries around the world have suffered from depleted stocks and overexploitation¹⁷⁸ and Canada has not been immune.¹⁷⁹

Aquatic birds will also require protection in national marine parks. They will be subject to the same regime as other "fauna" or "natural resources" within national marine parks. In Canada most avian protection in coastal areas has taken place under the *Migratory Birds Convention Act*¹⁸⁰ by creating migratory bird sanctuaries. However, designation as a national park will provide additional protections for nesting sites or rookeries of migratory and other aquatic birds.

To summarize the situation, at first glance it seems that the hunting of marine species would be prohibited in national marine parks and that for any threatened or protected species of animal or bird the hunting and poaching controls are significant. The problem is that the decision to permit both recreational and

¹⁷⁵*Fisheries Act*, *supra*, note 154 at ss 44-48.

¹⁷⁶R.S.C. 1985, c. C-33; the regulations are found at CRC 1978, c. 413.

¹⁷⁷For example, the *North Pacific Fisheries Convention Act*, R.S.C. 1985, c. F-18.

¹⁷⁸World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 266.

¹⁷⁹For a more detailed discussion of fisheries in marine parks, see Brown, *supra*, note 80.

¹⁸⁰R.S.C. 1985, c. M-7.

commercial fishing within national marine parks includes, by definition, not only fishing but also whaling, sealing and the harvesting of marine plants. Until some very strong provisions are included in the yet-to-be-negotiated marine park fisheries management plans – plans which *are* required by the Marine Parks Policy¹⁸¹ – and some amendments are made to the *Fisheries and National Parks Act* regulations to permit enforcement of the agreed regimes, it may be very difficult to prohibit, within park boundaries, activities such as sealing and whaling which seem antithetical to the entire philosophy of preservation within the national parks of Canada.

Conclusions

The development of national marine parks in Canada has been a slow and difficult process as there are a number of barriers to marine parks creation. Foremost among these is the need for the federal government to obtain clear title to the seabed of any provincially owned inland waters or shoreline areas in order to obtain plenary legislative jurisdiction. Luckily, many seabed areas – under both the territorial sea and federally owned internal waters – are already owned by the federal Crown. Even once title problems are solved, however, establishment of marine parks will require the government to overcome public resistance to the siting of parklands and must also take into account a number of interdepartmental conflicts.

Once marine parks are established further difficulties remain, particularly in the area of environmental protection. Zoning, the primary park management tool, seems singularly unsuited to protecting marine park areas from detrimental effects of pollutants due to the fluctuating nature of the aquatic environment. There are also administrative difficulties created by the proposed regime for parks management which involves interdepartmental control over many aspects of natural resource management and park use. This is perhaps best exemplified by the possibility that fishery management regimes could allow such activities as whaling and sealing within national marine parks.

Perhaps the most troubling aspect of marine parks management as currently proposed is the underlying concept. For many years now the role of national parks in Canada has been geared quite strongly toward preservation, rather than recreation or exploitation. In 1987, the Canadian Parks Service stated this vision of national parks as a place for preservation of the natural environment in these words:

National parks and other protected places are our lifeline to an ecologically stable future. They are places where the forces that animate our planet and make it

¹⁸¹Marine Policy, *supra*, note 51 at para. 2.3.

unique are allowed to operate with minimal interference by man; places where we can wonder and pay respect to other living things and the intricacies of ecosystems; places that produce oxygen, stabilize the hydrological cycle, grow abundant fish and wildlife, stay erosion, pour out no man-made toxicants into air or water.¹⁸²

Most important, national parks were characterized as being a category of "...highly protected land [that] will exist at one end of a spectrum of parks and conservation lands which extends, *at the other end*, to more intensive recreational use, and even to multiple use including resource extraction... ." ¹⁸³ Thus, national parks are clearly intended to be parks at the end of the spectrum where preservation is utmost while other types of parks, such as provincial parks, accommodate multiple use. Yet fishing, shipping, pipelines and other intensive uses of national marine parks are contemplated¹⁸⁴ in all but the preservation zones (which may be periodically reclassified due to temporal zoning).

This returns us to the "chicken and egg" question raised much earlier: if marine parks truly cannot be established without eroding the primary goal of preservation, how can we expand our national parks system into the oceans in a way that achieves marine preservation? To begin to escape from this dilemma, we must first answer an underlying question. Did we, as much of the literature suggests, adopt conservation (not preservation) as our goal because ecological problems suggest this as the only possible choice – which then led us to look to a shared management regime amongst various government sectors? Or, alternatively, did interagency pressure coupled with public resistance suggest shared management as the only practical choice – which then caused us to adopt a conservation, rather than preservation, model?

Let us assume that the first of these scenarios is correct: ecological imperatives dictate that conservation is possible and preservation is not, and legal-political considerations then suggested conservation could be achieved most readily by shared management and multiple resource use. Assume we have reached the right answer when we chose to move away from the "end of the spectrum" with the most highly protected land, because the "natural imperatives" left us no alternative. What are the implications of this "choice"?

First, we may have more success in establishing national marine parks, but

¹⁸²Task Force on Park Establishment, *Our Parks – Vision for the 21st Century* (Ottawa: Environment Canada, 1987) at 4.

¹⁸³*Ibid.* [emphasis added].

¹⁸⁴It is interesting to note that the American marine sanctuary model, which has been influential in Canada, emphasizes site selection based on "resource and human use values." J. Epting, "National Marine Sanctuary Program: Balancing Resource Protection With Multiple Use" (1981) 18 *Houston L. Rev.* 1037 at 1040. Pressure from the offshore oil and gas industry has caused particular problems in emphasizing resource protection in American marine parks. *Ibid.* at 1048-54.

they may end being indistinguishable from provincial aquatic parks. Such parks (like Desolation Sound in British Columbia which has been described as a "recreational boating mecca")¹⁸⁵ are often heavily oriented toward intensive use. This may or may not be a desirable goal, but the choice should be explicit. The federal government should not be "selling" these parks as part of its commitment to environmental protection if they are to be exploited for intensive recreational use and tourist potential.

Second, and this is a concern repeatedly expressed by the public during reviews of the draft Marine Parks Policy,¹⁸⁶ we must be alert to the impact of incorporating multiple resource use policies into our national parks system. Are we introducing into that system a precedent for resource exploitation which could erode the preservation objectives of terrestrial national parks? Parks Canada has fought a long uphill battle to ensure that national parks finally become a bastion of preservation, not exploitation, and this could be the first step in a backslide to the historical roots of the parks as resorts.

Third, is the conservation policy as proposed adequate? The creation and regulation of national marine parks in Canada is in a state of flux; current policies are largely untested and the legislative framework is rudimentary. As a result, it is difficult to say with confidence whether the proposals for marine parks management are desirable. Yet an initial examination of the proposed regulatory regime leaves one with a number of troubling doubts. For example, one might question the feasibility of achieving conservation through continued resource harvesting when past experience (for example, in relation to whaling) reveals inadequacies in our management measures. If we are going to rely on ecology to justify our laws and policies, we must make sure those policies make ecological, not merely bureaucratic, sense.

Finally, we might question whether ecological imperatives truly lead to the need for interagency management and multiple resource use. Despite ecological differences between marine and terrestrial environments, there is nothing to suggest preservation would not work (within inherent biological constraints) just as well as conservation. In terrestrial parks, air quality and migratory birds are environmental components with similar transience to seawater and fish, yet we do not assume that single-agency management based on a preservation model is entirely futile.

Let us now assume that the alternative scenario is correct: administrative realities dictated that interagency management was the only pragmatic choice.

¹⁸⁵P. Dearden, "Desolation Sound Marine Park, British Columbia" in Lien & Graham, vol. 2, *supra*, note 3 at 157.

¹⁸⁶Mondor, *supra*, note 3 at 16.

This could, of course, be readily achieved by a multiple resource use scheme rather than the usual single-agency preservation model for parks. What are the implications here?

All of the above mentioned problems are, of course, still issues: concerns over intensive use, precedential impacts of the management model, adequacy of the proposed policies and the logic of the conclusion that multiple use and conservation flow, necessarily, from an interagency structure. What is different is how readily one might endorse the justification for such a model, if we are doing this for bureaucratic convenience rather than ecological necessity. Is interdepartmental conflict and public resistance really so insurmountable that we cannot preserve marine parks in the same way we preserve terrestrial parks? One is tempted to suggest that the federal government try harder.

What would be the implications of following the terrestrial parks model for marine parks management? First, parks areas would need to be federally owned to permit plenary legislative jurisdiction. This, in turn, would accomplish two goals. One, the shared management regime would be unnecessary as there would be no need to turn to federal legislation other than the *National Parks Act*, and single-agency management could occur. Two, provincial challenges to the *vires* of legislation governing environmental issues within marine parks would be precluded.¹⁸⁷ Parks establishment might be more difficult than under the proposed multiple use scheme; it is unlikely to be significantly more difficult than modern terrestrial parks establishment, however.

Second, under single-agency management it would seem possible to continue to try to use a preservation model. Resource harvesting could be eliminated, or at least regulated by an agency that has as its primary mandate parks preservation rather than, say, maintaining the economic viability of the fishing industry. While ecological realities dictate that migratory species and the water itself will not remain within park boundaries, like air in terrestrial parks, the park itself could be insulated from intensive use. Cooperative agreements with agencies outside the park boundaries to reduce detrimental activities will be necessary regardless of whether one is conserving or preserving the park itself.

Finally, and possibly of greatest benefit, one would be keeping all parts of our national parks system at the "end of the spectrum" where protection is utmost. This may be important both symbolically, and as a means of preserving the integrity of Parks Canada's operations. We should bear in mind the words of the

¹⁸⁷As an aside, it is worth noting that other enactments, such as the *Canada Shipping Act*, would still be in use outside marine park boundaries. For such "external" purposes, however, their inherent strengths and weaknesses remain consistent regardless of what management regime is chosen within the park.

World Commission on Environment and Development, which in 1987 emphasized the importance of preservation of species and their ecosystems, calling this an "indispensable prerequisite" for a sustainable future.¹⁸⁸ They called upon national governments to do the very best they can to save other species and their habitats. Canada is taking an important step toward that goal by beginning to implement a national marine parks system, but we need to continue to take a long hard look at whether our laws and policies are structured in a way which can best achieve this laudable goal.

¹⁸⁸W.C.E.D., *supra*, note 178 at 166.