Canada

Constitutional Impacts on Conservation
– Effects of Federalism on Biodiversity Protection –

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Introduction

The protection of biodiversity has become an important national and international issue within the past decade (see Noss and Cooperrider 1994 for a discussion of the reasons, which range from intrinsic to aesthetic). Canada, along with over 150 other countries, ratified the 1992 Convention on Biological Diversity (CBD 1992), and is obliged to implement the provisions of the convention through programmes, plans, and legislation to protect native biodiversity (Lyster 1985). Biodiversity conservation is multi-sectoral and interdisciplinary, encompassing, *inter alia*, protected areas, wildlife and habitat, species at risk and land use planning, and also has implications for agriculture, forestry and mining sectors. Because of this pervasiveness, an ecosystem (or 'whole picture') perspective will be required to protect biodiversity. Specifically, this includes the application of ecosystem-based management for the maintenance of ecological integrity (Agee and Johnson 1988; Grumbine 1990; Grumbine 1994). In Canada, for example, the concept of ecological integrity was included in the *National Parks Act* (R.S. 1985 Ch.N-14) in 1988 in a secondary capacity of park management, but was enshrined in policy (Parks Canada 1994) as the major priority in all management decisions. Subsequently, through the 2000 *National Parks Act* amendments, ecological integrity was given top priority, and now provides the legal mandate for Parks Canada to work towards this objective. Parks, however, represent a small percentage of the Canadian landscape, and the real challenge is to protect native biodiversity in other areas.

Numerous scientific studies have been undertaken in Canada, and globally, regarding the biological aspects of biodiversity conservation (see CBIN 2000). There is a variety of issues to consider regarding the conservation of biodiversity, e.g. habitat, population and community dynamics, invasive species etc. Here we focus on legislative and constitutional issues. We examined whether the federal government can implement fully the provisions of the CBD imposed on Canada by ratification of the convention. Specifically, we examined whether the constitutional division of powers, as set out in the Canadian constitution, and the operational system of environmental federalism (including federal-provincial relations) limit biodiversity conservation in Canada.

The first half of this article addresses the constitutional limitations on the federal government's ability to conserve at the national level: the second half addresses the capacity of existing federal legislation to conserve at the ecosystem level.

Constitutional Division of Powers Relating to Environment

The Constitution Act of 1982, and the various accompanying documents, establishes the federalist system of government and outlines the jurisdiction and responsibilities of the federal and provincial governments in Canada.

Provincial Powers

Section 92 of the Constitution outlines 16 areas in which the provinces may enact legislation. Section 92(5) has the greatest implications for land use planning and protected areas establishment. Under this section, the provinces are given legislative authority to manage and sell public lands belonging to them, including forestry resources. Section 92A outlines provincial authority over, *inter alia*, the 'development, conservation and management of non-renewable natural resources and forestry resources' (s.92A(1)(b)).

In addition to legislative authority, section 109 of the Constitution confers ownership rights to the provinces of all public lands, mines and minerals within their borders. Ownership of lands does not include ownership of wildlife, fish and waters according to the common law; however, ownership does give the provinces the authority to conserve resources (Harrison 1996:33).

Although the Constitution confers broad provincial jurisdiction over areas that affect the environment, there are constitutional limits to provincial power. For instance, throughout the 1982 constitutional amendment process, renewable resources were consciously excluded (Meekison and Romanow 1985:15). Also, provincial powers extend only to matters within the province, such that a province cannot enact legislation primarily to regulate activities that occur beyond its borders, even if such activities affect the environment within its borders (Harrison 1996:34). Matters of extraprovincial effect are the realm of federal government authority under s.92(10)(a). The provinces cannot officially legislate in areas that are of exclusive federal jurisdiction, but legislation would likely only be invalidated if its primary concern overlaps with a matter of federal jurisdiction (Harrison 1996:34). In the face of a challenge over conflicting overlapping legislation, the paramountcy doctrine dictates that the federal law prevails (Rutherford and Muldoon 1991). ➳

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Limits on Federal Powers

The legislative authority of the federal parliament is listed in section 91 of the Constitution. Contrary to the explicit jurisdictional powers conferred upon the provinces with respect to public lands and property, the Constitutional position regarding the federal government over environmental matters is unclear (Harrison 1995:418). The exclusive fisheries legislative authority is potentially the most far-reaching of the federal sectoral powers as it gives the federal government the power to control water pollution (Skogstad and Kopas 1992:45; Harrison 1995:419). Historically, the federal government has used this power for environmental objectives (Thompson 1980:24).

Section 91(1A) gives the federal government ownership over federal Crown property, which includes the legislative power over its resources. This ownership authority has implications for the conservation and protection of territorial lands and wildlife outside of areas that are subject to comprehensive land claim agreements. The amount of federal property within provincial borders is limited, but includes lands negotiated as part of the national park system as well as national wildlife refuges. However, federal authority over the land ends at the park boundary, and since National Parks are scattered around the country and represent a small percentage of the land base (2.6%), the federal government's proprietary powers, except in the territories (Yukon, Northwest and Nunavut), are not significant enough to provide a comprehensive basis for nationwide broad ecosystem protection.

The Federal General Power

Under s.91, federal parliament has the general power to make laws for the 'Peace, Order and good Government of Canada' (POGG), and the extent of this authority with respect to the environment is the subject of some debate (Harrison 1995:419; Morton 1996:45). Two doctrines have emerged in attempts to provide justification and interpretation for the appropriate application of the POGG power: national emergency and national concern (Harrison 1996:43; Morton 1996:45). In the face of a large-scale environmental emergency of national or international proportions, the federal government would have extensive, but only temporary, power to intervene into matters normally of exclusive provincial jurisdiction. The declaration of 'environmental emergency' would be in the hands of the courts, and it is unlikely that such a contingency would be a common occurrence (Harrison 1996:43). Where a matter has not been specifically named to either level of government, but is considered to be beyond local or provincial concern, the national concern doctrine could be used by the courts to justify the application of POGG (Harrison 1996:43).

The extensive proprietary authority granted to the provinces through the Constitution represents the main barrier to federal involvement in broad-scale environmental and conservation protection. Although the courts generally do not find in favour of federal legislative powers over provincial property powers, a few cases in the past two decades illustrate a potential relaxation in the judicial defense of provincial resources. (For example, *Friends of the Old Man River Society* v. *Canada* (Minister of Transport) 1991 and, *Canadian Wildlife Federation Inc.* v. *Minister of the Environment* 1991. Perhaps the most important constraint to federal environmental protection is the uncertainty of the limits of federal authority due to the indirect environmental powers conferred upon the federal government through the Constitution (Harrison 1995:420). It is due partly to this uncertainty that the federal government has taken a limited view of its jurisdiction.

Courtesy: CBD Secretariat

Responsibility and Implementation of International Conventions

Under the Constitution the federal government does not have unilateral power to implement international conventions through legislation. The passage of legislation is subject to the normal constitutional division of powers (Morton 1996:45). The Constitution deals with conventions in section 132. However, it only grants the federal government authority to enact legislation to implement treaties entered into with foreign nations by the British Empire on Canada's behalf (e.g. Migratory Birds Convention 1916, entered into between the USA and Canada, and the federal Migratory Birds Convention Act, 1994 SC 1994 c.22; first enacted in 1917). The section has not been updated since Canada became a sovereign nation. Despite lack of clarification in this area, the federal government has taken on the role of agreeing to numerous international environmental conventions, such as The Convention Concerning the Protection of the World Cultural and Natural Heritage; United Nations Convention on the Law of the Sea; The Convention on International Trade in Endangered Species of Wild Fauna and Flora; and The Convention on Wetlands of International Importance Especially as Waterfowl Habitat.

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However, the federal government can only enact legislation regarding those treaties where there is explicit federal jurisdiction. In many cases where jurisdiction is not exclusively the realm of the federal government, reliance on the provincial enactment and enforcement of relevant legislation is necessary for Canada to meet its obligations under a convention. This is the case regarding the 1992 CBD. Thus, one potential problem could be if a province refuses to cooperate with the federal government, particularly if it views enactment of such legislation as a possible threat or hindrance to economic development or other provincial objectives. Canada is an unusual case in this regard. In both Australia and the USA, the high courts have determined that the passage of domestic legislation for the implementation of a treaty is an acceptable jurisdictional 'intrusion' (Holland 1996:4).

There is growing speculation that the POGG power in Canada may have a role to play in conferring the necessary power on federal parliament to implement, via legislation, newer treaties of global environmental scope (Harrison 1996:38). For instance, the existence of an international treaty on a particular environmental matter may indicate that the issue is of 'national concern' (Harrison 1996:44). The national concern argument was supported in the case of the *Queen* v. *Crown Zellerbach Canada Limited* (1988) in which the federal government was granted pre-emptive authority over provincial jurisdiction to regulate the dumping of waste within provincial borders. It was argued that the province was in violation of the federal *Ocean Dumping Control Act* (1975) because the pollution caused by the company in question, although originating in provincially owned waters, had an extraprovincial effect (extending to federal coastal waters) and could not be resolved by governmental cooperation alone (MacLellan 1995:331-2).

Environmental Provisions lacking in the Constitution

Up to this point, the focus of this article has been on what is written in the Constitution, but it is also important to outline what is *not* written. The *Constitution Act* (1867, 1982) contains no mention of the term 'environment'. Because of this, jurisdiction regarding various matters of environmental concern is unclear, and often overlapping. The provincial government tends to defend and push jurisdiction over environmental issues, usually for economic reasons associated with control over the management of resources for exploitation (Harrison 1995:417). This assertion of provincial authority has rarely been contested by the federal government (Harrison 1996), and there have been few judicial challenges that examined the appropriateness of the jurisdictional division of power with respect to the environment.

It is doubtful that jurisdictional issues can be 'solved'. This is because environmental issues are ubiquitous and not considered a coherent subject in the constitutional sense (Harrison 1995:419). Issues span spatial and temporal scales, and environmental protection can have implications for multiple governmental agencies. Furthermore, strategies for reducing human impact extend beyond traditional social and scientific disciplines. Thus, amending the Constitution to grant jurisdiction over the environment to one or the other level of government would be impractical (Rutherford and Muldoon 1992). Even the practicality of allocating components of the 'environment' (e.g. air or water pollution, wildlife or habitat protection) to either level of government is uncertain because these components are inextricably linked (Rutherford and Muldoon 1992).

Environmental Federalism

The operational system of government in Canada regarding environmental matters has been described as a decentralized, cooperative federalism (Saunders 1985; Skogstad and Kopas 1992; Harrison 1996). This means that rather than the federal government actively asserting jurisdiction in areas that are not clearly defined by the Constitution, it normally takes a back seat role with respect to environmental regulation (Harrison 1996). This contributes to the decentralized power structure, with the provinces generally being able to decide when, or if, to regulate on matters of environmental concern. In certain situations in recent history, the federal government has pushed jurisdiction, and at these times, the traditional cooperative system has shifted to a type of competitive federalism, (described generally by Breton (1989)).

The pattern of federal involvement in environmental matters over the past three decades has occurred during two periods, termed 'green waves' (see Chapters 4, 5 and 6 of Harrison (1996)). The first occurred between 1969 and 1972, when public environmental awareness and interest in environmental issues grew nationally, and internationally, with respect to air and water pollution and depletion of natural resources. The federal government passed nine environmental statutes during this time (e.g. *Canada Water Act* 1970; *Amendments to Fisheries Act* 1970; *Clean Air Act* 1971) and created the Department of the Environment to administer them (Dwivedi 1974).

The federal government retreated from playing a larger role in the environment between 1973 and 1985. Public interest in environmental issues also subsided during this time. The balance of power shifted back to the provinces, and the federal government took advantage of overlapping jurisdiction and avoided regulation and enforcement of the controversial sections of its new environmental statutes (Harrison 1996:81). The federal government also backed down on its commitment to set national environmental standards, deferring to the provinces for the regulation of pollution control mechanisms (Harrison 1996:86).

The second period occurred between 1985 and 1995, and more diverse issues came to the fore, both globally (e.g. the ozone layer, global warming, tropical forest destruction), and locally (e.g. preservation of wilderness areas, the importance of waste disposal and recycling) (Skogstad 1996:103). Again during this time, public interest in environmental issues increased. In response to public concern, both levels of government passed new environmental legislation. The centrepiece of the federal initiative was the passage of the *Canadian Environmental Protection Act* in 1988 (CEPA; amended in 1999, c.33). The federal government asserted that control of toxic sub-

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stances was an area of 'national concern', and thus used the POGG power to justify jurisdictional limits (Harrison 1996:130). It also passed the *Canadian Environmental Assessment Act* (CEAA; 1992 c.37, proclaimed in January 1995) during this time.

The federal pattern of government on environmental matters includes proposing national guidelines, overseeing federal-provincial consultation and bargaining to define national regulatory standards, and then seeking provincial cooperation in enforcing the agreed-upon standards (Skogstad and Kopas 1992:43-4; MacLellan 1995:324). In general, the federal government maintains a weak role in the environmental field (Harrison 1995:415). This may be attributed to: 1) uncertain constitutional jurisdiction and overlapping jurisdiction (Dwivedi 1974); 2) the federal government taking a limited view of its own powers regarding environmental issues due to provincial resistance (Muldoon and Valiante 1988; Saunders 1988); 3) preference to avoid coercive regulation in the provinces that may be perceived as placing environmental quality over economic development (MacLellan 1995:324); 4) an underlying belief that economic development and environmental protection cannot be achieved simultaneously, and that resource development should take priority (Skogstad and Kopas 1992:44); and, 5) the facilitation of intergovernmental consultation through numerous cooperative mechanisms (Skogstad and Kopas 1992:43/4). That the federal government normally takes a narrow view of its jurisdiction, conceding to the provinces in environmental issues (Harrison 1996:19), is an impediment to the federal government implementing not only its environmental statutes, but also its commitments under international treaties, such as CBD, where jurisdiction is overlapping.

The traditional pattern of cooperative federalism in environmental matters presented above has been characterized by intergovernmental agreements, negotiations behind closed doors generally without public consultation (MacLellan 1995:326), and relative harmony between the two levels of government. During the second green wave the general public and environmentalists, alike, widely supported a greater federal role in environmental matters (MacLellan 1995:329; Harrison 1996:120,140,153) because of Canada's weak enforcement history with regard to environmental regulations (Skogstad and Kopas 1992:50).

Intergovernmental Relations

Federal-provincial relations have a significant role to play in the federal government's ability or willingness to implement environmental conservation initiatives where jurisdictional limits are unclear. Because of the ubiquitous nature of 'environment', jurisdictional authority is rarely, if ever, strictly the responsibility of one level of government. Programmes or strategies to implement an international environmental convention (e.g. CBD) often require the cooperation of multiple agencies at both levels of government. If the provinces feel pushed by the federal government, relations may become tense, and obtaining cooperation from provincial governments may prove difficult. On the other hand, if the federal government concedes too much to the provinces to achieve or maintain harmony, this can lead to uncoordinated legislation and varied policy and regulatory responses across the system (MacLellan 1995:325).

Recently, in light of the Rafferty–Alameda, Oldman Dam, and Zellerbach cases, which have ruled in favour of increased federal involvement in what the provinces view as provincial matters, and because of public demand for a greater federal role in environmental matters, the federal government has taken a slightly broader view of its jurisdiction. This has challenged the traditional, closed process of cooperative federalism, leading to a type of competitive federalism (MacLellan 1995:336; Skogstad and Kopas 1992:54) as both levels of government try to obtain public support through policy and legislative action.

The Role of Cooperative Agreements and Interministerial Councils

There are over 400 formal federal-provincial agreements, and hundreds of informal agreements on environmental issues (Skogstad and Kopas 1992:47). However, none of these is legally binding upon either level of government. Two cooperative initiatives deserving of special mention are the 1990 Statement of Interjurisdictional Cooperation on Environmental Matters (STOIC) and the 1998 Canada-Wide Accord on Environmental Harmonization. STOIC was an initiative of the Canadian Council of Ministers of the Environment (CCME – discussed below) in response to provincial concerns over the *Canadian Environmental Protection Act* (Harrison 1995:430). STOIC, which was supported by all the provinces, commits governments to information sharing, timely consultation, and harmonization of environmental standards (Harrison 1996:143). It also states that concurrency over the environment exists in that both levels of government have legislative and constitutional authority to regulate in environmental matters (Harrison 1996:143). Some feel that provincial support was unanimous in an attempt to immobilize the federal government with consultations and broad commitments to harmonize so that the possibility of federal unilateralism with respect to pollution control and the environmental assessment process could be reduced (Gardner 1994:15; Harrison 1995:430). Regardless, the statement could be more of a provincial defence than a tool for cooperation, and illustrates that the results of cooperative agreements are not always consistent with the written intent.

Similar concerns have been raised regarding the Canada-wide Accord, which was ratified by all provinces (except Quebec) and the territories. It was developed with the stated goal of enhancing environmental protection by increasing intergovernmental coordination, clarifying and redefining federal and provincial roles, and eliminating overlap and duplication regarding environmental issues (Harrison 2000). However, during the agreement negotiations environmental groups were in strong opposition because they felt it would further weaken the federal role in environmental protection (Harrison 2000).

Numerous interministerial councils have been set up to deal with federal-provincial consultations and mecha-

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nisms of cooperation. The CCME is the main vehicle of intergovernmental cooperation in environmental matters, acting as a body to provide advice on policies, programmes, and agreements, and a forum for consultation, bargaining, and information sharing (Skogstad 1996:116). The council has been important in increasing interactions and reducing tensions between the two levels of government (MacLellan 1995): however, actual policy outputs to increase environmental protection have been disappointing (VanNijnatten 2000).

The Extent of the Federal Role in Environmental Matters

The previous section outlined the federal role in environmental issues over the past three decades, and alluded that a greater federal role would be desirable in Canadian environmental policy. There are various arguments to support this position.

First, the provinces generally regard the use of natural resources, to generate revenue, as more important than environmental protection (Harrison 1996:19). Second, in the international arena, the federal government is held more accountable for the ratification of conventions than the provinces, and thus should have greater legal control over implementation. Third, the public would like to see federal government playing a greater role in environmental matters (Hoberg and Harrison 1994:122; Harrison 1996:120). Fourth, the implementation of strategies and plans can be more effective if there is a national standard or objective in place, which can then be complemented by regional and local efforts through provincial policy and legislative commitment. Finally, an increased federal role could increase the level of competitive federalism, which is thought to increase the creativity and diversity of policy initiatives (Dwivedi and Woodrow 1989:275-6; Painter 1991:270). Policy creativity could occur because competitive federalism results in a more open process than traditional cooperative federalism, and can increase the degree of public involvement and consultation.

Grizzly,
Jasper National Park, Canada Courtesy: Ursula Krug for EH Foundation

The federal and provincial governments extended considerable effort to cooperate and redefine roles regarding environmental matters in the 1990s (e.g. CCME, STOIC, the Canada-wide Accord) (Harrison 2000). This means that the federal government has maintained a back seat role in regulation and enforcement. However, the federal government is now actively seeking the views of environmentalists and interest groups along with industrial and resource developers on environmental issues (Skogstad 1996:119). Thus, a greater plurality of interests is gaining access to environmental policy decision-making in Canada, which may contribute to increased policy creativity and diversity.

Approach to Land Use Planning and Protected Areas

To evaluate whether the constitutional make-up and resultant system of federalism limits the federal government's ability to protect biodiversity, the commitments made in the national biodiversity strategy are examined, and an overview of federal implementation of the objectives listed in the strategy is presented. Constraints on the federal government are also identified.

The Canadian Response to the CBD

With support from the provincial and territorial governments, the federal government ratified the convention in December 1992, and is committed to implementing the articles of the CBD. Article 6(a) of the CBD states that each Party (i.e. country that has ratified the CBD) must develop a national strategy for the protection of biodiversity. Ratification has implications for not only the federal government, but also the provincial governments, because the vast majority of native species and their habitats come under provincial jurisdiction. Federal–provincial sensitivities and potential for conflict over jurisdiction explain why the federal government sought provincial endorsement before ratifying the CBD. This also explains why development of the Canadian Biodiversity Strategy (CBS) (Environment Canada 1995) took place through a specially commissioned working group, which included ministers from parks, environment, wildlife and forestry, and was advised by a multi-stakeholder advisory group (Environment Canada 1995:10).

During this process, a few sound principles were developed and included in the CBS, such as the need to adopt an integrated ecosystem-based approach to planning and management (21,60-1), and a need to increase the capacity for the public and interest groups to participate in implementation activities. Nevertheless, there are two main concerns with the CBS.

First, there is no legal component (i.e. an act with regulations) to the CBS, and thus there is no instrument to compel action. Two out of the five goals listed could be interpreted as action goals, while the other three pertain to research, cooperation and education (see Table 1). Both research *and* action, e.g. through regulation, are important components of a conservation strategy. Also, the strategic directions of the two action-oriented goals do not actually commit the governments to any specific legislative or policy initiatives. Certain objectives are outlined (e.g. reconnection of fragmented ecosystems (1.5), completion of protected areas network by 2000 (1.13), review

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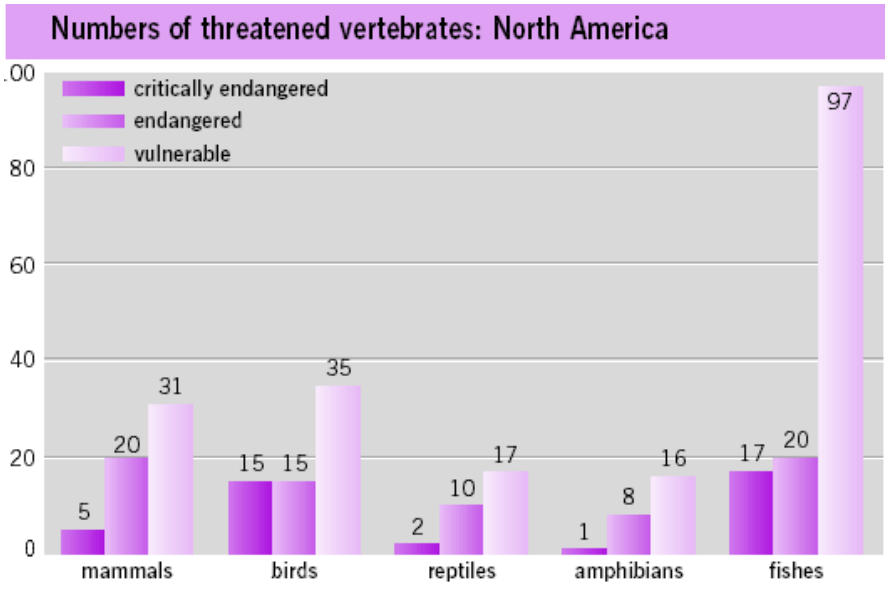
of species at risk legislation (1.21)), but the tone is discretionary, and mechanisms to implement these objectives are not specified.

Second, responsibility for protection has largely been deferred to the provinces, and is discretionary. The CBS states that 'provincial, territorial, and federal governments, in cooperation with stakeholders and members of the public, will pursue the implementation of the strategic directions contained in the Strategy in accordance with their initiatives and specific needs under the CBS. There is also no definitive requirement for ongoing jurisdictional reporting and no mechanism for synthesizing the information into an informative national report to the COP.

Second, the federal government has not devised an implementation plan for biodiversity protection, under which the CBS could be coordinated and accountability increased. The BCO states that it will produce a document aimed at compiling the information from each department's action plan, once these have been completed. However, the Commissioner felt that this would not constitute an implementation plan unless it also included time frames, resources to be allocated, and performance indicators (Com. Env. and Sust. Dev. 1998:4.24).

Note: critically endangered (extremely high risk of extinction in immediate future); endangered (very high risk of extinction in near future); vulnerable (high risk of extinction in medium-term future)

The data include all globally threatened vertebrate species with country records in the UNEP-WCMC database (UNEPWCMC 2001a). Marine species recorded by ocean area are not included



Courtesy: GEO 3

policies, plans, priorities, and fiscal capabilities' (Environment Canada 1995:2). Thus, governments were not given guidance on how to protect biodiversity, and there is no system of interjurisdictional coordination or accountability. Such potential for inconsistency across the provinces and territories of Canada may not enhance the case of the conservation of biodiversity, as wildlife and ecosystems do not obey jurisdictional boundaries (Sierra Club of Canada 1996a).

The 1998 Report of the Commissioner of the Environment and Sustainable Development provided a critique of federal implementation efforts regarding the CBS. The Commissioner determined that even though implementation of the CBS is still in its early stages, progress has been slow and deadlines have been missed. Several shortcomings were identified.

First, the national report to the Conference of the Parties (COP), prepared by the Biodiversity Convention Office (BCO) branch of Environment Canada (BCO 1998a), failed to include many elements identified in the COP reporting guidelines (Com. Env. and Sust. Dev. 1998:4.20). The Annex to the report (BCO 1998b) lists various initiatives that have been undertaken in each jurisdiction, but many of these are sectoral and/or previously ongoing programmes that appear to be incidental to the objectives of the CBS. There are few direct links made between these

Third, interjurisdictional coordination efforts are unfocused. There are few opportunities for high-level discussions of biodiversity issues among jurisdictions, and this is an impediment to developing and maintaining momentum towards the objectives of the CBS (Com. Env. and Sust. Dev. 1998:4.28).

In addition to the shortcomings outlined above, and the implementation issues exposed by the Commissioner's report, we have identified several other limitations of the CBS that could have implications for its 'action' components. For example, the CBS stated that there are many mechanisms already in place for the protection of biodiversity, including, *inter alia*, sustainable development strategies, sectoral policies and programmes, and round table processes, but that others 'to more specifically address the provisions of this Strategy will be brought onstream according to the policies, priorities, constraints and needs of each jurisdiction' (Environment Canada 1995:77). This statement is discretionary, and does not require that jurisdictions devise a process to identify the gaps in protection. Also, the statement represents a flaw in the CBS

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because those jurisdictions that have not fully 'bought in' to the principles of the CBS may use the options provided to avoid taking action. Also, there is no requirement for the establishment of an overall central accountability mechanism, e.g. a piece of overarching legislation that commits each jurisdiction to the principles of the CBD as well as the CBS. Finally, the CBS fails to require the development of a comprehensive long-term land use strategy in each jurisdiction. The CBS suggested using land use planning to identify and establish protected areas (2.17), but does not require jurisdictions to develop comprehensive land use strategies. This is significant, because it has been recognized that comprehensive land use planning is an essential component to effective protected areas planning, and ecosystem biodiversity protection (Franklin 1993; Grumbine 1990; Holdgate 1994; Phillips 1998; Winter 1994). The CBS itself states that 'protected areas alone cannot protect biodiversity' (Environment Canada 1995:26). It is also significant that there is no mechanism suggested to ensure the establishment of connected, ecologically viable, networks of protected areas across the country through coordination and collaboration among jurisdictions. Strategic direction 1.5 suggests reconnecting fragmented ecosystems, through corridors and other means, but there is no explicit, complementary, suggestion to strive to prevent fragments in the landscape in the first place – something that integrated land use planning could address. In this regard, the CBS is reactive rather than proactive.

Establishment of Protected Areas

Goal 1B of the CBS commits jurisdictions to 'make every effort to complete Canada's networks of protected areas representative of Canada's land-based natural regions by the year 2000' (Environment Canada 1995:1.13). This is one of the more innocuous goals from a provincial perspective because every jurisdiction, at least to some degree, already had a protected areas programme in place well before the release of the CBS in 1995. In fact, in 1992, the chairs of the Canadian Parks Ministers' Council (a.k.a Federal-Provincial Parks Council, or FPPC), Wildlife Ministers' Council of Canada, and Canadian Council of Ministers of the Environment signed the 'Statement of Commitment to Complete Canada's Networks of Protected Areas'. In the Statement, the tri-councils committed, on behalf of each jurisdiction, to a statement identical to the one presented in the CBS, noted above, and also agreed to adopt frameworks and strategies to work towards achieving the goals. The Statement was criticized by the Commissioner of the Environment and Sustainable Development (2000:Ch.7) because it allowed councils to set agendas according to their own timetables, and the councils did not commit to a particular target (e.g. protecting a certain percentage of the land area). Also, the Statement did not identify a mechanism for the monitoring and reporting of each jurisdiction's progress towards implementation.

Effective implementation has been recognized as an ongoing problem at both levels of government (Sierra Club of Canada 1996b, 97, 98, 99, 2000; Com. Env. and Sust. Dev. 1998). The federal government has made significant commitments towards increasing the integrity of the National Park system (e.g. adoption of ecological integrity in policy and law, commissioning of the Federal Panel on the Ecological Integrity of Canada's National Parks), and has committed to completing the system of National Parks. However, progress toward the latter goal has been slow (Auditor General of Canada 1996:ch.31; Lowry 1999:341). The main reason can be attributed to the impact of the Canadian federalist system (Lowry 1999:341). Parks Canada acknowledges this impediment to the expansion of the national park system by stating that extensive provincial negotiations are required to resolve jurisdictional conflicts and land use issues, and that this process is very slow and time-consuming (Parks Canada 1997:10). The process is also complex, such that for successful negotiation, Parks Canada is often forced to agree to compromises (e.g. in development, boundaries, and degree of visitation (Lowry 1999:342)) that may ultimately compromise the ecological integrity of the 'protected' area. Cost is also a significant factor, and land costs are increasing in many areas especially where a federal presence is not particularly desired (Lowry 1999:342).

Through the *National Parks Act* the federal government has the jurisdiction to develop and amend legislation, management and conservation plans for existing National Parks, develop departmental policy, and negotiate with the provinces to expand the national park system. The federal government has no explicit jurisdiction to legislate or regulate on issues outside park boundaries that may affect the ecological integrity of the park, and there are currently no judicial precedents in this area. In addition, however laudable the efforts by the federal government may be, National Parks alone will be unlikely to successfully create an ecologically viable network of protected areas, simply because the federal government will not be able to gain ownership over a sufficient amount of Canada's land base within provincial borders. With the National Parks currently making up only 2.6% of the land base, the cooperation of the provinces is necessary to protect a large enough land base to contribute to ecosystem and species biodiversity protection (Noss 1996). It has not been scientifically determined how much protected land would be sufficient in the Canadian context, but it *is* known that most individual parks are not even expansive enough to protect large carnivore species over the long term (Landry *et al.* 2001).

It is important to note that neither the 1992 Statement of Commitment, nor the CBS, makes an explicit commitment for jurisdictions to work together to meet the objectives of the CBD and ensure a coordinated effort across the system. This is despite the fact that coordination is an essential step to establishing an effective *network* of protected areas, rather than just a collection of protected areas.

Nevertheless, there are mechanisms in place to bolster cooperation. For example, the parks ministers from each jurisdiction have come together to form the Federal Pro-

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vincial Parks Council (FPPC). The FPPC was formed as a result of the 1961 Resources for Tomorrow conference in response to a recognized need for improved cooperation among governmental park agencies. The mission of the council is to 'provide a Canada-wide focus for coordinated intergovernmental leadership and action on park issues, for the exchange of technical information and know-how and for the joint development and support of parks initiatives and programmes' (FPPC 2000). A cursory examination of the activities of the FPPC revealed that most of their products and reports, at least recently, are of an informational nature. This was based on information on their 1997/98 Report and the FPPC Administration Manual. Public access to information and reports of the FPPC is limited as they are not catalogued or displayed in an office or library, and not available via their website. The FPPC does not appear to have taken a role in assisting in the development of a system-wide action plan for establishing protected areas, nor is there evidence that it plays a role in federal-provincial negotiations for new National Parks. While information-sharing among jurisdictions is helpful so that each jurisdiction is kept up to date with the other's activities, successes and limitations, it does not encourage action. There does not appear to be a forum for the synthesis of this information so that it might be used to increase collaborative and consistent policy-making and programming.

Discussion

A major constraint on federal action in biodiversity protection is the constitutional division of powers. Because of the importance the provinces place on autonomy over policy-making, they are sensitive to assertions of power from the federal government that could have an effect on provincial lands or undertakings. The federal government generally takes a back seat to environmental regulation, and in doing so avoids situations of federal-provincial conflict.

A general characteristic of the Canadian environmental protection process, unlike the US system, is that there have been few judicial challenges (Harrison 1995:420; Harrison 1996:102). However, as environmental groups become more mobilized with respect to biodiversity issues, and gain greater access to the judicial process, the courts could also have a larger role to play in interpreting government roles. This was evident to a certain extent between 1985 and 1995 as environmentalists used the court system to work towards their objectives (Skogstad and Kopas 1992:51; MacLellan 1995:329), and this served to push a tentative federal government to action. The inclusion of an environmental bill of rights to the Constitution, similar to the Charter of Rights and Freedoms, could also serve to increase the role of the courts in environmental decision-making by providing a clearer basis for judicial interpretation (Rutherford and Muldoon 1992). The addition of an environmental bill of rights is not an innovative suggestion. Globally, more than 18 countries have entrenched environmental rights in their constitutions, and of those constitutions amended since 1975 Canada appears to be the only one to have omitted an environmental component (Rutherford and Muldoon 1992:29). However, the political climate and state of intergovernmental affairs in Canada is not currently conducive to constitutional reform, and because of the complexities of the reform process there has been speculation that constitutional amendment may not even be possible in Canada (Van Nijnatten 2000).

The power to implement international conventions is not an explicitly stated constitutional power of the federal government, but there is growing speculation that the federal POGG power, through the national concern doctrine, could be used to justify federal legislative authority in implementing conventions. However, it has not been tested in Canadian courts whether biodiversity conservation would qualify as an issue of national concern. Biodiversity is considered an area of national concern in Australia, and is legislated at the federal level through the *Environment Protection and Biodiversity Conservation Act* (1999).

Courtesy: CBD Secretariat

Implementation of the CBS thus far has been deficient in all jurisdictions, and there is no built-in accountability mechanism. Federal level legislation (such as a hypothetical Biodiversity Convention Act) committing jurisdictions to monitoring and reporting of biodiversity initiatives consistent with the articles of the CBD and the principles of the CBS would be useful. In such an act, a requirement for a national level State of Biodiversity Report (similar to the State of the Environment and State of the Parks reporting) to be tabled in Parliament at appropriate intervals could increase accountability nationally, and also internationally.

Integrated landscape planning, which is important for

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the establishment of an ecologically viable network of protected areas, as well as biodiversity protection outside of protected areas, is inadequately dealt with in the CBD and the CBS. The development of comprehensive, long-term land use strategies, through public consultation processes, could enhance protection. However, creating provincial buy-in on this concept could be a potential problem in Canada because the provinces do not tend to commit to policies that could have an impact on the scope of present and future land and resource use decisions.

Given the constraints on the federal government's obtaining judicial or constitutional clarity for the conservation of biodiversity, and the limited view it has taken in its own role in the implementation of the CBS, advocating for increased collaboration with the provinces for the protection of biodiversity is the most realistic approach. However, the closed, traditional system of cooperative federalism, where the federal government takes a back seat role in environmental protection to maintain harmony with the provinces, is unlikely to be the answer. It appears that a certain amount of competition is necessary, because if the federal capacity for unilateral action, or threat of this, is taken away, then the federal government could become powerless to promote environmental conservation policies (Painter 1991:288).

Evidence of competition, and the preparedness of the federal government to act unilaterally on an issue, surfaced in the nationwide ban on the use of toxic lead shot in waterfowl hunting, implemented by Environment Canada under the Migratory Birds Convention Act. This ban was due to be implemented in 1995, but was delayed until 1999 due to opposition from some western provinces, which contended that lead-induced mortality was not substantial within their provinces. The federal government prevailed, resulting in a ban that applies to all regions and people (Canada Gazette 1997).

If a balance can be reached between cooperation and competition, the capacity to initiate creative policies and provide for enforcement and public involvement could be enhanced (Skogstad and Kopas 1992:56).

A recognized way for government to respond to public concerns and create acceptable policies is through multi-stakeholder forums (MacLellan 1995:339), provided that these are substantive, not merely symbolic. The work of interministerial councils could represent a mechanism for creating jurisdictional buy-in for biodiversity protection. However, statements of commitment have tended to remain symbols of cooperation, rather than instigating coordinated action, and this represents a significant barrier to environmental protection (Skogstad 1996:125). A broader definition of 'environment' would be beneficial to improve interagency coordination. The familiar concept of 'environmental policy', which leads to the sectoral demarcation of policy concerns (and is usually equated with pollution control), will need to be abandoned in favour of an 'ecosystem-based policy' approach that encompasses broad and integrated concepts, and recognizes the pervasiveness and interconnected nature of environmental concerns.

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