Oil and Gas Development in the British Columbia Offshore: Does Canada's Integrated Coastal and Oceans Management Strategy Provide a Framework for Resolving Contentious Ocean Use Issues?

by

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Abstract

This thesis explores the legal and political contexts in which offshore oil and gas (OOG) decisions in British Columbia's Queen Charlotte Basin (Basin) are being made and situates these decisions within Canada's integrated coastal and oceans management (ICOM) strategy. The geography, ecology and current ocean uses of the Basin are reviewed and environmental impacts of OOG considered. The federal-provincial jurisdictional and ownership complexities and issues of aboriginal rights and title are then reviewed. Canada's efforts to implement ICOM through the *Oceans Act* and subsequent policies are assessed, as compared to the U.S. model and in light of international principles. Core ICOM principles of sustainability, integration, precaution and transparency are specifically reviewed. While Canada's oceans strategy is consistent with internationally-accepted principles, it falls short of a true ICOM regime and is not sufficiently developed to resolve the OOG debate. Nonetheless, OOG decisions can and should be guided by its principles.

Examiners:

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Dr. Jeremy Wilson, Co-supervisor (Department of Political Science)

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List of Acronyms, Abbreviations & References

Aarhus Convention	UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)
Aarhus Handbook	Public Participation in Making Local Environmental Decisions: The Aarhus Convention Newcastle Workshop Good Practice Handbook (2000)
Aarhus Standards	Aarhus Convention requirements and the Aarhus Handbook good practices for public participation
Agenda 21	Agenda 21: Programme of Action for Sustainable Development (1992)
AGRA Report	Review of Offshore Development Technologies (1998)
Auditor General Report	Report of the Commission of the Environment and Sustainable Development 2005
Basin	Queen Charlotte Basin
B.C.	Province of British Columbia
B.C. Submission	The Province of British Columbia's Perspective on the Federal Moratorium on Oil and Gas Activities, Offshore British Columbia (submitted to the Public Review of the Federal Moratorium on Oil and Gas Activities 2004)
Brooks Report	Rights, Risks and Respect: A First Nations Perspective on the Lifting of the Federal Moratorium on Offshore Oil and Gas Exploration in the Queen Charlotte Basin of British Columbia (2004)
BCEAA	B.C. *Environmental Assessment Act*
CEAA	*Canadian Environmental Protection Act*
CMA	coastal management area
CZMA	*Coastal Zone Management Act* (U.S.)

Consultation Policy	Provincial Policy for Consultations with First Nations (2002)
DFO	Department of Fisheries and Oceans (Canada)
East Coast	east coast of Canada
EEZ	exclusive economic zone
federal government	Canada's federal government
FNEP	First Nations Engagement Process
Haida Gwaii	aboriginal name for the Queen Charlotte region
IM Policy	Policy and Operational Framework for Integrated Management under the *Oceans Act*
IMP	integrated management plan
ICOM	integrated coastal and oceans management
LOMA	large ocean management area
MLA Task Force	B.C. Offshore Oil and Gas Task Force
MLA Task Force Report	British Columbia Report of the Offshore Oil and Gas Task Force (2002)
MOU	Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada, between Canada and British Columbia
Noordwijk Guidelines	*Guidelines for Integrated Coastal Zone Management* (The World Bank, 1996)
Ocean Blueprint	An Ocean Blueprint for the 21st Century: Final Report of the U.S. Commission on Ocean Policy 2004
Oceans Action Plan	Canada's Oceans Action Plan under the *Oceans Act*
Oceans Policies	collectively, the Oceans Strategy, IM Policy and Oceans Action Plan
Oceans Strategy	Canada's Oceans Strategy under the *Oceans Act*

OAP	U.S. Ocean Action Plan
OOG	offshore oil and gas
OOGD	offshore oil and gas development
OCS	outer continental shelf
OCSLA	*Outer Continental Shelf Lands Act* (U.S.)
Pew Commission Report	America's Living Oceans: Charting a Course for Sea Change, A Report to the Nation (2004)
Priddle Panel	Federal Public Review Panel
Priddle Report	Report of the Public Review Panel on the Government of Canada Moratorium on Offshore Oil and Gas Activities in the Queen Charlotte Region British Columbia (2004)
Province	Province of British Columbia, including reference to its government
provincial government	Province of British Columbia government
RSC Report	Report of the Expert Panel on Science Issues Related to Oil and Gas Activities, Offshore British Columbia (2004)
Rio Declaration	The Rio Declaration on Environment and Development (1992)
Stratton Report	Our Nation and the Sea, Report of the Stratton Commission (1969)
Strong Panel	B.C. Scientific Review Panel
Strong Report	British Columbia Offshore Hydrocarbon Development: Report of the Scientific Review Panel: A Report In Two Volumes (2002)
UNBC	University of Northern British Columbia
UNBC Report	A Review of the State of Knowledge of Marine and Shoreline Areas in the Queen Charlotte Basin (2004)

UNCLOS III	Third United Nations Conference on the Law of the Sea (1982)
UNCED	United Nations Conference on Environment and Development (1992)
U.S.	United States of America
U.S. Commission	U.S. Commission on Ocean Policy established by the *Oceans Act of 2000*
WCC Report	Preparing to Meet the Coastal Challenges of the 21st Century: Report of the World Coast Conference 1993
West Coast	west coast of Canada
Wingspread Declaration	Wingspread Statement on the Precautionary Principle

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Chapter 1

1.1 Introduction

The last five years have witnessed renewed business, community and political interest in pursuing offshore oil and gas development[1] in the waters of coastal British Columbia. As coastal communities experience economic decline through resource depletion and industry closures, they seek economic development potential in new sectors.[2] The need for economic diversification away from traditional resource sectors has pressured the Province to look for new opportunities and the potential revenues from OOGD could be significant to both the local and provincial economies.[3]

Evidence of oil and gas potential in the Queen Charlotte Basin[4] was first discovered in the early 1960s and some exploratory activities were undertaken at that time. Exploration abruptly ended in 1972 when the federal government imposed an indefinite moratorium on OOGD on the West Coast, a moratorium that was later matched by a provincial moratorium. Attempts by the Province to have the moratoria lifted have to date been unsuccessful.

The current provincial government supports and is pursuing OOGD because, in its view, "the potential public benefits from an offshore oil and gas industry are too great to

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[1] Hereinafter referred to as OOGD. Offshore oil and gas hereinafter referred to as OOG.

[2] In 1997, individuals from north coastal communities formed the North Coast Oil and Gas Taskforce with a view to building local industry, stakeholder and government support for lifting the moratoria. See online: <http://www.supplyline.com/ftpgstorMar01.asp> for an overview of the Taskforce's work.

[3] See British Columbia, *The Province of British Columbia's Perspective on the Federal Moratorium on Oil and Gas Activities, Offshore British Columbia,* submitted to the Public Review of the Federal Moratorium on Oil and Gas Activities (Victoria: Province of British Columbia, April 15, 2004) at 9-10 [hereinafter B.C. Submission]. This submission states that coastal economies are suffering from downturns in resource sectors such as forestry and fishing and that new economic drivers are needed to secure the long-term economic future of the coast.

[4] Queen Charlotte Basin hereinafter referred to as the Basin. There are three other basins that may have petroleum potential in the British Columbia offshore: the Winona, Tofino and Georgia Basins.

ignore."[5] The Province believes that supply and demand forecasts indicate a clear need for new oil and gas resources, despite the likely growth in clean energy. It also believes that revenues could fund vital public services and bring significant benefits in terms of jobs, business investment and development and improved local infrastructure.[6]

On the other end of the spectrum are conservation groups, many of which have expressed their unreserved opposition to OOGD on the West Coast. These include the Sierra Club of Canada (B.C. Chapter),[7] the Living Oceans Society,[8] the David Suzuki Foundation,[9] the Western Canada Wilderness Committee[10] and Greenpeace Canada.[11] In addition, over 110 conservation, labour and First Nations groups have come together, through the Oil Free Coast Alliance, with more than 1000 individuals to pledge their

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[5] See B.C. Submission, *supra* note 3 at 1. The land-based oil and gas industry in B.C. is an important economic contributor, with revenues exceeding $1.8 billion in 2001. In 1999, approximately 14,500 people were directly employed by the industry. See British Columbia, *British Columbia Offshore Hydrocarbon Development: Report of the Scientific Review Panel: A Report In Two Volumes* (Volume I: British Columbia Offshore Hydrocarbon Development; Volume II: Appendices to the Report of the Scientific Review Panel) by David Strong et al. (Victoria: Ministry of Energy and Mines, January 15, 2002) at 2 [hereinafter Strong Report], online: <http://www.offshoreoilandgas.gov.bc.ca/reports/scientific-review-panel/>. The scientific review panel hereinafter referred to as the Strong Panel.

[6] *Ibid.*

[7] The Sierra Club of Canada is a non-profit organization with a mandate that includes "to practice and promote the responsible use of the earth's ecosystems and resources." See online: <http://www.sierraclub.ca/bc/programs/marine/issue.shtml?x=550&als[URL_ITEM]=24ad1fd0ec90a1265449091eeba17b55>.

[8] The Living Oceans Society is a "non-profit research and public education organization that promotes the need for a healthy ocean and healthy communities on Canada's Pacific Coast." See online: <http://www.livingoceans.org/index.shtml>.

[9] The David Suzuki Foundation is a non-profit organization that works to "find ways for society to live in balance with the natural world that sustains us" and focuses on four program areas, including oceans and sustainable fishing. See online: <http://www.davidsuzuki.org/Oceans/CoastalOil/background.asp>.

[10] The Western Wilderness Committee is a non-profit organization with a "mission to research, publish, and distribute information about threatened Canadian wilderness and wildlife in order to build broad public support for their preservation." See online: <http://www.wildernesscommitteevictoria.org/campaigns_oil.php>.

[11] Greenpeace a non-profit organization that that works to protect the environment "by negotiating solutions, conducting scientific research, introducing clean alternatives, carrying out peaceful acts of civil disobedience and educating and engaging the public." Greenpeace is demanding a legislated ban on OOGD. See online: Greenpeace Canada, <http://www.greenpeace.ca/e/campaign/climate_energy/depth/oog/ban.php>.

support for maintaining the moratoria.[12] These organizations oppose all OOGD in the West Coast offshore primarily because of their concerns that it would threaten the health of ocean and coastal ecosystems.[13] Other reasons include a belief that the local and provincial economic benefits would be modest, that Canada must look for alternate energy sources and comply with its Kyoto obligations[14] and that fisheries, aboriginal practices and tourism would be harmed.[15] Conservation groups are also concerned that existing regulatory regimes are inadequate to protect the coastal and oceans areas from the potentially devastating impacts of OOGD, leaving the moratoria as the only protective mechanism.[16] For these groups, there is no compromise: no OOG activities should be allowed, not even exploration.

The renewed interest in lifting the moratoria on West Coast OOGD provides a lens through which to consider the current state of oceans governance in British Columbia. If public response to lifting the moratoria is any indication, a decision to allow OOGD in a unique, diverse and arguably fragile ecosystem is one that cannot be undertaken lightly. While the pressures that bear upon government on both sides of this issue can be readily identified, a determination of the appropriate decision making processes is more elusive. The OOG debate raises crucial questions about how ocean use

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[12] The Oil Free Coast Alliance was formed in 1999 with a mandate to ensure that the West Coast moratoria on OOGD remain in place [hereinafter Alliance]. The Alliance believes that any OOG activities would harm the ocean and coastal ecosystems and would negatively impact on fisheries and tourism. See online: Oil Free Coast Alliance, <http://ofc.domain7.com/index.html>.

[13] *Ibid.*

[14] See United Nations, *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (Kyoto: December 11, 1997), online: <http://unfccc.int/essential_background/kyoto_protocol/background/items/1351.php>.

[15] *Ibid.* See also the David Suzuki Foundation, *supra* note 9.

[16] See David Suzuki Foundation, *ibid.* It believes the moratoria are "the only effective mechanism that guarantees protection of B.C.'s coastline and existing industries like fishing and tourism." See also Susan Rutherford, *Putting the Assumptions to the Test* (2004) [unpublished], online: The Living Oceans Society <http://www.livingoceans.org/library/index.shtml>.

and user decisions should be made, especially in light of strongly held and opposing views.[17]

1.2 Purpose and Scope

This thesis explores and assesses the legal and political context in which decisions about OOGD are being made in British Columbia. Decision about whether, where and when to allow OOGD are made within a legal context that includes challenging federal-provincial jurisdiction and ownership issues as well as claims of aboriginal rights and title. The legal context also includes the existing and proposed federal and provincial regulatory structures, the most significant being the federal *Oceans Act*[18] and Oceans Policies that lay the foundation for integrated coastal and oceans management[19] in Canada.

The renewed interest in OOGD and recent provincial efforts to pursue an OOG industry coincide with an increased global awareness of the complexity and fragility of ocean ecosystems and the need for improved oceans governance. At the international level, this awareness has led to the creation of a set of ICOM principles that are now

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[17] The federal public review panel concluded, after four months of hearings in coastal B.C. communities, that the "strongly held and vigorously polarized views it received do not provide a ready basis for any kind of public policy compromise at this time in regard to keeping or lifting the moratorium." See Natural Resources Canada, *Report of the Public Review Panel on the Government of Canada Moratorium on Offshore Oil and Gas Activities in the Queen Charlotte Region British Columbia*, by Roland Priddle et al. (Ottawa: Ministry of Natural Resources Canada, 2004) at iii [hereinafter Priddle Report]. The federal public review panel hereinafter referred to as the Priddle Panel.

[18] *Oceans Act,* S.C. 1996, c.31 [hereinafter *Oceans Act* or Act]. The term Oceans Policies hereinafter refers to the policies created under the Act.

[19] Many terms are used in the literature to refer to the principles of integrated coastal and ocean management, including "integrated coastal zone management", "coastal resource management", "integrated resource management" and "coastal area planning and management". See J.G.M. Parkes and E.W. Manning, *An Historical Perspective on Coastal Zone Management in Canada* (Ottawa: Department of Fisheries and Oceans, Oceans Conservation Report Series, Canadian Technical Report of Fisheries and Aquatic Sciences 2213, 1998) at 10. The term ICOM hereinafter refers to the integrated management of both coastal and ocean spaces.

broadly accepted by coastal nations and that form the basis for implementing ICOM governance structures at national and local levels. The adoption of the *Oceans Act* in 1997 marked Canada's commitment to a new oceans governance model based on the core ICOM principles of sustainability, integration, precaution and transparency. While implementation of Canada's integrated management policy is in its early days, the Act and the Oceans Policies set out the principles on which ocean use decisions, including those about OOG, are to be made.

Decisions about whether, where and when to allow OOGD are also made in a political context. While questions of jurisdiction, ownership and aboriginal rights and title are legal issues, they are also highly politicized. It is more likely that jurisdiction and ownership questions will be resolved through political agreement than judicially determined. Resolution of aboriginal rights and title issues are, for the most part, being resolved through treaty negotiation processes. Rights and title issues in respect of OOGD are likely to be resolved through negotiation processes as well. The current political climate in British Columbia favours a negotiated resolution to aboriginal claims and the provincial government has indicated a renewed interest in working with First Nations to ensure fair distribution and management of resources.

The political context also requires consideration of the role of other actors in the decision making process, including stakeholders, B.C. communities and environmental groups. Decisions about whether to lift the OOG moratoria have received a great deal of media attention and public opinion is both vocal and divided. These competing viewpoints have affected how decisions about OOG are made, with the federal and provincial governments undertaking formal review processes to assist in decision

making. These processes, while arguably inadequate in the circumstances, reflect a growing expectation of and need for public input into environmental decision making.

This thesis focuses on the Basin because it is estimated to have the greatest resource potential and has therefore been the focus of the OOG debate. The claims of aboriginal rights and title, the unresolved jurisdiction and ownership issues, the selection of the area for a national marine conservation area[20] and a large ocean management area[21] add to the complexity of the debate.

This thesis does not attempt to answer questions of whether, where and when OOGD should be permitted in the Basin. Nor does it purport to explore all issues relevant to the OOG debate. Its aim is to explore the legal and political issues that affect how OOGD decisions are made and to situate these decisions within the larger context of ICOM and Canada's plans for integrated oceans management. It assesses whether Canada's integrated coastal and oceans management strategy provides a framework for resolving a contentious ocean use issue such as OOGD.

1.3 General Outline

This thesis is divided into five chapters. Chapter 1 introduces the subject, sets out the purpose and scope and provides this general outline. Chapter 2 begins with a brief overview of the economics, geography and ecology of the Basin, followed by an assessment of the current stresses on this region and the environmental impacts of OOGD. The historical context of OOGD in British Columbia is then reviewed to provide the necessary background for the subsequent discussion of recent provincial efforts to lift

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[20] See *infra* note 234.
[21] See *infra* note 273.

the moratoria and the federal response to those efforts. Recent indicators from both Canada and British Columbia are considered in order to assess the current political climate. This is followed by a brief review of the unresolved federal-provincial jurisdictional and ownership issues that have historically hindered OOG negotiations.

Aboriginal title and rights claims are then discussed in the context of the offshore. There is a strong First Nations presence in the Queen Charlotte region (known as Haida Gwaii to the aboriginal peoples) and, as will be discussed, unanimous First Nations opposition to any OOGD at this time. Based on recent jurisprudence and the apparent strength of aboriginal claims, the Province would need to first undertake extensive consultations with all affected First Nations, and make appropriate accommodation, before approving any OOG activities. Chapter 2 concludes with an assessment of the Province's vision for a comprehensive West Coast OOG regulatory regime.

Chapter 3 studies the regulatory structure governing the use, management and preservation of coastal and marine waters, with a focus on Canada's efforts to implement ICOM through the *Oceans Act* and Oceans Policies. This chapter situates ICOM within its international roots and examines its core principles and goals, with particular emphasis on the principles of sustainability, integration and precaution. The existing federal and provincial environmental laws that apply to coastal and ocean spaces are reviewed, followed by a chronology of Canada's early efforts towards establishing ICOM. This is followed by a detailed review and critical assessment of the integrated management provisions in the *Oceans Act* and Oceans Policies.

For comparative purposes, the U.S. oceans governance regime is discussed, with a particular focus on the jurisdictional issues that have hindered effective management of

OOGD in the U.S. While the U.S. has a long and at times highly effective history with ICOM, it faces oceans governance challenges similar to Canada and recent efforts to reform U.S. policy are instructive. Chapter 3 concludes with an assessment of whether Canada's version of ICOM presents a decision making framework for determining whether, where and when OOGD should be allowed in the Basin.

Chapter 4 examines the role of public participation in Canadian oceans governance, beginning with a review of the core ICOM procedural principle of transparency. The transparency principle requires decision making to be undertaken in an open and transparent manner, with full public involvement. The forms, objectives and limitations of citizen engagement are considered, followed by an assessment of the collaborative governance model of public participation set out in the Oceans Policies. While the collaborative model reflects a commitment to public involvement, important components of the model are not yet fully developed. Although the federal government has committed to collaborative oceans governance, both the federal and provincial governments have recently pursued public processes respecting the moratoria that were not collaborative. This chapter concludes with a discussion of the challenges to effective public involvement in decision making and suggests the need for further public engagement in respect of OOGD.

Chapter 5 brings together and summarizes the key issues discussed in this thesis and draws conclusions on Canada's Oceans Policies and how OOGD decisions are framed within its context. The thesis concludes with recommendations for improving decision making processes in oceans governance and for working towards a truly integrated coastal and oceans management regime in Canada.

Chapter 2: The Economic, Historical, Political and Legal Contexts of Offshore Oil and Gas in the Basin

2.1 The Economic Potential of Offshore Oil and Gas

The economic potential of OOG is very real: 1998 estimates indicate the Basin may contain 9.8 billion barrels of oil and 25.9 trillion cubic feet of natural gas. At thirty dollars (U.S.) per barrel for oil, estimates of the combined gross value were over $110 billion.[22] With current oil prices topping sixty dollars (U.S.) per barrel, the economic incentives become even more compelling.

Estimates of the resource potential in the Basin are derived from geological modeling based on existing well data, seismic profiles and knowledge of the geological characteristics of the Basin.[23] The economic potential predictions are therefore estimates only, based on "best efforts with modest data."[24] The only way to determine with accuracy the true resource potential is to conduct further investigations, beginning with seismic surveying followed by exploratory drilling. The Province argues that the moratoria must be lifted in order to ascertain the actual nature and location of the resource through further investigations. Only then, it is argued, can the economic

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[22] See B.C. Submission, *supra* note 3 at 2. If these estimates are correct, the Queen Charlotte Basin alone has the same potential as the Jeanne D'Arc Basin off the Newfoundland coast.

[23] Royal Society of Canada, *Report of the Expert Panel on Science Issues Related to Oil and Gas Activities, Offshore British Columbia*, by Richard Addison et al. (Ottawa: Royal Society of Canada, February 2004) at 13, online: <http://www.rsc.ca/index.php?page_id=115> [hereinafter RSC Report]. Eighteen wells have been drilled in the Basin; eight offshore in Hecate Strait and ten on Graham Island. Estimates are the Basin contains 80% of the region's petroleum volume, with southern Hecate Strait and Queen Charlotte Sound being the most likely areas. See Strong Report, *supra* note 5 at 7-8. See also M.J. Whiticar et al., *Analysis of the Petroleum Potential in Queen Charlotte Basin Phase 1 Report: Broad Scale Basin Characterization* (Victoria: University of Victoria, June 25, 2003), a report sponsored by the BC Ministry of Energy and Mines.

[24] RSC Report, *ibid.* at 14.

opportunities be evaluated and the environmental risks properly assessed.[25] Unfortunately, the necessary investigatory methods themselves are known to cause environmental damage through death and injury to sealift and the introduction of toxic chemicals into the marine ecosystem.

2.2 The Geography and Ecological Resources of the Basin

The Basin has an area of approximately 80,000 square kilometers and includes the Queen Charlotte Islands and offshore areas of Hecate Strait, Queen Charlotte Sound and Dixon Entrance. It is bounded to the south by Vancouver Island and to the north by Alaska and includes all marine coastal waters, estuaries and shorelines within these boundaries.[26] The Basin is a highly productive subarctic marine ecosystem that is home to numerous fish communities (including all species of Pacific salmon), thirty marine mammal species (including cetaceans, pinnipeds and sea otters), large numbers of invertebrate species (including unique sponge reefs) and at least thirty species of seabirds (with over a million seabirds breeding in the Basin). The species identified in the Basin include five that are endangered, seven that are threatened and many that are considered ecologically important or economically valuable.[27]

In its review of the state of knowledge of the Basin marine and shoreline areas, the UNBC Report concluded that, while there is considerable knowledge available, significant knowledge gaps remain for certain marine species and their habitats,

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[25] B.C. Submission, *supra* note 3 at 2.
[26] LGL Limited Environmental Research Associates, *A Review of the State of Knowledge of Marine and Shoreline Areas in the Queen Charlotte Basin,* prepared for the University of Northern British Columbia's Northern Land Use Institute, Northern Coastal Information and Research Program (Prince George: University of Northern British Columbia, September 2004) at 5, online: <http://www.unbc.ca/nlui/ncirp/projects.html> [hereinafter UNBC Report].
[27] RSC Report, *supra* note 23 at 53-59.

particularly in areas beyond the near shore.[28] The Strong Report notes that much of the Basin is used year-round for spawning and rearing habitat and emphasizes that the complexity and diversity of the sealift underscores the need to understand life cycles and species interactions.[29]

2.3 Existing Ocean Uses in the Basin

The Basin is already subject to human activities that are impacting its complex ecosystem. These include commercial, aboriginal and recreational fishing uses, as well as shipping and tourism.[30] Additionally, both shellfish and finfish aquaculture are expected to become important industries in the region in the future.[31] While the Basin is not densely populated, it does support a population of 66,000 that is economically dependant on the fishery and forestry sectors.[32] OOG exploration and development activities have the potential to create additional stresses on this region by affecting its ecosystems, creating user conflicts and impacting its existing industries.

2.4 Environmental Impacts of Offshore Oil and Gas

Environmental effects are an inevitable result of OOG activities and can be divided into two broad categories: impacts associated with exploration, development and

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[28] UNBC Report, *supra* note 26 at xiii-xiv.
[29] Strong Report, *supra* note 5 at 25.
[30] Environment Canada estimates that, at current tanker traffic levels, "Canada can expect over 100 small oil spills, about 10 moderate spills and at least one major spill offshore each year. There are also more than 1,000 inland spills in Canada each year. A catastrophic spill (over 10,000 tonnes) may occur once every 15 years." See online: <http://www.ec.gc.ca/ee-ue/pub/chocolate/fact1_e.asp >. The RSC Report predicts that tourism may be most affected by OOGD, due to the perception that OOG installations detract from the natural environment. See *supra* note 23 at 66.
[31] Strong Report, *supra* note 5 at 26.
[32] RSC Report, *supra* note 23 at 65.

production; and impacts associated with catastrophic spills from human or mechanical error, blowouts or product transport.[33]

2.4.1 Exploration, Development and Production

2.4.1.1 Seismic Surveys

Impacts associated with exploration, development and production begin with the seismic surveys conducted before exploratory drilling. Seismic surveys are conducted in areas considered most likely to contain oil and gas, to gather information about the geological composition of the ocean floor. Seismic testing involves shooting high pressure sound waves (generally with an air gun source) through the water at determined intervals and recording the reflected waves to produce two and three dimensional images of subsurface geology.[34] The pressure and noise created by the air guns is known to cause mortality, physiological damage, temporary hearing loss and behavioural disturbance in marine biota.[35]

While the exact impacts of seismic activity are not known for all biota, it is acknowledged that fish very close to the source will be killed and that other non-life threatening effects, such as internal injury, stunning, reproductive damage and behavioural changes, can be experienced by fish many kilometres away.[36] Similarly, seismic testing will cause severe physical damage and death to eggs and larvae within close range of the source, while impacts at greater distances are unknown.[37] Mortality

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[33] Strong Report, *supra* note 5 at 26.
[34] See RSC Report, *supra* note 23 at 16-18 for a detailed account of the use of seismic surveys.
[35] *Ibid.* at 17.
[36] *Ibid.* at 74-75.
[37] *Ibid.*

has also been shown in macroinvertibrates (such as crabs, shrimp and clams) and there may also be effects on deep-diving birds.[38]

The effects of seismic surveying on marine mammals are not clearly understood despite a number of studies. Because marine mammals use sound to communicate, it seems likely that their communication would be affected, although perhaps only temporarily. It is not known whether seismic testing causes temporary or permanent hearing loss, or whether any disturbance has any permanent effect on individual or population survival.[39] Efforts are being made on the East Coast and in other jurisdictions to mitigate potential effects on marine mammals by limiting seismic testing when marine mammals are present.[40] However, the implementation of such measures requires sufficient knowledge about marine mammal distribution within the survey area and information about marine mammals in the Basin is scarce.[41]

2.4.1.2 Operational Discharges

After sufficient seismic surveys are conducted, exploratory wells are drilled. Drilling inevitably produces operational wastes that tend to be disposed of at sea after some degree of treatment. These operational discharges include drilling muds, drill cuttings and produced waters. Drilling muds are either water or oil based and comprise a number of chemicals that are used to flush rock cuttings from the drill bit and bring the cuttings up to the surface. These oil-laden cuttings are then separated from the muds,

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[38] *Ibid.* at 78.
[39] *Ibid.* at 77.
[40] *Ibid.*
[41] *Ibid.* Having this information is particularly crucial in the Basin, because many of the marine mammals are under threat. The RSC Report notes that, of the 24 species of marine mammals observed in the area, Blue, Sei and North Pacific Right whales are "endangered"; humpbacks are listed as "threatened" and North Pacific Offshore Killer whales are of "special concern".

which are then reinjected for further use. Theoretically, it is possible to create a closed system in which drilling muds are reinjected and recycled, or disposed of onshore, but this is not standard practice.[42] Drill cuttings and drilling muds can cause environmental damage both because of their toxic components, such as heavy metals and oils, and also by smothering benthic communities through the deposit of small particles on the sea floor.[43]

Produced waters are wastes created during extraction and are a mixture of oil and water that contains hydrocarbons. Again, reinjection or onshore disposal is possible, but not standard practice. While produced waters can be treated to reduce oil content before disposal, they are eventually disposed of at sea with some oil content.[44] Discharge of produced water continues at a steady rate during production and volumes tend to increase as production ages.[45]

2.4.2 Oil Spills

All phases of offshore oil and gas operations involve frequent small oil spills that will have a direct effect on biota in the immediate area of the spill, as well as cumulative long term impacts on the marine ecosystem.[46] Batch spills can occur from mechanical or human errors, while blowouts are uncontrolled releases of oil from a well and can last for long periods of time. A blowout is always a possibility during exploration and production and could have significant consequences.[47]

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[42] Strong Report, *supra* note 5 at 27.
[43] RSC Report, *supra* note 23 at 80-81.
[44] *Ibid.* at 81-82.
[45] *Ibid.*
[46] Strong Report, *supra* note 5 at 27.
[47] *Ibid.* at 35.

Oil spills from product transport carries the greatest risk of environmental contamination due to spills in loading and off-loading as well as spills from tankers in the course of transport. It has been determined, however, that worldwide tanker spills have decreased significantly, likely due to improved enforcement and increased use of double-hulled tankers.[48] Nonetheless, the list of oil spills from tankers is long, including, most recently, the sinking of the tanker Prestige off the coast of Spain in 2002, which released its 70,000 tons of fuel oil into the ocean.[49]

The full impacts of larger oil spills are not completely known, but studies have shown that species such as marine mammals and seabirds are most significantly impacted due to their contact with the sea surface. Species within the intertidal zone are also heavily impacted due to the tendency for oil to migrate to shore.[50] Recent studies on the long-term effects of oil spills, based largely on the 1989 Exxon Valdez oil spill, have shown that many species, including seabirds, have not yet fully recovered and that the long term effects of chronic low-level pollution may be highly damaging to certain populations.[51]

While the risk of a large oil spill from an offshore platform may be low, the immediate and long term impacts can be significant. In November of 2004, 165,000 litres of oil flowed directly into the Atlantic Ocean from the Terra Nova oil production platform, located 350 kilometres southeast of Newfoundland, resulting in a slick that

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[48] RSC Report, *supra* note 23 at 88.
[49] "Ships, spills and slicks" *Canadian Broadcasting Corporation* (November 22, 2004), online: <http://www.cbc.ca/news/background/environment/ships_spills_slicks.html>.
[50] Strong Report, *supra* note 5 at 29-31 .
[51] *Ibid.*

covered fifty-seven square kilometres.[52] The spill, caused by two mechanical failures, was estimated by the Canadian Wildlife Service to have killed at least 10,000 seabirds, although exact numbers will never be known.[53]

2.5 The History of Oil and Gas Exploration in the Basin

2.5.1 Early Exploration and the Moratoria

Evidence of oil and gas potential in the Basin was first discovered in the early 1960s. In the 1950s and 1960s, Canada issued exploration leases covering over nine million hectares of British Columbia coastal waters. From 1967 to 1969, Shell Canada Ltd. conducted seismic testing and drilled fourteen exploratory wells in an area ranging from Barkley Sound in the south, through the Basin to Hecate Strait in the north.[54]

While evidence of both oil and gas deposits was found in the Basin, exploration ended abruptly in 1972 when Canada decided to suspend all work obligations under existing federal permits and not to approve any new exploration permits in the West Coast offshore.[55] In 1982, the Province prohibited, by regulation, any drilling within a provincial "inland marine zone" encompassing the waters landward of a line drawn off

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[52] "Seabird loss could be devastating: scientists" *Canadian Broadcasting Corporation* (November 24, 2004), online:< http://stjohns.cbc.ca/regional/servlet/View?filename=nf-spill-birds-20041124>; and "Low expectations for oil cleanup" *Canadian Broadcasting Corporation* (November 25, 2004), online: <http://stjohns.cbc.ca/regional/servlet/View?filename=nf-oil-cleanup-20041125 >. Little oil could be recovered due to strong winds and choppy seas. Five days later, an estimated 1,000 litres of oil was spilled during routine operations from another rig in the Terra Nova area.

[53] "Terra Nova seabird toll released" *Canadian Broadcasting Corporation* (April 8, 2005), online: <http://stjohns.cbc.ca/regional/servlet/View?filename=nf-spill-count-050407>.

[54] For a detailed chronology, see B.C. Submission, *supra* note 3 at 3, 24-27.

[55] This 1972 decision by Canada is generally referred to as the federal moratorium; however, all evidence indicates the moratorium is no more that a policy statement made in 1972 and continued to this day. There was no formal mechanism establishing a moratorium on oil drilling (such as an order-in-council) that would need to be repealed in order to allow drilling to resume. For an assessment of both the federal and provincial moratoria, see Strong Report, *supra* note 3 at Appendix 3, a submission by Dr. Rod Dobell & Claire Abbott.

the west coast of the Queen Charlotte Islands southward to the west coast of Vancouver Island.[56] The prohibition on drilling within the inland marine zone was lifted in 1994 by an amending regulation.[57] On this basis, it has been suggest that there are today no formal moratoria at either the provincial or federal level and that OOGD could proceed in the Basin at any time upon agreement by Canada and British Columbia that new license applications or exploratory applications under current licenses will be considered.[58]

Regardless of the legal formality of the moratoria, the decision of whether to open up the Basin for OOGD remains a complex and contentious political issue that both the Province and Canada have been grappling with for many years.

2.5.2 Activities in the 1980s

In 1984, Canada and British Columbia established the West Coast Offshore Exploration Environmental Assessment Panel to conduct a review of the environmental and socio-economic effects of allowing OOGD off the northern coast of the Province. This Panel was asked to make recommendations on the terms and conditions under which exploration could proceed in a safe and environmentally sound manner. It concluded that an exploratory program could proceed, provided a number of conditions were met. It

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[56] Petroleum and Natural Gas Drilling Licence Regulation, B.C. Reg. 10/82, made pursuant to the *Petroleum and Natural Gas Act* and prohibits drilling within the defined inland marine zone.
[57] See B.C. Regulation 55/94.
[58] B.C. Submission, *supra* note 3 at Appendix 3 at 12.

also made a number of recommendations respecting the terms under which exploration should be undertaken.[59]

Concurrent with the West Coast Panel Report, Canada and the Province conducted negotiations of the so-called Pacific Accord, an agreement that would cover the management, jurisdictional and royalty-sharing issues for OOGD. These negotiations continued until 1989 when, influenced by the public outcry over the Exxon Valdez oil spill, British Columbia declared that there would be no drilling for at least five years. Canada concurrently announced that it would not consider any OOGD until requested to do so by the Province.[60]

2.5.3 Activities in the 1990s

Political interest in OOGD was seemingly dormant for the next decade, although there is evidence that it remained of interest to British Columbia during that time. In 1996, the Ministry of Energy, Mines and Petroleum Resources commissioned the Canadian Ocean Frontiers Research Foundation[61] to review and assess the changes in offshore exploration technologies and public review mechanisms in the ten years since the West Coast Panel Report. In its report, the COFRF concluded that many of the concerns raised previously had been addressed through advances in technology and

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[59] West Coast Offshore Exploration Environmental Assessment Panel, *Offshore Hydrocarbon Exploration: Report and Recommendations of the West Coast Offshore Exploration Environmental Assessment Panel* (Ottawa: Minister of Supply and Services Canada, April, 1986) [hereinafter the West Coast Panel Report].

[60] See B.C. Submission, *supra* note 3 at 26.

[61] The Canadian Ocean Frontiers Research Foundation (COFRF) describes itself as a "society comprised of industrial, academic, individual and government members…that undertakes research and innovation in the major marine disciplines, and provides independent scientific reviews and opinions on contemporary marine issues." While the Foundation is independent of government, its goal is to expand B.C.'s oceans economy.

research programs initiated by government.[62] However, it identified two areas of deficiency that needed to be addressed: first, the lack of understanding of the biological resources at risk from OOGD activities and, second, the determination of acceptable standards of risk in marine environmental assessment practice.[63] Further, the COFRF noted that no process had been established to undertake a review of the moratoria, nor any priorities set to address the concerns raised in the West Coast Panel Report. The COFRF concluded that it is up to government to create a climate conducive to further research and industry activity and that the moratoria must be lifted in order to attract industry interest.[64]

In 1998, the Premier's Advisory Council on Science and Technology commissioned AGRA Earth & Environmental Ltd. to review the "status of existing and future offshore exploration developments in order to update the information available."[65] The AGRA Report considered the offshore exploration industry in both Canada and elsewhere, in terms of the advancements in offshore technology and the physical, biological and socio-economic offshore management and monitoring environments. It concluded that significant changes had taken place in the previous ten years, particularly

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[62]Canadian Ocean Frontiers Research Foundation, *Assessment of Progress in Scientific, Technological and Resource Management Issues Related to the 1986 Review of Offshore Petroleum Exploration in British Columbia Waters* (Report no. 96001, March 15, 1996), online: <http://www.offshoreoilandgas.gov.bc.ca/reports/reports.htm> at 32.

[63] *Ibid.*

[64] *Ibid.* at 33.

[65] AGRA Earth & Environmental Ltd., *Review of Offshore Development Technologies*, submitted to British Columbia Information Science and Technology Agency (St. John's: AGRA Earth & Environmental Ltd., December 21, 1998), online: <http://www.offshoreoilandgas.gov.bc.ca/reports/reports.htm> [hereinafter AGRA Report].

in the management of the offshore industry, management of the physical environment, offshore engineering and environmental management strategies.[66]

2.6 Recent Provincial Initiatives to Review the Moratoria

In 2001, the Province announced its intention to once again consider lifting the moratorium as part of its economic renewal plan[67] and began a number of initiatives to determine whether OOGD "can be carried out in an environmentally and socially responsible manner."[68] These initiatives included appointing a government caucus subcommittee comprising six MLAs to solicit the viewpoints of individuals and groups that would be most affected by OOGD.[69] This subcommittee held public hearings in nine coastal and northern communities and prepared a report summarizing the "concerns and challenges that residents of coastal communities expect to face"[70] should OOGD proceed. Concurrently, the Province commissioned an update of the AGRA Report in light of "scientific and technological advancement, changes in regional economics and

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[66] *Ibid* at i-iv.

[67] In the July 24, 2001 British Columbia Throne Speech (2nd session, 37th Parliament), the Lieutenant Governor stated:

> Another sector of our economy which offers enormous promise is the oil and gas industry. For over two years, northern British Columbians have waited for government leadership to explore the enormous opportunities of offshore oil and gas off our North Coast. The potential gains and risks could be enormous. Therefore, over the next six months, my government will examine the possibility of converting those rich reserves into jobs and opportunities for northern working families. An independent scientific review panel will be appointed to address the hard questions that must be answered before we can consider realizing this potential. It will ascertain whether those resources can, in fact, be extracted in a way that is scientifically sound and environmentally responsible, with its initial findings being tabled by January 31, 2002.

Online: <http://www.legis.gov.bc.ca/37th2nd/4-8-37-2.htm>.

[68] B.C. Submission, *supra* note 3 at 3.

[69] Hereinafter MLA Task Force.

[70] British Columbia, *Report of the Offshore Oil and Gas Taskforce* by Blair Lekstrom et al. (Victoria: Ministry of Energy and Mines, no date), online: <http://www.offshoreoilandgas.gov.bc.ca/reports/task-force/> [hereinafter MLA Task Force Report]. The MLAs found that the environment was the issue that elicited the greatest passion and emotion from presenters, at 4.

developments in other jurisdictions."[71] The resulting report concluded that "there are no unique fatal flaw issues that would rule out exploration and development activities."[72]

Finally, the Province established the Strong Panel to advise on the following four matters:

- the scientific and technological considerations relevant to offshore oil and gas exploration, development and production;
- further research or studies that should be undertaken to advance the "state of knowledge" on these considerations;
- any specific government actions that should be taken prior to a decision on whether or not to remove the current provincial moratorium; and
- any specific conditions or parameters that should be established as part of a government decision to remove the moratorium.[73]

The Strong Panel submitted its report, comprising two volumes and over 120 pages, in January, 2002, after conducting a review of previous reports and scientific literature and undertaking its own investigations. The Strong Report contains fourteen recommendations to both the federal and provincial governments in respect of OOGD activities and the potential lifting of the moratoria. These recommendations range from the need to fill the significant knowledge gaps in the nature of the sea-bottom and the subsurface and the existing biota and their life cycles, to the need to improve administrative and regulatory structures and to ensure effective First Nations' participation in the industry.[74]

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[71] Jacques Whitford Environment Limited, *British Columbia Offshore Oil And Gas Technology Update*, prepared for the B.C. Ministry Of Energy And Mines (Vancouver: October 19, 2001) at i, online: < http://www.offshoreoilandgas.gov.bc.ca/reports/jwl-report/>.
[72] *Ibid.* at 171.
[73] Strong Report, *supra* note 5 at i.
[74] *Ibid.* at 39-51.

The Strong Report acknowledges that adverse environmental impacts would be "quickly felt in coastal communities and habitats"[75] due to the proximity of drilling sites. It also accepts that there is a poor understanding of potential long-term impacts on marine ecosystems and that the area is prone to seismic activity. Nonetheless, the Strong Report concludes that these factors do not support a general prohibition on OOGD but rather an assessment on a case by case basis:

> There are a number of regional and site-specific gaps or inadequacies of data, knowledge, understanding and indeed infrastructure and capacity, which must be addressed in the early stages following any removal of the moratorium. Nevertheless, oil and gas are being produced offshore under the full range of conditions found in virtually every variety of natural environment in the world, and clearly there have been steady improvements in the science, the technology and the regulations enabling and governing such activities. We conclude overall that, while there are certainly gaps in knowledge and needs for intensification of research and a continuing commitment to baseline and long-term monitoring, these do not preclude a decision on the moratorium. There is no inherent or fundamental inadequacy of the science or technology, properly applied in an appropriate regulatory framework, to justify retention of the BC moratorium.[76]

The Province responded to the recommendations of both the Strong Report and the MLA Task Force Report for further scientific studies by commissioning the University of Northern British Columbia to carry out scientific and technical research in the Basin. The UNBC Report compiled existing data on key environmental features[77] of the Basin and also sought to fill in data gaps through the gathering of local knowledge. It concluded that there is considerable knowledge on the values of marine and shoreline areas, but significant knowledge gaps in areas beyond the near shore. The UNBC Report recommended that further studies be funded to close existing knowledge gaps, that

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[75] *Ibid.* at i.
[76] *Ibid.* at 51.
[77] The UNBC Report, *supra* note 26 at xiii, identifies the following categories of marine values: marine mammals, fish and marine habitats, marine-associated birds, fisheries, tourism and recreation, archaeology and heritage and areas of special significance.

initiatives be undertaken to integrate traditional knowledge with scientific knowledge, that a single repository for such knowledge be created and that governments identify protected areas, exclusion zones and special management areas within the Basin.[78]

Also in 2002, the Province announced that it would create a dedicated offshore oil and gas team to work towards development of offshore resources.[79] The BC Offshore Oil and Gas Team was created in January of 2003, with a mandate to enable offshore oil and gas development to occur in British Columbia.[80] This was followed, in February of 2003, by the Province's announcement that it intended to have an OOG industry up and running by 2010.[81]

2.7 The Federal Response

In 2002, the Province provided copies of the Strong Report and its other studies to Canada and asked it to consider lifting the federal moratorium. In response to this request, the federal Minister of Natural Resources Canada announced that the federal government would proceed with a three-stage review of the moratoria to assist it in its decision-making. The review focused on the Basin due to its high resource potential and consisted of:

- a science review by the Royal Society of Canada to identify science gaps related to possible oil and gas activity offshore of British Columbia;

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[78] *Ibid.* at xiv-xv.
[79] See British Columbia, *Energy for our Future: A Plan for BC*. (Victoria: Ministry of Energy, Mines and Petroleum Resources, November 2002) at 8, online: <http://www.gov.bc.ca/empr/popt/energyplan.htm>.
[80] The BC Offshore Oil and Gas Team is a government team established as part of the Ministry of Energy, Mines and Petroleum Resources. See online: < http://www.offshoreoilandgas.gov.bc.ca>.
[81] In the February 11, 2003 British Columbia Throne Speech (4th session, 37th Parliament), the Lieutenant Governor stated: "Offshore oil and gas exploration holds tremendous promise for communities in the Northwest and on northern Vancouver Island. By 2010, your government wants to have an offshore oil and gas industry that is up and running, environmentally sound, and booming with job creation." See online: <http://www.legis.gov.bc.ca/37th4th/4-8-37-4.htm>.

- a public review, to be undertaken by an independent three-member panel, to hear the views of British Columbians regarding the broad environmental and socioeconomic considerations surrounding the question of whether to keep or lift the federal moratorium on oil and gas activities in the Basin; and
- a First Nations Engagement Process to explore issues of unique interest to First Nations.[82]

These reviews were completed in 2004; the science review (the RSC Report) in February and the public review (the Priddle Report) and the First Nations process[83] in October. With respect to the RSC Report, the panel essentially agreed with the Strong Report that, while there are significant knowledge gaps, no gaps need to be filled prior to lifting the moratorium.[84]

The Priddle Report concluded "that the strongly held and vigorously polarized views it received do not provide a ready basis for any kind of public policy compromise at this time in regard to keeping or lifting the moratorium."[85] The Priddle Panel found that there was near consensus that significant information gaps exist respecting biophysical data and environmental and socio-economic impacts, but disagreement as to how best to

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[82] The three-stage review was undertaken to fulfill Canada's commitment to undertake a Strategic Environmental Assessment prior to any policy change respecting the moratorium. See Priddle Report, *supra* note 17 at 127. The Priddle Panel conducted hearings in ten communities from January to August, 2004 and received both oral and written submissions. It then accepted written comments on submissions.

[83] Natural Resources Canada, *Rights, Risks and Respect: A First Nations Perspective on the Lifting of the Federal Moratorium on Offshore Oil and Gas Exploration in the Queen Charlotte Basin of British Columbia,* by Cheryl A. Brooks (Ottawa: Ministry of Natural Resources Canada, 2004) [hereinafter Brooks Report]. The First Nations Engagement Process [hereinafter FNEP] was conducted through informal discussions with First Nations communities most likely to be affected by OOG. Participating groups included the Haida, the Tsimshian, Kwakwaka'wakw and Coast Salish peoples. See Brooks Report at 15 for a complete list of participants.

[84] The RSC Report reached two conclusions. First, that no science gaps needed to be filled prior to lifting the moratorium, provided an "adequate regulatory regime is put in place." Second, that the existing restriction on tanker traffic should be maintained. RSC Report, *supra* note 23 at 121-122.

[85] Priddle Report, *supra* note 17 at 5.

fill those gaps.[86] There was also near-consensus on the need to protect ecosystems and to address First Nations interests and concerns.[87] The Priddle Report concluded that, overall, 75 percent of all participants wished to keep the moratorium and 23 percent supported lifting it.[88] Nonetheless, it made no recommendation as to whether the moratorium should be lifted; rather, it presented four options ranging from keeping the moratorium (option 1) to lifting the moratorium (option 4), with options 2 and 3 involving undertaking further investigations either before lifting the moratorium (option 2) or after lifting the moratorium but before allowing any activity (option 3).[89]

The Brooks Report found that all First Nations and other participants in the FNEP unanimously opposed lifting the moratorium. While numerous reasons were cited for this opposition, the report emphasized the respondents' "inextricable links to the coastal waters and its resources as foundational to their very cultures, traditions, livelihood and socio-economic conditions."[90] The Brooks Report concluded that, if government is to move forward on the issue of OOGD, it needs to respect and accommodate First Nations "as full partners in the decision-making, management and utilization of the resources in their traditional territories."[91]

2.8 The Current Political Climate

Despite the findings of the Priddle Report that the vast majority of British Columbians do not support lifting the moratoria, and despite the unanimous opposition to

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[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.* at 4.
[89] *Ibid.* at 107-111.
[90] Brooks Report, *supra* note 83 at 6.
[91] *Ibid.* at 13.

OOGD expressed by all First Nations in the Brooks Report, British Columbia remains firm in its goal of having an established OOG industry by 2010. The BC Offshore Oil and Gas Team continues to have significant funding and is pursuing its offshore project plan.[92] However, there are some indications that public opinion has had an effect on the government's willingness to openly promote OOGD at this time. Prior to the release of the Priddle Report, the Province made the following commitment:

> Your government will encourage the government of Canada to complete its scientific review and join with B.C. in responding to this truly exceptional offshore oil and gas opportunity with actions that are scientifically sound, environmentally safe and socially responsible.[93]

However, there was little mention of OOGD after the release of the Priddle Report, no mention of OOGD during the May, 2004 provincial election and no mention of it in the 2005 Throne Speeches. In January, 2005, the *Petroleum News* reported that Premier Gordon Campbell's dream of having an offshore industry up and running by 2010 "has been jolted back to reality"[94] and that the Energy Minister had conceded that there is little prospect of preliminary testing taking place before 2010.[95]

Despite these setbacks, the BC Offshore Oil and Gas Team continues to undertake further studies[96] and to formulate potential royalty, tenure and regulatory models for a

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[92] See BC Submission, *supra* note 3 at 28 for the May, 2003 Project Plan [hereinafter Offshore Project Plan]. The Team has a $5.8 million budget for the 2005/2006 fiscal year.
[93] February 10, 2004 British Columbia Throne Speech (5th session, 37th Parliament).
[94] Gary Park, "British Columbia offshore on hold" *Petroleum News* volume 10, no. 4 (January 23 2005).
[95] *Ibid.*
[96] Such as those through UNBC, see *supra* note 26.

future Pacific Accord with Canada.[97] From British Columbia's perspective, Canada has no choice but to eventually agree to lift the moratoria.[98]

At the federal level, there is as yet no official position or decision on lifting the moratoria. When the Priddle Report and the Brooks Report were released, Natural Resources Canada made the following statement:

> Protecting our coastline and ocean is very important. At the same time, the Government of Canada recognizes that offshore oil and gas activities have the potential to contribute to the long-term economic development of the province. There are a variety of public views and concerns that need to be taken into account by the Government of Canada before any decision is taken regarding the moratorium.[99]

While Ottawa has not made an official decision, the lack of a decision may be a decision itself. Media reports indicate that Ottawa will let OOGD fade away without making a formal decision at this time. In December, 2004, former federal Minister of Environment David Anderson was quoted as saying that a decision has been made to continue the moratorium and that no major announcement would be made because continuing the moratorium would not be a change in policy.[100] A January, 2005 article speculated that the federal and provincial Liberals had agreed to put the issue on the back burner due to fears of losing seats in urban ridings.[101]

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[97] In his most recent presentation, Patrick O'Rourke, Assistant Deputy Minister, BC Offshore Oil and Gas Team, confirmed that the Province's development of a comprehensive, single-window regulatory regime is not dependant on the moratorium being lifted at this time, stating: "Formal lifting of the federal moratorium is not a prerequisite to this political accord. Development of a regulatory regime is a type of 'contingency planning' so that governments are ready when the moratorium is lifted." See Patrick O'Rourke, "Smart Regulation of BC's Offshore Oil and Gas" (Power Point Presentation to the Smart Regulations at Work in B.C. Conference, March 16, 2005), online: <http://www.offshoreoilandgas.gov.bc.ca/reports/presentations.htm> [hereinafter Smart Regulation].

[98] Personal Communication with Patrick O'Rourke, BC Offshore Oil and Gas Team, May 10, 2005.

[99] Press Release, *Natural Resources Canada* 2004/64, November 19, 2004.

[100] "Oil-gas moratorium stays, Anderson says" *CanWest New Service* (December 17, 2004).

[101] "B.C. Liberals' political concerns put offshore oil on back burner" *Vancouver Sun* (January 12, 2005).

At this time, it appears the moratoria will stay in place but that British Columbia will continue to lay the foundation for future exploration when the two governments can agree that the time is right. Given world oil prices and the continuing demand for oil and gas, it is unlikely that these potential resources will forever go untapped in the West Coast offshore.

2.9 Federal- Provincial Jurisdiction and Ownership

At the core of any decision to pursue OOGD on the West Coast are the unresolved issues of ownership and jurisdiction, both as between British Columbia and Canada and with respect to aboriginal rights and title over the seabed and waters of the Basin. Looking first to the federal and provincial powers over OOGD, there are two issues at play: ownership of the seabed and its resources and legislative jurisdiction over activities in ocean and coastal areas.

2.9.1 Ownership

With respect to the ownership of resources, Canada owns the seabed, subsoil and resources within the territorial sea, which extends 12 nautical miles from the low water mark of the coastline.[102] Under international law, Canada has the exclusive right to explore and exploit the resources in Canada's exclusive economic zone and its continental shelf.[103]

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[102] This ownership was established in *Reference Re: Ownership of Offshore Mineral Rights (British Columbia),* [1967] S.C.R. 792.

[103] These coastal and ocean zones and a coastal nation's rights respecting them were established in The United Nations Third Convention on the Law of the Sea, 1982 (December 10, 1982), online: http://www.un.org/Depts/los/convention_agreements/texts/unclos/contents.htm [hereinafter UNCLOS]. UNCLOS was ratified by Canada on November 7, 2003 (See Table of Ratifications/Accessions, online: <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>)

Ocean waters within the low water mark of the outer coastline are not part of the territorial sea but are considered internal waters.[104] British Columbia owns the seabed, subsoil and resources of ocean waters within the low water mark, including internal waters such as Georgia Strait.[105] Ownership of the seabed, subsoil and resources of the Basin, however, has not been judicially determined nor otherwise agreed upon by Canada and British Columbia. All existing exploratory licenses in the Basin have been issued by Canada (who may take the position that these waters form part of the territorial sea, making ownership federal), while the Province has asserted jurisdiction over the Basin by issuing three Orders-in-Council declaring the area an "inland marine zone" and reserving the seabed to the Provincial Crown.[106] It seems most likely that this jurisdictional issue will be resolved through political agreement as on the East Coast.[107]

2.9.2 Jurisdiction

While ownership issues remain undetermined in the Basin, each level of government has some jurisdiction to regulate OOGD activities based on the division of

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and its provisions codified in the *Oceans Act, supra* note 18 at ss. 14 & 18. The exclusive economic zone extends 200 nautical miles from the baselines of the territorial sea [hereinafter EEZ]. The continental shelf may extend beyond the EEZ depending on the natural prolongation of the land territory of Canada.

[104] *Oceans Act*, *supra* note 18 at s. 6.

[105] This ownership was established in *Reference Re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388. The Court reasoned that the western provincial boundary was historically considered to be the west coast of Vancouver Island and therefore that ocean waters lying eastward of that boundary are internal waters.

[106] See note 56 . See also Al Hudec & Van Penick, "British Columbia Offshore Oil and Gas Law" (2003) 41 Alta. L. Rev. 101 at paras. 43-45.

[107] Canada agreed to revenue-sharing with Newfoundland and Nova Scotia despite the decision in *Reference Re: Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (Hibernia Reference)*, [1984] 1 S.C.R. 86, in which the Court confirmed that Canada held the exclusive rights to oil and gas in the continental shelf.

powers in the *Constitution Act, 1867*.[108] The jurisdictional divide is potentially complex, as there are a number of heads of power that may apply to OOGD activities. Canada has significant regulatory powers through its jurisdiction over navigation and shipping, defense, fisheries, trade and commerce and the residual peace, order and good government power.[109] The provinces have jurisdiction over property and civil rights, a power that gives them broad powers over land use and activities within the inland waters.[110] Provinces also have jurisdiction over exploration, development, conservation and management of non-renewable resources in the province.[111] Provincial laws of general application may also incidentally apply to federal activities and Canada has the power to expressly extend provincial laws over sea areas by regulation under the *Oceans Act*.[112]

2.10 Aboriginal Rights and Title in the Basin

The area comprising the Basin is home to many First Nations, including the Haisla, Heiltsuk, Tsimshan and Haida First Nations. While the first three First Nations are engaged in the treaty negotiation process, the Haida rejected the treaty process after completing stage one and have instead filed a claim in British Columbia Supreme Court

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[108] *Constitution Act, 1867*, enacted as the *British North America Act, 1867 (U.K.)*, 30 & 31 Vict., c.3 (U.K.), renamed by item 1 of the Schedule to the *Constitution Act, 1982* being Schedule B of the *Canada Act, 1982*, c.11 (U.K.), reprinted in R.S.C. 1985, App. II, no. 5 [hereinafter *Constitution Act*].
[109] *Ibid.* at ss. 91(1), 91(12), 91(2) & 91.
[110] *Ibid.* at s. 92(13).
[111] *Ibid.* at s.92A.
[112] *Oceans Act, supra* note 18 at ss. 9 & 21.

asserting aboriginal title to all of Haida Gwaii (the aboriginal name for the Queen Charlotte Islands) and the surrounding waters, including title to the seabed.[113]

With respect to aboriginal rights, it is fishing rights, transportation and cultural and spiritual activities that are most likely to be at issue with respect to OOGD.[114] With respect to aboriginal title, any use of such territory for OOGD, regardless of whether there is an actual impact upon aboriginal activities, would constitute an interference with that title.[115] This is because aboriginal title is a claim to the exclusive use and occupation of a territory. To date, both the provincial and federal governments have refused to recognize aboriginal title claims to ocean territory.[116] Whether a claim for aboriginal title to the sea and seabed would ultimately succeed in court is unclear, although some have argued that aboriginal title to sea spaces can be substantiated within the Canadian legal context.[117]

2.10.1 Justification of Infringement of Aboriginal Rights and Title

Aboriginal rights, including aboriginal title and treaty rights, are entrenched in the *Constitution Act* and any government activities that may infringe upon these rights or title

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[113] Vancouver Registry, B.C. Supreme Court Action No. L020662. The Haida claim title to the "land, inland waters, seabed and sea" of their traditional territory. In its Statement of Intent with the BC Treaty Commission, the Haida describe their territory to include "the entire Haida Gwaii, the surrounding waters, the air space and the Kaigainaa Archipelago [and] the waters include the entire Dixon Entrance, half of the Hecate Straits, halfway to Vancouver Island and westward into the abyssal ocean depths." See BC Treaty Commission, online: <http://www.bctreaty.net/soi_3/soihaida.html>.

[114] Murray T. Rankin, "Offshore Oil and Gas and Coastal British Columbia: The Legal Framework" (2004) 62(4) Advocate (B.C.) 497 at 502.

[115] *Ibid.*

[116] *Ibid.* at 503.

[117] C. Rebecca Brown & James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 37(1) U.B.C. Law Rev. 449 at 453. The authors conclude that the question of aboriginal title to sea spaces may never be definitively answered but instead managed through negotiations and agreements. See also Douglas J.R. Moodie, "Aboriginal Maritime Title in Nova Scotia: An 'Extravagant and Absurd Idea'?" (2004) 37 U.B.C. L. Rev. 495.

must be justified and appropriate accommodation made, even where such claims are unproven.[118] Because OOGD activities may infringe upon aboriginal title or rights, both the provincial and federal governments must first justify any infringements in accordance with the tests set out by the Supreme Court of Canada. Activities that infringe aboriginal rights or title will only be permitted if they can be justified. Otherwise, OOGD in the Basin could, and no doubt would, be challenged in court by First Nations claiming that such activities interfere with their aboriginal rights or title.

The test for infringement of aboriginal rights or title was first established by the Supreme Court of Canada in *R. v. Sparrow.*[119] The Court in *Sparrow* set out a two-part test for justification of the infringement of aboriginal and treaty rights: first, an inquiry as to whether the impugned legislation interferes with an existing aboriginal or treaty right; and, second, if there is interference, a determination of whether the interference is justifiable. Under the justification part of the test, the court considers whether government has a valid legislative objective and whether the honour of the Crown has been upheld in how the legislative objective has been achieved. Most importantly for this discussion, *Sparrow* articulated considerations to be addressed within the justification analysis, including whether there has been as little infringement as possible, whether fair compensation has been paid, and whether consultation has been undertaken.[120]

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[118] See *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.J. No. 70, aff'g in part 99 B.C.L.R. (3d) 209, [2002] B.C.J. No. 378 (C.A.), with supplementary reasons 5 B.C.L.R. (4th) 33, [2002] S.C.J. No. 1882, rev'g [2000] B.C.J. No. 2427 (S.C.) [hereinafter *Haida*]. The appeal to the Supreme Court of Canada by the Crown was dismissed; the appeal by Weyerhaeuser Co. was allowed. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] S.C.J. No. 69, rev'g 98 B.C.L.R. (3d) 16, [2002] B.C.J. No. 155 (C.A.), aff'g 77 B.C.L.R. (3d) 310, [2000] B.C.J. No. 1301 (S.C.) [hereinafter *Taku River*].

[119] [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

[120] *Ibid.* at para. 82.

In *Delgamuukw v. British Columbia,*[121] the Supreme Court of Canada again looked at the duty to consult as part of the justification test for infringement. Writing for the majority, Lamer C.J.C. set out the nature of the duty to consult and introduced the concept of accommodation in the following often-quoted passage:

> There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.[122]

Delgamuukw established that some level of good faith consultation is always required to justify an infringement and that there must be an intention to address concerns raised during those consultations. The intention to address concerns is evidenced by the Crown's willingness to modify its actions in response to concerns raised during consultations.

Most recently, in the companion cases of *Haida* and *Taku River,* the Supreme Court of Canada confirmed that the duty to consult arises in the face of asserted but unproven rights.[123] The nature and scope of the duty will vary with the circumstances of

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[121] [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
[122] *Ibid.* at para. 168.
[123] The Province had strenuously resisted this characterization of its duty in its dealings with First Nations at the negotiating table and in numerous court challenges to the Province's land and resource use decisions. After *Delgamuukw,* the Province consistently took the position that the duty to consult exists only where

each case and will be generally proportionate to the strength of the First Nation's claim to rights or title and the seriousness of the potential adverse effects upon those rights or title.[124]

The Court grounded its decisions in the concept of the honour of the Crown in its dealings with aboriginal peoples, noting that, while the Crown's honour does not require it to act in a First Nation's best interest, it does mandate negotiation leading to a just settlement of claims, which implies a duty to consult.[125] Speaking for the Court, McLachlin C.J.C. made the following comments respecting Crown policy that does not take account of asserted aboriginal rights:

> The Crown, acting honourably, cannot run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.
> ...
> To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[126]

The Court in *Haida* outlined principles and guidelines to be followed by all parties to a consultation. First, the Crown's duty is triggered when the Crown has real or

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aboriginal rights or title have been proven. Since few First Nations have established treaty rights in B.C. and no First Nation has proven its aboriginal title in court, the Province proceeded with land use decisions respecting lands subject to such claims without undertaking any consultation, much less making accommodation.

[124] Both the Haida and the Tlingit First Nations were in treaty negotiations with the Province and the land use activities at issue were proposed on lands identified by the First Nations as being subject to their aboriginal title claims. The First Nations argued that the Province had a duty to consult them respecting the proposed uses of these lands before making land use decisions. To find otherwise, the First Nations argued, could result in their lands and resources being changed and denuded by the time their claims are settled through treaty negotiation or litigation. See *Haida, supra* note 118 at para. 33.

[125] *Ibid.* at paras. 16-20.

[126] *Ibid.* at para. 27.

constructive knowledge of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.[127]

Second, good faith is required of both sides and the Crown must in all cases have an intention to substantially address aboriginal concerns through a meaningful process.[128] The spectrum of consultation ranges from a weak claim, where notice, information and discussion are sufficient, to a strong case, requiring "deep consultation, aimed at finding a satisfactory interim solution."[129] Importantly, consultation does not give First Nations a veto over what can be done in cases where rights have not been established.[130]

Third, the Court concluded that in order to be meaningful, consultation must occur early in the process, at the time of strategic planning for the resource.[131] Based on these principles, it is likely that any OOGD must be preceded by meaningful consultations with all affected First Nations on the basis of a strong *prima facie* case for, at a minimum, aboriginal rights in the Basin that would be impacted by OOG activities.[132] In order for such consultation to be meaningful, government must first gather sufficient scientific and socio-economic data on the risks and likely impacts of proposed OOGD activities to enable the First Nations to accurately assess potential impacts on their rights. Consultation must also include a willingness to address concerns and mitigate potential impacts and to pay compensation for infringement.

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[127] *Ibid.* at para. 35.
[128] *Ibid.* at para. 42.
[129] *Ibid.* at paras. 43 & 44.
[130] *Ibid.* at para. 48.
[131] *Ibid.* at paras. 75 & 76. The Province had argued that consultation need not take place until application for a cutting permit as the tree farm license does not itself authorize any cutting.
[132] It would be difficult to argue that the affected First Nations do not have aboriginal fishing rights that could be affected by OOG structures and the potential environmental impacts of OOGD.

After the British Columbia Court of Appeal decisions in *Taku River* and *Haida*, Provincial policy about First Nations consultation was rewritten to be consistent with those judgments.[133] The Consultation Policy requires consultation to be efficient and transparent, diligent and meaningful. It also requires accommodation in appropriate cases and requires consultation and accommodation prior to the decision being made.[134]

A formal consultation process in respect of OOGD has not yet been initiated by either the federal or provincial governments. At the Provincial level, the BC Offshore Oil and Gas Team has recognized the need to work with affected First Nations to enlist their support and involvement in OOGD. The Province has stated that not only will it meet its obligations, but that it envisions an OOG industry in which First Nations have a role in decisions and a share in the profits.[135] While the Province has committed to meeting its obligations, it has also stated that the resolution of OOGD issues should be pursued outside of the treaty negotiation process.[136]

If the history of provincial-aboriginal relations is any indication, it will be an uphill battle for the Province to enlist the support of First Nations for OOGD. The difficult land claims negotiations and the abundance of litigation between the parties over resource use and allocation has created a "political climate of distrust"[137] and fragmented the relationship. There is, however, recent evidence of a general commitment by the

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[133] Province of British Columbia, *Provincial Policy for Consultations with First Nations* (British Columbia: October 2002) [hereinafter "Consultation Policy"].
[134] *Ibid.* at paras. 18-21.
[135] Jack Ebbels, "Developing British Columbia's Offshore Oil and Gas" (Power Point Presentation to the Nisga'a First Nation Special Assembly, April 23, 2004) online: <http://www.offshoreoilandgas.gov.bc.ca/whats-new/>.
[136] See BC Submission, *supra* note 3 at 10.
[137] See Douglas M. Johnson & Erin N. Hildebrand, eds. *B.C. Offshore Hydrocarbon Development: Issues and Prospects* (Victoria: Maritime Awards Society of Canada, 2001) at 15.

Province to rebuild relationships with First Nations. The Province has indicated that it will "work tirelessly to establish a new relationship with First Nations"[138] that is based on openness, transparency and collaboration and that it will develop new approaches for consultation and accommodation.[139] This new approach to First Nations consultation may assist the Province in its efforts to enlist First Nations support for the OOGD proposal.

2.10.2 The Ocean is Our Table: First Nations Opposition to OOGD

Canada established the FNEP to explore issues unique to First Nations and also encouraged First Nations to participate in the Priddle Panel.[140] The FNEP involved discussions with representatives of approximately seventy First Nations, as well as aboriginal umbrella organizations, all of whom expressed their unreserved opposition to lifting the moratoria.[141] The Brooks Report cites many reasons for this opposition, including the need to first resolve aboriginal land and title claims, concerns about the impacts of oil spills and seismic testing on the environment and on aboriginal fishing rights and traditional practices and a general lack of trust in both the review process and in government providing compensation for any infringement of aboriginal rights.[142] Many participants expressed concern that they were not consulted on the design and

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[138] September 12, 2005 British Columbia Throne Speech (1st Session, 38th Parliament), online: <http://www.legis.gov.bc.ca/38th1st/4-8-38-1.htm>.
[139] See Ministry of Aboriginal Relations and Reconciliation website, online: <http://www.gov.bc.ca/arr/popt/the_new_relationship.htm>. The Province has created a five-page document titled "The New Relationship" and has committed $100 million to a "new relationship fund."
[140] Brooks Report, *supra* note 83 at 1.
[141] *Ibid.*
[142] *Ibid.* at 2.

development of the review process and a belief that the process was a token effort undertaken for reasons of optics and not substance.[143]

The Brooks Report reflects some of the reasoning and insights of the peoples who have lived in the Basin area for thousands of years and whose way of life is intricately connected with the land and the sea. These insights include the obligation to protect resources for future generations; the need to recognize the connectedness of the coast; and concerns about the cumulative environmental impacts of fish farming, forestry, cruise ship and tanker traffic, tourism, industrial runoff and now, potentially, seismic testing and drilling.[144] Overall, the participating First Nations stressed their opposition to lifting the moratorium because they believe that it is not in the best interests of their people, the resources and their traditional territories. In short, "they believe that the risks to environment and lifestyle outweigh the returns."[145]

The Brooks Report indicates that more than formal consultation will be required in order to enlist the support of First Nations for OOGD. First Nations expressed interest in being involved from the very beginning, from designing the processes, developing a regulatory regime, having a clearly defined role in management, obtaining revenue sharing and being involved in filling knowledge gaps that include the incorporation of traditional knowledge.[146] First Nations are seeking a partnership with government and "recognition and respect, manifested in a meaningful role in government decision-making and management within their respective territories."[147]

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[143] *Ibid.* at 6.
[144] *Ibid.* at 8.
[145] *Ibid.* at 7.
[146] *Ibid.* at 11.
[147] *Ibid.*

While it is true that First Nations do not have a veto over OOGD, the recent decisions in *Haida* and *Taku River* emphasize that the courts will not uphold government actions that are undertaken without full consideration, disclosure and consultation with affected First Nations in a manner that upholds the honour of the Crown. The possibility of OOGD in the Basin strikes at the very core of the traditions and practices of a number of First Nations and therefore the level of consultation and accommodation required will fall at the high end of the spectrum. As Richard Spencer of the Kitkatla First Nation said to the MLA Taskforce, "The ocean is our table".[148]

2.11 Developing a Regulatory Regime for the West Coast

There is at present no regulatory regime that would govern OOGD on the West Coast. The East Coast regulatory regime was established by legislation in 1987 for Newfoundland and 1988 for Nova Scotia. The regime is founded on intergovernmental accord agreements and mirror federal and provincial legislation that establish joint regulatory frameworks administered by quasi-independent boards.[149] Under the *Accord Acts*, Canada delegated the administration of the offshore oil and gas regime to the Provinces and to the created boards, and adopted by referential incorporation various provincial statutes that would apply to these regimes. These include laws dealing with worker's compensation, labour relations and occupational health and safety.

The *Accord Acts* create a licensing regime under which OOG is undertaken, beginning with an exploration license giving exclusive rights to explore, drill and seek

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[148] B.C. Submission, *supra* note 3 at 6.

[149] See *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.3; *Canada-Newfoundland Atlantic Accord Implementation Act*, S.N. 1986, c. 37; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act,* S.C. 1988, c. 28; and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act,* S.N.S. 1987, c. 3 [hereinafter collectively, Accord Acts].

further licenses in the defined area, followed by a significant discovery license, given after a discovery is made and, finally, a production license. The *Accord Acts* also provide for environmental assessments and environmental impact statements that are required in order to obtain approval for a development plan.[150] The *Accord* Acts created a comprehensive *ad hoc* regime for East Coast OOGD and it seems inevitable that a similar approach would be taken on the West Coast.

The Province envisions a regime in which questions of ownership and jurisdiction are set aside and a single-window, comprehensive management and regulatory regime is developed to deal with all aspects of exploration, development, monitoring, decommissioning and reclamation.[151] According to the BC Offshore Oil and Gas Team:

> The Province believes a regulatory and management regime must be comprehensive, dealing with all aspects of offshore exploration and development, including the establishment of fiscal arrangements (e.g., royalties and taxes); initial decisions to open areas for exploration; granting of exploration rights and tenures; environmental assessments of all proposed offshore activities; approval of development plans; establishment and monitoring of operational health, environment and safety requirements; and decommissioning and reclamation.[152]

The Province anticipates that an effective, comprehensive regulatory body for OOGD in British Columbia can be developed that improves upon the *Accord Acts* and uses British Columbia's Oil and Gas Commission[153] as a model. In addition to its other

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[150] See Gerlinde van Driel & Alexander MacDonald, "Environmental Regime for Development of an Oil and Gas Project in the Newfoundland Offshore" (2002) 40 Alta. L. Rev. 131, for an overview of the applicable environmental assessment regimes in the Newfoundland offshore.

[151] See Patrick O'Rourke, "British Columbia Offshore Oil and Gas" (Power Point Presentation to the Greater Victoria Chamber of Commerce, Offshore Forum, September 14, 2004) at 16 & 20, online: <http://www.offshoreoilandgas.gov.bc.ca/reports/presentations.htm>.

[152] See Smart Regulation, *supra* note 97 At 10.

[153] Created under the *Oil and Gas Commission Act*, S.B.C. 1998, c.39. The Commission regulates land-based oil and gas development. See also Murray Rankin et al., "Regulatory Reform in the British Columbia Petroleum Industry: The Oil and Gas Commission" (1999) 38 Alta. L. Rev. 143, for an overview

responsibilities, this body would administer all applicable federal and provincial environmental regulations. A single-window OOGD regulatory regime does not, however, necessarily involve substantive changes to existing legislation. Legislative amendments would be aimed at creating a one-stop administrative structure for obtaining approvals for OOGD, not at changing the substance of existing laws. Single-window regulation is aimed at regulatory efficiency, not necessarily at better or more stringent regulation. The Province has clearly stated that its goal is to have an OOG industry and it recognizes that regulatory ease will make OOG more attractive to oil and gas companies.[154]

Federal and provincial environmental protection laws may remain as currently drafted, without amendment to ensure effective and appropriate regulation of OOGD activities.[155] Using the Oil and Gas Commission as a model does not provide assurance to those concerned about environmental protection, nor does the government's track record in effective environmental regulation. Since the provincial Liberals formed the government in 2001, numerous regulatory changes have been made that, critics contend, weaken and politicize environmental protection laws.[156] These include changes to environmental assessment laws as well as changes to the structure of the Oil and Gas

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of the Commission structure and functions. See also Sierra Legal Defense Fund, "This Land is Their Land: An Audit of the Regulation of the Oil and Gas Industry in BC" (Vancouver: June 2005), online: <http://www.sierralegal.org/publications.html> [hereinafter This Land] for a review of the Commission's performance.

[154] See Smart Regulation, *supra* note 97.

[155] Existing federal and provincial environmental protection laws are reviewed in chapter 3.

[156] See West Coast Environmental Law Association, "The BC Government: A One-Year Environmental Review" (Vancouver: West Coast Environmental Law Association, July, 2002), online: <http://www.wcel.org/issues/deregulation/ >.

Commission that have removed its independence by rendering it subject to direct Ministerial control.[157]

The creation of any OOGD regulatory regime will require the full cooperation and consent of the federal government. While British Columbia is facing significant resistance to OOGD, the BC Offshore Oil and Gas Team continues to formulate regulatory models in preparation for a future industry. While British Columbia undertakes this work, Canada is proceeding with the implementation of a new oceans governance regime based on the internationally accepted principles of ICOM. Chapter 3 will explore and assess the international roots of ICOM, its core principles and Canada's vision for integrated oceans governance.

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[157] See Rutherford, *supra* note 16 at 11-12; and This Land, *supra* note 153 at 26-27.

3. Chapter 3: Oceans Governance and the Shift to Integrated Coastal and Oceans Management

Any decision to allow OOGD in the West Coast offshore must be made in the context of existing policies and institutional structures intended to guide ocean and coastal use decisions in British Columbia. Because of the overlapping federal and provincial jurisdiction over coastal and ocean matters, as discussed in section 2.7, effective planning must be coordinated both within the Province (including local government) and between the Province and Canada.

At present, oceans governance in Canada is divided jurisdictionally between Canada and the provinces, with little integration or coordination of policies or regulatory structures. Canada's oceans management is best described as a "patchwork"[158] approach, involving a "complex web of laws and regulations managed by different levels of government."[159] Within British Columbia, oceans policy is sectoral and largely resource driven, with limited coordination among ministries and local governments.[160] However, oceans governance in Canada is in the midst of a policy shift that began with the adoption of the federal *Oceans Act* in 1997. This legislation set the stage for the implementation of a new oceans governance and policy framework based on the principles of integrated coastal and oceans management.

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[158] Parkes & Manning, *supra* note 19 at 2.

[159] Fisheries and Oceans Canada, *Canada's Oceans Strategy* (Ottawa: Fisheries and Oceans Canada, Oceans Directorate, 2002) [hereinafter Oceans Strategy] at 4.

[160] See Fikret Berkes et al., "The Canadian Arctic and the *Oceans Act*: the development of participatory environmental research and management" (2001) 44 Ocean & Coast. Mgmt 451 at 452. The authors reference the "frantic frontier-driven research" where research into environmental problems is driven by desire for resource development.

The inclusion of ICOM-based principles and goals in the *Oceans Act* reflects a significant theoretical shift in Canadian oceans governance. Canada is moving from its existing single-sector regulatory approach to a more modern approach based on the principles of integration and collaboration, with express recognition of the need for sustainable development and a precautionary approach. While the implementation of the *Oceans Act* is proving to be a slow process, its vision represents the future of oceans governance in Canada.

The focus of the discussion in this chapter is to what extent ICOM, in its current or projected form, guides decision making around whether, when and where OOGD proceeds on the West Coast. Chapter 4 will then examine and assess a key procedural principle of ICOM, that of public participation in decision making. The role of public participation in policy formation and implementation will be assessed in the context of both making the decision to allow OOGD and in the implementation of Canada's new oceans governance regime.

This chapter first explores the international foundations of ICOM and the principles and goals underlying an ICOM regime, including consideration of why oceans present challenging governance issues, both regionally and globally. It is only within this international context that Canada's Oceans Policies can be fully understood and assessed. Canada's early efforts at implementing some form of ICOM will be reviewed, followed by a discussion of the key components and principles of the *Oceans Act* and Oceans Policies. Canada's interpretation of the key substantive principles upon which the *Oceans Act* is based, those of sustainable development, integration and precaution, will be specifically considered.

In order to provide a broader perspective on the implementation of an ICOM regime, the U.S. model will be reviewed and discussed in terms of its strengths and weaknesses, with particular emphasis on the federal-state offshore oil battles that continue to plague the U.S. administration. While ICOM is somewhat new to Canada, the U.S. legislated an integrated coastal management regime over thirty years ago and its experiences are largely instructive for Canada.

3.1 The International Context of ICOM

3.1.1 Oceans As Integrated Ecosystems

The principles and concepts of ICOM have emerged internationally out of a global recognition of the need for ocean and coastal management policies that are rational, sustainable and integrated, in order to address the effects human activities are having on marine ecosystems. The international community has come to realize that the oceans are, by their nature, a unified, indivisible ecosystem with limited capacities and resources and that effective, sustainable governance requires new, integrated institutions. It has been noted that jurisdictional divisions in the oceans are an attempt to draw an arbitrary boundary "through waters that constitute an ecological whole."[161]

Historically, the vastness of the oceans gave rise to a paradigm of inexhaustibility, a belief that the oceans are so vast and their resources so great that, no matter what we do, they are bound to recover.[162] Craig traces this paradigm to the principle of the "freedom of the seas" that emerged in the 1600s, in which the seas were considered common

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[161] *Ibid.*

[162] See Robin Kundis Craig, "Taking the Long View of Ocean Ecosystems: Historical Science, Marine Restoration, and the Oceans Act of 2000" (2002) 29 Ecology L.Q. 649 at 2.

property for all to use and therefore to overuse and exploit.[163] This concept is reflected in traditional ocean governance regimes in Canada, the U.S. and elsewhere, which have focused on single-sector ocean use and exploitation rather than on integrated, sustainable, use and preservation.

In these regimes, each single-sector regulatory body considers only its own sector's needs and impacts and does not consider effects on other uses and interests or the cumulative effects of multiple uses on a single ecosystem. As populations grow, particularly in coastal areas, human demands on the oceans are increasing, both in terms of ocean resource exploitation and the use of oceans as a repository for wastes. Conflicts between users are becoming more common and cumulative effects more apparent.

It is only over the last twenty-five years or so that a global recognition of the profound impact that human activities are having on the oceans has emerged. These include exhausted fisheries on Canada's East Coast, the devastation of coral reefs and other bottom-based ecosystems from net trawling, the declining populations of shore birds through lost habitat and oil spills, and widespread beach, fisheries and shellfish closures due to land-based sources of pollution.[164] Given that human actions have often caused obvious widespread devastation of marine ecosystems, it is likely that such actions have caused many changes in ocean ecosystems of which we are not even aware or have only begun to understand.

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[163] R. J. Wilder, "Is this Holistic Ecology or Just Muddling Through? The Theory and Practice of Marine Policy" (1993) 21 Coast. Mgmt 209 at 217.

[164] See Mohammed El-Sabh et al., "Coastal Management and Sustainable Development: From Stockholm to Rimouski" (1998) 39 Ocean & Coast. Mgmt 1, for a discussion of the stresses on the oceans.

Although society is beginning to appreciate the impacts human actions have on ocean ecosystems, we are still a long way from truly understanding the complexity of those ecosystems. Further, there is no baseline from which to determine the state of the oceans before human interference. It is not sufficient to look only at recent, short-term, human impacts– there is evidence that human-induced changes date back more than a century.[165]

While a complete understanding of the complexity of ocean ecosystems can likely never be attained, there is recognition globally that the failure to implement some form of integrated management will allow the continued destruction of marine ecosystems and permit use and user conflicts increase, ultimately irreparably harming the oceans and the resources they provide.

3.1.2 Law of the Sea Conferences and UNCED

International recognition of the need for consensus on the rights and responsibilities of coastal nations initially arose out of a move by coastal nations to enclose ocean spaces adjacent to their coastlines, for both commerce and security reasons.[166] Starting with the U.S. (precipitated by the discovery of oil and gas in the Gulf of Mexico), nations began to unilaterally assert exclusive jurisdiction over coastal waters within various stated distances from shore.[167] These unilateral declarations created pressure for an international conference to "restore order and coherence to an

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[165] See Jeremy B.C. Jackson et al., "Historical Overfishing and the Recent Collapse of Coastal Ecosystems" (2001) Science 629.
[166] See Biliana Cicin-Sain & Robert W. Knecht. *Integrated Coastal and Ocean Management: Concepts and Practices* (Washington D.C.: Island Press 1998) at 71.
[167] *Ibid.*

increasingly chaotic situation."[168] The result was a series of United Nations Law of the Sea Conferences that attempted to reach agreement on coastal nations' rights and responsibilities regarding oceans. While the first two Law of the Sea Conferences failed to reach agreement on the extent of the territorial sea (in 1958 and 1960), the Third United Nations Conference on the Law of the Sea resulted in a 320-article document that has been hailed as a "constitution" for oceans. [169]

The preamble to UNCLOS reflects its two overarching principles: that the oceans are the common heritage of mankind, and are interconnected and therefore must be treated as a whole.[170] This latter notion was an important affirmation of the need for an integrated approach to the marine environment. UNCLOS also significantly expanded the size of ocean areas subject to national jurisdiction and management by defining and delineating the territorial sea, the continental shelf and the EEZ of coastal nations.[171] It gave coastal nations exclusive rights over living and non-living resources within the 200-nautical mile EEZ and, concurrent with this expanded national jurisdiction, established national responsibilities for oceans management, including an obligation to "protect and preserve" the marine environment.[172]

While UNCLOS produced an important international document that reflected a growing awareness and acceptance of key oceans management principles, it did not provide a framework or detailed approach for oceans management. This emerged in 1992 at the United Nations Conference on Environment and Development, a conference

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[168] *Ibid.* at 69.
[169] UNCLOS, *supra* note 103. See also Cicin-Sain & Knecht, *ibid.* at 69-71.
[170] *Ibid.*
[171] See Lawrence Juda, "Changing National Approaches to Ocean Governance: The United States, Canada and Australia" (2003) 34 Ocean Devel. & Int'l L. 161 at 162-164.
[172] UNCLOS, *supra* note 103 at Articles 61, 62 & 145.

that addressed the need for environmentally sustainable development in all aspects of human activity and for a transformation of attitudes and behaviours to achieve this goal.[173]

UNCED led to both the Rio Declaration and Agenda 21.[174] Although it is a non-binding document, the Rio Declaration's twenty-seven principles are an important achievement of UNCED in their recognition of the "integral and interdependent nature of the Earth"[175] and the provision of a written foundation for future international agreements to protect the human environment.

Agenda 21 is a more goal-oriented document: a forty-chapter action plan addressing state responsibilities for environmental protection that has been hailed as capturing "the ethos of contemporary environmentalism"[176] by providing specific recommendations for achieving sustainable development in all aspects of human activity. Chapter 17 of Agenda 21 addresses the protection of oceans, seas and coastal areas and

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[173] The United Nations Conference on Environment and Development (also called the Earth Summit), held in Rio de Janeiro in 1992 [hereinafter UNCED]. UNCED was the largest and perhaps most significant UN conference ever held, attended by 172 governments, 2,400 non-governmental organization representatives and 17,000 individuals, with the proceedings transmitted by over 10,000 on-site journalists to millions worldwide. See United Nations website, online: <http://www.un.org/geninfo/bp/enviro.html>.

[174] United Nations, *The Rio Declaration on Environment and Development,* in *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro: UN Department of Public Information, A/CONF.151/26 (Vol. I) 1992), online: <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> [hereinafter Rio Declaration]; and United Nations, *Agenda 21: Programme of Action for Sustainable Development*, in *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro: UN Department of Public Information, No.E.93.I.11, 1992), online: <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> [hereinafter Agenda 21] . UNCED also produced the *Statement of Forest Principles*, the *United Nations Framework Convention of Climate Change* and the *United Nations Convention on Biological Diversity*.

[175] Rio Declaration, *ibid.* at preamble.

[176] Douglas M. Johnston, "UNCLOS III and UNCED: A Collision of Mind-Sets?" in Lorne K. Kriwoken et al., eds. *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (London: Kluwer Law International Ltd. 1996) at 15.

"the protection, rational use and development of their living resources."[177] Echoing UNCLOS, it recognizes the marine environment as an integrated whole and the need for:

> ...new approaches to marine and coastal area management and development, at the national, subregional, regional and global levels...that are integrated in content and are precautionary and anticipatory in ambit.[178]

Chapter 17 specifically commits coastal nations to integrated management and sustainable development of coastal areas and the marine environment under their national jurisdiction, including by providing "for an integrated policy and decision-making process, including all involved sectors, to promote compatibility and a balance of uses."[179] Chapter 17.6 further provides that:

> Each coastal State should consider establishing, or where necessary strengthening, appropriate coordinating mechanisms (such as a high-level policy planning body) for integrated management and sustainable development of coastal and marine areas and their resources, at both the local and national levels. Such mechanisms should include consultation, as appropriate, with the academic and private sectors, non-governmental organizations, local communities, resource user groups, and indigenous people.[180]

Although it is non-binding, Agenda 21 marks the beginning of ICOM's international credibility through its recognition of and commitment to the principle of sustainable development and creation of a mandate for all coastal nations to strengthen governance regimes as necessary to implement ICOM programs.

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[177] Agenda 21, *supra* note 174 at c. 17.1.
[178] Ibid.
[179] *Ibid.* at c. 17.5. Chapter 17.5 also provides that States agree it is necessary to identify existing and projected uses of coastal areas and their interactions; concentrate on well-defined issues concerning coastal management; apply preventive and precautionary approaches in project planning and implementation; promote the development and application of methods that reflect changes in value resulting from uses of coastal and marine areas, including pollution, marine erosion, loss of resources and habitat destruction; and provide access, as far as possible, for concerned individuals, groups and organizations to relevant information and opportunities for consultation and participation in planning and decision-making at appropriate levels.
[180] *Ibid.* at c.17.6.

Since the creation of Agenda 21, there have been numerous attempts to further define and interpret the concepts of ICOM.[181] The 1993 World Coast Conference, held in Noordwijk, The Netherlands, provided a forum for coastal zone experts and policy makers to discuss means and opportunities for strengthening integrated coastal zone management.[182] That Conference recognized ICOM as "the most appropriate process to address current and long-term coastal management issues,"[183] reflecting the ever-growing international support for the implementation of ICOM regimes.

3.1.3 The Objectives and Principles of ICOM

ICOM is not a specific management regime, but rather a comprehensive management process that strives to recognize, balance and integrate coastal and ocean uses with a view to achieving long-term ecosystem preservation and the sustainable use of resources. The WCC Report and the Noordwijk Guidelines[184] both recognize that every ICOM structure is unique and that ICOM embodies a range of concepts and techniques that each nation must adapt to suit its particular circumstances.

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[181] See Cicin-Sain & Knecht, *supra* note 166 at 102. They identify five major efforts to develop international guidelines, including the Noordwijk Guidelines (see *infra* note 184), the World Coast Conference Report in 1994 (see *infra* note 182), the Organization for Economic Cooperation and Development in 1991, the United Nations Environmental Programme in 1995 and the International Union for the Conservation of Nature and Natural Resources in 1993.

[182] The World Coast Conference was attended by representatives of more than 90 nations, 20 international organizations and 23 non-governmental organizations. See World Coast Conference, *Preparing to Meet the Coastal Challenges of the 21st Century: Report of the World Coast Conference* (Noordwijk, The Netherlands, 1993) [hereinafter WCC Report] at 2, online: <http://www.netcoast.nl/projects/netcoast/info/history/wccpdf.htm>.

[183] Ibid.

[184] Jan C. Post & Carl G. Lundin, eds. *Guidelines for Integrated Coastal Zone Management* (Washington D.C.: The International Bank for Reconstruction and Development/The World Bank, August 1996) [hereinafter Noordwijk Guidelines].

Although there is no single definition of ICOM, it does have some key components that have been generally recognized and accepted. The Noordwijk Guidelines identify ICOM's core operational objectives as:

> 1. Strengthening sectoral management, for example through training, legislation and staffing.
> 2. Preserving and protecting the productivity and biological diversity of coastal ecosystems, mainly through prevention of habitat destruction, pollution and overexploitation.
> 3. Promoting rational development and sustainable utilization of coastal resources.[185]

An ICOM regime is grounded in substantive and procedural principles, all of which are set out in the Rio Declaration in some form.[186] Procedurally, ICOM is grounded in the principle of transparency, which demands open and transparent decision making with full public participation and access to information.[187] Substantive principles of ICOM include the principles of sustainable development (also called intergenerational equity), integration and precaution.

3.1.3.1 Sustainable Development

The principle of sustainable development reflects the perspective that, "as members of the present generation, we hold the earth in trust for future generations."[188] The concept of sustainability is the core goal underlying both the Rio Declaration and Agenda 21 and is the primary goal of ICOM.[189] Sustainability may be thought of as the

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[185] *Ibid.* at 5.
[186] Rio Declaration, *supra* note 174. See also Cicin-Sain & Knecht, *supra* note 166 at 52-55.
[187] Cicin-Sain & Knecht, *ibid.* at 53. See also Agenda 21, *supra* note 174 at c. 17.5, which calls for access to information, consultation and participation in decision making. This principle will be discussed in Chapter 4.
[188] Cicin-Sain & Knecht, *ibid.*
[189] The preamble to Agenda 21 provides that it "marks the beginning of a new global partnership for sustainable development." *Supra* note 174 at preamble 1.6.

overarching principle governing human activity, with the other principles as the means to achieving this goal.[190]

Cicin-Sain and Knecht envisage sustainable development as "a new paradigm, a new mode of thinking that serves as a guide to action"[191] and that "achieving sustainable development entails a *continuous process of decision making* whereby certain questions are asked and 'right' choices and decisions are made."[192] Under this analysis, sustainable development has three major emphases:

- Economic development to improve the quality of human life.
- Development that is environmentally sensitive and makes appropriate use (or nonuse) of natural resources.
- Development that is equitable in its distribution of benefits within society, internationally and intergenerationally.[193]

While sustainable development is conceptually straightforward, the application of the principle can vary widely because any determination of what is sustainable is highly subjective. For example, any use of non-renewable resources such as oil and gas is by its nature not sustainable. Consequently, notions of sustainability in OOGD discussions tend to be aimed at resulting environmental impacts on the surrounding ecosystem.

While there are different formulations of the principle that can affect its interpretation and practical application, the principle tends to be stated broadly and

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[190] The World Summit on Sustainable Development was held in Johannesburg, South Africa (August 26-September 4, 2002). See *Report of the World Summit on Sustainable Development* (New York: UN Department of Public Information, A/CONF.199/20, 2003). The delegates adopted the Johannesburg Declaration on Sustainable Development in which the nations of the world reaffirmed their commitment to sustainable development.

[191] Cicin-Sain & Knecht, *supra* note 166 at 84.

[192] *Ibid.*

[193] *Ibid.* at 84-85.

contain the essential core concept of intergenerational equity. The Rio Declaration states the principle as follows:

> The right of development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.[194]

The *Oceans Act* contains a similar definition, being "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[195]

Sustainable development, therefore, is the core principle and goal of ICOM and is also a decision making process achieved through the application of other principles, including the principles of integration and precaution.[196]

3.1.3.2 Integration

The principle of integration recognizes that all coastal and ocean uses are inter-related and that resource use, development and environmental protection must be viewed as a whole. ICOM is grounded in the principle of integration, as described by Cicin-Sain and Knecht:

> First and foremost, the process is designed to overcome the fragmentation inherent in both the sectoral management approach and the splits in jurisdiction among levels of government at the land-water interface. This is done by ensuring that the decisions of all sectors (e.g., fisheries, oil and gas production, water quality) and all levels of government are harmonized and consistent with the coastal policies of the nation in question.[197]

Integration refers to sectoral integration among all coastal and ocean users in various sectors ("horizontal integration") and to the integration of the different levels of

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[194] *Ibid.* at principle 3.
[195] *Oceans Act*, *supra* note 18 at s. 30
[196] This interpretation is supported by the Rio Declaration, *supra* note 174,which directs states to ensure sustainable development through, *inter alia*, integration (principle 4) and precaution (principle 15).
[197] Cicin-Sain & Knecht, *supra* note 166 at 39.

government involved in coastal and ocean management ("vertical integration"). It also includes spatial integration of land-based and marine uses and interdisciplinary integration of science, management and users. The principle of integration recognizes that all coastal and ocean uses are inter-related and that resource use, development and environmental protection cannot be viewed as distinct issues, as every decision in one area necessarily affects the other.

3.1.3.3 The Precautionary Approach or Principle

Over the last thirty years or so, the precautionary approach, or principle,[198] has become widely accepted in environmental policy circles. This principle traces its origins to the German environmental policy *Vorsorgeprincip*, a policy developed in the 1970s to address concerns over acid rain.[199] The importance of the principle has continued to grow and, since its inclusion into the Rio Declaration, has "been included in virtually every recent treaty and policy document related to the protection and preservation of the environment."[200] However, while the principle has gained wide use and acceptance, there remains the challenge of how to attain truly precautionary policies through specific

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[198] There is some distinction in the literature between the precautionary approach and the precautionary principle, although they are often used interchangeably. Reference to the precautionary approach, as is used in the Rio Declaration, tends to reflect a more utilitarian formulation of the principle that accepts some risk and the need to balance socio-economic concerns. See David VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Towards Sustainable Development* (London: Kluwer Law International, 1995) at 21. In this discussion I will use the terms interchangeably.

[199] See Mike Feintuck, "Precautionary Maybe, but What's the Principle? The Precautionary Principle, the Regulation of Risk and the Public Domain" (2005) 32(3) J. Law and Soc'y 371 at 374. *Vorsorgeprincip* required that "if wisdom and science combine to warn that actions may lead to harm, government has the duty to change society by persuasion and regulation." See also Joel Tickner & Nancy Myers, "Precautionary Principle: Current Status and Implementation" (2000) Synthesis/Regeneration 23, online: <http://www.greens.org/s-r/23/23-17.html> who indicate that the principle involves not only foresight, but "forecaring."

[200] David Freestone & Ellen Hey, eds. *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer Law International 1996) at 3.

instruments and measures.[201] Further, while the principle is widely accepted, its formulation, application and interpretation lack uniformity, ranging from more eco-centric (or stronger) to more utilitarian (or weaker) and from conceptually ambiguous to more precise. As VanderZwaag notes, "the precautionary principle is caught between competing philosophies of life, one eco-centric and risk-adverse, the other more utilitarian and risk-taking."[202]

Regardless of the specific formulation used, the principle at its core is based on the notion that, when faced with scientific uncertainty, precautions should be taken to prevent environmental harm, rather than trying to repair harm that has been done.[203] Freestone and Hey make the following observation:

> The concept assumes that science does not always provide the insights needed to protect the environment effectively, and that undesirable effects may result if measures are taken only when science does not provide such insights.[204]

While every statement of the principle should contain the core concept of preventing environmental harm in the face of scientific uncertainty, the specific formulation adopted in any given case is crucial to how the principle is applied in practice. The Rio Declaration's statement of the principle represents a more utilitarian formulation, as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as

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[201] *Ibid.* at 4.
[202] VanderZwaag, *supra* note 198 at 19. VanderZwaag notes, at 20, that "most phrasings of the principle are more utilitarian allowing for some environmental trade-offs in the name of economic development and socio-economic benefits."
[203] See Per Sandin, "The Precautionary Principle and the Concept of Precaution" (2004) 13 Envtl. Values 461, for an interesting assessment of the concept of precaution.
[204] Freestone & Hey, *supra* note 200 at 12.

> a reason for postponing cost-effective measures to prevent environmental degradation.[205]

This articulation is more utilitarian because it is qualified: it only requires states to apply the principle "according to their capabilities," in cases where "serious or irreversible damage" is threatened and, even in such cases, only measures that are "cost-effective" need be undertaken. More recently, the 1998 Wingspread Statement on the Precautionary Principle presented an eco-centric version:

> When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof.[206]

The Wingspread Declaration calls for a positive duty to take precautionary measures where there are threats to human health or the environment and places the burden on proponents of an activity to prove the activity would not cause harm. Unlike the Rio Declaration formulation, there are no qualifiers as to the level of the risk or the economics of the measures.

Because the formulation and interpretation of the precautionary principle can vary widely, the specific formulation and context must be considered in each case. In 2003, Canada released a discussion paper on the precautionary principle in which it supported the approach as articulated in the Rio Declaration and stated "that the absence of full scientific certainty shall not be used as a reason to postpone decisions where there is a

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[205] Rio Declaration, *supra* note 174 at principle 15.
[206] Johnson Foundation, Wingspread Statement on the Precautionary Principle (Racine, Wisconsin: Johnson Foundation, January, 1998), online: <http://www.johnsonfdn.org/conferences/precautionary/finpp.html> [hereinafter Wingspread Declaration].

risk of serious or irreversible harm."[207] This support for the Rio Declaration, as well as the references to "full scientific certainty" and "serious or irreversible harm", indicates that Ottawa takes a more utilitarian approach to the application of the principle in Canadian environmental law.[208]

These different formulations of the precautionary principle illustrate its range of possible applications and interpretations. However, the implementation of any formulation of the principle presents challenges, as the principle is arguably an "empty vessel"[209] that has no meaning or practical application until it is situated within existing scientific, political, economic and legal parameters. As Feintuck notes:

> What emerges from even the briefest survey of the development and implementation of the precautionary principle is a complex picture of interaction between science, public policy and law. Only by examining it in this broader context can the precautionary principle be fully understood, and it must be viewed not as a free-standing concept, but rather as part of a broader regulatory system relating to risk.[210]

In any given situation, there will be a multitude of opinions on whether a matter is scientifically uncertain, whether there is a risk of harm and the extent of the risk, and the appropriate form of precaution, if any. The result is that even a seemingly eco-centric version of the principle may be ineffective if those applying the principle place greater

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[207] Environment Canada, *A Canadian Perspective on the Precautionary Approach/Principle* (Discussion Paper) (Ottawa: Environment Canada, 2001), online: <http://www.ec.gc.ca/econom/discussion_e.htm>.

[208] Nonetheless, Boyd sees the inclusion of references to the principle in federal legislation as a sign of hope for the future of environmental protection. As for the current state, he writes: "Canadian environmental law is generally based on the opposite of the precautionary principle, in that conclusive scientific evidence of harm is necessary before steps will be taken to limit an activity or restrict the use of a particular substance." David R. Boyd. *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press 2003) at 234. See also David L. VanderZwaag et al., "Canada and the Precautionary Principle/Approach in Ocean and Coastal Management: Wading and Wandering in Tricky Currents" (2002-2003) 34 Ottawa L. Rev. 142.

[209] Feintuck, *supra* note 199 at 378.

[210] *Ibid.* at 377.

emphasis on development or economics than environmental preservation. It has been noted that the precautionary principle:

> [D]oes not tell decision-makers or individual actors what to do or when; it does not reverse the burden of proof, requiring the proponents of a particular activity to prove that it is free of risks; and it does not place environmental concerns ahead of social and economic ones.[211]

Because of its inherent vagueness and ambiguity, use of the principle as a moral guide or a decision-making rule is problematic, as it cannot yield specific verdicts or policies.[212] However, the vagueness of the principle may not be a weakness if it is not intended to be a moral or decision-making rule, but "more like a banner that signifies a shared commitment to the welfare of the environment and of future persons, as well as shared reservations about economic cost-benefit analysis."[213]

The need to clarify the practical implications and ensure legal implementation of the precautionary principle has been identified as one of the greatest challenges of international environmental law.[214] The above discussion indicates it may well be an impossible challenge. The application of the precautionary approach, in the context of the *Oceans Act,* will be considered below.

3.2 Canadian Oceans Governance and ICOM

Before the *Oceans Act* came into force in 1997, Canada did not have legislation aimed at creating an integrated national oceans or coastal policy. As noted in the Oceans

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[211] Jaye Ellis & Alison FitzGerald, "The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality" (2004) 49 McGill L. J. 779 at para 782.
[212] Derek Turner & Lauren Hartzell, "The Lack of Clarity in the Precautionary Principle" (2004) 13 Envtl. Values 449 at 451 & 459. These authors also point out that it is not clear from the literature what kind of principle it is intended to be: moral, practical or symbolic.
[213] *Ibid.* at 459.
[214] Douglas M. Johnston & David L. VanderZwaag, "The Ocean and international Environmental Law: Swimming, Sinking and Treading Water at the Millenium" (2000) 43 Ocean & Coast. Mgmt 141 at 153.

Strategy, "[a]lmost every federal department and agency in Canada is involved in the management of the oceans through policies, programs, services or regulations."[215] While Canada borders three oceans and has the longest coastline in the world, it has not kept pace with international ICOM efforts.[216]

As will be discussed, the adoption of the *Oceans Act* and the subsequent Oceans Policies reflect a new approach to oceans governance that is consistent with the internationally recognized principles of ICOM. This new approach represents a significant policy shift in Canadian oceans governance, one that expressly recognizes the need for sustainability, integration, precaution and transparency. However, the implementation of the Oceans Policies is in its infancy, with the DFO currently undertaking preliminary data collection. Regulation remains fragmented at both the provincial and federal levels, with a multitude of single-sector regulations that apply to ocean and coastal uses.[217] As well, there are significant deficiencies in the Oceans Policies that will, if not addressed, limit the effectiveness of the proposed regime.[218]

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[215] Oceans Strategy, *supra* note 159 at 6.

[216] See Parkes & Manning, *supra* note 19 at 11.

[217] British Columbia does not have a coastal plan or provincial strategy for coastal planning and use, despite its extensive control over coastal areas. Coastal planning tends to be guided by land and resource use allocation. The Coast and Marine Planning Branch, formerly part of Ministry of Sustainable Resource Management (this ministry was recently eliminated), has been responsible for the design and delivery of coastal planning along with the coordination of coastal and marine policy within provincial agencies. However, has no mandate to create a comprehensive coastal plan that would coordinate ocean and coastal uses and conservation initiatives. It has created some regional and local coastal plans with a focus on coastal and oceans resource use and allocation of upland and foreshore tenures. See online, <http://srmwww.gov.bc.ca/rmd/coastal/> . This branch will be moved to either the Ministry of Agriculture and Lands or the Ministry of Environment.

[218] The deficiencies in the Oceans Policies and the DFO's slow implementation of the Oceans Policies has most recently been criticized by the Office of the Auditor General of Canada, who concluded that the "promise of the *Oceans Act* is unfulfilled" and that the DFO has "fallen far short of meeting its commitments and targets." See Office of the Auditor General of Canada, *2005 Report of the Commissioner of the Environment and Sustainable Development* (Chapter 1- Fisheries and Oceans Canada – Canada's Oceans Management Strategy) (Ottawa: Office of the Auditor General of Canada, 2004), online:

Those provincial and federal environmental laws that apply in ocean and coastal areas will be briefly reviewed, followed by an assessment of the *Oceans Act* and the Oceans Policies.

3.2.1 Existing Environmental Laws

Provincially, there are conservation and environmental protection regulations that apply to ocean and coastal areas. These include the waste disposal provisions under the *Environmental Management Act*,[219] the power to reserve Crown land for ecological purposes under the *Ecological Reserve Act*,[220] the creation of provincial parks under the *Park Act*[221] and the creation of sanctuaries and management areas under the *Wildlife Act*.[222]

British Columbia also has an environmental assessment law applicable to coastal areas within provincial jurisdiction. However, the British Columbia *Environmental Assessment Act*[223] was rewritten in 2002, taking it, according to Boyd, from "one of the country's most progressive provincial [environmental assessment] laws to one of the weakest laws."[224] While the BC Offshore Oil and Gas Team has indicated that environmental assessment of OOGD would be comprehensive, activities relating to OOGD are not covered under the BCEAA, although the construction of an OOGD

<http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c2005menu_e.html> [hereinafter Auditor General Report] at 2.

[219] S.B.C. 2003, c.53. This Act replaced the previous *Waste Management Act.*

[220] R.S.B.C. 1996, c. 103. B.C. has created over 100 marine ecological reserves under this legislation.

[221] R.S.B.C. 1996, c. 344. Many provincial parks have a marine component.

[222] R.S.B.C. 1996, c. 488.

[223] S.B.C. 2002, c. 43 [hereinafter BCEAA].

[224] Boyd, *supra* note 208 at 157. Boyd notes that assessments are no longer mandatory but rather rest with bureaucrats and that previous requirements to examine cumulative effects and alternatives were eliminated.

facility is eligible for assessment.[225] Whether such a facility would be subject to an assessment would be determined on a case-by-case basis at the bureaucratic level.

Federally, there are a number of existing conservation and environmental protection regulations that apply in the offshore. These include fish and habitat protection provisions in the *Fisheries Act,*[226] laws regulating marine transport under the *Navigable Waters Protection Act,*[227] laws respecting maritime transport and trade under the *Canada Marine Act*[228] and laws under the *Canada Shipping Act*[229] that regulate pollution from ships, other vessels and oil handling facilities. The *Canada Wildlife Act,*[230] the *Species At Risk Act*[231] and the *Migratory Birds Convention Act*[232] are aimed at the protection of wildlife and apply to marine species. As well, the *Canada National Marine Conservation Areas Act*[233] authorizes Parks Canada to establish marine conservation areas for the purpose of protecting and conserving representative marine areas for the benefit, education and enjoyment of the people of Canada and the world.[234] The *Canadian*

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[225] Reviewable Projects Regulation, B.C. Reg. 370/2002 at Part 4.

[226] R.S.C. 1985, c.F-14. This Act includes provisions respecting fish habitat protection and pollution prevention. Section 35(1) prohibits any person from carrying on "any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat," unless the person's activity is authorized under section 35(2). This Act is arguably the most important legislation protecting B.C.'s coastal waters.

[227] R.S.C. 1985, c. N-22. Although this Act is aimed at preventing interference with navigation, it does contain provisions that prevent the deposit of waste into the ocean and also requires permits for any structures built in navigable waters.

[228] S.C. 1998, c.10.

[229] R.S.C. 1985, c. S-9. Part XV of this Act deals with pollution prevention, but does not apply to discharges from ships involved in oil and gas drilling and production activities. Regulations under this Act include the Oil Pollution Prevention Regulations, SOR 93-3.

[230] R.S.C. 1985, c. W-9.

[231] S.C. 2002, c. 29.

[232] R.S.C. 1994, c. 22. See also the Migratory Birds Regulation, C.R.C., c. 1035.

[233] S.C. 2002, c.18.

[234] *Ibid.* at s.4 . Parks Canada is creating a marine conservation area for the Queen Charlottes that will extend about ten kilometres offshore from the existing Gwaii Haanas National Park Reserve and encompass approximately 3,400 km². See Parks Canada, online: <http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/natcul/natcul4_E.asp>. Under the legislation, marine conservation areas will be divided into zones allowing for different levels of uses, with at least one highly protected zone to preserve special

Environmental Protection Act[235] regulates the production and control of toxic substances that may harm habitat and contains specific provisions relating to marine pollution from land-based and vessel sources.[236]

With respect to environmental assessment, the *Canadian Environmental Assessment Act*[237] requires an environmental assessment to be completed prior to certain types of projects being undertaken, including offshore oil and gas developments. In each case, the relevant government agency proceeds with an initial screening of the likely environmental and cumulative effects of the project. Some projects will require a comprehensive study and a small percentage will proceed to panel reviews or mediation.[238]

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features or sensitive ecosystems and one zone that encourages ecologically sustainable use of marine resources. Parks Canada has identified a three-level zoning system, with zone I being the "preservation" zone, zone II being the "natural environment" zone, and zone III being the "conservation" zone. The Act prohibits ocean dumping and non-renewable resource extraction and development in any marine conservation area (s.13), while activities such as fishing, aquaculture and recreation can be permitted.

[235] S.C. 1999, c.33.

[236] *Ibid.* at Part 7, divisions 2 and 3.

[237] S.C. 1992, c. 37 [hereinafter CEAA].

[238] On November 17, 2005, the Honourable Stéphane Dion, Minister of the Environment and Minister responsible for the Canadian Environmental Assessment Agency, announced that the Comprehensive Study List Regulations, SOR 94-638, under the CEAA, will be amended so that offshore oil and gas exploratory drilling projects will require only a screening assessment rather than the current comprehensive study assessment. See Canadian Environmental Assessment Agency, News Release, "Federal Minister Stéphane Dion Announces Changes to the Environmental Assessment of Offshore Oil and Gas Exploratory Drilling Projects" (November 17, 2005), online: <http://www.ceaa-acee.gc.ca/013/nr051117_e.htm>.
For a thorough discussion and critique of the CEAA, see Boyd, *supra* note 208 at 151- 152. Boyd notes that between 1995 and 2000, 25,000 assessments were conducted under the CEAA, of which 99.9% were screenings. Only forty-six projects were subject to comprehensive studies, only ten to panel reviews and none to mediation. Of all these projects, 99.9% were approved. Not surprisingly, Boyd considers the legislation weak because of "its discretionary nature…limited opportunities for public input, the lack of enforcement or offence provisions, the failure to require mandatory follow-up and monitoring, the potential conflict of interest created by self-assessment, and the lack of independent decision making" at 154.

3.2.2 Jurisdictional Challenges to ICOM

The same ownership and jurisdictional issues that Canada faces with respect to OOGD have arguably impeded efforts to implement some form of integrated management. While political will[239] is ultimately the key to implementation, the most frequently cited reason for the lack of ICOM in Canada is the assertion that the jurisdictional issues make effective ICOM nearly impossible.[240] It is true that the division of powers in the *Constitution Act* presents a significant challenge to the development and implementation of ICOM in Canada. Because coastal provinces own the seabed, subsoil and resources of ocean waters above the low water mark and have jurisdiction over land use and coastal activities, Canada could not implement ICOM without the active agreement and participation of the coastal province. Correspondingly, Canada's jurisdiction over navigation and shipping, fisheries and trade and commerce, as well as its exclusive jurisdiction within the EEZ, mean that any provincial regime must include federal participation.

The ownership and jurisdictional issues inherent in Canadian federalism mean that any ICOM regime must find a way for Canada and the provinces to work cooperatively towards common goals.[241] The need for cooperative federalism should not be considered a barrier to ICOM; in fact, a core goal of ICOM is to overcome

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[239] See Cicin-Sain & Knecht, *supra* note 166 at 126, for their definition of political will as "the resolve or determination needed by a decision-maker to take a course of action that involves expenditure of political capital or comes with some political cost."

[240] See Matthew Heemskerk, "National Efforts at Integrated Coastal Zone Management: The Canadian, Australian and New Zealand Experiences" (2001) 10 Dal. J. Leg. Stud. 158 at 168; and Juda, *supra* note 171 at170.

[241] See British Columbia, *Coastal Zone Position Paper* (Victoria: Province of British Columbia, 1998) at 3, which sets out the Province's position on oceans governance, including in respect of OOG and British Columbia's "ownership" of inland areas.

jurisdictional complexities through policy harmonization.[242] While this may be a challenge, jurisdictions including the U.S. have implemented strategies that have been effective in encouraging interjurisdictional cooperation and coordination in coastal zone management.

3.2.3 Early Canadian Efforts at ICOM

Canada had undertaken initiatives towards integrated management over the years, but until 1997 had not managed to rally sufficient political support to see its efforts through to implementation. While practical impediments such as jurisdictional issues have plagued these efforts, the lack of political will to make the necessary institutional changes is the overriding factor. [243]

Canada's efforts began in 1961 with the *Resources for Tomorrow Conference*, a gathering of multi-sector experts to assess the current status of resource management and to implement coordination.[244] This Conference spawned further work and meetings over the next decade, with a view to creating a unified coastal zone framework. These initiatives were ultimately unsuccessful due to lack of political will and budgetary constraints.[245]

Similarly, the 1978 National Coastal Zone Conference led to the creation of a set of shore management principles that could have formed the basis for coordinated and

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[242] See Cicin-Sain & Knecht, *supra* note 166 at 140.
[243] See Marcus Haward & Lawrence P. Hildebrand, "Integrated Coastal Zone Management" in Kriwoken et al., *supra* note 176 at 162-163. They cite many factors contributing to the failure to establish ICOM until the 1990s, including lack of awareness, multiple jurisdictions, administrative fragmentation, sectoral focus and federal-provincial conflicts.
[244] Ibid.
[245] Parkes & Manning, *supra* note 19 at 14.

effective ICOM frameworks.[246] However, a lack of political will yet again saw this initiative "slowly fade away through resource starvation."[247] It was not until 1987, when the DFO called for the creation of new legislation to provide for integrated oceans management,[248] that hopes for ICOM in Canada were re-ignited.

Canada's renewed political interest in implementing some form of ICOM likely emerged from the confluence of a number of factors. First, the early 1990s was a period of increased public awareness and concern over the declining state of the oceans and coasts, both globally (as witnessed by UNCLOS and UNCED) and at home.[249] Second, Canada was preparing to ratify UNCLOS, under which it would have increased national jurisdiction and responsibilities over oceans under international law. Finally, the United Nations had declared 1998 the International Year of the Ocean and Canada wanted to have its oceans laws in order by that time.[251] The coming together of these factors exerted sufficient pressure on Canada to pursue a more integrated approach to oceans management and ultimately led to the passage of the *Oceans Act* in 1997.

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[246] Canadian Council of Resource and Environment Ministers, *Shore Management Symposium Proceedings* (Victoria, 1978).
[247] Parkes & Manning, *supra* note 19 at 17.
[248] See Department of Fisheries and Oceans, Oceans Policy for Canada: A Strategy to Meet the Challenges and Opportunities on the Oceans Frontier (Ottawa: Government of Canada, 1987).
[249] See El-Sabh et al., *supra* note 164 for a summary of the 1996 Coastal Zone Conference, held in Rimouski, PQ. The delegates endorsed the Rimouski Declaration which called for, *inter alia*, "immediate action to develop and implement a Canadian Oceans Policy for the 21st Century" at 21.
[251] In 1998, The Independent Commission on the World's Oceans issued its report, *The Ocean...Our Future* (Cambridge: Cambridge University Press, 1998), calling for nations to adopt integrated approaches to oceans governance.

3.2.4 The *Oceans Act*

The *Oceans Act* is comprised of three parts. Part I, titled "Canada's Maritime Zones", provides for the full extent of coastal and ocean jurisdiction permitted by UNLCOS and customary international law. It is here that Canada establishes and claims a 12-nautical mile territorial sea (in which Canadian and certain provincial laws apply), a 24-nautical mile contiguous zone (for the enforcement of customs, fiscal, immigration and sanitary laws), a 200-nautical mile EEZ (in which Canada has exclusive rights to living and non-living resources) and also defines the continental shelf (which in some areas will extend beyond the EEZ) and the internal waters of Canada.[252] Canada also claims exclusive rights to establish and use artificial islands, installations and structures, to undertake marine science research and to protect and preserve the marine environment within the EEZ.[253]

Part II of the *Oceans Act*, titled the "Oceans Management Strategy," contains the general framework and directions for integration and coordination of oceans management. This Part contemplates, first, the creation of a "national strategy" for ocean and coastal waters,[254] followed by the creation and implementation of integrated management plans.[255] The Minister of the DFO is given a number of powers, including the ability to develop and implement policies and programs, to establish advisory or management bodies and to coordinate with other ministers, boards and agencies.[256] However, the Act does not set out the specific policy instruments or strategies to be used

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[252] *Oceans Act*, *supra* note 18 at ss. 4-20.
[253] *Ibid.* at s.14.
[254] *Ibid.* at s. 29.
[255] *Ibid.* at ss. 31 and 35. Integrated management plans hereinafter referred to as IMPs.
[256] *Ibid.* at s. 32.

in the creation and implementation of a national strategy. These are matters determined by the DFO through policy.

The *Oceans Act* specifically defines and adopts the principles of sustainable development, integrated management and the precautionary approach. As discussed in section 3.1.3, these substantive principles of ICOM are entrenched in the Rio Declaration and Agenda 21. They are introduced in the preamble to the Act and then repeated in section 30, which directs the Minister of the DFO to lead the development and implementation of a national coastal and oceans strategy based on the principles of:

> (a) sustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs;
> (b) the integrated management of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law; and
> (c) the precautionary approach, that is, erring on the side of caution.[257]

As discussed above, the specific formulation of the precautionary approach chosen is significant. In this case, "erring on the side of caution" is perhaps purposefully vague. It could be interpreted and applied as an eco-centric version, in that it is not limited by economic or harm qualifiers, but could also support a utilitarian interpretation because it does not define the harms nor include an obligation to take precautionary measures.

Canada's support of the Rio Declaration's version of the precautionary approach, combined with the vague definition of precaution in the *Oceans Act,* indicates that a utilitarian interpretation of the principle is intended and likely to be adopted.[258] The exact formulation of the precautionary principle that will be applied and decisions about

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[257] *Ibid.* at s.30.
[258] See *supra* note 207.

scientific uncertainty, risk of harm and balancing of socio-economic factors, are left to the discretion of the Minister.

This makes it difficult to predict how the precautionary principle will contribute to federal oceans policy generally and to decisions about OOG in particular. References to precaution are made throughout the Oceans Policies, without any indication of how the principle will be interpreted and applied in specific circumstances. If the scope of the principle is not defined and the methods for applying the principle not delineated, it may be left without any meaning or likelihood of application. It may be, as suggested by Turner and Hartzell, that precaution in Canadian oceans governance will be no more than a banner that government can waive as a symbolic commitment to environmental values.[259]

Part III of the *Oceans Act* is organizational, giving to the Minister all powers, duties and functions over ocean matters within Canada's jurisdiction that are not otherwise assigned to another department or agency. However, while the DFO is the lead ministry for oceans, a number of other federal departments and agencies continue to have ocean-related jurisdiction, including Environment Canada, the Department of Transport and the Department of National Defense.

While the *Oceans Act* has been praised for its adoption of an integrated approach to oceans governance consistent with internationally-accepted principles, it has been criticized in many respects, including for its failure to mandate national strategies and management plans, to address the institutional fragmentation and jurisdictional

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[259] *Supra* note 212.

complexities, to create an administrative structure and to clearly define the principles upon which it is based.[260]

Part II of the Act does not commit the government to creating and implementing a national strategy or IMPs, but only to leading and facilitating these processes. Further, there are virtually no requirements in the Act respecting the content of the national strategy or the IMPs, and no timeframes, deadlines, process criteria or review criteria. It allows but does not require the Minister to consult other governments and groups and establish advisory boards and marine environmental quality guidelines. Perhaps most significantly, the *Oceans Act* fails to recognize or resolve the significant federal-provincial jurisdictional issues that could seriously impede effective ICOM in Canada. There are no requirements, mechanisms or incentives for joint federal-provincial initiatives to address the coordination or integration of interjurisdictional marine uses. The Act purports to provide for ICOM, but bases this significant policy change on existing legislation, institutions and interrelationships.

For all of these reasons, the *Oceans Act* is foundational only, providing the broad concepts upon which ICOM may be established in Canada. The Act sets out the principles, but when, whether and to what extent ICOM is implemented will depend entirely on the DFO bureaucracy and, to some extent, the level of voluntary cooperation the DFO receives from other agencies, provinces, aboriginal peoples, non-governmental

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[260] See generally Juda, *supra* note 171 at 18-19; Linda C. Nowlan, "Comments on the *Oceans Act*: Translating the Vision into Law" (Vancouver: West Coast Environmental Law Association, 1995), online: <http://www.wcel.org/resources/publications/default.cfm>; Aldo Chircop, "Legislating for Integrated Marine Management: Canada's Proposed Oceans Act of 1996" (1995) 33 Can. Y.B. Int'l. Law 305; and Aldo Chircop & Bruce A. Marchand, "Oceans Act: Uncharted Seas for Offshore Development in Atlantic Canada" (2001) 24 Dal. L.J. 23.

organizations and stakeholders. To date, the DFO has released three policy documents that further define Canada's goals and objectives for implementing ICOM and that elaborate on the proposed ICOM framework.

3.2.5 The Oceans Policies

In 2002, five years after the *Oceans Act* came into force, the DFO released both the *Oceans Strategy* and the *Policy and Operational Framework for Integrated Management of Estuarine, Coastal and Marine Environments in Canada.*[261] In 2005, the DFO released *Canada's Oceans Action Plan,*[262] a twenty-page document that sets out "phase 1" of the action plan to implement integrated management. These policies form an integral part of Canada's ICOM proposal, as they reflect not only the current status of ICOM but also solidify Canada's priorities and policy directions for implementation of an ICOM regime.

3.2.5.1 The Oceans Strategy

The Oceans Strategy defines "the vision, principles and policy objectives for the future management"[263] of marine areas, in furtherance of its overarching goal to "ensure healthy, safe and prosperous oceans for the benefit of current and future generations of Canadians."[264] In addition to setting out Canada's three core policy objectives for the

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[261] Fisheries and Oceans Canada, Canada's Oceans Strategy: Policy and Operational Framework for Integrated Management of Estuarine, Coastal and Marine Environments in Canada (Ottawa: Fisheries and Oceans Canada, Oceans Directorate, 2002) [hereinafter IM Policy].
[262] Fisheries and Oceans Canada, *Canada's Oceans Action Plan, For Present and Future Generations* (Ottawa, Fisheries and Oceans Canada, 2005) [hereinafter Oceans Action Plan].
[263] Oceans Strategy, *supra* note 159 at v.
[264] *Ibid.* at 10.

advancement of ocean management,[265] the Oceans Strategy recognizes the complexity and deficiencies of Canada's current ocean governance structure and supports an integrated management approach to the regulation of all marine and land-based activities that impact on coastal and ocean waters. The Oceans Strategy identifies three specific areas in which Canada will take steps to improve governance, as follows:

- Establish institutional governance mechanisms to enhance coordination and collaboration across all levels of government.
- Implement integrated management planning to engage partners in the planning and managing of ocean activities.
- Engage Canadians in oceans management by promoting stewardship and public awareness, through the integrated management process and through other initiatives.[266]

These three areas– governmental coordination, user/stakeholder collaboration and public awareness– form the policy foundation for Canada's ICOM vision. However, the Oceans Strategy itself does not elaborate on how Canada will implement these policies to achieve its goals of integrated and sustainable governance.

While the Oceans Strategy adopts and reiterates the key principles of ICOM, it does little to further those principles and objectives with institutional structures, or, like the *Oceans Act* itself, concrete plans for implementation. The Oceans Strategy does not meet the Agenda 21 objectives. It fails to set out an integrated policy and decision making process, to specifically identify existing and projected ocean uses, to focus on well-defined issues, or to provide for specific mechanisms for consultation and

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[265] These three objectives are: understanding and protecting the marine environment; supporting sustainable economic opportunities; and promoting international leadership. The Oceans Strategy proposes a four-year plan for achieving these three objectives, but notes that these initiatives will in some cases be subject to "policy approval and new financial resources." See *Ibid.* at 12

[266] *Ibid.* at 18-20 & 25-26.

participation.[267] The Oceans Strategy operates at a very general policy level, leaving Canada without institutional structures, detailed implementation policies, deadlines, funding, review procedures, consultation requirements or concrete initiatives for interjurisdictional cooperation.

3.2.5.2 The Integrated Management Policy

The IM Policy, a self-described working document, is intended to address more specifically Canada's proposals for integrated management. Following up on the Oceans Strategy, it confirms Canada's commitment to an integrated approach to the protection and development of coastal and oceans waters based on the principles set out in the *Oceans Act*. Its goal for integrated management is the "sustainable development of oceans and their resources"[268] through comprehensive, collaborative, flexible and transparent planning and managing of human activities.

The IM Policy proposes a collaborative governance model involving integrated management bodies, composed of both government and non-government representatives, that will coordinate and guide decisions respecting their defined ocean or coastal areas in accordance with management plans developed for those area. The function of the management body would change over time, beginning with an initial focus on information and consultation, then progressing to advising on the IMP and, finally, to overseeing the IMP implementation.[269] The core goal is to engage citizens in the process at all levels and includes undertaking the following approaches:

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[267] Agenda 21, *supra* note 174 at c. 17.5.
[268] IM Policy, *supra* note 261 at 2.
[269] *Ibid.* at iii.

- ocean management decisions based on shared information, on consultation with stakeholders, and on their advisory or management participation in the planning process;
- institutional arrangements that bring together governments, user groups and other interests also responsible for resource management, conservation and economic development;
- management systems in which governments, user groups and other interests take an active part in designing, implementing and monitoring the effectiveness of coastal and ocean management plans; and
- institutional arrangements in which governments, user groups and other interests enter into agreements on oceans management plans with specific responsibilities, powers and obligations.[270]

The IM Policy proposes the establishment of Large Ocean Management Areas and smaller Coastal Management Areas that would together cover all marine waters within Canadian jurisdiction.[271] While each defined area would have an integrated management body directing its regulation, implementation of all regulatory measures, policies and programs would remain with the various governmental ministries and agencies having jurisdiction. The DFO proposes to take a lead role in establishing management objectives for LOMAs through joint agreement among participants. The proposal for CMAs is less defined, due to the federal-provincial jurisdictional issues arising from the intersection of land, coastal and ocean activities. Because the primary jurisdiction for land and coastal areas is provincial, the DFO sees itself only as a facilitator of the integrated management process for CMAs.

The IM Policy establishes a general policy and framework for how the DFO proposes to create management areas and how management plans will be conceived and implemented. However, there remains a great deal of uncertainty about when and how

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[270] *Ibid.* at 11.

[271] *Ibid* at 15. Large ocean management areas hereinafter referred to as LOMAs and coastal management areas as CMAs.

these management areas will actually take shape. The DFO envisions that each management area, plan and body will be unique so that it can be tailored to the specific needs, interests and uses of each area. This means that the DFO has not established and does not propose to establish a structural framework for management bodies.

The IM Policy envisions collaborative management of all management areas, a process where all interested parties will come together and agree on all aspects of the IMP. Yet there is no provision for how these parties will be brought together or how collaborative management will actually work on the ground. Without any vision or direction for the necessary institutional framework to bring together a vast diversity of interests– governments, aboriginal peoples, NGOs, community group, industry and individuals– each initiative would expend significant resources in creating (and agreeing on) its own model.

Perhaps most striking is that the DFO has little to contribute in the area where there is the greatest and most imminent need for ICOM– the coastal and near-shore areas. Instead of tackling the need for interjurisdictional coordination head-on, the DFO instead has chosen to focus on the open ocean areas.

3.2.5.3 The Oceans Action Plan

The Oceans Action Plan is the latest DFO publication on the implementation of the *Oceans Act*. The Oceans Action Plan reiterates the need to modernize oceans management through the implementation of new oceans governance arrangements founded on the principles of sustainable development, integrated management and the

precautionary approach.[272] The Oceans Action Plan sets out a series of initiatives to be completed within the next two years, including undertaking IMPs for five specific LOMAs, one of which is the Pacific North Coast. This area encompasses 88,000 square kilometres, ranging from the Alaska border in the north to northwest Vancouver Island in the south and includes the Basin.[273] The process for these LOMAs involves the identification of ecologically significant areas, seabed mapping and the creation of ecosystem objectives to inform the creation of ecosystem overview and assessment reports that will provide the necessary scientific information as the foundation for decision making.[274] Again, open and collaborative governance and management arrangements will be created that involve governments, aboriginal groups, stakeholders and others.[275]

Essentially, the Oceans Action Plan follows up on the IM Policy in pursuing the creation of LOMAs and reiterating the principles of integrated management as stated in the *Oceans Act*. As with the policies that precede it, however, it fails to address the need for interjurisdictional cooperation, a revised legislative framework and supporting institutional structures. While the Oceans Policies emphasize the need for new and modern oceans governance in Canada, the DFO's focus continues to be on information collection and coordination, not on legislative and institutional reform.[276]

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[272] Oceans Action Plan, *supra* note 262 at 4 & 5.
[273] *Ibid.* at 13-15. The DFO has named this proposed area the Pacific North Coast Integrated Management Area. See online: <http://www.pac.dfo-mpo.gc.ca/oceans/im/default_e.htm>.
[274] *Ibid.* at 15 & 16.
[275] *Ibid.* at 15.
[276] Personal Communication with Kelly Francis, Senior Policy Advisor, Oceans, Department of Fisheries and Oceans Canada, June 23, 2005. The Auditor General Report, *supra* note 218 at 2, notes that the Oceans Action Plan fails to address the barriers to implementing a national oceans strategy, including "the

3.2.6 Cooperation through Memoranda of Understanding

In 2004, Canada and British Columbia entered into a Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada.[277] While non-binding, the MOU is significant in that it reflects the intentions and political agreements of Canada and British Columbia to undertake further actions to implement the Oceans Policies. The MOU sets out specific activities and objectives aimed at protecting the marine environment and supporting sustainable economic opportunities. It commits both governments to jointly develop sub-agreements to implement measures for a number of matters, including coastal and integrated oceans management planning, a marine protected areas framework and the sharing of information related to offshore oil and gas resources.[278]

To date, no sub-agreements have been completed under the MOU. Nonetheless, the signing of the MOU represents an important first step towards federal-provincial intergovernmental coordination of oceans governance.[279] While the Oceans Policies highlight the need to work with other levels of government, the MOU is the first concrete indication of a willingness by both levels of government to work cooperatively towards ICOM.

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need for strong leadership and coordination over the long term, adequate funding, and an accountability framework with appropriate performance measures and reporting requirements."

[277] *Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada*, online: < http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/media/bc/index_e.asp> [hereinafter MOU].

[278] *Ibid.*

[279] This MOU may be particularly significant given the Province's past position on the *Oceans Act*. See *Coastal Zone Position Paper*, *supra* note 241, which illustrates an adversarial position with Canada over jurisdictional issues.

3.2.7 Conclusions on the Oceans Policies

A successful ICOM program must have not only a collaborative and participatory process, but also intergovernmental cooperation, institutional coordination (within each level of government) and legal and financial components.[280] The roles of all levels of government must be specified and coordinated, appropriate institutional structures established, necessary legal tools to allow the program to operate put in place and the necessary funding assured. The Oceans Policies fail on all four of these fronts. [281]

With respect to intergovernmental coordination, the IM Policy refers to instituting mechanisms to enhance coordination and collaboration, but provides no concrete structures or frameworks for how intergovernmental coordination will be achieved. There is no recognition or resolution of the significant federal-provincial jurisdictional issues that has and could continue to seriously impede effective ICOM in Canada. The issue of interjurisdictional cooperation is arguably the most critical due to serious and imminent threats to coastal and near-shore areas. As will be discussed below, the U.S. experience of encouraging state participation through funding is widely viewed as successful and could be implemented in Canada.

With respect to institutional coordination, the Act makes some effort to consolidate oceans powers within the federal government by giving the DFO the lead role in federal oceans management and all residual powers not otherwise expressly given to another department or agency. However, giving the residual power to the DFO does not reduce the number of other federal departments and agencies that have authority over

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[280] See generally Cicin-Sain & Knecht, *supra* note 166 at 139-170.
[281] For general critiques of the *Oceans Act*, see Juda, *supra* note 171 at 18-19; Nowlan, *supra* note 260; and Chircop, *supra* note 260.

oceans. An effective ICOM regime requires each level of government to review its administrative structure and take steps to integrate and better coordinate its ocean and coastal regulations.[282]

It has been suggested that having an integrated, centralist agency to deal with all coastal and ocean matters is the best way to achieve integration.[283] However, from a structural perspective, there will always be some fragmentation within government and certain matters that relate to oceans may be better dealt with by a different agency. If all ocean matters were to fall to one agency, this would inevitably create fragmentation elsewhere. For example, if marine aspects of defence and national security are taken away from their current departments, those departments become fragmented in order to integrate oceans matters. What is crucial is that each level of government create institutional mechanisms to coordinate the activities of all departments and agencies involved in the ICOM process. By creating these institutional structures, there can be effective coordination of authority so that each department is not making ocean use and user decisions in isolation.

With respect to legal components, the Oceans Policies contemplate no amendments to the existing regulatory framework. There will be no changes to ensure that existing regulatory powers are incorporated into the ICOM framework. ICOM contemplates the implementation of its processes and procedures through legislative action, as well as the coordination and implementation of effective regulatory measures.

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[282] The DFO acknowledged this need in its response to the Auditor General Report and stated that it is working towards integration through the creation of deputy minister and assistant deputy minister-level committees from over twenty federal organizations with oceans responsibilities. See Auditor General Report, *supra* note 218 at 7, 8.

[283] For example, the U.S. Commission recommends having a national oceans council to oversee all aspects of oceans use. See *infra* note 302.

Finally, there are no guarantees of funding and no funding incentive programs to encourage participation. Each year, implementation is subject to federal budgeting. In March 2005, Canada committed twenty-eight million dollars to the Oceans Action Plan over the next two years.[284] What will be accomplished within the next two years and what funding will follow remains to be seen.

3.3 The U.S. Experience with ICOM

The U.S. experience with ICOM serves as an instructive model for comparative purposes, both because its history is much longer and because it faces similar challenges with federalism and multi-level governance. A brief review of the federal-state battles over OOGD underscores the need for interjurisdictional cooperation and integration in oceans planning. It is also interesting that, despite its much longer history with ICOM, the U.S. is facing governance challenges and pressures similar to those facing Canada. Recent policy reviews of U.S. oceans governance are to a large extent applicable to the Canadian experience.

3.3.1 The U.S. Jurisdictional Divide

As in Canada, the U.S. has a federal system in which powers are divided between the national and state governments. After years of contention, the *Submerged Lands Act of 1953*[285] confirmed that coastal states have title and jurisdiction over the lands and waters at least three miles out from the coast. Outside the three-mile limit, title and

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[284] See Department of Fisheries and Oceans, "Oceans Action Plan: Phase 1" (Backgrounder BG- PR-05-002e, March 2, 2005), online: <http:// www-comm.pac.dfo-mpo.gc.ca/pages/release/bckgrnd/2005/bg002_e.htm>.

[285] 43 U.S.C. 1301 et. seq. at 1311-1312.

jurisdiction are federal under the *Outer Continental Shelf Lands Act.*[286] This gives the states regulatory powers over waters within the three-mile limit, subject to the federal regulation of commerce, navigation, national defense and international affairs. Because of the jurisdictional divide, state coastal regulations and programs end at the three-mile water mark and at state borders. The federal government has its own legislation and programs beyond the three-mile mark.[287]

To a certain extent, this division of powers has made coastal zone policies less problematic in the U.S. than in Canada, as states have authority not just over the coastal land but also out three miles into the water. This creates a substantial, unified, area in which to regulate coastal activities and almost all coastal states have created coastal management plans under the federal *Coastal Zone Management Act.*[288] However, as will be discussed below with respect to OOGD, this three-mile division has created significant problems where proposed activities in the OCS have the potential to negatively impact the adjacent coastal state.

3.3.2 State Coastal Management Plans

The U.S. approach to coastal zone management employs two crucial tools to provide incentives to coastal states to undertake coastal management. The CZMA creates a federal-state cooperative framework in which states are encouraged to participate through federal funding incentives and through the so-called "consistency" provisions. First, states that participate receive significant federal funding for both coastal planning

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[286] 43 U.S.C. 1331-1356, P.L. 212, Ch. 345 [hereinafter OCSLA]. The outer continental shelf [hereinafter OCS] refers to submerged lands lying seaward and outside of the area of lands beneath navigable waters, and of which the subsoil and seabed appertain to the U. S. and are subject to its jurisdiction and control.
[287] See Craig, *supra* note 162 at 658.
[288] *Coastal Zone Management Act*, 16 U.S.C. 1451-1464, Ch.33; P.L. 92-583 [hereinafter CZMA].

and implementation of their coastal programs. Second, states with approved coastal management plans can veto federal ocean activities in their coastal waters that are not consistent with the approved state plan, thereby giving states with management plans more power to control coastal activities. The consistency provisions essentially allow states to oust federal activities that would otherwise be solely under federal control.[289] Providing funding incentives and giving states more powers have proven effective ways to encourage state participation in a federal initiative and overcome some of the hurdles of federalism.

The U.S. recognized the need for effective oceans governance in the late 1960s, causing Congress to create the Stratton Commission to undertake a comprehensive examination of oceans management. The Stratton Commission released *Our Nation and the Sea*[290] in 1969, identifying the need for a central, integrated and independent agency to oversee all aspects of civilian ocean-related activities. This recommendation led to the creation of the National Oceanic and Atmospheric Agency, although it was not independent (falling under the Department of Commerce) and it did not eliminate other departments and agencies having ocean-related programs. The Stratton Report also led to the passage of the CZMA, legislation that was considered groundbreaking at the time and that has become the cornerstone of U.S. coastal management policy. When the

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[289] See Marc J. Hershman et al., "The Effectiveness of Coastal Zone Management in the United States" (1999) 27 Coast. Mgmt 113 at 114-116, for an overview of the structure of the CZMA.

[290] Commission on Marine Science, Engineering and Resources, *Our Nation and the Sea* (Washington D.C.: U.S. Government Printing Office, 1969), online: <http://www.lib.noaa.gov/edocs/stratton/> [hereinafter Stratton Report].

CZMA was passed in 1972, the U.S. was hailed as a "world leader"[291] in the enactment of oceans legislation.

The federal government has taken a strong leadership role through the CZMA by establishing national objectives, goals and policies that guide and influence state policies and programs, while allowing states to tailor programs to their individual needs and circumstances. Consequently, there is considerable diversity at the state level in the content and management of coastal zone management programs. However, the CZMA does not create a federal coastal zone agency, strategy or coordinated framework for regulating federal actions or programs. This has resulted in a situation similar to that in Canada, with a patchwork of separately legislated and operated federal programs, each with its own stand-alone goals.

3.3.3 Oil and Gas Development in the U. S. Offshore

One area where the lack of a federal strategy or coordinated framework has caused the most contention is OOGD. Offshore drilling in the U.S. began over 100 years ago off the California coast.[292] As technology improved, companies began drilling in deeper waters further out from the coast, with extensive production taking place in the OCS. Under the OCSLA, the federal government has the exclusive right to grant leases to use and exploit the resources in the OCS, without any formal input from adjacent coastal states. Over the years, numerous court battles have been waged by oil companies wanting to exercise federal lease rights in the OCS despite state opposition. States such

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[291] Biliana Cicin-Sain, "Essay: A National Ocean Governance Strategy for the United States is Needed Now" (1994) 22 Coast. Mgmt 171 at 171.

[292] John A. Duff, "Offshore Management Considerations: Law and Policy Questions Related to Fish, Oil and Wind" (2004) 31 B.C. Envtl. Aff. L. Rev. 385 at 391.

as California, New Jersey, Washington and Oregon have vehemently opposed OOGD in the OCS due to their concern over the potential environmental impacts.[293] The federal government, on the other hand, has encouraged new development, even in states where there is strong opposition.[294]

States that oppose OOGD in the OCS have in some cases prevented drilling on the basis that it is not consistent with the state's coastal management plan.[295] As well, coastal states' Congressional delegates have in some cases successfully kept oil and gas at bay by pressuring the President to declare a moratorium, or by preventing federal leasing in the OCS through budget restrictions.[296]

The lack of state involvement in the federal leasing process has caused the states that oppose OOGD to rely on moratoria as the only means of having some control over OCS development. The resulting federal-state stalemate illustrates the need for cooperative oceans governance because the "governance structure dividing authority three miles offshore is a dismal failure for all the parties involved- those who support and those who oppose new oil and gas development."[297] It has been noted that the political considerations that led to the implementation of the three-mile division are no longer relevant, and that there is little contemporary justification for the current regime.[298]

In the U.S., the jurisdictional division is legislated and therefore could be

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[293] Wilder, *supra* note 163 at 218.
[294] *Ibid.*
[295] See Bruce Kuhse, "The Federal Consistency Requirements of the Coastal Zone Management Act of 1972: It's time to Repeal this Fundamentally Flawed Legislation" (2001) 6 Ocean & Coast. L. J. 77 at 103. Florida has not always been successful in its efforts to prevent OOGD.
[296] See Lynn S. Sletto, "Piecemeal Legislative Proposals: An Inappropriate Approach to Managing Offshore Oil Drilling" (2003) 33 Golden Gate U.L. Rev. 557 at 567. There is a Presidential moratorium on OOGD in most of the OCS that expires in 2012 as well as an annual moratorium on spending federal funds on the offshore leasing process.
[297] Wilder, *supra* note 163 at 217.
[298] *Ibid.* at 219.

completely revisited. In Canada, ownership is determined based on the provincial boundaries at confederation and jurisdiction is constitutionally determined. In both cases, however, federalism allows for flexibility in the allocation of authority and the principles of ICOM demand a cooperative, integrated approach. While the OOGD battles in the U.S. are unique to that country's specific jurisdictional division, the need for cooperation is equally applicable in the Canadian context.

3.3.4 Recent Efforts to Reform U.S. Policy

The U.S. has not substantially revised or updated its approach to oceans management since the 1970s and is no longer a world leader in this area. Today, more than thirty years after the CZMA came into force, the U.S. continues to take a sectoral approach to governance that does not address interrelationships and conflicts among users and uses. There is no single, comprehensive oceans or coastal strategy at the federal level. As Cicin-Sain noted in 1994:

> In the more than 20 years since the key elements of the U.S. approach to the ocean were crafted, extensive changes have taken place- both domestically and internationally- that warrant a fundamental reexamination of U.S. ocean policy. Among the major changes that have taken place domestically are the rise in environmental consciousness; the emergence of energy use and supply as a major issue; implementation of the dozen major federal laws enacted in the early 1970s; significant increases in ocean uses and conflicts; extensions in U.S. jurisdiction...Internationally, too, the period since the early seventies has seen significant changes, such as the fundamental changes in the international ocean legal framework through the Law of the Sea Convention... .[299]

These domestic and international changes compelled the U.S. to initiate the first comprehensive review of national oceans policy since the Stratton Report. In 2000,

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[299]Cicin-Sain, *supra* note 291 at 172.

Congress passed the *Oceans Act of 2000*,[300] legislation that created the U.S. Commission on Ocean Policy with a mandate to make recommendations for a coordinated and comprehensive national oceans policy to promote human safety, commerce, science, technology and ecosystem protection.[301]

After undertaking extensive consultations and investigations, the U.S. Commission released its final Report, *An Ocean Blueprint for the 21st Century*,[302] which makes 212 recommendations for a comprehensive national oceans policy and which calls for immediate, decisive action to implement those recommendations. The Ocean Blueprint reflects the sustainability principles of Agenda 21 as well as many of the ICOM principles set out in the Noordwijk Guidelines. The report is premised upon thirteen "fundamental guiding principles" upon which all recommendations are based, including the principles of sustainability, ecosystem-based management, adaptive management, best-available science and participatory governance.[303] While the recommendations made by the U.S. Commission are very detailed and specific, the overarching message is the need to implement the guiding principles to improve oceans governance. The new

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[300] P.L. 106256 [hereinafter *Oceans Act of 2000*].
[301] *Oceans Act of 2000*, s. 2, creating the U.S. Commission on Ocean Policy [hereinafter U.S. Commission].
[302] U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century: Final Report of the U.S. Commission on Ocean Policy* (Washington, D.C.: 2004) online: <http://www.oceancommission.gov> [hereinafter Ocean Blueprint]. See also Pew Oceans Commission, *America's Living Oceans: Charting a Course for Sea Change, A Report to the Nation*, May 2003, online: <http://www.pewtrusts.org/> [hereinafter Pew Commission Report]. The Pew Oceans Commission's mandate was "to identify policies and practices necessary to restore and protect living marine resources in U.S. waters and the ocean and coastal habitats on which they depend." The Commission found that "national ocean policy and governance must be realigned to reflect and apply principles of ecosystem health and integrity, sustainability, and precaution" and that "decisions should be founded upon the best available science and flow from processes that are equitable, transparent, and collaborative." (at 7). The Commission made a number of recommendations, including that the U.S. create a "principled, unified national ocean policy based on protecting ecosystem health and requiring sustainable use of ocean resources." (at 7).
[303] *Ibid.* at 412.

governance would not only integrate federal activities and improve coordination among government actors, but also create a stronger role for states and local stakeholders.[304]

This call for broader involvement at the state and local levels, as well as greater public participation, largely parallels the Canadian experience. There is recognition that the traditional single-sector governance structures have failed and that a modern governance approach that is integrated and participatory is required.

While the U.S. Commission has recognized the need for significant reform and the adoption of fundamental guiding principles that are in line with international models, the Bush Administration has not fully embraced reform. In response to the Ocean Blueprint, President Bush released the U.S. *Ocean Action Plan*,[305] which commits to improving coordination and integration of ocean governance. The focus, however, is solely on coordination and not on consolidating existing agencies or creating a new oceans agency. The OAP continues a sectoral approach to oceans governance and does not commit to greater public participation or broader stakeholder involvement. Further, the Bush Administration has not expressly accepted or committed to the fundamental guiding principles adopted by the U.S. Commission– it instead proposes to continue with the existing regime.

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[304] *Ibid.* at xxxvi.

[305] *U.S. Ocean Action Plan.* The Bush Administration's Response to the U.S. Commission on Ocean Policy. (Washington D.C., 2004), online: <http://ocean.ceq.gov/> [hereinafter OAP].

3.3.5 Lessons Learned

Comparing the U.S. Commission's recommendations for reformed oceans governance to Canada's Oceans Policies is somewhat challenging, as the U.S. approach to cooperative federalism tends to include a strong federal leadership role combined with a dominant implementation role for states. The Ocean Blueprint supports this strong federal role, while calling for increased participation at other levels. It does not focus on implementing a specific regulatory framework or process, likely because these are primarily state matters.

At this point, the U.S. and Canada face similar issues and pressures in respect of oceans management. Both countries are in the early stages of considering ocean policy reform. The U.S. has benefited from three decades of strong coastal zone management legislation that has encouraged states to implement integrated coastal management plans at the state and local levels. However, it suffers from the lack of a national coastal zone policy and continues to have a patchwork of single-sector federal regulations.

Canada can learn from the U.S. model of cooperative federalism to the extent that the U.S. has successfully encouraged state coastal programs through financial incentives and the consistency provisions of the CZMA. Because Canada and the U.S. face similar hurdles in implementing integrated oceans governance, Canada can also learn from the insights and recommendations in Ocean Blueprint and the Pew Commission Report, much of which is equally applicable to Canadian oceans governance.

3.4 Does ICOM Provide a Decision Making Framework for OOGD?

ICOM in Canada is in its early stages. While the *Oceans Act* was adopted eight years ago, policy and implementation work under the Act has been slow. Today, as use and user conflicts continue to increase, ocean and coastal management decisions are fragmented, with little vertical or horizontal integration.

The ICOM regime proposed in the Oceans Policies is a collaborative, participatory process founded on substantive ICOM principles. Current efforts are focused on preparing the necessary background documentation for creating IMPs in five priority LOMAs, including one in the Pacific North Coast that includes the Basin. OOGD is one of the potential uses identified for the LOMA contemplated for the Pacific North Coast.[306]

According to the IM Policy, use and user decisions would be made collaboratively by an integrated management body composed of government and non-government representatives.[307] However, there is no structure for these management bodies and no indication of the level of decision making that would be entrusted to them. Given the Province's decision to support and promote OOGD, it likely would not consent to a management body making formative policy decisions about whether OOGD should proceed. It is more likely that such a body would address issues of use and user coordination and the mitigation of impacts.

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[306] See DFO online: http://www.pac.dfo-mpo.gc.ca/oceans/im/default_e.htm>. Because the Province takes the position that OOG facilities should be at least 20 kilometres from shore, these activities would be within the LOMA and not in a possible CMA.

[307] IM Policy, *supra* note 261 at iii.

ICOM in Canada is not yet sufficiently developed to guide decision making about OOGD in the Basin. While the principles of ICOM hold promise for the rational, sustainable use of ocean and coastal resources, each region must develop its own version of ICOM that addresses its unique circumstances. ICOM is not intended to provide specific answers to specific questions, but to provide a principled process for answering questions.

While the process contemplated by the *Oceans Act* has not yet been implemented, decisions around OOGD in the Basin should be undertaken in accordance with the integrated management principles set out in the Act and the Oceans Policies, as these are the existing federal oceans policies and are consistent with internationally-recognized principles. This means that decisions about OOGD must be made in accordance with the substantive principles of sustainability, integration and precaution, as well as in a procedurally transparent manner. The next chapter will examine the principle of transparency and the role of public participation in oceans policy formation and implementation.

4. Chapter 4 – Public Participation and Decision Making

A core principle of ICOM is procedural transparency, in which decisions are made in an open and transparent manner, with full public involvement.[308] Over the last decade, the need for public participation has been widely acknowledged in environmental policy circles, with non-participatory forms of policy making increasingly described as "illegitimate, ineffective and undemocratic."[309]

The transparency principle gained international recognition and acceptance by its inclusion in Agenda 21[310] and the Rio Declaration,[311] both of which call for broad public involvement in decision making. The European nations have fully embraced the principle through adoption of the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[312] The Aarhus Convention has been called "the most ambitious venture in the area of

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[308] See Cicin-Sain & Knecht, *supra* note 166.

[309] See Harriet Bulkeley & Arthur P.J. Mol, "Participation and Environmental Governance: Consensus, Ambivalence and Debate" (2003) 12 Envtl. Values 143 at 144. The authors note that governance of environmental problems has evolved over the past four decades from consensual arrangements between state and industry, to inclusion of a wide range of stakeholders and publics.

[310] The preamble to Agenda 21 provides for "The broadest public participation and the active involvement of the non-governmental organizations and other groups." See Agenda 21, *supra* note 174 at preamble.

[311] Rio Declaration, *supra* note 174 at principle 10 provides as follows:
"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[312] United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, online: <http://www.unece.org/env/pp/> [hereinafter Aarhus Convention]. The Aarhus Convention came into force on October 30, 2001 and provides for action to ensure public access to environmental information, foster public participation in environmental decision making and extending access to justice in environmental matters. It followed the so-called Sofia Guidelines, a set of Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making, that arose out of the October, 1995 Environment for Europe Ministerial Conference held in Sofia, Bulgaria.

environmental democracy so far undertaken under the auspices of the United Nations"[313] because of its commitment to strengthening citizen's environmental rights. It elaborates on principle 10 of the Rio Declaration by requiring states to guarantee the right to public participation in environmental decision making and by setting out specific requirements for undertaking participatory processes.[314]

This chapter explores the role of public participation in decision making, beginning with an overview of its forms, objectives and limitations. The complexities and challenges in implementing effective citizen engagement and incorporating outcomes in decisions are then evaluated. The Aarhus Convention public participation provisions are reviewed in order to provide a standard against which Canada's participatory processes can be evaluated. The collaborative governance model proposed by the Oceans Policies is then reviewed and critically assessed in terms of its key features and outstanding issues.

While the DFO is proceeding with implementation of the Oceans Policies, both Canada and British Columbia have carried out *ad hoc* processes to consider whether to lift the moratoria on OOGD in the Basin. Both the federal and provincial reviews have included a public process to assess public opinion on the moratoria. However, these public processes have been public hearings and not collaborative processes as envisioned by the Oceans Policies. The forms, objectives and results of these processes are assessed and consideration given to how the public processes contributed to government decision making.

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[313]Kofi A. Annan, Secretary General, United Nations, online: <http://www.unece.org/env/pp/statements.05.11.htm>.
[314] Aarhus Convention, *supra* note 312 at Articles 1, 6-8.

4.1 The Forms, Objectives and Limitations of Public Participation

The objectives of citizen engagement are many and include the need to increase public understanding of issues, to facilitate conflict resolution and to rebuild trust between the public and the state to ensure that policy decisions are legitimate and effective.[315] It has also been contended that public participation in environmental policy making is essential to counter-balance the influence of industry stakeholders:

> Public participation, then, does more than contribute to the policy debate: it frames the debate and even ensures that it takes place. Perhaps even more significantly, the involvement of the public confirms assumptions of a democratic policy process and helps to legitimize the role of the state as open and fair, as an independent arbitrator of competing interests.[316]

The objectives of citizen engagement will vary in each situation, but generally fall into five categories:

- incorporating public values into decisions;
- improving the substantive quality of decisions;
- resolving conflict among competing interests;
- building trust in institutions; and
- educating and informing the public.[317]

Public participation can take many forms and includes any mechanism intentionally instituted to involve the lay public or their representatives in decision making.[318] This can range from opportunities to express opinions, such as public meetings and hearings, to more formal roles for public participation such as advisory

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[315] VanderZwaag, *supra* note 198 at 36, 148-149.
[316] Melody Hessing & Michael Howlett, *Canadian Natural Resource and Environmental Policy: Political Economy and Public Policy* (Vancouver: UBC Press, 1997) at 112.
[317] Thomas C. Beirle & Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Washington D.C.: Resources for the Future, 2002) at 6.
[318] *Ibid.*

committees, task forces and alternate dispute resolution processes. In more formal versions, the public engages directly in policy formulation and implementation. However, a formal process does not necessarily lead to greater influence on policy, as participation can be constrained by other factors (including the terms of reference, procedural rules and the influence of others).[319] In some cases, a more confrontational approach, such as direct action and media coverage, may prove the most effective means to attain the desired policy outcomes.[320]

While public engagement in policy making is seen as intrinsically good, there are several important issues that need to be resolved, including:

> [h]ow to organize and institutionalize participation, who should be involved at what points in the decision-making process, how to prevent participation from paralyzing policy making, and what is the goal of participation.[321]

These questions of how and when to engage the public, who is representative of the public and how public input should or could be incorporated into policy decisions, are complex and present significant challenges to those designing a public engagement process.[322] Ensuring appropriate citizen representation and implementation of outcomes are arguably most problematic.

It has been noted that "environmental tokenism" may result in only a limited number of representatives in any given process as there are no agreed-upon criteria to

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[319] *Ibid.* at 124. The authors note that some participatory venues channel energies into "positions of cooperation and compromise and detract from both a hard bargaining position and other forms of resistance that some believe are more effective."
[320] *Ibid.* at 123.
[321] *Ibid.* at 151.
[322] See Anna Davies, "What Silence Knows: Planning, Public Participation and Environmental Values" (2001) 10 Envtl. Values 77 at 80.

ensure that a range of environmental perspectives is represented.[323] Determining appropriate representation will involve a balancing of interests and may depend on the objectives of the process. More formal processes are used where the objective is to directly engage the public in the policy making process. However, formal processes are generally limited to smaller numbers of participants because of time and money considerations and because greater numbers make resolution more difficult to achieve.[324] Further, more formal processes may inhibit participants where the process is dominated by partisan or special interest groups with a strong interest in the outcomes, leaving little room for the involvement of others.[325] British Columbia's participatory processes, for example, tend to be dominated by stakeholders with strong economic interests in outcomes.[326]

As to outcomes, the transparency principle focuses on the process of public participation and not the substantive outcome. While improving the substantive quality of decisions may be a process objective, concern has been expressed that "the public makes bad decisions."[327] There is no guarantee that "procedural democracy will produce substantive environmental benefits if there are competing views of what the environment should look like and what it is valuable for."[328] Regardless of the level of the process, there will always be differing views on the value of the environment, the appropriate

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[323] Hessing & Howlett, *supra* note 316 at 124. The authors note that representation is also limited by social class, ethnicity and other factors, with marginalized groups not having the resources to effectively participate.
[324] See Beierle & Cayford, *supra* note 317 at 63-77 for a discussion on designing public processes.
[325] Renee A. Irvin & John Stansbury, "Citizen Participation in Decision Making: Is it Worth the Effort?" (2004) 64(1) Pub. Admin. Rev. 55 at 59.
[326] See Johnson & Hildebrand, *supra* note 137 at 14.
[327] Beierle & Cayford, *supra* note 317 at 27.
[328] Davies, *supra* note 322 at 80.

level of risk and, ultimately, what is in the common interest and therefore is the best or right decision.

In some cases, public participation may be aimed, not at making better decisions, but at ensuring a more cooperative public by persuading the public of the validity of the decision.[329] There is also concern that participants may make decisions based purely on local considerations that are not the best overall decisions when regional, national or international interests are considered.[330]

While transparency is a key principle of ICOM, it is only a principle- it does not prescribe how, when or for what purposes to engage the public. These questions must be answered in each case where citizen engagement is contemplated. Nor should the focus on process override strong, substantive decision making. As will be discussed later, this process orientation is particularly evident in the Oceans Policies, while the critical substantive dimensions are largely ignored.

4.2 The Aarhus Convention

The Aarhus Convention represents agreement by over thirty-five nations to the need for public participation in decision making. While a European convention, it is open for signature to any United Nations member and has been recognized as a useful model or reference point for other regions.[331]

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[329] Irvin & Stansbury, *supra* note 325 at 56-57.
[330] *Ibid.* at 59-60. See also Klaus Peter Rippe & Peter Schaber, "Democracy and Environmental Decision-Making" (1999) 8 Envtl. Values 75, for a discussion of why many environmental policy decisions are of national importance.
[331] Mrs B. Schmognerová, Executive Secretary, United Nations Economic Commission for Europe (Opening Remarks) *Participatory Democracy and Good Governance: Fundamental Tools for a Human Rights Approach to Sustainable Development* (Johannesburg, South Africa: August 26, 2002), online:

The Aarhus Convention was adopted to "enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."[332] It requires public participation on decisions regarding listed activities (including oil and gas), as well as public participation in the preparation of plans, programs, executive regulations and other legally binding rules. Articles 6, 7 and 8 contain specific requirements for participatory processes, including:

- that the process is undertaken early in the decision making, when all options are open and effective participation can take place;
- that early notice of the process is given, with reasonable timeframes;
- that adequate, timely and effective notice of the nature of the proposed activity, the proposed decision and details and procedures of the process are given;
- that sufficient information about the proposed activities and its possible impacts is given; and
- that access is given to all available information.[333]

These requirements are supplemented through a "good practices" handbook created to guide government implementation of public participation opportunities under the Aardus Convention.[334] The Aarhus Handbook focuses on practical implementation of the legal requirements, highlighting important issues that must be addressed when creating participatory processes. At the outset, it stresses the importance of engaging the public in decision making whenever possible and early in the process, "even when it is

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<http://www.unece.org/press/execsec/2002/bs020826.htm>. To date, there have been no non-European signatories.

[332] Aarhus Convention, *supra* note 312 at preamble.

[333] *Ibid.* at Article 6.

[334] United Kingdom, Department of the Environment, Transport and the Regions. *Public Participation in Making Local Environmental Decisions: The Aarhus Convention Newcastle Workshop Good Practice Handbook* (London: Department of the Environment, Transport and the Regions, 2000) [hereinafter Aarhus Handbook]. The Aarhus Handbook was created as part of the workplan created to implement the Aarhus Convention.

uncertain what they will say or when they may oppose the proposal."[335] However, it also notes that public participation:

> ...should only be undertaken when the options are open (when public participation can make a difference); there is a clear idea of what the public is being asked to do; and there is a commitment to listen to the public's views and take them into account in making the decision.[336]

The Aarhus Handbook sets out detailed standards and directions for creating optimal public processes. These include:

- The public should be engaged as much as possible, as more formal techniques give the public a stronger role.
- It is not sufficient to have a process open to the public. The best decision making processes actively seek out all the people and organizations likely to be affected by the decision so that they are fully aware of it and its likely effect on them.
- It is important to hear a variety of opinions about a proposal, as there is no single public opinion. NGOs are not necessarily representative of public opinion.
- Participation should take place as early as possible, before strategic decisions are made.
- Steps should be taken to encourage public participation.
- Good information about the process and the proposal is vital for effective public participation.
- Outcomes must be taken into account in making the decision.[337]

The Aarhus Convention and Aarhus Handbook together create requirements and a good practices framework for public engagement that has been widely accepted by the European community. While a European initiative, its standards provide a reference against which to evaluate Canada's participatory processes

4.3 Public Participation in the Oceans Policies

The *Oceans Act* and the Oceans Policies adopt and accept the need for public participation in integrated management and provide for collaboration as the means of

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[335] *Ibid.* at 13.
[336] *Ibid.*
[337] *Ibid.* at 10-17. Aarhus Convention requirements and Aarhus Handbook good practices together referred to as Aarhus standards.

citizen engagement. The *Oceans Act* specifies that the development and implementation of the oceans strategy must be undertaken:

> ...in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies.[338]

The collaborative governance model is a cornerstone of Canada's integrated management policies and represents a significant theoretical shift from a top-down, traditionalist approach to a more current form of participatory governance that is bottom-up, with power dispersed to a broader range of actors. This collaborative model is process-oriented, with a focus not on substantive rules or their enforcement, but on the decision making process.

At the outset, the Oceans Strategy says that oceans governance is a "collective responsibility shared by all" and that Canada's core commitments are to "work collaboratively" within and among governments, to "share responsibility for achieving common objectives" and to "engage Canadians in oceans-related decisions in which they have a stake."[339]

Collaborative governance refers generally to the coming together of all interested persons, including government and non-government actors, to make decisions on the basis of shared information. It has been noted that, ideally, collaborative groups consist of representatives of all parties interested in a certain issue, "who would identify their points of agreement, weigh the relative importance of contentious areas, and reach a

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[338] *Oceans Act*, *supra* note 18 at s. 29.
[339] Oceans Strategy, *supra* note 159 at 18.

compromise management plan for the governing agency's consideration."[340] While this has appeal, critics have noted that it may not improve decisions because the decision taken may only reflect local interests and not the greater public interest, may not be superior to a government decision and may be an inappropriate devolution of government authority to unelected groups.[341]

As discussed earlier, the IM Policy sets out specific policies for the creation of collaborative governance through integrated management bodies for each ocean management area. Under this model, management bodies are comprised of a variety of government and non-government actors who would first guide policy decisions on the creation of an IMP and then guide the implementation and ongoing monitoring of the IMP.

There are some important features of this collaborative model that will limit its effectiveness if not remedied. First, the management body would not have any regulatory authority- authority for all policies and programs would remain with the various government ministries that have jurisdiction.[342] The role of collaboration is advisory only, with decisions ultimately made at the bureaucratic and political levels. This raises concerns about the utility of the collaborative governance process, since decisions of the management body are recommendations only. On the other hand, delegating decision

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[340] Allyson Barker et al., "The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis" (2003) 23 J. Land Resources & Envtl. L. 67 at 67.

[341] *Ibid.* Some believe that it is inappropriate to delegate government decision making authority to non-elected groups. See also David N. Pellow, "Negotiation and Confrontation: Environmental Policymaking Through Consensus" (1999) 12 Soc'y & Nat. Resources 189, for a discussion of the pitfalls of consensus-based decision making.

[342] The IM Policy provides that the integrated management process will use existing legislation and "is not intended to replace existing sectoral processes but rather to provide overall coordination, coherence and balance to the manner in which an ocean or coastal area is managed." See IM Policy, *supra* note 261 at 27.

making powers to a non-elected collaborative body has been criticized as an abdication of government responsibility.[343] Arguably, an effective collaborative process depends on how government reacts to and ultimately implements the recommendations. If the management body's recommendations are respected and implemented, the process, at least, will be meaningful and effective.

Second, it is not yet clear at what point the proposed collaborative process will begin. The earlier the public is involved, the more influence the public can have on shaping policy. The initial, agenda-setting, stage, has a decisive impact on the entire policy process and its outcomes.[344] The DFO is currently gathering information to prepare for creation of the five proposed LOMAs. This information gathering process, which is expected to take two years, does not have a public participation component. This means that overarching policy decisions about the LOMA boundaries and what ecological factors and ocean uses should be assessed, are being made outside the collaborative process.

Third, the DFO has not addressed who will participate in the process and how participants will be selected. Because the DFO does not propose to establish a structural framework for management bodies, the first step in collaborative governance will be the process of establishing and defining the process rules, with the expectation that those rules will be negotiated in each case and will vary from case to case. This raises questions about who will oversee the process of selecting participants, determining whom they represent and defining the rules of participation. These issues alone could mire the

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[343] See Barker et al., *supra* note 340. See also Sara Singleton, "Collaborative Environmental Planning in the American West: The Good, the Bad and the Ugly" (2002) 11(3) Envtl. Politics 54 at 55.
[344] See Hessing & Howlett, *supra* note 317 at 105.

process in extensive pre-process negotiations that are likely to inhibit rather than stimulate the undertaking.[345]

Flexibility to allow participants to deliberate the process rules can be justified given the scope of interested parties and the vastness and diversity of coastal and ocean ecosystems in Canada. This does not preclude, however, the creation of a basic, flexible framework from which to begin. If extensive personal and financial resources must be expended on deliberating the framework, participants may become frustrated or simply exhausted and the process may stall before substantive planning can begin. A strong case can be made for the creation of a broad process framework to provide a starting point for management bodies.

Last, the collaborative process is entirely process-oriented and fails to address the quality of resulting decisions. While process is an undeniably important component of an effective ICOM regime, it must not overshadow the substantive aspects of integrated management. The IM Policy and the Oceans Action Plan both focus heavily on process with very little attention to substance. This orientation reflects Canada's overall approach to integrated management, in which Canada seeks to retain existing institutional frameworks and legislation. Implementing an ICOM regime, however, requires not only new institutional structures, but also new or revised regulatory programs.[346] An

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[345] The DFO has been involved in two recent collaborative projects, both of which illustrate the potential difficulties. The first example is the establishing of Race Rocks as a marine protected area under the *Oceans Act.* For an overview of the difficulties encountered in the collaborative process, see Sean LeRoy et al., "Public Process and the Creation of the Race Rocks Marine Protected Area" (Conference Paper, Georgia Basin/Puget Sound Research Conference, Vancouver, 2004), online: http://www3.telus.net/LeRoy/Portfolio/. The second example is the creation of the West Coast Aquatic Management Board as a collaborative management pilot project. The Board spent its first two years negotiating its terms of reference. See online: <http://www.westcoastaquatic.ca/Home.htm>.

[346] See Noordwijk Guidelines, *supra* note 184.

appropriate, coordinated, regulatory regime is needed, both to ensure standards and goals are met and to allow for the implementation of management bodies' recommendations. Simply providing for a collaborative process is not sufficient.

A number of the above concerns could be remedied through further development of the collaborative model. In its current form, the model does not meet Aarhus standards: it fails to involve the public at the earliest possible stage, to adequately define the governing procedures, to ensure broad participation and to provide for how outcomes will be implemented.

4.4 The Moratoria Review Processes

The Oceans Policies embrace the transparency principle and provide for a collaborative approach that engages citizens in the integrated management process.[347] Despite this commitment and the DFO's identification of the Pacific North Coast as a priority LOMA, both British Columbia and Canada conducted *ad hoc* public review processes about OOGD that were not collaborative and failed to meet Aarhus standards. The Provincial and federal processes will each be reviewed and critically assessed in terms of the process chosen, its stated objectives and to what extent it meets Aarhus standards.

4.4.1 The Provincial Public Process

At the provincial level, the MLA Task Force held public hearings in nine coastal and northern communities, receiving over 150 oral presentations and almost 130 written

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[347] IM Policy, *supra* note 261 at 11.

submissions.[348] The MLA Task Force had a mandate to solicit the viewpoints of those who would be most affected by OOGD, not to examine the scientific feasibility of OOGD or the social, environmental or economic merits of lifting the moratoria.[349] The resulting twelve-page MLA Task Force Report drew no conclusions on whether the public supported lifting or maintaining the moratoria, but identified six issues participants wished to see addressed before a decision on OOGD.[350]

The public hearing process provided an opportunity for citizens to attend and speak to the panel or provide written submissions. While the process was open to the public, hearings were only held in northern and coastal communities, making it likely that most participants would be from those areas. As well, the decision to conduct hearings as opposed to assessing public opinion through polling, meant that the participants were self-selecting and not necessarily reflective of the views of the community at large, much less the Province as a whole. The process has been criticized as inadequate on a number of grounds, including inadequate engagement of stakeholders (who were limited to comments only), a lack of partnerships with First Nations to manage the review process, inadequate information and inadequate delineation of decision making criteria.[351]

4.4.2 The Federal Public Process

The federal public review process was undertaken to gauge public opinion on OOGD on the West Coast with the specific objective:

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[348] See MLA Task Force Report, *supra* note 70 at 1.
[349] *Ibid.*
[350] *Ibid.* at 12-13.
[351] Simon Fraser University (Offshore Oil and Gas Research Group, School of Resource and Environmental Management) *A Review of Offshore Oil and Gas Development in British Columbia* (Vancouver: Simon Fraser University, May 11, 2004), online: <http://www.rem.sfu.ca/sustainableplanning/OOGRG.html> at xii.

> …to provide a fair and effective means by which the views of British Columbians, especially those in the communities most likely to be affected, could be heard on the question of whether to keep or lift the federal moratorium on oil and gas activities in the [Queen Charlotte Region] and the broad environmental and socio-economic impacts relating to any decision on the moratorium.[352]

The Priddle Panel began the process by holding preliminary sessions to inform the public about the review, discuss the review process, provide background information and identify issues.[353] The Priddle Panel then conducted twenty days of hearings in ten communities with over 1,400 participants.[354] Overall, it received the views of nearly 3,700 participants, 3,540 of which were written submissions.[355] On the basis of these submissions, the Priddle Panel concluded that 75% of participants opposed lifting the moratorium and that:

> …the views it heard do not provide a ready basis for any kind of public policy compromise at this time regarding keeping or lifting the moratorium. It is apparent from the summaries and evaluation that British Columbians hold strong and vigorously polarized views on the issue of oil and gas activity in the [Queen Charlotte Region].[356]

The Priddle Panel assessed public opinion by providing opportunities for the public, including stakeholders and First Nations, to express their views. The public could either attend a hearing and speak to the Priddle Panel or provide written submissions. The process was open to everyone, with hearings in northern and coastal communities as well as in Vancouver and Victoria. As with the MLA Task Force Panel, the decision to

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[352] Priddle Report, *supra* note 17 at 2.
[353] *Ibid.* at Appendix A1 at 8 & 9.
[354] *Ibid.* at 2.
[355] *Ibid.*
[356] *Ibid.* at 114.

conduct hearings to assess public opinion meant that the participants were self-selecting and not necessarily reflective of the views of the community at large.

While the Priddle Panel followed written terms of reference and delivered a comprehensive report, the process was not designed to engage citizens in decision making, only to solicit opinions. Environmental groups have readily accepted and embraced the Priddle Report, while those who favour lifting the moratoria have leveled strong criticism at its methods and conclusions.[357] The B.C. Minster of Energy and Mines was openly dismissive of the Priddle Report, saying:

> As far as I'm concerned, it's not a very good report…It doesn't tell us anything that we didn't already know. If I was the federal government, I'd be pretty disappointed about taking almost a year to come up with nothing.[358]

The Priddle Report has also been criticized by the Canadian Taxpayers Association and the B.C. Chamber of Commerce for its lack of critical evaluation of submissions.[359] This criticism stems from the Priddle Panel giving equal weight to all submissions, whether from individuals or organizations representing many people's views. The Priddle Panel recognized the difficulties with attributing equal weight to all submissions, but chose this approach because it could not find a weighting formula that would be broadly acceptable. As Roland Priddle stated:

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[357] See Living Oceans Society, News Release, "Offshore Oil and Gas Too Risky: British Columbians Send a Clear Message" (November 19, 2004), online: <http://www.livingoceans.org/newsevents/index.shtml>; and David Suzuki Foundation, News Release, "Public review shows federal government should not lift oil and gas moratorium" (November 19, 2004), online: <http://www.davidsuzuki.org/>.

[358] Jeff Rud, "Energy Minister shrugs off opposition to offshore oil, Study showing massive opposition contains nothing new, he says" *Victoria Times Colonist* (November 20, 2004). Interestingly, it was the environmental groups that were originally critical of the Priddle Panel, due to allegations of bias of the panel members, in particular Roland Priddle, a former board member of Talisman Energy, and Don Scott, former mayor of Prince Rupert and a founding member of the North Coast Oil and Gas Taskforce.

[359] See B.C. Chamber of Commerce, News Release, "Public Review Panel Fails to Address the Views of BC" (November 19, 2004); and Canadian Taxpayers Association, New Release, "CTF to Priddle Panel: Why Bother?" (November 19, 2004).

> So we fell back simply on a headcount. That was the best we could do. That's the big picture. Those are important numbers. They are correct numbers. But in using them you must understand how they were arrived at.[360]

In the end, those who favour lifting the moratoria have attempted to discredit the public process as being flawed and therefore not reflective of public opinion, while those who favour keeping the moratoria have embraced it. This result illustrates the very polarization reported by the Priddle Panel.

Upon release of the Priddle Report, the federal Minister of Natural Resources Canada called the process "broad and open" and stated that the reports would help the government assess the next steps regarding the moratorium.[361] How to interpret and use the findings of the Priddle Report is ultimately a decision of government. However, having decided to put the question to the public, it will be politically difficult to then proceed in the face of overwhelming public opposition.

4.4.3 Sufficiency of the Public Review Processes

Both public engagement processes focused on assessing public opinion and not on involving the public in decision making. After its process was completed, the Province made a decision to develop an OOG industry without further public engagement, although it does contemplate future stakeholder and First Nations consultations.[362] As discussed in chapter 2, Canada has seemingly decided to maintain the moratoria for the foreseeable future, although no formal announcement has been made to that effect.

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[360] Rud, *supra* note 355.
[361] Natural Resources Canada, News Release 2004/64, "Reports on BC Offshore Moratorium Released" (November 19, 2004), online: <http://www.nrcan-rncan.gc.ca/media/newsreleases/2004/200464_e.htm>.
[362] See Offshore Project Plan, *supra* note 92.

These *ad hoc* processes for public engagement illustrate some of the challenges and complexities of public involvement in policy making discussed above. These include not only how and when to engage the public, but how to incorporate outcomes into decision making. In this case, the objective of assessing public opinion was achieved; however, the processes did not resolve conflict, build trust or incorporate public values into the decision.[363] Nor is it possible to assess whether the processes educated and informed the public, although the Priddle Panel made efforts to do so. Evaluating whether the federal process improved the quality of decisions is highly subjective because of the competing and oppositional values at play. Those who oppose OOGD are likely to believe the public process improved the outcome, while those who favour OOGD have tried to discredit the process and are likely to be critical of the federal government's reliance on its outcome.

Consideration should also be given to whether the public engagement processes were sufficient or whether further processes should be undertaken. Using the Aarhus standards as a reference, both public processes were inadequate, although the Priddle Panel was superior in terms of providing notice and background and procedural information. Both processes failed to engage the public in decision making, to actively seek out a broad public including those most affected, to actively encourage participation and to provide information on how outcomes would be implemented.

While the processes do not meet Aarhus standards, whether to undertake further public engagement will depend on the intended goals of doing so. Arguably, further

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[363] Priddle Report, *supra* note 17 at 114 notes the strong polarization of views and the need for consensus-building. The Province's decision to proceed with OOGD indicates a decision to not incorporate public values into the decision making.

processes are essential at some stage if government decides to lift the moratoria, because of the strong opposing views held by British Columbians. The Province has stated that further engagement will take place only with respect to the where, when and how of OOGD, and not about lifting the moratorium. Again, the Aarhus standards require the public to be involved early, at the time of strategic decision making. Failure to meaningfully engage the public in the initial decisions may make later engagement more problematic because the public may resent being excluded from the initial, arguably more crucial, decision.

How and when Canada will wade through this decision remains to be seen. It seems likely that a federal decision will involve further public consultation at some point, as it would be politically difficult for Canada to lift the moratoria in the face of the Priddle Report findings. Further public processes are needed to either overrule the Priddle Report's findings or work towards consensus-building to convince opponents of the benefits of OOGD or the need for a compromise position.

4.5 Conclusions on Public Participation

Citizen engagement in decision making is becoming less the exception and more the rule in environmental policy making. The principle of procedural transparency through public participation is a core ICOM principle that has gained international acceptance. While public participation has arguably become essential in policy making circles, serious questions remain about how to organize and implement participation that must be resolved in each case.

In Canada, public participation through collaborative governance is incorporated into the Oceans Policies as the foundation for integrated oceans management. The

collaborative process involves government and non-government actors coming together to decide on ocean uses and allocations within a defined area. However, many questions regarding implementation of collaborative governance remain outstanding, including the selection of participants, the scope of the process and the institutional framework in which decisions will be made. If not resolved, these issues threaten the effectiveness of the collaborative process.

While the collaborative process is Canada's vision for integrated management, the public participation processes undertaken by Canada and British Columbia as part of the moratoria reviews were not collaborative. These processes not designed to directly engage citizens in policy making and failed to meet the Aarhus standards for public participation. It should not be surprising, therefore, that their utility was also limited.

It is possible to design a public process that engages citizens (including stakeholders and First Nations) and government with a view to resolving conflict among polarized groups and achieving resolution, if not consensus. Processes that allow a higher level of public engagement in the debate and provide for public input from an early stage are more likely to resolve conflicts. While public engagement is not a panacea for resolving contentious issues, it can contribute positively to environmental policy making.[364]

The question of whether to allow OOGD in the Basin has generated a great deal of public interest over the last number of years, with governments, First Nations, stakeholders, environmental groups and countless others weighing in on whether OOGD

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[364] See Raj Anand & Ian G. Scott, "Financing Public Participation in Environmental Decision Making" (1982) 60 C.B.R. 81 at 93-94, for a discussion of the benefits.

should proceed. Because of this public interest, it is questionable whether government could legitimately proceed with lifting the moratoria without further public engagement. Designing and implementing appropriate public processes will present significant challenges.

5. Chapter 5 - The Continuing OOGD Debate in the Basin

The question of whether to allow oil and gas development in the waters of coastal British Columbia has been debated for over thirty years. Since the imposition of the federal moratorium in 1972, political interest in OOGD has come and gone and come again. The level of debate has never been greater than in the last five years, triggered largely by the provincial government's 2001 announcement that it would pursue OOGD as part of its economic renewal plan. This announcement resulted in a flurry of government and non-government scientific and socio-economic studies and engagement processes. The Province has decided to pursue OOGD, but the federal government, apparently influenced by strong public opposition, is not yet on board.

While environmental groups have breathed a collective sigh of relief, there is little doubt the debate will continue. The economic potential of OOG, given rising prices and increasing energy demands, makes it too attractive to be left untapped indefinitely.

Those who oppose OOGD cite the need to protect the Basin's rich and diverse ecosystems from inevitable environmental impacts. Environmental impacts that alter ecosystems may then affect fisheries and other resource sectors as well as First Nation customs and practices. Actual long and short-term environmental impacts of OOGD are unpredictable because so little is known about Basin habitats and marine species. It is

widely acknowledged that these significant knowledge gaps must be filled before moving forward with OOGD.

The Province cannot allow OOGD without federal agreement and cooperation in resolving jurisdictional and ownership issues and creating a regulatory regime. While it has historically claimed ownership of the oil and gas resources in the Basin, any provincial attempt to create an OOG regime is likely to be strenuously opposed by Canada. The Province has indicated its desire to develop a political accord with Canada along the lines of the East Coast regime and is likely to continue pressuring the federal government until it relents.

Perhaps more significant are the unresolved aboriginal title and rights claims in the Queen Charlotte region. Even if government continues to deny title claims to ocean spaces, existing aboriginal rights would likely be infringed by OOGD activities such that consultation would be required before any OOGD activities are permitted. To its credit, the Province, after clear direction from the Supreme Court of Canada, has announced its resolve to pursue a new relationship with First Nations and make serious efforts to conclude treaty negotiations. With respect to OOGD specifically, the Province has committed to go beyond consultation and involve First Nations through co-management or revenue-sharing agreements.

5.1 OOG Decision Making in the Context of ICOM

The ongoing debate about where, when and whether to allow OOGD highlights the complexity of modern oceans governance, where use and user decisions are increasingly contentious. Existing, single-sector regulatory regimes have proved inadequate to address increasing use and user conflicts and have allowed ocean and

coastal ecosystems to degrade and resources to deplete. Recognition of the increasing threats to coastal and oceans health and of the inadequacy of existing governance regimes led to the development and international acceptance of ICOM. ICOM is a comprehensive, principled, management process that strives to recognize, balance and integrate ocean and coastal uses to achieve long-term sustainability. In the thirty years since its conception, ICOM has become the indisputable model for modern oceans management regimes at national and local levels.

Recent interest in West Coast OOGD coincides with Canada's commitment to a national oceans strategy founded on ICOM principles. Canada has acknowledged the continuing degradation of the ocean and coastal environments, despite efforts to improve environmental quality and the need for governance reform to ensure sustainable oceans uses. Through the *Oceans Act* and Oceans Policies, Canada has significantly reformed its coastal and oceans management regime and has expressly adopted core ICOM principles. The Act and Oceans Policies direct a national oceans governance regime that is sustainable, integrated and precautionary, with collaborative decision making through integrated management bodies comprised of government and non-government actors.

Implementation of the Oceans Policies is, however, proving to be a slow process hindered by a deficient governance framework and a lack of assured and adequate funding. Canada's integrated management vision falls short of a true ICOM regime on a number of grounds, including its failure to address interjurisdictional cooperation and to institute the necessary legislative and institutional reform. The *Oceans Act* came into force in 1997, but there is little, if any, evidence of change in the way decisions are made in ocean and coastal areas of Canada.

The federal and provincial moratoria review processes reveal Canada's lack of progress in implementing the Oceans Policies. While the Oceans Policies provide for government collaboration and cooperation with First Nations, stakeholders and community groups in decision making, the moratoria review processes did not incorporate these principles. The Province unilaterally conducted a review process that focused primarily on scientific investigations with a brief process to ascertain public opinion. The Province did not work collaboratively with any other groups in designing or implementing its process and implemented a process that failed to meet Aarhus standards for public participation.

Nor was the federal review process collaborative in design or implementation. While both the FNEP and the Priddle Panel received submissions from aboriginal groups and others, neither involved a collaborative process that engaged the participants in decision making. This failure to follow the principles of the Oceans Policies raises questions about how to reconcile the Oceans Policies on the one hand, and the federal process for OOGD on the other. Given the significance of OOGD decisions, the potential impacts on other uses and users, and Canada's plans for a LOMA in the Pacific North Coast, this is the ideal circumstance to engage the principled, collaborative decision making provided for in the Oceans Policies. If the federal government is truly embracing ICOM, all coastal and oceans policy decisions should be made within its framework. To the extent the ICOM framework is not sufficiently developed to prescribe the decision making process, its substantive principles and policies can and should nonetheless guide interim decisions.

5.2 The Way Forward: Recommendations for the Future

This discussion began by questioning how crucial ocean use and user decisions should be made and how the OOG debate fits in with Canada's ICOM initiatives. Recommendations follow for improving the decision making processes and working towards a truly integrated coastal and oceans management regime in Canada that is sustainable and precautionary.

While the federal government is leading the ICOM initiative, provincial involvement is vital to its successful implementation. With jurisdiction over activities above the low water mark and within inland waters, the Province controls most coastal activities that impact ocean ecosystems. The Province could contribute a great deal to implementation of an effective ICOM regime. It could, first, create and fund a program dedicated to integrated coastal management policy and planning. This program could work with the DFO to ensure the timely negotiation of subagreements under the MOU and the creation of CMAs. A provincial initiative with a mandate to coordinate and oversee integrated coastal management would be a vital first step towards policy harmonization and horizontal integration of coastal management. While it is not necessary to integrate all coastal-related regulatory oversight into one department, it is important to coordinate the activities and policies among the various ministries, agencies and departments that have coastal mandates.

Second, the Province should continue to fund research to fill knowledge gaps. Thorough and comprehensive scientific data on coastal ecosystems is indispensible for effective coastal planning and is a prerequisite to OOGD. Research should be driven by the need for a greater understanding of coastal ecosystems and not, as is at present the

case, by a desire to exploit resources. If resource exploitation is the only goal, the scope of the scientific enquiry will be narrowed to answer only questions necessary to facilitate

resource development. Increasing ecosystem knowledge is necessary to make good resource use decisions and to meet conservation and sustainability goals.

Third, the Province should reconsider and redesign its public engagement processes if it wishes to pursue OOGD in the Basin. This new approach should begin with public input into the design of the process itself. The Province must be willing to allow a higher level of public engagement in the debate and should then respect the outcomes of whatever process it chooses. The Province can take guidance from the Aarhus standards in constructing a public process. Perhaps more than any other proposed oceans use, OOGD should be considered in the context of other ocean uses and users and not as a stand-alone decision. The possibility of allowing OOGD into a complex and fragile ecosystem raises important questions that should be answered in the context of Canada's Oceans Policies.

At the federal level, the DFO is focusing on information collection in support of the IMPs for the five priority LOMAs. Further policy work is, however, needed to remedy deficiencies that could impede effective ICOM in Canada. First, the DFO should create a basic structural framework for integrated management bodies. This framework should include details of participant selection, the internal procedures governing the body's proceedings and an indication of how decisions will be implemented by the DFO.

Second, Canada should make further efforts to engage the cooperation of the Province in integrated management. This could be through mechanisms that offer

financial incentives or regulatory control similar to the U.S. model, or through other means such as co-management agreements or reciprocal legislation. While Canadian federalism creates obstacles to integrated oceans governance, it also is flexible enough to overcome these obstacles where the political will exists. Federal-provincial cooperation is essential to an effective ICOM regime in Canada and, if achieved, would generate regional and national benefits through coordinated and effective management.

Third, Canada should review its legislative and institutional frameworks with a view to improving coordination, efficiency and outcomes in oceans governance. The *Oceans Act* has added an additional layer to an existing regulatory regime without consideration of the need for legislative changes as part of ICOM implementation. While ICOM does not require a completely new regulatory regime, it does call for the implementation of its processes through legislative action. At present, the DFO does not anticipate legislative amendments to improve the regulatory regime or to implement the Oceans Policies.

Fourth, Canada must commit to long-term and adequate funding to implement the Oceans Policies. So far, funding has been limited and has not been guaranteed. Providing the necessary financial resources is an ICOM requirement. The DFO cannot fulfill its commitment to implement ICOM without adequate financial backing.

Last, Canada should commit to undertaking OOGD decisions within the context of the Oceans Policies. Despite slow implementation, the *Oceans Act* and Oceans Policies reflect the existing policies and principles under which oceans decisions, including those about OOGD, should be made. If Canada is truly committed to implementing an ICOM regime, it should ensure that all ocean use decisions, in particular

highly contentious ones such as OOG decisions, are made in accordance with its principles. Otherwise, Canada's commitment may appear superficial and the legitimacy of its Oceans Policies may be questioned.

The ongoing OOGD debate exists within Canada's and British Columbia's political and legal contexts. Canada has accepted the need for a modern oceans governance regime based on ICOM principles. The diverse views and interests, the existing and potential uses, the unique and complex ecosystems and the interjurisdictional complexities all underscore the need for ICOM in Canada. ICOM can provide a rational, sustainable and acceptable resolution to use and user conflicts and preserve ecosystem health if properly implemented. Decisions about OOGD should be made within Canada's ICOM framework and not through *ad hoc* political processes. These governance mechanisms should ensure that crucial decisions reflect the values and needs of coastal communities and British Columbians generally, now and in the future.

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