FEDERAL ENDANGERED SPECIES LEGISLATION IN CANADA: EXPLAINING THE LACK OF A POLICY OUTCOME

by

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B. Arts. Sc., McMaster University, 1998

A THESIS SUBMITTED IN PARTIAL FULFILMENT
OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

In

THE FACULTY OF GRADUATE STUDIES

(Department of Political Science)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

August 1999

Department of Political Science

The University of British Columbia
Vancouver, Canada

Date Oct. 20, 1999

ABSTRACT:

This thesis attempts to uncover the reasons why Canada, unlike the United States and Australia, does not have stand alone federal endangered species legislation. In particular, I will focus upon the history of Bill C-65, the proposed federal endangered species statute which died on the Order Table in 1997. Using the "policy regime" framework developed by George Hoberg, I examine the ideas, actors, and institutions that have combined within a given set of background conditions to produce this distinctive *lack of a policy outcome*, assessing the relative causal importance of each variable in terms Bill C-65's failure.

Using Peter Haas' epistemic community approach, the causal knowledge of conservation scientists' regarding habitat loss is found not to have influenced the policy substance of Bill C-65. However, it is argued that scientists did play an important role in the legislative failure insofar as they joined forces with environmentalists to discredit the weak scope and substance of the bill. These pro-environment actors, however, were matched throughout the interest group competition by the parallel forces of industry and private landowner groups, who criticized Bill C-65 as a litigious, punitive and "American" style of legislation. The provinces, for their part, sided with the landowners and industry groups, arguing that the federal government had overstepped its wildlife management jurisdiction.

Given a context of low public concern for environmental issues, and the institutional trend towards regulatory decentralization, the federal government had very few incentives to introduce a strong bill. However, the provinces, landowners, and industry groups, all felt it was too strong, while environmentalists and scientists felt just the opposite. Bill C-65's failure, therefore, was the result of the federal government's inability to satisfy anyone on this issue. Determining who "won" this first endangered species battle, however, is quite difficult without knowing whether Cabinet felt the bill was too strong or too weak, and without knowing what the next legislative proposal will entail. In conclusion, it is found that all three regime components of ideas, actors, and institutions were equally important factors in bringing about the failure of Bill C-65, and the current policy delay that continues to this day.

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LIST OF ACRONYMS

CESC	Canadian Endangered Species Coalition
CESCC	Canadian Endangered Species Conservation Council
CCME	Canadian Council of Ministers of the Environment
CESPA	Canada Endangered Species Protection Act
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
DFO	Department of Fisheries and Oceans
ESA	Endangered Species Act
IFAW	International Fund for Animal Welfare
NAEC	National Agriculture Environment Committee
RENEW	Recovery of Nationally Endangered Wildlife
SARWG	Species at Risk Working Group
SLDF	Sierra Legal Defence Fund
WAPPRIITA	Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act
WMCC	Wildlife Ministers Council of Canada

ACKNOWLEDGEMENTS

I am grateful to many individuals for their assistance with this thesis. First and foremost, I would like to thank Dr. Kathryn Harrison, who has supported in me in a variety of ways over the course of the past sixteen months. Indeed, had I not been granted the opportunity to do research assistance for her, I would not have even known about the endangered species issue itself. Second, I am indebted to a number of UBC professors who have overseen different aspects of this project. Thanks go out to Dr. Donald Blake, Dr. Susan Glenn, Dr. George Hoberg, Dr. Kal Holsti, Dr. Brian Job, and Dr. Paul Tennant - all of whom have made my experience at UBC a richer one. Finally, I would like to thank my parents, Bruce and Stephanie, my sister, Matilda, and my girlfriend, Ashley, for their encouragement and their understanding. Their support over the years is the real reason why I am here today.

CHAPTER I

INTRODUCTION

> The last word in ignorance is the man who says of an animal or plant: 'What good is it?' If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.
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> Aldo Leopold, 1949

Canada's endangered species responsibilities, though not as extensive as those in more tropical countries, are impressive. Possessing the longest coastline of any nation, and with some 13 million square kilometers of land and water, Canada is home for nearly 20% of the world's species, 20% of its freshwater, and 24% of its wetlands (Environment Canada, 1995). On April 23, 1999, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) added a total of 31 Canadian wildlife species to the national list of species at risk, bringing the number of extinct, extirpated, endangered, threatened, and vulnerable species to 338, up from 307 last year.[1] This biodiversity tragedy

[1] According to COSEWIC (1994), species are defined as "any indigenous species, subspecies or geographically separate population". In terms of the risk categories assigned by the Committee, an "extinct" species is a "species formerly indigenous to Canada that no longer exists anywhere". An "extirpated" species is "a species no longer existing in the wild in Canada but occurring elsewhere". An "endangered" species is "a species threatened with imminent extinction or extirpation throughout all or a significant portion of its Canadian range". A "threatened" species is "a species likely to become endangered in Canada if the factors affecting its vulnerability are not reversed".

notwithstanding, no legal consequences flow from such designations. In other words, Canada's endangered species do not receive automatic protection and recovery measures as they might in the United States, Europe, Japan, or Australia, simply because there is no specific legislation mandating direct federal government intervention. This thesis, therefore, is an attempt to better understand the conspicuous lack of a federal endangered species statute in Canada.

Following the signing of the *Convention on Biological Diversity* in 1992, the Canadian government engaged in a process to ensure compliance with its international environmental obligations. The major hurdle presented by this biodiversity commitment was the required development of Canadian laws to protect endangered species. At the time, only a handful of provinces possessed stand alone legislation, and the federal government did not. Seven years later, several more provinces have passed endangered species laws, while Ottawa has not. In fact, the Liberal government's only attempt to enact legislation failed when the infamous Bill C-65 died on the Order Table following the 1997 federal election call. Although one might assume that an issue of such scientific significance and symbolic resonance would lead to an expedient government response, the current legislative vacuum has engendered more questions than answers. Why did the bill fail? Why has it taken so long for Ottawa to enact legislation to which it has internationally committed?

One does not need to look very far to understand the difficulties inherent in the development of a statutory species protection regime. Aside from such scientifically

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Finally, a "vulnerable" species is "a species particularly at risk because of low or declining numbers, small range, or for some other reason, but that is not threatened". For the purposes of this thesis, the terms "species at risk" and "endangered species" will be used interchangeably to refer to species in all risk categories.

complex issues as species listing and recovery planning, there are a host of socio-economic and political ramifications that are inevitably blended into the endangered species policy mix. The implication of species at risk legislation, especially when it follows the scientific recommendations for habitat-based protection, is that it regulates land use. Thus, one might expect such affected parties as industry and private landowner groups to react defensively against any perceived threat of state intervention on private property. When this basic regulatory dynamic is translated into a federal political context, the web of interested actors is multiplied; Canada's two-tiered system of governance results in a division of state land ownership and management, and an endangered species statute raises the confrontational spectre of federal regulation over provincially-owned lands. How to reconcile the notion of property rights and responsibilities (both governmental and non-governmental) with the environmental imperative of biodiversity protection? Clearly, the issue of Canadian endangered species protection requires a degree of socio-political organization and cooperation that is not easily achieved.

Theoretical Overview

In order to provide a comprehensive analysis of this policy delay, this thesis will employ the "policy regime framework" developed by George Hoberg. Through this multi-causal theoretical lens, policy outcomes are understood to be the result of an intersection of three distinct, though interrelated, components: actors, institutions, and ideas. Though such variables are disaggregated for the sake of analytic simplicity, the

regime approach emphasizes the systemic and holistic process that is policy-making.[2] In short, these three components are discussed not only in terms of the independent causal effects they exert on policy outcomes, but also as interactive entities which, given a particular context of background conditions, combine to yield unique policy outcomes (Hoberg, 1997a; 1998). The endangered species outcome (or lack thereof), however, is unique insofar as it provides an opportunity to test the regime framework's explanatory potential against a case of policy absence.

The first regime component, actors, is defined as the "individuals and organizations, both public and private, that play an important role in the formulation and implementation of public policies" (ibid: 2). The pursuit of *interests* within a competitive political arena is structured by the *resources* that each actor can draw upon to influence policy outcomes, and the *strategies* employed to maximize such resources. The policy regime approach does not assume, however, that the policies adopted by governments reflect an equal distribution of power resources throughout society. The traditional pluralist assumption of pressure group competition occurring on a level playing field is belied by the myriad structural (economic) and organizational (collective action) biases inherent in each and every policy domain (Hoberg, 1992; Pross, 1996; Atkinson and Coleman, 1996). Thus, strategic actors are understood to exert whatever political influence they have within a systemically constrained environment of *realpolitik*, in order to transform their policy preferences into advantageous outcomes.

The institutional conditions under which this competition of interests occurs are of fundamental importance to any complete policy analysis. As the second causal

[2] A more in-depth study of the "regime" concept is undertaken by Hoberg (1992: 4-6).

component of the regime framework, institutions are understood by Hoberg as the systems of "rules and procedures that allocate authority over policy" (1997a: 3). The degree to which institutions "matter" in the policy-making process, however, is the subject of considerable scholarly debate.[3] By defining the parameters of political behaviour, they structure the roles, interactions, and (occasionally) the interests of legitimate policy participants. Thus, institutions can influence the policy-making process by shaping the authority and relations between government actors (ie. between the executive, the legislature, and the judiciary, as well as between federal and subnational governments), and by defining the rules of interest group participation (state/society relations). In effect, institutions define the available resources and the strategic directions of each and every actor in a given policy arena.

Ideas constitute the final component in the regime framework, and are perhaps the most difficult variable to analyze without reference to both actors and institutions. Although many competing understandings of ideas exist across a spectrum of scholarly perspectives, this thesis will adopt the simple, yet broad, definition employed by Hoberg: ideas are "causal and normative beliefs about the substance and process of public policy" (ibid: 3). While recent attempts to incorporate cognitive factors into policy analyses have achieved prominence, the jury is still out as far as their ability to independently influence policy outcomes. As Hall has pointed out, ideas-based scholars "need to develop more sophisticated theories about how ideas can be persuasive in themselves, which is to say, at least partially independently of the power of their proponents" (1997: 185). This being said, the fact that ideas are difficult to disentangle from other analytic variables does not

[3] As Hoberg (1998) notes, the institutional literature is vast, and includes historical, rational choice, and organizational

necessarily imply that the task cannot be accomplished, or that causal knowledge cannot exert a tremendous impact in a given policy area. Ideas can serve as power resources for actors, and as constraints on government policy-makers, especially when transmitted through expert or "epistemic" communities (Haas, 1992). Once institutionalized, they can become embedded in the operating procedures of an organization, and shape the "worldviews" of relevant decision-makers. Thus, cognitive factors can not only shape interests and provide resources, but can also redefine the institutional context within which policy is made.

Having distinguished the three regime components and their overlapping interactions, the contextual backdrop of the analysis needs to be outlined. As mentioned previously, actors, institutions, and ideas can only be understood in a given environment of economic, macropolitical, international, and public opinion conditions (to name but a few). While each of these underlying conditions will be discussed at different stages in the thesis, I have chosen to focus an entire chapter on how currents of public concern have shaped the endangered species decision-making climate. Not only do opinion polls represent crucial bellwethers for government policy-makers, they can also serve as potential power resources for both state and interest group actors. In fact, recognizing that public concern plays a major role in defining governments' electoral priorities, shifts in concern have the potential to influence their policy interests, as well as their interests in maintaining (or shifting) specific institutional arrangements within the environmental policy domain.[4] The background of public opinion, therefore, is a fundamental

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streams. See Hall and Taylor (1996) for an overview of these traditions.

[4] It could be argued that public opinion has an important impact on the influence of ideas in a given policy area. However, the lack of theoretical advance into this area precludes any serious attempt to organize the effects of public

contextual variable to consider in conjunction with the interest and institutional components of the policy regime framework.

Outline of the Thesis

In order to achieve a balanced assessment of the relative importance of each causal variable, as well as a complete understanding of the circumstances under which the legislative delay continues, this thesis will proceed in seven chapters.

Chapter 2 lays the groundwork for the thesis, and is developed through two distinct sections of background information. The first section provides a review of the current state of federal endangered species protection in Canada, outlining the various statutes, programs, and institutionalized organizations which provide a modicum of support for species at risk. The federal measures are then assessed in relation to the patchwork of provincial efforts on the endangered species front, underlining the absence of a consistent and enforceable protective regime in Canada. This theme is further explored by way of a brief juxtaposition with the United States' *Endangered Species Act* (ESA) of 1973, widely regarded as one of the most powerful and least discretionary environmental statutes in the world.

The second section places the endangered species issue into a historical context, outlining the various ebbs and flows throughout its development from the 1970s to the late 1990s. The role of the environmental movement, the impact of the *Convention on Biodiversity*, and the gamut of federal activities leading up to the failure of Bill C-65 will

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opinion into the cognitive component of the regime framework. While this omission presents an obvious weakness in

all be presented. Following this chronological summary of endangered species events, a summary of the important elements and proposed amendments to Bill C-65 will be presented.

Chapter 3 begins with a discussion of the place of ideas in policy analysis, and moves into an overview of the "epistemic community" approach pioneered by the International Relations theorist, Peter Haas. Haas' cognitivist framework provides a theoretical platform upon which the role and importance of endangered species ideas are analyzed. In particular, the role of conservation scientists in Canada is evaluated in terms of their functioning as a knowledge-based community of experts. Although Haas' theory would suggest that their shared causal and normative beliefs about the threat of species endangerment (and biodiversity more generally) should have influenced the policy substance of Bill C-65, this is shown not to have been the case. Judging by the dearth of habitat protection provisions in Bill C-65, causal knowledge did not exert any significant impact, *independently of actors and institutions,* on the development of federal legislation. However, when ideas are understood in a larger political context as a potential power resource (especially in terms defining the scientific boundaries of policy credibility), the role of science and conservation scientists is more clearly delineated. As interest-driven political actors opposing the weak scientific foundations of the proposed federal legislation, conservation scientists have contributed to the current legislative delay through their association with the larger environmental community.

Chapter 4 tackles the backdrop of public concern, a contextual factor whose fluctuations exert an important influence on the overall effects of both interest and

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the thesis, it also points towards the potential for new avenues of idea-based research.

institutional-based regime components. First, opinion polls are discussed in terms of their potential as a power resource for environmental groups. While these actors point to recent surveys indicating an overwhelming breadth of support for federal legislation, it is demonstrated that the symbolic issue of endangered species protection simply does not matter in comparison with other, more salient national issues such as the economy and national unity. Without the strength of public opinion backing their demands, the environmental and scientific communities' arguments have lost some clout in terms of being able to sway the electoral incentives of the federal government. The effects of this lack of environmental interest become even more striking when the analysis of incentives and disincentives shifts to the federal government and the institutional arrangements governing this policy field. Drawing upon Kathryn Harrison's (1996) theory regarding the impact of opinion on federal environmental involvement, it is shown that the government's willingness to "overstep" its perceived endangered species jurisdiction is greatly reduced during periods of low public concern. Thus, the analysis of public opinion trends highlights the way in which fluctuating background conditions of societal concern can tilt the competitive balance between actors and influence the interests of decision-makers themselves.

Chapter 5 examines the role of interest groups in the legislative delay, considering their influence from the theoretical perspective of neo-pluralism. Following a brief description of the institutionalized multistakeholder consultation process in which the groups formally interact, the three most relevant non-governmental actors competing within the endangered species arena are assessed. Environmental, private landowner, and industry groups are discussed in terms of their political strengths, strategies, and their

reactions to the substance of Bill C-65. To be sure, none of these actors were pleased by the proposed legislation, and each called for wholesale changes on a number of different fronts. While environmentalists decried the limited scope of application, the lack of habitat protection measures, and the discretionary provisions, industry and private landowner representatives (a powerful combination of actors) attacked the government for its jurisdictional overbearance, its punitive and legalistic approach, and its distinct lack of compensation or incentive measures. This (seemingly) intractable interest group conflict was expressed quite clearly through the interdepartmental disagreement in Cabinet over the bill's contents. It is determined, therefore, that a major causal factor underlying Bill C-65's failure was the federal government's inability to satisfy the diverse range of endangered species interests held by different stakeholders.

Chapter 6 studies the way in which Canada's macropolitical institutions have shaped the development of endangered species legislation. The ambiguous constitutional division of environmental responsibilities is outlined in order to introduce one of the most fundamental of Canadian institutions: *federalism*. After a brief discussion of the intergovernmental Wildlife Ministers Council of Canada (WMCC) and its role in developing Canada's collective governmental response to the Biodiversity Convention, the interests of the provincial governments with respect to federal endangered species legislation will be examined. Their desire to maintain the current trend towards a decentralized environmental regulatory regime is at the heart of their objections to any federal statute whose scope impedes provincial land and resource management responsibilities. Given that the federal government recognizes the necessity of a collaborative approach to species preservation in Canada, the provinces' unanimous

rejection of Bill C-65 (primarily over international transboundary species and civil suit provisions) goes a long way towards explaining its demise. It must be emphasized, however, that provincial interests in promoting a decentralized species protection regime are rooted in their material and electoral interests as landowners and responsible governments. In other words, the jurisdictional stakes of federal endangered species legislation are a proxy for the provincial governments' desire to maintain a greater degree of control over their economic (and therefore electoral) strategies. Thus, the balance of evidence suggests that institutions, and the interests embedded within them, were an extremely important cause of Bill C-65's failure and of the overall policy delay.

Chapter 7 is developed as both a discussion and conclusion, reviewing the relative causal impacts of the three regime components, and reassessing their interrelated explanatory potential. The lack of an endangered species policy outcome will then be assessed in light of the events that have transpired since the failure of Bill C-65. As the federal government prepares to initiate new legislation in the fall of 1999, there are indications that many of the previous proposal's shortcomings will be addressed. From landowner compensation schemes to a revised civil accountability process, it would appear that the federal government is becoming more receptive to a range of endangered species stakeholders. With the recent appointment of a more "conservationist" Environment Minister, David Anderson, and hints of a renewed Liberal interest in improving the government's environmental profile, perhaps the legislative time for species at risk has come. Indeed, recent reports suggest that Anderson has made a new legislative proposal to Cabinet that would protect species and habitat on both public and private lands - a far cry from the provisions of Bill C-65. Nonetheless, uncertainty about

the scope and substance of this new environmental statute prevails, especially in terms of how far the federal government is willing to interpret its endangered species jurisdiction in the face of provincial, landowner, and industry objections.

Before embarking on this regime analysis of policy absence, a conceptual caveat is in order. The most fundamental limitation of this study stems from the uncertainty engendered by *the lack of a definitive dependent variable: a policy outcome*. In a sense, I am telling a tale whose ending is as yet unknown. Without any concrete statutory result, it is impossible to pronounce conclusively which independent analytic variables (or combination thereof) are the cause of the current delay. Evaluating the outcome in terms of "winners" and "losers" would require insight into internal government decision-making that is practically unobtainable. For instance, did the federal cabinet decide to scrap this proposed legislation in response to environmentalist and scientist concerns over the bill's habitat protection shortcomings? Or were they reacting to the pressure exerted by industry groups, landowners, and the provincial governments, for whom a strong bill threatened to impose significant costs without compensation? Either way, it is unclear which regime components carried greater causal weight, and it must therefore be concluded that a package of factors underlie the delayed enactment of a federal species at risk statute.

Although the search for an analytic "truth" will become more apparent following the initiation of new legislation, there are enough pieces already in place to form an educated assessment of the endangered species puzzle. In effect, this issue can be analyzed at two separate levels. From a short term perspective, Bill C-65's failure is consistent with the scenarios described according to each of the three policy regime

components. Without a proposal based on the policy prescriptions of science, the federal government could not draw upon the support of the scientific community and the credibility of their ideas. This lack of support was compounded by the widespread dissatisfaction among each and every interest group, and by the provinces' hostility towards a bill that did not further the institutionalization of Canada's decentralized regulatory regime. In short, different aspects of Bill C-65 alienated different actors. The federal retreat, therefore, is quite understandable when one considers the wall of criticisms that confronted them on the eve of the June 1997 election.

From a long term perspective, however, this conclusion is unsatisfactory because it seems inevitable that one "side" will eventually emerge victorious from the endangered species battle. Without further insight into Cabinet deliberations from the spring of 1997, one cannot presume to determine who that will be. Assuming that the scientists' and environmentalists' demands for broad habitat protection measures are incompatible with the provinces' goals of maintaining a limited federal regulatory role, it seems reasonable to conclude that some combination of regime elements will eventually overcome the others. Only time will tell which interests will carry the day. It is from this incomplete platform, therefore, that the lack of federal endangered species legislation is to be considered.

CHAPTER II

BACKGROUND INFORMATION

The Current State of Federal Endangered Species Protection in Canada

Assessing the current level of endangered species protection in Canada is a complicated exercise, if only because the responsibility for their regulation is split between different levels of government, and because the federal government (as well as some provinces) does not have legislation that is specifically concerned with protecting species at risk.[5] Canada's endangered species range over a wide variety of federally-controlled lands, from Indian reserves, to military lands, national parks, sea coast and inland fishery waters, and the high Arctic. At the moment, there exists a patchwork of federal statutes which provide, either directly or indirectly, certain measures of species protection. Among the most important of these are the *Fisheries Act*, the *Migratory Birds Convention Act*, the *Wild Animal and Plant and Regulation of International and Interprovincial Trade Act*, the *Canada Wildlife Act*, and the *National Parks Act*.

The Department of Fisheries and Oceans (DFO) is responsible for the implementation of the *Fisheries Act*, which protects all fish (including shellfish, crustaceans, marine animals and their eggs, spawn, spat and juvenile stages) and their marine habitat (Bourdages, 1996). Fish habitat as outlined in the Act includes "spawning grounds and nursery, rearing, food supply and migration areas". This broad habitat definition, combined with stiff prohibitions on its alteration, disruption or destruction

have made the *Fisheries Act* a powerful protective tool for both species and their ecosystems. However, it should be noted that the Act does not afford any specific protection (habitat or otherwise) for fish species at risk of extinction.

The *Migratory Birds Convention Act* stems from an Empire Treaty signed between the US and Canada in 1916, a commitment made by both countries to protect a variety of transboundary bird species. In particular, the Act regulates hunting practices and permits, limits trade and commerce, and provides for the creation of migratory bird sanctuaries (Estrin and Swaigen, 1993). Once again, however, there are no specific provisions in the Act for endangered bird or habitat protection.

The *National Parks Act* of 1933 protects all plant and animal species within the boundaries of Canada's national parks. Heavy fines and jail sentences can be imposed upon any individuals who "hunt, disturb, confine, or possess threatened or protected species" on these lands. Thus, the *National Parks Act* does provide a certain level of protection against species extinction, albeit in a restricted set of pristine land preserves.

The *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (WAPPRIITA) was enacted in 1992 to prohibit the export or interprovincial transport of plants and animals (or their products) listed by COSEWIC (see below). This *Act*, stemming from the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), allows for the strict control of any trade or commerce in endangered species and is backed by the threat of stiff penalties.

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[5] A detailed description of the federal and provincial governments' claims to endangered species jurisdiction is provided in Chapter 6.

Finally, the 1973 *Canada Wildlife Act* enabled the federal government to undertake public education and research programs on wildlife conservation. The *Act* also granted responsibility to the Minister of the Environment (through the Canadian Wildlife Service) to coordinate federal and provincial policies relating to wildlife and their habitats (Bourdages, 1996). Under the *Canada Wildlife Act,* the federal government may, in cooperation with the province, "take such measures as the Minister deems necessary for the protection of any species of wildlife in danger of extinction". Thus, this Act contains mechanisms for protecting endangered species, and also allows for the acquisition and management of habitat. However, the broad mandate of this statute has been to manage wildlife habitat and conduct conservation research - the Act was intended to preserve and enhance the diversity of Canada's fauna and flora, not to implement non-discretionary recovery plans or stringent prohibitions like the 1973 ESA. This statute is deemed inadequate, therefore, because it is not equipped with action-forcing provisions (in terms of automatic prohibitions, listing procedures, and recovery efforts) designed specifically for the rescue of Canada's endangered species.[6]

Species Listing and Recovery in Canada

The listing of species at risk in Canada has been undertaken by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) since 1977. Composed of independent scientific experts from provincial, territorial, and federal wildlife agencies, as well as from non-governmental conservation organizations, COSEWIC is the recognized

[6] Confidential interview with a federal wildlife official, July 1999.

authority on species assessment. However, without any stand alone federal legislation regarding Canada's species at risk, the COSEWIC list has no legal authority, and no regulatory consequences. It is a toothless list of nationally endangered species, and cannot be imposed upon the provincial governments.

The recovery of Canada's endangered species has been organized by the Recovery of Nationally Endangered Wildlife (RENEW) Committee since 1988. As a joint federal-provincial body that integrates non-governmental agencies, the RENEW committee has been given the task of developing recovery plans for the species listed by COSEWIC. Although RENEW has achieved some remarkable recovery successes (specific examples include the wood bison and the ferruginous hawk), "the effectiveness of the plans is severely constrained by limited financial resources, insufficient scientific data to manage each species and the fact that the plans do not have the force of law" (Bourdages, 1996: 15). Recovery efforts for Canada's species at risk, therefore, operate under significant constraints, and are not mandated by federal or provincial statutes.

Species at Risk Protection by the Provinces: An Inconsistent Patchwork of Standards

With regards to provincially-controlled lands, the protection for species at risk varies from coast to coast. Since provincial crown lands imply provincial proprietary rights over all wildlife (including species at risk), it is important to recognize that the provincial governments will almost always be involved in the protection of endangered species and their habitats. As of March 1999, every province east of Manitoba had enacted or was in the process of legislating provincial endangered species legislation.

However, these laws vary in terms of the stringency of their prohibitions, their requirements for habitat protection, and their degree of enforcement. In addition, those provincial statutes which do provide for the specific protection of species at risk are merely enabling in nature, and do not compel their governments to act (Canadian Wildlife Service, 1994; Foley and Maltby, 1995). Not surprisingly, this Canadian standard of non-discretionary language has brought heated criticism from leading environmental groups, who clamour for strongly prohibitive and compulsory federal and provincial legislation.

As a result of commitments made in the 1996 *National Accord on the Protection of Species at Risk in Canada*, each province is supposed to develop the necessary legislation and programs to comprehensively protect Canada's endangered species.[7] The *National Accord*, however, does not require specific endangered species statutes, nor does it require that this protection be mandatory. Taking the example of British Columbia (the province with the most biological diversity in Canada), it becomes increasingly clear that the federal patchwork of species protection is matched (and perhaps surpassed) by provincial regulations. Like Alberta, B.C. has no stand alone endangered species legislation. Instead, it relies upon a number of statutes and policies to provide an "umbrella" for species protection, namely the *Forest Practices Code*, the *Wildlife Act*, and the *Protected Areas Strategy*. Under these, the development and implementation of recovery plans are not mandatory, and the levels of species protection are inconsistent. According to environmental groups like the Sierra Legal Defense Fund (SLDF), therefore, such umbrella formulas for endangered species preservation are leaky at best (SLDF, 1997).

[7] The *National Accord* will be discussed more comprehensively in Chapter 6.

The Overall Endangered Species Picture in Canada: A Brief Comparison With the US

All told, federal and provincial statutes and policies afford varying levels of protection to Canada's species at risk. The acts described above include a number of measures to protect species from extinction, but vary in their prohibitions, penalties, and conservation measures. As Estrin and Swaigen emphasize: "Even this legislation, which is plagued with inconsistencies, vague definitions, and unsuitable penalties, is inadequate to protect these [endangered] species" (1993: 363). None of the federal or provincial statutes are designed specifically to cope with the emergency situation of species endangerment, and all of them are discretionary laws. In other words, the current legislative situation does not *require* that anything be done about an endangered plant or animal in Canada.

Canada's piecemeal security blanket contrasts sharply with the less discretionary, more stringent, and more comprehensive *Endangered Species Act* (ESA) in the United States.[8] Widely considered to be the world's most comprehensive and prohibitive wildlife protection law, the ESA was hailed as a monumental legislative achievement by environmental groups following its enactment in 1973 (Bean, 1983). The action-forcing ESA fit into a long federal history of wildlife regulation measures, and was the incremental product of a remarkably benign policy environment.[9] In short, the US statute

[8] For a series of distinct, yet interrelated analyses of the ESA and its policy implications, see Kohm (1991) and Bean (1983).

[9] A comprehensive analysis of the ESA's historical development is provided by Yaffee (1982), who underlines how the endangered species problem was considered a "technical" issue (a matter of "simple" biology) that was not seen to threaten any identifiable interests and would not impose any concentrated costs. Yaffee also details how this highly

was enacted under fundamentally different conditions, the last in a series of important federal environmental regulatory initiatives of the early 1970s (Yaffee, 1982).

The ESA requires the designation of both "endangered" and "threatened" species, whose listing is to be based on the best available scientific information. Upon listing, species and their critical habitats receive strong federal protection in the form of broad prohibitions and the mandatory development and implementation of recovery plans. Section 9 of the Act makes it unlawful to "take" an endangered species, a term defined so broadly as to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 USC., 1532(19)). A recent US Supreme Court ruling (*Babbit vs. Sweet Home*) has further clarified and expanded this "taking" definition by determining that significant habitat modification or degradation is equivalent to "harming" an endangered species. And, because the "taking" prohibitions apply to "any person", both federal and nonfederal (government and private) actions fall under this statute's jurisdiction (16 USC., 1538(a)(1)). In other words, every government agency, developer and private landowner can be held accountable for habitat-altering activities, a situation that has ignited debate about the constitutional legality of the ESA vis-a-vis the Fifth Amendment.[10]

Finally, the ESA is equipped with powerful mechanisms to enforce its regulations; heavy fines and jail sentences threaten those who knowingly violate the Act's prohibitions. Citizen suits can be brought by any person against any person, company or government agency alleged to be in violation of the Act. Combined with the non-

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symbolic matter generated very few political opponents, a situation that has changed significantly over the course of its implementation.

discretionary language of the statute (the ESA does not simply *authorize* protection, it *compels* it), these civil action provisions have led to a litigious, and often controversial enforcement of the ESA. Overall, therefore, the ESA is an extremely stringent statute, and has become one of the most powerful regulatory tools available to environmentalists. Consequently, it is both hailed and reviled in the US as the "pit bull" of environmental regulations.

The real divergence between these two countries' endangered species regimes lies in the action-forcing nature of the ESA, and the flexible "enabling" statutes found in Canada. In the US, the non-discretionary ESA has been part of a legalistic regulatory framework that "gives environmentalists powerful leverage over the implementation of statutory mandates" (Hoberg, 1997b: 37). It should be emphasized that, for the most part, both levels of Canadian government have the statutory authority to protect species at risk. In other words, Canadian governments could, if they wanted, protect and recover endangered species; their US counterparts do not enjoy a similar level of autonomy. Since federal and provincial governments cannot be compelled by Canadian groups or citizens to implement existing statutory provisions, the survival of this country's endangered species depends almost entirely on political will.

[10] Private landowner groups in the United States argue that the restrictive "takings" provisions of the ESA run counter to their constitutionally protected rights as property owners. This subject will be revisited in Chapter 5, during the discussion of private landowner interests.

A History of the Federal Endangered Species Issue in Canada

While endangered species have long been a symbolic theme in the North American environmental movement, the issue of Canada's federal endangered species legislation gathered political steam only in the mid-1970s. Due in part to the relative weakness of Canadian environmental groups and a lack of interest within the federal government, endangered species were not placed on a statutory pedestal as they had been in the United States. By and large, species at risk were considered to be provincial matter, and already to be "managed" at the federal level through the *Wildlife Act.*[11] However, following the passage of Ontario's *Endangered Species Act* in 1971 (the first provincial stand alone legislation in Canada), and the historic enactment of the US ESA in 1973, Canadian environmental groups began lobbying the federal and provincial governments to improve the coordination of their endangered species conservation programs. In particular, they solicited intergovernmental involvement in a national scientific listing process for species at risk. It is interesting to note, therefore, that although Canada's environmental community was aware of the action-forcing American statute, their lobbying efforts were not focused on achieving stand alone federal legislation (Pratt, 1999). Thus, the mobilization of a Canadian endangered species movement was not (at least in the beginning) the explicit product of US policy emulation, unlike many other environmental policy areas.[12]

[11] Confidential telephone interview with a federal wildlife official, June 1999.
[12] For a more detailed comparison, see Hoberg's chapter "Governing the Environment: Comparing Canada and the United States" in Banting, Hoberg, and Simeon (1997).

In 1976, two of Canada's largest environmental organizations, the Canadian Nature Federation (CNF) and the World Wildlife Fund (WWF), co-sponsored the Symposium on Canada's Endangered Species and Habitats. This national conference was intended to promote the endangered species issue as a matter of political relevance, and raised numerous concerns about the adequacy of federal involvement in this area. As Michael Singleton (1977: 99) of the Canadian Federation of Naturalists stated during the proceedings, "[t]hree words characterize endangered species legislation in Canada: piecemeal, jumbled, and cosmetic". Unfortunately for these hopeful environmental groups, the event did not engender a great deal of political debate, if only because the Canadian electorate was paying scant attention to environmental issues at the time (Harrison, 1996). On the other hand, the symposium did succeed in bringing about the establishment of COSEWIC, thereby institutionalizing an independent scientific committee responsible for the annual listing of Canada's endangered species.

Waxing and Waning in the 1980s: Domestic Disinterest Buoyed by International Attention

Throughout much of the 1980s, the issue of endangered species protection (along with most other environmental concerns) continued to fall victim to an inattentive Canadian electorate, essentially disappearing from the domestic political agenda. Internationally, however, the endangered species movement cause gained prominence thanks to a series of reports which promoted biodiversity protection through "sustainable development". Beginning with the International Union for the Conservation of Nature's

World Conservation Strategy in 1980, and followed by the 1987 release of *Our Common Future* by the World Commission on Environment and Development (otherwise known as the Brundtland Commission), the endangered species issue was essentially kept afloat by an international emphasis on the conservation of threatened ecosystems and species. Buoyed by these influential environmental endorsements, Canadian groups dedicated to the cause of species endangerment mounted a political comeback of sorts in the latter part of the decade and into the early 1990s.

The Rio Earth Summit of 1992

The United Nations Conference on the Environment and Development, held in June of 1992 in Rio de Janeiro, marked a new beginning in the development of federal endangered species legislation, and signaled an important victory for Canada's environmental community. Amidst great political fanfare, the Government of Canada returned from the Rio Summit as the first industrialized nation to sign the *Convention on Biological Diversity*; Canada had scored an important symbolic victory in the realm of international environmental diplomacy. In doing so, the Mulroney government committed Canada to the achievement of the Convention's three main objectives: "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources" (United Nations, 1992: 4). This commitment to the conservation of biodiversity requires that Canada implement comprehensive federal and provincial legislation to protect endangered species and their habitats. Under Article 8k of the Convention, signatory

countries are obliged to "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations" (ibid: 8). Thus, when the federal government ratified the Convention in December of 1992, it bound itself to enact stand-alone endangered species legislation. No longer could the endangered species issue simply be ignored; the political process to determine the form and scope of such a statute had only just begun.

Post-Rio Developments: Focus Groups, Task Forces, and Stakeholder Consultation

In early 1993, the House of Commons Standing Committee on the Environment heard briefings from various stakeholders and government officials in a preliminary effort to sort out the most efficient and effective approach to uphold Canada's biodiversity commitments. The Committee recommended that Environment Canada initiate a comprehensive intergovernmental approach to protect species at risk and their habitats (Canadian Wildlife Service, 1994). Following the Standing Committee's report, a multistakeholder "focus group" coordinated by the Canadian Wildlife Service officials began the task of figuring out how to accomplish such an integrated national approach to wildlife management. Their report recommended that both provincial and federal governments should enact "comprehensive legislation...to ensure the protection of species, ecological communities, and ecosystems", and that the "federal government should frame national minimum standards for designation and protection of endangered species...and their habitats" (Canadian Wildlife Service, 1993: 2-3). Clearly, these initial

recommendations pointed to the need for an integrated approach to Canada's endangered species regime with extensive federal leadership.

With Deputy Prime Minister Sheila Copps at the helm of Environment Canada, a multi-stakeholder Task Force on Endangered Species Conservation was established in April 1994. This Task Force was composed of representatives from major resource industries, private landowners, academia, and environmental groups, and provided extensive policy recommendations to the federal government.[13] In November of 1994, the federal government circulated a discussion paper among stakeholder groups, and invited public suggestions on the legislative proposals contained within the document (Environment Canada, 1994). A series of regional public consultation "workshops" were held across Canada in May of 1995, through which both federal and provincial governments coordinated their efforts to gain stakeholder input into this aforementioned discussion paper. Finally, in the fall of 1995, Minister Copps began the legislative process with the release of a plain language proposal for an endangered species bill (Environment Canada, 1995b).

In parallel with Environment Canada's stakeholder consultation, the federal and provincial governments initiated a series of complex intergovernmental negotiations to prepare a comprehensive national response to the Biodiversity Convention. Recognizing their shared responsibility for endangered species protection, both levels of government communicated through the Wildlife Ministers Council of Canada (WMCC), and established an intergovernmental Biodiversity Working Group to develop what became

[13] The Task Force's recommendations were made in a final report to the federal government in May of 1996. However, much of their input was ignored by the federal government in the proposed Bill C-65, causing many stakeholders to question the value of such an enterprise.

known as the *Canadian Biodiversity Strategy*.[14] The *Canadian Biodiversity Strategy* was officially released in 1995 (prior to the plain language proposal), and was a general document describing the "strategic directions" and "guiding principles" that would bring Canada into conformity with its Biodiversity Convention commitments. Not surprisingly, it repeatedly stressed the importance of intergovernmental cooperation and collaboration, recognizing as it did the "existing constitutional and legislative responsibilities for biodiversity in Canada" (Environment Canada, 1995a: 2).

The National Accord and Bill C-65

The culmination of these stakeholder consultations and intergovernmental negotiations occurred in October of 1996, with the signing of the *National Accord for the Protection of Species at Risk*, followed less than a month later by the tabling of Bill C-65, the federal government's much anticipated formal legislative proposal. On October 2, 1996, Canada's federal and provincial wildlife ministers reached an agreement in the WMCC that committed each jurisdiction to pass legislation protecting endangered species and their habitat. Developed in the spirit of the ongoing "harmonization" exercise, the *National Accord* was an intergovernmental framework designed to facilitate the enactment of a seamless and integrated web of protective legislative measures across all Canadian jurisdictions.[15] Following this announcement, the federal Bill C-65, otherwise known as the *Canada Endangered Species Protection Act* (CESPA), was introduced to

[14] The important role played by the WMCC in the development of federal legislation is further explored in Chapter 6.
[15] "Harmonization" refers broadly to the decentralization and coordination of Canada's federal and provincial environmental programs. This process is outlined more fully in Chapter 6.

the House of Commons for first reading by the new Environment Minister, Sergio Marchi.[16] Symbolically accompanied at the press conference by an endangered peregrine falcon, Marchi proclaimed a new era in species protection, announcing that "[the] new Act – plus the Accord – equals protection for endangered species from coast to coast to coast. We now have a comprehensive national framework for action – not a patchwork quilt" (Office of the Minister of the Environment, 1996:1).

Despite Marchi's enthusiasm, Bill C-65 was attacked by virtually every stakeholder group, from industry to private landowner to aboriginal and environmental groups. Many groups felt that the federal government had gone "too far" with this proposed legislation, and that it was prioritizing species over people, and doing so without jurisdictional authority. The mass media, however, focused their coverage on the more vociferous attacks launched by the environmental and scientific communities, which labeled the proposed legislation as weak first step that needed much improvement.[17] Clearly, where one stood on Bill C-65 depended entirely upon where one sat: it was either too strong or too weak, too punitive or riddled with too many loopholes, jurisdictionally overbearing or excessively limited in scope. In all cases, however, stakeholders criticized the federal government for ignoring their recommendations from the consultation process.

Following weeks of public hearings in the House Standing Committee on the Environment and Sustainable Development, an amended, and "environmentally improved", Bill C-65 was returned to Parliament on March 3, 1997. Cabinet then spent

[16] See *Figure 1* for an outline of the essential elements of the proposed legislation, details of the initial amendments made in the Standing Committee, and final amendments made after cabinet consultation.
[17] See McIlroy, A. (1996a), McIlroy, A. (1996b), Pynn, L. (1996).

Figure 1 MAIN ELEMENTS OF BILL C-65:

Bill as Introduced

Government Leadership

Although the Minister of the Environment is primarily responsible for the Act's administration, the Ministers of Fisheries and Oceans and Canadian Heritage will have responsibility for different aspects of endangered species management (for aquatic species and for species within National Parks). The Act provides for the establishment of the Canadian Endangered Species Conservation Council (CESCC), an intergovernmental body responsible for the overall leadership in national endangered species protection efforts [Section 12].

Scope of Application

Species are eligible for protection under the Act if they are (i) species on federal lands, (ii) aquatic species, and (iii) migratory birds listed under the *Migratory Birds Convention Act* [Section 3(1)].

In addition, the responsible Minister may pass regulations to prohibit direct harm to international transboundary animals and their residences [Section 33].

Species Listing

Decisions on species listing will be made by the Minister in consideration of listing recommendations made by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), based on an annual review of status reports for individual species. COSEWIC will classify species as extinct, extirpated (no longer existing in the wild in Canada), endangered, threatened, or vulnerable [Sections 13 and 14]. Once COSEWIC designates a species, the recommendation becomes public and the responsible Minister makes the final decisions on what species to include in the "official" list of species at risk in Canada [Section 30].

Protection of Listed Species: Automatic Prohibitions, Emergency Designations, and Exemptions

The Act provides for the automatic protection of listed endangered and threatened species. It is made unlawful to kill, harm, harass, capture, or take such individuals[Section 31]. The destruction of a listed individual's residence (defined as a specific dwelling place such as a nest or den) is also prohibited [Section 32]. Following an emergency COSEWIC designation, the responsible Minister may issue an emergency order to protect the species and its residence [Section 34 (1)]. Specific exemptions can be granted through permits or agreements under CESPA or other Acts of Parliament, provided that special measures are taken to mitigate impacts to the species [Section 46].

Blanket exemptions are authorized for activities required for national security, safety and health [Section 36(1)].

Recovery Plans

The Act requires the development of recovery plans for listed species (within one year for endangered species, and within two years for threatened species). Such plans are to be developed in cooperation with all affected stakeholders, and must address the threats to the species' survival, including the loss of critical habitat [Section 38 (2),(3),(4),(5)]. Within 150 days after the plan is completed, the government must announce how it intends to implement the specified measures [Section 40 (2)]. The responsible Minister may make regulations to implement recovery plan measures [Section 42 (1)].

Citizen Action Provisions

The Act allows private citizens to take civil enforcement actions against the government in order to ensure accountability [Section 60]. The citizen must first request a government investigation, and may proceed with legal action only if the government response is found by a judge to be "unreasonable" or delayed [Sections 56, 60 (1a,b)]. The responsible Minister may decide not to investigate if the civil action application is deemed "frivolous or vexatious" [Section 57 (2)].

Major Standing Committee Amendments Following Public Hearings

-automatic protection of species' residence expanded to include breeding, rearing, and hibernating areas
-prohibitions against harm to international transboundary animals and their residences expanded to wherever they are found in Canada, not just on federal lands. Federal government is responsible for such animals *unless* equivalent provincial legislation is in place [Section 33]

Major Amendments Proposed by Government in House of Commons

-prohibitions do not apply to a person who takes listed species as a result of the incidental and unforeseeable by-catch of an authorized fishery
-preparation and implementation of recovery plans must consider socioeconomic "feasibility", and address the concerns of affected interests
-cost/benefit analyses of socioeconomic impacts required *before* the implementation of recovery plans.
-although Standing Committee amendments (as summarized above) were left in place, the terms of the final bill are "watered down" throughout, most notably in terms of providing discretionary powers to the federal government to alter recovery plans based on socioeconomic cost/benefit analysis.

several weeks, *in camera*, finalizing the terms of the bill, a process which culminated in a new series of proposed amendments to Bill C-65. The 115 proposed amendments introduced in the House of Commons (40 of which were proposed by the Environment Minister) would have diluted some of the bill's environmental strengths, many of which had been introduced by the notoriously independent and pro-environment Standing Committee chaired by Charles Caccia. On April 24, 1997, debate on this final package of amendments began in the House of Commons, although none of the amendments suggested by Cabinet were passed because there was insufficient time to proceed to the voting stage. Amidst the circling rumours of a spring election, Bill C-65 was placed on the legislative backburner, in part because of the limited availability of House time, but also because the contentiousness and complexity of the endangered species bill precluded the possibility of its quick passage. Thus, after a token House debate, the Liberal government called for a June federal election; Parliament was dissolved, and the final version of Bill C-65 died on the Order Paper.

CHAPTER III

THE IMPACT OF IDEAS IN THE ENDANGERED SPECIES LEGISLATIVE PROCESS

An Epistemic Community Approach

Ideas are slippery concepts that defy simple categorization, conceptualization, and operationalization. From social psychology and behaviouralism to applied game theory and international relations, "ideational" factors have been employed by so many different methodological perspectives as to make their integration into a coherent program of policy research next to impossible (Levy, 1994). That being said, the treatment of ideas as a causal variable has gained popularity throughout the larger political science community over the past decade. Disenchanted by the traditional approaches which emphasized rational actors and predetermined material interests, this "cognitive revolution" has blown fresh air into "structural" or power-based models of policy analysis (Hasenclever et al.,1996: 207). However, as Hoberg as noted, all ideas-based approaches are not equal, and their contributions across the fields of political science have varied (1998).[18]

This thesis will examine the impact of cognitive forces on endangered species policy from a particularly influential international relations perspective. Pioneered by Peter Haas, the "epistemic community" approach integrates ideas into an institutionalist

[18] For review articles on ideas-based approaches in international relations, see Jacobsen (1995), Hasenclever et al. (1996), and Woods (1996); in comparative politics, see Blyth (1997); in comparative political economy, see Hall

framework, stressing the role of shared causal knowledge through expert groups (Haas, 1992; Adler and Haas 1992; Haas, 1993). In an effort to explain international policy cooperation and coordination under conditions of uncertainty, Haas seeks to demonstrate how communities of knowledge-based experts can redefine state interests and policy preferences, especially within a policy context of increasing technical complexity.[19] By communicating a consensus-based "truth" of science to an uncertain power, and by infiltrating national and international bureaucracies, epistemic communities can institutionalize their influence and more effectively enact their policy prescriptions. The emphasis on the role of scientific communities and their causal knowledge, therefore, makes Haas' approach a particularly appropriate lens through which endangered species ideas can be analyzed.

Canada's Conservation Scientists as an Epistemic Community

Haas defines an epistemic community as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue area" (Haas: 1992, 3). The community aspect of these knowledge-based experts derives from a series of four intersubjective understandings: (1) shared normative and principled beliefs: a common set of community "values"; (2) shared causal beliefs and a shared understanding of the interlinkages between policy approaches and outcomes; (3) shared notions of validity

(1997); in domestic policy, see Yee (1996); from a more post-positivist (or social constructionist) perspective, see Torgeson (1996) and Stone (1997).

derived from an internally-defined set of criteria; and (4) a shared policy enterprise, derived from the belief that such a prescription is in the best interests of humanity (ibid: 3). Clearly, shared normative and causal ideas are the foundation of Haas' ideational approach.

Applying Haas' functional definition to Canadian conservation scientists, it would appear that there exists an "epistemic community" within the endangered species policy arena. Both in terms of causal and normative beliefs about species endangerment, the consensus among conservation scientists is nothing short of remarkable. Dubbed a "mission-oriented" scholarly endeavour, conservation science is an explicitly (and unabashedly) value-laden enterprise (Soule, 1985). The aim of conservation in a biological sense is to ensure the continuing existence of species, habitats and biological communities and the interactions between genes, species and ecosystems. Conservation biologists readily acknowledge their environmental bias: *biological diversity is understood to be good.* This notion of "goodness", however, underlies both a general philosophical belief about the inherent value of biodiversity, as well as a causal belief about the interconnectedness and interdependency of all earthly life forms. All species are deemed "valuable" because they are, directly or indirectly, crucial to each other's overall survival. Recognizing the inherent stochasticity of nature, conservation biologists accept as one of their scientific (and philosophical) principles that prudence is essential when dealing with the environment (Noss et al., 1997). This precautionary principle is derived from the understanding that, since biological diversity is inherently good, cannot be replaced, and should be conserved (as opposed to destroyed), then the risk of

[19] Haas' thesis of epistemically-induced policy cooperation is highlighted by the case of the Mediterranean Action Plan

extinction must be mitigated. Conservation science, then, is a "prudent" science founded upon both the normative and causal ideas of biodiversity preservation.

In terms of causal ideas, the notion that a *loss of biological diversity* is a threat to humanity has achieved a remarkable consensus within the scientific community. As evidence concerning exponential rates of species extinction accumulated in the post-war years, the different branches of conservation science developed to the point where it is universally understood that habitat must be protected at a variety of spatial and temporal scales (Caughley and Gunn, 1996; Hunter, 1996; Spellerberg, 1996; Meffe and Carroll, 1997). From a scientific standpoint, there is no escaping the fact that the planet's species are increasingly threatened by the destruction, fragmentation, and degradation of the ecosystems in which they exist. Thus, there is nearly unanimous scientific consensus that habitat loss is the most important problem facing Canada's species at risk (see *Figure 2*), and conservation scientists concur that the protection of this habitat must be the central focus of any endangered species legislation (Noss and Cooperrider, 1994; Noss et al, 1997). Indeed, this conclusion has been supported most recently by the Senate Subcommittee report on Canada's boreal forest, which asserted that "Canada needs a strong Endangered Species Act that also recognizes the importance of preserving the habitat on which endangered species depend for their survival" (Senate Subcommittee on the Boreal Forest, 1999).

Further supporting this notion of *community-based* consensus is the remarkable mobilization of Canada's scientific community, which has pressured the federal government on the issue of habitat protection throughout the legislative process. This

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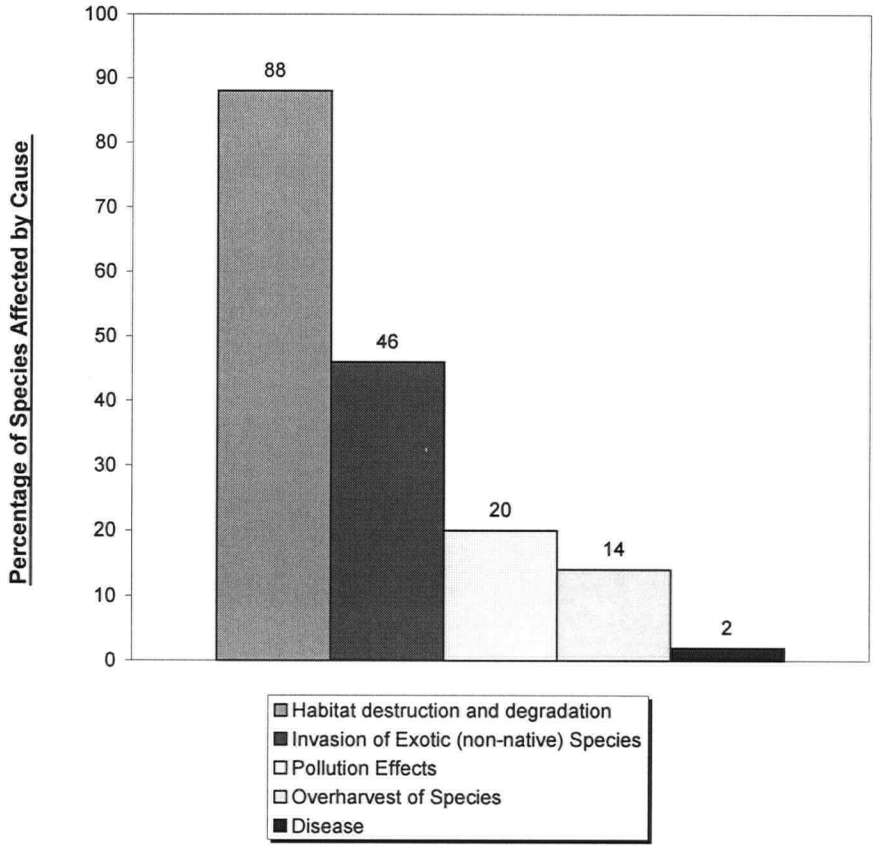
(Haas, 1993).

Figure 2: Causes of Species Endangerment



Source: adapted from Noss et al. (1997: 7).
Note: The data in this figure represents the causes of endangerment of species listed as threatened and endangered in the United States as of 1995. A species can have more than one cause of endangerment.

pressure has come in the form of three highly publicized letter writing campaigns, which explicitly politicized the role of Canadian scientists in the endangered species affair.[20] Following on the heels of two similar letters sent to Sheila Copps in October 1995 and to Sergio Marchi in February 1997, over six hundred scientists signed a letter addressed to Prime Minister Chretien in February of 1999, demanding legislative action from the federal Liberals. Their message was blunt, focusing on the need for a scientifically credible statute: "Can you assure us that your government's new bill will include

mandatory protection for all scientifically listed species, and nationwide habitat protection? Anything less will be scientifically unacceptable" (Abrahams et al., 1999a).

These well-organized acts of scientific advocacy represented the "largest scientific sign-on letter in recent history", and underscored the remarkable unanimity of this community of conservation scholars on the endangered species front (Abrahams et al, 1999b). Bolstered by the outspoken support from 13 Fellows of the Royal Society (including Dr. David Schindler, a University of Alberta professor and former federal Fisheries biologist known for his work on acid rain), provincial and federal government scientists, and such well-known advocates as David Suzuki, Canada's scientific community has employed the strength and credibility of their consensual knowledge in order to achieve specific policy ends. Thus, a strong case can be made for defining conservation scientists as an endangered species epistemic community: a group of experts linked by basic normative assumptions about the value of biodiversity, by a common understanding of the causal relationship between habitat and biodiversity loss, and by a shared policy prescription founded on the principles of habitat protection.

Assessing the Impact of Epistemic Communities: The Defeat of Causal Knowledge?

Through a well-respected and influential community, Haas' theory leads to the hypothesis that the habitat-based policy prescriptions of conservation scientists would have a great impact on the federal legislative process. With such overwhelming scientific consensus dictating a habitat-based solution to the globally threatening problem of

[20] The letter writing campaigns have been given ample exposure through Canada's newspapers. For a sample of this

biodiversity loss, it might seem shocking that Canada's federal government has yet to enact protective legislation. Perhaps even more surprising would be the prescriptive substance of the original Bill C-65, in which habitat provisions were extremely limited, discretionary, and rendered essentially toothless through the use of the unscientific term "residence" (see Chapter 5 for a more complete discussion of the habitat and residence provisions of Bill C-65). Faced with such a wide divergence between policy and scientific prescription, one might be inclined to question whether or not scientific ideas were, in fact, a significant causal variable in this policy equation. Although scientific consensus is strong, it would seem that causal knowledge (when operationalized through the epistemic community framework) had little or no impact on the substance of the original legislative proposal. However, in terms of the overall failure of Bill C-65, this conclusion would miss a larger point about the interactive role of ideas, actors, and institutions within the policy-making process, a point which is made both by Haas, and previously in the outline of the policy regime framework. The overall impact of ideas must be understood in conjunction with the advocacy efforts of conservation scientists, whose outright rejection of Bill C-65 undoubtedly contributed to its demise.

It should be emphasized that although Haas views the epistemic community approach as a way of "endogenizing knowledge-based sources of regime change", he does not argue that ideas carry any *independent* causal weight in determining national or international interests (1993: 200). Ideas and interests are understood to be analytically distinct though interconnected entities, linked by standard basic variables such as the distribution of material capabilities and institutional constraints. Epistemically-informed

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coverage, see Hanna (1997), McIlroy (1997), and McIlroy (1999a).

learning, therefore, is seen as an inherently political process, and hinges on interest and power-based issues of "who learns what, when, to whose benefit, and why" (Adler and Haas: 1992, 370). Thus, for all that Haas' epistemic approach preaches the power of ideas, it is clear that the causal effects of ideas are in fact political effects being exerted by predominantly political groups.[21] In other words, ideas do not matter on their own; consistent with the policy regime approach, epistemic communities impact on the policy-making process insofar as they help to define interests, institutionalize policy prescriptions, and provide actors with valuable political resources.

The flexibility of Haas' theory, however, leads one to question whether or not his assertions about the importance of shared knowledge are non-falsifiable. If ideas are important only under specific institutional and interest-based conditions, does Haas really challenge the rationalist assumptions of fixed understandings and predetermined interests? All other analytic variables being equal, the shared knowledge embodied in epistemic communities may indeed influence public policy; this equality, however, is more of an analytic contrivance than political reality. Consequently, the epistemic community understanding of endangered species "ideas" fails to outline exactly how consensus-based demands for habitat protection interacted within a larger context of power resources, institutional constraints, and interested behaviour. Without any account of the intersection of ideas and politics, Haas' epistemic community approach fails to explain how causal knowledge actually contributed to the current delay.

As an independent analytic variable, therefore, ideas did not play a decisive role in the development of federal endangered species legislation; the causal knowledge of a

[21] Indeed, Haas has been criticized by Hoberg (1998) for trying to "finesse" the distinction between epistemic

unified epistemic community did not necessarily "trump" interests or institutions. Rather, as the forthcoming section outlining environmental groups' resources and strategies will demonstrate, the impact of ideas is best understood in terms of their role in fusing together the campaigns of both scientific and environmental communities. Their shared interest in maximizing habitat protection provisions has allowed each of them to benefit from a symbiotic alliance, sharing power resources in terms of the environmentalists' organizational capacity and the credibility of scientists' policy knowledge. It will be shown, therefore, that the lack of a policy outcome is consistent with the hypothesized influence of ideas; conservation scientists contributed to the downfall of Bill C-65 by attacking the ideas underlying the proposed legislation. Thus, ideas mattered insofar as this epistemic community effectively shattered the scientific credibility of Bill C-65, leaving the federal government without any appeal to causal knowledge in defense of their proposal.

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communities and interest groups, and thereby reducing the theoretical applicability of his ideas-based approach.

CHAPTER IV

THE ROLE OF PUBLIC OPINION AS A CONTEXTUAL VARIABLE

Introduction

The regime framework treats public opinion as part of the background conditions that shape the political environment in which actors compete over policy outcomes (Hoberg, 1998). Along with such dynamic forces as market (economic) conditions and elections, public opinion helps to define a historically specific context within which policy is made. Hoberg suggests that the strategic opportunities and political resources of each actor shift according to the fluctuations of this context (ibid). Perhaps most importantly, the incentives of government actors (as the key figures within the regime framework) are understood to change as new electoral threats and opportunities arise from within these background conditions. *Incentive formation and resource redistribution*, therefore, are the primary effects of public opinion change.

Although he acknowledges that perturbations in background conditions are inherently unpredictable, Hoberg points out that major public policy changes occur only rarely without them (ibid). Indeed, the most powerful pressures for significant policy change emanate from exogenous shocks to the political system, often because they alter the status quo distribution of political resources. The implication of this is that, all other conditions being equal, policy change is unlikely to occur without any significant shift in public opinion levels. In terms of Canadian environmental policy-making, this hypothesis is supported by the work of Kathryn Harrison, who suggests that the most

significant environmental policy initiatives (both federal and provincial) have occurred during the peaks of public concern over this issue. Thus, with regards to federal endangered species legislation, one might hypothesize that such a major policy initiative would be unlikely to occur in the absence of a positive shift in public concern regarding species protection laws (or regarding environmental issues more generally).

The following chapter outlines how the background condition of public opinion has denied environmental groups the exogenously-generated resources needed to successfully overcome the current endangered species policy inertia. Although these actors are quick to point to the nearly unanimous Canadian approval of the *concept* of federal legislation, the depth of this support is highly suspect. In fact, when considered alongside other issues of national concern, the current endangered species delay becomes far more clear. The federal government's electoral incentives to speed along the process of enacting strong species at risk legislation have been consistently outweighed by their electoral incentives to focus on other, more salient policy debates. Thus, public opinion levels have worked against the environmental and scientific communities, while strengthening the relative positions of the provinces, industry groups, and private landowners.

Endangered Species Polls as a Political Resource: Parlaying Unanimity into Pressure?

On an environmental issue such as endangered species, one would expect the Canadian electorate to support the notion of protective federal legislation. Politically, it is difficult to argue against species preservation; after all, furry animals and fragrant

flowers are symbols of the beauty and wealth in our country's natural environment. As with most aspects of the environment, however, the diffuse benefits of species protection are spread evenly across Canada, distributed among all citizens who care to enjoy biodiversity in any shape or form. Thus, when the average Canadian voter is asked whether or not they support the enactment of endangered species legislation (in isolation from other legislative issues), their response is most likely to be positive. Taken at face value, one might assume that there is a high degree of Canadian support for federal endangered species legislation.

This hypothesis is supported by Canada's environmental groups, for whom the public support of federal endangered species legislation is considered a political resource of considerable value. Pointing to a series of public opinion polls taken over the past several years, environmentalists assert that the Canadian electorate has been unanimous and consistent in their support for federal legislation. Two polls in particular, one conducted by the Angus Reid Group in May of 1995, and another conducted by Pollara in May of 1999, produced "definitive" results on the question of public support. The Angus Reid poll found that 94% of respondents responded positively when asked the following question:

> According to experts, there are 243 endangered, threatened and vulnerable species of animals and plants in Canada, such as the Beluga Whale and the Prairie Rose. Presently, these species have no national legal protection, although the federal government is currently considering such legislation.

Would you support or oppose federal legislation that would protect endangered species? (Angus Reid Group, 1995).

The more recent Pollara poll, commissioned by the International Fund for Animal Welfare (IFAW), appears to confirm the results uncovered by the Angus Reid Group. The Pollara findings are deemed politically significant not only because of their near unanimity, but also because they were delivered by pollsters employed quite regularly by the Liberal government themselves. Among other results, it was found that 97% of respondents believe that "laws to protect endangered species are important", that 92% support federally established "national standards that would apply in all provinces and territories", and that 97% believed it is "important for the Canadian government to work with the United States and Mexican governments to protect endangered species that migrate between countries" (IFAW, 1999).

In sum, the Pollara poll paints a picture of the Canadian public in support of a strongly protective federal role, at least in terms of national standard-setting and international cooperation. IFAW was quick to underline the "overwhelming support" for federal legislation, suggesting that the stakes in this issue are nothing less than the Canadian public's perception of the federal government's capacity for environmental leadership. The animal welfare advocates did not hide their intention to use the poll as a leverage point in their lobbying efforts, welcoming the survey results as yet another affirmation of the public's commitment to save species at risk (MacQueen, 1999: A1). As Rick Smith, National Director for the IFAW stated in reaction to the Pollara poll:

"This is hardly the stuff of controversy. It's a tremendous opportunity for federal and provincial governments to please the majority of their constituents" (IFAW, 1999).

Shallow Unanimity?: Canada's Lack of Environmental Priorities

Although it would appear that Canadians are nearly unanimous in their approval of the *concept* of federal legislation, there are a number of reasons to question the depth of this support. First, it is important to acknowledge the relative ignorance of the average voter on this endangered species issue. Certainly, environmental groups did not highlight the lack of an "informed endangered species electorate"; IFAW would be loathe to reveal that fully 66% of respondents thought the federal government already had a law to protect endangered species, and another 21% did not know whether such a law existed (Pollara, 1999: 30). Only 14% recognized the lack of stand alone federal legislation, a level of awareness that is disappointing to the environmentalists' camp, and one which certainly justifies their emphasis on a public education campaign. No doubt groups such as IFAW are aware that there is less incentive for the federal government to hurry forward (or even enact) costly and contentious legislation that a majority of Canadians think already exists.

A second, more crucial issue that casts doubt on the political importance of the Angus Reid and Pollara polls relates to the closed-ended design of their surveys. Both polls were restricted in scope to the issue of endangered species and their legislative protection, without any reference to other important issues (environmental, economic, or otherwise). Because they asked direct questions about a symbolically popular subject matter, it should come as no surprise that the typical response was extremely positive; the

polls were inherently biased in favour of endangered species support. As a quick glance at the aforementioned Angus Reid question will attest, respondents were asked a yes or no question after a two sentence preamble which simultaneously emphasized the magnitude of the problem and the lack of governmental response. By asking a leading question without placing the endangered species issue within any wider political context, the polls were inherently biased in favour of a positive response. Without an in depth understanding of (or any reference to) the complexities of this legislative issue, who could say no to an imperiled Beluga or Prairie Rose?

In both surveys, respondents were asked their opinions on the endangered species issue in order to gauge the degree of latent public concern. However, the polls did not purport to measure the salience of the endangered species issue, and its relative importance in a context of competing public policy concerns. In other words, the fact that 94% of Canadians endorse federal legislation is rather inconsequential without any knowledge of how this support holds up relative to other pressing electoral concerns. The "consensual character" of this endangered species issue, therefore, may only be masking the thinnest of layers of "real" public concern (Harrison, 1996: 56). This theme has been explored most recently by Ted Schrecker (1999: 6):

> [P]references for environmental protection - however intense they may be - are not readily comprehensible as interests in the political-economic sense. More importantly in political terms, they may or may not motivate the politically effective segments of the public to make investments of time, money and other political resources comparable to those that may be

> mobilized with respect to such issues as local property values, cable rates, or the taxation of investment income. Another way of stating this point is that support for environmental conservation is often a mile wide, but only a few inches deep - a point that is normally very well understood by political elites.

Schrecker's emphasis on the political economy of public concern underlines the importance of understanding the endangered species issue in conjunction with other salient policy debates. While environmental groups have worked diligently to publicize and mobilize the wealth of latent public concern, they have yet to demonstrate to the federal government that the endangered species issue actually matters. In fact, such groups avoid mention of a national environmental poll, conducted in May 1998 by the very same Pollara group, which indicates that endangered species fail to register among Canadians' top ten "most important environmental issues" (Pollara, 1998). Designed and approved by Environment Canada, Transport Canada, and Natural Resources Canada, the questionnaire produced results that underscore the uphill battle faced by endangered species activists. As the following discussion will illustrate, their task of awakening Ottawa from its deferential slumber can only be accomplished by transforming this breadth of symbolic concern into an environmentally attentive electorate.

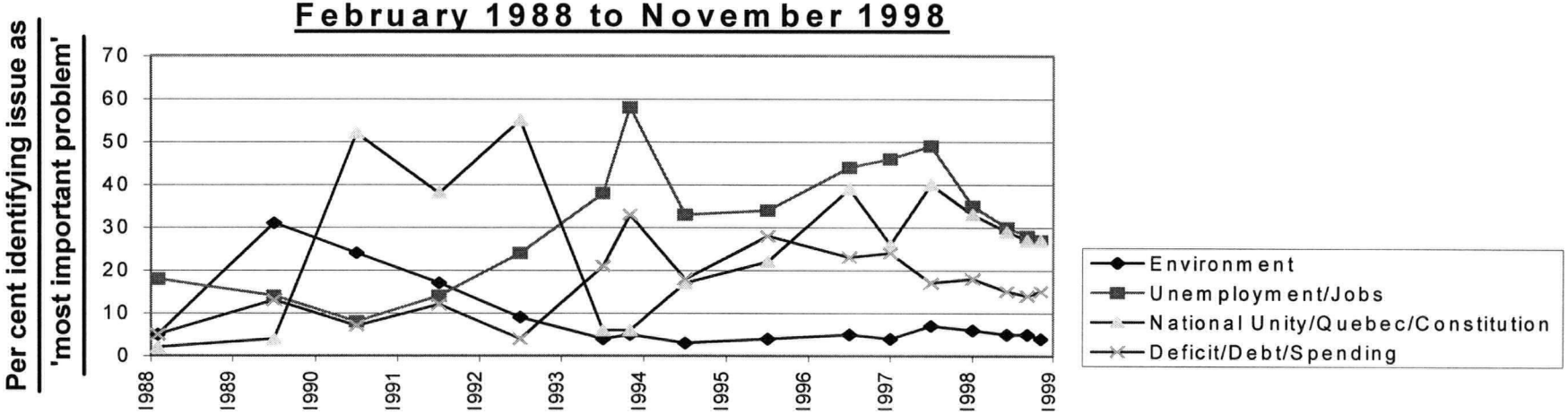
Public Opinion and Federal Environmental Policy

Over the years, Canadian public support for environmental issues has waxed and waned in two distinct cycles (Harrison, 1995; Harrison, 1996). The first surge in

environmental salience occurred in the 1960s, and was followed by nearly two decades of relative public disinterest, before regaining momentum in the mid-1980s. This second wave of environmentalism, which crested in January of 1990, was part and parcel of what Bakvis and Nevitte have termed the "greening of the Canadian electorate" (1992: 144). However, struck by the onset of a receding economy, governments and voters began to focus more on fiscal issues such as deficit and debt reduction in the early 1990s (Hoberg, 1993: 312). This most recent flow and ebb of environmental salience is charted in *Figure 3*, where it is shown that, in recent years, environmental concerns have played second fiddle to a number of issues, including (but not limited to) unemployment/jobs, national unity/constitutional debates, and deficit/debt reduction. Thus, the signing of the *Convention on Biodiversity* in 1992 and subsequent legislative developments on the endangered species front have been accomplished in a climate of relative environmental coolness.

While the effects of public opinion currents on public policy decisions have been debated for some time (see Page and Shapiro, 1983; Stimson, 1999), one particular approach bears relevance to the issue of federal endangered species legislation. In her study of Canadian federalism and environmental policy, Kathryn Harrison convincingly demonstrates a causal linkage between levels of public concern for the environment and heightened federal and provincial government activity to ensure its protection. As she asserts in *Passing the Buck*: "The most compelling explanation for environmental policy is that public opinion occasionally overcomes the obstacles to collective action, thus

Figure 3: **Relative Salience of Environmental Concerns: February 1988 to November 1998**



Source: Angus Reid Canada (1998)

Question: "Thinking of the issues presently confronting Canada, which one do you feel should receive the greatest attention from Canada's leaders? What other issues do you think are important for Canada right now?"

Note: Up to three issues were accepted from each respondent, and figures represent "total mentions"; therefore, percentages will exceed 100.

transforming politicians' incentives" (Harrison, 1996: 16). To support this argument, Harrison underlines how the federal government's distinctive patterns of environmental leadership and deference have coincided with the aforementioned waves of public support and indifference.

During the late 1960s and early 1970s, the federal government demonstrated an unprecedented willingness to extend its previously untested environmental jurisdiction, enacting statutes and creating institutions that included the new department of Environment (Harrison, 1996). Following the decline in public support for environmental issues, federal legislative activity receded until the late 1980s, leaving the implementation and enforcement of national regulations in the hands of the provinces. However, as the Canadian electorate experienced a second "greening", the federal government once again demonstrated its willingness to challenge provincial turf on the environmental front. With the proclamation of the *Canadian Environmental Protection Act* in 1988, and the promise of increased federal spending though the $3B Green Plan in 1990, Ottawa's unilateral environmental presence was once again spurred on by an environmentally attentive public (Harrison, 1995).

As Harrison summarizes: "Federal (and provincial) jurisdictional assertiveness in recent years can be attributed to electoral incentives to claim credit from the public during a period of heightened attention to environmental issues. In contrast, previous federal deference can be seen as an effort to avoid blame from industries resistant to environmental regulation during a period of public inattentiveness" (ibid, 415). From this public opinion perspective, Ottawa's regulatory role is conditioned by the relative salience of environmental issues, and the concomitant shifts in opportunities for electoral

credit and blame. As public concern for environmental issues emerges, the federal government's incentive to avoid concentrated blame for industrial regulation decreases, and their incentive to satisfy the diffuse interests of "green" voters is magnified. When such environmental concerns wane, federal deference is rediscovered. Applied to the issue of endangered species legislation, this logic helps to clarify the federal government's apparent distaste throughout the 1990s for a strong, interventionist statute that encroaches unilaterally upon provincial "jurisdiction".

The relatively restricted scope and weak provisions of Bill C-65 are best explained according to Harrison's logic: Ottawa's deference to provincial environmental authority and its unwillingness to provoke industry interests is a function of the relatively low salience of environmental issues. Without compelling support from a green-minded public, the federal government has had, and continues to have, little electoral incentive to introduce a bill whose scope might incur the wrath of a number of concentrated interests. As environmental issues maintain a lowly position in the national hierarchy of "top of mind" issues, the old pattern of federal deference is reinforced by the symbiotic interests of provinces and extractive resource industries. As the primary owners of Crown lands and resources, provincial governments become "increasingly protective of their authority to promote economic development of those resources, with the full support of resource-based industries", most notably during periods of low environmental salience (Harrison, 1996: 165).

This dynamic is supported by the work of Vogel, who has empirically demonstrated what many consider intuitive: just as the political strength of environmental groups is sapped by concern about the strength of the economy, so increases the strength

of business interests during times of economic hardship (1989). Thus, as the Canadian electorate licked its wounds from a recession, the federal government was (and, to a certain extent, still is) unlikely to don its interventionist hat and engage in an untimely political scrum with resource industries, private landowners, and the ever-defensive provincial governments. With more enemies than votes to be won, the Liberal government's reluctance to table a strong and centralizing endangered species statute like the ESA is quite understandable from a public opinion perspective.

In conclusion, the analysis of public opinion as a political resource goes a long way towards explaining the failure of Bill C-65 and, more generally, Canada's endangered species policy delay. Recognizing that the priority assigned to environmental issues by the Canadian electorate is strongly influenced by the perceived state of the economy and the federation itself, it has been difficult for environmental groups to steer the federal government's focus away from economic and unity priorities (Bakvis and Nevitte, 1992). In other words, environmentalists were, and continue to be stymied in their attempts to effectively mobilize their greatest political resource; while Canadian voters may care about the issue of endangered species protection *in isolation*, they tend to be ignorant of the current statutory situation and are more concerned with other legislative issues. The environmentalists' untimely loss of public opinion leverage has enhanced the relative strength of their industry and private landowner opponents, and has weakened the federal government's electoral incentives to enact strong legislation in the face of provincial objections. Without the threat of an attentive and informed public to force their hand, the federal government was able to propose a comparatively weak endangered species statute without any great fear of electoral retribution.

CHAPTER V

ENDANGERED SPECIES ACTORS AND INTERESTS

Introduction

Theoretical Overview

Discussions emphasizing the role and influence of North American interest groups in public policy formation are, for the most part, framed within the dominant framework known as pluralism. Traditional pluralist theory conceives of interest groups as the core institutions in the policy-making process, and assumes a relatively equal dispersal and fragmentation of power among such groups (Hoberg, 1992). This presumption of a level playing field has been subsequently reformulated in light of the contributions of such theorists as Olson (1965), Wilson (1975), and Lowi (1964; 1979), each of whom stressed how the varying concentrations of costs and benefits affect organized interest activity within the polity. "Neo-pluralist" models have adapted to account for groups' varying capacity to influence policy, the obstacles to collective activity, and the different types of politics involved in each policy domain. As Atkinson and Coleman summarize: "pluralist imagery has given way to a variety of alternative models that stress the difficulties of organizing and maintaining interests, the uneven character of organization, and the privileged status of business" (1996: 193).

A neo-pluralist analysis of the environmental policy field would, therefore, suggest that the diffuse rewards of environmental protection (from which every member

of society benefits) provide less incentive to mobilize and organize collective political activity than do the concentrated costs of environmental protection (borne typically by private sector interests). Thus, this theory posits a systemically biased interest group competition over environmental regulation; as a consequence, business interests tend to prevail over environmental interests. Recognizing the diffuse environmental interests and the concentrated private sector costs of endangered species protection, neo-pluralist interest group theory would predict an unfavourable legislative outcome for those in favour of a strong federal statute.

Traditional pluralist analyses have also tended to minimize the state as a unit of analysis, highlighting the dynamic role of society and the accommodating "transmission belt" role of the government (Howlett and Ramesh, 1995: 34). Canadian renditions of this pluralist strain, however, have distinguished themselves from their American counterparts by focusing on a more active, interventionist state in the policy-making arena. As Pross has argued, Canada's tradition of state-centred pluralism embodies "an open system which perceives the political process as one of bargaining between organized groups, with the government participating in this process and giving its authority to the accommodation achieved" (1996: 46). Empowered by this unique resource of decision-making *authority*, governments are, by definition, the actors around which policy competitions revolve (Hoberg, 1998). It must be emphasized, however, that governments themselves are fragmented, embodying a variety of different societal interests within different departments and agencies. Thus, this analysis of the endangered species actors recognizes that the government must be understood simultaneously as a "divided house" of interdepartmental tensions, as well in terms of a unified and self-

interested mediator of interest group competition. The discussion of actors and interests, therefore, will begin by underlining the institutional framework within which the federal government attempts to organize stakeholder conflict in the environmental policy arena.

Outline of the Chapter

There is no question that interest group conflict over the scope and substance of federal endangered species legislation is of fundamental importance in explaining the current delay and the failure of Bill C-65. This chapter will examine a conflicting array of actors, interests, resources, and strategies, and will provide a detailed consideration of these actors' reactions to Bill C-65. Four main groups are discerned, although they can be polarized into two distinct camps: the environmentalist and scientific communities, and the private landowner and industry groups. The "environmental" community is pushing for a "strong" federal presence in the regulation of endangered species, seeking broad, scientifically-based habitat protection measures, timely recovery plan development and implementation, and an independent listing process.[22] They also tend to be in support of a non-discretionary, action-forcing statute modeled on the ESA found in the United States. Industry and private landowner groups, on the other hand, have made it clear that they will not support any legislation that smacks of the ESA. Fearing a litigious and confrontational endangered species regime dominated by the courts and the federal government, these groups advocate more decentralized (or "weak") legislation which

[22] The author acknowledges the conceptual difficulties that result when industry "interests" (which can usually be reduced to *material* considerations) are equated with environmentalists' "interests" (which are less financial, and more oriented towards "post-material" *values*). Although the scope of this thesis precludes any real discussion of the

leaves the regulation of species protection up to the provinces. They argue in favour of a "cooperative" approach that emphasizes incentives and compensation (although this is not necessarily a point of difference between them and the environmental community).

In all, this chapter provides ample evidence to support the conclusion that the failure of Bill C-65 had everything to do with both its strengths and its weaknesses. The proposed federal endangered species legislation foundered because very few of the actors' interests were satisfied; as a result, the Liberal government was unable to draw upon the support of a single constituency. Thus, at the end of the day, it is very difficult to ascertain which stakeholder groups "won" or "lost" this particular legislative battle. Although from the scientists' and environmentalists' perspective, Bill C-65 was too weak a proposal to begin with, it contained several elements which appeared to threaten industry, landowner, and provincial actors. Taken at face value, a post hoc analysis would appear to suggest that the industry, private landowner, and provincial government triumvirate were favoured by the preservation of the status quo (no regulation being better than any regulation). This logic assumes, however, that the next federal proposal will be environmentally weaker than the previous attempt, and also that the environmental community would have preferred a weak bill to none at all. Since neither of these presumptions are necessarily true, the strongest conclusion that can be drawn is that the failure of Bill C-65 and the concomitant endangered species delay represents a "real" victory for no actor at all.

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differences between the two, it is worth noting that these actors are, in fact, competing over two completely different

The Institutional Impact of Multistakeholder Consultation

Before delving into the substance of this interest group conflict, the institutional venue for such a competition must be outlined. Indeed, the interaction of such a diverse array of participants has, to a large degree, been shaped by a federally-organized conflict resolution scheme. Consensus-based multistakeholder consultation is the pre-eminent mechanism through which interest groups contributed to the policy-making process, and is designed to accommodate difference and dissent by emphasizing consensus through cooperative struggle. It is part of a larger trend in governance towards increased citizen involvement, a shift which "is beyond doubt one of the most influential and least well-defined aspects of environmental decision-making in this country" (Dorcey and McDaniels, 1999: 5).

Stakeholder consultation evolved during the 1980s to accommodate the previously marginalized interests of environmental groups in the policy-making process (Hoberg, 1993). The multistakeholder model signaled a move away from the traditional bipartite format of policy negotiations, where "the essential dynamic was bargaining between business and government, with environmental groups playing only a peripheral role" (ibid: 316). Institutionalized consultation effectively opened up the channels of communication for citizen involvement in the policy-making arena, and positioned federal and provincial governments at the centre of this interaction.

In many ways, the multistakeholder consultation can be seen as the institutional counterbalance to Canada's primary decision-making process of executive federalism. In

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notions of "interest" in this endangered species debate.

contrast to the closed and secretive negotiations that characterize cabinet and intergovernmental meetings, stakeholder consultation is, by definition, a more open and inclusive process. By providing a more transparent venue through which competing interests can establish common ground, it has become the preferred mechanism for achieving policy legitimacy and accountability. As well, consultation provides a forum for information gathering and exchange of diverse policy perspectives. As Dorcey and McDaniels point out: "Citizen involvement has in many ways almost replaced policy analysis as a means of gaining insight into policy issues" (1999: 5).

However, achieving interest group consensus in such a contentious policy area has proven extremely difficult, and it could be hypothesized that such institutional arrangements have accomplished little aside from bogging down the legislative process. This being said, there were a number of important areas within which multistakeholder consensus was achieved, as illustrated by the recommendations of the Task Force on Endangered Species Conservation (1996). In particular, the participants agreed on the need for a scientific listing process (unimpeded by political considerations), the need for ecosystem or habitat-based approach to species recovery (although there was dissent over whether or not there should be *automatic* habitat prohibitions), and the need for compensation measures for land owners and users.[23] As the sections outlining actors' interests will demonstrate, Bill C-65 failed to deliver on the scientific listing and compensation fronts, leading many stakeholder representatives to believe that the federal government had engaged them in a "cosmetic" consultation effort. Not surprisingly, the

[23] Among the significant areas of Task Force disagreement were the issues of citizen suits, and federal versus provincial paramountcy in the protection of transboundary species.

effectiveness of the multistakeholder process was criticized on a number of different levels by different actors.

For some private landowners, there had simply not been enough of a federal effort to "really" consult the people whose individual efforts (and property interests) mattered the most for endangered species (Strankman, 1999). Aboriginal groups felt that they should have been involved more directly (as a third order of government) in the process, and not simply as another "stakeholder" alongside industry, environmental, and private landowner interests. Given that many bands had already secured binding land management agreements with the federal government, they argued that their representatives should have been incorporated earlier in the design of every discussion paper and legislative proposal, and were bitter that their interests were not represented on the federally-appointed Task Force.[24] Both industry and environmental groups complained that the federal consultation ended up being little more than a *pro forma* exercise, soliciting consensus-based policy recommendations that were eventually ignored. As will be discussed further in the concluding chapter, this criticism led to the establishment of an *ad hoc* multistakeholder Species at Risk Working Group (SARWG), which sought to avoid a repeat of the disastrous Bill C-65. In effect, every party felt as though they had been ignored in some crucial respect, leading more cynical observers to assert that endangered species legislation was being developed underneath the veneer of participatory democracy. Even though there remained significant areas of stakeholder

[24] In many ways, the aboriginal community's objections to Bill C-65 were a function of the lack of federal consultation in the policy-making process. In terms of specific legislative content, their concerns about the role of wildlife management boards established under land claims legislation were essentially resolved through the amendments made in the Standing Committee. In can be concluded, therefore, that the failure of Bill C-65 was not a function of aboriginal groups' dissatisfaction, a point which was made clear during interviews of Environment Canada officials.

disagreement, the abject failure of Bill C-65 leads one to question how seriously the federal government actually considered the stakeholder recommendations.

Environmental groups: Joining Forces and Integrating Communities

The terms most often used to describe Canada's environmental groups are "pluralist" and "fragmented", a testament to their diversity in kind and purpose (Wilson, 1992; Hoberg, 1997b). Most of their support is mobilized through volunteer efforts, an important strength that is highlighted by Jeremy Wilson: "The environmental movement's greatest resource is its large, varied, and highly committed membership" (Wilson, 1992: 110). Indirectly linked to this dedicated membership support is another key political resource available to environmental groups: their ability to influence trends in Canadian public opinion. As was previously in the section dealing with public opinion, environmentalists have not hesitated to brandish the national polls which suggest an overwhelming support base for federal legislation.

One of the most frequently cited weaknesses of Canada's environmental movement is its comparative lack of financial strength and its uncertainty of funding. Beyond the financing garnered through membership fees and (on occasion) governmental contributions, environmental groups are consistently competing at a fiscal disadvantage against their more affluent competitors in the business and industry sectors. Another factor which tends to exacerbate this financial disadvantage is the movement's lack of peak associations. In general, this organizational characteristic is considered one of the

movement's most glaring political weaknesses, especially insofar as it limits its ability to apply concentrated pressure on the federal and provincial governments (Hoberg, 1997b).

The issue of endangered species legislation, however, brought about important changes in the coordination of environmental groups. In order to maximize both their financial and organizational clout, a significant portion of Canada's environmental movement banded together in March 1994 to form a peak association called the Canadian Endangered Species Coalition (CESC) (Elgie, 1995).[25] Directed by a steering committee composed of six major groups, CESC voices the collective concerns of Canadian environmentalists who want to "secure comprehensive national, provincial and territorial legislation to protect species-at-risk" (CESC, 1997b).[26] The Coalition is further supported by over 100 national and regional organizations, including the Canadian Bar Association, the Canadian Labour Congress, Greenpeace, the United Church of Canada, and the National Farmers' Union.[27] Thus, CESC represents an impressively broad cross-section of Canada's religious, labour, corporate, and environmental communities, whose collective voice amounts to several million Canadians.

By coordinating the efforts of larger multiple issue groups (such as Sierra Club of Canada and WWF) with those of the smaller grassroots organizations, CESC has mobilized a national endangered species movement. Through information sharing and

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[25] At the beginning of 1999, the Coalition shifted strategic directions and became the Canadian Endangered Species Campaign. Although the scope of this thesis does not permit a detailed discussion of the internal dynamics underlying such a change, it is worth noting that the new "campaign" approach implies a less centralized direction from the steering committee, and gives environmental groups greater freedom to pressure the government on endangered species issues of their choice. Obviously, this shift also serves to weaken the impact that results from a unified environmental voice in this policy area.

[26] Until the change from "Coalition" to "Campaign" occurred, the six steering committee groups were the Canadian Nature Federation, Canadian Parks and Wilderness Society, World Wildlife Fund Canada, Sierra Legal Defence Fund, l'Union quebecoise pour la conservation de la nature, and Sierra Club of Canada. Since then, the steering committee has been trimmed to four groups, with the last two organizations no longer participating.

networking, CESC links the organizational and political capacity of Canada's environmental groups, giving them a louder (and presumably more influential) voice along with a more coordinated platform. Environmental groups' key strategy is to try to demonstrate (and promote) the pan-Canadian solidarity underlying their endangered species message. In conjunction with this organizational strategy of peak association development, they have sponsored letter writing campaigns from a diverse array of Canadian "communities" who might not otherwise be mobilized as environmental lobby units. For example, Canadian artists (including such notables as Margaret Atwood, Robert Bateman, and Bruce Cockburn) were organized through CESC to write a joint letter to Sergio Marchi in the spring of 1996, just prior to the release of Bill C-65. US environmental groups were mobilized in a similar fashion, adding an interesting international element to the environmental community's approach.[28] Thus, the environmental community did everything in its power to broaden its base of societal support, and to focus it through the lens of a single representative association.

The final environmentalist strategy worth mentioning concerns the use of science and causal knowledge as a political resource. As mentioned earlier in the section dealing with the role of conservation science and scientists, environmentalists benefited tremendously from a symbiotic relationship with this epistemic community. Buttressed by the extensive scientific support for a policy of biodiversity protection through habitat

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[27] Other notable supporters of CESC include: The Body Shop Canada, the Council of Canadians, United Fish and Allied Workers Union, United Steelworkers of America, and Vegetarians of Alberta.

[28] The first US environmental group letter writing campaign (coordinated by CESC) was followed, in March of 1999, by a highly publicized petition directed at the US Secretary of the Interior and Secretary of Commerce (see McIlroy, 1999b; 1999c). Over 400 groups, led by Earthjustice Legal Defense Fund, Defenders of Wildlife, and Northwest Ecosystem Alliance, demanded that trade sanctions be invoked (using legislation known as the Pelly amendment, which was made to the Fisherman's Protective Act of 1967) against Canada for its failure to enact federal endangered species legislation. In an attempt to spur Canadian government action through embarrassment, the groups complained

preservation, environmental groups seized the opportunity to link the credibility of their policy objectives with the ideas of this community. In fact, according to one signatory to the scientists' letters, Sierra Legal Defence Fund (one of the key environmental law organizations and a CESC steering committee member) effectively orchestrated the scientists' letter writing campaign.[29] Sierra Legal Defence Fund staff, however, assert that they only provided "administrative" assistance in terms of distributing the petition among the scientific community, mailing the final version to Prime Minister Chretien, and helping to correct legal facts within the letter itself, indicating a high level of interaction between the two communities. In any case, all of this is not to suggest that environmentalists somehow manipulated the scientific community in order to influence the substance of their petition. However, there is no doubt that the environmental community worked quite closely with scientists, profiting from a mutually beneficial relationship through which organizational capacity was "exchanged" for scientific credibility. Clearly, the power of ideas in the form of causal knowledge added a key resource in the environmentalists' advocacy arsenal.

Environmentalists' Interests: Strength, Scope, and Accountability

Although environmental groups across Canada focus their efforts on different legislative aspects of species protection, a number of overarching themes have come to define their general position. Throughout the consultation process, environmentalists'

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that US efforts on this environmental front are being undermined by Canada's lax species protection regime, and that Ottawa is not moving quickly enough to change the situation.

[29] Confidential interview with scientist, July 1999.

insisted that the protection of species at risk would require, at minimum, the incorporation of the certain key elements. While the following series of demands is not intended to be exhaustive, it does represent the standard formula upon which CESC assesses the effectiveness of any federal proposal:

1) An *independent listing process* for "endangered", "threatened", and "vulnerable" species, whereby listing decisions would be made by COSEWIC without threat of political interference;
2) The *non-discretionary protection of species at risk and their natural habitat*, backed by *stiff penalties* for any statutory violations;
3) The *mandatory and timely implementation of recovery plans*, with broad stakeholder involvement;
4) *Application to the full extent of federal jurisdiction*, ensuring intergovernmental cooperation through a *national safety net*; and
5) *Advance review of projects* that may adversely affect the protection or recovery of a listed species or its habitat (CESC, 1997a).

Environmental groups are pressing for a scientifically accountable process through which the crisis of species endangerment can be managed (and prevented) while minimizing the potential for political meddling. Their demands for habitat protection, backed by a nearly unanimous scientific consensus, are the crucial measure of federal commitment: "A law that doesn't require habitat protection cannot protect species at risk" (ibid). Recognizing that cooperation among jurisdictions is a crucial component of any

habitat protection regime, they outline a "harmonized" approach to achieve their habitat goals. As stated in CESC's unofficial legislative checklist: "The federal law should provide a safety net for Canada's species at risk while respecting provincial competence to protect and recover species in provincial jurisdiction. Where equivalent provincial regulations are enforced, the federal regulations need not apply" (CESC, 1997a). However, the environmentalists' interpretation of federal and provincial jurisdiction is fundamentally different from that espoused by industry and landowner interests, a crucial distinction that underpins their respective reactions to Bill C-65.[30]

Generally speaking, Canadian environmental groups support a more expansive interpretation of the federal government's environmental jurisdiction. Since the early 1970s, they have stood in favour of a more centralized environmental regime, from policy development to the implementation of regulations (Harrison, 1996). As Fafard notes: "Independent action by Ottawa is deemed to be desirable on the assumption that the federal government is more likely than provincial governments to strive to ensure high levels of environmental protection" (1998: 15). Environmentalists' desire for a more proactive federal presence is driven by their longstanding concerns over provincial "conflicts of interest", especially when it comes to the regulation of extractive resource industries such as mining and forestry. From their perspective, the provinces are hamstrung by the demands of mobile companies, and are far too susceptible to the economic and electoral pressures they exert. As Harrison notes: "In addition to their suspicions of the provinces as resource owners, many environmentalists perceived

[30] A more complete discussion of the debate over the division of environmental jurisdiction in Canada is provided in Chapter 6.

provincial governments to be more vulnerable to threats of job losses and reductions in their tax base" (1996: 125).

Environmentalists' support for a strong federal statute with a national safety net is, therefore, driven by their fear of weak provincial cooperation on the endangered species front. They fear that the *National Accord* (the intergovernmental framework for ensuring a comprehensive Canadian species protection regime), with its lack of enforcement mechanisms and time lines for action, is not binding on the provinces, and therefore cannot guarantee Canada-wide species protection. Given the current patchwork of discretionary provincial endangered species legislation, it is only natural for environmentalists to seek strong federal involvement. Certainly, the prospect of intergovernmental overlap does not frustrate environmentalists like it does industry representatives and provincial governments (Fafard, 1998). They are more concerned that the federal government not legislate itself into an endangered species irrelevance by failing enact a statute that asserts its "full" jurisdictional authority. Put differently, environmental groups prefer two levels of cabinet discretion to one in the regulation of endangered species. As Stewart Elgie testified during the Standing Committee hearings:

> The federal government ought to have legislation on the books so that it can ensure protection of species in its authority when it's needed. Where there's a provincial law that overlaps with part of that, then by all means we don't need two laws saying the same thing...figuring out how to avoid situations where there is a duplication would be a wonderful problem to have to deal with. The federal government would gain power...if it creates

> that authority in this bill and then allows it to be waived or modified where provinces are in fact doing as much or more than its act is doing. But it must create the power in this bill (Elgie, 1996b: 0.1040).

Environmental Groups' Reaction to Bill C-65

The lack of support from the environmentalists' camp was an important factor underlying the demise of Bill C-65. Although they liked the inclusion of citizen action provisions and the requirement for a timely production of recovery plans, they were very critical of the proposed legislation on a number of fronts. From the independence of the listing process, to the narrow scope of application and lack of habitat protection, Bill C-65 was considered too weak and too discretionary to ensure any meaningful federal endangered species presence. In environmentalists' view, the federal government was ignoring science, abdicating its jurisdictional authority, and downloading the bulk of its wildlife responsibilities onto the unreliable provincial governments. The following sections, therefore, will serve to elaborate on those aspects of the proposed statute (both before and after amendments were made) that were deemed inadequate by the environmental community.

A) COSEWIC: Politicizing the Listing Process?

Along with the scientific community, environmentalists were sharply critical of the terms of reference for COSEWIC in Bill C-65. As the most venerable endangered

species institution in Canada, COSEWIC had maintained a reputation for scientific credibility and objectivity in its listing process. Sections 13 and 14 of the bill, however, provided for COSEWIC "recommendations" regarding species listing, implying that their scientific decisions would not necessarily be definitive. The federal Cabinet was granted final say over the "official" endangered species list, and would not necessarily be held to the COSEWIC recommendations. Fearing that controversial listing decisions would be overturned by politically-motivated decision-makers, environmentalists and scientists were unequivocal in their denunciation of this potential outlet for political interference.[31] This provision prompted such outrage that one prominent scientist commented that "science doesn't count in this country", and that the "offensive ignoring of scientists" had produced a "cosmetic bill".[32] In the Standing Committee hearings, Stewart Elgie of SLDF spoke with the same kind of vitriol: "Political balancing shouldn't poison the creation of a list. The list must be credible. That's the whole foundation of the act." (Elgie, 1996b: 0.0925).[33] Thus, the environmental and scientific communities were united in their criticism of Bill C-65's potentially politicized listing procedures.

B) Lack of Critical Habitat Protection

> It is not rocket science to figure out how to protect critical habitat. There are lots of models out there, and the federal act will be significantly

[31] Schrecker (1999) engages in an interesting discussion on this very point, suggesting that political interference is unavoidable no matter where the final listing decisions are made.
[32] Confidential telephone interview with scientist, July 1999.
[33] As the scientists' letter to Prime Minister Chretien opined: "Canada's endangered species are too imperiled, too close to extinction and too precious to be held hostage to lobbyists, political manipulation or simple ignorance" (McIlroy, 1999a: A1).

> weaker than all four provincial laws on the books in terms of how it deals with the most significant problem (Elgie, 1996b: 0.0945).

The environmental community has made it abundantly clear from the beginning that any effective federal endangered species statute requires the protection of habitat. Recalling that the phenomenon of species loss is primarily the byproduct of human activity and the concomitant destruction of natural habitat, these actors insist that any legislation without mandatory habitat protection is scientifically indefensible (Noss, O'Connell, and Murphy, 1997). Indeed, the federally-appointed Task Force unanimously advised the government that "[e]fforts to recover species must be planned and undertaken in accordance with an ecosystem or multi-species approach" (Task Force on Endangered Species Conservation, 1996: 3). Environmentalists went beyond these scientific arguments, arguing that habitat protection measures would "not have any significant negative impacts on development" (CESC, 1995: 1). The absence of any kind of habitat-based approach in the proposed Bill C-65, therefore, was criticized as the most glaring of deficiencies.

Scientists and environmentalists alike were dumbfounded by the federal government's use of the term "residence" to describe that area which was protected by the federal government from harm and destruction. Their shock stemmed from the use of a term that is not current in the conservation sciences, and led, quite predictably, to a concerted attack on the scientific credibility of the proposed bill. Section 2 defined a species "residence" as "a specific dwelling place, such as a den, nest or other similar area habitually occupied by an individual during all or part of its life cycle" (Government of

Canada, 1996: 4). Other critical living areas, such as mating grounds, feeding grounds, and migration routes, were left unprotected. Julie Gelfand, executive director of the Canadian Nature Federation, summed up the widespread dissatisfaction with this restrictive and scientifically irrelevant term:

> [I]t would be like saying I'm going to protect your home, but I'm actually only going to protect your bedroom because that's your nest and that's where you den. The rest of your house may not be protected, but where you sleep eight hours of the day will be protected. We believe you should expand the concept of residence. We need to protect breeding grounds, we need to protect feeding grounds, and not just where a species dens or nests (1996: 0.0940).

Although the Standing Committee amended the definition of "residence" to include "breeding and rearing areas", environmentalists and scientists failed to secure any automatic prohibitions against the destruction of critical habitat.[34] Only through the discretionary recovery plans and emergency designations could any form of critical habitat protection be achieved. Thus, in comparison to the US ESA and its automatic prohibitions against the harming of an endangered species' habitat, Bill C-65 did not even come close to providing similar levels of non-discretionary habitat protection. In fact, on the habitat front, Bill C-65 was weaker than any of the provincial endangered species

[34] However, as Catherine Austen pointed out in her analysis of Bill C-65, this amendment was a notable improvement for such animals as fish and caribou, which depend on specific breeding grounds (and don't necessarily build nests or dens).

statutes and the federal *Fisheries Act*, all of which prohibit the "harming" of habitat. The *Fisheries Act* protects fish and aquatic ecosystems from harmful activities everywhere in Canada, whether on federal, provincial, or private lands. Stewart Elgie was quick to point out such a glaring incongruity: "Ironically, non-endangered fish species will get stronger habitat protection under the *Fisheries Act* than endangered species will get under Bill C-65" (1996a: 7). Frustrated that the federal government had "manufactured" a new term to appease the concerns of private landowners, industry groups, and certain provinces, the supporters of a habitat-based statute were disappointed by the bill's lack of a credible scientific foundation.

C) A Narrow Scope:

One of the most important concerns raised by environmental groups was CESPA's limited scope of application. They felt that the federal government was deliberately underestimating their environmental jurisdiction, abandoning the bulk of habitat management responsibilities in the hands of discretionary provinces. The proposed statute did not go far enough to ensure the preservation of species that fall through provincial legislative cracks, and was deemed inadequate as a national safety net. Echoing the critique of Canada's scientific community, environmentalists attacked the scientific logic behind this protection, since it was limited to individual species and their "residences", and did not apply to their critical habitat. The federal government was, therefore, abdicating its responsibility to protect species and their habitat on provincial and private lands, and was effectively passing the endangered species buck.

Environmentalists were frustrated because the bill did not apply throughout Canada, covering less than 4% of the country's land base south of the territories (Austen, 1997). As demonstrated in *Figure 1*, Bill C-65 proposed full protection only to those species living on "federal lands", aquatic species falling under the *Fisheries Act*, and migratory birds covered under the *Migratory Birds Convention Act*. Once a listed species ranged off federal lands it would no longer be covered. Similarly, migratory birds listed under the *Migratory Birds Convention Act* would receive federal protection, but their habitat was left under provincial jurisdiction. In addition, environmentalists argued that since the act only applied to a certain number of birds, other migratory species such as raptors, hawks, eagles, owls and falcons would not be sheltered under this bill. Thus, only aquatic species received the "complete protection package", hardly an environmental victory considering that this was in keeping with previously established fisheries powers. During the final amendments, however, an exemption was made at the behest of Canada's fisheries groups: the "unforeseen" and incidental by-catch of listed species would be permitted, much to the displeasure of the environmental community (Austen, 1997). Such statutory exemptions were not accompanied by any amendments to "repair" the Bill's limited application, leaving environmentalists with the feeling that the bill "[gave] the federal government the optional power to fire a blank" (Elgie, 1996b: 0.0930).

The second major difficulty environmentalists had with the bill's scope concerned the contentious provisions for international and provincial transboundary species. Bill C-65 offered no protection for endangered species that cross interprovincial borders, an area where environmental groups had hoped to see more aggressive federal involvement. With

regard to the Canada/US border, Section 33 partially satisfied environmental groups, granting the federal government discretionary authority to regulate internationally ranging or migrating animals and their residences. Following the Standing Committee's amendments, this provision was upgraded to *require* such protection, although the federal government could defer authority to any province which had *equivalent* regulations. This requirement for provincial equivalency appeased environmental groups, who had consistently promoted a national safety net concept with the federal government retaining residual endangered species authority. However, since Section 33 only applied to animals (it was based on the federal government's criminal law powers to prevent cruelty to animals), the federal government could offer no guarantees on transboundary plant species (Austen, 1997).

Combined with the weakness of "residential" as opposed to critical habitat protection, environmental groups felt that the overall provisions for transboundary species protection were too soft and narrow. This lukewarm appraisal of the Section 33 provisions, however, must be interpreted within the context of industry, landowner, and provincial interests on the international transboundary species front. In truth, Section 33 was the most jurisdictionally "overbearing" aspect of Bill C-65 because it held significant potential to involve the federal government in the management of a large number of endangered species. Thus, the environmentalists' critique of Section 33 was, in all likelihood, a strategic counterargument to blunt the objections of their opposition (to be discussed in the forthcoming section on landowner and industry reactions to the bill).

D) Recovery Plans

In many ways, environmental groups were pleasantly surprised by the federal government's proposals for endangered species recovery. Bill C-65 required the development of recovery plans within a year after the listing of an endangered species, and within two years for threatened and extirpated species. Vulnerable species were to be managed according to a plan developed within three years of listing. In each case, the timely preparation of recovery plans that identified a species' critical habitat was a non-discretionary duty, a provision that pleased the environmental community.

Timeliness of *preparation* aside, environmentalists were less than enthused about the government's decision to leave the *implementation* of such recovery plans up to the discretion of the responsible minister. This discretionary provision was of particular importance because the plans form the basis for the most crucial aspect of species protection: habitat planning. In other words, Bill C-65 proposed recovery plans, but did not mandate their implementation. The responsible minister was required within 150 days to "prepare and publish in the public registry a report on how, and within what time-frames, the Government of Canada intends to implement the measures contained in the plan" (Government of Canada, 1996: 20). This implementation report, however, was not backed up by a binding plan; environmentalists, therefore, felt that Bill C-65 gave the federal government too much room to wriggle free of recovery plan implementation. As Stewart Elgie argued in his analysis of the proposed bill:

> The responsible Minister is...required to monitor implementation of the recovery plan and report on that implementation within five years of the

> plan's conclusion. However, the Act does not contain any provision requiring the Minister to actually implement the recovery plan. The lack of any requirement to implement protection measures in a recovery plan is a significant weakness (1996a: 7).

Recalling the federal government's discretionary posture with respect to the COSEWIC listing process, environmentalists became increasingly convinced that Bill C-65 would become yet another "enabling" environmental statute without teeth. The action-forcing language so prevalent in the ESA was hardly to be found within this document, causing these groups to voice cynicism over the government's legislative intent. From their perspective, the federal government was leaving too much room for political maneuvering and was, therefore, demonstrating an inadequate level of state commitment to the task of saving species at risk. Without any mandatory protection provisions or effective accountability measures (see the following discussion on citizen action provisions), they felt that Bill C-65 left the fate of Canada's species in the hands of the federal Cabinet. This situation left environmental groups both concerned about the merit of Bill C-65, and deeply dissatisfied with their constant uphill battle against the silent institution of governmental discretion.

Industry and Private Landowner Groups: A Combined Opposition

Perhaps the most important difference between the Canadian and US experiences in enacting federal species at risk legislation has been the emphatic convergence of

private landowner and industry concerns at the bargaining table. In the early 1970s, there was little or no opposition to the development of the ESA, mainly because it was viewed as a harmlessly symbolic statute without concentrated costs; business and industry groups did not see the legislation as a threat to their interests, as evidenced by their decision not to testify during the House and Senate hearings for the ESA (Yaffee, 1982). In short, species protection was treated primarily as a technical (biological) matter, and was so politically popular that Republicans and Democrats practically stumbled over each other to champion the cause of bald eagles and other charismatic megafauna (Yaffee, 1982; 1994; Kohm, 1991).

Of course, the confrontational history of the ESA's implementation has belied these initial assumptions that species protection would not adversely affect any obviously identifiable interests, a fact not lost upon Canadian private landowner and industry groups alike. With the recent US Supreme Court decision (*Babbit v. Sweet Home*) to interpret the "taking" provision expansively, and the halting of logging activities in the Pacific Northwest due to the presence of the endangered spotted owl, the ESA has come under attack by property owners of all stripes.[35] Since the "taking" prohibitions apply to "any person" (meaning both governments and private individuals), every industry, business, developer, and agriculture producer can be held accountable for habitat-altering activities, without any guarantee of compensation. Not surprisingly, Canadian private property interests (both individual landowners and industries) have kept a close eye on ESA developments in the US, learning from the political experiences of their cross-border counterparts and mobilizing their forces to oppose any similar legislation. By inserting

issues of socioeconomic costs and property rights into the species endangerment debate, these groups have brought about a competition of interests that did not materialize in the making of the ESA.

For the sake of simplicity, the analysis of industry and private landowner groups will be proceed in tandem, treating both as "opposition" groups within the endangered species policy arena. As will be discussed further in the descriptions of each community, their basic interests (and their objections to Bill C-65) are linked by a shared concern about regulatory uncertainty, property rights, and compensation; they are, after all, each affected by any government regulation of land use. However, it is worth highlighting the fact that this convergence of actors fighting against a "strong" endangered species statute presents a unique dynamic not often encountered in the environmental policy arena. On this issue, environmentalists face competition not only from industry groups (as is typical of point-source oriented environmental laws), but also from communities of landowners, many of whom represent the agriculture sector. Thus, one might hypothesize that the combined strength of these actors has posed a significant (if not insurmountable) challenge to environmental groups, even when the added political resources of conservation scientists are taken into account. The following sections, therefore, will outline the resources, strategies, and interests that this combined opposition brings to the endangered species conflict.

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[35] The Supreme Court ruled that significant habitat modification or degradation is equivalent to "harming" an

Private Landowners: Beliefs, Interests, and Strengths

Often lost in the shuffle of Canadian environmental politics are the loosely grouped interests of private landowners, who, on this issue of endangered species legislation, have been represented most strongly by Canada's agricultural community.[36] Although it is often taken for granted that business and industry concerns are the primary opponents of environmental regulation, private landowners have assumed an increasing prominence in the environmental policy arena. This effect has been especially evident in the United States, where the regulation of land use (for instance, to protect wetlands) has sparked conflict over the proper relationship between the state and private property. As contentious issues concerning land management and preservation cropped up following the enactment of the ESA in 1973, private landowners joined the fray of interested actors, adding another competitive dimension to the politics of environmental regulation. Thus, the retarded development of Canada's federal endangered species legislation can be attributed, in part, to the emergence of a new stakeholder on the environmental scene.

For generations, the rights of property owners have been fervently invoked to counteract state restrictions against land use. The rise of the so-called "Wise-Use" land movement in the US is yet another incarnation of this political sentiment, primarily reflecting the fright and anger engendered by the ESA's (occasionally) prohibitive implementation (Echeverria and Eby, 1995; Hummel, 1995). Coined by the early conservationist Gifford Pinchot, the term "wise use" has developed into a rhetorical tool

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endangered species, and should therefore be prohibited under the Section 9 definition of a species "taking".

[36] For the sake of convenience in this thesis, the agricultural community is subsumed under the more broad title of "private landowner interests" so as not to exclude other actors (such as land developers) from this actor category.

that challenges the US statute's constitutional basis, while championing the interests of individuals and rural communities (Pendley, 1995). More specifically, it asserts that the ESA violates the constitutional rights of private property owners by granting excessive power to the state over such lands. Perhaps not surprisingly, this grassroots property rights movement has extended its political perspective across the 49th parallel, and has imparted upon many Canadian landowners a distinctly negative view of the US ESA (and, quite often, of state-organized species protection regimes more generally speaking) (Strankman, 1999).[37] Thus, the development of federal endangered species legislation in Canada has been marked by the opposition of a community of landowners whose interests are embodied in their private property "values".[38]

As mentioned previously, Canada's private landowner community is most abundantly represented on the endangered species front by the agriculture sector. Although the agriculture sector's numbers have decreased over the years, their political clout has remained impressive across the country, especially in terms of their influence over the provincial governments (Skogstad, 1987). Part of the reason underlying this strength is that agriculture producers are represented by a large variety of effective farm organizations both provincially and federally (Forbes, 1985). There are two main types of groups: general agricultural farm organizations and commodity-specific groups, both of

[37] Simeon, Banting and Hoberg have described this process as one of "parallel domestic pressures", and assert that it is an important force for environmental policy convergence between Canada and the US (1997). Elsewhere, Hoberg has argued that policy convergence can occur through "activist driven emulation", whereby knowledge is transmitted through "transnational policy communities" as actors try to "shame" their government to enact policies similar to those in other countries (1991: 110). It is interesting to note, therefore, that a dynamic of "reverse emulation" is occurring within the endangered species debate in Canada. Influenced by the transnational diffusion of the US "Wise-Use" movement, Canadian landowners are attempting to steer the government away from a statute like the ESA and are advocating a distinct policy divergence.

[38] Of course, it would be remiss to assume that all private landowners share this wise-use perspective. However, the purpose of outlining the vision of this movement is to help the reader understand the substance behind many landowners' resistance to an "interventionist" federal statute that might infringe upon their property rights.

which maintain distinct characteristics in terms of their ideological predispositions and their relations with different levels of government (Skogstad, 1987). As Skogstad notes: "The agricultural community is heterogeneous in its organization, its goals, and the means it espouses to achieve those goals" (ibid: 36). Thus, diversity and organization are understood to be the bedrock of the agriculture sector's political strength.

In terms of the development of federal endangered species legislation, however, the agriculture sector has spoken through a single powerful voice. The National Agriculture Environment Committee (NAEC) is the peak association representing the vast majority of Canada's agricultural producers on environmental issues, from the Canadian Federation of Agriculture, to the Canadian Pork Council, the Dairy Farmers of Canada, and the Western Canadian Wheat Growers Association. To be sure, the coordination of such a diversity of influential organizations through one stakeholder channel has concentrated private landowner influence over the endangered species policy process, a strategy adopted similarly by the environmental community. Thus, the significant political resources of Canada's agricultural organizations have been pooled in order to defend their common interests as private landowners.

Business and Industry Groups

Business and industry associations are generally understood to be the most powerful actors among interest groups, unparalleled in their ability to influence public policy (Lindblom, 1977; Hessing and Howlett, 1997; Schrecker, 1999). Represented by a variety of sector-specific peak associations, their interests are supported by a wealth of

financial and organizational resources with which to lobby all levels of government. In terms of their ability to create jobs, generate tax revenues, and contribute to political parties, industry and business groups maintain an upper hand in terms of influencing the legislative process. As Charles Lindblom states, they are "structurally advantaged compared with other political interests" (1993: 102).

Of particular importance to business and industry is the political leverage gained through the threat of mobile capital, whereby companies can "punish" a government by removing or relocating their investments (Hessing and Howlett, 1997). As Schrecker points out in a recent article, environmental groups cannot match this resource; the resource of job blackmail provides companies with the unparalleled power of political intimidation "in contests about the appropriate balance among the competing values of economic return and environmental protection" (1999: 5). Recognizing Canada's economic dependence on the exports of extractive resource industries, it should come as no surprise that the protection of their interests is a high priority for the federal and provincial governments (especially when public concern about unemployment and the strength of the economy is high). Thus, one would expect the development of federal endangered species legislation to be heavily influenced by the concerns of business and industry interests.

As active participants in the workshops, consultation processes, and the federally-appointed Task Force, industry representatives recognized the need to develop comprehensive legislation that would meet Canada's international commitments. Certainly, at least some Canadian industries have a vested interest in maintaining and promoting a "green" image, especially in the wake of the international boycotts generated

by Clayoquot Sound anti-logging protests. However, companies have a more tangible material interest in the state regulation of endangered species and their habitat: federal legislation will impact on their productive capacity, and, consequently, their profit margins. Industry wants to see federal legislation that would not only protect the species at risk, but would also serve to protect their resource investment interests.

Understanding that resource extraction companies such as mining and forestry are fueled by both foreign and domestic investments, regulatory certainty is an industry priority; investors tend to shun unstable political climates and volatile regulatory regimes. Such uncertainty, however, is engendered by the simultaneous regulatory involvement of the federal and provincial governments. Industry is united in their opposition to a regime with two levels of environmental control because it muddles the locus of regulatory decision-making, creates delay, and increases costs of compliance.[39] In addition, entangled regulatory duties engender the fear that governments' might engage in an electoral struggle for environmental credit (Harrison, 1996). In sum, governmental overlap creates an "inefficient" dynamic that would threaten the overall competitiveness of industry. As the following sections will demonstrate, this overriding interest in regulatory devolution and environmental harmonization is the at the core of industry groups' reactions to Bill C-65.

However, it is important to remember that regulatory certainty is not necessarily sought for the sake of certainty *per se*; companies understand that environmental controls are a part of modern industrial production, but (regardless of their pro-environment rhetoric) would be expected to seek to entrench as lax a regulatory regime as possible.

[39] Confidential telephone interview with industry official, July 1999.

Thus, industry groups would be expected to prefer a weak federal statute, such that endangered species regulation is effectively devolved onto the provincial governments. This hypothesis is consistent with other areas of environmental regulation, since industry representatives almost always defend the jurisdictional primacy of the provinces, if only because their aforementioned politico-economic resources carry more weight among the provinces (Harrison, 1996). As Harrison explains: "It is no accident that industries facing...regulations historically have favoured provincial jurisdiction, since they benefit not only from a symbiotic relationship between resource owner and developer, but from the threat of jurisdictional mobility" (1996: 176). Thus, industry groups are promoting a weak federal endangered species statute and are discouraging intergovernmental overlap, with the expectation that provincial management of endangered species is more apt to be "investor-friendly".

Shared Interests Among Industry and Private Landowner Groups

In their efforts to oppose any emulation of the ESA, both industry groups and private landowners share a set of core interests within the Canadian endangered species debate.[40] Three main arguments are typically advanced: first, it is asserted that the achievement of species preservation must be balanced by socioeconomic needs and realities. This point is especially important to individual property owners within the agricultural community, who demand that the regulatory clout of federal legislation be offset by compensation packages, tax incentives, and cost-sharing programs (of which the

US has very few). In short, they do not want to bear the financial brunt of species protection.

Second, industry and landowner groups are wary of any increased federal "intervention" into what they consider to be a distinctly provincial jurisdiction. Emphasizing the need for a cooperative approach that recognizes the primacy of provincial regulatory authority in the environmental sphere, these groups are against any legislation with a scope of application as broad as the ESA (where the federal, and not the state, government is primarily responsible for species protection). This jurisdictional interest is particularly salient among industry groups, for whom a strong federal role implies unnecessary regulatory duplication and economic uncertainty.

Finally, industry and landowner groups are united in their opposition against any federal legislation which includes civil suit provisions as a means of ensuring government accountability. From their perspective, the responsibility for law enforcement should be exclusively reserved for governments. An open and legalistic system reminiscent of the US is deemed too punitive and adversarial, offering an ineffective model of endangered species protection based on disincentives. Citizen suit provisions, in their opinions, emphasize sticks over carrots, and are therefore an inefficient and costly approach to saving endangered species. Any federal legislation containing such accountability measures, therefore, risks undermining the spirit of partnership and cooperation that is needed to cultivate a successful endangered species protection regime.

[40] Although their endangered species policy interests may be similar, industry and private landowner groups arguments

Industry and Private Landowner Reactions to Bill C-65

Industry and landowner groups' concerns about the substance of Bill C-65 centred around these aforementioned issues of compensation, civil suits, and jurisdictional encroachment. Their consensus was that Bill C-65 did more to threaten their economic investments than to encourage them, and that the litigious spirit of the Act would actually serve to undermine the protection of endangered species. Understanding their desire for unobtrusive yet predictable federal legislation, both groups denounced the bill as an overly aggressive federal foray into provincial regulatory territory. In short, they felt that federal government had overstepped its jurisdiction, fueled uncertainty, and left them without any guarantee of recompense - a recipe for industry and landowner rejection.

A) Lack of Compensation Provisions:

The idea that a "shared-cost" system of endangered species management should be implemented in any federal legislation was central for both industry and landowner groups. Led by the NAEC, however, landowners were markedly more aggressive on this issue, perhaps because the stakes for individual farmers were more concentrated than they were for larger business groups and industries. They did not feel that Bill C-65 demonstrated a federal willingness "to put the money where its environmental mouth had led it", and had not initiated legislation which would ensure that all costs be borne by each and every Canadian taxpayer (Strankman, 1999). These concerns stemmed from the

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were not coordinated in any way.

rather non-committal (discretionary) language found in Section 8 of Bill C-65, which outlined how funding agreements would operate under the statute:

> The Minister may...enter into an agreement with the government of a province, a municipal authority, or organization or any other person to provide for the payment of contributions to the costs of programs and measures for the conservation of wildlife species (Government of Canada, 1996: 8).

Discontent with this discretionary approach towards incentives and compensation packages was widespread, causing many individual landowners to wonder whether Ottawa had any sense of the socio-economic "realities" inherent in species protection legislation. Citing the many instances of private landowner partnership in wildlife conservation efforts, the need for an equitable distribution of endangered species burdens was underlined by Jim Turner, Director of the Canadian Cattlemen's Association:

> The protection of wildlife habitat on their land comes at a cost to cattle producers. These costs include income and opportunity losses, and also increased costs resulting from wildlife damage and public access. While most cattle producers are prepared to voluntarily make a contribution to wildlife protection, any legislation that forces them to forgo income or increase their costs must include a provision for compensation for those losses (1996: 0.1126).

Without any explicit recognition of the social and economic consequences of endangered species management (at least until the final amendments were proposed), and without any guarantee of mitigation measures to compensate those most affected by the legislation, Bill C-65 appeared threatening to industry groups and to an openly anxious landowner contingent.

B) Jurisdictional Overbearance

Industry and landowner groups were adamant that Bill C-65 failed to recognize the primacy of provincial regulatory authority in the endangered species sphere. Like the provinces, they were most upset by the Section 33 provisions for federal intervention in cases dealing with international transboundary animals. Given that the majority of Canada's threatened and endangered animals range across the Canada/US border at some point in their lives, one can understand why their concern over the international transboundary issue was particularly acute. In fact, unofficial Canadian Wildlife Service reports indicate that, depending on how an international transboundary species is defined, these species could account for well over 90% of Canada's listed animals (Aniskowicz, 1998). Faced with the prospect of mandatory federal intervention on an unknown number of animal species qualifying under Section 33, industry and landowner groups were unequivocal in their rejection of this provision.

Industry groups argued that one level of government was enough, and that the transboundary provisions only served to create unnecessary regulatory duplication and investor uncertainty. They felt that Bill C-65 effectively forced the provincial governments to meet national standards established by Ottawa (or else face federal

intervention on a regular basis). Thus, Bill C-65 did not live up to the commitments made both in the *National Accord* to work "cooperatively" in the recovery of international transboundary species.

Individual landowners, most notably the cattle producing community, supported this argument against Bill C-65's "unknown" potential for federal intervention on international transboundary species. Having recently locked horns with Ottawa over the issue of gun control, they were extremely sensitive to any perceived federal "attack" on individual and property rights. Keeping in mind their concerns about the Section 60 citizen action provisions, it is unsurprising that landowner groups such as the Canadian Cattlemen's Association reacted strongly to the threat of a judicially-imposed federal presence on issues of land management.

C) Endangered Species Protection Actions: Revisiting the ESA?

Compounding the lack of compensation measures and the international transboundary species provisions was Bill C-65's civil action provision, which brought about extreme reactions from the private landowner and industry groups. Like industry, landowners viewed the "endangered species protection actions" as an ill-fated accountability mechanism that had already failed once in the US. In their opinion, the Section 60 provisions for "endangered species protection action" were a recipe for future judicial nightmares, and would only serve to engender conflict and create unnecessary schisms between environmental groups, rural farming and industry communities, and the different levels of government. Costly and prolonged court proceedings, ongoing stakeholder animosity, and the purposeful elimination of endangered species from private

lands would all result from such a poorly-conceived federal accountability measure. In their view, the proposed legislation undermined any potential incentive for partnership and cooperation by concentrating too much attention on punitive measures and litigation, a model which (in their opinion) had already been proven ineffective. As Anthony Andrews, Executive Director of the Prospectors and Developers Association of Canada stated during the Standing Committee hearings:

> We need to learn from our friends in the United States...The lesson we should learn from this is that an approach based on highly prescriptive, punitive legislation does not work...We are concerned that the spirit of the bill can be questioned when you see that 50 out of 107 clauses in the bill talk about ways and means to punish those who violate the remaining 57 provisions. I am hoping we are not following the American model of legislation, where most of the effort and financial resources are spent on policing and in the courts rather than on protection of the species themselves (1996: 0.0845).

Conclusion

The reactions of both landowner and industry groups indicate that they thought Bill C-65 would leave them defenseless against a statutory wave of state and environmentalist persecution. They foresaw an endangered species regime dominated by

crippling penalties, unnecessary federal interventionism, and environmental litigation. In their view, the federal government was abdicating its enforcement responsibilities and downloading them onto Canadian individuals, a situation which tended towards the openly legalistic and adversarial system of the United States. In short, private property rights, individual freedoms, and endangered species themselves would be the victims of Bill C-65. An inflammatory article published in Alberta Report captured the "extreme" landowner's sentiments perfectly: "Endangered Species Overkill: Ottawa's proposed wildlife grab threatens property owners with huge fines, years in jail and loss of land" (Avram, 1997: 6).

The failure of Bill C-65, therefore, was relatively predictable from an industry and landowner standpoint. The proposed legislation appeared to open the door for an "Americanized" environmental enforcement regime, without any promise of recompense or recognition for their volunteer efforts. Bill C-65, therefore, smacked of confrontation and governmental intrusion. Recognizing that industry groups and landowners stand to bear the concentrated costs of endangered species protection, it should come as no surprise that they mobilized their organizations effectively to blunt any perceived federal "attack". While standing wholeheartedly behind the idea of endangered species protection, these groups also supported the notion that sustainability was a two-way street; Bill C-65 certainly did not do enough to sustain their goodwill and protect their "endangered" economic interests.

Divided Interests Within the Federal Cabinet

Although the federal government is not normally understood to be a political actor in the same sense as the above stakeholders, there are compelling reasons to link the discussion of stakeholder groups and the divided interests of the federal cabinet on this endangered species issue. Up to this point, only those interests that are common to the federal government as a whole have been treated. However, any discussion of federal endangered species motivations presents the inherent weakness of assuming the Liberal government to be a unified entity. This assumption, although useful for the purposes of analyzing intergovernmental diplomacy, tends to fall apart upon closer scrutiny of the federal cabinet. As Dwivedi and Woodrow have noted, the "overlapping jurisdiction between levels of government is often exacerbated by the internal fragmentation of responsibilities among departments and agencies within both the federal and provincial governments" (1988: 265). Different ministries are beholden to different interest group pressures, and they pursue specific departmental mandates and policy objectives. This dynamic inevitably produces cabinet competition to achieve different departmental ends, a competition which in many ways represents a microcosm of the larger interest group struggle. Considering the number of departments (and their clients) potentially affected by an endangered species statute, it should therefore come as no surprise that the legislative process was shaped by internal federal strife.

Although cabinet secrecy precludes a definitive account of the interdepartmental wranglings on this issue, there were strong indications that a significant degree of cabinet

conflict helped bring about the downfall of Bill C-65.[41] Environment Canada, guided mainly by the bureaucratic arm of the Canadian Wildlife Service, has tended to side with scientists and environmentalists, fueling interdepartmental disagreement about the proper federal role in habitat management. Various federal departments, including Fisheries and Oceans (DFO), Industry, Agriculture, Transport, and Natural Resources, have been embroiled in discussions with Environment Canada regarding the scope and substance of any species at risk legislation.[42] All five departments attacked different aspects of Environment Canada's proposed bill, voicing concerns similar to those brought up during the stakeholder consultations by representatives of Canada's fisheries groups, private landowner and agricultural groups, and industry groups.

Arguing strongly over issues of compensation, jurisdictional overlap, and regulatory uncertainty, the dissenting departments' messages were, in fact, rather simple. They wanted a statute with limited regulatory measures, that would not inhibit commercial activities or circumscribe their ability to manage such activities (Curtis, 1999). As previously outlined in *Figure 1*, the final version of Bill C-65 was weakened in several respects following a lengthy debate in the federal cabinet. Given the economic clout of their portfolios, it is perhaps not surprising that these "dissenting" ministries managed to veto certain clauses (or prevent their inclusion from the very beginning), and dilute many of the stronger environmental provisions of Bill C-65 through amendment. For instance, the "incidental bycatch" loophole introduced as part of the final package of Cabinet amendments was undoubtedly the result of DFO's persistent lobbying, most

[41] Confidential telephone interviews with federal and provincial officials, industry representatives, and environmentalists, July/August 1999.

likely in response to concerns voiced by fisheries groups. Similarly, one would hypothesize that private landowners were supported in their efforts by Agriculture Canada, and that industry groups were defended by the Ministries of Industry and of Natural Resources. Thus, it can be asserted that Environment Canada, although supported in their efforts by the environmental and scientific communities, faced an uphill interdepartmental battle within the federal Cabinet.

As a means of pursuing the government's primary interest of reelection, as well as their own departmental goals, therefore, certain departments adopted the role as protectors of specific societal interests, and fought on behalf of those communities that opposed the proposed legislation. Thus, it is concluded that interdepartmental disagreement on the issue of endangered species legislation contributed to this federal policy delay, and it may be speculated that such internal conflicts of interest were a key factor in bringing about the downfall of Bill C-65. Clearly, the task of enacting an endangered species statute with environmental teeth was made more complicated by the pro-development interests of certain departments within the federal executive.

Discussion and Conclusion: Victory in Delay, or Delayed Victory?

While the bill's failure rendered moot each provision and each amendment, it most certainly clarified the legislative hurdles that will again be encountered once a new endangered species proposal is debated within Cabinet, most likely during the fall of 1999. In the meantime, as endangered species languish without statutory protection, can

[42] An oft-cited example of this political wrangling involves DFO and their extensive lobbying efforts to delay the

it be asserted that the failure of Bill C-65 and the consequent delay represents a victory for any of the stakeholders? Certainly, it is very difficult to ascertain whether the government was most influenced by the arguments from the environmental and scientific communities, or by the arguments of the industry and private landowner groups. Although the Standing Committee demonstrated an environmental bias throughout their amendments, the changes proposed as a result of Cabinet debate tended towards a weaker, more socio-economically inclined statute. Without any information as to the collective direction (if any) taken by Cabinet as the decision was made to scrap Bill C-65, and without any final outcome to compare against, one cannot determine which interests "mattered" the most. Taking a more "long term" perspective of Canadian endangered species policy, only time will tell who actually won this battle (although a change in background conditions may make this analysis impossible). Obviously, a stronger bill would indicate that the environmental forces won, while a weaker bill would point to just the opposite. From this broad analytic view, therefore, firm conclusions regarding the impact of interest group competition are disappointingly few and far between.

When one interprets the interest group conflict from a "short term" perspective, however, a number of conclusions can be drawn regarding the failure of Bill C-65. Taken at face value, one can tentatively establish a set of interim winners and losers from this first legislative battle. Industry and landowner groups were able to maintain the status quo of a largely unregulated endangered species regime, while environmental groups have nothing to show in terms of species protection legislation, and have no guarantees that the next proposal will be any better than the last. This victory for the "opposition" forces,

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Atlantic cod's inclusion on COSEWIC's endangered species list (Comeau, 1998; Schrecker, 1999).

however, is particularly shallow insofar as the failure of Bill C-65 has denied them the benefit of regulatory certainty; private landowners and industry groups will have to fight once again to achieve the weak statute they so desire. Indeed, there are no guarantees that the next proposal will be any more to their liking than was Bill C-65. Thus, industry and private landowners can claim a slight short term victory, but not much more.

Of course, this assessment assumes a great deal about the bottom line (long term) interests of the environmental community. Regardless of who benefits from the status quo of legislative limbo, it is not immediately apparent that the environmentalists were upset by the collapse of Bill C-65. As the Canadian Endangered Species Coalition argued: "When it comes to endangered species, a weak law isn't a mistake that can be easily fixed. A weak law means extinction" (CESC, 1996: 3). Recognizing the inherent political difficulty of undertaking any substantial legislative review once a statute has been enacted (the effects of inertia and policy legacy), it could be argued that environmentalists were unwilling to accept a weak statute on an issue of such fundamental importance. Certainly, this is the standard response from environmentalists across the country.[43] Rather than pass a bill for the sake of achieving a modicum of species protection, the environmental and scientific communities may have determined that a short term loss could translate into a long term victory. However, separating rhetoric from reality is impossible without the knowledge of a policy soothsayer; as mentioned before, this is the point where the limits of analysis are reached. In the short term, environmentalists may have been defeated, but it is quite possible that this loss was of the sacrificial or strategic variety.

[43] Confidential telephone interviews with environmentalists, July/August 1999.

One cannot say with certainty, therefore, whether or not the neo-pluralist hypothesis is supported by the current lack of a policy outcome. It would appear, though, that there exists a systemic bias favouring the interests of those who prefer the regulatory status quo over those who seek policy change. The fact that industry and landowner groups can claim at least a partial victory due to the legislative delay underlines the disadvantages faced by the environmentalists. Without a wealth of public concern to support their cause, it would seem that environmental groups have been caught, as they so often are, on the wrong side of a policy inertia. Even with strong public support, however, one still has to question whether the environmentalists resources could ever be a match for the well-organized opposition of industry and private landowner peak associations. Only time will tell which side emerges victorious in this prolonged battle over endangered species regulation.

The most firm conclusion that can be made with respect to Bill C-65 is that *the self-interested competition of actors was an important causal variable underlying its failure*. The current policy delay is, in many ways, a function of the federal government's inability to produce a statute that satisfies the full range of stakeholder interests. As two environmentalists, Rita Morbia and Elizabeth May stated recently: "C-65 did not move us forward and alienated almost everyone. The legislation appeared too tough to natural resource users, compromising their concern over the plight of species, while it did very little to protect anything. The bill was an odd combination of being weak and belligerent, ineffectual yet bullying" (1998: 19). After all of the consultations, task forces, and public workshops, the federal government was forced into a politically embarrassing

retreat, unable to gather a "minimum supporting coalition" to justify the proposal's passage into law.

CHAPTER VII

THE ROLE OF INSTITUTIONS

Introduction

The final analytic component in the policy regime framework is of fundamental importance to any complete understanding of Canadian environmental policy-making. Institutions, according to Archer et al., are the "systems of rules" which allocate authority over policy, and define the "parameters of political behaviour"; in short, they determine the roles, structure the interactions, and even influence the interests of legitimate policy participants (1995: 2). Broadly speaking, then, an institutionalist perspective argues that the organizational structures and procedures governing a given political unit are the primary causal factors underlying Canada's environmental policies. The policy regime framework, therefore, interprets the effects of institutions within a context of actors who interpret ideas and pursue interests, revealing that these effects have been critical in determining the lack of an endangered species policy outcome. Having already outlined the dynamics of interest group participation through institutionalized multistakeholder consultation, we must now examine how Canada's divided system of governance has influenced the development of endangered species policy. The federal government's failure to enact species at risk legislation can only be understood by examining one of the most fundamental of Canadian institutions: the unique brand of *federalism* that mediates between different levels of Canadian government

Although Weaver and Rockman (1993) have theorized that major policy initiatives are more difficult to enact in the horizontally fragmented institutions of the US congressional regime, it can been asserted that the vertical fragmentation of Canada's federal and provincial governments has been a significant factor in retarding the development of endangered species legislation. This notion is supported by Hoberg, who suggests that "Canadian federalism may prove to be a greater obstacle to environmental policy than the separation of powers in the United States" (1997b: 378). Thus, it is hypothesized that the relative strength of the provincial governments has precluded any federal attempt to enact legislation with the scope and non-discretionary prohibitions of the ESA. From the province's perspective, control over species and habitat management is part and parcel of their authority over land and resource issues, and their dissatisfaction with federal "intrusions" on this front are at the heart of the current statutory delay.

Before provincial reactions to Bill C-65 are assessed, it is first necessary to outline the ambiguous jurisdictional context within which the endangered species issue is taking place. In many ways, the fundamental debate in this whole legislative affair concerns the breadth of the proposed federal legislation. Following this, the intergovernmental context of executive federalism (through the Wildlife Ministers Council of Canada) will be detailed in order to better understand the *National Accord* and, more generally speaking, the trends in Canadian environmental policy. In conclusion, it will be shown that the endangered species issue can be distilled into two simple questions that may never be answered conclusively: What are the constitutional limits of federal species at risk authority, and to what extent are these constitutional limits imposed by federal politics?

The Context of Environmental Federalism in Canada: Jurisdictional Ambiguity

Due to a lack of explicit constitutional provision, the Canadian environmental policy field is characterized by an ambiguous set of overlapping jurisdictions. That is, both levels of government are simultaneously responsible for protecting Canada's natural environment, and their authority to do so stems from wide-ranging distribution of proprietary and legislative powers found in sections 91 and 92 of the *Constitution Act, 1982*. The essential dilemma underlying the Canadian endangered species debate, therefore, arises from an unclear division of constitutional authority.

In general, it has been conceded that the provincial governments possess the most far reaching constitutional levers of environmental power, and are the "most responsible" for the protection of species at risk. First, by virtue of their ownership of public lands within provincial borders, provinces maintain a substantial proprietary authority. The second main parameter of provincial environmental jurisdiction lies in the provinces' legislative control over natural resources. As outlined in section 92A, the provinces may exclusively make laws in relation to the development, conservation, and management of resources in the province, as well as forestry and hydroelectric facilities. Additional grants of legislative jurisdiction include powers over local works and undertakings, property and civil rights, and matters of a local or private nature. Thus, the crux of provincial authority to protect and restore endangered species is their power to "hold virtually an inclusive jurisdiction" over matters pertaining to both publicly and privately owned resources within their borders (Dwivedi and Woodrow, 1988: 268).

As with most other areas of environmental regulation and implementation, the federal government has traditionally deferred to provincial authority in matters pertaining to wildlife management. Although the federal government maintains an extensive proprietary authority over a variety of lands and waters, these areas are limited in comparison to those controlled by the provinces.[44] Thus, since federal crown lands within provincial boundaries are limited in extent, "federal proprietary powers cannot support comprehensive federal policies within provincial borders" (Harrison, 1995: 419). Most federal claims to endangered species jurisdiction are based on a number of relatively narrow heads of power found in Section 91 of the *Constitution Act, 1867-1982.* The federal Parliament can justify its regulatory and legislative presence in wildlife matters that fall under its constitutional authority over sea coast and inland fisheries, Indians and lands reserved for Indians, census and statistics, and criminal law (Gibson, 1994; Canadian Bar Association, 1996). In addition, they have management authority over a number of migratory birds pursuant to the 1916 Canada/US *Migratory Birds Convention* supported by the Empire Treaty power. Clearly, the cumulative potential of these particular sources of jurisdiction is not sufficient to justify a sweeping federal endangered species statute. Thus, *direct* federal authority over endangered species regulation is limited, if only because the provinces are Canada's primary landowners and resource managers.

It should be noted, however, that a large number of legal scholars have argued for a more expansive interpretation of the federal government's environmental and endangered species jurisdiction (Canadian Bar Association, 1996). In their view, the

[44] "Federal lands" include those in the Arctic, National Parks and National Wildlife Areas, defence bases, Transport

constitutional authority to enact broad species at risk legislation is rooted in the "Peace, Order, and Good Governance" power (P.O.G.G) conferred on the Parliament of Canada in Section 91 of the Constitution (Skogstad and Kopas, 1992). Although this justification for federal endangered species intervention is somewhat controversial, it is argued that the P.O.G.G. power could support federal legislation over all international *and* interprovincial transboundary species based on the fact that endangered species meet the legal test of "national dimension" or "national concern" as defined by the *Crown Zellerbach* decision. This opinion has been voiced most notably by SLDF lawyer Stewart Elgie, who contends that the federal duty to protect all transboundary endangered species is analogous to the federal jurisdiction over such transboundary issues as acid rain and climate change (Elgie, 1996b). In fact, the potential of P.O.G.G. is of such broad compass that the federal government could, potentially, cover all species on all lands in Canada. As Dale Gibson stated in an article entitled *Endangered Species and the Parliament of Canada*:

> Under both its inherent jurisdiction concerning matters of 'national dimension' and its authority to implement international treaties, the Parliament of Canada has ample constitutional power to legislate with respect to most, if not all, of the responsibilities imposed on Canada by the *Rio Convention*, and, in particular, the obligations it imposes regarding legislative protection for endangered species (1994: 22).

Canada properties, native reserves, and federal Crown corporation lands.

While there is no doubt that the provinces have extensive proprietary and legislative authority to regulate both species and their habitats, it is also clear that the federal government has the constitutional authority to enact stand alone legislation regulating such "federal" species as aquatic species and marine mammals (subject to the *Fisheries Act*), migratory birds, and all species on federal lands. Less clear is the federal government's endangered species jurisdiction based on the P.O.G.G. power, a question which has yet to be answered definitively by the Supreme Court. Of course, whether or not this controversial basis for statutory authority is accepted by the government depends on the advice provided to them by officials within the Department of Justice, as well as on a whole host of political considerations involving interest group and provincial government pressures. As it stands, it is highly unlikely that the federal government will regulate endangered species unilaterally on the basis of the POGG power. Joint responsibility for species and habitat protection is a political reality of Canada's environmental federalism, if only because the boundaries of federal and provincial legislative competence over species at risk and their habitats are not entirely clear. It is within this context of jurisdictional uncertainty that the political struggle over federal endangered species legislation is currently being waged, underlining the need for a coordinated approach to ensure that all species at risk throughout Canada are afforded comprehensive and effective legal protection.

Executive Federalism and the WMCC: A Collaborative Approach to Endangered Species Legislation

Accepting that the functions and responsibilities of the federal and provincial governments are not divided into watertight jurisdictional compartments, scholars of federalism have debated endlessly over the nature and substance of shared policy-making in Canada. One understanding that has come to embody the relations between simultaneously autonomous and interdependent governments is embodied in the notion of "executive federalism". Defined by Donald Smiley (1980: 91) as "the relations between elected and appointed officials of the two orders of government in federal-provincial interactions", executive federalism embodies "a pattern of bargaining between the executives of federal and provincial governments similar in many ways to international negotiations" (Simeon, 1987: 428). Executive federalism is understood to be the essence of a negotiated Canadian polity, whose lack of intrastate institutions has required a coming together of governments to effectively achieve joint policy objectives. Stated differently, executive federalism is the institutionalization of intergovernmental collaboration.

In practice, executive federalism can be broken down into an elaborate machinery of intergovernmental institutions. The primary (and most politically visible) institution, the First Ministers' Conference, is the pinnacle of what Richard Simeon has dubbed "federal-provincial diplomacy" (1972: 312). In the case of endangered species policy, however, federal-provincial diplomacy is carried out at levels beneath the First Ministers'

Conference, through meetings of federal, provincial, and territorial ministers responsible for wildlife management.

The preeminent forum for intergovernmental negotiation and joint action regarding species at risk is the consensus-based Wildlife Ministers Council of Canada (WMCC). The WMCC is the institutionalized channel through which federal and provincial ministers continue to discuss, *in camera,* the substance of federal endangered species legislation. Linked to this closed-door council is a committee of deputy ministers, whose regularized meetings allow departmental officials to provide bureaucratic support for their elected ministers. Thus, the WMCC represents an intricate web of intergovernmental diplomacy, the central institutional backdrop in the development of Canada's comprehensive legislative response to the *Convention on Biological Diversity.*

The significance of this intergovernmental institution lies in its consensus-based system of shared decision-making. Behind the closed doors of the WMCC, provincial Ministers have been free to voice their concerns regarding the development of federal endangered species legislation. However, the importance of this model of executive federalism extends beyond such privileged access to federal policy-makers; on issues that require legislative coordination, provincial influence is structurally embedded by virtue of the WMCC's requirement of intergovernmental consensus. By requiring that unanimity be achieved among ministers, the council effectively gives the provinces a veto in the process of establishing a shared federal-provincial vision of Canada's national endangered species protection policies. Thus, the consensus-based approach dilutes the federal influence, placing them on an "equal footing" with the provincial governments (VanNijnatten, 1998: 16). With its established convention of cooperative decision-

making, the WMCC essentially precludes federal unilateralism, and promotes the integration of provincial interests into federal endangered species legislation. As the following sections on the *National Accord* and Bill C-65 will demonstrate, the institutionalization of provincial interests has narrowed the range of "provincially acceptable" (read: decentralized) federal policy options, rendering the legislative process that much more difficult for the Liberal government.

The National Accord for the Protection of Species at Risk

Through the WMCC, both levels of government worked together to develop a national framework for the protection and conservation of species at risk. On October 2, 1996, an agreement was reached to ensure that complementary federal-provincial legislation and programs would be established in order to provide "effective" and "cooperative" protection for endangered species across Canada. The *National Accord for the Protection of Species at Risk* was a strong document that committed each level of government to "provide immediate legal protection for threatened or endangered species" (Environment Canada, 1996: 8). In effect, it was an intergovernmental pledge to enact a seamless web of federal and provincial statutes, and to provide for multi-jurisdictional cooperation in their implementation. Clearly, from the perspective of both levels of government, the development of a federal endangered species statute was understood as a joint legislative endeavour, not as a unilateral decree from Ottawa.

Although the *National Accord* provided a basic framework for Canada's endangered species protection regime, it did not spell out any clear divisions of

jurisdictional authority. It recognized COSEWIC as the independent scientific body responsible for species listing decisions, and established very broad goals concerning issues of citizen participation and awareness, development and implementation of recovery plans, and habitat protection (although it did not suggest any national standard of immediate legal protection for habitat). Interestingly, on the subject of transboundary species, the *National Accord* explicitly committed both levels of government to a cooperative, multi-jurisdictional approach, an agreement that many provinces felt was ignored in the development of Bill C-65. Thus, while the *National Accord* provided some degree of policy direction, the document was general enough to grant every government an equal degree of policy freedom.

Not surprisingly, the *National Accord* was long on prescriptions designed to avoid overlapping activities and inter-jurisdictional disputes. In order to promote this cooperative approach, the *National Accord* proposed to established a new intergovernmental body called the Canadian Endangered Species Conservation Council (CESCC). CESCC was to be composed of the federal, provincial, and territorial ministers responsible for wildlife, including the federal Ministers of the Environment, Fisheries and Oceans, and Canadian Heritage. The council was envisioned as a consensus-based intergovernmental coordinating body (although the word consensus was not used in the *National Accord* itself), providing a forum to resolve disputes, report on progress, and provide direction in implementing the *National Accord* framework. Clearly, at this October 1996 juncture in the legislative process, federal-provincial cooperation on species protection was a dominant theme. However, the spirit of "harmonized" intergovernmental collaboration embodied in the *National Accord* was not

limited to the endangered species issue; rather, it reflected both governments' shared institutional interest in decentralizing Canada's version of environmental federalism.

Provincial Interests: Reestablishing Provincial Regulatory Control

It should be emphasized that the maintenance of harmonious federal-provincial relations was a high priority within the Canadian environmental policy arena, and was not a trend unique to the species at risk process. Through the consensus-based intergovernmental body of the Canadian Council of Ministers of the Environment (CCME), Ottawa and the provinces had, since November of 1993, been working to reduce federal-provincial overlap in the environmental field and to streamline their regulatory duties (Harrison, 1996). On November 20, 1996, less than two months after the signing of the *National Accord* and the introduction of Bill C-65, the federal and provincial governments announced that an agreement in principle had been achieved with respect to the *Canada-Wide Accord on Environmental Harmonization.* Clothed in such technical jargon as "rationalization" and "harmonization", the intentions of this agreement were quite clear: to minimize overlap and duplication, to increase intergovernmental collaboration, and, most importantly, to promote a decentralized implementation of national environmental standards (Harrison, 1995).

In the context of declining support for environmental issues, shrinking budgets, and political uncertainty in Quebec, the CCME emphasized the need for a "single-window" approach to the management of Canada's environmental protection. In essence, the Harmonization Accord was a commitment to maintain an intergovernmental peace, at

least on the environmental front, by devolving regulatory power and decision-making control onto the provincial governments. This negotiated peace, however, was contingent on two changes sought and obtained by the provinces within Canada's environmental policy regime (Elgie, 1998).

First, the provincial governments wanted to reestablish the jurisdictional balance of power in their favour. Their aim was to ensure that they could unilaterally regulate the environment on provincial Crown lands without threat of federal intervention, especially in terms of environmental assessment and inspection activities. Indeed, the provinces wanted to avoid a regime that would place their own development projects under Ottawa's regulatory supervision. Still fresh in the minds of the provinces were the landmark Supreme Court decisions of 1989 and 1992, which forced the federal government to comply with its own non-discretionary Environmental Assessment and Review Process (EARP) guidelines on provincially-owned projects. By redefining the balance between citizens, governments, and the courts, the Rafferty-Alameda and Oldman River cases effectively forced both federal and provincial politicians to reevaluate their formerly comfortable balance of executive environmental federalism (Harrison, 1996). As Harrison notes: "The combined effect...was to force the federal government to acknowledge and exercise its considerable jurisdiction over the environment" (1995: 428). Faced with the prospect of increased judicial activism and more limited cabinet discretion, the provinces (and Ottawa) were very supportive of a "cooperative" and "rationalized" *Harmonization Accord* that promised to reestablish the federal government's traditional deference to provincial environmental authority (Harrison, 1996).

Second, they wanted to shift the process of establishing Canadian environmental standards and priorities so that these would set by intergovernmental consensus, rather than by unilateral federal decree. The provinces were only too eager to blunt the institutional growth of any US-style legalistic conventions, favouring the cozy and secretive confines of federal-provincial councils. As mentioned previously, the promotion of intergovernmental agreement through consensus-based councils enhanced the provinces' power resources within the environmental policy-making arena. By granting them an effective veto in the development of national environmental strategies and programs, these councils provided a more effective channel of influence to the more independent-minded provinces such as Quebec and Alberta. Thus, the provinces were seeking to entrench the institution of "consensus-based" executive federalism, whereby national environmental policies, such as endangered species legislation, would be negotiated through such councils as the CCME and the WMCC.[45]

Taken together, these two goals can be restated quite simply: the provinces wanted to ensure greater control over "national" environmental policy-making and implementation. To be sure, the prospect of greater citizen involvement through increased environmental judicialization threatened to undermine the balance of power between citizens and governments; the provinces, therefore, were concerned that the federal government would be forced into playing a stronger regulatory role. Thus, in the wake of Rafferty-Alameda and Oldman River, the provinces (and Ottawa) sought to promote the institutions that best served their interests of legislative authority and proprietary rights. Having committed to an intergovernmental framework of

[45] It is worth noting that many of the same provincial Ministers sitting on the CCME are also provincial representatives

harmonization and regulatory devolution, and having agreed upon a "national" approach to coordinate the protection of species at risk, the provinces were in a strong position to influence the outcome of the federal government's proposed Bill C-65.[46]

Provincial Reactions to Bill C-65

Although the context of intergovernmental harmonization may have pointed towards a decentralized federal endangered species statute, the proposed Bill C-65 was roundly criticized by those provinces most in favour of regulatory devolution. In particular, Alberta and Quebec wasted no time sounding off the alarm bells of jurisdictional overlap and duplication, objecting to Bill C-65 on the grounds that it overstepped the boundaries of federal environmental authority. Contrary to the claims of environmental critics and scientists, both provinces argued that the bill's scope was too broad, and that it smacked of the confrontational ESA. However, the criticism was not limited to these two provinces alone; Bill C-65 was *unanimously rejected* by each and every provincial government, a united stand that effectively sealed the fate of the legislative proposal.[47] Without provincial buy-in, federal rhetoric about a "cooperative" and "coordinated" approach meant very little. In short, Bill C-65 was scuttled not because of stakeholder squabbles, but because of the harsh Canadian realities of intergovernmental *realpolitik.*

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at the WMCC.

[46] Quebec did not officially sign the *National Accord*, primarily for political reasons that extend beyond the environmental policy arena. However, interviews with provincial and federal wildlife officials confirmed that Quebec was "on-side" with respect to this framework agreement, and that they fully intended to adhere to its principles.

[47] Confidential telephone interviews with B.C., Ontario, and Quebec officials, July/August 1999.

Having agreed to the *National Accord*, it can be assumed that the provinces supported the enactment of federal endangered species legislation, at least in principle. Even the most adamant supporters of provincial paramountcy over endangered species recognized the need for a federal statute, provided that it did not interfere with their role as primary landowners and resource managers. In other words, the provinces were supportive of a federal presence in wildlife management under the condition that it be limited to federal lands and species (strictly defined); essentially, they were advocating a statute that enshrined the status quo, and did not upset the delicate balance of environmental regulation. While comprehensive species coverage was a shared intergovernmental goal, it would have to come at the price of "cooperation" and "rationalization" as defined by the provinces.

Three provisions in Bill C-65 upset the provincial governments: 1) the appointment of COSEWIC members without provincial consent; 2) the federal government's control over international transboundary species; and 3) the citizen action clauses. Their objection to this first provision stemmed from the language found in Section 13 (2) of the *Act*, which stipulated that COSEWIC members would be "appointed by the Minister after consulting the Council." (Government of Canada, 1996: 9). From the provinces perspective, "consultation" was an insufficient guarantee against the possibility of a centralized listing body. They wanted more control over the decision-making processes of endangered species protection, and demanded that COSEWIC's scientists be chosen based on intergovernmental consensus.

The provinces' second objection, meanwhile, was perceived as the bill's most important shortcoming - a major jurisdictional faux pas. Echoing the industry and private

landowner criticisms outlined earlier, the provincial governments argued that the international transboundary species provisions contained in Section 33 granted Ottawa too much regulatory power, even though it applied only to animals and their "residences". As mentioned earlier, most of Canada's animals at risk range across the Canada/US border. Thus, in the words of a former Ontario Ministry of Natural Resources official, Section 33 "could, quite conceivably, apply to every species in the province with the possible exception of some obscure frog in the northern Highlands".[48] When this provision was upgraded by the Standing Committee to *require* federal involvement unless there were equivalent provincial regulations, the provinces felt that they being placed in the uncomfortable position of "having their performance judged by the federal government".[49] Having consistently rejected the safety net concept based on "federal" national standards, they were not prepared to accept this form of federal regulatory leadership. Section 33, therefore, represented a wide window through which Ottawa could stretch its management authority, and could make a mockery of the established patterns of environmental jurisdiction. According to one of Quebec's most senior wildlife bureaucrats, Bill C-65 was unanimously rejected by the provinces on these grounds alone.[50]

Linked to these international transboundary issues were the provincial arguments against the inclusion of a civil suit provision. Like industry groups, the provinces objected to the regulatory uncertainty that would be engendered by such a clause, concerned that endangered species policy-making powers would shift in the direction of

[48] Confidential telephone interview, July 1999.
[49] Confidential telephone interview with Quebec wildlife official, July 1999.
[50] Confidential telephone interview with Quebec wildlife official, July 1999.

the Supreme Court of Canada. Rather than empowering the provincial governments through decentralization, citizen action provisions would engender a more litigious environmental policy regime and place an unprecedented amount of regulatory authority in Canada's judiciary. Understood in the light of Section 33, the provinces objections become more clear: they did not relish the thought of environmental groups forcing the federal government (either politically or legally) to take action on provincial lands as a result of some transboundary animal species. There was simply too much potential for such accountability measures to drive a federal wildlife management "wedge" into provincial economic development strategies. In short, civil suit provisions threatened to remove that aspect of intergovernmental cooperation the provinces most appreciated; federal deference and discretion on endangered species matters would be undermined by the involvement of Canada's courts.

Provincial Politics Underlying the Demise of Bill C-65

Unanimity aside, certain provinces were more vocal in their criticism of the proposed legislation. As the traditional opponents of federal environmental infringement, Alberta and Quebec did not hesitate to brand Bill C-65 as yet another one of Ottawa's attempted power grabs. Both claimed that it reneged on commitments made in the National Accord to leave habitat protection to the provinces and that it was a step away from the harmonized "single window" approach to environmental regulation. As the Bloc Quebecois environment critic, Monique Guay, stated in the Montreal Gazette:

> It is impossible to protect a species without protecting its habitat. Since the provinces have jurisdiction over the habitats found within their territory, the province - in this case Quebec - is responsible for the protection of this habitat...Again the federal government clumsily encroaches on Quebec jurisdiction (1997: B9).

In the case of Quebec, the most obvious of motives can be adduced: the political necessity of keeping Ottawa's legislative paws out of provincial territory defended both federally and provincially by separatist political parties. Considering the salience of the national unity issue during this period, it is more than likely that Quebec felt it could score easy political points against a federal government that was extremely sensitive to criticism on this front. Regardless, it came as no surprise that both the Bloq Quebecois and the Parti Quebecois were unwilling to consider federal endangered species legislation that included even the slightest hint of jurisdictional overlap. In other words, the political strength of the separatist parties and the relative salience of the sovereignty issue precluded the possibility of Bill C-65's unconditional acceptance in Quebec.

Given the dearth of Liberal support in Canada's Western regions, it should come as no surprise that such resource-minded provinces as Alberta criticized the proposed legislation as being too interventionist and heavy-handed. As longtime supporters of decentralized regulation (recall the National Energy Program, Oldman River Dam, and the more recent gun control controversies), Alberta could count on the political support of both landowner and industry groups in their crusade against a strong endangered species bill. Arguing that Bill C-65 created an unnecessary overlapping of federal and provincial

duties, Alberta Environment Minister Ty Lund was quoted as saying that Bill C-65 "pretty much cuts the provinces out of the loop" (Avram, 1997: 9).

Conclusions

The provincial governments' rejection of Bill C-65 was, in many ways, a refusal to accept the possibility of federal regulatory interference in the management of "provincial" endangered species. The proposed statute did little to avail their concerns about a federal "Big Brother", and raised the spectre of an endangered species protection regime that emphasized co-optation over cooperation. The provincial governments wanted federal legislation which would help to cement a more decentralized division of Canadian environmental responsibilities; instead, they felt they were being asked to accept a regime which solidified the notions of federal leadership and provincial junior partnership. Unacceptable as this scenario was, it seems almost obvious that Bill C-65 stood no chance against the incoming tide of regulatory rationalization. Cognizant of the ebbing public interest in environmental issues, they were not about to support a bill which encroached upon "their" lands and threatened their development interests. Needless to say, legal arguments about federal jurisdiction over issues of "national concern" held little water in the intergovernmental arena of endangered species politics.

It would be a mistake, however, to view the intergovernmental conflict over species protection as an debate of purely jurisdictional proportions. As articulated more thoroughly in the previous sections outlining industry, landowner, and environmentalist interests, the division of environmental regulatory authority involves a web of

complicated and self-interested relationships between each and every actor involved in this policy debate. The provincial government does not seek a decentralized environmental regulatory regime or regulatory "certainty" for its own sake; rather, the defense of provincial institutional interests is driven by an interconnected set of material and electoral interests, neither of which can be disentangled from the other. One cannot forget that the provinces are not only governments, but landowners as well; as "Wise-Use" proponents so forcefully assert, endangered species' existence comes at a cost that is most often borne by those on whose land they exist.

The devolution ("harmonization") of regulatory responsibilities provides the provinces with greater latitude within which they can develop their own economic strategies, and reduces the degree of uncertainty that is imposed by the threat of federal intervention. For the provinces, the endangered species issue is not simply a debate about the "proper" protection of cuddly animals and pretty flowers, but also about the "proper" control over economic development. Their electoral fortunes are, for better or for worse, more often determined by the jobs they create than by the species they save. The revenues they generate to provide social programs are dependent on the success of businesses and investment opportunities within their borders. The symbiotic alliance forged between landowners, industry groups, and provincial governments, therefore, is an interest-oriented byproduct of the institutional arrangements governing Canada. If the provincial governments act as though they are conduits for certain societal interests, it is because the federal system in which we live has structured their priorities in parallel. Thus, it must be emphasized that provincial objections to Bill C-65 were not rooted in

jurisdictional concerns *per se*, but rather in protecting their own electoral and material interests.

CHAPTER VII

DISCUSSION AND CONCLUSION

The main finding of this multi-causal policy analysis is that the current lack of a federal endangered species statute in Canada is the result of an interrelated and contextually-specific package of ideational, institutional, and interest-based factors. As an intermediate policy outcome, the failure of Bill C-65 is consistent with each of these three regime components. In terms of ideas, it was found that the causal knowledge of scientists, when operationalized through Haas' epistemic community approach, did not exert a significant independent impact on the substance of Bill C-65. However, the credibility of conservation scientists' habitat protection prescriptions (in conjunction with their role as political advocates) provided the larger environmental community with an important political resource. Considering the overall weakness of Bill C-65's habitat provisions, it can be concluded that conservation scientists and their causal ideas helped bring about the downfall of a scientifically suspect proposal.

It can also be asserted that the failure of Bill C-65 is consistent with the self-interested competition of actors. From environmentalists and scientists, to the powerfully linked industry and private landowner groups, not a single stakeholder supported the passage of the federal proposal. Whether the groups conceived of the bill as too weak or too strong, the resounding rejection heard from all sides rendered the federal government's task of cobbling together a minimum supporting coalition next to impossible. Of course, this intractable interest group conflict was only made more complicated by the decentralizing demands of the provincial governments. Strengthened

by the institutional trend towards regulatory harmonization, the economically-driven provinces made it very difficult for the federal government to enact habitat-based legislation. Their objections to Bill C-65 on the grounds of jurisdictional overbearance leaves no doubt that the institutional dynamic of federalism was yet another key component in the proposal's demise.

To put it mildly, the federal government has been placed in a difficult situation: torn by competing interests, constrained by causal ideas, and bound by federal institutions. Without a tangible policy outcome, however, it is impossible to discern which combination of analytic variables best explains the current delay. Only once a new piece of legislation is proposed will such distinctions become possible (presuming that the background conditions remain roughly the same). For the time being, therefore, the most obvious conclusion of this thesis is that the current legislative delay is a function of too many antithetical interests - an intractable competition among governmental and non-governmental actors as defined by the institutional constraints of Canadian federalism.

However, in the aftermath of Bill C-65, a new, more conciliatory dynamic among stakeholder groups has taken hold. The sad state of endangered species affairs has spawned a remarkable coming together of competing stakeholders through an *ad hoc* working group known as the Species at Risk Working Group (SARWG). Disenchanted by the federal government's handling of the consultative process and dismayed by the content of Bill C-65, this informal gathering of non-governmental actors first met in April of 1998 to "develop a new pragmatic and cost-effective approach that is best for the

species and habitats involved" (SARWG, 1998: 4).[51] Thus, environmental, private landowner, and industry groups have initiated a cooperative dialogue, and have circumvented the institutions of state mediation to produce a multistakeholder blueprint for federal endangered species legislation.

Focusing on both legislative and non-legislative approaches to the problem of species endangerment, SARWG achieved consensus on a preventative package of measures that would "protect both species and their habitats, recognizing the importance of sustainable management" (ibid: 9). Their proposal involves a "two-stream" strategy, merging an ecosystem (habitat-based) approach to wildlife management with a complementary species specific approach that focuses on the protection and recovery of listed species. In terms of jurisdiction, governments are entrusted with the responsibility of working out their respective roles, so long as a "no gap" principle is ensured. Interestingly, SARWG recommends that the protection of international transboundary species be led by the *federal* government, with equivalency provisions allowing for provincial override. Echoing the advice of the multistakeholder Task Force Report from 1996, the Group calls for an independent scientific listing process (without cabinet discretion). In addition, the proposal emphasizes the incorporation of socio-economic considerations into multistakeholder recovery efforts, seeking to minimize costs incurred by communities and landowners alike. Not surprisingly, this shared cost approach is accompanied by demands for a significant financial commitments from governments, both federal and provincial. From tax structure adjustments to compensation packages,

[51] SARWG is composed of representatives from the Canadian Nature Federation, Canadian Wildlife Federation, Sierra Club of Canada, Canadian Pulp and Paper Association, Mining Association of Canada, and the National Agriculture

SARWG emphasizes the necessity of government financing in order to develop a truly successful species protection regime.

Needless to say, this instance of cooperative and constructive consultation demonstrates a willingness on the part of competing stakeholders to find an endangered species solution. While such dedication may not seem particularly remarkable, it is nonetheless crucial to acknowledge that the development of federal endangered species legislation need not be perceived in terms of a zero-sum conflict between those who support environmental causes and those who do not. If the federal government were to initiate a bill with both habitat protection and compensation guarantees, perhaps the intractable competition could be transformed into a workable solution. However, judging by the provinces' dismissal of the Section 33 provisions for international transboundary species in Bill C-65, it seems reasonable to hypothesize that any new proposal that includes federal habitat regulation on *any* provincial lands will be met, once again, with severe disapproval.

There are other signs, however, that the endangered species tide may be turning in the environmentalists favour. First, recent developments in Ottawa appear to have established a more environmentally-friendly set of background conditions in preparation for this fall's endangered species showdown. Indeed, the federal government may be initiating a "greener" agenda, to counter the attacks leveled against them by environmental groups over the course of their past two mandates. To be sure, there has been a significant change in the overall federal policy-making environment. With the successful tightening of government spending and the elimination of deficit concerns, the

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Environment Committee. It is important to note, however, that the Group has met as individuals without any official

Liberals are faced with a new dilemma of a budgetary surplus. Gone are the days of departmental program review and cost cutting, replaced by public discussion over the relative benefits of various spending programs and tax cuts. As debate concerning the substance of a "millenium" or "legacy" budget gathers steam, the federal government is weighing a more balanced set of spending options than it was only a couple of years prior. The endangered species cause, it could be argued, stands to benefit from this shuffling of federal priorities, given the harsh (fiscally restrained) climate that inhibited the previous legislative effort.

Second, it is possible that the Liberal government's electoral incentives have shifted in an environmental direction. Although I have not seen the federal government polls to substantiate such a claim, Environment Canada officials have confirmed unofficially that levels of environmental concern have been on the upswing over the past year.[52] In fact, there are further indications that the governing Liberals are growing more interested in promoting an environmental agenda during the second half of their mandate. Prime Minister Chretien was quoted in *The Globe and Mail* as saying that the environment "is a sector that is becoming - that is - important for me" (McIlroy, 1999d: A4). As innocuous as this comment may appear, it was made on the same day that Chretien shuffled Environment Minister Christine Stewart out of her portfolio to make room for former Fisheries and Oceans Minister, David Anderson. While Stewart was widely criticized as a weak environmental performer, her replacement is a senior minister with noted conservationist credentials.

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mandate, and not as representatives of specific sectors.

[52] Confidential telephone interview with Environment Canada official, August 1999.

Anderson's pro-environmental bias is accompanied by recent experiences on the intergovernmental battlefield, most notably during the "salmon war" with former British Columbia Premier, Glen Clark. Noting his firm conservationist stance with respect to salmon and their habitat, and his reported assertion that "new endangered species legislation will be pointless unless it protects the habitat of animals facing extinction", there is certainly reason for optimism within the environmentalist camp (ibid: A4). In fact, the latest *Globe and Mail* report suggests that Anderson has presented a new endangered species proposal to the federal Cabinet, one which addresses the issue of habitat protection by using the federal government's Criminal Law powers to protect species and their critical habitat on both public and private lands (McIlroy, 1999e). While the proposal would make it a criminal offence to destroy endangered species' habitat, it (apparently) does not include compensation packages; clearly, this is more reminiscent of the ESA than was Bill C-65. Although nothing is set in stone (the proposal requires Cabinet approval for drafting, as well as for the actual draft), the proposal would represent a major shift in terms of federal leadership and standard-setting. All of a sudden, it seems entirely possible that ideas, and the interests of scientists and environmentalists could trump the dominant triumvirate of industry, private landowner, and provincial interests. With environmental concern and the national economy on the rise, perhaps the Liberal government is toughening itself in anticipation of a real habitat jurisdiction battle with the provincial governments.

Appealing though this may sound to environmentalists, a less sanguine (and perhaps more realistic) view would suggest that there is no other compelling evidence pointing to a federal plan to retreat on the harmonization front; the intergovernmental

stakes involved in the endangered species issue are still too great to warrant any unilateral federal endangered species action. Slowly but surely, Canadian governments are institutionalizing a decentralized environmental regulatory regime, and their incentives to do so will not change in time to prevent federal endangered species legislation from following this path. Given the context of an ongoing, though less salient, national unity debate, the efforts to harmonize environmental management are intended as a positive step towards "renewing the federation". The restoration of cozy federal-provincial relations in the environmental policy field are part and parcel of their attempts to construct a new vision of Canadian cohesiveness and federal function without the pitfalls of protracted constitutional change. One would be surprised, therefore, if the Liberal government chose to run roughshod over provincial interests; as Schrecker points out somewhat pessimistically: "conflicts between habitat protection and property rights will mean that jurisdictional conflicts will emerge as particularly severe in this area, and that Canadians simply cannot have both the present incarnation of Canadian federalism and an effective national policy for protecting endangered species" (1999: 31-32).

Whether or not the federal government proposes a provincially-palatable statute this coming fall, the debate over endangered species protection will hardly have begun. As evidenced by the US experiences with the ESA, the politics of wildlife management occur throughout the policy implementation phase, as decision-makers are confronted with real life conflicts of species extinction and socioeconomic well-being. In a sense, the current rhetoric of cooperation, jurisdiction, and partnership means very little; only when three federal ministries, ten provincial and three territorial governments, affected stakeholder groups, and multiple aboriginal land management councils actually set about

solving issues of extinction together will we begin to understand how effective Canada's endangered species regime really is. In the meantime, our country's "green" self-image is hardly being sustained by round upon round of embarrassing political wranglings. Unfortunately, the winding path followed thus far by the federal government gives no clear indication that they are willing to take the lead in protecting Canada's endangered species.

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