

# Alternative to Anchoring in BC Marine Parks

- Ben van Drimmelen

## Introduction

There are more than 200 marine parks in BC. Many are remote, but fourteen in the Canadian portion of the Salish Sea<sup>1</sup> are particularly popular with both international and domestic boaters and are heavily used in the summer months:

1. Sidney Spit (*Sidney Island*)
2. Cabbage Island (*Tumbo Island*)
3. D'Arcy Island
4. Princess Margaret (*Portland Island*)
5. Beaumont Bay (*South Pender Island*)
6. Montague Harbour (*Galiano Island*)
7. Newcastle Island
8. Plumper Cove (*Keats Island*)
9. Pirate's Cove (*De Courcy Island*)
10. Wallace Island
11. Copeland Islands
12. Desolation Sound
13. Buccaneer Bay (*North Thormanby Island*)
14. Harmony Islands

Boaters require safe mooring when visiting marine parks, and mooring typically involves anchoring. However, that damages park seafloors. Mooring buoys can eliminate such damage, but only six marine parks have such structures to ease anchoring pressure:

- ✓ three national parks: Sidney Spit, Cabbage Island and Beaumont Bay; and
- ✓ three provincial parks: Montague Harbor, Newcastle Island and Plumper Cove.

Unfortunately, even where mooring buoys have been installed, park fee policies inadvertently encourage anchoring. Both the provincial and national parks charge \$12 to \$14 for use of a buoy - but there is no fee for anchoring. (Only Newcastle Island<sup>2</sup> goes further and actually prohibits anchoring.) The combination of a mooring fee alongside free anchoring encourages continued plowing and scouring of park seafloors by anchors, anchor chains and rode.

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<sup>1</sup> The Salish Sea includes the combined U.S.-Canada waters of the Straits of Georgia and Juan de Fuca, Puget Sound, the San Juan and Gulf Islands and extends northward to Desolation Sound and the Discovery Islands.

<sup>2</sup> Newcastle Island (off Nanaimo) currently prohibits anchoring to allow for the recovery of sub tidal and inter-tidal marine life in Mark Bay. This may end once such recovery has been achieved.

Why do park policies encourage anchoring even when mooring buoys are available? Taking this further, why is anchoring not simply prohibited in all marine parks? This article examines those questions.

## Seafloor Resources Require Protection

As the name implies, marine parks include aquatic as well as terrestrial park areas. Protection of the seafloor is even more essential than conservation of park terrestrial features because the seafloor damage is unseen.

The seafloor in marine parks provides vital habitat for a host of creatures: sea stars, sea urchins, sea cucumbers, crabs, shrimp, barnacles, mussels, chitons, snails, nudibranchs, tubeworms and ribbon worms, rockfish, sculpins, flounders and even the Giant Pacific octopus. That habitat exists at two levels:

- On the seafloor, eelgrasses grow horizontally in dense, extensive beds or meadows that provide food, shelter and protection for many organisms, including shellfish. Elsewhere, algae (commonly, “seaweeds”) cover the intertidal and a significant proportion of the subtidal seafloor. These algae also provide significant habitat and food.
- In the water column, kelps form high dense canopies above the seafloor. Like the seafloor flora, they provide habitat for many invertebrates and fish.

Those plants and their associated organisms play a vital role in the integrity of nearshore ecosystems in our marine parks. Given the diversity of marine life, anchoring in marine parks should be carefully controlled to minimize ecological impact. Some non-government organizations have attempted to make mooring less damaging. For example, the BC Marine Parks Forever Society<sup>3</sup> has provided stern ties in nine<sup>4</sup> of the fourteen popular marine parks. However, stern tying does not eliminate anchoring damage - it still requires setting an anchor off the bow.

Efforts have been made in some local marine parks to educate boaters about anchor damage. Sidney Spit has signs on the dock asking boaters to avoid anchoring in less than 10 metres of water. However, voluntary compliance is inadequate because anchoring continues. A 2006 study at Sidney Spit<sup>5</sup> reported that, even when unoccupied mooring buoys were available, 30% of overnighting boats nevertheless chose to anchor, with 85% of those boats anchored in sensitive eelgrass beds.

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<sup>3</sup> <https://www.bcmpfs.ca/>

<sup>4</sup> The nine are listed at <https://www.bcmpfs.ca/find-marine-parks/>

<sup>5</sup> Leatherbarrow, K.E., 2006; *Monitoring environmental impacts of recreational boat anchoring on eelgrass (Zostera marina L.) and benthic invertebrates in the Gulf Islands National Park Reserve of Canada*. Master’s thesis, Department of Geography, University of Victoria. 114 pp.

Allowing (and, in light of the mooring buoy fee, actually encouraging) anchoring is directly contrary to sound conservation of seafloor life in our marine parks. Park policies should discourage anchoring and promote the use of mooring buoys. Current policies accomplish the exact opposite.

## Who can Charge a Fee for Anchoring?

So, why is why anchoring not prohibited in marine parks or, if not prohibited, at least subject to a fee? Jurisdiction in the marine environment is complicated, leaving provincial park authorities in particular uncertain whether they have the power to regulate anchoring. However, a review of case law suggests that this should not be an issue.

Anchoring, and the right to constrain it, is indeed fairly complex. To begin with, everyone has a common law right to navigation, which includes the incidental right to anchor.<sup>6</sup> However, such rights must not be exercised in ways that interfere with the equal rights of others. In addition, common law rights can be altered, or even overridden, by legislation.

Do park authorities have the authority to regulate anchoring? That requires consideration of the division of powers set out in the *Constitution Act, 1867*. Under section 91, the federal government has exclusive legislative authority over buoys (s. 91(9)) and navigation and shipping (s. 91(10)). Within the province, the legislature, under section 92, has exclusive jurisdiction with respect to property and civil rights (s. 92(13)) and local or private matters (s. 92(16)). The province also has constitutional authority over the management of public lands, including provincial foreshore, under section 92(5). BC's *Land Act*<sup>7</sup> defines Crown land as "land, whether or not it is covered by water".

Anchoring, in at least some situations, is a core aspect of navigation and shipping. For example, anchoring for emergencies or repairs are included in one's right of navigation. With primary authority for navigation, the federal government, and thus Parks Canada, clearly has the authority to regulate anchoring in national marine parks.

The provincial authority is less clear. A province cannot validly enact legislation that conflicts directly with a subject area that the Constitution has assigned to the federal government. However, there is room for overlap. The Supreme Court of Canada has said:<sup>8</sup>

"In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of

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<sup>6</sup> *R. v. Lewis et al.*, 2009 BCPC 386 (CanLII), <<http://canlii.ca/t/27tgz>>, retrieved on 2020-11-16, at para 29. The court was considering regulations enacted by the federal government, in consultation with the City of Vancouver, limiting anchoring and mooring in False Creek.

<sup>7</sup> R.S.B.C. 1996, c. 245, s. 1.

<sup>8</sup> *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 SCR 641, <<http://canlii.ca/t/1ft82>>, retrieved on 2020-11-16, at para 45.

government; overlap of legislation is to be expected and accommodated in a federal state.”

In another decision, the same Court said:<sup>9</sup>

“The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers.”

Given that jurisdictional overlap is allowed, and even inevitable, how can one determine when overlap is valid? The Supreme Court of Canada has clarified that provincial laws can affect areas of federal jurisdiction as long as they don’t actually impair federal laws:<sup>10</sup>

“The difference between ‘affects’ and ‘impairs’ is that the former does not imply any adverse consequence whereas the latter does... It is when the adverse impact of a law adopted by one level of government increases in severity from ‘affecting’ to ‘impairing’ that the ‘core’ competence of the other level of government ... is placed in jeopardy, and not before.”

BC’s highest court, our Court of Appeal, allowed a mere municipal bylaw (municipalities have very limited jurisdiction compared to a province) restricting the moorage of vessels to overlap with the federal authority to regulate navigation:<sup>11</sup>

“I agree with the District that upholding those regulations does not support the corollary that any provincial regulation of moorage or anchorage would be in pith and substance an invasion of the federal navigation and shipping power.”

So, how to apply these principles to provincial power to regulate or prohibit anchoring in BC marine parks? The starting point is determining the primary purpose of such legislation.<sup>12</sup> If the primary purpose is within the province’s authority, some incidental effect on federal authority is allowed.

BC’s *Park Act* regulates the use of provincial parks, and specific provision is made for uses and structures on land (beach recreational activities) and the foreshore (docks and wharves). It is also clear that the purpose of the Act extends to the regulation of the use of park lands covered by water, including such uses as temporary boat moorage, water-based recreational activities, mooring buoys and the water-based component of boat launching facilities, docks and piers. The primary purpose of a park regulation restricting anchoring would be regulation of park use and protection of park resources. That is distinct from trying to regulate the actual

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<sup>9</sup> *Ontario (Attorney General) v. OPSEU*, 1987 CanLII 71 (SCC), [1987] 2 SCR 2, <<http://canlii.ca/t/1ftn6>>, retrieved on 2020-11-16, at p. 18.

<sup>10</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 SCR 3, <<http://canlii.ca/t/1rmr1>>, retrieved on 2020-11-16, at para. 48.

<sup>11</sup> *West Kelowna (District) v. Newcomb*, 2015 BCCA 5 (CanLII), <<http://canlii.ca/t/gfvn7>>, retrieved on 2020-11-16

<sup>12</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 SCR 3, <<http://canlii.ca/t/1rmr1>>, retrieved on 2020-11-16, at para. 25.

operation of boats or other marine vessels, which would be a federal power. Thus, the *Park Act* and its regulations, can validly be directed at protection of park seafloor resources.

## Conclusion

Both provincial and federal marine parks can validly manage or prohibit anchoring in those parks. Nevertheless, boating visitors need secure mooring in such areas. Mooring buoys can provide such security with minimal impact on park resources. However, even where mooring buoys are available, free anchoring creates a perverse incentive for ongoing damage to those resources.

Park authorities should continue to provide signage and brochures to inform boaters about the location and sensitivity of seafloor life. However, that is not enough. Mooring buoys should be installed and maintained in all popular recreational boat anchorages in marine parks. Whether buoys are available or not, a fee should be charged for boaters who choose to anchor in, and thereby damage, marine park resources. In addition, use of mooring buoys should be encouraged by being free of any fee.