**Themes**:

1) Env law embedded in envelope of principles & policies (SD, adaptive mgmt., env justice – overlap and tensions between)

2) Methods (voluntary, reg, economic incentives – context matters)

3) Institutions/orgs to administer env law (courts, Env Can, NTREE, FN)

4) Scales of govs (intnl, nat, local – Spraytech)

5) Social justice (public partp, FN, standing, who pays for damage)

6) Can in comparison to other jurisdictions

7) Questions of law reform

**Env Can: CEPA, SARA, help w CEAA, Migratory Birds Convention Act, Fisheries Act pollution**

CEPA = Canadian Environmental Protection Act 1999

SARA = Species at Risk Act 2003

UNDRIP = United Nations Declaration on the Rights of Indigenous Peoples 2007

OECD = Organization for Economic Cooperation and Development 1961

IPCC = Intergovernmental Panel on CC 1988

NTREE = National Roundtable on the Environment and the Economy 1988-2013

**BASICS**

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| **Tool box** | - Env standards - what is acceptable  - Plans and strategies - processes for d-ming  - Conservation area designations  - Economic incentives  - Information dissemination  - Property rights and contracts  - Civil penalties and liability  - Criminal enforcement and prohibitions  - Voluntary codes and agreements |
| **History** | - 50s & 60s economic growth = 60s & 70s global env movement. Thought env law would work, capitalism would fix it. 80s & 90s change in thought   * Silent spring (chemicals, pesticides), Japan Minimata disaster (toxic waste)   - Env law going up, but env getting worse   * Change in nature of env problems (future, invisible, etc.) * Badly designed * Economic growth, pop. growth, attitude problems * Human mind not equipped for this, can’t adapt   - Env law doesn’t deal well w the fundamental drivers of env problems  - Now TREND: cost increasing, local to global, temporal dimension |
| **Canada is bad** | - Resource-based economy*,* big country*,* lack of imagination in policy dev  - Political system – first-past-post means seats not truly representative  - Conference Board of Canada (2012) Report Card:   * 15th out of 17, “C” grade on env performance, need to do more |
| **Tragedy of the Commons**  (Hardin) | - Best for individual is not good for collective – resource gets overused and degraded. Will ruin all. (ex. Canada’s collapse of cod fisheries)  - Need behavioral modification; incentives, command regulation |
|  | - Law of E: embed through all legal system  - E Law: discrete compartmentalized body of law  - Major flaw of env law is that it tends to be about mitigating and maintaining harm at a “tolerable level” – what is this? Changes |

KEY PRINCIPLES

SUSTAINABLE DEVELOPMENT

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| **Basics** | - Idea arose in late 80s. Definition from CEPA 1999:   * Dev that meets the needs of this gen w/out compromising the ability of future gens to meet their own needs |
| **Principles** | - Integration of env policy in development d-ming   * External (btwn policy sectors), internal, disciplinary, harmonization (intnl cooperation) * Stocklholm and Rio stated a need for this   - Sustainable use and conservation of NR   * Ex. NZ – Resource Management Act 1991 – sustainable management, use resources *while*. “At the same time” (balancing) or “so long as” (either or)?   - Intergenerational equity (pass on to children – don’t know future needs)   * Stocklhom and Rio   - Intragenerational equity (w/out this can’t have intergenerational equity)  - Precautionary principle   * Act despite uncertainty. Err on side of caution. No interference * “Irreversible effects” vs. “likely damage, harmful effects” * Spraytech   - Internalization of costs (polluter pays - what cost, how to determine?)  - Adaptive management (Holling) (not well recognized in Can policy)   * Despite uncertainty, must act, try diff regs. Interfere, small scale * Flexibility rather than rigid blueprints   - Ecological modernization (influential in EU and Japan)   * Economic prosperity and env protection can go together * Business case for improved env behaviour – innovative tech, buis acumen, managerial creativity |
| **Procedural Principles** | - Env info (informed decisions)  - Public participation:  - Env assessment (only deals w known threats) |

ACTORS

GOVERNMENT

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| **Levels of Reg** | - Decentralization/local (Revesz):   * Race to the top – competition btwn jurisdictions * Democratic self-determination * Costs less, standards tailored to local ecosystems   - Centralization/federal (Engel and Esty)   * Prevents race to the bottom and spill-overs of problems * Better/more resources, only one regulatory process * Avoids risk of independent interests getting in the way. * We’re more likely to make sacrifices if everyone else is too   - Subsidiarity principle: Ppl can make decisions that concern themselves, should only delegate to a higher level if they can’t handle it.   * Criteria: sufficiency, benefit, close to citizen, autonomy * Empowers ppl to be active and creative * Treaty of the European Community, Spraytech |
| **Constitution** | - National Cs that have env clauses have better envs (Boyd) – not in Can, env provisions must be tied to other source of power in C   * China only ideas, South Africa and Germany have teeth   - S.91 = fed powers:   * Functional: Navigation & shipping, sea coast & inland fisheries, fed works & undertaking, Abs & Ab lands, canals, harbors, rivers and lake improvements - Fowler, Friends of Oldman River * Conceptual: POGG, taxation/raising money, trade & commerce, criminal law, public debt & property (spending power) - Crown Zellerbach, Hydro-Quebec * Proprietary: federal lands, etc.   - S.92 = prov powers:   * Matters of purely local or private nature, prov property and civil rights, C&O of non-renewable NR, forestry and electrical energy, C&O of prov land, mines & minerals   - Shared: Agriculture, companies, some crim law   * Paramountcy (Multiple Access v McCutcheon) can’t comply w both * Interjurisdictional immunity – specific no-go area   - **Aboriginal jurisdiction** |
| Fowler v The Queen (1980) | - Logging that could damage salmon. Debris could enter coastal waters.  - Feds lost, provision too broad – need to link action and harm to fisheries |
| Friends of the Oldman River v Alberta (1992) | - Feds can use EAs to look at projects in prov (prov dam project)  - EA procedures supported by a variety of C heads of power |
| R v Crown Zellerbach (1988) | - *Ocean Dumping Control Act* upheld under POGG as having a singleness, indivisibility, and distinctiveness that separates it from prov concern  - POGG = matter of national concern, deals w what provinces can’t. |
| R v Hydro-Quebec (1997) | - CEPA fed toxic substance reg upheld as a crim power: env protection is a public purpose sufficient to support crim reg, protects human health & life  - Crim = public purpose reinforced by a penal sanction. Broad lang for env is acceptable b/c problems are broad and unknown |
| **Spraytech v Hudson** (2001) | - **Municipality** enacted bylaw restricting pesticide use – health driven  - Ms are stat bodies, can only exercise powers given + “general welfare”  - Bylaw supports PP and subsidiary principle  - *All* gov levels may act on the env as long as no conflict. M can make regs more demanding than prov or fed, but not less so |
| **Fed-Prov Relations** (Harris) | - **Unilateralism**: Separate but keep an eye on each other, rivalry, duplication (popular 1960s – 80s)   * Env groups like it b/c tough, independent fed gov   - Cooperativism: Share info, common standards, joint assessments, etc.   * Eliminates overlap, but can water down standards   - Reationalization: Divide up tasks and obligations   * Each level can do what it does best, loss of mutual oversight   - Can currently btwn cooperativism and rationalization. Current fed gov trying to minimize its role   * Canada-Wide Accord on Environmental Harmonization (1998) tried to get fed-prov cooperation, consensus on standards, packages that cover lots of topics |

NON-GOVERNMENTAL

1. General public (including community groups, NGOs, individuals)
2. Aboriginal peoples
3. Business/corporate actors

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| **Public Participation** | - Largely about accountability and legitimacy. Env access to justice literature says we need to extend scope of accountability to corps, otherwise delegation could undermine public accountability   * NPRI a good step. Issues of standing – Bills of Rights help   - Theories:   * Rational elitism: d-ming requires levels of expertise ppl don’t have * **Liberal democracy**: Need frameworks for ppl to get info and have input, Parliament too remote. *At the heart of many Can systems* * Deliberate democracy: Direct partp, town halls etc. * Env justice: Need equity in distribution of costs & benefits of the ways we use the env   - Biggest opportunities in fed and prov EAs  - Can bring up NIMBY, undermine d-m (ex. wind farm Nantucket Sound) |
| **Types of Rights** | - **Procedural**:   * Aarhus Convention 98 – gives rights to public, obligations on parties regarding: * - **Access to info** * - **Public partp in d-ming** * - **Access to justice** (ex. Friends of the Earth). Standing, funding   - **Substantive**: Content of rights? Limits?  - Can has some statutory **Bills of Rights** to address these issues   * Yukon: “Right to a natural, healthful env” - balance env and econ * Ontario: Procedural only, right to comments, request investigations, review adequacy, etc. * Proposed fed Bill C-469 (An Act to Establish a Canadian Environmental Bill of Rights): Narrowly rejected in 2011 |
| **Corporate/ Business Actors** | - Biz often target of env reg, NGO watchdogs, social investors  - Theories for business interest in the env:   * Business theory: Good for biz, shareholder values, avoid env tax * Political theory: Lobby to create favorable milieu for operations * Stakeholder theory: Shareholder impact on biz behaviour * Ethical theory: Moral responsibility, social license to operate, CSR – can be sources of env innovation & improvements (watchdogs)   - Fiduciary duty to stakeholders can raise the bar and/or restrain  - Watch out for greenwashing |

ABORIGINAL INTERESTS

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| **Aboriginal**  **Actors** | - Special stakeholders in env, have some C control over NR on their land  - Rights: CL, treaties, intnl law, C   * C s.91 = fed authority “Indians and Lands Reserved for Indians” * C s.35 = recognize & affirm existing Ab/treaty rights – can be reg * Indian Act s.88 = prov laws can apply to Ab peoples, not lands, where they otherwise wouldn’t be able to, laws of gen app   - UN Declaration on the Rights of Indigenous Peoples, 2007 (Can), gives Abs the right to conservation and protection of their lands and resources   * “States shall establish and implement assistance programs for Indg peoples for such conservation and protection” (Article 29.1)   - Theories: Ab peoples as:   * Guardians of the env – protect Ab rights = protect env * Env architects – created relationships, co-evolution of land * Misguided envms – all humans guilty of harming env * Forsaken envms – connection gone, no relation to env stewardship * Env victims – dams, mines, etc. (Kashechewan water pollution) * **Env innovators** Can – expertise and proximity to land, build on it   - Types of laws: Ab law (customary), Ab rights (recognized in Can legal system), Treaty provisions (historic & modern), Leg governing Abs, Env leg that touches on Ab issues  - **Duty to consult**: Closely related to partp of Abs in env d-ming   * Haida Nation v British Columbia (2004) * Taku River Tlingit First Nation v British Columbia (2004) * Mikisew Cree First Nation v Canada (2005) |
| **Aboriginal Rights Cases** | - Calder v British Columbia (1973): Rights not a derivative of Crown, associated w use and occupation  - R v Sparrow (1990): Reg doesn’t extinguish s.35 rights – existing rights, can be infringed upon following certain rules & procedures  - R v Van der Peet (1996): Rights = integral to culture pre-contact  - Delgamuukw v BC (1997): Title based on prior use & occupation. Limits to rights - Inherent limits, gov can infringe on land-based rights  - Tsilhqot’in Nation v BC (2007): Clarify title, **only feds can regulate and infringe on Ab rights** |
| **Aboriginal Treaty Rights** | - Historic treaties (peace and friendship treaties):   * R v Marshall no.1 (1999): Interp of 1760 treaty recognized Mi’kmaq right to catch and sell. Interp ambiguity against Crown * R v Marshall no.2 (1999): Treaty rights subject to Can law (ex. fisheries management laws). **Rights can be infringed upon**   - Modern treaties (negotiation better than litigation): Features:   * Fee simple title to small portions of land trad used and occupied * Rights to hunt, fish, trap over it and larger surrounding area * Rights to advis gov or share in env d-ming (ex. land use planning) * Financial compensation * Income support for Ab hunters |
| **Legislation governing Abs** | - Indian Act 1876:   * S.18: Reserves held by Crown for use and benefit (trust, fiduciary) * S.57: GiC can make regs authorizing license granting to cut timber * S.73: GiC can regulate a lot (animals, weeds, dogs, sanitation, etc.) * Not participatory, discretionary, paternalistic, no Ab customary law considered, not a democracy, no duty to protect env   - First Nations Land Management Act (1999):   * Abs can opt out of LM provision of IA by negotiating agreement * Can enact own land codes, funding agreements * Limited self-gov, supervised by feds, prov env laws are base line |
| **Legislation affecting Abs** | - SARA: Ab identified env stakeholder and carved a niche in d-ming   * S.8.1: National Ab Council on Species at Risk * S.15(2-3), s.18: COSEWIC involves Abknowledge * S.66(1)(d)(2): Mgmt plans for species of concern * S.83(5)(b): Possession exemptions   - CEAA:   * S.5(1): Env effects include impacts relating to Abs * S.19(3): EAs must take Ab knowledge into account * S.105: Agency’s object is to consult w Abs on policy issues |

SOURCES OF LAW

COMMON LAW

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| **Modern use of CL** | - **Limits**: imprecise standards, restrictions on standings, reactive & adversarial, evidentiary challenges (causation), inadequate remedies, haphazard dev lof law, litigation time and costs, hard to use when no specific person has suffered (env at large, animals, NRs, etc.)  - **Advantages**: Focus on justice of indv (don’t need reg to do it), adaptable & flexible, range of remedies, can compensate ppl affected, shifts w social values (civil rights, status of women, etc.)  - CL has been largely overtaken by leg |
| **Property and K law** | - K = Define env responsibilities btwn parties  - Property = Easements, covenants riparian rights  - Negotiated agreements btwn indvs, corps, and state |
| **Torts**  (goal is compensation) | - **Private nuisance**   * Material injury OR unreasonable interference w reasonable use & enjoyment of land (St.Helen’s Smelting Co v Tipping) * Interference requires a balancing – utility of activity, reasonableness of land use, location, duration, foreseeability, etc. * Best approach for protecting interests in land, doesn’t cover health   - **Public nuisance**   * Behaviour that unreasonably affects comfort of life of many: Protects common areas/amenities, not enough to have lots of ppl * Standing: Special Injury Rule – private P can only claim if damage is more specific to them than to everyone else, or get AG to do it * **Obstacles for use in CC**: Target, remedy sought? Problems of proving causation, proximity, and of being pre-empted by reg. Not designed to protect property rights. No good remedies (injunctions & compensation not enough), not generally justiciable, too much policy, too ambiguous * Ex. Connecticut v AEP (2011) USSC blocked claim to discipline power corps for GHGs as matter for gov reg rather than judiciary   - **Trespass**: Direct physical interference to property, no damage necessary  - **Negligence**: Legal duty of care, breach, causation, actual damage   * Duty is to avoid acts that you can reasonably foresee would be likely to injure the other party * Useful for CC? Often missing requisite proximity, duty of care might be met by complying w regs |
| **Rylands v Fletcher** (1868) | - Reservoir on property, leaked into mine shaft  - Test: potentially dangerous substance brought onto land that is not naturally there, escape (accidental), damage, liability (only need AR, defence of due diligence, doesn’t extend to acts of god)  - Can be used for cases of personal injury, broader than public nuisance, and not tied to balancing of social utility like private nuisance |
| Smith v Inco Limited (2011) | - **Private nuisance** claim shot down – no material injury, property value loss b/c of public concern, not nickel itself. Nickel not harmful to health  - Didn’t meet Rylands v Fletcher strict liability test, and made it hard to use. **Facility not unnatural b/c of zoning, release was intentional**  - Significant for ongoing relevance of CL in modern env pollution |
| **Statutory Defence Doctrine** | - Madrake Management v TTC: Toronto transit noise, private nuisance. Train great social utility + legal authority to create the nuisance b/c of leg that requires it to operate (unavoidable consequence, no other way)  - Sutherland v Vancouver Intnl Airport Authority: Case for noise of new runway. Unsuccessful, airport stat backing  - Susan Heyes Inc v South Coast BC Transportation Authority: Business on Cambie lost $ from train station construction, private nuisance. Stat |
| **Public Trust Doctrine** | - Conveys a fiduciary relationship btwn state & citizens, asset is NR  - Gives a right to manage and use resources  - Seen in Canada (R v Lord, R v Meyer, Canada v PEI – fish and waterways) British Columbia v Canadian Forest Products Ltd (Canfor) (2004): Forest fire, BC suing as property owner and as rep for ppl of BC.  - Types of value: use value (loss of timber), existence value (value of NR for future gens), intrinsic value (beauty, etc.) |

DOMESTIC LEGISLATION

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| **Federal Leg** | - Authorities:   * Environment Canada, Parks Canada, Fisheries and Oceans Canada, CEAA, Transport Canada, Indian and Northern Affairs Canada   - NTREE = abolished 2012 |

INTERNATIONAL ENV LAW

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| **Basics** | - Purposes: Emerged to address tragedy of the commons   * Framework for cooperation for global env problems * Establish rules by which states can access NR (sea bed minerals) * Establish standards for env mgmt. & sustainability govs can adopt * Avoid race to the bottom, set level playing field * Mechanisms for peaceful resolution of env disputes   - Sources:   * **Customary intnl rules**: obligation, don’t need a treaty (ex. notify & inform states of major env impacts & risks, equitable use of shared resources, avoid injury to neighboring states) * **Conventions/treaties**: Vienna Convention on the Law of Treaties 1969. Ratification, multilateral, bilateral, regional. Lots in the 90s * **Decisions of judicial/arbitral tribunals**: Trail Smelter case – states can use NRs as they see fit as long as no harm to neighbors. Soft law (principles only) & hard law (like leg), *jus cogens* (peremptory law). States, peoples, indvs, intgov orgs, NGOs * **Decisions of intnl institutions** – limited ability to enforce * Opinions of esteemed experts (ICJ) – a possibility   - Major tension is btwn developed & developing countries   * Can’t all contribute equally, disproportionate effects & polluting * Common but differentiated responsibility: Some states have bigger historical impact & more resources now, so have a responsibility to take the lead. Focus on financial resources and eradication of poverty – Convention on Biological Diversity 92 |
| **History** | - Phases:   * 1. Permissive (prior to 1950) – do what you want in your own backyard. Changed by Trail Smelter 1941 (reflected in Stockholm) * 2. Env restrictions on areas beyond nat jurisdiction (1950-70) – Oil tanker spills shifted idea that beyond borders is a free-for-all * 3. Env restrictions on activities/areas w/in nat jurisdiction (1971 on) – States’ backyards have global impact, Common Heritage of Humankind principle (all need to care, intnl community, env)   - Milestones:   * Stockholm Conference 1972 – comprehensive system of IEL, move away from Trail Smelter, more focus on env harm, less thresholds of injury, affirms right to exploit NRs but not in a way that causes harm beyond nat jurisdiction * UN “Our Common Future” report 1987 – idea of SD * Earth Summit in Rio 1992 – harmonize tension of econ and env, led to many important declarations and principles (PP) * Johannesburg World Summit 2002 * Rio + 20 UN Conference 2012 |
| **Cases from ICJ** | - See handout. Not many cases and not effective in driving change:   * Remedies might be deficient * Politics – parties might not want to challenge each other * Many states don’t accept jurisd of intnl arbitrator, sovereignty |
| **Intnl Law Incorporation** | - Distinguish source of law  - Treaties: 3 methods of incorporation:   * 1. Leg reference to original treaty, says it has legal status in the nat * 2. Reformulate treaty obgs according to protocols and lang of nat * 3. Say laws already in line w treaty obgs, don’t need to do more * - Can takes UK approach – Crown can ratify w/out domestic leg giving effect.   - CIL: automatically part of domestic law, no formal leg needed   * If nat leg affirms rule contrary to CIL, domestic leg prevails   Intnl law as **interpretive tool**:   * If ambiguity, interp in a way consistent w intnl obgs (National Corn Growers Association v Canada) * Even if not fully incorporated in Can law (R v Baker)   - Feds can’t make treaties that encroach on division of powers   * But POGG might let them encroach pursuant to treaties   - Intnl law mentioned in both Sprayetch (PP) and Hydro-Quebec (intnl law evinces values), but very general and vague |

ENFORCEMENT

REGULATION (command and control)

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| **Basics** | - Abbott: Prescriptive nature of reg + imposition of negative sanction  - BC Env Mgmt Act 2003: Definitions fairly ppl-focused  - CEPA s.185: Can’t transport dangerous stuff, unless licensed to pollute  - System = ppl must comply w gov, prop rights can’t come before the state   * Comes from idea that use of land is not independent of others   - Gov supervision is fundamental to reg enforcement & implementation |
| **Tools:** | - General approach is “dilute & disperse”, not total elimination  - Harm = Figure out your goals by distinguishing between:   * Degradation of recipient env media (air, water, land), and * Protected end-points (human health, animals, ecological process)   - **Pollution situations: At what point to reg?**   * 1. From stationary sources (ex. factories) * 2. From mobile sources (ex. ppl and cars) * 3. Waste deposition (ex. landfills) * 4. Harm from dangerous products (ex. BPA ban in child toy)   - Consider: Politics & public attitude, intnl trade & econ relations, corp behaviour, technology |
| **Tool: Licensing** | - Usually relate to specific facilities (point source), provisions relate to standards, discretionary. Don’t generally displace CL rights  - Designed to prevent/minimize a particular type of harm |
| **Tool: Env Standards** | - UK Royal Commission on Env Pollution 1998: env standards involve value judgments on acceptability of env modification. Formally stated after consideration and exert influence on activities.   * Not objective (politics, economy, public pressure) * Controversy about disputed science   - **Target stds**: Focus on effects of emissions & activities:   * Receptor stds: Focus on particular env (ex. fish habitat) * Ambient stds: Establish ceilings of pollutant in a medium   - **Source-based stds**: Focus on polluter source:   * Performance stds: Limit how much emitted, leave how to source * Process stds: Limit activity itself * Products stds: Characteristics of a product, qualities & dimensions (ex. BPA in baby bottles) |
| **Other types of Regulation** | - Env Impact Assessments (more info = better d-ming)  - Parks & protected areas mgmt.  - Public partp in reg d-ming |
| **CEPA** 1999 | - Focus on pollution, esp toxic substances & hazardous waste  - Principles: s.2 PP   * Shift from preventing effects to preventing creation * Virtual elimination – cumulative toxins too small to quantify * Ecosystem approach, PP * Intergov cooperation * Science-based d-ming – Act to reflect science, not politics   - Methods:   * Licensing, permits, guidelines & codes, collaboration, info dissem * S.54 sets ambient stds – not legally enforceable, but benchmark   - Criticisms:   * Lack of accountability (discretion & expertise) * Cost & efficiency considerations = uniform app, no cost/other consideration for unique areas * Impact on private property rights |
| **Enforcement** | 1. **Cooperative**: Persuade & bargain w corps to comply, env not true crimes  2. **Punitive**: Penalties required for protection, recognize env harm   * Ex. Hydro-Quebec: SCC views reg offence as crim in character, CEPA   3. **Responsive**: case-by-case for most effective approach, go up the ladder (Braitwaite – education & negotiation 🡪 notices 🡪 crim)  - In general, Can env offences are reg/public welfare offences, strict liability   * Sault Ste. Marie: **Due diligence defence** = rsble belief of mistake, or rsble care in circ. Consider: efforts to solve prob, response time, preventative systems, tech limitations, nature/gravity of harm   - Crim liability and reg offences:   * BC Wildlife Act: s.84 creative sentencing – discipline options * Ontario Env Penalties Reg (EPA 2007) – most offences are absolute liability, no due diligence defence. Stricter than rest of Can * Idea of ecocide (Higgins)   - Mechanisms:   * Admin sanctions (money), inspections, audits, rewards for good * Private prosecutions (suits, judicial review of gov action) |
| **Regulatory Innovations** | - Command reg has bad rep associated w perceived high econ costs and inefficiencies, too many vested interests, and impact on private property  - To mitigate, countries (esp EU):   * Integrated pollution control systems: Comprehensive approach to reg all pollutants together rather than in silos – synergistic effects * Extended producer responsibility and product stewardship * Promoting reg flexibility: ex. corp w good record = less audits etc. * Alternative sanctions: ex. name and shame |

ECONOMIC INSTRUMENTS

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| **Economic Policy Instruments (EIPs)** | - More popular (flexible) as we shift away from rigid C&C. But still need reg   * Same outcome, lower cost. Fill the gap of C&C that once you’ve met the law you’re good. Take account of diff circumstances of sources   - OECD: “Is that affect costs and benefits of alternative actions open to econ agents, w the effect of influencing behaviour in a way favorable to the env  - Principles behind EPIs:   * User pays: Pay for resources used, quantification of costs * Polluter pays: Pay for pollution, creation of externalities * Internalization of env costs: Pay for externalities created * Beneficiary-compensation: Compensate for things good for others   - Rio Declaration of Env & Dev 1992 principle 16: Encourages internalization of costs & use of EPIs to make polluters pay  - Free market environmentalism: Anderson - “no one washes a rental car”  - Market pathologies:   * Externalities (uncompensated side-effects, 3rd party) * Myopia (short-term orientation) * Degradation of quasi-public goods (ocean, atmosphere, etc. only seemingly infinite, market doesn’t know when to stop, ToC) * Lack of valuation of env goods & services (utilitarian, Canfor) * Addiction to econ growth, inability to scale growth w/in biosphere   - Davied Driesen: Gov drives demand through policies. EPIs promote efficiency, dissemination of tech, not innovation (ex. hybrid vehicles Cali)   * **Prof agrees – success and efficacy of EPIs depends critically on the gov in place**   - Classification of EPIs by OECD: Price-based, tradeable env rights, info   * Taxes, levies, etc. – price signal – gov sets price for env use * Subsidies – price signal – supports things we think are good * Deposit-refund systems – recycling * Market creation – C&T, create an artificial market * Financial enforcement sanctions – fines, assigns liability, reg |
| **Tax** | - Arthur Pigou: Finding optimal level of pollution   |  |  | | --- | --- | | Pros | Cons | | - Gov price, politically accountable  - Market determines env behaviour  - Ongoing financial incentive  - Price certainty in market  - Already existing system | - Politically unpopular, stigma  - Socially regressive, inequities  - Complex  - Uncertainty of env results | |
| **Cap and Trade** | - Ronald Coase: No gov, market solution. Assume property rights   |  |  | | --- | --- | | Pros | Cons | | - Gov set env std/behavior, certainty of env outcomes  - Market determines price  - Incentives attach to marketable property rights  - Good for large point-source emitter  - Allows env groups to partp | - Potential lack of competition  - Determining allowances?  - Who gets initial rights?  - Uncertain market price  - Potential high transaction costs  - Not good for diffuse pollution  - Creation of “hot spot” regions  - Potentially contentious ($ for biz) | |
| **Canada & EPIs** | - Canada in the OECD (David Suzuki): Near the bottom for use of env taxes  - Dept of Fisheries and Oceans has C&T for some fish species (1982)  - CEPA ss.322, 328: Tradeable allowance production system, deposits, fees |
| **BC Carbon Tax** (2008) | - Rate on July 1 2012 = $30/CO2 equivalent emissions ($5/year increase)  - Offset in other taxes, revenue neutral – more reductions for poor  - Stuart Elgie, from Sustainable Prosperity:   * Fuel use down ~16% compared to Can, GDP stayed similar * Has been tax-positive positive for BC * BC = lowest fuel use and lowest income tax, healthy econ w fast-growing clean tech sector * Economic signals that reward positive behavior = good policy |

INFORMATION GATHERING

More info = better public partp, transparency & accountability, education

Requirements to gather & disclose info can be on public or private sector

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| **National Pollutant Release Inventory (NPRI)**  Env Can – CEPA - NPRI | - Can’s publically accessible inventory of pollutant releases and disposals  - Started w tragedy in India – ppl to be more aware of env dangers here   * “Right to Know” leg in US – let pub know if need emerg steps, need to move away. Implicit is that companies w dang subs will face pressure * Can followed suit in ’92 w leg under ’92 CEPA, including NPRI   - NPRI has 2 components:   * 1. Mandatory reporting by certain site-based facilities * 2. Public access in form of database organized by Env Can   - Reqs for something to be reported: 1. Employee threshold. 2. Concentration threshold. 3. Quantity threshold  - Limitations:   * Small facilities not captured by regs * Focus on chem release, so if not released not reg (ex. cosmetics, food) * Confidentiality means some stuff not disclosed * Env Can doesn’t have resources to actually monitor & enforce   - Great Lakes United and Mining Watch Canada v Minister of the Env and Mining Association of Can (2009): Subs being used weren’t reported, gov had to include mining chems and subs as being required to be reg |
| **Corp Financial Reporting & Securities Reg** | - Only prov securities regors – work together to make “nat instruments” (NIs) designed to ensure companies conduct w integrity, disclosure, etc.   * Ex. NI 51-102, Continuous Disclosure: Reports to explain important trends & risks affecting financial statements * Financial report = env report b/c env performance may be $ relevant * Opp for disclosure, but quality has been shoddy   - Ontario Securities Commission report on env reporting: Staff Notice 51-716   * Env matters found in voluntary repts, not securities reg filings. * Often boilerplate disclosure (not for investors), not in timely manner (undermines predictions), not integrated in financial reporting   - Tried to remedy, Canadian Securities Administrators Staff Notice 51-333   * Significant guidance to reporting companies on env disclosures * But no separate disclosure requirements for CC |

ENVIRONMENTAL ASSESSMENTS

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| **Definition** | - Techq for gathering info on possible env effects of proposed dev or activity |
| **Key issues** | - What role should EA play in gov d-ming? – What should trigger EA? – Which env effects to be considered? – Should EAs consider alternatives to projects, **cumulative effects**? Role for EA in programs & policies (beyond projects)? – How to harmonize fed and prov EA systems? |
| **CEAA 2012** | - 1974 EA Review Office (fed) – now part of CEAA, only did big projs  - 1992 CEAA – same year as Rio, public env conscience exploded  - 2012 CEAA- Completely replaces ’92 version, big changes. Bill C-38   * Puts main responsibility on provs, feds only minor role * - Fed: Only sub if meet standards, no overlap, shorter timelines * - Eliz May: Won’t work well, fed focus on fish & migratory birds   - Rspble Authorities: Nat E Board, Can Nuclear Safety Commission, CEAgency   * Final decision w cabinet & PM, take econ interests into account, PP   - When/how triggered:   * S.2 – “designated projs”. S.10 RA prelim ass to EA (tight sched) * S.14(2) – Catchall provision for M to do EA if not listed, discretionary   - Mechanisms:   * Screening + comprehensive study OR mediation + panel review * S.26/27 gives 1 year to complete standardized ass. Big projs 2 years.   - Scope: Narrow info gathering process already largely req by RAs on projs   * S.2 = env (broad def). S.5 – env effects (all fed). S.19 = factors   - Public Partp: Not enough time, “interested party” limiting (Doelle)  - Prov vs. fed process:   * **Substitution** – where M thinks approp to do at fed level * **Equivalency** – prov’s process meets reqs, can do EA. M decides – can exempt lots of projs on basis of adequate prov EA (Doelle)   - Major probs w new Act: Narrowing of designated projs, discretion, considerations limited, Unilateralism (fed gov stepping out, see pg 4)  - Stuart Elgie: New Act weakens EA   * Equiv assumes provs can handle fed issues, time limits not long enough   - Brenda Kenney: New Act good   * One-process-one-review clarifies, consistency and predictability * Generous timeline, longer doesn’t mean better (Ex. Mackenzie Valley)   - Bruce Pardy: EA itself not good way to protect env   * All discretion in gov. Equates public partp w having a say * Better to just have statutes w clear rules – we know impacts by now * Gov better seen as rule makers than as problem solvers   - **Strategic EAs** go beyond proj level to env effects of gov policies, programs & plans. EU best at it.   * Fed Cabinet directive in 1990 made SEA a req for proposals when important env effects likely. In 2004, public reporting mandatory after   - BC’s EA Act, 2002, administered by EA Office in Min of Env:   * Sets thresholds for EA that excludes many projs, broad discretion * Haddock report: * - Gap btwn leg claim EA does for env prot & what courts say it does * - Not equivalent to CEAA, would be improved by being more similar |

CASE STUDY: CLIMATE CHANGE

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| **Basics** | - Major aspects of CC:   * Mitigation: Reduce things like GHGs * Adaptation: Improve resilience of humans & ecosystems to deal w CC.   - Can still a fossil fuels based econ – cost of our prosperity (externality)?   * ~50% of Can GHG emissions = industry, 25% = transportation * Global, ~63% = energy sector, 18% = land-use change & forestry   - Intnl CC law build on PP & common-but-differentiated responsibilities |
| **Opinions** | - **Stern Report**: Deal w CC now = 1-2% global GDP/year. Later = 5-10%  - **Bjorn Lomborg**: $ better spend on improving human welfare  - **George Monbiot**: Don’t reduce FF use 90% by 2050 = catastrophe  - **Matt Ridley**: High prob small warming, low prob big warning. Doing damage preparing for low prob (ex. biofuels could be food. Adaptive mgmt though?) |
| **Intnl Milestones** | - 1979 first World Climate Conference - 1988 IPCC  - 1992 UN Framework Convention on CC (UNFCCC)  - 1997 Kyoto Protocol negotiated. - 2005 Protocol into effect  - 2007 Bali conference & post-Kyoto plans. - 2009 Copenhagen Accord  - Currently in limbo, Kyoto ended in 2012, no replacement yet |
| **UNFCCC**  (1992) | - Huge # of parties. Can remains a member despite backing out of Kyoto  - Goal (Art 2): stabilize GHG concs in atmosphere at low enough level to prevent dangerous anthro interference w C system   * Top is 2 degree increase, need to stabilize at 1990 levels by 2000   - Commitments for all states (Article 4(1)):   * Inventories of GHG Es & removals, programs to mitigate Es (no specific lang, useless), protect & sustainably use C sinks, cooperate in prepping for adaptation, develop new tech and invest in climate science   - Extra commitments for developed countries:   * Nat policies/measures on CC mitigation, limit anthropo Es, GHG sinks * Give $ resources to meet agreed costs incurred by devping countries |
| **Kyoto Protocol** (1997) | - Core features: Covers 6 GHGs (principally CO2 & methane)   * Dev countries collectively reduce net GHG Es by >5% below 1990 levels by 2008-2012 commitment period * Targets diff for diff countries – Can was 6%, EU 7%, most others 8% * Forest “sinks” can be used in calc of net reductions * No special obligations on developing countries – **US didn’t like this**   - Flexible mechanisms, state-to-state or company-to-company:   * Joint implementation, banking of E allowances, E trading, etc.   - IPCC report: 95% sure CC is man-made.  - Copenhagen Accord (2009): Dev countries to identify, by Jan 31 2010, new commitments to reduce GHG Es by 2020. Intnl devs affecting domestic policy   * US and Can target of 17% reduction from 2005 |
| **Canada’s GHG E Record** | - 0.5% world pop, ~2% GHGs. 2006: Can #54/56 in CC policies for dev states  - 2008, up 24% since 1990 (highest ever). 31.5% over Kyoto target  - Provs doing diff things, hard to build cooperation  - We do have improved energy efficiency – less FF per unit of production  - Domestic action options:   * Transparency reg (ex. Corp disclosure of GHG Es) * Econ instruments – most effective, clear message about cost * Command reg (stds, tech prescriptions, building regs, land use zones) * C sink protective measures (ex. forest reserves, nat parks, etc.)   - Early initiatives: Emphasis on studies, broad policies, voluntary approaches   * NTREE (Domestic E trading 2000, Ecological Fiscal Reform 2001) * Subsidies (ex. CC Action Fund) * Ratification of Kyoto, Dec 2002 – withdrawal Dec 2011   - Canada’s CC Plan 2002: Liberals, meant to meet Kyoto goals:   * No comprehensive tools to price C. Key instruments = * 1. Large final emitters (covenants w reg backstop, intnl trading ability) * 2. Partnership fun (cost-share E reductions w prov, fed, Ab, NGOs, etc) * 3. Strategic investment (in innovative tech like transit, CO2 pipeline) * 4. Coordinated innovation strategy (Tech orgs working together) * 5. Targeted measures (info, incentives, regs, tax measures)   - Harper initiatives and proposals:   * Turning the Corner Policy (C capture reg in oil sands, need to track US) * Silence climate scientists (no funding, CC positions, NTREE abolished) * Oil Sands Advocacy Strategy (dept of foreign affairs) * Sector-by-sector approach (cont. from Liberals, eg. Separate reg for heavy & light duty vehicles, targeted discrete mechanisms, follow US) * Target Coal-Fired Power Plants (new regs in 2015)   - 2007, NTREE said gov not pursuing Kyoto, will exceed by 34% - abolished |
| **Case Study: Kyoto Protocol Implement-ation Act** (2007) | - KPIA Private Member’s Bill 2006, Liberals. Not supported by Con gov, passed   * Tries to force gov to do Kyoto obgs – mandatory actions and deadlines   - 2007 M released A Climate Change Plan for the Purposes of the KPIA 2007:   * Just previous sugg measures, leave Can in breach. Failed to do plan * Failed to meet KPIA deadlines for draft prep & implementing measures   - Friends of the Earth v Canada (2008): Initiated judicial review in Fed Court:   * Appeared M directly contravened stat obgs, court asked to assert RoL * Friends of Earth have standing? Yes * S.5 impose a justiciable duty on M to prepare Kyoto-compliant plan? - Not justiciable: Cumbersome lang (mandatory mixed w permissibe), references to policy-laden considerations * Ss.7-9 justiciable? - No, regs primarily a performance of political duty not judicially enforceable. Also, Act created system of public and Parl accountability as a substitute for judicial review * Gov won – Parl’s intent that the Act be enforced by Parl – case raised political question, not legal. **Non justiciable** |
| **Provincial Initiatives** | - Quebec: N America’s first (modest) C tax in 2007. - Ont & Q: C&T 2009.  - Ont 2009: streamlines & guarantee prices for renewable eng  - Man 2008: Try to be consistent w Kyoto obgs – AB 2003: Reduce GHG Es relative to GDP through “eng intensity” targets for controlled sectors  - BC Climate Action Plan 2008:   * Outlines strategies and initiatives take it 75% of the way to goal of 33% below 2007 levels by 2020, and 80% below 2007 by 2050 * GHG Reduction Targets Act 2007. (C&T) Act 2008. (Vehicle E Stds) Act 2008. Local Gov (Green Communities) Statutes Amendment Act 2008. Carbon Tax Act 2008 * GHG Reduction (E Stds) Statutes Amendment Act 2008: landfill reg, capture & use methane * Utilities Commission Amendment Act 2008: Encourage low C projs * GHG Reduction (Renewable & Low C Fuel Reqs) Act 2008: Bring in more alternative eng * C Neutral BC gov – LEED Gold buildings, hybrid fleet cars, etc. * Subsidies (investment in low C econ) |
| **Local Gov Action: Vancouver** | - Econ incentive for cities to be good about CC – C tax avoidance  - Van the leading city in Can for action on CC. Wide-ranging policies: New buildings meet LEED gold stds, transportation (reducing downtown parking), increasing bicycle network, adopted large fleet of electric vehicles, collecting and using landfill methane since 1990  - Local management of CC: Global shift towards this method   |  |  | | --- | --- | | Pros | Cons | | - Democratic: ppl closer to decision  - Easier, shallower hierarchies  - Ability of local govs to synergize & integrate policies into one geography  - Municipalities labs for experimentation – can fulfill principle of adaptive mgmt., Spraytech | - CC needs uniform nat approaches  - Legal & $ constraints locally  - Lack of expertise  - Collective action problem, race to the bottom (backstop at higher level)  - NIMBYism (toxic dump, ex.)  - Magnify disparities (rich/poor, ex.) | |

CONSERVATION: SAVING ENDANGERED SPECIES

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| **Basics** | - Biodiversity definitions:   * Genetic: Gives species’ robustness & diversity – humans limited * Species: Range or plants &animals – building block of life * Ecosystem: Range of ecological systems – supports other diversity   - Losing species ~100 per day (estimate)  - Limitation of consv law: designed to prot geographical space, not enough  - SARA nomenclature:   * Extinct: Not verified in existence for 50 years * Extinct in Wild: Only surviving in zoos, sanctuaries * Critically Endg: Down to last numbers, precipice of Ext * Endg: Only one step more secure than critically endg * Extirpated: No longer in wild of that country * Threatened: Downward spiral, facing lots of pressures * Vulnerable/special concern: Shifting from secure status to worrying * Rare: Naturally uncommon (ex. specialized ecological niche) * Indeterminate: Not a lot of info or knowledge * Common/of least concern: No need to worry   - Entering 6th mass extinction? Extinction of bees – lose everything else  - Intnl Union for the Conservation of Nature (IUCN) Red List shows most extinctions on small islands (evolved in isolation, specialized niche)  - Threats to biodiversity:   * Habitat loss or degradation (fragmentation, pollution, etc,) * Hunting & trade in wildlife * Competition from exotic/foreign species * CC (changing precipitation, etc. Parks = no protection if migrate) * Genetic decline (loss of numbers = loss of resilience to cope) * Occasional natural disasters   - Methods of consv:   * Site-specific (in-situ): Protect where they live now (eg. Parks – SARA) * Species-based: Beyond habitat to species as a whole (ex. relocate flightless birds to island w no predators, no hunting of species, etc.) * Controlling threatening process: Fundamental threats to biodiversity * Ex-situ: Breeding programs in zoos etc., protection out of natural habitat – generally seen as desperate measures |
| **Treaties** | - Global: (aids to interpretation of nat leg). Tend not to be useful for Ca b/c generally they respect sovereignty over biological resources, are facilitative rather than prescriptive, focus on cooperation and sharing of knowledge, and offer flexibility.   * Convention on Intnl Trade in Endg Spc of Wild Fauna & Flora, (CITES). 1973. Can * Convention on the Law of the Sea, 1982. Can. Important – foundation for prot ocean biodiversity, but unsuccessful * Convention on Biological Diversity, 1992. Can. Most important we have, designed to make integrated approach to prot biodv. Says nature not just to consv, but to be sustainably used and managed – gives spcs econ value, and therefore incentive to prot. Implemented by SARA, but no econ mechanisms in SARA * See vague and discretionary lang in intl treaties - politics   - Regional: Treaty congestion, too many to be effective  - Ecosystem-based:   * Convention on Wetlands of Intnl Importance especially as Waterfowl Habitat, 1971. Can. Wetlands have immense biodv.   - Species-based:   * Agreement on Conservation of Polar Bears, 1973. Can.   - Bilateral:   * Migratory Bird Treaty, 1916: UK, Can, US. * Canada-US Great Lakes Water Quality Agreement, 1978   - Many conventions not translated into Canadian law |
| **Key Organizations** | - Non-governmental:   * IUCN: leading org in the world * World Wild Find for Nature (WWF)   - Inter-governmental:   * Commission on the Consv of Antarctic Marine Living Resources * Intnl Whaling Commission   - SARA shows importance of orgs, institutions need to evaluate & research in order for the Act to work |
| **Key Federal Legislation** | - Canada Wildlife Act, 1973: Allows for acquisition of lands by M for research, consv, study, etc. Creates “national wildlife areas”  - Fisheries Act, 1985: prohibit harm to habitat of fish, reduced by Bill-C-38  - Wild Animal and Plant Protection and Regulation of Intnl and Inter-provincial Trade Act, 1992: Gives effect to CITES  - Migratory Birds Convention Act, 1994  - Oceans Act, 1998: Framework for entity that manages national parks  - Canada National Parks Act (CNPA), 2000: Change in 1998 when phrase “ecological integrity” was embedded as a fundamental purpose: Ss.8(1) and (2): M responsible – first priority is ecological integrity (s.2 “condition determined to be characteristic of natural region”)   * Canadian Parks and Wilderness Society v Canada 2001 (Wood Buffalo case): M, on behalf of PC, authorized construction of winter road through Wood Buffalo National Park * - Court said s.8 involves delicate balancing, doesn’t require ecological integrity to be determinative factor – not sole priority * Friends of Cypress Prov Park Society v BC 2000: BC Park Act s.53 says parks to be dedicated to preservation of their natural state, as well as for the use and enjoyment of the public – judge gave emphasis of use and enjoyment   - Species at Risk Act (SARA) 2003  - Canadian Environmental Assessment Act, 2012: s.5 defines env effects |
| **SARA** (2003) | - Debate about application to prov – long time to dev, part of reluctance  - Preamble: Wildlife has value (cultural, spiritual, recreation, education, etc.)  - Institutional mechanisms:   * Committee on the Status of Endangered Wildlife in Canada (COSEWIC): Evaluates species, role in listing, classifies using best available info, including Ab TK, but no final say (M s.27) * Canadian Endangered Species Conservation Council: Collection of Ms from prov, territories, feds – harmony and collaboration in consv * National Aboriginal Council on Species at Risk: 6 reps of Ab ppls, selected by M on recommendation, advisory role. Important ex of Ab ppls issues and perspectives interfacing w nat leg and consv   - Diff consequences from classification – ss.32 & 33 only apply to EET. kill, harm, harass, capture, trade, possess etc. “Residence” is limiting  - Compt M to prepare Recovery Strategies for EET, and Action Plans. Delays:   * Expensive – no funds in midst of budget cuts * Delay of strategies = delay of critical habitat = delay of having to act   - Protection of s.58 reqs critical habitat to be identified  - SARA has capacity to go beyond feds into provs – safety net provision:   * S.34 gov can apply ss.32 &33 to spcs under prov control – but this is for “residences” and not critical habitat * Has never been used, nor has s.80 (emergency provision)   - Collaboration: Use of env tools to achieve goals – on the ground cooperation   * S.10 M can make agreements w govs, orgs, wildlife mgmt board * S. 11: M can make consv agreement w gov, org, person. After consulting w COSEWIC may establish stewardship plan w incentives and other measures to support voluntary stewardship actions taken by any gov in Can, org, or person   - EcoJustice took gov to court to implement RS for Humpbacks, successful |
| **Prot of Biodv Outside of Prot Areas** | - SARA could be used, agreements w private landowners are allowed  - Conservation covenants/easements   * BC Land Titles Act goes beyond common law – allowed to create covenants w/out having adjoining land (s.219) |