

Main Themes:

- env law has developed in a piecemeal fashion
- env law is about mitigating and maintaining harm at a tolerable level- problem is defining what a “tolerable level” is, this is why stds/regulations tend to fail
- Env is always in a state of flux/unpredictable- difficult to set benchmarks, cannot fit into silos
- CC can overwhelm all efforts to protect biodiversity/environment in general

Developments:

- 1) Economic growth and env development can go hand-in-hand
- 2) Legislation can resolve env issues- i.e. clean up pollution
- 3) Law must be married to agencies- need regulators as well as regulation
- 4) There are diff ways to approach env law- i.e. command/control reg
- ***Sig shift from CL to public reg, coupled w/ a growing reliance on int law**

Approaches to Env Law:

- 1) **Descriptive approach** = all laws that apply to env in a particular jurisdiction
- 2) **Purposive approach** = defining the law in terms of its purpose
- 3) **Jurisprudential approach** = collection of legal principles
- 4) **Problem-solving approach**- most useful, dealing w/ issues case-by-case
 - 1) What is the nature of the env issue or dispute?
 - 2) What are the relevant legal concepts?
 - 3) What is involved in applying the relevant laws to the particular problem?

Canada ranked 15 out of 17 peer countries (Conference Board of Canada 2012)

- Dimensions of performance = air quality, waste, water quality/quantity, biodiv and conservation, nat resource management, CC and energy efficiency
- Must promote economic growth w/o env degradation = sustainable consumption

Imp concepts:

- 1) **sustainability** = development that meets needs of present w/o compromising needs of future
- 2) **adaptive management** = experimental approach where policies/regulations are constantly adjusted; key focus to id and reduce uncertainty where possible
- 3) **ecological modernization** = separation of ethics from env, improvements through economics
- 4) **tragedy of the commons** = **collective action problem**- lack of control over resources sets up potential for env destruction (need behavioral changes through incentives, command reg)

Sustainability principles:

- Integration of env and development in policy-making
- Sustainable utilization and conservation of nat resources
- **Intergenerational equity** = duty to conserve resources for future generations
- **Intragenerational equity** = availability of resources within current generation
- Internalization of env costs (i.e. **polluter pays principle**, idea behind economic mechs)
- **Precautionary principle** (somewhat conflicts w/ adaptive management)
 - 1) **response to threat** of serious or irreparable damage
 - 2) **lack of sci certainty**- shifts burden of proof to developers to show a level of safety before proceeding (better to err on side of caution)
 - 3) **cost-effective measures**

Procedural Principles:

- env info → disclosure requirements
- public participation
- env impact assessments → incorporating disclosure and participation

Public Participation:

- **Decentralization**- local knowledge, local democracy, citizen involvement, greater efficiency, more experimentation/**adaptive management**, interjurisdictional competition can encourage a “**race to the top**” = improved standards / “**race to the bottom**” (if cos relocate)
- **Centralization**- more consistency, more resources, national capacity, problem w/ lowest common denom = tragedy of the commons, deterioration in stds
- **Principle of Subsidiarity** = law-making and implementation are best achieved at a level of gov't that is effective and close to the citizens affected; should only delegate decisions to a higher level that cannot be handled at lower level

GOVERNMENT

Constit:

- no explicit “env power”; s.91 = fed, s.92 = prov
- Fed constit powers are **functional** (navigation and shipping, Indians) and **conceptual** (POGG, crim law, trade and commerce)
 - POGG can be a framework to incorporate int law
- Prov powers: prop/civil rights, forestry and electrical energy, mines and minerals
- Concurrent powers: agriculture, companies
- **Paramountcy** = when legislations conflict, fed is paramount/prov inoperative
 - Operational conflict, frustration of legislative purpose, impossibility of dual compliance
 - Same applies when prov and bylaw conflict
- **Interjurisdictional Immunity** = prov law which affects a core of fed jurisdiction is rendered inapplicable

Fowler v the Queen (1980): (sawmill debris in streams flowing into coastal waters, charge under Fisheries Act although no evidence that fish were affected) **Provision ultra vires Parliament = too broad**, intruding into prov powers.

Spraytech v Hudson (2001): (municipal bylaw regulating/restricting pesticide use; statutory power to make bylaws to secure POGG in the area) **Bylaw was validly enacted, compliance with fed and prov legislation is possible.**

- Purpose: to minimize pesticide use and promote health
- Consistent w/ principles of int law, **precautionary principle = CIL**
- No operational conflict btwn bylaw and fed Pest Control Products Act; no barrier to dual compliance w/ bylaw and Quebec Pesticides Act
 - no evidence that Parliament intended to preclude municipal reg of pesticides
- Pesticides Act establishes permit and licensing system for vendors, which complements fed legislation focus on products= **tri-level regulatory regime**
- bylaw may not be prohibitory, may not discriminate unless enabling legislation so authorizes
 - overall effect to prohibit aesthetic use of pesticides while allowing other uses, discrim necessary for regulation in this case
- **principle of subsidiarity**

R v Crown Zellerbach (1988): (whether fed legislation regulating ocean dumping extends to dumping in prov marine waters) Ocean Dumping Control Act is **constit valid**- in relation to a **matter of national concern under POGG power** of Parliament.

- Logging co dredging woodwaste from ocean floor- no evidence of dispersal or any effect on navigation/marine life
- **Matter of national concern (under POGG)**- must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from prov concern
 - Prov inability test: prov failure to deal effectively w/ the intra-prov aspects of the matter could have an adverse effect on extra-prov interests
- Marine pollution= clearly a matter of concern to Canada as a whole
- Dumping in prov marine waters= single, indivisible matter, distinct from dumping in other prov waters
- Marine pollution distinguished from freshwater pollution

*Note that POGG can be used by feds to encroach on prov matters/div of powers

Friends of the Oldman River Society v Canada (1992): (seeking to compel fed gov't to conduct EA for a dam) **EA regime upheld, legitimacy of EA established** (not a regulatory regime but an info-gathering tool).

- 2 fundamental aspects of Guidelines Order:
 - 1) substance dealing w/ EA to facilitate decision making under fed power through which a proposal is regulated
 - 2) procedural element that coordinates process of assessment
 - = instrument to regulate the manner in which fed institutions carry out their duties/functions
- **Diff heads of power can undertake assessments**
 - **EA falls within POGG**; any intrusion into prov matters merely incidental

R v Hydro Quebec (1997): (whether determination/regulation of toxic substances under **CEPA** falls within fed constit power) **Impugned provisions are valid under fed crim law power.**

- Protection of clean env = public purpose suff to support a crim prohibition
- Env protection is an int problem that requires action by gov'ts at all levels
- Parliament may enact prohibitions under crim law power against specific acts for the purpose of preventing pollution
 - This does not preclude provinces from exercising powers under s.92 to regulate and control pollution as well
- In this case- limited prohibition applicable to a restricted number of substances, enforced by penal sanction and supported by valid crim objective
- **Crim law requirements: Public purpose, prohibitive, sanctions/penalties**

Fed-prov relations:

Unilateralism- each gov't operates separately, but keeps an eye on the other; offers several layers of env protection but can lead to paramountcy issues

Cooperativism- consensus approach = sharing info and developing common stds; efficient but can water down stds to the lowest common denom

Rationalization- dividing up tasks btwn gov'ts, demarcation of responsibilities

- *current system btwn cooperativism and rationalization

Canada-Wide Accord on Env Harmonization: cooperative approach to develop and implement consistent env measures in all jurisdictions, does not change constit

*In some countries: **right to a healthy env included in constitution/bill of rights**

- = enforceable/secure right, better env protection (S. Africa, Germany; unsuccessful in China)
- however, detailed env stds and rules must still come through legislation
- **effectiveness of constit norms largely depends on the willingness of courts to interpret and elaborate on their application, certainty of language, justiciability issues**

substantive rights = basic human rights

- i.e. right to life/liberty, right to privacy, right to a healthy env

procedural rights = methods of decision-making, essential to the implementation and enforcement of substantive rights

- 1) access to information
- 2) public participation in admin decisions
- 3) access to justice (i.e. judicial review, right to appeal, mediation, legal aid/intervenor funding)

NON-GOVT ACTORS = Ab peoples, general public (individuals, community groups, NGOs), business/corp actors

Ab peoples- Legislation:

- **S.91(24):** fed authority for “Indians and all lands reserved for Indians”
- **S.35:** recognizes and affirms **Ab and treaty rights**
- **Indian Act:** reserves to be held by Crown for the use and benefit of Indians (s.18); GIC may make regulations/grant licenses in respect of timber, minerals, animals, etc. (ss.57, 60, 73); general prov laws applicable to Indians (s.88)
 - Limitations: no performance stds, not v democratic, no consideration of Ab law, small size of reserves, potential for fed/prov infringement of rights
- **FNs Land Management Act:** allows opting out of Indian Act through agreement w/ Minister; power to enact own land management regimes/land codes (ss.6, 18); power to enact laws in relation to the land (s.20); requirement to develop env protection/EA regimes (s.21)
 - More democratic, considers Ab laws, offers limited self-governance, sets performance stds (perhaps not tough enough to meet)
- **SARA:** nothing in the Act shall be construed so as to abrogate or derogate from the protection provided for existing Ab or treaty rights (s.3)
- **CEAA, 2012:** effects of projects must be considered “w/ respect to Ab people”, EA must engage in consultation
- **UNDRIP** (int law): leading statement of human rights norms that apply to Ab ppl

Ab rights

- **Calder:** recognition of rights/title- pre-existing, not derived from the Crown
- **Sparrow:** s.35 interpretation, Crown cannot infringe an existing right
- **Van der Peet:** Ab rights = integral to a distinctive culture test
- **Delgamuukw:** Ab title based on prior use and occupation; inherent limit test- cannot use land in a way incongruous with significance claimed (not a freehold; land is constrained by gov’t reg (external) and inherent limits (internal))
- **Tsilhqot’in:** Only fed gov’t can infringe Ab rights (because of s.91(24))

- S.88 of Indian Act may allow some prov infringement
- **Duty to consult and accommodate:** *Haida Nation v BC, Taku River Tlingit FN v BC, Mikisew Cree FN v Canada*
 - 1) Duty can be triggered when rights are asserted, rather than proven
 - 2) Scope of duty proportional to potential impact of the decision
 - 3) Duty rests on the Crown
 - 4) Crown can delegate procedural aspects of that duty
 - 5) Existing laws can be used as the vessel for consultation, separate process not necessarily required

Treaties: create own substantial env law regimes

- **Mikisew:** consultation in the context of treaties
- **R v Marshall (no 1 and 2):** broad interpretation of treaty rights, can be infringed
- Land Claims Agreements: (i.e. Nunavut Agreement, Nisga'a Agreement)
 - 1) FS title to small portions of land traditionally used and occupied
 - 2) rights to hunt/fish/trap wildlife over it + larger surrounding area
 - 3) rights to advise gov't authorities (w/ regard to wildlife, land use, forestry)
 - 4) financial compensation
 - 5) income support for indigenous hunters

Ab-env relations: ecological protectors, env architects, misguided environmentalists, forsaken environmentalists, env victims, env innovators

*In general- Ab people are stakeholders in the env, have some unique rights to its protection

Public Participation (Richardson & Razzaque):

- Increasing demand for consultation, more transparent/accountable decisions
- Gov't should initiate and ensure participation- through education, advisory/review boards, public advocacy, hearings and submissions, litigation
- Factors fuelling growth of participation:
 - 1) increased public awareness/concern about ecological and human health
 - 2) growth of human rights in legal and political systems
 - 3) int concerns about good governance
 - 4) lack of trust in gov'ts = demand for more grassroots, direct involvement
- Sustainability- depends on **economic, social and env considerations**
- **Arnstein's ladder:** spectrum of participation- from mere notification to consultation and joint decision-making power (env law typically in the middle = informing, consultation, placation)
- **Top-down vs. bottom-up approaches, substantive vs. procedural rights, NIMBYism-** participation that can detract from decision-making
- Theories of participation:
 - **Rational elitism-** participation restricted to experts
 - **Liberal democracy-** consultation of individuals and NGOs, procedural rights and frameworks to shape substantive policy outcomes
 - **Deliberative democracy-** empowering citizens in actual decision-making
- Broader ideas:
 - **Env citizenship** = public participation to nurture env responsibility
 - **Env justice** = democratic decision-making to ensure social equity

- **Legal mechs for participation:**

- **1) constitutional** (entrenchment of substantive rights- i.e. Ontario EBR)
 - **2) participation in admin decision-making** (EIAs, SEAs, public inquiries)
 - **3) access to info laws** (env disclosure requirements- i.e. public inventories of toxic chemicals, env auditing of businesses, eco-labelling programs)
 - **4) access to justice** (judicial review, public interest litigation, class actions)
 - **standing-** courts increasingly willing to hear from env groups/individvs w/ no direct interests at stake; however, some limitations necessary to prevent floodgates (3-part test in US = injury in fact, causation, redressability)
- **Pros of participation** = democratic legitimacy, improved implementation of decisions, **subsidiarity** (reflecting local needs and circumstances)
 - **Cons** = NIMBYism, costs/delays, lowest common denom (compromises required), lack of resources/knowledge, unequal ability to participate

Corporate responsibility (Utting):

- Cos adopting variety of initiatives to improve social/env/human rights reputation
 - increased public disclosure of env policy and performance info, greater shareholder activism in decision-making, codes of conduct
- Contributing factors:
 - NGO sector has expanded rapidly
 - NGOs/activists have been critical of gov't reg of corps
 - Globalization has altered rights and obligations of corps
 - Some env/social disasters, linked to cos, have become high-profile int issues
- Win-win proposition: **good social and env performance is also good for profits**
 - CSR can enhance co's competitive advantage, can encourage innovation
 - Some initiatives (i.e. eco-efficiency, recycling) can reduce costs
 - good for staff morale/motivation
- Modern businesses must respond to concerns of multiple stakeholders (including NGOs, consumers, environmentalists and local communities), **must** be able to adapt
- Business-NGO collaboration and public-private partnerships contribute to good governance and good management (**convergence and co-regulation**)
- **Corp responsibility to corp accountability-** CSR must be articulated to be meaningful = concrete proposals and campaigns, laws, int oversight
 - Idea that cos must be held accountable through some element of punishment or sanction; moral compulsion is not suff
- Theories of CSR:
 - **Business theory:** cos act in a certain way b/c of economic value
 - **Political theory:** cos have political power, can lobby and influence gov'ts in order to regulate the env
 - **Stakeholder theory:** co is embedded in a series of relationships w/ other stakeholders, should behave in a way that considers these interests
 - **Ethical theory:** cos have moral responsibilities and values = social license to operate; imp to maintain reputation in society at large

COMMON LAW

Fed Legislation

CEPA = Canadian Env Protection Act

- Reg of toxic substances, cross-border air and water pollution, ocean dumping
- Toxic Substances List, National Pollutant Release Inventory (NPRI), industry-specific regulations (i.e. Passenger Automobile and Light Truck GHG Emission Regulations, Renewable Fuel Regulations, Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations)
 - *trend for Env Canada to focus on substance-specific regulations
- broad powers of investigation for enforcement officers, broad liability for cos
- **public participation measures:** env registry, whistleblower protection, mech to request investigation, CL right to sue for personal loss
- **mandatory consultation w/ prov, territorial and Ab gov'ts** on issues such as toxic substances and env emergency regulations

CEAA = Canadian Env Assessment Act

- Ensures that fed gov agencies take env concerns into consideration
- Assessments consider whether designated projects will have sig env effects
- 2012 Act = dramatic reduction in # of projects subject to formal EA at the fed level

SARA = Species at Risk Act

- Identifies and categorizes wildlife at risk, prohibits many activities related to them
- Considerable **public involvement**- public registry, National Ab Council

Fisheries Act

- Safeguards fish and fish habitat; prohibits deposit of deleterious substances in waters, prohibits harmful alteration, disruption or destruction of fish habitat

Other statutes: Transportation of Dangerous Goods Act, Hazardous Products Act, Canadian Consumer Product Safety Act, Pest Control Products Act, Canada Shipping Act, Marine Liability Act, Navigable Waters Protection Act, Oceans Act, Canada National Marine Conservation Areas Act, Migratory Birds Convention Act, Canada National Parks Act, Crim Code, Energy Efficiency Act

Whatever happened to Canadian Env Law? (Wood, Tanner & Richardson):

- 19th cent industrialization- laws focused on human health
- 1940s: land use and watershed planning
- 1950s: pollution began to be addressed, creation of specialized agencies
- 1960s/70s: public faith in politics to solve env problems, emergence of a system of env law = EA legislation, endangered species protection laws, specialist env agencies and courts- i.e. **Env Canada**, Canadian Env Law Assn, prov ministries
 - 1969 Trudeau's Throne Speech- promoted 5 new env statutes (**CEPA**)
 - **recognition of Ab rights, public inquiries**
 - Berger Report (pipeline assessment): idea of ecological limits to economic growth, need to consider cumulative impacts, need for caution in the face of uncertainty, imp of informed consent from Ab ppl
 - Private sector- voluntary codes of conduct
- However, Canada more of an importer than exporter of env law reform
 - Heavily influenced by US law/policy
 - Fundamental problem- approaches tend to address symptoms rather than root causes of env degradation

- 1980s: growth of int law; issues = fed-prov tensions, economic cost of reforms
- 1990s: env bills of rights in some provinces, efforts to improve env/economic integration and fed-prov cooperation; issues w/ public sector reform = massive budget and program cuts, reduced fed role in env regulation
 - Major challenges: difficulty translating sustainable development principles into practical changes, reliance on nat resources in consumption/production, public concerns about economy/employment

2001 UVic report: **Canada's env performance among worst of any industrialized country** (esp. for per capita GHG emissions, SO₂ emissions, CO pollution, water consumption, energy consumption and generation of nuclear waste)

2005: **Canada ranked 28th out of 30 OECD countries for overall env performance**

2006: **Canada ranked second to last for CC policies in 56 industrialized countries**

2009: **Canada last among G8 countries for performance in addressing CC**

- Suggestions for improvement:
 - **EPIs** (ecological tax reform, extended producer responsibility, tradable pollution allowances, financial incentives to improve corp behavior)
 - **CC policies/measures, legislative action, more citizen participation, reg flexibility** (env improvement plans)
- Innovations: EIAs, prov initiatives/C taxes, municipal plans/bylaws (*Spraytech*), efforts to consider Ab interests

Smith v Inco (2011): (class action against Inco's nickel refinery for accumulation of nickel particles in the soil of private properties) **Failure to establish private nuisance or strict liability, claims dismissed.**

- TJ: found Inco liable in private nuisance and under strict liability imposed by the rule in *Rylands v Fletcher*
- CA: dismissed both actions
- Change in soil readily ascertainable, but not harmful
 - To constitute physical harm/damage, change in chem composition must be shown to have had some detrimental effect on the land
- Alleged decrease in property values- not caused by nickel itself
- No proof of actual harm to health or some realistic risk of actual harm to health
 - **No actual, substantial, physical damage; nuisance claim fails**

• **Rylands v Fletcher:**

- Operation of refinery not considered a "non-natural" use (compliance w/ env and zoning regs = imp factor)
- No mishap or accident causing damage in this case
- **Failure to establish elements, claim dismissed**

BC v Canadian Forest Products Ltd (2004): (fire negligently caused by Canfor, resulted in loss of logging revenue for the Crown)

- 3 claims: use value (loss of timber), existence value (for future generations), intrinsic value (natural beauty)

- **Crown compensated for expenditures related to suppression of fire and restoration of burned-over areas** (= use value)
- Failure to establish other claims (narrow commercial focus = timber value)
- Accepted role of AG as defender of public interest in the law of public nuisance; usual remedy is injunctive, not compensatory
- **Burning down a public forest = public nuisance, negligence**
- *There are public rights in the env that reside in the Crown
 - Procedural right of AG to sue for their protection, repping the Crown as *parens patriae* (parent of the nation)
 - **Public trust doctrine**: fid relationship in which the state is a trustee of a nat resource, which it holds on behalf of citizens
- No legal barrier to Crown suing for compensation as well as injunctive relief
 - Crown regarded as a landowner of a tract of forest in this case
 - Public trust doctrine could apply in future cases- for env (non-commercial) damage

Possible claims/defences: focus on compensation to individuals

Nuisance (public and private)

- **Private**- based on either material physical damage to claimants' properties, or interference w/ the beneficial use of claimants' properties: **Is there material/substantial damage? Unreasonable?**
 - D's conduct may be reasonable and yet result in an unreasonable interference w/ P's property rights
 - For physical damage claims, damage = unreasonable interference (must be material, actual and readily ascertainable)
 - For beneficial use claims, reasonableness is measured by balancing competing factors (nature of the interference, **social utility** of activity, character of locale, duration of nuisance, foreseeability of damage, sensibility)
- **Public**- any activity which unreasonably interferes w/ the public's interest in questions of health, safety, morality, comfort or convenience; must affect common space
 - Usual remedy for Crown = injunction; however, damages possible (*Canfor*)
 - For private citizens who have suffered a special loss (i.e. personal injury, damage to private property), remedy = damages
 - P must be affected in some way beyond the general public
 - P's claim will be balanced against D's right to engage in the activity w/o undue restriction, **social utility** of the activity (*Fillion v New Brunswick*)
- *issues w/ causation and remoteness when dealing w/ env
- public nuisance as a basis for CC litigation → *Connecticut v American Electric Power Co*
 - unsuccessful- court did not have jurisdiction- policy issues, *FoE case*

Trespass- direct physical interference w/ another's property, actual damage not required

- Unlikely to be established in pollution cases- pollution tends to be indirect, does not physically interfere (i.e. smell or gas does not qualify)

Strict liability in *Rylands v Fletcher*- damages caused to property by the escape of a substance "likely to cause mischief"; unnatural use of D's property and some kind of mishap or accident that results in damage (i.e. flooding through mine shaft)

- 4 elements:
 - 1) D made a non-natural or special use of his land

- 2) D brought onto his land something likely to do mischief if it escaped
- 3) substance in question in fact escaped
- 4) damage was caused to P's property as a result of the escape
- Liability aimed at risk associated w/ accidental and unintended consequences of an activity (i.e. floods, gas leaks, chem spills, fires), does not extend to "acts of God"
 - D will be held strictly liable for damages that flow from mishaps or misadventures that occur in the course of their activity
 - Strict liability cannot be imposed for intended results of an activity
 - No CL rule imposing strict liability on "ultra hazardous" activities
- Defence of due diligence available
- Note that *Rylands* can be used for cases of personal injury, is not tied down to ideas of balancing social utility (diff from private nuisance)

Negligence- legal duty of care owed by D to P = duty to take reasonable care to avoid acts or omissions that can be reasonably foreseen to injure P

- Elements:
 - Breach of duty (via careless or intentional conduct)
 - Causation btwn breach and loss
 - Actual damage to P
- Inherent wrongfulness in D's act (rather than the effects of D's act- in a nuisance action)
- Unlikely to have requisite proximity/foreseeability in env lawsuit

Statutory Authority Defence:

- Express stat authority to commit nuisance, implied authority to commit nuisance, or legislation provides delegated regime for distributing permits
- ***Tock v St. Johns***: stat defence should apply if express or implied in legislation
- ***Susan Heyes v Translink***: (small business owner negatively impacted during Canada Line construction) Translink was statutorily authorized to cause disturbances; **there was a nuisance, but statutory authority defence prevailed.**

Remedies: injunction (equitable remedy), monetary damages, abatement (self-help)

Possible streamlined approach: damage, substantial/unreasonable, no defences, standing, remedies

INT ENV LAW

- pre-1950s: permissive phase, state sovereignty over resources
 - ***Trail Smelter***- principle of neighbourliness: "no state has the right to use or permit the use of a territory in a manner as to cause injury to the territory of another" (anthropocentric view, does not deal w/ shared territories)
- 1950-70: restrictions on areas beyond national jurisdiction
 - imp conceptual shift to recognizing shared territories (i.e. high seas)
 - **tragedy of the commons issue, common heritage of humankind principle**
- 1971-present: restrictions on activities/areas within national jurisdiction

30 years of IEL (Driesen):

- 1970s and 80s: proliferation of treaties (i.e. series of ozone agreements)
- Framework conventions- agreement upon principles/procedures that guide creation of more specific actions; actual implementation occurs nationally

- **IEL requires national reg and private compliance with that reg-** depends upon effective enforcement of relevant national laws
- 1990s: sig decline in int env law
 - more challenging issues = CC, declining biodiv
 - treaties largely devoid of firm commitments, lack of implementation
- framework approach requires fresh negotiation/implementation cycle every time a new env problem emerges, can be slow/ineffective
- Directions for Reform:
 - **Making the law less indirect** (i.e. placing duties on private entities)
 - **Int Env Organization-** single entity keeping track of env issues
 - **Transparency and Public Participation**
 - **Sustainable Development, Economic Dynamics, Efficiency** (emphasis on innovation)

Principles and Concepts of IEL: embedded in Stockholm and Rio Declarations

- **Sustainable development**, integration, and interdependence
- **Inter-generational and intra-generational equity**
- Responsibility for transboundary harm (Principle 2 Rio)
- Transparency, public participation, access to info/remedies (Principle 10 Rio)
- Cooperation, and common but differentiated responsibilities (Principle 7 Rio)
- **Precaution** (Principle 15 Rio)
- Prevention- obligation to assess potentially harmful activities
- **“polluter pays principle”** (Principle 16 Rio)
- Access and benefit sharing regarding nat resources- i.e. indigenous/local participation (Principle 22 Rio)
- Common heritage and common concern of humankind- protection of env, resources beyond national borders
- **Good governance** = transparent, accountable, honest; states and non-state actors
- Int public law principles also apply = duty to negotiate in good faith, principle of neighbourliness and notification, duty to settle disputes peacefully

Applying Int Law to Canadian Env Law (Côté):

2 main sources of Canada’s int obligations:

- **1) CIL** = general domestic practices automatically accepted as law
- **2) treaties** = voluntary agreements w/ sovereign states or intergovernmental organizations, entered into/ratified by the fed gov’t
 - Treaties require implementation- gov’t must show clear and unequivocal intention to incorporate treaty into Canadian law
 - Text of treaty itself can never be invoked as the basis for a claim
- Treaties are also sources of interpretation of Canadian law
 - **Principle of consistent interpretation:** courts will strive to interpret domestic law in accordance w/ int obligations

Note that Canada has violated its int law obligations, has pulled out of several treaties

- Our int reputation requires change in foreign policy and approach to int law

*IEL is strongly affected by tensions btwn developed and developing countries

- inequalities in development, disprop impacts (i.e. is China's growth sustainable?)
- need a **common, but differentiated approach**

*IEL does not have a good record of enforcement/compliance

- **relatively little litigation**; state sovereignty issues- many states do not accept the jurisdiction of int court, there may be political reasons why they want to avoid court
- i.e. Australia v Japan- int moratorium on whaling, Aus arguing that Japan is hiding behind "science/research exception"; if Japan loses, no guarantee that their practices will actually change

COMMAND REGULATIONS = prohibitions, licensing, stds, sanctions, non-state actors

- **Command**: prescriptive nature of the regulation (env stds, licences, planning tools)
- **Control**: negative sanction (inspections, liability, admin and crim penalties)
- Criticisms = inefficient, costly, inflexible, bureaucratic, few incentives to go "beyond compliance", hard to enforce
 - ***Shift towards a broader mix of instruments**

Styles of Enforcement

- **Cooperative**: emphasis on persuasion, bargaining w/ companies to comply; idea that env offences are qualitatively diff than true crimes (in terms of social utility, immediacy of consequences), fewer prosecutions
- **Punitive**: more prosecutions, emphasis on penalties (= **punishment + deterrence**); idea that env is under-protected, compliance-based approaches are not effective enough for changing corp behaviour
- **Responsive**: idea that issues should be handled on a case-by-case basis; can use admin compliance mechs (i.e. reporting obligations, inspections, env audits)
- Canada tends to be more conciliatory; however, **CEPA** endorses stricter enforcement ? (**Env Canada** reports annually on enforcement efforts; provisions upheld as valid crim law power in *R v Hydro-Quebec*)

Types of Law

- **Substantive law** = detailed policies, programs and rules through which govts seek to mold behavior in pursuit of specific social goals (i.e. env command regulation)
- **Formal law** = neutral, universal rules and procedures that leave substantive value judgments to private actors (i.e. doctrines of nuisance, trespass and negligence)
- **Reflexive law** = promoting self-reflection and self-correction by regulated actors in line with regulators' goals (i.e. env management systems, economic incentives)

Env Stds (generally set by central reg authority)

- **Target standards** = set by reference to target being protected (i.e. aquatic env)
 - **Ambient and receptor standards**- set levels on the max pollutant conc permitted in the env at any one place
- **Source-related standards** = set by reference to pollution source
 - **Performance or emission standards**- control what is being emitted
 - **Specification or process standards**- control activities producing pollution
 - **Product standards**- control characteristics of manufactured products
- Role of Science = only advisory; increasing emphasis on trad/local knowledge

Env Licences = instruments created under gov't authority that require cos/individuals to gain prior approval or meet min performance levels; usually relate to **specific facilities**

- Efficient inspection of businesses can reduce enforcement costs
- Issues: expensive to administer/enforce, licensing schemes are inflexible, not as suited to situations where env is affected by multiple sources
- In general, **licenses do not displace CL rights** (but might- stat authority defence)

Env Planning Instruments

- Env Impact Assessment (EIA), Strategic Environmental Assessment (SEA)
 - EIA asks whether a project will make a net positive contribution to sustainability, rather than focusing on adverse env effects; SEA deals w/ gov't plans/policies/programs
- Parks and Protected Areas Regulation

CEPA

- Early focus on toxins, hazardous waste, pollution; national database of pollutants
- Relies heavily on guidelines and codes, focuses on info-gathering and disclosure
- Collaborative mechs (i.e. National Advisory Council) to create national framework for env control
- **S.54**: sets ambient stds- not legally enforceable, but a benchmark
- Principles:
 - **Preventative rather than reactionary**
 - **Virtual elimination** of bioaccumulative toxins
 - Ecosystem approach
 - **Precautionary principle**
 - Intergovernmental cooperation
 - Sci-based decision making
- **S.274(1)**: crime against env provision, triggered by violations of **CEPA** itself

Jamie Benidickson: “Offences, Prosecutions and Penalties”

Env offences = regulatory/public welfare offences (not true crimes)

- **Presumption of strict liability** = no MR, A has opportunity to prove due diligence (took all reasonable care in the circumstances)
- **absolute liability** = no MR, no defences
- Factors to consider: subject matter of the legislation, overall regulatory pattern, penalty provided, precision of language employed (**R v Sault St Marie**)
- Judicial interpretation plays a sig role in elaborating scope of liability
- Criminalization may be attractive to those who regard env degradation as a serious affront to contemp social values
 - however, difficult to distinguish btwn degrees of moral fault, provisions dealing w/ public health in the Code are vaguely worded and unreliable for env protection
- Through **CEPA**: some ability to impose penalties, individs can request public investigation
- Fines have been increased in many jurisdictions, prison sentences have been ordered in some cases, court may also order restoration work or impose other costly obligations
- Possible to initiate private prosecution- though costly, difficult
- Task of determining most appropriate sentencing option rests w/ the court

- Relevant considerations = nature of the env affected, degree of damage and deliberateness of the offence, A's attitude/remorse, efforts made to comply, nature/size of corp, profits realized from the offence, previous crim record, other evidence of character

*need to balance env protection/restoration measures alongside trad punitive and deterrence considerations

ECONOMIC MECHANISMS = taxes, cap-and-trade schemes, subsidies, deposit-refund, liability

- More flexible, business-friendly and cost-effective than command/control (**incentivization rather than penalization**)
- EPIs (economic policy instruments)- aim to achieve same env outcome at a lower cost or superior env outcome at same cost
 - Encourages efficiency, "beyond compliance", tech innovation
 - Able to consider diffs in polluters
- Principles = **user pays, polluter pays, internalization of env costs, beneficiary-compensation**
- Assuming all participants = cost-minimizers, well-defined system can allocate responsibility among various pollution sources

Tradable emission allowances/emissions trading:

- Gov't establishes target quantity of emissions (cap) and issues tradable permits to firms, market determines price for permits
- **Certainty of emissions amt, uncertainty of price**
- Politically attractive for taxpayers; businesses decide how to satisfy stds
- Any source reducing more than necessary- gets emission reduction credit (ERC)
- Credit is transferable, can be sold to other sources (to offset their pollution)
- Works well w/ emission stds, large point-source polluters, uniformly mixed pollutants
- **Cons:** models may be inaccurate, some uncertainty about admin/storage of ERCs, new instit structure required, hotspot problem, impractical at individ household level

Pollution taxes/emissions charges:

- Gov't sets price on emissions, market determines resulting quantity of emissions
- **Certainty of price, uncertainty of emissions amt**
- **User pays principle**
- Revenue raised can be put back into env programs, can offer tax benefits
- Strong incentive for businesses to change behavior, less regs required
- Works well w/ existing tax system, pervasive pollution situations
- **Cons:** politically unpopular, complex, potentially detrimental to economic growth, socially regressive (disprop effects on certain groups)

BC Carbon Tax: (University of Ottawa article, in-class video)

- Since 2008- has sig reduced GHG emissions and use of petroleum fuels
- Covers residential, commercial and industrial sources
- **Revenue neutral:** all revenues from C tax fund corresponding cuts in other taxes
- Tax shift is beneficial in 2 ways:
 - 1) by increasing taxes on C emissions, discourages pollution (helps env)
 - 2) by reducing income taxes, encourages employment/investment (helps economy)
- BC now has lowest per capita fuel use of any large province; economy has outperformed rest of country over this time period

- *Lowest fuel use in Canada, lowest income tax, healthy economy (w/ fast-growing clean technology)- only exception for aviation fuel, not covered by C tax
- Note that correlation does not necessarily = causation; geo factors, infrastructure in BC may also affect our energy use/economy

Free market cannot determine acceptable pollution levels:

- Terry Anderson: market doesn't do a v good job of valuing env issues
- **Market pathologies:** externalities, short-term focus, degradation of quasi-public goods (i.e. oceans, atmos), lack of valuation of env goods and services, addiction to economic growth and inability to scale growth within biosphere limits
- **Resources are seemingly infinite in size/abundance**, need market mechanisms to control exploitation
- David Driesen: gov't intervention (EPIs) stimulate efficiency, not necessarily innovation
- Arthur Pigou: gov't intervention is most effective, need prices on pollution
- Ronald Coase: gov't should not be involved, individs and cos can find solutions through property rights/privatization
- Glenn Beck: EPIs are seen as intrusive, high cost

CEPA, s.322: Minister may establish guidelines, programs and other measures for the development and use of economic instruments and market-based approaches

S.328: Minister may make regulations prescribing fees

- Seems to create a regulatory scheme, capacity to implement economic mechs

Other fed EPIs: DFO Individ Transferable Quota scheme, GHG Emission Reduction Trading Pilot scheme, National Roundtable on the Env and Economy

ENV ASSESSMENT = predicting, assessing and mitigating potential impacts that a project, policy or program might have on humans, wildlife and ecological processes

NPRI: mandatory reporting of particular pollutants, public access in a database

- Idea that site-based hazards must be disclosed to the public
- 5 substance categories, 3 thresholds to meet: employee, conc, quantity
- **Limitations:** only biggest producers required to report; focus on release, rather than use of chemicals; confidentiality clauses = wide range of substances unlikely to be regulated

Great Lakes United and MiningWatch Canada v Minister of the Env and Mining Association of Canada: mining waste to be reported and included in NPRI database

Corp reporting:

- Securities law- governs relationship btwn cos and investors
- Env disclosure can be integrated into mandatory financial reporting
- OSC Staff Notice: requires timely reporting, provides sig guidance on env disclosure

CEAA: national framework for EA, designed to streamline EA processes

- In 2012- fundamental changes introduced through budget bill; **fewer fed EAs w/ much narrower scope of assessment, considerable uncertainty, v discretionary, less public involvement, new burdens on prov processes**

- designated project- CEA Agency has discretion to require fed EA (s.10)
- not a designated project- Minister has discretion to require fed EA (s.14(2))
- only 2 process options = std EA and panel review (w/ strict timelines)
- s.15: responsible authorities = NEB, CNSC, CEA Agency

Will fed EA be triggered?

- is the project included in the def'n of "designated project" under s.2?
 - if so, does it meet the requirements under s.10?
 - if not, is it nonetheless included in s.14(2)?

What is the scope of EA?

- Is project likely to cause sig adverse **env effects** under s.5?
- If yes, are those effects justified in the circumstances? (s.52)
- If justified, then conditions for project approval must be determined (s.53)
- **EA factors to be assessed**- under s.19: env effects of project, comments from public, mitigation measures, purpose of project, alt means; may consider local/Ab knowledge

Substitution: Minister decides that prov EA = approp substitute for fed EA in a particular case

Equivalency: GIC can fully exempt a designated project or class of projects from application of CEAA, on the basis that those projects are adequately assessed at prov level

CBC Radio interview

Stewart Elgie: EA laws are imp, fed involvement is required (since effects cross borders)

- Do not want duplications/delay, but do not want to eliminate fed processes entirely
- Timelines are problematic, many projects will never be assessed

Bruce Parry: EA is not effective, waste of time and money

- need firm rules in statutes- providing certainty for cos and public

Context is so crucial to sustainable development; EA = tool for adaptive env management

- **Cumulative effects** must be considered- should assess projects in combination w/ other projects (existing or proposed)

CLIMATE CHANGE: collective action problem, perceived infiniteness of resources, fossil fuel-based economy has been essential to our development

Mitigation = trying to reduce effects of GHGs

Adaptation = trying to improve resilience of human society and ecosystems to deal w/ CC

*There is a cost involved in reducing fossil fuel use and CC

- Nicholas Stern: 1-2% of world GDP/year could achieve stabilization in CC
- Bjorn Lomborg: money spent on env is not v well spent, more useful elsewhere
- George Monbiot/David Suzuki: emissions targets/climate action needed

C neutral = idea that C consumption can be offset so that net carbon is 0

Precautionary principle: where there are threats of irreversible or irreparable harm, should not postpone taking cost-effective/reasonable measures (uncertainty should not stop action)

Adaptive management: need to try new technologies and promote what works, must be flexible/able to adapt and change

In Canada- majority of emissions from **industry sector** (a.c.t. energy sector, land-use changes and forestry, agriculture)

- with 0.5% of world pop, Canada emits nearly 2% of GHGs
- Energy-efficiency is improving: economy has increased faster than GHG emissions
- Albertan oil sands = largest single source of climate pollution in Canada (could be taxed, or province required to purchase carbon credits from other provinces?)
 - No particular regs target the oil sands, proposed regs opposed by oil cos

UN Framework Convention on CC: not particularly restrictive, fairly discretionary; overall goal to achieve stabilization of GHG concs in atmos

- States agree to compile inventories of GHG emissions, protect carbon sinks, develop new tech, mitigate emissions; extra commitments for developed countries

Kyoto Protocol: GHG emissions (primarily CO₂ and methane)- to be 5% below 1990 levels by 2008-2012, no special obligations for developing countries

- **Kyoto Protocol Implementation Act (KPIA)**: directed at ensuring compliance w/ Protocol through public, sci, political discourse; annual reports required
- Canada ratified in 2002, withdrew in 2011 (failure to meet int obligations)

Copenhagen Accord: new commitments for developed countries, Canada committed to 17% below 2005 levels by 2020

- Good example of int developments influencing domestic policy
- **sector-by-sector regulation**- emissions performance stds (i.e. targeting coal-fired power plants), performance requirements for various products (i.e. vehicles, fuels)

Other Canadian initiatives:

- 2002 CC Plan (did not contain economic mechs, ineffective at changing behavior)
- Subsidies offered through CC action fund, eco-agriculture biofuels initiative, sustainable tech development
- National Roundtable (abolished by Conservatives- silencing climate scientists)
- **Turning the Corner policy**- proposed C capture regs in oil sands development, goal to track US policies and set new emissions targets
- **Oil sands advocacy strategy**- promoting oil sands friendly policies in foreign countries
- **Current focus on harmonizing regulations and stds w/ those of the US** = focus on business and economic development
- Joint fed/prov action has been largely unsuccessful, policies must be coordinated
- Provinces acting independently and in cooperation w/ other provinces/some states
- **In BC**: C tax, renewable fuels stds, tailpipe emission stds, public awareness campaigns, regulations for vehicle idling, Clean Energy Act, BC Energy Plan, Green Building Code, GHG Inventory Report, GHG Reduction (Cap and Trade) Act

Possible domestic actions:

- Transparency regulation (corp disclosure of GHG emissions)
- Economic mechanisms (NDP favor cap and trade scheme)
- Command regulation
- Carbon sink protective measures (forest reserves, national parks)

Friends of the Earth v Canada: (FoE sought enforcement of KPIA- declaratory and mandatory relief through judicial review) **Act not justiciable**, no duty on minister to regulate; mixture of mandatory and permissive terms, policy-laden considerations unsuitable for judicial review.

- Deference to gov't; court has no role in reviewing reasonableness of gov't response to Kyoto commitments
- ***env law is policy heavy, not particularly amenable to judicial scrutiny**
- ***In *Spraytech*:** judicial activism, use of precautionary principle and subsidiarity principle as aids to stat interpretation = v diff result!

Local Climate Action: (*Spraytech*, Vancouver examples)

- **Pros:** increased participation in policy-making, decisions tailored to local needs, democratic citizenship, additional check/balance against central gov't, action initiated more quickly, complementary policies/regs across sectors
 - i.e. land use planning, building stds, public transport, waste disposal, protecting/managing local env amenities
 - local policy experimentation dovetails w/ **adaptive env management**
- **Cons:** role of local gov't is limited- lack of resources/expertise, local autonomy may emphasize existing social/economic disparities btwn communities, NIMBYism, cooperation across municipal borders can result in collective action problems
 - i.e. costly local action undermined if other localities do not act similarly, stringent stds in 1 jurisdiction may push cos to relocate = **race to the bottom** (interjurisdictional comp)
 - National gov't fosters more egalitarian distribution of resources, greater consistency in policies/guidelines

Vancouver (Schwartz article): not particularly industry heavy, transportation = main problem

- Expansive mitigation and adaptation policies (i.e. climate change plans, LEED stds for new buildings, reduction of parking spaces, extensive bicycle network, landfill methane capture, electric/hybrid vehicles in city fleet)
- Most imp factors = **personal commitments of politicians/staff, structure of bureaucracy** (dedicated Sustainability Group)
- Compared to other Canadian cities, Van has adopted most measures (14/16)

*Note that C footprints are not necessarily contained within cities- large amt of C consumption occurs elsewhere and is extremely imp (i.e. where food/products come from, travel)

SPECIES AT RISK

- Imp to preserve wildlife/nature- for genetic diversity, economic benefits, research opportunities, trad use by Ab ppl
- Main threats to biodiversity = habitat loss/degradation, hunting/trade, competition from exotic species, CC, genetic decline, occasional natural disasters
- Methods of conservation = site-specific (in-situ) protection, species-based protections, control of threatening processes (i.e. pipelines), ex-situ conservation (i.e. breeding programs in zoos)
- Key organizations:
 - Non-gov't = Int Union for Conservation of Nature (IUCN), WWF
 - Inter-gov't = Commission on Conservation of Antarctic Marine Living Resources, Int Whaling Commission, Regional fisheries orgs

- **Public trust doctrine**- obligation on gov't to safeguard env/integrity of public land
- **Conservation easements/covenants** on private land- create restrictions on land use
 - **S.219(3) and 219(4) of BC Land Titles Act**: covenant may be granted in favor of the Crown, a municipality, or any person designated by minister; may be registered on title, negative or positive in nature, is enforceable against landowner and subsequent owners
- **Multilateral/Bilateral treaties**: Convention on Int Trade in Endangered Species (CITES), Convention on Protection of World Natural and Cultural Heritage, Convention on Law of the Sea, Migratory Birds Convention Act (btwn Canada/US)
- Regional treaties also exist- may be redundant considering scope of global treaties
- In Canada: Fisheries Act, Canada National Parks Act, BC Ecological Reserves Act, Oceans Act, Canada Wildlife Act
 - **CNPA, s.8: ecological integrity** = 1st priority of minister
 - **Canadian Parks and Wilderness Society v Canada**: Act requires a balancing of conflicting interests; ecological integrity = 1st priority but not sole priority
- Endangered Species Acts- in some provinces
- **Convention on Biol Diversity**: recognition that species have economic value; main objectives = conservation, sustainable use, fair/equitable sharing of the benefits

SARA (fed legislation)- focus on conservation of species, not use

- **Limitations**: v discretionary, only applies to fed lands/aquatic species and migratory birds, concept of “residence” is fairly narrow, identification of critical habitat and implementation of recovery strategies v inconsistent
- **COSEWIC** = Committee on the Status of Endangered Wildlife in Canada
- **s.15**: duty to classify species and conservation statuses using best available info, including Ab knowledge (National Ab Council w/ advisory role)
- **s.27**: Minister decides which species are listed
- **s.33**: prohibits destruction of species’ residences (narrower than critical habitat)
- **ss.37, 47, 65**: competent minister must prepare recovery strategies, action plans and management plans
 - **Problem**: key provisions are not triggered until critical habitat has been identified/recovery strategies and action plans have been developed
- **S.58**: prohibits destruction of critical habitat on fed lands and habitats of aquatic/migratory bird species (**orca case**)
- **2 safety net provisions**- which have not been used
 - **S.80**: emergency power (**spotted owl case**)
 - **S.34**: GIC, on recommendation of Minister, may order that prohibitions in ss.32 and 33 apply for a listed species in a province or territory
- Act is ultimately designed to **promote collaboration and cooperation**
 - **ss.10, 11**: competent minister may enter into agreements with any gov't in Canada, organization or wildlife management board in order to administer Act or achieve its goals
 - **collaboration** (implementation of Act through agreements)- may be a better use of resources than penalization/enforcement of rules

Saving the Northern Spotted Owl (UBC Law article):

- Owl listed as endangered in 1986, pop has continued to decline

- Logging activity in old growth forests = habitat loss/fragmentation, increased predation/competition, interspecies mating considered a threat
- **Conservation highly controversial due to high economic value of timber**
- Prov protection- **Wildlife Act, Forest and Range Practices Act** (mostly discretionary)
- **SARA, s.80: feds can intervene if prov measures are deemed inadequate-** have declined to use this discretionary power so far
- Spotted Owl Recovery Team and Management Plan- has tried to maintain habitat
- **Clearly a compromise among conservation, economic and social concerns**
- Endangered species legislation appears to be largely ineffective

Appeal Court Decision Affirms Protection for Killer Whales (Eco-justice):

- Fed gov't legally bound to protect orca critical habitat, including prey availability and marine env quality; **Fisheries Act** (v discretionary)- cannot be used as a substitute for mandatory protection under **SARA s.58**