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Regulatory Excellence and Democratic Accountability

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Regulation is a challenging policy instrument from the perspective of democratic governance. It typically entails imposition of costs or restrictions on some actors in order to protect the welfare of others. The exercise of the state's monopoly on coercion demands strong mechanisms for democratic accountability to ensure that the freedoms of those who are regulated are not limited without appropriate justification and due process. At the same time, obstacles to collective action present a very different democratic challenge.[1] Those who face compliance costs typically are smaller in number with more at stake than the beneficiaries of regulation. Regulated interests thus tend to be well organized to oppose strict standards and enforcement, while beneficiaries – whether consumers, workers, breathers of the air – are often great in number with modest or uncertain individual stakes in the outcome. The challenge of collective action thus suggests a risk of unduly weak, rather than excessive, regulation.

This paper considers the question of regulatory excellence through a lens of democratic accountability. Since my own research has focused on environmental regulation, and most recently energy and climate change, the paper draws examples primarily from those fields. Unfortunately, mitigation of climate change all too often has provided examples of regulatory failure. I thus have attempted to reflect on failure in order to identify features of regulatory excellence that were lacking.

What Counts as Regulation?

The central question of "what makes an excellent regulator," prompts two prior questions: what do we mean by regulation, and who is the regulator? Regulation involves a series of activities: from design of regulatory mandates and regulatory agencies via legislation, to adoption of rules using authority delegated by legislation, to promotion of compliance with those rules. Studies of regulation typically focus on the second and third steps. However, this paper occasionally revisits the first step – the design of regulatory institutions and mandates by legislators – since the original statute, in which legislatures opt for the policy instrument of regulation, can predispose the steps that follow to excellence or failure. After all, even the most capable and committed regulator will fail if her mandate is unattainable, her authority inadequate, or the process or institutions she inherits fundamentally flawed.

Who is the Regulator?

In envisioning "the regulator," one tends to think of stand-alone regulatory agencies, such as the Canadian National Energy Board, the US Consumer Product Safety Commission, or the UK Civil Aviation Authority. However, regulation takes place in varied institutional settings, and the identity of regulators is accordingly more diverse.

The regulator is typically envisioned as a bureaucrat, wielding the proverbial stick, or at least a clipboard and yardstick.[2] Yet if we consider regulation to comprise all three of the steps discussed above, it is clear that there are different categories of regulators. Elected legislators write statutes that devise regulatory mandates, institutions, and processes. Those statutes delegate future decisions, to be enacted via regulations or permits, to executive actors, who may be elected or appointed. Implementation is usually undertaken by public servants, but in some cases can even involve non-governmental actors, such as professional bodies, to whom public authority is delegated. Any one of these actors – legislators, heads of regulatory authorities, or the staff who answer to them – could be considered regulators, and the criteria for excellence differ in recognition of the different roles each actor plays.

The legal or constitutional context has important implications for identity of regulators and mechanisms of accountability. In a parliamentary democracy, executive and legislative functions are fused. Ministers who wield regulatory authority are expected to hold seats in Parliament and are accountable, both individually and as a Cabinet collectively, to the legislature. Indeed, ministerial responsibility to the elective House of Commons, rather than the Crown, is *the* fundamental principle of parliamentary government. In contrast, in a presidential system with a separation of powers between the executive and legislature, as in the US, executive actors typically are prohibited from holding seats in the legislature.

This has several implications. First, in a parliamentary system the director of the relevant regulatory body usually will be an elected politician. For instance, Canadian environmental statutes typically grant regulatory authority to either the Minister of the Environment, or Cabinet as a whole. In contrast, the director or administrator of a US regulatory agency, such as the Environmental Protection Agency, is a bureaucratic official appointed by the President. While appointed bureaucrats are presumably – and should be – chosen primarily based on their expertise, a politician will almost certainly be a layperson with no specialized knowledge of the subject matter at hand but with a stronger claim to speak for the affected public. However, the flip side of democratic legitimacy is partisanship and political motives, which may render an elected regulator more inclined than a more independent bureaucrat to eschew publicly beneficial regulations that would incur the wrath of powerful or generous constituencies.

Second, mechanisms of democratic accountability differ. In both cases, accountability to voters is indirect. In a parliamentary system, Ministers' immediate accountability is to the legislature, where they must answer publicly to hostile opposition parties. In acting on authority delegated by Parliament, individual Ministerial responsibility is most relevant. The Minister answers first and foremost to the House of Commons. In a presidential system, regulators are directly accountable to the President. Although regulators often face criticism from the legislature, they have independent authority and legitimacy via the elected President.

Third, the nature of regulatory statutes produced by parliamentary and presidential systems tends to differ. Faced with an independent executive, the US

Congress seeks to ensure fidelity to its intentions by tying the hands of those to whom it delegates regulatory authority via non-discretionary statutory mandates.[3] It is common to find highly specific language with respect to regulatory triggers, factors to be considered in rulemaking, standards of decision making, and deadlines, all backed by citizen suit provisions that invite judicial enforcement of any of those mandates. In contrast, the majority coalition that controls the legislature in a parliamentary system both drafts and implements legislation. They are, in effect, delegating regulatory authority to themselves (although also to future Cabinets). As a result, regulatory statutes produced by Westminster parliamentary systems tend to *authorize* rather than *mandate* regulation by the executive via more pithy statutes that grant discretion to the executive. While US environmental statutes typically direct the EPA Administrator via the word "shall," comparable Canadian legislation allows that the Minister "may" undertake a variety of actions. With such discretionary authority there also is a weaker basis for legal challenges: the courts tend to be less active in the regulatory process in parliamentary systems, such as Canada's, than in the US.[4]

Complicating matters further, regulatory agencies may be more or less independent of their political sovereigns in either system. Regulatory independence is established by appointment of regulatory oversight boards with multi-year terms, narrow conditions for dismissal of directors, and statutory limits on political interference. There are two very different rationales for independence. The first is to take the politics out of rulemaking and enforcement by ensuring that decisions are made by experts, based only on their expertise. The second is predicated on awareness, if not explicit acknowledgement, that politics is central to regulation. In that case, well-intentioned (or fearful) legislators may choose to "pass the buck" for politically difficult decisions to arms-length officials.[5] As discussed further below, the former rationale is compelling if regulatory decisions are in fact merely technical matters, guided by political decisions set out by the statute. However, if that is not the case, there is a risk of depicting what are in fact value-based decisions as matters of fact, in so doing weakening mechanisms of democratic accountability.

Closing the Scrutiny Gap

Regulation typically imposes costs on a discrete number of actors in order to deliver benefits for a much broader community.[6] Where regulatory decisions may have significant impacts on a subset of actors, a best-in-class regulator has a responsibility to consult those parties, to ensure that any decision is made with understanding of the magnitude of potential impacts and means to mitigate costs. This typically applies to firms, sectors, or individuals that are the targets of regulation. In the Canadian context, there is also a constitutional duty to consult Aboriginal governments that have shared or unresolved claims to land or resources that may be affected by a project under review or operating industry.

The diffuseness of benefits delivered by regulations that protect the environment or broad classes of consumers, investors, or workers presents a very different democratic challenge. As set out decades ago by Mancur Olson and James Q. Wilson, the logic of

collective action should lead regulators to anticipate a scrutiny gap, in which those potentially regulated are more engaged and attentive than those who will benefit from regulation.[7] Consider the example of regulations to reduce industrial emissions of greenhouse gases, which would impose significant costs on a discrete number of polluters in order to achieve benefits for the public at large, and indeed for the entire planet, now and for decades to come. Those constrained by regulation are keenly aware of what is at stake for them and motivated to defend their interests with regulators, whether on their own or via collective action with like facilities or industries. In contrast, the beneficiaries of broadly-diffused benefits tend to be ill-informed, inattentive, and unorganized.

This divergence in political engagement can yield a growing gap between popular perception and reality as one proceeds through the regulatory process. The media, and thus the public, tend to be most attentive at the legislative stage. However, statutes that promise bold targets may win over voters with the promise of "clean" air, water, and food, while leaving critical decisions with respect to how, or even whether, to achieve those targets to a regulatory process that takes place after media scrutiny has subsided. This is particularly problematic when regulatory statutes are discretionary, as is common in parliamentary systems, since there is no guarantee that promised actions will ever materialize once public attention fades.[8] At the rulemaking stage, although the media attention has often moved on, those who are adversely affected have even stronger financial incentives to learn about and speak on behalf their interests in notice and comment or other stakeholder consultation processes. There is thus a risk that public support will be underestimated, and proposals relaxed or amended to offer concessions apparent to regulated interests but not to the public at large. If engagement of beneficiaries is an uphill battle at the legislative and rulemaking stages, the slope is even steeper as implementation of regulations moves from a single point of decision to monitoring of compliance of and enforcement actions against hundreds or thousands of facilities.

This dynamic underlay the phenomenon of regulatory "capture" documented by Marver Bernstein decades ago. In the absence of public scrutiny, regulatory authorities established to protect the public interest over time became sympathetic to the plight of regulated industries, to the point that regulations intended to protect the public became a means to protect existing firms from competition.[9] Of course, much has changed since Bernstein wrote in the mid-1950s. The 1960s and 1970s saw a veritable explosion of public interest groups that seek to represent the diffuse interests of the public in consumer and environmental protection. Legislators themselves responded with non-discretionary "action-forcing" statutes backed by citizen suits. There are stronger expectations for public reporting, and greater media interest in new areas of social regulation. However, it remains the case that only a small fraction of those who nominally share the goals of environmental or other public interest groups join or donate. Moreover, the specificity of US regulatory statutes is the exception to the rule. Capture may not be as easy in the past, but the structure of interests that allowed capture to occur is still in place.

An excellent regulator thus would endeavor to document and publicized the magnitude and distribution of costs and benefits of proposed actions. Efforts should be

made to reach out to those who are diffusely affected (whether by costs or benefits), beyond mere publication in an official government register or gazette that only those with dedicated public affairs staff would be in a position monitor. This is particularly important for individuals from low-income communities, who may live in closest proximity to regulated facilities, but have less access to online sources or free time to monitor them. Polling, focus groups, or stakeholder consultations by invitation (possibly with financial assistance to facilitate participation) offer other vehicles for actively soliciting input from wheels less inclined to squeak.

Honesty

It goes without saying that elected officials and public servants should not provide false information. It follows that it is also wrong to intentionally mislead, for instance by omitting relevant information or taking advantage of an intended audience's lack of expertise or inattention to details. In practice, however, and especially when the regulator is (or is headed by) a politician, it is difficult to draw the line between where strategic "framing," the lingua franca of politics, leaves off and intentionally misleading voters begins. Those who present a selectively optimistic picture might argue that it is the job of opposition parties or critics in civil society to fill information gaps or offer alternative scenarios. Still, a regulator aiming for excellence, mindful that inattentive citizens will often misunderstand unfamiliar material, presumably would not push those boundaries.

Unfortunately, there are many examples from Canadian environmental regulation that do seem to push that line. For instance, the federal Environment Minister, Canada's lead environmental regulator, has insisted repeatedly that the government is on track to meet its greenhouse emissions targets for 2020 based on its sector-specific regulatory strategy, even though her own department projects that only about half the reductions needed relative to a business-as-usual baseline will have been achieved by 2020, and no additional federal regulatory proposals have been published that could even begin to close that gap by the deadline.[10] Canadian and US governments have often proposed what sound like ambitious greenhouse gas reduction goals that are, in fact, targets for reduction of emissions *intensity* relative to production, at a rate expected to yield continued emissions growth. For instance, Alberta's 2008 Climate Change Strategy promised to "reduce emissions by 50 Megatonnes by 2020" several times before clarifying only towards the end of the document that those reductions were relative to a business-as-usual projection, and that emissions in fact were expected to be higher, not lower, by 2020.[11] The preface by the Premier at the time promised that "Alberta's greenhouse gas emissions will steadily decline," although the strategy projected *increasing* emissions for more than a decade. Even then, the credibility of the Alberta Environment Minister's claim as late as 2015 to be on track to meet the province's 2020 target to limit emissions growth has been challenged, not least by the province's own Auditor General who documented that the department had known since 2012 that it was not on track.[12]

Clear Rationales: Facts vs. Values

Regulatory standards rest on two types of questions. *Positive* questions concern what we know, and don't know, about the facts – the scope of the problem, what is causing it, what can be done about it, and at what cost. These questions are the province of experts, including scientists, doctors, engineers, and social scientists. In contrast, *normative* questions ask what ought to be done. What level of risk is acceptable? How much cost or restriction on liberties is justified to address a given problem? Are proposed regulations fair? Scientists have no special claim to answer such questions. Their specialized training offers no particular insight into public values, nor is there any reassurance that their values are representative of the public's. With respect to the second set of questions, in a democracy *politicians* are elected to represent voters' normative values.

There is no question that regulatory excellence demands reliance on the best available expertise and evidence. However, it would be a mistake to assume that regulatory decisions can be based on evidence or science alone. Rather, excellence in regulation requires thoughtful deliberation with respect to both facts and values, and where to draw the sometimes-blurred line between the two. At minimum, a best-in-class regulator will be explicit with respect to both the factual and value basis of regulatory decisions.

Failure to distinguish between questions of fact and values can yield two distinct problems. The first is that value judgments will be made by experts. The problem is greatest where experts themselves are unaware or inattentive to where their expertise leaves off and their values begin. The line between the two is especially blurred in the realm of uncertainty, where experts may posit a range of plausible risks. In that context, the decision whether to adopt a risk-neutral, risk-tolerant, or risk-averse posture necessarily draws on values as well as facts.[13]

While the need to justify regulatory decisions in court has prompted attention to the fact-value distinction in the US, in Canada it is still common to hear calls for regulatory decisions to be left to the experts. For instance, Canadian scientists and environmentalists lobbied for a scientific advisory body to be assigned exclusive authority with respect to listing of endangered species, even though the decision to list could have significant economic and distributive consequences. Although that effort was unsuccessful, in the case of National Energy Board (NEB) "expert panels" are granted broad authority to weigh both evidence and values in conducting environmental assessments of major oil and gas projects. One mechanism to constrain experts' value judgments is for politicians to specify generic decision rules (e.g., to ensure health protection with a "margin of safety" or to require adoption of "best technology economically achievable"). However, NEB expert panels set their own terms of reference, the implication being that not only do the values of expert panelists weigh heavily in their assessment of the acceptability of the risks posed by a project, but also in the questions that get asked in the first place. The results can be problematic and

inconsistent. For instance, a recent NEB review of Enbridge's proposal to build the "Northern Gateway" pipeline from the tar sands in Alberta to the Pacific coast in British Columbia took into account the economic benefits to Canada at the point of extraction but deemed the corresponding environmental costs of extraction to be beyond the scope of the review.

The second risk is that regulators will misrepresent their political or value judgments as science. Canadian regulators' project approvals or chemical standards are often justified simply on the grounds that the projects or substances are "safe," in so doing concealing policymakers' judgments with respect to risk acceptability. The irony is that while it is entirely appropriate that elected representatives should be making those judgments, there is nonetheless a temptation for policymakers to hide behind the authority and reputation of science. That temptation may be particularly great where the underlying call is based on political calculus, rather than assessment of the fairness of the anticipated distribution of costs and benefits. This seems most problematic in a parliamentary system where the head of a regulatory authority is often a politician, where statutes typically grant tremendous discretion to the executive, and (as discussed below) where there are often stronger norms of confidentiality. Yet the need to justify regulatory decisions to critical judges can also prompt US regulators to overstate the degree to which their decisions are driven purely by "the facts." Cary Coglianese and Gary Marchant, for example, conclude that in justifying its national ambient air quality standards for ozone and particulate matter, the US EPA "exaggerated the determinacy of science in an effort to mask contested policy choices and escape scrutiny."[14]

While regulatory independence is seen as a solution to the problem of confusing political values with expert judgment, and more generally of political interference, independence can increase the risk of the first problem, namely, value-based or political decisions made by unaccountable experts. A solution sometimes employed is to rely on a governing board that combines expertise and representation of different interests. However, that strategy still leaves the question of which interests will be represented and by whom (discussed further below under "neutrality").

One clear implication, whether regulators are independent or not, is that they should provide a public rationale for their decisions, one that is sensitive to the distinction between questions of fact and value, as well as to the interactions that occur in the realm of scientific uncertainty. Explicit consideration of distributional considerations is critical to provide confidence that fairness rather than political influence has carried the day. Where regulation will be carried out by relatively independent bureaucrats, it is critical for elected legislators to provide explicit guidance with respect to the values they intend to inform future rulemaking, and for decision makers to justify their decisions within those values.

Neutrality

An excellent regulator is unbiased, other than to ensure adherence to values specified by the statute. That can be a challenge, given the scrutiny gap noted above.

Regulatory officials who disproportionately hear from regulated interests thus need to actively seek out other perspectives.

Legislators creating regulatory authorities must exercise care not to make matters worse by institutionalizing real or apparent conflicts of interest. First, it can be problematic for agencies to have conflicting mandates, particularly if one mandate is dominant. This was an underlying motive transferring responsibility for pesticide regulation to the US EPA in 1972 from the US Department of Agriculture, as the latter organization's primary mandate to promote agriculture and protect the interests of farmers created at best a perceived and at worst a real conflict of interest. Yet, amendments to Canadian Environmental Assessment Act reduced the role of agencies such as Health Canada and Environment Canada in favor of greater autonomy for line departments. Federal port authorities, such as Port Metro Vancouver, are thus exclusively responsible for conducting environmental assessments of a broad range projects within their purview. This is problematic given that the Port itself claims that its core mandate is to promote trade. Moreover, the Port is required to fully fund its own operations with revenues from port users and tenants, thus creating a financial disincentive to reject a project that would yield significant revenues for its own operations. The risks of conflicting mandates is also apparent in a recent decision to approve a coal port in British Columbia, not by the provincial Ministry of Environment, but rather the Ministry of Mines, which did so by amending a decades-old permit for a *gravel* quarry.

Second, institutionalized bias may be created through appointment of boards of directors that govern independent regulatory agencies. In the case of Port Metro Vancouver, a majority of the board members are appointed based on nominations from diverse industries using the port. While this board composition seems designed to avoid bias in the Port's role of regulating access to the Port by different users, it is ill-suited to a mandate to regulate the environmental impacts of those same industries.

Finally, even in an era celebrating government-business cooperation, it is especially critical for regulators to distinguish between the roles of the state versus the roles of regulated actors. When comments are sought, it must be by the regulator, not (or in addition to) the proponent or industry. Perhaps reflecting the longstanding cooperation model, when a coal port was proposed in the Vancouver harbor, it was the private proponent, rather than Port Metro Vancouver, that distributed information on corporate letterhead to neighbors and solicited public comments on the project. Where regulatory goals are negotiated, there must be opportunities for diverse stakeholders to participate. When partnerships agreements are struck by business and regulators, the terms of the agreement and compliance reports must be available to the public.

Commitment to Evaluation and Public Reporting

As noted above, the scrutiny gap tends to expand with each step along the regulatory process. Media attention at the legislative stage typically fades by the point of rulemaking, and it is a distant memory when it comes to monitoring of compliance by hundreds or thousands of regulated entities (although there are of course exceptions of

high profile rules or instances of noncompliance). Implementation failures loom especially large in context of permissive statutes, which authorize but do not require performance of various regulatory actions. In that context, it is easy to promise bold actions at the legislative stage, yet fail to follow through at the more politically-challenging implementation stage.

A best-in-class regulator will be committed to monitoring and reporting at each step of implementation. That suggests the need for two distinct, though related, forms of evaluation, both of which must be public: assessment of the efficacy of regulatory programs, and reporting on compliance by private actors. Regulators' evaluation of their own performance is challenging both analytically and politically. Politically, it is of course unappealing for any agency to publicly report on its own failures. For that reason, a commitment to periodic program evaluation and public compliance reporting ideally will be built into legislative mandates. This also offers the advantage of reminding legislators of progress, or lack thereof, toward goals they set in years past. It can also be effective to rely on independent auditors. In Canada's parliamentary system, the office of the Auditor General reports to Parliament, rather than Cabinet or an individual Minister. That independence lends credibility to occasional regulatory program reviews, which often reveal failings that the executive branch has either not found or not publicized. The Auditor General of Canada reported in 2012 and, disturbingly, again in 2014 that Environment Canada had failed to put in place mechanisms to track compliance and monitor the impact of its regulations on greenhouse gas emissions. Similarly, in 2014, the Alberta Auditor General "found no evidence that the [provincial Environment] department regularly monitored performance between 2008 and 2012 against the 2008 [climate action] strategy targets" and that there was "no clear link between the implementation plan and monitoring and reporting."[15]

Analytically, it we are to understand what works and doesn't, it is essential to control for other factors that might have affected outcomes, including technological progress and market forces. This challenge is particularly important in the case of voluntary or "beyond compliance" programs, which hold the appeal of promoting progress with a minimal commitment of agency resources. However, evaluation of such programs are fraught with problems of self-selection; those who "volunteer" to go beyond compliance may simply be those who are doing so for other reasons. Indeed, after controlling for selection, many voluntary programs that were once celebrated appear to have had minimal or no impact.[16] In the absence of those evaluations, regulators had drawn quite the opposite conclusion – that encouragement of voluntary action could offer a credible substitute for regulation.

Transparency

Each of the foregoing dimensions – democratic accountability, honesty, clarity of rationale, neutrality, and performance evaluation – is enhanced by transparency. However, regulatory transparency presents special challenges in Westminster parliamentary systems. The traditional interpretation of individual ministerial responsibility is that the Minister, and only the Minister, must answer to the House for all

actions by any public servants that report to them. It follows that bureaucrats should be anonymous, accountable only through the Minister. Bureaucratic anonymity is further reinforced by the expectation of a permanent public service, in which even the most senior of officials retain their positions when there is a change of government. After all, it would be difficult for a government to trust officials who were clearly associated with regulations of which a new government disapproves. Finally, the doctrine of collective ministerial responsibility, such that members of a Cabinet stand – or fall – as one, rests on a tradition of candid discussions backed by Cabinet secrecy.

A growing struggle between transparency and secrecy is illustrated by the recent debate in Canada over Cabinet "muzzling" of government scientists. Although government scientists routinely publish in peer-reviewed journals, media interviews concerning their research and even conference presentations must be approved with responses vetted by Cabinet. An incredulous public asks why the government is trying to hide the facts uncovered by science, not least when the research in question has already been published. Defenders of the government argue that government scientists often venture beyond the science to offer their own policy prescriptions, which is not only the appropriate purview of politicians, but a violation of Ministerial responsibility.

Where regulators fail to document their success or failure voluntarily, it is critical that members of the public be able to obtain such records by other means, including freedom of information statutes. However, the exemption for "advice to Cabinet," consistent with the norm of Cabinet secrecy, again exemplifies the fundamental tension between traditional accountability to parliament and modern accountability to the public directly.

Jeffrey Roy notes that "the traditional doctrine of ministerial responsibility is simply no match for today's contemporary governance mosaic."[17] The ritual of a daily question period is inadequate for holding the executive to account for the complicated and diverse activities of a modern government, with the result that information essential to accountability simply does not emerge. Indeed, Ministers themselves are hard-pressed to monitor the activities of their own departments, to say nothing of independent agencies that sit even less easily within the parliamentary tradition. At the same time, there has been a decline of public deference, and emergence of digital communications and social media that offer opportunities for direct citizen oversight of regulators to complement, rather than supplant, the work of parliament. There is no question that parliamentary should continue to demand answers from Ministers, but given the inevitable limitations of that mechanism of accountability, it is time for regulators to throw open their doors to allow greater scrutiny of information by both legislators and citizens at large.

Procedural Fairness

In addition to fairness of outcomes, regulatory excellence demands a fair decision-making process, one in which a broad range of interests have an opportunity to share their perspectives and provide feedback on proposed standards or decisions. Ideally, consultations provide valuable information on both questions of fact (who is

affected and how) and values (what is the range of public opinion). Laypersons can contribute expert knowledge drawn from personal experience or oral history.

There is, however, a tradeoff between substantive and procedural goals, in particularly between timeliness and cost-effectiveness versus procedural openness. Where to draw the line is further complicated by competing interpretations. A campaign by a Canadian environmental group to "mob the mic" by signing up thousands of British Columbians to testify at NEB hearings concerning the Northern Gateway pipeline has been depicted by some as healthy citizen engagement, and by others as intentional obstruction of the regulatory process.[18]

Still, many recent regulatory processes would seem to fall well short of that grey area. In pursuit of "world class regulation," Environment Canada itself has committed that, "Affected parties [will be] engaged throughout the [regulatory] process to give stakeholders a voice, enable market certainty, reinforce credibility, and engender public trust."[19] However, the Auditor General of Canada reports that detailed regulatory proposals have been shared with industry representatives only. The distinctive Canadian approach of inviting diverse stakeholders to "multi-stakeholder consultations" on regulatory proposals that prevailed for two decades appears to have been abandoned since 2006, while the terms of reference for National Energy Board pipeline reviews since Northern Gateway have excluded all but a narrow definition of "directly affected" citizens, including dozens of academic experts who unsuccessfully sought to testify concerning climate change.[20]

Conclusion

Needless to say, it is difficult to establish quantitative measures for criteria such as honesty, transparency, and procedural fairness. In part, that is because there is a gray area between acceptable and unacceptable performance. Where is the line between strategic and misleading rhetoric? How inclusive is inclusive enough? How transparent is sufficiently open? In part, it is also difficult to measure performance on these criteria because only those making public statements know whether they are intentionally misleading their audience. However, the impossibility of devising quantitative measures does not imply that these criteria are less important. Indeed, they are the fundamental underpinnings of any regulatory regime.

Regulation is among the most politically challenging of policy instruments. Regulated entities actively resist strict mandates, while beneficiaries are often disengaged. In that context, it is easy to ignore discretionary mandates or decline to enforce unpopular standards. It is tempting to keep bad news private, and to oversell program effectiveness. However, an excellent regulator is one who is aware of and resists those temptations. An excellent regulator goes looking for trouble, and ways to solve it.

Notes

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About the Author

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