
# Climate Change Regulation:
## Lessons from Regulatory Failure

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Discussion Paper for the
Penn Program on Regulation's
International Expert Dialogue on
"Defining and Measuring Regulatory Excellence"

March 19-20, 2015

University of Pennsylvania Law School

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March 2015

## Introduction

The focus of my research in recent years has been climate change mitigation policy, particularly regulation or pricing of greenhouse gas emissions in Canada, the United States, and Australia. All to often that has been a story of regulatory failure. While a focus on failure may seem to be setting the bar for regulatory excellence far too low, my hope is that reflecting on failures can serve both to identify foundational principles without which excellence will be unattainable, as well as to underscore that in practice the challenge to improve regulatory remains a far cry from achieving excellence.

The question "what makes a regulator excellent?" prompts another question -- who do we mean by the regulator? Elected legislators pass statutes that specify regulatory goals, institutions, and procedures with varying degrees of detail. They invariably delegate critical decisions, to be enacted via regulations or permits, to executive actors, who may be elected (as in parliamentary systems) or appointed (as in the US Presidential system). Implementation -- monitoring of compliance and enforcement of regulations — is invariably undertaken by unelected public servants, or even in some cases non-governmental actors to whom authority is delegated. One might choose to evaluate the performance of any one of these regulators, but the criteria for excellence presumably would differ in recognition of the different roles each actor plays in the regulatory regime. The audience for evaluation may also differ: senior executives normally evaluate bureaucrats' performance, the executive branch may be accountable to the legislature or voters, and elected legislators are accountable to voters. Since the failure to regulate greenhouse gas emissions to date typically has stalled early in the regulatory process, the discussion below focuses primarily on regulatory design by elected officials and democratic accountability.

As I reflected on the criteria below, I found myself returning time and again to a pervasive challenge, varying levels of attentiveness by regulatory targets and beneficiaries. Regulation often imposes costs on a discrete number of actors in order to deliver benefits for a much broader community. For instance, one regulates industrial pollution in order to achieve benefits for the public at large, which in the case of greenhouse gases entails all residents of the entire planet, now and for decades to come. This presents a fundamental political challenge, as set out decades ago by Olson and Wilson. Those constrained by regulation typically 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. In contrast, the beneficiaries of broadly-diffused benefits tend to be ill-informed, inattentive, and unorganized. This divergence in political engagement can easily yield a gap between popular perception and reality: ambitious regulatory goals may not be translated into meaningful standards to achieve them; formally demanding rules

may not be enforced; complicated rules may offer concessions apparent to intended beneficiaries but not to the public at large. Recognition of this scrutiny gap is critical in designing institutions, rules, and procedures for regulatory excellence, a factor I have tried to incorporate that in the following criteria.

**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, 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 in Canadian climate policy that do seem to push that line. For instance, the federal Environment Minister has continued to insist 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 regulations have been proposed that could even begin to close that gap by the deadline.[1] 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, consistent with increasing emissions. For instance, Alberta's 2008 Climate Change Strategy promised to "reduce emissions by 50 Megatonnes by 2020" several times before clarifying towards the end of the document that those reductions were relative to a business-as-usual projection, and that emissions in fact would be higher, not lower, by 2020.[2] The preface by the Premier 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 current Alberta Environment Minister's claim to be on track to meet the 2020 target has been challenged.[3]

Debates about regulatory design also have tremendous potential to mislead voters who are not familiar with novel regulatory instruments such as carbon taxes and emissions trading. In debates about a carbon tax in British Columbia, the opposition New Democratic Party (NDP) took advantage of voters' misunderstanding by implying that an NDP government would meet the same emissions target at a lower cost to voters by applying a cap and trade system to "big polluters," in so doing taking advantage of voters' failure to anticipate pass-through of costs from industry and sidestepping the fundamental question of how the NDP cap and trade system would achieve the same target unless it applied to household and transportation fuel distributors. Similarly misleading rhetorical strategies were employed by both the NDP and Conservative

parties in attacking a Liberal proposal for a national carbon tax in the 2008 Canadian federal election.

**Legislative accountability**

Regulatory statutes are adopted by elected legislatures, where clarity, effectiveness, and accountability are advanced through open and vigorous debate. As with the criterion of honesty, one might argue that it is sufficient to adhere to procedural rules of the legislative institution in question. If critics do not do their job effectively, that is not the responsibility of a statute's drafters. However, as with voter inattention, critical issues in regulatory design could easily escape opponents' attention for a number of reasons, including the breadth of issues demanding legislators' attention, legislators' own lack of familiarity with technical matters, unequal resources available to the governing and opposition parties (at least in a parliamentary system), and the ease with which a majority party can impose limits on parliamentary debate. If we are seeking excellence, it is incumbent on those designing a regulatory framework to adhere to the spirit as well as the letter of legislative institutions in designing regulatory regimes.

A growing problem in Canada's parliament is the increasing reliance on omnibus budget bills as a vehicle for regulatory reform. In recent years, budget bills have included substantive amendments to numerous regulatory statutes. This is problematic both given the tenuous connection of *regulatory* design to government *spending* and, especially, the inability of parliamentary committees to exercise due care in scrutinizing massive, incoherent bills in a short time period. A member of Canada's parliament recently admitted that many parliamentarians don't even read omnibus bills, let alone subjecting them to appropriate hearings.[4] When that has occurred, the governing party has neither offered its rationale nor defended dozens of substantive amendments.

This problem is exemplified most recently by Bill C-43, which was passed by Canada's parliament in December 2014. Among the many, seemingly unrelated, provisions of the mid-year budget bill were a series of amendments to the regulatory regime established by the Canada Marine Act. The amendments delegate extensive authority to the executive, beyond that already specified by the Access to Information Act, to authorize destruction of public documents. The amendments also authorize the sale of "federal lands" to federal Port Authorities. The amendment is seemingly inconsequential, since the properties would remain in public hands and still be administered by the same Port Authorities. The Government's rationale for the amendment is thus puzzling, and no elaboration was provided in the absence of parliamentary scrutiny. However, the change of status from "federal" to "port" lands is expected to exempt Port Authorities from their current responsibilities to apply statutes such as the Canadian Environmental Assessment Act and Species at Risk Act to port users, at a time Ports are responsible for approval of numerous controversial projects to export fossil fuels.[5]

Once a statute has delegated regulatory authority to the executive, democratic accountability demands that the responsible regulator provide a reasonably full

explanation of their reasoning in support of regulations. In my experience, the record of regulatory decision-making tends to be less fulsome in the Canadian parliamentary system than the US presidential system decision, where anticipation of a legal challenge incentivizes regulators to set out their case from the outset.

**Commitment to Monitoring and Reporting of Performance**

"Action-forcing" US regulatory statutes typically hold regulators' feet to the fire through a combination of nondiscretionary mandates, deadlines, and threats of citizen suits. In contrast, parliamentary systems, which concentrate both legislative and administrative authority in Cabinet's hands, typically write 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. It is thus all the more important for a regulator committed to excellence to track performance relative to statutory goals, and to make that accounting public. Yet, 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.

**Transparency**

Freedom of information statutes further enhance regulatory accountability. Where regulators fail to publicly document their success or failure voluntarily, it is critical that members of the public be able to obtain such records by other means. However, regulatory accountability is undermined by broad exemptions on disclosure. The exemption for "advice to Cabinet" exemplifies a fundamental tension between transparency and traditional mechanisms of accountability in parliamentary systems. The norms of individual and collective Ministerial accountability demand that Cabinet deliberations and also public servants' advice to Cabinet remain confidential. Similarly, the tradition of a permanent public service relies on bureaucratic anonymity, particularly for senior bureaucrats who may have advised previous governments. At the same time, the looming role of the Minister in regulatory decisions taken under her/his authority offers considerable discretion with respect to disclosure. In my own experience, "Cabinet advice" has been employed to exempt extensive records related to climate change regulations.

**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. There is an obvious tradeoff between timeliness and cost-effectiveness and procedural openness. Yet 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." [6] However, the Auditor General of Canada reports that detailed regulatory proposals have been shared only with selected industry representatives. 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. The terms of reference for ongoing National Energy Board reviews of various bitumen pipeline proposals excluded all but a fairly narrow definition of citizens "directly affected," including dozens of academics who sought to testify with respect to one particular project's potential impact on climate change.[7]

Legislators devising or overseeing mandates for regulatory authorities should be mindful of institutionalized conflicts of interest that can limit procedural fairness in subtle, but significant, ways. This was an underlying motive transferring responsibility for pesticide regulation to the US EPA in 1972 from the Department of Agriculture, whose mandates to promote agriculture and protecting the interests of farmers created at best a perceived and at worst a real conflict of interest. Yet, amendments to Canadian Environmental Assessment Act (in a previous budget bill) reduced the role of agencies such as Health Canada and Environment Canada in favour of line departments. Federal port authorizes, 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 a core mandate of the Port is to promote trade. A board of Directors, the majority of which are appointed based on nominations from industries using the port, is thus responsible for regulating the environmental impacts of those same industries. Moreover, the Port is required to fully fund its own operations with revenues from Port operations and leases, thus creating a disincentive to reject a project that would yield significant revenues for its own operations. Similarly, a recent decision to approve a coal port in British Columbia was made 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.

**Expert Advice vs. Political Judgment**

Regulatory standards rest on a combination of facts and values. Excellent regulatory decision-making thus demands not only reliance on the best available expertise (surely incompatible with the rejection by many members of the US Congress of the overwhelming scientific consensus concerning anthropogenic climate change), but also thoughtful deliberation with respect to policy goals and risk aversion or tolerance in the face of scientific uncertainty.

Relevant expertise may be subtly excluded through incomplete or skewed mandates. While the Government of Canada nominally remains committed to a target to reduce greenhouse gas emissions by 17% below 2005 levels by 2020, and the majority of emissions growth is a result of expansion of bitumen production from Canada's tar sands, the terms of reference of the National Energy Board panel reviewing the Enbridge

Northern Gateway pipeline excluded consideration of the implications for greenhouse gas emissions at the point of production (as well as downstream combustion in destination jurisdictions), even though it invited consideration of the upstream economic benefits of expanded production.

Reliance on both expertise and values demands clarity with respect to who is responsible for each component. While the need to justify regulatory decisions in court has prompted greater attention to this distinction in the US, in Canada it is still common to hear calls for scientists to wield exclusively responsibility for regulatory decisions. For instance, Canadian scientists and environmentalists unsuccessfully lobbied for a scientific advisory body to be assigned exclusively authority with respect to listing of endangered species, even though the decision to list could have significant economic and distributive consequences. The flip side is that Canadian politicians often justify regulatory decisions that rely, at least in part, on their value judgments as if they were driven only by expert advice. Project approvals or chemical standards are justified on the grounds that the projects or substances in question are "safe," thus downplaying policymakers' own, quite appropriate, judgments with respect to risk acceptability in the face of expert uncertainty.

## Concluding Thoughts

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 grey area between acceptable and unacceptable performance. Where is the line between strategic and misleading rhetoric? How inclusive is inclusive enough? How transparent? In part, it is because there are tradeoffs among evaluative criteria. In part, it is 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.

## Notes

[1] See Shawn McCarthy, "Environment Minister Aglukkaq vows to fulfill 2020 carbon promise," Globe and Mail, 18 November 2013; Environment Canada, Canada's Emissions Trends, October 2013; Office of the Auditor General of Canada, Report of the Commissioner of the Environment and Sustainable Development, Fall 2014.
[2] Government of Alberta. Alberta's 2008 Climate Change Strategy: Responsibility, Leadership, Action. January 2008.
[3] Matt McClure, "Alberta's Claims of Greenhouse Gas Success Don't Measure Up, Experts Say," Calgary Herald, 22 March 2015.
[4] Rachel Aiello, "We 'don't have a clue' what's in budget bills, say MPs," Hill Times, 7 March 2015.
[5] West Coast Environmental Law Association, Legal Backgrounder - Bill C-43. 2014.
[6] Commissioner of the Environment and Sustainable Development, 2014.
[7] Simon Donner, Kathryn Harrison, and George Hoberg, "Donner, Harrison, and Hoberg: Let's Talk About Climate Change." National Post, 10 April 2014.